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筑波法政叢書

Modern Nation and Citizenship and Civil Rights

– The Development of Citizenship and Civil Rights in the United States of America –

Koutaro MATSUZAWA

筑 波 法 政 学 会

Preface

Why do we, human beings, build, form, and maintain a Nation? What is the nation which we, human being, build, form, and maintain? In what way should we build, form, and maintain the nation?

Many people have attempted to find reasonable or appropriate answers through the implementation of several kind of means, schemes or techniques for making analysis developed in various branches of knowledge, not only in jurisprudence, but also in philosophy, historical studies, politics, sociology, economics, anthropology, linguistics and other scientific fields. Through these efforts, quite a few answers have been published and shared among human beings for ages. This article is one of such activities of us, human beings, which also attempts to answer the above questions.

In order to answer those questions, as mentioned above, there are several ways and methods which have been applied for and there are enormous and numerous achievements and accomplishments accumulated from the past to the present. This article is not the one which investigates the whole of such knowledge on the nation. Instead, this article tries to get some new knowledge that may contribute to the future of human beings paying attention from the different perspectives on which past studies and analyses have not focused.

This article tries to analyze the real historical facts from the perspective as follows for answering such the questions above mentioned.

- What did the persons who built and formed a nation think and discuss in practice as they built and formed a modern nation?
- What original ideas or thoughts of the founders were changed in the course of history?
- What forms such ideas or thoughts are at the present time?

In considering the above-mentioned questions, this article concentrated its focus on the concept “nationals” for it is considered as the most important element among three elements, Nationals, Territory and Sovereignty which are said to constitute a nation.

Regarding the object for the analysis, this article choses the United States of America. Among many nations or modern nations in the world, the United States of America is thought to be the nation which, seeing from the situation at the time of its founding, is genuinely constructed and formed rather based on the political philosophy and theory concerning a modern nation under the remotest influence from the ancien régime, although it takes place based on the conditions and circumstances induced by facts and realities existed in each times or era in the United States of America.

The conceptualization or methodology adopted in this article may be disputable itself. For example, one may question whether the history of citizenship and civil rights in the United States of America is decisively affected by some preconditions or backgrounds existed in the United States, such as the founding through the revolution for independence or the existence of slavery. It might be impossible to dispel such a question completely. Actually, it could be true that each nation in the world would have been established and managed based on its own historical, political, social, economic or cultural background and it should be true that each nation was aware of its own problems in its founding and constructed its unique governmental or legal system for solving them.

Taking such a reality into consideration, it would be inevitable to admit the existence of particularity of the United States. Based on this point, the existence of the limitation regarding the theory or conclusion of this article should be admitted.

Although this logic should be perceived, it never means that the existence of different historical, political, social, economic, or cultural backgrounds among countries makes us impossible to learn from or referring to the history or experiences of other countries. Rather, the process of the development characterizing the history of a modern constitution is to learn actively from the history and experiences of foreign nations which would be quite different from those of the nation and to incorporate the knowledge acquired from such learning into its own system so as to

pursue the security of the dignity, liberty and rights of individuals. It was also the standpoints and methods for the establishment of a modern constitution taken by founders of it.

In this regard, the theoretical challenge tried in this article and the output based on the analysis made in this article should make meaningful contribution in the development of constitutional theory in relation to the concept of national or citizenship.

Furthermore, as being seen in the following parts, when Congress held discussions, for example, regarding the Fourteenth Amendment which defines the word "citizen", what were considered and discussed there were not only concrete problems people confronted against directly at the time, such as deciding the destiny of the slavery or the proposal of the amendment to the Constitution which was intended to solve such concrete problems. Such real and concrete problems were surely taken into consideration, but the main topics which were considered and discussed there were the idea of the pursuit of the security of the dignity, liberty and rights of individuals, which are the foundation of the very founding of the United States of America, the concrete way how to construct the nation, the United States of America, the mutual relation between them, and the way to adjust and coordinate that relation.

When the problem which the persons who took part in the history of citizenship and civil rights of the United States confronted was perceived as the problem of the relation between the pursuit of the security of the dignity, liberty and rights of individuals and the way how the nation should exist, it could be said that many countries which were constructed according to the theory regarding the modern nation model would confront the same or similar problem. In this regard, seeing what answers the United States of America gave to such problems would be meaningful and useful for many countries and peoples who are constructing one of such countries. In this meaning, to consider the case of the United States of America in order to understand general legal relation between a modern nation which many real countries in the world fall under and individuals would give an important perspective.

It is a great pleasure if this article would make a contribution to the accumulation of knowledge of humankind regarding a nation through the provision of a new perspective on the questions presented at the beginning.

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Koutaro MATSUZAWA

Contents

Chapter 1 Subject of this analysis

Section 1 Current situation of the Concepts of Nationality and the Rights of the Nation

There are around 200 countries on the earth at present[1], which are said to consist of the people, the territory and the sovereignty. Legally, these countries are connected to their respective peoples with the concept of nationality, which is stipulated in constitutions or other laws and statutes[2]. Since a relation between a country and the people varies depending on the historical contexts of an establishment process, configurations of population, a racial structure, a political system, diplomatic relationships and circumstances, policies regarding a national defense or social security and other various factors in each country, the system of nationality law for regulating the relationships between a country and the people are stipulated in extremely various ways.

A country may exercise its governmental power over a citizen or national of the country residing in a foreign country and, reciprocally, a citizen of a country who lives in a foreign country may exercise the right over the home country, in such a way as in the case of oversea voting.

What powers a country has over its citizens and which rights and duties a citizen of a country has or owes to the country to which (s)he belongs are determined exclusively by the domestic law of each country with some exceptions, such as international human rights rules. Thus, the contents of nationality law are various depending on the policy or social conditions of relevant countries[3].

The international law sometimes imposes certain duties on countries from the viewpoint of the international human rights etc.[4]. However, it is generally admitted that matters concerning nationality are to be determined, independently in principle, by each sovereign country, as provided in the Articles 1 and 2 of Convention on Certain Questions relating to the Conflict of Nationality Laws[5].

As has just being seen, the present state of this affair is that there are really various types of relations between countries and their peoples, which are permitted even under the general rules of the international society. Based on this situation and legal condition, modern countries should consider how to configure or construct the nation and what relations to build and maintain with persons or peoples and, in the contrary, the persons or peoples and the nationals of each country in the modern international society should consider what and how her/his relation to "the country" (s)he belongs to being assumed based on the condition articulated above. This is the "nationality" problem for modern countries and persons or peoples in the world.

Taking the situations described above into consideration, this article traces the history of the citizenship of the

1 There are 193 member countries joining the United nations and the newest member country is South Sudan which was accepted in the year 2011. https://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html.

2 For example, U.S. Office of Personal Management, CITIZENSHIP LAWS of the World, Fredonia Book (2005) shows statutes concerning nationalities of various countries around the world.

See also, concerning the state of the international law on citizenships and nationalities, Peter J. Shapiro, A new international law of citizenship, 105 Am. J. Intl. L., 694 (2011).

3 Cf., Linda K, Kerber, The meanings of citizenship, 84 J. of Am. Hist. 833 (1997), indicates the fact that, analyzing citizenships at the level of the individuals, different individuals acquire different citizenships through different methods.

4 Cf., for example, Clause 3 of Article 24 of International Covenant on Civil and Political Rights, and Article 7 of Convention on the Rights of the Child.

Moreover, Article 15 of Universal Declaration of Human Rights, although having no legal binding force, provides "Everyone has the right to a nationality." in the Clause 1 and "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." in the Clause 2.

5 The Article 1 of this treaty provides that it is for each State to determine under its own law who are its nationals and that this law shall be recognized by other States in so far as it is consistent with international conventions, international customs and the principles of law generally recognized with regard to nationality.

Japan has signed but not ratified this treaty. However, it is considered that this treaty confirmed and declared the general principle of international law. see p. 21 of Kidana Shoichi, Commentaries on the Nationality Law, (Heisei 15 (2003): Nihon Kajo Shuppan).

United States and analyzes how the relation between a country and its people has been configured and constructed in the United State and, after it, it considers how the relation between a country and its people should be configured in order to properly build up a modern nation.

The following of this chapter articulates the present state of discussion regarding the country-people relation, outlines the descriptions of this article for assisting readers to comprehend its discourse and makes explanations regarding terminologies including "citizenship" as the presumption for the further discussions in this article.

Section 2 The State of the Discussion

While, as mentioned above, it is generally said that a country consist of the people (or the nation), the territory and the sovereignty, "the people" or "nation" could be the most important constituent of the country since a country is a system of people, which is utilized for the people.

In relation to this constituent "people", the most important points, for a country or for the people, which should be considered could be summarized into the following two points:

1. Who is the citizen of a country?
2. What does it mean to be the citizen of the country?

In actions or practices of governments or countries, the answers to these questions should be clear and it seems impractical for any existing country to leave these questions unresolved[6].

However, the theoretical grounds on which the legal practices concerning nationality are or should be based on are not clear.

For example, with regard to the first question, (1) Who is the citizen of a country, one may explain the contents of the current nationality law of the relevant country as the formal rule, in accordance with which the nationality shall be determined. Then, for example, one may say, as the substantial explanation, that the natural born nationality has been traditionally regulated in the world on the two grounds, the jus sanguinis principle and the jus soli principle.

However, such explanations as above are not sufficient and appropriate. First, concerning the formal aspect, it doesn't offer the ground to justify the logic of the nation for deciding the range of the citizen in accordance with the criterion provided in the current law of the country. Second, concerning the substantial aspect, it doesn't explain on what ground the principle, whether jus sanguinis or jus soli, could be justified or authorized to be adopted as the criterion for deciding the range of the citizen. The latter point can be expounded as follows: it is true that the principles, jus sanguinis and jus soli, might be said to be "legitimate" since the criterion for nationality has been traditionally decided according to one of those principles in all over the world, but by what reason or whether such traditions could be "justified" is never made clear.

Similar irrationality or insufficiency can also be found, for what does it means to be a citizen in the meaning of (2) above.

For example, in the Japanese Constitution, the title of chapter 3 is "Rights and Duties of the Nation". The Japanese Supreme Court ruled on the rights of "the Nation" that the guarantee of fundamental human rights under the provisions in this chapter of the Constitution shall have the equal effect over the foreign persons staying in Japan except for ones which shall be interpreted to be applicable only to the nation in the nature of the rights[7]. However, it

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6 In author's personal experience, there are persons who have many passports issued from many countries. In this regard, there seems to be an exception against general rules mentioned above in particular cases and who is a citizen of which country is not always clear in the border area. In reality, it is easily imagined that the similar things exist also in relation to persons having the dual nationality of the United States and Japan. In this regard, we could infer the border case is still left unclear by law in practice although perhaps not in theory.

As a literature explaining the Japanese domestic conditions concerning those problems, see, for example, "On the relations between Japanese family registers and nationality" in p.2 ff, Koseki No. 283(1970).

7 Japanese Supreme Court judgement October 4 Showa 53 (1978), p.1223 ff in Minshu Vol 32 no. 7 (Maclean Case).

is not clear what is "the rights applicable only to the nation in the nature". In addition, it is neither clear what nature of such rights could be the ground for the exclusive applicability to the Japanese nation.

In relation to this point, there appears to be almost no discussion regarding the general nature of the rights that are applicable exclusively to the Japanese nation. Instead, ordinally, discussions in relation to this point take place in such a way as follows.

First the question, "which right shouldn't be guaranteed for a foreign individual", based on the catalog of the human rights provided in the chapter 3 of the Japanese Constitution, is analyzed and then one examines whether some rights which are thought practically not to be guaranteed for foreign peoples should be guaranteed also for foreign peoples in some conditions or not.

If chapter 3 of the Japanese Constitution is interpreted to guarantee "the fundamental human rights" of an individual as "a human" despite its title, neither to determine what nature each right should have nor to find the reasons why some rights should not be guaranteed to a foreign individual would not be essential. Rather, what is essential is the reason why some rights in the catalog of the human rights in chapter 3 of the Japanese Constitution should be interpreted to be guaranteed only to the Japanese nation, not to a human being in general. However, this problem has not been solved in the discussions in Japan until now.

The main subject of this article is to consider those two problems described above by referring to the discussions taken places in several kind of legal scenes in the United States.

Section 3 The Outline, Preceding Studies and Method for the Analysis

Subsection 1 The subject to be examined

The subject to be scrutinized in this article is the history regarding the citizenship and civil rights of the United States.

This is because the United States seems to be the country that has been built and established most genuinely guided by the political theory or philosophy concerning a modern nation in the most remote sphere, though as far as the reality permitted, from, so-called, "the ancien régime".

This article set its focus not on the thoughts of philosophers who designed the philosophical foundation for building and forming a modern nation. Rather, it set its focus on how the people, who challenged the practical realities required to establish a modern nation, thought and argued, how such people's outputs have been transformed in the following history and what form such outputs are at present.

Subsection 2 The Structure

The development of the history of citizenship in the United States is divided into three stages with the Civil War as the major turning point. The periods are: the stage before the Civil War, the reconstruction period just after the Civil War and the time after the completion of the reconstruction. The discussion in this article progresses according to this periodical order. In addition, the development process of the civil rights will also be considered according to the periodical order mentioned above, as the rights adjoining to citizenship.

In chapter 2, at first, in what way the term citizenship was used at the time of the establishment of the Constitution of the United States after the Independence is analyzed. As it is noticed, the term "citizen" was used in the Constitution of the United States while the definition of it was not stipulated. In this article, the meaning of the term "citizen" is tried to make clear by examining the proceedings of Congress at the time of the legislation of the Constitution and the articles such as contemporaneous legal commentaries.

From chapter 3 to chapter 5, how the concept "citizenship" as understood during the time of the Reconstruction is analyzed. During the Reconstruction period, the amendments to the Constitution which are called the Civil War

Amendments, i.e., the Thirteenth, Fourteenth and Fifteenth Amendments were provided in the United States. Among them, the Fourteenth Amendment is the most important provision in relation to the history of the citizenship since it provides the first legislative definition of the "citizenship of the United States". In this regard, the most important study to be made in this article is to analyze the meaning of this provision. However, since this provision was, as described above, established as part of the policies for forming the frame to settle after the Civil War conditions, the meaning of this provision will be made clear only by taking into consideration also the Thirteenth and Fifteenth Amendments which were provided during the same period. In this context, this article considers each of them in the chapter 3 and chapter 5.

In chapter 6, this article analyzes the development of the citizenship of the United States immediately after the Reconstruction period. In this chapter, the development of the legal system in relation to the woman's citizenship will be focused.

In chapter 7, this article considers the meaning of the Clause 5 of Section 1 of Article 2 of the United States Constitution using the concept "a natural born Citizen" for providing condition to become a president of the United States, through which meaning of the citizenship of the United States becomes clear in relation to the eligibility or qualification for election.

In chapter 8, the outputs developed from the chapter 2 to chapter 7 will be revisited for analyzing thoroughly and the main theme of this article explained above will be revisited and discussed.

Subsection 3 Terminology

Generally, the term "nationality" is used for indicating the connection between a country and its person or people and this term means the nationality or citizenship in general.

In the context of Immigration and Nationality Act of the United States, the term "national" means (1) citizens of the United States and (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States[8]. The latter (2) is defined concretely as a person born in an outlying possession of the United States etc.[9]. Since this article mainly concerns the former (1), the distinction between nationals in (1) and in (2) is not important for the discussions in this article. In this regard, so long as it is not explicitly referred to, the difference between Citizenship and National is omitted in this article[10].

Subsection 4 Preceding Studies

As listed in the catalog of the reference annexed to this article, there are many books and papers concerning the theme of this article.

Among them, the literatures most frequently referred to may be "The Development of American Citizenship, 1608-1870" (Univ. of North Carolina Pr. 1978) by James H. Kettner and "Civic Ideals -- Conflicting Visions of Citizenship in U.S. History" (Yale Univ. Pr. 1997) by Roger M. Smith.

The former literature was written by a historian specializing in the United States history and it deals the period from the colonial to the early United States eras. The subject of it is the historical situations up to 1870's around the national foundation time of the United States.

However, while exploring these eras is very valuable for understanding the history of the citizenship in the United States, there are limits i.e., it mainly described the situation by 1870.

In addition to the timeframe analyzed in this literature, there needs to be a reformulation of its legal interpretation

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8 8 U.S.C.A 1101 (21), (22).

9 Concerning the definition, see 8 U.S.C.A 1408 and 8 FAM 301.1-1 (U)Introduction. A literature describing this point, see Robert C. Divine, Immigration Practice (15th ed.) 12-3(a) (1)(Juris Publishing, Inc. 2014).

10 In relation to the noncitizen nationals, cf., Daniel Levy and et al., U.S. Citizenship and Naturalization Handbook(2018-2019 ed.), Chap. 3(Thomson Reuters 2018).

of provisions concerning the citizen in the United States Constitution at that time since the format used is not one ordinarily used in legal theorization. Moreover, since it analyzed mainly Fourteenth Amendment in detail, but not much on other provisions relating to citizenship, it does not pay much attention to the relationship of citizenship to the political participation, which is important for the democratic country like the United States.

The latter literature was written by a political theoretician. This is also very much informative and meaningful as a precursor, but there is also a limitation regarding the scope of the timeframe since it describes the situation mainly by the early times of 20th century. Additional reinterpretation is also required to acknowledge the legal theoretic meaning of the Constitutional provisions concerning the concept of citizen since it uses an analytical technique used in political, but not legal, theory.

Subsection 5 Method of Analysis

Taking those described above into account, this article will adopt the following method and means.

First, the timespan of the historical facts to be analyzed is set to be the time from the national founding era to the present.

Second, the subject to be analyzed are set to be the provisions of the United States' Constitution that concern citizenship and civil rights, the federal statutes related to those, the relevant decisions by the U.S. government and the judgements by the Federal Supreme Court, for objectively limiting the subjects to be scrutinized for avoiding possible subjective arbitrariness to select the opinions concerning the main subject of this article. As for the judicial precedent, the subjects for the analysis are limited to the judgements of the Federal Supreme Court unless there are some special necessities.

Third, this article adopts a generally used orthodox method where the proceedings of Congress or other legislative sources produced during the legislation process are scrutinized so that the intention of the legislator is detected. The purpose of that is to make clear the original meaning of the provisions of the United States' Constitution concerning Citizenship and Civil Rights from the viewpoint of the legal theoretical study. This article tries to follow the opinions pros and cons to bills as much as possible when examining the proceedings of Congress. It is because it is necessary to exclude arbitrariness concerning the interpretation of the provisions as far as possible in order to fairly evaluate the process of the debates in Congress.

Fourth, the texts explicitly referred to or quoted are generally restricted to the book of laws and ordinances, the proceedings or official records concerning the decisions by the government and the book of the precedents by the courts while the references used to analyze them or the general literatures relevant to each issues are mentioned in the footnotes. However, there are some exceptions, namely Commentaries by Blackstone, Story and Kent and the articles in "Federalist", for, on the one hand, the commentaries mentioned above were being taken as the authoritative sources for the interpretation of Common Law or other rules at the early time of the foundation of the United States and, on the other hand, Federalist is publicly recognized as the literature which has reflected the opinions of the drafting people of the United States' Constitution, though it was not the official statement of the government.

Chapter 2 The Beginning of the United States - From the National Founding to Civil War

Section 1 Orientation of the Discussion in This Chapter

When the Constitution of the United States was firstly signed in 1787 by the Delaware and put into effect in 1789, there was no provision to define "citizen" despite that the term "citizen" is used in many provisions[1,2,3,4,5]. Since the

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1 he Constitution of the United States uses several terms for indicating a person, i.e., "people", "person", "citizen" and "inhabitant" other than the terms indicating some official posts. Moreover, the term "elector" is also used to indicate an individual having the right to vote.

Followings are the lists of articles using those terms in the text of the Constitution of the United States.

"people":

- Preamble, Article1 Section 2 Clause 1 (Term and Requirements for a Member of the House of Representatives), Amendment I (Right of petitions), Amendment II (Right to bear arms), Amendment IV (Search and Seizure), Amendment IX (Non-Enumerated Rights), Amendment X (Rights Reserved to States or People),
- Amendment XVII Clause 1 (Election of Senators), Amendment XVII Clause 2 (To fill the vacancies of Senators)

"person":

- Article 1 Section 2 Clause 2 (Requirements for a Representative), Article 1 Section 2 Clause 3 (Share of Tax, Distribution of the Number of Representatives), Article 1 Section 3 Clause 3 (Requirements for a Senator), Article 1 Section 3 Clause 6 (Impeachment), Article 1 Section 6 Clause 2 (Ban of Concurrent Posts), Article 1 Section 7 Clause 2 (Passage of Bill), Article 1 Section 9 Clause 1 (Migration), Article 1 Section 9 Clause 8 (Prohibition of Granting Nobility), Article 2 Section 1 Clause 2 (Electors for Presidential Election), Article 2 Section 1 Clause 3 (Process of Presidential Election), Article 2 Section 1 Clause 5 (Requirements for the President), Article 3 Section 3 Clause 1 (Proof of Treason), Article 3 Section 3 Clause 2 (Punishment of Treason), Article 4 Section 2 Clause 2 (Extradition), Article 4 Section 2 Clause 3 (Escaping Slave), Amendment IV (Search and Seizure), Amendment V (Grand Jury, Double Jeopardy, Self-Incrimination, Due Process),
- Amendment XII (Election of President and Vice-President), Amendment XIV Section 1 (Due Process, Equal protection), Amendment XIV Section 2 (Distribution of the Number of Representatives), Amendment XIV Section 3 (Disqualification of an Officer), Amendment XX Section 3 (Representation and Succession of the President), Amendment XX Section 4 (Congressional Choice of the President), Amendment XXII Section 1 (Two Term Limit on President).

"citizen"

- Article 1 Section 2 Clause 2 (Requirements for a Representative), Article 1 Section 3 Clause 3 (Requirements for a Senator), Article 2 Section 1 Clause 5 (Requirements for the President), Article 3 Section 2 Clause 1 (Scope of Judicial Power), Article 4 Section 2 Clause 1 (Interstate Privileges and Immunities),
- Amendment XI (Restriction of Judicial Power), Amendment XIV Section 1 (Definition of Citizenship, Immunity and Privilege of Citizens), Amendment XIV Section 2 (Distribution of the Number of Representatives), Amendment XV Section 1 (Right to Vote), Amendment XIX Section 1 (Women's Right to Vote), Amendment XXIV (Poll Tax), Amendment XXVI (Right to Vote at Age 18).

"inhabitant":

- Article 1 Section 2 Clause 2 (Requirements for a Representatives), Article 1 Section 3 Clause 3 (Requirements for a Senator), Article 2 Section 1 Clause 3 (Process of Presidential Election),
- Amendment XII (Election of President and Vice-President), Amendment XIV Section 2 (Distribution of the Number of Representatives).

"elector":

- Article 1 Section 2 Clause 1 (Requirements of an Elector for the House of Representatives), Article 2 Section 1 Clauses 2, 3 and 4 (Electors for Presidential Election),
- Amendment XII (Election of President and Vice-President), Amendment XIV Section 2 (Distribution of the Number of Representatives), Amendment XVII Section 1 (Election of Senators), Amendment XXIII Section 1 (Presidential Vote in D.C.), Amendment XXIV Section 1 (Poll Tax).

(The first parts in each list enumerate the provisions that include the respective term as in the original text(including the first 10 amedments). The second parts enumerate the provisions that come to include the respective term through the amendments.)

As being seen from those provisions, the term "people" or "person" is used for the provisions concerning the guarantee of rights except for those concerning privileges and immunities or the right to vote and election.

In relation with this point, although the word "slave" is not used in the U.S. Constitution, the following provisions are said to deal of the slavery system, namely: Article 1 Section 2 Clause 3 (Share of Tax, Distribution of the Number of Representatives), Article 1 Section 9 Clause 1 (Migration), Article 1 Section 9 Clause 4 (Poll Tax), Article 4 Section 2 Clause 3 (Extradition), Article 5 (Amendment to the Article 1 Section 9 Clause 1 and 4), In addition, followings are said to presuppose the existence of slaves: Article 1 Section 8 Clause 15 (Calling of Militia), Article 1 Section 9 Clause 5 (Prohibition of Export Tax), Article 1 Section 10 Clause 2 (Additional Imposts on Import or Export), Article 2 Section 1 Clause 3 (Presidential Election), Article 4 Section 2 Clause 2 (Extradition), Article 5 (The Amendment Process). Following provisions are also said to have been affected from the slavery

term citizen was used in the text, there should be some common understanding of the concept at that time.

This chapter will analyze how the word "citizen" was understood from the time of the national founding to the establishment of Fourteenth Amendment in 1868, based on some historical materials[6,7].

Section 2 analyzes the meaning of each provision of the original Constitution which includes the term "citizen". In the original text of Constitution, the term "citizen" is used in the provisions concerning the requirements for federal official posts to be elected[8], the jurisdiction of federal courts[9] and the privileges and immunities of citizens in certain interstate relations[10]. Besides, the provision concerning the power of the Federal Congress to legislate certain unified rules on naturalization[11] also contains the word "citizen". This article will examine the discussions in the process of

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system: Article 1 Section 8 Clause 2 (Borrowing), Article 3 Section 2 Clause 1 (Jurisdiction), Article 4 Section 1 (Interstate Faith and Credit), Article 4 Section 2 Clause 1 (Privileges and Immunities), Article 4 Section 3 Clause 2 (Territory Belonging to the United States), Article 4 Section 4 (Protection of States). Cf., Paul Finkelman, The Constitution and the Intentions of the Framers: the Limits of Historical Analysis, 50 Univ. Pitt. L. Rev. 349, 379 (Note 147, 148, 149) (1989).

In relation to those, it is pointed out that the expression to imply the male sex was deliberately avoided in the United States' Constitution until the establishment of Fourteenth Amendment. (Charles A. Beard, The Republic (Viking Pr. 1943) p.5) According to that literature, although the preliminary draft contained the provision which provided that a House of Representatives and a Senate consist of "bodies of men", the current expression was adopted in the end.

In relation to this point, on the ground that a pronoun to represent the male sex is used in Article 1 Section 2, Section 3, Section 6, Section 7, Article 2 Section 1, Section 3, Section 4 and Amendment 5 and 6, such an opinion has ever asserted as a female could not take public office like the President or the member of Congress. Roger M. Smith, Civic Ideals, 131 (Yale Univ. Pr. 1997).

2 In relation to the definition of Citizenship, according to Sidney Kansas, on June 6, 1776, preceding the adoption of the Declaration of Independence, the continental committee adopted the decision that a person who inhabited one of United Colonies and was protected by the law should owe the duty of allegiance to the law and become a member of the colony. Sidney Kansas, Citizenship of the United States of America, 14 (Washington Pub. Co. 1936).

3 The word "Citizen" is used in the following part of the Declaration of Independence which was issued on July 4, 1776:

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

4 Other than "citizen", "subject" or "national" are used for expressing a connection between a country and an individual.

Concerning the use of those words, cf., Maximilian Koessler, "Subject", "Citizen", "National" and "Permanent Allegiance", 56 Yale L. J. 58 (1946).

5 The Section 9 of Northwest Ordinance 1787 (formally, An Ordinance for the government of the Territory of the United States northwest of the River Ohio, 1 Stat. 51) includes the expression "a citizen of one of the United States" in the context that no person was eligible or qualified to act as a representative unless he had been a citizen of one of the United States for three years, and Article 4 of the same ordinance uses the phrase "citizens of the United States" concerning free sailing on the navigable waters leading into the Mississippi and St. Lawrence.

6 In order to make clear the original meaning of Citizenship at the time before the establishment of Fourteenth Amendment, this article examines the proceedings of Constitutional Convention which should represent the understanding of Citizenship in the original Constitution, the statutes that were established by the time of the Civil War, the relevant decisions of the government and the precedents of the Federal Supreme Court.

As a literature which discusses the meaning of Citizenship based on the philosophical background before Civil War, cf., Douglas G. Smith, Citizenship and the Fourteenth Amendment, 34 San Diego L. Rev. 681 (1997).

In that paper, the doctrines of John Locke, Samuel Pufendorf, Jean Jacque Burlamaqui and Emmerich de Vattel are scrutinized as the thoughts that gave effects on the forming of the concept of citizen of the United States. The influences of Roman Law are also discussed.

The paper concludes that the purpose of the definition of Citizenship in Fourteenth Amendment was to protect the fundamental rights that were considered to be associated with the citizenship at the time of the establishment of the U.S. Constitution from the violations by the Federation or the States.

7 While this article pays attention to the term "citizen" in the Constitution of the United States so as to make the meaning of it clear, there is a literature which analyzes the concept American citizenship during the time from the Independence to the establishment of the Constitution, namely, Douglas Bradburn, The Citizenship Revolution (Univ. of Virginia Pr. 2009). The literature discusses the legal system concerning the citizenship in various States during the time from the War of Independence to the establishment of the Constitution, the relation between the War of Independence and the abandonment of the citizenship, the conditions around the definition of the citizenship of the United States in relation to the naturalization of foreigners and each State's practical treatment of the citizenship of free blacks who had been emancipated under the influence of the War of Independence.

8 Article 1 Section 2 Clause 2 (Requirements for a Representative), Article 1 Section 3 Clause 3 (Requirements for a Senator), Article 2 Section 1 Clause 5 (Requirements for President).

9 Article 3 Section 2 Clause 1 (Scope of Judicial Power).

10 Article 4 Section 2 Clause 1 (Interstate Privileges and Immunities).

11 Article 1 Section 8 Clause 4 (Legislative Power of the Federal Congress to Provide Unified Rules on Naturalization).

the legislation of the Constitution, the articles in the Federalist[12,13] representing the opinion of the drafters of the Constitution and Commentaries by Story which was considered as a standard commentary on the Constitution.

Section 3 will overview the statutes concerning citizenship and civil rights which were established by the time of the Civil War by the Federal Congress and Section 4 will analyze the opinion of the Attorney General concerning the concept "citizen". Section 5 will consider the Dred Scott case for making the opinion of Federal Supreme Court on the concept "citizen" clear.

Section 6 will sum up the materials seen up to the section 5 and give an outline of the image of "citizen" prevailing before the Civil War.

Section 2 Citizenship in the Original Text of the Constitution

Subsection 1 Citizenship as a requirement for the assumption of official posts

Paragraph 1 Requirements for a Representative

The first draft of the Constitution that was proposed in 1787 to the Constitutional Convention provided that a Representative should have been a citizen of the United States for more than three years[14]. In opposition to the draft, there was an opinion that it was not desirable for foreigners to participate the government or legislation and an opinion that it would be too difficult to learn the regional conditions that were expected to be known by a Representative in only three years. In addition, there was a proposal that the term should be prolonged to be seven years[15] because there was a possibility that certain rich nation like Britain might send a secret agent for some evil purposes. During the discussions, there were also proposals that the length of the term should be four years, that a Representative should be a natural born citizen or that the term should be prolonged to be nine years[16]. However, in the end, the proposal that the length of the term should be seven years was approved.

Concerning this issue, Story's Commentary approves the conclusion that a foreigner should be excluded from Representatives, since there could be no security for a due administration of any government by persons, whose interests and connections were foreign, and who owed no permanent allegiance to it. Besides, Story points out that the main issue is whether foreigners, even after naturalization, should be eligible to serve as Representatives, and that in England, all aliens born, unless naturalized, were originally excluded from a seat in parliament. Then Story says that a different course from England was adopted in the American colonies antecedent to the Revolution, with a view to inviting emigrations and settlements, and thus to facilitate the cultivation of their wild and waste lands. In this regard, he points out, it is impracticable to enforce any total exclusion of naturalized citizens from office[17].

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12 This article uses the following versions of the Federalist(hereinafter Federalist). Alexander Hamilton, James Madison, John Jay, Federalist Papers (Mentor Book 1999); Federalist Papers: Primary Documents in America History(https://guides.loc.gov/federalist-papers).

13 Although the part will not be analyzed in this article, No. 2 of the Federalist brought up the following point:
"... whether it would conduce more to the interest of the people of America that they should, to all general purposes, be one nation, under one Federal Government, or that they should divide themselves into separate confederacies, and give to the head of each the same kind of powers which they are advised to place in one national government."
Then it pointed out the following two things:
1. American people is one united people - a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence.
2. To general purposes American people have uniformly been one people each individual citizen everywhere enjoying the same national rights, privileges, and protection.
Based on the text quoted above, Citizenship Poverty and Federalism: 1787–1882 by James W Fox Jr. (60 Univ. Pitt. L. Rev. 412, 436 (1999)) points out that so called national citizenship was aimed at by the drafters.

14 II Max Farrand ed., The Records of the Federal Convention of 1787, at 178, 216 (1974) [hereinafter Farrand]

15 Id., at 216.

16 Id., at 268.

17 II Joseph Story, Commentaries on the Constitution, § 617 (Da Capo Pr. 1970) (1833) [hereinafter Story]

No. 52 of the Federalist states that the qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention. It also points out that, although a Representative must have been seven years a citizen of the United States[18], under certain reasonable limitations including that, the door of this part of the Federal Government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.

In view of those arguments above, citizenship seems to be considered as a necessary condition to be elected as a Representative but not a sufficient condition for that. It can easily be seen that, since there lived many people who received citizenship by naturalization at the time of the National Founding, it was thought not suitable to leave such people the administration of the country even if they had received citizenship.

On the other hand, there seems to have been a judgement that it would not have been practicable to exclude all naturalized citizens from serving as Representatives since considerable numbers of capable persons were naturalized citizens at that time. From that point of view and from the viewpoint of the straightforwardness of the regulation, it seems to have been an appropriate judgement to allow a person to be elected as a Representative when (s)he has been a citizen for more than certain provided length of time.

Paragraph 2 Requirements for a Senator

At the Constitutional Convention, it was proposed that a Senator should have been a citizen for more than four years[19]. In the discussion regarding this requirement, similar to the case of Representatives, there were opinions pointing out the danger of a Senator having foreign connections since the Senate has the power to conclude treaties and the danger of having government officials who hold views against the basis of the U.S. government[20]. On the other hand, against the proposal prolonging the requirement, there were opinions that such a restriction was unnecessary because the Federal Congress had the power to determine naturalization with which it could give persons different privileges according to their respective lengths of citizenship, that the Constitution might get certain undesirable anti-liberal attribute by adding such a restriction and that such a restriction might hinder the immigrations of people desirable for the United States of America[21].

The No. 62 of the Federalist mentions that a Senator should have been a citizen nine years while only seven years are required for a Representatives. It raises the following reasons.

First, since participating immediately in transactions with foreign nations, a Senator ought to be one who are thoroughly weaned from the prepossessions and habits incident to foreign birth and education.

Second, the term of nine years appears to be a prudent compromise between a total exclusion of adopted citizens, whose merits and talents may claim a share in the public confidence, and an indiscriminate and hasty admission (to the Senate) of them, which might create a channel for foreign influence on the national councils.

As being seen above, citizenship was thought to be at most a necessary condition but not a sufficient condition for a Senator as being seen regarding a Representative. Moreover, since the Senate, different from the House of Representatives, has the power to influence directly to diplomatic matter, such as with the power to approve a treaty[22], it is generally thought that the requirement regarding the term to have been a citizen of the United States of America must be longer for a Senator than for a Representative.

Such the way of regulation was taken for finding a reasonable compromise between the exclusion and the unconditional acceptance of naturalized citizens. The situation was similar to that of Representatives in that it was

18 U.S. Const. Art I § 2. cl. 2.
19 II Farrand, 179.
20 Id., at 235.
21 Id.
22 U.S. Const. art. II § 2, cl. 2.

necessary to compromise on some point between the exclusion of influence from certain foreign countries and the need to obtain talented persons during the time of the National Founding.

Theoretically, making distinctions among American citizens may or may not be legally appropriate. However, the real situation of the United States of America at that time was that the independence from foreign countries was national desire while it was necessary to obtain talented citizen for the government and the country. In this regard, the system seems to be well designed for responding such a situation[23].

Paragraph 3 Requirements for President

The Constitution of the United States of America provides that a President must be a natural born citizen of the United States[24]. There seems to be no intensive discussion in relation to this point either in the proceedings of the Constitution Convention nor in Federalist[25].

Commentary by Story says that it is indispensable to restrict a President to a natural born citizen and that the purpose of the restriction is to exclude foreign influence from the executive councils and duties of the government[26]. It also says that the general propriety of the exclusion of foreigners, in common cases, was scarcely doubted by any sound statesman and that it cut off all chances for ambitious foreigners, who might otherwise be intriguing for the office and interposes a barrier against those corrupt interferences of foreign governments[27].

The Constitution requires a President to be more than thirty five years old and to have been an inhabitant of the United States for fourteen years. From this point, the Constitution requires a President to be really committed to the society of the United States in addition to having the citizenship and to be required belonging not only formally but also substantially to the United States[28].

Subsection 2 Clause regarding the Jurisdiction of Federal Courts and Citizenship

The Federalist and Story's Commentary respectively state as follows regarding the clause concerning the jurisdiction of Federal Courts.

No. 80 of Federalist says that the federal judiciary should be able to deal all cases between one State or its citizens and another State or its citizens[29] for making citizens of each State to be entitled to all the privileges and immunities

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23 At the same time, it should be well understood that this distinction was accepted due to this situation and it is provided in the Constitution as the exceptional case. In this regard, it should be fair to say that it cannot be a precedent to justify the discrimination among citizens.

24 U.S. Const. art. II § 1, cl. 5.

25 Cf., also Chapter 7 Section 2.

26 III Story, §1473. Article 2 Section 1 Clause 5 of the Constitution of the United States provides that no person except a natural born citizen, or "a citizen of the United States, at the time of the adoption of this Constitution", shall be eligible to the office of President. On the latter condition in the provision, Story says that it is "out of respect to those distinguished revolutionary patriots, who were born in a foreign land, and yet had entitled themselves to high honors in their adopted country". Id.

27 Story pointed out that the foreign influence inflicted the most serious evils upon the elective monarchies of Europe, and named Germany, Poland, and the pontificate of Rome as the examples.

Regarding this point, it may be needed to consider what kind of concrete influences from foreign countries were supposed at that time. In connection with this point, it is pointed out that, at the Constitutional Convention, there were some opinions preferring limited monarchy and, in addition, there was a rumor that the Constitutional Convention was considering an invitation of a monarch from some foreign countries. See Max Farrand, The Framing of the Constitution of the United States. 172-173 (Yale Univ. Pr. 1913).

28 Twelfth Amendment of the Constitution of the United States provides that no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States, which means that the same requirements are imposed on the office of Vice-President as those on that of President.

29 On this problem, No. 80 of Federalist states that Article 4 Section 2 Clause 1 of the Constitution "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several State" is the basis of the Union and points out that every government ought to possess the means of executing its own provisions by its own authority. Then it concludes that in order to maintain inviolably the quality of privileges and immunities to which the citizens of the Union are entitled, the federal judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. As the ground for that, it

of citizens of the several State, which is provided in Article 4 Section 2 of the Constitution.

Story's Commentary says that, concerning "Controversies between citizens of different states", the power of the federal courts may be indispensable, or in the highest degree expedient, to carry into effect some of the privileges and immunities conferred, and some of the prohibitions upon states expressly declared, in the constitution. Besides, it states that, in the case of evasion of the privileges and immunities of citizens or when some legislation of a state impairs the obligation of private contracts or grants unconstitutional preferences to its own citizens, the jurisdiction to enforce the obligations of the constitution ought to be confided to the federal courts[30].

As seen above, the provision is provided in order to establish the procedure to secure the privileges and immunities provided in Article 4 Section 2 of the Constitution equally for all citizens of the United States. This provision is intended to prevent each State from any impartial treatment for its own citizens so that the purpose of the Constitution of the United States, namely "to form a more perfect union"[31], shall not be hindered in the end.

Subsection 3 Inter-state Privileges and Immunities and the Power of the Federal Congress to Regulate Naturalization

The document titled "Observations on the Plan of Government" that was presented to the Constitutional Convention by the Representative of the State of South-Carolina, Charles Pinckney, concerning the provision on interstate privileges and immunities dated May 28, 1787, stated that Article 4 of the Constitution of the United States intends to extend the rights of the Citizens of each State throughout the United States and was formed exactly upon the principles of the 4th article of the Confederation[32,33,34].

The draft of the article proposed on August 6, 1787 to Committee of detail was as follows.

The Citizen of each State shall be entitled to all privileges and immunities of citizens in the several states.

In accordance with the record regarding the proposal dated August 28, it reported that Pinkney was not satisfied with the draft and seemed to wish some provision which included the element in favor of property in slave[35].

Regarding the relationship between the interstate privileges and immunities and the power of the Union over naturalization, No. 42 of the Federalist mentioned as follows[36].

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points out that to secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to thetribunal which, having no local attachments, is likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, is never likely to feel any bias inauspicious to the principles on which it is founded.

30 III Story, § 1684.

31 Preamble of the U.S. Const.

32 III Farrand, 112. According to it, the first draft of the provision was as follows. II Farrand, 173.
(The free (inhabs)) Citizens of each State shall be intitled to all Privileges & Immunities of free Citizens in the sevl States.
The draft was proposed by Pinkney. Id., 174.

33 Concerning the legislation process of the Article 4 of the Confederation and Article 4 Section 2 Clause 1 of the Constitution, see David Skillen Bogen, Privileges and Immunities -- Reference Guide to the United States Constitution, p.12 (Praeger Pub. 2003)

34 Regarding the rule provided in the Article 4 Section 2 Clause 1 of the Constitution, it is pointed out that to secure an equal treatment for a non-inhabitant visitor to a inhabitant or for a temporary guest is so old a custom especially among merchants that Magna Karta also includes such a description of the custom. Stewart Jay, Origin of the Privileges and Immunities of States Citizenship under Article IV, 45 Loyola Univ. Chi. L. J. 1, 6 (2013). (Regarding this point, cf., the text of Magna Carta clause 41, cf., https://www.bl.uk/magna-carta/articles/magna-carta-english-translation) The paper points out that from the second half of the eighteenth century to the nineteenth century in establishing a municipal government, recognizing the rights of municipal residents, states enacted naturalization statutes providing that new citizens would be treated equally with established ones. Id., at 34–36. Moreover, in relation to this point, it is pointed out that the first appearance of the word privilege seems to have been in a protest document by Edward Coke to Charles I in 1621. Eric R. Claeys, Blackstone's Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan, 45 San Diego L. Rev. 1, 11 (2008).

35 II Farrand, 443. In the record dated February 13, 1821, Pinkney said "at the time I drew that constitution, I perfectly knew that there did not then exist such a thing in the Union as a black or colored citizen, nor could I then have conceived it possible such a thing could have ever existed in it; nor, notwithstanding all that has been said on the subject, do I now believe one does exist in it." III Farrand, 446.

36 Concerning the interstate privileges and immunities provided in Article 4 Section 2 Clause 1, Federalist says that it can be deemed

While Article 4 of the Articles of Confederation[37] provided "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 enjoy therein all the privileges of trade and commerce", there is a confusion of language here. Concretely, neither the relationship among the phrases "free inhabitants", "free citizens" and "people" representing persons or the expressions "all privileges and immunities of free citizens" and "all the privileges of trade and commerce" representing privileges and immunities was not clear.

Due to this confusion, the Federalist continues to argue that, it may be interpreted as "those who come under the denomination of free inhabitants of a State, although not citizens of such State, are entitled, in every other State, to all the privileges of free citizens of the latter; that is, to greater privileges than they may be entitled to in their own State: so that it may be in the power of a particular State, or rather every State is laid under a necessity, not only to confer the rights of citizenship in other States upon any whom it may admit to such rights within itself, but upon any whom it may allow to become inhabitants within its jurisdiction."

Moreover, the Federalist continues that the difficulty could not be removed even if the word "inhabitants" is interpreted to be applicable only to citizens. It argues that it is because the power of naturalization was retained by each State and that an alien, therefore, legally incapacitated for certain rights in one state where qualifications of greater importance are required, may, by previous residence only in the other State where residence for a short term confirms all the rights of citizenship, elude his incapacity.

The Federalist concludes that "the new Constitution has accordingly, with great proprietary, made provision against them, and all others proceeding from the defect of the Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States".

Regarding this point, Story's Commentary states that the provision concerning privileges and immunities of Citizens in Article 4 Section 2 of the Constitution of the United States is the revision of Article 4 of Confederation so as to confer on Citizens of each State, if one may so say, a general citizenship and to communicate all the privileges and immunities, which the citizens of the same state would be entitled to under like circumstances[38].

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to be the basis of the Union.

37 Articles of Confederation art. IV. The relevant part is: The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and 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.

38 III Story §1800. On this point, following paper studies the history of the privileges and immunities of Citizens in Article 4 Section 2 of the Constitution of the United States from the British colonial era, Cf., David S. Bogen, The Privileges and Immunities Clause of Article IV, 37 Case Western Reserve L. Rev. 794 (1987). The paper points out followings:

- Colonial inhabitants were all originally the King's subjects, and no colony treated the inhabitants of other colonies as aliens. The Declaration of Independence destroyed this basis for unity but the Article IV of the Articles of Confederation supplied the missing ties and preserved the colonial rights, such as to move freely between colonies, to be treated as a native of any colony where residence was established, and to be free from discrimination based on place of birth in commercial dealings.
- The Constitution created a national government which unified the disparate state governments. The privileges and immunities clause of Article 4 Section 2 of the Constitution cemented the ties among the states.
- The privileges and immunities clause of Article 4 Section 2 of the Constitution was intended to secure the former intercolonial privileges of movement, citizenship, and trade.

Following papers study the meaning of the term "Privileges and Immunities" from the perspective of the historical development of it since the British colonial era. Cf., Thomas H. Burrell, A Story of Privileges and Immunities: From Medieval Concept to the Colonies and United States Constitution, 34 Campbell L. Rev. 7 (2011); Thomas H. Burrell, Privileges and Immunities and the Journey from the Confederation to the United States Constitution: Courts on National Citizenship and Antidiscrimination, 35 Whittier L. Rev. 1991 (2014); David R. Upham, Corfield v. Coryell and the Privileges and Immunities of American Citizenship, 83 Tex. L. Rev. 1483 (2005).

The following paper also analyzes this clause and states that the Privileges and Immunities which this provision guarantees corresponds to a fundamental natural right. Cf., Chaster James Antieau, Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four, 9 William and Mary L. Rev. 1(1967).

Moreover, the following paper concludes that the clause guarantees a series of substantial rights and, incidentally, prohibits

From the examinations above, it can be concluded that the interstate privileges and immunities clause had the purpose to treat citizens of all States equally in the United States, so as to unite the States and to establish one nation. It can also be said that the essence of the interstate guarantee of privileges and immunities was for a citizen of one State not to be treated in another State differently from the citizens of the latter State[39,40,41].

As for the power of the Federal Government over naturalization, it can be concluded that the power was given to the Union so as to unite all the States that had before determined their own citizens independently.

Section 3 The Federal Congress and Citizenship and Civil Rights

The following are major statutes concerning Citizenship or Civil Rights which the United States Congress provided by the time of the Civil War in 1860.

Subsection 1 Legislations Concerning Citizenship

By the Civil War in 1860, the United States Congress provided statutes concerning acquisitions and change of Citizenship, including the statute regarding naturalization of foreigners.

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discrimination among citizens. Cf., Douglas Smith, The privileges and Immunities Clause of Article IV, Section2: Precursor of Section 1 of the Fourteenth Amendment, 34 San Diego L. Rev. 809 (1997).

There are also papers which set their focus on the relation between the meaning of the constitutional clause and the Articles of Confederation or the constitutions of States before the Confederation. Cf., Robert G. Natelson, The Original Meaning of Privileges and Immunities Clause, 43 Geo. L. Rev. 1117 (2009); Kurt T. Lash, The Origins of the Privileges and Immunities Clause, Part I : "Privileges and Immunities" as an Antebellum Term of Art, 98 Geogetown L. J. 1241 (2010).

It has been pointed out that, since the privileges and immunities clause of Article 4 Section 2 of the Constitution provides "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens "in several States"." but not "in the other States", it may be interpreted to be applicable on the ground that a citizen of one State is a citizen of that same State, at least verbally. David Skillen Bogen, Privileges and Immunities -- Reference Guide to the United States Constitution, 100 (Praeger Pub. 2003).

39 Cf., Michael J. Garcia and Meghan Totten et.al. ed., The Constitution of the United States Analysis and Interpretation, 965 (GPO 2017).

40 Tucker says in Appendix of Blackstone's Commentaries that, while the Federal Congress has power to establish an uniform rule of naturalization throughout the United State, each State possesses the right of making denizens of aliens and that, however, since denizen is different from Citizen, a denizen is not guaranteed the benefit secured by Article 4 Section 2 of the Constitution. I St. George Tucker, Blackstone's Commentaries, app. 365. (Augustus M. Kelley Pub. 1969) (1803). (Concerning the meaning of the term "denizen", as for a modern understanding, see Black's Law Dictionary (11th ed., 2017): it describes "A person given certain rights in a foreign country or living habitually in a foreign country" and "(English law) A person whose status is midway between being an alien and a natural-born or naturalized subject.)

Another book points out that the word denizen was used in a court case which denied the political rights or civil rights to free blacks in both the Northern and Southern States before the Civil War. This book also points out, at the time of the joining of the State of Missouri to the Union in 1820, it was insisted, against one who opposed to the Missouri constitution prohibiting the entering of free blacks into the State, that a free black was a denizen but not a citizen. Kunal M. Parker, Making Foreigners: Immigration and Citizenship Law in America 1600–2000, Chap. 4 "Citizenship, Alienage, and Borders for the Native-Born" (Cambridge University Press 2015). From these facts, denizen seems to be used for representing a non-citizen whose political rights or civil rights are curtailed.

41 The following paper analyses the relationship between the independence of the United States and the Privileges and Immunities provided in the Article 4. Cf., Stewart Jay, Origins of the Privileges and Immunities of State Citizenship under Article IV, 45 Loyola Univ. Chi. L. J. 1 (2013). Analysis of this paper is as follows: while each State became an independent country by the independence from the Great Britain, Americans lost all the privileges and immunities they had had as British subjects in the colonial era. Article 4 intended to restore the privileges Americans which had existed before Independence.

This paper also says that what the provision intended to guarantee is so wide that it included the rights for life, body and property as well as the privileges on commerce or the access right to certain public benefits. Moreover, it says, the provision intended to guarantee to Citizens traveling or temporarily residing in another States or doing business or owning property outside their home States and being treated exactly like the local people. There is another paper which analyzes from a similar perspective. Cf., Thomas H. Burrell, A Story of Privileges and Immunities: From Medieval Concept to the Colonies and the United States Constitution, 34 Campbell L. Rev. 7, 100 (2011).

Paragraph 1 Naturalization Act of 1790

After the Independence of the United States from Great Britain, the United States Congress, firstly organized after the establishment of the Constitution of the United States, enacted the Naturalization Act of 1790[42]. The act provided that a free white person who had inhabited in the domain of the United States for more than two years should be able to become a citizen of the United States after some conditions, such as "having good character" were satisfied and after certain procedure such as swearing respect for the Constitution of the United States before a court had been completed. This act also provided that the children of naturalized persons dwelling within the United States, being under the age of twenty one years at the time of such naturalization of the parent, should be considered as a citizen of the United States and that the children of citizens of the United States that might be born beyond Sea, or out of the limits of the United States, should be also considered as a natural born citizen, however, it provided that the right of citizenship should not descend to persons whose fathers had never been resident in the United States.

The Naturalization Act of 1790 was amended several times by 1860.

The amendment in 1795[43] prolonged the period of inhabiting which was required for Naturalization to five years and required the renunciation of the allegiances and fidelity to any foreign price, potentate, state or sovereignty and anything such as the title or order of nobility for Citizenship[44]. While this amendment still provided that the children of the citizens of the United States born out of the limits and jurisdiction of the United States should be citizens of the United States, it didn't contain the qualification "natural born".

The next amendment was done in 1798[45]. In this amendment, the requirement of the period to be the resident for naturalization was prolonged to be fourteen years, which had been five years before. Moreover, some additional conditions, such as not being a subject of a nation with whom the United States should be at war, were added.

In 1802, the Naturalization Act was entirely amended[46]. On this occasion, the length of the period to be residing was shortened to be five years and rules on the requirements and procedure for naturalization were provided in detail. Section 4 of this amended Naturalization Act provided that the children of persons duly naturalized under any of the laws of the United States, being under the age of twenty-one years at the time of their parents being so naturalized, should be considered as citizens of the United States if dwelling in the United States and that the children of persons who now are, or have been citizens of the United States, shall be considered as citizens of the United States[47].

The next amendment of 1804[48] provided the exception concerning acquisition of citizenship of persons who had been residing in the United States from 1798 to 1802, which provided simpler procedure than the usual for such persons. It also provided that, when any alien had completed a series of procedures but died before actually naturalized, the widow and the children of such alien should be considered as citizens of the United States.

After those amendments referred to above, the amendment of 1813[49] provided an exception concerning

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42 1 Stat. 103 (1790). The formal title is: An Act to establish an uniform Rule of Naturalization.

43 1 Stat. 414. The formal title is: An Act to establish an uniform rule of Naturalization; and to repeal the act heretofore passed on that subject.

44 Article 1 Section 9 Clause 8 of the Constitution prohibits the United States to grant any title of nobility and a person holding any office of the United States to accept of any present, emolument, office, or title, of any kind whatever, from any foreign state etc., without the consent of Congress.

45 1 Stat. 566. The formal title is: An Act Supplementary to and to amend the act, intituled "An act to establish an uniform rule of naturalization, and to repeal the act heretofore passed on that subject".

46 2 Stat. 153. The formal title is: An Act to establish an uniform rule of Naturalization, and to repeal the acts heretofore passed on that subject.

47 2 Stat. 153, 155.

48 2 Stat. 292. The formal title is: An Act in addition to an Act intituled "An Act to establish an uniform rule of Naturalization, and to repeal the acts heretofore passed on that subject".

49 3 Stat. 53. The formal title is: An Act supplementary to the acts heretofore passed on the subject of an uniform rule of naturalization. In relation to this point, there is a record that, in 1813, a provision which required aliens to have been residing for five years in the United States as a precondition of naturalization was introduced again. Edwin Austin Avery ed. Laws Applicable to Immigration and Nationality. 749 (U.S. GPO 1953); Michael Le May & Elliot Robert Barkan ed., U.S. Immigration and Naturalization Laws and Issues, 19 (Greenwood Pr. 1999). On this point, cf. An Act for the regulation of seaman on board the public and private vessels of

naturalization of aliens belonging to hostile countries, and the amendment of 1824[50] introduced the procedure for naturalization of an alien who was under twenty one years old and had immigrated into the United States not accompanied by the parents.

Despite those amendments of Naturalization Act, being a free white person consistently was a requirement of naturalization. Concerning those naturalization acts, Congress provided again that children of citizens of the United States who were born in a foreign country should be citizens of the United States, and established a statute which provided that a woman who had married with a citizen of the United States should be a citizens of the United States[51].

Various alterations were made regarding the requirement of the length of residence in the United States to applicants for citizenship. It could be inferred that the reason would be similar to the case of the requirement for Representatives or Senators, that was, while it was generally agreed that citizens of the United States should have certain close relation to the United State, there was disagreement how long a person should have resided there to get such a relation.

In this period, the derivative acquisition of citizenship had already been dealt in laws. Regarding this point, however it was generally accepted that the citizenship of a parent should be inherited by the child, there were further points to be concretely considered. The first point was whether the inherited citizenship as such should be again inherited to the descendants, and the second point was on what conditions a child could inherit the citizenship of their parents.

Paragraph 2 Other Acts

The Congress of 1798 provided the Alien Act of 1798[52] and the Alien Enemies Act of 1798[53,54]. The Alien Act provided that the President could order non-citizen who was deemed as dangerous to the peace of the United States to deport from the United States whether in wartime or in peacetime[55]. This act was a temporary statute that expired in 1800[56].

The Alien Enemies Act provided that citizens of a country at war with the United States could be arrested and detained in the wartime[57].

Moreover, the United States Congress of 1803 provided an act prohibiting importation of certain persons, specifically the importation of any negro or other person of color[58].

The former Alien Act and Alien Enemies Act intended to exclude the citizens of a foreign country at war who was residing in the United States. This was for the protection of the society established in the domain of the United States or the United States Government itself. The latter act prohibiting importation of black and other persons intended to exclude the possibility for black persons to become members of the United States society. Considering that those

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the United States, 2 Stat. 809 (Sec. 12).

50 4 Stat. 69. The formal title is: An Act in further addition to "An Act to establish an uniform rule of Naturalization, and to repeal the Acts heretofore passed on that subject".

51 10 Stat. 604. The Formal title is: An Act to secure the Rights of Citizenship to Children of the United States born out of Limits thereof.

52 1 Stat. 570. The formal title is: An Act concerning Aliens.

53 1 Stat. 577. The formal title is: An Act respecting Alien Enemies.

54 Concerning the legislation process of those statutes and the movement of the United States Government against foreigners at the time, cf., Kunal M. Parker, Making Foreigners: Immigration and Citizenship Law in America 1600–2000. 67 (Cambridge University Press 2015).

55 A literature points out that this act concerned a war with France and that it concretely aimed at French persons including intelligence agents from France. Gregory Fehlings, Storm on the Constitution: The First Deportation Law, 10 Tulsa J. of Comp. & Intl. L. 63. 79 (2002).

56 One literature says that there was no person this rule was applied to (Roger M. Smith, Civic Ideals, 162 (Yale Univ. Pr. 1997)). Contrary to this, the other literature points out there existed one person this rule was applied to (Gregory Fehlings, Storm on the Constitution: The First Deportation, 10 Tulsa J. Comp. & Intl. L. 63, 105 (2002)).

57 In this period, the United States Congress provided a peace keeping act regulating crimes against the Unites States Government. 1 Stat. 596. The formal title of the act mentioned just above is: An Act in addition to the act, entitled "An Act for the punishment of certain crimes against the United States".

58 2 Stat. 205. The Formal title is: An Act to prevent the importation of certain persons into certain states, where, by the laws thereof, their admission is prohibited.

persons were imported as slaves at that time, it was one of a series of political measures to build the social equality in the United States at that time.

Subsection 2 Legislations concerning Civil Rights

Followings are major statutes concerning Civil Rights provided before the Civil War[59,60,61].

Congress of 1802 established the Act Concerning the District of Columbia[62]. It provided that the members of the city assembly of Washington City should be elected from free white male inhabitants who had resided in the city for more than twelve months.

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59 In relation to the acts explained above, the supplementary resolution (Resolution for the Admission of Missouri) of Enabling Act for Missouri, which was established on the occasion of the entering of the State of Missouri into the Union, (the formal title is: An Act to authorize the people of the Missouri territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states, and to prohibit slavery in certain territories.) had a clause that the state assembly of Missouri should not be admitted to establish any statute that might exclude citizens from the enjoyment of the privileges and immunities which were guaranteed by the United States Constitution. See, Francis Newton Thorpe, The Federal and State Constitution, 2448 (GPO 1977) (1909); Earl M. Maltz, Dred Scott and the Politics of Slavery, 16 (Univ. Pr. of Kansas 2007).

60 Besides statutes explained above, Congress of 1850 made, as one of the elements of the Compromise of 1850, an amendment (9 Stat. 462. The formal title is An Act to amend, and supplementary to the Act entitled "An Act respecting Fugitives from Justice, and Persons escaping from Service of their Masters," approved February twelfth, one thousand seven hundred and ninety-three.) of Fugitive Slave Act of 1793 (1 Stat. 302. The formal title of 1793 act is An Act respecting Fugitives from Justice, and Persons escaping from Service of their Masters.). Section 5 of the act ordered all good citizens to support the execution of this law.

61 Some statutes described above included provisions concerning the guarantee of the rights etc. of the inhabitants of the respective joining states, which are such as follows(Francis Newton Thorpe, The Federal and State Constitution, 2448 (GPO 1977) (1909)):

(i) Article 3 of Treaty Ceding Alaska in 1867 concluded between the Russian Empire and the United States provides that the inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. Id., at 236.

(ii) Article 9 of Treaty of Guadalupe Hidalgo in 1848 concerning the cede of California, Texas and others provides that the Mexicans, who were in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, shall be incorporated into the Union of the United States, and be admitted at the proper time to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution. Id., at 381.

(iii) Article 6 of Treaty Ceding Florida between Spain and the United States in 1819 provides that the inhabitants of the ceded territories shall be admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States. Id., at 651.

(iv) Section 12 of an Act to divide the Territory of Wisconsin and to establish the Territorial Government of Iowa of 1838 provides that the inhabitants of the Territory of Iowa shall be entitled to all the rights, privileges, and immunities heretofore granted and secured to the Territory of Wisconsin and to its inhabitants. Id., at 1116.

(v) Article 3 of Treaty Ceding Louisiana concluded between France and the United States 1803 provides that the inhabitants of the ceded territory shall be admitted, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States. Id., at 1360.

(vi) Section 12 of an Act to establish the Territorial Government of Minnesota 1849 provides that the inhabitants of the Territory of Minnesota shall be entitled to all the rights, privileges, and immunities heretofore granted and secured to the Territory of Wisconsin and to its inhabitants. Id., at 1986.

(vii) Resolution providing for the admission of the state of Missouri into the Union, on a certain condition in 1821 states that no law shall be passed in conformity to the law of Missouri, by which any citizen, of either of the states in this Union, shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the constitution of the United States. In addition, the similar content is stated also in a Proclamation Admitting Missouri by the President of the United States promulgated in 1821. Id., at 2148.

(viii) Section 14 of an Act to establish the territorial government of Oregon in 1848 provides that the inhabitants of the Territory of Oregon shall be entitled to enjoy all and singular the rights, privileges, and advantages granted by the articles of compact contained in the ordinance for the government of the territory, on the thirteenth day of July, seventeen hundred and eighty-seven. Id., at 2992.

Cf., Christopher R. Green, Equal Citizenship, Civil Rights and the Constitution: The Original Sense of the Privileges or Immunities Clause, 47 (Routledge 2015).

Besides, concerning treaties with native Americans or a treaty regarding the cession of Alaska, cf., Kurt T. Lash, The Fourteenth Amendment and the Privileges and Immunities of American Citizenship. pp50 (Cambridge Univ. Pr. 2014).

62 2 Stat. 195. The formal title is: An Act to incorporate the inhabitants of the City of Washington, in the District Columbia.

In the same year, Congress established an Act Admitting the Territory of Ohio to the Union[63]. Article 4 of the act provided that the right to vote in the election for the constitutional convention of the state should be given to all male citizens of the United States who should have arrived at full age, and resided within the territory at least one year previous to the day of election, and should have paid a territorial or county tax[64].

Regarding the similar issue, Indiana Suffrage Right Act of 1808[65] provided that every free white male person in the Indiana territory, above the age of twenty-one years, having been a citizen of the United States, and resident in the said territory one year next preceding an election of representatives, and who had certain amount of property should be entitled to vote for the representatives to the general assembly of the territory.

At the time of joining the Indiana territory to the Union in 1816, the Indiana Enabling Act prescribed the qualification of the voters for the constitutional convention of the state[66]. It provided that all male citizens of the United States, who should have resided within the territory, at least one year previous to the day of election, and who should have paid a county or territorial tax and all persons having in other respects the legal qualifications to vote for representatives in the general assembly of the territory, should be authorized to choose representatives to form a convention.

After the joining of those States, some States joined the Union up to 1860 and the statutes established by the United States Congress at those occasions prescribed the base number for the allocation of the members of the territory assembly or the requirement to have the right of election for the member of the constitutional convention. They generally used white male citizens or inhabitants of the United States for counting the base number and for setting the eligibility of the right to vote[67,68].

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63 2 Stat. 173. The formal title is: An Act enable the people of the Eastern division of the territory northwest of the river Ohio to form a constitution and state government, and for the admission of such state into Union, on an equal footing with the original States, and for other purposes.

64 Section 9 of Preamble of Northwest Territory Ordinance which preceded the act provided that, so soon as there should be five thousand free male inhabitants of full age in the district, they should receive authority to elect a representative from their counties or townships to represent them in the general assembly. A representative to be elected in that election should have been a citizen of one of the United States three years and be a resident in the district or have resided in the district three years, and, in addition, in either case, should hold in his own right, two hundred acres of land within the same district. It was necessary for a man, in turn, in order to be qualified as an elector of a representative to be a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or the like freehold and two years residence in the district.

Article 5 of the Ordinance provided that whenever any of the northwest States should have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into Congress of the United States, on an equal footing with the original States in all respects whatever, and should be at liberty to form a permanent constitution and State government.

In relation to this point, while Articles 1 and 2 of the Ordinance provided guarantee of various rights, the term "person" or "inhabitants" were used and the term "citizen" were not used in them. Besides, while Article 6 prescribed, on the one hand, that there should be neither slavery nor involuntary servitude in the territory, it prescribed, on the other hand, that a fugitive escaped from the state where slavery was lawful into these states might be conveyed to the person claiming his or her labor or service.

65 2 Stat. 469. The formal title is: An Act extending the right of Suffrage in the Indiana territory.

66 3 Stat. 289. The formal title is: An Act to enable the people of the Indiana Territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states.

67 Cf., Francis Newton Thorpe, The Federal and State Constitution (GPO 1977) (1909): p.93 (Alabama); p.262 (Alaska); p.662 (Florida); p.968 (Illinois); p.1113 (Iowa); p.1171 (Kansas); p.1376 (Louisiana); p.1983 (Minnesota); pp.2029–2030 (Mississippi); p.2141 (Missouri); p.2393 (Nevada); p.2989 (Oregon); p.4067 (Wisconsin).

Other states and territories than enumerated above also had similar provisions in respective constitutions:

- Article 3 of the constitution of the state of Kentucky 1792 (Id., at 1269) provided that all free male citizens of the age of twenty-one years should enjoy the right of an elector.
- Article 2 of the constitution of the state of Maine 1819 (Id., at 1649) provided that every male citizen of the United States of the age of twenty-one years and upwards should be an elector.
- Article 2 of the constitution of Michigan territory 1835 (Id., at 1932) provided that every white male citizen above the age of twenty-one years should be entitled to vote at the election.
- Article 3 of the constitution of Tennessee territory 1796 (Id., at 3418) provided that every freeman of the age of twenty-one years and upwards should be entitled to vote for members of the general assembly.
- Article 3 of the constitution of the state of West Virginia 1861–1863 (Id. at 4016) provided that the white male citizens of the State should be entitled to vote.

68 The Act for the admission of the State of California into the Union 1850 (see Francis Newton Thorpe, The Federal and State

In 1850, Congress established a statute that admitted the Utah territory[69]. It also provided that every free white male inhabitant above the age of twenty-one years, who should have been a resident of the Territory, should be entitled to vote at the first election. In the same year as above, Congress enacted an act to establish a territorial government of New Mexico[70], which prescribed similar requirements to have the rights of an elector[71]. Moreover, in 1854, Congress established Kansas-Nebraska Act[72]. The act was intended to organize the territorial government of Nebraska and Kansas. It also provided that it was free white male citizen of the United States above the age of twenty one years[73] who should be entitled to vote at the election[74].

Congress of 1792 established a Militia Act[75]. That Act intended to make a civilian in peacetime be armed and serve in the military in emergency. It provided that every free able-bodied white male citizen, who was of the age of eighteen years and under the age of forty five years, should be enrolled in the militia.

As being seen from the above descriptions concerning the right to vote, to be a white male person was thought as a requirement for participating politics at that time. At the same time, as also being seen from the Militia Act, the national defense was thought to be the duty of white male persons.

Section 4 Administration and Citizenship -- Opinion of the Attorney General

By the time of the Civil War, Attorneys General issued some opinions on citizenship[76,77].

Constitution, 390 (GPO 1977) (1909)), although it had no provision concerning the right of an elector, provided that in no case should non-resident proprietors, who are citizens of the United States, be taxed higher than residents and that all the navigable waters within the State should be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor. In addition, Article 2 of the initial constitution of the state of California 1849 provided that every white male citizen of the United States and every white male citizen of Mexico of the age of twenty-one years, who should have been a resident of the State six months next preceding the election should be entitled to vote at all elections. (Id., at 393)

69 9 Stat. 453. The formal title is: an Act to establish a territorial government for Utah.

70 9 Stat. 446. The formal title is: an Act proposing to the State of Texas the Establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory claimed by her exterior to said Boundaries, and of all her Claims upon the United States, and to establish a territorial Government for New Mexico.

71 Section 19 of the act provided that no citizen of the United States shall be deprived of his life, liberty, or property, in said Territory, except by the judgment of his peers and the laws of the land.

72 10 Stat. 277. The formal title is: an Act to organize the Territories of Nebraska and Kansas.

73 Sec. 5 and Sec. 23.

74 The act negated Compromise of 1850 concerning the slavery, which had settled the opposition between the Southern and the Northern States concerning whether the State of California should be joined to the Union as a Free State or as a Slave State (Sec. 14 and Sec. 32). Moreover, the act abolished Missouri Compromise of 1820 which decided the prohibition of slave states at latitude 36º30′ and northward.

75 1 Stat. 271. The formal title is: an Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States.

76 Besides those explained above, Attorney Generals issued the following opinions concerning citizenship:

- In 1819, responding to an inquiry by the Secretary of War whether a person who settled in the Michigan Territory prior to the execution and ratification of Jay's Treaty and continued to reside there without the declaration to be a British subject should become a citizen of the United States, the Attorney General said the person should not be a citizen of the United States because he didn't go through formalities prescribed by the Naturalization Act of 1795. 5. Op. Atty's Gen. 716.
- In 1857, the Attorney General stated that the distinction between citizen and elector pervaded public law in states, so it was an error to assume there was inseparable connection between the fact of the exercise of the advantages of suffrage and the fact of citizenship. 8 Op. Atty's Gen. 300, 302.
- In 1862, responding to an inquiry whether a lady, born in the United States of American parents, married a Spanish subject and residing in the United States, but who was never naturalized, and with her husband and his child of three years of age, also born in the United States, removed to Spain, where she lived till her husband's death, should have the citizenship of the United States, the Attorney General stated that the removal to Spain didn't mean to abandon the citizenship of the lady and the child, so that the lady and child should be citizens of the United States. 10 Op. Atty's Gen. 321.
- In 1862, the Attorney General stated that children born abroad of aliens, who subsequently had emigrated to the United States

In 1821, responding to an inquiry by the Secretary of the Treasury, whether free persons of color were, in Virginia, 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[78], the Attorney General stated that "citizens of the United States" used in the Constitution, had the same meaning that it had in the several acts of the Congress under the authority of the Constitution. Then, he said that no person should be included in the description of citizen of the United States who had not the full rights of a citizen in the State of his residence[79], so that free persons of color in Virginia should not be citizens in the federal constitution or the Acts referred to in the inquiry because they didn't have privileges white persons could have.

In 1843, responding to an inquiry by the Secretary of Treasury, whether free colored persons should be entitled to the benefits of the pre-emption act of 1841[80], the Attorney General affirmed it[81]. He stated that, in the proper acceptation of the term of the act, only aliens were excluded from the privileges of pre-emptioners and that free colored people were denizens but not aliens, so that they should enjoy universally the rights of denizenship[82].

In 1856, responding to an inquiry by the Secretary of the Interior, whether a half-blood Indian could claim a right of pre-emption under the act of 1841 which gave such right only to a citizen of the United States or one who had filed his declaration of intention to become a citizen as required by the naturalization laws, the Attorney General pointed out that what was meant by the term "citizen of the United States" in the Constitution and laws of the United States, how the rights of such citizenship might be acquired, and how lost, had not been fully determined, either by legislation or adjudication. He said as follows[83].

The Attorney General stated: To begin, the Constitution distinguishes between natural born citizens and citizens by naturalization, which can be seen from the Section 1, Article 2. Second, while, in its highest political sense, citizen

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with their families, and had been naturalized there during the minority of their children, should be citizens of the United States, and that children born in the United States of alien subjects, who had declared their intention of becoming citizens according to the naturalization act should be citizens of the Unites States. 10 Op. Atty's Gen. 330, 331.

77 Besides the opinions of Attorney Generals described above, it is pointed out that there was an unpublished opinion drafted in 1832 by Roger B. Taney, the Attorney General who later judged the Dred Scott case. Cf., Carl Brent Swisher, Roger B. Taney and the tenets of Democracy, 34 Maryland Historical Magazine, 207, 218 (1939). In that opinion, Taney said that "men" in the Declaration of Independence didn't include Africans, that the African race in the United States, even when free, were everywhere a degraded class, and exercised no political influence, and that the privileges they were allowed to enjoy were as a matter of kindness and benevolence rather than of right. Then, he said that, where African race were nominally admitted by law to the privileges of citizenship, they were permitted to be citizens by the sufferance of the white population and held whatever rights they enjoy were at their mercy, so that African race had been never regarded as a constituent portion of the sovereignty of any state. Moreover, Taney said in the text, African race were not regarded as citizens provided in the Constitution.

78 1 Op. Atty's Gen. 506.

79 That opinion was grounded by the fact that if a person born and residing in Virginia, but possessing none of the high characteristic privileges of a citizen of the State, was nevertheless a citizen of Virginia in the sense of the Constitution, then, on his removal into another State, he acquired all the immunities and privileges of a citizen of that other State, although he possessed none of them in the State of his nativity, but such a consequence could not have been in the contemplation of the convention.

Moreover, in that opinion, the Attorney General also considered the provision prescribing requirements for President. He stated that the only qualification required by the constitution to render a person eligible as President, senator, or representative of the United States, was, that he should be a "citizen of the United States" of a given age and residence and that, since free negroes and mulattoes could satisfy the requisitions of age and residence as well as the white man, if nativity, residence, and allegiance combined, were sufficient to make him a "citizen of the United States" in the sense of the constitution, then free negroes and mulattoes were eligible to those high offices.

80 5 Stat. 453 (1841). Section 10 of the act prescribed the pre-emptive right on the public lands of every person being the head of a family, or widow, or single man, over the age of twenty-one years, and being a citizen of the United States, or having filed his declaration of intention to become a citizen, as required by the naturalization laws. Id. at 455.

81 4 Op. Atty's Gen. 147.

82 This opinion got such a criticism by the next opinion of the Attorney General of 1856, that, since the pre-emption act of 1841 restricted persons entitled to pre-empt to citizens of the United States and the persons who should have declared their intention to become citizens according naturalization laws, it was an error to include free colored people born in the United States into that. 7 Op. Atty's Gen. 753.

83 7 Op. Atty's Gen. 746, 753.

signifies in our public law, the person who constitute the political society, the appellation is not confined to persons enjoying the right of suffrage, and, on the other hand, a person may be an elector without being citizen.

Third, persons may born abroad (of citizens in the public service, for instance) and be natural born citizens of the United States, while persons may be born in the United States (of aliens in the service of their government, for instance,) and not be natural born citizens of the United States. So, the mere fact of a person being born in the United States does not constitute a citizen thereof. As a conclusion, the Indians are the subjects of the United States, and therefore are not, in mere right of home-birth, citizens of the United States[84].

In addition to that, the Attorney General pointed out that an Indian could be naturalized, though, not by the naturalization act applied only to foreigners but only by some competent act of the General Government, either a treaty or an act of Congress. Moreover, the Attorney General pointed out that, although no person of the race of Indians was a citizen of the United States by right of local birth, which was an incapacity of his race, the incapacity of race, attached to the Indian as such, should be susceptible of being determined by intermarriage with persons of the dominant race of the country. And he stated next that, although no general solution had not been given to the question, at what period or stage of descent the incapacity would disappear, it was reasonable and just that a half-blood Indian, who still belonged to a tribe, and who claimed and took the benefits of such tribal membership, should not be allowed at the same time to claim benefits which were only attached by law to persons not Indians.

In 1859, the Attorney General stated an opinion that a white child born in the United States, of foreigners, was a citizen of the United States[85].

Section 5 Citizenship in Court -- Dred Scott Case

In Dred Scott case of 1857[86], the Federal Supreme Court showed the opinion on citizenship[87]. In it, the plaintiff who had been born in Virginia as a child of negro slaves claimed the confirmation of the status of the free man grounded on the law of the state where he had ever moved to and resided with his master. That law was prohibiting slavery[88].

Subsection 1 Judgement of the Supreme Court

The Supreme Court denied that the plaintiff was a citizen of the United States and dismissed the appeal. The court opinion was as follows.

Paragraph 1 Whether a Person Who Has Slave Ancestors Can Enjoy the Rights of Citizen

The court opinion 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, guarantied by that instrument to the citizen?”[89]. The court opinion judged on this point was as follows.

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84 The opinion also said that a slave could not be a citizen for the same reason. Id. at 749.

85 9 Op. Atty’s Gen. 373 (1859).

86 60 U.S. 393 (1857).

87 Concerning the cases on renunciation of citizenship at the time, see my paper, Kotaro Matsuzawa, The Development of Expatriation in America, p.203 Tsukuba-Hosei (Tsukuba University Journal of Law and Politics) No. 25 (1998).

88 As references for this case, cf., ex., David Thomas Konig, et.al., The Dred Scott Case - Historical and Contemporary Perspectives on Race and Law(Ohio Univ. Pr., 2010); Earl M. Maltz, Dred Scott and the Politics of Slavery(Univ. Pr. of Kansas, 2007); Mark A. Graber, Dred Scott and the Problem of Constitutional Evil(Cambridge Univ. Pr., 2006); Austin Allen, Origins of the Dred Scott Case - Jacksonian Jurisprudence and the Supreme Court, 1837–1857(Univ. of Georgia Pr., 2006); Don E. Fehrenbacher, The Dred Scott Case(Oxford Univ. Pr., 1978).

89 60 U.S. 393, 403. The court opinion, rewording the question into more detailed setting, stated that the matter in issue was whether

The words "people of the United States" and "citizens" were synonymous terms, and they both described the political body who, according to the republican institutions, formed the sovereignty, and who held the power and conducted the Government through their representatives. They were generally called the "sovereign people," and every citizen was one of this people, and a constituent member of this sovereignty[90].

Concerning the question before the court, it stated that persons, who had slave ancestors, were not included, and had not been intended to be included, under the word "citizens" in the Constitution, and could therefore claim none of the rights and privileges which that instrument provided for and secures to citizens of the United States[91].

Moreover, it also stated that they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them[92].

Paragraph 2 Whether a State Can Give a Person the Status of Citizen

The court opinion said that every State could independently give any person the rights or privileges of the citizen of the State within the boundary of the State, but it could not make a person a citizen of the United States nor give him citizenship of the other State[93].

Paragraph 3 Exclusive Power of Congress Concerning Naturalization

The court opinion said that the Constitution had conferred on Congress the right to establish a uniform rule of naturalization and that this right was evidently exclusive, so that no State could, by any act or law of its own passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States[94].

Paragraph 4 Only a Person Who Participates As a Member of a State Is a Citizen

The court opinion stated that every person who was at the time of the adoption of the Constitution recognized as citizens in the several States, had also become citizens of this new political body, but none other, and that the political body was formed by them, and for them and their posterity, but for no one else[95]. Then it said that the personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded[96].

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the descendants of slaves, when they should be emancipated, or who were born of parents who had become free before their birth, were citizens of a State, in the sense in which the word citizen was used in the Constitution of the United States.

At the same time, it stated that this judgement should be understood as speaking of those persons who are the descendants of Africans who were imported into this country, and sold as slaves. This mentioning was intended to make clear the intent that the logic of this judgement should not be applied to Indian tribes. Id.

90 Id., at 404.

91 Id.

92 Id., at 405.

93 Id.

94 Id.

95 Id., at 406

96 Id. The court opinion said that the new political body was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States and it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.(Id., at 407)

Then it examined the content of the Declaration of Independence, the legislation process of the Constitution of the United States, statutes of several States, the legislations of Congress and the decisions of the Government, in order to ground the insistence up to there (Id., at 407−426). Among them, in examining the legislation process of the Constitution of the United States, the court opinion said that, if black people were thought to be included in "citizen" of the Constitution, or if the Constitution compelled the large

Subsection 2 Concurring and Dissenting Opinions

In relation to the court opinion concerning the citizenship of the appellant, Justice Daniel stated the concurring opinion, and Justice McLean and Justice Curtis stated the dissenting opinions[97].

Paragraph 1 Concurring Opinion of Justice Daniel

Justice Daniel first pointed out that since the appellant was a slave so that he was himself strictly property, to be used in subserviency to the interests, the convenience, or the will, of his owner, and that to suppose the existence of any privilege or discretion of him would be to deny the relation of master and slave[98]. Then he concluded that a slave possessing within himself no civil nor political rights or capacities, could not be a citizen. In addition, Justice Daniel stated that the term citizen conveyed the ideas of connection or identification with the State or Government, and a participation of its functions, and, beyond this, necessarily implied the actual possession and enjoyment of an entire equality of privileges, civil and political[99].

The justice added that, from the nature and objects of civil and political associations, and upon the direct authority of history, citizenship was not conferred by the simple fact of emancipation, and such a result was deduced therefrom in violation of the fundamental principles of free political association[100].

Paragraph 2 Dissenting Opinion of Justice McLean

Justice McLean insisted that being born under our Constitution and laws, no naturalization was required to make him a citizen and that the most general and appropriate definition of the term citizen was “a freeman”. Then the justice concluded that the plaintiff was, being a freeman, and having his domicile in a State different from that of the defendant, a citizen within the act of Congress, and that the courts of the Union should be open to him[101].

Paragraph 3 Dissenting Opinion of Justice Curtis

Justice Curtis paid attention to the phrase “a citizen of the United States at the time of the adoption of the Constitution” in the Constitution[102] in order to make clear who were “Citizens of the United States”, and concluded that citizens of the United States at the time of the adoption of the Constitution could have been no other than citizens of the United States under the Confederation. Then, he argued that, except for the inhabitants of the territory of the United States out of the limits of the States, the citizens of the several States were citizens of the United States under the Confederation[103].

The justice also pointed out that, under the Confederation, the Government of the Confederation possessed only

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slaveholding States to receive black people as citizens from another State, then the Constitution would not be consented by such States(id., at 416-417).

97 This article will analyze only opinions which stated their views on citizenship of the appellant however there were also concurring opinions of Justice Wayne and Justice Campbell and separate opinions of Justice Nelson, Justice Grier and Justice Carton.

98 Id., at 475-476.

99 Id., at 476.

100 Id., at 479. In this respect, the justice stated as follows: Since the laws of the Federal Government, in authorizing the extension by naturalization of the rights and immunities of citizens of the United States to those not originally parties to the federal compact, have restricted that boon to free white aliens alone, “if the rights and immunities connected with or practiced under the institutions of the United States can by any indirection be claimed or deduced from sources or modes other than the Constitution and laws of the United States, it follows that the power of naturalization vested in Congress is not exclusive - that it has in effect no existence, but is repealed or abrogated.” Id., at 481.

101 Id., at 531. Regarding this, the justice pointed out the following (Id.):

- In this case, it is not alleged that the plaintiff(appellant) had his domicile in any other State, nor that he is not a free man in Missouri.
- The appellant(plaintiff) is averred to have had a negro ancestry, but this does not show that he is not a citizen of Missouri, within the meaning of the act of Congress authorizing him to sue in the Circuit Court.

102 U.S. Const. Art. II. § 1, cl. 5.

103 60 U.S. 393, 572.

the powers expressly delegated to it and that no power was thus delegated to the Government of the Confederation, to act on any question of citizenship, or to make any rules in respect thereto[104]. The justice then argued that, to determine whether any free persons, descended from Africans held in slavery, were citizens of the United States, it was 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[105].

Then the justice pointed out that, at the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the State of New Hampshire and some other States, though descended from African slaves, were not only citizens of those States, but such of them, as had other necessary qualifications, possessed the franchise of electors[106]. Furthermore, the justice added, it was known that the fourth article of the Confederation[107] would have the effect to confer on such persons the privileges and immunities of general citizenship[108].

Moreover, the justice pointed out that, in some of the States, colored persons were among persons qualified by law to act on this subject, and that in at least five of the States they had the power to act, and doubtless did act, by their suffrages, upon the question of the adoption of the Constitution[109].

Then, the justice stated that it would be strange, if we were to find in the Constitution anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established[110].

The justice stated, as a conclusion, that, under the Constitution of the United States, every free person born on the soil of a State, who was a citizen of that State by force of its Constitution or laws, was also a citizen of the United States[111].

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104 Id.

105 Id.

106 Id., at 573.

107 Article of Confederation, Art. 4.

108 60 U.S. 393, 575.

109 Id., at 576.

110 Id.

111 Id. As the grounds of this opinion, the justice first paid attention to the phrase "a natural-born citizen" in Section 1, Article 2 of the Constitution of the United States and pointed out that the phrase came from the principle of public law which referred citizenship to the place of birth. Then the justice insisted that if the Constitution recognized that principle, one of four things in following had to be true (Id., at 577.):

- The Constitution itself has described what native-born persons shall or shall not be citizens of the United States;
- it has empowered Congress to do so;
- all free persons, born within the several States, are citizens of the United States; or
- it is left to each State to determine what free persons, born within its limits, shall be citizens of such State, and thereby be citizens of the United States.

Among them, the justice dismissed the first alternative because the Constitution itself contained no such provision. Then, concerning the second one, the justice stated that if such a power of Congress existed, what persons born within the States might be President or Vice President of the United States, or members of either House of Congress had to depend solely on the will of Congress. Then he considered whether the power of Congress to establish a uniform rule of naturalization might be interpreted as giving such power as above to Congress (Id., at 578). However, on this point, he argued that it was a power only to prescribe a rule for the removal of the disabilities consequent on foreign birth.

Then, concerning the third and fourth alternatives, the justice finally selected the fourth as a correct one, so argued that it should be left to each State to determine what free persons, born within its limits, should be citizens of such State, and thereby be citizens of the United States (Id.). As the grounds, the justice enumerated the following fact: Before the Confederation, the power of determining what persons should and what persons should not be citizens was possessed by the States. It embraced what may be divided into three parts; First: The power to remove the disabilities of alienage, either by special acts in reference to each individual case, or by establishing a rule of naturalization to be administered and applied by the courts. Second: Determining what persons should enjoy the privileges of citizenship, in respect to the internal affairs of the several States. Third: What native-born persons should be citizens of the United States. But only the first-named power, that of establishing a uniform rule of naturalization, was granted; and here the grant, according to its terms, stopped (Id., at 579). The justice drew the conclusion from the examination of Article 3, Section 2, Clause 1 (on the judicial power) and Article 4, Section 2, Clause 1 (on the privileges and immunities of citizens) of the Constitution of the United States, and the provisions concerning the electors of the federal election of the public officers. The justice pointed out that, while those provisions referred to citizens of each State, no provision referred to citizens of the United States (Id.). In addition to those, the justice argued that persons who enjoyed national rights of citizenship were described as

Section 6 Conclusion

Subsection 1 Arguments regarding "Citizenship" at the Establishment Era of the Constitution

As being seen above, the Constitution of the United States requires not only being a mere citizen but also being a natural-born citizen or having been a citizen for certain years to become a President, a Senator or a Representative. The reason was, as being seen in the discussions of its legislation process, to minimize the possibility of the interference in the United States government from certain foreign countries.

It is true that the interferences of foreign countries were a concern and the exclusion of them was desired in the arguments in the legislation process of relevant provisions. But, on the other hand, attention should be paid to the fact that being a natural-born citizen was required for a President but not for the other public offices.

The main reason why being a natural-born citizens was not required for all public offices would be that there were too small number of natural-born/native-born citizens of the United States to build the government of the United States at that time. However, it was just one side of the reason. As being seen, it was argued as its reason that the talented persons among naturalized people should be rather useful for the United States.

In relation to those requirements, it should be noted, in addition, that the requirements were prescribed so formally that everyone could have the qualification for public offices only when (s)he satisfied such requirements without worrying about the other conditions.

Subsection 2 "Citizen" Conceived by Congress, Government and Supreme Court

Paragraph 1 Citizen As the Member of a Country

As being seen in the provisions of the naturalization law, basically, the "citizen" was conceived by Congress as free white people and not as ones being slaves. In this regard, it can be said that there was an intention of the Congress to consist citizens with white people.

However, in turn, from the amendment process of the naturalization law where the requirement of the length of the inhabiting period varied and a citizen or subject of a hostile country was excluded from the naturalization, it is clear that being a white person was not conceived as a sufficient condition to be a citizen[112].

Besides, it was seen from the legislations concerning admission of the Territories or States into the Union that being a male person was a requirement for becoming an elector. Since those provisions were explicitly requiring being white male people in addition to being citizens, strictly saying, it is not clear whether the term "citizen" itself was thought to imply such conditions. However, being a male person was anyway required for the participation in the political decisions at Congress of the United States regardless of whether the term "citizen" was thought to imply being a male person.

As in the arguments in Congress, the presupposition that, basically, citizens were consisted with white persons was seen in the opinions of Attorney General. However, the opinion of Attorney General generally admitted the possibility for an Indian to become a citizen of the United States if some legal measures were taken and it stated that colored people inhibiting in the United States were not foreigners but denizens. In this regard, it can be said that the Attorney General did not show clear position concerning the problem who were the members of the country.

In contrast to it, the Supreme Court definitely stated in the Dred Scott case that a black person was, regardless of

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citizens of each State in the provision of the Constitution so that citizens of each State, as such, enjoyed the privileges and immunities of general citizenship guaranteed by the Constitution (Id., at 580).

112 In relation to the naturalization law, there were also the arguments regarding how children of the naturalized person were to be treated. From the broader perspective, this point is connected closely to the relationship between "family" and country, on which there was not yet a firm conception of.

whether (s)he was a slave or not, a person to be governed by white people and therefore not a citizen. Moreover, the Supreme Court said that even Federal or State law could not make a black person to be a citizen. In this regard, the Supreme Court seems to have the presupposition that the United States were consisted with the white citizens and its opinion was different from that of the Government or Congress, which publicly stated the United States should be composed of white people and white people was superior to black people.

All in all, it can be concluded that, despite of the words of the Declaration of Independence, every organ of the United States supposed at the time before the Civil War that white people constituted "citizens" and that only white male people could substantially participate in the politics[113].

Paragraph 2 Rights which Citizens Enjoy

Based on the records of the arguments regarding the jurisdiction of the federal courts, or the opinions on the interstate privileges and immunities of citizens, or on the power of Congress to decide the uniform naturalization law, it can be concluded that setting the concept of citizenship at the level of the Union had the meaning and function to correct the imbalance of the enjoyments of the rights among States existed when the Constitution of the United States was established, while sustaining the status as subjects of England which the citizens of each State had before.

Furthermore, as being seen in the opinions of the Attorneys General, citizenship was treated not only from the viewpoint of correcting the imbalance. It was thought that there were some rights which even non-citizen could enjoy while there were some rights enjoyed just by citizens. However, seeing from the legislation process of the Constitution of the United States, which was analyzed, it can't be concluded that the original purpose of setting the concept citizen was to introduce a gap between citizens and non-citizens concerning the enjoyment of rights.

Paragraph 3 Clear Conceptualization of the Prospecting for Civil War and Reconstruction Era

Ordinary, a country is organized based on the background of some social relations. In fact, it is almost impossible to perceive a country without the background society[114,115]. In this respect, considering the building process of a country, it can be said that a country is built on the background society and, at the same time, the country being established may create a somewhat new society.

In relation to this point, at the period when the United States was established and by the time before the Civil War, being analyzed above, it could be said that the background society was composed mainly of white male persons presupposing the existence of black persons who were enslaved. This situation was basically maintained up to the time of the Civil War while some adjustments and reformulation took places, however, also as mentioned above, there were some elements which contradicted to these basics.

As being seen in the following chapter, through the legislation of Thirteenth, Fourteenth and Fifteenth Amendments that were established after the Civil War, the United States started to create a new society through the re-establishment of some elements included in the Declaration of the Independence and the Constitution of the United States.

Since there is very close relationship between a country and the background society as being seen also in the history, it could be said that it is important to take into consideration the relationship between a country and the

113 However, as Justice Curtis pointed out in Dred Scott case, it was also the fact that some of colored persons had in fact exercised their rights to vote.

114 Provided, from the view of territoriality of the country, there are instances that the jurisdiction of a country reaches to an uninhabited island. If such a case is also taken into account, it should be accepted that jurisdiction of a country covers a place where no person is inhibiting. It would be a future subject of author's study to consider such a relationship problem between a country and the territory.

115 Regarding the relation between the U.S. Citizenship and the definition of the "United states", cf., Daniel Levy and et al., U.S. Citizenship and Naturalization Handbook(2018-2019 ed.), § 2:4(Thomson Reuters 2018).

background society in understanding the meaning of the Constitution. In relation to this point, in considering an establishment process of a country through the constitution, it should not be taken as a matter of course that the constitution is established on some fixed backgrounds of society. As being seen in the historical experience of the United States of America, humankind has gradually improved the social situation to protect the "rights and interests" of "individuals" by building a state through establishing the constitution. Such a view is expressed also in the preamble of the Constitution of the United States, namely, "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

During the period of the history of the United States of America in this chapter, the aim described in the preamble of the Constitution was not yet fully realized. Rather, seeing from the Supreme Court opinion in the Dred Scott case, what is being seen at most is that, whether consciously or unconsciously, the ultimate target to be aimed at was made crystalized[116].

As mentioned, after this period, the Civil War broke out and, then, the restitution process started with the establishment of the Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution. Through this period, the nation of the United States of America had made their ideal clear and this work to realize this ideal led to the civil rights movement since the middle of the twentieth century. Furthermore, in the twenty first century, Barack Obama who is a black person was elected as President. It could be understood as an expression of the realization of supra-racial "citizen" as is aimed at, thinking from the view of the developing history of the concept citizen in the United States.

On the other hand, there are still various problems regarding the Civil Rights including racial or other social discriminations in the United States of America, which are rather common in all other modernized countries with a modern constitution. The United States of America challenged such the difficult problem regarding the citizenship and civil right, as described in the following chapter, with the effort to overcome those difficulties through pursuing the ideal conceptualization of the "citizen" to be designed and to be established.

116 Regarding this point, it is pointed out that Dred Scott case made the candidate of President of 1860, Abraham Lincoln, famous and degraded the popularity of his rival candidate, Stephen A. Douglas. See Paul Finkelman, Scott v. Sandford: The Court's most Dreadful Case and how it Changed History. 82 Chicago-Kent L. Rev. 3, 13 (2007).

Chapter 3 The Original Meaning of the Thirteenth Amendment

Section 1 Orientation of the discussion in This Chapter

On March 4, 1861, around one month after the President Lincoln insisted on the inseparability of the Union in his first inaugural speech, the bombardment of Fort Sumter happened, and the Civil War broke out. After it, there was the declaration of emancipation of slaves in 1863, and, finally, on Mach 4, 1865, one month after the second inaugural speech of President Lincoln, the Civil War was ended by the surrender of the Southern States.

Congress passed the Thirteenth Amendment of the Constitution in January, 1865, and promulgated it on December 18 of the same year. This amendment is the first among so-called the Civil War Amendments. In the legislation process, Congress discussed matters concerning the reconstruction of the Southern States, which, in later stage, were relating to the conceptualization of the Citizenship and Civil Rights.

Section 2 of this chapter analyzes the historical circumstances in this period i.e., by the time of the establishment of the Thirteenth Amendment, through examining statutes enacted. Section 3 will analyze the legislative discussions concerning the Thirteenth Amendment in Congress. Finally, section 4 will summarize the materials which was put in order up to section 3, make clear the matter of concern to Congress at that time and consider what solution Congress offered by establishing the Thirteenth Amendment and, moreover, what questions were left unsolved at the time.

Section 2 Up to the Establishment of the Thirteenth Amendment

Subsection 1 Movement of Congress

Paragraph 1 Statutes Enacted by the time of the establishment of the Thirteenth Amendment

The 37th[1] and 38th[2] Congress of the United States enacted some statutes precursor to the Thirteenth Amendment. The major ones were as follows[3].

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1 37th Cong. Jul. 4, 1861-Mar. 3 1863.

2 38th Cong. Dec. 7. 1863-Mar. 3 1865.

3 In addition to those in the above, Congress implemented following policies:

- Abolishing the colonial plan of black people.(An Act making appropriations for sundry civil expenses of the government for the year ending the thirteenth of June, eighteen hundred and sixty-five, and for other purposes, Sec. 7, 38−1 Cong. Globe app. 246, 249. At the beginning, as being seen in the Act abolishing Slavery in the District Columbia (12 Stat. 376) Sec. 11 or Confiscation Act 1862 (12 Stat. 589), Congress had planned the colonization of emancipated slaves but that policy was changed.)
- Equalizing the wages between white and black soldiers. (An Act making Appropriations for the support of the Army for the year ending the thirteenth June, eighteen hundred and sixty-five, and for other purposes, Sec. 2, 38−1 Cong. Globe app. 177, 178.)
- Approving the qualification of black people to testify in a court. (An Act making appropriations for sundry civil expenses of the government for the year ending the thirteenth of June, eighteen hundred and sixty-five, and for other purposes, Sec. 3, 38−1 Cong. Globe app. 248.)
- Prohibiting the exclusion of black people from the use of a streetcar in the District of Columbia. (An Act to Incorporate the Metropolitan Railroad Company in the District of Columbia, Sec. 14, 38−1 Cong. Globe app. 240−241; cf. An act to amend an act entitled "an act to incorporate the Metropolitan Railroad Company in the District of Columbia." Sec. 5, 38−2 Cong. Globe app. 149−150.)
- Permitting black people to engage mail carrying work. (An Act to remove all disqualification of color in carrying the Mails, 38−2 Cong. Globe app. 143.)

E. M. Maltz, Civil Rights, The Constitution and Congress, 1863−1869, 6 (Univ. Pr. of Kansas 1990) [hereinafter Maltz]. Moreover, in 1864 a series of Fugitive Slave Acts were abolished(13 Stat. 200. The formal title of the act is "An Act to repeal the Fugitive Slave Act of eighteen hundred and fifty, and all Acts and Parts of Acts for the Rendition of Fugitive Slaves). In addition to the instances above, Congress of 1862 established an act to prohibit the federal army from returning a fugitive slave to the master and adopted a resolution to support the States adopting the slave emancipation policy. Paul Finkelman, The Civil War, Emancipation and the Thirteenth Amendment -- understanding who freed the slaves, in the Alexander Tsesis, The Promises of Liberty, 36, 44 (Colum. Univ. Pr. 2010).

1861 The first Confiscation Act (Confiscation Act 1861, 12 Stat. 319)[4]

1862 Slave Emancipation Act of the District of Columbia
(Act of April 16, 1862, 12 Stat. 376)[5]
The second Confiscation Act
(Confiscation Act 1862, 12 Stat. 589)[6]
Militia Act of 1862 (12 Stat. 597)[7]

1863 Conscription Act of 1863 (12 Stat. 731)[8]

1864 Conscription Act of 1864 (13 Stat. 6)[9]

The outlines of them are as follows.

Paragraph 2 The First Confiscation Act

The first Confiscation Act of 1861 was enacted for realizing a swift resolution of the rebellion of the Southern States by weakening the military power of the rebel army. It provided that, when a slave was employed in aiding the rebellion, the rights over the slave of the person who ordered the slave to do so, should be confiscated. Since the primary intention of the act was strategic and military, there was no provision prescribing the freedom of emancipated slaves[10]. However, it was the first act prescribing the emancipation of slaves Congress established[11].

Paragraph 3 Slave Emancipation Act of the District of Columbia

As the movement against the slavery had become active by 1862, many bills providing for securing the freedom of emancipated slaves were proposed to the Congress[12]. The first enforced act among them was the Slave Emancipation Act of the District of Columbia. This act was intended to emancipate persons who were forced into servitude because of their African descent. Modeled on the Northwest Ordinance[13], it prohibited slavery and involuntary servitude within the area of the District of Columbia and prescribed the procedural rules to compensate for the emancipation of the slaves and to secure the freedom of emancipated slaves[14,15,16].

Paragraph 4 The Second Confiscation Act

Following the establishment of the Slave Emancipation Act of the District of Columbia, Congress enacted the second Confiscation Act.

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4 The formal title is “An Act to confiscate Property used for Insurrectionary Purposes”.

5 The formal title is “An Act for the Release of certain Persons held to Service or Labor in the District of Columbia”.

6 The formal title is “An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes”.

7 The formal title is “An Act to amend the Act calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Inversion, approved February twenty-eight, seventeen hundred and ninety-five, and the Acts amendatory thereof, and for other Purposes”.

8 The formal title is “An Act for enrolling and calling out the national Forces, and for other Purposes”.

9 The formal title is “An Act further to regulate and provide for the enrolling and calling out the National Forces, and for other Purposes”.

10 Herman Belz, A New Birth of Freedom, 4 (Greenwood Pr. 1976) [hereinafter Belz]

11 George H. Hoemann, What God Hath Wrought -- The Embodiment of Freedom in the Thirteenth Amendment, 28 (Garland Pub. Co. 1987) [hereinafter Hoemann]

12 Belz, at 5.

13 An Ordinance for the Government of the Territory of the United States northwest of the river Ohio, reprinted in F. N. Thorpe ed., II Federal and State Constitution, 957–962 (Scholarly Pr. 1977) (1909).

14 This act was amended and corrected to give the federal courts the power to provide an emancipation certificate for a slave who could not take the emancipation proceedings because of the absence of the master. 12 Stat. 538 (1862).

15 On June 19, 1862, an act to secure freedom to all persons within the Territories of the United States was established. 12 Stat. 432. (1862)

16 Congress established an act to provide the Education of Colored Children in the District of Columbia. 12 Stat. 407, 537 (1862).

Being similar to the first Confiscation Act, the intention of this act was to weaken the rebels, extending the income of the federal army, and preparing the institutional foundation of the reconstruction of the southern States after the war. The security of freedom of persons released from the slavery was not the first purpose of the act[17,18]. In this act, such a tendency was more noticeable than in the first one as this second Confiscation Act provided that President could employ, organize and make use of freed slaves in a way which was thought to be the best for public welfare.

Despite of such a content, the act can be evaluated as promoting the liberation of slaves since it explicitly provided that confiscated slaves should become free.

Paragraph 5 Militia Act of 1862

In 1862 Congress enacted Militia Act. The first Militia Act in America was established in 1792, which provided that only white male citizen should be enrolled in the militia[19]. This act of 1862, in contrast, abolished the racial eligibility condition and made black people able to participate in the federal army.

Paragraph 6 Conscription Acts of 1863 and of 1864

In 1863, Congress enacted a Conscription Act for the military needs. This act provided that the federal army should consist of all able-bodied male citizens of the ages between twenty and forty-five years and that those people should be liable to perform military duty when called out by the President for that purpose. Since a racial eligibility condition was not adopted in the act, it became possible for black people to be called for the military service. However, since it did not explicitly provide that black people could be conscripted, they were not conscripted in practice. Afterward, Conscription Act of 1864 explicitly provided that all able-bodied colored persons should be drafted to be enrolled and to form a part of the national forces.

A series of the acts concerning military service, established between 1862 and 1864, outlined above, was to give, together with the complementary relationship between the military service and the privileges and immunities as a citizen in the traditional policy of the United States[20], significant influences to the movements of black people to acquire citizenship[21]

Paragraph 7 Wade-Davis Bill

In addition to those explained above, on July 8, 1864, Congress passed the Wade-Davis bill[22]. Although the bill was rejected by President Lincoln[23], the content presented a reconstruction plan for the Southern States by Congress so as to secure the republican governments in the rebelling States, based on the Section 4 Article 4 of the Constitution of the United States. The bill required that the slavery system should be abolished in the new constitutions of the rebelling States, extended the power of the federal courts in order to secure the freedom of emancipated persons, and prescribed penal regulations against persons who tried to restrict the freedom of emancipated persons.

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17 Belz, at 7.

18 The range of application of the act was limited to the soldiers and public servants of the Confederate States of America or the State joining it while the first Confiscation Act was applied to all the participants in the rebellion.

19 Militia Act, 1 Stat. 271 (1792).

20 S. T. Ansell, Legal and Historical Aspects of the Militia, 26 Yale L. J. 472 (1917).

21 Belz, at 23.

22 An Act to guarantee to certain States whose Governments have been usurped or overthrown a Republican Form of Government, reprinted in I Henry Steele Commager, Documents of American History, 437 (9th ed. Prentice-Hall Inc. 1973).

23 Proclamation concerning a Bill "to Guarantee to certain states, whose governments have been usurped or overthrown a republican form of Government." and concerning reconstruction July 8, 1864., reprinted in VII, Arthur Brooks Lapsley ed., The Writings of Abraham Lincoln, 168(The Lamb Pub. Co., 1905); Michael Les Benedict, A Compromise of Principle - Congressional Republicans and Reconstruction 1863–1869, 83 (W. W. Norton & Co. Inc 1974).

Subsection 2 Decisions of Administrative Offices Concerning Citizenship and Civil Rights

During this period, the Administration of the Federal Government engaged two things regarding citizenship and civil rights. One was the proclamations of the emancipation of slaves by the President Lincoln and another was the issuances of the opinions regarding the "citizen" by the Attorney General.

Paragraph 1 Proclamations of Emancipation of Slaves

As being shown in his first Inaugural Address[24], in the beginning, Lincoln did not aim for the abolishment of the slavery. He intended only the restoration of the unification of the United States. However, as the argument for emancipation of slaves getting stronger by 1862, he announced the Preliminary Emancipation Proclamation[25] in 1862 and the final Emancipation Proclamation[26] in the next year[27].

Those two proclamations were issued based on the President's wartime power and declared that persons owned by someone as slaves in the rebelling States should be free on and after January 1, 1863, and that the Government of the United States should act to secure the freedom of the freed persons. Especially, the former Preliminary Proclamation quoted "an Act to Make an additional Article of War"[28], which prohibited from making use of the Federal Army to capture or to return fugitive slaves, and the second Confiscation Act as explained above, which explicitly provided that slaves should be emancipated, and required the observance of the persons engaged in military services.

While the Preliminary Proclamation referred to a plan to colonize "persons of African descent" upon the American Continent or elsewhere, the plan was later abolished by the rejection of Congress[29].

Paragraph 2 Presentation of Attorney General's Opinion Concerning Citizenship

In 1862, the Attorney General, responding to an inquiry from the Secretary of the Treasury whether "colored men" were competent to be masters of vessels of the United States[30,31], stated, in relation to the meaning of "Citizen", as follows.

First, the term "Citizen" in the Constitution expressed certain political quality of the individual in his relation to the nation. Concretely, the term was used to declare that the individual was a member of the body politic, and bound to it by reciprocal obligation of allegiance on the one side and protection on the other side. In this regard, being a citizen did not mean having certain privileges or immunities.

Second, a person born in the United States was a citizen of the United States[32] and of the State where he resided. Concerning this point, the Attorney General stated that, at least in relation to the Constitution of the United States, being a citizen should not be denied by the reason that the person was colored or not white.

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24 Abraham Lincoln, First Inaugural Address, Mar. 4, 1861, reprinted in IV Roy P. Baslered, The Collected Works of Abraham Lincoln, 262 (Rutgers Univ. Pr. 1959). (Japanese reference: Shakuhachi Takagi and Hikaru Saito (trad.), Collected Speeches of Abraham Lincoln, p.93 (Iwanami Shoten 1983))

25 Preliminary Emancipation Proclamation, Sep. 24, 1862, V Id., at 433. (Japanese reference: p. 136.)

26 Emancipation Proclamation, Jan. 1, 1863, VI, Id., at 28 (Japanese reference: p. 140.)

27 Regarding those proclamations, there were various criticisms, namely, it was unclear whether the proclamations declared the security of freed slaves or simply the abolishment of the slavery systems of the rebelling States by amending their constitutions and statutes, or it was doubtful for President to have the power to announce such proclamations. G. Sidney Buchanan, The Quest for Freedom: A legal History of the Thirteenth Amendment, 12 Hous. L. Rev. 1, 6 (1974).

28 12 Stat. 354 (1862).

29 Supra note 3; cf. Hoemann, at 71.

30 10 Op. Att'y. Gen. 382 (1862).

31 The master of the vessel of the United States was restricted to a white citizen of the United States at that time. 2 Stat. 809 (1813). That statute was abolished later. 13 Stat. 201 (1864). In connection with this problem, cf. 39−1 Cong. Globe. 1116 (Rep. Wilson); 1 Stat. 287 (An Act concerning the registering and recording of ships or vessels).

32 Concerning this point, the Attorney General sent the same opinion also in responding to the question of the Secretary of State, whether a child born in the United States of alien parents who had never been naturalized was, by the fact of birth, a natural-born citizen of the United States. 10 Op. Att'y Gen. 328 (1862).

After all, the Attorney General did not refer in this opinion to the question whether a slave could become a citizen. However, on the other hand, he interpreted the scope of the judgement of Dred Scott case[33] so narrow that he stated there was no obstacle to think a free black person to be a citizen.

This opinion of Attorney General, as well as a series of acts concerning army established from 1862 to 1864 which being seen above, had a great influence on the movement to give black people citizenship of the United States by being quoted in the arguments in Congress afterward and through other ways[34].

Section 3 Legislation Process of the Thirteenth Amendment

The original bill of the Thirteenth Amendment was proposed to the Senate of the 38th Congress of the United States on January 11, 1864, and to the House of Representatives on May 31, 1864. The Senate passed the bill on April 8, 1864[35]. The House of Representatives put the bill to the vote on June 15 of the same year. But the number of the votes polled did not reach the legally required two thirds majority[36], and the bill was rejected in that session. The House of Representatives discussed the bill again in the next session[37] and passed it on January 31, 1865[38].

Subsection 1 Discussion in the Senate

Paragraph 1 Statement of Senator Trumbull

The substantial discussion in the Senate began on March 28, 1864 with the statement by Senator Trumbull who was the representative of the Committee on Judicial Affairs[39]. In this statement, first of all, the senator pointed out that the root cause of the problems around the rebellion of the Southern States was the existence of the slavery system. He insisted that, since the application range of the slave emancipation proclamation of the President was restricted to the rebelling States, and since there were some doubts expressed about the legitimacy of the power of President to announce such a proclamation, it was necessary to amend the Constitution to ban the slavery in order to deter the resurrection of the slavery by any future statute of the United States or any State.

Paragraph 2 Assertions of Senators Supporting the Amendment

Senators who supported the amendment in the discussion generally based their assertions on the following grounds.

In relation to the federal system, it was insisted that the existence of slavery meant negation of the republican institutions, the supremacy of the Federal Government and the unity and life of the nation[40]. In addition, it was argued that by virtue of the power to lay and collect taxes etc. for the purpose of the common defense or general welfare[41], the power to declare war and to provide armies and a navy[42] or the power to guarantee a republican form of

33 60 U.S. 393 (1857).

34 Malz, at 8; Belz, at 31. As an instance when it was quoted in the argument on Thirteenth Amendment of the Constitution, cf., 38-1 Cong. Globe 1323 (Sen. Wilson).

35 The result of voting was 38 to 6. The senators who opposed to it were Senators Davis, Hendricks, McDougall, Powell, Riddle and Saulsbury. 38-1 Cong. Globe, 1490.

36 The result of the voting was 93 to 65. In the case of amendment to the Constitution, more than two thirds of all votes in each house are required to propose cf. U.S. Const. art. V.

37 On this issue, President Lincoln suggested reconsideration to the House of Representatives in his fourth message and it was recorded in the proceedings of Congress. 38-2 Cong. Globe, app 3.

38 38-2 Cong. Globe, 531.

39 38-1 Cong. Globe, 1313.

40 Id., at 1320 (Sen. Wilson).

41 U.S. Const. art. I § 8, cl. 1.

42 U.S. Const. art. I § 8, cl. 11- cl. 14.

government to every state in the Union[43], or based on the Due Process clause[44], Congress could put the slavery under the control, or, rather, to do so was the obligation of Congress[45]. Besides, regarding the relation between slavery and humanity or concerning racial problems, it was insisted that the abolishment of slavery led to the achievement of guarantee of the rights to be respected and free family relationships based on humanity[46]. Moreover, there were other opinions expressed, for instance, that even if it could be admitted of black people to be inferior to white one, it could not be accepted to make black people slaves because of that.[47] Further since slavery was not based on human reason or Common Law, it could be negated by statutes of any States, and the measures needed to make slavery expired should be taken[48].

Paragraph 3 Assertions of Senators Opposing to the Amendment

Six Senators disagreed with the bill of amendment. Five[49] among them expressed their opinions in the discussion. The main points were that the abolishment of slavery by Congress might invade the power of States to regulate property right[50], that it might invade the power of States to regulate the domestic relations[51], that the true cause of the rebellion was rather the insistence on the abolition of slavery[52], and that this amendment was beyond the power of amending the Constitution[53].

Paragraph 4 Proposal to Amend the Amendment Bill

In the process of the discussion, there was a proposal from the supporters of the amendment to amend the bill by the following sentence: "All persons are equal before the law, so that no person can hold another as a slave; and Congress may make all laws necessary an proper to carry this article into effect everywhere within the United States and the jurisdiction thereof.[54]" However, the proposal was withdrawn in the face of an opinion that the report of the Committee which wording was based on the ordinance for Northwester Territory which had been adjudicated upon repeatedly, was better than the proposal whose wording referred to French constitution[55].

From the opposing side, there were two proposals to amend the amendment bill. One was that no black person should be a citizen of the United States or be eligible to any civil or military office[56] and another was that no slave should be emancipated unless the owner should be paid first the value of the slave to be emancipated[57]. Both proposals were rejected.

Subsection 2 Discussion in the First Session of the House of Representatives

The first substantial discussion in the House of Representatives began on May 31 and continued up to June 15,

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43 U.S. Const. art. IV, § 4.
44 U.S. Const. Amend. V.
45 38-1 Cong. Globe, 1480 (Sen. Sumner).
46 Id., at 1324 (Sen. Wilson).
47 Id., app. 113 (Sen. Howe).
48 Id., at 1440 (Sen. Harlan). Senator Harlan quoted in this opinion the court opinion of Somersett's Case in the colonial era, the dissenting opinion of Dred Scott Case and the court opinion of Prigg v. Pennsylvania Case (10 Pet. 611) to demonstrate the nature of slavery. Id., at 1438. By the way, although the quotation number of Prigg v. Pennsylvania case recorded in the Cong. Globe is "10 Pet. 611", as we quoted above, that number seems to be wrong. The correct number should be "41 U.S. (16 Pet.) 539, 541".
49 Senator Riddle didn't state his opinion.
50 38-1 Cong. Globe, 1366 (Sen. Saulsbury); Id., at 1483 (Sen. Powell).
51 Id., at 1366 (Sen. Saulsbury).
52 Id., at 1442 (Sen. Saulsbury); Id., at 1444 (Sen. McDougall); Id., at 1483 (Sen. Powell).
53 Id., at 1489 (Sen. Davis).
54 Id., at 1483 (Sen. Sumner).
55 Id., at 1489 (Sen. Howard).
56 Id., at 1424. It was proposed by Senator Davis. The result of the voting was yeas 5, nays 32.
57 Id., at 1425. It was proposed by Senator Powell. The result of the voting was yeas 2, nays 34.

1864[58]. The second one was held from January 6 to 31, 1865.

Paragraph 1 Major Assertions of Representatives Supporting the Amendment Bill

The outline of assertions by Representatives supporting the amendment was as follows.

Regarding purpose of establishment of the Constitution, an opinion stated that, as demonstrated in the preamble thereof, Sovereign power of nation intended to declare the basic Bill of Rights by establishing the Constitution, and, slavery should be corrected for that purpose since the framers of the Constitution had failed to do so in some provision of the Constitution at the time it was established[59].

In relation to the federal system, there were opinions, for instance, that, since the war was performed to abolish slavery, the legislative organ of the Government should amend the Constitution in order to finish the war and to prevent the supporters of slavery from bringing such a crisis of the nation again[60], or that, since the very abolishment of slavery was necessary to reconstruct the Union, it was necessary to abolish slavery not only in the rebelling States but in all the territories of the United States[61].

Moreover, in relation to the rights of citizens of the Republic, it was insisted that the acceptance of the proposed amendment would lead to the guarantee of the rights to be enjoyed by citizens of the Republic, so that emancipated or free black people enjoyed their innate rights, and, moreover, white people who were residing in one of the slave States and opposing to slavery would also enjoy their rights[62].

Paragraph 2 Major Assertions of Representatives Opposing to the Amendment

The assertions of Representatives who opposed to the amendment to the Constitution were as follows.

In relation to the federal system, there were opinions stating that the amendment in question would contribute only to eternal disunion and a continuous war[63], or that the very insistence on the abolishment of slavery was causing the division of the Union. Therefore it would be necessary to reject such a bill for the constitutional amendment in order to reconstruct the Union[64].

In relation to the power of States, it was insisted that the amendment bill would invade the autonomy of the States that had joined to the Union presupposing the permission of slavery system[65], or that a domestic institution like

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58 By May 31, plural bills which contents were mutually similar, were proposed to the House of Representatives by Representatives Ashely, J. Wilson, Windom, Arnold, Norton, and Stevens. Cf., Hermann Ames, The Proposed Amendments to the Constitution of the United States, 214 (Lenox Hill Pub. & Dist. Co. 1970)(Burt Franklin 1896). Among them, the bill proposed by Representative Wilson was:

Section 1. Slavery, being incompatible with a free Government, is forever prohibited in the United States; and involuntary servitude shall be permitted only as a punishment for crime.

Section 2. Congress shall have power to enforce the foregoing section of this article by appropriate legislation.

He stated, along with the proposal, that what we should note was that slavery was incompatible with a free Government, that it was inconsistent with the purpose of the Constitution which was declared at its preamble, and that what we should learn from the rebellion was that the constitutional rights of all the citizen should be equally and correctly guaranteed in all States. 38−1 Cong. Globe, 1199−1204.

Representative Lovejoy proposed to solve the problem by enacting ordinary Acts, instead of amending the Constitution. This proposal was to write down some statements or provisions in the Declaration of Independence or the Constitution as provisions of an Act. The proposal, together with a bill on the rights of freedman proposed in the same season by Representative E. D. Elliot, seemed to demonstrate the House's interest on the status of emancipated people. See Hoemann, at 109.

59 38−1 Cong. Glob, 2614 (Rep. Morris); Id., at 2955 (Rep. Kellogg).

60 Id., at 2944 (Rep. Higby).

61 Id., at 2949 (Rep. Shannon).

62 Id., at 2991 (Rep. Ingersoll).

63 Id., at 2615 (Rep. Herrick); Id., at 2962 (Rep. Holman).

64 Id., at 2947 (Rep. Kalbfleisch).

65 Id., at 2616 (Rep. Herrick); Id., at 2939 (Rep. Pruyn); Id., at 2961 (Rep. Holman).

slavery could not be changed by way of an amendment to the Constitution[66], or that it was the exclusive power of each State to decide whether slavery should be allowed there[67].

In addition, in relation to property rights, there was also an opinion that the amendment bill would invade the property of individual[68].

Subsection 3 Discussion in the Second Session of the House of Representatives

Representative Ashley who had changed his vote from yea to nay in the first session[69], proposed, on December 15, 1864, redeliberation of the proposal of Thirteenth Amendment in the second session. Then, on January 6, 1865, the deliberation on the amendment proposal began again[70].

Paragraph 1 Opinion of Representative Ashley

Representative Ashley stated, as the first speaker, on January 6 as follows[71].

The Representative insisted that slavery could never exist in the United States if the Constitution had been correctly interpreted. However, the amendment to the constitution became necessary because the Government who violated in practice the principles of the Constitution and the Courts who distorted the meaning of the Constitution, both supported the existence of slavery. He also pointed out that the slavery system was infringing the rights not only of slaves but also of the white people who opposed to the system.

The Representative insisted, next, that the Independence and the establishment of the Constitution were realized based on the unity of the people of the United States and the national citizenship which had already existed before, and that the founders established the national Constitution in order to secure the unity and the national citizenship for which they risked life, fortune, and honor. Then, he insisted that slavery should be abolished based on the facts described above, and that the amendment to the Constitution concerning slavery should be possible from the view that the insistence of the exclusive power of each State on slavery was apparently absurd and the Constitution had no special provision on slavery despite that it could have excluded slavery from the amendable matters in advance.

The Representative also pointed out, in relation to the governmental forms of States, that the Constitution guaranteed the republican form of government and the nationality of citizenship[72], and that it would not allow the existence of such a State in the Union as it didn't have the civil government acting in compliance with the Constitution.

Paragraph 2 Assertions of Representatives Supporting the Amendment in the Second Session

Major opinions of Representatives supporting the amendment in the Second Session were as follows[73].

In relation to the rights of the individual, there were opinions that, in order to fulfill the task to guarantee a

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66 Id., at 2940 (Rep. Pruyn).

67 Id., at 2952 (Rep. Coffroth).

68 Id., at 2940 (Rep. Fernando Wood).

69 Representative Ashley intentionally did that in order to propose to deliberate on the bill again in the second session. 38-1 Cong. Globe 2995.

70 Between the first and the second sessions of the 38th Congress, there were presidential and House of Representatives elections. As the result, Lincoln was elected to the President again and the republican party gained the seats from 102 to 149, which meant the victory of the supporters of Thirteenth Amendment Hoemann, at 125; Charles Fairmann, Reconstruction and Reunion 1864-88, 1149 (Macmillan Co. 1971).

71 38-2 Cong. Globe 138.

72 Cf. U.S. Const. art. IV. § 2.

73 In the following, this article will enumerate mainly the opinions which did not appear in the discussions of the House of Senators or of the first session of the House of Representatives, whether supporting or opposing to the amendment bill.

republican form of government for each State, the Federal Government should provide some machinery to secure the rights of the individual in its community, so as to secure the individual freedom equally for all the citizens[74], or that civil freedom should be secured not only for certain species but for all human beings irrelevant to their origins or political conditions, and the freedom and equality before the law should be secured so as for each race to be permitted the elevation to which its own capacity and culture should entitle it[75].

Concerning the power of Congress, viewing from the fact that a bill to prohibit Congress from amending the Constitution to abolish slavery had been passed in the 36th Congress[76], the power of Congress to amend the Constitution to declare an abolishment of slavery should be approved, in turn[77].

Paragraph 3 Assertions of Representatives Opposing to the Amendment Bill

In the second session, major opinions of Representatives opposing to the amendment bill were as follows.

In relation to the federal system, there was an opinion that the power which was not delegated to the Union would still be reserved for each State and that slavery was a domestic institution of each State outside the jurisdiction of the Union, so it could not change even by amending the Constitution[78]. Moreover, there was another opinion that it was apparent that slavery would gradually disappear and, if so, whether and when slavery would be abolished should be left to the decision of each State[79].

In relation to the rights of individuals, it was insisted that the effect of the amendment would make it possible to invade the property also of the citizen of the loyal States to the Union[80]. There was also a concern expressed that, if the infringement of the right of a State and the properties of individuals by this amendment was allowable, it would be possible for a minority to be deprived of their other rights by the same method[81]. In addition, it was insisted that the master-slave relation between white and black men was a natural relationship into which black and white races naturally fell under the influence of the mutual necessity for personal security, social tranquility and subsistence[82], or that the amendment bill in question would deprive slaves of their natural guardians[83]. At the same time, it was pointed out that, while the original Constitution counted slaves into the population which was basic for the taxation and representation, the proposed amendment had no provision to make emancipated slaves citizens of the United States, so that freed slaves could never have their representatives as provided by the Constitution[84].

Section 4 Meaning of the Thirteenth Amendment

Subsection 1 Result of the Discussion in Congress

The supporter group of the Thirteenth Amendment thought that slavery was incompatible with the ideals of

74 38−2 Cong. Globe 143 (Rep. Orth).

75 Id., 155 (Rep. Davis).

76 On February 21, 1861, constitutional amendment bill to prohibit the authorization of the Congress to abolish slavery had been passed in the 36th Congress and submitted to approvals of States. Hermann Ames, The Proposed Amendments to the Constitution of the United States, 196, 363 (Lenox Hill Pub. & Dist. Co. 1970) (Burt Franklin 1896); cf. II Department of State, Documentary History of the Constitution of the United States of America 1786−1870, 516 (Rothman & Co. 1998) (1894). That bill was approved only by the State of Illinois. Howard Devon Hamilton, The legislative and Judicial History of the thirteenth amendment, 9 Nat'l Bar J. 26, 27 (1951).

77 38−2 Cong. Globe 174 (Rep. Odell).

78 Id., at 151 (Rep. Roger); Id., at 238 (Rep. Cox); Id., at 481 (Rep. Finck).

79 Id., at 220 (Rep. Cravens).

80 Id., at 151 (Rep. Roger).

81 Id., at 181 (Rep. Vorhees).

82 Id., at 177 (Rep. Ward).

83 Id., at 176 (Rep. Ward).

84 Id., at 154 (Rep. Roger).

republican form of government and of the guarantee of rights as provided in the Constitution, and that slavery was the cause of the Civil War. Therefore, they thought that the Civil War would be ended by the abolishment of slavery, and they promoted the establishment of the amendment.

The opposition group of the Thirteenth Amendment thought that the abolishment of slavery would invade the power of each State and the individual property and insisted that the insistence on the abolishment of slavery was the true cause of the Civil War. In this regard, they thought that what was necessary was to establish the autonomy of each State on the domestic relations and to secure the individual property. Therefore, they opposed to the amendment.

In the end, the Thirteenth Amendment was established, which negated the existence of "slavery and involuntary servitude" in the United States and solved the problem according to the supporters opinion. Reconstruction was launched in this way and with this view.

This choice involved, except for the ethical justification problem of slavery, a subtle but important significance in that. It was a selection of the model on which the ideal of republican form of government and the security of the individual rights as provided in the Constitution were based.

Paragraph 1 Choice of the Political System

In relation to the federal system or the ideal of the republican government, this choice led to the allowance of the interference of the Union even into, so-called, domestic relations. Such a concern was expressed in the statement of Representative Cox, namely, "Should we amend the Constitution so as to change the relation of parent and child, guardian and ward, husband and wife, the laws of inheritance, the laws of legitimacy? Because we have the power, must we seize it? Where will it end, when once began?"[85]. Taking it into consideration that slavery was thought as an institution of each State and considered as a part of the law of family, this choice may have caused great change to the national system of the United States as it permitted the Federal Government not only to involve widely in the relationship between the Union and States but also to intervene extensively in the family system in each State[86].

On the other hand, if the Thirteenth Amendment had not been adopted to maintain the federal system and republican government in which slavery system was inherent, then it would have maintained not only political problems concerning the relation between the Federal and State Governments at that time, but also legal problems in relation to the provisions of the Constitution, namely, Section 4 Article 4 prescribing the preservation of republican form of government of each State or Clause 1 Section 9 Article 1 to permit a legislation to prohibit an importation of slaves after the year 1808[87].

Between such alternatives as described above, Congress decided to choose establishing the Thirteenth Amendment, thinking that the abolition of slavery should be included in the Constitution. What was an important factor for judging the abolishment of slavery as fitting the Constitution was the relation of the abolition of slavery to the constitutional principle of guarantee of human rights.

Paragraph 2 Problems Concerning Guarantee of Human Rights

During the process of discussion on the bill of the Thirteenth Amendment it was not only pointed out that slavery contains certain ethical problems, but also was argued that slavery system was incompatible with the guarantee of fundamental human rights which was a purpose of the Constitution so that to amend that should be suitable to the constitutional purpose. In addition, it was also insisted that abolishing slavery would allow emancipated slaves, free

85 Id., at 242 (Rep. Cox).

86 Concerning the impact on the relationship of family, it was also pointed out that to abolish slavery would promote a guardian spirit to protect the family relations. 38−1 Cong. Globe 1324 (Sen. Wilson).

87 England enacted in 1833 the Slavery Abolition Act to abolish slavery system. If the United States had decided to keep slavery, there might have occurred some international political problems in relation to that act. Concerning the abolition of slavery in England, see the part of "Slavery Abolition Acts" in Shakuhachi Takagi et al. ed., Jinken Sengen Shu (Collection of the Declarations of Human Rights), (Iwanami Shoten 1977).

black people and white people opposed to slavery to enjoy their own rights as the citizens of the United States.

The Thirteenth Amendment was established based on such a recognition. On the other hand, this choice, in effect, deprived citizens of their properties to secure which should be a purpose of the establishment of the Constitution, through the amendment of the very Constitution[88]. In this meaning, seeing from the view of guarantee of rights, the enactment of the Thirteenth Amendment reduced the rights. In this respect, it could be said that the Thirteenth Amendment changed the mode of the guarantee of rights, rather than extended the range and strength of it.

Subsection 2 Problems Left Unsolved (1) --- The Status of Black People

A problem which was not solved by the establishment of the Thirteenth Amendment though pointed out during the discussion in Congress was, namely, "what are you going to do then with these liberated negroes?[89]". This problem unfolded as various concrete problems.

Paragraph 1 Citizenship of Black People

Regarding the citizenship of black people, Senator Wilson stated an opinion approving of giving black people citizenship, quoting the opinion of the Attorney General of 1862[90].

In opposition to it, Senator Davis proposed an amendment to the Constitution to declare that black person could not be a citizen. This proposal was rejected.

Viewing from those facts, it can be concluded, at least in the Senate, that it was thought that emancipated slaves would become citizens.

However, as demonstrated in the opinion of the Attorney General, holding citizenship itself implied that the person was a member of the political community, and no substantial meaning could be deduced from a mere fact of being a citizen. Rather, it was permitted that there were some differences in the rights to be enjoyed among citizens. From this respect, it should be concluded that what it substantially meant to be accepted as a citizen was unclear at that time. In addition, the relation between the citizenship of the United States and that of a State or where was the power to decide the acquisition or loss of the status of citizen, was not clear[91].

Paragraph 2 Rights for Black People to Enjoy After the Emancipation - Rights in General

What rights a black person would have after the emancipation was also argued. The argument occurred especially on rights in general and the suffrage. On rights in general, it was stated that, by the amendment, there should be no more slavish restraint or involuntary servitude except as a punishment for crime[92], owning slaves as property should be prohibited[93], a person who had been a slave should be made a freeman[94], and, moreover, some rights should be guaranteed to a freed black person[95]. As the rights to be guaranteed to emancipated black people, there were enumerated, saying abstractly, the God-given rights[96], the natural rights[97] and the rights to life, liberty and pursuit of

88 Hoemann at 146.

89 38-2 Cong. Globe. 179 (Rep. Malloy).

90 38-1 Cong. Globe. 1323.

91 Regarding this problem, there were two views pointed out: One was that whether a black person should be a citizen of any one of the State was a question for that State to determine (38-1 Cong. Globe 1465 (Sen. Henderson)). Another was that the problem whether to raise the black people to citizenship and suffrage contrary to State laws would be reconsidered after the establishment of the Thirteenth Amendment (38-2 Cong. Globe 170 (Rep. Yeaman)).

92 38-2 Cong. Globe 200 (Rep. Farnsworth).

93 Id., at 244 (Rep. Woodbridge); Id., at 236 (Rep. Smith).

94 38-1 Cong. Globe 1463 (Sen. Henderson); 38-2 Cong. Globe 217 (Rep. Smither).

95 38-2 Cong. Globe 487 (Rep. Morris).

96 38-1 Cong. Globe 2990 (Rep. Ingersoll).

97 38-2 Cong. Globe 202 (Rep. McBride).

happiness[98].

However, opinions varied concerning what concrete rights to be guaranteed to black people[99]. Moreover, concerning the conditions and degree of the enjoyment of those rights, it seems that it was not necessarily expected that there would be equal guarantees between emancipated black persons and white persons was expected, considering the fact that anxiety over the equal rights between white and black people was expressed[100] or that the wording based on the Northwest Ordinance was adopted while the amendment bill proposed by Senator Sumner was rejected[101].

Paragraph 3 Rights for Black People to Enjoy After the Emancipation --- The Suffrage

The question of the suffrage of black people was the most controversial. It was insisted that the suffrage of black people would become approved as an effect of the amendment[102], the principle of representation as provided by the Constitution would be changed[103], which was one of the grounds on which the opposing group to the amendment based their argument.

Concerning this problem, it was also pointed out that admitting the natural rights should be separated from admitting the suffrage[104]. In this regard, how to solve this problem was left unsettled in the end[105].

In relation to the eligibility for election, the original Constitution was taking slaves partially into account as a part of population to calculate the distribution of the number of Representatives to each State[106]. However, how to treat slaves emancipated by the Thirteenth Amendment was provided neither in the original Constitution nor the provisions of the Thirteenth Amendment, so this problem also had to be dealt with in some way.

Subsection 3 Problems Left Unsolved (2) - Other Problems

As described above, the purposes of the acts Congress established around the time of the Civil War before the Thirteenth Amendment were, first, to emancipate slaves engaged in the servitudes to be free men and, second, to build republican governments in the Southern States.

Concerning the former purpose, namely, to emancipate slaves engaged in servitude, the emancipation itself was the primary purpose; what status of those emancipated people would have was not necessarily clear. Rather, as the subsidiary purpose, to make those emancipated people serve in war was intended. This problem was discussed during the legislative process of the Thirteenth Amendment also as a question whether the emancipated slaves who served in

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98 Id., at 142 (Rep. Orth).

99 The major rights enumerated as one to be guaranteed by the effect of the amendment were as follows:
- The right to get a fee in consideration of the labor (38−1 Cong. Globe 2990 (Rep. Ingersoll)).
- The right to marry and to build a family relation (38−1 Cong. Globe 1324 (Sen. Wilson); 38−2 Cong. Globe 193 (Rep. Kasson)).
- The right to hold property (38−1 Cong. Globe 1439 (Sen. Harlan)).
- The right to sue or to testify in court (Id).
- The right to the freedom of expression (Id).

100 38−2 Cong. Globe 177 (Rep. Ward); Id., at 179 (Rep. Mallory); Id., at 216 (Rep. White).

101 Concerning the reason why the amendment bill by Senator Sumner was rejected, there are two different interpretations. One is that it was because the bill could be interpreted to give black people the same civil and political rights as white people would have (Belz, at 127). Another is that it was simply because of formal wording problems (Malz, at 23; Hoeman, at 117). Concerning the Northwest Ordinance, see Howard Devon Hamilton, The Legislative and Judicial History of the thirteenth amendment, 9 Nat'l Bar J. 26, 48 (1951). According to that literature, the clause to ban slavery in the Northwest Ordinance was generally interpreted as not giving any civil or political rights to black people. Id., at 52.

102 38−2 Cong. Globe 179 (Rep. Mallory).

103 38−1 Cong. Globe 2987 (Rep. Edgerton).

104 38−2 Cong. Globe 202 (Rep. McBride)

105 In ratifying the Thirteenth Amendment, the State of South Carolina added a reservation that provision 2 of the amendment should not be interpreted as giving Congress some legislative power concerning the political status of emancipated people. Hoemann, at 156.

106 U.S. Const. art. I § 2 cl. 3.

war in defense of the Union should be permitted to be citizens of the United States.

To tie an acquisition of citizenship to the military service could be said to be a traditional way of thinking of the United States, as mentioned above. However, the legitimacy of such a tying itself was not reconsidered during the discussion on the Thirteenth Amendment. Afterward, this problem was discussed again in the deliberation process on the Nineteenth Amendment.

The latter purpose, namely, to build republican governments in the Southern States had such a significance as to demand the rebelling States to choose one particular model, namely a republican government without slavery as the domestic institution, among various possible forms of a republican government. In this meaning, the Thirteenth Amendment not only had an effect to reconstruct the Union, but also gave an influence even to the domestic political system of the member State.

That result means, in legal theoretically saying, to externally order each State to change the political system the citizens of the State have chosen by their own wills, which may have led to a legal interpretational problem of the Declaration of Independence that declares "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness", in relation to the significance and limit of a self-chosen governmental forms by the citizens. However, that point was never taken as a subject matter of the discussion at that time.

Section 5 Summary of this Chapter

Persons who took part in the discussions in Congress to establish the Thirteenth Amendment decided to unravel the meaning of the original Constitution according to the Declaration of Independence, so that they decided to amend the other parts of the Constitution. This means that they were forced to confront the Constitution itself, which had been their own support[107,108], and that the only text which remained in their hands was the Declaration of Independence[109].

When they decided to judge the meaning of the original Constitution according to the Declaration of Independence and to amend the other parts of the Constitution according to that meaning, they believed that any problem could be solved through this[110]. However, as mentioned above, they were forced to confront various problems derived from that decision, such as how to think of the relation of emancipated slaves to the civil government[111]. That led to the Fourteenth and Fifteenth Amendments and, further, to the series of enactments of laws concerning Civil Rights that began from the year 1866.

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107 Concerning differences in thought between the Declaration of Independence and the Constitution of the United States, see Makoto Tsujiuchi, Slavery and Liberalism in the United States of America, p. 32 (Tokyo Univ. Pr. 1997).

108 The Thirteenth Amendment voided the provisions on escaping slaves (Clause 3, Section 2 of Article 4) and on the portion of Representatives and direct taxes, so-called three fifth clause, (Clause 3, Section 2 of Article 1). Because especially of the latter clause, the prescribed number of Representatives was augmented in the Southern States, which became the motive of enactment of the Section 2 of the Fourteenth Amendment. See Howard Devon Hamilton, The Legislative and Judicial History of the thirteenth amendment, 9 Nat'l Bar J. 26, 56 (1951).

109 Many Senators or Representatives referred to the relation between the Declaration of Independence and the abolition of Slavery. Cf. ex. 38-1 Cong. Globe 1323 (Sen. Wilson); Id., at 1422 (Sen. Johnson).

110 Jacobus tenBroek, Thirteenth Amendment to the Constitution of the United States Consummation to abolition and key to the Fourteenth Amendment, 39 Cal. L. Rev. 171, 176 (1951); Herman Belz, Emancipation and Equal Rights, 113 (W.W.Norton & Company 1978).

111 Robert Mansell, Jurisdiction in nineteenth century international law and its meaning in the citizenship clause of the fourteenth amendment, 32 St. Louis Univ. Pub. L. Rev. 329, 354 (2013).

Chapter 4 The Original Meaning of the Fourteenth Amendment

Section 1 The Subject and Orientation of this Chapter

In the 39th Congress held from December 4, 1865, the second constitutional amendment among so called Civil War Provisions, namely, the Fourteenth Amendment was established.

The article consists of five sections. The first section provides "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", which makes clear who has the citizenship. The same section continues "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States", which guarantees Civil Rights of citizens.

The second section prescribes the way to allocate the number of Representatives and the relation between the portion and the right to vote, the third section prescribes the sanction against a person who have engaged in rebellion against the United States, the fourth section prescribes the treatment of debt or obligation incurred in aid of such rebellion and the fifth section prescribes the power of Congress to enforce this article.

As being seen from the construction of the provisions, the article was intended to solve the problem, how to reconstruct the governmental system of the United States which was destroyed by the Civil War and was felt into functional disorder. Congress confronted in this occasion with the task to consider the meanings of Citizenship and Civil Rights in detail.

In this chapter, this article will analyze the legislative process of the Fourteenth Amendment and consider the original meanings of Citizenship and Civil Rights[1].

In Sections 2 to 4 of this chapter, this article will survey the legislative processes of some acts concerning citizenship and Civil Rights established during the 39th Federal Congress when the bill of the Fourteenth Amendment was discussed, with a view of verifying the original meaning of the Fourteenth Amendment. The most important acts concerning Citizenship and Civil Rights that were established in the 39th Congress are an amendment of Freedmen's Bureau Act and Civil Rights Act of 1866, which were based on Section 2 of the Thirteenth Amendment[2]. In this

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1 In the Fourteenth Amendment, the term "citizens" is used in the Sections 1 and 2. While this article analyzes mainly the first section, since the meaning of "citizens" in those two sections seem to be same and closely related, it analyzes also the Section 2 as far as it is needed.

2 About the same time of the proposal of those bills, there were other two bills concerning the security of the rights of freedmen proposed by Senator Wilson (39-1 Cong. Globe 39) and by Senator Summer (Id., at 91). The bill by Senator Wilson consisted of two provisions. Section 1 declared that laws or rules of rebelling States by which any inequality of civil rights and immunities among the inhabitants were recognized based on the race, color or descent or in consequence of a previous status of slavery or involuntary servitude of such inhabitants were to be void, and that it was prohibited for those States to enact such laws or rules. Section 2 provided the punishment on a person who violated the provision of Section 1 and the duty of the President to execute the punishment.

Senator Sumner proposed two bills to Congress, but both were rejected. The outlines of them were:

- to prohibit all types of discrimination based on race or others in the rebelling States, to declare for all persons to be equal, to provide exclusive jurisdiction of the courts of the United States on the offenses involving a person of African descent and on the suits involving a person of African descent as a party, and to execute the Thirteenth Amendment of the Constitution.
- to declare equality of all persons, including even judicial and political equality, intending to secure in the rebelling States the republican form of government provided in the Constitution.

Concerning the reason of the rejection, there are two interpretations; one says it was because the security to be provided by the bill was insufficient (Jacobus tenBroek, Equal Under Law, 177 (Macmillan Co. 1965) quoted in Jones v. Mayer Co. 392 U.S. 409, 429 (1968)), and another says it was because the effectivity was doubted (Charles Fairman, Reconstruction and Reunion 1864-88, 1223 (Macmillan Co. 1971) [hereinafter Fairman]).

In the House of Representatives, Representative Farnsworth proposed a resolution which said "as all just powers of government are derived from the consent of the governed, that cannot be regarded as a just Government which denies to a large portion of its citizens, who share both its pecuniary and military burdens, the right to express either their consent or dissent to the laws which

regard, this article will analyze the Freedmen's Bureau Act and Civil Rights Act of 1866 in Section 2 and Section 3 of this chapter, respectively. In Section 4, this article will overview other acts concerning citizenship and Civil Rights established during the 39th Congress.

In Section 5, this article will analyze the discussion on the Fourteenth Amendment. The bill of the Fourteenth Amendment was proposed to both the Upper and Lower Houses on April 30, 1866. The House of Representatives deliberated it from May 8 to 10 1866, and approved it on 10th of the month. The Senate deliberated it from May 23 to June 8 of the year, with the amendments to Sections 2 and 3 of the bill, and then approved it on June 8. The House of Representatives agreed to the amendments given by the Senate on 13 of the month. After that, the bill to amend the Constitution was submitted for ratification by every State and, finally, the constitutional amendment came into force on July 28, 1868. This article will analyze the deliberation process on the bill of the constitutional amendment in Congress, including some other constitutional amendment bills proposed at the same time with the main bill of the constitutional amendment.

In Sections 6 and 7, this article will summarize the arguments of Congress described up to Section 5, and analyze the significance and effect of the establishment of the Fourteenth Amendment.

Section 2 Amendment of Freedmen's Bureau Act

Subsection 1 Resurrect of the Slavery-like Institution and Amendment of Freedmen's Bureau Act

On December 18, 1865, at the time of the first session of the 39th Congress, the Secretary of State declared that the Thirteenth Amendment had become a part of the Constitution[3]. With this Article, all slaves were freed and it was prohibited to force anyone into involuntary servitude or toil. However, it did not necessarily solve all problems. The Southern States enacted so-called Black Code[4] to try to regenerate an institution which was substantially similar to the slavery in the past[5,6].

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subject them to taxation and to military duty, and which refuses them full protection in the enjoyment of their inalienable rights" (39−1 Cong. Globe 46). This resolution bill was submitted to Joint Committee on Reconstruction (Id., at 48).

3 13 Stat. 774.

4 Concerning Black Code, see Makoto Tujiuchi, Slavery and Liberalism of America, Chapter 4, (Tokyo Univ. Pr. 1997). Regarding a digest of the provisions of each State, cf., Edward McPherson, The Political History of the United States of America During the Period of Reconstruction April 15 1865- July 15 1870. 29−44 (Da Capo Press (1972))(1871)[hereinafter McPherson]. Black Codes were enacted in the State of Alabama and some other Southern States between the years 1865 and 1866. Among them, the statutes which had the most decisive effect on the discussion regarding the bill to amend Freedmen's Bureau Act and to enact the Civil Rights Act of 1866 were especially those of the States of Mississippi and South California. cf. Donald G. Nieman, To Set the Law in Motion, 111 (KTO Pr. 1979); 39−1 Cong. Globe 1153 (Rep. Thayer) (In which there were enumerated the names of States, Mississippi, Alabama, South California and Virginia); Id., at 1160 (Rep. Windom) (In which there were enumerated the names of States, Mississippi, Georgia, South California, North Carolina, and Virginia.) As common characteristics of Black Codes, the followings could be enumerated:
- Separation on the races in public places like a school or in marriages.
- Restriction for black persons to own real estates.
- To give an employer the power of detailed regulation on the behaviors of black employees.

5 A literature points out that what was considered as the problem was insufficient measures each State had taken against the private persons' discriminative behaviors to emancipated persons in the State, rather than the enactment of Black Code itself. See, Robert L. Kohl, The civil rights act of 1866, Its hour come round at last, 55 Va. L. Rev. 272 (1969); John Hope Franklin, The Civil Rights Act of 1866 Revisited, 41 Hastings L. J. 1135 (1990).

6 According to George Bentley, the necessity of the amendment of Freedmen's Bureau Act was insisted on the ground of following materials, in addition to the existence of Black Codes:
- So-called Schurz Report, which was drawn up by General Carl Schurz according to an ordinance of President Johnson in inspecting Southern States in order to decide the question whether conditions similar to Proclamation appointing a Governor for North Carolina (reprinted in William MacDonald ed., Selected Statutes and Other Documents Illustrative of the History of the United States, 135 (Macmillan Co. 1903)[hereinafter MacDonald]) should be applied also to the other rebelling States.

The first proposed measures against such situations was the amendment of Freedmen's Bureau Act. The base act of this amendment, Freedmen's Bureau Act, was enacted in the 38th Congress[7,8]. The act consisted of five provisions. The section 1 provided that the purpose to establish the bureau should be the supervision and management of all abandoned lands and the control of all subjects relating to refugees and freedmen from rebel states. The section 2 prescribed the concrete range of business of the bureau to issue regarding provisions of clothing and fuel, as the Secretary of War might deem needful, to suffering refugee, freedmen and their wives and children.

Subsection 2 Content of the Bill to Amend Freedmen's Bureau Act

While the bill to amend Freedmen's Bureau Act[9], proposed by Senator Trumbull at the 39th Congress on January 5, 1866[10], was basically intending to extend the term of existence of the Freedmen's Bureau, it provided, in addition, first that the area to be managed by the Freedmen's Bureau should be expanded from within the rebel States to all over the territories of the United States[11], and secondly that some measures should be established to secure the rights of black people.

The second point above was provided as follows: "whenever in any State or district in which the ordinary course of judicial proceedings has been interrupted by the rebellion, and wherein, in consequence of any State or local law, ordinance, police or other regulation, custom, or prejudice, any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person an estate, including the constitutional right of bearing arms, are refused or denied to negros, mulattoes, freedmen, refugees, or any other persons, on account of race, color, or any previous condition of slavery or involuntary servitude, or wherein they or any of them are subjected to any other or different punishment, pains, or penalties, for the commission of any act or offence that are prescribed form white persons committing like acts or offences, it shall be the duty of the President of the United States, through the commissioner, to extend military protection and jurisdiction over all cases affecting such persons so discriminated against."[12]

- Reports made by Freedmen's Bureau.

In both reports, it was reported that an institution similar to the former slavery system was going to be applied to former slaves in Southern States and that there were injuring actions against freed black people. See, George R. Bentley, A History of the Freedmen's Bureau, 107 (Oxford Univ. Pr. 1955). Concerning the influences of Schurz Report at that time, cf. Barry Sullivan, Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981, 98 Yale L. J. 541, 553 (1989).

7 An Act to establish a Bureau for the Relief of Freedmen and Refugees, 13 Stat. 507 (1865).

8 The act was deliberated at 37th and 38th Congresses. Concerning the discussion process, see Hermen Bels, A New Birth of Freedom - The Republican Party and Freedmen's Rights 1861-1866, Chap. 5-6 (Greenwood Pr. 1976); Henry Wilson, History of the Antislavery Measures of the Thirty-seventh and Thirty-eighth United-States Congress 1861-1864, Chap. 17 (Walker wise & Co. 1864); See, also Makoto Tsujiuchi, Slavery and Liberalism of America, Chap. 5 (Tokyo Univ. Pr. 1997) (Japanese).

During the discussion, the supporting side of the enactment insisted that, since emancipated slaves should enjoy their civil freedoms, the Freedmen's Bureau should be established as a means to secure those newly guaranteed rights, while the opposing side insisted that former slaves became freemen by emancipation, so the establishment of Freedmen's Bureau would contradict their status as freemen. The conflict was solved, in the end, as follows: The Freedmen's Bureau was subordinated to War Department and the term of existence was limited to the period during Civil War and one year after the end of the war, so that it was made clear for the Freedmen's Bureau to be a temporary measure as far as Civil War was continuing. Moreover, in the wording of the provision, the Commissioner of the Freedmen's Bureau didn't have a power of general supervision over all freedmen, but only to control of all subjects relating to freedmen, so that the range of the business was restricted to the assistance on the urgent matters.

The discussion was concentrated mainly on the status of emancipated slaves, but, meanwhile, how to treat white men in Southern States who had been faithful to the Union was also recognized as a problem and this problem was also made within the range of the business of the Freedmen's Bureau. This decision gave an important positive impact for the passage of the bill.

9 McPherson, at 73. In addition to the bill explained above, Senator Doolittle also proposed another bill which was also concerning the Freedmen's Bureau. 39-1 Cong. Globe 77 (1865). The content of the proposal was quite similar to that by Senator Trumbull. cf. Michael Les Benedict, A Compromise of Principle, 149 (W. W. Norton & Co. 1974).

10 39-1 Cong. Globe 129.

11 McPherson, at 73, Sec. 1.

12 Id., at 73, Sec. 7.

In addition, Sections 4 and 5 prescribed the redistribution of the lands abandoned during the Civil War, and Section 8 prescribed an imprisonment and a fine to be imposed on the person who still continued to apply discriminatory laws, statutes or ordinances or to do other discriminatory administrative actions.

Subsection 3 Presidential Veto

The bill passed through the Senate on January 25, 1866, then through the House of Representatives on February 6 of the same year and was sent to the President. But the President used President's veto on the following reasons[13].

First, the President pointed out, concerning the point that the bill gave the bureau the power to protect freed persons from local law or others in eleven rebel States by setting up the military jurisdiction over all parts of the United States, that such a power without legal supervision under such a provision had a possible risk to be attended capricious, unjustly or passionately by neglecting the actual situations of that area, irrespective of the provisions of the Constitution[14].

Second, the President stated that since Freedmen's Bureau had been established in order to make freedmen free and self-sustained persons, to make the bureau a permanent branch of administration so as to feed, clothe or educate freedmen by the United States, would rather get in the way of their independence.

Third, the President pointed out that the section 5 of the bill seemed to intend to deprive the owner of land of his land without guarantee of any procedure for him, violating the provision of the Constitution, namely, no person shall "be deprived of life, liberty, or property, without due process of law."[15]

Subsection 4 Amendment by Way of Reproposal

After the use of Presidential veto, the bill was put to the vote again, but the number of votes polled didn't reach that which was legally required to overrule presidential veto, namely two thirds of the present members. Thus the bill was rejected[16].

After then, a bill to amend Freedmen's Bureau Act was proposed again by Representative Eliot on May 22, 1866[17]. In spite of another use of presidential veto[18], the bill was approved at both the Senate and the Houses of Representative on July 16, 1866[19]. Ultimately, the amendment bill which contained almost the same as that proposed by Senator Trumbull was established in the end[20].

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13 Id., at 68. In addition to those described above, another reason was pointed out, namely, the fact that Representatives of the States which would get the most significant influence by the amendment were absent at that Congress.

14 Id., 69. There were quoted the Fifth and Sixth Amendments of the Constitution.

15 U.S. Const. Amend. V.

16 39−1 Cong. Globe 943.

17 Id., at 2743.

18 Id., at 3849. The explanation of the reason by the President to the House of Representatives regarding the use of the president's veto pointed out following points, avoiding an overlap with previously mentioned issues:
- Freedmen already enjoyed the rights equal to white persons through each State or federal court, so that there was no need to continue the existence of Freedmen's Bureau even after the end of Civil War and to admit setting up a military tribunal by the army there.
- Already established Civil Rights Act (meaning Civil Rights Act of 1866, to be describe bellow) had provided all necessary measures, so that the measures provided by the bill were not necessary.
- The legislation of the bill might deprive persons of their property who are equally deserving objects of the nation's bounty as those whom by this legislation Congress sought to benefit.

19 39−1 Cong. Globe 3842 (the Senate); Id., at 3851 (the House of Representatives).

20 An Act to continue in force and to amend "An Act to establish a Bureau for the Relief of Freedmen and Refugees", 39−1 Cong. Globe app. 366 (14 Stat. 173 (1866)). The formal title of this Act is almost same as that in the bill proposed by Senator Trumbull. The differences of this act from the Trumbull's bill were mainly in the fact that this act determined the term of prolongation of the existence of the Freedmen's Bureau to be two years, and in the procedure for President to set up and to provide the military protection and jurisdiction concerning the cases of infringement of rights of freedmen or refugees. (Donald G. Nieman, The Freedmen's Bureau and Black Freedom, 418 (Garland Pub. Inc. 1994)).

The power of Freedmen's Bureau was substantially expanded also by Army Appropriation Bill of 1866 (14 Stat. 90, 92) and by

Section 3 Establishment of Civil Right Act of 1866

Subsection 1 Needs to Protect Freedmen's Rights and Content of Civil Right Act of 1866

As Freedmen's Bureau was established originally based on the War Power Congress had by the Constitution, which allowed Congress only to take a temporary measure to protect freedmen's rights, there was recognized the need to consider some permanent measures to protect freedmen's rights[21]. In responding to this, Civil Right Act of 1866 was established[22]. The outline of the content of the act was as follows.

Section 1 defined Citizen of the United States as "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States". Then, concerning the rights the citizens as such could enjoy, it provided, "such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding".

Section 2 provided that any person who, under color of any law, statute, ordinance, regulation, or custom, should subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, or by reason of his color or race, than was prescribed for the punishment of white persons, should be punished.

Section 3 provided that the district courts of the United States should have cognizance, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who were denied or could not enforce in the courts or judicial tribunals of the State or locality where they might be any of the rights secured to them by this act.

Section 4 provided that the district attorney, the officers and agents of the Freedmen's Bureau or other officers of the United States should be specifically authorized and required to institute proceedings against all and every person who should violate the provisions of this act.

Subsection 2 Course of Establishment

The bill of this act was proposed also, like the bill to amend Freedmen's Bureau Act, by Senator Trumbull, on January 5, 1866[23]. The bill was deliberated in the Senate from January 29 to February 2 of the year, then approved[24]. In the House of Representatives, it was deliberated from March 2 to 13, then approved with a few amendments[25]. After the Senate agreed to the amendments by the House of Representatives[26], the amended bill was sent to the

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Southern Homestead Act (14 Stat. 66) which were established as acts at the same period. Cf., George R. Bentley, A History of the Freedmen's Bureau, 134 (Oxford Univ. Pr. 1955).

In 1868, the term of the existence of the Freedmen's Bureau was prolonged and it finally existed by 1872. Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753, 783(1985)

21 Herman Belz, Emancipation & Equal Rights, 114 (W. W. Norton & Co. 1978); Jacobus tenBroek, Thirteenth Amendment to the Constitution of the United States, 39 Cal. L. Rev. 171, 184 (1951).

22 An Act to Protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication, 14 Stat. 27.

23 39−1 Cong. Globe 129.

24 Id., at 606.

25 Id., at 1367.

26 Id., at 1416.

President. On March 27, the President used the veto power, but the Senate approved it again on April 6[27] and the House of Representatives approved it again on April 9[28], respectively[29]. Thus the act was established in the end.

During the legislation process of this act, the Senate and the House of Representatives[30] deliberated as follows.

Subsection 3 The First Discussion at Senate

Paragraph 1 Explanation Given by Senator Trumbull

On January 29, 1866, Senator Trumbull explained his bill as follows[31].

At first, Senator Trumbull stated that the Thirteenth Amendment of the Constitution made all laws for the purpose of maintaining and supporting slavery null and void and declared all persons inhabited in the United States to be free. Then, he stated that the act was intended to carry the constitutional declaration into effect by securing in reality the liberty for all inhabitants of the United States[32]. He also insisted, referring to the reality that formerly so-called Slave

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27 Id., at 1809.

28 Id., at 1861.

29 In the process for the re-approval of the House of representatives, since the resolution was done immediately after the use of the president's veto, there were no substantial deliberation on it. On April 7, 1866, two days before the resolution, Representative Lawrence gave following comments from the standpoint of a supporter (39−1 Cong. Globe 1832).

- Congress had the power to define citizenship of the United States, from which a person should get some rights and owe some duties.
- The rights to come with federal citizenship were the right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property.
- The present question was whether the nation was powerless to punish the great crime of denying civil rights constitutionally recognized when the States deny the citizens the means without which life, liberty, and property could not be enjoyed. To solve this problem, in addition to the power to protect rights provided in Section 2, Article 4 of the Constitution of the United States, the power to secure the compliance with federal laws by punishment or other means and the power to secure the equal enjoyment of the civil rights being proper for federal citizenship in all States would be helpful.

In this opinion, it was pointed out that rights of naturalized citizens should be protected by the establishment of the bill. In connection with it, it was also pointed out that it would be strange if a person having become a citizen of the United States through naturalization could not be protected by Congress when the rights of the person as a citizen of the United States were infringed by laws of a State.

30 The legislation process of this act was, later, examined in the case, Jones v. Alfred H. Mayer Co. (392 U.S. 409 (1968)). In that case, the plaintiff insisted that the defendant had rejected to sell its own house to the plaintiff because the plaintiff was a black person, which violated 42 U.S.C. § 1982 (the successor law of Civil Right Act of 1866). In the judgement, the court analyzed the legislation process of the act as follows:

First, it stated that Senator Trumbull who was the chair of the Judiciary committee of the Senate had said on Section 2 of the Thirteenth Amendment "I reported from the Judiciary Committee the second section of the [Thirteenth Amendment] for the very purpose of conferring upon Congress authority to see that the first section was carried out in good faith... and I hold that, under that second section, Congress will have the authority, when the constitutional amendment is adopted, not only to pass the bill of the Senator from Massachusetts, but a bill that will be much more efficient to protect the freedman in his rights." (39−1 Cong. Globe 43, cited at 392 U.S. 409, 430). So, the provision was not considered to give the United States Government only a power to make laws in order to abolish slavery.

Second, the judgement stated, Senator Trumbull's bill would, as he pointed out, "destroy all [the] discrimination" embodied in the Black Codes, but it would do more: it would affirmatively secure for all men, whatever their race or color, what the Senator called the "great fundamental right" i.e., "the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property." (39−1 Cong. Globe 599, cited at 392 U.S. 409, 432).

The judgement recognized that while the Senate had passed the bill considering above two points, the House of Representatives seemed to have passed the bill on the same assumption, namely, that the act was a comprehensive statute forbidding all racial discrimination affecting the basic civil rights enumerated in the Act (392 U.S. 409, 435). So, the judgement concluded, the Act was designed to prohibit all racial discrimination with respect to the rights enumerated therein (392 U.S. 409, 436).

Moreover, the judgement ruled, quoting opinions of Senator Trumbull (39−1 Cong. Globe 322) and Representative Wilson (Id., 1118), that the power of Congress provided in Section 2 of the Thirteenth Amendment should allow Congress to eliminate all racial barriers to acquisition of real and personal property (392 U.S. 409. 439). Concerning this judgement's way of understanding on the legislation process, cf. Fairman, Chap. 20.

31 39−1 Cong. Globe 474. While Senator Trumbull outlined the bill on January 12 (Id., at 211), the substantial explanation was given on the 29th.

32 Id., at 474. On this point, Senator Trumbull stated at another chance, "when the Constitution had been amended and slavery

States had enacted statutes providing discriminatory treatments based on the color of the skin of a person[33], that to exclude such discriminatory treatments and to carry the purpose of the Thirteenth Amendment into effect were the purpose of the bill.

Then, the Senator insisted that, while there might be a question whether Congress had the power to enact such a bill, the Thirteenth Amendment of the Constitution admitted Congress the power to do so[34,35].

The Senator also insisted in the opinion that any statute which was not equal to all and which deprived any citizen of civil rights which were secured to other citizens should be an unjust encroachment of his liberty. Moreover, the Senator stated, quoting some judgements of the cases concerning Article 4, Section2, Clause 1 of the Constitution[36], that the meaning of being a citizen of the United States was to be secured such fundamental rights as belonging to every free person, which was given by the provision, "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."[37]

Paragraph 2 Opinions of Supporters

During the legislation process of the act, it was questioned whether Congress had the power to enact such an act as the bill. The supporters stated their opinion on that problem as follows.

In relation to the Thirteenth Amendment of the Constitution, it was pointed out, the judiciary committee at the time of the establishment of the Thirteenth Amendment should already have foreseen that Southern States might use their power to restrain the rights and privileges of emancipated slaves. So, it was insisted that it should have intended to give the United States Congress the power to enact such an act as the bill to protect slaves or freed persons in such cases[38].

In addition, it was also insisted that the Federal Government should have the power necessary to secure the rights equally of all people within its limits, even when it was not explicitly provided in the Constitution, by which Congress could give various rights to black people[39]. Moreover, it was pointed out that the Government of the United States had been organized, in its origin, not in the interests of any race or color[40].

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abolished, and we were about to pass a law declaring every person, no matter of what color, born in the United States a citizen of the United States, the same rights would the appertain to all persons who were clothed with American citizenship." Id., at 600.

33 Id., at 474. Senator Trumbull explained the situation referring to the examples of such statutes of States of Mississippi and South California.

34 Id., at 474.

35 In relation with this issue, Senator Trumbull stated that some parts of the bill were adopted, with reversing, from Fugitive Slave Act established in 1850, and, if the legitimacy of the power of Congress to establish that Act was admitted, Congress should also have an authority to enact the bill (39−1 Cong. Globe 475).

Cf., Fugitive Slave Act: An Act to amend, and supplementary to, the Act entitled "An Act respecting Fugitives from Justice, and Persons escaping from the Service of their Masters", approved February 12, 1793 (9 Stat. 462), reprinted in I Henry Steele Commager, Documents of American History, 321 (9th ed., Prentice-Hall Inc. 1973). The Act provided that, when a fugitive slave had been found, such a slave should be returned to the master and that every citizen should owe the duty to cooperate with the polices of the United States in the search and arrest of escaping slaves. To that reasoning by Senator Trumbull, Senator Johnson presented a doubt on the effectiveness of the bill since Fugitive Slave Act had been ineffective (39−1 Cong. Globe 505). Moreover, Senator Cowan pointed out that Fugitive Slave Act itself was suspected not to be constitutional since it was substantially infringing the proper power of every State, so that the bill also was suspected to violate the Constitution (Id., at 604).

36 39−1 Cong. Globe 474. Senator Trumbull quoted there the judgements of the general court of the State of Maryland (Campbell v. Morris, 3 H. & McH. 535 (1797)), of the supreme court of Massachusetts (Abbott v. Bayley 23 Mass. (6 Pick.) 92 (1827)) and of the Circuit Court on Corfield v. Coryell case (4 Wash. C. C. 371, 380 (U.S.C.C., Pa., 1823)).

37 39−1 Cong. Glove 474. Senator Trumbull quoted there Blackstone's explanation of the natural rights and civil rights and Story's Commentary on the Article 4, Section 2, Clause 1 of the Constitution of the United States. The relevant part of Story's Commentary quoted by the Senator stated that the intention of the clause was to confer on citizens, if one might so say, a general citizenship and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances.

38 Id., at 503 (Sen. Howard).

39 Id., at 530 (Sen. Johnson).

40 Id., at 570 (Sen. Morrill).

Besides opinions concerning the power of Congress, in relation to the power of States, it was pointed out that the bill was originally intended to give civil rights equally to people of different race or color, so it should not restrict the proper power of each State[41].

Paragraph 3 Opinions of Opponents

The insistence of persons who opposed to the enactment of the bill was concentrated to express the question whether Congress had the power to establish such an act as the bill. In more details, it was insisted that to enact the bill should deviate from the power of Congress given by the Thirteenth Amendments[42]. As the reasoning of the insistence, it was insisted that the Thirteenth Amendments simply liberated negro slaves and that's all there was of it, and that the section 2 of it admitted Congress only to establish the measure to emancipate such persons, namely, to enact measures such as Habeas Corpus Act to give black people that privilege[43].

In addition, it was insisted from the opponents side that they, as the member of their community, should have the power to decide by themselves who to be the members of their community and that they should owe no duty to accept as the member a person who might be detrimental to their interests. It was insisted that, if black people should be made citizens as provided by the bill, Congress should propose an amendment to the Constitution to consult with the citizens of the United States[44].

Besides, in relation to the power of State, it was pointed out that, while the bill admitted the jurisdiction of the Union on the matter of the rights of citizens on freedom and property in each State, such matters had traditionally been considered to belong to the exclusive jurisdiction of each State[45]. Moreover, in relation with this issue, it was pointed out that, although the bill, in effect, made void the laws established by the people of any State and prescribed the punishment against the officers whose act had been legal in the State law, the Union should have no such power[46].

Paragraph 4 Amendment Proposal

From the opponent side, an amendment of the bill was proposed on the ground that the original Constitution allowed the Federal Government to secure rights of a citizen who had moved among States but didn't give it the power to legislate on the matters concerning a person who inhabited within one State[47]. The proposal was to modify the provisions of the bill like follows:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

"any person or persons who shall subject or cause to be subjected a citizen of any of the United States to the deprivation of any privilege or immunity in any other State to which such citizen is entitled under the Constitution and laws of the United States, such person or persons shall be liable to be sued for damages by the party injured, and shall also be deemed to be guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding $1,000, or imprisonment not exceeding one year, or both, in the discretion of the jury."[48]

However, this proposal was rejected[49].

Paragraph 5 Discussion on Definition of Citizenship

The maters concerning citizenship and the definition of citizenship included in the bill were discussed in a way as

41 Id., at 504 (Sen. Howard); Id., at 602 (Sen. Lane (of Indiana)).
42 Id., at 477 (Sen. Saulsbury); Id., at 500, 603 (Sen. Cowan); Id., at 600 (Sen. Guthrie).
43 Id., at 499 (Sen. Cowan).
44 Id., at 498 (Sen. Van Winkle).
45 Id., 478 (Sen. Saulsbury); Id., at 598 (Sen. Davis).
46 Id., at 603 (Sen. Cowan).
47 U.S. Const., amend. X; U.S. Const art. IV, § 2, cl. 1.
48 39−1 Cong. Globe 595 (Sen. Davis).
49 Id., at 606.

follows.

Regarding the definition of citizenship, the bill did not have a part providing the definition of citizenship at the time when it was first proposed by the judiciary committee during the first session in the Senate[50]. While that part was inserted afterward, the definition of citizenship prescribed, at the stage of the first amendment proposal, the definition of citizenship as "all persons of African descent born in the United States hereby declared to be citizens of the United States"[51]. Senator Trumbull who proposed the amendment bill stated at the time of the proposal that, since in Slave States persons of African descent born in the United States were not considered as citizens and there were legislated acts to discriminate colored people, in order to solve the problems, Congress should use the power to define citizens of the United States[52] so as to declare all persons born in the United States to be citizens and to make it clear for any such person to enjoy his rights as a citizen[53].

Later, there was proposed an amendment of that part to be: "all person born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States, without distinction of color"[54]. But it caused to generate a question whether Indian[55] or Chinese or gypsies[56] should also become citizens of the United States, or not.

Considering on those problems, another amendment was proposed, which read "All persons born in the United States, and not subject to any foreign Power or tribal authority, are hereby declared to be citizens of the United States,"[57] Moreover, there were other proposals to insert after the word "Power" the words "and Indians holding lands in severalty by allotment"[58], then to change the amendment by inserting the words "excluding Indians not taxed"[59] after the word "power"[60] in accordance with the constitutional usage of words.

Against the proposals for the amendments described above, there were oppositional opinions, namely, that it was doubtful to make citizenship dependent on the taxation viewing from the nature of citizenship[61], or that, while a white person had citizenship whether he paid a tax or not, it was strange for an Indian to be required to pay a tax before he could be regarded as a citizen of the United States[62].

Against the latter opposing opinion, following arguments were presented.

First, it was pointed out that Indians substantially organized unique governments so that they were not within the jurisdiction of laws of the United States, and the original Constitution itself formally didn't count Indians in the enumeration of the people of the United States so to be interpreted considering Indians not to be citizens. In this regard, it insisted, inserting the words mentioned above should be necessary to make the situation clear[63].

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50 Id., at 211.

51 Id., at 474.

52 Senator Trumbull based the argument on the power of Congress to decide naturalization provided by Article 1, Section 8, Clause 4 of the Constitution.

53 39-1 Cong. Globe 475.

54 Id., at 498.

55 Id., at 498 (Sen. Guthrie).

56 Id., at 498 (Sen. Cowan).

57 Id., at 504 (Sen. Lane (of Kansas)).

58 Id., at 522 (Sen. Lane (of Kansas)). This proposal was done in considering the fact that the State of Kansas at that time considered Indians who had gotten a land as the citizens. cf. Id., at 506 (Sen Lane (of Kansas)). On this point, a question was raised, that is, how to treat Indians lived in a wildlife reserve of the State of California, for such Indians were under the protection of the State but not under the authority of the tribe. Id., at 526 (Sen. Conness).

59 U.S. Const. art. I, § 2, cl. 3.

60 39-1 Cong. Globe 527 (Sen. Trumbull).

61 Id., at 527 (Sen. Hendricks).

62 Id., at 571 (Sen. Henderson). The intention of this opinion should be carefully assessed since it admitted a wide range of discretion to States to determine the degree of enjoyment of rights or privileges coming from citizenship. Senator Henderson stated on this issue that it might be allowed to restrict the right of Indians to make a contract by a State law even if Indians were declared to be citizens of the United States. He also avoided answering the question what rights Indians could get when becoming citizens of the United States. Id., at 572.

63 Id., 527, 572 (Sen. Trumbull). There was an additional explanation that the wording was chosen to make clear the fact that Indians

Second, it was pointed out, since to make Indians citizens of the United States would not only give them rights but also impose duties on them, it was the old policy of the Government of the United States not to admit it but to treat the affairs by treaties with the tribes[64].

Furthermore, there was an opinion that an Indian who did not suit to a civil life could not be made a citizen[65]. Regarding this issue, it was also insisted that, since the United States of America had been founded as a nation of white people where both black people and Indians were not the member forming the beginning, Congress couldn't make them citizens[66]. However, against that opinion, it was argued that the Constitution of the United States did not say such a thing[67].

Paragraph 6 Discussion on Civil Rights

The latter part of proposal that prescribed on Civil Rights stated, at the time of the proposal, namely, on January 29, as follows: "there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery[68]".

Concerning the words "civil rights" in this proposal, it was questioned whether political rights like suffrage should be included in them[69]. Regarding this issue, it was pointed out that the act treated only rights belonging to "all freemen" but not political rights[70].

In relation with this point, Senator Saulsbury pointed out that the bill could be interpreted verbally to give suffrage as a civil right to all people of any races based on citizenship, in spite of such an explanation as above. Based on it, he insisted that the wording of the provision should be amended to prevent such the interpretation. However, the proposal was rejected[71].

Furthermore, it was questioned that, while the bill admitted enjoyment of rights or immunities based on the fact of being an inhabitant and not that of being a citizen, the definition of "citizen" described above might require certain amendment of that part[72]. To this question, there was given an answer that the definition of citizen wouldn't have any influence on the use of the regulation power of each State so as to protect the general peace and public welfare of the State[73].

Subsection 4 Discussion in the House of Representatives

Paragraph 1 Explanation given by Representative Wilson

In the House of Representative, Representative Wilson gave an explanation regarding the intention of the proposal of the bill as follows[74].

First, the Representative stated that the definition of citizen of section 1 of the bill which adopted place of birth as the criterion was similar to the law of England inherited to the United States, and that there was no precedence for the race or color to be taken into account in applying the criterion. Thus colored people born in the United States also should become citizens of the United States[75]. Moreover, the Representative stated that, even when a colored person

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were considered virtually as foreigners. cf. Id., at 572 (Sen. Johnson).

64 Id., at 571 (Sen. Doolittle).

65 Id., at 572 (Sen. Trumbull); cf. Id., at 573 (Sen. Williams).

66 Id., at 528, 575 (Sen. Davis).

67 Id., 530 (Sen. Johnson); Id., at 570 (Sen. Morrill).

68 Id., at 474 (Sen. Trumbull).

69 Id., at 476 (Sen. Mcdougall); Id., 477, 606 (Sen. Saulsbury); Id., at 599 (Sen. Davis).

70 Id., at 476, 599, 606 (Sen. Trumbull).

71 Id., at 606.

72 Id., at 572 (Sen. Williams). In relation with this issue, Senator Johnson pointed that, since the word in the provision was "inhabitant", it would become impossible for each State to draw any distinction between citizens of the State and the other inhabitants including foreigners. Id., at 505.

73 Id., at 574 (Sen. Henderson).

74 Id., 1115.

75 Id.

had not been admitted as a citizen of the United States, since the United States Congress has the power to establish a uniform rule of naturalization[76], such a person could be made to be a citizen by "naturalization"[77].

Second, the Representative stated that the rights which the citizens of the United States should enjoy by the first section of the bill were natural rights every person could enjoy throughout the entire dominion of the Republic[78]. In addition, the Representative stated that the purpose of the bill was to ensure for all citizens could equally enjoy civil rights and immunities, and it merely affirmed existing law so as to realize the intent provided in Article 4 section 2 of the United States Constitution[79].

Furthermore, the Representative explained concerning the present situation that, if all our citizens were of one race and one color, or if each State had formed its law system without taking a race or color of a person into account at least on civil rights and immunities, the bill would be unnecessary, but such was not the case. He continued that they had to do their best to protect their citizens in the enjoyment of the great fundamental rights which belonged to all men[80] and that the provisions of section 2 and thereafter of the bill were for accomplishing that end[81].

Besides, the Representative stated concerning the ground to enact the bill that, while the legal foundation of the part concerning emancipated people was in the Thirteenth Amendment of the Constitution, the other part required the enactment of the bill so as to give the United States Congress the power to guarantee citizens more rights than that[82].

Paragraph 2 Opinions of Supporters

The outline of the opinions stated by the supporters of the bill were as follows.

Concerning citizenship, there were opinions that black people should not be reduced to the condition of the slavery as before if considering their contributions during Civil War, that since they were already not slaves, they should be citizens of the United States and that, even if they were not citizens yet, it was necessary to make them citizens by the power of Congress to enact a uniform rule of naturalization[83,84].

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76 U.S. Const. Art I. § 8, cl. 4.

77 39−1 Cong. Globe 1116.

78 Id., at 1117. Representative Wilson stated concerning the rights prescribed in the bill that suffrage fell outside of the rights to be guaranteed by the bill since it was under the jurisdiction of each State except for the situation where the interception of Congress was necessary in order to secure the republican form of the government (39−1 Cong. Globe 1117). On this issue, he also explained its nature based on the theories of Blackstone and Kent (Id., at 1118). At another chance, he stated that the qualification to become a witness at the State court should not be deprived of if it was necessary to protect liberty, safety or property which citizens should enjoy, and, so far, the State law prohibiting a citizen from testifying at the court should be made void (Id., at app. 157).

79 Id., at 1117. Representative Wilson understood Article 4 Section 2 of the Constitution as a provision to be applied to the relation between a State and its citizen, but not between a State and a citizen of another State. Cf. Earl Maltz, Reconstruction without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment, 24 Hous. L. Rev. 221, 252 (1987).

80 39−1 Cong. Globe 1118.

81 Id., at 1118.

82 Id., at 1118. Representative Wilson quoted at another occasion(39−1 Cong. Globe 1294) the judgement of Prigg v. The Commonwealth of Pennsylvania (41 U.S. 539 (1842)). The issue of that case was whether the fact that a person who had been asked by a citizen of the State of Maryland had forcibly carried away a fugitive slave owned by the citizen to the State of Pennsylvania violated a law of the State of Pennsylvania which prohibited carrying away any negro or mulatto by force or fraud from the part of the State to keep the person as a slave. In the judgement, how to allocate the jurisdiction and power between the Union and States concerning the relation between that State laws and Federal Fugitive Slave Act established on February 12, 1793 was discussed. The court opinion, quoted by Representative Wilson, pointed out, quoting Article 4 Section 2 clause 3 of the Constitution, that the founders of the Constitution had approved of the existence of slavery. Then, it ruled that, since the rights of the owners of slaves, since they were secured by the Constitution, could not be restricted by any State laws, the Federal Government should use the power in order to secure the rights substantially. (41 U.S. 539, 615). While the judgement affirmed the power of the Federal Government from the view of securing the rights of owners of slaves, after abolition of slavery, the same logic was used, in turn, as a reason of the power of the Federal Government to set up necessary means for abolition of slavery. cf. Robert J. Kaczorowski, The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary, 98 Tale L. J. 565, 565 (1989).

83 39−1 Cong. Globe 1124 (Rep. Cook).

84 It was insisted at another place, concerning the power of Congress to enact naturalization quoted there, that it should give Congress the power not only to give citizenship to foreigners but also to give citizenship of the United States and all rights coming from it to

In relation to the United States or the United States Government, it was insisted that people who had considered the nation/government should be that of white people had been defeated (in Civil War), so the country should be of its inhabitants and be governed by them, which was also the thought of the founders of the nation/government, therefore, it was appropriate to consider people born in the nation as the citizens[85].

Concerning the protection of the rights of freed persons, the followings were stated.

First, taking the social conditions at that time into consideration, it was insisted that, since rights of citizens were infringed in reality by the officers or the community in some States, and since the State government could not be counted upon for the improvement of the condition, the Union should intercept it[86]. In addition, it was insisted that the status of the people of rebelling States, because of their contribution to the rebellion, could be considered either citizens of the United States or foreigners, so the United States Government had to decide whether to accept them or not, and that the bill showed the position of the United States Government under such problematic conditions, namely, the United States Government decided to accept them as citizens and to give them privileges and immunities as citizens of the United States[87]. It was also insisted that to pass the bill was necessary to protect the persons in rebelling States who had been loyal to the Union[88].

Second, concerning the relationship between the guarantee of rights and the definition of citizenship, it was stated that the purpose of the bill was to guarantee citizens Fundamental rights of citizenship, namely, the rights which were common to the citizens of all civilized States, i.e., to secure life, liberty and property and to declare for all humans to be equal before the law, and that, in order to accomplish that purpose, the bill defined citizenship of the United States, according to the already generally admitted principle, based on the place of birth[89].

Third, in relation to the federal system, it was stated that the purpose of the bill was prohibition of discrimination in securing the civil rights of citizens on account of "race, color or previous condition of slavery", namely, equal security of the civil rights, so, as far as it was realized, any State could use its power as before. Therefore the bill didn't invade the power of States[90]. Besides, as an opinion on the duty of the Federal Government, it was stated that, since the United States Government owed the duty to secure domestically and internationally the rights of individuals according to the preamble of the Constitution, it would be strange, since the Government had been held competent to fulfill the duty within the domain of any European potentate but it had been considered powerless to do the duty within the nation[91]. In relation with those opinions, there was such an opinion that the intention of approving enactment of the Thirteenth Amendment of the Constitution was to abolish slavery so as to give men under the yoke of servitude real freedom by the section 1 and to give Congress ability to protect and guarantee the rights which the Section 1 gave them[92]. Moreover, in relation to the Thirteenth Amendment of the Constitution, it was pointed out that the provision gave Congress the power to establish a law to regulate discriminative acts among citizens[93].

Paragraph 3 Opinions of Opponents

The opponents to the bill insisted, in relation with the Thirteenth Amendment of the Constitution, that the purpose of the first section was to make former slaves freemen, so the second section admitted only the power to prevent

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anyone. Id., at 1152. (Rep. Thayer). In addition, Representative Raymond pointed out that, while Congress could naturalize colored foreigners to give them citizenship and its ancillary rights, it should be strange if Congress couldn't do it for colored people born in the United States. Id., at 1266.

85 Id., at 1262 (Rep. Broomall).

86 Id., 1151, 1153 (Rep. Thayer); Id., at 1160 (Rep. Windom).

87 Id., at 1263 (Rep. Broomall).

88 Id., at 1265 (Rep. Broomall).

89 Id., at 1152 (Rep. Thayer).

90 Id., at 1293 (Rep. Shellabarger).

91 Id., at 1263 (Rep. Broomall). cf. U.S. Cont. Preamble; U.S. Const. art. I, § 8; U.S. Const. art. IV, § 2.

92 Id., at 1151 (Rep. Thayer).

93 Id., at 1124 (Rep. Cook).

States from making black people slaves again[94].

Concerning the range of the powers of Congress, it was insisted that Congress did not have the power to define the civil rights and immunities of the citizens of each State[95]. Concretely, these were opinions, that it should be the power of each State to determine the legal status of its inhabitants and to regulate the relationship among them, so to invade the power should cause to form the absolute and despotic central government[96], and that the change like the one provided in the bill should be done through amendment of the Constitution and even if it should be done, in a way to impose an obligation on each State to secure the civil rights and restrict the interception of the Federal Government to the case in which the States refused to give such security[97]. In relation with that issue, it was also pointed out that if the second section of the bill was applied, a State's officer who used the power in compliance with law of the State could be punished when it infringed the rights secured by the bill, which caused to prohibit the State's officers from applying a law of the State or to punish an officer who simply applied a law of the State, so that it invaded the power of the State and caused to build a powerful central government in the end[98]. In addition to those opinions, there was also a concern expressed that, if the Federal Congress could extend the rights and privileges enjoyed by white people to colored people, Congress could also take it away from anyone, but such an interpretation would not be agreeable[99].

In regard to those opinions above mentioned, it was also pointed out that, concerning what were the objects to be protected by the Constitution, while the original Constitution of the United States intended to guarantee general human rights through protecting life, liberty, and property for "any person", this bill was intending to guarantee the rights of citizens, which was neglecting the intention of the original founders of the Constitution[100].

Paragraph 4 Whether "Civil Rights" Could Include Suffrage

As the concrete problems regarding the interpretation of the bill, it was especially controversial whether suffrage could be included in "civil rights" of the bill. On this issue, in relation to the power of State, a concern was expressed that if the Federal Congress should be allowed to establish such an act, then, as a logical consequence thereof, the Federal Congress should also be allowed to legislate some acts to give suffrage to colored people of each State, which should be an exclusive power of the State[101]. In addition, as a wording problem, it was pointed out that as the common usage of "civil rights", suffrage couldn't be interpreted not to be included into it[102].

Against the latter opinions, it was insisted that "civil rights and immunities" were different from political privileges and that the rights to be protected by the bill were the former but not the latter[103].

Paragraph 5 Amendment in the House of Representatives

As having already been stated, the bill was amended in the House of Representatives. Main amendment points were as follows. The term "inhabitant" which was being held during the discussion at the Senate was changed into the term "citizen" so as to limit the range of the application of the bill to the citizens of the United States, not inhabitants of each State[104].

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94 Id., at 1123 (Rep. Rogers); Id., at 1156 (Rep. Thornton).

95 Id., at 1296 (Rep. Latham).

96 Id., at 1157 (Rep. Thornton).

97 Id., at app. 159 (Rep. Delano).

98 Id., at 1121 (Rep. Rogers); Id., at 1154 (Rep. Eldridge); Id., at 1266 (Rep. Raymond); Id., at 1271 (Rep. Kerr); Id., at 1292 (Rep. Bingham). Notably, the opinion of Representative Raymond was stated from the standpoint of the supporter of the aim of the bill.

99 Id., at 1120 (Rep. Rogers).

100 Id., at 1292 (Rep. Bingham). Representative Bingham pointed out there that the bill would allow each State to discriminate aliens or strangers, which should be unjust.

101 Id., at 1121 (Rep. Rogers).

102 Id., at 1157 (Rep. Thornton); Id., at 1291 (Rep. Bingham).

103 Id., at 1117 (Rep. Wilson); Id., at 1151 (Rep. Thayer); Id., at 1159 (Rep. Windom).

104 Id., at 1115.

The phrase "as is enjoyed by white citizens" were inserted in the list of the rights to be guaranteed by the bill[105]. Moreover, the words to prohibit general discrimination concerning civil rights and immunities were deleted[106].

Subsection 5 President's Veto

The President used the power of veto over the bill. The reasons were as follows[107].

First, the President stated that the provision of the first section of the bill was concerning federal citizenship and the rights accompanied by it[108], but it didn't purport to give any status as citizens of States except for the rights coming from federal citizenship, so that the citizenship of each State should be given by the State. Then, the President continued that it wouldn't be good policy to decide to give federal citizenship and its ancillary rights to black people having just been emancipated, if considering their education level, in Congress where eleven of the thirty six States were unrepresented[109,110].

Second, the President pointed out that, while the bill was intending to realize a perfection of equality of the white and black races concerning the rights enumerated in the latter part of the first section, such a matter had been considered to belong to an exclusive power of States[111]. Moreover, the President pointed out that if the Union could exclude the legislations of States on those matters, then the Federal Congress could interfere the suffrage concerning the governmental organization of each State, which would be a contradiction because Congress clearly didn't have such a power.

Third, concerning the jurisdiction of State courts, the President stated that the second section of the bill should be said to violate the judicial power of States in that a judge who ruled a case according to the law of the State might be punished by a federal law, which was suspected to be a violation of the Federal Constitution. Moreover, he pointed out, the third section of the bill expanded the jurisdiction of federal court to such an unconstitutionally wide area, so, even taking the Thirteenth Amendment into consideration, it should violate the Constitution[112].

Finally, the President insisted, it would be best, after the abolishment of slavery, that building new relationship between white and black people, both of which already consisted of mutually independent subjects, was left to the laws regulating capital and labor, but the enactment of the bill would interfere in the process[113].

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105 Id., at 1115. Representative Wilson, who proposed that amendment, pointed out at the proposal time, that without those words, the rights the bill should protect might be interpreted to be enjoyed regardless of the sex or age. Id., at app. 157.

106 Id., at 1366 (Rep. Wilson, Report from the Committee on the Judiciary). The sentence deleted were "Without distinction of color, and there shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory on account of race, color, or previous condition of slavery". In associate with that, the amendment which had inserted in the House of Representatives, namely, "nothing in this act shall be so construed as to affect the laws of any State concerning the right of suffrage" (39−1 Cong. Globe 1162 (Rep. Wilson)), was struck out because it had become unnecessary (Id., at 1366). cf. Horace Edgar Flack, The Adoption of the Fourteenth Amendment, 35 (The John Hopkins Pr. 1908)[hereinafter Flack]. Representative Wilson stated about the amendment that, while the amendment would not materially change the bill, certain unintentionally latitudinarian construction some opponents had worried about would be avoidable by striking out those words from the provision. 39−1 Cong. Globe 1366.

107 Id., at 1679 (1866); cf. McPherson, at 75.

108 The President stated there that the provisions would be understood to give federal citizenship to Chinese, Indian subject to taxation, the people called Gipsies, as well as the entire race designated as blacks, people of color, negroes, mulattoes, and persons of African blood.

109 The President pointed out there that the rights enumerated in the bill were originally guaranteed also to the foreigners not naturalized, so those rights could be guaranteed even if citizenship were not given, and that in order for a person who didn't understand the organization of the government or law of the United States to be given citizenship, the person should show the fact that he in fact had the ability as a citizen to use the rights coming from citizenship under the Constitution of the United States.

110 Moreover, the President also pointed out on this issue that, while a black person would get citizenship and its accompanying rights based on the born place according to the bill, persons of foreign birth should have been inhabiting for five years in the United States and, further, satisfy other requirements like showing good moral character, which would cause discrimination against educated and patriotic foreigners. 39−1 Cong. Globe 1679.

111 Id., at 1680.

112 Id.

113 Id., at 1681.

Subsection 6 The Second Discussion at Senate

Paragraph 1 Insistence of Senator Trumbull

Speaking against the use of the veto of the President, Senator Trumbull insisted, in outline, as follows[114].

The Senator insisted that, while the President questioned the appropriateness of the legislation of the bill because of the lack of representatives of rebelling States, such an insistence on a particular bill should be inappropriate since he had never complained about it concerning other already enacted bills[115].

Then, the Senator insisted that, although the President interpreted the bill to define only a person who should have federal citizenship, a person should become a citizen of its residing State when becoming a citizen of the United States, so the interpretation by the President was wrong[116,117].

Furthermore, Senator Trumbull stated on the civil rights provided by the bill as follows.

First, in relation to suffrage, the Senator stated that being a citizen didn't necessarily mean having the right of suffrage, which could be seen from the fact that female people or children didn't have it[118]. So, he insisted, a person who should be given citizenship wouldn't necessarily enjoy the right of suffrage.

Second, the Senator insisted, the rights enumerated in the bill which citizens of the United States could enjoy were those which all free citizens or free men should be able to enjoy in all countries, so they should be enjoyed all over the States of the Union[119]. Moreover, the Senator stated, concerning the relationship between the United States Government and its citizens, that, since the protection by the Government and allegiance to the Government were reciprocal rights, if the Government had the right to call citizens to its defense and, as the result, to give damages to the citizens in the condition of war, it should have also the right to give certain protection to the citizens[120], and so emphasized the legitimacy of the power of the United States to protect its citizens.

Third, the Senator stated, concerning the relation between the second section of the bill and the actions of officers of States, that the legislators of a State could not be punished because of their legislative action and that judges could not be punished except for intentional violation of the provisions of the bill, and that, since there was a precedent of enactment to punish officers who intentionally violated the laws of the United States under State law[121], the punishment provision of the bill was necessary to assure the general effectivity of the bill[122]. In addition, the Senator finally stated that, when it became necessary to judge a case in a federal court in order to protect the rights of freed men against some discriminatory legislation of a State, the Federal Congress should have the power to set the jurisdiction of the Federal Courts based on the second section of the Thirteenth Amendment[123] and insisted on the

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114 Id., at 1755. Besides those described above, the Senator also pointed out that the logic of the bill was partly appropriated from Fugitive Slave Act (9 Stat. 462, Sep. 18, 1850). Cf., 39−1 Cong. Globe 1760.

115 39−1 Cong. Globe 1756.

116 Id., at 1756. Senator Trumbull quoted there the judgement "A citizen of the United States residing in any State of the Union is a citizen of that State" by Supreme Court in the case, Gassies v. Ballon (6 Pet. 761 (1832)). On this issue, however, Senator Johnson later pointed out that the judgement stated it only as far as the jurisdiction of the courts was concerned. 39−1 Cong. Globe 1775 (Sen. Johnson).

117 39−1 Cong. Globe 1757. In addition, Senator Trumbull insisted, it was true that the bill discriminated against foreigners in the respect that it made every person born in the United States a citizen of the United States, but foreigners should not be differently treated on whether the person was of white or black, and a child of a foreigner should become a citizen of the United States by being born in the United States as well as a child of white citizens of the United State, so it would be inappropriate for the President to have said the bill discriminated against foreigners.

118 Id., at 1757.

119 Id., at 1757. On this issue, the Senator stated that citizens of the United States should enjoy those rights also in a foreign country under the protection of the United States Government, and stated furthermore that foreigners could also be able to enjoy those rights under the protection of the United States Government "when duly naturalized".

120 Id.

121 Cf. 1 Stat. 112, 118 Sec. 26 (1790).

122 39−1 Cong. Globe 1758.

123 Id., at 1759.

legitimacy of setting up of the jurisdiction of the federal courts.

Finally, the Senator stated, the bill was intending neither to confer nor abridge the rights of any one but to guarantee equal enjoyment of civil rights among citizens and to protect them against discriminatory punishment[124], so as to make the purpose of the bill clear again.

Paragraph 2 Opinions of Supporters

During the discussion on this issue, the supporters of the bill insisted as follows.

Concerning the relation between Federal and State citizenships, it was pointed out that, if to become a citizen of the United States didn't mean for a person to enjoy any right in relation to citizenship of the State where the person resided and being a citizen of the United States had no meaning in leaving from or going to any State, to be a citizen of the United States would be nonsense[125]. So, it was insisted, the significance of citizenship of the United States should be in guaranteeing certain right in States.

Concerning the relation between the Federal Government and State governments, it was pointed out that, when a State government didn't do justice to freed men, the Federal Government should do it, and that a State government could avoid interference of the Federal Government by abolishing acts which might infringe the rights guaranteed by the second section of the bill[126]. As such, it was insisted that to do justice to the citizens should be the duty of the Federal Government and, since each State could secure its freedom by obeying the provisions of the bill, the bill shouldn't infringe the power of the State.

Paragraph 3 Opinions of Opponents

In the discussion on the issue, the opponents of the bill insisted as follows.

Concerning citizenship of the United States provided by the bill, it was insisted that the primary citizens of the United States should be citizens of all the States at the time of the adoption of the Constitution and their descendants, persons who had been naturalized conforming to the laws passed by Congress and their descendants, and all native born white persons[127].

In relation to the Thirteenth Amendment, it was pointed out, since the first section of the Thirteenth Amendment had emancipated slaves, the second section had authorized Congress to pass the measure to comprehend those slaves. Then, it was insisted that, since the bill made more rights to be the objects of the guarantee than being allowed, it should be outside of the power given to Congress by the Thirteenth Amendment[128].

Moreover, concerning the power of States, it was stated that, while a person had become a citizen of the United States, so far, through the fact that the person had become a citizen of the State he had been born based on the law or constitution of the State, the bill provided that a person should become directly a citizen of the United States based on the place of birth so that the rights guaranteed by laws of the State would be given to him based on his citizenship

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124 Id., at 1760. Then, the Senator stated "Each State, so that it does not abridge the great fundamental rights belonging, under the Constitution, to all citizens may grant or withhold such civil rights as it pleases".

125 Id., at 1781 (Sen. Trumbull). Although the statement itself was concerning a naturalized citizen of the United States.

126 Id., at 1785 (Sen. Stewart).

127 Id., at app 182 (Sen. Davis). In this opinion, it was also insisted, there was only citizenship of the United States as citizenship in the United States, and citizens of the United States could become residents of any State or Territory of the United States, but any State didn't have the power to give citizenship and even the Union had only the power to admit foreigners to be naturalized in the United States.

128 Id., at app 184 (Sen. Davis). The Senator stated as follows. "It is utterly unsound and absurd to contend that the second section of this amendment would authorize Congress to pass this measure to comprehend those slaves, and confer upon them the same civil rights and punishments as appertained to white persons; but if that were even true, there is no color of authority for extending it to the 929, 899 blacks who were free before the adoption of this amendment, and also to more than 30,000,000 of white people, and the civil rights and punishments of this aggregate people."

of the United States, which should infringe the power of States and should violate the Constitution[129].

Concerning the relation between the punishment provision of the bill and the jurisdiction of the State courts, it was insisted that, while the second section of the bill was explained only to punish a person who intentionally infringed the rights enumerated in the provision, such an intention would be inferred from the action to be done, so, as the result, the judge who applied a law of a State which violated any provision of the bill would be punished, which would unconstitutionally invade the power of the administration of Justice of the State[130].

Section 4 Other Legislations by Congress

Other than those two acts described so far, the Federal Congress established some more acts concerning civil rights during the same period. The major ones among them were as follows.

Subsection 1 Slave Kidnapping Act of 1866

The first one is Slave Kidnapping Act of 1866[131]. That Act was enacted in order to deal with the situation where emancipated men were captured and sold as slaves in the States of Florida, Mississippi, Louisiana and others at that time[132].

Section 1 of the Act provided that, if any person should kidnap or carry away any other person, whether negro, mulatto, or otherwise, with intent that such other person should be sold or carried into involuntary servitude, or held as a slave; or if any person should entice, persuade, or knowingly induce any other person to go on board any vessel or to any other place, with intent that he or she should be made or held as a slave, or sent out of the country to be so made or held, or should in any way knowingly aid in causing any other person to be held, sold, or carried away, to be held or sold as a slave, he or she should be punished. Section 2 provided that, if the master or owners, or person who having charge of any vessel should receive in board any other person whether negro, mulatto, or otherwise, with knowledge or intent that such person should be carried from State, Territory or district of the United States, to a foreign country, state, or place, to be held or sold as a slave, or should carry away from any State, Territory, or district of the United States, any such person, with the intent that he or she should be so held or sold as a slave, such master, owner, or other person offending, should be punished.

Subsection 2 Peonage Act of 1867

The second one is Peonage Act of 1867[133]. That Act was established as a measure against the movement to make Native Americans slaves in New Mexico and compulsory labor (Peonage) for repayment of the debt[134]. However, the area for the Act to be applied was not restricted to New Mexico but extended to be all over the United States[135]. The Act provided that Peonage for repayment of the debt should be prohibited, that statutes or ordinances to set up or protect making such a labor relationship should be void, and that any person who should make other person to do such compulsory labor or any person who should aid a person to do it should be punished.

Subsection 3 Acts Relating to Habeas Corpus of 1867

The third one is the Acts relating to Habeas Corpus established in 1867[136], which were to amend Judicial Court Act

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129 Id., at 1776 (Sen. Johnson).

130 Id., at 1778 (Sen. Johnson).

131 14 Stat. 50. The formal title is: An Act to prevent and punish Kidnapping.

132 39-1 Cong. Globe 852 (Sen. Clark).

133 14 Stat. 546. The formal title is: An Act to abolish and forever prohibit the system of Peonage in the Territory of New Mexico and other Parts of the United States.

134 MacDonald, at 168.

135 39-2 Cong. Globe. 1571 (Sen. Wilson).

136 14 Stat. 385. There are two Acts concerning Habeas Corpus established in 1867. The formal titles of them are, respectively: An Act

of 1789[137]. Section 1 of the act provided that the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, should have power to grant writs of habeas corpus in all cases where any person might be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States, and admitted the appeal on such cases to the circuit court or the Supreme Court of the United States[138].

Subsection 4 Franchise Acts of D.C. and of Territories of the United States

As the fourth ones, there are Franchise Act of D.C.[139] and Franchise Act of Territories of the United States[140]. Section 1 of the Franchise Act of D.C. provided that male persons, whether natural-born or naturalized, over the age 21 should have suffrage regardless of the race or color.

The latter, Franchise Act of Territories of the United States was established at the same period as Franchise Act of D.C., which prohibited discrimination based on the race or the like, concerning the use of the right to vote[141].

Subsection 5 First Reconstruction Act of 1867

As a legislation concerning Civil Rights, there is First Reconstruction Act of 1867[142].

That Act was intended to make clear how to proceed with the returning of the rebel States to the Union. The Preamble stated that this Act was enacted because there was no legal State government adequately protecting the life and property of the people in the rebel States. Then, Sections 1 and 2 set up the military government in the rebel States, and Section 3 prescribed the duty of officers to protect all persons in their personal rights and property, and, to that end, gave the officers the power to perform penal, civil, or military judgement[143]. Section 5 provided, as the requirements of returning of a rebel State to the Union and entitling the State to representation in Congress[144], that the people of any one of the rebel States should have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident

amendatory of "An Act to amend an Act entitled "An Act relating to Habeas Corpus, and regulating judicial Proceedings in certain Cases"", approved May 11th, 1866; An Act to amend "An Act to establish the judicial Courts of the United States", approved Sep. 24, 1789.

The former Act was, as could be seen from the title, intended to amend Habeas Corpus Act of 1863 (An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases, 12 Stat. 755). The legislative intention of Habeas Corpus Suspension Act of 1863 was to approve of the suspension by President Lincoln of the privilege for Habeas Corpus provided by Article 1 Section 9 Clause 2 of the United States Constitution. It provided, in addition, a federal officer who became a defendant (accused) in a State court because of the action conforming to federal laws and rules, with measures to defend in the trial, extended the jurisdiction of the federal courts which had been rather restrictive in Judicial Act of 1789, so as to make it possible to remove such cases to the federal courts. (Section 3 of Civil Right Act of 1866 quoted the act in this meaning.) (Cf. MacDonald, 75; Harold M. Hyman, More Perfect Union, 249 (Alfred A. Knopf, Inc. 1973)). The Act of 1863 was amended in 1866, so as to admit the federal courts more extensive jurisdiction (39−1 Cong. Globe app. 322). The Act of 1867, mentioned above, amended the act of 1863 again, so as to provide that, when a case was removed from a State court to a federal court, the federal court where the case was transferred should owe a duty to issue a writ, habeas corpus cum causa, in order for the defendant (accused) under the custody of the State to be transferred.

137 An Act to establish the Judicial Courts of the United States, 1 Stat. 73.

138 While Congress amended the part concerning the appeal to the Supreme Court (15 Stat. 44 (1868)) in the next year of the establishment of the act, the amendment had been reverted in 1885 (23 Stat. 437). Concerning the details, Cf. William F. Duker, A Constitutional History of Habeas Corpus, Chap. 4 (Greenwood Pr. 1980); Fairman, Chap. 12.

139 14 Stat. 375. The formal title is: An Act to regulate the Franchise in the District of Columbia.

140 14 Stat. 379. The formal title is: An Act to regulate the elective Franchise in the Territories of the United States.

141 Concerning the legislation process, cf. Earl M. Maltz, Civil Rights, the Constitution and Congress 1863−1869, 43, 121 (Univ. Pr. of Kansas 1990); McPherson, 114, 154.

142 14 Stat. 428. the formal name was: An Act to provide for the more efficient Government of the Rebel States.

143 Robert J. Kaczorowski, The Nationalization of Civil Rights, 145 (Garland Pub. Inc. 1987).

144 At the 39th Congress, the Representatives and Senators from Rebel States were rejected to attend. Cf. 39−1 Cong. Globe 6−7.

in said State for one year previous to the day of such election[145].

Section 5 Discussion in Congress

On April 30, 1866, Joint Committee on Reconstruction proposed the Fourteenth Amendment, to the House of Representatives by the Representative Stevens, and to the Senate by the Senator Fessenden[146,147]. The bill of the

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145 The requirements were maintained in the second Reconstruction Act (An Act supplementary to an Act entitled "An Act to provide for the more efficient Government of the Rebel States", passed March 2nd, 1867 and to facilitate Restoration, 15 Stat. 2, Sec. 1.

146 39−1 Cong. Globe 2286 (The House of Representatives); Id., at 2265 (The Senate).

147 On March 16, 1866, Senator Steward proposed at the Senate, the joint resolution in order to make clear the conditions to allow the rebel States return to the Union, which outlines were as follows (39−1 Cong. Globe 1437).

Section 1 : The former revel State shall be recognized as having fully and validly resumed its former relation with the Federal Government and its chosen representatives shall be admitted into the two houses of the national Congress whenever the State shall have so amended its constitution as:

1. to do away all existing distinctions as to civil rights and disabilities among the various classes of its population by reason either of race or color, or previous condition of servitude;
2. to repudiate all pecuniary indebtedness which the said State may have heretofore contracted, incurred, or assumed in connection with the late unnatural and treasonable war;
3. to yield all claim to compensation on account of the liberation of its slaves;
4. to provide for the execution of the elective franchise to all persons upon the same terms and conditions, making no discrimination on account of race, color, or previous condition of servitude.

Section 2 : After aforesaid conditions shall have been compiled with and the same shall have been ratified by a majority of the present voting population, a general amnesty shall be proclaimed.

Section 3 : All other States not above specified be respectfully requested to incorporate an amendment in their State constitutions respectively, corresponding with the one above described. Section 4 : The resolution is not intended to assert coercive power on the part of Congress in regard to the regulation of the right of suffrage in the different States of the Union.

On April 12, as a substitute for the above resolution proposal, Senator Stewart proposed a bill of two sections to amend the Constitution. The Section 1 provided that all discriminations among the people because of race, color, or previous condition of servitude, either in civil rights or the right of suffrage, were prohibited, but the States might exempt persons now voters from restrictions on suffrage hereafter imposed. The Section 2 provided that obligations incurred in aid of insurrection or of war against the Union, and claims compensation for slaves emancipated, were void. This amendment bill was referred to the joint committee (39−1 Cong. Globe 1906)., and, on April 16, presented to the committee. The committee heard the opinion of Senator Stewart concerning the bill. Cf., Benj. B. Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction, 82 (Columbia Univ. 1914) [Hereinafter Kendrick].

Besides, on April 21, Representative Stevens who was a member of the joint committee submitted a bill to amend the Constitution to the joint committee which contents were as follows:

Section 1. No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of rase, color, or previous condition of servitude.

Section 2. From and after the fourth day of July, in the year one thousand eight hundred and seventy-six, no discrimination shall be made by any state, nor by the United States, as to the enjoyment by classes of persons of the right if suffrage because of race, color, or previous condition of servitude.

Section 3. Until the fourth day of July, one thousand eight hundred and seventy-six, no class of persons, as to the right of any of whom to suffrage discrimination shall be made by any state, because of race, color, or previous condition of servitude, shall be included in the basis of representation.

Section 4. Debts incurred in aid of insurrection or of war against the Union, and claims of compensation for loss of involuntary service or labor, shall not be paid by any state nor by the United States.

Section 5. Congress shall have power to enforce by appropriate legislation, the provisions of this article.

The bill was proposed to Representative Stevens by Robert Dale Owen who was a son of Robert Owen (Kendrick, 83, 296; Robert Dale Owen, Political Results from the Varioloid, 35 The Atlantic Monthly 660 (1875)), and the joint committee drafted its bill of the amendment to the Constitution based on the proposition. The outline of the discussion process was as follows:

On April 21, Representative Bingham moved to amend section 1 by adding the words "nor shall any state deny to any person within the jurisdiction the equal protection of the laws, nor take private property for public use without just compensation", but the proposal was rejected. The Representative proposed again on the same day to add a new provision as the fifth section whose contents were "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 this jurisdiction the equal protection of the laws". This proposal was approved. (Kendrick, 85, 87) However, that new section 5 was afterward denied at the resolution on the 25th day of the month (Id., at 98).

Fourteenth Amendment consisted of five sections.

The first section provided "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."

The second section provided "Representatives shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of male citizens shall bear to the whole number of such male citizens not less than twenty-one years of age."[148]

That amendment proposal was reconsidered on the day 28 in the committee, then Representative Stevens moved to strike out all section 2 and the words regarding the time limit in section 3, namely, "Until the fourth day of July, 1876.", which was approved (Id., at 101). Then, Senator Williams moved to strike out section 3 and proposed to add a provision, that is, "Representatives shall be apportioned among the several states which may be included within this Union according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens, not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or the other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.", which was approved (Id., at 102).

Moreover, Senator Harris moved to insert an additional section which was same as one proposed at both the Upper and Lower Houses as section 3 of an amendment on April 30, 1866, which was approved (Id., at 104).

Furthermore, Representative Bingham moved to strike out the first section of the proposed amendment to the Constitution and to insert in lieu thereof an amended provision which was the same as the current second sentence of section 1 of the Fourteenth Amendment. That proposal was approved (Id., at 106).

After those amendments described above, the amendment bill was decided to be finally presented to both Houses (Id., at 116).

In relation with that, the joint committee decided to submit to the Senate and the House a report concerning return of the rebel States to the Union and the conditions of the acceptance of the representatives of those States in Congress on June 6, 1866 (Kendrick, 120) and submitted on the days 18 and 22 of the month reports of the majority opinion and the minority opinion (McPherson, 84). Those reports would not have given any influence to the discussion seeing from the submission time, but they made clear the stand point of the joint committee from the viewpoints of the majority and minority.

The outline of the majority opinion in the report was as follows. First, the majority opinion stated that the States lately in rebellion had been, at the close of the war, disorganized communities, without civil government, and without constitutions or other forms, by virtue of which political relations could legally exist between them and the Federal Government. So, the majority opinion continued, Congress could not be expected to recognize as valid the election of representatives from such disorganized communities. In addition, the majority opinion insisted, Congress would not be justified in admitting such communities to a participation in the government of the country without first providing such constitutional or other guarantees as well tended to secure the civil rights of all citizens of the Republic; a just equality of representation; protection against claims founded in rebellion an crime; a temporary restoration of the right of suffrage to those who had not actively participated in the efforts to destroy the Union and overthrow the Government; and the exclusion from positions of public trust of at least a portion of those whose crimes had proved them to be enemies to the Union, and unworthy of public confidence. Then, it was stated that the joint committee proposed an amendment to the Constitution in order to realize the situation to satisfy above conditions.

On the other hand, the minority opinion stated, that since any State could not break away from the Union, the States lately in rebellion should still keep the same relationship with the Union as before, so it was desirable for those States to return to the Union as soon as possible. Moreover, the minority opinion pointed out that the provision in the bill which forced to guarantee black people the right of suffrage should invade the power of States concerning the election, which might cause some States to reject partly the ratification.

148 The third section of the bill provided, "Until the 4th day of July, in the year 1870, all persons who voluntary adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress, and for electors for President and Vice President of the United States." The fourth section prescribed the cancellation of the debts and obligations coming from aiding in insurrection or war or loss of involuntary service or labor. The fifth section prescribed the power of Congress to enforce those provisions.

In addition, the joint committee submitted two more bills (39−1 Cong. Globe 2286)

- a bill provided that, whenever the above amendment should have become part of the Constitution of the United States, and any State lately in insurrection should ratified the same, and should have modified its constitution and laws in conformity therewith, the Senators and Representatives from such State, if found duly elected and qualified, might, after having taken the requested oaths of office, be admitted into Congress as such.

Before the deliberation on the bill of the Fourteenth Amendment, Congress discussed two other bills to amend the Constitution. This article will first overview the discussions regarding them, and, afterward, will consider the discussion on the bill of the Fourteenth Amendment.

Subsection 1 Bill by Representative Bingham

Paragraph 1 Proposal on February 13, 1866

The joint committee submitted a bill to amend the Constitution on February 13, 1866, which was before the proposal of April 30. The bill stated "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states; and to all persons in the several States equal protection in the rights of life, liberty and property"[149].

The Senate didn't discuss on this bill, so called the Representative Bingham Bill. The House of Representatives deliberated it from February 26 to 28, where there were discussions as follows.

Paragraph 2 Explanation by Representative Bingham

Representative Bingham explained the bill to the House of Representatives twice on February 26 and 28[150].

- a bill provided that those who acted as officers of the confederate States of America of certain high grade or above should not be eligible to any office under the Government of the United States.

149 On December 5, 1865, the second day of the 39th Congress, at the House of Representatives, Representative Stevens proposed following bill to amend the Constitution(39-1 Cong. Globe 10).

"All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color."

Then, on the next day of the day mentioned above, Representative Bingham proposed a bill to amend the Constitution so as to empower Congress to pass all necessary and proper laws to secure to all persons in every State of the Union equal protection in their rights, life, liberty, and property (39-1 Cong. Globe 14).

Furthermore, those Representatives submitted following bills, respectively, to the joint committee on January 12, 1866:

Bill by Bingham

"The Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property."

Bill by Stevens

"All laws, state or rational, shall operate impartially and equally on all persons without regard to race or color." (Kendrick, 46)

Those bills were discussed in the sub-committee made within the joint committee and united as follows, then submitted to the joint committee on January 20:

"Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property." (Id., at 51).

There was a proposal to the committee to discuss whether that bill should be submitted to Congress together with another bill to amend the Constitution concerning the allocation of the number of Representatives to States. However, the committee decided to treat those as mutually independent bills. Furthermore, the committee set up a new sub-committee on January 24 so as to deliberate the former bill again. The sub-committee submitted on January 27 to the joint committee a bill in the following form:

"Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every state full protection in the enjoyment of life, liberty and property; and to all citizens of the United States in any State the same immunities and also equal political rights and privileges." (Id., at 56).

After discussions on several amendments on the bill in the joint committee, there was a move to decide to submit the bill to Congress. However, it was not approved since there were the same number of yeas and nays, so the deliberation on the bill was to be continued.

On February 3, the same bill was deliberated again, and, at that time, a substitute bill which provided "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)" was approved (Id., at 61), and on February 10, that bill was finally decided to be submitted to both Houses of Congress (Id., at 62). (However, the public record of the bill which was submitted to the House of Representatives on February 13 didn't include the references to the provisions of the Constitutions. Cf. 39-1 Cong. Globe 806 (Senate), 813 (House).)

150 It was pointed out that when the 35th Congress discussed on the Oregon constitution concerning the admission of the Oregon Territory into the Union, Representative Bingham stated as follows:

At the first explanation on February 26, Representative Bingham pointed out that the wording of the bill was after the provisions of Article 4 Section 2 of the original Constitution and of the Fifth Amendment except for the part giving Congress a special legislative power, and he insisted that the cause of trouble was the fact that the power of the execution of those provisions were allocated to each State and its officers so that even when those provisions were violated by rebelling States, the Federal Government could not cope with those situations. Then, the Representative stated that taking those into consideration, the amendment was proposed for the purpose of giving to the whole people the care in future of the unity of the Government[151,152].

On February 28, Representative Bingham pointed out, despite that it had been affirmed that citizens of the United States had the privileges and immunities as the citizens in each State and that no person should be deprived of life, liberty and property without due process of law[153], the opponents were opposing the amendment to the Constitution to enforce the Bill of Rights by way of legislation by the Federal Congress on the ground that it might invade power of State[154]. Then, the Representative insisted that any State should not insist on its reservation of power to infringe the privileges or immunities of citizens under the Constitution that guaranteed equal enjoyment of those rights for all citizens[155].

Based on those above, Representative Bingham insisted that in order to protect the loyal white minority or the loyal but disfranchised colored majority in rebel States, the power to do so should be given to the Federal Congress[156]. The insistence of the Representative was, he explained in effect, the motive of the bill.

Paragraph 3 Opinion of Supporters of Bingham's Bill

The supporters of the bill first pointed out that the bill would amend the original Constitution so as to realize the intention of the Constitution better than before and to guarantee the rights of citizens of each State by making them also citizens of other States in the United States[157].

Second, it was insisted that, concerning the power of State and the rights of emancipated persons, the amendment bill intended to give the Federal Congress the legislative power to secure natural rights guaranteed by the Constitution as the nature of the citizens of the United States, but not to invade any power of State, and that this amendment was necessary in order to secure the rights of emancipated persons[158].

- Only persons who owed allegiance to the Government of the United States were the citizens of the United States.
- The allegiance should be one which requires the citizen not only to obey, but to support and defend, if need be with his life, the Constitution of his country.
- All free persons born and domiciled within the jurisdiction of the United States, were citizens of the United States form birth.

Furthermore, it was pointed out that when the 37th Congress discussed on the act to emancipate slaves within the District of Columbia, the Representative insisted, all persons born within the United States and owing allegiance to no other sovereignty should be natural-born citizens. Cf., Patrick J. Charles, Decoding the Fourteenth Amendment's Citizenship Clause: Unlawful Immigrants, Allegiance, Personal Subjection, and the Law, 51 Washburn L. J. 211, 221 (2012).

151 39−1 Cong. Globe 1033.

152 Id., at 1034. On this issue, Representative Bingham supplemented the explanation by quoting the case, Barron v. The Mayor and City Council of Baltimore (32 U.S. (7 Pet.) 243 (1833)). In the case, a plaintiff who had gotten damages from a construction work by a public cooperative established by Baltimore city claimed the compensation based on the Fifth Amendment of the Constitution of the United States. The Federal Supreme Court ruled that the target of the Federal Constitution was the Federal Government but not the government of each State, so the restriction of the power provided by the Constitution should be interpreted to be targeted at the Federal Government but not at State governments. Cf. 39−1 Cong. Globe 1089.

153 Id., at 1089.

154 Id.

155 Id.

156 Id., at 1094.

157 Id., at 1054 (Rep. Higby); Id., at 1063 (Rep Kelly). Representative Higby quoted there among the provisions of the original Constitution, Article 1, Section 8 of the same article, Article 4 Section 2 Clause 1, and Fifth Amendment, and Representative Kelly quoted Article 4 Section 4.

158 39−1 Cong. Globe 1088 (Rep. Woodbridge).

Paragraph 4 Opinion of Opponents of Bingham's Bill

The opponents of the bill insisted first that, concerning Article 4 Section 2 and Fifth Amendment of the Constitution Representative Bingham had referred to, the privileges and immunities of citizens provided by the original Constitution was planned to be protected by courts and a legislation by Congress for the execution of those provisions had been intentionally avoided, so the amendment bill would be against the original intention[159].

Second, since the representatives of the rebel States did not present at the Congress at that time, it was pointed out that to amend the Constitution in the way to affect those States without representation of those States would be inappropriate[160].

Third, concerning power of States, it was insisted that this amendment bill would make it possible for an act of the Unite States to amend or abolish acts of States, but the statutes of a State should be amended through the legislation of the State and, even when the amendment was desirable, not through that of the Union[161]. Moreover, it was also insisted that the amendment would centralize the power to the Federal Government so as for the Federal Government to have the primary legislative power concerning the rights of life, liberty and property and, as the result, the legislative power of States would be infringed[162].

Paragraph 5 Amendment and Rejection of the Bill

On February 28, Representative Hotchkiss stated that he could support the amendment bill as far as it meant that no State should discriminate between its citizens. However, he continued that, if the Federal Congress had power to legislate on the rights of life, liberty and property uniformly in all over the United States, when some persons who were like ones having participated the rebellion got to the status to be able to use such power of the Federal Government, acts established by such persons would be applied to all States of the United States. Then, he insisted that a desirable amendment would be to prohibit States from discriminating between its citizens, and proposed the postponement of the resolution on the subject for the time being[163].

Accepting the proposal by Representative Hotchkiss, Representative Conkling moved to postpone the voting on the amendment bill, which was approved by the House[164]. This amendment bill was ultimately rejected[165].

Subsection 2 Bill by Representative Stevens

The Congress deliberated the amendment bill concerning the allocation of Representatives which would be treated later in Section 2 of the Fourteenth Amendment of the Constitution, from January 22 to 31, 1866 in the House of Representatives, and from February 5 to March 9 of the same year in the Senate. This, so-called, Stevens bill, however, was, after all, rejected in the Senate[166].

Paragraph 1 Explanation by Representative Stevens

On January 22, 1866, in the House of Representatives, Representative Stevens, on behalf of the joint committee,

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159 Id., at app. 133 (Rep. Rogers).

160 Id., at 1057 (Rep. Randall).

161 Id., at 1064 (Rep. Hale). However, Representative Hale voted for the amendment at the final vote. Id., at 1095.

162 Id., at 1087 (Rep. Davis).

163 Id., at 1095 (Rep. Hotchkiss). The Representative pointed out there that the purpose of the Constitution was not only to give the majority power but also to restrict the power of the majority so as to protect the rights of the minority.

164 Id., at 1095.

165 Id., at 2980: cf. Flack, 59. Representative Bingham proposed indefinite postponement of a resolution on the bill based on the reason that the purpose of the bill would be overtaken by passing the Fourteenth Amendment at the House of Representatives, on which this article will see later. That proposal was approved. 39−1 Cong. Globe 2980.

166 At the 39th Congress, there were about thirty bills to amend the Constitution proposed in this regard, except for Stevens bill. Among them, it was only Stevens bill that was passed by any House. cf. Herman Ames, The Proposed Amendments to the Constitution of the United States, 371 (Lenox Hill Pub. & Dist. Co. 1970) (Burt Franklin 1896)

proposed following bill to amend the Constitution[167]. "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed; Provided, That whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation."[168]

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167 At the beginning of the session on December 5, 1865, Representative Stevens introduced, concerning the same matters, following proposals (39−1 Cong. Globe 10):

"Representatives shall be apportioned among the States which may be within the Union according to their respective legal voters: and for this purpose none shall be named as legal voters who are not either natural-born citizens or naturalized foreigners. Congress shall provide for ascertaining the number of said voters. A true census of the legal voters shall be taken as the same time with the regular census."

On January 9, 1866, the Representative proposed to the joint committee another bill where the definition of legal voters was amended as following: "and for this purpose none shall be considered as legal voters who are not either natural born or naturalized citizens of the United States, of the age of twenty-one years." (Kendrick, 41.) However, in the official record, it was stated that one day before the day above, namely, on January 8, a bill concerning allocation of Representatives proposed by Representative Blaine had been submitted from the House of Representatives to the joint committee, which had been the base plan of the proposal above. cf. 39−1 Cong Globe 136 (Rep. Blaine); Id., at 961 (Sen. Buckalew). Regarding the outline of the bill of Representative Blaine, cf. Flank, 98.

In responding to the proposal, during the discussion at the joint committee, following two points were commented:

- The word "male" was added just before the word "citizen". Although that word had not been used in the bill discussed just after the proposal, it was adopted in the provision of the Fourteenth Amendment.
- The proposal to add to the requirements for the legal voters a condition "who can read and write" was rejected.

The resolution on the bill was postponed, and on January 12, further bills concerning the same subject were moved by four committee members (Kendrick, at 43).

Morrill's Bill: "Representatives and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers of persons, deducing therefrom all of any race of color, whose members or any of them are denied any of the civil or political rights or privileges."

William's Bill: "Representatives and Direct taxes shall be apportioned among the several States of the Union according to their respective numbers, excluding negros, Indians, Chinese, and all persons, not white, who are not allowed the elective franchise by the Constitution of the States in which they respectively reside."

Conkling's Bill: "Representatives and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers, counting the whole number of citizens of the United States: provided that whenever in any State civil or political rights or privileges shall be denied or abridged on account of race or color, all persons of such race or color shall be excluded from the basis of representation or taxation."

Boutwell's Bill: "Representatives and direct taxes shall be apportioned among the several States, which man be included within this Union, according to the respective number of citizens of the United States in each State; and no State shall make any distinction in the exercise of the elective franchise on account of race or color."

To make the joint committee's Bill from those bills, a subcommittee was established. The subcommittee submitted a bill of three parts as following on January 20(Id., at 50).

Article A: "Representatives and direct taxes shall be apportioned among the several States within this Union, according to the respective numbers of citizens of the United States in each State; and all provisions in the Constitution or law of any State, whereby any distinction is made in political or civil rights or privileges, on account of race, creed or color, shall be inoperative and void."

Article B: "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of citizens of the United States in each State; provided that, whenever the elective franchise shall be denied or abridged in any State on account of race, creed or color, all persons of such race, creed or color, shall be excluded from the basis of representation."

Article C: "Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property."

The subcommittee proposed the bill intending that either A or B, combining with C should be submitted to the Congress as the bill of the joint committee. The joint committee decided to treat the Article C as an independent bill and to adopt Article B as the joint committee bill so as to submit it to the Congress. Moreover, according to the motion by Representative Stevens, a bill providing that "citizens of the United States" should be construed to mean all persons born in the United States or naturalized, excepting Indians, was proposed. Against that, Representative Conkling moved an amendment bill to delete the words "citizens of the United States in each State" then to insert in lieu thereof the words "persons in each State, excluding Indians not taxed". The latter proposal was adopted, so that the Stevens Bill was withdrawn. Finally, the bill after amendment was submitted to the Congress.

168 39−1 Cong. Globe 351.

The Representative gave such an explanation on the bill that it proposed to change the present basis of representation to representation upon all persons, with provisos that, wherever any State excluded a particular class of persons from elective franchise, the number of the members of the excluded class should be subtracted from the basis number of representation[169].

In addition to the explanation by Representative Stevens, Representative Conkling gave further explanation as follows.

He insisted, the fundamental principle provided by Articles I, Section 2 of the Constitution should be interpreted to be that the government of a free political society belonged to its members and not to others, and that, if others were allowed to share in its control, they did so by expressed concession, not by right[170]. After that, he explained that slaves had not been members of that political society which formed the constitution of the United States since they had been without personal liberty, and therein they had been without a natural right, and, in effect, without political right, for only a fraction of their political rights had been to be used through their masters[171]. Then, he explained the problematic situation as follows: Emancipation of the former slaves vitalized only their natural rights, but not political rights as their political abilities were questioned. They never had political power. Their masters had a fraction of power as masters. But there were neither masters nor slaves. "The whole relationship in which the power originated and existed is gone. Does this fraction of power still survive? If it does, what shall become of it? Where is it to go?"[172].

Then, based on the consideration described above, the Representative discussed possible policies to solve the problem above. He argued that although, according to Article 1, Section 2 of the Constitution of the United States, a person who had been emancipated to be a freeman should be counted into the basis of representation as five fifths, not three fifths like before, the number of representatives would increase, as a result, for the people who thought such emancipated persons should not be suitable for participating to the free government, which would not be a desirable result[173]. Then, he presented three thinkable plans to cope with the situation. The first plan was to make the basis of representation in Congress and in the Electoral College consist of sufficiently qualified voters. The second was to deprive the States of the power to disqualify or discriminate politically on account of race of color. The third was to leave every State perfectly free to decide for itself, not only who should vote, but who should belong to its political community in any way, and thus to say who should enter into its basis of representation and who should be shut out, while, in any State contained a class unfit or supposed to be unfit for political rights or unworthy to act politically in the States, these classes should not be put upon the nation as fit and worthy to be represented in the nation's councils[174].

The Representative commented on those plans as follows. The first plan might cause abusive increase of the basis of representation by States and even if some uniform standards were adopted, it would not work as expected because of the diverse conditions on the populations among States[175]. As for the second plan, it would not be approved by each State because there was a strong opposition that it might cause infringement of power of State[176]. The third and last plan was suitable to the principle that representation did not belong to those who had not political existence but to those who had. In this regard, the intention of the bill was in accordance with the third plan[177].

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169 Id., at 351.

170 Id., at 356.

171 Id.

172 Id.

173 Id., at 357. There, Representative Conkling presented a detailed table and showed how and to what degree the numbers of the representatives in the Slave States would increase.

174 Id.

175 Id., at 358. Representative Conkling pointed out there that, when the requirement for voting was set to be male citizens of the United States twenty-one years old and upward, it would shut out four fifths of the citizens of the country which consisted of women and children, from the basis of representation and taxation.

176 Id.

177 Id.

The Representative also stated at the same time that, although there was also a plan to adopt the number of "citizens of the United States" as the basis of the apportionment, that plan was not adopted since the Constitution provided "persons" had always constituted the basis, and in order to make it easier for the States that counted foreigners into the basis of the apportionment to approve the bill[178].

Paragraph 2 Opinion of Supporters for Stevens' Bill

In the process of the discussion, the supporter side of the bill presented the interpretation that the amendment bill was intended to prevent some persons who judged some other persons to be unsuitable to use political power by themselves, from using such political power by representing such other persons[179].

In addition, as merits of the amendment bill, it was enumerated that its establishment would weaken the political influence of Southern States so as to protect colored people[180], and that the bill would secure equality among States in the United States and equality of citizens[181].

Paragraph 3 Opinions of Opponents against Stevens' Bill

Opponents of the amendment bill stated that the bill required Southern States to give black people the suffrage[182], that the bill would infringe the power of each State[183], that the bill was based on the party interest of the Republican Party[184], that whether black people had the ability to participate in politics was questionable[185], or others.

Furthermore, in the process of the discussion, there were opinions contrary to those above, namely, that the bill was insufficient in that it didn't prescribe other matters than racial discrimination[186], or that the bill might, in reverse, cause to recognize the existence of racial discrimination[187].

Paragraph 4 Conclusion of Discussion in the House

Based on the discussion above, the joint committee reconsidered the amendment bill. While the part of "direct taxation" was deleted[188], it was approved in the end[189].

In addition, there was also an argument that, from the view of equality of the value of vote, the number of persons having suffrage should be the basis of representation[190]. However, it was rejected at the stage of resolution on whether it should be presented as an alternative to the amendment bill[191].

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178 Id., at 359. On this issue, Representative Stevens pointed out just before the resolution at the House of Representatives that the reason of the change of the words from "citizens" to "persons" was to avoid excluding the method to count foreign population into the basis. 39−1 Cong. Globe 537.

179 39−1 Cong. Globe 404 (Rep. Lawrence).

180 Id., at 407 (Rep. Pike).

181 Id., at 429 (Rep. Bingham).

182 Id., at 353 (Rep. Rogers)

183 Id., at 387 (Rep. Trimble); Id., at 424 (Rep. Eldridge); Id., at 455 (Rep. Kerr); Id., at 484 (Rep. Raymond).

184 Id., at 449 (Rep. Harding of Kentucky).

185 Id., at 448 (Rep. Harding); Id., at 459 (Rep. Wright); Id., at app. 63 (Rep. Hogan).

186 Id., at 380 (Rep. Brooks). Representative Brooks also asked for prohibition of sexual discrimination.

187 Id., 376, 386 (Rep. Jenckes); Id., at 383 (Rep. Farnsworth); Id., at 385 (Rep. Baker); Id., at 404 (Rep. Lawrence); Id., at 406 (Rep. Shellabarger); Id. (Rep. Eliot); Id., at app. 298 (Rep. Schenck); Id., at app. 57 (Rep. Julian). However, Representatives Farnsworth, Baker, Lawrence, Shellabarger, Schenck and Julian voted for the bill at the final voting.

188 Id., at 535. On the discussion in the joint committee, cf Kenrick, 58.

189 39−1 Cong. Globe 538.

190 Id., at 380. (Rep. Orth); Id., at 404 (Rep. Lawrence); Id., at 407, 535 (Rep. Schenck).

191 Id., at 538. A proposal which was presented by Representative Schenck but rejected finally, provided that representatives should be apportioned among several States according to the number of male citizens of the United States over twenty-one years of age having the qualifications requisite for the electors of the most numerous branch of the State Legislature.

Paragraph 5 Explanation for Stevens' Bill at the Senate

The discussion at the Senate began, as far as according to the record, with a proposal by Senator Doolittle of a bill to change the basis of apportionment to be the number of male electors of the age of twenty-one years or more, admitted by State legislature[192], and a proposal by Senator Sumner of a bill to prohibit discrimination in political rights by race or the like and to declare the equality of enjoyment of such rights in an act but without amendment to the Constitution[193]. Furthermore, according to the official record, Senator Henderson also proposed an amendment to the Constitution, namely, "No State, in prescribing the qualifications requisite for electors therein shall discriminate against any person on account of color or race."[194]

After the presentations of those amendment proposals, Senator Fessenden, representing the joint committee, explained the amendment bill as follows[195].

First, the Senator pointed out that the abolishment of slavery made it necessary to amend the Constitution[196], and that the most problematic matter concretely was the provision prescribing the apportioned number of the Representatives to States. Then, the Senator stated that, although that provision could keep being applied without amendment, States still kept the power to determine the qualifications for voters, which might cause, as easily imaginable, former slave States not to give freed men the suffrage. So, he continued, some measures against such a situation would become necessary[197].

The Senator then stated that, although it would have been possible directly to prohibit each State from discriminating on account of race or color so far as regards civil and political rights, freedmen having just be

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192 Id., at 673.

193 Id., at 674 (Sen. Sumner). Senator Sumner pointed out in the speech, with detailed consideration of the will of the legislators of the Constitution, following points (Id., at 682).

- "Republican Government" provided in the Constitution had naturally the facts, firstly that all persons had equal rights, and secondly that the government based its legitimacy on the agreement by the ruled people.
- Slavery was positioned as an exceptional existence in the Constitution of the United States.
- The Constitution did not admit racial discrimination.

Furthermore, the Senator insisted that suffrage was a universal right subject to restrictions only by the age, character (which seems to mean a felon, seeing from the fact that the Senator referred there to exclusion a person of infamous life), registration or address, and that Congress could and should secure it in compliance with Republican Government Security Clause and Section 2 of the Thirteenth Amendment of the Constitution. Moreover, the Senator delivered a speech again in the discussion process of the bill and then pointed out, as the reasons to oppose against the bill, following points. (39−1 Cong. Globe 1224)

- It was allowing discrimination based on race.
- It violated the principle since the establishment of the Constitution, namely, a principle "No taxation without representation".
- It was intending to strengthen the power of State which was the cause of the Civil War.
- It might allow oligarchy, class system or dictatorship based on race.
- As the result, it would take in the Constitution of the United States a misunderstanding that the Government of the United States was that of white people.
- It allowed to make use of the concept "Race" as a condition of suffrage.
- It tied the hand of Congress in its interpretation of a Republican Government under the guarantee clause.
- It would restrict the use of the power under proper conditions for abolition of slavery in the United States which would be admitted under the Thirteenth Amendment of the Constitution.
- The adoption of the bill would, in the end, make the rule of the rebels over the people having been allegiant to the Union everlasting in the former rebel States.
- The bill was an immoral and improper compromise in history that would become a serious infringement of Human Rights.

Furthermore, the Senator added following points. (Id.)

- The number of electors should be the basis of the apportionment of Representatives (on the ground that representational democracy could be interpreted as a substitutional system of direct democracy).
- It should be a duty of the Congress to do necessary actions for security of equal enjoyment of civil and political rights of all persons in both voting and justice systems (based on the republican government clause and the Thirteenth Amendment of the Constitution of the United States).

194 39−1 Cong. Globe 702.

195 Id., at 703.

196 Id.

197 Id.

emancipated from slavery could not be said to fit to be admitted to the exercise of the right of suffrage, so that such a way might cause an oligarchy in the so-called Slave States[198]. Furthermore, the Senator pointed out also that, although a provision to prohibit discrimination by any State on account of race or color should be introduced in the Constitution in the future, the suffrage could not be taken as one of natural rights and the proposal of such a provision would, if any, not be accepted by States at present[199].

The Senator stated that the joint committee, as possible solutions of those problems described above, drafted another bill which adopted the number of the voters or citizens having suffrage as the basis for the apportionment of Representatives[200]. However, against the former one, namely that which took the number of voters as the basis, there were oppositions that the original Constitution itself also took the population as the basis, and that since the rate of male persons of the age of twenty-one years or more in the population was various from State to State, it would cause unfair treatments among States. In addition, concerning a bill taking the number of citizens as the basis, the Senator pointed out a problem that, since some States were giving the right to vote also to foreigners, it could not be changed[201]. Then, the Senator explained that the latter bill which took the population as the basis was drafted taking all the problems about the former into consideration, so that all persons of each State could be counted into the basis number[202].

Paragraph 6 Opinions of Supporters for Stevens' bill at the Senate

Opinions of the supporter of Stevens' Bill were as follows.

First, in relation to the rights of black people, there was an opinion that black persons should not be merely given the rights but also admitted to have suffrage in order to secure their own rights[203]. In relation with that opinion, it was stated that, as the result of abolishment of slavery, former slaves had become not merely freedmen, but also free men and citizens of the United States, so that they should have, of course, the right to be represented in Congress and it was reasonable that any State would be rejected the apportionment of the Representatives corresponding to the degree the State negated that fact[204]. Moreover, there was also an opinion that it couldn't be approved the persons who forced black people into servitude by black code etc. would vote in Congress representing the people they were oppressing[205].

Next, it was stated that considering the contributions of black persons in the Civil War, the Federal Government couldn't be said to be a government of white people[206]. Further on this point, there were opinions that, when black persons who had fought for the Federal Government were asking for liberty, the Federal Government should not

198 Id., 703–704.
199 Id., at 704.
200 Id.
201 Id., at 705.
202 Id.
203 Id., at 834 (Sen. Clark); Id., at app. 156 (Sen. Morrill); Id., at app. 96 (Sen. Williams).
204 Id., at app. 154 (Sen. Morrill). Senator Morrill stated there as following. The Senator said that the rebel States rejected the civil and political rights of former slaves because such people were not citizens of the United States based on the fact that each State had the power to determine whether a person should be a citizen of the United States. The Senator pointed out that, however, since slavery had been abolished, former slaves had become freemen and citizens of the United States. Then, he stated that since they had become citizens of the United States, the Federal Government had a duty to secure the rights of such people. The Senator also stated that as the right to vote was an important nature of a citizen of the United States, if the power to determine the requirements for such a right was left exclusively to each State, each State would, as the result, have the power to infringe citizenship of the United States. Furthermore, the Senator pointed out, Article 1 Section 2 Clause 3 of the Constitution provided not merely that population should be the basis of the apportionment of Representatives, but that the number of free persons and the three fifths of the other persons should be counted as the basis, so it could be said to adopt the number of free persons as the basis except for "the other persons" than free ones. Moreover, the Senator also pointed out that after the abolition of slavery, a State where many of the citizens were not allowed to enjoy the rights as a citizen could not be said to have a republican government.
205 39–1 Cong. Globe app. 154 (Sen. Morrill).
206 Id., at 832 (Sen. Clark).

deprive them of the chance[207], and that it couldn't be acceptable for the black persons who had devoted themselves to protecting the Union to be deprived of the right to vote while the white persons in the rebel States who had rebelled against the Union were going to exercise their right to vote without any restriction[208].

In relation to the federal system, it was pointed out that, since the number of free persons was taken as the basis on the apportionment of representatives in the amendment bill, the number of the free persons whose suffrage was denied on account of color or race was simply subtracted from the basis number, and the bill didn't mention the right to vote so that the power of each State on it and the range of power of the Union were left unchanged[209]. On the other hand, with regard to the relation between the Union and the Southern States, on the problem that the emancipation of slaves might rather extend the political influences of the Southern States as Representative Stevens pointed out at the House of the Representatives, it was insisted that it could not be approved for the rebel States being hostile to the Union in the Civil War to extend, as the result, their political influences within the Union[210].

Besides, concerning Henderson's Bill and Doolittle's Bill which had been proposed at the early time of the discussion in the Senate, following opinions were stated, namely, Henderson's Bill might allow each States to discriminate on the other grounds than race, and Doolittle's Bill would not be accepted by States because it did not respect the political existence of females and persons of the age under twenty-one years[211].

Paragraph 7 Opinions of Opponents against Stevens' Bill at the Senate

Opinions of the Senators who opposed to Stevens' Bill were as follows.

In relation to the federal system, it was insisted that it should be the right of State to regulate suffrage[212].

In relation to the governmental form of States, it was insisted that the republican form of government provided by the Constitution[213] should be interpreted to allow various forms of government and not to secure one special form of the government of State, and that the provision of the Constitution required the Union to deal with the problems when a republic form of government of a State was in danger by a rebellion or the like, but could not present the ground of the Power of the Union to force States to give black people suffrage[214]. Regarding the relationship between the Northern and Southern States, it was pointed out that, as the number of persons who had not suffrage but would be added to the basis number of the apportionment of representatives would be unchanged for the Northern States but decreased for the Southern States according to the amendment bill[215], the purpose of this bill should be merely to keep an advantage of the Republican Party to the Democratic Party[216].

In relation to the original Constitution, it was insisted that there should be no need to change the way of thinking adopted by the original Constitution. Concretely, there was an opinion that the future disappearance of slavery was

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207 Id., at app. 156 (Sen. Morrill).

208 Id., at 833 (Sen. Clark).

209 Id., at 1256 (Sen. Wilson).

210 Id., at app. 152 (Sen. Morrill).

211 Id., at app. 97 (Sen. Williams). In addition, Senator Wilson pointed out following problems of Henderson's Bill and Doolittle's Bill. Id., at 1257 (Sen. Wilson).

- Taking the present situation into consideration, it was unthinkable that the bill of Henderson was approved by States.
- According to the bill of Doolittle, the number of persons who were not born in the United States and not naturalized yet would be deducted from the basis number, so that the quantity of the apportionment of representatives would be decreased for the Northern States and increased for the Southern States.

212 Id., at 765 (Sen. Johnson); Id., at 880(Sen. Hendricks); Id., at 1285(Sen. Cowan). Senator Johnson stated that it could be changed by the amendment of the Constitution but Senator Cowan insisted that against it. Id., at 1286.

213 U.S. Const. art. IV. § 4.

214 39-1 Cong. Globe app. 149 (Sen. Saulsbury).

215 Id., at 877 (Sen. Hendricks). According to the original Constitution, the three fifths of the number of slaves are counted into the basis number of the apportionment of representatives (cf. U.S. Const. art I. § 2, cl. 3). But according to the amendment bill the number of persons who are not given suffrage will not be counted into the basis number, so that the number of persons who don't have suffrage but are counted into the basis number will be decreased.

216 39-1 Cong Globe 878 (Sen. Hendricks); Id., at 963 (Sen. Buckalew); Id., at app. 145 (Sen. Saulsbury).

foreseen at the time of the establishment of the Constitution, and it should be intended for former slaves to be counted as free men into the representative basis whenever emancipation took place in a Sate, therefore, this amendment would be against the thought of the persons who had established the Constitution[217]. In addition to that, there was an opinion that, while what was questioned was whether it was appropriate to adopt the population of each State as the basis of apportionment of representatives, since the original Constitution also adopted that method and it was simple and convenient in practice, it could be thought to be a suitable way, but the bill would damage the equality among States[218].

In relation to black people, there were opinions that white and black people were of so different races that they should not compose one political community[219] and that, while it was allowable to make black people enjoy the rights as free men, suffrage should be given to them only after they had overcome the difference rooted in their nature from white people[220].

Besides, there was such a critic against the bill that, while the original Constitution adopted the population of a State as the common basis of the apportionment of representatives and taxation, this bill separated those and changed only the basis of the apportionment of representatives without regulation concerning tax, which would be against the principle, no Taxation without Representation[221].

Different from the opinions above, the Senators who expected rather the enlargement of the electorates criticized that the purpose, namely, the realization of the suffrage of black people could not be attained by the rule this bill was adopting, in the States where the black population was small[222]. Furthermore, it was insisted that what should be attained by the amendment to the Constitution would be to secure the suffrage not only of black people but also of all citizens all over the United States[223].

In addition to all the opinions above, in relation to the Thirteenth Amendment of the Constitution, it was stated that the purpose of the bill could and should be realized by enacting statutes by Congress based on the Thirteenth Amendment[224]. Furthermore, it was pointed out that the bill would negate the regulative power of the Union in the end, so that the power of States to deny the right to vote of black people would be admitted[225].

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217 Id., at 962 (Sen. Buckalew). Besides, Senator Buckalew stated following points.
- Although this amendment bill should be formally applied to all black people, the explanation of the aim concerns only former slaves.
- This bill based the proposal on the population ratio without considering the high rate of mortality of black people since the Civil War.
- While this bill deducted from the basis number the number of persons who were discriminated on account of race, a regulation of effectively same result could be attained without apparently appealing to the provisions of the bill.

In addition, the Senator pointed out a procedural problem whether the present members of Congress and representatives of States who had not been through the election for asking the public opinion on the bill could be said to have legitimacy to establish this amendment. He continued that, if the amendment had been established under the present situation, the effectivity would be questioned.

218 39−1 Cong Globe 962 (Sen. Buckalew).

219 Id., 880 (Sen. Hendricks).

220 Id., at 766 (Sen. Johnson).

221 Id., at 811 (Sen. Sumner); Id., at app. 118 (Sen. Henderson); Id., at 962 (Sen. Buckalew).

222 Id., at app. 119 (Sen. Henderson).

223 39−1 Cong. Globe app. 100 (Sen. Yates).

224 Id., at app. 100−103 (Sen. Yates). In this speech, Senator Yates pointed out following points concerning citizenship.
- If the power of decisions on the matters concerning citizenship were given to each State, the Union would become unable to secure the safety of citizens whose existence was its foundation, so that a stratification of society would be formed, which could be a cause of conflict in the future.
- Although black people were formerly thought to be unable to become citizens without amendment to the Constitution, since it was amended by the Thirteenth Amendment of the Constitution, black people should have been free men so as to become constitutive members of the United States as the citizens.

He continued that suffrage should be necessary in order to secure the rights citizens should be able to enjoy.

225 Id., at app. 119 (Sen. Henderson); Id., at 1182 (Sen. Pomeroy).

Paragraph 8 Resolution at the Senate

Henderson's Bill was rejected by a vote on March 9, 1866[226]. Next, Sumner's Bill was rejected, but, meanwhile, Clark's Bill was proposed. This bill was one to amend the word "electors" in Doolittle's Bill to be "citizens"[227]. Senator Clark explained that the intention of the amendment bill was to propose to take the number of voters as the basis of apportionment[228].

On the Clark's Bill, Senator Creswell pointed out that the word "citizens" was not suitable since it might cause disputes on the meaning, and that citizens could be interpreted to include persons who had taken part in the rebellion so as to give them suffrage, which should be undesirable[229].

On the other hand, concerning the point as above mentioned, Senator Trumbull insisted that by adopting the word citizens, it could be made clear, if a State would give black people suffrage so as to expand the apportionment of representatives in Congress, then the State should also make the black people citizens[230]. Moreover, the Senator insisted, against the opinion of Senator Johnson who pointed out to use the word citizens would mean to exclude foreigners, that only persons who had citizenship should be allowed to take part in the elections in the future[231].

Although some other amendment bills were proposed, one of which, for example, proposed to insert a substantially same phrase as that of Senator Henderson's Bill, all of those bills had been rejected, together with the bill of the joint committee for reconstruction[232].

Subsection 3 Discussion regarding the Fourteenth Amendment Bill of the Constitution at the House of Representatives

Concerning the bill of amendment to the Constitution proposed by the joint committee for reconstruction on April 30, 1866, the outline of the opinions exchanged in the House of Representatives from May 8 to 10 was as follows.

Paragraph 1 Explanation of the Purpose in the House of Representatives

At the beginning, Representative Stevens gave a preliminary remark that the bill was not necessarily ideal, for there was need for the joint committee for reconstruction to choose a realistic plan. He explained the aim of each provision in the bill as follows[233].

The Representative stated that the first section of the amendment bill banned each State from infringing the privileges and immunities and violating life, liberty or property of the citizens of the United States, and from negating equality under the law for all persons within the jurisdiction, seeing that both matters were referred to in the Declaration of Independence and the organic law. The Representative continued that, although those infringements were formerly concerning the actions of Congress but not involving the actions of States, this amendment would give the Federal Congress the power to force States to enforce the law equally on all persons. Furthermore, the Representative stated also that this amendment bill was intended to secure by the Constitution what formerly was secured by Civil Rights Act, so that it would be kept secured regardless of the changes of the members of Congress[234].

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226 Id., at 1284.

227 Precisely, while Doolittle's Bill regulated also the apportionment of direct tax, Clark's Bill did not. Cf. 39−1 Cong. Globe 673.

228 39−1 Cong. Globe 1284.

229 Id., at 1285.

230 Id.

231 Id.

232 Id., at 1289.

233 Id., at 2459. Explained above is only the part concerning the section 1 or 2 of the explanation by Representative Stevens.

234 Id. Concerning the relation between Civil Rights Act and the provisions of this amendment, Representative Finck, after the end of the explanation by Representative Stevens, still pointed out that, if this provision was approved as an amendment to the Constitution, it would mean admitting the fact that the establishment of Civil Rights Act had been out of the power of Congress (Id., at 2461). Against that opinion, Representatives Garfield and Thayer expressed their opinion supporting the explanation of Representative Stevens (Id., at 2463, 2465).

Next, Representative Stevens explained, Section 2 provided that, if any State excluded any of its adult male citizens from the elective franchise, or abridged that right, the State should forfeit its right to representation in the same proportion. He continued on this point that the effect of the provision would be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive, so that the States would, sooner or later, chose the former alternative[235].

Paragraph 2 Opinions of Supporters for the Amendment Bill

Supporters of the amendment bill insisted as follows.

First, an opinion was presented that Section 1 of the bill should be interpreted to give the Union the power to secure each citizen inhabiting each State[236], which concretely meant that, as the Federal Congress needed to secure the right of equality of the citizens of the United States within the power given to it by the Constitution, the first section of the bill gave such power to Congress[237].

Next, concerning Section 2, it was pointed out that the reconstruction of the United States would be made possible by giving suffrage to black persons and restricting suffrages of the persons who had participated in the rebellion[238]. There was also an opinion that seeing from the viewpoint of the relation between a State and the Union, the strength of power of a State should be determined by the ratio of the persons who could participate in elections, but not by the ratio of the persons who were inhabiting the State with the suffrage being denied, so that Section 2 could be supported[239]. There was an additional opinion that since former slaves were not counted as the basis of representation for State politics in former rebel States, it could not be accepted that such persons would be counted as the basis of representation of those States in the Federal Congress[240].

Besides, from the side of the supporters of the expansion of electors, it was stated that, although it was regrettable not to be able to provide in the Constitution that all intellectual adult citizens of the United States should have suffrage comparable to Natural Rights, the amendment bill could be supportable as a realistic compromise[241].

Paragraph 3 Opinions of Opponents against the Amendment Bill

Opinions of the opponents against the bill were generally as follows.

In relation to the federal system, it was pointed out that the purpose of the bill was to invade the power of States that had been recognized as being necessary for protection of liberty and property of people at the establishment of the Constitution, and, furthermore, to restrict the suffrage of people in rebel States so as to make them obey the current ruling party, so that, if the bill would be approved, the Union would become impossible to be restored[242]. Further on this point, there were insisted opinions that Section 1 of the bill should make it possible for the Federal Government to interrupt State governments by providing the protection of the privileges and immunities of citizens of the United States, which would destroy the power of States and the nature of the Union that should be the foundation of the federal system[243], and that Section 2 of the bill was forcing the former rebel States to give black people suffrage, which those

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235 Id., at 2459.

236 39-1 Cong. Globe 2498 (Rep. Broomall); Id., at 2542 (Rep. Bingham). Representative Bingham stated there that the purpose of Article 1 should be to protect the privileges and immunities of all citizens of the United States and the rights all persons naturally had, from infringement or denial by the unconstitutional action of any State.

237 39-1 Cong. Globe 2502 (Rep. Raymond).

238 Id., at 2532 (Rep. Banks).

239 Id., at 2511 (Rep. Eliot).

240 Id., at 2464 (Rep. Thayer); Id., at 2498 (Rep. Broomall); Id., at 2535 (Rep. Eckley).

241 Id., at 2462 (Rep. Garfield); Id., at 2469 (Rep. Kelly).

242 Id., 2500 (Rep. Shanklin); Id., at 2530 (Rep. Randall (of Pennsylvania)). Representative Shanklin pointed out that if this bill would be approved, people of the former rebel States would no longer have any interest in staying in the Union.

243 Id., at 2538 (Rep. Rogers).

States would not accepted. Therefore, such a bill as being unlikely to be approved should not be proposed[244].

As a criticism to the discussion process of the amendment bill, it was insisted, in spite that a provision of the amendment of the Constitution provided "no state, without its consent, shall be deprived of its equal suffrage in the Senate"[245], the representatives of the former rebel States were not admitted to be present at Congress, therefore, the proposal of amendment to the Constitution under such a situation would not be allowable[246]. Besides, there were also various opinions on the third section presented by many representatives[247]. Finally, the House of Representatives passed the bill on May 10, 1866[248].

Subsection 4 Discussion on the Fourteenth Amendment Bill at the Senate

Paragraph 1 Explanation of Proposal by Senator Howard

Responding to the proposal by Senator Fessenden on April 30, Senator Howard gave an explanation regarding the intention of the proposal at the Senate on May 23[249]. The outline of it was generally as follows[250].

The Senator explained at first the section 1 of the amendment bill.

First, he stated that the first clause of Section 1 of the amendment bill related to the privileges and immunities of the citizens of the United States as such, and as distinguished from all other persons not citizens of the United States[251]. He continued that, although those privileges and immunities of citizens of the United States could not be clarified, the second section of the fourth article of the Constitution and the personal rights guaranteed and secured by the first eight amendments of the Constitution would be included in them[252]. Furthermore, the Senator stated that, while the privileges and immunities guaranteed by the Constitution had been solely for citizens of the United States and not thought as any restraint on State legislation so far[253], the object of the first clause of the section 1 of the amendment bill was to restrain the power of the States and compel them at all times to respect the privileges and immunities of citizens of the United States, which were great fundamental guarantees of the Constitution[254]. In addition, the Senator explained that it was the fifth section of the amendment bill that was giving Congress authority in order to ensure for States respect the privileges

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244 Id., at 2538 (Rep. Rogers).

245 U.S. const. art. V.

246 39−1 Cong. Globe 2461 (Rep. Finck).

247 Concerning Section 3, Representative Stevens stated that the provision inhibited the participation of rebels in the election of members of Congress and that of President, which he himself thought too tolerant of the rebels (Id., at 2460).

The supporters of that provision insisted that the provision like this was necessary for the welfare and relief of the Union (cf. ex., Id., at 2509 (Rep. Spalding)). On the other hand, the opponents against this provision insisted that the provision would exclude many people of the former rebel States from executing the right to vote, so that the approval of the provision would be made difficult, which would hinder the return of the former rebel States to the Union (cf. ex. Id., at 2502 (Rep. Raymond)).

Finally, the provision was put to the vote without any amendment, together with all other provisions. (Id., at 2545)

248 39−1 Cong. Globe 2545.

249 From April 30 to May 23, the following procedures concerning the proposed amendment bill were taken at the Senate.

On May 2, in the discussion on that bill concerning attendance of the Congress members from the former rebel States which was among the proposals accompanying the main amendment bill, Senator Dixon proposed, as a substitute for the bill and all of the resolutions reported by the joint committee on reconstruction, a bill of such a resolution of the joint committee as to require the admission of every State to its share in public legislation whenever it present itself, not only in an attitude of loyalty and harmony, but in the persons of representatives whose loyalty could not be questioned under any constitutional or legal test. (39−1 Cong. Globe 2332).

Next, on May 10, it was notified that the bill had been passed by the House of Representatives. (Id., at 2530).

On May 14, Senator Stewart proposed an amendment bill which inserted the definition of citizen and deleted the section 3 of the original bill. (Id., at 2560).

On May 23 and after, the subject of the discussion at the Senate had been focused on the amendment bill which the House of Representatives had passed.

250 Id., at 2764.

251 Id., at 2765.

252 Id. Senator Howard quoted there the judgement of the case, Corfield v. Coryell (4 Wash. C. C. 371, 380 (U.S.C.C.Pa., 1823)).

253 39−1 Cong. Globe 2765.

254 Id.

and immunities of citizens of the United States in concrete cases[255].

Second, the Senator stated that the last two clauses of the first section of the amendment bill disabled a State from depriving not merely a citizens of the United States, but any person, whoever he might be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State[256]. The Senator also stated that the first section of the proposed amendment did not give any person the right of voting which was not, in law, one of the privileges or immunities secured by the Constitution, but merely the creature of law[257].

Third, the Senator explained that the second section of the amendment bill neither recognized the authority of the United States over the question of suffrage in the several States at all, nor secured the right of suffrage to the colored race[258]. Then, presupposing as above, the Senator explained the present situation as follows. That is, formerly under the Constitution, while the free States were represented only according to their respective numbers of men, women, and children, all of course endowed with civil rights, the slave States had the advantage of being represented according to their number of the same free classes, increased by three fifths of the slaves whom they treated not as men but property[259]. The Senator then insisted that, while after the abolishment of slavery, a former slave should be counted as one man into the basis number of representation under the present Constitution, so that the number of Representatives from once slaveholding States would be increased, those States still had been excluding from the ballot the whole of their black population, so it could not be endurable to increase the Representatives of the late slaveholding States under such a situation[260]. Then, he continued that the joint committee for reconstruction thought it wiser to adopt a general principle applicable to all the States alike, namely, that where a State excluded any part of its male citizens from the elective franchise, it should lose Representatives in proportion to the number so excluded[261]. Further on this point, the Senator stated that the clause applied not to color or race at all, but simply to the fact of the individual exclusion. He continued that the committee did not adopt the principle of making the ratio of representation depending upon the number of voters, for it so happened that there was an unequal distribution of voters in several States. However, it did adopt the population as the basis which the Constitution itself originally framed[262]. In addition, the Senator explained that, while those provisions of the amendment bill would force the former slave States to admit their colored population the right of suffrage, they should be applied not exclusively to those States but also to all States without distinction[263].

Paragraph 2 Discussion on Section 1 of the Amendment Bill

After the explanation given by Senator Howard, the discussion began. Concerning the first section of the amendment bill, the outline of the discussion was as follows[264].

On the same day as Senator Howard gave the explanation, Senator Wade proposed to amend the provision as follows[265].

"No State shall make or enforce any law which shall abridge the privileges or immunities of the persons born in

255 Id., at 2766.
256 Id.
257 Id. Representative Bingham also stated the almost same opinion at the House of Representatives. Id., at 2542.
258 Id., at 2766.
259 Id.
260 Id.
261 Id., at 2767.
262 Id.
263 Id.
264 On the section, Senator Yates proposed that there should be some additional clause which said that any provision in the forgoing sections should not affect the rights, franchises, or privileges of any inhabitants of the United States or a State or a Territory of the United States guaranteed by the constitutional amendment abolishing slavery within the United States, in force on the eighteenth day of December, 1865. Regarding this proposal, the Senator explained that it could avoid the infringement by courts on the rights which had already approved before this amendment. 39-1 Cong. Globe 3037.
265 39-1 Cong. Globe 2768. Wade's Bill consisted of four sections, and the second section prescribed the apportionment of Representatives, the third prescribed the debt coming from the rebellion, the fourth prescribed the power of Congress for the enforcement of the amendment provisions.

the United States or naturalized by the laws thereof; 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 law."

The Senator pointed out on the amendment that, although there had been a deal of uncertainty about the meaning of the word "citizen" used in the first section of the bill by the joint committee, undesirable interpretations could be avoided by striking out the word "citizens" and prescribing like the first clause of his proposal[266].

This proposal by Senator Wade was not put to the vote.

On May 29, Senator Howard proposed an amendment to insert into Section 1 of the bill the words, "All persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside"[267].

The Senator explained the purpose of his proposal as follows: This amendment was simply declaratory of the law already recognized in the land that every person born within the limits of the United States, and subject to their jurisdiction, was by virtue of natural law and national law a citizen of the United States, except for persons born in the United States who were foreigners, aliens, or belonging to the families of ambassadors or foreign ministers accredited to the Government of the United States. Such an amendment would make clear the definition of citizen of the United States, which could be expected to solve various problems on that[268].

On this amendment proposal, Senator Doolittle proposed to insert the words "excluding Indians not taxed", insisting that Senator Howard should not be intending to include the Indians by the amendment. Opposing to that, Senator Howard insisted that it had been thought for Indians who had been born within the limits of the United States but keeping subject to the tribe, not to be born subject to the jurisdiction of the United States in the sense of the amendment, but to be as being quasi foreign nations in the legislation and jurisprudence[269].

Concerning this amendment proposal by Senator Doolittle, there were some opinions presented. Among them, as supporting opinions, it was stated that since there were the Indians in the reservations or other places who were under the jurisdiction the United States but should not be the citizens, and since the Constitution of the United States also excluded the Indians who were not taxed, from the basis number for the apportionment of the representatives, the amendment to insert the words "excluding Indians not taxed" should be approved[270]. It was also stated that, since the courts might consider the meaning of the provision of the bill that all persons born within the United States and subject to the jurisdiction thereof were citizens, so that they would consider the Indians born within the United States, with whom the United States were making treaties, had become citizens by virtue of the amendment, the words "excluding Indians not taxed" should be inserted[271].

As an opinion opposing the Doolittle amendment, it was pointed out that the meaning of the words "subject to the jurisdiction thereof" should be "not owing allegiance to anybody else" and that Indians were thought not subject to the jurisdiction of the United States, seeing from the fact that the United States might make treaty with the tribes of Indians[272]. In addition, it was stated that, by inserting the words "excluding Indians not taxed", someone might interpret that taxed Indians should be citizens but not-taxed Indians should not be citizens. Thus such an insertion should be avoided, for it was not good idea to make whether someone was a citizen dependent on whether he was

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266 On this point, Senator Fessenden presented a question concerning how to treat a person born from the parents who was temporary visitors from abroad. Responding the question, Senator Wade stated that such a case would be so rare that the general rule shouldn't be changed because of it, quoting an instance that the children of foreign ministers would not become citizens of the United States under a fiction of law even if they were born in the United States. 39−1 Cong. Globe 2769.

267 39−1 Cong Globe 2869. Senator Wade withdrew his amendment proposal after the proposal of the amendment bill by Senator Howard. Id.

268 Id., at 2890.

269 Id., at 2890.

270 Id., at 2892−3 (Sen. Doolittle).

271 Id., at 2894 (Sen. Johnson).

272 Id., at 2893 (Sen. Trumbull); Id., at 2895 (Sen Howard).

taxed or not[273]. Furthermore, there was also a concern that the words "excluding Indians not taxed" might lead to an interpretation that whether someone had citizenship should be determined by the fact whether he was taxed or not, which was wrong, so those words should not be inserted[274]. Moreover, it was pointed out that, when the first and second sections of the amendment bill were construed together, the term "citizen" in those sections could be interpreted as not including Indians not taxed, for such Indians were not counted as persons in the basis of the representation, so that there would be no need to insert the words "excluding Indians not taxed" into the first section[275].

Besides those opinions above, there was an opinion that, while the purpose of the definition of citizenship provided by the first section of the amendment bill was to give black persons citizenship, if black persons were recognized to be citizens, there was no reason why Indians were not recognized to be citizens, so the amendment to insert "excluding Indians not taxed" shouldn't be appropriate[276].

After the deliberation, the amendment proposal by Senator Doolittle was rejected while the amendment bill by Senator Howard was approved[277].

As other opinions concerning the first section of the amendment bill, there were following ones.

As opinions supporting the first section of the amendment bill, there were following ones.

First, it was insisted that, as the guarantee of the privileges and immunities of citizens by the original Constitution had become a dead letter because Congress didn't have had any power to enforce it, Congress should have the power to do so since slavery had been abolished and the rebellion had ended[278]. Second, there was presented an opinion that, since the power of Congress to secure due process of law and equality under law had been doubted by persons entitled to high consideration, the latter part of the first section of the bill should be enacted in order to leave no doubt as to the existence of that power[279]. Third, it was pointed out that, since there were some movements to reject giving the rights attached to citizenship to a large part of the population in the former rebel States, the legislation of the first section of the bill would be indispensable[280].

As opinions opposing the first section of the amendment bill, there were following ones.

First, it was insisted that, while any State had the power to determine who could use the political power and, if it was thought to be proper, to forbid entrance of anyone who was not a citizen of the United States into the territory, if citizenship of the United States was given to anyone by its being born in the United States, that power of a State would be restricted, which would be undesirable[281].

Second, it was insisted that the former part of the first section of the bill would guarantee citizenship and the privileges and immunities of the citizen for many people including black persons, the Chinese and Indians as well as white people of the United States coming from Europe, which would require coexistence of mutually incompatible peoples and degrade the citizenship of the United States that had been highly esteemed at home and abroad[282].

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273 Id., at 2894 (Sen. Trumbull).

274 Id., at 2895 (Sen. Howard).

275 Id., at 2897 (Sen. Williams).

276 Id., at 2897 (Sen. Saulsbury); Id., at 2895 (Sen. Hendricks).

277 Id., at 2897. At the last stage of the discussion, Senator Fessenden presented an amendment proposal to insert the words "or naturalized". In the end, the wording had become the same as the current one of the first clause of Section 1 of the Fourteenth Amendment. Id., at 3040.

278 Id., at 2961 (Sen. Poland).

279 Id.

280 Id., at app. 219 (Sen. Howe).

281 Id., at 2891 (Sen. Cowan). Senator Cowan insisted there, illustrating the cases of Chinese and Gipsy, that, since those people were quite different in race, religion, and custom from ordinary people, it would be impossible to make one society with them. Against that, Senator Conness stated that, concerning the Chinese in the State of California, in spite of the insistence of Senator Cowan, the State was ready to accept the amendment so as to provide the children of Mongolian parents with Civil Rights and equality under the law. 39−1 Cong. Globe 2892.

282 Id., at 2939 (Sen. Hendricks). Against that opinion of Senator Hendricks, Senator Howe argued that such an extension of the subject of citizenship of the United States should rather elevate the dignity of American citizenship than degrade it. Id., at app. 219.

Third, it was insisted that the guarantee of due process of law and equality under the law should be done by each State as far as the relation between a State and its citizens was concerned, so that the Federal Constitution should not provide that[283].

Paragraph 3 Discussion on Section 2 of the Amendment Bill

On the second section of the amendment bill, after the explanation given by Senator Howard, Senators Wade and Wilson presented respective amendment proposals[284]. Among them, the proposal by Senator Wade was as follows[285].

"No class of persons as to the right of any of whom to suffrage discrimination shall be made, by any State, shall be included in the basis of representation, unless such discrimination be in virtue of impartial qualifications founded on intelligence or property[286], or because of alienage, or for participation in rebellion or other crime."

The Senator explained about the proposal that, as there were some States where suffrage was restricted on unjustifiable reasons[287], the portion of representatives of such States would be diminished according to the second section of the joint committee's bill, but such a method should be inappropriate and the way to solve such a problem should be left to the decision of each State[288].

The amendment bill of Senator Wilson was as follows[289].

"Representatives shall be appointed among the several States according to their respective numbers; but if in any State the elective franchise is or shall be denied to any of its inhabitants, being male citizens of the United States, above the age of twenty-one years, for any cause except insurrection or rebellion against the United States, the basis of representation in such State shall be reduced in the proportion which the number of male citizens so excluded shall bear to the whole number of male citizens over twenty-one years of age."

Senator Wilson explained about the proposal that the proposal intended to change the word "citizens of the States" in the second section of the bill of the joint committee for reconstruction, into the words "inhabitants being male citizens of the United States"[290].

On the next day, namely, May 24, Senator Sherman proposed an amendment bill. That bill was intended to replace the Sections 2 and 3 of the joint committee's bill. The part to replace the second section provided that representatives should be apportioned according to the number of male citizens of the United States at the age of 21 years or above who had the right to vote in the election of the State congress, including persons having participated in the rebellion[291].

On May 29, Senator Howard proposed to amend the second section of the amendment bill by changing the term "citizens" into the phrase "inhabitants, being citizens of the United States"[292]. On the next day, namely, May 30, responding to the question by Senator Johnson on that proposal, Senators Fessenden and Howard explained that the

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283 Id., app 240 (Sen. Davis). Senator Davis pointed out there that the purpose of the definition of a citizen of the United States in the provision was to make black persons citizens and to press them forward to a full community of civil and political rights with white race.

284 Id., at 2768. In addition to those senators, at the deliberation on the twenty third day, Senator Clark proposed an amendment of the third and fourth sections of the joint committee's bill and Senator proposed one concerning the ratification procedure by States, respectively.

285 Id., at 2768.

286 The term "property" was used at the time of the submission of Wade's bill on May 17 (Id., at 2636), but was stricken out at the stage of the proposal to the floor on May 23 (Id., at 2770).

287 Senator Wade enumerated as such an example the case of the State of New England or others, where only a person who could read the Constitution of the United States and write his/her own name could enjoy the right to vote. Id., at 2769.

288 Id., at 2769.

289 Id., at 2770.

290 Id., at 2770. However, in the formal record, the term "citizens of the States" was not used in the second section of the joint committee's bill, but instead the term "its male citizens" were being used (Id., at 2764).

291 Id., at 2804. Just before the proposal of Senator Sherman, Senator Stewart had given the speech that, while supporting the suffrage of black people, if the suffrage of persons having participated in the rebellion were retained, the causing factor of a recurrence of rebellion would be strengthen and it would make it more difficult for the suffrage of black people to be admitted. So, he supported there to grant rebels a general pardon. Id., at 2798.

292 Id., at 2895.

object was to make section two conform to section one so as to prevent a State from saying that, although a person was a citizen of the United States, he was not a citizen of the State[293].

On June 4, Senator Hendricks criticized the amendment bill, saying that it violated the principle that those whom the State treat as unfit to vote shall not be represented[294], and proposed to amend the latter part of the second section of the bill to be "And excluding (from the basis of representation) also two fifths of such persons as have been discharged from involuntary servitude by any proclamation of the President of the United States or by the amendment to the Constitution of the United States since the year 1861, and to whom the elective franchise may be denied"[295].

As the motive for the amendment proposal, Senator Hendricks explained that, although the apportionment of the representatives for the former rebel States would be increased by liberation of slaves, the proposed amendment should make the representation from the southern States based on precisely the same basis as before the war[296].

This amendment proposal was dropped without being put to a vote.

On the same day, Senator Doolittle proposed an amendment, which said, "After the census to be taken in the year 1870, and each succeeding census, Representatives shall be apportioned among the several States which may be included within this Union according to the number in each State of male electors over twenty-one years of age qualified by the laws thereof to choose members of the most numerous branch of its Legislature"[297]. Regarding this proposal, the Senator explained that, according to that amendment, although there was no difference on the effect that the number of the black persons without the right to vote should not be counted into the basis of representation, making explicit the population having the right to vote the basis of representation would make clear the principle that voters should be equal in electing the representatives. Therefore the bill would be more acceptable for States than in the case of depriving representation in proportion to the black population until they would get the right to vote[298].

It was pointed out on this proposal that the States consisting of new immigrants would get more apportionment of the representatives than those having joined the Union since before because the former States would have more male population, but it would be inappropriate if considering the representation ratio to the whole population[299]. That proposal was rejected through voting[300].

Just after the proposal above, Senator Doolittle proposed another amendment to change "male electors" into "male citizens of the United States" so as to count into the basis of representation also the persons having deprived of the right to vote because of having participated in the rebellion[301].

It was stated as a supporting opinion for the proposal that such an amendment would equalize the political power of all citizens of all States[302]. On the other hand, there was an opposing opinion that, according to the amendment proposal, the population of the foreigners who had not been naturalized yet should be subtracted from the basis of

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293 Id., at 2897.

294 Id., at 2939.

295 Id., at 2942. (The part in parentheses was inserted by the author.)

296 Id., at 2942. Following the explanation given by Senator Hendricks, Senator Doolittle stated that, according to this amendment, three fifths of black persons would be counted into the basis of representation as before until they would be given their right to vote, so that the bill would be more acceptable for both northern and southern States than before.

297 Id., at 2942. The amendment bill presented by Senator Doolittle was including the provision concerning the apportionment of direct tax among States.

298 Id., at 2942.

299 Id., at 2962 (Sen. Poland).

300 Id. At 2986.

301 Id.

302 Id., at 2986 (Sen. Sherman). However, Senator Sherman stated that he would not approve Doolittle's amendment proposal by a political reason, and, in fact, he voted against that bill (Id., 2991).

Furthermore, against the insistence that it would cause unequal apportionment of representatives if the number of electors were not adopted as the basis of representation since many male citizens had been immigrating from the eastern into western States, he stated that since such immigrants would participate in the election at the eastern States as a representative of the family inhabiting in the western States, the insistence like above should be out of the point (Id., at 2987).

representation, so that the States which had many of such people would unfairly lose their representatives[303]. That amendment proposal was voted down[304].

On June 6, Senator Williams proposed to amend the second section of the bill to be "Representatives shall be apportioned among several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever the right to vote at any election held under the Constitution and laws of the United States, or of any State, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State"[305].

On this amendment bill, the Senator stated that the phrase "the right to vote" was substituted for the phrase "the elective franchise" and the phrase "any election held under the Constitution and laws of the United States or of any State" was added so as to make it clear to States that the State was required to allow those persons, before they could be counted in the basis of representation, to vote at elections held under the constitution and laws of the State as well as at elections held under the Constitution and laws of the United States[306].

Regarding this amendment, Senator Henderson pointed out that the phrase, "But whenever the right to vote at any election held under the Constitution and laws of the United States, or of any State, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States," might be interpreted to include elections of minor officers. In this regard, he proposed to amend that part to be "But whenever the right to vote for Governor, judges, or members of either branch of the Legislature is denied by any State to any of it male inhabitants of such State, being twenty-one of age"[307].

Regarding this amendment proposal, Senator Williams proposed to amend the same part to be "But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and Judicial officers of a State, or members of the Legislature thereof"[308].

At the final resolution, the amendment proposed by Senator Williams was approved[309].

In addition to the matters described above, following points on the second section of the amendment bill were pointed out.

First, as a supporting opinion, it was stated that there was no justification for white persons to vote representing black persons in the southern States, or that, although giving right to vote directly to black persons would be the most desirable way if taking the contributions of black people to the federal side in the Civil War into account, the suffrage would also be granted to black people as an effect of the provisions of the amendment bill[310].

Second, opinions opposing the amendment bill were as follows.

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303 39-1 Cong. Globe 2987 (Sen. Wilson). Against the opinion of Senator Wilson described above, Senator Sherman stated that, since a foreigner could become a citizen by naturalization so as to have the right to vote and, furthermore, since nearly all of foreigners were naturalized in a short period of time, it was not a big problem. Id.

304 Id., at 2991. It is pointed out that the existence of compulsory adherence to the party decision of the Republican Party was suspected to be the cause of the rejection of the two amendment proposals by Senator Doolittle. cf. Frank, 123; Kendrick, 318-319; Joseph B. James, The Framing of the Fourteenth Amendment, 147 (Univ. of Illinois Pr. 1965).

305 39-1 Cong. Globe 2991.

306 Id., at 2991.

307 Id., at 3011. Regarding this point, Senator Johnson pointed out that, as a phraseological problem, if such an amendment would be approved, the provision should be amended to mean that only persons who were denied the right to vote at any State election should be deducted from the basis of representation. Id., at 3027.

308 Id., at 3029.

309 Id., at 3041. Against this amendment, Senator Howard pointed out that it would be practically difficult to apply that provision so that it would be difficult to precisely determine the basis number of representation, and proposed an amendment of the amendment to limit the range of application of the provision to the elections of the members of State legislature. But that proposal was rejected. Id., at 3039-40.

310 Id., at 2963 (Sen. Poland).

It was insisted that it should be the proper power of each State to determine who would be allowed to vote in the State[311], and that the amendment bill would be intending to allow the States having no black population to deprive the States having black population of the political power which was guaranteed by the constitutional laws for the Union and which would provide a new cause of conflicts[312].

Third, concerning the relationship between the purpose of the amendment and the practically expected behaviors of States after the approval of the bill, an opinion pointed out that, while the purpose of the amendment should be to make it guaranteed to choose representatives of all persons irrespective of races, the real effect of the amendment was for black people to lose their representation unless the State would not give suffrage to them[313].

Furthermore, it was also pointed out, from the side of the promoters of the extension of suffrage, that this amendment might be interpreted in effect to admit that each State had the power to arbitrarily exclude black people from the election, or that, while this amendment inhibited exclusion of black people from the election, the exclusion of white citizens or of foreigners wasn't inhibited.

In addition, there were various opinions, namely, that the Government should not be one consisting of various races[314], or that this amendment would give each State a motivation to give suffrage even to inadequate persons in order to extend its influential power[315].

Paragraph 4 Discussion on Section 3 of the Amendment Bill

There was also a proposal to amend the third section of the amendment bill[316].

The amendment to the amendment bill was approved by Senate on June 8, 1866[317]. The House of Representatives approved the Senate version on June 13[318]. The amendment proposal was put to ratification of States, and, finally, it came into effect on July 28, 1868[319,320].

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311 Id., at 2987 (Sen. Cowan); Id., at app. 235 (Sen. Davis).

312 Id., at 2988–2989 (Sen. Cowan); Id., at app. 240 (Sen. Davis).

313 Id., at 3027 (Sen. Johnson).

314 Id., at 3038 (Sen. McDougall)

315 Id., at 3033 (Sen. Hendricks). However, on the voting, Senator Hendricks voted for the bill.

316 On May 29, 1866, at Senate, it was proposed that the wording of the original section 3 of the amendment bill should be changed to be the same one as that of the current provision (Id., at 2869), and the proposal was approved on the 31st day (Id., at 2921). While the third section passed firstly through the House of Representatives denied the right to vote of the participants in a rebellion, this amendment denied the qualification of such persons to assume certain official posts.

317 Id., at 3042.

318 Id., at 3149. In the discussion at the House of Representatives on the amendment done by the Senate, Representative Stevens pointed out on the amendments at the Senate,

- in the first section, the conflict between the Union and States would be resolved by introducing the definition of citizen of the United Sates and of citizen of a State;
- in the second section, the suffrage of black persons would be admitted but the effect would be weaker than the Representative expected.

Id., at 3148.

319 Rev. Stat. 31 (1878). cf. 15 stat. 708 (1868).

320 There was a record that following amendment proposal on the first section was presented by one of the southern States at the stage of ratifying process (I Walter L. Fleming, Documentary History of Reconstruction, 238 (Cleveland, O., The A. H. Clark Company 1906)) .

Sec. 3 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 in which they may reside, and the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. No state shall 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.

Comparing it with the current provisions of the Fourteenth Amendment, while the current Fourteenth Amendment provides "No state shall make or enforce any law which shall abridge the privileges or immunities of citizen of the United States", the corresponding part of the proposal provides, keeping consistency with the provision of Article 4, Section 2 of the original Constitution, "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several State". There is a theory which insists, focusing on that point, that the Fourteenth Amendment was intended to give the Union the stronger power to control States than before, so as to guarantee the privileges and immunities of citizens of the United States. Kurt T. Lash, The Origin of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866, 101 Geo. L. J.

Section 6 Summary of Discussion in Congress

This section will summarize the discussion on the definition of Citizen and Civil Rights in Congress so as to consider the significance and effect of the establishment of the Fourteenth Amendment[321].

Subsection 1 Meaning of Defining Citizenship

Paragraph 1 Practical Effect of the Definition

The definition of Citizen is said to be a declaratory provision which had been the law long before[322]. However, followings could be pointed out as the practical effects of the establishment of the definitive provision.

First, in relation to the judgement of Dred Scott case[323], it could be said, the establishment invalidated the decision that a slave is not a citizen of the United States and cannot become a citizen[324].

Second, it could be said that the establishment of the Fourteenth Amendment defining citizenship resolved certain doubt about the legitimacy of the Congressional power to give citizenship, having been expressed in the process of deliberation concerning Civil Rights Act[325].

Third, in relation to suffrage, since "citizen" mentioned in the second section of the Fourteenth Amendment should have the same meaning as that in the first section of the same article[326], the definition of the persons who should have citizenship in the Fourteenth Amendment surely had an effect on the range of persons who should be given suffrage[327].

Paragraph 2 Comparing Section 1 of the Fourteenth Amendment with Civil Rights Act

As being seen above, the definition of Citizenship was provided both in Civil Rights Act of 1866 and in the

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1275, 1328 (2013).

321 Regarding the relation between Civil Rights Act and the Fourteenth Amendment, there were two opinions presented at the time of the amendment, namely, one is that the Fourteenth Amendment provided the aim of Civil Rights Act so as for Civil Rights Act not easily to be amended or abolished according to the change of the power balance in Congress (39−1 Cong. Globe 2459 (Rep. Stevens); Id., at 2462 (Rep. Garfield); Id., at 2896 (Sen. Howard)); another is that as there had been some uncertainty on whether Congress had the power to legislate Civil Rights Act, the Fourteenth Amendment has confirmed the existence of that power of the Federal Congress (Id., at 2502 (Rep. Reymond); Id., at 2511 (Rep. Eliot)). As an example of the posterior interpretation of the Fourteenth Amendment, the judgement of the case, United States v. Wong Kim Ark (169 U.S. 649 (1898)) stated that since Civil Rights Act, as an ordinary act of legislation, might be repealed by any subsequent congress, the same congress framed the Fourteenth Amendment of the Constitution and defined Citizen (Id., at 675).

However, while the bill of Civil Rights Act was presented by the Judiciary committee of the Senate, that of the Fourteenth Amendment was presented by the joint committee for Reconstruction. Senator Fessenden who was the chair of the joint committee for Reconstruction stated in the establishment process of the Fourteenth Amendment that the Fourteenth Amendment had no relation to Civil Rights Act, and that there was no reference to Civil Rights Act in the process of discussion on the Fourteenth Amendment (39−1 Cong. Globe 2896). Furthermore, Representative Bingham who proposed the prototypical bill for that of the Fourteenth Amendment stated that there was a doubt about the power of Congress to legislate Civil Rights Act, and opposed to the bill of Civil Rights Act (Id., at 1291). Taking those facts into consideration, it is true that the Fourteenth Amendment "constitutionalized" Civil Rights Act and resolved the doubt about the power of Congress to legislate Civil Rights Act, but, as far as the intention of the legislators is concerned, it should be said, the Fourteenth Amendment and Civil Rights Act were not congruent in the aims or contents. cf. ex. Hermine Herta Meyer, The History and Meaning of the 14th Amendment, 107 (Vantage Pr. 1977).

322 39−1 Cong. Globe 1115 (Rep. Wilson); Id., at 1291 (Rep. Bingham); Id., at 2890 (Sen. Howard).

323 60 U.S. 393 (1857).

324 39−1 Cong. Globe 571 (Sen. Morrill); Id., at 2768 (Sen. Wade).

325 Cf. ex. 39−1 Cong. Globe 1266 (Rep. Reymond); Id., at 1268 (Rep. Kerr).

326 39−1 Cong. Globe 2897 (Sen. Williams).

327 Representative Stevens stressed that the second section of the article was the most important provision in his explanation regarding the aim of the Fourteenth Amendment at the House of Representatives(39−1 Cong. Globe 2459) and the substantial discussion was heavily focused on the section in reality. cf. Earl M. Maltz, Civil Rights, the Constitution and Congress, 1863−1869, 93 (Univ. Pr. of Kansas 1990). However, the section had not been applied because of the practical difficulty of its application. Cf. George David Zuckerman, A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment, 30 Fordham L. Rev. 93, 116 (1961).

Fourteenth Amendment. While the former, Civil Rights Act, defined citizens to be "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States", the latter, the Fourteenth Amendment defined persons who should have citizenship to be "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". Comparing them, the following could be pointed out:

1. In the Fourteenth Amendment, a naturalized person is also a citizen of the United States.
2. While "persons...not subject to any foreign power" are citizens of the United States in Civil Rights Act, "persons...subject to the jurisdiction of the United States" are citizens of the United States in the Fourteenth Amendment.
3. While Civil Rights Act includes the words "excluding Indians not taxed", Section 1 of the Fourteenth Amendment doesn't include those words.
4. While Civil Rights Act defines only citizens of the United States, the Fourteenth Amendment defines citizens of the United States and each State.

These points could be analyzed as follows.

First, concerning a naturalized person in 1., it was just before the final resolution at the Senate that the word "naturalized" was inserted into the text of the Fourteenth Amendment[328], and there was found no explanation about the purpose of the insertion. In the legislation process of Civil Rights Act, it was pointed out that a naturalized citizen would be treated same as a natural born citizen after naturalization[329] and that a naturalized former foreigner would get guaranteed the right not by courtesy from the State but under the laws of the Federal Government so that (s)he could also hold the right to go in or out from any State belonging to the Union and, furthermore, had the right to be protected by the Federal Government in foreign lands[330]. Therefore, it could be said at any rate that the aims of Civil Rights Act and of the Fourteenth Amendment were substantially same and the only difference between them is the fact that the Fourteenth Amendment explicitly provided that a naturalized person should become a citizen. However, as being seen in the fact that the Constitution provides only a natural born citizen shall be eligible to the office of President, a naturalized citizen and a natural born citizen may be treated mutually differently in the law of the United States. In this regard, it can be said that it is proper and significant to have the Fourteenth Amendment defining a natural born and a naturalized citizen in one provision.

Next, on 2. above, in the legislation process of the Fourteenth Amendment, there was presented an explanation that "persons subject to the jurisdiction of the United States" meant to exclude from the person to be granted citizenship, foreigners who belong to the families of ambassadors or foreign ministers residing in the United States[331,332]. Although it was not clearly argued what implications the phrase "not subject to any foreign power" in Civil Rights Act could have, it could be said, from the analysis of the legislation process of that Act, that it is substantially same as the meaning of the Fourteenth Amendment[333]. It is uncertain how much that problem was taken into consideration at the time of the establishment of the Fourteenth Amendment or of Civil Rights Act of 1866. However, we could point out the difference at least in the ways of expression, namely, while the Civil Rights Act is focusing on the person who is not subject to a foreign jurisdiction or not under the power of or allegiant to a foreign country, the Fourteenth Amendment is focusing on the person who is under the power of or allegiant to the United States. In this

328 39−1 Cong. Globe 3040 (Sen. Fessenden).
329 Id., at 1152 (Rep. Thayer); Id., at 1781 (Sen. Trumbull).
330 Id., at 1757 (Sen. Trumbull).
331 Id., at 2890 (Sen. Howard).
332 As a literature considering the arguments on this point from the time of the national foundation to the days after the establishment of the Fourteenth Amendment. Cf., Patrick J. Charles, Decoding the Fourteenth Amendment's Citizenship Clause: Unlawful Immigrants, Allegiance, Personal Subjection, and the Law. 51 Washburn L. J. 211 (2012); Allen R. Kamp, The Birthright Citizenship Controversy: A study of conservative substance and rhetoric, 18 Texas Hispanic J. of L. and Policy 49 (2012). etc.
333 However, on this problem see the opposing opinion of Justice Fuller in the case, United States v. Wong Kim Ark (169 U.S. 649 (1898)).

regard, it could be said that the former defines a person to have citizenship being conscious of the relationship of the person with a foreign country, while the latter does it being conscious of the relationship of the person with the governmental power of the United States.

When this difference is considered from the practical point of the view, "a person not subject to any foreign power" may not have quite same legal effect as "a person subject to the jurisdiction of the United States". For example, on the one hand, according to Civil Rights Act, since a natural born citizen of a foreign country would be thought to get the citizenship other than that of the United States by his birth so that he would enter under the power of the foreign country, he might not be able to get the citizenship of the United States. On the other hand, according to the FourteenthAmendment, a person who is subject to the jurisdiction of the United States may get the citizenship of the United State whether he would get the citizenship of a foreign country or not. Furthermore, children of the members of an international organization may be considered as not under the power of a foreign country so as to be able to get citizenship of the United States according to Civil Rights Act, but according to the Fourteenth Amendment such children may not get citizenship of the United States because they would not be subject to the jurisdiction of the United States[334].

Third, considering the words "excluding Indians not taxed" in the 3., in relation to the 2., Indians were thought to be basically excluded from persons to have citizenship both in Civil Rights Act and the Fourteenth Amendment. However, while Civil Rights Act had one provision to define citizen including those words, the Fourteenth Amendment included those words in the second section and the exclusion of Indians from citizen was there to be determined by interpretation together with the first section[335,336].

Fourth, concerning the 4., it was pointed out that making the relation between citizenships of States and of the United Sates would have the effect to prevent a State from generating conditions where a person was a citizen of the United States but not of the States[337]. It was also stated in the process of the legislation of Civil Rights Act that the purpose of the act was to recognize black people who had been discriminated by being considered as non-citizens in the Southern States to be citizens so as to remove such discriminations[338]. Seeing from such a viewpoint, it could be said that the establishment of the definition provision had a great effect.

Subsection 2 Civil Rights to Be Enjoyed

Paragraph 1 Nature of the Rights Secured by Civil Rights Act

In the legislation process of Civil Rights Act, there were following explanations regarding the rights to be secured by the act[339].

1. Natural rights secured in the Declaration of Independence, the original Federal Constitution and the Thirteenth Amendment of the Constitution[340].

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334 On this point, cf., Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, & Ronald Y. Wada, Immigration Law & Procedure, § 92.3[3](LexisNexis 2020). In practice, the Fourteenth Amendment shall not apply to children of the members of an international organization, who would be categorized to be a type enumerated in the UN Privileges and Immunities List published by the UN delegation of the United States.

335 39−1 Cong. Globe 2897 (Sen. Williams).

336 However, it could be said that, seeing from the point of the structure of the provisions, the Fourteenth Amendment is more inclusive for Indians than Civil Rights Act.

337 39−1 Cong. Globe 2897 (Sen. Fessenden).

338 Id., at 475 (Sen. Trumbull).

339 Concerning the point, a literature says, the concept "rights" included liberties, advantages, exemption, privileges and immunities at the time of the legislation of the Federal Constitution, and the majoritarian, the collective, or the Government as well as individuals were considered to be holders and Natural Law, Law of Nations, Common Law or the combination of some of them were thought to be the possible foundation of the rights. On the other hand, the literature continues, the privileges and immunities were meaning not natural rights but interests specially given to the members of certain collectives. See, Kurt T. Lash, The Fourteenth Amendment and the Privileges and Immunities of American Citizenship, pp. 12 (Cambridge Univ. Pr. 2014).

340 39−1 Cong. Glove 474 (Sen. Trumbull); Id., at 1117 (Rep. Wilson); Id., at 1151 (Rep. Thayer).

2. The privileges and immunities in Article 4, Section 2 of the Federal Constitution[341].

3. The rights consequent to citizenship of the United States[342].

However, it was pointed out in the legislation process of the act that the enumeration of the rights in the act did not intend to secure the rights not enumerated there, that is, it was intended to be an exhaustive enumeration[343]. Furthermore, seeing from the fact that the term which might imply an extensive interpretation had been struck out[344], the rights to be secured by Civil Rights Act should be understood to be restricted to those enumerated in the act.

In addition, there was presented an explanation that the right of suffrage, the right to become a jury member and the right for both black and white children to attend the same school were not included in the rights to be secured by the act[345].

Seeing from those facts above, it can be concluded that the rights which were thought to be secured by Civil Rights Act were quite restrictive and didn't include many political rights, let alone suffrage.

In relation to the contexts of how the rights should be secured, the followings were stated, namely, (1) the security of rights by the Act were targeted at not only black people, (2) apart from practical need of the application[346], the area for the act to be applied was all over the United States[347], (3) there should be no discrimination among races[348], i.e., the rights were secured in the same level as white citizens, (4) the act didn't apply to foreigners[349]. Seeing from those facts, it can be said that, although the contents of the rights to be secured by the act were quite restrictive, the context for the application was supposed to be extensive.

Paragraph 2 Nature of the Privileges and Immunities to Be Secured by the Fourteenth Amendment

The privileges and immunities to be secured by the first section of the Fourteenth Amendment were explained in the process of the legislation as follows[350,351,352].

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341 Id., at 474 (Sen. Trumbull). Senator Trumbull quoted there, as an example of the interpretation of the provision referred to in the body, the judgement of the Maryland General Court (Campbell v. Morris, 3 H. & McH. 535(1797)), the judgement of Massachusetts Supreme Court (Abbot v. Bayley, 23 Mass. (6 Pick.) 92 (1827)), and the judgement of Federal Circuit Court on the case, Corfield v. Coryell (4 Wash. C. C. 371, 380 (U.S.C.C.Pa., 1823)).

The last of them, namely, the judgement on Corfield v. Coryell Case, stated on the privileges and immunities to be secured by the provision as follows. First, it stated that the rights secured by that provision was fundamental and belonged to the citizens of all free governments and had been enjoyed by the citizens of the several States which compose the Union. Second, the judgement stated "What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised".

Representative Wilson also quoted the judgement to explain the rights to be secured by Civil Rights Act. 39−1 Cong. Globe 1117 (Rep. Wilson).

342 39−1 Cong. Globe 1757 (Sen. Trumbull).

343 Id., at 1151 (Rep. Thayer).

344 Cf. 39−1 Cong. Globe 1366 (Rep. Wilson).

345 39−1 Cong. Globe 1757 (Sen. Trumbull); Id., at 1117 (Rep. Wilson).

346 Id., at 475 (Sen. Trumbull). Senator Trumbull stated there that it would only be necessary to go into the late slaveholding States and subject to fine and imprisonment one or two in a State.

347 14 Stat. 27, Sec. 1; 39−1 Cong. Globe 1757 (Sen Trumbull).

348 14 Stat. 27, Sec. 1; 39−1 Cong. Globe 1115 (Rep. Wilson).

349 39−1 Cong. Globe 1115 (Rep. Wilson).

350 Senator Howard stated that it was impossible to fully define the privileges and immunities in their entire extent and precise nature, so that the content should be considered case by case. 31−9 Cong. Globe 2765 (Sen. Howard).

351 There is a literature which enumerates the privileged and immunities being secured by the Fourteenth Amendment at the time of the establishment in a way such as follows, considering the discussion in Congress.

1. The rights declared in Declaration of Independence[353],

2. The rights guaranteed by Civil Rights Act[354],

3. The privileges and immunities provided in the second section of Article 4 of the Constitution[355,356],

4. The rights guaranteed by the provisions from the first to eighth amendments of the Constitution[357].

The right of suffrage was explained to be out of the security by this provision[358].

As for the range of the application of the security of rights, the privileges and immunities in Section 1 of the Fourteenth Amendment should be secured for citizens of the United States, the clauses of due process and equality under the law in the same provisions should be secured for all persons[359]. Furthermore, as for the organ for the administration, while Bingham's Bill, which was a prototype of the Fourteenth Amendment, enumerated only Congress as the organ for the execution, Section 1 of the Fourteenth Amendment was provided to be directly applicable[360] as well as Congress was to be the organ for execution provided in the fifth section[361].

Comparing with Civil Rights Act of 1866 described above[362], while Civil Rights Act exhaustively enumerated the

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Firstly, it enumerates the rights provided by the Federal Constitution and to be applied to States. It states that, since the Bill of Rights in the Constitution should be incorporated into the provision of Due Process, the rights to be guaranteed by other provisions should be included in such rights, namely, the prohibition of any attainder law and of retroactive punishment provided by the sections 9 and 10 of Article 1 and the privileges and immunities provided by the section 2 of Article 4 of the Constitution.

Secondly, it enumerates the rights secured by the ordinary act legislated by Congress which is based on the Federal Constitution. It states that such rights should include the rights based on interstate commercial treaties or other treaties concluded by Congress, or the rights concerning intellectual properties or based on the rules of bankruptcy.

Thirdly, it enumerates the rights to be guaranteed through the interpretation of the Constitution. Concretely, it includes the right to travel.

Cf., William J. Rich, Why "Privileges or Immunities?": An Explanation of Framers' Interpretation and the Supreme Court's Misinterpretation, in Elizabeth Reilly ed., Infinite Hope and Finite Disappointment, 139, 143 (2011).

352 In relation to the point, a literature points out that Representative Bingham, who was the presenter of the Fourteenth Amendment, stated at the 42nd Congress, which was after the establishment of the Fourteenth Amendment, the privileges and immunities of citizens of the United States provided by the Fourteenth Amendment meant the rights guaranteed by the first right amendment provisions of the Constitution. See, Kurt T. Lash, The Fourteenth Amendment and the Privileges and Immunities of American Citizenship, 66 (Cambridge Univ. Pr. 2014).

353 39-1 Cong. Globe 2459 (Rep. Stevens); Id., at 2510 (Rep. Miller).

354 Id., at 2459 (Rep. Stevens); Id., at 2462 (Rep. Garfield); Id., at 2465 (Rep. Thayer); Id., at 2511 (Rep. Eliot).

355 Id., at 2765 (Sen. Howard). Senator Howard quoted there the judgement of Corfield v. Coryell (4 Wash. C. C. 371, 380 (U S. C. C., Pa., 1823)).

356 Concerning this point, while Article 4, Section 2 of the Constitution provides "The Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the Several States", the Fourteenth Amendment, Section 1, Clause 2 provides "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States". Considering this fact, it can be pointed out that the latter provision, in contrast to the former one, prohibits States from abridging the privileges or immunities which any citizen of the United States shall have supposing the person has citizenship.

357 39-1 Cong. Globe 2765 (Sen. Howard). Senator Howard enumerated there as the rights to come under the category, freedom of expression and of press; the right of the people peaceably to assemble and petition the Government for a regardless of grievances, a right appertaining to each and all people; the right to keep and to bear arms, the right to be exempted from the quartering of soldiers in as house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his tight to be tried by an impartial jury of vicinage; and the right to be secure against expressive bail and against cruel and unusual punishments. Concerning this point, Freedmen's Bureau Act provided that "the constitutional right to bear arms" should be secured. 14 Stat. 173, 176, Sec. 14 (1866). See also McPherson at 74.

358 39-1 Cong. Globe 2766 (Sen. Howard); Id., at 2542 (Rep. Bingham).

359 Id., 2765, 2766 (Sen. Howard); Id., at 2542 (Rep. Bingham).

360 Concerning this point, the Fourteenth Amendment itself did not explicitly provide the jurisdiction of the courts. On the other hand, Article 3 of Civil Rights Act provided the jurisdiction of the courts on the case concerning the rights to be secured by the act. Cf., 14 Stat. 27, Sec.3.

361 39-1 Cong. Globe 2766 (Sen. Howard).

362 A literature says, other than the points mentioned above, that, while Civil Rights Act uses the term "right", the Fourteenth Amendment uses the phrase "privileges and immunities", which implies that the rights to be secured were different between Civil Rights Act and the Fourteenth Amendment and that the latter was intended to guarantee also the civic republican government and the value of participatory democracy. Daniel J. Levin, Note: Reading the Privileges or Immunities Clause: Textual Irony, Analytical

rights to be secured by the act, the Fourteenth Amendment was not restrictive for the rights to be secured so that the latter would be interpreted to be able to secure the rights of wider range than the former.

Furthermore, seeing from the viewpoint of the execution of the provisions, it could be said that, while Civil Rights Act was basically supposing the courts as the organ for the execution, Section 5 of the Fourteenth Amendment set Congress to be the executive organ so as to admit wider participation of the Union into such matters than before.

Subsection 3 Pending Problems

The problems which were brought up in the legislation process of the on Civil Rights Act or the Fourteenth Amendment but not resolved are as follows.

1. The suffrage of black people.
2. The rights of women or young people.
3. The relation between taxation and citizenship.
4. The status of Indians.
5. The rights of foreigners.

The opinions regarding those problems above presented in the legislative processes could be summarized as follows.

Concerning the suffrage of black people (1), there were opinions that the suffrage should be given also to black people[363], and it was stated that black people should be guaranteed freedom of expression and the right of petition[364]. Furthermore, there was some discussion on the relation to the second section of the Fourteenth Amendment. That section provided the apportionment of representatives of a State that had restrained the suffrage based on race or color should be diminished. Although this might have solved in part of the problem regarding the suffrage of black people, this problem was to be treated later by the Fifteenth Amendment.

Concerning (2) above, there were presented some opinions concerning the property right and the suffrage of women or minors[365]. The right of suffrage concerning these people was to be treated later by the Nineteenth and Twenty-Sixth Amendments of the Constitution.

Concerning the relation between taxation and citizenship, (3), in discussing the words “Indians without taxation”, while there were opinions that whether to have citizenship or not should not be made dependent on whether he was taxed or not[366], another opinions insisted it would be understandable to give citizenship to a person who didn’t owe any tax[367]. In relation to the suffrage, this problem was later treated by the Twenty-Fourth Amendment of the

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Revisionism, and an Interpretive Truce, 35 Harv. C. R. -C. L. L. Rev. 569 (2000).

363 Ex. 39−1 Cong. Globe 741 (Sen. Lane); Id., at 2540 (Rep. Farnsworth).

364 Id., at 2765 (Sen Howard).

365 Major opinions concerning women or youths presented in the legislation process were generally as follows.

- 39−1 Cong. Globe 380 (Rep. Brook).; There was proposed an amendment bill which provided the number of persons who were denied the right to vote because of race or sex should be subtracted from the basis number of representation.
- Id., at 1089 (Rep. Bingham).; There was a statement, namely, while those rights which were universal and independent of all local State legislation belong to every woman whether married or single, the property right should be under the local laws of States.
- Id., at 1227 (Sen. Sumner).; It was mentioned that women were represented through men.
- Id., at 1263 (Rep. Broomall).; There was an opinion that, although women and infants were citizens, it would be necessary to amend the constitution in order to give the right of suffrage to them.
- Id., at 1293 (Rep. Shellabarger).; It was stated there that Civil Rights Act permitted the States to say that a wife or child might not testify, sue of contract, and its whole effect was to require that whatever rights as to each of the enumerated civil matters the States might confer upon one race or color of the citizen should be held by all races in equality.
- Id., at 2767 (Sen. Howard).; There was a statement that many female persons would be intellectually more suitable to the right of suffrage than ordinary male persons who were allowed to vote and the same could be said for male persons under the age of twenty-one or foreigners.
- Id., at 3035 (Sen. Henderson).; There was a statement that the reason the right of suffrage was not given to the women was that her interests were best protected by father, husband, and brother.

366 39−1 Cong. Globe 572 (Sen Hendricks); Id., at 2894 (Sen. Trumbull).

367 Id., at 2891 (Sen. Cowan).

Constitution.

Regarding the relation to Indians, (4), it was stated that since Indians belonged to another government and the relation of the United States with them was to be determined by treaties[368], Indians should be excluded from citizenship holders. However, on this issue, there were other opinions, one of which insisted that uncivilized Indians should not be citizens[369], and another of which insisted that Indians also should be accepted as citizens[370].

Regarding the problem of foreigners rights, (5), opinions like follows were presented. As for general rights, an opinion insisted that to secure only the rights of citizens would mean to discriminate against foreigners[371]. On the right of suffrage, an opinion stated that a foreigner could get the right of suffrage by naturalization, which should be the normal way for foreigners to get suffrage[372].

Section 7 Conclusion

Civil Rights Act and the Fourteenth Amendment defined citizenship of the United States and citizenship of every State was defined as derivation from that of the United States. As the result, freedmen got citizenship of the United States and then citizenship of several States. Consequently, as the substantive effect, every freedman should enjoy the rights as a citizen through Civil Rights Act and the Fourteenth Amendment[373].

However, as for the procedure for the guarantee of the rights, it is true that the procedure in court was established to a certain degree: the Fourteenth Amendment was not enough to establish the right to vote for the security of the rights through Congress. The right to vote later became the main subject of the Fifteenth Amendment of the Constitution. One of the causes of such a result would be, excepting political or social problems existing under such a situation or circumstances at that time, that to hold a citizenship would not imply to hold the right to vote as a necessary consequence in legal theories.

The United States of America confirmed, by defining citizenship as described above, the way to constitute its own body by selecting its members by itself through the law, excluding the natural or personal attributions like race, color, or formers status of slave as the criterion which is in the outside of the law[374]. In this meaning, the establishment of the definition of citizenship should be said to have had great significance for the reconstruction of the United States after Civil War.

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368 Id., at 527, 572 (Sen. Trumbull); Id., at 2890 (Sen. Howard).

369 Id., at 572 (Sen. Trumbull).

370 Id., at 2895 (Sen. Hendricks); Id., at 2897 (Sen. Saulsbury).

371 Id., at 1292 (Rep. Bingham). On this point, Representative Cowan commented, it should not be allowed, whether a person was a citizen or not, to kill or to rob the person or even a visitor from a foreign country, therefore such person should be said to be under the protection of the law, then what meaning should it have to be a citizen of the United States? Id., at 2890.

372 Id., at 1285 (Sen. Trumbull).

373 Regarding the relation between the federal citizenship and the state citizenship, cf., Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, & Ronald Y. Wada, Immigration Law & Procedure, § 91.01[3] [c] (LexisNexis 2020).

374 There is a literature pointing out that no law may limit the access to U.S. citizenship of any person who satisfies the constitutional definition. Cf., Daniel Levy and et al., U.S. Citizenship and Naturalization Handbook(2018-2019 ed.), § 2:3(Thomson Reuters 2018).

In relation to this, it could be pointed out that the decision taken by the Fourteenth Amendment, which excludes the extra-legal criteria for defining the citizenship holders, accepts the possibility to include persons who could not be recognized as members of its political body in accordance with extra-legal criteria and to exclude persons who could be recognized as members of its political body in accordance with extra-legal criteria as people intend. If there is only a statute which defines the citizenship holders, the Congress could change as it prefers in accordance with the political situation against which it confronts from time to time. But, in reality, since the holders of the citizenship is defined in the Constitution, the definition of the citizenship is saved from the arbitral change of it. In this regard, the Fourteenth Amendment could be recognized as a balanced decision between acquiring the flexibility for the definition of the citizenship holder and the avoidance of the arbitral change of it, which seems to contribute the stability and the sustainability of the political body.

In relation to this, it should be recognized that, as mentioned in the above mentioned literature, statutory citizenship, such as the citizenship of the naturalized persons, may be restricted by conditions precedent or conditions subsequent or elimination altogether by Congress.

Chapter 5 Citizenship and Civil Rights in the Reconstructing Era of the United States

Section 1 The Subject and Orientation of this Chapter

Section 1 of the Fourteenth Amendment of the Constitution provides, after making clear who should be a citizen, as follows.

1. No State shall make or enforce any law which shall be abridge the privileges and immunities of citizens of the United States;
2. Any state shall not deprive any person of life, liberty, or property, without due process of law;
3. Any state shall not deny to any person within its jurisdiction the equal protection of the laws.

Section 5 of the Amendment gives the Congress of the United States the power to enforce, by appropriate legislation, the provisions of the article. By this provision, Section 1 should have been executed by Congress as well as by the courts. In this chapter, this article examines the tendencies of the Federal Congress and the federal courts in treating citizenship and civil rights in the Reconstruction period after the establishment of the Fourteenth Amendment and in the period connecting to that[1,2].

In Sections from 2 to 5, the trends in the Federal Congress are examined. First, in Section 2, the legislation process of the Fifteenth Amendment will be considered. In Sections 3 and 4, a series of Civil Rights Acts established in this period will be outlined. In Section 5, the provisions which were established in relation with citizenship or civil rights and reported in the code book of federal statutes will be examined so as to see how citizenship and civil rights were understood at that time.

In Sections from 6 to 8, the trends in the federal courts are examined. First, in Section 6, it will be analyzed how citizenship and civil rights were understood in the judgement of Slaughter-House case, in which the Federal Supreme Court stated the interpretation of the Fourteenth Amendment at first time. In Sections 7 and 8, this article will survey how the decision concerning citizenship and civil rights which the Federal Supreme Court had given in Slaughter-House Case was accepted by the judgements concerning the Fourteenth Amendment at its early time.

Section 9 will summarize the analyses given in Sections from 2 to 8, and give certain conclusions.

Section 2 The Fifteenth Amendment of the Constitution

The 40th Congress, following the 39th Congress where the Fourteenth Amendment of the Constitution was proposed, deliberated on the bill of the Fifteenth Amendment[3]. The article consists of two provisions. The first section

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1 The Reconstruction period is generally said to end by the final withdrawal of the Federal Army from the southern States based on, so called, "Compromise of 1877" which concerned the dispute between candidates of Democratic Party and of Republican Party about the number of votes polled in the presidential election of 1876. (cf. II Leonard Levy et al. ed., Encyclopedia of the American Constitution, 478 (2nd ed. Macmillan Co. 2000); "Compromise of 1877" in Matsumura et al. ed., The Kenkyusha dictionary of British and American history (Kenkyu-sha 2000)). This chapter will treat this period and the next duration when the influence of the Reconstruction was still going on.

2 Regarding the relation between the Federal Congress and the courts concerning the fifth section of the article, there are some analyses on the nature of the power of Congress provided by the section. Cf., ex., Ronald D. Rotunda, The Power of Congress under Section 5 of the Fourteenth Amendment after City of Boerne v. Flores, 32 Ind. L. Rev. 163 (1998); K. G. Jan Pillai, In Defense of Congressional Power and Minority Rights under the Fourteenth Amendment, 68 Miss. L. J. 431 (1998).

3 As the reasons of the proposal of the Fifteenth Amendment, following two things are pointed out.
- While the right to vote of black people had been already established in the Southern States by that time since it was one of conditions for them to return to the Union (Cf. An Act to provide for the more efficient Government of the Rebel State, 14 Stat. 428 (1876)), it was not admitted in the Northern States yet, so its immediate realization in the Northern States was required.
- There was a legal possibility that the Southern States might deprive black people of the right to vote just after the return to the Union was accepted.

provides “the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude”, and the second section prescribes the power of the Federal Congress to enforce the article.

In the legislation process, there were presented various amendments and proposals by the Senate and the House of Representatives[4], the bill of the Senate was accepted. In the following, the discussions on the proposed bills at Congress will be examined.

Subsection 1 Discussion at the House of Representatives

Paragraph 1 Explanation regarding the Bill of Representative Boutwell

On January 11, 1869, Representative Boutwell proposed the bill to amend the Constitution as follows[5].

See, John Mabry Mathews, Legislative and Judicial History of the Fifteenth Amendment, 21 (Johns Hopkins Pr. 1909) [hereinafter Mathews]; Earl M. Maltz, Civil Rights, the Constitution, and Congress, 1863−1869, 143 (Univ. Pr. of Kansas 1990) (In addition to those above, Mathews stated that the thoughts that the election of the Federal Government should be treated by the Union and that a universal election should be realized by the Union influenced the establishment of the Fifteenth Amendment.)

4 In the House of Representatives, a bill concerning the right to vote based on the Fourteenth Amendment was proposed at the same time as the bill of the Fifteenth Amendment (40−3 Cong. Globe 285 (1869) (Rep. Boutwell)). The former bill consisted of five provisions. The first section provided that no State should abridge or deny the right of any citizen of the United States to vote for electors of President and Vice-President of the United States, or for Representatives in Congress, or for members of the legislature of the State in which he might reside, by reason of race, color, or previous condition of slavery and that any provisions in the laws or constitution of any State inconsistent with this section were declared to be null and void. The second section provided that officers or other persons engaging in an election named in the first section, who should willfully refuse to register the name of any citizen entitled to vote for any officer named in the first section on count of race, color, or previous condition of slavery of such citizen, should be punished. The third section provided that any person who should willfully hinder or obstruct, or attempt to hinder or obstruct, any citizen on account of the race, color, or the previous condition of slavery of such citizen, in the exercise of his right to vote for the officers named in the first section should be punished. The fourth section provided that any person disqualified by section 3 of the Fourteenth Amendment of the Constitution who should exercise the powers and duties of any office therein, should be deemed guilty of misdemeanor. The fifth section provided that the district courts of the United States should have exclusive jurisdiction of all offenses committed against this act. H. R. 1667, 40th-3rd Cong. pr. No. 596 (1869).

The deliberation regarding the bill of that act progressed at the same time as that on the amendment of the Constitution. Some amendment proposals to that act were presented, which were as follows.

On January 23, 1869, Representative Brooks proposed an amendment that inhibited discrimination by reason of sex or others (40−3 Cong. Globe 638). On the same day, Representatives Robinson proposed an amendment bill to change the word “citizen” into “inhabitants” (Id.). Also on the same day, Representative Bingham proposed an amendment bill that no State should make or enforce any law which should abridge or deny to any male citizens of the United States, of sound mind, and over twenty-one years of age, the equal elective franchise at all elections in the State wherein he should have actually resided for certain period except such citizens as should engage in rebellion or insurrection. (H. R. 1667, 40th-3rc Cong. Pr. No. 648 (1869); cf. 40−3 Cong. Globe 638).

On January 27, Representative Ward proposed an amendment bill which said that no State should make or enforce any law which should deny to any male citizen of the United States over twenty-one years of age, who had been such citizen for three months, the free exercise of elective franchise in the State of his residence, except as punishment for treason or other crime of the grand felony at common law. On the same day, Representative Shellabarger proposed an amendment which provided that no State should, make or enforce any law which should deny or abridge to any male citizen of the United States of the age of twenty-one years or over, and who was of sound mind, an equal vote at all elections in the State in which he should have such actual residence as should be prescribed by law, except to such as have engaged or might hereafter engage in insurrection or rebellion against the United States (40−3 Cong. Globe 639).

On January 28, Representative Shanks proposed an amendment bill that inhibited abridgment of the right to vote by reason also of property, as well as of race or others (H. R. 1667, 40th-3rd Cong. Globe pr. No. 677 (1869)).

After all, in the end, those proposals described above were not put to the vote because priority was given to the deliberation on the constitutional amendment bill (40−3 Cong. Globe 686; cf. William Gillette, The Right to Vote: Politics and Passage of the Fifteenth Amendment, 52 (John Hopkins Univ. Pr. 1969) [hereinafter Gillette]).

5 40−3 Cong. Globe 286. Representative Boutwell presented the bill as a proposal of the judiciary committee of the House of Representatives. Before that, on December 7, 1868, Representatives Kelly and Broomall proposed independently amendments to the Constitution concerning the right of suffrage (40−3 Cong. Globe 9 (1868)). The bill of Representative Kelley was: “No State shall deny to or exclude from the exercise of any of the rights of privileges of an elector any citizen of the United States by reason of race or color.” The Bill of Representative Broomall was:

“Neither Congress nor any State by its constitution or laws shall deny or restrict the right of suffrage to citizens of the United States on account of race or parentage of such citizens; and all qualifications or limitations of the right of suffrage in the constitution

Section 1 The right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of the race, color, or previous condition of slavery of any citizen or class of citizens of the United States.

Section 2 The Congress shall have power to enforce by proper legislation the provisions of this article.

The Representative stated that this bill was one of a series of measures growing out of the rebellion, was necessary for the reorganization and pacification of the country with which Congress had been charged, and would secure to all the people of the country, without distinction of race or color, the privilege of the elective franchise[6]. Furthermore, he insisted that the object of the bill was to secure universal suffrage to all adult male citizens of the country[7]. Besides, he explained that there was nothing in the bill that should prevent any State from requiring of voters a property or educational qualification[8].

Paragraph 2 Supporting Opinions for the Bill at the House of Representatives

Supporters of the bill first insisted, from the viewpoint of the relation between the political system and the citizens, that since just government was founded on the consent of the governed and since the established mode of consent was through ballot box, the Government which withheld the right of suffrage was, as to the governed from whom it was withheld, no just Government. Thus the citizen could not be denied the right to the ballot in any State[9]. They also insisted, from the viewpoint of the governed, that since no man was safe in his person or property in a community where he had no voice in the protection either, the Government should give the people the right of the self-defense and of the ballot[10].

Second, the supporters pointed out concerning the problem of race or color that to deny the citizen the right of elective franchise because of the race or color should violate the principle of republican government of the United States[11]. Supporters insisted that, since a colored man was a citizen of the United States equal to the other citizens and since the Government of the United States was no longer the Government of white men but that of people, black persons should also be given the right to vote[12].

Paragraph 3 Opposing Opinions against the Bill at the House of Representatives

The opponents against the amendment bill insisted first that the United States was not to guarantee any particular form of republican government and that the States certainly should have the right to select or choose for themselves the form, only so that it was republican. They continued that a State could not be said not to have the republican government only because it didn't allow all its citizens to vote[13].

Furthermore, it was pointed out that to have citizenship should not necessarily mean to have the right to vote[14].

Paragraph 4 Amendment Proposals to the Bill at the House of Representatives

Some amendments to the bill of the House of Representatives were proposed[15]. Any one of those amendment

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or laws of any State, based upon race or parentage, are, and are hereby, declared to be void."

Both were decided to be discussed at the Judiciary Committee of the House of Representatives.

6 40−3 Cong. Globe 555 (1869).

7 Id., at 560.

8 Id., at 561.

9 Id., app. 102 (Rep. Broomall); Id., at app. 94 (Rep. Corley).

10 Id., at 693 (Rep. Shanks); Id., at app. 241 (Rep. Blackburn).

11 Id. at app. 200 (Rep. Loughridge).

12 Id., at app. 93 (Rep. Whittmore); Id., at app. 94 (Rep. Corley); Id., at app. 96 (Rep. Bowen); Id., at app. 102 (Rep. Hamilton).

13 Id., at 644 (Rep. Eldridge); Id., at 689 (Rep. Beck).

14 Id., at 644 (Rep. Eldridge); Id., at 691 (Rep. Beck).

15 Representative Boutwell himself also proposed an amendment to add "nor shall educational attainments or the possession or ownership of property ever be made a test of the right of any citizen to vote". But that amendment proposal was rejected. Id., at

proposals was intended to restrict the power given to States to set up the qualifications for the right to vote by other various reasons than race, color, or previous condition of slavery.

On January 23, 1869, Representative Brooks proposed an amendment bill which consisted of two sections. The first section of the proposal provided "the right of any person of the United States to vote shall not be denied or abridged by the United States or by any State by reason of his or her race, sex, nativity, or age when over twelve years, color, or previous condition of slavery of any citizen or class of citizens of the United States"[16].

On January 29, Representative Shellabarger proposed an amendment bill which provided "No State shall make or enforce any law which shall deny or abridge to any male citizen of the United States of the age of twenty-one years or over, and who is of sound mind, an equal vote at all elections in the State in which he shall have such actual residence as shall be prescribed by law, except to such as have engaged or may hereafter engage in insurrection or rebellion against the United States, and to such as shall be duly convicted of treason, felony, or other infamous crime"[17].

Furthermore, on the same day, Representative Bingham proposed an amendment bill which provided "No State shall make or enforce any law which shall abridge or deny to any male citizen of the United States of sound mind and twenty-one years of age or upward the equal exercise of the elective franchise, subject to such registration laws as the State may establish, at all elections in the State wherein he shall have actually resided for a period of one year next preceding such election, except such of said citizens as shall hereafter engage in rebellion or insurrection, or who may have been or shall be duly convicted of treason or other infamous crime"[18].

In the discussion process, there was presented an opinion that especially the right of suffrage should not be denied on account of ignorance or poverty[19]. Furthermore, it was also insisted that every person owing allegiance to the Government and not under the legal control of another should have an equal voice in making and administering the laws and that there should be no distinction of wealth, intelligence, race, family, or sex[20].

In spite of the amendment proposals and opinions described above, the constitutional amendment bill was, in the end, approved without any correction, and was sent to the Senate[21].

Paragraph 5 Supporting Opinions for the Bill of the House of Representatives in the Senate

On January 30, 1869, the constitutional amendment bill of the House of Representatives was committed to the committee on the Judiciary of the Senate[22].

On February 3 of the same year, the committee presented the bill with the first section amended to be "The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States, or any State, on account of race, color, or previous condition of servitude", so as to make the right to hold office also included as the object[23].

The supporters for the bill of the committee on the judiciary of the Senate insisted as follows.

First, regarding the guaranty of the rights for black people, it was pointed out that, since all just governments should rest on the consent of the governed and since the colored people of the country were to be recognized as citizens and held subject to the laws, those colored persons should have the right to an enactment of the laws and to a

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16 Id., at 561. The second section provided the power of the Congress to enforce this provision by an appropriate legislation.

17 Id., at app. 97.

18 Id., at 722. The Bingham's bill was amended a little in the wording before put to the vote. Id., at 743.

19 Id., at app. 94 (Rep. Corley).

20 Id., at app. 102 (Rep. Broomall).

21 Id., at 745.

22 Id., at 741.

23 Id., at 827–828. William Gillette wrote, there was in the State of Georgia at that time a trouble in which the black members of the state assembly had been excluded from the assembly because they were black. Gillette 50. Regarding the public record on similar troubles, cf. 40–3 Cong. Globe 1426 (Rep. Butler).

participation in the administration of the Government[24]. Also from the viewpoint of history, it was insisted that since black people had become citizens after the Civil War, they should be given the ballot[25]. Concerning the relation of the suffrage to other rights, it was pointed out that, when black people would have the suffrage as a result of the amendment of the Constitution, their enjoyment of other Civil Rights would also be secured[26]. Furthermore, relating to those opinions described above, it was also stated that, if black people were to be imposed taxes, they should be able to select the Government who would tax them[27].

Second, concerning the effect of this amendment of the Constitution to the national government, it was pointed out that, if the amendment bill was established, it would prevented the suffrage of black people to be denied in the former rebel States[28], and that the right to vote of black people would stand at the equal position in all States[29]. Further on this point, it was stated that the amendment might prevent a possible rebellion by black people where the black people were not yet guaranteed the right to vote despite that there were many black persons residing in the States[30]. Moreover, there was an opinion that the enfranchisement of the black people would remove the problem concerning black people which had existed since the national foundation, from the arena of national politics[31].

Third, concerning persons who should get the right of suffrage by the amendment, it was stated that, although some insisted as a reason of the opposition against the amendment, that, while intelligence and virtue were necessary to use the right of suffrage properly, but black people generally lacked them so that black people shouldn't be allowed to vote, intelligence and virtue were the characteristic not of race but of individuals and a woman was not allowed to vote even if she had already acquired the necessary intelligence and virtue, so such a reason of the opposition should be inappropriate[32]. Furthermore, it was pointed out that, since the great body of the men upon whom the right of suffrage was to be conferred by the amendment were men who had long been free, who lived in the northern States, namely, not men just emerged from slavery but a comparatively educated class living throughout the entire North, the argument that might be made for enfranchising men just emerging from slavery could not be made for them[33].

Fourth, concerning the eligibility for the offices, there was presented an opinion that, when a State said a certain man or a certain class of men should not be eligible to office, it meant that the people of the State should not elect them to the offices, which was a restriction not only upon the right of the individual but also upon the right of the people and lifting off such the restriction would enfranchise the whole body of the people of that State[34].

Paragraph 6 Opposing Opinions against the Bill of the House of Representatives in the Senate

The opponents against the bill of the Judiciary committee at the Senate, which was the descendant of the bill of the House of Representatives insisted following points.

In relation to the power of State, it was insisted that the amendment bill was intended to give the sovereignty to the Union so as to abolish the power of autonomy of each State thereof[35]. Furthermore, there was also an opinion that,

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24 40-3 Cong. Globe 911 (Sen. Willey).
25 Id., at 980 (Sen. Abbott); Id., at 1004 (Sen. Yates).
26 Id., at 912 (Sen. Willey); Id., at 990 (Sen. Morton).
27 Id., at 911 (Sen. Willey).
28 Id., at 911 (Sen. Willey).
29 Id., at 912 (Sen. Willey); Id., at 983 (Sen. Ross).
30 Id., at 912 (Sen. Willey); Id., at 998 (Sen. Sawyer).
31 Id., at 912 (Sen. Willey); Id., at 991 (Sen. Morton).
32 Id., at 982 (Sen. Welch); Id., at 998 (Sen. Sawyer).
33 Id., at 990 (Sen. Morton).
34 Id., at 1040 (Sen. Howe).
35 Id., at app. 161 (Sen. Saulsbury). The Senator pointed out as a concrete problem the fact that, since the meaning of the words "appropriate legislation" in the second section was not clear, the Federal Congress might be able to arbitrarily control the conditions of elections at any State.

since the elections of each State to be performed under the constitution of the State should be involved in the fundamental construction the government of the State, such an proposal to amend the Federal Constitution as to affect such elections shouldn't be allowed[36]. It was also insisted that, since it should be fundamental for a republican government to determine the qualification of its electors, a proposal to amend the Federal Constitution so as to control the elections of a State performed under the constitution of the State would deny the power of States to determine their own electors and, therefore, violate the Federal Constitution which guaranteed any State a republican government[37,38]. Furthermore, there was an opinion that the bill should not be allowable since it deprived States of the power to perform the elections by giving that power to the Union[39].

Next, concerning the fact that the purpose of this amendment of the Constitution was to guarantee black persons the right to vote, it was pointed out that, first of all, it had never caused any trouble for black persons not to be guaranteed the right to vote[40].

Concerning the general ability of black people, it was insisted that, although public virtue and intelligence were the foundation of a republic, black people as a race were unfortunately too ignorant and superstitious to give them the right to vote[41]. Furthermore, there was presented even an opinion that the questioned amendment should confer the franchise of suffrage upon an inferior race so as to subvert the system of government organized by their ancestors[42].

Paragraph 7 Amendment Proposal to the Bill of the House by the Senate

To the bill of the Judiciary Committee of the Senate, some amendment proposals were presented[43,44].

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36 Id., at 860 (Sen. Dixon); Id., at app. 288 (Sen. Davis); Id., at app.168 (Sen. Bayard). However, Senator Davis stated that it would be allowed for Congress to the power to enact the law concerning national elections and to enforce it.

37 U.S. Const. art. IV. § 4.

38 40-3 Cong. Globe app. 151 (Sen. Doolittle).

39 Id., app. 151 (Sen. Doolittle). Against such an opinion emphasizing the power of States as described above, it was insisted that such a way of thinking was insisted together with the presupposition of separated States from the Union and, therefore, wrong and that the Union was not a mere aggregation of States but a nation (Id., at 990 (Sen. Morton)). It was also insisted that the dangers which had arisen to safe and just government had not arisen from centralization, but from decentralization (Id., at 981 (Sen. Abbott); Id., at 990 (Sen. Ross)).

40 Id., at app. 165 (Sen. Saulsbury). Senator Saulsbury enumerated there following points as the condition to justify any amendment of the Constitution and insisted such condition was not satisfied, namely:

- Authority to make it.
- Necessity of its being made, arising from evils suffered from its not having been made.
- That these evils would not exist if the amendment should be made, and that those evils were greater than would result from the making of the amendment.
- That society and government would be improved by its being made.

In relation to this point, Senator Hendricks pointed out that the test tried in some of Southern States to confer suffrage to colored people had not shown so great success as to justify very high hopes in that direction (Id., at 989).

Similar insistence to that of Senator Saulsbury was presented also by Senator Abbott who supported the amendment. The Senator enumerated, as the conditions to be considered concerning the amendment bill, following check points and examined one by one (Id., at 980):

1. Have we a constitutional authority to do it?
2. Is it equitable to do it under the terms of the Constitution?
3. Is it expedient to do it?

On 1., he concluded that there was no obligation by fundamental law not to insert such a provision as that of the amendment bill into the Constitution.

On 2., he argued that it was true that there were various opinion on the question whether the right to vote was a natural right or not, but since, at least, it was certain that the Federal Government was founded on the idea that all political power was vested in not a part but all of the people, to base the government of a State on the consent of all the people would be equitable.

On 3., he insisted that they could not resist the overwhelming current public opinion in favor of universal suffrage and concluded that they had necessity as well as right impelling them to the action to give the right of suffrage to the great mass of the people without distinction of color or race or personal qualities. (He exemplified there the extension of the range of the holders of Civil Rights in England, France, Italy, Austria, Prussia, Russia and etc..)

41 Id., at 911 (Sen. Vickers); Id., at 989 (Sen. Hendricks).

42 Id., at app. 165 (Sen. Bayard); Id., at 1012 (Sen. Doolittle).

43 The article will introduce there only the proposals recorded in Congressional Globe series. Regarding other proposals, cf., Edward

In relation to the racial matter, there were presented following amendment proposals.

First, on February 3, 1869, Senator William proposed an amendment to insert the word "natural-born" just before the word "citizens". The senator explained that the intention of the amendment proposal was to deprive of Chinese and Japanese in the States of California and Oregon of the elective franchise or the right to hold office[45].

Second, on the same day as above, Senator Corbett proposed an amendment which added the sentence "But Chinaman not born in the United States and Indians no taxed shall not be deemed or made citizens"[46]. This proposal was also intended to restrict the right to participate in politics of Chinese and Indians not taxed, as the proposal of Senator Williams mentioned above was.

As an amendment proposal taking the relation between the Union and States into consideration, there were two kinds of proposals, namely, one to try to maintain the power of States and another to restrict that.

As an example of the former type, that is, to try to maintain the power of States, Senator Howard proposed on February 3, 1869, an amendment which provided "Citizens of the United States, of African descent, shall have the same right to vote and hold office in States and Territories, as other citizens, electors of the most numerous branch of their respective Legislatures". On this proposal, the Senator explained that, since the bill of the Senate allowed Congress the power to determine the qualifications of electors or office holders and it was so undesirable, he proposed the amendment[47].

Second, on the same day as above, Senator Sawyer proposed an amendment which guaranteed the right to vote and hold office to all male citizens of the United States who are twenty-one years old and of sound mind, while it guaranteed States the right to prescribe requirements for the right to vote and hold office if the requirement conditions

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McPherson, The Political History of the United States of America During the Period of Reconstruction April 15, 1865 -- July 15, 1870, 400 (Da Capo Pr. 1972) [hereinafter McPherson]. There were found some discrepancies on the dates of seemingly same proposals between Congressional Globe and McPherson. In such cases, This article adopted the date recorded in Congressional Globe.

44 There were following proposals in addition to the proposals quoted above.

On February 3, 1869, Senators Fowler and Pomeroy independently proposed the amendment bills like following. The proposal of Senator Fowler was: "All citizens of the United States residents of the several States now or hereafter comprehended in the Union, of the age of twenty-one years and upward, shall be entitled to an equal vote in all elections in the State wherein they shall reside, (the period of such residence as a qualification for voting to be decided by each State,) except such citizens as shall engage in rebellion or insurrection, or shall be duly convinced of treason or other infamous crime"(40−3 Cong. Globe 828. Senator Fowler later amended the words "All citizens of the United States" to be "All the male citizens of the United States". Id., at app. 199.).

The proposal of Senator Pomeroy said "The right of citizens of the United States to vote and held office shall not be denied or abridged by the United States or any State for any reason not equally applicable to all citizens" (40−3 Cong. Globe 828. The Senator proposed a similar amendment also to the bill of the Senate on January 29. Id., at 708).

On February 4, Senator Warner proposed an amendment which said "The right of citizens of the United States to hold office shall not be denied or abridged by the United States or any State on account of property, race, color, or previous condition of servitude; and every male citizen of the United States of the age of twenty-one years or over, and who is of sound mind, shall have an equal vote at all elections in the State in which he shall have actually resided for a period of one year next preceding such election, except such as may hereinafter engage in insurrection or rebellion against the United States and such as shall be duly convicted of treason, felony, or other infamous crime" (Id., at 861).

On February 8, Senator Drake proposed an amendment which provided "No citizen of the United States shall, on account of his race, color. or previous condition of servitude, be by the United States or any State denied the right to vote or to hold office" (Id., at 999). The Senator explained there that the amendment should make clear the fact that the right to vote or to hold office was not the right automatically given to the citizens of the United States but that to be given through appropriate legislation, and the fact that the purpose of the constitutional amendment was to prevent from the hinderance of the execution of the right to vote or to hold office on account of race or others (Id. In relation to that, the Senator proposed a similar amendment also to the bill of the Senate (Id., at 1302). On this occasion, Senator Fowler pointed out that it should be made clear that the right of suffrage should be given to all persons who constituted the society or the government, namely, all citizens, and insisted that the original bill of the Senate should be adopted in order to give the right to vote also to white persons who had not yet been guaranteed that right (Id., at 1303.)).

45 40−3 Cong. Globe 938.

46 Id., at 939. Against this proposal, Senator Trumbull pointed out at the later stage of the discussion that to insert such a sentence was undesirable since they were trying to amend the Constitution so as to give the right to vote and to hold office even to the Hottentots and cannibals from Africa. Id., at 1036.

47 40−3 Cong. Globe 985. Furthermore, the Senator proposed a similar amendment at the time of the discussion on the bill of the Senate on February 17, 1869.

were applicable equally to all male citizens of the United States[48].

Third, on February 8, 1869, Senator Davis proposed to the Judiciary Committee of the Senate an amendment to add following sentence, namely, "But Congress having to propose amendments to the Constitution of the United States only, this provision is not intended to apply to or in any way to affect the principles and forms of the governments of the several States as organized by their respective constitutions"[49].

As an example of the latter type above, namely, amendments intending to restrict the power of States, Senator Williams proposed on February 4, 1869, an amendment which provided "Congress shall have power to abolish or modify any restrictions upon the right to vote or hold office prescribed by the constitution or laws of any State"[50]. The Senator stated that by that amendment Congress could correct any wrong oppressive requirement made by a State for the right to vote or hold office so as to guarantee all the citizens equal political rights[51].

Besides above, Senator Wilson proposed, intending not only to pursuit the abolition of the restriction on the right of suffrage on account of race but also to remove the restrictive requirements for the suffrage in general, an amendment which provided "No discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise, or in the right to hold office on account of race, color, nativity, property, education, or creed"[52].

Furthermore, on February 9, Senator Sumner proposed an amendment which consisted of five sections and guaranteed not only the right to vote but also the procedural law without discrimination for the registration of electors. The first section of the proposal prohibited from denying or abridging the right to vote and to hold office anywhere in the United States under any pretense of race or color and made void the law of a State, including its constitution, which violated the prohibition. The second section provided that any person who, under any pretense of race or color, willfully hindered or attempted to hinder any citizen of the United States from being registered, or from voting, or from being voted for, or from holding office, should be punished. The third section provided the punishment on a person who willfully defused to register the name or to receive, count, return, or otherwise give the proper legal effect to the vote of any citizen under any pretense of race or color. The fourth section prescribed the jurisdiction of the cases concerning the act. The fifth section provided that every citizen unlawfully deprived of any of the rights of citizenship secured by the act under any pretense of race or color might maintain a suit against any person so depriving him[53].

Paragraph 8 Discussion at the Senate on the Criterion to Restrict the Right of Suffrage

In the discussion process, two problems, namely, an issue regarding the criteria to restrict the right of suffrage and a question whether the words "citizens of the United States" should be inserted or not, were intensively argued.

Concerning the former problem, that is, the criteria to restrict the right of suffrage, there were presented following opinions.

As for the general criterion, it was insisted that "qualification" was quite different from "quality" and that nothing should be a qualification, which was not in its nature attainable[54]. Furthermore, it was insisted that, while as a criterion to exclude from voting, race, property, religion, birthplace or lack of education was often mentioned, in

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48 40-3 Cong. Globe 828.

49 Id., at 982.

50 Id., at 864. Senator William proposed a similar amendment also to the bill of the Senate on January 21. Id., at 491.

51 Id., at 900.

52 Id., at app. 154. The record of Wilson's bill on February 9 in Congressional Globe was modified a little in wording from that quoted above. Cf., Id., at 1029.

53 Id., at 1041.

54 Id., at 902 (Sen Sumner). Senator Sumner enumerated there, as qualifications to be later attainable, residence, property, education and character.

order to settle this question once for all, it would be better to declare that every male citizen of the United States, native or naturalized, above the age of twenty-one years, should have the right to vote, unless he was excluded for crime and to provide that no State should exclude any one from the right to vote because of such fact as above[55].

Concerning the power of States, on the one hand, it was insisted that no distinction should be made among citizens on account of a factor other than age, residence or sex[56]. On the other hand, it was insisted that the States had the exclusive right to regulate the qualifications of electors, including color, property, intelligence, whether he could read the Constitution or anything else[57].

Next, concerning the individual requirements for the right to vote, there was an opinion that, although it was problem for women to be excluded from elections, woman's suffrage would not be attainable if considering the political situation at that time[58].

Concerning the requirement of educational standard, it was pointed out that, although it should not be allowable to abridge the right to vote on account of race, color, or lack of property, since to protect and guard their civilization against the incoming floods of ignorance and barbarism would be simply to preserve the jewel of liberty, educational test for suffrage would be desirable as an encouragement to popular intelligence[59].

Concerning the other requirements for the right to vote, there was expressed an opinion which said that, while the powers of Government were most safely for the benefit of all entrusted to the people at large, the general principle should be subject to exceptions, so that the restriction of suffrage on account of age, sex, or race should be allowed[60].

In relation to this point, there was expressed a concern that the bill of the Judiciary Committee of the Senate prohibited only the discrimination of the enjoyment of the right to vote on account of race, color, or the like, so that it might be interpreted to allow discriminations on account of other factors than those prescribed therein[61].

Paragraph 9 Discussion on the phrase "Citizens of the United States" at the Senate

The question whether the phrase "citizens of the United States" should be included in the provision or not was discussed on the occasion that Senator Sumner proposed to strike the words out from the bill of the Judiciary Committee of the Senate[62]. In relation to that, there was also a problem that the Naturalization Act at that time[63] provided only white persons could be naturalized.

On this point, on the one hand, there was an opinion that whether the Declaration of Independence would be applied to Chinamen or not was undecided[64], or that it would be desirable for every man, whatever might be the country from which he had come, to be accepted if he could, by his industry, add to their national wealth[65]. On the other hand, against the opinions above, it was pointed out that it was not possible the Declaration of Independence ever could be so understood as to give to foreigners in the United States the same rights that native-born citizens possessed[66]. Furthermore, there was an opinion that some offense should be necessary to protect their government

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55 Id., at 1013 (Sen. Sherman).

56 Id. at 1039 (Sen. Sherman).

57 Id., at 909 (Sen. Vickers). In another place, Senator Vickers stated "Public virtue and intelligence are the foundations of a republic. … It is a government of opinion, of principle. … its officers and agents must be wise, capable, and patriotic. The people who select them must, to a great extent, possess the same elements" and insisted that the introduction of black people, who were unfortunately ignorant and superstitious, into their political affaires would be undesirable. Id., at 911.

58 Id., at 862 (Sen. Warner).

59 Id., at 1037 (Sen. Paterson).

60 Id., at app. 168 (Sen. Bayard).

61 Id., at 862 (Sen. Warner); Id., at 863 (Sen. Morton); Id., at 900 (Sen. Williams).

62 Id., at 1030.

63 An Act to establish an uniform rule of Naturalization, and to repeal the acts heretofore passed on that subject, 2 Stat. 153 (1802).

64 40−3 Cong. Globe 1035 (Sen. Sumner).

65 Id., at 1036 (Sen. Cameron).

66 Id., at 1034 (Sen. Williams).

against Chinamen[67,68,69].

Paragraph 10 Course of Things Thereafter

As the result of the discussions described above, on February 9, the amendment bill of Senator Wilson was substituted for the first section of the Judiciary Committee's bill[70], then, the bill was finally approved by vote and committed to the House of Representatives[71].

The House of Representatives received the bill on February 10, 1869[72], and deliberated it on the 15th day of the month[73]. The House did not agree to the bill amended by the Senate[74] and proposed to organize a joint committee on that problem[75]. Responding to that, the Senate began to discuss on this issue on the 17th[76]. The Senate withdrew the amendment to the House's bill[77] and then tried to reach the agreement on the original bill of the House of Representatives. But the agreement couldn't be reached so that the bill of the House of Representatives was rejected in the end[78].

Afterward on the same day, the Senate presented again to the floor the Senate' bill on which the discussion had been suspended halfway[79].

Subsection 2 Discussion on the Senate's Bill

Paragraph 1 Proposal by the Senate

The Senate's bill was proposed on January 15, 1869, by the Judiciary Committee of the Senate[80]. The content was: "The right of citizens of the United States to vote and to hold office shall not be denied or abridged by the United States, or any State, on account of race, color, or previous condition of servitude. And Congress shall have power to enforce the provisions of this article by appropriate legislation."[81].

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67 Id., at 1033 (Sen. Morton). In relation to that, Senator Hendricks pointed out that the amendment of the Constitution might force the Chinese vote upon the people of the Pacific coast even when they didn't want it by themselves. Id., at 900. Senator Williams also pointed out a similar issue. Id., at 901.

68 However, at the same time, such an amendment proposal by Senator Corbett to the bill of the Judiciary Committee of the Senate, as providing that the Chinese who had not been born in the United States and Indians not taxed should not be included in the male citizens of the United State, was still rejected (Id., at 1036), so that the opinion of the Judiciary Committee of the Senate on this issue was unclear.

69 Senator Trumbull pointed out on the constitutional amendment bill that if the phrase "citizens of the United States" was included in it, the discrimination on account of race or others would be prohibited only to citizens of the United States, while if this phrase was struck out, such a discrimination should be prohibited not only to the electors who were citizens of the United States but also to all electors whether being citizens or not. He continued that, since, in the United States, there was no strict correspondence between being a citizen of the United States and having the right to vote, the difference above would have some influence to the power of States to regulate the elections. Id., at 1030.

70 The Wilson's bill proposed on February 8 (Id., at app. 154) itself was resected on the next day, namely, on February 9. But, according to the record in Congressional Globe, that rejected bill of Senator Wilson was substantially same as, but formally different in wording from, the bill proposed on February 8. The Senator proposed the same bill as that had been proposed on February 8 again after the rejection of February 9 (Id., at 1035). It was the bill proposed again on February 9 that the Judiciary Committee of the Senate had finally approved (Id., at 1040).

71 40-3 Cong. Globe 1040, 1044. In addition to the bill of the Judiciary Committee of the Senate, an amendment bill to Clause 2, Section1, Article 2 of the Constitution of the United States was attached to the bill, and the bill was committed to the House of Representatives. cf. Id., at 1224.

72 Id., at 1055.

73 On some day between February 10 to 15, Representative Ashley proposed an amendment bill to the bill of the Senates (40-3 Cong. Globe 1107).

74 Representative Boutwell who proposed to oppose the Senate's bill stated as the reason of the opposition that the Senate's amendment to the House's bill provided no special security for persons who had been slaves (Id., at 1225).

75 Id., at 1226.

76 Id., at 1285.

77 Id., at 1295.

78 Id., at 1300.

79 Id.

80 Id., at 378.

81 Id., 379. In the record in Congressional Globe, there were some differences in wording, line breaking or other forms among the bill dated

The discussion on the Senate's bill quoted above was carried out on January 28 and 29 of the year, and, after some pause in between, reopened on February 17.

Senator Stewart who was the presenter of the bill explained that the Senate's bill to amend the Constitution was the logical result of the rebellion, of the abolition of slavery, and of the conflicts in that country during and before the war, and that it was the only measure that would really abolish slavery[82].

In the discussion process of the Senate's bill, while there was expressed an opinion that they should give all citizens equal rights and then protect everybody in the United States in the exercise of those rights so as to realize the ideas which lay at the foundation of their institutions[83], there was also presented an opinion that, although the idea to realize universal suffrage could be approved, such a realization should be done by the people of the various States[84].

Paragraph 2 Amendment Proposals to the Senate's Bill

Some amendments were proposed to the Senate's bill[85].

First, on February 17, Senator Howard proposed to strike the words "by the United States or" in the bill to be that the right of citizens of the United States to vote and hold office should not be denied or abridged by any State on account of race, color, or previous condition of servitude[86]. The Senator explained, as the reason of the proposal, that those words would imply the United States should have the power to deny or abridge the right of the citizen to vote or to hold office on account of any other fact than race, color, or others[87]. Against this proposal, Senator Edmonds pointed out that, since the United States had plenary jurisdiction over the subject of suffrage in the Territories and in the District of Columbia, those words should be kept in the provision[88].

On the same day as above, Senator Doolittle proposed an amendment bill which said "Nor shall any citizens be so denied by reason of any alleged crime, unless duly convicted thereof by the verdict of an impartial jury". Regarding this proposal, Senator Doolittle explained that it was intended to prohibit the exclusion of citizens from the right of franchise by the machinery of test-oath[89,90].

Paragraph 3 Discussion on the Criterions to Restrict the Right of Suffrage

Besides the arguments described above, concerning the problem of the exclusion of women from elections, there was an opinion that women also should be able to enjoy the right of suffrage[91]. It was also insisted that the enjoyment of the right of suffrage should be guaranteed on the basis of manhood, not of sex[92].

January 15 (Id.), 1869, that dated the 23rd of the same month (Id., at 542) and that dated February 17 of the same year (Id., at 1300).

82 Id., at 668.

83 Id., at 672 (Sen. Wilson); Id., at 1303 (Sen. Fowler). Senator Fowler pointed out that the amendment of the Constitution would not be enough if it should not guarantee the right of suffrage also to white citizens who were not given the right to vote at that time. Senator Fowler voted nay to the amendment bill, in the end. Id, at 1318.

84 Id., at 670 (Sen. Fowler).

85 This article will not refer to such amendment proposals to the House's bill as being similar to the proposals discussed at the Senate, so as to concentrate the main ones recorded in Congressional Globe. As for the amendment proposals this article won't mention, see McPherson, 404.

86 Id., at 1304.

87 Id.

88 Id.

89 Test-Oath: An oath required to be taken as a criterion of the fitness of the person to fill a public office. What is especially well-known is one which the law of the United States or that of a State required after the Civil War concerning the person's opinion or actions during the war time, which was judged to be unconstitutional because it was a kind of retroactive punishment. See, Kenzo Takayanagi and Sanji Suenobu ed., Dictionary of Anglo-American Law (Yuhikaku 1990); See also, "Test Oath Cases", Cf. VI Leonard Levy et al. ed., Encyclopedia of the American Constitution, 2679 (2nd ed., Macmillan Co., 2000).

90 40−3 Cong. Globe 1305.

91 Id., at 670 (Sen, Fowler).

92 Id., at 710 (Sen. Pomeroy).

Paragraph 4 Sending to the House of Representatives

As the outcome of the discussions and arguments on those amendment proposals described above, the Senate finally approved on February 17, 1869, the Senate's bill without any amendment, and referred it to the House of Representatives[93]. The House of Representatives began to discuss it from the 20th day of the month. Representatives Shellabarger, Logan, and Bingham, each proposed an amendment to that[94]. Among them, the proposal by Representative Bingham was to strike out the words "by the United States or" and to insert the words "nativity, property, creed" so as to prohibit the discrimination also on account of nativity, property and creed[95]. The bill, so amended as to meet the Representative Bingham's proposal, was approved in the end[96].

The decision of the House of Representatives was sent to the Senate on February 22[97] and the Senate discussed it on the same day and the next day. The Senate didn't approve the amendment by the House of Representatives and proposed to organize a joint committee to the House of Representatives[98].

On the 25th day of the same month as above, the joint committee's bill was presented to both the Senate and the House of Representatives[99]. The content of the bill was the same as that of the Senate's bill before the amendment by the House except that the part concerning the guarantee of the right to hold office was removed from it. It was quite the same as the current provisions of the Fifteenth Amendment of the Constitution[100]. The joint committee's bill was approved by the House of Representatives without any discussion[101].

At the Senate, following issues were pointed out[102].

First, concerning the question whether the purpose of the amendment is to prohibit discrimination on the right of suffrage or to guarantee the right of suffrage, there was presented an opinion that the purpose of the amendment was not to guarantee the right of suffrage to a colored man[103]. Concerning this point, there was expressed an opinion that the amendment did not resolve the problem of the right of suffrage of black people but only shelved it[104]. Concerning the right to hold office, there were expressed opinions that many members of the Senate understood the amendment was not intended to guarantee the right to hold office[105].

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93 Id., at 1318, 1329. cf. Gillet 67.

94 The amendment proposal of Representative Shellabarger was a correction of the bill he had proposed at the time of the discussion on the House's bill (40−3 Cong. Globe app. 97) (Id., at 1426). The proposal of Senator Logan was to strike out the part concerning the right to hold office (Id.), which was based on the thought that the original Constitution had left the power to determine the qualifications for holding office to States. On the other hand, Senator Butler proposed the amendment based on the thought that the right to vote and the right to hold office should be inseparable (Id.).

95 Id., at 1426.

96 Id., at 1428.

97 Id., at 1436.

98 Id., at 1481.

99 Id., at 1563 (The House); Id., at 1593 (The Senate).

100 Id., at 1623.

101 Id., at 1563.

102 In addition to the points described above, following opinions were also expressed.

- It was regrettable that the words to prohibit the discrimination on account of nativity, property or creed could not be added to the provision (Id., at 1628 (Sen. Morton); Id., at 1626 (Sen. Wilson)).
- It was an important power of States to determine the holders of the right to vote and to hold office, so it should be out of the power of Congress to establish the bill as an amendment of the Constitution (Id., at 1631 (Sen. Davis); Id., at 1639 (Sen. Buckalew)).

Concerning the latter point, Senator Doolittle pointed out that, if the bill was enacted, the governments of Pacific States might be dominated by Asians. Id., at 1628.

103 Id., at 1625 (Sen. Howard). However, the Senator stated that, when the right of suffrage of colored people was infringed by any State, the Federal Congress should intervene it according to the second section of the amendment.

Furthermore, at the time when that issue was discussed at the House of Representatives, Representative Bingham stated the same opinion as that of Senator Howard mentioned above (Id., at 727). On the other hand, against that opinion, Representative Jenckes pointed out that such an intervention would be difficult in practice (Id., at 728).

104 Id, at 1625 (Sen. Howard).

105 Id., at 1629 (Sen. Sawyer). In fact, Senators, Edmunds (Id., at 1626), Wilson (Id., at 1627), Morton (Id., at 1628), Fowler (Id., at 1641), and Stewart (Id., at 1629) pointed out that the amendment would not guarantee the right to hold office.

On February 26, the Senator approved the amendment bill of the joint committee[106]. The bill was committed to the ratification by States. The amendment finally came into effect on March 30, 1870[107].

Section 3 Major Acts regarding Civil Rights

In the period treated in this chapter, the Federal Congress enacted some acts concerning the Civil Rights in order to practically enforce the Fourteenth and Fifteenth Amendments of the Constitution[108,109].

Subsection 1 The Enforcement Act of 1870

The Federal Congress enacted the Enforcement Act of 1870 on May 30, 1870[110]. The Act consisted of twenty-three sections in total, including the provisions concerning the enforcement of the Fifteenth Amendment and certain re-regulation of the Civil Rights Act of 1866[111].

The first section of the Act provided "all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding".

Next, the provisions from Section 2 to Section 7 prescribed the procedures to punish the obstructive actions to prepare elections or to operate elections.

The second section provided "if by or under the authority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to be done as a prerequisite or qualification for voting, and by such constitution or laws persons or officers are or shall be charged with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite, or to become qualified to vote, it shall be the duty of every such person and officer to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote without distinction of race, color, or previous condition of servitude". In addition to that, the same section provided punishments on the person who violated that.

The third section provided that, whenever some procedure required as a prerequisite to qualify a citizen to vote by any law failed to be carried into execution by any wrongful action of the officer or other person charged with the duty

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On this point, Senators Wilson (Id., at 1626) and Warner (Id., at 1641) stated that an amendment of the Constitution to guarantee all political rights equally to all citizens regardless of race or others would be idealistically desirable.

106 Id., at 1641.

107 Rev. Stat. 32 (1878). cf. 16 Stat. 1131 (1870).

108 On the contents of such Acts, see Charles Fairman, Reconstruction and Reunion 1864−88 Part Two, 143 et seq. (Macmillan Co. 1987); Bernard Schwartz, Statutory History of the United States Civil Rights Part I, p. 443 (Chelsea House Pub. 1970); Sidney Buchanan, The Quest for Freedom: A Legal History of the Thirteenth Amendment, 12 Hous. L. Rev. 3, 334 (1974); Mathews, Chap. 5; Xi Wang, The Making of Federal Enforcement Laws, 1870−1872, 70 Chi.-Kent L. Rev. 1013, 1021 (1995).

109 In 1892 the majority of Congress and the President was occupied by the Democratic Party for the first time after the Civil War, and the series of the Civil Rights Acts enacted from the time of the proclamation of the Thirteenth Amendment of the Constitution in 1865 to the time of the establishment of the Civil Rights Act of 1875, were reviewed. Then, on February 8, 1894, Congress established Civil Rights Repeal Act of 1894 (28 Stat. 36. the formal title is: An Act to Repeal all statutes relating to supervisor of elections and special deputy marshals, and for other purposes.). That act abolished the most part of the Enforcement Act of 1870 and the Force Act of 1871 so as to exclude the intervention of the Union into the management of elections by States. Cf. I Leonard Levy et al. ed., Encyclopedia of the American Constitution, 415 (2nd ed., Macmillan Co., 2000).

110 16 Stat. 140. The formal title is: An Act to enforce the Rights of Citizens of the United States to Vote in the several States of this Union, and for other Purposes.

111 The purpose of the enacting was thought at first to be to protect the right to vote of citizens of the United States which had been denied on account of race or other reasons in the States to join the Union (H. R. 1293, 41st-2nd Cong. pr. No. 528 (1870)), or to enforce the Fifteenth Amendment of the Constitution (S. 810, 41st-2nd Cong. (Apr. 19, 1870)). But, because of the later amendments, it was to include provisions non necessarily concerning the right to vote. So the subject of the Act was finally changed to be to guarantee the right to vote to the citizens of the United States in the several States joining to the Union.

to perform the procedure, the procedure should be considered to be completed by the citizen and the officer or other person having done the wrongful action should be punished.

The fourth section provided "if any person, by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, prevent, or obstruct, or shall combine and confederate with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote or from voting at any election as aforesaid," such person should be punished.

The fifth section provided that, if any person should prevent or attempt to prevent any person from exercising or in exercising the right of suffrage, to whom the right of suffrage was secured or guaranteed by the Fifteenth Amendment to the Constitution of the United States, such a person should be punished.

The sixth section provided that, if two or more persons should band or conspire together with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, such persons should be punished.

The seventh section provided that, when there was a violation of the fifth or the sixth section of the act, the punishment was determined according to the law in the State where such a violation was committed.

The provisions from the eighth to thirteenth section prescribed the procedure for the execution of the act. The fourteenth and fifteenth sections prescribed the procedure to execute the third section of the Fourteenth Amendment of the Constitution, and the provisions from the nineteenth to the twenty third section was concerning unlawful actions at the time of performing election.

The remarkable sections among those above were the sixteenth, seventeenth, and eighteenth sections, which provided the security of the rights of a person who was within the domain of the United States.

The sixteenth section provided "all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void".

The seventeenth section provided that the infringement of any right secured or protected by the last preceding section of the act on account of being an alien, or by reason of color or race should be punished.

The eighteenth section enacted the provisions of the Civil Rights Act of 1866[112] again so as to make the security by the preceding two sections operated in accordance with that Act[113].

The sixteenth section had been presented at the Senate as an independent bill but, by an amendment, it was finally incorporated into the Act. Senator Stewart, who proposed the original provision and was also the proposer of the amendment to incorporate the provision into the Act, explained that it was intended to extend the range of the persons to be secured by the Civil Rights Act of 1866 up to foreign peoples[114].

The Act was amended and complemented by the Force Act of 1871[115]. The Force Act of 1871 consisted of nineteen

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112 14 Stat. 27.

113 Concerning the eighteenth section, it is pointed out that it was enacted in order to dissipate the doubt about the Constitutionality of the Civil Rights Act of 1866. Slaughter-House Cases, 83 U.S. 36, 97 (Field, J., dissenting) (1872); Robert J. Kaczorowski, The Chase Court and Fundamental Rights: A Watershed in American Constitutionalism, 21 N. Ky. L. Rev. 151, 163 (note 51) (1993).

114 41−2 Cong. Globe 1536, 3562, 3658. Cf. Runyon v. McCrary, 427 U.S. 160, 198 (1976). However, while the Civil Rights Act of 1866 included a provision to secure the property right, such a provision was not included in the Act of 1870.

115 16 Stat. 433. The formal title is: An Act to amend an Act approved May thirty-one, eighteen hundred and seventy, entitled "An Act to enforce the Rights of Citizens of the United States to vote in the several States of this Union, and for other purposes".

sections and prescribed the power of the officers of the Union and of the federal courts and the punishments in case of unlawful actions concerning elections[116].

Subsection 2 Ku Klux Act of 1871

On April 20, 1871, the Federal Congress enacted the so-called Ku Klux Act in response to the President's message which required legislation to deal with the danger about the lives and properties of people in the Southern States[117,118].

The first section of the Act provided that any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, should subject any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, should be liable to the party injured in any court according to the procedural rules provided by the Civil Rights Act of 1866[119] or the other remedial laws of the United States.

The second section prescribed the contents of the sixth section of the Enforcement Act of 1870[120] in more detail and, in addition, concretely provided the actions to be punished. Such actions included the conspiracy to deprive any person or a class of persons of the equal protection of the laws, or of equal privileges or immunities under laws. Furthermore, following action was also prescribed to be punished in the section, namely, the conspiracy for the purpose of impeding, hindering, obstruction, or defeating the due course of justice in any State of Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice President of the United States or as a member of the Congress of the United States[121]. The latter part of the section provided that any person injured by the act as the realization of such conspiracy as provided in the former part could maintain an action for recovery of damages in the proper district or circuit court of the United States[122].

The third and fourth sections of the Act prescribed the power of President to execute the Act, the fifth section the

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116 This Act was also partly amended by an Act making Appropriations for sundry civil Expenses of the Government for the fiscal Year ending June 13th, 1873, and for other Purposes (17 Stat. 348 (1872)) established on June 10, 1872. Concerning this issue, see Xi Wang, The Making of Federal Enforcement Laws, 1870–1872, 70 Chi.-Kent L. Rev. 1013, 1055 (1995).

117 42–1 Cong. Globe 236 (1871). Though the President's message did not mention it, the legislation was a counter measure against the terrorism by Ku Klux Klan in the Southern States. Cf., ex. Alfred Avins, Fourteenth Amendment Limitations on Banning Racial Discrimination: The original Understanding, 8 Ariz. L. Rev. 236, 246 (1967); William Crosskey and Charles Fairman, "Legislative History", and the Constitutional Limitations on State Authority, 22 Uni. Chi. L. Rev. 1, 91 (1954).

118 17 Stat. 13. The formal title is: An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.

119 14 Stat. 27.

120 16 Stat. 140.

121 In the original bill presented by Senator Shellabarger on March 28, 1871, the word "citizen" was not used but, instead, the word "person" was used (H. R. 320, 42nd-1st Cong. Globe pr. No. 217). The former condition including "any citizen of the United States" in the part described above was added by the Judiciary Committee of the Senate on some day between the seventh and tenth days of April (H. R. 320, 42nd-1st Cong. Apr. 10 1871). On this issue, Senator Edmunds stated that, although the conditions including the word "citizen" would be subsumed under the conditions provided just before that, since the phrase of that provision was too general and vague to be a criminal statue, the provision including the words whose meaning had been established in common law or other laws should be added in order to make the meaning of the condition clear (42–1 Cong. Globe 567).

The latter provision including "any citizen of the United States" was added on the 14th day of the same month without any special discussion (42–1 Cong. Globe 704 (Sen. Edmunds)).

122 This part was not included in the original bill proposed by Senator Shellabarger on March 28, 1871 (H. R. 320, 42nd-1st Cong. pr. No. 217). However the provision with almost the same content was included in an amendment bill proposed by Senator Willard on May 31 (H. R. 320, 42nd-1st Cong. pr. No. 219), or in an amendment proposed by Senator Cook on April 4 (H. R. 320, 42nd-1st Cong. pr. No. 222), or, furthermore, in an amendment proposed by Senator Shellabarger on April 5(H. R. 320, 42nd-1st Cong. pr. No. 223; 42–1 Cong. Globe 477).

requirements to qualify a member of the jury in the trial involving the Act, the sixth section the responsibility of a person who overlooked the actions prohibited in the Act, and the seventh section the relations of the Act with other preexisting laws and statutes.

Subsection 3 The Civil Rights Act of 1875

On March 1, 1875, Congress established the Civil Rights Act of 1875[123]. The Act consisted of five sections[124].

The preamble of the Act declared "it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law".

The first section provided that all persons within the jurisdiction of the United States should be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

The second section prescribed the punishment and the liability for damage in the case of the infringement of the rights to be secured by the Act. The third section prescribed the exclusive jurisdiction of the federal courts on the cases concerning the Act. The fifth section prescribed the jurisdiction of the Federal Supreme Court to review the case arising under the provisions of the Act.

The fourth section provided "no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude".

Section 4 The Other Legislations by Congress

Along with the Civil Rights Act mentioned above, Congress enacted following acts concerning Citizenship or Civil Rights.

Subsection 1 Acts Concerning Citizenship

Major acts concerning citizenship were as follows[125].

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123 18 Stat. 335. The formal title is: An Act to Protect all citizens in their civil and legal rights.

124 Regarding this Act, whether Congress had had the power to legislate it was questioned in a series of cases of 1883, so-called, Civil Right Cases (United States v. Stanley.; United States v. Ryan.; United States v. Nichols.; United States v. Singleton.; Robinson & Wife v. Memphis and Charleston Railroad Co., 109 U.S. 3). The court opinion of the Federal Supreme Court of the case stated as follows and denied the power of Congress in the corresponding cases:

- The Fourteenth Amendment was prohibitory upon the States only, and the legislation authorized to be adopted by Congress for enforcing it was not direct legislation on the matters respecting which the States were prohibited from making or enforcing certain laws, or doing certain acts, but was corrective legislation such as might be necessary or proper for counteracting and redressing the effect of such laws or acts.
- The Thirteenth Amendment related only to slavery and involuntary servitude, yet such legislative power extends only to the subject of slavery and its incidents, and the denial of equal accommodations in inns, public conveyances, and places of public amusement, imposes no badge of slavery or involuntary servitude upon the party.

125 Besides those mentioned above, there were two laws concerning citizenship, namely, Treaty concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russias to the United States of America (15 Stat. 539), which was concluded to purchase Alaska, and Joint Resolution to provide for annexing the Hawaiian Islands to the United States (30 Stat. 750).
The Article 3 of the former treaty provided as follows.

- The inhabitants of the ceded territory might return to Russia within three years;
- If they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, should be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and should be maintained and

Paragraph 1 Expatriation Act (Act of July 27, 1868)

The Expatriation Act[126] concerned the treatment of citizenship of the United States in foreign countries. The content of the Act was to declare that the rights of expatriation were the natural and proper rights of people and made it clear that a person who was naturalized in the United States should lose the former citizenship and become a citizen of the United States[127].

The Act consisted of three sections. The first section declared that any declaration, opinion, order, or decision of the officer of the government of the United Stated to deny or restrict the right of expatriation should be inconsistent with the fundamental principles of the government of the United States. The second and third section prescribed the diplomatic protection of the citizens by the Federal Government.

Paragraph 2 An Act to Amend the Naturalization Act, of July 14, 1870

The Federal Congress established a Naturalization Amendment Act so as to amend the existing procedural rules for naturalization[128]. The seventh section of the Act extended the naturalization laws to aliens of African nativity and to persons having African descent.

Paragraph 3 Chinese Exclusion Act of 1882

In the same period, the Federal Congress established the Chinese Exclusion Act[129]. The Act was the first statute Congress established to restrict immigration by reason of race. The first section prohibited the immigration of Chinese laborers into the United States for ten years, and the fourteenth section prohibited the naturalization of a Chinese person[130,131].

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protected in the free enjoyment of their liberty, property, and religion.

- The uncivilized tribes would be subject to such laws and regulations as the United States might adopt in regard to aboriginal tribes of that country.

The first section of the latter Joint Resolution prohibited further immigration of Chinese into Hawaiian Islands and also the entering of Chinese from the Hawaiian Islands into the United States.

126 15 Stat. 223. The formal title is: An Act Concerning the Rights of American Citizens in Foreign States.

127 On the Act, cf., the authors article, Kotaro Matsuzawa, The Development of Expatriation in America, Tsukuba-Hosei No.25, p. 208 (1998) (in Japanese).

128 16 Stat. 254. The formal title is: An Act to amend the Naturalization Laws and to punish Crimes against the same, and for the other Purposes.

129 22 Stat. 58. The formal title is: An Act to execute certain treaty stipulations relating to Chinese. As could be seen from the title, the Act was legislated in order to execute a treaty with China in the United States.

The United States concluded a treaty of peace, amity and commerce with China at first time in 1844 (8 Stat. 592). Then, it was amended by so-called Treaty of Tianjin, in 1858 (12 Stat. 1023). Furthermore, in order to complement the treaty, Burlingame Treaty was concluded in 1868 (16 Stat. 739).

The fifth article of the treaty mutually recognized the freedom of expatriations and emigrations and promised the legislation to punish the citizens or subject of the country who took Chinese subjects to the United States or any other foreign country or citizen of the United States to China or any other foreign country, without their free and voluntary consent respectively.

After then, responding to the Chinese exclusion movements in the United States, the Federal Government concluded with China in 1880, a treaty to admit the power of the Federal Government to restrict the immigration of Chinese. (22 Stat. 826., reprinted un Henry Steele Commager, I Documents of American History, 559 (9th ed., Prentice-Hall Inc. 1973)). In the treaty, the first article provided that the Federal Government of the United States should have the power to restrict immigration of Chinese laborers, and the second and third articles provided that Chinese subjects should have and be secured the same rights, privileges, immunities, and exemptions as might be enjoyed by the citizens or subjects of the most favored nation. The Act described in the main text was enacted after that treaty.

130 The exclusion of the Chinese from the United States had been abolished during the World War II. An Act to repeal Chinese Exclusion Acts, to establish quotas, and for other purposes, 57 Stat. 600 (1943). Regarding the situation leading to that result, see IV John Bassett Moore, A Digest of International Law, 187 et seq. (1906); III Green Haywood Hackworth, Digest of International Law, 776 et seq. (1942); John Hayakawa Torok, Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth and Fifteenth Amendments and Civil Rights Laws, 3 Asian L. J. 55, 96 (1996) [hereinafter Torok].

131 In relation to the Act, Congress enacted in 1875 the first Immigration Restriction Act (Page Law, 18 Stat. 477 (1875). The formal title is: An Act Supplementary to the acts in relation to immigration.)

Subsection 2 Legislations Concerning Civil Rights

Next, the legislations concerning civil rights in this period were as follows[132].

Paragraph 1 Act for Equal Right in the District of Columbia of March 18, 1869

The Act for Equal Right in the District of Columbia[133] stroke out the word "white" all together which had been contained in the provisions of laws or rules to be applied in the District of Columbia or in ordinances or other rules to be applied in the Cities Washington and Georgetown. By this Act, the restriction based on the word, regarding the right to vote, to hold office, or to become a jury was cleared in that area.

Paragraph 2 Act on Ownership of Real Estate in the Territories

The Act on Ownership of Real Estate in the Territories[134] provided that a person who was not a citizen or did not declare the intention to become a citizen of the United States could not acquire or held or own any real estate in any of Territories of the United States or of the District of Columbia unless there was some special provisions in existing treaties to secure such rights[135,136].

Section 5 Citizenship and Civil Rights in Revised Statutes

In 1866, Congress admitted the power of President to organize the committee to revise all the federal acts. The revision had been completed in 1874 and, through some amendments, the Revised Statutes was established in 1878. The Revised Statutes was considered as an official version of the collection of the federal statutes established by the year, 1874, except for a few exceptions[137,138].

The Revised Statutes consists of 74 Titles, 5601 Sections and 1085 pages. Among the provisions included it, ones concerning citizenship or Civil Rights were as follows[139,140].

The fifth section of the Act restrained the immigration of a person who had been found guilty of a felonious crime other than political ones or who was women imported for the purpose of prostitution.

The second section of the Act provided that any citizen of the United States who should take or cause to be taken or transported, to or from the United States any subject of China, Japan, or any Oriental country, without their free and voluntary consent, for the purpose of holding them to a term of service, should be punished. The third section prohibited the transport of women to the United States for the purpose of prostitution. On the Act, cf. Torok, 96.

As the Acts in relation to the Act above, Congress enacted Contract Labor Act in 1885 and General Immigration Restriction Act in 1891. (The fornal title is: An Act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia, 23 Stat. 332 (1885); An Act in amendment to the various Acts relative to immigration and the importation of aliens under contract or agreement to perform labor, 26 Stat. 1084 (1891))

132 In addition to the Act, Congress established an Act to remove from certain persons the political disabilities imposed by the third section of the Fourteenth Amendment. (An Act to remove political Disabilities imposed by the 14th Article of the Amendment of the Constitution of the United States, 17 Stat. 142 (1872)).

133 16 Stat. 3. The formal title is: An Act for the further Security of equal Rights in the District of Columbia.

134 24 Stat. 476 (1887). The formal title is: An Act to restrict the ownership of real estate in the Territories to American citizens, and so forth.

135 The Act prohibited also the corporation which was not established on the law of the United States, any State, or any Territory of the United States, from owing any real estate. In 1897, the Act was amended a little for some adjustments on the interim measures and so forth. Cf. 29 Stat. 618.

136 On this issue, the Federal Supreme Court judged in the case, Oyama v. California(332 U.S. 633 (1948)), that to restrain foreigners from owing the real estate by the law of a State was suspected to be unconstitutional.

137 V Leonard Levy et al. ed., Encyclopedia of the American Constitution, 2227 (2nd ed., Macmillan Co. 2000).

138 The Revised Statutes referred to in this article is a Reprint version of "Revised Statutes of the United States, Passed at the 1st Session of the 43rd Congress, 1873-'74 (2nd ed., Washington, GPO, 1878)".

139 In the Revised Statutes, as the Titles concerning citizenship or civil rights, we could enumerate Title XXIV Civil Rights, Title XXV Citizenship, Title XXVI The Elective Franchise, Title XXVII The Freedmen, Title XXIX Immigration, and Title XXX Naturalization. However, from the index of the book, there are found some other Titles which include the word, "citizen",

Subsection 1 Provisions Concerning Citizenship

The provisions prescribing the acquisition or forfeiture of citizenship are recorded in Title XXV "Citizenship", Title XXIX "Immigration", and Title XXX "Naturalization".

Paragraph 1 Title XXV "Citizenship"

The XXV Title consisted of ten sections, and the range of the section numbers was from 1992 to 2001. The most remarkable provisions were following ones[141].

Section 1992 declared that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, were citizens of the United States.

Section 1993 provided that all children born out of the limit and jurisdiction of the United States, whose fathers had been or might be at the time of their birth citizens thereof, were declared to be citizens of the United States[142,143].

Section 1994 provided that a woman who had married a citizen of the United States or who herself had been legitimately naturalized should be a citizen of the United States.

The provisions from Section 1996 to Section 1998 provided that all persons who deserted the military or navy service should lose their rights of citizenship or to become citizens. In addition, those provisions provided also that such persons should lose the right to hold office. Section 1999 prescribed the right of expatriation[144], and Section 2000 provided that all naturalized citizens of the United States, while in foreign country, should receive from the Government the same protection of persons and property which was accorded to native born citizens.

Paragraph 2 Title XXIX "Immigration"

Title XXIX consists of seven sections, and the section number begins with 2158 and ends with 2164. Above all of those provisions, Section 2164 prohibited unequal imposition of tax or charge by any State upon any person immigrating from a foreign country[145].

Paragraph 3 Title XXX "Naturalization"

Title 30 consists of ten Sections and the section number begins with 2165 and ends with 2174. Among them,

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"citizenship", or "civil rights". As such titles, Title XIII The Judiciary, Title XVIII Diplomatic and Consular Officers, Title XXIII The Territories, Title XXXII The Public Land, Title XLVII Foreign Relations, Title XLVIII Regulation of Commerce and Navigation, Title LIII Merchant Seamen, Title LVII Pensions, Title LXIX Insurrection, and Title LXX Crimes could be enumerated.

140 This article will here (re)quote all the provisions as far as registered in the relevant Titles, whether it has already been considered above in this article.

It should be noted that not all provisions having been considered in this article up to here are registered in the relevant Titles of the Revised Statutes. Concerning the criterion of the registration of the Acts in the Revised Statutes, cf. Charles Fairman, Reconstruction and Reunion 1864–88 Part Two, 136–137 (Macmillan Co. 1987).

141 The outline of other provisions in this Title is as follows.

- The section 1995 prescribed the citizenship of a person born in the State of Oregon.
- the Section 2001 prescribed the official duty of President to execute diplomatic protection of a citizen.

142 However, Section 1993 provided also that the rights of citizenship should not descend to children whose fathers had never resided in the United States.

143 Section 1993 was, according to the notation in the Revised Statutes, adopted from the statute of April 14, 1802. Based on it, it could be said that the acquisition of citizenship based on Jus sanguinis principle had already been established by that time in the United States (However, a reference says that the Act of 1802 provided only the citizenship of the children of citizens of the United States who had been born by the year 1802 (cf. 2 Stat. 153, 155) and that Jus sanguinis principle for citizenship had been established only by the Act of 1855 (10 Stat. 604). See, Fred K. Nielsen, Some Vexations Questions relating to Nationality, 20 Colum. L. Rev. 840, 841. (1920)).

144 According to the notation in Revised Statutes, the section and the next one were adopted from the Expatriation Act which was seen in Section 5 Subsection 4 Paragraph 1 in this chapter of this article.

145 Section 2158 prohibited citizens of the United States from taking any part in trading concerning Asian unskilled laborers, so-called Cooly, and the provisions from Section 2159 to Section 2163 prescribed the matters concerning the execution of Section 2158.

remarkable provisions are as follows[146].

Section 2165 provided general procedural rules for naturalization, and required, as conditions for naturalization, to declare on oath the eternal renouncement all allegiance to any foreign prince, potentate, state or sovereignty and the support of the Constitution of the United States, and to reside, as a man of a good moral characters within the United States for five years at least, and within the State or Territory where the court for the naturalization process was at the time held, one year at least and to make an express renunciation of the title or order of nobility if the person had borne[147]. Section 2169 provided that the provisions of the Title should be applied to aliens of African nativity, and Section 2171 provided that alien enemies, namely, a native citizen or subject, or denizen of any country, state, or sovereignty with which the United State was at war should not be naturalized.

Subsection 2 Provisions Concerning Civil Rights

The provisions concerning Civil Rights are recorded in Title XXIV "Civil Rights" and Title XXVI "The Elective Franchise".

Paragraph 1 Title XXIV "Civil Rights"

Title XXIV consists of fifteen sections and the section number begins with 1977 and ends with 1991. The remarkable provisions are as follows[148].

Section 1977 provided that all persons within the jurisdiction of the United States should have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as was enjoyed by white citizens, and should be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1978 provided that all citizens of the United States should have the same right, in every State and Territory, as was enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property[149].

Section 1979 prescribed the civil liability of a person who should subject any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

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146 Other provisions than those described above were generally as follows. Naturalization of aliens honorably discharged from military service (Section 2166); Naturalization of minor residents (Section 2167); The status of widow and children of aliens who had died in the middle of the naturalization process (Section 2168); Residence of five years in the United States (Section 2170); Citizenship of children under the age of 21 years of persons naturalized under certain laws to be citizens (Section 2172); Police court of District of Columbia has not power to naturalize foreigners (Section 2173); and Naturalization of seamen (Section 2174).

147 Section 2165 prescribes in the latter part the exceptional conditions for foreigners having resided within the United States on the day January 29, 1795, or before, or foreigners having been residing within the United States between June 18, 1798 and June 18, 1812.

148 The outlines of the provisions in the Title other than those described above are as follows.

- Section 1980 regulated regarding (1) the prevention by force or threat of any person from accepting or holding any office, (2) the determent by force or threat of any party or witness in any court of the United States from attending such court or from testifying to any matter, (3) equal protection under the law or equal enjoyment of the privileges and immunities, or the conspiracy of the prevention by force, intimidation, or threat of any citizens being entitled to vote from giving his support or advocacy in a legal manner in the election for President, Vice-President or a member of Congress, or the action for the recovery of damages if a person committed to such a conspiracy as above in fact injured any other person in furtherance of the object of such conspiracy.
- Section 1981 prescribed the liability of a person who, having any knowledge concerning such conspiracy as prescribed in Section 1980 and having the power to prevent, neglected or refused to do so, for the damages of the person who was injured in furtherance of the object of such conspiracy.
- The provisions from Section 1982 to Section 1990 prescribed the procedural rules for criminal or civil procedure concerning provisions of the Title or the rules for the execution of the provisions in the Title.

149 According to the notation in Revised Statutes, Section 1977 was adopted from Execution Act of 1870 and Civil Rights Act of 1875, and Section 1978 from Civil Rights Act of 1866 (14 Stat. 27). Since, while Section 1977 prescribed on persons in general, Section 1978 prescribed on citizens of the United States, it could be understood that the editor of Revised Statutes would have interpreted Execution Act of 1870 as partly extending the range of application of Civil Rights Act of 1866 to foreigners.

Constitutions and laws.

Paragraph 2 Title XXVI "The Elective Franchise"

Title 26 consists of thirty sections, and the section number begins with 2002 and ends with 2031. Above all, Section 2004 provided that all citizens of the United States who were otherwise qualified by law to vote at any election by the people on any State, Territory, district, county, city, parish, township. school district, municipality, or other territorial subdivision, should be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude, notwithstanding any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary[150].

Section 6 Slaughter-House Cases

In 1972, the Federal Supreme Court judged on the Slaughter-House Cases[151]. In those cases, it was disputed whether the statute legislated by Louisiana State Legislature which gave the foundation to the establishment of a company to monopolistically treat the collection and slaughter of domestic animals should violate the Thirteenth or Fourteenth Amendments of the Constitution.

Subsection 1 Court Opinion

The court opinion judged on citizenship and civil rights as follows.

The court opinion stated that the purpose of the establishment of the three amendments to the Constitution after Civil War, namely, the thirteenth, fourteenth and fifteenth ones, was the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him[152]. The court opinion continued, in interpreting those articles, even though they were applied to every person whether the person was black or not, the initial purpose of those articles should be taken into consideration[153].

Then, the court opinion overruled the Dred Scott Case[154] and stated that the definition of citizenship in the fourteenth article of the amendment was declared persons might be citizens of the United States without regard to their citizenship of a particular State and that its main purpose was without doubt to establish the citizenship of the black person[155]. The court opinion ruled that the phrase, "subject to its jurisdiction" in the article had been intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States[156].

Furthermore, the court opinion stated that the fourteenth article of the constitutional amendment made it clear that there was a citizenship of the United States, and a citizenship of a State, which were distinct from each other, and which depended upon different characteristics or circumstances in the individual, namely, in that while a person had to reside within a State to make him a citizen of it, it was only necessary that he should be born or naturalized in the United States to be a citizen of the Union[157].

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150 Other provisions in the Title prescribed the power of the Union or its officer concerning elections, prohibition of the officers from discriminating citizens in the proceedings for offering the right to vote, the punishment on the officer violating such prohibition as above, and the rules for the procedure concerning any provision in the Title.

151 Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

152 83 U.S. 36, 71.

153 Id., at 72.

154 60 U.S. (19 How.) 393 (1857).

155 83 U.S. 36, 73.

156 Id.

157 Id., at 74.

Besides, the court opinion stated, concerning "the privileges or immunities" provided in the Fourteenth Amendment, that the privileges and immunities to be protected by the article were only those of the citizen of the United States and that the privileges and immunities of the citizen of a State were not protected by the amendment, but by the government of the State[158,159].

Furthermore, the court opinion ruled on that issue that, until the establishment of the Fourteenth Amendment, the jurisdiction of the matters concerning the privileges and immunities of citizens of a State had been belonging exclusively to the State[160], except for the matters concerning the Retroactive Punishment Prohibition Act, the

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158 Id., at 74. The court opinion presupposed the distinction between the citizenship of the United States and the citizenship of a State in the first clause of the first section in the article, then paid attention to the second clause of the same section, and stated that if the clause was intended as a protection to the citizen of a State against the legislative power of his own State, the provision should have also referred to the citizenship of a State.

159 The court opinion, referring to the Article of Confederation of 1781 and Article 4, Section 2 of the Constitution of the United States in interpreting the words, "the privileges or immunities" provided in the first section of the Fourteenth Amendment, stated that the privileges and immunities protected by Article 4 of the Constitution were belonging to those of citizens of a State (83 U.S. 36, 76). At that part of the judgement, while the original constitutional provision provides "all Privileges and Immunities of Citizens in the Several States", the court opinion quoted it as "all the privileges and immunities of citizens of the several States", in which "in" in the original provision was changed into "of" (Id., at 75) (This point was pointed out by Justice Bradley in his dissenting opinion (Id., at 117)). In relation to the point, it was also pointed out that, while the provision was interpreted to merely prohibit several States from discriminating between people of one State and people of another State after the Civil War, there was also an interpretation that it guaranteed certain fundamental right before the Civil War. On this issue, cf. Richard L. Aynes, Constructing the Law of Freedom: Justice Miller, The Fourteenth Amendment, and Slaughter-House Cases, 70 Chi.-Kent. L. Rev. 627, 636 (n. 55) (1994); I Laurence Tribe, American Constitutional Law, 1306 (Foundation Pr. 3rd ed. 2000). Furthermore, on the doctrinal situation of the interpretations of the provision before the Civil War, cf. James H. Kettner, The Development of American Citizenship 1608–1870, 258 (Univ. North Carolina Pr. 1978); David S. Bogen, The Transformation of the Fourteenth amendment: Reflection from the Admission of Maryland's First Black Lawyers, 44 Maryland L. Rev. 939, 950 (1985).

In relation with the problems referred to above, as a literature which analyses the rights secured in constitutions of several States at the time of the ratification of the Fourteenth Amendment by each State, see Steven G. Calabresi & Sarah E. Agudo, Individual rights under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition? 87 Tex. L. Rev. 7 (2008).

160 The court opinion quoted there, as the cases concerning the second Section of Article 4 of the Constitution, following ones, namely, Corfield v. Corwell Case (4 Wash. C. C. 371 (U.S.C.C., Pa. 1823)), Paul v. Virginia Case (75 U.S. (8 Wall.) 168 (1868)), Ward v. The State of Maryland Case (79 U.S. (12 Wall.) 418 (1870)).

Among them, the issue of the Paul v. Virginia Case was whether the statute providing that a corporation established in somewhere other than the State of Virginia should deposit certain amount of State bond in the State government to get the license to do commerce in the State, should violate the second Section of Article 4 of the Constitution of the United States.

The court opinion of that case judged that Corporations were not citizens within the meaning of the first of these clauses of the second Section of Article 4 of the Constitution, and ruled as follows.

First, the court opinion stated that the object of the clause was to place each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States were concerned (75 U.S. 168, 180).

Next, the court opinion pointed out that the clause relieved the citizens of each State from the disabilities of alienage in other States, that it inhibited discriminating legislation against them by other States, that it gave them the right of free ingress into other States, and egress from them, that it insured to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness, and that it secured to them in other States the equal protection of their laws (Id.).

Based on the understanding described above, the court opinion stated that the privileges and immunities secured to citizens of each State in the several States by the provision in question were those privileges and immunities which were common to the citizens in the latter States under their constitution and laws by virtue of their being citizens (Id.).

In the Ward v. The State of Maryland Case, the issue was the taxation by the State of Maryland on persons who were not residents of the State. The court opinion of that case stated first of all that beyond doubt the words "privileges and immunities" in the constitutional provision were words of very comprehensive meaning (79 U.S. 418, 430 (1870)). Then, the court opinion stated that the clause plainly and unmistakably secured and protected the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens (Id.).

The court opinion of the Slaughter-House Case deduced from the Ward v. the State of Maryland Case that the privileges and immunities in Section 2, Article 4 of the Constitution had comprehensive nature, and then stated, based on the judgement of the Paul v. Virginia Case, that the object of the clause was to secure citizens of several States equal enjoyment of the privileges and immunities secured by each State. Slaughter-House Cases 83 U.S. 36, 76 (1872).

Confiscation Act or the prohibition of the legislation to infringe contractual obligations[161]. Then, the court opinion continued that it should not be the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States, to transfer the security and protection of all the civil rights from the States to the Federal Government[162,163].

Besides, the court opinion stated that the privileges and immunities of citizens of the United States were ones which owed their existence to the Federal Government, its national character, or its Constitution or its laws. Then, the court opinion enumerated such rights concretely as follows. Namely:

"to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several States"[164], to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government, to peaceably assemble and petition for redress of grievances, to enjoy the privilege of the writ of habeas corpus, to use the navigable waters of the United States, however they might penetrate the territory of the several States, to enjoy all rights secured to our citizens by treaties with foreign nations, to become a citizen of any State of the Union by a bona fide residence therein, and to enjoy the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth[165].

Subsection 2 Dissenting Opinions by Justices Filed, Bradley, and Swayne

Against the court opinion, Justices Filed, Bradley, and Swayne stated their dissenting opinions.

Paragraph 1 Dissenting Opinion of Justice Field

Justice Field, in contrast to the court opinion, emphasized the significance of the citizenship of the United States and its ancillary rights, and insisted the importance of the role of the Union in protecting and securing those rights.

Justice Field stated first of all that the Fourteenth Amendment made citizenship of the citizens of the United States dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry, and that it made clear that a citizen of a State was only a citizen of the United States residing in that State[166].

Next, the justice stated that the fundamental rights, privileges, and immunities which belonged to a person as a free man and a free citizen belonged to him as a citizen of the United States, and were not dependent upon his citizenship of any State[167,168]. The justice stated that the privileges and immunities of citizens of the United States, of every one of them, was secured against abridgment in any form by any State and that the Fourteenth Amendment places them under the guardianship of the National authority[169].

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161 U.S. Const. Art. I § 10.

162 Id., at 77

163 The court opinion stated there that the right the plaintiff claimed did not belong to the jurisdiction of the Federal Government and should be protected and secured by the State government. Id., at 78.

164 Id., at 79. The court opinion quoted those instances of the privileges or immunities embraced by double quotations, from the Crandall v. Nevada Case (73 U.S. 35 (1867)).

165 83 U.S. 36, 79-80.

166 Id., at 95.

167 Id.

168 Besides, the justice also stated that the privileges and immunities of the Fourteenth Amendment consisted of the rights provided by the Civil Rights Act of 1866 (14 Stat. 27 (1866)) and the rights provided by Section 2, Article 4 of the Constitution of the United States, which the citizen of all free governments should enjoy. 83 U.S. 36, 96-98.

169 Id., at 101.

Paragraph 2 Dissenting Opinion of Justice Bradley

The dissenting opinion of Justice Bradley also emphasized the significance of the citizenship of the United States.

The justice stated that the Fourteenth Amendment established the facts that citizenship of the United States was the primary citizenship in this country, and that State citizenship was secondary and derivative[170]. Then the justice continued, a citizen of the United States had a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen, and the whole power of the nation was pledged to sustain him in that right[171].

Next, the justice insisted that citizenship was not an empty name, but that, in this country, at least, it had connected with it certain incidental rights, privileges, and immunities of the greatest importance, and that these rights and immunities attached only to State citizenship, and not to citizenship of the United States, appeared to him to evince a very narrow and insufficient estimate of constitutional history and the rights of men, not to say the rights of the American people[172].

Furthermore, the justice also stated that the rights ancillary to the privileges and immunities of citizens of the United States included the privilege of buying, selling, and enjoying property or others, and that these privileges they would enjoy whether they were citizens of any State or not[173].

Paragraph 3 Dissenting Opinion of Justice Swayne

Justice Swayne's dissenting opinion also emphasized the necessity of care to certain degree for the privileges or immunities of the United States or their ancillary rights.

The justice stated that "the privileges and immunities" of a citizen of the United States included, among other things, the fundamental rights of life, liberty, and property, and also the rights which pertained to him by reason of his membership of the Nation[174]. Then, the justice also stated that, concerning the citizenship of the United States and that of a State, each had the rights peculiar to itself, that the object of the Fourteenth Amendment was only those attached to the citizenship of the United States, and that all privileges or immunities which belonged to the citizen of a State, except as a bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, were left to the guardianship of the bills of rights, constitutions, and laws of the States respectively[175].

The justice, nevertheless, insisted that the Fourteenth Amendment was a consequence of the Civil War, and that it was necessary to enable the government of the nation to secure to everyone within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy, so that the construction adopted by the majority of the court was, in his judgment, much too narrow[176].

Section 7 Cases on Civil Rights

Subsection 1 Court Opinion of Slaughter-House Cases

The court opinion of the Slaughter-House Cases stated that the Fourteenth Amendment declared that persons might be citizens of the United States without regard to their citizenship of a particular State, so as to make all persons born within the United States and subject to its jurisdiction citizens of the United States, and that the phrase, "subject to its jurisdiction" in the Fourteenth Amendment was intended to exclude from its operation children of ministers, consuls,

170 Id., at 112.
171 Id.
172 Id., at 116.
173 Id., at 119.
174 Id., at 126.
175 Id.
176 Id., at 129.

and citizens or subjects of foreign States born within the United States[177].

After the Slaughter-House Cases, the Federal Supreme Court treated the definition of a citizenship holder in the Elk v. Wilkins Case[178].

Subsection 2 Elk v. Wilkins Case

Paragraph 1 Outline of Case

An Indian, born as a member of one of the Indian tribes within the United States, which still existed and was recognized as a tribe by the government of the United States, who had voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a state, but who had not been naturalized, or taxed, or recognized as a citizen either by the United States or by the State, was not recognized a citizen of the United States within the meaning of the first section of the Fourteenth Amendment of the Constitution. He took legal action insisting that he had severed his tribal relation to the Indian tribes in more than a year and completely surrendered to the jurisdiction of the United States, so that he should be able to enjoy the privileges and immunities of a citizen under the Fourteenth Amendment.

Paragraph 2 Court Opinion

The court opinion of the case pointed out that it was the problem whether the plaintiff should be a citizen within the meaning of the first section of the Fourteenth Amendment of the Constitution, and ruled on the problem generally as follows, so as to deny the citizenship of the plaintiff, and rejected the claim.

The court opinion pointed out that the Indian tribes, being within the territorial limits of the United States, were taken to be distinct political communities, and that the members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States[179].

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177 83 U.S. 36, 73.

Concerning the phrase "subject to its jurisdiction thereof", there were several, mutually different practical patterns performed after the establishment of the Fourteenth Amendment. See, III John Bassett Moore, A Digest of International Law, p. 278 et seq. (1906). The literature enumerated following concrete instances.

1. A case of a child born in Philadelphia in the year 1852 whose father was not naturalized until November 6, 1860. In the case, the Secretary of State interpreted the phrase "subject to its jurisdiction thereof" to be an affirmance of the common law of England and to be intended to exclude the children of foreign ministers or other persons who might be within their territory with rights of extraterritoriality.
2. A case of a person born in the United States, who during infancy was removed by his father, who was a Saxon subject, to Saxony, where he ever afterward remained. His father subsequently became a citizen of the United States by naturalization. Later, he applied to the American legation in Berlin for a passport but the legation refused to grant it on the ground that he was born of Saxon subjects, who were only temporarily in the United States, and was never "dwelling in the United States", either at the time of since his parent's naturalization, and was not naturalized by force of a statute. The Secretary of State confirmed the decision.
3. A case of a youth who appeared to be born in New York and applied to the American legation in Berne, Switzerland, for passport as a citizen of the United States. His mother was a widow originally from Switzerland, and it was uncertain whether her late husband was a citizen of the United States, but when she returned to Switzerland, for years after her illegitimate son's birth, she obtained a passport from the American legation as a citizen of the United States. She resided in Switzerland till her death, and her son had also continued to live there up to the time of his application for a passport. The Department of State said that he was so far a citizen of the United States that he might, on reaching his majority, select which nationality he would adhere to, the United States or Switzerland, and that he was meanwhile to be considered as an American citizen residing in Switzerland, entitled to the protection of the United States and consequently to a passport.
4. A case of a person who was born in the United States, and whose father came to America and married there a Swiss lady, but, without having become a citizens of the United States or declared his intention to do so, returned to Germany, taking with him his wife and child. The Department of State said he was no doubt born in the United States, but he was on his birth "subject to a foreign power" and "not subject to the jurisdiction of the United States", and judged that he was not a citizen of the United States under the Fourteenth Amendment of the Constitution.

178 112 U.S. 94 (1884).

179 Id., at 99.

Then, the court opinion stated that the alien and dependent condition of the members of the Indian tribes could not be put off at their own will without the action or assent of the United States, and that they were never deemed citizens of the United States except under explicit provisions of treaty or statute to that effect either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization and satisfactory proof of fitness for civilized life[180].

Furthermore, the court opinion also stated that the Fourteenth Amendment required persons to be completely subject to the political jurisdiction of the United States and to owe immediate allegiance to the United States, and that persons not thus subject to the jurisdiction of the United States at the time of birth could not become so afterwards except by being naturalized[181]. Then, the court opinion pointed out that that Indians born within the territorial limits of the United States as members of and owing immediate allegiance to one of the Indiana tribes were not "born in the United States and subject to the jurisdiction thereof" within the meaning of the first section of the Fourteenth Amendment, could be seen from the fact that the second section of the Fourteenth Amendment was excluding the number of Indians not taxed from the base number of the apportionment of representatives[182]. Besides, the court opinion added that Indians (not taxed) were excluded also from the citizenship holders provided in the first section of the Civil Rights Act of 1866[183,184].

Paragraph 3 Dissent Opinion of Justice Harlan

Against the court opinion, Justice Harlan stated a dissenting opinion.

The justice pointed out, concerning the words "Indians not taxed", that it was clear for the plaintiff to be taxed and that it was also clear from the provision of Article 1, Section 2, Clause 3 of the Constitution[185] that there had been, in many States, Indians, not members of any tribe, who had constituted a part of the people for whose benefit the state governments were established. Then the justice insisted, taking such conditions as described above into account, that the words "excluding Indians not taxed", which was also adopted in the provision of the Fourteenth Amendment, was interpreted so that Indians who were taxed were counted into the basis number of the apportionment of representatives[186].

Next, the justice insisted that by the provision of the Civil Rights Act of 1866, national citizenship should be conferred upon all persons in the country, of whatever race who were born within the territorial limits of the United States and were not subject to any foreign power, so that an Indian residing in one of the States and subject to taxation there should become, by force alone of the act of 1866, a citizen of the United States[187]. Furthermore, the justice, in connection with the above issue, stated that the entire debate in the legislation process of the Civil Rights Act of 1866 showed that no Senator who participated in it doubted that the bill was intended to admit to national citizenship Indians who abandoned their tribal relations and became residents of one of the states or territories, within the full jurisdiction of the United States, and that there seemed to be no purpose to abandon the policy inaugurated by the Act of 1866 in establishing the Fourteenth Amendment[188]. Besides, the justice also pointed out that there was no ground to justify the insistence that the Fourteenth Amendment intended to give citizenship of the United States only

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180 Id., at 100.
181 Id., at 102.
182 Id.
183 14 Stat. 27; Rev. Stat. 1992.
184 112 U.S. 94, 103.
185 The judgement quotes "Article 1 Section 3", but, inferring from the context, the quotation number should be such as above. Id., at 112.
186 Id.
187 Id.
188 Id., at 114, 115.

to Indians who had been completely subject to the jurisdiction of the United States at the time of their birth[189].

Subsection 3 United States v. Wong Kim Ark Case

Paragraph 1 Outline of Case

In 1898, the Federal Supreme Court treated the problem concerning citizenship in the United States v. Wong Kim Ark Case[190]. In this case, a child born in the United States, whose parents were subjects of the Emperor of China having permanent domicile and residence in the United States, took an action because it was rejected for him to return to the United States based on the Chinese Exclusion Act.

Paragraph 2 Court Opinion

The court opinion ruled as follows and confirmed the plaintiff's holding citizenship[191,192].

First, the court opinion stated that the definition of citizenship in the Fourteenth Amendment of the constitution had to be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. Then, the court opinion continued that according to the common law of England, every person born within the dominions of the Crown, no matter whether of English or of foreign parents, was an English subject, save only the children of foreign ambassadors, or a child born to a foreigner during the hostile occupation of any part of the territories of England[193,194].

Next, the court opinion considered the rule of Roman law, by which the citizenship of the child followed that of the parent, and stated that there was little ground for the theory that, at the time of the adoption of the Fourteenth Amendment of the Constitution of the United States, there was any settled and definite rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion[195]. In relation to the point above, the court opinion stated that it could not be doubted that it was the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons should be entitled to its citizenship[196].

Furthermore, the court opinion stated that, seeing from the face of the Fourteenth Amendment as well as from the history of the times, the definition of citizenship therein was not intended to impose any new restrictions upon citizenship or to prevent any persons from becoming citizens by the fact of birth within the United States who would thereby have become citizens according to the law existing before its adoption[197].

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189 Id., at 117.

190 169 U.S. 649 (1898).

191 The court opinion of the case stated that the Slaughter-House Cases and the Elk v. Wilkins Case were both irrelevant to the judgement of the case. Id., at 678, 682.

192 In this case, Justice Fuller stated a dissenting opinion.

The justice stated that, since a person born in the United States would be undoubtedly subject to the territorial jurisdiction of the United States, the words "not subject to any foreign power" in the Civil Rights Act of 1866 should suppose a person who was nevertheless subject to the political jurisdiction of a foreign government, and that by the terms of the Act, all persons born in the United States, and not owing allegiance to any foreign power, were citizens (Id. At 720.).

Furthermore, the justice continued that, although those words were thought to intend to exclude the children of public ministers or of aliens in territory in hostile occupation, such children should be in the condition of extraterritoriality or something like that, so that there was no necessity as to them for the insertion of the words, although they were embraced by them. The justice deduced that the words should be interpreted to be targeted at persons of some other type, and concluded that the words were inserted to prevent the acquisition of citizenship by the children of such aliens merely by birth within the geographical limits of the United States (Id., at 721).

193 Id., at 657.

194 The court opinion stated that the same rule of the common law of England was in force in the United States as an English colony, and continued to prevail under the Constitution as originally established. Id., at 658.

195 Id., at 667.

196 Id., at 668.

197 Id., at 676.

Besides, the court opinion pointed out that the Naturalization Acts having been established by that time treated aliens residing in this country as "under the jurisdiction of the United States," and American parents residing abroad as "out of the jurisdiction of the United States."[198] Then, in addition to the point above, the court opinion further pointed out that to hold that the Fourteenth Amendment of the Constitution excluded from citizenship the children, born in the United States, of citizens or subjects of other countries would be to deny citizenship to thousands of persons of European parentage who had always been considered and treated as citizens of the United States[199].

As other issues than those described above, the court opinion stated that, by taking the legislation processes of the Civil Rights Act of 1866 and the Fourteenth Amendment of the Constitution into consideration, it seemed to be generally held that children born in the United States to Chinese parents should become citizens of the United States[200]. Furthermore, the court opinion continued that the acts of Congress known as the Chinese Exclusion Acts, the earliest of which was passed some fourteen years after the adoption of the constitutional amendment, could not control the meaning or impair the effect of the Fourteenth Amendment, but should be construed and executed in subordination to its provisions[201]. Moreover, the court opinion stated that citizenship by birth was established by the mere fact of birth under the circumstances defined in the Constitution, and therefore it needed no naturalization[202,203]. Further on this point, the court opinion stated that the Fourteenth Amendment, while it left the power to Congress, where it had been before, to regulate naturalization, had conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship[204].

Section 8 Cases regarding Rights Coming from Citizenship

Subsection 1 Standpoint of the Court Opinion of Slaughter-House Cases

The Federal Supreme Court ruled in the Slaughter-House Cases that the Fourteenth Amendment secured only the privileges and immunities of citizens of the United States, and that the privileges and immunities of citizens of the United States were ones which owed their existence to the Federal Government, its national character, or its Constitution or its laws.

Until the Federal Supreme Court confirmed that standpoint in the Twining v. New Jersey Case[205] of 1908, there had been many cases where the infringement of those privileges or immunities was insisted[206]. The Federal Supreme Court also judged in that period on the civil rights coming from citizenship of the United States even though it didn't refer to the words "the privileges or immunities".

In the following sections, this article will analyze the cases concerning "the privileges or immunities" of the Fourteenth Amendment of the Constitution and those concerning other cases regarding civil rights accruing from citizenship of the United States.

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198 Id., at 687.

199 Id., at 694.

200 Id., at 697.

201 Id., at 699.

202 The court was thinking of "naturalization" there as including not only the proceeding for a foreigner to get citizenship but also that for children born outside of the United States whose parents were citizens of the United States to obtain citizenship. Id., at 703.

203 Id., at 702.

204 Id., at 703.

205 211 U.S. 78, 96 (1908).

206 According to Charles Wallace Collins, between 1872 and 1910, there had been 604 cases in which the claim was based on the Fourteenth Amendment of the Constitution, and among them in 40 cases a claim based on the privileges or immunities could be recognized. Cf., Charles Wallace Collins, The Fourteenth Amendment and the States, 183 (Appendix C) (Da Capo Pr. 1974) (1912).

Furthermore, a dissenting opinion of Justice Stone in the Colgate v. Harvey Case (296 U.S. 404 (1935)) stated that the privileges or immunities were insisted in at least 44 cases by the time of the judgement of the case, but rejected in all those cases.

Subsection 2 Privileges or Immunities of the Fourteenth Amendment

Paragraph 1 What Comes Under the Privileges or Immunities Provided in the Fourteenth Amendment

In that period, there was no case in which a right coming from citizenship was affirmed because it belonged to the privileges or immunities provided in the Fourteenth Amendment. On the contrary, there were many cases in which a claim of a right insisting that it should be attached to citizenship of the United States was denied. In some of the latter cases, Federal Supreme Court expressed its thought on the rights attached to the citizenship of the United States[207].

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207 Concerning other instances where the privileges or immunities of a citizen of the United States was claimed and rejected, than those enumerated above, cf., Michael J. Garcia(Attorney Editor) & Meghan Totten(Legal Editor) et al., The Constitution of the United States of America Analysis and Interpretation(Centennial Ed.), 1845 (GPO 2017)(https://www.govinfo.gov/collection/constitution-annotated?path=/gpo/Constitution%20of%20the%20United%20States%20of%20America:%20Analysis%20and%20Interpretation/2017%20Edition%20(Cases%20decided%20through%208-26-2017)). In the book, following cases are cited as examples in which statutes or laws were insisted to infringe the privileges or immunities of citizens of the United States, but in vain.

- Holden v. Hardy, 169 U.S. 366, 380 (1898) (statute limiting hours of labor in mines);
- Williams v. Fears, 179 U.S. 270, 274 (1900) (statute taxing the business of hiring persons to labor outside the state);
- Wilmington Mining Co. v. Fulton, 205 U.S. 60, 73 (1907) (statute requiring employment of only licensed mine managers and examiners and imposing liability on the mine owner for failure to furnish a reasonably safe place for workmen);
- Heim v. McCall, 239 U.S. 175 (1915); Crane v. New York, 239 U.S. 195 (1915) (statute restricting employment on state public works to citizens of the United States, with a preference to citizens of the state);
- Missouri Pacific Ry. v. Castle, 224 U.S. 541 (1912) (statute making railroads liable to employees for injuries caused by negligence of fellow servants and abolishing the defense of contributory negligence);
- Western Union Tel. Co. v. Milling Co., 218 U.S. 406 (1910)(statute prohibiting a stipulation against liability for negligence in delivery of inter-state telegraph messages);
- Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873);
- In re Lockwood, 154 U.S. 116 (1894) (refusal of state court to license a woman to practice law);
- Kirtland v. Hotchkiss, 100 U.S. 491, 499 (1879) (law taxing a debt owed a resident citizen by a resident of another state and secured by mortgage of land in the debtor's state);
- Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1874);
- Mugler v. Kansas, 123 U.S. 623 (1887);
- Crowley v. Christensen, 137 U.S. 86, 91 (1890);
- Giozza v. Tiernan, 148 U.S. 657 (1893) (statutes regulating the manufacture and sale of intoxicating liquors);
- In re Kemmler, 136 U.S. 436 (1890) (statute regulating the method of capital punishment);
- Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (statute regulating the franchise to male citizens);
- Pope v. Williams, 193 U.S. 621 (1904) (statute requiring persons coming into a state to make a declaration of intention to become citizens and residents thereof before being permitted to register as voters);
- Ferry v. Spokane, P. & S. Ry., 258 U.S. 314 (1922) (statute restricting dower, in case wife at time of husband's death is a nonresident, to lands of which he died seized);
- Walker v. Sauvinet, 92 U.S. 90 (1876) (statute restricting right to jury trial in civil suits at common law);
- Presser v. Illinois, 116 U.S. 252, 267 (1886) (statute restricting drilling or parading in any city by any body of men without license of the governor);
- Maxwell v. Dow, 176 U.S. 581, 596, 597-98 (1900) (provision for prosecution upon information, and for a jury (except in capital cases) of eight persons);
- New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 71 (1928) (statute penalizing the becoming or remaining a member of any oathbound association-other than benevolent orders, and the like-with knowledge that the association has failed to file its constitution and membership lists);
- Palko v. Connecticut, 302 U.S. 319 (1937) (statute allowing a state to appeal in criminal cases for errors of law and to retry the accused);
- Breedlove v. Suttles, 302 U.S. 277 (1937) (statute making the payment of poll taxes a prerequisite to the right to vote);
- Madden v. Kentucky, 309 U.S. 83, 92-93 (1940), (overruling Colgate v. Harvey, 296 U.S. 404, 430 (1935)) (statute whereby deposits in banks outside the state are taxed at 50¢ per $100);
- Snowden v. Hughes, 321 U.S.1 (1944) (the right to become a candidate for state office is a privilege of state citizenship, not national citizenship);
- MacDougall v. Green, 335 U.S. 281 (1948) (Illinois Election Code requirement that a petition to form and nominate candidates fora new political party be signed by at least 200 voters from each of at least 50 of the102 counties in the State, notwithstanding that 52% of the voters reside in only one county and 87% in the 49 most populous counties);
- New York v. O'Neill, 359 U.S. 1(1959) (Uniform Reciprocal State Law to secure attendance of witnesses from within or without a state in criminal proceedings);

Paragraph 2 Bradwell v. Illinois Case

I relation to the privileges or immunities of citizens of the United States, after the Slaughter-House Cases, the Federal Supreme Court first judged the Bradwell v. Illinois Case[208]. In the case, a married woman who was a citizen of the United States and of the State of Illinois was refused to be granted a license to practice in the court of the State, on the ground that females were not eligible under the laws of that State.

The Federal Supreme Court ruled on the case that it could be affirmed that there were privileges and immunities belonging to citizens of the United States, in that relation and character, and that it was these and these alone which a state is forbidden to abridge, but the right to admission to practice in the courts of a state was not one of them, so that the right in no sense depended on citizenship of the United States[209,210]. The claim was rejected.

Paragraph 3 Bartemeyer v. Iowa Case

In 1873, the Federal Supreme Court treated the Bartemeyer v. Iowa Case[211]. In this case, the issue was whether a statute regulating or prohibiting the sale of intoxicating liquors should be deemed to infringe the privileges or immunities.

The Federal Supreme Court pointed out first of all that, since the statute of Iowa was in existence long before the Fourteenth Amendment of the federal Constitution, whatever were the privileges and immunities of the plaintiff, as they stood before that amendment, under the Iowa statute, they had certainly not been abridged by any action of the state legislature since that amendment had become a part of the Constitution[212]. Then, the Federal Supreme Court ruled that, unless that amendment conferred privileges and immunities which the plaintiff had not previously possessed, the argument of the plaintiff had to fail[213]. The Federal Supreme Court continued that however the most liberal advocate of the rights conferred by that amendment had contended for nothing more than that the rights of the citizen previously existing, and dependent wholly on state laws for their recognition, were now placed under the

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- James v. Valtierra, 402 U.S. 137 (1971)(a provision in a state constitution to the effect that low-rent housing projects could not be developed, constructed, or acquired by any state governmental body without the affirmative vote of a majority of those citizens participating in a community referendum).

(As far as checked, each editions of The Constitution of the United States of America Analysis and Interpretation from 1973 contains the similar list which has been changed from time to time.)

Furthermore, though there are some duplications with instances enumerated above, in relation to the first eight Amendments of the Constitution, a literature says, following rights were insisted as the privileges or immunities of citizens of the United States and denied.

- the right to bear arms, guaranteed by the Second Amendment,
- the guaranty against prosecution for a capital, or otherwise infamous crime, except on indictment of a grand jury, contained in the Fifth Amendment,
- the protection against compulsory self-incrimination, afforded by the Fifth Amendment,
- the right in a criminal case to be confronted by witnesses, included in the Sixth Amendment,
- the right to trial by jury in criminal prosecutions, guaranteed by the Sixth Amendment,
- the right of trial by jury in suits at common law, guaranteed by the Seventh Amendment.

Pendleton Howard, The Privileges and Immunities of Federal Citizenship and Colgate v. Harvey, 87 Univ. Penn. L. Rev. 262, 270 (1939).

Besides, regarding this issue, cf. Colgate v. Harvey 296 U.S. 404 (footnote 2 of the dissenting opinion of Justice Stone) (1935); Hague v. C. I. O. 307 U.S. 496 (footnote 1 of dissenting opinion of Justice Stone) (1939).

208 83 U.S. (16 Wall.) 130 (1872). As a similar case, cf. ex. In re Lockwood 154 U.S. 116 (1894).

209 Id., at 139. However, the Federal Supreme Court stated that the right to admission to practice in the federal courts would be related to citizenship of the United States.

210 In this case, Justice Bradley stated as a concurring opinion that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state, and that in view of the peculiar characteristics, destiny, and mission of woman, it was within the province of the State legislature to ordain what offices, positions, and callings should be filled and discharged by men. Id., at 141, 142.

211 85 U.S. (18 Wall) 129 (1873). As a similar case, cf. ex. Crowley v. Christensen, 137 U.S. 86 (1890).

212 Id., at 132.

213 Id., at 133

protection of the Federal Government, and were secured by the Federal Constitution[214]. The court opinion stated that the right to sell intoxicating liquors, so far as such a right existed, was not one of the rights growing out of citizenship of the United States[215], and it so confirmed that the privileges or immunities secured by the Fourteenth Amendment were not newly conferred by that provision[216].

Paragraph 4 Minor v. Happersett Case

In 1874, the Federal Supreme Court addressed the relation between the right of suffrage and the privileges and immunities in the case Minor v. Happersett[217]. The fact of the case was as follows: when a white woman who was a citizen of the United States and of the State of Missouri over the age of twenty-one years, wishing to vote for electors for President and Vice President of the United States and for a representative in Congress and for other officers at the general election, applied to register as a lawful voter with the registrar of voters, the registrar refused to do it on the grounds that she was not a "male citizen of the United States" but a woman. The woman sued.

In this case, the Federal Supreme Court considered the relation between citizenship of the United States and Common Law, and it confirmed that women had already been citizens of the United States by Common Law before the establishment of the Fourteenth Amendment of the Constitution and that sex had never been made one of elements of citizenship in the United States[218].

However, at the same time, the Federal Supreme Court first stated that the Fourteenth Amendment did not add any new right to the privileges and immunities of a citizen[219]. Second, the Federal Supreme Court pointed out that the Section 2 of the Fourteenth Amendment was supposed male citizens as the electors[220]. Then, third, it stated that the establishment of the Fifteenth Amendment suggested that the privileges or immunities of the Fourteenth Amendment was thought not to include the right of suffrage[221]. Fourth, it pointed out that, although the Constitution provided that the United States should guarantee to every State a republican government[222], it could not be said that a government was not republican because women were not made voters[223]. In the end, the Federal Supreme Court rejected the claim[224].

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214 Id.

215 Id.

216 In this case, concurring opinions of Justice Bradley and Justice Field were stated.

The concurring opinion of Justice Bradley stated "By that portion of the Fourteenth Amendment by which no state may make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, or take life, liberty, or property, without due process of law, it has now become the fundamental law of this country that life, liberty, and property (which include "the pursuit of happiness") are sacred rights, which the Constitution of the United States guarantees to its humblest citizen against oppressive legislation, whether national or local, so that he cannot be deprived of them without due process of law." Id., at 136.

Justice Field pointed out, as a supplement to the dissenting opinion in the Slaughter-House Cases, following points (Id., at 137).

The justice pointed out as the intention of the dissenting opinion in the Slaughter-House Cases, that the Fourteenth Amendment was intended not to interfere in any respect the police power of a State, but to guard any of the just rights of the citizen against abridgment by a State. After that, the justice stated on the meaning of the Fourteenth Amendment generally as follows.

First, the justice stated that the Fourteenth Amendment was intended to justify legislation, extending the protection of the national government over the common rights of all citizens of the United States, and thus obviate objections to the legislation adopted for the protection of the emancipated race.

Second, the justice stated that the Fourteenth Amendment recognized, if it did not create, a national citizenship, and declared that their privileges and immunities, which embraced the fundamental rights belonging to citizens of all free governments, should not be abridged by any state.

217 88 U.S. (21 Wall.) 162 (1874).

218 Id., at 165, 167, 170.

219 Id., at 171.

220 Id., at 174.

221 Id., at 175.

222 U.S. Const. Art. IV, § 4.

223 88 U.S. 162, 176.

224 Besides, the Federal Supreme Court confirmed that it should be under the jurisdiction of a State to determine the qualifications requisite for electors unless Congress established some act concerning that matter. Id., at 170, 178.

Paragraph 5 Maxwell v. Dow Case

In 1900, the Federal Supreme Court ruled in the Maxwell v. Dow case[225] that an indictment by a grand jury should be necessary in a prosecution by a State for murder and that a person should be only liable tried after presentment by a grand jury, both were not included in the privileges or immunities of the United States[226].

In the judgement of the case, the Federal Supreme Court stated that the rights secured to the individual by the Fifth or by the Sixth or by the Seventh Amendment were not a privilege or immunity of a citizen of the United States, but that they were secured to all persons as against the Federal Government, entirely irrespective of such citizenship, so that they shouldn't belong to the privileges or immunities of citizens of the United States protected in the Fourteenth Amendment[227]. Furthermore, the Federal Supreme Court ruled that the privileges and immunities of citizens of the United States did not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government[228,229].

Paragraph 6 Twining v. New Jersey Case

The Federal Supreme Court judged the Twining v. New Jersey Case[230] in 1908. The plaintiffs, the defendants in the instance (hereafter defendants) who were citizens of the United States insisted that they should enjoy the privileges or immunities of citizens of the United States secured by the Fourteenth Amendment, and that such privileges or immunities should include those secured by the first eight amendments of the Constitution of the United States, namely, also the exemption from compulsory self-incrimination secured by the Fifth Amendment.

The court opinion of the case ruled as follows.

The court opinion pointed out that the distinction between national and state citizenship and their respective privileges had come to be firmly established[231]. Then, it stated, that an exemption from compulsory self-incrimination was what was described as a fundamental right belonging to all who lived under a free government, and incapable of impairment by legislation or judicial decision. It was, so far as the States were concerned, a fundamental right inherent in state citizenship, and it was a privilege or immunity of that citizenship only[232].

Furthermore, the court opinion explained that privileges and immunities of citizens of the United States were only such as arise out of the nature and essential character of the National Government, or were specifically granted or secured to all citizens or persons by the Constitution of the United States[233]. The court opinion enumerated those instances: the right to pass freely from State to State[234], the right to petition Congress for a redress of grievances[235], the right to vote for national officers[236], the right to enter the public lands[237], the right to be protected against violence while in the lawful custody of a United States marshal[238], and the right to inform the United States authorities of

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225 176 U.S. 581 (1900).
226 Id., at 594.
227 Id., at 595.
228 Id., at 597.
229 In this case, Justice Harlan stated his dissenting opinion that the privileges and immunities protected in the first eight amendments of the Federal Constitution should be enjoyed by all citizens of the United States (Id., at 608), so that the right to enjoy a trial by grand jury secured by the Sixth Amendment of the Federal Constitution should be guaranteed also in a prosecution by a State through the Fourteenth Amendment (Id., at 612).
230 211 U.S. 78 (1908).
231 Id., at 96.
232 Id., at 97.
233 Id.
234 Citing Crandall v. Nevada, 73. U.S. 35 (6 Wall.) 35 (1867).
235 Citing United States v. Cruikshank, 92 U.S. 542 (1875).
236 Citing Ex parte Yarbrough, 110 U.S. 651 (1884); Wiley v. Sinkler, 179 U.S. 58 (1900).
237 Citing United States v. Waddell, 112 U.S. 76 (1884).
238 Citing Logan v. United States, 144 U.S. 263 (1892).

violation of its laws[239,240].

The court opinion concluded that the Fourteenth Amendment did not forbid the States to abridge the personal rights enumerated in the first eight amendments, because those rights were not within the meaning of the clause privileges and immunities of citizens of the United States and because the exemption from compulsory self-incrimination was not a privilege or immunity of national citizenship guaranteed by the Fourteenth Amendment against abridgment by the States[241].

In this case, Justice Harlan stated a dissenting opinion[242] that insisted as follows.

The justice insisted that it was deemed necessary in the legislation of the Fourteenth Amendment that the privileges and immunities mentioned in the original amendments, and universally regarded as our heritage of liberty from common law[243], were thus secured to every citizen of the United States and placed beyond assault by any government, Federal or State[244]. Next, the justice insisted that the privilege of immunity from self-incrimination was one "universal in American law" and was everywhere deemed "of great value, so it should be interpreted to be included in the privileges or immunities in the Fourteenth Amendment whatever were the privileges or immunities secured by the Fourteenth Amendment[245]".

Subsection 3 Cases Concerning Civil Rights Coming from Federal Citizenship

Paragraph 1 Court Opinion in Slaughter-House Cases

As being seen above, the Federal Supreme Court specified in the judgement of the Slaughter-House Cases the nature of the privileges and immunities of citizens of the United States as owing their existence to the Federal Government, its national character, or its Constitution or its laws.

In the following cases, the Federal Supreme Court affirmed the rights belonging to the citizenship of the United States, though it didn't refer to the words "the privileges or immunities" provided in the Fourteenth Amendment[246].

In relation to the following after the case of the United States v. Cruikshank case, the Federal Supreme Court considered the meaning of the rights coming from citizenship of the United States mainly in relation to the sixth section of the Execution Act of 1870[247]. The section prescribed the punishment on a person who conspired together to

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239 Citing In re Quarles, 158 U.S. 532 (1985).

240 211 U.S. 78

241 Id., at 99.

242 Justice Harlan insisted in the latter part that what the Fourteenth Amendment forbade any State from abridging as the privileges or immunities of citizens of the Unite States should include the right of free speech (Amdt. II), the exemption from cruel or unusual punishments (Amdt. VIII), the exemption from being put twice in jeopardy of life or limb for the same offense (Amdt. V), or the exemption from unreasonable searches and seizures of one's person, house, papers or effects (Amdt. IV). Id., at 124.

243 Id., at 122. the phrase "the privileges and immunities mentioned in the original amendments" Justice Harlan used there meant, inducing from the context, probably the rights secured by the first eight amendments of the Constitution.

244 Id.

245 Id. at 123.

246 In a case other than ones described, the Federal Supreme Court stated in the Oyama v. California Case (332 U.S. 633) of 1948 that the right to hold real estate should be a right of citizens of the United States. (Id., at 646).

247 16 Stat. 140, 141 (1870), Re-enacted in, R. S. 5508. That section provided, "if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such person" should be punished. The provision recorded in Revised Statutes is almost the same in the meaning but the wording and style have been modified, for example, omitting the word "band".

In relation to that, the Federal Supreme Court stated that, as could be seen from the formal title of the Enforcement Act of 1870, namely "An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes", citizen in that provision meant a person who held the right or privilege as a citizen of the United State or of a State. See, Baldwin v. Franks 120 U.S. 678, 690 (1887). In that case, the legitimacy of the petition for writ of habeas corpus for a person who had been accused of the conspiracy to expel Chinese subjects by violence who lawfully resided in the United States was questioned.

injure, oppress, threaten, or intimidate any citizen with intent to hinder his free exercise and enjoyment of any right or privilege secured to him by the Constitution or laws of the United States.

Paragraph 2 Crandall v. Nevada Case

Though it was earlier than the Slaughter-House Cases, the Federal Supreme Court judged the Crandall v. Nevada case[248] in 1867. In that case, the court addressed whether a special tax imposed by the State of Nevada on passengers when carried out of the State should violate the Federal Constitution.

The Federal Supreme Court ruled that people of the United States constituted one nation, and that every citizen of the government of the people could be secured the right to come to the seat of government to assert any claim he might have upon that government, to transact any business he might have with it, to seek its protection, to share its offices, to engage in administering its functions, or to free access to its seaports, through which all the operations of foreign trade and commerce were conducted, to the subtreasuries, the land offices, the revenue offices, and the courts of justice in the several states[249].

Paragraph 3 United States v. Cruikshank Case

In 1875, the Federal Supreme Court judged the United States v. Cruikshank case[250].

In this case, the validity of the prosecution by the sixth section of the Execution Act of 1870 on persons who assembled to injure the citizens of the United States who had African ancestors was questioned. Concerning the right to assemble in relation to the concepts of conspiracy and banding provided in the provision generally, the court opinion stated as follows and affirmed the right to peacefully assemble[251].

The court opinion stated first that citizens were the members of the political community to which they belonged, and that they were the people who composed the community, and who, in their associated capacity, had established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights[252].

Next, the court opinion stated that the people of the United States, "in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty[253]" to themselves and their posterity, ordained and established the government of the United States, and stated also that the Government of the United States had only limited power. Then, the court opinion stated that the Federal Government could neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction[254].

Taking facts described above into consideration, the court ruled that the right of the people to peaceably assemble for lawful purposes had existed long before the adoption of the Constitution of the United States, that it was not, therefore, a right granted to the people by the Constitution, and that as no direct power over it had been granted to Congress, it remained subject to State jurisdiction. However, at the same time, the court opinion continued that only

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The Federal Supreme Court interpreted the meaning of "citizen" narrowly as described above, so as to conclude that Chinese should not be a citizen.

However, against that judgement, there was a dissenting opinion of Justice Harlan which insisted that in application of that provision, whether the victim was a citizen or not should be irrelevant. Id., at 698.

248 73 U.S. 35 (1867). The case was quoted by the court opinion of the Slaughter-House Cases in enumerating the privileges or immunities of citizens of the United States. See, Slaughter-House Cases 83 U.S. 36, 79 (1872).

249 73 U.S. 35, 43-44.

250 92 U.S. 542 (1875).

251 As another judgement confirming that the judgement of the United States v. Cruikshank case affirmed the right peacefully to assemble, see, Hague v. C. I. O. 307 U.S. 496, 512 (1939).

252 92 U.S. 542, 549.

253 The court opinion quoted there the Preamble of the Constitution of the United States. Id.

254 Id., at 550.

such existing rights were committed by the people to the protection of Congress as came within the general scope of the authority granted to the national government[255].

Finally, the court opinion stated that the right of the people to assemble peaceably for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, was an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. Then, the court opinion continued that the very idea of the form of a republican government implied a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances[256].

Paragraph 4 Strauder v. West Virginia Case

In 1880, the Federal Supreme Court judged the Strauder v. West Virginia case[257].

In this case, the plaintiff, a colored man, was indicted for murder in the Circuit Court of Ohio County in West Virginia, and upon trial, was convicted and sentenced. But the plaintiff insisted that by virtue of the laws of the State of West Virginia, no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State, that white men of the age twenty-one or more were so eligible, and that, by reason of his being a colored man and having been a slave, he had reason to believe, and did believe, he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia for the security of his person as was enjoyed by white citizens[258]. The Federal Supreme Court ruled that the controlling question were, first, whether, by the Constitution and laws of the United States, every citizen of the United States had a right to a trial of an indictment against him by a jury selected and impaneled without discrimination against his race or color, because of race or color, and, second, if he had such a right and was denied its enjoyment by the State in which he was indicted, whether he might cause the case to be removed into the Circuit Court of the United States[259].

As for the former question, the Federal Supreme Court stated that it was not whether a colored man, when an indictment had been preferred against him, had a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it was whether, in the composition or selection of juror by whom he was to be indicted or tried, all persons of his race or color might be excluded by law solely because of their race or color, so that by no possibility could any colored man sit upon the jury[260]. The Federal Supreme Court stated that it was necessary to consider whether the right to have a jury selected for the trial without discrimination against all persons of his race or color, because of their race or color, should be protected by the Fourteenth Amendment or the legislation of Congress, and, then, stated as follows.

The Federal Supreme Court stated that the Fourteenth Amendment was designed to assure to the colored race the enjoyment of all the civil rights that, under the law, were enjoyed by white persons, and to give to that race the protection of the general government in that enjoyment whenever it should be denied by the States, and that it not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation[261]. Furthermore, the Federal Supreme Court stated that the Fourteenth Amendment contained a necessary implication of a positive immunity, or right, most valuable to the colored race, namely, the right to exemption from unfriendly legislation against them distinctively as colored, to exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoyed, and against

255 Id., at 551–552.
256 Id., at 552.
257 100 U.S. 303 (1879).
258 Id., at 304.
259 Id., at 305.
260 Id.
261 Id. at 306.

discriminations that reduced them to the condition of a subject race[262].

The Federal Supreme Court concluded that it was hard to see why the statute of West Virginia, which excluded colored persons from a jury, should not be regarded as discriminating against a colored man when he was put upon trial for an alleged criminal offence against the State[263]. The case was remitted with instructions to reverse the judgment of the Circuit Court of Ohio county[264].

Paragraph 5 Ex Parte Yarbrough Case

The Federal Supreme Court judged the Ex Parte Yarbrough case[265] in 1884.

In this case, the issue was the admissibility of the petition for a writ of habeas corpus for the release of several persons convicted, sentenced and imprisoned for conspiracy to intimidate a person of African descent from voting at an election for a member of Congress.

The court opinion, in considering the Constitutionality of the ground provisions[266] for the punishment, stated that the Fifteenth Amendment of the Constitution, by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly showed that the right of suffrage had been considered to be of supreme importance to the national government and had not been intended to be left within the exclusive control of the States[267]. Then, the Federal Supreme Court, while admitting that the amendment gave no affirmative right to the colored man to vote[268], stated that the protection of the right to be exempted from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude[269] should be within the power of Congress to legislate not only for the colored citizens but also for citizens in general[270].

Paragraph 6 U.S. v. Waddell Case

In 1884, the Federal Supreme Court judged the U.S. v. Waddell case[271]. In this case, the issue was the punishment[272] on the person who prevented any other citizen from freely exercising or enjoying the right of the citizen to make a homestead entry upon unoccupied public lands[273]. The court opinion of the case ruled that the right to make a homestead entry upon unoccupied public lands was the exercise of a right secured by the law which was legislated by the power of the Federal Congress based on Article 4, Section 3, Clause 2 of the Constitution, and so

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262 Id., at 307-8.

263 Id., at 309. However, the Federal Supreme Court stated there that the Fourteenth Amendment did not prohibit a State from prescribing the qualifications of its jurors, for example, the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. Id., at 310.

264 Id., at 312.

265 110 U.S. 651 (1884).

266 R. S. 5508, R. S. 5520. As for the former provision, it has already been seen above. The latter provision prescribes the punishment on persons who conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from voting.

267 110 U.S. 651, 664.

268 Id., at 665.

269 The court opinion quoted there the United States v. Reese case (92 U.S. 214(1875)). In that quoted case, the validity of the sections 3 and 4 of the Execution Act of 1870 (16 Stat. 140 (1870)), which prescribed the punishment on an officer to perform election who rejected the vote of a citizen of African race, was questioned. The Federal Supreme Court ruled that those provisions were not appropriate legislation (92 U.S. 214, 221-2.). In the decision process, the court opinion stated that though the Fifteenth Amendment did not confer the right of suffrage upon anyone, it prevented the states, or the United States from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude (Id., at 217).

270 110 U.S. 651, 665. On this point, the Federal Supreme Court ruled later in the U.S. v. Classic case (313 U.S. 299 (1941)) that the right of the people to choose Representatives in Congress, though the States were authorized by the Constitution to legislate on the subject, was a right established and guaranteed by the Constitution, and hence was one secured by it to those citizens and inhabitants of the State who were entitled to exercise the right.

271 112 U.S. 76 (1884).

272 R. S. 5508.

273 R. S. 2289.

affirmed the power of the Federal Congress to legislate such a statute for its protection[274].

Paragraph 7 Logan v. United States Case

In 1892, the Federal Supreme Court judged the Logan v. United States case[275].

In this case, the issue was the punishment of persons who conspired and then put it into practice to kill a citizen of the United States who was in the custody of a United States Marshall under a lawful commitment to answer for an offense against the United States.

The court opinion stated that the principal question in this case was whether the right of a citizen of the United States in the custody of a United States Marshal under a lawful commitment to answer for an offense against the United States, to be protected against lawless violence, was a right secured to him by the Constitution or laws of the United States, or whether it was a right which could be vindicated only under the laws of the several States[276]. Then, the court opinion ruled that the right in question did not depend upon any of the amendments to the Constitution but arose out of the creation and establishment by the Constitution itself of a National Government, paramount and supreme within its sphere of action. Then, the court opinion continued that any Government which had power to indict, try, and punish for crime, and to arrest the accused, and held them in safekeeping until trial, had to have the power and the duty to protect its prisoners so held against unlawful interference, as well as its executive and judicial officers charged with keeping and trying them[277].

Furthermore, the court opinion restated that the United States were bound to protect all persons in their service or custody against lawless violence in the course of the administration of justice, and it ruled that such a duty and the correlative right of protection were not limited to the magistrates and officers charged with expounding and executing the laws, but applied with at least equal force to those held in custody on accusation of crime and deprived of all means of self-defense[278].

Finally, the court opinion affirmed the right based on the law of the United States to be protected from unlawful violence.

Paragraph 8 In Re Quarles and Butler Case

In 1895, the Federal Supreme Court stated in the In re Quarles and Butler case[279] that it was the right of every private citizen of the United States to inform a marshal of the United States, or his deputy, of a violation of the internal revenue laws of the United States, for, though not depending directly on any amendment of the Constitution, it was a right arisen out of the creation and establishment by the Constitution itself of a National Government.

Paragraph 9 Motes v. United States Case

In 1900, the Federal Supreme Court judged the Motes v. United States case[280].

In this case, the Federal Supreme Court stated that it was the right and privilege of a citizen, in return for the protection he enjoyed under the Constitution and laws of the United States, to aid in the execution of the laws of his country by giving information to the proper authorities of violations of those laws[281]. Furthermore, the Federal Supreme Court continued that the right and privilege might properly be said to be secured by the Constitution and laws of the United States, and that it was competent for Congress to declare a conspiracy to injure, oppress, threaten, or intimidate

274 112 U.S. 76, 79.
275 144 U.S. 263 (1892). Also in this case, the application of the provision R. S. 5508 was questioned.
276 Id., at 282.
277 Id., at 294.
278 Id., at 295.
279 158 U.S. 532 (1895). The application of R. S. 5508 was questioned in this case, too.
280 178 U.S. 458 (1900). The application of R. S. 5508 was questioned in this case, too.
281 Id., at 462.

a citizen because of the exercise by him of such right or privilege to be an offense against the United State[282].

Paragraph 10 Crutcher v. Commonwealth of Kentucky Case

In addition to those cases concerning the sixth section of the Execution Act of 1870, which have already been seen above, in 1891, the Federal Supreme Court ruled in the Crutcher v. Commonwealth of Kentucky case[283], in which a statute of the State of Kentucky imposing a tax on a company for the license to engage in interstate commerce was questioned, that to carry on interstate commerce was not a franchise or a privilege granted by the state, and that it was a right which every citizen of the United States was entitled to exercise under the Constitution and laws of the United States[284].

Section 9 Conclusion

A series of discussion on citizenship and the privileges or immunities of the citizens of the United States since the outbreak of the Civil War had tentatively ended with the judgements of the Wong Kim Ark case in 1898 and of the Twining v. New Jersey case in 1908.

In the former case, the Federal Supreme Court made clear its opinion regarding citizenship by birth in the United States, which is provided in the Fourteenth Amendment of the Constitution and plays an important part in order to solve the question who should be citizens of the United States.

In the series of cases leading to the latter case, the Federal Supreme Court made clear its opinion on the privileges or immunities of citizens of the United States, which is also provided in the Fourteenth Amendment of the Constitution.

In the following, this article will sum up the discussion in this chapter, in two parts, namely, those concerning citizenship and those concerning civil rights.

Subsection 1 Discussion on Citizenship

Paragraph 1 Acquisition of Citizenship by Birth in the United States

According to the definition in the Fourteenth Amendment, all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and a citizen of the United States becomes a citizen of a State of a member of the Union by residing there.

For the court, which considered to apply that part of this provision, the problem was especially regarding citizenship by birth in the United States. Concretely, the question was whether such a child of foreigners as born in the United States could get citizenship of the United States.

On this issue, the Federal Supreme Court, in the Slaughter-House Cases, stated that such a child should not get citizenship of the United States[285], but it ruled in the Wong Kim Ark case that such a child should get citizenship of the United States based on the interpretation of Common Law[286].

In the Dred Scott case[287], the Federal Supreme Court ruled that citizens of the United States consisted of persons who had been citizens of the United States at the time of the establishment of the original Constitution of the United States, and their descendants. It then concluded that black people were not, and could not become citizens of the Unite States[288].

It was the Fourteenth Amendment that had changed the rule. Through the Fourteenth Amendment, black people

282 Id., at 463.
283 141 U.S. 47 (1891).
284 Id., at 57.
285 83 U.S. 36, 73.
286 169 U.S. 649, 693.
287 60 U.S. (19 How.) 393 (1857).
288 Id., at 404.

acquired citizenship of the United States and therefore their citizenship of the States there they resided. The provision of the amendment that provided citizenship of the United States could be acquired solely by the fact being born in the United States, irrespective of race, a blood relation, or a previous condition of slavery, had a great significance in securing citizenship for black persons.

Additionally, such an interpretation of the Fourteenth Amendment as above by the court opinion the Wong Kim Ark case led to the conclusion that a person born in the United States should get citizenship of the United States irrespective of the foreign rules on the nativity, which guaranteed the United States the inherent right to determine who should be the citizenship holders[289].

However, as was seen in the Elk v. Wilkins case, not all persons born in the United States were made citizens of the Unite States. Citizenship of the Indians, that is Native Americans was treated only in later legislations[290]. And that the Federal Supreme Court determined the attribute of citizenship by Common Law, had led to an important conclusion concerning the nature of the rights incidental to citizenship. Namely, as being seen in the Minor v. Happersett case, the rights to be secured as incidental to citizenship were also deemed to be the rights based on Common Law so as to be similar to the rights having been secured before the Civil War[291].

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289 U.S. v. Wong Kim Ark 160 U.S. 649, 667-8.

290 As shown in the Dred Scott case (60 U.S. 393, 404 (1857)), before the establishment of the Fourteenth Amendment of the constitution, Indians would not be made citizens of the United States unless some treaty or legislation by Congress was so provided. That fact had been unchanged, as was seen in the Elk. v. Wilkins case, even after the establishment of the Fourteenth Amendment.

By an Act established on March 3, 1871 (16 Stat 544, 566, R. S. 2079. That provision was legislated as a part of "An Act making Appropriations for the current and contingent Expenses of the Indian Department, and for fulfilling Treaty Stipulations with various Indian Tribes, for the Year ending June thirty, eighteen hundred and seventeen-two, and for other Purposes".) the Federal Government stopped considering Indians as an independent country, and promoted the policy of assimilation of Indians. The Government, as a part of the policy, established the Indian General Allotment (Dawes) Act of 1887 (24 Stat. 388. The formal title of the Act is: An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and other purposes.). The Act was intended to abolish the sharing system of the estates reserved for Indians and changed them into private lands in order to break up the inherent communities and cultures of Indians and to make every Indian an individual farmer so as to promote the policy of assimilation of Indians into American society (Cf., "Dawes Act" in the web of the Ourdocuments.gov maintained by the National Archives and Records Administration (NARA), https://www.ourdocuments.gov/doc.php?flash=false&doc=50; "Dawes General Allotment Act" in Takeshi Matsumura et al. ed., The Kenkyusha dictionary of British and American history, (Kenkyu Sha, 2000) (in Japanese)). The sixth section of the Act provided that every Indian born within the territorial limits of the United States to whom allotments should have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who had voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and had adopted the habits of civilized life, was hereby declared to be a citizen of the United States, and was entitled to all the rights, privileges, and immunities of such citizens.

After the establishment of the Indian General Allotment Act, by 1924, the Federal Government had provided various methods to an Indian to become a citizen of the United States, so that many Indians had become citizens of the United States by the year. In that year, 1924, the Federal Government established the Indian Citizenship Act of 1924 (43 Stat. 253. The formal title is: An Act to authorize the Secretary of the Interior to Issue certificate of Citizenship to Indians.). That Act provided that all noncitizen Indians born within the territorial limits of the United States should be, and they were hereby, declared to be citizens of the United States, and that the right of any Indian tribes had should not be affected by that. As could being seen from the provisions, the Act was not necessarily intended to promote the assimilation of Indians, but, as already mentioned above, the central issue at that time was no longer whether Indians should be deemed as citizens of the United States. After that Act, Indians would be made citizens of the United States by the fact being born in the United States, irrespective of their wills, and whether he belonged to any Indian tribe.

Concerning citizenship of Indians, cf. ex. Robert Porter, The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous People, 15 Harv. Blackletter L. J. 107 (1999); Arnold J. Lien, The Acquisition of Citizenship by the Native American Indians, 13 Washington University Studies 121 (1925); Dudley O. McGovney, American Citizenship, 11 Colum. L. Rev. 326 (1911); David H. Getches et al., Cases and Materials on Federal Indian Law, 163 (4th ed. West Pub. Co. 1998).

Furthermore, concerning the legal institution or laws on citizenship of Indians before the Civil War, cf., Frederick E. Hoxie, What was Taney thinking? American Indian Citizenship in the Era of Dred Scott, 82 Chi.-Kent L. Rev. 329 (2007). The paper explains the process for the security of the rights of Indians based on treaties, including the rights on lands, to be gradually ignored by making Indians citizens of the United States so as to remove them from the subjects to be protected by the treaties while the protection of the rights of Indians was newly promised through treaties.

291 88 U.S. 162, 171.

Paragraph 2 Acquisition of Citizenship by Naturalization

The Naturalization Act was amended in this period, so that black people became able to be naturalized. However, at the same time, an Act to prohibit naturalization of Chinese persons was enacted.

Concerning acquisition of citizenship by birth, the first section of the Fourteenth Amendment excluded the discrimination on account of race. But concerning naturalization, another method to get citizenship, more time was needed to exclude such a discrimination[292].

In the same period, the domestic laws were revised to make a naturalized person immediately eligible to become a citizen of the United States so that such a person could enjoy a diplomatic protection as a citizen of the United States in a foreign country, and, at the same time, treaties were concluded to realize such a condition. By those, a naturalized person became treated as a citizen of the United States even when he came back to his former native country, which was the first step toward the substantial realization of the change of nationality by the self-selection of a citizen[293].

Subsection 2 Discussion on Civil Rights

Paragraph 1 Movement in Congress

Congress established the Fifteenth Amendment, and a series of Civil Rights Acts.

The Fifteenth Amendment of the Constitution of the United States was established not as the direct guarantee of the right to vote to every citizen, at least in its original meaning. Neither was the right to hold office deemed to be under the protection of the amendment. However, at least in theory, that provision separated the qualification to become electors from race, and every citizen of the United States became able to participate in the decision process of the Federal Government or State governments irrespective of the race[294].

Next, Congress intended to guarantee civil rights through a series of Civil Rights Acts. However, many of the rights to be guaranteed were, as being seen from the sixteenth and seventeenth sections of the Execution Act of 1870, those enjoyed not only by citizens of the United States but also by all human beings including foreigners, apart from few exceptions[295].

Paragraph 2 Judgements of Federal Supreme Court

In a meaning that an achievement for the realization of the civil rights was made only in a limited way, a similar tendency was also seen in the judgements of the Federal Supreme Court[296].

From the Slaughter-House Cases to the Twining v. New Jersey case, several rights had been picked up as belonging to “the privileges or immunities” of the Fourteenth Amendments. However, in many cases, including ones mentioned above, arguments to link rights to the privileges or immunities of citizens were in vain. Further, many rights including those to be secured by the amendments to the Constitution of the United States, had become, in the same period or sometime later, secured for not only citizens of the United States but also persons in general, through a theory of

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292 It was in 1965 that the United States of America had abolished racial discrimination in the Immigration Act. Cf., Gabriel J. Chin, Were the Immigration and Nationality Act Amendments of 1965 Antiracist?, included in Gabriel J. Chin, et. al. ed., The Immigration and Nationality Act of 1965: Legislating a New America, p.11(Cambridge University Press. Kindle ed.); Keijiro Nuoi, Immigration and Nationality Acts in the United States of America Vol. 1 (Annotations), p. 26 (Yuhikaku 1985(in Japanese)).

293 On this issue, see authors paper, Kotaro Matsuzawa, The Development of Expatriation in America, Tsukuba-Hosei No.25 (1998) p. 203 (in Japanese).

294 Ex Parte Yarbrough 110 U.S. 651, 665. The realization of the right to vote or to hold office of black people became an issue in its substantial meaning only in the middle of the twentieth century. Cf. VI Leonard Levy et al. ed., Encyclopedia of the American Constitution, pp. 2809−2814 (2nd ed. Macmillan Co. 2000). On this point, see following Web page in the site of the United States House of Representatives: https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Constitutional-Amendments-and-Legislation/

295 16 Stat. 140, 144.

296 Cf. ex. Alexander M. Bickel, The Morality of Consent, Chap. 2 (Yale Univ. Pr. 1975).

substantive due process or incorporation doctrine, by the provisions to provide due process or equality under the law[297].

On the other hand, the rights incidental to citizenship of the United States were made clear by a series of judgements beginning with the Crandall v. Nevada case[298]. The Judgement of the Slaughter-House cases made especially clear that to be a citizen of the United States implies to be a citizen of a State where he resides[299]. This had a great significance since each State should play a major part for the security of civil rights[300].

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297 Normand G. Benoit, The Privileges or Immunities Clause of the Fourteenth Amendment: can there be life after death? 11 Suffolk Univ. L. Rev. 61, 91 (1976); Philip B. Kurland, The Privileges or Immunities Clause: "It's Hour Come Round at Last"?, 1972 Wash. Univ. L. Q. 405, 414 (1972); I Laurence H. Tribe, American Constitutional Law, § 7-4, 5, 6 (3rd ed. 2000). Tribe wrote there that, as one of the reasons why the words "the privileges or immunities" of the Fourteenth Amendment was not used for the security of rights, it could be pointed out that the security of the privileges or immunities were targeted only at citizens of the United States. Id., at 1324. However, Tribe insisted against such a reasoning that words "the privileges or immunities" secured the rights which a State should not deny to any person for citizens of the United States and it could not be said that the provision secures the rights only for citizens of the United States exclusively. Id., at 1324-1325.

In relation to this point, there is a reference which stated that, among the privileges and immunities stated by the Federal Supreme Court in the Slaughter-House cases, other rights than the right secured by treaty, the right to become a citizen of a State by residing in the State, or the right to enjoy diplomatic protection on the open sea or in a foreign country, would be enjoyed by persons in general. Bruce R. Trimble, the Privileges of Citizens of the United States, 10 Univ. Kansas City L. Rev. 77, 82(1942).

298 A literature enumerates, as the rights enjoyed by citizens of the United States but not by alien inhabitants in theory, following rights.

- The ability to petition for the permanent residence of parents, children and spouse;
- The ability to bestow citizenship of the United States on a child born abroad;
- The ability to reside permanently in the United States, or even indefinitely outside the United States, without losing status;
- Protection from loss of status resulting from certain bad acts or other grounds of inadmissibility or deportability from the United States;
- Enjoyment of certain political rights, including the right to vote, to hold political office and to serve on juries;
- Enjoyment of certain property rights, including the rights to own business licenses and copyright;
- Enjoyment of certain constitutional rights, such as substantive due process;
- Enjoyment of diplomatic protection by the United States when abroad;
- Eligibility for certain welfare benefits;
- Ability to own a gun;
- Eligibility for certain sensitive government jobs for which citizenship is legally required;
- Entitlement to a United States passport;
- Certain tax exemptions;
- A greater sense of belonging and community within the United States.

Robert C. Divine, Immigration Practice (15th ed.), 12-2 (Juris Publishing Inc. 2014).

There are other literatures explaining the differences between the citizens and aliens in relation to the enjoyments of rights.

One literature states that citizenship in the United States provides certain rights and privileges not available to noncitizens and that these benefits include the right to vote, the right to hold public office and eligibility for unlimited types of employment. It also mentioned that citizens are able to confer immigration benefits upon their family members more easily and quickly than permanent noncitizens. Cf. Daniel Levy, U.S. Citizenship and Naturalization Handbook 2018-2019 ed., § 1:7(Thomson Reuters 2018).

Another literature enumerates following points regarding rights and privileges of the citizens.

- Entry into and stay in the United States
- Travel or Residence outside the United States
- Holding U.S. Passports
- Entitled to the Diplomatic Protection
- Transmission of Nationality to Children Born Abroad
- Possession of Political Rights

Cf., Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, & Ronald Y. Wada, Immigration Law & Procedure, § 91.5[1](2020)

Other literature states that United States citizens are not subject to the immigration laws of the United States, including the deportation and exclusion proceedings, and also they can sponsor certain relatives for permanent resident status, including spouse, children, brothers and sisters, married and unmarried sons and daughters and, if 21years of age or older, a United States citizens can sponsor his/her parents. Cf., Richard D. Steel, Steel on Immigration Law(2018-2019 ed.), § 15:24(Thomson Reuters 2018).

It is also stated in other literature that United States citizens have certain rights and privileges not available to noncitizens and that they have the right to vote, the right to hold public office and eligibility for unlimited type of employment. Cf. Shane Dizon and Pooja Dadhania, Immigration Law Service 2d, § 14.1(Thomson Reuters 2013). This literature contains the Chapter "Right of Noncitizens: Constitutional, Statutory, and other Rights"(Chapter 16).

299 Slaughter-House Cases, 83 U.S. 36, 80.

300 The court opinion of the Slaughter-House Cases stated that each State should play a major role for the security of civil rights, and enumerated, as the examples of the privileges or immunities of citizens of a State, a series of rights found in the cases concerning Article 4, Section 2 of the Constitution of the United States. Slaughter-House Cases, 83 U.S. 36, 75. However, the Federal Supreme

Subsection 3 Citizenship and Civil Rights after Establishment of the Fourteenth Amendment

Paragraph 1 Discussion on Citizenship

As being seen in the last chapter, holding citizenship had been legislatively determined by the establishment of the Fourteenth Amendment, and the same establishment swept out from the United States the situation where citizenship was restricted on account of a fact alien to law, namely, race. At that time, the people of the United States had to confront the question, "who should have citizenship?". This question was, seeing from another viewpoint, also one "With whom would we found the nation?" for the United States adopting a republican form of government.

As being seen in this chapter, the judgement of the Wong Kim Ark case interpreted the Fourteenth Amendment by adopting a principle of Common Law. The judgement of the case, though it made a certain progress on the limitation problem of citizenship holders including black citizens, still involved a difficult problem in the determination of the proper attribute of citizenship[301]. The method adopted by the judgement, namely, that, while determining citizenship holders according to the criterion in Common Law on the one hand, the peculiar power of the United States to determine citizenship is emphasized on the other hand, is, as it were, the autonomous or automatic returning back to the traditional and ancestral way of thinking. It could be doubtful whether the Federal Supreme Court have had the power as its capacity to discuss much deeper or in a different way than the judgement of Wong Kim Ark case, as having been seen, other than relying on such the traditional and ancestral theory. But it could be said that the judgement was not enough as an answer to the question, "who should have citizenship?", in a meaning that the judgement could be justified, if any, only by its historical coherence. It should be also pointed out that such a defect caused the problem in determining the attribute of citizenship[302].

Paragraph 2 Discussion on Civil Rights

Thinking in relation to the latter question, namely, "with whom they would found the nation", the Fifteenth Amendment of the Constitution of the United States excluded race from the criteria for the participation in the Government, though, in practice, this was realized only half a century later due to actual political conditions and circumstances. Nevertheless, the Fifteenth Amendment contributed to the autonomous formation of the subject of determination of the will of the nation. That effect should be highly appreciated.

Furthermore, in relation to the enjoyment of civil rights, while it was insisted that citizens of the United States and foreigners should almost equally enjoy the basic rights, it was emphasized that citizens of the United States should enjoy the privileges and immunities so as to remove any discrimination among citizens of the United States within the domain of the United States. This could be understood to mean that the setup and clarification of the concept of citizenship was done not for a security of any profit through differentiation, but for seeking some fairness to be realized within the domain of the United States.

Court has affirmed in some cases that a State set up some distinction among persons, based on whether he holds citizenship of the State or whether he resides in the state. (Baldwin v. Montana Fish and Game Commission, 436 U.S. 371 (1978). cf. Mark Strasser, The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel, 52 Rutgers L. Rev. 495, 561 (2000)).

Concerning this point, the policy of a State to treat foreigners differently should be subject to a strict examination by courts except for the matter concerning governmental processes (The Constitution of the United States of America-Analysis and Interpretation, 2171(Centennial Ed.)(GPO 2017) (https://www.govinfo.gov/content/pkg/GPO-CONAN-2017/pdf/GPO-CONAN-2017.pdf). In this regard, the aforementioned will not necessarily have meaning practically. Rather, on this issue, it should be noticed that the court opinion of the Dred Scott case did not admit a black person the ability to hold the rights by the reason that a black person could not be a citizen and could not hold civil rights. Cf. Dred Scott v. Stanford, 60 U.S. 393, 405.

301 See, Subsection 1, Paragraph 1 in this section.

302 As a literature pointing out a similar problem, see James W. Fox Jr., Citizenship, Poverty, and Federalism: 1787–1882, 60 Univ. Pitt. L. Rev. 421, 558 (1999).

Chapter 6 Women and Citizenship --- Development of Citizenship of the United States

Section 1 Subject and Orientation of this Chapter

After the establishment of the Fifteenth Amendment of the Constitution of the United States, there were three amendments to the Constitution using the term "citizens"[1]. First among them, was the Nineteenth Amendment, in which discrimination on account of sex is prohibited. Regarding citizenship, it is the citizenship of women that is most discussed after the establishment of the Fourteenth Amendment.

In this chapter, this article will examine citizenship and civil rights of women in order to see how development of citizenship and civil rights took place after the period analyzed in the last chapter. In the course for examining the relation between being women and the enjoyment of civil rights, the relation to the civil duties will also be examined.

In section 2, the discussion for the establishment of the Nineteenth Amendments at Congress will be analyzed. In section 3, a series of legislations relating to the change of citizenship of women will be examined. In section 4, the relation between being a woman and enjoyment of civil rights and some issues regarding the relation between being a woman and civil duties will be considered. In section 5, the outputs from section 2 to section 4 will be summed up.

Section 2 Legislation Process of the Nineteenth Amendment

After the right to vote of women was denied in the judgement of the Minor v. Happersett case of 1875[2,3] and up to the time of the establishment of the Nineteenth Amendment in 1920, Congress had discussed the right of women to vote in 1886, 1913, 1915 and 1918[4].

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1 Among the constitutional amendments after the Fifteenth Amendment, other than Nineteenth Amendment, Twenty-Fourth, Twenty-Sixth Amendments contained the term "citizens". The Twenty-Fourth Amendment prohibits the deprivation of the right to vote by reason of failure to pay any poll tax or other tax, and the Twenty-Sixth Amendment reduced the age for voting to 18 years. Concerning theTwenty-Fourth and Twenty-Sixth Amendments, cf. ex. Vikram David Amar, Jury Service as Political Participation akin to Voting, 80 Cornell. L. Rev. 203, 243 (1995).

2 88 U.S. 162 (1874).

3 A literature stated that the movement to give the right to vote to women in the United States began at the time of the seventh President Jackson and that after the vote of women was accepted in a school district of the State of Kentucky in 1838, similar institution was adopted in each States, and then in 1887 the right to vote of women was generally affirmed in the universal election of a local government of the State of Kansas. The Constitution of the United States of America -- Analysis and Interpretation, 2293 (Centennial Ed.) (GPO 2017) (https://www.govinfo.gov/content/pkg/GPO-CONAN-2017/pdf/GPO-CONAN-2017.pdf).

4 A literature stated that there were 11 affirmative and 7 negative reports on the right to vote of women presented to the committees of the Senate or of the House of Representatives between 1871 and 1896. Cf., IV Susan B. Anthony & Ida Husted Harper, The History of Woman Suffrage, 12 (Hon-No-Tomosha 1998). The outlines of some of them are quoted in the book, which are as follows.

Two report were presented from the Judiciary Committee of the House of Representatives in 1871. They were responses to the petitions to legislate a federal act admitting the right of suffrage of women. Those petitions insisted that, though the right of suffrage of women should be affirmed based on the Fourteenth and Fifteenth Amendments, each State was denying it.

Among them, a major opinion presented by Representative Bingham stated that the Fourteenth and Fifteenth Amendments did not deny the power of a State to exclude women from voting in regulating the elections, and that Congress had no power to do such a regulation. That is, it denied the possibility of the legislation by Congress to guarantee women the right of suffrage (II Id., at 461).

Representative Loughridge reported a minor opinion (Id., at 464), which outline was as follows.

First, the report pointed out that, in the Roman Republic, women occupied a higher position as to political rights and privileges, than in any other contemporaneous government. And in England unmarried women had always been competent to vote and to hold civil offices, if qualified in other respects.

Second, the report claimed that from the very nature of their Government, the right of suffrage as a fundamental right of citizenship, not only included in the term "privileges of citizens of the United States", as used in the Fourteenth Amendment, but also included in the term as used in section 2 of Article 4. Furthermore, it pointed out that the majority of the committee claimed the adoption of the Fifteenth Amendment was by necessary implication a declaration that the States had the power to deny the right of suffrage to citizens for any other reasons than those of race, color, or previous condition of servitude. But it insisted against the majority opinion that it was too violent a construction of an amendment, which prohibited States from, or the United States from,

abridging the right of a citizen to vote by reason of race, color, or previous condition of servitude, to say that by implication it conceded to the States the power to deny that right for any other reason, for on that theory the State could confine the right of suffrage to a small minority. On this issue, the report stated that the second section of the Fourteenth Amendment prescribed a penalty when a State restricted the right of suffrage of male citizens, and that it did not admit the power of the States to abridge the enjoyment of the right of suffrage of citizens other than male ones.

Third, the report pointed out that section 2, article 1 of the Constitution provided that the members of the House of representatives should be chosen by the people of the several States, not by the male people. Furthermore, it stated that the provision surely recognized the power of the State to regulate the qualifications of the electors, but it did not allow the State to give the right of suffrage only to a part of the citizens.

In 1878 and 1879, concerning the bill to amend the Constitution so as to prohibit the denial of the right of suffrage by reason of sex, some reports were presented from the Committee on Privileges and Elections. Among them, the outline of a report presented by Senator Wadleigh was as follows (III id., at 112).

First, the report stated that to admit the right of suffrage of women would make several millions of female voters, totally inexperienced in political affairs, quite generally dependent upon the other sex, all incapable of performing military duty and most of which did not wish to assume the irksome and responsible political duties. It furthermore insisted that a change so great should only be made slowly and in response to a general public demand, of the existence of which there was no evidence before the committee.

Second, the report stated that, though some said that without the right of suffrage the rights of women would be injured by oppression and unfairness, the restrictions on the rights of women had been gradually removed through common law without the right of suffrage of women.

Third, the report stated that, considering the power of the States, it would not be a wise way for three quarters of the States in the United States to force the rest of the States to accept the right of suffrage of women through the amendment to the Constitution.

Another report from the Committee on Privileges and Elections presented by Senator Hoar at the same time was as follows (Id., at 131).

First, the report stated that, though the people of the United States and of Several States had founded their political institutions upon the principle that all men had an equal right to a share in the government, their fathers failed in three particulars to carry the principle to its logical result, one of which was to exclude women from share in the government. And furthermore it stated that, if the principle mentioned above was correct, no class of persons could rightfully be excluded from their equal share in the government, unless they could be proved to lack some quality essential to the proper exercise of political power.

Second, the report stated that a person who voted helped, first, to determine the measures of government and, second, to elect persons to be instructed with public administration. Then, it continued that such a person should possess, first, an honest desire for public welfare, second, sufficient intelligence to determine what measure or policy was best, third, the capacity to judge the character of persons proposed for office, and, fourth, freedom from undue influence, so that the vote the person casted was its own, and not another's. And it insisted that women did not seem to lack those abilities.

Third, the report stated that, though many persons feared that taking part in politics would destroy those feminine traits which were the charm of woman, the study of political questions, the forming an estimate of the character of public men or public measures, and the casting a vote certainly had in themselves nothing to degrade the most delicate and refined nature.

Fourth, against the majority opinion which stated as the reasons to deny the right of suffrage of women that it would make several millions of female voters, totally inexperienced in political affairs, quite generally dependent upon the other sex, all incapable of performing military duty and most of which did not wish to assume the irksome and responsible political duties, the report responded as follows. First, the objection of inexperience in public affairs applied alike to every voter when he first vote. Second, that women were quite generally dependent on the other sex is true, but so it was true that men were quite generally dependent on the other sex. Third, capacity for military duty had no connection with capacity for suffrage, for it would scarcely be proposed to disfranchise men who were unfit to be soldiers by reason of age or bodily infirmity. The report furthermore insisted that though there was the argument that women were without the power to enforce the laws, it was not physical power alone but power aided by the respect for law of the people, on which laws depended for their enforcement, that if the right of suffrage was a birthright, then it was obvious that no other power than that of the individual concerned could rightfully restrain its exercise, and that since if the rights of women was protected without the right to vote by sympathies from men, then it was unjust in that men tended to treat women better, the defect in the governmental system should be corrected. In addition, the report stated finally that the prevention of unjust discrimination by States against large classes of people in respect to suffrage was even admitted to be a matter of national concern and important function of the national constitution and laws.

In 1882, the first majority opinion supporting the guarantee of the right of suffrage for women was presented to the Senate by Senator Lapham from the Committee on Woman Suffrage. The outline was generally as follows (Id., at 231).

First, the report stated that the framers of their system of government embodied in the declaration of Independence the statement that to secure the rights which were therein declared to be inalienable and in respect to which all men were created equal, "governments are instituted among men deriving their just powers from the consent if the governed." Then the report continued that the system of representative government they inaugurated could only be maintained and perpetuated by allowing all citizens to give that consent through the medium of the ballot-box.

Second, the report stated that to deny to one-half of the citizens of the republic all participation in framing the laws by which they were to be governed, simply on account of their sex, was political despotism to those who were excluded, and "taxation without

Subsection 1 Discussion in the Senate of 1886

On December 7, 1886, Senator Blair proposed an amendment to the Constitution to secure women the right of suffrage[5]. The content of the amendment bill was as follows[6].

Section 1 The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Section 2 The Congress shall have power, by appropriate legislation, to enforce the provisions of this article.

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representation" to such of them as had property liable to taxation.

Third, the report stated that though it was said that the majority of women did not desire and would not exercise the rights, the assertion only rested in conjecture, that in ordinary elections multitudes of men did not exercise the right, and that it was only in extraordinary cases and when their interests and patriotism were appealed to, that male voters were with unanimity found at the polls, and it would doubtless be the same with women. Then the report continued that even if the statement above were founded in fact, it furnished no argument in favor of excluding women from the exercise of the franchise, for it was the denial of the right of which they complained.

At the same time as above, the minority report presented by Senator George against the majority opinion described above was generally as follows (III Id., at 237).

First, the opinion stated that each State had the power to determine the qualifications of electors, and pointed out that, whenever the Federal Constitution spoke of elections for a federal office, it adopted the qualifications for electors prescribed by the State in which the election was to be held.

Second, the opinion stated that the Fifteenth Amendments gave the right of suffrage to black persons so as to abolish the relation between the former slaves and their former masters and to eliminate the infringement of the rights of black persons coming from racial prejudice and antagonism between races, but there had never been similar conditions between men and women.

Third, the opinion insisted that the best mode of disposing of the question was to leave its solution to the power most amenable to the influences and usages of society in which women had so large and so potential a share, confident that at no distant day a right result would be reached in each State which would be satisfactory to both sexes and perfectly consistent with the welfare and happiness of the people.

In 1883, at the House of Representatives, a report which content was generally as follows was presented by Representative White from the Committee on Woman Suffrage (III Id., at 263). That report proposed an amendment to the Constitution of the United States to secure the right of suffrage to citizens of the United States without regard to sex by following reasons.

First, there were vast interests in property vested in women, which property was affected by taxation and legislation, without the owners having voice or representation in regard to it. The adoption of the proposed amendment would remove a manifest injustice.

Second, by conferring upon women the right of suffrage, the condition of women would be greatly improved by enlargement of their influence, which might correct the unjust discrimination made against women in industrial and educational pursuits. In relation to that, the questions social and family relations were of equal importance to and affect as many women as men. Giving to women a voice in the enactment of laws pertaining to divorce and custody of children and division of property would be merely recognizing as undeniable right. Furthermore, municipal regulations in regard to houses of prostitution, of gambling, of retail liquor traffic, and of all other abominations of modern society, might be shaped very differently and more perfectly were women allowed the ballot. And if women had a voice in legislation, the momentous question of peace and war, which might act with such fearful intensity upon women, might be settled with less bloodshed.

Third, in a society there was no problem in which the mother was not equally interested with the father, the daughter with the son, the sister with the brother. Therefore the one should have equal voice with the other in molding the destiny of this nation.

In 1884, at the Senate, the majority opinion which supported the right of suffrage of women and a minority opinion against it was presented. A part of the former was quoted in the explanation of the intention of the proposal given by Senator Blair at the time of the proposal of an amendment to the Constitution concerning the right of suffrage of women at the Senate in 1887 (49−2 Cong. Rec. 37). It pointed out that voting on an amendment to the State constitution to admit the right of suffrage of women was carried out in several States at that time, that women were allowed to vote in some Territories, and that it was shown through some petitions to Congress that there was a public opinion that the right of suffrage of women should be affirmed all over the United States. Besides, in the same year, there was presented at the House of Representatives a report that the problem of the right of suffrage of women should be resolved in each State. (IV Susan B. Anthony & da Husted Harper, The History of Woman Suffrage, 47 (Hon-No-Tomosha 1998)).

In 1886, a minority opinion was presented from the Judiciary Committee of the House of Representatives (IV Id., at 82). In the report, following points were pointed out as the reasons to accept the right of suffrage of women.

First, it was necessary for women to admit the right to vote in order for women to get out of the dependence on men so as to freely improve themselves.

Second, By women's exercising the right to vote, it could be expected that the virtues of women would have an good influence on various fields.

Third, though it is sometimes said that women themselves didn't wish for the right of suffrage, that could not be a reason to deny the right of suffrage to the women who wish it.

5 49−2 Cong. Rec. 23.

6 Id., at 34.

The amendment bill was discussed on December 8 in the same year and on January 25 in the next year at the Senate, but it was ultimately rejected[7].

Paragraph 1 Proposal by Senator Blair to Amend Constitution

Senator Blair explained the amendment bill generally as follows[8].

First, the Senator, as a premise, pointed out that the principle of their form of government which distinguished it from aristocracies, monarchies and despotisms, was that "every human being of mature powers, not disqualified by ignorance, vice, or crime, is the equal of and is entitled to all the rights and privileges which belong to any other human being under law". Then, the Senator continued that the independence, equality and dignity of all human souls was the fundamental assertion of those who believed in what we called human freedom[9]. Considering the premise above that infants, idiots, or women was thought to be represented by male persons, the Senator stated that such a way of thinking had to be proved by showing the fact that those persons agreed to such a representation or that they had no ability being necessary for expressing their consents, but, in reality, there was no chance given to them to express such consents even when they had the necessary ability[10].

Based on the arguments above, the Senator stated that, if it was true that "all just government is founded upon the consent of the governed," then the government of woman by man, without her consent given in a sovereign capacity, even if that government be wise and just in itself, was a violation of natural right and an enforcement of servitude against her on the part of man, if woman had enough capacity for voting[11,12].

Besides, the Senator insisted that women could be represented only by exercising their right to vote based on their own wills, and that without it, it could not be said that women were represented as free beings[13].

Moreover, the Senator insisted that all adult men and women needed the same rights and remedies under the same condition and that it was recognized for those who believed in republican form of government that the right of

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7 Id., at 1002.

8 In addition to the matters described above, Senator Blair also pointed out following points.

First, examining the criterions which were often enumerated as the requirements for a male person to enjoy the right to vote, namely, age, property, sanity, education, observance of the law, the Senator insisted that all those requirements were for the purpose of mental and moral fitness for the suffrage on the part of those who exercised it, but had no relation to the physical condition. Further on this point, the Senator pointed out that, since the freest government on the face of the earth had the reserved power under the call of necessity to place a woman in the forefront of a battle, it could not be claimed that woman had no right to vote because she was not liable to fight. Id., at 35.

Then, the Senator quoted and discussed some opinions opposing to the right of women to vote.

First, against an opinion which denied women the enjoyment of the right of suffrage because women would become mothers, the Senator pointed out that it could not be said that a person who satisfied all the other requirements for the right to vote would lose the qualification only because of being a mother. Id., at 36.

Next, against an opinion that women did not wish the right to vote, the Senator pointed out that the right of suffrage was that of an individual, so that even if most of women did not want to acquire that right, it should not be allowable to deny a person the right of suffrage because the person was a woman. Besides, the Senator pointed out that a woman might be saying that she didn't want the right to vote in order to meet the intention of a man. Id., at 37.

Furthermore, against an opinion that by giving women the right of suffrage there might happen a discrepancy of political opinions between a husband and a wife, so that society might became unstable, the Senator pointed out that a man had been living peacefully irrespective of the difference of his political opinion from that of the neighbor. Id.

In addition, against an opinion that there had been historically no era in which women had the political rights and an opinion that women would not vote even if the right to vote was given to women, the Senator pointed out that both had historical dis-proofs. Id., at 37.

9 49−2 Cong. Rec. 34.

10 Id.

11 However, the Senator stated there that, if woman, like the infant or the defective classes, be incapable of self-government, then republican society might exclude her from all participation in the enactment and enforcement of the laws under which she lived.

12 Id. The Senator stated that he desired to say his opinion first of all in reply to the board assumption of those who denied women the suffrage by insisting that they were already represented by their fathers, husbands, brothers, or sons.

13 Id.

suffrage needed to be a fundamental right for all human beings in free society[14].

Paragraph 2 Opinions Supporting the Amendment Proposal

One of the supporters of the proposal to amend the Constitution insisted that considering the viewpoint of the relation between the right to vote and intelligence, even if women were inferior to men in intelligence, it could not be a reason not to grant the right of suffrage, and if the level of the intelligence would be adopted as a criterion for the right to vote, such a criterion should be applied equally to men and women[15].

Besides, another supporter also pointed out that seeing from the viewpoint of the relation between woman and politics, it was a fact that woman, as the mother or wife, educated the children or the husband, and that there was no reason to believe that a woman degraded herself by stating her opinion to the political decisions concerning their education or by declaring her political position[16].

Paragraph 3 Opinions of Opponents of the Amendment Proposal

One of the opponents of the amendment proposal insisted that, seeing from the viewpoint of the relation between the husband and wife relation and politics, a woman used her influence on her father, husband, brothers and sons, though there was an opinion that it was unfair that women were taxed on her property without participating in the legislation or that the laws were enforced affecting her property without being represented[17]. Furthermore, the opponent also stated an opinion that, though there was an opinion that woman should have the right to vote in order to be protected from the force of her oppressive husband, if such a husband could use such force, then he would use it over the voting of the wife, so that the right of woman to vote would not be helpful for woman[18].

Next, the opponent stated that, the difference in physical or mental structure between man and woman showed that difficult and bothersome social tasks should be done by man while the tasks for graceful life and for raising infants as well as housekeeping should be done by woman[19].

Besides, another opponent stated an opinion regarding the nature of the right of suffrage. Since women were emotional in nature, emotional suffrage should be avoided for being a voter required the ability to logically solve public problems[20]. There was an additional opinion that the right to vote should be given, based on a utilitarian judgement or a political consideration, by a nation to persons to whom the nation wanted to give it; thus it was never a natural right[21].

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14 Id, at 36. The Senator pointed out there that whether the right of suffrage was secured would determine whether the government was founded on the consent of the governed and whether the governed were free or enslaved, as well.

15 Id., at 984 (Sen. Dolph). Senator Dolph stated there that he himself did not approve of the opinion that women were inferior to men in intelligence.

Further on this point, the Senator stated, responding to a question whether woman should be a member of a jury, that becoming a jury member had no relation to enjoying the right of suffrage. The Senator furthermore stated that, while to determine who should be a jury member or a soldier or hold an office would be a matter to be determined within the community, whether a citizen could participate in the formation of the government which might affect the life, property or destiny of the citizen should be a matter of civil right in that if it was negated for the citizens, it would be a despotism. Id., at 985.

16 Id., at 988 (Sen. Hoar)

17 Id., at 981 (Sen. Brown).

18 Id., at 982 (Sen. Brown).

19 Id., at 983 (Sen. Brown).

20 Id., at 986 (Sen. Vest).

21 Id. (Sen. Vest). According to the record, the Senator quoted there a petition with many signatures against offering woman the right of suffrage (Id., at 986) and a letter from Clara T. Leonard pointing out that woman could participate in politics by using her influence on man and it was not socially good for woman to enjoy the right of suffrage (Id., at 987).

Against that, Senator Blair introduced a petition for the realization of the right of woman to vote grounded on that governments could be just only when deriving their power from the consent of the governed, that in a government professing to be a government of the people, all the people of mature age should have a voice, and that the ballot in popular governments was a most potent element in all moral and social reforms. Id., 991. Then, Senator Blair asked that the document of the arguments concerning woman suffrage in various Committees at the Senate be printed into the Congressional Record, and it was approved. Id., at 992. Then, the

Subsection 2 Discussion in the Senate since 1913

Paragraph 1 Proposal to amend the Constitution by Committee on Woman Suffrage

In 1913, a proposal to amend the Constitution to grant woman the right of suffrage was presented in the Senate of the United States from the Committee on Woman Suffrage[22].

Senator Ashurst, representing the Committee, stated on the constitutional amendment bill as follows.

The Senator pointed out that political liberty invested the citizen with an appreciation of his or her duties and responsibility, and that it secured to the citizen safety of person, secured the power to assist in selecting public officials, and secured the opportunity to rebuke by ballot the extravagance of public officials. The Senator then insisted that it made the individual citizen the peer -- the equal -- of every other individual citizens and stimulated and excited the individual to aspire to excellence for himself and the Government[23].

The Senator stated that, since there was no such thing as a national voter in the United States and the qualifications of voters were fixed and determined by the State, the constitutional amendment intended not to confer the right of suffrage upon anyone, but simply to exclude the discrimination on account of sex from the qualifications of voters[24].

Furthermore, the Senator pointed out, on the relation between the governmental system of the United States and the constitutional amendment, that Government was strong or weak, capable or deficient, according to the people who controlled and made up that government. He insisted that the "people" constituted the Government in the Republic and that the granting of the elective franchise to women would add strength, efficiency, justice, and fairness to government[25].

Moreover, the Senator pointed out that, "the people" included women who could not be denied the political privileges and responsibilities without doing violence to the fundamental principles of their Government[26]. The Senator also insisted that it was anomalous in a free republic, controlled by, and administered for all the people, to deny to one-half of its citizens the right of exercising a valuable function of citizenship, to wit, the elective franchise, and thus precluded that one-half from the right and power to say what law or polity should be its rule of conduct[27].

In addition, the Senator stated that they were in constant warfare against fraud and violence, avarice and cupidity, and liberty and justice whose success would be accelerated by extending the franchise to women[28]. The Senator insisted that woman's sphere, her ideals and her duties, made her the inescapable and essential conservator of human life, and that it was in harmony with political and natural justice to accord to her the right to say what laws should assist her in bringing about the betterment of her economic conditions[29]. Then, the Senator, while pointing out that though there were some persons who believed that, when women voted, all human problems would easily and expeditiously be solved, it could not be true. Rather, woman's suffrage would, as the years glided by, bring a gradual change in their social and economic conditions and more and more would be observed a truer justice, a spirituality, a

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record of arguments before the select Committee on Woman Suffrage at the Senate in 1884 and the record of arguments in the Judiciary Committee at the Senate in 1880 were printed in the Congressional Record.

22 In Congressional Record, the proposal was first mentioned at the Senate on December 19, 1913 (63−2 Cong. Rec. 1188). It was pointed out there that, despite the several repeated requests for the discussion on the proposal from the Committee of Woman Suffrage, the proposal had not been taken up. According to the record, after the presentation the proposal was once rejected to be discussed (Id., 1628), and on January 21, 1914, it was taken up again (Id., at 2016). However, even at that time there was considerable discussion on whether it should be discussed. And there was stated that concerning the amendment proposal, the Committee on Woman Suffrage submitted on June 13, 1913, a report asking for the admission of the right of woman to vote (Id., at 2019).

A bill to amend the Constitution which was drafted based on that report was also recorded in the later page of the Congressional Record (Id., at 5093).

23 Id., at 2020.

24 Id., at 2021.

25 Id., at 2025.

26 Id.

27 Id.

28 Id.

29 Id.

morality, and an idealism running through their laws[30].

Moreover, the Senator pointed out, regarding the influence of the constitutional amendment to women or society, that as the cottage industry had been abated and the woman's sphere had been expanded far beyond her home, it was indispensable to offer a woman the right and opportunity to have sensible and wholesome laws and regulations even to assist her in procuring pure foods, pure fabrics and sanitary house[31]. Then the Senator insisted that voting would not lessen affection, and political affairs could not make women false to their inborn instincts or cause them to lose one jot or title of their soft and loving tenderness[32].

Finally, the Senator stated that women were particularly qualified for and entitled to political liberty, for as a class they always stood against violence and fraud, they always supported the cause of liberty and progress, that they had been the chief mainsprings that inspired, encouraged, and consoled great and useful men, and that women were essentially qualified to vote and act as a balance wheel to men in great contests[33].

Paragraph 2 Opinions of Supporters for the Constitutional Amendment

The supporters of the constitutional amendment bill first insisted, from the viewpoint of the relation between the constitutional amendment and the nature of woman, that woman had the same natural right to exercise of the ballot as man[34], and that inasmuch as woman was a human being, having never consented to her disenfranchisement, she

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30 Id. Senator Ashurst enumerated following instances of the change woman suffrage might produce.
- A strict attention to the laws concerning sanitary regulations, food supply, educational, and moral conditions.
- Scientific conservation of the public health.
- Laws providing for good roads, so that the transportation of crops and all plant foods may be easier and cheaper.
- Laws which will make for system which will see to it that the workers who create wealth and prosperity shall have an equitable share of that wealth and prosperity which they create.
- Laws which will make for a system allowing those whose labor creates wealth ample time for relaxation, for pleasure, and reading.
- Laws requiring employers to provide reasonably safe places in which to work and reasonably safe machinery with which to work.
- With women suffrage a public office will no longer be viewed as booty or plunder that has been captured from a defeated enemy, but will be viewed simply as an honorable opportunity to serve the common good of all the people.
- Women suffrage leads to wholesome prison reform.

In relation with those points above, Senator Shafroth stated that following points in the statutes of the State of Colorado were reformed largely through the influence of woman (Id., at 4194).
- The establishment of a juvenile court and a code for the treatment of juvenile delinquents.
- The establishment of a State industrial school for girls.
- Of a State school for dependent children.
- Of a State home for mental defectives.
- Compulsory education for all children from 8 to 16 years of age.
- Preventing child labor during terms of school.
- Establishing parents as joint heirs of deceased children.
- Making it a misdemeanor for adult children to all to support aged or infirm parents.
- Increasing the age of consent of girls and protecting them by criminal statutes.
- Creating a State traveling library commission of women.
- Establishing a pure-food bureau and providing for the enforcement of laws as to pure food.
- Preventing husbands from mortgaging household goods without signature of the wife.
- Providing for examination of teeth, eyes, and ears of school children.
- Creating a bureau for prevention of cruelty to dumb animals.
- Abolishing the sweat box in getting confessions from prisoners.
- Authorising punishment for prisoners so that by good conduct and work they can obtain their liberty in much shorter time.
- Establishing a board of charities for the supervision of all public prisons and eleemosynary institutions, and prohibiting men from taking any earnings of immoral women.

31 Id., at 2026.

32 Id., at 2027

33 Id.

34 Id., at 3598 (Sen. Bristow); Id., at 4270 (Sen. Thompson).

was entitled, under the principle of the Declaration of Independence, to have her consent sought and obtained in the matter of legislation[35]. Furthermore, the supporters pointed out, from the viewpoint of the peculiar nature of woman, the argument that politics would degrade woman was utterly without foundation[36], and they insisted, from the viewpoint of the intelligence of woman, that the women in those days were far more ready for (en)franchisement than the men were when they first had usurped the power and that the women would add more intelligence to the vote of the nation than had been ever added to the voting power of any government at any one time[37]. Besides, one of the supporters stated, from the viewpoint of the tendency of woman, that no one could be more interested or more vitally concerned in the moral life and character of the communities in which they lived than were the women of those communities, yet they were in many of the States denied a voice in determining what should be the character of the laws governing such communities or the methods of their administration or enforcement, which was a problem[38]. On this point, other supporters pointed out that the most convincing argument for the political enfranchisement of women was the absence of any really persuasive argument against it, and that, if it be right to extend the voting privilege to all sorts and conditions of men, there could be found no justice of denying the same right to all sorts and conditions of women[39].

Second, one of the supporters pointed out from the viewpoint of the social role of woman that women were American citizens, that they were just as intelligent and just as well educated, and probably better educated, than the men, that they were just as much interest in the welfare of the country as the men, and that they had a greater interest in the preservation of the home and the protection of the children of the country, and that they were allowed to own and did own property under the laws of every State and the Union, and they were entitled to have it protected the same as was the property of men. Supporters insisted that it could not be approved that, nevertheless, women should not be granted franchise only because they were women[40]. Furthermore, the supporters pointed out, from the viewpoint of the relation between women and men or between women and the home environments, that it was not true that the exercise of the franchise by women could cause the quarrels between a husband and the wife[41]. Moreover, it was also insisted that it was not true that if a woman was given the right to vote, she would be thereby compelled to neglect her domestic duties and the duties which she owed to her family[42]. Further on this point, there was presented an opinion that, since women educated the children of the nation, which was of the highest importance

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35 Id., at 4140 (Sen. Shafroth).

36 Id., at 3599 (Sen. Bristow); Id., at 3600 (Sen. Sutherland); Id., at 4275 (Sen. Owen).

37 Id., at 4271 (Sen. Thompson).

38 Id., at 3598 (Sen. Bristow).

39 Id., at 3601 (Sen. Sutherland); Id., at 5103 (Sen. Newlands). However, Senator Newlands stated there that as far as sex was concerned, he saw no reason why the male of the white race should deny the females of the white race, so he stood for the extension of suffrage to white woman and the denial of the right of suffrage to the people of any other race than the white race. Next to that, Senator Williams proposed to insert the word “white” between the preposition “of” and the word “citizens” in the first line of section 1 of the constitutional amendment bill so that the provision was modified to be “the right of white citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.” (Id., at 5104) In proposing that amendment, the Senator stated that one could not have democratic institutions in any country in the world without race homogeneousness. That proposal of Senator Williams was rejected. (Id., at 5107). In relation to this problem, in the time earlier than the part quoted above, Senator Borah stated that he had not any desire to yield up to Japanese and Chinese women a voice in deciding the question how they should control their schools on Pacific slope (Id., at 4962).

40 Id., at 4334 (Sen. Works).

41 Id., at 4140 (Sen. Shafroth); Id., at 4144 (Sen. Sutherland); Id., at 4955 (Sen. Lane). Senator Sutherland introduced there the letter from a judge which said that there was no case where the difference of political opinions between a husband and the wife was insisted as a cause of the divorce proceedings.

However, on this point, Senator Bryan pointed out in other occasion, quoting a statistics on the divorce rate (Id., at 4204), the divorce rates in the States where men and women had equal suffrage were higher than the average in the United States. (Id., at 4207)

42 Id., at 4276 (Sen. Chamberlain). Senator Chamberlain insisted that the suffrage of women, rather, tended to improve the families (Id., at 4277).

to the national interest, women should have the right to vote[43]. Besides, it was pointed out as an instance from the viewpoint of the relation between women and the society that the right of suffrage gave women a better and more equitable wage for equal service performed[44].

Third, from the viewpoint of the relation between the constitutional amendment bill and the governmental system, it was pointed out that taxation without representation was the principle against which their ancestors had protested. It was then insisted that laws that compelled women to pay the tax but gave them no voice in determining its rates or for what purpose it would be expended would conflict with the very fundamental principles upon which every free government be based[45]. Then, it was insisted, from the viewpoint of the Constitution of the United States at that time, that the Constitution had been framed in such a way as not to deny woman suffrage, and it said that the people, not just the men but including the women, should equally enjoy the rights[46]. Concerning the same point, it was also insisted that, since the Constitution of the United States already provided that race or color should not stand in the way of the ballot, there was no reason why one other word should not be written into the clause so as to prevent the far more unwise and cruel discrimination against sex[47].

Fourth, it was insisted from the viewpoint of the relation between the constitutional amendment bill and the practical performance of the Government that extending to women the right to vote would, generally speaking, advance the administration of justice[48]. It was also insisted that, if woman suffrage had been established, it would have been an important factor in putting an end to machine politics, which had corrupted the governing powers of this nation to a large degree and in so many instances[49]. Furthermore, there was an opinion that there were certain questions which women would give more serious attention to than most men would do, so giving women the suffrage would have beneficial effects in respect to those matters in which they were especially interested[50].

Fifth, it was insisted from the viewpoint of the security of women's rights that the only way in which one could be absolutely sure of one's rights, benefits, moral and material, which might flow from the association with government, was to be vested with the same power of participation and voice in the policies of that association as others were vested with, and that the only way in which woman could be sure of her rights of the benefits, moral and mental, that flowed from free government, was to be equipped with the ballot, the only weapon known to free government in the peace time[51]. In addition, there was presented an opinion that women were political slaves if they had no voice in the government, and it was within the unrestricted power of another class to make them social and personal slaves[52], or that the right of suffrage gave women working in factories a better and more equitable wage for equal service

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43 Id., at 4274 (Sen. Owen).

44 Id., at 4273 (Sen. Owen).

45 Id., at 3598 (Sen. Owen); Id., at 4272 (Sen. Shafroth); Id,. at 4274 (Sen. Owen).

46 Id., at 4272 (Sen. Owen). Senator Owen, examining concrete provisions of the Constitution, pointed out there following facts.

- The Constitution says the members of the House of Representatives should be chosen by the people, not by the men, and the Representatives should be apportioned according "to the whole number of free persons" which meant men and women.
- The rights secured by the First, Fourth, Ninth and Fourteenth Amendments should be enjoyed not only by men but also by women, and women should have the right of suffrage to enforce their guaranteed rights.
- Citizens of the United States defined in the Fourteenth Amendment should include women.
- Since the Fifteenth Amendment intended to guarantee the right of suffrage even to black persons, it should not be allowable to deny the right to white women.
- It should not be allowable that, while the power of taxation of Congress admitted by the Sixteenth Amendment had been exercised not only on men but also on women, the women had no right to be heard in choosing those who should pass the laws in regard to taxation or in selecting those who administered the laws of taxation.

47 Id., at 4959 (Sen. Poindexter).

48 Id., at 4281 (Sen. Sherman).

49 Id., at 4275 (Sen. Owen). Senator Owen stated there as the reason that women would not stand for a man known to them to be immoral and corrupt.

50 Id., at 5088 (Sen. Gronna).

51 Id., at 4194 (Sen. Clapp).

52 Id., at 4959 (Sen. Poindexter).

performed[53].

Paragraph 3 Opinions of Opponents of the Constitutional Amendment Bill

The opponents of the constitutional amendment bill generally insisted on the following points.

It was pointed out from the viewpoint of the relation between the constitutional amendment bill and the federal system that under their form of government, that questions of age, length of residence, and sex, which qualified the individual as an elector, should be properly and inherently state questions and not federal questions, and that if the Federal Government had the right to say that equal suffrage should be extended whether a State favored it or not, then the Federal Government had the right to say that equal suffrage should not be extended whether the State favored it or not, which could not be approved[54]. Furthermore, it was insisted from the viewpoint of the mutual relations among States that it should not be allowed for other States to force a State to confer the privilege of suffrage on women through the amendment to the Constitution[55]. Further on this point, it was also noted that it was a serious question whether Congress or even a vote of the necessary number of States should undertake to enforce upon any given State the right of suffrage where neither the men nor the women of the State desired it[56]. Concerning this point it was also insisted that, since there were, in reality, some States where the women would not go to the polls even if permitted by law to do so, it should be better in such States to leave that matter with the States[57].

Next, it was insisted from the viewpoint of the social role of woman that better results would come to the community, if woman should be left in her sphere to nurture and train the youth, to take care of her home and household, and to minister to the wants and needs of her home, rather than be hawking around the polls on election day[58]. Furthermore, there was presented an opinion that the proposal of the constitutional amendment bill was a cruel charge to make against the woman who yet believed that the home and the child were her sphere while politics and business were the sphere of man[59].

Then, from the viewpoint of the governmental system, it was pointed out that there was a difference between civil rights and political rights and that, while the deprivation of a civil right was unjust, the non-possession of a political right might be a benefit[60]. It was also pointed out that, if it was taxation without representation not to allow a woman to vote who owned property, the same could be said as to minors, as to nonresidents, as to unnaturalized persons, as to aliens or as to people who owned property in several States[61].

Besides, against the insisted positive effect of admitting woman suffrage, it was pointed out that for every good law that had been passed in a woman-suffrage State a correspondingly good law had been passed in nearly every other State[62].

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53 Id., at 4273 (Sen. Owen).

54 Id., at 4211 (Sen. McCumber); Id., at 4214 (Sen. Williams); Id., at 4336 (Sen. Pomerene); Id., at 5091 (Sen. Lee). Senator McCumber stated the opinion quoted in the body, from the stand point that, while he admitted the Union had the power to legislate concerning the elections through constitutional amendments, it was morally not agreeable. At the same time, the Senator admitted the Fifteenth Amendment to the Constitution had been necessary for the protection of the citizenship rights of the colored people after the Civil War, but he stated that similar necessities did not exist for the woman suffrage. cf. Id., at 4212.

55 Id., at 4900 (Sen. Thornton); Id., at 5103 (Sen. Oliver).

56 Id., at 4147 (Sen. Works); Id., at 4197, 4200 (Sen. Bryan). According to the statement of Senator Bryan, the woman suffrage was already adopted at that time in States of Wyoming (1869), Colorado (1893), Idaho (1896), Utah (1896), Washington (1910), California (1911), Oregon (1912), Kansas (1912), and Arizona (1912). (Id., at 4198)

57 Id., at 4338 (Sen. Vardaman). Senator Vardaman proposed at the same time to amend the constitutional amendment bill by inserting the words “But in all other respects the right of citizens to vote shall be controlled by the State wherein they reside” (Id., at 4339). This proposal was rejected (Id., at 5106).

58 Id., at 4145 (Sen. Martine of New Jersey).

59 Id., at 4203 (Sen. Bryan).

60 Id., at 4201 (Sen. Bryan).

61 Id., at 4201 (Sen. Bryan).

62 Id., at 4336 (Sen. Pomerene). Against that pointing out, Senator Borah insisted that, since there were a number of instances in which laws bearing upon particular subjects had been sought to be passed for years prior to the adoption of woman suffrage in those States the passage of which had followed immediately after the adoption of woman suffrage, woman suffrage could be said to be effective

In addition, from the viewpoint of the woman's interest in the political system, it was stated that, since there were some States where most of the women did not desire to have and exercise the right of suffrage, the Union should not force such a State to give the women the right of suffrage until most of the women in the State wanted it[63].

Paragraph 4 Resolution

The constitutional amendment bill was in the end rejected on March 19, 1914 because it could not get the required number of favorable votes, two thirds of all valid votes, for proposing amendment to the Constitution[64].

Subsection 3 Discussion at the House of Representatives in 1915

In 1915, a bill to amend the Constitution so as to extend the right of suffrage to women was discussed at the House of Representatives[65,66]. The constitutional amendment bill proposed at that time prohibited in the first section that the United States or any State denied suffrage on account of sex, and, in the second section, provided the power of the Federal Congress to enforce the provisions of the article[67].

Paragraph 1 Opinions of Supporters of the Constitutional Amendment Bill

The supporters of the constitutional amendment insisted as follows.

First, an opinion was presented from the viewpoint of the nature of woman that refuted the notion woman was not qualified to vote because woman had long since demonstrated her qualifications for voting in the States where for

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(Id., at 4337). However, against that instance, Senator Pomerene argued again that what was nearer the truth of it would be that the average of both man and woman was advancing and that the good legislation they were getting was the result of that advanced opinion, so that it would not be due only to woman (Id., at 4337).

63 Id., at 4214 (Sen. Williams). Senator Williams stated there that the line of cleavage, moral or mental, in society was not a sex line at all, and that the establishment of woman suffrage would neither make bad government excellent, nor make excellent government bad (Id.). Moreover, the Senator pointed out that suffrage was not a right but a privilege granted to the individual by society in the interest of society, so that it was not given to idiots, and, he furthermore stated, using the State of Mississippi as an instance, that Mississippi had the right to determine whether the citizens of some type should or should not vote, and in determining that matter, to consider Mississippi's interest, the interest of society, which far overbalanced the interest of the individual who was seeking suffrage (Id., at 4215).

64 Id., at 5108.

65 It was at the third session of the sixty-third Congress that the amendment bill was discussed. Another amendment bill to extend suffrage to women was proposed by Representative Modell also in the second session (cf. 63-2 Cong. Rec. App. 856 (1914)), but, according to the record, there were only few mentions on the bill.

Besides, in the second session, so-called Shafroth-Palmer constitutional amendment proposal concerning woman suffrage was also presented (Cf. The statement by Representative Hayden at the third session of the 63rd Congress. 63-3 Cong. Rec. app. 149 (1915). In addition, the proposal with the same content was presented also at the Senate at the same period (63-2 Cong Rec. 5162 (1914)). But there was no substantial discussion.) According to a statement of Representative Hayden, the Shafroth-Palmer bill referred to above provided "Whenever any number of legal voters of any State, to a number exceeding 8 per cent of the number of legal voters voting at the last preceding general election held in such State, shall petition for the submission to the legal voters of said State of the question whether women shall have equal rights with men in respect to voting at all elections to be held in such State, such question shall be so submitted; and if, upon such submission, a majority of the legal voters of the State voting on the question shall vote in favor of granting to women such equal rights, the same shall thereupon be deemed established, anything in the constitution or laws of such State to the contrary notwithstanding." However, there was found no record of the discussion on that constitutional amendment bill.

66 There was recorded, as a part of the discussion, in the Congressional Record, the statement of Representative Mondell, which included a summary of the conditions of the other countries admitting woman suffrage like Norway, the histories of the adoption of woman suffrage in some States joining to the Union, the present state of the exercise of the right to vote by women and its effect to the legislation in each State and the like (Id., at app. 95). Besides, also in the statement of Representative Raker in the Congressional Record, relevant code and statutes of the States joining the United States and of the foreign countries where woman suffrage was adopted, were recorded (Id., at app. 457).

Moreover, the summing-up of the main statements at the House of Representatives concerning the constitutional amendment bill was recorded as a statement of Representative Mott, in the Congressional Record (Id., at app. 654).

67 63-3 Cong. Rec. 1420. Concerning this constitutional amendment bill, Representative Cullop offered a proposal to amend the preamble part (Id., at 1430).

years she had voted[68]. There was an opinion that women had gained rather than lost as home-loving and home-making mothers because of the right and opportunity to vote[69], and that good women, like good men, would never be lowered by politics, but politics would instead be put on a higher level by reason of woman's participation[70]. Further on this issue, it was also insisted that women had both intelligence and morality on which good citizenship was based and that it was necessary to give them the opportunity to use them in the affairs of government[71]. There was also presented an opinion that equal suffrage would increase the proportion of educated voters[72].

In relation with the issue above, against the opinion which insisted that women would be degraded by being given the right of suffrage, it was insisted that there was no reason why the exercise of the high and sovereign right of citizenship at the ballot box was degrading, and that something was sadly wrong with the present-day politics if women were too good for. Indeed, the purifying influence of these good women was an immediate need[73].

Next, against an opinion that the ballot should not be given to women because of their inexperience in politics, it was insisted that since men gained their experience in politics simply by demanding a voice in the conduct of government and making use of their opportunities when secured, it was exactly what women were asking, namely, an opportunity to gain experience[74].

In addition to those opinions described above, there was presented an opinion that the Nation needed the vote of its womanhood fully as much as the women needed the ballot[75].

Second, from the viewpoint of the social role of woman, there was presented an opinion that since women were the peer of men in every social activity, there was no reason why they should not be their peers in making and enforcement of the laws of the land[76]. In relation to that opinion, it was insisted that the fear that woman would give up her home interests in order to enter the political arena was imaginary and wrong[77]. Moreover, it was also insisted that, while it was claimed that woman's special sphere was the home, politics had to do directly and vitally with the safety, efficiency, and happiness of the home. Indeed, many of the functions of the old-time home had been transferred to the market, bakery, dairy, packing house, laundry, factory, water and light plants, public school, and the various departments of government, all of which were regulated by laws, whose wise enactment and efficient enforcement depended directly upon the exercise of the voting privilege, so without ballot, it was evident that woman

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68 Id., at 1471 (Rep. Volstead); Id., at 1474 (Rep. Hobson); Id. at 1477 (Rep. Evans); Id., at 1481 (Rep. Cullop); Id., at app. 457 (Rep. Raker). Representative Volstead pointed out there the high educational level of women.

69 Id., at 1433 (Rep. Stephens of California).

70 Id., at 1469 (Rep. Reilly of Connecticut); Id., at 1479 (Rep. Evans); Id., at 1481 (Rep. Cullop).

71 Id., at 1461 (Rep. Farr).

72 Id., at 1435 (Rep. Bell of California); Id., at 1442 (Rep. Henry); Id., 1442 (Rep. Abercrombie). However, Representative Abercrombie voted against the bill in real voting.

In this relation, Representative Bell pointed out that the high schools of every State in the Union were graduating more girls than boys, often twice or three times as many, and that eighty-five per cent of the teachers in the public schools of the United States were women.

73 Id., at 1411 (Rep. Kelly). Representative Kelly stated there that it was more likely that, instead of women being lowered by contact with politics, politics would be lifted up by contact with women.

74 Id., at 1411 (Rep. Kelly).

75 Id., at 1410 (Rep. Kelly); Id., at 1462 (Rep. Hayes). Representative Kelly enumerated there following points to support woman suffrage in the United States.

- The Nation needed intelligent, educated voters, and more girls than boys were being graduated from their high schools or and colleges every year.
- The Nation needed native-born voters, and there were 129 men of foreign birth to every 100 women of foreign birth in the country. (Which seemed to have meant that by giving the women the ballot the rate of the native-born citizens would be increased (comment by the author). In relation to this comment, Representative Abercrombie pointed out that there were in the Nation ten times as many native-born women as the women born abroad. Id., at 1442).
- The Nation needed law-abiding votes, and women form the minority of all the criminal and vicious classes.
- The Nation needed voters who would put the rights of humanity above the right to plunder, and a woman by her very nature was peculiarly interested in conserving human life and surrounding it with the greatest possible protection.

76 Id., at 1445 (Rep. Madden).

77 Id., at 1436 (Rep. Bell of California); Id., at 1446 (Rep. Towner); Id., at 1462 (Rep Hayes).

was powerless to adequately protect the family and develop the home[78].

Furthermore, as a positive effect of giving suffrage to women, it was insisted that woman's suffrage would be an incentive for her to deepen her knowledge of politics and government and the increased knowledge would be reflected in her children, and would be additional stimulus to her husband to do his full duty as an American citizen[79].

Next, from the viewpoint of woman and society, it was insisted that, if there was no sex in taxation, no sex in legal punishment, no sex in business or industry, no sex in education, then there was no reason for sexual difference in the ballot[80]. Furthermore, it was also pointed out, from the viewpoint of social development, that, since women were engaging more and more in industrial pursuits, there was a continually growing reason why they should participate in regulating the conditions under which they were obliged to work[81]. Moreover, there was represented an opinion that it should be desirable for men to invite women's assistance for the eternal betterment of social, political, and financial conditions for which all good men strived since women were their best business partners, best community boosters and best home patriots[82], or an opinion that equal suffrage would create the society where men and women work together upon equal terms, which should generate harmony, mutual helpfulness, and efficiency in the relation between men and women in business, social, and religious life[83].

Third, it was insisted from the viewpoint of the governmental system that women were certainly "people", and if "people" had the right to alter any form of government, it was "plain as a pikestaff" that women had a right to vote in government[84]. In addition, it was also insisted that in order to solve the problems which man alone could not solve, it was necessary to use all of the intelligence, character, and patriotism of which both sexes possessed[85]. In relation to that, it was insisted that an effect of the constitutional amendment would be to strengthen the foundation of their free institutions[86] as well as good government, good sense, and justice[87].

Next, from the viewpoint of democracy, it was pointed out that granting the ballot to women would render justice to half of their citizenship[88]. In addition, it was insisted that they could never have an ideal democracy so long as half of the people who were qualified for suffrage were irresponsible and inadequately protected[89]. Further on this point, it was stated that the constitutional amendment bill was the next step in the development of the democracy, for the democracy could be best developed through more democracy with individuals, moving up and closer to the process of his Government. Thus, if the traditional male elector of America was to move up closer to his government, to a near-perfect development of his nation and beneficences which were to be secured under that development, the women of America, equal in intellect, in capacity, and in the law, had to move up with him[90].

Besides, there was presented an opinion that property rights should be represented on the same basis for men and

78 Id., 1442 (Rep. Abercrombie). However, Representative Abercrombie voted against the constitutional amendment bill (Id., at 1484).

79 Id., at 1462 (Rep. Farr); Id., at 1474 (Rep. Hobson).

80 Id., at 1442 (Rep. Abercrombie). However, Representative Abercrombie voted against the constitutional amendment bill (Id., at 1484). Furthermore, the Representative insisted there that intelligence rather than sex should be made the supreme test of the citizenship.

81 Id., at 1445 (Rep. Madden).

82 Id., at 1448 (Rep. Barnhart).

83 Id., at 1442 (Rep. Abercrombie). However, he voted against the constitutional amendment bill, in his actual voting (Id., at 1484).

84 Id., at 1415 (Rep. Hulings). Furthermore, Representative Hulings stated there that when, while it was affirmed that all "governments derive their just power from the consent of the governed", the government denied the governed an expression of their consent or dissent, it was the duty of the people to alter or abolish it.

85 Id., at 1442 (Rep. Abercrombie). However, Representative Abercrombie voted against the constitutional amendment bill in his actual voting (Id., at 1484).

86 Id., at 1475 (Rep. Hobson).

87 Id., at 1415 (Rep. Murdock); Id., at 1445 (Rep. Madden); Id., at 1461 (Rep. Farr). Representative Murdock stated there that every man from a suffrage state could testify that suffrage had not harmed the home or charged the relation of woman to her home sphere and that it lifted the level of the electorate.

88 Id., at 1475 (Rep. Hobson).

89 Id., at 1442 (Rep. Abercrombie); Id., at 1463 (Rep. Gorman); Id., at 1477 (Rep. Sabath). However, Representative Abercrombie voted against the constitutional amendment bill in his actual voting (Id., at 1484).

90 Id., at 1415 (Rep. Murdock); Id., at 1462 (Rep. Gorman).

women, so it was fair and right that those who had to pay taxes should have a voice as to the size of the tax and the way it should be spent[91], and there was an opinion that there was no reason why the wife or daughter whose energies, capabilities, and interests were equal to those of the husband and father should not have the same rights to protect that property by legislation enacted, through which she spoke, that he had[92].

Fourth, from the viewpoint of actual political conditions, it was insisted that, though it was said that ballots should not be given to women because all women did not want it, there was no reason why those who did not want it should prohibit those who did want it. While it was true some women would not vote, neither did some men, but that did not affect the principle that the duties and privileges of citizenship belong by right to women as well as men[93].

In addition, from the viewpoint of actual political problems, it was pointed out that, since the numerous questions with which they had battled unsuccessfully would appeal to womanhood in a deeper sense than to manhood, women's participation would be an advantage to the public[94].

Moreover, from the viewpoint of the right to vote and to hold office, it was insisted that, though it was claimed that women who voted had to be allowed to hold office, all men did not hold office, though most of them would not object, that many offices could be as well or better filled by women, and that man's greed for monopoly in officeholding should not be permitted to stand in the way of political and social justice[95]. Further in relation with this issue, there was presented an opinion that, though it was claimed that women who voted had to do police duty and go to war, men unfit for such services voted, that, moreover, some kinds of police duty could be performed by women, and that in time of war taxes and nurses were as necessary as arms and soldiers[96].

Fifth, from the viewpoint of the right of woman, it was insisted that women were citizens, part of the people and holding a right to help make the laws under which they should live and to which they had to render obedience[97]. There was also presented an opinion that women were entitled to the right of suffrage since the formation of the Government and that a growing sense of the individuality and the dignity of manhood demanded that it should be recognized, not as a gift, but as an inalienable right[98]. Furthermore, it was insisted that the inalienable rights of person as they were affected by legislation had to be preserved for woman, and that no one could fully represent her in framing laws which dealt with them[99]. Moreover, it was asserted that suffrage was an inherent and an indefensible right, that it was the citizen's weapon for defense in a society which had exchanged the rifle for the ballot, and that

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91 Id., at 1435 (Rep. Bell of California).

92 Id., at app. 102 (Rep. Cline).

93 Id., at 1411 (Rep. Kelly); Id., at 1442 (Rep. Abercrombie). However, Representative Abercrombie voted against the constitutional amendment in his actual voting (Id., at 1484).

94 Id., at 1472 (Rep. Fess).

95 Id., at 1442 (Rep. Abercrombie). However, Representative Abercrombie voted against the constitutional amendment bill in his actual voting (Id., at 1484). Concerning this issue, Representative Sabath stated that in the light of his experience in his State, women would continue to assist in the election of these men to office who were best and most deserving, and would support and work for legislation which was for the best interests of the masses and the Nation (Id., at 1477).

96 Id., at 1442 (Rep. Abercrombie). However, Representative Abercrombie voted against the constitutional amendment bill in his actual voting (Id., at 1484).

97 63-3 Cong. Rec. 1409 (Rep. Kelly); Id., at 1445 (Rep. Madden).

98 Id., at 1415 (Rep. Hulings). Concerning this issue, Representative Cramton pointed out that the right of one person to take part in the affairs of government should not and did not depend in any case upon the desire of any other person to exercise that right, and that the right was not the right of a class, but the right of an individual (Id., at 1460).

99 Id., at 1435 (Rep. Bell of California). Representative Bell pointed out there that representative democracy without equal suffrage was impossible, because it was only through that form of government that people who were subject to laws might have a voice in making them, and insisted that restriction of the franchise tended to encourage aristocracy. Furthermore, the Representative pointed out that though many of the laws and reforms of the present day relative to the welfare of the child, the protection of women and of public health and morals had been inspired and secured by women, they had had to arrive at that result by getting someone else to do the work for them, and then stated that woman should have the right to express their opinions on public matters in as straightforward, simple, direct manner, and that woman could be take part in public affairs in a womanly way and that it was desirable for women to state their opinions from the viewpoint of woman.

woman had the same inherent right to self-defense that man possessed[100].

Then, it was pointed out from the viewpoint of the sexual difference that exclusive male suffrage involved a male aristocracy that ruled one-half the population without their consent, which could not be called democracy[101]. Furthermore, it was insisted that all States should be prohibited from withholding the right to vote from any American citizen upon the ground that that citizen happened to be a woman[102]. In addition, there was presented an opinion that the reasons why women should vote were the same as why men should vote, the same as the reasons for having a republic rather than a monarchy[103].

Besides, it was also insisted that, though it was said that giving the women the vote meant doubling the vote of her father or husband, even if it was true, the property-owning woman should have the vote to protect her own interests[104]. Further on this point, it was also insisted that, though it was claimed that women were represented by men and could make laws by indirect influence, law enforcement was as important as law enactment and both could be better by direct than by indirect influence[105].

Furthermore, from the viewpoint of the effects of suffrage, it was insisted that the ballot should be given to woman because it would add to rather than detract from her usefulness to society and the nation[106]. Moreover, it was pointed out that the ballot in the hands of women would break down the system of unequal pay in industry[107].

Sixth, from the viewpoint of the federal system, there was presented an opinion that it could not be believed that State rights had to be the determining factor in the question of woman suffrage or that the civilization of some of American States was so far below the civilization of other American States as to make a difference in social conditions necessary for the broadest form of equality in vote[108]. In relation with the issue, it was also insisted that the amendment raised no question affecting the control of the State over the franchise except the right of the State to disfranchise any citizen on

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100 Id., at 1453 (Rep. Baily); Id., at 1468 (Rep. Keating). However, Representative Baily voted against the constitutional amendment bill in his actual voting (Id., at 1483). Representative Keating stated there also that, as being clear from the Declaration of Independence, the right to vote was the most important of all man's natural rights, and without the right all other rights were insecure.

101 Id., at 1437 (Rep. Bryan). Representative Bryan stated there that, if the situation for women not to have the right to vote advanced the common good or if the one-half under subjection were unfit for self-government, the situation might be excusable, and continued that, however, where those held under subjection were the most advanced in morals and education, were the mothers and sisters of the ruling aristocrats, there could be no possible excuse.

102 Id., at 1418 (Rep. Lafferty).

103 Id., at 1429 (Rep. Taylor of Colorado); Id., at 1435 (Rep. Bell of California); Id., at 1460 (Rep. Cramton); Id., at 1477 (Rep. Evans). Representative Taylor stated there that the natural right of a woman to vote was just as clear as that of a man and rested upon exactly the same ground.

104 Id., at 1411 (Rep. Kelly). On this issue, Representative Murdock stated that the men who had insisted before the adoption woman suffrage that suffrage would merely double the vote and that the women would vote with men, after the adoption of suffrage, went to the polls and voted with women (Id., at 1414).

105 Id., at 1442 (Rep. Abercrombie). However, Representative Abercrombie voted against the constitutional amendment bill in his actual voting (Id., at 1484). The Representative pointed out there following concrete objections.
- Men would not be willing for women to represent them at the polls.
- Government without the consent of the governed was undemocratic and tyrannical.

106 Id., at 1452 (Rep. Seldomridge). Representative Seldomridge stated there as follows: "We not only expect her to fulfill all the obligations that rest upon her by reason of her sex, but we compel her to endure the strain and stress of mental and physical competition with the other sex in order to support herself and those who are dependent upon her. If the Nation is not willing to provide for her release from this burden, she should at least be given the franchise in order that she may use it, as far as possible, as a means to alleviate and remove oppressive conditions of toil and environment." He also stated at the same time that, in those days when the foundations of other nations were being undermined, they should all the more give themselves to the work of strengthening the basic principles of their new national character, and continued that to that work they had to not only summon the strong and earnest men of the Nation, but the loyal and consecrated women as well, and that there could be no segregation of effort, and it had to be mutual and sympathetic.

107 Id., at 1410 (Rep. Kelly).

108 Id., at 1447 (Rep. Borland); Id., at 1460 (Rep. Cramton). Representative Cramton stated there that in the theory of their Government those matters which involved alike the welfare of the whole country should be passed upon by the Federal Government, but local matters which might require different treatment in different sections of the country should be governed locally, and continued that he could not believe women in one section of the country were materially different from their sisters elsewhere, and insisted that especially their natural right to share in their government existed in one State as much as in another.

account of sex. Thus it left all other qualifications of the voter to be determined by the various States through their constitutional agency, and each State could protect the exercise of the franchise to the fullest extent of its power[109].

Paragraph 2 Opinions of Opponents

The opponents of the constitutional amendment bill insisted following points.

First, it was insisted from the viewpoint of the power of State that any constitutional amendment that would take the right away from the State to control their police powers and to absolutely determine every phase of the suffrage question in every State of the Union, could not be voted for[110].

Second, it was insisted in relation to the nature of woman that to give woman the ballot was to unsex her and replaced the tender, loving, sweet-featured mother of the past with the cold, calculating, harsh-faces, street-corner scold of politics[111]. It was also insisted that the chief effect of the participation of the women in governmental affairs would be to degrade woman[112]. In relation with the issue, it was insisted from the viewpoint of the relation between man and woman that man had always been considerate of woman's welfare so that it could be unthinkable that woman could do any better for herself than man did for her[113].

Third, it was pointed out that a majority of the women opposed to woman suffrage[114]. It was also pointed out that there was a considerable feeling amongst the women opposed to suffrage that voting power, forcibly imposed to all women without regard to domestic relations, would negatively prejudice the high place which American women held at that time in the esteem of manly men[115]. Besides, from the viewpoint of the right to vote and the duties accompanying it, there was an opinion that if the right of the ballot was given to woman, it would be her duty to exercise that right, but the great majority of the mothers of America did not want to spend their time, their thought, and their energy in the exercise of that duty, so under such conditions woman suffrage could not be accepted[116].

Fourth, it was insisted from the viewpoint of the existing governmental system that their fathers had founded the government upon the family as the unit of political power, with the husband as the recognized and responsible head, that they had marvelously progressed materially, socially, politically, and religiously under that splendid system, that born but a little more than a century ago into the family of nations, they were the most enlightened and best ruled Government on the globe, and that there was no reason why they should abandon such system of government[117].

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109 Id., at 1451 (Rep. Seldomridge).

110 Id., at 1408 (Rep. Henry); Id, at 1417 (Rep. Sumners); Id., at 1421 (Rep. Webb); Id., at 1432, 1479 (Rep. Stafford); Id., at 1444 (Rep. Morgan of Louisiana); Id., at 1448 (Rep. Sisson); Id., at 1450 (Rep. Henry); Id., at 1453 (Rep. Hughes of Georgia); Id., at 1459 (Rep. Sloan); Id., at 1459 (Rep. Carter); Id., at 1461 (Rep. Mulkey); Id., at 1464 (Rep. Heflin); Id., at 1475 (Rep. Miller); Id., at 1479 (Rep. Lazaro); Id., at 1480 (Rep. Fields); Id., at app. 118 (Rep. Gray of Indiana); Id., at app. 163 (Rep Parker of New Jersey).

111 Id., at 1414 (Rep. Clark) Representative Clark insisted there that in Christianity the husband was the head of the home and wives was in subjection to their husbands, that woman suffrage would cause the disruption of the American home which was the foundation stone of their glorious Republic, and that the propaganda for "votes for women" was an attempt to take woman from the sphere in which God intended she should move. He furthermore insisted that practically all the women of America who were happily married were opposing to woman suffrage (Id., at 1414). Against that insistence, Representative Murdock who made a speech next to Representative Clark, stated that the American home was no longer a patriarchal institution, but was a partnership (Id., at 1414).

112 Id., at 1414 (Rep. Clark); Id., at 1421 (Rep. Webb); Id., at 1436 (Rep. Moore); Id., at 1465 (Rep. Heflin).

113 Id., at 1461 (Rep. Mulkey). Representative Mulkey stated there that if women could vote, they could not improve their condition, but might place themselves in a position that men would not be as tolerant and patient and chivalrous toward them as they were at that time.

114 Id., at 1421 (Rep. Webb); Id., at 1449 (Rep. Henry); Id., at 1464 (Rep. Heflin). Representative Webb stated that he believed that 90 per cent of the mothers in the country were not only not in favor of woman suffrage, but were positively against it.

115 Id., at 1436 (Rep. Moore). Representative Moore stated there that while he recognized the "right" of mothers, wives, and single women, if they so desired, to inject themselves into the maelstrom of politics, even though the exercise of that "right" might tend to lessen the sacred preference which was already accorded to them by all true Americans, he did not believe he was authorized as a Representative to impose such responsibilities upon them until at least a majority of the women accepted it.

116 Id., at 1479 (Rep. Fields).

117 Id., at 1465 (Rep. Heflin).

Paragraph 3 Resolution

In the end, the joint resolution for the constitutional amendment proposal was rejected on January 12, 1915, because favorable votes did not reach two thirds of the whole voting which was necessary to propose a constitutional amendment[118].

Subsection 4 Discussion at Congress in 1917

At the House of Representatives in Session 2 of 65th Congress in 1917, Representative Raker presented a bill to amend the Constitution to extend the right of suffrage to women[119]. The constitutional amendment bill was discussed and approved at the House of Representatives on January 10, 1918[120], and submitted to the Senate. The discussion on it at the Senate began on May 6 of the same year[121], and was deliberated intermittently up to the first day of October. But the bill failed to receive two thirds votes, necessary for the proposal of constitutional amendment, and was rejected in the end[122]. After that, the vote on the bill was decided to be reconsidered afterwards[123], but it still could not receive two thirds votes at the Senate in the next session, so that it was finally rejected[124].

Paragraph 1 Discussion at the House in Session 2 of the 65th Congress (1) -- Opinions of Supporters

The supporters of the constitutional amendment insisted following points.

First, from the viewpoint of the nature of woman, it was insisted that it was not logical that one sex should have the power to deny the right of suffrage to the other[125]. In relation to this point, from the standpoint to positively support more woman suffrage, it was insisted that, since the women of the nation at that time possessed in equal measure with men of the nation all elements of education, intelligence, and character comprising good citizenship, in the spirit of true democracy, justice and equality, that resolution should be passed so that the full right of suffrage was given to the women of the nation[126]. And, against the opinion that women did not want suffrage, it was pointed out that there should be no harm to the women who did not want to vote even if the ballot was given to the women who wanted to vote[127].

Second, from the viewpoint of the social role of woman, it was insisted that since the noble women of America had done their part in times of peace and times of war to make the grand country what it was at that time, one should be in favor of granting suffrage to the women across America[128]. Then, it was pointed out that the American women of the country were doing the same as the men in the factory, in the field, in the shop, and in fact, in every field of endeavor where aid and assistance could be given to the government in its mighty struggle for democracy[129]. Further

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118 Id., at 1484.

119 65-2 Cong. Rec. 543. The content of the bill presented at that time was almost same as that of the current Nineteenth Amendment of the Constitution except for some differences in wording (cf. Id., 770).

120 Id., at 810.

121 Id., at 6094.

122 Id., at 10988.

123 Id., at 11040.

124 65-3 Cong. Rec. 3062 (1918).

125 65-2 Cong. Rec. 791 (Rep. Treadway).

126 Id., at 802 (Rep. Norton).

127 Id., at 780 (Rep. Langley).

128 Id., at 789 (Rep. Elliot).

129 Id., at 772 (Rep. Raker). Representative Raker stated there in Canada or other countries, women were granted the suffrage, supported the realization of conscription, and contributed to the nation in a war time. The Representative, then, explained that woman suffrage was being realized in other countries, for example, Mexico, France or others (Id., at 773). He, then, pointed out that it had been the Nation, not the States which had declared war, conscripted men, voted a necessary huge war tax, and had taken over the control of food and fuel, and had appealed women to take the places of men, to give their money, their labor, their sons, and insisted that they could not consistently profess to lead in a war for democracy and be the last nation to establish it at home, that they could not claim that the Nation was fighting for democracy abroad and left the States to demonstrate their understanding of

on this issue, it was insisted that women were already helping to bear war's heavy burdens, that the country depended on them as well as on men, that they were willingly giving their loved ones to aid in the preservation of liberty and civilization, and that the great Republic could no longer deny them the right of suffrage[130].

Third, from the viewpoint of the political system, it was stated that the constitutional amendment bill was essential to the equality of rights upon which the Government stood[131,132].

Fourth, from the viewpoint of practical politics, there was presented an opinion that the Nation needed as never before the votes of women for solving the problems, i.e., bad housing, unwholesome food, conservation of life and health, commercialized vice, and evil working conditions, which required the help of the women to be solved[133]. Next, from the viewpoint of the comparison with other countries, it was insisted that woman suffrage was the test of their good faith and of their preaching of liberty and justice to all humanity, that within the next three years the women of all the English-speaking people of the world, outside of the United States, would be granted the right of suffrage, and that it would be a colossal blunder as well as an unspeakable outrage if the United States should fall behind the rest of the civilized world in granting that plain and simple act of justice to their good women[134].

Fifth, from the viewpoint of the protection of the rights of women, it was insisted that, since a woman retained control of her own property after the marriage and her liberty of action in ordinary affairs was unchallenged, that status of women to achieve participation in political affairs was a necessary corollary to other statuses having been achieved[135]. Concerning this point, it was insisted that women would want and prefer the vote to protect themselves over the chivalry and reverence that men so graciously handed out to them while denying them justice[136].

Besides, from the viewpoint of the wills of women, there was presented an opinion that, if women, by their own conduct and knowledge of public affairs and by an expression of the majority of their own sex, showed their desire to exercise the right of franchise, they should be assisted in procuring it[137].

Sixth, from the viewpoint of the federal system, it was stated that the resolution under consideration denied the right of any State to enact law that would deny any citizens the right of voting because of sex, and that it was not an affirmative grant[138]. In addition, there was presented an opinion that the amendment proposal did not fix the qualifications for electors, and that the same qualifications that existed in the States for men, giving them the right to vote, would apply to women[139]. Moreover, it was pointed out that the constitutional amendment would equalize the voting privilege of women and would handle that great democratic question better than if it were left to each State to decide, for the idea of woman in a suffrage State being disenfranchised by moving into a non-suffrage State was

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democracy at home, and that the loyal votes of women who would vote in the place of absent men were a national concern.

130 Id., at 796 (Rep. Gallagher).

131 Id., at 769 (Rep. Kelly of Pennsylvania). Representative Kelly stated there that the women voters in equal-suffrage States had not protection at all when they changed their residence into other States, and that an amendment to the National Constitution was essential if there was to be "Equal rights to all, special privileges to none".

132 Besides, there was also presented by Representative Powers, from the stand point to respect for the constitutional amendment process, an opinion that he would vote for the joint resolution in order to give the people of his State, along with the people of every other State in the Union, the right, if they desired to exercise it, of amending the Constitution of the United States in the only way in which it could be amended. Id., at 790 (Rep. Powers). However, Representative Powers stated there that he himself was not voting either for or against woman suffrage.

133 Id., at 769 (Rep. Kelly of Pennsylvania).

134 Id., at 788 (Rep. Taylor pd Colorado). Representative Taylor summed up the reasons why he had been an advocate of woman suffrage as follows: that it is absolutely just, that wherever women have been given the right of suffrage throughout the civilized world they have wisely exercised it, and that their influence has been unqualifiedly beneficial.

135 Id., at 788 (Rep. Lehlbach). Representative Lehlbach pointed out there that the opponents of woman suffrage were not in reality opposing the giving of the vote, but were protesting against and were trying to deny the existence of the present order of things that made the granting of the vote logical and necessary.

136 Id., at 791 (Rep. Mays).

137 Id., at 791 (Rep. Treadway).

138 Id., at 767 (Rep. Campbell pf Kansas); Id., at 786 (Rep. Blanton).

139 Id., at 772 (Rep. Raker); Id., at 806 (Rep. Barkley). Representative Raker pointed out there that the fact was that her sex, for which she was not responsible, had been the basis for a denial to women of the privilege of participating in the Government.

settled only by federal amendment[140].

Paragraph 2 Discussion at the House in Session 2 of the 65th Congress (2) -- Opinions of Opponents

The opponents against the constitutional amendment insisted following points.

First, from the viewpoint of the nature and societal role of woman, there was presented an opinion that conferring the right of sufferage onto woman was to lower her from her proud estate, and it could not be consented that she should be taken from the high pedestal which, since the dawn of civilization, she had so fittingly occupied with the common consent of all mankind[141]. In relation with this issue, from the viewpoint of the relation between man and woman, it was stated that, if women desired and were to have the ballot to protect themselves from men and man-made laws and if they were to be placed upon an exact equality with men in administrating the affairs of government, so that they might in the future protect themselves, then they might expect no special protection of the law beyond what was accorded to men, and they should ask for the repeal of those laws which applied to them at that time by reason of being under the coverture of marriage[142].

In addition, from the viewpoint of woman's participation in politics and her responsibility from it, there was presented an opinion that if women were to take an active part in the politics of the country and in managing the government, they had to undoubtedly neglect some of the duties imposed upon them by nature and by society. In their view, adding to the burden already placed upon them would not only be an injustice, but would sufficiently increase their responsibilities to result in the neglect of some of them, and thus the country would suffer loss[143]. Moreover, it was also insisted that if, after the war was over, the economic condition of woman should so nearly equal that of man that she should be entitled to the vote, if for every man working in the factory and the field there should be a woman so engaged, then the social structure would have gone to smash, and the family, as the unit of society, would have gone to smash[144].

Second, from the viewpoint of the governmental system and political conditions, it was insisted that a nation was only as strong as its men, that history, physiology, and psychology all showed that giving woman equal political rights with man would deteriorate manhood, and that not only because it was desirable for their country to win the war, but because nations should possess the male virility necessary to guarantee its future existence, the pending amendment should be opposed[145].

Third, from the viewpoint of the federal system, it was insisted that the proposed federal amendment, if passed, would deprive the State of its legal right to determine its electorate, which could not be approved[146]. In relation to

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140 Id., at 804 (Rep. Gallivan).

141 Id., at 782 (Rep. Clark of Florida). Representative Clark stated that women as a class, while the intellectual equals of men, and frequently their superior, were peculiarly fitted for those duties and responsibilities which pertained to the home and home life.

142 Id., at 785 (Rep. Clark of Florida). Representative Clark stated there that woman could not exercise the rights of a man and at the same time claim the privileges of a woman.

143 Id., at 782 (Rep. Clark of Florida).

144 Id., at 787 (Rep. Gray of New Jersey).

145 Id., at 787 (Rep. Gray of New Jersey).

146 Id., at 765 (Rep. Moon); Id., at 783 (Rep. Clark of Florida); Id., at 789 (Rep. Small); Id., at 794 (Rep. Stafford); Id., at 797 (Rep. Heflin); Id., at 799 (Rep. Ramsey); Id., at 799 (Rep. Mansfield); Id., at 800 (Rep. Gard); Id., at app. 49 (Rep. Harrison); Id., at app. 50 (Rep. Mansfield). Representative Moon stated there "When you deprive a State of the right to say who its electors are or place restrictions upon the State in determining the qualifications of its electors, you strike down absolutely and unconditionally the life of its sovereignty." (However, Representative Moon stated that he did not oppose to each State giving suffrage to the women (Id., at 766)). Similarly, Representative Stafford stated that if woman suffrage was forced upon unwilling States, they were deprived of the right of ever changing their form of government, so far as suffrage was concerned (Id., at 795).

Representatives Clark (Florida), Small, and Gard referred, as a ground of their insistence, to Article 1, Section 2 of the Constitution (Requirements for Representative), and Representative Gard referred, in addition, to the Tenth Amendment of the Constitution (Rights Reserved for States or People).

Furthermore, Representative Clark stated that the provisions of the Fourteenth and Fifteenth Amendments of the Constitution did

that, there was also presented a concern that the constitutional amendment would not only coerce the people of a number of States into granting to women the privilege of voting at election, but also it would also admit to assert the right to overturn, alter, amend, and repeal the taxation laws, the school laws, the statutes of descent and distribution of real and personal property, and numberless other local laws and institutions which had been deeply rooted in such old States as Virginia and Massachusetts since before the Federal Government was organized[147].

Furthermore, from the viewpoint of the suffrage and the power of States, it was insisted that suffrage for either man or woman was not a "right" but was simply a privilege, to be conferred or withheld at the pleasure of the State, and that women was not disfranchised but simply unfranchised at that time[148]. Regarding this point, it was insisted more straightforwardly that a representative should consider the fact that the majority of the electors who selected him as the representative were not supporting woman suffrage[149].

Paragraph 3 Discussion at the Senate in Session 2 of the 65th Congress (1) -- Opinions of Supporters

The supporters of the constitutional amendment bill in the Senate insisted following points.

First, from the viewpoint of natural rights, there was presented an opinion that woman had a natural right to take part in the public affairs of their own country[150]. In this regard, it was also insisted that whether being called a natural right or not, suffrage was wrongfully taken away from the women by usurpation of the man[151]. Further on that issue, it was also insisted that man had established for himself by brute force in the early dawn of civilization the higher place he had occupied in the political and business world, but that action in so doing was not founded on justice, and should be righted, like all other wrongs[152].

Next, on the issue whether suffrage would change the quality of woman, several Senators insisted that suffrage would have never changed the quality of woman[153].

Besides, on the influence of woman suffrage, there was presented an opinion that bringing women into politics would be well and good for politics[154]. In addition, it was also insisted that the women of the country were far better

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not give Congress the power to regulate the suffrage or to prescribe the qualifications of voters in the different States, but Congress was simply given by them the power to reduce the representation of a State if that State should in the exercise of its exclusive power to deny to a certain class the right to vote.

147 Id., at 776 (Rep. Gordon). Representative Gordon pointed out there that, if any considerable number of people, prior to the adoption of the Federal Constitution, had asserted the right and power of three-fourths of the States to usurp by constitutional amendment jurisdiction and control over purely local matters, the Constitution would never have been ratified by the requisite number of States.

148 Id., at 781, 782 (Rep. Clark of Florida).

149 Id., at 775 (Rep. Gordon); Id., at 778 (Rep. Moore of Pennsylvania); Id., at 779 (Rep. Kearns); Id., at 790 (Rep. Lufkin); Id., at app. 43 (Rep. Dallinger). In relation with this issue, Representative Moon stated that some of advocates of the amendment said that gentleman who voted to submit for ratification to the States the prohibition amendment had to upon the same ground vote to submit the suffrage amendment, but it was wrong, and continued that a man who voted to submit the prohibition amendment in obedience to the will of the majority of the people of the district or State he represented did right, because the highest principle involved in representative government was obedience to the will of the majority of the people as understood by their representative (Id., at 766).

Besides, Representatives Kearns (Id., at 779) and Stevenson (Id., at 797) stated that since the convention of their party provided that the problem of woman suffrage should be a matter of each State but not of the Union, they had to vote against the amendment.

Further on this issue, Representative Clark (Florida) stated that, when the constitutional amendment was submitted for the ratification to the State of Florida, the legislature would pass on the question of ratification, but men composing one-half of the senate in that legislature were elected in 1916 and without the slightest reference to the proposed amendment, and questioned whether that could be said to be giving the "people" of Florida an opportunity to express their views on that very important question (Id., at 781).

150 Id., at 10782 (Sen. McKellar).

151 Id., at 10781 (Sen. Thompson); Id., at 10925 (Sen. Jones of Washington).

152 Id., at 10775 (Sen. Ransdell).

153 Id., at 8344 (Sen. Poindexter); Id., at 10775 (Sen. Ransdell); Id., at 10785 (Sen. McKellar); Id., at 10791 (Sen. Williams); Id., at 10932 (Sen. Kirby); Id., at 10945 (Sen Phelan). Senator Williams, however, voted against the constitutional amendment in his actual voting (Id., at 10987).

154 Id., at 10925 (Sen. Jones of Washington); Id., at 10945 (Sen. Phelan); Id., at 10947 (Sen. Kendrick); Id., at 10977 (Sen. Cummins).

prepared for the ballot that the men were when they usurped the power of using it to the exclusion of the woman, and that the granting of suffrage to the twenty millions of women voters of the country would bring to the electorate more intelligence and patriotism than was ever brought to it before at any one time[155].

From the viewpoint of equality, it was pointed out that in all the arguments and voluminous discussion there had been no good, sound reason assigned by anybody why equal suffrage should not be granted[156]. It was also pointed out that, in many States, criminals, men who could neither read nor write, or men who could not speak the English language were allowed to vote, but women alone were not allowed to do so, which should be unjust[157]. In addition, it was insisted that, although some said that men and women differed temperamentally, physically, and mentally, and therefore women should not vote, that very difference was a powerful argument for suffrage, as laws dealt with women as well as men, and both should have a part in making them[158].

Second, from the viewpoint of the social role of woman, it was stated that the suffrage had not required any displacement of women in her domestic or other relations[159]. However, there was, on the other hand, an opinion that if, because of the change of economic and industrial conditions, they could not keep women in the home, then they should by all means help her to make the nation her home and to raise all standards of business and of industry to the standards of the home, which they could best do by permitting her to express herself politically[160]. So, woman suffrage seems to have been, in a certain respect, expected to change the social conditions around women. Furthermore, from the viewpoint of the actual social role of women at that time, there was presented an opinion that since women taught the boys and girls of the nation throughout the land, if the male students thus had taught by women were capable of making good voters, the teachers of these students also were inherently capable of making discriminating voters[161]. Besides, it was pointed out that, though there was an argument that women were represented by the votes of their husbands and fathers and brothers and sons, it evidently failed in the hundreds of thousands and perhaps millions of women who had no husband, who had no brothers and who had no fathers and who had no sons to do their voting for them[162].

Third, from the viewpoint of political institution, there were presented following opinions.

There was an opinion that no one could fairly deny that women were part of the governed, and hence the fundamental principle of their Government was violated when one refused to permit them to participate in that government[163]. In addition, there was an opinion that, if the principle was true that the just powers of government were derived from the consent of the governed, it would be an infringement of the rights of the women for men to make all laws not only for himself but also for his mothers, sisters, and his wives without their consent[164]. In relation to that, it was insisted that, if they required that woman should obey the laws, it followed inevitably from the principle that she had to be given a voice in making laws[165].

Next, from the viewpoint of the public principle of universal election, it was pointed out that inasmuch as one had proclaimed universality in the exercise of the franchise, one was both illogical and unjust so long as they confined its

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Senator Jones stated there that woman suffrage would greatly increase the intelligent votes (Id., at 10926).

155 Id., at 8345 (Sen. Thompson). According to the pointing out by Senator Thompson, forty States of the Union already permitted in some form woman suffrage at that time, and only 8 States did not yet. However, the Senator also pointed out the fact that even the suffrage States did not necessarily treat women equally to men in the suffrage.

156 Id., at 10781 (Sen. Thompson).

157 Id., at 10782 (Sen. McKellar). Senator McKellar furthermore stated there that it would be unjust not to allow women to vote while Malay, Turks, or negroes were allowed to vote.

158 Id., at 10925 (Sen. Jones of Washington).

159 Id., at 8344 (Sen. Poindexter).

160 Id., at 10947 (Sen. Kendrick).

161 Id., at 10782 (Sen. McKellar).

162 Id., at 10786 (Sen. McKellar); Id., at 10947 (Sen. Kendrick).

163 Id., at 10898 (Sen. Shafroth).

164 Id., at 10898 (Sen. Shafroth).

165 Id., at 10942 (Sen. Phelan).

operation to one-half of the American people[166]. In relation to that, there was also presented an opinion that males and females were equal before the law in their responsibility for crime, payment of taxes, and most of the obligations of citizenship, so they should be equals in lawmaking[167]. Especially from the viewpoint of taxation, it was stated that women had been taxed without giving them any representation in the Government, which was unjust[168]. Furthermore, it was insisted that if a violation of the principle, no taxation without representation, was tyranny to men, it should be also tyranny to women, and that since the major portion, or fully one-half, of the property in the United States in a generation went to women, women should be given the representation in the Government[169].

Fourth, from the viewpoint of actual political conditions, there were presented following opinions.

It was pointed out that the movement in favor of woman suffrage was proceeding with increased force every day that passed[170]. In addition, it was pointed out that woman suffrage was absolutely right, and it proved a complete success wherever it was tried[171]. In relation with the issue, it was stated that woman's suffrage had been gaining support in those days because woman had performed more than their part in World War I, which was a great struggle for democracy, freedom and liberty and which showed that woman could contribute to governmental activities, so woman should be franchised[172].

Then, from the viewpoint of the influence of woman suffrage, there was presented an expectation that the enfranchisement of women would bring verve and vigor, intelligence and sound judgement to the support of such measures as might be necessary for the solution of the great race problem[173].

Besides, from the viewpoint of the security of the rights of women, it was insisted that refusing suffrage to women because of their sex while giving it to men was legislative unfairness that no one could justify[174]. Furthermore, from the viewpoint of the federal system, it was pointed out that the women in many of the States were permitted to vote while the women of many other of the States were denied the privilege, and it was insisted that the constitutional amendment could relatively easily correct such an unfair situation[175]. In relation to this point, from the viewpoint of the power of States, it was stated that the constitutional amendment simply extended to all of the women, white and black, within a State the same privilege enjoyed by the men, so that it could not be said to trespass on the reserved

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166 Id., at 10858 (Sen. Thomas).

167 Id., at 10775 (Sen. Ransdell).

168 Id., at 10782 (Sen. McKellar).

169 Id., at 10899 (Rep. Shafroth). Senator Shafroth pointed out there that, in eight States of the Union, while they allowed aliens who had only filed their first declaration of citizenship to vote, they did not allow the women to vote.

170 Id., at 6306 (Sen. Jones of New Mexico). Senator Jones stated there that enfranchisement did not necessarily mean only the ability to cast the ballot, but it meant enfranchisement in its broader sense, namely, the freedom, the liberty which female sex might obtain, the removal of bondage which had been put upon them for generations and centuries. Furthermore, he presented at the same time a table which summed up the trend of each State congress concerning woman suffrage in 1917 (Id.).

Senator Jones initially voted for the constitutional amendment but later switched to the oppositional position (Id., 10987) and, after the rejection of the proposal of the constitutional amendment, proposed to reconsider the result of the voting (Id., at 10988).

171 Id., at 10781 (Sen. Thompson).

172 Id., at 10781 (Sen. Thompson); Id., at 10782 (Sen. McKellar).

173 Id., at 10771 (Sen. Vardaman). Senator Vardaman stated there that what he supported was fundamentally "white" woman suffrage, and he thought the white man and the negro could not live peacefully together in the same country on terms of political and social equality, so his intention was that white women would contribute to the legislative action of States to abolish the Fifteenth Amendment of the Constitution.

174 Id., at 10775 (Sen. Ransdell). Senator Ransdell pointed out there that neither man nor woman had an inherent right to vote because he or she was 21 years of age, but voted because the law permitted. (It seems to mean that there is no reason in the nature of the right to vote why only men should be given it. (The author)). The Senator continued that the right to vote was denied in 35 of their sovereign States to women who were college presidents, lawyers, doctors, bankers, heads of business firms, ministers of the gospel, college graduates, and leaders in every movement for human betterment, while most of those same States gave suffrage to illiterate men who could not read the ballots they were voting not speaking the English language, and many of whom at that crucial moment, when the liberty of mankind was at stake, were avoiding military service because of sympathy with their enemies, which could not be said to be giving women the "square deal" of which good Americans boasted so proudly.

175 Id., at 10781, 10782 (Sen. McKellar).

power of the State[176].

Paragraph 4 Discussion at the Senate in Session 2 of the 65th Congress (2) -- Opinions of Opponents

The opponents against the constitutional amendment presented following opinions.

First, from the viewpoint of the nature and social role of woman, it was insisted that whether the right to vote should be given to women was not a question involving a superior or inferior mental endowment, but rather a question of the division of labor, duties, and responsibilities between two sexes, that it was an undeniable fact that there was divergence in nature, character, and mental traits between two sexes, and that since masculine nature protected women, it could not be approved that women needed the ballot to protect them against their masculine kin[177]. Besides, from the viewpoint of the social role of woman, it was insisted that there was not a woman in all America worthy of the name of mother, which was infinitely beyond that of voter, who had not inspired her boy with the very principle upon which this Government rested, namely, democracy, and local self-government[178].

Second, from the viewpoint of the governmental system or actual political conditions, there were presented following opinions.

There was presented a criticism that, since no government could exist as a free government, a sovereign government, or a government responsible to and representative of the people governed unless that government within itself could control its own electorate, the constitutional amendment violated that fundamental principle[179].

Next, from the viewpoint of actual politics, there was presented an opinion that no Democratic Senator in in good faith could vote for the constitutional amendment since Democratic Party was opposing it[180], or that since the majority of the voters in the State by which he was elected had voted against similar amendment proposals for woman suffrage several times, he could not vote for the constitutional amendment[181].

Third, from the viewpoint of the federal system, there was presented an opinion that each State could and ought to decide the question of suffrage for itself[182], or that each State had and preserved the absolute right to say who should

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176 Id., at 10944 (Sen. Phelan).

177 Id., at 10773 (Sen. McCumber). However, Senator McCumber stated that he would vote for the constitutional amendment since the legislature of the State he represented (North Dakota), by an almost unanimous vote, had requested its congressional delegation to do so (Id., at 10775). And he actually voted for the constitutional amendment (Id., at 10987).

178 Id., at 10933 (Sen. Smith of South Carolina).

179 Id., at 10930 (Sen. Underwood).

180 Id., at 10777 (Sen. Hardwick).

181 Id., at 10788 (Sen. Pomerene). Against that opinion, Senator Phelan pointed out that only the male voters of his State had expressed their view as the opinion of the State and one-half of the people, namely, the women of his State were actually disfranchised (Id., at 10942).

182 Id., at 8349 (Sen. Brandegree); Id., at 9215 (Sen. Reed); Id., at 10775 (Sen. Fletcher); Id., at 10777, 10779 (Sen. Hardwick); Id., at 10780 (Sen. Guion); Id., at 10788 (Sen. Pomerene); Id., at 10855 (Sen. Reed); Id., at 10893 (Sen. Benet); Id., at 10932 (Sen. Smith of South Carolina); Id., at 10947 (Sen. Beckham). Senators Guion and Smith stated at the relevant places that they did not oppose woman suffrage but did oppose doing it through the amendment to the Federal Constitution. Senator Pomerene stated that he himself supported woman suffrage.

Senator Beckham abstained from voting (Id., at 10987). In the statement on an occasion quoted above, he referred to following points (Id., at 10948).

- The right to vote was not only a privilege but it was an obligation. Merely giving to woman the vote would not in itself benefit her.
- If a substantial right denied to woman in any State and it the right could not be protected for woman without the right to vote, woman should be given the ballot, but there was not any such insistence.

Concerning this issue, Senator Cummins, quoting Article 1, Section 2 (The Term of Representatives, Qualifications Requisite the Electors), The Seventeenth Amendment (Direct Election of Senators) (Note by the author: In Congressional Record, it is said that the Senator quoted the Sixteenth Amendment of the Constitution, it should be an error) and the Fourteenth Amendment, Section 2 (Apportionment of Representatives) of the Constitution, and pointing out the fact that the Constitution gave Congress an exclusive power concerning naturalization, stated that it was all wrong to assume that the Federal Government had surrendered its authority to regulate and control the qualifications of voters in various States (Id., at 10977).

vote for its State officers based on the foundation principle of the Republic[183].

Paragraph 5 Discussion at the Senate in Session 2 of the 65th Congress (3) - Amendment Proposal

During the deliberation, there were presented some amendment proposals to the constitutional amendment, which were as follows.

On June 27, 1918, Senator Williams proposed to amend the words "the right of citizens of the Unite States to vote" to be "the right of white citizens of the United States to vote" and presented the reasons of the proposal as follows[184].

First, Senator Williams pointed out that in a great democratic Republic where people pretended, at any rate, that they were in favor of liberty, equality, and fraternity, but they wanted a homogeneous population that could be virtually and really brothers with one another. Then, the Senator continued that such a Republic would be impossible with a heterogenous population where there was no possibility of blood relationship in lawful marriage[185]. Furthermore, the Senator insisted that his amendment would secure white supremacy and the supremacy of the white man's civilization and his social institutions for all time to come, because the white women could vote under it and other women could not unless the people of a given State decreed that they could[186].

That amendment proposal was finally decided to be laid on the table[187].

On the same day as above, that is, on June 27, 1918, Senator Frelinghuysen proposed to add the following sentences to the constitutional amendment, namely, "But no person, male or female, shall hereafter exercise the right of suffrage hereunder at an election for Senators and Representatives in Congress and electors for President and Vice President of the United States, unless such person shall have acquired citizenship by birth or under the naturalization laws of the United States, and, if a female, otherwise than by marriage. The Congress shall provide by law the requirements for conferring the right to vote for the officers herein named upon those who have acquired citizenship by marriage."[188]

The Senator explained on the proposal as follows: In accordance with the ordinal procedure for the naturalization stipulated in the naturalization law, there needed to be a declaration of an intention to become a citizen in addition to the five years' residence and, moreover, there were also qualifications as to age, education, character, renunciation of order of nobility or hereditary title as well as of allegiance, and the renunciation of prior allegiance. But it was also stipulated that a woman married to a citizen of the United States, who might herself be lawfully naturalized, should be deemed a citizen. In accordance with this law, the male alien had to have five years' residence; he had to declare his intention to become a citizen; and then, after two years, the court of jurisdiction in the locality in which he resided should examine him as to his allegiance, as to his loyalty, and as to his educational qualification. However, under the constitutional amendment and without that safeguard, thousands of women who were married to American citizens might automatically be enfranchised, despite that they might be at heart alien in loyalty to the country. Based on this, he proposed it in order to correct that problem[189].

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183 Id., at 10776 (Sen. Fletcher).

184 Id., at 8346. Senator Williams stated in another place that he approved woman suffrage (Id., at 10982). Senator Phelan pointed out, concerning the amendment proposal of Senator Williams, that since the Chinese and Japanese under their naturalization laws were ineligible to citizenship and the naturalization laws provided for the naturalization only of persons of the white race, the fortunes of the Chinese and Japanese were not at all involved in this amendment.

185 Id., at 8346 (Sen. Williams).

186 Id., at 10790 (Sen. Williams).

187 Id., at 10984.

188 Id., at 10780 (Sen. Frelinghuysen).

189 Id., at 10780 (Sen. Frelinghuysen). At other place, Senator Frelinghuysen stated that the first object was to place in the Constitution itself a provision which would safeguard the country against the exercise of the right of franchise in federal matters by aliens residing or sojourning within their midst, and that the second object was to insure that, in conferring the right to vote upon women who were citizens, they did not create a legal situation in which foreign women might, through the operation of the almost

Against that amendment proposal by Senator Frelinghuysen, Senator Calder insisted that they had in the country 5,800,000 white women of foreign birth at that time, many of whom were voting, and all of whom would be disfranchised by the provision, although married to citizens of the United States. He continued that especially, while he knew a woman who came to the country from Europe when she was 1 year of age, who had lived in the U.S. for seventy odd years, who had been educated there, and who was the mother of children born in the county, under the terms of the amendment she would be disfranchised, which could not be accepted[190]. However, against the opinion of Senator Calder, Senator Gore, expressing his approval to the amendment by Senator Frelinghuysen, pointed out that women described by Senator Calder should have been naturalized citizens of the United States[191]. On this occasion, Senator Gore stated, concerning his own amendment proposal presented on July 2, 1918, that the intention of his amendment proposal was substantially same as that of the proposal by Senator Frelinghuysen[192] and that so he decided not to offer it and not to press it upon the consideration of the Senate at that time[193].

Finally, the amendment proposal of Frelinghuysen was decided to be laid on the table[194].

In addition to those above, following proposals were also presented.

On July 2, 1918, Senator Gore proposed an amendment that no person other than a citizen of the United States should be entitled to vote for Senators and Representatives in Congress or for electors for President and Vice President of the United States[195].

On September 26, 1918, Senator Fletcher proposed from the standpoint that it was an exclusive power of each State to determine who should be the voters, an amendment that the right of citizens of the United States to vote should not be abridged by the United States on account of sex[196]. That amendment proposal was finally decided to be laid on the table[197].

Paragraph 6 Discussion at the Senate in Session 2 of the 65th Congress (4) - Presidential Speech

On the occasion of the deliberation on the pending constitutional amendment, the President gave an address about the subject[198].

First, the President stated that he regarded the concurrence of the Senate in the constitutional amendment proposing the extension of the suffrage to women as vitally essential to the successful prosecution of the great war of humanity in which they were engaged, and he explained the reasons as follows.

From the viewpoint of democracy, the President pointed out "If we be indeed democrats and which to lead the world to democracy, we can ask other peoples to accept in proof if our sincerity and our ability to lead them whither they wish to be led nothing less persuasive and convincing that our actions". And then, the President stated "They are

universally recognized principle that a married woman's citizenship followed that of her husband, qualified to exercise the franchise in federal elections, although wholly unfitted by character, education, residence within the country, and knowledge of and regard for its institutions, or otherwise, to have a voice in public affairs (Id., at 10950). Then, he stated furthermore that by his addition the equality between the foreign man or unmarried foreign woman and the foreign woman who married a citizen of the United States would be realized (Id., at 10951).

Further on this issue, the Senator requested to record as a part of his statement the list of States where to have citizenship was made to be one of the requirements for women to vote, and the request was accepted (Id., at 10953).

190 Id., at 10985.

191 Id., at 10986.

192 Id., at 10986. The proposal of Senator Gore, in contrast to that of Senator Frelinghuysen, lacked the provision corresponding to the part providing that the Congress should provide by law the requirements for conferring the right to vote for the officers herein named upon those who had acquired citizenship by marriage (Id., at 10986).

193 Id., at 10986.

194 Id., at 10987.

195 Id., at 8604 (Sen. Gore).

196 Id., at 10777 (Sen. Fletcher).

197 Id., at 10987.

198 Id., at 10928.

looking to the great, powerful, famous Democracy of the West to lend them to the new day for which they have so long waited; and they think, in their logical simplicity, that democracy means that women shall play their part in affairs alongside men and upon an equal footing with them. If we reject measures like this, in ignorance or defiance of what a new age has brought forth, of what they have seen but we have not, they will cease to follow or to trust us."

Second, the President insisted, concerning the role which women played during the war, that, while women had made significant and various contributions during the war, men should not admit them only to a partnership of sacrifice, suffering, and toll and not to a partnership of privilege and or rights.

Third, the President stated, from the viewpoint of the international relations, "we shall not only be distrusted but shall deserve to be distrusted if we do not enfranchise them (women: noted by the author) with the fullest possible enfranchisement, as it is now certain that the other great free nations will enfranchise them."

Finally, the President stated, from the viewpoint of the future roles of women, that the contributions of women were vital not only to the wining of the war but also to the right solution of the great problems which they had to settle immediately when the war was over, and, he continued, that they should have needed then a vision of affairs which was women's and the sympathy and insight and clear moral instinct of the women of the world and that their safety would depend upon the direct and authoritative participation of women in their counsels.

Paragraph 7 Discussion at the Senate in Session 3 of the 65th Congress (1) - Opinions of Supporters

At the Senate in the third session of the 65th Congress, the joint resolution proposing the constitutional amendment was carried over from the previous session and was deliberated again. In the discussion, the supporters of the constitutional amendment insisted as follows.

First, from the viewpoint of the federal system, it was insisted that sex did not enter anywhere in the qualifications for President, Vice-President, Senators, or Representatives prescribed in the Constitution, that the Fourteenth Amendment of the Constitution defined citizens to include all persons, whether male or female, and that it prohibited States from abridging the privileges and immunities of all citizens of the United States and from depriving any person of liberty or the equal protection of the law, so they had no right, as a matter of constitutional law, to prevent women from voting[199].

Next, it was insisted from the viewpoint of governmental system that man was not more than the equal of woman , that woman had the same right to life, liberty, and the pursuit of happiness as man, and that although the purpose of the establishment of their Government had been to secure those rights, their present form of Government had been and was destructive of these ends in that it had denied to women the liberty to which she was entitled[200]. Furthermore, there was presented an opinion that woman was a human being just as was man, she was subject to the laws of the land just as was man, she was required to contribute to the maintenance of the Government just as was man, she was interested in good government just as was man, she responded to the call of her country just as did man, she bore and reared the whole citizenship of the country, and she loved her country and sacrificed for it even more than did man, therefore, it should be right that she should have the privilege to vote[201].

Then, from the viewpoint of taxation, it was pointed out that, although the Revolutionary fathers had stated that taxation without representation was tyranny, today their Government was tyrannically treating the best women of the world by exacting taxes from them without their express consent[202].

Besides, from the viewpoint of the social conditions at that time, it was insisted that, since the American women had rendered every service in their power for their country during the war, they should be properly honored and

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199 65-3 Cong. Rec. 3053 (Sen. Pollock).
200 Id., at 3053 (Sen. Pollock).
201 Id, at 3054 (Sen. Pollock).
202 Id., at 3053 (Sen. Pollock).

rewarded[203].

Paragraph 8 Discussion at the Senate in Session 3 of the 65th Congress (2) - Opinions of Opponents

The opponents of the constitutional amendment insisted that the matters concerning the qualifications of electors should be in the power of each sovereign State[204].

Besides, Senator Frelinghuysen tried to propose an amendment to correct the condition that a woman who had married a citizen of the United States could get the right to vote without the declaration of the allegiance and loyalty to the United States, or other qualifications which were required for naturalization[205]. But it was not accepted because of a procedural requirement in the Senate[206].

Subsection 5 Discussion at the Federal Congress in 1919

On May 19, 1919, Representative Mann proposed a constitutional amendment to extend the right of suffrage to women[207].

The constitutional amendment bill was submitted to the Committee on Woman Suffrage in the House of Representatives, proposed to the House from the Committee, and, after some discussion, approved at the House on the 21st day of the same month[208]. After that, the bill was submitted to the Senate[209]. The Senate intermittently discussed it from May 23 onwards[210], and approved it on June 4[211].

After that, the constitutional amendment was submitted to the States for the ratification, and, finally, established and came into effect on August 26, 1920[212].

Paragraph 1 Discussion at the House of Representatives (1) - Opinions of Supporters

In the discussion at the House of Representatives, the supporters of the constitutional amendment insisted as follows.

First, from the viewpoint of the role of woman, it was pointed out that in home, in religion, in education, in society, and in the very fundamentals of civilization itself, it had been woman who had been the moulder of their highest ideals and purposes and the inspiring genius for the achievement of liberty, justice, and democracy[213]. From the viewpoint of the relation between the home and woman, it was insisted that to permit mothers of the country to express their views on important issue would not injure the homes[214]. From the viewpoint of woman's role as a mother, it was pointed out that, though some said that woman should not vote because she could not bear arms, every mother who bare a son to fight for Republic took the same chance of death that the son took when he went to arms[215].

Next, from the viewpoint of the governmental system and political conditions, it was insisted that taxation without representation should no longer apply to womankind[216]. In relation to the World War I, it was pointed out that woman had demonstrated in the awful war just ended, as well as in every crisis of the world's history, her undisputed right to

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203 Id., at 3056 (Sen. Calder).
204 Id., at 3061 (Sen. Gay).
205 Id., at 3060. The amendment proposal of Senator Frelinghuysen was: "That no married woman shall be entitled to vote who would not be so entitled if she were a single woman."
206 Id., at 3061.
207 66-1 Cong. Rec. 24.
208 Id., at 94.
209 Id., at 128.
210 Id., at 129.
211 Id., at 634.
212 19th Amendment to the U.S. Constitution: Women's Right to Vote (1920) (https://www.ourdocuments.gov/doc.php?flash=true&doc=63)
213 66-1 Cong. Rec., at 83 (Rep. Nelson of Wisconsin).
214 Id., at 80 (Rep. Little).
215 Id., at 80 (Rep. Little).
216 Id., at 83 (Rep. Nelson of Wisconsin).

equal suffrage[217], and it was insisted that the world was calling as never before for both men and women of great brains and noble hearts to meet the large and complex problems of national and international reconstruction[218].

Third, from the viewpoint of the enjoyment of the privilege of woman, it was insisted that, although some said that a woman could not have the rights of a man and the privileges of a woman, if men were still being the gentlemen after women got the right of suffrage, a woman could still retain the privilege of being treated like lady, a wife, and a mother when she voted[219].

Fourth, from the viewpoint of international comparison, it was pointed out that practically every civilized country in the world had extended the right of suffrage to women[220].

Paragraph 2 Discussion at the House of Representatives (2) - Opinions of Opponents

The opponents of the constitutional amendment insisted as follows.

First, from the viewpoint of the social role of woman, it was insisted that the good, pure woman, the queen of the American home, the mother of their children, their sisters and their daughters, ought to all be at home[221]. It was also insisted that it could not be believed that a vast majority of women wanted the vote[222].

Next, from the viewpoint of the federal system, it was insisted that the constitutional amendment violated Article 1, Section 2 of the Constitution by providing that Congress should determine who might vote or who should not vote, which destroyed the foundation of local self-government[223].

Furthermore, from the viewpoint of the duties of citizens, it was also insisted that women ought not to have the privileges of citizenship because they could not enter the armies[224].

Paragraph 3 Discussion at the Senate (1) - Opinions of Supporters

In the deliberation at the Senate, the supporters of the constitutional amendment insisted that the overwhelming majority of the people of the United States were in favor of the amendment[225]. It was also stated that there was no sound reason to oppose the constitutional amendment[226].

From the viewpoint of the federal system, there was presented an opinion that the good women of the country would be a powerful aid in the restoration as well as preservation of local self-government[227].

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217 Id., at 83 (Rep. Nelson of Wisconsin); Id., at 84 (Rep. MacCrate); Id., at 93 (Rep. Mondell).

218 Id., at 83 (Rep. Nelson of Wisconsin).

219 Id., at 80 (Rep. Little)

220 Id., at 82 (Rep. Raker).

221 Id., at 89, 92 (Rep. Clark of Florida).

222 Id., at 85 (Rep. Focht). Representative Focht furthermore stated there that in the State of Pennsylvania, which was his State, they had better laws for the protection womanhood than they had in the States where they had had woman suffrage for 25 years. So, he insisted it was not necessary for women to engage in the conflict and asperities of politics to secure more than quality of protection with men.

223 Id., at 82 (Rep. Hardy); Id., at 85 (Rep. Black); Id., at 88 (Rep. Clark of Florida). Representative Hardy stated there that the question of suffrage, once exclusively for the States, had been taken over by the Federal Government, first as to race through the Fifteenth Amendment, and at that time as to sex through the pending constitutional amendment. However, Representative Hardy stated that he supported woman suffrage itself. Besides, Representative Black stated that the Seventeenth Amendment prescribed that the electors should have same qualifications as those required for electing the most numerous branch of the States legislature, which confirmed the power of the States to determine the qualifications for electors. Representative Clark (Florida) stated that a radical change in the structure of a great government should not be made unless it should be indisputably established that the proposed change was not only for the betterment of mankind, but that it was necessary for the welfare of the people.

224 Id., at 90 (Rep. Clark of Florida).

225 Id., at 622 (Sen. Thomas).

226 Id., at 624 (Sen. Kirby).

227 Id., at 623 (Sen. Thomas)

Paragraph 4 Discussion at the Senate (2) - Opinions of Opponents

The opinions of the opponents of the constitutional amendment concentrated on the problem regarding the Power of States for elections.

It was insisted above all that the matter of suffrage should be settled by the action of the respective States[228]. In addition, there was also presented an opinion that when a society organized itself to do business, about the first thing it did was to prescribe the qualifications of its voting members, and it was the usual procedure for an organization in the process of formation to prescribe in its constitution that the voting membership should not be extended or restricted except by a vote of members of the society, so the regulation of the franchise in the States was left to the voting members, in other words, the people of those States[229].

Furthermore, concerning the structure of the central Government, there was presented an opinion that when they had taken from several States the right to modify, qualify, and determine their franchise, the sovereignty of the State in every other particular had ceased to be and they would all be living in a centralized Government[230].

Besides, from the viewpoint of the actual political conditions, it was stated that in the South the women had not desired the right of suffrage and that the sentiment had been strongly against suffrage[231].

Paragraph 5 Discussion at the Senate (3) - Amendment Proposals

In the discussion on the constitutional amendment, some proposals to amend the amendment were presented.

On June 3, 1919, Senator Harrison proposed an amendment to change the words "citizens of the United States" into the words "white citizens of the United States". However, it was rejected in the voting carried out just after the proposal[232].

On the same day as above, Senator Underwood proposed to amend the preamble of the pending constitutional amendment which asked for the approval of each State legislature, so as to require the approval of the Constitutional Convention of each State. There was much discussion on the proposal, but it was rejected in the end[233].

Furthermore, on June 4, 1919, Senator Gay proposed to amend the second section of the constitutional amendment to give the several States the authority to enforce the constitutional amendment through legislation. But it was rejected[234].

Section 3 Women and Change of Citizenship

The change of woman's citizenship presented issues especially concerning marriage. In relation to this point, it was in 1855 that a federal act concerning citizenship of a woman was first established. After that, major legislative steps regarding changes of woman citizenship were taken in 1907 and 1922.

This article will analyze hereinafter the federal enactments and judgements on relevant cases in chronological order with periodical division.

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228 Id., at 561 (Sen. Borah); Id., at 569 (Sen. Underwood); Id., at 620 (Sen. Brandegee). However, Senator Borah stated there that woman suffrage had been realized in his State and he himself had been an advocate of it.

229 Id., at 616 (Sen. Wadsworth). Senator Wadsworth stated there that the tendency which the constitutional amendment represented would make citizens the servant and dependent of government instead of being its master in the end (Id., at 618).

230 Id., at 619 (Sen. Smith of South Carolina); Id., at 625 (Sen. King). However, Senator King did not vote in the actual voting (Id., at 635). Senator King stated that, since the people of his State required that he voted for the submission of the amendment to the Constitution providing woman suffrage, he could not vote against it (Id., at 625).

231 Id., at 627 (Sen. Reed). Senator Reed pointed out there as the reasons why the women in the South were against suffrage the fact that there was the race question and the fact that for the most part of the ladies of the South were intensely wedded to their home life, and were but little inclined to thrust themselves into public affairs.

232 Id., at 557, 558. The provisions of the constitutional amendment proposal deliberated at that time were the same as the current provisions of the Nineteenth Amendment of the Constitution. cf. Id., at 556.

233 Id., at 634.

234 Id., at 634.

Subsection 1 Citizenship of Woman Before the Legislation of 1907

Paragraph 1 Citizenship of Woman before and in 1855

In 1855 or before, citizenship of a woman was to change independently, irrespective of her marriage[235].

As a judgement which confirmed the point above, there was the Shank v. Dupont Case[236,237]. The outline of the case is: A woman born in South Carolina before the declaration of independence inherited in 1782 an estate there from her father who had been a citizen of South Carolina; She married a British officer and, at the evacuation of Charleston, in 1782, went to England, where she remained until her death; She died in 1801 and left five children, born in England; Then, those children claimed the estate in South Carolina. In the judgement, the change regarding the citizenship of the woman became an issue. The court opinion first confirmed that the woman had gotten citizenship-by-birth in the United States[238]. Then, the court opinion ruled that she had never lost her citizenship of the United States by the marriage to a foreigner, temporary allegiance to a foreign country, or the like[239].

Paragraph 2 Act of 1855 and the Amendment

In 1855 there was established an act concerning citizenship which was the first including provisions on citizenship of woman[240]. The act provided that any woman who might lawfully be naturalized under existing laws, married to a citizen of the United States should be deemed as a citizen[241].

In 1868, the Supreme Court presented in the Kelly v. Owen et al. Case[242] the interpretation of the provision of the act above. The outline of the case was: a man who was a native of Ireland emigrated to the United States, then married a woman in 1853, and naturalized in 1855, and died in 1862. The woman (his widow) claimed his estate. Then it was questioned whether she should be deemed to be a citizen of the United States through her late husband's naturalization.

The Supreme Court ruled that whenever a woman, who under previous acts might be naturalized, was in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after the marriage, she became by that fact a citizen also. Then, the Supreme Court stated that the object of the act was to allow her citizenship to follow that of her husband without the necessity of any application for naturalization on her part. And it stated that the terms, "who might lawfully be naturalized under the existing laws" only limited the

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235 Sophonisba P. Breckinridge, Marriage and the Civic Rights of Women, 19 (Univ. Chicago Pr. 1931) [hereinafter Breckinridge]. However, in England there was a legislation in 1844, providing that a woman who had married an English subject should be naturalized and enjoyed equal rights and privileges to those of a natural born subject of England. Id.; Virginia Shapiro, Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States, 666, 672 (1984), in Women and Politics (Pt. 2) (Nancy F. Cott ed., K. G. Sauer 1994). [hereinafter Shapiro] (According to Shapiro, the enactment of the United States in 1855, which will be examined below, was modeled after that English law.)

236 28 U.S. 242 (1830).

237 In relation with the issue, a literature pointed out that there was a judgement of a lower court in 1908 which stated that a woman who was a citizen of the United States should not, at least as long as she was residing in the United States, lose her citizenship by her marriage to a foreigner. Candice Lewis Bredbenner, A Nationality of Her Own, 39 (note 37) (Univ. California Pr. 1998) [hereinafter Bredbenner].

238 28 U.S. 242, 245.

239 Id., at 246. However, the court opinion judged that she had lost the citizenship of the United States by the effect of the Treaty of Peace of 1783 concluded between the United States and Great Britain. Id.

240 An Act to secure the Right of citizenship to Children of Citizens of the United States born out of the Limit thereof, 10 Stat. 604 (1855). That Act was consisted of two sections. The first section provided that persons born out of the limits and jurisdiction of the United States, whose fathers were at the time of their birth citizens of the United States, should be deemed to be citizens of the United States. In relation with the issue, in an Act of 1802 (An Act to establish uniform rule of Naturalization, and to repeal the Acts heretofore passed on that subject, 2 Stat. 153, 155), which could be seen as the ancestor of the Act treated in the body text, "children of persons" was used in the wording, instead of being restricted to "father".

241 Id. (Sec. 2).

242 7 Wall. 496 (1868).

application of the law to free white women[243,244].

Next, the Supreme Court presented the interpretation of the act in the Low Wah Suey v. Backus case[245] in 1912. In this case, while a Chinese woman being married with a United States citizen of Chinese descent had been expelled from the United States because of her prostitution, the husband filed a suit.

The court opinion ruled on the question whether that woman should be an "alien" as the object of expulsion, quoting a provision in the Act of 1855 described above, that since the woman could not become a naturalized citizen under the laws of the United States, although she was the wife of a Chinaman of American birth, she remained an alien and subject to the terms of the act[246,247].

After then, the Act of 1855 was amended concerning the condition of expulsion in 1917[248]. The amendment provided that the marriage to an American citizen of a female of the sexually immoral classes the exclusion or deportation of which was prescribed by the act should not invest such female with United States citizenship if the marriage of such alien female should be solemnized after her arrest or after the commission of acts which made her liable to deportation under the act[249].

Paragraph 3 Opinion of Attorney General

Attorneys General issued following opinions concerning the relation between citizenship of the United States and marriage in this period up to the time of legislation of the Act of 1907[250].

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243 Id., at 498.

244 In 1870, Congress enacted an Act admitting naturalization of black people (An Act to amend the Naturalization Laws and to punish Crimes against the same, and for the other Purposes 16 Stat. 255, 256). By that act a black person had become one who might lawfully be naturalized under the existing law. However, persons being neither white nor black had been long deemed not to satisfy that condition, so that a woman of such category could not get citizenship even when she had married a citizen of the United States. D. O. McGovney, Race Discrimination in Naturalization, 8 Iowa L. Bulletin 129, 143 (1923). However, in relation with the issue, it was also pointed out that there had been some cases where an Indian woman, who might not lawfully be naturalized under existing laws, was deemed to have derivative citizenship by her marriage to a citizen of the United States when she had left her original tribe and accepted a civilized life style. See, Nancy F. Cott, Justice for All? Marriage and Deprivation of Citizenship in the United States, Justice and Injustice in Law and Legal Theory, 84 (Austin Sarat and Thomas R. Kearns ed., Univ. of Michigan Pr. 1996)[hereinafter Cott].

245 255 U.S. 460 (1912).

246 Id., at 476.

247 As a similar case, there was one in which a Japanese wife of a United States citizen of Japanese descent was refused an issue of passport because she did not meet the requirements for naturalization. III Green Haywood Hackworth, Digest of International Law, 84 (GPO 1942) [hereinafter Hackworth]. In the book, there was reported a case of 1909 which ruled that a woman who had married a citizen of the United States and prostituted herself was not expelled from the United Sates if she satisfied the racial requirement for naturalization. Id., at 86 (citing 27 Op. Atty. Gen. (1908–1909) 507, 515, 520). As another reference concerning the case, see Bredbenner, p. 33.

Another literature reports an older statement of the Secretary of State in 1903, which informed the United States Minister to China that the principle of the Act of 1855, that the citizenship of a wife follows the citizenship of the husband, would not apply to a Chinese or Japanese woman since such a woman could not be naturalized. III John Bassett Moore, Digest of International Law, p. 458f (GPO 1906). [herein after Moore].

However, in the book, there was also presented a statement of a Judiciary clerk of the Department of State in 1885 which said that a Chinese woman who had married a citizen of the United States in China would get citizenship of the United States by the fact of their marriage. Moore 463.

248 An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States, 39 Stat. 874, 889 (Sec. 19).

249 Concerning the issue, there were two instances of interpretation of the provision by Minister of Justice:

- The marriage between an alien female and a United States citizen in the meaning of the provision should mean the marriage performed in the United States. 32 Op. Atty. Gen. 178 (1920).
- even a woman who had once been expelled on account of her sexual misconduct might be given citizenship based on the later marriage to a citizen of the United States through the act of 1855. 33 Op. Atty. Gen. 398 (1923).

250 A literature presented some other instances of the opinions of the Attorney General regarding the cases of marriage of a foreign female to a citizen of the United States. Namely, (Moore pp. 458)

- A case of 1894 in which a widow of an American citizen, residing in Nicaragua, claimed exemption, on the ground of her American citizenship, from a forced loan. Attorney General stated that while she acquired by her marriage the nationality of her

First, in relation to the case between a citizen of the United States and an alien woman, in 1874, the Attorney General received a question from the Secretary of State, whether any free white woman, not an alien enemy, who was married to a citizen of the United States, was, by reason of her marriage, deemed to be a citizen of the United States, irrespective of the time of place of the marriage or the residence of the parties.

The Attorney General stated that an alien woman who had intermarried with a citizen of the United States residing abroad -- the marriage having been solemnized abroad, and the parties after the marriage continuing to reside abroad -- was to be regarded as a citizen of the United States, though she might never have resided in the United States[251].

Next, in 1877, the Attorney General received a question from the Secretary of the Treasury, concerning the following case: An alien woman married a naturalized citizen and resident of the United States, who died in 1860. In 1862 she married an alien, who was domiciled in the United States, but who subsequently died without becoming a citizen thereof. She claimed compensation for her separate property taken during the lifetime of her second husband.

The Attorney General answered that by virtue of the provision of the statute embodied in section 1994 of the Rev. Stat., the claimant upon her first marriage acquired a permanent status of citizenship, which could be lost only as in the case of other citizens; that this status was not affected by her subsequent marriage; and that she was a citizen of the United States[252].

Second, in relation to the case of a citizenship of a female citizen of the United States married to a foreigner, the Attorney General presented the following opinion[253].

The Attorney General received in 1862 from the Secretary of State an inquiry whether when a lady, a natural born

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husband, yet, being a native of Nicaragua and continuing to reside in the country of her origin, there was room for contention that she had resumed her original nationality; and that, as she had not since her husband's death manifested any intention of coming to the United States, it was not the duty of the Government to intervene to secure her immunity from obligations imposed upon her by the country of her birth and continued domicil (In relation to that, there was a similar case of a woman residing in Santo Domingo, see Moore 457).

- A case of 1901 in which a woman, by her marriage to a citizen of the United States, became vested with her husband's rights as a citizen of the United States but upon his death she might revert to her original citizenship or retain her American citizenship. Attorney General stated that she elected to do the latter, and the fact that she was dwelling in Turkey did not militate against her doing so, and held that she was entitled to a passport as a citizen of the United States.
- A case of 1894 in which a woman, originally a British subject, went to Canton, in China, and opened a hotel; by British regulations, British subjects were required, under certain penalties, to take out a license for such purpose; there was no American regulation on the subject; the woman claimed to be an American citizen on account of the fact that she had been married an American citizen though already having been divorced. Attorney General admitted her opinion that she was a citizen of the United States, stating that she became an American citizen by her marriage, both by British and by American law; that she had not lost her American nationality by any method recognized by American law; that according to British law an English woman, who by marriage acquires foreign citizenship, should, in order to reacquire her original nationality upon her husband's death, obtain a certification therefor from the British authorities; that it was assumed that she had not taken any steps to require British nationality.
- A case of 1888 in which a woman was a native of Zurich, Switzerland, and she was married at New York to a native of Baden, who, in few months after the marriage, was naturalized to be a citizen of the United States; however they returned to Europe and were resided in Zurich, then the husband deserted the wife, and, it was said, went back to the United States; since the desertion nothing had been heard of him, and it was not known that he was alive; the authorities of the canton of Zurich applied to the American legation in Berne for a passport for her. Attorney General rejected the application, stating that her remaining in Zurich after her desertion would, under ordinary circumstances, presumptively revive her Swiss domicil and nationality.

251 14 Op. Atty. Gen. 402 (1874).

252 15 Op. Atty. Gen. 599 (1877).

253 In addition to the opinions of Attorney General described above, a literature enumerated following opinions of Secretary of State. Moore pp. 450

- An alien woman, on her marriage to a subject or citizen, should merge her nationality in that of her husband.
- An woman, a citizen of the United States who married a foreign citizen and lost the citizenship of the United States should resume the citizenship, after she divorced or became a widow, on the condition that she had had the residence in the United States.

Besides, in the book, in relation with the issue described above, there was enumerated a case where a widow, a daughter of a high governmental official of the United States, who had married in 1874 a British subject and become a naturalized British subject, was "unconditionally readmitted to the character and privileges of a citizen of the United States" by a special enactment in 1898. Id., at 456 (citing 30 Stat. 1496). As for details of the case, see John L. Cable, Decisive Decision of United States Citizenship 41 (Michie Co. 1967) [hereinafter Cable].

citizen of the United States, had married a Spanish subject and, then, moved to Spain with her husband and their child born in the United States where she lived till her husband's death, the lady and the child should be citizens of the United States.

Answering the inquiry, the Attorney General stated that, since the removal of the lady and her daughter to Spain and their residence there, under the circumstances, were not evidence of an attempt on their part to expatriate themselves, they were still American citizens[254]. In that answer, the Attorney General explicitly stated that a female citizen of the United States would never be deprived of her citizenship by her marriage to a foreigner.

However, there was a case in which the Attorney General judged differently although the circumstances were similar to the case above. In 1866, the Attorney General received from the Secretary of State an inquiry when a lady, born in France whose father was a citizen of the United States at the time of her birth, married in France a French citizen, then had become a widow but continued after the death of her husband to reside there, should be a citizen of the United States. The Attorney General answered that that lady was a citizen of France and not of the United States, pointing out the facts that she had become a French citizen by Code Civil of France and that she didn't acquire the domiciliary residence in the United States which could constitute evidence of a desire and intention on her part to assume the duties and obligations of an American citizen[255,256].

Subsection 2 Act of 1907 and Woman Citizenship

Paragraph 1 Establishment of the Act of 1907

In 1907, Congress enacted "an Act In reference to the expatriation of citizens and their protection abroad"[257]. The third section of the act provided concerning a female citizen of the United States who married a foreigner as follows. First, it provided that any American woman who married a foreigner should take the nationality of her husband. Second, it also provided that at the termination of the marital relation she might resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

Next, the fourth section provided the legal status of a foreign woman after the termination of the marital relation who had acquired American citizenship by marriage to an American, as follows. First, it provided that she should be assumed to retain the same if she continued to reside in the United States, unless she made formal renunciation thereof before a court having jurisdiction to naturalize aliens. Second, it provided that, if she resided abroad, she might retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation[258].

Paragraph 2 Mackenzie v. Hare Case

The Supreme Court made the interpretation of the third section of the Act referred to above in the case, Mackenzie v. Hare[259], in the year 1915. The outline of the fact of the case was as follows. A female citizen of the United States who had married a subject of the kingdom of Great Britain and been residing in the State of California was refused

254 10 Op. Atty. Gen. 321 (1862).

255 12 Op. Atty. Gen. 7 (1866).

256 Besides, in 1869, Attorney General answered to a question from Secretary of the Treasury that a woman born in the United States, but married to a citizen of France and domiciled there, was not "a citizens of the United States residing abroad", within the meaning of those words in the provisions relating to internal revenue. 13 Op. Atty. Gen. 128 (1869).

257 34 Stat. 1228. Concerning the background and the outline of the legislation of the act, see Bredbenner pp.46; author's paper (Kotaro Matsuzawa) "The Development of Expatriation in America" Tsukuba-Hosei No.25 (1998), pp. 210 (in Japanese).

258 The fifth section of the Act provided that a child born without the United States of alien parents should be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent, provided that such naturalization or resumption took place during the minority of such child, and that the citizenship of such minor child should begin at the time such minor child began to reside permanently in the United States.

259 Mackenzie v. Hare, 239 U.S. 299 (1915).

registration as a voter on the ground that, by reason of her marriage to her husband, a subject of Great Britain, she took the nationality of her husband and ceased to be a citizen of the United States. The woman claimed a right as a voter under the constitution of California and the Constitution of the United States.

The court opinion ruled that, although it might be conceded that a change of citizenship could not be imposed without the concurrence of the citizen, since the marriage was voluntarily done by the plaintiff, the renunciation of citizenship as the result was deemed to be voluntarily done by the plaintiff, and the claim of the plaintiff was rejected[260].

Besides, the court opinion stated that the foundation principle of the statute was the identity of husband and wife, which had been an ancient principle of their jurisprudence, and that it had been neither accidental nor arbitrary, and worked in many instances for the protection of wife[261]. Furthermore, the court opinion also stated that it was true there had been much relaxation of it, but in its retention, as in its origin, it was determined by their intimate relation and unity of interests, and that this relation and unity might make it of public concern in many instances to merge their identity and to give dominance to the husband[262].

By this judgement, it was confirmed that a female citizen of the United States should lose her citizenship by her marriage to a foreigner even when she had been residing within the United States[263]. But it involved a serious problem because a woman might lose her citizenship, hence the right to vote by marriage to a foreigner in a State where a woman citizen had the right of suffrage[264]. Furthermore, later in the wartime, property of a woman who had lost her citizenship because of marriage to a foreigner was commandeered as the property of a foreigner. So, the influence of the judgement was also serious in this respect[265,266].

Subsection 3 Cable Act of 1922 and Woman Citizenship

Paragraph 1 Outline of Cable Act

In 1922, Congress established the Cable Act in order to secure independent citizenship of a woman[267]. This act consisted of seven sections, and the outline was as follows.

The first section provided that the right of any woman to become a naturalized citizen of the United States should not be denied or abridged because of her sex or because she was a married woman. Since a married woman had not been

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260 Id., at 312.

261 Id., at 311.

262 Id.

263 The result above was planned since the establishment time of the act of 1907. See, Bredbenner 58.

264 In fact, in the State in which the plaintiff of the case referred to above resided, the right to vote was enjoyed by all citizens of the United States, whether male or female. 239 U.S. 299, 306.

265 Bredbenner 68, 72. Concerning the judgement of the Mackenzie case and the a series of Woman's movements to amend the Act of 1907, see Bredbenner pp. 67.

266 In addition to the points mentioned above, the Act of 1907 might involve following problems concerning the change of the nationality of woman.

- Since the second section of the act provided that a citizen of the United States who would be naturalize in a foreign nation should lose the citizenship of the United States when the person declared the allegiance to that foreign nation (34 Stat. 1228), if a husband did such a declaration, the wife might also lose automatically the citizenship of the United States under the Act of 1907 (However, an opinion of Attorney General of 1915 stated that the loss of American citizenship of a citizen by his act of taking the qualified oath of allegiance to Canada in enlisting in the Canadian Army would not ipso facto forfeit the citizenship of his wife. 30 Op. Atty. Gen. 412, 419(1915).).
- The same second section provided that when any naturalized citizen should have resided for two years in the foreign state from which he had come, or for five years in any other foreign state it should be presumed that he had ceased to be an American citizen (30 Stat. 1228), so that when a naturalized husband lost the citizenship by this provision, the wife also might lose her citizenship even if she had continued to reside in the United States.

As for the details on that problem or other relevant questions relating to the Act, see Fred K. Nielsen, Some Vexatious Questions relating to Nationality, 20 Colum. Law. Rev. 840, 856 (1920).

267 42 Stat. 1021 (1922). The formal title of the act is: An Act relative to the naturalization and citizenship of married women. As for the legislation process of the act, see Cable pp. 38; Breckinridge pp. 22; Bredbenner Chap. 3.

able to be naturalized independently of the husband before the enactment, that point was changed by the provision[268].

Next, the second section provided that any woman who married a citizen of the United States after the passage of the act, or any woman whose husband was naturalized after the passage of the act, should not become a citizen of the United States by reason of such marriage or naturalization[269]. However, it also provided that if eligible to citizenship, she might be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions: No declaration of intention should be required; In lieu of the five-year period of residence within the United States and the one-year period of residence within the State or Territory where the naturalization court was held, she should have resided continuously in the United States, Hawaii, Alaska, or Puerto Rico for at least one year immediately preceding the filing of the petition.

The third section provided that a woman citizen of the United States should not cease to be a citizen of the United States by reason of her marriage after the passage of the act, unless she made a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens. However, it also provided that any woman citizen married to an alien ineligible for citizenship should cease to be a citizen of the United States; that if at the termination of the marital status she was a citizen of the United States she should retain her citizenship regardless of her residence, and that if during the continuance of the marital status she resided continuously for two years in a foreign State of which her husband was a citizen or subject, or for five years continuously outside the United States, she should thereafter be subject to the presumption that she should lose her citizenship.

The fourth section prescribed a re-naturalization of a woman who had lost her citizenship by marriage before the establishment of the act, and the fifth section provided that no woman whose husband was not eligible to citizenship should be naturalized during the continuance of the marital status[270].

Paragraph 2 Various Problems Relating to the Cable Act

In relation to the Cable Act, there were some problems concerning the change of citizenship at that period[271].

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268 Hackworth 50; Bredbenner 42. However, concerning that point, a literature introduces an opinion of the Secretary of State of 1877 which stated that a female foreigner could be naturalized on same condition and by the same proceeding as that for a male foreigner. Moore 331. On this issue, Flournoy said that, though there was no statute to negate naturalization of an unmarried woman, there was a judgement which denied the naturalization of a woman being married to a foreigner. Richard W. Flournoy, The New Married Women's Citizenship Law, 35 Yale L. J. 159, 162 (1923) [hereinafter Flournoy].

269 It was pointed out as the motive of the legislation of the provision that by the guarantee of the woman suffrage, it had become necessary to restrict the acquisition of citizenship by a foreign woman who did not satisfy the requirements for the naturalization. Flournoy, 162; J. S. Reeves, Nationality of Married Women, 17 Am. J. Intl. L. 97, 99 (1923); Lucius F. Crane, The Nationality of Married Women, VII Journal of Comparative Legislation and International Law, 55 (3rd Series 1925) [hereinafter Crane]; Shapiro 678.

270 The sixth and seventh sections provided the relations between this act and the act of 1907.

271 In addition to the problems described above, there was pointed out a problem that there was a possibility in which a woman might be made stateless if the act of the native land of the woman provided a woman should lose her citizenship of the native land by marriage to a foreigner, for the Cable Act provided that a foreign woman should not acquire citizenship of the United States only by her marriage to a citizen of the United States (According to Flournoy, there were at that time laws by which a woman should lose her citizenship by marriage to a foreigner, in Costa Rica, Cuba, Dominican Republic, Germany, Great Britain, Greece, Haiti, Latvia, Mexico, Nicaragua, Peru, Poland, Rumania, Spain, Switzerland and Turkey. Flournoy, 164. Another literature enumerates as a country having similar law Japan as well as Austria, Brazil, Bolivia, Canada, Cuba, Denmark, Dominican Republic, Germany, Great Britain, Greece, Guatemala, Haiti, Holland, Hungary, Luxenburg, Norway, Peru, Persia, Poland, Rumania, Spain, Sweden, and Turkey. Cyril D. Hill, Citizenship od Married Women, 18 AJIL 720, 728 (1924) [hereinafter Hill].) (Since there were especially many cases where an American woman married a British subject, there were also many troubles happening in such cases. Flournoy, 164; Hill 728; Crane 57.). Breckinridge 43; Bredbenner 196. Besides, when the native country of a husband had a law by which the wife should automatically acquire nationality of her husband's country (according to Flournoy, such a law was established in Japan as well as in Austria, Belgium, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, France, Germany, Greece, Hungary, Haiti, Italy, Latvia, Mexico, Netherland, Norway, Peru, Persia, Poland, Portugal, Rumania, Russia, Siam, Spain, Sweden, and Venezuela. Flournoy, 167.), the wife might have dual citizenship. Bredbenner 196. In order to solve the former problem, the eighth article of Convention on Certain Questions relating to the Conflict of Nationality Laws provided "If the national law of the wife causes her to lose her nationality on marriage with a foreigner, this consequence shall be conditional on her acquiring the

First, in relation to the regionally admitted number of immigrants involving spouses, the relation of the act to the Immigration Act of 1921[272] was questioned. Namely, since while a woman who had married before the establishment of the act had acquired citizenship by the marriage, a woman who married after the establishment of the act should not automatically acquire citizenship, the latter woman should be counted into the number of regional allocation of immigrants which maximum number was restricted by the Immigration Act of 1921[273]. In the immigrants allocation, it was true, a wife of a male citizens of United States was given preference[274]. But such preference was not given to a husband of a female citizen of the United States and, moreover, whether a spouse of a male citizen of the United States was treated better was made dependent on how the marital relation was[275].

In order to solve that problem, Congress established so-called Johnson-Reed (National Origin) Act[276] in 1924. Under the act, additional immigrant allocations for kindreds or others of a citizen of the United States whom the provision for regional immigrant allocation had not applied before, was provided. However, even in this act, a spouse of a female citizen of the United States was not equally treated to a spouse of a male citizen of the United States[277]. Besides, under that act, there was no treatment provided for a person who had lost citizenship of the United States by marriage to a foreigner and had been residing abroad[278].

To solve this problem, Congress established, in addition, the Copeland-Jenkins Act[279] in 1928.

The first section of the act provided that a woman who was a citizens of the United States and who prior to the establishment of Cable Act had lost her citizenship by reason of her marriage to an alien, but at the time of application for an immigration visa was unmarried should be given the immigration visa irrespective of the limited number of immigrants. And the second section amended the Johnson-Reed Act to provide that an immigrant who was the husband of a citizen of the United States by a marriage occurring prior to June 1, 1928, should be also given the immigration visa irrespective of the limited number of immigrants.

However, even by this act, a woman who had married to an alien before the establishment of Cable Act and whose marital relation was still continued at the time of application would be given the immigration visa only within the limited number of immigrants. Moreover, a husband who had married to a citizen of the United States after May 31,

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nationality of the husband". However, the United States of America was not a participant of the convention and, already in the forming process of the convention, voted against it. Concerning the extent and degree of participation of the United States in the forming process of the convention, see Manley O. Hudson, The Hague Convention of 1930 and the Nationality of Women, 27 Am. J. Intl. L. 117, 122 (1930); Bredbenner chap. 6.

Regarding this problem, the Act of 1940 (50 Stat. 1137, 1145) admitted a simplified naturalization proceeding by providing that a person who upon the effective date of the section was married to or thereafter married a citizen of the United States, or whose spouse was naturalized after the effective date of the section, if such person should have resided in the United States in marital union with the United States citizen spouse for at least one year immediately preceding the filing of the petition for naturalization, might be naturalized after the effective date of this section upon compliance with all requirements of the naturalization laws. As for the details, see Hackworth 88.

On the same problem, the current law provides that any person whose spouse is a citizen of the United States may be naturalized if such person immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least three years, and during the three years immediately preceding the date of filing his application has been living in marital union with the citizen spouse. 8 U.S.C.A. 1430.

272 An Act to limit the immigration of Aliens into the United States, 42 Stat. 5 (1921).

273 Bredbenner 115.

274 42 Stat. 5, 6.

275 Breckinridge 28; Bredbenner 115.

276 43 Stat. 153 (1924) (repealed by McCarran-Walter Act, 66 Stat. 163, 279 (1952)). The formal title is: An Act to limit the immigration of Aliens into the United States, and for other purposes.

277 Bredbenner 120. Under the Act of 1924, there was surely some measures taken for a spouse of a female America citizen, for the husband of a citizen of the United States was included in the preferred immigrants on issuing immigration visa. 43 Stat. 153, 155 (Sec. 6 (a)). However, the husband of a female citizen of the United States was not included in the immigrant who was exempted from the limited number of regionally admissible immigrants. Id (Sec. 4 (a))

278 Bredbenner 120.

279 45 Stat. 1009 (1928). The formal title of the Act (in fact, a resolution) is: Joint Resolution Relating to the immigration of certain relatives of United States citizens and of aliens lawfully admitted to the United States.

1928 was given only a preference for immigration.

Second, the Cable Act abolished, in relation to the naturalization procedure, the Act of 1907 which provided that a woman who had lost the citizenship of the United States by marriage and who had been residing abroad could recover the citizenship only by the notification to the consul of the United States when the marital relation to an alien had been dissolved. As the result, it was required for a woman who came under the case to go through a certain naturalization procedure to recover her citizenship, though the requirements for the naturalization were somewhat relaxed compared with ordinary cases. Because of that, such a woman could apply to recover citizenship only after she had entered the United States as an immigrant within the regionally limited number of immigrants. Moreover, since such a woman as having recovered her citizenship as above was deemed as a naturalized citizen of the United States by the act, she might be subject to the revocation of naturalization in certain cases[280].

The Cable Act had also the following problem. The third section of Cable Act provided that any woman citizen who married an alien ineligible for citizenship should cease to be a citizen of the United States. And the fifth section provided that no woman whose husband was not eligible to citizenship should be naturalized during the continuance of the marital status. As the consequence of those provisions, a woman's right to acquire the citizenship would have been restricted by her marriage[281].

Paragraph 3 Settlement of the Problems by Legislation and Developments Thereafter

Those problems referred to above had been settled by legislations or other measures since 1930.

In 1930, Congress established an Act to amend the Cable Act[282].

That Act consists of three sections. The first section repealed the part of the third section of the Cable Act which was relating to the presumption of loss of citizenship by married women by residence abroad. The second section amended the fourth section of the Cable Act so as to provide a simplified re-naturalization procedure of a woman who had lost her United States citizenship by reason of her marriage to an alien eligible to citizenship or by reason of the loss of United States citizenship by her husband. The third section amended the Johnson-Reed Act so as to provide that a woman who had been a citizen of the United States and lost her citizenship by reason of her marriage to an alien, or the loss of United States citizenship by her husband, or by marriage to an alien and residence in a foreign country should be allowed to immigrate irrespective of the regional immigration limit, namely, be counted into non-quota immigrants.

In 1931, Congress established an Act to amend the naturalization laws[283]. The fourth section of the act amended the Cable Act by repealing the part of the third section of the Cable Act which provided that a woman who married an alien not eligible to citizenship should lose her citizenship. Besides, it repealed also the part of the fifth section of

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280 Bredbenner 134.

281 Bredbenner 135. In the book, there are explained some inconvenient cases, for example, a case in which a woman who had been a natural-born citizen of the United States lost her citizenship because her husband could not satisfy the requirements for acquisition of citizenship of the United States on account of his race.

Besides, other cases concerning the same problem were pointed out in another literature.(Cott 92) Namely,

- A Chinese female citizen of the United States who was born in the United States was deemed as a Chinese subject because of her marriage to a Chinese man and rejected to enter the United States because she was a Chinese and, moreover, she was denied naturalization in the United States because of her race.
- A woman who married a man of India who had been naturalized in the United States became stateless because her husband's naturalization was revoked on the ground that an Indian should not be classified as "white person".

282 46 Stat. 854. The formal title of the Act is: An Act to amend the Law relative to the citizenship and naturalization of married women, and for other purposes. Besides, on the same day, Congress established an Act which restricted the expulsion of a woman who satisfied the racial requirements for naturalization and had married a soldier born in the United States who served in the World War I. 46 Stat. 849. The formal name the act is: An Act To amend an Act entitled "An Act relative to naturalization and citizenship of married women." approved September 22, 1922. As for details of those acts, see Bredbenner 122, 168.

283 46 Stat. 1511 (1931). The formal title of the Act is: An Act to Amend the naturalization laws in respect of posting notices of petitions for citizenship, and for other purposes.

Cable Act which provided that no woman who had married a husband not eligible to citizenship should be naturalized during the continuance of the marital status. By all those, a female citizen of the United States would no longer lose her citizenship by her marriage to a foreigner who was not permitted to be naturalized, and even a woman who had already lost her citizenship by her marriage to a foreigner whose naturalization was not permitted, had become able to acquire her citizenship again by an ordinary naturalization process[284].

Moreover, the Congress of 1932 amended the Johnson-Reed Act established in 1924. By the amendment, a husband who was a foreigner and married to a citizen of the United States prior to July 1 of 1932 was permitted to immigrate irrelevant to the regional quota of immigrants. Further, an alien husband who had married a citizen of the United States on or after July 1 of 1932 would be treated as a preferred immigrant[285].

In 1934, Congress amended the second section of Cable Act so that a husband of a citizen of the United States also became eligible for the citizenship of the United States through a little simplified naturalization process similar to a wife of a citizen of the United States[286]. In relation to that, on July 13 of the same year, the United States concluded a Convention concerning equality of nationalities among countries joining in Organization of American States[287], which prohibited discriminatory legislation on nationality on account of sex.

In 1936, Congress established an Act to repatriate women who had been a citizen of the United States but had lost it by marriage to a foreigner before the establishment of the Cable Act and whose marital relation was dissolved thereafter[288]. That act provided that such a woman should recover the citizenship by taking an oath prescribed in the provision before a court exercising the naturalization jurisdiction within the United States, or before the consul when outside of the jurisdiction of the United States.

In 1940, Congress established the Nationality Act which comprehensively aggregated the laws concerning nationality scattered over various places before then[289]. The section 317 of the act provided the procedure for repatriation by a woman who had lost her citizenship by marriage to an alien before the establishment of Cable Act[290]. Clause (a) of the section provided that a person who had been a citizen of the United States and lost United States citizenship by marriage to an alien might, if no other nationality was acquired by affirmative act other than such marriage, be naturalized upon compliance with all requirements of the naturalization laws through some simplified naturalization procedure[291]. Next, clause (b) of the same section provided that a woman, who had been a citizen of the United States at birth and who had or was believed to have lost her United States citizenship by reason of her marriage to an alien, if no other nationality was acquired by affirmative act other than such marriage, should be deemed to be a citizens of the United States from and after the taking of the oath of allegiance to the United States.

Moreover, the section also provided that citizenship recovered through naturalization provided in the section should be

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284 The same conditions were applied also to a woman who was racially not permitted to be naturalized. Ernest J. Hover, Citizenship of Women in the United States, 26 Am. J. Intl. L. 700, 718 (1932).

285 An Act to exempt from the quota husbands of American citizens. 47 Stat. 656.

286 48 Stat. 797 (1934). The formal title of the Act is: An Act to amend the law relative to citizenship and naturalization, and for other purposes. By this Act, in addition to the point referred to above, following points were amended:
- Although it had been provided that children whose fathers were citizens of the United States would become citizens of the United States (R. S. 1993), children of female citizens of the United States should also get their citizenships.
- Concerning the acquisition of citizenship of children by the naturalization or the resumption of citizenship of the parent, the previous wording “by virtue of the naturalization of or resumption of American citizenship by the parent” was amended to be “by virtue of the naturalization of or resumption of American citizenship by the father or the mother” so as to make it clear that a child could acquire the citizenship by the naturalization etc. of the mother.

287 49 Stat. 2957 (1934) (Convention on the Nationality of Women. O. A. S. Treaty Series No. 4, 38, entered into force Aug. 29, 1934. cited as Edwina Austin Avery ed. Law Applicable to Immigration and Nationality, 1256 (GPO 1953)).

288 49 Stat. 1917 (1936). The formal title is: An Act to repatriate native-born women who have heretofore lost their citizenship by marriage to an alien, and for other purposes.

289 54 Stat. 1137. The formal title is: To revise and codify the nationality laws of the United States into comprehensive nationality code.

290 54 Stat. 1137, 1146.

291 For the recovery of citizenship of such women, following procedures could be omitted, that is, declaration of intention, certificate of arrival and certain period of residence within the United States. Id. (Sec. 317. (a)(1))

the same citizenship status as that which existed immediately prior to the loss, so that when a woman who was native born American citizen and lost it by her marriage to an alien was repatriated through naturalization procedure, such a woman would no longer expose herself to the risk of the revocation of the naturalization as a normal naturalized citizen[292].

After that, in 1946, Congress established an Act[293] in which a Chinese wife of an American citizen was permitted to immigrate as a non-quota immigrant, and then, in 1948, an Act[294] in which husbands of American citizens were permitted to immigrate as non-quota immigrants[295,296].

Section 4 Woman and Civil Rights and Duties

There are many issues concerning the relation between women and civil rights and duties. This article will give an outline of the situation regarding the enjoyment of civil rights by women during the early period of the United States of America. After that, this article will examine the relation between women and civil duties, especially from the viewpoint of a female jury and military service by women.

Subsection 1 Conditions of Women at Early Period of the United States

Paragraph 1 Understanding in Blackstone's Commentaries

Regarding the conditions married women were placed in under Common Law, Blackstone stated in his Commentaries of 1803 edition as follows.

First, generally on the change of the conditions of the rights of women by marriage, Blackstone stated "by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-french a feme-covert, faemina viro co-operata; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquires by the marriage"[297].

Next, Blackstone examined some concrete points concerning the legal capacity of a wife. Blackstone stated concerning the capacity of a wife to become a party of an action, after mentioning the responsibility of a husband[298], "If

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292 However, a literature says that there were still left certain problems, for example, that a woman keeping the marital relation to an alien and a woman having dissolved such a relation were treated differently, or that a woman keeping the marital relation to an alien was required to take naturalization procedure to acquire her citizenship, even in the case in which she should be deemed to be the same as a native born citizen after the repatriation. Bredbenner 192. However, the literature also pointed out that the reason why a woman keeping the marital relation to an alien and a woman having dissolved such a relation were treated separately might be to diminish the number of women with dual nationality. Id., at 196.

293 60 Stat. 975. The formal title of the Act is: An Act to place Chinese wives of American Citizens on a nonquota basis.

294 62 Stat. 241. The formal title of the Act is: An Act to amend the Immigration Act of 1924, as amended.

295 Congress established in 1947 an Act which provided concerning citizen members of the United States armed forces that the alien spouse of an American citizen by a marriage should not be considered as inadmissible because of race. An Act to amend the Act approved December 28, 1945, entitled "An Act to expedite the admission to the United States of alien spouses and alien minor children of citizen members of the United States armed forces", 61 Stat. 401.

296 In the current law, spouses of American citizens, whether husbands or wives, are permitted to immigrate as non-quota immigrants (8 U.S.C.A. 1151(b)(2(A)(i)), and given certain priority also in the naturalization (8 U.S.C.A. 1430(a)). In relation to that, concerning problems in the preferential treatment for spouses of American citizens on immigration or the like, see Janet M. Calvo, Spouse-Based Immigration Law: The Legacies of Coverture, 28 San Diego L. Rev. 593 (1991).

297 II St. George Tucker ed., Blackstone's Commentaries, 442 (Rothman Reprint Inc. 1969)(1803).

298 Id. Blackstone stated there, concerning the relation between a husband and the wife, like following.

- A man could not grant anything to his wife, or entered into covenant with her: for the grant would be to suppose her separate existence.
- A woman might be attorney for her husband; for that implied no separation from, but was rather a representation of, her lord.
- A husband might bequeath anything to his wife by will; for that could not take effect till the coverture was determined by his death.

the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own: neither can she be sued, without making the husband a defendant"[299].

Concerning the property of a wife, Blackstone stated, "in the civil law the husband and wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries: and therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband", while, on the other hand, it also stated, "though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void, or at least voidable; except it be a fine, or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary"[300].Furthermore, Blackstone stated that a wife could not by will devise lands to her husband, unless under special circumstances, for at the time of making it she was supposed to be under his coercion.

Third, concerning the relation between crimes and the status of a wife, Blackstone stated that the law excused her in some felonies, and other inferior crimes, committed by her, through constraint of her husband[301]. Besides, Blackstone stated "the husband also (by the old law) might give his wife moderate correction. ⋯ But, with us, ⋯ this power of correction began to be doubted: and a wife may now have security of the peace against her husband; ⋯ the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior"[302].

Paragraph 2 Understanding by Tucker

Following the part quoted above of Blackstone's comment, Tucker, who edited the Commentaries pointed out following facts concerning the distinction by sex in English law[303].

First, Tucker stated that if a husband kills his wife, it was the same if he killed a stranger or any other person, but if the wife killed her husband, it was regarded by the laws as a much more atrocious crime, as she not only breaks through the restraints of humanity and conjugal affection but threw off all subjection to the authority of her husband. For Tucker, therefore the law treated her crime as a species of treason and condemns her to the same as if she killed the king. Further on this issue, Tucker stated that by the common law all women were denied the benefit of clergy[304]

- The husband was bound to provide his wife with necessaries by law, as much as himself; and if the contracts debts for them, he was obliged to pay them: but for anything besides necessaries, he was not chargeable. Also if a wife eloped, and lived with another man, the husband was not chargeable even for necessaries.
- If the wife be indebted before marriage, the husband was bound afterwards to pay the debt.

299 Id., at 443. After that, Blackstone pointed out followings:
- In criminal prosecutions, the wife might be indicted and punished separately; for the marital union was only a civil union.
- But, in trials of any sort, they were not allowed to be evidence for, or against, each other.

300 Id., at 444.

301 Id. However, Blackstone stated, on the other hand, that such a logic would extend not to treason or murder.

302 Id., at 445.

303 Id.

304 Benefit of clergy; At common law, the privilege of a cleric not to be tried for a felony in the King's Court<in the Middle Ages, any man who could recite the "neck verse" was granted the benefit of clergy>. Although clergy included monks and nuns as well as priests, only in rare cases did women claim or receive benefits of clergy. Congress outlawed benefits of clergy in federal courts in April 1790. It was abolished in England in 1827 but survived even longer in some American States, such as South Carolina, where it was successfully claimed in 1855. Black's Law Dictionary (11th ed.); Formerly a useful device for avoiding the death penalty in English and American criminal law. On producing letters of ordination, the accused clerk was turned over to the local bishop for trial in the bishop's court, which never inflicted the death penalty and frequently moved for acquittal. Later, anyone having the remotest relationship to the church could also claim benefit of clergy. In the 14th century, the royal judges turned this clerical immunity into a discretionary device for mitigating the harsh criminal law by holding that a layman, convicted of a capital offense, might be deemed a clerk and obtain clerical immunity if he could show that he could read, usually the 51st Psalm. The importance of this device was further diminished by the 18th-century practice of transporting persons convicted of capital crimes to the colonies, whether they were entitled to benefit of clergy or not, and it was finally abolished in the early 19th century. Benefit of clergy was adopted in most of the American colonies by judicial practice. Though generally abolished soon after the American Revolution, it persisted in the Carolinas until the mid-19th century. Cf., Encyclopedia Britannica, "benefit of clergy"(https://www.britannica.com/topic/benefit-of-clergy); A privilege by which a clergy could be exempted from ordinary criminal procedure at secular court in certain crimes. One who enjoyed

and that however learnd they were, their sex precluded the possibility of taking holy orders though a man, who could read, and was for the same crime subject only to burning in the hand and few months imprisonment.

Second, Tucker stated on the property rights of women as follows: Intestate personal property was equally divided between males and females but a son though younger than all his sisters was heir to the whole of real property. Besides, he stated in relation to the facts above that a woman's personal property by marriage became absolutely her husband's which at his death he might leave entirely away from her. Furthermore, he stated that by the marriage the husband was the absolute master of the profits of wife's lands during the coverture.

Third, concerning the taxation on women, Tucker stated that with regard to the property of women, there was taxation without representation[305].

Fourth, as to compensation of damage, Tucker stated that a parent could have no reparation by our law from the seducer of his daughter's virtue, but by stating that she was his servant and that by the consequences of the seduction he was deprived of the benefit of her labour, or where the seducer at the same time was a trespasser upon the close or premises of the parent, and concluded that female virtue, by the temporal law, was perfectly exposed to the slanders of malignity and falsehood.

After those considerations, Tucker concluded that female honor, which was dearer to the sex than their lives, was left by the common law to be the sport of an abandoned calumniator.

Paragraph 3 Kent's Commentaries

Commentary by James Kent stated about the situation in which married women were placed as follows[306].

Concerning the effect of marriage to the legal status of woman, Kent stated that by the common law the husband and wife were regarded as one person, and her legal existence and authority in a degree lost or suspended, during the continuance of the matrimonial union.

Then he stated on each concrete issues generally as follows.

First, Kent stated that under law no contracts could be made between the husband and wife, without the intervention of trustees, for she was considered as being sub potestate viri, and incapable of contracting with him, while equity would decree performance of a contract by the husband with his wife.

Second, Kent stated that a wife could not convey lands to her husband, though she might release her dower to his grantee, nor could the husband convey lands by deed directly to the wife, and that, however, the husband might devise lands to his wife, for the instrument was to take effect after his death.

Finally, Kent stated that the general rule was, that the husband became entitled, upon the marriage, to all the goods and chattels of the wife and to the rents and profits of her lands, and he became liable to pay her debts and perform her contracts.

Paragraph 4 Establishment of Married Women's Property Acts

As being seen above, at the establishment time of the United States, a woman fell into the situation where she could not conclude any contracts, nor bring a case before court, nor make a will, and a wife was under the protection and management by the husband concerning the property.

Since the 1830's, so-called Married Women's Property Acts were established in many States, by which the

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the privilege could be subject to the ecclesiastical court where death penalty was never applied even when the crime that one committed deserved death penalty at secular courts. By the end of the fourteenth century, the benefit of clergy had been extended not only to clergies but also to all persons who had some connection to church, and since whether a person had necessary connection to church was decided on whether the person could read, so that practically all persons who could read had become able to enjoy the benefit. See (in Japanese) "benefit of clergy" in Hideo Tanaka (ed.), Dictionary of Anglo-American Law (Tokyo Univ. Pr. 1994).

305 On this problem, Tucker insisted that there seemed at present no substantial reason why single women should be denied the privilege to have representation.

306 II James Kent, Commentaries on American Law, pp.129 (Fred B. Rothman & Co. 1989)(1873).

situation was changed[307,308]. Above all, the Statute of the State of New York which was established in 1848 was deemed as the model statute for the other States' Married Women's Property Acts. The content of the statute of New York was generally as follows[309].

The first and second sections of the act provided that the real property of any female who might hereafter marry, and which she should own at the time of marriage, and the rents, issues, and profits thereof, should not be subject to the sole disposal of her husband, nor be liable for his debts, and should continue her sole and separate property, as if she had been a single female, and that the real and personal property, and the rents, issues, and profits thereof, of any female married, should not be subject to the disposal of her husband; but should be her sole and separate property, as if she had been a single female, except so far as the same might be liable for the debts of her husband heretofore contracted.

Next, the third section of the act provided that any married female might take by inheritance, or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner and with like effect as if she had been unmarried, and the same should not be subject to the disposal of her husband nor be liable for his debts. Furthermore, the fourth section provided that all contracts made between persons in contemplation of marriage should remain in full force after such marriage takes place[310,311].

By the effect of those enactments, the restrictions on the legal status of women based on the status of married women in Common Law had disappeared by the beginning of the twentieth century[312,313] and the issue of the women's enjoyment of rights proceeded to the next stage.

Subsection 2 Women and Jury System

Since the establishment period, the jury system has been considered as a measure for self-government in the United States of America, such that the participation of citizens in the jury system has been thought to be an effective

307 A literature says that the statue for married women's Property was established in the State of Alaska in 1835, then in the State of Mississippi in 1839. Kathleen S. Sullivan, Constitutional Context: Women and Rights Discourse in Nineteenth-Century America, 69 (John Hopkins Univ. Pr. 2007). However, the statutes established at that period did not admit the independence of the property rights of a wife, but only prescribed the range of property to be exempted from bankruptcy and enforcement procedure in the case of the bankruptcy of the family. So, it was rather in order to protect married women than to give married women legal independence. Cf., "American Women: Resources from the Law - State Law Resources- Married women's property laws" Libraryhttps://guides.loc.gov/american-women-law/state-laws#s-lib-ctab-19233885-1

308 From 1870 on, a statute for married women's property was established also in England, in which a wife was admitted the capacity to hold her own property. On this issue, see (in Japanese) "Married Women's Property Acts" in Hideo Tanaka (ed.), Dictionary of Anglo-American Law (Tokyo Univ. Pr. 1994). See also (in Japanese) the same entry words in Takeshi Matsumura et al., The Kenkyusha dictionary of British and American history (Kenkyu-sha 2000).

309 An Act for the more effectual protection of the property of married women, passed April 7, 1848, cited at Winston E. Langley & Vivian C. Fox, Women's Rights - in the United States, 80 (Greenwood Pr. 1994).

310 The act was amended in the next year. The amendment made the third section more detailed and new provision prescribed how to treat the property of a female which was held in trust before marriage. Id., at 82.

311 On the one hand, the establishment of the series of such acts is considered to have contributed to the improvement of the social status of women, but, on the other hand, it is also pointed out that the actual effect of those enactments was to strengthen the domestic role and responsibility of women. Id., at 81; Richard H. Chused, Married Women's Property Law: 1800-1850, 71 Georgetown L. J. 1359, 1369, 1411, 1423 (1983).

It is also pointed out that the practical motivation of those enactments by States was to protect a wife from the creditors of the husband. Join Hoff, Law, Gender, and Injustice - A Legal History of U.S. Women, 122 (N. Y. Pr. 1991). [hereinafter Hoff] (However, Hoff says that though Married Women's Property Acts themselves were not for liberating women from the status of protected persons, they still contained a sign of the destruction of the old institution. Id., at 187.)

312 Hoff, 121, 191. Also cf., Black's Law Dictionary (11th ed.)("married women's property acts"; Statutes enacted to remove a married women's legal disabilities; esp., statues that abolished the common-law prohibitions against a married woman's contracting, suing and being sued, or acquiring, holding, and conveying property in her own right, free from any restrictions by her husband, In addition, these acts abolished the spousal-unity doctrine.).

313 However, it was only in the Kirchberg v. Feenstra case (450 U.S. 455) of 1981 that the Supreme Court judged that a State act which allowed a husband exclusive right of disposition of family properties should be unconstitutional as invading the equality under the law.

way to secure the freedom of the citizens[314]. On this point, the Supreme Court stated in the Powers v. Ohio case[315] that jury service was an exercise of responsible citizenship by all members of the community[316], and that jury service was essential to preserve the democratic element of the law[317].

Paragraph 1 Glasser v. United States Case

The Supreme Court treated the problem of Women and jury system for the first time in Classer v. U. S.[318,319].

Acts of the State of Illinois providing for jury service by women became effective on July 1, 1939. The grand jury for this case, composed entirely of men, was summoned on August 25, 1939. The defendant insisted that the grand jury was illegally constituted because, at the time it was drawn, Illinois law required state jury lists to contain the names of women.

The Supreme Court ruled that in view of the short time elapsing between the effective date of the Illinois Acts and the summoning of the grand jury, it was not error to omit the names of women from federal jury lists where it was not shown that women's names had yet appeared on the state jury lists[320]. However, Supreme Court pointed out in the obiter dicta that it was required that the jury be a "body truly representative of the community," and not the organ of any special group or class[321].

Paragraph 2 Ballard v. United States Case

The Supreme Court treated in the case Ballard v. United States[322] the question whether a jury in a criminal case had to include a female juror.

First, the court opinion pointed out that it was provided in federal codes that jurors in a federal court should have the same qualifications as those of the highest court of law in the State. Then, the court opinion pointed out that Congress also prohibited disqualification of citizens from jury service on account of race, color, or previous condition of servitude, and that it required that jurors should be chosen without reference to party affiliations, and that it provided that jurors should be returned from such parts of the district as the court might direct so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district. Then, Supreme Court continued that none of the specific exemptions which it had created was

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314 Concerning the public opinion at the establishment period, see Federalist No. 83. As a literature which pointed out, it was only male citizens who could become a jury in common law, see III William Blackstone, Commentaries on the Law of England, 362 (Univ. Chicago Pr. 1979)(1765): cf. Justin Miller, The Women Juror, 2 Oregon L. Rev. 30 (1922).

315 499 U.S. 400 (1991). As another case where the Supreme Court ruled that participation in the Jury system should be a privilege and duty of citizens, there is Thiel v. Southern Pac. Co., 382 U.S. 217, 224 (1946).

316 Id. at 402.

317 Id., at 407.

318 315 U.S. 60 (1942).

319 However, before that case, the Supreme Court stated in the case, Strauder v. West Virginia (100 U.S. 303 (1879)) in which the problem of exclusion of colored persons from jurors was treated, following points. In relation to the Fourteenth Amendment,

- The Fourteenth Amendment was designed to assure to the colored race the enjoyment of all the civil rights that, under the law, were enjoyed by white persons, and to give to that race the protection of the general government in that enjoyment whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions(Id., at 306).
- It could not be said that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State had expressly excluded every man of his race, because of color alone, however well qualified in other respects, was not a denial to him of equal legal protection (Id., at 309).

However, following those judgements, the Supreme Court stated that a State might confine the selection of its jurors to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications, which the Fourteenth Amendment was never intended to prohibit(Id., at 310).

320 315 U.S. 60, 65.

321 Id., at 86.

322 329 U.S. 187 (1946).

along the lines of sex[323], and stated that these provisions reflected a design to make the jury "a cross-section of the community," and truly representative of it[324].

Second, the court opinion pointed out that in California where the case was brought before the court, women were eligible for jury service under local law and that the system of jury selection adopted by Congress contemplated, therefore, that juries in the federal courts sitting in such States would be representative of both sexes, so that if women were excluded, only half of the available population was drawn upon for jury service[325]. Besides, the court opinion also pointed out that the purposeful and systematic exclusion of women from the panel in the case had been a departure from the scheme of jury selection which Congress had adopted[326].

Third, the court opinion pointed out that, although someone might think that an all-male panel drawn from the various groups within a community would be as truly representative as if women were included on the ground of the thought that the factors which tend to influence the action of women were the same as those which influence the action of men - personality, background, economic status - and not sex, the two sexes were not fungible and a community made up exclusively of one was different from a community composed of both[327].

Finally, the court opinion concluded that the systematic and intentional exclusion of women deprived the jury system of the broad base it had been designed by Congress to have in the democratic society[328]. The judgement of the original court was reversed[329].

Against the court opinion, Justice Burton stated a dissenting opinion[330,331].

First, Justice Burton pointed out that, while the Judicature Act provided, "Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned", there was no constitutional, statutory, or court rule or policy requiring women to be placed on all federal jury lists[332]. Then, the Justice continued on this issue that Congress might have required such a course, and might have set up complete federal qualifications for federal jurors, but it had never done so, and pointed out that the fact was an inescapable recognition by Congress that it saw nothing seriously prejudicial in the continued use of exclusively male federal juries in states where women were not eligible for state jury duty[333].

Second, the justice pointed out that by a general practice of not calling women for jury duty although eligible for such duty, the state courts of California, in effect, had granted women a substantial exemption from that duty, and insisted that the California courts thus had treated men and women as equally qualified, and had assumed that litigants would have an adequate impartial jury, regardless of the sex of the jurors, provided the jurors were otherwise qualified to serve. Then, the justice insisted that while such a state practice was not binding upon the federal courts as

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323 Id., at 191.

324 Id.

325 Id.

326 Id., at 193.

327 Id.

328 Id., at 195. The court opinion stated there that the injury of the exclusion of women from jury panels was not limited to the defendant, but there was injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.

329 Id., at 196.

330 In addition to Justice Burton, Justice Jackson stated a concurring opinion, and Justice Frankfurter stated a dissenting opinion, with whom the Chief Justice, Justice Jackson and Justice Burton concurred.

The concurring opinion of Justice Jackson was irrelevant to our subject, and the dissenting opinion of Justice Frankfurter was in sum that under the circumstances of the case the absence of women from the grand jury panel did not vitiate the indictment.

331 The dissenting opinion of Justice Burton was joined in by the Chief Justice and Justice Frankfurter, and Justice Jackson partially joined in it.

332 329 U.S. 187, 203, 204.

333 Id., at 204.

a matter of law, it was persuasive as indicating that litigants did not need to be treated as having been prejudiced when a Federal District Court had conformed its practice to that of the state[334].

Third, the justice insisted that the error in the federal practice could not be the exclusion of women, as such, because such exclusion not only was permitted, but was required by federal statute in states where they were not eligible for state jury duty, and that the error, if any, had to consist of the failure to require the listing of women, as well as men, for all federal jury service in a state which permitted such listing for state jury service, even though the state regarded such listing as directory to, and not mandatory upon, the state courts[335].

Finally, the justice insisted that the exclusion of women, as such, from jury service not only was in accordance with the traditional practice, but was in accordance with the congressionally approved future practice in the federal and state courts, and he concluded that the only objectionable practice in the case was that, after the State had established a directory system of eligibility of women for state jury service, the federal court did not at once enlarge that policy into a mandatory requirement that all qualified women be placed upon all federal jury lists[336].

Paragraph 3 Fay v. People of State of New York Case

In the following year of the judgement described above, the Supreme Court judged on the same problem in the case, Fay v. People of State of New York[337]. In this case, a requirement to be elected for so-called blue ribbon jury[338] was questioned.

The court opinion pointed out that the question was whether a warranted conviction by a jury individually accepted as fair and unbiased should be set aside on the ground that the makeup of the panel from which they had been drawn unfairly narrowed the choice of jurors and denied defendants due process of law or equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution. Then, the court opinion stated generally as follows.

First, against the defendants' insistence of unconstitutionality to systematically and intentionally exclude women from the blue ribbon jury, the court opinion pointed out that in women the statute of the State of New York were equally qualified with men, but they did not have a duty to become a juror[339]. Then, the court opinion stated that, though only those who volunteered or were suggested as willing to serve by other women or by organizations, including the League of Women Voters, were subpoenaed for examination, the evidence did not show that women were excluded from the special jury[340].

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334 Id., at 205.

335 Id., at 206.

336 Id.

337 332 U.S. 261 (1947).

338 In the case, the words "blue ribbon jury" were used. Black's Law Dictionary (11th ed.) wrote as follows; A jury consisting of jurors who are selected for their special qualities, such as advanced education or special training, sometimes used in a complex civil case(usu. By stipulation of the parties) and sometimes also for a grand jury(esp. one investigating governmental corruption). According to Dictionary of Anglo-American Law (Hideo Tanaka ed., Tokyo Univ. Pr. 1994), Blue Ribbon Jury is the same as a special Jury, and Special Jury is explained as a Jury consisted of jurors who have certain social status or profession in addition to ordinary qualifications.

339 According to the explanation by the court opinion, "to qualify as a juror, a person must be an American citizen and a resident of the county; not less than 21 nor more than 70 years old; the owner or spouse of an owner of property of the value of $ 250; in possession of his or her natural faculties and not infirm or decrepit; not convicted of a felony or a misdemeanor involving moral turpitude; intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly", and "women are equally qualified with men, but, as they also are granted exemption, a woman drawn may serve or not, as she chooses" (332 U.S. 261, 266).

Concerning the blue ribbon jury, the statute of the State of New York provided that special jurors were selected from those accepted for the general panel by the county clerk, but only after each had been subpoenaed for personal appearance and had testified under oath as to his qualification and fitness. And it also provided that all who claimed and were allowed exemption from general service could be eliminated (Id., at 267).

According to the explanation given by the court opinion, the special jury panel was part of the regular machinery of trial in counties of one million or more inhabitants (Id., at 268).

340 332 U.S. 261, 277.

Second, the court opinion stated that, while the defendants insisted that the exclusion of women from a jury violated due process provided by the Fourteenth Amendment, it was true that the proportion of women on the jury panels did not equal their proportion of the population, but it had a historical reason[341]. The court opinion continued that the contention that women should be on the jury was not based on the Constitution, but based on a changing view of the rights and responsibilities of women in our public life. Then, the court opinion stated that the Court might insist on their inclusion on federal juries where, by state law, they were eligible, but woman jury service had not so become a part of the textual or customary law of the land that one convicted of crime had to be set free by the Court if his state had lagged behind what the justices of the Court personally might regard as the most desirable practice in recognizing the rights and obligations of womanhood[342].

In the end, the court opinion rejected the insistence of the defendants and affirmed the original judgement[343].

Against the court opinion, Justice Murphy stated a dissenting opinion. The dissenting opinion of Justice Murphy stated that the equal protection clause of the Fourteenth Amendment prohibited a state from convicting any person by use of a jury which was not impartially drawn from a cross-section of the community, which meant that juries had to be chosen without systematic and intentional exclusion of any otherwise qualified group of individuals. Then, the justice stated that he believed that the constitutional standard of jury selection had been ignored in the creation of the so-called "blue ribbon" jury panel in this case[344].

Paragraph 4 Civil Rights Act of 1957 and Hoyt v. Florida Case

In 1957, Congress established the Civil Rights Act of 1957[345]. In that Act, the qualification requirements of a juror in federal courts were distinguished from those of a juror in State courts, and women were permitted to serve on juries in federal courts[346,347].

After that, the Supreme Court treated again the problem of women's qualification for juries in the case, Hoyt v. Florida[348] of 1961. In the case, the defendant(appellant) who was a woman and who killed her husband was convicted in a Florida state court of second-degree murder, insisted that her trial before an all-male jury violated her rights under the Fourteenth Amendment.

The court opinion stated, as the premise, that while the statute of the State of Florida required that grand and petit jurors be taken from "male and female" citizens of the State possessed of certain qualifications, it contained the following proviso: "provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list." Then the court

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341 On this issue, the court opinion summarized as follows: The first state to permit women jurors was Washington, and it did not do so until 1911. In 1942, only 28 States permitted women to serve on juries, and they were still disqualified in the other 20. Moreover, in 15 of the 28 States which permitted women to serve, they might claim exemption because of their sex (Id., at 289).

However, in the case, Taylor v. Louisiana (419 U.S. 522 (1975)), the Supreme Court said that the first State in the United States that permitted women to serve on juries was the State of Utah and it was in 1898 (Id., at 536).

342 322 U.S. 261, 290.

343 Id., at 296.

344 Id.

345 71 Stat. 634 (1957). The formal title of the act is: An Act to Provide means of further securing and protecting the civil rights of persons within the jurisdiction of the United States.

346 Joanna L. Grossman, Notes Women's Jury Service: Right of Citizenship or Privilege of Difference?, 46 Stan. L. Rev. 1115, 1138 (1994); I Suzanne O'Dea Schenken, Form Suffrage to the Senate - An Encyclopedia of American Women in Politics, 368 (ABC-CLIO 1999).

347 However, the Act did not explicitly give women the qualification to become jurors. cf. 71 Stat. 634, 638.

Moreover, an act of 1968 (An Act to provide improved judicial machinery for the selection of federal juries, and for other purposes, 82 Stat. 53 (1968)) provided, "Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries". 82 Stat. 53, 60.

348 368 U.S. 57 (1961).

opinion pointed out that, since the enactment of the statute, only a minimal number of women had so registered, so appellant challenged the constitutionality of the statute both on its face and as applied in the case[349].

Next, the court opinion stated that manifestly, Florida's statute did not purport to exclude women from state jury service, and that rather, the statute gave to women the privilege to serve, but did not impose service as a duty. Then, the court opinion continued that it could not be said that what in form might be only an exemption of a particular class of persons could in no circumstances be regarded as an exclusion of that class, and that where an exemption of a class in the community was asserted to be in substance an exclusionary device, the relevant inquiry was whether the exemption itself was based on some reasonable classification and whether the manner in which it was exercisable rested on some rational foundation[350].

Then, the court opinion pointed out that in the selection of jurors, Florida had differentiated between men and women in two respects. Concretely, the court opinion pointed out that it has given women an absolute exemption from jury duty based solely on their sex, no similar exemption obtaining as to men, and that it had provided for its effectuation in a manner less onerous than that governing exemptions exercisable by men[351].

On those points, however, the court opinion stated, they could in neither respect conclude that Florida's statute was not based on some reasonable classification and that it was thus infected with unconstitutionality. As the reason, the court opinion stated that despite the enlightened emancipation of women from the restrictions and protections of bygone years and their entry into many parts of community life formerly considered to be reserved to men, woman was still regarded as the center of home and family life, so that they could not say that it was constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determined that such service was consistent with her own special responsibilities[352].

Moreover, the court opinion stated that, although appellant argued that the statute, in practical operation, resulted in an exclusion of women from jury service, because women, like men, could be expected to be available for jury service only under compulsion and, in fact, only few women were registered for juries, the argument was beside the point because the relative paucity of women jurors did not carry the constitutional consequence appellant would have it bear, for circumstances or chance might well dictate that no persons in a certain class would serve on a particular jury or during some particular period[353].

In the end, the court opinion rejected the insistence of the defendant(appellant). There was a concurring opinion by the Chief Justice, Justice Black, and Justice Douglas, which also stated that no sexual discrimination could be found in the jury system of Florida[354].

Paragraph 5 Alexander v. Louisiana Case

In 1972, the Supreme Court judged the case, Alexander v. Louisiana[355], in which petitioner, a Negro, appealed his rape conviction in Lafayette Parish, which had been affirmed by the Louisiana Supreme Court, contending that the grand jury selection procedures followed in his case had been invidiously discriminatory against Negroes and, because of a statutory exemption provision, against women[356].

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349 Id., at 58.

350 Id., at 60–61.

351 Id., at 61.

352 Id., at 62. The court opinion pointed out, following that, that Florida was not alone in so concluding, and continued that women were now eligible for jury service in all but three States of the Union, that of the forty-seven States where women were eligible, seventeen besides Florida, as well as the District of Columbia, had accorded women an absolute exemption based solely on their sex, exercisable in one form or another, and that in two of these States, as in Florida, the exemption was automatic, unless a woman volunteers for such service.

353 Id., at 64.

354 Id., at 69.

355 406 U.S. 625 (1972).

356 In the case, in addition to the insistence that women were excluded from juries, the petitioner also insisted that black people were

The court opinion stated that the strong constitutional and statutory policy against racial discrimination had permitted Negro defendants in criminal cases to challenge the systematic exclusion of Negroes from the grand juries that indicted them, and that those groups arbitrarily excluded from grand or petit jury service were themselves afforded an appropriate remedy[357]. However, at the same time, the court opinion pointed out that there was nothing in past adjudications suggesting that male petitioner himself had been denied equal protection by the alleged exclusion of women from grand jury service[358].

In the case, Justice Douglas stated a concurring opinion[359].

The justice insisted that the time had come to reject the dictum in Strauder v. West Virginia[360] that a State might confine jury service to males. Then, the justice stated that to exclude women as a class from jury rolls violated petitioner's constitutional right to an impartial jury drawn from a group representative of a cross-section of the community[361]. Then, Justice Douglas pointed out that there were no women on the venire from which the jury was chosen, and that while the venire had been selected from returns to questionnaires sent to parish residents, not a single one of the some 11,000 questionnaires was even sent to a woman. The justice concluded from those facts that a systematic exclusion had operated with respect to the jury lists in the case[362].

Besides, the justice stated that the absolute exemption provided by Louisiana, and no other State, betrayed a view of a woman's role which could not withstand scrutiny under modern standards[363]. The justice insisted as the reason of the judgement that classifications based on sex were no longer insulated from judicial scrutiny by a legislative judgment that "woman's place is in the home," or that woman was, by her "nature," ill-suited for a particular task, and that such a type of thought should be firmly disapproved.

Furthermore, on this issue, against the insistence of Louisiana that women were not totally excluded from service, but they might volunteer, or that it was impractical to require women affirmatively to claim the statutory exemption because of the large numbers who would do so, the justice insisted that neither man nor woman could be expected to volunteer for jury service, so that the automatic exemption, coupled with the failure even to apprise parish women of their right to volunteer, resulted in as total an exclusion as would have obtained if women had not been permitted to serve at all[364].

Paragraph 6 Taylor v. Louisiana Case

In 1975, the Supreme Court judged the case, Taylor v. Louisiana[365], in which the appellant, a male, had been convicted of a crime by a petit jury selected from a venire on which there had been no women and which was selected pursuant to a system resulting from Louisiana constitutional and statutory requirements that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service. The appellant insisted the unconstitutionality of such a jury selection.

The court opinion first recognized that, when this case had been tried, the Louisiana Constitution and the Louisiana Code of Criminal Procedure provided that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service[366]. Then, the court opinion stated that the Louisiana jury selection system did not disqualify women from jury service, but, in operation, its conceded systematic impact was that only a very few women, grossly disproportionate to the number of eligible women in the community, were

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actually excluded from the grand jury. Id., at 626.

357 Id., at 633.

358 Id. However, this point was irrelevant to the conclusion of the judgement.

359 Id., at 634.

360 100 U.S. 303, 310 (1879).

361 405 U.S. 625, 635.

362 Id., at 638.

363 Id., at 639.

364 Id., at 643.

365 419 U.S. 522 (1975).

366 Id., at 523.

called for jury service and that the Court should consider whether the Louisiana jury selection system had deprived appellant of his Sixth and Fourteenth Amendment right to an impartial jury trial[367]. The court opinion, then, concluded that Louisiana's special exemption for women operated to exclude them from petit juries, which was contrary to the command of the Sixth and Fourteenth Amendments[368]. The court opinion stated there as follows.

First, against the insistence by the State of Louisiana that the appellant, a male, had no standing to object to the exclusion of women from his jury, the court opinion stated that the appellant's claim, however, was that he was constitutionally entitled to a jury drawn from a venire constituting a fair cross-section of the community and that the jury that tried him was not such a jury by reason of the exclusion of women. Then, the court opinion stated that the appellant was not a member of the excluded class, but there was no rule that claimed such as Taylor presented might be made only by those defendants who were members of the group excluded from jury service, so that the appellant was entitled to the issue[369].

Second, the court opinion stated that the fair cross-section requirement was fundamental to the jury trial guaranteed by the Sixth Amendment[370], and that the fair cross-section requirement was violated by the systematic exclusion of women, who, in the judicial district involved here, amounted to 53% of the citizens eligible for jury service[371].

Third, concerning the argument that women as a class served a distinctive role in society and that jury service would so substantially interfere with that function that the State has ample justification for excluding women from service unless they volunteer, even though the result was that almost all jurors are men, the court opinion stated generally as follows. The court opinion stated that the States were surely free to grant exemptions from jury service to individuals in case of special hardship or incapacity and to those engaged in particular occupations the uninterrupted performance of which was critical to the community's welfare, and that such exemptions would not pose substantial threats that the remaining pool of jurors would not be representative of the community. Then, the court opinion continued that a system excluding all women, however, was a wholly different matter and that it was untenable to suggest those days that it would be a special hardship for each and every woman to perform jury service or that society could not spare any women from their present duties. Moreover, the court opinion stated that it might be burdensome to sort out those who should be exempted from those who should serve, but that task was performed in the case of men, so that the administrative convenience in dealing with women as a class was insufficient justification for diluting the quality of community judgment represented by the jury in criminal trial[372].

Fourth, the court opinion summarized the short history and the state at that time surrounding women and jury system as follows. First, the court opinion pointed out that no case had squarely held that the exclusion of women from jury venires deprived a criminal defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross-section of the community. It also pointed out that it was apparent that the first Congress did not perceive the Sixth Amendment as requiring women on criminal jury panels, for the direction of the First Judiciary Act of 1789 had been that federal jurors were to have the qualifications required by the States in which the federal court was sitting, and, at the time, women were disqualified under State law in every State.

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367 Id., at 525.

368 There was presented in the case a dissenting opinion by Justice Rehnquist. Id., at 538. The dissenting opinion by Justice Rehnquist stated that the complete swing of the judicial pendulum from the Hoyt v. Florida case 13 years later should depend for its validity on the proposition that, during those years, things had changed in constitutionally significant ways, but he was not persuaded of the sufficiency of either of the majority's proffered explanations as to intervening events, namely, social changes encompassing both their higher degree of sensitivity to distinctions based on sex, and the evolving nature of the structure of the family unit in American society. Then, he insisted that constitutional adjudication should be a more canalized function than enforcing as against the States the Court's perception of modern life.

369 Id., at 526.

370 Id., at 530. The court opinion stated there that community participation in the administration of the criminal law was not only consistent with our democratic heritage, but was also critical to public confidence in the fairness of the criminal justice system, and that restricting jury service to only special groups or excluding identifiable segments playing major roles in the community could not be squared with the constitutional concept of jury trial.

371 Id., at 531. In the case, no women were on the venire from which the petit jury was drawn. Id., at 524.

372 Id., at 534.

Then, the court opinion stated that necessarily, then, federal juries in criminal cases were all male, and that it was not until the Act of 1957[373] that Congress itself provided that all citizens, with limited exceptions, were competent to sit on federal juries. Moreover, the court opinion continued, Hoyt v. Florida[374] was decided and had stood for the proposition that, even if women as a group could not be constitutionally disqualified from jury service, there was ample reason to treat all women differently from men for the purpose of jury service and to exclude them unless they volunteered.

However, the court opinion ruled that the view that the Sixth Amendment afforded the defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community, it was no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence was that criminal jury venires were almost totally male[375].

Then, the court opinion stated that, if it had been ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time had long since passed. The court opinion continued that if it could have been held in a past that Sixth Amendment juries had to be drawn from a fair cross-section of the community but that this permitted the almost total exclusion of women, this was not tenable[376].

Finally, the court opinion ruled that, although the States remained free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it might be fairly said that the jury lists or panels were representative of the community, Louisiana's special exemption for women operated to exclude them from petit juries, which should be considered to be contrary to the command of the Sixth and Fourteenth Amendments[377].

Paragraph 7 Duren v. Missouri Case

In the same year, 1975, the Supreme Court confirmed in the case, Daniel v. Louisiana[378], that the legal principle of Taylor v. Louisiana[379] case should not be applied retroactively.

After that, in the case, Duren v. Missouri[380] the Supreme Court judged again on the relation between women and jury system. In the case, the petitioner contended that his right to trial by a jury chosen from a fair cross-section of his community had been denied by provisions of Missouri law granting women who so request an automatic exemption from jury service.

The court opinion first confirmed the principle of Taylor v. Louisiana case, namely, that systematic exclusion of women during the jury selection process, resulting in jury pools not reasonably representative of the community, denied a criminal defendant his right, under the Sixth and Fourteenth Amendments, to a petit jury selected from a fair cross-section of the community[381].

Then, the court opinion stated that Missouri continued to exempt women from jury service upon request, and that the Court held that such systematic exclusion of women that resulted in jury venires averaging less than 15% female violated the Constitution's fair cross-section requirement[382].

After that, the court opinion stated as follows[383].

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373 Civil Rights Act of 1957, 71 Stat. 634, 638.

374 368 U.S. 57 (1961).

375 419 U.S. 522, 536. The court opinion concluded there that to the extent described in the body text, they could not follow the contrary implications of the prior cases, including Hoyt v. Florida.

376 Id., at 537.

377 Id.

378 420 U.S. 31 (1975).

379 419 U.S. 522 (1975).

380 439 U.S. 357 (1979).

381 Id., at 359.

382 Id., at 360.

383 In the case, Justice Rehnquist indicated followings in his dissenting opinion.

- If the Court ultimately concluded that men and women should be treated exactly alike for purposes of jury service, it would have imposed substantial burdens upon many women, particularly in less populated areas, without necessarily producing any corresponding increase in the representative character of jury panels. If it ultimately concluded that a percentage of women on

The court opinion stated that, in order to establish a prima facie violation of the fair cross-section requirement, the defendant had to show (1) that the group alleged to be excluded was a "distinctive" group in the community; (2) that the representation of this group in venires from which juries were selected was not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation was due to systematic exclusion of the group in the jury selection process[384]. Then, the court opinion examined those three points.

First, on the issue (1), the court opinion stated that the Taylor case, without doubt, had established that women "are sufficiently numerous and distinct from men" so that, "if they are systematically eliminated from jury panels, the Sixth Amendment's fair cross-section requirement cannot be satisfied."[385]

Second, on the issue (2), the court opinion stated that given petitioner's proof that in the relevant community 54% of the adults were women, the Court had to disagree with the conclusion of the court below that jury venires containing approximately 15% women were "reasonably representative" of this community, and that such a gross discrepancy between the percentage of women in jury venires and the percentage of women in the community required the conclusion that women had not been fairly represented in the source from which petit juries had been drawn in the County[386].

Third, on the issue (3), the court opinion pointed out that, in order to establish a prima facie case, it was necessary for petitioner to show that the underrepresentation of women, generally and on his venire, was due to their systematic exclusion in the jury selection process. Then, the court opinion stated as follows. The court opinion pointed out that there was no indication that underrepresentation of women occurred at the first stage of the selection process - the questionnaire canvass of persons randomly selected from the relevant voter registration list, and that, however, the first sign of a systematic discrepancy was at the next stage - the construction of the jury wheel from which persons are randomly summoned for service. The court opinion continued that less than 30% of those summoned had been female, demonstrating that a substantially larger number of women answering the questionnaire claimed either ineligibility or exemption from jury service. Moreover, the court opinion pointed out that at the summons stage, women were not only given another opportunity to claim exemption, but also were presumed to have claimed exemption when they did not respond to the summons. Then, the court opinion concluded that the percentage of women at the final, venire, stage was much lower than the percentage of women who were summoned for service, in view of which the resulting disproportionate and consistent exclusion of women from the jury wheel and at the venire stage was quite obviously due to the system by which juries were selected[387].

Fourth, the court opinion stated that in order to justify the right to a proper jury could not be overcome on merely rational grounds, and that, rather, it required that a significant State interest be manifestly and primarily advanced by those aspects of the jury selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group. The court opinion, then, stated that, however, the State of Missouri did not show such conditions[388].

Fifth, the court opinion admitted that the Court recognized that a State might have an important interest in assuring that those members of the family responsible for the care of children were available to do so, and that an exemption appropriately tailored to that interest would survive a fair cross-section challenge. However, the court opinion insisted that the constitutional guarantee to a jury drawn from a fair cross-section of the community required that States exercised proper caution in exempting broad categories of persons from jury service. Besides, the court opinion stated

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jury panels greater than 15% but substantially less than 50% was permissible even though the State's jury selection system permitted women, but not men, to "opt out" of jury service, it was simply playing a constitutional numbers game (Id., at 374).

- If the jury selection process should be done according to what the court opinion showed, then the probability would be that today's decision would cause States to abandon not only gender-based, but also occupation-based, classifications for purposes of jury service. If so, the troubles would take place (Id., at 376).

384 439 U.S. 357, 364.

385 Id.

386 Id.

387 Id., at 366.

388 Id., at 367.

that although most occupational and other reasonable exemptions might inevitably involve some degree of overinclusiveness or underinclusiveness, any category expressly limited to a group in the community of sufficient magnitude and distinctiveness so as to be within the fair cross-section requirement - such as women - ran the danger of resulting in underrepresentation sufficient to constitute a prima facie violation of that constitutional requirement[389].

Paragraph 8 J. E. B. v. Alabama ex rel. T. B. Case

In 1994, the Supreme Court judged the case, J. E. B. v. Alabama ex rel. T. B.[390]. In the original action, the mother of a minor child, respondent State of Alabama filed a complaint for paternity and child support against petitioner J. E. B..

In consisting the jury, the State used 9 of its 10 peremptory strikes to remove male jurors, so that all the selected jurors were female. Petitioner objected to the State's peremptory challenges on the ground that they were exercised against male jurors solely on the basis of gender, in violation of the Equal Protection Clause of the Fourteenth Amendment.

The trial court and the court of appeals rejected the insistence of the petitioner, and found petitioner to be the father of the child in question, and the trial court ordered him to pay child support. Against it, the Supreme Court granted certiorari.

The court opinion of the case stated that intentional discrimination on the basis of gender by state actors violated the Equal Protection Clause, particularly where, as in the case, the discrimination served to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women[391], and then the court opinion argued as follows.

First, the court opinion pointed out that the Court consistently had subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly were based on reasonable considerations in fact might be reflective of "archaic and overbroad" generalizations about gender, or based on "outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas.""

Then, the court opinion stated that, while respondent suggested that gender discrimination in this country had never reached the level of discrimination against African-Americans, and therefore gender discrimination was tolerable in the courtroom, it was true, the prejudicial attitudes toward women in the country had not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, overpowered those differences. Moreover, the court opinion pointed out that, with respect to jury service, African-Americans and women shared a history of total exclusion[392].

Moreover, the court opinion stated that their nation had had a long and unfortunate history of sex discrimination, which warranted the heightened scrutiny they afforded all gender-based classifications[393]. Then, the court opinion stated that the only question was whether discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in achieving a fair and impartial trial, and that it was necessary to be examined whether peremptory challenges based on gender stereotypes provided substantial aid to a litigant's effort to secure a fair and impartial jury.

Then, the court opinion ruled, from the viewpoint above, as follows, namely: Although the respondent State maintained that its decision to strike virtually all the males from the jury in this case "may reasonably have been based upon the perception, supported by history, that men otherwise totally qualified to serve upon a jury in any case might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child", the Court should not accept as a defense to gender-based peremptory challenges "the very stereotype the law condemns."[394]

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389 Id., at 370.

390 511 U.S. 127 (1994).

391 Id., at 130.

392 Id., at 135, 136.

393 Id., at 136.

394 Id., at 137. The court opinion mentioned there that the State's rationale, not unlike those regularly expressed for gender-based strikes, was reminiscent of the arguments advanced to justify the total exclusion of women from juries, and that from the view of

Besides, the court opinion stated that discrimination in jury selection, whether based on race or on gender, caused harm to the litigants, the community, and the individual jurors who were wrongfully excluded from participation in the judicial process[395].

In addition, the court opinion pointed out that when state actors exercised peremptory challenges in reliance on gender stereotypes, they ratified and reinforced prejudicial views of the relative abilities of men and women[396]. Then, the court opinion stated that equal opportunity to participate in the fair administration of justice was fundamental to their democratic system, and that it did not only further the goals of the jury system, but did reaffirm the promise of equality under the law - that all citizens, regardless of race, ethnicity, or gender, had the chance to take part directly in our democracy[397].

There were presented in the case concurring opinions by Justice O'Connor and Justice Kennedy as well as dissenting opinions by Justice Rehnquist and Justice Scalia[398].

Among them, the concurring opinion by Justice Kennedy indicated the following points.

Justice Kennedy pointed out that, for purposes of the Equal Protection Clause, an individual denied jury service because of a peremptory challenge exercised against one on account of one's sex was no less injured than the individual denied jury service because of a law banning members of her sex from serving as jurors[399].

Then, Justice Kennedy stated that the Court did not prohibit racial and gender bias in jury selection only to encourage it in jury deliberations, and that once seated, a juror should not give free rein to some racial or gender bias of his or her own.

Moreover, the justice stated that a juror sat not as a representative of a racial or sexual group but as an individual

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the fact that while the State offered virtually no support for the conclusion that gender alone was an accurate predictor of juror's attitudes, it urged the Court to condone the same stereotypes that justified the wholesale exclusion of women from juries and the ballot box, the State seemed to assume that gross generalizations that would be deemed impermissible if made on the basis of race were somehow permissible when made on the basis of gender. Id., at 138.

395 Id., at 140. On this issue, the court opinion stated that the litigants were harmed by the risk that the prejudice that motivated the discriminatory selection of the jury would infect the entire proceedings, and that the community was harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engendered. Id.

Moreover, the court opinion stated in the later part that all persons, when granted the opportunity to serve on a jury, had the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflected and reinforced patterns of historical discrimination, and continued that striking individual jurors on the assumption that they held particular views simply because of their gender was practically a brand upon them, affixed by the law, an assertion of their inferiority (Id., at 141), which denigrated the dignity of the excluded juror, and, for a woman, re-invoked a history of exclusion from political participation (Id., at 142.).

396 Id., at 140.

397 Id., at 145.

398 The concurring opinion by Justice O'Connor stated, the very reason why they cherished the peremptory challenge was that the lawyer would often be unable to explain the intuition on which experienced lawyers would often correctly judge which jurors were likely to be the least sympathetic, for lawyers might be deterred from using their peremptories, out of the fear that if they were unable to justify the strike the court would seat a juror who knew that the striking party thought him unfit, so that the decision of the case should be limited to a prohibition on the government's use of gender-based peremptory challenges. Id., at 148, 150.

The dissenting opinion by Justice Rehnquist stated that the two sexes differed, both biologically and, to a diminishing extent, in experience, so that use of peremptory challenges on the basis of sex was generally not the sort of derogatory and invidious act which peremptory challenges directed at black jurors might be. Id., at 156.

The dissenting opinion by Justice Scalia pointed out that, although the Court treated itself to an extended discussion of the historic exclusion of women not only from jury service, but also from service at the bar, it was irrelevant, since the case involved state action that allegedly discriminated against men (Id., at 157.), that by the decision of the court opinion damage had been done to the peremptory challenge system, on which it was said that it had to be exercised with full freedom or it failed of its full purpose (Id., at 161), and that damage had been done, secondarily, to the entire justice system, which would bear the burden of the expanded quest for reasoned peremptories that the Court demanded, for every case contained a potential sex-based claim (Id., at 162). Then, Justice Scalia insisted that not to eliminate any real denial of equal protection, but simply to pay conspicuous obeisance to the equality of the sexes, the Court imperiled a practice that had been considered an essential part of fair jury trial since the dawn of the common law. Id., at 163.

399 Id., at 153. The justice stated there that the neutrality of the Fourteenth Amendment's guarantee was confirmed by the fact that the Court had no difficulty in finding a constitutional wrong in this case, which involved males excluded from jury service because of their gender.

citizen, and that nothing would be more pernicious to the jury system than for society to presume that persons of different backgrounds went to the jury room to voice prejudice. The justice continued that the jury pool had to be representative of the community, but that was a structural mechanism for preventing bias, not enfranchising it. Then, the justice stated that the Constitution guaranteed a right only to an impartial jury, not to a jury composed of members of a particular race or gender[400].

Subsection 3 Women and Military Service

Military service also has been recognized as one of duties derived from citizenship[401].

Paragraph 1 Relation between Women and Military Service in Early Time of U.S.

Concerning the relation between women and military service[402], there were following provisions in Title XIV "Army" of Revised Statutes[403] which was edited in 1878 based on early acts of the United States[404,405].

First, Section 1238 provided, "[w]omen may be employed, instead of soldiers, as nurses in general or permanent hospitals, at such times and in such numbers as the Surgeon-General, or the medical officer in charge of any such hospital, may deem proper."

Second, Section 1239 provided, "[h]ospital matrons and nurses may be employed in post of regimental hospitals in such numbers as may be necessary."

Third, Section 1240 provided, "[w]omen may be allowed to accompany troops as laundresses, in numbers not

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400 Id., at 154.

401 As literatures which point out the fact: as a case judgement, Arver v. U.S., 245 U.S. 366 (1918); as papers, G. Sidney Buchanan, Women in Combat: An Essay on ultimate Rights and Responsibilities, 28 Hous. L. Rev. 503, 542 (1991); Robin Rogers, A Proposal for Combatting Sexual Discrimination in the Military: Amendment of Title VII, 78 Calif. L. Rev. 165, 168 (1990).

402 During most of the time of American history, women had not participated directly in battles, but mainly served in medical services in wartime. Concretely, women mostly as clergies took part in medical service for the army. However, after the establishment of Army Nurse Corp by Congress of 1901, such women worked as a part of the regular army. (Army Reorganization Act of 1901, 31 Stat. 748, 753)(Sec. 19). The formal title of the Act is: An Act to increase the efficiency of the permanent military establishment of the United States. Besides, Congress established in 1908 Navy Nurse Corp (35 Stat. 127, 146. The formal title of the act to establish the corp is: An Act Making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and nine, and for other purpose.). see, Kristy N. Kamarck, Women in Combat Issue for Congress, R42075 Congressional Research Report, 2 (2015). That paper gives an example as an exceptional case where a woman, Margaret Corbin was given a pension in 1776 by American Army, caused from her wound in the battle of Fort Washington against British Army.

403 On Revised Statutes, see V Leonard Levy et al. ed., Encyclopedia pf the American Constitution, 2227 (2nd ed., Macmillan Co. 2000).

404 In addition, there were following provisions which concerned the status of woman in Revised Statutes:

- Section 165 of Title IV "Provisions Applicable to All the Executive Departments" provided, "[w]omen may, in the discretion of the head of any Department, be appointed to any of the clerkships therein authorized by law, upon the same requisites and conditions, and with the same compensations, as are prescribed for men."
- Section 167, no. 5 of the same Title as above provided, "[t]o the women employed in duties of a clerical character, subordinate to those assigned to clerks of the first class, including copyists and counters, or temporarily employed to perform the duties of a clerk, nine hundred dollars."
- Section 235 of Title VII "The Department of the Treasury" provided, "in the office of Treasurer of the United States: … Seven women, as laborers, at a salary of two hundred and forty dollars a year each.…in the Bureau of Statistics: … One charwoman, at salary of four hundred and eighty dollars a year."
- Section 393 of Title IX "Post-Office Department" provided, "[t]here shall be in the Post-Office Department: … Three female laborers, at salary of four hundred and twenty dollars a year."
- Section 1994 of Title XXV "Citizenship" provided, "Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."
- Section 3064 of Title XXXIV "Collection of Duties" provided, "[t]he Secretary of the Treasury may from time to time prescribe regulations for the search of persons and baggage, and for the employment of female inspectors for the examination and search of persons of their own sex."

405 It is pointed out that women has served for the army since the Independence War at the time of the establishment of the United States of America. See, Maj. Gen. Jeanne Holm, Women in the Military, Chap 1 (Presidio 1982); Marilyn A Gordon and Mary Jo Ludvigson, The Combat Exclusion for Women Aviator: A Constitutional Analysis, 1 USAFA J. Leg. Studies 51, 52 (1990), and so forth.

exceeding four to a company."

Paragraph 2 United States v. Schwimmer Case

Concerning the relation between women and military service, the Supreme Court judged the case, United States v. Schwimmer[406], in 1929. The issue of the case was whether the fact that a woman gave a negative answer to the question, "if necessary, are you willing to take up arms in defense of this country?", could be a reason of the rejection of her naturalization.

The court opinion first recognized that the applicant's rejection to bear arms for the United States was based on her uncompromising pacifist belief. Then, the court opinion stated that it was a fundamental principle of the Constitution that it was the duty of citizens by force of arms to defend our government against all enemies whenever necessity arose[407]. And then, the court opinion stated that whatever tended to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracted from the strength and safety of the government, and that their opinions and beliefs, as well as their behavior indicating a disposition to hinder in the performance of that duty, were subjects of inquiry under the statutory provisions governing naturalization, for if all or a large number of citizens opposed such defense, the "good order and happiness" of the United States could not long endure[408].

Then, the court opinion pointed out that her objection to military service rested on reasons other than mere inability because of her sex and age[409] personally to bear arms. Moreover, the court opinion stated that the fact that she was an uncompromising pacifist, with no sense of nationalism, but only a cosmic sense of belonging to the human family, justified belief that she might be opposed to the use of military force as contemplated by the Constitution and laws, and that her testimony clearly suggested that she was disposed to exert her power to influence others to such opposition[410].

Based on the considerations above, the court opinion stated that a pacifist, in the general sense of the word, was one who sought to maintain peace and to abolish war, that such purposes were in harmony with the Constitution and policy of our government, that, however, the word was also used and understood to mean one who refused or was unwilling for any purpose to bear arms because of conscientious considerations, and that such persons were liable to be incapable of the attachment for and devotion to the principles of our Constitution that were required of aliens seeking naturalization.

Then, the court opinion stated that the burden was upon her to show that her pacifism did not oppose the principle that it was a duty of citizenship, by force of arms when necessary, to defend the country against all enemies and that her opinions and beliefs would not prevent or impair the true faith and allegiance required by the act. The court opinion concluded that, however, she had failed to do so[411].

In the end, the court opinion ruled that her application for naturalization should be rejected[412].

Justice Holmes stated in his dissenting opinion that, so far as the adequacy of her oath was concerned, he hardly could see how that was affected by the statement, inasmuch as she was a woman over fifty years of age, and would not be allowed to bear arms if she wanted to[413]. Furthermore, the justice stated that the notion that the applicant's optimistic anticipations would make her a worse citizen was sufficiently answered by her examination, which seemed to him a better argument for her admission than any that he could offer[414].

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406 279 U.S. 644 (1929).
407 Id., at 650.
408 Id., at 651.
409 According to the dissenting opinion of Justice Holmes of the case, the applicant was a woman over fifty years of age. Id., 653.
410 Id., 651
411 Id., at 653.
412 Id.
413 Id.
414 Id., at 654.

Paragraph 3 Women's Participation in Navy and Army

At the beginning of the twentieth century, the U.S. Army, Congress, and public opinion, all had a negative opinion about the employment of women for military service. However, in response to the shortage of manpower at the time of World War II, Congress instituted the Women's Army Auxiliary Corps in 1942[415]. In the same year, Congress established an Act[416] to accept women as members of the Naval Reserve, based on which the Marine Corps Women's Reserve had been also established[417]. Moreover, in 1943, Congress instituted the Women's Army Corps (WAC)[418].

Paragraph 4 Armed Services Integration Act of 1948 and Military Selective Service Act

In 1948, Congress established two acts. One was Armed Services Integration Act of 1948[419], and another was Military Selective Service Act[420]. Besides, the Supreme Court judged a series of cases concerning the latter Act.

First, the former, Armed Services Integration Act was established in order to consolidate the rules regarding the relations between women and the Army provisions which had been scattered in various acts because of the gradual extension of actual participation of women in military service during World War I and II[421] and to officially recognize that female soldiers served in the standing army. However, at the same time, it prescribed the upper limit of the percentage of female members[422], and set the highest possible status which a woman could assume. Moreover, the act prohibited women from being assigned to duty in aircraft engaged in combat missions or in vessels of the Navy except hospital ships and naval transports[423,424].

Among them, the limitation of the percentage of the number of female members and the ceiling of the status of a woman were gradually removed by a series of amendments in and after 1967[425].

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415 56 Stat. 278. The formal title of the founding Act is: An Act to establish a Women's Army Auxiliary Corps for service with the Army of the United States. The mission of the Women's Army Auxiliary Corps was restricted to noncombatant service with the Army of the United States for the purpose of making available to the national defense when needed the knowledge, skill, and special training of the women of the Nation.

416 56 Stat. 730. The act was a revision of Naval Reserve Act of 1938. The formal title is: An Act to expedite the war effort by releasing officers and men for duty at sea and their replacement by women in the shore establishment of the Navy, and for other purposes. This act provided that the Women's Reserve should be composed of members who had attained the age of twenty years (Sec. 503), and that members of the Women's Reserve should be restricted to the performance of shore duty within the continental United States only and should not be assigned to duty on board vessels of the Navy or in combat aircraft (Sec. 504).

417 Historical Branch, G3-3 Division Headquarters, U.S. Marine Corps., Marine Corps Women's Reserve in World War II (1968) https://www.usmcu.edu/Portals/218/MC%20Women_s%20Reserve%20in%20WWII.pdf

418 57 Stat. 371. The formal title of the act is: An Act to establish a Women's Army Corps for service in the Army of the United States.

419 62 Stat. 356. The formal title is: An Act to establish the Women's Army Corps in the Regular Army, to authorize the enlistment and appointment of women in the Regular Air Force, Regular navy and Marine Corps, and in the Reserve components of the Army, Navy, Air Force, and Marine Corps, and for other purposes.

420 62 Stat. 604. The formal title is: An Act to provide for the common defense by increasing the strength of the armed forces of the United States, including the reserve components thereof, and for other purposes.

421 A literature says that a woman could engage in military service only as one of civilians or disguising herself a man until women served in war as volunteers for the Navy of the United States in 1917. It was at the time of the World War I that women officially took part in the army for the first time. But even at that time, women worked as assistants for male combatants.

As we stated above, when male soldiers ran short in the World War II, women not only worked for the army but also contributed to the industry assisting the performance of the war. While such a fact promoted the independence of women, in spite of such various contributions, many women retired from military services and only few women remained in the army to keep their statuses. See, Merrianne E. Dean, Note: Women in Combat - the duty of Citizen-soldier, 2 San Diego Justice J. 429, 435 (1994) [hereinafter Merrienne]. On the establishment of the Women's Army Corps, see Chikako Uemura, Establishment of the Women's Army Corps in the United States of America, Gender, and Sexuality, pp. 47 in Mejiro America Kenkyu-kai, War and Women -- Multicultural Social Historical Study on Wars and Women in American History(Seibun-Sha(1998))(in Japanese).

422 As to the Army, 62 Stat. 357. As to the Navy, 62 Stat. 363. As to the Air Force, 63 Stat. 371.

423 As to the Navy, 62 Stat. 368. As to the Air Force, 62 Stat. 373. As to the Army, it was to be decided by Secretary of the Army, 62 Stat. 359.

424 Merrianne 436; James D. Milko, Comment : Beyond the Persian Gulf Crisis: Expanding the Role of Servicewomen in the United States Military, 41 Am. U. L. Rev. 1301, 1305 (1992) [hereinafter Milko].

425 The amendment of 1967 was done through enacting of an Act to amend title 10, 32, and 37, United States Code, to remove restrictions on the careers of female officers in the Army, Navy, Ari Force, and Marine Corps, and for other purposes, 81 Stat. 374

Next, concerning the range of tasks women could engage in, there was a problem that the act itself did not explicitly define "combat mission". On this problem, each Force had provided its own definition at the beginning time. But afterward the Department of Defense presented a report on the issue in 1988. In the report, it was recommended that the Secretary of Defense adopted a standardized rule under which noncombat units or positions would be closed to women only if the type, degree, and duration of risk of direct combat, exposure to hostile fire, or capture was as great in those units or positions as in the combat units regularly supported by noncombat positions. The Secretary of Defense adopted the rule[426].

Such a situation as above was changed since the Gulf War in 1991. It had turned out that during the Gulf War, women took part in the military operations under severe conditions as well as men. It was also realized that it had become difficult to distinguish combat and noncombat missions because of the development of military technology. Besides, it was recognized that women had appropriately performed their duties under such conditions[427].

Taking those conditions into consideration, Congress amended federal acts[428] so that women became able to engage in almost all tasks of the Army[429].

The Military Selective Service Act provided that it should be the duty of every male citizen of the United States, and every other male person residing in the United States, who was between the ages of eighteen and twenty-six, to submit to registration[430].

At the beginning of the act, Congress declared that an adequate armed strength had to be achieved and maintained to ensure the security of this nation, and, furthermore, that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which was fair and just, and which was consistent with the maintenance of an effective national economy[431].

In 1975, by a Presidential Proclamation, the registration procedure was discontinued. At the same time, the President asked Congress for the allocation of funds for extending the target of the registration procedure to both men and women, but Congress rejected it[432].

In 1980, the President recommended again that Congress amended the act to permit the registration and conscription of women as well as men. In response to the recommendation, the question having already been disputed in lower courts, namely, whether the Military Selective Service Act which restricted the registration to men was constitutional, drew the public attention again. The question was treated by the Supreme Court in the case, Rostker v. Goldberg[433,434]. The Supreme Court finally approved of the decision of Congress[435].

(1967). Concerning the Act and other relating acts, see Maj. Gen. Jeanne Holm, Women in the Military - An Unfinished Revolution, 192–203 (Presidio 1982).

426 Milko 1308.

427 Merrianne 438.

428 National Defense Authorization Act for Fiscal Years 1992 and 1993, 105 Stat. 1290, 1365 (1991); National Defense Authorization Act for Fiscal Year 1994, 107 Stat. 1547, 1659 (1993).

429 A literature says that over 80% of all jobs in the military services are open to women, and women comprise approximately 14% of the armed services. Kingsley R. Browne, Women at War: An Evolutionary Perspective, 49 Buffalo L. Rev. 51, 59 (2001).

430 62 Stat. 604, 605.

431 Id.

432 Leslie Ann Rowley, Gender Discrimination and the Military Selective Service Act: Would the MSSA Pass Constitutional Muster Today?, 36 Duq. L. Rev. 171, 172(1997) [hereinafter Rowley].

433 Rostker v. Goldberg, 453 U.S. 57 (1981).

434 As for the details, see Rowley 173 (note 17); Ellen Oberwetter, Note: Rethinking Military Defense: Male-Only Draft Registration and the Intersection of Military Need with Civilian Rights, 78 Tex. L. Rev. 173 (1999).

435 The judgement of the case ruled that the decision of Congress was constitutional, stating following points:

- Congress carefully considered whether to register only males for potential conscription or whether to register both sexes, and its broad constitutional authority could not be ignored in considering the constitutionality of its studied choice of one alternative in preference to the other.
- Since women were excluded from combat service by statute or military policy, men and women were simply not similarly situated for purposes of a draft or registration for a draft, and Congress' decision to authorize the registration of only men therefore did not violate the Due Process Clause.

After that and up to the present day, women have never been obliged to register for a draft[436]. However, it is pointed out that the role of women in the Army has been gradually expanded in spite of the above judgement of the Supreme Court[437]. Furthermore, in 2013, the Secretary of Defense abolished the limitations on women concerning combat or other military services[438], such that, by December 3, 2015, only 10% of military positions were to be still closed to women[439].

On January, 2013, the Secretary of Defense at that time abolished the limitation on women participating in strategic operations and ordered that the criterions of posting and the way of assignment in the Army should be revised by January 2016. On December 3, 2015, the Secretary of Defense announced that, based on the order above, all posts of the Army, without exception, would be opened to women and on March 10, 2016, the Secretary announced that the Services' and SOCOM's implementation plans for the integration of women into direct ground combat roles were approved[440].

Section 5 Conclusion

This section will analyze the historical development of the relation between women and the change of Citizenship, the discussion in the legislation process of the Nineteenth Amendment of the Constitution, and the discussion regarding the relation between women and Civil Rights and Duties.

Subsection 1 Changes Surrounding Woman and Citizenship

Although at the early time citizenship of a woman was to be changed together with that of her spouse, a woman has finally become able to change her citizenship independently from her spouse. Of course, in actual situations, most of the losses or acquisitions of citizenship of individuals were generally done unrelated to the will of the individuals, but only in certain cases would the will of an individual matter[441]. In this regard, to provide some requirements or restrictions for citizenship would be inescapable in certain degree. However, the history of the amendment of the relevant act in the United States shows that the conditions for change of citizenship have been made gradually free from sexual discrimination.

In this process, the effects of the relation between a woman and her spouse on the citizenship of the woman have been questioned. On this problem, in the end, a spouse of a citizen of the United States of America, whether a male or female, became able to acquire citizenship of the United States through a simplified naturalization procedure.

Subsection 2 Women and Civil Rights

The Nineteenth Amendment of the Constitution prohibits rejection or restriction of enjoyment of the right of suffrage on account of sex. The discussion in the establishment process of the amendment is generally as follows.

First, the predominant opinion supporting the establishment of the Nineteenth Amendment, insisted that a woman was a woman citizen, able to fulfill her civil duties and, moreover, also from the viewpoint of the fundamental philosophy of the Constitution, a citizen should not be denied the right of suffrage on the ground that the citizen was a woman.

Against that opinion, an opinion opposed to the establishment of the Nineteenth Amendment insisted that, although a woman citizen of the United States was surely a citizen of the United States, the citizen was a female and had the

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436 50 U.S.C. app. Sec. 453.

437 Cf. Jil Elaine Hasday, Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change, 93 Minnesota L. Rev. 96 (2008).

438 United States Government Accountability Office, Report to Congressional Committees - Military Personnel - DOD Is Expanding Combat Service Opportunities for Women, but Should Monitor Long-Term Integration Progress, GAO-15−589(Jul, 2015) https://www.gao.gov/assets/680/671507.pdf

439 https://www.defense.gov/News/Article/Article/632536/carter-opens-all-military-occupations-positions-to-women/

440 Kristy N. Kamarck, Women in Combat: Issues for Congress, R42075 Congressional Research Report, 14 (2016).

441 Hidefumi Egawa et al., Nationality Law (3rd ed.), 21 (Yuhikaku Pr. 1997) (A book in Japanese).

social status and role as a woman.

The fact that the Nineteenth Amendment was established in the end would show that the former opinion has been selected in the United States. It seems to mean, at the same time, that the latter opinion was rejected, which could be interpreted that a conventional thought on what "woman" should be has been rejected, restricted or changed irrespective whether it has certain implications in a positive way or in a negative way.

Subsection 3 Woman and Civil Duty

The change of the relation between woman and civil duty could be seen most remarkably in the areas of the participation of women in jury and the abolition of discrimination against women in military services. As to the former area, it is not by itself able to reduce the burden on women. However, from the viewpoint "Women are very much needed on juries. Otherwise women will never be tried by their peers"[442], a person, even if a woman, should participate as far as the person is a citizen.

As to the latter problems of military service, although the participation of women in military service also would never reduce the burden on women, from the viewpoint that such a participation of an individual would confirm the status of the individual as a citizen, it would have been indispensable for women[443,444].

442 Carol Wiesbrod, Images of the Woman juror, 9 Harv. Women's L. J. 59, 73 (1986).

443 As a literature that points out the same view point as above, Merrianne 459; Kenneth L. Karst, The Pursuit of Manhood and the Desegregation of the Armed Forces, 38 UCLA L. Rev. 499, 523 (1991); Mary E. Becker, The Politics of Women's Wrongs and the bill of "Rights": A Bicentennial Perspective, 50 Univ. Chi. L. Rev. 453, 501 (1992).

444 There were also some concrete economical disadvantages for women caused from the fact that they could not assume a post in the Army. On this issue, see G. Sydney Buchanan, Women in Combat: An Essay on Ultimate Rights and Responsibilities, 28 Hous. L. Rev. 503, 511 (1991); Pamela R. Jones, Note: Women in the Crossfire: Should the Court allow it?, 78 Cornell L. Rev. 252, 258 (1993); Robin Rogers, A Proposal for Combatting Sexual Discrimination in the Military: Amendment of Title VII, 78 Calf. L. Rev. 165, 167 (1990).

Chapter 7 Eligibility for President and Natural-Born Citizenship of the United States

Section 1 Subject and Orientation of This Chapter

Article 2 Section 1 Clause 5 of the Constitution of the United States of America prescribes such requirements for inauguration of President as being a natural-born citizen[1] or a citizen of the United States at the time of the adoption of the

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1 Concerning the wording "a natural born citizen", there is a similar phrase "a native born citizen". Black's Law Dictionary (10th ed.) says concerning those wording as follows.

As for "native-born", it has been used since eighteenth century, having following meanings:

- Born within the territory jurisdiction of a country
- Born of parents who convey rights of citizenship to their offspring, regardless of the place of birth.

As for "natural-born citizen", the dictionary says, while it has been similarly used since eighteenth century, it means a person born within the jurisdiction of a national government. From those explanations, it seems that the difference between native born citizen and natural born citizen is that the former includes so to speak derivative(inherited) citizenship.

In the revised version of the Black's Law Dictionary (11th ed.), "natural-born citizen" is explained as follows.

- A person born within the jurisdiction of a national government.
- A person born outside the jurisdiction of a national government to a parent who is a citizen of that nation.
- A person born outside the jurisdiction of a national government to a father who is a citizen of that nation(in this meaning, following caption is added, " It was the common-law sense of the nearest analogous phrase in English law(common-law subject) at the founding of the United States of America.)

In this version, however there is not a "native born citizen", there is a "native born", which says as follows.

- Born within the territorial jurisdiction of a country
- Born of parents who convey rights of citizenship to their offspring, regardless of the place of birth.

In relation to this, Naturalization Act of 1790 provided that natural born citizens should include children born beyond sea or out of the limits of the United States. On this issue, the explanation of Article 2 Section 1 Clause 5 of the Constitution by "Constitution of the United States of America -- Analysis and Interpretation" (Centennial edition)(2017) written by Congressional Research Service of Library of Congress states, quoting Naturalization Act of 1790 referred to above, "There is reason to believe, therefore, that the phrase includes persons who become citizens at birth by statute because of their status in being born abroad of American citizens".

On this point, it can be seen following expressions in judgements of the Supreme Court of the United States:

- The court opinion of the case, Osborn v. United States Bank (22 U.S. (9 Wheat.) 737 (1824)), stated "He(a naturalized citizen) is distinguishable in nothing from a native citizen except so far as the Constitution makes the distinction".(Id., at 827-8)
- The court opinion of the case, Minor v. Happersett (88 U.S. 162 (1875)), stated "The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common-law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners" (Id., at 167), which treated natives and natural-born interchangeably.
- The court opinion of the case, Elk v. Wilkins (112 U.S. 94 (1884)), stated "The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the constitution, by which 'no person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president;' and 'the congress shall have power to establish an uniform rule of naturalization.' Const. art. 2, 1; art. 1, 8. By the thirteenth amendment of the constitution slavery was prohibited." (Id., at 101) Seeing from that, the Supreme Court seems to have taken "citizenship by birth" and "natural born citizen" in a same meaning.
- The court opinion of the case, Luria v. United States (231 U.S. 9 (1913)), stated "Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency". (Id., at 22)
- The court opinion of the case, United States v. Schwimmer (279 U.S. 644 (1929)), stated "Except for eligibility to the Presidency, naturalized citizens stand on the same footing as do native-born citizens". (Id., at 649)
- The court opinion of the case, Baumgartner v. United States (322 U.S. 665 (1944)) stated "The naturalized citizen has as much right as the natural born citizen to exercise the cherished freedoms of speech, press and religion". (Id., at 680)
- The court opinion of the case, Knauer v. United States (328 U.S. 654 (1946)), stated "Citizenship obtained through naturalization is not a second-class citizenship. It has been said that citizenship carries with it all of the rights and prerogatives of citizenship obtained by birth in this country 'save that of eligibility to the Presidency". (Id., at 658)
- The court opinion of the case, Schneider v. Rusk (377 U.S. 163 (1963)), stated "We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive. The only difference drawn by the Constitution is that only the "natural born" citizen is eligible to be President." (Id., at 165)

Seeing from the cases quoted above, the Supreme Court seems to have used following words, in view of terminology, without any rigid distinction, namely, native citizen, natives, natural-born citizens, citizenship by birth, native born citizen, citizenship obtained by birth, citizenship of the native born, or the like.

Constitution[2], having attained to the age of thirty five years[3], and been fourteen years a resident within the United States[4].

Among them, the meaning of the requirement "a natural-born citizen of the United States" has been especially controversial since the establishment of the Constitution until the present. The issue has been also argued as a practically important problem at every time of presidential election. In this chapter, taking such a state into account, this article will analyze the meaning of the requirement and consider the content and practical effect of the legal theory on which it could be founded.

In section 2, this article will confirm the original meaning of Article 2 Section Clause 5 of the Constitution of the United States of America, based on literatures at the establishment time of the Constitution and various commentaries published at the early time after the establishment of the Constitution. In sections 3 and 4, the way of understanding of the law of natural born citizenship in Common Law of the United States and the provisions in the Federal Constitution and Acts will be considered. In section 5, this article will introduce some federal cases which judged on natural born citizenship. In section 6, recent arguments around the phrase "natural born citizen" will be surveyed.

In section 7, taking all up to section 6 into account, this article will confirm the meaning of "a natural born citizen" and consider the legal theory to decide who is to be a natural born citizen. Then, this article will consider how the requirement should be, taking into account a special situation, namely, the fact that there have been many constitutional amendment proposals concerning that requirement.

Section 2 Original Meaning of Article 2 Section 1 Clause 5

Subsection 1 Discussion at Constitutional Convention

In Constitutional Convention (Federal Convention of 1787) held at Philadelphia on July 26, 1787, a subcommittee[5]

In relation to the constitutions of States, there is a literature which points out the fact that when a proposal that a governor of a State shall be a natural born citizen of the United States was presented in the Constitutional Convention held at the State of New York, the phrase "natural born citizen" was once amended to be "native-born citizen" and then, finally, to be "native citizen". It concluded from the fact that for the persons engaging in the establishment of that constitution, "natural-born" and "native" had one same meaning. Isidor Blum, Is Gov,. George Romney Eligible to Be President? Part 1, N. Y. L. J., Oct. 16, 11 (1967).

Taking all above into consideration, although it is not necessarily treat all phrases above as having mutually different meanings, this article will try to make clear what wording is used in each reference as far as possible.

However, since "natural born citizenship" as a eligibility qualification for President is the main subject in this chapter, it should be noted that it is an important point at issue whether a person borne abroad of the United States could be a "natural born citizen" provided in Article 2 Section 1 Clause 5 of the Constitution of the United States.

2 It is pointed out that the requirement, "to be a citizen of the United States, at the time of the adoption of the Constitution" was added by considering the fact that there was no person who was "a natural born citizen" at the time of the adoption of the Constitution. Edward S. Corwin, The President-Office and Powers 1787–1984 (Fifth rev. ed., 38 (N. Y. Univ. Pr. 1984)).

The first person who was born after the National Founding (Declaration of Independence) and then became President was Martin Van Buren, the eighth President of the United States, and the first person who was born after the establishment of the Constitution of the United States and then became President was John Tyler, the tenth President of the United States.

3 Concerning the requirement "having attained to the age of thirty five years", Federalist No. 64 stated "By excluding men under thirty-five from the first office, and those under thirty from the second, it confines the electors to men of whom the people have had time to form a judgment, and with respect to whom they will not be liable to be deceived by those brilliant appearances of genius and patriotism, which, like transient meteors, sometimes mislead as well as dazzle."

On this issue, Kent (James Kent, Commentaries on American Law, Vol. I, Lect 13 (4th ed.) (New-York 1827)) said "The age of the President is sufficient to have formed his public and private character".

4 On the requirement, having been fourteen Years a resident within the United State, Commentary of Story (Joseph Story, Commentaries on the Constitution, Vol. III, § 1473 (Da Capo Pr. 1970) (1833)[hereinafter Story]) stated, it "is also made an indispensable requisite for every candidate; so, that the people may have a full opportunity to know his character and merits, and that he may have mingled in the duties, and felt the interests, and understood the principles, and nourished the attachments, belonging to every citizen in a republican government." That commentary also said "No one has supposed, that a temporary absence abroad on public business, and especially on an embassy to a foreign nation, would interrupt the residence of a citizen, so as to disqualify him for office."

The length of residence was changed from twenty-one to fourteen years at the Constitutional Convention. On this point, there is a literature pointing out that it was in order to make it possible for Pierce Butler, James McHenry and Alexander Hamilton to meet the requirement. Michael Nelson, Constitutional Qualification for President, 17 Presidential Studies Quarterly 383, 394 (1987).

5 That subcommittee is named as Committee of Details in the public record.

was to be set up so as to discuss the requirements for President, together with those for a judge and member of Congress[6]. The subcommittee presented to the Constitutional Convention a draft of provisions concerning organization of government involving eligibility requirements for a member of the Upper and Lower Houses. But it didn't include provisions on eligibility requirements for President[7]. Therefore, the Constitutional Convention on August 20 asked for the subcommittee to report on such requirements[8]. Responding to it, the subcommittee proposed on August 22 as one of various amendments of the previously proposed provisions the eligibility requirement candidates for President, namely, that President should be of the age of thirty five years, and a Citizen of the United States, and should have been an Inhabitant thereof for twenty one years[9].

On August 31 of the same year, that issue was to be deliberated at the Committee on Postponed Matters, together with other affairs[10]. On September 4, the Committee presented a bill, such part of which as concerning this problem was as follows[11].

No person except a natural born citizen or a Citizen of the United States at the time of the adoption of this Constitution shall be eligible to the office of President; nor shall any person be elected to that office, who shall be under the age of thirty five years, and who has not been in the whole, at least fourteen years a resident within the United States.

Comparing that with the previous bill, the differences are that the phrase "natural born citizen" was newly added and that the period of residence was shortened from twenty-one to fourteen years[12].

Though that phrase was, without any noticeable discussion, adopted on September 7, 1787[13], there were some syntactical and rhetorical amendments given to the bill[14].

In relation with that, on June 18 during the Constitutional Convention was in session, Hamilton published so called Hamilton Plan. Article 9 Section 1 in that document provided that no person should be eligible to the office of President of the United States unless he be now a Citizen of one of the States or be born a Citizen of the United States[15].

Although the degree of the influence of the document was not clear since it was not concerning a matter discussed in the official convention, there was a record in which John Jay sent to George Washington, the chairman of the Constitutional Convention at that time, a letter where it was written that it would be wise and seasonable to provide a strong check to the admission of foreigners into the administration of the national Government and to declare expressly that the Command in chief of the American army should not be given to any but a natural born Citizen[16,17,18,19].

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6 II Max Farrand, The Records of the Federal Convention of 1787, at 116, 121 (Yale Univ. Pr. 1911) [hereinafter II Farrand]

7 Id., at 177, 185.

8 Id., at 337, 344.

9 Id., at 367.

10 Id., at 473.

11 Id., at 494, 498.

12 J. Michael Medina, The Presidential Qualification Clause in this Bicentennial Year: the need to eliminate the natural born citizen requirement, 7 Oklahoma City Univ. L. Rev. 260 (1987).

13 II Farrand at 536.

14 Id., at 574, 598.

15 III Farrand, Appendix F, 629. The original text is as following.

No person shall be eligible to the office of President of the United States unless he be now a Citizen of one of the States, or hereafter be born a Citizen of the United States.

16 III Farrand, Appendix A. LXVIII, 61; IV United States Bureau of Rolls and Library, Documentary History of the Constitution of the United States 1786–1870, 237 (Department of State, 1905) [hereinafter Documentary History of the Constitution].

The original text (keep the spelling) is as follows: Permit me to hint, whether it would not be wise & seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in chief of the american army shall not be given to, nor devolve on, any but a natural *born* Citizen.

17 On September 2, 1787, Washington replied to Jay's letter by sending a letter in which he expressed his gratitude to the hint by Jay.

18 Concerning this issue, a literature points out that, since John Jay had children born during he had been a diplomat in Spain and

Moreover, in the discussion on the eligibility requirements for a member of the House of Representatives, although not for President, at the Constitutional Convention, there was presented an opinion that the members of the House of Representatives should be restricted to native persons in order to avoid influences from foreign countries[20]. Responding to that opinion Hamilton presented an alternative proposal requiring the keeping of citizenship and residence in the United States. Furthermore, Madison insisted that the republican nature should be maintained together with a philosophy of liberalism to secure the merit of the invitation of foreigners, and pointed out, it was true that there was a risk of influences of foreign countries but the risk was not so big, for, even if a foreign country would decide to offer a bribe, it would be addressed not to a suspicious foreigner but to a trustworthy native person.

Subsection 2 Commentaries

Story's Commentary stated that it was indispensable to require President to be a natural born citizen of the United States, and that it was in order to exclude foreign influence from the government[21]. The Commentary wrote that it was so reasonable to exclude foreigners that it would scarcely be doubted by any sound statesman. Story continued that it would cut off all chances for ambitious foreigners, who might otherwise be intriguing for the office and interpose a barrier against those corrupt interferences of foreign governments in executive elections[22,23,24].

Next, Kent's Commentary[25] stated that as the President was required to be a native citizen of the United States[26],

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France, it is doubtful that he insisted a thing which made those children shouldn't be eligible to the office of President. Michael Nelson, Constitutional Qualification for President, 17 Presidential Studies Quarterly 383, 396 (1987).

19 A literature points out that from the facts that the phrase "natural born citizen" was used in this letter and that the time when there occurred those correspondences and that when a proposal using that phrase was presented were quite close, there seemed to be more relation between them than a coincidence. Jack Maskell, Qualifications for President and the "Natural Born" Citizenship Eligibility Requirement, R42097 Congressional Research Report, 6 (2011).

20 II Farrand, 268.

21 III Story, § 1473. In addition, concerning Article 2 Section 1 Clause 5 which provides "a citizen of the United States, at the time of the adoption of this Constitution", Story said that it was an exception introduced out of respect to those distinguished revolutionary patriots who were born in a foreign land.

22 On this point, Story enumerated, as examples of the fact that foreign influence had inflicted the most serious evils upon the elective monarchies of Europe, Germany, Poland, and the pontificate of Rome. Id.

23 Moreover, Story stated in another book concerning the relation between domicile and citizenship or the rights of subject as follows:

First, persons, who are born in a country, are generally deemed to be a citizens and subjects of that country. A reasonable qualification of the rule would seem to be, that in it should not apply to the children of parents, who were *in itinere* in the country, or who were abiding there for temporary purposes, as for health, or curiosity, or occasional business. It would be difficult, however, to assert that in the resent state of public law such a qualification is universally established. Secondly, foreigners, who reside in a country for permanent or indefinite purposes, animo manendi, are treated universally as inhabitants of the country. Thirdly, a national character, acquired in a foreign country by residence, changes when the party has left the country animo non revertendi; and if he be in itinere to his native country with that intent, his native domicil revives. The moment a foreign domicil is abandoned, the native domicil is re-acquired. But a mere return to the native country, without an intent to abandon the foreign domicil, does not work any change of domicil. Fourthly, abassadors and other foreign ministers retain their domicil in the country, which they represent, and to which they belong. But a different rule generally applies to Consuls, and to other commercial agents, who are presumed to remain in a country for purposes of trade, and who therefore acquire a domicil, where they reside. Fifthly, children born upon the sea are deemed to belong, and have their domicil in the country, to which their parents belong. Joseph Story, Commentaries on the Conflict of Laws, Foreign and Domestic, § 48(Boston, 1834).

24 On this issue, Story stated in another book as follows:

It is not too much to say, that no one, but a native citizen, ought ordinarily to be intrusted with an office so vital to the safety and liberties of the people. But an exception was, from a deep sense of gratitude, made in favor of those distinguished men, who, though not native, had, with such exalted patriotism, and such personal sacrifices, united their lives and fortunes with ours during the Revolution. But even a native citizen might, from long absence, and voluntary residence abroad, become alienated from, or indifferent to his country; and, therefore, a residence for fourteen years within the United States is made indispensable, as a qualification to the office. This, of course, does not exclude persons, who are temporarily abroad in the public service, or on their private affairs, and who have not intentionally given up their domicil here. Joseph Story, A Familiar Exposition of the Constitution of the United State. § 271, p. 167 (Boston, 1840).

25 I James Kent, Commentaries on American Law, Lect. 13 (4th ed.) (New York 1827).

26 Kent used there the expression, "a native citizen of the United States".

ambitious foreigners could not intrigue for the office, and the qualification of birth cut off all those foreign inducements to corruption, negotiation, and war[27,28].

Tucker stated in the note of Blackstone's Commentaries[29] that that provision in the Constitution rquiring the President to be a native-born citizen[30] was a happy means of security against foreign influence. Then, Tucker continued that the admission of foreigners into the councils, consequently, could not be too much guarded against, and that their total exclusion from a station to which foreign nations had been accustomed to attach ideas of sovereign power, sacredness of character, and hereditary right, was a measure of the most consummate policy and wisdom[31].

From those considerations above, it can be seen that the provision of the Constitution was thought at the time of the establishment to be one of safeguards against influences from foreign countries. Concerning the influences from foreign countries which were mentioned in various literatures, it is necessary to concretely consider what influences from foreign countries were supposedly realistic at that time. In relation to this point, it was pointed out that there was stated in the Constitutional Convention at that time an opinion that a limited monarchy was appropriate for the United States, and that there was a rumor that someone would be invited from a foreign country to become King of the United States[32]. Concretely, for example, there were rumors that the President of the Congress of Confederation established on the Articles of Confederation sounded a son of King of Prussia out about becoming King of the United States, that Frederick, Duke of York and Albany, the second son of George III, was to be invited to become King of the United States, and the like[33]. Taking such a situation into consideration, it could be said that the concrete content of "influences of foreign countries" at that time would include the situation that someone relating to the royal family of a foreign country was inaugurated as a sovereign of the United States or that the United States which was intending to establish a new world order was involved in the old world order, and that the desire to avoid such a situation was the reason why the provision of the Constitution was prescribed[34,35].

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27 Kent enumerated there as bad examples the elective monarchies of Germany and Poland, and the Pontificate at Rome.

28 However, Kent stated there that it had been found impossible to guard the election from the mischiefs of foreign intrigue and domestic turbulence, from violence or corruption, and that mankind had generally taken refuge from the evils of popular elections in hereditary executives, as being the least evil of the two. In this regard, Kent quoted two examples, one was France in 1804, when the legislative body changed their elective into an hereditary monarchy, on the avowed ground that the competition of popular elections led to corruption and violence; another was the first partition of Poland, in 1773, when the partitioning powers thought it expedient to foster and confirm all the defects of its wretched government, they sagaciously demanded of the Polish diet, that the crown should continue elective. Kent stated on the latter Poland case that such a decision was done for the very purpose of keeping the door open for foreign intrigue and influence.

At here, Kent stated that the state of society and of property in the United States, and their moral and political habits, had enabled them to adopt the republican principle, and to maintain it hitherto with illustrious success.

29 I St. George Tucker, Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States and of the Commonwealth of Virginia, App. 323−324 (Reprint, South Hackensack, N. J.: Rothman Reprints, 1969) (Philadelphia 1803). (http://press-pubs.uchicago.edu/founders/documents/a2_1_1s18.html

30 Tucker used the expression "a native-born citizen".

31 On the issue, Tucker stated that it was by means of foreign connections that the stadtholder of Holland, whose powers at first were probably not equal to those of a president of the United States, became a sovereign hereditary prince before the late revolution in that country. Then, Tucker continued that it was not with levity to give a remark that the very title of their first magistrate, in some measure, exempted them from the danger of those calamities by which European nations were almost perpetually visited.

Furthermore, Tucker pointed out that the title of king, prince, emperor, or czar, without the smallest addition to his powers, would have rendered him a member of the fraternity of crowned heads, and that their common cause had more than once threatened the desolation of Europe. And then, Tucker stated that to have added a member to the sacred family in America, would have invited and perpetuated among them all the evils of Pandora's Box.

32 Max Farrand, The Framing of the Constitution of the United States, 172−173 (Yale Univ. Pr. 1913).

33 Michael Nelson, Constitutional Qualification for President, Presidential Studies Quarterly, vol. XVII, No. 2, 383, 395 (1987).

34 Akhil Reed Amar, America's Constitution, A Biography, 164 (Random House 2005).

35 On this issue, there is a literature which points out, quoting papers or statements of Jefferson, Hamilton, Joh Adams, or Washington, that the reason why the words "natural-born citizen" was used was because persons who involved in the establishment of the Constitution generally had a distrust of foreigners or naturalized citizens. Malinda L. Seymore, The Presidency and the Meaning of Citizenship, 2005 Brigham Young Univ. L. Rev. 927, 939 (2005) [hereinafter Seymore].

Section 3 Common Law, Federal Constitution, Acts, and Natural-Born Citizen

Subsection 1 Understanding in Common Law Theory[36]

The meaning of the words, "a natural-born citizen", is not defined in the Constitution. Federal Supreme Court stated in various cases that such a phrase in the Constitution should be interpreted according to the wording of the common law of England on which the founders of the Constitution of the United States based their legal thoughts[37,38]. Accordingly, this article will analyze the meaning of the words "a natural-born citizen" by referring Commentaries of Blackstone[39].

The Commentaries of Blackstone[40] stated that the first and most obvious division of the people was between aliens and natural-born subjects, and continued that natural-born subjects were such as were born within the dominions of the crown of England, that is, within the allegiance of the king, and that aliens, such as were born out of it. Besides, the Commentaries stated that allegiance was the tie, or *ligamen*, which bound the subject to the king, in return for that protection which the king afforded the subject, that the thing itself, or substantial part of it, was founded in reason and the nature of government, and that the name and the form were derived to them from their Gothic ancestors.

In relation to the allegiance, the Commentaries stated that it, both expressed and implied, was however distinguished by the law into sorts or species, the one natural, the other local[41]. Then, it continued that natural allegiance was such as was due from all men born within the king's dominions immediately upon their birth, which could not be forfeited, canceled, or altered, by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature, and that local allegiance was such as was due from an alien, or stranger born, for so long time as he continued within the king's dominion and protection.

Next, the Commentaries first stated that the children of the king's ambassadors born abroad were always held to be natural subjects, for as the father, though in a foreign country, owed not even a local allegiance to the prince to whom he was sent, so, the son was also regarded to be born under the king of England's allegiance[42]. It secondly stated that to encourage foreign commerce, it had been enacted by statute 25 Edward III. St. 2. that all children born abroad, provided both their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England. It furthermore stated that by several more modern statutes these restrictions were further expanded, so that all children, born out of the king's ligeance, whose fathers

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36 Cf., Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, & Ronald Y. Wada, Immigration Law & Procedure, § 92.3[1], § 93.1[1]- [3] (LexisNexis 2020).

37 For instance: Ex parte William Wells, 18 Howard (59 U.S.) 307, 311 (1855); Moore v. United States, 91 U.S. 270, 274 (1875); Smith v. Alabama, 124 U.S. 465, 478 (1888); United States v. Wong Kim Ark, 169 U.S. 649, 654–655 (1898); Ex parte Grossman, 267 U.S. 87, 108–109 (1925).

38 On this issue, there is a record which says that on October 14, 1774, there was presented such a resolution of Several State Conventions on the Adoption of the Federal Constitution that the respective colonies were entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage according to the course of that law, and that they had been entitled to the benefit of such of the English statutes as existed at the time of their colonization, and which they had, by experience, respectively found to be applicable to their several and local circumstances. I Jonathan Elliot, The Debate in the Several Conventions, on the Adoption of the Federal Constitution [Elliot's Debates], 44 (2d ed. 1836). http://memory.loc.gov/ammem/amlaw/lwed.html

39 On this issue, Story stated that the whole Structure of our jurisprudence stood upon the original foundations of the common law. I Joseph Story, Commentaries on the Constitution of the United States. § 157 (1833). However, Story stated in the case judgement he took part in that the common law of England was not to be taken in all respects to be that of America, and that their ancestors had brought with them its general principles and claimed it as their birthright, but they had brought with them and adopted only that portion which was applicable to their situation. Van Ness v. Picard, 27 U.S. (2 Peters) 137, 144 (1829).

40 I William Blackstone, Commentaries on the Laws of England, 354 (1765).

41 Id., at 357.

42 Id., at 361.

were natural-born subjects, were now natural-born subjects themselves, for all intents and purposes and without any exception[43].

Moreover, the Commentaries explained the meaning of "Denizen". According to it, denizen was an alien born, but who had obtained ex donatione regis [by royal gift] letters patent to make him an English subject. Unider this interpretation, the denizen was in a kind of middle state between an alien, and natural-born subject, and partook of both of them. Additionally no denizen could be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant from the crown.

Subsection 2 Civil Rights Act of 1866 and the Fourteenth Amendment

After the Civil War, Congress established Civil Rights Act of 1866[44]. The first section of the act provided, "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States". Following that Act, in 1868, the Fourteenth Amendment of the Constitution was established. The first section of the Fourteenth Amendment provided, "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".

Comparing those two provisions, while Civil Rights Act defined that a citizen of the United States was "a person not subject to any foreign power", the Fourteenth Amendment defines that a citizen of the United States is "a person subject to the jurisdiction of the United States". Concerning this issue, in the legislation process of the Fourteenth Amendment, it can be found an explanation that that "a person subject to the jurisdiction of the United States" is a citizen of the United States means that it does not include persons born in the United States who are foreigners, aliens, who belongs to the families of ambassadors or foreign ministers[45]. The implications of the words "a person not subject to any foreign power" was not necessarily made clear in the discussion process. But, as far as being inferred from the legislation process, the expression had almost similar meaning as the words "person subject to the jurisdiction of the United States" provided in the Fourteenth Amendment[46].

Subsection 3 Development of Federal Acts

After the United States had become independent from Great Britain and the Constitution of the United States had been established, the Federal Congress was organized and it established the Naturalization Act in 1790[47]. The Act provided that the children of the citizens of the United States, who might be born beyond sea or out of the limits of the United States should be considered as natural born citizens[48,49].

The Naturalization Act of 1790 was amended several times up to the 1860's. The amendment of 1795[50] also provided, like the Naturalization Act of 1790, that the children of citizens of the United States, born out of the limits and jurisdiction of the United States, should be considered as citizens of the United States, but, as being seen,

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43 However, the Commentaries also stated that it was not applied when their said fathers were attainted, or banished beyond sea, for high treason, or were then in the service of a prince at enmity with Great Britain.

44 14 Stat. 27. The formal title of the act is: An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.

45 39-1 Cong. Globe 2890 (Sen. Howard).

46 As for the details of the issue, see Chapter 4, Section 6, Subsection 1, Paragraph 2 in this article.

47 1 Stat. 103 (1790). The formal title of the act is: An Act to establish a uniform Rule of Naturalization.

48 However, it contained a proviso that the right of citizenship should not descend to persons whose fathers had never been resident in the United States.

49 In relation with the issue, there is a literature which stated that the Act of 1790 was a codification of the common law. Vincent A. Doyle, The Natural Born Citizen Qualification for the Office of President: Is George W. Romney Eligible?, The Library of Congress Legislative Reference Service JK 516 A1 (425/225, A225), Washington D. C. (February 27, 1968).

50 1 Stat. 414. The formal title of the amendment act is: An Act to establish a uniform rule of Naturalization; and to repeal the act heretofore passed on the subject.

"natural-born"[51] was dropped from the qualification of citizens.

The Naturalization Act was amended again in 1798[52]. In this amendment, the prescription that the children of citizens of the United States, born abroad should be considered as citizens of the United States was kept valid.

Then, the Naturalization Act was wholly amended in 1802[53]. In that amendment, it was provided again that the children of citizens of the United States who were born abroad should be considered as citizens of the United States. But in the provision the qualification words "natural born" was still not included[54].

After that, in 1855, an act concerning the acquisition of citizenship of the children of citizens of the United States who were born abroad was established[55]. The act provided that persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers had been or should be at the time of their birth citizens of the United States, should be deemed and considered to be citizens of the United States.

Congress of 1866 granted President the power to institute a committee to re-edit the whole of the federal acts . The reedition was finished in 1874, and revised in 1878, and completed as the Revised Statute[56]. The Revised Statute was deemed as the official version of federal acts established up to 1874 apart from a few exceptions[57]. Concerning the acquisition of citizenship by birth, section 1992 of the Revised Statutes provided that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, were declared to be citizens of the United States, and section 1993 provided that all children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers had been or might be at the time of their birth citizens thereof, were declared to be citizens of the United States[58,59]. Besides, section 2172 re-enacted the act of 1802, and provided that the children of persons who had been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, might have become citizens of any one of the States, under the laws of the United States and being under the age of twenty-one years at the time of the naturalization of their parents, should, if dwelling in the United States, be considered as citizens of the United States, and that the children of persons who were, or had been, citizens of the United States, should, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States.

In 1907, Congress established "An Act in reference to the expatriation of citizens and their protection abroad"[60].

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51 While the reason why those words had been dropped was not explicitly discussed in the legislation process, there is a literature which stated that they might avoid defining the meaning of the words provided in the Constitution by an ordinary federal acts. Charles Gordon, Who can be President of the United States: the Unsolved Enigma, 28 Maryland L. Rev., 1, 11 (1968).

52 1 Stat. 566. The formal title of the act is: An Act Supplementary to and to amend the act, intituled "An Act to establish an uniform rule of naturalization; and to repeal the act heretofore passed on that subject."

53 2 Stat. 153. The formal title of the act is: An Act to establish an uniform rule of Naturalization, and to repeal the acts heretofore passed on that subject.

54 The exact provision read "[t]he children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States", so that the children born abroad of persons who were previously citizens of the United States should also become considered as citizens of the United States.

55 10 Stat. 604. The formal title of the act is: An act to secure the Right of Citizenship to Children of Citizens of the United States born out of the limits thereof.

56 The Revised Statutes referred to in this article is the Reprint version of Revised Statutes of the United States, Passed at the 1st Session of the 43rd Congress, 1873-'74 (2nd ed. Washington, GPO, 1878).

57 V Leonard Levy et al. ed., Encyclopedia of the American Constitution, 2227 (2nd ed., Macmillan Co., 2000).

58 However, the section 1993 provided also that the rights of citizenship should not descend to children whose fathers never resided in the United States.

59 According to the comment in the Revised Statutes, the section 1993 was a reprint of a provision of the act of April 14, 1802. If so, the acquisition of citizenship based on the principle, jus sanguinis, was already introduced in the law of the United States at the time of 1802 (However, a literature says that the act of 1802 was merely intended to give citizenship of the United States to person who had been born abroad as children of citizens of the United States by the time of 1802 (cf. 2 Stat. 155), and that the principle jus sanguinis was established only by the act of 1855 (10 Stat. 604). Fred K. Nielsen, Some Vexatious Questions relating to Nationality, 20 Colum. L. Rev. 840, 841 (1920). In relation to this point, cf., Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, & Ronald Y. Wada, Immigration Law & Procedure, § 93.1[3](LexisNexis 2020)).

60 34 Stat. 1228. As for the details and background of the legislation process of the act, see my paper (in Japanese), Kotaro Matsuzawa, The Development of Expatriation in America, Tsukuba-Hosei No.25 (1998), pp. 210.

The section 6 of the Act provided that all children born outside the limits of the United States who were citizens thereof in accordance with the provisions of section 1993 of the Revised Statutes of the United States and who continued to reside outside the United States should, in order to receive the protection of the Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and should be further required to take the oath of allegiance to the United States upon attaining their majority.

Congress of 1934 established an act relative to Civil Rights and Naturalization[61]. While in a previous statute the children born out of the limits of the United States, whose fathers had been or might be at the time of their birth citizens of the United States were deemed as citizens thereof (Revised Statutes Sec. 1993), under the act, the children whose mothers were citizens of the United States could also inherit the citizenship of the United States[62,63]. Under this act, in cases where one of the parents was an alien, the right of citizenship should not descend unless the child came to the United States and resided therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she should take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization[64,65].

Congress of 1940, in response to advice from the advisory panel instituted from a Presidential Order by President Roosevelt, established the Nationality Act of 1940[66,67]. Chapter 2 of the Act treated Nationality at Birth, and section 201 provided that following persons should be considered as citizens of the United States at birth[68,69,70]:

(a) A person born in the United States, and subject to the jurisdiction thereof;

(b) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe (provided, that the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property);

(c) A person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has resided in the United States or one of its outlying possessions, prior to the birth of such person;

(d) A person born outside of the United States and its outlying possessions of parents one of whom is a citizen

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61 48 Stat. 797 (1934). The formal title of the act is: An Act to amend the law relative to citizenship and naturalization, and for the other purposes.

62 Besides, it was stipulated that the residential condition of the father or mother in the United States should be satisfied "previous to the birth of such child".

63 In 1994, Congress provided the Act (108 Stat. 4305. The Immigration and Nationality Technical Correction Act of 1994. The formal title of the act is: An Act to amend title III of the Immigration and Nationality Act relating to nationality and naturalization) that made this condition to be applied retroactively to a person born before noon(Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of the United States who, prior to the birth of such person, had resided in the United States.

64 On the issue, see 38 Op. Atty. Gen. 10 (1934). Answering a question "whether a child born abroad of an American and alien parent is to be regarded as an American citizen at birth or whether such citizenship attaches only after the child has resided in the United States five years immediately pre-ceding its eighteenth birthday and has taken the oath of allegiance within six months following its twenty-first birthday", the Attorney General stated that such child should acquire citizenship at birth.

65 The proviso was replaced by a laxer condition by the Immigrants and Nationality Act of 1952. 66 Stat. 163 Sec. 301 (c).

66 54 Stat. 1137. The formal title of the act is: An Act to revise and codify the nationality laws of the United States into a comprehensive nationality code. The first section of the Act prescribed that the abbreviation of the Act should be Nationality Act of 1940.

67 As to the outline of the act, see (in Japanese) Kotaro Matsuzawa, The Development of Expatriation in America, Tsukuba-Hosei No.25 (1998), p. 212.

68 The body text of the provision is "The following shall be nationals and citizens of the United States at birth".

69 Besides, Section 202 provided the acquisition of citizenship of the United States for persons born in Puerto Rico, and Section 203 provided that for persons born in Panama Canal Zone or the Republic Panama.

70 In 1946, an amendment of Nationality Act of 1940 was established so as to alleviate the conditions to inherit citizenship for children of persons who had served in the U.S. Army. An Act to amend section 201 (g) of the Nationality Act of 1940 (54 Stat. 1138–1139; 8 U.S.C.A. 601), 60 Stat. 721 (1946).

of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(e) A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person;

(f) A child of unknown parentage found in the United States, until shown not to have been born in the United States;

(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: Provided, that, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: Provided further, that, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease[71].

Congress of 1952 amended the Nationality Act of 1940, and established Immigrants and Nationality Act of 1952[72]. Section 301 in Title III Chapter 1 of the Act provided the acquisition of citizenship by birth and the content was similar to that of Nationality Act of 1940[73], except for following points:

(i) As to the case coming under (d) of Naturalization Act of 1940, the length of the period for which a citizen parent should physically present continuously in the United States or one of its outlying possessions, prior to the birth of the child concerned, was set to be at least one year.

(ii) As to the case coming under (e) of Naturalization Act of 1940, length of the period for which a citizen parent should physically present continuously in the United States or one of its outlying possessions, at any time prior to the birth of the child concerned, was set to be at least one year.

(iii) As to the case coming under (f) of Naturalization Act of 1940, a child concerned should be found while under the age of five years, and it was only until shown, prior to his attaining the age of twenty-one years, not to have been born in the United State.

(iv) As to the case coming under (g) of Naturalization Act of 1940, the length of the period for which a citizen parent should physically present continuously in the United States or one of its outlying possessions, prior to the birth of the child concerned, was set to be totally not less than ten years, at least five of which were after attaining the age of fourteen years. Besides, it was also provided that any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements. Moreover, a child concerned should come to the United States prior to attaining the age of twenty-three years and the length of the period for which such a person should physically present continuously in the United States, should be at least five years immediately following any such coming, and

71 However, the condition was not to be applied to a child born abroad whose American parent was at the time of the child's birth residing abroad solely or principally in the employment of the Government of the United States or a bona fide American, educational, scientific, philanthropic, religious, commercial, or financial organization, having its principal office or place of business in the United States, or an international agency of an official character in which the United States participates, for which he received a substantial compensation.

72 66 Stat. 163. The formal title of the act is: An Act to revise the laws relating to immigration, naturalization, and nationality: and for other purposes.

73 Like in the Nationality Act of 1940, in the act of 1952 the section 302 prescribed special treatments on acquisition of citizenship of the United States for persons born in Puerto Rico, the section 303 for ones born in Panama, the section 304 for ones born in Alaska, the section 305 for ones born in Hawaii, the section 306 for ones born in Virgin Islands, and the section 307 for ones born in Guam.

such physical presence should follow the attainment of the age of fourteen years and precede the age of twenty-eight years.

Section 4 Current Law on Citizenship by Birth

Subsection 1 Outline of Current Law

As being seen above, the Fourteenth Amendment of the Constitution provides, "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." Moreover, other than the rule regarding the citizenship provided in the Fourteenth Amendment, Congress has established the code for naturalization based on the power of the Union to establish a uniform rule for naturalization given by Article 1, Section 8, Clause 4 of the Constitution.

Based on these rules, the current Immigration and Nationality Act[74] provides that a person shall acquire citizenship of the United States by birth in the following cases[75].

First, Title III, Chapter I, Section 301[76,77] of the Act provides that a person should be deemed as a citizen of the United States in the following cases:

(a) a person born in the United States, and subject to the jurisdiction thereof;

(b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(d) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(e) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(f) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents, one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years[78]

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74 Immigration and Nationality Act (INA).

75 The heading of the Title III of the current Immigration and Nationality Act is "Nationality and Naturalization", and the heading of the Chapter I is "Nationality at Birth and Collective Naturalization".

76 8 U.S.C.A. § 1401.

77 The heading of Section 301 is "Nationals and citizens of United States at birth".

78 In this case, while the Immigration and Nationality Act of 1952 contained the provision that any periods of honorable service in the Armed Forces of the United States by such citizen parent might be included in computing the physical presence requirements of this paragraph, the current provision is more extensive. Namely, it provides, "any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in

(h) a person born before noon (Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of the United States who, prior to the birth of such person, had resided in the United States.

Second, Section 302 of the Act prescribes for persons born in Puerto Rico, Section 303 for persons born in the Canal Zone or Republic of Panama, Section 304 for persons born in Alaska, Section 305 for persons born in Hawaii, Section 306 for persons living in and born in the Virgin Islands, and Section 307 for persons living in and born in Guam[79].

Subsection 2 Birth in the United States or in the Territories

Paragraph 1 Range of Domain of the United States

As for an individual born in the United States or the territories, thinking analytically of the phrase "all persons born or naturalized in the United States, and subject to the jurisdiction thereof" in the Fourteenth Amendment, the first thing would be what the domain of the United States means[80], and the second thing would be what meaning of "subject to the jurisdiction".

Of those things, the domain of the United States has been frequently discussed, for the United States of America has gradually expanded the domain throughout its history[81]. Section 101 (d) of the Nationality Act of 1940 defined United States as "the continental United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands"[82].

After that, Section 101 (38) of the Immigration and Nationality Act of 1952 defined "United States" as "the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands", so that Guam was added to the list[83].

Section 101 (a)(38) of the current Immigration and Nationality Act defines the term "United States" as "except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands"[84]. In addition, the territorial waters also belong to the domain of the United States. A Presidential Proclamation of 1988 declares that the territorial sea of the United States henceforth expands to 12 nautical miles

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section 288 of title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date."

79 Section 308 of the Act prescribes for nationals but not citizens of the United States at birth, and Section 309 for children born out of wedlock.

80 Cf., Daniel Levy and et al., U.S. Citizenship and Naturalization Handbook(2018-2019 ed.), § 2:4 to § 2:24 (Thomson Reuters 2018).

81 In relation with the issue, a literature states, concerning a person who is born somewhere in the United States other than in the area which does not belong to any State at the birth, in a territory, or in the District of Columbia, that although such a person could be given citizenship of the United States by a legislation of Congress, it is questionable whether such a person could be a "natural born citizen" in the meaning of the Article 2, Section 1, Clause 5 of the Constitution. Sarah Helene Duggin & Mary Beth Collins, Natural Born in the U.S.A.: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It, 85 Boston Univ. 53, 92 (2005). [hereinafter Duggin & Collins].

82 Before the Nationality Act of 1940 which provided the definition of the domain of the United States came into effect on January 13, 1941, there had been no federal act defining "the United States" in relation to acquisition of citizenship. In the Revised Statutes, which was in effect before 1941, the words "the United States" were used, but the words are thought to have meant the domains of the States which had been admitted to the Union. 7 FAM 1112 (d)(CT:CON-314; 08-21-2009); 8 FAM 301.1-2.

83 Still after that, Joint Resolution To Approve the "Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America", and for the other purposes (90 Stat. 263), which was resolved on May 24, 1976, added Commonwealth of the Northern Mariana Islands to the domain of the United States.

84 As being seen from the provision quoted above, Puerto Rico is included in the United States in the current law, but the people of Puerto Rico don't have the federal tax obligation and are given the right to vote for presidential elections only in primary elections. Taking those facts into consideration, it may be questionable whether a person born in Puerto Rico should satisfy the condition of Article 2, Section 1, Clause 5 of the Constitution. Duggin & Collins, at 92.

from the baselines of the United States determined in accordance with international law[85].

It is provided that a person born on a foreign ship within the territorial seas of the United States shall be a citizen of the United States at birth[86]. On the other hand, it is provided that persons born on such vessels as foreign warships, naval auxiliaries, and other vessels or aircraft owned or operated by a foreign state and used for governmental non-commercial service, while in U.S. internal waters, do not acquire U.S. citizenship by virtue of place of birth, because such persons are not subject to jurisdiction of the United States[87]. It is also provided that a child born on a U.S.-registered or documented ship on the high seas or in the exclusive economic zone outside the U.S. territory does not acquire U.S. citizenship by reason of the place of birth[88]. The conditions are similar also in the case of aircraft. It is provided that a child born on a U.S.-registered aircraft outside U.S. airspace does not acquire U.S. citizenship by reason of the place of birth[89]. Besides, it is provided that U.S. military installations abroad and U.S. diplomatic or consular facilities abroad are not part of the United States[90,91].

As being written, since the independence, the United States has gradually extended the territories corresponding to the range where the acquisition of citizenship by birth would happen. Such examples also include each of the current States which have been merged into the Union throughout the history. Moreover, the current Immigration and Nationality Act has the provisions on the acquisition of citizenship by birth in Puerto Rico, Panama, Hawaii, and the like, and those provisions prescribes the beginning time of the citizenship to be acquired by birth in those areas[92]. In addition, there are the areas in the United States in which a person would not acquire citizenship by birth, but only be deemed a national of the United States, in spite of being under the administration of the United States government[93,94].

Paragraph 2 Meaning of "Subject to the Jurisdiction"

Regarding the meaning of "subject to the jurisdiction"[95] in the Fourteenth Amendment, generally speaking, a nation had an exclusive and absolute jurisdiction within its own territory[96]. However, there may be some exceptions coming from something such as international comity, and, moreover, in the United States, some of such exceptions have been admitted also for Native Americans[97].

The Supreme Court stated that the phrase was intended to exclude children of foreign sovereigns or their ministers, those born on foreign public ships, of enemies within and during a hostile occupation of part of our territory, and

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85 Presidential Proclamation 5928 of Dec. 27, 1988, 54 Fed. Reg. 777 (Jan. 9, 1989), 103 Stat. 2981.

86 7 FAM 1114(a)(CT:CON-314; 08-21-2009); 8 FAM 301.1-4.

87 7 FAM 1113(d)(2) (CT:CON-314; 08-21-2009); 8 FAM 301.1-3(d)(2).

88 7 FAM 1113(a)) (CT:CON-314; 08-21-2009); 8 FAM 301.1-3(a).

89 7 FAM 1113(b)) (CT:CON-314; 08-21-2009); 8 FAM 301.1-3(b).

90 7 FAM 1113(c)) (CT:CON-314; 08-21-2009); 8 FAM 301.1-3(c).

91 Seeing from the provision that U.S. military installations abroad and U.S. diplomatic or consular facilities abroad are not part of the United States, children of ambassadors or of diplomats would be deemed not to be natural born citizens in the current law. On the other hand, a literature points out that Sir Edward Coke stated in so-called Calvin's Case (7 Coke Report 1a, 77 ER 377 (1608)) that a child to whom the wife of an Ambassador of England gave birth abroad should be a natural born subject. Peter H. Schuck & Roger M. Smith, Citizenship without Consent, 14 (Yale Univ. Pr. 1985).

92 See, 8 U.S.C.A. § 1402 ff.

93 8 U.S.C.A. § 1101(a)(22)(B)

94 8 U.S.C.A. § 1408. As for the details, see 7 FAM 1120(CT:CON-105 06-01-2005); 8 FAM 308(u).

95 Cf., Daniel Levy and et al., U.S. Citizenship and Naturalization Handbook(2018-2019 ed.), § 2:25 to § 2:28 (Thomson Reuters 2018).

96 The Schooner Exchange v. McFaddon & others, 11 U.S. 116, 136 (1812).

97 Elk v. Wilkins, 112 U.S. 94, 137-139 (1884). However, a federal act established in 1924 (43 Stat. 253. The formal title of this act is "an Act to authorize the Secretary of the Interior to issue certificate of citizenship to Indians".) provided that Native Americans should acquire citizenship of the United States.

The current law provides that Native Americans, if born in the United States, shall be nationals and citizens of the United States at birth. 8 U.S.C.A. § 1401(b).

children of members of the Indian tribes owing direct allegiance to their several tribes[98]. The current act, taking the point above into account, prescribes that the Fourteenth Amendment shall not apply to sovereigns of a foreign country while visiting the United States or members of foreign delegations[99,100].

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98 United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898).

99 Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, & Ronald Y. Wada, Immigration Law & Procedure, § 92. 3 [3](LexisNexis 2020). The cases to which the Fourteenth Amendment would not apply are: children of the persons who appear on the Blue List (a list of members of diplomatic corps issued by the Department of State of the United States); children of the persons who appear on UN Privileges and Immunities List issued by the UN delegation of the United States. In addition, the Fourteenth Amendment would not apply to children of persons related to the members of the delegation of any member state of NATO or of OAS although there is no special list for them, for such persons should have diplomatic immunity.

On the other hand, the Fourteenth Amendment is thought to apply to children of any of following persons:

(i) Persons who appear on the White List (the list of employees of the diplomatic corps of the Department of State).

(ii) Consuls and the staffs of a consulate (however, persons who are engaging in consular in an Embassy should have diplomatic immunity so that the Fourteenth Amendment should not apply to them).

(iii) Diplomats of the third nation dispatched in other country than the United States.

(iv) Such employees of the delegation of any member state of the United Nations or any other international organization as not being registered in any diplomatic corps list or the like.

(v) The staffs or employees of the United Nations or any other international organization who are not registered in any diplomatic corps list or the like.

100 There is presented an opinion which insists that persons "subject to the jurisdiction" should be interpreted as meaning persons who can legitimately stay in the United States under the jurisdiction of the United States, namely, citizens of the United States and foreigners who can legitimately stay in the United States, and that Section 1, Clause 1 of the Fourteenth Amendment should be interpreted to give citizenship only to such persons. Peter H. Schuck and Roger M. Smith, Citizenship Without Consent, at 116 (Yale Univ. Pr. 1985). On the other hand, as literatures opposing to such an interpretation as above, for example, Christopher L. Eisgruber, Birthright Citizenship and the Constitution, 72 N. Y. Univ. L. Rev. 54 (1997); Katherine Culliton-Gonzalez, Born in the Americas: Birthright Citizenship and Human Right, 25 Harv. Human Rights J. 127 (2012); Nicole Newman, Birthright Citizenship: Fourteenth Amendment's Continuing Protection Against an American Caste System, 28 Boston College Third World L. J. 437 (2008). Generally on this issue, see Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents: Joint Hearing Before the Subcommittee on Immigration and Claims and the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 104th Cong., 1st Sess., on H. R. 705, H. R. 1363, H. J. Res. 56, H. J. Res. 64, H. J. Res. 87, H. J. Res. 88, and H. J. Res. 93, December 13, 1995 (U.S. GPO 1996).

In addition, as a literature which summarizes recent arguments on the issue, Alexandra M. Wyatt, Birthright Citizenship and Children Born in the United States to alien Parents, An Overview of the Legal Debate, R44251 Congressional Research Report (2015); Ben Harrington, The Citizenship Clause and "Birthright Citizenship": A Brief Legal Overview, LSB10214 Congressional Research Report(2018).

Furthermore, as a literature which points out that there is no person who can control the situation at the birth of her/himself, whether the adopted principle is jus sanguinis or jus soli, see Mae M. Ngai, Birthright Citizenship and the Alien Citizen, 75 Fordham L. Rev. 2521, 2526 (2007). The paper points out that, seeing from the view point of consent, only naturalized persons can express their intention to be naturalized, and insists that if children of illegal immigrants could not acquire citizenship, it is to impose a disadvantage on children on account of the parents' misbehavior.

According to the interpretation of Government, all children born in and subject, at the time of birth, to the jurisdiction of the United States acquire U.S. citizenship at birth even if their parents were in the United States illegally at the time of birth. 7 FAM 1111(d)(CT:CON-314; 08-21-2009); 8 FAM 301.1-1 (U)(d).

In relation with the issue, there was presented in the first session of the 43rd Congress of 1874 a bill for the uniform interpretation on the acquisition of citizenship at birth (43-1 Cong. Rec., 3279 (1874)). First, that bill provided that all persons should be regarded as citizens of the United States, who might have been born and were residing within the United States and subject to the jurisdiction thereof, and that all married women whose husbands might be such citizens as against all powers, except the power within whose jurisdiction an alien women married to a citizen of the United States might have been born and continue to reside. Then, it provided that a child born in the United States of parents who were not citizens, and who did not reside within the United States, and who were not subject to the jurisdiction of the United States, should not be regarded as a citizen thereof, unless

- such a child should reside in the United States, or
- his or her father, or in case of the death of the father his or her mother, should be naturalized during the minority of such child, or
- such child should within six months after becoming of age file in the department of State, in such form and with such proof as should be presented by the Secretary of States, a written declaration of election to become such citizen, or
- such child should become naturalized under general laws.

Second, that bill provided that a child born abroad, whose father might be a citizen of the United States, residing in and subject to the jurisdiction of the United States, should be regarded as a citizen of the United States at the time of birth and should follow and have the domicile and citizenship of the father during minority.

Subsection 3 Citizenship by Birth in a Foreign Country

Paragraph 1 Term of Residence of Parents for the Child's Inheritance of Citizenship

In the United States, since the Naturalization Act of 1790, a person born abroad also acquires citizenship of the United States under certain conditions by Congressional statute. Such an act to give citizenship to persons born abroad has been repeatedly amended. Whether certain person should become a citizen by birth of the United States would be decided according to the relevant laws which are effective at the time of birth[101]. It should be noted that such provisions often prescribed the requirements on the parents who were citizens of the United States, for giving citizenship at birth to the children.

The outline of the change of such requirements in chronological order is as follows.

First, before the establishment of Nationality Act of 1940, the federal act generally required only the fact that the parents had ever resided in the United States[102]. It did not require a certain length of the period of the residence of parents in the United States, so that only temporary residence was sufficient.

Second, the Nationality Act of 1940 required that, when both parents were citizens of the United States, one of them should have ever resided in the United Stated or the Territory, or that, when one of parents was a citizen of the United States and the other was not a citizen but a national[103] of the United States, the citizen parent should have resided in the United States or the Territory. It was also provided that, when one of parents was a citizen of the United States and the other was an alien, the citizen parent should have resided in the United States or one of its outlying possessions at the time of the birth of the children for ten or more years which should include five or more years after the age of sixteen. Such a residence should not be a temporary stay but instead had to be the residence in the United States or one of its outlying possessions as the place of general abode[104]. However, such a residence was not required to be so permanent as to be considered as a domicile, and it was allowable to temporarily leave that place. In 1946 the law was so amended, in the case where one of parents was a citizens of the United States and the other was an alien, that it was provided that, if the citizen parent had served in any of the U.S. Forces after the opening of war on December 7, 1941, and before the end of the war, the citizen parent should have had, prior to the birth of a child, ten

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Third, the bill was provided that the following persons should be regarded as not subject to the jurisdiction of the United States within the intent of the Fourteenth Amendment, or not residing within the United States within such intent, namely,

(i) born or naturalized citizens of the United States who became naturalized as citizens or subjects of another State, or who entered into the civil, naval, or military service of any foreign prince of state, or of any colony, district, or people foreign to the United States;

(ii) citizens of the United States who might be domiciled abroad;

(iii) naturalized citizens of the United States who might, by terms of any treaty, be regarded as having resumed their original nationality, or who, on returning to their native country, might be convicted of offenses against laws of the country committed prior to their arrival in the United States;

(iv) a citizen of the United States becoming the wife of an alien, who should not reside within the United States (but such citizen might, on the death of her husband, become again a citizen of the United States by residing within one of the States or Territories, and becoming subject to the jurisdiction of the United States, and filing in the Department of State, in such form as might be prescribed by the Secretary of State, a written declaration of her election to become such citizen);

(v) a naturalized citizen of the United States becoming domiciled in the country of his or her nativity, unless when otherwise regulated by treaty.

The bill was rejected. Patrick J. Charles, Decoding the Fourteenth Amendment's Citizenship Clause: Unlawful Immigrants, Allegiance, Personal Subjection, and the Law, 51 Washburn L. J. 211, 234 (2012).

101 7 FAM 1131-1-2(TL: CON-68; 04-01-1998); 8 FAM 301.4-1(A)(2). However, there may be some cases, like the 1802 amendment of Naturalization Act, in which provisions to be retroactively applied are prescribed. 2 Stat. 153, Sec 4.

102 As it will be seen below, the Act of 1934 (48 Stat. 797.) required that the child should reside in the United States to keep the citizenship, but such a requirement was abolished by the act of 1978 (92 Stat. 1046). Moreover, the Act of 1994 provided remedies for persons who had lost citizenship because of the lack of that requirement. 108 Stat. 4305 (1994). The formal title of the act of 1994 is: An Act to amend title III of the Immigration and Nationality Act to make changes in the laws relating to nationality and naturalization. The abbreviation is also provided as "Immigration and Nationality Technical Corrections Act of 1994".

103 8 U.S.C.A. § 1101(a)(22)(B); 8 U.S.C.A. § 1408.

104 54 Stat. 1137, Sec. 104. It provided that the place of general abode should be deemed the place of residence.

years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of twelve years[105].

Third, the Nationality Act of 1952 basically inherited the provisions of the Nationality Act of 1940, so, for example, the place of general abode was deemed as the place of residence also in the act of 1952[106]. On the other hand, as being said above, it was provided that in order for a child to be a citizen of the United States, when one of the parents was a citizen of the United States and the other was not a citizen but a national of the United States, the citizen parent should have been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of the child, and when one of the parents was an alien and the other a citizen of the United States, the citizen parent should have, prior to the birth of such person, been physically present in the United States or one of its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years. Further, in contrast to the Act of 1940, the term "have residence" in the Nationality Act of 1940 was changed into the term "be physically present" in the Nationality of 1952[107].

Fourth, the amendment act of 1986 provided that, when one of the parents was an alien and the other was a citizen of the United States, the citizen parents should be physically present in the United States or its outlying possessions for not less than five years, at least two years of which were after attaining the age of fourteen years[108]. This requirement is the same as that of the current law.

As being seen above, the current statute provides that, when one of the parents is a citizen of the United States and the other is not a citizen but a national of the United States, the citizen parent shall be physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of the child concerned[109].

Paragraph 2 Where a Parent to Reside for Transmission of Citizenship

Under the law before the establishment of the Nationality Act of 1940, only the residence of the parents in the United States was required. On this point, the Nationality Act of 1940 provided that the citizen parent should have resided in the United States or in any of its outlying possessions. In addition, it provided the definitions of the United States and of its outlying possessions from the viewpoint of geographical areas[110].

The Immigration and Nationality Act of 1952 also provided, like the Nationality Act of 1940, that the citizen parent should be physically present in the United States or one of its outlying possessions, and the provisions to define "United States" and "outlying possessions"[111] were prescribed, which is the same as that of the current law.

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105 60 Stat. 721. The formal title of the act is: An Act to amend Section 201(g) of the Nationality Act of 1940 (54 Stat. 1138–1139; 8 U.S.C.A. § 601).

106 The Nationality Act of 1952 also provided, the term "residence" meant the place of general abode. In addition, it provided that the place of general abode of a person meant his principal, actual dwelling place in fact, without regard to intent. 66 Stat. 163, 170, Sec. 101(33).

107 However, the requirement was alleviated later in: An Act Granting the benefits of section 301(a)(7) of the Immigration and Nationality Act to certain children of United State citizens, 70 Stat. 50 (1956); An Act to amend section of 301(a)(7) of the Immigration and Nationality Act, 80 Stat. 1322 (1966).

108 100 Stat. 3655. The formal title of the act is: An Act to amend the Immigration and Nationality Act, and for other purposes.

109 8 U.S.C.A. §1401(d).

110 54 Stat. 1137. The Nationality Act of 1940 provided that the term "United States" meant the continental United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands, and that the term "outlying possessions" meant all territory over which the United States exercised right of sovereignty, except the Canal Zone of Panama.

111 66 Stat. 163, 170, 171. The Immigration and Nationality Act of 1952 provided that the term "United States" meant the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States, and that the term "outlying possessions of the United States" meant American Samoa and Swains Island.

Paragraph 3 Inheritance of Citizenship and Allegiance to the United State

Before the establishment of the Act of 1934, there was no act which required certain action in order for a person who was in a foreign country and had acquired citizenship of the United States by inheritance from the parent to maintain his/her citizenship[112].

The Act of 1934[113] had no special provision other than one which required the residence of the parents in the United States prior to the birth of the child concerned when both parents were citizens of the United States. However it required, in the case in which one of the parents was an alien and the other was a citizen of the United States, that the child concerned came to the United States and resided therein for at least five years continuously immediately previous to his/her eighteenth birthday, and, furthermore, that, within six months after the child's twenty-first birthday, he or she should take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization.

The Nationality Act of 1940, which amended the Act of 1934, abolished the requirement of oath of allegiance, but required, in order to maintain inherited citizenship in the case in which one of the parents was an alien and the other was a citizen of the United states, that the child concerned should reside in the United States or its outlying possessions for periods totaling five years between the ages of thirteen and twenty-one years[114].

The Act of 1952, which amended the Act of 1940, required, in order to maintain inherited citizenship in the case in which one of the parents was an alien and the other was a citizen of the United States, that the child concerned should come to the United States prior to attaining the age of twenty-three years and should immediately, following any such coming, be continuously physically present in the United States for at least five years[115,116].

Congress of 1972 established an Act to alleviate the requirement of residence in the United States for a child of the alien and citizen parents to inherit citizenship[117]. The Act did, first, shorten the length of period of physical presence in the United States of the child concerned from five to two years between the ages of fourteen years and twenty-eight years, and, second, provide that absences from the United States of less than sixty days in the aggregate during the period for which continuous physical presence in the United States was required should not break the continuity of such physical presence, and, third, provide that if the alien parent was naturalized while the child was under the age of eighteen years and the child began to reside permanently in the United States while under the age of eighteen years, the child should be treated same as a child of the citizen parents.

After that, in 1978, the requirement of physical presence of a child for keeping citizenship was abolished[118]. Since the act of 1978 was not retroactive, there was established an act to make persons who could not have become citizens because of the failure to meet the physical presence requirement in the United States before 1978, citizens of the United States from and after taking the oath of allegiance to the United States[119].

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112 However, the act of 1907 (34 Stat. 1228) which was referred to above prescribed that all children born outside the limits of the United States who were citizens thereof by inheritance and who continued to reside outside the United States should, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and should be further required to take the oath of allegiance to the United States upon attaining their majority.

113 48 Stat. 797.

114 54 Stat. 1137. Sec. 201(g).

115 66 Stat. 163, Sec.301(b).

116 The requirement "be physically present" was so alleviated by the amendment of 1957, that absences from the United States of less than twelve months in the aggregate, during the period for which continuous physical presence in the United States was required, should not be considered to break the continuity of such physical presence. 71 Stat. 639. The formal title of the act is: An Act to amend the Immigration and Nationality Act, and for other purposes.

117 86 Stat. 1289. The formal title of the act is: An Act to amend section 301 of the Immigration and Nationality Act.

118 92 Stat. 1046. The formal title of the act is: An Act to repeal certain sections of the title III of the Immigration and Nationality Act, and for other purposes.

119 108 Stat. 4305. The formal title of the act is: An Act to amend title III of the Immigration and Nationality Act to make changes in the laws relating to nationality and naturalization.

Paragraph 4 Citizenship of Illegitimate Children by Inheritance

Concerning an illegitimate child's acquisition of citizenship through inheritance, the cases are divided into one in which the citizen parent is the father and one in which the citizen parent is the mother of the child.

First, although the Act of 1855 provided that a child who was born abroad and whose father was a citizen of the United States should be a citizen of the United States, an illegitimate child whose father was a citizen of the United States was thought not to become a citizen of the United States[120].

The Nationality Act of 1940 provided that a child born out of wedlock should inherit citizenship if the paternity was established during minority by legitimation or adjudication of a competent court[121].

The Immigration and Nationality Act of 1952 amended the Nationality Act of 1940, so that the confirmation of the paternity by adjudication of a competent court was abolished and legitimation prior to the age of twenty-one years was prescribed as the only measure for an illegitimately born child to inherit citizenship[122].

The Amendment Act of 1986[123] provided that the child born outside of the United States and its outlying possessions whose father was a citizen of the United States should be deemed as a citizen of the United States under following conditions.

(i) a blood relationship between the child and the father is established by clear and convincing evidence,

(ii) the father had the nationality of the United States at the time of the child's birth,

(iii) the father unless deceased has agreed in writing to provide financial support for the child until such child reaches the age of eighteen years, and

(iv) while such child is under the age of eighteen years, (1) such child is legitimated under the law of the child's residence or domicile, or (2) the father acknowledges paternity of the child in writing under oath, or (3) paternity of the child is established by adjudication of a competent court.

This amendment added the requirements of the proof of the blood relationship by clear and convincing evidence and of the promise in writing to provide financial support for the child until such child reached the age of eighteen years, while it alleviated the requirement of the legitimation by the father so as to allow the father's acknowledgment of paternity of the child in writing under oath.

The current Immigration and Nationality Act[124] requires following facts.

1. a blood relationship between the person and the father is established by clear and convincing evidence,
2. the father had the nationality of the United States at the time of the person's birth,
3. the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
4. while the person is under the age of 18 years -
   (A) the person is legitimated under the law of the person's residence or domicile,
   (B) the father acknowledges paternity of the person in writing under oath, or
   (C) the paternity of the person is established by adjudication of a competent court.

Second, in around 1912, although there was no rule enacted, the Department of State held that a child born out of wedlock to a U.S. citizen mother, acquired U.S. citizenship through the mother if she previously had resided in the United States. It was considered that in the absence of a legally recognized father, the mother, as the sole parent,

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120 An opinion of Attorney General of 1920 stated that a child born out of wedlock, in a foreign country, of an American father and an alien mother, could not inherit citizenship as nullius filius, but after the child was legitimated, such a child might be considered a native citizen of the United States (32 Op. Atty. Gen. 162 (1920).).

121 54 Stat. 1137, Sec. 205. However, the term, "during minority by legitimation or adjudication of a competent court", of the provision above in the Nationality Act of 1940 was changed by the amendment of 1952 into "while such child is under the age of twenty-one years by legitimation".

122 66 Stat. 163. Sec. 309.

123 100 Stat. 3655.

124 8 U.S.C.A. § 1409.

would have the rights normally attributed to a U.S. citizen father, which should also avoid statelessness for the child[125]. However, it was overturned by the opinions of the Attorney General which stated that Section 1993 in the Revised Statutes of 1878 did not admit the transmission of citizenship through the mother to the child[126,127].

The amendment of 1934 made it possible for a female citizen of the United States to transmit citizenship to the child, whether the father was a citizen or not[128].

The Nationality Act of 1940 provided that a child born out of wedlock should be held to have acquired at birth the mother's nationality status in the absence of legitimation or adjudication to establish the paternity if the mother had the nationality of the United States at the time of the child's birth and had previously resided in the United States or one of its outlying possessions[129]. The Immigration and Nationality Act of 1952 deleted the condition of the absence of the confirmation of the paternity provided in the Nationality Act of 1940 and required that the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year[130]. That requirement is kept in the current law[131].

Paragraph 5 Citizenship of Adopted Children

On October 30, 2000, the President signed on the Child Citizenship Act of 2000, and the Act was put into effect on February 27, 2001[132,133,134].

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125 8 FAM 301.5-3(B)(a).

126 39 Op. Atty. Gen. 290 (1939); 39 Op. Atty. Gen. 397 (1939). Recognizing the harshness inherent in this holding, the attorney general expressed hope that legislative relief could be given retroactively and this was done in section 205 of the Nationality Act of 1940. 8 FAM 301.5-3(B)(c); 8 FAM 301.6-5(A)(The provisions of section 201, subsections (c), (d), (e), and (g), and section 204, subsections (a) and (b), hereof apply, as of the date of birth, to a child born out of wedlock, provided the paternity was established during minority, by legitimation, or adjudication of a competent court. In the absence of such legitimation or adjudication, the child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, should be held to have acquired at birth her nationality status(8 U.S.C. 605; 54 Stat. 1139-1140.)).

127 However, the administrative practice seemed to have still given citizenship at birth to an illegitimate child if the mother previously had resided in the United States. 8 FAM 301.5-3(B)(b).

128 48 Stat. 797. The amendment was interpreted, although it was not explicitly provided, that an illegitimate child of a citizen mother should inherit citizenship as well as a child of a citizen father. Charles Gordon, Stanley Mailman, Stephen Yale-Loeh, & Ronald Y. Wada, Immigration Law & Procedure, § 93.4 [3][b](LexisNexis 2020).

129 54 Stat. 1137, Sec. 205. This provision was retroactive.

130 66 Stat. 163, Sec. 309(c).

131 8 U.S.C.A. §1409(c).

132 114 Stat. 1631; 8 U.S.C.A. §1431. The formal title of the Act is: An Act to amend the Immigration and Nationality Act to modify the provisions governing acquisition of citizenship by children born outside of the United States, and for other purposes.

In relation to the administrative manual regarding this act, cf., 8 FAM 301.10 Acquisition of U.S. Citizenship under the Child Citizenship Act(CT:CITZ-37;06-08-2020)

133 This Act provided that a parent who was a citizen of the United States (or, if the citizen parent has died during the preceding 5 years, a citizen grandparent or citizen legal guardian) might apply for naturalization on behalf of a child born outside of the United States who had not acquired citizenship automatically under section 1431 of title 8, and that the Attorney General should issue a certificate of citizenship to such applicant upon proof, to the satisfaction of the Attorney General, that the following conditions had been fulfilled (this part was amended in 2002 (116 Stat. 1837) and in 2008 (122 Stat. 186)):

(1) At least one parent (or, at the time of his or her death, was) is a citizen of the United States, whether by birth or naturalization.

(2) The United States citizen parent

(A) has (or, at the time of his or her death, had) been physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years; or

(B) has (or, at the time of his or her death, had) a citizen parent who has been physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years.

(3) The child is under the age of eighteen years.

(4) The child is residing outside of the United States in the legal and physical custody of the applicant (or, if the citizen parent is deceased, an individual who does not object to the application).

(5) The child is temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful status.

The Act provided that a child adopted by a United States citizen parent and who had the permanent residence in the United States should become a citizen of the United States when all of the following conditions are fulfilled:

(i) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.

(ii) The child is under the age of eighteen years.

(iii) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

In relation to this, it was also required that the child satisfies the requirements applicable to adopted children under the relevant provision of the Immigration and Nationality Act[135].

The provision above is now prescribed in Title III, Chapter 2, "Nationality through Naturalization". According to the wording of the provision, such a child "automatically becomes a citizen of the United States". The term, "automatically" in the provision means "without the need to apply for citizenship"[136,137].

Paragraph 6 Citizenship of Children of Armed Forces Members or U.S. Government Employees (or their Spouses)

The Citizenship for Children of Military Members and Civil Servants Act[138], enacted on March 20, 2020, provides that a child born outside of the United States acquires automatic citizenship in cases where the child is an lawful permanent resident[139] and is in the legal and physical custody of his or her U.S. citizen parent who is under the following conditions.

- Stationed and residing outside of the United States as a member of the U.S. armed forces;
- Stationed and residing outside of the United States as an employee of the U.S. government; or

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134 In relation to the Act, concerning the case in which a citizen woman gave birth to a child in a foreign country, if the mother was unmarried, according to Section 309(c) (8 U.S.C.A. § 1409(c)) it was required in order for the child to acquire citizenship that she had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year. But in the same case except that the mother had married an alien father, according to 301(g) (8 U.S.C.A. § 1401(g)), it was required that the mother, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years. A literature points out that therefore it could be said that the citizen mothers who legitimately married an alien are exposed to "marriage penalty". However, the literature admits that the concern of section 309(c) was that, assuming many nations have citizenship laws similar to those of the United States under which unmarried fathers cannot transmit citizenship without going through certain formalities, children of unmarried mothers might not acquire the nationality of their fathers, so the alleviation of the requirement would be reasonable in order to avoid statelessness. But the literature also points out that the difference between sections 309(c) and 301(g) could even be an incentive to divorce. See, David A. Isaacson, Correcting Anomalies in the United States Law of Citizenship by Decent, 47 Ariz. L. Rev. 313, 353 (2005).

135 8 U.S.C.A. § 1101(b)(1).

136 Press release from the Department of State regarding the Child Citizenship Act of 2000, dated February 26, 2001.

In accordance with the FAQ regarding the Child Citizenship Act of 2000 published by the Bureau of Consular Affairs of the Department of State (https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-FAQs/child-citizenship-act-of-2000.html), a child who enters the United States on an IR-4 or IH-4 visa (to be adopted in the United States) will automatically acquire U.S. citizenship when the adoption occurs in the United States.

137 In relation to Article 2, Section 1, Clause 5 of the Constitution of the United States, it would be questioned whether a person who acquired citizenship according to the provision above of the federal act should be a natural born citizen of the Constitution. On this question, a literature answers that a person who acquired citizenship of the United States according to the provision above of the federal act should not be considered a natural born citizen of the United States. Duggin & Collins, at 106.

138 134 Stat. 274; 8 U.S.C.A. § 1431(c). The formal title of the Act is: An Act to facilitate the automatic acquisition of citizenship for lawful permanent resident children of military and Federal Government personnel residing abroad, and for other purposes. (https://www.govinfo.gov/content/pkg/PLAW-116publ133/pdf/PLAW-116publ133.pdf)

In relation to this, cf., USCIS Policy Manual, "Chapter 4 - Automatic Acquisition of Citizenship after Birth (INA 320)", "C. Children of Armed Forces Members or U.S. Government Employees (or their Spouses)". (https://www.uscis.gov/policy-manual/volume-12-part-h-chapter-4#footnote-11)

139 In cases involving the child of a U.S. armed forces member residing outside the United States, the child must be authorized to accompany and reside with the U.S. armed forces member as provided by the member's official orders. If the spouse of the U.S. armed forces member is the qualifying U.S. citizen parent, the spouse must be authorized to accompany and reside with the U.S. armed forces member as provided by the member's official orders.

- The spouse residing outside the United States in marital union with a U.S. armed forces member or U.S. government employee who is stationed outside of the United States.

Section 5 Citizenship by Birth in Court Judgements

In this section, this article will analyze the cases concerning the acquisition of citizenship by birth[140] below chronologically.

Subsection 1 Cases in Early Years

In the early years after the foundation of the United States, the Supreme Court treated several cases concerning citizenship of persons born in the United States[141].

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140 In addition to the cases introduced above, in the case, Ruben Flores-Villar v. United States of 2011, the Supreme Court affirmed the judgement of the court of appeal without reasoning (131 S. Ct. 2312 (2011)).

In that case, a defendant who was convicted of importation of marijuana and deported reentered the United States and insisted that he was a citizen of the United States. Based on the recognition by the court, the defendant was born in Mexico in 1974 to his U.S. citizen father who was 16 years of age at the time, and his non-U.S. citizen mother. Defendant's father was issued a certificate of citizenship in 1999 because his mother, defendant's grandmother, was a U.S. citizen by birth. And defendant's father and grandmother brought defendant to the U.S. when he was two months old.

The defendant asked the U.S. Government for the certification that he was a citizen of the United States, based on the Section 301(a)(7) (8 U.S.C.A. §1401(a)(7)) and Section 309 (8 U.S.C.A. §1409) of the Immigration and Nationality Act, which prescribed the acquisition of citizenship for a child who was born abroad and one of whose parents was a citizen of the United States. The U.S. Government rejected the defendant's application based on the fact that the defendant's father did not satisfy the requirement of the federal act at the time of the birth of the defendants, which was that the citizen parent should, prior to the birth of the child, be physically present in the United States or its outlying possessions for totally ten years, at least five years of which were after attaining the age of fourteen years.

In the suit, the defendant deported insisted that he himself should be a citizen of the United States. On the one hand, since the defendant was born when his father was sixteen years old, it was impossible for the father to satisfy the residential requirement. On the other hand, if the citizen parent were the mother, the child would acquire citizenship of the United States only when the mother has been in the United States for continuous one year. The questions were whether such difference in federal act might be considered as a discrimination based on the gender difference of the parent and whether the requirement which could not be satisfied on the age of a parent when the child was born might be considered as a discrimination on the basis of age, which involved the Due Process Clause provided in the Fifth Amendment to the Constitution.

The federal district court(497 F. Supp 2d 1160(2007)) denied the motion of the defendant, quoting Nguyen case which will be picked up in this article, and ruled that the different treatment between the cases of a father and a mother in the provisions of federal act was intended to minimize the risk of stateless of a child by relaxing the requirement for mother's cases when the child could not acquire citizenship of the country of his or her birth, and that, concerning the residential requirement for a father, the Government had an important public interest for confirming a link between the United States and a child born abroad.

Further, the court of appeal(533 F. 3d 990(2008)) stated that some means to avoid statelessness was necessary, and, though the fit was not perfect, it was sufficiently persuasive in light of the virtually plenary power that Congress had to legislate in the area of immigration and citizenship. On this point, while the defendant insisted that, though prevention of stateless children was a legitimate goal, it could not be furthered by penalizing fathers, the court of appeal stated, quoting the Nguyen case, that the residence differential was directly related to statelessness, that the one-year period applicable to unwed citizen mothers sought to insure that the child would have a nationality at birth, and that, likewise, it furthered the objective of developing a tie between the child, his or her father, and this country.

Moreover, the court of appeal judged, concerning the longer residential requirement for a father, it was not irrational to believe that residence in the United States advanced the objective of a link between the citizen, the United States, and a foreign-born child born out of wedlock, and that the children of citizen mothers born out of wedlock abroad ran a greater risk of being stateless than the children of citizen fathers.

141 Other than the cases to be picked up in the body text, there is a case which the supreme court of Pennsylvania judged in 1781 and registered in the United States Reports, Respublica v. Chapman (1 U.S. 53 (1781)), in which citizenship of the United States was treated in relation to treason. In that case, the question was whether a person who was born at the State of Pennsylvania before the Declaration of Independence of the Unite States and had lived in the State of his birth until December 26, 1776, and who owed allegiance to Great Britain, might be punished for treason. The court opinion stated that the cases which had been produced upon the present controversy, were of an old government being dissolved, and the people assembling, in order to form a new one, that, when such instances occur, the voice of the majority had to be conclusive, as to the adoption of the new system, that, however, all the writers agreed, that the minority had, individually, an unrestrainable right to remove with their property into another country, that a reasonable time for that purpose ought to be allowed, and that, in short, that none were subjects of the adopted government, who had not freely assented to it. Then, the court opinion ruled that since there were no laws to be obeyed from the 14th of May

In 1804, the Supreme Court judged the case, Murray v. Schooner Charming Betsy[142]. The question of the case was whether a person who was born in the United States and while an infant, between 1789 and 1790, moved to Denmark and had taken an oath of allegiance thereto in 1797, should have citizenship of the United States. The court opinion of the case recognized the person as a citizen of the United States.

Next, in 1808, the Supreme Court judged the case, McIlvaine v. Coxe's Lessee[143]. The question of the case was whether a person born in the Colony of New Jersey before the year 1775 and residing there until the year 1777, but who then joined the British army and ever since adhered to the British, could inherit lands in the State of New Jersey as a citizen of the United States. The court opinion stated that, since the person remained in the State not only after she had declared herself a sovereign state, but after she had passed laws by which she pronounced him to be a member of, and in allegiance to the new government, after October 4, 1776, he became a member of the new society, entitled to the protection of its government and bound to that government by the ties of allegiance[144].

In 1830, the Supreme Court dealt with the case, Inglis v. The Trustee of the Sailor's Snug Harbor[145]. The question of the case was whether a person born in the United States before the Independence of the United States, and who moved with his father to Great Britain could inherit lands in the State of New York from his father. The court opinion stated that since the person was born before the Independence of the United States, he should be a British subject, and that as the person and the father withdrew from New York to the British dominions and remained there ever since demonstrated a voluntary dissolution of allegiance to the State of New York. The court opinion stated that the person was an alien and incapable of taking lands in New York by inheritance[146].

In those cases above which were judged in the early years after the Independence of the United States, the court, in confronting the question, what principle of the law the decision on the division between citizens of the United States and aliens, like subjects of the Great Britain, should be based on, seems to have judged the cases from the viewpoints, whether the person concerned was born in the United States, and whether the birth of the person was before or after the Independence of the United States[147].

Subsection 2 Lynch v. Clarke Case

In 1844, the judgement on the case, Lynch v, Clarke[148] was delivered in the State of New York, which gave an important influence on the law of the United States concerning the acquisition of citizenship. In the judgement, the court recognized U.S. citizenship of a person born of British parents who stayed temporarily at the State of New York at the person's birth, and the court stated that the person had the right to inherit property including real estate in New York[149]. The court opinion of the case stated as follows.

1776, to the 11th of Feb. 1777, the prisoner could not be deemed a subject of the State of Pennsylvania on the 26th day of December 1776, so, the jury found not guilty of High Treason. As an introduction for the case, see, Josh Blackman, Original Citizenship, 159 U. Pa. L. Rev. 95 (2010).

142 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64 (1804).

143 McIlvaine v. Coxe's Lessee, 8 U.S. (4 Cranch.) 209 (1808). This case was treated also in 1805 by the Supreme Court. McIlvaine v. Coxe's Lessee, 6 U.S. (2 Cranch.) 280 (1805).

144 Id. at 212.

145 The Supreme Court treated the case, Inglis v. The Trustee of the Sailor's Snug Harbor, 28 U.S. (3 Pet.) 99 (1830).

146 Id., at 126–127.

147 In relation with the issue, in the case, Inglis v. The Trustee of the Sailor's Snug Harbor (28 U.S. (3 Pet.) 99 (1830)), the Supreme Court stated as follows: "The rule as to the point of time at which the American ante nati ceased to be British subjects differs in this country and in England as established by the courts of justice in the respective countries. The English rule is to take the date of the Treaty of Peace in 1783. Our rule is to take the date of the declaration of independence. And in the application of the rule to different cases some difference in opinion may arise. The settled doctrine of this country is that a person born here, who left the country before the declaration of independence and never returned here, became thereby an alien, and incapable of taking lands subsequently by descent in this country." Id., at 121. However, in the case, Shank v. Dupont (28 U.S. (3 Pet.) 242 (1830)), the Supreme Court took the year 1783 as the time of the criterion for the issue.

148 Lynch v. Clarke, 3 N. Y. Leg. Obs. 236 (1 Sand Ch. 583) (1844).

149 Id., at 237, 259.

First, the court opinion stated that there was no doubt that since common law prevailed in all the thirteen colonies was the common origin of their jurisprudence, and was the basis of their laws and jurisprudence, it followed that all persons born in the colonies while in the ligeance of the King of England, became subjects of the Crown of England[150]. The court opinion then stated that at the Declaration of Independence, by the law of each and all the thirteen states, a child born within their territory and ligeance respectively, became thereby a citizen of the state of which he was a native[151].

After that, the court opinion stated that to a limited extent the common law prevailed in the United States as a system of national jurisprudence after the establishment of the Constitution of the United States[152]. It continued that since the Constitution of the United States contained no clause declaring who should be deemed citizens, the law which had prevailed on this subject, in all the states, became the governing principle or common law of the United State[153]. As a conclusion, the court opinion stated that by the law of the United States, every person born within the dominions and allegiance of the United States, whatever the situation of his parents were, was a natural born citizen[154,155].

In this case as well as in earlier cases, the court recognized the acquisition of citizenship by birth in the United States. The court opinion of the case stated that it was based on the common law principle coming from England, which had been accepted in the legal system of the United States.

Subsection 3 Dred Scott v. Sanford Case

In 1857, the Supreme Court of the United States judged on the Dred Scot v. Stanford case[156]. In this case, the plaintiff who was born in Virginia as a child of negro slaves sued for the confirmation of the status of the free man grounded on the law of the state where he had ever moved to and resided with his master, which prohibited anybody from owning a slave.

The court opinion ruled that United States citizenship was enjoyed by two classes of individuals[157]:

(i) white persons born in the United States as descendants of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States and who became also citizens of this new political body, the United States of America, and

(ii) those who, having been born outside the dominions of the United States, had migrated thereto and been naturalized therein.

The court opinion then ruled that the States were competent to confer state citizenship upon anyone in their midst, but they could not make the recipient of such status a citizen of the United States, and that the Negro was ineligible to attain United States citizenship, either from a State or by virtue of birth in the United States, even as a free man descended from a Negro residing as a free man in one of the States at the date of ratification of the Constitution.

The judgement of the case was expressing a unique way of thinking in that it decided the origin of citizenship through an inference of the intention of the founders of the Constitution of the United States. The appropriateness of the judgement has been questioned and doubted afterward, which has been seen as one of causes of the Civil War.

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150 Id., at 242.

151 Id., at 244.

152 Id., at 246.

153 Id.

154 Id. at 250.

155 The court opinion stated also, in relation to the act of 1802, that the children of citizens of the United States born abroad were citizens of the United States already by common law principle. Id., at 248.

156 60 U.S. (19 How.) 393 (1857).

157 The summarizing of the judgement of the Dred Scott case above is based on the annotation on Section 1 of the Fourteenth Amendment given in “The Constitution of the United States of America -- Analysis and Interpretation (Centennial edition) of 2017(p1840)” edited by Congressional Research Service of Library of Congress.

Subsection 4 Slaughter-House Cases

In 1972 at the time of reconstruction after Civil War, the Supreme Court judged the Slaughter-House Cases[158]. The question of the case was whether a statute, enacted by the legislature of the State of Louisiana to establish a corporation with the exclusive right, for twenty-five years, to have and maintain slaughterhouses, landings for cattle, and yards for inclosing cattle intended for sale or slaughter within certain areas in that State, should violate the Thirteenth or Fourteenth Amendment of the Constitution.

On the question of the definition of citizenship provided in the Fourteenth Amendment, the court opinion stated that it overturned the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States, and that its main purpose was to establish the citizenship of the negro without any doubt[159]. Furthermore, the court opinion stated that the phrase, "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States[160].

The judgement of the case expressed, though as an obiter dicta, the authoritative interpretation of the part for acquisition of citizenship by birth provided in the Fourteenth Amendment for the first time after the establishment of the Amendment.

Subsection 5 Minor v. Happersett Case

In 1874, the Supreme Court judged the case Minor v. Happersett[161]. In this case, a native-born free white female citizen of the United States and of the State of Missouri over the age of twenty-one years wishing to vote for electors for President and Vice-President of the United States and for a representative in Congress and for other officers at the general election, applied to one registrar of voters to register her as a lawful voter, which he refused to because she was not a "male citizen of the United States," but a woman and the constitution of the State of Missouri provided, "Every male citizen of the United States shall be entitled to vote". The court opinion ruled in the relevant part that since the Constitution did not in words say who should be natural-born citizens, resort had to be had elsewhere to ascertain that, and continued that at common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also[162].

In this case, the Supreme Court explicitly stated, though as an obiter dicta, that a person both of whose parents were citizens of the United States was a natural-born citizen in the meaning of Article 2, Section 1, Clause 5 of the Constitution of the United States.

Subsection 6 Elk v. Wilkins Case

In 1884, the Supreme Court judged the Elk v. Wilkins[163] case. In this case, the plaintiff, a person born as a member of one of the Indian tribes within the United States, who insisted that he had severed his tribal relation to the Indian tribes, and fully and completely surrendered himself to the jurisdiction of the United States, was rejected registration as a voter of the election for the congress of the city of Omaha. The plaintiff insisted that he should be able to enjoy as a citizen all the privileges and immunities of citizen.

The court opinion examined whether the plaintiff was a citizen of the United States in the meaning of section 1 of

158 Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

159 Id., at 73.

160 Id.

161 88 U.S. (21 Wall.) 162 (1874).

162 Id., at 167. The court opinion pointed out there that some authorities went further and included as citizens children born within the jurisdiction without reference to the citizenship of their parents and that, however for the purposes of this case, it was not necessary to solve these doubts, although there have been doubts on the argument.

163 Elk v. Wilkins, 112 U.S. 94 (1884).

the Fourteenth Amendment of the Constitution, and it concluded that the plaintiff was not a citizen by following reasons, and rejected the claim.

First, the court opinion pointed out that the Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states, but they were alien nations, distinct political communities, with whom the United States might and habitually did deal as they thought fit, either through treaties made by the President and Senate or through acts of Congress in the ordinary forms of legislation, and that the members of those tribes owed immediate allegiance to their several tribes and were not part of the people of the United States[164].

Then, the court opinion stated that the alien and dependent condition of the members of the Indian tribes could not be put off at their own will without the action or assent of the United States, and that they were never deemed citizens of the United States except under explicit provisions of treaty or statute to that effect either declaring a certain tribe to be citizens or authorizing individuals of particular tribes to become citizens upon application to a court of the United States for naturalization[165].

Moreover, the court opinion stated that the phrase of the Fourteenth Amendments of the Constitution required persons being completely subject to their political jurisdiction and owing them direct and immediate allegiance to become citizens, so that persons not thus subject to the jurisdiction of the United States at the time of birth could not become so afterwards except by being naturalized[166]. Then, the court opinion pointed out that Indians born within the territorial limits of the United States who were members of and owing immediate allegiance to one of the Indiana tribes, although in a geographical sense born in the United States, were no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States of ambassadors or other public ministers of foreign nations, which could be confirmed by the fact that the second section of the Fourteenth Amendment excluded Indians not taxed from the base number of Representatives[167]. The court opinion also pointed out that first section of the Civil Rights Act of April 9, 1866[168],stating who should be citizens of the United States, provided for "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed."[169]

In this case, the Supreme Court interpreted that "subject to the jurisdiction" meant owing allegiance to the United States. "Being alleged to" in the meaning of the judgement of the case caused a dispute in relation to the question whether all persons born in the United States should acquire citizenship of the United States by birth. However, the judgement on the Wong Kim Ark case did not require satisfying such a condition.

Subsection 7 United States v. Wong Kim Ark Case

In 1898, the Supreme Court judged the case of United States v. Wong Kim Ark[170]. In the case, a child born in the United States, of parents of Chinese descent, who, at the time of his birth, were subjects of the Emperor of China but had a permanent domicile and residence in the United States, claimed a writ of habeas corpus, insisting that he was a citizen of the United States, for on his return to the United States on the steamship Coptic from a temporary visit to China, he applied to the collector of customs at the port of San Francisco for permission to land, and was by the collector refused such permission on account of the Chinese Exclusion Acts. The court opinion ruled that any person born in the United States and subject to the jurisdiction of thereof should be a natural born citizen in the United States.

First, the court opinion stated that the language of the Constitution could not be understood without reference to

164 Id., at 99.
165 Id., at 100.
166 Id., at 102.
167 Id.
168 14 Stat. 27; Rev. Stat. 1992.
169 112 U.S. 94, 103.
170 United States v. Wong Kim Ark, 169 U.S. 649 (1898).

the common law and that according to the fundamental principle of the common law of England, children born in England, whether their parents are nationals or aliens, were natural born subjects except for the children of foreign ambassadors, or the children of alien enemies born during and within their hostile occupation of part of the King's dominions[171,172]. Moreover, the court opinion pointed out that Congress, when dealing with the question of citizenship in the aspect of naturalization, treated aliens residing in this country as "under the jurisdiction of the United States," and American parents residing abroad as "out of the jurisdiction of the United States"[173,174].

Furthermore, the court opinion stated that the sentence of the Fourteenth Amendment was declaratory of existing rights and affirmative of existing law as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States[175], and it stated that the Fourteenth Amendment affirmed the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes[176,177].

Then, the court opinion pointed out that taking the debates in the legislation process of the Civil Rights Act of 1866 or the Fourteenth Amendment of the Constitution into consideration, it could be seen that a child born of Chinese parents in the United States seemed to be thought to become a citizen of the United States[178]. Furthermore, the court opinion stated that the acts of Congress known as the Chinese Exclusion Acts, the earliest of which was passed some fourteen years after the adoption of the constitutional amendment, could not control its meaning or impair its effect, but had to be construed and executed in subordination to its provisions[179], that citizenship by birth was established by the mere fact of birth under the circumstances defined in the Constitution, and that no naturalization by authority of Congress[180] was needed[181]. In relation with that issue, the court opinion ruled that the Fourteenth Amendment, while leaving the power to the Congress where it was before, to regulate naturalization, had conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship[182].

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171 Id., at 657.

172 In addition, the court opinion stated that the same rule was in force in all the English Colonies upon the continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established. Id., at 658.

173 Id., at 687.

174 On that issue, the court opinion, as the reason why any exception other than the ambassadors or the like should not be recognized to the persons subject to the jurisdiction of the United States, affirmatively quoted the judgement of the case, Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch.) 116 (1812), namely, "When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. … Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption". Id., at 686.

175 Id., at 688

176 Id., at 693.

177 The court opinion stated that the Fourteenth Amendment did not refer to the acquisition of citizenship of children born of American citizens in foreign countries, and that whether such children could become citizen of the United States was to be treated by the power of Congress to enact a uniform rule of naturalization. Id., at 689.

178 Id., at 697.

179 Id., at 699.

180 "Naturalization" in the meaning of that mentioned there, the court opinion thought, should include not only the procedure for foreigners to acquire citizenship of the United States but also that for children born abroad of American citizens as well as for people to become citizens by the annexation of foreign territory. Id., at 703.

181 Id., at 702.

182 Id., at 703.

Against the court opinion, Justice Fuller stated a dissenting opinion, with whom Justice Harlan concurred. Against the court opinion which stated that a child born in the United States of parents who were not citizens of the United States, and under the laws of their own country and of the United States could not become such was, from the moment of his birth a citizen of the United States by virtue of the first clause of the Fourteenth Amendment, any act of Congress to the contrary notwithstanding, Justice Fuller pointed out that if the conclusion of the majority opinion was correct, then the children of citizens of the United States, who had been born abroad since July 8, 1868, when the amendment was declared ratified, were aliens, unless they had, or should on attaining majority, become citizens by naturalization in the United States, while children who were aliens by descent, but born on their soil, were exempted from the exercise of the power to exclude or to expel aliens[183].

Next, the dissenting opinion stated that it was almost an universal rule that the citizenship of the parents determines it, and that the framers of the Constitution were familiar with the distinctions between the Roman law and the feudal law, between obligations based on territoriality and those based on the personal and invisible character of origin, and that, however, in the matter of nationality, there was nothing to show that framers intended to adhere to principles derived from regal government, which they had just assisted in overthrowing[184,185].

Moreover, the dissenting opinion pointed out that the children of U.S. citizens born abroad were always natural-born citizens from the standpoint of this Government, and that if not, those born since the Fourteenth Amendment were not citizens at all, unless they had become such by individual compliance with the general laws for the naturalization of aliens[186].

Furthermore, the dissenting opinion also stated that considering the circumstances surrounding the framing of the Constitution, it was unreasonable to conclude that "natural-born citizen" applied to everybody born within the geographical tract known as the United States, irrespective of circumstances, and continued that it was not acceptable that the children of foreigners, happening to be born to them while passing through the country were eligible to the Presidency, while children of citizens of the United States, born abroad, were not[187].

Then, the dissenting opinion stated, concerning the Civil Rights Act of 1866[188], which provided similar content to that of the Fourteenth Amendment, that the words "not subject to any foreign power" did not, in themselves, refer to mere territorial jurisdiction, for the persons referred to were persons born in the United States, that all such persons were undoubtedly subject to the territorial jurisdiction of the United States, and yet the Act concedes that nevertheless they might be subject to the political jurisdiction of a foreign government, and that, in other words, by the terms of the Act, all persons born in the United States, and not owing allegiance to any foreign power, were citizens[189]. Then, the dissenting opinion insisted that it was to prevent the acquisition of citizenship by the children of such aliens merely by birth within the geographical limits of the United States that the words "and not subject to any foreign power," were inserted[190].

Moreover, concerning the Fourteenth Amendment established after the Civil Rights Act of 1866, the dissenting opinion insisted, quoting the court opinion of the Slaughter-House cases, that the phrase "subject to the jurisdiction thereof" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign

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183 Id., at 705.

184 Id., at 709.

185 The dissenting opinion expressed afterward a problem that it was not clear whether the Fourteenth Amendment was intended to impose the original English common law rule as a rigid rule on the country or to operate to abridge the treaty-making power, or the power to establish an uniform rule of naturalization. Id., at 729.

186 Id., at 714.

187 Id., at 715.

188 14 Stat. 27. The formal title of the act is: An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.

189 169 U.S. 649, 720. The dissenting opinion stated also that the allegiance of children was not the local allegiance arising from their parents' merely being domiciled in the country, and that it was single and not double, allegiance.

190 Id., at 721.

States born within the United States[191]. Furthermore, the dissenting opinion stated that the Fourteenth Amendment undoubtedly had particular reference to securing citizenship to the members of the colored race, whose servile status had been obliterated by the Thirteenth Amendment and who had been born in the United States, but were not and never had been subject to any foreign power[192].

In addition to those described above, the dissenting opinion also stated that since formerly, perhaps still, Chinese penal laws had denounced the severest penalties on those who renounced their country and allegiance, it would be improbable that the Fourteenth Amendment was designed to accord citizenship to persons so situated and to cut off the legislative power from dealing with the subject[193]. It also stated, referring to the treaty between the United States and China concluded July 28, 1868, the ratifications of which were exchanged on November 28, 1869, that the any relevant provisions had reference to an entirely voluntary emigration for these purposes, and did not involve an admission of change of allegiance unless both countries assented[194].

The judgement of the Wong Kim Ark case is considered, even today, as an important leading case concerning the acquisition of citizenship of the United States by birth in the United States.

Subsection 8 Weedin v. Chin Bow Case

In 1926, the Supreme Court judged the case, Weedin v. Chin Bow[195]. The question of the case was when the father should have resided in the United States in order for the child who had not resided in the United States to get citizenship of the United States, in relation to the proviso of § 1993 in Revised Statutes, namely, "but the rights of citizenship shall not descend to children whose fathers never resided in the United States". The court opinion rejected the insistence that the residence of the father at any time in the United States before his death entitled his son, whenever born, to citizenship, and ruled that only the children whose fathers have resided in the United States before their birth become citizens under the section.

The judgement of the case gave an instance of the condition on a citizen parent to transmit citizenship to the child born in a foreign country.

Subsection 9 Perkins v. Elg Case

In 1939, the Supreme Court judged the case, Perkins v. Elg[196]. The question of the case was whether the plaintiff, who was born in the United States of Swedish parents emigrated to the United States and naturalized here, had lost her citizenship and was subject to deportation because of her removal during minority to Sweden, appeared that her parents resumed their citizenship in that country but that she returned here on attaining majority with intention to remain and to maintain her citizenship in the United States[197].

The court opinion ruled that though the plaintiff might have acquired Swedish citizenship by virtue of the operation of Swedish law on the resumption of that citizenship, as at birth she became a citizen of the United States, that citizenship had to be deemed to continue unless she had been deprived of it through the operation of a treaty[198] or

191 Id., at 723. Afterward of the statement above, the dissenting opinion stated that the view of the court opinion of the Slaughter-House Cases was that the children of "citizens or subjects of foreign States," owing permanent allegiance elsewhere and only local obedience in the United States, were not otherwise subject to the jurisdiction of the United States than were their parents.

192 Id., at 727.

193 Id., at 726.

194 Id., at 730.

195 274 U.S. 657 (1926).

196 307 U.S. 325 (1939).

197 Concretely, the trouble was in that the plaintiff obtained an American passport which was issued on the instructions of the Secretary of State and entered the United States, but then, got an expulsion order.

198 Article 1 of the treaty provided, "[c]itizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully, recognized as citizens of Sweden or Norway, shall be held by the government of the United States to be Swedish or Norwegian citizens, and shall be treated as such." But, it

congressional enactment or by her voluntary action in conformity with applicable legal principles[199].

The court opinion stated more generally that if a child born in the United States was taken during minority to the country of his parents' origin, where his parents resumed their former allegiance, he did not thereby lose his citizenship in the United States[200].

The judgement of the case was an example in which the Supreme Court judged on the influence of the changes of citizenship or nationality of parents to citizenship of the children born in the United States.

Subsection 10 Montana v. Kennedy Case

In 1961, the Supreme Court judged the case Montana v. Kennedy[201]. The question of the case was, considering the fact that while §1993 of Revised Statutes provided that all children born out of the limits and jurisdiction of the United States, whose fathers were at the time of their birth citizens thereof, were declared to be citizens of the United States, §2172 provided that the children of persons who were, or had been, citizens of the United States, should, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof[202], whether it might be a contradiction that while the former provided that only children of male citizens could acquire citizenship, the latter provided that children of citizen parents could acquire citizenship irrespective of the sex of the citizen parents. A child born in Italy of a mother, a natural-born citizen of the Unite States, and an Italian father in 1906, moved to the United States in the same year, and had resided there but not being naturalized. Such a child, the petitioner, received an expulsion order and brought an action for the confirmation of his status of citizen of the United States.

The court opinion ruled that at the time of petitioner's birth in 1906, R.S. §1993 provided the sole source of inherited citizenship status for foreign-born children of American parents, and that the statute could not avail the petitioner, who was the foreign-born child of an alien father[203,204].

The case serves as a precedence concerning the transfer of citizenship of the United States to a child born abroad of a citizen parent. The court opinion stated that under the law at the time of the birth of the children, citizenship of the United States should not be transferred to the child whose mother was a citizen of the United States. As mentioned above, under the law at the time of the judgement of the case, citizenship of the United States would be transferred also to the child of the American mother under certain conditions. It should be noted that it was because the law to be applied in deciding whether a person should be a citizen or not, should be that which was valid at the time of the birth of the person, that the judgement of the case negated citizenship of the petitioner.

Subsection 11 Rogers v. Bellei Case

In 1971, the Supreme Court judged the case, Rogers v. Bellei[205]. The question of the case was how to interpret the

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contained also following provision: "Reciprocally, citizens of Sweden or Norway who have resided in the United States of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the government of Sweden and Norway to be American citizens, and shall be treated as such."

199 307 U.S. 325, 329.

200 Id.

201 366 U.S. 308 (1961).

202 As being seen from the provision, both "parents" and "citizens" were plural in §2172, based on which the Government insisted that the provision was intended to apply only to the case where both parents were citizens of the United States. Id., at 310-311.

203 Id., at 312.

204 As the other issue than that described above, the petitioner insisted that based on §5 of the 1907 Act(34 Stat. 1228) which provided that a child born without the United States of alien parents should be deemed a citizen of the United States by virtue of resumption of American citizenship by the parent, the petitioner should be deemed a citizen of the United States. Against the insistence, the court opinion stated that since mere marriage to an alien, without change of domicile, did not terminate the citizenship of an American woman either at the time of petitioner's birth or his mother's return to the United States, his mother had not lost citizenship of the United States, so she had not resumed citizenship. The court opinion concluded that the petitioner could not be deemed a citizen also by the provision. Id., at 314.

205 401 U.S. 815(1971). As for the outline of the case, see authors paper (in Japanese), The Federal Congress and Citizenship - in Relation to Loss of Citizenship, Tsukuba-Hosei No. 24 (1998), p. 167.

provisions providing that such a person should be nationals and citizens of the United States at birth, as one born outside the geographical limits of the United States and its outlying possessions of parents one of whom was an alien, and the other a citizen of the United States who, prior to the birth of such person, had been physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years[206], and which, on the other hand, provided that such a person should lose his nationality and citizenship unless he should come to the United States prior to attaining the age of twenty-three years and should immediately following any such coming be continuously physically present in the United State for at least five years[207].

The plaintiff who was born in Italy of an Italian father and American mother and who had continued to reside there received, because he held dual nationality, an alert from the Department of State of the United States concerning the residential requirement to keep citizenship of the United States. In the end, the plaintiff lost the chance to satisfy the residential requirement, and was deemed to lose citizenship of the United States. Against those facts, the plaintiff claimed that those provisions violated the Fourteenth Amendment of the Constitution.

As to the application of the Fourteenth Amendment, the court opinion ruled that since he was born abroad, he was not naturalized in the United States, and he has not been subject to the jurisdiction of the United States, it seemed indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff, so that he simply was not a "Fourteenth Amendment first sentence" citizen[208]. Then, the court opinion stated that the plaintiff's claim thus had to center in the statutory power of Congress and in the appropriate exercise of that power within the restrictions of any pertinent constitutional provisions other than the Fourteenth Amendment's first sentence[209]. The court opinion ruled that, as to the former issue, the existence of the power had been recognized[210] and that, as to the latter issue, the solution to the dual nationality dilemma provided by the Congress by way of required residence surely was not unreasonable[211]. From the view of the fact that the judgement of the case distinguished a natural-born citizen provided in the Fourteenth Amendment from other types of citizen, the judgement could be interpreted in such a way as categorizing citizenship of a child born abroad of a citizen of the United States into citizenship to be acquired, based on the Naturalization law legislated by Congress.

On the issue above, Justices Brennan and Black stated dissenting opinions. Justice Brennan stated in his dissenting opinion that in the light of the complete lack of rational basis for distinguishing among citizens whose naturalization was carried out within the physical bounds of the United States and those who might be naturalized overseas, the conclusion was compelled that the reference in the Fourteenth Amendment to persons "born or naturalized in the United States" included those naturalized through operation of an Act of Congress, wherever they might be at the time[212].

Justice Black insisted in his dissenting opinion that naturalization, when used in its constitutional sense, was a generic term describing and including within its meaning all those modes of acquiring American citizenship other than birth in the United States[213].

Subsection 12 Miller v. Albright Case

In 1998, the Supreme Court judged the case, Miller v. Albright[214]. Petitioner in the case was born out of wedlock in 1970 in the Philippines. Her mother was a Filipino national. In 1992, the State Department denied petitioner's

206 66 Stat. 163, 236, Sec. 301 (a)(7).
207 66 Stat. 163, 236, Sec. 301 (b).
208 401 U.S. 815, 827.
209 Id., at 828.
210 Id., at 830.
211 Id., at 833.
212 Id., at 845.
213 Id., at 841.
214 Lorelyn Penero Miller, Petitioner v. Madelene K. Albright, 523 U.S. 420 (1998).

application for registration as a United States citizen. After that in the same year, a Texas court granted a petition of an American citizen residing in Texas who served in the United States military in the Philippines, stating that the citizen was the father of the petitioner of the case.

After a Texas court granted Mr. Miller's petition for a paternity decree finding him to be her father, petitioner reapplied for citizenship status, which was again denied on the ground that the Texas decree did not satisfy the requirement of the provision of Immigration and Nationality Act that a child born out of wedlock and outside the United States to an alien mother and an American father be legitimated before age 18 in order to acquire citizenship. Petitioner then sued the Secretary of State in Federal District Court in Texas, seeking a judgment declaring her to be a United States citizen, emphasizing that the citizenship of an out-of-wedlock, foreign-born child of an alien father and an American mother was established at birth under § 1409(c), and alleging that § 1409's different treatment of citizen fathers and citizen mothers[215,216] violated Mr. Miller's Fifth Amendment equal protection right by utilizing the suspect classification of gender without justification.

The court opinion of the case ruled that the Immigration and Nationality Act which treated differently between an illegitimate child of an American mother and that of an American father was constitutional. It indicated following points as the reasons.

First, the court opinion stated that if the citizen was the unmarried female, she had to first choose to carry the pregnancy to term and reject the alternative of abortion-an alternative that was available by law to many, and in reality to most, women around the world, that she had to then actually give birth to the child, and that Section 309(c) (8 U.S.C.A. 1409(c)) of Immigration and Nationality Act rewarded choice and that labor by conferring citizenship on her child[217].

Then, the court opinion pointed out that if the citizen is the unmarried male, he need not participate in the decision to give birth rather than to choose an abortion in order to preserve his right to confer citizenship on the child, and that Section 309(a)(4) of Immigration and Nationality Act (8 U.S.C.A. § 1409(a)(4)) required even less of the unmarried father that provision was alternatively satisfied if, before the child turns 18, its paternity "is established by adjudication of a competent court." Then the court opinion ruled that it seemed obvious that the burdens imposed on

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215 While Section 309 of Immigration and Nationality Act (8 U.S.C.A. § 1409(c)) provided that a person born outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year, Section 309(a) of the Act (8 U.S.C.A. § 1409(a)) required, concerning a person born of the American father, out of wedlock, to satisfy following conditions, in addition to the residential condition of the father who should be physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years (8 U.S.C.A. § 1401(g)).

(1) a blood relationship between the person and the father is established by clear and convincing evidence,
(2) the father had the nationality of the United States at the time of the person's birth,
(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
(4) while the person is under the age of 18 years
(A) the person is legitimated under the law of the person's residence or domicile,
(B) the father acknowledges paternity of the person in writing under oath, or
(C) the paternity of the person is established by adjudication of a competent court.

The petitioner questioned the fact that in the case of a citizen mother, only (2) among those requirements was required, but others were not. Against the insistence, the court opinion stated as follows: (1) was not at issue here, however, because the Government did not question the blood relationship; it is unclear whether the requirement (3) even applied in petitioner's case since it was added in 1986, after the petitioner's birth; since the State Department's refusal to register petitioner as a citizen was expressly based on (4), the only issue presented by the facts of this case was whether the requirement in (4). After all, the court opinion judged the requirement (4). Id., at 431−432.

216 In relation with the issue, Justice Breyer stated in the dissenting opinion that Section 309 (a)(3) of Immigration and Nationality Act (8 U.S.C.A. § 1409 (s) (3)) violated "equal protection" of the laws since that subsection required an American father to "agre[e]... to provide financial support" for the child until the child "reaches the age of 18," but did not require the same of an American mother. 523 U.S. 420, 487.

217 523 U.S. 420, 433.

the female citizen were more severe than those imposed on the male citizen, and that the argument that the male citizen and his offspring were the victims of irrational discrimination was singularly unpersuasive[218].

Second, the court opinion stated that it was argued that the male citizen parent would "forever forfeit the right to transmit citizenship" if he did not come forward while the child was a minor, whereas there was no limit on the time within which the citizen mother might prove her blood relationship, the argument overlooked the difference between a substantive condition and a procedural limitation, and that, however, the truth was, the substantive conduct of the unmarried citizen mother that qualifies her child for citizenship was completed at the moment of birth while the relevant conduct of the unmarried citizen father or his child might occur at any time within 18 years thereafter[219].

Third, the court opinion stated that the substantive requirement embodied in Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) served, at least in part, to ensure that a person born out of wedlock who claimed citizenship by birth actually shared a blood relationship with an American citizen[220], that there was no doubt that ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent was an important governmental objective. It also stated that it could not be denied that the male and female parents were differently situated in that respect, and that the requirement that the father made a timely written acknowledgment under oath, or that the child obtained a court adjudication of paternity, produced the rough equivalent of the documentation that was already available to evidence the blood relationship between the mother and the child[221].

In addition, against the suggestion of petitioner that it was irrational to require a formal act such as a written acknowledgment or a court adjudication because the advent of reliable genetic testing fully addressed the problem of proving paternity, and that § 1401(a)(1) already required proof of paternity by clear and convincing evidence, the court opinion stated that nothing in Section 309(a)(1) (8 U.S.C.A. 1409(a)(1)) required the citizen father or his child to obtain a genetic paternity test. Moreover, It stated that it was difficult to understand why signing a paternity acknowledgment under oath prior to the child's 18th birthday was more burdensome than obtaining a genetic test, which was relatively expensive, and that Congress could fairly conclude that despite recent scientific advances, it still remained preferable to require some formal legal act to establish paternity[222].

Fourth, the court opinion stated that Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) served two other important purposes that were unrelated to the determination of paternity, the interest in encouraging the development of a healthy relationship between the citizen parent and the child while the child is a minor, and the related interest in fostering ties between the foreign-born child and the United States. Then, the court opinion pointed out that, when a child was born out of wedlock outside of the United States, the citizen mother, unlike the citizen father, certainly knew of her child's existence and typically would have custody of the child immediately after the birth, so such a child thus had the opportunity to develop ties with its citizen mother at an early age, and might even grow up in the United States if the mother returned, and that, by contrast, due to the normal interval of nine months between conception and birth, the unmarried father might not even know that his child existed, and the child might not know the father's identity. Taking those facts into consideration, the court opinion ruled that the provision required a

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218 Id., at 434.

219 Id., at 435.

220 Id.

221 Id., at 436. On this issue, the court opinion indicated following points.

- The blood relationship to the birth mother was immediately obvious and was typically established by hospital records and birth certificates. On the other hand, the relationship to the unmarried father might often be undisclosed and unrecorded in any contemporary public record.
- If the statute had required the citizen parent, whether male or female, to obtain appropriate formal documentation within 30 days after birth, it would have been "gender-neutral" on its face, even though in practical operation it would disfavor unmarried males because in virtually every case such a requirement would be superfluous for the mother.

222 Id., at 437. On this point, the court opinion added that Congress was of course free to revise its collective judgment and permitted genetic proof of paternity rather than requiring some formal legal act by the father or a court, but the Constitution did not require any such change.

relatively easy, formal step by either the citizen father or his child that showed beyond doubt that at least one of the two knew of their blood relationship, thus assuring at least the opportunity for them to develop a personal relationship, and that given the size of the American military establishment that had been stationed in various parts of the world for the past half century, it involved strong Governmental interests[223].

The court opinion also stated that Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) was supported by the undisputed assumption that fathers were less likely than mothers to have the opportunity to develop relationships, and that none of the premises on which the statutory classification was grounded could be fairly characterized as an accidental byproduct of a traditional way of thinking about the members of either sex, but the biological differences between single men and single women provided a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands[224].

Against the court opinion described above, some concurring and dissenting opinions were presented[225].

The concurring opinion of Justice Scalia stated that because only Congress had the power to set the requirements for acquisition of citizenship by persons not born within the territory of the United States, federal courts could not exercise that power under the guise of their remedial authority[226], and that to ignore Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) because of its unconstitutionality could not be on the transfer of citizenship over which Congress had the plenary power to decide[227].

The dissenting opinion of Justice Ginsburg stated that Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) unconstitutionally classified on the basis of gender in determining the capacity of a parent to qualify a child for citizenship[228].

Concretely, the justice pointed out that the section rested on familiar generalizations, namely, that mothers, as a rule, were responsible for a child born out of wedlock, while fathers unmarried to the child's mother, ordinarily, were not[229].

Moreover, the justice insisted that one could demur to the Government's observation that more United States citizen mothers of children born abroad out of wedlock actually raised their children than did United States citizen fathers of such children, and that even if the observation was true, it did not justify distinctions between male and female United States citizens who took responsibility, or avoided responsibility, for raising their children[230]. Furthermore, the justice insisted that it could not justify reliance on gender distinctions when the alleged purpose of Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)), namely, assuring close ties to the United States, could be achieved without reference to gender[231].

The dissenting opinion of Justice Breyer insisted that Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) was unconstitutional since it discriminated on the basis of gender, making it significantly more difficult for American fathers than for American mothers to transmit American citizenship to their children born out of wedlock[232].

Concretely, the justice insisted that gender based distinctions such as provided in Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) had to further important governmental objectives, and the discriminatory means employed had be "substantially related" to the achievement of those objectives, and that, however, the statutory distinctions there

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223 Id., at 438. On this issue, the court opinion stated that there was found no confirmation of the fact that there had been any communication between petitioner and the father.

224 Id., at 444.

225 There was another concurring opinion of Justice O'Connor. The concurring opinion generally stated that the appellant was the third party concerning the right of her father to transmit citizenship, so that she could not claim that right to assist her position.

226 Id., at 453, 456.

227 Id., at 457.

228 Id., at 460.

229 Id.

230 Id., at 470.

231 Id.

232 Id., at 481.

violated these standards[233,234].

Next, Justice Breyer stated that it was asserted that Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) served two interests, first, "ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent," and second, "encouraging" certain relationships or ties, namely, "the development of a healthy relationship between the citizen parent and the child while the child is a minor," as well as "the related interest in fostering ties between the foreign-born child and the United States". However, the justice insisted that although there seemed to be no doubt that these interests were important, the relationship between the statutory requirements and those particular objectives was one of total misfit[235].

Furthermore, the justice insisted that the assumption that knowledge of birth could make a significant gender-related difference rested upon a host of unproved gender-related hypotheses[236].

Subsection 13 Tuan Anh Nguyen v. INS Case

In 2001, the Supreme Court judged the case, Tuan Anh Nguyen v. INS[237]. The issue of the case was again the provision of Immigration and Nationality Act which prescribes the transference of citizenship to an illegal child[238,239], which was also the issue of Miller v. Albright case.

The plaintiff of the case was born out of wedlock of a U.S. citizen father and a Vietnamese mother in 1969 in Vietnam. In 1975, the plaintiff immigrated into the United States, acquired the right of permanent residence there, and was raised by the father who was an American citizen, in the State of Texas. In 1922, at the time when the plaintiff was 22 years old, the plaintiff committed a crime and was prosecuted by a State court of Texas. Three years after the event, Immigration and Naturalization Service (INS) began the procedure to expel the plaintiff on account of his committing a crime. Against the proceedings, the plaintiff insisted in front of Board of Immigration of Appeal that he himself was a citizen of the United States. But the Board did not accept his insistence because of the lack of the satisfaction of the requirement provided in Immigration and Nationality Act. Then, the suit was brought.

The court opinion pointed out that the statutory distinction relevant in this case was that § 1409(a)(4) required one of three affirmative steps to be taken if the citizen parent was the father, but not if the citizen parent was the mother, namely, legitimation, a declaration of paternity under oath by the father, or a court order of paternity. The court opinion continued that Congress' decision to impose requirements on unmarried fathers that differed from those on unmarried mothers was based on the significant difference between their respective relationships to the potential

233 Id., at 482.

234 Justice Breyer stated there that if the citizen parent was a man, the statute required a promise by the father to support the child until the child was 18, while if the citizen parent was a woman, she did not need do it, and gave an illustration that when both parents did not support the child, if the mother was a citizen of the United States, citizenship still would be transmitted to the child while if the father was a citizen, citizenship would never be transmitted, considering which the provision did not meet the standards.

235 Id., at 484. In connection with that issue, Justice Breyer stated that the provision concerned required, for example, the American citizen father to acknowledge paternity before the child reached 18 years of age, or for the child or parent to obtain a court equivalent (legitimation or adjudication of paternity) and the court opinion suggested that the requirement produced the rough equivalent of the documentation, such as a birth certificate memorialized in hospital records, already available to evidence the blood relationship between the mother and the child, and that, however, even if the "equivalency" was assumed, it still could not be understood the need for the prior-to-18 legitimation-or-acknowledgment requirement. Furthermore, the justice insisted that the proof of paternity could be done by inexpensive DNA testing according to Section 309(a)(1) (8 U.S.C.A. § 1409(a)(1)), so that the requirement in Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) would be unnecessary.

236 Id., at 485.

237 533 U.S. 53 (2001).

238 8 U.S.C.A. § 1409(a).

239 Concerning the Tuan Anh Nguyen v. INS case, there was a literature which pointed out that, since the plaintiff, Nguyen, was born in 1969, as the Supreme Court acknowledged, Nguyen was subject to a transitional provision under which he could have elected application of current section 309(a) (8 U.S.C.A. § 1409(a)) established in 1986 or the old, pre-1986 version of section 309(a) (533 U.S. 53, 60), and that if Nguyen did not elected the current section, the pre-1986 version of the section would be applied, so that it might be possible for Nguyen to be recognized to be a U.S. citizen. David A. Isaacson, Correcting Anomalies in the United States Law of Citizenship by Decent, 47 Ariz. L. Rev. 313, 336(2005).

citizen at the time of birth[240]. Then the court opinion stated that such difference was justified by following two important Governmental objectives[241].

As to the first important Governmental objective, the court opinion stated that it was the importance of assuring that a biological parent-child relationship exists[242]. On this objective, the court opinion pointed out that in the case of the mother, the relation was verifiable from the birth itself, while, in the case of the father, the uncontestable fact was that he need not be present at the birth and, if he was present, furthermore, that circumstance was not incontrovertible proof of fatherhood. Then, the court opinion concluded that since fathers and mothers were not similarly situated with regard to the proof of biological parenthood, the imposition of a different set of rules for making that legal determination with respect to fathers and mothers was neither surprising nor troublesome from a constitutional perspective[243].

In addition, against the argument that the requirement of Section 309(a)(1) (8 U.S.C.A. § 1409(a)(1)), that a father provided clear and convincing evidence of parentage, was sufficient to achieve the end of establishing paternity. Given the sophistication of modern DNA tests, the court opinion pointed out that the provision of the act, however, did not actually mandate a DNA test, and that the Constitution, moreover, did not require that Congress elected one particular mechanism from among many possible methods of establishing paternity[244]. The court opinion continued that with respect to DNA testing, the expense, reliability, and availability of such testing in various parts of the world might have been of particular concern to Congress, so that the adoption of different requirements depending on the sex of a citizen parent was not unreasonable[245].

Next, the court opinion stated that the second important governmental interest was the determination to ensure that the child and the citizen parent had some demonstrated opportunity or potential to develop not just a relationship that was recognized, as a formal matter, by the law, but one that consisted of the real, everyday ties that provided a connection between child and citizen parent and, in turn, the United States[246]. On this issue, the court opinion pointed out that, while the mother knew that the child was in being and was hers and had an initial point of contact with him, such that there was at least an opportunity for mother and child to develop a real, meaningful relationship, the same opportunity did not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father. From the court's opinion, it is not always certain that a father would know that a child was conceived, nor was it always clear that even the mother would be sure of the father's identity[247]. Moreover, the court opinion stated that it took on particular significance in the case of a child born overseas and out of wedlock because there were young people, men for the most part, who were on duty with the Armed Forces in foreign countries or who, because of the ease of travel and the willingness of Americans to visit foreign countries, had taken in numerous of trips abroad[248].

Then, the court opinion stated that these facts above demonstrated the critical importance of the Government's interest in ensuring some opportunity for a tie between citizen father and foreign born child that was a reasonable substitute for the opportunity manifest between mother and child at the time of birth. Moreover, the court opinion stated that the importance of the governmental interest at issue here was too profound to be satisfied merely by conducting a DNA test, for scientific proof of biological paternity did nothing, by itself, to ensure contact between

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240 533 U.S. 53, 62.

241 In relation with the issue, the court opinion adopted in the judgement the standard that for a gender-based classification to withstand equal protection scrutiny, it should be established at least that the classification served important governmental objectives and that the discriminatory means employed were substantially related to the achievement of those objectives. Id., at 60-61.

On this point, Justice O'Connor in her dissenting opinion, although adopting the same standard as the court opinion, stated that the standard was not met in the case. Id., at 74.

242 Id., at 62.

243 Id., at 63.

244 Id.

245 Id., at 63-64.

246 Id., at 64.

247 Id., at 65.

248 Id.

father and child during the child's minority[249]. Furthermore, the court opinion stated that Congress was well within its authority in refusing, absent proof of at least the opportunity for the development of a relationship between citizen parent and child, to embrace a child as a citizen[250]. Taking all those above into consideration, the court opinion concluded that Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) addressed an undeniable difference in the circumstance of the parents at the time a child was born, and that it should be noted, furthermore, that the difference did not result from some stereotype, defined as a frame of mind resulting from irrational or uncritical analysis[251].

The court opinion stated, concerning the question whether Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) was substantially related to the achievement of important Governmental objectives, that since, in furtherance of the desire to ensure some tie between this country and one who sought citizenship, various other statutory provisions concerning citizenship and naturalization require some act linking the child to the United States to occur before the child reached 18 years of age, and since Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) should not be invalidated because Congress had elected to advance an interest that was less demanding to satisfy than some other alternative, it could be said that the discriminatory means employed were substantially related to the achievement of those objectives[252].

Against the court opinion, Justice Scalia and Justice O'Connor presented dissenting opinions. The dissenting opinion of Justice Scalia insisted that the Court lacked power to provide relief of the sort requested in this suit, namely, conferral of citizenship on a basis other than that prescribed by Congress[253].

The dissenting opinion of Justice O'Connor insisted that, in contrast to the court opinion, Section 309(a)(4) (8 U. S. C. A. § 1409(a)(4)) had no relation to any important Governmental objectives[254]. As the reasons, the justice insisted following points.

First, the justice stated that, although, according to the Court, the first governmental interest to be served was the importance of assuring that a biological parent-child relationship existed, the court opinion did not sufficiently show the fit between the discriminatory means of Section 309(a (4) (8 U.S.C.A. § 1409(a)(4)) and the asserted end[255]. The justice stated that while Section 309(a)(1) (8 U.S.C.A. § 1409(a)(1)) required that "a blood relationship between the person and the father [be] established by clear and convincing evidence", atop that provision, Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) required legitimation, an acknowledgment of paternity in writing under oath, or an adjudication of paternity before the child reaches the age of 18. The justice continued, however, that it was difficult to see what Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) accomplished in furtherance of "assuring that a biological parent-child relationship exists," that Section 309(a)(1) (8 U.S.C.A. § 1409(a)(1)) did not achieve this on its own, and that the virtual certainty of a biological link that modern DNA testing afforded reinforced the sufficiency of Section 309(a)(1) (8 U.S.C.A. § 1409(a)(1))[256].

Second, the justice stated that it was difficult to see how the limitation of the time allowed for obtaining proof of paternity substantially furthered the assurance of a blood relationship. In relation to the problem, the justice insisted that modern DNA testing, in addition to providing accuracy unmatched by other methods of establishing a biological link, essentially negated the evidentiary significance of the passage of time. Then, the justice concluded that because Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) added little to the work that Section 309(a)(1) (8 U.S.C.A. § 1409(a)(1)) did on its own, it was difficult to say that Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) "substantially furthers" an important governmental interest[257].

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249 Id., at 66–67.
250 Id., at 67.
251 Id., at 68.
252 In relation with the issue, the court opinion pointed out concretely that the statute could be satisfied on the day of birth, or the next day, or for the next 18 years. Id., at 71. In addition, the court opinion pointed out that the section in question was not the sole means by which the child of a citizen father could attain citizenship.
253 Id., at 73.
254 Id., at 74.
255 Id., at 79.
256 Id., at 80.
257 Id., at 80–81.

Third, against the court opinion that stated the second important governmental interest furthered in a substantial manner by Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) was the determination to ensure that the child and the citizen parent had some demonstrated opportunity to develop a relationship consisting the real, everyday ties that provided a connection between child and citizen parent and, in turn, the United States, Justice O'Connor pointed out that the majority opinion emphasized the opportunity or potential to develop a relationship rather than the actual relationship. The justice insisted that it was questionable whether such an opportunity, apart from the existence of an actual relationship, qualified as an "important" governmental interest and that it was difficult to see how anyone profited from a "demonstrated opportunity" for a relationship in the absence of the fruition of an actual tie[258].

Fourth, the justice pointed out that under the present law, the statute on its face accorded different treatment to a mother who was by nature present at birth and a father who was by choice present at birth even though those two individuals were similarly situated with respect to the "opportunity" for a relationship. On this issue, the justice concretely indicated that the mother could transmit her citizenship at birth, but the father could not do so in the absence of at least one other affirmative act. Then, the justice concluded that the different statutory treatment was solely on account of the sex of the similarly situated individuals, and that such a type of treatment was patently inconsistent with the promise of equal protection of the laws[259].

Fifth, Justice O'Connor insisted that while the recitation of statistics concerning military personnel and overseas travel highlighted the opportunities for United States citizens to interact with citizens of foreign countries, it bore little on the question whether the discriminatory means of Section 309(a)(4) (8 U.S.C.A. § 1409(a)(4)) were a permissible governmental response to those circumstances, and that indeed, the majority's discussion might itself simply reflect the stereotype of male irresponsibility[260].

Subsection 14 Sessions, Attorney General v. Morales-Santana case

(1) Facts

In 2017, the Supreme Court judged the case, Sessions, Attorney General v. Morales-Santana[261,262]. In this case, the appellee (Luis Ramon Morales-Santana) who was born in the Dominican Republic in 1962 and who immigrated to the United States of America at the age of thirteen years and had resided since then, insisted that he had the citizenship of the United States because his biological father (Jose Morales) was a citizen of the United States.

Jose who is the father of the appellee, was born in Puerto Rico in 1900[263] and immigrated into the Dominican

258 Id., at 84. Justice O'Connor stated there that it was difficult to see how the requirement that proof of such opportunity be obtained before the child turns 18 substantially furthered the asserted interest, and pointed out that, as the facts of the case demonstrated, it was entirely possible that a father and child would have the opportunity to develop a relationship without obtaining the proof of the opportunity during the child's minority (According to the description of Justice O'Connor, in 1975, before his sixth birthday, Nguyen came to the United States, where he was reared by his father, and, in 1997, a DNA test showed a 99.98% probability of paternity questioned in the case.).

259 Id., at 86. Furthermore, Justice O'Connor stated there that indeed, the idea that a mother's presence at birth supplied adequate assurance of an opportunity to develop a relationship while a father's presence at birth did not would appear to rest only on an overbroad sex-based generalization.

260 Id., at 94.

261 137 S. Ct. 1678 (2017).

262 The act on which this case dealt, section 1401 (a) (7) of Nationality Act of the United States (8 U.S.C.A. § 1401 (a) (7) (the version in 1958); Immigration and Nationality Act Sec. 301) required in order for a foreign-born child of the couple of the citizens of the United States to acquire the citizenship of the United States that both of the parents, prior to the birth of the child, should have been physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years. Section 1409 (a) of the same Act as above (8 U.S.C.A. § 1409 (a) (at the time of 1958)) provided that the same rule as that of § 1401 should be applied also to a foreign-born child between the United States citizen father and the alien mother. In addition, Section 1409 (c) of the same Act (8 U.S.C.A. § 1409 (c) (at the time of 1958)) provided as an exception that as far as a foreign-born child between the United States citizen mother and the alien father was concerned, the mother should have been physically present in the United States or one of its outlying possessions for a continuous period of one year.

263 In the Immigration and Naturalization Act of the United States, Puerto Rico is treated as a part of the United States, so that a person

Republic 20 days before his nineteenth birthday. Based on those facts, the father could not satisfy the condition of § 1401 (a)(7) of Immigration and Naturalization Act of the United States, which required five-year physically presentation in the United States or one of its outlying possessions after becoming fourteen years old[264]. That father of the appellee had resided in the Dominican Republic with a Dominican woman and the woman gave birth to the appellee. After then, the father formally married the woman, recognized the child as his own, and signed his name on the registration of the appellee's birth.

In the year 2000, the government of the United States of America asked for an expulsion order to the appellee as an alien who had committed several crimes. The immigration judge rejected the claim that the appellee should have the citizenship of the United States, and confirmed the expulsion order. After then, the appellee filed a lawsuit insisting that it should violate the equal protection guaranteed by the due process clause of the Fifth Amendment of the Constitution of the United States to deny the appellee the acquisition of citizenship of the United States from his father.

The Board of Immigration Appeals rejected the appellee's claim.

The Second Circuit Court of Appeals overruled the judgement of the Board and accepted the appellee's claim ruling that the discriminative treatment between unmarried father and mother in law should be unconstitutional and that the appellee should have acquired the citizenship of the United States from his father[265]. Then, the Federal Government appealed to the Supreme Court.

(2) Judgement of the Supreme Court[266,267]

The outline of the judgement of the Supreme court is as follows;

(i) The Court held that the gender line Congress drew should be incompatible with the requirement that the Government accord to all persons "the equal protection of the laws." Nevertheless, the Court judged that § 1409(c)'s exception for unwed mothers could not be converted into the main rule displacing § 1401(a)(7) and § 1409(a). Then the Court stated that therefore it should be left to Congress to select, going forward, a physical-presence requirement (ten years, one year, or some other period) uniformly applicable to all children born abroad with one U.S.-citizen and one alien parent, wed or unwed. The Court asserted that in the interim, the Government had to ensure that the laws in question are administered in a manner free from gender-based discrimination.

(ii) The Court stated that, while Sections 1401 and 1409 were rife with overbroad generalizations about the way men and women were, laws of this kind were, today, subjected to review under the heightened scrutiny that now attends "all gender-based classifications."

Laws granting or denying benefits "on the basis of the sex of the qualifying parent," the Court's post-1970 decisions affirm, differentiate on the basis of gender, and therefore attract heightened review under the Constitution's equal protection guarantee.

Prescribing one rule for mothers and another for fathers, § 1409 was of the same genre as the classifications the courts declared unconstitutional. Successful defense of legislation that differentiates on the basis of gender, the Court reiterated, requires an "exceedingly persuasive justification."

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born in Puerto Rico would become a natural-born citizen of the United States. 8 U.S.C.A. § 1101 (a)(38).

264 However, Dominican Republic was under the government of the United States of America at that time. Based on the fact, the appellee insisted in the appeal that his father should have acquired the citizenship of the United States and he should take it over.

265 Luis Ramon Morales-Santana v. Lynch, 804 F.3d. 520 (2015).

266 However the issues treated in this case include the questions, whether a child can invoke the existence of sexual discrimination concerning her/his parents' acquisition of citizenship of the United States(137 S. Ct. 1688), what standard of judgement of the constitutionality should be applied in that case(Id; 137 S. Ct. 1692) and others, this article will concentrate to the issue, the allowable or discriminative difference of treatments between man and woman concerning the child's acquisition of citizenship of the United States and its derivative problems, so that it would discuss only the relevant part of the judgement.

267 The judgement of the case contains a concurring opinion of Justice Thomas joined by Justice Alito. The opinion agrees the court opinion in opposing the judgement of the court of appeal and states that extending 8 U.S.C.A. § 1409(c)'s 1-year physical presence requirement to unwed citizen fathers is not an appropriate remedy for any equal protection violation and that it is doubtful for the court to have the power to provide relief of the sort requested in this suit.

(iii) The defender of legislation that differentiates on the basis of gender had to show "at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."

Moreover, the classification had to substantially serve an important governmental interest today, for "in interpreting the equal protection guarantee, the Court has recognized that new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and unchallenged."

In this case, the Government supplied no "exceedingly persuasive justification".

(iv) Enacted in the Nationality Act of 1940 (1940 Act), § 1409 ended a century and a half of congressional silence on the citizenship of children born abroad to unwed parents. During this era, two once habitual, but now untenable, assumptions pervaded the Nation's citizenship laws and underpinned judicial and administrative rulings: In marriage, husband is dominant, wife subordinate and unwed mother is the natural and sole guardian of a nonmarital child.

Under the once entrenched principle of male dominance in marriage, the husband controlled both wife and child. "Dominance of the husband," the Court observed in 1915, "is an ancient principle of our jurisprudence." Through the early 20th century, a male citizen automatically conferred U.S. citizenship on his alien wife. A female citizen, however, was incapable of conferring citizenship on her husband; indeed, she was subject to expatriation if she married an alien. The family of a citizen or a lawfully admitted permanent resident enjoyed statutory exemptions from entry requirements, but only if the citizen or resident was male. And from 1790 until 1934, the foreign-born child of a married couple gained U.S. citizenship only through the father.

For unwed parents, the father-controls tradition never held sway. Instead, the mother was regarded as the child's natural and sole guardian. At common law, the mother, and only the mother, was "bound to maintain [a nonmarital child] as its natural guardian." In line with that understanding, in the early 20th century, the State Department sometimes permitted unwed mothers to pass citizenship to their children, despite the absence of any statutory authority for the practice.

In the 1940 Act, Congress discarded the father-controls assumption concerning married parents, but codified the mother-as-sole-guardian perception regarding unmarried parents. The Roosevelt administration explained on this point: "[T]he mother [of a nonmarital child] stands in the place of the father... [,] has a right to the custody and control of such a child as against the putative father, and is bound to maintain it as its natural guardian."

This unwed-mother-as-natural-guardian notion rendered § 1409's gender-based residency rules understandable. Fearing that a foreign-born child could turn out "more alien than American in character," the administration believed that a citizen parent with lengthy ties to the United States would counteract the influence of the alien parent. Concern about the attachment of foreign-born children to the United States explained the treatment of unwed citizen fathers, who, according to the familiar stereotype, would care little about, and have scant contact with, their nonmarital children. For unwed citizen mothers, however, there was no need for a prolonged residency prophylactic. The alien father, who might transmit foreign ways, was presumptively out of the picture.

(v) For close to a half century, the Court viewed with suspicion laws that relied on overbroad generalizations about the different talents, capacities, or preferences of males and females. In particular, the Court recognized that if a statutory objective was to exclude or 'protect' members of one gender in reliance on 'fixed notions concerning that gender's roles and abilities', the objective itself was illegitimate.

In accord with such an eventual understanding, the Court held that no 'important governmental interest' was served by laws grounded in the obsolescing view that unwed fathers were invariably less qualified and entitled than mothers to take responsibility for nonmarital children. Overbroad generalizations of that order, the Court came to comprehend, had a constraining impact, descriptive though they might be of the way many people still order their lives. Laws according or denying benefits in reliance on stereotypes about women's domestic roles, the Court observed, might create a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver. Correspondingly, such laws might deserve men who exercised responsibility for raising their children. In light of the

equal protection jurisprudence the Court developed since 1971, § 1409(a) and (c)'s discrete duration-of-residence requirements for unwed mothers and fathers who accepted parental responsibility was stunningly anachronistic.

(vi) In urging the Court nevertheless reject the appellee's equal protection plea, the Government cited three decisions of this Court. However, none of those controlled this case.

First, the 1952 Act provision at issue in the Fiallo v. Bell case[268] gave special immigration preferences to alien children of citizen (or lawful-permanent-resident) mothers, and to alien unwed mothers of citizen (or lawful-permanent-resident) children. In that case, unwed fathers and their children, asserting their right to equal protection, sought the same preferences. In the case, applying minimal scrutiny (rational-basis review), the Court upheld the provision, relying on Congress' exceptionally broad power to admit or exclude aliens. The current case, however, involved no entry preference for aliens.

The appellee claims he was, and since birth had been, a U.S. citizen. Examining a claim of that order, the Court did not disclaim, as it had done in the Fiallo, the application of an exacting standard of review.

Second, the provision challenged in the Miller v. Albright[269] and the Nguyen v. INS[270] cases as violative of equal protection required unwed U.S. citizen fathers, but not mothers, to formally acknowledge parenthood of their foreign-born children in order to transmit their U.S. citizenship to those children. After Miller produced no opinion for the Court, the Court took up the issue anew in Nguyen. There, the Court held that imposing a paternal-acknowledgment requirement on fathers was a justifiable, easily met means of ensuring the existence of a biological parent-child relationship, which the mother established by giving birth. The appellee's challenge did not renew the contest over § 1409's paternal-acknowledgment requirement (whether the current version or that in effect in 1970), and the Government did not dispute that the appellee's father, by marrying appellee's mother, satisfied that requirement.

Unlike the paternal-acknowledgment requirement at issue in Nguyen and Miller, the physical-presence requirements before the Court related solely to the duration of the parent's prebirth residency in the United States, not to the parent's filial tie to the child. As the Court of Appeals observed in the current case, a man needed no more time in the United States than a woman in order to have assimilated citizenship-related values to transmit to his child. And unlike Nguyen's parental-acknowledgment requirement, § 1409(a)'s age-calibrated physical-presence requirements could not fairly be described as 'minimal'.

(vii) Notwithstanding § 1409(a) and (c)'s provenance in traditional notions of the way women and men were, the Government maintained that the statute served two important objectives:

- ensuring a connection between the child to become a citizen and the United States and
- preventing "statelessness," i.e., a child's possession of no citizenship at all.

Even indulging the assumption that Congress intended § 1409 to serve these interests, neither rationale survived heightened scrutiny.

(viii) The Court takes up first the Government's assertion that § 1409(a) and (c)'s gender-based differential ensured that a child born abroad had a connection to the United States of sufficient strength to warrant conferral of citizenship at birth. The Government did not contend, nor could it, that unmarried men took more time to absorb U.S. values than unmarried women did. Instead, it presented a novel argument, one it did not advance in Flores-Villar case[271].

An unwed mother, the Government urged, was the child's only legally recognized parent at the time of childbirth. According to that, an unwed citizen father entered the scene later, as a second parent. A longer physical connection to the United States was warranted for the unwed father, the Government maintained, because of the competing national influence of the alien mother. Congress, the Government suggested, designed the statute to bracket an unwed U.S. citizen mother with a married couple in which both parents were U.S. citizen, and to align an unwed U.S. citizen

268 430 U.S. 787 (1977).
269 523 U.S. 420 (1998).
270 533 U.S. 53 (2001).
271 United States v. Flores-Villar, 536 F.3d 990 (2008); Flores-Villar v. United States, 564 U.S. 210 (2011).

father with a married couple, one spouse a citizen, the other, an alien.

Underlying such an apparent design was the assumption that the alien father of a nonmarital child born abroad to a U.S. citizen mother would not accept parental responsibility. For an actual affiliation between alien father and nonmarital child would create the 'competing national influence' that, according to the Government, justifies imposing on unwed U.S. citizen fathers, but not unwed U.S. citizen mothers, lengthy physical-presence requirements. Hardly gender neutral that assumption conformed to the long-held view that unwed fathers care little about, and indeed were strangers to, their children. Lump characterization of that kind, however, no longer passed equal protection inspection.

Accepting, arguendo, that Congress intended the diverse physical-presence prescriptions to serve an interest in ensuring a connection between the foreign-born nonmarital child and the United States, the gender-based means scarcely served the posited end. For the scheme permitted the transmission of citizenship to children who had no tie to the United States so long as their mother was a U.S. citizen continuously present in the United States for one year at any point in her life prior to the child's birth.

The transmission held even if the mother married the child's alien father immediately after the child's birth and never returned with the child to the United States. At the same time, the legislation precluded citizenship transmission by a U.S. citizen father who fell a few days short of meeting § 1401(a)(7)'s longer physical-presence requirements, even if the father acknowledged paternity on the day of the child's birth and raised the child in the United States. One could not see the close means-end fit required to survive heightened scrutiny in this driven-by-gender scheme.

(ix) The Government maintained that Congress had established the gender-based residency differential in § 1409(a) and (c) to reduce the risk that a foreign-born child of a U.S. citizen would be born stateless. This risk, according to the Government, was substantially greater for the foreign-born child of an unwed U.S. citizen mother than it was for the foreign-born child of an unwed U.S. citizen father. But there was little reason to believe that a statelessness concern prompted the diverse physical-presence requirements. Nor had the Government shown that the risk of statelessness disproportionately endangered the children of unwed mothers.

As the Court of Appeals pointed out, with one exception, nothing in the congressional hearings and reports on the 1940 and 1952 Acts referred to the problem of statelessness for children born abroad.

Reducing the incidence of statelessness was the express goal of other sections of the 1940 Act. The justification for § 1409's gender-based dichotomy, however, was not the child's plight, it was the mother's role as the 'natural guardian' of a nonmarital child.

Infecting the Government's risk-of-statelessness argument was an assumption without foundation. "[F]oreign laws that would put the child of the U.S. citizen mother at risk of statelessness (by not providing for the child to acquire the father's citizenship at birth)," the Government asserts, "would protect the child of the U.S. citizen father against statelessness by providing that the child would take his mother's citizenship." The Government, however, neglected to expose this supposed 'protection' to a reality check. Had it done so, it would have recognized the formidable impediments placed by foreign laws on an unwed mother's transmission of citizenship to her child[272].

In 2014, the United Nations High Commissioner for Refugees (UNHCR) undertook a ten-year project to eliminate statelessness by 2024. Cognizant that discrimination against either mothers or fathers in citizenship and nationality laws was a major cause of statelessness, the Commissioner made a key component of its project the elimination of gender discrimination in such laws. In that light, the Court could not countenance risk of statelessness as a reason to uphold, rather than strike out, differential treatment of unmarried women and men with regard to transmission of citizenship to their children.

In sum, the Government advanced no "exceedingly persuasive" justification for § 1409(a) and (c)'s gender

272 The Court quotes, concerning the risk of statelessness for children, the report of experts who have studied the issue, which concluded that the risk of parenting stateless children abroad had been and remained at that time, substantial for unmarried U.S. citizen fathers, a risk perhaps greater than that for unmarried U. S. citizen mothers. 137 S. Ct. 1678, 1697.

specific residency and age criteria, so the disparate criteria the Government asserted, the Court held, could not withstand inspection under a Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens.

(x) While the equal protection infirmity in retaining a longer physical-presence requirement for unwed fathers than for unwed mothers was clear, the Court was not equipped to grant the relief the appellee sought, i.e., extending to his father (and, derivatively, to him) the benefit of the one-year physical-presence term § 1409(c) reserved for unwed mothers.

There were "two remedial alternatives," the Court's decisions instructed, when a statute benefits one class (in this case, unwed mothers and their children), as § 1409(c) did, and excluded another from the benefit (here, unwed fathers and their children). Namely, a court might either declare the statute a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it might extend the coverage of the statute to include those who were aggrieved by exclusion. When the right invoked was that to equal treatment, the appropriate remedy was a mandate of equal treatment, a result that could be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class. However, how equality was accomplished was a matter on which the Constitution was silent. The choice between these outcomes was governed by the legislature's intent, as revealed by the statute at hand.

Ordinarily, the Court reiterated, extension, rather than nullification, was the proper course.

Illustratively, in a series of cases involving federal financial assistance benefits, the Court struck discriminatory exceptions denying benefits to discrete groups, which meant benefits previously denied were extended. Here in this case, however, the discriminatory exception consisted of favorable treatment for a discrete group (a shorter physical-presence requirement for unwed U.S. citizen mothers giving birth abroad). Following the same approach as in those benefits cases striking the discriminatory exception led here to extending the general rule of longer physical-presence requirements to cover the previously favored group. In making the assessment, a court should measure the intensity of commitment to the residual policy - the main rule, not the exception - and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.

The residual policy here, the longer physical-presence requirement stated in § § 1401(a)(7) and 1409, evidences Congress' recognition of the importance of residence in this country as the talisman of dedicated attachment. And the potential for disruption of the statutory scheme was large.

For if § 1409(c)'s one-year dispensation was extended to unwed citizen fathers, it would be irrational to retain the longer term when the U.S. citizen parent was married. Disadvantageous treatment of marital children in comparison to nonmarital children was scarcely a purpose one could sensibly attribute to Congress.

Although extension of benefits was customary in federal benefit cases, all indicators in this case pointed in the opposite direction. Put to the choice, Congress, the Court judges, would have abrogated § 1409(c)'s exception, preferring preservation of the general rule.

(xi) The Court held that the gender-based distinction infecting § § 1401(a)(7) and 1409(a) and (c) violated the equal protection principle, as the Court of Appeals correctly had ruled. For the reasons stated, however, the Court had to adopt the remedial course Congress likely would have chosen had it been apprised of the constitutional infirmity. Although the preferred rule in the typical case was to extend favorable treatment, this was hardly the typical case. Extension here would render the special treatment Congress prescribed in § 1409(c), the one-year physical-presence requirement for U.S. citizen mothers, the general rule, no longer an exception. On the other hand, Section 1401(a)(7)'s longer physical-presence requirement, applicable to a substantial majority of children born abroad to one U.S. citizen parent and one foreign-citizen parent, therefore, had to hold sway. Going forward, Congress might address the issue and settled on a uniform prescription that neither favored nor disadvantaged any person on the basis of gender. In the interim, as the Government suggested, § 1401(a)(7)'s now-five-year requirement should apply, prospectively, to children born to unwed U.S. citizen mothers.

Section 6 "Natural-Born Citizen" Requirement for Presidency

In this section, this article will examine some examples of the argument on the requirement "a natural-born citizen" for President and consider the proposals having been raised up to the present time to amend the Constitution or in other ways concerning that requirement.

Subsection 1 Major Instances Involving the Requirement, a Natural-Born Citizen

The major instances of the (candidates for) President on whom whether the requirement "a natural-born citizen" was satisfied was questioned are as follows[273,274,275].

person	How the requirement "natural-born citizen" was problematized.
Chester A. Arthur	Chester A. Arthur, who had been the Vice-President under the 20th President James Abraham Garfield, was inaugurated as President after the assassination of President Garfield. But a suspicion that Arthur was born in Canada or Ireland was rumored in the mass media[276].
Christopher Schurmann	Schurmann, who became a candidate for the presidency in 1896, was born in the United States. But both his parents were immigrants from Germany, so it was questioned whether a person born of foreigners in the United States could become President[277].
Charles Evans Hughes	Hughes, who became a candidate for the presidency in 1916, was born in the United States. But both of his parents were subjects of the Great Britain, and not naturalized in the United States. The problem was that Hughes had dual nationality under the law of England at that time[278].
Barry Goldwater	Goldwater, who was a Republican candidate for the presidency in 1964, was born in Phoenix in the State of Arizona. But Arizona was not yet a State of the Union at that time, so whether a person born in such a place could be a natural born citizen was questioned[279].
George Romney	Romney, who was a Republican candidate for the presidency in 1968, was born of U.S. citizen parents in Mexico. While a grandfather of George Romney had immigrated into Mexico in 1886, both parents of George was maintaining citizenship of the United States, and returned to the United States after George was born. The issue was whether George Romney was a natural-born citizen in spite of the fact that he was born in Mexico[280].

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273 The purpose of this article in here is to understand in what context the requirement, "a natural-born citizen" provided in Article 2, Section 1, Clause 5 of the Constitution is discussed, but not to examine whether each candidate for President really satisfied the requirement, so latter question will not be investigated.

274 In addition to those enumerated above, sometimes, Henry Kissinger born in Germany, Christian Herter born in France, and Madeleine Albright born in Czech, all of whom were former Secretaries of State have been listed as persons who regrettably could not become President because they were born abroad. The issues of disputes raised in the case of such persons includes not only the fact that in spite that they are excellent persons, that they contribute to the national interests of the United States, and that they were loyal to the United States, they cannot be inaugurated as President, but also the fact that such a person can become Secretary of State which practically manages foreign affairs of the United States, but not President, the logical consistency of which is doubtful.

Concerning the representation of the powers and duties of President, a federal act has a provision for the problem, except for Article 2, Section 1, Clause 6, the Twentieth Amendment, and the Twenty-fifth Amendment of the Constitution. According to the provision of the federal act (3 U.S.C.A. § 19), an individual acting as President in case of vacancy in offices of both President and Vice President has to be such officer as is eligible for the office of President under the Constitution.

275 Though not enumerated in above, Franklin D. Roosevelt Jr. who was born in Canada and rumored to run for president is picked up in literatures concerning the requirement, "natural-born citizen". Charles Gordon, Who Can be President of the United States: The unresolved Enigma, 28 Maryland L. Rev. 1 (1968).

276 Thomas C. Reeves, The Mystery of Chester Alan Arthur's Birthplace, 38 Vermont Hist. 4, 295 (Vermont Historical Society, 1971). https://vermonthistory.org/journal/misc/MysteryOfChester.pdf

277 An Editor of that Period (The Battle of Bietigheim), The Presidential Campaign of 1896, 131 (Funk & Wagnalls 1925 (However, there is printed 1888 on the first title page.)) https://archive.org/details/presidentialcam00catlgoog

278 Breckinridge Long, Is Mr. Charles Evans Hughes a "Natural born citizen" within the meaning of Constitution?, 146-148 Chi. L. News 220 (Dec. 7, 1916). At that time, it was questioned whether, while a person who acquired citizenship by birth in the United States would be a native born citizen, when such a person owed allegiance to a foreign country at the same time, he still could be a natural born citizen.

279 Seth Lipsky, The Citizen's Constitution: An Annotated Guide, para. 166 (2011).

280 Isidor Blum, Is Gov. George Romney Eligible to Be President?, N. Y. L. J. Oct. 16 & 17 (1967); Pinckney G. McElwee, Natural Born Citizen, 113 Cong. Rec. 15875 (Jun. 14, 1967); Eustace Seligman, A Brief for Governor Romney's Eligibility for President, N. Y. L. J., Nov. 15 (1967), reprinted in 113 Cong. Rec. 35019 (Dec. 5, 1967); Vincent A. Doyle, The Natural Born Citizen Qualification for the Office of President: Is George W. Romney Eligible?, The Library of Congress Legislative Reference Service JK 516 A1 (425/225, A225), Washington D. C. (February 27, 1968).

Lowell Weicker	Weicker, who declared in 1979 his candidacy for the presidential election of 1980, was born in France. In 1976, whether he was a natural born citizen was questioned[281].
John McCain	McCain was born in 1936 on a military base of the United States in Panama Canal Zone. At the time of the presidential election of 2008, whether he was a natural born citizen was questioned[282].
Barack Obama	At the times of the presidential elections of 2008 and 2012, it was questioned whether Obama was a natural born citizen. Obama was born in Hawaii of the American citizen mother and the father who, since born in British Kenya colony, had been a British subject at the time of birth[283].
Ted Cruz	Cruz, who was a candidate for the presidential election of 2016, was born at a hospital in Canada, of the father who was a resident in the United States and the mother who was a citizen of the United States. Whether Ted Cruz was a natural born citizen was questioned[284].

Subsection 2 McCain's Case - Resolution of Congress

Regarding the question whether McCain was a natural born citizen, Congress adopted a resolution to recognize that McCain was a natural born citizen. The content was as follows[285,286].

Recognizing that John Sidney McCain, III, is a natural born citizen.
Whereas the Constitution of the United States requires that, to be eligible for the Office of the President, a person must be a "natural born Citizen" of the United States;
Whereas the term "natural born Citizen", as that term appears in Article II, Section 1, is not defined in the Constitution of the United States;
Whereas there is no evidence of the intention of the Framers or any Congress to limit the constitutional rights of children born to Americans serving in the military nor to prevent those children from serving as their country's President;
Whereas such limitations would be inconsistent with the purpose and intent of the "natural born Citizen" clause of the Constitution of the United States, as evidenced by the First Congress's own statute[287] defining the term "natural born Citizen";
Whereas the well-being of all citizens of the United States is preserved and enhanced by the men and women who are assigned to serve our country outside of our national borders;
Whereas previous presidential candidates were born outside of the United States of America and were understood to be eligible to be President; and
Whereas John Sidney McCain, III, was born to American citizens on an American military base in the Panama Canal Zone in 1936: Now, therefore, be it
Resolved, That John Sidney McCain, III, is a "natural born Citizen" under Article II, Section 1, of the Constitution of the United States.

281 Nashua Telegraph, Saturday, August 14, 1976.

282 "Recognizing that John Sidney McCain, III, is a natural born citizen.", S. Res. 511, 110th Cong. 2d Sess. (2008). On this issue, in a case one of which issue was whether McCain was a natural born citizen, a party insisted that McCain was born not in a U.S. military base but in a hospital which was placed in Panama. Fred Hollander v. Senator John McCain and the Republican National Committee, 566 F. Supp. 2d. 63 (2008).

283 Concerning Barack Obama, various actions were brought before the court on the ground of various reasons. Among them, some insisted that Barack Obama was born not in Hawaii. Concerning such an insistence, it was pointed out that if Obama were not born in Hawaii, according to the federal law at the time of 1961, when one of the parents was a citizen and another a foreigner, the citizen parent had to reside in the United States for ten years at least five years of which the parent was at the age of 14 years or more, which might not have been satisfied by the mother of Barack Obama, taking account of her age. Jack Maskell, Qualifications for President and the "Natural Born" Citizenship Eligibility Requirement, R42097 Congressional Research Report, 39 (note 172) (2011).

Concerning the issue, Obama made his birth certificate public to prove he was born in Hawaii. https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/birth-certificate-long-form.pdf

284 Paul Clement & Neal Katyal, On the Meaning of "Natural Born Citizen", 128 Harv. L. Rev. Forum 161 (2015).

285 S. Res. 511, 110th Cong. 2d Sess. (2008).

286 On the question whether McCain could be said to be a natural born citizen, there were brought about many theoretical debates, for example, a paper by Gabriel J. Chin, a letter by Laurence Tribe and Theodore Olson (http://journaloflaw.us/0%20JoL/2-3/JoL2-3.pdf), a paper by Peter J. Shapiro (Peter J. Shapiro, McCain's Citizenship and Constitutional Method, 107 Mich. L. Rev. First Impressions, 42 (2008) (https://repository.law.umich.edu/mlr_fi/vol107/iss1/20/) and etc.

Gabriel J. Chin insisted, based on so-called Insular cases, that since the Panama Canal Zone was not incorporated into the United States at the time of the birth of McCain of 1936, McCain born at such a place could not be a natural born citizen, and that, however, by the federal act of 1937 (50 Stat. 558 (1938). The formal title is An Act relating to the citizenship of certain classes of persons born in the Canal Zone or the Republic of Panama), which made persons who was born in that zone citizens of the United States and was deemed to be retroactive, McCain acquired citizenship of the United States. Gabriel J. Chin, Why Senator John McCain cannot be President: Eleven Months and a Hundred Yards Short of Citizenship, 107 Michi. L. Rev. First Impression, 1 (2008).

Furthermore, the Act of 1934 (Revised Statutes, Section 1993), which was valid in 1936, provided that a person who was born of a citizen parent out of the limits and jurisdiction of the United States should acquire citizenship of the United States. But, there was an opinion that, since the Panama Canal Zone was under the jurisdiction of the United States, a person born there might not acquire citizenship by that provision. On this issue, it was said that the Department of State issued an interpretation that the acquisition of citizenship by that provision should occur at any place in the world. Stephen E. Sachs, John McCain's Citizenship - A Tentative Defense, 47 (SSRN (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1236882)); Stephen E. Sachs, Why John McCain was a Citizen at Birth, 107 Mich. L. Rev. First Impression, 49 (2008).

287 Though the quotation was not explicit, the statute would mean Naturalization Act established by Congress in 1790 (1 Stat. 103 (1790)).

Questioning whether McCain satisfied the requirements for a natural born citizen, there were some actions brought before the courts. Among them, a judgement of the Federal District Court of California on the case, Robinson v. Bowen[288] stated generally as follows.

First, the judgement ruled that Article 2 (Section 1, Clause 5) left to Congress the role of defining citizenship, including citizenship by reason of birth, and that many decades later, the Fourteenth Amendment set a floor on citizenship and provided that all born or naturalized in the United States, and subject to the jurisdiction thereof, were citizens, and nonetheless, subject to the floor of the Fourteenth Amendment, it had always been left to Congress to define who might be a citizen by reason of birth[289].

Second, the judgement pointed out that at the time of Senator McCain's birth, the pertinent citizenship provision prescribed that "[a]ny child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States." Then, the judgement concluded that under the view of the Supreme Court, Senator McCain was a citizen at birth. Moreover, the judgement stated that in 1937, to remove any doubt as to persons in Senator McCain's circumstances in the Canal Zone, Congress enacted Section 303(a) of Immigration and Nationality Act (8 U.S.C.A. § 1403(a)), which declared that persons in Senator McCain's circumstances were citizens by virtue of their birth, thereby retroactively rendering Senator McCain a natural born citizen, if he was not one already[290].

Subsection 3 Obama's Case --- Treatment by Court

Concerning the question whether Obama is a natural born citizen of the United States, various actions were brought before courts, based on various grounds[291].

Most of those actions were dismissed on account of the lack of jurisdiction of the courts. But in some cases it was stated that it was an established principle of law that, in spite of the nationalities of the parents, a person born in the United States was a natural born citizen of the United State in the meaning of Article 2, Section 1, Clause 5 of the Constitution[292].

Subsection 4 Major Amendment Proposals Concerning Article 2, Section 1, Clause 5 of the Constitution

Paragraph 1 Summary of Constitutional Amendment Proposals

Concerning Article 2, Section 1, Clause 5 of the Constitution of the United States, there have been presented many amendment proposals[293,294]. The summary of those in chronological order was generally as follows.

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288 Markham Robinson v. Secretary of State Debra Bowen, 567 F. Supp. 2d 1144 (2008).

289 Id., at 1145.

290 Id., at 1146.

291 Derek T. Muller, Scrutinizing Federal Electoral Qualifications, 90 Indiana I. J. 559, note 134 & 136 (2015). In relation to this, a web site reports that more than 200 actions had been raised by August 2015. (http://tesibria.typepad.com/whats_your_evidence/BIRTHER%20CASE%20LIST.pdf)

292 Cf. Ex. Steve Ankeny and Bill Kruse v. Governor of the State of Indiana, No. 49A02-0904-CV-353 (Nov. 12, 2009); Tracy Fair, et al v. Barack Hussein Obama, No. 06-C-2012-060692 (Aug. 27, 2012).

293 This article used following resources to collect constitutional amendment proposals:
- Library of Congress -- Century of Lawmaking for an New Nation -- Bills and Resolutions (http://memory.loc.gov/ammem/amlaw/lwhbsb.html)
- THOMAS (https://www.congress.gov/)
- GPO FDSYS (https://gpo.gov/fdsys/)
- LexisNexis.com
- Westlaw.com
- ProQuest Digital U.S. Bills and Resolutions 1789 - 2013
- CIS Congressional Bills, Resolutions and Laws (Proquest)
- John R. Vile ed., Proposed Amendments to the U.S. Constitution 1787 -- 2001 (vol. I -- vol. III and Supplement vol. IV) (The Law Exchange, Ltd. 2003)

294 There were some movements in several States to require presidential candidates to present the birth certificate before the

According to the records, it was on July 7, 1798 that the first amendment proposal concerning Article 2. Section 1, Clause 5 of the Constitution was presented[295]. That proposal did not intend to change the part, "natural born citizen", but to change the part, "a citizen of the United States, at the time of the adoption of this Constitution". It proposed to change the part to be a person who "shall have been a resident in the United States at the time of the declaration of independence, and [who] shall have continued either to reside within the same or to be employed in its service from that period to the time of his election." This proposal also targeted the eligibility for Vice-President or for Senator or Representative in Congress, as well as for President.

Furthermore, a similar proposal to that described above was proposed at the House of Representatives on July 9 of the same year[296]. That proposal was intended to change the same part as above to be "a resident in the United States at and since the Declaration of Independence," or one who "may have been in the employment of the United States during that time." According to the public record, as an alternative when that proposal was not agreeable, there was presented a proposition "to exclude all persons not naturalized at the passing of the amendment, and all such as shall not have resided fourteen years in the United States previous to their election."

Those proposals were presented not at the first Congress. But it was done at the time when the United States was at war with a foreign country and, after the establishment of Alien and Sedition Act, it was intended to exclude persons other than "natural born citizens" or "persons who had resided at and since the Declaration of Independence" from citizens eligible to the office of President or members of Congress[297].

It was at the 40th Congress convened after the Civil War that the next amendment proposal to the part "natural-born citizen" of the Article 2, Section 1, Clause 5 of the Constitution was presented. The proposal presented at the House of Representatives in 1868 proposed to delete the parts, "a natural born citizen" and "at the time of the adoption of this Constitution"[298]. Next to that, at the Senate of the 41st Congress of 1871, it was proposed to amend the constitutional provision to be that every person, whether a natural-born or foreign-born citizen of the United States, who should have attained to the age of thirty-five years and been fourteen years a resident within the United States, should be eligible to the office of President[299]. At the 42nd Congress summoned in the same year, there was presented an amendment proposal which rendered a naturalized person eligible for the office of President or Vice President[300]. In 1872, at the Congress in the next year, there was presented an amendment proposal which provided that naturalized citizens who had attained the age of thirty-five years, and had resided fourteen years in the United States, were eligible to the offices of President and Vice President[301].

On November 18, 1947, there was presented at the House of Representatives a constitutional amendment bill regarding the presidential qualifications. The amendment bill proposed to, like that of 1868, delete the parts, "a

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presidential election of 2012. cf. ex. State of Arizona, Senate, 49th legislature, 2nd Regular Session, 2010, Senate Bill 1024, An Act amending Sections 16-311, 16-312, 16-321, 16-341, 16-344, 16-502, 16-507, and 16-543.02, Arizona revised statutes; relating to conduct of Elections.

295 7 Annals of Cong. 602 (1798).

296 8 Annals of Cong. 2132-2133 (1798).

297 Herman V. Ames, The Proposed Amendment to the Constitution of the United States during the First Century of its History, II Annual Report of the American Historical Association for the year 1896, 74 (GPO 1897). In this literature, it was recorded that though the State of New York, which was discontented with the provision of the Constitution which rendered a foreign-born person who was a citizen of the United States at the time of the adoption of this Constitution eligible to the Presidency, proposed that this article be so amended, "That no person, except natural-born citizens, or such as were citizens on or before the 4th day of July, 1776, or such as held commissions under the United States during the war and have at any time since the 4th day of July, 1776, become citizens of one or other of the United States, and who shall be a freeholder, shall be eligible to the places of President, Vice-President, or member of either House of the Congress of the United States", such a resolution was not introduced in the First Congress.

The literature said that the proposal was a Federalist affront to Albert Gallatin, who had strongly opposed the Alien and Sedition Act.

298 H. R. 269, Cong. Globe, 40th Cong., 2d Sess., 2526 (1868).

299 S. R. 284, Cong. Globe, 41st Cong., 3d Sess., 538, 1263 (1871).

300 H. R. 52, Cong. Globe, 42nd Cong., 2d Sess., 57, 307 (1871).

301 Cong. Globe, 42nd Cong., 3d Sess., 226 (1872).

natural born citizen" and "at the time of the adoption of this Constitution"[302]. Representative Keogh, who presented that proposal, also presented a similar proposal in 1949[303].

Constitutional amendment bills, which Representative Rabaut presented in 1956 and 1957, provided that a natural born citizen of the United States or a person both of whose parents were citizens of the United States at his birth and whose mother belonged to the U.S. Army and served outside of the United States or whose mother accompanied his father who belonged to the U.S. Army and served outside of the United States, should be eligible to the office of President[304].

The amendment proposal, which was presented by Representative Forand to the House of Representative of the 85th Congress summoned in 1958, rendered "a person born in the United States and subject to the jurisdiction thereof" and a person born outside of the United States both of whose parents were citizens of the United States and one of whose parents served in the U.S. Army and worked outside of the United States under the command of the army, eligible to the office of President[305]. Similar amendment bills were presented by Representative Fogarty[306] and Representative Forand[307] at the 86th Congress. In addition, Representative Fogarty presented similar amendment bills also to the 87th Congress of 1961[308] and the 88th Congress of 1963[309].

At the House of Representatives of the 90th Congress of 1967, Representative Matsunaga presented a constitutional amendment bill which provided that "a natural born citizen" or "a naturalized citizen of the United States for at least fifteen years" should be deemed to be eligible for the office of President[310].

At the Senate of the 92nd Congress of 1971, Senator Fong, together with Senators Baker, Bible, Hollings, Humphrey, Metcalf, Muskie and Proxmire, presented a proposal which asked for rendering naturalized citizens eligible to the office of President[311].

In the second session of the same Congress of 1972, there were presented some proposals at the House of Representatives. The proposal of Representative McDonald provided that a person who, even if not being native born, had been a citizen of the United States for at least twelve years and resided in the United States for at least fourteen years at the time of the election should be eligible for the office of President[312]. The proposals by Representatives Drinan[313] and Abzug[314] provided that a citizen of the United States should not be deemed to be ineligible to the office of President on the ground that such person was not "a natural born citizen".

At the Senate of the 93rd Congress of 1973, Senator Fong presented a bill to amend the Constitution. The bill by the Senator provided that a citizen elected to President should have resided in the United States for totally at least fourteen years by the time of the inauguration[315].

At the House of Representatives of the first session of the same Congress, Representative McDonald presented the same constitutional amendment bill as that presented by himself in 1972[316]. In addition, the Representative, together with Representatives Abzug, Brown(California), Burton, Collins, Harrington, Leggett, Matsunaga, Podell, and

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302 H. J. Res. 259, 80th Cong., 1st Sess. (1947).
303 H. J. Res. 28, 81st Cong., 1st Sess. (1949).
304 H. J. Res. 645, 84th Cong., 2nd Sess. (1956); H. J. Res. 80, 85th Cong., 1st Sess. (1957).
305 H. J. Res. 612, 85th Cong. 2nd Sess. (1957).
306 H. J. Res. 205, 86th Cong., 1st Sess. (1959); H, J. Res. 517, 86th Cong., 1st Sess. (1959). Representative Fogarty presented amendment proposals twice which were mutually similar.
307 H. J. Res. 214, 86th Cong., 1st Sess. (1959).
308 H. J. Res. 571, 87th Cong., 1st Sess. (1961).
309 H. J. Res. 397, 88th Cong., 1st Sess. (1963).
310 H. J. Res. 795, 90th Cong., 1st Sess. (1967).
311 S. J. Res. 161, 92nd Cong., 1st Sess. (1971).
312 H. J. Res. 1220, 92nd Cong., 2nd Sess. (1972).
313 H. J. Res. 1245, 92nd Cong., 2nd Sess. (1972).
314 H. J. Res. 1255, 92nd Cong., 2nd Sess. (1972).
315 S. J. Res. 137, 93rd Cong., 1st Sess. (1973). The same amendment bill was presented also to the House of Representatives by Representative Burton. H. J. Res. 740, 93rd Cong., 1st Sess. (1973).
316 H. J. Res. 491, 93rd Cong., 1st Sess. (1973).

WonPat, presented a constitutional amendment bill, which provided, like his proposal of 1972, that a person who had been a citizen of the United States for at least twelve years and had resided in the United States for at least fourteen years at the time of the election should be eligible for the office of President[317].

In the second session of the same Congress of 1974, Representative Bingham presented a constitutional amendment bill. His bill was, though some wordings were different, essentially same as the bill proposed by Representative Abzug in 1974[318]. Besides, at the same session, Representative Seiberling also presented a similar constitutional amendment bill[319].

In the 1st session of the 94th Congress of 1975, Representative Bingham presented again the constitutional amendment bill which was same as what he presented in 1974[320]. In the same session, Representative Matsunaga presented a constitutional amendment bill which provided that a person who had been a citizen of the United States for at least twelve years and had resided in the United States for at least fourteen years by the time of the election should not be deemed to be ineligible to the office of President[321].

In the first session of the 95th Congress of 1977, Representative Bingham presented a constitutional amendment bill which provided that a citizen of the United States otherwise eligible to the office of President should not be ineligible because such citizen was not a natural born citizen[322].

At the Senate of the 98th Congress of 1983, Senator Eagleton, together with Senator Proxmire, presented a constitutional amendment bill which provided that a naturalized citizen who had been a citizen of the United States for eleven years, if satisfying the other requirements, should be eligible to the offices of President and of Vice President[323].

At the House of Representatives in the 1st session of the 100th Congress of 1987, Representative Fazio proposed a constitutional amendment bill which provided that a naturalized citizen of the United States who had been a citizen of the United States for eleven years, if satisfying the other requirements, should be eligible for President or Vice President[324]. The Representative presented similar bills also to the House of Representatives in the 1st session of the 101st Congress of 1989[325] and to the House in the 1st session of the 102nd Congress of 1991[326].

At the House of Representatives in the 2nd session of the 106th Congress of 2000, Representative Frank presented a constitutional amendment bill which provided that a person who had been a citizen of the United States for at least 20 years, if satisfying the other requirements, should not be deemed ineligible to the office of President[327]. The representative presented a similar proposal also in the 1st session of the 107th Congress of 2001[328]. In addition,

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317 H. J. Res. 589, 93rd Cong., 1st Sess. (1973).

318 H. J. Res. 880, 93rd Cong., 2nd Sess. (1974). On the one hand, the bill presented by Representative Abzug provided, "No person who is a citizen of the United States shall be ineligible to the office of President solely on the grounds such person is not a natural born citizen", and, on the other hand, the bill presented by Representative Bingham provided, "A citizen of the United States otherwise eligible to hold the Office of President shall not be ineligible because such citizen is not a natural born citizen.

While Representative Bingham presented such a bill on January, 1974, the Representative also presented the same bill twice on February of the year, at the first time, together with Representatives Chisholm, Rosenthal, De Lugo, Frenzel, Nix, and WonPat (H. J. Res. 890, 93rd Cong., 2nd Sess. (1974)), and, at the second time, together with Representative Harrington (H. J. Res. 896, 93rd Cong., 2nd Sess. (1974)). Moreover, Representative Bingham presented again the same bill on April of the year, together with Representatives Abzug, Badilio, Brademas, Eckhardt, Fascell, Meeds, Mink, Schroeder, and Thompson(New Jersey). H. J. Res. 993, 93rd Cong., 2nd Sess. (1974).

319 H. J. Res. 1051, 93rd Cong., 2nd Sess. (1974).

320 H. J. Res. 33, 94th Cong., 1st Sess. (1975).

321 H. J. Res. 127, 94th Cong., 1st Sess. (1975).

322 H. J. Res. 38, 95th Cong., 1st Sess. (1977).

323 S. J. Res. 72, 98th Cong., 1st Sess. (1983), Cong. Rec., 98th Cong., 1st Sess. 7055 (1983).

324 H. J. Res. 229, 100th Cong., 1st Sess. (1987).

325 H. J. Res. 450, 101st Cong., 1st Sess. (1989).

326 H. J. Res. 246, 102nd Cong., 1st Sess. (1991).

327 H. J. Res. 88, 106th Cong., 1st Sess. (2000).

328 H. J. Res. 47, 107th Cong., 1st Sess. (2001).

Senator Hatch presented a similar amendment bill to the Senate in the 1st session of the 108th Congress of 2003[329].

At the House of Representatives in the 1st session of the 108th Congress of 2003, Representative Snyder, together with Representatives Issa and Frank, proposed a constitutional amendment bill. The bill provided that a person who was of the age of at least thirty-five years and had been resided in the United States for fourteen years or more should be deemed eligible to the office of President or Vice President, which deleted the parts "a native born citizen" and citizen "at the time of the adoption of this Constitution" and changed the expression of the conditions for ineligibility into the form of the conditions for eligibility[330]. Representative Snyder also presented, together with Representative Shays, a similar amendment bill in the 1st session of the 109th Congress[331]. Moreover, at the 1st session of the 108th Congress, Representative Conyers also presented a constitutional amendment bill, which provided that a person who had been a citizen of the United States for twenty years should be eligible to the office of President[332]. The Representative also presented a similar proposal, together with Representative Sherman, in the 1st session of the 109th Congress of 2005[333].

At the Senate in the 2nd session of the 108th Congress, Senator Rohrabacher presented a constitutional amendment bill. The bill provided that a person who had been a citizen of the United States for twenty years or more and who satisfied the other requirements for the eligibility to the office of President, should not be deemed ineligible to President on the ground that such a person was not a natural born citizen[334]. The Senator also presented a similar amendment bill in the 1st session of the 109th Congress of 2005[335].

Paragraph 2 Nature of Constitutional Amendment Bills

Concerning those constitutional amendment bills described above, the following analysis are presented.

First, it is said that each constitutional amendment bill reflected its concrete historical backgrounds. As being seen above, the constitutional amendment bills presented by the time of the end of Civil War were taking into consideration the policies of the U.S. Government around the time of the adoption of the Constitution or the political conditions just after the Civil War. Then, it was also pointed out that the constitutional amendment bills around the year 1960 had the backgrounds of the consideration of equality of citizens or of the fact that there were the potential presidential candidates who were born abroad, such as Christian Herter, Franklin D. Roosevelt Jr., Barry Goldwater, and George Romney[336]. Furthermore, it was said that the constitutional amendment bills presented by Representative Bingham in the late 1970's were considering the existence of Henry Kissinger who was a potential presidential candidate born outside of the United States (in Germany)[337]. Moreover, concerning the constitutional amendment bills proposed around 2003, it may have been the background that there were at that time several potential presidential candidates who were born abroad, for example, Arnold Schwarzenegger, who was born in Austria and is a former governor of the State of California, Jennifer Granholm, who was born in Canada and is a former governor of the State of Michigan, or others[338].

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329 S. J. Res. 15, 108th Cong., 1st Sess. (2003).

330 H. J. Res. 59, 108th Cong., 1st Sess. (2003).

331 H. J. Res. 42, 109th Cong., 1st Sess. (2005).

332 H. J. Res. 67, 108th Cong., 1st Sess. (2003).

333 H. J. Res. 2, 109th Cong., 1st Sess. (2005).

334 H. J. Res. 104, 108th Cong., 2nd Sess. (2004).

335 H. J. Res. 15, 109th Cong., 1st Sess. (2005). The bill mentioned above provided, "A person who is a citizen of the United States, who has been a citizen of the United States for at least 20 years, and who is otherwise eligible to hold the Office of the President, is not ineligible to hold that Office by reason of not being a native born citizen of the United States". On the wording of the bill, a literature pointed out that it might generate disputes concerning the interpretative difference between "native born citizen" and "natural born citizen". Duggin & Collins, at 150.

336 Seymore, at 947.

337 Id., at 949.

338 Id., at 950; Lawrence Friedman, An idea whose time has come -- the curious history, uncertain effect, and need for amendment of the "natural born citizen" requirement for the presidency, 52 Saint Louis Univ. L. J. 137, 139 (2007).

Second, although there have been presented many constitutional amendment bills up to the present time, any such bill has never been approved of and established by Congress. One fundamental reason of it would be the fact that no public agreement has been established so as to amend the Constitution. As the reasons why such public agreement has not been attained, the following problems have been pointed out[339].

(i) People fear that passing a constitutional amendment will somehow destabilize the American legal system because any amendment to the Constitution opens the door for others to push forward constitutional amendments to advance their own causes. And, moreover, people are afraid that each amendment represents a movement away from the original intent of the Founding Fathers.

(ii) The provision including natural born citizen clause does not affect that many people.

(iii) Similar to the fears that the Founding Fathers felt, the possibility that a foreigner will come in and somehow "take over" America is felt to continues to exist in America by people, albeit in a slightly different form[340,341].

(iv) There is an opinion that foreign-born citizens retain an emotional attachment and a sense of loyalty to their homelands.

(v) It is failed to be understood what it concretely means to be a natural born citizen and people do not truly understand what they are being asked to vote for by the question whether the natural born citizen clause should be amended.

(vi) There is racism and religious intolerance among people of the United States.

(vii) American people afraid, amending the natural born citizen clause would signal to the rest of the world that America is willing to be one country of many and that Americans are interested in becoming part of a global world culture.

(viii) Some Americans afraid that, since the President was a Symbol of America, not only of its value but also of its power and strength, abolishing the natural born citizen clause may change the traditions and values of America that the presidency represents.

Third, an analysis showed that the constitutional amendment bills having been proposed so far could be classified into following three categories[342].

(i) Elimination of the natural born citizenship requirement entirely;

(ii) Exemption of certain groups of citizens from the natural born citizenship requirement;

(iii) Elimination of the natural born citizenship criterion coupled with the addition of other criteria, such as minimum length of citizenship.

According to that analysis, (i) would have made natural born and naturalized citizens equal in all respects, eliminating the last vestiges of distinction among citizens. It also states as the demerit of (iii) that additional years of citizenship no more effectively screen for loyalty than the natural born proviso itself, and that any such requirement would discriminate against both persons who naturalized as adults and against some of those who naturalized before

339 Sarah P. Herlihy, Amending the Natural Born Citizen Requirement: Globalization as the Impetus and the Obstacle, 81 Chi.-Kent L. Rev. 275 (2006). This paper enumerated following points as the reasons to amend the "natural born citizen" clause.
- The natural born citizen requirement is discriminatory because it treats naturalized citizens differently from natural born citizens.
- The natural born citizen clause is outdated by the development of globalization.
- Place of birth is not a proxy for loyalty.
- The natural born citizen requirement is undemocratic because the electorate cannot elect a naturalized citizen as President or others.

340 In relation with this issue, another paper pointed out that, while the origin of the Natural-Born Citizen Clause and the early attempts to further restrict presidential eligibility on source of citizenship grounds illustrated a distrust of foreignness, an assumption that naturalized citizens were potentially disloyal to a far greater degree than were natural-born citizens, the failure of more recent attempts to expand presidential eligibility to include foreign-born citizens showed that they did not progressed very far from their historical roots on that issue. Seymore, at 952.

341 The paper said that the fear of foreigners amongst Americans increased in the wake of the September 11th attacks, and that post-September 11th, many Americans came to believe that the need to protect national security justified the use of racial profiling.

342 Duggin & Collins, at 148.

the age of majority[343].

In relation to that, there is an opinion that since, after all, the fourteen-year residency requirement is perfectly adequate to ensure that a person born in the United States, who immediately departs the United States only to return fourteen years before becoming President, is sufficiently familiar with American politics, culture, and traditions[344], there should be no reason why the same time period is inadequate for the naturalized citizen[345].

Subsection 5 Other Bills

In addition to the bills which proposed to amend directly Article 2, Section 1, Clause 5 of the Constitution, there have been presented various amendment bills which would amend other provisions of the Constitution, the Immigration and Nationality Act, or other acts so as to affect the effect of the natural born citizen clause. Followings are the outlines of some notable ones among them.

Paragraph 1 Bill Defining Natural Born Citizen

At the Senate in the 2nd session of the 108th Congress of 2004, Senator Nickles, together with Senators Landrieu and Inhofe, presented a bill to define the term, "Natural Born Citizen"[346]. The bill provided, "Congress finds and declares that the term "natural born Citizen" in Article 2, Section 1, Clause 5 of the Constitution of the United States means:

(i) any person born in the United States and subject to the jurisdiction thereof; and

(ii) any person born outside the United States

(A) who derives citizenship at birth from a United States citizen parent or parents pursuant to an Act of Congress; or

(B) who is adopted by 18 years of age by a United States citizen parent or parents who are otherwise eligible to transmit citizenship to a biological child pursuant to an Act of Congress."[347]

Concerning the bill, it was pointed out that it might cause some interpretational problems in following cases[348].

If a foreign born couple with a foreign born infant son/daughter were to become naturalized United States citizens, their infant would acquire United States citizenship through derivative naturalization. As a living biological child, however, (s)he would not be qualified as "natural born" pursuant to the act. In contrast, if, following their naturalization, the same couple subsequently adopted a foreign born teenager who had never lived in the United States, this adopted child would be considered a "natural born" citizen. Thus, only the latter child would be eligible for the presidency. In addition, while a teenager adopted at age seventeen would be deemed "natural born," a nineteen year old immigrant would be perpetually barred from seeking the Presidency.

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343 After the part quoted above, the paper suggested that a proper constitutional amendment should satisfy following conditions.

(i) An amendment should eliminate any distinction or quality of citizenship based on circumstances of birth;

(ii) An appropriate change in the Presidential qualifications criteria need not disturb the criteria set by the Framers that have worked reasonably well since 1787;

(iii) The Constitution should require a multinational President-elect to renounce any and all claims to foreign citizenship prior to taking the oath of office.

Then, in addition, the paper presents a constitutional amendment model. Namely:

Any citizen of the United States who has attained to the age of thirty five years and who has been fourteen years a resident within the United States shall be eligible to the Office of the President, provided that any person elected to the office of President who is also a citizen of any other country shall renounce any such citizenship under oath or by affirmation prior to taking the oath of the office of President.

344 U.S. Const. Art II, § 1, cl. 5.

345 Seymore, at 994.

346 S. 2128, 108th Cong., 2nd Sess. (2004).

347 The bill also defined the geographic sense of the United States to mean the several States of the United States and the District of Columbia.

348 Duggin & Collins, at 146.

As another problem of the bill, it was also pointed out that the status of both Native Americans and those born in United States territories would remain unclear. Moreover, it was also said that any attempt to encompass persons naturalized after birth within the meaning of "natural born Citizen," would be difficult as a construction of this phrase. Furthermore, it was also insisted against the bill that it was unclear whether Congress had constitutional authority to define natural born citizenship for purposes of Article 2, and that even if Congress did possess the authority to legislate in this regard, a statute would not prevent a crisis from occurring, for the constitutionality of any statute might be contested, and the very existence of a legal action would be disruptive, even if the courts ultimately held the case non-justiciable[349].

Paragraph 2 Bills Concerning Definition of Citizenship

There have been presented to Congress also such bills as amending the definition of citizenship in the Fourteenth Amendment of the Constitution or other acts so as to restrict the children of illegal immigrants or of non-immigrant aliens from acquiring natural born citizenship[350,351].

First, as constitutional amendment proposals, bills of the following types have been presented. It requires persons to be born to

(i) parents both of whom are either citizens or lawful permanent residents;
(ii) a mother who is a legal resident;
(iii) a mother who is a citizen or legal resident;
(iv) parents one of whom is a citizen;
(v) parents one of whom is a citizen or person who owes permanent allegiance to the United States;
(vi) parents one of whom is a legal resident;
(vii) parents one of whom is a citizen or lawful permanent resident;
(viii) parents one of whom is a citizen, is lawfully in the United States, or has lawful status under the immigration laws of the United States;
(ix) parents one of whom is a citizen, a lawful permanent resident who resides in the United States, or an alien performing active duty service in the U.S. Armed Forces.

Second, as not a constitutional amendment but an act defining the words, "subject to the jurisdiction" of the United States provided in the Fourteenth Amendment, Section 1 of the Constitution, the proposals of following types have been presented. It defines

(i) persons, whose birth mothers are not citizens, nationals, or lawful permanent residents of the United States and who are citizens/nationals of another country of which a natural parent is a citizen/national, as not being born subject to the jurisdiction of the United States within the meaning of the Fourteenth Amendment, but rather as being born subject to the jurisdiction of the other country;

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349 Id., at 147.

350 Margaret Mikyung Lee, Birthright Citizenship under the 14th Amendment of Persons Born in the United States to Alien Parents, RL33079 Congressional Research Report 10 (2015); Alexandra M. Wyatt, Birthright Citizenship and Children Born in the United States to Alien Parents, An Overview of the Legal Debate, R44251 Congressional Research Report (2015). Similar constitutional amendment bills were presented to Congress in 1919, 1921 and 1923. Rachel E. Rosenbloom, Policing the Borders of Birthright Citizenship: Some Thoughts on the New (and Old) Restrictionism, 51 Washburn L. J. 311, 317 (2012). According to the paper, around 1920, the restriction of giving birthright citizenship in the United States targeted mainly at Asian immigrants, like Chinese or Japanese, but it also targeted to Mexican immigrants. As references on such backgrounds of constitutional amendment proposals, see Gabriel J. Chin et al., Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice A Policy Analysis of Affirmative Action, 4 Asian Pac. Am. L. J. 129, 145 (1996) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1186242); Roger Daniels, The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion, 83-85 (California Univ. Pr. 1962).

351 As a paper which points out that such bills as mentioned above may be used for restricting American citizenship holders from the view point of ethnicity or race, see Kristin A. Collins, Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation, 123 Yale L. J. 2134, 2224 (2014) [hereinafter Collins].

(ii) persons, whose birth mothers are not citizens or lawful permanent residents of the United States and who are citizens/nationals of another country of which a natural parent is a citizen/national or who are citizens/nationals of another country other than the United States, as not being born subject to the jurisdiction of the United States within the meaning of the Fourteenth Amendment, but rather as being born subject to the jurisdiction of the other country;

(iii) persons born subject to the jurisdiction of the United States as including persons born in wedlock to a mother or father who is a U.S. citizen, a U.S. national, or a lawful permanent resident who maintains primary residence in the United States, or persons born out of wedlock to a mother who is a U.S. citizen, a U.S. national, or a lawful permanent resident who maintains primary residence in the United States;

(iv) persons born subject to the jurisdiction of the United States as including persons born in wedlock to a mother or father who is a U.S. citizen, a U.S. national, or a lawful permanent resident who maintains primary residence in the United States, or persons born out of wedlock to a mother who is a U.S. citizen, a U.S. national, or a lawful permanent resident who maintains primary residence in the United States, or to a father who is a U.S. citizen, a U.S. national, or a lawful permanent resident who maintains primary residence in the United States, but only if paternity has been established by clear and convincing evidence and the father has satisfied certain requirements;

(v) persons born subject to the jurisdiction of the United States as including persons born in the United States to a mother or father who is a national of the United States (this would include citizens and non-citizen nationals) or a lawful permanent resident who maintains his or her residence in the United States;

(vi) persons born subject to the jurisdiction of the United States as including persons born in the United States to a mother or father who is a citizen or national of the United States, a lawful permanent resident whose residence is in the United States, or an alien performing active duty service in the U.S. Armed Forces.

Among them, (i) and (ii) would avoid the problem of rendering a person stateless by permitting persons born to unauthorized alien or nonimmigrant mothers to be citizens at birth if they have no viable claim to citizenship in another country. On the other hand, those two proposals could result in a scenario in which a person may be born in the United States to a mother who is a nonimmigrant or unauthorized alien and a father who is a U.S. citizen, national or lawful permanent resident and not be born a U.S. citizen because that person has a claim to citizenship in the mother's country.

Next, the proposal (iii) does not permit a person born out of wedlock to a father who is a U.S. citizen, national or lawful permanent resident to be considered born subject to the jurisdiction of the United States and does not provide for the acquisition of U.S. citizenship by such a person through a U.S. citizen father. So, this proposal would mean that persons born abroad out of wedlock to a U.S. citizen father and an alien mother would have a process by which they could be deemed U.S. citizens at birth[352] and, paradoxically, persons born in the United States of similar parentage would not. The fourth proposal (iv) avoids such issues by providing for the birthright citizenship of a person born out-of-wedlock to a father who is a U.S. citizen, national, or lawful permanent resident. And the proposals (v) and (vi) would not raise these constitutional issues because they make no distinctions based on the gender of the parent.

Other than those above, there was a type of proposal which, without statutorily defining "born subject to the jurisdiction" of the United States, would have provided that the person should not be a national or citizen at birth unless at least one of the parents is, at the time of birth, a citizen or national of the United States or an alien lawfully admitted for permanent residence. Furthermore, there has ever been presented another type of proposal which do not purport to be a congressional interpretation of the Citizenship Clause but would imposed such a statutory limitation on visa holders as a child born to a parent who is a nonimmigrant under the Immigration and Nationality Act would not

352 8 U.S.C.A. § 1409(a).

be a U.S. citizen by birth in the United States unless the other parent was a U.S. citizen or lawful permanent resident.

Concerning those proposals which intended to limit the effect of the acquisition of U.S. citizenship by birth provided in the Fourteenth Amendment of the Constitution, it is pointed out that virtually all such bills would limit jus soli citizenship using jus sanguinis principles and that some of these proposals would also use gender- and marriage-based limitations to regulate jus soli birthright citizenship, to the exclusion of nonmarital children of American fathers, which may lead to problems[353].

Section 7 Conclusion

Taking all the references introduced up to here in this chapter into consideration, this section will give in the following some considerations on certain notable points.

Subsection 1 Meaning of "Natural Born Citizen"

In considering the meaning of the words "natural born citizen" in Article 2, Section 1, Clause 5 of the Constitution of the United States[354], although, as referred to below, there is a dispute whether it is appropriate to treat naturalized citizens differently from natural born citizens in eligibility for the presidency or others, according to the general interpretation of the words at present, there would be no objection in the conclusion that "natural born citizen" doesn't include naturalized citizens[355].

Second, in relation to "natural born citizen", there is an interpretational question on the range of persons born within the United States. On this issue, it could be generally approved that a person born to American citizen parents within the United States is a natural born citizen. In relation to that, whether persons of following types would be natural born citizens may be questioned[356]. Namely, whether

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353 Colllins, at 2224.

354 Literally speaking, since "natural born citizen" provided in Article 2, Section 1, Clause 5, a citizen of the United States under the Fourteenth Amendment and a citizen under an act based on Article 1, Section 8, Clause 4 of the Constitution, all are using different expressions or based on different legal grounds, so the mutual relation among them would present an interpretational question.

355 The Constitution of the United States of America - Analysis and Interpretation, 483 (Centennial Ed.) (GPO 2017) (https://www.govinfo.gov/content/pkg/GPO-CONAN-2017/pdf/GPO-CONAN-2017.pdf); Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, & Ronald Y. Wada, Immigration Law & Procedure, § 91.02[4] [c] (LexisNexis 2020).

356 In addition to the examples mentioned above, it is pointed out that it could be questioned whether persons of following types should come under "natural born citizen":

(i) Persons born in the District of Columbia;
(ii) Children of diplomats, other representatives of foreign governments that the United States does not recognize;
(iii) Persons belonging to a tribe of Native Americans;
(iv) Children born in embassies, on military bases, and in other areas of special United States jurisdictions;
(v) Persons whose birthplace is unknown.

Duggins & Collins, at 98. The paper says on each type as follows.

On (i), following facts are pointed out, namely, that the Supreme Court stated that whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular constitutional provision depended upon the character and aim of the specific provision involved, that District residents pay federal income tax, that the District of Columbia is not a state, that it was necessary to amend the Constitution (the Twenty-Third Amendment) to enfranchise District residents to vote in presidential elections, and that the District still does not have Congressional representation on a par with that of the states (it had neither Senators nor Congressional Representatives, but is only permitted to have "shadow" representation in the House of Representatives). Then the paper concludes that there still remains uncertainty on this issue.

Second, on the problem of Children of certain representatives of foreign governments that the United States does not recognize (ii), such children, since they would be deemed to be subject to the jurisdiction of the United States in the meaning of the Fourteenth Amendment of the Constitution, would acquire citizenship by birth, so that it may be concluded that they were native born citizens in the meaning of the Article 2, Section 1, Clause 5 of the Constitution.

Third, on the problem of persons belonging to a tribe of Native Americans (iii), while the Supreme Court denied in Elk v. Wilkins Case that such persons were citizens of the United States, some of such persons were given American citizenship by the Act of 1924. So, it is improbable that the Supreme Court deny the eligibility of Native Americans for the presidency. However, concerning at least a part of Native Americans, there are arguments on the eligibility for the presidency.

(i) children born in the United States to non-citizen parents could be native born citizens;

(ii) children born in one of outlying possessions of the United States could be native born citizens;

(iii) persons with dual nationality could be native born citizens.

Among them, in relation to (i), considering discussions examined up to here, it would be questioned how to treat, for example, a child whose parents are aliens but lawful permanent residents in the United States, or a child born to the alien parents who stay temporarily at the United States, or a child whose parents are unlawfully staying at the United States[357].

In relation to that point, taking it into consideration that in the Wong Kim Ark case which the Supreme Court judged in 1898, the parents of the plaintiff had a domicile in the United States and resided there, it could be affirmed that the Supreme Court thought that a child of parents domiciled in the United States should acquire citizenship of the United States. In addition, taking it into account that Chinese were not permitted to be naturalized at that time, it could be said that the Supreme Court ruled that even a child whose parents were not qualified to be naturalized could acquire citizenship of the United States.

As being seen from the words in the judgement[358] or the administrative practice on nationality[359], children whose parents stay temporarily at the United States or children of illegal immigrant parents are, irrespective of the reason or cause of the stay of the parents at the United States, given citizenship of the United States when such children are born in the United States. However, there is a movement to exclude children of illegal aliens or of illegal immigrants from the object of application of the first sentence of the Fourteenth Amendment, and bills for such a purpose have been presented to Congress again and again.

Next, on (ii), under the current law, persons born in one of outlying possessions of the United States are not citizens but nationals of the United States. Viewing from the fact, according to Article 2, Section 1, Clause 5 of the Constitution, such persons would not come under "natural born citizen"[360].

Fourth, in relation to each point enumerated in (iv), the paper points out the respective problem.

Fifth, concerning (v), the paper points out that while the current Immigration and Nationality Act is giving citizenship of the United States to the persons of this category, there may still be a question in relation with the Article 2, Section 1, Clause 5 of the Constitution.

357 On that issue, in relation to the provision of the first sentence of the Fourteenth Amendment, how to interpret the words "subject to the jurisdiction thereof" would be questioned.

On this question, the court opinion of the Slaughter-House cases stated that the phrase was intended to exclude "children of ministers, consuls and citizens or subjects of Foreign States". (83 U.S. 36, 73. The literal quotation is: the phrase, "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.). Moreover, the court opinion of the Elk v. Wilkins case also took the same position (112 U.S. 94, 102. The judgement stated, the children of subjects of any foreign government born within the domain of that government, or the children born within the United States of ambassadors or other public ministers of foreign nations were not subject to the jurisdiction of the United States.).

On the other hand, the court opinion of the Wong Kim Ark case stated that all children born in the United States were subject to the jurisdiction thereof, "with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes", so that children of persons merely under the foreign government were not taken as the exceptions. (169 U.S. 649, 693.)

In relation to the issue, the court opinion of the Wong Kim Ark case stated that the part quoted above from the judgement of the Slaughter-House cases was wholly aside from the question in judgment and from the course of reasoning bearing upon that question (169 U.S. 649, 678.).

358 The judgement of the Wong Kim Ark case stated that citizenship by birth was established by the mere fact of birth under the circumstances defined in the Constitution, and that every person born in the United States, and subject to the jurisdiction thereof, became at once a citizen of the United States, and needed no naturalization (169 U.S. 649, 702.).

359 Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, & Ronald Y. Wada, Immigration Law & Procedure, § 92, 3[2][e] (LexisNexis 2020).

360 Duggins & Collins, at 96. As another literature, which inquired into the ground of such treatment, see John R. Hein, Comments: Born in the U.S.A., But not Natural Born: How Congressional Territorial Policy Bars Native-born Puerto-Ricans From Presidency, 11 J. Const. L. 423 (2009).

(iii) was discussed, as described above, concerning the eligibility of Charles Evans Hughes for the presidency. Since Hughes was, though he became the presidential candidate of the Republican Party, defeated in the election in the end, the discussion on the problem of the eligibility for the presidency seems to have stopped there[361].

Third, there is an issue whether a person born abroad could be included in "natural born citizen". As described above, it has been a tradition in the United States that some acts give citizenship of the United States to a person both or at least one of whose parents are citizens of the United States[362,363]. On the question whether such citizens should fall under "natural born citizen" in the meaning of Article 2, Section 1, Clause 5 of the Constitution, however there is a judgement of the Supreme Court on the case, Roger v. Bellei, in relation to the Presidential election, as being seen, for example, from the resolution of Congress in the case of McCain, such citizens seem to be thought in practice to come under "natural born citizen".

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361 In relation to the issue, in a literature published at that time, there was an opinion that a person with dual nationality was not a natural born citizen (Breckinridge Long, Is Mr. Charles Evans Hughes a "Natural born citizen" within the meaning of Constitution?, 146-148 Chi. L. News 220 (Dec. 1916)). However, a paper recently published insists that there is no provision of Constitution prohibiting a person with dual nationality from inaugurating President. Peter J. Spiro, McCain's Citizenship and Constitutional Method, 107 Mich. L. Rev. First Impression 42, 47 (2008).

362 In relation with the problem of the conferment of citizenship of the United States by a federal act, there is a question how to understand the relation between the current Immigration and Nationality Act and the judgement of Wong Kim Ark case.

The current Immigration and Nationality Act defines "naturalization" as "the conferring of the nationality of a state upon a person after birth, by any means whatever" (8 U.S.C.A. § 1101 (23)), which is based on the thought that "naturalization" is made effective after the birth. On the other hand, as the title of Section 301 of the same act (8 U.S.C.A. § 1401) is expressed as "Nationals and citizens of the United States at Birth", a person who acquired citizenship of the United States according to the section would be deemed as not naturalized but natural born citizen. However, the court opinion of the United States v. Wong Kim Ark case did not recognized any way of acquisition of citizenship other than that by birth or by naturalization, and admitted citizenship by birth only through satisfying the conditions provided in the Constitution. The court opinion stated, on the other hand, that citizenship by naturalization could only be acquired by naturalization under the authority and in the forms of federal law. Moreover, it ruled that every person born in the United States, and subject to the jurisdiction thereof, became at once a citizen of the United States, and needed no naturalization, and that a person born out of the jurisdiction of the United States could only become a citizen by being naturalized (169 U.S. 649, 702). In this regard, there are some contradiction. If the standpoint of the judgement of the case is considered fully, as the judgement stated citizenship by birth could be acquired by the Constitution, it might be questioned whether a person who is a natural born citizen based on a federal act which was established on the basis of Article 1, Section 8, Clause 4 of the Constitution is eligible for the presidency or not.

However, against such an argument, it could be pointed out, the judgement stated that the sentence of the Fourteenth Amendment was declaratory of existing rights and affirmative of existing law as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States, and that it had not touched the acquisition of citizenship by being born abroad of American parents, and had left that subject to be regulated by Congress in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization (169 U.S. 649, 688). Moreover, since the judgement of the case was concerning not a question on citizenship of a child born abroad to American citizen parents but a question of citizenship of a child born in the United States to alien parents, it could be said that, though it surely judged the problem of the acquisition of citizenship by birth generally, the part of the judgement on the citizenship of children born abroad to citizen parents was a mere obiter dicta of the case.

363 In relation to the issue, it results from the nature of citizenship itself that while any federal act cannot generally limit citizenship given by the Fourteenth Amendment of the Constitution, citizenship given by a federal act could be limited by some other federal act unless the restriction is judged unreasonable, arbitrary, or unfair. On this point, see United States v. Wong Kim Ark, 169 U.S. 649, 688 (1898); Roger v. Bellei, 401 U.S. 815, 830 (1970). In relation with the point, on the difference between citizens of the United States by birth and by naturalization, see J. Michael Medina, The Presidential Qualification Clause in this Bicentennial Year: the need to eliminate the Natural born citizen requirement, 7 Oklahoma City Univ. L. Rev. 253 (n. 1) (1987). In this paper, following differences are enumerated.

(i) A naturalized citizen also cannot become Vice-President.
(ii) The Constitution requires that Senators be citizens for nine years and Representative for seven years, so that a naturalized citizen, depending upon his age at time of naturalization, may have to wait past the minimum age in order to become a member of Congress.
(iii) a candidate for naturalization is subject to certain conditions a natural born citizen would never be imposed, for example, to abandon peerage or the like.
(iv) There is a legal institution, such as revocation of naturalization (8 U.S.C.A. § 1451), which may apply to a naturalized citizen but never to a natural born citizen.

Besides, on the cases concerning the rights of naturalized citizens, see Michael J. Garcia and Meghan Totten et.al. ed., The Constitution of the United States Analysis and Interpretation, 307 (GPO 2017).

Subsection 2 Range of "Natural Born Citizen"

If it is supposed that any federal act other than the Constitution can prescribe who shall be a "natural born citizen"[364], then the next problem to be considered is how to prescribe it.

As described above, in the United States, a person born in the United States would, irrespective of the legal status of the parents, have citizenship of the United States apart from special exceptions according to the judgement of the Wong Kim Ark case or the administrative practices relating to this point.

Taking the following legal history concerning Citizenship in account, the judgement of Wong Kim Ark, which stated that the Fourteenth Amendment adopted the jus soli principle without exception, would be reasonable. Namely, the judgement of the Dred Scott case admitted only "white persons born in the United States as descendants of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States and who became also citizens of this new political body, the United States of America" and naturalized persons, to be citizens of the United States[365]; afterward, that is, after the Civil War, the Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution, the so-called the Reconstruction Amendments, were established and especially the definition of citizenship in the Fourteenth Amendment was also drafted by taking the situation after that war into consideration. It would be also understandable from this point of view that no proposal to restrict the jus soli principle of the Fourteenth Amendment by emphasizing the words "subject to the jurisdiction thereof" had ever been approved of and established as an act by Congress[366,367,368,369].

Next, persons born abroad to the America citizen parents are, as described above, given citizenship of the United States under certain conditions by a federal act. In relation to that, it could be said that the United States has gradually expanded the range of the persons who could acquire citizenship from the parent. It could be inferred that the increase of the number of Americans who are active in overseas, which could be seen as a result of the development

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364 There is a controversy over the constitutional ground of the power of Congress to legislate an act concerning citizenship of children born abroad. On this issue, see Michael G. McFarland, Derivative Citizenship: Its History, Constitutional Foundation, and Constitutional Limitations, 63 NYU Annual Survey of American L. 467, 483 (2008). The paper examines, as the possible ground, the Power of Congress to establish an uniform rule of naturalization based on Article 1, Section 8, Clause 4 of the Constitution, the Foreign Affairs Power recognized by the Supreme Court, and the Citizenship Clause of the Fourteenth Amendment of the Constitution. As for the power concerning naturalization, the paper points out a question whether it could be a ground to regulate naturalization of a person who was born abroad to American citizen parents because he or she is considered to be a natural born citizen. As for the Foreign Affairs Power of Congress, it points out a problem that matters concerning acquisition of citizenship are domestic affairs, not foreign ones. As for the Fourteenth Amendment of the Constitution, it points out the fact that the Supreme Court ruled in the case, Rogers v. Bellei, that derivative citizenship did not fall within the meaning of citizenship of the Fourteenth Amendment. After those considerations, the paper says that it could be grounded on, if any, the plenary power of Congress.

365 Since the national foundation, up to the year, 1870, the Nationality Law of the United States admitted only white persons to be naturalized. See, Revised Statutes of the United States, Passed at the 1st Session of the 43rd Congress, 1873-'74, § 2169 (2nd ed., Washington GPO, 1878).

366 Concerning this issue, an opinion of the Office of Legal Counsel of the Department of Justice in 1995 indicated following two points. First, since the rule of citizenship acquired by birth within the United States is the law of the Constitution, a bill that would deny citizenship to children born in the United States to certain classes of alien parents is unconstitutional on its face. Second, a constitutional amendment to restrict birthright citizenship, although not technically unlawful, would flatly contradict the Nation's constitutional history and constitutional traditions. Walter Dellinger, Asst. Atty. Gen., Legislation Denying Citizenship as Birth to Certain Children Born in the United States, 19 Ops. of the Office of Legal Counsel 340, 341 (1995).

367 As for the discussions in Congress concerning the issue above, see Birthright Citizenship; Is it the right policy for America?: Hearing before the Subcommittee on Immigration and Border Security of the Committee on the Judiciary, House of Representatives, 114th Cong. 1st Sess., (Apr. 29, 2015).

368 However, it is pointed out that there are some countries other than the United States, in which the jus soli principle is adopted, but some restrictions on the acquisition of the nationality by birth through it are also legislated. Margaret Mikyung Lee, Birthright Citizenship under the Fourteenth Amendment of Persons born in the United States to alien Parents, RL33079 Congressional Research Report, 19 (2015).

369 However, in relation to the Native Americans, by making Native Americans citizens of the United States, the sovereignty of the tribe has been weaken so that tribes of Native Americans have been dissolved. Frederick E. Hoxie, What was Taney thinking? American Indian citizenship in the era of Dred Scott, 82 Chi.-Kent L. Rev. 329 (2007); D. Carolina Nunez, Beyond Blood and Borders: Finding meaning in Birthright Citizenship, 78 Brooklyn L. Rev. 835 (2013).

of the globalization, necessitates such legislative treatments[370].

The same issue was disputed in the Supreme Court as the question how to think of the fact that, concerning the acquisition of citizenship of illegitimate children, Section 309 of the Immigration and Nationality Act (8 U.S.C.A. § 1409) prescribes differently between cases of citizen fathers and of citizen mothers.

As being seen above, the Supreme Court affirmed the constitutionality of the provision both in the cases, Miller v. Albright and Nguyen v. INS. The court opinions in both cases stated that the provision was not unreasonable because it based on the fact that, while mothers were necessarily together with the children at the birth of the children, fathers were (possibly) not. Moreover, it also stated that the provision was established from following legitimate purposes, namely, (i) to secure the confirmation of the relation between a U.S. citizen parent and the child, (ii) to enhance the development of a healthy relationship between the citizen parent and the child, and (iii) to foster the ties that provide a connection between child and citizen parent and, in turn, the United States.

It may be not necessarily unreasonable to suppose, as the Supreme Court did, that while in most cases the mother is there at the birth of the child, the father is possibly not there[371]. It could be also said that, seeing from the standpoint

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370 Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, & Ronald Y. Wada, Immigration Law & Procedure, § 93. 1 [1] (LexisNexis 2020). In addition, as a literature which relates the constitutional amendment bill to Article 2, Section 1, Clause 5 and the increase of the number of the Americans who are active in foreign countries, see constitutional amendment to allow Foreign-Born Citizens to be President: Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 106th Cong. 2nd Sess. (Jul. 24, 2000) (testimony of Prof. John M. Yinger).

371 However, at the present state of art, the birth through the artificial insemination becomes made possible by the progress of reproduction technology and it is used in reality. In relation to this, there is a report, which says that, in the case of the United States, the rate of the birth through so-called Assisted reproductive Technology (ART) is 1.5 % of the whole of U.S. births in the year, 2011. U.S. Dept. of Health and Human Services-Centers for Disease Control and Prevention Assisted Reproductive Technology Surveillance - United States, 2011, p. 1 (Nov. 21, 2014) (https://www.cdc.gov/mmwr/preview/mmwrhtml/ss6310a1.htm).

As a literature which gave considerations to Section 309 of the Immigration and Nationality Act (8 U.S.C.A. § 1409), see David A, Isaacson, Correcting Anomalies in the United States Law of Citizenship by Decent, 47 Ariz. L. Rev. 313 (2005). The paper points out the following results. The case (1): a male person, who has lived in the United States his whole life, moves overseas at the age of thirty and has a child with a woman who is not a U.S. citizen; although the father never marries the child's mother or thinks to do any paperwork related to the child's citizenship, the two parents live together with their child, and the father provides financial support for the family. The case (2): a female person, who was born in the United States but left with her parents when she was three years old and has never returned, decides to make some money as an egg donor for an infertile foreign couple; she never meets the child conceived from her egg. Under the current law, the child in the case (1) will not be a U.S. citizen, but the child in the case (2) almost certainly will be.

The dissenting opinion of Justice Ginsburg in the Miller v. Albright case pointed out the problem of doubtful distinctions between male and female United States citizens who took responsibility, or avoid responsibility, for raising their children, which would be a similar situation to the cases described above. If such a thing can happen in reality, then, as the justice pointed out, the court opinion would be questionable, which supposed that more United States citizen mothers of children born abroad out of wedlock actually raised their children than did United States citizen fathers of such children.

In relation to that issue, in 2014, United State Department of State and United States Department of Homeland Security adopted following policy (USCIS PA-2014-009, Oct. 28, 2014) (https://www.uscis.gov/policymanual/Updates/20141028-ART.pdf). Namely,

(i) "natural mother" or "natural father" is a genetic parent or gestational parent. Accordingly, the "natural mother" of a child born out of wedlock includes a non-genetic gestational mother if she is the legal parent at the time of birth.

(ii) A gestational mother has a petitionable relationship without a genetic relationship to the child, as long as she is also the child's legal parent at the time of birth.

(iii) A non-genetic gestational legal mother who is a U.S. citizen may transmit citizenship at birth, or after birth, when all other pertinent citizenship and naturalization requirements are met.

The Current version of the Foreign Affairs Manual states as follows(8 FAM 304.3, Acquisition of U.S. Citizenship at Birth - Assisted Reproductive Technology. https://fam.state.gov/FAM/08FAM/08FAM030403.html)

8 FAM 304.3-1 Birth abroad to a U.S. citizen gestational mother who is also the legal mother at the time she gives birth (Birth mother, but not genetic mother)

(a) A child born abroad to a U.S. citizen gestational mother who is also the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous egg donor and the U.S. citizen husband of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizens, with a citizenship claim adjudicated under the Immigration and nationality Act (INA) 301(c).

of the nation, it may be understandable as a general rule to require a male citizen, though not a female citizen, to take proceedings for the proof of the parent-child relationship between a child and him in order to confirm the relationship between the child and the nation[372,373].

On the other hand, even assuming the facts the Supreme Court supposed, the consideration on such the situations would not uniquely determine how concretely to construct the legal institution in relation to such the children. In this regard, any institution should be exposed to examinations of its reasonability or suitableness for the purpose of the

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(b) A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous sperm donor and the U.S. citizen wife of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizens, with a citizenship claim adjudicated under INA 301(c).

(c) A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous egg donor and the non-U.S. citizen husband of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of a U.S. citizen mother and alien father, with a citizenship claim adjudicated under INA 301(g).

(d) A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, and who is not married to the genetic mother or father of the child at the time of the child's birth, is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen mother, with a citizenship claim adjudicated under INA 309(c).

8 FAM 304.3-2 Birth abroad to a surrogate of a child who is the genetic issue of a U.S. citizen mother and/or U.S. citizen father

(a) For purposes of this section, the term "surrogate" refers to a woman who gives birth to a child, who is not the legal parent of the child at the time of the child's birth in the location of the birth. In such a case, the surrogate's citizenship is irrelevant to the child's citizenship analysis.

(b) A child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and her U.S. citizen spouse, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizen parents, with a citizenship claim adjudicated under INA 301(c).

(c) A child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and anonymous sperm donor, is considered for citizenship purposes to be a person born out of wedlock to a U.S. citizen mother, with a citizenship claim adjudicated under INA 309(c). This is the case regardless of whether the woman is married and regardless of whether her spouse is the legal parent of the child at the time of birth.

(d) A child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and her non-U.S. citizen spouse, is considered for citizenship purposes to be a person born in wedlock of a U.S. citizen mother and alien spouse, with a citizenship claim adjudicated under INA 301(g).

(e) A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and his non-U.S. citizen spouse, is considered for citizenship purposes to be a person born in wedlock of a U.S. citizen father and alien spouse, with a citizenship claim adjudicated under INA 301(g).

(f) A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and anonymous egg donor, is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen father, with a citizenship claim adjudicated under INA 309(a). This is the case regardless of whether the man is married and regardless of whether his spouse is the legal parent of the child at the time of birth.

(g) A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and the surrogate (mother) who is not married to the U.S. citizen father is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen father, with a citizenship claim adjudicated under INA 309(a). Note that in such a case, despite the genetic and gestational connection, the surrogate mother is not the legal parent of the child at the time of birth, usually pursuant to a surrogacy agreement.

372 Viewing from the standpoint of a nation, it would be understandable that, in the case in which a male citizen of the United States moved abroad and has an illegitimate child there with a woman who is not a U.S. citizen, when the male citizen petitions the U.S. Government for the confirmation of the status of U.S. citizen of the child, the Government cannot help judging that the relationship between the male citizen and the child is so uncertain that it is difficult to recognize citizenship of the child without any concerns about the relationship between the child and the United States. However, in relation with that issue, Justice O'Conner stated in the Nguyen v. INS case that the court opinion which judged Section 309 of the Immigration and Nationality Act (8 U.S.C.A. § 1409) constitutional simply reflected the stereotype of male irresponsibility.

373 In relation to this issue, the dissenting opinion of Justice O'Connor in the Nguyen v. INS case introduced the fact that, when 8 U.S.C.A. § 1409 was first enacted as § 205 of the Nationality Act of 1940, the Committee stated in explanation of the rationale for § 205 to Congress that under American law the mother had a right to custody and control of such a child as against the putative father, and was bound to maintain it as its natural guardian. 533 U.S. 53, 91. Viewing from the statement in that explanation, to custody and control of an illegitimate child was considered as a right. However, Justice O'Conner evaluated after such an introduction that it was paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children. Id. at 92.

institution[374] and it would be concluded that more detailed examinations and evaluations were needed on the current institute prescribed by Section 309 of the Immigration and Nationality Act (8 U.S.C.A. § 1409) in the cases described above as the dissenting opinions of the cases indicated[375].

Concretely, to begin with, as for (i) the confirmation of the parent-child relationship between a child and the citizen parent, it is true, as the court opinions of the cases, Miller v. Albright and Nguyen v. INS, pointed out, that it is not an obligation of Congress to legislate so as to adopt a certain method for such a confirmation, but, when the result of DNA test is presented in reality, its usability does not have to be or should not be denied.

Second, in relation to (ii) the development of a healthy relationship between the citizen parent and the child, the plaintiff of the Nguyen v. INS case was in fact raised by the U.S. citizen father. Based on the fact, what was important in the case was, as Justice O'Connor pointed out, that there was in fact an opportunity for the father to raise the child in the case[376]. In this regard, as a judgement on a concrete case, that fact should have been taken into consideration more.

Third, in connection with (iii) fostering ties that provide a connection between a child and citizen parent and, in turn, the United States, the opinion stated by Justice Breyer in the Miller v. Albright case would be convincing, which insisted that even if the purpose is considered legitimate, the relation between the purpose and the requirement that a citizen father should recognize the child or take other procedures before the child becomes 18 years old does not fit[377].

The case, Sessions, Attorney General v. Morales-Santana, dealt with a dispute about the conditions of transmission of citizenship of the United States from a foreign-born-citizen father to the child. Different from the Miller v, Albright case and Nguyen v. INS case, which main issue was justifiability of the requirement Section 309 (a)(4) of Immigration and Naturalization Act (8 U.S.C.A. § 1409 (a)(4)), that is, legitimation, a declaration of paternity under oath by the father, or a court order of paternity before the child is at the age of eighteen years, the focus of the Sessions, Attorney General v. Morales-Santana was on the provision which required an American-citizen father to be physically present in the United States for a certain period.

In relation to this point, the issue dealt in the Sessions, Attorney General v. Morales-Santana has rather an indirect relation to the question what relationship should be between a child and the United States of America to confer citizenship to the child. Besides, concerning the ability to transmit the values to be derived from citizenship, there should be no need to differentiate the requirements depending on gender. When considering those points, the judgement on this case could be evaluated positively, although the case didn't provide the substantial solution which could be supportive to the appellee[378].

As mentioned, while the judgements of Miller v. Albright and Nguyen v. INS cases dealt with a problem concerning the relationship between a child and the parent who took care of the child, the judgement of Sessions, Attorney General v. Morales-Santana case discussed a condition concerning the place where a parent had been at the time before the birth of the child. In this regard, although there is a difference on the point of discussion dealt in these cases, the conditions disputed in those cases could be considered as concerning how the relationship between a child and the father or mother, or the relationship of a child to the United States through his/her American-citizen father or

374 A paper says that the historical sources suggest that gender-based regulation of jus sanguinis citizenship is not fixed or inevitable, but is the product of a choice - a choice made by officials acting under historically and institutionally contingent pressures and imperatives. See Collins, at 2230.

375 However, as Justice Scalia stated in dissenting opinions of the cases, Miller v. Albright and Nguyen v. INS, there is a discussion on the question whether the Court can amend the act established by Congress so as to give anyone citizenship of the United States. As a literature which insists that the Court should reconsider the power of Congress on the matters concerning transmission of citizenship from the view point of the protection of civil rights, see Michael G. McFarland, Derivative Citizenship: Its History, Constitutional Foundation, and Constitutional Limitations, 63 NYU Annual Survey of American L. 467 (2008).

376 533 U.S. 53, 85.

377 523 U.S. 420, 484.

378 Cf., Morales-Santana v. Sessions, 706 Fed. Appx. 40(2017). On remand from the United States Supreme Court, United States Court of Appeals for the Second Circuit denied the petition for review and decided that Morales-Santana is not a United States citizen.

mother, should be related to the qualification for citizenship of the child. From such a viewpoint, it can be said that these cases are as concerning questions, what relationship between an individual and a state should be desirable from the view of the conferment of citizenship of the United States, and what conditions for the acquisition of citizenship a statute should prescribe in order to confirm such a relationship.

In relation to this point, it would be reasonable for the Government to think it necessary to require foreign-born children to have a certain relationship between the children and the country and, concretely, there could be various ways to set up the requirements for connecting the relation between a child and citizen parent and, in turn, the United States. As being discussed in those three cases considered above, such concrete ways should be reasonable and equitable from the viewpoint of citizens of the United States of America.

How to construct the institutional frame for acquisition of citizenship of the United States by birth has been considered as an important matter since the foundation of the nation[379] and acts or judgements concerning this issue have historically developed going through in each channel in various ways. Moreover, in the United States of America as a democratic country, how the institute for the acquisition of citizenship by birth is organized has very important meaning in that it has an effect on who is eligible for the office of President and other significant offices. In this regard, when some federal acts intend to change the range of the persons who shall fall under "natural born citizen", its justifiability would be intensively checked and whether the regulation truly reflects the philosophy of the foundation of the United States of America would be a very important point to be discussed[380].

In relation with that issue, as mentioned above, whether an individual acquired citizenship by birth is determined by the relevant acts which were effective at the time of the person's birth. So, an amendment to the institution concerning the acquisition of citizenship by birth would, in relation to the eligibility to the office of President, namely, in relation to Article 2, Section 1, Clause 5 of the Constitution, put its influence in future, that is, thirty five years after the amendment at the latest. Taking the fact into consideration, it should be said that an amendment to the institution concerning the acquisition of citizenship by birth would affect how the United States will be in the future and in this regard, such an amendment should take it into account.

Subsection 3 From What Persons Citizens Choose President

Article 2, Section 1, Clause 5 of the Constitution of the United States admits a citizen of the United States at the time of the adoption of the Constitution, as well as a natural born citizen, to be eligible to the office of President. The reason would be that there was no person who was a natural born citizen and who already attained the required age for President at the time of the national founding. However, viewing from the fact that a person who, though it was before the founding of the United States, belonged to a foreign country was admitted to be eligible to the office of President on account of such person's contribution to the United States, it could be reconsidered whether it is appropriate that even a person who has greatly contributed to the United States after the foundation would be never eligible to the office of President only because the person is not a natural born, but a naturalized citizen[381].

Taking those into consideration, it seems to be reasonable that, during history of the United States, there have been presented many constitutional amendment proposals to Congress so as to make naturalized citizens, as well as natural born citizens, eligible to the presidency.

Regarding the constitutional amendment proposals, the contents of them are various and each of them seems to

379 In relation to this point, following paper points out that the conferment of citizenship of the United States according to the principle, jus soli, has contributed to the equality and integration of the nation. Mae M. Ngai, Birthright Citizenship and the Alien Citizen, 75 Fordham L. Rev. 2521 (2007).

380 As an example, see Constitutional Amendment to allow Foreign-Born Citizens to be President: Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 106th Cong. 2nd Sess. (Jul. 24, 2000) (testimony of Prof. John M. Yinger).

381 Maximizing voter Choice: Opening the Presidency to Naturalized Americans: Hearing before the Comm. on the Judiciary, Senate, 108th Cong. 2nd Sess., (Oct. 5, 2004) (testimony of Prof. John M Yinger).

have its political background and contexts, namely, each of them seems to suppose a concrete presidential candidate born abroad. In this regard, it must be said that such constitutional amendment proposals have been presented not purely by an intention to correct the defect of the Constitution or to improve it so as to make the constitutional provision appropriate, but also by some political intention affected by a certain concrete political situation. In addition, it should be noted that an amendment of the Constitution is necessarily reflecting or influenced by not only the principle of the law of Constitution but also by various, internal or external matters to law, namely, the way how citizens of the United States are thinking about the Constitution or its amendment, the recognition or sentiment citizens of the United States have on foreigners, the national identity citizens of the United States have, or others.

In relation with that problem, the Supreme Court stated in both cases, Miller v. Albright and Nguyen v. INS, that Section 309 of the Immigration and Nationality Act (8 U.S.C.A. § 1409) had the legitimate objective to foster the ties that provided a connection between child and citizen parent and, in turn, the United States. But it is not clear what the Supreme Court concretely supposed there as fostering such the ties between a child and the United States. Such the condition regarding the ties between a child born abroad and the United States would be considered as an additional requirement in comparison with a child born in the United States since the child is able to get citizenship only by birth in the United States. And these problematics also lead to a question whether a nation shall choose the individuals who constitute it or an individual shall choose how his/her nation is. In this regard, it will be important to consider the concrete meaning of the ties to be fostered between foreign born children and the United States[382].

Subsection 4 Relation to Foreign Country

The phrase "natural born citizen" in Article 2, Section 1, Clause 5 was adopted in order to avoid influences of foreign countries to the United States of America as a newly born nation. The concrete aims of this include to stop the movement to establish a kingdom in the United States by inviting some relatives of a royal family from Europe[383]. In relation to this, it was pointed out in some records of the United States that there were in fact certain people in America who were trying to make use of influences of foreign powers. Viewing from such facts, it could be said that the problem of foreign influences had also an aspect of a domestic problem in the United States.

Of course, it would be improbable and impossible to organize an election to select a governor of a nation from people in all over the world. However, if citizens of a nation are showing the desire, i.e., selecting a governor from people being rather the outsider to the nation, and in contemporary concrete context, choosing a governor from the people who are born abroad, it could be a point for discussion and the question whether a person who are born abroad and get citizenship of the United States by "naturalization" should be included into "natural born citizen" should be answered with a reasonable explanation[384].

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382 In practice, the government of a country would have the primary power to judge whether an individual has citizenship of the country or not and the government of a nation would need to have and execute such a power. However, in theory, it could be thought that it is individual persons that construct a nation so that it would not be suitable for the principle of a democratic, not feudalistic, nation for a nation arbitrarily to make desirable persons its citizens. In relation with the fact that the Supreme Court stated both in the cases, Miller v. Albright and Nguyen v. INS, that Section 309 of the Immigration and Nationality Act (8 U.S.C. A. § 1409) had the legitimate objective to foster the ties that provided a connection between child and citizen parent and, in turn, the United States, though it is understandable that the confirmation of such ties would be important in practice, in viewing from the standpoint to consider how to design and plan a modern state, it should be concluded that the less requirements a nation sets up for an individual to be a citizen of the nation, the more desirable the structure of the nation as a modern state.

383 However, on this issue, a paper points out that though No. 3 of the Federalist or other papers expressed a concern over influences from foreign countries, No. 68 of it enumerated as the measures against such influences the institute of selected voters for presidential elections and it didn't mention the requirement "natural born citizen" in Article 2, Section 1, Clause 5. See Andrew Miller, Terminating the "just not American enough" idea: Saying "Hasta La Vista" to the Natural-born-citizen requirement of Presidential Eligibility, 57 Syracuse L. Rev. 97, 118 (2006).

384 In relation to this problem, a paper points out that in England, persons born abroad to the British subject parents had been gradually included into "natural-born subject" since the year, 1350, and an Act established in 1740 provided, a British subject born abroad could hold public office. See Jill A. Pryor, The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for resolving Two Hundred Years of Uncertainty, 97 Yale L. J. 881, 886 (1988).

This question could be answered based on the current version of the Constitution. At the same time, if a constitutional amendment is also considered as an option, how to discuss and decide on the matters regarding the question could be a question falling under the category of politics. However, based on the fact that the Constitution of the United States of America was established "in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity," and if it is supposed that a measure including an amendment to the Constitution itself is an option for the realization of the purpose, the discussion regarding such a measure relating to the question cold be taken place in the sphere of Constitutional theory.

In relation with this problem, some papers point out that in the international community where globalization is progressing, the natural born citizen clause no longer contributes to the realization of the objective the Founding Fathers supposed at the time of the establishment of the Constitution in 1789, and that it rather causes a split of the nation in the United States, like a discrimination on race or religion[385,386,387]. On this point, though it is improbable and technically impossible to perform an election to select a governor of a nation from people in all over the world as mentioned above, it would be a reasonable opinion as a general principle to think it meaningful and useful to open the possibility for persons with various cultural and racial backgrounds or persons having wide and various human relations to participate in or contribute to the administration of a nation in that information or knowledges concerning political measures could be attained from wide range of people so that the range of the alternatives of effective and useful measures for the administration would be enlarged.

385 Sarah P. Herlihy, Amending the natural born Citizen requirement: Globalization as the impetus and the Obstacle, 81 Chi.-Kent L. Rev. 275, 281 (2006).

386 In relation to the point, it is also questioned whether a natural born citizen of the United States who was naturalized into a foreign county may be eligible to the office of President. See Peter J. Spiro, McCain's Citizenship and Constitutional Method, 107 Mich. L. Rev. First Impression 42, 47 (2008).

387 However, since this problem involves an international aspect of the nationality law, the adjustment on the conflicts of laws would be necessary, especially certain care to reduce stateless persons would be necessary.

Chapter 8 History of Citizenship and Civil Rights of the United States and How the Legal System of a Modern Country Regarding the Members Should Be

Section 1 Subject of this Chapter and Orientation of the Discussion

As stated in Chapter 1, the subject of this article is to analyze and to consider major problems around "nationality". On this subject, this article has thought the problems as follows through investigating the history of citizenship of the United States.

1. Who is the citizen of a country?
2. What does it mean to be the citizen of the country?

This article also intended to consider how the relationship between a country and the people should be formed in a modern nation based on the analysis and consideration as mentioned above.

From Chapter 1 to 7, this article has given an overview on the various aspects of the arguments concerning "citizen" from the founding era to the present time of the United States of America. In this chapter, this article will sum up what being seen up to here, try to evaluate the historical experience of the United States, and consider what should be taken into account in designing the legal institution concerning the determination of the members of a modern nation.

In the second section, the arguments on Citizenship, and then, in the third section, the arguments on Civil Rights are summed up. In the fourth and fifth sections, taking the contents of sections 2 and 3 into consideration, this article will consider general problems on modern nation and Citizenship and Civil Rights. In sixth section, based on the discussion up to there, the relation between a future development of a modern nation and its citizenship will be considered.

Section 2 Development Process of Citizenship in the United States of America

Subsection 1 Understanding of Citizenship at the dawn time of the United States

Paragraph 1 Separation from Foreign Countries

As being seen in Chapter 2, at the founding stage of the United States, the major problem for the founders was, above all, how to acquire the independence of the new government from foreign countries so as to form their own proper government. Consequently, they put a high priority on establishing citizenship and, being incidental to that, the degree of independence of the officers of the government from foreign countries. It was natural since the purpose of the founding of the United States was to break off the preexisting governmental system so as to establish an independent government.

The intention of such separation from foreign countries in the aspect of citizenship is to be seen from laws concerning naturalization. Those laws included a provision regarding a renunciation of the status of nobility and, more bluntly, disallowed naturalization of alien enemies[1].

As to the independence of the officers from foreign countries, the Constitution of the United States of America required the President, Senator and Representative to be a natural-born citizen, to have been a citizen for nine years or more and to have been a citizen for seven years or more, respectively.

As being seen above, the Constitution of the United Sates provided two level selections, namely, selections at the

1 Cf., ex., Naturalization Act of 1790.

stages of naturalization and of assumption of the public offices in order to avoid influence to its own government from foreign governments. The cause to make such a way of selection necessary was the fact that there were many immigrants in the United States and that they should be positively accepted for the development of it. Based on this situation, naturalization should be admitted relatively generously, while there was a need to put a certain limitation in persons who would be directly involved in real political decisions, in order to secure political independence of the United States Government.

Paragraph 2 Concerning Race

Concerning race, it can be seen from the requirements for naturalization provided by naturalization acts or the opinions of Attorney General at the founding time that a citizen was thought basically to be a white person. However, whether it was to be restricted only to a white person is not necessarily clear when the opinion of Judge Curtis in Dred Scott Case or others are referred[2].

Even if colored people were thought not to be citizens, their status was not necessarily clear as there was an opinion of Attorney General stating that colored people were denizens. The complexity of that problem becomes especially vivid in the relationship with Indians. As for Indians, the naturalization procedure has been different from the ordinary one.

Considering those above, it could be said that the relation between citizenship and race, concretely said, the relation between being a citizen and belonging to some race was not necessarily clear in the United States at that time. Moreover, there were such people at some ambiguous status as being neither citizens nor foreigners, so it seems that basically what type of persons there were in relation to the nation was not orderly understood[3].

Paragraph 3 National Unity

Based on the understanding regarding the jurisdictions of Federal Courts, bestowment of the power for the naturalization to the Federal Congress and the interpretation concerning inter-State enjoyment of privileges and immunities of citizen, in the process for forming the Union, it can be seen that federal citizenship was made use for unification and equalization of the conditions among citizens which had been various among each States.

It is natural that individuals in reality have various status in relation to the nation and are under various conditions. Moreover, there are two possible interpretations of relation between an individual and the nation or state power, namely, the relation between an individual and the Union and between an individual and a State since the United States is a federal nation. Especially the relation between an individual and a State seems to have been quite different State by State. Therefore, the real effect of establishing federal citizenship would be to reduce the situations for such different conditions to occur for individuals in relation to the Union or States as coming from those involved relationships. However, even if the result was only to reduce the difference among treatments of individuals in each State, to realize the situation where all individuals were put in equal status at least in Law would have been important for the stability of the Union.

Subsection 2 Emancipation of Slaves and Reform of Government - the Thirteenth Amendment

Paragraph 1 Emancipation of Slaves

After the end of the Civil War, the Thirteenth Amendment was established. By the provision, slaves were emancipated from involuntary servitude and slavery. It also meant concretely a release of the United States from the problems caused by the slavery system and from the confrontation against the problems originating from a

2 See Chapter 2, Section 4 and Chapter 2, Section 5, Subsection 2, Paragraph 3 of this article (Dissenting opinion of Justice Curtis.)

3 On that issue, as a literature analyzing the details since the colonial era, see Kunal M. Parker, Making Foreigners: Immigration and Citizenship Law in America 1600–2000, (Cambridge University Press 2015).

contradiction between the ideal of the Founding and the existence of slavery system.

However, it solved not all problems coming from slavery. Rather it also caused new problems. Namely, it became necessary to confront the problem of what relationship should be established between former slaves and the nation or, more concretely, between those people and the Union or each State.

Paragraph 2 Reform of Government

By the Thirteenth Amendment, the power of States to decide autonomously on slavery was abolished, and each State was no longer able to sustain slavery system. This posed a question on the federal system, which had been formed in the history of the United States by the time. Further, it meant not merely becoming unable to sustain slavery system, but, rather, change the way of existence of each State.

The discussion taken place for the establishment of the Thirteenth Amendment was an argument between the persons who tried to protect freedom and rights of people inhabiting within a State under the power of the Union and the persons who tried to protect the jurisdiction of each State on the matters formerly subject to its exclusive power as a domestic power. As far as that argument is concerned, seeing from the fact that the Thirteenth Amendment was finally established, it can be said that the opinion of the former persons was approved in the end. This could be understood that, when some questionable actions were done within a State by the State, the intervention in such an action could not be avoided merely because it was a domestic affair, so that some concrete reasoning from the viewpoint of the protection of liberty and rights of individuals became necessary for an action of a State. Moreover, taking into consideration the fact that the establishment of the Thirteenth Amendment was just after the Civil War, and, in addition, considering the existence of the Section 2 of that provision, the provisions of the Thirteenth Amendment should be interpreted as admitting some ways of intervention of the Union against a State when the State took any unjust action.

That the possibility of intervention of the Union in a member State when there is malpractice of the State is secured would mean, seeing from a different viewpoint, that the philosophy of the founding of the United States, that is, a principle that the security of liberty and rights of individuals is the necessary precondition of the retention of governmental system, have been made effective in the end[4].

Such an opinion as opposing a constitutional amendment on the ground that it would change the proper power of States has been found here and there in each discussion on a constitutional amendment bill. However, to begin with, it was because the defects of the existing governmental system at the time had been generally realized that those constitutional amendment proposals were presented. Under such a circumstance, it was quite difficult to persuasively insist that the existing governmental system at that time should be retained. Nevertheless, such an insistence was presented in several occasions in the arguments on constitutional amendment bills, which might be because they could not find any other reason to ground their oppositions on[5].

Subsection 3 Definition of Citizenship - The Fourteenth Amendment

The Fourteenth Amendment of the Constitution was for solving problems which the Thirteenth Amendment

4 However, on the other hand, as being seen from the case of Indians or others, it means that the Union would intervene the governmental practice of a State if the Union think it inappropriate regardless of whether it is a domestic matter or proper to the State, or not. It means also that the interpretation of the philosophy of the United States provided in the Declaration of Independence or the Constitution of the United States would tend to be monopolized by the Union. In this meaning, the probability of the invasion of the freedom or other rights of an individual by the Union itself would have become higher. On this issue, see author's paper (in Japanese), Kotaro Matsuzawa, Development of the citizenship education in the United States of America, Tsukuba-Hosei No. 65 (2016).

5 Especially, the opposing opinions presented during the discussion for enacting the Nineteenth Amendment of the Constitution look like arguments of such type.

brought about[6].

As for the question who is a citizen, the problem which Congress confronted during the discussion for the establishment of the Fourteenth Amendment was not only whether freed black persons should become citizens of the United States. The problems Congress confronted then were:

1 whether emancipated persons should be made to be citizens;

2 with what persons the United States of America should be consisted; and

3 who should participate in the process of decision for the volition of the United States.

As for the first problem, "whether emancipated persons should be made to be citizens", the need to solve it already arose when Congress rejected the bill of Lincoln to send freed black people back to Africa. The answer to the question was, though vaguely, already obtained during the discussion for the establishment of the Thirteenth Amendment of the Constitution[7].

However, the problem was not solved enough merely by providing "emancipated slaves shall be citizens as a matter of course". There were people who politically approved of emancipating slaves but rejected to constitute the one and same government together with emancipated slaves. So, in order to give a perfect answer to the problem, a general question, whom "citizens of the United States of America" meant, should have been considered. Then, the legislators of the Fourteenth Amendment reached the second problem, "of what persons the United States of America should consist".

This problem was very complicated, for what was questioned there was not to give case-specific answers to certain discrete problems but to create a standard in a society in which Native Americans and Chinese immigrants as well as white and black persons lived and in which they had various relationships with each other.

Furthermore, the fact that the United States of America adopted a republican form of government gave the problem essential complexity and importance. For the adoption of a republican form of government inevitably had close connections between the second and third problems, namely, "of what persons the United States of America should be consisted" and "who should participate in the process of decision of the volition of the United States". That is, to determine who would have citizenship of the United States meant, in the end, to decide who should determine the volition of the United States and what a nation the United States of America should be, as well.

In the end, within the provisions of the Fourteenth Amendment of the Constitution, there were left allowed the existence of the persons who, though being "subject to the jurisdiction of the United States" in the meaning of the first section, could not participate in the determination of the policies of the United States in the meaning of the second and third sections. In this meaning, the solutions provided by the Fourteenth Amendment to the problems above were not perfect[8,9].

However, by the definition of citizen in the first section of the Fourteenth Amendment, the United States has parted from the past, a priori or law-external commonsense, "the Government of white people"[10,11]. Then, as the result, the United States decided "what persons the United States of America should be consisted with" by itself so as to take the first step of the reform from a State of "nationals" to a State of "citizens"[12].

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6 See Chapter 3, Section 5 of this article.

7 See Chapter 3, Section 4, Subsection 2, Paragraph 1 of this article.

8 The problem of the Fourteenth Amendment is not only that it provided only in an incomplete way to force States to admit the right of suffrage of black people. That the provision encouraged the States to make only male inhabitants would have a vote shows not only an imperfection as a measure but also a structural defect.

9 However, concerning the persons falling under the type prescribed in the third section, the problem has been solved by a legislation by Congress according to the provision of the section. Lester S. Jayson et al. eds., The Constitution of the United States of America - Analysis and Interpretation -, 1529, (U.S. GPO 1973).

10 39−1 Cong. Globe 528, 575 (Sen. Davis).

11 However, Representative Wilson of Iowa stated that race had never been used in the law as a criterion for deciding who should have citizenship. 39−1 Cong. Globe 1115 (Rep. Wilson).

12 However, in the legislation process of the Civil Rights Act, the right of a community to determine its members was insisted from

Subsection 4 Citizenship After the Fourteenth Amendment

Paragraph 1 Activities of Congress

After the establishment of the Fourteenth Amendment, Congress improved the Naturalization Act so as to make also black people able to be naturalized. However, in the same period, Congress also legislated an act prohibiting Chinese persons from being naturalized. It was still difficult at that time to completely exclude race or other natural conditions from the standard to determine citizens.

In addition, in the same period as above, Congress enacted a legal institute to protect the rights of naturalized citizens at the time when they went abroad, especially to their former home country, and concluded treaties for it with each foreign country. Various types of international transference of people, for example, the case that a person who once immigrated into the United States again moved to another country and had the residence there, were increased along with the fact that technological developments made an international trip easier and easier, which would have made such legislative treatments for protecting the citizens as described above necessary.

Paragraph 2 Judgements by the Supreme Court of the United States

After the establishment of the Fourteenth Amendment, the Supreme Court judged the meaning of "a natural born citizen" in a series of judgements from the Slaughter-House cases to the Wong Kim Ark case. Above all, in the judgement of the Wong Kim Ark case, the Supreme Court judged according to Common Law that a child born in the United States, even if born to alien parents, should acquire citizenship of the United States.

The Fourteenth Amendment changed the judgement of the Dred Scott case, and made persons who had been emancipated according to the Thirteenth Amendment citizens of the United States, and citizens of several States as well. The problem the United States confronted during the legislation process of the Fourteenth Amendment was, in the first place, to determine the relationship between persons emancipated by the Thirteenth Amendment and the United States of America. However, as pointed out above, there were many other various persons with whom the relationship of the United States should be determined. As the result, the present form of the Fourteenth Amendment was selected. In addition to that, since, to begin with, the United States of America needed to accept a large quantity of immigrants in order to establish the nation, it would be appropriate that the Supreme Court adopted the principle of inclusion and unification, not exclusion, in the Wong Kim Ark case.

The Supreme Court based the judgement on Common Law to induce the conclusion, as being seen in the Wong Kim Ark case, and the Common Law have been also frequently referred to in considering the meaning of citizenship in cases. This attitude of the Supreme Court raised a serious problem because Common Law is not necessarily compatible with the principle of the Foundation of the United States of America and such a way of thought would be suspected to be a return to the tradition without thoroughly pursuing the reasonable judgement[13]. It caused, in the end, the problem of sexual discrimination, which was appeared in the judgement of the Minor v. Happersett case.

Subsection 5 Woman and Citizenship - Obtaining Independent Change of Woman Citizenship

Before the year 1855, citizenship of a woman was to be changed independently irrespective of her marriage. But the Act of 1855 provided that a female alien should acquire citizenship of the United States by marriage to an U.S. citizen. Moreover, the Act of 1907 provided that any American woman who married a foreigner should follow the

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the side of opponents to the Act (39−1 Cong. Globe 498 (Sen. Van Winkle)). In addition, it is pointed out that the fact that Congress has the power of determination concerning enjoyment of citizenship or civil rights means also that Congress has the power to take it away, which may be risky. (Id., at 1120 (Rep. Rogers)).

13 However, according to the general understanding at that time, it was common to interpret the Fourteenth Amendment as approval of the jus soli principle which was accepted through Common Law. See Bernadette Meyer, The Gestation of Birth right Citizenship 1868−1898 State's Rights, the law of Nations, and Mutual Consent, 15 Geo. Immigr. L. J. 519, 530 (2001).

nationality of her husband.

Such a movement was changed toward the direction making the nationality of a woman unaffected by her marriage in a series of enactments beginning with Cable Act of 1922. The provisions of the Acts of 1855 and of 1907 were, as the judgement of the Mackenzie v. Hare indicated, intended to secure the unity of a married couple, so they were not necessarily inappropriate at those times. However, seeing the fact that those provisions led to the conclusion which affected whether a woman should have the right to vote, as the judgement showed, it would look natural that there occurred a series of movements to secure the independence of woman citizenship from marriage, like the establishment of Cable Act.

However, even if the principle of independent change of woman citizenship was approved of, the need of the measures to support the unity of a couple would not become unnecessary by it. On this problem, the United States was to grope for the policies to realize both an independent change of woman citizenship and the security of unity of a couple at the same time, through the amendments of the naturalization act or other statutes after the Cable Act.

The resulting legal standard was to provide, a marriage, as a general rule, should not affect citizenship of woman, to simplify the naturalization procedure of an alien who married a citizen of the United States, and, moreover, to alleviate the conditions for such an alien to enter into the United States for the naturalization. Along with such changes, the rules for the change of nationality in case of end of the marriage were also adjusted to a certain degree. Such a movement would be, whether it was the best way or not, evaluated that a reasonable legislation was done for an appropriate change of the nationality of a married person for reflecting the will of the individual person to the decision of the nation the person would belong to.

Subsection 6 Transfer of Citizenship of the United States

A human being would get married to someone at its certain life stage and be given a child and raise the child usually at the next life stage. So, usually the question how to treat citizenship of the child would occur after the problem of the change of nationality along with marriage.

In relation with the question, viewing from the standpoint of the happiness of a child, there would be no objection to the thought that any child should be given citizenship[14]. However, there may occur a dispute on the question, on what ground and through what proceedings, citizenship of what country a child should be given. As, theoretically, it is difficult to suppose the will of the child in such a case, this problem needs to be considered from the standpoint of the parents[15].

On this issue, since the United States has adopted, as described above, the principle, jus soli through the Fourteenth Amendment of the Constitution, the problem would not occur in the case where a child is born in the United States[16]. However, when a child is born abroad to the U.S. citizen parents, the problem would occur.

Regarding this problem, both the judgements of the cases, Miller v. Albright and Nguyen v. INS, judged constitutional the act which prescribed certain additional procedural requirements for transferring citizenship to an

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14 On this point, see Article 7 of UN Convention of the Rights of the Child.

15 In relation with this problem, Article 9 of Convention on the Elimination of All Forms of Discrimination Against Women "mandates states parties to grant women equal rights with men to acquire, change or retain their nationality and equal rights with respect to the nationality of their children."

16 However, it does not mean an institution like that of the United States has no problem. In the United States which adopted the jus soli principle according to which citizenship was given to a person on the ground of his/her birth within the United States except for special exceptions, a child would acquire citizenship of the United States irrespective of the wills of the parents or of the child her/himself. However, that a person belongs to a state means that the person will be imposed taxes or, if there is a draft system, the duty of military service, or other various duties on by the state. Therefore, it may be questioned whether such an institute according to which a state unilaterally confers citizenship to a person born there should be appropriate. However, even when the jus sanguinis principle was adopted, a child of a parents with citizenship of a country would be given citizenship of the country irrespective of the wills of the parents or the child. In this regard, this is not a problem which can be solved by simply changing the principle but rather it should be a problem what the most appropriate way or method to confer or to acquire a citizenship.

illegitimate child by the citizen father to those in the case required for by the citizen mother.

In those judgements, the first question was on the relation between the conferment of citizenship and the relationship between an illegitimate child and the father or the mother, and the second question was on the relation between the conferment of citizenship and such relationship of an illegitimate child and the United States, as it would be formed through the relationship of the child with the citizen father or mother[17].

On the first question, that is, what the relation of the parent-child relationship between the child and the father or mother with the conferment of citizenship should be, both court opinions of those cases stated that to confirm biologically the existence of the parent-child relationship and to secure such real connection between the parent and child as it could be hoped to be constructed through the biological parent-child relationship, both were the important objectives to the Government of the country.

Between such objectives, the former one, which put an importance on the biological parent-child relationship, reminds us of the fact that the judgement of the Dred Scott case rejected to recognize black persons to be citizens of the United States on the ground that the United States of America should be consisted of the descendants of the citizens at the time of the national foundation. It is true that the jus sanguinis principle has been long acknowledged, even at present, as a reasonable foundation for conferment of a nationality in the international society, so that it is not wrong in principle that Congress based the way of thought on that principle in order to construct the legal system for nationality. However, taking the historical course into consideration in which the legislation of the Fourteenth Amendment of the Constitution was needed to correct the conclusion of the Dred Scott judgement, the importance of the fact that Section 309(a) of the Immigration and Nationality Act (8 U.S.C.A. § 1409(a)) is adopting the jus sangunis principle should be understood as rather relative, and, rather, the adoption of the jus sanguinis principle in the statute should have been interpreted to promote to investigate more concrete details of a case considering whether the application of the standard might cause any substantive infringement of human rights of any parties or other important questions, and it would have been such a behavior that fitted the historical progress of the United States.

Next, on the latter objective, which put an importance on such a real connection between a child and the citizen parent or, further, the United States itself as it could be hoped to be constructed through the biological parent-child relationship, there are some problems to be considered.

Slavery, which existed in the United States from the time of the national founding up to the Civil War, was sometimes thought, as found in the discussion during the legislation process of the Thirteenth Amendment of the Constitution, to be a part of the family system. The United States abolished the slavery and then legislated the Fourteenth Amendment of the Constitution so as to make emancipated people citizens of the United States. Moreover, after that, the substantial status as a citizen was secured for the people who were made citizens by the Fourteenth Amendment, through the establishment of the Fifteenth Amendment of the Constitution and various political and social movements that occurred in the twentieth century. It could be seen in a meaning as a historical movement which had changed and reformed the family system so as to form citizens or citizen systems.

The situations were similar in the cases of the women's acquisition of the right to vote and of the security of the independent change of citizenship of women. That means, in the process of making female persons ordinary citizens, the view of woman that woman should take the central part in the family, or the view of family that family should be formed by making a woman the core, was changed so as to produce the "female citizen" in the public.

When the judgements of the cases, Miller v. Albright and Nguyen v. INS, are considered supposing the historical development of the notion of family in the United States or the notion of the relation between the United States and families therein, it could be understood that those judgements are intending not only to change the notion on how the family relationship should be, so as to bring citizens about from there, but also to make family itself the place of

17 Papers on those judgements, for instance: David Martin, Behind the Scene on a Different Set: What Congress Needs to Do in the Aftermath of St. Cyr and Nguyen, 16 Geo. Immigr. L. J. 313 (2002); Kif Augustine-Adams, Gendered States: A Comparative Construction of Citizenship and Nation, 41 Va. J. Intl. L. 93 (2000).

raising and training of citizens. Whether such a way of thinking on the relation between a nation and a family is appropriate, and what legal relation should be there between the fact that a person is a member of a family and the fact that the person is, as a citizen, a member of a nation, would be very difficult and important problems when it was also taken into consideration that a family is still in fact the first place of the birth and raising humankind[18,19].

Subsection 7 Conditions on citizens to transfer U.S. citizenship

In the Sessions, Attorney General v. Morales-Santana case, the Supreme Court stated its opinion regarding a condition on citizen, who is a parent of a child born in the outside of the United States, for transferring the citizenship of the United States to the child.

It would be reasonable for the Government to think it necessary to require a foreign-born child to have a certain relationship between the child and the country. In relation to this point, there may be various way to set up conditions for ascertaining such a relationship, from just requiring a genetic relationship to putting some conditions such as requiring a parent living together certain period with the child, as the one discussed in Miller v. Albright and Nguyen v. INS, or such as requiring certain qualification on the parent as discussed in the Sessions, Attorney General v. Morales-Santana.

Generally speaking, this kind of conditions or qualifications should be reasonable and equitable, especially from the aspect of the gender thinking based on the Session, Attorney General v. Morales-Santana. Also, as mentioned, since the United States of America is a democratic country and it has an effect on who is eligible for the office of President or other significant offices, how the institute for the acquisition of citizenship by birth is organized has very important meaning and whether the regulation truly reflects the philosophy of the foundation of the United States of America would also become very important.

In relation to this, the court opinion of the Sessions, Attorney General v. Morales-Santana criticized that "Fearing that a foreign-born child could turn out "more alien than American in character," the administration believed that a citizen parent with lengthy ties to the United States would counteract the influence of the alien parent"[20]. In relation to this point, the following part mentioned in the same case should also be paid attention, "As the Court of Appeals observed in this case, a man needs no more time in the United States than a woman "in order to have assimilated citizenship-related values to transmit to [his] child."[21,22]

After all, as stated by Justice O'Connor in the Nguyen v. INS[23], the existence of the actual relationship is more important than the opportunity. In this regard, in setting up conditions for ascertaining such a relationship, at least, there should be a procedure in which checks the record whether there has been any actual relationship fostered between a citizen parent and the United States in a same way as a child and citizen parent and, in turn, the United

18 As a paper considering those problems, cf. ex. Annette Ruth Appel, Virtual Mothers and the Meaning of Parenthood, 34 U. Mich. J. L. Rrf. 683 (2001).

19 In considering how to foster persons from the viewpoint of relation between an individual and the nation, there could be three ways to be imagined, i.e., (i) leaving such a task to the family, (ii) leaving it to the state, and (iii) sharing it between the family and the state. In relation to an institute for an immigration laws or laws relating to the nationality, the adoption of the concept (i) or (iii) would require an immigration laws or nationality laws to be designed for supporting and protecting family relationship and, further, it may also be needed to design a law regarding a family system itself for the purposes. In relation with this point, a provision of the Immigration and Nationality Act, which made an adopted child a citizen automatically (8 U.S.C.A. § 1431(b)) could be an example as a reference.

20 137 S. Ct. 1678, 1692.

21 Moreover, the following part in the same case should also be paid attention, "The transmission held even if the mother married the child's alien father immediately after the child's birth and never returned with the child to the United States. At the same time, the legislation precluded citizenship transmission by a U.S.-citizen father who fell a few days short of meeting § 1401(a)(7)'s longer physical-presence requirements, even if the father acknowledged paternity on the day of the child's birth and raised the child in the United States".

22 Regarding the assimilation to the United States, in relation to the Constitution, it may be pointed out that it establishes seven years and nine years even for the Representatives and the Senators as a period for the assimilation respectively.

23 533 U.S. 53, 84.

States[24].

Subsection 8 Change of the Meaning of Natural Born Citizen

There was no natural born citizen at the time of the national foundation. However, Article 2, Section 1, Clause 5 of the Constitution of the United States required that President should be a natural born citizen. As being seen above, it was in order to avoid the influence of foreign countries to the Government of the United States.

After that, the Fourteenth Amendment of the Constitution defined citizens of the United States to be "all persons born or naturalized in the United States", so that both naturalized and natural born citizens were declared to be citizens in one sentence.

Although, even after the establishment of the provision, naturalized citizens have been treated differently from natural born citizens in various acts, precedents of the Supreme Courts or others have stated that, in principle, naturalized and natural born citizens are all equal. Moreover, there have been proposed not a few amendment bills to the requirement for the presidential eligibility since the early days of the United States up to present. Such a course of history could be understood that, as the globalization of the world, including the United States, has progressed so that more and more people move internationally and the ways of such movements also have been diversified, such a development of the international situation has caused a change of social relationship to be created by the movements of people, so that the United States has responded to such a social change in the reality.

Section 3 Development Process of Civil Rights and Duties in the U.S.

Subsection 1 Civil Rights at the Dawn of the United States

Paragraph 1 Political Rights

The civil rights at this period could be analyzed from two points of view, that is, political rights and the other civil rights.

First, regarding an issue on the political rights, a naturalized citizen was not eligible to the office of President of the United States, and could not be a candidate unless nine years for Senator, or seven years for Representative had passed since the naturalization. In this meaning, there was a big difference between naturalized and natural born citizens.

Next, concerning especially the right to vote among political rights, some acts being valid at that time showed that being a white male citizen was required as a qualification for voting. In this meaning, to be a citizen and to have the right to participate in politics were thought to be mutually different matters. In addition, it was seen from an opinion of the Attorney General at that time that some foreigners were allowed to vote somewhere in the United States. Taking those facts above into consideration, it could be inferred that the natural or extra-legal conditions, like being male or being white, were thought to be more important than formal qualifications, like being a citizen.

Further on the political rights, Congress established at this period the Militia Act which recognized only white male persons to be eligible for the enrollment in the militia. It would be a reflection of a thought that participation in war was a type of participation in politics.

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24 In relation to this point, however, there is an issue which should be taking also into consideration, i.e., the substantial relation between a child and citizen parent and, in turn, the United States would not always mean that the relation is preferable to the United States and would not foster a preferable people to the United States. As one could realize, there are some people who has a citizenship or nationality of the United States but who are contradicting against the United States despite that the one has been grown in the United States with the hold of the United States Citizenship.

In this kind of case, still in relation to the legal institute regarding the citizenship or nationality, it is not a possible option for the United States to denationalize such the person, although the one could be punished as committed to the treason or other crime in the field of criminal law. In relation to the legal area regarding the citizenship or nationality, at least in the context of the United States legal system, the expatriation would happened only in accordance with the intention of the one who wants to expatriate oneself as judged by the Supreme Court in the case of Vance and Terrazas case(444 U.S. 252(1980)).

After all, the nation cannot construct itself through selecting people by itself as it likes and it is the citizens and nationals who construct the nation with other citizens and nationals.

Paragraph 2 The Other Civil Rights

As for the civil rights other than political ones, according to the provisions of the Constitution, citizens of the United States, whether being citizens of any State, should enjoy equal rights in several States. It would have meant, as mentioned above, partly to respond to the needs of individual citizens. However, at the same time, such a treatment, which would reduce conflicts between citizens, would have been necessary for the continuity of the existence of the Union.

Opinions of Attorney General in this period showed that being a citizen was understood as being a member of the political society. However, it was not necessarily clear what rights or duties citizens should have had in the other scenes than political one. In addition, it could be inferred that there were certain differences in enjoyment of civil rights between citizens and the other persons. However, viewing from the fact that the notion, denizen was used, the legal system was not exclusively constructed on the citizen-alien dichotomy. Rather, the situation was complicated since it was at a transition period from a legal system supposing a status system to a modern legal system for a civil society.

Subsection 2 Emancipation of Slaves and Civil Rights

Paragraph 1 Influence on Emancipated People

Slaves were emancipated through the Thirteenth Amendment, so that former slaves were deemed to be able to enjoy certain civil rights. However, which civil rights were to be enjoyed by such people was not necessarily clear. It was a matter of course that former slaves were freed from involuntary servitude by the abolishment of slavery, so that such people were to be respected as ordinary human beings. However, as for the question which rights such people should acquire, the answer was unclear except that the security of certain abstract rights was discussed, so that it was also not clearly answered whether such people and white people should enjoy equal rights, or how civil rights would be secured for emancipated persons. The indefiniteness was especially noticeable in the question concerning political rights. It was said that the enjoyment of political rights and that of the other civil rights were quite different matters, and it was quite obscure whether emancipated people could have political rights.

The Thirteenth Amendment prescribed only the abolishment of slavery so as to emancipate former slaves, and did not intend to give a clear standard for the relationship between emancipated persons and the Union or States. So, it was natural that there were left problems concerning the relationship between emancipated persons and the Union or States after the establishment of the Thirteenth Amendment. In order to answer the question what rights should be enjoyed by some persons in a society, the relation between such persons and the other members in the society should be determined and established. However, what the abolishment of slavery and emancipation of slaves through the Thirteenth Amendment did was only to order to destroy the former human relations being based on master-slave relationship and to renew the human relations, so that the problems on concretely what relationship should be newly established in such a new society were left unsolved. In the end, the establishment of the Thirteenth Amendment of the Constitution could not give an enough guiding principle for the problem what rights and duties relationships should be established in the new society.

Further on this issue, it should also be noted the fact that already at the time of Civil War, black persons were serving in the army not as slaves. Considering this fact, it could be seen that black persons already had, though it might not be called a right, a certain legal status at that time. The fact that black persons had certain status in the army in Civil War, so that they made certain contributions there, had a great influence on the later movements to give them citizenship and civil rights.

Paragraph 2 Influence on the Other Persons

The establishment of the Thirteenth Amendment of the Constitution had an effect not only on the status of former slaves, but also, naturally, on the state of rights of persons who had held slaves. It means that persons who had had

slaves as their own property were no longer let to keep them. From the theoretical perspective, it means that a former property which had been "proper" as a good to the owner was no longer allowed to be held by any person. It could be seen that there was a big change of the relationship between individuals and the nation or the society.

Subsection 3 Definition of Citizenship and Civil Rights

Paragraph 1 Meaning of Civil Rights

In the legislation process of the Fourteenth Amendment, Congress confronted the problem regarding the meaning of civil rights, that is, "what rights a person as a citizen of the United States should enjoy". This problem was, in relation to the wording of the Fourteenth Amendment, one on the meaning of the words "the privileges or immunities of citizens of the United States", and substantively it was the problem what rights "especially" citizens of the United States could enjoy.

In the establishment processes of the Civil Rights Act of 1866 and the Fourteenth Amendment of the Constitution, there were two ways of thinking: one was to think of rights to be secured by those statutes as a kind of natural rights, and another to think of such rights as ones incidental to citizenship of the United States.

The intention of the former thought which was based on the natural law theory would be to secure the rights, which should be enjoyed by persons as human beings, as the rights of citizens of the United States, and the intension of the latter thought which based on citizenship theory would be to secure the rights of citizens including civil rights for the persons who had become citizens of the United States.

Those two ways of thinking may, of course, sometimes lead to the same conclusion, but they may sometimes conflict with each other. If one thinks based on the latter thought that citizens of the United States may sometimes have an advantage in the security of human rights over other persons, such a thought would conflict with the former thought. However, irrespective of such possible contradiction, there was no explicit discussion on the issue during the legislation process of the Fourteenth Amendment.

Paragraph 2 Concrete Rights Citizens Enjoy

What concrete rights did the Constitution or other acts at this period intend to secure for citizens of the United States? Seeing the contents of the rights enumerated in the Freedmen's Bureau Act or the Civil Rights Act of 1866 and the logical relation between Section 1 and Section 2 of the Fourteenth Amendment of the Constitution, it could be inferred that the rights which Congress intended to secure by those acts were not political rights but the rights for citizens' everyday lives like the right to conclude a contract or others. That could be understood as an answer to the question which had been discussed in the legislation process of the Thirteenth Amendment of the Constitution, namely, concretely which rights a person as a citizen of the United States could enjoy. However, as it would be clear especially from the discussion on Section 2 of the Fourteenth Amendment of the Constitution, it was an expression of the fact that Congress at that time had no intention to secure enough political rights for new citizens of the United States. Such a stance of Congress was, though it could be understood as a result of courtesy to States which powers would have be restricted by the federal system, a serious problem as to the security of the rights of individuals. This problem, being put off, led to the establishment of the Fifteenth Amendment of the Constitution[25].

As for the degree and range of the security of civil rights for emancipated people, the target of legislations seems to secure equal level of the rights to that for white people, for both the Freedmen's Bureau Act and the Civil Rights Act of 1866 contained the phrase which states that freed persons should enjoy "civil rights … belonging to white

25 Concerning Section 2 of the Fourteenth Amendment, it provides that the basis of representation should be reduced in the proportion corresponding to the number of male citizens who were denied the right to vote. In this respect, it lacked considerations for women concerning the right to vote. See David A. Matin, Behind the Scenes on a Different Set: What Congress Needs to Do in the Aftermath of St. Cyr and Nguyen, 16 Geo. Immigr. L. J. 313, 336 (2002).

persons" or "the security of person and property, as is enjoyed by white citizens". Though, based on the political situation at that time, it might be natural that whether the security of rights was at the level of that for white persons was made use of as the benchmark, whether depending on such a benchmark was appropriate was questionable, for it would lead to another question how homogeneously to treat persons who belong to different categories. Rather, it might have been more appropriate to set up and adopt a higher concept than race, such as "Human beings" or the like, for the security standard of civil rights, so as to consider whether the then state of the security of civil rights would be right or wrong by using such a broader standard as the benchmark.

As for the procedural aspect of the security of civil rights, the right of emancipated persons for the due process of law was established, through the invalidation of the judgement of the Dred Scott case by the Fourteenth Amendment of the Constitution and the establishment of a declarative provision of the Civil Rights Act of 1866. Seeing the fact, it can be said that not only substantive rights of emancipated persons were secured but also the rights concerning the procedure to secure those rights were, to some degree, secured. Regarding this point, in relation to the rights secured by the Fourteenth Amendment of the Constitution, it could be said that the right for the procedure to protect those rights, which were necessary in everyday lives of citizens, were secured at the everyday life level. But, since it is a matter of course that one may need to participate in forming and constructing the legal system in order to attain the security of civil rights, the Fourteenth Amendment was not enough in this respect in that it only restrictively implemented the security of the right to vote for emancipated persons. This, as mentioned above, led to the establishment of the Fifteenth Amendment of the Constitution.

Paragraph 3 Relation to the Establishment of the Union

In relation to the establishment and integration of the United States, the historical meaning and the effect of the Fourteenth Amendment on what rights and how citizens of the United States should enjoy, could be explained as follows.

The Constitution of the United States of America was established, as mentioned above, in order to form "a more perfect union"[26]. The Constitution provided that there was citizenship at the level of the Union, and it provided that citizens of each State should enjoy equal rights as citizens of the United States[27].

However, at the time of the establishment, the Constitution didn't define what persons should become citizens of the United States, and which rights a person as a citizen of the United States should enjoy was not necessarily clear except for the rights falling under the privileges and immunities clause of Section 2 of Article 4 of the Constitution or bill of rights secured by several amendments of the Constitution. There would be, behind such legislation, following political considerations, that is, to declare that the Union was established, that there existed citizens of the United State and that citizens thereof should enjoy certain rights would be enough for that consolidation of the Union which was required at the time of the establishment of the Constitution, and more detailed provisions might be considered as some infringement of the power of States.

However, after the establishment of the Constitution of the United States, more and more people were moving within the United States. Such a change of the state required more detailed and more complete prescriptions so as to effectively secure the rights of citizens of the United States. If the situation had been left as it was, persons who frequently moved among States could not have enjoyed the security of rights, so that various problems would have occurred[28].

In establishing the Fourteenth Amendment of the Constitution, a rule to define the holder of citizenship of the United States was established, and the rights the persons who had acquired citizenship of the United States according

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26 See Preamble of the Constitution of the United States of America.

27 U.S. Const art. IV, § 2, cl. 1.

28 The Dred Scott case occurred on the occasion of the interstate movement of the plaintiff. If the living area of black persons had been limited within one State, such a problem as the Dred Scott case would not have happened.

to the rule should enjoy was also provided.

As for the rule to determine who should be citizens of the United States, the Fourteenth Amendment itself provided essentially only the acquisition of citizenship by birth. However, after the establishment of the Fourteenth Amendment, racial discrimination in the provisions of the naturalization act was lessened to some degree. In addition, to the problems, which rights citizens of the United States should enjoy, the Civil Rights Acts, which were legislated by Congress around the time of the establishment of the Fourteenth Amendment gave more details.

Subsection 4 Civil Rights in Reconstruction Period

Paragraph 1 The Fifteenth Amendment of the Constitution

As the last amendment to the Constitution in the reconstruction period, Congress established the Fifteenth Amendment of the Constitution. The Fifteenth Amendment provided that the right of citizens of the United States to vote should not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude, so that it excluded natural qualifications or extra-legal qualification, i.e., qualification decided in outside of legal system, from the standard to determine the persons who should participate in politics. It could be highly evaluated in that it secured the autonomous decision on who were the subjects to determine the volition of the nation.

However, what the Fifteenth Amendment explicitly did was only to establish a minimum exclusion of inappropriate criterions for the security of the right. Though other inappropriate criterions for the security of rights, such as sex, whether taxed or not, or age, were also brought up for discussion in the legislation process of the Fifteenth Amendment, the exclusion of those criterions was not included into the provision. In this meaning, the establishment of the Fifteenth Amendment was not enough and incomplete as a solution for the actual problems. Furthermore, while the Fifteenth Amendment prescribed the right to vote, it did not prescribe any condition regarding eligibility for election or public offices, which was also a defect in the provision.

Paragraph 2 Civil Rights and Congress

Congress of the United States in this period established a series of Civil Rights Acts. Those acts included one to protect an effective execution of the right to vote by enforcing the Fifteenth Amendment of the Constitution, or one to secure the right to conclude a contract or other rights which should be necessary as a legal frame for civic and social life in general.

Among those acts, especially the Enforcement Act of 1870 was notable in that it guaranteed aliens equal rights to those of citizens. Seeing from it, it could be said that fundamental rights were to be enjoyed equally by citizens of the United States and aliens in the United States at that time. Moreover, that Act of 1870 as well as Civil Rights Acts established later emphasized that all citizens should enjoy certain rights, so as to exclude discriminations among citizens of the United States. Seeing those facts, it could be concluded that the setting up or disambiguation of citizenship was not done as a certain differentiation for securing profits of a certain group categorized as citizens, but it was aimed at establishing some fairness within the United States.

In addition, Congress established in this period the Act for Equal Right in the District of Columbia and the Act on Ownership of Real Estate in the Territories. The former act was the one deleting the words “white person” from the provisions of those acts containing it and, by that, the racial discrimination was demolished from the related laws. The latter act, on the other hand, prohibited persons other than citizens of the United States from owning real estate in the United States[29].

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29 As mentioned above, the establishment of citizenship seemed to be not intended to secure special interests of citizens of the United States and, rather, it would be intended to establish certain equality among citizens of the United States. In relation to this understanding, how the fact that an act to allow only citizens of the United States to own real estate in the United States could be interpreted is a question. In considering this point, that it occurred at transitional period in which still complicated legal relations

Paragraph 3 Civil Rights and the Supreme Court

The Supreme Court of the United States presented in this period a series of judgements, up to that of the Twining v. New Jersey case.

As pointed out above, the judgement of the Minor v. Happersett case interpreted the Constitution of the United States based on Common Law, so that it concluded, a woman did not enjoy the right to vote. Although the problems concerning the conferment of citizenship were dealt with according to Common Law before the establishment of the Fourteenth Amendment of the Constitution in the United States and the legislation process of the Fourteenth Amendment would be understood that it intended to codify the Common Law, there could be a chance for the Supreme Court to interpret the Fourteenth Amendment independently from the Common Law. However, the Supreme Court did not do so.

The Supreme Court already adopted in the Slaughter-House cases the theory to interpret the Fourteenth Amendment modestly so as to limit the range of the effect of the provision, so that it ruled there that the Fourteenth Amendment guaranteed only the privileges and immunities incidental to citizenship of the United States and not those of citizens of States. The Supreme Court adhered to that opinion in a series of judgements after that.

It is true, as the judgement of Slaughter-House cases pointed out, that it was considered as one of the important purposes of the amendments in the legislative process of the Thirteenth and Fourteenth Amendments to make emancipated persons independent citizens and to guarantee their rights. However, as mentioned above, Congress at that time was discussing not only the problem of the status of emancipated people. Congress also established the Civil Rights Act at the very same time, so that it worked on the problem of securing the rights in general within the United States. Taking those facts into consideration, it would be inevitable for the court opinion of the Slaughter-House cases to be criticized as playing down the dynamism the Fourteenth Amendment brought about to the United States.

At the same time, the Supreme Court gave certain consideration for this issue in relation to the Enforcement Act of 1870. In this regard, the Supreme Court could be said to have played a certain role in securing rights by the Union. However, if looking at the details of the related cases the Supreme Court judged, the fundamental stance of the Supreme Court was along the line of the judgement of the Slaughter-House cases and estranged from the trend of Congress, for the fact was merely that the Supreme Court expressed active judgements on the cases in which a protection of the rights of black persons was asked for.

Subsection 5 Subsequent situation regarding Rights and Duties of U.S. Citizens

Paragraph 1 Effect of the Setting-Up of Citizenship of the United States

From the viewpoint of the impacts of the Fourteenth Amendment providing the privileges or immunities of citizens on the modern society, Saenz v. Roe case would be a notable case[30]. What was questioned in the case was the provision of a statute of the State of California, which limited the amount payable to a family that has resided in the State for less than 12 months to the amount payable by the State of the family's prior residence. The Supreme Court ruled that the provision infringed the right to travel, which was included in the privileges or immunities secured by the Fourteenth Amendment, so that it was unconstitutional. The court opinion of the case stated, in relation to the privileges or immunities of citizens of the United States provided in the Fourteenth Amendment, generally as follows[31].

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between aliens and the United States of America were gradually put in order should be taking into account. Regarding this issue, the Supreme Court stated in the judgement of the Oyama v. California case (332 U.S. 633 (1948)) that it was questionable to restrain an alien from owning real estate because of the nationality.

30 526 U.S. 489 (1999).

31 In this case, Justice Rehnquist and Justice Thomas stated dissenting opinions.

The court opinion pointed out that, though there was not the word "travel" in the text of the Constitution, the right to travel was so important that it was a virtually unconditional personal right, guaranteed by the Constitution[32]. Then, the court opinion stated that the "right to travel" embraced at least three different components: it protected (1) the right of a citizen of one State to enter and to leave another State[33], (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State[34], and, (3) for those travelers who elected to become permanent residents, the right to be treated like other citizens of that State[35].

Next, the court opinion stated that the issue in this case, then, was the third aspect of the right to travel, namely, the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State, and further pointed out, that right was protected not only by the new arrival's status as a State citizen, but also by the status as a citizen of the United States under the Fourteenth Amendment[36]. Further on this point, the court opinion stated, that newly arrived citizens had two political capacities, one state and one federal, added special force to their claim that they had the same rights as others who shared their citizenship, so that neither mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminated against some of its citizens because they had been domiciled in the State for less than a year. Then it concluded that the appropriate standard might be a categorical one[37].

Moreover, the court opinion pointed out that since the right to travel embraced the citizen's right to be treated equally in the new State of residence, the discriminatory classification (like one questioned in the case) was itself a penalty[38].

Furthermore, the court opinion stated that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence and that the Clause did not provide for, and did not allow for, degrees of citizenship based on length of residence[39]. Moreover, the court opinion stated that citizens of the United States, whether rich or poor, had the right to choose to be citizens of the State wherein they reside while the States, however, did not have any right to select their citizens[40].

Based on the judgement above, the Supreme Court confirmed that citizens of the United States should be treated equally in all States through the so-called right to travel, which was secured as a right included in the privileges or

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Justice Rehnquist pointed out that the right to travel and the right to become a citizen were distinct (Id., at 513), and, further, that there was a need for a State to assure that only persons who established a bona fide residence received the benefits provided to current residents of the State (Id., at 516, 520).

Justice Thomas, after considering the legislation process of the Fourteenth Amendment, pointed out that the fact that the judgement of the Slaughter-House cases interpreted the privileged or immunities of the Fourteenth Amendment narrowly was the cause of the trouble (Id., at 527). Then, the justice stated that it was necessary to understand what the Framers of the Fourteenth Amendment thought that it meant, and also to consider whether the Clause should displace, rather than augment, portions of their equal protection and substantive due process jurisprudence (Id., at 528).

32 Id., at 498.

33 The court opinion stated, concerning this aspect, there would be no need to identify the source of that particular right in the text of the Constitution (Id., at 501).

34 The court opinion, quoting the first sentence of Section 2, Article 4 of the Constitution, stated that this aspect of the right was to be enjoyed as the "Privileges and Immunities of Citizens in the several States". Id.

35 Id., at 500.

36 Id., at 502. The court opinion stated there that the third aspect was recognized also in the Slaughter-House cases. Id., at 503.

37 Id., at 504.

38 Id., at 505. The court opinion also pointed out that though the classifications challenged in the case were defined entirely by (a) the period of residency in California and (b) the location of the prior residences of the disfavored class members, those conditions had no relevance to their need for benefits or to the State's interest in making an equitable allocation of the funds to be distributed among its needy citizens.

39 Id., at 506. The court opinion quoted there the judgement of the Zobel v. Williams case (457 U.S. 55 (1982)). In that case, what was questioned was the statute of the State of Arizona, which provided a dividend program of a part of mineral income of the State to distribute annually a portion of the Fund's earnings directly to the State's adult residents. The Supreme Court ruled that the statute violated the equal protection of the laws in Section 1 of the Fourteenth Amendment of the Constitution.

40 Id., at 510.

immunities provided in the Fourteenth Amendment.

Paragraph 2 Civil Rights and Duties

By the establishment of the Nineteenth Amendment of the Constitution, women overcame the sexual discrimination in enjoyment of the right of suffrage. The federal statute had already abolished the sexual discrimination in the property right during marriage.

Through the improvement of the legal system regarding the enjoyment of rights by women, a woman was guaranteed the rights as a citizen but, at the same time, the duties of a citizen were also imposed upon a woman. Concretely, a woman bore the duty to be a member of a jury and, further, began to participate in the armed forces so as to serve in the military. Especially, in relation to the armed forces, women not only participated in military service but also began to take part in real battles. Seeing the discussion in the legislation process of the Nineteenth Amendment, it could be inferred that the contributions of women to the United States generated the motivation to guarantee women the enjoyment of the rights as a citizen.

The fact that, in conferring citizenship to a type of persons, the contribution of the persons of the type to the nation was important factor has often been pointed out in the legislation processes including in the process for the establishment of the Thirteenth Amendment where the contributions of black persons in Civil War were reported.

Generally speaking, it would be natural that a group puts certain burden on the members for retaining and maintaining the group, and it would be reasonable to decide whether a person should be allowed to enter in a group in view of the person's contribution to the group. So, the historical development of citizenship of the United States could be said to be in a course of natural way.

However, some considerations would be valuable based on the cases of Jury Service and Military Service.

Paragraph 3 Participation in Jury by Citizens

In relation to the jury system, the judgement of the J.E.B. v. Alabama ex rel. T.B. case stated that equal opportunity to participate in the fair administration of justice was fundamental to their democratic system, and ruled that discrimination in jury selection, whether based on race or on gender, caused harm to the litigants, the community, and the individual jurors who were wrongfully excluded from participation in the judicial process. In this judgement, Justice Kennedy stated as the concurring opinion that a juror sat not as a representative of a racial or sexual group but as an individual citizen.

On the other hand, at the time before the judgement above, the court opinion of the Ballard v. U.S. case stated that the two sexes were not fungible and that a community made up exclusively of one was different from a community composed of both. From the standpoint of the judgement, it could be concluded that the participation of women in the jury system is essential because two sexes were not fungible.

In relation to those two ways of thinking, there is a question from what standpoint female jurors should discharge their duties. On the one hand, a woman should take part of jurors because she is a woman, but, on the other hand, a juror is appointed on the basis of the status of a citizen irrespective of the sex. According to the former way of thinking, a woman would be expected to discharge her duty as a juror taking into her sexuality into consideration, but according to the latter way of thinking, it would be induced that a woman is expected to discharge her duty as a juror from the standpoint of a citizen paying no attention to her sex. As the result, a woman who becomes a jury member would confront a, though maybe not practically, at least logically difficult problem.

Such a problem, of course, will occur not only for women. Since every natural person has certain unique attributes, a parallel problem may occur for anyone who becomes a jury member. Since jury service is not the only duty of a citizen, a similar problem may happen concerning other duties of a citizen. Then, certain appropriate treatment for each concrete problem would be necessary.

Paragraph 4 Military Service of Citizen

Speaking of military service, the fact that black persons and women served in the armed forces so that they had fulfilled their duties was one of important factors for them to be recognized as proper citizens.

The Supreme Court stated in the United States v. Schwimmer case[41], "that it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution".[42] Even at present, an oath to bear arms on behalf of the United States when required by the law is still provided as a type of required oaths for naturalization in the United States[43].

There are many conflicts in the world even at present, and, because of the progress of the globalization of the world, many countries in the world, including the United States of America, may be influenced by such conflicts to some degree. Considering such a situation, the policy of the United States regarding naturalization could be acceptable, according to which it is required to make a promise of a certain contribution to the nation in case of emergency. However, as it will be discussed below, it would be a point to be considered whether such a matter as the will of working in military service or taking part in a battle should be taken into consideration in recognizing a person as a citizen.

Paragraph 5 Eligibility for Offices and Citizenship -- Meaning of "Natural Born Citizen"

The provision of Article 2, Section 1, Clause 5 of the Constitution provides that President should be a "natural born citizen". As mentioned above, that requirement was, as analyzed, aimed at excluding possible influences of foreign countries such as an invitation of someone relating to the royal family of a foreign country.

As the time passed since that time, through the globalization and the international expansion of areas for the activities by citizens of the United States, the diversity of citizens of the United States was enhanced. Concretely speaking, first, since the United States was made up of immigrants from the very beginning, persons who had diverse origins and various legal relationships acquired citizenship of the United States by their birth in the United States. Second, it often happened that citizens of the United States moved to or immigrated in a foreign country and had children there. In view of such a situation, the United States, in which the holders of citizenship were never determined only by historical or other law-external conditions, has dealt with each concrete problem by judgements of the courts or establishment or amendment of related acts whenever a problem concerning the extension of citizen of the United States happened.

Since citizenship of the United States itself has been highly evaluated, the answers the Government of the United States has given to a problem regarding citizenship have attracted public attention. In addition, because of the fact that the United States of America is a democratic nation and, moreover the fact that, as being seen above, Article 2, Section 1, Clause 5 of the Constitution requires being a natural born citizen as a condition for the eligibility to the office of President, the system for the acquisition of natural born citizenship attracts still more attention, so that whether that system is properly designed has been questioned again and again in the legislative history of the

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41 279 U.S. 644 (1929).

42 Id., at 650.

43 Section 337 of the Immigration and Nationality Act (8 U.S.C.A. § 1448) provides following types of oaths which are required for naturalization.

(1) to support the Constitution of the United States;
(2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the applicant was before a subject or citizen;
(3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic;
(4) to bear true faith and allegiance to the same; and
(5) (a) to bear arms on behalf of the United States when required by the law, or
(b) to perform noncombatant service in the Armed Forces of the United States when required by the law, or
(c) to perform work of national importance under civilian direction when required by the law.

immigration and nationality system of the United States.

Also in this process, the appropriateness of the requirements provided by Article 2, Section 1, Clause 5 of the Constitution has been questioned from the viewpoint of the equality between natural born and naturalized citizens, so that many constitutional amendment proposals have been presented.

Section 4 Modern Nation and Citizenship

Subsection 1 Significance of Efforts by the United States

As presented in the Chapter 1 of this article, one of the most important issues concerning the concept "National" or "Citizenship" is how to determine who should be the nationals or citizens. Regarding this problem, this article has considered the historical development of the legal system of the United States concerning citizenship up to the last chapter, and showed that the people of the United States have been trying to answer this problem with a view to taking care of human dignity and human rights security of each individual person at the same time caring of the independence and unity of the nation.

Considering the fact that the United States of America was originally constructed through the revolution for independence from Great Britain, as could be seen from the Declaration of Independence, in order to protect the dignity of individuals and the liberty and rights of human beings, it is natural that the United States confronted the problem in such a way as described above. It was in order to acquire and secure the dignity of individuals and the liberty and fundamental rights of human beings that the United States of America founded itself. The nation was founded by the decision of the members, who recognized themselves and one another as citizens of the United States by their own will. There was a strong will to seek the security of the dignity of individuals as well as a flat rejection to be given an identity, whether political or natural, from outside. This reflects a strong desire for determining their identity by themselves.

The attempt to build a modern nation, similar to other many human activities qualified as "modern", which have occurred in the stream of history, is an activity of human beings to confront the historical, traditional, or natural conditions which had restrained past human activities as irresistible obstacles. Viewing from this standpoint, the historical course which the United State as a modern nation has followed would look natural.

It is not sure whether all countries in the world must confront a problem in a similar way what the United States has experienced, namely, the problem that a nation must determine by itself what standard is appropriate for deciding who should be the member of the nation, instead of applying any self-evident criterion to choose its citizens. However, as the interdependence in the international society becomes deeper and its meaning becomes graver and as the international movement of human beings expands more and more, then the number of the countries and nations that are forced to confront the similar problem will increase in the future.

Seeing from another viewpoint, the problem of the change of the members of the community could be understood as a problem to be solved not by applying a certain rule to decide who is a member of the community, but by determining who should be recognized as a member of the community. Taking this problem in this way, almost every country would be recognized as confronting since the process is turned from the procedure applying a certain standard or rule for deciding the member to the procedure to decide the member of a certain nation.

Thinking in this way would make every nation recognize whether they have ever seriously considered the problem how a group "Nation" would be constituted from. When people really confront the problem and earnestly think about the solution, the efforts having been made by the United States, in which the dignity of individuals and the security of the liberty and rights have been highly evaluated, will be highly appreciated and useful for all of nations.

Subsection 2 Nation as a Group of Human Beings and its Relation to the Members

A nation is a group which has been intentionally formed by human beings. In this meaning, it is different from a gemeinshaft such as a family, which has been in principle spontaneously generated. That is especially applicable to a modern state, for which the social contract theory has been thought as the construction principle, and in which a nation is explained to be formed through the agreement among individuals. Considering the foundation of this notion, it would be realized that there is no reason why a state should be constructed only with persons who belong to the same group of race, ethnicity or a group of people with whom we can communicate each other in the same language. Theoretically and in practice, there is and could be a case to construct a nation among persons belonging to a different race or different ethnicity or persons using different languages with whom people have a difficulty to communicate. When a practical cost to manage such a nation exceeded the merit to form a nation, to constitute such a nation would be judged impracticable and inappropriate. As being seen from the discussion on civil rights in Congress of the United States, which was described above, what should be done here is to see the balance realistically between the need to work out the task and the cost to do it, and the merit to do it against.

An existing modern state, including the United States, is constructed and formed and is existing for solving real and concrete problems. A modern state is never the one crystalized based on pure scholarly conceptualized notions, and its establishment and continuation are neither self-evident nor self-sufficient. It is unreasonable that, neglecting the point mentioned above, one takes an establishment of a modern state as self-evident, or that, giving up considering various possible types of a state, one adheres to one certain type of state as for granted.

In addition to that, we should remember that human beings change all the time, along with which the needs of them change. The form of a state should be changed along with the change of human beings. People would not think it appropriate for human beings to be forced being suitable for a certain form of a state.

In considering the problem who should enjoy citizenship, people should pay enough attention to the points described above. As being seen from the history of citizenship of the United States described above, with whom one would be to construct a modern nation is not a matter already established from the beginning. The United States obtained the independence from Great Britain through the Revolution, then, accepted emancipated persons as citizens in the reconstruction period, and recognized women as a structural element of the United States through giving the right of suffrage to women in the early time of the twentieth century.

Seeing from frequent amendments of the immigration acts and other acts, whether such endeavors of the United States have succeeded or failed could not be judged easily. In addition, even after individuals had become citizens, there have occurred many and various troubles concerning citizenship or citizens such as confiscation of citizenship or discrimination among citizens[44]. The history concerning citizenship of the United States of America shows that, even if a nation autonomously decides who should be its citizens, it does not automatically lead to the protection of the dignity of individuals. However, there are many things to be learned for us and to be taken into consideration from the circumstances of the United States where they continue, or rather, have been forced to continue to have awareness of the problem regarding who should be the citizens.

Subsection 3 Determination of the Range of Citizens and History

The judgement of the U.S. v. Wong Kim Ark case, which is still considered as a leading case even at present, interpreted the Fourteenth Amendment of the Constitution in accordance with the Common Law. Considering the role of the Supreme Court in the governmental system, it would be doubtful that there were other alternatives the

44 In relation to this issue, there is a historical fact that, during the World War II in the first half of the twentieth century, Japanese-Americans who had citizenship of the United States were concentrated into camps and forced to give up citizenship of the United States. Cf. ex. Kunal M. Parker, Making Foreigners; Immigration and Citizenship Law in America 1600−2000, Chap. 6 (Cambridge University Press 2015).

Supreme Court could choose. But such a way of interpretation as being in accordance with the Common Law seems to have caused the problem of sexual discrimination, as in the Minor v. Happersett case.

Above all, as being seen from the Declaration of Independence of the United States, a deep-rooted discord with Great Britain was one of the historically important factors promoting the founding of the United States. A state as well as individuals who constitute it cannot be completely free from the historical conditions surrounding it. However, at the same time, as being seen again from the Declaration of Independence of the United States, a state as well as individuals who constitute it sometimes resist the historical conditions surrounding it.

At the time of founding of the United States, they thought that citizens of the United States should be white persons and, in fact, essentially only male white persons were thought to be the members of the United States especially in relation to politics. Though the Constitution of the United States did not explicitly provide so, the slavery system was permitted in the United States. However, after that, through the reconstruction period after the Civil War, former slaves were emancipated and incorporated into citizens together with other persons by the definition of citizen in the Fourteenth Amendment of the Constitution. More later, by further amendments of related acts, a racial criterion for naturalization was abolished and the change of citizenship of a woman was made connected with the individual will of the woman.

Such a series of movements shows that what has been fundamentally common in the tide of history regardless of various affections from each condition of each epoch would be the fact that human beings or individuals always insist and seek their own dignities through various ways and measures beyond the generations, so that the institute of system of a nation may be also reformed. Concretely speaking, what could be read from the history of citizenship of the United States is that, though a nation could draw up and decide the policies to maintain itself in confronting each historical difficulties, for a modern nation, which is established above all on behalf of realization of the dignity of individuals, it would erode its own foundation that a nation neglects the dignity of individuals in order to maintain itself, so that, if such is the case, the nation cannot avoid being reformed in the end. Further, as being seen again from the history of citizenship of the United States, a decision based only on the conditions peculiar to that time would be, being involved into the flow of history, undermined by the tide of times and discarded in the end, such as the judgement of the Dred Scott v. Sandford case.

The standpoint to consider the members of a nation from the viewpoint of respect of the dignity of individuals, which keeps its value confronting the dynamism of history, would be an important one in considering the legal system of a state concerning the members. When one considers such a legal system, it would be as an important viewpoint as one standing on the historical course of the nation, and should not be neglected[45,46].

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45 In relation with this issue, though it would be a matter of course, that even matters referred to as the historical facts are, in reality, the products of somewhat artificially made or distorted recognition of human on real world and not the products of pure nature. This can be said for other things which are sometimes enumerated together with history, namely, tradition or political, social or economical conditions. Even matters standing outside of legal system are not necessarily thought to be beyond the reach of human beings in all the time. Rather, it is probable that such matters are intentionally made or modified before entering into the public recognition.

46 In relation to this issue, following statements of Thomas Jefferson in letters addressed to J. W. Eppes in 1813, to William Plumer in 1816 and to Thomas Earle in 1823.

(To J. W. Eppes)

"The earth belongs to the living, not to the dead. The will and the power of man expire with his life, by nature's law. Some societies give it an artificial continuance, for the encouragement of industry; some refuse it, as our aboriginal neighbors, whom we call barbarians. The generations of men may be considered as bodies or corporations. Each generation has the usufruct of the earth during the period of its continuance. When it ceases to exist, the usufruct passes on to the succeeding generation, free and unincumbered, and so on, successively, from one generation to another forever."

"We may consider each generation as a distinct nation, with a right, by the will of its majority, to bind themselves, but none to bind the succeeding generation, more than the inhabitants of another country. Or the case may be likened to the ordinary one of a tenant for life, who may hypothecate the land for his debts, during the continuance of his usufruct; but at his death, the reversioner (who is also for life only) receives it exonerated from all burthen."

"The period of a generation, or the term of its life, is determined by the laws of mortality, which, varying a little only in different

Subsection 4 Purpose of Establishing A Modern Nation and Nationality Law

Nationality is the most general legal bond which ties a person to a certain nation, and a person belongs to and becomes a member of a state through the nationality. Nationality of an individual means the qualification for the individual to be a member of a nation. A nation distinguishes its members from the other individuals and treats them differently in various aspects[47].

A nation selects and distinguishes individual or human beings as a part of the execution of its governmental power. In the present situation where there is neither world-nation nor world government but only an international society, it is necessary in reality for a nation to fix its limit of member individuals so as to circumscribe the human scope of the execution of the governmental power. In doing so, the nation must consider the rightness or legitimacy of the founding as well as historical, cultural, political, economic, or social conditions. The legal system concerning citizenship of the United States has developed by taking those factors in each period into consideration, and it still continues developing. And, as mentioned above, it has been the balance of such various factors and the respect of the dignity, liberty or rights of individuals that has been considered in every period. In other words, the historical development of the legal system of citizenship of the United States has been an adjustment process between the needs on the side of the execution of the governmental power of the nation and what individuals or human beings desire.

Under the condition that there is no world-state or world-government and many individual human beings live belonging to some state in the international society, it would be practically difficult to prohibit or limit the power of every state from legislating nationality law for the execution of its governmental power. However, there are many possible ways to structure a nationality law and the need for governmental actions of the nation are never all that should be considered in planning and designing a nationality law. Seeing from the history of citizenship of the United States, since individual human beings construct a modern state and become its citizens for the purpose not of being ruled by it but of protecting the dignity and liberty and rights of the individuals, what should first be considered for planning the system of nationality law would be what design of the system would be suitable best for protecting the dignity and liberty and rights of individual human beings. In this regard, awareness that the design principle of Nationality law should be changed from "Nationality Law for Government" to "Nationality Law for Respecting the Dignity, Liberty and Rights of Individuals" should be widely shared in the present situation where many countries

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climates, offer a general average, to be found by observation. I turn, for instance, to Buffon's tables, of twenty-three thousand nine hundred and ninety-four deaths, and the ages at which they happened, and I find that of the numbers of all ages living at one moment, half will be dead in twenty-four years and eight months. But (leaving out minors, who have not the power of self-government) of the adults (of twenty-one years of age) living at one moment, a majority of whom act for the society, one half will be dead in eighteen years and eight months. At nineteen years then from the date of a contract, the majority of the contractors are dead, and their contract with them."

(To William Plumer)

"The idea that institutions established for the use of the nation cannot be touched nor modified, even to make them answer their end, because of rights gratuitously supposed in those employed to manage them in trust for the public, may perhaps be a salutary provision against the abuses of a monarch, but is most absurd against the nation itself. Yet our lawyers and priests generally inculcate this doctrine, and suppose that preceding generations held the earth more freely than we do; had a right to impose laws on us, unalterable by ourselves, and that we, in like manner, can make laws and impose burdens on future generations, which they will have no right to alter; in fine that the earth belongs to the dead, and not the living."

(To Thomas Earle)

"That our Creator made the earth or the use of the living and not of the dead; that those who exist not can have no use nor right in it, no authority or power over it; that one generation of men cannot foreclose or burden its use to another, which comes to it in its own right and by the same divine beneficence; that a preceding generation cannot bind a succeeding one by its laws or contracts; these deriving their obligation from the will of the existing majority, and that being removed by death, another comes in its place with a will equally free to make its own laws and contracts, - these are axioms so self-evident that no explanation can make them plainer".

See Saul K. Padover ed., Thomas Jefferson on Democracy(1946(1st pub.).

According to the same logic, Jefferson stated in a letter addressed to Madison in 1789 that one generation should not have a right to borrow money on future generation's account.

47 Hidefumi Egawa et al, Nationality Law 3rd edition, p. 3 (Yuhikaku 1997) (Written in Japanese).

are developing as modern states.

Section 5 Modern State and Civil Rights and Duties

Subsection 1 Rights of Citizens of the United States

Regarding the rights of citizens of the United States, the observations of this article will be summarized as follows.

For the United States at the founding time, "the power" meant Great Britain which had brought "a long train of abuses and usurpations" to America[48]; the power was just what they wanted to escape from, and such a situation made it unavoidable for America to found a nation. Then, Declaration of Independence was adopted.

However, to form a nation, the United States of America, meant to run the risk of forming in America a power holder which might become the second Great Britain. So, they must prevent the newly established organization from transforming into the second Great Britain. For that reason, first of all, a governmental system which takes the retention of the nation as the most important value should not be adopted. So, the natural law theory was advocated as the ground of the liberty and rights of individuals. The fact that individuals who had their natural rights established the United States in order to make the security of their natural rights more perfect should be made clear first of all for the United States, so that the protection of the dignity of individuals and the security of the liberty and rights of them were indispensable for that.

Such a way of thinking has been polished as time passed by and during the process what they should confront has been gradually made clear. At the time of revolution for independence, what they really confronted was a nation, Great Britain. However, the true problem then was not the existence itself of Great Britain or the fact that residents in the United States were oppressed by it. The true problem was the situation in which they were not guaranteed the liberty or rights which they thought to be able to legitimately hold. It was such a situation that the United States should have confronted and overcome. From such an understanding of the situation, it was natural that they could not help realizing the problem of black slaves who were living under the oppression by the State within the United States. Then, they realized that it was necessary to guarantee the liberty and rights of black people who were put in an inferior position of the society on account of the natural, law-external condition, namely, race. It caused the Civil War.

If the Civil War had led to the establishment of two different governments, one for the emancipated people, another for the pre-existing citizens, then the situation surrounding the problem would have been quite different. However, in fact, the United States chose the reconstruction of one nation, the United States of America, into which the former ordinary citizens and emancipated persons were united as citizens of the United States. Then, as the natural course of the matters, the United States realized that the liberty and rights of the newly incorporated citizens should be also protected against the infringement by the government they were constituting for themselves, as well as those of pre-existing citizens.

This movement was only for acquisition and security of minimum necessary liberty and rights of emancipated persons for existing as citizens in the society. But later, as being seen in the establishment of the Fifteenth Amendment, the movement began to aim at also the rights for controlling social conditions concerning construction or reformation of the nation.

Such a movement, later, involved women. Women were not allowed even to independently hold a property in the early years. But later, such property rights were guaranteed for women, and, through the Nineteenth Amendment of the Constitution, women were guaranteed the right to vote, so that women could participate in the determination of the structure of the nation.

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48 In connection with that point, the Declaration of Independence includes following sentence: "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States." See, for example, https://www.archives.gov/founding-docs/declaration-transcript. In Japanese, Shakuhachi Takagi et al, Collection of Declarations of Human Rights, p. 115 (Iwanami-shoten 1977).

Subsection 2 Duties of Citizens of the United States

Regarding the duties of citizens of the United States, the observations of this article could be summarized like following[49].

To begin with, since the United States of America has been a nation adopting democratic system, it needed look for clerks to serve itself mainly from its citizens in order to construct and maintain the organization.

Concretely speaking, as being seen, for example, from the discussions in the legislation process of the Thirteenth and Nineteenth Amendments of the Constitution, they considered a person's will of active participation in defending the United States in emergency as an important factor for recognizing the person as a citizen. It would be this way of thinking that has been expressed in the requirement of the oath readily to bear arms in defense of the United States in naturalization. However, such an attitude caused a problem what to do when the thought of a person who petitioned to be naturalized was opposed to such a way of thinking[50].

This article considered the relation between being citizens and duties of citizens, in the cases of the duty to participate in a jury and the duty of military service. Concerning those duties, the discussions in the United States are not sufficient and there have been left some problems on that, as mentioned above.

How to understand the duties of citizens would have an important meaning when it is denied, as it is in the United States, that there are a priori criteria for being citizen of the United States, and when the members are to be determined by the volition of the nation itself. So, the problem, what exact contents or what meanings the duties of citizens should have would be so important that we should continue to consider it also in the future.

Subsection 3 Modern State and Civil Rights

Seeing from the historical transition of the rights and duties of citizens of the United States, the problems concerning the rights and duties of citizens can be said to occur in relation to the political power under which those citizens are.

First, as for the rights of citizens, the reason why citizens need to have certain rights as citizens is because citizens are at some different status from other persons in relation to the state to which such citizens belong. Concretely speaking, since a citizen may possibly be more exposed to the infringement of the rights by a nation than a non-citizen person may, citizens should have the rights as citizens in order to be protected against such possible infringements.

As the Declaration of Independence supposed, human beings are originally not allowed to infringe rights of other persons, and that condition should not change in principle even when such human beings constitute a group so as to build an organizational system, a nation. Even when a nation is established, such a nation should not be allowed to infringe the

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49 Followings are mentioned regarding liabilities or obligations of U.S. citizenship in literatures.

- U.S. citizens are liable for registration and service under the selective service laws, irrespective of their place of residence
- U.S. citizens may be subjected to several kind of taxes irrespective where residing or sojourning in the U.S. or abroad
- The U.S. citizen may be subject to liabilities under the laws of the United States when the statute is clearly intended to be effective outside the United States
- Special statutory provisions make U.S. citizens abroad amenable to subpoenas issued by courts in the United States and make them liable to punishment for contempt for failure to comply with such subpoenas
- Citizens owe an absolute and permanent allegiance to the government in the U.S.. Treason against the United States may be committed only by a person owing allegiance to the United States and may be committed only by levying war against the United States or adhering to its enemies, giving them aid and comfort.

However, it is also mentioned that these liabilities generally are applicable to permanent resident aliens to the same extent as applicable to citizens.

Cf., Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, & Ronald Y. Wada, Immigration Law & Procedure, §91.5[2] (LexisNexis 2020); Dizon, Shane and Dahania, Pooja, Immigration Law Service 2d, §14.3 and §14.4(Thomson Reuters 2013); Richard D. Steel, Steel on Immigration Law(2018-2019 ed.), §15:24(Thomson Reuters 2018); Daniel Levy and et al., U.S. Citizenship and Naturalization Handbook(2018-2019 ed.), §1:7(Thomson Reuters 2018).

50 On this point, See the case, United States v. Schwimmer (279 U.S. 644 (1929)).

legitimate rights or interests of the persons who are other ones than the state. Therefore, a modern state is not allowed in principle to infringe the dignity of individuals, whether such individuals are member citizens of the nation or not[51].

On the other hand, practically, citizens need to have some effective measures to secure their own rights or interests since they have in their daily lives contact with the state they have constituted. From such a point of view, citizens need civil rights[52].

Subsection 4 Modern State and Civil Duties

Regarding the civil duties, as it is shown in a series of judgements on the participation of women in a jury, citizens of a democratic state, unlike those of non-democratic one, are supposed to actively participate in the operation of the state, so that such citizens should owe certain duties.

In such a case, in what perspective citizens fulfill the roles would be an important problem. What is no less important than that is what duties should be considered as the civil duties of citizens.

As for the problem of the relation between the roles or duties of citizens and the attributes or their diversity of the citizens, since the roles of citizens are varied, the characteristic of each duty should be considered in its assignment. At the same time, generally speaking, the system "citizen" itself should be formed by taking it into consideration that for the first place, the attributes of individual human beings are really also varied.

Subsection 5 Modern State and Military Service

As for the problem, what duties should be considered as civil ones, the duty of military service, which we have thought about as a duty of citizens in this article, should be carefully considered. If to actively take part in an attack against any foreign country were adopted in a model legal system for nationality as an important factor to be considered in recognizing someone to be a citizen of a nation, it would allow such nations as approving of the attack against other countries to exist in all over the world.

Under the present condition that there are, in fact, oppositions of interests among nations all over the world, which have sometimes caused international armed conflicts, it may not be denied for someone to think that the purpose of

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51 However, in the case of the United States, it was statutes or administrative actions of several States that might infringe the dignity and rights as individuals or human beings of freed men who were emancipated from slavery system through the Thirteenth Amendment of the Constitution, and, in order to eliminate that, freed men was made citizens of the United States, and then there occurred a movement aiming at guaranteeing them also the right to vote from the view point of the substantial security of their rights.

52 Concretely what rights are civil rights or natural rights is a problem. In relation to this problem, from the discussions in the legislative history, namely, the establishments of the Thirteenth Amendment of the Constitution, Civil Rights Act of 1866 and the Fourteenth Amendment and then the Fifteenth Amendment of the Constitution, it could be seen the fact that an individual becomes a citizen in order to protect the natural rights, and the natural rights are secured as the rights of citizens for citizens. On the other hand, from a series of enactments of Civil Rights Act in the reconstructing period, or later judgements of the Supreme Court of the United States concerning the privileges or immunities of citizens, due process or equal protection of the laws provided in the Fourteenth Amendment, it could be seen that the security of, not the rights of citizens, but rather the right of individuals was aimed at. Taking those historical facts into consideration, it could be pointed out that even a right which was recognized and guaranteed at first as a right based on the status of citizen may become recognized and guaranteed later as a right of an individual.

In addition, concerning especially the guarantee of the right of suffrage, in the discussions during establishment process of the Fifteenth or Nineteenth Amendment of the Constitution, there was presented a doubt about the fact that individuals were not guaranteed the right to vote in the capacity of an individual, or an insistence that individuals residing in the United States should be guaranteed the right to vote. Taking such historical facts into consideration, it could be said that an individual should be guaranteed the right of suffrage to a nation if the individual may be affected by the action of the nation. If one think so, the right of suffrage should be thought to be guaranteed being based on the status not of the citizen of the nation but of the individual who may be affected by the action of the nation.

Based on those above mentioned, a temporary conclusion on this problem could be as follows. The concrete content of civil rights would change depending on historical, social, political or other factors. That is the case also for the political rights like the right to vote. Seeing from the historical development considered in this article, it could be concluded that the catalog of civil rights would be generated from a balancing thought between the factors described above and the view point of the protection of the dignity, liberty or rights of individuals. This point will be continued to think about.

establishing a nation is to "provide for the common defense", and that it is realistic for a nation to constitute a legal system for its defense forces. However, if a modern nation was in its origin formed and organized as an idealistic sublation of "the war of all against all", and if such a modern state was not intended only to replace "the war of all individuals against all individuals" with "the war of all states against all states", to build a system which presupposes the use of forces as a measure for resolving international conflicts would be unsuitable and inappropriate for the public principle or the system of a modern nation. Moreover, seeing from the aspect of the whole world, apart from some special conditions of concrete nations, it would not be appropriate that, on the pretext of the defense of the state, the intention to actively participate in an attack against the other countries is taken as the requirement for becoming a citizen of the state. Such a rule would also contradict the efforts to make wars illegal, which humankinds have worked on since the twentieth century[53].

From the second half of the twentieth century to the beginning of the twenty first century, the modern democratic state in Western Europe has been considered as a model for constructing a nation system in everywhere in the world. Whether the factor mentioned above should be considered as a requirement for citizenship of such a modern democratic nation would be an important issue in considering the world order presupposing the modern nation system.

Subsection 6 Eligibility to Public Offices of Modern Nation

Taking the United States as an example, it could be said that a modern nation would be organized in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to the people themselves and their posterity. It is never supposed to be such a community with only a common destiny as its purpose with only unclear origin.

It means that individuals who constitute such an organization would belong to the organization according to a standard clearly provided by laws or other rules. Persons who operate such an organization would be chosen and perform the tasks under the conditions or for the purposes prescribed by laws or other rules. A member of a modern state does not belong to the nation without knowing anything on its origin or grounds, and a management person of a modern nation neither assumes the managing post nor manage the state without clear knowledge of the origin or grounds.

Such the understanding as described above is the one which is acknowledged when considering the discussions about the legal system concerning acquisition of citizenship of the United States and the history of development of the system, and, further, considering the history around the Article 2, Section 1, Clause 5 of the Constitution. Such an artificial characteristic of a modern state is worth being noted every time in thinking about how to construct a modern state.

Moreover, taking it into consideration that the constitutional amendment proposals concerning the phrase "a natural born citizen" in Article 2, Section 1, Clause 5 of the Constitution were presented based on the background of the existence of the potential strong candidate for President at each time, the real motivations of those proposals were not to pursue any legal rightness but to accomplish some particular political or social interests. In relation to this point, it should be considered that the appropriateness of the legal theory motivated by some law-external interests should be reviewed.

In relation to this issue, it should be noted that while political or social situations may change any time, a law, especially a constitution should provide stability for getting over changing situations, as that it is the proper function of a law or constitution. For example, suppose that under a particular political-social condition, a certain potential candidate for President is drawing public attention, so that an amendment to the constitution is taken up for discussion. There may be, of course, an oppositional political-social power to the candidate, too. Under such a condition, when the constitution is amended only aiming at making that candidate President, even though it is done through certain democratic and legitimate process for amending the constitution, the appropriateness of such an amendment to the constitution might be questioned by the oppositional power, whose strength may later increase

53 On this issue, it should be recalled that, in the General Treaty for Renunciation of War as an Instrument of National Policy, the so-called Kellog-Brian Pact signed in 1928, major states at that time promised the renunciation of war, and that the United Nations was established after World War II.

because of the change of the political-social situation and, based on this change, there may also be presented again an amendment proposal to the constitution. If it is supposed that, to keep back the restless waves of the change of political-social situation so as to avoid political disorder caused by too frequent changes of the system is also a task of the constitution, then such a way of designing the constitution could not be said to be appropriate as the arguments about amendments to the constitution will occur whenever the political-social situation changes. Rather, the constitution should be designed, at least ideally, never to need any large scale change such as amending the fundamental structure even when confronting political-social changes in the nation. In order to accomplish that, the design of the constitution should be intended to be politically and socially neutral. Also in amending the constitution, by taking the reality of political society and various relationships among various political-social powers into consideration as much as possible, the amendment should be aimed at establishing so stable provisions that it could overcome any unexpected changes of the political-social situation. It should never be a rush adoption of a temporary political-social tendency at the time. For that purpose, as being seen from the consideration on the historical development concerning citizenship and civil rights of the United States, which is analyzed in this article, to consider whether the constitution should be amended from the viewpoint of the respect for the dignity, liberty and rights of individuals would be the most effective way of thinking to keep the design of a constitution politically and socially neutral. Such a viewpoint as mentioned above would be also suitable for designing or amending the constitution concerning the eligibility requirements for the significant offices.

In relation with the matter above, if one recognizes that a modern state is artificially formed for the purpose of respecting the dignity of individuals and the security of the liberty and rights of individuals, and that it is a subject which should discharge the tasks taking the purpose of its formation as mentioned above into account, then the next problem would be how to collect capable persons and to assign them to appropriate posts according to the results of the consideration on the purpose of the formation. More concretely speaking, as for the eligibility to significant offices, it would be an important option to think about the requirements for eligibility to public offices from the viewpoint, persons with what ability should be appointed to operate a modern nation which purpose is to respect the dignity and to secure the liberty and rights of individual human beings under the situation that the range and quantity of international movements of individuals are expanding along with the progress of globalization in the world.

Section 6 Development of Modern State and Change of Citizen

Subsection 1 Territoriality of State · Relationship Among Individuals

In a modern nation and society, the meaning of the territoriality of a state and the social relationship constructed among individuals are changing. For example, between a neighbor whom you never meet or talk with and a friend residing in a foreign country with whom you often communicate through the internet or other various computer application services, who do you know better? If taking such an example into account, the importance of citizenship as a belonging to a territorial state or citizenship acquired by birth would be lessened compared with that in the past[54].

On the other hand, in the real world, a nation state still exists as a territory state, and each state establishes its

54 Concerning this issue, a paper points out, in the United States, while there is a case that some natural born citizens of the United States participated in the activity of Taliban in spite that they know the group is hostile toward the United States, there are many naturalized citizens who were commended for contributing to the United States, and their allegiance to the United States is never doubted. Sarah Helene Duggin & Mary Beth Collins, Natural Born in the U.S.A.: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It, 85 Boston Univ. L. Rev. 53, 136 (2005). Concerning the point, in relation to so-called September 11 attacks, a series of four coordinated terrorist attacks which happened on September 11, 2001, a paper insisted that a provision which conferred citizenship of the United States by birth to a child born in the United States whose parents temporarily stay at the United States should be amended. John C. Eastman, Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11, 12 Tex. Rev. L. & Pol. 167 (2008). On the same issue, another paper insists that an argument from the viewpoint of rule of law based on the Constitution of the United States is necessary. Peter H. Schuck, The Meaning of American Citizenship in a Post-9/11 World, 75 Fordham L. Rev. 2531 (2007).

independence from others and exercise the sovereign power within its territory. Moreover, it exercises the jurisdictional power over the individuals who have citizenship or nationality of the nation. The most powerful subject which exercises the power to keep order in societies including the international society is still a nation, which still has such power.

How to design a system for a modern nation so as to realize "the greatest happiness of the greatest number" while keeping consistency in the existence of a modern nation as a territorial one under the situation where the fictionality of a territorial society are almost revealed, it would be one of peculiarly modern and important problems which a modern nation or, rather, any effort to design a system of modern nation must challenge. A modern nation required modernized persons as the citizens and was constructed on the basis of those persons. Similarly, a nation which will be constructed in the future would require suitable persons for it in order to be adoptable to the situation mentioned above. What a future theory of a system concerning citizen beyond a modern citizen or citizenship theory would be required to do would be to construct the concept of "citizen" as individuals according to such a new image of the suitable persons as mentioned above and to form a system concerning citizenship on the basis of this new concept of "citizen"[55].

Subsection 2 Liberty and Rights of Individuals and Design of Nation System

In considering such future "citizen" concept as mentioned above and designing a citizenship system based on it, aiming at securing and guaranteeing the dignity, liberty and rights of individuals should be required, as being seen in the history of citizenship and civil rights of the United States considered in this article. Considering the history of citizenship and civil rights of the United States as an example, it could be said that, when some better way to realize the dignity, liberty and rights of individuals is found, there is no reason to hesitate to reform the current system of a nation. Even when one does not pursue any better way to secure the dignity, liberty and rights of individuals, the system of the nation would be, in the end, reformed by a movement grounded on natural rights of individual human beings[56].

In relation to the issue, a cultural, historical background shared among nationals or inhabitants is sometimes mentioned as the foundation of a nation. It is true that it would be difficult to deny that the existence of cultural-historical background common to the nationals may possibly contribute to the simplification of the state system and the efficiency of the administration of such a nation. However, being seen from the history of citizenship and civil rights of the United States considered in this article, each opinion insisting on the importance of protecting the existing system of a nation on the basis of the cultural-historical background shared by the nationals has been overcome by an opinion based on the real and concrete needs or on the sense of rightness recognized in each period.

Taking such cases into consideration, it would not be appropriate, viewing from the cause of the modern nation that is said to be constructed in order to secure the dignity, liberty and rights of individuals, to rationalize nation-side circumstances, to justify the failures or inefficiency of the system or administration of a nation, or to plan a system which will require additional burdens on the nationals without reconsidering the system or the way of administration of the nation, on the basis of the common cultural-historical background, when designing a system of a nation suitable for the present situation mentioned above.

If considering a more concrete and actual situation, it is already the reality that many peoples in the world are

55 In relation to this problem, in a modern nation and society where the dissolution of families are going on, it should be reconsidered whether it is appropriate to suppose that the existence of family relationship would promote the mutual understanding between persons with a blood relationship and, in the end, the mutual understanding between an individual and the nation as well. However, despite such a reality, it is also still a reality that there are many nations which consist of citizens who have become its citizens according to the nationality system based on the jus sanguinis principle, and which are exercising their sovereignty in the world.

Taking the facts described above into consideration, it could be said that a state which citizens are determined according to the jus sanguinis principle has also similar problems to those of a state which citizens are determined according to the jus soli principle.

56 In relation with the issue, though it is generally accepted that a nation imposes certain duties on individuals, the less and lighter such duties are, the higher the system design of the nation would be evaluated, and if certain reform of the institution of a nation will improve the welfare of individuals without increasing the burdens on the individuals in the nation, what one should do is to reform the institution of the nation, and not to require people to adjust the duties of the individuals there.

sharing common information and experiences and constructing common cultural-historical background by virtue of the progress of globalization and the expansion beyond the national borders of an information society through world-wide digital communication networks like such as the Internet. In this regard, what should be challenged in reality would be the problem how to amend or improve the way of design of the system of a nation concerning citizenship in view of such actual situation as referred to above[57].

57 However, as for the way of consideration on such an issue, it should be noted that the reverse side of the situation, that is, how to think about the problem if some experiences, or cultural or historical matters are not shared with some part of people. For example, let's pick up a question mentioned above, namely, a neighbor whom you never meet or talk with and a friend residing in a foreign country with whom you often communicate through internet or other various computer application services, who do you know better? The problem here is to what degree one could image to construct and provide a legal system with "a neighbor whom you never meet or talk with". One should realize that the problem of such type already occurs in the modern society where fragmentation or segmentation is progressing in very complicated way.

Epilogue

1. Development Process of Citizen or Citizenship of the United States and Dignity of Individuals

Reviewing the result of the study having been described in this article up to here, I get a strong impression that the development of the citizenship or civil rights of the United States of America developed definitive influences in relation to the requirements for the consistency with natural rights theory. What is fundamentally common throughout the history of citizenship and civil rights of the United States is a strong belief that a human being has the dignity as an individual by nature and that a nation exists for the purpose of its realization, though it has been insufficiently achieved at each stage of the historical development because of various restrictions. The belief has been so continuously held that even if it sometimes retreats, pushed back by trends of certain ages, it has been repeatedly resurrected and gradually brought to realization.

Considering the situation that there still occur almost every day violations of human rights or discrimination problems in various places even at the present time, we could not say that the United States is a perfect and complete modern nation. However, the situation would be the same for any one of about two hundred countries in the world. In such a present situation, it might still depend on the choice of citizens in each era and place whether it is better to have a ruler or representative of a nation who insists the nation is perfect and complete and demands the citizens to be satisfied with the present situation as it is, or to continuously try to improve the present situation as people have done in the United States. However, we can see from the history of the United States that individual human beings have patiently insisted on their natural rights by various means beyond the ages. The final impression which I got from this study is that, taking such a stream of history into consideration, there is in reality no other choice than the latter one in the long run.

Furthermore, I got also an impression that it is not appropriate for a nation to insist on the protection and continuation of the nation itself by making light of the dignity of individuals. For, since the foundation of the existence of a nation is in the realization of the dignity of individuals, a nation which makes light of the dignity of individuals would erode its own foundation by itself, so that it would be unavoidable for such a nation to be reformed. That is what the history of citizenship and civil rights of the United States of America analyzed in this article have shown.

Because of the necessity for the establishment of the United States, the founding fathers at the time of the establishment of the Constitution of the United States compromised with the existence of slavery system, and the provisions adopted in the original Constitution took forms accepting the continuation of slavery. Under the concrete conditions at the time, it might have been the most practical and realistic choice. However, after that, the Civil War occurred, so that the reform of the Constitution and the nation constructed on it was required. After that, the movement to realize the dignity, liberty, and rights of individuals led to the movement to secure citizenship and civil rights of women. Taking such an history and experience of the United States concerning citizenship and civil rights into account, the countries which are willing to construct itself after the modern nation model should be aware of in what way they should think of and according to what principle they should develop their legal system or government regarding the membership of each country and the rights and duties which the members have in common.

2. Individual and Citizen

At the founding time of the United States, though it was not enough due to various reasons, in relation to the Constitution, being a “citizen” meant two things, that is, to be not an alien and to be one of all equal Americans. The word “citizen” was used in order to denote those “facts” or to display a “situation” implied by those facts.

Such “facts” or a “situation” as referred to above was only a fiction in the meaning that the original Constitution of the United States of America allowed a slavery system and the existence of the slaves. However, in the reconstruction period after the Civil War, the concepts, liberty and equality, which the word “citizen” was considered to embody, were to sway the course of real history. As the result, the slavery system was abolished and black people became individuals and, further, citizens. Such a movement led to the amendments to the Constitution, which, since then, prohibits any discrimination against black persons or women in the right to vote. That movement indicates, we could say, that an idea “citizen” changed the reality.

On the other hand, in the following era, while there occurred a movement to secure women’s civil rights including the right to vote, civil duties were to be imposed on women through the system such as jury service or military service. It was through the movement to extend the security of the liberty and rights of women by means of the concept “citizen” that women had gotten the measures to protect themselves against the discrimination in the right to vote. However, another movement which also occurred at the same time was that the duties of citizen were imposed on women, which could be considered as a movement that women were burdened duties in an organization of a nation and incorporated into it by means of the concept “citizen”[1].

Under the democratic system, a state could not exist unless individuals who constitute the nation accept a certain responsibility for it. In this meaning, individuals have to accept some civil duties. However, it would be questionable to think that at any time any civil duties are a priori or self-evident ones of a citizen since he or she is a “citizen”. The proper way of thought about civil duties would be to consider the necessity of such a duty every time in each concrete case before they would be burdened on citizens. The purpose for which an individual becomes a citizen in a democratic nation is for the individual to become freer so as to get more chances to pursue his/her own happiness than otherwise, and never to be labeled as a citizen so as to be imposed various duties on with neither understanding, accepting, nor knowing the contents or the legitimate reasons of the duties.

On the ground of being a citizen of a nation, an individual sometimes requires non-interference to a nation or certain protection from the nation. On the other hand, a nation, in turn, requires, based on the concept of “citizen”, an individual to owe certain duties or to do certain actions. In this meaning, we could say that the concept “citizen” is a bridging concept which joins each individual and a nation, so the concept of “citizen” is an instrumental concept and not a categorical or normative one.

The “citizen” concept joins a state and each individual so as to explain their mutual relationship, and, from the viewpoint of scientific study, such a way of understanding of the concept “citizen” would be appropriate and important. However, if one thinks that is only what one can learn from the history of citizenship and civil rights of the United States of America, it would be too trivializing of that long history. As anyone could see in that history, the people of the United States established the United States and have become its citizens “in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity”. They have never established the United States and become its citizens in order to enter under the yoke of it. I think that this is the most important matter which the history of citizenship and civil rights of the United States of America has shown. Viewing from this standpoint, the most notable thing in thinking about the concept of “citizen” or considering the meaning of being a citizen would be that it is in order for us to become free individuals that we have established a nation and become its citizens.

3. Artificiality or Operationality of Citizen Concept

As mentioned above, taking the history which this article has analyzed and examined into consideration, it

1 However, a paper points out that the participation in jury service was an index of the status of women as citizens. Gretchen Ritter, Jury services and women’s citizenship before and after the Nineteenth Amendment, 20 L. & Hist. Rev. 479, 498 (2002).

concludes that people in the United States have established the nation and become its citizens in order to become free individuals. It is self-evident that the legal concept "citizen" which was formed there is artificially created when we consider, for example, the fact that the concept is based on the Social Contract Theory. However, such an artificiality or operationality of the "citizen" concept is not always well recognized. Sometimes, the fact that the meaning or content of the concept was constructed and formed artificially with certain intention is forgotten, so that the concept is understood as if it had the objectively or externally already fixed meaning and content and, further, based on such understanding, some judgments or orders are sometimes issued.

However, "nation" or "citizen" are artificially created concepts and not ones to explain any phenomena which are beyond the operation by human beings. In fact, in the reconstruction period of the United States, the amendments to the Constitution reformed the pre-existing federal system of the United States of America, and the concept "citizen", which had been undefined in the original Constitution, was reinterpreted and explicitly defined in the provision of an amendment to the Constitution.

What I have described in this article could be interpreted from another angle as the process where the persons who constructed the United States recognized the artificiality and operationality of the "citizen" concept of the United States and utilized the concept for their purposes. If such a historical experience is not the United States proper phenomenon but showing a certain general practical relation between a modern nation and its citizens, we also need to recognize the artificiality and operationality of "citizen". And if so, it would be useful for us to share the knowledge on the historical facts, that is, how and according to what way of thinking the "citizens" of the United States, who had realized such artificiality and operationality, utilized the concept[2].

More concretely speaking, the concept "citizen" in the United States solved problems concerning slavery and worked as a fundamental concept to generate and establish the equality of individual human beings. On the other hand, in relation to women, the concept "citizen" worked as a basic concept for a nation to impose certain duties on women as individual human beings. In this regard, it can be said that the concept "citizen" has worked as having double meanings in the history.

In relation to the issue, as mentioned above, it would be difficult to deny, generally, the power of a nation to impose certain duties on its members. However, that the individual human beings who had become citizens of a nation think about and construct by themselves the content and meaning of the concept "citizen" through the consideration on the reason why the individuals become citizens of the state, and without being bound by the

2 In relation to this issue, as already mentioned above, the Supreme Court interpreted the Fourteenth Amendment of the Constitution, which adopted the jus soli principle concerning citizenship, based on the history of common law, in the United States v. Wong Kim Ark case.

The fact that such a dependency on the common law caused a problem was already pointed out above.

Concerning the adoption of the jus soli principle in the Constitution of the United States, we should note, while the current Immigration and Nationality Act confers citizenship of the United States according to the jus soli principle based on the Fourteenth Amendment, it also contains provisions which confers citizenship according to the jus sangunis principle, though there is found no opinion insisting that the latter provisions may violate the Fourteenth Amendment. That is, the United States adopted not necessarily only one principle, either jus soli or jus sanguinis, or rather, both principles are adopted by the United States. Though, of course, there may be some variety in how to combine the jus soli and jus sanguinis principles, many other countries are adopting such a combined principle.

Taking such a situation into account, the jus soli and the jus sanguinis are never mutually exclusive principles, and which principle a nation is adopting would not be a decisive factor in considering the human structure of the state. What is to be considered in thinking about the structure of a nation in relation to the human element is the balancing of the convenience or reasonability for the government of a nation and the security of the dignity, liberty and rights of individuals. The principles, just soli and jus sanguinis, would be properly understood as explanatory concepts to give legal technical legitimacy to the result of the balancing consideration.

In relation to above mentioned, cf., Daniel Levy and et al., U.S. Citizenship and Naturalization Handbook(2018–2019 ed.), §4:1(Thomson Reuters 2018); Stephen H. Legomsky and David B. Thronson, Immigration and Refugee Law(7th ed.), 1515(Foundation Pr., 2019); Charles Gordon, Stanley Mailman, Stephen Yale-Loehr, & Ronald Y. Wada, Immigration Law & Procedure, §91.2[1] [2] (LexisNexis 2020); Shane Dizon and Pooja Dadhania, Immigration Law Service 2d, §14.13 and §14.26(Thomson Reuters 2013).

“citizen” concept which the state had forced on the citizens, it is what has been done in the history of citizenship and civil rights of the United States of America. In this process, the United States has continuously pursued the realization of the proper human dignity, liberty, and rights of individuals. When we realize a fact that we belong to a certain nation, think about the meaning and try to operate or construct the system of the nation, it would have a great importance for us to share such the knowledge on the historical course concerning citizenship and civil rights of the United States. The knowledge on such historical experiences must be useful also for the construction and administration of a future state.

(End)

Cases

	Cases in the Federal Supreme Court	Case Number	Year
1	Shank v.Dupont	28 U.S.242	1830
2	Gassies v.Ballon	6 Pet.761	1832
3	Barron v.The Mayor and City Council of Baltimore	32 U.S.(7 Pet.)243	1833
4	Prigg v.The Commonwealth of Pennsylvania	41 U.S.539	1842
5	Dred Scott v.Sandford	60 U.S.(19 How.)393	1856
6	Crandall v.Nevada	73 U.S.35	1867
7	Kelly v. Owen	7 Wall.496	1868
8	Paul v.Virginia	75 U.S.(8 Wall.)168	1868
9	Ward v.The State of Maryland	79 U.S.(12 Wall) 418	1870
10	Bradwell v.Illinois	83 U.S.(16 Wall.)130	1872
11	Slaughter-House Cases	83 U.S.(16 Wall.) 36	1872
12	Bartemeyer v.Iowa	85 U.S.(18 Wall.)129	1873
13	Minor v.Happersett	88 U.S.(21 Wall.)162	1874
14	United States v.Reese	92 U.S.214	1875
15	United States v.Cruikshank	92 U.S.542	1875
16	Strauder v.West Virginia	100 U.S.303	1879
17	Ex parte Yarbrough	110 U.S.651	1884
18	United States v.Waddell	112 U.S.76	1884
19	Elk v.Wilkins	112 U.S.94	1884
20	Baldwin v.Franks	120 U.S.678	1887
21	Crowley v.Christensen	137 U.S.86	1890
22	Crutcher v.Commonwealth of Kentucky	141 U.S.47	1891
23	Logan v.United States	144 U.S.263	1892
24	In re Lockwood	154 U.S.116	1894
25	In re Quarles and Butler	158 U.S.532	1895
26	United States v.Wong Kim Ark	169 U.S.649	1898
27	Maxwell v.Dow	176 U.S.581	1900
28	Motes v.United States	178 U.S.458	1900
29	Wiley v.Sinkler	179 U.S.58	1900
30	Twining v.New Jersey	211 U.S.78	1908
31	Low Wah suey v.Backus	225 U.S.460	1912
32	Mackenzie v.Hare	239 U.S.299	1915
33	Arver v.U.S.	245 U.S.366	1918
34	United States v.Schwimmer	279 U.S.644	1929
35	Colgate v.Harvey	296 U.S.404	1935
36	Hargue v.C.I.O.	307 U.S.496	1939
37	U.S. v.Classic	313 U.S.299	1941
38	Glasser v. United States 315U.S.60(1942).	315U.S.60	1942
39	Thiel v.Southern Pac.Co.	328 U.S.217	1946
40	Ballard v.United States	329 U.S.187	1946
41	Fay v.People of States of New York	332 U.S.261	1947
42	Oyama v.California	332 U.S.633	1948
43	Hoyt v.Florida	368 U.S.57	1961
44	Jones v.Mayer Co.	392 U.S.409	1968
45	Alexander v.Louisiana	405 U.S.625	1972
46	Taylor v.louisiana	419 U.S.522	1975
47	Daniel v.Louisiana	420 U.S.31	1975
48	Runyon v.McCrary	427 U.S.160	1976
49	Baldwin v.Montana Fish and Game Commission	436 U.S.371	1978
50	Duren v.Missouri	439 U.S.357	1979
51	Kirchberg v.Feenstra	450 U.S.455	1981
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【About Author】
MATSUZAWA Koutaro is currently Consul in the Consulate General of Japan in Honolulu.
He received Legum Doctor (LL.D) in 2016 from the University of TSUKUBA in Japan.
Contact: kotaromatsuzawa@gmail.com

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Author: MATSUZAWA, Koutaro
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