Judge Joseph W. Woodrough

August 29, 1873 - October 2, 1977

Judge Joseph W. Woodrough served as a federal judge for 61 years. He was nominated to the district court bench by President Woodrow Wilson in 1916, and to the U.S. Court of the Appeals for the Eighth Circuit by President Franklin Roosevelt in 1933. Judge Woodrough was renowned for walking hundreds of miles to remote trial venues. In 1932, he presided over a two-month jury trial, involving 59 defendants, bringing an end to the political machine and crime syndicate that controlled Omaha for the first third of the Twentieth Century.

Woodrough's portrait was painted by J. Laurie Wallace, an Omaha artist and student of Thomas Eakins.

Judge Elmer S. Dundy

April 9, 1968 - October 28, 1896

Judge Elmer S. Dundy was the first judge of the U.S. District Court for the District of Nebraska. In 1879, he heard Ponca Chief Standing Bear's habeas corpus petition, and declared for the first time that an American Indian was a person under the law. The ruling prevented the federal government from forcing Standing Bear to reside on a reservation.

The next year, John Elk, an Omaha resident whose parents were members of an Indian tribe, brought suit in federal court because he was denied voter registration. Judge Dundy, sitting with 8th Circuit Judge George W. McCrary, dismissed Elk's action. The Supreme Court affirmed the dismissal in *Elk v. Wilkins* (1884), holding that members of a tribe could attain citizenship only through naturalization. The *Elk* decision remained in effect until Congress passed the Indian Citizenship Act in 1924.

Justice Samuel Freeman Miller

April 5, 1816 - October 13, 1890

Justice Samuel Freeman Miller was the first Justice of the United States Supreme Court from west of the Mississippi River. Nominated by President Abraham Lincoln in 1862, Justice Miller served until his death in 1890. He wrote 616 opinions–more than any other Justice in history. Although an ardent advocate for the abolition of slavery, Justice Miller took a narrow view of the Fourteenth Amendment, and his opinions limited the Amendment's application in the late Nineteenth Century.

J.M. Woolworth, a prominent Omaha lawyer and judge, donated this portrait of Justice Miller to the U.S. District Court for the District of Nebraska. Woolworth served as President of the American Bar Association and helped found the Omaha Library and the Nebraska State Historical Society. The artist is Thomas Le Clear of New York's National Academy.

Abrogation Recognized by Estate of Conner by Conner v. Ambrose, N.D.Ind., December 23, 1997

83 U.S. 36

Slaughter-House Cases

Supreme Court of the United States

Supreme Court of the United States December 1, 1872 83 U.S. 36 1872 WL 15386 21 L.Ed. 394 16 Wall. 36 *(Approx. 41 pages)*

SLAUGHTER-HOUSE CASES.

THE BUTCHERS' BENEVOLENT ASSOCIATION OF NEW ORLEANS

v.

THE CRESCENT CITY LIVE-STOCK LANDING AND SLAUGHTER-HOUSE COMPANY.

PAUL ESTEBEN, L. RUCH, J. P. ROUEDE, W. MAYLIE, S. FIRMBERG, B. BEAUBAY, WILLIAM FAGAN, J. D. BRODERICK, N. SEIBEL, M. LANNES, J. GITZINGER, J. P. AYCOCK, D. VERGES, THE LIVE-STOCK DEALERS' AND BUTCHERS' ASSOCIATION OF NEW ORLEANS, AND CHARLES CAVAROC

v.

THE STATE OF Louisiana, *ex rel.* S. BELDEN, ATTORNEY-GENERAL.

THE BUTCHERS' BENEVOLENT ASSOCIATION OF NEW ORLEANS

v.

THE CRESCENT CITY LIVE-STOCK LANDING AND SLAUGHTER-HOUSE COMPANY.

December Term, 1872

***1** ERROR to the Supreme Court of Louisiana.

The three cases—the parties to which as plaintiffs and defendants in error, are given specifically as a sub-title, at the head of this report, but which are reported together also under the general name which, in common parlance, they had acquired—grew out of an act of the legislature of the State of Louisiana, entitled: '*An act to protect the health of the City of New Orleans, to locate the stock landings and slaughter-houses, and to incorporate 'The Crescent City Live-Stock Landing and Slaughter-House Company*,'' which was approved on the 8th of March, 1869, and went into operation on the 1st of June following; and the three cases were argued together.

The act was as follows:

'SECTION 1. *Be it enacted, &c.*, That from and after the first day of June, A.D. 1869, it shall not be lawful to land, keep, or slaughter any cattle, beeves, calves, sheep, swine, or other animals, or to have, keep, or establish any stock-landing, yards, pens, slaughter-houses, or abattoirs at any point or place within the city of New Orleans, *or the parishes of Orleans, Jefferson, and St. Bernard*, or at any point or place on the *east* bank of the Mississippi River within the corporate limits of the city of New Orleans, or at any point on the west bank of the Mississippi River, above the present depot of the New Orleans, Opelousas, and Great Western Railroad Company, *except* that the 'Crescent City Stock Landing and Slaughter-House Company' may establish *themselves* at any point or place as hereinafter provided. Any person or persons, or corporation or company carrying on any business or doing any act in contravention of this act, or landing, slaughtering or keeping any animal or animals in violation of this act, shall be liable to a fine of $250, for each and ***39** every violation, the same to be recoverable, with costs of suit, before any court of competent jurisdiction.'

The second section of the act created one Sanger and sixteen other persons named, a corporation, with the usual privileges of a corporation, and including power to appoint officers, and fix their compensation and term of office, and to fix the amount of the capital stock of the corporation and the number of shares thereof.

The act then went on:

'SECTION 3. *Be it further enacted, &c.*, That said company or corporation is hereby authorized to establish and erect at its own expense, at any point or place on the east bank of the Mississippi River within the parish of St. Bernard, or in the corporate limits of the city of New Orleans, below the United States Barracks, or at any point or place on the west bank of the Mississippi River below the present depot of the New Orleans, Opelousas, and Great Western Railroad Company, wharves, stables, sheds, yards, and buildings necessary to land, stable, shelter, protect, and preserve all kinds of horses, mules, cattle, and other animals; and from and after the time such buildings, yards, &c., are ready and complete for business, and notice thereof is given in the official journal of the State, the said Crescent City Live-Stock Landing and Slaughter-House Company shall have *the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privileges granted by the provisions of this act;* and cattle and other animals destined for sale or slaughter in the city of New Orleans, or its environs, shall be landed at the live-stock landings and yards of said company, and shall be yarded, sheltered, and protected, if necessary, by said company or corporation; and said company or corporation shall be entitled to have and receive for each steamship landing at the wharves of the said company or corporation, $10; for each steamboat or other water craft, $5; and for each horse, mule, bull, ox, or cow landed at their wharves, for each and every day kept, 10 cents; for each and every hog, calf, sheep, or goat, for each and every day kept, 5 cents, all without including the feed; and said company or corporation shall be entitled to keep and detain each and all of said animals until said charges are fully paid. But ***40** if the charges of landing, keeping, and feeding any of the aforesaid animals shall not be paid by the owners thereof after fifteen days of their being landed and placed in the custody of the said company or corporation, then the said company or corporation, in order to reimburse themselves for charges and expenses incurred, shall have power, by resorting to judicial proceedings, to advertise said animals for sale by auction, in any two newspapers published in the city of New Orleans, for five days; and after the expiration of said five days, the said company or corporation may proceed to sell by auction, as advertised, the said animals, and the proceeds of such sales shall be taken by the said company or corporation, and applied to the payment of the charges and expenses aforesaid, and other additional costs; and the balance, if any, remaining from such sales, shall be held to the credit of and paid to the order or receipt of the owner of said animals. Any person or persons, firm or corporation violating any of the provisions of this act, or interfering with the privileges herein granted, or landing, yarding, or keeping any animals in violation of the provisions of this act, or to the injury of said company or corporation, shall be liable to a fine or penalty of $250, to be recovered with costs of suit before any court of competent jurisdiction.

**2 'The company shall, before the first of June, 1869, build and complete A GRAND SLAUGHTER-HOUSE of sufficient capacity to accommodate all butchers, and in which to slaughter 500 animals per day; also a sufficient number of sheds and stables shall be erected before the date aforementioned, to accommodate all the stock received at this port, all of which to be accomplished before the date fixed for the removal of the stock landing, as provided in the first section of this act, under penalty of a forfeiture of their charter.

'SECTION 4. *Be it further enacted, &c.*, That the said company or corporation is hereby authorized to erect, at its own expense, one or more landing-places for live stock, as aforesaid, at any points or places consistent with the provisions of this act, and to have and enjoy from the completion thereof, and after the first day of June, A.D. 1869, *the exclusive privilege of having landed at their wharves or landing-places all animals intended for sale or slaughter in the parishes of Orleans and Jefferson;* and are hereby also authorized (in connection) to erect at its own expense one or more slaughter-houses, at any points or places ***41** consistent with the provisions of this act, and to have and enjoy, from the completion thereof, and after the first day of June, A.D. 1869, *the exclusive privilege of having slaughtered therein all animals, the meat of which is destined for sale in the parishes of Orleans and Jefferson.*

'SECTION 5. *Be it further enacted, &c.*, That whenever said slaughter-houses and accessory buildings shall be completed and thrown open for the use of the public, said company or corporation shall immediately give public notice for thirty days, in the official journal of the State, and within said thirty days' notice, and within, from and after the first day of June, A.D. 1869, *all other stock landings and slaughter-houses within the parishes of Orleans, Jefferson, and St. Bernard shall be closed, and it will no longer be lawful to slaughter cattle, hogs, calves, sheep, or goats, the meat of which is determined for sale within the parishes aforesaid, under a penalty of* $100, *for each and every offence,*

recoverable, with costs of suit, before any court of competent jurisdiction; that all animals to be slaughtered, the meat whereof is determined for sale in the parishes of Orleans or Jefferson, must be slaughtered in the slaughter-houses erected by the said company or corporation; and upon a refusal of said company or corporation to allow and animal or animals to be slaughtered after the same has been certified by the inspector, as hereinafter provided, to be fit for human food, the said company or corporation shall be subject to a fine in each case of $250, recoverable, with costs of suit, before any court of competent jurisdiction; said fines and penalties to be paid over to the auditor of public accounts, which sum or sums shall be credited to the educational fund.

'SECTION 6. *Be it further enacted, &c.*, That the governor of the State of Louisiana shall appoint a competent person, clothed with police powers, to act as inspector of all stock that is to be slaughtered, and whose duty it will be to examine closely all animals intended to be slaughtered, to ascertain whether they are sound and fit for human food or not; and if sound and fit for human food, to furnish a certificate stating that fact, to the owners of the animals inspected; and without said certificate no animals can be slaughtered for sale in the slaughter-houses of said company or corporation. The owner of said animals so inspected to pay the inspector 10 cents for each and every animal so inspected, one-half of which fee the said inspector shall retain for his services, and the other half of said fee shall be ***42** paid over to the auditor of public accounts, said payment to be made quarterly. Said inspector shall give a good and sufficient bond to the State, in the sum of $5000, with sureties subject to the approval of the governor of the State of Louisiana, for the faithful performance of his duties. Said inspector shall be fined for dereliction of duty $50 for each neglect. Said inspector may appoint as many deputies as may be necessary. The half of the fees collected as provided above, and paid over to the auditor of public accounts, shall be placed to the credit of the educational fund.

****3** 'SECTION 7. *Be it further enacted, &c.*, That all persons slaughtering or causing to be slaughtered, cattle or other animals in said slaughter-houses, shall pay to the said company or corporation the following rates or perquisites, viz.: For all beeves, $1 each; for all hogs and calves, 50 cents each; for all sheep, goats, and lambs, 30 cents each; *and the said company or corporation shall be entitled to the head, feet, gore, and entrails of all animals excepting hogs, entering the slaughter-houses and killed therein*, it being understood that the heart and liver are not considered as a part of the gore and entrails, and that the said heart and liver of all animals slaughtered in the slaughter-houses of the said company or corporation shall belong, in all cases, to the owners of the animals slaughtered.

'SECTION 8. *Be it further enacted, &c.*, That all the fines and penalties incurred for violations of this act shall be recoverable in a civil suit before any court of competent jurisdiction, said suit to be brought and prosecuted by said company or corporation in all cases where the privileges granted to the said company or corporation by the provisions of this act are violated or interfered with; that one-half of all the fines and penalties recovered by the said company or corporation [*Sic* in copy—REP.], in consideration of their prosecuting the violation of this act, and the other half shall be paid over to the auditor of public accounts, to the credit of the educational fund.

'SECTION 9. *Be it further enacted, &c.*, That said Crescent City Live-Stock Landing and Slaughter-House Company shall have the right to construct a railroad from their buildings to the limits of the city of New Orleans, and shall have the right to run cars thereon, drawn by horses or other locomotive power, as they may see fit; said railroad to be built on either of the public roads running along the levee on each side of the Mississippi ***43** River. The said company or corporation shall also have the right to establish such steam ferries as they may see fit to run on the Mississippi River between their buildings and any points or places on either side of said river.

'SECTION 10. *Be it further enacted, &c.*, That at the expiration of twenty-five years from and after the passage of this act the privileges herein granted shall expire.'

The parish of Orleans containing (as was said [1]) an area of 150 square miles; the parish of Jefferson of 384; and the parish of St. Bernard of 620; the three parishes together 1154 square miles, and they having between two and three hundred thousand people resident therein, and prior to the passage of the act above quoted, about, 100 persons employed daily in the business of procuring, preparing, and selling animal food, the passage of the act necessarily produced great feeling. Some hundreds of suits were brought on the one side or on the other; the butchers, not included in the 'monopoly' as it was called, acting sometimes in combinations, in corporations, and companies, and sometimes by themselves; the same counsel, however, apparently representing pretty much all of them. The ground of the

opposition to the slaughter-house compeny's pretensions, so far as any cases were finally passed on in this court was, that the act of the Louisiana legislature made a monopoly and was a violation of the most important provisions of the thirteenth and fourteenth Articles of Amendment to the Constitution of the United States. The language relied on of these articles is thus:

***4** 1. The legislature of Louisiana, on the 8th of March, 1869, passed an act granting to a corporation, created by it, the exclusive right, for twenty-five years, to have an maintain slaughter-houses, landings for cattle, and yards for inclosing cattle intended for sale or slaughter within the parishes of Orleans, Jefferson, and St. Bernard, in that State (a territory which, it was said,—see *infra*, p. 85,—contained 1154 square miles, including the city of New Orleans, and a population of between two and three hundred thousand people), and prohibiting all other persons from building, keeping, or having slaughter-houses, landings for cattle, and yards for cattle intended for sale or slaughter, within those limits; and requiring that all cattle and other animals intended for sale or slaughter in that district, should be brought to the yards and slaughter-houses of the corporation; and authorizing the corporation to exact certain prescribed fees for the use of its wharves and for each animal landed, and certain prescribed fees for each animal slaughtered, besides the head, feet, gore, and entrails, except of swine: *Held*, that this grant of exclusive right or privilege, guarded by proper limitation of the prices to be charged, and imposing the duty of providing ample conveniences, with permission to all owners of stock to land, and of all *37 butchers to slaughter at those places, was a police regulation for the health and comfort of the people (the statute locating them where health and comfort required), within the power of the State legislatures, unaffected by the Constitution of the United States previous to the adoption of the thirteenth and fourteenth articles of amendment.

2. The Parliament of Great Britain and the State legislatures of this country have always exercised the power of granting exclusive rights when they were necessary and proper to effectuate a purpose which had in view the public good, and the power there exercised is of that class, and has until now never been denied.

Such power is not forbidden by the thirteenth article of amendment and by the first section of the fourteenth article. An examination of the history of the causes which led to the adoption of those amendments and of the amendments themselves, demonstrates that the main purpose of all the three last amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery.

3. In giving construction to any of those articles it is necessary to keep this main purpose steadily in view, though the letter and spirit of those articles must apply to all cases coming within their purview, whether the party concerned be of African descent or not.

While the thirteenth article of amendment was intended primarily to abolish African slavery, it equally forbids Mexican peonage or the Chinese coolie trade, when they amount to slavery or involuntary servitude; and the use of the word 'servitude' is intended to prohibit all forms of involuntary slavery of whatever class or name.

***5** The first clause of the fourteenth article was primarily intended to confer citizenship on the negro race, and secondly to give definitions of citizenship of the United States, and citizenship of the States, and it recognizes the distinction between citizenship of a State and citizenship of the United States by those definitions.

The second clause protects from the hostile legislation of the States the privileges and immunities of *citizens of the United States* as distinguished from the privileges and immunities of citizens of the States.

These latter, as defined by Justice Washington in *Corfield* v. *Coryell*, and by this court in *Ward* v. *Maryland*, embrace generally those fundamental civil rights for the security and establishment of which organized society is instituted, and they remain, with certain exceptions mentioned in the Federal Constitution, under the care of the State governments, and of this class are those set up by plaintiffs.

4 The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the National government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof; and it is these which are placed under the protection of Congress by this clause of the fourteenth amendment.

It is not necessary to inquire here into the full force of the clause forbidding a State to enforce any law which deprives a person of life, liberty, *38 or property without due process of law, for that phrase has been often the subject of judicial construction, and is, under no admissible view of it, applicable to the present case.

5. The clause which forbids a State to deny to any person the equal protection of the laws was clearly intended to prevent the hostile discrimination against the negro race so familiar in the States where he had been a slave, and for this purpose the clause confers ample power in Congress to secure his rights and his equality before the law.

West Headnotes (20)

AMENDMENT XIII.

**6 'Neither slavery nor *involuntary servitude* except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, nor any place subject to their jurisdiction.'

AMENDMENT XIV.

'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. *44

'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 Supreme Court of Louisiana decided in favor of the company, and five of the cases came into this court under the 25th section of the Judiciary Act in December, 1870; where they were the subject of a preliminary motion by the plaintiffs in error for an order in the nature of a supersedeas. After this, that is to say, in March, 1871, a compromise was sought to be effected, and certain parties professing, apparently, to act in a representative way in behalf of the opponents to the company, referring to a compromise that they assumed had been effected, agreed to discontinue '*all* writs of error concerning the said company, now pending in the Supreme Court of the United States;' stipulating further 'that their agreement should be sufficient authority for any attorney to appear and move for the dismissal of *all* said suits.' Some of the cases were thus confessedly dismissed. But the three of which the names are given as a sub-title at the head of this report were, by certain of the butchers, asserted not to have been *dismissed.* And *Messrs. M. H. Carpenter, J. S. Black, and T. J. Durant, in behalf of the new corporation*, having moved to dismiss them also as embraced in the agreement, affidavits were filed on the one side and on the other; the affidavits of the butchers opposed to the 'monopoly' affirming that they were plaintiffs in error in these three cases, and that they never consented to what had been done, and that no proper authority had been given to do it. This matter was directed to be heard with the merits. The case being advanced was first heard on these, January 11th, 1872; Mr. Justice Nelson being indisposed and not in his seat. Being ordered for reargument, it was heard again, February 3d, 4th, and 5th, 1873.

*Mr. John A. Campbell, and also Mr. J. Q. A. Fellows, argued the case at much length and on the authorities, in behalf of *45 the plaintiffs in error.* The reporter cannot pretend to give more than such an abstract of the argument as may show to what the opinion of the court was meant to be responsive.

I. The learned counsel quoting Thiers,[2] contended that 'the right to one's self, to one's own faculties, physical and intellectual, one's own brain, eyes, hands, feet, in a word to his soul and body, was an incontestable right; one of whose enjoyment and exercise by its owner no one could complain, and one which no one could take away. More than this, the obligation to labor was a duty, a thing ordained of God, and which if submitted to faithfully, secured a blessing to the human family.' Quoting further from Turgot, De Tocqueville, Buckle, Dalloz, Leiber, Sir G. C. Lewis, and others, the counsel gave a vivid and very interesting account of the condition and grievances of the lower orders in various countries of Europe, especially in France, with its *banalités* and '*seigneurs justiciers*,' during those days when 'the prying eye of the government followed the butcher to the shambles and the baker to the oven;' when 'the peasant could not cross a river without paying to some nobleman a toll, nor take the produce which he raised to market until he had bought leave to do so; nor consume what remained of his grain till he had sent it to the lord's mill to be ground, nor full his cloths on his own works, nor sharpen his tools at his own grindstone, nor make wine, oil, or cider at his

own press;' the days of monopolies; monopolies which followed men in their daily avocations, troubled them with its meddling spirit, and worst of all diminished their responsibility to themselves. Passing from Scotland, in which the cultivators of each barony or regality were obliged to pay a 'multure' on each stack of hay or straw reaped by the farmer—'thirlage' or 'thraldom,' as it was called—and when lands were subject to an 'astriction' astricting them and their inhabitants to particular mills for the grinding of grain that was raised on them, and coming to Great Britain, the counsel adverted to the reigns of Edward III, and Richard **46* II, and their successors, when the price of labor was fixed by law, and when every able-bodied man and woman, not being a merchant or craftsman, was 'bounden' to serve at the wages fixed, and when to prevent the rural laborer from seeking the towns he was forbidden to leave his own village. It was in England that the earliest battle for civil liberty had been made. Macaulay thus described it: [3]

***7* 'It was in the Parliament of 1601, that the opposition which had, during forty years, been silently gathering and husbanding strength, fought its first great battle and won its first victory. The ground was well chosen. The English sovereigns had always been intrusted with the supreme direction of commercial police. It was their undoubted prerogative to regulate coins, weights, measures, and to appoint fairs, markets, and ports. The line which bounded their authority over trade, had, as usual, been but loosely drawn. They therefore, as usual, encroached on the province which rightfully belonged to the legislature. The encroachment was, as usual, patiently borne, till it became serious. But at length the Queen took upon herself to grant patents of monopoly by scores. There was scarcely a family in the realm that did not feel itself aggrieved by the oppression and extortion which the abuse naturally caused. Iron, oil, vinegar, coal, lead, starch, yarn, leather, glass, could be bought only at exorbitant prices. The House of Commons met in an angry and determined mood. It was in vain that a courtly minority blamed the speaker for suffering the acts of the Queen's highness to be called in question. The language of the discontented party was high and menacing, and was echoed by the voice of the whole nation. The coach of the chief minister of the crown was surrounded by an indignant populace, who cursed *monopolies*, and exclaimed that the prerogative should not be allowed to touch the old liberties of England.'

Macaulay proceeded to say that the Queen's reign was in danger of a shameful and disgraceful end, but that she, with admirable judgment, declined the contest and redressed the grievance, and in touching language thanked the Commons for their tender care of the common weal. **47*

The great grievance of our ancestors about the time that they largely left England, was this very subject. Sir John Culpeper, in a speech in the Long Parliament, thus spoke of these monopolies and pollers of the people:

'They are a nest of wasps—a swarm of vermin which have overcrept the land. Like the frogs of Egypt they have gotten possession of our dwellings, and we have scarce a room free from them. They sup in our cup; they dip in our dish; they sit by our fire. We find them in the dye-fat, wash-bowl, and powdering-tub. They share with the butler in his box. They will not bait us a pin. We may not buy our clothes without their brokage. These are the leeches that have sucked the commonwealth so hard that it is almost hectical. Mr. Speaker! I have echoed to you the cries of the Kingdom. I will tell you their hopes. They look to Heaven for a blessing on this Parliament.'

Monopolies concerning wine, coal, salt, starch, the dressing of meat in taverns, beavers, belts, bone-lace, leather, pins, and other things, to the gathering of rags, are referred to in this speech.

But more important than these discussions in Parliament were the solemn judgments of the courts of Great Britain. The great and leading case was that reported by Lord Coke, *The Case of Monopolies.* [4] The patent was granted to Darcy to buy beyond the sea all such playing-cards as he thought good, and to utter and sell them within the kingdom, and that he and his agents and deputies should have the whole trade, traffic, and merchandise of playing-cards, and that another person and none other should have the making of playing-cards within the realm. A suit was brought against a citizen of London for selling playing-cards, and he pleaded that being a citizen free of the city he had a right to do so. And——

***8* 'Resolved (Popham, C.J.) *per totam Curiam*, that the said grant of the plaintiff of the sole making of cards within the realm, was utterly void, and for two reasons: **48*

'1. That it is a monopoly and against the common law.

'2. That it is against divers acts of Parliament.'

[The learned counsel read Sir Edward Coke's report of the judgment in this case, which was given fully in the brief at length, seeking to apply it to the cases before the court.]

It was from a country which had been thus oppressed by monopolies that our ancestors came. And a profound conviction of the truth of the sentiment already quoted from M. Thiers—that every man has a right to his own faculties, physical and intellectual, and that this is a right, one of which no one can complain, and no one deprive him—was at the bottom of the settlement of the country by them. Accordingly, free competition in business, free enterprise, the absence of all exactions by petty tyranny, of all spoliation of private right by public authority—the suppression of sinecures, monopolies, titles of nobility, and exemption from legal duties—were exactly what the colonists sought for and obtained by their settlement here, their long contest with physical evils that attended the colonial condition, their struggle for independence, and their efforts, exertions, and sacrifices since.

Now, the act of the Louisiana legislature was in the face of all these principles; it made it unlawful for men to use their own land for their own purposes; made it unlawful to any except the seventeen of this company to exercise a lawful and necessary business for which others were as competent as they, for which at least one thousand persons in the three parishes named had qualified themselves, had framed their arrangements in life, had invested their property, and had founded all their hopes of success on earth. The act was a pure MONOPOLY; as such against common right, and void at the common law of England. And it was equally void by our own law. The case of *The Norwich Gaslight Company* v. *The Norwich City Gaslight Company*, [5] a case in Connecticut, and more pointedly still, *The City of Chicago* v. *Rumpff*, [6] a case in Illinois, and *The Mayor of the City of Hudson* v. *Thorne*, [7] ***49** a case in New York, were in entire harmony with Coke's great case, and declared that monopolies are against common right. [8]

****9** How, indeed, do authors and inventors maintain a monopoly in even the works of their own brain? in that which in a large sense may be called their own. Only through a provision of the Constitution preserving such works to them. Many State constitutions have denounced monopolies by name, and it is certain that every species of exclusive privilege is an offence to the people, and that popular aversior to them does but increase the more largely that they are granted.

II. *But if this monopoly were not thus void at common law, would be so under both the thirteenth and the fourteenth amendments.*

The thirteenth amendment prohibits 'slavery and involuntary *servitude*.' The expressions are ancient ones, and were familiar even before the time when they appeared in the great Ordinance of 1787, for the government of our vast Northwestern Territory; a territory from which great States were to arise. In that ordinance that are associated with enactments affording comprehensive protection for life, liberty, and property; for the spread of religion, morality, and knowledge; for maintaining the inviolability of contracts, the freedom of navigation upon the public rivers, and the unrestrained conveyance of property by contract and devise, and for equality of children in the inheritance of patrimonial estates. The ordinance became a law after Great Britain, in form the most popular government in Europe, had been expelled from that territory because of 'injuries and usurpations having in direct object the establishment of an absolute tyranny over the States.' Feudalism at that time prevailed in nearly all the kingdoms of Europe, and serfdom and servitude and feudal service depressed their people to the level of slaves. The prohibition of 'slavery and involuntary servitude' in every form and degree, except as a ***50** sentence upon a conviction for crime, comprises much more than the abolition or prohibition of African slavery. Slavery in the annals of the world had been the ultimate solution of controversies between the creditor and debtor; the conqueror and his captive; the father and his child; the state and an offender against its laws. The laws might enslave a man to the soil. The whole of Europe in 1787 was crowded with persons who were held as vassals to their landlord, and serfs on his dominions. The American constitution for that great territory was framed to abolish slavery and involuntary servitude in all forms, and in all degrees in which they have existed among men, except as a punishment for crime duly proved and adjudged.

Now, the act of which we complain has made of three parishes of Louisiana 'enthralled ground.' 'The seventeen' have *astricted* not only the inhabitants of those parishes, but of all other portions of the earth who may have cattle or animals for sale or for food, to land them at the wharves of that company (if brought to that territory), to keep them in their pens, yards, or stables, and to prepare them for market in their abattoir or slaughter-house. Lest some competitor may present more tempting or convenient arrangements, the act directs that all of these shall be closed on a particular day, and prohibits any one from having,

keeping, or establishing any other; and a peremptory command is given that all animals shall be sheltered, preserved, and protected by this corporation, and by none other, under heavy penalties.

**10 Is not this 'a servitude?' Might it not be so considered in a strict sense? It is like the 'thirlage' of the old Scotch law and the *banalités* of seignioral France; which were servitudes undoubtedly. But, if not strictly a servitude, it is certainly a servitude in a more popular sense, and, being an enforced one, it is an involuntary servitude. Men are surely subjected to a servitude when, throughout three parishes, embracing 1200 square miles, every man and every woman in them is compelled to refrain from the use of their own land and exercise of their own industry and the improvement *51 of their own property, in a way confessedly lawful and necessary in itself, and made unlawful and unnecessary only because, at their cost, an exclusive privilege is granted to seventeen other persons to improve and exercise it for them. We have here the 'servients' and the 'dominants' and the 'thraldom' of the old seignioral system. The servients in this case are all the inhabitants in any manner using animals brought to the markets for sale or for slaughter. The dominants are 'the seventeen' made into a corporation, with these seignioral rights and privileges. The masters are these seventeen, who alone can admit or refuse other members to their corporation. The abused persons are the community, who are deprived of what was a common right and bound under a thraldom.

III. *The act is even more plainly in the face of the fourteenth amendment.* That amendment was a development of the thirteenth, and is a more comprehensive exposition of the principles which lie at the foundation of the thirteenth.

Slavery had been abolished as the issue of the civil war. More than three millions of a population lately servile, were liberated without preparation for any political or civil duty. Besides this population of emancipated slaves, there was a large and growing population who came to this country without education in the laws and constitution of the country, and who had begun to exert a perceptible influence over our government. There were also a large number of unsettled and difficult questions of State and National right that had no other settlement or solution but what the war had afforded. It had been maintained from the origin of the Constitution, by one political party—men of a high order of ability, and who exerted a great influence—that the *State* was the highest political organization in the United States; that through the consent of the separate States the Union had been formed for limited purposes; that there was no social union except by and through the States, and that in extreme cases the several States might cancel the obligations to the Federal government and reclaim the allegiance and fidelity of its members. Such were the doctrines of Mr. *52 Calhoun, and of others; both those who preceded and those who have followed him. It is nowhere declared in the Constitution what 'a citizen' is, or what constitutes citizenship; and what ideas were entertained of citizenship by one class in our country may be seen in the South Carolina case of *Hunt* v. *The State*, where Harper, J., referring to the arguments of Messrs. Petigru, Blanding, McWillie, and Williams—men eminent in the South as jurists—who were opposing nullification, says:

**11 'It has been *admitted* in argument by all the counsel except one, that in case of a secession by the State from the Union, the citizens and constituted authorities would be bound to obey and give effect to the act.'

But the fourteenth amendment does define citizenship and the relations of citizens to the State and Federal government. It ordains that '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 where they reside.' Citizenship in a State is made by residence and without reference to the consent of the State. Yet, by the same amendment, when it exists, no State can abridge its privileges or immunities. The doctrine of the 'States-Rights party,' led in modern times by Mr. Calhoun, was, that there was no citizenship in the whole United States, except *sub modo* and by the permission of the States. According to their theory the United States had no integral existence except as an incomplete combination among several integers. The fourteenth amendment struck at, and forever destroyed, all such doctrines. It seems to have been made under an apprehension of a destructive faculty in the State governments. It consolidated the several 'integers' into a consistent whole. Were there Brahmans in Massachusetts, 'the chief of all creatures, and with the universe held in charge for them,' and Soudras in Pennsylvania, 'who simply had life through the benevolence of the other,' this amendment places them on the same footing. By it the national principle has received an indefinite enlargement. *53 The tie between the United States and every citizen in every part of its own jurisdiction has been made intimate and familiar. To the same extent the

confederate features of the government have been obliterated. The States in their closest connection with the members of the State, have been placed under the oversight and restraining and enforcing hand of Congress. The purpose is manifest, to establish through the whole jurisdiction of the United States ONE PEOPLE, and that every member of the empire shall understand and appreciate the fact that his privileges and immunities cannot be abridged by State authority; that State laws must be so framed as to secure life, liberty, property from arbitrary violation and secure protection of law to all. Thus, as the great personal rights of each and every person were established and guarded, a reasonable confidence that there would be good government might seem to be justified. The amendment embodies all that the statesmanship of the country has conceived for accommodating the Constitution and the institutions of the country to the vast additions of territory, increase of the population, multiplication of States and Territorial governments, the annual influx of aliens, and the mighty changes produced by revolutionary events, and by social, industrial, commercial development. It is an act of Union, an act to determine the reciprocal relations of the millions of population within the bounds of the United States—the numerous State governments and the entire United States administered by a common government—that they might mutually sustain, support, and co-operate for the promotion of peace, security, and the assurance of property and liberty.

***12** Under it the fact of citizenship does not depend upon parentage, family, nor upon the historical division of the land into separate States, some of whom had a glorious history, of which its members were justly proud. Citizenship is assigned to nativity in any portion of the United States, and every person so born is a citizen. The naturalized person acquires citizenship of the same kind without any action of the State at all. So either may by this title of citizenship ***54** make his residence at any place in the United States, and under whatever form of State administration, he must be treated as a citizen of that State. His 'privileges and immunities' must not be impaired, and all the privileges of the English Magna Charta in favor of freemen are collected upon him and overshadow him as derived from this amendment. The States must not weaken nor destroy them. The comprehensiveness of this amendment, the natural and necessary breadth of the language, the history of some of the clauses; their connection with discussions, contests, and domestic commotions that form landmarks in the annals of constitutional government, the circumstances under which it became part of the Constitution, demonstrate that the weighty import of what it ordains is not to be misunderstood.

From whatever cause originating, or with whatever special and present or pressing purpose passed, the fourteenth amendment is not confined to the population that had been servile, or to that which had any of the disabilities or disqualifications arising from race or from contract. The vast number of laborers in mines, manufactories, commerce, as well as the laborers on the plantations, are defended against the unequal legislation of the States. Nor is the amendment confined in its application to laboring men. The mandate is universal in its application to persons of every class and every condition. There are forty millions of population who may refer to it to determine their rank in the United States, and in any particular State. There are thirty-seven governments among the States to which it directs command, and the States that may be hereafter admitted, and the persons hereafter to be born or naturalized will find here declarations of the same weighty import to them all. To the State governments is says: 'Let there be no law made or enforced to diminish one of the privileges and immunities of the people of the United States;' nor law to deprive them of their life, liberty, property, or protection without trial. To the people the declaration is: 'Take and hold this your certificate of status and of ***55** capacity, the Magna Charta of your rights and liberties.' To the Congress it says: 'Take care to enforce this article by suitable laws.'

The only question then is this: 'When a State passes a law depriving a thousand people, who have acquired valuable property, and who, through its instrumentality, are engaged in an honest and necessary business, which they understand, of their right to use such their own property, and to labor in such their honest and necessary business, and gives a monopoly, embracing the whole subject, including the right to labor in such business, to seventeen other persons—whether the State has abridged any of the privileges or immunities of these thousand persons?'

***13** Now, what are 'privileges and immunities' in the sense of the Constitution? They are undoubtedly the personal and civil rights which usage, tradition, the habits of society, written law, and the common sentiments of people have recognized as forming the basis of the institutions of the country. The first clause in the fourteenth amendment does not deal with any interstate relations, nor relations that depend in any manner upon State laws, nor is any standard among the States referred to for the ascertainment of these privileges and

immunities. It assumes that there were privileges and immunities that belong to an American citizen, and the State is commanded neither to make nor to enforce any law that will abridge them.

The case of *Ward* v. *Maryland*[9] bears upon the matter. That case involved the validity of a statute of Maryland which imposed a tax in the form of a license to sell the agricultural and manufactured articles of other States than Maryland by card, sample, or printed lists, or catalogue. The purpose of the tax was to prohibit sales in the mode, and to relieve the resident merchant from the competition of these itinerant or transient dealers. This court decided that the power to carry on commerce in this form was 'a privilege or immunity' of the sojourner.

2. *The act in question is equally in the face of the fourteenth amendment in that it denies to the plaintiffs the equal protection of the laws.* By an act of legislative partiality it enriches seventeen persons and deprives nearly a thousand others of the same class, and as upright and competent as the seventeen, of the means by which they earn their daily bread.

3. *It is equally in violation of it, since it deprives them of their property without due process of law.* The right to labor, the right to one's self physically and intellectually, and to the product of one's own faculties, is past doubt property, and property of a sacred kind. Yet *this* property is destroyed by the act; destroyed not by due process of law, but by charter; a grant of privilege, of monopoly; which allows such rights in this matter to no one but to a favored 'seventeen.'

It will of course be sought to justify the act as an exercise of the police power; a matter confessedly, in its general scope, within the jurisdiction of the States. Without doubt, in that general scope, the subject of sanitary laws belong to the exercise of the power set up; but it does not follow there is no restraint on State power of legislation in police matters. The police power was invoked in the case of *Gibbons* v. *Ogden.*[10] New York had granted to eminent citizens a monopoly of steamboat navigation in her waters as compensation for their enterprise and invention. They set up that Gibbons should not have, keep, establish, or land with a steamboat to carry passengers and freight on the navigable waters of New York. Of course the State had a great jurisdiction over its waters for all purposes of police, but none to control navigation and intercourse between the United States and foreign nations, or among the States. Suppose the grant to Fulton and Livingston had been that all persons coming to the United States, or from the States around, should, because of their services to the State, land on one of their lots and pass through their gates. This would abridge the rights secured in the fourteenth amendment. ***57** The right to move with freedom, to choose his highway, and to be exempt from impositions, belongs to the citizen. He must have this power to move freely to perform his duties as a citizen.

****14** The *Passenger Cases,* in 7 Howard, are replete with discussions on the police powers of the States. The arguments in that case appeal to the various titles in which the freedom of State action had been supposed to be unlimited. Immigrants, it was said, would bring pauperism, crime, idleness, increased expenditures, disorderly conduct. The acts, it was said, were in the nature of health acts. But the court said that the police power would not be invoked to justify even the small tax there disputed.

Attorneys and Law Firms

Messrs. M. H. Carpenter and J. S. Black (a brief of Mr. Charles Allen being filed on the same side), and Mr. T. J. Durant, representing in addition the State of Louisiana, contra.

Opinion

Mr. Justice MILLER, now, April 14th, 1873, delivered the opinion of the court.

These cases are brought here by writs of error to the Supreme Court of the State of Louisiana. They aries out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that State.

The cases named on a preceding page,[11] with others which have been brought here and dismissed by agreement, were all decided by the Supreme Court of Louisiana in favor of the Slaughter-House Company, as we shall hereafter call it for the sake of brevity, and these writs are brought to reverse those decisions.

The records were filed in this court in 1870, and were argued before it as length on a motion made by plaintiffs in error for an order in the nature of an injunction or supersedeas, *58 pending the action of the court on the merits. The opinion on that motion is reported in 10 Wallace, 273.

On account of the importance of the questions involved in these cases they were, by permission of the court, taken up out of their order on the docket and argued in January, 1872. At that hearing one of the justices was absent, and it was found, on consultation, that there was a diversity of views among those who were present. Impressed with the gravity of the questions raised in the argument, the court under these circumstances ordered that the cases be placed on the calendar and reargued before a full bench. This argument was had early in February last.

Preliminary to the consideration of those questions is a motion by the defendant to dismiss the cases, on the ground that the contest between the parties has been adjusted by an agreement made since the records came into this court, and that part of that agreement is that these writs should be dismissed. This motion was heard with the argument on the merits, and was much pressed by counsel. It is supported by affidavits and by copies of the written agreement relied on. It is sufficient to say of these that we do not find in them satisfactory evidence that the agreement is binding upon all the parties to the record who are named as plaintiffs in the several writs of error, and that there are parties now before the court, in each of the three cases, the names of which appear on a preceding page, [12] who have not consented to their dismissal, and who are not bound by the action of those who have so consented. They have a right to be heard, and the motion to dismiss cannot prevail.

**15 The records show that the plaintiffs in error relied upon, and asserted throughout the entire course of the litigation in the State courts, that the grant of privileges in the charter of defendant, which they were contesting, was a violation of the most important provisions of the thirteenth and fourteenth articles of amendment of the Constitution of the United States. The jurisdiction and the duty of this court *59 to review the judgment of the State court on those questions is clear and is imperative.

The statute thus assailed as unconstitutional was passed March 8th, 1869, and is entitled 'An act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company.'

The first section forbids the landing or slaughtering of animals whose flesh is intended for food, within the city of New Orleans and other parishes and boundaries named and defined, or the keeping or establishing any slaughter-houses or *abattoirs* within those limits except by the corporation thereby created, which is also limited to certain places afterwards mentioned. Suitable penalties are enacted for violations of this prohibition.

The second section designates the corporators, gives the name to the corporation, and confers on it the usual corporate powers.

The third and fourth sections authorize the company to establish and erect within certain territorial limits, therein defined, one or more stock-yards, stock-landings, and slaughter-houses, and imposes upon it the duty of erecting, on or before the first day of June, 1869, one grand slaughter-house of sufficient capacity for slaughtering five hundred animals per day.

It declares that the company, after it shall have prepared all the necessary buildings, yards, and other conveniences for that purpose, shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the act, and that all such animals shall be landed at the stock-landings and slaughtered at the slaughter-houses of the company, and nowhere else. Penalties are enacted for infractions of this provision, and prices fixed for the maximum charges of the company for each steamboat and for each animal landed.

Section five orders the closing up of all other stock-landings *60 and slaughter-houses after the first day of June, in the parishes of Orleans, Jefferson, and St. Bernard, and makes it the duty of the company to permit any person to slaughter animals in their slaughter-houses under a heavy penalty for each refusal. Another section fixes a limit to the charges to be made by the company for each animal so slaughtered in their building, and another provides for an inspection of all animals intended to be so slaughtered, by an officer appointed by the governor of the State for that purpose.

**16 These are the principal features of the statute, and are all that have any bearing upon the questions to be decided by us.

This statute is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meritorious class of citizens—the whole of the butchers of the city—of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families, and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city.

But a critical examination of the act hardly justifies these assertions.

It is true that it grants, for a period of twenty-five years, exclusive privileges. And whether those privileges are at the expense of the community in the sense of a curtailment of any of their fundamental rights, or even in the sense of doing them an injury, is a question open to considerations to be hereafter stated. But it is not true that it deprives the butchers of the right to exercise their trade, or imposes upon them any restriction incompatible with its successful pursuit, or furnishing the people of the city with the necessary daily supply of animal food.

The act divides itself into two main grants of privilege,—the one in reference to stock-landings and stock-yards, and *61 the other to slaughter-houses. That the landing of livestock in large droves, from steamboats on the bank of the river, and from railroad trains, should, for the safety and comfort of the people and the care of the animals, be limited to proper places, and those not numerous, it needs no argument to prove. Nor can it be injurious to the general community that while the duty of making ample preparation for this is imposed upon a few men, or a corporation, they should, to enable them to do it successfully, have the exclusive right of providing such landing-places, and receiving a fair compensation for the service.

It is, however, the slaughter-house privilege, which is mainly relied on to justify the charges of gross injustice to the public, and invasion of private right.

It is not, and cannot be successully controverted, that it is both the right and the duty of the legislative body—the supreme power of the State or municipality—to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. To do this effectively it is indispensable that all persons who slaughter animals for food shall do it is those places *and nowhere else*.

The statute under consideration defines these localities and forbids slaughtering in any other. It does not, as has been asserted, prevent the butcher from doing his own slaughtering. On the contrary, the Slaughter-House Company is required, under a heavy penalty, to permit and person who wishes to do so, to slaughter in their houses; and they are bound to make ample provision for the convenience of all the slaughtering for the entire city. The butcher then is still permitted to slaughter, to prepare, and to sell his own meats; but he is required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished him at that place.

**17 The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the *62 duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit.

The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may *now* be questioned in some of its details.

'Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all,' says Chancellor Kent, [13] 'be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.' This is called the police power; and it is declared by Chief Justice Shaw [14] that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.

This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. 'It extends,' says another aminent judge, [15] 'to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; . . . and persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.'

*63 The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power. It is not, therefore, needed that we should seek for a comprehensive definition, but rather look for the proper source of its exercise.

**18 In *Gibbons* v. *Ogden*, [16] Chief Justice Marshall, speaking of inspection laws passed by the States, says: 'They form a portion of that immense mass of legislation which controls everything within the territory of a State not surrendered to the General Government—all which can be most advantageously administered by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts. No direct general power over these objects is granted to Congress; and consequently they remain subject to State legislation.'

The exclusive authority of State legislation over this subject is strikingly illustrated in the case of the *City of New York* v. *Miln*. [17] In that case the defendant was prosecuted for failing to comply with a statute of New York which required of every master of a vessel arriving from a foreign port, in that of New York City, to report the names of all his passengers, with certain particulars of their age, occupation, last place of settlement, and place of their birth. It was argued that this act was an invasion of the exclusive right of Congress to regulate commerce. And it cannot be denied that such a statute operated at least indirectly upon the commercial intercourse between the citizens of the United States and of foreign countries. But notwithstanding this it was held to be an exercise of the police power properly within the control of the State, and unaffected by the clause of the Constitution which conferred on Congress the right to regulate commerce.

*64 To the same purpose are the recent cases of the *The License Tax* [18] and *United States* v. *De Witt*. [19] In the latter case an act of Congress which undertook as a part of the internal revenue laws to make it a misdemeanor to mix for sale naphtha and illuminating oils, or to sell oil of petroleum inflammable at less than a prescribed temperature, was held to be void, because as a police regulation the power to make such a law belonged to the States, and did not belong to Congress.

It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city, the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health, and comfort of the people require they shall be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent, and effectual. But it is said that in creating a corporation for this purpose, and conferring upon it exclusive privileges—privileges which it is said constitute a monopoly—the legislature has exceeded its power. If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation and on the public would have been the same as it is now. Why cannot the legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing? That wherever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the powers necessary to effect the desired and lawful purpose, seems hardly to admit of debate. The proposition is ably discussed and affirmed in the case of *McCulloch* v. *The State of Maryland*, [20] in relation to the power of Congress to organize *65 the Bank of the United States to aid in the fiscal operations of the government.

**19 It can readily be seen that the interested vigilance of the corporation created by the Louisiana legislature will be more efficient in enforcing the limitation prescribed for the stock-landing and slaughtering business for the good of the city than the ordinary efforts of the officers of the law.

Unless, therefore, it can be maintained that the exclusive privilege granted by this charter to the corporation, is beyond the power of the legislature of Louisiana, there can be no just exception to the validity of the statute. And in this respect we are not able to see that these privileges are especially odious or objectionable. The duty imposed as a consideration for the privilege is well defined, and its enforcement well guarded. The prices or charges to be made by the company are limited by the statute, and we are not advised that they are on the whole exorbitant or unjust.

The proposition is, therefore, reduced to these terms: Can any exclusive privileges be granted to any of its citizens, or to a corporation, by the legislature of a State?

The eminent and learned counsel who has twice argued the negative of this question, has displayed a research into the history of monopolies in England, and the European continent, only equalled by the eloquence with which they are denounced.

But it is to be observed, that all such references are to monopolies established by the monarch in derogation of the rights of his subjects, or arise out of transactions in which the people were unrepresented, and their interests uncared for. The great *Case of Monopolies*, reported by Coke, and so fully stated in the brief, was undoubtedly a contest of the commons against the monarch. The decision is based upon the ground that it was against common law, and the argument was aimed at the unlawful assumption of power by the crown; for whoever doubted the authority of Parliament to change or modify the common law? The discussion in the House of Commons cited from Macaulay clearly *66 establishes that the contest was between the crown, and the people represented in Parliament.

But we think it may be safely affirmed, that the Parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges—privileges denied to other citizens—privileges which come within any just definition of the word monopoly, as much as those now under consideration; and that the power to do this has never been questioned or denied. Nor can it be truthfully denied, that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to success in that way.

It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the constitution of that State or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited.

**20 If any such restraint is supposed to exist in the constitution of the State, the Supreme Court of Louisiana having necessarily passed on that question, it would not be open to review in this court.

The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the thirteenth article of amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment.

*67 This court is thus called upon for the first time to give construction to these articles.

We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar; we have discussed

it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go.

Twelve articles of amendment were added to the Federal Constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original; and the twelfth, adopted in eighteen hundred and three, was so nearly so as to have become, like all the others, historical and of another age. But within the last eight years three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument.

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human rights; ***68*** additional powers to the Federal government; additional restraints upon those of the States. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

****21*** The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel. And when hard pressed in the contest these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the Federal government succeeded in that purpose. The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument. ***69*** Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

'1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

'2. Congress shall have power to enforce this article by appropriate legislation.'

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four millions of slaves—and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.

That a personal servitude was meant is proved by the use of the word 'involuntary,' which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on

the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word slavery had been used. The case of the apprentice slave, held under a law of Maryland, liberated by Chief Justice Chase, on a writ of habeas corpus under this article, illustrates this course of observation.[21] And it is all that we deem necessary to say on the application of that article to the statute of Louisiana, now under consideration.

**22 *70 The process of restoring to their proper relations with the Federal government and with the other States those which had sided with the rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they *71 ratified that article by a formal vote of their legislative bodies.

Before we proceed to examine more critically the provisions of this amendment, on which the plaintiffs in error rely, let us complete and dismiss the history of the recent amendments, as that history relates to the general purpose which pervades them all. A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments that, notwithstanding the restraints of those articles on the States, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all those States denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.

**23 Hence the fifteenth amendment, which declares that 'the right of a citizen of the United States to vote shall not be denied or abridged by any State on account of race, color, or previous condition of servitude.' The negro having, by the fourteenth amendment, been declared to be a citizen of the United States, is thus made a voter in every State of the Union.

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean 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. It is true that only the fifteenth amendment, in terms, *72 mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether *73 this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated Dred Scott case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

**24 To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed.

'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.'

The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. 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.

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. *74 Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States*.' It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

***25** Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

***75** If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

The first occurrence of the words 'privileges and immunities' in our constitutional history, is to be found in the fourth of the articles of the old Confederation.

It declares 'that 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 the 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.'

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: 'The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.'

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of *Corfield* v. *Coryell*, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823.[22]

***76** 'The inquiry,' he says, 'is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, 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 prescribe for the general good of the whole.'

****26** This definition of the privileges and immunities of citizens of the States is adopted in the main by this court in the recent case of *Ward* v. *The State of Maryland*,[23] while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which the fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure.

In the case of *Paul* v. *Virginia*,[24] the court, in expounding this clause of the Constitution, says that 'the privileges and immunities secured to citizens of each State in the several

States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter *77 States under their constitution and laws by virtue of their being citizens.'

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.

Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

**27 All this and more must follow, if the proposition of the *78 plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges *79 and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which own their existence to the Federal government, its National character, its Constitution, or its laws.

One of these is well described in the case of *Crandall* v. *Nevada*.[25] It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, '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 all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States.' And quoting from the language of Chief Justice Taney in another case, it is said 'that *for all the great purposes for which the Federal government* was established, we are one people, with one common country, *we are all citizens of the United States;*' and it is, as such citizens, that their rights are supported in this court in *Crandall* v. *Nevada*.

***28** Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, ***80** are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration.

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

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal government.

We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it ***81** is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

***29** 'Nor shall any State deny to any person within its jurisdiction the equal protection of the laws.'

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that

is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statemen seem to have divided on the line which should separate the powers of the National government from those of the State governments, and though this line has *82 never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government.

Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statemen have still believed that the existence of the State with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.

**30 But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

*83 The judgments of the Supreme Court of Louisiana in these cases are

AFFIRMED.

Mr. Justice FIELD, dissenting:
**30 I am unable to agree with the majority of the court in these cases, and will proceed to state the reasons of my dissent from their judgment.

The cases grow out of the act of the legislature of the State of Louisiana, entitled 'An act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate 'The Crescent City Live-Stock Landing and Slaughter-House Company,'' which was approved on the eighth of March, 1869, and went into operation on the first of June following. The act creates the corporation mentioned in its title, which is composed of seventeen persons designated by name, and invests them and their successors with the powers usually conferred upon corporations in addition to their special and exclusive privileges. It first declares that it shall not be lawful, after the first day of June, 1869, to 'land, keep, or slaughter any cattle, beeves, calves, sheep, swine, or other animals, or to have, keep, or establish any stock-landing, yards, slaughter-houses, or abattoirs within the city of New Orleans or the parishes of Orleans, Jefferson, and St. Bernard,' except as provided in the act; and imposes a penalty of two hundred and fifty dollars for each violation of its provisions. It then authorizes the corporation mentioned to establish and erect within the parish of St. Bernard and the corporate limits of New Orleans, below the United States barracks, on the east side of the Mississippi, or at any point below a designated railroad depot on the west side of the river, 'wharves, stables, sheds, yards, and buildings, necessary to land, stable, shelter, protect, and preserve all kinds of horses, mules, cattle, and other animals,' and provides that cattle and other animals, destined for sale or slaughter in the city of New Orleans or its environs, shall be landed at the landings and yards of the company, and be there *84 yarded, sheltered, and plotected, if necessary; and that the company shall be entitled to certain prescribed fees for the use of its wharves, and for each animal landed, and be authorized to detain the animals until the fees are paid, and if not paid

within fifteen days to take proceedings for their sale. Every person violating any of these provisions, of any of these provisions, or elsewhere, is subjected to a fine of two hundred and fifty dollars.

**31 The act then requires the corporation to erect a grand slaughter-house of sufficient dimensions to accommodate all butchers, and in which five hundred animals may be slaughtered a day, with a sufficient number of sheds and stables for the stock received at the port of New Orleans, at the same time authorizing the company to erect other landing-places and other slaughter-houses at any points consistent with the provisions of the act.

The act then provides that when the slaughter-houses and accessory buildings have been completed and thrown open for use, public notice thereof shall be given for thirty days, and within that time 'all other stock-landings and slaughter-houses within the parishes of Orleans, Jefferson, and St. Bernard shall be closed, and it shall no longer be lawful to slaughter cattle, hogs, calves, sheep, or goats, the meat of which is determined [destined] for sale within the parishes aforesaid, under a penalty of one hundred dollars for each and every offence.'

The act then provides that the company shall receive for every animal slaughtered in its buildings certain prescribed fees, besides the head, feet, gore, and entrails of all animals except of swine.

Other provisions of the act require the inspection of the animals before they are slaughtered, and allow the construction of railways to facilitate communication with the buildings of the company and the city of New Orleans.

But it is only the special and exclusive privileges conferred by the act that this court has to consider in the cases before it. These privileges are granted for the period of twenty-five years. Their exclusive character not only follows *85 from the provisions I have cited, but it is declared in express terms in the act. In the third section the language is that the corporation 'shall have the *sole and exclusive privilege* of conducting and carrying on the live-stock, landing, and slaughter-house business within the limits and privileges granted by the provisions of the act.' And in the fourth section the language is, that after the first of June, 1869, the company shall have 'the exclusive privilege of having landed at their landing-places all animals intended for sale or slaughter in the parishes of Orleans and Jefferson,' and 'the exclusive privilege of having slaughtered' in its slaughter-houses all animals, the meat of which is intended for sale in these parishes.

In order to understand the real character of these special privileges, it is necessary to know the extent of country and of population which they affect. The parish of Orleans contains an area of country of 150 square miles; the parish of Jefferson, 384 square miles; and the parish of St. Bernard, 620 square miles. The three parishes together contain an area of 1154 square miles, and they have a population of between two and three hundred thousand people.

**32 The plaintiffs in error deny the validity of the act in question, so far as it confers the special and exclusive privileges mentioned. The first case before us was brought by an association of butchers in the three parishes against the corporation, to prevent the assertion and enforcement of these privileges. The second case was instituted by the attorney-general of the State, in the name of the State, to protect the corporation in the enjoyment of these privileges, and to prevent an association of stock-dealers and butchers from acquiring a tract of land in the same district with the corporation, upon which to erect suitable buildings for receiving, keeping, and slaughtering cattle, and preparing animal food for market. The third case was commenced by the corporation itself, to restrain the defendants from carrying on a business similar to its own, in violation of its alleged exclusive privileges.

The substance of the averments of the plaintiffs in error *86 is this: That prior to the passage of the act in question they were engaged in the lawful and necessary business of procuring and bringing to the parishes of Orleans, Jefferson, and St. Bernard, animals suitable for human food, and in preparing such food for market; that in the prosecution of this business they had provided in these parishes suitable establishments for landing, sheltering, keeping, and slaughtering cattle and the sale of meat; that with their association about four hundred persons were connected, and that in the parishes named about a thousand persons were thus engaged in procuring, preparing, and selling animal food. And they complain that the business of landing, yarding, and keeping, within the parishes named, cattle intended for sale or slaughter, which was lawful for them to pursue before the first day of June, 1869, is

made by that act unlawful for any one except the corporation named; and that the business of slaughtering cattle and preparing animal food for market, which it was lawful for them to pursue in these parishes before that day, is made by that act unlawful for them to pursue afterwards, except in the buildings of the company, and upon payment of certain prescribed fees, and a surrender of a valuable portion of each animal slaughtered. And they contend that the lawful business of landing, yarding, sheltering, and keeping cattle intended for sale or slaughter, which they in common with every individual in the community of the three parishes had a right to follow, cannot be thus taken from them and given over for a period of twenty-five years to the sole and exclusive enjoyment of a corporation of seventeen persons or of anybody else. And they also contend that the lawful and necessary business of slaughtering cattle and preparing animal food for market, which they and all other individuals had a right to follow, cannot be thus restricted within this territory of 1154 square miles to the buildings of this corporation, or be subjected to tribute for the emolument of that body.

**33 No one will deny the abstract justice which lies in the position of the plaintiffs in error; and I shall endeavor to *87 show that the position has some support in the fundamental law of the country.

It is contended in justification for the act in question that it was adopted in the interest of the city, to promote its cleanliness and protect its health, and was the legitimate exercise of what is termed the police power of the State. That power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways. All sorts of restrictions and burdens are imposed under it, and when these are not in conflict with any constitutional prohibitions, or fundamental principles, they cannot be successfully assailed in a judicial tribunal. With this power of the State and its legitimate exercise I shall not differ from the majority of the court. But under the pretence of prescribing a police regulation the State cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgment.

In the law in question there are only two provisions which can properly be called police regulations—the one which requires the landing and slaughtering of animals below the city of New Orleans, and the other which requires the inspection of the animals before they are slaughtered. When these requirements are complied with, the sanitary purposes of the act are accomplished. In all other particulars the act is a mere grant to a corporation created by it of special and exclusive privileges by which the health of the city is in no way promoted. It is plain that if the corporation can, without endangering the health of the public, carry on the business of landing, keeping, and slaughtering cattle within a district below the city embracing an area of over a thousand square miles, it would not endanger the public health if other persons were also permitted to carry on the same business within the same district under similar conditions as to the inspection of the animals. The health of the city might require the removal from its limits and suburbs of all buildings for keeping and slaughtering cattle, but no such *88 object could possibly justify legislation removing such buildings from a large part of the State for the benefit of a single corporation. The pretence of sanitary regulations for the grant of the exclusive privileges is a shallow one, which merits only this passing notice.

It is also sought to justify the act in question on the same principle that exclusive grants for ferries, bridges, and turnpikes are sanctioned. But it can find no support there. Those grants are of franchises of a public character appertaining to the government. Their use usually requires the exercise of the sovereign right of eminent domain. It is for the government to determine when one of them shall be granted, and the conditions upon which it shall be enjoyed. It is the duty of the government to provide suitable roads, bridges, and ferries for the convenience of the public, and if it chooses to devolve this duty to any extent, or in any locality, upon particular individuals or corporations, it may of course stipulate for such exclusive privileges connected with the franchise as it may deem proper, without encroaching upon the freedom or the just rights of others. The grant, with exclusive privileges, of a right thus appertaining to the government, is a very different thing from a grant, with exclusive privileges, of a right to pursue one of the ordinary trades or callings of life, which is a right appertaining solely to the individual.

**34 Nor is there any analogy between this act of Louisiana and the legislation which confers upon the inventor of a new and useful improvement an exclusive right to make and sell to others his invention. The government in this way only secures to the inventor the temporary enjoyment of that which, without him, would not have existed. It thus only recognizes in the inventor a temporary property in the product of his own brain.

The act of Louisiana presents the naked case, unaccompanied by any public considerations, where a right to pursue a lawful and necessary calling, previously enjoyed by every citizen, and in connection with which a thousand persons were daily employed, is taken away and vested exclusively *89 for twenty-five years, for an extensive district and a large population, in a single corporation, or its exercise is for that period restricted to the establishments of the corporation, and there allowed only upon onerous conditions.

If exclusive privileges of this character can be granted to a corporation of seventeen persons, they may, in the discretion of the legislature, be equally granted to single individual. If they may be granted for twenty-five years they may be equally granted for a century, and in perpetuity. If they may be granted for the landing and keeping of animals intended for sale or slaughter they may be equally granted for the landing and storing of grain and other products of the earth, or for any article of commerce. If they may be granted for structures in which animal food is prepared for market they may be equally granted for structures in which farinaceous or vegetable food is prepared. They may be granted for any of the pursuits of human industry, even in its most simple and common forms. Indeed, upon the theory on which the exclusive privileges granted by the act in question are sustained, there is no monopoly, in the most odious form, which may not be upheld.

The question presented is, therefore, one of the gravest importance, not merely to the parties here, but to the whole country. It is nothing less than the question whether the recent amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by State legislation. In my judgment the fourteenth amendment does afford such protection, and was so intended by the Congress which framed and the States which adopted it.

The counsel for the plaintiffs in error have contended, with great force, that the act in question is also inhibited by the thirteenth amendment.

That amendment prohibits slavery and involuntary servitude, except as a punishment for crime, but I have not supposed it was susceptible of a construction which would cover the enactment in question. I have been so accustomed to regard it as intended to meet that form of slavery which had *90 previously prevailed in this country, and to which the recent civil war owed its existence, that I was not prepared, nor am I yet, to give to it the extent and force ascribed by counsel. Still it is evidence that the language of the amendment is not used in a restrictive sense. It is not confined to African slavery alone. It is general and universal in its application. Slavery of white men as well as of black men is prohibited, and not merely slavery in the strict sense of the term, but involuntary servitude in every form.

**35 The words 'involuntary servitude' have not been the subject of any judicial or legislative exposition, that I am aware of, in this country, except that which is found in the Civil Rights Act, which will be hereafter noticed. It is, however, clear that they include something more than slavery in the strict sense of the term; they include also serfage, vassalage, villenage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others. Nor is this the full import of the terms. The abolition of slavery and involuntary servitude was intended to make every one born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. A prohibition to him to pursue certain callings, open to others of the same age, condition, and sex, or to reside in places where others are permitted to live, would so far deprive him of the rights of a freeman, and would place him, as respects others, in a condition of servitude. A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a freeman. The compulsion which would force him to labor even for his own benefit only in one direction, or in one place, would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, *91 and would equally constitute an element of servitude. The counsel of the plaintiffs in error therefore contend that 'wherever a law of a State, or a law of the United States, makes a discrimination between classes of persons, which deprives the one class of their freedom or their property, or which makes a caste of them to subserve the power, pride, avarice, vanity, or vengeance of others,' there involuntary servitude exists within the meaning of the thirteenth amendment.

It is not necessary, in my judgment, for the disposition of the present case in favor of the plaintiffs in error, to accept as entirely correct this conclusion of counsel. It, however, finds support in the act of Congress known as the Civil Rights Act, which was framed and adopted

upon a construction of the thirteenth amendment, giving to its language a similar breadth. That amendment was ratified on the eighteenth of December, 1865,[26] and in April of the following year the Civil Rights Act was passed.[27] Its first section declares that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are 'citizens of the United States,' and that '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 enjoyed by white citizens.'

**36 This legislation was supported upon the theory that citizens of the United States as such were entitled to the rights and privileges enumerated, and that to deny to any such citizen equality in these rights and privileges with others, was, to the extent of the denial, subjecting him to an involuntary *92 servitude. Senator Trumbull, who drew the act and who was its earnest advocate in the Senate, stated, on opening the discussion upon it in that body, that the measure was intended to give effect to the declaration of the amendment, and to secure to all persons in the United States practical freedom. After referring to several statutes passed in some of the Southern States, discriminating between the freedmen and white citizens, and after citing the definition of civil liberty given by Blackstone, the Senator said: 'I take it that any statute which is not equal to all, and which deprives any citizen of civil rights, which are secured to other citizens, is an unjust encroachment upon his liberty; and it is in fact a badge of servitude which by the Constitution is prohibited.'[28]

By the act of Louisiana, within the three parishes named, a territory exceeding one thousand one hundred square miles, and embracing over two hundred thousand people, every man who pursues the business of preparing animal food for market must take his animals to the buildings of the favored company, and must perform his work in them, and for the use of the buildings must pay a prescribed tribute to the company, and leave with it a valuable portion of each animal slaughtered. Every man in these parishes who has a horse or other animal for sale, must carry him to the yards and stables of this company, and for their use pay a like tribute. He is not allowed to do his work in his own buildings, or to take his animals to his own stables or keep them in his own yards, even though they should be erected in the same district as the buildings, stables, and yards of the company, and that district embraces over eleven hundred square miles. The prohibitions imposed by this act upon butchers and dealers in cattle in these parishes, and the special privileges conferred upon the favored corporation, are similar in principle and as odious in character as the restrictions imposed in the last century upon the peasantry in some parts of France, where, as says a French *93 writer, the peasant was prohibted 'to hunt on his own lands, to fish in his own waters, to grind at his own mill, to cook at his own oven, to dry his clothes on his own machines, to whet his instruments at his own grindstone, to make his own wine, his oil, and his cider at his own press, . . . or to sell his commodities at the public market.' The exclusive right to all these privileges was vested in the lords of the vicinage. 'The history of the most execrable tyranny of ancient times,' says the same writer, 'offers nothing like this. This category of oppressions cannot be applied to a free man, or to the peasant, except in violation of his rights.'

**37 But if the exclusive privileges conferred upon the Louisiana corporation can be sustained, it is not perceived why exclusive privileges for the construction and keeping of ovens, machines, grindstones, wine-presses, and for all the numerous trades and pursuits for the prosecution of which buildings are required, may not be equally bestowed upon other corporations or private individuals, and for periods of indefinite duration.

It is not necessary, however, as I have said, to rest my objections to the act in question upon the terms and meaning of the thirteenth amendment. The provisions of the fourteenth amendment, which is properly a supplement to the thirteenth, cover, in my judgment, the case before us, and inhibit any legislation which confers special and exclusive privileges like these under consideration. The amendment was adopted to obviate objections which had been raised and pressed with great force to the validity of the Civil Rights Act, and to place the common rights of American citizens under the protection of the National government. It first declares that '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.' It then declares that '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 *94 process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

The first clause of this amendment determines who are citizens of the United States, and how their citizenship is created. Before its enactment there was much diversity of opinion among jurists and statesmen whether there was any such citizenship independent of that of the State, and, if any existed, as to the manner in which it originated. With a great number the opinion prevailed that there was no such citizenship independent of the citizenship of the State. Such was the opinion of Mr. Calhoun and the class represented by him. In his celebrated speech in the Senate upon the Force Bill, in 1833, referring to the reliance expressed by a senator upon the fact that we are citizens of the United States, he said: 'If by citizen of the United States he means a citizen at large, one whose citizenship extends to the entire geographical limits of the country without having a local citizenship in some State or Territory, a sort of citizen of the world, all I have to say is that such a citizen would be a perfect nondescript; that not a single individual of this description can be found in the entire mass of our population. Notwithstanding all the pomp and display of eloquence on the occasion, every citizen is a citizen of some State or Territory, and as such, under an express provision of the Constitution, is entitled to all privileges and immunities of citizens in the several States; and it is in this and no other sense that we are citizens of the United States.'[29]

**38 In the Dred Scott case this subject of citizenship of the United States was fully and elaborately discussed. The exposition in the opinion of Mr. Justice Curtis has been generally accepted by the profession of the country as the one containing the soundest views of constitutional law. And he held that, under the Constitution, citizenship of the United States in reference to natives was dependent upon citizenship in the several States, under their constitutions and laws.

*95 The Chief Justice, in that case, and a majority of the court with him, held that the words 'people of the United States' and 'citizens' were synonymous terms; that the people of the respective States were the parties to the Constitution; that these people consisted of the free inhabitants of those States; that they had provided in their Constitution for the adoption of a uniform rule of naturalization; that they and their descendants and persons naturalized were the only persons who could be citizens of the United States, and that it was not in the power of any State to invest any other person with citizenship so that he could enjoy the privileges of a citizen under the Constitution, and that therefore the descendants of persons brought to this country and sold as slaves were not, and could not be citizens within the meaning of the Constitution.

The first clause of the fourteenth amendment changes this whole subject, and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship 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. A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State. The exercise of these rights and privileges, and the degree of enjoyment received from such exercise, are always more or less affected by the condition and the local institutions of the State, or city, or town where he resides. They are thus affected in a State by the wisdom of its laws, the ability of its officers, the officiency of its magistrates, the education and morals of its people, and by many other considerations. This is a result which follows from the constitution of society, and can never be avoided, but in no other way can they be affected by the action of the State, or by the residence of the citizen therein. They do not derive *96 their existence from its legislation, and cannot be destroyed by its power.

The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was

required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character. But if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence.

**39 What, then, are the privileges and immunities which are secured against abridgment by State legislation?

In the first section of the Civil Rights Act Congress has given its interpretation to these terms, or at least has stated some of the rights which, in its judgment, these terms include; it has there declared that they include 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 full and equal benefit of all laws and proceedings for the security of person and property.' That act, it is true, was passed before the fourteenth amendment, but the amendment was adopted, as I have already said, to obviate objections to the act, or, speaking more accurately, I should say, to obviate objections to legislation *97 of a similar character, extending the protection of the National government over the common rights of all citizens of the United States. Accordingly, after its ratification, Congress re-enacted the act under the belief that whatever doubts may have previously existed of its validity, they were removed by the amendment. [30]

The terms, privileges and immunities, are not new in the amendment; they were in the Constitution before the amendment was adopted. They are found in the second section of the fourth article, which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,' and they have been the subject of frequent consideration in judicial decisions. In *Corfield* v. *Coryell*, [31] Mr. Justice Washington said he had 'no hesitation in confining these expressions to those privileges and immunities which were, in their nature, fundamental; which belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose the Union, from the time of their becoming free, independent, and sovereign;' and, in considering what those fundamental privileges were, he said that perhaps it would be more tedious than difficult to enumerate them, but that they might 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.' This appears to me to be a sound construction of the clause in question. The privileges and immunities designated are those *which of right belong to the citizens of all free governments.* Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons. In the discussions *98 in Congress upon the passage of the Civil Rights Act repeated reference was made to this language of Mr. Justice Washington. It was cited by Senator Trumbull with the observation that it enumerated the very rights belonging to a citizen of the United States set forth in the first section of the act, and with the statement that all persons born in the United States, being declared by the act citizens of the United States, would thenceforth be entitled to the rights of citizens, and that these were the great fundamental rights set forth in the act; and that they were set forth 'as appertaining to every freeman.'

**40 The privileges and immunities designated in the second section of the fourth article of the Constitution are, then, according to the decision cited, those which of right belong to the citizens of all free governments, and they can be enjoyed under that clause by the citizens of each State in the several States upon the same terms and conditions as they are enjoyed by the citizens of the latter States. No discrimination can be made by one State against the citizens of other States in their enjoyment, nor can any greater imposition be levied than such as is laid upon its own citizens. It is a clause which insures equality in the enjoyment of these rights between citizens of the several States whilst in the same State.

Nor is there anything in the opinion in the case of *Paul* v. *Virginia*, [32] which at all militates against these views, as is supposed by the majority of the court. The act of Virginia, of 1866, which was under consideration in that case, provided that no insurance company, not incorporated under the laws of the State, should carry on its business within the State without previously obtaining a license for that purpose; and that it should not receive such license until it had deposited with the treasurer of the State bonds of a specified character, to an amount varying from thirty to fifty thousand dollars. No such deposit was required of insurance companies incorporated by the State, for carrying on *99 their business within the State; and in the case cited the validity of the discriminating provisions of the statute of

Virginia between her own corporations and the corporations of other States, was assailed. It was contended that the statute in this particular was in conflict with that clause of the Constitution which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' But the court answered, that corporations were not citizens within the meaning of this clause; that the term citizens as there used applied only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature had prescribed; that though it had been held that where contracts or rights of property were to be enforced by or against a corporation, the courts of the United States would, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the State, under the laws of which it was created, and to this extent would treat a corporation was a citizen within the provision of the Constitution extending the judicial power of the United States to controversies between citizens of different States, it had never been held in any case which had come under its observation, either in the State or Federal courts, that a corporation was a citizen within the meaning of the clause in question, entitling the citizens of each State to the privileges and immunities of citizens in the several States. And the court observed, that the privileges and immunities secured by that provision 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; that special privileges enjoyed by citizens in their own States were not secured in other States by the provision; that it was not intended by it to give to the laws of one State any operation in other States; that they could have no such operation except by the permission, expressed or implied, of those States; and that the special privileges which they conferred must, therefore, be enjoyed at home unless the assent ***100** of other States to their enjoyment therein were given. And so the court held, that a corporation, being a grant of special privileges to the corporators, had no legal existence beyond the limits of the sovereignty where created, and that the recognition of its existence by other States, and the enforcement of its contracts made therein, depended purely upon the assent of those States, which could be granted upon such terms and conditions as those States might think proper to impose.

****41** The whole purport of the decision was, that citizens of one State do not carry with them into other States any special privileges or immunities, conferred by the laws of their own States, of a corporate or other character. That decision has no pertinency to the questions involved in this case. The common privileges and immunities which of right belong to all citizens, stand on a very different footing. These the citizens of each State do carry with them into other States and are secured by the clause in question, in their enjoyment upon terms of equality with citizens of the latter States. This equality in one particular was enforced by this court in the recent case of *Ward* v. *The State of Maryland*, reported in the 12th of Wallace. A statute of that State required the payment of a larger sum from a non-resident trader for a license to enable him to sell his merchandise in the State, than it did of a resident trader, and the court held, that the statute in thus discriminating against the non-resident trader contravened the clause securing to the citizens of each State the privileges and immunities of citizens of the several States. The privilege of disposing of his property, which was an essential incident to his ownership, possessed by the non-resident, was subjected by the statute of Maryland to a greater burden than was imposed upon a like privilege of her own citizens. The privileges of the non-resident were in this particular abridged by that legislation.

What the clause in question did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for ***101** the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States. If under the fourth article of the Constitution equality of privileges and immunities is secured between citizens of different States, under the fourteenth amendment the same equality is secured between citizens of the United States.

It will not be pretended that under the fourth article of the Constitution any State could create a monopoly in any known trade or manufacture in favor of her own citizens, or any portion of them, which would exclude an equal participation in the trade or manufacture monopolized by citizens of other States. She could not confer, for example, upon any of her citizens the sole right to manufacture shoes, or boots, or silk, or the sole right to sell those articles in the State so as to exclude non-resident citizens from engaging in a similar manufacture or sale. The non-resident citizens could claim equality of privilege under the provisions of the fourth article with the citizens of the State exercising the monopoly as well as with others, and thus, as respects them, the monopoly would cease. If this were not so it would be in the power of the State to exclude at any time the citizens of other States from participation in particular

branches of commerce or trade, and extend the exclusion from time to time so as effectually to prevent any traffic with them.

**42 Now, what the clause in question does for the protection of citizens of one State against the creation of monopolies in favor of citizens of other States, the fourteenth amendment does for the protection of every citizen of the United States against the creation of any monopoly whatever. The privileges and immunities of citizens of the United States, of every one of them, is secured against abridgment in any form by any State. The fourteenth amendment places them under the guardianship of the National authority. All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were *102 held void at common law in the great *Case of Monopolies*, decided during the reign of Queen Elizabeth.

A monopoly is defined 'to be an institution or allowance from the sovereign power of the State by grant, commission, or otherwise, to any person or corporation, for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade.' All such grants relating to any known trade or manufacture have been held by all the judges of England, whenever they have come up for consideration, to be void at common law as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood, and putting it into the power of the grantees to enhance the price of commodities. The definition embraces, it will be observed, not merely the sole privilege of buying and selling particular articles, or of engaging in their manufacture, but also the sole privilege of using anything by which others may be restrained of the freedom or liberty they previously had in any lawful trade, or hindered in such trade. It thus covers in every particular the possession and use of suitable yards, stables, and buildings for keeping and protecting cattle and other animals, and for their slaughter. Such establishments are essential to the free and successful prosecution by any butcher of the lawful trade of preparing animal food for market. The exclusive privilege of supplying such yards, buildings, and other conveniences for the prosecution of this business in a large district of country, granted by the act of Louisiana to seventeen persons, is as much a monopoly as though the act had granted to the company the exclusive privilege of buying and selling the animals themselves. It equally restrains the butchers in the freedom and liberty they previously had, and hinders them in their lawful trade.

The reasons given for the judgment in the *Case of Monopolies* apply with equal force to the case at bar. In that case a patent had been granted to the plaintiff giving him the sole *103 right to import playing-cards, and the entire traffic in them, and the sole right to make such cards within the realm. The defendant, in disregard of this patent, made and sold some gross of such cards and imported others, and was accordingly sued for infringing upon the exclusive privileges of the plaintiff. As to a portion of the cards made and sold within the realm, he pleaded that he was a haberdasher in London and a free citizen of that city, and as such had a right to make and sell them. The court held the plea good and the grant void, as against the common law and divers acts of Parliament. 'All trades,' said the court, 'as well mechanical as others, which prevent idleness (the bane of the commonwealth) and exercise men and youth in labor for the maintenance of themselves and their families, and for the increase of their substance, to serve the queen when occasion shall require, are profitable for the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is *against the common law and the benefit and liberty of the subject.*'[33] The case of Davenant and Hurdis was cited in support of this position. In that case a company of merchant tailors in London, having power by charter to make ordinances for the better rule and government of the company, so that they were consonant to law and reason, made an ordinance that any brother of the society who should have any cloth dressed by a cloth-worker, not being a brother of the society, should put one-half of his cloth to some brother of the same society who exercised the art of a cloth-worker, upon pain of forfeiting ten shillings, 'and it was adjudged that the ordinance, although it had the countenance of a charter, was against the common law, *because it was against the liberty of the subject; for every subject, by the law, has freedom and liberty to put his cloth to be dressed by what cloth-worker he pleases, and cannot be restrained to certain persons, for that in effect would be a monopoly*, and, therefore, such ordinance, by color of a charter or any grant by charter to such effect, would be void.'

**43 *104 Although the court, in its opinion, refers to the increase in prices and deterioration in quality of commodities which necessarily result from the grant of monopolies, the main ground of the decision was their interference with the liberty of the subject to pursue for his

maintenance and that of his family any lawful trade or employment. This liberty is assumed to be the natural right of every Englishman.

The struggle of the English people against monopolies forms one of the most interesting and instructive chapters in their history. It finally ended in the passage of the statute of 21st James I, by which it was declared 'that all monopolies and all commissions, grants, licenses, charters, and letters-patent, to any person or persons, bodies politic or corporate, whatsoever, of or for the sole buying, selling, making, working, or using of anything' within the realm or the dominion of Wales were altogether contrary to the laws of the realm and utterly void, with the exception of patents for new inventions for a limited period, and for printing, then supposed to belong to the prerogative of the king, and for the preparation and manufacture of certain articles and ordnance intended for the prosecution of war.

The common law of England, as is thus seen, condemned all monopolies in any known trade or manufacture, and declared void all grants of special privileges whereby others could be deprived of any liberty which they previously had, or be hindered in their lawful trade. The statute of James I, to which I have referred, only embodied the law as it had been previously declared by the courts of England, although frequently disregarded by the sovereigns of that country.

The common law of England is the basis of the jurisprudence of the United States. It was brought to this country by the colonists, together with the English statutes, and was established here so far as it was applicable to their condition. That law and the benefit of such of the English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their circumstances, were claimed by the Congress of the United Colonies in 1774 as a part of their 'indubitable rights and liberties.'[34] ***105*** Of the statutes, the benefits of which was thus claimed, the statute of James I against monopolies was one of the most important. And when the Colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all others. The immortal document which proclaimed the independence of the country declared as self-evident truths that the Creator had endowed all men 'with certain inalienable rights, and that among these are life, liberty, and the pursuit of happiness; and that to secure these rights governments are instituted among men.'

44** If it be said that the civil law and not the common law is the basis of the jurisprudence of Louisiana, I answer that the decree of Louis XVI, in 1776, abolished all monopolies of trades and all special privileges of corporations, guilds, and trading companies, and authorized every person to exercise, without restraint, his art, trade, or profession, and such has been the law of France and of her colonies ever since, and that law prevailed in Louisiana at the time of her cession to the United States. Since then, notwithstanding the existence in that State of the civil law as the basis of her jurisprudence, freedom of pursuit has been always recognized as the common right of her citizens. But were this otherwise, the fourteenth amendment secures the like protection to all citizens in that State against any abridgment of their common rights, as in other States. That amendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes. If the trader in London could plead that he was a free citizen of that city against the enforcement to his injury of monopolies, surely under the fourteenth amendment every ***106 citizen of the United States should be able to plead his citizenship of the republic as a protection against any similar invasion of his privileges and immunities.

So fundamental has this privilege of every citizen to be free from disparaging and unequal enactments, in the pursuit of the ordinary avocations of life, been regarded, that few instances have arisen where the principle has been so far violated as to call for the interposition of the courts. But whenever this has occurred, with the exception of the present cases from Louisiana, which are the most barefaced and flagrant of all, the enactment interfering with the privilege of the citizen has been pronounced illegal and void. When a case under the same law, under which the present cases have arisen, came before the Circuit Court of the United States in the District of Louisiana, there was no hesitation on the part of the court in declaring the law, in its exclusive features, to be an invasion of one of the fundamental privileges of the citizen.[35] The presiding justice, in delivering the opinion of the court, observed that it might be difficult to enumerate or define what were the essential privileges of a citizen of the United States, which a State could not by its laws invade, but

that so far as the question under consideration was concerned, it might be safely said that 'it is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit, without unreasonable regulation or molestation, and without being restricted by any of those unjust, oppressive, and odious monopolies or exclusive privileges which have been condemned by all free governments.' And again: 'There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor.'

***45** In the *City of Chicago* v. *Rumpff*,[36] which was before the Supreme Court of Illinois, we have a case similar in all its ***107** features to the one at bar. That city being authorized by its charter to regulate and license the slaughtering of animals within its corporate limits, the common council passed what was termed an ordinance in reference thereto, whereby a particular building was designated for the slaughtering of all animals intended for sale or consumption in the city, the owners of which were granted the exclusive right for a specified period to have all such animals slaughtered at their establishment, they to be paid a specific sum for the privilege of slaughtering there by all persons exercising it. The validity of this action of the corporate authorities was assailed on the ground of the grant of exclusive privileges, and the court said: 'The charter authorizes the city authorities to license or regulate such establishments. Where that body has made the necessary regulations, required for the health or comfort of the inhabitants, all persons inclined to pursue such an occupation should have an opportunity of conforming to such regulations, otherwise the ordinance would be unreasonable and tend to oppression. Or, if they should regard it for the interest of the city that such establishments should be licensed, the ordinance should be so framed that all persons desiring it might obtain licenses by conforming to the prescribed terms and regulations for the government of such business. We regard it neither as a regulation nor a license of the business to confine it to one building or to give it to one individual. Such an action is oppressive, and creates a monopoly that never could have been contemplated by the General Assembly. It impairs the rights of all other persons, and cuts them off from a share in not only a legal, but a necessary business. Whether we consider this as an ordinance or a contract, it is equally unauthorized, as being opposed to the rules governing the adoption of municipal by-laws. The principle of equality of rights to the corporators is violated by this contract. If the common council may require all of the animals for the consumption of the city to be slaughtered in a single building, or on a particular lot, and the owner be paid a specific sum for the privilege, what would prevent the making a ***108** similar contract with some other person that all of the vegetables, or fruits, the flour, the groceries, the dry goods, or other commodities should be sold on his lot and he receive a compensation for the privilege? We can see no difference in principle.'

It is true that the court in this opinion was speaking of a municipal ordinance and not of an act of the legislature of a State. But, as it is justly observed by counsel, a legislative body is no more entitled to destroy the equality of rights of citizens, nor to fetter the industry of a city, than a municipal government. These rights are protected from invasion by the fundamental law.

***46** In the case of the *Norwich Gaslight Company* v. *The Norwich City Gas Company*,[37] which was before the Supreme Court of Connecticut, it appeared that the common council of the city of Norwich had passed a resolution purporting to grant to one Treadway, his heirs and assigns, for the period of fifteen years, the right to lay gas-pipes in the streets of that city, declaring that no other person or corporation should, by the consent of the common council, lay gas-pipes in the streets during that time. The plaintiffs having purchased of Treadway, undertook to assert an exclusive right to use the streets for their purposes, as against another company which was using the streets for the same purposes. And the court said: 'As, then, no consideration whatever, either of a public or private character, was reserved for the grant; and as the business of manufacturing and selling gas is an ordinary business, like the manufacture of leather, or any other article of trade in respect to which the government has no exclusive prerogative, we think that so far as the restriction of other persons than the plaintiffs from using the streets for the purpose of distributing gas by means of pipes, can fairly be viewed as intended to operate as a restriction upon its free manufacture and sale, it comes directly within the definition and description of a monopoly; and although we have no direct constitutional provision against a monopoly, ***109** yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the Bill of Rights, the first section of which declares 'that no man or set of men are entitled to exclusive public emoluments or privileges from the community,' to render them void.'

In the *Mayor of the City of Hudson* v. *Thorne*, [38] an application was made to the chancellor of New York to dissolve an injunction restraining the defendants from erecting a building in the city of Hudson upon a vacant lot owned by them, intended to be used as a hay-press. The common council of the city had passed an ordinance directing that no person should erect, or construct, or cause to be erected or constructed, any wooden or frame barn, stable, or hay-press of certain dimensions, within certain specified limits in the city, without its permission. It appeared, however, that there were such buildings already in existence, not only in compact parts of the city, but also within the prohibited limits, the occupation of which for the storing and pressing of hay the common council did not intend to restrain. And the chancellor said: 'If the manufacture of pressed hay within the compact parts of the city is dangerous in causing or promoting fires, the common council have the power expressly given by their charter to prevent the carrying on of such manufacture; but as all by-laws must be reasonable, the common council cannot make a by-law which shall permit one person to carry on the dangerous business and prohibit another who has an equal right from pursuing the same business.'

***47** In all these cases there is a recognition of the equality of right among citizens in the pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common right, and void.

This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, ***110** throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition. The State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name. The fourteenth amendment, in my judgment, makes it essential to the validity of the legislation of every State that this equality of right should be respected. How widely this equality has been departed from, how entirely rejected and trampled upon by the act of Louisiana, I have already shown. And it is to me a matter of profound regret that its validity is recognized by a majority of this court, for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated. [39] As stated by the Supreme Court of Connecticut, in ***111** the case cited, grants of exclusive privileges, such as is made by the act in question, are opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void. That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws. [40]

***48** I am authorized by the CHIEF JUSTICE, Mr. Justice SWAYNE, and Mr. Justice BRADLEY, to state that they concur with me in this dissenting opinion.

Mr. Justice BRADLEY, also dissenting:

I concur in the opinion which has just been read by Mr. Justice Field; but desire to add a few observations for the purpose of more fully illustrating my views on the important question decided in these cases, and the special grounds on which they rest.

The fourteenth amendment to the Constitution of the United States, section 1, declares that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.

The legislature of Louisiana, under pretence of making a police regulation for the promotion of the public health, passed an act conferring upon a corporation, created by the act, the exclusive right, for twenty-five years, to have and maintain slaughter-houses, landings for cattle, and yards for ***112** confining cattle intended for slaughter, within the parishes of Orleans, Jefferson, and St. Bernard, a territory containing nearly twelve hundred square miles, including the city of New Orleans; and prohibiting all other persons from building, keeping, or having slaughter-houses, landings for cattle, and yards for confining cattle intended for slaughter within the said limits; and requiring that all cattle and other animals to be slaughtered for food in that district should be brought to the slaughter-houses and works of the favored company to be slaughtered, and a payment of a fee to the company for such act.

It is contended that this prohibition abridges the privileges and immunities of citizens of the United States, especially of the plaintiffs in error, who were particularly affected thereby; and whether it does so or not is the simple question in this case. And the solution of this question depends upon the solution of two other questions, to wit:

First. Is it one of the rights and privileges of a citizen of the United States to pursue such civil employment as he may choose to adopt, subject to such reasonable regulations as may be prescribed by law?

Secondly. Is a monopoly, or exclusive right, given to one person to the exclusion of all others, to keep slaughter-houses, in a district of nearly twelve hundred square miles, for the supply of meat for a large city, a reasonable regulation of that employment which the legislature has a right to impose?

The first of these questions is one of vast importance, and lies at the very foundations of our government. The question is now settled by the fourteenth amendment itself, that citizenship of the United States is the primary citizenship in this country; and that State citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence. The States have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, **113* and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens. And when the spirit of lawlessness, mob violence, and sectional hate can be so completely repressed as to give full practical effect to this right, we shall be a happier nation, and a more prosperous one than we now are. Citizenship of the United States ought to be, and, according to the Constitution, is, a surt and undoubted title to equal rights in any and every States in this Union, subject to such regulations as the legislature may rightfully prescribe. If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.

***49* Every citizen, then, being primarily a citizen of the United States, and, secondarily, a citizen of the State where he resides, what, in general, are the privileges and immunites of a citizen of the United States? Is the right, liberty, or privilege of choosing any lawful employment one of them?

If a State legislature should pass a law prohibiting the inhabitants of a particular township, county, or city, from tanning leather or making shoes, would such a law violate any privileges or immunities of those inhabitants as citizens of the United States, or only their privileges and immunities as citizens of that particular State? Or if a State legislature should pass a law of caste, making all trades and professions, or certain enumerated trades and professions, hereditary, so that no one could follow any such trades or professions except that which was pursued by his father, would such a law violate the privileges and immunities of the people of that State as citizens of the United States, or only as citizens of the State? Would they have no redress but to appeal to the courts of that particular State?

This seems to me to be the essential question before us for consideration. And, in my judgment, the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of **114* his most valuable rights, and one which the legislature of a State cannot invade, whether restrained by its own constitution or not.

The right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves. I speak now of the rights of citizens of any free government. Granting for the present that the citizens of one government cannot claim the privileges of citizens in another government; that prior to the union of our North American States the citizens of one State could not claim the privileges of citizens in another State; or, that after the union was formed the citizens of the United States, as such, could not claim the privileges of citizens in any particular State; yet the citizens of each of the States and the citizens of the United States would be entitled to certain privileges and immunities as citizens, at the hands of their own government—privileges and immunities which their own governments respectively would be bound to respect and maintain. In this free country, the people of which inherited certain traditionary rights and privileges from their ancestors, citizenship means something. It has certain privileges and immunities attached to it which

the government, whether restricted by express or implied limitations, cannot take away or impair. It may do so temporarily by force, but it cannot do so by right. And these privileges and immunities attach as well to citizenship of the United States as to citizenship of the States.

***50** The people of this country brought with them to its shores the rights of Englishmen; the rights which had been wrested from English sovereigns at various periods of the nation's history. One of these fundamental rights was expressed in these words, found in Magna Charta: 'No freeman shall be taken or imprisoned, or be disseized of his freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we pass upon him or condemn ***115** him but by lawful judgment of his peers or by the law of the land.' English constitutional writers expound this article as rendering life, liberty, and property inviolable, except by due process of law. This is the very right which the plaintiffs in error claim in this case. Another of these rights was that of *habeas corpus*, or the right of having any invasion of personal liberty judicially examined into, at once, by a competent judicial magistrate. Blackstone classifies these fundamental rights under three heads, as the absolute rights of individuals, to wit: the right of personal security, the right of personal liberty, and the right of private property. And of the last he says: 'The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land.'

The privileges and immunities of Englishmen were established and secured by long usage and by various acts of Parliament. But it may be said that the Parliament of England has unlimited authority, and might repeal the laws which have from time to time been enacted. Theoretically this is so, but practically it is not. England has no written constitution, it is true; but it has an unwritten one, resting in the acknowledged, and frequently declared, privileges of Parliament and the people, to violate which in any material respect would produce a revolution in an hour. A violation of one of the fundamental principles of that constitution in the Colonies, namely, the principle that recognizes the property of the people as their own, and which, therefore, regards all taxes for the support of government as gifts of the people through their representatives, and regards taxation without representation as subversive of free government, was the origin of our own revolution.

This, it is true, was the violation of a political right; but personal rights were deemed equally sacred, and were claimed by the very first Congress of the Colonies, assembled in 1774, as the undoubted inheritance of the people of this country; and the Declaration of Independence, which ***116** was the first political act of the American people in their independent sovereign capacity, lays the foundation of our National existence upon this broad proposition: 'That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.' Here again we have the great threefold division of the rights of freemen, asserted as the rights of man. Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all; and these rights, I contend, belong to the citizens of every free government.

***51** For the preservation, exercise, and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.

I think sufficient has been said to show that citizenship is not an empty name, but that, in this country at least, it has connected with it certain incidental rights, privileges, and immunities of the greatest importance. And to say that these rights and immunities attach only to State citizenship, and not to citizenship of the United States, appears to me 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.

On this point the often-quoted language of Mr. Justice Washington, in *Corfield* v. *Coryell*,[41] is very instructive. Being ***117** called upon to expound that clause in the fourth article of the Constitution, which declares that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States,' he says: 'The inquiry is, what are

the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental;* which belong, of right, to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental privileges 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.'

***52** It is pertinent to observe that both the clause of the Constitution referred to, and Justice Washington in his comment on it, speak of the privileges and immunities of citizens *in* a State; not of citizens *of* a State. It is the privileges and immunities of citizens, that is, of citizens as such, that are to be accorded to citizens of other States when they are found in any State; or, as Justice Washington says, 'privileges and immunities which are, in their nature, fundamental; ***118** which belong, of right, to the citizens of all free governments.'

It is true the courts have usually regarded the clause referred to as securing only an equality of privileges with the citizens of the State in which the parties are found. Equality before the law is undoubtedly one of the privileges and immunities of every citizen. I am not aware that any case has arisen in which it became necessary to vindicate any other fundamental privilege of citizenship; although rights have been claimed which were not deemed fundamental, and have been rejected as not within the protection of this clause. Be this, however, as it may, the language of the clause is as I have stated it, and seems fairly susceptible of a broader interpretation than that which makes it a guarantee of mere equality of privileges with other citizens.

But we are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself. The Constitution, it is true, as it stood prior to the recent amendments, specifies, in terms, only a few of the personal privileges and immunities of citizens, but they are very comprehensive in their character. The States were merely prohibited from passing bills of attainder, *ex post facto* laws, laws impairing the obligation of contracts, and perhaps one or two more. But others of the greatest consequence were enumerated, although they were only secured, in express terms, from invasion by the Federal government; such as the right of *habeas corpus*, the right of trial by jury, of free exercise of religious worship, the right of free speech and a free press, the right peaceably to assemble for the discussion of public measures, the right to be secure against unreasonable searches and seizures, and above all, and including almost all the rest, the right of *not being deprived of life, liberty, or property, without due process of law.* These, and still others are specified in the original Constitution, or in the early amendments of it, as among the privileges and immunities ***119** of citizens of the United States, or, what is still stronger for the force of the argument, the rights of all persons, whether citizens or not.

But even if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they now are. It was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens; the privilege of buying, selling, and enjoying property; the privilege of engaging in any lawful employment for a livelihood; the privilege of resorting to the laws for redress of injuries, and the like. Their very citizenship conferred these privileges, if they did not possess them before. And these privileges they would enjoy whether they were citizens of any State or not. Inhabitants of Federal territories and new citizens, made such by annexation of territory or naturalization, though without any status as citizens of a State, could, nevertheless, as citizens of the United States, lay claim to every one of the privileges and immunities which have been enumerated; and among these none is more essential and fundamental than the right to follow such profession or employment as each one may choose, subject only to uniform regulations equally applicable to all.

**53 II. The next question to be determined in this case is: Is a monopoly or exclusive right, given to one person, or corporation, to the exclusion of all others, to keep slaughter-houses in a district of nearly twelve hundred square miles, for the supply of meat for a great city, a reasonable regulation of that employment which the legislature has a right to impose?

The keeping of a slaughter-house is part of, and incidental to, the trade of a butcher—one of the ordinary occupations of human life. To compel a butcher, or rather all the butchers of a large city and an extensive district, to slaughter their cattle in another person's slaughter-house and pay him a toll therefor, is such a restriction upon the trade as materially to interfere with its prosecution. It is onerous, unreasonable, arbitrary, and unjust. It has none of the *120 qualities of a police regulation. If it were really a police regulation, it would undoubtedly be within the power of the legislature. That portion of the act which requires all slaughter-houses to be located below the city, and to be subject to inspection, &c., is clearly a police regulation. That portion which allows no one but the favored company to build, own, or have slaughter-houses is not a police regulation, and has not the faintest semblance of one. It is one of those arbitrary and unjust laws made in the interest of a few scheming individuals, by which some of the Southern States have, within the past few years, been so deplorably oppressed and impoverished. It seems to me strange that it can be viewed in any other light.

The granting of monopolies, or exclusive privileges to individuals or corporations, is an invasion of the right of others to choose a lawful calling, and an infringement of personal liberty. It was so felt by the English nation as far back as the reigns of Elizabeth and James. A fierce struggle for the suppression of such monopolies, and for abolishing the prerogative of creating them, was made and was successful. The statute of 21st James, abolishing monopolies, was one of those constitutional landmarks of English liberty which the English nation so highly prize and so jealously preserve. It was a part of that inheritance which our fathers brought with them. This statute abolished all monopolies except grants for a term of years to the inventors of new manufactures. This exception is the groundwork of patents for new inventions and copyrights of books. These have always been sustained as beneficial to the state. But all other monopolies were abolished, as tending to the impoverishment of the people and to interference with their free pursuits. And ever since that struggle no English-speaking people have ever endured such an odious badge of tyranny.

It has been suggested that this was a mere legislative act, and that the British Parliament, as well as our own legislatures, have frequently disregarded it by granting exclusive privileges for erecting ferries, railroads, markets, and other establishments of a public kind. It requires but a slight *121 acquaintance with legal history to know that grants of this kind of franchises are totally different from the monopolies of commodities or of ordinary callings or pursuits. These public franchises can only be exercised under authority from the government, and the government may grant them on such conditions as it sees fit. But even these exclusive privileges are becoming more and more odious, and are getting to be more and more regarded as wrong in principle, and as inimical to the just rights and greatest good of the people. But to cite them as proof of the power of legislatures to create mere monopolies, such as no free and enlightened community any longer endures, appears to me, to say the least, very strange and illogical.

**54 Lastly: Can the Federal courts administer relief to citizens of the United States whose privileges and immunities have been abridged by a State? Of this I entertain no doubt. Prior to the fourteenth amendment this could not be done, except in a few instances, for the want of the requisite authority.

As the great mass of citizens of the United States were also citizens of individual States, many of their general privileges and immunities would be the same in the one capacity as in the other. Having this double citizenship, and the great body of municipal laws intended for the protection of person and property being the laws of the State, and no provision being made, and no machinery provided by the Constitution, except in a few specified cases, for any interference by the General Government between a State and its citizens, the protection of the citizen in the enjoyment of his fundamental privileges and immunities (except where a citizen of one State went into another State) was largely left to State laws and State courts, where they will still continue to be left unless actually invaded by the unconstitutional acts or delinquency of the State governments themselves.

Admitting, therefore, that formerly the States were not prohibited from infringing any of the fundamental privileges and immunities of citizens of the United States, except *122 in a few specified cases, that cannot be said now, since the adoption of the fourteenth amendment. In my judgment, it was the intention of the people of this country in adopting that amendment

to provide National security against violation by the States of the fundamental rights of the citizen.

The first section of this amendment, after declaring that all persons born or naturalized in the United States, and subject to its jurisdiction, are citizens of the United States and of the State wherein they reside, proceeds to declare further, that '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;' and that Congress shall have power to enforce by appropriate legislation the provisions of this article.

Now, here is a clear prohibition on the States against making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States.

If my views are correct with regard to what are the privileges and immunities of citizens, it follows conclusively that any law which establishes a sheer monopoly, depriving a large class of citizens of the privilege of pursuing a lawful employment, does abridge the privileges of those citizens.

The amendment also prohibits any State from depriving any person (citizen or otherwise) of life, liberty, or property, without due process of law.

55 In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.

The constitutional question is distinctly raised in these cases; the constitutional right is expressly claimed; it was ***123*** violated by State law, which was sustained by the State court, and we are called upon in a legitimate and proper way to afford redress. Our jurisdiction and our duty are plain and imperative.

It is futile to argue that none but persons of the African race are intended to be benefited by this amendment. They may have been the primary cause of the amendment, but its language is general, embracing all citizens, and I think it was purposely so expressed.

The mischief to be remedied was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the National government which had troubled the country for so many years in some of the States, and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation. The amendment was an attempt to give voice to the strong National yearning for that time and that condition of things, in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect on every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman, without fear of violence or molestation.

But great fears are expressed that this construction of the amendment will lead to enactments by Congress interfering with the internal affairs of the States, and establishing therein civil and criminal codes of law for the government of the citizens, and thus abolishing the State governments in everything but name; or else, that it will lead the Federal courts to draw to their cognizance the supervision of State tribunals on every subject of judicial inquiry, on the plea of ascertaining whether the privileges and immunities of citizens have not been abridged.

In my judgment no such practical inconveniences would arise. Very little, if any, legislation on the part of Congress would be required to carry the amendment into effect. Like the prohibition against passing a law impairing the obligation of a contract, it would execute itself. The point would ***124*** be regularly raised, in a suit at law, and settled by final reference to the Federal court. As the privileges and immunities protected are only those fundamental ones which belong to every citizen, they would soon become so far defined as to cause but a slight accumulation of business in the Federal courts. Besides, the recognized existence of the law would prevent its frequent violation. But even if the business of the National courts should be increased, Congress could easily supply the remedy by increasing their number and efficiency. The great question is, What is the true construction of the amendment? When once we find that, we shall find the means of giving it effect. The argument from inconvenience ought not to have a very controlling influence in questions of this sort. The National will and National interest are of far greater importance.

**56 In my opinion the judgment of the Supreme Court of Louisiana ought to be reversed.

Mr. Justice SWAYNE, dissenting:

I concur in the dissent in these cases and in the views expressed by my brethren, Mr. Justice Field and Mr. Justice Bradley. I desire, however, to submit a few additional remarks.

The first eleven amendments to the Constitution were intended to be checks and limitations upon the government which that instrument called into existence. They had their origin in a spirit of jealousy on the part of the States, which existed when the Constitution was adopted. The first ten were proposed in 1789 by the first Congress at its first session after the organization of the government. The eleventh was proposed in 1794, and the twelfth in 1803. The one last mentioned regulates the mode of electing the President and Vice-President. It neither increased nor diminished the power of the General Government, and may be said in that respect to occupy neutral ground. No further amendments were made until 1865, a period of more than sixty years. The thirteenth amendment was proposed by Congress on the 1st of February, 1865, the fourteenth on *125 the 16th of June, 1866, and the fifteenth on the 27th of February, 1869. These amendments are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the States, and deeply affect those bodies. They are, in this respect, at the opposite pole from the first eleven. [42]

Fairly construed these amendments may be said to rise to the dignity of a new Magna Charta. The thirteenth blotted out slavery and forbade forever its restoration. It struck the fetters from four millions of human beings and raised them at once to the sphere of freemen. This was an act of grace and justice performed by the Nation. Before the war it could have been done only by the States where the institution existed, acting severally and separately from each other. The power then rested wholly with them. In that way, apparently, such a result could never have occurred. The power of Congress did not extend to the subject, except in the Territories.

The fourteenth amendment consists of five sections. The first is as follows: 'All persons born or naturalized within the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make 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.'

**57 The fifth section declares that Congress shall have power to enforce the provisions of this amendment by appropriate legislation.

The fifteenth amendment declares that the right 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. Until this amendment was adopted the subject *126 to which it relates was wholly within the jurisdiction of the States. The General Government was excluded from participation.

The first section of the fourteenth amendment is alone involved in the consideration of these cases. No searching analysis is necessary to eliminate its meaning. Its language is intelligible and direct. Nothing can be more transparent. Every word employed has an established signification. There is no room for construction. There is nothing to construe. Elaboration may obscure, but cannot make clearer, the intent and purpose sought to be carried out.

(1.) Citizens of the States and of the United States are defined.

(2.) It is declared that no State shall, by law, abridge the privileges or immunities of citizens of the United States.

(3.) That no State shall deprive *any person*, whether a citizen or not, of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

A citizen of a State is *ipso facto* a citizen of the United States. No one can be the former without being also the latter; but the latter, by losing his residence in one State without acquiring it in another, although he continues to be the latter, ceases for the time to be the former. 'The privileges and immunities' of a citizen of the United States include, among other things, the fundamental rights of life, liberty, and property, and also the rights which pertain to him by reason of his membership of the Nation. The citizen of a State has the same

fundamental rights as a citizen of the United States, and also certain others, local in their character, arising from his relation to the State, and in addition, those which belong to the citizen of the United States, he being in that relation also. There may thus be a double citizenship, each having some rights peculiar to itself. It is only over those which belong to the citizen of the United States that the category here in question throws the shield of its protection. All those which belong to the citizen of a State, except as a bills of attainder, *ex post facto* ***127** laws, and laws impairing the obligation of contracts, [43] are left to the guardianship of the bills of rights, constitutions, and laws of the States respectively. Those rights may all be enjoyed in every State by the citizens of every other State by virtue of clause 2, section 4, article 1, of the Constitution of the United States as it was originally framed. This section does not in anywise affect them; such was not its purpose.

****58** In the next category, obviously *ex industriâ*, to prevent, as far as may be, the possibility of misinterpretation, either as to persons or things, the phrases 'citizens of the United States' and 'privileges and immunities' are dropped, and more simple and comprehensive terms are substituted. The substitutes are 'any person,' and 'life,' 'liberty,' and 'property,' and 'the equal protection of the laws.' Life, liberty, and property are forbidden to be taken 'without due process of law,' and 'equal protection of the laws' is guaranteed to all. Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property, and of all solid individual and national prosperity. 'Due process of law' is the application of the law as it exists in the fair and regular course of administrative procedure. 'The equal protection of the laws' places all upon a footing of legal equality and gives the same protection to all for the preservation of life, liberty, and property, and the pursuit of happiness. [44]

***128** It is admitted that the plaintiffs in error are citizens of the United States, and persons within the jurisdiction of Louisiana. The cases before us, therefore, present but two questions.

(1.) Does the act of the legislature creating the monopoly in question abridge the privileges and immunities of the plaintiffs in error as citizens of the United States?

(2.) Does it deprive them of liberty or property without due process of law, or deny them the equal protection of the laws of the State, they being *persons* 'within its jurisdiction?'

Both these inquiries I remit for their answer as to the facts to the opinions of my brethren, Mr. Justice Field and Mr. Justice Bradley. They are full and conclusive upon the subject. A more flagrant and indefensible invasion of the rights of many for the benefit of a few has not occurred in the legislative history of the country. The response to both inquiries should be in the affirmative. In my opinion the cases, as presented in the record, are clearly within the letter and meaning of both the negative categories of the sixth section. The judgments before us should, therefore, be reversed.

****59** These amendments are all consequences of the late civil war. The prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members. The provisions of this section are all eminently conservative in their character. They are a bulwark of defence, and can never be made an engine of oppression. The language employed is unqualified in its scope. There is no exception in its terms, and there can be properly none in their application. By the language 'citizens of the United States' was meant *all* such citizens; and by 'any person' ***129** was meant *all* persons within the jurisdiction of the State. No distinction is intimated on account of race or color. This court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it. The protection provided was not intended to be confined to those of any particular race or class, but to embrace equally all races, classes, and conditions of men. It is objected that the power conferred is novel and large. The answer is that the novelty was known and the measure deliberately adopted. The power is beneficent in its nature, and cannot be abused. It is such an should exist in every well-ordered system of polity. Where could it be more appropriately lodged than in the hands to which it is confided? It is necessary to enable the government of the nation to secure to every one 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. Without such authority any government claiming to be national is glaringly defective. The construction adopted by the majority of my brethren is, in my judgment, much too narrow. It defeats, by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted. To the extent of that limitation it turns, as it were, what was meant for bread into a stone. By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by this amendment. Against the former this court has been called upon more than once to interpose. Authority of the same amplitude was intended to be conferred as to the latter. But this arm of our jurisdiction is, in these cases, stricken down by the judgment just given. Nowhere, than in this court, ought the will of the nation, as thus expressed, to be more liberally construed or more cordially executed. This determination of the majority seems to me to lie far in the other direction.

*130 I earnestly hope that the consequences to follow may prove less serious and far-reaching than the minority fear they will be.

All Citations

83 U.S. 36, 1872 WL 15386, 21 L.Ed. 394, 16 Wall. 36

Footnotes

1 See *infra*, pp. 85, 86.

2 De la Propriété, 36, 47.

3 History of England, vol. 1, p. 58.

4 11 Reports, 85.

5 25 Connecticut, 19.

6 45 Illinois, 90.

7 7 Paige, 261.

8 The statement of these cases being made, *infra*, pp. 106–109, in the dissenting opinion of Mr. Justice Field, is not here given.

9 12 Wallace, 419. ***56***

10 9 Wheaton, 203.

11 See *supra*, p. 36, sub-title.

12 See subtitle, *supra*, p. 36.—REP.

13 2 Commentaries, 340.

14 Commonwealth *v.* Alger, 7 Cushing, 84.

15 Thorpe *v.* Rutland and Burlington Railroad Co., 27 Vermont, 149.

16 9 Wheaton, 203.

17 11 Peters, 102.

18 5 Wallace, 471.

19 9 Id. 41.

20 4 Wheaton, 316.

21 Matter of Turner, 1 Abbott United States Reports, 84.

22 4 Washington's Circuit Court, 371.

23 12 Wallace, 430.

24 8 Id. 180.

25 6 Wallace, 36.

26 The proclamation of its ratification was made on that day (13 Stat. at Large, 774).

27 14 Id. 27.

28 Congressional Globe, 1st Session, 39th Congress, part 1, page 474

29 Calhoun's Works, vol. 2, p. 242.

30 May 31st, 1870; 16 Stat. at Large, 144.

31 4 Washington's Circuit Court, 380.

32 8 Wallace, 168.

33 Coke's Reports, part 11, page 86.

34 Journals of Congress, vol. i, pp. 28–30.

35 Live-Stock, &c., Association *v.* The Crescent City, &c., Company (1 Abbott's United States Reports, 398).

36 45 Illinois, 90.

37 25 Connecticut, 19.

38 7 Paige, 261.

39 'The property which every man has in his own labor,' says Adam Smith, 'as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.' (Smith's Wealth of Nations, b. 1, ch. 10, part 2.)
In the edict of Louis XVI, in 1776, giving freedom to trades and professions, prepared by his minister, Turgot, he recites the contributions that had been made by the guilds and trade companies, and says: 'It was the allurement of these fiscal advantages undoubtedly that prolonged the illusion and concealed the immense injury they did to industry and their infraction of natural right. *This* illusion had extended so far that some persons asserted that the right to work was a royal privilege which the king might sell, and that his subjects were bound to purchase from him. We hasten to correct this error and to repel the conclusion. God in giving to man wants and desires rendering labor necessary for their satisfaction, conferred the right to labor upon all men, and this property is the first, most sacred, and imprescriptible of all.' . . . He, therefore, regards it 'as the first duty of his justice, and the worthiest act of benevolence, to free his subjects from any restriction upon this inalienable right of humanity.'

40 'Civil liberty, the great end of all human society and government, is that state in which each individual has the power to pursue his own happiness according to his own views of his interest, and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws.' (1 Sharswood's Blackstone, 127, note 8.)

41 4 Washington, 380.

42 Barron *v.* Baltimore, 7 Peters, 243; Livingston *v.* Moore, Ib. 551; Fox *v.* Ohio, 5 Howard, 429; Smith *v.* Maryland, 18 Id. 71; Pervear *v.* Commonwealth, 5 Wallace, 476; Twitchell *v.* Commonwealth, 7 Id. 321.

43 Constitution of the United States, Article I, Section 10.

44 Corfield *v.* Coryell, 4 Washington, 380; Lemmon *v.* The People, 26 Barbour, 274, and 20 New York, 626; Conner *v.* Elliott, 18 Howard, 593; Murray *v.* McCarty, 2 Mumford, 399; Campbell *v.* Morris, 3 Harris & McHenry, 554;

Towles's Case, 5 Leigh, 748; State v. Medbury, 3 Rhode Island, 142; 1 Tucker's Blackstone, 145; 1 Cooley's Blackstone, 125, 128.

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Abrogation Recognized by Mueller v. Auker, 9th Cir.(Idaho), August 10, 2009

83 U.S. 130

Supreme Court of the United States

Bradwell v. People of State of Illinois

Supreme Court of the United States December 1, 1872 83 U.S. 130 1872 WL 15396 21 L.Ed. 442 16 Wall. 130 *(Approx. 7 pages)*

BRADWELL

v.

THE STATE.

December Term, 1872

***1** IN error to the Supreme Court of the State of Illinois.

Mrs. Myra Bradwell, residing in the State of Illinois, made application to the judges of the Supreme Court of that State for a license to practice law. She accompanied her petition with the usual certificate from an inferior court of her good character, and that on due examination she had been found to possess the requisite qualifications. Pending this application she also filed an affidavit, to the effect 'that she was born in the State of Vermont; that she was (had been) a citizen of that State; that she is now a citizen of the United States, and has been for many years past a resident of the city of Chicago, in the State ofIllinois.' And with this affidavit she also filed a paper asserting that, under the foregoing facts, she was entitled to the license prayed for by virtue of the second section of the fourth article of the Constitution of the United States, and of the fourteenth article of amendment of that instrument. ***131**

The statute of Illinois on the subject of admissions to the bar, enacts that no person shall be permitted to practice as an attorney or counsellor-at-law, or to commence, conduct, or defend any action, suit, or plaint, in which he is not a party concerned, in any court of record within the State, either by using or subscribing his own name or the name of any other person, without having previously obtained a license for that purpose from some two of the justices of the Supreme Court, which license shall constitute the person receiving the same an attorney and counsellor-at-law, and shall authorize him to appear in all the courts of record within the State, and there to practice as an attorney and counsellor-at-law, according to the laws and customs thereof.

On Mrs. Bradwell's application first coming before the court, the license was refused, and it was stated as a sufficient reason that under the decisions of the Supreme Court of Illinois, the applicant-'as a married woman would be bound neither by her express contracts nor by those implied contracts which it is the policy of the law to create between attorney and client.' After the announcement of this decision, Mrs. Bradwell, admitting that she was a married woman-though she expressed her belief that such fact did not appear in the record-filed a printed argument in which her right to admission, notwithstanding that fact, was earnestly and ably maintained. The court thereupon gave an opinion in writing. Extracts are here given:

'Our statute provides that no person shall be permitted to practice as an attorney or counsellor at law without having previously obtained a license for that purpose from two of the justices of the Supreme Court. By the second section of the act, it is provided that no person shall be entitled to receive a license until he shall have obtained a certificate from the court of some county of his good moral character, and this is the only express limitation upon the exercise of the power thus intrusted to this court. In all other respects it is left to our discretion to establish the rules by which admission to this office shall be determined. But this discretion is not an arbitrary one, and must be held subject to at least two limitations. One is, that the ***132** court should establish such terms of admission as will promote the proper administration of justice; the second, that it should not admit any persons or class of persons who are not intended by the legislature to be admitted, even though their exclusion is not expressly required by the statute.

**2 'The substance of the last limitation is simply that this important trust reposed in us should be exercised in conformity with the designs of the power creating it.

'Whether, in the existing social relations between men and women, it would promote the proper administration of justice, and the general well-being of society, to permit women to engage in the trial of cases at the bar, is a question opening a wide field of discussion, upon which it is not necessary for us to enter. It is sufficient to say that, in our opinion, the other implied limitation upon our power, to which we have above referred, must operate to prevent our admitting women to the office of attorney at law. If we were to admit them, we should be exercising the authority conferred upon us in a manner which, we are fully satisfied, was never contemplated by the legislature.

'It is to be remembered that at the time this statute was enacted we had, by express provision, adopted the common law of England, and, with three exceptions, the statutes of that country passed prior to the fourth year of James the First, so far as they were applicable to our condition.

'It is to be also remembered that female attorneys at law were unknown in England, and a proposition that a woman should enter the courts of Westminster Hall in that capacity, or as a barrister, would have created hardly less astonishment than one that she should ascend the bench of bishops, or be elected to a seat in the House of Commons.

'It is to be further remembered, that when our act was passed, that school of reform which claims for women participation in the making and administering of the laws had not then arisen, or, if here and there a writer had advanced such theories, they were regarded rather as abstract speculations than as an actual basis for action.

'That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth.

'In view of these facts, we are certainly warranted in saying *133 that when the legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended to women.'

The court having thus denied the application, Mrs. Brad-well brought the case here as within the twenty-fifth section of the Judiciary Act, or the recent act of February 5th, 1867, amendatory thereto; the exact language of which may be seen in the Appendix.

West Headnotes (2)

Attorneys and Law Firms

Mr. Matthew Hale Carpenter, for the plaintiff in error:

**3 The question does not involve the right of a female to vote. It presents a narrow matter:

Can a female citizen, duly qualified in respect of age, character, and learning, claim, under the fourteenth amendment, [1] the privilege of earning a livelihood by practicing at the bar of a judicial court?

1. The Supreme Court of Illinois having refused to grant to a woman a license to practice law in the courts of that State, on the ground that females are not eligible under the laws of that State; *Held*, that such a decision violates no provision of the Federal Constitution.

2. The second section of the fourth article is inapplicable, because the plaintiff was a citizen of the State of whose action she complains, and that section only guarantees privileges and immunities to citizens of other States, in that State.

3. Nor is the right to practice law in the State courts a privilege or immunity of a citizen of the United States, within the meaning of the first section of the fourteenth article of amendment of the Constitution of the United States.

4. The power of a State to prescribe the qualifications for admission to the bar of its own courts is unaffected by the fourteenth amendment, and this court cannot inquire into the reasonableness or propriety of the rules it may prescribe.

The original Constitution said:

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

Under this provision each State could determine for itself what the privileges and immunities of its citizens should be. A citizen emigrating from one State to another carried with him, not the privileges and immunities he enjoyed in his native State, but was entitled, in the State of his adoption, to such privileges and immunities as were enjoyed by the class of citizens to which he belonged by the laws of such adopted State.

But the fourteenth amendment executes itself in every State of the Union. Whatever are the privileges and immunities of a citizen in the State of New York, such citizen, emigrating, carries them with him into any other State of the Union. It utters the will of the United States in every State, and silences every State constitution, usage, or law which conflicts with it. If to be admitted to the bar, on attaining the age and learning required by law, be one of the ***134*** privileges of a white citizen in the State of New York, it is equally the privilege of a colored citizen in that State; and if in that State, then in any State. If no State may 'make or enforce any law' to abridge the privileges of a citizen, it must follow that the privileges of all citizens are the same.

Does admission to the bar belong to that class of privileges which a State may not abridge, or that class of political rights as to which a State may discriminate between its citizens?

4 It is evident that there are certain 'privileges and immunities' which belong to a citizen of the United States as such; otherwise it would be nonsense for the fourteenth amendment to prohibit a State from abridging them. I concede that the right to vote is not one of those privileges. And the question recurs whether admission to the bar, the proper qualification being possessed, is one of the privileges which a State may not deny.

In *Cummings* v. *Missouri*,[2] this court say:

'The theory upon which our political institutions rest is, that all men have certain inalienable rights-that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness *all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law.* Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.'

In *Ex parte Garland*,[3] this court say:

'The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counsellors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order, *upon* ***135*** *evidence of their possessing sufficient legal learning and fair private character. . . .* The order of admission is the judgment of the court, that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, *and can only be deprived of it for misconduct, ascertained and declared by the judgment of the court, after opportunity to be heard has been offered.*'[4]

It is now settled by numerous cases,[5] that the courts in admitting attorneys to, and in expelling them from, the bar, act judicially, and that such proceedings are subject to review on writ of error or appeal, as the case may be.

5 From these cases the conclusion is irresistible, that the profession of the law, like the clerical profession and that of medicine, is an avocation open to every citizen of the United States. And while the legislature may prescribe qualifications for entering upon this pursuit, they cannot, under the guise of fixing qualifications, exclude a class of citizens from admission to the bar. The legislature may say at what age candidates shall be admitted; may elevate or depress the standard of learning required. But a qualification, to which a whole class of citizens never can attain, is not a regulation of admission to the bar, but is, as to such citizens, a prohibition. For instance, a State legislature could not, in enumerating the qualifications, require the candidate to be a white citizen. This would be the exclusion of all colored citizens, without regard to age, character, or learning. Yet no sound mind can draw a distinction between such an act and a custom, usage, or law of a State, which denies this privilege to all female citizens, without regard to age, character, or learning. If the legislature may, under pretence of fixing qualifications, declare that no ***136*** female citizen shall be permitted to practice law, it may as well declare that no colored citizen shall practice law; for the only provision in the Constitution of the United States which secures to colored male

citizens the privilege of admission to the bar, or the pursuit of the other ordinary avocations of life, is the provision that 'no State shall make or enforce any law which shall abridge the privileges or immunities of a citizen.' And if this provision does protect the colored citizen, then it protects every citizen, black or white, male or female.

Now, Mrs. Bradwell is a citizen of the United States, and of the State of Illinois, residing therein; she has been judicially ascertained to be of full age, and to possess the requisite character and learning.

Still admission to the bar was denied her, not upon the ground that she was not a citizen; not for want of age or qualifications; not because the profession of the law is not one of those avocations which are open to every American citizen as matter of right, upon complying with the reasonable regulations prescribed by the legislature; but first upon the ground that inconvenience would result from permitting her to enjoy her legal rights in this, to wit, that her clients might have difficulty in enforcing the contracts they might make with her, as their attorney, because of her being a married woman; and, finally, on the ground of her sex, merely.

Now, the argument *ab inconvenienti*, which might have been urged with whatever force belongs to it, against *adopting* the fourteenth amendment in the full scope of its language, is futile to resist its full and proper operation, now that it has been adopted. But that objection is really without force; for Mrs. Bradwell, admitted to the bar, becomes an officer of the court, subject to its summary jurisdiction. Any malpractice or unprofessional conduct towards her client would be punishable by fine, imprisonment, or expulsion from the bar, or by all three. Her clients would, therefore, not be compelled to resort to actions at law against her. The objection arising from her coverture was in fact ***137** abandoned, in its more full consideration of the case, by the court itself; and the refusal put upon the fact that the statute of Illinois, interpreted by the light of early days, could not have contemplated the admission of any woman, though unmarried, to the bar. But whatever the statute of Illinois meant, I maintain that the fourteenth amendment opens to every citizen of the United States, male or female, black or white, married or single, the honorable professions as well as the servile employments of life; and that no citizen can be excluded from any one of them. Intelligence, integrity, and honor are the only qualifications that can be prescribed as conditions precedent to an entry upon any honorable pursuit or profitable avocation, and all the privileges and immunities which I vindicate to a colored citizen, I vindicate to our mothers, our sisters, and our daughters. The inequalities of sex will undoubtedly have their influence, and be considered by every client desiring to employ counsel.

***6** There may be cases in which a client's rights can only be rescued by an exercise of the rough qualities possessed by men. There are many causes in which the silver voice of woman would accomplish more than the severity and sternness of man could achieve. Of a bar composed of men and women of equal integrity and learning, women might be more or less frequently retained, as the taste or judgment of clients might dictate. But the broad shield of the Constitution is over them all, and protects each in that measure of success which his or her individual merits may secure.
No opposing counsel.

Opinion

Mr. Justice MILLER delivered the opinion of the court.

The record in this case is not very perfect, but it may be fairly taken that the plaintiff asserted her right to a license on the grounds, among others, that she was a citizen of the United States, and that having been a citizen of Vermont at one time, she was, in the State of Illinois, entitled to any right granted to citizens of the latter State.

The court having overruled these claims of right founded on the clauses of the Federal Constitution before referred ***138** to, those propositions may be considered as properly before this court.

As regards the provision of the Constitution that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, the plaintiff in her affidavit has stated very clearly a case to which it is inapplicable.

The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the State whose laws are complained of. If the plaintiff was a citizen of the State of Illinois, that provision of the Constitution gave her no protection against its courts or its legislation.

The plaintiff seems to have seen this difficulty, and attempts to avoid it by stating that she was born in Vermont.

While she remained in Vermont that circumstance made her a citizen of that State. But she states, at the same time, that she is a citizen of the United States, and that she is now, and has been for many years past, a resident of Chicago, in the State of Illinois.

The fourteenth amendment declares that citizens of the United States are citizens of the State within which they reside; therefore the plaintiff was, at the time of making her application, a citizen of the United States and a citizen of the State of Illinois.

We do not here mean to say that there may not be a temporary residence in one State, with intent to return to another, which will not create citizenship in the former. But the plaintiff states nothing to take her case out of the definition of citizenship of a State as defined by the first section of the fourteenth amendment.

In regard to that amendment counsel for the plaintiff in this court truly says that there are certain privileges and immunities which belong to a citizen of the United States as such; otherwise it would be nonsense for the fourteenth amendment to prohibit a State from abridging them, and he proceeds to argue that admission to the bar of a State of a person who possesses the requisite learning and character is one of those which a State may not deny.

***7 *139** In this latter proposition we are not able to concur with counsel. We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them. This right in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any State, or in any case, to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the State and Federal courts, who were not citizens of the United States or of any State. But, on whatever basis this right may be placed, so far as it can have any relation to citizenship at all, it would seem that, as to the courts of a State, it would relate to citizenship of the State, and as to Federal courts, it would relate to citizenship of the United States.

The opinion just delivered in the *Slaughter-House Cases*[6] renders elaborate argument in the present case unnecessary; for, unless we are wholly and radically mistaken in the principles on which those cases are decided, the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.

It is unnecessary to repeat the argument on which the judgment in those cases is founded. It is sufficient to say they are conclusive of the present case.

JUDGMENT AFFIRMED.

Mr. Justice BRADLEY:
I concur in the judgment of the court in this case, by which the judgment of the Supreme Court of Illinois is affirmed, but not for the reasons specified in the opinion just read.

***140** The claim of the plaintiff, who is a married woman, to be admitted to practice as an attorney and counsellor-at-law, is based upon the supposed right of every person, man or woman, to engage in any lawful employment for a livelihood. The Supreme Court of Illinois denied the application on the ground that, by the common law, which is the basis of the laws of Illinois, only men were admitted to the bar, and the legislature had not made any change in this respect, but had simply provided that no person should be admitted to practice as attorney or counsellor without having previously obtained a license for that purpose from two justices of the Supreme Court, and that no person should receive a license without first obtaining a certificate from the court of some county of his good moral character. In other respects it was left to the discretion of the court to establish the rules by which admission to the profession should be determined. The court, however, regarded itself as bound by at least two limitations. One was that it should establish such terms of admission as would promote the proper administration of justice, and the other that it should not admit any persons, or class of persons, not intended by the legislature to be admitted, even though not expressly excluded by statute. In view of this latter limitation the court felt compelled to deny the application of females to be admitted as members of the bar. Being contrary to the rules

of the common law and the usages of Westminster Hall from time immemorial, it could not be supposed that the legislature had intended to adopt any different rule.

**8 The claim that, under the fourteenth amendment of the Constitution, which declares that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, the statute law of Illinois, or the common law prevailing in that State, can no longer be set up as a barrier against the right of females to pursue any lawful employment for a livelihood (the practice of law included), assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life.

*141 It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society *142 must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.

**9 For these reasons I think that the laws of Illinois now complained of are not obnoxious to the charge of abridging any of the privileges and immunities of citizens of the United States.

Mr. Justice SWAYNE and Mr. Justice FIELD concurred in the foregoing opinion of Mr. Justice BRADLEY.

The CHIEF JUSTICE dissented from the judgment of the court, and from all the opinions.

All Citations

83 U.S. 130, 1872 WL 15396, 21 L.Ed. 442, 16 Wall. 130

Footnotes

1 See the Amendment, *supra*, pp. 43, 44.

2 4 Wallace, 321.

3 Ib. 378.

4 Ex parte Heyfron, 7 Howard's Mississippi, 127; Fletcher *v.* Dainger-field, 20 California, 430.

5 Ex parte Cooper, 22 New York, 67; Strother *v.* Missouri, 1 Missouri, 605; Ex parte Secomb, 19 Howard, 9; Ex parte Garland, 4 Wallace, 378.

6 *Supra*, p. 36.

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Richard L. Aynes, Bradwell v. Illinois: Chief Justice Chase's Dissent and the "Sphere of Women's Work", 59 La. L. Rev. 521 (1999)

The United States v. Thomas Dennison, et al.

The Defendants

Like many cities of the early twentieth century, Omaha was once ruled by a corrupt political machine. Omaha's political boss was Tom Dennison, and his key lieutenant and business manager was Billy Nesselhous.

Dennison settled in Omaha in 1892, after prospecting and gambling in Colorado. Nesselhous settled in Omaha seven years earlier. He was a former jockey who made his living in saloons and on street corners, gambling with shell games and dice. Dennison saw in Nesselhous a keen ability to persuade others and a gift for the careful calculation of odds. Together, they formed a lucrative joint venture. Dennison controlled elections in Omaha's Third Ward, giving him political patronage powers. Nesselhous managed the city's gambling, liquor, prostitution, and loan shark operations, under Dennison's direction.

Before Prohibition, Dennison operated his business out of the Budweiser Saloon at 14th and Douglas Streets. He later moved his office one block west to the Karbach building. Police commissioners beholden to Dennison passed on his instructions to their officers. Police cooperation ensured that competition in vice industries was eliminated, and legitimate businesses paid tribute for protection. At times, the machine's domination of vice operations was violent. During Prohibition, Omaha police shootings included the killing of bootleggers who were in competition with the Dennison-Nesselhous syndicate.

Some well-known Nebraskans, including Sarah Joslyn, N.P. Dodge, and Senators George Norris and R.B. Howell, publicly opposed the Dennison-Nesselhous syndicate. Others viewed it as a necessary evil that protected Omaha from a takeover by the crime syndicates of Chicago and Kansas City. Eventually, federal agents and Nebraska Attorney General C.A. Sorensen decided to move against Omaha's crime syndicate. Federal agents carefully investigated Dennison and Nesselhous's activities, and brought Dennison, Nesselhous, and 57 other defendants to trial.

William "Billy" Nesselhous

Tom Dennison

The Trial

In 1932, Dennison, Nesselhous, and 57 other defendants were indicted in the United States District Court for the District of Nebraska on charges of conspiracy to violate the National Prohibition Act. The indictment listed 168 overt acts in furtherance of the conspiracy. United States District Judge Joseph Woodrough presided over the two-month trial, and Assistant United States Attorney Edson Smith prosecuted. Omaha attorney Ed Shafton represented Dennison.

The Omaha World-Herald covered the trial on its front page every day. National media, including the New York Times, also took an interest in the trial. The testimony shed light on the methods used by crime syndicates and political machines of the Prohibition era to rig elections and trials, bribe judges and public officials, extort and launder money, and commit murder.

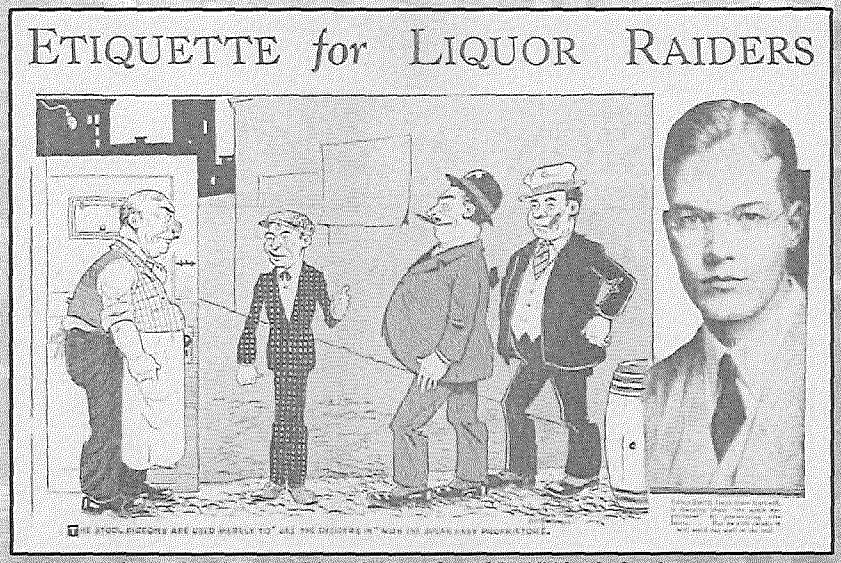
The jurors deliberated for five days and then informed the judge they were deadlocked. Judge Woodrough ordered them to continue deliberating. After two more days of deliberation, the jurors were in hopeless disagreement, and Judge Woodrough declared a mistrial. Interviews conducted 50 years after the trial by University of Nebraska at Omaha Professor Orville Menard revealed that the defendants' pretrial contact with the jurors ensured there would be a holdout.

Publicity generated by the trial raised Omahans' awareness of the nature of gangland activities, the crime syndicate, and its political machine. A bi-partisan anti-Dennison ticket swept Omaha's city elections the year after the trial, and the machine met its demise.

EVENING WORLD-HERALD, OMAHA, NEB., TUESDAY, OCTOBER 11, 1932

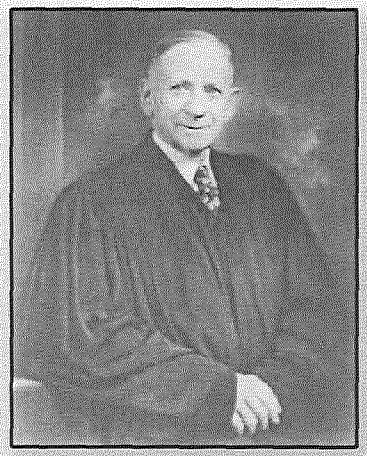
Scene in Judge Woodrough's Courtroo m at the Federal Building Where the L iquor Syndicate Trial Is in Progress

Defendants and their attorneys. Attorney Ed Shafton represented Dennison.

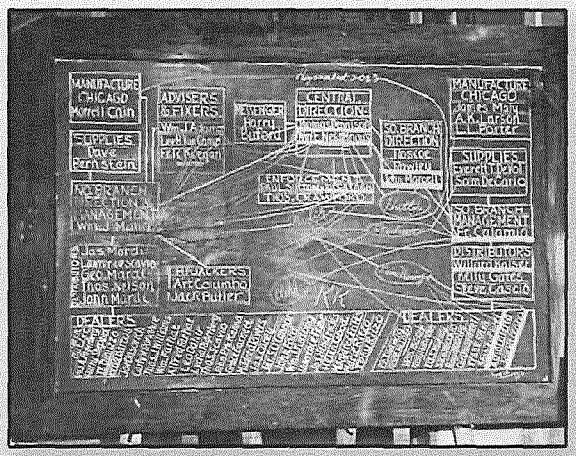


Assistant United States Attorney Edson Smith enforced Prohibition in Omaha.

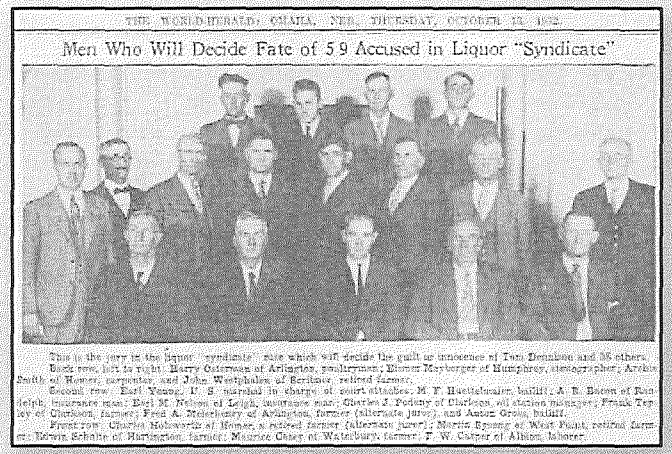
Federal courthouse where trial was held. Source: National archives: RG 121-BA, Box 11, Print 977



United States District Judge Joseph William Woodrough



Closing argument demonstrative exhibit



THE WORLD-HERALD, OMAHA, NEB., THURSDAY, OCTOBER 12, 1922.

Men Who Will Decide Fate of 59 Accused in Liquor "Syndicate"

This is the jury in the liquor "syndicate" case which will decide the guilt or innocence of Tom Dennison and 58 others. Back row, left to right: Harry Osterman of Arlington, poultryman; Elmer Mayberger of Humphrey, stenographer; Archie Smith of Homer, carpenter, and John Westphalen of Scribner, retired farmer.

Second row: Earl Young, U. S. marshal in charge of court attaches; M. F. Hartigan, bailiff; A. E. Bacon of Fort Calhoun, insurance man; Earl M. Nelson of Leigh, insurance man; Charles J. Podany of Clarkson, oil station manager; Frank Tepley of Clarkson, farmer; Fred A. Meierhenry of Arlington, farmer (alternate juror), and Anton Gross, bailiff.

Front row: Charles Holcomb of Homer, a retired farmer (alternate juror); Martin Sponsler of West Point, retired farmer; Erwin Schulte of Hartington, farmer; Maurice Chley of Walthill, farmer; F. W. Chilver of Albion, laborer.

The jurors

Epilogue

Dennison died in 1934, and Nesselhous in 1937.

Judge Woodrough was elevated to the United States Court of Appeals for the Eighth Circuit in 1933. He walked from his Dundee home to his downtown chambers every work day until his death in 1961 at the age of 104.

Edson Smith practiced law in Omaha until his death in 1988. Professor Menard's 1989 book chronicling the Dennison-Nesselhous era said, "Edson Smith alone seems to have been occupied with law enforcement for the law's sake, preparing and prosecuting a case wherein criminal activities, in his judgment, warranted a trial."

Ed Shafton practiced law in Omaha until his retirement in 1994 at the age of 85, and continued to work for philanthropic causes until his death in 2000. When asked about his famous client, Shafton simply said, "Mr. Dennison was a lobbyist," and smiled.

References: "River City Empire: Tom Dennison's Omaha" (2013 edition) by Professor Orville D. Menard; and The Nebraska Lawyer, April 2001 edition, pp. 26-31

Official portrait of Judge Joseph William Woodrough (1873-1977). NSHS 13001-2 01

THE WAYFARING JUDGE

WOODROUGH AND ORGANIZED CRIME IN THE U.S. DISTRICT COURT

BY NICK BATTER

In 1897, a twenty-four-year-old attorney came to Omaha to start his career in earnest. He lacked a law degree—or any degree for that matter—but had been admitted to the profession on the basis of having read a few legal treatises and because some prominent citizens vouched for his character. As the century came to a close, the attorney—Joseph William Woodrough—had grown to become one of the "leading legal lights of the State."[1]

By pure coincidence, just as Woodrough was arriving in Omaha, the city's four biggest crime bosses were leaving in a hurry, under mysterious circumstances. Their power vacuum would be filled almost instantly by another recent arrival, Tom Dennison, whose career up until that point had consisted almost exclusively of gambling and theft across a variety of frontier towns. By the turn of the century, the gambler was king of Omaha's underworld, having consolidated power by leveraging corrupt police officials to rout his rivals.[2]

Sunday World-Herald.

ON THE BENCH AT 21-FEDERAL JUDGE AT 42 -
JOSEPH W. WOODROUGH

Unusual Career of Young Lawyer Appointed Successor of Late Judge Munger

Woodrough was preceded on the bench by William Henry Munger, no relation to Thomas Charles Munger, a judge with whom Woodrough often clashed. *Omaha World-Herald,* March 26, 1916

Like Dennison, Woodrough's path to Omaha was meandrous. Born into family of reknowned Ohio sawmakers, Woodrough developed wanderlust in his teenage years. He traversed Europe by foot with a nephew of future President Theodore Roosevelt and met with Wilhelm II, the newly coronated German emperor.[3] Woodrough took classes at Annenschulen and Heidelberg University but, running out of both money and enchantment for German pedagogy, he left without graduating. He celebrated his eighteenth birthday in the middle of the Atlantic Ocean, aboard the *Wieland* en route home to America.[4]

Woodrough lingered briefly in Omaha, joining a cohort of twenty-one students attending classes in the inaugural year of the Omaha Law School. While a student, he worked under his uncle, William Beckett, attorney for Byron Reed and for wealthy heirs to the Creighton family estate. However, Woodrough hardly lasted the year. His uncle was a firebrand, banned from one courtroom for throwing a punch at a judge (he missed his target, but hit the bailiff square in the face).[5]

Woodrough departed to join even rougher company, arriving in remote Ward County Texas in 1894, an expanse of the Pecos Valley named for a local peg-legged hero whose natural leg was lost to a cannonball during the fight for Texan independence. Woodrough set to work raising cattle, farming onions, and practicing law.[6] The nascent lawyer ran for, and was elected, county judge the same year. The county's population, which hovered around one hundred, was "as unlearned in civil and criminal codes as it was proficient in the art of quick draw and steady trigger finger." Undaunted, the twenty-one-year-old judge had gunslingers hauled into his red sandstone courthouse, where they were fined $25 for carrying sidearms in public.[7] Thanks to Woodrough's enforcement of the laws, "peace soon reigned in the Pecos [Valley]." His contributions to onion farming, perhaps, also warrant note: a Ward County onion would go on to win top prize at the World's Fair in Saint Louis.[8]

Woodrough's connections to the Nebraska legal community led him back up tornado alley, to partner in law with William Gurley, a veteran litigator in downtown Omaha. In Woodrough's first year back, Omaha was capturing the attention of the world with the dazzling electric lights of the Trans-Mississippi Exhibition. Yet the growth and notoriety that would follow contained equal parts darkness. As Dennison's political machine grew, Omaha continued to garner national infamy for brazen kidnappings, racial violence, and xenophobia.[9] Meanwhile, inefficiencies in the judiciary slowed adjudication to a crawl. Woodrough complained that new cases were simply left "mouldering, like John Brown's body" (though apparently without marching on in spirit).[10] Woodrough hoped to combat organized crime and disorganized law.

His legal mentor, Gurley, was a prominent enemy of Dennison's patron, Edward Rosewater. Their feud was such a spectacle that crowds filled the Orpheum theater just to hear them argue—a show "well worth the price of admission." The *Omaha World-Herald* recounted Gurley's eloquence against Rosewater, who retorted while "teetering on tiptoe as he shrieked in high falsetto." Rosewater, who had the benefit of owning his own newspaper, printed more glamorous accounts of himself. Gurley turned the debate toward Rosewater's use of cronies and favoritism to build a political machine with men like Dennison working in the shadows. In the end it was a humiliating defeat for Rosewater, who had only "cleaned up" against Gurley "like the man cleaned up the packing house when he was dragged through it by the heels."[11]

The rivalry would soon impact Woodrough. He was nominated as the Democratic candidate for county judge in 1905. Although his opponent was "not as well versed in the law," Rosewater campaigned strongly against Woodrough,

contributing to his defeat in the general election.[12] Omaha would prove more vexing to Woodrough than any of his previous adventures. Dennison and his associates would be not be disarmed as easily as the frontier gunslingers Woodrough was accustomed to.

Nonetheless, as the years progressed and his legal practice grew, Woodrough formed a philosophy and lifestyle that would undergird the rest of his life. He complained: "We have elaborate systems of courts in this state that cost the people millions of annual outlay, and they take five years to decide a dispute about a bill of goods. We have legislatures that often follow dark and devious ways, and bosses in every city that can deliver votes with unholy certainty."[13] Just as previous generations had fought against the evils of "kingship" and "slavery," he saw his generation as needing soldiers, too. This new fight "will take the brain and courage of men to fire their hearts and spur them on to heroism as grand as the race has seen." He called on his peers to reject corruption, bossism, and bureaucracy, and referred to men who used their talents merely for wealth as "vulgar."[14]

Woodrough was energized when a progressive intellectual threw his hat into the 1912 presidential race; he "worked and organized day and night for the election of Woodrow Wilson."[15] Fortune was on Wilson's side. Republicans faced a crisis in 1912 when their incumbent, Taft, was challenged by former President Theodore Roosevelt. Working alongside William Jennings Bryan, Woodrough's Wilson League of Nebraska helped contribute Nebraska's eight electoral votes to a Wilson victory.

Federal District Judge William Munger died during Wilson's first term, in the autumn of 1915. Because of Woodrough's support of Wilson, his name appeared high on lists of possible successors, although he had not solicited an appointment. Bryan, whose relationship with Wilson had cooled due to the ongoing war in Europe, initially supported Woodrough, but Bryan and other populists suddenly revoked their support days before a White House official arrived in Nebraska to meet various candidates. "Why Woodrough's chances should wane does not appear on the surface," said the *World-Herald*, "but it is said that Bryan workers have been turning their attention to other candidates."[16] Bryan formally threw his support behind an attorney from Grand Island, whom the administration almost immediately disregarded due to his advanced age. Although Bryan's eleventh-hour change of heart mystified reporters, it probably didn't surprise Woodrough, whose law partner, Gurley, was also a longtime public critic of Bryan.[17] And at a time when Bryan was panning Wilson's foreign policy, Woodrough was extolling it.

Rejecting a direct appeal from Bryan to appoint a different candidate, President Wilson chose Woodrough. By the first of April 1916, Woodrough had been sworn in and seated on the bench.[18] He was the youngest federal judge in the country.

Woodrough increasingly adopted military analogs as his guiding philosophy when the United States entered the Great War in Europe. In a 1918 article, sandwiched between an advertisement for war bonds and a firsthand account from the front, Woodrough referred to himself as "a new recruit in a very important unit of democracy's far-flung battle line." He continued: "the coming years will subject each and all of our basic institutions to tests as severe as they have ever encountered in the past. The maelstrom of war will surge about the foundations of them all." These foundations, Woodrough urged, must be defended both by "the blood of martyrs on fields as battle" as well as "judicial tribunals . . . in the quiet chambers of the courts."[19]

A prohibition official closes up a building in Omaha. From the Bostwick-Frohardt Collection, owned by KMTV-Channel 3 and on permanent loan to the Durham Museum, Omaha.

Robert Samardick, dubbed "Raiding Bob" by the press, routinely tested the limits of the Fourth and Fifth Amendments. From the Bostwick-Frohardt Collection, owned by KMTV-Channel 3 and on permanent loan to the Durham Museum, Omaha.

His philosophy permeated more than his rhetoric; Woodrough adopted a strict personal regimen. A colleague on the federal bench, Richard Robinson, would later remember him as "Spartan in his tastes and in the way he lived. He shunned luxury hotels, he spent little time in clubs . . . he disliked ostentation or pomposity in any form [and] believed in physical fitness." Woodrough usually marched the ten miles from his home to the courthouse and, when hearing cases in Lincoln or elsewhere in the state, was known to travel the distance on foot. Justice Blackmun would later recollect:"woe unto the law clerk . . . not able to keep up with him." He prescribed his clerks with outside reading on a wide variety of topics. He would regularly order the "whole platoon" to report to his house, where he would offer "good, if simple food" before showing them "a tree to chop down, or a fence to paint, or some other household chore requiring strong young backs."[21]

However, despite Woodrough's simple tastes, serious philosophy, and habit of walking tremendous distances on foot, he was not a severe figure. Rather, above all else, former friends and clerks remembered his friendliness and sense of humor. "He was a peach, just a great guy. Didn't go to law school. Didn't write any articles. Just a real human being."[21] Throughout his career, without ever seeming to compromise his values or strict self-discipline, he managed to maintain a boyish demeanor and optimism. In his chambers, which were often "full of laughter," he would use stacks of legal tomes to perform afternoon calisthenics, or as an improvised bed for a mid-day nap.[22] In 1918, as fledgling Allied air forces were bombing Cologne, Woodrough was unexpectedly absent from court, missing the plea hearing of a hotel clerk facing charges of selling whiskey to soldiers. The judge, apparently more concerned with what soldiers were eating, was discovered at home, "doing his bit" by tilling up his lawn to make a victory garden. He even registered for the draft, despite being past the cut-off age. Unsurprisingly, the draft board's physical examiners found him perfectly fit to fight.[23]

Woodrough's good humor, coupled with his distaste for the exclusive social clubs where his colleagues spent much of their free time, allowed the judge to remain grounded and empathetic to ordinary, working-class Nebraskans. Chief Judge Robert Van Pelt would remember him as "the most human judge the District Court of Nebraska has ever had."[24] An (apparently) amateur poet would go further, penning:

> He sits upon that bench, just like you and me
> And the office does not swell his head in the slightest degree
> For he belongs to the people they call the Common Herd
> For degrees of self-importance to him they are absurd
> He cares for no one in so far as their success
> For he treats the wealthy just like the widow in distress
> And while upon the bench he is patient all the while
> And carries with him a nice and lovely smile.[25]

He seemed to charm many of those who entered his court. On one occasion, despite receiving a $50 fine from Woodrough, a repentant haberdasher blurted out: "Judge, any time you want your hats cleaned or reblocked it won't cost you a cent." The day prior, an apropos editorial in the *World-Herald* had quipped: "It makes us almost sad that we can't stand up before Judge Woodrough to be sentenced."[26]

Woodrough's ascension to the bench would also coincide with a reform movement sweeping the state. Nebraska amended its state constitution to prohibit alcohol in 1917. Those in Omaha frustrated at rampant corruption orchestrated by underworld boss Dennison "argued strongly and persuasively about the need for cleaning and change."[27] Dennison's crony, "Cowboy" Jim Dahlman, who had served as mayor for twelve years, was unseated by Edward Smith in 1918. Smith and Woodrough were well acquainted, due to Smith's close friendship with Woodrough's former law partner. While in private practice, Smith and Woodrough shared neighboring offices and both taught at Creighton Law School.[28] Dennison, sore at Smith's electoral success, remarked, "let the bastards have it their way for awhile [and by the next election] they'll be glad to see us back."[29]

To make good on his promise, Dennison stirred up racial violence. *The Omaha Bee*, now published by Edward Rosewater's son, Victor, "printed whatever [Dennison] wanted" and repeatedly ran stories of crimes against whites at the hands of

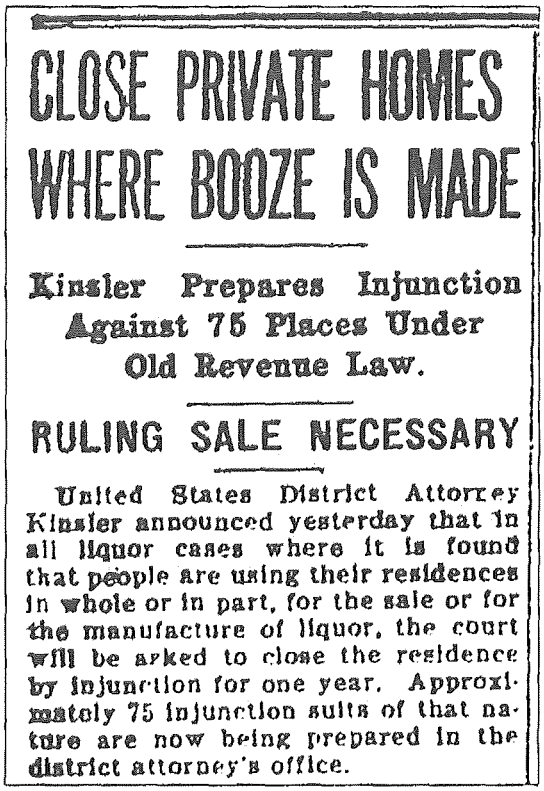
blacks. Many of these crimes are thought to have actually been committed by Dennison thugs in blackface.[30] When in September 1919 a black man named Will Brown was accused of raping a white woman, *The Bee* sprang on the opportunity to run incendiary articles. A livid mob of thousands stormed the courthouse intent on lynching him. They besieged the building and set it on fire.

Mayor Smith, inside the courthouse when the arson began, was an embodiment of Woodrough's ideal of jurists as soldiers. While working for the Attorney General years before, Smith trained Nebraskan volunteers to fight in the Spanish American War.[31] Now he strode out of the burning courthouse, telling the mob: "I will not give up the man. I'm going to enforce the law even with my own life. If you must hang somebody, then let it be me."[32] He fought as the angry crowd closed in on him, but was knocked unconscious and, with a noose placed around his neck, dragged behind a car and strung up from a traffic pole before he was rescued. Back at the courthouse, the police lacked the mayor's grit; they surrendered their prisoner. Brown was hanged from a telephone pole and shot repeatedly, dragged behind a stolen police car, and set on fire. Mayor Smith, drifting in and out of consciousness for days, kept muttering: "Mob rule will not prevail in Omaha."[33]

A leadership crisis appeared on the national level as well when Woodrough's idol, President Wilson, suffered a major stroke in October 1919 and remained incapacitated for the remainder of his term. Meanwhile, both nationally and in Nebraska, the anti-corruption activists that had elected leaders like Mayor Smith over their criminally-backed rivals were mobilizing behind the Prohibition movement. The Eighteenth Amendment was ratified following a decisive vote by the Nebraska legislature on January 16, 1919.

Although Nebraska already had state prohibition laws in effect, national prohibition meant that bootleggers—and the bosses of larger underworld machines—would face Woodrough and his colleagues in federal court. The impact on the courts was immediate and dramatic. At one point, liquor violations constituted two thirds of all criminal indictments. Courts accustomed to seeing major cases involving issues of federal concern instead found themselves flooded with indictments against petty offenders. The influx was so extreme that Woodrough suggested bringing a third federal judge to Nebraska, devoted entirely to disposing of prohibition cases.[34]

The man chiefly responsible for the deluge on the courts was Robert Samardick. An immigrant from the Balkans, Samardick found his way to South Omaha's growing Serbian community after working as a boy in the iron mines of northern Minnesota. After service in counter-intelligence during the war, he served briefly in the Omaha Police Department before resigning to become a federal prohibition agent in 1920.[35] With a teetotaler's zeal for punishing libertines, Samardick tested the limits of the Fourth and Fifth Amendments. He violently rounded up hundreds of bootleggers and innocent bystanders alike, becoming a familiar face before Woodrough's bench.



CLOSE PRIVATE HOMES WHERE BOOZE IS MADE

Kinsler Prepares Injunction Against 75 Places Under Old Revenue Law.

RULING SALE NECESSARY

United States District Attorney Kinsler announced yesterday that in all liquor cases where it is found that people are using their residences in whole or in part, for the sale or for the manufacture of liquor, the court will be asked to close the residence by injunction for one year. Approximately 75 injunction suits of that nature are now being prepared in the district attorney's office.

Omaha World-Herald, July 14, 1923, 2.

Samardick took his post just as the Eighteenth Amendment and National Prohibition Act came into effect. He wasted no time. When investigating possible liquor violations, rather than knocking, Samardick would chop through doors with a large steel axe. The press quickly dubbed him "Raiding Bob."[36] He was frequently in court, testifying against suspected bootleggers and defending himself against assault charges. Shortly after a case in which Samardick stood accused of punching a cab driver in the face, he was again brought into court for assaulting a friend of Senator

Robert Howell. After smashing through the door of the woman's grandmother's house, she alleged he pinned her to the ground, twisting her arm while catechizing her about possible liquor in the house.[37] In a later episode, he pleaded guilty to assaulting a postal worker, and was fined $150 by Judge Thomas Munger. Understandably, the *World-Herald* began referring to those he raided as his "victims," but his tactics were supported by high ranking prohibition officials, who brought him to the east coast to train their agents.[39]

Unlike Samardick, Woodrough was sympathetic to low level offenders. A former colleage, Harold Rock, recalled: "I wouldn't say he was soft on

The Hotel Fontenelle 1922, looking west on Douglas from 17th Street in Omaha. The following year, prohibition agent Samardick sought to close the hotel after bellboys sold liquor there, but Woodrough ruled against the government's "padlock" injunction. NSHS RG2341-266v

anybody, but he was not a headhunter. He had a great affection for the little fellow. He looked around and saw what the times were. He didn't consider brewing a mortal sin."[39]

Although known for his austere personal tastes, prior to joining the bench Woodrough would commonly enjoy drinks with friends. "He wasn't a rouster . . . but he would have a scotch now and then." He criticized those who believed "that the country is going to pot and everybody is crooked" and put his "faith in the honesty of the human race."[40]

Samardick and Woodrough seemed destined for conflict. Samardick's harsh enforcement of liquor laws steadily pushed Woodrough to hand down decisions limiting the government's ability to enforce prohibition. In 1923, Samardick obtained a warrant and raided an Omaha pharmacy, finding clear evidence of liquor violations.[41] At trial, however, Woodrough dismissed the case. The judge determined that Samardick in particular, and prohibiton agents in general, were not "federal officers," and thus any search warrant executed by them was unreasonable and illegal. He wrote: "it is probable that no greater hindrance to the effective and successful enforcement of the [law] could arise than a persistent ignoring of the limitation put by law upon searches and seizures."[42]

Although the case sent shockwaves across the country, it had little practical effect at home. The bootlegging pharmacist, who had barely escaped conviction thanks to Woodrough's ruling, continued selling booze from his pharmacy. Although the pharmacist did not learn his lesson in court, Samardick had. He raided the pharmacy again, bringing along a U.S. marshal to serve the warrant. Woodrough presided over a jury trial and the pharmacist was found guilty on all thirteen counts.[43]

Rather than checking their power to avoid running afoul of the law, prohibition forces grew bolder. Samardick and his counterparts in the U.S. Attorney's office began looking for other sanctions they could levy against bootleggers, which they found in section 22 of the National Prohibition Act, called the padlock provision. The law, in essence, gave federal prosecutors the power to lock up any home or business suspected of being involved in the illegal sale or manufacture of liquor.[44] The regional prohibition chief warned the public that his goal was to file a nuisance action against every home, business, and factory where a liquor violation had occurred and "close them all up for a year and a day."[45]

Prosecutors began to make good on the threat in early 1923. When Samardick's undercover agents discovered a handful of entrepreneurial bellboys at a local hotel selling whiskey to patrons, unbeknownst the hotel's management, Samardick promptly raided the building. Despite failing to find a drop of liquor on the premises, the agents carted off two bellboys and petitioned Woodrough to padlock the entire hotel.[46]

Woodrough was skeptical, and demanded that the government justify its request. The government was so focused on getting Woodrough to recognize its padlock powers that it gave the guilty bellboys favorable plea deals in exchange for their testimony at the injunction hearing against the hotel. Woodrough grilled the hotel's operator about the liquor scheme.[47] In the end, it was determined that management had no knowledge or involvement, and prohibition agents had overstated their case against the hotel. Woodrough denied them the power to padlock the hotel. Samardick, imaginably dejected by Woodrough's ruling, "evidenced keen disappointment at the decision."[48]

Woodrough's ruling would prove fortuitous for Omaha. The hotel, named the Fontenelle, was an early venture of Eugene Eppley, who called the decision "vindication" and a "decisive victory." Eppley turned the Fontenelle into the flagship property of a large chain of upscale hotels, and with his fortune became one of the greatest philanthropists in Omaha's history. Had Woodrough allowed the government to shutter Eppley's fledgling business, it would have snuffed out one of the brightest lights of Omaha's mid-century growth.[49]

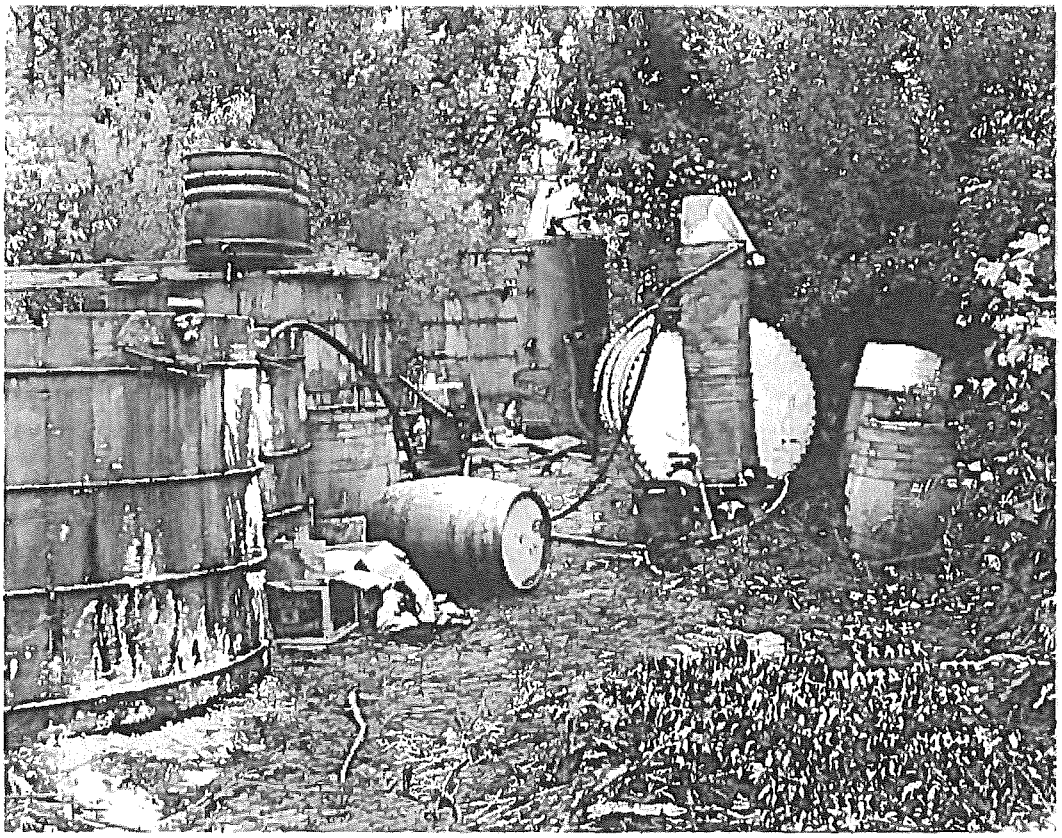
In the case of the Fontenelle Hotel, Woodrough made a provisional ruling against the government's specific padlock injunction. Undeterred, prohibition agents continued applying for padlocks. Woodrough occasionally acceded, granting two injunctions in late 1923 against businesses that refused to clean up. Emboldened, the agents increased the scope and tempo of their requests. In early 1924, an older husband and wife appeared in court to defend against a padlock provision on their home.[50] The previous year, the husband confessed that he had sold small quantities of wine from the house and he was subsequently sentenced. No further liquor violations were alleged to have happened. Nonetheless, prohibition agents followed up with a padlock request, asking Woodrough to seal the home and its contents for a year—effectively throwing the pair out into the streets without their belongings.

Rather than simply deny the motion, Woodrough deemed the entire section of the law unconstitutional. To Woodrough, the padlock law gave the government unconstitutionally broad power in violation of the Sixth Amendment's guarantees that crimes be tried to a jury. "The federal government cannot put offenders against its criminal laws on trial, except before a jury. This is a very fundamental feature of the federal institution and must be scrupulously safeguarded by the court."[51]

In Illinois, where courts had allowed padlocking of hundreds of homes and businesses, one reporter excitedly called it "the most important court ruling affecting personal liberties since the famous Dred Scott case."[52] Papers from Omaha to New York City predicted a swift Supreme Court ruling to iron out the issue. None came. Unfettered, Woodrough used similar reasoning to invalidate even more provisions of the Prohibition Act.[53]

With Woodrough constantly chipping away at the government's prohibition powers on constitutional grounds, prohibition officials did everything in their power to avoid Woodrough's court. Samardick would wait until Woodrough left town before bringing cases against suspected bootleggers. When Woodrough was holding court in western Nebraska, his usual substitute in Omaha was Judge John McGee from the Minnesota District. McGee, a recent Harding appointee, was known for his ability to strike "fear into the hearts of Omaha bootleggers." His record of harsh sentences for minor liquor offenses won him the nickname "Ten-year" McGee.[54] As soon as McGee arrived to replace Woodrough, Samardick happily unloaded his backlog of cases on the tougher judge, flooding the court's docket with hundreds of new defendants. Although McGee again proved himself an enemy of bootleggers in his court, the salvo of cases was his undoing.[55] After finishing out the year as Woodrough's substitute, McGee returned to his chambers in Minneapolis and shot himself in the head. His colleagues, citing a suicide note, declared him "cracked by the burden of [a] calendar overcrowded with bootleg cases."[56]

Woodrough managed his own heavy case burden differently, applying lenity in place of stringency. This encouraged more defendants to enter guilty pleas, avoiding lengthy trials. Woodrough also allowed prosecutors wide berth in striking plea deals. When criticized, the judge merely responded that "he knew of no other way in which the hundreds of liquor cases could be disposed of, and that he believes no real injustice is [being] done."[57]



Bootleg liquor was often manufactured in isolated rural areas, such as this still discovered near North Platte in 1933.
NSHS RG2613-1

Despite taking away much of the punitive powers of prohibition forces, Woodrough had initially allowed them broad discretion in investigating potential bootlegging operations. When agents raided a downtown Omaha distillery after claiming to smell hints of fermenting mash in the air, defendants brought in a meteorologist and a chemist to dispute the possibility that any fumes could have been detected by a human nose. While the agents confiscated truckloads of equipment and supplies—clearly the tools of a large scale operation—they ultimately found only four small containers of actual mash.[58] Nonetheless, Woodrough upheld the validity of their

search, reasoning that "[o]fficers must go where their senses tell them a crime is being committed."[59]

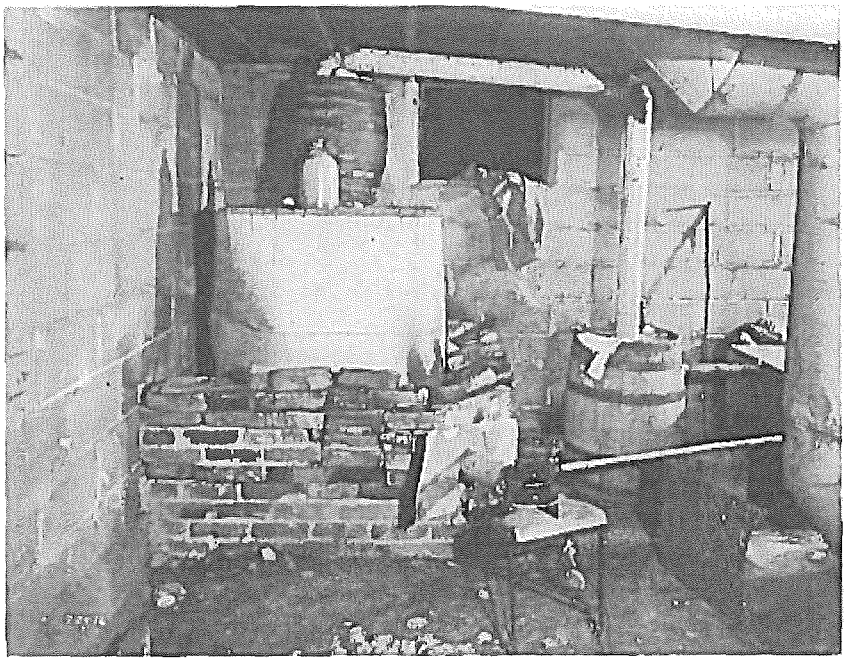
Over time, warrantless raids became bolder while underlying probable cause became more scant. In one case, agents raided a farmhouse after claiming to smell fermenting mash from two hundred yards away, despite a strong wind at their backs. Woodrough expressed "sickening doubt" that agents had smelled anything and invalidated their search. Seeing the raids as an abuse of power, Woodrough set out to carve a bright line, ruling that "the mere odor of fermenting mash would not justify a raid" in any case. The "protection of the inalienable rights of the American citizen is of more important than easy enforcement of the prohibition law," he commented. Following the ruling, Woodrough quickly disposed of a dozen pending liquor cases.[60]

The decision caused a national stir. One Omaha reporter mailed photographs of Woodrough to his colleagues across the country, predicting that "Woodrough's pictures will be in good demand."[61] He received national praise from prohibition critics. The *New York Herald Tribune* editorialized:

> [Woodrough] is expressing a philosophy of government that lies at the foundation of American institutions. Needless to say, the vast majority of his fellow countrymen will agree with him; they will applaud his refreshing reassertion of a principle which in the last 10 years has been made to yield right and left to enforcement expediency. . . The confidence of the people in the federal bench as a bulwark of their rights would be greatly strengthened were it graced with more men of the caliber and fearlessness of this Omaha jurist.[62]

Of this the U.S. Attorney in Nebraska complained: "It is equivalent to saying that a man cannot break into a house without a warrant, even if he can see or hear a felony—even a murder—being committed."[63]

However, Woodrough's main critic on the issue was Judge Thomas Munger, who recognized the evidentiary fruits of warrantless sniff searches. While the colleagues kept their disagreement cordial and private, their differing philosophies played out in their courtrooms. The disagreement came to a head when Woodrough dismissed the case of a defendant that Judge Munger had ruled against just days prior. "Federal Judges Clash" read the front page of the *World-Herald*.[64] Munger



A basement still found in a Lincoln home in 1932.
NSHS RG2183-1932-724-1

was partially vindicated when Woodrough's bright line rule was erased by the Eighth Circuit, which held that probable cause could exist "where an officer of the law has direct personal knowledge [of the crime] from one or more of his five senses of sight, hearing, smell, touch, or taste."[65] The ruling still allowed Woodrough to invalidate overreaching searches case-by-case. The relationship between the Fourth Amendment's privacy protections and the senses of law enforcement officers has continued to vex courts and legal scholars ever since.[66]

Controversial decisions and backlash from his colleagues did not faze Woodrough. He was not sentimental, and loved attempts at change. When a block of historic buildings was torn down near his office, the public was incensed. Woodrough, however, was transfixed by the construction site. "He knew every day what had happened and what was going on over there."[67] Perched on his windowsill, with his legs resting across the radiator, he would stare out the window as steamshovels, cranes, and a regiment of construction workers erected the new building.[68] To Woodrough, the march of public progress was more compelling than maintaining a status quo. "The judge wasn't one to sit there and admire old buildings, he'd rather see new things going." Prohibition forces discovered that Woodrough held a similar outlook as a jurist. He had no qualms about striking down existing law in order to foster liberties more important to the public. "He didn't mind causing

a stir . . . he probably got a bang out of it. Seeing those prohibition [agents] staggering around in their underwear would be kind of entertaining [to him]."[69]

Woodrough's distaste for the unending liquor prosecutions grew as he witnessed ordinary people dragged into court and threatened with all manner of punishment. But as poor immigrants were losing their savings for purchasing small quantities of wine, major bootlegging operations were thriving beyond the reach of the law. The crime bosses like Dennison, who amassed fortunes from bootlegging and whose corruption had been catalyst for ratifying the Eighteenth Amendment in the first place, were rarely brought to justice. To the public, the National Prohibition Act seemed ineffective at routing serious crime.

The Dennison crime machine had fully matured by the mid-twenties. New growth was fed by upstarts, the most prominent of whom was a young immigrant named Louise Vinciquerra, known more commonly among bootleggers as Queen Louise. By the first few years of the decade, the twenty-two-year-old's income was more than four times that of the state governor.[70] "Her home oozed opulence," said the *World-Herald*, and she drove a Packard high-luxury sedan.[71] Unlike Dennison, who avoided law enforcement and operated behind layers of cronies, Vinciquerra worked in plain sight, treating prohibition fines as if they were taxes of a legitimate enterprise. She routinely appeared before Woodrough's bench, pleaded guilty to bootlegging, and paid her fines before immediately returning to her distilleries. Her cavalier approach attracted a tremendous amount of legal and media attention, which Dennison was happy to avoid. Although he was technically a competitor, Dennison sometimes bankrolled the legal expenses of Vinciquerra's colorful court appearances.[72]

Much of Vinciquerra's success can be attributed to a number of associates she had working within law enforcement. Prohibition agents raided her facilities only to find the lingering smell of mash and signs of recently-moved equipment.[73] But her insiders aided her with more than tips. Prohibition Agent Earl Haning, who was in love with Vinciquerra, conducted raids on her rivals, confiscating their supplies and equipment. Where some suitors may have sent boxes of chocolates, Haning sent Vinciquerra hundred-pound sacks of distilling sugar. Haning's scheme was uncovered by his boss Samardick who, true to form, left Haning "badly beaten" before stripping him of his badge and sending him the federal penitentiary.[74]

Federal officials continued peppering Vinciquerra's enterprise with fines and raids, to hardly any effect.

Woodrough was not alone in his frustration at seeing petty offenders torn apart by the law as major criminals carried on with impunity. By the mid-1920s, federal prosecutors elsewhere in the country had succeeded in tackling their region's crime bosses. Assistant Attorney General Mabel Walker Willebrandt did this by breaking with her contemporaries: "I have no patience with this policy of going after the hip-pocket and speakeasy cases. That's like trying to dry up the Atlantic Ocean with a blotter." Decades earlier, around the time a young Woodrough was traveling south to Texas, Willebrandt had been traveling west by covered wagon with her parents from Missouri to Oklahoma. She eventually made it to California to study law, serving as public defender before going to work with the Justice Department. In the first few years of her appointment, she took down a major figure in Woodrough's hometown: Cincinnati bootleg king George Remus.[75]

Woodrough and Willebrandt would only truly cross paths once, during a tax dispute that would be one of Willebrandt's last cases in federal court. Although the panel ruled against the government, Woodrough penned a thorough dissent in favor of Willebrandt's arguments.[76] Willebrandt, an expert in both tax and prohibition law, had been one of an early contingent of prosecutors who saw the possibility of punishing crime bosses through the tax code. In time, Woodrough found himself supporting that view. By holding major bootleggers liable for tax offenses, the government was able to reach crime bosses who otherwise had escaped the law.

This new sword was brought to Omaha by twenty-four-year-old assistant U.S. Attorney Edson Smith. A native Nebraskan, Smith had won regional honors serving on the offensive lines of both his college football and debate teams. Within four months of his graduation from Harvard Law School, he was given the onerous task of leading all bootlegging prosecutions in the state. Smith wasted no time—within weeks of being hired, he briefed and argued his first case before the Eighth Circuit, arguing against an appellant who sought to have one of Woodrough's decisions reversed.[77]

As the roaring twenties came to a close, Smith brought over a hundred tax evasion cases against Omaha's major bootleggers. A winter raid by prohibition agents against notorious liquor baron and reputed John Dillinger associate Gene Livingston gave Smith his first notable target.

Livingston, an eclectic and violent criminal, was known as "the man of many rackets."[78] In addition to bringing criminal charges against Livingston, Smith used inventory and empty grain sacks to calculate the amount of illicit business Livingston had failed to pay taxes on, hitting him further under an "old internal revenue statute." The government's fines exceeded a quarter of a million dollars.[79]

Livingston, accustomed to favorable treatment, light penalties, and a protective network of bribed public officials, received a rude awakening when Smith brought his case to Woodrough's court. Livingston hoped to conclude the trial early, but Woodrough denied all requests. Smith made it clear that Livingston's days of special treatment were over: "In view of the fact that there are more than one hundred defendants now awaiting trial, it will be necessary for Livingston to wait his turn."[80] When the trial came, Livingston took the stand in his own defense. He weaved a far-fetched tale to the jury, recounting in detail how he had only run from police in a burst of excitement, accidentally fell into a hiding spot, and failed to respond to officers due to dizziness. Rather than pick apart his story in cross-examination, Smith let Livingston dig his own grave with the apparent dishonesty. Smith asked only a single question of the career criminal ("Were you ever convicted of a felony?") before concluding cross-examination.[81]

The government's terse argument convinced the jury, and Woodrough sentenced Livingston to prison. However, it quickly became clear why Livingston had been so eager to have his trial schedule accelerated: he was trying to leave town. Livingston, likely Omaha's third major bootlegger behind Denison and Vinciquerra, had borrowed his expensive distilling equipment from two of Al Capone's Chicago lieutenants.[82] With his equipment in government possession, and funds frozen by Smith's tax charges, Livingston found himself unable to cure his criminal debts. Despite the conviction, he would never see the inside of a federal prison. Shortly after the trial, a car with Chicago license plates pulled up beside him in traffic, destroying his vehicle in a maelstrom of bullets. Livingston miraculously escaped, and began hiding out in a speakeasy. As he sat in the back of the bar, an assassin thrust a shotgun through a nearby window, killing Livingston instantly with a shot that nearly cut him in half.[83]

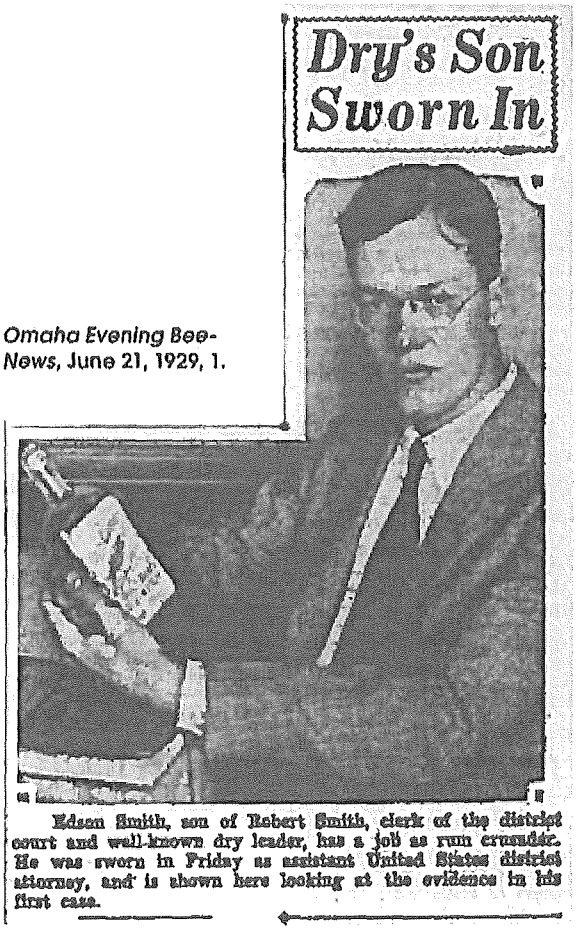
This and similar episodes of violence, all rooted in organized crime, only bolstered Smith's focus on tackling major crime bosses rather than low-level offenders. Woodrough, who had always been sympathetic and lenient toward small time bootleggers, would prove much harsher toward the lieutenants and leaders of the bigger criminal enterprises. However, Smith's tax evasion cases would drive a new wedge between Judges Woodrough and Munger, who disagreed on the validity of Smith's tax prosecutions. This led to prohibition cases ending in dramatically different conclusions in Nebraska, depending on which courtroom they landed. A colleague later summarized the period succinctly: "[Judge] Munger believed in the National Prohibition Act prosecutions. Judge Woodrough did not. Judge Woodrough believed in prosecuting intoxicating liquor violators through the Internal Revenue Act for failure to pay taxes. Judge Munger did not."[84] Smith, however, did not leave anything to chance once this judicial divide became evident. As a young attorney, he was known to wear both a belt and suspenders.[85] Likewise, his charges against major bootleggers began to show a similar degree of prudence and redundancy, invariably arguing for both tax evasion and conventional liquor violations.

U.S. Assistant Attorney General Mabel Walker Willebrandt. An expert in both tax and prohibition law, she was one of the first prosecutors to use the tax code against crime bosses. Library of Congress, Prints and Photographs Division

Louise Vinciquerra's enterprise continued to grow during this same period. After divorcing her first husband (following a heavy exchange of gunfire in their bedroom), she married the fallen prohibition agent Earl Haning, recently released from prison for his corruption and participation in

Vinciquerra's criminal enterprise. They celebrated their reunion with a string of small crimes.[86] Vinciquerra, as much as any other figure, was the type that kept Woodrough up at night. Unlike the small offenders, stripped of their savings for enjoying a single bottle of wine, Vinciquerra lived as quasi-royalty while publicly ignoring the laws.

On an early September evening in 1930, prohibition agents crept into the overgrown weeds along Blondo Street, near Vinciquerra's home. Already tipped off about the impending raid, Vinciquerra was outside, directing a team of men hauling casks of whiskey down the sidewalk into waiting trucks. Agents rushed into the garage, dodging a jug of whiskey lobbed at them by Vinciquerra's young son. Both Vinciquerra and Haning were placed under arrest. Vinciquerra made a calm phone call to an associate to arrange her release, and asked an officer to escort her to jail in her Packard so she could return home more easily later that day.[87] But Vinciquerra would not be allowed to return home so easily. Smith levied heavy charges against her entire enterprise, resulting in multiple convictions in Woodrough's court. With Queen Louise and most of her major associates behind bars, her operation came to a crashing end.


Dry's Son Sworn In

Edsen Smith, son of Robert Smith, clerk of the district court and well-known dry leader, has a job as run crusader. He was sworn in Friday as assistant United States district attorney, and is shown here looking at the evidence in his first case.

Omaha Evening Bee-News, June 21, 1929, 1.

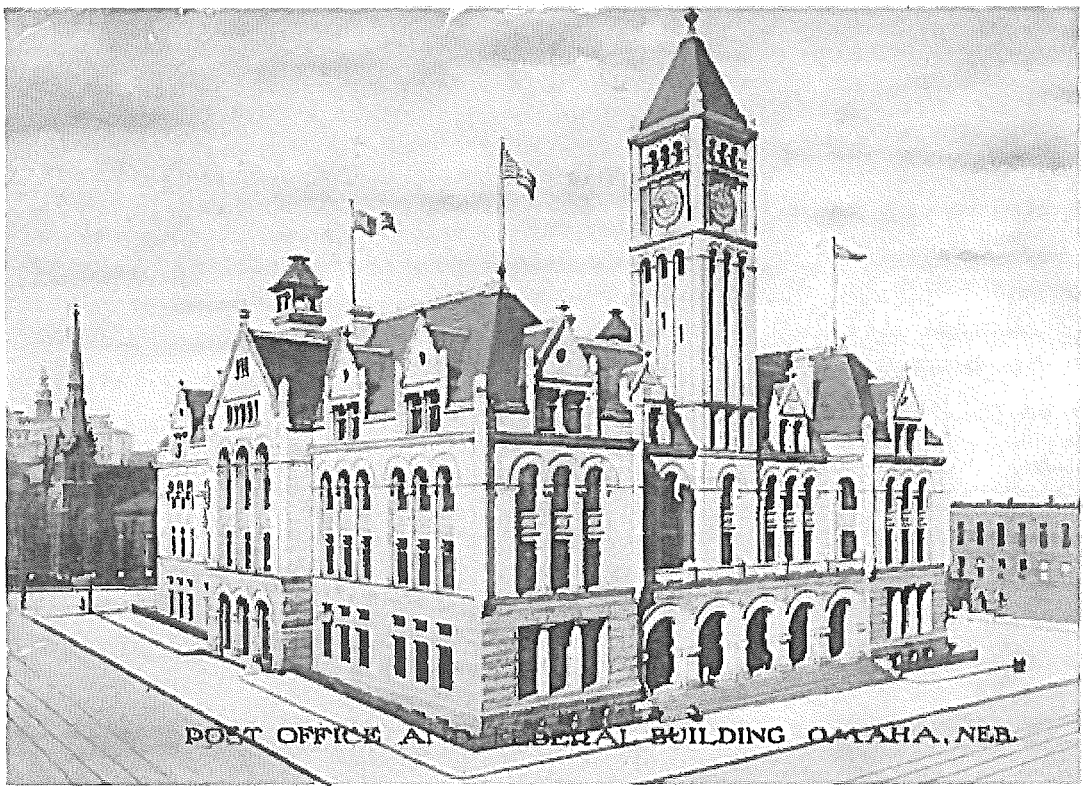
Economic downturn in the summer of 1929 gave root to widespread depression by mid-autumn. President Hoover's utilitarian focus, though often effective, ultimately ruined the public support he had worked so tirelessly to curry. As economic catastrophe grew, public sentiment became hostile toward leaders seen as out of touch, and public anger at political bosses reached a fever pitch.

However, old members of Omaha's establishment were either too intertwined or too intimidated to take on Dennison's syndicate directly. Although violence increased steadily, the victims were usually members of criminal gangs or the innocent poor. By the early 1930s, the hardline Samardick had left service as a prohibition agent to join the Omaha police force. However, despite being an "honest and faithful officer," the local force struggled with his "radical and sometimes ruthless methods," and he was forced to resign. To the relief of organized crime, he was replaced by softer, possibly corrupt, enforcers.[88] A local businessman named Harry Lapidus reached out to officials in Washington, requesting they reinstate Samardick to his prohibition post.[89] With the Livingston and Vinciquerra rackets already dismantled by Smith in Woodrough's court, the return of "Raiding Bob" Samardick posed an existential threat to Dennison's empire. Woodrough, Smith, and Samardick represented three public officials Dennison could not bribe, and who together were capable of sending him to prison. "We can't control Samardick. It would mean our ruination," Dennison lamented. To prevent Lapidus's efforts to bring Samardick back, Dennison had him silenced. As Lapidus drove home from the Jewish Community Center, two nights before the start of Hanukkah, an assailant rushed up to his car and shot him three times in the head.[90]

Dennison succeeded in preventing Samardick's return to federal service, but in so doing he turned other powerful interests against him. Unlike previous victims of Dennison's machine, Lapidus "was a ranking member of Omaha's legitimate business community."[91] The murder gave the U.S. Attorney the political capital he needed to pursue charges against Dennison and more than fifty of his associates.[92] The goal was to smash the Dennison political machine, roots and all. Smith was assigned to prosecute the case. Woodrough would preside.

Smith issued over one hundred subpoenas, and Louise Vinciquerra was brought down from Dodge County Jail to testify for the government.[93] Worried that Dennison's wide influence in both underworld and political circles could compromise the case, the prosecution implemented strict secrecy instructions on subpoenas, requiring they be kept off the books and that responsive documents be personally hand-delivered to Smith.[94] One of Smith's star witnesses was "guarded like the rajah's ruby," hidden away on an upper floor of the courthouse. Smith "waited until after employes [*sic*] in the building had gone home and then smuggled . . . cots from the first to the fourth floor" where the witness lived, flanked by bodyguards around the clock.[95]

Dennison's attorneys sought to postpone the trial due to health issues, claiming that an "early trial will risk Dennison's life" due to a mild stroke he had suffered that summer.[96] Woodrough, unsympathetic, ordered Dennison to be examined by a physician, and eventually moved forward with the trial. However, Dennison's claims were not merely a stalling tactic. The *New York Times* described the crime boss as entered the courtroom as a "palsied old man racked by a long series of illnesses from which he has not yet recovered." At one point in the trial, his "weakened condition led to pneumonia, and he lingered near death for several days."[97] Woodrough continued proceedings even in Dennison's absense.



Built between 1892 and 1906, the Omaha Post Office at 16th and Capitol also served as the U.S. District Courthouse during Woodrough's tenure.
NSHS RG2341-248a

The trial lasted nearly two months. Detailed accounts of Dennison's enterprise of political corruption and vice were daily front page news. The papers parroted courtroom allegations of Dennison's personal hit lists, secret meetings with Al Capone, and over forty years of corruption and control over Omaha.

Smith's arguments had strong appeal in the court of public opinion, but Dennison's culpability was a matter for the jury. While Smith had taken precautions to ensure the security of his witnesses and evidence, no similar precautions had been taken for the jurors. Though he was a gambler by nature, Dennison did not leave his freedom to chance. Before the trial, his thugs paid visits to the homes of prospective jurors, leaving them fearful for their lives if they convicted the crime boss. Another juror was simply bribed for a favorable vote.[98]

The jury locked itself on the fourth floor of the federal courthouse for days, deliberating long into the evenings. Holdouts, later revealed to be bribed or threatened, refused to cast a vote to convict Dennison, who the other jurors thought "guilty as hell." For a week, "waste baskets full of torn up ballots were carried from the jury room." Woodrough urged them to come to a decision. None came. Losing hope, Woodrough questioned the jurors before declaring a hung jury, commenting that "while a verdict is obviously highly desirable, it seems to be futile to keep the jury any longer."[99] Dennison went free and the government weighed its options.

What the courts failed to achieve in 1932, the public accomplished in 1933. With the trial testimony fresh in mind, Omaha voters swept the last remnants of Dennison's political allies out of power in citywide elections. Radio stations broadcast the victory songs of his opponents, an elegy to a political machine that had controlled the city for a generation. The government, perhaps satisfied that Dennison's machine had been destroyed, perhaps unsure of its ability to convict in a new trial, eventually dropped its case. But the old gambler's luck ended there. Soon after the trial, Dennison was seriously injured in a car accident, snapping his collarbone and suffering massive trauma. He developed pneumonia and a brain hemmhorage in the hospital.[100] He took nineteen days to die.

Vinciquerra never recovered from her incarceration. After spending two years behind bars, she returned home and struggled to make

Nick Batter is an attorney in Omaha. He would like to thank Judge Laurie Smith Camp for her support of this project. This article is derived from research for a forthcoming book narrating the history of the Federal District Court of Nebraska, currently being written by Dr. John Wunder, Professor of History Emeritus at the University of Nebraska-Lincoln and Dr. Mark Scherer, Professor of History at the University of Nebraska-Omaha. All or portions of the article will also appear in that book.

ends meet. Sorrow plagued the remainder of her life. Her ex-husband killed Haning in her garage on the Fourth of July. The widow moved west, hoping to start a new enterprise outside an Arizona mining town. Although she succeeded in escaping the Omaha underworld, the violence of her lifestyle ultimately caught up to her. After a falling out with criminal elements in the southwest, her bones were found in the desert, intermingled with the flowering branches of a red ocotillo bush.[101]

The elections that destroyed the Dennison machine also saw Raiding Bob Samardick return to the Omaha police force. Within a year, he was chief of police.[102]

Smith moved from public to private practice, where he enjoyed a prominent legal career spanning half a century. He would argue three cases before the United States Supreme Court. Woodrough observed that it was "very few and rare who have given so much" as Smith.[103]

Shortly after the Dennison trial, Woodrough was elevated by President Franklin Roosevelt to a seat on the Eighth Circuit Court of Appeals—the new president's first major judicial appointment.[104] Despite his rise to prominence, Woodrough maintained the good cheer, compassion, and love of long walks that had always been the hallmarks of his legal career. A former appellate clerk, himself appointed to the federal bench, would reflect on Woodrough's time in the circuit court:

> He never thought any case was unimportant or that any individual was not worthy of justice or that any cause was so unpopular that he didn't want to get involved with it. He never lost that sense of compassion. His hobby and his life was the law. But he never took it so seriously or himself so seriously that he ever lost his ability to have a good time with people.[105]

Woodrough's most prominent work came, perhaps, in 1958, when he penned orders upholding the desegregation of public schools in Little Rock, Arkansas.[106] He served as a judge until his death at age 104. He remains the longest serving federal judge in American history.[107]

Dennison and Woodrough are buried in the same cemetery. Dennison is memorialized by an oversized piece of white marble spilling across multiple burial plots, in a section reserved for the powerful elite with whom Dennison associated. Woodrough is laid to rest a just a few hundred yards downhill, his small gravestone hardly visible in the grass. Though Woodrough was never in the military, the plots that surround him are exclusively the simple, uniform headstones of Nebraska's Civil War and World War veterans. The judge often drew inspiration between soldiers on the battlefield and jurists in the courtroom. Appropriately, Woodrough and the soldier's shared memorial reads: "These men pass away as a tale that is told, but their work will endure forever."[108]

NOTES

[1] *The American Lawyer* 8 (March 1900): 121. The practice of admitting attorneys who had "read the law" was common during this period, and was sometimes coupled with a brief period of apprenticeship under a practicing attorney.

[2] Orville D. Menard, *Political Bossism in Mid-America : Tom Dennison's Omaha, 1900-1933* (Lanham, MD: University Press of America, 1989), 54-56. The story of Dennison's empire, though alluded to herein to the extent that it parallels Woodrough's career, has been more fully and ably explored by other historians, most notably, Menard, referenced here; also, Laurie Smith Camp, "When Clerks of the District Court Had Real Power: Robert Smith's Omaha, 1908-1950," *The Nebraska Lawyer* (April 2001): 26.

[3] *Cincinnati Daily Gazette*, Mar. 23, 1874; family background comes from correspondence between the author and Margot Woodrough, in consultation of her Woodrough family genealogy book (unpublished); *Memorial Proceedings for The Honorable Joseph W. Woodrough*, transcribed proceedings reported in 583 F.2d 5 (May 17, 1978), digital recording available on the Nebraska U.S. District Court's website at http://www.ned.uscourts.gov/internetDocs/judicialArchive/Woodrough_Resolution.mp3. It was an exciting time to visit. Otto von Bismarck had succeeded in unifying the Germanic states, but was succumbing to pressure to resign from Wilhelm, due to Bismarck's opposition to the young kaiser's aggressive foreign policies. The German Empire was also in the midst of a twenty year process of drafting its civil code.

[4] Author correspondence with Heidelberg University (Germany) Historian, summer 2014. Annenschulen: Louis Brandeis, another jurist native to the Ohio valley, credited this school for inspiring him to study law during his time there twenty years prior. Heidelberg University: Some sources mistakenly claim that Woodrough studied at Heidelberg University in Ohio, near his home, but he was never a student there. Correspondence with Heidelberg University (Ohio) Archivist, summer 2014; *Wieland* manifest, Aug. 31, 1891, courtesy Margot Woodrough.

[5] *Omaha World-Herald* (hereafter, *OWH*), Sept. 14, 1892, 5; Sunrise Edition, Jan. 12, 1903; "Enraged the Court, Lawyer Beckett Raised a Rumpus at Omaha," *San Francisco Call*, Aug. 13, 1895; *OWH*, Aug. 12, 1895, 1.

[6] Irrigation records in a collection of unsorted papers relating to Judge Woodrough, scans of which were provided to the author by Donnita Barber of the Ward County Archives; *Handbook of Texas Online*, David C. Humphrey, "Ward, Thomas William," accessed March 18, 2016, http://www.tshaonline.org/handbook/online/articles/fwa52. Uploaded on June 15, 2010. Modified on October 30, 2012. Published by the Texas State Historical Association; *Memorial Proceedings*.

[7] *Memorial Proceedings*. This policy, and two weddings officiated by Woodrough, are the only judicial acts for which records survive. *Ward County Marriages 1893-1945*, Vol. 1, USGenWeb, http://www.rootsweb.ancestry.com/~txward/ward_county_marriages_1893.htm.

[8] "Judge Met King, Lived Amid Guns," *OWH*, morning ed., Oct. 4, 1977; author correspondence with Donnita Barber, Ward County Archives. Woodrough's foray into cattle ranching, however, would be a misadventure. After nearly exhausting the county's grain supply in an unsuccessful attempt to fatten his herd for market, all of his livestock broke free and stampeded into Mexico. He never recovered them. He later considered it to be a blessing, as the cost of continued feed for the cattle would have bankrupted him.

[9] Lawrence H. Larsen and Barbara J. Cottrell, *The Gate City: A History of Omaha* (Boulder, CO: Pruett, 1982), 166. Liz Rea, *History at a Glance*, Douglas County Historical Society, http://www.omahahistory.org/History%20at%20a%20Glance%209-2007.pdf.

[10] The judicial backlog is evident by the fact that cases brought by Woodrough and Beckett, who ended their practice together in 1899, were still caught up in the courts as late as 1905. Joseph W. Woodrough, "Reform of Legal Procedure," *The Creighton Chronicle* 4, no. 3 (Dec. 1, 1912): 167.

[11] *OWH*, May 30, 1902, 12; *Omaha Bee*, May 31, 1902, 5; *OWH*, May 31, 1902, 9.

[12] Edward F. Morearty, *Omaha Memories: Recollections of Events, Men and Affairs in Omaha, Nebraska, from 1879 to 1917* (Omaha: Swartz Printing Co., 1917), 201. Morearty, a local attorney, incorrectly recalls the race as being in 1902.

[13] Joseph W. Woodrough, "The Game You Can't Lose," *The Creighton Chronicle* 3, no. 7 (Apr. 1, 1912): 309.

[14] Woodrough, "The Game You Can't Lose," 306, 308.

[15] Morearty, *Omaha Memories*, 201.

[16] *OWH*, Mar. 14, 1916. See also, *Nebraska State Journal*, Nov. 5, 6, 1915.

[17] *Nebraska State Journal*, Nov. 6, 1915; *OWH*, Mar. 14, 1916; "W. F. Gurley of Omaha Speaks of Bryanism at Chicago," *New York Times*, Apr. 10, 1900, 1.

[18] *OWH*, Mar.26, 1916.

[19] Joseph W. Woodrough, "Beginning My Work on the Federal Bench," *The Creighton Chronicle* 9, no. 7 (Apr. 20, 1918): 409.

[20] *Memorial Proceedings*.

[21] Author interview with Harold Rock, former law clerk for Woodrough, January 2015.

[22] *Memorial Proceedings*; Harold Rock interview.

[23] *OWH*, May 17, 1918, 8; Draft Registration Card, 1331, Sept. 3, 1918.

[24] *Memorial Proceedings*.

[25] Ed F. Morearty, "Judge Woodrough," *OWH*, May 21, 1924, 13.

[26] *OWH*, Nov. 18, 1929, 8; Nov. 19, 1929, 7.

[27] Menard, *Political Bossism*, 114. See also, "Bootlegger's Carnival, *Nebraska Timeline* (May 2012), Nebraska State Historical Society, www.nebraskahistory.org/publish/publicat/timeline/bootleggers_carnival.htm

[28] *OWH*, May 22, 1930, 33; Corinne Jacox, *A Century of Creighton University School of Law Faculty Publications, 1904-2004* (Creighton University Klutznick Law Library, August 2009), www.creighton.edu/fileadmin/user/law-school/faculty/publications/RetrospectiveFacultyBibliography.pdf. Their tenure as adjuncts overlapped by six years. Smith moved into Woodrough's old office when Woodrough relocated to the newly-constructed Brandeis building in 1906. *The Creighton Brief* (1909): 23, 33.

[29] Menard, *Political Bossism*, 113.

[30] Ibid., 246-47; Orville D. Menard, "Lest We Forget: The Lynching of Will Brown, Omaha's 1919 Race Riot," *Nebraska History* 91 (2010): 159.

[31] *Omaha Mercury*, Apr. 8, 1898. He was prepared to fight himself, but was medically disqualified by the regular army: *Omaha Mercury*, July 1, 1898.

[32] *Omaha's Riot in Story and Picture* (Omaha, NE: Educational Publishing Co., [1919?]), http://www.historicomaha.com/riot.htm; Menard, "Lest We Forget, 159; Menard, *Political Bossism*, 249.

[33] Menard, "Lest We Forget, 159-60; Menard, *Political Bossism*, 250; *Omaha's Riot in Story and Picture*. Mayor Smith survived.

[34] *OWH*, Jan. 13, 1927, 1.

[35] *OWH*, June 26, 1964, 34. Samardick went on to serve multiple terms as Omaha's police chief.

[36] *OWH*, June 26, 1964, 1; *Lincoln Evening Journal*, Dec. 26, 1929, 2.

[37] *St Petersburg Times*, Feb. 20, 1925, 31.

[38] *OWH*, Jan. 3, 1929; July 14, 1923, 1; June 26, 1964, 1.

[39] Harold Rock interview.

[40] *The American Lawyer* 8 (1900): 121; Harold Rock interview; *OWH*, sunrise ed., Mar. 7, 1924.

[41] *OWH*, Nov. 28, 1923, 6.

[42] *United States v. Musgrave*, 293 F. 203, 207 (D. Neb. 1923).

[43] "U.S. Judge Rules Dry Agents Lack Right to Serve Search Warrants," *San Francisco Chronicle*, Dec. 5, 1923, 1; "Search Warrant Service Barred to Dry Agents," *Chicago Daily Tribune*, Dec. 5, 1923, 10; "Not Civil Officers," *Little Rock Arkansas Gazette*, Dec. 5, 1923, 16; "Testimony of Robert Samardick" and "Verdict," *U.S. v. Musgrave*, crim. 3716, National Archives (1924).

[44] *United States Statutes at Large*, Sixty-Sixth Congress, Sess. I, 305. www.legisworks.org/congress/66/publaw-66.pdf sec.22

[45] *OWH*, Feb. 1, 1923, 1.

[46] Ibid.

[47] *OWH*, Mar. 7, 1923, 1, 19.

[48] *OWH*, May 9, 1923, 15.

[49] Ibid. A lessee at the time, Eppley was struggling to obtain title to the Fontanelle from its bankrupt owners. He ultimately succeeded, and spent the rest of his life living in the Fontanelle, from which he ran his multistate enterprise.

[50] *OWH*, Dec. 21, 1923, 12; Motion to Dismiss, No 573 Equity, undated, *U.S. v. Lot 29 Block 16, Highland Place, City of Omaha*, Neb., 296 F. 729 (D. Neb. 1924). Copied from National Archives.

[51] *United States v. Lot 29, Block 16, Highland Place, City of Omaha, Neb.*, 296 F. 729, 735 (D. Neb. 1924).

[52] *Daily Register Gazette* (Rockford, IL), May 27, 1924, 6.

[53] *OWH*, May 31, 1924, 6; *Trenton* (NJ) *Evening Times*, May 29, 1924, 6. Reprinted from *New York World*; *U.S. v. Cunningham*, 37 F.2d 349.

[54] *OWH*, July 21, 1924, 3; Feb. 17, 1925. When defendants were found guilty, McGee often charged them additionally with perjury for having claimed they were innocent.

[55] Thomas H. Boyd, "The Life and Career of the Honorable John B. Sanborn, Jr.," *William Mitchell Law Review* 23, Issue 2 (1997), http://open.mitchellhamline.edu/wmlr/vol23/iss2/4. McGee's ability to dispose of cases was truly prolific. He held court in the evenings and on Saturdays. On one day, he imposed 112 sentences in 130 minutes. Tour buses had to be commandeered to transport all of the convicts to prison.

[56] *Milwaukee Journal*, Feb. 17, 1925, 3.

[57] *OWH*, May 4, 1928, 1.

[58] Affidavit of Meteorologist M. V. Robins, Sept. 5, 1928; Affidavit of Chemist John O'Brien, Sept. 4, 1928; Receipt, Search Warrant, Feb. 23, 1928, Ralph W. Jones, prohibition agent. All from National Archives, Kansas City, criminal case record #5973.

[59] *United States v. White*, 29 F.2d 294, 295 (D. Neb. 1928).

[60] *OWH*, Jan. 4, 1930, 2; Nov. 28, 1929, 11; Dec. 3, 1929, 10; Nov. 28, 1929, 11.

[61] Photo of Woodrough with note on the back by Homer Gruenther of the *Omaha Daily Tribune*, dated Jan. 9, 1930. Author's collection.

[62] "A Rock in a Weary Land," *New York Herald Tribune*, reprinted in *OWH*, Dec. 3, 1929, 10.

[63] *OWH*, Nov. 28, 1929, 11.

[64] *OWH*, Dec. 3, 1929, 1.

[65] *Day v. U.S.*, 37 F.2d 80 (8th Cir. 1929).

[66] Stephen A. Simon, "Dog Sniffs, Robot Spiders, and the Contraband Exception to the Fourth Amendment," *Charleston Law Review* 7 (2012): 111.

[67] Harold Rock interview.

[68] Photo, "Judge Woodrough sitting in a windowsill looking at construction," Robert Paskach Collection, Durham Museum, Omaha.

[69] Harold Rock interview.

[70] *OWH*, Dec. 16, 1948, 1; *Nebraska Blue Book, 1922*, 137.

[71] *OWH*, Dec. 16, 1948, 1; Affidavit of William Pauley, Oct. 6, 1931. National Archives, Kansas City, criminal case record #7025.

[72] *OWH*, Nov. 17, 1922, 21; Oct. 18, 1932, 2.

[73] See, for example, *OWH*, Sept. 8, 1929, 16, describing a raid in which mash was found, but all equipment and finished liquor had been recently removed. See also 1931 testimony regarding Vinciquerra being warned and moving her equipment and product. Affidavit of Claude Williams (agent), Oct. 6, 1931. National Archives, Kansas City, criminal case record #7025.

[74] *OWH*, Oct. 9, 1928, 1; Apr. 1, 1932, 1, 10.

[75] Jack O'Donnell, "Can This Woman Make America Dry?," *Collier's Magazine*, Aug. 6, 1924.

[76] *Kansas City Structural Steel Co. v. Com'r of Int. Revenue*, 33 F. 2d 53. Willebrandt expected to be appointed attorney

general by Hoover following his 1928 victory, and resigned when no advancement came.

[77] *OWH*, Dec. 12, 1924, 36; April 11, 1926, 16; Oct. 15, 1929, 6; *Day v. U.S.*, 37 F.2d 80 (8th Cir. 1929). The circuit court found for the appellant and reversed Woodrough's judgment. Edson Smith was no relation to Mayor Smith.

[78] *OWH*, Mar. 4, 1930, 1; "Omaha's First Century," series of articles in *OWH*, 1954. http://www.historicomaha.com/olcchap8.htm ; *OWH*, Jan. 11, 1930, 1.

[79] *OWH*, Mar. 4, 1930, 1; Apr. 17, 1930, 29.

[80] *OWH*, Apr. 22, 1930, 4.

[81] *OWH*, Apr. 19, 1930, 2.

[82] Menard, *Political Bossism*, 262, 292. The strategy of tax prosecution used against Livingston was also used months later to send Al Capone to Alcatraz. Chicago prosecutors relied heavily on the testimony of Capone's defecting attorney, Ed O'Hare (whose son Butch, a WWII flying ace, is the namesake of the city's primary airport). Similarly in Omaha, Eugene O'Sullivan, an attorney associated with the Dennison machine, later worked with authorities against Dennison.

[83] *OWH*, May 2, 1930, 1.

[84] *Memorial Proceedings.*

[85] Harold Rock interview.

[86] *OWH*, Aug. 16, 1928, 1; Oct. 30, 1928, 1; Dec. 16, 1948, 1.

[87] Affidavit of William Pauley (agent), Oct. 6, 1931. National Archives, Kansas City, criminal case record #7025. Despite his young age, Vinciequerra's son, Carl, was likely a challenge for prohibition agents. He grew up to become an adept boxer, representing the United States in the 1936 Olympics in Berlin.

[88] *OWH*, Apr. 12, 1930, 30; Apr. 14, 1930, 8; Oct. 18, 1932, 6. Samardick filled the newly-created position of Federal Probation Officer. See *OWH* Dec. 1, 1930, 1.

[89] *OWH*, Oct. 18, 1932, 6. Lapidus's motives were far from altruistic. He had strong ties to a number of elected officials, and sought to increase his own power by weakening Dennison's political machine. By cracking down on Dennison's illicit empire, he sought to dry up the revenue streams that not-so-secretly funded Dennison's candidates.

[90] Ibid.; Menard, *Political Bossism*, 268-69. Hannukah 1932 began on Dec. 24.

[91] Menard, *Political Bossism*, 267.

[92] Bill of Particulars, National Archives, Kansas City, criminal case record #7025, *U.S. v Dennison, et al.*

[93] See, generally, National Archives, Kansas City, criminal case record #7025, including Petition for Writ of Habeas Corpus Ad Testificandum.

[94] Subpoena of Oliver Hazelton, Nov. 16, 1932; Subpoena of Dr. Nicholas, Oct. 14, 1932.

[95] *OWH*, Oct. 6, 1932, 1.

[96] *OWH*, Oct. 7, 1932.

[97] *New York Times*, Oct. 30, 1932; John Kyle Davis, "The Gray Wolf: Tom Dennison of Omaha," *Nebraska History* 58 (1977): 47.

[98] Menard, *Political Bossism*, 308-309.

[99] Menard, *Political Bossism*, 309; *OWH*, Dec. 13, 1932, 6; See also, *OWH*, Dec. 6, 1932, 1.

[100] Davis, "The Gray Wolf," 47-48; *OWH*, Feb. 2, 1934, 2; Feb. 15, 1934, 4.

[101] *OWH*, July 5, 1933, 1, 4; Dec. 16, 1948, 1.

[102] *OWH*, June 26, 1964, 1.

[103] Personal letter, Woodrough to Smith, Jan. 8, 1934, personal collection of Laurie Smith Camp; *The Nebraska Lawyer* (April 2001): 26.

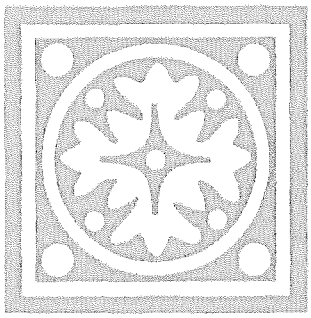
[104] *OWH*, Apr. 15, 1933, 1.

[105] *OWH* insert, *Magazine of the Midlands*, July 9, 1978, 4.

[106] *OWH*, Sept. 30, 1958, 1.

[107] *OWH*, Apr. 15, 1933, 1. Some sources claim District Judge Wesley Brown as having a longer career, serving an impressive fifty years from 1962 to 2012. However, these sources fail to take into account Woodrough's prior service on the district court bench before his elevation to appellate judge. From his appointment in 1916 until his death in 1977, Woodrough spent a total of sixty-one years on the federal bench, assuming senior status in 1961.

[108] Forest Lawn Cemetery, Omaha, memorial marker in Grand Army of the Republic section.



Distinguished by U.S. v. Boylan, N.D.N.Y., March 3, 1919

Original Image of 5 S.Ct. 41 (PDF)

Elk v. Wilkins
Supreme Court of the United States. November 3, 1884. 5 S.Ct. 41. 28 L.Ed. 643 *(Approx. 12 pages)*

ELK
v.
WILKINS.

November 3, 1884.

Synopsis

In Error to the Circuit Court of the United States for the District of Nebraska.

ARLAN and WOODS, JJ., dissenting.

West Headnotes (2)

Attorneys and Law Firms

***42 *97** *A. J. Poppleton* and *J. L. Webster*, for plaintiff in error.

G. M. Lamberton, for defendant in error.

Opinion

***98** GRAY, J.

***94** This is an action brought by an Indian, in the circuit court of the United States for the district of Nebraska, against the registrar of one of the wards of the city of Omaha, for refusing to register him as a qualified voter therein. The petition was as follows: ***95** 'John Elk, plaintiff, complains of Charles Wilkins, defendant, and avers that the matter in dispute herein exceeds the sum of five hundred dollars, to-wit, the sum of six thousand dollars, and that the matter in dispute herein arises under the constitution and laws of the United States; and, for cause of action against the defendant, avers that he, the plaintiff, is an Indian, and was born within the United States; that more than one year prior to the grievances hereinafter complained of he had severed his tribal relation to the Indian tribes, and had fully and completely surrendered himself to the jurisdiction of the United States, and still so continues subject to the jurisdiction of the United States; and avers that, under and by virtue of the fourteenth amendment to the constitution of the United States, he is a citizen of the United States, and entitled to the right and privilege of citizens of the United States. That on the sixth day of April, 1880, there was held in the city of Omaha (a city of the first class, incorporated under the general laws of the state of Nebraska, providing for the incorporation of cities of the first class) a general election for the election of members of the city council and other officers for said city. That the defendant, Charles Wilkins, held the office of and acted as registrar in the Fifth ward of said city, and that as such registrar it was the duty of such defendant to register the names of all persons entitled to exercise the elective franchise in said ward of said city at said general election. That this plaintiff was a citizen of and had been a *bona fide* resident of the state of Nebraska for more than six months prior to said sixth day of April, 1880, and had been a *Bona fide* resident of Douglas county, wherein the city of Omaha is situate, for more than forty days, and in the Fifth ward of said city more than ten days prior to the said sixth day of April, and was such citizen and resident at the time of said election, and at the time of his attempted registration, as hereinafter set forth, and was in every way qualified, under the laws of the state of Nebraska and of the city of Omaha, to be registered as a voter, and to cast a vote at said election, and complied with the laws of the city and state in that behalf. ***96** That on or about the fifth day of April, 1880,

and prior to said election, this plaintiff presented himself to said Charles Wilkins, as such registrar, at his office, for the purpose of having his name registered as a qualified voter, as provided by law, and complied with all the provisions of the statutes in that regard, and claimed that, under the fourteenth and fifteenth amendments to the constitution of the United States, he was a citizen of the United States, and was entitled to exercise the elective franchise, regardless of his race and color; and that said Wilkins, designedly, corruptly, willfully, and maliciously, did then and there refuse to register this plaintiff, for the sole reason that the plaintiff was an Indian, and therefore not a citizen of the United States, and not, therefore, entitled to vote, and on account of his race and color, and with the willful, malicious, corrupt, and unlawful design to deprive this plaintiff of his right to vote at said election, and of his rights, and all other Indians of their rights, under said fourteenth and fifteenth amendments to the constition of the United States, on account of his and their race and color. That on the sixth day of April this plaintiff presented himself at the place of voting in said ward, and presented a ballot, and requested the right to vote, where said Wilkins, who was then acting as one of the judges of said election in said ward, in further carrying out his willful and malicious designs as aforesaid, declared to the plaintiff and to the other election officers that the plaintiff was an Indian, and not a citizen, and not entitled to vote, and said judges and clerks of election refused to receive the vote of the plaintiff, ***43* for that he was not registered as required by law. Plaintiff avers the fact to be that by reason of said willful, unlawful, corrupt, and mailcious refusal of said defendant to register this plaintiff, as provided by law, he was deprived of his right to vote at said election, to his damage in the sum of $6,000. Wherefore, plaintiff prays judgment against defendant for $6,000, his damages, with costs of suit.'

The defendant filed a general demurrer for the following causes: (1) That the petition did not state facts sufficient to constitute a cause of action; (2) that the court had no jurisdiction of the person of the defendant; (3) that the court had no jurisdiction of the subject of the action. The demurrer was argued before Judge McCRARY and Judge DUNDY, and sustained; and, the plaintiff electing to stand by his petition, judgment was rendered for the defendant, dismissing the petition, with costs. The plaintiff sued out this writ of error.

By the constitution of the state of Nebraska, art. 7, § 1, 'every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the state six months, and in the county, precinct, or ward for the term provided by law, shall be an elector: *First*, citizens of the United States; *second*, persons of foreign birth who shall have declared their intention to become citizens, conformably to the laws of the United States on the subject of naturalization, at least thirty days prior to an election.' By the statutes of Nebraska, every male person of the age of 21 years or upward, belonging to either of the two classes so defined in the constitution of the state, who shall have resided in the state 6 months, in the county 40 days, and in the precinct, township, or ward 10 days, shall be an elector; the qualifications of electors in the several wards of cities of the first class (of which Omaha is one) shall be the same as in precincts; it is the duty of the registrar to enter in the register of qualified voters the name of every person who applies to him to be registered, and satisfies him that he is qualified to vote under the provisions of the election laws of the state; and at all municipal, as well as county or state elections, the judges of election are required to check the name, and receive and deposit the ballot, of any person whose name appears on the register. Comp. St. Neb. 1881, *c.* 26, § 3; *c.* 13, § 14; *c.* 76, §§ 6, 13, 19.

The plaintiff, in support of his action, relies on the first clause of the first section of the fourteenth article of amendment of the constitution of the United States, by which '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;' and on the fifteenth article of amendment, which provides that '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.' This being a suit at common law in which the matter in dispute exceeds $500, arising under the constitution of the United States, the circuit court had jurisdiction of it under the act of March 3, 1875, *c.* 137, § 1, even if the parties were citizens of the same state. 18 St. 470; *Ames* v. *Kansas*, 111 U. S. 449; S. C. 4 SUP. CT. REP. 437. The judgment of that court, dismissing the action with costs, must have proceeded upon the merits, for if the dismissal had been for want of jurisdiction, no costs could have been awarded. *Mayor* v. *Cooper*, 6 Wall. 247; *Mansfield, C. & L. M. Ry.* v. *Swan*, 111 U. S. 379; S. C. 4 SUP. CT. REP. 510. And the only point argued by the defendant in this court is whether the petition sets forth facts enough to constitute a cause of action. The decision of this point, as both parties assume in their briefs, depends upon the question whether the legal conclusion, that under and by virtue of the fourteenth amendment of the

constitution the plaintiff is a citizen of the United States, is supported by the facts alleged in the petition and admitted by the demurrer, to-wit: The plaintiff is an Indian, and was born in the United States, and has severed his ****44** tribal relation to the Indian tribes, and fully and completely surrendered himself to the jurisdiction of the United States, and still continues to be subject to the jurisdiction of the United States, and is a *bona fide* resident of the state of Nebraska and city of Omaha. The petition, while it does not show of what Indian tribe the plaintiff was a member, yet, by the allegations that he 'is ***99** an Indian, and was born within the United States,' and that 'he had severed his tribal relations to the Indian tribes,' clearly implies that he was born a member of one of the Indian tribes within the limits of the United States which still exists and is recognized as a tribe by the government of the United States. Though the plaintiff alleges that he 'had fully and completely surrendered himself to the jurisdiction of the United States,' he does not allege that the United States accepted his surrender, or that he has ever been naturalized, or taxed, or in any way recognized or treated as a citizen by the state or by the United States. Nor is it contended by his counsel that there is any statute or treaty that makes him a citizen.

The question then is, whether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States, within the meaning of the first section of the fourteenth amendment of the constitution. Under the constitution of the United States, as originally established, 'Indians not taxed' were excluded from the persons according to whose numbers representatives and direct taxes were apportioned among the several states; and congress had and exercised the power to regulate commerce with the Indian tribes, and the members thereof, whether within or without the boundaries of one of the states of the Union. 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. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed ***100** by any state. General acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them. Const. art. 1, §§ 2, 8; art. 2, § 2; *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *Worcester* v. *Georgia*, 6 Pet. 515; *U. S.* v. *Rogers*, 4 How. 567; *U. S.* v. *Holliday*, 3 Wall. 407; *Case of the Kansas Indians*, 5 Wall. 737; *Case of the New York Indians*, Id. 761; *Case of the Cherokee Tobacco*, 11 Wall. 616; *U. S.* v. *Whisky*, 93 U. S. 188; *Pennock* v. *Commissioners*, 103 U. S. 44; *Crow Dog's Case*, 109 U. S. 556; S. C. 3 SUP. CT. REP. 396; *Goodell* v. *Jackson*, 20 Johns. 693; *Hastings* v. *Farmer*, 4 N. Y. 293.

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. 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; for examples of which see treaties in 1817 and 1835 with the Cherokees, and in 1820, 1825, and 1830 with the Choctaws, (7 St. 159, 211, 236, 335, 483, 488; *Wilson* v. *Wall*, 6 Wall. 83; Opinion of Atty. Gen. TANEY, 2 OP. Attys. Gen. 462;) in 1855 with the Wyandotts, (10 St. 1159; *Karrahoo* v. *Adams*, 1 Dill. 344, 346; *Gray* v. *Coffman*, 3 Dill. 393; *Hicks* v. *Butrick*, Id. 413;) in 1861 ****45** and in March, 1866, with the Pottawatomies, (12 st. 1192; 14 st. 763;) in 1862 with the Ottawas, (12 St. 1237;) and the Kickapoos, (13 St. 624;) and acts of congress of March 3, 1839, *c.* 83, § 7, concerning the Brothertown Indians; and of March 3, 1843, *c.* 101, § 7, August 6, 1846, *c.* 88, and March 3, 1865, *c.* 127, § 4, concerning the Stockbridge Indians, (5 St. 351, 647; 9 St. 55; 13 St. 562.) See, also, treaties with the Stockbridge Indians in 1848 and 1856, (9 St. 955; 11 St. 667; 7 Op. Attys. Gen. 746.)

Chief Justice TANEY, in the passage cited for the plaintiff ***101** from his opinion in *Scott* v. *Sandford*, 19 How. 393, 404, did not affirm or imply that either the Indian tribes, or individual members of those tribes, had the right, beyond other foreigners, to become citizens of their own will, without being naturalized by the United States. His words were: 'They' (the Indian tribes) 'may without doubt, like the subjects of any foreign government, be naturalized by the authority of congress, and become citizens of a state, and of the United States; and if an

individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.' But an emigrant from any foreign state cannot become a citizen of the United States without a formal renunciation of his old allegiance, and an acceptance by the United States of that renunciation through such form of naturalization as may be required law.

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. The main object of the opening sentence of the fourteenth amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes, (*Scott* v. *Sandford*, 19 How. 393;) and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the state in which they reside. *Slaughter-House Cases*, 16 Wall. 36, 73; *Strauder* v. *West Virginia*, 100 U. S. 303, 306.

This section contemplates two sources of citizenship, and two sources only: birth and naturalization. The persons declared ***102** to be citizens are 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts; or collectively, as by the force of a treaty by which foreign territory is acquired. Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indiana tribes, (an alien though dependent power,) although in a geographical sense born in the United States, are 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. This view is confirmed by the second section of the fourteenth amendment, which provides that 'representatives shall be apportioned among ***46** the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.' Slavery having been abolished, and the persons formerly held as slaves made citizens, this clauses fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original constitution as counted only three-fifths of such persons. But Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis of representation, in which all other persons are now included, is wholly inconsistent with their being considered citizens. So the further provision of the second section for a proportionate ***103** reduction of the basis of the representation of any state in which the right to vote for presidential electors, representatives in congress, or executive or judicial officers or members of the legislature of a state, is denied, except for participation in rebellion or other crime, to 'any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States,' cannot apply to a denial of the elective franchise to Indians not taxed, who form no part of the people entitled to representation.

It is also worthy of remark that the language used, about the same time, by the very congress which framed the fourteenth amendment, in the first section of the civil rights act of April 9, 1866, declaring who shall be citizens of the United States, is 'all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed.' 14 St. 27; Rev. St. § 1992. Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the fourteenth amendment, by being 'naturalized in the United States,' by or under some treaty or statute. The action of the political departments of the government, not only after the proposal of the amendment by congress to the states in June, 1866, but since the proclamation in July, 1868, of its ratification by the requisite number of states, accords with this construction. While the amendment was pending before the legislatures of the several states, treaties containing provisions for the naturalization of members of Indian tribes as citizens of the United States were made on July 4, 1866, with

the Delawares, in 1867 with various tribes in Kansas, and with the Pottawatomies, and in April, 1868, with the Sioux. 14 St. 794, 796; 15 St. 513, 532, 533, 637.

The treaty of 1867 with the Kansas Indians strikingly illustrates the principle that no one can become a citizen of a nation without its consent, and directly contradicts the supposition that a member of an Indian tribe can at will be alternately a citizen of the United States and a member of the tribe. That treaty not only provided for the naturalization of members ***104*** of the Ottawa, Miami, Peoria, and other tribes, and their families, upon their making declaration, before the district court of the United States, of their intention to become citizens, (15 St. 517, 520, 521;) but, after reciting that some of the Wyandotts, who had become citizens under the treaty of 1855, were 'unfitted for the responsibilities of citizenship,' and enacting that a register of the whole people of this tribe, resident in Kansas or elsewhere, should be taken, under the direction of the secretary of the interior, showing the names of 'all who declare their desire to be and remain Indians and in a tribal condition,' and of incompetents and orphans as described in the treaty of 1855, and that such persons, and those only, should thereafter constitute the tribe, it provided that 'no one who has heretofore consented to become a citizen, nor the wife or children of any such person, shall be allowed to become members of the tribe, except by the free consent of the tribe after its new organization, and unless the agent shall certify that such party is, through poverty or incapacity, unfit to continue in the exercise of the responsibilities of citizenship of the United States, and likely to become a public charge.' 15 St. 514, 516.

Since the ratification of the fourteenth amendment, congress has passed several acts for naturalizing Indians of certain tribes, which would have been ***47*** superfluous if they were, or might become without any action of the government, citizens of the United States. By the act of July 15, 1870, *c.* 296, § 10, for instance, it was provided that if at any time thereafter any of the Winnebago Indians in the state of Minnesota should desire to become citizens of the United States, they should make application to the district court of the United States for the district of Minnesota, and in open court make the same proof, and take the same oath of allegiance as is provided by law for the naturalization of aliens, and should also make proof, to the satisfaction of the court, that they were sufficiently intelligent and prudent to control their affairs and interests, that they had adopted the habits of civilized life, and had for at least five years before been able to support themselves and their families; and thereupon ***105*** they should be declared by the court to be citizens of the United States, the declaration entered of record, and a certificate thereof given to the applicant; and the secretary of the interior, upon presentation of that certificate, might issue to them patents in fee-simple, with power of alienation, of the lands already held by them in severalty, and might cause to be paid to them their proportion of the money and effects of the tribe held in trust under any treaty or law of the United States; and thereupon such persons should cease to be members of the tribe; and the lands so patented to them should be subject to levy, taxation, and sale in like manner with the property of other citizens. 16 St. 361. By the act of March 3, 1873, *c.* 332, § 3, similar provision was made for the naturalization of any adult members of the Miami tribe in Kansas, and of their minor children. 17 St. 632. And the act of March 3, 1865, *c.* 127, before referred to, making corresponding provision for the naturalization of any of the chiefs, warriors, or heads of families of the Stockbridge Indians, is re-enacted in section 2312 of the Revised Statutes.

The act of January 25, 1871, *c.* 38, for the relief of the Stockbridge and Munsee Indians in the state of Wisconsin, provided that 'for the purpose of determining the persons who are members of said tribes, and the future relation of each to the government of the United States,' two rolls should be prepared under the direction of the commissioner of Indian affairs, signed by the sachem and councilors of the tribe, certified by the person selected by the commissioner to superintend the same, and returned to the commissioner; the one, to be denominated the citizen roll, of the names of all such persons of full age, and their families, 'as signify their desire to separate their relations with said tribe and to become citizens of the United States,' and the other to be denominated the Indian roll, of the names of all such 'as desire to retain their tribal character and continue under the care and guardianship of the United States;' and that those rolls, so made and returned, should be held as a full surrender and relinquishment, on the part of all those of the first class, of all claims to be known or considered as members of the tribe, or to be interested ***106*** in any provision made or to be made by the United States for its benefit, 'and they and their descendants shall thenceforth be admitted to all the rights and privileges of citizens of the United States.' 16 St. 406.

The pension act exempts Indian claimants of pensions for service in the army or navy from the obligation to take the oath to support the constitution of the United States. Act of March 3, 1873, *c.* 234, § 28, (17 St. 574; Rev. St. § 4721.) The recent statutes concerning

homesteads are quite inconsistent with the theory that Indians do or can make themselves independent citizens by living apart from their tribe. The act of March 3, 1875, *c.* 131, § 15, allowed to 'any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations,' the benefit of the homestead acts, but only upon condition of his 'making satisfactory proof of such abandonment, under rules to be prescribed by the secretary of the interior;' and further provided that his title in the homestead should be absolutely inalienable for five years from the date of the patent, and that he should be entitled ***48** to share in all annuities, tribal funds, lands, and other property, as if he had maintained his tribal relations. 18 St. 420. And the act of March 3, 1884, *c.* 180, § 1, while it allows Indians 'located on public lands' to 'avail themselves of the homestead laws as fully, and to the same extent, as may now be done by citizens of the United States,' provides that the form and the legal effect of the patent shall be that the United States does and will hold the land for twenty-five years in trust for the Indian making the entry, and his widow and heirs, and will then convey it in fee to him or them. 23 St. 96. The national legislation has tended more and more towards the education and civilization of the Indians, and fitting them to be citizens. But the question whether any Indian tribes, or any members thereof, have become so far advanced in civilization that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are *107 and whose citizens they seek to become, and not by each Indian for himself. There is nothing in the statutes or decisions, referred to by counsel, to control the conclusion to which we have been brought by a consideration of the language of the fourteenth amendment, and of the condition of the Indians at the time of its proposal and ratification.

The act of July 27, 1868, *c.* 249, declaring the right of expatriation to be a natural and inherent right of all people, and reciting that 'in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship,' while it affirms the right of every man to expatriate himself from one country, contains nothing to enable him to become a citizen of another without being naturalized under its authority. 15 St. 223; Rev. St. § 1999. The provision of the act of congress of March 3, 1871, *c.* 120, that 'hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty,' is coupled with a provision that the obligation of any treaty already lawfully made is not to be thereby invalidated or impaired; and its utmost possible effect is to require the Indian tribes to be dealt with for the future through the legislative and not through the treaty-making power. 16 St. 566; Rev. St. § 2079.

In the case of *U. S.* v. *Elm*, 23 Int. Rev. Rec. 419, decided by Judge WALLACE in the district court of the United States for the Northern district of New York, the Indian who was held to have a right to vote in 1876 was born in the state of New York, one of the remnants of a tribe which had ceased to exist as a tribe in that state; and by a statute of the state it had been enacted that any native Indian might purchase, take, hold, and convey lands, and, whenever he should have become a freeholder to the value of $100, should be liable to taxation, and to the civil jurisdiction of the courts, in the same manner and to the same extent as a citizen. N. Y. St. 1843, *c.* 87. The condition of the tribe from which he *108 derived his origin, so far as any fragments of it remained within the state of New York, resembled the condition of those Indian nations of which Mr. Justice JOHNSON said in *Fletcher* v. *Peck*, 6 Cranch, 87, 146, that they 'have totally extinguished their national fire, and submitted themselves to the laws of the states;' and which Mr. Justice MCLEAN had in view when he observed in *Worcester* v. *Georgia*, 6 Pet. 515, 580, that in some of the old states 'where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government, the laws of the state have been extended over them, for the protection of their persons and property.' See, also, as to the condition of Indians in Massachusetts, remnants of tribes never recognized by the treaties or legislative or executive acts of the United States as distinct political communities, *Danzell* v. *Webquish*, 108 Mass. 133; *Pells* v. *Webquish*, 129 Mass. 469; Mass. St. 1862, *c.* 184; 1869, *c.* 463.

***49** The passages cited as favorable to the plaintiff, from the opinions delivered in *Ex parte Kenyon*, 5 Dill. 385, 390, in *Ex parte Reynolds*, 5 Dill. 394, 397, and in *U. S.* v. *Crook*, 5 Dill. 453, 464, were *obiter dicta*. The *Case of Reynolds* was an indictment, in the circuit court of the United States for the Western district of Arkansas, for a murder in the Indian country, of which that court had jurisdiction if either the accused or the dead man was not an Indian, and was decided by Judge PARKER in favor of the jurisdiction, upon the ground that both were white men, and that, conceding the one to be an Indian by marriage, the other never

was an Indian in any sense. 5 Dill. 397, 404. Each of the other two cases was a writ of *habeas corpus;* and any person, whether a citizen or not, unlawfully restrained of his liberty, is entitled to that writ. *Case of the Hottentot Venus*, 13 East, 195; *Case of Dos Santos*, 2 Brock. 493; *In re Kaine*, 14 How. 103. In *Kenyon's Case*, judge PARKER held that the court in which the prisoner had been convicted had no jurisdiction of the subject-matter, because the place of the commission of the act was beyond the territorial limits of its jurisdiction, and, as was truly said, 'this alone would be conclusive of this case.' ***109** 5 Dill. 390. In *U. S.* v. *Crook*, the Ponca Indians were discharged by Judge DUNDY because the military officers who held them were taking them to the Indian Territory by force and without any lawful authority, (5 Dill. 468;) and in the case at bar, as the record before us shows, that learned judge concurred in the judgment below for the defendant.

The law upon the question before us has been well stated by Judge DEADY in the district court of the United States for the district of Oregon. In giving judgment against the plaintiff in a case resembling the case at bar, he said: 'Being born a member of 'an independent political community'-the Chinook-he was not born subject to the jurisdiction of the United States-not born in its allegiance.' *McKay* v. *Campbell*, 2 Sawy. 118, 134. And in a later case he said: 'But an Indian cannot make himself a citizen of the United States without the consent and co-operation of the government. The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form. The Indians in Oregon, not being born subject to the jurisdiction of the United States, were not born citizens thereof, and I am not aware of any law or treaty by which any of them have been made so since.' *U. S.* v. *Osborne*, 6 Sawy. 406, 409. Upon the question whether any action of a state can confer rights of citizenship on Indians of a tribe still recognized by the United States as retaining its tribal existence, we need not, and do not, express an opinion, because the state of Nebraska is not shown to have taken any action affecting the condition of this plaintiff. See *Chirac* v. *Chirac*, 2 Wheat. 259; *Fellows* v. *Blacksmith*, 19 How. 366; *U. S.* v. *Holliday*, 3 Wall. 407, 420; *U. S.* v. *Joseph*, 94 U. S. 614, 618. The plaintiff, not being a citizen of the United States under the fourteenth amendment of the constitution, has been deprived of no right secured by the fifteenth amendment, and cannot maintain this action. Judgment affirmed.

***110** HARLAN, J., *dissenting.*
Mr. Justice WOODS and myself feel constrained to express our dissent from the interpretation which our brethren give to that clause of the fourteenth amendment which provides that '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.' The case, as presented by the record, is this: John Elk, the plaintiff in error, is a person of the Indian race. He was born within the territorial limits of the United States. His parents were, at the time of his birth, members of one ***50** of the Indian tribes in this country. More than a year, however, prior to his application to be registered as a voter in the city of Omaha, he had severed all relations with his tribe, and, as he alleges, fully and completely surrendered himself to the jurisdiction of the United States. Such surrender was, of course, involved in his act of becoming, as the demurrer to the petition admits that he did become, a *bona fide* resident of the state of Nebraska. When he applied in 1880 to be registered as a voter, he possessed, as is also admitted, the qualifications of age and residence in state, county, and ward, required for electors by the constitution and laws of that state. It is likewise conceded that he was entitled to be so registered if, at the time of his application, he was a citizen of the United States; for, by the constitution and laws of Nebraska, every citizen of the United States, having the necessary qualifications of age and residence in state, county, and ward, is entitled to vote. Whether he was such citizen is the question presented by this writ of error.

It is said that the petition contains no averment that Elk was taxed in the state in which he resides, or had ever been treated by her as a citizen. It is evident that the court would not have held him to be a citizen of the United States, even if the petition had contained a direct averment that he was taxed; because its judgment, in legal effect, is that, although born within the territorial limits of the United States, he could not, if at his birth a member of an Indian tribe, acquire national citizenship ***111** by force of the fourteenth amendment, but only in pursuance of some statute or treaty providing for his naturalization. It would, therefore, seem unnecessary to inquire whether he was taxed at the time of his application to be registered as a voter; for, if the words 'all persons born * * * in the United States and subject to the jurisdiction thereof' were not intended to embrace Indians born in tribal relations, but

who subsequently became *bona fide* residents of the several states, then, manifestly, the legal *status* of such Indians is not altered by the fact that they are taxed in those states. While denying that national citizenship, as conferred by that amendment, necessarily depends upon the inquiry whether the person claiming it is taxed in the state of his residence, or has property therein from which taxes may be derived, we submit that the petition does sufficiently show that the plaintiff was taxed, that is, belongs to the class which, by the laws of Nebraska, are subject to taxation. By the constitution and laws of Nebraska all real and personal property, in that state, are subject to assessment and taxation. Every person of full age and sound mind, being a resident thereof, is required to list his personal property for taxation. Const. Neb. art. 9, § 1; Comp. St. Neb. *c.* 77, pp. 400, 401. Of these provisions upon the subject of taxation this court will take judicial notice. Good pleading did not require that they should be set forth, at large, in the petition. Consequently, an averment that the plaintiff is a citizen and *bona fide* resident of Nebraska implies, in law, that he is subject to taxation, and is taxed, in that state. Further: The plaintiff has become so far incorporated with the mass of the people of Nebraska that being, as the petition avers, a citizen and resident thereof, he constitutes a part of her militia. Comp. St. Neb. *c.* 56. He may, being no longer a member of an Indian tribe, sue and be sued in her courts. And he is counted in every apportionment of representation in the legislature; for the requirement of her constitution is that 'the legislature shall apportion the senators and representatives according to the number of inhabitants, excluding Indians not taxed, and soldiers and officers of the United States army.' Const. Neb. art. 3, § 1.

***112** At the adoption of the constitution there were, in many of the states, Indians, not members of any tribe, who constituted a part of the people for whose benefit the state governments were established. This is apparent from that clause of article 1, § 3, which requires, in the apportionment of representatives and direct taxes among the several states 'according to their respective ***51** numbers,' the exclusion of 'Indians not taxed.' This implies that there were, at that time, in the United States, Indians who were taxed; that is, were subject to taxation by the laws of the state of which they were residents. Indians not taxed were those who held tribal relations, and therefore were not subject to the authority of any state, and were subject only to the authority of the United States, under the power conferred upon congress in reference to Indian tribes in this country. The same provision is retained in the fourteenth amendment; for, now, as at the adoption of the constitution, Indians in the several states, who are taxed by their laws, are counted in establishing the basis of representation in congress. By the act of April 9, 1866, entitled 'An act to protect all persons in the United States in their civil rights, and furnish means for their vindication,' (14 St. 27,) it is 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.' This, so far as we are aware, is the first general enactment making persons of the Indian race citizens of the United States. Numerous statutes and treaties previously provided for all the individual members of particular Indian tribes becoming, in certain contingencies, citizens of the United States. But the act of 1866 reached Indians not in tribal relations. Beyond question, by that act, national citizenship was conferred directly upon all persons in this country, of whatever race, (excluding only 'Indians not taxed,') who were born within the territorial limits of the United States, and were not subject to any foreign power. Surely every one must admit that an Indian residing in one of the states, and subject to taxation there, became, by force alone of the act of 1866, a citizen of the United States, although ***113** he may have been, when born, a member of a tribe. The exclusion of Indians not taxed evinced a purpose to include those subject to taxation in the state of their residence. Language could not express that purpose with more distinctness than does the act of 1866. Any doubt upon the subject, in respect to persons of the Indian race residing in the United States or territories, and not members of a tribe, will be removed by an examination of the debates, in which many distinguished statesmen and lawyers participated in the senate of the United States when the act of 1866 was under consideration.

In the bill as originally reported from the judiciary committee there were no words excluding 'Indians not taxed' from the citizenship proposed to be granted. Attention being called to this fact, the friends of the measure disclaimed any purpose to make citizens of those who were in tribal relations, with governments of their own. In order to meet that objection, while conforming to the wishes of those desiring to invest with citizenship all Indians permanently separated from their tribes, and who, by reason of their residence away from their tribes, constituted a part of the people under the jurisdiction of the United States, Mr. Trumbull, who reported the bill, modified it by inserting the words 'excluding Indians not taxed.' What was intended by that modification appears from the following language used by him in debate: 'Of course we cannot declare the wild Indians who do not recognize the government of the

United States, who are not subject to our laws, with whom we make treaties, who have their own laws, who have their own regulations, whom we do not intend to interfere with or punish for the commission of crimes one upon the other, to be the subjects of the United States in the sense of being citizens. They must be excepted. The constitution of the United States excludes them from the enumeration of the population of the United States when it says that Indians not taxed are to be excluded. It has occurred to me that, perhaps, the amendment would meet the views of all gentlemen, which used these constitutional words, and said that all persons born in the United States, excluding ***114** Indians not taxed, and not subject to any foreign power, shall be deemed citizens of the United States.' Cong. ****52** Globe, (1st Sess. 39th Congress,) p. 527. In replying to the objections urged by Mr. Hendricks to the bill even as amended, Mr. Trumbull said: 'Does the senator from Indiana want the wild roaming Indians, not taxed, not subject to our authority, to be citizens of the United States-persons that are not to be counted, in our government? If he does not, let him not object to this amendment that brings in *even* [only] *the Indian when he shall have cast off his wild habits, and submitted to the laws of organized society and become a citizen.*' Id. 528.

The entire debate shows, with singular clearness, indeed, with absolute certainty, that no senator who participated in it, whether in favor of or in opposition to the measure, doubted that the bill as passed admitted, and 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. It was so interpreted by President Johnson, who, in his veto message, said: 'By the first section of the bill all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. This provision comprehends the Chinese of the Pacific states, *Indians subject to taxation*, the people called gypsies, as well as the entire race designated as blacks, persons of color, negroes, mulattoes, and persons of African blood. Every individual of those races, born in the United States, is, by the bill, made a citizen of the United States.'

It would seem manifest, from this brief review of the history of the act of 1866, that one purpose of that legislation was to confer national citizenship upon a part of the Indian race in this country-such of them, at least, as resided in one of the states or territories, and were subject to taxation and other public burdens. And it is to be observed that, whoever was included within the terms of the grant contained in that act, became citizens of the United States without any record of ***115** their names being made. The citizenship conferred was made to depend wholly upon the existence of the facts which the statute declared to be a condition precedent to the grant taking effect. At the same session of the congress which passed the act of 1866, the fourteenth amendment was approved and submitted to the states for adoption. Those who sustained the former urged the adoption of the latter. An examination of the debates, pending the consideration of the amendment, will show that there was no purpose on the part of those who framed it, or of those who sustained it by their votes, to abandon the policy inaugurated by the act of 1866, of admitting to national citizenship such Indians as were separated from their tribes and were residents of one of the states or territories outside of any reservation set apart for the exclusive use and occupancy of Indian tribes.

Prior to the adoption of the fourteenth amendment, numerous statutes were passed with reference to particular bodies of Indians, under which the individual members of such bodies, upon the dissolution of their tribal relations, or upon the division of their lands derived from the government, became, or were entitled to become, citizens of the United States by force alone of the statute, without observing the forms required by the naturalization laws in the case of a foreigner becoming a citizen of the United States. Such was the statute of March 3, 1839, (5 St. 349,) relating to the Brothertown Indians in the then territory of Wisconsin. Congress consented that the lands reserved for their use might be partitioned among the individuals composing the tribe. The act required the petition to be evidenced by a report and map to be filed with the secretary of the interior, by whom it should be transmitted to the president; whereupon the act proceeded: 'The said Brothertown Indians, and each and every of them, shall then be deemed to be, and from that time forth are hereby declared to be, citizens of the United States to all intents and purposes, and shall be entitled to all the rights, privileges, and immunities of such citizens,' etc. Similar legislation was enacted with ***116** reference ****53** to the Stockbridge Indians. 5 St. 646, 647. Legislation of this character has an important bearing upon the present question, for it shows that prior to the adoption of the fourteenth amendment it had often been the policy of congress to admit persons of the Indian race to citizenship upon their ceasing to have tribal relations, and without the slightest reference to the fact that they were born in tribal relations. It shows, also, that the citizenship thus granted was not, in every instance, required to be

evidenced by the record of a court. If it be said that the statutes prior to 1866, providing for the admission of Indians to citizenship, required in their execution that a record be made of the names of those who thus acquired citizenship, our answer is that it was entirely competent for congress to dispense, as it did in the act of 1866, with any such record being made in a court, or in any department of the government. And certainly it must be conceded that except in cases of persons 'naturalized in the United States,' (which phrase refers only to those who are embraced by the naturalization laws, and not to Indians,) the fourteenth amendment does not require the citizenship granted by it to be evidenced by the record of any court, or of any department of the government. Such citizenship passes to the person, of whatever race, who is embraced by its provisions, leaving the fact of citizenship to be determined, when it shall become necessary to do so in the course of legal inquiry, in the same way that questions as to one's nativity, domicile, or residence are determined.

If it be also said that, since the adoption of the fourteenth amendment, congress has enacted statutes providing for the citizenship of Indians, our answer is that those statutes had reference to tribes, the members of which could not, while they continued in tribal relations, acquire the citizenship granted by the fourteenth amendment. Those statutes did not deal with individual Indians who had severed their tribal connections and were residents within the states of the Union, under the complete jurisdiction of the United States. There is nothing in the history of the adoption of the fourteenth amendment which, in our opinion, justifies the conclusion ***117** that only those Indians are included in its grant of citizenship who were, at the time of their birth, subject to the complete jurisdiction of the United States. As already stated, according to the doctrines of the court, in this case,-if we do not wholly misapprehend the effect of its decision,-the plaintiff, if born while his parents were members of an Indian tribe, would not be embraced by the amendment even had he been, *at the time it was adopted*, a permanent resident of one of the states, subject to taxation, and, in fact, paying property and personal taxes, to the full extent required of the white race in the same state.

When the fourteenth amendment was pending in the senate of the United States, Mr. Doolittle moved to insert after the words 'subject to the jurisdiction thereof,' the words 'excluding Indians not taxed.' His avowed object in so amending the measure was to exclude, beyond all question, from the proposed grant of national citizenship, tribal Indians who-since they were, in a sense, subject to the jurisdiction of the United States-might be regarded as embraced in the grant. The proposition was opposed by Mr. Trumbull and other friends of the proposed constitutional amendment, upon the ground that the words 'Indians not taxed' might be misconstrued, and also because those words were unnecessary, in that the phrase 'subject to the jurisdiction thereof' embraced only those who were subject to the complete jurisdiction of the United States, which could not be properly said of Indians in tribal relations. But it was distinctly announced by the friends of the amendment that they intended to include in the grant of national citizenship Indians who were within the jurisdiction of the states, and subject to their laws, because such Indians would be completely under the jurisdiction of the United States. Said Mr. Trumbull: 'It is only those who come completely within our jurisdiction, who are subject to our laws, that we think of making citizens; and ***54** there can be no objection to the proposition that such persons should be citizens.' Cong. Globe, pt. 4, (1st Sess. 39th Cong.) pp. 2890-2893. Alluding to the phrase 'Indians not taxed,' he remarked that the language of the proposed constitutional amendment was ***118** better than that of the act of 1866 passed at the same session. He observed: 'There is a difficulty about the words 'Indians not taxed.' Perhaps one of the reasons why I think so is because of the persistency with which the senator from Indiana himself insisted that the phrase 'Indians not taxed,' the very words which the senator from Wisconsin wishes to insert here, would exclude everybody that did not pay a tax; that that was the meaning of it; we must take it literally. The senator from Maryland did not agree to that, nor did I; but, if the senator from Indiana was right, it would receive a construction which, I am sure, the senator from Wisconsin would not be for, for if these Indians come within our limits and within our jurisdiction and are civilized, he would just as soon make a citizen of a poor Indian as of the rich Indian.' Id. 2894.

A careful examination of all that was said by senators and representatives, pending the consideration by congress of the fourteenth amendment, justifies us in saying that every one who participated in the debates, whether for or against the amendment, believed that, in the form in which it was approved by congress, it granted, and was intended to grant, national citizenship to every person of the Indian race in this country who was unconnected with any tribe, and who resided, in good faith, outside of Indian reservations and within one of the states or territories of the Union. This fact is, we think, entitled to great weight in determining the meaning and scope of the amendment. *Lithographic Co. v. Sarony*, 111 U. S. 57; S. C. 4

SUP. CT. REP. 279. In this connection we refer to an elaborate report made by Mr. Carpenter, to the senate of the United States, in behalf of its judiciary committee, on the fourteenth of December, 1870. The report was made in obedience to an instruction to inquire as to the effect of the fourteenth amendment upon the treaties which the United States had with various Indian tribes of the country. The report says: 'For these reasons your committee do not hesitate to say that the Indian tribes within the limits of the United States, and the individuals, members of such tribes, while they adhere to and form a part of the tribes to which they belong, are not, within the meaning of the ***119** fourteenth amendment, 'subject to the jurisdiction' of the United States, and therefore that *such* Indians have not become citizens of the United States by virtue of that amendment; and, if your committee are correct in this conclusion, it follows that the treaties heretofore made between the United States and the Indian tribes are not annulled by that amendment.' The report closes with this significant language: 'It is pertinent to say, in concluding this report, that treaty relations can properly exist with Indian tribes or nations only, and that, *when the members of any Indian tribe are scattered, they are merged in the mass of our people, and become equally subject to the jurisdiction of the United States*.'

The question before us has been examined by a writer upon constitutional law whose views are entitled to great respect. Judge COOLEY, referring to the definition of national citizenship as contained in the fourteenth amendment, says: 'By the express terms of the amendment, persons of foreign birth, who have never renounced the allegiance to which they were born, though they may have a residence in this country, more or less permanent, for business, instruction, or pleasure, are not citizens. Neither are the aboriginal inhabitants of the country citizens, so long as they preserve their tribal relations and recognize the headship of their chiefs, notwithstanding that, as against the action of our own people, they are under the protection of the laws, and may be said to owe a qualified allegiance to the government. When living within territory over which the laws, either state or territorial, are extended, they are protected by, and, at the same time, held amenable ***55** to, those laws in all their intercourse with the body politic, and with the individuals composing it; but they are also, as a *quasi* foreign people, regarded as being under the direction and tutelage of the general government, and subjected to peculiar regulations as dependent communities. They are 'subject to the jurisdiction' of the United States only in a much qualified sense; and it would be obviously inconsistent with the semi-independent character of such a tribe, and with the obedience they are expected to render to their tribal head, that they should be vested with the complete rights-or, on the other ***120** hand, subjected to the full responsibilities-of American citizens. It would not for a moment be contended that such was the effect of this amendment. When, however, the tribal relations are dissolved, when the headship of the chief or the authority of the tribe is no longer recognized, and the individual Indian, turning his back upon his former mode of life, makes himself a member of the civilized community, the case is wholly altered. He then no longer acknowledges a divided allegiance; he joins himself to the body politic; he gives evidence of his purpose to adopt the habits and customs of civilized life; and, as his case is then within the terms of this amendment, it would seem that his right to protection, in person, property, and privilege, must be as complete as the allegiance to the government to which he must then be held; as complete, in short, as that of any other native-born inhabitant.' 2 Story, Const. (Cooley's Ed.) § 1933, p. 654. To the same effect are *Ex parte Kenyon*, 5 Dill. 390; *Ex parte Reynolds*, Id. 397; *U. S.* v. *Crook*, Id. 454; *U. S.* v. *Elm*, Dist. Ct. U. S., N. D. N. Y. 23 Int. Rev. Rec. 419.

It seems to us that the fourteenth amendment, in so far as it was intended to confer national citizenship upon persons of the Indian race, is robbed of its vital force by a construction which excludes from such citizenship those who, although born in tribal relations, are within the complete jurisdiction of the United States. There were, in some of our states and territories at the time the amendment was submitted by congress, many Indians who had finally left their tribes and come within the complete jurisdiction of the United States. They were as fully prepared for citizenship as were or are vast numbers of the white and colored races in the same localities. Is it conceivable that the statesmen who framed, the congress which submitted, and the people who adopted that amendment intended to confer citizenship, national and state, upon the entire population in this country of African descent, (the larger part of which was shortly before held in slavery,) and, by the same constitutional provision, to exclude from such citizenship Indians ***121** who had never been in slavery, and who, by becoming *bona fide* residents of states and territories within the complete jurisdiction of the United States, had evinced a purpose to abandon their former mode of life, and become a part of the people of the United States? If this question be answered in the negative, as we think it must be, then we are justified in withholding our assent to the doctrine which excludes the plaintiff from the body of citizens of the United States upon the

ground that his parents were, when he was born, members of an Indian tribe; for, if he can be excluded upon any such ground, it must necessarily follow that the fourteenth amendment did not grant citizenship even to Indians who, although born in tribal relations, were, at its adoption, severed from their tribes, subject to the complete jurisdiction as well of the United States as of the state or territory in which they resided.

Our brethren, it seems to us, construe the fourteenth amendment as if it read: 'All persons born subject to the jurisdiction of, or naturalized in, the United States, are citizens of the United States and of the state in which they reside;' whereas the amendment, as it is, implies in respect of persons born in this country that they may claim the rights of national citizenship from and after the moment they become subject to the complete jurisdiction of the United States. This would not include the children born in this country of a foreign minister, for the reason that, under the fiction of extraterritoriality as recognized ***56** by international law, such minister, 'though actually in a foreign country, is considered still to remain within the territory of his own state,' and, consequently, he continues 'subject to the laws of his own country, both with respect to his personal *status* and his rights of property; and his children, though born in a foreign country, are considered as natives.' Halleck, Int. Law, *c.* 10, § 12. Nor was plaintiff born without the jurisdiction of the United States in the same sense that the subject of a foreign state, born within the territory of that state, may be said to have been born without the jurisdiction of our government. For, according to the decision in *Cherokee ***122** Nation* v. *Georgia*, 5 Pet. 17, the tribe of which the parents of plaintiff were members was not 'a foreign state, in the sense of the constitution,' but a domestic dependent people, 'in a state of pupilage,' and 'so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered an invasion of our territory and an act of hostility.' They occupied territory which the court, in that case, said composed 'a part of the United States,' the title to which this nation asserted independent of their will. 'In all our intercourse with foreign nations,' said Chief Justice MARSHALL in the same case, 'in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our citizens. * * * They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.' And, again, in *U. S.* v. *Rogers*, 4 How. 572, this court, speaking by Chief Justice TANEY, said that it was 'too firmly and clearly established to admit of dispute that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority.' *The Cherokee Tobacco*, 11 Wall. 616. Born, therefore, in the territory, under the dominion and within the jurisdictional limits of the United States, plaintiff has acquired, as was his undoubted right, a residence in one of the states, with her consent, and is subject to taxation and to all other burdens imposed by her upon residents of every race. If he did not acquire national citizenship on abandoning his tribe and becoming, by residence in one of the states, subject to the complete jurisdiction of the United States, then the fourteenth amendment has wholly failed to accomplish, in respect of the Indian race, what, we think, was intended by it; and there is still in this country a despised and rejected class of persons with no nationality whatever, who, born in our territory, owing no allegiance to any foreign power, and subject, as residents of the states, to all the burdens of government, ***123** are yet not members of any political community, nor entitled to any of the rights, privileges, or immunities of citizens of the United States.

All Citations

112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643

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Called into Doubt by In re M.K.T., Okla., January 20, 2016

U.S. v. Crook
Circuit Court, D. Nebraska. January 1, 1879

5 Dill. 453
Case No. 14,891, 5 Dill. 453 [1]
5 Dill. 453, 28 F. Cas. 895, No. 14,891 (Approx. 6 pages)
Circuit Court, D. Nebraska.

UNITED STATES ex rel. STANDING BEAR
v.
CROOK.

1879.

Synopsis

This was a hearing upon return to writ of habeas corpus issued against George Crook, a brigadier general of the army of the United States, at the relation of Standing Bear and other Indians, formerly belonging to the Ponca tribe of Indians.

Attorneys and Law Firms

*695 A. J. Poppleton and John L. Webster, for relators.

G. M. Lambertson, U. S. Atty.

Opinion

DUNDY, District Judge.

During the fifteen years in which I have been engaged in administering the laws of my country, I have never been called upon to hear or decide a case that appealed so strongly to my sympathy as the one now under consideration. On the one side, we have a few of the remnants of a once numerous and powerful, but now weak, insignificant, unlettered, and generally despised race; on the other, we have the representative of one of the most powerful, most enlightened, and most Christianized nations of modern times. On the one side, we have the representatives of this wasted race coming into this national tribunal of ours, asking for justice and liberty to enable them to adopt our boasted civilization, and to pursue the arts of peace, which have made us great and happy as a nation; on the other side, we have this magnificent, if not magnanimous, government, resisting this application with the determination of sending these people back to the country which is to them less desirable than perpetual imprisonment in their own native land. But I think it is creditable to the heart and mind of the brave and distinguished officer who is made respondent herein to say that he has no sort of sympathy in the business in which he is forced by his position to bear a part so conspicuous; and, so far as I am individually concerned, I think it not improper to say that, if the strongest possible sympathy could give the relators title to freedom, they would have been restored to liberty the moment the arguments in their behalf were closed. No examination or further thought would then have been necessary or expedient. But in a country where liberty is regulated by law, something more satisfactory and enduring than mere sympathy must furnish and constitute the rule and basis of judicial action. It follows that this case must be examined and decided on principles of law, and that unless the relators are entitled to their discharge under the constitution or laws of the United States, or some treaty made pursuant thereto, they must be remanded to the custody of the officer who caused their arrest, to be returned to the Indian Territory, which they left without the consent of the government.

On the 8th of April, 1879, the relators, Standing Bear and twenty-five others, during the session of the court held at that time at Lincoln, presented their petition, duly verified, praying for the allowance of a writ of habeas corpus and their final discharge from custody thereunder.

SELECTED TOPICS

Jurisdiction, Proceedings, and Relief

Pre-Printed Habeas Corpus Petition

Secondary Sources

Construction and Application of Antiterrorism and Effective Death Penalty Act (AEDPA)--U.S. Supreme Court Cases

26 A.L.R. Fed. 2d 1 (Originally published in 2008)

...This annotation collects and analyzes the cases of the U.S. Supreme Court that have construed and applied provisions of the Antiterrorism and Effective Death Penalty Act of 1996. Some opinions discusse...

Relief in habeas corpus for violation of accused's right to assistance of counsel

146 A.L.R. 369 (Originally published in 1943)

...This annotation assumes that a right of one accused of a crime to the assistance of counsel was violatedthat is, that the accused had a right to the assistance of counsel, that he was denied that right...

Pleading and Proving Ineffective Assistance of Counsel in a Federal Habeas Corpus Proceeding: A Primer

88 Am. Jur. Proof of Facts 3d 1 (Originally published in 2006)

...Called the "Great Writ," a writ of habeas corpus is the last line of defense for a person challenging their state court convictions in Federal Court. When the United States Congress passed the AEDPA wi...

See More Secondary Sources

Briefs

Brief on the Merits for Petitioner

2010 WL 3183845
Vincent CULLEN, Acting Warden of the California State Prison at San Quentin, Petitioner, v. Scott Lynn PINHOLSTER, Respondent.
Supreme Court of the United States
Aug. 09, 2010

...The en banc opinion of the United States Court of Appeals for the Ninth Circuit, affirming the district court judgment granting habeas corpus relief, is reported as Pinholster v. Ayers, 590 F.3d 651 (9...

Petitioner's Brief on the Merits

2010 WL 1919618
Kelly HARRINGTON, Warden, Petitioner, v. Joshua RICHTER, Respondent.
Supreme Court of the United States
May 10, 2010

...FN* Counsel of Record The en banc opinion of the Ninth Circuit Court of Appeals, granting habeas corpus relief, is reported as Richter v. Hickman, 578 F.3d 944 (9th Cir. 2009) (en banc). The earlier pa...

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS, KANSAS, LOUISIANA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA,

The petition alleges, in substance, that the relators are Indians who have formerly belonged to the Ponca tribe of Indians, now located in the Indian Territory; that they had some time previously withdrawn from the tribe, and completely severed their tribal relations therewith, and had adopted the general habits of the whites, and were then endeavoring to maintain themselves by their own exertions, and without aid or assistance from the general government; that whilst they were thus engaged, and without being guilty of violating any of the laws of the United States, they were arrested and restrained of their liberty by order of the respondent, George Crook.

The writ was issued and served on the respondent on the 8th day of April, and, the distance between the place where the writ was made returnable and the place where the relators were confined being more than *696 twenty miles, ten days were allotted in which to make return.

On the 18th of April the writ was returned, and the authority for the arrest and detention is therein shown. The substance of the return to the writ, and the additional statement since filed, is that the relators are individual members of, and connected with, the Ponca tribe of Indians; that they had fled or escaped from a reservation situated some place within the limits of the Indian Territory—had departed therefrom without permission from the government; and, at the request of the secretary of the interior, the general of the army had issued an order which required the respondent to arrest and return the relators to their tribe in the Indian Territory, and that, pursuant to the said order, he had caused the relators to be arrested on the Omaha Indian reservation, and that they were in his custody for the purpose of being returned to the Indian Territory.

It is claimed upon the one side, and denied upon the other, that the relators had withdrawn and severed, for all time, their connection with the tribe to which they belonged; and upon this point alone was there any testimony produced by either party hereto. The other matters stated in the petition and the return to the writ are conceded to be true; so that the questions to be determined are purely questions of law.

On the 8th of March, 1859, a treaty was made by the United States with the Ponca tribe of Indians, by which a certain tract of country, north of the Niobrara river and west of the Missouri, was set apart for the permanent home of the said Indians, in which the government agreed to protect them during their good behavior. But just when, or how, or why, or under what circumstances, the Indians left their reservation in Dakota and went to the Indian Territory, does not appear.

The district attorney very earnestly questions the jurisdiction of the court to issue the writ, and to hear and determine the case made herein, and has supported his theory with an argument of great ingenuity and much ability. But, nevertheless, I am of the opinion that his premises are erroneous, and his conclusions, therefore, wrong and unjust. The great respect I entertain for that officer, and the very able manner in which his views were presented, make it necessary for me to give somewhat at length the reasons which lead me to this conclusion.

The district attorney discussed at length the reasons which led to the origin of the writ of habeas corpus, and the character of the proceedings and practice in connection therewith in the parent country. It was claimed that the laws of the realm limited the right to sue out this writ to the free subjects of the kingdom, and that none others came within the benefits of such beneficent laws; and, reasoning from analogy, it is claimed that none but American citizens are entitled to sue out this high prerogative writ in any of the federal courts. I have not examined the English laws regulating the suing out of the writ, nor have I thought it necessary so to do. Of this I will only observe that if the laws of England are as they are claimed to be, they will appear at a disadvantage when compared with our own. This only proves that the laws of a limited monarchy are sometimes less wise and humane than the laws of our own republic—that whilst the parliament of Great Britain was legislating in behalf of the favored few, the congress of the United States was legislating in behalf of all mankind who come within our jurisdiction.

Section 751 of the Revised Statutes declares that 'the supreme court and the circuit and district courts shall have power to issue writs of habeas corpus.' Section 752 confers the power to issue writs on the judges of said courts, within their jurisdiction, and declares this to be 'for the purpose of inquiry into the cause of restraint of liberty.' Section 753 restricts the power, limits the jurisdiction, and defines the cases where the writ may properly issue. That may be done under this section where the prisoner 'is in custody under or by color of authority of the United States, * * * or is in custody for an act done or omitted in pursuance of

a law of the United States, * * * or in custody in violation of the constitution or of a law or treaty of the United States.' Thus, it will be seen that when a person is in custody or deprived of his liberty under color of authority of the United States, or in violation of the constitution or laws or treaties of the United States, the federal judges have jurisdiction, and the writ can properly issue. I take it that the true construction to be placed upon this act is this, that in all cases where federal officers, civil or military, have the custody and control of a person claimed to be unlawfully restrained of liberty, they are then restrained of liberty under color of authority of the United States, and the federal courts can properly proceed to determine the question of unlawful restraint, because no other courts can properly do so. In the other instance, the federal courts and judges can properly issue the writ in all cases where the person is alleged to be in custody in violation of the constitution or a law or treaty of the United States. In such a case, it is wholly immaterial what officer, state or federal, has custody of the person seeking the relief. These relators may be entitled to the writ in either case. Under the first paragraph they certainly are—that is, if an Indian can be entitled to it at all—because they are in custody of a federal officer, under color of authority of the United States. And they may be entitled to the writ under the other paragraph, *697 before recited, for the reason, as they allege, that they are restrained of liberty in violation of a provision of their treaty, before referred to. Now, it must be borne in mind that the habeas corpus act describes applicants for the writ as 'persons,' or 'parties,' who may be entitled thereto. It nowhere describes them as 'citizens,' nor is citizenship in any way or place made a qualification for suing out the writ, and, in the absence of express provision or necessary implication which would require the interpretation contended for by the district attorney, I should not feel justified in giving the words 'person' and 'party' such a narrow construction. The most natural, and therefore most reasonable, way is to attach the same meaning to words and phrases when found in a statute that is attached to them when and where found in general use. If we do so in this instance, then the question cannot be open to serious doubt. Webster describes a person as 'a living soul; a self-conscious being; a moral agent; especially a living human being; a man, woman, or child; an individual of the human race.' This is comprehensive enough, it would seem, to include even an Indian. In defining certain generic terms, the first section of the Revised Statutes, declares that the word 'person' includes copartnerships and corporations. On the whole, it seems to me quite evident that the comprehensive language used in this section is intended to apply to all mankind—as well the relators as the more favored white race. This will be doing no violence to language, or to the spirit or letter of the law, nor to the intention, as it is believed, of the law-making power of the government. I must hold, then, that Indians, and consequently the relators, are 'persons,' such as are described by and included within the laws before quoted. It is said, however, that this is the first instance on record in which an Indian has been permitted to sue out and maintain a writ of habeas corpus in a federal court, and therefore the court must be without jurisdiction in the premises. This is a non sequitur. I confess I do not know of another instance where this has been done, but I can also say that the occasion for it perhaps has never before been so great. It may be that the Indians think it wiser and better, in the end, to resort to this peaceful process than it would be to undertake the hopeless task of redressing their own alleged wrongs by force of arms. Returning reason, and the sad experience of others similarly situated, have taught them the folly and madness of the arbitrament of the sword. They can readily see that any serious resistance on their part would be the signal for their utter extermination. Have they not, then, chosen the wiser part by resorting to the very tribunal erected by those they claim have wronged and oppressed them? This, however, is not the tribunal of their own choice, but it is the only one into which they can lawfully go for deliverance. It cannot, therefore, be fairly said that because no Indian ever before invoked the aid of this writ in a federal court, the rightful authority to issue it does not exist. Power and authority rightfully conferred do not necessarily cease to exist in consequence of long non-user. Though much time has elapsed, and many generations have passed away, since the passage of the original habeas corpus act, from which I have quoted, it will not do to say that these Indians cannot avail themselves of its beneficent provisions simply because none of their ancestors ever sought relief thereunder.

Every 'person' who comes within our jurisdiction, whether he be European, Asiatic, African, or 'native to the manor born,' must obey the laws of the United States. Every one who violates them incurs the penalty provided thereby. When a 'person' is charged, in a proper way, with the commission of crime, we do not inquire upon the trial in what country the accused was born, nor to what sovereign or government allegiance is due, nor to what race he belongs. The questions of guilt and innocence only form the subjects of inquiry. An Indian, then, especially off from his reservation, is amenable to the criminal laws of the United States, the same as all other persons. They being subject to arrest for the violation of our criminal laws, and being 'persons' such as the law contemplates and includes in the

description of parties who may sue out the writ, it would indeed be a sad commentary on the justice and impartiality of our laws to hold that Indians, though natives of our own country, cannot test the validity of an alleged illegal imprisonment in this manner, as well as a subject of a foreign government who may happen to be sojourning in this country, but owing it no sort of allegiance. I cannot doubt that congress intended to give to every person who might be unlawfully restrained of liberty under color of authority of the United States, the right to the writ and a discharge thereon. I conclude, then, that, so far as the issuing of the writ is concerned, it was properly issued, and that the relators are within the jurisdiction conferred by the habeas corpus act.

A question of much greater importance remains for consideration, which, when determined, will be decisive of this whole controversy. This relates to the rights of the government to arrest and hold the relators for a time, for the purpose of being returned to a point in the Indian Territory from which it is alleged the Indians escaped. I am not vain enough to think that I can do full justice to a question like the one under consideration. But, as the matter furnishes so much valuable material for discussion, **698* and so much food for reflection, I shall try to present it viewed from my own standpoint, without reference to consequences or criticisms, which, though not specially invited, will be sure to follow.

A review of the policy of the government adopted in its dealings with the friendly tribe of Poncas, to which the relators at one time belonged, seems not only appropriate, but almost indispensable to a correct understanding of this controversy. The Ponca Indians have been at peace with the government, and have remained the steadfast friends of the whites, for many years. They lived peaceably upon the land and in the country they claimed and called their own.

On the 12th of March, 1858, they made a treaty with the United States, by which they ceded all claims to lands, except the following tract: 'Beginning at a point on the Niobrara river, and running due north so as to intersect the Ponca river twenty-five miles from its mouth; thence from said point of intersection up and along the Ponca river twenty miles; thence due south to the Niobrara river; and thence down and along said river to the place of beginning; which tract is hereby reserved for the future homes of said Indians.' In consideration of this cession, the government agreed 'to protect the Poncas in the possession of the tract of land reserved for their future homes, and their persons and property thereon, during good behavior on their part.' Annuities were to be paid them for thirty years, houses were to be built, schools were to be established, and other things were to be done by the government, in consideration of said cession. See 12 Stat. 997.

On the 10th of March, 1865, another treaty was made, and a part of the other reservation was ceded to the government. Other lands, however, were, to some extent, substituted therefor, 'by way of rewarding them for their constant fidelity to the government, and citizens thereof, and with a view of returning to the said tribe of Ponca Indians their old burying-grounds and cornfields.' This treaty also provides for paying $15,080 for spoliations committed on the Indians. See 14 Stat. 675.

On the 29th day of April, 1868, the government made a treaty with the several bands of Sioux Indians, which treaty was ratified by the senate on the 16th of the following February, in and by which the reservations set apart for the Poncas under former treaties were completely absolved. 15 Stat. 635. This was done without consultation with, or knowledge or consent on the part of, the Ponca tribe of Indians.

On the 15th of August, 1876, congress passed the general Indian appropriation bill, and in it we find a provision authorizing the secretary of the interior to use $25,000 for the removal of the Poncas to the Indian Territory, and providing them a home therein, with consent of the tribe. 19 Stat. 192.

In the Indian appropriation bill passed by congress on the 27th day of May, 1878, we find a provision authorizing the secretary of the interior to expend the sum of $30,000 for the purpose of removing and locating the Ponca Indians on a new reservation, near the Kaw river.

No reference has been made to any other treaties or laws, under which the right to arrest and remove the Indians is claimed to exist.

The Poncas lived upon their reservation in southern Dakota, and cultivated a portion of the same, until two or three years ago, when they removed therefrom, but whether by force or otherwise does not appear. At all events, we find a portion of them, including the relators, located at some point in the Indian Territory. There, the testimony seems to show, is where

the trouble commenced. Standing Bear, the principal witness, states that out of five hundred and eighty-one Indians who went from the reservation in Dakota to the Indian Territory, one hundred and fifty-eight died within a year or so, and a great proportion of the others were sick and disabled, caused, in a great measure, no doubt, from change of climate; and to save himself and the survivors of his wasted family, and the feeble remnant of his little band of followers, he determined to leave the Indian Territory and return to his old home, where, to use his own language, 'he might live and die in peace, and be buried with his fathers.' He also states that he informed the agent of their final purpose to leave, never to return, and that he and his followers had finally, fully, and forever severed his and their connection with the Ponca tribe of Indians, and had resolved to disband as a tribe, or band, of Indians, and to cut loose from the government, go to work, become self-sustaining, and adopt the habits and customs of a higher civilization. To accomplish what would seem to be a desirable and laudable purpose, all who were able so to do went to work to earn a living. The Omaha Indians, who speak the same language, and with whom many of the Poncas have long continued to intermarry, gave them employment and ground to cultivate, so as to make them self-sustaining. And it was when at the Omaha reservation, and when thus employed, that they were arrested by order of the government, for the purpose of being taken back to the Indian Territory. They claim to be unable to see the justice, or reason, or wisdom, or necessity, of removing them by force from their own native plains and blood relations to a far-off country, in which they can see little but new-made graves opening for their reception. The land from which they fled in fear has no attractions for them. The love of home and native land was strong enough in the minds of these people to induce them to brave every peril to return and live and die where they had been reared. The bones of the dead son *699 of Standing Bear were not to repose in the land they hoped to be leaving forever, but were carefully preserved and protected, and formed a part of what was to them a melancholy procession homeward. Such instances of parental affection, and such love of home and native land, may be heathen in origin, but it seems to me that they are not unlike Christian in principle.

What is here stated in this connection is mainly for the purpose of showing that the relators did all they could to separate themselves from their tribe and to sever their tribal relations, for the purpose of becoming self-sustaining and living without support from the government. This being so, it presents the question as to whether or not an Indian can withdrawn from his tribe, sever his tribal relation therewith, and terminate his allegiance thereto, for the purpose of making an independent living and adopting our own civilization.

If Indian tribes are to be regarded and treated as separate but dependent nations, there can be no serious difficulty about the question. If they are not to be regarded and treated as separate, dependent nations, then no allegiance is owing from an individual Indian to his tribe, and he could, therefore, withdraw therefrom at any time. The question of expatriation has engaged the attention of our government from the time of its very foundation. Many heated discussions have been carried on between our own and foreign governments on this great question, until diplomacy has triumphantly secured the right to every person found within our jurisdiction. This right has always been claimed and admitted by our government, and it is now no longer an open question. It can make but little difference, then, whether we accord to the Indian tribes a national character or not, as in either case I think the individual Indian possesses the clear and God-given right to withdraw from his tribe and forever live away from it, as though it had no further existence. If the right of expatriation was open to doubt in this country down to the year 1868, certainly since that time no sort of question as to the right can now exist. On the 27th of July of that year congress passed an act, now appearing as section 1999 of the Revised Statutes, which declares that: 'Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and, whereas, in the recognition of this principle the government has freely received emigrants from all nations, and invested them with the rights of citizenship. * * * Therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the rights expatriation, is declared inconsistent with the fundamental principles of the republic.'

This declaration must forever settle the question until it is reopened by other legislation upon the same subject. This is, however, only reaffirming in the most solemn and authoritative manner a principle well settled and understood in this country for many years past.

In most, if not all, instances in which treaties have been made with the several Indian tribes, where reservations have been set apart for their occupancy, the government has either reserved the right or bound itself to protect the Indians thereon. Many of the treaties

expressly prohibit white persons being on the reservations unless specially authorized by the treaties or acts of congress for the purpose of carrying out treaty stipulations.

Laws passed for the government of the Indian country, and for the purpose of regulating trade and intercourse with the Indian tribes, confer upon certain officers of the government almost unlimited power over the persons who go upon the reservations without lawful authority. Section 2149 of the Revised Statutes authorizes and requires the commissioner of Indian affairs, with the approval of the secretary of the interior, to remove from any 'tribal reservation' any person being thereon without authority of law, or whose presence within the limits of the reservation may, in the judgment of the commissioner, be detrimental to the peace and welfare of the Indians. The authority here conferred upon the commissioner fully justifies him in causing to be removed from Indian reservations all persons thereon in violation of law, or whose presence thereon may be detrimental to the peace and welfare of the Indians upon the reservations. This applies as well to an Indian as to a white person, and manifestly for the same reason, the object of the law being to prevent unwarranted interference between the Indians and the agent representing the government. Whether such an extensive discretionary power is wisely vested, in the commissioner of Indian affairs or not, need not be questioned. It is enough to know that the power rightfully exists, and, where existing, the exercise of the power must be upheld. If, then, the commissioner has the right to cause the expulsion from the Omaha Indian reservation of all persons thereon who are there in violation of law, or whose presence may be detrimental to the peace and welfare of the Indians, then he must of necessity be authorized to use the necessary force to accomplish his purpose. Where, then, is he to look for this necessary force? The military arm of the government is the most natural and most potent force to be used on such occasions, and section 2150 of the Revised Statutes, specially authorizes the use of the army for this service. The army, then, it seems, is the proper force to employ when intruders and trespassers who go upon the reservations are to be ejected therefrom.

The first subdivision of the Revised Statutes *700 last referred to provides that 'the military forces of the United States may be employed, in such manner and under such regulations as the president may direct, in the apprehension of every person who may be in the Indian country in violation of law, and in conveying him immediately from the Indian country, by the nearest convenient and safe route, to the civil authority of the territory or judicial district in which such person shall be found, to be proceeded against in due course of law.' This is the authority under which the military can be lawfully employed to remove intruders from an Indian reservation. What may be done by the troops in such cases is here fully and clearly stated; and it is this authority, it is believed, under which the respondent acted.

All Indian reservations held under treaty stipulations with the government must be deemed and taken to be a part of the 'Indian country,' within the meaning of our laws on that subject. The relators were found upon the Omaha Indian reservation. That being a part of the Indian country, and they not being a part of the Omaha tribe of Indians, they were there without lawful authority, and if the commissioner of Indian affairs deemed their presence detrimental to the peace and welfare of the Omaha Indians, he had lawful warrant to remove them from the reservation, and to employ the necessary military force to effect this object in safety.

General Crook had the rightful authority to remove the relators from the reservation, and must stand justified in removing them therefrom. But when the troops are thus employed they must exercise the authority in the manner provided by the section of the law just read. This law makes it the duty of the troops to convey the parties arrested, by the nearest convenient and safe route, to the civil authority of the territory or judicial district in which such persons shall be found, to be proceeded against in due course of law. The duty of the military authorities is here very clearly and sharply defined, and no one can be justified in departing therefrom, especially in time of peace. As General Crook had the right to arrest and remove the relators from the Omaha Indian reservation, it follows, from what has been stated, that the law required him to convey them to this city and turn them over to the marshal and United States attorney, to be proceeded against in due course of law. Then proceedings could be instituted against them in either the circuit or district court, and if the relators had incurred a penalty under the law, punishment would follow; otherwise, they would be discharged from custody. But this course was not pursued in this case; neither was it intended to observe the laws in that regard, for General Crook's orders, emanating from higher authority, expressly required him to apprehend the relators and remove them by force to the Indian Territory, from which it is alleged they escaped. But in what General Crook has done in the premises no fault can be imputed to him. He was simply obeying the orders of his superior officers, but the orders, as we think, lack the necessary authority of law, and are, therefore, not binding on the relators.

I have searched in vain for the semblance of any authority justifying the commissioner in attempting to remove by force any Indians, whether belonging to a tribe or not, to any place, or for any other purpose than what has been stated. Certainly, without some specific authority found in an act of congress, or in a treaty with the Ponca tribe of Indians, he could not lawfully force the relators back to the Indian Territory, to remain and die in that country, against their will. In the absence of all treaty stipulations or laws of the United States authorizing such removal, I must conclude that no such arbitrary authority exists. It is true, if the relators are to be regarded as a part of the great nation of Ponca Indians, the government might, in time of war, remove them to any place of safety so long as the war should last, but perhaps no longer, unless they were charged with the commission of some crime. This is a war power merely, and exists in time of war only. Every nation exercises the right to arrest and detain an alien enemy during the existence of a war, and all subjects or citizens of the hostile nations are subject to be dealt with under this rule.

But it is not claimed that the Ponca tribe of Indians are at war with the United States, so that this war power might be used against them; in fact, they are amongst the most peaceable and friendly of all the Indian tribes, and have at times received from the government unmistakable and substantial recognition of their long-continued friendship for the whites. In time of peace the war power remains in abeyance, and must be subservient to the civil authority of the government until something occurs to justify its exercise. No fact exists, and nothing has occurred, so far as the relators are concerned, to make it necessary or lawful to exercise such an authority over them. If they could be removed to the Indian Territory by force, and kept there in the same way, I can see no good reason why they might not be taken and kept by force in the penitentiary at Lincoln, or Leavenworth, or Jefferson City, or any other place which the commander of the forces might, in his judgment, see proper to designate. I cannot think that any such arbitrary authority exists in this country.

The reasoning advanced in support of my views, leads me to conclude:

1. That an Indian is a 'person' within the meaning of the laws of the United States, and has, therefore, the right to sue out a writ of habeas corpus in a federal court, or before a federal judge, in all cases where he may be confined or in custody under color of authority *701 of the United States, or where he is restrained of liberty in violation of the constitution or laws of the United States.

2. That General George Crook, the respondent, being commander of the military department of the Platte, has the custody of the relators, under color of authority of the United States, and in violation of the laws thereof.

3. That no rightful authority exists for removing by force any of the relators to the Indian Territory, as the respondent has been directed to do.

4. That the Indians possess the inherent right of expatriation, as well as the more fortunate white race, and have the inalienable right to 'life, liberty, and the pursuit of happiness,' so long as they obey the laws and do not trepass on forbidden ground. And,

5. Being restrained of liberty under color of authority of the United States, and in violation of the laws thereof, the relators must be discharged from custody, and it is so ordered.

Ordered accordingly.

NOTE. At the May term, 1879, Mr. Justice Miller refused to hear an appel prosecuted by the United States, because the Indians who had petitioned for the writ of habeas corpus were not present, having been released by the order of Dundy, District Judge, and no security for their appearance having been taken.

All Citations

5 Dill. 453, 25 F.Cas. 695, No. 14,891

Footnotes

1 Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.

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