

**OPINION OF
ATTORNEY GENERAL
BATES ON CITIZENSHIP**

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Opinion of Attorney General Bates on Citizenship by Edward Bates

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EDWARD BATES

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OPINION.

ATTORNEY GENERAL'S OFFICE,

November 29, 1862.

HON. S. P. CHASE,

Secretary of the Treasury.

SIR: Some time ago I had the honor to receive your letter submitting, for my opinion, the question whether or not *colored men* can be citizens of the United States. The urgency of other unavoidable engagements, and the great importance of the question itself, have caused me to delay the answer until now.

Your letter states that "the schooner Elizabeth and Margaret, of New Brunswick, is detained by the revenue cutter Tiger, at South Amboy, New Jersey, because commanded by a 'colored man,' and so by a person not a citizen of the United States. As colored masters are numerous in our coasting trade, I submit, for your opinion, the question suggested by Captain Martin, of the Tiger: *Are colored men citizens of the United States, and therefore competent to command American vessels?*"

The question would have been more clearly stated if, instead of saying *are colored men citizens*, it had been said, *can colored men be citizens of the United States*; for within our borders and upon our ships, both of war and of commerce, there may be *colored men*, and *white men*, also, who are not citizens of the United States. In treating the subject I shall endeavor to answer your question as if it imported only this: Is a man legally incapacitated to be a citizen of the United States by the sole fact that he is a *colored*, and not a *white man*?

Who is a citizen? What constitutes a citizen of the United States? I have often been pained by the fruitless search in our law books and the records of our courts for a clear and satisfactory definition of the phrase *citizen of the United States*. I find no such definition, no authoritative establishment of the meaning of the phrase, neither by a course of judicial decision in our courts nor by the continued and consentaneous action of the different branches of our political government. For aught I see to the contrary, the subject is now as little understood in its details and elements, and the question as open to argument and to speculative criticism, as it was at the beginning

of the government. Eighty years of practical enjoyment of citizenship, under the Constitution, have not sufficed to teach us either the exact meaning of the word or the constituent elements of the thing we prize so highly.

In most instances, within my knowledge, in which the matter of citizenship has been discussed, the argument has not turned upon the existence and the intrinsic qualities of citizenship itself, but upon the claim of some right or privilege as belonging to and inhering in the character of citizen. In this way we are easily led into errors both of fact and principle. We see individuals, who are known to be citizens, in the actual enjoyment of certain rights and privileges, and in the actual exercise of certain powers, social and political, and we, inconsiderately, and without any regard to legal and logical consequences, attribute to those individuals, and to all of their class, the enjoyment of those rights and privileges and the exercise of those powers as incidents to their citizenship, and belonging to them only in their quality of citizens.

In such cases it often happens that the rights enjoyed and the powers exercised have no relation whatever to the quality of citizen, and might be as perfectly enjoyed and exercised by known aliens. For instance, General Bernard, a distinguished soldier and devoted citizen of France, for a long time filled the office of general of engineers in the service of the United States, all the time avowing his French allegiance, and, in fact, closing his relations with the United States by resigning his commission and returning to the service of his own native country. This, and all such instances, (and they are many,) go to prove that in this country the legal capacity to hold office is not confined to citizens, and therefore that the fact of holding any office for which citizenship is not specially prescribed by law as a qualification is no proof that the incumbent is an American citizen.

Again, with regard to the right of suffrage, that is, the right to choose officers of government, there is a very common error to the effect that the right to vote for public officers is one of the constituent elements of American citizenship, the leading faculty indeed of the citizen, the test at once of this legal right, and the sufficient proof of his membership of the body politic. No error can be greater than this, and few more injurious to the right understanding of our constitutions and the actual working of our political governments. It is not only not true in law or in fact, in principle or in practice, but the reverse is conspicuously true; for I make bold to

affirm that, viewing the nation as a whole, or viewing the States separately, there is no district in the nation in which a majority of the known and recognized citizens are not excluded by law from the right of suffrage. Besides those who are excluded specially on account of some personal defect, such as paupers, idiots, lunatics, and men convicted of infamous crimes, and, in some States, soldiers, all females and all minor males are also excluded. And these, in every community, make the majority; and yet, I think, no one will venture to deny that women and children, and lunatics, and even convict felons, may be citizens of the United States.

Our code (unlike the codes of France, and perhaps some other nations,) makes no provision for loss or legal deprivation of citizenship. Once a citizen, (whether *natus* or *datus*, as Sir Edward Coke expresses it,) always a citizen, unless changed by the volition and act of the individual. Neither infancy nor madness nor crime can take away from the subject the quality of citizen. And our laws do, in express terms, declare women and children to be citizens. See, for one instance, the act of Congress of February 10, 1855, 10 Stat., 604.

The Constitution of the United States does not declare who are and who are not citizens, nor does it attempt to describe the constituent elements of citizenship. It leaves that quality where it found it, resting upon the fact of home, birth, and upon the laws of the several States. Even in the important matter of electing members of Congress it does no more than provide that "the House of Representatives shall be composed of members chosen every second year *by the people* of the several States, and the *electors* in the several States shall have the qualifications requisite for the electors of the most numerous branch of the State legislature." Here the word *citizen* is not mentioned, and it is a legal fact, known of course to all lawyers and publicists, that the constitutions of several of the States, in specifying the qualifications of electors, do altogether omit and exclude the word *citizen* and *citizenship*. I will refer, in proof, to but three instances.

1. The constitution of Massachusetts, adopted in 1779-'80, in article 4 of section 3, chapter 1, provides as follows: "Every *male person* being twenty-one years of age, and *resident* of a particular town in this commonwealth for the space of one year next preceding, having a freehold estate within the same town of the annual income of three pounds, or any estate of the value of sixty pounds, shall have the

right to vote in the choice of representative or representatives for said town."

2. The constitution of North Carolina, adopted in 1776, after a bill of rights, and after reciting that "whereas allegiance and protection are, in their nature, reciprocal, and the one should of right be refused when the other is withdrawn," declares, in section 8, "that all *freemen* at the age of twenty-one years, who have been *inhabitants* of any one county within the State twelve months immediately preceding the day of any election, and shall have paid public taxes, shall be entitled to vote for members of the house of commons for the county in which he resides."

3. The constitution of Illinois, adopted in 1818, in article 2, section 27, declares that "in all elections all *white male inhabitants* above the age of twenty-one years, having resided in the State six months next preceding the election, shall enjoy the right of an elector; but no person shall be entitled to vote except in the county or district in which he shall actually reside at the time of the election."

These three constitutions belong to States widely separated in geographical position, varying greatly from each other in habits, manners, and pursuits, having different climates, soils, productions, and domestic institutions, and yet not one of the three has made *citizenship* a necessary qualification for a voter; all three of them exclude all females, but only one of them (Illinois) has excluded the black man from the right of suffrage. And it is historically true that the practice has conformed to the theory of those constitutions, respectively, for, without regard to citizenship, the colored man has not voted in Illinois, and freemen of all colors have voted in North Carolina and Massachusetts.

From all this it is manifest that American citizenship does not necessarily depend upon nor coexist with the legal capacity to hold office and the right of suffrage, either or both of them. The Constitution of the United States, as I have said, does not define citizenship; neither does it declare who may vote, nor who may hold office, except in regard to a few of the highest national functionaries. And the several States, as far as I know, in exercising that power act independently and without any controlling authority over them, and hence it follows that there is no limit to their power in that particular but their own prudence and discretion; and therefore we are not surprised to find that these faculties of voting and holding office are not uniform in the different States, but are made to depend upon

a variety of facts, purely discretionary, such as age, sex, race, color, property, residence in a particular place, and length of residence there.

On this point, then, I conclude that no person in the United States did ever exercise the right of suffrage in virtue of the naked, unassisted fact of citizenship. In every instance the right depends upon some additional fact and cumulative qualification, which may as perfectly exist without as with citizenship.

I am aware that some of our most learned lawyers and able writers have allowed themselves to speak upon this subject in loose and indeterminate language. They speak of "all the rights, privileges, and immunities guaranteed by the Constitution to the citizen" without telling us what they are. They speak of a man's citizenship as defective and imperfect, because he is supposed not to have "all the civil rights," (all the *jura civitatis*, as expressed by one of my predecessors,) without telling what particular rights they are nor what relation they have, if any, with citizenship. And they suggest, without affirming, that there may be different grades of citizenship of higher and lower degree in point of legal virtue and efficacy; one grade "in the sense of the Constitution" and another inferior grade made by a State and not governed by the Constitution.

In my opinion the Constitution uses the word citizen only to express the political quality of the individual in his relations to the nation; to declare that he is a member of the body politic, and bound to it by the reciprocal obligation of allegiance on the one side and protection on the other. And I have no knowledge of any other kind of political citizenship, higher or lower, statal or national; or of any other sense in which the word has been used in the Constitution, or can be used properly in the laws of the United States. The phrase "a citizen of the United States," without addition or qualification, means neither more nor less than a member of the nation. And all such are, politically and legally, equal—the child in the cradle and its father in the Senate are equally citizens of the United States. And it needs no argument to prove that every citizen of a State is, necessarily, a citizen of the United States; and to me it is equally clear that every citizen of the United States is a citizen of the particular State in which he is domiciled.

And as to voting and holding office, as that privilege is not essential to citizenship, so the deprivation of it by law is not a deprivation of citizenship. No more so in the case of a negro than in case of a white woman or child.