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William David Stout
University of Tennessee

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MODERN TRENDS IN THE JUDICIAL CONCEPT OF THE RELATION BETWEEN CITIZENSHIP AND THE SUFFRAGE

By William David Stout*

The civil rights issue is being discussed as widely as any other in our national political scene; and like most others that arise from time to time, it is considered almost universally in the light of popular prejudices and historical misinterpretations. In the press, on the street, in Congress, and even in academic circles, we hear discussions of pending civil rights legislation based on such concepts as Herrenvolk and the "rights" of a vague Hegelian entity called a "state". The shadowy figure of a little Austrian ghost seems to smile approvingly upon many of our concepts that involve such mysticisms as white supremacy and states with personalities. In view of the present interest in and controversy over civil rights, it seems that the time has come to re-examine some of our traditional concepts and accepted dogmas. There is a need, at the present time, to arrive at a generally accepted definition of such terms as civil liberties, civil rights, political privileges, and citizenship, and to attempt the establishment of a relationship between them if possible. As a beginning in establishing any such relationship that may exist, this article is offered.

The pages that follow make no attempt to define exactly the before-mentioned terms, but, as indicated in the title, limit themselves to a discussion of the concept of citizenship and its meaning in a free society. It is believed by this writer that if an understanding of this word and an agreement as to the rights inherent in the condition it describes is reached, most problems arising from civil rights and civil liberties will be resolved automatically. It is with this premise that the historical meaning of the term, as well as what it has come to mean in the minds of American judges, will be discussed. Despite relatively firm pronouncements in the past by students and courts to

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* A.B., Georgetown College; M.A. University of Kentucky. Department of Political Science, University of Tennessee. Formerly taught at the University of Kentucky and Connecticut College.
the effect that the suffrage is not a necessary attribute of citizenship, there has been a recent tendency to include it in discussions of civil rights. This tendency is in direct opposition to the view generally expressed in American jurisprudence, especially since the passage of the Fourteenth Amendment to the Federal Constitution.

The adoption of that Amendment marks the beginning of the movement in this country to draw a clear line of distinction between civil liberties and civil rights, on the one hand, and political privileges on the other. This distinction was an old one, at that time, on the European continent but had never been rigidly observed in the less doctrinaire outlook of English Common Law. At the risk of making a generalized statement of questionable accuracy, civil liberties and civil rights, for our limited purposes here, may be lumped together and defined collectively as liberties and immunities that are inherent in citizenship. These are considered generally to include the immunity of a person against arbitrary bodily restraint and judicial procedure, the right of free expression, and those rights defined in the first nine amendments. Some students consider all of these to be civil liberties that have their sanction in a body of natural law, while positive laws that establish the conditions necessary to the enjoyment of these liberties are held to be the civil rights in the strictest sense. From the foregoing, it is accepted usually that the rights and immunities of citizens do not include the suffrage.

The very fact, however, that the recent report of the President’s Commission on Civil Rights, as well as the civil rights planks in both major party platforms last year, included the subject of the suffrage, indicates an undercurrent of thought that considers the suffrage as essential to citizenship. It will be the purpose of the remainder of this discussion to examine some of the concepts of citizenship accepted at various periods in history and to determine whether or not this undercurrent of thought is nullius filius trying to work its way into the society of respectable legal concepts that boast a noble heritage of sound precedent.

At the moment, no attempt will be made to reach a definition of citizenship that can be accepted as final. Instead, it is hoped that this writer’s interpretation of several periods of history will make his position clear and will, at least, shed some light on the origins of the term. First, it should be noted that the terms citizen and citizenship have rarely been used except in those political societies dedicated to

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the principle of individual dignity and the existence of certain fundamental liberties that give immunity against arbitrary action. *Citizen*, or its equivalent, is common in the writings of ancient Greece and Rome, but it fell into disuse during the latter period of the Roman Empire and in the writings of Medieval Europe. Here it was supplanted by such terms as *subject, man, vassal, or liegeman*. As shall be pointed out later, the word is sometimes used in ancient writings to describe a person who has certain rights but who takes no part in determining the policies or leadership of the state. This use, however, is always qualified, and full citizenship before modern times was always used to denote active membership and participation in a political society.

\[\text{II} \]

*Quis nam igitur liber? Sapiens qui sibi imperiosus.*

—Horace

It is impossible here to do any more than mention very briefly the concept of citizenship in ancient Greece, although Athens is conceded generally to have been the forerunner of later free governments. A quick perusal of the ideas of one man will have to be considered sufficient to give us a fair view of an idea that was doubtless accepted by enough Athenians to be recognized as a valid Athenian view. It is said by Aristotle,\(^2\) who has as good a claim as any other man to be the first systematic political scientist, that a citizen is one who shares in the political administration of the state. No person who does not share in this activity can be considered a citizen in the fullest sense of the word. Nor can judicial privileges or immunities be considered a test of citizenship, for, as Aristotle says, these may even be given to foreigners by treaty. Aristotle speaks of the active officeholder as a dicast and a member of the sovereign political assembly as an eclecsast. In attempting to find a common term including both, he says—

"Let us for the sake of distinction call it 'indefinite office,' and we will assume that those who share in such office are citizens. This is the most comprehensive definition of a citizen, and best suits all those who are generally so called."

"He who has the power to take part in the deliberative or judicial administration of any state is said to be a citizen of that state; and speaking generally, a state is a body of citizens sufficing for the purposes of life."

Thus Aristotle reaches the conclusion that the citizens of a state

\(^2\) *Politics, III, 1: 1275a, 4 ff. (Jowett's translation).*
\(^3\) *Ibid., 1275a, 311-34; 1275b, 19-21.*
are by definition those who hold the sovereign power. In a democracy we must assume, then, if we accept the Aristotelian view, that this sovereign body is the group referred to in such characteristic phrases as "we the people." If the ideas expressed in the *Politics* are to be considered even a partial basis for modern political thinking, we can quite easily and logically conclude that the "people" referred to in American constitutions are those who hold the political sovereignty. Of course, this concept of citizenship is entirely too simple to satisfy the doctrinaire approach of modern legal thought, and we have found it necessary to draw a fine line of distinction between civil liberties and civil rights on the one hand and political privileges on the other. If our legal concepts were simplified so, it well might be that legislative bodies themselves would understand what they had ordained as well as the courts! Liberty in this country has come to mean the possession of certain fundamental rights, more specifically, those rights mentioned by Justice McReynolds in *Myer v Nebraska*. According to this statement, liberty includes—

"not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest."

In addition to these liberties, a citizen is guaranteed certain immunities in court procedure that may be denied to a non-citizen or a national. The possession of these procedural rights has become our most valid test of citizenship. Compare this to the clinching statement in Aristotle's argument that—

"as is evident, there are different kinds of citizens [but] he is a citizen in the highest sense who shares in the honors of the state."

Lest it be said that Aristotle's view was too philosophical and was not founded upon a firm legal basis, it should be noted that in Rome this same viewpoint was held generally. No lesser figure than Cicero says that no monarchy or oligarchy, regardless of the idealism characteristic of the rulers, can be a good government. This is because

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4 362 U.S. 390 67 L.Ed. 1042; 43 S.Ct. 625 (1923).
all men are equal—a serious departure from Aristotle—and, in order to enjoy that equality, must be given a share in the rulership of the state. Even the most enlightened form of authoritarianism possesses something of the nature of slavery, and true liberty could never exist under the conditions established by such governments.\(^7\) Now the question arises as to whether Cicero represents an isolated case or whether his view was accepted and his ideas applied. That the sovereignty in the early Roman Republic, at least theoretically, rested in the general body of citizens, or the \textit{Populus}, there can be no doubt. Though possibly inaccurate in some details and often over idyllic, the description of the Roman Constitution by Polybius is sufficient to demonstrate this point.\(^8\) Does it necessarily follow, however, that membership in the sovereign \textit{Populus} was essential to or constituted the test of citizenship? This question can be answered only by a discussion of the expansion of Rome before the time of Augustus and by noting the measures taken with respect to the non-Roman peoples who were brought under her rule.

As Rome exerted pressure against her boundaries and expanded over the Italian peninsula, many peoples who felt no bond with the heritage of the ancient city found themselves incorporated into the growing political system. This created a tremendous problem for the new governors, for holding so many people in subjugation was too great a task for so small a population. The only answer was to extend to the conquered peoples certain benefits and privileges in order to insure their allegiance. To do this, these peoples had to be given a sense of belonging to or membership in the body politic; but to extend the suffrage to so many over such a large territory would mean a surrender of sovereignty by the conqueror to the conquered. Also ancient voting procedures and tallying methods could not cope with an expression of public opinion with such a broad base. The precedent for the solution of this problem was set when Rome expanded to include the coast peoples south of Latium and the lower Volturnas Valley. Livy tells us that at this time the peoples of Fundi, Formiae, Capua, Cumae, and Suessula were given the Roman citizenship \textit{sine suffragio}.\(^9\) In other words, citizenship had become a condition in which legal, property, and civil rights were protected but political privileges were not guaranteed. It should be noted carefully, though, that Livy refers to this as a special kind of or qualified citizenship, the implication being that full citizenship still denoted membership in the sovereign \textit{Populus}. In the year 189 B.C. a bill had granted full cit-

\(^7\) \textit{De R	extsc{e}publica}, I, 26-27.  
\(^8\) \textit{Histories}, VI, 11-18.  
\(^9\) \textit{Ab U	extsc{r}be Cons	extsc{d}ita}, VIII, 11.
zenship, or the right to enroll in the rural tribes, to sons of ex-slaves. That this grant carried with it the suffrage is substantiated by the fact that Sempronius modified it in 167 B. C. because of the tendency of these libertini to vote in blocks. The recall of the suffrage, then, was in itself a modification of citizenship.10

The policy of giving qualified or sine suffragio citizenship to non-Roman peoples on the peninsula, and, later, in other parts of the world, continued with the expansion of this energetic city-state's power over the Mediterranean area. In the year 125 B. C., during the consulship of M. Fulvius Flaccus, further recognition of the problem growing out of the absorption of non-Roman peoples into the growing empire was given by the adoption of a measure which was to become the accepted policy in later times. Those of the peoples allied with Rome who were willing to accept Roman citizenship were enfranchised. Those who did not elect to come into the Roman state were given the right to appeal to the Populus against acts of tyranny by Roman magistrates.11 With some modifications this became accepted policy in the following years, and we see in it the formal establishment of two grades of citizenship: that which gave to those who held it a share in the choice of officials and in the making of policy, and that which carried a guarantee of justice to its holders. The Populus then was not only the ultimate seat of authority and protector of the rights of the member cives, its authority extended to protect the rights of those coming under the ius provocations.

During the period of Rome's expansion beyond the Italian peninsular, the term civitas sine suffragio was gradually dropped in favor of the term Latin rights. The reason for this lay deeper than in an accidental change in terminology but was based on the fact that in the latter days of the Republic full citizenship had ceased to exist for all practical purposes. In the hectic years of the first century B. C., events all seemed to point toward the time when the Populus as a sovereign body was to become a myth or, at best, only an ideal. The real power was shifting into the hands of a small military and aristocratic oligarchy. Personal rivalries within this class of "war Lords" dominated political affairs from the bloody epoch of Marius and Sulla until peace and order were finally restored under Augustus.

During this period of civil strife and chaos, one series of events tend to demonstrate the shift of power from the Populus to the small group of political manipulators at the top. As late as the year 49 B. C. the Praetor L. Roscicus had proposed and secured the passage of a

10 Livy, op. cit., XLV, 15.
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bill granting full citizenship and the franchise to the people of Cisalpine Gaul, thus completing the enfranchisement of all Italy. In the same year Caesar, seeking to consolidate political support, rewarded the Transpadine Gauls for past services by a Lex Rubra effecting a transition of these people from Latin rights to full citizenship as far as legal procedure was concerned. Thus citizenship may exist without the suffrage; but this citizenship did not represent an elevation of the Latins, it merely demonstrated the loss by citizens generally of that right which distinguished them from Latins. The emotional feeling of superiority, a feeling of aristocratic distinction, was now the distinguishing mark of the Roman citizen.

The principle of the sovereign power resting in the Populus, however, never completely disappeared in theory; in fact, it remained a basic cornerstone of western political philosophy throughout the Middle Ages. Oddly enough, it was even used as a support for the despotism of the Roman Emperors. We are told by Cassius Dio that in 24 B.C. a decree, later referred to as the Lex Regia or Lex Imperio, was passed by the Roman Senate. The origins of this act are not clear to modern historians; there even seems to be some doubt as to the accuracy of the preceding account, but of one thing we are certain: the principles laid down in the act were recognized by the lawyers of the Empire and of the Middle Ages. The law was simply that the Roman people, acting in their sovereign capacity, delegated their power to the Princeps! No more complete transfer of political authority has ever been made, nor could it be. Such an unlimited delegation could never serve as a restraint upon imperial authority but did serve to preserve the theory of popular sovereignty. The extent to which this delegation was carried is illustrated by Ulpian's statement that "princeps legibus solutus est." A closer examination of this statement of imperial authority would indicate that the Roman Populus was no longer a body of individual men, but rather an organism in itself. Blanket consent had been given for the Emperor to exercise sovereign powers, but the consent had been granted unanimously by a group acting collectively; minorities were a part of this group but were considered also to have given their consent. The fact that this theoretical consent was given gave rise to the important maxim in Roman law that nothing is so peculiarly characteristic of imperial power as the fact that the Emperor must live and rule under the laws. This doctrine apparently represented

12 Ibid., p. 644.
13 LIII, 28, 2.
14 Digest, I, 3, 51.
15 Justinian, Codex, VI, 23, 3.
the generally accepted view, but, of course, in actual practice, it seems inevitable that Ulpian's more realistic statement should hold true.

With the passing of any effective political control from the body of citizenry, there was no method of protecting any of the rights or privileges held by this group. By the fourth century, political citizenship had ceased to exist and with it passed many, if not most, of the legal immunities. True, some persons such as manumitted slaves were restricted in their right to pass property on to their children and by other legal disabilities; these persons were called Latins to distinguish them from citizens. However, not all of those who were recognized as citizens were granted full legal immunities, for stringent legal restrictions maintained a rigid caste system that was the antithesis of judicial protection. A citizen was no more than a member of a social stratum.

As man's position in the state became more and more dependent upon his station in life, he lost status as an individual and became simply a component part of a group which had an organic life of its own. Any consent by which an emperor ruled was a perfunctory recognition by this social organism of a fait accompli and, in actual practice, did not involve the active consent or refusal of consent by individuals after effective deliberation. Politically, man had been submerged or lost in the background. However, it should be pointed out again, at the risk of monotonous over-repetition, that the theories of the times allowed for no inherent imperial authority. Despite a few isolated statements by such men as St. Gregory and St. Isadore that suggest a divine sanction for imperial authority, the rule accepted by most was still the doctrine of Ulpian:

*Quod principi placuit, legis habet vigorem ut potestatem\*
*cum lege regia, quae de impero ejus lata est, populus ei et in eum omne suum imperium et potestatum conferat.*

In retrospect it seems safe at this point to draw the conclusion that the rise and fall of political privilege as a right of citizenship was concurrent with the rise and fall of those legal rights and immunities by which modern students seek to characterize citizenship. No responsible historian would be likely to venture the assertion that real universal suffrage ever existed in the ancient world, but at least it can be said that shortcomings in this field were not rationalized by legal justifications. As long as true political citizenship existed, even if only in theory, legal immunities were protected. These immunities were lost when the individual was conquered by a living, organic society.

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16 *Dig.*, I, 4, 1.
Le feu qui semble éteint souvent dort sous la cendre;  
Qui l’ose reveiller peut s’en lasser sur prendre.  
—Corneille.

With the passing of the Roman Empire and its theoretical reincarnation in the Medieval German Empire, we find that the doctrine of popular consent lived on as the foundation of the political thought of the Middle Ages. True, the concept of citizenship and the rights inherent in it seemed lost, for social activity was a group activity completely submerging man or the individual. Man had his station in society, but society could speak for all men. Of course the result was somewhat the same as in the later Roman Empire, this is, the Emperor or king was an absolute ruler, but sometimes more than mere lip service was paid to the idea of popular consent. We see at an early date a significant example of this in connection with the dethronement and later restoration of the Emperor Lewis. One of the leading scholars of the day, Hincmar of Rheims, has the following comment on that situation:

Nostra aetate pium Augustum Ludovicum a regno delectum, post satisfactionem episcopalis unanimitas, samore consilio, cum populi consensu, et Ecclesiae et regno restituit.  

Medieval sources are full of such illusions to an organic state delegating its powers to a king or emperor, although no formal representative body existed. As another example, we have the following excerpt from the proclamation of the Truce of God for the Diocese of Cologne in 1083. After expressing the need for such a measure, the proclamation continues:

And by the advice of our faithful subjects we have at length provided this remedy, so that we might to some extent re-establish, on certain days at least, the peace which, because of our sins, we could not make enduring. Accordingly we have enacted and set forth the following: having called together our parishioners to a legally summoned council, which was held at Cologne, we have caused to be read in public what we propose to do in this matter. After this had been for some time fully discussed “pro et con” by all, it was unanimously agreed upon, both the clergy and the people consenting, and we declared in what manner and during what parts of the year it ought to be observed.

That this idea of government by popular consent was to a great

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17 Dr. Divorti Hlotarii et Theibergae, VI.  
extent Roman rather than Teutonic is indicated by a comparison of the coronation oaths of various English kings during the period of transition from the Saxon to the Norman periods. In 978 the new Saxon king Ethelred II, in a condescending manner, made certain promises to his people, however, without recognizing them as the ultimate source of his authority. We note some, although little, change in this expressed by the first Norman in 1066 when William the Conqueror began his oath with the following phrase:

Having first, as the archbishop required, sworn before the altar of St. Peter the Apostle, in the presence of the clergy and the people

This suggestion of the recognition of the consent principle was fully amplified by Henry I, who upon taking the throne in 1101, announced to the people of England:

Know that by the mercy of God, and by the common counsel of the barons of the whole kingdom of England, I have been crowned king of the same kingdom.29

At no time in Medieval history before the Reformation was any theory of governmental authority other than that of consent generally adopted. However, care should be taken not to confuse this concept with those from which modern representative government stems, for in the Middle Ages consent was given not by a majority of individuals but rather by a living organism known as society. Majorities today may often determine the wishes of individuals in a group, but Medieval society was considered to have a life of its own, separate from that of individuals. Care should be taken, reasoned the learned men of the period, lest men should make their own laws. Magisterial authority was considered to be representative of the group, but not of majorities of individuals or single men. This organismic concept is probably best illustrated by the following quotation from Bulgarus, one of the famous “four doctors” who followed Irnerius at the Bologna law school:

“Non est singulis concendum, quod per magistratum publice possit fieri, ne occaso sit maiores tumultus faciendi.” Vigor judicianus ideo est medio constitutus ne singuli jus sibi dicant. Non enim competit singulis, quod permissum est tantum universitati, vel et qui obtenit vicem universitatis, id est populi, quals est magistratus: alioquin-contingeret occaso maiores tumultus."30

Public policy, then, was determined by the customs of the people collectively and not by groups of persons constituting a majority. Even this might be considered changed by the application of the Lex

29 The full texts of these three oaths are found in ibid., 1, 6, p. 2-3.
30 Bulgarus, Gloss on Digest, L, 177, 178.
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Regia, under which it became doubtful as to whether or not the Populus could ever retrieve the sovereignty once it was delegated to the Emperor. The Emperor was in a position actually to announce the will of the nation. Not only must we recognize that it was in practice impossible for the Populus to regain powers delegated to the Emperor, at an early date we have a formalized statement of such a step even in theory. In commenting on the saying of Julianus to the effect that custom has the force of law, Irnerlus says that this was once true, but not after the Lex Regia. The full statement reads:

Loquitus haec lex secundum sua tempora, quibus populus habebat potestatum condendi leges, ideo tacito consensu omnium per consuetudinem abrogabantur. Sed quod hodie potestas translatæ est in imperum, nihil faceret desuetudo populi.21

Thus in an age of authoritarian government, we find that most political thinkers were writing in terms of government by consent. True, these theories of popular consent often did take a turn like that of the above quotation, but, nevertheless, the idea remained constant that no government held inherent sovereignty. Of course, from time to time throughout the Middle Ages, various scholars spoke of a divine sanction for government, and they sometimes even took the view that kings ruled by divine right. After citing one of these statements of divine written by Baldus,22 however, two eminent modern scholars have concluded that no real significance should be attached to the theory until the sixteenth century.23

In summing up this brief resume of the Middle Ages so far, care should be taken to note that there was no regularly constituted legislative authority. Any laws established by popular desire were established by custom and usage and were incorporated into the whole body of natural law to be interpreted by the king. Since all law was dependent upon acceptance by the king acting in his judicial capacity, it must be concluded that individual citizens who by their personal efforts might bring pressure to bear for the alteration of the legal system were mere “advisers” of the king. Thus, as long as society was in itself a living organism, there could be no true citizenship. But before dismissing the Middle Ages as a period in which the concept of citizenship ceased to exist, it should be pointed out that had the consent theory not been kept alive, there would have been no basis for the rebirth of the individual and the re-emergence of the idea of citizenship. In the twelfth and thirteenth centuries we see the early

21 Irnerhus, Gloss on Digest, I, 3. 32.
22 Commentary on Digest, 2, v. ff.
stages of the revival of the concept of man as an individual and of the laws of the land—representing the positive will of persons in the community

If, as is now generally accepted, legislation in the Middle Ages was the result of judicial interpretation, then we must expect to find the first mroads of popular government in connection with the judicial functions. If citizenship implies the right to participate in governmental functions as individuals, then, of course, any such participation in the Middle Ages would be in the administration of justice. That this was actually the historical fact is borne out by an examination of the Assize of Clarendon of 1166. In this document, which lays the groundwork of the modern jury system, we find reference to the term "legal men," or men who live under the law and who are joint owners of the law. These men are the ones who are eligible for service on a jury to investigate violations of law—the only form of "representative" governmental function of the time. In the beginning of the document we find:

In the first place, the aforesaid King Henry III, with the consent of all his barons, for the preservation of the peace and the keeping of justice, has enacted that inquiry shall be made through the several counties and through the several hundreds, by twelve of the most legal men of the hundred and by four of the most legal men of each manor, upon their oath that they will tell the truth, whether there is in their hundred or in their manor, any man who has been accused or publicly suspected of himself being a robber, or murderer, or thief, or of being a receiver of robbers, or murderers, or thieves, since the lord king has been king.24

It is interesting to note that not only were legal men eligible for this jury service—none but legal men were eligible—but men of bad testimony were deprived of this right and were cast out from the law. In other words, we can safely conclude that the main punishment for crime was outlawry by the courts, or deprivation of the rights of membership in the political community. As the document continues we find that—

The lord king wills, moreover, that those who make their law and shall be absolved by the law, if they are of very bad testimony of many and legal men, shall abjure the lands of the king, so that within eight days they shall go over the sea, unless the wind shall have detained them; and with the first wind which they shall have afterward they shall go over the sea, and they shall not afterward return into England, except on the permission of the lord king; and then let them be outlawed if they return, and if they return they shall be seized as outlaws.25

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24 Translations and Reprints, I, 6, p. 22-23.
25 Ibid., 24-25.
With this statement of individual political privileges in a judicial state, we have the stage set for the near-revolutionary thinking of the thirteenth century which, as well as marking the culmination of Middle-Age culture and development, served as a period of transition into the modern era. Three major events of this century command our attention at this point: Magna Carta, the development of positive law by St. Thomas Aquinas, and the doctrine of customary law as stated by Bracton.

In article 39 of Magna Carta, we find the earlier decree of Henry II amplified to the extent that not only do free men, or legal men, possess the right to sit on juries for the investigation of illegal activities, but also that no free man may be seized, dispossessed, outlawed, banished, or in any way destroyed without a hearing before his peers. Again, invoking the prevailing Medieval doctrine that law was founded in nature rather than in the will of the nation, we find further evidence that eligibility for jury service was the only possible method of popular participation in government. Also we find that no freeman was responsible to a government in which he was denied the right to participate. Clearly, English law was returning to something akin to the idea of citizenship found in early Greece and Rome. It might be brought out in objection that in recent times women have been denied the right to hold office and to vote while, at the same time, they were accepted as citizens. However, this point seems to be answered in article 54 of the same document, which reads:

No one shall be seized nor imprisoned on the appeal of a woman concerning the death of anyone except her husband.

This seems to imply that women did not have the full rights and privileges enjoyed by freemen; they could not take a full part in the dispensation of justice. If they did enjoy the position of "freemen", it was a qualified position roughly comparable to the Roman cives sine suffragio. However, there were instances in the Middle Ages in which women actually did exercise judicial functions. During the absence of Henry II in 1253, his wife Eleanor held the position of Lady Keeper of the Privy Seal. Her duties were judicial as well as perfunctory and ministerial and were important enough to cause Baron Campbell to include her biographical sketch in his Lives of the Lord Chancellors of England. Also there is the case of Anne, Countess of Pembroke, Dorset, and Montgomery, who held the office of here-
dictary sheriff. She exercised the duties of her office in person and actually sat on the bench with judges. Even in France, where a woman could not occupy the throne, there is the case of Mahaut, Countess of Artois, who assisted in the trial of Robert of Flanders and in the coronation of Philip the Long. If, then, women do hold a traditional right to be considered citizens, this right must stem from the activities of these and others in the matriarchy of western civilization.

St. Thomas Aquinas did not completely break away from the old tradition of finding the law through the ceremonal incantations of members of the legal cult that caused it to crystallize and reveal itself to the courts; the basic law according to him was a personalized concept of Aristotle’s natural law which he called divine law. However, there was allowance made in his writings for amplification of this body of law, even of additions to it so long as they did not take precedence over the laws established by God in nature. One of the types of law that he recognizes is positive law, or that which is the result of man’s conscious will. Of course there was no provision made by St. Thomas for a formal legislative body, but strong recognition was given to the fact that laws could be established by custom through a conscious common agreement. 29

An even stronger statement on laws born as a result of man’s will is found in the writings of the English jurist Bracton. According to his statement, unwritten laws and customs in England have the force of leges, for they are established through the will of the great men as well as of the commonwealth. Through this will, the counsel and common consent of the nation may join with the will of the king to constitute the authority of law. 30 At first glance, this may appear little different from the older consent theory, but the latter statement takes into account the conscious will of individuals as opposed to the organismic concept of society. This point is given emphasis by the later statement that positive law cannot be altered or annulled except by the counsel and common consent of those who made it. 31

In closing this discussion of the Medieval period, we must come to the conclusion that governmental authority continued, after the fall of Rome, to exist by the consent of the governed. As has been pointed out, this consent was granted collectively by a living, organic state. This of course meant that the power of the king or emperor often was virtually absolute; but without the theoretical existence of government by consent, there would have been no basis for the later emergence

29 Summa Theologica, 2, 2, 57, 2.
30 De Legibus, 1, 1, 2.
31 Ibid., 2, 6.
or rebirth of the individual’s privilege of participating in government. Cicero’s statement, cited earlier, that true freedom could not exist without this right of participation in government, seems to be given recognition in the fact that the first step taken toward our modern English liberties was the grant to freemen of the right to participate in the judicial activity, the only active governmental function of the time. This of course is a far cry from universal suffrage, but this early beginning did mark a step forward in re-establishing the long forgotten principle that eligibility for governmental participation was the distinguishing mark of citizenship—in this case, the mark of a freeman.

The road from this early beginning to the general recognition of parliamentary supremacy in 1688 was a long and tedious one that must be dealt with in a very brief and sweeping glance at this point. The chief characteristic of the development was the change from the concept of Parliament as a court to the acceptance of that body as a formal representative legislative group. Not until very recent times has either England or America enjoyed anything approaching universal suffrage, but the theory of representation in a legislative body on a strictly individualistic basis was firmly established in theory by the time of William and Mary. Even with this trend in England, we do find the more doctrinaire writings on the continent defining citizenship as a condition growing out of judicial privileges and immunities, a close approach to the insecure possession of the civitas sine suffragio of Roman times. As an illustration of this, we have the following quotation from Jean Bodin, which gives its author a strong claim to the title of “patron saint of the post-Fourteenth-Amendment Supreme Court”

It is a more serious fault to say that none is a citizen who does not participate in public authority, or who has no part in the deliberative or consultive bodies. This is Aristotle’s definition. It has been more truly said by Plutarch that citizens are those who enjoy the benefits of the laws and privileges of a civil community, varying according to age, sex, rank, and condition, so that, for example, nobles have the rights of nobles, and plebians the rights of plebians.22

Nevertheless, the cry in England was against taxation without representation, and the idea was carried over to the New World that the right of governments to regulate the activities of men was based on the consent of man. Without this concept, neither the Revolution of 1688 nor the American Revolution would have been likely. Without these two movements, the whole body of Anglo-American

liberties very likely would have fallen victim to the high infant mortality rate. It is with this thought, then, that we turn to a discussion of American developments and the idea that freedom consists largely of a voice in the management of the affairs of state.

IV

Who would be free, themselves must strike the blow.

—Byron

Freedom exists only where the people take care of the government.

—Woodrow Wilson

Every school boy has had impressed upon him the idea that the thirteen colonies of Great Britain in the New World sought independence from the mother country because of their objection to taxation without representation. More mature scholars are apt to look upon this as an over-simplification, yet we find that it is the basis for the clinching argument for separation from Britain used in the Declaration of Independence:

to secure these rights, governments are created among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

When Jefferson wrote these words, he was not merely restating the old consent theory of the Middle Ages, although a quick glance at what has been said on the preceding pages may indicate it. The difference lies in the fact that Jefferson had been exposed to the writings of a host of continental and English writers who had expanded the contract theory from the thirteenth century until the period following the Revolution of 1688. No longer, by his day, was the idea of consent by an organismic society universally accepted. The background of Jefferson's ideas is so varied, of course, that it is impossible to devote the space here to an adequate discussion of it; however, a few short quotations from some of the leading writers of the seventeenth century will serve to illustrate the changed concept of community during the period mentioned.

Early in the seventeenth century Grotius, in speaking of law growing out of social obligations, had said:
For those who had associated themselves with some group, or had subjected themselves to a man or to men, had either expressly promised, or from the nature of the transaction must be understood impliedly to have promised, that they would conform to that which should have been determined, in the one case by the majority, in the other by those upon whom authority had been conferred.\(^\text{23}\)

This was soon followed by Samuel Pufendorf's observation on the organism known as society, which reads:

> On the whole, to join a multitude, or many men, into one Compound Person, to which one general act may be ascribed, and to which certain rights belong, as 'tis opposed to particular members, and such rights as no particular member can claim separately from the rest; 'tis necessary, that they shall have first united their wills and powers by the intervention of covenants; without which, how a number of men, who are all naturally equal, should be link'd together, is impossible to be understood.\(^\text{24}\)

Even though the name of Thomas Hobbes has not gone down in history as an exponent of popular limitations upon established authority, we do find a curious reference to a social contract—though this contract is used to justify a government founded on force. The statement is that—

> I authorize and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner.\(^\text{25}\)

Although Harrington's doctrine of rotation in office may leave much to be desired from the point of view of modern democracy, the place of the individual was well established in his system. He describes his equal commonwealth as—

> a government established upon an equal Agrarian, arising into the superstructure on three orders, the senate debating and proposing, the people resolving, and the magistracy executing by an equal rotation through the suffrage of the people given by the ballot.\(^\text{26}\)

A thinker held in particularly high esteem by Jefferson was Algernon Sydney. In attempting to justify popular control, Sydney asks—

> whether bawds, whores, thieves, buffoons, parasites, and such vile wretches as are naturally mercenary, have not more power of Whitehall, Versailles, the Vatican, and the Escurnal, than in Venice, Amsterdam, and Switzerland: whether Hide, Arlington, Danby, their graces of Cleveland and Portsmouth, Sunderland, Jenkins, or Chiffinch, could probably have attained such power as they

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\(^{23}\) Prolegomena (Kelsey's trans.), sect. 15.

\(^{24}\) De Jure Naturae et Gentium (Kennet's trans.), Bk. VII, Ch. II, sec. 6.

\(^{25}\) Leviathan, Ch. XVII.

\(^{26}\) Oceana (Liljegren ed.), p. 33.
have had amongst us if it had been disposed of by the suffrages of parliament and people.\textsuperscript{57}

We may conclude this resume of Jefferson’s intellectual background with an appropriate quotation from John Locke, who represents the culmination of pre-American democratic theory. In speaking of the community, he says:

That which acts any community, being only the consent of the individuals of it, and it being necessary to that which is one body to move one way; it is necessary the body should move that way whither the greater force carries it, which is the consent of the majority.\textsuperscript{58}

The general trend of the above quotations demonstrates clearly that the social contract was no longer, as in the Middle Ages, based on the consent of a mystical corporate body with its own life but upon the agreement of individual members of that society. This clearly shows where Jefferson and his predecessors broke from their forebears. Of course it would be assuming too much to say that by Jefferson’s time the suffrage was considered to be a fundamental right of citizenship, but it certainly is obvious that the theory of popular participation was developing and that the theoretical basis of the suffrage was being broadened. If this had not been the case, there would have been the anomaly of some privileged persons determining the will of the group, nothing short of a return to medievalism!

Some of the early state constitutions in this country give recognition to the suffrage as a natural right of citizens, which is a quite natural view for men of the Revolutionary period and early nineteenth century to adopt. The first constitution of Virginia makes some broad statements as to the natural rights of man, and recognizes that among these rights is a share in the control of the officers of government. More specifically, Article 6 of the Declaration of Rights deals with elections, stating that they should be free and that—

All men having sufficient evidence of permanent common interest with, and common attachment to the community, have the right of suffrage.\textsuperscript{59}

The word “citizen” is not used here, but is clearly implied by the phrases “permanent common interest” and “common attachment,” for what is a citizen but a member of a political society? The same section from which the above quotation is taken lists among the rights of these “electors” immunity against taxation or the power of eminent

\textsuperscript{57} \textit{Discourses} (Toland ed.), p. 205.
\textsuperscript{58} \textit{Of Civil Government}, Bk. II, sect. 96.
\textsuperscript{59} \textit{Heneng, Statutes at Large of Virginia}, p. 109.
domain without their own consent or that of their representatives. Presumably those who did not qualify as having a permanent common interest in or attachment to the community did not enjoy this immunity but must be considered as possessing limited or *sine suffragio* citizenship.

Other states were not as free in recognizing the suffrage as a natural right; in fact, the frontier state of Vermont was the first to give more than formal recognition and grant universal male suffrage. However, the trend throughout the country was toward a general liberalization of voting requirements, which in itself is indicative of the influence of the "right of suffrage" school of thought. One of the strongest arguments for the natural right to the suffrage in the post-Revolutionary period comes from the pen of Joel Barlow, who proclaims the necessity for a national legislature with population alone as the basis for representation and chosen by universal manhood suffrage. Recognizing a kind of natural aristocracy, based on individual merits rather than heredity, however, he says:

> That some men in the same society should be wiser and better than others, is very natural; and it is natural, that the people should choose them to represent them in the formulation of laws.*

The effect of such quotations is noticeable in the constitutional debates of the first part of the nineteenth century. The New York convention of 1821 provided an arena of debate over the question of the suffrage as a right of all men, though the discussion involved the content of the constitution rather than natural law. Later several delegates, notably Jay and Clarke, advanced the idea of natural law as a basis for universal suffrage. The natural right approach is more noticeable in the Massachusetts convention of 1820-21, but with the same result of presenting the suffrage as a right. Leaders of this viewpoint were Richardson, Baldwin, Dearborn, and Dana, the latter going so far as to say that property qualifications were anti-republican and were imposed before independence was assured and before the principles of government were understood. Writers on political questions in the following years took up the cry for the right of universal suffrage, as exemplified by E. P Hurlbut. His theory of the suffrage stems from his contention that government is established for the purpose of protecting human rights. For this reason, every citizen who has an understanding of his right should have the suffrage re-

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*Political Writings, 1796 ed., p. 168.*
*New York Debates, 1821. 163-173.*
*Ibid., 183-186.*
Regardless of property, he even toys with the idea of experimenting with woman suffrage.\[4^4\]

Thus, we see in the early part of our history as an independent nation not universal acceptance of, but, at least, a growing feeling that universal suffrage was based on a right of man and was closely linked to liberty itself. The trend was in this direction until the Civil War.

In the immediately preceding discussion, the word *citizen* was used to a minimum degree, since there was no universal understanding of its meaning before the Fourteenth Amendment; but since that Amendment did attempt to establish a basis for it, it will be used more freely in the following pages. Before taking up the aftermath of its passage, however, it would be appropriate to examine a few of the leading court decisions of the pre-Civil War period.

In the early cases coming under federal jurisdiction, there were attempts made by the courts to define the word *citizen*. One example is the case of *Johnson v Twenty-one Bales*, in which a Federal Judge recognized that there were no citizens under the law of nations, but that that law recognized all men as members of the societies in which they were found.\[4^5\] This was followed by another court which said that as far as jurisdiction of the courts is concerned, citizenship means nothing more than residence.\[4^6\] The clear implication here is that all persons had certain judicial rights even though they were not full members of the community in the fullest sense. Those unqualified citizens were a part of that body known as "we the people" who held the sovereignty. This point is brought home in an early Kentucky decision regarding a slave suing for her freedom. Here we find a citizen defined as one who enjoys all the privileges enjoyed by the highest class in society. This includes the right to participate in the choosing of officers and of seeking public office. The plaintiff in this case did not possess this right for two reasons: first, because of her sex, and second, because of her membership in a servile class. Therefore, it was concluded that her rights before the courts were not guaranteed, and she could not bring suit for her freedom. The case was dismissed.\[4^7\]

The latter case has one interesting implication; judicial rights are not secure without political rights. Women, as the court stated, were dependent upon adult males, as were children, so their rights were protected by the condition of those adult males. A slave, how-

\[4^4\] *Essays on Human Rights and Their Political Guarantees*, New York, 1845, p. 107, 118-123, 144-172.

\[4^5\] Fed. Cas. No. 7, 417; 2 Payne 601 (1814).

\[4^6\] *In re* The Pizarro, 2 Wheat. 227 4 L. Ed. 226 (1817).

\[4^7\] Amy v. Smith, 11 Ky. 326 (1829).
ever, had no rights. This doctrine was adhered to until the Civil War and was stated by the Supreme Court in the celebrated case of *Dred Scott v Sanford.* This should prove the logic of Cicero’s statement that liberty could not exist without political rights and seems to verify the contention that the early view in this country that judicial rights and immunities belonged to those who held the political power.

It is not, of course, to be assumed that the suffrage has ever been considered in practice to be a right of American citizenship, but the evidence seems to leave little doubt that in the early years full rights before the law belonged only to those who exercised the sovereignty. It was not until after the passage of the Fourteenth Amendment that we have the problem of Negro citizenship, but with that problem facing them the courts were well able to defend the special political privileges of the white population and find a basis in American law for *civitas sine suffragio.*

V

Schüler: Zur Rechtsgelehramkeit kann ich nicht bequemen.
Mephistophiles: Ich kann es Euch so sehr nicht ubelnehmen,
   Ich weiss, wie es um diese Lehre steht.
Es erben sich Gesetz’ und Rechte
Wie eine eigene Krankheit fort,
Sie schleppen von Geschlecht sich zum Geschlechte
Und rucken sach von Ort zu Ort.
Vernunft wird Unsinn, Wohltat Plage;
Weh dir, dass du ein Enkel bist!
Von Rechte, das mit geboren ist,
Von dem ist leider! nie die Frage.

—Goethe’s Faust

*Law, logic and Switzers may be hired to fight for anybody.*
—English proverb

The Fourteenth Amendment attempted to establish a formal concept of national citizenship and went so far as to define some of the privileges that that condition carried with it. Among these privileges were immunities against arbitrary action on the part of the state, particularly judicial action. It also provided that Congress should have the power to decrease the representation of any state in the National House of Representatives by the same proportion that adult male citizens were denied the suffrage by that state. This, of course, does

\[19\] How. 393, 15 L. Ed. 691 (1856).
not establish enfranchisement of citizens as a right but does recognize the principle that the will of a political society can be determined only by its members. Representatives can represent only those who voted; otherwise a minority would determine the will of an organic state. This provision of the Fourteenth Amendment, then, was merely a restatement of the doctrine of a society made up of individuals rather than having a life of its own.

Following the ratification of this Amendment, a case came before the Georgia courts testing the status of citizens in relation to the suffrage. This involved the election of 1868, in which Richard W White, a “person of color,” defeated William J. Clements in the race for clerk of the superior court of Chatham County. Clements brought suit for possession of the office on the ground that White was not eligible, as a “person of color,” to hold office. The superior court of the Eastern Circuit upheld Clements’ claim to the office, but White appealed to the Supreme Court of the State, presided over by Chief Justice Joseph E. Brown, Governor of Georgia during the Confederate period. That court, in an opinion by the Chief Justice and a concurring opinion by Justice McCay, held that White was a citizen and, as such had a right to vote and hold office. Of the word citizen, Brown’s statement was that—

The word is never used by the people in a monarchy, since it involves an idea not enjoyed by subjects, to wit, the inherent right to partake in the government.

In the light of precedents it is difficult to see how the Georgia Supreme Court could have held otherwise. The very fact that the Fourteenth Amendment authorized Congress to take punitive steps against states who denied a substantial number of citizens the suffrage, indicates that the denial was one of right rather than privilege. This of course raises the question that if the Fourteenth Amendment did give recognition to the suffrage as a right of citizenship, what was the necessity for the Fifteenth and still later the Nineteenth? The only answer to this is that neither of the latter amendments attempted to establish the suffrage as a right of citizenship, but merely prohibited specific discriminations with regard to the elective franchise. Tacit recognition of the right to vote, at least for male citizens, had already been given in the former. There is, as has been previously stated, sufficient ground for believing that the right of suffrage had been considered a natural right of free citizens, as is indicated in a New York decision shortly after the Fourteenth Amendment to the effect that

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*White v. Clements, 39 Ga. 232 (1869).*
the Constitution did not confer the right of suffrage but simply recognizes it as an existing right.\textsuperscript{50}

The United States Supreme Court has never at any time given full recognition to the inalienable right of a citizen to vote. However, from time to time in its history, it has spoken of citizens as "the people," presumably that group which holds the sovereignty. This point is illustrated in the \textit{Cruikshank} case, which as well as pointing out that there was no fundamental right to vote inherent in citizenship, spoke of citizens as the members of the political community to which they belong. They are the people, said the Court, who compose the community, and who in their associated capacity have established or submitted to the dominion of a government for the promotion of their welfare and protection of their individual, as well as their collective, rights.\textsuperscript{51} If, in the face of this, our courts are to continue to insist that the only protection of the suffrage on the part of the Federal government is against specific discriminations in voting, and not recognition of the franchise as a right, we may, as well as not, reverse our recent trend of broadening the basis of suffrage. This is the historic view, however,\textsuperscript{52} and has not been altered materially in recent election cases.\textsuperscript{53} The negative, non-discrimination view is usually accepted by our leading constitutional lawyers. As has been noted, however, this was not the approach before the Fifteenth Amendment; so we must conclude that it is the result of legal manipulations designed to thwart the threat of engulfment by the non-white population. People are rash, and their will as expressed by their elected representatives must be tempered by the sound judgment of the "corporate mind" as "found" and not "made", by the courts.

The development of the present view on citizenship and the suffrage cannot be documented in the limited space allowed here, but it should be pointed out that this view rests primarily on two major decisions of the Supreme Court in addition to those cited above. These are \textit{Minor v Happersett} and \textit{Gunn v United States},\textsuperscript{54} the former dealing with woman suffrage and the latter with Negro suffrage under the Fifteenth Amendment. Both of these state that voting is not a right, but a privilege, the terms of which are to be

\textsuperscript{50} People v. Wilson, 3 Hun. (N. Y.) 437 (1875).
\textsuperscript{51} United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588 (1875).
\textsuperscript{52} United States v. Givens, Fed. Cas. No. 15,211 (1873); McKay v. Campbell, Fed. Cas. No. 8,839, 2 Abb. (U. S.) 120, 1 Savy. 374 (1870); United States v. Crosby, Fed. Cas. No. 14,893, 1 Hughes 448 (1871); United States v. Anthony, Fed. Case. No. 14,459, 11 Blatch. 200 (1873); United States v. Amson, 6 Fed. 819 (1881); and other Fifteenth Amendment cases.
\textsuperscript{54} 21 Wall. 162 (1875); 238 U. S. 374, 35 S. Ct. 926, 59 L. Ed. 1340 (1915).
The only protection of the suffrage found in the National Constitution is protection against specific discriminations, and not of the right to vote \textit{per se}. This view has never been abandoned by the national judiciary and has been restated in the latest pronouncements on the subject. At the turn of the twentieth century, however, there was a slight, though not serious, threat to this argument, when the Supreme Court upheld a Court of Claims statement to the effect that since a party was not a citizen of Texas at the time of the state's declaration of independence, he could not be considered "one of the people of Texas." This, of course, implies that a citizen is by definition one of the body of "people," the sovereign body of the state. One who is not one of the people, then, is one who does not share in the sovereignty.

This writer realizes fully that this brief discussion of the American courts cannot qualify as a definitive study and does no more than point out a few cases illustrating major trends; necessity for condensation has made this inevitable. The present doctrine, however, is well enough understood to make a definitive study unnecessary as long as it is pointed out that the suffrage is not a right under our contemporary interpretations. Also, it is believed that the few cases mentioned are sufficient, in view of the earlier portion of this article, to point out the fact that modern legal thought represents a reversal of a trend of thought that has developed in an almost unbroken chain of political writings since the time of Aristotle.

In conclusion, it should be re-emphasized that government in the Western World has always been considered to be the result of a contract or an act of consent. In the writings of Greece and the Roman Republic, this consent was given by individuals. In the period of the Roman Empire and during the Middle Ages, society was looked upon as an organic body with a will separate from that of its members. During these periods, man not only lost his political privileges, but also his personal freedoms and immunities that were dependent upon them. These liberties and immunities of man were reborn only after man began the long journey back to gaining a share in the honors of the state, a journey not yet completed. Since the Civil War, we have been faced with the spectre of Negro voting; and in attempting to solve the problem presented by it, have developed a bit of legal rationalism that represents a reversal of our trend since the dawn of the modern era. True, the suffrage has been broadened during this period, but by doing the right thing in the wrong way we

\textsuperscript{35} \textit{Coutzen v. United States}, 33 Ct. Cl. 475 (1898): \textit{affirmed} 141 U. S. 191, 21 S. Ct. 98, 45 L. Ed. 148 (1900).
have left open the door to legal restrictions on voting that well may rob us of our birthright as a free nation. Any attempt to say that the will of "we the sovereign people" can be determined by those citizens who can pay poll tax, qualify as persons without color or African ancestry, or boast a family tree, instead of by all the people is no more than a return to the Medieval doctrine of an organismic society. When a large number of people accept that view, we have started down the road backwards.

Of course, it must be recognized that certain qualifications, such as age, residence, sanity, et cetera, must be held by voters. These, however, are not real restrictions on popular rule, whereas any hint of an organismic society is. It must be concluded by this writer, after an admittedly exploratory rather than definitive study, that there is strong evidence pointing to the fact that without the suffrage there can be no citizenship. The recommendations of the President's Commission on Civil Rights, cited earlier, has considerable justification for including the suffrage as a right. In fact, it seems that Federal protection of the right to vote, rather than guarantees against discriminations, was the eventual goal of the theorists from whose doctrines our Constitution developed. Rather than being nullius filius, it may be argued that the doctrine of right to vote may be the victim of an imposter or pretender which has has crowded it from its rightful place in our legal thought.