

# American Citizenship After *Afroyim* and *Bellei*: Continuing Controversy

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One of the least heralded of the important constitutional decisions made during the sixties was the Warren Court's attempt to define the elusive concept of American citizenship. On the surface, the decision in *Afroyim v. Rusk*<sup>1</sup> seemed to resolve a century of doubts concerning the extent of congressional power to withdraw an individual's citizenship. This resolution was, however, largely illusory. Indeed, it is surprising how little relevance *Afroyim* had regarding the most pressing questions about the durability of citizenship. In *Rogers v. Bellei*,<sup>2</sup> the Court not only failed to come to grips with these remaining problems, but it also obscured what seemed to be *Afroyim's* clear holding: absent the citizen's voluntary renunciation, American citizenship is beyond congressional power to withdraw.<sup>3</sup> Thus, this little understood but significant area of the law is once again in a state of disarray.

## A. Background

### 1. The Natural born Citizen

Although the original Constitution used the word "citizen," it nowhere defined the term or explained how citizenship could be acquired, or whether and how it could be lost.<sup>4</sup> Prior to the Civil War, the

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1. 387 U.S. 253 (1967).

2. 401 U.S. 815 (1971).

3. 387 U.S. at 268.

4. The original Constitution refers to citizenship in three different contexts: (1) eligibility for holding office, art. I, § 2, cl. 2; art. I, § 3, cl. 3 (representatives and senators); art. II, § 1, cl. 4 (president); (2) cases to which the judicial power extends, art. III, § 2, cl. 1; and (3) privileges and immunities, art. IV, § 2, cl. 1. None of these provisions, however, attempts to define the citizenship required.

United States adhered to the doctrine of indelible allegiance, which originated in the common law. In an American context, indelible allegiance meant that birth within the jurisdiction of the United States created citizenship. The citizen had no right to terminate his allegiance to the United States without the government's consent.<sup>5</sup>

Three major changes in citizenship policy accompanied the Civil War era. First, a statute enacted in 1865 provided that both flight to avoid conscription and desertion from the armed forces were acts that indicated the intention of the perpetrators "to have voluntarily relinquished and forfeited their rights of citizenship."<sup>6</sup> This statute injected a notion of volition into the law that persists today. It created an irrefutable pronouncement which is, at best, logically questionable. This combination of a legislatively mandated concept of volition and congressional assumption of the power to determine that certain conduct is inconsistent with a desire to retain citizenship represents the most perplexing problem that plagues any quest to square congressional power with constitutional limitations.

Indelible allegiance lasted only until 1868, when Congress recognized that "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."<sup>7</sup> This rather obscure statute made the individual's truly voluntary action dispositive of his allegiance. It also seemed to create a simple mechanism for determining whether a citizen actually wished to expatriate himself: the execution of a formal renunciation of his citizenship before appropriate diplomatic officials. The determination of volition, however, has never been limited to a formal renunciation of citizenship.

Although dormant for a century, the first sentence of the Four-

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5. In *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 246 (1830), the Court found that "[t]he general doctrine [of citizenship] is, that no persons can, by any act of their own, without the consent of the government, put off their allegiance, and become aliens." For a discussion of the problems attendant to the doctrine of indelible allegiance, see G. VON GLAHN, *LAW AMONG NATIONS* 182 (1965) [hereinafter cited as VON GLAHN].

6. Act of Mar. 3, 1865, ch. 79, § 21, 13 Stat. 490. The use of the phrase "rights of citizenship" is unique in nationality legislation and has not been repeated. In effect, the government gave its consent to draft dodgers and deserters to "renounce" their citizenship in conformity with the doctrine of indelible allegiance.

7. Act of July 27, 1868, ch. 249, 15 Stat. 223. To a country inundated by immigrants, most of whom became citizens, indelible allegiance became a paradoxical doctrine. The United States adhered to it for its own citizens but continued to naturalize citizens from countries that also adhered to the doctrine. See VON GLAHN, *supra* note 5, at 182.

teenth Amendment<sup>8</sup> eventually became the most significant provision pertaining to citizenship. This citizenship clause made national citizenship primary and state citizenship derivative. More importantly, however, the clause's absolute language at least suggested the possibility that an American's citizenship was beyond the reach of congressional power. Since such a suggestion was incompatible with what courts have viewed as compelling governmental interests that might necessitate denationalization,<sup>9</sup> the Fourteenth Amendment played no role in the controversy over citizenship until *Afroyim*.

## 2. The Naturalized Citizen

Until the adoption of the Fourteenth Amendment, the method of acquiring citizenship by a person born in the United States was largely a product of congressional fiat.<sup>10</sup> The framers of the Constitution, however, explicitly gave Congress the sole power to determine the method of admitting aliens to citizenship. Article I delegated to Congress the power to "establish a uniform rule of naturalization."<sup>11</sup> While the Supreme Court has never precisely interpreted the scope of this "rulemaking" power, the implication has been that this power is analogous to the power to regulate:<sup>12</sup> it "is complete in itself, may be exercised to its

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8. "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." U.S. CONST. amend. XIV, § 1.

9. In this article, "denationalization" refers to governmental withdrawal of citizenship regardless of how that citizenship was acquired; "denaturalization" refers to governmental withdrawal of a naturalized citizen's citizenship; and "expatriation" refers to an individual's voluntary renunciation of citizenship.

10. "Citizenship depends . . . entirely on municipal law and is not regulated by international law. Acquisition of citizenship of the United States is governed solely by the Constitution and by Acts of Congress." *Tomasichio v. Acheson*, 98 F. Supp. 166, 169 (D.D.C. 1951). Prior to 1868, there was no constitutional mandate on citizenship. Congress adhered to the doctrine of *jus soli*, which, like indelible allegiance, was also a remnant of the British experience: "birth within the limits of the jurisdiction of the Crown, and of the United States, as the successor of the Crown, fixed nationality, and . . . there could be no change in this rule of law except by statute . . ." *Weedin v. Chin Bow*, 274 U.S. 657, 660 (1927). According to the theory of *jus soli*, birth in the United States creates citizenship regardless of the parents' allegiance. The Fourteenth Amendment formally adopted the *jus soli* method of determining citizenship. See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). In some instances, however, the United States adheres to the doctrine of *jus sanguinis* under which the child's citizenship or nationality is determined by his parents' citizenship or nationality regardless of where he is born. See Act of May 24, 1934, PUB. L. No. 73-250, ch. 344, 48 Stat. 797.

11. U.S. Const. art. I, § 8, cl. 4.

12. At least modern usage defines a rule as "an authoritative regulation for action, conduct, method, procedure, arrangement, etc." WEBSTER'S NEW INTERNATIONAL DICTIONARY 2182 (2d ed. 1934).

utmost extent, and acknowledges no limitations, other than those which are prescribed in the constitution."<sup>13</sup> Logically, such a plenary power can be used to achieve virtually any public policy objective.<sup>14</sup>

It is clear that the fulfillment of an alien's desire to attain American citizenship is completely dependent upon congressional discretion.<sup>15</sup> With regard to those born in the United States, however, the citizenship clause places at least the acquisition of citizenship beyond the reach of congressional discretion. Structurally, the Constitution seems to imply that, once citizenship is attained, all American citizens are similarly situated relative to the Constitution and laws, regardless of birthplace.<sup>16</sup> For the most part, however, neither the Supreme Court nor Congress has accepted this proposition, and congressional power has been used to distinguish between the "two citizenships." Moreover, the debate over the nature of American citizenship has focused on the extent rather than the existence of congressional power to denationalize an individual despite the origin of this citizenship. Both "types of citizens" find their citizenship constantly in peril because they might unwittingly commit an act indicative of a desire to voluntarily expatriate themselves.

## B. The Law and Logic of Denationalization

Since passing the Acts of 1865 and 1868,<sup>17</sup> Congress has enacted three major nationality statutes culminating with the Immigration and

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13. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

14. In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857), the Court sharply limited congressional power to provide a uniform rule of naturalization by holding that, since the framers never envisioned black people as part of the American political community, the Constitution required their exclusion from that community. Thus, blacks were not citizens of the United States and Congress could not use its seemingly plenary power to alter their alien status. *Id.* at 426. Nor was the *Dred Scott* limitation the only curb on congressional power over nationality that the Court imposed during the nineteenth century. In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the Court severely limited congressional power to define the phrase "subject to the jurisdiction of the United States," a power which, according to section 5, should have been included in Congress' power to enforce the Fourteenth Amendment. *Id.* at 695-96.

15. Clearly, Congress could validly bar all naturalization by simply failing to pass a rule. Once Congress elects to pass a rule, however, it is a live issue whether conditions can be imposed on the alien or former alien that could not be validly imposed on natural-born citizens. See text accompanying notes 21-39 *infra*.

16. Article I, section 8 enumerates congressional powers. It is a well established rule of construction that an enumeration in a legal instrument denies all items not enumerated unless incident to an expressly enumerated item. *United States v. Harris*, 106 U.S. 629, 636 (1883). In *Terada v. Dulles*, 121 F. Supp. 6 (D. Haw. 1954), the court rejected the government's contention that the power to denaturalize was a necessary and proper incident of the power to naturalize.

17. See notes 5 and 6 *supra*.

Nationality Act of 1952.<sup>18</sup> Twentieth century nationality legislation illustrates the expanding power that Congress has assumed over the retention of citizenship. Section 349 of the Act of 1952 lists ten actions that indicate a citizen's desire to "voluntarily" expatriate himself, including service in a foreign army, taking an oath of allegiance to a foreign state, voting in a foreign election, desertion from the armed forces, and treason against the United States.<sup>19</sup>

The rationale behind this list is anything but a benevolent attempt to facilitate the individual's right of expatriation since all a citizen need do to avail himself of that right is to execute a formal renunciation. Rather, Congress decided that certain activities were inconsistent with the national interest and prescribed denationalization as the penalty for engaging in such activities. Although there is seemingly no rational nexus between commission of these acts and the desire to forfeit American citizenship, commission is tantamount to executing a formal renunciation.

The actions established by section 349 as indicative of a relinquishment of United States citizenship apply to all citizens. Section 340 of the Act of 1952 provides additional actions for which only a naturalized citizen can lose his citizenship. These include the individual's refusal to testify within ten years of attaining citizenship before a congressional committee that is investigating his subversive activities, when such refusal results in a contempt conviction. Also included is affiliation within five years of naturalization with any organization, membership in which would have precluded the individual's naturalization.<sup>20</sup> Unlike section 349, there is no pretense of volition in section 340. Rather, section 340

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18. Act of June 27, 1952, PUB. L. No. 82-414, 66 Stat. 163 [hereinafter cited as Act of 1952]. The other major statutes were the Act of Oct. 14, 1940, PUB. L. No. 76-853, 54 Stat. 1137 and the Act of June 29, 1906, PUB. L. No. 59-338, 34 Stat. 596.

19. The other grounds are: obtaining naturalization in a foreign state, performing a job or service in a foreign state when the performer either has or acquires that state's nationality, formal renunciation of citizenship in the United States, formal renunciation abroad and leaving or remaining outside the United States during either a war or a national emergency for the purpose of evading military service. Act of 1952, 66 Stat. 267-68.

20. The third offense is remaining outside the United States, within five years of naturalization, for the purpose of residing in a foreign country. Such conduct was *prima facie* evidence of a lack of intent to reside in the United States as required by the naturalization oath. Act of 1952, 66 Stat. 261. In *Schneider v. Rusk*, 377 U.S. 163, 168-69 (1964), the Court invalidated section 352(a)(1) of the Act of 1952, which, like section 340, provided for the denaturalization of those residing abroad. See text accompanying notes 70-72 *infra*. Unlike section 340, there was no five year limit attached to the applicability of section 352(a)(1). Act of 1952, 66 Stat. 261, 269.

specifies that commission of any of these "offenses" constitute *prima facie* evidence that the individual perjured himself when he swore that he was of good moral character and "attached to the principles of the Constitution."<sup>21</sup> Thus, section 340 singles out the naturalized citizen for special surveillance, and mandates a heavy penalty for his engaging in proscribed conduct.<sup>22</sup>

There are important constitutional problems attending both the definition of "voluntariness" in the Act of 1952 and its prescription of what constitutes *prima facie* evidence of perjury. First, while the congressional desire to protect the nation's foreign policy from private intrusions and to discourage actions that might cause embarrassment is certainly legitimate, it is much less certain whether the intruder's denaturalization is a constitutionally proper response to the problem. *Afroyim* purported to authoritatively resolve this problem. There is another question, however, that has never been resolved. Although Congress clearly has a significant interest in preserving the integrity of the naturalization process against fraud, it is quite another matter whether this concern can be translated into a withdrawal of citizenship on account of an individual's exercise of constitutionally protected rights.

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21. Section 316(a) of the Act of 1952, 66 Stat. 242, requires that applicants for naturalization be of good moral character, attached to the principles of the Constitution, and disposed to the good order and happiness of the United States. Section 313(a) of the Act of 1952, 66 Stat. 240-41, lists the types of activities, beliefs and affiliations that constitute a bar to naturalization. For a good overview of some of the litigation that has arisen under section 316(a), see W. BISHOP, *INTERNATIONAL LAW* 522-24 (3d ed. 1971).

The bulk of litigation that has reached the Supreme Court involves the attachment requirement. *See, e.g.*, *Girouard v. United States*, 328 U.S. 61 (1946); *United States v. MacIntosh*, 283 U.S. 605 (1931); *United States v. Schwimmer*, 279 U.S. 644 (1929). The most interesting cases involve the relationship between attachment and post-naturalization affiliations. *See, e.g.*, *Knauer v. United States*, 328 U.S. 654 (1946); *Baumgartner v. United States*, 322 U.S. 665 (1944); *Schneiderman v. United States*, 320 U.S. 118 (1943). In these cases the government sought to revoke naturalization on the grounds that their Communist and Nazi affiliations indicated that the applicants lied when they swore that they were attached to the principles of the Constitution. In each case, the Court adhered to the view that the government's mistakes in not scrutinizing naturalization applications more closely were "not to be corrected by meagre standards for disproving such allegiance retrospectively." 322 U.S. 665, 675. The government bore a heavy burden of proving that its evidence of lack of attachment was "clear, unequivocal, and convincing." 320 U.S. 118, 125.

22. Congress provided additional surveillance by enacting the Expatriation Act of 1954, 8 U.S.C. § 1481(a)(9) (1970), which prescribes loss of citizenship for rebellion, insurrection and seditious conspiracy as those terms were defined by the Smith Act (18 U.S.C. 2384 et seq.). For an analysis of this statute's constitutionality, see Comment, *The Expatriation Act of 1954*, 64 *YALE L.J.* 1164 (1955).

## 1. An Analysis of Section 340

The theory underlying the distinctly second class citizenship that results from section 340 is that, since naturalization is a privilege, the grantor, Congress, can impose conditions on the recipient with an aim toward insuring that all prerequisites have been honestly fulfilled. Thus, a certificate of naturalization is "open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured."<sup>23</sup> It is easy to accept the premise that "the rights of the naturalized citizen derive from satisfying, free of fraud, the requirements set by Congress . . . ."<sup>24</sup> Clearly, there exists no constitutional right to be naturalized or to retain citizenship that has been fraudulently procured. However, the legitimacy of governmental power to infer perjury and revoke citizenship on the basis of the naturalized citizen's exercise of rights that the Constitution protects is not nearly so clear.

Congressional power to mandate what is tantamount to a loyalty oath as a prerequisite to attaining citizenship cannot be successfully controverted. A prospective citizen's loyalty and his past activities are patently legitimate congressional concerns. But the mere validity of an oath does not logically sanction the principle that, as a condition of attaining citizenship, the recipient can be forced to surrender rights that every natural born citizen possesses.<sup>25</sup>

The right-privilege dichotomy has challenged the Supreme Court

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23. *Johannessen v. United States*, 225 U.S. 227, 238 (1912). The Court took the position that, since naturalization was a privilege, denaturalization and deportation were simply civil proceedings and so did not have to conform to the requirements for criminal proceedings that the Fifth and Sixth Amendments mandate. See text accompanying notes 28-29 *infra*.

24. *Schneider v. Rusk*, 377 U.S. 163, 166 (1964).

25. "A naturalized citizen is indeed made a citizen under an Act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual." *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 827 (1824). In *Afroyim*, Justice Harlan rejected the use of *Osborn* as a precedent since Chief Justice Marshall's remarks are taken from a context that render them meaningless with regard to citizenship. 387 U.S. 253 at 275-76. Indeed, the *Osborn* decision neither has nor purports to have anything to do with citizenship. Marshall simply contrasted a naturalized citizen, who, he thought, was made "total" by the act of naturalization with a bank, whose charter gave it all the rights and capacities it possessed.

since the advent of loyalty oaths.<sup>26</sup> Although the government can require the individual to sacrifice the unfettered exercise of certain constitutional rights if it has a compelling interest contrary to such an exercise,<sup>27</sup> the fact that naturalization is a privilege is not dispositive of the validity of section 340. It is clear that the First Amendment guarantee of association<sup>28</sup> and the Fifth Amendment guarantees of equal protection<sup>29</sup> and against self-incrimination apply to all persons in the United States, not solely to citizens or to natural born citizens. Yet section 340 forces the naturalized citizen to choose between exercising his constitutional rights and retaining his citizenship. Indeed, with regard to the membership and testimony provisions of section 340, the naturalized citizen's "choice" is completely illusory. If he refuses to testify and is convicted for contempt, he loses his citizenship; if he testifies and reveals his affiliations, he may lose his citizenship for "fraud."

In *Kennedy v. Mendoza-Martinez*,<sup>30</sup> the Court held that withdrawal of citizenship for evading service in the nation's armed forces was punishment, which could be imposed only after all of the Constitution's procedural safeguards had been afforded the accused. Thus, section 340 seems constitutionally deficient not only because it inflicts punishment

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26. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234 (1961); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960). These commentators contend that any legal distinction between a right and a privilege is virtually nonexistent in respect to a legislature's power to arbitrarily deprive an individual of a privilege that it has previously granted.

27. See, e.g., *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *Ex Parte Curtis*, 106 U.S. 371 (1882) (upholding statutes that restricted the political activities of certain federal employees).

28. The First Amendment, of course, mentions no right of freedom of association. In *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958), however, the Court found it "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause . . . ."

29. In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Court found the notion of equal protection of the laws to be an integral part of the Fifth Amendment's Due Process Clause.

30. 372 U.S. 144 (1963). This decision seems to overrule *sub silentio* the *Johannesen* decision, *supra* note 23. *Mendoza* arose under section 401(j) of the Act of 1940, which was the predecessor to section 349(a)(10) of the Act of 1952. The Court held that "Congress has plainly employed the sanction of deprivation of nationality as a punishment for the offense of leaving or remaining outside the country to evade military service without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments." 372 U.S. 144, 165-66. The Court rejected the contention that, unless they lose their citizenship, deserters would go unpunished since "without being expatriated, the evader living abroad is not in a position to assert the vast majority of his component rights as an American citizen." *Id.* at 184.



for the assertion of constitutional rights, but also because it fails to provide appropriate procedural guarantees. It is also significant that section 340 fails to consider the quality of membership in subversive organizations. Recent decisions have held that such consideration is necessary in order to avoid the defect of overbreadth.<sup>31</sup>

It should not be inferred that Congress lacks power to provide rules of evidence in judicial, quasi-judicial, and denaturalization proceedings. The Fifth Amendment's due process clause, however, limits congressional power to prescribe such rules. Presumably, Congress could remedy the procedural defects of section 340 in light of *Mendoza* as long as the scheme it provides adheres to the following standard:

[A] legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law [but] it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.<sup>32</sup>

Two factors seem to vitiate the existence of a rational connection between the failure to fulfill the mandates of section 340 and the inference of perjury in the oath. First, it is difficult to accept, as a logical proposition, that Congress can admit an individual to citizenship and then punish him for exercising freedoms that are crucial to that community's existence.<sup>33</sup> It is certainly conceivable that an individual could

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31. See, e.g., *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); note 33 *infra*.

32. *Mobile, J. & K.C. R.R. v. Turnipseed*, 219 U.S. 35, 43 (1910). See also *Tot v. United States*, 319 U.S. 463 (1943) (presumption that the possession of a firearm by a fugitive was illegal under the Federal Firearms Act was arbitrary); *Taylor v. Georgia*, 315 U.S. 25 (1942), and *Bailey v. Alabama*, 219 U.S. 219 (1911) (presumptions of intent to defraud from the failure to perform work for which an advance payment was made was arbitrary). The Court has, however, upheld many presumptions. See, e.g., *Yee Hem v. United States*, 268 U.S. 178 (1925) (presumption that one possessing opium had illegally imported it upheld); *Hawes v. Georgia*, 258 U.S. 1 (1922) (presumption that the owner of the premises on which distilling apparatus was seized knew of its presence is valid); *Adams v. New York*, 192 U.S. 585 (1904) (presumption that possession of policy slips was "knowing" held valid); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (presumption that, if a Chinese alien could not produce a residence certificate on demand, he was in the country illegally was valid). In each case, the presumed fact was made *prima facie* evidence of guilt. This meant that the burden of proof was shifted from the government to the accused who was compelled to rebut the presumption.

33. Indeed, section 340 seems to strongly resemble many cases in which the Court has invalidated laws because of their "chilling effect" on protected freedoms. See, e.g., *DuBois Clubs of America v. Clark*, 389 U.S. 309, 317-18 (1967) (Douglas, J., dissent-

faithfully subscribe to the naturalization oath, yet later, in the atmosphere of political freedom that may have motivated his desire to seek citizenship, elect a course of conduct that conflicts with section 340.

In addition to the absence of the rational nexus between testimony, membership and denaturalization that the due process clause requires, section 340 raises important equal protection issues. Clearly, the statute treats native born and naturalized citizens differently, but, of course, differential treatment is not in and of itself dispositive of a law's unconstitutionality. The crucial issue is whether the classification is designed "so as not to discriminate between . . . inhabitants except upon some reasonable differentiation fairly related to the object of regulation."<sup>34</sup> In the indiscriminate lumping together of all naturalized citizens guilty of the specified offenses and the presumption that their naturalization was fraudulently procured without any requirement that evidence of actual fraud be adduced, section 340 is so overinclusive<sup>35</sup> that it invidiously discriminates against naturalized citizens.

In *Afroyim*, the Court accepted the principle that "[c]itizenship, like freedom of speech, press, and religion, occupies a preferred position in our written Constitution . . . ." <sup>36</sup> If citizenship is a preferred or fundamental right,<sup>37</sup> then the government must bear the burden of

ing); *Shelton v. Tucker*, 364 U.S. 479 (1960); *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958). While section 340's stated intention of preventing fraud is clearly legitimate, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." 364 U.S. 479, 488.

34. *Railway Express v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

35. Overinclusiveness means that a statute's regulations apply to some persons who do not possess the characteristics the statute seeks to regulate. See *Tussman & tenBroek, The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 348 (1949). Since perfect inclusiveness, in which everyone possessing the traits the statute describes is included in its regulatory scheme and no one who does not possess those traits is included, is virtually impossible to achieve, it is never a test of constitutionality. Rather, there seems to be a judicially ascertainable amount of tolerable variation from perfection that the Court discovers on a case by case basis. Thus, in *Perez v. Brownell*: "The fatal defect in the statute before us is that its application is not limited to those situations that may rationally be said to constitute an abandonment of citizenship. In specifying that any act of voting in a foreign political election results in loss of citizenship, Congress has employed a classification so broad that it encompasses conduct that fails to show a voluntary abandonment of American citizenship." 356 U.S. 44, 76 (1958) (Warren, C. J., dissenting).

36. *Perez v. Brownell*, 356 U.S. 44, 84 (1958) (Douglas, J., dissenting).

37. The preferred position doctrine is usually associated with First Amendment freedoms. Its origin is probably in Justice Harlan F. Stone's footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938): "It is unnecessary to consider now whether legislation which restricts those political processes [that the Bill of Rights

proving that section 340 both serves a compelling interest and is the least drastic method by which that interest can be accomplished.<sup>38</sup> It is difficult to accept section 340's implicit logic that either the national interest or the integrity of the naturalization process would be compromised if a naturalized citizen exercised constitutionally guaranteed rights. At minimum, there would seem to exist other methods of satisfying the legitimate governmental interests involved that avoid most significant constitutional questions.

Moreover, since the Act of 1952 gives the government the power to challenge any naturalization application in court,<sup>39</sup> the sole function of section 340 seems to be to give the government the opportunity to correct the investigatory inadequacies that resulted in its failure to contest the naturalization decree. On balance, the individual's constitutional rights seem to outweigh the need for the type of retrospective scrutiny that section 340 embodies. Although the provisions of section 340 have never been litigated,<sup>40</sup> they nonetheless remain a threat to the freedom of naturalized Americans.

### C. Afroyim v. Rusk: Sound and Fury

Until the sixties, the federal courts rarely challenged congressional primacy in nationality matters. Even in the twenties and early thirties

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protects] which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . than are most other types of legislation." With the advent of the notion of fundamental rights protected by the equal protection clause, however, "more exacting judicial scrutiny" became the only standard that the Court found acceptable in evaluating the constitutionality of "undesirable legislation." Thus, "strict scrutiny of the classification which a State makes . . . is essential, lest unwittingly, or otherwise, invidious discriminations are made . . . ." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

38. While citizenship has never been held to be either a preferred or a fundamental right, it could be argued that denationalization is as devastating to the vindication of rights as is other "undesirable legislation." See note 63 *infra*. If this is so, then the alternative means doctrine places the burden on the government either to adopt other methods or to prove that other methods do not exist. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 407-09 (1963); *Braunfeld v. Brown*, 366 U.S. 599, 610 (1961) (Brennan, J., concurring and dissenting).

39. Section 336(d) of the Act of 1952, 66 Stat. 258, gives the government power to contest a naturalization petition in *Johannessen v. United States*, 225 U.S. 227 (1912), the Court held that the doctrine of *res judicata* did not estop the government from later instituting proceedings to revoke a fraudulently procured naturalization certificate since the original proceeding was not adversary. Comment, *Denaturalization Under The Immigration and Nationality Act of 1952*, 51 MICH. L. REV. 881, 883 n.8 (1953).

40. In *Schneider v. Rusk*, 377 U.S. 163 (1964), the Court invalidated a law that contained a residence requirement very similar to that of section 340. *But see Luria v. United States*, 231 U.S. 9 (1913).

when the Court carefully scrutinized congressional motives in enacting legislation,<sup>41</sup> nationality laws were shielded from legitimate constitutional inquiry by the notion that it was beyond the competence of the judiciary to examine matters so intimately involved with foreign affairs. Courts implicitly accepted the argument that the denationalization features of nationality laws were designed merely to facilitate the individual's right to voluntary expatriation. Thus, withdrawal of citizenship was generally treated as a matter of statutory interpretation.<sup>43</sup>

The possibility that a new theory of American citizenship might be emerging was signalled by two significant decisions in 1958. In *Perez v. Brownell*,<sup>43</sup> the government attempted to deport Perez, a natural born citizen, on the grounds that he had voluntarily relinquished his citizenship by voting in an election in Mexico. A five judge majority rejected the contention that the Fourteenth Amendment's first sentence restricted congressional power to remove citizenship<sup>44</sup> and argued that the nation could protect itself from embarrassment arising from the actions of private citizens abroad by divorcing itself from such individuals.<sup>45</sup> The Court held that the congressional determination that participation by Americans in foreign elections could adversely affect the conduct of foreign affairs and could cause international tensions was a reasonable one.

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41. See, e.g., *United States v. Butler*, 297 U.S. 1 (1936); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); *Hammer v. Dagenhart*, 247 U.S. 251 (1918). It was not until *United States v. Darby*, 312 U.S. 100, 116 (1941) that the Court decided: "The thesis . . . that the motive of the prohibition . . . can operate to deprive the regulation of its constitutional authority has long ceased to have force . . . ."

42. In *Mackenzie v. Hare*, 239 U.S. 299 (1915), which was the first case involving a native born American's denationalization, the Court argued that the withdrawal of a woman's citizenship because she married an alien was valid despite the fact that the couple resided in the United States. Thus, "judicial opinion has taken for granted [that this exercise of congressional power] would not only be valid but demanded" since an American woman's marriage to an alien might cause the government embarrassment. *Id.* at 312. For this reason, the Court thought that Mrs. Mackenzie's denationalization was "as voluntary and distinctive as expatriation and *its consequences must be considered as elected.*" *Id.* (emphasis supplied). Similarly, in *Perkins v. Elg*, 307 U.S. 325, 329 (1939), the Court held: "As at birth she became a citizen of the United States, that citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles." In neither of these cases did the Court seriously entertain the possibility that what judicial opinion had taken for granted might be wrong.

43. 356 U.S. 44 (1958). The case was litigated under section 401(e) of the Act of 1940, 54 Stat. 1169, which is identical to its successor, section 349(a)(5) of the Act of 1952, 66 Stat. 268.

44. *Id.* at 58 n.3.

45. *Id.* at 60-62.

Obviously, the significance of *Perez* does not lie in the majority's holding, which closely parallels earlier decisions.<sup>46</sup> For the first time, however, a strongly worded dissenting opinion objected to the traditional American theory of congressional power over citizenship. Speaking for the four dissenters, Chief Justice Earl Warren disagreed with the argument that the Fourteenth Amendment was irrelevant in determining the scope of congressional power. The dissenters contended that American citizenship was much too precious to be entrusted to congressional whim:

Whatever may be the scope of its powers to regulate the conduct and affairs of all persons within its jurisdiction, a government of the people cannot take away their citizenship simply because one branch of that government can be said to have a conceivably rational basis for wanting to do so.<sup>47</sup>

Warren's dissenting opinion in *Perez* had to wait nearly a decade before it was adopted by a majority in *Afroyim*. On the same day as *Perez*, however, the Court invalidated the government's attempt to denationalize a deserter from the armed forces. In *Trop v. Dulles*,<sup>48</sup> the *Perez* dissenters were joined by Justice William J. Brennan.<sup>49</sup> This new majority reasoned that denationalization simply was not related rationally to the power to wage war.<sup>50</sup> Significantly, a majority could not agree that there were no circumstances under which the government might legitimately denationalize an individual. The two cases are important because the size and intensity of the dissent in *Perez* and the close scrutiny of the rational nexus underlying governmental power by the majority in *Trop* foreshadowed an impending change in the law. The Court demonstrated a willingness to shed its passivity and actively

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46. *Perez* relies heavily on *Mackenzie v. Hare*, 239 U.S. 299 (1915), and on *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

47. 356 U.S. 44, 65 (Warren, C. J., dissenting) (emphasis in original).

48. 356 U.S. 86 (1958). *Trop* was litigated under section 401(g) of the Act of 1940, 54 Stat. 1169, which is identical to its successor, section 349(a)(8) of the Act of 1952, 66 Stat. 268.

49. There indeed seems to be a paradox between Brennan's votes in *Perez* and *Trop*, the former to sustain the denationalization of one who had committed no crime, the latter to affirm the citizenship of a convicted deserter. He explains: "Congress asserted power to expatriate the deserter bears to the war powers precisely the same relation as its power to expatriate the tax evader would bear to the taxing power." *Trop v. Dulles*, 356 U.S. 86, 113 (1958). Since he could not see the rationality of the latter exercise, he could not see the rationality of the former either. It was not until *Afroyim* that Justice Brennan accepted the thesis that the Fourteenth Amendment precluded denationalization regardless of its rationality.

50. Five judges could not accept Chief Justice Warren's conclusion that "citizenship is not subject to the general powers of the National Government . . . ." 356 U.S. at 92.

examine not only the relevancy of legislation to some legitimate governmental purpose but also the constitutional rationale underlying denationalization to insure that withdrawals of citizenship were not inconsistent with constitutional guarantees.

The landmark case in nationality is *Afroyim v. Rusk*,<sup>51</sup> in which the Court overruled *Perez*. The lower courts had relied on *Perez* in affirming *Afroyim's* denationalization for voting in an Israeli parliamentary election. In a 5 to 4 decision, the Supreme Court reversed, and the majority was able to unite behind Justice Hugo Black's opinion. The Court began its inquiry by "resurrecting" the Fourteenth Amendment's citizenship clause, and held that, while the clause was designed primarily to overrule *Dred Scott*,<sup>52</sup> it was also a restriction on the national government's power to tamper with citizenship. *Afroyim* is probably best noted for the following characterization of American citizenship:

We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this nation against a congressional forcible destruction of his citizenship . . . Our holding does no more than give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.<sup>53</sup>

There are, however, great legal difficulties attendant to this simple, definitive sounding principle.

The Court's holding in *Afroyim* is based totally on the notion of volition. Clearly, the Court was not attempting to disparage congressional power to facilitate voluntary expatriation. Rather, the Court interpreted the citizenship clause to prohibit involuntary withdrawals of citizenship so that only the citizen's voluntary action can affect the retention of his citizenship.

This reasoning, however, appears to miss the most crucial aspect of denationalization as it has been practiced. The Act of 1952, as well as all prior nationality statutes, is couched in terms of volition. Indeed, after listing the ten actions that result in "voluntary expatriation," section 349(b) of the Act of 1952 provides:

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51. 387 U.S. 253 (1967).

52. "It is true that the chief interest of the people in giving permanence and security to citizenship in the Fourteenth Amendment was the desire to protect Negroes. . . . This undeniable purpose . . . would be frustrated by holding that the Government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs. . . ." 387 U.S. 253, 262-63.

53. *Id.* at 268.

Any person who commits or performs any act specified in subsection (a) shall be conclusively presumed to have done so voluntarily and without having been subjected to duress of any kind. . . .<sup>54</sup>

By terms of section 349(a), when an individual engages in one of the ten listed activities he has voluntarily expatriated himself. He has not had his citizenship revoked by legislative fiat or by an intricate procedure that balances American foreign policy with individual freedom. Significantly, at least on its face, this "voluntary" action is all that *Afroyim* seems to require.<sup>55</sup>

Taken literally, *Afroyim* is without meaning since no one has ever lost his citizenship by anything other than his own "voluntary action." Since 1868, when Congress recognized the right of voluntary expatriation, denationalization legislation has been disguised as a simple facilitation of that right. As is obvious from litigation that has followed the commission of these voluntary acts, loss of citizenship was seldom the individual's real desire.<sup>56</sup>

In order to have any significance, *Afroyim* must be read to hold that, although Congress can provide a mechanism by which the individual can voluntarily expatriate himself, volition is now a judicially ascertainable quality, and the government must bear the burden of proving

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54. 66 Stat. 268. The only individuals eligible to raise a defense of duress are those who are neither nationals of the state in which the "offense" was committed nor had spent the preceding ten years in that foreign state. For an example of the difficulties of proving duress, see *Kawakita v. United States*, 343 U.S. 717 (1952).

55. "[The Court] has assumed that voluntariness is here a term of fixed meaning; in fact, of course, it has been employed to describe both a specific intent to renounce citizenship, and the uncoerced commission of an act conclusively deemed by law to be a relinquishment of citizenship. Until the Court indicates with greater precision what it means by 'assent,' today's opinion will surely cause still greater confusion . . . ." 387 U.S. at 269 n.1 (Harlan, J., dissenting). Even under the most normal seeming circumstances, reasonable men can differ over what constitutes volition. In *Jolley v. Immigration and Naturalization Service*, 441 F.2d 1245, 1251 (5th Cir.), cert. denied, 404 U.S. 946 (1971), a divided court held that Jolley's formal renunciation of citizenship, which he executed in Toronto, for the purpose of evading the draft, was voluntary. Judge Rives dissented and argued that Jolley's abhorrence of the draft and his battle with his local board, which would not give him conscientious objector status, might have put him in such a psychological state that his renunciation was involuntary. Most commentators, however, argue that volition must be defined in terms of a formal renunciation of citizenship. Note, "Voluntary Relinquishment" of American Citizenship: A Proposed Definition, 53 CORNELL L. REV. 325 (1968); Comment, *Expatriation: Demise of the "Rational Nexus,"* 12 U.C.L.A.L. REV. 510 (1965); Note, "Voluntary": A Concept in Expatriation Law, 54 COLUM. L. REV. 932 (1954).

56. See, e.g., *Kazdy-Reich v. Marshall*, 88 F. Supp. 787 (D. Colum. 1950) in which the Court upheld the revocation of a woman's citizenship despite the uncontroverted testimony that she was a completely loyal American who had voted in a Hungarian election for the sole purpose of defeating communism. See also note 65 *infra*.

that the citizen's renunciation was truly voluntary. *Afroyim* makes the statutory presumption of volition rebuttable rather than legally absolute. *Afroyim's* only concession to the past was a footnote in which the Court acknowledged that the citizenship clause did not protect perpetrators of fraud.<sup>57</sup> The government still possesses the power to institute proceedings for revocation, but *Afroyim* indicates that the Court will carefully scrutinize the charges to insure that the alleged fraud involved, either lying about or concealing a fact that was material at the time the application was filed.<sup>58</sup> It is highly doubtful that section 340's "inferential fraud" provisions are consistent with *Afroyim's* narrow view of the permissible grounds for revocation.

*Afroyim* is probably the first specific modern limitation on what has been recognized as the government's inherent power to conduct foreign affairs.<sup>59</sup> In holding that the power to denationalize was a natural concomitant of the power to conduct foreign affairs, the *Perez* majority had not written on a clean slate. In both *United States v. Curtiss-Wright Export Corp.* and *Fong Yue Ting v. United States*,<sup>60</sup> the Court's acknowledgement of the existence of inherent powers in foreign affairs seemed to support the *Perez* majority's conclusion. In a sense, Justice John M. Harlan's complaint that the *Afroyim* majority's absolute view of the citizenship clause failed "almost entirely to dispute the reasoning in *Perez*"<sup>61</sup> is true. In a broader sense, however, the Court did not have to come to grips with this reasoning precisely because of its

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57. "Of course . . . naturalization unlawfully procured can be set aside." 387 U.S. at 267 n.23.

58. Since denationalization has been held to be punishment, *supra* note 30, which must be preceded by procedural safeguards, any judicial proceeding to denaturalize for fraud must be governed by the standard of proof beyond a reasonable doubt, which has been held to be an essential part of the liberty protected by the due process clause. *In Re Winship*, 397 U.S. 358, 364 (1970).

59. The Constitution does not specifically mention a "foreign affairs" power and the Constitution's structural philosophy, *infra* note 60, seems to vitiate any doctrine of inherent powers. In *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915), however, the Court found that a plenary power over foreign affairs was "an attribute of sovereignty." This theory was heartily endorsed in *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936).

60. In *Curtiss-Wright*, the Court held that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality." *Id.* at 318. In *Fong Yue Ting v. United States*, 149 U.S. 698, 707-10 (1892), the Court reviewed and cited approvingly various authorities who argued in support of inherent powers in foreign affairs.

61. 387 U.S. 253, 269 (Harlan, J., dissenting).



view of the citizenship clause. Whatever the necessities of modern foreign policy might be, the Fourteenth Amendment simply did not permit the involuntary withdrawal of citizenship.

The Court's decision in *Afroyim* seemed to effectively raise citizenship to the status of a fundamental personal right in much the same manner as the Warren Court selected other interests and similarly elevated them during the sixties.<sup>62</sup> As with the creation of other fundamental rights, citizenship's apparent elevation was accompanied by a vigorous dissenting view. As they did so often in the past, Justices Black and Harlan found that yet another part of the Fourteenth Amendment could be construed to mean two very different things.<sup>63</sup> Each side fails, however, to overcome a significant problem with its position.

On the one hand, since the nature of American citizenship was so vague in 1868, it is debatable whether the Fourteenth Amendment's first sentence was designed to affect congressional power over citizenship at all. Justice Harlan argues with some persuasiveness that the citizenship clause:

neither denies nor provides to Congress any power of expatriation; its consequences are . . . exhausted by its declaration of the classes of individuals to whom citizenship initially attaches.<sup>64</sup>

It would be arguably paradoxical if, given its location in an amendment designed to limit state power and increase national power over the states,<sup>65</sup> the citizenship clause was intended to be more than a truism asserting the primacy of national citizenship over state citizenship.

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62. See *Shapiro v. Thompson*, 394 U.S. 618 (1969) (interstate travel); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (international travel); *Reynolds v. Sims*, 377 U.S. 533 (1964) (fairly apportioned electoral districts); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (education). But see *San Antonio v. Rodriguez*, 411 U.S. 1 (1973).

63. The two have sharply disagreed over the mandates of the equal protection clause regarding apportionment, *Hadley v. Junior College District*, 397 U.S. 50 (1970); over the extent of the "Miranda warning," *Mathis v. United States*, 391 U.S. 1 (1968); and over whether a judge's comment on a defendant's failure to testify comported with due process, *Chapman v. California*, 386 U.S. 18 (1967). In *Afroyim*, their clash demonstrates the enormous difficulty in trying to divine the intent of the framers. Both point to emphatic statements made during the congressional debates over the Fourteenth Amendment to vindicate their arguments and neither seems particularly more persuasive than the other. 387 U.S. at 258, 287. A careful study of the debates does not seem to shed any light on the essential debate: whether the framers of the citizenship clause intended to restrict whatever power Congress might have had to withdraw citizenship. The crucial point might be that, since the Constitution nowhere mentions a power to denationalize, any restriction on such a power by the citizenship clause would have been superfluous.

64. 387 U.S. at 292 (Harlan, J., dissenting opinion).

65. The Court used this type of argument to decide that the necessary and proper

On the other hand, however, it would have been utterly remarkable if, given their much-fabled concern for securing liberty against governmental oppression, the framers of the Constitution, the Bill of Rights, and the Fourteenth Amendment had left citizenship to a particular era's conception of the necessities of its foreign policy. Such a conclusion means that great pains were taken to insure the liberty of those in the United States, but nothing whatsoever was done to secure their right to remain in the United States. Without citizenship, one is an alien subject to deportation virtually at the host country's pleasure. In a real sense, denationalization:

is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community [for] [i]n short, the expatriate has lost the right to have rights.<sup>66</sup>

Thus, *Afroyim's* unequivocal terms belie very real difficulties underlying the attempt to pinpoint the relationship between American citizenship and governmental power. Whatever its shortcomings might be, however, *Afroyim* establishes that, unless the government can prove otherwise, denationalization is presumed to be involuntary when the victim complains that it is.<sup>67</sup> While even the most fundamental right could theoretically be abridged if the government demonstrates a compelling interest that cannot be achieved in a less drastic fashion, *Afroyim* held that the government's legitimate interest in conducting foreign affairs unencumbered by the interference of private citizens was not a sufficiently compelling reason to denationalize those who interfere.

### D. Rogers v. Bellei: Two Steps Backward

Whenever there is a radical upheaval in the Supreme Court's personnel in a relatively short time, the possibility of a retreat from

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clause of Article I, section 8 was an addition to rather than a limitation on congressional power. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419-20 (1819).

66. *Trop v. Dulles*, 356 U.S. 86, 101-02 (1958).

67. In *Afroyim*, the Court sidestepped the problem of objective and subjective intent. Since "effective use of voluntary expatriation . . . required a profound change in the meaning of 'voluntary.'" Congress adopted such a change in section 349(b) of the Act of 1952, 66 Stat. 268. Thus, Congress simply attempted to dispense "with the requirement of subjective intent to renounce nationality by indicating that mere performance of one of the designated acts should operate automatically to divest American citizenship . . . and this standard was satisfied by a showing that performance of the designated act was voluntary." Comment, *The Expatriation Act of 1954*, 64 YALE L.J. 1164, 1175 (1955). Although it purported to do so, *Afroyim* did not really reverse this profound change.

the principles enunciated in closely divided decisions occurs. Such a retreat from the principles of *Afroyim* seems to be implied by the Burger Court's<sup>68</sup> decision in *Rogers v. Bellei*.<sup>69</sup>

Bellei was born and always resided in Italy. Although his father was a natural born citizen of Italy, Bellei acquired American citizenship at birth pursuant to a 1934 law,<sup>70</sup> which provided that a child born outside the United States to an alien and a citizen was a citizen. Since Bellei's mother was an American citizen, he became a citizen. Section 301(b) of the Act of 1952, however, mandated loss of citizenship by those who had not lived in the United States for at least five years prior to their twenty-eighth birthday.<sup>71</sup> Although Bellei had registered under the Selective Service Act and had visited the United States five separate times, he had never resided here. After several warnings from immigration officials, his citizenship was revoked.

The district court<sup>72</sup> relied on *Afroyim* and on *Schneider v. Rusk*<sup>73</sup> to justify its decision to reinstate Bellei's citizenship. In *Schneider*, the Supreme Court had invalidated section 352(a)(1) of the Act of 1952, which made a naturalized citizen's residence abroad for three years in the nation of his former citizenship grounds for denaturalization.<sup>74</sup> Significantly, *Schneider* did not condemn the residence restriction *per se*. Rather, the Court reasoned that the statute's applicability to only naturalized citizens was invidiously discriminatory since it presumed that residence abroad by such citizens was somehow inconsistent with the obligations of naturalized citizenship. In *Bellei*, the district court concluded that, as with section 352(a)(1) in *Schneider*, section 301(b) lacked the requisite rational basis needed to sustain its discriminatory treatment of American citizens who chose not to fulfill the statute's residence requirement.<sup>75</sup>

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68. The Burger Court that rendered the *Bellei* decision included Chief Justice Warren E. Burger and Justice Harry A. Blackmun. They replaced Chief Justice Warren and Justice Fortas who had been part of the *Afroyim* majority. The "full" Burger Court was not constituted until the addition of Justices Powell and Rehnquist to replace Harlan and Black in 1972.

69. 401 U.S. 815 (1971).

70. Act of May 24, 1934, PUB. L. No. 73-250, ch. 344, 48 Stat. 797. Section 301(a)(7) of the Act of 1952 is the successor of the 1934 law.

71. 66 Stat. 236.

72. *Bellei v. Rusk*, 296 F. Supp. 1247 (D.D.C. 1969).

73. 377 U.S. 163 (1964).

74. The statute distinguishes between residence in the state of former nationality, for which the permissible duration is three years, section 352(a)(1) and residence in another state, for which the permissible duration is five years, section 352(a)(2).

75. The district court recognized that "[t]here is an undeniable danger that

*Afroyim* seemed to mandate affirmation of the district court's decision. While *Schneider* had held out the possibility that congressional power could be validly used to declare that living abroad was inconsistent with the retention of American citizenship,<sup>76</sup> *Afroyim's* declaration of the virtual<sup>77</sup> indestructibility of American citizenship seemed to rule out the possibility. Clearly, Bellei's failure to fulfill the residence prescription of section 301(b) was not the truly voluntary renunciation of citizenship that the Fourteenth Amendment required since he had unequivocally indicated a desire to retain his American citizenship.<sup>78</sup> Also, since Bellei's activities in Italy such as voting, employment, military service, etc.,<sup>79</sup> were never a part of any judicial proceeding, the government would have been hard pressed to demonstrate the specific compelling interest that motivated the general applicability of section 301(b) without any consideration of mitigating circumstances.

Despite the seemingly irresistible logic supporting the district court's judgment, the Supreme Court reversed in a 5 to 4 decision. The Court found *Bellei* easily distinguishable from both *Schneider* and *Afroyim*. While *Afroyim's* citizenship was acquired by his naturalization in the United States and *Schneider's* citizenship was acquired by her parents' naturalization in the United States, Bellei was neither born in the United States nor naturalized nor subject to the jurisdiction of the United States. This led the Court to conclude that "the first sentence of the

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children, born and raised abroad . . . will have no meaningful connection with the United States, its culture or heritage . . . [Regardless,] Congress may not proceed by granting citizenship, and then either qualifying the grant by creating a second class citizenship or terminating the grant." 296 F. Supp. 1247, 1252 (D.D.C. 1969).

76. Shortly after the *Schneider* decision, the Court reiterated that "freedom of movement across frontiers in either direction . . . is basic in our scheme of values." *Aptheker v. Secretary of State*, 378 U.S. 500, 505-06 (1964), quoting *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958). *Aptheker* would seem to furnish a constitutional rationale for holding that the residence requirements of both sections 340 and 352(a)(1) were invalid on their faces.

77. Despite *Afroyim's* absolute language, the qualifying word must be used because of the possibility of fraud, *supra* note 58, and the problem of volition, *supra* note 55.

78. The Court's survey of all of Bellei's opportunities to comply with section 301(b), 401 U.S. 815, 818-20, and the fact that Bellei asserted "no claim of ignorance or of mistake or even of hardship," *id.* at 836, raises the nagging question of volition. Interestingly, the statute afforded him no opportunity to show ignorance or hardship or mistake or even that his residence in this country would not have been in the national interest despite the fact that he was deferred from military service because of his employment in Italy with the NATO defense program.

79. Congress took great pains to proscribe these activities in section 349(a). The absence of any consideration of Bellei's actions in Italy raises questions about section 301(b)'s purpose. It is debatable whether the due process clause's rational nexus requirement is fulfilled.

Fourteenth Amendment has no application to plaintiff Bellei. He simply is not a Fourteenth Amendment first sentence citizen."<sup>80</sup> The Court argued that the existence of the citizenship clause:

[h]as not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization.<sup>81</sup>

Thus, Bellei's "claim to citizenship is wholly, and only, statutory."<sup>82</sup> The Court thought that congressional power to deal with "the entanglements which may stem from dual allegiance"<sup>83</sup> was an obvious concomitant of the power to create "statutory citizenship." The Court thought that section 301(b)'s passage:

[r]eveals a careful consideration by the Congress of the problems attendant upon dual nationality of a person born abroad . . . . The solution to the dual nationality dilemma provided by the Congress by way of required residence surely is not unreasonable. It may not be the best that could be devised, but here, too, we cannot say that it is irrational or arbitrary or unfair.<sup>84</sup>

The Court could not see the logic behind recognizing congressional power to create Bellei's citizenship on the one hand yet disparaging the validity of imposing certain "reasonable" conditions on the retention of that citizenship on the other.<sup>85</sup> Rather, section 301(b) simply required a person with dual citizenship to elect one citizenship or the other.<sup>86</sup>

The Court emphatically rejected the contention that Congress had made Bellei a second class citizen by forcing him to make a choice that other citizens did not have to make.<sup>87</sup> The Court argued that Bellei's

80. 401 U.S. at 827.

81. *United States v. Wong Kim Ark*, 169 U.S. 649, 688 (1898). The Court cites this statement approvingly in *Bellei*, 401 U.S. at 830, despite the fact that it was certainly dictum in *Wong Kim Ark*, which involved a child born in the United States not abroad. The practice of citing dictum was heavily criticized by the dissenters in *Afroyim*, 387 U.S. at 275-77.

82. 401 U.S. at 833.

83. *Id.* at 832, quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 187 (1963) (Brennan, J., concurring).

84. 401 U.S. at 833.

85. *Id.* at 834.

86. *Id.* at 833.

87. "Neither are we persuaded that a condition subsequent in this area impresses one with 'second-class citizenship.' That cliché is too handy and too easy, and, like most clichés, can be misleading . . . . The proper emphasis is on what the statute permits him to gain from the possible starting point of noncitizenship, not on what he claims to lose from the possible starting point of full citizenship to which he has no constitutional right in the first place." *Id.* at 835-36.

admittedly differential treatment was justified by his clearly different circumstances: he never resided in the United States, and despite repeated warnings about the consequences of continued residence in Italy, he expressed neither the desire nor the intention of ever living in the United States. Since he never had a constitutional right to be an American citizen in the first place, the Court held that *Bellei*'s conditional citizenship did not violate either the citizenship or due process clause.<sup>88</sup>

Justice Black, author of the Court's opinion in *Afroyim*, wrote the principal dissenting opinion in *Bellei*.<sup>89</sup> He argued that *Bellei* could not be meaningfully distinguished from either *Schneider* or *Afroyim* since:

[U]nder the view adopted by the majority today, all children born to Americans while abroad would be excluded from the protections of the Citizenship Clause and would instead be relegated to the permanent status of second class citizenship, subject to revocation at the will of Congress. The Court rejected such narrow, restrictive and super-technical interpretations of the Citizenship Clause . . . in *Afroyim* . . .<sup>90</sup>

Justice Black contended that it was the act of conferring citizenship rather than the place it was conferred or the residence of the citizen that was dispositive of the citizenship clause's applicability.<sup>91</sup> He took exception to the Court's "irrational or arbitrary or unfair" standard<sup>92</sup> and he accused the majority of imposing a completely arbitrary standard in place of the Constitution's dictates.<sup>93</sup>

Despite the Court's attempt to distinguish *Bellei* from *Afroyim*, it is clear that *Bellei* liberalizes the absolute conception of citizenship that *Afroyim* seemed to make a Fourteenth Amendment standard. The Court's affirmation of section 301(b)'s validity both on its face and as applied to *Bellei* means that there is a category of citizenship that, although legally obtained, is not indestructible. Despite the questionable

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88. *Id.* at 836.

89. *Id.*

90. *Id.* at 839.

91. "If, for example, Congress should decide to vest the authority to naturalize aliens in American embassy officials abroad . . . I have no doubt that those so naturalized would be just as fully protected by the Fourteenth Amendment as are those who go through our present naturalization procedures . . . [O]ne can become a citizen of this country by being born *within* it or by being naturalized *into* it." *Id.* at 843 (emphasis in original). Justice Black argues that *Bellei*'s acquisition of citizenship was tantamount to being naturalized. *Id.* at 839-40.

92. "It is a dangerous concept of constitutional law that allows the majority to conclude that, because it cannot say the statute is 'irrational or arbitrary or unfair,' the statute must be constitutional." *Id.* at 844.

93. "The Court today puts aside the Fourteenth Amendment as a standard by which to measure congressional action with respect to citizenship, and substitutes in its place the majority's own vague notions of 'fairness.'" *Id.* at 844.

relevance of Marshall's dictum in *Osborn v. Bank of the United States*<sup>94</sup> to nationality cases, *Afroyim* adopted that opinion's thesis of the limitation of congressional power over citizenship. *Bellei* clearly departs from this standard, acknowledges congressional power over some types of citizenship, and suggests a possible re-evaluation of *Afroyim*'s Fourteenth Amendment absolutism.

On the surface, the Court's logic seems reasonable. Since *Bellei* was neither born nor naturalized in the United States, the citizenship clause is not precisely applicable. It is probably true that "[o]ne could hardly call this a generous reading of the great purposes the Fourteenth Amendment was adopted to bring about."<sup>95</sup> It is not inconceivable, however, that if the Fourteenth Amendment's framers were concerned with congressional power over citizenship at all, they inferentially meant to exclude from the amendment's protection those who were neither born in nor took an oath of allegiance to the United States. Indeed, the Court's opinion took at least implicit cognizance of *Bellei*'s particular circumstances rather than mechanically applying section 301(b). The Court argued that the withdrawal of *Bellei*'s citizenship was neither arbitrary nor abrupt, and it took note that he was not condemned to a condition of statelessness.<sup>96</sup> The *Bellei* majority seemed implicitly to balance the competing equities. While *Bellei*'s denationalization could not be equated with the achievement of a compelling governmental interest, it seemed that on balance, the government's interest in withdrawing the citizenship of an individual over whom it had never had jurisdiction at least arguably outweighed *Bellei*'s interest in or need to be an American citizen.<sup>97</sup>

To a large extent, however, the *Bellei* majority begs rather than answers the most compelling questions concerning citizenship. It is one thing for the Court to confine its ruling to a very narrow set of circumstances; it is very different to virtually ignore that decision's impact on a broader legal area. While the Court's opinion purports to address the limited facts presented, *Bellei* raises questions about *Afroyim*'s continuing relevance. It is important to note that *Bellei*, not *Afroyim*, invented the concept of a "Fourteenth-Amendment first sentence

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94. 22 U.S. (9 Wheat.) 738, 827 (1824).

95. 401 U.S. at 838-39.

96. *Id.* at 836.

97. In *United States v. Robel*, 389 U.S. 258 (1967), the Court seemed to reject the use of a balancing approach when important civil liberties were endangered by a governmental program. Rather, when substantial interests are involved, "we deem it inappropriate for this Court to label one as being more important or more substantial than the other." *Id.* at 268 n.20.

citizen"; *Afroyim* held only that American citizenship was indestructible. The loophole that the *Bellei* majority located in the Fourteenth Amendment's coverage might reveal a much more fundamental shift in judicial thinking.

In a low key fashion, the Court seemed to remove citizenship from the "preferred" status to which *Afroyim* had elevated it. The logic that *Bellei* had no right to retain his citizenship because Congress need not have made him a citizen means that only those born in the United States can be assured of retaining their citizenship. Thus, the Court's division over the nature of American citizenship is essentially a contrast between those judges who believe that the Constitution makes citizenship an end in and of itself, and those judges who argue that when citizenship becomes an impediment to the exercise of one of Congress' powers, the necessary and proper clause<sup>98</sup> implies congressional power to divest that citizenship. Yet *Afroyim* clearly held that the power to divest was not a necessary and proper adjunct of the power to conduct foreign affairs. In holding that the citizenship clause does not preclude section 301(b)'s divestment of *Bellei*'s citizenship, the Court rather incredibly concludes that if Congress can adopt conditions that must be met before citizenship can be attained by a person born abroad<sup>99</sup> then surely it can impose the "same condition subsequent" to attaining citizenship.<sup>100</sup>

It is easy to concede the validity of the precedent condition, that one parent of a child born abroad must be an American citizen who has resided in the United States for at least ten years. It does not follow, however, that a statute requiring the child who acquires citizenship in this manner live in the United States for at least five years prior to age twenty-eight is "precisely the same condition subsequent." This analogy hardly makes the "good constitutional sense"<sup>101</sup> that the Court claims. It seems inescapable that the condition subsequent is very different from the condition precedent; section 301(a)(7), which gave *Bellei* his citizenship, is very different from section 301(b), which took it away, and

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98. "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, sec. 8, cl. 18 (emphasis added). If denationalization is a necessary incident to the conduct of foreign affairs, presumably Congress could recognize the president's primacy in foreign affairs and delegate him the power to denationalize. Delegations recognizing this primacy were upheld in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

99. 401 U.S. at 831.

100. *Id.* at 834.

101. *Id.*



residence in the United States by the child's parent before the child is born is surely not the same as residence in the United States by the child.

The logical extension of this position is devastating to the civil liberties of those who acquire their citizenship under an act of Congress. It means that statutes such as section 340, which circumscribe constitutionally protected activities, are perfectly constitutional since the "good moral character" and "attachment to the principles of the Constitution" requirement is the same both prior and subsequent to the attainment of citizenship. Undoubtedly, Congress could have required *Bellei* to live in the United States for five years prior to age twenty-eight as a condition for attaining American citizenship, just as aliens must reside in this country for five years before they are eligible to become citizens.<sup>102</sup> But *Afroyim* held that Congress may not impose conditions for retaining citizenship; yet section 301(b) imposes just such a condition.

### E. Conclusion

In a subtle fashion, the Burger Court reintroduced for debate two important questions. The proposition that, since Congress was under no constitutional obligation to grant *Bellei* citizenship, the citizenship thus conferred was only a "watered-down" version of the citizenship possessed by those born in the United States, simply restates the virtually discredited right-privilege dichotomy. The alternative is that the proper question is not whether *Bellei* had a constitutional right to become an American citizen, but whether, as a citizen, he had the same right to live abroad that all native born citizens had. The Court never reached this question in *Bellei*, apparently because it was unwilling to accept *Afroyim's* major premise: once granted, a person's citizenship is beyond any congressional power to involuntarily divest it.<sup>103</sup>

*Bellei* also suggests that the "necessary and proper" theory of denationalization, which was a virtually unchallenged rationale for congressional power until *Afroyim*, might be re-emerging. In *Bellei*, the Court thought it beyond question that Congress could confront and deal with problems that might arise from an individual's possession of dual citizenship. Logically, if Congress possesses the power to remedy the purely hypothetical problems that *Bellei* could have caused, it is difficult to believe that Congress would be constitutionally unable to denational-

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102. Act of 1952, 66 Stat. 242.

103. After quoting from *Afroyim*, the Court argued: "We do not accept the notion that those utterances are now to be judicially extended to citizenship not based upon the Fourteenth Amendment and to make citizenship an absolute." 401 U.S. at 835.

ize the perpetrator of acts that might have a direct and detrimental affect on the conduct of foreign affairs. Once the logic of a power to denationalize is admitted, it is nearly impossible rationally to limit the power. *Afroyim's* solution was to abolish the power to denationalize completely; the Burger Court seemed unwilling to accept this solution in *Bellei*. The proper response seems to be that, although Congress may, of course, discourage and punish private individuals who interfere with the conduct of foreign affairs, methods other than denationalization must be found.

The problem of volition, which *Afroyim* left unresolved, has been replaced in importance by the re-emergence of a need to enunciate a coherent theory of American citizenship. Until the Court settles on such a theory, the disarray that has plagued citizenship law can do nothing but persist. More importantly, imprecision poses a significant threat to citizenship, which is an important building block for other civil liberties.<sup>104</sup>

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104. If one is permitted to remain in this country, denationalization is not as devastating as it might be since the Bill of Rights and other constitutional safeguards apply to everyone in the United States. Similarly, in *Sugarman v. Dougall*, 413 U.S. 634 (1973) and *Graham v. Richardson*, 403 U.S. 365 (1971), the Court held that alienage was a suspect classification that was subject to close judicial scrutiny. This situation happens to be a quirk of our constitutional system since "the stateless person has no rights, either intranational or international, which are inalienable. He exists at the mercy of the State in which he resides." Comment, *The Expatriation Act of 1954*, 64 *YALE L.J.* 1164, 1191 (1955) (footnotes omitted). If, however, he is forced to leave this country, and "[e]very sovereign State has the right to expel aliens from its borders, and modern States including the United States do so freely," *id.* at 1190 (footnotes omitted), he may not be so lucky. Other countries might opt to be less charitable and "if a stateless person is a victim of a 'denial of justice' by the governmental authorities of a State, he has no recourse whatever. Under contemporary international law neither the governments of individual States nor international organizations are considered to have legal standing to intervene in his behalf." *Id.* at 1191 (footnotes omitted). For these reasons, the Comment's author argues that denationalization is cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 1194. Chief Justice Warren echoed this view in *Trop v. Dulles*, 356 U.S. 86, 101-02 (1958), but it has never been adopted.