

# Expatriation - A Concept In Need Of Clarification

An American woman marries a man who is a foreign national. The husband's job requires extensive travel in a certain part of the world. At his urging, the wife obtains naturalization in the husband's native country to facilitate their travel on the same foreign passport. At no time, however, does she make an express renunciation of her United States nationality. Moreover, she continues to maintain close ties to the United States. She visits her family on several occasions. She even continues to file her individual income tax return with the Internal Revenue Service. She considers herself a dual national. Several years later, after obtaining a divorce, she applies for renewal of her American passport. The Passport Office of the Secretary of State informs her that she is ineligible because she has relinquished her United States citizenship.<sup>1</sup>

The plight of this hypothetical ex-American<sup>2</sup> suggests two basic but unsettled issues in United States expatriation law which this article will explore: (1) Does Congress have the power to take away a person's citizenship without his assent? (2) If a citizen's "assent" is required, how is it to be determined? These questions have no certain answers, a fact which indicates the continuing state of confusion which traditionally has characterized American expatriation law. This article will examine the historical sources of the confusion, its present manifestations, and finally a conceptual approach that could eliminate it.

## I. HISTORICAL SOURCES OF THE CONFUSION

The history of expatriation law has been well covered by other legal writers;<sup>3</sup> an extensive review of its development will not be

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<sup>1</sup>Fairness to the State Department, however, requires mention that under this particular set of hypothetical facts a determination of expatriation would not be automatic. For a summary of the Department's current operating procedures, see note 120 and accompanying text, *infra*.

<sup>2</sup>1,250 persons were expatriated in the year ended June 30, 1973. Of these, 819 lost their nationality through naturalization in a foreign state. IMMIGRATION AND NATURALIZATION SERVICE ANNUAL REPORT, 122 (1973).

<sup>3</sup>See, e.g., Roche, *The Expatriation Cases*, 1963 SUP. CT. REV. 325 (1963) [hereinafter cited as Roche]; Gordon, *The Citizen and the State: Power of*

attempted here. The focus instead will be on those factors which have contributed to its present ambiguity.

### A. THE CONSTITUTION

The first source of confusion is the Constitution. In its original form there was little mention of citizenship, much less the loss of citizenship.<sup>4</sup> The lack of consensus at the time of its drafting concerning the nature of American citizenship explains this omission. Although the United States had seemingly adopted the English common law doctrine of perpetual allegiance,<sup>5</sup> that principle was inimical to the policy of encouraging immigrants to help settle the young country's frontiers. The framers also disagreed over whether citizenship was within the jurisdiction of the states or the federal government. The dominant view, asserted by Jefferson, was that state citizenship was primary, and that federal citizenship attached only through the state.<sup>6</sup> Finally, the status of the Negro was an issue so divisive it was left unresolved.<sup>7</sup>

Not until 1868, with the passage of the Fourteenth Amendment, did the Constitution attempt to define citizenship. The Citizenship Clause,<sup>8</sup> however, has proven to be an unsatisfactory definition. In its post-Civil War context, it had two limited purposes. The first was to overturn the doctrine of primary state citizenship by creating an independent basis for federal citizenship. The second was to assure the Negro's right of citizenship by, in effect, overruling the *Dred Scott* decision.<sup>9</sup> Whether broader purposes should be inferred from the language and legislative history of the Citizenship Clause is a question of continuing debate.<sup>10</sup>

### B. AD HOC STATUTORY DEVELOPMENT

In addition to the constitutional void regarding loss of citizenship, a lack of statutory guidance also plagued the early development of

*Congress to Expatriate American Citizens*, 53 GEO. L.J. 315 (1965); Duvall, *Expatriation Under United States Law, Perez to Afroyim: The Search for a Philosophy of American Citizenship*, 56 U. VA. L. REV. 408 (1970).

<sup>4</sup>Congress was, however, authorized "[t]o establish an uniform Rule of Naturalization." U.S. CONST., art. I, § 8, cl. 4.

<sup>5</sup>See *Shanks v. Dupont*, 3 Pet. 242, 246 (1830); *Inglis v. Sailor's Snug Harbour*, 3 Pet. 99, 125 (1830). This doctrine denied one's right to sever his allegiance without the consent of the sovereign. BLACKSTONE, COMMENTARIES 154-55 (Gavit ed. 1941).

<sup>6</sup>Roche, *supra* note 3, at 329, 335.

<sup>7</sup>Roche, *supra* note 3, at 328.

<sup>8</sup>"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, cl. 1.

<sup>9</sup>*Scott v. Sandford*, 19 How. 393 (1856). See *Slaughter-House Cases*, 16 Wall 36, 74, 95, 112 (1872).

<sup>10</sup>See, e.g., *Afroyim v. Rusk*, 387 U.S. 253, 284-85 (1967), and text accompanying notes 40-42, *infra*.

expatriation law. The first significant expatriation statute in the United States was not enacted until 1868. It proclaimed that the "right of expatriation is a natural and inherent right of all people . . . ."<sup>11</sup> The purpose of the Act, however, was not to allow United States citizens to expatriate themselves; rather, it was to protect those immigrants who had become naturalized Americans from the competing claims of their former nationality.<sup>12</sup> Consequently, the statute said nothing about how a citizen might exercise his officially proclaimed right.

During the last third of the nineteenth century, therefore, practical necessity drew the executive branch into this constitutional and statutory vacuum. The Department of State began the practice of deciding which acts were deemed to be an exercise of the citizen's right of expatriation.<sup>13</sup> Mainly to legitimize this practice, Congress in 1907 enacted a statute which for the first time set forth specific acts whereby United States citizenship could be lost.<sup>14</sup> The important point about the 1907 Act is that in attempting to give statutory validity to an existing administrative practice, it very subtly began to shift the focus from the individual's right of expatriation to the government's power of expatriation.

The potential conflict inherent in this shift soon manifested itself in the courts. In *Mackenzie v. Hare*,<sup>15</sup> decided in 1915, the plaintiff challenged the 1907 Act's provision for loss of citizenship by an American woman who married a foreigner.<sup>16</sup> She based her challenge on the absence of an express constitutional grant of power to Congress. The Court answered that the statute was merely an exercise of the inherent power of sovereignty in foreign relations.<sup>17</sup> Moreover, the Court did not perceive the statute as encroaching upon Mrs. Mackenzie's right of expatriation. In fact, it conceded that loss of citizenship could not be "arbitrarily imposed, that is, without the concurrence of the citizen."<sup>18</sup> But the statute in controversy dealt with a "condition voluntarily entered into, with notice of the conse-

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<sup>11</sup>Preamble to the Act of July 27, 1868, ch. 249, 15 Stat. 223.

<sup>12</sup>Roche, *supra* note 3, at 330. The act was, however, eventually construed to include a citizen's right to divest himself of his nationality. 14 OP. ATT'Y. GEN. 296 (1873).

<sup>13</sup>See BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD, §§ 319, 324 (1915).

<sup>14</sup>Act of March 2, 1907, ch. 2534, 34 Stat. 1228. Basically, loss of nationality would result from the following acts: (1) naturalization in a foreign state; (2) taking an oath of allegiance to another sovereign; (3) marriage of an American woman to an alien; and (4) residence of a naturalized citizen in a foreign state for certain periods of time.

<sup>15</sup>239 U.S. 299 (1915).

<sup>16</sup>This provision of the 1907 Act was repealed by Act of Sept. 22, 1922, ch. 411, §§ 3, 7, 42 Stat. 1022.

<sup>17</sup>239 U.S. at 311.

<sup>18</sup>*Id.*

quences," which was "tantamount to expatriation."<sup>19</sup> In other words, the Court imputed to Mrs. Mackenzie her consent to the loss of citizenship. She had expatriated herself by her conduct. The government had merely given official recognition to such conduct.<sup>20</sup> Thus, with this opinion the Supreme Court sanctioned a statute which in turn had legitimized an administrative practice which had developed by default.

Despite the doctrinal weakness of the 1907 Act, Congress was at least arguably trying to give effect to one's right of expatriation by recognizing those acts which manifest a desire to terminate citizenship.<sup>21</sup> The Nationality Act of 1940,<sup>22</sup> however, departed significantly from this conceptual limitation. Largely a product of pre-World War II xenophobia, the 1940 Act greatly expanded the grounds for expatriation, both quantitatively and qualitatively. Congress began to use expatriation as a supplemental punishment for certain offenses against the sovereign.<sup>23</sup> The shift was now complete. Expatriation was no longer merely an act by which an American could divest himself of citizenship that had become too onerous. It was now a tool of the state, a sanction against unlawful behavior. This accretion of power, facilitated by the tense international climate of the times, ignored the original meaning of expatriation and distorted the limited mandate of *Mackenzie*.<sup>24</sup> Its legal repercussions would soon reach the judiciary.

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<sup>19</sup>*Id.* at 312.

<sup>20</sup>This "objective test" of voluntariness was more explicitly stated in *Savorgnan v. U.S.*, 338 U.S. 491, 499-503 (1950).

<sup>21</sup>Roche, *supra* note 3, at 332.

<sup>22</sup>Ch. 876, 54 Stat. 1137, *as amended*, 8 U.S.C. § § 1481(a) (1)-(10) (1970).

<sup>23</sup>Although further modifications were made in 1952 (Nationality Act of 1952, ch. 477, 66 Stat. 163) and 1954 (Expatriation Act of 1954, ch. 1256, § 2, 68 Stat. 1146), it is essentially the 1940 Act which remains on the books today. 8 U.S.C. § § 1481(a)(1)-(10) (1970). It provides that a citizen will lose his nationality by:

1. Obtaining naturalization in a foreign state.
2. Taking an oath of allegiance to a foreign state.
3. Serving in the armed forces of a foreign state without authorization.
4. Employment by the government of a foreign state or any subdivision thereof.
5. Voting in a foreign political election.
6. Formal renunciation before a U.S. diplomatic or consular officer abroad.
7. Formal renunciation in the United States during wartime if approved by the Attorney General.
8. Court martial conviction and dishonorable discharge for desertion during wartime.
9. Conviction for treason, attempting by force to overthrow, or bearing arms against the United States. (Added by 1954 Act).
10. Departing from or remaining outside of the United States during wartime for the purpose of evading service in the armed forces.

<sup>24</sup>*See* *Perez v. Brownell*, 356 U.S. 44, 69-73 (1958) (dissenting opinion of Chief Justice Warren). Chief Justice Warren argued that *Mackenzie* should be strictly limited to its facts, which involved a temporary loss of citizenship during the

## C. JUDICIAL INTERVENTION

1. THE PRE-AFROYIM<sup>25</sup> CASES:  
CHALLENGING CONGRESS' POWER

Judicial doubt about Congressional power to expatriate first manifested itself at the Supreme Court level in *Perez v. Brownell*,<sup>26</sup> decided in 1958. A five-to-four majority upheld the constitutionality of a section of the 1940 Act which provided for loss of nationality by a citizen who votes in a foreign election.<sup>27</sup> Justice Frankfurter, after reviewing the history of "statutory expatriation," concluded that the provision was merely an exercise of the government's inherent power to regulate foreign affairs.<sup>28</sup> He did concede a "rational nexus" limitation on such power, but had little difficulty in finding that the "means, withdrawal of citizenship, [was] reasonably calculated to effect the end . . . the avoidance of embarrassment in the conduct of our foreign relations attributable to voting by American citizens in foreign political elections."<sup>29</sup> The majority opinion in *Perez*, then, was basically a reaffirmation of the *Mackenzie* rationale.<sup>30</sup>

The real significance of *Perez*, however, is found in Chief Justice Warren's dissent.<sup>31</sup> He directly challenged the fundamental source of the government's power to expatriate. He argued that since citizens are the very basis of our system of government, the state is "without power to sever the relationship that gives rise to its existence."<sup>32</sup> Citizenship is a fundamental right crystallized by the Citizenship Clause of the Fourteenth Amendment.<sup>33</sup> Congress could not take away United States citizenship to implement its general regulatory powers; it could merely give formal recognition to the individual's own voluntary surrender of his citizenship.<sup>34</sup> By making voting in a foreign election an act of expatriation, Congress had gone beyond its limited authority in this area.<sup>35</sup>

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time an American woman is married to a foreigner. "Her citizenship was not taken away; it was held in abeyance." *Id.* at 70.

<sup>25</sup> *Afroyim v. Rusk*, 387 U.S. 253 (1967).

<sup>26</sup> 356 U.S. 44 (1958).

<sup>27</sup> Ch. 876, § 401(e), 54 Stat. 1137, *as amended*, 8 U.S.C. § 1481(a)(5) (1970).

<sup>28</sup> 356 U.S. at 57.

<sup>29</sup> 356 U.S. at 60.

<sup>30</sup> 239 U.S. at 311-12. *See* text accompanying notes 15-20, *supra*.

<sup>31</sup> 356 U.S. at 62. Warren was joined by Justices Black and Douglas. Douglas also wrote a separate dissent, in which Black concurred. *Id.* at 79. Justice Whittaker wrote a separate dissent in which he agreed with the majority's premise that Congress had the power to expatriate in order to regulate foreign affairs but felt the statute in question failed the "rational nexus" test. *Id.* at 84-85.

<sup>32</sup> *Id.* at 64.

<sup>33</sup> *Id.* at 65-66.

<sup>34</sup> *Id.* at 68-69.

<sup>35</sup> *Id.* at 76. "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." *Id.*

After Warren's dissent in *Perez*, the *Mackenzie* rationale, which had remained virtually unchallenged for over forty years, no longer appeared unassailable as the fortress of statutory expatriation. Over a ten-year period the Supreme Court repeatedly struck down specific provisions of the expatriation statutes.<sup>36</sup> While not directly addressing the fundamental issue of Congressional power, these decisions set the stage for the eventual vindication of the *Perez* dissenters in *Afroyim v. Rusk*.<sup>37</sup>

## 2. AFROYIM: THE NO-POWER VIEW

In *Afroyim v. Rusk*, the Supreme Court faced precisely the same issue it had supposedly resolved nine years earlier in *Perez*. Afroyim was refused renewal of his passport on the ground that he had lost his citizenship by voting in an election in Israel. This time the Court held, in another 5-4 decision, that Congress had no general power, express or implied, to take away a person's citizenship without his assent. Justice Black, writing for the majority and echoing many of the ideas in the *Perez* dissent,<sup>38</sup> relied mainly on the Citizenship Clause of the Fourteenth Amendment. He examined its legislative history and the language itself and concluded that its purpose was to put expatriation beyond the reach of Congress:

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, whatever his creed, color, or race. Our holding does no more than to give 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>39</sup>

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<sup>36</sup>*Trop v. Dulles*, 356 U.S. 86 (1958), decided the same day as *Perez*, invalidated 5 to 4 the statutory provision for expatriation upon conviction for desertion during time of war. The majority found the provision to be a cruel and unusual punishment in violation of the Eighth Amendment's prohibition. Justice Brennan, the swing vote, adhered to his position in *Perez* that Congress had the power to expatriate but found that this particular statute bore no rational relation to Congress' war power. 356 U.S. at 114.

*Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), saw the demise of another provision: loss of nationality by remaining outside the United States during wartime to avoid service in the military. Justice Goldberg, writing for another 5 to 4 majority, reasoned that this provision was penal in character and thus subject to the procedural safeguards of the Fifth and Sixth Amendments.

*Schneider v. Rusk*, 377 U.S. 163 (1964), struck down § 352(a)(1) of the Immigration and Nationality Act of 1952, which expatriated a naturalized citizen who resided continuously for three years in the state of his former nationality. The statute was found to have discriminated unjustifiably against naturalized citizens in violation of the Due Process Clause of the Fifth Amendment.

<sup>37</sup>387 U.S. 253 (1967).

<sup>38</sup>At one point in the opinion Black stated: "[W]e agree with the Chief Justice's dissent in the *Perez* case that the Government is without power to rob a citizen of his citizenship . . . ." *Id.* at 267.

<sup>39</sup>*Id.* at 268.

Harlan's dissent<sup>40</sup> first attacked the majority's historical analysis of the Fourteenth Amendment. The Citizenship Clause was meant to be definitional, not prohibitory, in character; it merely declared to whom citizenship initially attaches. Its purposes were to overturn the *Dred Scott* decision and to create a basis for the primacy of federal citizenship over state citizenship.<sup>41</sup> It was in no way intended to prohibit Congress from expatriating unwilling citizens. Nor could such a purpose be gleaned from the language itself.<sup>42</sup> In addition, Harlan noted the fundamental ambiguity created by the majority's failure to specify what it meant by "assent":

[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 in this area of the law.<sup>43</sup>

This criticism was prophetic. Since *Afroyim* dealt only with the specific act of voting in a foreign election, questions soon arose as to its effect on the validity of other expatriation provisions. To provide administrative guidance for both the Department of State and the Immigration and Naturalization Service, Attorney General Ramsey Clark issued a Statement of Interpretation<sup>44</sup> concerning *Afroyim*. To determine what the Court meant by "voluntary relinquishment" Clark looked to earlier Supreme Court cases, notably Chief Justice Warren's dissent in *Perez*.<sup>45</sup> He concluded that *Afroyim* did not confine the term to include only a written renunciation. Other acts could be made the basis for expatriation if they "reasonably manifest an individual's transfer or abandonment of allegiance to the United States . . . ." <sup>46</sup> He noted also that under the statute if the individual raises the issue of intent, the burden of proof is on the party assert-

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<sup>40</sup>*Id.*

<sup>41</sup>*Id.* at 284. See text accompanying notes 6-9, *supra*.

<sup>42</sup>"The construction now placed on the Citizenship Clause rests, in the last analysis, simply on the Court's *ipse dixit*, evincing little more, it is quite apparent, than the present majority's own distaste for the expatriation power." *Id.* at 293.

<sup>43</sup>*Id.* at 269 n. 1.

<sup>44</sup>42 OP. ATT'Y. GEN. 34 (1969).

<sup>45</sup>The Chief Justice conceded: "It has long been recognized that citizenship may not only be voluntarily renounced through exercise of the right of expatriation but also by other actions in derogation of undivided allegiance to this country. While the essential qualities of the citizen-state relationship under our Constitution preclude the exercise of governmental power to divest United States citizenship, the establishment of that relationship did not impair the principle that conduct of a citizen showing a voluntary transfer of allegiance is an abandonment of citizenship." 356 U.S. at 68.

<sup>46</sup>42 OP. ATT'Y. GEN. 34 at 4.

ing that expatriation has occurred.<sup>47</sup> He added: "*Afroyim* suggests that this burden is not easily satisfied by the Government."<sup>48</sup>

*Afroyim* thus represents the culmination of the past ambiguity in expatriation law and the source of its present confusion. On the one hand it appeared to settle the basic issue of congressional power to expatriate by directly overruling *Perez*. On the other it generated the more practical question of what constitutes "voluntary renunciation." Moreover, the very narrowness of the margin of decision gave rise to doubts as to its real impact. A change in the Court's composition could easily lead to still another reversal in its position. Meanwhile, the Attorney General's interpretation, in an attempt to simplify the burden on those who had to administer the law, struck a middle ground between the polar extremes of *Perez* and *Afroyim*. In this unstable context, then, the post-*Afroyim* judiciary has had to function.

## II. MANIFESTATIONS OF THE CONFUSION: THE AFTERMATH OF AFROYIM

An examination of the expatriation cases decided since *Afroyim* confirms the suspicion that the central issue in this area of the law, *i.e.*, whether Congress can divest an unwilling American citizen of his nationality, remains unsettled. The courts in their efforts to harmonize their own results with the holding in *Afroyim* have adopted tactics of questionable validity.

### A. *ROGERS V. BELLEI*: DISTINGUISHING AWAY THE ISSUE

One effect of the *Afroyim* decision is that the courts have resorted to technical and largely artificial constructs in an attempt to avoid its absolutist impact. The most striking example of this phenomenon is found in *Rogers v. Bellei*,<sup>49</sup> the only expatriation case decided by the Supreme Court since *Afroyim*. Plaintiff Bellei was born in Italy to an American mother and an Italian father, thereby becoming a citizen of the United States as well as Italy.<sup>50</sup> He subsequently lost his American citizenship because he failed to meet the statutory requirement of five years residence in the United States

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<sup>47</sup>8 U.S.C. § 1481(c) (1970) (*originally enacted as Act of September 26, 1961, Pub. L. No. 87-301, § 19, 75 Stat. 656*).

<sup>48</sup>42 OP. ATT'Y. GEN. 34 at 4. Shortly after the Attorney General's Statement of Interpretation was published, the Department of State and the Immigration and Naturalization Service agreed on certain interpretive guidelines, based upon but more specific than the Attorney General's opinion. Department of State Circular Airgram CA-2855, May 16, 1969.

<sup>49</sup>401 U.S. 815 (1971).

<sup>50</sup>8 U.S.C. § 1401(a)(7) (1970).

between the ages of 14 and 28.<sup>51</sup> His challenge to the constitutional validity of the statute was unsuccessful. The Court, in another five-to-four decision, reasoned that since he was not born or naturalized in the United States he was not a "Fourteenth-Amendment-first-sentence citizen."<sup>52</sup> Hence, Bellei was taken out from under the *Afroyim* rule, which was premised on the Fourteenth Amendment's Citizenship Clause. After clearing that obstacle the Court had little difficulty in applying the rational basis test to the statute in question. It found that the "solution to the dual nationality dilemma provided by the Congress by way of required residence surely is not unreasonable."<sup>53</sup>

Justice Black, who had written the majority opinion in *Afroyim*, responded with a predictably vigorous dissent.<sup>54</sup> He criticized the Court's "narrow and extraordinarily technical reading of the Fourteenth Amendment," and argued that the phrase "in the United States" was "meant to be understood in two somewhat different senses: one can become a citizen of this country by being born *within* it or by being naturalized *into* it."<sup>55</sup> The actual place of naturalization, whether within or outside the physical bounds of the United States, is of no legal significance. The Citizenship Clause, in other words, is non-territorial. Black's most telling criticism of the majority opinion, though, was that it sanctions a form of discrimination against a certain class of citizens, a practice condemned in *Schneider v. Rusk*.<sup>56</sup> This unfortunate result stemmed from an effort to reconcile two conflicting sentiments. The majority sensed that *Afroyim* had perhaps gone too far in completely divesting Congress of the power to expatriate, yet did not want the Court to appear so vacillating as to overrule itself once again on the strength of another bare majority. The Court thus sought to distinguish *Afroyim* by declaring Bellei a non-Fourteenth Amendment citizen. In the process it created a second-class citizenship for those who

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<sup>51</sup> 8 U.S.C. § 1401(b) (1970).

<sup>52</sup> 401 U.S. at 827.

<sup>53</sup> *Id.* at 833. The Court also reasoned that since Congress may impose a condition precedent on the granting of citizenship status (naturalization), it should also be able to impose a condition subsequent. *Id.* at 834-36. Given the nature of the citizenship right (*see* notes 95-103 and accompanying text, *infra*), it is doubtful whether this technical contract analogy is appropriate. For a discussion of whether Congress has the power to grant such a conditional citizenship, *see* Comment, *The Conditional Status of Derivative Citizenship*, 9 U.C.D. L. REV. (1975).

<sup>54</sup> *Id.* at 836. Alleging that the Court had in effect overruled *Afroyim*, Black declared: "This precious Fourteenth Amendment American citizenship should not be blown around by every passing political wind that changes the composition of this Court." *Id.* at 837.

<sup>55</sup> *Id.* at 843 (emphasis in original).

<sup>56</sup> 377 U.S. 163 (1964). *See* note 36, *supra*.

happened to be born to an American parent while abroad.<sup>57</sup>

B. *JOLLEY V. INS*:  
“NARROWING” THE ISSUE

Another example of the confusion generated by *Afroyim* is the Fifth Circuit's decision in *Jolley v. Immigration and Naturalization Service*.<sup>58</sup> Petitioner Jolley had fled to Canada to avoid the draft. While there, he went before the United States consul in Toronto and formally renounced his United States citizenship. When he subsequently entered this country, the United States attempted to deport him as an alien excludable at the time of entry. Jolley argued that his renunciation had been made under duress of the Selective Service laws.<sup>59</sup> The court conceded that *Afroyim* had left open the question of when a citizen “voluntarily relinquishes” his citizenship. The *Jolley* case did not pose the problem of implied renunciation, however, because “Jolley's renunciation on its face was unequivocal. The question simply becomes whether or not his renunciation was free and uncoerced.”<sup>60</sup> After thus defining the issue, the court held that as a matter of law, Jolley's renunciation was a product of personal choice and that the mere difficulty of that choice did not amount to duress.<sup>61</sup>

Judge Rives in his dissent argued that Jolley had presented a “genuine issue of material fact” as to his nationality and that the case should therefore be transferred to a district court for a factual determination of that issue:<sup>62</sup>

The majority treats the issue too narrowly when it inquires simply whether petitioner's formal renunciation was made under duress. That attaches undue importance to the Act of Congress providing for loss of nationality by making a formal renunciation, whereas the vital question is the intention on the part of the citizen himself.<sup>63</sup>

Judge Rives thought the court should have given Jolley the opportunity to show that in light of all the circumstances surrounding his act

<sup>57</sup>In response to *Bellei*, Congress made the residency requirement less onerous, reducing the required period of residence from five to two years. Act of October 27, 1972, Pub. L. No. 92-584, § §1, 3, 86 Stat. 1298, amending 8 U.S.C. § 1401 (1970) (codified at 8 U.S.C. § 1401(b) (Supp. 1975)). But the change is one of degree only; the discrimination still remains.

<sup>58</sup>441 F.2d 1245 (5th Cir. 1971), cert. denied, 404 U.S. 946 (1971).

<sup>59</sup>Jolley had unsuccessfully appealed his deportation order to the Board of Immigration Appeals pursuant to 8 C.F.R. § 242.21 (1971). He then sought review in the Court of Appeals under Immigration and Nationality Act § 106(a), 8 U.S.C. § 1105(a) (1970).

<sup>60</sup>441 F.2d at 1249-50 n. 9.

<sup>61</sup>*Id.* at 1250. “Dislike for the law does not in and of itself compose coercion; subjective detestation cannot be metamorphosed into duress.” *Id.*

<sup>62</sup>See Immigration and Nationality Act, § 106(a)(5), 8 U.S.C. § 1105(a)(5) (1970).

<sup>63</sup>441 F.2d at 1256.

of renunciation his "paramount intention" was to avoid being drafted rather than to relinquish his citizenship.<sup>64</sup>

The Court thus found itself split along the lines predicted by Harlan's dissent in *Afroyim*.<sup>65</sup> In effect, the majority held that specific subjective intent is not a necessary element of "voluntary relinquishment"; the dissent found such intent to be determinative.<sup>66</sup> To the extent that the majority opinion focused only upon the act of renunciation itself, it is inconsistent with the tenor of *Afroyim*. Although the act itself was "unequivocal," the post-*Afroyim* administrative guidelines suggest that the act is only one factor among all the circumstances to be considered in determining the individual's subjective intent.<sup>67</sup> It is not so much the result of the case that contravenes *Afroyim*; indeed, had the issue been decided as a factual matter, Jolley would likely have been found to have had the requisite subjective intent to abandon his citizenship. Rather, it is the court's method of analysis which seems to defy the spirit, if not the letter, of *Afroyim*. Whether in fact the majority in *Jolley* misread *Afroyim* or not, the mere fact that the court became bogged down in a semantic quagmire indicates that the meaning of "voluntary relinquishment" is far from clear.

### C. TWO RECENT CASES: ASSUMING THE ISSUE

A third type of judicial reaction to *Afroyim* is found in the two most recent expatriation decisions, *King v. Rogers*<sup>68</sup> and *Peter v. Secretary of State*.<sup>69</sup> Both cases, in tacit recognition of the ambiguity inherent in *Afroyim*, have expressly avoided resolving the voluntariness issue by assuming that specific intent is required for expatriation and confining themselves to the narrower question of whether the government had met its burden of proof regarding such intent. In *King*, the plaintiff had been born in the United States. He later voluntarily became a naturalized citizen of Great Britain. He asserted that he did this only to acquire a British passport to facilitate travel in connection with his job in Singapore. He also became a citizen of Israel by operation of the laws of that country. King contended that he never intended to give up his American nationality and that he had a right to use all three citizenships. The court began its analysis by stating: "We assume, without deciding, that specific

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<sup>64</sup>*Id.*

<sup>65</sup>See text accompanying note 43, *supra*.

<sup>66</sup>For a more thorough analysis of the *Jolley* decision, see Note, *Formal Renunciation of United States Citizenship to Avoid Criminal Liability Under Selective Service Law Constitutes a Voluntary Relinquishment of Nationality Within the Meaning of Afroyim v. Rusk*, 71 COLUM. L. REV. 1532 (1971).

<sup>67</sup>See notes 44-48 and accompanying text, *supra*.

<sup>68</sup>463 F.2d 1188 (9th Cir. 1972).

<sup>69</sup>347 F. Supp. 1035 (D.D.C. 1972).

subjective intent to renounce United States citizenship is required for expatriation."<sup>70</sup> The court then discussed a variety of documentary evidence pointing to acts which were inconsistent with a desire to retain United States citizenship or which affirmatively indicated a decision to accept foreign nationality. It concluded that the Secretary of State had sufficiently proven subjective intent.<sup>71</sup>

*Peter v. Secretary of State*<sup>72</sup> is another example of a court pointedly avoiding the constitutional issue in *Afroyim*. The plaintiff was a naturalized American citizen who later married a Hungarian citizen, thereby also becoming a Hungarian national. After she accepted a position with the Hungarian Radio in Budapest, the State Department notified her that she had been expatriated.<sup>73</sup> The court realized that the statute in question, to be constitutional, would have to be applied in a manner consistent with the *Afroyim* decision. The court quickly disposed of this issue, however, by "[a]ssuming arguendo that the Attorney General's Statement of Interpretation of *Afroyim* [is] correct, and that as so construed section 349 (a) (4) (A) is constitutional . . ."<sup>74</sup> Again, the sole remaining issue was whether the Secretary of State had proved voluntary relinquishment. Although the court had some difficulty in articulating what quantum of proof was actually required,<sup>75</sup> it declared that the government's evidence of voluntary renunciation was, "at best, equivocal," and concluded that the "defendant has not sustained his burden of proof that plaintiff has voluntarily expatriated herself."<sup>76</sup>

#### D. THE PRESENT STATUS: UNCERTAINTY

The judicial response to *Afroyim*, then, indicates a continuing state of confusion concerning expatriation law. In *Bellei*, five members of the Supreme Court endorsed the expatriation of a derivative citizen against his will in spite of *Afroyim*'s explicit prohibition of involuntary expatriation. The *Jolley* court confined itself to ruling

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<sup>70</sup>463 F.2d at 1189.

<sup>71</sup>*Id.* at 1190.

<sup>72</sup>347 F. Supp. 1035 (D.D.C. 1972). *Peter* is the most recent expatriation case as of this writing.

<sup>73</sup>Immigration and Nationality Act, § 349(a)(A), 8 U.S.C. § 1481(a)(4)(A) (1970).

<sup>74</sup>347 F. Supp. at 1038.

<sup>75</sup>At one point the court invoked the "clear, convincing and unequivocal evidence" standard of a pre-*Afroyim* case, *Nishikawa v. Dulles*, 356 U.S. 129, 135 (1958). *Peter v. Secretary of State*, 347 F. Supp. at 1038. Then the court apparently found a standard, however nebulous, "imposed by the Attorney General's Statement of Interpretation — 'a burden [on the government] not easily satisfied . . .'" *Id.* at 1039. According to the statute, the government must establish loss of nationality by a preponderance of the evidence. 8 U.S.C. § 1481(c) (1970). This confusion as to quantum of proof is also the result of efforts to interpret *Afroyim*.

<sup>76</sup>347 F. Supp. at 1039.

on whether the expatriative act itself was voluntary, despite the emphasis in *Afroyim* on the citizen's underlying intent in performing the act. And in the two most recent cases the courts have expressly avoided the constitutional issue and concentrated solely on the narrower burden of proof question. These four cases, while painstakingly trying not to tread on *Afroyim*, have nevertheless collectively blunted its impact. The judicial pendulum, having reached the end of its arc in *Afroyim*, seems to be swinging back in the direction of *Perez*.

This confused status of legal precedent has weakened an already dangerously emaciated expatriation statute. To uphold its validity, courts have resorted to "following" Attorney General Clark's administrative guidelines instead of the *Afroyim* decision itself.<sup>77</sup> Some commentators have expressed doubt that any of its provisions, short of explicit renunciation, are constitutionally valid in light of *Afroyim*.<sup>78</sup> That this state of judicial and statutory flux has resulted in a problem of significance is evidenced by two recent examples. First, there was our embarrassment over the status of United States citizens serving in the Israeli army during the Middle East conflicts. By not forcibly expatriating these citizens, the United States was seen, by the Arab states at least, as condoning such participation.<sup>79</sup> A second example was the difficulty with the application of President Ford's amnesty program to those war resisters who had become citizens of another country without formally renouncing their United States citizenship. It was not clear whether these men had become "aliens," so as to be excluded from the amnesty program.<sup>80</sup>

Hence, expatriation in the United States is a concept riddled with judicial and statutory uncertainty. It is indeed a concept in need of clarification.

### III. AN APPROACH TOWARD CLARIFICATION

#### A. THE CONSTITUTIONAL ISSUE: CONGRESSIONAL POWER

Does Congress have the power to take away a person's citizenship without his assent? The judicial aftermath of *Afroyim* indicates that

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<sup>77</sup>See, e.g., *Peter v. Secretary of State*, 347 F. Supp. 1035 (D.D.C. 1972), and text accompanying note 74, *supra*.

<sup>78</sup>See, e.g., Marsh, *The Supreme Court and the Power of Congress to Expatriate — From the Objective to the Subjective Test of Voluntariness: A Shift in Pre-dominance*, 22 Sw. L.J. 466, 477-81 (1968).

<sup>79</sup>*N.Y. Times*, Oct. 21, 1969, § 1, at 15, col. 1. See Dionisopoulos, *Afroyim v. Rusk: The Evolution, Uncertainty and Implications of a Constitutional Principle*, 55 MINN. L. REV. 235, 254-56 (1970).

<sup>80</sup>*N.Y. Times*, Sept. 20, 1974, § 1, at 17, col. 1. The President had declared that his program would not apply to a person who was precluded from re-entering the United States under 8 U.S.C. § 1182(a)(22) (1970), which refers to any alien

the Supreme Court has yet to provide a satisfactory answer to this question. Why has the resolution of this issue been so elusive? There are two major reasons. First, the conceptual distinction between expatriation and denationalization has been blurred. The merging of these two concepts has precluded a clear understanding of the precise issue involved. Second, reliance on the Constitution has been either unrealistic or inexact. The judiciary has not clearly articulated the Constitution's proper role in resolving the expatriation issue. An appreciation of these two sources of confusion is essential to clarifying this muddled area of the law.

### 1. CONCEPTUAL REFINEMENT: THE FIRST STEP

The first step in clarifying the concept of expatriation is to take a fresh look at its meaning, unfettered by past judicial categorizations. Expatriation has traditionally been thought of as a means by which a citizen voluntarily casts off his nationality when, for whatever personal reasons, it becomes too heavy a burden. The role of the state has been limited to recognizing, or refusing to recognize, the exercise of that option.<sup>81</sup> This is contrasted with denationalization, a procedure more akin historically to banishment or exile, whereby the government, for whatever official reasons, determines that one of its citizens no longer deserves that status and thus forcibly expels him.<sup>82</sup> The essence of expatriation is the desire of the individual, whereas the essence of denationalization is the desire of the state.

Viewed in this light, the loss of citizenship issue comes into sharper focus. The phrase "involuntary expatriation" becomes a contradiction in terms. The state cannot expatriate a citizen. Only the citizen can expatriate himself. The state can merely regulate the exercise of that right. This analysis seems simple — almost self-evident. But it is a necessary first step in resolving the continuing dispute over expatriation and must not be forgotten. The blurring of the analytical distinction has enabled the government to accomplish denationalization under the guise of expatriation. By resorting to an artificial construct, the doctrine of "imputed consent,"<sup>83</sup> the state appears to be recognizing the citizen's wishes when it is actually furthering its own interests. Once this rationalization is exposed, the inconsistency inherent in the government's seductive attempt to justify "expatriation" is manifest. The real issue then stands out clearly. An inquiry

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who has left or remained outside the country in order to evade military service during wartime or national emergency.

<sup>81</sup> 8 WHITEMAN, DIGEST OF INTERNATIONAL LAW, 99-101 (1967) [hereinafter cited as WHITEMAN].

<sup>82</sup> *Id.* at 98-99. "The term 'denationalization' usually denotes the deprivation of nationality by unilateral fiat of the State the nationality of which is terminated. It is thus to be distinguished from renunciation or expatriation." *Id.* at 98.

<sup>83</sup> See note 20, and accompanying text, *supra*.

into the power of Congress to take away a person's citizenship without his assent is an examination, not of the power to expatriate, but rather of the power to denationalize.

## 2. THE ROLE OF THE CONSTITUTION

After isolating the proper issue, the first step in resolving it is to determine the precise role of the Constitution in expatriation law. Failure to do this in the past is the second major cause of the present confusion. The Supreme Court, by its very nature, seeks to find either a grant or a prohibition of all governmental powers in the Constitution.<sup>84</sup> But in looking to the Constitution for a source of the denationalization power, the Court has consulted an oracle that does not speak. Our Constitution says little about citizenship, and nothing about loss of citizenship. The Court's attempts to divine a conclusive message from this silence have led to highly subjective and inevitably inconsistent results.

For example, the majority in *Afroyim* felt compelled to base its decision on the Fourteenth Amendment's Citizenship Clause.<sup>85</sup> As we have seen, however, the basic purpose of the Citizenship Clause was to protect the newly acquired citizenship status of the emancipated slaves.<sup>86</sup> The Court nevertheless concluded that the amendment was meant to deny Congress the expatriation power. But how could the Court in 1967 presume such an "intent," formed over a century earlier, when the Fourteenth Amendment's framers did not even mean to deal with the problem of expatriation in the first place? Justice Black, indeed, had to strain to wring such a sweeping prohibition out of the Citizenship Clause. His effort amounts to little more than a self-serving extrapolation.<sup>87</sup>

On the other hand, the *Perez* doctrine, namely that denationalization is merely an exercise of Congress' power to regulate foreign affairs,<sup>88</sup> has an equally doubtful genesis in the Constitution. The concept that the federal government's power over foreign affairs is an inherent attribute of sovereignty, entirely distinct from any powers mentioned in the Constitution, was introduced by Justice Sutherland in 1936.<sup>89</sup> Although *Perez* does mention the doctrine of inherent

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<sup>84</sup> Roche, *supra* note 3, at 327.

<sup>85</sup> See text accompanying note 39, *supra*.

<sup>86</sup> *Afroyim v. Rusk*, 387 U.S. 253, 294-95 (1967) (dissenting opinion of Mr. Justice Harlan). See also text accompanying note 41, *supra*.

<sup>87</sup> See note 42, *supra*.

<sup>88</sup> See text accompanying note 28, *supra*.

<sup>89</sup> *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). A less explicit version of this doctrine was used to justify an expatriation statute in *Mackenzie v. Hare*, 239 U.S. 299, 311-12 (1915). See text accompanying note 17, *supra*. The doctrine has never been fully accepted, nor has it been seriously challenged. See HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION*, Ch. 1, (1972) [hereinafter cited as HENKIN].

powers,<sup>90</sup> it also appears to rely on the Necessary and Proper Clause<sup>91</sup> as a source of the denationalization power.<sup>92</sup> If so, this reliance is misplaced because the Necessary and Proper Clause refers only to powers explicitly delegated to Congress in the Constitution.<sup>93</sup> Even if *Perez* is based solely on the inherent power of foreign affairs, however, the point remains: the source of such power is extraconstitutional. In other words, the power to denationalize is derived, not from the Constitution, but from the concept of a nation-state.

If the Constitution serves neither as an absolute prohibition against denationalization nor as a clear-cut source of such power, how is it relevant at all? The answer is that all powers exercised by the federal government, regardless of their source, are limited by the Constitution's safeguards of individual rights. Not even the exercise of national sovereignty is sacrosanct; if it impinges on an individual's constitutional rights it is subject to the same judicial scrutiny as any other exercise of governmental power.<sup>94</sup> In sum, the Constitution provides no specific peg on which to hang the grant or denial of the power to denationalize. Rather, its general safeguards serve to limit the exercise of that power.

### 3. CITIZENSHIP AS A CONSTITUTIONAL RIGHT

The conceptual separation between expatriation and denationalization has crystallized the relevant issue. The realization that the Constitution neither grants nor denies the power of denationalization has suggested a more realistic role for that document in resolving the issue. Thus, the issue is one of denationalization, and the role of the Constitution is one of limitation. These conclusions are important because they set the analytical stage for what is really the central inquiry: when does the exercise of the denationalization power exceed the limits of the Constitution?

The answer to that question, in turn, depends on the nature of the

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<sup>90</sup>The majority opinion cites both the *Curtiss-Wright* and *Mackenzie* cases (see note 89, *supra*). 356 U.S. at 57.

<sup>91</sup>"[The Congress shall have Power] To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ." U.S. CONST., art. I, § 8, cl. 18.

<sup>92</sup>"The question must finally be faced whether, given the power to attach some sort of consequence to voting in a foreign political election, Congress, acting under the Necessary and Proper Clause, . . . could attach loss of nationality to it." 356 U.S. at 60.

<sup>93</sup>See note 91, *supra*.

<sup>94</sup>HENKIN, *supra* note 89, at 252-54. The Court in *Perez* explicitly recognized this point: "Broad as the power in the National Government to regulate foreign affairs must necessarily be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations." 356 U.S. at 58.

constitutional right, if any, violated by the exercise of the denationalization power. The effect on the individual is obviously loss of citizenship. The right of citizenship is undoubtedly a constitutional right. It is specifically granted by the first sentence of the Fourteenth Amendment.<sup>95</sup> Moreover, the right of citizenship is in many ways unique. Chief Justice Warren recognized this in his *Perez* dissent:

Citizenship is man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf. His very existence is at the sufferance of the state within whose borders he happens to be. In this country the expatriate would presumably enjoy, at most, only the limited rights and privileges of aliens, and like the alien he might even be subject to deportation and thereby deprived of the right to assert any rights.<sup>96</sup>

The seminal nature of this citizenship right is significant. A statute that can deprive an individual of such a right is subject to judicial review of the highest intensity. The Supreme Court has applied the strict scrutiny standard when the right being threatened is one which is necessary to assure access to or effective participation in the political process. The First Amendment freedoms of speech and association,<sup>97</sup> for instance, help to ensure the very existence of a democratic process in which diversity of opinion plays a crucial role. The right to vote<sup>98</sup> is also an essential foundational right in our society. These rights have a special status because they give our form of government its viability.<sup>99</sup>

Similarly, the right of citizenship is, to use the famous phrase in *Yick Wo v. Hopkins*, "preservative of all rights."<sup>100</sup> A fundamental assumption underlying our form of government is that ours is a government of the people. This country's sovereignty inheres in its citizens. Extinguishment of citizenship by unilateral fiat thus becomes a self-inflicted and potentially mortal wound; it pierces the very essence of the state's existence. It was in this context that Chief Justice Warren questioned the government's "power to sever the rela-

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<sup>95</sup> Although the Citizenship Clause cannot be interpreted as an absolute denial of the power to take away citizenship (*see* text accompanying note 41, *supra*), it can be reasonably viewed as an automatic grant of citizenship to all those born or naturalized in the United States.

<sup>96</sup> 356 U.S. at 64-65 (emphasis in original; footnotes omitted).

<sup>97</sup> *See, e.g., NAACP v. Button*, 371 U.S. 415, 438 (1963); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

<sup>98</sup> *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Dunn v. Blumstein*, 405 U.S. 330, 336-37 (1972).

<sup>99</sup> *See Goodpaster, The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973).

<sup>100</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

tionship that gives rise to its existence.”<sup>101</sup> The power to terminate citizenship, then, like the power to impinge on free speech and association or the power to deny the vote, carries with it a serious threat to the survival of democracy itself. Moreover, since citizenship is generally a qualification for voting in this country,<sup>102</sup> the right of citizenship effectively includes within it the right to vote. *A fortiori*, citizenship must be a “fundamental” right. For these reasons any denial of the citizenship right should be subject to the Supreme Court’s strict scrutiny.<sup>103</sup>

#### 4. DENATIONALIZATION AND THE STRICT SCRUTINY TEST

To satisfy the strict scrutiny test, a denationalization statute must be “necessary to promote a *compelling* governmental interest.”<sup>104</sup> This statement of the test actually embodies two parts. First, the statute must further a very substantial governmental interest. Second, in pursuing that interest, the government cannot choose means which unnecessarily impinge on constitutionally protected rights.<sup>105</sup>

To apply the first part of the test it is necessary to determine what interests the government is pursuing when it exercises the power to denationalize. Preventing interference with the conduct of foreign policy has served as the major justification for the denationalization power in the past.<sup>106</sup> Minimizing conflict and embarrassment resulting from acts of United States citizens abroad is undeniably an important governmental interest. To the extent that it is in fact the

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<sup>101</sup> *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (dissenting opinion of Chief Justice Warren).

<sup>102</sup> *WHITEMAN*, *supra* note 81, at 383. Upon denationalization a person’s status would change from citizen to alien. Although the equal protection guarantee of the Constitution applies generally to aliens (*Truax v. Raich*, 239 U.S. 33, 39 (1915); *Graham v. Richardson*, 403 U.S. 365, 371 (1971)), the Court has recently suggested that they can be denied the right to vote. *Sugarman v. Dougall*, 413 U.S. 634, 648-49 (1973).

<sup>103</sup> Even if the right of citizenship could not be deemed “fundamental” in comparison with First Amendment or voting rights, its deprivation might still be subject to strict scrutiny by virtue of the fact that it is a constitutionally-granted right. This alternate approach to fundamental rights is illustrated in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), which involved the right to education. The Court said that the key to discovering whether such a right is “fundamental” is to assess whether it is “explicitly or implicitly guaranteed by the Constitution.” *Id.* at 33-34. Citizenship is a right so guaranteed.

<sup>104</sup> *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (emphasis in original).

<sup>105</sup> This second prong of the test has been expressed in a variety of ways. Statutes affecting constitutional rights must be drawn with “precision,” *NAACP v. Button*, 371 U.S. 415, 438 (1963), and must be “tailored” to serve their legitimate objectives. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969). The state must choose “less drastic means.” *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

<sup>106</sup> *Mackenzie v. Hare*, 239 U.S. 299, 311-12 (1915); *Kawakita v. U.S.*, 343 U.S. 717, 733-36 (1952); *Perez v. Brownell*, 356 U.S. 44, 57-60 (1958).

government's objective in taking away a person's citizenship, it satisfies the first prong of the test.

It is sometimes difficult, however, to isolate that particular objective from other, less legitimate ones. All too often the government's denationalization provisions have been dictated by an underlying desire to ensure the undiluted allegiance of its citizens.<sup>107</sup> Laudable as this goal might be in other contexts, it has no place in a loss-of-nationality determination. It makes denationalization a form of punishment for being less than a model citizen. The Court has already declared punishment to be an unconstitutional objective of denationalization.<sup>108</sup> Moreover, it amounts to state-enforced patriotism, which has no place in our society. In other words, it is important to examine carefully what governmental interest is really being pursued by a denationalization provision. Some interests are compelling, others are not.

But even if denationalization clears the first hurdle by furthering a compelling governmental interest, it still faces the second half of the strict scrutiny test: necessity. Here the denationalization power runs into serious difficulty. The goal of minimizing United States embarrassment caused by acts of its citizens abroad can be accomplished by means less drastic than termination of citizenship. An alternate method is simply to withdraw the citizen's right to diplomatic protection. The State Department has used this sanction for many years.<sup>109</sup> In fact, the Supreme Court itself has suggested such an alternative to denationalization.<sup>110</sup> It provides the government with an opportunity to disassociate itself officially from the undesirable

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<sup>107</sup> The courts have often recognized and even implicitly endorsed this objective of denationalization. For instance, in *Perez* after stating that loss of citizenship for voting in a foreign election was justified by its potential embarrassment to our government, the Court added: "Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship." 356 U.S. at 60-61. Part of the problem arises from the conceptual merging of expatriation and denationalization. The state is denationalizing the individual under the guise of determining for him where his true "allegiance" really lies.

<sup>108</sup> "Citizenship is not a license that expires upon misbehavior . . . [C]itizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be." *Trop v. Dulles*, 356 U.S. 86, 92-93 (1958). See note 36, *supra*. To the extent that the government wants to deter certain acts by punishment, it can incorporate them into its already existing penal system.

<sup>109</sup> BORCHARD, *supra* note 13, at § § 379, 380 (1915). See Comment, *Expatriation: Constitutional and Non-Constitutional Citizenship*, 60 CALIF. L. REV. 1587, 1609-13 (1972).

<sup>110</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 184-85 (1963). The government's power to afford a citizen diplomatic protection abroad is largely discretionary. See BORCHARD, *supra* note 13, at § 143.

acts of its citizens; yet the individual retains his citizenship and is free at all times to return to the United States.

Perhaps an example is the best way to illustrate that denationalization is not an indispensable part of the foreign affairs power. Serving in the armed forces of a foreign state is an act which, under current statutes, will result in denationalization.<sup>111</sup> Suppose the foreign state is engaged in a conflict toward which the United States is trying to maintain official neutrality. The citizen's act interferes with that foreign policy goal. The other country or countries to the conflict attribute the act of an American citizen to the United States government, whose acquiescence in the matter is seen as official endorsement. The solution to this problem lies in effectively communicating to those countries that the United States does not approve of the act of its citizen. To accomplish this official disassociation the Government need not strip the individual of his citizenship. Stripping him of his diplomatic protection will have the same communicative effect.

On the other hand, suppose a citizen enlists in a hostile army, one actually engaged in conflict with the United States. This situation also has a certain element of national embarrassment. But nothing this country can do to the individual will really detract from whatever propaganda the enemy gains from the situation. Nor would denationalization have any impact on the individual's effectiveness as an enemy soldier — the only direct injury to the United States. Hence, the real motive of the government would be to punish the individual for his treasonous act. Again, this is an impermissible function of the denationalization power. Societal retribution for a person's undesirable acts must be accomplished through the existing penal system.<sup>112</sup>

Another component of the necessity test under the strict scrutiny standard is that the statute, even if assumed necessary to achieve certain governmental interests, must be drawn with precision.<sup>113</sup> The government is not permitted to make the usual rough overinclusive and underinclusive statutory classifications which are allowed under a minimum rationality test. The effect of the individual's act must, with few exceptions, coincide with the evil Congress is trying to prevent. While this requirement does not preclude the exercise of the denationalization power in the abstract, it does, as a practical matter, make an acceptable denationalization statute exceptionally difficult to draft. For example, under the present statute, employment by the government of a foreign state will result in denationalization.<sup>114</sup> Some situations, especially if the person is serving in an important

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<sup>111</sup> 8 U.S.C. § 1481(a)(3) (1970).

<sup>112</sup> See note 108, *supra*.

<sup>113</sup> See note 105, *supra*.

<sup>114</sup> 8 U.S.C. § 1481(a)(4) (1970).

political post, could admittedly be detrimental to United States foreign policy. But employment in many lesser positions in a foreign government would conflict little if any with our foreign policy objectives. Moreover, what about the American businessman abroad who, instead of becoming a foreign governmental official, merely bribes one? His act could be very embarrassing to the United States Government, yet he would not lose his citizenship. Any such divergence between legislative classification and legislative goal would jeopardize the validity of a denationalization statute under a strict scrutiny standard.

It is doubtful, then, that an exercise of the denationalization power, at least as manifested under existing statutes, could satisfy the strict scrutiny standard. Even where the power is exercised pursuant to a legitimate foreign policy goal, it would still be an unnecessarily harsh means of achieving that goal. Furthermore, even if a less drastic alternative is not available, the statute could still be fatally imprecise.

In sum, the preceding analysis has focused solely upon the concept of denationalization. It has juxtaposed two effects of the exercise of such a power: first, the importance of the governmental interest served and, second, the nature of the individual right taken away. Underlying the analysis has been an effort to avoid the conceptual pitfalls that permeate this area of the law. An interesting aspect of this process, however, is that it has led to virtually the same result as in *Afroyim*. The *Afroyim* majority denied absolutely the power of denationalization. The present analysis admits the theoretical existence of such a power but concludes that its exercise would seldom, if ever, be constitutional.

#### B. THE STATUTORY ISSUE: DETERMINATION OF "ASSENT"

To arrive at the same result as *Afroyim*, however, is not to complete the analysis. For *Afroyim* left unanswered the second major question which this article posits: if a citizen's assent to loss of nationality is required, how is it to be determined? In answering this question a continued awareness of the distinction between expatriation and denationalization is essential. In talking about a citizen's assent we are dealing with expatriation, not denationalization. The focus now is on the will of the individual, not of the state. The state's role in expatriation is limited to recognition of the individual's choice. Viewed in this light, the issue becomes: which acts, when performed by an individual, sufficiently manifest an intent to abandon his nationality so as to enable the state to recognize his decision? To put it more simply, which acts are most likely to constitute genuine, and not fictitious, "voluntary relinquishment?"

Inherent risks, of course, attend the drawing of a line at any point on the continuum of various acts that might lead to expatriation.<sup>115</sup> Only an awareness of the state's limited role of recognition makes the task feasible. Three such acts appear to be compatible with that limited role: formal renunciation, naturalization in a foreign state, and taking a foreign oath of allegiance. At one end of the continuum is the act of formal renunciation, an act which almost invariably is performed with an intent to abandon nationality. The state therefore would nearly always be correct in presuming such an act to be expatriative. Indeed, if this act were not sufficient to effect relinquishment of citizenship, the right of expatriation would be meaningless. It is difficult to conceive of a clearer manifestation of the requisite intent than formal renunciation. But there are two additional acts which, with substantial certainty, are accompanied by an intent to transfer allegiance from one country to another. One is the deliberate acquisition of another nationality: naturalization in a foreign state. The other is taking an oath or other formal declaration of allegiance to a foreign state.<sup>116</sup> Like formal renunciation, these two acts are clear manifestations of a desire to relinquish citizenship. Again, in order to honor the individual's right of expatriation, the state must recognize the loss of nationality flowing from their voluntary performance.

Beyond these three acts, however, one reaches a point on the continuum where the intent underlying the act becomes more equivocal. Serving in a foreign army, deserting from the armed forces, voting in a foreign election, failing to meet a residency requirement, for example, are likely to be motivated by reasons other than a desire to relinquish citizenship. If the state declared these acts to be expatriative, it would exceed its limited role of recognition and

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<sup>115</sup> One possibility would be not to draw a line at all and simply declare that any act when performed with an intent to abandon nationality will result in expatriation. But the open-ended character of such a law would make it a nightmare to administer. Requiring the citizen to perform certain specific expatriative acts serves several important functions; it (1) informs the citizen precisely how he can accomplish expatriation, (2) creates an awareness in the citizen of the significance of his act, and (3) provides concrete guidelines for operational agencies to follow. In general, it imparts a degree of predictability to the administration of the law.

<sup>116</sup> The oath must of course be meaningful. Former Secretary of State Hughes once offered some guidance in this respect: "It is the spirit and meaning of the oath and not merely the letter, which is to determine whether it results in expatriation. It is not a mere matter of words. The test seems to be the question whether the oath taken places the person taking it in complete subjection to the state to which it is taken . . . so that it is impossible for him to perform the obligations of citizenship to this country." 3 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 219-20 (1942), quoting Letter from Secretary Hughes to Frank L. Polk, March 17, 1924. See also, *Baker v. Rusk*, 296 F. Supp. 1244 (C.D. Cal. 1969) (plaintiff's oath of allegiance to the British Crown as part of his admission to the Canadian bar held not sufficient for expatriation).

would cross over into the area of denationalization.<sup>117</sup>

But even with respect to the three acts which may be deemed to result in expatriation, the possibility exists that the specific intent to abandon one's citizenship might be absent. For this reason the presumption of an intent to expatriate oneself should be rebuttable. In the rare cases where a person performed one of these acts but did not intend to relinquish his nationality, he should be given the opportunity to prove affirmatively that he meant to retain that nationality. If his claim is genuine he should have little difficulty in pointing to positive acts of continued allegiance to his country.

A potential objection to this approach is that it would be unworkable in actual practice because "specific intent" is too subjective a standard. A person who is, after all, asserting his citizenship in an expatriation proceeding is obviously contending that no matter how his conduct may have appeared to others, he did not at the time intend to abandon his nationality. But this objection ignores the fact that similar procedural approaches are already being used in both administrative and judicial determinations of expatriation. The administrative agencies are currently following Attorney General Clark's Statement of Interpretation together with the combined Department of State-Immigration and Naturalization Service guidelines.<sup>118</sup> The lower federal courts also are "following" these administrative guidelines, thereby in effect elevating them to the status of judicial precedents.<sup>119</sup> These documents adapt the expansive language of *Afroyim* to the realities of our diplomatic posts around the world. They promulgate the following general standard: performance of acts under existing expatriation statutes will normally result in loss of nationality absent countervailing evidence of an intent not to abandon United States citizenship. The finder of fact must determine the individual's subjective intent from all the circumstances surrounding the act.<sup>120</sup> In no case, however, does a self-serving statement that one

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<sup>117</sup> Under this approach, the only way an individual could lose his nationality would be by performing one of the three designated acts. All other loss of nationality provisions now in effect, whether they apply to native-born, naturalized or derivative citizens, would be invalid. See 8 U.S.C. § 1401(b) (Supp., 1975), amending 8 U.S.C. § 1401 (1970); 8 U.S.C. § 1482, 1484 (1970).

<sup>118</sup> See notes 44-48 and accompanying text, *supra*.

<sup>119</sup> *Baker v. Rusk*, 296 F. Supp. 1244, 1246 (C.D. Calif. 1969); *In re Balsamo*, 306 F. Supp. 1028, 1033 n. 16 (N.D. Ill. 1969); *Peter v. Secretary of State*, 347 F. Supp. 1035, 1037-38 (D.D.C. 1972).

<sup>120</sup> A more precise summary of the State Department's current position on expatriation is contained in a letter, dated January 7, 1975, to this author from Francis G. Rando, Chief of Foreign Operations, Passport Office, U.S. Department of State: "The Department continues to hold that voluntary performance of the following acts is considered highly persuasive evidence of an intention to relinquish citizenship and will normally result in expatriation:

- (1) Naturalization in a foreign state
- (2) A meaningful oath of allegiance to a foreign state
- (3) Service in the Armed Forces of a foreign state engaged in hostilities

did not intend to abandon his citizenship, standing by itself, overcome the presumption of expatriation. The claimant must have additional evidence that he did not in fact intend to transfer allegiance at the time he performed the act.<sup>121</sup> Such judicial determination of the citizen's subjective attitude has not proven an impractical task. The proposed approach would, in this respect, merely bring doctrine into line with practice.

### C. ADVANTAGES OF THE PROPOSED APPROACH

Probably no single solution to the loss of nationality problem will eliminate the inveterate disunity which has characterized this area of the law. Citizenship means something different to each individual. The roots of that meaning are more emotional than intellectual. Elimination of the conceptual confusion, however, will at least reduce discord to a tolerable level. The major advantage of the approach described in this article is that it identifies the two major sources of the existing confusion. The first is a failure to appreciate the difference between expatriation and denationalization. The separation of these two concepts allows a distinct analysis of each. This is important because each has its own justifications and limitations. The second source of ambiguity is a failure to articulate clearly the role of the Constitution in resolving the issue. Unrealistic reliance on the Citizenship Clause, for instance, requires divisive attempts to "interpret" legislative history to support desired results. It was the necessity of resorting to this kind of rationalization in the first place which has allowed expatriation law to be "blown around by every passing political wind . . . ."<sup>122</sup> Under the suggested approach the law would not be susceptible to such misfortune because it would be tethered to a firm conceptual anchor by an accepted standard of judicial review.

In addition to clarification, the suggested analysis has another significant effect. It enhances the enjoyment of individual human rights

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against the United States

(4) Service in an important political post in a foreign government.

We also hold that the voluntary performance of any other act described by statute as expatriating results in expatriation if it is determined that the person, at the time the act was performed, intended to transfer or abandon allegiance. Intent is determined on the basis of objective evidence, as well as subjective statements." (Presumably, formal renunciation is thought to be such an obvious act of expatriation as not to require mention.)

<sup>121</sup> Among the various factors to be weighed in determining intent are whether claimant: actively sought to become a citizen of another state, disclaimed military or tax obligations to the United States, maintained close family or business ties in America, used the act as means to advance his career, became deeply involved in the internal affairs of a foreign state, *e.g.*, served in public office.

<sup>122</sup> *Rogers v. Bellei*, 401 U.S. 815, 873 (1971) (dissenting opinion of Mr. Justice Black). See note 54, *supra*.

by encouraging freedom of movement and association. The international climate that gave rise to the Nationality Act of 1940 has changed dramatically. Preoccupation with internal security and alarm over imminent violence have given way to a more sophisticated appreciation of the diversity and interdependency of the world's peoples. Accordingly, the American citizen should be given the utmost opportunity to travel, live and work abroad without fear that he might thereby lose his United States citizenship.<sup>123</sup> The ascendancy of individual volition over state pursuit of foreign policy objectives is a step toward greater human dignity.<sup>124</sup>

### CONCLUSION

Recall the predicament of the erstwhile American citizen in the introduction to this article. She had become a naturalized citizen of her husband's native country without being aware of the legal consequences flowing from such an act. Her motives for the act were subtle, complex, and varied. But her subsequent conduct indicates that they did not include a desire to give up her United States nationality. Under present law, however, her chances of a successful appeal from a finding of expatriation are uncertain. Despite repeated attempts to put the issue at rest, the basic question in this area of the law remains unsettled: does Congress have the power to take away a person's citizenship without his assent?

The Supreme Court in *Afroyim v. Rusk* attempted to provide a negative answer to that question. But the way in which the Court arrived at its answer was largely self-defeating. It utilized the traditional divisive rubric of expatriation law. It relied on constitutional and legislative history that itself was ambiguous. It bottomed its decision upon the Citizenship Clause of the Fourteenth Amendment, whose effect on expatriation is far from manifest. It became so preoccupied with its sweeping rhetoric as to practically invite dissent. Four members of the Court accepted the invitation, thereby blunting the impact of the decision even further.

Furthermore, the Court in answering one basic question rekindled another: if a citizen's "assent" is required, how is it to be determined? The Court neglected to say precisely what it meant by "voluntary relinquishment." The result has been that the lower courts

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<sup>123</sup> Moreover, individual interaction with foreign states, despite its potential complications, can add significantly to international understanding.

<sup>124</sup> "The long-term policy most compatible with an international law of human dignity would be one that seeks the utmost voluntarism in affiliation, participation, and movement. . . . The individual should be able to become a member of, and to participate in the value processes of, as many bodies politic as his capabilities will permit." McDougal, Lasswell, and Chen, *Nationality and Human Rights: The Protection of the Individual in External Arenas*, 83 YALE L.J. 900, 903 (1974).

have resorted to a variety of questionable tactics to ensure the compatibility of their decisions with the elusive *Afroyim* mandate. Moreover, the Court's omission rendered uncertain the viability of those provisions of the expatriation statutes which had not already been specifically invalidated.

The first step in resolving these persistent issues is to articulate unequivocally the conceptual dichotomy between expatriation and denationalization. The former springs from individual choice, the latter from governmental prerogative. Thus, the question of "involuntary expatriation" is actually a question of denationalization.

After identifying the proper issue, the next step is to realize that the Constitution neither grants nor denies the power of denationalization. It does, however, limit the exercise of that power. The extent of the limitation depends on the nature of the constitutional right at stake. Since the Fourteenth Amendment specifically grants the right of citizenship and since that right is a prerequisite of full participation in the democratic process, its deprivation is subject to a strict standard of judicial review. Existing denationalization provisions either do not serve a compelling foreign policy objective or are not necessary to achieve the objective. The Constitution, therefore, does not deny the existence of the denationalization power, but does effectively prohibit its exercise.

This result leaves one remaining issue: the extent of the state's role in expatriation. The very meaning of the term, however, resolves the issue. The state can only officially recognize the individual's choice. To avoid the pitfall of "constructive consent," expatriative acts must be limited to those which, with substantial certainty, are accompanied by an intent to relinquish citizenship. Three such acts are formal renunciation, naturalization, and an oath of foreign allegiance. But even with respect to these three acts, the presumption of specific intent must be rebuttable.

Under the approach to expatriation suggested in this article there would be no doubt that our hypothetical woman is still an American citizen. The circumstances surrounding her naturalization combined with her subsequent conduct could easily rebut the loss of nationality presumption created by her act. More significantly, the Government could no longer justify its position by invoking the artificial doctrine of imputed consent or the broad demands of foreign policy. The only justification for taking away her citizenship would be that she had in fact intended to give it up.

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