AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Democratic Rights/Citizenship

Afroyim v. Rusk, 387 U.S. 253 (1967)

Beys Afroyim was a naturalized American citizen who went to Israel in 1950 and voted in that country's national election the next year. The State Department in 1960 declared that Afroyim could not have his American passport renewed because, having voted in a foreign election, he was no longer an American citizen. This decision was based on the Nationality Act of 1940, which declared," a person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by . . . [v]oting in a political election in a foreign state." Afroyim brought a lawsuit in federal district court, asking the judge to declare that this provision of the Nationality Act violated his Fourteenth Amendment rights. Both the federal district court and the Court of Appeals for the Second Circuit rejected this claim. Afroyim then appealed to the Supreme Court of the United States.

Precedent was clear when Afroyim brought his lawsuit. In Perez v. Brownell *(1958), the Supreme Court specifically sustained the Nationality Act of 1940. Justice Frankfurter's majority decision asserted,*

> *[T]he critical connection between this conduct and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. The termination of citizenship terminates the problem. 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.*

The Perez *decision was controversial. Four justices dissented. Other decisions, most notably* Trop v. Dulles *(1958), which held that Congress could not expatriate persons for committing crimes, sharply limited federal power to divest persons of citizenship. Given the increased liberalism of the Warren Court, Afroyim had some reason for thinking that* Perez *was ripe for overruling.*

The Supreme Court by a 5-4 vote ruled that the Nationalization Act was unconstitutional. Justice Black's majority opinion held that citizens could not be deprived of citizenship without their consent. Black emphasized what he believed were the plain meaning of the constitutional text and the original understanding of the Fourteenth Amendment. Justice Black frequently relied heavily on these interpretative approaches and, as was often common, Justice Harlan criticized Justice Black's history in a dissent. Whose history to do find more constitutionally accurate? Suppose for various reasons, Justice Brennan or Chief Justice Warren had written the Afroyim *opinion. Would they have placed the same emphasis on text and history? What opinion do you believe they would have written? Would you have found that opinion more or less convincing than the Black opinion?*

JUSTICE BLACK delivered the opinion of the Court.

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[W]e reject the idea expressed in *Perez v. Brownell* (1958) that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent. This power cannot, as *Perez* indicated, be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any,

and we can draw no support from theirs. In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship. Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones. The Constitution, of course, grants Congress no express power to strip people of their citizenship, whether in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power. And even before the adoption of the Fourteenth Amendment, views were expressed in Congress and by this Court that under the Constitution the Government was granted no power, even under its express power to pass a uniform rule of naturalization, to determine what conduct should and should not result in the loss of citizenship. . . .

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. . . [A]ny doubt as to whether prior to the passage of the Fourteenth Amendment Congress had the power to deprive a person against his will of citizenship once obtained should have been removed by the unequivocal terms of the Amendment itself. It provides its own constitutional rule in language calculated completely to control the status of citizenship: 'All persons born or naturalized in the United States . . . are citizens of the United States . . . ' There is no indication in these words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time. Rather the Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit.

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. . . . Nevertheless, when the Fourteenth Amendment passed the House without containing any definition of citizenship, the sponsors of the Amendment in the Senate insisted on inserting a constitutional definition and grant of citizenship. They expressed fears that the citizenship so recently conferred on Negroes by the Civil Rights Act could be just as easily take away from them by subsequent Congresses, and it was to provide an insuperable obstacle against every governmental effort to strip Negroes of their newly acquired citizenship that the first clause was added to the Fourteenth Amendment. . . .

This undeniable purpose of the Fourteenth Amendment to make citizenship of Negroes permanent and secure 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 or some other power generally granted. Though the framers of the Amendment were not particularly concerned with the problem of expatriation, it seems undeniable from the language they used that they wanted to put citizenship beyond the power of any governmental unit to destroy. In 1868, two years after the Fourteenth Amendment had been proposed, Congress specifically considered the subject of expatriation. Several bills were introduced to impose involuntary expatriation on citizens who committed certain acts. With little discussion, these proposals were defeated.

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To uphold Congress' power to take away a man's citizenship because he voted in a foreign election in violation of s 401(e) would be equivalent to holding that Congress has the power to 'abridge,' 'affect,' 'restrict the effect of,' and 'take . . . away' citizenship. Because the Fourteenth Amendment prevents Congress from doing any of these things, we agree with the Chief Justice's dissent in the Perez case that the Government is without power to rob a citizen of his citizenship under s 401(e).

. . . Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their 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, whatever his creed,

color, or race. Our holding does no more than to 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.

Perez v. Brownell is overruled. The judgment is reversed.

JUSTICE HARLAN, whom JUSTICE CLARK, JUSTICE STEWART, and JUSTICE WHITE join, dissenting.

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[T]he available historical evidence is not only inadequate to support the Court's abandonment of *Perez*, but, with due regard for the restraints that should surround the judicial invalidation of an Act of Congress, even seems to confirm *Perez*' soundness.

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The most pertinent evidence from this period [before the ratification of the Fourteenth Amendment] upon these questions has been virtually overlooked by the Court. Twice in the two years immediately prior to its passage of the Fourteenth Amendment, Congress exercised the very authority which the Court now suggests that it should have recognized was entirely lacking. In each case, a bill was debated and adopted by both Houses which included provisions to expatriate unwilling citizens.

In the spring and summer of 1864, both Houses debated intensively the Wade-Davis bill to provide reconstruction governments for the States which had seceded to form the Confederacy. Among the bill's provisions was § 14, by which 'every person who shall hereafter hold or exercise any office * * * in the rebel service . . . is hereby declared not to be a citizen of the United States.' Much of the debate upon the bill did not, of course, center on the expatriation provision, although it certainly did not escape critical attention. Nonetheless, I have not found any indication in the debates in either House that it was supposed that Congress was without authority to deprive an unwilling citizen of his citizenship. . . .

Twelve months later, and less than a year before its passage of the Fourteenth Amendment, Congress adopted a second measure which included provisions that permitted the expatriation of unwilling citizens. Section 21 of the Enrollment Act of 1865 provided that deserters from the military service of the United States 'shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens . . . Significantly, however, it was never suggested in either debate that expatriation without a citizen's consent lay beyond Congress' authority. Members of both Houses had apparently examined intensively the section's constitutional validity, and yet had been undisturbed by the matters upon which the Court now relies.

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The narrow, essentially definitional purpose of the Citizenship Clause [of the Fourteenth Amendment] is reflected in the clear declarations in the debates that the clause would not revise the prevailing incidents of citizenship. Senator Henderson of Missouri thus stated specifically his understanding that the 'section will leave citizenship where it now is.' Senator Howard, in the first of the statements relied upon, in part, by the Court, said quite unreservedly that 'This amendment (the Citizenship Clause) which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is … a citizen of the United States.' Henderson had been present at the Senate's consideration both of the Wade-Davis bill and of the Enrollment Act, and had voted at least for the Wade-Davis bill. Howard was a member of the Senate when both bills were passed, and had actively participated in the debates upon the Enrollment Act. Although his views of the two expatriation measures were not specifically recorded, Howard certainly never expressed to the Senate any doubt either of their wisdom or of their constitutionality. It would be extraordinary if these prominent supporters of the Citizenship Clause could have imagined, as the Court's construction of the clause now demands, that the clause was only 'declaratory' of the law 'where it now is,' and yet that it would entirely withdraw a power twice recently exercised by Congress in their presence.

There is, however, even more positive evidence that the Court's construction of the clause is not that intended by its draftsmen. Between the two brief statements from Senator Howard relied upon by the Court, Howard, in response to a question, said the following:

> 'I take it for granted that after a man becomes a citizen of the United States under the Constitution he cannot cease to be citizen, except by expatriation or the commission of some crime by which his citizenship shall be forfeited.'

It would be difficult to imagine a more unqualified rejection of the Court's position; Senator Howard, the clause's sponsor, very plainly believed that it would leave unimpaired Congress' power to deprive unwilling citizens of their citizenship.

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There is, moreover, still further evidence, overlooked by the Court, which confirms yet again that the Court's view of the intended purposes of the Citizenship Clause is mistaken. While the debate on the Act of 1868 was still in progress, negotiations were completed on the first of a series of bilateral expatriation treaties, which 'initiated this country's policy of automatic divestment of citizenship for specified conduct affecting our foreign relations.' . . . . Seven such treaties were negotiated in 1868 and 1869 alone; each was ratified by the Senate. If, as the Court now suggests, it was 'abundantly clear' to Congress in 1868 that the Citizenship Clause had taken from its hands the power to expatriation, it is quite difficult to understand why these conventions were negotiated, or why, once negotiated, they were not immediately repudiated by the Senate.

Further, the executive authorities of the United States repeatedly acted, in the 40 years following 1868 upon the premise that a citizen might automatically be deemed to have expatriated himself by conduct short of a voluntary renunciation of citizenship; individual citizens were, as the Court indicated in Perez, regularly held on this basis to have lost their citizenship. . . . President Grant urged Congress in his Sixth Annual Message to supplement the Act of 1868 with a statutory declaration of the acts by which a citizen might 'be deemed to have renounced or to have lost his citizenship.' . . . The administrative practice in this period was described by the Court in *Perez*; it suffices here merely to emphasize that the Court today has not ventured to explain why the Citizenship Clause should, so shortly after its adoption, have been, under the Court's construction, so seriously misunderstood.

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The Citizenship Clause thus neither denies nor provides to Congress any power to expatriation; its consequences are, for present purposes, exhausted by its declaration of the classes of individuals to whom citizenship initially attaches. Once obtained, citizenship is of course protected from arbitrary withdrawal by the constraints placed around Congress' powers by the Constitution; it is not proper to create from the Citizenship Clause an additional, and entirely unwarranted, restriction upon legislative authority. 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.

I believe that *Perez* was rightly decided, and on its authority would affirm the judgment of the Court of Appeals.