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Expatriation Restored

ARTICLE

EXPATRIATION RESTORED

JONATHAN DAVID SHAUB*

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Expatriation—the loss or relinquishment of citizenship—has a long and divisive history as a fundamental concept of American citizenship. It has been the subject of contentious and robust debate from the very beginning of the country. This Article posits that the concept of expatriation today has little jurisprudential salience, despite its increasing rhetorical valence in the context of terrorism, because the historical development of the concept has obscured its meaning. Expatriation originally had a precise meaning: an individual right declared by the country in 1868 to be “indispensable” to the inalienable rights identified in the Declaration of Independence. That meaning has largely been lost due to what this Article identifies as the precession of the subject of expatriation’s root verb “expatriate.” This Article attempts to reverse this precession and unencumber expatriation from the language of rights. In so doing, it seeks to restore the original concept grounded in allegiance. Without that restoration, the possibility of the state acting to expatriate an individual involuntarily continues to be a viable, if difficult, path, as demonstrated by recent and repeated legislative proposals. If expatriation is restored as a singular, coherent, historical concept, however, that possibility no longer exists. And without that restored concept of expatriation, grounded in allegiance, citizens’ rights may be imperiled by a formal, as opposed to functional, understanding of citizenship.

I. INTRODUCTION

Unfamiliar to most, expatriation—the loss or relinquishment of citizenship—has a long and divisive history as a fundamental concept of American citizenship. In the 1779 Virginia Code, Thomas Jefferson declared expatriation to be a “natural right which all men have.”¹ During the early years of the United States, a legislator referred to it as “the foundation of our Revolution.”² One commentator has called it “one of the three great international issues” of the day during the period leading up to and following the War of 1812,³ and the Act of July 27, 1868 declared it to be “a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness.”⁴ On March 31, 1958, the Supreme Court

¹ I-MIEN TSIANG, *THE QUESTION OF EXPATRIATION IN AMERICA PRIOR TO 1907*, at 26 (1942).

² 7 ANNALS OF CONG. 354 (1797).

³ Nancy L. Green, *Expatriation, Expatriates, and Expats: The American Transformation of a Concept*, 114 AM. HIST. REV. 307, 312 (2009).

⁴ An Act Concerning the Rights of American Citizens in Foreign States, ch. 249, 15 Stat. 223 (1868).

issued three closely divided opinions about it that one Justice called at the time “the most important constitutional pronouncements of this century.”⁵ And most recently, legislation has been introduced in the last five Congresses that would utilize it as a tool to combat terrorism.⁶

The nature of expatriation has been the subject of contentious and robust debate from the very beginning of the country. In current political, popular, and scholarly dialogue, expatriation potentially includes under its umbrella everything from the founding era debates about allegiance owed to England⁷ to a Civil War statute punishing desertion by deprivation of the “rights of citizenship”⁸ to a tweet by then-President-elect Trump suggesting that one of the consequences of flag burning should be “loss of citizenship.”⁹ It includes the first law on expatriation, the Expatriation Act of 1868,¹⁰ as well as the legislative proposals that have been introduced since September 11th to remove the U.S. citizenship of suspected terrorists and those who aid them.¹¹ And that array of meaning is a problem.

This Article posits that the concept of expatriation today has little jurisprudential salience, despite its increasing rhetorical valence in the context of terrorism, because the historical development of the concept has obscured its meaning. Expatriation originally had a precise meaning: an individual right declared by the country in 1868 to be “indispensable” to the inalienable rights identified in the Declaration of Independence.¹² That meaning has largely been lost due to what this Article identifies as the precession of the subject of expatriation’s root verb “expatriate.”¹³ The only viable subject of

⁵ PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC* 147 (2013).

⁶ Expatriate Terrorist Act, S. 361, H.R. 1021, 115th Cong. (2017); Expatriate Terrorist Act, S. 247, H.R. 503, 114th Cong. (2015); Enemy Expatriation Act, H.R. 545, 114th Cong. (2015); Enemy Expatriation Act, H.R. 4186, 114th Cong. (2015); Expatriate Terrorists Act, S. 2779, H.R. 5450, 113th Cong. (2014); Enemy Expatriation Act, S. 1698, H.R. 3166, 112th Cong. (2011); H.R. Res. 1288, 111th Cong. (2010) (urging the “issuance of a certificate of loss of nationality for Anwar al-Awlaki”); Terrorist Expatriation Act, S. 3327, H.R. 5237, 111th Cong. (2010).

⁷ See *infra* text accompanying notes 42–99.

⁸ See *infra* text accompanying notes 754–56.

⁹ See Steve Vladeck, *A Short Course on the Constitutional Law of Expatriation*, JUST SECURITY (Nov. 29, 2016), <https://www.justsecurity.org/35006/short-constitutional-law-expatriation/> [<https://perma.cc/FW6M-7XEL>] (quoting tweet); Charlie Savage, *Trump Calls for Revoking Flag Burners’ Citizenship. Court Rulings Forbid It.*, N.Y. TIMES (Nov. 29, 2016), <https://www.nytimes.com/2016/11/29/us/politics/trump-flag-burners-citizenship-first-amendment.html> [<https://nyti.ms/2jEp4y8>] (also quoting tweet).

¹⁰ 15 Stat. 223.

¹¹ See WEIL, *supra* note 5. See the Bush Administration’s draft legislative proposal known as the “Patriot Act II” that was never formally submitted after it was leaked. Domestic Security Enhancement Act of 2003 § 501 (Jan. 9, 2003), <http://www-tc.pbs.org/now/politics/patriot2-hi.pdf> [<https://perma.cc/G2QE-KCGX>]. See generally Nora Graham, *Patriot Act II and Denationalization: An Unconstitutional Attempt to Revive Stripping Americans of Their Citizenship*, 52 CLEV. ST. L. REV. 593 (2005).

¹² 15 Stat. 223.

¹³ “Precession” is the comparatively slow rotation of the axis of another rotating body, such as the circular motion of the point of a spinning top. It is most commonly used to describe

the verb “expatriate” was initially as clear as, and identical to, its object: the individual citizen. The debate involved only the authority of a state to prevent or limit an individual from expatriating herself.¹⁴ But, as a consequence of the historical precession described in Part I, the state became a viable actor as well, an additional subject of the verb “expatriate.” The Supreme Court’s reaction to this precession only furthered it without restoring expatriation as a singular, historical concept.¹⁵ And, consequently, the concept of expatriation today includes elements of both the individual and the state acting as subject.¹⁶

The current statute governing expatriation—section 349 of the Immigration and Nationality Act (“INA”)¹⁷—embodies the distortion of the concept caused by its historical evolution, as do the repeated legislative proposals to amend section 349. The INA provides that a citizen who voluntarily engages in any of its enumerated acts “with the intention of relinquishing United States nationality” “shall lose his nationality.”¹⁸ The specific intent requirement, a constitutional requirement originating in the Supreme Court’s foundational decisions in *Afroyim v. Rusk*¹⁹ and *Vance v. Terrazas*,²⁰ ensures that the government is not violating the Fourteenth Amendment and expatriating the individual; instead, the individual is intentionally expatriating herself. But the acts in the statute predate the Supreme Court’s rulings and represent the era of expatriation in which the state did act as the subject and expatriate individuals. As a result, if an individual does perform one of the acts, the government can still “revoke” her citizenship against her will under section 349, what some have called “involuntary expatriation,”²¹ if it can prove, by a preponderance of the evidence, that she specifically intended to relinquish her citizenship in performing the act, even if she asserts that she did not so intend.²²

Further complicating the issue is that, despite the paramount importance of the citizen’s intent under the current *Afroyim-Terrazas* framework, an individual citizen can expatriate herself *only* by performing one of section

the motion of the Earth’s axis of rotation. I use this term to describe the phenomenon by which the actor in the context of expatriation has slowly rotated from individual to state and back around to individual. The term is apt because expatriation has always derived its meaning from the dynamic mix of the national and international definitions of “citizen,” “citizenship,” and “allegiance,” which themselves have been in constant flux throughout U.S. history. Thus the subject of the verb “expatriate” is a second axis by which to understand expatriation, the rotation of which has generated significant changes over the course of U.S. history that have largely gone unnoticed.

¹⁴ See *infra* text accompanying notes 100–42.

¹⁵ See *infra* text accompanying notes 278–378.

¹⁶ See *infra* text accompanying notes 436–70.

¹⁷ 8 U.S.C. § 1481(a) (2012).

¹⁸ *Id.*

¹⁹ 387 U.S. 253 (1967).

²⁰ 444 U.S. 252 (1980).

²¹ BEN HERZOG, REVOKING CITIZENSHIP: EXPATRIATION IN AMERICA FROM THE COLONIAL ERA TO THE WAR ON TERROR 24–25 (2015).

²² *Terrazas*, 444 U.S. at 260–63.

349's enumerated acts with the requisite intent. She cannot, for example, renounce her citizenship within the United States, even in a sworn statement before a court, except when the United States is "in a state of war."²³ Nor could a citizen do as Adam Gadahn did and rip up his passport in a public video, but instead of calling it a "symbolic" gesture, claim it to be his formal act of expatriation.²⁴ Despite the individual's clear intent to renounce his citizenship and expatriate himself, he could apply for a new passport the following day, and the State Department could not deny the request on citizenship grounds.²⁵

The pending and past legislative proposals to add terrorism-related provisions to section 349 demonstrate the inherent tension and confusion in the modern concept of expatriation. In 2010, shortly after Faisal Shahzad, a dual Pakistani-American citizen, attempted to detonate a car bomb in the middle of Times Square, Senators Joe Lieberman (D-Conn.) and Scott Brown (R-Mass.) introduced legislation called the Terrorist Expatriation Act.²⁶ Senator Lieberman said that "[t]hose who join such groups [as al Qaeda and the Taliban] join our enemy and should be *deprived* of the rights and privileges of U.S. citizenship and the ability to use their American passports as tools of terror."²⁷ Senator Brown advocated the slightly different position that "[i]ndividuals who pick up arms . . . have effectively *denounced* their citizenship, and this legislation simply *memorializes* that effort."²⁸

When Senator Ted Cruz (R-Tex.) first introduced the Expatriate Terrorists Act in 2014,²⁹ shortly after the United States commenced airstrikes against the Islamic State in Iraq and Syria (ISIS),³⁰ he stood on the Senate floor to argue for its passage by unanimous consent, stating that the bill

²³ 8 U.S.C. § 1481(a)(6). Even then, the individual's renunciation would be sufficient only if the Attorney General approves the renunciation as "not contrary to the interests of the United States" and it is undertaken according to the procedures described by the Attorney General. *Id.*

²⁴ See *American-Born Al Qaeda Spokesman Lashes Out at U.S. in New Tape*, FOXNEWS.COM, Jan. 6, 2008, <http://www.foxnews.com/story/2008/01/06/american-born-al-qaeda-spokesman-lashes-out-at-us-in-new-tape.html> [<https://perma.cc/6G9K-LCGQ>] (describing a video released by al-Qaeda that "featured the California-born Adam Gadahn tearing up his U.S. passport as part of a 'symbolic' protest against Washington").

²⁵ See U.S. Dep't of State, Renunciation of U.S. Nationality Abroad, <https://travel.state.gov/content/travel/en/legal-considerations/us-citizenship-laws-policies/renunciation-of-citizenship.html> [<https://perma.cc/D5LW-KFUK>] ("Renunciations abroad that do not meet the conditions described above have no legal effect.").

²⁶ Terrorist Expatriation Act, S. 3327, 111th Cong. (2010).

²⁷ Jean Spencer, *Lieberman, Brown Unveil Bill to Strip Citizenship*, WALL ST. J. (May 6, 2010), <https://blogs.wsj.com/washwire/2010/05/06/lieberman-brown-unveil-bill-to-strip-citizenship/> [<https://perma.cc/JFU6-66D4>] (emphasis added).

²⁸ Charlie Savage & Carl Hulse, *Bill Targets Citizenship of Terrorists' Allies*, N.Y. TIMES (May 6, 2010), <http://www.nytimes.com/2010/05/07/world/07rights.html> [<https://perma.cc/E8TY-E63V>] (emphasis added).

²⁹ Expatriate Terrorists Act, S. 2779, 113th Cong. (2014).

³⁰ See Remarks on the Situation in Iraq, 2014 DAILY COMP. PRES. DOC. 602 (Aug. 7, 2014), (President Obama explaining that he had authorized airstrikes in Iraq against ISIS). The President referred to the group as "ISIL," the Islamic State of Iraq and the Levant, and the group is also known as the Islamic State, the name it gave itself on June 29, 2014. See KEN-

would “make fighting for ISIS, taking up arms against the United States, an *affirmative renunciation* of American citizenship,” which is a “privilege . . . not a right.”³¹ According to Cruz, “[p]eople who are serving foreign powers—or in this case, foreign terrorists—are clearly in *violation* of the oath which they swore when they became citizens.”³² The political dialogue demonstrates the confusion between what entity is taking an action—the state or the terrorist—and what the action—expatriation—really is. Under the proposed additions to section 349, which are based on both criminal and non-criminal acts,³³ would the United States be “depriving” individuals of their citizenship because they were in “violation” of their oath? Or have these terrorists “affirmative[ly] ren[ounced]” and “effectively denounced” their citizenship, actions that would simply be “memorialize[d]” by the statute’s revocation of citizenship?

These legislative proposals, among other things, have led to a spate of scholarly commentary on expatriation.³⁴ But this discussion has been hampered by the confusion and conflation inherent in the term “expatriation” itself. Section 349, and the various legislative proposals, are not the cause of the problem. They are a symptom.

This Article starts from the beginning—the creation of the individual right of expatriation at the founding of our country—and attempts to restore expatriation as a singular, coherent concept. As it demonstrates, the foundation of that concept, obscured by the precession of the subject and ultimately extinguished by the Supreme Court, is allegiance. Part II traces the history of expatriation in the United States from the founding of the country to the current section 349, demonstrating the precession of the subject of “expatriate” from the individual, to the state, and then back around to the individual, a rotation that occurred amidst dizzying developments in the United States

NETH KATZMAN ET AL., CONG. RESEARCH SERV. R43612, IRAQ CRISIS AND U.S. POLICY 8 (2014).

³¹ 160 CONG. REC. S5726 (daily ed. Sept. 18, 2014) (emphasis added).

³² *Id.* (emphasis added).

³³ The proposals would each add several “expatriating acts” to section 349, including becoming a member of, providing training or material assistance to, or joining the hostile forces of a foreign terrorist organization. Expatriate Terrorist Act, S. 361, H.R. 1021, § 1, 115th Cong. (2017); Enemy Expatriation Act, S.1698, H.R. 3166, § 2, 112th Cong. (2011).

³⁴ See, e.g., HERZOG, *supra* note 21; WEIL, *supra* note 5; Leslie Esbrook, *Citizenship Unmoored: Expatriation as a Counter-Terrorism Tool*, 37 U. PA. J. INT’L L. 1273 (2016); Annam Farooq, *Expunging Statelessness from Terrorist Expatriation Statutes*, 44 HOFSTRA L. REV. 933 (2016); Nora Graham, *Patriot Act II and Denationalization: An Unconstitutional Attempt to Revive Stripping Americans of Their Citizenship*, 52 CLEV. ST. L. REV. 593 (2005); Charles Hooker, *The Past as Prologue: Schneiderman v. United States and Contemporary Questions of Citizenship and Denationalization*, 19 EMORY INT’L L. REV. 305 (2005); Peter J. Spiro, *Expatriating Terrorists*, 82 FORDHAM L. REV. 2169, 2177 (2014); Shelby D. Wood, *No Going Home: An Analysis of U.S. and U.K. Expatriation Laws as Applied to the Current Crisis in Iraq and Syria*, 25 TRANSNAT’L L. & CONTEMP. PROBS. 229 (2015); David Cole, *No, You Can’t Strip Americans of their Citizenship, Senator Cruz: The Folly of the Expatriate Terrorists Act*, JUST SECURITY (Sept. 17, 2014), <https://www.justsecurity.org/15147/no-cant-strip-americans-citizenship-senator-cruz-folly-expatriate-terrorists-act/> [https://perma.cc/LSV2-CYDE]; Vladeck, *supra* note 9.

and internationally with respect to citizenship, travel, immigration, and residence abroad. Part III attempts to reverse this precession and unencumber expatriation from the language of rights in order to restore expatriation to the original concept grounded in allegiance. Part IV explains why such restoration is vital. Without it, the possibility of the state acting as subject continues to be a viable, if difficult, path, as demonstrated by the pending legislative proposals. And without a restored concept of expatriation grounded in allegiance, citizens' rights may be imperiled by a formal, as opposed to functional, understanding of citizenship.

II. THE HISTORY OF EXPATRIATION AND THE PRECESSION OF THE SUBJECT

This Part recounts the fascinating history of the law of expatriation in the United States. As it demonstrates, the birth and historical development of the concept of expatriation in the United States is a precession of the subject of its root verb “expatriate”—from citizen, to government, and around to citizen again. This entire precession is now imbedded in the concept itself, obscuring the meaning of expatriation in scholarly and political discourse and preventing a dialogue about its place in our modern, global society.

At the time of the founding of the United States, the individual right of expatriation was inseparable from emigration and naturalization.³⁵ From the founding of the country to the Expatriation Act of 1868, during an era in which allegiance to more than one country was an absurdity,³⁶ the creation and advancement of an individual right of expatriation in the United States was propelled by the desire that individuals emigrating from their native country and naturalizing as U.S. citizens had the ability, and indeed the right, to transfer their allegiance from their native country to the United States.³⁷ With respect to the act of expatriation, the subject of the underlying verb “expatriate,” from the founding of the country until the 20th century, was the individual.

As the United States developed and faced new international challenges and pressures, the precession of the subject to the state began with the first

³⁵ See, e.g., Edwin M. Borchard, *Decadence of the American Doctrine of Voluntary Expatriation*, 25 AM. J. INT'L L. 312, 314 (1931) (“Freedom of emigration and freedom of expatriation, its incident and corollary, are thus indelibly associated. The abandonment of the one involves an abandonment of the other.”).

³⁶ See 9 Op. Att’y Gen. 356, 361 (1859) (“No government would allow one of its subjects to divide his allegiance between it and another sovereign; for they all know that no man can serve two masters. . . . The allegiance demanded of a naturalized resident must have been always understood as exclusive.”); 3 JOHN B. MOORE, A DIGEST OF INTERNATIONAL LAW 518 (1906) (recognizing that the “doctrine of double allegiance” had been criticized as “un-philosophical”); Peter Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1417–42 (1997); see also *United States v. Wong Kim Ark*, 169 U.S. 649, 720 (1898) (Fuller, C.J., dissenting) (“[D]ouble allegiance in the sense of double nationality has no place in our law.”).

³⁷ See HERZOG, *supra* note 21, at 27–30; TSIANG, *supra* note 1, at 25–28.

administrative implementation of the individual right of expatriation in the late 20th century and the codification of existing law in the Expatriation Act of 1907.³⁸ In implementing international treaties and the 1907 Act, the executive branch developed a common law of expatriation, complete with presumptions and evidentiary requirements. The Nationality Act of 1940 then attempted to codify this common law,³⁹ but, in so doing, it also altered the fundamental nature of expatriation, reifying in statute the precession of the subject to the state.

In the latter half of the 20th century, in a series of closely divided decisions arising under the Nationality Act of 1940 and its descendants, the Supreme Court again altered the nature of expatriation. After some initial disagreement, the Court ultimately forced the precession of the subject back to the individual, ruling that the Constitution prohibited the government from acting as the subject of “expatriate.” But, in so doing, the Court did not restore expatriation to its historical conception, an endeavor for which Chief Justice Warren had advocated in his dissent in the first round of decisions on the Nationality Act of 1940.⁴⁰ Instead, the Court accepted the expansion of the concept and limited its applicability. As a constitutional matter, it forced the subject of “expatriate” back around to the individual, but it did nothing to recognize or resolve the ambiguities created by the past precession of the subject to the state.

A. *The Individual Right to Expatriation and the Formation of a Nation*

At its inception, at least its modern inception, expatriation was an individual right. This individual right of expatriation, “though of Roman extraction, seems to have had its birth in the United States.”⁴¹ Under the British common law, the concept did not exist. However, as the political theories out of which the Declaration of Independence and Constitution were born took hold, the concept of expatriation played a significant role in establishing a new country and defining its relation to its citizens and to citizens of other countries.

1. *The Origins of the Concept of Expatriation*

The common law, infused by its feudal origins,⁴² incorporated the doctrine of perpetual allegiance, for which the formal legal maxim was *Nemo patriam, in qua natus est, exuere, nec legantiae debitum ejurare possit*, or “No man may abjure his native country nor the allegiance which he owes to

³⁸ An Act In Reference to the Expatriation of Citizens and Their Protection Abroad, ch. 2534, 34 Stat. 1228 (1907).

³⁹ The Nationality Act of 1940, ch. 876, 54 Stat. 1137.

⁴⁰ *Perez v. Brownell*, 356 U.S. 44, 62 (1958) (Warren, C.J., dissenting).

⁴¹ GEORGE HAY, TREATISE ON EXPATRIATION 2 (1812).

⁴² *Id.* at 34.

his sovereign.”⁴³ Under British law at the time of the Declaration of Independence, the bond of allegiance between a sovereign and its subject was an immutable, permanent bond established by the law of nature.⁴⁴ As Blackstone explained, it was “a principle of universal law, that the natural-born subject of one prince cannot by an act of his own—no, not by swearing allegiance to another—put off or discharge his natural allegiance to the former.”⁴⁵ Nor could a foreign sovereign “dissolve the bond of allegiance between the subject and the crown,” by naturalizing or gaining the allegiance of a British subject.⁴⁶

In objecting to the practices of King George III, the American colonists initially framed their arguments within the prevailing common law doctrine of perpetual allegiance and presented their arguments as Englishmen.⁴⁷ The Declaration of Independence, drawing on the precedent of the English Revolution of 1688, abandoned that position and declared that the colonists were “[a]bsolved from all Allegiance to the British Crown and that all political connection between them and the state of Great Britain is and ought to be totally dissolved.”⁴⁸ In discarding the doctrine of perpetual allegiance, the colonists adopted a Lockean, contractual view of the relation between subject and sovereign.⁴⁹ The authority of the British crown was derived by “compact,” and because the King had violated that compact by his actions, the colonies asserted he had “dissol[ved],”⁵⁰ “abdicated,”⁵¹ and “forfeit[ed]”⁵² the crown’s authority.⁵³

⁴³ TSIANG, *supra* note 1, at 11 (quoting SIR EDWARD COKE I, A COMMENTARY UPON LITTEJOHN SEC. 129A, 19th ed. 1832). I-Mien Tsiang, in her comprehensive investigation of the first century of expatriation, traces the concept of perpetual allegiance as far back as the mid-14th century, during which the House of Lords debated the status of children born abroad to English subjects but assumed that the parents’ status could not be altered. *Id.*

⁴⁴ *Id.* at 13–15.

⁴⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *358.

⁴⁶ *Rex v. Aeneas MacDonald*, 18 How. St. Tr. 858 (1747); TSIANG, *supra* note 1, at 16.

⁴⁷ TSIANG, *supra* note 1, at 18.

⁴⁸ THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776); *see also* HAY, *supra* note 41, at 4.

⁴⁹ *See* Denver Brunsmann, *Subjects v. Citizens: Impressment and Identity in the Anglo-American Atlantic*, 30 J. EARLY REPUBLIC 557, 559 (2010). As Herzog describes it, the “new political ideas” of the American Revolution included the idea that “allegiance to and membership in a political community were matters of individual choice” as opposed the British tradition in which “[a]llegiances were conceived of as natural vertical ties between individual subjects and the king, like parent to child, and these ties could not be dissolved even with the subject’s consent.” HERZOG, *supra* note 21, at 29–30; *see also* HAY, *supra* note 41, at 29–30 (discussing Locke’s rejection of perpetual allegiance from birth and his acceptance of “allegiance voluntarily contracted,” though Locke thought that once an individual had consented to be a subject of a state that bond was “unalterabl[e] and “indissolubl[e]”).

⁵⁰ TSIANG, *supra* note 1, at 19 (quoting N.J. CONST. of 1776).

⁵¹ *Id.* at 19 n.45.

⁵² *Id.*

⁵³ *See* HAY, *supra* note 41, at 81–83 (“The first page of the Declaration of Independence, asserts, not in terms, but substantially, the principle of expatriation.”). In furtherance of the new contractual theory of citizenship and in rejection of perpetual allegiance, the new sovereign states formalized new compacts: requiring oaths of allegiance from, for example, officers

The severing of British sovereignty and formation of the United States as a separate sovereign, or groups of sovereigns, under the Articles of Confederation and the Constitution did not settle the question of expatriation. The question of expatriation was of fundamental importance during the early days of the United States, and the debate largely fell along the familiar divide between the Federalists and Republicans, exemplified by the distinctly different views of Thomas Jefferson and Alexander Hamilton.⁵⁴ In helping fashion the first laws of Virginia to comply with the new American ideals of equality and social compact, Jefferson, while abolishing concepts like primogeniture and entail and drafting protections for religious freedom, also recognized as part of the Virginia Code a “natural right” of expatriation.⁵⁵ The 1814 pamphlet “A Treatise on Expatriation,” contends that the concept of expatriation “was probably first introduced” in this Virginia law.⁵⁶

Under Jefferson’s natural rights view that animated the Virginia provision and similar provisions in other states, the right of expatriation was “inherent in every man by the laws of nature, and incapable of being rightfully taken from him even by the united will of every other person in the nation.”⁵⁷ Although the Virginia law established a formal procedure for expatriation, wherein an individual could “declare her intent to expatriate orally in court or by written deed,”⁵⁸ Jefferson did not believe such formal procedures were necessary: “[T]he individual may do it by any effectual and unequivocal act or declaration.”⁵⁹

The Federalists, by contrast, continued to espouse a vestige of the doctrine of perpetual allegiance, in which the sovereign retained authority over the relinquishment of citizenship. For example, arguing against laws passed by New York to punish Loyalists, Alexander Hamilton contended that citizens could not “at pleasure renounce their allegiance to the state of which they are members” and “devote themselves to a foreign jurisdiction,” because allowing such a right would be “contrary to law and subversive of

or all white males and, collectively, requiring all persons holding commissions or offices under Congress to take an oath of allegiance. See TSIANG, *supra* note 1, at 20–21.

⁵⁴ See Rising Lake Morrow, *The Early American Attitude Toward the Doctrine of Expatriation*, 26 AM. J. INT’L L. 552, 552–55 (1932). Expatriation also became a debate in Great Britain during this time period. Although the common law doctrine of perpetual allegiance still controlled, there was some suggestion in earlier cases that the inhabitants of a British territory that had been conquered by a foreign power were no longer subjects to the crown. The question arose then whether, by the Peace Treaty of 1783 and the Jay Treaty of 1794, the British crown had consented to the expatriation of British subjects who had chosen to remain in the conquered territory and become citizens of one of the United States. Eventually, this view prevailed, though some still argued for the position that a subject remained a subject permanently. See TSIANG, *supra* note 1, at 21–24.

⁵⁵ DOUGLAS BRADBURN, *THE CITIZENSHIP REVOLUTION: POLITICS AND THE CREATION OF THE AMERICAN UNION, 1774-1804*, at 105 (2009); see also TSIANG, *supra* note 1, at 26.

⁵⁶ HAY, *supra* note 41, at 3.

⁵⁷ BRADBURN, *supra* note 55, at 106.

⁵⁸ TSIANG, *supra* note 1, at 26.

⁵⁹ BRADBURN, *supra* note 55, at 106.

government.”⁶⁰ The New York law proposed to cancel the citizenship of Loyalists, but Hamilton argued that “[t]he idea, indeed, of citizens transforming themselves into aliens by taking part against the State to which they belong, is altogether of new invention, unknown and inadmissible in law, and contrary to the nature of the social compact.”⁶¹ In this contention, as in many others, Hamilton was directly opposed to Jefferson,⁶² who asserted that Loyalists became aliens by adhering to the British cause during the Revolution.⁶³

2. Early Controversies

Jefferson and Hamilton’s competing views were largely theoretical until judicial and political disputes brought the issue of expatriation into sharp focus at the turn of the 19th century. In April 1793, Gideon Henfield, an American citizen, joined the mostly American crew of the French privateer *Citoyen Genêt*, setting out from Charleston to “strike a blow in the great new war of the French Revolution.”⁶⁴ As he had been promised, he was given command of the first prize the *Citoyen Genêt* seized,⁶⁵ the British vessel *William*, and he then sailed the *William* to Philadelphia to dispose of it.⁶⁶ He and a fellow American sailor were arrested upon arrival for disobeying President Washington’s declaration of neutrality, and the resulting case became a defining moment of American politics, demonstrating the fundamental disagreements within the country about, among other things, the French Revolution, the nature of the American nation, and American citizenship.⁶⁷ Although Henfield initially argued that he had been unaware of the Neutrality Proclamation, which was issued three days after he departed Charleston,⁶⁸ he soon switched strategies. Supported by the controversial French ambassador Citizen Genêt,⁶⁹ Henfield argued that he could not be charged with trea-

⁶⁰ *Id.*

⁶¹ TSIANG, *supra* note 1, at 28.

⁶² See, e.g., LIN-MANUEL MIRANDA, *Election of 1800, on HAMILTON* (ORIGINAL BROADWAY CAST RECORDING) (Atlantic Records 2015) (Alexander Hamilton singing, “I have never agreed with Jefferson once. . . . We have fought on like seventy-five different fronts.”).

⁶³ BRADBURN, *supra* note 55, at 106.

⁶⁴ *Id.* at 101; see also *Henfield’s Case*, 11 F. Cas. 1099, 1110–11 (CC.D. Pa. 1793) (No. 6360).

⁶⁵ *Henfield’s Case*, 11 F. Cas. at 1116.

⁶⁶ WILLIAM CASTRO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF THE FIGHTING SAIL* 85 (2006). Henfield’s actions created quite a stir in the capital and prompted the British minister to file a protest with Thomas Jefferson, then Secretary of State. *Id.*

⁶⁷ BRADBURN, *supra* note 55, at 102–03.

⁶⁸ CASTRO, *supra* note 66, at 91; see also *Henfield’s Case*, 11 F. Cas. at 1116 (“[O]n his examination before the magistrate, he protested himself an American, that as such he would die, and therefore could not be supposed likely to intend anything to her prejudice. He declared if he had known it to be contrary to the president’s proclamation, or even the wishes of the president, for whom he had the greatest respect, he would not have entered on board.”).

⁶⁹ BRADBURN, *supra* note 55, at 110–12; *Henfield’s Case*, 11 F. Cas. at 1116.

son because he had exercised his “natural right of expatriation” and become a French citizen.⁷⁰

The prosecution, which was assisted by Alexander Hamilton,⁷¹ rejected an individual’s absolute right to expatriate himself. They argued that an individual citizen who defied the President and attacked a foreign country could not be absolved by claiming expatriation; an individual citizen “could not escape the duties of citizenship without the consent of the nation as a whole.”⁷² Henfield relied on his natural right of expatriation. Despite the instructions of presiding Justice James Wilson, which heavily favored the prosecution,⁷³ the jury acquitted Henfield and set off ripples throughout the country.⁷⁴ While the Washington Administration took steps to ensure other American citizens did not join the French against the British, including publishing Justice Wilson’s instructions to the jury, the Republican opposition toasted Henfield and the “patriotic jury of Philadelphia” that recognized the natural right of expatriation.⁷⁵

The next important expatriation case that arose, known as *Talbot’s Case*,⁷⁶ also involved American citizens who had seized a foreign vessel, this time a Dutch ship, and escorted it to Charleston where they claimed it as a prize.⁷⁷ When arrested, native Virginian Edward Ballard claimed he had expatriated himself pursuant to the procedures prescribed by Virginia law.⁷⁸ Native Virginian William Talbot claimed he had expatriated himself by swearing allegiance to France in Guadalupe, and he had a commission from the French authorities and papers showing his naturalization as a French citizen.⁷⁹ The case ultimately reached the Supreme Court after the circuit court found the two guilty.⁸⁰ The Virginians’ lead counsel, Alexander J. Dallas,

⁷⁰ CASTRO, *supra* note 66, at 91–92.

⁷¹ CASTRO, *supra* note 66, at 95; *Henfield’s Case*, 11 F. Cas. at 1115 n.3 (noting that a draft indictment had “marginal corrections, apparently by Mr. Hamilton”).

⁷² BRADBURN, *supra* note 55, at 113.

⁷³ *Henfield’s Case*, 11 F. Cas. at 1120 (“It is the joint and unanimous opinion of the court, that the United States, being in a state of neutrality relative to the present war, the acts of hostility committed by Gideon Henfield are an offence against this country, and punishable by its laws. . . . Much has been said on this occasion, by the defendant’s counsel, in support of the natural right of emigration; but little of it is truly applicable to the present question. Emigration is, undoubtedly, one of the natural rights of man. Yet it does not follow from thence that every act inconsistent with the duty is inconsistent with the state of a citizen. Nothing is more inconsistent with the duty of a citizen than treason; but it is because he still continues a citizen that he is liable to punishment.”); see also CASTRO, *supra* note 66, at 96; BRADBURN, *supra* note 55, at 113–14.

⁷⁴ BRADBURN, *supra* note 55, at 113–16.

⁷⁵ *Id.* at 114–15.

⁷⁶ 3 U.S. (3 Dall.) 133 (1795).

⁷⁷ BRADBURN, *supra* note 55, at 116; HERZOG, *supra* note 21, at 30; Green, *supra* note 3, at 311; TSIANG, *supra* note 1, at 30–31.

⁷⁸ BRADBURN, *supra* note 55, at 116.

⁷⁹ *Id.*

⁸⁰ The circuit court recognized an individual’s right to expatriate generally, but found the two guilty because an expatriated former citizen “has no right, in his new character, to injure the country of his first and native allegiance, by open violation of her treaties with friendly powers.” *Jansen v. The Vrow Christina Magdalena*, 13 F. Cas. 356 (1794) (No. 7216)

based his argument on the right of expatriation, which he contended derived from the difference between *citizenship*, the principle of the Revolution, and *allegiance*, which was equivalent to “servitude.”⁸¹ Opposing Dutch counsel, echoing the circuit court, did not deny the right to expatriation but argued that it could only be accomplished “under the regulations prescribed by law,” and Congress had not prescribed any such regulations.⁸² Under its view, the Constitution vests Congress with the exclusive power over naturalization, which included “[t]he power of regulation of emigration,” and, thus, the Virginia laws “under which Ballard pretends to have renounced his allegiance, can have no effect on the political rights of the Union.”⁸³ As a result, Ballard and Talbot could not have expatriated themselves pursuant to procedures established by law.⁸⁴

In the Court’s lead opinion, Justice Patterson first reasoned that even if a Virginia citizen could expatriate himself under Virginia law, such expatriation could not divest him of his federal citizenship and its attendant obligations.⁸⁵ He also agreed with the Dutch and the circuit court that the Virginians could not have expatriated themselves because Congress had not provided for such expatriation, opining that such a law was “much wanted.”⁸⁶

Justice Iredell was the only other Justice to address the right to expatriation directly. His opinion eloquently argued for the principle of a right to expatriation,⁸⁷ but he also believed the state could limit that right in light of the citizen’s obligations to the state:

As every man is entitled to claim rights in society, which it is the duty of the society to protect, he in his turn is under a solemn obligation to discharge all those duties faithfully which he owes as a citizen to the society of which he is a member.⁸⁸

If the right to expatriation were an inalienable right “upon which no act of legislation c[ould] lawfully be exercised,” then “it must be left to every man’s will and pleasure, to go off, when, and in what manner, he pleases.”⁸⁹ Iredell rejected that notion because it would elevate citizens’ “mere private inclination” over “principles of patriotism and public good,” the qualities that “ought to predominate” in government.⁹⁰ Iredell’s view, then, was of a qualified right of expatriation, “a reasonable and moral right which every

⁸¹ BRADBURN, *supra* note 55, at 117.

⁸² 3 U.S. (3 Dall.) 133, 150 (1795).

⁸³ *Id.* at 150–51.

⁸⁴ BRADBURN, *supra* note 55, at 119.

⁸⁵ *Talbot’s Case*, 3 U.S. (3 Dall.) at 152–53.

⁸⁶ *Id.* at 153–54.

⁸⁷ Justice Iredell wrote that a man “should not be confined against his will to a particular spot because he happened to draw his first breath upon it.” *Id.* at 162.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 163.

man ought to be allowed to exercise, with no other limitation than such as the public safety or interest requires, to which all private rights ought and must forever give way.”⁹¹

The third critical judicial case on expatriation of this era was that of Isaac Williams,⁹² a U.S. citizen who accepted a position on a French frigate in 1797, took an oath of allegiance to France, and renounced his allegiance to all other countries, “particularly to America.”⁹³ Williams had served in the French navy for five years, moved his family to French territory, and intended to reside there permanently, but, on a short visit to Connecticut to visit family and friends, he was arrested and indicted for committing acts of war against Great Britain.⁹⁴ Williams argued that he had expatriated himself and that to hold differently would be contrary to the naturalization laws of the United States, which allowed citizens of foreign nations to become American citizens.⁹⁵

Chief Justice Ellsworth, sitting on the circuit court, rejected that argument, stating that the “common law of this country remains the same as it was before the Revolution,” and that “all the members of a civil community are bound to each other by compact,” such that “members cannot dissolve this compact without the consent or default of the community.”⁹⁶ He noted that even “the most visionary writers on this subject do not contend for the principle in the unlimited extent, that a citizen may at any and at all times, renounce his own, and join himself to a foreign country.”⁹⁷ Ellsworth’s statements in *Williams* set off a national debate, and “the question of expatriation was openly argued, and, for the first time, became a definite issue between the two political parties.”⁹⁸ For example, a Virginia paper opposed to the Federalist administration argued that “[t]he natural right [of expatriation] formerly secured to the citizens of this State by law” had been “abrogated” not by the Constitution or federal law “but by the judgment of a Federal Court.”⁹⁹

3. *Impressment, the War of 1812 and the Continuing Debate*

The debate over the right to expatriation continued during the start of the 19th century, but came to the fore of public consciousness in a different context: the British impressment into service of British-born American citi-

⁹¹ *Id.*; see also TSIANG, *supra* note 1, at 31; BRADBURN, *supra* note 55, at 120. Because Iredell did not believe that even Talbot’s foreign naturalization had completely severed his obligations to his native country, he ultimately ruled against him. *Talbot’s Case*, 3 U.S. (3 Dall.) at 165.

⁹² *Williams’ Case*, 29 F. Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708).

⁹³ *Id.* at 1330.

⁹⁴ TSIANG, *supra* note 1, at 32; BRADBURN, *supra* note 55, at 121.

⁹⁵ *Williams’ Case*, 29 F. Cas. at 1330.

⁹⁶ *Id.* at 1331.

⁹⁷ *Id.*

⁹⁸ TSIANG, *supra* note 1, at 34.

⁹⁹ *Id.* at 35.

zens.¹⁰⁰ As this practice of impressment and the disagreement over an citizen's right to expatriate herself culminated in the War of 1812,¹⁰¹ the question of expatriation became "one of the three great international issues of the time."¹⁰² In the United States, competing pamphlets argued the different positions on expatriation, with those supporting it as an absolute right also supporting the war against Great Britain for its practice of impressment.¹⁰³ Other pamphlets supported the common law concept of perpetual allegiance and generally opposed the war.¹⁰⁴ One of the most prominent pamphlets, George Hay's *Treatise on Expatriation*, argued strenuously against perpetual allegiance, calling it "bad in theory," "odious and detestable in practice," and "in the highest degree oppressive and cruel."¹⁰⁵

The impressment controversy and the public debates prompted renewed action and debate in Congress as well. When the debate over the right of expatriation returned in force to Congress in 1817,¹⁰⁶ at least one representa-

¹⁰⁰ The "laxity of American naturalization procedure was often considered in England as an instrument to encourage and harbor British deserters." *Id.* at 46. The naturalization law in the United States required only a renunciation of native allegiance and a probationary period of residence, which was shortened from fourteen years to five years in 1802. *Id.* In the face of the continued impressment of U.S. citizens into military service in their native country, particularly Britain, Congress passed a law in 1796 aimed at protecting American seamen by providing them citizenship protections. Brunsmann, *supra* note 49, at 574 (2010). The citizenship documents and protections provided by Congress ultimately proved ineffectual at preventing impressment into the service of Britain, however. *Id.*; see Spiro, *supra* note 36, at 1421–23. In 1807, the King proclaimed that "we do hereby warn all such mariners, seafaring men, and others, or natural-born subjects, that no such letters of naturalization, or certificates of citizenship, do, or can, in any manner, divest our natural-born subjects of the allegiance, or in any degree alter the duty which they owe to us, their lawful Sovereign." TSIANG, *supra* note 1, at 46 (quoting royal proclamation of Nov. 11, 1807).

¹⁰¹ Spiro, *supra* note 36, at 1422–23; 1 FREDERICK VAN DYNE, CITIZENSHIP OF THE UNITED STATES 271 (1903) ("One of the chief causes of the War of 1812 between the United States and Great Britain was the rigor with which the latter government applied the doctrine of inalienable allegiance. British cruisers took from American vessels on the high seas naturalized American citizens of British origins, and impressed them for service in the royal navy, on the grounds that they were British subjects by birth, and that no forms gone through in America could d[i]vest them of their British nationality.").

¹⁰² Green, *supra* note 3, at 312.

¹⁰³ *Id.*; TSIANG, *supra* note 1, at 52–53. Even though Federalists were generally against the war, see Brunsmann, *supra* note 49, at 583–85, and not as supportive of the individual right of expatriation, several prominent Federalists objected to the practice of impressment and the underlying justification of perpetual allegiance, see TSIANG, *supra* note 1, at 46–47.

¹⁰⁴ TSIANG, *supra* note 1, at 53–55.

¹⁰⁵ HAY, *supra* note 41, at 87–88.

¹⁰⁶ The first discussion of expatriation occurred during consideration of the 1795 Act establishing a uniform rule of naturalization, the second federal law governing naturalization, which, for the first time, required that an individual naturalizing as a U.S. citizen "renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatever, and particularly, by name, the prince, potentate, state or sovereignty whereof such alien may, at the time, be a citizen or subject." An Act to Establish a Uniform Rule of Naturalization and to Repeal the Act Heretofore Passed on That Subject, ch. 20, 1 Stat. 414, 414 (1795). One legislator proposed an amendment to "impede a return to citizenship of those who should expatriate themselves," and a debate occurred over several days about the doctrine of perpetual allegiance and the respective roles and authorities of the federal and state governments in the context of citizenship and expatriation. 4 ANNALS OF CONG. 1005, 1027–30

tive contended that the federal government lacked the authority under the Constitution to provide for expatriation, a position espoused by several others as well and largely based on their view that the federal government could not dissolve *state* citizenship.¹⁰⁷ The proposal at issue would have permitted any citizen to declare in writing her intention to relinquish her citi-

(1794); *see also* *Afroyim v. Rusk*, 387 U.S. 253, 272 (1967) (Harlan, J., dissenting) (describing this debate). In 1797, expatriation was again the subject of debate in the Legislature as the House of Representatives considered an express expatriation provision, which, as part of a bill prohibiting U.S. citizens from entering into foreign military service, would have allowed a U.S. citizen to “by deed in writing” before witnesses and a court “declare that he absolutely and entirely renounces all allegiance and fidelity to the United States, and to every of them, and shall forthwith depart of the territorial limits thereof.” 7 ANNALS OF CONG. 349 (1797). A citizen who undertook those procedures would “be considered expatriated, and forever thereafter deemed an alien, in like manner and to all intents as if he had never been a citizen” from the time of his departure from the country. *Id.* The provision divided the House along familiar lines, with Southern legislators from Virginia and South Carolina supporting it as codifying the inherent right of expatriation upon which the Revolution had been founded, *see id.* at 354 (“Mr. Giles [Va.] thought there could not be a doubt in the minds of Americans on the subject of expatriation. Indeed, he said, this was the foundation of our Revolution.”), and northern legislators advocating for the removal of the provision because they believed the government retained some control over a citizen’s ability to expatriate himself and thus throw off the obligations of citizenship, *see id.* at 352 (“There was a mutual obligation, Mr. S[mith] said, between a Government and all its citizens. The Government owed protection to its citizens, and citizens owed obedience to their Government. These duties were mutual and co-extensive; and they might as well say that Government could abandon its citizens when it pleased as that citizens could desert their Government when they pleased.”).

¹⁰⁷ *See* TSIANG, *supra* note 1, at 57; *Afroyim*, 387 U.S. at 273–75 (Harlan, J., dissenting). In 1810, Congress debated and passed a constitutional amendment pursuant to which, as ultimately passed, any U.S. citizens who acquired any title of nobility from another country would “cease to be a citizen of the United States.” 20 ANNALS OF CONG. 530, 549, 572–73, 635, 671 (1810); HERZOG, *supra* note 21, at 38 (showing development and revisions of the proposed amendment). The amendment ultimately fell two states short of ratification, *see* Gideon M. Hart, *The “Original” Thirteenth Amendment: The Misunderstood Titles of Nobility Amendment*, 94 MARQ. L. REV. 311, 315 & n.15 (2010), but, had it passed, it “would have had the potential to denationalize many Americans and even to change the course of history,” HERZOG, *supra* note 21, at 38. Although there is little historical record to explain the impetus for or debate over this “obscure” amendment, *id.*; *see also* Hart, *supra* note 107, at 324, at least one congressman argued that the fact of its passage by Congress meant that Congress did not think it could take citizenship away from individuals by statute. *See Afroyim*, 387 U.S. at 259 (quoting Congressman Anderson of Kentucky: “The cases to which their powers before this amendment confessedly did not extend, are very strong, and induce a belief that Congress could not in any case declare the acts which should cause ‘a person to cease to be a citizen.’”). That argument, like the debate over the 1818 expatriation bill, may have been grounded in “the dominant Jeffersonian view . . . that citizenship was within the jurisdiction of the states; a statute would thus have been a federal usurpation of state power.” *Id.* at 278 (Harlan, J., dissenting) (quoting John P. Roche, *The Expatriation Cases: “Breathes There the Man, With Soul So Dead . . . ?*, 1963 SUP. CT. REV. 325, 335) [hereinafter Roche, *The Expatriation Cases*]. Other rationales that would explain the need for a constitutional amendment, as opposed to a statute, have been proposed as well. *See id.* (suggesting that a constitutional amendment was necessary because the proposed amendment was intended to enforce the Emoluments Clause); Hart, *supra* note 107, at 321 & n.49 (citing the loophole of “constitutional magnitude” that a foreign noble could disclaim his title of nobility temporarily in order to become a U.S. citizen or office holder and then reclaim it and a legislator’s statements that Congress “had no power respecting this matter” without the amendment); *id.* at 346 (noting the amendment would provide “a constitutional protection against treachery, which did not depend upon a Congress that could be secretly corrupted”).

zenship in open court and to depart the country, at which point “such person shall . . . thenceforth be considered no citizen.”¹⁰⁸ The proposal ultimately failed, but the debate on expatriation demonstrates that the opinions in Congress reflected the wide variance in opinion among the first generations of American citizens.¹⁰⁹ Expatriation touched on fundamental questions about individual rights, state and federal authority, the nature of the polity, and obligations of citizenship,¹¹⁰ and the views were as diverse as they were strongly held.

4. *Further Judicial Consideration of the Individual Right of Expatriation*

During the early 19th century, expatriation controversies continued to reach the judiciary, including several cases in the Supreme Court. But these disputes typically involved the inverse of the issue debated in public discourse and by Congress. While the pamphlet arguments, congressional debates, and the impressment issue typically focused on the right of new Americans to expatriate themselves from their native land by virtue of transferring allegiance to the United States, the cases that reached the judiciary typically involved the relinquishment of citizenship by *American* citizens. The lower and state court decisions displayed the same diversity of opinion as the congressional and public debates, with some courts adhering to the doctrine of perpetual allegiance,¹¹¹ some supporting a qualified right of expatriation that required the consent of the sovereign,¹¹² and a few adopting the Jeffersonian position of an unqualified right of expatriation.¹¹³

After acknowledging the debate over the right to expatriation but declining to address it directly several times,¹¹⁴ the Supreme Court ultimately issued two decisions in 1830 directly addressing expatriation. In *Inglis v. Trustees of Sailor's Snug Harbor*,¹¹⁵ the Court faced the question of whether John Inglis, who had been born in New York on an unknown date during the Revolutionary War, could inherit land under New York law, a question that turned on whether Inglis was a citizen or an alien.¹¹⁶ Although it was not clear whether Inglis had been born in New York prior to the signing of the Declaration of Independence, after the signing but before the British took

¹⁰⁸ TSIANG, *supra* note 1, at 57.

¹⁰⁹ See MORROW, *supra* note 54, at 564 (“There was no unanimity on the question [of expatriation]. The state court decisions contradicted each other, the Supreme Court in general opposed the right, and statesman could be quoted on all sides.”).

¹¹⁰ TSIANG, *supra* note 1, at 56–61.

¹¹¹ See, e.g., *Ainslie v. Martin*, 9 Mass. (8 Tyng) 454 (1813).

¹¹² See TSIANG, *supra* note 1, at 64–65.

¹¹³ *Id.* at 64–66.

¹¹⁴ See *In re the Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822); *M'Ilvaine v. Coxe's Lessee*, 8 U.S. (4 Cranch) 209 (1808); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

¹¹⁵ 28 U.S. (3 Pet.) 99 (1830).

¹¹⁶ *Id.* at 120–22.

possession of New York, or after the British had taken possession of New York, the Court held that Inglis was an alien under each of these scenarios because his father had chosen to adhere to his native British allegiance while Inglis was a child and Inglis had “never attempted to throw off” that allegiance “by any act disaffirming the choice made for him by his father.”¹¹⁷ The Court recognized the “right of election . . . in all revolutions like ours,”¹¹⁸ and applied “the doctrine of allegiance . . . which rests on the ground of a mutual compact between the government and the citizen or subject, which it is said cannot be dissolved by either party without the concurrence of the other.”¹¹⁹ Citing a New York law banishing British loyalists who fled to British territory during the war, the Court determined that, even if Inglis were a New York citizen by birth and New York law, both the state and he had consented to his election of British allegiance.¹²⁰

The second case, *Shanks v. Dupont*,¹²¹ involved a native South Carolina woman who married a British officer in 1781 and departed the United States with her husband in 1782.¹²² Justice Story, writing for the majority, held that the temporary occupation of South Carolina by the British did not affect her American citizenship and that her marriage to the British officer “produce[d] no dissolution of the native allegiance of the wife.”¹²³ He stated the “general doctrine” as “no persons can, by any act of their own, without the consent of the government, put off their allegiance and become aliens.”¹²⁴ But he ultimately held that she had expatriated herself by electing to be a British subject after the war because the United States had consented to such election in the Peace Treaty of 1783.¹²⁵

5. Official Recognition of the Right to Expatriation

The Supreme Court’s and lower courts’ decisions did not settle the issue of expatriation, and, in the years after the War of 1812, the United States continued to confront the issue, most often in the context of foreign nations attempting to impress U.S. citizens into military service. Opinions were mixed at the beginning of this period over whether the United States should interpose herself between a foreign state and a U.S. citizen who had emigrated from that country or who was otherwise considered a subject of the foreign nation.¹²⁶ And a further question arose whether the United States

¹¹⁷ *Id.* at 124–26.

¹¹⁸ *Id.* at 122.

¹¹⁹ *Id.* at 124–25.

¹²⁰ *Id.* at 125–26. “It cannot, I presume, be denied, but that allegiance may be dissolved by the mutual consent of the government and its citizens or subjects.” *Id.* at 125.

¹²¹ 28 U.S. (3 Pet.) 242 (1830).

¹²² *Id.*

¹²³ *Id.* at 246.

¹²⁴ *Id.*

¹²⁵ *Id.* at 249–50.

¹²⁶ TSIANG, *supra* note 1, at 72–77.

should act differently with respect to naturalized U.S. citizens and natural-born U.S. citizens, with some advocating that the former should be provided less, or no, protection abroad when they were subject to the jurisdiction of their former sovereign.¹²⁷

Ultimately, under President Buchanan, who had long advocated a robust right of expatriation and protection for naturalized U.S. citizens abroad as a Senator and as Secretary of State,¹²⁸ the United States adopted a position of interceding on behalf of naturalized and natural-born U.S. citizens whom foreign governments attempted to impress or prosecute on the basis of their military obligations.¹²⁹ An opinion by Attorney General Black in the Buchanan Administration memorialized the prevailing executive branch position.¹³⁰

Confronted with the case of naturalized U.S. citizen Christian Ernst, who had been arrested on a temporary return visit to his native Hanover and impressed into military service, Black concluded that it was the “natural right of every free person . . . [to] throw[] off his natural allegiance and substitut[e] another allegiance in its place,” a principle upon which the United States “was populated” and to which it “owe[d] . . . its existence as a nation.”¹³¹ Black’s opinion defined the exercise of the right of expatriation as “not only *emigration* out of one’s native country, but *naturalization* in the country adopted as a future residence,”¹³² and his argument largely rested on the fact that U.S. laws, as well as the laws of numerous European nations, permitted the naturalization of foreign subjects.¹³³ He ardently defended the notion that U.S. law permitted no distinction between naturalized citizens and native-born citizens, excepting those inscribed in the Constitution, and he concluded by expressly rejecting the consensual view of expatriation, the view that had been adopted by the Supreme Court almost 30 years prior in *Shanks*.¹³⁴ Black concluded that even if Ernst had not followed the emigration laws of Hanover, “the Hanoverian government cannot justify the arrest of Mr. Ernst . . . unless it can also be proved that the original right of expatri-

¹²⁷ *Id.* at 75–79.

¹²⁸ Spiro, *supra* note 36, at 1427; TSIANG, *supra* note 1, at 72–75.

¹²⁹ TSIANG, *supra* note 1, at 75–79.

¹³⁰ Right of Expatriation, 9 Op. Att’y Gen. 356 (1866).

¹³¹ *Id.* at 359.

¹³² *Id.*

¹³³ *Id.* at 361–62.

¹³⁴ *Id.* at 363 (“Hanover probably has some municipal regulation of her own by which the right of expatriation is denied to those of her people who fail to comply with certain conditions. Assuming that such a regulation existed in 1851, and assuming also that it was violated by Mr. Ernst when he came away, the question will then arise whether the unlawfulness of his emigration makes his act of naturalization void as against the king of Hanover. I answer no, certainly not. He is an American citizen by our law; if he violated the law of Hanover, which forbade him to transfer his allegiance to us, then the laws of the two countries are in conflict, and the law of nations steps in to decide the question upon principles and rules of its own. By the public law of the world we have the undoubted right to naturalize a foreigner, whether his natural sovereign consented to his emigration or not.”).

ation depends on the consent of the natural sovereign. This last proposition I am sure no man can establish."¹³⁵

Although not intended to be public, Attorney General Black's opinion found its way into print and into the public consciousness.¹³⁶ President Buchanan directed Secretary of State Cass to act on the basis of it, and he restated Black's conclusions in his annual message to Congress in 1860: "Our Government is bound to protect the rights of our naturalized citizens everywhere to the same extent as though they had drawn their first breath in this country."¹³⁷

After the Civil War, the issue of protecting naturalized citizens abroad returned to the public consciousness, most notably in the cause of two Irish-born, naturalized American citizens, both Civil War veterans, who were prosecuted for and convicted of treason in Great Britain under procedures that applied only to citizens, despite their contention that they had expatriated themselves.¹³⁸ Relying on the doctrine of perpetual allegiance, the British courts rejected the Irish-Americans' defense that they had exercised their right of expatriation and were no longer British subjects due to their American naturalization.¹³⁹ The two were ultimately convicted, and their case resulted in "[n]ational outrage"¹⁴⁰ and became a "cause celebre" in the United States¹⁴¹ for the individual right of expatriation and protection of naturalized U.S. citizens abroad. The case, and others like it, led Congress to consider numerous resolutions in support of that cause.¹⁴²

¹³⁵ *Id.*

¹³⁶ TSIANG, *supra* note 1, at 80.

¹³⁷ James Buchanan, President, Fourth Annual Message (Dec. 3, 1860), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT 3157, 3172 (James D. Richardson ed., 1897).

¹³⁸ Green, *supra* note 3, at 315. The two Irish-Americans, Warren and Costello, landed in Dublin during the Fenian agitation, part of an expedition providing men and arms. TSIANG, *supra* note 1, at 85; *see also* Green, *supra* note 3, at 315; Spiro, *supra* note 36, at 1427-28.

¹³⁹ The British Court reasoned: "[A]ccording to the law of this country, he who is born under the allegiance to the British Crown, cannot, by any act of his own, or by any act of any foreign country or government, be absolved from that allegiance. . . . You may have acquired all the privilege of American citizens. . . . But while you may enjoy those privileges in America, yet, when you come to this country, where your allegiance binds you by bonds from which you cannot be freed—here, in this country—you must be amenable to the laws which here prevail." *R v. Warren* [1867] pamphlet rep. (Cty. Dublin Comm'n) (Ir.) 130, *reprinted in* H. EXEC. DOC. NO. 40-157, at 290-91 (1868).

¹⁴⁰ Spiro, *supra* note 36, at 1427.

¹⁴¹ Green, *supra* note 3, at 315.

¹⁴² TSIANG, *supra* note 1, at 86. For example, the House in November 1867 investigated whether the U.S. minister to Great Britain should be "charged with neglect of duty toward American citizens in England and Ireland by failing to secure their rights as such citizens," and considered a resolution demanding that the Secretary of State "communicate to this House all correspondence to and from the Department for the two years last past on the arrest, imprisonment, trial, or conviction of any American citizen, or any person claiming to be such, in Great Britain and Ireland." CONG. GLOBE, 40th Cong., 2d Sess. 786 (1867).

The end result of the political outcry over the Irish-Americans' fate,¹⁴³ and the culmination of almost a century of thought about an individual's right of expatriation, was the Expatriation Act of 1868.¹⁴⁴ At the end of 1866, President Johnson informed Congress that it "seem[ed] to be a favorable time for an assertion by Congress of the principle so long maintained by the executive department that naturalization by one state fully exempts the native-born subject of any other state from the performance of military service under any foreign government."¹⁴⁵ Congress ultimately went further: (1) declaring that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness"; (2) establishing that the government would disavow any foreign state's claim to allegiance from its native-born citizen who had become a naturalized U.S. citizen; and (3) affirming that naturalized U.S. citizens were entitled to the same protections abroad as native-born citizens.¹⁴⁶ The Act required the President to demand the release of any U.S. citizen imprisoned abroad in violation of the rights of U.S. citizenship.¹⁴⁷

Ultimately enshrined by the Expatriation Act of 1868, the view of expatriation as an individual right initially prevailed within the executive branch and in popular opinion, perhaps in large part due to the necessity of establishing and growing a new nation composed largely of immigrants. Concerns about dual allegiances and a desire to protect U.S. citizens from impressment or obligations to their native states led to a less stringent naturalization process and the recognition of a citizen's right of expatriation. But, as this section shows, the question of expatriation during the formation of the United States was far from settled. Some, starting with Thomas Jefferson, viewed it as an absolute individual right, inherent in natural law. Others, including the Supreme Court in *Inglis* and *Shanks*, maintained that the sovereign retained control over the circumstances in which an individual could exercise her right of expatriation, a vestige of perpetual allegiance. The questions that remained at the time of the codification of the Expatriation Act of 1868 thus involved the authority of the sovereign to prohibit, limit, or define an individual's exercise of her right of expatriation; they had nothing to do with the

¹⁴³ As stated by one Representative, after recounting the numerous cases of Irish-born American citizens who had been prosecuted as British subjects, "God save Ireland, shouted these brave American citizens from beneath the gallows, surrounded by a scowling mob of anti-Irish and anti-American Englishmen, and here from beneath this dome in these Hall of legislation, whose decrees shall yet govern the world, we reecho that cry." CONG. GLOBE, 40th Cong., 1st Sess. 788 (1867).

¹⁴⁴ An Act Concerning the Rights of American Citizens in Foreign States, ch. 249, 15 Stat. 223 (1868); see Spiro, *supra* note 36, at 1427–28 (noting that Congress "moved quickly" after the outrage over the prosecution of the Irish-Americans "to enact legislation categorically affirming expatriation").

¹⁴⁵ Andrew Johnson, President, Second Annual Message (Dec. 3, 1866), in 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT 3643, 3656 (James D. Richardson ed., 1897).

¹⁴⁶ 15 Stat. 223.

¹⁴⁷ *Id.*

state's authority to strip an individual's citizenship.¹⁴⁸ The individual was the only conceivable subject of the underlying verb "expatriate."

B. *Precession to the State as Subject*

The Expatriation Act of 1868—giving United States citizens the inherent right to relinquish their citizenship and providing for the protection of foreign citizens who relinquished their native citizenship to become U.S. citizens—had to be implemented by the executive branch, primarily in the context of international relations. That implementation began the precession of the subject of "expatriate" to the state. Although expatriation was a largely American conception in the late eighteenth century, by the end of the nineteenth century, it had begun to gain international recognition, especially in the Western world.¹⁴⁹ Difficulties in implementation and inconsistencies between the naturalization and emigration laws of different countries, however, led to the need for international agreements.¹⁵⁰ Recognizing that the United States had no authority to determine whether a foreign nation, under its law, considered a particular individual its citizen or subject, the United States entered into a series of international treaties and began to formulate a body of executive branch common law to implement them. The State Department was responsible for receiving and responding to requests for assistance from U.S. citizens abroad, and, in administering this responsibility, it applied the executive branch common law. In these expatriation inquiries, the individual remained the subject, the only entity with the authority to exercise her right of expatriation. But the state began to establish rules and procedures for effectuating an individual's actions that would resolve differences in national laws.

Ultimately, the rules and procedures of the executive branch common law were codified. The Expatriation Act of 1907,¹⁵¹ developed by the executive branch officials who had been administering the international treaties,¹⁵²

¹⁴⁸ See *To Amend the Nationality Act of 1940: Hearings on H.R. 6250 Before a Subcomm. of the S. Comm. on Immigration*, 77th Cong. 6 (1942) (Statement of John F. Finerty (D-Ill.)) ("[C]ertainly up to the passage of the expatriation act by the Congress, in 1868 . . . there was the greatest dispute; not whether a citizen could be deprived of his citizenship, but whether he could even surrender it if he wanted to.").

¹⁴⁹ Green, *supra* note 3, at 315.

¹⁵⁰ *Id.*; HERZOG, *supra* note 22, at 57–61.

¹⁵¹ Expatriation Act of 1907, ch. 2534, 34 Stat. 1228 (1907).

¹⁵² In 1906, the Senate passed a joint resolution calling for the President to appoint, with the advice and consent of the Senate, a commission "to examine into the laws, rulings, and practice of the United States relative to citizenship, expatriation, and the protection abroad of citizens of the United States and those who have made the declaration of intention to become citizens of the United States, and to make a report and recommendations thereon to the President, who shall transmit the same to Congress for its consideration." S.J. Res. 30, 59th Cong. (1906). The House Committee on Foreign Affairs, to which the resolution was referred, recommended it not be passed because "such commissions are sure to be leisurely, certain to be costly, and apt to be ineffective." H.R. REP. NO. 59-4784, at 1 (1906). Instead, the Committee recommended that the "Secretary of State select some of the gentlemen connected with the

largely codified the existing law of expatriation and contemporary administrative practice. As a result, the 1907 Act did not alter significantly the doctrine of expatriation. But it did, for the first time, establish in a statute particular actions by which a citizen “shall be deemed to have expatriated himself.”¹⁵³ In the 1907 Act, those actions mirrored the historical understanding of expatriation as an individual right.

The second major codification of expatriation law, the Nationality Act of 1940,¹⁵⁴ went further. It went beyond the historical acts that, by definition, constituted an individual’s exercise of his right to expatriation, and instead legislated circumstances in which an individual citizen “shall lose his nationality.”¹⁵⁵ In the Nationality Act of 1940, *evidence* that the executive branch had formerly considered relevant to expatriation, such as voting in a foreign election or employment by a foreign nation, became expatriation itself, what Justice Frankfurter would later call “statutory expatriation.”¹⁵⁶ With the 1940 Act, the precession to the state was complete: the state was no longer recognizing expatriation or even “deeming” it to have occurred. The state was expatriating the individual.

1. Early Administrative Practice and the Expatriation Act of 1907

Until the first general statute governing the loss of citizenship was passed in 1907, the individual right of expatriation was largely handled administratively. The Expatriation Act of 1868 established definitively the right of expatriation, but, as Justice Patterson had recognized eighty years previously in *Talbot’s Case*,¹⁵⁷ Congress still had not provided individuals any means for exercising the right.¹⁵⁸ The United States’s recognition of the right of expatriation had been mirrored in other Western countries, including Great Britain,¹⁵⁹ but some means by which to administer the transfer of citizenship and naturalization of foreign citizens was necessary. Accordingly, the United States concluded numerous treaties with foreign nations, collectively known as the “Bancroft treaties” after the U.S. official who concluded

State Department who have given special attention to these subjects, have them prepare a report and propose legislation that could be considered by Congress at the next session.” *Id.* Upon this recommendation, three State Department officials were directed to make this inquiry, and submitted their recommendations to Congress. See H.R. Doc. No. 59-326, at 1–2 (1906) [hereinafter 1906 State Department Report].

¹⁵³ Expatriation Act of 1907, § 2.

¹⁵⁴ Nationality Act of 1940, § 401, 54 Stat. 1137, 1168–69.

¹⁵⁵ *Id.*

¹⁵⁶ *Perez v. Brownell*, 356 U.S. 48 (1958).

¹⁵⁷ 3 U.S. (3 Dall.) 133, 163–65 (1795).

¹⁵⁸ FREDERICK VAN DYNE, *CITIZENSHIP OF THE UNITED STATES* 272 (1903) (“[T]here is no mode of renunciation of citizenship prescribed by our laws. Whether expatriation has taken place in any case must be determined by the facts and circumstances of the particular case. No general rule that will apply to all cases can be laid down.”).

¹⁵⁹ Green, *supra* note 3, at 315; Spiro, *supra* note 36, at 1428–29.

the first with the North German Federation.¹⁶⁰ These treaties governed the naturalization and expatriation of citizens of the two countries.¹⁶¹ But given the waves of immigrants coming to the United States, there was a need to establish uniformity both domestically and abroad in naturalization and expatriation procedures and formality. In 1876, in his last message to Congress, President Grant summed up the situation, which would largely continue for the next three decades:

The United States has insisted upon the right of expatriation, and has obtained, after a long struggle, an admission of the principle contended for by acquiescence therein on the part of many foreign powers and by the conclusion of treaties on that subject. It is, however, but justice to the government to which such naturalized citizens have formerly owed allegiance, as well as to the United States, that certain fixed and definite rules should be adopted governing such cases and providing how expatriation may be accomplished.

. . . .

. . . The delicate and complicated questions continually occurring with reference to naturalization, expatriation, and the status of such persons as I have above referred to induce me to earnestly direct your attention again to these subjects.¹⁶²

Because Congress had not legislated on the subject, the duty of implementing the right to expatriation recognized in the 1868 Act fell largely to the executive branch and, specifically, to the State Department.¹⁶³ The State

¹⁶⁰ Spiro, *supra* note 36, at 1428, n.73; Treaty, Prussia-U.S., June 12, 1871, 15 Stat. 615 (1868). The United States would continue to enter into a number of analogous treaties with countries all over the world, including Bavaria, Mexico, Denmark, Brazil, and Honduras. HERZOG, *supra* note 21, at 58–59.

¹⁶¹ See *Perez v. Brownell*, 356 U.S. at 48 (describing these treaties); HERZOG, *supra* note 22, at 57.

¹⁶² Ulysses S. Grant, President, Eighth Annual Message (Dec. 5, 1876), in 10 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT 4353, 4359–60 (James D. Richardson ed., 1897). President Grant also noted two of the primary problems that most often raised difficult citizenship questions: individuals living abroad asking for the protection of the United States as citizens and marriages between U.S. women and foreigners, as well as the children of those marriages. *Id.* (“While emigrants in large numbers become citizens of the United States, it is also true that persons, both native born and naturalized, once citizens of the United States, either by formal acts or as the effect of a series of facts and circumstances, abandon their citizenship and cease to be entitled to the protection of the United States, but continue on convenient occasions to assert a claim to protection in the absence of provisions on these questions. And in this connection I again invite your attention to the necessity of legislation concerning the marriages of American citizens contracted abroad, and concerning the status of American women who may marry foreigners and of children born of American parents in a foreign country.”).

¹⁶³ See Spiro, *supra* note 36, at 1439. Later, the Immigration and Naturalization Service, which was a part of the Department of Labor until it was transferred to the Department of Justice in 1940, see Reorganization Act of 1939, ch. 36, 53 Stat. 561 (the transfer was part of Reorganization Plan No. V, 5 Fed. Reg. 2223, 5 U.S.C. § 133t note (1940), submitted by the President pursuant to the Reorganization Act), would also play a role in determining citizen-

Department was responsible for implementing the Expatriation Act of 1868 and the various Bancroft treaties and for responding to calls for diplomatic protection from U.S. citizens abroad, the context in which expatriation decisions typically occurred. The lack of any definition in the Expatriation Act of 1868 left the State Department and other executive branch departments with an “absence of authoritative or of legislative definition” and “much doubt” about the principles of expatriation,¹⁶⁴ leading to somewhat inconsistent results.¹⁶⁵ But a general approach developed, by which the State Department would apply a “balancing test” to determine whether “the individual showed more attachment to the other country than to the United States.”¹⁶⁶

Domicile abroad was not sufficient to imply expatriation, for example, but if a naturalized U.S. citizen returned to her native country and circumstances demonstrated a “definitive abandonment of residence and domiciliary or representative business interest in the United States,” then the State Department would presume a relinquishment of U.S. citizenship.¹⁶⁷ The Department also looked to see whether the individual, though residing abroad, had engaged in “acts of allegiance” to the United States, such as paying her taxes, and the absence of such acts could raise a presumption of renunciation of citizenship.¹⁶⁸ This inquiry, which ultimately resembled a “totality of the circumstances” test, was an attempt to determine whether a particular person had in fact transferred her allegiance to a foreign country, the only conclusive act of expatriation, of which the best evidence was naturalization in a foreign state.¹⁶⁹

The Expatriation Act of 1907 in large part codified the State Department’s approach and international practice under the Bancroft treaties.¹⁷⁰

ship and would reach different conclusions on some questions of expatriation than the State Department, forcing the Attorney General to resolve the disagreements. *See infra* text accompanying note 193.

¹⁶⁴ No. 497 Letter from Hamilton Fish, Sec’y, Dep’t of State, to Ulysses S. Grant, President (Aug. 25, 1873), in 2 FOREIGN RELATIONS OF THE UNITED STATES 1186 (1873) (hereinafter “Papers Relating to Expatriation”).

¹⁶⁵ *See* TSIANG, *supra* note 1, at 8.

¹⁶⁶ Spiro, *supra* note 36, at 1440.

¹⁶⁷ TSIANG, *supra* note 1, at 99.

¹⁶⁸ Spiro, *supra* note 36, at 1440.

¹⁶⁹ *See, e.g., id.*; TSIANG, *supra* note 1, at 101–02; *see also* Expatriation–Foreign Domicile–Citizenship, 14 Op. Att’y Gen. 295–97 (1873) (consisting of a letter from George H. Williams, Attorney General, to President Ulysses S. Grant) (“Residence in a foreign country and an intent not to return are essential elements of expatriation; but to show complete expatriation as the law now stands, it is necessary to show something more than these. . . . [I]n addition to domicile and an intent to remain, such expressions or acts as amount to a renunciation of United States citizenship and a willingness to submit to or adopt the obligations of the country in which the person resides, such as accepting public employment, engaging in a military service . . . may be treated by this Government as expatriation, without naturalization. Naturalization is, without doubt, the highest but not the only evidence of expatriation.”); MOORE, *supra* note 36, at 574 (quoting Secretary of State Cass) (“The moment a foreign becomes naturalized, his allegiance to his native country is severed forever.”); FREDERICK VAN DYNE, CITIZENSHIP OF THE UNITED STATES 272 (1903) (“The most obvious and effective form of expatriation is by naturalization in another country.”).

¹⁷⁰ *See, e.g.,* Spiro, *supra* note 36, at 1441; TSIANG, *supra* note 1, at 106–07.

However, it also codified for the first time the exclusionary mien of expatriation. By the start of the 20th century, the country had switched from concern for “ingress and inclusion, defending those who wanted to become American citizens,”¹⁷¹ to concern about the high levels of immigration.¹⁷² Whereas the right of expatriation had derived, in part, from the need of the United States to populate its country,¹⁷³ the United States at the turn of the century started to be concerned about this population and about potential fraud.¹⁷⁴ It was in this context that Congress passed the Expatriation Act of 1907. Further, faced with the increasing incidence of foreign citizens naturalizing in the United States before returning to their native country shortly thereafter and there claiming the protections of U.S. citizenship, several Presidents had “repeatedly urged Congress to define the acts by which a citizen might be deemed to have lost or forfeited his citizenship.”¹⁷⁵ The conception of citizenship as a compact, inherently composed of both individual rights and obligations, and the paramount importance of domicile and allegiance in securing that relationship, led to the codification in the 1907 Act of actions constituting the abandonment or transfer of allegiance, i.e., acts of expatriation.

The 1907 Act originated in the report submitted by a commission composed of three State Department officials tasked with examining the law and practice related to citizenship, expatriation, and protection abroad.¹⁷⁶ The Commission recommended that the Expatriation Act of 1868 “be supplemented by an act declaring that expatriation of an American citizen may be assumed” when 1) “he obtains naturalization in a foreign state”; 2) “he engages in the service of a foreign government and such service involves his taking an oath of allegiance to such government”; and 3) “when he becomes domiciled in a foreign state, and such domicile [sic] may be assumed when he shall have resided in a foreign state for five years, without intent to return to the United States.”¹⁷⁷ The commission also recommended that the presumption of foreign domicile arising from five years’ residence abroad in the third category could be overcome by “competent evidence,” and that the exercise of the right to expatriation “shall only be permitted or recognized in time of peace.”¹⁷⁸ These recommendations largely reflected acts that constituted loss of citizenship prior to 1907 according to various treaties between

¹⁷¹ Green, *supra* note 3, at 315.

¹⁷² See HERZOG, *supra* note 21, at 43.

¹⁷³ See TSIANG, *supra* note 1, at 111–12.

¹⁷⁴ See Green, *supra* note 3, at 315–16.

¹⁷⁵ TSIANG, *supra* note 1, at 104; see also 1906 State Department Report, *supra* note 152, at 17 (noting that “our Government may be called on to protect during the period of liability to military service a person who has no intention of ever residing in the United States or performing any obligations to it, but who, after shielding himself from the performance of his duty to the Government under which he resides by the ambiguity of his position, finally accepts the allegiance of the country of his birth or continued domicile.”).

¹⁷⁶ See TSIANG, *supra* note 1, at 104–05.

¹⁷⁷ 1906 State Department Report, *supra* note 152, at 23.

¹⁷⁸ *Id.*

the United States and foreign nations.¹⁷⁹ In a separate section of its report dealing specifically with the effect of naturalization upon the status of wives and minor children, the commission recommended that an American woman who married a foreign citizen should take the nationality of her husband “during coverture”, but could “revert to her American citizenship” upon death of her husband or divorce by either registering within a year or returning to the United States to live.¹⁸⁰

The 1907 Act largely adopted the Report’s recommendations about naturalization and taking an oath of allegiance to a foreign country,¹⁸¹ and also adopted its recommendations about the citizenship of American women who married foreign citizens and the children of such marriages.¹⁸² The 1907 Act also provided, as suggested by the Report, that “no American citizen shall be allowed to expatriate himself when this country is at war.”¹⁸³ With respect to domicile abroad, however, the 1907 Act departed from the Report’s recommendations. The Report had recommended a broad presumption of permanent domicile abroad—which would result in an assumption of expatriation—after a certain period of residence abroad, applicable to all American citizens, natural born and naturalized.¹⁸⁴ The 1907 Act, however, limited the applicability of this provision to naturalized citizens, excluding native-born citizens from its reach.¹⁸⁵ Naturalized U.S. citizens who resided for two years in their native state or five years in any other foreign state were presumed to “ha[ve] ceased to be an American citizen,” but naturalized

¹⁷⁹ See HERZOG, *supra* note 21, at 43.

¹⁸⁰ 1906 State Department Report, *supra* note 152, at 29.

¹⁸¹ The Report justified the second provision, providing for expatriation by accepting employment in the service of a foreign government if such employment required the taking of an oath of allegiance, principally on the basis of the meaning of the oath. See 1906 State Department Report, *supra* note 152, at 23 (explaining that an American citizen who “takes an oath of allegiance to a foreign government in order to enter its service” has forsworn his allegiance to the United States and “has expatriated himself from the United States” has done so “with equal certainty” as an American citizen who naturalizes in a foreign country); see also *id.* (“[N]o man should be permitted deliberately to place himself in a position where his services may be claimed by more than one government and his allegiance be due to more than one.”). In accord with this reasoning, the 1907 Act adopted the taking of the oath of allegiance as the act constituting expatriation and did not require the additional condition that the individual have entered into the employment of the foreign country. Expatriation Act of 1907, ch. 2534 § 2, 34 Stat. 1228, 1228 (1907).

¹⁸² See 1907 Act, §§ 3–6, 34 Stat. at 1229.

¹⁸³ 1907 Act, § 2, 34 Stat. at 1228.

¹⁸⁴ See 1906 State Department Report, *supra* note 152, at 23. The Report catalogued the long, though not entirely consistent, history of treating naturalized and native-born citizens equally in terms of their rights of citizenship and in protection abroad. See *id.* at 8 (“This protection has always been accorded to naturalized citizens equally with native citizens, except that there was fluctuation in the practice of protecting naturalized citizens upon their return to the country of their origin until the [Expatriation Act of] 1868.”); *id.* at 12 (“The able and exhaustive report of the Committee on Foreign Affairs of the House . . . and the debates in the Senate and House . . . left no doubt of agreement on the great point of the right of absolute equality of protection of naturalized and native Americans while in foreign state.”).

¹⁸⁵ See 1907 Act, § 2, 34 Stat. at 1228.

citizens could overcome this presumption “on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States.”¹⁸⁶

2. *Interpretation and Implementation of the 1907 Act*

The State Department circular that went out following the passage of the 1907 Act reiterated the three methods of expatriation enumerated in the Act—naturalization in a foreign country, the taking of an oath of allegiance to a foreign country, and continued residence abroad by naturalized citizens—and directed every United States foreign service officer to notify the Department if a U.S. citizen naturalized in a foreign country or took an oath of allegiance to a foreign country.¹⁸⁷ The circular also set out three methods by which a naturalized citizen who had lived abroad in her native country for two years or in any other foreign country for five could overcome the presumption of expatriation: 1) if residence abroad was primarily the result of American trade or business; 2) if residence abroad was for bona fide reasons of health or education; and 3) if an unforeseen exigency prevented the person from returning to the United States as intended.¹⁸⁸ The Secretary of State stated in the circular that the “evidence required to overcome the presumption must be of specific facts and circumstances which bring the alleged citizen under one of the [specified] categories, and mere assertion, even under oath, that any of the enumerated reasons exist will not be accepted as sufficient.”¹⁸⁹

a. *Naturalization in a Foreign Country*

With respect to naturalization in a foreign state, the State Department determined that involuntary naturalization did not affect loss of citizenship.¹⁹⁰ For example, a U.S. citizen who applied for Russian citizenship after “being told he ‘would be without the law’ during his stay in Russia if he did not become a Russian,” was ruled not to have voluntarily naturalized and remained a U.S. citizen.¹⁹¹ Some difficulties arose with respect to foreign laws that bestowed citizenship on individuals when certain requirements were met; the State Department had to determine whether an individual had “accept[ed] or reject[ed] the citizenship thus thrust upon him” by the foreign state.¹⁹² In these cases, the State Department developed what Professor John P. Roche dubbed the “doctrine of supplemental acts,” looking at acts such as applying for an identity card, holding office, or performing other

¹⁸⁶ *Id.*

¹⁸⁷ See TSIANG, *supra* note 1, at 106.

¹⁸⁸ *See id.*

¹⁸⁹ *Id.*

¹⁹⁰ See John P. Roche, *Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25, 28 (1950).

¹⁹¹ *Id.* at 28.

¹⁹² *Id.*

acts “ordinarily open only to [the foreign state’s] subjects” in order to determine whether the individual had accepted the nationality thrust upon her.¹⁹³

Another difficulty that arose concerned children who were born in the United States but whose parents naturalized in foreign states during the child’s minority.¹⁹⁴

Ultimately, the Supreme Court resolved the issue in *Perkins v. Elg* in an opinion that is instructive about the Court’s understanding of expatriation and the 1907 Act.¹⁹⁵ Marie Elizabeth Elg was born in Brooklyn to naturalized U.S. citizens native to Sweden. During her childhood, her parents moved back to Sweden and voluntarily reassumed their Swedish citizenship. Marie returned to the United States when she was 21 and was admitted as a citizen.¹⁹⁶ But six years later she was informed that she was not a citizen and threatened with deportation.¹⁹⁷ Her action to establish her citizenship reached the Supreme Court, which held, citing executive branch opinions, actions, and administrative guidances that both pre- and post-dated the 1907 Act, that

¹⁹³ *Id.* at 29. Another problem involved individuals who had naturalized in foreign countries during World War I. The 1907 Act provided that “no American citizen shall be allowed to expatriate himself when this country is at war.” Expatriation Act of 1907, ch. 2534 § 2, 34 Stat. 1228, 1228 (1907). The Secretary of State and Department of Labor, which then housed the Immigration and Naturalization Service, disagreed on what the correct approach to these individuals should be. *See* 39 Op. Att’y Gen. 474, 476 (1940). While the Secretary of State determined that individuals who had voluntarily naturalized in other countries during the war would be considered citizens until July 2, 1921, *see* Exceptions, 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW, ch. 9, § 248, at 264–65, the Secretary of Labor asserted that attempted wartime expatriation should be regarded as never becoming effective, *see* Loss of Citizenship Through Marriage to Alien, Foreign Naturalization, or Foreign Oath of Allegiance, 39 Op. Att’y Gen. at 476 (quoting from a memorandum prepared by the Solicitor of Labor). Ultimately, Attorney General Jackson resolved the issue in favor of the Secretary of State’s position, concluding that “American citizens who were naturalized abroad after entry into the war . . . and prior to the congressional resolution . . . declaring the war at an end, lost their citizenship as of the latter date.” *Id.* at 481. He reasoned that the provision had been “intended to protect the interests of the United States,” and it would be “clearly contrary to the interests of the United States, that one who has in fact abandoned his former allegiance and taken upon himself the allegiance of a foreign power is, nevertheless, free to enter our country at will with all the rights of a citizen.” *Id.*

¹⁹⁴ *See, e.g.,* United States v. Reid, 73 F.2d 153 (9th Cir. 1934); Citizenship of Ingrid Therese Tobiassen, 36 Op. Att’y Gen. 535 (1932); Roche, *supra* note 190, at 30. The fact that children born as U.S. citizens who wanted to return and claim that citizenship upon reaching majority would not be able to do so under the prevailing view led Congress to pass statutes to allow specific individuals who had been deemed to have expatriated themselves during their childhood to return to the United States as citizens. *See* Act of July 13, 1937, ch. 493, 50 Stat. 1030 (“[I]n the administration of the immigration laws, James Lincoln Hartley, a native-born citizen of the United States who involuntarily lost his citizenship at the age of seven years by reason of the naturalization of his father as a citizen of Canada, shall be held and considered to have been legally admitted to the United States for permanent residence. Notwithstanding any other provision of law, said James Lincoln Hartley may be naturalized as a citizen of the United States . . .”).

¹⁹⁵ 307 U.S. 325 (1939).

¹⁹⁶ *Id.* at 327.

¹⁹⁷ *Id.* at 328.

she was a citizen because she had elected to retain her U.S. citizenship on reaching maturity.¹⁹⁸

Petitioners stress the American doctrine relating to expatriation. By the Act of July 27, 1868, Congress declared that “the right of expatriation is a natural and inherent right of all people.” Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking. That right is fittingly recognized where a child born here, who may be, or may become, subject to a dual nationality, elects on attaining majority citizenship in the country to which he has been removed. But there is no basis for invoking the doctrine of expatriation where a native citizen who is removed to his parents’ country of origin during minority returns here on his majority and elects to remain and to maintain his American citizenship. Instead of being inconsistent with the right of expatriation, the principle which permits that election conserves and applies it.

. . . .

. . . Having regard to the plain purpose of Section 2 of the Act of 1907, to deal with voluntary expatriation, we are of the opinion that its provisions do not affect the right of election, which would otherwise exist, by reason of a wholly involuntary and merely derivative naturalization in another country during minority.¹⁹⁹

Of course, executive branch officials still had to determine after *Elg* what constituted election after majority, which they did by looking to some of the same acts that made up Roche’s “doctrine of supplemental acts.”²⁰⁰

b. Oath of Allegiance

Executive branch officials also had to determine what constituted an “oath of allegiance” to a foreign state within the meaning of the 1907 Act. They would evaluate each oath, looking at factors such as whether it was required by the laws of the foreign state and sworn before a government official. As one Secretary of State stated the inquiry: “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

¹⁹⁸ See *id.* at 330–49.

¹⁹⁹ *Id.* at 334, 347.

²⁰⁰ Roche, *supra* note 190, at 31. An individual only had to make one election, however, and once an election had been made, subsequent acts suggesting allegiance to the other country were not regarded as evidence of a different election. For example, a dual Canadian national who established U.S. residence after reaching majority but then returned to Canada to vote in an election remained a U.S. citizen because of the initial election. *In re M*, 1 I. & N. Dec. 536 (B.I.A. 1943).

to perform the obligations of citizenship to this country.”²⁰¹ Executive branch officials struggled initially with oaths of allegiance required for service in foreign militaries, evaluating each oath individually to determine, for example, whether the allegiance was temporary or permanent.²⁰² Ultimately, they started treating them all equally, a result affirmed by a federal court that determined the length of the oath did not matter, only that the allegiance sworn was total.²⁰³ Service in a foreign army that required an oath of allegiance of all soldiers would lead to an administrative presumption that a citizen had taken the oath, which the individual bore the burden of rebutting.²⁰⁴

As with naturalization during minority, the taking of an oath of allegiance by a minor also created disagreement within the executive branch. The doctrine of “confirmatory acts” became a way to determine if minors who took an oath of allegiance had expatriated themselves.²⁰⁵ A minor taking an oath of allegiance did not expatriate herself unless, upon majority, she engaged in confirmatory acts, which one decision of the Board of Immigration Appeals defined as “affirmative, overt act[s] which indicate[] a continued allegiance to the foreign state.”²⁰⁶ Although the State Department initially took the view that a voluntary oath by a minor did constitute expatriation, it ultimately adopted the confirmatory acts doctrine after adverse court decisions.²⁰⁷ Under this doctrine, “the overt act, in order to confirm the oath, must have a direct relationship to the purpose for which the oath was

²⁰¹ Roche, *supra* note 190, at 33.

²⁰² *Id.* at 34.

²⁰³ *Ex parte Griffin*, 237 F. 445, 447 (N.D.N.Y. 1916). One exception to this practice was the treatment of American citizens who joined the Canadian Army before the United States entered World War II. They swore a special oath of “fealty,” that was designed to avoid the loss of citizenship, and the Board of Immigration Appeals acquiesced in that workaround. *See In re T*, 1 I. & N. Dec. 596 (B.I.A. 1943).

²⁰⁴ *See United States ex rel. Rojak v. Marshall*, 34 F.2d 219, 220 (W.D. Pa. 1929). Attorney General Jackson’s opinion about naturalization in a foreign country during World War I also dealt with oaths of allegiance taken during that time. *Loss of Citizenship Through Marriage to Alien, Foreign Naturalization, or Foreign Oath of Allegiance*, 39 Op. Att’y Gen. 474, 481 (1941). Contrary to those who were naturalized in a foreign state during the war, the Attorney General determined, consistent with the positions of the State Department and INS, that individuals who took an oath of allegiance to the foreign state had not necessarily expatriated themselves, effective July 2, 1921. *Id.* Because “the nationality of the foreign state is not acquired through the mere taking of an oath of allegiance,” *id.* at 482, an individual would not be considered to have expatriated himself “unless he demonstrated by some confirmatory act that he had actually abandoned his allegiance to the United States,” Roche, *supra* note 190, at 34.

²⁰⁵ *Id.* at 35.

²⁰⁶ *Id.*

²⁰⁷ *See Minors*, 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW, ch. 9, § 249, at 270–74 (recounting the past decisions of the State Department regarding minors taking oaths of allegiance and quoting State Department decisions noting that the 1907 Act “does not attempt to make any distinction between minors and adults” and concluding that “in the absence of a clear showing of duress, any person, whether minor or adult, who takes an oath of allegiance to a foreign state thereby becomes expatriated”).

taken, thus amounting to a practical reaffirmation of the oath of allegiance."²⁰⁸

In many ways, the inquiry paralleled the naturalization inquiry. The oath had to be voluntary and not taken under duress, although a citizen claiming duress bore the burden of proof. And examples of "confirmatory acts"—voting in a foreign election, obtaining a foreign identity card, joining a foreign military force—mirrored the "supplemental facts" considered in the naturalization inquiries. However, while naturalization in a foreign country almost universally required the individual to establish her residence in that country, an oath of allegiance could be taken anywhere.²⁰⁹ The State Department had a longstanding position, however, that expatriation could be accomplished only by departure from the United States.²¹⁰ Thus, an oath of allegiance to a foreign country that was taken in the United States could not constitute expatriation. Roche locates the basis for this position in the "early interpretation of expatriation as a *transfer* of allegiance from one sovereign to another—as opposed to simple *loss* of nationality."²¹¹ Because a transfer "could not by definition take place within the jurisdiction of the United States,"²¹² expatriation could not occur.

c. Residence Abroad by Naturalized Citizens

The 1907 Act provided that when a naturalized citizen had lived abroad for two years in his native country or five years in any foreign country, "it shall be presumed that he has ceased to be an American citizen."²¹³ As noted, the administrative guidance circulated by the State Department following the passage of the Act specified three ways in which the presumption could be overcome: limited types of business abroad, health or education abroad, or exigent circumstances. These were later expanded to include additional types of business abroad, and an exception made for residence in Canada and Mexico, but each method of overcoming the presumption included as a necessary condition an ultimate intent to return to the United States and reside there permanently.²¹⁴

This provision was the subject of further disagreement within the executive branch. The State Department contended that an individual who could

²⁰⁸ Roche, *supra* note 190, at 35.

²⁰⁹ MINORS, 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW, ch. 9 § 249, at 274 (noting that the State Department "made a further ruling to the effect that in view of the fact that there were two or three Federal court decisions holding that a minor does not expatriate himself by taking an oath of allegiance to a foreign government . . . [the Department] should follow these decisions in the matter of granting passports, notwithstanding the fact that . . . [it] could, in the exercise of the discretion conferred upon the Secretary of State in such matters, decline to do so").

²¹⁰ Roche, *supra* note 190, at 36.

²¹¹ *Id.*

²¹² *Id.* at 37.

²¹³ Act of Mar. 2, 1907, ch. 25, 34 Stat. 1228.

²¹⁴ TSIANG, *supra* note 1, at 106.

not overcome the presumption had expatriated herself, a position supported by Attorney General Charles J. Bonaparte.²¹⁵ But Bonaparte's successor, Attorney General George Wickersham, overruled the State Department's view and interpreted the 1907 Act in a more limited way. He contended that the purpose of the presumption was "to relieve the Government of the obligation to protect such citizens residing abroad" not to "decitizenize them, but to withdraw from them the ordinary protections of a citizen if they have become permanent residents abroad."²¹⁶ The State Department at first resisted Wickersham's interpretation and sought to undermine or overturn it, refusing to deliver passports to citizens.²¹⁷ The Department immediately reassumed its interpretation of the statute when a district court rejected Wickersham's ruling.²¹⁸ In 1926, however, in light of Supreme Court and other judicial decisions that supported it,²¹⁹ the State Department finally accepted the Wickersham view for good.²²⁰ Accordingly, from 1926 until the Nationality Act of 1940, residence abroad "related only to the loss of *protection* by naturalized citizens abroad" and did not constitute expatriation.²²¹

d. Married Women

The provision pertaining to married women²²² led to the principal Supreme Court decision on the 1907 Act, a decision that would later become

²¹⁵ WEIL, *supra* note 5, at 85.

²¹⁶ *Id.*

²¹⁷ Roche, *supra* note 190, at 39.

²¹⁸ *Id.*

²¹⁹ See *United States v. Gay*, 264 U.S. 353, 389 (1924) ("[P]lace of residence . . . might be regarded as an element in continuing [an individual] a citizen and presumptions could be erected upon it, and we are prompted to say it is a presumption easy to preclude, and easy to overcome. It is a matter of option and intention.").

²²⁰ Roche, *supra* note 190, at 39.

²²¹ *Id.*

²²² This provision, effecting the temporary loss of citizenship for women who married foreign men, addressed fears that "alien men married American women simply to get a foothold in the United States," and represented a "tremendous setback for women's struggle for full citizenship rights, as it implied that women derived their status as citizens from their American husbands rather than their own individuality." HERZOG, *supra* note 21, at 43. Because of this provision, the act was also known as the "Gigolo Act." *Id.*; see also Green, *supra* note 3, at 319. And one scholar has claimed that it "caused the feminist revolution." Green, *supra* note 3, at 319. The provision forcing women to take the citizenship of foreign husbands was the subject of considerable resistance from U.S. women and those supporting women's rights, and this opposition led Congress to repeal it for the most part in the Cable Act of 1922, which provided that "a woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this act." Married Women's Independent Citizenship (Cable) Act, ch. 411, 42 Stat. 1021, § 3 (1922); see Green, *supra* note 3, at 319. The Cable Act did not restore citizenship to women who had lost their citizenship under the 1907 Act, however. Married Women's Independent Citizenship (Cable) Act, ch. 411, 42 Stat. 1021, § 4 (1922); Janet M. Calvo, *Gender, Wives, and U.S. Citizenship Status: The Failure of Constitutional and Legislative Protection*, 9 INT'L REV. CONSTITUTIONALISM 263, 281 (2009). Under the Cable Act, women who married aliens who were themselves ineligible for American citizenship continued to lose their citizenship, Calvo, *supra*, at 282–86, but this exclusion was ultimately removed in 1931, see Act of March 3, 1931, ch. 442, 46 Stat. 1511, § 4(a) (1931).

the subject of considerable disagreement among Supreme Court Justices. In *Mackenzie v. Hare*,²²³ a woman who had been born in California and never left was not allowed to register to vote in San Francisco because she had married a citizen of Great Britain, thereby taking his nationality and relinquishing hers.²²⁴ She brought an action against the Board of Election Commissioners in San Francisco to compel her registration as a voter, relying on statements from *Osborn v. Bank of the United States*²²⁵ and *United States v. Wong Kim Ark*,²²⁶ among other things, to contend that Congress had no authority to denationalize her without her consent.²²⁷ The Court noted that her arguments were “in exact antagonism to the statute,” but it ultimately determined that her case did not implicate the question of Congress’s authority to provide for involuntary expatriation.²²⁸ Instead, the Court held that the plaintiff’s marriage to the foreign citizen was “a condition voluntarily entered into, with notice of the consequences,” an act “as voluntary and distinctive as expatriation.”²²⁹ In light of the international and domestic consequences of American citizens marrying foreigners and the prevailing view of marriage as “unifying” the two, with the man’s identity subsuming the woman’s, the Court found it was “no arbitrary exercise of government” to provide that “as long as the relation lasts it is made tantamount to expatriation.”²³⁰

In 1950, following the passage of the Nationality Act of 1940,²³¹ the Court relied on *Mackenzie* in analyzing, under the 1907 Act, the effect of naturalization in a foreign country by a U.S. citizen. The petitioner in *Savorgnon v. United States*²³² had applied for, and been granted, Italian citizenship in the United States, which she had been required to do to acquire royal consent to her marriage to an Italian Vice Consul stationed in the United States.²³³ She signed an oath in Italian, which she neither understood nor had translated to her, which stated that she “renounce[d] [her] American citizenship,” but the district court found as a matter of fact that the petitioner had intended to obtain Italian citizenship but “had no intention of

²²³ 239 U.S. 299 (1915).

²²⁴ *Id.*

²²⁵ 22 U.S. (9 Wheat.) 738, 827–28 (1822) (“A naturalized citizen is indeed made a citizen under an act of Congress . . . He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.”).

²²⁶ 169 U.S. 649, 703 (1898) (“The power of naturalization, vested in congress by the constitution, is a power to confer citizenship, not a power to take it away.”); *see also id.* (citing *Osborn*, 22 U.S. at 827).

²²⁷ *Mackenzie*, 239 U.S. at 310.

²²⁸ *Id.* at 310–12.

²²⁹ *Id.* at 312.

²³⁰ *Id.*

²³¹ *See infra* text accompanying notes 239–45.

²³² 338 U.S. 491 (1950).

²³³ *Id.* at 494.

renouncing her allegiance to the United States.”²³⁴ Although the executive branch contended that the petitioner had lost her citizenship when she signed the oath under the 1907 Act, the Court ultimately did not resolve that question, relying instead on the petitioner’s subsequent residence in Italy to support her loss of citizenship.²³⁵ But the Court did address, and reject, the petitioner’s contention that “her intent should prevail,” i.e. that she could not lose her citizenship under legislation unless she intended to do so.²³⁶ The Court reasoned that the United States “ha[d] long recognized the general undesirability of dual allegiances” and that “[t]here is nothing . . . in the Act of 1907 that implies a congressional intent that, after an American citizen has performed an overt act which spells expatriation under the wording of the statute, he nevertheless can preserve for himself a duality of citizenship by showing his intent or understanding to have been contrary to the usual legal consequences of such an act.”²³⁷ Relying on *Mackenzie*, the Court held that the petitioner was “a competent adult” who “voluntarily and knowingly” engaged in an expatriating act, the consequences of which she was “responsible for understanding” and by which she was “bound.”²³⁸

3. *The Nationality Act of 1940*

The modern conception of expatriation originates in the Nationality Act of 1940.²³⁹ In 1933, by Executive Order, President Roosevelt designated the Secretary of State, the Attorney General, and the Secretary of Labor as a Committee on Immigration charged with reviewing U.S. immigration and nationality laws and practices, recommending revisions, and proposing a single, comprehensive law to collect all of the formerly scattered provisions on immigration.²⁴⁰ The eventual result was the Nationality Act of 1940, section 401 of which is the precursor of current section 349 and the basis for expatriation today.²⁴¹ The bill was presented as a codification of existing law with some recommended substantive changes,²⁴² and was endorsed by all of the

²³⁴ *Id.* at 495.

²³⁵ *Id.* at 503.

²³⁶ *Id.* at 499–500.

²³⁷ *Id.* at 500.

²³⁸ *Id.* at 502.

²³⁹ The Nationality Act of 1940, ch. 876, 54 Stat. 1137. The full title of the Act displays its purpose: “An Act to revise and codify the nationality laws of the United States into a comprehensive nationality code.” *Id.*

²⁴⁰ See generally 3 STAFF OF H. COMM. ON IMMIGRATION & NATURALIZATION, 76TH CONG., REP. PROPOSING A REVISION AND CODIFICATION OF THE NATIONALITY LAWS OF THE UNITED STATES V (Comm. Print 1938) [hereinafter 3 REP. ON NATIONALITY LAWS]. (“By your Executive Order of April 25, 1933, you designated the undersigned a committee to review the nationality laws of the United States, to recommend revisions, and to codify the laws into one comprehensive nationality law for submission to the Congress.”); see also HERZOG, *supra* note 21, at 45.

²⁴¹ Nationality Act of 1940 § 401.

²⁴² 2 STAFF OF H. COMM. ON IMMIGRATION & NATURALIZATION, 76TH CONG., REP. PROPOSING A REVISION AND CODIFICATION OF THE NATIONALITY LAWS OF THE UNITED STATES III

major executive branch departments.²⁴³ As a result, the law was subject to little debate or dissent,²⁴⁴ even though it included several significant changes to existing law, including to the law of expatriation.²⁴⁵ As originally passed, section 401 included, and would be amended to include more, significant departures from and additions to the 1907 Act and the historical conception of expatriation. As a result, the Nationality Act of 1940, especially section 401, marks the culmination of the precession of the subject of “expatriate” to the state.

a. Section 401

Section 401 of the Nationality Act of 1940 provided that a U.S. citizen “shall lose his nationality” by performing any of a series of enumerated acts, which included the two primary expatriation acts in the 1907 Act: “[o]btaining naturalization in a foreign state” and “[t]aking an oath or making an affirmation or other formal declaration of allegiance to a foreign state.”²⁴⁶ But it also included several additional acts: 1) service in the armed forces of a foreign state, 2) employment under the government of a foreign state, 3) voting in a foreign election, 4) making a formal renunciation of citizenship before a U.S. diplomatic officer in a foreign state, 5) conviction of desertion, or 6) conviction for treason.²⁴⁷ The first four of these acts—along with the use of a foreign passport as a national of that country, which was ultimately not adopted—were proposed by the Commission and reflected a codification of the “supplemental facts” and “confirmatory acts” that had been used by the executive branch in implementing the 1907 Act.²⁴⁸ The Commission described the addition of these new acts as “intended to deprive persons of American nationality when such persons, by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United States.”²⁴⁹ However, these four acts, unlike the historical acts of expatriation, did not involve the assumption of a new nationality.²⁵⁰

(Comm. Print 1938) [hereinafter 2 REP. ON NATIONALITY LAWS] (transmitting “a report concerning the Revision and Codification of the Nationality Laws of the United States,” which “indicate[d] the desirability from the administrative standpoint of having the existing nationality laws now scattered among a large number of separate statutes embodied in a single, logically arranged and understandable code,” and noting that “[c]ertain changes in substance are likewise recommended”).

²⁴³ HERZOG, *supra* note 21, at 45.

²⁴⁴ *Id.*

²⁴⁵ Herzog argues that these changes, and the fact that there was so little debate over them, may be explained “by the anticipation of war and the concern that German Americans may have dual loyalty.” *Id.* at 46.

²⁴⁶ § 401(a),(b), 54 Stat. at 1169.

²⁴⁷ *Id.* § 401(c)–(h).

²⁴⁸ T. Alexander Aleinkoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1477 (1986).

²⁴⁹ 3 REP. ON NATIONALITY LAWS, *supra* note 240, at VII (“None of the various provisions in the Code concerning the loss of American nationality . . . is designed to be punitive or to interfere with freedom of action.”).

²⁵⁰ HERZOG, *supra* note 21, at 46.

They had formerly served as evidence of such an assumption, used to support a finding that voluntary expatriation had occurred,²⁵¹ but, with the enactment of the Nationality Act of 1940, they became sufficient in and of themselves to establish expatriation.

The fifth and sixth enumerated instances in which a U.S. citizen “shall lose his nationality” were of an entirely different nature and origin. During the Civil War, the United States found herself in the same position in which European countries had formerly been—in need of conscription for military service and facing the problem of citizens expatriating themselves to avoid such conscription.²⁵² In fact, naturalized citizens were returning to their native countries to avoid conscription in the Civil War and then appealing to the United States to intercede when their native country attempted to impress them into military service, a practice that led President Abraham Lincoln to suggest Congress “fix a limit beyond which no citizen of the United States residing abroad may claim the protection of his Government.”²⁵³

As a result, shortly before the end of the Civil War, Congress passed a law designed to increase the punishment for desertion from the Union Army. Section 21 of that bill provided that, “in addition to the other lawful penalties of the crime of desertion,” any deserter who failed to report within sixty days of the passage of the bill “shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship,” and that “all persons who, being duly enrolled, shall . . . go beyond the limits of the United States with intent to avoid any draft into the military or naval service, duly ordered, shall be liable” to the same penalty.²⁵⁴ This law was, as one author

²⁵¹ See *supra* text accompanying notes 163–86.

²⁵² As Secretary of State Seward put it, the United States was, on one hand, resisting foreign powers’ “claims for the exemption from [U.S.] military service of persons who appealed to their protection” and “on the other . . . enforcing [the] claims for the exemption of the like class from military service in foreign countries, on the ground of their having acquired the rights of citizenship in the United States.” TSIANG, *supra* note 1, at 83 (quoting William H. Seward, Sec’y of State, to John Lothrop Motley, Minister to Austria, (Apr. 21, 1863)).

²⁵³ *Id.* at 83–84.

²⁵⁴ Act of March 3, 1865, ch. 79, 13 Stat. 487; see also TSIANG, *supra* note 1, at 84. It is not clear whether the law intended to effect a loss of citizenship itself or a loss of only the “rights of citizenship.” Because citizenship carried with it few, if any rights beyond voting at that time of open borders, the loss of the right to vote was often conflated with the loss of citizenship, making it difficult to discern whether the law intended to remove voting rights or citizenship itself. Roche, *supra* note 190, at 62. Unsurprisingly given its history of pushing for harsher interpretation of expatriation provisions, the State Department testified during hearings related to the Nationality Act of 1940 that it interpreted the 1865 statute to impose a loss of citizenship, not merely the “rights” that accompany it. *To Revise and Codify the Nationality Law of the United States into a Comprehensive Nationality Code: Hearing on H.R. 6127 superseded by H.R. 9980 Before the H. Comm. on Immigration and Naturalization*, 76th Cong. 132–33 (1940) (statement of Richard W. Flournoy, Assistant Legal Advisor, Department of State). The Board of Immigration Appeals had reached a different interpretation of the statute, citing it as an example of Congress “depriv[ing] citizens of all or a part of the ordinary rights of citizenship.” *In re P*, 1 I & N Dec. 127, 132 (B.I.A. 1941). In its view, “[d]eserters from military service in time of war forfeit[ed] their *rights of citizenship*” under the statute, not their citizenship itself. *Id.* (emphasis added). That view also appears to have been adopted by President Coolidge, who issued a proclamation of amnesty for deserters who had been con-

has described it, the “first occasion on which the revocation of citizenship was introduced and actually performed.”²⁵⁵ In the debates over the legislation, the objections were “connected to the penal system or were part of the protests against the Civil War itself,” and there was little discussion of the power of Congress to revoke citizenship or the nature of citizenship.²⁵⁶

Subsections (g) and (h) in section 401 of the Nationality Act of 1940, which provided for the loss of citizenship upon conviction for desertion or for “[c]ommitting any act of treason against, or attempting by force to overthrow or bearing arms against the United States,”²⁵⁷ originated in this 1865 Civil War desertion statute. The Commission proposed only the loss of citizenship upon conviction for desertion, citing the 1865 law, which it described as “distinctly penal in character.”²⁵⁸ The provision providing for loss of nationality upon conviction for treason or for attempting to overthrow or bearing arms against the United States was not proposed by the Commission or added during the extensive consideration of the bill in the House.²⁵⁹ Instead, it was added on the floor of the Senate as a “penalty,” recognized as “drastic,” similar to the existing penalty for desertion proposed to be included in the new section 401.²⁶⁰ One commentator attributed the addition of this provision to “congressional refusal to distinguish between loss of citizenship and loss of the rights of citizenship,” noting that the treason provision was a “penalty measure not unlike the old practice of banishment employed by the Greeks.”²⁶¹ These two provisions, unlike the other formerly evidentiary acts that were codified as expatriation in the Nationality Act of 1940, “appeared to be concerned about something other than transferred or divided allegiance,” and clearly “permitted the denaturalization of citizens who may not have acquired citizenship elsewhere.”²⁶² And, unlike the historical acts of expatriation, they could not, by definition, constitute expatriation themselves because only citizens could be convicted of treason or desertion.²⁶³

victed after the close of fighting in World War I but while the U.S. was still technically at war. A Proclamation, 43 Stat. 1940 (Mar. 5, 1924). President Coolidge referred to convicted deserters as “fellow citizens,” and proclaimed that there would be “fully remitted as to such persons any relinquishment or forfeiture of their rights of citizenship.” *Id.* at 1940–41.

²⁵⁵ HERZOG, *supra* note 21, at 40.

²⁵⁶ *Id.* at 40–41. There was also a prior bill, the Wade-Davis Bill, that sought to strip the citizenship of Confederate officials, which passed both Houses of Congress but was pocket vetoed by President Lincoln because he thought it was too harsh a measure. *See Afroyim v. Rusk*, 387 U.S. 252, 279–81 (1967) (Harlan, J., dissenting) (describing the bill).

²⁵⁷ Nationality Act of 1940, ch. 876, § 401(g),(h), 54 Stat. 1168, 1169.

²⁵⁸ 1 STAFF OF H. COMM. ON IMMIGRATION & NATURALIZATION, 76TH CONG., REP. PROPOSING A REVISION AND CODIFICATION OF THE NATIONALITY LAWS OF THE UNITED STATES 68 (Comm. Print 1938) [hereinafter 1 REP. ON NATIONALITY LAWS].

²⁵⁹ Roche, *supra* note 190, at 56.

²⁶⁰ 86 CONG. REC. 12430–31 (1940).

²⁶¹ Roche, *supra* note 190, at 56.

²⁶² Aleinkoff, *supra* note 248, at 1477.

²⁶³ *See* Morrow, *supra* note 54, at 553 (“While [Jefferson] believed that American citizens were free to divest themselves of [their citizenship] by acts manifesting their intention, the laws did not admit that the bare commission of a crime amounts of itself to a divestment of

b. Subsequent Amendments to Section 401

Congress established in the Nationality Act of 1940 that the loss of citizenship could be imposed on the basis of provisions that were formerly evidence of a transfer of allegiance and of provisions that “appear[ed] penal in nature,”²⁶⁴ and it then proposed and enacted amendments to section 401 that furthered this concept of expatriation. In 1944, Congress added a new subsection 401(j) effecting the loss of citizenship for any U.S. citizen who departed or remained outside the United States “for the purpose of evading or avoiding training and service in the land or naval forces of the United States.”²⁶⁵ And in the Expatriation Act of 1954, Congress added additional criminal convictions under the Smith Act, including conspiracy, to the existing provision providing for loss of citizenship for convictions for treason or attempting to overthrow the government.²⁶⁶

The most perverse proposals to amend section 401 during this period, however, were intended to address the “Japanese problem” and provided various means by which to revoke the citizenship of the Japanese-Americans interned during World War II.²⁶⁷ Ultimately, on the advice of Attorney General Biddle and in light of constitutional concerns expressed during the consideration of the various proposals,²⁶⁸ a neutral provision was enacted as subsection (i) of section 401, which permitted U.S. citizens to renounce their citizenship within the United States during a time of war.²⁶⁹ But its intent, and ultimate effect, was directed solely at Japanese-American citizens, over

the character of a citizen, and withdraws the criminal from their coercion.”(internal quotation omitted)).

²⁶⁴ Aleinkoff, *supra* note 248, at 1477.

²⁶⁵ Act of Sept. 27, 1944, ch. 418, 58 Stat. 746; Roche, *supra* note 190, at 60. This new subsection mirrored a similar 1912 addition to the 1865 Civil War desertion statute. *See* Act of Aug. 22, 1912, ch. 336, 37 Stat. 356; Roche, *supra* note 190, at 61.

²⁶⁶ Expatriation Act of 1954, ch. 1256, sec. 2, 68 Stat. 1146, 1146 (adding as expatriating acts a conviction for “violating or conspiring to violate any of the provisions of section 2383 of title 18 . . . or willfully performing any act in violation of section 2385 of title 18 . . . or violating section 2384 of said title by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them”).

²⁶⁷ *Expatriation of Certain Nationals of the United States: Hearings Before the H. Comm. on Immigration and Naturalization on H.R. 2701, H.R. 3012, H.R. 3489, H.R. 3446, and H.R. 4103, 78th Cong. 13 (1944)* [hereinafter *Expatriation of Certain Nationals*]; *see also* HERZOG, *supra* note 21, at 47–48.

²⁶⁸ Roche, *supra* note 190, at 58.

²⁶⁹ An Act to Provide for the Loss of United States Nationality Under Certain Circumstances, Pub. L. No. 78-405, ch. 368, 58 Stat. 677 (1944). Herzog notes that the “appearance of this amendment as a bureaucratic correction has caused legal scholars surveying expatriation laws to ignore its existence or to underestimate its importance,” which he describes as “one of the darkest hours in American domestic history.” HERZOG, *supra* note 21, at 46. Writing while the events of World War II and the internment of Japanese Americans was still a fresh memory, Roche does not ignore this history and comprehensively describes the underlying rationale for this provision: to denationalize Japanese-American U.S. citizens. Roche, *supra* note 190, at 57–60.

5000 of whom renounced their U.S. citizenship through this provision while incarcerated in concentration camps during the war.²⁷⁰

Section 401, especially the penal elements included originally and in subsequent amendments, represented a distinct turn in the law of expatriation.²⁷¹ Acts that did not necessarily involve a transfer of allegiance but had formerly been used to confirm the voluntariness of an individual's act of expatriation, i.e. naturalization in a foreign country or an oath of allegiance to a foreign country, themselves became acts of expatriation. And they were combined with provisions stripping individual citizens' nationality as punishment. Section 401 thus represented the birth of "statutory"²⁷² or "involuntary"²⁷³ expatriation, where the government, by statute and against the individual's will, declares citizenship to be lost on the basis of acts prescribed by the government.²⁷⁴ Representative of this new conception, and of

²⁷⁰ See HERZOG, *supra* note 21, at 46–47 ("The nominal generality of the law was intended to obscure the specific aim of its legislators—namely, to find and establish a measure that would enable the American government to expatriate and deport as many native-born American citizens of Japanese descent as possible without interference by the Supreme Court."); see also Roche, *supra* note 190, at 58–59.

²⁷¹ Aleinkoff, *supra* note 248, at 1477; Roche, *supra* note 190.

²⁷² Perez v. Brownell, 356 U.S. 44, 48 (1958).

²⁷³ Afroyim v. Rusk, 387 U.S. 253, 263 (1967).

²⁷⁴ Section 401 was not the only provision of the Nationality Act of 1940 that reflected a changing conception of expatriation that included the possibility of the state acting as subject. Another significant change was the codification of the State Department's long-repressed view on residence abroad. Instead of raising a rebuttable presumption that "never ripen[ed] into actual expatriation," and could be easily overcome by a return, or an expressed intent to return to, the United States, section 404 of the 1940 Act established that residence abroad by a naturalized citizen for two years in her native country or five in any other effected the loss of citizenship. Roche, *supra* note 190, at 40; see Act of Oct. 14, 1940, ch. 876, § 401, 54 Stat. 1137, 1169–70. A State Department official, testifying in favor of this provision, stated it was "the most important proposed change in the whole code, and may be the subject of some controversy," that but it was necessary because the State Department, given the numerous citizens abroad who were applying to it for protection or passports, though that "there should be some point at which such person should lose not only his right to protection but his citizenship itself." Roche, *supra* note 190, at 40; see also 2 REP. ON NATIONALITY LAWS, *supra* note 242, at VII ("The mere presumption of expatriation provided for in section 2 of the act of March 2, 1907, in cases of naturalized citizens residing for 2 years in the foreign states from which they came or 5 years in other foreign states, has proven inadequate."). Sections 405 and 406 exempted the citizens abroad from the effect of section 404 for the reasons previously specified as ways to overcome the presumption of the 1907 Act. Section 405 exempted from section 404 citizens living abroad who were employed by the United States or who were living abroad due to disability incurred in the service of the United States. Section 406, which largely codified the State Department's implementation of the 1907 provision, exempted: (1) citizens who had lived in the United States for twenty-five years before moving abroad and were at least sixty-five years old; (2) citizens residing abroad solely or principally to represent a U.S. "educational, scientific, philanthropic, religious, commercial, financial, or business organization" or an international agency in which the United States participated; (3) citizens residing abroad on account of health; (4) citizens residing abroad "for the purpose of pursuing studies; (5) citizens under twenty-one years old who were the wife, husband, or child of an American citizen who fit into one of the other categories; (6) citizens who were "born in the United States or one of its outlying possession, who originally had American nationality, and who, after having lost such nationality through marriage to an alien, required it." 54 Stat. at 1170. But the law, as emphasized by Roche shortly after its passage, "provided for *automatic denationalization* for those who could not claim immunity under sections 405 and 406. Roche,

the precession of the subject of “expatriate” to the state, is a law professor’s statement read by a congressman in 1944 in support of a proposal to strip the citizenship of native-born U.S. citizens of Japanese ancestry: “The language of the fourteenth amendment was declaratory and there is nothing here or elsewhere in the Constitution which abridges either the individual’s right of expatriation *or the Nation’s right to expatriate in appropriate circumstances.*”²⁷⁵

The codification and multiplication of “expatriative acts” in the Nationality Act of 1940 and subsequent amendments occurred immediately prior to the entry of the United States into World War II, during the war, and then during the initial years of the Cold War.²⁷⁶ In the guise of protecting the nation from outside threats during these periods of potential and actual war, the Nationality Act of 1940 and its subsequent amendments unleashed a new concept of expatriation untethered to the individual “natural right” advocated by Thomas Jefferson and recognized by the Expatriation Act of 1868. As the executive branch began applying the new statutory regime governing expatriation to tens of thousands of American citizens,²⁷⁷ the debate over expatriation no longer centered around the authority of the state to restrict or define an individual’s exercise of her right of expatriation. Instead, the debate centered around the authority of the *state* itself to “expatriate” a U.S. citizen. That debate, over the state as subject of “expatriate,” would soon bitterly divide the Supreme Court.

C. *The Supreme Court and Precession Back to the Individual*

As the executive branch implemented the Nationality Act of 1940, numerous individuals challenged their loss of citizenship under the Act’s various provisions. Ultimately, the Supreme Court would wrestle with the Act and expatriation in a dramatic series of cases resolved by an array of 5-4

supra note 190, at 41. In early litigation over this provision, the D.C. Circuit in *Lapides v. Clark*, rejected the argument that it was unconstitutional because it arbitrarily discriminates against naturalized citizens. 176 F.2d 619, 621 (D.C. Cir. 1949) (“The statute has a purpose in the international policy of our government. The Act does not arbitrarily impose a loss of citizenship. It deals with a condition voluntarily brought about by one’s own acts, with notice of the consequences. . . . [T]o avoid embarrassments and controversies with foreign governments . . . we cannot doubt that . . . Congress has the power to distinguish between native born and naturalized citizens.”). One judge dissented from the ruling, arguing that naturalized citizens must be treated equally to native born citizens. *Id.* at 623 (“Aside from the Nationality Act, citizens may live abroad. By imposing a heavy penalty on the exercise of this liberty the Nationality Act takes part of it away from all naturalized citizens, regardless of their devotion to America and their connections here. All native citizens, regardless of possible devotion to a foreign country and connections there, are exempt. Congress may expatriate citizens on reasonable grounds. No doubt these may include five years residence abroad. But it does not follow that Congress may expatriate some citizens and not others on this ground.”).

²⁷⁵ *Expatriation of Certain Nationals*, *supra* note 267, at 15 (statement of Hon. Leroy Johnson) (emphasis added).

²⁷⁶ HERZOG, *supra* note 21, at 45.

²⁷⁷ WEIL, *supra* note 5, at 83–107.

decisions, with Justices repeatedly switching positions to swing the majority and adopting diverse rationales to support their desired outcomes.²⁷⁸ The various opinions reflect disagreement not only about the power of Congress to enact the loss of citizenship provisions in the Nationality Act of 1940 but also, more fundamentally, disagreement about the nature of citizenship and expatriation. Underlying this disagreement is the additional question of which entity or entities are, or may be, the arbiters of that nature and what means may be permissibly employed in that determination.

After the initial discord, the Supreme Court ultimately settled the question of expatriation and loss of citizenship in its 1967 landmark decision *Afroyim v. Rusk*,²⁷⁹ which overruled the Court's 1958 decision in *Perez v. Brownell*.²⁸⁰ Though some confusion remained until 1980, when the Court reaffirmed and elaborated upon *Afroyim* in *Vance v. Terrazas*,²⁸¹ the Court's decision in *Afroyim* definitely rejected congressional authority to strip an individual's citizenship and, in so doing, rejected the state-as-subject expatriation codified in the Nationality Act of 1940. In this way, the Court forced the precession of the subject back around to the individual. In so doing, however, the Court did not *reverse* the precession and reestablish the historical conception of the individual right of expatriation, an endeavor for which Chief Justice Warren had advocated in his dissent in *Perez*.²⁸² Instead, the *Afroyim* majority neglected entirely the historical concept of expatriation and instead accepted the contemporary conception, adding a constitutional overlay based on the Fourteenth Amendment. That approach, cemented by the Court's decision in *Terrazas*, continued the precession of the subject back around to the individual while retaining the state as a viable subject, rather than recognizing and reversing the distortion that had occurred from its past course.

1. Initial Discord

On March 31, 1958, the Supreme Court announced three opinions from a narrowly divided court on the implementation of the 1940 Act, as amended: *Perez v. Brownell*,²⁸³ *Trop v. Dulles*,²⁸⁴ and *Nishikawa v. Dulles*.²⁸⁵ In his exhaustive exploration of the Justices' papers underlying these and subsequent cases involving the 1940 Act, Patrick Weil notes that Justice Douglas described these three opinions at the time as "the most important

²⁷⁸ See *id.* at 14–65 (relying on Justices' papers to describe the volatility and disagreement in the Justices' opinions and the numerous instances of Justices changing their vote).

²⁷⁹ 387 U.S. 253 (1967).

²⁸⁰ 356 U.S. 44 (1958).

²⁸¹ 444 U.S. 252 (1980).

²⁸² *Perez*, 356 U.S. at 62 (Warren, C.J., dissenting).

²⁸³ 356 U.S. 44 (1958).

²⁸⁴ 356 U.S. 86 (1958).

²⁸⁵ 356 U.S. 129 (1958).

constitutional pronouncements of this century.”²⁸⁶ The three cases had been argued in May 1957 and were reargued before the full Court in October, and, after much internal discussion and wrangling over the outcomes and draft opinions, the Court announced all three decisions at the same time, consisting of twelve separate opinions.²⁸⁷ The divisiveness of the cases led *Time* magazine to opine that the “fundamental bitterness” between the Justices had been “unknown since 1946, when Justice Robert Jackson began feuding in public with Justice Hugo Black.”²⁸⁸

The opinion in each case involved a different provision of the 1940 Act, as amended. Clemente Martinez Perez was born in the United States but taken to Mexico when he was eleven years old.²⁸⁹ He remained in Mexico for twenty-three years, a period that included the beginning of World War II, and then applied for and received admission to the United States as an alien laborer, indicating in those applications that he had been born in Mexico.²⁹⁰ He ultimately applied for admission on the basis of his natural-born citizenship, but he was ordered excluded by immigration officials on the basis of his admissions that he had remained outside the United States in order to avoid military service and had voted in political elections in Mexico.²⁹¹ He then entered as an alien once again and, in administrative hearings before immigration officials, claimed the right to remain based on his natural-born citizenship.²⁹² After being ordered deported, he brought suit in district court seeking a declaration of his citizenship.²⁹³

Albert L. Trop was also born in the United States, and served in the United States Army in French Morocco in 1944.²⁹⁴ There, he escaped from a stockade imposed for disciplinary reasons because he found the “conditions intolerable,” and he was gone for less than a day before surrendering to an army officer willingly.²⁹⁵ He was convicted of desertion and sentenced to hard labor, forfeiture of pay, and a dishonorable discharge.²⁹⁶ In 1952, he applied for a passport, but his application was denied on the ground that he had lost his citizenship pursuant to the 1940 Act.²⁹⁷

Mitsugi Nishikawa was born in California to Japanese citizens, giving him dual citizenship at birth.²⁹⁸ He remained in the United States and graduated from the University of California before returning to Japan in 1939,

²⁸⁶ WEIL, *supra* note 5, at 147.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Perez v. Brownell*, 356 U.S. 44, 46 (1958).

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.* at 46–47.

²⁹³ *Id.* at 47.

²⁹⁴ *Trop v. Dulles*, 356 U.S. 86, 87 (1958).

²⁹⁵ *Id.*; see also Brief of Petitioner at 3, *Trop v. Dulles*, 356 U.S. 86 (1958) (No. 56-70).

²⁹⁶ *Trop*, 356 U.S. at 88.

²⁹⁷ *Id.*

²⁹⁸ *Nishikawa v. Dulles*, 356 U.S. 129, 131 (1958).

intending to stay for a few years.²⁹⁹ In Japan, as the war began, he was drafted in military service, and, at that time, due to his fear of Japanese authorities and understanding that the American consulate would not aid dual citizens, he did not attempt to renounce his Japanese citizenship, to return to the United States, or to seek aid from U.S. consular officials.³⁰⁰ He served as a mechanic in the Japanese Air Force during the war and after the war sought an American passport from the U.S. Consulate in Japan.³⁰¹ He instead received a certificate of loss of nationality.³⁰²

The circumstances of the three cases were representative of the circumstances of thousands of U.S. citizens who had engaged in acts specified in the 1940 Act, that put their citizenship in doubt. Executive branch officials applied the expanded provisions of the 1940 Act aggressively in the context of the Cold War and communist "scare": if they were aware of an act occurring, they denied the citizenship of the individual.³⁰³ Thus, the thousands of U.S. citizens who had been convicted of desertion, had voted in a foreign election, or had served in the armed services of a foreign nation were regarded by executive branch officials as forfeiting their citizenship by these acts.

In its trio of decisions, the Supreme Court put a sharp halt to many such administrative determinations, but it could not garner a majority to stop all of them. In *Nishikawa*, seven Justices agreed that the executive branch could not determine that an individual citizen had lost his citizenship by serving a foreign military without evidence that the individual's foreign service was actually voluntary, especially when the foreign country made it a crime not to enlist.³⁰⁴ Because expatriation had historically been a voluntary act and because of the "drastic" consequence of "denationalization," the government bore the burden of proving voluntariness.³⁰⁵ In *Trop*, Chief Justice Warren wrote a plurality opinion for the four *Perez* dissenters holding first that Congress lacked any authority to divest citizens of their citizenship.³⁰⁶ But, given that a majority of the Court had rejected this view, expressed by the same four Justices in dissent in *Perez*,³⁰⁷ the Chief Justice's plurality opinion also held in the alternative that the loss of citizenship upon a conviction for desertion was penal in nature and, due to its severe nature, was "cruel and unusual punishment" forbidden by the Eighth Amendment.³⁰⁸ However, the deciding vote in *Trop* was cast by Justice Brennan, who agreed in a concur-

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 131–32.

³⁰¹ *Id.* at 131–33; see also Brief of Respondent at 5–6, *Nishikawa v. Dulles*, 356 U.S. 129 (1958) (No. 57-19).

³⁰² *Nishikawa*, 356 U.S. at 131.

³⁰³ WEIL, *supra* note 5, at 136–44.

³⁰⁴ *Nishikawa*, 356 U.S. at 137–38.

³⁰⁵ *Id.* at 134.

³⁰⁶ *Trop v. Dulles*, 356 U.S. 86, 92 (1958).

³⁰⁷ *Id.* at 93.

³⁰⁸ *Id.* at 101–02.

ring opinion that the loss of citizenship was unconstitutional, but on the ground that the loss of citizenship for desertion was “punishment” and that “expatriation as punishment” lacked the “requisite rational relation” to Congress’s legitimate authority over the military.³⁰⁹ Justice Frankfurter, the author of the *Perez* majority, joined by three other Justices, dissented.³¹⁰

In *Perez*, Justice Frankfurter delivered the majority opinion in a 5-4 decision, where the four *Trop* dissenters were joined by Justice Brennan.³¹¹ The majority upheld the immigration officials’ determination that Perez had lost his U.S. citizenship, reasoning that Congress had the authority to provide for the loss of citizenship of U.S. citizens who voted in foreign elections because the provision was rationally related to its implied constitutional authority over foreign affairs.³¹² Discussing the example of U.S. citizens voting in the Saar plebiscite cited during the legislative debates, he argued that Congress had the power to “reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests.”³¹³ Chief Justice Warren, joined by the other members of the *Trop* plurality, dissented, arguing strenuously that Congress had no authority over citizenship, which was protected absolutely by the Fourteenth Amendment.³¹⁴

Though both opinions have been studied in depth, two characteristics of the dueling *Perez* opinions warrant further attention. First, Justice Frankfurter’s opinion begins its analysis by turning to the history of “[s]tatutory expatriation,” beginning with the 1907 Act, and he marks the Expatriation Act of 1868 as Congress’s “starting point” for dealing with the international difficulties of naturalization and allegiance.³¹⁵ Like Justice Brennan in *Trop*, who refers to Congress’s “imposition of expatriation,”³¹⁶ Justice Frankfurter acknowledges an active congressional role in choosing as its “means” the “withdrawal of citizenship” and providing for the “termination of citizenship.”³¹⁷ Chief Justice Warren’s opinion, by contrast, uses “expatriation” only when referring to the individual right of expatriation and its historical

³⁰⁹ *Id.* at 108–11, 113–14 (Brennan, J., concurring).

³¹⁰ Justice Frankfurter would have held that the provision was an appropriate exercise of Congress’s war powers, and he argued that the Court should defer to Congress’s determination that the withdrawal of citizenship for a desertion was necessary. *Id.* at 121 (Frankfurter, J., dissenting) (“Possession by an American citizen of the rights and privileges that constitute citizenship imposes correlative obligations, of which the most indispensable may well be [military service]. . . . It is not for us to deny that Congress might reasonably have believed the morale and fighting efficiency of our troops would be impaired if our soldiers knew that their fellows who had abandoned them in their time of greatest need were to remain in the communion of our citizens.”).

³¹¹ *Perez v. Brownell*, 356 U.S. 44, 45 (1958).

³¹² *Id.* at 62.

³¹³ *Id.* at 57.

³¹⁴ *Id.* at 64–66 (Warren, C.J., dissenting).

³¹⁵ *Id.* at 48.

³¹⁶ *Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J., concurring).

³¹⁷ *Perez*, 356 U.S. at 58, 60.

evolution.³¹⁸ He refers to the actions taken pursuant to the 1940 Act only as “denationalization” and denies Congress has any such “power to denationalize.”³¹⁹

Second, the opinions dispute the meaning of *Mackenzie* and *Savorgnon* as they relate to expatriation. Justice Frankfurter cites the Court’s statement in *Mackenzie* that the plaintiff had “not intended to give up her American citizenship,” and states that “[w]hat both women did do voluntarily” in the two cases “was to engage in conduct to which Acts of Congress attached the consequence of denationalization, irrespective of—and in those cases contrary to—the intentions and desires of the individuals.”³²⁰ Chief Justice Warren, in response, argued that the two cases were not examples of Congress exercising power to denationalize the plaintiffs but represented the principle that “citizenship may not only be voluntarily renounced through exercise of the right of expatriation but also by other actions in derogation of the undivided allegiance to this country.”³²¹ While Congress lacked authority “to divest United States citizenship,” the government could “giv[e] formal recognition to the inevitable consequence of the citizen’s own voluntary surrender of his citizenship.”³²² And such voluntary surrender or “abandon[ment]” could be effected historically only “by conduct showing a voluntary transfer of allegiance to another country.”³²³

After the March 1958 triumvirate, the Court would address, and struggle with, the 1940 Act and loss of citizenship twice more before its landmark decision in *Afroyim*. After the *Trop* and *Perez* decisions, the Court vacated and remanded another case, *Mendoza-Martinez v. Mackey*,³²⁴ for further consideration, though it would ultimately return to the Court.³²⁵ Francisco Mendoza-Martinez was born in the United States to Mexican citizens and thus had dual citizenship upon birth.³²⁶ He moved to Mexico in 1942 to avoid the draft, and he was convicted of draft evasion in 1947 after he had returned.³²⁷ In 1953, the Department of Justice ordered him to be deported based on section 401(j) of the Nationality Act of 1940, which effected the loss of citizenship for draft evasion, and he filed a declaratory judgment action challenging the constitutionality of that provision.³²⁸

After the Court’s initial remand, the district court found section 401(j) unconstitutional, and then the issue returned to the Supreme Court, where, as Weil recounts, there was initially a six-Justice majority, which included Jus-

³¹⁸ *Id.* at 66–69, 72.

³¹⁹ *Id.* at 75, 78 (Warren, C.J., dissenting).

³²⁰ *Id.* at 61.

³²¹ *Id.* at 68 (Warren, C.J., dissenting).

³²² *Id.* at 68–69.

³²³ *Id.* at 73.

³²⁴ 356 U.S. 258 (1958).

³²⁵ *Mackey v. Mendoza-Martinez*, 362 U.S. 384 (1960).

³²⁶ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 147 (1963).

³²⁷ *Id.*

³²⁸ *Id.* at 148.

tice Brennan, to uphold Congress's authority to declare Mendoza-Martinez's citizenship lost.³²⁹ Instead of issuing an opinion, however, the Court again remanded the case, this time on a question of collateral estoppel.³³⁰ On its return to the Court, although five Justices initially voted to rule against Mendoza-Martinez and a draft opinion was circulated upholding the power of Congress "to recognize an abandonment of citizenship" under its war power, the Court again did not decide it.³³¹ Justice Whitaker, the fifth vote, first rejected the draft opinion and then retired before the case was decided.³³² The case was set for re-argument and combined with another expatriation case involving section 401(j), in which Joseph Cort, a doctor who had been born in the United States but lived in England, had been determined to have lost his citizenship for failing to comply with an instruction to return for military service.³³³ Unlike Mendoza-Martinez, Cort did not have dual citizenship.³³⁴

Justice Frankfurter, the author of the majority in *Perez* and the principal dissent in *Trop*, suffered a stroke in August 1962 and was replaced by Justice Goldberg before *Mendoza-Martinez* and *Cort* were decided.³³⁵ Siding with the three remaining *Perez* dissenters and Justice Brennan, who had retreated from his initial vote in *Mendoza-Martinez*, Justice Goldberg provided the fifth vote against expatriation, and he ultimately wrote the majority opinion.³³⁶ His opinion reasoned that the draft evasion expatriation provisions were "invalid because in them Congress has plainly employed the sanction of deprivation of nationality as a punishment—for the offense of leaving or remaining outside the country to evade military service—without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments."³³⁷ He distinguished *Perez* as involving Congress's foreign affairs power and *Trop* as involving punishment imposed after a conviction for desertion that provided due process.³³⁸ Building on the language of Chief Justice Warren's *Perez* dissent, Justice Goldberg discussed U.S. citizenship as "a most precious right," "one of the most valuable rights in the world today"—the loss of which amounted to a "deprivation of all that makes life worth living."³³⁹ In a concurring opinion, Justice Brennan announced he had "some felt doubts of the correctness of *Perez*, which I joined," but noted that these cases did not require him to resolve them since they did not involve either deliberative foreign attachment or the "participation by Ameri-

³²⁹ WEIL, *supra* note 5, at 166–67.

³³⁰ *See id.* at 167.

³³¹ *Id.*

³³² *Id.*

³³³ *Mendoza-Martinez*, 372 U.S. at 149–51.

³³⁴ *Id.* at 149.

³³⁵ WEIL, *supra* note 5, at 168.

³³⁶ *Id.* at 167–68.

³³⁷ *Mendoza-Martinez*, 372 U.S. at 165–66.

³³⁸ *Id.* at 164.

³³⁹ *Id.* at 159–60, 166.

can nationals in the internal politics of foreign affairs.”³⁴⁰ In a footnote in Justice Goldberg’s majority opinion, likely inconspicuous at the time, he states that “[t]here is, however, no disagreement that citizenship may be voluntarily relinquished or abandoned, either expressly *or by conduct*.”³⁴¹ In light of later developments, this footnote becomes somewhat remarkable.³⁴²

This series of cases and spate of opinions, drawing numerous tenuous distinctions and promulgating diverse rationales, left the state of the loss of citizenship provisions in considerable confusion.³⁴³ As Justice Black would later note, after *Perez*, the Court “consistently invalidated on a case-by-case basis various other statutory sections providing for involuntary expatriation.”³⁴⁴ But *Perez* remained good law, and the changes in the membership on the Court meant that even Justice Brennan’s “doubts” about his *Perez* vote were not obviously sufficient to provide a fifth vote to overturn the decision in a subsequent case. A review of the Supreme Court’s 1963 term in the *Harvard Law Review*, after discussing these cases, noted that the “direction of future expatriation cases must remain uncertain.”³⁴⁵ Four years later, the Court would resolve the uncertainty in *Afroyim*.

³⁴⁰ *Id.* at 187–88 (Brennan, J., concurring).

³⁴¹ *Id.* at 159 n.11 (emphasis added) (citing *Perez v. Brownell*, 356 U.S. 44, 48–49, 66–67 (1958) (Warren, C.J., dissenting)).

³⁴² See *infra* text accompanying notes 346–84. The Court would decide another expatriation case the next year involving section 404 of the Nationality Act of 1940, providing for the loss of citizenship of naturalized citizens living abroad for specified periods of time. *Schneider v. Rusk*, 377 U.S. 163 (1964). The Court held this provision unconstitutional, reasoning that it constituted “discrimination aimed at naturalized citizens” and created “a second-class citizenship” since native-born citizens were “free to reside abroad indefinitely without suffering loss of citizenship.” *Id.* at 168–69. The Court’s reasoning echoed the dissenting opinion of Judge Edgerton in the D.C. Circuit’s *Lapides* decision analyzing this provision and of Professor Roche’s law review article discussing the provision and the *Lapides* decision. See *Lapides v. Clark*, 176 F.2d 619, 622–23 (D.C. Cir. 1949) (Edgerton, J., dissenting); Roche, *supra* note 190, at 42–43. Justice Douglas’ opinion went on to discuss the foundation of expatriation provisions, noting that “[l]iving abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance, and in no way evidences a voluntary renunciation of nationality and allegiance.” *Schneider*, 377 U.S. at 169. This decision struck down the laws that had been used to remove the citizenship of almost 40,000 U.S. citizens, rendering it effectively a nullity. WEIL, *supra* note 5, at 170–71.

³⁴³ In another expatriation case the same term as *Schneider*, *Marks v. Esperdy*, 377 U.S. 214 (1964), the Court split 4-4, due to Justice Brennan’s relatively late recusal. WEIL, *supra* note 5, at 171–72. *Marks* involved a native-born citizen who had voluntarily joined Castro’s army but argued that he had “never renounced or intended to renounce his American citizenship” and that expatriation was cruel and unusual punishment forbidden by *Trop*. WEIL, *supra* note 5, at 172 (quoting a bench memorandum from Justice Brennan’s papers); see also *Marks v. Esperdy*, 315 F.2d 673, 674 (2d Cir. 1963). The Second Circuit had upheld his expatriation, *Marks*, 315 F.2d at 676, and the Supreme Court’s 4-4 split affirmed that decision without setting a precedent, *Marks v. Esperdy*, 377 U.S. 214 (1964). Though papers show that before his recusal Justice Brennan had voted in conference to reverse the Second Circuit, he acknowledged at the time that he did not know “how he w[ould] finally retreat from *Perez*.” WEIL, *supra* note 5, at 171.

³⁴⁴ *Afroyim v. Rusk*, 387 U.S. 253, 255 (1967).

³⁴⁵ Note, *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 177, 195 (1964). The author claimed that “*Perez* may retain little vitality after th[e] [*Schneider*] decision,” and that “[t]he plethora of attitudes within the Court on the propriety of expatriation and the tendency

2. Afroyim, *Executive Branch Interpretation*, and Terrazas

The painter Beys Afroyim was native of Poland who immigrated to the United States in 1912 and became a naturalized citizen in 1926.³⁴⁶ In 1950, he went to Israel, where he voted the next year in an election for the Knesset.³⁴⁷ When he applied to renew his U.S. passport in 1960, the State Department informed him that he had lost his citizenship under the 1940 Act by voting “in a political election in a foreign state.”³⁴⁸ Afroyim brought a declaratory judgment action challenging the constitutionality of the voting provision of the 1940 Act, and the government defended on the basis of *Perez*, arguing that Congress was “empower[ed] to terminate citizenship without the citizen’s voluntary renunciation.”³⁴⁹ Justice Black wrote the majority opinion overturning *Perez* and holding, as Justice Black had advocated beginning in his *Nishikawa* concurrence, that Congress lacked “any general power, express or implied, to take away an American citizen’s citizenship without his assent.”³⁵⁰

Justice Black ultimately grounded his holding in the “language and the purpose of the Fourteenth Amendment,” acknowledging that prior “legislative and judicial statements may be regarded as inconclusive” and that the Court’s holding “might be unwarranted if it rested entirely or principally upon that legislative history.”³⁵¹ But he spent a considerable amount of time on unsuccessful, historical legislative proposals to take away citizenship, quoting at length from the statements of legislators against these bills.³⁵² Unlike Chief Justice Warren’s *Perez* dissent, Justice Black’s *Afroyim* opinion does not delve into the history of expatriation and voluntary transfers of allegiance except to stress that expatriation required the “assent” of the citizen.³⁵³ His framing of the issue excludes consideration of expatriation as originally understood, which was, by definition, voluntary: “The fundamental issue before this Court here, as it was in *Perez*, is whether Congress can consistently with the Fourteenth Amendment enact a law stripping an Amer-

of majority opinions to ignore relevant precedent . . . further obscures the significance which *Schneider* will ultimately come to have.” *Id.*; see also Philip Kurland, *The Supreme Court 1963 Term. Forward: Equal in Origin and Equal in Title to the Legislative and executive branches of the Government*, 78 HARV. L. REV. 143, 170–75 (1964) (discussing the series of expatriation cases that began with *Perez* and concluding that “[i]t would be interesting to know what the ‘law of the land’ is on the subject of expatriation”).

³⁴⁶ *Afroyim*, 387 U.S. at 254; HERZOG, *supra* note 21, at 82.

³⁴⁷ *Afroyim*, 387 U.S. at 254.

³⁴⁸ *Id.* (internal quotation marks omitted).

³⁴⁹ *Id.* at 255.

³⁵⁰ *Id.* at 257; see also *Nishikawa v. Dulles*, 356 U.S. 129, 138–39 (1958) (Black, J., concurring).

³⁵¹ *Afroyim*, 387 U.S. at 261, 267.

³⁵² *Id.* at 257–67.

³⁵³ *Id.* at 257.

ican of his citizenship which he has never voluntarily renounced or given up.”³⁵⁴

Administrative practice after *Afroyim* was mixed. The first footnote in Justice Harlan’s dissenting opinion for four Justices in *Afroyim* was prescient in this regard. In the footnote, Justice Harlan thought it “appropriate to note at the outset what appears to be a fundamental ambiguity in the opinion for the Court” that would “surely cause still greater confusion in this area of the law.”³⁵⁵ The ambiguity was whether the *Afroyim* opinion, by saying Congress had no power to expatriate a citizen “without his assent,” was adopting the reasoning of Chief Justice Warren’s *Perez* dissent, which “acknowledged that ‘actions taken in derogation of undivided allegiance to this country’ had ‘long been recognized to result in expatriation.’”³⁵⁶ Because the dissent found it “difficult to find any semblance of th[at] reasoning . . . in the approach taken by the Court,” it read Justice Black’s opinion “instead to adopt a substantially wider view of the restrictions upon Congress’ authority in this area.”³⁵⁷ The footnote accused the majority of “assum[ing] that voluntariness is here a term of fixed meaning” when “in fact . . . it ha[d] 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.”³⁵⁸

Shortly after the *Afroyim* decision, Attorney General Ramsey Clark issued an opinion interpreting it to guide the State Department and INS in their implementation of section 349.³⁵⁹ Clark highlighted the constitutional mandate that a citizen cannot be deprived of citizenship “unless he has ‘voluntarily relinquished it,’” but noted that it left the contours of that requirement undefined.³⁶⁰ Specifically, Clark reasoned that *Afroyim* did not “reach the question of whether it may be possible under some circumstances for allegiance to be transferred or abandoned without constituting a voluntary relinquishment of the status of citizenship.”³⁶¹ For guidance, Clark determined that voluntarily relinquishment was not limited to a written renunciation but could “also be manifested by other actions declared expatriative under the act, if such actions are in derogation of allegiance to this country.”³⁶² However, “even in those cases, *Afroyim* leaves it open to the individual to raise the issue of intent,” which, once raised, must be proven by the party asserting expatriation has occurred.³⁶³ Citing Justice Black’s statement in his *Nishikawa* concurrence, that the voluntary performance of certain acts

³⁵⁴ *Id.* at 256.

³⁵⁵ *Id.* at 269 n.1 (Harlan, J., dissenting).

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ Expatriation—Effect of *Afroyim v. Rusk*, 42 Op. Att’y Gen. 397 (1969).

³⁶⁰ *Id.* at 398 (citation omitted).

³⁶¹ *Id.* at 400.

³⁶² *Id.*

³⁶³ *Id.*

may be “highly persuasive evidence in the particular case of a purpose to abandon citizenship,” Clark distinguished between acts that may be “sufficiently probative to support a finding of voluntary expatriation”—the acceptance of an important political post in a foreign government or voluntary enlistment in the armed services of a foreign government engaged in hostilities against the United States—and acts that may not be so probative—accepting employment as a public school teacher or enlisting in the armed forces of allied countries.³⁶⁴ In each case, however, executive branch officials would have to “make a judgment, based on all the evidence, whether the individual comes within the terms of an expatriation provision and has in fact voluntarily relinquished his citizenship.”³⁶⁵

In the administrative proceedings that implemented this guidance, the results were quite mixed. The State Department and INS recognized, as had the Attorney General, that specific intent was an aspect of inquiry after *Afroyim*.³⁶⁶ But the ambiguity in *Afroyim* highlighted by Justice Harlan’s footnote³⁶⁷ ultimately led to continued questions about the role of intent and the types of evidence on which the executive branch could rely until the Supreme Court’s decision in *Vance v. Terrazas*.³⁶⁸

Terrazas, unlike the Court’s past expatriation cases, involved one of the two historical modes of expatriation codified in the 1907 Act: the taking of an oath of allegiance to a foreign country. Laurence J. Terrazas was born in the United States to a Mexican citizen, thus acquiring dual nationality at birth.³⁶⁹ At the age of twenty-two he executed an application for a certificate of Mexican nationality, for which he swore “adherence, obedience, and submission to the laws and authorities of the Mexican Republic” and “expressly renounce[d] United States citizenship, as well as any submission, obedience, and loyalty to any foreign government, especially to that of the United States of America.”³⁷⁰ The primary issue in the case, and the only question presented in the Solicitor General’s jurisdictional statement, was whether Congress had the authority to provide for a lower evidentiary standard, preponderance of the evidence, in expatriation cases and whether it could erect

³⁶⁴ *Id.* at 400–01.

³⁶⁵ *Id.* at 401.

³⁶⁶ See Steven S. Goodman, Note, *Protecting Citizenship: Strengthening the Intent Requirement in Expatriation Proceedings*, 56 GEO. WASH. L. REV. 341, 347 n.27 (1988) (describing the positions of the agencies); see also HERZOG, *supra* note 21, at 90–93 (describing the establishment in 1967 of the Board of Appellate Review within the State Department to hear appeals from decisions made by the Department, most of which involved citizenship).

³⁶⁷ For a contemporary explanation by a State Department official of the difficulty of interpreting *Afroyim* and the administrative problems created by the addition of intent to the expatriation inquiry, see Donald K. Duvall, *Expatriation Under United States Law*, Perez to Afroyim: *The Search for a Philosophy of American Citizenship*, 56 VA. L. REV. 408 (1970).

³⁶⁸ 444 U.S. 252 (1980); see also Note, *United States Loss of Citizenship Law After Terrazas: Decisions of the Board of Appellate Review*, 16 N.Y.U. J. INT’L L. & POL. 829, 830 (1984) (noting that “*Terrazas* resolved decades of dispute over whether intent to relinquish citizenship was a necessary element in establishing loss of nationality”).

³⁶⁹ *Terrazas*, 444 U.S. at 255.

³⁷⁰ *Id.* at 255–56, 255 n.2.

a presumption of voluntariness that arose from the commission of any of the acts specified by section 349.³⁷¹

In the Supreme Court, however, the United States raised the issue of intent and adopted a new position³⁷² that it needed to prove only “the voluntary commission of an act . . . that ‘is so inherently inconsistent with the continued retention of American citizenship that Congress may accord to it its natural consequences, *i.e.* loss of nationality.’”³⁷³ And that it need not prove “a specific intent to renounce” citizenship in addition to the proof of that voluntary act.³⁷⁴ Arguing that the *Afroyim* majority opinion incorporated the rationale of the Chief Justice’s *Perez* dissent, the government pointed to the same language to which Justice Harlan had pointed in his footnote: the Chief Justice’s allowance that certain action “in derogation of undivided allegiance to this country” had “long been recognized” to constitute expatriation.³⁷⁵ But the Court rejected this argument, noting that *Afroyim*, not the Chief Justice’s *Perez* opinion, was the majority opinion that established the law and holding that it required that the “trier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship.”³⁷⁶ The Court cited Attorney General Clark’s opinion and administrative guidance issued by the State Department and INS to establish that the executive branch had effectively conceded prior to this case that the question of intent was relevant, even when one of the expatriating acts had been committed.³⁷⁷ The majority was “confident that it would be inconsistent with *Afroyim* to treat the expatriating acts specified . . . as the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen.”³⁷⁸

³⁷¹ Jurisdictional Statement at 3, *Vance v. Terrazas*, 444 U.S. 252 (1980) (No. 78-1143) (stating the question presented as “[w]hether 8 U.S.C. 1481(c), which provides that in actions to determine the loss of United States nationality the party claiming that such loss has occurred bears the burden of proving such claim by a preponderance of the evidence, and that a person who has performed an act of expatriation is presumed to have done so voluntarily unless the presumption is rebutted by a preponderance of the evidence, is unconstitutional under the Citizenship Clause of the Fourteenth Amendment.”).

³⁷² *Terrazas*, 444 U.S. at 258 n.5 (noting that the question of whether the government must prove an individual specifically intended to relinquish her citizenship was not raised in the jurisdictional statement and had not been presented below but deciding to address the government’s argument).

³⁷³ *Id.* at 258–59.

³⁷⁴ *Id.* at 260.

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 261.

³⁷⁷ *Id.* at 261–63.

³⁷⁸ *Id.* at 261. With respect to the other question presented, the Court reversed the Second Circuit’s holding that Congress lacked the authority to provide for a finding of voluntariness by a preponderance of the evidence and remanded the case. On remand, the district court found that Terrazas had lost his citizenship by voluntarily taking the oath and specifically intending to renounce his citizenship. See *Terrazas v. Muskie*, 494 F. Supp. 1017, 1020 (N.D. Ill. 1980), *aff’d sub nom.* *Terrazas v. Haig*, 653 F.2d 285 (7th Cir. 1981).

Following the *Terrazas* decision, the executive branch at first tried to follow its previous administrative practices.³⁷⁹ But the issue of intent made it difficult for any administrative determination of loss of citizenship to withstand challenge by an individual claiming she did not intend to renounce her citizenship in performing a particular act.³⁸⁰ As a result, the executive branch in 1990 ultimately adopted the policy that remains in place today. An individual who naturalizes in a foreign country or takes an oath of allegiance to a foreign country is presumed *not* to have intended to renounce her citizenship.³⁸¹ This presumption does not apply to formal renunciations of citizenship before a consular officer, service in a foreign military that is engaged in hostilities against the United States, acceptance of a policy-level position in a foreign state, or conviction for treason or attempting to overthrow the government.³⁸² The latter grounds are uncommon, and potentially unconstitutional,³⁸³ and the first is the most common and most straightforward method of expatriation, which is typically accompanied by the strongest proof of intent. The executive branch thus bears a heavy burden in trying to prove a citizen has lost her citizenship if she did not formally renounce it. As a result, expatriation without the cooperation of the individual citizen is effectively inert under the current law. As *Terrazas* intended, “expatriation depends on the will of the citizen” today,³⁸⁴ and, in light of the intent requirement, this is true both at the time of the action and at the time of the administrative proceedings regarding loss of citizenship.

III. RESTORING EXPATRIATION

Modern expatriation law in the United States thus begins with Chief Justice Warren’s dissent in *Perez* and Justice Black’s majority opinion in *Afroyim* and effectively ends with the Court’s decision in *Terrazas* and the executive branch’s implementation of that decision in its 1990 guidance. Since that time there have been repeated attempts by legislators to amend section 349, the direct descendant of section 401 of the Nationality Act of

³⁷⁹ See HERZOG, *supra* note 21, at 90–109 (recounting the history of the Board of Appellate Review’s decisions regarding citizenship following the *Terrazas* decision); Aleinkoff, *supra* note 248, at 1501–03 (describing the State Department’s application of *Terrazas*).

³⁸⁰ See generally Alan G. James, *Expatriation in the United States: Precepts and Practice Today and Yesterday*, 27 SAN DIEGO L. REV. 853 (1990).

³⁸¹ *Id.* at 895; see also U.S. DEP’T OF STATE, ADVICE ABOUT POSSIBLE LOSS OF U.S. NATIONALITY AND DUAL NATIONALITY, <https://travel.state.gov/content/travel/en/legal-considerations/us-citizenship-laws-policies/citizenship-and-dual-nationality.html> [<https://perma.cc/BXK8-FNWD>].

³⁸² James, *supra* note 380, at 895.

³⁸³ It appears that no individual has been expatriated under this provision since World War II. See Lawrence Abramson, Note, *United States Loss of Citizenship Law After Terrazas: Decisions of the Board of Appellate Review*, 16 N.Y.U. J. INT’L L. & POL. 829, 867. And the Supreme Court’s holding in *Trop v. Dulles* that the stripping of citizenship upon conviction for desertion constituted unconstitutional punishment would appear to apply equally to stripping citizenship as punishment for treason or attempting to overthrow the government. See *id.*

³⁸⁴ *Vance v. Terrazas*, 444 U.S. 252, 263 (1980).

1940, to include additional “expatriating” acts. But each of these proposals has been premised on the constitutional framework erected by the Court in *Afroyim* and *Terrazas*. And although some may draw a direct line from Chief Justice Warren’s *Perez* dissent to the Court’s prevailing *Afroyim–Terrazas* framework,³⁸⁵ that narrative, which focuses on outcome, overlooks and obscures a fundamental distinction between the two: their conceptions of expatriation and the role of allegiance. As Professor Roche noted, while the Court was building toward *Afroyim*, the court had “discovered two fundamentally different types of expatriation provisions . . . interwoven in one statute and alleged to be founded on the same constitutional foundation.”³⁸⁶ The Court never untangled them.

This Article argues for the completion of Chief Justice Warren’s long-neglected endeavor to restore the concept of expatriation to its historical roots. The precession from the individual to the state as the subject of “expatriate”—not the power “to expatriate,” as *Terrazas* would later characterize it³⁸⁷—was the animating force of the Chief Justice’s dissent and the basis for the disagreement between the Chief Justice and the *Perez* majority. Their disagreement was whether Congress had the authority to redefine “expatriation”: that is, to transform an act that had never been regarded as a transfer of allegiance but had been used by the executive branch as *evidence* of such a transfer into a statutory act the performance of which automatically resulted in the loss of citizenship. In the context of the facts at issue in *Perez*, Chief Justice Warren rightly objected: Voting in a foreign election had never itself been “expatriation” because it did not necessarily involve a transfer of allegiance.³⁸⁸

The *Afroyim–Terrazas* framework takes a different approach, however. Although the Court forced the subject of “expatriate” to rotate back to the individual citizen, it did not ground these decisions in the long history of expatriation or attempt to restore the historical concept. Instead, the majority opinion in *Afroyim* largely rested on the Fourteenth Amendment,³⁸⁹ citing a separate “inconclusive” history for whatever it was worth as additional support.³⁹⁰ The majority conceived of citizenship as a fundamental “right” and forced the precession of the subject from the state back around to the individual without first disentangling expatriation from the distinct concept of involuntary citizenship stripping. In the context of expatriation, shrouding citizenship in the language of rights is both a poor fit with historical practice

³⁸⁵ See Aleinkoff, *supra* note 248, at 1480–82.

³⁸⁶ Roche, *The Expatriation Cases*, *supra* note 107, at 355. Roche noted that the first “type[] of expatriation provision[]” related to “transfers of loyalty” and the second concerned “betrayals of allegiance.” *Id.*

³⁸⁷ 444 U.S. at 259–60.

³⁸⁸ *Perez v. Brownell*, 356 U.S. 44, 78 (1958) (“The mere act of voting in a foreign election, however, without regard to the circumstances attending the participation, is not sufficient to show a voluntary abandonment of citizenship.”).

³⁸⁹ *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967).

³⁹⁰ *Id.*

and internally inconsistent. This Part attempts to restore expatriation and unencumber it from the language of rights. The end result is an understanding of citizenship and expatriation that restores both the intended subject and the intended principle, an understanding that closely mirrors Chief Justice Warren's position in his *Perez* dissent. As demonstrated in Section IV, this restoration is necessary to begin a discussion of the place of expatriation in today's world and to prevent the erosion of the individual rights of citizens. Restoration permits a distinction between expatriation and other actions parading under its umbrella and partaking in its history.

A. Restoration

In the judicial, congressional, scholarly, and popular discourse about expatriation today, the consequence of the precession of the subject of "expatriate" is evident. One of the most recent contributions by the foremost legal scholar in this area, for example, is entitled *Expatriating Terrorists*.³⁹¹ This title refers to an action taken against terrorists by the state, and the bills proposed to amend section 349 in the recent years have been similarly entitled "Terrorist Expatriation Act"³⁹² and "Expatriate Terrorists Act."³⁹³ Although the *Afroyim-Terrazas* framework establishes that the U.S. Constitution permits only the individual to act as the subject of "expatriate," the prevailing conception of expatriation, as a result of the historical precession of its subject, is not so limited. A word or concept's development of new meanings or connotations as it moves or is moved from one historical, sociological, or linguistic context to another is nothing new or surprising.³⁹⁴ But, in a common law system, where the jurisprudence surrounding a particular concept is based on its history, it is vital to understand that movement and alteration.

Both the majority opinion and Chief Justice Warren's dissent in *Perez* grounded their conclusions in historical practice regarding expatriation, and, in light of the different conceptions of citizenship and expatriation underlying their analyses, both were correct that historical practice provides some support for their conclusions. Justice Frankfurter located the "starting point" for the dispute in the Expatriation Act of 1868, and identified the 1907 Act as the "first introduc[tion]" of "statutory expatriation, as a response to problems of international relations."³⁹⁵ He cited *Mackenzie*, which addressed the provision of the 1907 Act depriving women married to foreigners of

³⁹¹ See generally Spiro, *supra* note 34.

³⁹² S. 3327, 111th Cong. (2010).

³⁹³ S. 2779, 113th Cong. (2014).

³⁹⁴ Cf. Jonathan David Shaub, *A Foucauldian Call for the Archaeological Excavation of Discourse in the Post-Boumediene Habeas Litigation*, 105 NW. U. L. REV. 869, 870-71 (2011) (arguing that the meaning of "unlawful enemy combatant" was altered by the discourse surrounding Guantanamo and al-Qaeda).

³⁹⁵ *Perez v. Brownell*, 356 U.S. 44, 48 (1958).

their citizenship, as the first instance in which the courts addressed “[t]he question of the power of Congress to enact legislation depriving individuals of their American citizenship.”³⁹⁶ The Chief Justice responded that “[t]he Government is without the power to take citizenship away” because of the Citizenship Clause and the nature of sovereignty.³⁹⁷ He argued that the provision at issue in *Mackenzie* was “merely declarative of the law as it was then understood” and that the case ultimately “acknowledges that United States citizenship can be abandoned, temporarily or permanently, by conduct showing voluntary transfer of allegiance to another country.”³⁹⁸ Justice Frankfurter clearly understood expatriation to include the state acting as subject, an authority he believed Congress had as part of its authority to regulate foreign relations. Chief Justice Warren understood expatriation differently.

Chief Justice Warren’s dissent in *Perez* was faithful to the historical conception of expatriation and represented an attempt to reverse the precession of the subject that had occurred. By contrast, in *Afroyim*, Justice Black distinguishes between “involuntary expatriation” and “voluntary expatriation,” and he argues that the Congress that passed the Fourteenth Amendment “specifically considered the subject of *expatriation*,” citing bills that were “introduced to impose involuntary expatriation on citizens who committed certain acts.”³⁹⁹ Whereas Chief Justice Warren had relied on the history of the individual right of expatriation and the executive branch’s administration of that right to argue that the act that was the basis for *Perez*’s loss of citizenship was *not* expatriation, Justice Black uses the word “expatriation” but relies on history related to congressional power to strip citizenship, citing legislators’ statements from the early 19th century about the failed Thirteenth Amendment, which would have removed the citizenship of any United States citizen who had received a title of nobility from a foreign country,⁴⁰⁰ and statements from the debates about congressional power over citizenship from the early legislative proposals related to expatriation and the Expatriation Act of 1868.⁴⁰¹

Arguably, the history cited by Justice Black is more apt to the question of congressional authority than the history of the right of expatriation. Not only is this history of questionable persuasive value on the point for which it is presented,⁴⁰² but it also never recognizes that the question of congressional

³⁹⁶ *Id.* at 51.

³⁹⁷ *Id.* at 77–78 (Warren, C.J., dissenting).

³⁹⁸ *Id.* at 71–73.

³⁹⁹ *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967) (emphasis added).

⁴⁰⁰ See *supra* text accompanying note 106.

⁴⁰¹ *Afroyim*, 387 U.S. at 258–60.

⁴⁰² See *id.* at 271–93 (Harlan, J. dissenting) (carefully demonstrating the weaknesses of Black’s historical evidence). For example, Justice Harlan notes, with respect to the early discussions, that the discussion of expatriation provisions “was seriously clouded by the widely accepted view that authority to regulate the incidents of citizenship had been retained, at least in part, by the several States.” *Id.* at 271. He also objects to the majority’s almost total reliance on the Fourteenth Amendment because he argues that “twice in the two years immediately prior to its passage of the Fourteenth Amendment, Congress exercised the very authority which

authority is not the only relevant question. Nor does it acknowledge the nature and history of the provision at issue—an attempt by Congress to legislate executive branch evidentiary practices into statutory absolutes in order to reach desired results. Justice Black never engages with the critical issue in Chief Justice Warren’s dissent on the exact same provision, that voting in a foreign election did not “invariably involve[] a dilution of undivided allegiance sufficient to show a voluntary abandonment of citizenship,” i.e., that it did not, by definition, constitute expatriation as historically understood.⁴⁰³ Nor does he wrestle with the relationship, and possible tension, between his conception of expatriation as relying on the “assent” of the citizen and the principle on which Justice Goldberg found “no disagreement” only a few years earlier, “that citizenship may be voluntarily relinquished or abandoned, either expressly or by conduct.”⁴⁰⁴

Black’s *Afroyim* opinion states the holding of the Court as “the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship.”⁴⁰⁵ “Forcible destruction of citizenship” is here synonymous with the term he later uses: “involuntary expatriation.”⁴⁰⁶ *Terrazas* would similarly describe the *Perez* majority opinion as “affirm[ing] the power of Congress to expatriate” and “sustain[ing] congressional power to expatriate without regard to the intent of the citizen for particular conduct.”⁴⁰⁷ Noting that *Afroyim* held such power to be incompatible with the Fourteenth Amendment, the *Terrazas* majority concluded that “[i]n the last analysis, expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct.”⁴⁰⁸ And by “will of the citizen,” *Terrazas* made clear it meant intent of the citizen to relinquish *citizenship*, not to transfer allegiance, the historical understanding that formed the essence of Chief Justice Warren’s dissent in *Perez*.⁴⁰⁹

In *Afroyim* and *Terrazas*, the Supreme Court thus forced the precession of the subject back to the individual, ruling as a constitutional matter that the state lacked authority to be the subject. But it also continued to use the concept of “expatriation” to describe the state authority it was rejecting. In so doing, the Court furthered, rather than reversed, the precession, ensuring that “expatriate” now carries both subjects, individual and state, even if the latter lacks the constitutional authority to act. A telling contrast to this approach is

the Court now suggests that it should have recognized was entirely lacking,” citing the Civil War desertion statute and another bill related to the Civil War passed by both houses in 1864 that would have “declared not to be a citizen of the United States” every person “who shall hereafter hold or exercise any office . . . in the rebel service.” *Id.* at 279–80.

⁴⁰³ *Perez v. Brownell*, 356 U.S. 44, 75 (1958) (Warren, C.J., dissenting).

⁴⁰⁴ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 n.11 (1962).

⁴⁰⁵ 387 U.S. at 268.

⁴⁰⁶ *Id.* at 254, 256, 263.

⁴⁰⁷ *Terrazas*, 444 U.S. at 259–60.

⁴⁰⁸ *Id.* at 260.

⁴⁰⁹ *Id.* at 263.

Chief Justice Warren's dissent in *Perez*. While the majority opinion in *Afroyim* somewhat selectively uses historical evidence and largely distorts the meaning of the evidence it does cite in order to support, in a heavily qualified manner, its conclusion, Chief Justice Warren's *Perez* dissent recounts in detail the history of the specific provision at issue in order to restore the concept of expatriation. He dissented because he would have reversed the precession of the subject to the state that had been codified in the 1940 Act.

Chief Justice Warren concluded his *Perez* dissent with this cogent summary:

The power to denationalize is not within the letter or the spirit of the powers with which our Government was endowed. The citizen may elect to renounce his citizenship, and under some circumstances he may be found to have abandoned his status by voluntarily performing acts that compromise his undivided allegiance to his country. The mere act of voting in a foreign election, however, without regard to the circumstances attending the participation, is not sufficient to show a voluntary abandonment of citizenship. The record in this case does not disclose any of the circumstances under which this petitioner voted. We know only the bare fact that *he* cast a ballot. The basic right of American citizenship has been too dearly won to be so lightly lost.⁴¹⁰

As the history of expatriation demonstrates, the only acts that fall within the Chief Justice's category of "acts that compromise [a citizen's] undivided allegiance to his country" were acts of the individual to transfer her allegiance to another country voluntarily. Attorney General Black's opinion, on which the Chief Justice relied in part in *Perez*, emphasized that "[e]xpatriation includes not only emigration out of one's native country, but naturalization in the country adopted as a future residence."⁴¹¹ Expatriation could not be "imposed" or "deemed" to have occurred. Historically, it occurred at the moment of a citizen's voluntary transfer of allegiance.

Expatriation restored is the individual right of a citizen to renounce her allegiance to the United States and transfer that allegiance to a foreign entity and, in so doing, renounce her citizenship in the United States. Expatriation restored is, therefore, by definition, an act that can never be "involuntary" and can never be "statutory." It is "conduct [that] invariably involves a dilution of undivided allegiance sufficient to show a voluntary abandonment of citizenship."⁴¹²

⁴¹⁰ *Perez v. Brownell*, 356 U.S. 44, 78 (1958) (Warren, C.J., dissenting).

⁴¹¹ Right of Expatriation, 9 Op. Att'y Gen. 356, 359 (1866).

⁴¹² *Perez*, 356 U.S. at 75 (Warren, C.J., dissenting).

B. *Extracting Expatriation From the Language of Rights*

A full exploration of the history of and scholarly attention to the concept of citizenship is beyond the scope of this Article. But the Supreme Court's understanding of citizenship in *Perez*, *Afroyim*, and subsequent cases is a vital, and often overlooked, factor in the development of the modern conception of expatriation. Expressed most forcefully in the Chief Justice's dissent in *Perez*, though featuring prominently in various other opinions, is the contention that "[c]itizenship is man's basic right for it is nothing less than the right to have rights."⁴¹³ The Court ultimately grounded this right in the Citizenship Clause of the Fourteenth Amendment. This application of the language of rights to citizenship and the identification of the Fourteenth Amendment as its fount, however, has distorted the doctrine and application of expatriation.

1. *The Language of Rights*

The Citizenship Clause of the Fourteenth Amendment states that all persons "born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens."⁴¹⁴ In his reconstruction of the events leading up to the trio of decisions released on March 31, 1958, Weil reveals that the Chief Justice had initially planned a joint majority opinion for *Perez* and *Trop* that opened with this text.⁴¹⁵ For Chief Justice Warren and the other Justices who shared his view, this text resolved the inquiry because the Constitution bestowed citizenship on certain individuals and, as the Court had held in *Wong Kim Ark*, Congress could not alter that "sufficient and complete right."⁴¹⁶ In their view, the Fourteenth Amendment established a "right to citizenship," and, influenced by the work of Hannah Arendt,⁴¹⁷ that "right" was *the* fundamental human right, without which no other rights existed.

Afroyim embraced this language, as would *Terrazas* and other subsequent Supreme Court cases, concluding that its "holding d[id] 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."⁴¹⁸ A review of the briefs in *Trop*, *Perez*, and *Nishikawa*, as well as *Afroyim*, demonstrates that it was not necessarily assumed that the question before the Court involved the "right to citizenship," however. Of the peti-

⁴¹³ *Id.* at 64.

⁴¹⁴ U.S. CONST. amdt. XIV, cl. 1.

⁴¹⁵ WEIL, *supra* note 5, at 150.

⁴¹⁶ *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898) ("The fourteenth amendment, while it leaves the power, where it was before, in [C]ongress, to regulate naturalization, has conferred no authority upon [C]ongress to restrict the effect of birth, declared by the constitution a sufficient and complete right to citizenship.").

⁴¹⁷ Aleinkoff, *supra* note 248, at 1479 n.42 (discussing Arendt's work and its influence on the Chief Justice).

⁴¹⁸ *Afroyim v. Rusk*, 387 U.S. 263, 268 (1967).

tioners' briefs in the three 1958 decisions, only the petitioner's brief in *Perez* squarely based its argument on the "right to citizenship," and situated it within the rights framework that the Warren Court had been developing. Whereas the government's and others' briefs in the cases appear to conceive of citizenship as a status, which had been "lost" or "withdrawn" or of which the individual had been "deprived" under the 1940 Act, the petitioner in *Perez* argued forcefully that citizenship was a constitutional right, "undoubtedly the most precious right of all" because it is "the key to all the other rights guaranteed by the Constitution."⁴¹⁹ After recounting the history of expatriation, the brief associates historical expatriation with the waiver of other constitutional rights, noting the Court has been reluctant to infer such waiver and established "every reasonable presumption" against it.⁴²⁰ The petitioner's brief in *Afroyim* picked up on the language of Chief Justice Warren and similarly analogized citizenship to other rights, contending that the "[a]brogation of a right explicitly guaranteed by the Fourteenth Amendment is intolerable on a lesser justification than infringement of a First Amendment right or other basic liberties."⁴²¹

2. *Expatriation as a Relinquishment of a Constitutional Right*

The language of rights has significant consequences for the doctrine of expatriation. As Alexander Aleinkoff has recognized, "[i]n modern constitutional discourse, calling citizenship a 'right' gives it weight; it shifts the burden to the government to come forward with compelling reasons for its actions that abridge or deny citizenship."⁴²² Understanding citizenship as a right transforms expatriation, at least with regard to Fourteenth-Amendment citizens,⁴²³ from its historical conception as an individual right itself into the waiver or relinquishment of the constitutional right to citizenship, as *Perez* argued, which carries with it existing constitutional doctrine about the prerequisite facts and intent necessary for waiver, the party that bears the burden of establishing those facts, and the standard of evidence necessary in their establishment.⁴²⁴ Aleinkoff notes some of the problems inherent in conceiving of citizenship as a right,⁴²⁵ and points out, as Spiro has done more

⁴¹⁹ Brief of Petitioner at 8, *Perez v. Brownell*, 356 U.S. 44 (1958) (No. 57-44).

⁴²⁰ *Id.* at 17 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

⁴²¹ *Id.* at 19.

⁴²² Aleinkoff, *supra* note 248, at 1484.

⁴²³ In *Rogers v. Bellei*, decided four years after *Afroyim* and after Justice Blackmun had replaced Justice Fortas, the Court held that *Afroyim* did not apply to *jus sanguinis* citizens—children who are born abroad but become citizens at birth due to their parents' citizenship—because they were not "born or naturalized in the United States" within the meaning of the Fourteenth Amendment. 401 U.S. 815, 835 (1971).

⁴²⁴ Aleinkoff, *supra* note 248, at 1484 ("Our usual understanding is that while the state may not normally abridge constitutional rights, the individual may waive them. In this light, expatriation is not a right in and of itself; rather it is the waiver of the right to citizenship.").

⁴²⁵ *Id.* at 1485–88 (counting among the "major difficulties" of a "'rights' understanding of citizenship" the problem of locating its origin, the lack of any balancing of it as a "funda-

recently,⁴²⁶ that, despite Chief Justice Warren's recitation of the dire consequences of the loss of citizenship, what he calls the "right to have rights," citizenship today has relatively few consequences in terms of basic rights.⁴²⁷ Contemporary scholars questioned the factual truth of his statement at the time as well.⁴²⁸ Legal permanent residents enjoy almost all of the rights of citizens, aside from some so-called "political rights," which include voting and holding federal employment. Similarly, visitors, legal and illegal, enjoy many basic rights as well, with the significant exception of the right to remain in the country.⁴²⁹

Today, citizenship may be better conceived of as the right to participate in the state as a component of its sovereignty,⁴³⁰ than the right to have rights. But regardless of its actual nature, its conception in the context of expatriation has significant ramifications. As discussed, the right of expatriation was synonymous historically with the right of emigration and naturalization in another country. The intentional transfer of allegiance was an intentional severance of the citizenship relationship between an individual and her former country. The historical recognition of the right of expatriation established an individual's authority to transfer her allegiance, if she so chose, and, at the time of transfer, the individual had exercised that right. In other words, the intent of the individual with respect to her citizenship qua citizenship was immaterial; citizenship was a legal relation based on allegiance. The fundamental question for expatriation was whether the individual had chosen to transfer her allegiance voluntarily.

This understanding of expatriation co-existed with the Fourteenth Amendment comfortably. The Citizenship Clause overturned the *Dred Scott* decision, resolved the question of federal versus state citizenship, and eliminated the authority of the government to exclude particular classes of individuals from citizenship.⁴³¹ And its text and history are undoubtedly relevant to the question of Congress's authority, or lack thereof, to withdraw or abrogate citizenship. However, no one contends that the Fourteenth Amendment reestablished perpetual allegiance by its use of the verb "are," in the sense that it abrogated the individual's right to remove herself from its definition. Nor could they, given the contemporaneous passage of the Expatriation Act of 1868. One contemporaneous interpretation of the two acts together by Secretary of State Hamilton Fish claimed that individuals who had expatri-

mental right" against compelling government interests, and the fact that "[c]itizenship is not a right held against the state; it is a *relationship with* the state or, perhaps, a *relationship among* persons in the state").

⁴²⁶ Spiro, *supra* note 34, at 2170.

⁴²⁷ Aleinkoff, *supra* note 248, at 1484–85.

⁴²⁸ See Kurland, *supra* note 345, at 171 (calling the claim that citizenship is nothing less than the "right to have rights" part of a "grandiloquent" argument but one that was "not strong on fact").

⁴²⁹ Cf. Spiro, *supra* note 34, at 2170.

⁴³⁰ See WEIL, *supra* note 5, at 184–85.

⁴³¹ See Christina M. Rodriguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1363, 1365–66 (2009).

ated themselves had chosen to no longer be “subject to the jurisdiction of” the United States and thus were outside the scope of the Amendment’s definition.⁴³² Whatever the rationale, it is clear the Fourteenth Amendment permits expatriation, as restored, i.e. the right of an individual to relinquish citizenship. The language of rights, however, has obscured the nature of expatriation, which did not involve the relinquishment or waiver of a “right,” but was itself an individual right: the fundamental right to transfer *allegiance* from one country to another.

IV. EXPATRIATION RESTORED

The foregoing analysis is largely a theoretical enterprise, an attempt to separate out distinct concepts that have merged over time into a single statute, section 349, and a single dialogue about expatriation. While there is some intrinsic benefit to such endeavors, the true value is in permitting a new dialogue to take place in which every participant is speaking the same language and using the same concept. Expatriation restored and extracted from the language of rights is a concept that is not a part of the current discourse.

Two particular dialogues emerge from the process of restoring expatriation that warrant further discussion. First, expatriation restored is grounded in allegiance—specifically the voluntary *renunciation* of allegiance to the United States and *transfer* of that allegiance to a different sovereign.⁴³³ But allegiance is no longer part of the analysis. Reacting to the precession of the subject of “expatriate” to the state, the Supreme Court supplanted the inquiry into a citizen’s intent with respect to *allegiance* with an inquiry into a citizen’s intent with respect to *citizenship* itself. Second, the entrenchment of a robust “right” of “irreducible citizenship” under the *Afroyim–Terrazas* framework⁴³⁴ may have unforeseen consequences. While “citizenship has become absolutely secured” under this framework,⁴³⁵ the security of citizenship and the elimination of allegiance may also have the collateral consequence of degrading citizens’ individual rights. As a result of the *Afroyim–Terrazas* framework, the tension between state and citizen that formerly found resolution in discussions about expatriation and allegiance may have shifted to discussions over the scope of individual rights themselves.

⁴³² Letter from Hamilton Fish, Sec’y of State, to Ulysses S. Grant, President (Aug. 25, 1873), in *OPINIONS OF THE PRINCIPAL OFFICERS OF THE EXECUTIVE DEPARTMENTS ON EXPATRIATION, NATURALIZATION, AND ALLEGIANCE*, 11, 17, 18 (1873).

⁴³³ See *supra* notes 411–12.

⁴³⁴ Patrick Weil, *Citizenship, Passports, and the Legal Identity of Americans: Edward Snowden and Others Have a Case in the Courts*, *YALE L.J.F.* (Apr. 23, 2014), <http://www.yalelawjournal.org/forum/citizenship-passports-and-the-legal-identity-of-americans> [https://perma.cc/9SAF-HQXM].

⁴³⁵ *Id.*

A. *Expatriation Restored and Allegiance*

As one scholar has recently opined, the concept of allegiance “remains opaque” at the same time as it remains “an essential element of citizenship.”⁴³⁶ The naturalization “oath of allegiance” continues to require an individual to declare under oath that she “absolutely and entirely renounce[s] and abjure[s] all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which [she] ha[s] heretofore been a subject or citizen.”⁴³⁷ School children continue to pledge allegiance to the flag, and the U.S. Code uses the concept of allegiance to define who constitutes a U.S. national.⁴³⁸ Allegiance, or the lack thereof, thus remains a powerful concept; a term, like citizenship, that has been used to delineate “us” from “them” and to establish those individuals who constitute a particular society or nation-state.

Allegiance no longer remains an essential element of expatriation, however. Subjective intent with respect to citizenship qua citizenship is the paramount inquiry. Until *Afroyim*, as interpreted by *Terrazas*, expatriation never required an individual to intend to relinquish citizenship as a distinct right; it required only a voluntary renunciation and transfer of allegiance. Without allegiance, citizenship was not possible because, although dual citizenship was acknowledged and permitted, an individual could voluntarily pledge allegiance only to one sovereign.⁴³⁹ Under the governing *Afroyim–Terrazas* framework, an individual citizen can, in reality, transfer her allegiance to a foreign state, but is not considered to have expatriated herself unless she also desires not to be a citizen. But such an individual may want to retain citizenship for some tangible benefit, such as a passport to access Western nations without a visa; that desire is today determinative. In those circumstances, her allegiance is immaterial. Given the history of the concept of expatriation, there are at least two potentially compelling reasons for this development.

First, given the history of the state ascribing to itself the power to expatriate, the specific intent requirement of the *Afroyim–Terrazas* framework could be regarded as a prophylactic rule, ensuring that the individual’s volition remains paramount within the machinations of the administrative state and that the arbiter does not become the actor. Even if one agrees in the

⁴³⁶ Ashwini Vasanthakumar, *Treason, Expatriation and ‘So-Called’ Americans: Recovering the Role of Allegiance in Citizenship*, 12 GEO. J.L. & PUB. POL’Y 187, 190–91 (2014).

⁴³⁷ See 8 C.F.R. § 337.1(a) (2017); see also 8 U.S.C. § 1448(a)(2) (2012) (requiring a person seeking to be admitted to citizenship to take an oath “to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the applicant was before a subject or citizen”).

⁴³⁸ 8 U.S.C. § 1101(a)(22) (2012) (defining American national as a “person owing permanent allegiance to the United States”).

⁴³⁹ Cf. *Savorgnan v. United States*, 338 U.S. 491, 500 (1950) (“There is nothing . . . in the Act of 1907 that implies a congressional intent that, after an American citizen has performed an overt act which spells expatriation under the wording of the statute, he nevertheless can preserve for himself a duality of citizenship by showing his intent or understanding to have been contrary to the usual legal consequences of such an act.”).

abstract that an individual who has truly transferred or renounced her allegiance to the United States has voluntarily expatriated herself, the question remains how a state can determine when the renunciation or transfer of such a nebulous concept like allegiance has occurred. Because of the subjective nature of allegiance, the only certain way is to ask the individual person. Under this view, the prophylactic specific intent rule of the *Afroyim-Terrazas* framework is a necessity, unless there are procedural, judicial, and administrative safeguards that were not present historically that would also serve the same prophylactic function and prevent a repeat of the precession to the state as subject.⁴⁴⁰

A second possibility is that in today's global society, the acts that formerly constituted, by definition, a transfer of allegiance, such as naturalizing in a foreign country, may not carry the same definitional clarity. Dual citizenship has occurred throughout history as a result of, among other things, the doctrine of perpetual allegiance and the interaction of *jus soli* and *jus sanguinis* citizenship,⁴⁴¹ and has long been accepted in the United States.⁴⁴²

⁴⁴⁰ The text of the current section 349, originating in the Nationality Act of 1940, provides that a citizen "shall lose his citizenship" when the prerequisites of the statute have occurred. The 1907 Act provided that an individual "shall be deemed to have expatriated himself," upon taking an oath of allegiance to or naturalizing in a foreign country. Both statutes, the 1940 language more directly, provide that the act itself constitutes expatriation, leading to disputes over whether an individual was a citizen at a specified time after one of the specified acts. A different approach, and one perhaps less likely to lead to precession, would be to provide that an individual citizen may expatriate herself by voluntarily renouncing or transferring her allegiance. The statute could provide particular examples of acts and procedures, such as formal renunciation, or could allow an administrative agency such as the State Department to promulgate regulations doing so, while making clear that none of the acts itself could be a basis for expatriation. The two essential inquiries would be, as they were originally, allegiance and voluntariness. And the most difficult task would likely be defining "allegiance" in current society. Further, instead of providing for automatic expatriation upon the commission of an act, the statute could adopt several procedural protections to prevent precession: First, it could require the government to present its evidence of a voluntary renunciation or transfer of allegiance to a neutral magistrate, either in a district court or a special court such as the Foreign Intelligence Surveillance Court, and get an order permitting an expatriation inquiry. Evidentiary protections similar to those present in criminal law could be imposed in order to prevent a finding of expatriation without any of the protections afforded in the criminal justice system. And the executive branch could then be required to provide to the individual citizen notice of an expatriation inquiry and an opportunity to appear to argue that she had not expatriated herself. As in denaturalization proceedings, the burden on the government should likely be "clear and convincing evidence." See *Nishikawa v. Dulles*, 356 U.S. 129, 137 (1958) (requiring clear and convincing evidence of voluntariness of expatriating act); *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) (adopting clear and convincing evidence standard in denaturalization proceedings). But see *Vance v. Terrazas*, 444 U.S. 252, 265–66 (1980) (noting these holdings were not constitutional rulings and allowing a preponderance of the evidence standard and presumption of voluntariness under section 349). And even if lower standards are adopted, the availability of presumptions about voluntariness should be limited to acts that historically constituted expatriation: naturalization in a foreign country or the taking of an oath of allegiance to a foreign country. Such a provision would impose a substantial burden on the executive branch; one it may rarely find worth invoking. But the rationale for the provision would not necessarily be functional. It would be to reestablish an objective method of determining allegiance, rather than following the dictates of ascriptive citizenship.

⁴⁴¹ *Spiro*, *supra* note 36, at 1433. *Jus sanguinis* citizenship is transferred from parent to child, no matter where the child is born; *jus soli* citizenship is citizenship accorded based on

But ultimate allegiance has historically been singular, as represented by the naturalization oath still today.⁴⁴³ The acts codified in the 1907 Act of naturalizing in a foreign country or taking an oath of allegiance to that country were the acts of transferring allegiance; acts of expatriation. Or, in Chief Justice Warren's words, they were "acts that would of themselves show a voluntary abandonment of citizenship."⁴⁴⁴ Today, the notion of undivided allegiance may have less salience, despite the naturalization pledge. An oath of allegiance to one country may not entail, by definition, a renunciation of allegiance to another. Divided, volitional allegiance seems more palatable in our global society.⁴⁴⁵ As a result, the species of voluntary expatriation that occurred through the commission of acts that inherently constituted a transfer of allegiance may be extinct. Under such a view, the intent requirement represents a way to account for these historical developments in the concept of allegiance. In today's world, the only remaining species of expatriation, even as restored, is the specific, intentional renunciation of citizenship. Although Chief Justice Warren's dissent includes an understanding of expatriation that is excluded by the *Afroyim-Terrazas* framework, that exclusion has been rendered meaningless by the progress of history.

Either of these interpretations may make logical sense, but neither represents the way the Court conceived of or explained its actions in *Afroyim* and *Terrazas*. And that has consequences. Calls to "strip" citizenship from terrorists and others have been consistently made since 9/11.⁴⁴⁶ This movement has not been limited to the United States. Numerous Western and non-Western countries have passed or updated legislation that allows them to strip citizenship from citizens in particular circumstances.⁴⁴⁷ Great Britain

the place of birth. See *Miller v. Albright*, 523 U.S. 420, 478–79 (1998) (Breyer, J., dissenting); *United States v. Wong Kim Ark*, 169 U.S. 649, 667 (1898).

⁴⁴² See HERZOG, *supra* note 21, at 111–12.

⁴⁴³ *Id.* at 128; see 8 U.S.C. § 1448(a) (2012); 8 C.F.R. § 337.1 (2017).

⁴⁴⁴ *Perez v. Brownell*, 356 U.S. 61, 75 (1958) (Warren, C.J., dissenting).

⁴⁴⁵ Vasanthakumar, *supra* note 436, at 194–96. Furthermore, in previous transportation eras, residence, or residence *animo manendi*, with the intention of remaining permanently, was inseparable from allegiance and nationality. Returning to reside in the United States, or intending to do so, was held repeatedly to overcome any presumption that a citizen who had been living abroad had transferred her allegiance, a presumption that itself was based on residence. See *Perkins v. Elg*, 307 U.S. 325, 339 (1939). The idea that voluntary choices about residence have any relation to fundamental allegiances, or citizenship for that matter, may have lost much of its salience in the age of the ever-shrinking, fully wired globe. *But see, e.g.*, 8 U.S.C. § 1401(g) (requiring that a citizen be physically present for a total of five years, two of which must be after the age of fourteen, in the United States in order for his or her child to also be a U.S. citizen if the child is born outside of the United States).

⁴⁴⁶ The debates surrounding the legislative proposals by Senators Cruz, Lieberman, and Brown are the most prominent, though, despite the rhetoric about citizenship stripping, the legislation would in reality not have altered the specific intent requirement. See *supra* text accompanying notes __ to __. The Patriot Act II, which would have erected a presumption of specific intent, is probably more accurately described as a de facto stripping of citizenship.

⁴⁴⁷ See generally Esbrook, *supra* note 34, at 1281–90 (cataloguing the current state of the law in numerous countries). The British law allows for the removal of citizenship "where the Secretary of State is satisfied that the person has done something seriously prejudicial to the vital interests of the U.K., provided . . . that revocation of citizenship would not render him

has utilized its law to strip the citizenship of dual citizens engaged in terrorism prior to the targeting and killing of these individuals by drone strike⁴⁴⁸ and Australia has recently utilized its citizenship stripping law against an Islamic State fighter as well.⁴⁴⁹ If more terrorist acts against the United States are committed by U.S. citizens,⁴⁵⁰ these calls may get louder. The “wind of war” seems almost constant today, as do fears about security, and the increasing racial and cultural bias toward the Islamic community mirrors the racial exclusions and fears about “un-American” communist sympathizers and Japanese immigrants of the past.⁴⁵¹

As one scholar has pointed out, in practice the *Afroyim–Terrazas* framework does not entirely foreclose state-as-subject expatriation in practice.⁴⁵² It does require the government to prove intent, but, as the supporters and opponents of proposed legislation have noted, the government could take the position that engaging in particular actions related to terrorism demonstrates intent,⁴⁵³ a position the Patriot Act II sought to codify by establishing the commission of the act as sufficient to make a *prima facie* showing of intent

stateless.” *Id.* at 1285 (quoting British Nationality Act 1981, c. 61, § 40 (as amended by the Immigration, Asylum and Nationality Act 2002, c. 41, c. 13; Immigration Act 2014, c. 22)). See generally Shai Lavi, *Punishment and the Revocation of Citizenship in the United Kingdom, United States and Israel*, 13 *NEW CRIM. L. REV.* 404 (2010) (discussing the British law and its uses and arguing for the revocation of citizenship as punishment for a breach of allegiance).

⁴⁴⁸ See Susan Hennessy, *Banished: A British Solution to Citizenship, Due Process, and U.S. Drone Strikes*, *LAWFARE* (Mar. 7, 2013, 8:51 PM), <https://www.lawfareblog.com/banished-british-solution-citizenship-due-process-and-us-drone-strikes> [<https://perma.cc/KWK3-DLWN>]; Spiro, *supra* note 34, at 2182.

⁴⁴⁹ See Jacqueline Williams, *A Fighter for ISIS Loses His Citizenship*, *N.Y. TIMES*, Feb. 14, 2017, at A4.

⁴⁵⁰ Although there is no official list of the citizenship of individuals convicted of terrorism since 9/11, U.S. citizens and permanent residents constitute a significant number. One list compiled by The New America Foundation counts U.S. citizens and permanent residents as 84 percent of the 401 U.S. residents charged in terrorism cases since 2001. Peter Bergen, et al., *Terrorism in America After 9/11: Who Are the Terrorists?*, *NEW AM.*, <http://www.newamerica.org/in-depth/terrorism-in-america/who-are-terrorists> [<https://perma.cc/LYZ6-H3PM>]. U.S. citizens have also been the perpetrators of some of the most high-profile terrorist attacks, including Nidal Malik Hasan, the U.S.-born major who opened fire at Fort Hood, killing 13 and injuring 30 others, and Mohammad Youssuf Abdulazeez, a naturalized U.S. citizen who shot and killed five people at military installations in Chattanooga, Tennessee. Dzhokar Tsarnaev, one of the perpetrators of the Boston marathon bombing, was also a naturalized U.S. citizen.

⁴⁵¹ HERZOG, *supra* note 21, at 130 & tbl.9.1 (noting that military conflicts have been the force behind many historical proposals about expatriation).

⁴⁵² Vasanthakumar, *supra* note 436, at 213, 220–22.

⁴⁵³ See 160 Cong. Rec. S5726 (daily ed. Sept. 18, 2014) (remarks of Sen. Cruz) (stating that the bill would “make fighting for ISIS, taking up arms against the United States, an affirmative renunciation of American citizenship”); *id.* at S5728 (letter submitted by the ACLU) (arguing that the bill “would strip U.S. citizenship from Americans who have not been convicted of any crimes, but who are suspected of being involved with designated foreign terrorist organizations”); Charlie Savage & Carl Hulse, *Bill Targets Citizenship of Terrorists’ Allies*, *N.Y. TIMES*, May 7, 2010, at A12 (quoting Scott Brown as stating that “[i]ndividuals who pick up arms . . . have effectively denounced their citizenship, and this legislation simply memorializes that effort”).

and to put the burden on the individual citizen to disprove it.⁴⁵⁴ If an administration decided to utilize citizenship-stripping aggressively in the fight against terrorism⁴⁵⁵ under a version of the legislation that has been proposed, or even as a form of severe punishment for those engaging in “un-American” activities such as flag burning,⁴⁵⁶ the prevailing *Afroyim-Terrazas* framework would be an impediment but not an absolute bar. The government would have to prove intent, but the acts that can be used to demonstrate such intent are not limited and the question of allegiance is irrelevant. As Professor Roche recognized over fifty years ago, some of the acts in section 349 that could potentially be the basis for expatriation are “based on the proposition that ‘Bad Americans’ should be deprived of their nationality” and “provide[] a mode of punishment additional to those provided by the criminal law for certain heinous offenses against sovereignty.”⁴⁵⁷ Those acts, and the impetus to act against “Bad Americans,” remain today.

Restoring expatriation would nullify that possibility. Expatriation law would then not only continue to support the principle expressed in Chief Justice Warren’s *Perez* dissent and established as law by *Afroyim* that Congress lacks the constitutional authority to strip citizenship, but it would also remove the idea that a variety of acts can be the basis for expatriation as long as Congress codifies them and the requisite intent is present. In contrast to the acts specified by the current section 349, the two principal acts Congress “deemed” to be expatriation by an individual in the 1907 Act were in fact expatriation:⁴⁵⁸ under prevailing international understanding, they were voluntary transfers of allegiance from one country to another. Inclusion of only

⁴⁵⁴ The Patriot Act II, like the more recently proposed legislation, would have added several expatriating acts related to terrorism to section 349, but, unlike the later proposals, it would also have added a provision stating that “[t]he voluntary commission or performance” of two of the expatriating acts—namely joining the armed forces of a foreign state engaged in hostilities against the United States or “joining, serving in, or providing material support . . . to a terrorist organization . . . if the organization is engaged in hostilities against the United States, its people, or its national security interests”—would necessarily constitute “prima facie evidence that the act was done with the intention of relinquishing United States nationality.” Domestic Security Enhancement Act of 2003 § 501(b) (Jan. 9, 2003), <http://www-tc.pbs.org/now/politics/patriot2-hi.pdf> [<https://perma.cc/G2QE-KCGX>].

⁴⁵⁵ The Department of Justice under Attorney General Sessions has committed to “aggressively pursue denaturalization of known or suspected terrorists,” when their naturalized citizenship has been procured illegally or by deception. See Press Release, U.S. Dep’t of Justice, Justice Dep’t Secures the Denaturalization of a Repeat Child Sex Abuser (June 29, 2017), <https://www.justice.gov/opa/pr/justice-department-secures-denaturalization-repeat-child-sex-abuser> [<https://perma.cc/JM56-LD6N>]; see also 8 U.S.C. § 1451(a) (2012); *United States v. Mohammad*, 249 F. Supp. 3d 450, 457–58 (D.D.C. 2017). The Administration does not appear to have pursued the expatriation of any terrorists at this time.

⁴⁵⁶ See Charlie Savage, *Court Rulings Would Hinder Flag Stance from Trump*, N.Y. TIMES, Nov. 30, 2016, at A17 (quoting then-President-elect Trump’s tweet positing loss of citizenship as a punishment for flag burning).

⁴⁵⁷ Roche, *The Expatriation Cases*, *supra* note 107, at 337.

⁴⁵⁸ The two acts being naturalization in a foreign country or the taking of a meaningful oath of allegiance to a foreign country. As discussed, the provision dealing with residence abroad raised only a presumption of expatriation, and the provisions dictating that women who married foreign citizens lost their U.S. citizenship were not grounded in expatriation but rather

these acts was significant. In the government's view, individuals could not expatriate themselves without performing one of these acts, precisely because they could not expatriate themselves without transferring their allegiance to another country.⁴⁵⁹ That was not a limitation imposed on the individual by the state; it was a limitation in the concept of expatriation itself. In passing the 1907 Act, Congress was thus exercising the authority to codify the individual's right of expatriation, not to grant the executive branch new authority or alter the nature of expatriation itself. Justice Patterson had advocated for such legislation over a century earlier in *Talbot's Case*.⁴⁶⁰

As demonstrated by the repeated legislative proposals to add actions related to terrorism as additional expatriating acts under section 349, the idea that a citizen can lose her citizenship, or be deprived of it, on the basis of actions that cast doubt on her continued loyalty to the state has not disappeared entirely.⁴⁶¹ Although the precession of its subject of "expatriate" has made expatriation the centerpiece of this dialogue, the debates are in reality tied to the ancient concepts of banishment and exile.⁴⁶² They are related to expatriation only because they originate in the same fundamental concept of citizenship as social compact or consensual relationship that gave birth to the individual right of expatriation. But ultimately they are about the ways in which the state may act as a subject, action incompatible with the concept of expatriation restored. Relevant to that conversation, but not to expatriation restored, are the 1865 Civil War provision that imposed the loss of the "rights of citizenship" on deserters; the legislative proposal to revoke the citizenship of officers in the Confederate Government that was pocket vetoed by President Lincoln; and current section 349(a)(7), originating in the Nationality Act of 1940, that imposes the loss of citizenship as an additional consequence of a conviction for treason or attempting to overthrow the government.

in the historical subjugation of women to their husbands. See *supra* text accompanying notes 213–38.

⁴⁵⁹ Although it was an early source of controversy, the debate over the government's authority to limit expatriation to particular acts, or to particular locations, has largely disappeared as the individual right of expatriation has transformed into the voluntary waiver of the right to citizenship. Although Jefferson contributed to the first expatriation law in Virginia, which provided formal procedures for the exercise of the right, he also opined that an individual could exercise the right through any other effectual means. Bradburn, *supra* note 55, at 106. If an individual has a right to expatriate, can Congress limit its exercise to, for example, acts committed on foreign soil, as section 349 continues to require? 8 U.S.C. § 1481(a)(6). Superficially, the *Afroyim-Terrazas* framework stands for the principle that the individual is the ultimate arbiter of expatriation; the government has no authority. But, on closer inspection, they, in fact, do not address the question of government authority in this respect. Instead, they stand for the proposition that the individual must be the subject, the entity exercising authority, a response to the historical precession of the subject. They do not address to what extent Congress or the executive branch have the inherent authority to limit, standardize, or interpret such action or intent.

⁴⁶⁰ 3 U.S. (3 Dall.) 133, 163–65 (1795).

⁴⁶¹ See *supra* text accompanying notes 26–32.

⁴⁶² Roche, *supra* note 190.

As long as the prevailing conception of expatriation—as represented by the text of section 349 as well as the legislative and scholarly dialogue—contains the remnants of its past precession and includes under its umbrella acts relevant only as *evidence* of allegiance along with *punitive* citizenship-stripping measures that have little relation to transfers of allegiance, the potential for the state to act as subject remains. The further addition of loss of citizenship as punishment for acts such as terrorism that shock our sense of society remains viable by analogy to the existing desertion and treason provision. Despite their repeated invocation of the term, however, those conversations are not about expatriation.

The requirement to prove specific intent and the analogy to the voluntary waiver of rights would make the functional use of such provisions difficult in practice and would likely render punitive additions ineffective. But it would also operate as a panacea for any constitutional issues regarding Congress's authority to define expatriating acts. As one scholar characterizes it, "the requirement of specific intent would appear to collapse the distinction between statutory expatriation and voluntary renunciation."⁴⁶³ For example, as long as the government is willing to try and prove by a preponderance of the evidence that an individual intended to renounce citizenship when she, for example, provided material support for terrorism,⁴⁶⁴ the loss of citizenship is no longer a "punishment" that runs afoul of *Trop's* Eighth Amendment holding. It is simply a recognition of the "will of the citizen."⁴⁶⁵ Similarly, whether becoming a member of a foreign terrorist organization, as defined by the State Department, inherently constitutes a transfer of allegiance is irrelevant if the government can prove by circumstantial evidence that in becoming a member the individual intended to relinquish her citizenship.⁴⁶⁶

Even though the *Afroyim-Terrazas* framework is largely regarded as fulfilling the vision begun by Chief Justice Warren in his *Perez* dissent, the slight difference between the two is, in a word, allegiance. But the difference is not the existence or meaning of allegiance; the true difference is the nature of the inquiry into its existence. Chief Justice Warren, who attempted in his dissent to restore the historical understanding of expatriation, acknowledged that "United States citizenship can be abandoned, temporarily or permanently, by conduct showing voluntary transfer of allegiance to another coun-

⁴⁶³ Vasanthakumar, *supra* note 436, at 220.

⁴⁶⁴ See *Vance v. Terrazas*, 444 U.S. 252, 263 (1980); see also S. 361, 115th Cong. § 2 (2017) (adding "[b]ecoming a member of, or providing training or material assistance to, any foreign terrorist organization designated under section 219" as an additional basis for loss of citizenship). Almost all of the legislative proposals since 2001 to expand the expatriating acts in section 349 to address terrorism have included similar provisions. See *supra* note 6.

⁴⁶⁵ *Terrazas*, 444 U.S. at 260.

⁴⁶⁶ *Id.* at 261 ("'Of course,' any of the specified acts 'may be highly persuasive evidence in the particular case of a purpose to abandon citizenship.'" (quoting *Nishikawa v. Dulles*, 356 U.S. 129, 139 (1958) (Black, J., concurring))).

try.”⁴⁶⁷ But, in his view, such conduct was limited to “voluntarily performing acts that compromise his undivided allegiance to his country.”⁴⁶⁸ Historically, those acts are limited to those that by definition transfer allegiance to another country. The *Afroyim–Terrazas* framework abandons the focus on allegiance in favor of exalting specific intent regarding citizenship. Under this view, the acts currently enumerated in section 349, as well as any acts that may be subsequently added, trigger expatriation as long as the requisite intent is present.

The limitation imposed by the *Afroyim–Terrazas* framework is a limitation on the state: it may not expatriate an individual without her “assent,” that is, without “anything less than an intent to relinquish citizenship.”⁴⁶⁹ But as long as the state can shoulder its burden of proving the two necessary conditions—voluntary performance of an act listed in section 349 and specific intent to relinquish citizenship—the state has not violated the constitutional rule.⁴⁷⁰ In contrast, as explained by Chief Justice Warren’s dissent, expatriation restored is, by definition, inherently limited to voluntary transfers of allegiance. The possibility of expatriation occurring necessarily by, for example, providing material support to terrorism, joining a terrorist organization, engaging in hostilities against U.S. forces as part of a terrorist organization, or even burning an American flag, does not exist. The restoration of allegiance as the foundation of expatriation ensures that.

B. *Expatriation Restored and Citizens’ Individual Rights*

Afroyim’s conception of citizenship as an individually held “right” that is governed by familiar principles of voluntary waiver results in a sacred view of citizenship as a “kind of ‘super-right’—one that cannot be balanced away,” an “absolute right of citizenship.”⁴⁷¹ That admirable view, reinforced by *Terrazas*, has entrenched itself in American jurisprudence and society.⁴⁷² One unacknowledged collateral consequence, however, of the disappearance of expatriation as restored and allegiance from the dialogue and the emergence of an absolute right of citizenship may be the degradation of citizens’ individual rights.

⁴⁶⁷ *Perez v. Brownell*, 356 U.S. 44, 73 (Warren, C.J., dissenting).

⁴⁶⁸ *Id.* at 78. A similar sentiment appears on the Attorney General’s opinion interpreting the Court’s decision in *Afroyim*, though its understanding of actions that would be “in derogation of allegiance” was based on the understanding of allegiance and expatriation prevailing at that time, not on actions that were historically understood to constitute derogation of allegiance to one’s country: “‘Voluntary relinquishment’ of citizenship is not confined to a written renunciation It can also be manifested by other actions declared expatriative under the act, if such actions are in derogation of allegiance to this country.” *Expatriation—Effect of Afroyim v. Rusk*, 387 U.S. 253, 42 Op. Att’y Gen. 397, 400 (1969) (emphasis added).

⁴⁶⁹ *Terrazas*, 444 U.S. at 260.

⁴⁷⁰ *Id.* at 261.

⁴⁷¹ Aleinkoff, *supra* note 248, at 1486–87.

⁴⁷² WEIL, *supra* note 5, at 184–85.

In his recent book on the history of denaturalization, Patrick Weil eloquently recounts the revolution in citizenship that began with the Supreme Court's decision in *Afroyim*: "By saying to each American that, as a citizen, you are a part of the sovereign, independent of your age and your country of origin, the Supreme Court provoked a silent revolution in the relationship between the American people and their government."⁴⁷³ He argues that the *Afroyim* decision, which he views as the culmination of Chief Justice Warren's leadership on the issue, "embrac[ed] an innovative concept of citizen sovereign" and removed "the specter of expatriation that cast a pall shadow over a great many American citizens."⁴⁷⁴ This "citizen sovereignty" "protect[s] citizens from unwilling expatriation even if they also possess another nationality."⁴⁷⁵ Weil's contentions about the revolution achieved by *Afroyim* are insightful, and his book represents an important narrative cataloguing the checkered history of the United States in utilizing denaturalization and citizenship stripping (state-as-subject "expatriation") in support of racist exclusionary policies, xenophobia, the subjection of women, and the suppression of particular political ideas. He does not recognize, however, the potential collateral consequences of this revolution, and its subjugation of allegiance, on the rights of citizens more broadly.

Many of the most important cases establishing citizens' and noncitizens' rights and the relative constitutional authority of the three branches of government, especially in the context of national security or war, involve U.S. citizens who fall outside of prevailing socio-cultural norms about what constitutes a "citizen."⁴⁷⁶ One scholar has argued that this is the result of a category of "pseudo-citizenship," in which citizens who lack many of the characteristics of the "typical" citizen—racial, religious, and cultural—receive different treatment.⁴⁷⁷ Commentators have cited, for example, the differential treatment of John Walker Lindh and Yaser Hamdi by the Bush Administration as an example of discrimination within the class of U.S. citi-

⁴⁷³ *Id.* at 184–85.

⁴⁷⁴ *Id.* at 183.

⁴⁷⁵ *Id.*

⁴⁷⁶ Examples of such cases could include, among others, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Quirin*, 317 U.S. 1 (1942); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902); and *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Civil Rights Cases*, 109 U.S. 3 (1883). See also *al-Marri v. Wright*, 487 F.3d 160, 164 (4th Cir. 2007), *rev'd sub nom.* *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc) (per curiam), *vacated sub nom.* *al-Marri v. Spagone*, 555 U.S. 1220 (2009); *Padilla v. Hanft*, 423 F.3d 386, 388 (4th Cir. 2005).

⁴⁷⁷ See Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. DAVIS L. REV. 79, 87 (2004); see also Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002); Hiroshi Motomura, *Immigration and We the People After September 11*, 66 ALB. L. REV. 413, 422 (2003) ("What is really troubling about the government's response to September 11 has not been that the government is treating citizens and noncitizens differently. Rather, it is that current policies treat many citizens as if they were noncitizens - at least if we look beyond a narrow, legalistic definition of what it means to be a U.S. citizen.").

zens.⁴⁷⁸ Some of the characteristics they have highlighted, such as residence,⁴⁷⁹ were, in the past, used as indicia of allegiance and relevant to questions of expatriation.⁴⁸⁰ The story of Yaser Hamdi, as the Supreme Court considered his case and as the executive branch attempted to resolve his situation after the ruling, illustrates the problems that may be inherent in reducing citizenship to a waivable right, bereft of the concept of allegiance that formerly defined it and governed expatriation.

1. *Citizen Precedents*

Yaser Hamdi was born in Louisiana where his father, a Saudi citizen and chemical engineer, was stationed. He moved to Saudi Arabia with his family as a young child.⁴⁸¹ He was apprehended by the government in Afghanistan, allegedly fighting for the Taliban, and sent to Guantanamo until the Administration transferred him to South Carolina after it learned of his citizenship.⁴⁸² The Administration claimed the authority to detain Hamdi outside of the civilian criminal justice system as an enemy combatant, and a divided Supreme Court ultimately upheld his detention.⁴⁸³ The Court also required some level of due process, mandating that Hamdi receive “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision-maker.”⁴⁸⁴ Justice Souter, joined by Justice Ginsburg, dissented, arguing that, under governing law, congressional intent to authorize the detention of a citizen under the laws of war must be explicit.⁴⁸⁵ And Justice Scalia penned a forceful dissent based almost entirely on citizenship, arguing that Hamdi’s citizenship left only two options for detaining him: the civilian criminal justice system or a suspension of habeas corpus.⁴⁸⁶

⁴⁷⁸ Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 10 n.41 (2006) (“Hamdi’s situation is identical to that of John Walker Lindh, except that Lindh was indicted and plead guilty to crimes.”); see also Frank W. Dunham, *Where Hamdi Meets Moussaoui in the War on Terror*, 53 DRAKE L. REV. 839, 844 (2005) (suggesting that Hamdi was not prosecuted, despite identical circumstances to Lindh’s, because “he did not look like he was born in the United States. He looked like he was Saudi Arabian, he spoke Arabic; he was not, on the surface of it, an American citizen.”); Ediberto Román, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557, 559 (2006) (“While the cases of these individuals may be more complex than the above suggests, the disparate treatment of three similarly-situated individuals allows critics of the judicial system to raise questions concerning the motivations behind and basis for the disparate treatment.”).

⁴⁷⁹ See Stumpf, *supra* note 477, at 111–12.

⁴⁸⁰ See *supra* note 445.

⁴⁸¹ See Joel Brinkley, *A Father Waits as the U.S. and the Saudis Discuss His Son’s Release*, N.Y. TIMES, Oct. 10, 2004, at A15; Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004) (plurality opinion).

⁴⁸² Hamdi, 542 U.S. at 510 (plurality opinion).

⁴⁸³ *Id.* at 510–11, 516–24.

⁴⁸⁴ *Id.* at 533.

⁴⁸⁵ *Id.* at 539–41 (Souter, J., concurring in judgment).

⁴⁸⁶ *Id.* at 554 (Scalia, J., dissenting).

The principal case on which Justice O'Connor's plurality opinion in *Hamdi* relies is *Ex parte Quirin*.⁴⁸⁷ Her opinion rebuts Justice Scalia's formal distinction of the citizen by pointing to *Quirin*'s holding that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war."⁴⁸⁸ *Quirin*, of course, is the (in)famous case of the would-be German "saboteurs" who entered the United States surreptitiously with some notion of sabotage and then promptly surrendered.⁴⁸⁹ The Court agreed to hear their habeas case under its original jurisdiction on July 27, received briefing from the parties on July 29, heard oral argument that day and the next, July 30, and issued a short per curiam decision upholding the constitutionality of the trial of the saboteurs by military commission on July 31.⁴⁹⁰

One of these saboteurs, Haupt, contended he was a U.S. citizen and thus entitled to the procedural rights guaranteed to him by the Constitution, including that of a trial by jury.⁴⁹¹ His parents had traveled to the United States when he was a child and naturalized, making him a naturalized citizen as a child.⁴⁹² Under the governing law at the time *Quirin* was decided, however, Haupt was almost certainly not a citizen.⁴⁹³ The United States argued that Haupt had lost his U.S. citizenship because, upon reaching majority, Haupt had "elected to maintain German allegiance" and had "by his conduct [i.e. by joining the hostile German armed forces and presumably swearing an oath to Germany] voluntarily renounced or abandoned his United States citizenship."⁴⁹⁴ The Court brushed the argument aside in a single paragraph, holding that citizenship would not matter given that Haupt was

⁴⁸⁷ See generally *id.* (plurality opinion) (relying on *Ex parte Quirin*, 317 U.S. 1 (1942)).

⁴⁸⁸ *Id.* at 519 (quoting *Ex parte Quirin*, 317 U.S. at 37).

⁴⁸⁹ Andrew Kent, *Judicial Review for Enemy Fighters: The Court's Fateful Turn in Ex Parte Quirin, the Nazi Saboteur Case*, 66 VAND. U. L. REV. 153, 160–65 (2013) (providing the background of the case).

⁴⁹⁰ *Id.* at 164–65. The Court noted in its per curiam opinion that "a full opinion" would issue at a later date. *Ex parte Quirin*, 317 U.S. at 1. Six of the saboteurs were found guilty by the military commission three days later and then executed shortly thereafter. MICHAEL DOBBS, *SABOTEURS: THE NAZI RAID ON AMERICA* 263 (2004). The Court's opinion explaining its rationale did not issue until over two months later on October 29, 1942. 317 U.S. at 1.

⁴⁹¹ Kent, *supra* note 489, at 213.

⁴⁹² *Ex parte Quirin*, 317 U.S. at 20.

⁴⁹³ See 8 U.S.C. § 801 (1940); Burt Neuborne, *Spheres of Justice: Who Decides?*, 74 GEO. WASH. L. REV. 1090, 1109 n.23 (2006).

⁴⁹⁴ *Ex parte Quirin*, 317 U.S. at 20. That argument echoed the doctrines of confirmatory and supplemental acts that the State Department had formerly used to determine whether someone had truly transferred their allegiance to another sovereign. See *supra* text accompanying notes 187–221.

clearly an enemy belligerent.⁴⁹⁵ That choice allowed the *Hamdi* plurality to reject Justice Scalia's attempt to draw a bright-line rule at citizenship.⁴⁹⁶

The Court's decision in *Hamdi* has had significant consequences for the due process rights of American citizens in the national security context. The Department of Justice's Office of Legal Counsel concluded, largely relying on *Hamdi*, that the extraterritorial targeting of Anwar Al-Awlaki comported with due process, despite the lack of any notice or judicial review.⁴⁹⁷ Further, although the Obama Administration made it a policy not to detain any U.S. citizens as enemy combatants outside of the U.S. criminal justice system, *Hamdi* leaves that possibility open for future administrations. As a candidate, President Trump indicated a desire to make that possibility a reality,⁴⁹⁸ and the Trump Administration has recently detained a U.S. citizen as an enemy combatant in Iraq after the citizen surrendered to U.S.-aligned forces in Syria.⁴⁹⁹ The *Hamdi* decision, and the lower courts' implementation of it, allow for reduced due process protections, such as reliance on hearsay and a

⁴⁹⁵ *Id.* at 37–38. Under the principle of election, had it remained in existence in 2001, Hamdi may not have been a citizen either. The doctrine, which the Court implicitly accepted in *Perkins*, held that native-born citizens who moved abroad during their minority and gained another citizenship through their parents, had to make a choice of allegiances upon reaching majority. Hamdi was twenty years old when he traveled to Afghanistan on a Saudi passport and had never indicated an intent to return to the United States. Under the law existing at the time of *Perkins*, assuming the age of majority was 18, Hamdi's decision to continue his allegiance to Saudi Arabia may have been regarded as presumptively renouncing his U.S. citizenship, a presumption that could have been overcome had he demonstrated an intent to return to the United States to live permanently in the future. *See Perkins v. Elg*, 307 U.S. 325, 333–34 (1939).

⁴⁹⁶ *See Stumpf*, *supra* note 477, at 109 (“By aggregating citizens and non-citizens within the single category of enemy belligerents, *Quirin* allowed norms created for non-citizens and pseudo-citizens to apply to U.S. citizens.”).

⁴⁹⁷ *See Memorandum for the Att’y Gen. from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel (July 16, 2010)*, <https://www.justice.gov/olc/olc-foia-electronic-reading-room> [<https://perma.cc/63P6-2ML3>]. The same phenomenon of providing reduced rights to citizens who seem to be so only by accident may be at work in the OLC opinion as well. Like Hamdi, Al-Awlaki was born in the United States but taken back to his parents' native country, Yemen, during his childhood. Unlike Hamdi, Al-Awlaki returned to the United States after reaching majority and made the United States his home. Al-Awlaki thus would have a stronger claim than Hamdi to citizenship under expatriation as understood under the 1907 Act because of his election to return, but his later extended residence in Yemen would have raised a presumption of expatriation, one that could have been overcome by a return to the United States but would have prevented him from receiving the protection of the United States while he lived abroad. *See supra* text accompanying notes 194–200.

⁴⁹⁸ *See, e.g., Charlie Savage, Trump Backs Guantanamo for Trials of Americans*, N.Y. TIMES, Aug. 13, 2016, at A11.

⁴⁹⁹ *See Doe v. Mattis*, No. 17–cv–2069 (TSC), 2018 WL 534324, at *1 (D.D.C. Jan. 23, 2018); *ACLU v. Mattis*, No. 17–cv–2069 (TSC), 2017 WL 6558503, at *1 (D.D.C. Dec. 23, 2017); *see also* Spencer S. Hsu, *U.S. Judge Balks at Nearly Three-Month Detention of Unnamed American ISIS Suspect*, WASH. POST (Dec. 11, 2017), https://www.washingtonpost.com/local/public-safety/us-judge-to-question-nearly-3-month-detention-of-unnamed-american-isis-suspect/2017/12/10/c6fd50e6-dc4d-11e7-b859-fb0995360725_story.html [<https://perma.cc/QA4W-BVJD>].

presumption in favor of the Government's evidence,⁵⁰⁰ which set a precedent about the scope and nature of every citizen's due process rights. There is no separate Due Process Clause for citizens who are accused of being terrorists or citizens who are facing other coercive government actions.⁵⁰¹ The *Hamdi* precedent applies equally to all citizens (and non-citizens where applicable) in that regard, even if one can attempt to distinguish it based on its national-security context.⁵⁰² And the primary basis for its refusal to distinguish between citizens and non-citizens was a case about an individual who may very well not have been a citizen because he had voluntarily transferred his allegiance to another country before embarking on his mission of sabotage.

If the Court had analyzed Haupt's actions in light of the doctrine of expatriation restored, it may very well have concluded that Haupt was not a citizen, as he was most certainly not under the governing state-as-subject expatriation regime at the time. Instead, the Court set down a precedent in *Quirin*, which *Hamdi* picked up and furthered, setting another precedent, which was extended in the OLC opinion and is now the basis for the detention of another U.S. citizen as an enemy combatant.⁵⁰³ Had expatriation restored been the basis of the *Quirin* decision, that precedent would not have been available in *Hamdi*. And a majority of the Justices in *Hamdi* would almost certainly have found the detention unconstitutional.

If *Quirin* had been a decision about Haupt's allegiance and expatriation restored, it would likely have its own perils given the pressure on the Court to defer to the Executive. But the reinsertion at the forefront of the debate of the concept of *allegiance* as an express consideration, rather than an unconscious consideration, may also have prevented the degradation of citizens' rights. Express consideration of allegiance in both *Quirin* and *Hamdi* may even have elevated the importance of citizenship enough to sway a few Justices toward Justice Scalia's bright-line view. Based on *Quirin*, the plurality rejected the idea that Hamdi should have more rights based on his "accident" of birth.⁵⁰⁴ A more robust conception of citizenship that included alle-

⁵⁰⁰ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533–34 (2004) (plurality opinion); see also *Al-Bihani v. Obama*, 590 F.3d 866, 868–69 (D.C. Cir. 2010) (rejecting due process challenge to the use of hearsay and a preponderance of evidence standard).

⁵⁰¹ See *Hamdi*, 542 U.S. at 528–34 (grounding the due process analysis in the generally applicable test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), a case involving social security benefits).

⁵⁰² See, e.g., *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1370 (Fed. Cir. 2004) (relying on *Hamdi* in a due process analysis over the destruction of property in an Afghanistan airstrike); *Hicks v. Colvin*, 214 F. Supp. 3d 627, 636 (E.D. Ky. 2016) (rejecting the Social Security Administration's argument that *Hamdi* is "fundamentally different" and relying on it as part of its due process analysis); see also *Mohamed v. Holder*, No. 1:11-cv-50 (AJT/MSN), 2015 WL 4394958, at *5 (E.D. Va. Jul. 16, 2015) (applying *Hamdi* in the context of a citizen's challenge to his placement on the No Fly List).

⁵⁰³ See *Doe v. Mattis*, No. 17-cv-2069 (TSC), 2018 WL 534324, at *1 (D.D.C. Jan. 23, 2018); *ACLU v. Mattis*, No. 17-cv-2069 (TSC), 2017 WL 6558503, at *1 (D.D.C. Dec. 23, 2017).

⁵⁰⁴ *Hamdi*, 542 U.S. at 519, 522–24 (plurality opinion).

giance would prevent such a dismissal of citizenship in favor of protecting citizens' rights or limit the applicability of the holding so that citizens' rights were not diminished.

2. *The Right to Citizenship and "Voluntary" Expatriation*

The aftermath of the Supreme Court's decision in *Hamdi* also demonstrates the danger of considering citizenship a "right" as opposed to a status created by an individual's allegiance. Several months after the Court's decision, the Administration announced that Hamdi would be released to Saudi Arabia pursuant to an agreement.⁵⁰⁵ As one condition of this release, Hamdi agreed "to appear before a diplomatic or consular officer of the United States . . . to renounce any claim that he may have to United States nationality pursuant to Section 349(a)(5)" of the Immigration and Nationality Act.⁵⁰⁶ If he failed to fulfill this condition, or any other condition of the agreement, Hamdi could "be detained immediately insofar as consistent with the law of armed conflict."⁵⁰⁷ News reports indicate the Trump Administration has considered a similar resolution with respect to the U.S. citizen currently detained as an enemy combatant in Iraq: transferring him to Saudi Arabia but forcing him to renounce his citizenship as a condition of release.⁵⁰⁸

The fundamental necessity for expatriation from its inception has been voluntary action.⁵⁰⁹ In *Nishikawa*, even Justice Frankfurter, the author of the *Perez* majority, stressed in his concurring opinion the necessity that expatriation be voluntary, and he reasoned that a presumption of involuntariness was appropriate "[w]here an individual engages in conduct by command of a penal statute of another country to whose laws he is subject," especially when "a consequence as drastic as denationalization may be the effect of such conduct."⁵¹⁰ In the infamous case arising from the coerced renunciation of citizenship by Japanese Americans interned at the Tule Lake Camp, a court concluded that

the Government was fully aware of the coercion by pro-Japanese organizations and the fear, anxiety, hopelessness and despair of the renunciants . . . the existence of which . . . was adequate to pro-

⁵⁰⁵ Press Release, Mark Corallo, Dir. of Pub. Affairs, U.S. Dep't of Justice, Regarding Yaser Hamdi (Sept. 22, 2004), https://www.justice.gov/archive/opa/pr/2004/September/04_opa_640.htm [<https://perma.cc/2PDR-RPR8>].

⁵⁰⁶ Hamdi Release Agreement ¶ 8, http://news.findlaw.com/hdocs/docs/hamdi/91704stlagr_mnt3.html [<https://perma.cc/89S3-8W7L>].

⁵⁰⁷ *Id.* at ¶ 12.

⁵⁰⁸ *ACLU v. Mattis*, No. 17-cv-2069 (TSC), 2017 WL 6558503, at *2 (Dec. 23, 2017).

⁵⁰⁹ See *Perkins v. Elg*, 307 U.S. 325, 334 (1939) (noting that "voluntary action . . . is of the essence of the right of expatriation").

⁵¹⁰ *Nishikawa v. Dulles*, 356 U.S. 129, 141-42 (1958) (Frankfurter, J., concurring).

duce, at least, a confused state of mind on the part of the renunciants and in which considered decision became impossible.⁵¹¹

If expatriation is conceived of as the waiver of the right to citizenship, however, rather than a right itself, the analysis changes. Under the doctrines governing the waiver of “rights,” however, U.S. citizens may *voluntarily* enter into plea agreements with the government that waive their fundamental constitutional rights in exchange for reduced sentence terms or other considerations.⁵¹²

The executive branch has explicitly relied on an analogy between this doctrine and expatriation in exchange for an agreement not to pursue denaturalization to argue that such expatriation remains voluntary. Two former Nazi officials were facing denaturalization for having lied about their service to the Nazi regime upon seeking naturalization, but the United States agreed not to pursue denaturalization, which would potentially have the effect of removing Social Security benefits, if the two individuals left the country and renounced their U.S. citizenship.⁵¹³ OLC concluded that such renunciation was voluntary because, as in a plea agreement, “the individual[s] g[a]ve[] up valuable constitutional rights—the *right to citizenship*, in the case of [former Nazi officials], and the rights to trial by jury and to confront witnesses and the protection against self-incrimination in the case of criminal defendants—in exchange for less severe treatment by government prosecutors.”⁵¹⁴ The OLC opinion noted that there were “procedural differences” between the two practices, but reasoned that similarity of the “substantive issues involved—*i.e.* whether a *waiver of constitutional rights* as part of a bargain with government prosecutors can be considered voluntary” made the plea bargain analogy “highly relevant.”⁵¹⁵

The analogy of the OLC opinion is difficult to fault under the *Afroyim-Terrazas* conception of expatriation. Applying that framework, Hamdi did have the specific intent to renounce his citizenship, as evidenced by the fact that, advised by counsel, he expressly agreed to expatriate himself, and the plea bargain analogy makes it difficult to argue that his renunciation was not voluntary. And Hamdi could, under the threat of continued indefinite detention, be forced to “expatriate” himself, even though Nishikawa had not acted voluntarily to expatriate himself while serving in the Japanese army under threat of penal sanction, because Hamdi received a

⁵¹¹ *Abo v. Clark*, 77 F. Supp. 806 (N.D. Cal. 1948), *aff’d, rev’d, and amended in part*, 186 F.2d 766 (9th Cir. 1951).

⁵¹² *Brady v. United States*, 397 U.S. 742, 749 (1970).

⁵¹³ *Voluntariness of Renunciations of Citizenship Under 8 U.S.C. § 1481(a)(6)*, 8 Op. O.L.C. 220, 222–24 (1984).

⁵¹⁴ *Id.* at 231.

⁵¹⁵ *Id.*

“benefit” from the United States, i.e. an agreement not to detain him indefinitely as an enemy combatant.⁵¹⁶

One could certainly question the correctness of the plea bargain doctrine or question the aptness of the analogy. But setting those two potential objections aside, the concept of expatriation restored also shows the fundamental problem with the Hamdi agreement. Under expatriation restored, citizenship is not a right to be waived but the consequence of allegiance. Because allegiance has no role, the “voluntariness” of expatriation is reduced to the individual’s intent with respect to her citizenship. The question should not be whether Hamdi intended to relinquish his citizenship and did so voluntarily in order to receive a benefit; the question should be whether Hamdi made a conscious decision to renounce or transfer his allegiance or whether he, like Nishikawa, engaged in particular actions because the government threatened severe consequences if he did not, and never voluntarily decided to transfer his allegiance away from the United States. The precedent is troubling in that it would allow the government to use its ample powers of coercion to induce “voluntary” transfers of allegiance whenever doing so would be convenient.

* * *

Expatriation restored, a concept grounded in allegiance, provides a functional, as opposed to a merely formal, foundation for the rights of citizens, even citizens who may not fit the dominant sociocultural construct of a citizen. As one scholar has remarked, “[r]elying too heavily on a formal distinction between citizens and non-citizens will fail to anticipate the effect on citizens of rules now being crafted for non-citizens.”⁵¹⁷ Under the *Afroyim–Terrazas* framework, however, the formal distinction is the only one available where expatriation is concerned. And that distinction, though highly protective of citizenship, may fail to anticipate the effect on citizens’ rights of rules crafted in a regime in which allegiance bears no weight. Citizenship, under the *Afroyim–Terrazas* conception of expatriation, means an individual became a citizen either by birth or naturalization and wants to remain a citizen, nothing more. Under the concept of expatriation restored,

⁵¹⁶ Voluntariness remains an essential element of expatriation even under the *Afroyim–Terrazas* framework as demonstrated by the case of the 400 U.S. citizens of an obscure religious cult called the Original African Hebrew Israelite Nation of Jerusalem who renounced their U.S. citizenship in Israel at the command of the cult leadership. See Alan G. James, *Cult-Induced Renunciation of United States Citizenship: The Involuntary Expatriation of Black Hebrews*, 28 SAN DIEGO L. REV. 645 (1991). Eventually, almost all of the renunciants had their citizenship restored after pursuing appeals within the State Department to the Board of Appellate Review and seeking reconsideration. *Id.* at 661–70. The Board of Appellate Review, in reversing an earlier decision in one of these cases, found that renunciation had not been voluntary because it was “unable to conclude that appellant’s formal renunciation was wholly without taint of coercion.” *Id.* at 667. In stark contrast to the OLC opinion, the Board concluded that “[i]n our opinion, a renunciation procured by pressure, even pressure exerted on a presumptively strong, resourceful person, cannot stand as a matter of law.” *Id.*

⁵¹⁷ Stumpf, *supra* note 477, at 139.

however, citizenship entails something more fundamental: allegiance. Developing a concept of allegiance in the current, global society and defining, and providing notice of, objective indicia of its renunciation or transfer, could return expatriation restored and allegiance to the conversation. And that might ultimately provide a rationale that would prevent the discounting of citizenship as largely immaterial to the scope of constitutional rights.

V. CONCLUSION

Given the terrorism-related rebirth in legislative, scholarly, and popular attention to the authority of the government and the rights of a citizen with respect to citizenship, this Article seeks to reorient the dialogue by restoring the concept of expatriation. The keywords of this conversation include “loss of citizenship,” “denationalization,” “revoking” citizenship, and, invariably, “expatriation,” sometimes called “statutory expatriation” or “involuntary expatriation” to make clear that the term is using the state, not the individual, as its subject. But there should be no need for such clarification.

Expatriation restored is nothing more than an individual’s right to renounce her allegiance to her country and nothing less. As this Article explains, that individual right dates all the way back to, and in many ways originates in, the founding of our country, appearing in the writings of Thomas Jefferson, among others, and playing a role in leading the young United States back into war in 1812. Although the existence of the right was debated vigorously during the first century of the United States, that debate was settled in the Expatriation Act of 1868. This Article seeks to undo the distortion of the term expatriation that has occurred since and to restore expatriation as the individual right to transfer one’s allegiance.

This restoration is vital because the concept of expatriation today, as a result of the historical precession of the subject of “expatriate,” still includes the potential for state action. And it has lost all connection to allegiance, supplanting it with specific intent. As a result, section 349, and the proposed amendments to it, allow the state to act as subject when it can prove intent by circumstantial evidence. Expatriation restored does not permit that. Expatriation restored is limited to specific actions, the continuing validity of which remains to be explored. Without the historical concept of expatriation restored, courts are no longer able to point to allegiance as a defining characteristic of citizenship, one that differentiates and validates the rights of citizens. Instead, citizenship has become both an accidental formality that typically bears little weight in the context of individual rights and a right as waivable as any other fundamental right. Restoring expatriation would restore citizenship: the individual would be the only permissible subject of “expatriate” and allegiance would be determinative, not derivative.

