"The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship."

AFROYIM v. RUSK

387 U.S. 253, 87 S.Ct. 1660, 18 L.Ed.2d 757 (1967).

Sec. 401(e) of the Nationality Act of 1940 provided for loss of citizenship for any American who voted "in a political election in a foreign state." On the same day in 1958 that it decided Trop v. Dulles, the Court sustained, 54, in Perez v. Brownell the constitutionality of § 401(e). Several years later, when Beys Afroyim, a naturalized American citizen who had been living in Israel for a decade, applied for renewal of his passport, the State Department refused on grounds that he had voted in Israeli elections. Afroyim sued in a federal district court, but lost there as well as in the court of appeals. He then obtained certiorari.

Mr. Justice **BLACK** delivered the opinion of the Court....

Petitioner, relying on the same contentions about voluntary renunciation of citizenship which this Court rejected in upholding § 401(e) in *Perez*, urges us to reconsider that case, adopt the view of the minority there, and overrule it. That case, decided by a 54 vote almost 10 years ago, has been a source of controversy and confusion ever since.... Moreover, in the other cases decided with and since *Perez*, this Court has consistently invalidated on a case-by-case basis various other statutory sections providing for involuntary expatriation. It has done so on various grounds and has refused to hold that citizens can be expatriated without their voluntary renunciation of citizenship. These cases, as well as many commentators, have cast great doubt upon the soundness of *Perez*. Under these circumstances, we granted certiorari to reconsider it....

The fundamental issue before this Court ... is whether Congress can consistently with the Fourteenth Amendment enact a law stripping an American of his citizenship which he has never voluntarily renounced or given up. The majority in *Perez* held that Congress could do this.... That conclusion was reached by this chain of reasoning: Congress has an implied power to deal with foreign affairs as an indispensable attribute of sovereignty; this implied power, plus the Necessary and Proper Clause, empowers Congress to regulate voting by American citizens in foreign elections; involuntary expatriation is within the "ample scope" of "appropriate modes" Congress can adopt to effectuate its general regulatory power[;] "there is nothing in the ... Fourteenth Amendment to warrant drawing from it a restriction upon the power otherwise possessed by Congress to withdraw citizenship" ....

First we reject the idea expressed in *Perez* that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent. This power cannot ... be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from theirs. In our country the people are sovereign and the

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

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

The dissenting opinion here points to the fact that a Civil War Congress passed two Acts designed to deprive military deserters to the Southern side of the rights of citizenship. Measures of this kind passed in those days of emotional stress and hostility are by no means the most reliable criteria for determining what the Constitution means. [Footnote by the Court.]

It is true that the chief interest of the people in giving permanence and security to citizenship in the Fourteenth Amendment was the desire to protect Negroes. The Dred Scott [v. Sanford] decision [1857] had shortly before greatly disturbed many people about the status of Negro citizenship. But the Civil Rights Act of 1866 had already attempted to confer citizenship on all persons born or naturalized in the United States. Nevertheless, when the Fourteenth Amendment passed the House without containing any definition of citizenship, the sponsors of the Amendment in the Senate insisted on inserting a constitutional definition and grant of citizenship. They expressed fears that the citizenship so recently conferred on Negroes by the Civil Rights Act could be just as easily taken away from them by subsequent Congresses.... Senator Howard, who sponsored the Amendment in the Senate, thus explained the purpose of the clause:

> It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States.... We desired to put this question of citizenship and the rights of citizens ... under the civil rights bill beyond the legislative power....

This undeniable purpose of the Fourteenth Amendment to make citizenship of Negroes permanent and secure would be frustrated by holding that the Government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power

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

The entire legislative history of the 1868 Act makes it abundantly clear that there was a strong feeling in the Congress that the only way the citizenship it conferred could be lost was by the voluntary renunciation or abandonment by the citizen himself. And this was the unequivocal statement of the Court in the case of United States v. Wong Kim Ark [1898].... The Court ... held that Congress could not do anything to abridge or affect [Ark's] citizenship conferred by the Fourteenth Amendment. Quoting Chief Justice Marshall's well-considered and oft-repeated dictum in Osborn [v. Bank of the U.S. (1824)] to the effect that Congress under the power of naturalization has "a power to confer citizenship, not a power to take it away," the Court said:

> Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, a fortiori no act ... of Congress ... can affect citizenship acquired as a birthright, by virtue of the Constitution itself....
>
> ... [T]he Government is without power to rob a citizen of his citizenship under § 401(e).

Of course ... naturalization unlawfully procured can be set aside. See, e.g., Knauer v. United States [1946]; Baumgartner v. United States [1941]; Schneiderman v. United States [1943]. [Footnote by the Court.]

Because the legislative history of the Fourteenth Amendment and of the expatriation proposals which preceded and followed it, like most other legislative history, contains many statements from which conflicting inferences can be drawn, our holding might be unwarranted if it rested entirely or principally upon that legislative history. But it does not. Our holding we think is the only one that can stand in view of the language and the purpose of the Fourteenth Amendment, and our construction of that Amendment, we believe, comports more nearly than with the principles of liberty and equal justice to all that the entire Fourteenth Amendment was adopted to guarantee. Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world– as a man without a country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that

citizenship.

Perez is overruled. The judgment is

Reversed.

Mr. Justice **HARLAN,** whom Mr. Justice **CLARK,** Mr. Justice **STEWART,** and Mr. Justice **WHITE** join, dissenting....

I ...

The pertinent evidence for the period prior to the adoption of the Fourteenth Amendment can ... be summarized as follows. The Court's conclusion today is supported only by the statements, associated at least in part with a now abandoned view of citizenship, of three individual Congressmen, and by the ambiguous and inapposite dictum from *Osborn*. Inconsistent with the Court's position are statements from individual Congressmen in 1794, and Congress' passage in 1864 and 1865 of legislation which expressly authorized the expatriation of unwilling citizens. It may be that legislation adopted in the heat of war should be discounted in part by its origins, but, even if this is done, it is surely plain that the Court's conclusion is entirely unwarranted by the available historical evidence for the period prior to the passage of the Fourteenth Amendment. The evidence suggests, to the contrary, that Congress in 1865 understood that it had authority, at least in some circumstances, to deprive a citizen of his nationality.

II

The evidence with which the Court supports its thesis that the Citizenship Clause of the Fourteenth Amendment was intended to lay at rest any doubts of Congress' inability to expatriate without the citizen's consent is no more persuasive....

The Amendment as initially approved by the House contained nothing which described or defined citizenship. The issue did not as such even arise in the House debates....

In the Senate, however, it was evidently feared that unless citizenship were defined, or some more general classification substituted, freedmen might, on the premise that they were not citizens, be excluded from the Amendment's protection. Senator Stewart thus offered an amendment which would have inserted into § 1 a definition of citizenship, and Senator Wade urged as an alternative the elimination of the term "citizen" from the Amendment's first section. After a caucus of the chief supporters of the Amendment, Senator Howard announced on their behalf that they favored the addition of the present Citizenship Clause.

The debate upon the clause was essentially cursory in both Houses, but there are several clear indications of its intended effect. Its sponsors evidently shared the fears of Senators Stewart and Wade that unless citizenship were defined, freedmen might, under the reasoning of the *Dred Scott* decision, be excluded by the courts from the scope of the Amendment.... It was suggested, moreover, that it would, by creating a basis for federal citizenship which was

indisputably independent of state citizenship, preclude any effort by state legislatures to circumvent the Amendment by denying freedmen state citizenship. Nothing in the debates, however, supports the Court's assertion that the clause was intended to deny Congress its authority to expatriate unwilling citizens....

The narrow, essentially definitional purpose of the Citizenship Clause is reflected in the clear declarations in the debates that the clause would not revise the prevailing incidents of citizenship. Senator Henderson of Missouri thus stated specifically his understanding that the "section will leave citizenship where it now is." Senator Howard, in the first of the statements relied upon, in part, by the Court, said quite unreservedly that "This amendment [the Citizenship Clause] which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is ... a citizen of the United States." Henderson had been present at the Senate's consideration both of the Wade-Davis bill and of the Enrollment Act [the two bills passed by Congress in 1864 and 1865 that would have removed American citizenship from certain Confederates and deserters from the Union Army], and had voted at least for the Wade-Davis bill. Howard was a member of the Senate when both bills were passed, and had actively participated in the debates upon the Enrollment Act.... Howard certainly never expressed to the Senate any doubt either of their wisdom or of their constitutionality. It would be extraordinary if these prominent supporters of the Citizenship Clause could have imagined ... that it would entirely withdraw a power twice recently exercised by Congress in their presence.

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

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

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

Additional confirmation of the expectations of the clause's draftsmen may be found in the legislative history, wholly overlooked by the Court, of the Act for the Relief of certain Soldiers and Sailors, adopted in 1867. The Act, debated by Congress within 12 months of its passage of the Fourteenth Amendment, provided an exception from the provisions of § 21 of the Enrollment Act of 1865 for those who had deserted from the Union forces after the termination of general hostilities. Had the Citizenship Clause been understood to have the effect now given it by the Court, surely this would have been clearly reflected in the debates.... Nothing of the sort occurred....

There is, moreover, still further evidence.... While the debate on the Act of 1868 was still in progress, negotiations were completed on the first of a series of bilateral expatriation treaties,

which "initiated this country's policy of automatic divestment of citizenship for specified conduct affecting our foreign relations." ... Seven such treaties were negotiated in 1868 and 1869 alone; each was ratified by the Senate. If, as the Court now suggests, it was "abundantly clear" to Congress in 1868 that the Citizenship Clause had taken from its hands the power of expatriation, it is quite difficult to understand why these conventions were negotiated, or why, once negotiated, they were not immediately repudiated by the Senate.

Further, the executive authorities of the United States repeatedly acted, in the 40 years following 1868, upon the premise that a citizen might automatically be deemed to have expatriated himself by conduct short of a voluntary renunciation of citizenship; individual citizens were, as the Court indicated in *Perez*, regularly held on this basis to have lost their citizenship. Interested Members of Congress, and others, could scarcely have been unaware of the practice....

It seems to me apparent that the historical evidence ... irresistibly suggests that the draftsmen of the Fourteenth Amendment did not intend, and could not have expected, that the Citizenship Clause would deprive Congress of authority which it had, to their knowledge, only recently twice exercised. The construction demanded by the pertinent historical evidence, and entirely consistent with the clause's terms and purposes, is instead that it declares to whom citizenship, as a consequence either of birth or of naturalization, initially attaches. The clause thus served at the time of its passage both to overturn *Dred Scott* and to provide a foundation for federal citizenship entirely independent of state citizenship.... But nothing in the history, purposes, or language of the clause suggests that it forbids Congress in all circumstances to withdraw the citizenship of an unwilling citizen. To the contrary, it was expected, and should now be understood, to leave Congress at liberty to expatriate a citizen if the expatriation is an appropriate exercise of a power otherwise given to Congress by the Constitution, and if the methods and terms of expatriation adopted by Congress are consistent with the Constitution's other relevant commands.

... Once obtained, citizenship is of course protected from arbitrary withdrawal by the constraints placed around Congress' powers by the Constitution.... [But the] construction now placed on the Citizenship Clause rests, in the last analysis, simply on the Court's ipse dixit, evincing little more, it is quite apparent, than the present majority's own distaste for the expatriation power....

Editors' Notes

(1) **Queries:** What is the scope of "the Constitution" as Black sees it here? Only the document? What *modes* and *techniques* of constitutional interpretation did Black use to justify his decision? How effectively did he use any of them? To what extent did he rely on his usual appeal to the "plain words" of the Constitution? Does "intent of the framers of the Fourteenth Amendment" help his argument? The "purpose" of that amendment? Long and unbroken tradition? To what extent was Black's opinion based on "structural analysis," either in the narrow sense of the Constitution as document or in the broader sense of the evolving political system? To what degree and in what ways did Black's jurisprudence as stated here differ from

Warren's in Trop v. Dulles (1958; reprinted above, p. 144)? From his own in Griswold v. Connecticut (1965; reprinted above, p. 113)? Is there a firmer textual basis for a right to citizenship than for a right to privacy?

(2) **Queries:** What *mode(s)* and/or *techniques* of interpretation does Harlan use? How convincing is his opinion when pitted against Black's? Against Warren's in *Trop?* Granting, for the sake of argument, that Harlan was correct about the specific historical "intent of the framers" of the Fourteenth Amendment, given what have since become the ruthless uses of revocation of citizenship (see the discussion of Nazi policies in the Eds.' Notes to Trop v. Dulles, above at p. 144) and the consequences of statelessness in our world, how authoritative a source for constitutional interpretation is that "original intent"?

(3) Fedorenko v. United States (1981) reaffirmed federal authority to revoke the citizenship of a naturalized alien who had fraudulently obtained naturalization. (See fn. 2 to Black's opinion in *Afroyim*. Fedorenko had given false answers to important questions when initially applying for a visa to enter the United States. During World War II, he had been a Russian soldier; but he concealed from immigration officials the fact that, after being captured by the Germans, he had become a guard at Treblinka, a death camp in which the Nazis murdered several hundred thousand Jews. For the majority, Justice Marshall tersely disposed of the constitutional issue:

> On the one hand, our decisions have recognized that the right to acquire American citizenship is a precious one, and that once citizenship has been acquired, its loss can have severe and unsettling consequences.... For these reasons, we have held that the Government "carries a heavy burden of proof in proceeding to divest a naturalized citizen of his citizenship." ...
>
> At the same time, our cases have also recognized that there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship. Failure to comply with any of these conditions renders the certificate of citizenship "illegally procured," and naturalization that is unlawfully procured can be set aside.

The sole reference to *Afroyim* in the majority opinion was to fn. 2, "naturalization unlawfully procured can be set aside." White and Stevens dissented on statutory grounds.

(4) See also the discussion of the Court's denial of certiorari in Longstaff v. INS (1984), in fn. 3 to the Introductory Essay to Chapter 14, above at p. 830, and below in the Eds.' Notes (5) and (6) to Doe v. Commonwealth's Attorney (1976), at p. 1161. INS began deportation proceedings against Longstaff because when he was admitted to the United States nineteen years earlier he had not admitted he was homosexual. His background became public knowledge when he applied for citizenship.