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The Erosion of Citizenship: Rogers v. Bellei

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THE EROSION OF CITIZENSHIP:

ROGERS v. BELLEI[1]

Citizenship is a venerable concept, dating back to the nascent stages of sovereign entities.[2] To most of us it is a cherished right. As such, government attempts to abrogate it have been subjected to rigid judicial scrutiny and, in recent years, various congressional attempts to unilaterally revoke citizenship have been ruled unconstitutional.[3] In *Rogers v. Bellei*,[4] however, the United States Supreme Court, by a five to four vote, ruled that an individual who received an automatic congressional grant of citizenship at birth, but who was born *outside* the United States, may lose his citizenship for failure to fulfill any reasonable residence requirements which Congress may impose as a condition subsequent to that citizenship.

Plaintiff Aldo Mario Bellei was born in Italy on December 22, 1939, of an Italian father and an American mother. He became a naturalized citizen of the United States at birth by virtue of section 1993 of the Revised Statutes of 1874, as amended in 1934,[5] which conferred citizenship upon any child born outside the United States of only one American parent. This type of naturalized citizenship is known as *jus sanguinis*[6] or "naturalization by descent." In order for the child to qualify for and retain such citizenship under the 1934 amendments, the American parent must have resided in the United States at some time prior to the child's birth, and the child himself must reside in the United States continuously for five years prior to his

1. 401 U.S. 815 (1971).

2. *Cf.* Gordon, *The Citizen and the State: Power of Congress to Expatriate American Citizens*, 53 GEO. L.J. 315, 316 (1965). *See also* Hurst, *Can Congress Take Away Citizenship?*, 29 ROCKY MT. L. REV. 62, 64 (1956):

> [Citizenship] is the right to be here; to stay in the United States, a country where constitutional limitations make a person free from the oppressive hand of an arbitrary and tyrannical government, that gives United States citizenship its real and abiding value. This right to belong, this right to stay, connotes a permanent membership in a state composed of free people.

3. *See, e.g.*, Afroyim v. Rusk, 387 U.S. 253 (1967); Schneider v. Rusk, 377 U.S. 163 (1964); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Trop v. Dulles, 356 U.S. 86 (1958).

4. 401 U.S. 815 (1971).

5. *Id.* at 818. Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797, *amending* Act of April 19, 1866, Rev. Stat. § 1993 (1874).

6. "By right of blood, *jure sanguinis*, a child at birth may acquire the nationality of a parent." 2 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1073 (2d rev. ed. 1945) [hereinafter cited as HYDE].

eighteenth birthday. Following plaintiff's birth, however, statutes were enacted in 1940 and 1952 liberalizing the conditions to be met for acquisition and retention of citizenship through *jus sanguinis.* These statutes were expressly made applicable to any children born abroad subsequent to 1934.[7] Bellei was therefore entitled to take advantage of their provisions. Under the terms of the most recent statute, section 301(a) of the Immigration and Nationality Act of 1952, a child born outside of the United States is declared to be a national and a citizen of the United States at birth, providing that one of his parents is an American citizen who has been physically present in the United States for at least ten years prior to the birth of such child.[8] The act further states in section 301(b) that the "301(a) citizen" shall lose his nationality and citizenship unless he spends at least five years continuously in the United States between the ages of fourteen and twenty-eight.[9] This condition subsequent, although substantial, is less burdensome than the conditions existing at the time of Bellei's birth, and therefore represents the minimum criterion which Bellei had to satisfy under the naturalization statutes.

Bellei never established a residence in the United States. However, as an American citizen, he travelled under an American passport and registered with the Selective Service System.[10] When he renewed his passport in 1961 at age 21, he was warned of the residence requirements of section 301(b). In 1963, the year by which it was necessary for him to have begun five years residence in the United States in order to comply with the section,[11] he was granted a passport

7. Nationality Act of 1940, ch. 876, § 201(h), 54 Stat. 1139; Immigration and Nationality Act of 1952, 8 U.S.C. § 1401(c) (1970).

8. 8 U.S.C. § 1401(a)(7) (1970). Bellei's mother satisfied this parental residence requirement. 401 U.S. at 817-18.

9. 8 U.S.C. § 1401(b) (1970). Pub. L. 85-316, 8 U.S.C. § 1401b (1970), enacted in September, 1957, provides that absences of less than 12 months in the aggregate "shall not be considered to break the continuity of . . . [the] physical presence" required by § 301(b).

10. 401 U.S. at 819. On December 11, 1963, Bellei was asked to report for induction. Induction was, however, deferred because of Bellei's NATO defense program employment. After February 14, 1964, Bellei was informed by the Selective Service by letter that he had no further obligation for military service because of his loss of citizenship. *Id.* at 819-20.

11. To complete a full five years residence prior to age twenty-eight, Bellei would have had to begin residence in the United States prior to attaining age twenty-three on December 22, 1962. However, since absences aggregating less than twelve months are allowed (*see* note 9 *supra*) and since Bellei claimed to have begun his five year residence during a short visit to the United States in 1962 (Bellei v. Rusk, 296 F. Supp. 1247, 1248 (D.D.C. 1969); *see* 401 U.S. at 818-19), the crucial year for residence purposes was actually 1963.

extension until February, 1964.[12] When he failed to return to the United States by that date, he was informed by the State Department that he was no longer a citizen of the United States.[13]

Bellei then brought an action against the Secretary of State to enjoin the enforcement of section 301(b),[14] contending that it violated the protection of citizenship found by the courts in the Fifth Amendment's Due Process Clause.[15] A three-judge district court agreed with Bellei's Fifth Amendment contention and granted the requested injunction.[16] On direct appeal, however, the Supreme Court reversed the lower court's decision and upheld the State Department's revocation of Bellei's citizenship.[17]

12. Bellei v. Rusk, 296 F. Supp. 1247, 1248 (D.D.C. 1969).

13. *Id.*

14. Although Bellei probably could have insisted upon the application of the requirements of the 1934 Act, he did not do so, presumably since its restrictions are even stricter than those in the 1952 Act. See text accompanying notes 6-9 *supra.*

15. 296 F. Supp. at 1249. Bellei also relied upon the Eighth and Ninth Amendments. The Ninth Amendment merely states that the rights of the people are not limited to those specifically enumerated in the Constitution. *See* Griswold v. Connecticut, 381 U.S. 479, 492 (1965). The Eighth Amendment proscribes the imposition of cruel and unusual punishments. See note 17 *infra.*

16. Bellei v. Rusk, 296 F. Supp. 1247, 1249 (D.D.C. 1969).

17. 401 U.S. at 836. The *Bellei* Court never considered whether revocation of Bellei's citizenship was a violation of the Eighth Amendment's proscription of cruel and unusual punishment. However, as established in Trop v. Dulles, 356 U.S. 86 (1958), this is another constitutional concept deemed protective of citizenship. In *Trop* the statute under consideration provided for expatriation only after a conviction by a court-martial for desertion during time of war. The plurality opinion concluded that since the statute produced statelessness it inflicted cruel and unusual punishment. *Id.* at 101. However, statelessness was not an issue in *Bellei* because the plaintiff possessed Italian as well as American citizenship. 401 U.S. at 818. Thus, the absence of the penalty which so shocked the *Trop* Court would greatly weaken Bellei's claim of cruel and unusual punishment.

Before the Eighth Amendment claim can be reached, moreover, there is the question of whether the expatriation statute can even be considered to be punitive. The determination of this issue in the past "has been extremely difficult and elusive of solution." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963). There, the Court, in finding the particular expatriation to be an additional punishment for draft evasion which could only be inflicted, if at all, after compliance with certain basic procedural safeguards, listed several factors bearing upon the issue of punitiveness:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter,* whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face. *Id.* at 168-69 (footnotes omitted).

If the statute is found to be punitive in nature, punishment cannot be imposed without

The resolution of Bellei's claim depended upon the Court's interpretation of the sources and nature of United States citizenship.[18] One may acquire United States citizenship either by birth in the United States or through the process of naturalization.[19] Citizenship by birth in the United States derives from the common law concept of *jus soli*, which declares that the place of birth governs citizenship, a concept embodied in the Fourteenth Amendment.[20] On the other hand, citizenship by naturalization derives from Congress' power under Article I of the Constitution to enact a "uniform rule of naturalization."[21] Through naturalization, an alien acquires the nationality of the naturalizing state.[22] Naturalization as heretofore used by the Court has been considered to be a unitary concept encompassing any mode of acquiring citizenship other than by *jus soli*. The rights and privileges of citizenship were not thought to depend upon the particular source or method of naturalization. However, the Court in *Bellei* treated *jus sanguinis* as a third category of citizenship, which, as will be seen,

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compliance with the procedural safeguards of the Fifth and Sixth Amendments. *Id.* at 167. Upon an evaluation and application of the above cited factors to the instant case, it seems quite clear that section 301(b) is not punitive in nature. No *scienter* is required by the section. It does not on its face tend to promote retribution or punishment; the behavior to which it applies is not already a crime; a rational alternative purpose exists (acculturation of the individual—see text accompanying notes 114-16 *infra*); and the alternative purpose could seemingly only be achieved by the residence requirements.

18. For a definition of citizenship see note 2 *supra*. While the Immigration and Nationality Act fails to define "citizen" or "citizenship," a definition of "national" is afforded therein:

> The term "national" means a person owing permanent allegiance to a state. The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. 8 U.S.C. § 1101(a)(21)-(22) (1970).

See also W. BISHOP, INTERNATIONAL LAW 394-95 (2d ed. 1962); 1 OPPENHEIM, INTERNATIONAL LAW 644-45 (8th ed. H. Lauterpacht transl. 1955) [hereinafter cited as OPPENHEIM]; HYDE, *supra* note 6, at 1066-67 (footnote omitted):

> Citizenship, as distinct from nationality, is a creature solely of domestic law. It refers to rights which a State sees fit to confer upon certain individuals who are also its nationals. When the Constitution or laws of the United States declare that persons born under specified circumstances, or changing their allegiance by certain processes, shall become citizens of the United States, citizenship may be truly regarded as a source of American nationality; for the citizen of the United States is necessarily also a national of the United States. It is to be observed, however, that the United States claims as nationals numerous persons upon whom it has not conferred the status of citizens of the United States.

19. U.S. CONST. amend. XIV, § 1; 8 U.S.C. §§ 1421-59 (1970).

20. Weedin v. Chin Bow, 274 U.S. 657, 660 (1927); United States v. Wong Kim Ark, 169 U.S. 649, 674 (1898). *See* HYDE, *supra* note 6, at 1068-73.

21. U.S. CONST. art. I, § 8. United States v. Wong Kim Ark, 169 U.S. 649, 672 (1898).

22. OPPENHEIM, *supra* note 18, at 654; *see* HYDE, *supra* note 6, at 1087.

does not confer the same rights as citizenship either by birth within the United States or by naturalization after immigration.

The Court's current involvement with questions concerning Congress' power to unilaterally revoke an individual's United States citizenship began with its 1958 decision in *Perez v. Brownell.*[23] Perez was a native-born United States citizen who, by virtue of his birth in 1909 to Mexican parents, was also a citizen of Mexico.[24] His parents removed him to Mexico around 1920.[25] He was denied admission as a United States citizen in 1947 on the grounds that he had remained outside of the United States to avoid service in the armed forces and that he had voted in an election in Mexico, both of which activities result in a loss of citizenship under the Nationality Act of 1940.[26] Finding it unnecessary to deal with the draft evasion issue, the Court held that Perez had expatriated himself by voting in a foreign political election. Justice Frankfurter, speaking for the majority, concluded that "in making voting in foreign elections (among other behavior) an act of expatriation, Congress was seeking to effectuate its power to regulate foreign affairs."[27] The Court agreed that the government's inherent foreign affairs power is applicable in the citizenship area, noting further that the Necessary and Proper Clause permits the congressional exercise of this power whenever a "rational nexus" exists between it and the object sought to be achieved by the statute in issue.[28] In the *Perez* case, then, the question was: "Is the means, withdrawal of citizenship, reasonably calculated to effect the end that is within the power of Congress to achieve, the avoidance of embarrassment in the conduct of our foreign relations . . . ?"[29] Given such an expansive test, Justice Frankfurter found little difficulty in upholding Congress' power to revoke the United States citizenship of a person who voted in a foreign election. Moreover, the Court refused to look to the intentions of the individual to determine the voluntariness of the expatriation, stating that the "essential significance [of prior case law] is . . . [a] rejection of the notion that the power of Congress to terminate citizenship depends upon the citizen's assent."[30]

23. 356 U.S. 44 (1958).
24. *Id.* at 46.
25. *Id.*
26. 8 U.S.C. § 1481(a)(5), (10) (1970).
27. 356 U.S. at 57.
28. *Id.* at 58-60; *see* U.S. CONST. art. I, § 8, cl. 18.
29. 356 U.S. at 60.
30. *Id.* at 61; *see, e.g., Ex parte* Griffin, 237 F. 445, 453 (N.D.N.Y. 1916) (United States citizen who joined the Canadian army deemed to have voluntarily expatriated

Chief Justice Warren, joined by Justices Black and Douglas in dissent, maintained that citizenship cannot be taken from lawfully naturalized and native-born citizens.[31] Fundamental to the Chief Justice's argument was the concept that the first sentence of the Fourteenth Amendment affords absolute protection of the citizenship which it defines. Citizenship, he noted, is a constitutionally created right, whereas expatriation is nowhere mentioned in the Constitution.[32] He also stressed the importance of the fact that, in the United States, the *people* are sovereign:

> Whatever may be the scope of its powers to regulate the conduct and affairs of all persons within its jurisdiction, a government *of* the people cannot take away their citizenship simply because one branch of that government can be said to have a conceivably rational basis for wanting to do so.[33]

That *Perez* was a significant victory for the government is incontrovertible, yet a slight shift in emphasis led to a contrary result in another decision handed down the very same day. In *Trop v. Dulles*,[34] Justice Brennan switched sides and joined a five justice majority that invalidated a different expatriation statute.[35] The petitioner, a United

himself): "When he [the citizen] voluntarily does acts which the law says operate as expatriation, we have the necessary assent."

31. 356 U.S. at 66.

32. *Id.* at 65-66. Justice Douglas, joined by Justice Black, wrote another dissent attacking the majority for taking a position contrary to our constitutional heritage. *Id.* at 79. Justice Douglas, as had the Chief Justice, noted that nowhere is expatriation mentioned in the Constitution. *Id.* In his opinion the decision allowed Congress to brand an ambiguous act as a "voluntary renunciation" of citizenship without a finding that the citizen had transferred his loyalty from this country to another. *Id.* at 80.

33. *Id.* at 65. Justice Douglas expressed concern for the possible effect this concept could have in other areas:

> [I]f the power to regulate foreign affairs can be used to deprive a person of his citizenship because he voted abroad, why may not it be used to deprive him of his citizenship because his views on foreign policy are unorthodox or because he disputed the position of the Secretary of State or denounced a Resolution of the Congress or the action of the Chief Executive in the field of foreign affairs? *Id.* at 81-82.

In a separate dissent Justice Whittaker, although agreeing "that Congress may expatriate a citizen for an act which it may reasonably find to be fraught with danger of embroiling our Government in an international dispute or of embarrassing it in the conduct of foreign affairs . . . ," felt that the statutes as applied to the facts of this case proscribed conduct with minimal foreign affairs consequences. *Id.* at 84-85.

34. 356 U.S. 86 (1958).

35. *Id.* at 88, invalidating 8 U.S.C. § 1481(a)(8) (1970), which provides for loss of citizenship for wartime desertion. (Despite the Court's holding, the statute remains codified.) Justices Black, Douglas, and Whittaker joined Chief Justice Warren's opinion, while separate concurring opinions were written by Justice Black and Justice Brennan. The dissenters were Justices Frankfurter, Burton, Clark, and Harlan.

States citizen by birth, was convicted of wartime desertion while serving in the United States Army in French Morocco.[36] He was denied a passport in 1952, having, under section 401(g) of the Nationality Act of 1940,[37] lost his citizenship by reason of his conviction and resulting dishonorable discharge.[38] Chief Justice Warren, this time writing for the majority, distinguished *Perez* on the grounds that:

> The purpose of taking away citizenship from a convicted deserter is simply to punish him. There is no other legitimate purpose that the statute could serve. Denationalization in this case is not even claimed to be a means of solving international problems, as was argued in *Perez*.[39]

The majority rejected the argument of the dissenting justices, who would have sustained the withdrawal of citizenship from a deserter as a valid exercise of Congress' war power.[40] Finally, the Chief Justice concluded that the punishment was "cruel and unusual" since it forced Trop into a situation of statelessness, which results in the complete destruction of a citizen's status in organized society.[41] *Trop*, then, indicated that Congress' power to expatriate, recognized in *Perez*, would be subjected to careful judicial scrutiny so as to properly define its limitations.

In *Schneider v. Rusk*[42] a significant change in philosophy from the *Perez* decision occurred. Section 352(a)(1) of the Immigration and Nationality Act of 1952 provided for expatriation of naturalized citizens who resided continuously for three years in the nation of their birth or former nationality.[43] In a five to three decision Justice Douglas, speaking for the majority, condemned this statutory distinction between natural-born and naturalized citizens, holding the statute violative of the Fifth Amendment Due Process Clause:[44]

> This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make. Moreover, while the Fifth Amend-

36. 356 U.S. at 87-88.
37. 8 U.S.C. § 1481(a)(8) (1970).
38. 356 U.S. at 88.
39. *Id.* at 97.
40. *Id.* at 121-22.
41. *Id.* at 101.
42. 377 U.S. 163 (1964).
43. Congressionally preserved as 8 U.S.C. § 1484(a)(1) (1970).
44. 377 U.S. at 168-69.

> ment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process."[45]

The statute was invalidated despite the contentions of the dissenters that the petitioner had voluntarily expatriated herself[46] and that the majority decison would cause grave problems in the conduct of foreign affairs.[47]

The change in philosophy reflected in the decisions subsequent to *Perez* climaxed in 1967 with the overruling of *Perez* by *Afroyim v. Rusk*.[48] The petitioner in *Afroyim* was a naturalized United States citizen who voted in an Israeli political election in 1951.[49] His application for a United States passport was denied in 1960 on the ground that he had lost his citizenship by voting in a foreign election in contravention of section 401(e) of the Nationality Act of 1940.[50] The Court was thus faced with a fact situation substantially identical to *Perez*, giving it the opportunity to reconsider whether Congress can enact legislation stripping an American of his citizenship without his voluntary renunciation of the same.[51] Justice Black, writing the majority opinion in this five to four decision, adopted the approach of the dissenting justices in *Perez*:

> [W]e 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, as *Perez* indicated, be sustained as an implied attribute of sovereignty possessed by all nations. . . . In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship.[52]

45. *Id.* at 168, *quoting* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

46. Justice Clark concluded that the appellant had had statutory notice of the requirement, had disregarded the statute for eight years and intended to continue to do so, and thus had renounced her citizenship. 377 U.S. at 170.

47. The action of the Court in voiding these expatriations will cause no end of difficulties because thousands of persons living throughout the world will come under the broad sweep of the Court's decision. It is estimated that several thousand of these American expatriates reside in iron curtain countries alone. . . . The protection of American citizens abroad has always been a most sensitive matter and continues to be so today. This is especially true in Belgium, Greece, France, Iran, Israel, Switzerland and Turkey, because of their refusal to recognize the expatriation of their nationals who acquire American citizenship. The dissension that springs up in some of these areas adds immeasurably to the difficulty. *Id.* at 173-74.

48. 387 U.S. 253 (1967).

49. *Id.* at 254.

50. Nationality Act of 1940, ch. 876, § 401(e), 54 Stat. 1169, congressionally preserved as 8 U.S.C. § 1481(a)(5) (1970).

51. 387 U.S. at 256.

52. *Id.* at 257.

Justice Black held that the Fourteenth Amendment independently protects the citizenship which it defines from forcible destruction by Congress.[53] Justice Harlan, writing for the dissenters, insisted that the majority had failed to overcome the reasoning of *Perez*, taking particular issue with the majority's reliance on the Fourteenth Amendment:

> The Citizenship Clause . . . neither denies nor provides to Congress any power of expatriation; its consequences are, for present purposes, exhausted by its declaration of the classes of individuals to whom citizenship initially attaches. Once obtained, citizenship is of course protected from arbitrary withdrawal by the constraints placed around Congress' powers by the Constitution; it is not proper to create from the Citizenship Clause an additional, and entirely unwarranted, restriction upon legislative authority.[54]

The *Afroyim* decision declared that citizenship, *once granted*, is an absolute right which is beyond the power of Congress to revoke in the absence of the consent of the citizen. It has long been the rule, however, that the initial grant of citizenship through naturalization is in the nature of a privilege, rather than a constitutional right.[55] Congress, through its power to grant this privilege, may impose conditions precedent to the attainment of citizenship.[56] Every United States statute granting citizenship through the concept of *jus sanguinis*[57] has attached at least one condition precedent to the grant of citizenship,[58] and all have required residence of a parent in the United States be-

53. *Id.* at 268.

54. *Id.* at 292-93.

55. *See* Montana v. Kennedy, 366 U.S. 308 (1961) (petitioner, who was born in 1906 in Italy of the United States citizen *mother* and an Italian father and who resided continuously in the United States since the year of his birth, nevertheless held not to be a citizen of the United States—see text accompanying notes 76-82 *infra*); Weedin v. Chin Bow, 274 U.S. 657 (1927); United States v. Wong Kim Ark, 169 U.S. 649, 674 (1898).

56. *See* Maney v. United States, 278 U.S. 17, 22 (1928) (affirmed cancellation of illegally procured certificate of naturalization). See also Judge Leventhal's concurring opinion in Bellei v. Rusk, 296 F. Supp. 1247 (D.D.C. 1969): "My own assumption is that Congress can impose reasonable conditions that must be met before citizenship is recognized." *Id.* at 1253.

57. See note 6 *supra* and accompanying text.

58. Act of March 26, 1790, ch. 3, § 1, 1 Stat. 104 (children born of citizen parents outside the United States were to be considered natural born citizens, except that the right of citizenship would not descend to persons whose *fathers* had never been resident in the United States); Act of January 29, 1795, ch. 20, § 3, 1 Stat. 415 (continued the provisions of the Act of 1790); Act of April 14, 1802, ch. 28, § 4, 2 Stat. 155 (continued the provisions of the Act of 1790 if the parent(s) acquired citizenship *prior* to 1802); Act of February 10, 1855, ch. 71, § 1, 10 Stat. 604, codified as Rev.

fore such citizenship can vest in the foreign-born child.[59] The difficult question presented to the *Bellei* Court, therefore, was whether Congress has the power to establish conditions *subsequent* to the attainment of citizenship by *jus sanguinis*. Congress required oaths of allegiance in its Acts of 1907 and 1934,[60] and the Acts of 1934 and 1940 added five years residence in the United States as conditions subsequent.[61] It is this type of condition that *Bellei* confronts, a type of condition that has never been applied to the other categories of citizenship and which would seem contrary to the principles enunciated in the *Afroyim* decision.

The *Bellei* majority recognized the validity of the *Afroyim* and *Schneider* decisions,[62] but distinguished them through a novel interpretation of the opening sentence of the Fourteenth Amendment, which declares that "all persons born or naturalized *in* the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[63] The petitioner in *Schneider* was a German national by birth and obtained her citizenship by descent upon her mother's naturalization in the United States.[64] Although she did receive her citizenship by descent, as did Bellei, she obtained that naturalization while *physically present in* the United States. The plaintiff in *Afroyim*, a Polish national by birth, acquired citizenship *after immigration* by naturalization *in* the United States.[65]

Stat. § 1993 (explicitly required citizenship as well as residence of the father; the act applied retroactively to cover the gap since 1802); Act of March 2, 1907, ch. 2534, § 6, 34 Stat. 1229 (all children born abroad who were citizens under § 1993 were required, if still abroad at age eighteen, to record their intention to become residents and remain citizens of the United States, and to take an oath of allegiance at age twenty-one); Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797 (eliminated *paternal* citizenship requirement and, prospectively only, granted citizenship if at least one parent was a citizen; provided, however, that the child be subject to a five year continuous residence requirement immediately prior to attaining age 18 and an oath of allegiance within 6 months of attaining age 21 if one parent was an alien); Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1139 (similar to Act of 1934, but residence provision for child changed to require only a total of five years residence in the United States between the ages of thirteen and twenty-one). *See also* Montana v. Kennedy, 366 U.S. 308 (1961).

59. *See* Weedin v. Chin Bow, 274 U.S. 657, 665-66 (1927); note 58 *supra*.

60. Act of Mar. 2, 1907, ch. 2534, § 6, 34 Stat. 1229; Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797. *See* note 58 *supra*.

61. Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797; Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1139.

62. *See* 401 U.S. at 822-23, 827.

63. U.S. CONST. amend. XIV, § 1 (emphasis added).

64. 377 U.S. at 164.

65. 387 U.S. at 254.

Bellei, however, having never resided in the United States, became a citizen by virtue of descent alone:[66]

> The central fact, in our weighing of the plaintiff's claim to continuing and therefore current United States citizenship, is that he was born abroad. He was not born in the United States. He was not naturalized in the United States. And he has not been subject to the jurisdiction of the United States. All this being so, it seems indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff Bellei. He simply is not a Fourteenth-Amendment-first-sentence citizen.[67]

Holding that Bellei's claim could not therefore be founded upon Fourteenth Amendment citizenship, the Court said it "must center in the statutory power of Congress and in the appropriate exercise of that power within the restrictions of any pertinent constitutional provisions other than the Fourteenth Amendment's first sentence."[68] Justice Blackmun quoted *dictum* from *United States v. Wong Kim Ark*[69] for support:

> "But it [the first sentence of the Fourteenth Amendment] has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization."[70]

Justice Blackmun, having found congressional power to regulate the acquisition of citizenship through *jus sanguinis*, next turned to the constitutionality of the exercise of that power when used to impose a condition subsequent to a grant of citizenship.[71] He applied a "reasonableness" standard in evaluating Congress' primary concern with the dual nationality of persons in Bellei's position and found the residence requirement not unreasonable,[72] relying upon *Weedin v. Chin Bow*[73] to demonstrate that Congress emphasized residence as "the talisman of dedicated attachment"[74] in enacting the naturalization statutes:

66. 401 U.S. at 818.
67. *Id.* at 827.
68. *Id.* at 828.
69. 169 U.S. 649 (1898) (child born in United States to Chinese alien parents is a citizen by birth under the Fourteenth Amendment).
70. 401 U.S. at 830, *quoting* United States v. Wong Kim Ark, 169 U.S. 649, 688 (1898).
71. 401 U.S. at 831.
72. *Id.* at 833-34.
73. 274 U.S. 657 (1927).
74. 401 U.S. at 834.

> It is not too much to say, therefore, that Congress at that time . . . attached more importance to actual residence in the United States as indicating a basis for citizenship than it did to descent from those who had been born citizens of the colonies or of the states before the Constitution. As said by Mr. Fish, when Secretary of State, to Minister Washburn, June 28, 1873, in speaking of this very proviso, "the heritable blood of citizenship was thus associated unmistakenably with residence within the country which was thus recognized as essential to full citizenship."[75]

The Court found further support in Congress' conceded power to regulate the requisites of an initial grant of citizenship and pointed out that no alien has a right to naturalization unless he complies with all the statutory conditions precedent.[76] Congress may even refuse to enact *any* statute providing for the inheritance of citizenship by *jus sanguinis*.[77] Bellei could not complain if Congress had decided to impose the five year residence requirement as a condition *precedent* to the grant of citizenship. The Court concluded that there is no logic in reaching a different result when Congress has magnanimously structured the same requirement as a condition *subsequent* in order to confer citizenship rights from the moment of birth.[78]

Justice Blackmun rejected the proposition that the condition subsequent created a "second-class citizenship,"[79] reiterating that the plaintiff's citizenship was initially fully deniable and that, once it had been granted by Congress, it was equivalent in all respects to that of any other citizen, save for a single condition of residence.[80] He noted that individuals in the plaintiff's situation (*i.e.*, foreign-born children of an alien father and a citizen mother) lacked recourse to a claim to citizenship at all until 1934.[81] When the scope of "naturalization by descent" was gratuitously expanded at that time to include those persons whose *maternal* parent satisfied the parental citizenship and residence requirements, Congress imposed only a minimal residence condition upon the descendant, a condition which Bellei had failed to meet despite subsequent advantageous liberalizations in the

75. *Id.*, *quoting* Weedin v. Chin Bow, 274 U.S. 657, 665-66 (1927) (citations omitted).

76. *Id.* at 830 (citations omitted).

77. *Id.* at 830.

78. *Id.* at 835.

79. The Court referred to the language "second-class citizenship" originating in Schneider v. Rusk, 377 U.S. 163, 169 (1964), as a cliché, and noted that it "is too handy and too easy, and, like most clichés, can be misleading." 401 U.S. at 835.

80. *Id.* at 836.

81. *Id.* at 826; *see* note 55 *supra*.

law[82] and despite numerous warnings. Unlike the plaintiffs in *Afroyim* or *Schneider*, Bellei had never actually resided in the United States, although he had visited it five times.[83] Indeed, Bellei had been given every chance to attain United States citizenship, but had simply not taken the opportunity while available.[84] Finally, the problems inherent in the creation of stateless persons discussed by Chief Justice Warren in his *Perez* dissent and in *Trop*[85] were absent, since Bellei remained an Italian citizen.[86]

The *Bellei* Court thus treated Afroyim's naturalization *in* the United States as significant, and fashioned a strict interpretation of the Fourteenth Amendment to hold that the *Afroyim* Court intended only to extend the protections of the amendment to the limited class of persons naturalized while *physically present* in the United States.[87] The meager discussion and analysis presented in the opinion authored by Justice Blackmun provides little to sustain this interpretation of *Afroyim*. Justice Black, author of *Afroyim*, and Justice Brennan, who had concurred therein, dissented in *Bellei*.[88] In seperate opinions, both derided the failure of the majority to formulate a "rational basis" for segregating for the purpose of Fourteenth Amendment protection those naturalized in the United States from those naturalized while residing elsewhere.[89] Both Justices were of the opinion that citizenship wherever obtained came well within the scope of the *Afroyim* protection. In *Afroyim*, Justice Black had considered whether Congress had any power, express or implied, to terminate American citizenship without the citizen's consent.[90] He had rejected the argument that such a power

82. See text accompanying notes 7-9 *supra*.

83. 401 U.S. at 836.

84. *Id.* at 819-20, 836.

85. Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J. dissenting); Trop v. Dulles, 356 U.S. 86 (1958). The Chief Justice in *Trop* eloquently described the plight of the stateless person:

> It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights. *Id.* at 101-02.

86. 401 U.S. at 836.

87. *Id.* at 827.

88. 401 U.S. at 836, 845.

89. *Id.* at 843, 845.

90. 387 U.S. at 257.

is an implied attribute of sovereignty possessed by all nations, and had stated expressly that "[i]n our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship."[91] He supported his position by reference to the "mature and well-considered dictum"[92] of Chief Justice Marshall in *Osborn v. Bank of the United States*:[93]

> [The naturalized citizen] 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.[94]

The *Bellei* majority, on the other hand, relied upon the distinguishable facts in *Afroyim* to the exclusion of the *Afroyim* majority's discussion and analysis of the Fourteenth Amendment. As Justice Black pointed out, the majority and dissenting Justices in *Afroyim* all appeared to have agreed that the scope of the Citizenship Clause does reach *all* citizens.[95] The language of Justice Black in *Afroyim* strongly implies that it was the Court's view that the Fourteenth Amendment protects no less a class than the entire class of citizens referred to by prior legislative and judicial opinions. This view is substantiated by the *Afroyim* Court's adoption of the language of Senator Howard, a sponsor of the amendment, explaining 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 . . . beyond the legislative power . . . .[96]

Admittedly this was written with the Negro in mind,[97] but its adoption by the *Afroyim* Court clearly denotes a view that the Fourteenth Amendment's protection encompasses *all* citizens. It is clear that under *Afroyim* there is only one kind of citizen, and a citizen who is not a

91. *Id.*
92. *Id.* at 261.
93. 22 U.S. (9 Wheat.) 738 (1824).
94. 387 U.S. at 261, *quoting* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 827 (1924).
95. 401 U.S. at 842.
96. 387 U.S. at 263.
97. Justice Black in *Afroyim* stated: "[The] undeniable purpose of the Fourteenth Amendment [was] to make citizenship of Negroes permanent and secure . . . ." 387 U.S. at 263.

Fourteenth Amendment citizen simply does not exist. Yet this is precisely the classification given citizen Bellei by Justice Blackmun. Under *Afroyim* there were but two classifications, citizen and non-citizen; under *Bellei* a third is added which represents a kind of quasi-citizenship.

The *Bellei* Court attempted to avoid discussion of the *Afroyim* opinion by narrowly interpreting the word "in" found in the Fourteenth Amendment Citizenship Clause to mean within the geographical limits of the United States. Bellei was not therefore born "in" the United States, naturalized "in" the United States, nor subject to the geographical jurisdiction of the United States. Since he did not fall within this stringent "in" classification, the Court permitted his citizenship to be stripped from him. Under *Bellei* the quality of citizenship may turn on the happenstance of nativity.

In the past, such a literal translation of the same word has not been well received. The Supreme Court in *Savorgnan v. United States*[98] expressly rejected any such debilitating interpretation:

> One contention of the petitioner is the novel one that her naturalization did not meet the requirements of § 2 of the Act of 1907, because it did not take place within the boundaries of a foreign state. The answer is that the phrase in § 2 which states that "any American citizen shall be deemed to have expatriated himself when he has been naturalized *in* any foreign state in conformity with its laws . . ." refers merely to naturalization *into* citizenship of any foreign state. It does not refer to the place where the naturalization proceeding occurs.[99]

While the majority in *Bellei* failed to confront this issue, Justice Black noted that the word "in" found in the phrase "in the United States" was meant to encompass the acquisition of citizenship either "by being born *within* [the United States] or by being naturalized *into* it."[100] The *Afroyim* Court itself afforded the word "in" a comprehensive meaning so as to include *every* citizen of the United States.[101]

Proceeding from the conclusion that the plaintiff was not a Fourteenth Amendment citizen, the *Bellei* Court held that the condition subsequent imposed by section 301(b)[102] was not unreasonable, arbitrary,

98. 338 U.S. 491 (1950).

99. *Id.* at 499 (footnotes omitted and emphasis added in part).

100. 401 U.S. at 843.

101. "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. . . ." 387 U.S. at 268 (emphasis added).

102. 8 U.S.C. § 1401(b) (1970).

or unlawful.[103] In so holding, the Court implied that a conceptual distinction exists between expatriation on the one hand and a conditional grant of citizenship on the other. A tenuous basis for this distinction can be found in the structure of the statute itself. Section 301(b)[104] is not a "Loss of Nationality" provision, but rather is found in a chapter entitled "Nationality at Birth and Collective Naturalization." Unlike the "Loss of Nationality" sections, which are separated from those sections providing for grants of citizenship, this section is included within the grant of citizenship and is directly coupled with that grant. In short, it could be said the "Loss of Nationality" sections invalidated by *Afroyim*, *Schneider*, and their predecessors are "expatriative" while the *Bellei* Court was concerned merely with a conditional grant of citizenship.[105]

However, the expatriative conditions established by Congress and found unconstitutional in *Afroyim* and *Schneider* in fact appear no different in substance than the condition scrutinized in the instant case. The three cases all involved conditions to be executed subsequent to the acquisition of citizenship. The conditions are only distinguishable in that those considered in *Afroyim* and *Schneider* arose in a negative context proscribing performance of the condition,[106] whereas in *Bellei* the condition is in a positive context requiring performance of the condition. Bellei's citizenship had already been granted, and even if merely treated as a property right, rather than as a personal and fundamental right, such right had vested. Thus, regardless of *how* the citizenship was obtained, it would have been absolutely protected under *Afroyim* from unilateral revocation by government action, even if that action were not considered to be unreasonable, arbitrary or unlawful. The *Afroyim* Court recognized as exceptions only those statutes which provide for revocation of naturalization unlawfully procured.[107] By relating back to an individual's state of mind at the time of his naturalization[108] and prior to the grant of his citizenship, these statutes purport to invalidate the grant of citizenship, thereby rendering *Afroyim* inapplicable. Bellei could not fall within this single

103. 401 U.S. at 831.

104. 8 U.S.C. § 1401(b) (1970).

105. *See* 401 U.S. at 834-36.

106. "The loss of nationality under this Part [Part III—Loss of Nationality] shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this Part." 8 U.S.C. § 1488 (1970).

107. 387 U.S. at 267 n.23.

108. *See* 8 U.S.C. § 1451(c) (1970).

exception: his naturalization at birth precludes a showing of any of the elements necessary to a finding of unlawful procurement.

Having purportedly distinguished the *Afroyim* decision, Justice Blackmun proceeded to blithely ignore the broad due process principles enunciated in *Schneider*. The *Schneider* Court, as noted above, had struck down a provision distinguishing between naturalized and native born citizens as being contrary to the protection against unjustifiable discrimination found in the Due Process Clause of the Fifth Amendment.[109] Prior to *Schneider* the test for fulfillment of due process requirements relating to citizenship was succinctly stated by Justice Frankfurter in *Perez* as being whether "the means, withdrawal of citizenship, [is] reasonably calculated to effect [an] end that is within the power of Congress to achieve . . . ."[110] *Schneider*, however, departed from the "rational nexus" test used by the *Perez* Court and adopted instead a test balancing the plaintiff's right to non-discriminatory treatment against the governmental inter-

109. See text accompanying notes 42-47 *supra*.

110. 356 U.S. at 60. The power of Congress to create reasonable classifications consonant with due process has been widely affirmed. Justice Clark, in his dissent in *Schneider*, 377 U.S. at 176-77, cited several examples: Hirabayshi v. United States, 320 U.S. 81 (1943) (curfew order restricting Japanese Americans during wartime held not to be so discriminatory as to be a denial of due process); Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392 (1927) (city ordinance prohibiting the issuance to aliens of licenses to operate pool and billiard rooms does not violate the rights of aliens under the Equal Protection Clause of the Fourteenth Amendment); Terrance v. Thompson, 263 U.S. 197 (1923) (state legislation withholding the right to own or lease land for agricultural purposes from aliens who have not declared a good faith intention to become citizens of the United States is not violative of the Due Process or Equal Protection Clauses of the Fourteenth Amendment); Heim v. McCall, 239 U.S. 175 (1915) (state law that only citizens shall be employed on public works is not unconstitutional under the Privilege and Immunities Clause nor under the Equal Protection or Due Process Clauses of the Fourteenth Amendment). As the District of Columbia Circuit stated in upholding the predecessor of the section invalidated by *Schneider* (Act of October 14, 1940, ch. 4, § 404, 54 Stat. 1137):

> [W]here classification has [a] reasonable relation to legitimate legislative ends and is supported by considerations of policy and practical convenience, it is not arbitrary. The guaranty of due process demands only that a law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a reasonable and substantial relation to the object sought to be obtained. Lapides v. Clark, 176 F.2d 619, 620 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 860 (1949) (citations omitted).

See Steward Machine Co. v. Davis, 301 U.S. 548, 584 (1937) (a tax imposed by the Social Security Act upon employers of labor, but exempting employers of less than eight, agricultural labor, and domestic service in private homes is not violative of Fifth Amendment due process); Nebbia v. New York, 291 U.S. 502, 525 (1934) (state regulation fixing different prices at which storekeepers and dealers may buy and sell milk held consistent with the Equal Protection Clause of the Fourteenth Amendment because of the distinctions between the two classes of merchants).

ests served by the loss of nationality provision.[111] The Court recognized that such a test had "equal protection" connotations, stating that "while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' "[112] Applying this "balancing test" to circumstances strikingly similar to those in *Bellei*, the *Schneider* Court said:

> A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship.[113]

In *Bellei* the Court ignored *Schneider's* "balancing test;" instead it applied the "rational nexus" test of *Perez* and concluded that the imposition of the condition subsequent met the test since the condition (classification) created by Congress is "reasonably related" to purposes which are within the power of Congress to impose. Justice Blackmun found a two-fold purpose in the congressionally-created condition subsequent. He pointed first to the goal of maintaining a citizenry with undivided loyalty: "We cannot say that a concern that the child's own primary allegiance is to the country of his birth and of his father's allegiance is either misplaced or arbitrary."[114] Neither *Afroyim* nor *Schneider* had had occasion to weigh such a policy in favor of acculturation, for the provisions struck down in those cases affected citizens who either were born within or became naturalized after residency in this country.[115] In the instant case, however, the existence of a legitimate congressional concern regarding acculturation was conceded even by the three-judge district court which had originally upheld Bellei's claim.[116] Justice Blackmun also felt

111. This balancing test is very similar to the test employed under the Fourteenth Amendment Due Process Clause in the First Amendment area. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406 (1963) (denial of unemployment benefits because petitioner would not work on Saturday, the Sabbath Day of her faith, was held to have abridged her free exercise of religion); Bates v. Little Rock, 361 U.S. 516, 524 (1960) (city tax ordinance requiring lists with the names of the members of the local branches of the N.A.A.C.P. was held to be an unjustified interference with the members' freedom of association). Compare the balancing tests used in Zemel v. Rusk, 381 U.S. 1 (1965), upholding federal restrictions on the Fifth Amendment "liberty of travel," and Aptheker v. Secretary of State, 378 U.S. 500 (1964), holding different restrictions on travel to be a violation of Fifth Amendment due process.

112. 377 U.S. at 168, *citing* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

113. 377 U.S. at 168-69.

114. 401 U.S. at 832.

115. 387 U.S. at 254; 377 U.S. at 164.

116. "It is a legitimate concern of Congress that those who bear American citizen-

that the statute had properly been enacted in an effort to alleviate the problems created by the dual national between the governments claiming his allegiance.[117] In a statement that reveals the impact of the "rational nexus" test the Court opined:

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ship and receive its benefits have some nexus to the United States." 296 F. Supp. at 1252.

117. 401 U.S. at 832. The fact of "dual nationality" is an unpremeditated result of the operation of the municipal law of two different sovereignties, made possible by the absence of any generally accepted international "common law" on the subject. 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW, § 255 (1942); 3 MOORE, INTERNATIONAL LAW, § 425 (1906). Despite the fact that it is generally agreed to be undesirable for any person to have the nationality of more than one State at any one time, the concept of dual nationality is now commonly recognized. 1 OPPENHEIM, *supra* note 18, § 310. The dual national himself is burdened with the responsibilities of two citizenships, and the resulting problems are a constant source of conflict between States. *See* Barone, *Dual Nationality: With Particular Reference to the Legal Status of the Italo-American*, 23 FORDHAM L. REV. 243, 263-76 (1954). There have been some treaty arrangements controlling the matter of dual nationality, but such arrangements are not so widespread as to form a basis for recognizable international common law. 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW, § 242 (1942).

The Court asserts that Bellei's citizenship is revocable, and that in light of the policies against dual nationality it should be revoked. At the very least, individuals in Bellei's position should be required to make an election. 401 U.S. at 831-34, *citing* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 187 (1963) (Brennan, J., concurring) (recognizing "entanglements which may stem from dual allegiance"); Kawakita v. United States, 343 U.S. 717, 723-36 (1952) (finding a dual citizen of the United States and Japan guilty of treason for crimes perpetrated against the United States while residing in Japan during World War II, and noting that "[c]ircumstances may compel one who has a dual nationality to do acts which otherwise would not be compatible with the obligations of American citizenship"); Savorgnan v. United States, 338 U.S. 491, 500 (1950) (holding that plaintiff had renounced her citizenship upon becoming an Italian citizen, and that Congress has appropriate concern with dual nationality). For a possible "election" requirement, the Court cited Mandoli v. Acheson, 344 U.S. 133, 138 (1952) (specifically noting that in this particular case no statute existed imposing an election upon the dual national); Kawakita v. United States, 343 U.S. 717, 734 (1952) (noting that "under certain circumstances" a dual national can be deprived of his United States citizenship through an Act of Congress); Perkins v. Elg, 307 U.S. 325, 329 (1939) (holding that a native-born citizen who became a dual national during minority through his parent's foreign naturalization abroad did not lose his United States citizenship "provided that on attaining majority he elects to retain that citizenship and return to the United States to assume its duties"). *See* Flournoy, *Dual Nationality and Election*, 30 YALE L.J. 545, 693 (1921). Since Congress has not provided the machinery for such individuals to make such an election, the Court eliminated the dual nationality problem in *Bellei* by utilizing the only machinery Congress had provided—revocation of citizenship. 401 U.S. at 833.

If we assume that revocation on a condition subsequent is wrong, then what about the problem of dual nationality? To alleviate this problem in some measure, there has been enunciated a doctrine called "primary nationality" or "primary allegiance," which holds that although a dual national is required to discharge his duties of allegiance to both States with whose nationality he is clothed, he must give preference to the duties he owes the State in which he resides. 1 OPPENHEIM, *supra* note 18,

> The statutory development . . . reveals a careful consideration by the Congress of the problems attendant upon dual nationality of a person born abroad. This was purposeful and not accidental. It was legislation structured with care and in the light of then apparent problems.
>
> The solution to the dual nationality dilemma provided by the Congress by way of required residence surely is not unreasonable.[118]

The *Bellei* Court dismissed *Schneider* on the ground that Mrs. Schneider possessed Fourteenth Amendment citizenship,[119] whereas Bellei did not. However, the holding in *Schneider* was based not on the Fourteenth Amendment Citizenship Clause, but upon the Fifth Amendment Due Process Clause, making that decision applicable where *Afroyim* is inapplicable. In view of the fact that the *Perez* "rational nexus" test was enunciated six years prior to *Schneider*, and that *Perez* has since been overruled by *Afroyim*, it must be contended that *Schneider* superseded *Perez* and that therefore the issue of whether the exercise of congressional power in *Bellei* was so arbitrary and discriminatory as to violate due process should have been submitted to the test of *Schneider*. The comparative fact situations of *Schneider* and *Bellei* would seem to indicate that if the balancing test had been utilized, Bellei would have obtained a result similar to that reached in *Schneider*.[120]

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§ 310(a); 2 HYDE, *supra* note 6, § 372. The tribunals established pursuant to the Peace Treaty with Italy in 1947 have resolved several scores of cases of conflict of nationality laws by reference to the principle of "primary nationality" as an international doctrine. Perhaps the best known of these is the Mergé Claim, 22 I.L.R. 443 (United States Conciliation Commission, 1955), in which plaintiff was a United States national through *jus soli* and an Italian national by marriage. The tribunal held that plaintiff, by her habitual residence outside the United States and by other conduct had evidenced her intention to be effectively an Italian national. Applying this principle to the plaintiff Bellei, dual citizenship ceases to be a difficult problem from the policy standpoint discussed by the Court. Simply stated, Bellei's "primary allegiance" would have been to Italy until he assumed residence in the United States, at which time that allegiance would change.

118. 401 U.S. at 833. Justice Black's comment seems quite apt:

> The Court today holds that Congress can indeed rob a citizen of his citizenship just so long as five members of this court can satisfy themselves that the congressional action was not "unreasonable, arbitrary," "misplaced or arbitrary," or "irrational or arbitrary or unfair." My first comment is that not one of these "tests" appears in the Constitution. *Id.* at 837 (citations omitted).

119. *Id.* at 822.

120. This conclusion is bottomed on the premise that citizenship, once acquired, even non-Fourteenth Amendment citizenship, is a "fundamental right." The Court in Trop v. Dulles accepted this premise: "As long as a person does not voluntarily renounce or abandon his citizenship . . . his *fundamental right* of citizenship is secure." 356 U.S. 86, 93 (1958) (emphasis added). And Chief Justice Warren argued persuasively in his dissent in *Perez* that:

However, such speculation is now quite irrelevant; rather the focus should be on why the Court returned to the *Perez* test when *Schneider's* balancing test would seem to be the correct precedent. The single answer is that the Court chose this test to obtain a desired result. The majority chose to examine the congressional purposes of the statute and to ignore the language. In so doing the Court interpreted the statute as it should have been written rather than as it actually was written:

> A contrary holding would convert what is congressional generosity into something unanticipated and obviously undesired by the Congress. Our National Legislature indulged the foreign-born child with presumptive citizenship, subject to subsequent satisfaction of a reasonable residence requirement, rather than to deny him citizenship outright, as concededly it had the power to do, and relegate the child, if he desired American citizenship, to the more arduous requirements of the usual naturalization process. The plaintiff here would force the Congress to choose between unconditional conferment of United States citizenship at birth and deferment of citizenship until a condition precedent is fulfilled. We are not convinced that the Constitution requires so rigid a choice.[121]

It is apparent that the Court took a poorly written law and so construed it as to give it its anticipated meaning. Indeed, what has in effect been done is to create a special class of immigrant. This fa-

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I cannot believe that a government conceived in the spirit of ours was established with power to take from the people their most basic right.

Citizenship *is* man's basic right for it is nothing less than the right to have rights. 356 U.S. at 64.

See also Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963) (concurring opinion); Knauer v. United States, 328 U.S. 654, 676-79 (1946) (Rutledge, J., dissenting); Schneiderman v. United States, 320 U.S. 118, 167 (1943) (Rutledge, J., concurring); United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898). The origin of this doctrine of citizenship as a fundamental right may be traced to Chief Justice Marshall's dictum in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), to the effect that there are certain rights of American citizenship and the "Constitution does not authorize Congress to enlarge or abridge those rights." *Id.* at 827. If citizenship is a fundamental right, then it would seem that the constitutionality of congressional revocation of citizenship should "be judged by the stricter standard of whether it promotes a compelling state interest." Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (state and federal one year residency requirements to receive welfare assistance held violative of Fourteenth Amendment equal protection, the right of interstate movement, and the Fifth Amendment due process).

121. 401 U.S. at 835. The intent of Congress in demanding five years residency was thought to be in part the encouragement of acculturation in America's institutions, ideals, and way of life, thereby assuring the assumption of the responsibilities as well as the benefits of American citizenship. *See, e.g.*, 78 CONG. REC. 7340-41, 7348 (1934). The congressional debates preceding enactment of the 1940 and 1952 Acts do not refute such an interpretation.

vored immigrant is given the right to come to this country as a citizen at any time prior to his twenty-third birthday, at which time he must fulfill the residence obligation required of all immigrants.[122] The Court said of this "immigrant":

> The proper emphasis is on what the statute permits him to gain from the possible starting point of non-citizenship, not on what he claims to lose from the possible starting point of full citizenship to which he has no constitutional right in the first place.[123]

It would thus seem that this Court is far more concerned with the practical effect its decision might have on Congress, than it is with *stare decisis*.[124]

The apparent reason for the departure of *Bellei* from the *Schneider* and *Afroyim* decisions is the change in the composition of the Court. *Schneider, Afroyim* and their predecessors were carried by five man majorities,[125] including then Chief Justice Warren and Justices Black and Douglas. Of these, only Justice Douglas remains; the majority now controlling in *Bellei* is the result of the addition of Chief Justice Burger and the author of the opinion, Justice Blackmun.[126] The decision engineered by this new majority stands as a monument of contrived uncertainty in the fundamental area of citizenship. Certainly such a cherished right deserves more protection, and it is strongly urged that Congress re-evaluate citizenship by naturalization. Rather than create classes of citizens, it is suggested that Congress define those with an absolute right to citizenship, and that individuals such as Bellei, instead of receiving conditional citizenship, be given a preferred right to immigrate.

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122. A five year residence requirement prior to naturalization is imposed on aliens by 8 U.S.C. § 1427(a)(1) (1970).

123. 401 U.S. at 836.

124. The plaintiff here would force the Congress to choose between unconditional conferment of United States citizenship at birth and deferment of citizenship until a condition precedent is fulfilled. We are not convinced that the Constitution requires so rigid a choice. If it does, the congressional response seems obvious. 401 U.S. at 835.

125. *Schneider*: Chief Justice Warren, Justices Douglas, Black, Stewart, Goldberg. Dissent: Justices Clark, Harlan, White. *Afroyim*: Chief Justice Warren, Justices Douglas, Black, Brennan, Fortas. Dissent: Justices Harlan, Clark, Stewart, White.

126. *Bellei*: Chief Justice Burger, Justices Blackmun, Stewart, White, Harlan. Dissent: Justices Black, Douglas, Marshall, Brennan.