RECENT DEVELOPMENTS

STATUTE EXPATRIATING HYPHENATED AMERICANS HELD UNCONSTITUTIONAL

Schneider v. Rusk
377 U.S. 163 (1964)

Petitioner, a German national by birth, acquired American citizenship derivatively through naturalization of her mother.[1] While doing graduate work in France, she became engaged to a German citizen. Following a brief return to the United States, petitioner was married in Germany and has since resided there, except for two brief visits to the United States. In 1959, more than three years after petitioner had established residence in Germany, the United States denied her a passport, asserting she had lost her American citizenship under section 352(a)(1) of the Immigration and Nationality Act of 1952.[2] Petitioner filed a complaint for a judgment declaring her to be a United States citizen and enjoining enforcement of the denationalization statute. A statutory federal court rendered judgment for the United States, one judge dissenting.[3] Upon appeal to the United States Supreme Court this judgment was reversed. The majority opinion by Mr. Justice Douglas held that the statute in question was violative of the fifth amendment due process clause.[4]

In resolving the constitutional issue presented in *Schneider v. Rusk*,[5] the majority opinion began with the premise that "the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive." [6] The opinion recognized that two constitutional questions were inherent in the challenge of section 352(a)(1): did Con-

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[1] See 66 Stat. 245 (1952), 8 U.S.C. § 1431 (1958).

[2] 66 Stat. 269 (1952), 8 U.S.C. § 1484(a) (1958) provides:

(a) A person who has become a national by naturalization shall lose his nationality by—

(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act . . . (exceptions of § 353 were not germane to this controversy).

[3] Schneider v. Rusk, 218 F. Supp. 302 (D.D.C. 1958).

[4] Schneider v. Rusk, 377 U.S. 163 (1964). Chief Justice Warren, Justices Black, Stewart, and Goldberg concurred with Mr. Justice Douglas; Justices Clark, Harlan, and White dissented, Mr. Justice Clark writing the dissent. Mr. Justice Brennan did not take part in the decision.

[5] *Ibid.*

[6] *Id.* at 165. (Mr. Justice Douglas acknowledged an explicit constitutional limitation). *Cf.* Osborn v. United States Bank, 22 U.S. (9 Wheat.) 738, 827 (1824): "A naturalized citizen is, indeed, made a citizen under an act of congress. . . . He becomes

gress have the constitutional power to constitute specified acts conclusive evidence that a citizen had expatriated himself without requiring the person losing citizenship to give his subjective assent to this loss of citizenship rights, and, assuming an affirmative answer to the first question, did section 352(a)(1) exceed the substantive due process limits of the congressional power.[7] By contrast, the minority found that section 352(a)(1) did not violate due process, based upon constitutional history, prior legislative and executive action, and judicial decisions. The dissenters declared that the statute in question was a reasonable attempt by Congress to resolve important problems in foreign affairs.[8]

Prior to 1907, the United States had no statutes providing a mode of expatriation for her citizens.[9] In 1868, Congress declared expatriation the "natural and inherent right of all people," [10] but this legislation was passed in an effort to gain international recognition and acceptance of American naturalization of citizens from other nations.[11] Although recognizing the right of expatriation, Congress did not choose to provide uniform methods by which the United States citizen could expatriate himself.[12] From 1789 until 1868, the national government was primarily concerned with expatriation as it related to individuals who left other nations to become naturalized United States citizens, and it showed little interest in the problem of defining when American citizens expatriated themselves.[13] During this period the United States Supreme Court adhered to the perpetual allegiance doctrine;[14] it did not accept the view that the citizen could expatriate himself.[15]

The executive branch of the government was forced to deal with situations where foreign powers exercised political control over their native-born citizens who had become naturalized citizens of the United States but had later returned to the native land. In these situations the government adopted a pragmatic approach consonant with its power. When it was possible, the United States intervened to protect these individuals.[16] The concept of equal protection for both native-born and naturalized citi-

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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."

[7] Schneider v. Rusk, *supra* note 4, at 166-67.

[8] *Id.* at 169-78 (dissenting opinion).

[9] Tsiang, "The Question of Expatriation in America Prior to 1907," 60 Johns Hopkins Series pt. 3, at 103 (1942).

[10] 15 Stat. 223 (1868), 22 U.S.C. § 1731 (1958). The statute also asserted that naturalized citizens, while abroad, should receive "the same protection of persons and property that is accorded to native-born citizens. . . ."

[11] 3 Moore, International Law 580 (1906); Tsiang, *supra* note 9, at 95.

[12] See 15 Stat. 223 (1868), 22 U.S.C. § 1731 (1958).

[13] The legislative and executive branches of the government made no serious attempt to define expatriation regarding United States citizens. Tsiang, *supra* note 9, at 45-86, 111-12.

[14] Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 246 (1830).

[15] 3 Moore, *op. cit. supra* note 11, at 554-62; Tsiang, *supra* note 9, at 61-70.

[16] 3 Moore, *op. cit. supra* note 11, at 562-76; Tsiang, *supra* note 9, at 71-86.

zens was enunciated by various executive officers, this being corollary to the concept of equality of citizenship.[17] Nevertheless, naturalized citizens were sometimes instructed that they could not expect United States protection if, upon return to their country of origin, they were subjected to legitimate legal and political duties.[18]

In the latter half of the nineteenth century, Congress continued to remain silent regarding the loss of United States citizenship. During this period, the executive branch of the government negotiated naturalization treaties with many nations, the primary purpose being to define uniform rules regarding recognition of their respective naturalization policies. Some of these treaties provided that if the naturalized citizen should return to his native land and establish residence for a definite period of time, his adopted nation would not extend diplomatic protection to him, and he would be presumed to have expatriated himself.[19] This presumption created by the treaties was overcome if the individual returned to the United States.[20]

After the Expatriation Act of 1868,[21] it was generally recognized that American citizens, both native and naturalized, could expatriate themselves.[22] In later decades of the nineteenth century, the problem of finding a criterion of expatriation became increasingly acute due to the number of citizens traveling to other nations.[23] Determinations as to whether a citizen had expatriated himself were made by State Department officials on an *ad hoc* basis. These decisions were made by determining the individual's intent as manifested by all the available information on his particular situation.[24] Certain acts clearly inconsistent with allegiance to the United States, such as renunciation of American citizenship or swearing allegiance to another nation, were regarded as tantamount to expatriation.[25] As a rule, residence abroad with intent to remain there was also

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[17] Letter From Mr. Monroe, Secretary of State, to Mr. Foster, British Minister, May 30, 1812, in 3 Moore, *op. cit. supra* note 11, at 563, said: "It is impossible for the United States to discriminate between their native and naturalized citizens. . . ." See Letter From Mr. Buchanan, Secretary of State, to Mr. Rosset, Nov. 25, 1845, in 3 Moore, *op. cit. supra* note 11, at 566; Letter From Attorney General Black, Official Opinions of the Attorneys General of the United States, July 4, 1859, in 3 Moore, *op. cit. supra* note 11, at 574; Letter From Mr. Frelinghuyser, Secretary of State, to Mr. Cramer, Minister to Switzerland, July 28, 1883, in 3 Moore, *op. cit. supra* note 11, at 584.

[18] Letter From Mr. Wheaton, Minister to Prussia, to Mr. Knocke, July 24, 1840, in 3 Moore, *op. cit. supra* note 11, at 564.

[19] Tsiang, *supra* note 9, at 88-90.

[20] Miller v. Sinjen, 289 Fed. 388, 392 (8th Cir. 1923); Stein v. Fleischmann Co., 237 Fed. 679, 682, (S.D.N.Y. 1916).

[21] 15 Stat. 223 (1868), 22 U.S.C. § 1731 (1958).

[22] Tsiang, *supra* note 9, at 97-104; Letter From Mr. Fish, Secretary of State, to Mr. Washburne, Minister to France, June 28, 1873, in 3 Moore, *op. cit. supra* note 11, at 712.

[23] Tsiang, *supra* note 9, at 71.

[24] Tsiang, *supra* note 9, at 99, 103.

[25] 3 Moore, *op. cit. supra* note 11, at 734-45; Tsiang, *supra* note 9, at 98-103.

a requisite to expatriation.[26] Residence alone, however, did not serve as a basis for presuming that the citizen intended to expatriate himself.[27] These determinations applied to both native-born and naturalized citizens, although the presumption was stronger and was more quickly adopted when the question involved a naturalized citizen residing in his country of origin.[28] Generally, the existence of these facts only raised a presumption of expatriation, and the usual result was a loss of diplomatic protection if the immigrant had occasion to appeal to the United States for protection or intervention in his behalf.[29] As a rule, the presumption was effectively rebutted and citizenship was retained if the individual returned to the United States at a later date.[30]

The Citizenship Board of 1906 [31] reported that the protection extended to naturalized citizens abroad was equal to the protection accorded native-born citizens, except during certain periods when the naturalized citizen had not received full protection upon his return to the country of his origin. The Board went on to say that this practice of equal treatment was in accord with the views of the United States from the time of its independence up to that date.[32]

Both native-born and naturalized citizens abroad created problems for the government because it was called upon to protect the citizens in various altercations in foreign lands.[33] The naturalized citizen, however, created special problems when he returned to his native land. Some nations, refusing to recognize a right of expatriation, exerted political control over these persons. This created a dual citizenship situation, with the other nation having an equal right to control the individual.[34] Some nations recognized a qualified right in the individual to expatriate himself, but nevertheless forced compliance with legal duties and political obligations which either were unfulfilled when the individual emigrated to the United States, or which accrued during this period.[35] In other countries, the individual was automatically repatriated if he returned and established residence for the prescribed time.[36] The probability of these occurrences was

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[26] Letter From Mr. Bayard, Secretary of State, to Col. Frey, Swiss Minister, May 20, 1887, in 3 Moore, *op. cit. supra* note 11, at 584.

[27] Borchard, Diplomatic Protection of Citizens Abroad 553 (1916); Tsiang, *supra* note 9, at 98-99 (citing communications by Secretaries of State Washburne, Evarts, Frelinghuyser, Davis, and Bayard).

[28] See Tsiang, *supra* note 9, at 99, 107.

[29] Borchard, *op. cit. supra* note 27, at 690; 3 Hackworth, International Law 278-90 (1942).

[30] U.S. Dept. of State Citizenship Board of 1906, "Report on the Subject of Citizenship, Expatriation and Protection Abroad," H.R. Doc. No. 326, 59th Cong., 2d Sess. 26 (1906) [hereinafter cited as Citizenship Board].

[31] *Id.*

[32] *Id.* at 8.

[33] *Id.* at 25, 28 (citing President Grant's annual message to Congress, December 5, 1876).

[34] *Id.* at 12.

[35] *Ibid.*

[36] Tsiang, *supra* note 9, at 94, 104.

obviously increased whenever the naturalized citizen established long-term residence in the country of his birth.

The unexpressed corollary to the Expatriation Act of 1868[37] was that American citizens could also expatriate themselves. With this corollary as a premise, and motivated by the increased number of United States citizens going abroad for extended periods of time, the executive branch of the government repeatedly urged Congress to define expatriation.[38] Express renunciation of citizenship was rare, and the State Department sought objective means of defining when and how United States citizenship could be forfeited.[39] It was felt that, if these individuals had in fact expatriated themselves, the government should not have to provide diplomatic protection for them when they became involved in either private or public disputes, and that administrative convenience demanded that definitive rules for terminating citizenship be adopted.[40]

In December 1906, after studying the problems of expatriation and protection of citizens abroad, the Citizenship Board submitted its report to Congress.[41] One of the Board's recommendations was that a citizen should be presumed expatriated if he resided in a foreign state for more than five years without an intent to return to the United States.[42] In March 1907, Congress passed an act entitled "An Act in Reference to the Expatriation of Citizens and Their Protection."[43] This act provided, *inter alia,* that whenever a naturalized citizen resided for two years in his native state he would be presumed to have expatriated himself.[44] However, the presumption could be rebutted by presenting to diplomatic or consular officials of the United States objective evidence of lack of intent.[45] With the exceptions that the statute applied only to naturalized citizens and that it shifted the burden of proof from the government to the individual, it was declaratory of existing law. The rebuttable presumption was easy to overcome,[46] and the evidence used to overcome the presumption was the same evidence used in the *ad hoc* determinations made by the State Department prior to 1907.[47] With few exceptions the presumption was treated by both the courts and the State Department as one which never became conclusive. Therefore, when a person returned to the United States, he resumed his former status.[48]

In 1940, section 2 of the 1907 act was incorporated into section

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37 15 Stat. 223 (1868), 22 U.S.C. § 1731 (1958).

38 Tsiang, *supra* note 9, at 94 *et seq.*

39 Citizenship Board, *supra* note 30, at 25-26.

40 Tsiang, *supra* note 9, at 97-108.

41 Citizenship Board, *supra* note 30.

42 *Id.* at 23.

43 34 Stat. 1228 (1907).

44 34 Stat. 1228 (1907).

45 3 Hackworth, *op. cit. supra* note 29, at 286-90.

46 United States v. Gay, 264 U.S. 353, 358 (1924).

47 3 Hackworth, *op. cit. supra* note 29, at 288.

48 *Id.* at 292-94 [citing Nurge v. Miller, 286 Fed. 982 (E.D.N.Y. 1923) and Sinjen v. Miller, 281 Fed. 889 (D. Neb. 1922), *aff'd,* 289 Fed. 388 (8th Cir. 1923)].

404(b) of a bill entitled the Nationality Act of 1940.[49] The period of residence required was extended from two to three years and the three-year residence became *conclusive* proof of expatriation, regardless of mitigating factors suggesting a contrary intent on the part of the individual.[50] The Immigration and Nationality Act of 1952 incorporated the provisions of section 404(b) into section 352(a)(1) without significant changes.[51] *Schneider v. Rusk* represented the first time that the Supreme Court ruled on the constitutionality of section 352(a)(1) or its predecessors.

The Constitution of the United States does not contain an explicit provision vesting Congress with either the power to denationalize or the power to prescribe definitive methods by which the citizen can expatriate himself. Neither does constitutional history support the suggestion in the dissenting opinion that Congress was granted the power to denationalize or expatriate citizens holding citizenship by way of naturalization.[52] Although it has been suggested that article one, section eight, clause four of the Constitution grants this power by implication, the records of the Constitutional Convention evidence no intent on the part of the delegates to make this grant.[53] In both the Constitutional Convention and the debates on the first naturalization bill, there was discussion concerning the conditions which could be imposed upon an alien prior to his becoming a citizen. However, only once was mention made of limiting the rights of a naturalized citizen by imposing a condition subsequent on his citizenship.[54] The clear consensus of opinion was against any restriction of this nature, and the congressman making the suggestion of imposing a condition subsequent repudiated it later in the same debate.[55] Nineteenth century judicial interpretations conclusively determined that the Constitution did *not* grant Congress the power to expatriate or denationalize via article one, section eight, clause four. These decisions also determined that native-born and naturalized citizens had, in all respects save those enumerated in the Constitution, equal rights of citizenship.[56]

There was little discussion concerning article one, section eight, clause four at the Constitutional Convention. Prior to the adoption of the Constitution, the states had plenary power over naturalization. Several states

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[49] 54 Stat. 1168 (1940).

[50] 54 Stat. 1168 (1940).

[51] 66 Stat. 269 (1952), 8 U.S.C. § 1488(a) (1958).

[52] See 3 Farrand, The Records of the Federal Convention of 1787, 638 (1911) (index of clauses).

[53] *Ibid.*

[54] 1 Annals of Cong. 1109-14 (1790).

[55] *Id.* at 1113, (in attempting to limit the debate, Mr. Madison said that residence as a prerequisite to citizenship was the question).

[56] United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898); Osborn v. United States Bank, *supra* note 6, at 828 (1824). See 1 Crosskey, Politics and the Constitution 439-40 (1953). The distinctions drawn between native-born and naturalized citizens by the framers of the Constitution were those explicitly included in the Constitution, and these limitations imposed on naturalized citizens were not considered essential rights of citizenship.

had naturalization laws explicitly granting a foreign-born citizen all the rights, privileges and immunities of his native-born counterpart.[57] These facts suggest that this policy of liberal naturalization laws would be continued by the federal government.

In 1915, the Supreme Court upheld the power of Congress to define acts which would be conclusive evidence of expatriation.[58] The Court defined this legislative power as an inherent power of government to regulate foreign affairs. The Court reasoned that the federal government was sovereign, all sovereign nations could regulate their foreign affairs, and that this legislation was a legitimate expression of this inherent power.[59] In *Perez v. Brownell,*[60] heretofore the leading case on the congressional power to define expatriation, the Court upheld an expatriation statute which made voting in a foreign election conclusive evidence of expatriation.[61] The majority again relied upon the inherent power of the sovereign to regulate foreign affairs, coupling this concept with the necessary and proper clause to provide a constitutional basis for upholding the challenged legislation.

In 1915, the Court had qualified this power by stating that the expatriation could not be imposed without the "concurrence" of the citizen.[62] The question whether "concurrence" requires the individual's subjective assent or only the individual's objective assent—the performance of a prescribed act—presently divides the Court.[63] Majority opinions have uniformly held the view that "concurrence" means only the performance of the acts prescribed by Congress—not the intent of the individual.[64] Although this issue was referred to in the majority opinion, it did not form the basis for resolving the constitutional question in *Schneider v. Rusk.*

In *Schneider v. Rusk,* the Court faced the issue of whether section 352(a)(1) violated the due process limitations of the fifth amendment.[65] In the *Perez* case, the constitutionality of section 349 of the Immigration and Nationality Act[66] was challenged: thus the Court was faced with essentially the same question as was presented in the *Schneider* case. In

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[57] Citizenship Board, *supra* note 30, at 8.

[58] Mackenzie v. Hare, 239 U.S. 299 (1915).

[59] *Ibid.*

[60] Perez v. Brownell, 356 U.S. 44 (1958).

[61] 66 Stat. 268 (1952), 8 U.S.C. § 1481 (1958), defines acts constituting voluntary expatriation whether committed by native-born or naturalized citizens. Voting in a foreign election is one of the proscribed acts.

[62] Mackenzie v. Hare, *supra* note 58, at 311.

[63] Schneider v. Rusk, 377 U.S. 163, 166 (1964).

[64] *Ibid.*; see Perez v. Brownell, *supra* note 60, at 61.

[65] In a recent Court decision concerning the validity of another act defined by Congress to constitute conclusive evidence of expatriation, Mr. Justice Goldberg stated, "It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164 (1963).

[66] 66 Stat. 267 (1952), 8 U.S.C. § 1481 (1958).

formulating a method for determining the constitutionality of the legislation in *Perez v. Brownell,* Mr. Justice Frankfurter said:

> [A] rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution . . . the means—in this case, withdrawal of citizenship—must be reasonably related to the end—here, regulation of foreign affairs. The inquiry—and, in the case before us, the sole inquiry—into which the Court must enter is whether or not Congress may have concluded not unreasonably that there is a relevant connection between this fundamental source of power and the ultimate legislative action.[67]

In *Perez,* the majority found the requisite rational nexus between the withdrawal of the citizenship of an American who had voted in a political election in a foreign country and congressional power to regulate foreign affairs.[68] After finding a sufficient rational nexus between the constitutional power, the means utilized, and the objective, Mr. Justice Frankfurter briefly considered the reasonableness of the means employed, *i.e.,* expatriation. His answer was: "The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose." [69] Within broad limits, Congress was permitted to determine what solution was reasonable once the rational nexus was found to exist. The balancing of competing interests and values that would both support and deny the legislation was left to the judgment of Congress and not to the Court.[70]

In *Schneider v. Rusk,* Mr. Justice Douglas appeared to rely on the test used in *Perez v. Brownell* to resolve the constitutional question,[71] but in reality a somewhat different analysis was applied. Little consideration was given to the question of whether a rational nexus existed between the means employed and the objective to be obtained. The answer to this question would have been yes,[72] because it is clear that Congress enacted the legislation at the request of the executive branch of the government[73] for the purpose of resolving problems which could rationally be classified as being connected with foreign affairs.[74] The discrimination between native-

[67] Perez v. Brownell, *supra* note 60, at 58.

[68] The Court determined that the voting by an American citizen in a political election of another country created a situation potentially embarrassing to the United States in the conduct of her foreign affairs, and that it manifested conduct in some measure inconsistent with sole allegiance to the United States.

[69] Perez v. Brownell, *supra* note 60, at 60.

[70] See Trop v. Dulles, 356 U.S. 88, 119-20 (1958) (dissenting opinion). Mr. Justice Frankfurter, dissenting, discusses the role of the Court in determining the constitutionality of expatriation legislation.

[71] Schneider v. Rusk, 377 U.S. 163, 166 (1964).

[72] See Schneider v. Rusk, 218 F. Supp. 302, 315 (1963) (dissenting opinion).

[73] See Tsiang, "The Question of Expatriation in America Prior to 1907," 60 Johns Hopkins Series, pt 3, at 104. Hearings Before the House Committee on Immigration and Naturalization, 76th Cong., 1st Sess. 135-39 (1940).

[74] *Cf.* note 106 *infra.*

born and naturalized citizens, although possibly not warranted by the circumstances, was at least grounded upon a rational basis,[75] since the automatic termination of citizenship extinguished the foreign relations problem created by the individual. The majority opinion asked whether the particular means adopted by Congress were reasonable, considering both the necessity for, and the adverse effects resulting from, the legislation.[76] The answer was no. In contrast, the majority in *Perez v. Brownell* had declined to weigh the value of the particular legislative choice against its adverse effects after it had once found a sufficient rational nexus. Thus the *Schneider* majority departed from the solution in *Perez,* and examined the reasonableness of the *particular* congressional choice for resolving a national problem.

In balancing the deprivation to the individual against the public need, the Court quoted Judge Fahy, who dissented in the district court: "Such legislation . . . would have to be justified under the foreign relations power 'by some more urgent public necessity than substituting administrative convenience for the individual right of which the citizen is deprived.' " [77] The majority's treatment of the issue appears similar to the Court's treatment of legislation restricting first amendment rights in pursuance of legitimate legislative objectives such as civil order. In these legislative areas, the Court has long demanded the existence of a rational nexus and, in addition, has required a clear showing that the public need for application of the restrictive legislation has outweighed the unquestioned necessity of promoting and protecting the first amendment rights to the greatest degree practicable.[78] Unlike the majority in *Perez,* this majority was not willing to indulge in a sweeping presumption of constitutionality.[79] The Court appeared to be giving citizenship higher priority in its constitutional scheme of values than heretofore.[80] It is logical that this "most precious right," [81] basic to the existence of the individual's other rights, should be guarded by the same analysis as first amendment rights.

The majority opinion briefly discussed three factors which militated against a finding that the statute was a reasonable exercise of legislative power. The statute limited to three years the period in which a naturalized citizen could go abroad without an extended return to the United States.[82] A limitation on a citizen's right to travel when and where he wishes does

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[75] *Cf.* text accompanying notes 32-34 *supra.*

[76] Schneider v. Rusk, *supra* note 63, at 167.

[77] *Ibid.*

[78] See Beauharnais v. Illinois, 343 U.S. 250 (1952); Kovacs v. Cooper, 336 U.S. 77 (1949); Schenck v. United States, 249 U.S. 47 (1919); Schneider v. Rusk, 218 F. Supp. 302, 315 (1958) (dissenting opinion).

[79] Perez v. Brownell, *supra* note 60, at 60. See Schneider v. Irvington, 308 U.S. 147 (1939), on the presumption of constitutionality indulged when ruling on legislation restricting freedom of speech.

[80] See Thomas v. Collins, 323 U.S. 516, 527 (1945), on the preferred position of first amendment rights.

[81] Kennedy v. Mendoza-Martinez, *supra* note 65, at 159.

[82] 66 Stat. 269 (1952), 8 U.S.C. § 1484(a) (1958).

not seem to be in keeping with traditional American concepts of freedom. Only some urgent national need should justify this limitation.[83] In addition, due to business and family connections still existing in his former country, it would appear that the naturalized citizen would have more compelling reasons for spending long periods of time abroad than would his native-born counterpart. The statute appeared to assume an opposite conclusion.

A second factor which appeared to influence the majority was the intrinsic nature of the activity which caused expatriation. Prior to *Schneider v. Rusk*, the Court had three times sustained the constitutionality of statutes defining expatriation.[84] In each decision the Court described the conduct manifesting the concurrence of the citizen "as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship." [85] The conduct involved was voting in a political election in a foreign nation,[86] swearing allegiance to another nation,[87] and taking a foreigner as a husband.[88] These and other acts defined under section 349 [89] as manifesting an intent to expatriate oneself were arguably of a much different character than mere residence. As said in the majority opinion: "Living abroad . . . is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance." [90] Prior to 1940, residence alone was not decisive in determining whether the intent of an individual was to expatriate himself. In the prior cases upholding expatriation statutes, the fact that the criticized conduct imported a lack of allegiance appeared to be crucial to the members of the Court who voted to sustain the constitutionality of the act.[91] The Court has held that Congress can define objective standards for determining when a citizen intends to expatriate himself.[92] However, the fact that the conduct relied upon by Congress tended to correlate convincingly with the intent attributed to those expatriated may more easily have brought the legislation within the requirement of due process of law.[93] Here the Court would not accept the contention that residence abroad manifested a lack of allegiance, and this was important in determining the reasonableness of the statute.

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[83] Aptheker v. Secretary of State, 378 U.S. 500 (1964). See Schneider v. Rusk, 218 F. Supp. 302, 321 (1958) (dissenting opinion).

[84] Perez v. Brownell, *supra* note 60; Savorgnan v. United States, 338 U.S. 491 (1950); Mackenzie v. Hare, *supra* note 58.

[85] Perez v. Brownell, *supra* note 60, at 61.

[86] *Id.* at 64.

[87] Savorgnan v. United States, *supra* note 84.

[88] Mackenzie v. Hare, *supra* note 58.

[89] 66 Stat. 245 (1952), 8 U.S.C. § 1431 (1958).

[90] Schneider v. Rusk, *supra* note 71, at 169.

[91] Kennedy v. Mendoza-Martinez, *supra* note 65, at 214 (dissenting opinion).

[92] Mackenzie v. Hare, *supra* note 58.

[93] In Savorgnan v. United States, *supra* note 84, the Court expressly found that petitioner did not intend to expatriate herself; however, this is not to say that the act of swearing allegiance to another nation would not, as a rule, correctly manifest this intent.

A third factor which the Court found important in reaching its decision was that the statute created "second class citizenship" because it applied only to naturalized citizens. Mr. Justice Douglas stated, "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." [94] By reasoning from this premise, Mr. Justice Douglas ignored material considerations which supported the enactment of this legislation. To the degree it was felt that return to one's former country might stimulate allegiance for that nation, his assertion of the rationale of the statute was correct.[95] To the extent that the dissent relies upon the presumption of residence abroad as indicating a lack of allegiance, this assertion is also not in error.[96] However, Mr. Justice Douglas did not do justice to the legislation when he asserted that the statute proceeded on the assumption that foreign-born citizens bear less allegiance than do native citizens. The naturalized citizen *did* create a peculiar problem for the government, and demonstrably one purpose of the statute under examination was to eliminate the problem.[97] When the naturalized citizen returns to his former nation, a peculiar problem arises [98] which may permit special classification. With such a rational basis, some discriminatory legislation arguably would not deny due process.[99] Therefore it may be error to condemn the statute's classification as arbitrary under an equal protection application of the due process clause of the fifth amendment.[100]

Conversely, there is strong tradition opposing any classification between native-born and naturalized citizens, beyond the express classification of the Constitution.[101] As a rule, the Supreme Court has not upheld such classifications.[102] In a case involving fraudulent naturalization, the Court remarked that "citizenship obtained through naturalization is not second class citizenship." [103]

The dissent relied upon *Mackenzie v. Hare* as authority for a classification of the type under consideration.[104] In that case, the Court sustained the practice of relieving women of their citizenship when they married foreigners, while men retained their status as citizens. The classification

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94 Schneider v. Rusk, *supra* note 71, at 168.

95 Schneider v. Rusk, 377 U.S. 163, 168 (1964).

96 *Id.* at 178 (dissenting opinion).

97 *Cf.* text accompanying notes 32-34 *supra.*

98 See Roche, "The Loss of American Nationality—The Development of Statutory Expatriation," 99 U. Pa. L. Rev. 25, 41 (1950); *cf.* text accompanying notes 32-34 *supra.*

99 See Schneider v. Rusk, *supra* note 63, at 176 (dissenting opinion). Roche, *supra* note 98, at 41 states: "It is possible that Congress could constitutionally create second class citizenship."

100 See Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Hirabayashi v. United States, 320 U.S. 81, 100-01 (1943).

101 Osborn v. United States Bank, 22 U.S. (9 Wheat.) 737 (1824).

102 Knauer v. United States, 328 U.S. 654 (1946); Luria v. United States, 231 U.S. 9 (1913); United States v. Wong Kim Ark, 169 U.S. 649 (1898).

103 Knauer v. United States, *supra* note 102, at 658.

104 Schneider v. Rusk, *supra* note 71, at 170 (dissenting opinion).

was upheld upon the "unity of interest" doctrine in vogue in 1915, and upon the widely accepted principle of international law, then prevailing, that this act by naturalized women was an act of expatriation.[105] The majority did not accept *Mackenzie* as authority for supporting the *Schneider* classification. The *Mackenzie* Court was able to find that marriage to a foreigner reasonably implied a potential lack of allegiance on the part of a woman. The *Schneider* majority could not find residence abroad a reasonable basis for implying a potential lack of allegiance in a naturalized citizen. Thus, the premise of the marriage statute was held to be reasonable; the premise of the residence statute was held unreasonable.

Mackenzie aside, it is arguable that the statute should not have been invalidated solely on the basis of the differentiation between native-born and naturalized citizens. This is not to say that this factor, coupled with the statute's other undesirable features, was not enough to render the statute unconstitutional in any balancing of competing interests.

Regarding section 352(a)(1), two other factors not explicitly discussed in the majority opinion deserve comment. The operation of the statute often did not conform to the primary, expressed purposes for its existence. The statute provided for automatic expatriation of all those residing in their country of former citizenship, regardless of whether or not these individuals had created the type of national problem that the statute purported to obviate. Two of the major purposes of the statute were to keep the government from having to intervene in behalf of those persons who, for all intents and purposes, had abandoned citizenship and to provide a simple administrative answer for determining when those individuals involved in disputes had in fact given up citizenship.[106] However, the *effect* of the statute expatriated many who had created no international problem for the government, needlessly depriving them of citizenship. As was said by Mr. Justice Brennan, the power of Congress to expatriate exists only "where its exercise was intrinsically and peculiarly appropriate to the solution of serious problems inevitably implicating nationality. . . ." [107]

A second factor which is vitally important in any judicial determination involving a balancing of competing interests is the existence of possible alternative measures.[108] Several proposals have been suggested in the past and the distinct possibility that functional alternatives exist may have been an implicit factor influencing the majority.[109]

Contrasted against the interests which negatived section 352(a)(1) were its partially interrelated purposes and motivating factors: avoidance of United States involvement in disputes when foreign nations exerted control over their nationals, ignoring the effect of United States naturaliza-

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[105] Mackenzie v. Hare, *supra* note 58, at 311.

[106] See Hearings Before the House Committee on Immigration and Naturalization, 76th Cong., 1st Sess. 135-38 (1940); 86 Cong. Rec. 11945-49 (1940); 41 Cong. Rec. 1463 *et seq.* (1907); Citizenship Board, *supra* note 30, at 23-28.

[107] Kennedy v. Mendoza-Martinez, *supra* note 65, at 187 (concurring opinion).

[108] Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

[109] See Roche, *supra* note 98, at 71; Note, 49 Cornell L.Q. 78-79 (1963).

tion; administrative convenience in determining when the citizen had expatriated himself (in contrast to nineteenth century procedures); the feeling that the citizen should not be entitled to the benefits of American citizenship without living in the United States; and the assumption that either the naturalized citizen bears less allegiance to the United States or that this allegiance is lost more easily on return to his former nation.

The first two purposes were rational responses to national problems and, on the basis of prior decisions of the Supreme Court, some congressional action could have been taken to eliminate or mitigate these problems. The question involved, however, was whether section 352(a)(1) was a reasonable decision given all of the existing circumstances, including important restrictive factors suggesting that the statute was not appropriate.

It would appear that the latter two motivating factors did not fall within the power ascribed to Congress, and would not be appropriate reasons for legislation because they did not involve a problem of foreign affairs. The Constitution does not direct that a citizen have residence in the United States in order to maintain his citizenship. In this day and age it does not seem rational that a citizen should lose his citizenship solely because his residence is abroad. Nor, as the majority opinion maintained, is it reasonable to assume that the allegiance of the naturalized citizen is jeopardized by residence in a country where he formerly held citizenship.

Because the statute eliminated some instances of dual citizenship, the dissent relied upon this as being a policy factor supporting the statute's constitutionality. The statute, however, operated regardless of whether or not a dual citizenship problem was extant and whether or not another nation claimed the citizen as its own. The statute's effect on the citizen could often have been statelessness in the situation where the individual was expatriated by the United States but where he was not recognized as a citizen in the nation where he was residing. In addition, it would appear that there is no basis for statutory accommodation with nations which recognize no right of expatriation in their citizens without abandonment of the traditional United States' attitude that expatriation requires a decision by the citizen.

Because *Schneider v. Rusk* does *not* stand for the proposition that Congress may not define expatriation, the dissent's reliance on the history of expatriation in the United States only supports its argument if that history sustains expatriation on the basis of *residence.* It is stretching the point to argue that since residence abroad, coupled with the existence of other factors, was once used to create a continually rebuttable presumption of expatriation, residence alone can now be relied upon exclusively to determine whether an individual gave up his citizenship rights. In addition, assuming history did support the existence of this statute, the impact of this history would be considerably mitigated by the Court's method of determining the constitutionality of the statute. History is only one factor to be considered in the balancing of interests. With strong competing interests and values opposing existence of the statute, it is questionable whether the legislation could be sustained.

In attacking the majority's due process argument, the dissent appears to misconstrue the majority's reasoning. The dissent suggests that the majority opinion was based solely upon the arbitrary classification between native-born and naturalized citizens.[110] However, the majority opinion provided several grounds for declaring section 352(a)(1) unconstitutional, classification being only one of them. Further, Mr. Justice Clark reasons that the majority position implies Congress could expatriate all citizens and that, given this premise, Congress could certainly pass a more narrowly confined statute aimed at those citizens who create special problems for the federal government.[111] To the contrary, the majority opinion explicitly states that there are formidable limits on the power of Congress to expatriate or denaturalize anyone.[112] In reasoning that Congress could constitutionally enact the more narrow statute expatriating naturalized citizens, the dissent implicitly refuses to accept the balancing test applied in the majority opinion.

In summary, the decision in *Schneider v. Rusk* does not directly impair the constitutionality of similar statutes defining expatriation because the Court invalidated the statute on the basis of its peculiar operation and effect. The significance of the instant case lies in the method of analysis adopted by the majority—the application of the "balancing of interests" test in addition to the rational nexus requirement of *Perez*. If this method of analysis is followed in resolving future challenges to expatriation statutes, the statutes will be more closely scrutinized than heretofore. A showing that the necessity for particular legislation outweighs its adverse effects will be required by the Court. Furthermore, those Court members who maintain that expatriation is unconstitutional without the subjective assent of the individual involved could effectively utilize the balancing test to strengthen their position. The requirement that the conduct relied upon to show expatriation be "conduct inconsistent with undiluted allegiance to this country" was strongly emphasized in this case. This requirement could be applied so broadly as to demand a showing that the conduct prescribed be so clearly inconsistent with "undiluted allegiance" that it would corroborate subjective assent by the citizen. Thus the Court could alter the constitutional demands upon expatriation legislation without explicitly applying a different test.

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110 Schneider v. Rusk, *supra* note 95, at 176 (dissenting opinion).

111 *Ibid.*

112 Schneider v. Rusk, 377 U.S. 163, 168 (1964): "This Court has never held that Congress' power to expatriate may be used unsparingly in every area where it has general power to act."