"TO GIVE TO THIS CITIZEN THAT WHICH IS HIS OWN": JUSTICE BLACK'S ORIGINALIST INTERPRETATION OF THE FOURTEENTH AMENDMENT CITIZENSHIP CLAUSE IN *AFROYIM V. RUSK*

IBAD JAFRI*

ABSTRACT

This Note examines the evolution of Justice Hugo Black's originalist approach to the Fourteenth Amendment Citizenship Clause, culminating in the majority opinion he authored in 1967's Afroyim v. Rusk. In that landmark decision, the Court ruled that citizens of the United States may not be involuntarily deprived of their citizenship. The Court's ruling in Afroyim struck down a federal law mandating loss of U.S. citizenship for voting in a foreign election, overruling 1958's Perez v. Brownell, in which the Court upheld loss of citizenship under similar circumstances. The Note examines primary source material from the Library of Congress—in particular, cert memoranda and correspondence between the Justices—to show Justice Black's eventual reliance on a narrow selection of materials. Specifically, Justice Black uses the text of the Amendment and floor speeches by the two principal framers of the Fourteenth Amendment, New York Representative John Bingham and Michigan Senator Jacob Howard. The Note argues that Justice Black's approach ultimately shapes much of Chief Justice Warren's jurisprudence on the Citizenship Clause. The Note concludes by showcasing the legacy of Justice Black's opinion as a landmark work of progressive originalism.

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* J.D. expected, Georgetown University Law Center, 2022; B.A., International Relations and Cinema & Media Studies, Carleton College, 2017.

I. BACKGROUND

Much of Beys Afroyim's life is shrouded in mystery. Various sources state that he was born in either 1893 or 1898, either in Ryki, Poland, or Riga, Latvia.[1] Certain details of Mr. Afroyim's life are beyond dispute, however. In 1912, Afroyim immigrated to the United States, and on June 14, 1926, he was naturalized as a U.S. citizen.[2] In the United States, Afroyim obtained a top-tier arts education and was commissioned to paint portraits of cultural luminaries like George Bernard Shaw, Theodore Dreiser, and Arnold Schoenberg.[3] In 1949, Afroyim left the United States and settled in Israel, together with his wife, famed artist Soshana Afroyim, herself an acclaimed artist. And in 1951, he voted in an Israeli election.

In 1960, following the breakdown of his marriage, Afroyim sought to return to the United States. The State Department, however, refused to renew his passport, claiming that his 1951 vote caused him to forfeit his citizenship under the Nationality Act of 1940. His challenge of that decision, *Afroyim v. Rusk*, progressed to the Supreme Court in 1967, when the Court determined that Afroyim's right to retain his citizenship was guaranteed by the Citizenship Clause of the Fourteenth Amendment. In so doing, the Court struck down the Nationality Act and overruled its precedent from *Perez v. Brownell*, which had upheld loss of citizenship under similar circumstances less than a decade earlier.[4] The driving force behind that decision was Justice Hugo Black's proto-originalist interpretation of the Citizenship Clause. Black's opinion presented an expansive, originalist view of the Citizenship Clause. As Black describes it,

> We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.[5]

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1. *Compare* PETER J. SPIRO, AT HOME IN TWO COUNTRIES: THE PAST AND FUTURE OF DUAL CITIZENSHIP 153 (2016), *with* Naturalization Record of Beys Afroyim, (on file with the U.S. National Archives & Records Administration).
2. *Id.*
3. *Id.*
4. Perez v. Brownell, 356 U.S. 44, 62 (1958).
5. Afroyim v. Rusk, 387 U.S. 253, 268 (1967).

Black's perspective on this issue, first articulated in *Afroyim*, has taken root among scholars and jurists in the successive decades. This opinion now provides an invaluable look at Justice Black's textualism and has shaped much of the modern conception of the Citizenship Clause as an affirmative source of rights.

II. THE DEVELOPMENT OF JUSTICE BLACK'S VIEWS ON THE CITIZENSHIP CLAUSE PRE-AFROYIM

Famously, Justice Black is both a textualist and a proto-originalist. He hewed closely to an originalist interpretation of the text of the Constitution and Bill of Rights well before the rise of modern originalists like Justice Antonin Scalia.[6] Indeed, his jurisprudence typically involves constructing original interpretations of the Constitution and the Bill of Rights. David Strauss described Justice Black as one of the "most prominent originalists of the last hundred years . . . trying to sweep away what [he] saw as an established but mistaken approach to the Constitution."[7] Justice Black would describe his jurisprudence in similar terms, especially with regards to the Bill of Rights, which he believes is completely incorporated onto the states via the Fourteenth Amendment, which was written to address citizenship and equal protection concerns in the immediate aftermath of the Civil War.

> I would follow what I believe was the original intention of the Fourteenth Amendment—to extend to all the people the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.[8]

However, Justice Black's view of the Citizenship Clause took time to develop prior to *Afroyim*. Jurisprudence from earlier in Black's thirty-four-year tenure on the Court evinces a narrower vision of the Fourteenth Amendment broadly and the Citizenship Clause in particular, but still establishes serious thought about the history behind a pure textualist approach to the Fourteenth Amendment, which culminates in the expansive view of the Citizenship Clause later inherent in *Afroyim*.

Early signs of Justice Black's *Afroyim* opinion are evident in his 1947 dissent in *Adamson v. California*. Although *Adamson* did not directly concern the Citizenship Clause, Black's opinion indicates that he has devoted serious thought to the text of Fourteenth Amendment and its historical underpinnings. In *Adamson*, Black harkens back to the framers of the Fourteenth

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6. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY xi (2d ed. 1997).
7. David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL'Y 137 (2011).
8. *Id.*

Amendment, New York Congressman John Bingham and Michigan Senator Jacob Howard. Black's emphasis on Bingham is particularly interesting, as he was a largely forgotten figure prior to Black's approving references to him in *Adamson*.[9] Yet Black praises Bingham here as "the [James] Madison of the first section of the Fourteenth Amendment."[10] Black's dissent includes a detailed appendix explaining the history of the Fourteenth Amendment. There, he quotes Bingham's speech before the thirty-ninth Congress calling for the adoption of the Amendment. In that speech, Bingham explicitly ties the Amendment to the cause of uprooting and ending the vestiges of slavery by affirming the citizenship of former slaves. As Bingham describes it,

> [T]here never was even colorable excuse, much less apology, for any man North or South claiming that any State Legislature or State court, or State Executive, has any right to deny protection to any free citizen of the United States within their limits in the rights of life, liberty, and property. Gentlemen who oppose this amendment oppose the grant of power to enforce the bill of rights.[11]

Black also reveres Howard, who was already well-regarded as the ideological father of the Fourteenth Amendment.[12] In *Adamson*, he quotes in tandem from both Congressman Bingham and from Senator Howard's speech introducing the Fourteenth Amendment in the Senate.[13] Black echoes their views of the Fourteenth Amendment's specific role in dismantling the institution of slavery, writing the following:

> I cannot consider the Bill of Rights to be an outworn 18th century 'strait jacket' . . . Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced, and respected.[14]

At this time, Justice Black had not exhibited the absolutist view of the Citizenship Clause seen in *Afroyim*. He committed himself the guarantees of citizenship described by Bingham and in *Adamson*, but had not extended

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9. Daniel Crofts, *American Founding Son: John Bingham and the Invention of the Fourteenth Amendment*, 15 CIVIL WAR BOOK REV. 4 (2013).

10. Adamson v. People of State of California, 332 U.S. 46, 74 (1947).

11. Cong. Globe, 39th Cong., 1st Sess., 2890, 2896 (1866).

12. Randy E. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, 43 HARV. J.L. & PUB. POL'Y 1 (2020).

13. *Adamson*, 332 U.S. at 73 (quoting Cong. Globe, 39th Cong., 1st Sess. 10, 14 (1865)).

14. HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 120–21 (1st ed. 2006) (quoting *Adamson*, 332 U.S. at 89).

those guarantees to include protection against involuntary revocation of citizenship. However, his references to Bingham and Howard show that decades before *Afroyim*, Black was deeply committed to uncovering the original meaning of the text of the Fourteenth Amendment, and devoted to emphasizing the text of the Constitution much as he would later in *Afroyim*.

In 1949, Justice Black authored the majority opinion in *Klapprott v. United States* and expressed a much narrower view of the Citizenship Clause than the perspective he came to adopt in *Afroyim*. In *Klapprott*, although the Court reversed the revocation of plaintiff's citizenship and, Justice Black outlined scenarios in which citizenship could be revoked by the government without the consent of citizens. Justice Black agreed with the government in stating that the United States Code "plainly authorizes courts to revoke the citizenship of naturalized citizens after notice and hearing."[15] Furthermore, while Justice Black sides with the plaintiffs in declaring that "Congress did not intend to authorize courts automatically to deprive people of their citizenship for failure to appear,"[16] this statement implies a belief by Justice Black that the courts *could* deprive people of their citizenship if authorized to do so by Congress—directly at odds with the clear limitations on Congressional authority expressed by Black in *Afroyim*.[17] He does not refer to the Citizenship Clause at any point in *Klapprott*.

Black's view on the Citizenship Clause had clearly evolved by the time of the 1958 denationalization cases, most notably in *Perez v. Brownell*. There, the Court, in an opinion written by Justice Frankfurter, upheld the revocation of citizenship from Clemente Martinez Perez. Perez, an American citizen by birth, failed to register for the draft during World War II and voted in multiple Mexican elections. Justice Black signed onto Chief Justice Warren's dissent in *Perez*, which objected to the revocation on Citizenship Clause grounds. That dissent asserts that citizenship is a fundamental, irrevocable right from which other rights flow:

> Citizenship is man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf.[18]

Stated succinctly, Chief Justice Warren asserts that "United States citizenship is thus the constitutional birth-right of every person born in this country. This Court has declared that Congress is without power to alter this effect of birth in the United States."[19]

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15. Klapprott v. United States, 335 U.S. 601, 609 (1949).
16. *Id.* at 610.
17. *Afroyim*, 387 U.S. at 268.
18. *Perez*, 356 U.S. at 64.
19. *Id.* at 66.

The *Perez* dissent was authored by Chief Justice Warren. However, the historical record indicates that its Citizenship Clause arguments are primarily Justice Black's doing. Handwritten notes from Black to Chief Justice Warren in response to a draft circulated by Warren shed light on Black's thinking on the issue. As Black describes it, "I have made a number of pencil memorandums in your two dissents nearly all of which rest on the same basis—namely, I think constitutional citizenship can be lost *only* by *voluntary renunciation*."[20] Black echoes these arguments in *Trop v. Dulles* and *Nishikawa v. Dulles*. While no justices explicitly refer to the Citizenship Clause or even Fourteenth Amendment broadly at oral argument in *Trop*, Justice Black poses a question to plaintiff's counsel clearly alluding to the Citizenship Clause, asking if the Constitution "makes [Trop] a citizen of the country . . . and therefore, protects him from being banished as a punishment for a crime or for anything else?"[21] Black's concurrence with Warren's majority opinion in *Trop* emphasizes that "[n]othing in the Constitution or its history" supports the notion of a power vested in military authorities to denationalize an American citizen.[22] Here, Black begins to apply his textualist perspective on the Fourteenth Amendment to the Citizenship Clause in particular.

Meanwhile, in *Nishikawa*, Black continues his pivot towards the emphasis on the Citizenship Clause ultimately exhibited in *Afroyim*. *Nishikawa* offers an early test of the ideas expressed in *Afroyim*, as the Court ruled that a dual citizen of the United States and Japan who had served in the Japanese military during World War II could not be held to have lost his American citizenship unless the government could prove that he had voluntarily undertaken his Japanese military service, and in so doing, waived his citizenship.[23] Plaintiff's counsel—Fred Okrand and A.L. Wirin of the American Civil Liberties Union (ACLU) of Southern California, both of whom were involved with the ACLU's representation of Fred Korematsu[24]—did not initially focus on the Fourteenth Amendment. As a result, cert memoranda to the justices—Justice Douglas in particular—focuses on precedents from *Bruni v. United States*, *Lehmann v. Acheson*, and *Angello v. Dulles* indicating that "proof of conscription shifts the burden of proof to the government to prove that service was voluntary."[25] The memorandum makes only a brief reference to the Fourteenth Amendment in the final two sentences, where it deliberately avoids the question of the Citizenship Clause. "Petitioner also re-asserts . . . that expatriation of US citizens is unconstitutional under §1 of

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20. Hugo L. Black to Earl Warren, Justice Black's Suggestions on *Perez v. Brownell*, at 5, Earl Warren Papers, Library of Congress, Box 582 (emphasis in original).

21. Oral Reargument at 25:17, Trop v. Dulles, 356 U.S. 86 (1958).

22. *Trop*, 356 U.S. at 105.

23. Mitsugi Nishikawa v. Dulles, 356 U.S. 129, 138 (1958).

24. Fred Okrand, *Forty Years Defending the Constitution*, ONLINE ARCHIVE OF CAL. (1982), https://perma.cc/8YUZ-YYN6; *see also* Paul Weeks, *Lawyer Fought for All Rights*, RECORD (May 1, 2007), https://perma.cc/HK5X-GSE5.

25. *Nishikawa v. Dulles* Cert Memorandum at 1, William O. Douglas Papers, Library of Congress, Box 1185, Case No. 19 (Nov. 6, 1956).

the 14th Amendment. Although the question was briefed in [*Gonzales v. Landon*], it was not necessary to reach it."[26] Chief Justice Warren's majority opinion, meanwhile, omits mentioning the Fourteenth Amendment entirely. Yet Justice Black differentiates himself from the other justices by emphasizing the Citizenship Clause in his concurrence.

> The Fourteenth Amendment 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.' Nishikawa was born in this country while subject to its jurisdiction; therefore American citizenship is his constitutional birthright.[27]

While Justice Black had already exhibited a deep understanding of the Fourteenth Amendment, *Nishikawa* presents the first-ever example of him explicitly building an opinion around the Citizenship Clause. It would not be the last.

III. *AFROYIM V. RUSK* AND JUSTICE BLACK'S USE OF THE CITIZENSHIP CLAUSE

The *Afroyim* decision signaled another victory for the Court's progressives in overturning *Perez v. Brownell*. Yet while the ultimate verdict tracks with our modern-day understanding of Warren Court jurisprudence, the majority opinion is rooted in Justice Black's textualist philosophy and originalist understanding of the Clause. In *Afroyim*, rather than trending boldly towards Warren-style reformism or reading unenumerated rights into text as Justices Douglas or Blackmun in later cases, Justice Black applies his proto-originalist, textualist understanding to the Citizenship Clause.

Perhaps anticipating Black's increasing interest in the text of the Citizenship Clause, as well as the influence Black held over Warren in *Perez*, Afroyim's counsel, Nanette Dembitz, emphasizes it in Afroyim's petitioner's brief. Dembitz, a renowned legal figure in her own right and second cousin of Justice Louis Brandeis,[28] later received an appointment to a family court judgeship in New York City and was therefore required to recuse herself from the *Afroyim* case prior to oral argument. In this brief, Dembitz saw the Court's shifting emphasis toward the Citizenship Clause and wove it into each section of the argument, thematically binding the brief together. The brief divides the argument into three sections:

> I. The expatriation provision is invalid under the Fourteenth and Fifth Amendments because a vote by an American citizen in a foreign election cannot reasonably be deemed in itself to

26. *Id.*
27. *Nishikawa,* 356 U.S. at 138.
28. *Judge Nanette Dembitz, 76, Dies; Served in New York Family Court*, N.Y. Times, April 5, 1989, at B10.

manifest an abandonment or dilution of allegiance to the United States . . . .

II. The expatriation provision violates the Fourteenth Amendment, the due process guarantee of the Fifth Amendment, and the First Amendment because it imposes loss of citizenship and restricts freedom of expression without sufficient justification in public need . . . .

III. The statute is invalid under the Fifth, Sixth and Eighth Amendments because it violates the safeguards provided by those amendments with respect to the imposition of punishment.[29]

Section I invokes the Citizenship Clause briefly, referring to *Perez*'s dissent's claim that "the citizenship ordained by the Fourteenth Amendment can be abrogated by the Government only if the citizen voluntarily renounces it or his conduct manifests an abandonment of allegiance."[30] This, of course, does not stem from Warren, but rather from Black. The emphasis on the Citizenship Clause was maintained throughout this section of the argument, as the final subsection argues the Nationality Act is unconstitutional because of "violation of [the] citizenship guarantee of [the] Fourteenth Amendment and [the] due process guarantee of [the] Fifth Amendment."[31]

Section II pivots towards the Fifth Amendment due process clause, but goes hand-in-hand with Black's Citizenship Clause concerns by arguing that expatriation must meet a uniquely stringent constitutional test as "[a]brogation of a right explicitly guaranteed by the Fourteenth Amendment is intolerable on a lesser justification than infringement of a First Amendment right or other basic liberties."[32] Section III of the brief is less fixated on the Fourteenth Amendment, as the statement of its argument focuses on the Fifth, Sixth, and Eighth Amendments. However, this section of the argument spans only the final two pages of a thirty-six-page brief, and even there, the argument nods in the direction of the Citizenship Clause, with a footnote claiming that "[s]tatelessness is, among other things, homelessness," and that "[a]n essential benefit of citizenship is the citizen's right to reside in or return to the territory of his State."[33] Meanwhile, respondent's brief, filed by the office of Solicitor General Thurgood Marshall, does not mention the Fourteenth Amendment, much less the Citizenship Clause, priming it for a negative response from Justice Black. Instead, that brief focuses on a rational basis test, arguing the following:

29. Afroyim Pet'r's Br. I-ii, Dec. 17, 1956.
30. *Id*. at 4.
31. *Id*. at 17.
32. *Id*. at 19.
33. *Id*. at n.30.

A. Voting in a political election in a foreign state is conduct which Congress could rationally deem to be inconsistent with claims of American citizenship
B. Congress could reasonably conclude that embroilment or embarrassment in the conduct of foreign affairs might stem from an American citizen's voting in a foreign election
C. There is no First Amendment bar to the expatriating force of Section 401(e)[34]

Despite the respondent's brief ignoring the Fourteenth Amendment and its Citizenship Clause entirely in favor of emphasizing the First Amendment and political concerns, the reply brief, also filed by Dembitz, maintains a connection to the Fourteenth Amendment citizenship clause by implying that revocation of citizenship is only valid when done so with clear intent by the citizen in question. As Dembitz writes, "obtaining foreign naturalization and taking an oath of Foreign allegiance are acts addressed precisely, consciously and deliberately to the existence of citizenship and allegiance."[35] Dembitz also directly rebuts concerns about the political implications of the ruling, writing that "[t]hough the *Perez* opinion hypothesizes embarrassment in this country's foreign relations from an American citizen's voting abroad, even *Perez* does not support respondent's dangerous suggestion . . . that the 'potentiality of embarrassment' strengthens the inference of the citizen's commitment to another government."[36] Dembitz buttresses her Citizenship Clause argument by filing a brief, three-page memorandum supplemental to Afroyim's cert petition demonstrating "the ongoing impact of the expatriation provision at bar, on the Fourteenth Amendment guarantee of citizenship."[37] Here, Dembitz offers the only concrete evidence of the impacts of allowing the federal government to expatriate citizens presented in this case. That memorandum proceeds with a table showing the number of United States citizens who were administratively determined by the State Department to have lost citizenship under sections 401(e) and 349(a) of the Immigration and Nationality Act from 1961 through 1965. Combined, this amounted to approximately 5,376 instances of lost citizenship.

Conference discussions ahead of *Afroyim* and *Perez* confirm that the entire Court immediately recognized *Afroyim* as directly in conflict with *Perez v. Brownell*. The justices' conference following the cert petition makes repeated mention of *Perez*, according to Justice Douglas's notes on the occasion. Douglas's notes depict a court whose ultimate voting pattern did not shift from their initial impression at conference, with a majority comprised of Chief Justice Warren and Justices Black, Douglas, Brennan and Fortas, and a

34. Afroyim Def.'s Br. 1.
35. Afroyim Pet'r's Reply Br. 2, Feb. 2, 1967.
36. *Id*. at 4.
37. Afroyim Pet'r's Supp. Mem. 1, Sept. 23, 1966.

dissent shared by Justices Harlan, Clark, Stewart, and White. However, much of the Court was more concerned with the political ramifications of the case than with its constitutional basis. At conference, Warren and Clark made special note of the fact that a key difference between *Perez* and *Afroyim* was Afroyim's origins in Israel, which they felt added a foreign policy-oriented dimension to the case.[38] Justice Clark took a particular interest in this issue, as Justice Douglas characterized his remarks at conference by writing, "*Perez* [does not] permit foreigners to vote, Israel does—so we need not overrule."[39] Justice Brennan's notes also mention this line of reasoning at conference, with Brennan writing about Justice Clark's concerns that the fact that *Perez* "didn't allow foreigners to vote," unlike Israel, could result in a "disruption to foreign relations."[40]

However, conference notes in the runup to *Afroyim* indicate that the political concerns discussed by other justices did not comprise the bulk of Justice Black's calculus, and that Dembitz needed to respond accordingly in Afroyim's cert petition. Indeed, unlike the denationalization cases and Justice Black's eventual majority opinion, the certiorari petition does not explicitly refer to the Citizenship Clause, but instead evokes issues of equal protection, urging that "statutes infringing upon constitutional rights—among which citizenship is the most precious—must be narrowly drawn, and tailored to the specific needs which are advanced in justification."[41] The petition also addresses the political concerns of the other justices by arguing at length that Afroyim's act of voting in an Israeli election does no harm to the United States. One can speculate that this approach was designed to establish that the government had no compelling interest at stake in revoking Afroyim's citizenship, and that, without compelling government interest and a narrowly tailored law, Congress's revocation of citizenship violates the strict scrutiny test applied regularly by the Warren Court, most famously in *Brown v. Board of Education*.

Prior to oral argument, Dembitz received an appointment to a family court judgeship in New York City and recused herself from representing Mr. Afroyim. After her departure, Mr. Afroyim's case took a different form. Arguing before the Supreme Court, ACLU general counsel Edward Ennis—an experienced Supreme Court litigator who would become the organization's president two years later, and, like *Wirin*, was involved in *Korematsu*—turned his case away from the strict scrutiny-centric language of the cert petition and towards reasoning based on the Citizenship Clause, synchronizing it with

38. *Afroyim v. Rusk* Conference Notes, at XX, William O. Douglas Papers, Library of Congress, Box 1379, Case No. 456 (Feb. 24, 1967).

39. *Id.*

40. *Afroyim v. Rusk* Conference Notes, at XX, William J. Brennan Papers, Library of Congress, Box I:145, Docket Books, Case No. 456 (Feb. 24, 1967).

41. *Afroyim v. Rusk* Cert Petition, at XX, William O. Douglas Papers, Library of Congress, Box 1379, Case No. 456.

Justice Black's arguments in the denationalization cases. Barely seven minutes into oral argument, Ennis authoritatively argues that:

> where we're dealing with citizenship granted by the Fourteenth Amendment, a Congress has . . . no authority under the Constitution to remove United States citizenship, [and] that this can only be done by the voluntary act of the United States citizen, and all that the power of Congress is, is to regulate the manner in which this voluntary expatriation shall be expressed.[42]

Ennis tailored his argument to Black's proto-originalist sympathies by implicitly arguing that only a very narrow range of materials were relevant to the inquiry into congressional intent upon the enaction of the Fourteenth Amendment. In response to a question by Justice Clark about congressional intent, Ennis instead argues that "an examination of this history indicates that there was no evil that Congress was trying to prevent."[43] Justice Black, for his part, cleared the way for Ennis to maintain a focus on the Citizenship Clause. Early on at oral argument, Ennis addressed Justice Clark's concerns about the implications of this ruling on foreign relations in a manner that still played to Black's originalist approach towards the Fourteenth Amendment. First, Ennis downplayed the political implications of the ruling while maintaining a focus on the government's interest in maintaining an allegiance to citizenry, saying that "there's not the slightest indication that voting in a foreign . . . has any effect on our foreign relations."[44] Ennis also briefly addressed the State Department's directive regarding revocation of citizenship. The State Department's directive claimed that:

> [t]aking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto, which is inconsistent with continued allegiance to the United States whether or not the person in question has acquired the nationality of the foreign state.[45]

In response, Ennis argued only that the State Department's case in this regard was rooted in conjecture, and that State lacked factual support for that assertion.

Justice Black made no acknowledgement of those questions and showed where his focus was with a series of rapid-fire questions concerning the Citizenship Clause. True to form, Justice Black's concerns were not on the political implications of the case, but instead fixated on whether Afroyim's argument comported with the text of the Constitution, and the Citizenship

42. Oral Argument at 6:31, Afroyim v. Rusk, 387 U.S. 253 (1967), https://perma.cc/QT8X-TQ9T.
43. *Id.*
44. *Id.*
45. *Id.*

Clause in particular. Justice Black began by asking Ennis if "voting would in a foreign country into some extent effect the foreign relations of this county, would that answer to your argument under the Fourteenth Amendment, to the effect that citizenship is then granted and can only be lost by giving it up?"[46] Ennis immediately answered in the negative. Black's two successive questions serve only to reiterate his characterization of Ennis's arguments. Black tacitly establishes his agreement with petitioner's interpretation of the Citizenship Clause in asking clarifying questions allowing Ennis to establish that, as Black described it at oral argument, "it is not sufficient to show a voluntary renunciation of citizenship by an American citizen to show that he voted in a foreign election," and that "under the Fourteenth Amendment, there must be a plain and avowed renunciation of citizenship in order for a citizen to be stripped of it."[47]

In total, Justice Black posed three consecutive questions to Ennis concerning the Fourteenth Amendment and the substance of his argument. Immediately after Justice Black's line of questioning, Chief Justice Warren followed Black's lead, emphasizing the Citizenship Clause in his questioning as well. Following a few more inquiries on Fourteenth Amendment grounds, Justice Black proceeded to ask no more questions for the remainder of oral argument apart from one clarifying question he posed to defense counsel about the stipulations made in the complaint. Evidently, Justice Black had heard enough after Ennis responded in the affirmative to his own assertion that "under the Fourteenth Amendment, there must be a plain or a valid renunciation of citizenship in order for a citizen [to be] stripped of it."[48]

Justice Black's majority opinion in *Afroyim v. Rusk* follows in this originalist vein. Once again, Chief Justice Warren follows his lead on the Citizenship Clause, as evidenced Warren's brief notes to Black celebrating his opinion as "magnificent," and remarking "[m]ay *Perez* rest in peace!" In *Afroyim*, the Court emphasizes the lack of Constitutional authority for the Bill under which Afroyim's citizenship was revoked. Black roots the opinion in an originalist understanding of Congress's power to take away an individual's American citizenship. Here, Justice Black contends that "the Government was granted no power, even under its express power to pass a uniform rule of naturalization, to determine what conduct should and should not result in the loss of citizenship."[49] Justice Black's opinion is further crystallized by the fact that, while the opinion dwells at length on the Fourteenth Amendment, it avoids any discussion of the Fifth Amendment Due Process Clause, despite the fact that petitioner's brief devoted equal parts to the Fifth and Fourteenth Amendments.

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46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 257.

Although the opinion is rooted in the text of the Fourteenth Amendment and the Citizenship Clause, Justice Black employs legislative histories as well. As Black writes, "[o]n three occasions, in 1794, 1797, and 1818, Congress considered and rejected proposals to enact laws which would describe certain conduct as resulting in expatriation."[50] He showcases one particularly non-textualist avenue to arrive at his conclusion by citing the legislative history surrounding the unratified Titles of Nobility Clause—a source not used in the petitioner's brief. Black refers to the legislative history of "a proposed Thirteenth Amendment, subsequently not ratified, which would have provided that a person would lose his citizenship by accepting an office or emolument from a foreign government."[51] The fact that this proposal had been framed as a constitutional amendment, rather than an ordinary act of Congress, was seen by the majority as showing that, even before the passage of the Fourteenth Amendment, Congress did not believe that it had the power to revoke any person's citizenship. Furthermore, Black cites responses to this legislation from individual members of Congress indicating an originalist understanding of the Citizenship Clause that tracks with the petitioner's supplemental brief regarding expatriations. Black references the rebuke of this legislation by Congressman Lowndes of South Carolina.

> But, if the Constitution had intended to give to Congress so delicate a power, it would have been expressly granted . . . . The effect of assuming the exercise of these powers will be, that by acts of Congress a man may not only be released from all the liabilities, but from all the privileges of a citizen. If you pass this bill, . . . you have only one step further to go, and say that such and such acts shall be considered as presumption of the intention of the citizen to expatriate, and thus take from him the privileges of a citizen.[52]

Yet the use of these legislative histories does not indicate any wavering in Black's strident originalism. Rather, this draws the boundaries of Justice Black's approach to textualism and proto-originalism. Justice Black does not cite legislation or conference hearings in the way that Justice Harlan might. Rather, he includes congressional deliberations only when they revolve around the Fourteenth Amendment itself, as Lowndes's argument does at its outset. The basis of the opinion is the text of the Constitution, while the legislative histories are merely a supplement. As Black describes it, "Though the framers of the [Fourteenth] Amendment were not particularly concerned with the problem of expatriation, it seems undeniable from the language they used that they wanted to put citizenship beyond the power of any governmental

50. *Id*.
51. *Id*. at 258–59.
52. *Id*. at 260–61 (citing 31 ANNALS OF CONG. 1038–1039 (1818)).

unit to destroy."[53] This emphasis on the framers' language as a source intent, which undergirds the entire *Afroyim* opinion, establishes Justice Black's originalist approach to the Fourteenth Amendment broadly and the Citizenship Clause in particular.[54]

Justice Black's interpretation of the Citizenship Clause was met with resistance in Justice Harlan's dissent. Harlan agreed with Ennis that evidence of Congressional intent at the time of the enactment of the Fourteenth Amendment is murky at best with regards to revocation of citizenship, but other congressional enactments from the period—including the Wade-Davis reconstruction bill of 1864—indicate that the drafters of the Fourteenth Amendment did not view citizenship as an absolute right.[55] Harlan cites a wide range of legislation when attempting to answer this question, and derisively refers to the lack of material cited by the majority opinion in this regard. He focuses on congressional debates of 1794 and 1795 culminating in the Uniform Naturalization Act of 1795 and concludes that "[l]ittle contained in those debates is pertinent here."[56] Later, he turns to proposed legislation in 1797 that would have barred American citizens from entering into service for any foreign states in wartime and included procedures by which citizens could voluntarily expatriate themselves. Here, too, Harlan finds that "the debates do not include any pronouncements relevant to [this] issue."[57]

Justice Harlan repeatedly refers to evidence which he describes as inconclusive apart from the debates on the Wade-Davis bill, and even there, he concedes that citizenship was not the focus of that legislation, noting that "[m]uch of the debate upon the bill did not, of course, center on the expatriation provision, although it certainly did not escape critical attention."[58] Unlike Justice Black's opinion, Harlan's dissent here is focused on the legislative history rather than the text of the Fourteenth Amendment. His reference to the Enrollment Act of 1865 encapsulates his approach to the text, as he notes that "it was never suggested in either debate that expatriation without a citizen's consent lay beyond Congress' authority."[59] Here, too, the legislative history is at the forefront of Harlan's analysis. Indeed, regarding the Citizenship Clause, Harlan's dissent focuses primarily on the absence of evidence and interprets that as evidence of absence of an inherent right of citizenship.

While Harlan claims that the legislation he cites indicates that "Congress had twice, immediately before its passage of the Fourteenth Amendment, unequivocally affirmed its belief that it had authority to expatriate an

53. *Id*. at 263.
54. Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681 (1997).
55. *Afroyim*, 387 U.S. at 280.
56. *Id*. at 282.
57. *Id*.
58. *Id*. at 279.
59. *Id*. at 281.

unwilling citizen,"[60] his scholarship on the occasion of the Fourteenth Amendment's adoption is limited. Although Justice Harlan cites a vast array of materials from the late eighteenth- and early nineteenth century, he only refers to brief statements from Senator Howard and Missouri Senator John B. Henderson during the actual adoption of the Fourteenth Amendment which imply that the status of citizenship will remain unchanged but do not expound on the implications or meaning of that claim.[61]

Justice Black, for his part, might argue that the narrow range of materials he deems persuasive on this question is in accordance with his proto-originalist perspective. Justice Black's opinion in *Afroyim* makes heavy use of historical conceptions of the notion of citizenship. He notes that the concept of revocation of citizenship was deeply foreign to the framers, and accordingly, not in line with their intentions. As Black notes, "[i]n 1795 and 1797, many members of Congress still adhered to the English doctrine of perpetual allegiance and doubted whether a citizen could even voluntarily renounce his citizenship."[62] Black then traces that initial understanding of the Constitution to the eventual ratification of the Fourteenth Amendment, taking care to note the proposed-but-unratified Thirteenth Amendment, by which a person would lose citizenship by accepting an office or emolument from a foreign government.[63]

In analyzing the Fourteenth Amendment, Justice Black takes care to note the supremacy of the text of the amendment. In his view, the text establishes unequivocally that Congress *never* possessed the power to deprive a person of citizenship.

> It provides its own constitutional rule in language calculated completely to control the status of citizenship: 'All persons born or naturalized in the United States . . . are citizens of the United States . . . .' There is no indication in these words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time. Rather the Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit.[64]

However, Black bolsters that interpretation with a narrow reading of the legislative history, emphasizing the viewpoints of the specific authors of the Fourteenth Amendment. In particular, Black homes in primarily on one quotation from Senator Jacob Howard of Michigan on the occasion of the Fourteenth Amendment's adoption. There, Howard explains that the Citizenship Clause

60. *Id*. at 282.
61. *Id*. at 285.
62. *Id*. at 258.
63. *Id*. at 259.
64. *Id*. at 262.

"settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States."[65] Howard continues by noting that the Senate "desired to put this question of citizenship and the rights of citizens . . . under the civil rights bill beyond the legislative power."[66] That reliance on the Citizenship Clause as a source of basic rights in the broader context of the Reconstruction Amendments is the most crucial reading of legislative history in Black's analysis. As he describes it, the "undeniable purpose of the Fourteenth Amendment [is] to make citizenship of Negroes permanent and secure . . . ."[67]

Black's understanding is shaped by a narrow set of materials that he views as dispositive on the opinions of the specific framers of the Fourteenth Amendment. Citing more attenuated evidence like other legislation around the same period, legislative history, and floor debates involving people other than Howard and Bingham (referred to by Black in *Adamson* as the specific framers of the Fourteenth Amendment) would run counter to an intensely originalist perspective like Black's which emphasizes the text of the Constitution. Black explicitly says as much to note his reliance on the text of the amendment rather than the legislative history, saying the following:

> Because the legislative history of the Fourteenth Amendment and of the expatriation proposals which preceded and followed it, like most other legislative history, contains many statements from which conflicting inferences can be drawn, our holding might be unwarranted if it rested entirely or principally upon that legislative history. But it does not. Our holding we think is the only one that can stand in view of the language and the purpose of the Fourteenth Amendment, and our construction of that Amendment, we believe, comports more nearly than *Perez* with the principles of liberty and equal justice to all that the entire Fourteenth Amendment was adopted to guarantee.[68]

Immediate reactions from newspapers post-*Afroyim* refer to it in the context of *Perez v. Brownell*. The *New York Times*'s story on this decision takes the opinion out of Justice Black's hands and instead focuses on Warren, writing that:

> Chief Justice Warren's magisterial dissent in the *Perez v. Brownell* denationalization case in 1958 is one of his most impressive opinions in his service on the Supreme Court. That opinion has now nine years later achieved vindication in the Court's ruling this week in the case of *Afroyim v. Rusk*.[69]

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65. Cong. Globe, 39th Cong., 1st Sess., 2890, 2896 (1866).
66. *Id.*
67. *Afroyim*, 387 U.S. at 263.
68. *Id.* at 267.
69. *Always a Citizen*, N.Y. Times, June 1, 1967, at 42.

This characterization of the opinion does not consider the likelihood that the Fourteenth Amendment rationale at the basis of the *Perez* dissent is rooted in Justice Black's theories more than in Chief Justice Warren's, despite the fact that Justice Black referenced the Fourteenth Amendment in dissents in the denationalization cases, referred to it more readily at oral argument in those cases, and all but sourced the Citizenship Clause argument to Warren in his handwritten notes and memoranda.

The *Washington Post*, meanwhile, viewed the decision in its political context, saying that "[t]he Court had been gradually approaching its present conclusion for a number of years,"[70] referring to prior cases which determined that draft dodgers could not be punished for leaving the country and soldiers could not be deprived of citizenship in times of war. The latter mention likely refers to *Nishikawa v. Dulles*, though this is not made explicit. The *Post* also claimed that the majority's search for historical underpinnings for his opinion was largely fruitless, and that Justice Harlan's arguments held a stronger basis in the historical development of the Constitution. Indeed, Justice Harlan's characterization of the Citizenship Clause is rooted in Congressional debates in the runup to the enactment of the Uniform Naturalization Act of 1795, which he believes avoids any question that risks defining citizenship. Yet subsequent debates—in particular, regarding Senator Trumbull's 1866 Freedmen's Bureau Bill—indicate that "the Senate was alive to the desirability of a definition of citizenship and to its implications."[71] If this is the case, and the Senate intended to provide a Constitutional definition of citizenship, then the entire premise of Harlan's dissent—that the text of the Fourteenth Amendment is inconclusive—is mistaken. Regardless, this view of debates and legislative history as supreme is incompatible with Justice Black's textualist approach. In reviewing the text of the Fourteenth Amendment and employing a narrow range of legislative histories only insofar as they illuminate the text of the Constitution, Black is more focused on and keen to the history of the Fourteenth Amendment in the Citizenship Clause in particular than any other justice on the Court, just as he was dating back to *Adamson*.

IV. THE IMPACTS OF *AFROYIM* AND JUSTICE BLACK'S CITIZENSHIP CLAUSE ABSOLUTISM

While *Afroyim* is rarely cited today, much of the modern understanding of and emphasis on the Fourteenth Amendment Citizenship Clause tracks with Justice Black's opinion. Prior to *Afroyim*, the Citizenship Clause was rarely referred to in federal caselaw, with 171 citations to it recorded between the adoption of the Fourteenth Amendment and the *Afroyim* decision on May 29, 1967. In the fifty-three years since *Afroyim*, however, the Citizenship Clause

70. *The Right of Citizenship*, WASH. POST, May 30, 1967, at A14.

71. Robert E. Goostree, *The Denationalization Cases of 1958*, 8 AM. U. L. REV. 87, 93 (1959); *see also* Jack M. Balkin, *The Reconstruction Power*. 85 N.Y.U. L. REV. 101, 106 (2010).

has been cited 7,603 times, indicating that Justice Black's decision brought what was previously a sidelined Constitutional provision into the limelight. Those affects are similarly pronounced for secondary sources, as only 113 pre-*Afroyim* citations of the Citizenship Clause exist in comparison to 15,918 post-*Afroyim*. Moreover, while *Afroyim* itself is rarely cited—only nineteen of those 7,603 examples of caselaw refer to *Afroyim* specifically—Justice Black's textualist interpretation of the Citizenship Clause lives on in the work of practitioners and scholars. His view of the Citizenship Clause as a source of affirmative rights reverberated in the subsequent decades and into the present day—in particular, by progressives who, like Black, focus on the text of the Constitution.[72]

That view has had implications for jurists, attorneys and scholars who, even when not directly citing *Afroyim*, have relied on an expansive view of the Citizenship Clause as an independent source of liberty.[73] It has also opened the door to a variety of other applications of the Citizenship Clause. *Afroyim* used the Citizenship Clause for textualist grounds on which the Fourteenth Amendment could enact principles of equality.[74] The decades since *Afroyim* have shown that that interpretation of the Citizenship Clause can be expanded not only to protect racial equality and civil rights from encroachment, but also to empower Congress to advance the goals of equal citizenship.[75]

As Justice Black proved, this reading of the Citizenship Clause is expansive, and its implications are similarly far-reaching. Yet while this approach has far-reaching implications, in the context of Justice Black's jurisprudence, it is no radical departure, nor does it require a reading of rights only implied by the Constitution as other Warren Court decisions might. Here, the text is enough.

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72. David A. Strauss, *Not Unwritten, After All?*, 126 HARV. L. REV. 1532, 1542 (2013) (reviewing AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012)).

73. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 211–12 (2012).

74. *Id*.

75. Balkin, *supra* note 71, at 121.