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# To Ban or Not to Ban an American Taliban? Revocation of Citizenship & Statelessness in a Statecentric System

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# TO BAN OR NOT TO BAN AN AMERICAN TALIBAN? REVOCATION OF CITIZENSHIP & STATELESSNESS IN A STATECENTRIC SYSTEM

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## INTRODUCTION

This article examines differing conceptions of U.S. citizenship in the debate[1] over about the so-called American Taliban, John Walker Lindh,[2] and the question of denationalization. The article argues that while the dominant strains of citizenship theory may be invoked in support of denationalizing the American Taliban, the weight of opinion in American constitutional law and history, as well as an emerging international norm against statelessness, disfavor citizenship, revocation, exile or banishment. The first part of the article describes the ensuing citizenship conversation in the wake of revelations about certain Americans serving in the Taliban and al Qaeda—a dia-

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1. This article was written in the course of preparing for a citizenship debate against Professor Jonathan Turley of George Washington University on April 12, 2002. The debate sponsored by Princeton University's Whig-Cliosophic Society was captioned *"Should the U.S. revoke John Walker's Citizenship?"* I must express my gratitude to Professor Turley for being a most worthy and engaging adversary. In addition to appreciating the civil and professional tone of the debate, several members of the audience attested to the enlightening and edifying nature of the conversation. While this article features several arguments made in the debate, the article does not purport to present an account of Professor Turley's positions during the debate. Nonetheless, I wish to express my gratitude to Professor Turley for his profound insights and witty delivery. To read more about the debate, see *Legal Scholars Debate Loss of Citizenship*, TRENTON TIMES, Apr. 12, 2002. The article is dedicated to all such academics and civic-minded public intellectuals who engage the public on contemporary issues.

2. Although the case of John Walker Lindh was the most notorious, several other American-born citizens were affiliated in some capacity with the al Qaeda or Taliban organizations. Since the government's case against John Walker was settled in a plea bargain, this article refrains from assessing the man's guilt or innocence. Instead, the article is a reflection on the ensuing and enduring citizenship conversation triggered by Mr. Walker's most bizarre odyssey.

logue tinged with clarion calls for banishment or revocation of citizenship. Then, in Part II, the article examines various theories of citizenship and their implications for the Walker debate. After presenting the conceptions of citizenship as postulated by liberals and civic republican theorists, the article argues that both strains of citizenship theory appear to allow for the possibility of revocation—especially where treason is involved. In Part III, the article examines the jurisprudence of denationalization, focusing especially on the Supreme Court's rulings and reasoning with respect to involuntary expatriation of native-born citizens. The article argues that given the Court's view of the 14th Amendment and citizenship, it is highly unlikely that a denationalization proceeding against Walker would succeed absent compelling evidence of treason. In Part IV, the article argues that in addition to the Court's traditional hostility to revocation, the practice is also disallowed by principles of international human rights law, specifically, the emerging norm against statelessness.

## I. THE PUBLIC DEBATE OVER THE AMERICAN TALIBAN AND THE CITIZENSHIP CONVERSATION

In October 2001, the United States and its allies retaliated for the September 11, 2001, terrorist attacks on America against the Taliban and Al Qaeda in Afghanistan.[3] As the Taliban forces began to crumble and surrender, Americans were shocked to learn that one of the captives was a native-born American citizen—John Walker Lindh of Marin County, California.[4]

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3. The horrendous act of mega-terror carried out by nineteen members of Osama bin Laden's al Qaeda network killed or wounded thousands of Americans and significantly destabilized the global economy.

4. Walker, who reportedly spent his early teen years dabbling in rap music and ghetto chic, abandoned those interests for a most consuming passion for Islam and all things Muslim. *See A Long Strange Trip to the Taliban*, NEWSWEEK, Dec. 17, 2001, at 33. In late 1998, Walker left the comfort of Northern California to go to Yemen because he believed it was the closest thing to the "pure" language of the Quaran. *Id.* at 34. By the end of 1998, Walker migrated to Pakistan where he reportedly lived an ascetic and austere life of intense religiosity, marked by an effort to memorize all 6,666 sentences of the Quaran. *Id.* at 30. Suleyman al-Faris, as he was known, slept on a simple rope bed in a house with neither running water nor electricity after 10 p.m., and he reportedly refrained from socializing even with other Muslims. *Id.* In April 2001, Walker fled the hot weather in Pakistan for the "cooler mountains" and according to news reports, began a seven-month dalliance with militant fundamentalism. *Id.* By May 2001, Walker, who expressed interest "in getting a bird's eye view of how Sharia was being applied," reportedly "gravitated" towards the Taliban. *Id.* at 35. In late Spring 2001, Walker who had become, by his own admission, a "self-described jihadist" joined a "paramilitary training camp" run by Harakat ul-Mujahideen (HUM), a terrorist group committed to ending Indian rule in Kashmir. *See* Jess Bravin & Gary Fields, *American Fighter With Taliban Could Face Life Prison Sentence*, WALL ST. J., Jan. 16, 2002, at A4. According to the affidavit, studies at the camp included "propaganda speeches, firearms training and some unspecified 'special operations' training." *Id.* In June 2001, Walker left Pakistan for the mountains of Afghanistan to fight with the Taliban against the Northern Alliance. Since he spoke Arabic and not the local languages, the Taliban "referred him" to al-Farook, an al Qaeda

As Walker's odyssey came to light, he increasingly became the bete noire of talk radio shows, websites, and chat rooms. There was growing sentiment for his conviction for alleged sundry crimes as well as for revocation of his U.S. citizenship.[5] The emerging consensus was that the facts were largely incontrovertible and any legal defenses were merely procedural inconveniences to be endured before the inevitable banishment or execution.[6] Many were willing to abandon traditional notions of fairness in favor of Kangaroo procedures in the heat of the moment. Some suggested Walker and any other American Taliban should either be tried for treason, sedition, or terrorism, and they urged the government to revoke their U.S. citizenship and turn them over to the Afghans.[7] Others suggested that Walker be immediately put to death without a trial, urging that the authorities take him to New York, "let him loose and let people there take care of him," or that he should be left in Afghanistan.[8] As one visitor to a chat room stated, since Walker's could be considered treasonous, "[giving] him a trial simply because he is techni-

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training camp. *Id.* In late November 2001, Walker, famished and exhausted, was captured by Northern Alliance forces. *Id.*

5. *See* Gary Langer, *Poll: Charge Walker,* Dec. 10, 2002, *at* http://abcnews.go.com/ sections/politics/DailyNews/poll011210.html (last visited May 10, 2003). An ABCNEWS.com poll conducted in December 2001 revealed that 34 percent of Americans felt Walker should be charged with treason and twenty four percent favored other punishment "ranging from revoking Walker's citizenship to executing him." *Id.*

6. Yet, contrary to popular opinion, many legal authorities recognized that the government faced some particularly daunting hurdles. The circumstances of Walker's capture and his subsequent custody and interrogation could have triggered some potentially insurmountable constitutional defenses, including fifth, sixth and fourteenth amendment arguments. For example, a central issue in the case against Walker was the intentionality of Walker's actions and the voluntariness of his actions and statements. Courts have looked at factors such as whether a suspect was threatened or drunk with respect to whether he made a knowing and intelligent waiver. Legal scholars saw several potential lines of argument: Nathan Lewin, a prominent Washington lawyer said he expected lawyers to argue that in the chaos of war in Afghanistan, "the injured Mr. Walker could not have grasped the implications of declining a lawyer." *See* William Glaberson, *Whether Walker Knew of Counsel is Issue,* N.Y. TIMES, Jan. 17, 2002, at A17. Yale Kamisar, an expert on Miranda rights at the University of Michigan Law School, suggested the length of time Walker was held without his family being able to communicate with him might undermine the government's case. *Id.* Professor Kamissar said the courts had not defined how long the authorities might hold a suspect without disclosing a lawyer had been hired to represent him, authorities could probably justify questioning a suspect for hours or days without telling him a lawyer had been hired to represent him. *Id.* Yet, Kamissar noted that when detention and questioning "turns to a couple of days or more . . . the balance shifts in favor of the defense" in its assertion that a suspect should be told a lawyer has been hired to represent him. *Id.* As Professor Lewin stated, "If you've got a constitutional right to have a lawyer, you have a right to talk to someone who will hire you a lawyer." *Id.*

7. *See, e.g.*, Langer, *supra* note 5. One respondent to the ABCNEWS poll conducted December 5-9, 2001, stated, "Hold him prisoner until the war is over, then take away his citizenship." *Id.* Another opined, "Whatever the Afghan people want to do with him. He deserves the same punishment that they would give their own people. I think it should be up to them to decide." *Id.* Some compatriots were terse: "Hang the bastard." *Id.*

8. Michael Janofsky, *For Many, Verdict's in for Taliban Volunteer (and Skip the Trial),* N.Y. TIMES, Dec. 7, 2001, at B4.

cally an American citizen would not be fair."[9] In his characteristically restrained yet effective manner, Professor Turley, during a formal debate with this writer, argued that the U.S should revoke John Walker's citizenship.[10]

Even the relatively younger demographic group that watches and surfs the ChannelOne website participated in a vibrant citizenship debate. A sampling of the comments on ChannelOne revealed a widely shared view that Walker should be exiled and banned for treason and betrayal:

> Karena: "I don't think Walker should be let back in the United States because he's basically ruined his citizenship and showed the United States that he has betrayed us and even though he hasn't even killed an American. . . ."[11]
>
> Gb: "I think they should not let him back into the U.S. because he left the country in the first place. He fights for the Taliban so we should ban him from the country or trial [sic] him for treason."[12]
>
> Samantha: "I think that the USA should ban anyone who does fight for the Taliban [sic] soldiers. . . . I do not think that his parents should have let him go in the first place though, so it is partly their fault."[13]

The Attorney General of the United States, John Ashcroft, seemed to be stoking the public vitriol against Walker when he told millions of TV viewers that Walker betrayed America.[14] It is said the Attorney General's staff were so disgusted by Walker that they wanted to "make an example of

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9. *See* Ginger Malcolm, *Wrong Team, American Among Taliban Captured in Prison Uprising, Readers Comments*, http://www.channelone.com (last visited, Mar. 2, 2002).

10. *See generally, Legal Scholars Debate, supra* note 1.

11. *See* Malcolm, *supra* note 9.

12. *Id.*

13. *Id.* As these comments indicate, many who called for Walker's banishment were misinformed about the implications of serving in a foreign army. As Professor Turley has observed the U.S. government does not clearly prohibit American nationals from fighting in foreign wars: "It's always been a gray area. . . . The government has often preferred to remain blissfully ignorant of Americans engaged in that type of activity unless the U.S. citizen is joining a hostile force." David Crary, *Many Americans Have Fought For Foreign Armies*, PRAVDA, Dec. 24, 2001, *at* http://english.pravda.ru/usa/2001/12/24/24335.html (last visited, May 10, 2003). From the French Revolutionary war, to volunteers on the Allied side before U.S. entered WWI & WWII, thousands of Americans have fought for foreign armies. *Id.* Nonetheless, in the din of the public outcry against Taliban John, these historical precedents were mere legal niceties as many lambasted Walker for his ties to the Taliban regime and its doppelganger, the al Qaeda organization.

14. In a letter to the Editor of the New York Times, District Judge Avern Cohn opined that Attorney General John Ashcroft's public announcement of the filing of the complaint against John Walker appears to have violated long standing Justice Department "guidelines on release of information related to criminal proceedings that are entitled to ensure that a defendant is not prejudiced when such an announcement is made. These guidelines severely limit what a Justice department lawyer may say. Mr. Ashcroft's statement and news conference seem to suggest that there is really no need for a trial." Hon. Avern Cohn, *Letter to the Editor*, N.Y. TIMES, Jan. 18, 2002, at A22.

him."[15] An irate Ashcroft echoed the public's mood: "Youth is not absolution for treachery."[16] Mr. Ashcroft declared Walker "chose to train with Al Qaeda, chose to fight with the Taliban, [and] chose to be led by Osama bin Laden."[17] Rejecting the views of those who defended Walker's actions as a matter of choice by a member of a free society, Ashcroft chimed "personal self-discovery is not an excuse to take up arms against your country."[18]

As the debate raged over Walker's citizenship, certain critics of liberal individualism blamed the ideology and its excesses for the treacherous conduct of Walker and his ilk. Somewhat ironically, the circumstances of Walker's upbringing seemed to fit conveniently with this caricature of liber-

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15. *See A Long, Strange Trip*, *supra* note 4, at 36. The government's lawyers acted on cue. In a blistering 10-count indictment delivered on February 6, 2002, the government charged Walker with, *inter alia*, participating in conspiracy with al Qaeda to harm U.S. citizens. As evidence of guilt, the government pointed to Walker's military training and participation in or with the Taliban or al Qaeda; incriminating e-mails to his family; Walker's statements during interrogation by FBI; his refusal to cooperate with authorities when questioned at the prison compound; his remaining with fellow Taliban or al Qaeda fighters for a week after the uprising started; alleged corroborating evidence to support his statements to FBI and incriminating statements to media when captured. *See Excerpts From Government's Response to the Petition by Lindh's Lawyers*, N.Y. TIMES, Feb. 7, 2002, at A16.

16. David Johnston, *Walker Will Face Terrorism Counts in a Civilian Court*, N.Y TIMES, Jan.16, 2002, at A1, A10. Quite noticeably, the Justice department resisted alleged efforts by the Pentagon to use the military tribunal option supposedly advocated during NSC meetings. *Id.* Additionally, Ashcroft indicated in his comments that the government would have difficulties charging Walker with treason, noting that the Constitution imposes a "high evidentiary burden to prove charges of treason," as it would require confession or a testimony of treasonous acts by two witnesses. *Id.* The absence of treason charges completely undermines any case for denationalization—for in the absence of treason, the practice of denationalization enjoys very little support.

17. David Johnston, *Lindh Coerced After Capture Lawyers Assert, U.S. Indictment Is Filed as Defense Seeks Bail*, N.Y. TIMES, Feb. 6, 2002, at A1. Ironically, there was little evidence that Walker chose al Qaeda. In fact, the evidence suggested the contrary. When the U.S.-led campaign against the Taliban began, Walker was sent to fight against the Northern Alliance. Walker was reportedly given a choice by Mohammmad Al-Misri, an Egyptian who allegedly managed the training camp: go abroad and conduct overseas operations against the U.S. and Israel interests, or fight against the Northern Alliance. Bravin & Fields, *supra* note 4. Walker declined Al-Masri's invitation to travel "outside Afghanistan to conduct operations against the United States and certain Israeli targets," choosing instead to take on the Northern Alliance. *Id. See also* Christopher Marquis, *Document Paints Portrait of Committed Taliban Fighter*, N.Y. TIMES, Jan.16, 2002, at A10.

18. Johnston, *supra* note 16. Statements such as these further fueled the public's perception that Walker had specifically and deliberately chosen to take up arms against the USA, even if only indirectly. In one of its filings to the Court, the government referred to the NA as its "ally" and thereby suggested that by taking up arms against the NA, Walker engaged in battle against the U.S. *See Excerpts from Government's Response*, *supra* note 15. Yet, prior to the events in question, it was not known that the NA was formally a military or political ally of the United States. In fact, Walker's attorneys claim that Walker believed by siding with Taliban against the NA, Walker was actually on the side of the United States. James Brosnahan, Walker's chief lawyer said in court that the last that Walker heard, America had given the Taliban $43 million to eradicate Afghanistan's notorious poppy fields that served as a source of raw opium. *See* Katherine Q. Seelye, *Judge Quickly Turns Down Lindh's Request for Bail*, N.Y. TIMES, Feb. 7, 2002, at A16. As Brosnahan stated, "He knew he was fighting people not liked by the United States." *Id.*

alism. Walker Lindh, who grew up in affluent Marin County, California, reportedly enjoyed a laissez faire life of privilege, pampering, and plenty of opportunities for self-discovery.[19] It was insinuated that the permissive mores of Walker's new-age parents and their social milieu was to blame for his deviancy. Initially home-schooled by his mother, Walker was later sent to an "elite alternative high school where students were allowed to shape their own studies and had to check with their teacher only once a week."[20] Others blamed Walker's parents for not giving him guidance or teaching him to be responsible and for giving him money to pursue his individualistic goals.[21] As one angry resident of Longmont, Colorado stated: "It all goes back to money. It gave him the possibility of going there. I'm sure [his parents] sent him money a number of times."[22] His parents were obliquely chided for being nonjudgmental about his conversion to Islam and for not objecting when he dropped out of high school, taking the high-school diploma equivalency exam instead.[23] In one well-penned and caustic attack, Shelby Steele, a research fellow at the Hoover Institution, blamed John Walker Lindh's escapades on the post-'60s cultural liberalism of his Southern California parents:

> [John Walker inhabited a] world where learning is self-referential, where adults are only broadly tolerant. There are no external yes's and no's or rights and rights here, just the fashionable relativism. . . .
>
> In these precincts, a little anti-Americanism becomes sophistication, a mark of authenticity. . . .
>
> . . . This attitude, a kind of white American guilt, has shifted the culture from noblesse oblige to radical chic. . . . The post-60s shift to what Tom Wolfe called radical chic was essential a transfer of authority from traditional American culture to its former victims.
>
> . . . .
>
> This liberalism thrives as a subversive, winking, countercultural hipness. . . . [and] serves up self-hate to the young as idealism.[24]

Given Walker's seeming predilection for unbridled self-discovery, much of the debate about Walker was also a diatribe against the excesses of liberal individualism and its excessively rights-based conception of citizenship and self.

Walker's own self-indulgent comments before and after the highly charged atmosphere of post September 11, 2001, did little to defuse the in-

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19. *See A Long, Strange Trip, supra* note 4.
20. *See id.* at 33.
21. Janofsky, *supra* note 8.
22. *Id.*
23. *See A Long, Strange Trip, supra* note 4, at 34.
24. Shelby Steele, *Radical Sheik*, THE WALL ST. J., Dec. 10, 2002, at A18.

tensity of the public discussion about his citizenship rights. As he traveled in search of religion, Walker wrote regular e-mails to his family showing a deep-seated disenchantment with the policies of the American government.[25] In fact, Walker's callous comments and his apparent lack of sensitivity to the feelings of his fellow citizens may have been partly to blame for the avalanche of calls for his banishment. Following Walker's capture and his subsequent encounter with the media, Walker made many potentially troubling statements about his role in Afghanistan and his feelings for fellow Americans who suffered in the September 11 tragedy. Walker reportedly acknowledged that he was a "jihadist" and told Newsweek he "supported" the September 11 attacks.[26] With regard to the attack on the Pentagon, Walker stated things like that happened in war.[27]

In spite of Walker's seeming callousness, some Americans appeared more willing to grant him his rights of citizenship. On the other side of the citizenship debate, some argued in chatrooms and on talk radio that Walker was simply enjoying his freedoms of expression as an American:

> Chelsea: "I think that maybe he just wanted to be different or that he feels what we are doing to Afghanistan is maybe unfair."[28]
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> Sebastian: "I don't think that it's fair that Americans should be treated with hate when they stand up for what they believe in. This is suppose [sic] to be a land of freedom and you can't even fight for what you believe in."[29]
>
> Kevin: "He left America because the American government is just like the Taliban. . . . Jon [sic] is just expressing himself. Nothing wrong with that."[30]

Others were more inclined to treat Walker as a curiosity—a hapless latter day Odysseus who had wandered unto the wrong place at the wrong time and compounded the problem by making potentially incriminating statements under constitutionally ambiguous circumstances. Ironically, even the President's first instinct was to view Walker as errant, but harmless young man. Prior to being swayed by the public outcry against Walker, President Bush called Walker a "poor fellow" who had been "misled."[31]

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25. Seelye, *supra* note 18.

26. *See* Colin Soloway, *A U.S. Citizen on the Horror at Qala Jangi, Tale of an American Taliban*, NEWSWEEK, Dec. 10, 2001, at 34. As Walker emerged from captivity, a Newsweek reporter asked him whether he supported the September 11 attacks. After hesitating briefly, he stated: "That requires a pretty long and complicated explanation. I haven't eaten for two or three days, and my mind is not really in shape to give you a coherent answer." *Id.* Then when pressed, he said: "Yes, I supported it." *Id.*

27. *See Excerpts From Government's Response*, *supra* note 15.

28. *See* Malcolm, *supra* note 9.

29. *Id.*

30. *Id.*

31. *See A Long, Strange Trip*, *supra* note 4, at 32. In fact, the circumstances of Walker's

Nonetheless, pro-Walker views remained distinctly in the minority as a consensus emerged that Walker was a traitor whose expatriation would be a form of expiation, a sort of primeval rite of national purification. Opinion polls showed broad animus towards the American Taliban. In a *Newsweek* poll, forty-one percent of Americans believed that Walker "should be charged with treason and put on trial for fighting with the enemy."[32]

The Walker debate shows that the national citizenship debate is alive, heated, and well. Despite its acerbity and frequent hyperbole, some of the commentary engendered by Walker's odyssey reveals a deep interest in the concept of American citizenship. The renewed focus on citizenship is at odds with the punditry of eschatologically-minded cognoscenti who bemoan the "death of citizenship."[33] As Professor Ackerman has opined: "the practice of citizenship is disintegrating before our eyes" and "the rituals of citizenship have been stripped down to a precious few."[34] He observed that "It is quite possible to live life in America today without ever dealing with others as fellow citizens . . . focusing on our common predicament as Americans."[35] Contrary to Professor Ackerman's assertion, however, "TV pundits" do not hold a monopoly over dealing with each other as fellow citizens and engaging in a type of conversation about "national citizenship."[36] In the course of debating the Walker issue, the citizenship debate reached a cres-

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capture and his subsequent incarceration were so unusually horrific that some contended they were serious enough to impede successful prosecution of the government's case. Not surprisingly, Walker's attorneys were quick to paint a picture of Walker as an unfortunate victim of circumstances. They noted that when Walker was captured he was "exhausted, severely dehydrated and in physical and psychological shock that impaired his ability to speak." *See Excerpt from Lawyers' Filing For Lindh: "Threatened Him With Death,"* N.Y. TIMES, Feb. 6, 2002, at A12. They claimed that Walker's answers under interrogation were "coerced" and "unreliable." Jess Bravin, *Taliban John Lindh Faces New Charges*, WALL ST. J. Feb. 6, 2002, at B13. They further claimed the "alleged incriminating statements were extracted after soldiers threatened him with torture and death and ignored his requests for a lawyer." *Id.* Additionally, Walker's lawyers claimed that these interviews conducted by FBI agents on December 9 and 10 while in detention near Kandahar were conducted under "highly coercive conditions" after eight days of brutal confinement in freezing weather. Johnston, *supra* note 17, at A1, A12. The attorneys also claimed he had been repeatedly denied legal representation while under government custody. *See* William Glaberson, *The Legal Case, Ashcroft's Message: Case Against Walker is Solid*, N.Y TIMES, Jan.16, 2002, at A10. Furthermore, Walker's lawyers averred their client "was abused by his American captors, who bound him to a stretcher with heavy tape, placed him in a windowless metal container, gave him little food or medical attention and refused to allow him to speak with a lawyer." Johnston, *supra* note 17, at A1. Finally, Walker's lawyers claimed their client "believed the only way to escape the torture of his current circumstance was to do whatever the agent wanted" and that was when he reportedly "allegedly voluntarily waived his right to remain silent and his right to counsel and answered questions." Bravin, *supra*, at B13.

32. See *A Long, Strange Trip*, *supra* note 4, at 36.

33. *See, e.g.*, Bruce Ackerman, *Devane Lecture Series & Readings, The Death of Citizenship?* http://www.yale.edu/yale300/democracy/media/feb20.htm (last visited Mar. 2002).

34. *Id.*

35. *Id.*

36. *Id.*

cendo as many argued that Walker had forfeited his right to American citizenship. The rest of this article is devoted to examining the public's demand for Walker's denationalization in light of citizenship theories, Supreme Court precedents, and international law.

## II. THE JURISPRUDENCE OF CITIZENSHIP AND DENATIONALIZATION

### *A. Citizenship Theories*

Below, the article examines various theories of citizenship and their implications for the Walker debate. In large measure the citizenship debate is a polemic between liberals versus communitarians, and the conceptions of the good or the right held by both camps has implications for, *inter alia*, the question of denationalization. After presenting the conceptions of citizenship and self as postulated by liberals and civic republican theorists, the article argues that various approaches appear to permit revocation—if only in the most extreme cases such as those involving treason.

As a general matter, citizenship is variously conceptualized in terms of political institutions that are free to act—on the basis of national sovereignty—according to the will[37] and interests[38] of their citizenry, as well as with political authority[39] over such citizenry. Thus, Walzer defines a citizen as a member of a political community, who is entitled to receive certain benefits provided by the state (particularly protection) and who is expected to fulfill certain "common expectations" and responsibilities that are appurtenant to that membership.[40] Four general conceptions of citizenship have emerged: (1) "Citizenship as legal status," which centers on whom the State considers a citizen and the formal basis for the rights and duties of persons in the State;[41] (2) "citizenship as rights," which constitutes a broader view of

37. Kim Rubenstein & Daniel Adler, *International Citizenship; The Future of Nationality in a Globalized World*, 7 IND. J. GLOBAL LEGAL STUD. 519, 520 (2000) (citing ARISTOTLE, POLITICS (H. Rackman trans., 1959)).

38. *Id.* (citing JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Charles Frankel trans., 1947)).

39. *Id.* (citing JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH (M.J. Tooley trans., 1955)).

40. MICHAEL WALZER, WHAT DOES IT MEAN TO BE AN AMERICAN? ESSAYS ON THE AMERICAN EXPERIENCE 82-95 (1996). Expectations citizens have for each other include (1) "some degree of commitment or loyalty" as well as service and civility, (2) a commitment to defending the homeland "even to risk their lives in its defense;" (3) an expectation that citizens obey laws and "maintain a certain decorum of behavior" or a degree of "relative civility;" (4) an ethos of tolerance and participation and (5) active participation in political life. *Id.* The citizen—at least the "pluralist citizen"—should not merely enjoy the benefits of her status in a passive manner, but should be actively engaged in the "political and moral dimensions of citizenship" in order to realize a vital conception of a "political community." See MICHAEL WALZER, OBLIGATIONS, ESSAYS ON DISOBEDIENCE, WAR AND CITIZENSHIP 205, 210, 217-25.

41. Rubenstein & Adler, *supra* note 37, at 522 (citing Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 506 (2000)).

citizenship as a bundle of rights, responsibilities, and opportunities for participation that delineate the scope of sociopolitical membership inside a community;[42] (3) "citizenship as political activity," which reflects the so-called republican conception that centers on political participation; and (4) citizenship as a type of collective identity and sentiment.[43] As the International Court of Justice held in Nottebohm, citizenship or "nationality is a legal bond having as its basis a social fact of attachment, genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[44]

### *B. Liberal Individualism and the "Thin" Conception of Citizenship*

Liberal individualism, a rights based conception of citizenship, has its roots in the philosophies of Kant and Mills on one side of the continuum and Nietzsche and Satre on the other end.[45] Liberal theory of citizenship does not set forth any single notion of the ends of citizenship or the good life. Rather, it advances procedures and rules, along with an institutional framework, in which all persons—according to their own ends and interests—seek their own conceptions of good lives for themselves.[46] This framework represents a broader understanding of citizenship as a bundle of rights, responsibilities, and opportunities for participation that delineate the scope of sociopolitical membership in a polity.[47] Yet, liberal individualism is arguably a thin conception of citizenship because nothing is absolutely required of an individual except respect for others' freedom as well as "the minimal civic duties of keeping the state in being," which includes paying taxes, voting, and a willingness to defend the state from external or internal enemies.[48]

The "dominant liberal citizenship paradigm" is a rights-based account of citizenship that prioritizes the individual.[49] Liberal individualism "accords the individual not only ontological and epistemological priority, but moral priority as well."[50] Individuals as citizens are captains of their fate, who are presumed to be, and who ought to be, in control of their lives on all matters of consequence.[51] The individual is "an autonomous and responsible moral agent" free to choose and pursue his own life project.[52] The term "liberal in-

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42. *Id.*

43. *Id.*

44. Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4.

45. Adrian Oldfield, *Citizenship and Community, in* THE CITIZENSHIP DEBATES 76 (Gershon Shafir ed., 1998).

46. *Id.*

47. Rubenstein & Adler, *supra* note 37, at 522 (citing Bosniak, *supra* note 41).

48. Oldfield, *supra* note 45.

49. Ruth Lister, *Dialectics of Citizenship*, 12:4 HYPATIA 2, http://iupjournals.org/ hypatia/hyp12-4.html (last visited Mar. 2, 2002).

50. Oldfield, *supra* note 45, at 76.

51. *Id.*

52. *Id.* at 77.

dividualism" refers to the fact that, as persons, individuals need "freedom and security to pursue their lives unhindered."[53]

Citizenship under the liberal view is a "status to be sought and, once achieved, to be maintained."[54] Thus, the liberal individualist conception of citizenship is intensely individual rights-oriented—and it is effectively a legalistic conception of citizenship. The conception of citizenship as a "legal or juristic concept" is central to liberal individualism and dates back to Roman times. Following Gauis' division of the universe into "persons, actions and things," and the elaboration of property as a person's relationship to a thing, citizenship became linked with jurisprudential notions of "possessive individualism."[55] In effect, the individual "came to be by nature a proprietor or possessor of things," and with relationships to things fixed by law, a "citizen came to mean someone free to act by law, free to ask and expect the law's protection."[56] As citizenship became a legal status, the citizen came to be seen as a member of a "legal community" with a type of "legal standing" and, with respect to his or her affairs, bearing various rights to certain possessions, immunities, and/or expectations.[57] With respect to this conception of citizenship as a "legal or juristic concept," "the legalis homo" denotes "one who can sue and be sued in certain courts."[58]

With respect to the rights-based approach to citizenship, citizens view themselves as free persons in three important ways: (1) Citizens are free in that they conceive of themselves and of one another as having the moral power to have a conception of the good";[59] (2) Citizens view themselves as free in that "they regard themselves as self-originating sources of valid claims";[60] and (3) Citizens are "regarded as capable of taking responsibility for their ends, and this affects how their various claims are assessed."[61] The rights based approach is a thin conception of citizenship because individuals participate in society primarily out of a need and desire to maximize self-interest.[62] Within this conspectus, justice is required as a "remedial" value, to ensure that every person's search for the good life does not fundamentally undermine the search by others for their own good lives.[63]

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53. *Id.* at 76.

54. *Id.*

55. Pocock, *The Ideal of Citizenship Since Classical Times*, *in* THE CITIZENSHIP DEBATES 36, *supra* note 45.

56. *Id.* at 36-37.

57. *Id.*

58. *Id.* at 37.

59. John Rawls, *Justice as Fairness in the Liberal Polity*, *in* THE CITIZENSHIP DEBATES 63, *supra* note 45.

60. *Id.* at 64.

61. *Id.* at 65.

62. Michael Walzer, *Communitarian Critics of Liberalism*, 18:1 POLITICAL THEORY 6 (1990).

63. Oldfield, *supra* note 45.

The liberal individualist conception of citizenship can be used as "a positive concept." That is, it describes a "legal-political status that some individuals enjoy" and that is out of the reach of many others.[64] In this regard, citizenship denotes a "relationship between individuals and the polity in which citizens owe allegiance to their polity."[65] Contemporary political debates and movements seek to fulfill the promise of the rhetoric by empowering individuals to exercise their rights and instituting limits on political authorities to check infringements on individual rights.[66] An essential and nonderogable right of citizens is their claim to be secure from threatening forces given the threat that the state and society often pose to individual sovereignty.[67] Yet, citizens may have to defend the polity when it is threatened and "they must not betray it."[68] Only in the event of treasonous betrayal would it be proper to resort to revocation of birthright citizenship.

### *C. Civic Republicanism, Communitarianism and the "Thicker?" Conception of Citizenship*

The civic republican perspective harkens back to Aristotle, Machiavelli, Rousseau, and seventeenth-century English and eighteenth-century American republican thought.[69] The classical (Aristotelian) ideal entails "a definition of the human person as a cognitive, active, moral, social, intellectual, and political being," such that a person could not be "fully human unless he ruled himself" and took part in the decisions shaping his or her life.[70] For Aristotle, the citizen rules and is ruled by sharing in the administration of justice and in "indefinite offices" including the dicast (judge and jury) and as a member of the ecclesia or the assembly of citizens.[71] Later, writing in the sixteenth century, Jean Bodin stated that the citizen was "one who enjoys the common liberty and protection of authority."[72] Building on Aristotle's noninstrumental conception of politics, Pocock stated, "citizenship is not just a means to being free; it is the way of being free itself."[73]

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64. Peter H. Schuck, *The Re-evaluation of American Citizenship*, 12 GEORGETOWN IMMIGR. L.J. 1 (1997).

65. *Id.*

66. Oldfield, *supra* note 45.

67. *Id.*

68. Schuck, *supra* note 64.

69. Oldfield, *supra* note 45, at 79.

70. Pocock, *supra* note 55, at 35. As Pocock observes, Aristotle's account of equality was not all inclusive and some were incapable of achieving such equality. His ideal of citizenship as expressed also contained several features that persisted for two millennia, to wit, that "the citizen must be a male of known genealogy, a patriarch, a warrior, and the master of the labor of others (normally as slaves.)" *Id.* at 33.

71. ARISTOTLE, POLITICS BOOK III, *noted in* CHRISTIE AND MARTIN, TEXT AND READINGS ON THE PHILOSOPHY OF LAW 45-46 (2d ed., 1995).

72. Walzer, *supra* note 40, at 215.

73. Pocock, *supra* note 55, at 34.

Civic republican citizenship has four main components: (1) The republican citizen assuredly enjoys rights required to carry out his/her private ends and to perform his/her public role;[74] (2) rights are associated with a corresponding set of obligations;[75] (3) civic republicanism requires a disposition to actively defend the rights of other members of the political community;[76] and (4) the republican citizen is actively engaged in both the formal and informal domains of politics.[77] The civic republican tradition posits two conditions for citizenship; the individual becomes a citizen by fulfilling the obligations of the "the practice of citizenship," and individuals cannot be expected to engage in the practice of citizenship without active support.[78] To that end, citizens are to be empowered and provided with sufficient motivation in order to perform "stern and important tasks which have to do with the very sustaining of their identity."[79] These institutional props enable individuals to "reach a degree of moral and political autonomy" unattainable under the rights-based account.[80] Regarding the communitarian-republican view, citizenship is difficult to achieve in the modern world because people lack resources, opportunities, and attitudes of mind, motivation, or "habits of the heart."[81] The concept of citizenship as a practice embodied in the civic republican tradition "entails community," not community as in formal organization, but community with respect to any settings where individuals "take the practice of citizenship seriously."[82] Republican citizenship prioritizes "the interests of the wider community," and regards citizenship as a "demanding political obligation."[83] Political solidarity emerges from "the equality of a shared identity," that is at least partially "self-determined and chosen."[84] In deciding on an identity, citizens actively distinguish between fellow citizens, outsiders, strangers, or potential enemies.[85] In the civic republican tradition, "citizenship is exclusive: it is not a person's humanity that one is responding to, it is the fact that he or she is a fellow citizen, or a stranger. . . . [T]o remain a citizen one cannot always treat everyone as a human being."[86] To ensure capacity for such an important choice "natural"

74. David Miller, *Bounded Citizenship in* COSMOPOLITAN CITIZENSHIP 36 (Kimberly Hutchings & Roland Dannreuther eds., 1999)

75. *Id.*

76. *Id.*

77. *Id.*

78. Oldfield, *supra* note 45, at 79.

79. *Id.*

80. *Id.*

81. *Id.* at 86-87. Opportunities are conceived as an appropriate institutional setting; meanwhile, resources to effectively engage in the practice of citizenship include "health, education, and a reasonable income." *Id.* at 86-87.

82. *Id.* at 89.

83. Lister, *supra* note 49, at 2-3.

84. Oldfield, *supra* note 45, at 80.

85. *Id.* at 81.

86. *Id.*

or "precivic" persons have to be intentionally formed or "molded" to for their role as active citizens through education as well as a "prevalent set of mores and practices conducive to sustaining the civic ideal."[87] Civic education and transformation may require a "civil religion" as well as a "profession of faith in the community."[88]

### *D. Citizenship Theories and Denationalization*

In particular, the liberal approach can easily justify revocation if rights-bearing members are desirous of excluding offending behaviors or persons. Under the liberal paradigm's "consent perspective" of citizenship, outraged members of the community could legitimately claim the right to expel Walker for his actions—whatever they may have been. The "consent perspective" conceives of citizenship as "membership in a state generated by mutual consent of a person and the state."[89] Rousseau (and later Kant) provided citizenship its modern philosophical grounding, linking it to the theory of consent.[90] The citizen within the Social Contract is a "free and autonomous individual, who makes, or shares in the making of, the laws he obeys."[91] It is argued that by throwing off their allegiance to the Crown, American revolutionaries resolved to become "citizens of a new state constituted solely by the aggregation of their individual consents."[92] Professors Schuck and Smith argue that consensual citizenship is "more legitimate in theory, more flexible in practical policy problems, and more likely to generate a genuine sense of community among all citizens than the existing [and ascriptive jus soli] scheme."[93]

However, the consent approach provides a theoretical basis for revocation such as might occur when existing members deem another member's behavior totally objectionable and a threat to the rights of all the polity's members. Schuck and Smith argue that the requirement of "mutual consent" might mean "a society could freely denationalize citizens against their will,

87. *Id.*

88. *Id.*

89. T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1488 (1986). Philosopher John Locke viewed as the exemplar of the "transition from ascriptive subjectship to consensual citizenship" maintained that a child did not attain citizenship until s/he could legitimately give consent upon reaching adulthood. PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT, ILLEGAL ALIENS IN THE AMERICAN POLITY 23-24 (1985).

90. Walzer, *supra* note 40, at 212.

91. *Id.* at 211. "obedience to a law which we prescribe to ourselves is liberty." JEAN JACQUES ROUSSEAU, SOCIAL CONTRACT, bk. 1, ch. 8 (1950).

92. Schuck & Smith, *supra* note 89, at 1.

93. *Id.* at 4-5. Professors Schuck and Smith, proponents of the "consent" approach are troubled by illegal immigration, particularly the automatic acquisition of citizenship by children of illegal immigrants as required by a jus soli scheme. David A. Martin, *Membership and Consent: Abstract or Organic*, 11 YALE J. INT'L L. 278 (1985).

reducing their security and status, perhaps even leaving them stateless."[94] Similarly, David Martin observed that the exclusionary and "repressive potential" associated with consensualism is "most pronounced when society excludes those who realistically have no home elsewhere and therefore deserve the status of member in the only national society to which they are connected."[95] If rights-based citizenship is dependent on members' consent, then there is little to prevent the likes of Walker from arbitrary and "unlimited expatriation."[96] In addition, if the individual has the right to voluntarily terminate citizenship, then it would appear that under a liberal consent approach, citizenship is also terminable at the will of the government.[97]

Opponents of the consent approach argue that Schuck and Smith's "revisionist" attack on American citizenship practice should be opposed because of its exclusionary potential.[98] In fact, as Neumann shows, the "consensual strand realized its dangerous potential" in *Dred Scott* where Justice Taney made Dred Scott's citizenship "turn upon the putative will and intention of the Framers to exclude all blacks from the American political community."[99] At the same time, the narrow citizenship theory of modern liberal individualism suggests it would be difficult to revoke citizenship for conduct short of treason.

Similarly, even if Walker's claim to citizenship rested on social contract theory it could still be revoked. The so-called contractarian "perspective focuses on the agreements among individuals made in process of creating a state."[100] This contractarian approach arguably provides "stability and legitimacy to the development of constitutional law" as well as a useful way of thinking about principles of moral philosophy and constitutional governance.[101] Nonetheless, citizenship may be revoked even under a theory that treats the community as based on a contract. In fact, by its very nature, contract based citizenship is inherently revocable under various scenarios. The parties may at the moment the contract is entered into specify conditions or circumstances that will trigger automatic revocation. For example, the parties may specify that a failure to perform in whole or in part would be grounds for termination or revocation of the contractual right. As Aleinikoff

94. Schuck & Smith, *supra* note 89, at 37.

95. Martin, *supra* note 93, at 294. Martin contends this was precisely the problem "essential vice" in cases such as *Elk v. Wilkins*, 112 U.S. 94 (1884) and *Dred Scott*, 60 U.S. 393 (1856).

96. *See* Schuck & Smith, *supra* note 89, at 38.

97. Aleinikoff, *supra* note 89, at 1489 (noting denationalization statutes make it plain that government does not enter into the agreement believing it is terminable only by the individual).

98. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION, IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 166 (1996).

99. *Id.* at 167.

100. Aleinikoff, *supra* note 89, at 1490.

101. *Id.* at 1490-91.

argued, the "notion of citizenship absolutely unrevokable by the state does not seem to follow from contract theory."[102]

Since communitarian perspective views citizenship as a "cooperative affair" the theory, at first glance, seems to provide the best foundation for irrevocability of citizenship. After all, in light of the relationship between the citizen and the community, the latter cannot cast out one of its own for doing so would dismember the community itself.[103] With respect to the communitarian view, the individual is an "encumbered self" situated in real society, defined and constituted in part by her "relationships, roles, and allegiances" and her relationship with the state is based on her "identification with and immersion in the society's history, traditions, and core assumptions and purposes."[104] Thus, by the time most Americans are mature enough to comprehend concepts such as loyalty and allegiance, "they have already developed a conception of self that incorporates American citizenship."[105] As MacIntyre contended, our lives make sense only when we relate our intentions and actions to our history and the historical setting.[106] The communitarian approach situates a person's life within a common tradition such that the history of one's life is embedded in the larger narrative struggle of a historically and socially extended argument about the good life for all human beings.[107] In this cosmogony, individuals are not entirely sovereign authors of their lives, and they are also subordinate characters embedded in an "interlocking set of narratives" peopled by other protagonists.[108] A person must acknowledge the "variety of debts, inheritances, rightful expectations, and obligations" he/she inherits from the past of his/her family, city, tribe, and nation.[109] These inheritances are the givens or the "moral starting-point" that

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102. *Id.* at 1493.

103. *Id.* at 1494.

104. *Id.*

105. *Id.*

106. ALASDAIR MACINTYRE, AFTER VIRTUE 206, 222 (2d ed. 1984). Regarding the role and impact of the social or historical setting (conceived in a relatively inclusive manner) MacIntyre writes: "A social setting may be an institution, it may be what I have called a practice, or it may be a milieu of some other human kind. But it is central to the notion of a setting as I am going to understand it that a setting has a history, a history within which the histories of individual agents not only are, but have to be, situated, just because without the setting and its changes through time the history of the individual agent and his changes through time will be unintelligible." *Id.* at 206-07. Elsewhere, MacIntyre adds, "Narrative history of a certain kind turns out to be the basic and essential genre for the characrterization of human actions." *Id.* at 208.

107. *Id.* at 222. "Hence the individual's search for his or her good is generally and characteristically conducted within a context defined by those traditions of which the individual's life is a part. . . ." *Id.*

108. *Id.* at 218. The unity of an individual life, MacIntyre argues, "is the unity of a narrative embodied in a single life. To ask 'What is good for me?' is to ask how best I might live out that unity and bring it to completion. To ask 'What is good for man?' is to ask what all answers to the former question must have in common." *Id.* at 218-19.

109. *Id.* at 220. "[W]e all approach our own circumstances as bearers of a particular cial identity. I am someone's son or daughter . . . I am a citizen of this or that city; a member of

effectively gives each life its "moral particularity."[110] Thus, the communitarian conception of self is of an essentially shared relationship and "the identity of the human self is bound up with and partially constituted by that self's sense of meaning or significance of the objects and situations he encounters in his life."[111] The self then is inextricably wrapped in a community and a fully constituted person is effectively an 'intersubjective self' as the full definition of her identity must involve some reference to a defining community within which she is embedded.[112]

The sanction of denationalization is not easily reconcilable with communitarian and civic-republican theory. From the communitarian perspective, denationalization, like a "forced conversion" may be seen as "grossly" and impermissibly intruding "upon a person's conception of self."[113] As Aleinokoff put it, when a state "strips an individual of her citizenship, it may well be tearing the self apart."[114] Additionally, Aleinikoff contended denationalization should be disallowed because states should take "responsibility for the individual it has helped to constitute," meaning, the person it has "helped to endow" with "a set of values and relationships that precede any conscious choice by the citizen (at least at birth)."[115] "The state, like the family, could punish, but it ought not banish."[116]

The decisions of the United States Supreme Court appear to reflect the communitarian thesis against revocation even as they allow for limited denationalization in extreme cases. The reasoning in cases, such as *Afroyim*, appears to reflect this communitarian bias against revocation.[117] In the words of Justice Black, American citizenship "is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry."[118] It is therefore "completely incongruous to have a rule of law under which a group of citizens

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this or that guild or profession."

110. *See* STEPHEN MULHALL & ADAM SWIFT, LIBERALS AND COMMUNITARIANS 89-91 (1992) (citing MACINTYRE, *supra* note 106, at 220).

111. *Id.* at 107.

112. *Id.* at 110. As Charles Taylor argues, the "essential relation between selves and self-interpretation entails an equally essential relation between selves and other selves—a relation to community." *Id.* at 110 Taylor further argues that "any attempt to comprehend the integrity and identity of human beings in . . . atomistic terms, to regard society as merely an aggregation of such antecedently individuated atoms in the absence of which human beings would still be human, is incoherent." *Id.* at 111-12. Thus through membership in a variety of social groups, the individual identifies herself and is identified by others. She is simultaneously a sister, daughter, member of household, village, tribe and state. *See generally* MACINTYRE, *supra* note 106.

113. Aleinikoff, *supra* note 89, at 1495. Aleinikoff speculates that in certain cases, this may be necessary as denationalization may be akin to "removal of a malignant cancer." *Id.* at 1495, n.106.

114. *Id.*

115. *Id.* at 1496.

116. *Id.*

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

118. *Id.* at 267-68.

temporarily in office can deprive another group of citizens of their citizenship."[119] Under the *Afroyim* conception of citizenship as a "cooperative affair," people as citizens are "constituted by, and are constitutive of, the society in which they are raised."[120] Even cases that put forth this view, however, maintain denationalization may be appropriate for treason, subversion, or wartime desertion, whereby the citizen effectively demonstrates that he or she is completely un-American and unattached to the core principles of the society.[121] Yet, as Aleinikoff observed, "given the range of heinous crimes that this nation regularly experiences, it is not easy to say what acts would be so outré as to be un-American."[122]

These conceptions of citizenship are "linked rhetorically" and they can be used to foment "citizenship talk" that is "heated . . . energetic and morally charged."[123] These various citizenship theories permit revocation, particularly where the offending conduct imperils the fate of the polity itself, thus jeopardizing the rights of its members. In sum, both the liberal and communitarian approaches to citizenship complement each other, particularly on the debate about revocation. As Schuck noted, the positive meaning can check the normative meaning and its harsh exclusionary impulse: "When we are tempted to say (or feel) that our fellow citizens should 'shape up or ship out' or should 'love our country or leave it,' we may recall that our law does not view citizenship as a reward for civic virtue. The target of criticism may respond with what he imagines is a rhetorical trump: "It's a free country."[124]

## III. THE JURISPRUDENCE OF BANISHMENT: CITIZENSHIP REVOCATION IN AMERICAN LAW

Throughout history, forfeiture of citizenship and the corollary practices of banishment and exile have been used as punishment.[125] In the Roman Empire, when people lost their freedoms, they "necessarily lost . . . citizenship" as well.[126] For example, a Roman sold into slavery as an insolvent debtor, or condemned to the mines for his crimes as servus poenae, suffered not just a loss of his freedom, but a loss of citizenship as well.[127] Similarly, banishment was a weapon in the English legal arsenal for centuries.[128] Despite the frequent resort to banishment in the English legal system, the prac-

119. *Id.*

120. *See* Aleinikoff, *supra* note 89, at 1495.

121. Aleinikoff, *supra* note 89, at 1497.

122. *Id.* at 1498.

123. Schuck, *supra* note 64, at 1-2.

124. *Id.* at 2.

125. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 170 n.23 (1963) (noting that denationalization or involuntary expropriation are evidently "punitive").

126. *Id.*

127. *Id.* (citing John W. Salmond, *Citizenship and Allegiance*, 17 L.Q. REV. 270, 276 (1901)).

128. *Id.*

tice was always considered draconian and excessive even by the standards of the day.[129] Throughout history, the Court has grappled with "contending constitutional arguments in the context of certain basic and sometimes conflicting principles," involving the constitutionally guaranteed rights of citizenship pitted against Congressional powers and the associated obligations of individual citizens.[130]

There is a strong animus to denationalization in American political and legal history. The U.S. Congress, particularly in its first hundred years, seldom enacted denationalization legislation.[131] In fact, "on three occasions, in 1794, 1797, and 1818, Congress considered and rejected proposals to enact laws that would denote certain conduct as resulting in expatriation."[132] Not until 1865 did Congress pass what was later viewed as the first denationalization statute—the Enrollment Act of 1865 (section 21).[133] Subsequently, the government recognized the right of expatriation in the Expatriation Act of 1868.[134]

In the twentieth century Congress passed more denationalization statutes.[135] The 1907 Expatriation Act was aimed at limiting dual citizenship and its perceived ills.[136] In 1940, Congress subsequently added new grounds for denationalization including serving in foreign armed forces, voting in a foreign election, accepting certain offices or employment in a foreign state, and conviction for wartime desertion, treason, or attempt to forcibly overthrow the government.[137] In 1944, Congress authorized loss of citizenship for persons who left the U.S. in wartime to avoid military service.[138] In 1954, Congress provided for loss of citizenship for certain convictions under the Smith Act.[139] The current statutory basis for revoking Walker's citizenship is 8 U.S.C. § 1481, entitled "Loss of Nationality by Native-Born or Naturalized Citizen."[140]

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129. *Id.* (citing Maxey, *Loss of Nationality or Government Fiat?*, 26 ALB. L. REV. 151, 164 (1962)).

130. *Kennedy*, 372 U.S. at 159-60.

131. Aleinikoff, *supra* note 89, at 1475.

132. *Afroyim*, 387 U.S. at 257.

133. Aleinikoff, *supra* note 89, at 1475. Section 21 provided deserters from military service "shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship." *Id.* Nonetheless, historian John Roche argues that "rights of citizenship" referred to attributes of nationality such as the franchise. *Id.*

134. *Id.* at 1476.

135. *Id.* at 1476-77.

136. *Id.* at 1476.

137. *Id.* at 1477. The Immigration Act of 1952 amended the provision relating to employment in a foreign government. *See id.*

138. *Id.*

139. *Id.*

140. 8 U.S.C.A. § 1481 (West 2002)

> (a): A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the *intention* of relinquishing United States nationality:

These congressional statutes have led courts to increasingly take up various forms of denationalization actions. Aleinikoff observed that over the last century at least three categories of denationalization cases have emerged, i.e., cases referring to the government's act of terminating citizenship. First, in allegiance cases, denationalization proceedings were a result of withholding allegiance from the state—an act viewed as severing the nexus between citizen and state.[141] Aleinikoff observed allegiance may lapse due to voluntary transfer as in express or even implicit renunciation; or allegiance may be divided and/or be lacking as evinced by active disloyalty (treason) or gross apathy.[142] Second, in the punishment cases, the state sought to deny the benefits of citizenship from persons deemed undeserving.[143] Finally, in the third category of cases related to "public order," proceedings are instituted against individuals whose membership in the state presents a major threat to national security and public safety.[144]

An analysis of major denationalization cases shows the Supreme Court has been wrestling with the contradictory jurisprudential principles intertwined in the citizenship debate. The Court has grappled with the conflicting principles stemming from the precious nature of citizenship on the one hand and the related obligations of citizens as well as the powers of Congress on the other hand.[145] Whether inspired by civic myth or American exceptionalism, the cases reflect a judicial hostility against revocation of native-born citizenship, a reverential attitude towards native-born citizenship as well as a strong judicial bias against banishment and statelessness. Informed by the

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> (2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof, after having attained the age of eighteen years; or
>
> (3) entering, or serving in, the armed forces of a foreign state if (A) such armed forces are engaged in hostilities against the United States, or . . .
>
> (4)(B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, after attaining the age of eighteen years for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or
>
> (7) committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of section 2383 of Title 18, or willfully performing any act in violation of section 2385 of Title 18, or violating section 2384 of Title 18 by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction.

*Id.* (emphasis added).

141. Aleinikoff, *supra* note 89, at 1473.

142. *Id.*

143. *Id.*

144. *Id.* at 1474.

145. *Kennedy*, 372 U.S. at 160.

intent of the framers of the Fourteenth Amendment, the Court's reverential attitude towards citizenship has resulted in a very heavy burden of proof in denationalization cases and an increasingly demanding standard of review so that birthright citizenship has emerged as a fundamental "super-right."[146]

### *A. The Framers' Intent*

By most accounts, involuntary expatriation is seen as contrary to the intent of the framers of the original Constitution as well as the Fourteenth Amendment. The prevailing view at the constitutional convention, perhaps inspired by English precedents and natural law, was that citizenship was acquired by birth or naturalization and could only be lost with "the consent of the sovereign."[147] "[T]he central ascriptive principle" of Jus soli, or birthright citizenship, can be traced to feudal times.[148] Because subjectship to the political potentate under whom one was born was deemed "natural—sanctioned by divine will and rationally discoverable by natural law"—persons who acquired allegiance to a new ruler were deemed to be "naturalized."[149] According to Blackstone, an individual's obligation to the sovereign represented a "debt of gratitude [] which cannot be forfeited, canceled or altered by any change of time, place or circumstance."[150] Sir Edward Coke gave an account of the English law of ascriptive citizenship in *Calvin's Case* (1607) noting that the common law recognized as subjects of the king all persons born in the realm and subject to his laws, including the children of aliens.[151] Coke posited this was the result of personal relationship of allegiance owed to the King under natural law because of his protection of a child at its birth and the "natural debt bound the subject for life."[152] Nevertheless, the modern view announced by the Declaration of Independence posits governments were "instituted among men, deriving their just powers from the consent of the governed," and could be altered or abolished when

146. Aleinikoff, *supra* note 89, at 1486.

147. *Id.* at 1491. The Court favorably cited early English precedents in favor of the irrevocability of citizenship. For example in *United States v. Wong Kim Ark*, 169 U.S. 649, 665-60 (1898), the Court referred to early English law precedents such as *Calvin's Case* (aka the Case of Postnati) which held all persons born within the King's allegiance and subject to his protection were citizens of the realm. *Id.* (citing *Calvin's Case*, 7 Eng. Rep. 1, 4b-6a, 18a, 18b (1608); LORD CHIEF JUSTICE COCKBURN, COCKBURN ON NATIONALITY 7 (1869); A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 173-77, 741 (1st ed. 1896); Michael Gunlicks, *Citizenship as a Weapon in Controlling the Flow of Undocumented Aliens: Evaluation of Proposed Denials of Citizenship to Children of Undocumented Aliens Born in the United States*, 63 GEO. WASH. L. REV. 551, 552 (1995)).

148. Martin, *supra* note 93.

149. ROGERS M. SMITH, CIVIL IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 13 (1997).

150. Rubenstein & Adler, supra note 37 (citing SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 117 (1884)).

151. NEUMAN, *supra* note 98.

152. *Id.* at 167.

they subvert their proper acts.[153] Birthright citizenship is defended as "familiar," "easy to apply," practical, and inclusive enough to embrace all persons born in the United States, including children of illegal aliens.[154]

From its earliest decisions, the Supreme Court has held Fourteenth Amendment birthright citizenship is virtually absolute and un-abridgeable. Many were "greatly disturbed" by *Dred Scott*'s impact on American blacks' citizenship status.[155] To "protect" blacks after *Dred Scott*, citizenship under the Fourteenth Amendment was given "permanence and security."[156] In the process leading to its passage, Senate sponsors were concerned that the House version did not contain "any definition of citizenship."[157] They feared the citizenship recently granted to blacks under the Civil Rights Act could be easily withdrawn by future Congresses.[158] To safeguard against this possibility, and to place a permanent check against governmental efforts to denationalize the new black citizens, they insisted on including "a constitutional definition and grant of citizenship.[159] Consequently, the Fourteenth Amendment reads: "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."[160] According to Senator Howard, the primary Senate sponsor, the first clause was added to toughen the Fourteenth Amendment: "It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. . . . We desired to put this question of citizenship and the rights of citizens . . . under the civil rights bill beyond the legislative power . . . ."[161]

The framers clearly feared allowing the government to "rob a citizen of his citizenship without his consent" by claiming to act under "an implied general power to regulate foreign affairs or some other power generally granted," which would frustrate the undeniable purpose of the Fourteenth Amendment, to wit, making the citizenship of black Americans permanent and secure.[162] The entire legislative history of the 1868 Act reveals there was a "strong feeling" in the Congress that Fourteenth Amendment citizenship could only be lost by voluntary renunciation or abandonment by the citizen himself."[163]

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153. SMITH, *supra* note 148.
154. *See* Schuck & Smith, *supra* note 89, at 90-91.
155. *Afroyim*, 387 U.S. at 262.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. U.S. CONST. amend. XIV, § 1.
161. *Afroyim*, 387 U.S. at 263.
162. *Id.* at 263.
163. *Id.* at 265.

Since the people are sovereign, the Government "cannot sever its relationship to the people by taking away their citizenship."[164] The Constitution does not grant Congress an express power to denationalize and, although Congress has a power to "prescribe a uniform rule of naturalization," it has no power "to enlarge or abridge" Fourteenth Amendment citizenship.[165] Denationalization is not an act that is "necessary and proper" to execute a specifically granted power.[166] In his now famous dictum, Chief Justice Marshall stated that "[c]ongress, once a person becomes a citizen, cannot deprive him of that status," for the naturalized citizen "becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native.[167] The "unequivocal terms" of the Fourteenth Amendment[168] make birth "a sufficient and complete right to citizenship" and no act of Congress can restrict, abridge or affect "citizenship acquired as a birthright by virtue of the constitution itself."[169]

The "constitutional rule" of the Fourteenth Amendment is unequivocally "calculated completely to control the status of citizenship" by providing a permanent guarantee of citizenship that was not to be "shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit."[170] Fourteenth Amendment citizenship is not "a fleeting citizenship, good at the moment it is acquired" yet arbitrarily destructible.[171] A reasonable reading of the Fourteenth Amendment indicates that the citizenship guarantee is permanent unless and until the citizen voluntarily relinquishes it.[172]

In *Afroyim*, the Court refused to uphold a Congressional statute revoking citizenship because an American voted in a foreign election, which violated the statute, concluding the statute had the impermissible effect of

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164. *Id.* at 257.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 261-62.

169. *Id.* at 265-66. The author quotes Chief Justice Marshall's famous dictum in *Osborn* to the effect that Congress under the power of naturalization has "a power to confer citizenship, not a power to take it away," and noting:

> Congress having no power to abridge the rights conferred by the constitution upon those who have become naturalized citizens by virtue of acts of congress, a fortiori no act . . . of congress . . . can affect citizenship acquired as a birthright by virtue of the constitution itself. . . . The fourteenth amendment, while it leaves the power, where it was before, in congress, to regulate naturalization, has conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship.

*Id.*

170. *Afroyim*, 387 U.S. at 265-66. "This constitutional statement is to be interpreted in light of pre-existing common-law principles governing citizenship." *Kennedy*, 372 U.S. at 159 n.10.

171. *Afroyim*, 387 U.S. at 262.

172. *Id.*

abridging, affecting, restricting, and taking away citizenship against the clear mandate of the Fourteenth Amendment.[173] Consequently, the *Afroyim* Court held the Fourteenth Amendment protects every citizen from "a congressional forcible destruction of his citizenship," by an act of Congress because every citizen has "a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."[174]

Although the Fourteenth Amendment's express guarantee speaks of citizenship "in the most positive terms," the Court has also noted that the Constitution is silent about the permissibility of "involuntary forfeiture of citizenship rights."[175] Two years after the Fourteenth Amendment was proposed, Congress specifically considered and rejected "with little discussion" several bills designed to impose involuntary expatriation on citizens who committed certain acts.[176]

### *B. Preciousness of American Citizenship*

The Supreme Court has stated, "citizenship is a most precious right,"[177]—"a right no less precious than life or liberty."[178] Noting that it would be "difficult to exaggerate [the] value and importance" of the "priceless benefits" of American citizenship, the Supreme Court stated: "nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. . . . By many it is regarded as the highest hope of civilized men."[179] The Kennedy Court stated American citizenship is "one of the most valuable rights in the world today," the deprivation of which would have "grave practical consequences."[180] American "citizenship is no light trifle to be jeopardized any moment,"[181] and revoking a person's citizenship is

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173. *Id.* at 265-66.

174. *Id.* at 267-68. To determine whether citizenship has been voluntarily relinquished, one must look on the facts of each case and that Congress could provide rules of evidence for such proceedings. *Id.*

175. *Kennedy*, 372 U.S. at 159.

176. *Afroyim*, 387 U.S. at 263-64. In a congressional debate on one of these expatriation bills, Representative Van Trump of Ohio stated:

> To enforce expatriation or exile against a citizen without his consent is not a power anywhere belonging to this Government. No conservative minded statesman, no intelligent legislator, no sound lawyer has ever maintained any such power in any branch of the Government. The lawless precedents created in the delirium of war . . . of sending men by force into exile, as a punishment for political opinion, were violations of this great law . . . of the Constitution.

*Id.* at 264-65

177. *Kennedy*, 372 U.S. at 159.

178. Klapprott v. United States, 335 U.S. 601, 616-17 (1949) (Rutledge, J., concurring).

179. Schneiderman v. United States, 320 U.S. 118, 122 (1943).

180. *Kennedy*, 372 U.S. at 160 (citing REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION 235 (1953)).

181. *Afroyim*, 387 U.S. at 267-68.

"in its consequences more serious than a taking of one's property, or the imposition of a fine or other penalty."[182] In *Klaprott*, the Court reiterated, "to take away a man's citizenship deprives him of a right no less precious than life or liberty,"[183] and in *Trop,* the Court indicated that the "fundamental right of citizenship is secure" as long as a person does not voluntarily renounce or abandon his citizenship.[184]

The Supreme Court's opinions suggest the right of citizenship is more precious for native-born citizens. In *Kungys*, the Court noted that whereas Congress has authorized a special procedure that may result in the revocation of the citizenship of the "naturalized citizen," the precious right of American citizenship of the "native-born citizen" is a "truly inalienable" right.[185] At the same time the Court expressed concern with securing the precious right for both native-born and naturalized citizens. In *Klapprott*, where the Court frowned on the inadequacy of constitutional safeguards in denaturalization proceedings, Justice Rutledge's concurring opinion noted that the Court's rulings had effectively created "two classes of citizens in this country, one secure in their status and the other subject at every moment to its loss by proceedings not applicable to the other class."[186]

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182. *Schneiderman*, 320 U.S. at 122.

183. *Klapprott,* 335 U.S. at 616-17.

184. Trop v. Dulles, 356 U.S. 86, 93 (1958).

185. Kungys v. United States, 485 U.S. 759 (1988) (Stevens, J., concurring). In *Kungys*, where the U.S. brought action to revoke a naturalized alien's citizenship, the Court had to decide whether certain misrepresentations or concealments made by Kungys in connection with his naturalization proceeding were "material" and, whether those misrepresentations rendered Kungys' citizenship "illegally procured"because they established that he lacked the requisite good moral character when he was naturalized thirty-four years earlier. (The Government claimed Kungys had participated in executing over 2,000 Lithuanian civilians, most of them Jewish, in Kedainiai, Lithuania, between July and August 1941 and it further alleged that in applying for his visa and in his naturalization petition, Kungys had made false statements regarding the date and place of his birth and his wartime occupations and residence.) The Court, per Justice Scalia, held "the test of whether Kungys' concealments or misrepresentations were material is whether they had a natural tendency to influence the decisions of the Immigration and Naturalization Service." *Id.* at 772. It reasoned the test of whether concealments or misrepresentations were "material" within the meaning of a statute providing for the denaturalization of citizens whose naturalization certificates were procured by concealment of a material fact or by willful misrepresentation, was whether they could be demonstrated by clear, unequivocal and convincing evidence to have been predictably capable of affecting the INS's decision. *Id.* The Court also held that the statute—providing that a person was not of good moral character if he gave false testimony in order to secure immigration or naturalization benefits—did not impose a materiality requirement for false testimony. *Id.* Thus, the Court concluded Kungys' misrepresentation of the date and place of his birth in his naturalization petition was not material within the meaning of INA section 1451. *Id.* The Court remanded the case to the Third Circuit to determine whether the other misrepresentations or concealments that the District Court found to have been made in 1954 were supported by the evidence and material to the naturalization decision under the prescribed standard bearing in mind the unusually high burden of proof in denaturalization cases. *Id.* (citing Baumgartner v. United States, 322 U.S. 665, 670 (1944), and *Schneiderman*, 320 U.S. at 158).

186. *Klapprott*, 335 U.S. at 619 (citing *Schneiderman,* 320 U.S. at 167).

### *C. A Very High Burden*

Recognizing the preciousness of the right, the Court has noted that once conferred, American citizenship "should not be taken away without the clearest sort of justification and proof."[187] In actions to deprive one of "citizenship previously conferred" the "facts and the law should be construed as far as is reasonably possible in favor of the citizen."[188] In other words, although citizenship conferred upon an alien can be "revoked or canceled on legal grounds under appropriate proof," such a right "should not be taken away without the clearest sort of justification and proof."[189] The burden must be met with "clear, unequivocal, and convincing evidence, which does not leave the issue in doubt."[190] Even though denaturalization proceedings do not fall "within the technical classification of crimes" the Court still emphasizes "the unusually high burden of proof in denaturalization cases."[191] The Court observed that the factors supporting the use of a very heavy burden are largely the same in both contexts—"particularly critical is the immense importance of the interests at stake,[192] the possibility of loss of liberty,[193] the resultant stigmatization,[194] and the societal interest in the reliability of the outcome."[195] Justice Rutledge observed that notwithstanding what it is called, denaturalization proceedings, where successful, have the harsh effects of a penal or criminal conviction, save that the associated liability to deportation is a more severe penalty than is generally inflicted for crime.[196] Thus, in denaturalization cases, the government bears "a special burden," "an unusually heavy burden" that is "substantially identical with that required in criminal cases—proof beyond a reasonable doubt."[197] The *Klapprott* Court stated that since denaturalization is an "extraordinarily severe penalty" with "grave" consequences including deportation, loss of liberty, property, and even family relationships, "it seems peculiarly appropriate that a person's citizenship should be revoked only after evidence has established that the person has been guilty of prohibited conduct justifying revocation."[198] Using this high standard, the Court has ruled that default judgments in denaturalization cases are "intolerable."[199] Justice Rutledge stated in his

187. *Schneiderman*, 320 U.S. at 122.

188. *Id.*

189. *Id.*

190. *Id.* at 158. As the Court noted in *Vance v. Terrazas*, 444 U.S. 252 (1980), in light of "the importance of citizenship," the Court has "evinced a decided preference for requiring clear and convincing evidence to prove expatriation." *Id.* at 266.

191. *Kungys*, 485 U.S. at 776 (citing Baumgartner v. United States, 322 U.S. 665, 670 (1944)).

192. *Id.* at 795 (citing *In re Winship*, 397 U.S. 358, 363 (1970)) (Stevens, J., concurring).

193. *Id.* (citing *Klapprott*, 335 U.S. at 612).

194. *Id.* (citing *Schneiderman*, 320 U.S. at 122-23).

195. *Id.* (citing *In re Winship*, 397 U.S. at 363-64).

196. *Klapprott*, 335 U.S. at 611.

197. *Id.* at 611-612.

198. *Id.*

zation cases are "intolerable."[199] Justice Rutledge stated in his concurring opinion in *Klapprott*, "ordinary civil procedures, such as this apply in suits upon contracts and to enforce other purely civil liabilities, do not suffice for denaturalization and all its consequences."[200] Further, he said, "[i]f citizenship is to be defeasible for naturalized citizens, other than by voluntary renunciation or other causes applicable to native-born citizens," the defeasance should be "surrounded by no lesser protections than those securing all citizens against conviction for crime."[201] Additionally, the *Trop* Court stated that whenever the government is acting to revoke "the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence."[202]

Expatriation requires the "ultimate finding that the citizen has committed the expatriating act with the intent to renounce his citizenship," and Congress could require proof of an intentional expatriating act by a preponderance of evidence.[203] In *Vance*, the Court affirmed the statutory presumption under 8 U.S.C. § 1481 that expatriating acts, if proved, are presumed to have been committed voluntarily.[204] The party claiming expatriation bears the burden of proving the expatriating act was performed with the intent to relinquish citizenship.[205] To prove expatriation, "an expatriating act and an intent to relinquish citizenship must be proved by a preponderance of the evidence" and when an expatriating act is proved, "it is constitutional to presume it to have been a voluntary act until and unless proved otherwise by the actor."[206]

### *D. Minimalist Obligations Approach*

In denationalization proceedings, the Supreme Court has been reluctant to countenance revocation of citizenship for failure to perform obligations, and it is concerned with embarking down a slippery slope that could conceivably lead to demands for revocation for insubstantial reasons. Further, the Court has been loathe to revoke citizenship for mere failure to perform "citizenship obligations" or for actions that constitute bad citizenship. In *Trop*, the Court stated:

> Citizenship is not a license that expires upon misbehavior. The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation. . . . But citizenship is not lost every time a duty of citizenship is shirked. And the depri-

199. *Kungys*, 485 U.S. at 792 (Stevens, J., concurring).
200. *Klapprott*, 335 U.S. at 617.
201. *Id.* at 617-18.
202. *Trop*, 356 U.S. at 99.
203. *Vance*, 444 U.S. at 267.
204. *Id.*
205. *Id.*
206. *Id.* at 270.

> vation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be.[207]

The *Trop* Court recognized that the United States could suffer "serious injury" as a result of a "failure to perform" the "basic responsibilities of citizenship" such as paying taxes, serving in the military, as well as "full participation in the manifold activities of the civilian ranks."[208] While the government may punish "derelictions of the duties of citizenship," revocation of citizenship is inappropriate.[209]

Although traditional punitive reasons for denationalization have been limited to violations of laws against subversion, draft evasion, and wartime desertion, Aleinikoff suggests the punishment theory may even allow denationalization for anti-social conduct such as murder, child abuse, or tax evasion.[210] Justice Black observed, citizens' obligations to pay taxes and obey the laws are just as related to the nature of our citizenship as our military obligations.[211] Yet, the danger is that the Court may, by analogy, "impose expatriation as punishment for any crime," including tax evasion, bank robbery, and narcotics offenses.[212]

In *Trop*, the government argued "the necessary nexus to the granted power is to be found in the idea that legislative withdrawal of citizenship is justified in this case because Trop's desertion constituted a refusal to perform one of the highest duties of American citizenship—the bearing of arms in a time of desperate national peril."[213] This simplistic proposition, as the Court recognized, implied "a certain rough justice," for after all, it seems only fair that "[h]e who refuses to act as an American should no longer be an American."[214] The Court felt that a measure which purposefully denationalizes deserters is really inspired by "naked vengeance"[215] and is actually an arbitrary exercise of congressional power.[216]

In addition, certain offenses that are technically dubbed desertion "certainly fall far short of a 'refusal to perform this ultimate duty of American citizenship,'"[217] and thus "it stretches the imagination excessively to establish a rational relation of retribution to the ends purported to be served by expatriation of the deserter."[218]

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207. *Trop*, 356 U.S. at 92-93.
208. *Id.* at 92
209. *Id.* at 92-93.
210. Aleinikoff, *supra* note 89, at 1474.
211. *Trop*, 356 U.S. at 113 (Brennan, J., concurring).
212. *Id.*
213. *Id.* at 112.
214. *Id.*
215. *Id.*
216. *Id.* at 113.
217. *Id.* at 112.
218. *Id.* at 113.

The *Kennedy* Court frowned on the temptation to dispense with fundamental civil liberties during wartime or "under the pressing exigencies of crisis."[219] Justice Brennan's concurring opinion in *Kennedy* called denationalization a simplistic remedy "fraught with the most far-reaching consequences."[220]

The Supreme Court has also been wary of denationalizing persons on grounds that they are insufficiently attached to the principles of the Constitution. For example, in *Schneiderman*, where the Court laid down an unusually high threshold for such cases, the Court held that the government failed to carry its "burden of proving by evidence which does not leave the issue in doubt that petitioner was not in fact attached to the principles of the Constitution and well disposed to the good order and happiness of the United States" when he was previously naturalized.[221] The Court observed "the many important and far-reaching changes made in the Constitution since 1787 refute the idea that attachment to any particular provision or provisions is essential, or that one who advocates radical changes is necessarily not attached to the Constitution."[222] Lack of attachment to the Constitution was not shown merely because petitioner testified he wanted to change the Constitution, noting that it was "possible to advocate such changes and still be attached to the Constitution."[223]

Aleinikoff contends that denationalization should be based on conduct, and marked by specific and identifiable acts that "demonstrate lapsed, transferred, or divided allegiance, not belief."[224] He argues that "shifting to an al-

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219. *Kennedy*, 372 U.S. at 165.

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. . . . [I]f society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

*Id.*

220. *Id.* at 196 (Brennan, J., concurring).

> It is too simple to suggest that it is fitting that Congress be empowered to extinguish the citizenship of one who refuses to perform the 'ultimate duty' of rising to the Government's defense in time of crisis. . . . For if Congress now should declare that a refusal to pay taxes, to do jury duty, to testify, to vote, is no less an abnegation of ultimate duty—or an implied renunciation of allegiance—than a refusal to perform military service, I am unable to perceive how this Court, on the dissent's view, could presume to gainsay such a judgment.

*Id.*

221. *Schneiderman*, 320 U.S. at 122-23.

222. *Id.* at 137-38.

223. *Id.* at 141-42.

224. Aleinikoff, *supra* note 89, at 1500.

legiance-based understanding of denationalization will naturally lead to government investigations of the loyalty of citizens."[225] There is a danger of a slippery slope as even "contemptible citizens" may continue to have allegiance to the United States as well as adequate attachment to the core principles of the Constitution.[226]

Nonetheless, the *Kennedy* Court emphasized the citizenship obligations and noted in the now oft quoted dictum that the constitution is not a suicide pact:

> While it confirms citizenship rights, plainly there are imperative obligations of citizenship, performance of which Congress in the exercise of its powers may constitutionally exact. One of the most important of these is to serve the country in time of war and national emergency. The powers of Congress to require military service for the common defense are broad and far-reaching, for while the Constitution protects against invasions of individual rights, it is not a suicide pact. Similarly, Congress has broad power under the Necessary and Proper Clause to enact legislation for the regulation of foreign affairs. Latitude in this area is necessary to ensure effectuation of this indispensable function of government.[227]

### *E. Denationalization as Cruel and Unusual Punishment*

The hostility to denationalization in American jurisprudence has ironically led to the conclusion that depriving an American of citizenship may, in certain cases, constitute cruel and unusual punishment and is barred by the Eighth Amendment.[228] As the *Trop* Court concluded, state-sanctioned denationalization as a punishment is barred by the Eighth Amendment and "offensive to cardinal principles for which the Constitution stands" because it involves "the total destruction of the individual's status in organized society" and it is "a form of punishment more primitive than torture."[229] It is also "an extraordinarily severe penalty"—a punishment that is "tantamount to exile or banishment"[230] and "patently excessive."[231] The consequences of denationalization, including statelessness (discussed below), "may be more grave than consequences that flow from conviction for crimes,"[232] not the least because it "destroys for the individual the political existence that was centuries in the development."[233] Denationalization as punishment constitutes "an ex-

225. *Id.*
226. *Id.* at 1501.
227. *Kennedy*, 372 U.S. at 159-60.
228. *Trop*, 356 U.S. at 101.
229. *Id.* at 102.
230. *Kungys*, 485 U.S. at 791 (Stevens, J., concurring).
231. *Id.*
232. *Id.* at 792.
233. *Trop*, 356 U.S. at 101.

traordinarily severe penalty" and the "consequences may be more grave than consequences that flow from conviction for crimes."[234]

In determining that denationalization "subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment,"[235] the *Trop* Court rejected the pervading notion that the death penalty is "an index of the constitutional limit on punishment."[236] Although imprisonment and even execution may be appropriate for certain crimes, denationalization is a "technique outside the bounds of these traditional penalties is constitutionally suspect."[237] Furthermore, the death penalty "is not a license to the government to devise any punishment short of death within the limit of its imagination without violating the constitutional prohibition against cruel and unusual punishment."[238]

The Court concluded that "the exact scope" of the phrase 'cruel and unusual' punishment, as well as the "the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice."[239] In addition, the Court noted the interpretation of the Eighth Amendment continues to evolve, noting that it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" and the scope is "not static."[240] While the Court has not regularly ruled on Eighth Amendment cases, it has nonetheless ruled certain practices are unconstitutional. It readily ruled a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records is "cruel in its excessiveness and unusual in its character."[241] Although the Court has not drawn "precise distinctions between cruelty and unusualness," the *Trop* Court observed "if the word 'unusual' is to have any meaning apart from the word 'cruel,' however, the meaning should be the ordinary one, signifying something different from that which is generally done."[242] Denationalization as a

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234. *Kungys*, 485 U.S. at 792 (Stevens, J., concurring).

235. *Trop*, 356 U.S. at 99 (noting U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.")).

236. *Id.* at 99.

> Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.

*Id.*

237. *Id.*

238. *Id.*

239. *Id.* Yet, the phrase harkens back to the English Declaration of Rights of 1688 and the principle it represents can be traced back to the Magna Carta. *Id.* at 99-100.

240. *Id.* at 99.

241. *Id.*

242. *Id.*

punishment "certainly meets this test" because it is something different from that which has been "generally done"; it was never explicitly endorsed by the United States until 1940 and was never constitutionally tested until the *Trop* case.[243] As Justice Rutledge stated: "To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to our law and at most but doubtfully within Congress' power."[244] By enacting statutes to "punish" citizens through denationalization, the punishment power is not "exercised within the limits of civilized standards," and it infringes on human dignity.[245] Thus, "the Eighth Amendment forbids Congress to punish by taking away citizenship."[246]

Penal laws, including "indeterminate sentences and parole added to the traditional term of imprisonment" are generally designed to achieve the "humane and effective" goal of rehabilitation or deterrence.[247] Punishment by expatriation clearly "constitutes the very antithesis of rehabilitation," for excommunicating the offender literally makes him "an outcast."[248] Denationalization is likely to be counterproductive because stigmatizing the offender and making him "uncertain of many of his basic rights," will more likely tend to spur antisocial behavior.[249] Furthermore, if unaccompanied by banishment, expatriation may not achieve some of the desired effects because "it will not insulate society" from the offender because the sanction leaves the offender at large to perpetuate more mischief.[250] In addition, it is unlikely to serve as a deterrent for one undeterred by the prospect of long imprisonment or even death, one who will probably not be affected by expatriation, nor by the "insidious and demoralizing . . . experience of statelessness."[251]

Deporting the denaturalized citizen "obviously deprives him of liberty," and "it may result also in loss of both property and life; all that makes life worth living."[252] Denationalization might also affect innocent third parties

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243. *Id.*

244. *Kennedy*, 372 U.S. at 161-62 (citing Chaunt v. United States, 364 U.S. 350 (1960) (Rutledge, J. concurring)).

245. *Trop*, 356 U.S. at 99-100.

246. *Id.* at 103. The dissent queried:

> Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death? The seriousness of abandoning one's country when it is in the grip of mortal conflict precludes denial to Congress of the power to terminate citizenship here, unless that power is to be denied to Congress under any circumstance.

*Id.* at 125-26. As the dissent further opined: "to insist that denationalization is 'cruel and unusual' punishment is to stretch that concept beyond the breaking point." *Id.* at 125.

247. *Id.* at 111.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 112

252. *Kungys*, 485 U.S. at 792 (Stevens, J., concurring).

related to the deportee, and the "consequences of such a deprivation may even rest heavily upon his children."[253]

### *E. Birthright Citizenship as a Fundamental Right*

The Court's decisions appear to view citizenship as a type of non-derogable "super-right"[254] as exemplified by Chief Justice Warren's characterization of citizenship as "the right to have rights."[255] In *Trop,* the Court referred to a person's "fundamental right of citizenship" as secure unless the person acts to voluntarily renounce or abandon it.[256] Regarding this "rights perspective" on the loss of citizenship, Aleinikoff observed that Justice Black's finding in *Afroyim* that there is "a constitutional right to remain a citizen" has significant implications.[257] Referring to citizenship as a right "gives it weight [and] shifts the burden to the government to produce compelling reasons for its actions that abridge or deny citizenship."[258] If citizenship is a right then, according to Aleinikoff, "our usual understanding" is that it may not be taken away without ascertainment of an intent-to-relinquish or a voluntary waiver.[259] Yet, the rights perspective is fraught with difficulties because the Fourteenth Amendment does not speak in terms of rights nor does it establish an irrevocable right of citizenship.[260] Aleinikoff suggested that a claim of an irrevocable right in citizenship based on the Fourteenth Amendment could be that citizenship is a "fundamental right" protected by a substantive reading of the Fifth Amendment due process clause or perhaps implicit in the structure of the constitutional system.[261]

Aleinikoff argued that denationalization does not necessarily involve the loss of the "rights to have rights" unless it leads to statelessness.[262] Thus, Aleinikoff concluded that building a case for the right to citizenship on the ills facing denationalized persons is "problematic" because "citizenship is not a right held against the state" but rather a "relationship with the state."[263]

## IV. STATELESSNESS IN A STATECENTRIC SYSTEM

In addition to the above constraints against revocation of citizenship, both municipal and international law are in accord on undesirability of state-

253. *Id.*
254. Aleinikoff, *supra* note 89, at 1486.
255. *Id.* (citing *Trop*, 356 U.S. at 102).
256. *Trop*, 356 U.S. at 93.
257. Aleinikoff, *supra* note 89, at 1484.
258. *Id.*
259. *Id.*
260. *Id.* at 1485.
261. *Id.*
262. *Id.* at 1487.
263. *Id.* at 1487-88.

lessness, a foreseeable and likely consequence of denationalization. The Court's recognition of the perils of statelessness, coupled with an emerging consensus in international law, provides further support for the argument against denationalization.

De jure statelessness may be original (a person does not acquire nationality under the law of any state at birth), or subsequent (a person becomes stateless later in life by losing his nationality and not acquiring another).[264] De facto statelessness refers to "those persons with an ineffective nationality or those who cannot establish their nationality."[265] Persons who, "having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals."[266]

Stateless persons do not hold nationality under the law of any state and are therefore abysmally disadvantaged in any effort to secure rights or protection in the international domain.[267] Hundreds of thousands of stateless people around the world continue to exist in legal limbo and are subject to grave violations of their human rights.[268]

Yet, the very linkage of human rights protections and enforcement to nationality and statehood means that persons who are denationalized and rendered stateless continue to face peril in the international system of states.

Stateless persons lack the usual legal protections and remedies, and, if aggrieved, "there is no State which is competent to take up their case."[269] In international law, stateless persons are without protections from wanton maltreatment by state entities "apart from restraints of morality or obligations expressly laid down by treaty."[270]

Statelessness is generally regarded as a most unpropitious condition, and the "evils of statelessness" are recognized in international law by many publicists who have "unanimously disapproved of statutes which denationalize individuals without regard to whether they have dual nationality."[271] The centrality of the nationality concept is highlighted by a plethora of international treaties and conventions affecting nationality.[272]

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264. *See, e.g.*, Rachel Settlage, *No Place to Call Home: Stateless Vietnamese Asylum-Seekers in Hong Kong*, 12 GEO. IMMIGR. L. J. 187, 189-90 (1997) (discussing the plight of thousands of ethnic-Chinese migrants from Vietnam residing in Hong Kong).

265. *Id.* at 189-90.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Kennedy*, 372 U.S. at 160-61 (citing 1 OPPENHEIM, INTERNATIONAL LAW § 291 (8th ed., Lauterpacht, 1955)).

270. *Id.*

271. *Kennedy*, 372 U.S. at 161.

272. Rubenstein & Adler, *supra* note 37, at 525 (citing an extensive list of international treaties or conventions specifically dealing with nationality compiled by Nissam Bar-Yaacov and P. Weis including: 1906 Rio de Janeiro Convention on the Status of Naturalised Citizens;

A consistent theme in these treaties and declarations over the past fifty years has been an enunciation and elaboration of the right to nationality. The harsh consequences of statelessness led to "reaffirmation" of the right to nationality[273] in the United Nations Universal Declaration of Human Rights, Article fifteen, which states, "everyone has the right to a nationality" and that "no one shall be arbitrarily deprived of his nationality." [274] The International Covenant on Civil and Political Rights, Article twenty-four, also states that "every child has a right to nationality."[275] In the International Convention on the Elimination of All Forms of Racial Discrimination, parties undertake to guarantee the right of everyone to enjoy "the [civil] right to nationality" without distinction as to race, national, or ethnic origin.[276] Moreover, in the Convention on the Elimination of All Forms of Discrimination Against Women, state parties undertake to grant women "equal rights with men to acquire, change or retain their nationality" and to ensure that "neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of her husband."[277] In 1989, Article seven of the Convention on the Rights of the Child included "the right to acquire a nationality" and state parties are specifically enjoined to ensure the implementation of this and other rights in cases "where the child would otherwise

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1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws; 1930 Protocol Relating to Military Obligations in Certain Cases of Double Nationality; 1930 Special Protocol Concerning Statelessness; 1933 Montevideo Convention on Nationality; 1933 Montevideo Convention on Nationality of Women; 1954 Convention Relating to Status of Stateless Persons; 1954 Convention on Nationality Between the Members of the Arab League; 1957 United Nations' Convention on the Nationality of Married Women; 1963 European Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality; 1973 Convention for the Reduction of the Number of Cases of Statelessness; 1977 Protocol to the European Convention on Reduction of cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality; and 1977 Additional Protocol to the European Convention on Reduction of cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality. Nissim Bar-Yaacov, Dual Nationality (1961)). *Id. See also* European Convention on Nationality, Nov. 6, 1997, Europe. T.S. No. 166. *Id.*

273. *Kennedy*, 372 U.S. at 161 (citing U.N. Doc. No. A/810, at 71, 74 (1948) (adopted by the U.N. General Assembly on Dec. 10, 1948)). *See also* A Study on Statelessness, U.N. Doc. No. E/1112 (1949); Second Report on the Elimination or Reduction of Statelessness, U.N. Doc. No. A/CN. 4/75 (1953); Weis, *The United Nations Convention on the Reduction of Statelessness*, 11 INT'L & COMP. L. Q. 1073 (1962).

274. G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. No. A/810 (1948), Universal Declaration of Human Rights, *reprinted in* HENKIN BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW 144 (1993).

275. HENKIN, *supra* note 272, at 158.

276. International Covenant on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, 5 I.L.M. 352 (1966) *reprinted in* HENKIN, *supra* note 271, at 165.

277. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 180, U.N. GAOR, (1979), 19 I.L.M. 33 (1980) *reprinted in* HENKIN, *supra* note 271, at 174.

be stateless."[278] With respect to regional instruments, Protocol number four of the European convention for the Protection of Human Rights and Fundamental Freedoms articles state: "No one shall be expelled . . . from the territory of the State of which he is a nation" and "no one shall be deprived of the right to enter the territory of the State of which he is a national."[279] Meanwhile, the American Declaration of the Rights and Duties of Man declares "every person has the right to the nationality to which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him."[280] Article twenty of the American Convention on Human Rights states "every person has a right to a nationality . . . every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality."[281] It adds, "No one shall be arbitrarily deprived of his nationality or the right to change it."[282] While the African Charter on Human and People's Rights does not explicitly provide a "right to nationality," it states that every person has a right to "return to his country"—unfortunately the right appears subject to very broad "restrictions provided for by law for the protection of national security, law and order, public health or morality."[283] Consistent with this bias against statelessness, refugees and other displaced persons who are subject to expulsion on the limited grounds of national security or public order must be given "a reasonable period within which to seek legal admission into another country."[284]

Although these documents are often treated as soft law rather than so called hard law, taken in collocation, they indicate that an international norm against statelessness may have emerged sufficient to constitute a principle of customary international law.[285] States rarely resort to denationalization, and

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278. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, (1989) *reprinted in* HENKIN, *supra* note 271, at 188-89.

279. Protocol (No. 4) to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than those Already Included in the Convention and in the Protocol Thereto, E.T.S 46, 7 I.L.M. 978 (1986), 58 A.J.I.L. 334 (1964) *reprinted in* HENKIN, *supra* note 271, at 241.

280. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (March 30-May 2, 1948), *reprinted in* HENKIN, *supra* note 271, at 287-89.

281. American Convention on Human Rights, O.A.S. 9 I.L.M. 101 (1970) *reprinted in* HENKIN, *supra* note 271, 290, 296.

282. *Id.*

283. African Charter on Human and Peoples' Rights (Banjul Charter) 21 I.L.M. 58 (1982) *reprinted in* HENKIN, *supra* note 271, at 311, 313.

284. Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, July 28, 1951, *reprinted in* HENKIN *supra* note 271, 208.

285. For an analysis of how United Nations resolutions, declarations and international agreements harden and enter the corpus of customary international law, *see generally* J.M Spectar, *Pay Me Fairly Kathie Lee, The Right to a Living Wage, and a Proposed Protocol*, 20 N.Y. L. SCH. J. INT'L & COMP. L. 61, 74-80 (2000). *See also* Gunlicks *supra* note 145, at 565 (citing interview with Ralph G. Steinhardt, Professor of International Law and International Relations, The George Washington University Law School (Oct. 19, 1994)).

statelessness is universally condemned. In fact, as early as 1954, a United Nations survey of the nationality laws of eighty-four nations revealed that only the Philippines and Turkey imposed denationalization as a penalty for desertion.[286]

Although the United States is not specifically bound by the treaties on statelessness, because it is not a party, the United States has ratified the Charter of the Organization of American States ("OAS"), and OAS members have declared that the American Declaration of the Rights and Duties of man "contains and defines the fundamental human rights referred to in the Charter."[287] Furthermore, these international treaties are, according to Article VI (the supremacy clause), part of U.S. federal law and the customary international legal presumptions against statelessness are also incorporated as well under the renowned Supreme Court ruling in the *Paquete Habana* case.[288]

The United States Supreme Court's judicial aversion to statelessness suggests that the Court would most likely reject any revocation of Walker's citizenship. The Court has enunciated firm and unambiguous statements about the ills and perils of statelessness, and considers successful denationalization proceedings as precursors to potential statelessness. Justice Rutlege, in a concurring opinion in *Klapprott* was concerned about the involuntary expatriation or revocation of citizenship—the most "comprehensive and basic right of all,"—because "in its wake may follow the most cruel penalty of banishment."[289] Since American citizenship is "one of the most valuable rights in the world today" the Court is always concerned about the "grave practical consequences" of denationalization and the prospect of statelessness.[290] As the *Afroyim* Court noted, loss of citizenship may mean that a person is "left without the protection of citizenship in any country in the world"—the condition of statelessness.[291]

Denationalization as a punishment "strips the citizen of his status in the national and international political community."[292] The "calamity" of statelessness is more than simply the loss of specific rights, it is also "the loss of

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286. *See* Laws Concerning Nationality, U.N. Doc. No. ST/LEG/SER.B/4 (1954); *Id.* at 379, 461; *cf.* Nationality Law of August 22, 1907, Art. 17(2).

287. Gunlicks, *supra* note 146, at 565 (citing Advisory Opinion No. OC-10/89, Interpretation of the American Declaration, 29 I.L.M. 379, 389 (Inter-American Court of Human Rights)).

288. *See* discussion in Gunlicks, *supra* note 146, at 564. International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators . . . for trustworthy evidence of what the law really is. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (citing Hilton v. Guyot, 159 U.S. 113, 163-64, 214-15 (1895)).

289. *Klapprott*, 335 U.S. at 317 (Rutledge, J., concurring).

290. *Kennedy*, 372 U.S. at 160

291. *Afroyim*, 387 U.S. at 267-68.

292. *Trop*, 356 U.S. at 101.

a community willing and able to guarantee any rights whatsoever." [293] The stateless person may be compelled to roam the planet "shunted from nation to nation, there being no one obligated or willing to receive him," and he may even wind up under "the dubious sanctuary" of a tyrannical regime.[294]

In the condition of statelessness:

> His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.[295]

Statelessness, the Court reasoned, was inconsistent with American concept of human dignity as it left the offender "fair game for the despoiler at home and the oppressor abroad."[296] Denationalized persons would find it difficult or impossible to avail themselves of judicial relief to "alleviate the potential rigors of statelessness."[297]

The Supreme Court has also condemned the practice of state-sanctioned statelessness as barbaric or uncivilized. The Court has found "virtual unanimity" among civilized nations for the proposition that "statelessness is not to be imposed as punishment for crime."[298] Denationalization is abhorrent to the Constitution because it "subjects the individual to a fate of ever-increasing fear and distress."[299] The stateless person knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies.[300]

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293. *Id.*

294. *Kennedy*, 372 U.S. at 161 (citing ARENDT, THE ORIGINS OF TOTALITARIANISM 294 (1951)). *See also* SECKLER-HUDSON, STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES 244-53 (1934); Preuss, *International Law and Deprivation of Nationality*, 23 GEO. L. J. 250 (1934); Holborn, *The Legal Status of Political Refugees, 1920-1938*, 32 AM. J. INT'L L. 680 (1938).

295. *Trop*, 356 U.S. at 101.

296. *Id.* at 102.

297. *Id.*

298. *Trop*, 356 U.S. at 102. But the dissent countered: "Many civilized nations impose loss of citizenship for indulgence in designated prohibited activities" even while observing that "these provisions are often, but not always, applicable only to naturalized citizens." *Id.* at 126 (Frankfurter, J., dissenting). *See generally* Laws Concerning Nationality, U.N. Doc. No. ST/LEG/SER.B/4 (1954). Other countries such as the Philippines have made wartime desertion result in loss of citizenship—native-born or naturalized. *See* Philippine Commonwealth Act No. 63 of Oct. 21, 1936, as amended by Republic Act No. 106 of June 2, 1947, U.N. Doc., *supra*, at 379.

299. *Trop*, 356 U.S. at 102.

300. *Id.*

While a stateless person may not endure all disastrous consequences of this fate, the possibility makes the punishment of denationalization "obnoxious."[301]

Ironically, the rejection of statelessness and the support for statecentricity in the context of citizenship is done in the name of human rights. Yet, this leads to a peculiar position of defending the state in the name of human rights—a *non sequitur* for many proponents of human rights. The United States Supreme Court's position against statelessness reinforces the primacy of the nation state and has significant consequences for the development of international human rights in global society. The anti-statelessness principle expresses little faith in the protections of international law and the human rights domain. An endorsement of the Court's reasoning leaves cosmopolitan theorist in the paradoxical position of defending national citizenship, which is in itself, a stumbling block to the achievement of human rights in the age of globalization. Additionally, one is left in the curious position of seeming to endorse the benign ethnocentrism of the Court's reasoning about the importance of American citizenship in a world full of all sorts of unspeakable dangers. Recall that the *Afroyim* Court warned losing American citizenship is as serious a fate as losing life itself. The message is that human rights can only be protected by the nation state, notwithstanding the claims of the global citizenship paradigm. In addition, the Court's fear that denationalization can create "rightless" people is largely a consequence of the Court's reluctance to incorporate international human rights norms into U.S. legal disputes as well as its reluctance to impose substantive limits on Congressional power to deport aliens.[302] Yet, in a statecentric system, the Court's nationalistic rationale against denationalization is lesser of two evils—even if it does not bode well for global human rights discourse.

## CONCLUSION

John Walker's odyssey sparked a heated citizenship debate that warranted a second look at citizenship theory and practice on the question of de-

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301. *Id.* (citing Study on Statelessness, U.N.Doc. No. E/1112; Seckler-Hudson, Statelessness: With Special Reference to the United States; Borchard, Diplomatic Protection of Citizens Abroad, 262, 334). Yet the *Trop* dissent strongly rejected this supposition, arguing that denationalized persons, now aliens in the U.S. had significant constitutional protections and thus nothing to fear. In effect, the much-vaunted unpredictability of the alien's post-denationalization status was a canard: "Presumably a denationalized person becomes an alien vis-a-vis the United States. The very substantial rights and privileges that the alien in this country enjoys under the federal and state constitutions puts him in a very different condition from that of an outlaw in fifteenth-century England. He need not be in constant fear lest some dire and unforeseen fate be imposed on him by arbitrary governmental action—certainly not 'while this Court sits.'" *Trop*, 356 U.S. at 127. (Frankfurter, J., dissenting). In addition to "the multitudinous decisions of this Court protective of the rights of aliens" "the assumption that brutal treatment is the inevitable lot of denationalized persons found in other countries is a slender basis on which to strike down an Act of Congress otherwise amply sustainable." *Id.*

302. Aleinikoff, *supra* note 89, at 1487.

nationalization. Despite the often-clashing conceptions of citizenship in extant theories, there is general recognition of the precious nature of citizenship and very little judicial support for denationalization. Despite an aversion to revocation of citizenship, both proponents of liberal and the civic republican conceptions of citizenship may countenance revocation in the event of treason or other acts of *similar* magnitude that *fundamentally* threaten the security and viability of the state. In addition, a survey of the Court's jurisprudence of denationalization shows a strong tradition of judicial hostility to involuntary expatriation of native-born citizens. In fact, the cases reflect an evolving understanding of American citizenship as something of a fundamental right as well as a non-derogable human right. Fourteenth Amendment citizenship is "virtually impossible to lose" unless the citizen consents or voluntarily relinquishes it.[303] The Court has made it exceedingly difficult for Congress to abridge, restrict or curtail Fourteenth Amendment citizenship even for reasons such as desertion during war. The government faces a very heavy burden in denationalization proceedings and will not prevail unless it meets *Afroyim's* intent to relinquish test and the "demanding" standard in *Kungys*.[304]

Finally, the Court's traditional hostility to revocation is informed by an emerging consensus about the perils of statelessness in the international system of states. Ironically, the Court's endorsement of the emerging international norm against statelessness provides a rare instance where conservative-nationalist jurisprudence, and its apotheosis of statecentricism, has the effect of strengthening an emerging international norm.

303. Schuck, *supra* note 64, at 11-12.
304. *Id.*