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ARTICLE

How a Citizen Becomes an Alien: Three Cases of American Jews and Citizenship Lost, Regained, and Lost Again

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In the second half of the twentieth century, three Jewish men were stripped of their American citizenship after spending significant time in Palestine/Israel and engaging in statutorily defined "expatriating acts." Integral to the doctrine of liberal citizenship, in fact, were illiberal mechanisms of individual and categorical exclusion from citizenship intended to protect the sovereignty of the nation-state. These mechanisms gained particular expression in state agents' deliberations about the citizenship status of Jews, especially after the establishment of Israel. The emergence of dual citizenship as a legal possibility—the result of a 1967 Supreme Court ruling that overturned the expatriation of one of the men considered here—reveals the shifting ambitions of American state power, while also exposing the enduring ways in which U.S. government entities, from Congress to administrative agencies to the courts, justified the state's power to transform citizens into aliens.

For the nearly two decades after she fled Nazi Germany, political theorist Hannah Arendt lacked any national citizenship. In 1951, the same year she became a naturalized U.S. citizen, Arendt argued in her best-selling book, *The Origins of Totalitarianism*, that there was no surer sign of liberalism's demise and totalitarianism's rise than a government's decision to inflict statelessness on whole classes of people for their ostensible inability to fit the terms of national belonging. To be dispossessed of one's citizenship was to experience political annihilation, if not the total annihilation that hundreds of thousands of German Jews had suffered. In Arendt's words, national citizenship provided "the right to have rights," a formulation that would travel from the pages of her book to the opinions of the U.S. Supreme Court.[1]

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[1]Hannah Arendt, *Origins of Totalitarianism*, 2nd ed. (New York, 1958), 296–7. For biographical details of her life and citizenship status during this period, see Elisabeth Young-Bruehl, *Hannah Arendt: For Love of the World*, 2nd ed. (New Haven, CT, 2004), Part 2. On Arendt's political theories of citizenship, rights, and the state, see Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (New York, 2004), ch 2; Stephanie DeGooyer, Alastair Hunt, Lida Maxwell, and Samuel Moyn, *The Right to Have Rights* (New York, 2018); and Margaret Somers, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights* (Cambridge, UK, 2008). For comparative considerations of the category of statelessness, see Polly J. Price, "Jus Soli and Statelessness: A Comparative Perspective from the Americas," in *Citizenship in Question: Evidentiary Birthright and Statelessness*, eds. Benjamin N. Lawrance and Jacqueline Stevens (Durham, NC, 2017), 27–42; and Mira L. Siegelberg, *Statelessness: A Modern History* (Cambridge, MA, 2020). On statelessness in American history, see

While Arendt identified statelessness as the primary challenge to liberalism, its inverse—we might call it statefulness—was equally disruptive to the mid- to late-twentieth-century ideals of national sovereignty and individual rights. As it developed in the modern period, citizenship served as an exclusive contractual relationship between an individual and a territorially defined political unit, one validating the sovereignty of the other, and each playing a part in maintaining a geopolitical order defined by nation-state–based rights. But the dislocations, migrations, conquests, and redrawing of borders of the twentieth century persistently destabilized that relationship, producing not only stateless but also stateful individuals. A person without a state might suffer the fate of losing their political rights, while a person with multiple states threatened the very container of modern political rights: nation-state sovereignty.[2]

Here I draw attention to a small group of American citizens—three Jewish men—who attracted state authorities' suspicion for their statefulness. Each of these men was expatriated from American citizenship after spending significant time in Palestine/Israel, yet none wished to relinquish his citizenship. Calling upon the legal framework of liberal individualism, they argued in cases before American administrative and judicial bodies in the 1940s, 1960s, and 1980s that their sovereignty guaranteed them and not the state the right to determine whether they desired to remain American citizens, regardless of their status or conduct in other territories. Nonetheless, American officials worried that individual sovereignty expressed as allegiance to multiple states eroded national sovereignty. The complicated realities of citizens' physical locations, affective attachments, and political identities that exceeded the boundaries of the twentieth-century national ideal invigorated American expatriation law as a juridical tool to sustain the elusive and illusory division between citizens and aliens.

The cases considered reveal the historical contingencies, legal logics, and historiographical absences that together have sanctioned and naturalized a liberal state's ability to demarcate between citizens and aliens. The question of whether an American citizen could hold multiple citizenships preoccupied jurists, policy makers, and government officials because it exposed the messy and unsettled nature of liberal citizenship and national belonging. When that question alighted specifically on Jewish subjects and their nationality, it bore the context of longstanding debates about whether Jews fit into liberal modernity's conception of rights as inhering in the individual and as safeguarded through membership in a singular political unit. To understand how citizenship has worked in the United States is to examine the shifting logic of its inclusions and exclusions and to be attentive to those subjects who spilled over and across the categories of national belonging, defying them as they reified them.[3]

Linda K. Kerber, "The Stateless as the Citizen's Other: A View from the United States," *American Historical Review* 112, no. 1 (Feb. 2007): 1–34.

[2]On the shifting meaning of citizenship amid modern dislocations and transformations, see Linda Bosniak, "Citizenship Denationalized," *Indiana Journal of Global Legal Studies* 7, no. 2 (Spring 2000): 447–509; Rogers Brubaker, *Nationalism Reframed: Nationhood and the National Question in the New Europe* (New York, 1996); Frederick Cooper, *Citizenship, Inequality, and Difference: Historical Perspectives* (Princeton, NJ, 2018); Barry Hindess, "Neo-Liberal Citizenship," *Citizenship Studies* 6, no. 2 (2002): 127–43; Mae M. Ngai, "Birthright Citizenship and the Alien Citizen," *Fordham Law Review* 75, no. 5 (Apr. 2007): 2521–30; Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, MA, 2009); Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, CT, 1997); and John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State*, 2nd ed. (New York, 2018).

[3]First articulated in the eighteenth century and referred to as the "Jewish Question," the matter of whether Jews could be incorporated into liberal nation-state–based citizenship frames much of modern Jewish history, though has long been assumed to be irrelevant to American Jewish history. I dispute this claim in Lila Corwin Berman, "America's Jewish Question" (Stroum Lectures in Jewish Studies, University of Washington, May 10 and 12, 2022), https://jewishstudies.washington.edu/stroum-lectures-2022-americas-jewish-question-lila-corwin-berman/ (accessed July 28, 2022). For the intellectual basis of historical scholarship about the Jewish Question, see Jacob Toury, "The Jewish Question: A Semantic Approach," *Leo Baeck Institute Yearbook* 11 (Jan. 1966): 85–106; and Ismar Schorsch, *From Text to Context: The Turn to History in Modern Judaism* (Hanover, NH, 1994). On the idea of "questions" as a central intellectual project of modernity, see Holly Case, *The Age of Questions: Or, a*

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On the most straightforward level, the three cases I examine tell a progressive story of the liberalization of American citizenship across the second half of the twentieth century. From the 1940s through the 1980s, responding to the imperatives of Cold War competition, global mobility, and human rights activism, American state bodies pieced together a legal framework that made dual citizenship possible. Their improvised, provisional, and often inwardly contradictory efforts participated in a broad global shift that by the end of the twentieth century normalized multiple nationality as a replacement for both narrowly national and broadly imperial citizenship and as a practical if paradoxical way of balancing individual and national sovereignty. The turning point of the American story might be found in 1967, when a naturalized Jewish American man won his petition to retain his U.S. citizenship after being expatriated for voting in an Israeli election. The Supreme Court decision that allowed him to remain an American citizen overturned prior law and expanded the inclusive possibilities of liberal citizenship.[4]

The legal logic used to buttress this plotline, however, upends such a straightforward tale. In place of a steady movement toward an expansive and inclusive vision of citizenship, the three cases in fact display the American state's relentless efforts to classify citizens as desirable or undesirable to the project of national sovereignty. When it came to applying citizenship law, the U.S. administrative and judicial state rarely reasoned in terms of the individual, even as it ostensibly exercised liberal citizenship law premised on the individual subject.

State bodies determined the line between citizen and alien by situating individuals within categories or classes of people. Using analogical and precedent-based forms of reasoning, State Department and court officials refracted the Jewish men in these cases through classes of people—women, naturalized Americans, Black Americans, Mexican Americans, Japanese Americans, politically radical Americans, and so on—to determine whether they posed a problem to national sovereignty. This process of legal reasoning produced collective scripts, similar to what historian Natalia Molina calls "racial scripts," that enabled "what once served to marginalize and disenfranchise one group [to] be revived and recycled to marginalize other groups."[5] Furthermore, it constructed citizenship rules as "actual facts," in Jacqueline Stevens's words, or as "the practical site of a theoretical existence," in Lauren Berlant's terms.[6] Citizenship law became circularly dependent on historically contingent constructions of classes of people as either citizens or aliens, lawful or unlawful. The denial of citizenship

First Attempt at an Aggregate History of the Eastern, Social, Woman, American, Jewish, Polish, Bullion, Tuberculosis, and Many Other Questions over the Nineteenth Century, and Beyond (Princeton, NJ, 2018).

[4]For formative studies of American citizenship that argue for its ultimately liberal and inclusionary possibilities, see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York, 1995); and Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, MA, 1991). On imperial citizenship, examined through the British Empire, see Sukanya Banerjee, *Becoming Imperial Citizens: Indians in the Late-Victorian Empire* (Durham, NC, 2010); and Daniel Gorman, *Imperial Citizenship: Empire and the Question of Belonging* (New York, 2006). Useful explorations of imperial citizenship have also focused on its Jewish subjects and provide an alternative to the European-centric framing of modern Jewish history. See, for example, Julia Phillips Cohen, *Becoming Ottomans: Sephardi Jews and Imperial Citizenship in the Modern Era* (New York, 2014); Jessica M. Marglin, *Across Legal Lines: Jews and Muslims in Modern Morocco* (New Haven, CT, 2016); Devi Mays, *Forging Ties, Forging Passports: Migration and the Modern Sephardi Diaspora* (Stanford, CT, 2020); and Sarah Abrevaya Stein, *Extraterritorial Dreams: European Citizenship, Sephardi Jews, and the Ottoman Twentieth Century* (Chicago, 2016). On the rising global acceptance of dual citizenship, see Yossi Harpaz, *Citizenship 2.0: Dual Nationality as a Global Asset* (Princeton, NJ, 2019).

[5]Natalia Molina, *How Race Is Made in America: Immigration, Citizenship, and the Historical Power of Racial Scripts* (Berkeley, CA, 2014), 7.

[6]Jacqueline Stevens, "Introduction," in *Citizenship in Question*, eds. Lawrance and Stevens, 1–24, here 7; and Lauren Berlant, "Citizenship," in *Keywords for American Cultural Studies*, 2nd ed., eds. Bruce Burgett and Glenn Hendler (New York, 2014), 41–5, here 42. For similar discussions on the collective thresholds of individual citizenship, see Elizabeth F. Cohen, *Semi-Citizenship in Democratic Politics* (New York, 2009); Nancy F. Cott, "Marriage and Women's Citizenship in the United States, 1830–1934," *American Historical Review* 103, no. 5

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to former citizens, not only through expatriation, as explored here, but also through other means of denaturalization (and denationalization in the case of birthright citizens) exposed the illiberal logic undergirding and poking through progressive tales of liberal citizenship.[7]

My decision to focus on three cases of Jewish American citizens who faced expatriation may seem an odd one if my goal is to reveal the illiberal legal contortions necessary to maintain liberal citizenship. After all, at the very center of American Jewish history rests a claim of the country's full legal embrace of Jews as individual citizens. Imagining Jewish citizenship in the United States as a completed act, historians have often couched this claim in comparison to the imperfect, incomplete, and at times violent process of emancipation that Jews experienced in Europe and as evidence for the exceptionally realized nature of liberalism in the United States.[8]

I argue, however, that the regnant celebratory and superficial historiography of Jewish citizenship in the United States has diminished the fields of American Jewish history and U.S. legal and citizenship history. Historians of citizenship who have analyzed the cases of expatriation I consider here have neglected their subjects' Jewishness, satisfied with one-word descriptors or no designation at all. And, to the best of my knowledge, historians of American Jews simply have never examined these cases. As a result, the question of how Jews fit into a complicated

(Dec. 1998): 1440–74; and Ian Haney-Lopez, *White by Law: The Legal Construction of Race*, 2nd ed. (New York, 2006).

[7]The literature on the exclusions experienced by American citizens who were regarded in law as classes of people and not simply individuals is vast. For a range of the most important scholarship, see Kevin Bruyneel, *Third Space of Sovereignty: The Postcolonial Politics of U.S.-Indigenous Relations* (Minneapolis, MN, 2007); Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton, NJ, 2009); Steven Hahn, *A Nation under Our Feet: Black Political Struggles in the Rural South, from Slavery to Migration* (Cambridge, MA, 2003); Pippa Holloway, *Living in Infamy: Felon Disfranchisement and the History of American Citizenship* (New York, 2013); Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (New York, 2001); Erika Lee, *America for Americans: A History of Xenophobia in the United States* (New York, 2019); and Suzanne Mettler, *Dividing Citizens: Gender and Federalism in New Deal Public Policy* (Ithaca, NY, 1998).

[8]For examples of this standard historical interpretation of Jews and American citizenship, see Ira Katznelson, "Between Separation and Disappearance: Jews on the Margins of American Liberalism," in *Paths of Emancipation: Jews, States, and Citizenship*, eds. Pierre Birnbaum and Ira Katznelson (Princeton, NJ, 1995), 157–205; Steven Katz, "In Place of an Introduction: Some Thoughts on American Jewish Exceptionalism," in *Why Is America Different? American Jewry on Its 350th Anniversary*, ed. Steven Katz (Lanham, MD, 2010), 1–17; and Jonathan Sarna, "The Future of the Pittsburgh Synagogue Massacre," *Tablet*, Nov. 5, 2018, https://www.tabletmag.com/sections/news/articles/future-pittsburgh-synagogue-massacre (accessed Nov. 8, 2021). For two recent defenses of American Jewish exceptionalism, see Hasia R. Diner, *How America Met the Jews* (Providence, RI, 2017); and Rachel Gordan, "The Sin of American Jewish Exceptionalism," *AJS Review* 45, no. 2 (Nov. 2021): 282–301. For a broad critique of American Jewish exceptionalism, see Tony Michels, "Is America Different? A Critique of American Jewish Exceptionalism," *American Jewish History* 96, no. 3 (Sep. 2010): 201–24. David Sorkin's recent history of Jewish citizenship, which insightfully approaches emancipation as a nonlinear process and embraces Michels's critique of American Jewish exceptionalism, nonetheless asserts emancipation's successful resolution for post–World War II American Jews. See David Sorkin, *Jewish Emancipation: A History across Five Centuries* (Princeton, NJ, 2019), 352. For historians who have studied the exclusions that Jews confronted in the United States, see Naomi W. Cohen, *Jews in Christian America: The Pursuit of Religious Equality* (New York, 1992); Libby Garland, *After They Closed the Gates: Jewish Illegal Immigration to the United States, 1921–1965* (Chicago, 2014); Maddalena Marinari, *Unwanted: Italian and Jewish Mobilization against Restrictive Laws, 1882–1965* (Chapel Hill, NC, 2020); and Britt P. Tevis, "'Jews Not Admitted': Anti-Semitism, Civil Rights, and Public Accommodations Laws," *Journal of American History* (Mar. 2021): 107, no. 4: 847–870. The nearly singular focus on Ashkenazi Jews in much of American Jewish history has skewed the understanding of how these exclusions intersected with other racist policies in the United States. See Devin E. Naar, "Our White Supremacy Problem: Exposing the Roots of Intra-Jewish Prejudice," *Jewish Currents*, Apr. 29, 2019, https://jewishcurrents.org/our-white-supremacy-problem/ (accessed Nov. 8, 2021); Aviva Ben-Ur, *Sephardic Jews in America: A Diasporic History* (New York, 2009); and Bruce D. Haynes, *The Soul of Judaism: Jews of African Descent in America* (New York, 2018).

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and historically contingent legal infrastructure of citizenship that relied on categorical clarity to incorporate individuals into collective scripts of belonging or exclusion has been sidelined. Those scholars who are best trained to understand the dynamic and layered nature of Jewishness—as a political, religious, national, ethnic, and sometimes racial configuration—have misapprehended citizenship in the United States as a settled matter, while those scholars who reflect deeply on the instability of U.S. citizenship have left Jewishness either entirely unmarked or only perfunctorily mentioned in their studies.[9]

By mining legislative records, State Department documents, and court filings and proceedings, I draw attention to the legal and historical contingencies that placed three American Jewish men in the sights of American state deliberations about citizenship in the second half of the twentieth century. Far from an "all-or-nothing affair," American citizenship was in a constant state of construction, stabilized by the categories of people that state bodies deemed fit to occupy, yet undermined by the precariousness of those categories.[10] That the same person might shuttle back and forth across the line dividing citizen from alien spurred a crisis in meaning or, at least, a profound question about whether a nation-state that could bestow and deprive its subjects of citizenship could truly live up to liberal ideals.

Lapides v. Clark: "These Zionists"

As a young man in 1922, Louis Bernard Lapides arrived in the United States from Chernivtsi, a city on the banks of the Prut River in western Ukraine that was home to Romanian and Austrian nationalist movements. He received his American citizenship six years later, and in March of 1934, Lapides, along with his wife and their American-born son, left the United States for Palestine. On July 3, 1947, when he tried to re-enter the United States, perhaps to visit his son who had returned earlier to pursue his education, Lapides was detained by immigration officials. The Board of Special Inquiry of the Immigration and Naturalization Service determined that Lapides was no longer a U.S. citizen according to Section 404(c) of the 1940 Nationality Act, which stated that naturalized citizens who lived abroad for more than five years voluntarily expatriated themselves. As an alien and not a citizen, Lapides lacked the necessary visa documents to enter the United States, a conclusion upheld by the Commissioner and Board of Immigration Appeals.[11]

Lapides's expatriation had its roots in the turn-of-the-century centralization and federalization of American citizenship law. Until the Civil War, Congress had exercised minimal power over immigration, naturalization, and expatriation, in part because the Constitution was silent

[9]For reflections on the categorical instability of American Jews, see Lila Corwin Berman, "Jewish History beyond the Jewish People," *AJS Review* 42, no. 2 (Nov. 2018): 269–92; Dean Franco, "The Jews Are 'The New Jews,'" *Studies in American Jewish Literature* 39, no. 1 (2020): 139–59; Eric L. Goldstein, *The Price of Whiteness: Jews, Race, and American Identity* (Princeton, NJ, 2006); and David Schraub, "White Jews: An Intersectional Approach," *AJS Review* 43, no. 2 (Nov. 2019): 379–407. For approaches to legal history that recognize the necessity of tracking context-laden cultural debates to understand law, see Colin Dayan, *The Law Is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton, NJ, 2013); and Hiroshi Motomura, *Immigration Outside the Law* (New York, 2014).

[10]Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton, NJ, 2008), 81.

[11]Biographical details about Lapides's life appear throughout the files related to the case, with mention of the exact place of his birth, in Will Maslow, Shad Polier, and Sanford Bolz, "Brief of the American Jewish Congress as Amicus Curiae in the U.S. Court of Appeals for the District of Columbia," Mar. 25, 1949, Folder 14, Box 150, Records of the American Jewish Congress (I-77), American Jewish Historical Society, Center for Jewish History, New York, NY [hereafter RAJC]. Evidence of Lapides' year of birth in 1899 comes from a genealogical website: "Louis Bernard Lapides," Geni, https://www.geni.com/people/Louis-Lapides/6000000000113194178 (accessed Nov. 8, 2021). Case details emerge from *United States ex. rel. Lapides v. Watkins*, 165 F.2d 1017 (2d Cir. 1948); and *Lapides v. Clark*, 176 F.2d 619 (D.C. Cir. 1949), cert. denied, 338 U.S. 860 (1949). On Section 404(c), see "Notes: Section 404(c) of the Nationality Act of 1940: Residence Abroad as Automatic Expatriation of the Naturalized American," *Yale Law Journal* 59, no. 1 (Dec. 1949): 139–51.

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on the scope of the federal government's legislative power over these matters. The 1790 Naturalization Law loosely sketched broad restrictions on who could become a citizen—no women, no enslaved people, no non-whites—but it lacked enforcement mechanisms. Instead, individual states developed their own policies when it came to citizenship rights and privileges. However, in the aftermath of the emancipation of enslaved people, first in a series of congressional acts and then culminating in the passage of the Fourteenth Amendment in 1868, the federal government shored up its power over citizenship, binding the states to accept "all persons born or naturalized in the United States" as citizens.[12]

The same year that the Fourteenth Amendment became law, Congress expanded its power to determine not only who could enter but also who could exit citizenship by passing the Expatriation Act of 1868. In defining expatriation as "a natural and inherent right," Congress freed American citizens from the grip of the doctrine of "perpetual allegiance," an import from English law that had maintained "once a subject always a subject."[13] On the surface, a commitment to liberal individualism anchored American expatriation law. Citizens, not the state, possessed the right of expatriation and, thus, only citizens' intentional and voluntary activities could trigger their expatriation. Yet through its effort to codify expatriation, Congress also reserved the so-called plenary power, implicit but unenumerated in the Constitution, in the name of national sovereignty to determine what constituted intent, a power that chafed against liberal individualism.[14]

In 1907 on the heels of Progressive-era efforts to reform the process of naturalization, Congress sought to clarify the government's interpretive power when it came to determining whether a citizen intended to expatriate. A lengthy statute specified a range of scenarios from which state officials could conclude a citizen meant to become an alien. In setting out the possibilities, from taking an oath of allegiance to a foreign state to serving in a foreign nation's army or voting in its elections, Congress attempted to create an exhaustive list of expatriating acts while also positioning the state as reacting to, not instigating, expatriation. Embedded in this logic was a contradiction about how power over citizenship worked: just as Congress pursued a course of expanding its power over multiple facets of citizenship, including naturalization and expatriation, it simultaneously disavowed its power by claiming that true agency and sovereignty rested with the citizen who freely chose to act.[15]

Among the acts that Congress designated as exhibiting a citizen's intent to expatriate were ones that applied only to certain classes of citizens, a logic consistent with the broader scope of naturalization law that restricted citizenship also according to classes of people, whether defined by nationality or so-called mental, moral, and physical fitness. The most well-documented of class-qualified expatriation laws held that marriage to a foreigner indicated intent to expatriate

[12]On the centralization of citizenship law and the Fourteenth Amendment, see Garrett Epps, *Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America* (New York, 2006); Martha Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (Cambridge, UK, 2018); Kate Masur, *Until Justice Be Done: America's First Civil Rights Movement from the Revolution to Reconstruction* (New York, 2021), ch 9; and Kunal M. Parker, *Making Foreigners: Immigration and Citizenship Law in America, 1600–2000* (New York, 2015), ch 5.

[13]"An Act Concerning Rights of American Citizens in Foreign States," Pub. Law No. 40-249, 15 Stat. 223 (1869). On the English legal precedent against which Congress was acting, see James H. Kettner, *The Development of American Citizenship, 1608–1870* (Chapel Hill, NC, 1978), 50.

[14]On the doctrine of plenary power, see Bruyneel, *Third Space of Sovereignty*, Introduction; Stephen Legomsky, "Immigration Law and the Principle of Plenary Congressional Power," *The Supreme Court Review* 1984 (1984): 255–307; Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (Cambridge, MA, 2007), 16–7, 114; and Ibrahim Wani, "Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law," *Cardozo Law Review* 11, no. 1 (Oct. 1989): 51–118, here 62–3.

[15]On the 1907 expatriation law, see T. Alexander Aleinkoff, "Theories of Loss of Citizenship," *Michigan Law Review* 84, no. 7 (June 1986): 1471–503, here 1476–7; Ben Herzog, *Revoking Citizenship* (New York, 2015), 43–4; and Nancy L. Green, "Expatriation, Expatriates, and Expats: The American Transformation of a Concept," *American Historical Review* 114, no. 2 (Apr. 2009): 307–28, here 316–9.

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solely in the case of American women. Referred to as the Gigolo Act, the statute reflected American lawmakers' concern that foreign men's marriages to American women could potentially interfere with American sovereignty and its foreign policy aims. In addition to sex, the other class-based qualification included in the legislation was the distinction between naturalized and native citizens. According to the law, if a naturalized citizen lived in their native country for two years or elsewhere abroad for more than five years, the state could conclude that they had expatriated; the same was not true for a native citizen, who could live abroad without fear of expatriation. Thus, women and naturalized citizens, imagined as members of classes designated in expatriation law as fixed and significant, were subject to disparate treatment.[16]

Well before Lapides's case, the courts had affirmed the constitutionality of class-determined expatriation, despite the Fourteenth Amendment's clause obligating all states to provide equal protections for their citizens. A 1915 Supreme Court decision, *MacKenzie v. Hare*, upheld the Gigolo Act and explicitly noted that disparate treatment of citizens, whether based on sex or naturalization, was constitutional in expatriation law if the government offered a compelling rationale. The "national complications" that "may bring the Government into embarrassments and, it may be, into controversies" when a woman married a foreign man or when a naturalized citizen lived abroad for a lengthy period counted as legitimate reasons in the words of the Supreme Court, and it determined that neither law violated the terms of equal protection. Careful to extend the liberal principle of individual freedom, even as the Court justified the differential treatment of whole classes of citizens, the majority opinion in *MacKenzie* emphasized that the government was merely responding to "a condition voluntarily entered into" by a person who had "notice of the consequences."[17] While the act in question may have been volitional, the Court was clear that one's class of citizenship—as a woman or a naturalized person—was not. Instead, it regarded sex and birthplace as stable and legally determinative categories, much akin to the judiciary's reliance on racial categories in citizenship law. Yet in application, citizenship law both reified and unsettled the categories it constructed.

While the so-called Gigolo Act gradually lost its force, amended in 1922 to narrow its application and then almost entirely vacated in the 1940 Nationality Act, the premise of class-qualified expatriation for naturalized citizens endured and grew stronger, serving as the grounds for Lapides's detention as an alien in 1947.[18] Indeed, his case appeared to be exactly what the recently bolstered law, now outlined in Section 404(c) of the 1940 Nationality Act, had in mind, even down to the details of his residence in Palestine. Although the record does not indicate why Lapides chose to return to the United States in 1947 or why he was determined to regain his citizenship, he was likely motivated by the circumstances in Palestine after World War II, when the British government was expected to terminate its mandate. Given uncertainty at the time that Palestine would emerge as an independent Jewish state, Lapides may have wanted assurance that should Arab forces prevail, he would not be left stateless.[19]

[16]On American women expatriated due to marriage to foreign men, see Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* (Washington, DC, 1934), ch 2. On the Gigolo Act, see Ben Herzog and Julia Adams, "Women, Gender, and the Revocation of Citizenship in the United States," *Social Currents* 5, no. 1 (Feb. 2018): 15–31. On the ways in which citizenship procedures and documents attempt to stabilize classes of people, see Torpey, *The Invention of the Passport*, 228. On the categorical nature of immigration and naturalization law, see Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, NJ, 2004).

[17]*MacKenzie v. Hare*, 239 U.S. 299, here 312 (1915). On the case and its broader context, see Felice Batlan, "'She Was Surprised and Furious': Expatriation, Suffrage, Immigration, and the Fragility of Women's Citizenship, 1907–1940," *Stanford Journal of Civil Rights and Civil Liberties* 15, no. 3 (2020): 315–49; and Amanda Frost, *You Are Not American: Citizenship Stripping from Dred Scott to the Dreamers* (Boston, 2021), 90–1.

[18]On the 1922 Cable Act that amended the 1907 act, see Batlan, "'She Was Surprised and Furious,'" 324–8.

[19]On contestation over the status of Palestine during this period, see Anita Shapira, *Land and Power: The Zionist Resort to Force, 1881–1948* (New York, 1992); Zeev Sternhell, *The Founding Myths of Israel: Nationalism, Socialism, and the Making of the Jewish State* (Princeton, NJ, 1998), Epilogue; S. Ilan Troen, *Imagining Zion: Dreams, Designs,*

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Regardless of Lapides's motivations, his appeal to regain his citizenship also drew the attention of mid-century Jewish "lawyer-leaders"—men and a few women who pursued legal rulings to advance civil rights claims that they believed could improve Jews' standing—and Jewish and nonsectarian civil rights organizations that suspected American state bodies of using expatriation law as a vehicle for discrimination and civil rights violations. Irving Jaffe, Abraham Orlow, and Jack Wasserman, Jewish immigration attorneys with reputations for taking cases to expand civil rights protections, represented Lapides through a failed habeas corpus hearing; an unsuccessful appeal for a declaratory judgment; and, eventually, a rejected petition to the Supreme Court to place the case on its docket. As the case proceeded, Lapides appeared less as an individual with a specific claim and more as an exemplum, the subject of a test case to declare naturalization-based expatriation law unconstitutional, in violation of due process and equal protection.[20]

Helping Lapides's lawyers build their argument and submitting *amici curiae* briefs on his behalf were three organizations that became fixtures in mid-century constitutional claims: the American Civil Liberties Union (ACLU), the American Jewish Committee, and the American Jewish Congress. Unlike the Jewish organizations, the ACLU's interest in the case was purely strategic, designed to find the best challenge to the constitutionality of Section 404(c) of the 1940 law. In December 1948, a staff attorney wrote to Lapides's lawyers to inquire into the status of the case, asking, "If it has been settled, can another case be found?"[21] The specifics of the case—the appellant's identity or to what country he had traveled—were irrelevant to the ACLU's stated aim upon joining the case "to end discrimination between two types of citizens—the naturalized and the native."[22] Nanette Dembitz, the lead author of the ACLU's *Lapides* brief and, coincidentally, Louis Brandeis's second cousin, had instructed an ACLU staff attorney that it was "advisable to limit our brief to the simple question that *no* distinction can constitutionally be made between naturalized and native born."[23]

The American Jewish Committee (AJC), founded in 1906, and the American Jewish Congress (AJCong), established in 1918, shared the ACLU's commitment to civil rights and constitutional protections, but they were equally concerned by their finding that Jews were directly targeted by Section 404(c). In the prior statute, which had become law in 1907,

and Realities in a Century of Jewish Settlement (New Haven, CT, 2003); and Steven Wagner, *Statecraft by Stealth: Secret Intelligence and British Rule in Palestine* (Ithaca, NY, 2019).

[20]On Jewish "lawyer-leaders," see William E. Forbath, "Constitutionalism, Human Rights, and the Genealogy of Jewish American Liberalism," in *The Law of Strangers: Jewish Lawyers and International Law in the Twentieth Century*, eds. James Loeffler and Moria Paz (New York, 2019), 118–40, here 125. Lapides was represented by Jack Wasserman and Irving Jaffe, partners in a Washington, DC, law firm that specialized in immigration and naturalization, and Abram Orlow, a Philadelphia attorney with an active immigration practice. On Wasserman & Jaffe (the firm), see Wasserman, Mancini, & Chang, P.C., BCG Attorney Search, https://www.bcgsearch.com/bestlaw-firms/K7Gof/Wasserman-Mancini-and-Chang-PC/rankings (accessed July 28, 2022). On Abram Orlow, see "Orlow and Orlow, PC," Green and Spiegel LLC, https://www.gands.com/en-us/orlow-and-orlow-pc (accessed Nov. 8, 2021). An obituary of Orlow's son also includes information about Abram Orlow. See Bonnie Cook, "James J. Orlow, 82, Philadelphia Immigration Lawyer," *Philadelphia Inquirer*, Aug 31, 2018, https://www.inquirer.com/philly/obituaries/james-j-orlow-82-philadelphia-immigration-lawyer-20180828.html (accessed Nov. 8, 2021). For an examination of American Jewish lawyers' involvement in immigration law, see Britt Tevis, "'The Hebrews Are Appearing in Court in Great Numbers': Toward a Reassessment of Early Twentieth-Century Jewish Immigration History," *American Jewish History* 100, no. 3 (July 2016): 319–47.

[21]Letter to Jack Wasserman, Dec. 15, 1948, Box 1492, Legal Case Files, 1933–1990, American Civil Liberties Union Records, Mudd Library, Princeton University, Princeton, NJ [hereafter ACLUP].

[22]"Union to Participate in D.C. Naturalization Case," Weekly Bulletin #1374, Feb. 21, 1949, Box 1492, Legal Case Files, 1933–1900, ACLUP.

[23]Nanette Dembitz to Clifford Forster, Jan 28, 1949, Box 1492, Legal Case Files, 1933–1900, ACLUP. On Dembitz, see Philippa Strum, "Nanette Dembitz," *American National Biography* 2000, https://doi.org/10.1093/anb/9780198606697.article.1101144 (accessed Nov. 8, 2021); and on the ACLU, see Ellis Cose, *Democracy, If We Can Keep It: The ACLU's 100-Year Fight for Rights in America* (New York, 2020).

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naturalized citizens who lived abroad had been afforded a rebuttable presumption, meaning they had strong grounds from which to appeal any government action. A small committee of policy makers who drafted most of the 1940 Nationality Act had recommended changing the statute into a conclusive law to give the government more power and weaken the rebuttable presumption, but only in the case of naturalized citizens who returned to their countries of origin. This is likely where the matter would have stood had the State Department not intervened at the eleventh hour.[24]

In excavating the legislative record, the two Jewish organizations discovered House testimony offered by Richard Flournoy, assistant to the legal advisor of the State Department, that advocated extending the conclusive law to naturalized citizens living anywhere abroad, not only in their country of origin. Making his case, Flournoy had plainly directed Congress's attention to Jews. He explained, "The principal case we have, I may say, are these Zionists. They are principally Russian and German Jews who were naturalized in this country and later went to Palestine." Backtracking slightly, he noted that of course there were other such cases, "but I mean there are more of that particular body than in any other category."[25]

In a memo written after the *Lapides* case, an AJCong attorney characterized Flournoy's testimony as reflecting "a bureaucratic antagonism to American Jews supporting the Zionist ideal of the rebuilding of a Jewish homeland."[26] Indeed, Flournoy's wariness of "these Zionists" aligned with the State Department's history of drawing scrutiny to American Jews in Palestine. Beginning in the late nineteenth century, American consular officials stationed in Jerusalem had regarded naturalized American citizens who settled there with distrust, suspicious that many of them had little loyalty to the United States but were using their American credentials as a form of protection while they advanced their true religious or nationalist aims. According to Flournoy, a stronger law that dropped the rebuttable presumption for all naturalized citizens living abroad would enable the State Department to maintain its vigilance against dual nationality, a commitment that most other countries and international bodies shared.[27]

Excerpting Flournoy's testimony in its brief, the AJCong characterized it as "probably one of the most revealing [statements] ever made in a legislative hearing," while the AJC described the circumstances of Section 404(c)'s passage into law as "the very apogee of legislative nonchalance in dealing with rights this Court has deemed to be 'precious.'"[28] (The ACLU, however,

[24]On the legislative history, see Michael A. Schuchat, "Recent Decisions: Constitutional Law—Nationality Act Provision Which Provides for Loss of Citizenship of Naturalized Citizens after Five Years Residence in a Foreign Country Is Constitutional," *Georgetown Law Journal* 38, no. 1 (Nov. 1949): 137–9, here 138; and John P. Roche, "The Loss of American Nationality—The Development of Statutory Expatriation," *University of Pennsylvania Law Review* 99, no. 1 (Oct. 1950): 25–71, here 40–2 and 71. For a history of the AJC, see Naomi W. Cohen, *Not Free to Desist: The American Jewish Committee, 1909–1966* (Philadelphia, 1972). On the establishment of the AJCong, see Jonathan Frankel, "The Jewish Socialists and the American Jewish Congress Movement," *YIVO Annual of Jewish Science* 16 (1976): 202–341; and Arthur A. Goren, *New York Jews and the Quest for Community: The Kehillah Experiment, 1908–1922* (New York, 1970), 218–27.

[25]U.S. Congress, House, Committee on Immigration and Naturalization, *Hearings on H.R. 6127, Superseded by H.R. 9980*, 76 Cong, 1st Sess., Mar. 5, 1940, 129, 140. In 1929, Flournoy participated in a Hague Conference on Codification of International Law, resulting in a report that included a draft nationality treaty that promised "to prevent … cases of double nationality." See Peter J. Spiro, *At Home in Two Countries: The Past and Future of Dual Citizenship* (New York, 2016), 51. On Flournoy, see "Richard W. Flournoy, 1878–1961," *Proceedings of the American Society of International Law at Its Annual Meeting* 56 (Apr. 1962): 65–6.

[26]Will Maslow, "Statement of American Jewish Congress on McCarran-Walter Omnibus Immigration Bills (S.716 and H.R. 2379)," Mar. 15, 1951, Folder 27, Box 185, RAJC.

[27]On earlier State Department efforts to withdraw state protections from Zionist Jews, see Susanna Klosko, "The Infirm, the Unfortunate, and the Aged: 'Likely Public Charges', Immigration Control, and the Yishuv in Theory and Practice" (Ph.D. diss., Brandeis University, 2017).

[28]For Flournoy's extracted testimony in each brief, see Marcus Cohn, Brief on Behalf of American Jewish Committee as Amicus Curiae in the Supreme Court, October Term, 1949, Folder 3, Box 1, Legal Briefs

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made no mention of the exchange, though surely researchers, who had been instructed to unearth the full history of the statute, would have come across its direct indictment of Zionists.[29])

The AJC and AJCong were not interested in litigating Zionism as a Jewish nationalist ideology in their briefs, but they also could not ignore the implications that it had for American Jews. Historically, the two organizations had stood on opposing sides of the question of Jewish nationalism, with the AJC eschewing Zionism. American Jewish non-Zionists and even more extreme anti-Zionists (represented by the American Council for Judaism) feared that diasporic Jews' citizenship rights would be called into question by the creation of a dedicated Jewish nation-state. In 1915, shortly before his appointment to the Supreme Court, Louis Brandeis had delivered a speech to a conference of Reform rabbis encouraging the reluctant group to embrace Zionism as an expression of their American liberal ideals. By transmitting those ideals to "the Jewish settlement in Palestine," American Jews would simultaneously prove their loyalty to the United States and prove that Jews everywhere were loyal to liberalism.[30] No matter its affirmative terms, the case Brandeis made was a defensive one that emerged from the ambivalence he and many other American Jews felt about Jewish nationalism. In the 1940s, that same insecurity would have led the AJC and AJCong to perceive the singling out of "these Zionists" as broadly tarring American Jews with charges of disloyalty and a lack of patriotism.[31]

In their effort to prove that the law violated the constitutional protections afforded to all naturalized citizens, while retaining their determination to highlight the law's particular animus against Jews, the AJC and AJCong scripted Jews into complex relationships with other classes of citizens that experienced disparate treatment. For example, the AJC cited as precedent the recent Supreme Court case *Hirabayashi v. United States*, which in 1943 had upheld the constitutionality of curfews placed on Japanese Americans. Ignoring the actual decision, which amounted to the denial of full citizenship rights to a class of citizens, the AJC instead drew attention to the Court's avowal that "distinctions between citizens because of their ancestry" were "odious."[32] Likewise, the AJCong observed that the equality of all citizens "is part of the very fabric of our history."[33] With a selective reading of case law, the two briefs aligned Jews with Japanese Americans for the sake of applying the Court's rhetorical flourishes about liberal citizenship, while separating the two groups when it came to the Court's substantive decision to categorically curtail Japanese Americans' citizenship rights. By implication, the Jewish organizations distinguished Jews from groups that had suffered ostensibly rightful categorical exclusions from citizenship law. Their legal argument fallaciously suggested that the

Collection, American Jewish Committee Archives and Records Center, New York, NY [hereafter LBCAJC], 17–9; and Maslow, Polier, and Bolz, Amicus Brief, RAJC, 18–9.

[29]Brief for the American Civil Liberties Union, Amicus Curiae, in the U.S. Court of Appeals for the District of Columbia, c. Mar. 1949, Box 1492, Legal Case Files, 1933–1990, ACLUP.

[30]Louis Brandeis, "The Jewish Problem: How to Solve It," Speech to the Conference of Eastern Council of Reform Rabbis, Apr. 25, 1915, Louis D. Brandeis School of Law Library, https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/the-jewish-problem-how-to-solve-it-by-louis-d.-brandeis (accessed Nov. 8, 2021). On Brandeis, see Melvin I. Urofsky, *Louis D. Brandeis: A Life* (New York, 2009).

[31]On the status of Zionism in the AJC and AJCong, see Zvi Ganin, *An Uneasy Relationship: American Jewish Leadership and Israel, 1948–1957* (Syracuse, NY, 2005); Geoffrey P. Levin, "Liberal Whispers and Propaganda Fears: The American Jewish Committee and Israel's Palestinian Minority, 1948–1966," *Israel Studies Review* 33, no. 1 (Spring 2018): 81–101; and Melvin I. Urofksy, *American Zionism from Herzl to the Holocaust* (Lincoln, NE, 1995). On the American Council for Judaism, see Matthew Berkman, "Antisemitism, Anti-Zionism, and the American Racial Order: Revisiting the American Council for Judaism in the Twenty-First Century," *American Jewish History* 105, nos. 1–2 (Jan./Apr. 2021): 127–55; and Thomas A. Kolsky, *Jews Against Zionism: The American Council for Judaism, 1942–1948* (Philadelphia, 1990).

[32]Cohn, Amicus Brief, LBCAJC, 13. For the case under discussion, see *Hirabayashi v. United States*, 320 U.S. 81 (1943). On Japanese internment cases, see Lee, *America for Americans*, ch 6.

[33]Maslow, Polier, and Bolz, Amicus Brief, RAJC, 6.

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"odious" discrimination other groups experienced was as irrelevant to the history of Jews in the United States as it was to the country's true liberal promise.

At the same time, the Jewish organizations recognized that their paeans to America's liberal promise did not rest easily with their allegations of the antisemitic intent of the law. In the final paragraphs of its brief, the AJCong asserted, "To the extent that the statute is directed at narrowing the freedoms belonging to American citizens who are included in the phrase 'these Zionists,' the statute is an unwarranted invasion of those rights which indisputably belong to all citizens…."[34] Even more sharply, the AJC accused the law of creating "a second class citizenship not wholly dissimilar to that created by Hitler's Nuremberg Laws." Notably, instead of steering the court's attention to historical examples when classes of American citizens, whether Jewish or not, were summarily denied rights and petitioning the court to repair all of those wrongs in the interest of America's stated ideals, the brief set up the bogeyman of Nazi totalitarianism. Only by directing laws "at the problem, not at the class," the AJC suggested, could the United States avoid the fate of totalitarianism.[35] Naturalized citizens, Zionists, Jews: these were classes of citizens who all deserved equal protection barring clear evidence that they were causing a problem to national sovereignty. Instead, here, in this case and according to this misdirected law, a class was being treated as the problem, edging the United States closer to an enemy ideology. By invoking Nazism and sticking to the story of America's essential liberalism, the briefs studiously ignored the country's own homegrown history of expelling citizens and creating tiers of citizenship.

No matter the lawyers' carefully constructed briefs, the appeals court would not be convinced to reinstate Lapides's citizenship—and the Supreme Court entirely refused to consider the case. The appeals court opinion made no mention of the legislation's genealogy and its entanglement with state suspicion of nationalist Jews. Instead, the majority opinion noted that Supreme Court rulings clearly allowed Congress to distinguish citizens by class for legal purposes if the classification had "reasonable relation to legitimate legislative ends."[36] As precedent, the opinion cited the 1915 *MacKenzie* decision that had affirmed the constitutionality of using sex as a distinction in the application of citizenship law. In both that case and the present one, expatriation had been "voluntarily brought about by one's own acts, with notice of consequences."[37] The analogy between a naturalized citizen and a female citizen authorized the court to rule that the government had the constitutional right to declare a former citizen now an alien. According to the logic offered, just as an American woman became the possession of a foreign man and thus his homeland, a naturalized citizen—here, a Jewish man naturalized into U.S. citizenship—could lose his citizenship rights by surrendering himself to a foreign power (or, perhaps, his only true homeland).[38]

A dissenting opinion from the court of appeals rejected the analogy between Lapides and expatriated female citizens, instead arguing that the more faithful comparison could be found with the *Hirabayashi* case, cited in the AJC and AJCong briefs. According to the dissenting judge, *Hirabayashi* permitted the government to treat a whole class of citizens disparately solely because the government had invoked emergency conditions that necessitated otherwise unconstitutional actions, and it did not authorize the government willy-nilly to differentiate between classes of citizens. In this case, the judge did not believe the government had

[34]Ibid., 20.

[35]Cohn, Amicus Brief, LBCAJC, 2, 25.

[36]*Lapides v. Clark*, 176 F.2d, 620.

[37]Ibid., 621.

[38]For broad and varied perspectives on the feminization of Jewish men, see Daniel Boyarin, "Homotopia: The Feminized Jewish Man and the Lives of Women in Late Antiquity," *differences: A Journal of Feminist Cultural Studies* 7, no. 2 (Summer 1995): 41–81; Sander Gilman, *The Jew's Body* (New York, 1991); Paula E. Hyman, *Gender and Assimilation in Modern Jewish History: The Role of Jewish Women* (Seattle, 1995); and Riv-Ellen Prell, *Fighting to Become Americans: Assimilation and the Trouble Between Jewish Women and Men* (Boston, 1999).

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demonstrated urgent cause to expatriate Lapides for being foreign born and "sojourn[ing] in Palestine."[39] The dissenting opinion may have given Lapides high hopes for capturing the attention of the highest court, but they were dashed the following fall in October 1949 when the Supreme Court declined to hear the case.[40]

In response to the case's final fate, the ACLU wrote darkly, "We do not think the law reasonable, but obviously it will stand so far as the courts are concerned. Congress can hardly be expected to change it in view of its current attitude to the foreign-born."[41] The ACLU's despair was understandable. In 1952, just three years after the *Lapides* decision, Congress passed a new immigration act that maintained national-origins quotas. Congress's ongoing isolationism and nativism made it appear unlikely to loosen its grip on the power to act in the name of protecting national sovereignty, a power unenumerated by the Constitution but expressed in case law, and a power that often came at the expense of its own citizens' liberties.[42]

Despite the ACLU's lack of faith in Congress, the remedy for Lapides eventually came by way of that very body, when in 1951 it passed a "private bill"—that is, a bill introduced to govern extraordinary or specific circumstances not addressed through general laws—to admit him as a permanent resident in return for his "payment of the required visa fee and head tax" and as part of the allotted quota for the entrance of foreigners from Israel.[43] The record does not reveal why Lapides received this treatment, which was usually reserved for aliens with immediate family obligations or other compelling causes to gain settlement rights in the United States. Whatever the reason, the time Lapides had spent living in Palestine as a naturalized American citizen had performed the necessary alchemy to transform him from a citizen of the United States into an alien and, finally, into a documented resident.

In the years to come, as the State Department and the courts attempted to apply Congress's legal standards for distinguishing between citizens and expatriated citizens, these state bodies would once again alight on a naturalized American Jewish man who lived in Israel to begin to imagine a new kind of citizenship, far more portable and less exclusive than the citizenship Lapides had lost. Yet even as its laws shifted to embrace citizens with multiple nationalities, reflecting a broader global concern about statelessness, the U.S. government continued to rely on categorical legal reasoning as a tool to stabilize the distinction between citizens and aliens while advancing its national interests.

Afroyim v. Rusk: "The Right to Have Rights"

Born in Poland in 1893, Ephraim Bernstein, who later assumed the name Beys Afroyim, arrived in the United States in 1912 and became a U.S. citizen in 1926. After studying at the Chicago Art Institute and the National Academy of Design in New York City, he established the Afroyim Experimental School of Art in New York City, where he supervised a cadre of student artists who participated in Works Progress Administration projects in the 1930s.[44] He met his

[39]*Lapides v. Clark*, 176 F.2d, 623.

[40]For the denial of the writ of certiorari for the case to be heard by the Supreme Court, see *Lapides v. Clark*, 338 U.S. 860; and Fowler V. Harper and Alan S. Rosenthal, "What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari," *University of Pennsylvania Law Review* 99, no. 3 (Dec. 1950): 293–325, here 305–7.

[41]"Expatriate Denied Citizenship by U.S. Supreme Court," *Weekly Bulletin* #1409, Oct. 31, 1949, Box 1492, Legal Case Files, 1933–1900, ACLUP.

[42]On the 1952 McCarran-Walter Act, see Ngai, *Impossible Subjects*, 237.

[43]*Congressional Record*, 82 Cong., 1st Sess., Aug. 27, 1951, 10696. On private bills, see "Private Bills in Congress," *Harvard Law Review* 79, no. 8 (June 1966): 1684–706; and Charles D. Weisselberg, "The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei," *University of Pennsylvania Law Review* 143, no. 4 (Apr. 1995): 933–1034.

[44]For biographical details about Afroyim, see *Afroyim v. Rusk*, 250 F. Supp., 686, here 687 (1966). On the Afroyim Experimental School of Art, see Invitation to Children's Art Exhibition, 1943, Pamphlet Files, Art and Architecture Collection, New York Public Library, New York, NY [hereafter AAC]. On Afroyim's artistic training,

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future wife, Soshana Schüller, a recent refugee from Austria, when she attended his art classes in the early 1940s. According to several accounts, Afroyim and his wife were members of the Communist Party and, perhaps under pressure from American investigations, the couple and their son spent the late 1940s in Cuba. From there, the family moved to Europe and then Israel in 1949. Two years later, the couple's marriage dissolved, and Soshana left for Vienna with their son, who soon returned to Israel once Afroyim gained full custody of him.[45]

In 1960, Afroyim wished to travel to America, but when he applied to renew his passport, he learned he had been expatriated from the United States retroactive to July 31, 1951. According to the records of the U.S. Consulate in Haifa, on that date Afroyim had voted in an Israeli election, an act specified by Section 401(e) of the Nationality Act of 1940 as indicative of a citizen's intention to expatriate. Under a challenge, the statute had been upheld as constitutional by a 5–4 majority in the 1958 Supreme Court case *Perez v. Brownell*, which affirmed the expatriation of an American citizen for voting in a Mexican election. The majority opinion, penned by Justice Felix Frankfurter, relied on the same rationale that had justified the expatriation of women who married foreigners and naturalized citizens who lived abroad: "No man should be permitted deliberately to place himself in a position where his services may be claimed by more than one government and his allegiance be due to more than one."[46] The statute's origin, which Frankfurter outlined in his opinion, illustrated the dangers of dual allegiance to American interests. In the 1930s, Representative Samuel Dickstein, a Jewish congressperson from New York, had discovered that American citizens were returning to Europe on the Nazi party's dime to participate in a plebiscite vote so that Germany could absorb the contested Saar Territory. Dickstein viewed this as part of a subversive American-based operation to lend support to Nazism and struck back by legislating that Americans who participated in foreign elections automatically ceded their citizenship. Between 1949 and 1965, over 25,000 Americans had their citizenship revoked on this basis, a somewhat ironic twist for a law that started as a rebuke of Nazi tactics.[47]

Over the first half of the twentieth century, Congress, the State Department, and the courts had treated a citizen's political allegiance to more than one nation-state as an impossibility, with the exception of a few treaty-based agreements. Although humanitarian assistance organizations, including prominently some Jewish ones, expressed concern that statelessness was a far bigger human crisis than multistate membership, American state bodies and other liberal governments did not build a coherent framework to recognize and address refugees until after World War II. In the postwar years, even as the Cold War amplified American nationalism, it also spurred a more elastic sense of American boundaries, in which moveable people,

see "Metropolis Movement," Painting the Town, Museum of the City of New York, archived at Wayback Machine, Internet Archive https://web.archive.org/web/20080608192613/http://www.mcny.org/collections/painting/pttcat87.htm (accessed Nov. 8, 2021).

[45]On Soshana (Schüller) Afroyim, see "Shoshana, Afroyim," *Benezit Dictionary of Artists*, 2011 https://doi.org/10.1093/benz/9780199773787.article.B00172536 (accessed Nov. 8, 2021). For the couple's membership in the Communist Party and residence in Cuba, see Angelica Bäumer and Amos Schueller, eds., *Soshana: Leben und Werk* (Vienna, 2010). Also, see Peter J. Spiro, "*Afroyim*: Vaunting Citizenship, Presaging Transnationality," in *Immigration Stories*, eds. David A. Martin and Peter H. Schuck (New York, 2005), 147–68, here 153–4.

[46]*Perez v. Brownell* 356 U.S., 44, here 50 (1958). On the Perez case, see Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* (Philadelphia, 2012), chs 11 and 12.

[47]On Dickstein's effort to legislate against American citizens' participation in foreign elections, see *Perez v. Brownell* 356 U.S., 54–6. On the legislative context for Section 404(e), see Spiro, "*Afroyim*: Vaunting Citizenship, Presaging Transnationality," 150. On the number of Americans expatriated for voting in a foreign election, see Weil, *The Sovereign Citizen*, Appendix 4, 198–9. On Nazi infiltration into American life, see Bradley W. Hart, *Hitler's American Friends: The Third Reich Supporters in the United States* (New York, 2018). On Dickstein, see Finding Aid, Samuel Dickstein Papers (MS 8), Jacob Rader Marcus Center, American Jewish Archives, Cincinnati, OH http://collections.americanjewisharchives.org/ms/ms0008/ms0008.html (accessed Nov. 8, 2021).

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ideas, and capital could serve to strengthen American geopolitical power, spread democracy, and safeguard human rights. As historian Paul Kramer explains, "If American power was to flourish in the world … it would operate through networks spun by highly mobile actors" who moved across national boundaries, collapsing the distinction between American sovereignty over domestic space and its global strength during the Cold War.[48] In the same period, the rising international human rights movement brought scrutiny to forced expatriation that left people bereft of political rights. Motivated by concomitant demands to spread American power while ostensibly protecting the powerless by giving them nation-state status, American policy makers, well before most other countries' leaders, reconsidered whether undivided allegiance was a necessary or strategically useful qualification for citizenship and, if not, how they would craft a state process to account for statefulness.[49]

Although issued an official loss of citizenship document in 1961, Afroyim did not appear to pursue the matter again until 1965, when Nanette Dembitz, the lead author on the ACLU's amicus brief for *Lapides* and now a volunteer general counsel at the New York Civil Liberties Union (an affiliate of the ACLU), became involved in the case.[50] Notably, neither the AJC nor the AJCong filed amicus briefs on behalf of Afroyim, and while one can fairly speculate that his communist past may have dissuaded these organizations from weighing in, it is impossible to draw a firm conclusion from silence.[51] What is clear is that the ACLU was once again on the prowl for a good test case to press the courts on the constitutionality of forced expatriation, especially considering America's rising global power and the shifting human rights landscape. Dembitz wagered that Afroyim provided just the case.

As Dembitz pushed the case up the chain of courts, at each stage receiving judgments that affirmed the government's decision to expatriate Afroyim, she nonetheless saw signs that jurists were losing their faith in *Perez* and the doctrine of exclusive citizenship. In the last appeal before the case reached the Supreme Court, U.S. Court of Appeals judge Irving Kaufman, best known for sentencing Julius and Ethel Rosenberg to death for the crime of espionage in 1951, issued a concurring opinion that he "reluctantly" agreed with the majority's verdict against Afroyim only because *Perez* was still standing law, but he predicted that a reconsideration was "inevitable."[52]

In the fall of 1966, Dembitz received word that the Supreme Court would hear the case. Before the lower courts, she had employed a scattershot approach, as if experimenting to see which amendment (the First, Fifth, Sixth, Eighth, or Fourteenth) had the strongest purchase to prove the unconstitutionality of Afroyim's expatriation. By the time the case reached the Supreme Court, however, she had settled on the Fourteenth Amendment, arguing that by

[48]Paul Kramer, "The Geopolitics of Mobility: Immigration Policy and American Global Power in the Long Twentieth Century," *American Historical Review* vol 123, no. 2 (Apr. 2018): 393–438, here 415.

[49]For broader context on American global power, see Daniel Immerwahr, *How to Hide an Empire: A History of the Greater United States* (New York, 2019). On the state bureaucratic tools that developed around multistate allegiances, see David Cook Martín, "Rules, Red Tape, and Paperwork: The Archeology of State Control over Migrants," *Journal of Historical Sociology* 21, no. 1 (Mar. 2008): 82–119, here 105–9. On the rising power of human rights discourse and its connection to statelessness and refugees, see Peter Gatrell, *The Making of the Modern Refugee* (Oxford, UK, 2013); James Loeffler, *Rooted Cosmopolitans: Jews and Human Rights in the Twentieth Century* (New Haven, CT, 2018); Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chen, "Nationality and Human Rights: The Protection of the Individual in External Arenas," *Yale Law Review* 83, no. 5 (Apr. 1974): 900–88; Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA, 2010); and Siegelberg, *Statelessness*. The United States was one of the first countries to recognize dual citizenship, although by the turn of the millennium, most countries had followed suit. See Harpaz, *Citizenship 2.0*, 8.

[50]On Dembitz's role at the New York Civil Liberties Union, see Susan Heller Anderson, "Judge Nanette Dembitz, 76, Dies; Served in New York Family Court," *New York Times*, Apr. 5, 1989, B10.

[51]On liberal Jewish organizations' anticommunism, see Stuart Svonkin, *Jews Against Prejudice: American Jews and the Fight for Civil Liberties* (New York, 1997), ch 5.

[52]*Afroyim v. Rusk*, 361 U.S. F.2d, 102, here 104 (2d. Cir 1966).

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concluding Afroyim's intent based on only his actions and not his direct statements, Congress vacated its responsibility to protect equally the rights of all citizens. A recent case, *Schneider v. Rusk*, had overturned the distinction between native-born and naturalized citizen, which had been the statutory basis of Lapides's case, but the core of Dembitz's argument still rested on equal treatment, which she maintained would be impossible under the statute unless Congress sought to interpret every single citizen's intentions at any given moment.[53] At the last minute, Dembitz handed the case over to Edward Ennis, general counsel for the ACLU and later the organization's president, so she could accept a judicial appointment to New York's family court.[54] Executing Dembitz's argument in front of the Supreme Court in the winter of 1967, Ennis explained, "My final proposition is that Congress has no authority, under the Constitution to remove United States citizenship—that this can only be done by the voluntary act of the United States citizen—and all that the power of Congress is, is to regulate the manner in which this voluntary expatriation shall be expressed."[55]

The government's case to defend Afroyim's expatriation hinged on proving that Congress was well within its constitutional rights to interpret citizens' actions as clear indication of their intentions, even in the most extreme case of citizenship loss, and that this did not violate the terms of equal protection. The government's lawyer argued that no matter how Afroyim might describe his intentions for voting in the Knesset (Israeli parliament) election, this was wholly "immaterial" to his expatriation, which was justified by the indisputable meaning of his actions. Seeking to establish a pattern, the lawyer explained that Afroyim's vote in the 1951 election was part of a long line of acts that included his fourteen years of uninterrupted residence in Israel; his effort to gain an Israeli passport; his allowance of his American passport to lapse; and his participation in not just one but three elections. "It seems to me," the lawyer concluded, "that under those circumstances, petitioner has indicated that his primary allegiance is to Israel and not the United States."[56] Equal protection was irrelevant since Afroyim had shown himself to be quite unlike most other American citizens.

Nonetheless, just as Dembitz and the ACLU had hoped, a newly composed bench on the Supreme Court tilted the balance enough to overturn *Perez* and win a judgment declaring Afroyim's expatriation unconstitutional. The decision was as close as it could be, but this time the majority picked up the threads of the strong dissent in *Perez* from a decade earlier and wove them into a broad rejection of expatriation on any grounds other than the clear and voluntary intentions of a citizen. In crafting the dissenting opinion in *Perez*, Chief Justice Earl Warren had invoked Hannah Arendt's formulation of modern citizenship, writing, "Citizenship is man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen."[57] He argued for prioritizing the citizen's sovereignty over that of the nation and laid the foundation for a new interpretive logic that framed dual nationality as a tolerable, perhaps occasionally desirable, citizenship status and one deserving of civil rights protections.

Justice Hugo Black, the author of the majority opinion in *Afroyim*, built on Warren's earlier dissent in *Perez*, first quoting its invocation of Arendt and then continuing, "[L]oss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country." Absent obeisance to the doctrine of equal protection under the law, as guaranteed by the Fourteenth Amendment, Black admonished, "[A] group

[53]*Schneider v. Rusk*, 377 U.S. 163 (1964).

[54]On Dembitz's judicial appointment, see Anderson, "Judge Nanette Dembitz."

[55]U.S. Supreme Court, Oral Arguments in *Afroyim v. Rusk*, recorded Feb. 20, 1967, Oyez, https://www.oyez.org/cases/1966/456 (accessed Nov. 8, 2021).

[56]U.S. Supreme Court, Oral Arguments in *Afroyim*.

[57]*Perez v. Brownell,* 356 U.S., 64 (1958). On Warren and the *Perez* decision, see Donald K. Duvall, "Expatriation under United States Law, *Perez* to *Afroyim*: The Search for a Philosophy of American Citizenship," *Virginia Law Review* 56, no. 3 (Apr. 1970): 408–56; Herzog, *Revoking Citizenship*, 83; and Weil, *The Sovereign Citizen*, ch 11.

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of citizens temporarily in office … [could] deprive another group of citizens of their citizenship."[58]

Undoubtedly, the global crises of the last three decades that included the forcible transfer, imprisonment, and slaughter of human beings who had been systematically stripped of state protections by powerful leaders were on the justices' minds when they embraced Arendt's formulation of national citizenship as "the right to have rights." Yet far from a clear mandate, the Court's ruling stood on the weight of just one vote, with four justices dissenting. The dissenters reminded the Court that the Fourteenth Amendment's goal was to federalize citizenship and provide citizenship rights for people freed from slavery, and not, by extension, to limit Congress's power to revoke citizenship or deny naturalization. Indeed, just two years prior, Congress had passed a massive overhaul of its immigration and naturalization policy in the form of the Hart-Celler Act, revealing that even as it backed away from national-origins quotas it would not release its power, unenumerated in the Constitution but established in the courts, to regulate national sovereignty. With a plea for judicial restraint, the dissenting opinion concluded that "the present majority's own distaste for the expatriation power" must not speak for the Constitution.[59]

While the majority opinion gained its moral force and sense of urgency from decrying any political order that would wield statelessness as a tool, Afroyim, unlike Lapides in 1947, was not in danger of becoming "a man without a country." Under the Israeli Law of Return, passed in 1950, any Jewish person who was born or arrived in Israel was designated an *oleh* (Hebrew for "one who goes up," a term reserved for Jewish immigrants) and had the right to vote. Two years later, in 1952, the country's first Nationality Law defined all *olim* (plural) as citizens without requiring they relinquish other citizenships.[60] Whatever the status of his American citizenship, Afroyim's claim to Israeli citizenship had never been in doubt, though the specter of statelessness still loomed in the Court's deliberations. Not only did the majority opinion reference Arendt and, by implication, the recent history of Nazism and the Jewish refugee crisis it precipitated, but the case was under consideration during the lead up to the Six Day War, at a time when tensions ran high between Israel and surrounding Arab states. More than an aside, concerns about statelessness—a matter that preoccupied post-Holocaust human rights and international law discussions, within which many notable Jewish lawyers participated—stood at the center of the case, pushing the Court to embrace statefulness. Notably, the court, much like other American state actors at the time, seemed uninterested in the ways in which the new Israeli state had precipitated mass statelessness for Palestinians.[61]

Despite the State Department's longstanding eschewal of multiple nationalities and its historical reluctance to extend protections to citizens who decamped to Palestine/Israel, the Jewish state now provided a hospitable setting for a test case to create the legal possibility for dual citizenship. Foreign policy concerns that once might have been aggravated by dual citizenship claims were substantially mitigated by the geopolitical divisions of the Cold War and the strikingly reduced rates of migration between Eastern bloc and Western countries.[62] Beyond this, as legal scholar Peter Spiro explains, even judges with singular focus on matters of law would have

[58]*Afroyim v. Rusk*, 387 U.S. 253, here 268 (1967).

[59]Ibid., 293. On the 1965 act, see Ngai, *Impossible Subjects*, ch 7.

[60]Claude Klein, "The Right of Return in Israeli Law," *Tel Aviv University Studies in Law* 13 (1997): 53–61.

[61]On the global dimensions of the 1967 war, see Guy Laron, *The Six Day War: The Breaking of the Middle East* (New Haven, CT, 2017). On Palestinian statelessness, see Gatrell, *The Making of the Modern Refugee*, ch 4; and Salim Yaqub, *Imperfect Strangers: Americans, Arabs, and U.S.–Middle East Relations in the 1970s* (Ithaca, NY, 2016). For an exploration of some of the efforts among Arab students to register Palestinian rights in American policy discussions, see Geoffrey P. Levin, "Arab Students, American Jewish Insecurities, and the End of Pro-Arab Politics in Mainstream America, 1952–1973," *Arab Studies Journal* 25, no. 1 (Spring 2017): 30–59.

[62]Heinz Fassman and Rainer Münz, "European East-West Migration, 1945–1992," *International Migration Review* 28, no. 3 (Autumn 1994): 520–38.

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found it hard to fear "some sort of Israeli 'fifth column' in its more menacing, Cold War sense," given Israel's strategic importance as a foothold against Soviet power in the Middle East.[63] Indeed, already in the *Lapides* case, the AJCong had attempted to convince the court of just this point, explaining that expatriating Lapides "would be an unfriendly act and in flagrant violation of the international policy of our country," which was to defend "the Zionist ideal."[64] By the mid-1960s, this claim rang far truer than it had in the 1940s. In 1964, just three years before the *Afroyim* decision, Chief Justice Warren had spoken at a United Jewish Appeal event in New York City and extolled the "miracle" of the State of Israel, which he had seen firsthand when he visited in 1962. He explained that the political and economic development in Israel was doing as much to advance democracy as the last two world wars had, and he praised American humanitarian aid, through governmental and nongovernmental channels, for assisting this work. One could almost hear echoes of the case Brandeis had made for Zionism a half century earlier, but now by the 1960s, Israel was truly becoming a surrogate for American exceptionalism, a "pilot plant," as Warren termed it, for the global spread of liberal democracy.[65] Characteristic of the time, Warren's plaudits ignored the illiberalism that abounded in both countries, including Israel's treatment of Palestinians.

And yet, for all of Warren's praise of Israel and the Supreme Court's ruling that allowed Afroyim to retain his American citizenship, the case also drew unmistakable attention to the problem of Jewish citizenship in a post-1948 world. That any American Jew could now possess a separate legal and political identity as a citizen of another sovereign state disrupted the balance between individual and national sovereignty that had defined American citizenship law. Despite many mid-century American Jewish leaders' efforts to define Jewishness as a fundamentally religious identity and despite the rising cultural and political power of the "Judeo-Christian" idea that seemingly accepted Jews into the constellation of post–World War II American religious life, the categorical complexity of American Jews after the establishment of the Jewish state stressed the legal imagination of liberal citizenship.[66]

Those Jews who traveled to Israel and were involved in Jewish nationalist activities raised a set of historically contingent questions about just how far and upon what kinds of bodies American citizenship could travel. Jewish nationalism and the establishment of the Jewish state put American Jews at odds with the regnant conception of liberal citizenship as an exclusive relationship—and even more so once Israel instituted its citizenship laws that transformed any Jewish person by dint of their ethno-religious-racial identity into a potential Jewish national. To understand the transformation of dual citizenship from a legal impossibility to a bureaucratic status, scholars must be attentive to the complexities of twentieth-century Jewishness, as well as the specific challenges they posed to categories of state sovereignty and citizenship.

The *Afroyim* decision advanced the liberalizing claim, in Justice Black's words, that "the people are sovereign," not the government or the nation. As a sovereign individual and with his American citizenship restored, Afroyim could live a life of dual nationality, operating art

[63]Spiro, *At Home in Two Countries*, 58.

[64]Maslow, Polier, and Bolz, Amicus Brief, RAJC, 20.

[65]On Warren's trip and speech, see Irving Spiegel, "Warren Praises Israel 'Miracle,'" *New York Times*, Dec. 13, 1964, 76. On Israel as a surrogate power for American exceptionalism, see Michelle Mart, *Eye on Israel: How America Came to View Israel as an Ally* (Albany, NY, 2006); Melani McAlister, *Epic Encounters: Culture, Media, and U.S. Interests in the Middle East since 1945*, updated ed. (Berkeley, CA, 2005); and Dennis Ross, *Doomed to Succeed: The U.S.-Israel Relationship from Truman to Obama* (New York, 2015).

[66]On the shifting categories of Jewishness in the United States, see Lila Corwin Berman, *Speaking of Jews: Rabbis, Intellectuals, and the Creation of an American Public Identity* (Berkeley, CA, 2009). On the rising power of the Judeo-Christian idea, see K. Healan Gaston, *Imagining Judeo-Christian America: Religion, Secularism, and the Redefinition of Democracy* (Chicago, 2019); Kevin M. Schultz, *Tri-Faith America: How Catholics and Jews Held Postwar America to Its Protestant Promise* (New York, 2011); and Mark Silk, "Notes on the Judeo-Christian Tradition in America," *American Quarterly* 36, no. 1 (Spring 1984): 65–85.

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galleries in the Israeli city of Safed and on Staten Island and moving across national borders as a man with two countries.[67] Nonetheless, even in its newly liberalized form, American citizenship would not be entirely disentangled from claims of national sovereignty. As *Afroyim* became settled law, state agents retained and devised a set of legal tools to maintain the exclusionary dimensions of liberal citizenship and, thus, to use state power to surveil, discipline, and sometimes expatriate individuals.

The Cases of Meir Kahane: "Not the Law, but Rather My Politics"

When Meir Kahane lost his American citizenship for the second and final time in 1988, the American-born Jewish man had spent two decades walking a thin line between being an American and proclaiming his singular dedication to Israel as the only true home for Jews. His experience of losing, regaining, and then losing once again his citizenship reveals that as expatriation law liberalized over the second half of the twentieth century to accommodate citizens with multiple national loyalties, the American state also retained mechanisms to exclude citizens. Even in the face of a citizen's objections, state entities improvised the legal reasoning to maintain that such a citizen had voluntarily and intentionally expatriated.[68]

By the late 1960s, Brooklyn-born Martin David Kahane was known by Jews far and wide as Rabbi Meir Kahane, an Orthodox rabbi and the founder of the Jewish Defense League (JDL). Established in 1968, the JDL pledged to protect Jews against antisemitism by any means necessary, including violence. Popularizing the slogan "Never Again" and pillorying liberal Jews for fighting for everyone else's rights (most especially those of Black Americans) while compromising their own, Kahane appealed to post-Holocaust trauma and ably translated it into fundraising success, despite censure from Jewish communal organizations. In 1970, when the FBI opened an investigation to track his activities, it characterized the JDL as "extremely militant" and a threat in light of "increasing tensions in the Middle East."[69]

In 1971, Kahane emigrated to Israel and automatically gained citizenship, according to the same laws that had nationalized Afroyim. The Israel that Kahane found was not the one he wanted it to be, so he quickly organized a new political party, eventually named Kach, that espoused an undemocratic and vocally anti-Arab version of Zionism. After several failed bids for seats in the government, Kach received just over 1 percent of the popular vote in 1984, enough to send Kahane to the Knesset. And that is when his trouble with American citizenship began.[70]

The holder of a law degree, Kahane likely knew that his election to the Knesset could jeopardize his American citizenship. According to the terms of the 1952 Immigration and Nationality Act, service in a foreign government could be construed as an expatriative act, and in the post-*Afroyim* years, the statute had been clarified by the standard of voluntary relinquishment.[71] In a "statement of interpretation" released soon after the *Afroyim* decision,

[67]B. Afroyim, business card, no date, Artist Files, AAC.

[68]See Shaul Magid, *Meir Kahane: The Public Life and Political Thought of an American Jewish Radical* (Princeton, NJ, 2021). See also S. Daniel Breslauer, *Meir Kahane: Ideologue, Hero, and Thinker* (Lewiston, NY, 1986); and Robert I. Friedman, *The False Prophet: Rabbi Meir Kahane—From FBI Informant to Knesset Member* (New York, 1990).

[69]For the heavily redacted FBI file, see Meir D. Kahane Freedom of Information and Privacy Acts File, 105-HQ-207795, FBI Records: The Vault, Federal Bureau of Investigation, Department of Justice https://vault.fbi.gov/meir-kahane/meir-khane-part-01-of-14/view (accessed Nov. 8, 2021). On the JDL, see Michael E. Staub, *Torn at the Roots: The Crisis of Jewish Liberalism in Postwar America* (New York, 2002), 220–31.

[70]These details can be gleaned from Department of State, Board of Appellate Review, "In the Matter of MMDK [Meir Kahane]," May 1, 1986, 12 BAR (D) 194 (1986), vol. 12, Decisions of the Board of Appellate Review, Digitized Legal Collections, Florida State University College of Law Research Center, Tallahassee, FL, https://law.fsu.edu/research-center/digitized-legal-collections (accessed Nov. 8, 2021) [hereafter DBAR]; and *Kahane v. Shultz*, 653 F. Supp. 1486 (E.D.N.Y., 1987).

[71]Immigration and Nationality Act, Pub. Law No. 414, 66 Stat. 163, here 267 (1952).

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the U.S. Attorney General had sustained the government's interpretive power to determine when an action triggered expatriation by defining the standard as "not confined to a written renunciation" of citizenship and demonstrable through "other actions declared expatriative" by the government.[72] Thus, even as the judiciary in *Afroyim* had eroded the states' interpretive authority over an individual's action, the executive branch sought to recover a measure of state power by rebalancing the newly expanded inclusive dimensions of American citizenship with its exclusionary tools.

Aware of the states' ongoing power over expatriation, Kahane created a paper trail of his intentions to remain an American citizen. He and his lawyer wrote unbidden to the State Department expressing Kahane's desire "to remain a national of the United States" and documenting that he had "no intention whatsoever of giving up … United States citizenship."[73] Clearly aware of the law, Kahane and his attorney sought to prove that regardless of his actions, he did not meet the standard of "voluntary relinquishment" of citizenship.

Despite his preemptive efforts, when Kahane was sworn into the Israeli parliament in August 1984, the U.S. Consulate General in Jerusalem notified him that he was in danger of expatriation and now could submit evidence "regarding … intent toward U.S. citizenship."[74] On a form supplied to him, Kahane emphasized, "I knew I would *not* lose my citizenship since I had no intention of relinquishing it and so informed the State Department before taking my seat in Knesset."[75] He underscored his enduring allegiance and connections to the United States, illustrated by the residence he maintained there, his family and social ties, the income taxes he paid, and the time he spent (which he calculated as one-third of each year) in America. In a cover letter attached to the form, he insisted, "Now, stop bothering me."[76] Uncompliant, the American consulate issued Kahane a Certificate of Loss of Nationality, approved by a State Department official, who explained that Kahane's election to the Knesset was "unequivocal evidence of your exclusive commitment to a foreign state … and represented the effective abandonment of your United States citizenship." The correspondence acknowledged Kahane's efforts to deny his intention to relinquish his citizenship, but dismissed them as "completely inconsistent with, and contradicted by, your actions, as well as other statements you have made."[77]

Like Lapides and Afroyim before him, Kahane had the right to appeal his expatriation. In fact, the administrative process for appeal was far easier than it had been for his predecessors when they contested their expatriations. Under the Attorney General's guidelines, the State Department repurposed the Board of Appellate Review, a body established in the 1940s to oversee the formal procedures of canceling passports, into a "quasi-judicial" body that offered an automatic right to appeal to any expatriated citizen.[78] Three judges reviewed each case brought before it to determine if the government had met the standards of voluntary and intentional relinquishment necessary to expatriate a citizen. Even if the State Department's decision was upheld, the petitioner had yet another means of recourse through the courts.

[72]Ramsey Clark, "Expatriation of United States Citizens: Attorney General's Statement of Interpretation," *Federal Register* 34, no. 15 (Jan. 23, 1969): 1079–80. On his statement, see Duvall, "Expatriation under United States Law, *Perez* to *Afroyim*"; and Spiro, "*Afroyim*: Vaunting Citizenship, Presaging Transnationality," 160. On the ambiguities in the standard of voluntary relinquishment, see David F. Schwartz, "American Citizenship after *Afroyim* and *Bellei*: Continuing Controversy," *Hastings Constitutional Law Quarterly* 2, no. 4 (Fall 1975): 1003–28.

[73]Board of Appellate Review, "In the Matter of MMDK," DBAR, 196.

[74]*Kahane v. Shultz*, 653 F. Supp, 1488.

[75]Board of Appellate Review, "In the Matter of MMDK," DBAR, 196.

[76]*Kahane v. Shultz*, 653 F. Supp., 1488.

[77]Board of Appellate Review, "In the Matter of MMDK," DBAR, 197.

[78]Alan G. James, "The Board of Appellate Review of the Department of State: The Right to Appellate Review of Administrative Determinations of Loss of Nationality," *San Diego Law Review* 23, no. 2 (Mar.–Apr. 1986): 261–325, here 262. On the Board's tendency to overturn State Department expatriation orders, see Herzog, *Revoking Citizenship*, 104.

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Unsurprisingly, most of the cases the Board considered during the 1980s involved American citizens' actions, often their naturalization into citizenship or some other act construed to renounce their American loyalty, in Canada or Mexico. More remarkable, however, is that after those two near neighbors, Israel was the next most frequent country to appear in claims before the Board during that period, with twenty-one cases—approximately 6 percent of the total number of cases considered by the Board—involving American citizens in Israel. Despite the American government's increased tolerance of dual citizenship and its strong political and cultural alliance with Israel, the country's open citizenship laws for Jews could spur the American state into action.[79]

In 1986, when Kahane appealed his expatriation to the Board, he had reason to feel optimistic about his chances for success, and not only because the Board tended to favor appellants, whose intentions seemed evident by the very process. Setting even more promising odds for Kahane was the fact that just four years earlier, the Board had ruled in favor of a petitioner in a nearly identical case. An American-born woman named Marcia Freedman immigrated to Israel in 1969, automatically received Israeli nationality, became politically engaged in feminist and liberal Israeli politics, and in 1974 took a seat in the Knesset, executing a loyalty oath and serving a three-year term. When she sought to renew her American passport, she learned that the State Department had expatriated her retroactive to the start of her term. On appeal to the Board, she recovered her citizenship because, according to the majority opinion, her intention to expatriate remained "to some extent in doubt."[80] The dissenting judge, however, had characterized her appeal as rife with "self-serving statements," and he lambasted the majority's case for resting on speculation that, despite all evidence to the contrary, she had not intended to expatriate.[81]

As it happened, of the three judges who served on Freedman's case, only the dissenting one appeared on Kahane's panel. The Board did not have precedent-setting power, but the two cases were so similar and the one judge's knowledge of both was so deep that the Board's decision openly drew a comparison. Unlike Freedman, who pursued her claim to American citizenship only after leaving Knesset, Kahane had produced a long and preemptive paper trail. However, his politics and record of endorsing violence caused the Board much graver concern. Quoting directly from the Freedman opinion, Kahane's panel noted that "nothing in [Freedman's] dedication to women's rights issues while serving in the Knesset … signified a conflict with or abandonment of allegiance to the United States."[82] The Board found Freedman's activism palatable and in line with acceptable modes of liberal political activism that had helped build a sturdy bridge between the United States and Israel.[83]

Kahane, who traded in violence and claimed that his explicitly anti-Arab Zionism was true to the very intentions of the Jewish state, was a different story. The 1975 United Nations resolution that equated Zionism with racism evidenced that Kahane was not alone in his understanding of Zionism. However, American and Israeli political leaders and American Jewish leaders eschewed this formulation as inaccurate and, according to some, antisemitic, and

[79]Country-by-country data gleaned from the indices at DBAR, http://library.law.fsu.edu/Digital-Collections/publishedopinions/index.html (accessed Nov. 8, 2021) and also discussed in Herzog, *Revoking Citizenship*, 106–7. Note that four of the Israeli cases involved Black Hebrews, who had renounced American citizenship for fear of deportation from Israel but were not given citizenship rights under the Law of Return in Israel.

[80]Department of State, Board of Appellate Review, "In the Matter of MF [Marcia Freedman]," Jan. 29, 1982, 5 BAR (D) 158 (1980-1982), vol. 5, DBAR, 169. For Freedman's affidavit, see U.S. Citizenship Request Brief, 1980, Folder 7, Box 1, Marcia Freedman Papers, Robert D. Farber University Archives and Special Collections Department, Brandeis University Library, Waltham, MA.

[81]Board of Appellate Review, "In the Matter of MF," DBAR, 177.

[82]Ibid., 205.

[83]On the Board's disparate treatment between Marcia Freedman and Meir Kahane, see Elwin Griffith, "Expatriation and the American Citizen," *Howard Law Journal* 31, no. 4 (1988): 489–91.

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continued to draw a parallel between American and Israeli liberalism as the basis for the two countries' abiding connection.[84]

In writing its opinion, the Board relied on Kahane's public pronouncements to illustrate that with the exceptions of the missives he sent to the State Department, he appeared intent on flouting any allegiance he may have once had to the United States or its avowed liberalism. The Board directed attention to Kahane's 1974 book, *Our Challenge: The Chosen Land*, in which the appellant had characterized Israel as every Jew's "permanent home" and had recommended a Jew "give up his citizenship" to avoid being torn between two countries.[85] Turning to a 1985 speech he had delivered to the National Press Club, the Board again quoted Kahane at length, highlighting that he called Israel "my country" and that he described his American citizenship in purely self-interested terms: "[I]f I gave it up, the American Government would place great obstacles in my path in attempting to enter America for lecture tours…."[86] Assessing the record it had pieced together, the Board ruled unanimously that Kahane had "assented to his loss of citizenship" and affirmed the State Department's decision.

On appeal to the New York district court, however, Kahane succeeded in overturning the Board's decision and was able to regain his citizenship. The district court judge chided the administrative review process for running roughshod over the standard of intent as it had been defined by *Afroyim* and ruled that the government had not supplied the "preponderance of evidence" necessary, according to a 1980 Supreme Court ruling that upheld the citizenship of a Mexican American man and had been incorporated in 1986 into an amendment to the Immigration and Nationality Act. At once a statement of a far more expansive vision of citizenship that would allow citizens to hold multiple allegiances, the law nonetheless rearticulated the government's power to determine citizenship's outer limits. With a barb that cut both ways, the judge concluded that the government had fallen short of meeting the legal standards for expatriation, and the most it could prove was "that Kahane is a hypocrite, telling people that they should do as he says"—that is, move to Israel and renounce liberalism and the United States—"and not as he does"—that is, beg in court to keep his American citizenship.[87] Quoting directly from a letter the petitioner had sent to the State Department, the judge gave Kahane a word in the matter: "It is clear it is not the law but, rather [*sic*] my politics that disturbs the present Administration." He would remain an American citizen.[88]

But Kahane's status as an American citizen was short lived. In the fall of 1988, he appeared once again in court, this time unsuccessful in his bid to keep his citizenship. In order to abide by a new Israeli law applicable to all members of Knesset who held non-Israeli citizenship, Kahane had sworn an oath earlier that year that he "absolutely and entirely, without mental reservation, coercion or duress" relinquished his American citizenship, and he signed a statement that he understood his actions would cause him to become an alien in the United States.[89] Yet shortly after his attestations, the Israeli Supreme Court barred Kahane's political party from participating in the upcoming election, explaining that "the aims of the Kach and its actions are

[84]On the 1975 U.N. resolution and American and Israeli responses, see Amy Kaplan, *Our American Israel: The Story of an Entangled Alliance* (Cambridge, MA, 2018), 129–31; and Shaul Mitelpunkt, *Israel in the American Mind: The Cultural Politics of US-Israel Relations, 1958-1988* (Cambridge, UK, 2018), 226–8; and Yaqub, *Imperfect Strangers*, ch 5.

[85]Board of Appellate Review, "In the Matter of MMDK," DBAR, 207.

[86]Ibid.

[87]*Kahane v. Shultz*, 653 F. Supp., 1494. The preponderance of evidence standard comes from *Vance v. Terrazas* 444 U.S. 252 (1980). See Robert Elliot Fuller, "Preponderance of the Evidence: An Ineffective Burden of Proof in Expatriation Proceedings," *Fordham International Law Journal* 5, no. 1 (1981): 119–37; and Spiro, "*Afroyim*: Vaunting Citizenship, Presaging Transnationality," 161–2.

[88]*Kahane v. Shultz*, 653 F. Supp., 1489.

[89]*Kahane v. Secretary of State*, 700 F. Supp. 1162, here 1164 (D.D.C. 1988).

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racist and that it seeks to violently deny the rights … of segments of the population."[90] Scrambling, Kahane filed a new statement with the American consulate withdrawing his prior oath and seeking a reinstatement of his citizenship. In court, he described the Israeli law as "a gun to my head" and claimed his expatriative act did not meet the legal standard of being voluntary.[91] The judge scoffed at this, and, returning to the *Afroyim* case, he quoted Justice Black's assertion that in the United States sovereignty rested with the people, "and the Government cannot sever its relationship to the people by taking away their citizenship." The judge explained that Kahane had exercised his sovereign power to expatriate when he took the oath, and the government had no choice but to accept it, no matter the *ex-post-facto* excuses Kahane might manufacture. To do otherwise, the judge implied, would be to deny him his final right as an American citizen: individual autonomy.[92]

The judge reminded Kahane that although he would no longer be an American citizen, he could still enter the country as an alien. In 1990, he did just that. On a return trip to New York City, shortly after delivering a speech for the Zionist Emergency Evacuation Rescue Organization, a group that advocated for all diaspora Jews to move to Israel, he was shot to death. Though born in the United States, Kahane died an alien on American soil.[93]

Conclusion

The three cases examined here reveal the historically contingent legal methods that U.S. state powers used to determine when a citizen became an alien. Their actions might have upended the liberal claims of American citizenship by exposing an enduring tension between the ideal of individual sovereignty and the mandates of national sovereignty. Instead, administrative and judicial agents, jurists, Jewish lawyer-leaders, and Jewish and nonsectarian civil rights organizations crafted a legal world that turned the abstractions, categories, and collective scripts of citizenship law into realities of existence, whether to be maintained or challenged. That is, even the subjects of these cases and their representatives who were advancing civil rights and constitutional claims engaged in a process of reifying national citizenship as the proper—or, at least, the only—purveyor of rights and status.

The legal reasoning that administrative and judicial bodies relied on to determine that Lapides had expatriated, Afroyim had not, and Kahane first had not and then had expatriated, was inseparable from the exclusions and illiberal mechanisms that undergirded nation-state citizenship. After Lapides failed in his bid to regain citizenship, the boundaries of American citizenship, for its Jewish subjects and for others who fell into similar categories of having bonds to non-American nationalities or nation-states, might have seemed clearly defined. However, in a groundbreaking decision in 1967, the Supreme Court pronounced that a citizen's statefulness did not diminish the power of American sovereignty and, instead, drew rhetorical attention to the greater problem of statelessness, which could be the unfortunate result of a nation-state that too zealously enforced an exclusive doctrine of citizenship. Quickly, the new legal possibility of dual citizenship moved beyond the Jewish subject of the 1967 case and allowed other groups of citizens to be scripted into a legal framework that permitted statefulness. But the power of the state and its enforcement of national sovereignty never disappeared, as Meir Kahane was soon

[90]On the Kach decision in Israel, see Karin Laub, "Court Bars Kach Party from Election," Oct. 18, 1988, *AP News*, https://apnews.com/article/f18006b9b2e255ae52ff53e2b51b10da (accessed Nov. 8, 2021).

[91]*Kahane v. Secretary of State*, 700 F. Supp., 1167.

[92]Ibid., 1168. In 1990, the State Department issued a new standard to determine expatriation that further constrained the government's power, but even so, under the new guidance, Kahane likely would have lost his citizenship. See Alan G. James, "Expatriation in the United States: Precept and Practice Today and Yesterday," *San Diego Law Review* 27, no. 4 (1990): 853–905.

[93]John Kifner, "Meir Kahane, 58, Israeli Militant and Founder of the Jewish Defense League," *New York Times*, Nov. 6, 1990, B13; and Jared McCallister and Brian Kates, "Rabbi Kahane: Midtown Mayhem at Hotel," *New York Daily News*, Nov. 6, 1990, 3.

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to learn. His keen understanding of the expansion of liberal citizenship bought him a second chance, as his first expatriation ended with his reinstatement as an American citizen. But eventually, he hit the boundaries of liberalism, which he had so often pilloried in his own illiberal politics, and he lost his American citizenship.

While dual citizenship had seemingly expanded the liberal promise of citizenship by allowing the individual to affiliate with multiple nationalities, it did not untether citizenship from a model of nation-state–based rights in which citizens could be watched, classified, and excluded. From Kahane to the far greater number of Arab and Muslim Americans who were surveilled by national intelligence programs in the late-twentieth and early twenty-first centuries, American citizens bore the burden of the "basic ethical ambiguity" of modern liberal citizenship: its power to include a broad range of people in a rights-giving legal framework and yet its reliance on tools of exclusion, most importantly the very idea of national sovereignty, to define that same legal framework.[94] In the name of enacting nation-state–based liberal citizenship, American legal bodies advanced broad categories of belonging and unbelonging, scripting individuals into those legal categories and turning the categories of citizenship into the "actual facts" of existence through their application.[95]

Yet, as these three cases so clearly highlight, the actual facts of citizenship, including the laws that governed it and the people who inhabited it, were constantly changing. This is no surprise to scholars who study the contingencies, conditions, and legal dynamism of American citizenship, but what may be surprising to them is the way that a set of Jewish petitioners refracted debates about statefulness and statelessness as governing concerns in citizenship law. The courts' efforts to classify these Jewish subjects by analogizing them to other categories of citizens—from women to naturalized citizens to Asian Americans to Mexican Americans and more—revealed not only the instability of these categories but also the puzzle of Jewishness that refused to be solved by the available categories of American group standing, whether religious, racial, ethnic, or national. Historians of American Jews will not be surprised by that insight, since they have long traced the categorical instability of Jewishness in the United States, but they may be surprised to learn that this same categorical instability delimited Jews' citizenship status in the United States.

Jewish citizenship in the United States neither was a final chapter in the struggle for Jewish emancipation, nor was it a bellwether for the success of American liberalism. Rather, it can only be understood through its component parts—national citizenship and Jewishness—both of which refused to be resolved entirely by liberalism.

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[94]Bosniak, *Citizen and the Alien*, 1. On governmental surveillance of Arab Americans, see Pamela E. Pennock, "From 1967 to Operation Boulder: The Erosion of Arab Americans' Civil Liberties in the 1970s," *Arab Studies Quarterly* 40, no. 1 (Winter 2018): 41–52. On the status of expatriation law in the twenty-first century, see Jonathan David Shaub, "Expatriation Restored," *Harvard Journal on Legislation* 55, no. 2 (Summer 2018): 363–441, here 424–40.

[95]Stevens, "Introduction," in *Citizenship in Question*, 7. On the limitations of nation-state citizenship, see Reece Jones, ed., *Open Borders: In Defense of Free Movement* (Athens, GA, 2019); and Shachar, *The Birthright Lottery*.

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