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Contents

The Buddhist recluse in the late Heian (794–1185) and early Kamakura (1185–1333) periods as seen through Kamo-no-Chômei's *Hôjôki* and the poems of Saigyô

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The need to hide away, removing oneself from the mundane for a set time or a lifetime, is something which manifests itself in many ways. Regardless of motivation – spiritual, psychological, philosophical – such hiding carries some notion of personal renewal with it, whether to regroup and re-enter the fray strengthened and better-prepared, or to move towards an ultimate internal fulfillment. The idea of reclusion, to avoid distractions on the road to spiritual refinement and a more perfect wisdom, has been a part of human philosophy and religion since Antiquity.[1] In the Western tradition, the recluse often appears as one either motivated by religious practice or so anti-social he can no longer live within society. The East Asian recluse cannot, however, be understood exclusively as either of these two. To do so is to oversimplify something which at its core is neither of necessity religious (though one could argue it is always spiritual) nor anti-social.

Chinese attitudes toward reclusion predated its growth as a religious discipline in East Asia. In fact, entering reclusion was tradition-

[1] Good examples are the Greek Stoics and Neoplatonists and the Jewish Essenes. (C.H. Lawrence, *Medieval Monasticism: Forms of the Religious Life in Western Europe in the Middle Ages*, 2nd ed. [London: Longman Group, 1989], 2)

ally a result of Confucian and Daoist thought, and was normally a secular, or political move. For example, a man might leave public life because it harmed his nature and could do so secure in the fact that a rich philosophical tradition supported him in his decision, a tradition rooted deep in the idea that a man's primary responsibility was the nurturing of his own self. The philosophical bases for reclusion gave members of the imperial administration a justification for leaving or refusing public office and other members of society a reason for resisting pressures to take office in the first place. As Buddhism moved into China in the middle of the first century C.E., it encountered this already-established tradition of philosophical reclusion. Once Buddhism took root, the tradition of solitary reclusion could take on overtly religious overtones and become a fixture of East Asian religious life in general.[2]

Much as was the case in early China, the practice of removing oneself from the world was accepted and respected in Japan, religiously, politically, and socially. Especially during the late-twelfth and early-thirteenth centuries, upheavals at the imperial court made a life of reclusion particularly attractive to members of the aristocracy. Nobles could remove themselves from the most problematic elements of an increasingly complicated public life by becoming aesthete-recluses, which often included taking the tonsure as Buddhist monks.[3] In doing so, however, they still retained their upper-class cultural identities and continued to practice traditional court arts such as poetry and music, remaining very much a part of the intellectual life of the late Heian period.[4] The effects of reclusion and its ramifications, especially the impact it had on the development of Japanese literature, Buddhism, and the greater culture, both popular and elite, cannot be overemphasized, and many who chose the path of reclusion served as examples of the

[2] Wing-Tsit Chan, ed., *A Source Book in Chinese Philosophy* (Princeton, NJ: Princeton University Press, 1963), 425–8.

[3] The term is applied to recluses who made artistic pursuits a component part of their lives, as opposed to simply living lives of ascetic, religious seclusion. In fact, the disciplines of poetry and music in particular were often made a tool for achieving spiritual and religious goals.

[4] Laura W. Allen, "Images of the Poet Saigyô as Recluse," *Journal of Japanese Studies* 21, no. 1 (Winter 1995): 66–7; Tokue Mezaki, "Aesthete-Recluses During the Transition from Ancient to Medieval Japan," in *Principles of Classical Japanese Literature* (Princeton, NJ: Princeton University Press, 1985), 154; Marian Ury, "Recluses and Eccentric Monks: Tales from the *Hosshinshû* by Kamo no Chômei," *Monumenta Nipponica* 27, no. 2 (1972): 149.

proper life (especially in the spiritual sense of the word) for centuries after their deaths.[5] After all, though the point of reclusion is removal from the world, there is no escaping the fact that phenomena such as reclusion respond to and influence the social context from which they spring. Those who remove themselves from society still affect it directly and indirectly. If nothing else, holy people serve as examples to the world they avoid, and what they value is generally valued by the faithful who cannot or will not follow the same path.[6]

Kamo-no-Chômei and Saigyô, two of Japan's most well-known aesthete-recluses, are prime examples of this particular facet of Heian society, and open a window through their works not only into the life of the recluse as an individual but also into the broader culture. The following pages will attempt to shed light on the overall concept of reclusion and its importance by looking specifically at what they had to say about their own experiences: Saigyô through his collected poems, and Chômei through his seminal poetic essay *Hôjôki* "Ten-Foot-Square Hut", written in 1212. Why these two men? The most obvious reason is that they were roughly contemporary with each other (Saigyô lived from 1118–90, Chômei from 1155–1215), and that both, at first glance at least, lived a similar life of reclusion guided by their Buddhist faith. Both witnessed the period of transition between the end of Heian Japan and the beginning of the Kamakura shogunate (the period which traditionally denotes the end of ancient times and the beginning of the Japanese Middle Ages) and were very aware of the drastic changes that were taking place in society, which makes them valuable resources for understanding the era.[7] Neither attached himself permanently to the communal world of the monastery, both choosing rather to pursue their devotion (and, of course, their artistic interests) alone. They are the prime examples of Heian aesthete-recluses,[8] and are among the most revered in Japanese history, serving as successful models for emulation.[9]

Beyond these details of their lives, their poems and reflective essays evince very similar concerns and themes, and manifest a similar

[5] More about this below in relation to Chômei and Saigyô.

[6] Ludo J. R. Milis, *Angelic Monks and Earthly Men: Monasticism and its Meaning to Medieval Society* (Woodbridge, Suffolk: The Boydell Press, 1992), 68–72.

[7] William R. LaFleur, *Awesome Nightfall: The Life, Times, and Poetry of Saigyô* (Somerville, MA: Wisdom Publications, 2003), 25–7.

[8] *Ibid.*, 15–7.

[9] Allen, "Images of the Poet Saigyô as Recluse," 66–7; Ury, "Hosshinshû," 149.

sensibility to the problems of life. The works of both men represent some of the best of what late Heian literature has to offer. Their influence on later Japanese poetry and prose is extensive, both directly as a result of their own works and indirectly through the effect they had on Bashô in particular, one of Japan's most important poets (perhaps the most important before the modern period). Bashô especially admired Saigyô and sought to emulate him, noting in his work places that Saigyô had visited or mentioned and even patterning his travels after those of the earlier poet.[10] His *Narrow Road to the Interior*[11] was a tribute to Saigyô 500 years after his death.[12] Additionally, Bashô's *Record of the Hut of the Phantom Dwelling*[13] was modeled on *Hôjôki*, and Chômei's works had a general influence on Bashô's travel writing.[14]

In counterpoint to their similarities, there were also important differences between the men, differences that would affect their religious discipline and the tone of their works. Chômei[15] was born into a Shintô priestly family and was neither aristocratic in the true sense of the term (he has been referred to as "an aristocrat of low rank without office"[16]) nor samurai. He took vows rather late in life at the age of forty-nine.[17] Once he became a monk, he moved around little, shifting only once from Ôhara to Hino, where he lived out the remainder of his life.[18] When Chômei left society, he had nothing to hold him back: there were no close family members or familial ties, he was unmarried, and he was not a fixture in court society.[19] He himself says as much:

> Therefore,
> in my fiftieth spring
> I retired from the world.

[10] Haruo Shirane, *Traces of Dreams: Landscape, Cultural Memory, and the Poetry of Bashô* (Stanford, CA: Stanford University Press, 1998), 8, 11, 36, 268.

[11] Written in 1689.

[12] *Ibid.*, 182–3.

[13] Written in 1684, revised in 1690.

[14] *Ibid.*, 217, 326–7 (note 2).

[15] I realize that I am reversing their chronological order here, but I believe the contrast is sharper when Chômei is viewed first.

[16] Hilda Katô, "The *Mumyôshô* of Kamo no Chômei and Its Significance in Japanese Literature," *Monumenta Nipponica* 23, nos. 2/3 (1968): 340.

[17] *Ibid.*, 327.

[18] Yasuhiku Moriguchi and David Jenkins, trans., *Hojoki: Visions of a Torn World. Text by Kamo no Chomei* (Berkeley, CA: Stone Bridge Press, 1996), 23; Katô, "The *Mumyôshô* of Kamo no Chômei and Its Significance in Japanese Literature," 341.

[19] *Ibid.*, 341.

> In any case, I had no wife or child,
> no family to regret.
>
> I had no rank,
> no revenues,
> so where the worldly ties?[20]

Saigyô, on the other hand, came from a warrior family and was himself an active samurai, a fact that caused him no end of anxiety later in life.[21] He became a monk at the age of twenty-three, much earlier in life than Chômei.[22] When he entered reclusion he left behind a large number of relationships at court, not to mention a wife and at least one child.[23] Though he had loose attachments to established monasteries throughout his life, spending periods at hermitages attached to these (most notably at Mt. Kôya and Ise), he was a wanderer who undertook at least three major journeys throughout Japan.[24] The fact that he never really established a single location in which to live out his solitude and to which he could return after travelling (in contrast to Chômei's almost homey hut) adds to a sense of wandering in his poems, and it has been proposed that this very wandering was a component part of Saigyô's ascetic practice, and that his denying himself a home was a way of doing penance for past sins and served as a vehicle to the goal of salvation.[25] However, these differences, though they help give each man his unique perspective and tone of voice, do not outweigh the overarching similarities, both as recluses and as literary men.

Both Chômei and Saigyô are clearly genuine and earnest in their religious pursuit – the concerns evident in their writings show this. As one would expect from devout men, both are anxious over sin and its effects, present and future. The sin of attachment, in particular, is often on their minds. Chômei, in his collection of tales of exemplary recluses, the *Hosshinshû* (1212–16), speaks directly to this when he says:

> In this way [through aestheticism] we constantly keep our hearts clean of blemish and, before we realize it, we come to understand how it is that things appear and vanish, and

[20] Moriguchi and Jenkins, *Hojoki*, 60.
[21] LaFleur, *Saigyô*, xi, 1.
[22] *Ibid.*, 2; Allen, "Images of the Poet Saigyô as Recluse," 69.
[23] *Ibid.*, 75.
[24] *Ibid.*, 69–70; LaFleur, *Saigyô*, 15–7.
[25] Allen, "Images of the Poet Saigyô as Recluse," 66, 80.

> we cease to have attachment to fame and profit. This is to enter the path of deliverance, of freedom from illusion.[26]

The problem with attachment is in the illusory nature of the world and all it contains, and in the transient nature of those things men covet and pursue. It is the base Buddhist problem of desire and yearning which inhibits peace and serenity, and thus enlightenment.[27] For Chômei, the greatest source of anxiety on this account are his hut and the calm life he leads,[28] for which he holds great fondness:

> Buddha taught
> we must not be
> attached.
>
> Yet the way I love this hut
> is itself attachment.
>
> To be attached
> to the quiet and serene
> must likewise be a burden.[29]

Saigyô's attachment to the world manifests itself on a more human level, for his attachments are much more personal. Though he wants to leave behind the world in which he formerly lived, and work against the bad karma stacked up by his family's warrior background, he senses in his attachment to this very world a threat to his vocation.[30] His attachments are more emotional, and he speaks frequently of lost love.[31] His references are frequently oblique, but he does let his emotion run over on occasion, as in the following verse:

> Hidden away
> under leaves, a blossom
> still left over
> makes me yearn to chance upon
> my secret love this way.[32]

[26] Brittani D. A. Faulkes, "Politicized Aesthetics: Reclusion Literature in the Late Heian and Early Kamakura Eras of pre-modern Japan" (master's thesis, University of British Columbia, 1994), 84.

[27] Moriguchi and Jenkins, *Hojoki*, 19, 27–8.

[28] Chômei's relationship with his hut will be discussed in greater detail later.

[29] *Ibid.*, 76.

[30] LaFleur, *Saigyô*, 17, 19.

[31] Saigyô, poems 777, 1349, 1390, 1587, 2042 (1200). References to Saigyô are by poem number as listed in LaFleur, *Saigyô*.

[32] *Ibid.*, poem 653.

He also alludes to carnal attachments more than once[33] and makes a direct connection between the carnal life and sin:

> Black fires had
> their origin in dark nights
> of raging passion;
> stygian flame is surely
> like no other.[34]

Both men are also preoccupied with the attachments to the world their literary practice causes them. After all, writing poetry or prose is not only a potential distraction from their more strictly religious practice; it in some sense forced contact with the greater world, as they assume readers, and by extension, a desire for approval and recognition of obvious talent.[35] Saigyô in particular struggles with this and reaches some measure of reconciliation between poetic and ascetic practice by seeing the discipline of poetry as a component of ascetic practice. In other words, poetry can serve as a spiritual discipline as well as an earthly one.[36] The very holy (even saintly?) manner of Saigyô's death stands as proof that said reconciliation must have been a successful one for him.[37]

The concern over attachment is one facet of a concern over sin in general. As one might expect, a preoccupation with sin naturally leads to a desire to expiate sin. Both men speak of this, Saigyô wondering in response to the bonging of a temple bell "will the sins of this whole night/fall from me through its force?",[38] and Chômei painting a lovely picture of redemption when he says:

> Then in winter–
> snow!
> It settles
> just like human sin

[33] *Ibid.*, poems 821 (979), 1441.
[34] *Ibid.*, poem 1851.
[35] Moriguchi and Jenkins, *Hojoki*, 19; LaFleur, *Saigyô*, 29.
[36] Allen, "Images of the Poet Saigyô as Recluse," 91–3; LaFleur, *Saigyô*, 62–3.
[37] Saigyô died in the second month of the year, under cherry trees in full blossom, a time and circumstance he seems to predict in a poem he wrote years earlier. This led contemporaries and later admirers to view his death as proof that his life as an aesthete-recluse (as opposed to a simple religious, ascetic recluse) had not hampered his spiritual health. (Allen, "Images of the Poet Saigyô as Recluse," 70.)
[38] LaFleur, *Saigyô*, poem 774.

and melts,
in atonement.[39]

Worry over sin and its atonement leads as a natural result to a quest for enlightenment (or salvation, as it were) and a concern with the afterlife. Saigyô states bluntly:

When a man gives no
mind to what follows this life,
he's worse off than
that tree trunk standing in a field:
no branch or twig anywhere.[40]

There is a sense of anxiety, though, over how difficult this is to actually achieve. Chômei says:

And so the question,
where should we live?
And how?

Where to find
a place to rest a while?

And how bring even short-lived peace
to our hearts?[41]

The question of how to reconcile the earthly world of attachments and sin in general with the search for enlightenment or salvation (in short, peace) is never fully answered by either man. It is telling that both express doubt about their vocation. Saigyô comments on the seeming impossibility of a true, final break with the world when he says:

Why do I, who broke
so completely with this world,
find in my body
still the pulsing of a heart
once dyed in blossoms' hues?[42]

[39] Moriguchi and Jenkins, *Hojoki*, 64, 19.
[40] LaFleur, *Saigyô*, poem 989.
[41] Moriguchi and Jenkins, *Hojoki*, 58; see also 55.
[42] LaFleur, *Saigyô*, 87.

And Chômei, at the very end of his work, says:

> This is what I ask myself–
>
> You left the world
> to live in the woods,
> to quiet your mind
> and live the Holy Way.
>
> But though you appear
> to be a monk
> your heart is soaked in sin…
>
> Is your lowly life
> – surely a consequence of past deeds –
> troubling you now?[43]

It is fascinating to see this man question the value of the life he leads, and the very efficacy thereof, doubting even whether his lowly, holy existence, which is intended to bring him more quickly to enlightenment, might not itself be the result of past sins.

Two overarching themes permeate both the poems of Saigyô and Chômei's *Hôjôki*: loneliness and impermanence. Both serve not only as a commentary on the men's worldviews, but also as a window into their minds, providing a greater understanding of their reclusive life.

Though both chose to leave the world of men, entering a vocation in which the goal is the severing of all ties and attachments to their former lives, their writings are full of a palpable, emotive loneliness, indicating again that both retained a level of attachment (after all, if there were no attachment–no missing of companionship–there would be no loneliness). Saigyô freely acknowledges his loneliness throughout his poems, and speaks of his sadness and disheartedness at being alone.[44] He treats this feeling explicitly and at length, saying:

> Next to my own
> it would be good to have
> another's shadow
> cast here in the pool of moonlight
> leaked into my hut of bamboo grass.[45]
>
> Someone who has learned

[43] Moriguchi and Jenkins, *Hojoki*, 77.
[44] LaFleur, *Saigyô*, poems 775, 1125.
[45] *Ibid.*, poem 409.

how to manage life in loneliness:
would there were one more!
He could winter on this mountain
with his hut right next to mine.[46]

The one expected
doesn't come, and the moaning wind
tells the night is late;
a sound outside deepens loneliness:
geese, calling, fly past.[47]

Here in these mountains
I'd like one other who turned
his back to the world:
we'd go on about the useless way
we spent our days when in society.[48]

It is clear that Saigyô struggles with yearning for company, which is no surprise in light of his previous life and his residual attachment to it.

Chômei's loneliness shows forth more as memory and recollection than as a current, stated desire for companionship:

On quiet nights
I recall friends
while looking at the moon
through the window…

… I listen to
the distant cries of monkeys
and tears wet my sleeves…

… When I hear
the tuneful cries
of copper pheasants
they sound just like
my father and mother.[49]

[46] LaFleur, *Saigyô*, poem 560 (627).
[47] *Ibid.*, poem 2042 (1200).
[48] *Ibid.*, poem 2170 (1657).
[49] Moriguchi and Jenkins, *Hojoki*, 67–8.

As an intrinsic part of memory is a consciousness of loss, it is clear that Chômei was aware of that loss, and was made melancholy by it, though at the same time he seems to be a bit more comfortable in his own lonely skin than Saigyô:

> Awakening at night and
> poking embers from the ashes
> this old man finds his company.[50]

Even though the following is from a passage in which Chômei comments on the sin of using another's labor, it still reflects some of the same sense of being comfortable in loneliness:

> I have no companion here
> and no attendant either.
> Even if I built bigger
> who would I receive here,
> who would I have to live in it?
> … why not find your friends
> in song and nature?
> Why not be your own servant?[51]

It is logical that each man would voice his loneliness differently when viewed in the light of their former lives. As has been noted above, Chômei became a monk well into middle-age, and Kato has proposed that his lack of close family and relationships made him "a lonely man long before his retirement to the mountains."[52] When one is lonely among people, the change to true solitude is less drastic, and even brings a kind of peace. In contrast, Saigyô left his life in the full flower of manhood, and cut himself out of a very vibrant human setting. It is understandable that he would have felt his solitude all the more keenly, and his poems do occasionally have a wash of bitterness in loss that is absent in Chômei.

Though friendly company is missed by both men, their writings do evince the presence of alternate companions who serve to take the edge off loneliness, at least in some degree. In Saigyô there is a strong

[50] *Ibid.*, 68.
[51] *Ibid.*, 72.
[52] Katô, "The *Mumyôshô* of Kamo no Chômei and Its Significance in Japanese Literature," 341.

sense of the moon as companion, and he reaches the point of personifying her and makes her a stand-in for other company, especially his lost love:

> Here I huddle, alone,
> in a mountain's shadow, needing
> some companion somehow:
> the cold, biting rains pass off
> and give me the winter moon.[53]

> This place of mine
> never is entered by humans
> come for conversation,
> only by the mute moon's light shafts
> which slip in between the trees.[54]

> I'll never forget
> her look when I said goodbye…
> especially since,
> as keepsake, she set her sorrow-
> filled face on the moon above.[55]

A melancholy, insufficient companion perhaps, but one that nonetheless provides Saigyô with at least some solace.

Chômei is better-off on this count, as he enjoys the presence of a young boy, the son of the local mountainkeeper:

> There is a simple hut
> of brushwood
> at the foot of the hill
> where the mountainkeeper lives.
>
> And there is a little boy
> who sometimes visits.
>
> When all is still
> I walk with this companion.
> He is ten, I am sixty,

[53] LaFleur, *Saigyô*, poem 610.
[54] *Ibid.*, poem 1031.
[55] *Ibid.*, poem 684 (1185).

so the difference is great.
Yet both delight.[56]

The child seems a particularly fit companion to the recluse, for even though he is a fellow human, and certainly fills the need for human contact on a very real level, the contact is the most simple, pure pleasure in companionship, unencumbered by adult concerns and problems, discussions and polemics; it is perhaps the finest example of a human relationship which is beneficial to the soul's journey rather than detrimental. It allows Chômei to fulfill the human need to share that in which one delights with another who is equally delighted, and the joy Chômei feels wandering the mountains with this child is obvious.

It is also worth noting that both men find some sense of melancholy companionship in the fauna that surrounds them, which seems especially appropriate for Buddhists who see all life as similar and equally important. In particular, both mention deer,[57] monkeys,[58] and various kinds of birds.[59] Saigyô sums it up well when he says:

On a mountain stream,
a mandarin duck made single
by loss of its mate
now floats quietly over ripples:
a frame of mind I know.[60]

Here one sees a beautiful combination of affinity with life on a setting of floating impermanence (water) that symbolically mirrors Saigyô's own transient environment.

The sense of loneliness serves to heighten the theme of impermanence in both men's work. After all, if life were concrete and not transient, those conditions of separation and loss which bring about loneliness would not exist. Impermanence as a theme is also quite fitting for a Buddhist recluse – or any religious recluse, for that matter – as it is in keeping with ideas on the world as a passing home at best that are present in Buddhism, as in all the world's major religions.

[56] Moriguchi and Jenkins, *Hojoki*, 66.
[57] LaFleur, *Saigyô*, poems 481, 482 (448); Moriguchi and Jenkins, *Hojoki*, 68.
[58] LaFleur, *Saigyô*, poem 793; Moriguchi and Jenkins, *Hojoki*, 68.
[59] LaFleur, *Saigyô*, poems 39 (warblers), 2063 (1193) (ducks); Moriguchi and Jenkins, *Hojoki*, 64 (cuckoos), 68 (owls, pheasants).
[60] LaFleur, *Saigyô*, poems 2063 (1193).

Chômei cuts straight to the heart of this impermanence with his wonderful opening lines to *Hôjôki*:

> The flowing river never stops and yet the water never stays the same. Foam floats upon the pools, scattering, re-forming, never lingering long. So it is with man and all his dwelling places here on earth.[61]

He goes on to offer a lengthy commentary (the first third or so of his work is devoted to it) on the general impermanence, futility and passing nature of the works of men, especially their buildings, cities and the possessions they spend their lives pursuing,[62] and becomes especially pointed when he says: " All of man's doings are senseless but spending his wealth and tormenting himself to build a house in this hazardous city is especially foolish."[63] and talks about how "we and our houses / [are] fleeting, hollow."[64]

Saigyô also deals with the world's impermanence, speaking of "… the world man spins: / a world quickly vanishing,"[65] and commenting on the fundamental irreality of the world, saying:

> Since the "real world" seems
> to be less than truly real,
> why need I suppose
> the world of dreams is nothing
> other than a world of dreams.[66]

He, too, mentions the passing nature of his immediate surroundings:

> Nowhere is there place
> to stop and live, so only
> everywhere will do:
> each and every grass-made hut soon leaves
> its place within this withering world.[67]

It is ironic that in Chômei's case the very thing that he is most attached to in his recluded life, his hut, is one of those very things (houses

[61] Moriguchi and Jenkins, *Hojoki*, 31.
[62] *Ibid.*, 32–54.
[63] *Ibid.*, 38.
[64] *Ibid.*, 54.
[65] LaFleur, *Saigyô*, poem 1605.
[66] *Ibid.*, poem 1606.
[67] *Ibid.*, 2175 (1778).

in general) that provide his literary device throughout the *Hôjôki* to symbolize the very tension between attachment and impermanence. The recurrent image of houses and buildings is what holds his essay together and allows him some of his most acid attacks. Yet it is one of these selfsame houses that provides him comfort.[68]

Oddly enough, the two themes show opposed elements of the men's Buddhist perspective. Being lonely implies attachment – a lingering connection to and need for companionship. Impermanence makes attachment futile. The interplay and tension between these two themes gives an added depth and strength to the writings of both men, and allows them to convey much more meaning than what they say explicitly through words.

For a recluse of any variety to be successful in his practice, he must first choose a fit environment for his reclusion. Mountains, perhaps more than any other natural setting, provide a landscape conducive to the mindset. Whether for the philosophical recluse in ancient China, or the religious recluse in Buddhist Japan and China or the Christian West, mountains are an ever-present backdrop to life. The nature of this backdrop takes two forms: physical and symbolic.

Physically, mountains support the recluse experience in two ways. First, they serve to enhance and focus the recluse's loneliness and separation by virtue of their very remoteness. Saigyô notes this:

> Here I've a place
> so remote, so mountain-closed,
> none comes to call.[69]

> By imagining
> these mountain depths, some might think
> they come and go here;
> but, not living here themselves,
> can they know true pathos?[70]

and Chômei mentions:

> I hide myself away
> deep in the hills of Hino.[71]

[68] Moriguchi and Jenkins, *Hojoki*, 17.
[69] LaFleur, *Saigyô*, poem 793.
[70] *Ibid.*, poem 2161 (1630).
[71] Moriguchi and Jenkins, *Hojoki*, 62.

Second, mountains assist in the ascetic side of the recluse's life by providing a setting that is, simply put, physically difficult to move about and survive in. More than once, Saigyô mentions the ruggedness and danger inherent to his life in the mountains:

> So steep and dangerous
> is Mount Arachi that there's
> no path down the valley…[72]

> Scaling the crags
> where azalea bloom… not for plucking
> but for hanging on!
> the saving feature of this rugged
> mountain face I'm climbing.[73]

He even forgets his love of flowers in the face of the danger he is passing through! But beyond the incidental asceticism that is provided by a simply difficult life, mountains provide a means of intentional ascetic practice, as seen in the virtue of climbing to a particularly difficult-to-reach temple:

> The climb up to Mandala Temple in order to carry out the activities proper for a pilgrim there was an unusually difficult one. The climber must make what seems like an almost perpendicular ascent… It is said Kôbô Daishi[74] climbed up on to this every day in order to perform austerities. In order for others to perform devotional activities on it [without risk of falling off], a double enclosure has been constructed. Nevertheless, the dangers one faces in making a climb up to this place are truly extraordinary. I, for one, made my way to the top by crawling along on all fours.[75]

Additionally, the everyday climatological events humans live with – rain, snow, wind – are compounded in mountains, and make life a much more dangerous proposition than it is in more benign settings, as Saigyô attests to:

[72] LaFleur, *Saigyô*, poem 577.
[73] *Ibid.*, poem 184.
[74] Kûkai (774–835) is the founder of the Shingon sect of Japanese Buddhism.
[75] *Ibid.*, 37.

When the fallen snow
buried the twigs bent by me
to mark a return trail,
unplanned, in strange mountains,
I was holed up all winter.[76]

Regardless of whether he refers to a literal stranding (which seems somehow unlikely) or simply uses the idea to show the unpredictability of mountain life, he gets his point across.

Symbolically, mountains become even more important. In Buddhist literary arts, scaling mountains (especially so as to visit monasteries or other holy sites) symbolizes the rise from illusion to Nirvana and the difficult path of attaining enlightenment. This symbolism is alluded to in the above quote regarding Saigyô's climb to Mandala Temple. Beyond the Buddhist and poetical nature of mountains' symbolism, though, was an older tradition in Japan, in which mountains were seen as the abodes of sacred beings.[77] There were important religious associations in the Shintô religion of gods with mountains, and the passes that cut through them were seen as sacred places where people could come into contact with deities. Saigyô, though he is a Buddhist, refers to this when he speaks of

Following the paths
the gods passed over, I seek
their innermost place;
up and up to the highest of all:
peak where wind soughs through pines.[78]

In spite of all their dangers, though, a love for mountains and the beauty contained therein is evident. Long before, Bai Juyi, a devout man, but hardly a monk, had said that "the mountain belongs to the person who loves the mountain",[79] speaking of the magnificent beauty mountain views provided and of the sense of peace and tranquility they offered. This sense of delight in mountainous beauty is echoed in Saigyô:

[76] *Ibid.*, poem 579.
[77] *Ibid.*, 50.
[78] *Ibid.*, poem 2108.
[79] Stephen Owen, *The End of the Chinese "Middle Ages": Essays in Mid-Tang Literary Culture* (Stanford: Stanford University Press, 1996), 27.

> What a wretched place
> this would be if this despised,
> quickly passing world
> had no place to hide away –
> that is, no mountains in it.[80]

and also in Chômei:

> The mountains do not daunt me,
> so I enjoy the hooting of the owl.
> Each passing season
> brings its own enchantment.[81]

When reading the verses of Saigyô (with their frequent, rapt references to cherry blossoms and other wonders) or the *Hôjôki* of Chômei (with its lovely passage in which the author recounts his delight in wandering the mountains with his innocent, youthful companion), one cannot help but come away with the impression that these two men loved the setting in which they had chosen to exile themselves, not just for the assistance it provided in their devotions but for its very beauty. The physical separation and penance and loneliness of the lives both men chose were tempered by a love of the beauty which surrounded them.

As much as the mountains in which they are set, huts play a central role in the lives and reclusive practice of both men. Even though the recluse sought mountains for their very ruggedness and the difficulty of life in them, he nonetheless required some sort of shelter to make life tenable. Taken at face value, the nature of the huts supports the ascetic life lived without luxuries. Saigyô drops references to huts which are tenuous in construction (generally bamboo grass) and which offer small protection at best, especially against rain and moisture.[82] He sums it up neatly when he talks of this lonely, battered hut:

> in the midst of mountain storm's fury,
> drops drip in holes and silences.[83]

Throughout Chômei's *Hôjôki*, though, we see a much more subtle, lovely relationship between man and hut. Chômei chronicles a specific pattern of downsizing in his life, beginning with the house (presumably

[80] LaFleur, *Saigyô*, poem 991.
[81] Moriguchi and Jenkins, *Hojoki*, 68.
[82] LaFleur, *Saigyô*, poems 388, 409, 454, 456.
[83] *Ibid.*, poem 1026.

still in the city) he built after his family situation became tumultuous, a house which was "one-tenth the size / of my former house",[84] a humble construction much limited by funds, and not only hampered by size, but also by location:

> When it snowed
> or the wind blew
> my house felt precarious.
>
> It was near the river
> so danger from flooding
> always loomed.
> The place was also
> overrun with thieves.[85]

It is when he builds what will be his last dwelling, though, in Hino, that one begins to see the special relationship which develops. The theme of downsizing continues, but his tone begins to change:

> Then
> well into my sixth decade,
> when the dew of life disappears,
> I built a little hut,
> a leaf from which
> the last drops might fall.
>
> I was a wayfarer
> raising a rude shelter,
> an old silk worm
> spinning one last cocoon.
>
> Unlike the house of my middle years,
> this not even one hundredth the size.
>
> The fact is
> I get older,
> my houses smaller.
>
> As a house it is unique,
> ten feet by ten,
> the height no more than seven.[86]

[84] Moriguchi and Jenkins, *Hojoki*, 59.
[85] *Ibid.*, 59–60.
[86] *Ibid.*, 61.

He goes on to detail the simplicity of his hut and its easily-moveable construction, and the fact that it contains only that which is essential.[87] It is by no means grand and exciting:

> … nothing happens here
> in my little hut.
>
> Small as it is
> there is room to sleep at night
> and sit by day,
>
> Space enough
> for one man.[88]

Yet, before he has even finished telling the reader how basic his hut is, he has already called it "home",[89] a word heavy with connotation. He later elaborates on the theme:

> When I moved here
> I did not mean to stay this long,
> but five years have passed.
>
> This rough shelter
> has become my home.[90]

He speaks of the happiness he feels upon returning to his hut after having been away,[91] and goes so far as to eventually say "I love my lonely dwelling, / this one-room hut".[92] Even the detailed nature of his description of his hut shows that he is proud of it, and happy with the result.

Saigyô never seems to develop this same sort of close connection with locale (and huts in specific), perhaps because he moves about a great deal more than Chômei ever did. Saigyô implies that the huts where he stays are not his own when he says "No other is anywhere / near this borrowed field shed".[93] And yet he, also, at some point or another succumbed to the human need for a sense of home, however impermanent, speaking of

[87] Moriguchi and Jenkins, *Hojoki*, 61-3.
[88] *Ibid.*, 69.
[89] *Ibid.*, 63.
[90] *Ibid.*, 69.
[91] *Ibid.*, 75.
[92] *Ibid.*
[93] LaFleur, *Saigyô*, poem 481.

… my mountain hut
whose congenial loneliness
I'd hate to live without.[94]

Beyond meeting a simply physical need, huts are symbolic and even problematic. Though the shelter they offer can hardly be dispensed with, the connection they engender is a very real impediment to the loosing of attachments. Chômei and Saigyô use this symbol effectively. The glimpses one gets from both men about their environment mirror many of the same issues one sees as overarching themes in their works; the mountains and huts become additional motifs through which to address the concerns which nag at them.

In his article "A Comparison of the Early Forms of Buddhist and Christian Monastic Tradition",[95] Mathieu Boisvert argues that the drive to renounce worldly life is a natural development amongst devoted followers of religions in general, with the common goal of "relief from the vicissitudes of day-to-day life, either through the attainment of nibbana or through union with God".[96] Different traditions are joined by a focus on discipline, a single-mindedness of goal, and a sense of passage through a transitory world – a sense of being strangers, as it were.[97] This shows through clearly in the works of Chômei and Saigyô.

Through Chômei's *Hôjôki* and Saigyô's poems, one can piece together a picture of these two men as recluses, and very much as holy recluses. What is the value of understanding the narrow practice of only two in the midst of a phenomenon which spanned oceans, centuries and cultures? The stature of Chômei and Saigyô as two of the most respected religious and literary figures in Japanese history might seem reason enough in and of itself, for their influence was far-reaching. However, that is to sell them short. The greater value in looking at their lives through their literary legacies lies in the very human nature of the ascetic, reclusive existence that shows through: more than some idealized, stale image of religious devotion and near-perfection (much as one tends to find in hagiographical accounts of such famous figures), one sees two men who are vibrantly, palpably human

[94] *Ibid.*, poem 1019.

[95] Mathieu Boisvert, "A Comparison of the Early Forms of Buddhist and Christian Monastic Traditions," *Buddhist-Christian Studies* 12 (1992): 123–41.

[96] *Ibid.*, 123.

[97] *Ibid.*, 123–5, 138.

and imperfect in spite of their best efforts to dehumanize themselves and disconnect themselves from the world. Their enduring popularity and influence can be attributed in great measure to this humanity. To study these two men and the way they struggle with their inner demons, their connections to the world, their doubts, is to see the spiritual journey in its most pure, distilled form. Though these men are Buddhist recluses, much of what can be gleaned from their lives is applicable to reclusion in general, religious or otherwise, and provides valuable insight into the phenomenon. That, in turn, provides a greater understanding of human spirituality as a whole and gives them relevance far beyond their time and culture.

The "Uniform Rule" and its exceptions: a history of Congressional naturalization legislation

Daniel Rice

Article 1, Section 8 of the Constitution empowers Congress "[t]o establish an uniform Rule of Naturalization." Chief Justice Roger Taney recognized that Congress wields this power positively to confer "on an alien and his issue the rights and powers of a native-born citizen" and negatively to effect "the removal of the disabilities consequent on foreign birth."[1] The word "Rule" in the Naturalization Clause seems to be synonymous with "procedure," and early naturalization laws in fact decreed specific preconditions for naturalization – residence requirements, necessary oaths or affirmations, and the like. Yet a curious dichotomy of inclusion versus exclusion developed alongside the laws' substantive procedural components. Something about certain kinds of aliens – be it their race, political convictions, marital customs, criminal habits, linguistic ignorance, or military cowardice – rendered them inherently unfit for American citizenship by way of naturalization. The story of American naturalization legislation is also a story about who may and may not benefit from Congress's procedural determinations; the "uniform rule" is a rule for eligible aspirants only.

In Part I of this article, I discuss the American colonial experience with naturalization laws and account for the Naturalization Clause's

[1] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

inclusion in the Constitution. I then examine the historical development of Congress's "uniform rule" and deconstruct the mechanism by which certain groups have been excluded from and brought back within its reach. Lastly, I scrutinize Congress's posture towards expatriation, the logical converse of naturalization. In Part II, I ask why Congress might have thought it expedient to carve out statutory exceptions to the naturalization procedures it had earlier prescribed, and I relate the content of the two major kinds of historical exceptions to those procedures: derivative citizenship for women and children and an expedited naturalization timeline for alien veterans.

My joint investigation of procedure, exclusion and reinclusion, expatriation, and exceptions should furnish the reader an ensemble of rich perspectives from which to explore Congress's unfolding exposition of the meaning of American citizenship. I argue that Congress has often used its naturalization power to achieve nakedly partisan goals, an enterprise aided by the absence of any constitutional limitations on its procedural regulations. Congress has held prospective naturalized citizens to a much higher moral and behavioral standard than natural-born Americans, refusing to naturalize perpetrators of certain practices whose domestic criminalization would be ridiculed. The indiscriminate conferral of naturalization on certain non-white groups in the antebellum period sidestepped the implied racial limitations of existing naturalization laws (and may have exceeded Congress's powers under the Naturalization Clause); Congress similarly contravened its own pronouncement in declaring the existence of a natural right – complete discretionary expatriation – yet denying Americans its full enjoyment during wartime. Naturalization laws have often been propelled by the need to eradicate absurdities and prejudicial anachronisms, one of which threatened to hinder America's prosecution of World War II. And that citizenship could be transmitted and derived only through husbands and fathers until 1934 plainly signals another way in which women have been legally subordinate to men for much of American history.

I: Congressional Naturalization Legislation

A. Historical Antecedents and Early Understandings

In 1740, Parliament passed a law enabling non-Britons residing in the American colonies to acquire English citizenship, provided that they

had resided in a particular colony for at least seven years, communed in a Protestant congregation, and sworn an oath of allegiance to the crown.[2] Yet the 1740 statute did not expressly preempt contrary colonial legislation, and the American colonies continued to enact naturalization regulations more liberal than those specified by Parliament, just as they had before the 1740 law.[3] The contemporary slogan that ours is a "nation of immigrants" has never applied more truthfully than to pre-Revolutionary America. The need for additional settlers to cultivate untilled land, the likely military advantages flowing from an enlarged reserve of able-bodied men, and other "generally acknowledged benefits of population growth" prompted colonial legislatures to entice European immigrants with the guarantee of quick naturalization.[4] But an Order in Council issued on November 19, 1773 directed colonial governors to veto any new naturalization acts passed within their jurisdictions, thereby subjecting yet another source of the American colonists' livelihood to the distant and untrammeled regulatory discretion of Parliament.[5]

Both native Englishmen and the American colonists discerned a powerful linkage between territorial population and global political power. The author Daniel Defoe argued in 1709, for example, that "[p]eople are indeed the essential of commerce, and the more people the more trade; the more trade, the more money; the more money, the more strength; and the more strength, the greater the nation."[6] The Philadelphia lawyer and heraldist William Barton wrote in 1791, though after the conclusion of American independence, that

> [t]here is not, perhaps, any political axiom better established, than this, – That a high degree of population contributes greatly to the riches and strength of a state. In fact,

[2] 13 George II, c.7.

[3] A Massachusetts law from April 2, 1731, for instance, provided that "all Protestants of foreign nations, that have inhabited or resided within this province for the space of one year, are hereby declared to be naturalized, to all intents, constructions and purposes whatsoever." See "DOCUMENT 3: Province Laws—Massachusetts (April 2, 1731)" in Michael Lemay and Elliot Barkan, eds., *U.S. Immigration and Naturalization Laws and Issues: A Documentary History* (Westport, CT: Greenwood Press, 1999), 4.

[4] James Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill, NC: University of North Carolina Press, 1978), 106.

[5] *Ibid.*, 105.

[6] Defoe, *Review of the State of the British Nation* (1790). Cited in Alan Houston, *Benjamin Franklin and the Politics of Improvement* (New Haven, CT: Yale University Press, 2008), 106.

> the progressive increase of numbers, in the people of any civilized country, is reciprocally the cause and effect of its real wealth … that country, whose population is rapidly advancing, may fairly be said to be increasing in both these concomitants of national prosperity [riches and strength], with proportionable celerity.[7]

In this context, the colonists' solemn accusation in the Declaration of Independence that King George III

> has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands

becomes quite comprehensible.

As the Articles of Confederation "expressly delegated" no power respecting the naturalization of aliens to the Confederation Congress, individual states remained free, as before 1773, to formulate their own naturalization policies. Furthermore, the "free inhabitants" of each state (excepting "paupers, vagabonds, and fugitives from justice") were to "be entitled to all privileges and immunities of free citizens in the several States."[8] This resulted in a peculiar complication that threatened to erode the incipient bonds of interstate comity: An immigrant might acquire the inviolable privileges of citizenship through naturalization in the state erecting the fewest impediments to citizenship (e.g., an exceptionally short residence period), and the other states, though they might presently deem the immigrant unfit for naturalization, were legally bound to respect the former state's judgment.[9] James Madison observed in *Federalist 42* that "[t]he dissimilarity in

[7] William Barton, "Observations on the probabilities of the Duration of Human Life, and the progress of Population, in the United States of America; in a Letter from William Barton, Esq., to David Rittenhouse, L.L.D. President, A.P.S.," in *Transactions of the American Philosophical Society, Held at Philadelphia, For Promoting Useful Knowledge*, vol. 3 (Philadelphia: Robert Aitken & Son, 1792), 25. Barton was also the the primary designer of the Great Seal of the United States.

[8] *Articles of Confederation*, Article IV, Clause I.

[9] As Justice Joseph Story characterized the situation in his widely read *Commentaries*, "the laws of a single state were preposterously rendered paramount to the laws of all the others, even within their own jurisdiction." (Joseph Story, *Commentaries on the Constitution of the United States* [Boston, MA: Hilliard, Gray & Co., 1833], §537)

the rules of naturalization has long been remarked as a fault in our system," and Charles Pinckney argued in the dawning days of the Philadelphia Convention that the "Federal Government should also possess the exclusive right of declaring on what terms the privileges of citizenship and naturalization should be extended to foreigners … To render this power generally useful it must be placed in the Union."[10] There is no surviving evidence that even a single Framer verbally dissented from this principle at the Convention, and the Naturalization Clause, having been approved without debate from the delegates after its submission by the Committee of Detail on August 6, was among the new Constitution's least controversial.[11]

The original Constitution employed the term "citizen" rather sparsely. Save one exception, the document did not distinguish between naturalized and natural-born citizens, but there is every reason to believe that the former were understood to be eligible to serve in the House of Representatives and the Senate after reaching a sufficient age, competent to avail themselves of the jurisdiction of federal courts in their capacity as citizens of individual states, and "entitled to all Privileges and Immunities of Citizens in the several States."[12] As legal scholar Akhil Amar has pointed out, the founding generation knew well the immensity of the talent pool that might be sacrificed if naturalized citizens were to be excluded from high legislative and ministerial office. Seven of the Constitution's thirty-nine signers were foreign-born, as were three of the Supreme Court's first eight members (James Wilson, James Iredell, and William Paterson) and four of the first six secretaries of the treasury (most notably Alexander Hamil-

[10] James Madison, *The Federalist No. 42*, January 22, 1788; Charles Pinckney, "Observations On The Plan of Government Submitted to The Federal Convention, in Philadelphia, on the 28th of May, 1787," in *The Records of the Federal Convention of 1787*, ed. Max Farrand, vol. 3 (New Haven, CT: Yale University Press, 1911), 120.

[11] Story noted further that "[t]he propriety of confiding the power … to the national government seems not to have occasioned any doubt or controversy in the convention. For aught that appears on the journals, it was conceded without objection." Story, *Commentaries on the Constitution of the United States*, §537.

[12] Article II, Section 1 stipulates that "[n]o person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President." This restriction remains in effect today and presumably excludes foreign-born American citizens from the vice presidency, as well, yet it is unclear precisely how far down the line of succession this prohibition extends. Secretaries of State Henry Kissinger and Madeleine Albright are both naturalized American citizens, yet their positions placed them fourth in line to the United States presidency by way of succession.

ton and Albert Gallatin). Naturalized citizens also participated alongside natural-born Americans in the state ratifying conventions and so were embraced in the Preamble's crisp formulation of American sovereignty, the "People of the United States."[13]

That Congress was granted plenary authority in the field of naturalization legislation in no way determined that it would swiftly exercise that power, but subsequent events seem to indicate that the Framers understood the Naturalization Clause as something of a directive for immediate action. George Washington cautioned in his First Annual Message to Congress on January 8, 1790 that "[v]arious considerations also render it expedient that the terms on which foreigners may be admitted to the rights of citizens, should be speedily ascertained by a uniform rule of naturalization."[14] Speedy ascertainment ensued, and the House debates of February 3 and 4, which closely preceded the passage of the Naturalization Act of March 26, 1790, are remarkable for their insight into the Representatives' diversity of viewpoints and uncharacteristic humility.[15] None of those assembled as a Committee of the Whole had ever presided over the enactment of naturalization legislation – Theodore Sedgwick, a Federalist Representative from Massachusetts, "did not recollect an instance wherein gentlemen's ideas had been so various as on this occasion … from the want of understanding the subject" – and it appears that their utterances were informed largely by their personal inclinations regarding the essence of American citizenship, the solemn obligations attending the enjoyment of that citizenship, the desirability of population growth as an end in itself, and the assimilability of certain foreign elements.[16]

B. Procedural Elements of Naturalization Laws

The Naturalization Acts passed during the early Federal period established a framework by which aliens were to acquire American citizenship that endured without fundamental modification for over a century. The Act of 1790 provided that "any Alien being a free white per-

[13] For more on the framing and inclusion of the Natural-Born Citizen Clause, see Akhil Amar, *America's Constitution: A Biography* (New York, NY: Random House, 2006), 164–5.

[14] Frank George Franklin, *The Legislative History of Naturalization in the United States* (Chicago, IL: University of Chicago Press, 1906), 33.

[15] 1 Stat. 103.

[16] *Annals of Congress*, 1st Cong., 2nd sess., 1164.

son" who had resided within the United States for two years could file a petition for naturalization in any common-law court located in a state in which he had resided for at least one year. After "making proof to the satisfaction of such Court that he is a person of good character, and taking the oath or affirmation prescribed by law to support the Constitution of the United States," such person would become a citizen of the United States. There will be occasion later to discuss the discriminatory implications of the law's "free white person" verbiage, but suffice it to say here that the two-year residence period was evidently a compromise between those who desired to hold out every "inducement to foreigners to come and settle among us" and others who believed that "a term of four or seven years ought to be required" so that immigrants might not "tincture the system with the dregs of their former habits, and corrupt what we believe the most pure of all human institutions."[17] Alien reprobates were effectively excluded from American citizenship by the good-character provision, and the residence and oath-of-allegiance requirements would help ensure naturalized citizens' fitness as members of an exceptional civic community.[18] Scholars have also noted that Congress's devolution of the actual task of naturalization upon state and local courts paradoxically advanced the Naturalization Clause's uniformity requirement, for it ostensibly ruled out ad hoc legislative conferrals of citizenship on individual supplicants.[19] The uniformity principle, in turn, would afford prospective immigrants a certain psychological security – once "uniform" and "established," America's one rule of naturalization (and nothing else) was to govern the process by which they became fully incorporated into the polity.[20]

[17] Remarks of Rep. Thomas Hartley (Pro-Administration/Federalist-PA), *Ibid*. 1151; Remarks of Rep. Michael Stone (Anti-Administration-MD), *Ibid*. 1158.

[18] It should be noted, however, that the Act of 1790 took no notice of financial disparities among aliens seeking naturalization. Whereas Article IV of the Articles of Confederation denied the entitlement of "paupers" to "all privileges and immunities of free citizens in the several States" (i.e., a sort of *de facto* national citizenship), Article IV, Section 2 of the new Constitution imparted the benefit of interstate citizenship equally to all of "The Citizens of each State." In securing the promise of naturalization to the wealthy and indigent alike, the Act of 1790 thus harmonized with the spirit of Article IV, Section 2. See Amar, *America's Constitution: A Biography*, 251.

[19] James Pfander and Theresa Wardon, "Reclaiming the Immigration Constitution of the Early Republic," *Virginia Law Review* 96, no. 2 (2010): 395.

[20] *Ibid.*, 369.

The Naturalization Act of January 29, 1795 made one substantive alteration to the law of 1790 and imposed four additional requirements for the acquisition of American citizenship beyond what the former had stipulated.[21] Alien denizens were thereafter made to file a declaration of intention three years in advance of their applications for citizenship. The U.S.-residence requirement was increased from two to five years. Applicants were compelled to relinquish any hereditary titles previously bestowed on them and renounce all allegiance to their former sovereigns.[22] Lastly, prospective citizens would have to convince a court of their "attach[ment] to the principles of the constitution of the United States" and proper disposition toward the "good order and happiness" of the American form of government. As the French Revolution sank into butchery and began to devour its children, the prospect of a thriving Jacobin émigré population in America became a source of acute disquietude for Federalists, and so the 1795 Act was meant to ensure immigrants' fidelity to republican principles of the New World variety.[23]

And those immigrants, all understood, were far more likely to join the Democratic-Republican rather than the Federalist Party once they had acceded to the full privileges of citizenship. The more stringent Naturalization Act of June 18, 1798, an integral component of the now-infamous Alien and Sedition Acts passed during America's undeclared naval war with France, furnishes further evidence that Congress used its naturalization power at this time to inoculate the body politic against foreign elements ideologically hostile to the incumbent administration.[24] All agreed that "at a time when we may very shortly be involved in war, there are an immense number of French citizens in our country," and the national-security concerns precipitated by the Quasi-War afforded Federalists a magnificent opportunity to award themselves a competitive electoral advantage under the pretense of national self-preservation.[25] The U.S.-residence period was raised from five to

[21] 1 Stat. 414.

[22] American citizenship through naturalization and the possession of dual citizenship have theoretically been incompatible since this time, but the United States typically declines to dispute other nations' judgments that the act of swearing an oath of allegiance to the United States does not effectuate the loss of one's original citizenship.

[23] Pfander and Wardon, "Reclaiming the Immigration Constitution of the Early Republic," 404.

[24] 1 Stat. 566.

[25] Annals of Congress, 5th Cong., 2nd Sess., 1453; William Watkins, *Reclaiming the Amer-*

fourteen years and that in a particular state from two to five. Henceforth, a declaration of intention would be required five (rather than three) years in advance, and the channels of naturalization were closed off entirely to subjects of nations with which the United States might find itself at war. The Act of 1798 also created a comprehensive registry of current and future resident aliens; clerks of courts that received declarations of intention and effected individual naturalizations were required to certify and transmit all relevant documentation to the Secretary of State (a post then held by the High Federalist Timothy Pickering). It is no small irony that President Adams, who had twenty-two years earlier risked life and limb to denounce the Crown's "endeavour[ing] to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners," signed into law a naturalization bill mandating a probationary residence period twice that of the 1740 act of Parliament.

President Jefferson used the occasion of his First Annual Message to Congress, like Washington before him, to arouse Congress into action on the issue of naturalization. Jefferson waxed philosophical in inquiring whether we shall "refuse the unhappy fugitives from distress that hospitality which the savages of the wilderness extended to our fathers arriving in this land? Shall oppressed humanity find no asylum on this globe?"[26] Embedded in Jefferson's soaring rhetoric was an presidential plea that his newly empowered Democratic-Republican foot soldiers overturn the onerous 1798 law in order to ease the assimilation of ideologically amenable European immigrants. The Naturalization Act of April 14, 1802 was essentially identical to its immediate predecessor save four telling revisions: An applicant was now to declare on oath two (rather than five) years before his admission to citizenship that it was "bona fide his intention to become a citizen of the United States."[27] The U.S.-residence requirement was reduced from fourteen years to five (where it has remained for over two-hundred years) and the state-residence requirement from five years to one. In these three respects, the Act of 1802 was at least as procedurally liberal as the 1795 law. Lastly, participating courts were relieved of the responsibility to convey their naturalization records to the Department of

ican Revolution: The Kentucky and Virginia Resolutions and their Legacy (New York, NY: Palgrave Macmillan, 2004), 28.

[26] Franklin, *The Legislative History of Naturalization in the United States*, 97.

[27] 54 Stat. 1172.

State. A sympathetic constitutional historian once described the act as "epoch-making," the original justification for electioneering slogans to the effect that "the Democratic party enfranchised the white man" and would continue to be "the immigrant's best friend."[28] Jeffersonians in the Seventh Congress, like Federalists in the Fifth, turned the power to establish a uniform rule of naturalization to their own political advantage (though in response to the Federalists' provocation). It should also be noted that the Democratic-Republicans were perfectly content to use the federal legislative power to expand the rolls of a party membership hostile to the unnecessary exercise of federal legislative power.

The Constitution fully permits the creation of a uniform rule of naturalization that transparently serves the interests of a particular political party. Congress's naturalization power is apparently self-contained and subject to no check other than that which the body may impose on itself. The courts could have no possible justification for striking down as unconstitutional any law which merely announced the process by which a foreigner may acquire U.S. citizenship, whether it prohibited naturalization entirely or enabled alien tourists to become citizens after riding Space Mountain, for there exists no constitutional text or subconstitutional doctrine that might be plausibly interpreted to reduce Congressional discretion in this area.[29] Aliens are sometimes entitled to remedies in American courts when they have received discriminatory treatment vis-à-vis American citizens, but the Naturalization Clause is not litigable on Equal Protection grounds, as citizens receive no "treatment" to speak of from laws that affect the expectations and opportunities only of non-citizens.[30] The judiciary is also powerless, by its nature, to pass on the mere prudence of inadvisably burdensome naturalization regulations. Given that our popularly

[28] Francis Newton Thorpe, *A Constitutional History of the American People* (New York, NY: Harper & Brothers, 1898), 105.

[29] The Supreme Court has summarized the situation as follows: "Naturalization is a privilege, to be given, qualified, or withheld as Congress may determine, and which the alien may claim as of right only upon compliance with the terms which Congress imposes." *United States v. Macintosh*, 283 U.S. 605 (1931).

[30] At first glance, the Equal Protection Clause of the Fourteenth Amendment seems only to curb the discretion of state governments, but it has also been interpreted as a limitation on federal power through a process called "reverse incorporation" anchored in the Due Process Clause of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). The Fourteenth Amendment was not ratified until decades after the 1798 and 1802 laws, to be sure.

elected Congress need not worry about external assaults on the continuous functioning of its naturalization legislation once it has been enacted, one might expect naturalization laws to mirror public opinion at least as closely as in any other field into which Congress might enter. So it should come as no surprise that although the words "establish" and "uniform" connote principled promulgations of relative permanence, Congress has occasionally used its naturalization power to further the interests of transient political majorities.

After 1802, not a single major revision of naturalization procedures occurred for over a century. The Naturalization Act of June 29, 1906 effected a fundamental transformation in the process by which aliens were to acquire American citizenship, its purpose evidently being "to guard more jealously the portals of citizenship."[31] The 59th Congress contained nearly two Republicans for every Democrat, and the 1906 law surely decelerated the enfranchisement of a critical Democratic constituency, just as the Federalists' 1798 law had done. Whereas in some large coastal cities "Democratic judges [had] obligingly issued naturalization papers almost as soon as immigrants got off the boat" (the desire to preclude individual gatekeepers from perpetrating partisan shenanigans undoubtedly motivated many proponents of the original House bill, H.R. 15442), after 1906 federal courts alone were competent to naturalize aliens.[32] Those courts were obliged to accept only standardized petition forms containing such detailed information as an immigrant's occupation, age, place of birth, and present and former addresses, the name of the vessel and the date on which he arrived, and the names and residences of his spouse and children. The Bureau of Immigration and Naturalization was established within the Department of Commerce and Labor to superintend all matters concerning the naturalization of aliens. The privilege of naturalization would thereafter be denied to aliens "who cannot speak the English language." Applicants were to present to a judge the affidavits of two witnesses personally attesting to the petitioner's good character and continuous residence in the United States for the past five years. Bureau officials would conduct an investigation and submit their findings to the court, and, assuming a judge found those recommendations satisfactory, the ap-

[31] 34 Stat. 596; George Stephenson, *A History of American Immigration, 1820–1924* (Boston, MA: Ginn, 1926), 246.

[32] James McPherson, *Battle Cry of Freedom: The Civil War Era* (New York, NY: Oxford University Press, 2003), 136.

plicant would then take the requisite oaths of allegiance and renunciation. Prior to 1906, immigrants could be naturalized in any state or local court of record, and during that time both declarations of intent and petitions for naturalization "varied in content and wording from court to court, county to county, year to year."[33] Although Congress had mandated certain prerequisites for naturalization long before 1906, it did not until that year prescribe mechanisms by which its chosen rule might truly be rendered uniform in practice.

The next major piece of legislation affecting the procedural framework of naturalization was the Nationality Act of October 14, 1940, which aimed "[t]o revise and codify the nationality laws of the United States into a comprehensive nationality code."[34] A presidential committee of State, Justice, and Labor Department representatives had toiled for five years to consolidate and amend a set of regulations "heretofore scattered among a large number of statutes with frequent inconsistencies and anachronisms."[35] The Act codified more than it revised, but what procedural changes were made conformed to the pattern of administrative centralization in the naturalization of aliens. The Commissioner of Immigration and Naturalization was to "have charge of the administration of the naturalization laws," and the Act authorized him to "make such rules and regulations as may be necessary to carry [the law] into effect." The notion of a comprehensive registry of aliens arriving in the United States was resurrected and mandated anew. No immigrant could thereafter petition for admission to citizenship without furnishing both a certificate of arrival and two identifying personal photographs. Declarations of intention and petitions for naturalization were to consist merely of sixty-one and seventy-one blanks to be filled, respectively. The 1940 Act also left no question as to which American territorial residents became citizens at birth and which ethnicities were eligible for naturalization.

The last key example of procedurally salient naturalization legislation, the Immigration and Nationality Act of June 27, 1952 (also known as the McCarran-Walter Act), was enacted during the height of the Cold War over President Truman's veto.[36] In some respects liberalizing and

[33] Ilene Kanfer Murray, "Naturalization Information for Genealogists," St. Louis Genealogical Society, accessed April 19, 2011, http://www.stlgs.org/index.php?option=com_content&view=article&id=395.

[34] 54 Stat. 1137.

[35] "The Nationality Act of 1940," *Harvard Law Review* 54, no. 5 (1941): 860.

[36] 66 Stat. 163.

in others restrictive, its most significant provisions were those barring Communists and other political undesirables from entry into the United States and forbidding racial discrimination in the naturalization of aliens (to be discussed further). But McCarran-Walter also included a thorough restatement of naturalization procedures on the model of the 1940 Act. On top of the earlier English-proficiency requirement, prospective citizens would now have to possess "a knowledge and understanding of the fundamentals of history, and of the principles and form of government, of the United States." Today's mandatory written citizenship test originated from this clause. The Attorney General, rather than the Commissioner of Immigration and Naturalization (whose bureau was transferred to the Department of Justice), was delegated tremendous authority to "make such rules and regulations as may be necessary to carry into effect the provisions" of Chapter II, that pertaining to nationality through naturalization. Lastly, the necessity of filing a declaration of intention as a prelude to one's formal application for citizenship was permanently eliminated, though many applicants have since done so out of homage to the practice's history and symbolic meaning.

Professor Alexander Bickel once described law as "the sediment of history."[37] This metaphor neatly befits that class of statutes stipulating procedural requirements for naturalization. Today's prospective citizens must satisfy prerequisites conceived in the wake of the Thermidorian Reaction, the first interparty transfer of power in American history, the great waves of immigration in the late 19th century, and the onset of McCarthyism. "Sedimentary" provisions once deemed politically expedient or justified by now-obsolete national-security concerns have accumulated to form today's "uniform rule" for the acquisition of American citizenship. Candidates thus indirectly interact with some of the most meaningful themes and episodes of United States history as they strive to demonstrate a working knowledge of that history's fundamentals.

C. Eligibility for Naturalization

In establishing the terms by which aliens may be admitted to citizenship, naturalization legislation has also functioned to exclude certain classifications of people from that privilege on moral, ideological, and

[37] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, CT: Yale University Press, 1962), 236.

racial grounds. Exclusions have been accomplished either through express prohibitory language or by plain implication, as when particular groups were widely understood not to possess one or more attributes presumed to be necessary for acquiring citizenship.

1. Moral and Ideological Exclusion

From the outset, the Naturalization Act of 1790 (and all that succeeded it) rendered aliens unable to demonstrate their "good character" ineligible for full civic assimilation. From 1795 on, naturalization was reserved only for those "attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same." The Anarchist Exclusion Act of March 3, 1903, which passed not long after the assassination of President William McKinley on September 14, 1901, barred from naturalization aliens philosophically allergic to the principle of organized government or who were members of anarchist organizations.[38] It was no defense that an anarchist had never acted on his convictions and had resided peacefully in the United States for years; if his conscience disposed him to hold legislatively proscribed opinions, he was unable to consummate his chosen American identity. The Act of 1906 reaffirmed these provisions and also excluded "polygamist[s] or believer[s] in the practice of polygamy" and, as previously mentioned, aliens "who cannot speak the English language."[39] At a time when women's marriages to American citizens automatically invested them with citizenship, the Immigration Act of 1917 provided that females "of the sexually immoral classes" (prostitutes) could not obtain expedited citizenship in this fashion. [40] Convicted alien military and naval deserters were declared ineligible for citizenship by the Act of 1940. Lastly, the McCarran-Walter Act of 1952 forbade the naturalization of all advocates of the establishment of a totalitarian dictatorship, including Communists. It also clarified that adulterers, habitual drunkards and gamblers, convicted murder-

[38] 32 Stat. 1222.

[39] Joan Biskupic recounts in her biography of Justice Antonin Scalia that when Scalia's grandfather Antonino Scalia and father Salvatore Eugene Scalia made written declarations of intention in 1923 and petitioned for naturalization three years later, each twice certified in writing that "I am not an anarchist; I am not a polygamist nor a believer in the practice of polygamy." Joan Biskupic, *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia* (New York, NY: Sarah Crichton Books, 2009), 13.

[40] 39 Stat. 874.

ers, petitioners who lied to expedite their naturalizations, and aliens who had spent at least 180 days in jail during their United States residences were not of "good moral character" and were thus unsuitable for citizenship.

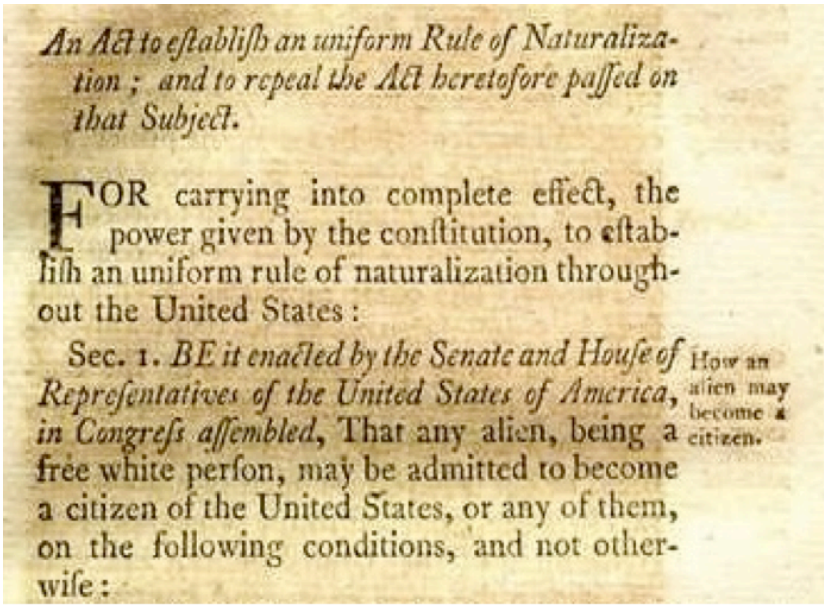
Prophylactic laws of this sort, read alongside cognate procedural requirements depicted above, ask much more of candidates for naturalization than Congress ever could of natural-born citizens. One recent survey suggests that nearly two-fifths of Americans would fail the U.S. citizenship test.[41] No American native could be imprisoned or expelled merely for his foolish lifestyle choices, nor do legal consequences attach to private imprecations on the Constitution and the system of government it creates. It is as if Congress knows it cannot coerce natural-born citizens into tailoring their beliefs and actions to suit some imagined ideal of American citizenship, so it will do all it legitimately can to ensure that interested aliens fortify our loftiest moral and philosophical conceptions of ourselves.

2. *Racial Eligibility*

Congressional activity on the issue of naturalization as it relates to the imposition and removal of racially and nationally based civil disabilities may be organized broadly into four categories: legislation expressly prohibiting certain alien groups from acquiring U.S. citizenship; laws insinuating that candidates of a certain skin color need not apply for naturalization; legislation and treaties conferring citizenship instantly and indiscriminately on certain groups of people, seemingly without regard to their race and in spite of the constitutional directive that Congress "establish an uniform Rule"; and laws merely enabling particular ethnic and national groups to petition for naturalization on the same basis as "free white persons." Up until 1952, when racial discrimination in naturalization was at last disallowed, Congress regularly acted to modify the application of its earlier naturalization laws and thereby alleviate a host of perceived anachronisms. It simply would not have been possible for our earliest statesmen to have prescribed a compre-

[41] "When NEWSWEEK recently asked 1,000 U.S. citizens to take America's official citizenship test, 29 percent couldn't name the vice president. Seventy-three percent couldn't correctly say why we fought the Cold War. Forty-four percent were unable to define the Bill of Rights. And 6 percent couldn't even circle Independence Day on a calendar." See Andrew Romano, "How Dumb Are We?," *Newsweek*, March 20, 2011, http://www.newsweek.com/2011/03/20/how-dumb-are-we.html.

hensive and uniform rule of naturalization that was to endure wholesale in the face of rapidly changing social conditions. While the under-



An Act to eſtabliſh an uniform Rule of Naturalization; and to repeal the Act heretofore paſſed on that Subject.

FOR carrying into complete effect, the power given by the conſtitution, to eſtabliſh an uniform rule of naturalization throughout the United States:

How an alien may become a citizen.

Sec. 1. *BE it enacted by the Senate and Houſe of Repreſentatives of the United States of America, in Congreſs aſſembled*, That any alien, being a free white perſon, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwiſe:

Figure 1: Opening lines of an original printed copy of the Naturalization Act of 1795, clearly showing the "free white person" limitation formulated five years earlier. From http://www.earlyamerica.com/earlyamerica/milestones/naturalization/naturalization_page1.html (accessed 1/26/11).

lying procedural framework of naturalization may have been swiftly ascertained and left largely unaltered for decades, the number and precise identity of the legitimate subjects of that process lingered in an unsettling state of indeterminacy for a century and a half. What follows is a rough chronology of this ad hoc adventure.

The terms of the very first Naturalization Act applied to "any Alien being a free white person," and, presumably, only to that group. After 1790, then, all indentured servants and non-whites were incapable of being naturalized by their own efforts. Charles Gordon has pointed out that the First Congress was very much a legislature of its time: When the 1790 law was drafted, the nation's population included only whites, blacks, and Native Americans, the first group alone being deemed fit for naturalization. The Framers "did not envisage the vast

army of immigrants who were destined to flock to our shores."[42] Unless and until Congress more clearly defined which groups were eligible or broadened the scope of its original language, it fell to the courts to determine whether certain national groups were "free white persons" within the meaning of the 1790 law. (Interestingly enough, in his infamous Dred Scott opinion, Chief Justice Taney cited the Naturalization Act of 1790 as evidence that "citizenship at [the time of the founding] was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the Government.")

The Louisiana Purchase Treaty of April 30, 1803 and the Adams-Onís Treaty of February 22, 1819 guaranteed to inhabitants of the territories acquired from France and Spain, respectively, all of the privileges and immunities enjoyed by citizens of the United States–in short, a kind of *de facto* national citizenship, though the recipients did not yet enjoy even state citizenship. It is unclear whether (yet is exceedingly unlikely that) the U.S. government intended to elevate by treaty the civic stature of Native Americans residing in these territories. On September 27, 1830, however, the Treaty of Dancing Rabbit Creek permitted patriarchs of the Choctaw tribe to become citizens of the United States merely by expressing their desire to do so. An Act of March 3, 1843 declared all members of the Stockbridge Indian tribe "citizens of the United States, to all intents and purposes," and the Treaty of Guadalupe Hidalgo of February 2, 1848 stipulated that those formerly Mexican inhabitants of territory now in the United States' possession would acquire the "title and rights" of "citizens of the United States" merely by continuing to reside within that territory and not publicly electing to retain their Mexican citizenship.[43] One scholar has remarked that measures of this nature "bestowed American citizenship upon considerable numbers of persons who would have been racially ineligible for naturalization under normal procedures"; Taney himself observed that "[o]n the question of citizenship … we have not been very fastidious."[44] Absent intermarriage, Native Americans were manifestly not "whites." These four treaties and the Stockbridge Indian Act foreshadowed later inconsistencies between what the governing naturalization statutes seemed to allow and what groups were in fact

[42] Charles Gordon, "The Racial Barrier to American Citizenship," *University of Pennsylvania Law Review* 93, no. 3 (1945): 247.

[43] 5 Stat. 612.

[44] Gordon, "The Racial Barrier to American Citizenship," 247; *Dred Scott*.

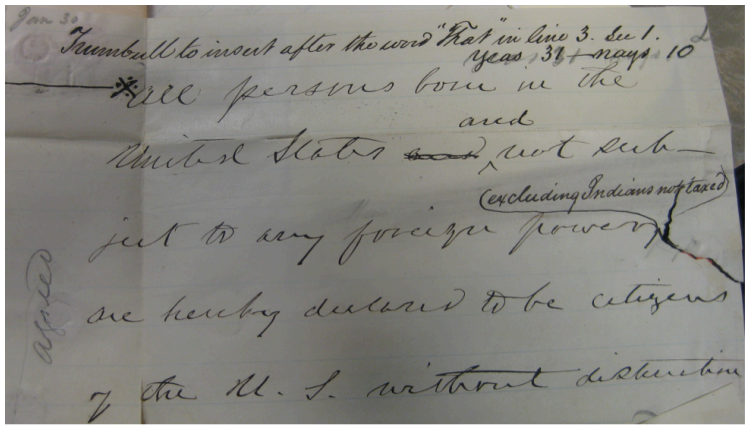


Figure 2: Lyman Trumbull's defining amendment to the proposed legislation that became the Civil Rights Act of 1866. National Archives, Center for Legislative Archives. (Author's photo)

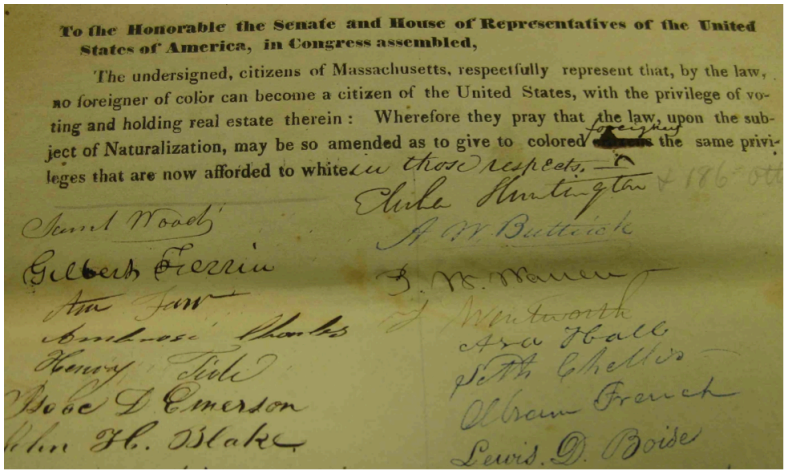
permitted to be naturalized through case-by-case Congressional exemptions.

It is fitting here to discuss a revolutionary moment in the history of *jus soli* ("right of the soil," or territorial birthright citizenship). In discarding one of Dred Scott's central holdings – that native-born African-Americans were not citizens of the United States at birth – the constitutional innovations of Reconstruction inadvertently created an injustice ameliorable only through a revision of naturalization laws. Ex-slaves did not automatically become American citizens following the Thirteenth Amendment's ratification on December 6, 1865. Congressional Republicans, however, "equated the status and rights of free people with the status and natural rights of citizens."[45] Republicans used their overwhelming majorities in the House and Senate to pass the Civil Rights Act of April 9, 1866, which proclaimed that "all persons born in the United States … excluding Indians not taxed, are hereby declared to be citizens of the United States."[46] This guarantee was constitutionalized two years later in Section 1 of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

[45] Robert J. Kaczorowski, "To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War," *The American Historical Review* 92, no. 1 (1987): 48.

[46] 14 Stat. 27.

After the Supreme Court held in *U.S. v. Wong Kim Ark* that the Fourteenth Amendment's language embraced even native-born members of a racial group expressly forbidden from naturalization – in short, that the Amendment meant what it said – there arose the absurdity of having "to justify the preclusion of parents from enjoyment of citizenship benefits which are available to their children."[47] The Act of 1866 and the Fourteenth Amendment begat an equally untenable inequity: African-Americans born in the United States became citizens at birth, while those born abroad could never acquire American citi-


To the Honorable the Senate and House of Representatives of the United States of America, in Congress assembled,

The undersigned, citizens of Massachusetts, respectfully represent that, by the law, no foreigner of color can become a citizen of the United States, with the privilege of voting and holding real estate therein: Wherefore they pray that the law, upon the subject of Naturalization, may be so amended as to give to colored foreigners the same privileges that are now afforded to white

Figure 3: Antebellum petition to Congress praying for an extension of naturalization laws to "colored foreigners." National Archives, Center for Legislative Archives. (Author's photo)

[47] 169 U.S. 649 (1898). Chinese-American birthright citizenship was at issue in *Wong Kim Ark*. In his dissenting opinion, Chief Justice Melville Fuller posited a critical connection between operative naturalization legislation and a proper constitutional understanding of *jus soli*: While the Fourteenth Amendment envisions birthright citizenship for American-born children of permanent American residents "who might themselves become citizens," he argued, it does not "arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this Government, are and must remain aliens." In other words, despite the Fourteenth Amendment's unexceptionably clear verbiage, Fuller's *jus soli* applies only to those categories of "persons"—whites and blacks—racially eligible to become full naturalized citizens. The majority holding of *Wong Kim Ark* is central to the contemporary debate over whether the Constitution should be amended to deny birthright citizenship to the offspring of illegal immigrants; Gordon, "The Racial Barrier to American Citizenship," 246.

zenship. The Naturalization Act of July 14, 1870 "hereby extended [the naturalization laws] to aliens of African nativity and to persons of African descent."[48] As the first generally applicable federal statute in American history explicitly entitling any other than non-white aliens to seek the privilege of American citizenship, the Act of 1870 constituted a paradigm shift in the field of naturalization legislation.

Yet Congressional opinion did not uniformly favor relaxation of citizenship laws. During a Senate debate on an early version of the bill that became the Civil Rights Act of 1866, several members astutely perceived that strict adherence to *jus soli* would bestow American citizenship on Chinese and Mongolians born within our borders. Senator Peter Van Winkle (R-OH) did

> not see where it comes in that we are bound to receive into our community those whose mingling with us might be detrimental to our interests. I do not believe that a superior race is bound to receive among it those of an inferior race if the mingling of them can only tend to the detriment of the mass.[49]

If "Asiatics" should be admitted to citizenship, argued Senator Edgar Cowan (R-PA), "there is an end to republican government" in California, "because it is very well ascertained that those people have no appreciation of that form of government; it seems to be obnoxious to their very nature."[50] Whether unfamiliar races became citizens by birth or naturalization mattered not; each course deflowered America's civic chastity irrevocably. Section 14 of the Chinese Exclusion Act, passed on May 16, 1882, legally ordained these prejudices: "hereafter no State court or court of the United States shall admit Chinese to citizenship."[51] Despite the manifold achievements of Reconstruction, the Act was unmistakably premised upon the belief that whites were "a superior race" vis-à-vis the Chinese. After 1882, then, qualified whites and blacks were clearly capable of becoming naturalized citizens; without

[48] 16 Stat. 256.

[49] *Congressional Globe*, 39th Cong., 1st sess., 1866, 498.

[50] *Ibid.*, 499. The Constitution, of course, guarantees to every state a republican form of government through the monitoring of "The United States." See Article IV, Section 4.

[51] 22 Stat. 58.

question, Chinese were not.[52] Yet the Orient was not a Chinese monolith–immigrants from elsewhere in East Asia, the Indian subcontinent, and Pacific island nations arrived in the United States armed with the reality that, although the naturalization laws had not yet technically been "extended" to them, neither had any prohibitory language yet foreclosed their naturalization as in the case of the Chinese.

This semantic difficulty was partially resolved in favor of citizenship for residents of certain *American* territories and dependencies, many of whom were non-white (within the meaning of the very first naturalization laws) and not of African descent. The Hawaiian Organic Act of April 30, 1900 declared all who were citizens of Hawaii on August 12, 1898, the date of its annexation, to be citizens of the United States.[53] Following a presidential visit to Puerto Rico, Theodore Roosevelt issued a special message to Congress on December 11, 1906 in which he expressed "the desirability of conferring full American citizenship upon" the inhabitants of that island.[54] Congress belatedly granted his wish on March 2, 1917 with its passage of the Jones-Shafroth Act.[55] United States Virgin Island natives were collectively naturalized on February 25, 1927, and Guam residents were made U.S. citizens on August 1, 1950.[56] Did these actions indicate that Congress did not understand the naturalization laws then in effect to erect an absolute bar to the naturalization of all non-whites and non-blacks through the regular channels?

The U.S. Supreme Court did not think so. In rapid succession, it held that Japanese, Hindus, and Filipinos were not "whites" and thus

[52] John Marshall Harlan, the revered judicial egalitarian of the late 19th century, appeared to countenance the wholesale exclusion of Chinese from citizenship in a little-known passage of his famous *Plessy v. Ferguson* dissent: "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race." Given the condemnatory tone that pervades the rest of Harlan's opinion, his purely descriptive language in this instance furnishes compelling evidence that Harlan did not inwardly object to Congress's decision. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Harlan, J., dissenting).

[53] 31 Stat. 141.

[54] Theodore Roosevelt, "Special Message to the Senate and House of Representatives, December 11, 1906," The American Presidency Project, http://www.presidency.ucsb.edu/ws/index.php?pid=69671.

[55] 39 Stat. 95.

[56] 44 Stat. 1234; 64 Stat. 384.

could not become naturalized U.S. citizens.[57] One might reason that the Court was merely fulfilling its duty to ensure uniformity in the legal system by clarifying the reach of certain statutory provisions in cases that come before it, but the spectacle of nine white male patrician-jurists opining on the most delicate anthropological questions of the day became too ridiculous for some observers. As "white person" cases began to percolate through the judiciary, lower federal courts struggled mightily to dispose of petitioners' requests in a principled fashion. Some federal district courts deferred to popular conceptions of the word "white" in resolving these cases, while others sought anchorage in the technical writings of ethnologists. A Parsi, a Syrian, a Hindu, and an Armenian were admitted to citizenship in the early 20th century by courts that interpreted "white" to include all supposed members of the "Aryan race"; the Supreme Court eventually held that the statutory phrase "free white persons" should be construed "in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popularly understood."[58] Such confusion was the result of the limited purview and attendant uncertainties of previous naturalization laws, ones that addressed only the statuses of Chinese, blacks, and the whites of a bygone era in a nation growing more racially heterogeneous by the year.

Section 28(c) of the Immigration Act of 1924 purportedly clarified the scope of the phrase "ineligible to citizenship": It was coextensive with the mass of individuals "debarred from becoming a citizen of the United States" under Section 2169 of the Revised Statutes of 1878 and the Chinese Exclusion Act.[59] But Section 2169 expressly debarred no one. Its provisions addressed eligibility, and they applied "to aliens being free white persons, and to persons of African nativity and persons of African descent," consigning the issue of non-Chinese exclusion to the endless litigation over Congressional implication. Section 303 of the Nationality Act of 1940 stipulated that "[t]he right to become a naturalized citizen … shall extend *only* to white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere" [italics mine]. For the first time, Congress explicitly placed all non-white and non-black aliens of the Orient on the

[57] T*akao Ozawa v. United States*, 260 U.S. 178 (1922); *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923); *Toyota v. United States*, 268 U.S. 402 (1925).

[58] See R. L. H., Jr., "Aliens: Naturalization: Who Is a 'White' Person?" *California Law Review* 11, no. 5 (1923): 351; *U.S. v. Bhagat Singh Thind*.

[59] 43 Stat. 153.

same legal footing as Chinese nationals, yet it ingloriously failed to define the least-understood term in American nationality law: whiteness.

Naturalization legislation, like that pertaining to immigration, necessarily affects a nation's foreign relations. And racially discriminatory naturalization legislation, especially that which disadvantages nationals of a state upon whose assistance one vitally depends, can have harmful diplomatic and military consequences. The Reich Citizenship Law of September 15, 1935 limited German citizenship to "that subject only who is of German or kindred blood."[60] So it was that at the onset of World War II, Nazi Germany and the United States were the only two countries in the world in which one's race might be sufficient to exclude one from naturalization. As Earl Harrison bitterly observed in 1944 upon resigning as U.S. Commissioner of Immigration and Naturalization, "all will agree that this is not very desirable company."[61] The United States was thus highly vulnerable to accusations of hypocrisy throughout its participation in the War for fighting injustice abroad while countenancing it at home, a charge that recurred throughout the overlapping years of the Cold War and the Civil Rights movement.[62]

An October 12, 1943 *New York Times* article reported that the Japanese had initiated a propaganda campaign designed to undermine the Sino-American wartime partnership by broadcasting the contents of the Chinese Exclusion Act. Indeed, pronouncements from our highest legislative and judicial institutions had forbidden the naturalization of nationals of China and the Philippines, both key allies (and the first line of defense) in America's fight against Japan. In a special message delivered the day before the *New York Times* article was published, President Roosevelt urged Congress to take swift action on a pending bill designed to repeal the Chinese Exclusion Act. Roosevelt denounced the 1882 Act as an "injustice," one of the great "anachronisms" and "mistakes of the past." He perceived a direct and debilitating connec-

[60] "The Reich Citizenship Law," Holocaust Education and Archive Research Team, http://www.holocaustresearchproject.org/holoprelude/reichclaw.html.

[61] Milton R. Konvitz, *The Alien and the Asiatic in American Law* (Ithaca, NY: Cornell University Press, 1946), 80. The relevant American exclusionary legislation far predated its much-maligned German analogue.

[62] Not all such criticism originated abroad. The 1948 Progressive Party Platform affirmed support for "legislation facilitating naturalization of Filipinos, Koreans, Japanese, Chinese, and other national groups now discriminated against by law." See Lemay and Barkan, *U.S. Immigration and Naturalization Laws and Issues*, 216.

tion between the Exclusion Act, "the spirit of [China's] people," and "her faith in her Allies"; repeal would be morally redemptive as well as militarily expedient.[63] As thousands of Japanese-American citizens languished in their own nation's internment camps, the Chinese Exclusion Act was erased from the statue books on December 17, 1943 in the form of the Magnuson Act.[64] The Luce-Celler Act of July 2, 1946, passed two days before President Truman's proclamation of Philippine independence and after the relentless agitation of Dalip Singh Saund's Indian Association of America, enabled Filipino-Americans and subcontinent Indian-Americans to become naturalized citizens, as well.[65]

Even at this late stage, over a century and a half after the Naturalization Act of 1790 was enacted, Congress was still carving out *ad hoc* exceptions to its increasingly malleable "uniform rule" with respect to ethnicities and nationalities – that whites and blacks could become naturalized citizens, while members of all other racial groups not indigenous to the Western Hemisphere could not. Each inclusionary alteration of the "established" naturalization scheme was essentially a national admission that certain groups were legitimately entitled to that from which they had only recently been statutorily forbidden. Surely, then, a process that has accommodated a gradual desertion of timeworn racial prejudices is to be preferred over a sclerotic regime in which a fully uniform and predictable yet injuriously outmoded rule of naturalization prevails. In any case, the McCarran-Walter Act of 1952 definitively repudiated America's troublesome legacy of racialized citizenship in declaring that "[t]he right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race."

3. *American Indians and Citizenship*

The Native American experience with respect to U.S. citizenship has been quite different from those of other demographic minorities. The Supreme Court ruled in 1884 that, although born within the territorial limits of the United States, Indians were members of "alien nations,

[63] Fred Warren Riggs, *Pressures on Congress: A Study of the Repeal of Chinese Exclusion* (Westport, CT: Greenwood Press, 1972), 211.

[64] 57 Stat. 600.

[65] 60 Stat. 416. Saund later served as the first Asian-American member of Congress. He represented California's 29th Congressional district from 1957–1963.

distinct political communities."[66] As such, they were not "subject to the jurisdiction" of the United States and thus did not become citizens at birth under the Fourteenth Amendment; *jus soli* had its limits, after all. Yet two years later, the Court upheld an act of Congress that recognized federal jurisdiction for fifteen major crimes committed by one Native American against another in tribal territory.[67] "These Indian tribes are the wards of the nation," Justice Samuel Miller wrote for an unanimous Court whose membership had not changed since 1884. Not because of any particular constitutional provision, but "[f]rom their very weakness and helplessness … there arises the duty of protection, and with it the power." The Supreme Court thus denied the existence of federal jurisdiction over Native Americans for purposes of substantiating their claims of birthright citizenship, only to permit the exercise of that very jurisdiction in a case that legitimized an impending assimilation policy that eventually mandated full Native American birthright citizenship.

Assured of the constitutionality of federal Indian legislation, Congress passed the Indian General Allotment (or Dawes) Act on February 8, 1887.[68] The law primarily sought to "civilize" the Native peoples by abolishing proprietary customs that purportedly inhibited their cultural and economic advancement; enhanced agricultural production would undoubtedly benefit the Indians' assimilators, as well.[69] The Dawes Act authorized the president to subdivide Indian reservations and redistribute them as separate tracts of land for individual tribal members. It then "declared to be a citizen of the United States" any Indian who was granted an allotment of land or reestablished "his residence separate and apart from any tribe of Indians therein, and ha[d] adopted the habits of civilized life." It was unclear, however, whether Indians became citizens immediately upon receiving their allotments or after the twenty-five-year period in which the federal government held their allotments in trust. The Burke Act of May 8, 1906 explained that allottees were to become citizens automatically at the end of the twenty-five year trust period, unless they received a fee-simple patent

[66] *Elk v. Wilkins*, 112 U.S. 94 (1884).

[67] The law under scrutiny was the Major Crimes Act of March 3, 1885 (23 Stat. 385), and the case was *United States v. Kagama*, 118 U.S. 375 (1886).

[68] 24 Stat. 388.

[69] Steven J. Gunn, "Indian General Allotment Act (Dawes Act) (1887)," in *Major Acts of Congress*, ed. Brian K. Landsberg, vol. 2 (Belmont, CA, 2003), 192.

from the secretary of the interior before that time.[70] By an Act of August 9, 1888, furthermore, an Indian woman who married a U.S. citizen was to acquire citizenship by that means.[71]

This trend toward the full cultural assimilation of Native Americans culminated with the passage of the Snyder Act on June 2, 1924.[72] Nearly two-thirds of all Native Americans had become U.S. citizens through earlier laws and treaties, but many of those who had elected to remain tribal members through proud and determined volition fiercely opposed the Snyder Act, which, in conferring citizenship retrospectively and prospectively on "all non-citizen Indians born within the territorial limits of the United States," effectively expatriated them from their "distinct political communities" without their consent.[73] Section 1 of the Fourteenth Amendment does not say that persons born within the United States but not subject to its jurisdiction cannot become citizens, only that ones born in the United States and answerable to its laws definitively are. There is thus nothing unconstitutional about the Snyder Act or the kindred laws preceding it, for they served to fill a constitutional cavity without violating its text. The principle of *jus soli* at last became universal in United States territory with the Nationality Act of 1940, which declared newborns of "Eskimo" and "Aleutian" (as distinguished from "Indian") tribes to be U.S. citizens. As full Native American citizenship occurred without a constitutional amendment, there is no doubt that the Snyder Act and its cohorts functionally overruled *Elk v. Wilkins* through an implicit legislative gloss to the effect that subjection to the jurisdiction of the United States was no longer necessary for obtaining citizenship by birth.

D. Expatriation

Congress has undoubtedly made liberal use of its power to establish the terms by which foreigners may become naturalized U.S. citizens. It has also exercised, on occasion, what might be inferred as a corollary of its plenary authority in the field of naturalization – the power to establish a uniform rule of *expatriation*, the process by which the bonds of allegiance between an individual and his former state are dis-

[70] 34 Stat. 182.
[71] 25 Stat. 392.
[72] 43 Stat. 233.
[73] Helen Peterson, "American Indian Political Participation," *Annals of the American Academy of Political and Social Science* 311 (1957): 121.

solved, with an accompanying loss of citizenship. Since the Constitution's ratification, the American government has had a powerful incentive to articulate a credible philosophical defense of the effectuality of individual expatriations. The more cumbersome and consent-contingent the process, the less readily deserving foreigners can exchange their alien allegiances for the lifelong opportunity to enrich the United States economically and intellectually, and the more impotent Congress's power to establish a uniform rule of naturalization. If expatriation cannot occur on the one end, naturalization cannot on the other (at least not without major diplomatic commotion). Providing a statutory roadmap for Americans' self-denaturalizations has always been much less of a Congressional priority.

In the American republic's fledgling years, English common law dictated that natural-born Britons remained British subjects until death, notwithstanding any attempt to evade military service through naturalization abroad.[74] That Old World hegemons dismissed other nations' naturalizations of their citizens as illegitimate became increasingly problematic after the adoption of the Constitution and Congress's expeditious exercise of its naturalization power. When the two came into conflict, the policies of Britain and the United States in this respect were irreconcilable. To have endorsed Britain's position on expatriation, even in the abstract, would have been to insist that Congress abjectly refrain from exercising a constitutional power expressly granted to it. Many early Federalists actually repudiated the doctrine of expatriation as inimical to the law of nations, the Hamiltonian position being captured most emphatically by Representative Zephaniah Swift (CT):

> Allegiance is a duty which mankind own and which they can never renounce and disclaim without the consent and concurrence of the supreme power of the state. … let a man remove himself into whatever country he pleases, he continues to owe allegiance to his native country, and is punishable for high treason for joining its enemies and levying war upon it.[75]

[74] Ralph Robinson, "Retaliation for the Treatment of Prisoners in the War of 1812," *The American Historical Review* 49, no. 1 (1943): 65.

[75] John P. Roche, "Loss of American Nationality: The Years of Confusion," *The Western Political Quarterly* 4, no. 2 (1951): 268, citing Zephaniah Swift, *A System of the Laws of the State of Connecticut*, Vol. 1 (1795-6), 164.

Congress instituted a regime of naturalization at an early hour, of course, and in so doing implicitly (and audaciously) denied that foreign sovereigns could demand perpetual allegiance of transatlantic emigrants. After the Royal Navy began impressing purported expatriates stationed on American vessels into its service during the Napoleonic Wars, President Jefferson wrote to Treasury Secretary Albert Gallatin that "I hold the right of expatriation to be inherent in every man by the laws of nature … the individual may [exercise such right] by any effectual and unequivocal act or declaration."[76] No public act emanated from Jefferson's sentiment for over sixty years, but it was an article of faith among subsequent generations of American statesmen and diplomats.[77]

In the mid-1860s, naturalized Americans were conscripted into the French and Prussian Armies while visiting relatives in their former homelands.[78] President Andrew Johnson concluded his Second Annual Message of December 3, 1866 with a request for

> an assertion by Congress of the principle so long maintained by the executive department that naturalization by one state fully exempts the native-born subject of any other state from the performance of military service under any foreign government.

On April 12, 1867, two naturalized American citizens, John Warren and Augustine Costello, set sail from New York to participate in the so-called "Jacmel Expedition," a Fenian campaign to raise an armed insurrection in Ireland. Warren and Costello were detained and sentenced by the British government under the Treason Felony Act of 1848, not-

[76] Franklin, *The Legislative History of Naturalization in the United States*, 135.

[77] Consider the written opinion of Attorney General Caleb Cushing dated October 31, 1856: "The doctrine of absolute and perpetual allegiance – the root of the denial of any right of emigration – is inadmissible in the United States. It was a matter involved in, and settled for us by, the Revolution, which founded the American Union… I think, in consideration of these premises, the omission of the federal laws to enact any express or specific restraints on expatriation is tacit or implied consent." 8 Op. Atty. Gen. 167. Cushing's successor Jeremiah Black opined on the same topic three years later: "The municipal code of England is not one of the sources from which we derive our knowledge of international law. We take it from natural reason and justice, from writers of known wisdom, and from the practice of civilized nations. All these are opposed to the doctrine of perpetual allegiance." 9 Op. Atty. Gen. 358.

[78] Roche, "Loss of American Nationality: The Years of Confusion," 282.

withstanding their earlier acquisition of American citizenship and renunciation of all prior allegiances. British judges, of course, deemed those relinquishments ineffectual and even cited learned exemplars of the Federalist position on expatriation as supposed confirmation that American statesmen championed full discretionary expatriation selectively.[79] This "singular and embarrassing conflict of laws," Presi-

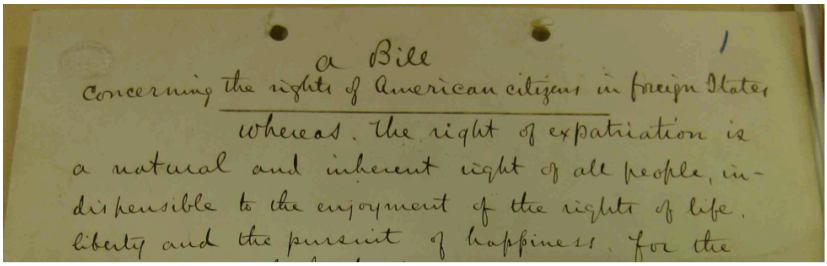

a Bill
concerning the rights of American citizens in foreign States
Whereas, the right of expatriation is
a natural and inherent right of all people, in-
dispensible to the enjoyment of the rights of life,
liberty and the pursuit of happiness. For the

Figure 4: Opening lines of H.R. 768, "A Bill concerning the rights of American citizens in foreign states," which became the Expatriation Act of 1868. National Archives, Center for Legislative Archives. (Author's photo)

dent Johnson complained in his Third Annual Message of December 3, 1867, "perplexes the public mind concerning the rights of naturalized citizens and impairs the national authority abroad." With evident exasperation, Johnson again "appeal[ed] to Congress to declare the national will unmistakably upon this important question."

Congress finally responded with the Expatriation Act of July 27, 1868, its first ever pronouncement on the subject.[80] Echoing Jefferson in more ways than one, the law's preamble affirmed that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness." Any official act that appeared to undercut this sacrosanct individual right was thereby "declared inconsistent with the fundamental principles of this government." The law did not specify any penalties for high-ranking deviants or flesh out the logistics of voluntary expatriation; it was, just as Johnson had requested, merely an assertion of principle. The content of the Expatriation Act of 1868 must have come

[79] Ellery C. Stowell and Henry F. Munro, *International Cases: Arbitrations and Incidents Illustrative of International Law as Practiced by Independent States*, vol. 1 (Boston, MA: Houghton Mifflin Co., 1916), 320–2.

[80] 15 Stat. 223.

as no surprise to its intended audience – world powers that rejected the very notion of expatriation – but the medium for articulating this sentiment was a novel one. The Act furnished a bold restatement of Congress's naturalization power, for in condemning as unjust the doctrine that an individual is powerless to relinquish his citizenship, it accorded primacy to systems of political theory in which nothing operates to obstruct a state's ability to naturalize aliens.

It was not until the 20th century that Congress acknowledged the efficacy of individual American expatriations on the same terms as those of foreigners desirous of acquiring American citizenship.[81] On July 3, 1906, Acting Secretary of State Robert Bacon, pursuant to a recommendation of the House Committee on Foreign Affairs, appointed a three-member board of experts to inquire into the existing expatriation laws and propose legislation for Congress to consider at its next session.[82] The board's 538-page report informed several key provisions of the resulting Expatriation Act of March 2, 1907, which enumerated a list of actions whose commission would result in the forfeiture of one's American citizenship.[83] These included obtaining naturalization abroad, swearing an oath of allegiance to any foreign state, and residing for two years in one's former country or five years in any other country (presumably as a civilian). Unless the 1907 Act was intended to supersede that of 1868 entirely, it is difficult to avoid concluding that the 1907 law was partially "inconsistent with the fundamental principles of this government," for it also stated that "no American citizen shall be allowed to expatriate himself when this country is at war."[84]

[81] In his Fifth Annual Message of December 1, 1873, President Grant complained that "Congress did not indicate in [the Expatriation Act of 1868], nor has it since done so, what acts are to be deemed to work expatriation… further legislation has become necessary." He again called Congress's attention to "the unsatisfactory condition of the existing laws with reference to expatriation and the election of nationality" in his Sixth Annual Message of December 7, 1874, but Congress did not immediately comply with Grant's request.

[82] Richard W. Flournoy Jr., "Naturalization and Expatriation," *The Yale Law Journal* 38, no. 1 (1922): 855.

[83] 34 Stat. 1228.

[84] In his *seriatim* opinion in the 1795 Supreme Court case *Talbot v. Jansen* (3 U.S. 133), Justice Iredell noted that "[s]ome writers on the subject of expatriation say, a man shall not expatriate in a time of war, so as to do a prejudice to his country. But if it be a natural, unalienable right, upon the footing of mere private will," as the Expatriation Act of 1868 would later assume, "who can say this shall not be exercised in time of war, as well as in time of peace, since the individual, upon that principle, is to think of himself only?" Iredell did not himself regard expatriation as a "natural, unalien-

This was precisely the condition under which droves of Englishmen sought naturalization in the United States in the early 1800s, after all, and their predicaments had then elicited the support of America's greatest legal minds.

Chapter IV ("Loss of Nationality") of the Nationality Act of 1940 contained a more thorough index of expatriable acts. New among them were serving in a foreign state's armed forces, voting in a foreign political election, formally renouncing one's nationality before an American consul stationed abroad, serving a foreign government in any capacity, deserting the United States Army or Navy during a time of war, and committing treason against the United States. Whereas McCarran-Walter had denied foreign Communists entry into America, the Expatriation Act of 1954 contemplated the denaturalization and expulsion of resident citizen-Communists insofar as the Communist Party USA existed to "engag[e] in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States."[85]

Though Congress inferred a power of expatriation from its express and plenary power to regulate the naturalization process, its expatriation laws injure U.S. citizens possessing a vast complement of constitutional rights. The Supreme Court has accordingly ruled that the use of denationalization as a means of punishment is prohibited by the Eighth Amendment's ban on cruel and unusual punishment and the Fifth and Sixth Amendments' procedural guarantees to accused criminals.[86] In *Afroyim v. Rusk* (1967), the Court held that "Congress has no power under the Constitution to divest a person of his United States citizenship absent his voluntary renunciation thereof."[87] An American's participation in an Israeli election did not sufficiently establish an intent to relinquish his American citizenship, but his swearing allegiance to a foreign state certainly would have.

II: Exceptions to the Standard Naturalization Procedures

The idea of exceptional naturalization legislation seems oxymoronic. Article 1, Section 8, Clause 4 merely empowers Congress to fix a sin-

able right," but his logic foreshadowed the incongruity between the 1868 Act's declaration of expatriation as an inherent individual right and the wartime qualification Congress later imposed.

[85] 68 Stat. 1146.

[86] *Trop v. Dulles*, 356 U.S. 86 (1958); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

[87] 387 U.S. 253.

gle standard to regularize aliens' acquisition of American citizenship. Congress is not expressly authorized to regulate naturalization as it sees fit, nor is it clearly granted the authority to effectuate individual or collective naturalizations itself, as it has often done with Native Americans and residents of American territories. Congress has nonetheless exercised great latitude in the interpretation of its Naturalization Clause powers, and it has occasionally waived the "uniform rule" for select petitioners.

A. Derivative Citizenship

Although the Naturalization Act of 1790 spoke of "free white person[s]," from the beginning two groups included in a literal reading of that phrase – women and children – were situated differently than adult white males with respect to proper naturalization procedures. For the most part, alien women and children acquired U.S. citizenship exclusively through their husbands and fathers. The concept of derivative citizenship, as opposed to the obtainment of citizenship through naturalization or birth within the United States, has historically been one of two major types of exceptions to the regular naturalization procedures that aliens who seek U.S. citizenship are typically expected to follow (the other type rewards aliens who have rendered honorable service in the United States military with an expedited path to citizenship). What follows is a brief synopsis of Congressional legislation that exemplifies this concept and helps demonstrate that women and men have historically been affected by naturalization laws in very different ways.

The 1790 Act itself contained a derivative element: The minor children (those under the age of twenty-one) of naturalized American citizens were to be considered citizens themselves as long as their fathers had at some point resided in the United States. Citizenship could thus be inherited only through the father. The Naturalization Act of 1802 conferred citizenship on the children of current or former citizens in cases in which those children had been born outside the territorial limits of the United States. Yet this provision was purely retrospective; the American lawyer Horace Binney noted in an 1853 pamphlet that

> [i]t does not probably occur to the American families who are visiting Europe … that all their children born in a foreign country are aliens, and when they return home will

return under all the disabilities of aliens.[88]

An Act of February 10, 1855, which "passed presumably because of Mr. Binney's suggestion," supplanted this inadvertent illogicality.[89] The Act declared that persons born outside of the United States, as long as their fathers were or had been U.S. citizens, were to be considered citizens at birth. This law furnishes splendid evidence that a patriarchal spirit animated early naturalization laws. It also helps to illustrate a major historical trend in the conception and enactment of such legislation: More often than not, 19th- and 20th-century naturalization laws not intended to serve as sweeping codifications arose to fill voids in the existing system or to ameliorate perceived injustices.

An unrelated section of the Act of 1855 provided that "any woman who might lawfully be naturalized under the existing laws" who was then married or became married to a U.S. citizen was to "be deemed and taken to be a citizen." Immigrant fiancées and spouses were obvious beneficiaries of this law, as were American bachelors with exotic tastes. But its language applied only to white women, coming as it did fifteen years before the Naturalization Act of 1870, and it designated a naturalized woman's citizenship status as dependent on her husband's. Although the 1855 law contained the first explicit acknowledgment that some women "might lawfully be naturalized under the existing laws" – they, too, were "persons" – the citizenship of men and women was hardly symmetric in one key respect, as citizenship could be transmitted and derived only through husbands and fathers. The Expatriation Act of March 2, 1907 gave notice that, henceforth, a woman who married a foreigner would take her husband's nationality and thus denaturalize herself.[90] Furthermore, such a woman retained the option of reacquiring American citizenship after the termination of her marriage – a crude incentive to divorce one's alien husband. A woman's marriage completely determined her citizenship status after 1907 – if she was an American and married another American, this status was undisturbed. If she was a white or black alien and married an American, she took on her husband's American citizenship. If she was an American citizen and married a foreigner, she lost her U.S. citizenship.

[88] Horace Binney, *The Alienage of the United States Under the Present Naturalization Laws* (Philadelphia, PA: C. Sherman, 1853), 5.

[89] 10 Stat. 604; Chief Justice William Taft in *Weedin v. Chin Bow*, 274 U.S. 657 (1927).

[90] 34 Stat. 1228.

Congress dispensed entirely with the custom of derivative citizenship for brides with the Married Women's Citizenship Act (or Cable Act) of September 22, 1922.[91] Petitioners to Congress in early 1916 argued that "such procedure is neither sane, safe nor expedient; especially now, when our Country is overshadowed by the great European War."[92] After the Nineteenth Amendment's ratification in 1920, marital derivative citizenship also enfranchised women who had lived their entire lives in allegiance to foreign sovereigns. The National Woman's Party and other feminist organizations determined to exercise their newly won political power justly claimed credit for the Cable Act's successful passage, however.[93] After 1922, no alien woman who married a U.S. citizen or whose husband was duly naturalized became a citizen by reason of her husband's citizenship, nor did any woman citizen lose her American citizenship because of her marriage to an alien (with one critical kind of exception). Instead, such a married woman could only obtain naturalization "upon full and complete compliance with all requirements of the naturalization laws," though no prior declaration of intention and a much shorter residence period would now be required of her. The Cable Act firmly "established the principle that marriage and citizenship could be separate and unique civic identities."[94]

The Cable Act may have discontinued derivative citizenship for women, but it did not end gender discrimination in naturalization laws. It also contained a gratuitous manifesto of Congress's racial prejudices. Section 3 of the Act declared that "any woman [but not a male] citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States." After 1922, then, "marriage to a non-white [and non-black] alien by an American woman was akin to treason against this country: either of these acts justified the stripping of citizenship from someone American by birth."[95]

[91] 42 Stat. 1021.

[92] Four women from Washington protesting the expatriation or naturalization of any citizen on account of marriage, Mar. 9, 1916 (endorsed Mar. 15, 1916); Committee on the Judiciary; Petitions and Memorials Referred to Committees (SEN 64A-J46); 64th Congress; Records of the United States Senate, Record Group 46; National Archives, Washington D.C.

[93] See Candice Lewis Bredbenner, chap. The Cable Act: Solutions and Problems, in *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* (Berkeley, CA: University of California Press, 1998), 80–112.

[94] Martha Gardner, *The Qualities of a Citizen: Women, Immigration, and Citizenship, 1870-1965* (Princeton, NJ: Princeton University Press, 2009), 124.

[95] Ian Haney López, *White by Law: The Legal Construction of Race* (New York, NY: New

Section 3's denaturalization provision was rescinded just nine years later in an Act of March 3, 1931, which declared that

> [a] woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage [to an alien ineligible for naturalization] … unless she makes a formal renunciation of her citizenship.[96]

Its work hardly complete, the National Woman's Party pressured the Roosevelt administration to sign the Montevideo Convention on the Nationality of Women at the Seventh International Conference of American States, which was held from December 3-26, 1933.[97] All of the Convention's High Contracting Parties agreed that "[t]here shall be no distinction based on sex as regards nationality, in their legislation or in their practice."[98] A Congressional Act of May 24, 1934 reaffirmed that a child born outside of the United States to at least one American citizen was a citizen at birth, but citizenship would now descend to the child if either parent had previously lived in the United States.[99] That only a mother's residence would suffice for a foreign-born child's acquisition of American citizenship was a dramatic reversal from an unbroken line of legislation to the contrary, one dating all the way back to the seminal Act of 1790.

B. Expedited Naturalization for Alien Veterans

The second major historical exception to the usual naturalization procedures pertains to immigrants serving in the United States military. This exception, in turn, may be divided into two subcategories: laws

York University Press, 2006), 34.

[96] 46 Stat. 1511.

[97] Beatrice McKenzie, "The Power of International Positioning: The National Women's Party, International Law, and Diplomacy, 1928-34," *Gender and History* 23, no. 1 (2011): 130.

[98] "Convention on the Nationality of Women, O.A.S. Treaty Series No. 4, 38, entered into force Aug. 29, 1934," University of Minnesota Human Rights Library, http://www1.umn.edu/humanrts/instree/uruguay1933.html.

[99] 48 Stat. 797. This law addresses only children born in wedlock. Provisions of the Nationality Act of 1940 and the McCarran-Walter Act of 1952 (codified in §1401(a)(7)[8 U.S.C. 12]) require males to satisfy a lengthier residence requirement than females before U.S. citizenship can be transmitted to out-of-wedlock children born abroad. §1401(a)(7) was challenged as a violation of the Equal Protection Clause, and the Supreme Court heard arguments in *Flores-Villar v. United States* on November 10, 2010. The Court had not issued its *Flores-Villar* opinion at the time of this writing.

that have allowed aliens already eligible for naturalization to expedite their applications for citizenship and ones that have enabled alien veterans of racial groups otherwise ineligible for naturalization to petition for American citizenship despite the standing restrictions of applicable naturalization laws. The existence of such exemptions for immigrant-soldiers has functioned to swell the ranks of America's armed forces during wartime and to reward aliens able and willing to risk their lives in defense of American institutions with the recognition that they have amply demonstrated their fitness for what many among them regard as the highest earthly desideratum.

On July 17, 1862, Congress granted the first dispensation of this sort to alien veterans of the armies of the United States.[100] That law enabled such veterans to become citizens without filing a declaration of intention and upon only one year's residence in the United States, though it required proof of honorable discharge and of good moral character, as became the norm in such legislation. An Act of July 26, 1894 allowed five-year veterans of the U.S. Navy or individuals who had served one full term in the Marine Corps to be admitted as citizens with no previous declaration of intention.[101] Six months after America's entry into World War I in April of 1917, Congress declared that any American who had expatriated himself since August 1, 1914 by swearing an oath of allegiance to and taking up arms for a country allied with the United States in the present hostilities could "reassume and acquire" the trappings of American citizenship merely by swearing an oath of allegiance to this nation.[102] The law constituted an official recognition that the expatriates' actions had not been dishonorable or treasonous but were rather patriotic (if initially suspect) sacrifices warranting the highest national encomiums. A virtually identical law was enacted on April 2, 1942 to cover U.S. citizens who took up arms for England and other of America's eventual allies in World War II after September 1, 1939.[103]

Laws excepting veterans from certain prerequisites to naturalization are typically applicable only for a designated period of time (usually two to five years), and so such legislation has accompanied nearly every major conflict in which the United States has participated since the Civil War. The circumstances surrounding the drafting and pas-

[100] 12 Stat. 597.
[101] 28 Stat. 124.
[102] 40 Stat. 340.
[103] 56 Stat. 198.

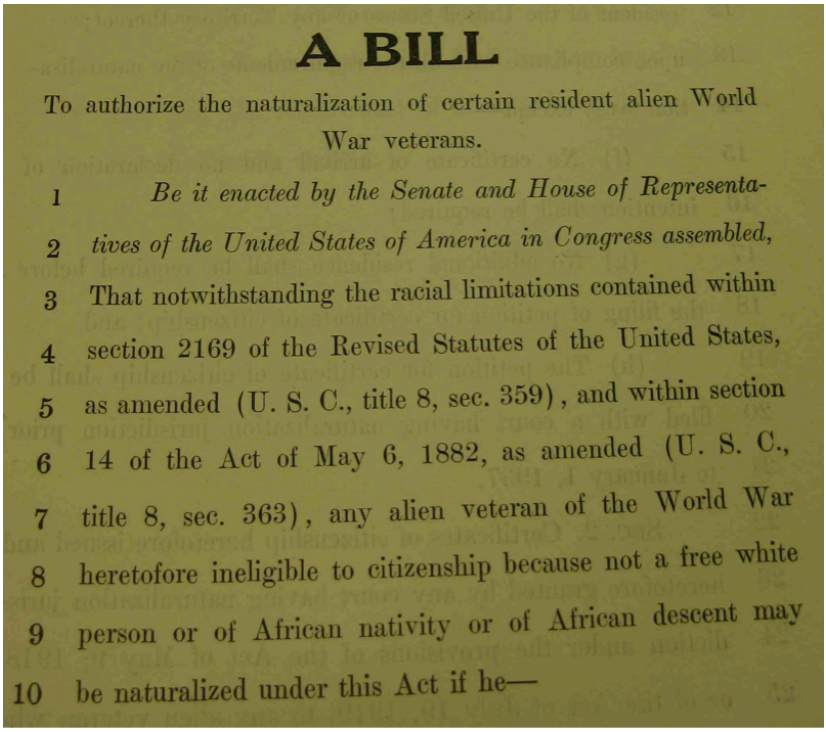
sage of the Act of May 9, 1918 yield a great deal of insight into Congress's propensity to treat alien soldiers favorably.[104] That law waived the five-year residence requirement for three-year veterans of the armed forces, and it provided that aliens who served the United States during World War I (with no distinctions among whites, blacks, Asians, Native Americans, or any other ethnic group) did not need to file a declaration of intention in order to become citizens.

The Selective Service Act of May 18, 1917 had mandated that all men – citizens and noncitizens alike – register with the Selective Service System.[105] Sixteen percent of the approximately 24,000,000 men who registered were aliens, and other nations (especially ones with which the United States was then at war) formally protested against the conscription of their nationals.[106] The May 9, 1918 Act thus envisioned the disappearance of the underlying premise of such diplomatic difficulties; it may also have been intended to secure the loyalty of various ethnic communities in the post-war period by encouraging individual members to view their national civic identity as transcending all parochial ones. It most certainly aimed to increase the cohort of able-bodied American warriors and reward honorably discharged alien veterans for their exemplary service. The fact that even Chinese nationals who had served in the U.S. military during World War I could now theoretically become naturalized (the law spoke of "any person") shows that "racialist definitions of citizenship remained contested and could be dislodged when other ideals of citizenship – in particular, the warrior ideal – better served strategic and ideological needs."[107]

But many federal judges refused to construe a longstanding policy out of existence through the unscientific detection of Congressional implication and intendment. As a result, whether an Asian-American veteran could become naturalized depended entirely upon the disposition of the judge to whom he petitioned, and many of these applications were not even entertained.[108] Nearly two decades later, in considering legislation that would make explicit the apparent racial exemption of May 9, 1918, the House Committee on Immigration and Naturalization regarded the bill as "simply a measure of justice" for those

[104] 40 Stat. 542.
[105] 40 Stat. 76.
[106] Lucy Salyer, "Baptism by Fire: Race, Military Service, and U.S. Citizenship Policy, 1918–1935," *The Journal of American History* 91, no. 3 (2004): 851–2.
[107] *Ibid.*, 849.
[108] *Ibid.*, 861–2.

"who are today very largely products of the environments of the United States, and qualified to serve this country acceptably in peace, as citizens, as they did in war, as aliens."[109] The Nye-Lea Act of June 24, 1935, which passed after years of intense lobbying from the American Legion and other veteran groups, decreed that notwithstanding previous naturalization laws' racial limitations, "any alien veteran of the



A BILL

To authorize the naturalization of certain resident alien World War veterans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding the racial limitations contained within section 2169 of the Revised Statutes of the United States, as amended (U. S. C., title 8, sec. 359), and within section 14 of the Act of May 6, 1882, as amended (U. S. C., title 8, sec. 363), any alien veteran of the World War heretofore ineligible to citizenship because not a free white person or of African nativity or of African descent may be naturalized under this Act if he—

Figure 5: An original printed copy of what soon became the Nye-Lea Act of 1935. National Archives, Center for Legislative Archives. (Author's photo)

World War heretofore ineligible to citizenship because not a free white person or of African nativity" could seek naturalization without filing a declaration of intention and with no additional residence require-

[109] U.S. Congress, House of Representatives, Report of the Committee on Immigration and Naturalization, "Naturalization of Resident Alien World War Veterans," Report No. 823, 74 Cong., 1 sess., April 26, 1935, p. 3.

ment.[110] Nye-Lea, then, was the veterans' McCarran-Walter, which it preceded by seventeen years.

Acts of March 27, 1942 (often referred to as the Second War Powers Act), June 30, 1953, and October 24, 1968 dispensed with many basic procedural requirements and allowed alien veterans who served in the armed forces of the United States during World War II, the Korean War, and the Vietnam War, respectively, to become U.S. citizens forthwith if they so desired.[111] An Act of June 28, 1968 provided for the summary naturalization of surviving spouses of U.S. citizens who died in active military service.[112] This law is particularly curious in that it contemplates the derivative acquisition of American citizenship only after the citizen-soldier's death in the line of duty. A relevant analogy would be a woman immigrant's obtainment of citizenship through marriage after (but not before) her husband's passing in the pre-Cable regime. On November 22, 1994, President Bill Clinton issued Executive Order 12939, which exempted aliens who served in the U.S. military during the Persian Gulf War from the residential requirement for naturalization. In this instance, President Clinton acted pursuant to a Congressional delegation of its authority to "designate … a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force" for purposes of expediting veterans' naturalizations.[113] President George W. Bush classified the period following September 11, 2001 as such a conflict in Executive Order 13269 (signed on July 3, 2002).

Conclusion

I hope that my joint analysis of procedure, eligibility, expatriation, and exceptions has produced a rich mosaic of the conditions Congress has historically imposed upon the most desirable civic inducement America can offer to aliens foreign and domestic. The logistical difficulty of acquiring American citizenship, the classification of petitioners as eligible or ineligible for that merit, the kinds of acts Congress has deemed worthy of denaturalization, and the allowance of exemptions from

[110] 49 Stat. 397; Salyer, "Baptism by Fire: Race, Military Service, and U.S. Citizenship Policy, 1918–1935," 871–2.

[111] 56 Stat. 182; 67 Stat. 108; 82 Stat. 1343.

[112] 82 Stat. 279.

[113] §329 [8 U.S.C. 1440].

Congress's "uniform rule" all offer clues to Congress's historical valuation of a prize whose acquisition it alone may regulate.

From the vantage of today, the unsavory features of superseded naturalization laws rightly continue to linger as stains on America's historical reputation. Their text once ordained what Franklin Roosevelt condemned as "injustice[s]" and "mistakes of the past." But as Congress broadened the pool of eligible petitioners – indeed, at the very moment racial characteristics became immaterial in the naturalization process – it simultaneously demanded more of candidates' hearts and intellects than ever before. The Founders granted themselves the naturalization power and devised procedures that stymied the growth of opposing political factions or reinforced the predominance of their own. Immigration and naturalization remain hotly contested political topics, of course, but subsequent generations of statesmen have reclaimed Congress's naturalization power as an effective tool in their enduring quest to cultivate a model citizenry.

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