

12-1-1978

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### Recommended Citation

Chin Kim & Stephen R. Fox, *The Legal Status of Amerasian Children in Japan: A Study in the Conflict of Nationality Laws*, 16 SAN DIEGO L. REV. 35 (1978).

Available at: <https://digital.sandiego.edu/sdlr/vol16/iss1/4>

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# The Legal Status of Amerasian Children in Japan: A Study in the Conflict of Nationality Laws

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*This article examines the conflict between Japanese and United States nationality laws, focusing on the nearly 4,000 Amerasian children who may become stateless as a result of this conflict. The effects of statelessness include legal, social, and economic hardships. The authors argue that the problems facing these individuals can be eliminated statutorily by either Japan or the United States or by a treaty between the two countries. Further, because the problem of statelessness is not unique to Japan and the United States, the authors urge multinational cooperation.*

Traditionally, the right of a State to define citizenship has been an indispensable element of sovereignty. As an aspect of their territorial supremacy, States have the right not only to grant citizenship but also to deny it.<sup>1</sup> Inevitably, different States have adopted different systems of nationality laws, causing instances of

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1. P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 102, 166 (1956). Arguably, States are limited in their right to refuse to grant nationality by a number of international agreements, most notably the United Nations Universal Declaration of Human Rights, which declares that:

1. Everyone has the right to a nationality.

both statelessness and dual nationality. The problem has been exacerbated in the twentieth century by the increase in international travel and marriage, resulting in more children being born out of their parents' native States.

One of the most striking examples of the hardships that the conflict of nationality laws can cause is that of children born since 1952 in Japan of Japanese-American marriages. In 1974, International Social Service of Japan, Inc. (ISS) published a study of the legal and social problems of almost 4,000 of these Amerasian children.<sup>2</sup> Because the fathers of these children, mostly American servicemen, are not Japanese, the children are not Japanese citizens. Although they are United States citizens from birth, these Amerasian children will lose their citizenship and become stateless unless they reside in the United States continuously for two years between the ages of fourteen and twenty-eight.<sup>3</sup> Many of these children live in fatherless homes under marginal economic circumstances, and because they are not Japanese citizens, they are ineligible for many social welfare benefits, including health insurance. A major illness striking one of these children could be compounded into a financial crisis for its family. Further, if these children allow their United States citizenship to lapse and they become stateless, they will remain in Japan at the sufferance of the Japanese government, and no other government could protect them from discrimination or expulsion.

The legal and social problems confronting these Amerasian children reflect many of the problems that typically result from

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2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

United Nations Universal Declaration of Human Rights, art. 15, G.A. Res. 217A(III), U.N. Doc. A/811 (1948).

2. INTERNATIONAL SOCIAL SERVICE OF JAPAN, INC., RESEARCH ON CHILDREN OF U.S. NATIONALITY IN JAPAN: FOR THE PURPOSE OF PROTECTING THEM FROM LOSS OF NATIONALITY (1974) [hereinafter cited as ISS STUDY] (on file with the *San Diego Law Review*). ISS found 3,913 of these children. *Id.* at 7. Approximately 92% of the children in the ISS study were born in Japan, and eight percent were born in third countries. The legal status of those children born in third countries, however, is substantially the same as that of the Amerasian children born in Japan.

In addition to the children of the ISS study, all of whom are legitimate, additional thousands of illegitimate Amerasian children, the products of liaisons between American servicemen or tourists and Japanese women, live in Japan. Because the fathers of these illegitimates cannot be found or are unknown, the children cannot claim United States citizenship. Japanese law, however, grants Japanese citizenship to children of unknown fathers if their mothers are Japanese. Japanese Nationality Law, Law No. 147 of May 4, 1950, art. 2, § 3 [hereinafter cited as Nationality Law], translated in A. MUTHARIKA, *THE REGULATION OF STATELESSNESS UNDER INTERNATIONAL AND NATIONAL LAW* pt. v (1977). Ironically, the legal status of illegitimate Amerasian children in Japan is thus far less precarious than that of legitimate ones.

3. 8 U.S.C. § 1401(b) (1976).

conflicts between nationality laws, and demand immediate attention. This article will review, briefly the two major conflicting principles of nationality law and their rationales and will discuss the consequences of conflicts between the two principles. It then will examine the nationality laws of Japan and the United States with particular reference to the provisions that affect the children of the ISS study. Much of this discussion will center on the social and legal status of Amerasian children in Japan and on current judicial interpretation of the relevant portions of United States nationality law. The article will conclude by suggesting several unilateral and bilateral means of resolving the nationality problems of these children and multilateral means of reducing the statelessness that results from the conflict of nationality laws.

#### THE INTERNATIONAL LAW OF NATIONALITY

Historically, nationality has served as the link between individuals and States, which are the only recognized actors in international law. States have the right to confer or withhold citizenship as they see fit.<sup>4</sup> As a result, an individual cannot demand protection abroad from his State. Whether to assert such protection is exclusively a decision of the State.<sup>5</sup>

Because municipal law governs the acquisition of nationality, international law demands no uniformity among nationality laws. In practice, however, two principles govern such laws: *jus soli* and *jus sanguinis*.<sup>6</sup> States following *jus sanguinis* grant citizenship to all children whose parents are citizens of the State, wherever the child is born. Nations adopting the principle of *jus sanguinis* characteristically grant the child of a mixed marriage the nationality of its father and an illegitimate child that of its mother.<sup>7</sup> *Jus soli*, on the other hand, grants nationality to all persons born in the territory of a State regardless of the nationality of their parents. *Jus soli* thus creates no distinctions of citizen-

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4. 1 L. OPPENHEIM, INTERNATIONAL LAW § 291, at 640 (8th ed. Lauterpacht 1955); P. WEIS, *supra* note 1, at 166.

5. 1 L. OPPENHEIM, *supra* note 4, § 291, at 640.

6. P. WEIS, *supra* note 1, at 97. The nationality laws of most States incorporate elements of both principles, but one or the other usually predominates. *Id.* The extensive use of these two principles as the framework for municipal nationality laws does not of itself create a norm of international law because congruence of municipal law is not sufficient to create a norm; consensus among States that a norm exists is equally necessary. *See id.* at 98.

7. *Id.* at 97. Japan, and most civil-law States, follow *jus sanguinis*.

ship between the legitimate and the illegitimate, or between children of aliens and children of citizens of the State of birth. It distinguishes, rather, between those born within the territory of a State and those born abroad, and denies nationality to children born abroad even if both parents are citizens.<sup>8</sup>

*Jus sanguinis* and *jus soli* will not create nationality problems for the vast majority of people, but conflicts between the two principles may create nationality problems for those children not born in their parents' native State. For example, a child born in a State following *jus soli*, but whose parents are nationals of a State that follows *jus sanguinis*, acquires two nationalities at birth: that of his parents and that of the State in which he is born. Conversely, a child born in a State following *jus sanguinis*, whose parents are citizens of a State following *jus soli*, acquires no nationality at birth: The State in which he is born cannot grant the child the nationality of its parents without infringing upon the parents' State's sovereignty, and the parents' home State does not grant nationality except as a consequence of birth within the State.<sup>9</sup> Further, should the child remain in a *jus sanguinis* State, its children may be stateless as a consequence of its statelessness.<sup>10</sup> The children of the ISS study illustrate a third type of conflict between the two principles. Their Japanese mothers are nationals of a State that follows primarily *jus sanguinis*; their American fathers are nationals of a State that follows *jus soli*. *Jus sanguinis* generally holds that children of mixed marriages acquire their father's nationality, while *jus soli* denies nationality to

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8. *Id.* Common-law States are the principal adherents of *jus soli*. One commentator suggests that this system of defining nationality is the product of the feudal system of medieval England, in which the individual was tied to the soil. A. MUTHARIKA, *supra* note 2, at 4. Although the dominant principle of United States nationality law is *jus soli*, the provision that will render the Amerasian children in Japan stateless is a variant of *jus sanguinis*. See notes 51-92 and accompanying text *infra*.

9. These examples are of necessity somewhat simplistic but serve to illustrate the results of the simultaneous existence of two essentially inconsistent principles. In many instances, States statutorily mitigate the consequences of the conflicts between the two principles for certain groups, such as diplomats, and few States adhere to "pure" *jus soli* or *jus sanguinis* principles.

10. The legitimate children of a stateless man living in a *jus sanguinis* State will be stateless regardless of the citizenship of his wife because citizenship of children of mixed marriages descends patrilineally in *jus sanguinis* States. Of course, if his wife is a citizen of a third country, the *jus sanguinis* State of birth cannot grant the child its mother's nationality. The legitimate children of a stateless woman will be stateless unless they are born in a *jus soli* State or unless the woman's husband is a national of a *jus sanguinis* State. Again, the example is valid only for purposes of illustration because most nationality laws deviate from "pure" principles to accommodate such situations as these. For further discussion of statelessness from birth, see 1 L. OPPENHEIM, *supra* note 4, § 311.

all children born abroad regardless of their parents' citizenship.<sup>11</sup>

Although conflict of nationality laws creating statelessness from birth is the most common cause of individual statelessness,<sup>12</sup> some persons lose their nationality by other means. The legislatures of some States terminate the nationality of citizens who remain abroad for specified periods of time, inferring an intent to expatriate from the individual's prolonged absence.<sup>13</sup> In other instances, States may terminate nationality for such other reasons as unlawful departure from the State initially.<sup>14</sup> Expiration of nationality is the prospect facing the Amerasian children of the ISS study unless they meet the United States' two-year residency requirement. Only the conflict of nationality laws between Japan and the United States, however, makes the expiration clause a matter of legal and social concern.

The prospective statelessness of 4,000 children of mixed Japanese-American marriages is not the most extensive or the most shocking example of modern statelessness,<sup>15</sup> but it illustrates the

11. The United States deviates from "pure" principles of *jus soli* to the extent of granting citizenship to children born abroad of one citizen and one alien parent. This citizenship is defeasible, however, and is the source of the potential statelessness of Amerasian children.

12. A. MUTHARIKA, *supra* note 2, at 3. A stateless person is one "who is not considered a national by any State under the operation of its laws." Convention Relating to the Status of Stateless Persons, *done* Sept. 28, 1954, art. 1, 360 U.N.T.S. 117. The other causes of individual statelessness, voluntary renunciation and deprivation as a consequence of performing certain acts (such as joining the armed forces of a foreign State or voting in a foreign election), are encountered rarely because few people renounce their nationality without acquiring another and because municipal law may restrict severely the use of the sanction of denationalization. *See, e.g.,* Perez v. Brownell, 356 U.S. 44 (1958); A. MUTHARIKA, *supra* at 2-13; 1 L. OPPENHEIM, *supra* note 4, § 302.

13. 1 L. OPPENHEIM, *supra* note 4, § 302, at 658.

14. P. WEIS, *supra* note 1, at 120.

15. Mass statelessness has been a major political problem of the twentieth century. Vagueness in the terms of some of the treaties ending World War I, and the parties' unwillingness to adjust their nationality laws to accommodate ethnic minorities living in areas that changed sovereignty, created extensive statelessness in central Europe. Between the World Wars, the Soviet Union, Italy, and Germany all denationalized large groups of citizens for political reasons. A. MUTHARIKA, *supra* note 2, at 5-13.

The Japanese-American children of the ISS study are but one example of statelessness resulting from the conflict of nationality laws. The problem of Thai-American children is as extensive. Approximately 4,000 children born of Thai mothers and American serviceman fathers during the Vietnam war are in danger of becoming stateless as the result of a Thai enactment that denies nationality to "those persons born in the Kingdom of Thailand by alien fathers or by alien mothers, but without apparent legal fathers and at that time fathers or mothers

problems inherent in an international order that accepts the two conflicting principles of *jus sanguinis* and *jus soli*. So long as States determine their own criteria for nationality, statelessness as a result of the conflict of nationality laws is inevitable. For the individual, statelessness is undesirable because he may be ineligible for many government services where he lives and because no State is obliged to protect him. For the international community, statelessness is undesirable because the existence of stateless persons can be a source of international friction.<sup>16</sup> A close examination of the logic and operation of the nationality laws of Japan and the United States and of the consequences of maintaining the present dual system of nationality laws will show the hardships that statelessness can create.

#### JAPANESE LAW OF NATIONALITY: *JUS SANGUINIS*

Historically, *jus sanguinis* has been the dominant principle of Japanese nationality law. The first statute regulating nationality, passed in 1873, provided that an alien woman who married a Japanese man acquired Japanese nationality but that a Japanese woman who married an alien man acquired his nationality. This statute also followed customary Japanese law that the child of

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. . . persons who were allowed to reside in the Kingdom of Thailand temporarily." Simon, *Thais to Make GIs' Babies Stateless*, Wash. Post, Dec. 11, 1977, § A, at 25, col. 3. The law may have been intended initially to apply only to the children of Vietnamese refugees, whom the Thai government considered potential security risks, but it has been applied to Thai-American children. *See id.* Whether the law is being applied to the children now is uncertain, *compare id.*, with N.Y. Times, Dec. 4, 1977, at 8, col. 1 (reporting that government officials had changed their interpretation of the law so as to exclude Thai-American children from its operation), but if the Thai government applies the law to the children, they will be denied identity cards, admission to Thai universities, entry into the armed forces and civil service, and the right to own land. Simon, *supra*.

Similarly, officials of the Pearl S. Buck Foundation, which cares for mixed-blood children in several Asian nations, assert that Korean officials have denied nationality to Korean-American children. *Id.*

16. P. WEIS, *supra* note 1, at 166. One authority argues that "it is both illogical and offensive to human dignity that International Law should permit a condition of statelessness," "so long as nationality is the link between the individual and the protection of rights accruing to him by virtue of International Law." 1 L. OPPENHEIM, *supra* note 4, § 313a, at 673. Implicit in this argument is a rejection of two coexisting principles of nationality law; indeed, Lauterpacht advocates a uniform principle of nationality. Such a uniform principle, however, would cause severe domestic political problems, whatever principle were adopted. For example, one can scarcely conceive of the Palestinians accepting an Egyptian adoption of *jus soli* that would seriously weaken their claim to a rightful home in Israel, or of the United States abandoning the *jus soli* principle enshrined in the fourteenth amendment. The right to define the prerequisites for citizenship in the State lies at the core of the concept of sovereignty. Nonetheless, Lauterpacht proposes extensive reforms in the system of determining nationality, discussed at notes 101-09 and accompanying text *infra*. *Id.* § 313a, at 674.

Japanese parents was Japanese, wherever it was born. Although the statute apparently did not mention children of alien parents born in Japan, the customary law did not grant such children Japanese nationality.<sup>17</sup> The more comprehensive nationality statute, enacted in 1899,<sup>18</sup> granted a child Japanese nationality if its father was Japanese at the time of its birth. If the child's father died before it was born and was Japanese at the time of his death, the child also became Japanese.<sup>19</sup> A child whose father could not be ascertained or who had no nationality acquired Japanese nationality if its mother was Japanese.<sup>20</sup> Foundlings born in Japan and children born in Japan of stateless couples also acquired Japanese nationality.<sup>21</sup> These latter two provisions, plus detailed (though restrictive) provisions for naturalization, were the major exceptions to a system otherwise embodying *jus sanguinis*.

The law of 1899 remained in effect until after World War II. The Constitution of 1947 granted the Diet the power to define the conditions of Japanese nationality,<sup>22</sup> which it did in 1950.<sup>23</sup> The new Nationality Law retained all the conditions of acquiring Japanese nationality at birth but created no new ones.<sup>24</sup>

Thus, Japanese law does not grant Japanese citizenship to the legitimate children of Japanese mothers and American fathers because the children do not come within any of the exceptions to *jus sanguinis* in the Japanese Nationality Law. Though these Amerasian children may be born, live their entire lives, and die in Japan, they will remain aliens.

Alienage always deprives an individual of some rights and opportunities that citizens enjoy. The deprivations of the most immediate importance to the Amerasian children of the ISS study are economic.<sup>25</sup> ISS found that only about half of the children

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17. See R. FLOURNOY & M. HUDSON, A COLLECTION OF NATIONALITY LAWS 381 editor's note (1929).

18. Law No. 66 of 1899, translated in R. FLOURNOY & M. HUDSON, *id.* at 382-88.

19. *Id.* art. 1.

20. *Id.* art. 3.

21. *Id.* art. 4.

22. KENPO (Constitution) art. X (Japan), translated in 7 A. BLAUSTEIN & G. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (1973).

23. Nationality Law, note 2 *supra*.

24. Article 2 of the Nationality Law, *id.*, contains only the four means of acquiring Japanese nationality at birth discussed at text accompanying notes 18-21 *supra*.

25. ISS reported that only one-fourth of the Amerasian children it interviewed recalled having experienced any prejudice as a result of their ethnicity. ISS



lived with both parents in 1973; forty-three percent lived in fatherless households, and half of those depended solely on the mother's income.<sup>26</sup> ISS found that most of these households were economically unstable and that the instability was exacerbated by the children's lack of Japanese nationality. Children of foreign nationality are ineligible for many Japanese social welfare programs, most notably health insurance. Almost half of the children that ISS interviewed reported that they had no health insurance.<sup>27</sup> Many of the mothers in fatherless households worked at low-paying jobs,<sup>28</sup> so a major accident or illness could become a financial, as well as a medical, catastrophe that might be averted if the children were eligible for government health insurance.<sup>29</sup>

Educational patterns among the children further illustrate the complexities of the situation. Two-thirds of the children in the ISS study had Japanese-language compulsory education, one-third English. Included among the Japanese-educated were virtually all of the children from fatherless households, who were raised as Japanese.<sup>30</sup> Because these children have never been to their fathers' native country and speak little, if any, English, the cultural barriers to meeting the residency requirement of United States law may be as great as the financial burden of two years' residence in the United States, required for retention of their United States citizenship. For those children who had English-language schooling, the burden will be considerably lighter. Because many of them come from homes in which the father re-

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Study, *supra* note 2, at 24. The most pressing problems facing the children are economic and legal.

26. *Id.* at 2, 18. Eighty-six percent of the fatherless households had lost the father by divorce, separation, or disappearance, most probably the result of cross-cultural tension in the family. *Id.* at 18-20. Four-fifths of the mothers heading fatherless households were employed, contributing further to family instability because the conflicting demands on their time required them to be away from home, unable to supervise young children much of the time.

27. *Id.* at 22. Eligibility for national health insurance depends on the policy of the local government, and since 1973, resident foreign nationals have been eligible for such insurance in the larger prefectures where many of the children live. Thus 27% of the children reported being covered by national health insurance in their prefectures, and 14% reported being covered from other Japanese government sources. *Id.* at 21-22.

28. Among the jobs that the mothers reported holding were bar hostess, clerk, cleaning woman, waitress, and factory worker. *Id.* at 18.

29. Among other programs for which the children were ineligible were assistance to preschool children and physically and mentally handicapped children, medical examinations, and counseling. *Id.* at 19.

The children's lack of Japanese nationality is in many cases only a complicating factor in the instability caused by their fathers' absence. If the children had Japanese nationality, the underlying instability would remain but would be ameliorated by the financial assistance the government provided.

30. *Id.* at 22.

mains, the language and cultural barriers, and presumably the financial burden, will be less formidable.

As these children grow older<sup>31</sup> their legal status as aliens under Japanese law will create further problems if they continue to reside in Japan. Many of the problems will result from operation of the *Horei*, the Japanese conflict-of-laws statute,<sup>32</sup> which requires that the *lex patriae*, the law of a person's nationality, be used to determine the person's legal capacity.<sup>33</sup> Thus, until they lose their United States nationality, the capacity of these children to marry, for example, will be governed by United States rather than by Japanese law.<sup>34</sup> Most of these children have never resided in the United States<sup>35</sup> and a fortiori have no domicile in a state in the United States from which to derive capacity to marry. Japanese courts applying the *Horei* literally thus would deny these children the right to marry so long as they remain United States citizens.

The *Horei*, however, provides that "the law of a foreign country shall not govern if its provisions are contrary to public policy and good morals."<sup>36</sup> Japanese courts have used this provision to avoid harsh consequences in a series of decisions granting divorces to Japanese wives of Filipino husbands.<sup>37</sup> The *Horei* requires divorce to be governed by the law of the husband's nationality at

31. At the time of the ISS study in 1973, the children ranged in age from 21 to less than one year old. *Id.* at 9. The oldest of the children are now 26, and if they have not begun to reside in the United States, they have forfeited their United States citizenship and already are stateless. For the oldest children, then, the legal consequences of statelessness are not a matter of conjecture but are reality.

32. *Horei* (Law Concerning the Application of Laws), Law No. 10 of 1898 (as amended) [hereinafter cited as *Horei*], translated in Ikehara, *Nationality in the Private International Law of Japan*, 7 JAP. ANN. INT'L L. 8, 20 (1963).

33. *Id.* art. 3, § 1. However, an alien who performs an act in Japan for which he lacks capacity under his national law, but who would have capacity to perform the act under Japanese law, is deemed to have capacity. *Id.* art. 3, § 2.

34. *Id.* art. 13, § 1 provides that the requirements for marriage are governed by the parties' nationality but that the formal requirements are governed by the place of celebration. Because the states of the Union determine their own marriage requirements, no United States law would govern the capacity of those children who do not have a United States domicile in which to marry. Further, because the conflict-of-laws principles of the state of domicile would govern, the lack of domicile would prevent a Japanese court from applying its own law through *renvoi*.

35. Sixty-nine percent of those interviewed had never lived in the United States. ISS STUDY, *supra* note 2, at 23.

36. *Horei*, *supra* note 32, art. 30.

37. These decisions are discussed in Ikehara, *Nationality in the Private International Law of Japan*, 7 JAP. ANN. INT'L L. 8, 10 (1963).

the time the grounds arose provided that the facts are also grounds for divorce under Japanese law.<sup>38</sup> Filipino law, however, does not allow divorce, so the Japanese courts have had to choose between following the principle of *lex patriae* to deny the divorce and invoking the public policy exception of the *Horei* to apply the Japanese *lex fori*. In cases in which the last matrimonial domicile was Japan and one of the spouses continued to reside in Japan, the courts have held that following Filipino law would be contrary to the Japanese policy of granting divorce and have followed Japanese law.<sup>39</sup> The lack of domicile in the United States does not come within the literal provisions of the public policy exception to the *Horei* because it is not a provision of United States law that violates public policy and good morals; rather, the lack of an applicable provision denies Amerasians the right to marry. Nonetheless, the similarity of the hardship to that suffered by Japanese wives of Filipino husbands makes it likely that Japanese courts will invoke the exception and allow Amerasians to marry.<sup>40</sup>

This reasoning should govern courts that must decide questions involving the capacity of children of mixed marriages.<sup>41</sup> The *Horei* requires *lex patriae* to determine the effect of a marriage,<sup>42</sup> the legitimacy of children,<sup>43</sup> property rights of spouses,<sup>44</sup> legal relations between parents and children,<sup>45</sup> intestate succession,<sup>46</sup> and the creation and effect of wills.<sup>47</sup> If Japanese courts were to apply United States law, the lack of a United States domicile necessarily would deny Amerasians any legal capacity so long as they retained their United States nationality.

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38. *Horei*, *supra* note 32, art. 16.

39. Had the courts followed Filipino law, several plaintiffs whose husbands had deserted them would have been unable to remarry.

40. The hardship suffered by Amerasians would be harsher, if anything, than that suffered by the Japanese-Filipino wives. Had the courts applied the *Horei* strictly, they would have denied the wives the opportunity to begin second families. If they apply it to Amerasians, they will deny them the opportunity to begin their first.

41. If any courts have decided such questions, their decisions are not reported in the literature on the subject that appears in English.

42. *Horei*, *supra* note 32, art. 14. The *lex patriae* to be applied is that of the husband, so this provision will not directly affect girls of mixed parentage.

43. *Id.* art. 17. Again, the *lex patriae* is patrilineal.

44. *Id.* art. 15. The *lex patriae* to be applied is that of the husband at the time of the marriage.

45. *Id.* art. 20. The father's nationality, again, determines the applicable law.

46. *Id.* art. 25.

47. *Id.* art. 26, § 1, provides that the substantive law of the testator's nationality governs the effect of his will, but § 3 allows the jurisdiction where the testator makes or revokes a will to impose its formal requirements.

Although the Japanese Nationality Law raises many problems for children of mixed parentage by following *jus sanguinis* principles; it deviates from "pure" *jus sanguinis* principles in one important particular: It grants Japanese nationality from birth to children of Japanese mothers and stateless fathers.<sup>48</sup> This deviation may create nationality problems for the offspring of Amerasian men, best illustrated by the following hypothetical situation: The son of an American father and a Japanese mother marries a Japanese woman when he is twenty-two years old. The couple has its first child two years later, and a second five years after the first, when the Amerasian man is twenty-nine. When the first child is born, the man is still a United States citizen, so the child cannot acquire Japanese nationality.<sup>49</sup> When the second child is born, however, the father has become stateless, and his child acquires Japanese nationality at birth. By deviating from "pure" principles of *jus sanguinis*, the Japanese Nationality Law may avoid perpetuating statelessness in many instances.

Ironically, many of the nationality problems that arise under the *Horei* will disappear for those Amerasians who allow their United States nationality to lapse, because the *Horei* provides that for persons who have no nationality, the law of domicile is considered the law of nationality.<sup>50</sup> Those Amerasian children who allow their United States nationality to lapse will moot all questions of international conflict of laws and determinations of whether the lack of an applicable United States law violates Japanese public policy. Becoming stateless, however, will have other, more serious, consequences. A consideration of applicable United States nationality law will help to emphasize the seriousness of these consequences.

#### UNITED STATES NATIONALITY LAW

All United States nationality law derives from two provisions of the Constitution: the fourteenth amendment's provision that

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48. Nationality Law, *supra* note 2, art. 2, § 3.

49. The child will not derive United States citizenship through its father, however. 8 U.S.C. § 1401(a)(7) (1976) requires a child born abroad of an alien and a United States citizen to live in the United States for 10 years, including at least five after his fourteenth birthday, before he can transmit United States citizenship to his children. Our hypothetical father, who cannot satisfy the residency requirement to retain his own citizenship, cannot transmit citizenship to his offspring. They will be born stateless.

50. *Horei*, *supra* note 32, art. 27, § 2.

"[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States"<sup>51</sup> and Congress's power to "establish an uniform Rule of Naturalization."<sup>52</sup> The fourteenth amendment thus constitutionalizes the principle of *jus soli* although Congress has added significant elements of *jus sanguinis* to the statutory scheme of citizenship since its inception.<sup>53</sup> Until the Citizenship and Naturalization Act of 1934<sup>54</sup> granted American women the right to transmit United States nationality to their children born abroad,<sup>55</sup> however, only American fathers could transmit United States citizenship to children born abroad.<sup>56</sup>

The 1934 Act also introduced an important new concept to United States nationality law: citizenship subject to a condition subsequent. Although the Act granted citizenship from birth to children born abroad of one United States citizen and one alien, Congress was concerned that such children might be subject to divided loyalties.<sup>57</sup> The Act therefore required them to live in the United States for at least five years immediately before their eighteenth birthday and to take an oath of allegiance within six months of their twenty-first birthday to retain their citizenship.<sup>58</sup> Subsequent amendments have eliminated the oath of allegiance and have liberalized the residency requirements so that the statute, now section 301(b) of the Immigration and Nationality Act, requires residence in the United States for two years between the ages of fourteen and twenty-eight to retain United States citizenship.<sup>59</sup>

The constitutional basis for granting citizenship subject to a condition subsequent is not readily apparent, and at least one commentator has suggested that "history is non-committal" about

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51. U.S. CONST. amend. XIV, § 1.

52. *Id.* art. I, § 8, cl. 4.

53. The first Naturalization Act, that of March 26, 1790, provided that "the children of citizens of the United States, that may be born beyond the sea, or out of the limits of the United States, shall be considered as natural-born citizens." Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795).

54. Ch. 344, 48 Stat. 797 (subsequently amended).

55. *Id.* § 1.

56. 3 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 13.3c, at 13-15 (rev. ed. 1978); see *Montana v. Kennedy*, 366 U.S. 308 (1961).

57. See H.R. REP. NO. 131, 73d Cong., 1st Sess. 2 (1933); S. REP. NO. 865, 73d Cong., 2d Sess. 2 (1933).

58. Ch. 344, § 1, 48 Stat. 797 (current version at 8 U.S.C. § 1401(b) (1976)). The Act provided that the right of citizenship "shall not descend" unless the child satisfied these conditions, but the Attorney General construed the grant of citizenship to vest at birth, subject to defeasance if the child did not meet the conditions. 38 OP. ATT'Y GEN. 10 (1934).

59. 8 U.S.C. § 1401(b) (1976).

congressional power to expatriate citizens.<sup>60</sup> The Supreme Court, however, has held that Congress does have the power to grant conditional citizenship. A short review of three recent major decisions is instructive to show the considerations the Court has deemed important.

In *Schneider v. Rusk*<sup>61</sup> the Court held unconstitutional a provision of the Immigration and Nationality Act that withdrew citizenship for any naturalized citizen who resided in the State of his former nationality or of his birth for three consecutive years.<sup>62</sup> The Government argued first that the provision was a reasonable exercise of congressional power over foreign relations because naturalized citizens often retain citizenship in their native States and because serious conflict with foreign States could arise if the United States tried to protect those citizens abroad. Second, the Government argued that three years' residence in the naturalized citizen's native land tends to attenuate his allegiance to the United States. The Government argued that distinguishing between native-born and naturalized citizens as classes, without regard to individual circumstances, is not invidious. Rather, the Government argued that expatriation is a reasonable alternative to withdrawing diplomatic protection from such citizens.<sup>63</sup>

The Court disagreed, "start[ing] from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive."<sup>64</sup> Congressional power to limit the activities of naturalized citizens, the Court held, is not unlimited. A limitation on the activities of naturalized citizens is constitutional only if the means, withdrawal of citizenship, is reasonably calculated to effect the end that is within congressional power: avoiding embarrassment in foreign relations.<sup>65</sup> The Court held that discriminating against naturalized citizens by so severely limiting their right to live abroad created a second-class citizenship. "Living abroad," the Court concluded, "whether the citizen be naturalized or native born, is no badge of lack of al-

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60. Comment, *Expatriation Law in the United States: The Confusing Legacy of Afroyim and Bellei*, 13 COLUM. J. TRANSNAT'L L. 406, 420 (1974).

61. 377 U.S. 163 (1964).

62. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 352, 66 Stat. 163.

63. 377 U.S. at 165.

64. *Id.*

65. *Id.* at 166 (quoting *Perez v. Brownell*, 356 U.S. 44, 60 (1958)).

legiance . . . .”<sup>66</sup>

Three years after *Schneider*, the Supreme Court decided *Afroyim v. Rusk*.<sup>67</sup> The issue in *Afroyim* was whether Congress could expatriate a citizen for voting in a foreign election. Mr. Justice Black, writing for a five-member majority, rejected the theory that Congress has any general power to expatriate a citizen without his consent.<sup>68</sup> The Court rejected the *Schneider* test in favor of an absolute bar to involuntary expatriation. To follow the logic of *Schneider* and its predecessors that Congress may expatriate a citizen whose activities may impede the conduct of United States foreign policy, Justice Black argued, would be to allow Congress to “abridge,” “affect,” “restrict the effect of,” and “take . . . away” citizenship in contravention of the fourteenth amendment.<sup>69</sup>

*Afroyim* is the broadest interpretation of the nature of citizenship and the greatest restriction on congressional power to abridge the right. The logic of *Afroyim* suggests that Congress is powerless to take away citizenship absent a citizen’s unambiguous action showing an intent to expatriate himself. The result in *Schneider*, that mere absence from the United States was insufficient to show an intent to expatriate oneself, together with the reasoning of *Afroyim*, suggest that section 301(b) of the Immigration and Nationality Act is unconstitutional because it deprives the children of one United States citizen and one alien of their citizenship if they do not come to the United States for two years.

The plaintiff in *Rogers v. Bellei*,<sup>70</sup> which the Supreme Court decided four years after *Afroyim*, and the three-judge court that ini-

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66. *Id.* at 169. In *Perez v. Brownell*, 356 U.S. 44 (1958), in which the Court first formulated the due process test it applied in *Schneider*, the issue before the Court was congressional power to expatriate a citizen for voting in a foreign election. The Court held that such expatriation did not violate due process. The distinction between *Perez* and *Schneider* thus seems to be the nature of the expatriating act: Congress may expatriate a citizen for committing a voluntary political act that affirmatively shows allegiance to a foreign State, but it cannot expatriate a citizen for committing passive, apolitical acts, without more. The Court, however, overruled *Perez* in *Afroyim v. Rusk*, 387 U.S. 253 (1967), and upheld expatriation for continued residence abroad in *Rogers v. Bellei*, 401 U.S. 815 (1971), so the suggested distinction is not supported by current law. Commentators, however, have criticized *Bellei* severely, so the distinction may regain some validity if the Supreme Court overrules *Bellei*. See, e.g., Schwartz, *American Citizenship After Afroyim and Bellei: Continuing Controversy*, 2 HASTINGS CONST. L.Q. 1003, 1020-27 (1975); Comment, *Expatriation Law in the United States: The Confusing Legacy of Afroyim and Bellei*, 13 COLUM. J. TRANSNAT’L L. 406 (1974); Casenote, *Problems of the Foreign-Born Citizen*, 11 COLUM. J. TRANSNAT’L L. 304 (1972).

67. 387 U.S. 253 (1967).

68. *Id.* at 257.

69. *Id.* at 267.

70. 401 U.S. 815 (1971).

tially heard *Bellei*<sup>71</sup> both relied heavily on *Afroyim* and *Schneider*. The trial court used the logic suggested in the preceding paragraph to hold section 301(b) unconstitutional, but the Supreme Court reversed. Mr. Justice Blackmun, writing for the Court, implicitly reverted to the ends-means due process test of *Schneider* and earlier decisions when he noted that "Congress has an appropriate concern with problems attendant on dual nationality"<sup>72</sup> and that "the [statutory] solution to the dual nationality dilemma . . . surely is not unreasonable. It may not be the best that could be devised, but . . . we cannot say that it is irrational or arbitrary or unfair."<sup>73</sup> In holding section 301(b) constitutional, the Court interpreted the citizenship clause of the fourteenth amendment, granting citizenship to "all persons born or naturalized in the United States,"<sup>74</sup> quite narrowly:

The central fact, in our weighing of the plaintiff's claim to continuing and therefore current United States citizenship, is that he was born abroad. He was not born in the United States. He was not naturalized in the United States. And he has not been subject to the jurisdiction of the United States. All this being so, it seems indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff *Bellei*. He simply is not a Fourteenth-Amendment-first-sentence citizen.<sup>75</sup>

In addition to citing congressional concern with problems of dual nationality, the Court cited Congress's history of "careful consideration" of the statutory scheme. The Court also noted that "[a] contrary holding would convert what is congressional generosity into something unanticipated and obviously undesired by Congress"<sup>76</sup> to support its conclusion that section 301(b) was constitutional. Two arguments were particularly important to the Court. First, the Court felt that "it does not make good constitutional sense, or comport with logic, to say, on the one hand, that Congress may impose a condition precedent, with no constitutional complication, and yet be powerless to impose precisely the same condition subsequent."<sup>77</sup> Second, the Court recognized the plaintiff's lack of attachment to the United States and that he did

71. *Bellei v. Rusk*, 296 F. Supp. 1247 (D.D.C. 1969), *rev'd sub nom. Rogers v. Bellei*, 401 U.S. 815 (1971).

72. 401 U.S. at 831.

73. *Id.* at 833.

74. U.S. CONST. amend. XIV, § 1.

75. 401 U.S. at 827. The trial court characterized as "niggardly" the Government's interpretation of § 301(b), which the Supreme Court adopted. 296 F. Supp. at 1249.

76. 401 U.S. at 833, 835.

77. *Id.* at 834.



not become stateless but retained his Italian citizenship.<sup>78</sup> The concluding sentence of the Court's opinion was thus narrow: "We hold that § 301(b) has no constitutional infirmity *in its application to plaintiff Bellei*."<sup>79</sup>

Although *Bellei* appears to settle the constitutionality of section 301(b), three theories might support another challenge to the statute by an Amerasian who has not or cannot satisfy the residency requirement.<sup>80</sup> The first theory derives from *Bellei*'s return to the fifth amendment due process test of *Schneider v. Rusk*. In *Schneider*, the Court noted that although the fifth amendment contains no equal protection clause, its due process clause prevents the most unjustifiable kinds of discrimination.<sup>81</sup> Among the classifications that the Court has held to require the most stringent judicial scrutiny are those discriminating on the basis of a person's status at birth. Two series of decisions in the past decade show the Court's reluctance to accept any discrimination based on either legitimacy<sup>82</sup> or alienage.<sup>83</sup> Just as a person cannot choose to be born legitimate or to be born a citizen, so a person cannot choose whether to be born a member of the "discrete and insular"<sup>84</sup> group of citizens to which section 301(b) applies. Thus, a new and intensive judicial review of section 301(b) may be appropriate.

However, all of the Court's illegitimacy decisions and all but two of its alienage decisions have concerned challenges to state, rather than to federal, regulations that discriminated on the basis

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78. *Id.* at 836.

79. *Id.* (emphasis added).

80. The Amerasian children whom ISS studied are not the only potential challengers of § 301(b). ISS reported that from 1962 to 1971, 327,460 children were born of one United States citizen and one alien parent. Twenty-five percent of these children were affected by the residency requirement, and 1,243 persons actually lost their United States citizenship because of § 301(b) during the period. ISS STUDY, *supra* note 2, at 42.

81. *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

82. See *Trimble v. Gordon*, 430 U.S. 762 (1977); *Mathews v. Lucas*, 427 U.S. 495 (1976); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *New Jersey Welfare Rights Org'n v. Cahill*, 411 U.S. 619 (1973); *Gomez v. Perez*, 409 U.S. 535 (1973); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Labine v. Vincent*, 401 U.S. 532 (1971); *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968).

83. See *Foley v. Connelie*, 434 U.S. 866 (1978); *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Examining Bd. of Engineers, Architects, and Surveyors v. Flores de Otero*, 426 U.S. 752 (1976); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Mathews v. Diaz*, 426 U.S. 67 (1976); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973).

84. "Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate." *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

of status at birth. The Court has been far more willing to uphold federal regulations because of Congress's powers to regulate immigration and to control foreign affairs.<sup>85</sup> Thus, in *Mathews v. Diaz*,<sup>86</sup> the Court upheld the portion of the Social Security Act<sup>87</sup> restricting eligibility of resident aliens for Medicare to those who had lived in the United States for at least five years. And in *Hampton v. Mow Sun Wong*,<sup>88</sup> the Court recognized that Congress and the President could exclude aliens from the federal civil service, though the Court held that due process required the decision to exclude aliens to be made at a level of authority comparable to that which makes immigration policy.<sup>89</sup> Thus, the Court's inhospitality to discrimination against aliens does not extend to federal regulations intimately bound up with foreign policy. The same exception probably would extend to section 301(b) because of the foreign policy implications of dual nationality.

A second, more promising theory that might support a new challenge to section 301(b) is the weakness of the *Bellei* Court's narrow interpretation of the fourteenth amendment's extension of citizenship to persons "naturalized in the United States." Justice Blackmun attached a purely geographical meaning to this phrase to hold that *Bellei* had statutory rather than constitutional citizenship. Justice Black, in dissent, argued strongly that the phrase carried no such geographic limitations, but that it included any acquisition of citizenship other than by birth within the United States.<sup>90</sup> Although this interpretation commanded only three votes in *Bellei*, it has considerable support in prior decisions of the Court<sup>91</sup> and in the history of the adoption of the four-

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85. "[A] division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business." *Mathews v. Diaz*, 426 U.S. 67, 85 (1976).

86. 426 U.S. 67 (1976).

87. 42 U.S.C. § 1395o(2)(A)(ii) (1976).

88. 426 U.S. 88 (1976).

89. *Id.* at 116. Subsequently, President Ford limited the civil service to citizens and nationals of the United States. Exec. Order No. 11,935, 3 C.F.R. § 146 (1977). For a discussion of *Mow Sun Wong*, see Comment, *Federal Civil Service Employment: Aliens Need Not Apply*, 15 SAN DIEGO L. REV. 171 (1977). The Seventh Circuit has upheld the constitutionality of Exec. Order No. 11,935, *supra*, in *Vergara v. Hampton*, 581 F.2d 1281 (7th Cir. 1978). See 47 U.S.L.W. 2161 (1978).

90. 401 U.S. at 840 (Black, J., dissenting).

91. In *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898), the Court held that

teenth amendment.<sup>92</sup> Used in conjunction with the due process arguments discussed above, it may overcome the decision in *Bellei*.

The third and most persuasive theory for not applying section 301(b) to stateless persons comes from the Court's opinion in *Bellei*. One of the Court's major concerns there was dual nationality. The Court noted that *Bellei* retained his Italian citizenship and carefully limited its holding to the facts presented. Certainly, the congressional concern with dual nationality that the Court noted is irrelevant if the plaintiff has no second nationality. The Court's reasoning was similar to the due process test of *Schneider*, which requires at least some congruence between ends sought and means adopted. Applying section 301(b) to dual nationals may reduce friction between the United States and the dual nationals' native countries; applying it to otherwise stateless people cannot reduce tension, but can only exacerbate it as other nations are forced to accept those whom the United States renders stateless.

Congressional concern with the friction that dual nationality may cause led to the enactment of section 301(b), but the statute lessens international tension at a cost of significant individual hardship. Amendments to section 301(b) could reduce or eliminate the hardships that now exist without creating additional tension between two States claiming a dual national's allegiance. These amendments and other possible legal changes that would reduce statelessness arising from the conflict of nationality laws will be considered after further discussion of the consequences of statelessness.

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The Fourteenth Amendment . . . contemplates two sources of citizenship, and only two: birth and naturalization. Citizenship by naturalization can only be acquired . . . under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. . . . A person born out of the jurisdiction of the United States can only become a citizen by being naturalized . . . .

92. The original language of the fourteenth amendment granted citizenship to all people born in the United States or "naturalized by the laws thereof." It has been argued that the language adopted was meant to have equal effect. H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 83-89 (1908). See Casenote, *Problems of the Foreign-Born Citizen*, 11 COLUM. J. TRANSNAT'L L. 304, 312 (1972).

Commentators have criticized the result and the logic of *Bellei* extensively, lending further support to the plausibility of a successful attack on it. *E.g.*, J. NOWAK, R. ROTUNDA, & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 901-02 (1978); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 279-80 (1978); Hertz, *Limits to the Naturalization Power*, 64 GEO. L.J. 1007, 1027-29 (1976); Wasserman, *The Involuntary Expatriation of Statutory Americans*, 5 INT'L LAW. 413 (1971); Comment, *Expatriation Law in the United States: The Confusing Legacy of Afroyim and Bellei*, 13 COLUM. J. TRANSNAT'L L. 406 (1974); Casenote, *Problems of the Foreign-Born Citizen*, 11 COLUM. J. TRANSNAT'L L. 304 (1972).

### THE CONSEQUENCES OF STATELESSNESS

The consequences under municipal law if an individual allows his United States citizenship to lapse are immediate and substantial: Under Japanese law, an alien may lack capacity to perform legal acts, and aliens and stateless people are ineligible for many social welfare programs.<sup>93</sup> Under United States law, aliens may be ineligible for employment in the federal civil service. Congress is free to impose other restrictions on aliens. Amerasians may be unable to transmit the right to United States citizenship to their children even before their citizenship lapses.<sup>94</sup> The consequences of statelessness under international law, while not as immediate, may be far more serious to the Amerasian children that ISS studied.

The most important consequence of statelessness under international law is "[n]ot the loss of any specific rights . . . , but the loss of a community willing and able to guarantee any rights whatsoever."<sup>95</sup> Those children of mixed marriages who remain in Japan will do so at the sufferance of the Japanese government. Though expulsion or other harsh treatment seems unlikely now, it is not implausible that severe economic or political problems could lead to discrimination against or expulsion of aliens. In such a situation no State would be obliged to accept stateless Amerasians, and no State would be competent to protect them if they remained in Japan.<sup>96</sup>

The seeming harshness of this prospect may be mitigated by the recognition that international law grants basic human rights—life, liberty, and freedom of conscience—without benefit of protection by a State.<sup>97</sup> However, "basic human rights" are very limited. Lauterpacht, for example, maintains that "it cannot be considered maltreatment if a State compels individuals destitute of nationality either to become naturalized or to leave the country."<sup>98</sup> Further, no State may be competent to assert rights of

93. See text accompanying notes 25-35 *supra*.

94. See note 49 and text accompanying notes 85-89 *supra*.

95. H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* 297 (1966).

96. One authority suggests, however, that for a State to expel stateless persons infringes the sovereignty of the receiving State. A. MUTHARIKA, *supra* note 2, at 174.

97. *Id.* at 15.

98. 1 L. OPPENHEIM, *supra* note 4, § 312, at 668 n.4.

stateless persons absent gross violations of human rights.<sup>99</sup>

Although the consequences of statelessness occurring under municipal law may be more immediate, the consequences under international law are potentially far more devastating. Japan need not, under international law, accord stateless persons equal or even fair protection under its laws. Japan may expel them at will, and because they are citizens of no other State, no other State is obligated to accept them. The ultimate appeal of a stateless person cannot be to a legal system, for he has none to protect him. It must be to a moral system, to the humanity of the State in which he finds himself.<sup>100</sup>

#### SOLUTIONS TO THE DILEMMA

Reducing the amount of statelessness that occurs as the result of the conflict of nationality laws may be accomplished at several levels. At a minimum, States may act unilaterally to facilitate naturalization of individuals. States also may act unilaterally to reduce the number of instances of statelessness that their own nationality laws cause. They may act bilaterally to eliminate the statelessness caused by specific conflicts in nationality laws. Ultimately, they could eliminate all statelessness caused by the conflict of nationality laws through multilateral agreements creating a single system of nationality law.

Because most of the children of the ISS study are culturally Japanese, the least disruptive solution to their nationality problems is to become naturalized Japanese citizens. The Japanese Nationality Law has more lenient requirements for naturalization of children of Japanese citizens than for others. A child must have been born in Japan, have lived in Japan for three years, and be "of upright conduct."<sup>101</sup> Most other applicants must have five years' consecutive residence and independent means of

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99. A. MUTHARIKA, *supra* note 2, at 15. Lauterpacht, in 1 L. OPPENHEIM, *supra* note 4, § 292, at 640-41, suggests that a State is entitled to treat its nationals and stateless persons within its territory at its discretion. A "right of intervention" to protect human rights may exist, but Lauterpacht argues that States are most reluctant to assert it unless human rights are "ruthlessly trampled upon." France, Great Britain, and Russia intervened in the Greco-Turkish War in 1824 to stop atrocities being committed against Turkish Christians. *Id.* § 137. The Charter of the United Nations contains rudimentary guarantees of a collective right of intervention. U.N. CHARTER art. 2, para. 7. See 1 L. OPPENHEIM, *supra* §§ 137, 168*f.*

100. Lauterpacht suggests that States have an obligation under the general principles of the United Nations Charter to respect human rights and fundamental freedoms, but that beyond such treaty obligations and "restraints laid down by morality," they may maltreat stateless individuals to any extent. 1 L. OPPENHEIM, *supra* note 4, § 291, at 640.

101. Nationality Law, *supra* note 2, art. 4, § 3; art. 5, § 3; art. 6, § 5.

support.<sup>102</sup> Although the Amerasian children that ISS studied are eligible for naturalization, the Japanese Minister of Justice has discretion with respect to each application,<sup>103</sup> so no child has a right to be naturalized.

Case-by-case naturalization will treat only the symptoms of Amerasian children's statelessness, not the causes. Several unilateral means of preventing future instances of statelessness are available to both the United States and Japan. The Japanese could amend their Nationality Law to grant citizenship to children who have only one Japanese parent, and either nation could amend its nationality laws to allow parents of different nationalities to choose one or the other for each of their children.<sup>104</sup> Such amendments would represent major departures from the Japanese law of *jus sanguinis*, however, and could disrupt the statutory scheme severely.

In comparison, section 301(b) has a history of amendment and is a relatively minor feature of United States nationality law. Either of two amendments would resolve many of the problems of both *Bellei* and the conflict of nationality laws. First, Congress could revise section 301(b) to grant citizenship to children born abroad of a United States parent and an alien only after they reside in the United States for two years between the ages of fourteen and twenty-eight, thus replacing the existing condition subsequent with a condition precedent.<sup>105</sup> Justice Blackmun in *Bellei* noted that such a requirement would present "no Constitutional complication" and held that the condition subsequent also presented no constitutional problem.<sup>106</sup> None of the doubt about the validity of involuntary expatriation that *Bellei* has spawned would arise by substituting a condition precedent. Further, Congress could grant preferential treatment to those children of one United States citizen parent who elect to become United States citizens, similar to the preferential treatment it now grants to

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102. *Id.* art. 4, §§ 1, 4.

103. *Id.* art. 3, § 2; art. 6.

104. The Korean Democratic People's Republic, for example, allows a North Korean living abroad and his or her spouse to agree on the nationality of their children who are born abroad. See Nationality Law of October 9, 1963, art. 5, translated in Kim, *North Korean Nationality Law*, 6 INT'L LAW. 324, 325 (1972).

105. See notes 57-60 and accompanying text *supra*.

106. *Rogers v. Bellei*, 401 U.S. 815, 834 (1971). See text accompanying note 77 *supra*.

alien wives of citizens.<sup>107</sup>

Second, Congress could amend section 301(b) to naturalize only those children of one United States citizen and one alien who do not acquire a second nationality by descent from the alien parent or from *jus soli* in the State in which born. Congress's concern historically has been with the conflicting loyalties and international friction that dual nationality might cause. Absent dual nationality, loyalties cannot conflict, and granting United States nationality only when statelessness otherwise would result does not conflict with the congressional purpose of reducing potential sources of international friction.

Although amendment of the nationality laws of Japan and the United States could eliminate the cause of the potential statelessness of Amerasian children, politics may make such a possibility unlikely. The two governments could achieve many of the same results by treaty or by executive agreement. While such agreements might not change the legal status of the children, they could mitigate the effects of statelessness by according the children some of the more important social and economic benefits of citizenship. The United States has concluded similar treaties dealing with other conflicts between nationality laws, such as the agreement with France<sup>108</sup> following World War II in which each nation accepted service by dual nationals in the other's armed forces as satisfaction of its own wartime military obligation. In the case of Japanese-American conflict of nationality laws, each nation could extend to those citizens of the other who have one parent from each nation the same rights to social services as its own citizens enjoy. If appropriate, the United States could accompany such an agreement with aid to offset the additional costs that Japan might incur.

Naturalization and unilateral and bilateral action can have only limited success at eliminating statelessness that results from the conflict of nationality laws. So long as *jus sanguinis* and *jus soli* coexist, bilateral and unilateral actions can resolve only specific conflicts, not the underlying cause. The most radical, but thorough, solution proposed to eliminate the conflict of nationality laws is the adoption of a single, universal system. Lauterpacht, in his edition of Oppenheim's *International Law*, proposes that everyone be entitled to the nationality of the State of his birth un-

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107. 8 U.S.C. § 1430 (1976).

108. Military Obligations of Certain Persons Having Dual Nationality, Feb. 25, 1948, United States-France, 62 Stat. 1950, T.I.A.S. No. 1756. Reciprocal acceptance of military service by dual nationals was extended to include service in World War I in a similar agreement. Military Obligations of Certain Persons Having Dual Nationality, Dec. 22, 1948, United States-France, 62 Stat. 3621, T.I.A.S. No. 1876.

less on attaining majority he chooses his parents' nationality.<sup>109</sup>

As a corollary, Lauterpacht advocates eliminating all expatriation, whether voluntary or involuntary, unless the person simultaneously acquires a new nationality. This proposal, presumably to be implemented by either multilateral treaty or municipal statute, realistically reflects the needs of most people who have either two nationalities or none as the result of conflict of nationality laws. Those persons born outside their parents' native State who return early in their childhood might legally be aliens in their homeland until they reach majority, but allowing parents a choice between the States of birth and of home for the child's nationality could eliminate such hardships. A uniform system of nationality laws such as Lauterpacht advocates would eliminate statelessness resulting from the conflict of nationality laws. However, because States guard their power to define the prerequisites for citizenship so carefully and because citizenship is so often a divisive political issue, uniformity must remain an ideal rather than a realistic goal.

#### CONCLUSION

Increased mobility in the twentieth century has made possible more international marriages than ever before. Among the attendant political and legal problems has been the inevitable statelessness or dual nationality of children born outside their parents' native States. The conflict between systems based on *jus soli* and *jus sanguinis* produces instances of statelessness. The 4,000 children of the ISS study illustrate the problem well: They are the victims of their inheritance, powerless to eliminate the source of their statelessness.

Elimination of the statelessness that results from the conflict of nationality laws nonetheless is possible. Naturalization and unilateral modification of nationality laws will eliminate individual cases and causes of statelessness. Bilateral treaties may elimi-

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109. 1 L. OPPENHEIM, *supra* note 4, § 313a, at 674. During the twentieth century, many efforts have been made to reduce statelessness and its effects, but most have been limited to specific groups of stateless persons, primarily refugees. See the discussion in P. WEIS, *supra* note 1, at 161. Additionally, efforts have been made to reduce the statelessness resulting from the conflict of nationality laws by encouraging States to adopt uniform nationality laws and to enter into international agreements to reduce statelessness. See Mutharika, *International Law and Loss of Nationality*, 3 E. AFR. L. REV. 205, 214 (1970).



nate some effects. However, so long as the international order accepts two inconsistent systems of nationality laws, some statelessness is inevitable. Only multilateral agreement on a common system of nationality law can prevent future legal, economic, and social disabilities such as the children of the ISS study suffer.

#### ADDENDUM

After this article had gone to press, Congress repealed section 301(b) of the Immigration and Nationality Act, which contained the two-year residency requirement for those children born abroad of one United States citizen and one alien.<sup>110</sup> Henceforth, children born under such circumstances will have indefeasible United States citizenship provided that the citizen parent had been physically present in the United States for ten years, at least five of which were after the age of fourteen.<sup>111</sup> The legislative history indicates that Congress intended the repeal to operate only prospectively,<sup>112</sup> so those people who have already lost their citizenship as the result of the operation of section 301(b) will not regain it by virtue of the repeal.<sup>113</sup> Congress eliminated the residency requirement because of the inequity of subjecting only one narrow class of citizens to any residency requirement and because “[l]oss of citizenship has been likened to banishment and exile. Citizenship should not be conferred lightly, but once it is conferred, it should not be lightly, nor discriminatorily revoked.”<sup>114</sup> The Departments of State and Justice both supported the repeal of section 301(b).<sup>115</sup>

Most of the children in the ISS study do not now face the pros-

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110. Act of Oct. 10, 1978, Pub. L. No. 95-432, 92 Stat. 1046.

111. Section 301(a)(7) of the Immigration and Nationality Act, 8 U.S.C. § 401(a)(7) (1976) (now renumbered § 301(g), 8 U.S.C. § 401(g)), which requires 10 years' physical presence in the United States before the parent may transmit citizenship to his or her offspring, remains in effect.

112. The committee report states that “the intent of the bill . . . is to repeal [§] 301(b) . . . in a prospective manner. Thus, those citizens who have lost their citizenship . . . before the date of enactment of this bill will not be restored to citizenship.” H.R. REP. No. 1493, 95th Cong., 2d Sess. 2 (1978).

113. The committee reported that between 1972 and 1977, 693 people had lost their citizenship pursuant to § 301(b). *Id.* The committee did not state how many of these people had retained a second nationality and how many people had become stateless.

114. *Id.* at 4.

115. Letter from Patricia M. Wald, Assistant Attorney General, to the Hon. Peter W. Rodino, Chairman of the Committee on the Judiciary, House of Representatives (Dec. 12, 1977), reprinted in *id.* at 6; Letter from Douglas J. Bennet, Jr., Assistant Secretary of State for Congressional Relations, to the Hon. Peter W. Rodino, Chairman of the Committee on the Judiciary, House of Representatives (Dec. 9, 1977), reprinted in *id.* at 5.

pect of statelessness,<sup>116</sup> and the consequences of statelessness need no longer concern them. The repeal of section 301(b), however, does not improve the legal or economic circumstances of the majority of the children, who were raised as Japanese and who have neither the desire nor the means to come to the United States. Because those children can no longer become stateless, the *Horei*'s substitution of domicile for nationality as the determinant of capacity for stateless persons can never be invoked, and should the question of the capacity of one of these persons to perform a legal act ever come before a Japanese court, the court will have to decide whether to invoke the public policy exception of the *Horei* by analogy to the Japanese-Filipino divorce decisions.<sup>117</sup> Further, because the boys among the children that ISS studied will not now become stateless, Japanese law will deny all of their children Japanese citizenship, not merely those born before the boys reach age twenty-eight.<sup>118</sup> United States law still requires presence in the United States for a substantial period before citizens born abroad can transmit citizenship to their issue,<sup>119</sup> so all the children of the boys in the ISS study who remain in Japan to raise their families will be stateless from birth. Although the "first generation" statelessness that section 301(b) caused has been eliminated, the "second-generation" statelessness that results will be more widespread because of its repeal. Of course, the repeal of section 301(b) did not affect the status of the children in the ISS study as aliens in Japan. They remain ineligible for many social welfare programs because they are not Japanese citizens, and the change in the legal relationship with a

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116. Because the repeal operates prospectively, those children who were under age 26 at the time of repeal will not lose their citizenship, and those who were over 28 will not regain theirs. The status of those between 26 and 28 years old is somewhat unclear: Although they could not have retained their citizenship under § 301(b), they had not yet lost it formally. Because the declared intent of the repeal was to eliminate hardship, and because the committee report was cast in terms of not restoring citizenship already lost, a court faced with a challenge to the continuing citizenship of one of the 26- to 28-year-olds should be most reluctant to hold him to have forfeited it.

117. See notes 36-40 and accompanying text *supra*.

118. See the hypothetical situation discussed in notes 49-50 and accompanying text *supra*.

119. 8 U.S.C. § 1401(a)(7) (1976) (now renumbered § 1401(g)) requires that a citizen have been present in the United States for at least 10 years, at least five of which were after his or her fourteenth birthday, before his or her children born abroad of a mixed marriage acquire United States citizenship when they are born.

State many of them will never visit does not ameliorate the economic instability of many of their families.

Thus, although Congress intended to reduce hardship by repealing section 301(b), the ironic result is that the Amerasian children in Japan whom it affected may suffer additional legal disadvantages unless they emigrate to the United States. This unintended consequence highlights the ultimate need for a uniform system of nationality laws and the immediate need for flexibility in intermediate amendments to existing nationality laws. Implicit in the congressional concern for the hardships that section 301(b) created was an assumption that all who were affected suffered identical consequences. Those who, like Aldo Bellei, want to retain their United States citizenship, will welcome the repeal, but those for whom United States citizenship creates legal or economic hardship in the States where they reside will suffer additional or at least prolonged hardships.

Congress recently established the Select Commission on Immigration and Refugee Policy,<sup>120</sup> one of whose tasks is to "conduct a study and analysis of the effects of the provisions of the Immigration and Nationality Act (and administrative interpretations thereof) on . . . the conduct of foreign policy."<sup>121</sup> Two significant ways for the Commission to carry out this mandate would be to investigate means of international consultation on the effects of amendments to immigration and nationality laws and to recommend Congress investigate the impact of proposed amendments to the Immigration and Nationality Act before approving them. So long as *jus soli* and *jus sanguinis* coexist, some people will be denied nationality and others will have dual nationality. A first step toward reducing the number of people thus affected and the hardships they suffer will be for States to consider the effects of their nationality laws beyond their own borders. The well-intentioned repeal of section 301(b) illustrates the disparity between intended and actual consequences that results from a parochial approach to the effects of States' nationality laws.

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120. Act of Oct. 5, 1978, Pub. L. No. 95-412, § 4, 92 Stat. 907 (codified at 8 U.S.C. § 1151 note).

121. *Id.* § 4(d)(1)(D).