

VOTE BY BLOOD: THE PERPETUATING FUNCTION OF PROXIES IN THE JAPANESE NATIONALITY LAW

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Citizenship is one of the main methods that governments use to delineate which persons have certain rights and which do not. In Japan, like in many other countries, citizenship also serves to indicate who ‘belongs’ under the moniker of Japanese. In recent years, more and more children are being born as dual citizens between Japan and another country. Migrant workers in Japan are increasingly seeking a similar dual citizenship status to gain the same rights as native Japanese citizens. However, the Japanese government has artfully crafted its Nationality Law over its 100 plus years of existence to permit the former ‘at-birth’ citizens to have those rights while making it functionally impossible for the latter to ever gain them.

This Comment argues that both internal and external influences from the Nationality Law’s origin in the nineteenth century through today have, against the global trend to expand citizenship opportunities, maintained the status quo of reserving Japanese citizenship for ethnic Japanese. Analyzing the history of the Law, challenges to it over the years, and the current legal justifications for its continued restrictive provisions, it appears that the conception of citizenship may be one of the few aspects of Japanese society that has withstood foreign influence.

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I. INTRODUCTION

On January 21, 2021, the Tokyo District Court ruled that Japanese citizens living abroad who naturalized in their adoptive country cannot retain their Japanese citizenship.¹ The court upheld Article 11 of the Nationality Law, which automatically revokes Japanese citizenship when a Japanese citizen naturalizes in another country,² as constitutional under this holding.³ The reasoning of the government in oral argument and the opinion of the court, however, was couched in generic language that could be used to apply strict enforcement against at-birth dual citizens in Japan, not just against prospective by-choice dual citizens as the plaintiffs were here.⁴ Specifically, the concerns of double voting opportunities and conflict-of-obligations that harm the Japanese national interest were raised as justifications for a prohibition on dual citizenship.⁵ The plaintiffs reacted to the decision by noting that involuntary expatriation under the Nationality Law forced “only Japanese nationals gaining foreign citizenship abroad to follow the rule on dual nationality, while ambiguity cloaks those at home.” The discrepancy in enforcement of the Nationality Law on prospective by-choice dual citizens (those who seek dual nationality through naturalization) compared to at-birth dual citizens (those who, under

¹ *Court Rules in Favor of Japan’s Ban on Dual Nationality*, KYODO NEWS (Jan. 21, 2021), <https://english.kyodonews.net/news/2021/01/543d5b467dd5-japan-court-rules-ban-on-multiple-nationality-constitutional.html> [<https://perma.cc/TMV9-NPZZ>].

² Kokuseki hō [Nationality Law], Law No. 88 of 2008, art. 11, para. 1 (Japan).

³ *Court Rules in Favor*, *supra* note 1.

⁴ *Id.*

⁵ *Id.*

the laws of two nations, are citizens of each at birth) is well recognized among scholars.⁶

The government and the court's line of argumentation in the context of the known inequalities of the Nationality Law highlights a problem that remains unaddressed in the current literature in this field. Namely, parsing out the reasons why the Nationality Law has been enforced more strictly on prospective by-choice dual citizens compared to at-birth ones. This issue is unique in the field of citizenship law since the Nationality Law's nominal restriction on dual citizenship of any kind is anomalous within Asia, where the recent trend is still against dual citizenship, and is largely out of step with current Western citizenship practices permitting dual citizenship of any kind.⁷

This Comment will demonstrate that, during Japan's Western-inspired era of nation building that gave birth to a Japanese conception of citizenship, it became inextricably tied to ethnicity. Even as conceptions of citizenship elsewhere in the world began to move away from such an ethnic basis (and as domestic and international pressures pushed Japan to follow suit), Japan remains anomalous among other countries in having functionally maintained that only ethnic Japanese may be citizens.⁸ Therefore, to avoid changing the law to disrupt this status quo while ensuring at-birth ethnically Japanese dual citizens are still able to enjoy the rights and privileges of citizenship, Japan has constructed legal 'proxies' or 'loopholes' for them. Non-Japanese who wish to be naturalized in Japan while maintaining their native citizenship, particularly migrant workers,⁹ are simply offered no proxy. This permits the government to truthfully state that dual citizenship of any kind is prohibited while ensuring that a fine line is drawn between ethnic

⁶ Mie Murazumi, *Japan's Laws on Dual Nationality in the Context of a Globalized World*, 9 PAC. RIM L. & POL'Y J. 415, 424–25 n. 86 (2000).

⁷ See Maarten Vink et al., *The International Diffusion of Expatriate Dual Citizenship*, 7 MIGRATION STUD. 362, 369–70 (2019) (noting that dual citizenship by naturalization elsewhere is recognized by all North American countries, most Central and Southern American, Oceanian, and European countries, and in a majority of African and Asian countries).

⁸ *Id.* at 369.

⁹ See generally Erin Aeran Chung & Daisy Kim, *Citizenship and Marriage in a Globalizing World: Multicultural Families and Monocultural Nationality Laws in Korea and Japan*, 19 IND. J. GLOB. LEGAL STUD. 195, 204–06 (2012) (illustrating the exponential increase of legal and illegal migrant workers flowing into Japan since the 1970s).

Japanese and foreigners in terms of social and legal recognition as Japanese.

Part II of this Comment will define citizenship as a social construct, noting its centrality to building a national identity. It will also discuss the legal development of citizenship, having begun in the West, and the circumstances that gave rise to legally recognized dual citizenship in these countries, using the United States as an example. Part III will explore the origin of citizenship in Japan from both a social and legal lens. It will follow the development of the law from its inception in the nineteenth century to today, culminating in the 2021 Tokyo District Court ruling. This historical background will inform Part IV, which will discuss whether Japan's conception of citizenship (as reflected in the Nationality Law) has changed since its inception, considering whether either domestic or international pressures to do so were present and have succeeded or not. It will also lay out the concept of 'proxies' or 'loopholes' offered to at-birth dual citizens, specifically in the context of voting rights, to show that an active decision has been made to preserve Japan's conception of citizenship as based primarily in ethnicity. Part V will conclude.

II. THE CITIZENSHIP PRINCIPLE

The two most common formulations of citizenship are *jus soli* and *jus sanguinis*. A *jus soli* system grants citizenship to all persons born in the territory of a country, while a *jus sanguinis* system grants citizenship to all persons born to parents who are citizens of that country. Given these dominant systems, dual citizenship tends to occur when a child is born in a *jus soli* country to a parent who is a citizen of a *jus sanguinis* country.¹⁰ It may also occur when a child is born to parents who each hold a different citizenship from *jus sanguinis* countries.¹¹ Furthermore, one can, where permitted, obtain dual citizenship through naturalization in a

¹⁰ Chin Kim & Stephen R. Fox, *The Legal Status of Amerasian Children in Japan: A Study of Conflict of Nationality Laws*, 16 SAN DIEGO L. REV. 35, 38 (1978). The authors also note that a child born in a *jus sanguinis* country with parents from a *jus soli* country gains no citizenship and is rendered stateless at birth. The issue of statelessness in Japan, focused on in the author's piece at length, is complex enough to merit its own paper, so it will not be addressed here.

¹¹ Tanja Brøndsted Sejersen, "I Vow to Thee My Countries": The Expansion of Dual Citizenship in the 21st Century, 42 INT'L MIGRATION REV. 523, 529 (2008).

foreign country.¹² Part II.A will lay out how citizenship is considered from a social lens and Part II.B will explore the legal development of citizenship and the emergence of dual citizenship, taking the United States as an example.

A. *Citizenship as a Social Construct*

Citizenship within the political science and related literature continues to have a floating definition, but one possible definition (with sufficient generality) was offered by Claire Skinner: “A citizen is a person who has membership within a state and has the rights and privileges of that state, which means that he or she is also beholden to that state’s laws.”¹³ However, other scholars would also attribute various extra-legal benefits of citizen status, such as an “implied sense of community and belonging.”¹⁴ It is this addition to the concept of citizenship as a whole that merits its division into a social and legal construct. While some see the social benefit of citizenship as a net good for establishing a unified and equal polity, it is important to recognize that citizenship, since its inception,¹⁵ has served three key purposes: to define, to delineate, and to exclude.

Citizenship has served a defining function since its origins in ancient Greek society.¹⁶ In those days, citizenship was defined markedly similar as it is today, asserting the rights and privileges that citizens are granted.¹⁷ It also, at least during Aristotle’s time, defined clan status and religious affiliation.¹⁸ On the other hand, citizenship has also served to define, by negative (or sometimes positive) inference, who is not a citizen. While each nation may vary in how it conceives citizenship, citizen children are taught at a young age to distinguish citizens from foreigners and to conclude that, by definition, foreigners are from birth simply different.¹⁹

The government, having established the definition of citizenship itself, is then able to use these definitions to delineate

¹² *Id.*

¹³ Claire Skinner, *Birthright Citizenship*, 1 IMMIGR. & MIGRATION: IN CONTEXT 89, 89 (2018).

¹⁴ Kyra Babakian, *Citizenship*, 1 IMMIG. & MIGRATION: IN CONTEXT 135, 135 (2018).

¹⁵ DIMITRY KOCHENOV, CITIZENSHIP 241 (2019).

¹⁶ Babakian, *supra* note 14, at 135.

¹⁷ *Id.*

¹⁸ KOCHENOV, *supra* note 15, at 32.

¹⁹ *Id.* at 51.

between citizens and non-citizens.²⁰ This makes explicit what is implicit in a nation's definition of citizenship—non-citizens do not deserve the same rights.²¹ Line drawing also ensures that citizenship status does not automatically correlate with residency in the country.²² This reveals the power that a legal definition of citizenship has to legitimize the social construct it creates—non-citizens who grew up in a given country, speak the language, and for all intents and purposes think of themselves as part of the citizenry will often find themselves on the other side of the line and therefore in the social 'other' group.²³

With who is a citizen or not defined and the rights and privileges of such status strictly segregated, this social perception of citizenship can then be used to exclude the non-citizen group.²⁴ One waning yet still present exclusionary category is race.²⁵ This exclusion manifests through the active denial of the rights and privileges offered to citizens, particularly in informing legislation that perpetuates this exclusion.²⁶ Prohibitions on dual nationality, as explored throughout the rest of this Comment, are one example of a policy arising out of exclusion based on race.²⁷ The following section will explore how citizenship as a legal construct has developed out of this chain of define-delineate-exclude, in other words the social conception of citizenship, with an emphasis on dual citizenship.

B. Citizenship as a Legal Construct

Before the Greek-originating concept of citizenship was codified in the West, an individual's loyalty was based on their feudal affiliation grounded in a notion of "perpetual allegiance" to

²⁰ *Id.* at 59.

²¹ *Id.*

²² *Id.* at 58.

²³ *Id.* at 30.

²⁴ *Id.* at 6–8, 200.

²⁵ *See id.* at 6–8, 96–97, 101, 103 (describing how race, a formerly popular way to exclude citizen from non-citizen, has decreased in use over time, but has not disappeared entirely).

²⁶ *Id.* at 51; Babakian, *supra* note 14.

²⁷ *See* KOCHENOV, *supra* note 15, at 113 ("Dual nationality is prohibited when the state reacts, unreasonably, to a neighboring state extending nationality to its resident ethnic minorities . . . or tries to limit naturalizations . . .").

their lord.²⁸ Once sovereigns began to take unilateral power in European states, this concept of allegiance to the lord transferred to the sovereign.²⁹ This meant, however, that when an individual moved to the realm of another sovereign, they entered into a perpetual allegiance with that sovereign, essentially creating the first instances of dual citizenship.³⁰ Under this system, citizenship could not be forfeited.³¹ When European states codified this system as *jus sanguinis* principles to prevent the kind of accidental dual citizenship that had happened previously, they did so with an aversion to by-choice dual citizenship as producing conflicting loyalties.³²

These European policies conflicted with American *jus soli* principles as they applied to European migrants to the United States who had naturalized, therefore granting them dual citizenship.³³ At first, European countries attempted to force compliance with conscription requirements on their citizens, one example being the British who took American sailors off American ships and absorbed them into the Royal Navy.³⁴ The United States and these European nations soon signed a series of treaties (known as the Bancroft treaties after the U.S. politician who facilitated them) to permit voluntary expatriation, allowing these dual citizens to renounce their European citizenship and the requirements it imposed.³⁵ These treaties, however, did not end the dual citizenship problem, since many countries still worried that those who held on to their dual citizenship had questionable loyalties.³⁶

The twentieth century saw increased movement of people internationally, contributing to the phenomenon of “globalism” that began to chip away at the concerns dual citizenship had posed for sovereign nations.³⁷ This is not to say that these changes occurred overnight—two international conventions in 1930 and 1963 both

²⁸ PETER J. SPIRO, AT HOME IN TWO COUNTRIES: THE PAST AND FUTURE OF DUAL CITIZENSHIP 13–14 (2016).

²⁹ Murazumi, *supra* note 6, at 429.

³⁰ *Id.*

³¹ SPIRO, *supra* note 28, at 14.

³² Murazumi, *supra* note 6, at 431.

³³ *Id.* at 429–30.

³⁴ SPIRO, *supra* note 28, at 15–16.

³⁵ Murazumi, *supra* note 6, at 430.

³⁶ *Id.*

³⁷ *Id.*

served to stem dual citizenship in Europe. Further, George Bancroft, driver of the Bancroft treaties, stated that one should “. . . as soon tolerate a man with two wives as a man with two countries.”³⁸ In the United Kingdom, however, a 1948 Act of Parliament permitted dual citizenship of any kind, whether at birth or by choice through naturalization.³⁹ Similar laws were adopted in France in 1973 and in Canada in 1976.⁴⁰ This expansion of dual citizenship spread over Europe through two more international agreements in 1993 and 1997.⁴¹

As of 2017, roughly 75% of European countries permit some form of dual citizenship and about 91% of countries in the Americas do.⁴² In Asia, however, only about 65% of countries permit any kind of dual citizenship, and within that group only a minority limit it to at-birth dual citizens, Japan being one, in turn barring dual citizenship through voluntary naturalization.⁴³ This is indicative of a purely *jus sanguinis* policy trend in Asia, bucking contemporary European citizenship principles that have largely merged *jus soli* and *jus sanguinis* principles.⁴⁴ One possible explanation for this shift in Asia is an inherent conception of citizenship not as a right, but as a privilege.⁴⁵ Similar notions continue to exist outside of Asia, one example being in Denmark (and to an extent, Germany) where the concept of the “homogeneous nation” continues to hamper dual citizenship.⁴⁶ The Danish rationale is, in part, that dual citizenship signals that one is not “fully committed to being Danish,” bringing into question whether they should be permitted to vote in Danish elections or run for office.⁴⁷

³⁸ *Id.* at 439–40; Sejersen, *supra* note 10, at 530.

³⁹ Murazumi, *supra* note 6, at 435–36.

⁴⁰ *Id.* at 436.

⁴¹ *Id.* at 440.

⁴² Vink, *supra* note 7, at 370.

⁴³ *Id.* at 369.

⁴⁴ Kristin Surak, *Convergence in Foreigners' Rights and Citizenship Policies? A Look at Japan*, 42 INT'L MIGRATION REV. 550, 550 (2008); Jessie Yeung, *These Asian Countries are Giving Dual Citizens an Ultimatum on Nationality—and Loyalty*, CNN (Mar. 15, 2021), <https://www.cnn.com/travel/article/asia-dual-citizenship-intl-hnk-dst/index.html#:~:text=Japan%20and%20China%20are%20giving,%2D%2D%20and%20loyalty%20%7C%20CNN%20Travel> [https://perma.cc/35F7-VHXC].

⁴⁵ Yeung, *supra* note 44.

⁴⁶ Sejersen, *supra* note 11, at 541–42.

⁴⁷ *Id.*

In Europe and the Americas generally, the driving force behind high rates of unconditional dual citizenship is a political desire to integrate the migrant class into the polity without forcing them to face the legal, social, and economic consequences renunciation of their native citizenship would bring.⁴⁸ This comes, in part, from these nations having modified their national identity to include a description of themselves as nations of immigrants.⁴⁹ Dual citizenship with a European/American country (or a developed country generally) is particularly enticing to those coming from countries that lack economic opportunities or security.⁵⁰ This reflects the contemporary notion that dual citizenship is not a matter of identity, but rather a matter of socioeconomic value.⁵¹ The multilingual abilities and cultural understandings that come with dual citizenship also import a scarcity that makes the socioeconomic value of dual citizenship more desirable for employers.⁵² The next section will explore the development of the legal construct of citizenship in the United States as a key example of the Western conception of citizenship. This analysis is important as Japan's Nationality Law has, since its inception, been significantly impacted by citizenship policy in the U.S.⁵³

1. A Western Example: The United States

Citizenship in the United States is grounded in two distinct constitutional clauses: Article I, Section 8—the Naturalization Clause, and the Fourteenth Amendment, Section 1—the Citizenship Clause.⁵⁴ The former grants Congress an affirmative power to

⁴⁸ Sejersen, *supra* note 11, at 534; Murazumi, *supra* note 6, at 441–42.

⁴⁹ Surak, *supra* note 44, at 554.

⁵⁰ See Yossi Harpaz, *Compensatory Citizenship: Dual Nationality as a Strategy of Global Upward Mobility*, 45 J. OF ETHNIC AND MIGRATION STUD. 897 (2018) (explaining that a second nationality or “compensatory citizenship” is sought by migrants to make up for lacking opportunities and securities offered by their home country).

⁵¹ Aoife Wilkinson, *Forfeiting Citizenship, Forfeiting Identity? Multiethnic and Multiracial Japanese Youth in Australia and the Japanese Nationality Law*, 12 NEW VOICES IN JAPANESE STUD. 21, 29 (2020) (finding that selective forfeiture of citizenship as cultural capital may produce more favorable economic outcomes).

⁵² See *id.* at 35–36 (finding that mixed Japanese youths strategically align their choice of citizenship with perceived future career outcomes).

⁵³ See *infra* Part 0 (discussing how the Nationality Law, both pre- and post-war, often changed in reaction to interactions with the U.S.).

⁵⁴ Kim & Fox, *supra* note 10, at 44–45.

create the laws for naturalization as an American citizen, while the latter establishes national citizenship for all persons born in the United States and all persons naturalized.⁵⁵ The power under Article I, Section 8 was not exercised, however, until the Naturalization Act of 1790.⁵⁶ Prior to this, citizenship in the United States in terms of both birthright and naturalization defaulted to state law.⁵⁷ In this sense, the Framers had no defined concept of citizenship in mind when they drafted the Constitution.⁵⁸ Under the 1790 Act, only federal naturalization procedures were established, leaving birthright citizenship to the states.⁵⁹

Congress adopted a new Nationality Act in 1795, which added the requirement that an “oath of renunciation and allegiance” be pledged when one naturalizes as a U.S. citizen—something that still exists today.⁶⁰ The oath contains explicit language that an individual who naturalizes renounces any prior foreign allegiances.⁶¹ In essence, it worked to offer European immigrants full protection under U.S. law against efforts made by their home countries to invoke the immigrants’ liabilities as citizens of their home countries.⁶² The renunciation of one’s former citizenship, especially by former British subjects, was central to the protections offered to prisoners of war during the War of 1812.⁶³ In the eyes of the British (and other European countries), neither an immigrant’s naturalization in the U.S. nor their voluntary renunciation of British citizenship through the oath were recognized.⁶⁴ This, together with the U.S. position that both these actions were recognized, reflected a

⁵⁵ U.S. CONST. art. 1, § 8, cl. 4; U.S. CONST. amend. XIV, § 1.

⁵⁶ *Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigr., Border Sec., and Claims of the H. Comm. on the Judiciary*, 109th Cong. 77 (2005) (statement of Rep. Sheila Jackson Lee, Ranking Member, H. Subcomm. on Immigr., Border Sec., and Claims).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *See id.* at 24 (statement of John Fonte, Senior Fellow, The Hudson Institute) (stating that naturalized Americans have taken the oath for over 200 years which requires renunciation of prior allegiances).

⁶¹ *Id.*

⁶² SPIRO, *supra* note 28, at 15–16.

⁶³ *Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigr., Border Sec., and Claims of the H. Comm. on the Judiciary*, 109th Cong. 25 (2005) (statement of John Fonte, Senior Fellow, The Hudson Institute).

⁶⁴ *Id.*

common trend in the West that dual citizenship through naturalization (i.e. by choice) was impermissible.

Birthright citizenship (or at-birth citizenship) was not federally established until the 1866 Civil Rights Act, which read: “All persons born in the United States, and not subject to any foreign power . . . are hereby declared to be citizens of the United States.”⁶⁵ This portion of the Civil Rights Act was later subsumed into the Fourteenth Amendment’s Citizenship Clause, which states similarly that “[a]ll persons naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States”⁶⁶ The language of “jurisdiction” has been interpreted to mean that any individual born on U.S. or territorial soil automatically becomes a U.S. citizen.⁶⁷ This expansion of citizenship opportunity produced more lanes for a child to be born with dual citizenship, but, like many other countries, the official U.S. policy worked to limit dual citizenship of any kind. Until the mid-twentieth century, for example, an American dual citizen who exercised any of the legal rights of their foreign citizenship automatically lost their American citizenship.⁶⁸

This policy, however, met resistance in the form of three seminal Supreme Court cases that expanded the political rights of dual citizens both in the United States and in their other country of citizenship. In *Schneider v. Rusk*, the court held that involuntarily stripping U.S. citizenship from a naturalized American citizen who lived abroad, but not from an at-birth American citizen who lived abroad, was unconstitutional under the Fifth Amendment Due Process Clause.⁶⁹ The Nationality Act of 1940, which established this provision, was held to have discriminated against naturalized U.S. citizens and treated them as lesser-than compared to at-birth U.S. citizens, for which the court held there could be no

⁶⁵ *Id.* at 78 (statement of Rep. Sheila Jackson Lee, Ranking Member, H. Subcomm. on Immigr., Border Sec., and Claims).

⁶⁶ U.S. CONST. amend. XIV, §1.

⁶⁷ *Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigr., Border Sec., and Claims of the H. Comm. on the Judiciary*, 109th Cong. 8 (2005) (statement of Rep. Hostettler, Chairman, H. Subcomm. on Immigr., Border Sec., and Claims). There remains debate among those who testified at this hearing whether “jurisdictional” means U.S. territory or allegiance to the U.S.

⁶⁸ *Id.* at 43 (statement of Peter J. Spiro, Dean, Univ. of Ga. School of Law).

⁶⁹ *Schneider v. Rusk*, 377 U.S. 163, 168–69 (1964).

justification.⁷⁰ Countering the zeitgeist against dual citizenship, Justice Douglas stated that, “[l]iving abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance.”⁷¹

Three years after *Schneider*, the Court ruled in *Afroyim v. Rusk* that neither an at-birth nor a by-choice dual citizen who votes in a foreign election can constitutionally have their U.S. citizenship involuntarily revoked.⁷² The court noted that the Citizenship Clause in the Fourteenth Amendment was likely meant to ensure that states did not forcefully revoke the citizenship of Black Americans.⁷³ The court held that this right of a secure citizenship applied to all U.S. citizens, and that the government had no power to revoke U.S. citizenship unilaterally.⁷⁴ The court also overruled *Perez v. Brownell*, a case from ten years prior which held that voting in a foreign election constitutionally permitted the government to revoke at-birth U.S. citizenship.⁷⁵ Both *Schneider* and *Afroyim* clarified that the U.S. policy to involuntarily revoke U.S. citizenship whenever a dual citizen of any kind actively interacted with their other country of citizenship was unconstitutional.

In *Rogers v. Bellei*, decided three years after *Afroyim*, the Court walked back its grand statement about secure citizenship and instead held that any legislation seeking to enact involuntary expatriation was constitutional as long as it survived heightened scrutiny.⁷⁶ The appellee in *Bellei* was born in Italy to an Italian father and an American mother.⁷⁷ Under a combination of an Italian *jus soli* policy and a U.S. *jus sanguinis* statute that permitted a child born abroad to a U.S. citizen who had lived in the U.S. for a prescribed period to obtain U.S. citizenship, Bellei was a dual citizen.⁷⁸ When he was notified that his U.S. citizenship had been revoked due to a failure to meet the residency requirement needed to maintain U.S. citizenship, which has since been removed from the

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967).

⁷³ *Id.* at 262.

⁷⁴ *Id.* at 266–67.

⁷⁵ *Id.* at 268; *Perez v. Brownell*, 356 U.S. 44, 62 (1958).

⁷⁶ *Rogers v. Bellei*, 401 U.S. 815, 831 (1971).

⁷⁷ *Id.* at 817–18.

⁷⁸ *Id.* at 818.

law, he challenged his involuntary expatriation under both Fifth and Fourteenth Amendment Due Process.⁷⁹ The Court held that as long as the Congressional power used to revoke U.S. citizenship from a dual national was not “unreasonable, arbitrary, or unlawful,” it remained constitutional under either version of Due Process.⁸⁰ As applied to *Bellei*, the Court held that Congress had legitimate concerns about conflicting loyalties and that a residency requirement confirmed one’s commitment to their duties as an American citizen.⁸¹ Since this was not unreasonable, arbitrary, or unlawful, the rescindment of *Bellei*’s citizenship was therefore proper.⁸²

The decision in *Bellei*, resting on concerns of competing loyalties, reflected the continued aversion to dual citizenship of any kind in the United States which, like in Europe, did not shift towards liberalization until the late twentieth century.⁸³ In 1986, Congress enacted an amended statute that required an affirmative statement to renounce U.S. citizenship when one does an act in their other country of citizenship that, under the pre-*Schneider* expansive or post-*Bellei* limited schemes, would have permitted the government to revoke U.S. citizenship.⁸⁴ This means that, as opposed to other countries (like Japan) that presume one intends to give up his/her “native” citizenship when he/she voluntarily naturalizes elsewhere, a U.S. citizen who does so is assumed to intend on retaining his/her American citizenship.⁸⁵ Under this structure, therefore, dual citizenship at-birth and by-choice—either by naturalization in the U.S. or a U.S. citizen who naturalizes elsewhere—is legally permitted.

⁷⁹ *Id.* at 820.

⁸⁰ *Id.* at 831.

⁸¹ *Id.* at 832.

⁸² *Id.* at 836.

⁸³ Sejersens, *supra* note 11, at 534.

⁸⁴ Murazumi, *supra* note 6, at 437–38. Under this amended statute, even U.S. citizens who assume office abroad cannot have their U.S. citizenship revoked unless they actively do so themselves. Some prominent examples are Boris Johnson, Prime Minister of the UK, who gave his up voluntarily and Arturs Krišjānis Kariņš, Prime Minister of Latvia, who has kept his.

⁸⁵ *Id.* at 436.

III. CITIZENSHIP IN JAPAN

This section is divided into three parts to reflect three significant eras of evolution in Japan's conception of citizenship. Part III.A covers the 1899 nationality law, the first of its kind in Japan, and its progeny through World War II. Part III.B looks at the adoption of the Nationality Law in 1950 and the series of rapid adjustments it underwent during the U.S. occupation of Japan. Finally, Part III.C examines the developments since the end of occupation.

A. *The 1899 Nationality Law*

Principles of citizenship did not enter the Japanese political consciousness in a legal sense until after the Meiji Restoration in 1868.⁸⁶ During this period of nation building, Japan adopted several Western notions of statehood, including a national flag in 1870,⁸⁷ a national anthem in 1888,⁸⁸ and citizenship in 1873.⁸⁹ This 1873 statute permitted a foreign wife of a Japanese man to obtain citizenship through marriage. It also implemented the *jus sanguinis* model, emulating the system used by most European states at the time,⁹⁰ which carried implications that children born in Japan to two foreign parents were not Japanese citizens.⁹¹ This original law was adopted in part to advance the Meiji government's "internal colonization" efforts to integrate the Ryukyuan and Ainu peoples into the Japanese polity by granting them equal treatment as Japanese citizens.⁹² In doing so, however, it also adopted European

⁸⁶ Catherine Lu, Toshihiro Menju & Melissa Williams, *Japan and "The Other": Reconceiving Japanese Citizenship in the Era of Globalization*, 29 ASIAN PERSP. 99, 103–4 (2005); Eric C. Han, *The Nationality Law and Entry Restrictions of 1899: Constructing Japanese Identity Between China and the West*, 4 JAPAN F. 521, 522 (2018).

⁸⁷ YASUTAKA TERUOKA, HINOMARU, KIMIGAYO NO NARITACHI [ORIGINS OF THE JAPANESE FLAG AND NATIONAL ANTHEM] 39 (1991); *see also* NORMA FIELD, IN THE REALM OF A DYING EMPEROR 69 (1991) (noting that Okinawa first received the new national flag in 1873).

⁸⁸ Teruoka, *supra* note 87, at 59–60.

⁸⁹ Kim & Fox, *supra* note 10, at 40.

⁹⁰ Murazumi, *supra* note 6, at 418.

⁹¹ Kim & Fox, *supra* note 10, at 41.

⁹² Lu, *supra* note 86, at 104.

conceptions of citizenship as a way to categorize a superior class of ethnic individuals.⁹³

A comprehensive nationality law enacted in 1899 consolidated a series of codes on nationality into a single piece of legislation.⁹⁴ The emphasis behind the formalization of nationality arose in part out of pressures from Western nations that traded in Japanese ports because they wanted Japan to permit their nationals to move freely.⁹⁵ The belief was that a law emulating those in the West was required for Westerners to acknowledge and respect Japan's sovereignty as it opened up to foreign influence.⁹⁶ It was also out of this desire to meet Western expectations that the 1899 law adopted then-common *jus sanguinis* principles.⁹⁷ The law was written in a way, however, to address the worry that Chinese laborers were inundating Japan.⁹⁸ Some policymakers in Japan argued that the Chinese would take advantage of potential naturalization and "inundate Japan and take jobs from Japanese workers."⁹⁹ Others argued that the Chinese would "harm Japan's customs and morals, and pollute the Japanese bloodline through intermarriage."¹⁰⁰

This intentional desire to exclude Chinese and foreigners generally from interfering with the existing Japanese conception of citizenship (i.e., their social understanding of what it means to be Japanese), is reflected in the text of the law. Deliberation in the Diet shows that there was an intentional framing of the text to "remove any implication that foreigners had a *right* to naturalization."¹⁰¹ Further, among the series of conditions required for naturalization,¹⁰² records show that the requirement of "being of

⁹³ *Id.*

⁹⁴ Han, *supra* note 86, at 527–28.

⁹⁵ *Id.* at 523.

⁹⁶ *Id.*

⁹⁷ *Id.* at 529.

⁹⁸ *Id.* at 525; *see generally* KOCHENOV, *supra* note 15, at 112 ("States around the world simply decide [to change their citizenship laws] based on what appears to be in their best interests in terms of financial or other gains from the body of citizens combined with the reinforcement of the key prejudices in society.").

⁹⁹ Han, *supra* note 86, at 525.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 529.

¹⁰² *See infra* Part 0 (listing off the conditions for naturalization under the 1899 nationality law).

good character” was left intentionally vague.¹⁰³ The hope was that, in addition to naturalization being at the discretion of the Interior Minister, this language would make it prohibitively difficult for foreigners to naturalize under the law.¹⁰⁴

The 1899 law also added that renunciation of one’s Japanese citizenship was only possible by voluntary acquisition of a foreign nationality.¹⁰⁵ Under this structure, people born to Japanese fathers in a *jus soli* country and therefore obtained dual citizenship could not renounce their Japanese citizenship because their non-Japanese nationality was not “voluntarily” acquired.¹⁰⁶ This nationality law, however, aggravated anti-Japanese sentiment in the United States where children of Japanese immigrants were born as dual citizens but were unable to renounce their Japanese citizenship, inviting questions of divided loyalties.¹⁰⁷ In reaction, Japan amended the nationality law in 1916 to conditionally permit dual citizens to renounce their Japanese citizenship.¹⁰⁸ Any request to do so had to be approved by the government, and any men over the age of seventeen had to fulfill their conscription duties prior to renunciation.¹⁰⁹

The nationality law was again amended in 1924,¹¹⁰ the last time before the Second World War, to directly address the issue of dual citizenship. This amendment introduced a parental recognition requirement where Japanese fathers of children born in an enumerated list of *jus soli* countries (including the United States) had to register their children on their family registry within fourteen days of birth to retain the child’s Japanese citizenship.¹¹¹ Additionally, it allowed those who already had dual citizenship to renounce their Japanese citizenship at will,¹¹² doing away with the

¹⁰³ Han, *supra* note 8694, at 530.

¹⁰⁴ *Id.*

¹⁰⁵ Kim & Fox, *supra* note 9, at 41; Murazumi, *supra* note 6, at 418.

¹⁰⁶ Murazumi, *supra* note 6, at 418.

¹⁰⁷ *Id.* at 418–19.

¹⁰⁸ *Id.* at 419.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 420.

¹¹¹ *See id.* at 420 (noting that the 1924 amendment required recognition, which likely meant registration of a child in the father’s family registry at the closest embassy/consulate).

¹¹² *Id.*

government discretion and conscription requirements of the previous amendment.

B. The Occupational Nationality Law

The Japanese government did not revisit the nationality law again until 1950 when, while under U.S. occupation, it adopted a new Nationality Law.¹¹³ This law, however, retained the language of the 1924 version and only changed the *jus soli* enumerates by expanding the list to all *jus soli* countries.¹¹⁴ A key consideration at the time of drafting was how to categorize former colonial subjects from Korea who were still living in Japan. During the colonial era, Koreans were considered citizens of Japan under both Japanese law and the international consensus.¹¹⁵ During the occupation, this was also the U.S. occupational government's (hereinafter "GHQ") position,¹¹⁶ which would not change until the formal dissolution of the Japanese Empire after the signing of the San Francisco Peace Treaty in 1952.¹¹⁷ During occupation, the U.S. government believed that no formal decision on the citizenship of Koreans in Japan should be made until Japan and a (hopefully) unified Korea could meet at the negotiation table.¹¹⁸ As the tensions leading up to the Korean War began to dash hopes of such a meeting, concerns arose among Japanese politicians about whether Koreans with Japanese citizenship were truly loyal to Japan.¹¹⁹

Under pressure from Japanese officials, while still recognizing that many Koreans in Japan were born in Japan and had known no other home, GHQ began debates over how to facilitate forced repatriation of Koreans with Japanese citizenship.¹²⁰ To do so, GHQ sought to delegitimize Korean claims to Japanese citizenship by attacking both its social and legal prongs. First, a key

¹¹³ *Id.*

¹¹⁴ *Id.* at 421.

¹¹⁵ Han, *supra* note 8694, at 522. Also note that Taiwanese were also subject to similar confusing citizenship status, but their numbers were relatively small compared to Koreans to the extent that the U.S. occupational administration did not concern itself as much with their status.

¹¹⁶ Simon Nantais, *Race to Subversion: Nationality and Koreans in Occupied Japan, 1945–1952*, 39 *DIPLOMATIC HIST.* 819, 821 (2015).

¹¹⁷ Han, *supra* note 86, at 539.

¹¹⁸ Nantais, *supra* note 116, at 823.

¹¹⁹ *Id.* at 827, 829.

¹²⁰ *Id.* at 830–31.

development was the establishment of the Republic of Korea (“ROK”) and its adoption of a Nationality Act, permitting citizenship to all Koreans “irrespective of domicile.”¹²¹ With this in its pocket, the GHQ targeted the social prong of Koreans with Japanese citizenship by setting out to “alienize” them to the point that they would voluntarily repatriate as Korean citizens. Legally, GHQ began to characterize Koreans in Japan as “undesirables” and “subversives” who were now, by its account, “Korean nationals” who ought to be deported to the ROK.¹²² Consequently, Koreans were now faced with the burden of “explaining why they had deliberately retained their Japanese nationality” instead of acquiring Korean citizenship,¹²³ amounting to a sort of loyalty test.

These efforts ultimately resulted in the 1952 amendment of the Nationality Law which stripped Japanese colonial citizens of their citizenship, rendering Koreans and Taiwanese living in Japan stateless.¹²⁴ This statelessness occurred because the signing of the San Francisco Peace Treaty dissolving Japanese claims over Korea and Taiwan occurred when the U.S. still did not recognize either state on the Korean peninsula or in China.¹²⁵

C. *Recent Developments in the Nationality Law*

In 1985, prompted by Japan’s signing of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, the government amended the Nationality Law to expand the passing of *jus sanguinis* citizenship to Japanese mothers.¹²⁶ Knowing this would increase instances of dual citizenship, this amendment added two new restrictions. First, the parental recognition requirement extended to children born anywhere, not just in *jus soli* countries, taking into account the irregularities in global citizenship laws that create acquisition loopholes for dual citizenship.¹²⁷ Second, the “election requirement” was introduced which mandated that children born as

¹²¹ *Id.* at 832.

¹²² *Id.* at 834–35.

¹²³ *Id.* at 839.

¹²⁴ Lu, *supra* note 86, at 106; Surak, *supra* note 44, at 557–58. Koreans who had their citizenship revoked and their descendants are commonly known as Zainichi Koreans.

¹²⁵ Nantais, *supra* note 116, at 840.

¹²⁶ Chung & Kim, *supra* note 9, at 210–11; Murazumi, *supra* note 6, at 421–22.

¹²⁷ Murazumi, *supra* note 6, at 422.

dual citizens had to renounce one of their citizenships before turning twenty-two.¹²⁸

The impetus behind the 1985 amendment was also the result of internal pressures arising out of increasing rates of migrant workers entering Japan.¹²⁹ Naturally, as these migrant workers integrated into Japanese society, children born to a Japanese parent (usually father) and a migrant worker parent (usually mother) presented an issue of potential statelessness.¹³⁰ In short, before the 1985 amendment, a child born under the circumstances described above had to be legally ‘recognized’ by the Japanese parent prior to birth; otherwise, unless the non-citizen parent could confer their citizenship to the child under their home country’s laws, the child would be stateless.¹³¹ Apart from the Japanese parent not recognizing the child, statelessness was also possible where the non-citizen parent was not easily identifiable as a citizen of any country.¹³² The amendment and a series of court cases after its adoption made clear that post-birth recognition and even a conclusion that “the actual [parent] would probably have recognized the fetus if the child had not been presumed to be the [parent’s] child” were sufficient to grant Japanese citizenship.¹³³ The only judicially enforceable way to prevent such a child from gaining citizenship is for the state to meet the burden of positively identifying at least one of the parents, not just establish the high probability that someone might be the parent, as the old burden required.¹³⁴

¹²⁸ *Id.*

¹²⁹ Sumi Shin, *Newcomer Migrants: Implications for Japan’s Administration of Social Services and Nationality*, 6 UCLA J. INT’L L. & FOREIGN AFFS. 313, 315 (2001–2002).

¹³⁰ *Id.* at 343–344.

¹³¹ *Id.* at 343–344, 345.

¹³² *See id.* at 343–44 (discussing the Andrew Rees case where a child born to a Japanese father and a non-citizen mother presumed to be from the Philippines was granted Japanese citizenship since the state could not meet its burden of affirmatively identifying at least one of the parents).

¹³³ *Id.* at 345, 349. It is also interesting to note that, during litigation regarding the recognition requirement under the 1985 amendment, a plaintiff raised the International Covenant on Civil and Political Rights (ICCPR), to which Japan is a signatory, that holds that every child has the right to citizenship and cannot be withheld that right based on discriminatory grounds. *Id.* at 347. The court, however, dismissed this assertion and stated that “[the] ICCPR Committee’s interpretations of the Covenant are not binding upon Japanese courts.” *Id.*

¹³⁴ *Id.* at 344.

The most recent amendment to the Nationality Law arose out of similar pressures the pre-war version faced from individuals who were disparately impacted by the law. In 2008, after a period of activism by Zainichi Koreans, Filipino mothers of children born out of wedlock to Japanese fathers, and the Association of Multicultural Families (*kokusai kekkon wo kangaeru kai*) who all challenged aspects of the Nationality Law in court, the Supreme Court of Japan ruled on what was called the “Nationality Affirmation Case.”¹³⁵ This case also came on the heels of decades of female migrant workers coming into Japan, which increased the rates of both mixed race relationships and marriages.¹³⁶ The court held that children born to a Japanese father and a foreign mother out of wedlock could obtain Japanese citizenship.¹³⁷ The court also held that both the marriage and paternal legitimacy recognition requirements in the 1985 version of the Nationality Law were unconstitutional on the grounds of engendering discrimination.¹³⁸ This ruling sparked what became the 2008 amendment to the Nationality Law which codified this holding into the law.¹³⁹

In 2018, eight Japanese citizens who had voluntarily naturalized in various European countries challenged the involuntary expatriation upon foreign naturalization clause of the Nationality Law as violating the Japanese constitution.¹⁴⁰ The clause in question, Article 11 of the Nationality Law, states that “[a] Japanese national shall lose Japanese nationality when he or she acquires a foreign nationality by his or her own choice.”¹⁴¹ The plaintiffs argued that this infringed on their constitutionally protected right to “. . . the pursuit of happiness” and “equal[ity] under the law.”¹⁴² While pieces of the Nationality Act had been litigated in the past,¹⁴³ this was the first time the court ruled on

¹³⁵ Wilkinson, *supra* note 51, at 26.

¹³⁶ Chung & Kim, *supra* note 9, at 205–6.

¹³⁷ Wilkinson, *supra* note 51, at 26.

¹³⁸ Chung & Kim, *supra* note 9, at 211–12.

¹³⁹ *Id.* at 211.

¹⁴⁰ *Court Rules in Favor*, *supra* note 1.

¹⁴¹ Kokuseki hō [Nationality Law], Law No. 88 of 2008, art. 11, para. 1 (Japan).

¹⁴² *Court Rules in Favor*, *supra* note 1; NIHONKOKU KENPŌ [KENPŌ] [Constitution], art. 13 (Japan); *Id.* art 14, para. 1.

¹⁴³ See Wilkinson, *supra* note 51, at 25–26 (describing NGO groups representing Zainichi Koreans and female migrant workers litigating the National Law piecemeal).

whether Japanese citizens who obtain a foreign nationality through voluntary naturalization could remain Japanese citizens.¹⁴⁴

The government argued that the plaintiffs ignored harms to the “national interest” that dual citizenship allegedly posed to Japan.¹⁴⁵ Specifically, the government noted that dual citizenship engendered double voting rights and double or conflicting diplomatic protections.¹⁴⁶ In January 2021, the court held for the government, stating that dual citizenship “could cause conflict in the rights and obligations between countries, as well as between the individual and the state.”¹⁴⁷

With this history in mind, the following section will analyze the evolution of the law since the Meiji era to help determine whether it can be said Japan’s conception of citizenship, both social and legal, has changed in a significant way and, if it has, to whose benefit.

IV. JAPAN’S CONCEPTION OF CITIZENSHIP

At the start, it is helpful to refer back to the text of the comprehensive nationality law as adopted in 1899. Under this version of the law, a non-citizen could naturalize if they met the following five conditions: (1) domicile for five consecutive years; (2) at least twenty years old and having “legal capacity”; (3) good conduct and behavior; (4) able to support oneself, and; (5) currently stateless or will give up one’s existing nationality upon naturalization.¹⁴⁸ These conditions are highlighted because all five appear, in the same order, in the current Nationality Law.¹⁴⁹ Additionally, Article 20 of the 1899 version mirrors, save slight differences in translation, Article 11 in the current version in rendering voluntary acquisition of another nationality as an automatic renunciation of Japanese citizenship.¹⁵⁰ Therefore, it appears (from an objective standpoint) that the central tenants of the

¹⁴⁴ *Court Rules in Favor*, *supra* note 1.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ GILBERT BOWLES, JAPANESE LAW OF NATIONALITY 2–3 (1915).

¹⁴⁹ Kokuseki hō [Nationality Law], Law No. 88 of 2008, art. 5 (Japan).

¹⁵⁰ Bowles, *supra* note 148, at 5; Kokuseki hō [Nationality Law], Law No. 88 of 2008, art. 11, para. 1 (Japan).

law have not changed in over a century. This is not to say, however, that Japan's conception of citizenship has not changed at all.¹⁵¹

A. *Nai Atsu and Gai Atsu*

The various amendments since 1950 all demonstrate some sort of reactionary change, not unlike those the old nationality law underwent in the early twentieth century,¹⁵² in response to domestic and international pressures (*nai atsu* and *gai atsu*, respectively). The 1952 revision that revoked citizenship from Koreans was the product of both. Domestically, political worries of insurgency risk from Koreans prompted policymakers to push the Japanese government (and GHQ) to take action to permit forced repatriation.¹⁵³ To do so legally, this meant having to change the Nationality Law to revoke former colonial citizenship from Koreans and Taiwanese.¹⁵⁴ Internationally, the onset of the Korean War (and the Cold War in general) put pressure on GHQ from the U.S. Government to expel Koreans from Japan to avoid the spread of communist sympathy in Japan.¹⁵⁵

The 1985 amendment similarly was subject to both domestic and international pressures. Domestically, the increase in migrant workers during the 1980s had presented Japanese policy makers with the following question: "how to handle a foreign population that fills a need for manual labor but lacks [an] established legal claim for continued residence, and whose potential for permanent settlement is considered undesirable, particularly in economic downturns?"¹⁵⁶ Internationally, international agreements to which Japan was signatory pushed Japan to adopt the principles of those treaties into their laws.¹⁵⁷ However, as evidenced by both the

¹⁵¹ If this was the case, a significant part of this paper would not exist. See *infra* Part 0.

¹⁵² See *supra* Part III.0 (noting that issues with Japan-U.S. dual nationality prompted several revisions of the old nationality law).

¹⁵³ See Nantais, *supra* note 116, at 827, 829 (discussing Japanese questions of Japanese-citizen Koreans' loyalties).

¹⁵⁴ See *id.* at 834–35 (describing how GHQ began to refer to Koreans as "Korean nationals" in order to facilitate repatriation).

¹⁵⁵ *Id.* at 827. It is relevant to note that the name of the GHQ committee that ran the forced repatriation debate was "The Committee on Counter-Measures against Communism in the Far East." *Id.* at 834.

¹⁵⁶ Shin, *supra* note 129, at 315

¹⁵⁷ See, e.g., *id.* at 338 n.107 ("The prospect of Japan's ratification of the UN Convention on the Elimination of All Forms of Discrimination against Women, which

additional restrictions the 1985 amendment placed on potential dual citizens and the refusal to hold these international agreements as binding authority in Japanese courts,¹⁵⁸ the influence *gai atsu* has had on the Nationality Law seems to have waned over time.

The 2008 amendment appeared to arise entirely out of domestic pressure, albeit from ‘foreigners’ in Japan. Domestic associations like the Association of Multicultural Families have taken the charge in challenging the Nationality Law so that more non-citizen children born and raised in Japan are able to enjoy the rights of citizenship.¹⁵⁹ There continues to be hope, however, that these sorts of groups may also put pressures on Japan to adopt the international human rights standards to which Japan remains a signatory.¹⁶⁰ The 2021 Tokyo District Court case may also be seen as the result of solely domestic pressure as the push to permit by-choice dual citizenship came from Japanese citizens living abroad.¹⁶¹

B. *Proxies and Loopholes*

A key observation to be made from the various revisions of the Nationality Law is that they have all been in service of a common goal—to take away citizenship from non-ethnic Japanese and extend it to ethnic Japanese. The 1952 amendment took it away from Koreans and Taiwanese, while the 1985 and 2008 amendments extended it to children who were at least half Japanese.¹⁶² This pattern reinforces the conception of citizenship ingrained in Japan since 1899 that citizenship is inexplicably tied to ethnicity.¹⁶³ The base idea around amendments extending the rights and privileges of citizenship which, in turn, expand the conception of citizenship to

went into force on July 25, 1985, compelled the government to revise the Nationality Law”).

¹⁵⁸ See Murazumi, *supra* note 6, at 422 (introducing additional provisions added to the 1985 amendment to counteract the increase in the number of dual nationals); see also *supra* note 132 and accompanying text (discussing the Andrew Rees case where a child born to a Japanese father and a non-citizen mother presumed to be from the Philippines was granted Japanese citizenship since the state could not meet its burden of affirmatively identifying at least one of the parents).

¹⁵⁹ Wilkinson, *supra* note 51, at 26.

¹⁶⁰ Shin, *supra* note 129, at 360.

¹⁶¹ *Court Rules in Favor of Japan’s Ban on Dual Nationality*, *supra* note 1.

¹⁶² See *supra* Part 0 (discussing the various amendments to the Nationality Law).

¹⁶³ Lu, *supra* note 86, at 104.

cover ethnic Japanese who might not neatly fit into the requirements of citizenship and subsequently grant them the rights of citizenship, is not an uncommon practice; particularly in the realm of voting rights, some countries have been open to enfranchising non-citizen residents who arguably fall within the nation's conception of citizenship.¹⁶⁴

For the purposes of this Comment, I call such an expansion of a nation's conception of citizenship and granting of rights of citizenship to those now included in the social/legal citizenry (at the expense of maintaining an out-group of non-citizens) as a 'proxy' or 'loophole' in a country's nationality law. As mentioned above, there are examples of states creating proxies for non-citizen residents who are integrated into the country's society to enjoy (at least some of) the rights and privileges of citizenship, particularly voting.¹⁶⁵ However, the trend is not in that direction; these days, the trend is to expand voting rights to non-resident citizens while continuing to restrict it from non-citizen residents, ensuring the line is maintained by formal citizenship status.¹⁶⁶ This is the model Japan continues to follow, and the remainder of this Comment will explore how the Nationality Law has been crafted, specifically in the context of voting rights for dual citizens, to maintain that only ethnic Japanese have the right to vote and, consequently, that the conception of citizenship in Japan remains ethnically based.

1. Dual Citizen Voting Rights in Japan

In the 2021 Tokyo District Court case, the government's argument that dual citizenship is undesirable because it offers individuals dual voting rights was not new. This same concern, supported by the general conflicting loyalties concern held during the early to mid-twentieth century around the globe, was the backbone of the government's defense in *Afroyim*.¹⁶⁷ There, the government had won in the lower courts on the line that an

¹⁶⁴ See KOCHENOV, *supra* note 15, at 238 ("New Zealand, the absolute leader in this field [of enfranchising non-citizen residents], allows any permanent resident to vote in the national parliament elections. The UK goes further with the rights granted to the resident citizens of Ireland or the Commonwealth: they not only vote, but they can also run for office.").

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 221.

¹⁶⁷ *Afroyim v. Rusk*, 387 U.S. 253, 255 (1967); *id.* at 268–69 (Harlan, J. dissenting).

American citizen voting in a foreign country implicated American “foreign affairs” interests.¹⁶⁸ Further, the justification against dual citizenship in the Danish case rests on similar grounds that one who votes in two different countries cannot honestly be assumed to have either country’s interests fully at heart.¹⁶⁹ This sentiment continues to underlie opposition to dual citizenship among scholars as well.¹⁷⁰

First, as expressed by the efforts off New Zealand and the UK to expand voting rights to non-citizen residents,¹⁷¹ it ought to be recognized that the above view against dual voting is not the majority view, particularly among Western countries from which the original principles of citizenship spread and where liberalized dual citizenship laws are now spreading.¹⁷² Enfranchising dual citizens, especially migrants who naturalize but also those who are at-birth dual citizens, is one of the driving factors behind current liberalizations of European and continental American dual citizenship laws.¹⁷³ In Italy, for example, seats in the legislature are reserved for citizens who live abroad (who tend to be dual citizens) to ensure that the diasporic community feels included in the political process.¹⁷⁴ In the United States, despite scholarly opposition, the current law not only permits dual voting, but goes as far as to permit holding office in a foreign country while retaining American citizenship.¹⁷⁵

In Japan, while prospective by-choice dual citizens are barred from double voting on the basis of automatic expatriation, at-birth dual citizens between the ages of eighteen to twenty-two can legally vote both in Japan and, where permitted, their other country of citizenship. This is because the Public Offices Election Law, the statute that sets the voting age, was amended in 2015 to lower the

¹⁶⁸ *Id.* at 255.

¹⁶⁹ Sejersen, *supra* note 11, at 541–42.

¹⁷⁰ See e.g., *Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigr., Border Sec., and Claims of the H. Comm. on the Judiciary*, 109th Cong. 1 (2005) (detailing several scholars who remain opposed to dual citizenship on the grounds of conflicting loyalties, especially for those who vote or seek to hold office in other countries).

¹⁷¹ See KOCHENOV, *supra* note 15, at 238.

¹⁷² Sejersen, *supra* note 11, at 531 fig.1.

¹⁷³ *Id.* at 534–35.

¹⁷⁴ *Id.*

¹⁷⁵ Murazumi, *supra* note 6, at 437–38.

requirement from twenty to eighteen.¹⁷⁶ The law had been previously amended in 1945 to lower the age from twenty-five to twenty.¹⁷⁷ This means, therefore, that during the deliberation and implementation of the “election requirement” in the 1985 amendment to the Nationality Law which mandated at-birth dual citizens to choose a citizenship at age twenty-two,¹⁷⁸ the Diet was aware (or at least should have been) that they were creating a loophole permitting at-birth dual citizens to double vote. Lowering the voting age again in 2015 after thirty years of dual citizens exercising their double voting rights would have been an opportunity for the Diet to revisit the election requirement to match it with the voting age, yet they did not do so.

Further, the justification against such a proxy (akin to the Danish) that the dual citizen voter would upset the national electorate with insincere influence that might elect representatives who will act counter to the national interest relies on the premise that the dual citizen population is large enough to have such an influence. The Japanese government has admitted that they have no idea how many dual citizens there are, either living in Japan or abroad.¹⁷⁹ Attempts to do so are seen as “bureaucratic nightmares,” which is part of the reason why the Nationality Law is rarely enforced against current dual citizens.¹⁸⁰ Going by estimates, there are roughly 518,000 Japanese who hold at least permanent residency in a foreign country, but the number of dual citizens within that group is unclear.¹⁸¹ Even assuming they are all dual citizens of voting age, the dual citizen vote would only make up 0.004% of the population and slightly less than 0.005% of the electorate.¹⁸² This small of a number, notwithstanding a large

¹⁷⁶ *Diet Enacts Law Lowering Voting Age to 18 from 20*, THE JAPAN TIMES (June 17, 2015), <https://www.japantimes.co.jp/news/2015/06/17/national/politics-diplomacy/diet-enacts-law-lowering-voting-age-18-20/> [<https://perma.cc/F3W6-TPJW>]

¹⁷⁷ *Id.*

¹⁷⁸ Murazumi, *supra* note 6, at 421–22.

¹⁷⁹ *Court Rules in Favor of Japan’s Ban on Dual Nationality*, *supra* note 1.

¹⁸⁰ Wilkinson, *supra* note 51, at 25.

¹⁸¹ *Court Rules in Favor of Japan’s Ban on Dual Nationality*, *supra* note 1.

¹⁸² *Japan: The World Factbook*, CIA (Feb. 17, 2022), <https://www.cia.gov/the-world-factbook/countries/japan/> [<https://perma.cc/V4MS-8FEJ>]; *Senkyo kanren shiryō* [*Election Data*], SŌMUSHŌ [MINISTRY OF INTERNAL AFFAIRS AND COMMUNICATIONS], https://www.soumu.go.jp/senkyo/senkyo_s/data/shugiin48/ [<https://perma.cc/TG2H-G4DC>] (last visited Apr. 22, 2021).

concentration of dual citizens in one electoral district, is unlikely to have any independent, material impact on a Japanese election.

Restricting the right to vote through involuntary expatriation of prospective by-choice dual citizens while permitting a proxy for at-birth dual citizens, therefore, appears not to be based in a uniform concern over electoral impacts of disloyal voters. Instead, recognizing that the prospective by-choice group primarily includes migrant workers seeking to naturalize in Japan,¹⁸³ the dual voting justification against dual citizenship as-applied to these migrant workers but not to ethnically half-Japanese at-birth dual citizens reflects a conception of citizenship tied to ethnicity that is closely held by the ruling political forces.¹⁸⁴ In short, it seems that the government has not kept the election requirement and the voting age in sync because it presents a proxy only available to (partially) ethnic Japanese, while complete restriction from voting to naturalized Japanese citizens who would seek to retain their prior citizenship keeps the non-Japanese out of the ballot box.

V. CONCLUSION

While the Nationality Law today has undergone a series of amendments since its adoption in 1950, both an objective look at the text and at the conception of citizenship from their births out of Western inspiration in the nineteenth century reveal little change. In this way, both the legal and social constructs that make up a nation's conception of citizenship have not undergone fundamental changes despite both domestic and international pressures on Japan to do so. The gatekeeper to the rights and privileges of citizenship in Japan continue to be ethnicity, and amendments in the Nationality Law and subsequent shifts in who is accepted in the Japanese conception of citizenship have all been in service of this basis on ethnicity.¹⁸⁵ Therefore, while dual citizenship continues to be prohibited by the Nationality Law, proxies permit ethnically Japanese dual citizens to 'count' both socially and legally, particularly when it comes to voting. This is at the expense of non-citizen residents who arguably

¹⁸³ See Chung & Kim, *supra* note 9, at 201–2 (describing how marriage migration and multicultural families generally are increasing challenges to citizenship laws that define themselves on ethnic grounds).

¹⁸⁴ Wilkinson, *supra* note 51, at 25.

¹⁸⁵ See *supra* Part IV.0.

may be more invested and impacted by the outcome of an election than non-resident Japanese citizens, but Japan's conception of citizenship makes the line clear—citizenship is for Japanese only.