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EXPATRIATION OF AMERICAN MINORS*

Lester B. Orfield †

THE United States Supreme Court in May, 1939, handed down a vitally significant decision on the expatriation of American minors.¹ Prior to that date, one was forced to deduce the law from conflicting decisions of the lower federal courts and of state courts, rulings by the departments of state, labor, and justice, and views of writers. This, therefore, seems an appropriate time at which to discuss the problems which have been raised and the solutions which have been offered.

The facts of this notable case were these: Miss Elg was born in Brooklyn, New York, on October 2, 1907. Her parents were born in Sweden. At some time prior to 1906 they had migrated to the United States and her father had been naturalized before a United States district court on September 24, 1906. In 1911 her mother returned to

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¹Perkins v. Elg, 307 U. S. 325, 59 S. Ct. 884 (1939). The opinion was unanimous. Justice Douglas took no part. That the strongest possible argument for the government was presented may be inferred from the fact that the only cases lost by the government at the October 1938 term were this one and the Strecker case. For a similar decision as to the expatriation of American women through marriage to aliens, see Mackenzie v. Hare, 239 U. S. 299, 36 S. Ct. 106 (1915). The Court there upheld the power of Congress by statute to expatriate American women through their marriage to aliens even though they retained their residence in the United States. But in 1922 and subsequently Congress repealed the act of 1907 providing for such expatriation. There has been no decision by the Supreme Court as to expatriation of American women marrying aliens before the act of 1907 providing for expatriation. A reasonable implication of the present case is that more clearly than formerly appeared such women were not expatriated; that their expatriation through marriage could be accomplished only through express treaty or statutory provision. See comment by the writer, 16 Neb. L. Bull. 176 (1937).
Sweden accompanied by Miss Elg. Miss Elg continued her residence uninterruptedly with her mother in Sweden until September 7, 1929. On July 25, 1922, her father returned to Sweden, where he has since resided. She resided with her father from the time he returned to Sweden in 1922 until she came to the United States on September 17, 1929, on a passport obtained from the department of state on July 22, 1929. She has resided in the United States ever since. On November 13, 1934, her father made a statement before an American consul in Sweden that he had voluntarily expatriated himself with respect to his American citizenship and intended to preserve his allegiance to Sweden. A communication dated October 30, 1934, from the Swedish ministry for foreign affairs to the American legation at Stockholm stated that her father had reacquired Swedish citizenship in 1924 through his two years' residence in Sweden, and that she had also acquired Swedish citizenship. The immigration and naturalization service of the United States under date of April 8, 1935, served her with notice of deportation as an alien who had not been legally admitted to the United States. Deportation proceedings were postponed from time to time. On July 16, 1936, she applied to the state department for a passport as an American citizen, but such passport was refused on July 29, 1936, on the ground that she was not an American citizen. On January 14, 1937, she brought suit in the United States District Court for the District of Columbia against the secretary of labor, the acting commissioner of immigration and naturalization and the secretary of state, asking for a declaratory judgment that she was an American citizen and for an injunction against deportation and failure to issue a passport. The district judge, Bailey, granted a declaratory judgment against the secretary of labor and the acting commissioner of immigration and naturalization, but dismissed the petition against the secretary of state. The court of appeals affirmed this decision. Cross-appeals on certiorari, granted on December 5, 1938, carried the case to the United States Supreme Court, where Miss Elg won a declaratory decree against all parties including the secretary of state.

The subject of expatriation of infants may be considered from a number of points of view. One may ask what international law has to say on the subject, if anything, whether through treaty or through judicial decision. One may ask what are the rules of municipal law, more particularly those of the United States. With respect to the law of the United States one may ask what are the rules under the Constitution, under treaties, under statutes, and at common law. One may make inquiry with respect to minors born in the United States (thus
citizens *jure soli*), minors born outside the United States, of American parents (thus citizens *jure sanguinis*), and minors who have become American citizens through the naturalization of their parents.

**INTERNATIONAL LAW**

One need not long be detained by the possible limitations laid down by international law. In the absence of treaty it seems clear that international law does not stand in the way of expatriation of American minors, nor does it, on the other hand, stand in the way of retention of American citizenship by American minors. That it does not stand in the way of expatriation would seem to follow from the fact that international law does not protect against statelessness. Hence the fact that a minor was expatriated without gaining any other citizenship, though highly regrettable, would make no difference as far as international law is concerned. That international law does not stand in the way of the retention of American citizenship may be reasonably implied from the fact that international law admits of dual citizenship. Hence the fact that a minor had acquired another citizenship would not mean that he lost his American citizenship. There are countless cases of minors and adults who are American citizens because born in the United States but also European citizens because their parents were European citizens.

It has thus been seen that traditional international law necessitates no doctrine of expatriation of American minors. In the absence of a treaty, this country need not recognize the expatriation abroad of minors or even of their parents. An increasing amount of international

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2 In turn, one may inquire whether there are any distinctions where the parents are native-born American citizens, where they are naturalized citizens, and where they are aliens.

3 In turn, one may inquire whether there are distinctions between minors where both parents are Americans and where only one parent is an American.

4 For a discussion of awards by international arbitration commissions, see Flournoy, "Dual Nationality and Election," 30 Yale L. J. 693 (1921). In Alexander v. United States, 3 Moore, International Arbitrations 2529 (1898), where a minor was born in the United States and went to Scotland, the country of his father, and later returned to the United States, it was held that he had never lost his American citizenship. See also Gautier v. Mexico, 3 ibid., 2450; Oscar Chopin v. United States, 3 ibid., 2506; Boutwell, Report 88 (1880); the Canevaro case before the Permanent Court of Arbitration, Italy v. Peru, 6 Am. J. Int. L. 747 (1912); Advisory Opinion of the Permanent Court of International Justice upon the nationality decrees issued in Tunis and Morocco, Hague, Perm. Ct. Int. J., Ser. B., No. 4, p. 24 (Feb. 7, 1923).

5 "As municipal law determines how citizenship may be acquired, it follows that persons may have a dual nationality." Hughes, C. J., in Perkins v. Elg, 307 U. S. 325 at 329, 59 S. Ct. 884 (1939).

law, however, is to be found in treaties. The express provisions of a treaty between the United States and another state might call for the expatriation of American minors under certain circumstances. There is nothing in traditional international law that bars the making of such treaties. Since treaties under the Constitution of the United States are a form of municipal law, consideration of the effect of treaties will be postponed until the discussion of municipal law limitations upon expatriation. Suffice it to say here that, so far as the writer is informed, no treaty entered into by the United States up to the present time has contained express provisions for the expatriation of minors born in the United States. In no case decided by the United States Supreme Court has a treaty been held even impliedly to provide for such expatriation. In fact, the idea of expatriation by implication seems to have been rejected in *Perkins v. Elg*.

**Municipal Law**

*The Constitution*

In examining the doctrines of the municipal law of the United States concerning expatriation, it behooves one at the outset to consider whether there are any constitutional limitations on the expatriation of minors. The Constitution nowhere expressly forbids the expatriation of minors; nor does it expressly permit such expatriation. It is true that the Fourteenth Amendment provides that “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” Obviously this means at least that the effect of birth on citizenship may not be changed. The nationality of the parents is immaterial. Thus while Chinese and Japanese are not permitted by the United States to migrate to this country and to be naturalized, persons of such races born here become American citizens. But the Constitution does not compel the conferring of American citizenship on children of American

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7 307 U. S. 325 at 337, 59 S. Ct. 884 (1939): “If the abrogation of that right had been in contemplation, it would naturally have been the subject of a provision suitably explicit.”

8 In United States v. Reid, (C. C. A. 9th, 1934) 73 F. (2d) 153, the parents were native Americans, though expatriation was permitted. In Perkins v. Elg the parents were naturalized American citizens who had come from Sweden, and expatriation was not allowed by either the Supreme Court or the court of appeals. In Citizenship of Ingrid Therese Tobiassen, 36 Op. Atty. Gen. 535 (1932), the parents were aliens from Norway who became naturalized after the birth of the minor, and expatriation was allowed.

citizens where such children are born abroad, nor does it compel the granting of permission to become naturalized American citizens to minors who may come to this country either alone or with their parents. That being true, if any distinction were to be taken between minors who are citizens because of birth in the United States and minors who are citizens for other reasons, it would seem that expatriation of the latter should be permitted without necessarily allowing it as to the former.

The court of appeals in Perkins v. Elg stated with respect to the rights of a minor that "it is doubtful, indeed, if there is any power in Congress,—in view of the provisions of the Fourteenth Amendment . . . —to take them away." The Supreme Court seems to have felt that Congress has such power through statute and treaty. The government, in its brief, pointed out that the Fourteenth Amendment was adopted as a restriction not on the powers of Congress but rather on the powers of the states. The Fourteenth Amendment did not have the effect of setting "doctrinaire restrictions preventing the Congress from acting as a member of the community of nations and prescribing reasonable provisions, adopted in many other countries, with respect to the expatriation of citizens." As the Supreme Court had said in Mackenzie v. Hare:

"Plaintiff contends, as we have seen, that it has not, and bases her contention upon the absence of an express gift of power. But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers." 18

It is clear that adults who were American citizens because of birth in the United States may be expatriated under certain circumstances. Neither the Fourteenth Amendment nor any other part of the Constitution stands in the way of voluntary expatriation. For instance, a citizen may expatriate himself by naturalization in a foreign country

11 Brief for Petitioner, p. 56.
12 Brief for Petitioner, p. 56. For the government's argument as to constitutionality of statutes, see pp. 54-62; and as to treaties, pp. 63-68.
18 239 U. S. 299 at 311, 36 S. Ct. 106 (1915).
or by taking an oath of allegiance to a foreign sovereign.\textsuperscript{14} There have been dicta to the effect that Congress cannot by legislative action expatriate a citizen without his consent.\textsuperscript{15} That is to say, the Constitution forbids involuntary expatriation. But a rather broad meaning has been given to the term "voluntary." The act resulting in expatriation might be perfectly legal and in no sense improper. It has been held that Congress may provide for the expatriation of an American woman by marriage to an alien even though she continued to reside in the United States.\textsuperscript{16} The Court said that the consent to expatriation is implied from the voluntary performance of an act which will result in expatriation. Until the recent case, it appeared open to doubt whether the Fourteenth Amendment prohibited legislation, not arbitrary in its nature, expatriating a citizen without his consent.\textsuperscript{17} To say that a citizen by

\textsuperscript{14} Act of March 2, 1907, § 2, 34 Stat. L. 1228, 8 U. S. C. (1934), § 17, quoted infra at note 60.

\textsuperscript{15} The Supreme Court stated in United States v. Wong Kim Ark, 169 U. S. 649 at 703, 704, 18 S. Ct. 456 (1898): "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. ... The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship. ... "No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country. ... Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful.".

The Supreme Court stated in Mackenzie v. Hare, 239 U. S. 299 at 311, 36 S. Ct. 106 (1915): "It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen."

In Burkett v. McCarty, 10 Bush (73 Ky.) 758 at 759 (1874), the court stated that "no mere act of state legislation can per se denationalize him against his will or without his concurrence." But this was a vindication of state, not national, citizenship, and was concerned not with the status of a minor, but with that of an adult expatriated by way of punishment and without judicial trial.

In Ainslie v. Martin, 9 Mass. 454 at 461 (1813), the court stated that the sovereign cannot discharge a subject "from his allegiance against his consent" except by disfranchisement "as a punishment for some crime." But the court stated this by way of corollary to the earlier and now discarded rule that no subject can expatriate himself.

\textsuperscript{16} Mackenzie v. Hare, 239 U. S. 299, 36 S. Ct. 106 (1915). The court stated, 239 U. S. at 311, that although there was no express gift of this power, "there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty."

\textsuperscript{17} The Supreme Court stated as to expatriation by marriage: "This is no arbitrary exercise of government," Mackenzie v. Hare, 239 U. S. 299 at 312, 36 S. Ct. 106 (1915). See ROTSCHEAEPER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 378 (1939); 19 MINN. L. REV. 589 (1935).
marrying consented to expatriation, bordered on fiction, particularly in an era of increasing rights for women.\textsuperscript{18}

Even if it were admitted that Congress could not by statute provide for involuntary expatriation, it would by no means follow that a treaty might not validly so provide.\textsuperscript{19} The Supreme Court has said: "The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations"\textsuperscript{20} extending "to all proper subjects of negotiation with foreign governments."\textsuperscript{21} Expatriation of nationals who become attached to the allegiance of another government is a subject properly pertaining to our foreign relations. Since, as was seen in \textit{Mackenzie v. Hare}, Congress has the implied power to pass statutes providing for the expatriation of American women marrying aliens, \textit{a fortiori} treaties may deal with the subject. Such treaties promote international amity by reducing the number of cases of dual nationality. Seventy years ago the United States entered into nine naturalization treaties. Since that time it has signed a multipartite pact and concluded twelve other bipartite naturalization treaties, the latest, with the now defunct Albania,\textsuperscript{22} having become effective in 1935.

Granted that expatriation is the proper subject for a treaty, there may still be difficulty as to whether treaties may provide for the expatriation of minors because of the naturalization abroad of their parent. Perhaps the possible limitations on the treaty-making power have been stated most broadly and emphatically by the Supreme Court in \textit{Geofroy v. Riggs}:\textsuperscript{28}

\textsuperscript{18} The Supreme Court stated its theory in Mackenzie v. Hare, 239 U. S. 299 at 311, 36 S. Ct. 106 (1915): "The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary and worked in many instances for her protection. There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy."

\textsuperscript{19} The Supreme Court in Perkins v. Elg seems to hold expatriation within the treaty-making power. To the same effect, see United States v. Reid, (C. C. A. 9th, 1934) 73 F. (2d) 153, certiorari denied 299 U. S. 544, 57 S. Ct. 44 (1936), because the petition was not filed in time. See contrary language in In re Reid, (D. C. Ore. 1934) 6 F. Supp. 800.

\textsuperscript{20} Santovincenzo v. Egan, 284 U. S. 30 at 40, 52 S. Ct. 81 (1931).

\textsuperscript{21} In re Ross, 140 U. S. 453 at 463, 11 S. Ct. 897 (1891); Asakura v. Seattle, 265 U. S. 332 at 341, 44 S. Ct. 515 (1924).

\textsuperscript{22} 49 Stat. L. 3241 (1932).

\textsuperscript{28} 133 U. S. 258 at 267, 10 S. Ct. 295 (1890), citing Fort Leavenworth R. R. v. Lowe, 114 U. S. 525, 5 S. Ct. 995 (1885).
"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. ... But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

A treaty providing for expatriation of minors through the naturalization of their parents would seem not to violate any of the specific prohibitions stated in this opinion. It does not attempt to authorize "what the Constitution forbids." 24 The Fourteenth Amendment does not in express language forbid such treaties. In the words of Justice Holmes in Missouri v. Holland, 25 such a treaty would not "contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms" of the Fourteenth Amendment. One may also recall the words of Justice Chase in Ware v. Hylton: "If the court possesses a power to declare treaties void, I shall never exercise it, but in a very clear case indeed." 26 Thus far no treaty has been declared unconstitutional. Conceivably the Fourteenth Amendment forbids treaties providing for "unreasonable" expatriation, but that is not the equivalent of "involuntary expatriation" of a minor by the act of his father. 27

Assuming that the Constitution permits only voluntary expatriation, should the case of the minor be regarded like that of the married woman? Can it be said that the expatriation of the parent is the voluntary act of the child? It has been so asserted on principle, 28 and there

24 Professor Rottschaefer says that this limit "may be ignored since there is no indication of how to determine what it forbids in connection with the treaty-making power." Rottschaefer, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 384-385 (1939).
26 3 Dall. 199 at 237 (1796). See also United States v. Reid, (C. C. A. 9th, 1934) 73 F. (2d) 153.
27 See Brief for Petitioner in Perkins v. Elg, at p. 67.
28 The solicitor general argued in Perkins v. Elg that family unity was desirable in matters of citizenship. Brief for the Petitioner, pp. 58-62. Traditionally the father had acted for the child. Congress was not acting arbitrarily in giving weight to the concept of family unity. While normally a change of domicile calls for voluntary action
is case authority supporting the view of voluntary expatriation in such a case. On the other hand, with respect to expatriation under the 1907 act of Congress by virtue of the taking of an oath of allegiance to a foreign state, it has been held that such oath must be taken voluntarily, and that such expatriation cannot be effected by one adjudged insane, or a minor acting on his own behalf.

The recent case of Perkins v. Elg would seem to lead to the conclusion that the Fourteenth Amendment does not forbid the involuntary expatriation of minors if that is accomplished by treaty or by act of Congress. In the absence of treaty or statute, there must be voluntary action by the minor "in conformity with applicable legal principles." As Chief Justice Hughes stated: "As at birth she became a citizen of the United States, that citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles." Since the Court found that no treaty or statute provided for expatriation of minors, it was not strictly necessary for the Court to hold that such treaty or statute would be permissible under the Constitution. All that it was requisite for the Court to decide was that, in the absence of treaty or statute, minors may not constitutionally be deprived without their consent of and formation of an intent to reside, an infant cannot change his domicile, and his domicile follows that of his father, or his widowed mother. Lamar v. Micou, 112 U. S. 452 at 470, 5 S. Ct. 221 (1884). At common law the child takes the nationality of the father. In re Page, (D. C. Cal. 1926) 12 F. (2d) 135. The United States applies the doctrine of citizenship jure sanguinis as well as that of juri soli. Since 1790 Congress by statute has provided that the naturalization of a father shall confer American citizenship on his children dwelling in the United States. More than twenty countries provide for expatriation in the case of a minor who acquires a new nationality in a foreign country by virtue of his parents' naturalization. Harvard Draft Convention on Nationality, 23 Am. J. Int'l L. Spec. Supp. 105 (1929). Moreover, if Congress could not expatriate minors born in the United States, it could not expatriate naturalized minors, since naturalized citizens possess all the rights of a native citizen except eligibility for the presidency.


33 Quaere, can there be any form of binding expatriation by an infant by his own act during his infancy? Compare United States ex rel. Baglivo v. Day, (D. C. N. Y. 1928) 28 F. (2d) 44. What is voluntary action by an infant "in conformity with applicable legal principles"?
their American citizenship. The Court does, and is forced to, decide whether the Fourteenth Amendment precludes involuntary expatriation of minors through administrative or judicial decision founded on usage and common law without the support of treaty or statute. 35

Since by treaty or act of Congress minors born in the United States can be involuntarily expatriated, it would seem even more clearly that minors who are citizens \textit{jure sanguinis} or citizens by derivation through the naturalization of the parents are subject to the same procedure. Expatriation through administrative ruling or judicial precedent would not seem so clearly precluded by the Fourteenth Amendment, though it should be remembered that the Fourteenth Amendment states that persons "naturalized in the United States" are citizens of the United States just as it states that persons "born" in the United States are citizens of the United States. Possibly it can be said that arbitrary deprivation of citizenship of these two classes of minors would be in violation of the Fourteenth Amendment or the due process clause of the Fifth Amendment. It is to be borne in mind that citizens \textit{jure sanguinis} have all the rights of citizens \textit{jure soli}, including the right to be president or vice president if elected, whereas naturalized citizens have all rights except the latter. It may be noted that naturalized citizens are mentioned in the Fourteenth Amendment while citizens \textit{jure sanguinis} are not.

\textit{Treaties}

Assuming that treaties may constitutionally provide for the involuntary expatriation of American minors, as \textit{Perkins v. Elg} seems to hold, the next problem in a given case is to decide whether a treaty or treaties have done so. 36 Thus far in the adjudicated cases no treaty has been construed by the United States Supreme Court as providing for involuntary expatriation. 37 The Supreme Court held in \textit{Perkins v. Elg}, contrary to recent views of the department of state and of the

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35 See the statement of Chief Justice Hughes quoted infra at note 122.
36 For an argument that the Treaty of 1869 with Sweden provided for involuntary expatriation, see Brief for Petitioner in \textit{Perkins v. Elg}, pp. 18-41.
37 The Minnesota court, however, has held that a treaty provided for involuntary expatriation. Ostby v. Salmon, 177 Minn. 289, 225 N. W. 158 (1929); Koppe v. Pfefferle, 188 Minn. 619, 248 N. W. 41 (1933).

A federal circuit court of appeals also so held in United States v. Reid, (C. C. A. 9th, 1934) 73 F. (2d) 153, certiorari denied because petition was not filed on time, 299 U. S. 544, 57 S. Ct. 44 (1936). The federal district court in that case held that a treaty if so construed would be unconstitutional. In re Reid, (D. C. Ore. 1934) 6 F. Supp. 800. The treaty involved was the 1870 naturalization treaty with Great Britain. 16 Stat. L. 775 (1870). Favoring interpretation of treaties to allow involuntary expatriation, see 34 \textit{Col. L. Rev.} 1366 (1934).
attorney general in the *Tobiassen* case, that the treaty with Sweden of 1869 required the recognition only of a voluntary expatriation, hence did not extend to minors born in the United States who are taken abroad by their parents. The treaty did not specifically mention minors who had obtained citizenship by birth in the country which their parents had left. Miss Elg had not expatriated herself by remaining in Sweden from the age of four till she was twenty-one. She had retained and had exercised the right of electing American citizenship by returning to the United States on attaining her majority. Furthermore, article III of the treaty, which allowed each state to receive back its original citizens who had been naturalized in the other and then returned to their native country and applied for readmission, was deemed to cover the return to the United States of Miss Elg, even if one were to concede that she had acquired Swedish citizenship through the alleged renaturalization there of her father. No provision of the treaty barred the United States from treating Miss Elg as having elected United States citizenship, which as a matter of fact she had never lost. Even if the "intent not to return" to America could under article III of the protocol be inferred from a two-year period of Swedish residence, this provision was applicable to the parent only, and could not have any application to a minor. Even if it did apply to a minor, it was a presumption rebutted by her actual return to the United States. The Supreme Court has thus indicated that it will not readily assume that a treaty has abrogated the right of a minor born in the United States to elect American citizenship on attaining his majority. As Chief Justice Hughes stated: "If the abrogation of that right had been in contemplation, it would naturally have been the subject of a provision suitably explicit. Rights of citizenship are not to be destroyed by an ambiguity." The writer knows of no treaty expressly providing for the expatriation of minors who are citizens *jure sanguinis*. Probably the Court would not imply involuntary expatriation in such a case either. Some recent treaties have expressly provided for the expatria-

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89 17 Stat. L. 809 (1869).
90 307 U. S. 325 at 335 ff. The court of appeals did not consider the meaning or effect of the treaty.
91 307 U. S. 325 at 337.
92 United States ex rel. Anderson v. Howe, (D. C. N. Y. 1916) 231 F. 546. This case suggests that Congress may by statute constitutionally lay down such a rule. See also Flournoy, "Naturalization and Expatriation," 31 Yale L. J. 848 at 861 (1922); 3 Moore, International Law Digest 754 (1906).
93 307 U. S. 325 at 337.
tion of minors who had become naturalized American citizens. It is believed that in the absence of such express provisions the Court would not imply involuntary expatriation in this case either.

The construction by the Supreme Court of the treaty with Sweden was supported by the construction given to naturalization treaties during the period from 1868 to 1872. The first of these treaties, containing provisions similar to those found in the treaty with Sweden, was made with the North German Confederation. In Steinkauler's Case, arising in 1875, with respect to this treaty, Attorney General Pierrepont upheld the right of election, saying:

"Under the treaty, and in harmony with the American doctrine, it is clear that Steinkauler, the father, abandoned his naturalization in America and became a German subject (his son being yet a minor), and that by virtue of German laws the son acquired German nationality. It is equally clear that the son by birth has American nationality; and hence he has two nationalities, one natural, the other acquired. There is no law of the United States under which his father or any other person can deprive him of his birthright."

Four years later in 1879 Secretary of State Evarts ruled to the same effect with respect to the same treaty.

The naturalization treaty with Denmark of 1872 contained similar provisions. Secretary Evarts construed this treaty also as not providing for expatriation. In the words of Chief Justice Hughes: "These

44 In the recent treaties with Bulgaria (1923), Czechoslovakia (1928), and Albania (1932), there was expressly retained within the definition of "naturalized" citizens minors who had acquired American citizenship through the naturalization of their parents. See Brief for Petitioner, pp. 28, 25, note 18. The statutes were respectively: 43 Stat. L. 1759 (1923); 46 Stat. L. 2424 (1928); 49 Stat. L. 3241 (1932).

45 15 Stat. L. 615 (1868).

46 15 OP. ATTY. GEN. 15 at 17 (1875). Petitioner, in its brief in Perkins v. Elg, at pp. 36-37, asserted, however, that the dictum relied on by the court of appeals from the Steinkauler case "did not even consider what effect the treaty might have upon the child." Petitioner concluded that the considered executive interpretation of the naturalization treaties was one of involuntary expatriation of minors; and that the opinions of the state department cited by the court of appeals to the contrary effect involved situations not within the purview of any naturalization treaty. For instance, in the Tobiassen Case, 36 OP. ATTY. GEN. 535 (1932), the state department claimed expatriation because of a naturalization treaty with Norway.

47 3 Moore, International Law Digest 543 (1906).


50 3 Moore, International Law Digest 544 (1906).
rulings, following closely upon the negotiation of these naturalization treaties, show beyond question that the treaties were not regarded as abrogating the right of election for which respondent here contends."

Subsequent rulings were to the same effect. For instance in 1890, Acting Secretary of State Wharton asserted the right of election at majority as to a minor who upon his own application had been admitted to Danish citizenship during his minority. An instruction by Secretary of State Sherman in 1897 with respect to an American minor who had acquired American citizenship through the naturalization of his father confirms this view. It would seem that if treaties do not expatriate naturalized minors, a fortiori they do not expatriate minors born in the United States. As late as 1906 the department of state issued a memorandum maintaining the right of election.

In the Tobiassen case the state department, relying on the naturalization treaty between the United States and Norway, took the position that Miss Tobiassen had ceased to be an American citizen. The attorney general gave an opinion relying on the similarity of the Norwegian statute to our own statute conferring derivative citizenship upon minors. He discussed the scope of the treaty-making power without indicating clearly whether or not the treaty was also relied upon. He agreed with the state department that Miss Tobiassen had been expatriated.

A number of treaties have provided for the acquisition of American citizenship by minors through the naturalization of their parents. Since 1790, acts of Congress have also so provided. Reciprocally these treaties may have permitted American minors to acquire foreign citizenship through the naturalization of their parents. But the fact that the United States may make it easy for alien minors to acquire American citizenship does not prove that it also wishes to facilitate the loss of American citizenship by American minors. Furthermore there is no reason why, even if the treaties permit the acquisition of foreign citizenship by American minors, such minors may not retain their American citi-

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52 3 MOORE, INTERNATIONAL LAW DIGEST 715 (1906).
53 3 ibid., 472 (1906).
55 Assistant Secretary of State Wilbur J. Carr in a letter to the Attorney General, dated October 7, 1931, stated that the state department had for many years construed the naturalization treaties as providing for involuntary expatriation of minors. See Supplemental Memorandum for Petitioner in Perkins v. Elg, Appendix A, pp. 9, 10.
56 36 OP. ATTY. GEN. 535 (1932).
57 Act of March 26, 1790, 1 Stat. L. 103.
zenship. As the Supreme Court states in *Perkins v. Elg* persons may have a dual nationality.

Statutes

As the Supreme Court held in *Perkins v. Elg*, Congress might by statute provide for involuntary expatriation of minors. But as in the case of treaties the Supreme Court has never construed any Congressional enactment as making such provision. The Government argued in *Perkins v. Elg* that section 2 of the act of March 2, 1907 barred the right of election. This section provides:

“That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

“When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe. *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war.”

It may be noted that the second paragraph of this section applies only to naturalized citizens. It merely raises a presumption of expatriation based on voluntary acts. It expressly provides that the presumption shall be rebuttable. It does not expressly apply to minors who have become naturalized American citizens. Since the 1907 statute was found by the Court not to be aimed at involuntary expatriation of minors born in the United States, possibly the court might take the same view as to naturalized minors.

As to involuntary expatriation of minors born American citizens *jure sanguinis*, here again no statute expressly provides for their expatriation where both parents are Americans. Under the act of March 2, 1907, such children who continued to reside outside the United

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Brief for Petitioner, pp. 41-45.


States must, in order to receive the protection of the United States, upon reaching the age of eighteen years record at an American consulate their intention to become residents and remain American citizens, and must also take an oath of allegiance upon attaining their majority. But loss of protection is not the same as loss of citizenship and the statute does not speak of loss of citizenship. However, under the act of 1934, if only one parent is an American, the minor loses his American citizenship if he fails to reside in the United States at least five years continuously immediately prior to his eighteenth birthday, and if he fails to take an oath of allegiance to the United States within six months after his twenty-first birthday.

Thus with respect to minors who were citizens though not born in the United States, the statutory situation may be summarized as follows: Minors who are citizens *jure sanguinis* because both parents are Americans under certain circumstances will lose protection but not citizenship. Minors who are citizens *jure sanguinis* because one parent is an American under certain circumstances will lose citizenship as well as protection. Minors who are citizens through the naturalization of their parents are, under certain circumstances, subject to a rebuttable presumption of loss of citizenship.

Before 1907 the concept of expatriation had been set forth in the different cases as they arose, both by the courts and the secretaries of state. In the statute of 1907 Congress defined the acts which might constitute expatriation. The government in its brief in *Perkins v. Elg* noted that the 1906 board inquiring into the laws regarding expatriation recommended a provision assuring the expatriation of an American citizen upon his obtaining naturalization in a foreign state as "declaratory legislation." But the government admitted that none of the cases analyzed by the board dealt with the problem of a minor acquiring derivative naturalization in a foreign state. In fact the board quoted the statement in *Ex parte Chin King*, that "a father cannot deprive his minor child of the status of American citizenship.... This status, once acquired, can only be lost or changed by the act of the party when arrived at majority...."

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63 *MooRE, INTERNATIONAL LAW DIGEST* 711-715 (1906).
64 Brief for Petitioner, pp. 44-45.
65 As to the cases analyzed by the board see H. R. Doc. 326, 59th Cong., 2d sess., pp. 160 ff., 210 ff. (1906).
It may be granted that cases decided prior to 1907 holding against involuntary expatriation would not be authority that Congress by the 1907 act had not provided and provided validly for such expatriation. As far as the federal courts were concerned, a single case had denied the doctrine of expatriation. The United States Court of Appeals for the Second Circuit and that for the District of Columbia in cases decided after the 1907 act ruled against expatriation, while that for the ninth circuit ruled in favor of it. Federal district judges in New York and Oregon also ruled against expatriation, as did a judge of the United States District Court for Hawaii.

The Supreme Court in *Perkins v. Elg* interpreted the statute as being "aimed at a voluntary expatriation." The Court found no evidence in the terms of the statute "that it was intended to destroy the right of a native citizen, removed from this country during minority, to elect to retain the citizenship acquired by birth and to return here for that purpose." Even if the minor by derivation from its parents became naturalized under the foreign law, the minor still retained the right of election in the absence of any statutory provision to the contrary. The Supreme Court thus agreed with the court of appeals, which also held that neither section 2 of the act of March 2, 1907, nor any other statute provided for involuntary expatriation.

In further defense of the view that the statutes should not be interpreted as providing for involuntary expatriation of minors, it may be pointed out, as did Chief Justice Hughes, that sections 5 and 6

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67 Ex parte Chin King, (C. C. Ore. 1888) 35 F. 354.
68 United States ex rel. Scimeca v. Husband, (C. C. A. 2d, 1925) 6 F. (2d) 957. The government in its Brief for Petitioner in *Perkins v. Elg* asserted that the discussion was not even dictum, but mere speculation. Brief, p. 45.
74 Ibid. The British statute, on the other hand, expressly expatriates British minors acquiring foreign citizenship. 33 Vict., c. 14, § 10 (3) (1870).
75 (App. D. C. 1938) 99 F. (2d) 408. The court of appeals even stated, p. 413, that "it is doubtful, indeed, if there is any power in Congress,—in view of the provisions of the Fourteenth Amendment . . . to take them [the rights of the child] away."
76 307 U. S. 325 at 344.
of the act of 1907, which limit the rights of children born without the United States, are silent as to the loss of citizenship by minor children born in the United States. By implication, the statute at least does not provide for involuntary expatriation of minors born in the United States. That this is true under the statute was shown by the views expressed in the instructions issued on November 24, 1923, by the department of state to the American diplomatic and consular officers. Thus as late as 1925 it was the view of the department of state that the act of March 2, 1907, had not provided for the involuntary expatriation of minors born in the United States of alien parents. The Supreme Court pointed out that the same view apparently prevailed in July, 1929, when on the instructions of the secretary of state, the state department issued a passport to Miss Elg as a citizen of the United States.

In April, 1935, Miss Elg was notified that she was an alien and was threatened with deportation. Thus between 1929 and 1935 a

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77 It should be noted, however, that section 5 merely provides for the acquisition of American citizenship by children born outside the United States of alien parents through the naturalization of or resumption of American citizenship by the parents, provided that the latter occur during the minority of the child and provided further that the child begins to reside permanently in the United States. Section 5 is silent as to loss of citizenship by such child. Section 6 deals with children born outside the United States who are citizens because their parents are American citizens. Section 6 does not provide for loss of citizenship by such children. It merely requires the doing of certain acts in order to receive the protection of the United States government. But while section 6 seems to look only to protection, it has been construed, perhaps erroneously, as limiting citizenship. Hence, since election is possible to the foreign-born children of American citizens under section 6, it would seem anomalous to deny that privilege to minors in the United States.

It should be noted that under the act of May 24, 1934, there may be a deprivation of citizenship as well as protection as to foreign-born children where one of the parents is an alien. Orfield, "The Citizenship Act of 1934," 2 Univ. Chi. L. Rev. 99 at 102 (1934).

78 U. S. DEPT. STATE, COMPILATION OF CERTAIN DEPARTMENT CIRCULARS Relating to Citizenship, etc., pp. 118, 121, 127 (1925), containing instructions to diplomatic and consular officers under date of November 24, 1923. The practice of the department of state was summarized in the circular instruction of Secretary of State Hughes. The opinion in the present case was written by Mr. Hughes.

79 See opinion in Perkins v. Elg, 307 U. S. 325 at 346, 59 S. Ct. 884 (1939). The Court stated that no sensible distinction could be drawn between a minor whose parents were aliens at the time of his birth and never lost their foreign nationality on the one hand, and a minor whose parents became foreign nationals through naturalization, on the other hand. In the latter case as well as the former there was no involuntary expatriation.

80 However, the secretary of state informed the attorney general in a letter dated January 21, 1937, that the issuance of this passport was the result of "clerical inadvertence." See Brief for Petitioner, p. 3, note 1.
change had occurred in the attitude of the state department. In the
view of the Supreme Court the change arose out of a conflict with
the opinion of the solicitor of the department of labor in the case of
Ingrid Therese Tobiassen. The department of labor favored the view
of no expatriation; the state department took the opposite position.
The secretary of labor, because of that conflict, requested the opinion
of the attorney general, which was given on June 16, 1932. This
opinion held that a child born in the United States and taken to Nor­
way by her parents had lost her American citizenship. The attorney
general approved the refusal of the state department to issue a pass­
port to her on the ground that she had acquired Norwegian nationality
and had ceased to be an American citizen. The attorney general quoted
the provision of the treaty with Sweden and Norway of 1869 and
referred to the Norwegian nationality law of August 8, 1924, and to
the provisions of the act of Congress of March 2, 1907. But he based
his opinion upon the Norwegian law and not on the naturalization
treaty with Norway, nor on any act of Congress. Thus the opinion
does not directly support the view that the act of Congress of March
2, 1907, or any other act, authorized involuntary expatriation of
minors. The Supreme Court rejected the opinion of the attorney gen­
eral, stating it was 'compelled to agree with the Court of Appeals
in the instant case that the conclusions of that opinion are not ade­
quately supported and are opposed to the established principles which
should govern the disposition of this case.' It is of interest that the
first part of the brief for the government was devoted to showing that
by Swedish law as well as by treaty Miss Elg had become a Swedish
citizen. The court of appeals had left open the question of the acqui­


\[82\] For the view of the solicitor of the labor department, see Supplemental Memo­

\[83\] 36 OP. ATTY. GEN. 535 (1932). However, Assistant Secretary of State Wilbur
J. Carr, in a letter dated October 7, 1931, to the Attorney General, stated: "This
Department has for many years uniformly held that former citizens of the United States
who have been naturalized during minority in foreign states through the naturalization
of their parents must be regarded as having lost their American nationality under the
provisions of Section 2 of the Act of Congress of March 2, 1907." Supplemental
Memorandum for Petitioners in Perkins v. Elg, Appendix A, pp. 9, 10.

The solicitor of the state department in a memorandum of August 17, 1926,
also found expatriation under the act of 1907. See Supplemental Memorandum for

The state department issued instructions to the same effect in 1917, 1921, and


\[85\] Brief for the Petitioners, pp. 12-18. On the other hand, the respondent Miss
tion of such citizenship. The Supreme Court did not definitely state that she had acquired Swedish citizenship under the Swedish law. But the Court held that, even if she had, she did not lose her American citizenship.

The Supreme Court seems to have given no weight to the argument made in the reply brief of the government with respect to section 317 of a draft nationality code prepared by representatives of the departments of state, justice, and labor, in pursuance of an executive order of April 25, 1933, designating the secretary of state, the attorney general, and the secretary of labor as a committee to review the nationality laws of the United States, to recommend revisions, and to codify the laws into one comprehensive nationality law for submission to Congress. This draft code was signed by the three cabinet members and submitted to the President, who sent it to Congress in June, 1938. This code assumed that there could be an involuntary expatriation of American minors and provided for their acquiring American citizenship through naturalization.

The Supreme Court also rejected the view that private acts of Congress, passed in 1937 and 1938 for the relief of native citizens who had been the subject of administrative action denying their citizenship, could be treated as the equivalent of a federal statute providing for involuntary expatriation. Such private acts, as in the case of the readmission to citizenship of Mrs. Nellie Grant Sartoris, had been invoked dialectically as evidence of Congressional views as to the law. Such reasoning is no longer admissible.

Elg argued that the Swedish statute required not only a residence in Sweden but also a loss of American citizenship. Thus a difficult question of renvoi would be presented. The Swedish Ministry for Foreign Affairs informed the American Legation at Stockholm that residence in Sweden with her father gave Miss Elg Swedish citizenship. Brief, pp. 17-18.

86 307 U. S. 325 at 329.
87 Reply Brief, pp. 4-5.
88 Section 317 of the code is set out in the Reply Brief, pp. 14-15.
90 307 U. S. 325 at 349.
91 Joint Resolution of May 18, 1898, 30 Stat. L. 1496. Some considered this a Congressional admission that Miss Grant had been expatriated by her marriage to Sartoris, a British subject. Borchard, "The Citizenship of Native-Born American Women Who Married Foreigners Before March 2, 1907, and Acquired a Foreign Domicile," 29 AM. J. INT. L. 396 at 411 (1935); 7 GEO. WASH. L. REV. 639 (1939); Brief for Petitioners in Perkins v. Elg, pp. 42-43.
The Situation Apart from Treaty and Statute

Suppose it be assumed, as so far seems to have been the fact, that no treaty or statute deals or purports to deal with the subject of expatriation of the various classes of American minors. For instance, what was the rule before 1868, the date the Bancroft naturalization treaties were first negotiated? The government relied, in Perkins v. Elg, on the Treaty of 1869 with Sweden and Norway. And what was the situation before Congress passed the act of March 2, 1907, dealing with expatriation? In Perkins v. Elg the government also relied on the act of 1907. Was there a common-law rule to be found in decisions of the state courts, the federal courts, opinions of the attorney general of the United States, rulings by the department of state, and views of writers, providing for involuntary expatriation? The United States Supreme Court in Perkins v. Elg found no such common-law doctrine, just as it had found no doctrine of involuntary expatriation laid down by treaty or statute.

In the early days there could be no question of expatriation of American minors, since the United States followed the English common-law view that citizens could not be expatriated without the consent of the government; and that in the absence of statute there was no possibility of expatriation. But in 1868 Congress passed a statute declaratory of the right of expatriation. In 1870 the British Parliament recognized the right.

The Supreme Court of the United States referred to the principle of election in the year 1830 in Inglis v. Trustees of Sailor's Snug Harbor. In that case a minor born in the United States was taken first to England and then to Nova Scotia. Justice Thompson stated that "his infancy incapacitated him from making any election for himself, and his election and character followed that of his father, subject to the right of disaffirmance in a reasonable time after the termination of his minority. . . ." However, it was not clear that the minor had been born after American independence or before the British military forces took possession of New York.

The New York court, in a case decided before the adoption of the
Fourteenth Amendment, the Bancroft treaties or the act of 1907, found no expatriation and asserted a right of election in the minor on attaining his majority. The Vermont court took the same position. The Minnesota court in recent cases, in finding expatriation as to minors born in the United States and taken to Canada, relied on the naturalization treaty with Great Britain of 1870 and the naturalization statutes of the United States permitting foreign minors to become American citizens through the naturalization of their parents.

The United States Circuit Court for Oregon in a case involving Chinese children asserted the right of election. There the children were born in the United States and then taken to China. The Circuit Court of Appeals for the Second Circuit made no reference to treaty or statute and cited the practice of the state department allowing election. A federal district court in New York also relied on the practice of the state department, indeed going so far as to say that a minor could not expatriate himself even by joining a foreign army. The federal district court in the Reid case relied on the practice of the state department, the early state cases, the earlier view of the attorney general, and the view of John Bassett Moore. The circuit court of appeals, in reversing that case, asserted that the practice of the state department as shown by a letter of October 7, 1931, had been to favor expatriation. The court also construed a treaty as providing for such expatriation. The court of appeals in Perkins v. Elg found the common law rule not to provide for expatriation, as shown in rulings by the state department, state decisions, and recent federal decisions.

97 Ludlam v. Ludlam, 26 N. Y. 356 at 376 (1863). See also Lynch v. Clarke, 1 Sandf. (N. Y. Ch.) 583 (1844). In Ludlam v. Ludlam, the minor was a citizen jure sanguinis, having been born in Peru of an American father.
98 State v. Jackson, 79 Vt. 504, 65 A. 657 (1907). In this case, too, the minor was a citizen jure sanguinis, having been born in Canada of an American father.
100 Ex parte Chin King, (D. C. Ore. 1888) 35 F. 354.
103 In re Reid, (D. C. Ore. 1934) 6 F. Supp. 800 at 802-806, noted 34 Col. L. Rev. 1366 (1934). The comment disapproves.
105 (App. D. C. 1938) 99 F. (2d) 408 at 412-413, noted in 7 Geo. Wash. L. Rev. 639 (1939), and by the writer in 18 Neb. L. Bull. 72 (1939). The former comment disapproves and the latter approves.
Distinguished writers, such as Hyde,\(^{108}\) Borchard,\(^{107}\) Van Dyne,\(^{108}\) and Moore,\(^{109}\) were cited by Chief Justice Hughes in *Perkins v. Elg*\(^{110}\) as taking the view that it was “a long recognized principle in this country”\(^{79}\) that a minor born in the United States was not expatriated by being taken by his parents to the country of their origin.

The attorney general in 1875 laid down the same view in Stein­kau ler’s case.\(^{111}\) This case arose prior to the act of Congress of 1907 but subsequent to the naturalization treaty of 1868 with North Germany,\(^{112}\) the other country involved. Attorney General Edwards Pierrepont, after reviewing, among other things, the naturalization treaty, concluded that the minor on reaching the age of twenty-one years could “then elect whether he will return and take the nationality of his birth, with its duties and privileges, or retain the nationality acquired by the act of his father.”

But almost sixty years later in *Citizenship of Tobiassen*\(^{118}\) the then attorney general seems to have departed from this position. Although he made reference to the existence of a naturalization treaty with Norway, the other country involved, and quoted the act of Congress of March 2, 1907, he expressly stated that expatriation rested not upon the treaty, but upon the Norwegian law. American statutes themselves permitted alien minors to acquire American citizenship through the naturalization of the father. Thus he seemed to be holding that aside from treaty and act of Congress an American minor could be expatriated if the law of a foreign country, similar to our own naturalization statute, conferred derivative citizenship upon minors. This was another way of saying that the common law offers no guaranty against expatriation. The Supreme Court in *Perkins v. Elg*\(^{114}\) rejected the reasoning of the attorney general in the *Tobiassen* case, and gave no comfort to the suggestion by the petitioner\(^{115}\) that it had never been settled whether or not there were modes of expatriation in addition to those provided

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\(^{106}\) 1 Hyde, International Law, §§ 374, 375 (1922).

\(^{107}\) Borchard, Diplomatic Protection of Citizens Abroad, § 259, p. 584 (1915).

\(^{108}\) Van Dyne, Citizenship of the United States 25-31 (1904).

\(^{109}\) 3 Moore, International Law Digest 532-551 (1906).


\(^{112}\) 15 Stat. L. 615 (1868).


\(^{114}\) 307 U. S. 325 at 348-349, 59 S. Ct. 884 (1939).

\(^{115}\) Brief for Petitioners, pp. 47-48.
for in the act of 1907, treaties, and other statutes prescribing specific modes of expatriation. The Court in fact ruled that the act of July 27, 1868,\textsuperscript{116} which declared that "the right of expatriation is a natural and inherent right of all people" dealt only with voluntary expatriation and had no application to the removal from the United States of a native citizen during minority.\textsuperscript{117}

Long before the act of 1907, a number of secretaries of state had ruled in favor of the right of election. Secretary William M. Evarts, in 1879, in an instruction to the American minister to Germany, with respect to the status of minors born in the United States of German parentage, asserted that their rights rested "on the organic law of the United States."\textsuperscript{118} He took the same view as to a minor of Danish parentage in 1880.\textsuperscript{119} Secretary Thomas F. Bayard, in answer to an inquiry by the Netherlands legation as to a minor born in the United States of Dutch parentage, repeated this view in 1888.\textsuperscript{120} In 1906 a memorandum prepared in the department of state by its law officer was sent by Acting Secretary of State Robert Bacon to the German ambassador asserting such right as to a minor born in the United States of German parentage.\textsuperscript{121} This was asserted although it was admitted that "there is no express provision in the law of the United States giving election of citizenship in such cases."

Chief Justice Hughes, having quoted liberally from the rulings, stated that

\begin{quote}
"they leave no doubt of the controlling principle long recognized by this Government. That principle, while administratively applied, cannot properly be regarded as a departmental creation independently of the law. It was deemed to be a necessary consequence of the constitutional provision by which persons born within the United States and subject to its jurisdiction become citizens of the United States. To cause a loss of that citizenship in the absence of treaty or statute having that effect, there must be some voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of a binding choice."
\end{quote}

\textsuperscript{117} 307 U. S. 325 at 334.
\textsuperscript{118} 3 Moore, International Law Digest 543 (1906).
\textsuperscript{119} 3 ibid., 544.
\textsuperscript{120} Foreign Relations of the United States 1341 (1888) (U. S. Dept. State).
\textsuperscript{121} Ibid. 657 (1906).
\textsuperscript{122} 307 U. S. 325 at 333-334.
The opinion by no means clarifies the scope of the doctrine of election. The Court ruled that where the minor returned to the United States on his majority and chose to remain and to maintain his American citizenship, he had elected American citizenship.\(^{123}\) Does this mean that a native born citizen must make an election immediately after attaining majority and that failure affirmatively to indicate his desire to retain American citizenship will constitute an abandonment of American citizenship? The government in its brief attempted to narrow the doctrine of election to cases of double allegiance at birth, so that a child of native or naturalized parents born in the United States could not elect.\(^{124}\) The Supreme Court gave no countenance to the argument.

Expatriation of American minors is primarily a question of municipal law. International law does not require the United States to recognize the expatriation of such minors; nor is international law violated if the United States expatriates its minor citizens. Treaties may alter the situation but have not expressly done so. Traditional international law does not stand in the way of such policy as the United States wishes to adopt.

The Federal Constitution confers no extensive guaranties against involuntary expatriation of American minors even when born in the United States. Such expatriation is valid where accomplished through treaty or act of Congress. But in the absence of treaty or statute, involuntary expatriation by means of administrative ruling violates the Fourteenth Amendment as to minors born in the United States. Treaties and statutes will not, if ambiguous, be construed to provide for expatriation. Existing treaties and statutes do not provide for expatriation of minors born in the United States. Nor do they do so as to minors who are citizens \textit{jure sanguinis} where both parents are Americans and one of them has resided in the United States prior to the birth of the child. Where one of the parents is an alien, citizenship may be lost under certain specified circumstances. Where the minor has been naturalized derivatively through its parents, there is possibly a statutory presumption of loss of citizenship on return of the parents to the home country, but such presumption is rebuttable.

Even aside from treaty and statute the practice of the attorney general, secretary of state, and labor department, though in some confusion, has been opposed to involuntary expatriation and has favored

\(^{123}\) Ibid., at 334.
\(^{124}\) Brief for Petitioners, pp. 51-52.
the right of the child to elect American citizenship on attaining his majority.

The decision in *Perkins v. Elg* keeps in force the policy of no expatriation until changed by treaty or statute. It gives adequate protection to American minors. Yet it does not prevent effective participation in international negotiation over this matter should a change become necessary or desirable. It points the way to Congress for further study of the problem of expatriation of minors, perhaps to be climaxed by enactment of clear, specific, and comprehensive legislation. It permits Congress to take account of possibilities of statelessness and of cases where the minor does not accompany his parents out of the United States. It indicates the need for more specific provisions in treaties. It corrects and makes uniform the practice of the state, justice, and labor departments, as well as clearing up the confusion in the lower federal courts. Some lingering doubts are left as to the scope of the doctrine of election.