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## Our Non-Citizen Nationals, Who are They?\*

UNLESS the reader has time for some interesting and intricate curiosities of American law he should pass this essay by. To determine exactly and completely the difference in American law between the status of non-citizen national and that of citizen national would be an interesting and profitable exercise in analytical jurisprudence. It would involve a cataloguing of all the legal relations that are peculiar to each status. I had hoped to introduce the present essay with an exhaustive study of these distinctions, but time has not permitted and I have limited my theme to the question, What persons have this status of non-citizen national with respect to the United States?

By the Treaty of Paris, which became effective April 11, 1899, Spain "relinquished" sovereignty over Cuba and "ceded" Puerto Rico, other Spanish islands in the West Indies, the Philippine Islands, and Guam to the United States. What effect did the cession have upon the nationality of the inhabitants of those islands?

The parties to the treaty expressed no intention of altering the status of resident aliens of British, German, Chinese, or other alien nationality. Those who were aliens both to Spain and to the United States continued to be aliens to the United States.

As to the inhabitants who were Spanish subjects the treaty contained these provisions:

### ARTICLE IX

"Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain . . . or may remove. . . . In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year<sup>1</sup> from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

\* This article will appear in *LEGAL STUDIES IN HONOR OF ORRIN KIP McMURRAY*, to be published in honor of Dean McMurray of the School of Jurisprudence of the University of California.

<sup>1</sup> Extended to eighteen months with respect to the Philippines by a supplementary convention between Spain and the United States, signed March 29, 1900. *FOREIGN RELATIONS* (1900) 889. For need of this extension, see *ibid.* (1899) 714 *et seq.*; abstract in 3 *MOORE'S DIG.* (1906) 321.

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."

It will be noted that these two paragraphs of the treaty dealt with two classes of persons: (1) "Spanish subjects, *natives of the Peninsula*," that is, of the Spanish mother-country, the Iberian Peninsula and adjacent islands,<sup>2</sup> and (2) "native inhabitants" of the *ceded* islands. The use of the word "ceded" in the second paragraph excluded the Cubans from its provision. The first paragraph, however, applied to Cuba as well as to all the ceded islands; hence the generality of the expression, that the Spaniards born in the Spanish mother-country who remained either in Cuba or in any of the ceded islands, without declaring their election to retain Spanish nationality, should acquire "the nationality of the territory in which they may reside." In respect to all the ceded islands this was definitely American nationality; as for Cuba, her national character was yet to be determined. It is sufficient here thus to direct attention to the peculiar factors that made the status of the Cubans a separate problem, one not included in this essay.

As to the Philippines and Puerto<sup>3</sup> Rico, let us take the easier point first, that is, the "Spanish subjects natives of the Peninsula," in the first paragraph, before passing to "the native inhabitants of the territories" dealt with in the second paragraph.

It will be noted that Spanish subjects natives of the Peninsula residing, at the date of the treaty, in Cuba or the ceded territory had an option of remaining or removing, and that those who remained had an option of retaining or losing Spanish nationality. The treaty did not expressly provide the latter option for those who removed. The Supreme Courts of the Philippines and of the United States have held<sup>4</sup> that this option of removal was intended to be an option to remove without incurring any change in nationality, so that by removal Spanish nationality was retained and American rejected, without the necessity of any declaration.

What is the meaning of "natives" in the expression "natives of the Peninsula"? Frequently the word is used in the sense of indigenous people or in a racial sense. Thus, "natives of the Peninsula" might have been taken to mean persons of Spanish blood or Spanish ancestry. In the main, this sense has been rejected in favor of "born in" the Peninsula.

Thus the United States District Court for Puerto Rico held that a

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<sup>2</sup> The United States State Department expressed opinions that "natives of the Peninsula" included natives of the Balearic and Canary Islands. *Ibid.*

<sup>3</sup> The change of name from Porto Rico to "Puerto Rico" was officially made by Act of Congress, May 17, 1932, 47 STAT. 158, 48 U. S. C. A. (Supp. 1933) §731a.

<sup>4</sup> *In re Bosque* (1902) 1 Phil. Rep. 88, *aff'd*, *Bosque v. United States* (1908) 209 U. S. 91.

person born in Puerto Rico and of adult age at the date of ratification of the treaty, although both his parents were of Spanish blood and his father a native of the Peninsula, did not under the treaty have a privilege of retaining Spanish nationality if he remained in Puerto Rico.<sup>5</sup> He became involuntarily an American national.

The same court held in several cases, however, that a Spaniard born in peninsular Spain who gave the name of his wife and minor children in the document<sup>6</sup> filed for the purpose of expressing his election to retain Spanish nationality for himself thereby elected for them also, and that this election was operative to preserve the Spanish nationality of the wife, regardless of the place of her birth, and likewise to preserve the Spanish nationality of the minor children during their minority, regardless of the place of their birth.<sup>7</sup> In several of these cases the children whose Spanish nationality was held thus to be preserved were born in Puerto Rico;<sup>8</sup> they were not "natives of the Peninsula" as the courts conceded. As to the minors, this judicially evolved rule, that the father's or guardian's<sup>9</sup> election served for them also, was coupled with

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<sup>5</sup> *Calderin v. Fabian y Fabian* (1903) 4 P. R. Fed. 152; and see *Laborde v. Laborde* (1907) 2 P. R. Fed. 493, especially at 502, 510.

<sup>6</sup> The United States military government in Puerto Rico had issued a general order, No. 132, dated August 31, 1899, by way of directing the manner in which the treaty privilege of election might be exercised. In part, it read:

"II. For the purpose of permanent record and the protection of the parties concerned, a document will be prepared in duplicate in each case by the municipal judge setting forth the following facts: (a) the name and surname of the interested party, his or her age, nationality (specifying the province), civil status and profession, trade and occupation. (b) Names of wife and children, should there be any, and the names of the applicant's parents. . . .

"III. Unmarried women (natives of the Peninsula), of legal age, will make declaration in the same manner as men." Quoted in *Ex parte Garcia* (1918) 10 P. R. Fed. 516, 536.

The failure to provide explicitly for election by married women seems to imply an administrative interpretation that a wife's nationality would be preserved by the husband's election. As to minors, the implication is not so strong. The express limitation of the provision for unmarried women to those of legal age implied that minors could not elect for themselves. Yet the document was merely to state the names of children (not limited to minors) and contained no statement that the parent elected on behalf of the children. It may be that the Spaniards who executed these documents assumed this to be the purpose of giving their children's names.

<sup>7</sup> *Ríos de Rubio v. Buset* (1906) 2 P. R. Fed. 139 (wife born in the Republic of Mexico); *Martínez de Hernández v. Casañas* (1907) 2 P. R. Fed. 519 (minor children born in Puerto Rico); *Echcandia v. San Sebastián* (1916) 9 P. R. Fed. 153 (wife born in Puerto Rico); *Ex parte Garcia*, *supra* note 6 (minor children born in Puerto Rico); and see *Rodríguez y Pujals v. Argüeso y Flores* (1907) 2 P. R. Fed. 517 (place of minor's birth not stated).

<sup>8</sup> *Ex parte Garcia*, *supra* note 6; *Martínez de Hernández v. Casañas*; *Rodríguez y Pujals v. Argüeso y Flores*, both *supra* note 7.

<sup>9</sup> In one case it was held that an election made by a native of the Peninsula to preserve the Spanish nationality of his minor niece, whose guardian he appears to have been, was effective. The girl, it also appears, was the daughter of a native of the Peninsula. *Martínez de Hernández v. Casañas*, *supra* note 7.

a limitation that they retained Spanish nationality only provisionally, during minority, and that upon coming of age, or within a reasonable time thereafter, they must elect for themselves to retain Spanish nationality, a failure then to elect resulting in the acquisition of American nationality as of the time of attaining majority, or perhaps at the expiration of the reasonable time period.<sup>10</sup>

This judicial interpretation seems to have been judicious. A parent born in the Peninsula may have had residing with him in the ceded territory a child or children born in the Peninsula, also a child or children born in the ceded territory, and all still minors at the date of cession. The treaty was silent in respect to minors. It did not purport to confer upon them capacity to elect for themselves. It did not authorize them to elect upon coming of age. The only election expressly mentioned was one to take place within a year<sup>11</sup> of the cession. The inference was reasonable that the election for minors born in the Peninsula was to be made by their parents or guardians. From this it was but a short step to extend the parent's or guardian's election to the minor children born in the ceded territory.

The reason assigned by the courts, namely, that the treaty should be construed as not intending to create diversity of nationalities within families, seems a good one. This extension in respect to some minors, as stated above, was made only in behalf of the minor children of natives of the Peninsula whose fathers or guardians elected, expressly or impliedly, in their behalf within the period fixed by the treaty. It did not enable a minor, whose parent or guardian had not elected for him, to elect Spanish nationality upon coming of age if that event occurred after the period fixed in the treaty. Such a minor, if he remained in the ceded territory, became *volens volens* an American national, just as did adult natives of the Peninsula who remained in the ceded islands and made no election within the treaty period.

The opinions in these cases make it clear that the courts took the words "natives of the Peninsula" to mean persons born in the Peninsula but believed that it would be giving the treaty a harsh literalness to hold that a wife or the minor children though not natives of the Peninsula should acquire a new nationality although the husband or father elected to retain the old. In one opinion the court by solemn dictum gave assurance that no further exceptions would be made beyond wives, widows, and minor children of natives of the Peninsula.<sup>12</sup>

It has been said that about five or six thousand Puerto Rican Spaniards born in the Peninsula elected to retain Spanish and reject

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<sup>10</sup> *Ex parte Garcia*, *supra* note 6.

<sup>11</sup> See note 1, *supra*.

<sup>12</sup> *Martinez de Hernandez v. Casañas*, *supra* note 7, at 532-533.

American nationality.<sup>13</sup> I have seen no corresponding statement with respect to the Philippines.

As to other classes of Spanish subjects inhabiting the islands at the time of cession they became American nationals without choice. This was the result of the lack of any treaty provision to the contrary.<sup>14</sup> These included approximately seven million persons in the Philippines and approximately eight hundred thousand in Puerto Rico.

There were without doubt some persons then inhabiting the ceded islands who were not Spanish nationals. The greater part of the population of the Philippines were the descendants of the "aborigines" who occupied the islands when Magellan "discovered" them, but there had been some Chinese and Japanese immigration for centuries, and more recently there had been immigrants of other Asiatic stocks and of European stocks. Some of these immigrants and perhaps some of their descendants were aliens to Spain. These did not become American nationals. They were no doubt relatively few compared to the total number of inhabitants, but to them as individuals the rules determining their status were important. These rules are to be found in the Spanish law. The courts under the American régime have found ascertainment of these rules quite difficult and in fact have not seriously sought to ascertain them.<sup>15</sup> Most of the judicial decisions dealing with this question have been concerned with the status of persons of Chinese descent residing in the Philippines at the cession. There are baffling obscurities in the Spanish nationality laws that none but a very competent Spanish legal scholar could resolve. I venture, however, in an appendix to this essay to discuss some of the difficulties and to indicate the remainder. I relegate this matter to an appendix not because it is not interesting, not because it is not important, but because the non-specialized reader might find it tedious. The curious will be interested in that peculiar Spanish institution, *vecindad*, and other matters.

It is a matter for wonderment what dictated to the American treaty commissioners the choice of words used in the second paragraph of article IX of the treaty: "The civil rights and political status of the

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<sup>13</sup> Compare Rodey, J., in *In re Bonnet y Jaspard* (1906) 2 P. R. Fed. 70, 75, with the statement in *Ex parte Garcia*, *supra* note 6, at 519.

<sup>14</sup> "Manifestly the nationality of the *inhabitants* of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal, or otherwise, *as may be provided*." *Boyd v. Thayer* (1892) 143 U. S. 135, 162 (italics added). If the word "inhabitants" in the first line of this quotation be changed to nationals of the ceding power residing in the territory, the statement expresses the accepted opinion.

<sup>15</sup> See the concurring opinion of Malcolm, J., in *United States v. Lim Bin* (1917) 36 Phil. Rep. 924, 927.

native inhabitants . . . shall be determined by the Congress." It is perfectly obvious that Congress, being the sole legislature over any territory of the United States not included in the States, may determine the civil rights and political status of the inhabitants, subject to the limitations of the Constitution. Could such a treaty stipulation relieve Congress of any of those limitations? Not the Americans who negotiated the treaty but the subsequent ingenious statesmanship of the Supreme Court invented the mysterious doctrine of "unincorporated territory,"<sup>16</sup> whereby until Congress "incorporates" newly annexed territory the governmental power of Congress over it is subject to some only of the limitations of the Constitution, that is, subject to those and those only which the Supreme Court deems "applicable." I mention this doctrine merely to dismiss the supposition that the status of "unincorporated territory" which the Supreme Court has conferred upon Puerto Rico and the Philippines was the product of this paragraph of the treaty. It is true that in *Downes v. Bidwell*,<sup>17</sup> Justice White, delivering the opinion which gave the doctrine of unincorporated territory the rationalization that has since been accepted by the Court, rested in part upon this paragraph, but he conceded that it was unessential. While he seemed to admit that immediate incorporation might be produced by a treaty provision expressly so providing "if the treaty be not repudiated by Congress," he said that a treaty of cession silent in respect to incorporation produced the effect of annexation without incorporation just as did a treaty that expressly stipulated against incorporation.<sup>18</sup> Two years later the Court held that the annexation of Hawaii by joint resolution of Congress did not "incorporate" that territory, although no reservation was made in the resolution of power in Congress to determine the civil and political status of the inhabitants.<sup>19</sup> Moreover, the doctrine of "unincorporated territory" as it has developed has no relation to the "political status" of the inhabitants of the territory, if by that is meant citizenship *vel non*. Thus the Supreme Court continued to hold Puerto Rico to be unincorporated territory after Congress had conferred United States citizenship upon all "citizens of Puerto Rico."<sup>20</sup> Moreover, the only limitations on Congress that the Supreme Court has so far held inapplicable to Puerto Rico and the Philippines are the requirements of uniformity in import duties and of juries in criminal cases. Under the decision in *Downes v. Bidwell*, so long as Puerto Rico

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<sup>16</sup> For a very comprehensive discussion, see Coudert, *The Evolution of the Doctrine of Territorial Incorporation* (1926) 26 COL. L. REV. 823.

<sup>17</sup> (1901) 182 U. S. 244.

<sup>18</sup> *Ibid.* at 339.

<sup>19</sup> *Hawaii v. Mankichi* (1903) 190 U. S. 197.

<sup>20</sup> *Balzac v. Porto Rico* (1922) 258 U. S. 298.

remains "unincorporated," Congress can levy special import duties upon goods coming to the continental United States from Puerto Rico although the shipper and consignee are both citizens. Trial without jury may still continue in Puerto Rico, so the Court holds,<sup>21</sup> notwithstanding that Puerto Ricans are now citizens.

There is no doubt whatever that President McKinley, Secretary of State Hay, and members of the Supreme Court had in their minds a fear of a dire handicap upon the United States in dealing with the Philippines if upon annexation all classes of Spanish subjects therein became citizens of the United States. That this turned out to be, in the main, a bugaboo, does not show that it was not a motive in the negotiations. Justice White even expressed the fear that if the inhabitants of these Islands acquired citizenship the United States could never relinquish its sovereignty over them.<sup>22</sup> If that were true, we cannot now grant independence to the Philippines, because a considerable number of citizens of the United States have become permanent residents of those Islands, have their homes there, and are as much "citizens of the Philippines" as are the non-citizen nationals that reside there. In the fervent controversy that raged between political parties and between members of the Court over the annexation of millions of remote islanders it is not strange that ill-founded apprehensions were entertained.

While the negotiation was proceeding, Secretary of State Hay had cabled to the American peace commissioners:

"The President wishes to know the opinion of the Commission as to inserting in treaty provisions on the subject of citizenship of inhabitants of Philippines which will prevent extension of that right to Mongolians and others not actually subjects of Spain; also whether you consider it advisable to provide, if possible, for recognition of existence of uncivilized native tribes in same manner as in Alaska treaty, perhaps leaving to Congress to deal with status of inhabitants by legislative act."<sup>23</sup>

The apprehension of the President that the status of inhabitants not subjects of Spain would be affected by annexation was clearly a misapprehension. Obviously they would remain aliens subject to the full power that Congress has over aliens residing anywhere in the United States. The misapprehension may have been imbibed from the inaccurate statement commonly made that upon cession the "inhabitants" acquire the nationality of the new government, in the absence of stipulations to the contrary,<sup>24</sup> instead of the correct statement that this principle operates only in respect to the nationals of the ceding country.

The reference by the President to the Alaska treaty gave the clue

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Downes v. Bidwell*, *supra* note 17, at 315-318.

<sup>23</sup> FOREIGN RELATIONS (1898) 961.

<sup>24</sup> See, e.g., the quotation and remark *supra* note 14.

upon which the Commission acted. In several other treaties of cession of territory to the United States it had been stipulated that the subjects of the ceding power remaining in the territory should become "citizens."<sup>25</sup> The treaty with Russia in 1867 contained a novel variation. It declared that the Russian subjects who remained in Alaska "*with the exception of uncivilized native tribes*, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States." In the light of our present-day knowledge and terminology, these "uncivilized tribes" came to us as non-citizen nationals. Being Russian subjects, their nationality changed, but they did not acquire citizenship. Nevertheless, the Supreme Court held<sup>26</sup> in 1905 that Alaska had been "incorporated" because of the express words of incorporation in the treaty and an intent of Congress inferred from its extending in 1868 the internal revenue and customs laws to that territory. I suppose that the treaty power is capable of giving the status of non-citizen national to newly annexed people even though their territory is "incorporated" by the treaty or by Congress. The treaty is the law applicable to them. The declaration of the Fourteenth Amendment that all persons born in the United States and subject to its jurisdiction are citizens may doubtless be construed as not applying to persons born in territory that was foreign at the time of their birth, even though it has been assumed to confer citizenship upon some persons<sup>27</sup> born in the United States before its adoption.

It seems therefore that the intent of the second paragraph of article IX of the Treaty of Paris was likewise to limit the effect of the cession to a change of nationality without conferring citizenship upon our new nationals. The fear that statesmen and judges felt that some evil consequence would follow if all the people ceded to us by Spain should thereby acquire citizenship of the United States, had only one sensible ground. That was that somewhere in the Constitution there must inevitably be found a constitutional right of a citizen to migrate freely throughout the empire, to reside in any part, in any territory or any state of his choice. It may be that this idea was behind the refusal of citizenship to American-born Indians until after the policy of the

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<sup>25</sup> See the treaties of cession of Louisiana and of Florida, quoted in 3 MOORE'S DIG. (1906) 313, 314, and the Treaty of Guadalupe Hidalgo, *ibid.* at 318.

<sup>26</sup> *Rasmussen v. United States* (1905) 197 U. S. 516.

<sup>27</sup> It has always been assumed that the Fourteenth Amendment wiped out the dictum of the Dred Scott case [*Dred Scott v. Sandford* (1857) 19 How. (60 U.S.) 393], and gave citizenship to all American-born Negroes, *ante-nati* as well as *post-nati*. This assumption is not affected by the decision that the Amendment did not confer citizenship upon American-born Indians either *post-nati* or *ante-nati*, since the Court held that the words "subject to the jurisdiction" in the Amendment were inserted for the purpose of excluding Indians. *Elk v. Wilkins* (1884) 112 U. S. 94.



United States to shunt them about where it pleased was abandoned. Fear of the effects of a right of free migration was the controlling motive behind Chief Justice Taney's dictum that a free Negro born in one of the states was not a citizen of the United States. He conceded that a citizen of the United States residing in a state is a citizen of that state<sup>28</sup> and by Article IV, Section 2, Clause 1 of the Constitution a state citizen has a constitutional right of ingress and egress to and from any state. True, he was speaking of the lack of power of any state to forbid ingress of citizens of other states. He was not considering whether Congress might forbid migration of citizens of the United States. It might be said, consistently with the point he made, that so long as a citizen of the United States has not gained residence in any state, that is, while he has residence in a territory only of the United States, Congress might forbid his migration to any other state or territory. If so it might with respect to Filipinos and Puerto Ricans, assuming that they became citizens of the United States at the cession. We have subsequently lost our fear with respect to Puerto Ricans, if the fear ever extended to that quarter. We have found them a mixture of whites and Africans quite homogeneous with the similar elements that constitute the greater part of the population of the continental United States. But whether one has little or much belief in the importance of race purity, one must recognize the social and governmental risks involved in the presence of large numbers of a race toward which a considerable part of the community has a racial antagonism. It required no great prophet to forecast that the coming into any of our states of large numbers of Malay Filipinos would develop a racial hostility. Now, it is possible for a court to concede that a citizen has a constitutional right of free migration which neither a state nor Congress can abridge and at the same time hold that a non-citizen national does not. The Commerce Clause, by negative implication perhaps, denies to the states power to forbid entry of non-citizen nationals, but no decision or principle so far articulated would compel the Supreme Court to hold that Congress could not do so. If this was the thought of the statesmen and judges, its potency cannot be denied.

The State Department, the Attorney General, Congress, and the Supreme Court have assumed that the paragraph validly accomplished its purpose of conferring nationality without citizenship upon the ceded people. The Supreme Court has not squarely so decided, but in *Toyota v. United States*<sup>29</sup> it assumed in a deliberate dictum that Filipinos may become citizens by naturalization by bringing themselves within the

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<sup>28</sup> This rule existed before the adoption of the Fourteenth Amendment. See *Gassies v. Ballou* (1832) 6 Pet. (31 U. S.) 761.

<sup>29</sup> (1925) 268 U. S. 402, 409.

narrow provisions of an act of Congress applicable to them, an absurd assumption if they are already citizens.

We have, on the one hand, no statutes which enable an alien to acquire the status of non-citizen national. On the other hand our naturalization statutes enable some aliens and some non-citizen nationals to become citizens. That is, naturalization under the present statutes of the United States is a process of attaining citizenship, not a process of attaining nationality merely.

The Treaty of Paris was incomplete with respect to two points which may reasonably be regarded as within the scope of matters dealt with:

(1) Nothing is said in the treaty with respect to Spanish subjects residing in the ceded territory who had been born neither in that territory nor in the mother-country. Spanish law declared that children of a Spanish father are Spanish nationals even though born abroad. This class of Spanish nationals, doubtless few in number, were not given an option, if they remained in the ceded territory, to elect to preserve their Spanish nationality.

(2) Although the treaty reserved to Congress the determination of the civil rights and political status of the native inhabitants of the ceded territory, it did not expressly make a like reservation with respect to those natives of the Peninsula who remained and acquired the new nationality by failure to retain the old.

Were these two classes of Spanish subjects incorporated into American citizenship by force of the cession and only the "native inhabitants" given the status of non-citizen nationals? If the doctrine is that it requires an express reservation in a treaty of cession to prevent the subjects of the ceding power from becoming at once citizens of the United States, it would seem logical to give the reservation no more scope than it expressly has. Chief Justice Marshall once questioned<sup>30</sup> whether cession of territory to the United States did not operate of itself to confer citizenship upon the resident subjects of the ceding power without express provision for citizenship, but Marshall lived before the concept of nationality without citizenship evolved. The doubts to which I have just directed attention seem never to have troubled any American statesman. The fact is that very little thought has been applied to the peculiar status of the persons with whom this essay is concerned. Attorney General Griggs<sup>31</sup> assumed that when it is

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<sup>30</sup> Speaking of the Florida treaty, Marshall said: "This treaty . . . admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States. It is unnecessary to inquire, whether this is not their condition, independent of stipulation." *American Ins. Co. v. Canter* (1828) 1 Pet. (26 U. S.) 511, 542.

<sup>31</sup> (1901) 23 Op. ATT'Y GEN. 401, 402.

said that these persons are nationals of the United States that concludes the whole subject. In that respect they do not differ from President Roosevelt or Chief Justice Hughes, who also are nationals of the United States. The point of difference is that these distinguished nationals are also citizens, while at least the greater number of the persons who underwent a change of nationality upon the Spanish cession became non-citizen nationals. I suggest the possibility that a few of them became citizen nationals. At least I put the question, If particular language of the treaty was essential in order to prevent acquisition by the ceded people of citizenship in addition to nationality, what is the status of that class of the ceded people to which the reservation of the treaty did not apply?

What has Congress done in exercise of the power reserved, if that is a correct way of putting it, to determine the political status of these ceded people? It assumed from the outset that they were indeed non-citizen nationals. Thus the passport law which previously authorized the issuance of passports to citizens only, was modified in 1902 for the benefit of these new nationals, so as to read: "No passport shall be . . . issued to . . . any other persons than those owing allegiance, whether citizens or not, to the United States."<sup>32</sup>

In 1906, with reference to these new nationals, an addition was made to the naturalization law. Previously the naturalization law gave to aliens only the opportunity for individual naturalization upon application and proof of prescribed qualifications.<sup>33</sup>

The addition extended the "applicable provisions" of that law to "all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty. . . ."<sup>34</sup>

The "applicable provisions" phrase turned out either an intentional or an unconscious joker, since it has been construed to make the racial discrimination with respect to aliens applicable to this extension, with

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<sup>32</sup> Act of June 14, 1902, 32 STAT. 386, 22 U. S. C. (1926) §212.

<sup>33</sup> When we speak of ineligibility of persons to naturalization because lacking in racial or some other prescribed qualification, we have reference to this statutory opportunity for individual naturalization under the statutes as they now stand. Congress may, of course, make any alien or non-citizen national eligible to acquire citizenship, regardless of his race or other condition, or it may collectively naturalize, confer citizenship upon, a class of persons regardless of race or personal qualifications. Thus, American Indians were always racially ineligible under the statutes providing for individual naturalization, but by the Act of June 2, 1924, 43 STAT. 253, 8 U. S. C. (1926) §3, all non-citizen Indians born in the United States were collectively converted into citizens—without privilege of rejecting this change of status.

<sup>34</sup> Act of June 29, 1906, §30, 34 STAT. 606, 8 U. S. C. (1926) §360.

the result that non-citizen nationals may become citizens under this Act of 1906 only if they are "white persons" or persons of "African descent."<sup>35</sup> Whether Congress intended this race discrimination is doubtful, but the significant point is that Congress recognized the status of these new nationals to be that of non-citizen nationals and gave to some of them, at least, an opportunity to become citizen nationals. The greater number of our non-citizen nationals, being Malays, were by this construction excluded from the privilege—even those who have become permanent residents within the States. One trifling opportunity to acquire citizenship has been given them. By Act of May 9, 1918, any "native-born Filipino," whatever his race, is eligible to naturalization upon honorable discharge after service for three years in the United States Navy, Marine Corps, or Naval Auxiliary.<sup>36</sup>

The legislation just discussed did not change the status of our islander non-citizen nationals. It merely gave an opportunity to some persons to elect to change into citizen nationals provided they satisfied the requirements.

Significant were the Acts of 1900<sup>37</sup> for Puerto Rico and of 1902<sup>38</sup> for the Philippines. The earlier declared, "all inhabitants continuing to reside" in Puerto Rico "who were Spanish subjects on April 11, 1899, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States. . . ." The later statute, using identical terms, declared the same classes of persons in the Philippines to be "citizens of the Philippine Islands." Both statutes excepted those natives of the Peninsula who had elected to reject American nationality under the terms of the treaty.

Obviously these statutes did not change the international status of these persons. From the date of cession they had been nationals of the United States. The statement that they were entitled to the protection of the United States had some value as a direction to diplomatic and consular officers of the United States. Otherwise it was merely declaratory that the United States recognized them to be eligible to protection by the United States in relation to other countries, that is, recognized them as being nationals of the United States. As to declaring them "citizens of Porto Rico," and "citizens of the Philippine Islands," those were statutory designations that meant nothing of themselves and would only have such meaning as would result from subsequent legislation

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<sup>35</sup> *Toyota v. United States*, *supra* note 29, at 410.

<sup>36</sup> 40 STAT. 542, 8 U. S. C. (1926) §388; see *Toyota v. United States*, *supra* note 29, at 409.

<sup>37</sup> Act of April 12, 1900, 31 STAT. 77, 79, 48 U. S. C. (1926) §733.

<sup>38</sup> Act of July 1, 1902, 32 STAT. 691, 692.

ascribing specific privileges, immunities, duties, and liabilities to "citizens of Porto Rico," or "citizens of the Philippine Islands." They were merely handy names of reference to the persons included.

These statutes defined who were members of these classes, namely, those who met three conditions: (1) being Spanish subjects on April 11, 1899, and (2) residing in the islands on that date, and (3) continuing to reside therein, or (4) being a child, subsequently born, of persons who satisfied the first three conditions.

"Residence" under points (2) and (3) means permanent residence or domicile, so that a native of Puerto Rico, who presumably had retained domicile there but who had lived in Chile from 1884 to 1901, was within the statute, notwithstanding his absence both on April 11, 1899, and on the date when the statute went into effect, April 12, 1900.<sup>39</sup> The provision for children born subsequently has much significance, as we shall see.

No later legislation by Congress has modified the status of "citizens of the Philippine Islands."

By the Jones Act (for Puerto Rico) of March 2, 1917,<sup>40</sup> all "citizens of Porto Rico" as defined in the Act of 1900, mentioned above, were declared "citizens of the United States."<sup>41</sup> So terminated the status of non-citizen national for these persons and the new status of citizen national supervened. There was a curious exception: the statute provided that any of these persons might "retain his present political status" by sworn declaration within six months in a district court of "intention not to become a citizen of the United States." It is said that 288 persons "unfortunately for themselves followed the independence movement"<sup>42</sup> and rejected American citizenship. Obviously they did not understand the legal relations involved. Refusal of citizenship no wise diminished their subjection to the United States. It seems that Congress also erred in giving them the opportunity to elect to remain

<sup>39</sup> Mr. Hill to Mr. Lenderink, April 29, 1901. FOREIGN RELATIONS (1901) 32. *Accord*: An opinion of Knox, Attorney General (1902) 24 OP. ATT'Y GEN. 40; an opinion of Hay, Secretary of State, Mr. Hay to Mr. Hardy, Feb. 26, 1904. FOREIGN RELATIONS (1904) 805. So conversely, it was held that a Spanish subject born in the Peninsula and physically residing in Puerto Rico before and during the period for recording election to retain Spanish nationality retained it without such election because, being a minor at that time, he had his legal residence or domicile at the domicile of his parents in Spain. *Rivera v. Pons* (1908) 4 P. R. Fed. 177.

<sup>40</sup> 39 STAT. 951, 953, 8 U. S. C. (1926) §5.

<sup>41</sup> This Act also conferred citizenship of the United States upon all natives of Puerto Rico who were temporarily absent April 11, 1899, who had returned, were permanent residents, and were not "citizens of any foreign country." The chief value of this was to cure the ambiguity as to the residence requirement of the Act of 1900.

<sup>42</sup> Hamilton, J., in *Ex parte Ramirez* (1918) 10 P. R. Fed. 549, 550; see also *Ex parte Morales* (1918) 10 P. R. Fed. 395, 397.

non-citizen nationals. By Act of March 4, 1927,<sup>43</sup> these persons were given another opportunity to become citizens of the United States by making a sworn declaration of "allegiance to the United States."<sup>44</sup> This was odd in view of the fact that they already owed allegiance to the United States just as fully in the status of non-citizen national as in that of citizen national. The change in status was significant but the mode provided for signaling the change was inappropriate. The intricacies involved in distinguishing nationality from citizenship probably never will be widely understood.

As stated above, Congress has not conferred citizenship upon those persons who became non-citizen nationals of the United States by virtue of the annexation of the Philippines. This doubtless is consistent with its intention to grant independence to those Islands, in contrast with its intention to retain Puerto Rico permanently as a part of the United States. In the Jones Act (for the Philippines) of August 29, 1916,<sup>45</sup> this policy toward the Philippines was declared and a more autonomous government with enlarged powers was established there. Consistently with this purpose, this inchoate independent nation was given power to determine what additions should be made to its "citizenship." Perhaps, after all, Congress acted wisely in creating the statutory category, "citizens of the Philippine Islands." This probably contributed to the sense of national unity among these people. It may have been assumed by them to have more meaning than a legal analysis would disclose. This statute, after repeating the provisions of the Act of 1902 (mentioned above) which declared who were "citizens of the Philippine Islands," added:

"The Philippine Legislature . . . is hereby authorized to provide by law for the acquisition of Philippine citizenship by [a] those natives of the Philippine Islands . . . [who did not acquire Philippine citizenship by the Act of 1902], [b] the natives of the insular possessions of the United States, and [c] such other persons residing in the Philippine Islands who are citizens of the United States, or who could become citizens of the United States under the laws of the United States if residing therein."<sup>46</sup>

Acting under this authority the Philippine legislature enacted a "naturalization law" in 1920.<sup>47</sup> The only persons who may become

<sup>43</sup> 44 STAT. 1418, 8 U. S. C. A. (Supp. 1933) §5a.

<sup>44</sup> A further opportunity was open to them, namely, naturalization under the Act of June 29, 1906, §30, 34 STAT. 606, 8 U. S. C. (1926) §360, discussed *supra*, p. 603. For the applicability of this provision to the Puerto Ricans who rejected citizenship in 1917, see *Ex parte Morales*, *supra* note 42. See also another provision for naturalization available to those who had enlisted in the armies of the United States. *Ex parte Ramirez*, *supra* note 42.

<sup>45</sup> 39 STAT. 545, 48 U. S. C. (1926) §§1001 *et seq.*

<sup>46</sup> *Ibid.* at 546, 48 U. S. C. (1926) §1002. The letters (a), (b), and (c) have been added for convenience in reference.

<sup>47</sup> Act No. 2927 (1920) 15 PUB. LAWS, P. I. 267.

"Philippine citizens" under this act are the three categories given above, (a), (b), and (c). Class (c) is thus phrased in the Philippine law: "(c) citizens of the United States or foreigners who under the laws of the United States may become citizens of said country if residing therein."

The remainder of the statute follows the plan of the naturalization statute of the United States with variations in substance. Thus, section 2 states grounds of personal disqualification of individual members of the classes (a), (b), and (c) given above; for example, being opposed to organized government, practicing or believing in the practice of polygamy, conviction of crimes involving moral turpitude, insanity, or having an incurable contagious disease.

Section 3 states personal qualifications required to be shown: age, twenty-one years; five years' residence; good conduct; holding real estate in the Philippines worth not less than one thousand pesos, or having some known trade or profession; and speaking and writing English, Spanish, or some native tongue—except that those falling in class (a) need none of these qualifications except that of age.

The oath to be taken by a person about to receive a certificate of naturalization includes this: "I recognize and accept the supreme authority of the United States of America in the Philippine Islands and will maintain true faith and allegiance thereto;" also the oath-taker pledges to obey the laws of the Philippine Islands, and the legal orders and decrees of the authorities duly constituted therein, and faithfully to defend its government. Quite properly, swearing allegiance to the Philippine Islands is not required.

The very next statute enacted by the Philippine legislature contained this:

"Whenever the Philippine flag is hoisted in public jointly with the American flag, both shall be hoisted and lowered at the same time. The American flag shall be placed above the Filipino flag when both are in a vertical line . . ." <sup>48</sup>

In addition to the naturalization statute mentioned above, the following provisions have been made by the Philippine legislature for the acquisition of Philippine citizenship: <sup>49</sup>

"Sec. 13 (a). Any woman who is now or may hereafter be married to a citizen of the Philippine Islands, and who might herself be lawfully naturalized, shall be deemed a citizen of the Philippine Islands.

"Sec. 13 (b). Children of persons who have been duly naturalized under this law, <sup>50</sup> being under the age of twenty-one years at the time of

<sup>48</sup> Act No. 2928, *ibid.* at 271, 272.

<sup>49</sup> Act No. 3448 (1928) 24 *ibid.* 26.

<sup>50</sup> "This law" means the naturalization statute No. 2927, to which Act No. 3448 is an addition.

the naturalization of their parents, shall, if dwelling in the Philippine Islands, be considered citizens thereof.

"Sec. 13 (c). Children of persons naturalized under this law who have been born in the Philippine Islands after the naturalization of their parents shall be considered citizens thereof."

The authority delegated by Congress and the "naturalization law" enacted in pursuance of it suggest many questions and comments. Only a few will be indulged in here. One remark may be made, not pertinent to the subject of this essay, namely, that with respect to class (c) Congress imposed upon the Philippines the race distinctions in the naturalization law of the United States.<sup>51</sup> The extreme case is that a Malay, a subject of Siam and not a native of the Philippines, is ineligible to be made a citizen of the Philippines though residing there, because not eligible to become a citizen of the United States if residing here. Was Congress of two minds in this legislation? It wanted to give to the people of the Islands through their legislature some authority to determine who might become members of their political society, but feared to give them an unlimited voice. Was it under the impression that any person made a "citizen of the Philippine Islands" by this delegated authority necessarily became a national of the United States? Did Congress fear that some implication might be drawn from the Constitution to deny power in Congress to forbid migration of non-citizen nationals from the Philippines to the continental United States? Or conceding constitutionality, may not Congress have desired to avoid increasing the necessity for such a law? In spite of strong urging Congress long refrained from forbidding the migration of Malay citizens of the Philippines to the States. If the Philippine legislature had been authorized to "naturalize" into Philippine citizenship foreign-born alien Chinese and Japanese, the demand for an exclusion of "Philippine citizens" from the continental United States would have been increased.

Is it true that aliens who become "citizens of the Philippine Islands" under this law thereby become nationals of the United States? If so, they become non-citizen nationals. No authority is given to the legislature of the Philippines to naturalize aliens into citizens of the United States. With respect to the international problem, there is no doubt that Congress may delegate to a subordinate organ of government power to enact an American nationality law. If the United States should extend protection abroad to an alien converted into a citizen of the

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<sup>51</sup> The Supreme Court of the Philippines has held that a person of Chinese blood born *in China* (cf. note 53), though he maintained a permanent residence in the Philippines from 1881 to the date of his application in 1925, was ineligible to naturalization because of his race. *Lucio v. Government of the Philippine Is.* (1928) 51 Phil. Rep. 596.



Philippine Islands under this law, the country upon whom the demand was made would have no basis for rebutting an assertion by the United States that the person was a national of the United States. It is doubtful, however, whether this is the intent of the law. Congress may only have intended to regard the status of citizenship of the Philippine Islands as a status having wholly to do with the internal affairs of the Philippine Islands—an authority to admit these aliens, while remaining alien to the United States, to equal privileges with the body of citizens of the Philippines. It may be a situation analogous to one formerly existing when twenty-two states of the Union and organized territories gave voting rights at all elections to aliens who had merely declared intention to become citizens. They thus held a sort of local citizenship without being either citizen or non-citizen nationals of the United States.

If this be the true construction of the act of Congress, the Philippine legislature misconceived it by requiring an alien who becomes a citizen of the Philippines under this law to take an oath of allegiance to the United States. That assumes acquisition of American nationality.

Class (*a*) of this statute presents matter of interest—"natives of the Philippines" who were not made citizens of the Philippines by the Act of 1902 or its provisions as repeated in the Act of 1916. Those Acts, as we have seen, conferred that status upon all Spanish subjects who became American nationals by the cession, and their children born subsequently. There may have been and doubtless were some Spanish subjects born in the Philippines who at the time of cession had established domicile abroad and who subsequently returned to the Islands as aliens. If so, class (*a*) may have been designed for them, but their number seems too insignificant to have gained legislative recognition. There are two larger categories which a natural reading of the word "natives" includes, namely, (1) persons born in the Philippines before the cession whose parents failed to claim<sup>52</sup> Spanish nationality for them, alien *ante-nati*, that is, alien to Spain and alien to the United States notwithstanding the cession, and (2) persons born there of alien parents since the cession, the *post-nati* of alien parentage. I shall later present an argument for the position that the *post-nati* of alien parentage acquire United States citizenship at birth. If so, they may be regarded as falling within class (*c*) of the statute, which determines what citizens of the United States may become citizens of the Philippine Islands. But it seems that they and all other citizens of the United States *born in the Philippines*, if birth there confers citizenship, are included in

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<sup>52</sup> See the rule of Spanish law on this point, discussed in the appendix to this essay, *infra*, p. 633.

class (a) as natives in order to give them the benefit of the provision that no qualification but age of majority is required for "naturalization" of persons in class (a),<sup>53</sup> whereas other citizens of the United States falling in class (c) have to show various qualifications to become "citizens of the Philippine Islands." This reconciles the provisions and avoids construing them as overlapping.

The question whether the Fourteenth Amendment is operative in the Philippines or in Puerto Rico is a fundamental one which I am reserving to the conclusion of this essay. It is one of the most perplexing difficulties of the subject in hand. Suffice it to say here, still postponing that issue, that if Congress assumed that the Constitution does not impose the rule of *jus soli* on the Philippines, that is, to make all persons born there since the cession citizens of the United States, it has nevertheless authorized the Philippine legislature to adopt it as a principle in Philippine naturalization. The attentive reader has already noticed that Congress has imposed no race discrimination with respect to "naturalization" of class (a), and that the Philippine legislature has provided but a single qualification—the age of majority.<sup>54</sup> Really, with reference to an alien, regardless of race, born in the Philippines before or since the cession, this law in effect confers upon him the privilege of electing at majority the status of citizen of the Philippines, subject to his renouncing his former allegiance, if any, and taking the prescribed oaths of obedience and allegiance. It is citizenship of the Philippines by election at majority, because of birth in the territory, as distinguished from outright *jus soli*, as applied in the Fourteenth Amendment to give citizenship of the United States at birth because of birth in the United States.

So far as class (b), "natives of the insular possessions of the United States," includes those natives of Puerto Rico who are now citizens of the United States, class (b) clearly overlaps class (c) in part. So far as it includes natives of Puerto Rico born before the cession who were not Spanish subjects and whose status has not since changed, class (b) overlaps the provision in class (c) for aliens. So far as class (b) includes persons born in Puerto Rico since the cession, of alien parents, the difficult question again arises, whether the Fourteenth Amendment

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<sup>53</sup> See *Go Julian v. Government of the Philippine Is.* (1923) 45 Phil. Rep. 289, where a person of Chinese blood born in the Philippines after the cession, his parents being aliens, was held eligible to naturalization as a member of class (a) to which the racial discrimination does not apply, reading class (a) as not cut down by the provision for class (c), that is, considering the latter to refer to those aliens who are not natives of the Philippines.

<sup>54</sup> The disqualifications stated in section 2 of the statute, stated above at p. 607, apply to this class, but of the qualifications prescribed in section 3, that of age only applies.

has been operative in Puerto Rico. There is one further possibility, namely, that there may be a few natives of Puerto Rico who were Spanish subjects at the date of the cession who still are non-citizen nationals of the United States, remnants of the small group that rejected citizenship of the United States in 1917.<sup>55</sup> This privilege given to persons of class (*b*) is also unqualified by any distinctions in respect to race, but individuals of this class must be free from all the disqualifications of section 2 and must possess all the qualifications of section 3. This class (*b*) provision seems to be little more than an empty gesture of sympathy for the natives of other islands possessing the rather derogatory status of "insular possession."

Finally, attention should be directed to some degree of anomaly in "naturalizing" a citizen of the United States into a citizen of the Philippines (class *c*). If he is an anarchist, assassinationist, or polygamist (has any of the disqualifications of section 2) he is ineligible; and why not? Equally, he is ineligible if he lacks any of the qualifications of section 3, unless the place of his birth puts him in class (*a*). The grant of this privilege to citizens of the United States is consistent with the interpretation that citizenship of the Philippines is a status purely local and internal. Nevertheless, a citizen of the United States who petitions for this privilege is required, like others, to swear allegiance to the United States, as well as obedience to the local government and laws.

Much of this discussion of the "naturalization" law of the Philippines is, strictly speaking, irrelevant to the theme of the essay—except that part of it which presents the pros and cons of the question whether the Philippine legislature is authorized to admit some aliens to the status of non-citizen nationals of the United States. Perhaps the right answer to this question is that Congress did not intend to confer nationality of the United States upon those aliens who may become "citizens of the Philippine Islands" under this "naturalization" law of the Philippine legislature. This statutory category has important local uses; it designates a class of persons who have certain local privileges. Congress has found it convenient to continue the category, "citizens of Porto Rico," even though it has conferred United States citizenship on all who had that status in 1917.<sup>56</sup> In 1927 Congress enacted that "all citizens of the United States who have resided or who shall hereafter [after March 4, 1927] reside in the island for one year shall be citizens of Porto Rico."<sup>57</sup> Obviously it is the intention of Congress to give citizens of the United States, wherever born or whatever their title to that status, the

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<sup>55</sup> See *supra*, p. 605.

<sup>56</sup> Subject to the election stated *supra*, p. 605.

<sup>57</sup> Act of March 4, 1927, 44 STAT. 1418, 48 U. S. C. A. (Supp. 1933) §733a.

maximum of local privileges in Puerto Rico, unless they are only transiently there.

Citizenship of the Philippine Islands is likewise, it seems, a purely local status.<sup>58</sup> The greater number of the persons who possess this status also have the status of non-citizen nationals of the United States; some may be citizens of the United States; some may be aliens, since some persons of the two classes last named are eligible to Philippine citizenship under the Philippine "naturalization" law. There is no provision of American law whereby a citizen of the United States becomes a non-citizen national by becoming a citizen of the Philippines; nor, if my conclusion is correct, is there any provision of law whereby an alien who becomes a citizen of the Philippine Islands under its "naturalization" law ceases to be an alien. It is true that an alien in acquiring Philippine citizenship is required by law to forswear his former allegiance and to swear allegiance to the United States; and in order to reach the conclusion which I have reached, I am required to assume that these requirements as applicable to aliens are beyond the authority delegated by Congress. The inconsistencies of the legislation force some construction.

We come now to grapple with some major difficulties of our subject.

Not only the Philippine Islands but also Puerto Rico remains "unincorporated territory." Has the Fourteenth Amendment, declaring that "all persons born . . . in the United States and subject to the jurisdiction thereof, are citizens of the United States," been operative in those islands since the cession? This question concerns chiefly children born in the islands, since the cession, of alien parents. It therefore concerns a small portion only of the persons born in the islands since the cession. The greater number of the persons born there since the cession are children of those Spanish subjects who became non-citizen nationals by the cession. We have already seen that Congress enacted that Spanish subjects residing in the islands at the cession, except those who elected to retain Spanish nationality, "and their children born subsequent thereto," should be "citizens of Porto Rico" and "citizens of the Philippine Islands," respectively. While I have argued that this "citizenship" is a local status internal to the islands, it is not inconsistent therewith to find implicit in these declarations an intent that the status of these children *in all respects* was to follow the status of their parents, and that since the parents were non-citizen nationals of the United States the children also should have that status. The question arises, Why are not these subsequently born children citizen nationals at birth

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<sup>58</sup> It is, of course, a local status. The question is whether it carries with it also a national status—whether all "citizens of the Philippine Islands" are necessarily also nationals of the United States.

by virtue of the Fourteenth Amendment? Consistently with precedents in our law, children born in the United States of parents who are non-citizen nationals are likewise non-citizen nationals, notwithstanding the Fourteenth Amendment. Congress acted within the precedents in prescribing the status of these subsequently born children. While our law has always followed the principle of *jus soli* in respect to acquisition of citizenship, it has followed the principle of *jus sanguinis* in respect to non-citizen nationality. All the precedents we have are to that effect, and none are to the contrary. It has always been said that the declaration of *jus soli* in the Fourteenth Amendment was declaratory of the prior law, and adopted to overcome the dictum of *Dred Scott v. Sandford*.<sup>59</sup> That dictum was that while American-born Negroes owed permanent allegiance to the United States they were not citizens of the United States. Chief Justice Taney and the two associates who concurred with him reasoned that it had never been the intention of the American people to include American-born Negroes in our citizenship. This opinion was not new.<sup>60</sup> It was accepted as law by state courts, by Congress, and the people, and the express affirmation of the Fourteenth Amendment was deemed necessary to wipe out the exception. So long as the view prevailed that American-born Negroes were non-citizen nationals, to use the modern terminology, their children generation after generation had followed the status of their parents. If the dictum was true in 1856, it had been true from 1789. The common law rule of citizenship *jure soli* by exception did not apply to Negroes, and the principle of *jus sanguinis* applied so as to give to the children of non-citizen nationals the same status, though they were born in the United States.

Even after the adoption of the Fourteenth Amendment it was likewise held that American-born tribal Indians were not citizens, regardless of where in the United States they were born.<sup>61</sup> While there were dicta of judges calling them aliens, these were inadvertences, because there could be no denying that the Indians owed permanent allegiance to the United States and were, in modern terminology, non-citizen nationals. To them likewise the principle of *jus sanguinis* applied—that the child, no matter where born, of a tribal Indian parent followed the status of the parent.

If it is admitted, as I think it should be, that the treaty power of the United States can annex people without conferring citizenship on

<sup>59</sup> *Supra* note 27.

<sup>60</sup> Attorney General Legare, in 1843, had placed free Negroes born in the United States in an intermediate status between full citizenship and alienage. He designated them "denizens." (1843) 4 *OP. ATT'Y GEN.* 147. See also opinion of William Wirt (1821) 1 *OP. ATT'Y GEN.* 506, and the opinion of Marcy, Secretary of State, given in 1855. 3 *MOORE'S DIG.* (1906) 880.

<sup>61</sup> *Elk v. Wilkins*, *supra* note 27.

them, Congress may say, as I think in effect it has said, that the descendants of these non-citizen nationals shall to the end of time follow the status of their forebears. The Fourteenth Amendment may be operative in the Philippines and Puerto Rico in respect to persons other than the subsequently born children of the new nationals of 1899, just as it is in the United States, but the children born of our Filipino nationals, whether born in the Philippines or in any other part of the United States, are not within its operation, just as American-born tribal Indians were outside its scope and American-born Negroes were outside the scope of the common law rule declared in the Amendment.

While the logic of precedent excepts the children of non-citizen nationals from the operation of the Fourteenth Amendment and makes it possible to recognize it as operative in the Philippines and Puerto Rico, there is an element that may lead to the opposite conclusion when the question reaches the court of last resort. If the Amendment does operate in the islands, then every child born there since the cession of alien parents is not merely a national but also a citizen of the United States. It is not new, though it may seem odd, that the child of an alien born on American soil acquires at birth a station superior to the child there born of non-citizen national parentage. For many generations that difference prevailed between children born in the United States of Negro or Indian non-citizen parentage and the children of aliens born here. The rule of the Fourteenth Amendment is repugnant to some persons because it makes no racial discrimination, and no doubt these persons will protest against any conclusion that has the effect of giving United States citizenship to the children born in the Philippines since April 11, 1899, of alien parents of Chinese or Japanese blood. The number of the latter is insignificant, and of the former almost so. It must be remembered that the children subsequently born in the Philippines of parents of Chinese blood who were subjects of Spain at the cession are non-citizen nationals following the status of their parents. I assume that no great harm will come from recognizing as citizens children born since the cession, in the Philippines and Puerto Rico, of alien parents of European stock. Whether the inexpediency of recognizing as citizens of the United States a few Chinese born since the cession in the Philippines will weigh heavily on the judicial mind, must be left to the future.

If my conclusion is correct, Congress in authorizing the Philippine legislature to grant citizenship of the Philippines to all persons born in the Islands was, in respect to the children born of alien parents since the cession, dealing with citizens of the United States. With respect to *ante-nati* of parents alien to Spain who failed to acquire Spanish na-

tionality by any rule of Spanish law, the Fourteenth Amendment would not operate retrospectively; the place of birth was not American at the time of birth.

Turning again to Puerto Rico, the question whether the Fourteenth Amendment has been operative there since the cession, or now is operative there, is on the same footing. Puerto Rico has been and still is "unincorporated territory." In the Jones Act<sup>62</sup> for Puerto Rico there is a provision which I have not yet discussed. That Act, it will be remembered, extended citizenship of the United States to all who had become non-citizen nationals by the cession of Puerto Rico. There was the additional provision that

". . . any person who is born in Porto Rico of an alien parent and is permanently residing in that island may, if of full age, within six months of the taking effect of this Act, or if a minor, upon reaching his majority or within one year thereafter, make a sworn declaration of allegiance to the United States . . ."

and thereby acquire citizenship of the United States. What adults were referred to and what minors? The use of the present tense in "is born" and "is residing" might not, taken alone, be conclusive that the Act referred to those persons only who were born of alien parents before March 2, 1917; but the adults were required to make a declaration of allegiance within six months from that date. Clearly, then, the only adults in contemplation were those born before 1917. Persons who were adults at that time necessarily were *ante-nati*, that is, born before the cession, April 11, 1899. The Fourteenth Amendment, if operative in Puerto Rico after the cession, would not apply retrospectively to them. As to the minors referred to, who were they? It seems that the only minors included are those born before March 2, 1917. Now, doubtless some who were then minors had been born before April 11, 1899. Being born of parents alien to Spain they were aliens to Spain at the cession unless their parents "claimed"<sup>63</sup> Spanish nationality for them. Such persons were aliens to the United States after the cession. But the language of the Act respecting minors is broad enough to include all persons born of alien parents in Puerto Rico between April 11, 1899, and March 2, 1917. My opinion is that to this extent Congress was indulging in unnecessary legislation. Congress apparently felt that, since birth in the United States generally confers citizenship, birth in Puerto Rico should have the same result, irrespective of race or nationality of the parents; or, at least, that the privilege of becoming citizens should be extended to persons so born. The result is substantially the same as it would be if the Fourteenth Amendment were operative in Puerto

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<sup>62</sup> 39 STAT. (1917) 951, 953, 8 U. S. C. (1926) §5.

<sup>63</sup> See the rules of Spanish law discussed in the appendix to this essay, *infra*, p. 633.

Rico both retrospectively and prospectively. On the assumption, which seems correct, that the Amendment did not operate retrospectively, this legislation by Congress was necessary to give to *ante-nati* aliens the privilege of citizenship; but, if my opinion is correct, it was superfluous in respect to the *post-nati* of alien parentage. In 1927 Congress gave to all the persons born in Puerto Rico of alien parents covered by the Act just discussed who had failed to take advantage of the privilege to become citizens a new period for election, one year from March 4, 1927.<sup>64</sup> This statute did not enlarge the class dealt with; it also applied to those persons only who were born in Puerto Rico before March 2, 1917, and then resided there.

What of persons born in Puerto Rico of alien parents since March 2, 1917? If Congress thinks that the Fourteenth Amendment is not operative in Puerto Rico and desires the same result as the operation of the Amendment would produce, why has it not declared generally that all persons heretofore or hereafter born in Puerto Rico are citizens, or that they may elect to become citizens? In my opinion this is unnecessary with reference to all *post-nati* of alien parents.

It is interesting to note that if the Fourteenth Amendment is not operative in Puerto Rico or the Philippines, the status of children born in those islands, since the cession, whose fathers were citizens of the United States, rests upon a forced construction of the Act of 1855. There is no other provision of American law that confers citizenship upon the child of a citizen<sup>65</sup> solely because of such parentage. This statute both in its original<sup>66</sup> and in its revised language<sup>67</sup> confers citizenship upon those children only who are "born out of the limits and jurisdiction of the United States" to a citizen father.<sup>68</sup>

It would be a forced construction to say that the Philippines and Puerto Rico are outside the limits and jurisdiction of the United States. The Court might, however, arrive at a decision upon a less artificial basis by a resort to judge-made law, with a conventional concealment of its legislative action, by imputing to Congress an intent that the Act of 1855 should *completely* supplement the *jus soli* principle. It could be said that since children born of a citizen father in what is unequivocally the "United States" and children born "out of the limits

<sup>64</sup> Act of March 4, 1927, c. 503, §2, 44 STAT. 1418, 8 U. S. C. A. (Supp. 1933) §5a.

<sup>65</sup> Except a provision of the naturalization law that gives citizenship to the minor children of a naturalized alien provided the children are dwelling in the United States. R. S. §2172, 8 U. S. C. (1926) §7. I say "solely" above because a child born of a citizen father "in the United States" is a citizen because of the place of birth.

<sup>66</sup> 10 STAT. (1855) 604.

<sup>67</sup> 34 STAT. (1907) 1229, 8 U. S. C. (1926) §6.

<sup>68</sup> There is a limiting proviso which has been interpreted to mean that the father must have resided in the United States before the child's birth. *Weedin v. Chin Bow* (1927) 274 U. S. 657.



and jurisdiction of the United States" are citizens, *a fortiori* children born of a citizen father in ambiguously appurtenant territory are intended to be citizens, or are citizens regardless of a fictitious congressional intent. By such a *tour de force* the Court, the case arising, may take care of the numerous children born in our "unincorporated territories" of United-States-born fathers and thus reduce the practical necessity for holding the citizenship provision of the Fourteenth Amendment operative in those territories. Or the Supreme Court may hold that provision operative in "unincorporated territory" without conflict with any decision, or with any dictum in any approved opinion, or with any doctrine heretofore announced by the Court.

It is true that Judge Hamilton of the so-called Federal Court for Puerto Rico has held that the citizenship provision of the Fourteenth Amendment is not operative in Puerto Rico. He reasoned that the "Insular Cases decided that the Constitution did not follow the flag" and that no part of the Constitution is operative in annexed territory until Congress "extends" it there, except certain "inherent natural rights of man" of which acquiring citizenship by birth on the soil was not one.<sup>69</sup> It is obvious that Judge Hamilton was following the "extension" theory announced in the opinion of Justice Brown, in *Downes v. Bidwell*, a theory with which no other member of the Court concurred.

Finley Peter Dunne, the humorist, said, "Mr. Justice Brown delivered the opinion of the Court, eight justices dissenting." The actual fact is stated in the official report, that Mr. Justice Brown "announced the conclusion and judgment of the Court."<sup>70</sup>

Chief Justice Taft, twenty years later, giving the opinion of a unanimous Court, said, "The *Insular Cases* revealed much diversity of opinion in this Court as to the constitutional status of the territory acquired by the Treaty of Paris ending the Spanish War, but the *Dorr Case*<sup>71</sup> shows that the opinion of Mr. Justice White of the majority in *Downes v. Bidwell*, has become the settled law of the court."<sup>72</sup> The opinion of Justice White laid down several propositions, the starting point of which was that the Constitution is the source of the power of Congress wherever it governs and "it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable."<sup>73</sup> His sixth formulation is nearest to a summary:

"As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to

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<sup>69</sup> *Maysonet v. Zamorano* (1919) 11 P. R. Fed. 412.

<sup>70</sup> *Supra* note 17, at 247. "Opinion of the Court" is the erroneous caption to each page of Justice Brown's opinion.

<sup>71</sup> *Dorr v. United States* (1904) 195 U. S. 138.

<sup>72</sup> *Balzac v. Porto Rico*, *supra* note 20.

<sup>73</sup> *Supra* note 17, at 289.

Congress in exercising this authority necessarily limit its power on this subject. It follows also that every provision of the Constitution which is applicable to the territories is also controlling therein."<sup>74</sup>

I shall not make the vain attempt to explain the reasoning upon which that mysterious status of "unincorporated territory" was imputed to Puerto Rico (and to the Philippines); it is sufficient to say that this status was asserted to be a factor in determining what limitations of the Constitution are applicable to Congress in governing those regions and what provisions of the Constitution are applicable to them. It is clear, however, that the proposition that the Constitution is eclectically applicable to territories and to Congress in governing them was meant to include "unincorporated territory." This appears clearly in the statement:

"From these conceded propositions it follows that Congress in legislating for Porto Rico was only empowered to act within the Constitution and subject to its applicable limitations, and that every provision of the Constitution which applied to a country situated as was that island, was potential in Porto Rico."<sup>75</sup>

The point actually decided in *Downes v. Bidwell* is stated in Justice White's conclusion:

"The result of what has been said is that whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession. As a necessary consequence, the impost in question assessed on merchandise coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such imposts, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words, the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico."<sup>76</sup>

The opinion will be searched in vain for any formula or standard by which may be determined what other limitations upon Congress are applicable in its government of Puerto Rico or the Philippines. In *Dorr v. United States*,<sup>77</sup> in holding that the requirement of juries in criminal trials did not apply to the Philippines the Court said that unincorporated territory "is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation."<sup>78</sup> The right to trial by jury was considered not a "fundamental right which goes wherever the jurisdiction of the United States ex-

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<sup>74</sup> *Ibid.* at 291.

<sup>75</sup> *Ibid.* at 293.

<sup>76</sup> *Ibid.* at 341-342.

<sup>77</sup> *Supra* note 71.

<sup>78</sup> *Ibid.* at 143.

tends"<sup>79</sup> and in view of the fact that jury trial was unknown to the people of the Philippines the Court concluded that "it was not intended" to "hamper" Congress in governing them by imposing the requirement of jury trial,<sup>80</sup> "to whatever other limitations it may be subject, the extent of which must be decided as questions arise."<sup>81</sup>

*Balzac v. Porto Rico*<sup>82</sup> contributes nothing to the evolution of a test for determining what provisions of the Constitution are applicable to unincorporated territory, merely reaffirming that the jury requirement is not, the contested point being resolved by holding that Puerto Rico was still unincorporated.

The only rationalization of these decisions that seems sensible is that the necessities of statesmanship and expediency require that Congress be freed from some of the limitations of the Constitution in legislating for some parts of American territory, especially where the lack of familiarity of the inhabitants with American institutions makes some of them unworkable there. This is true of the jury system, particularly in the Philippines. It seems in retrospect not so obvious, however, that like considerations made it necessary to hold that Congress could levy tariff duties on goods entering the continental United States from Puerto Rico and the Philippines. It may be that the Court felt an impulse to announce a general principle in its first case, in order to remove the anxiety felt in many quarters over the annexation of remote and dissimilar peoples, and in excess of zeal overstepped the requirements of the principle.

Formerly I contended<sup>83</sup> in the light of the actual decisions and the predominating language of the opinions that the Court was merely holding that some *limitations* on Congress contained in the Constitution did not apply to Congress in legislating for unincorporated territory; that these cases nowise question the applicability to every part of the United States of a rule of law enacted in the Constitution which in no accepted sense is a limitation on Congress. Such is the declaration that "all persons born . . . in the United States . . . are citizens . . ." The attentive reader has noticed, however, that while Justice White spoke almost continually about what limitations of the Constitution are applicable to Congress in governing unincorporated territory, he also spoke of what "provisions" of the Constitution are "applicable to the territories."

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<sup>79</sup> *Ibid.* at 148.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.* at 149.

<sup>82</sup> *Supra* note 20.

<sup>83</sup> McGovney, *American Citizenship* (1911) 11 COL. L. REV. 231, 326, at 338 *et seq.*

Of the term "United States" in the Fourteenth Amendment it will be asked, in the language of Chief Justice Marshall, "Does this term designate the whole, or any particular portion of the American empire?"<sup>84</sup> Justice Brown's individual opinion in *Downes v. Bidwell* was that "United States" in general in the Constitution refers only to the Union of States, excluding even the "organized territories," and that the Constitution applied only to that Union of States.<sup>85</sup> He pointed to the difference in the language of the Thirteenth and Fourteenth Amendments, the former abolishing slavery "within the United States, or any place subject to their jurisdiction," the latter speaking of birth "in the United States" without any addition. This was by way of arguing that no part<sup>86</sup> of the Constitution was operative of its own force outside the area included in the States unless made so by its own explicit language. Since Justice Brown did not admit the distinction between incorporated and unincorporated territories, it is obvious that his line of reasoning went too far. It tended to prove that the citizenship provision of the Fourteenth Amendment did not apply even in the continental "organized territories" of the United States until extended there by Congress, although the contrary has always been assumed.

In summary, it appears that it is an entirely open question whether the citizenship provision of the Fourteenth Amendment is operative in Puerto Rico, the Philippines, and other "unincorporated territory," and that the Supreme Court is free to decide it according to its appreciation of the requirements of statesmanship and expediency. If the Court accepts the theory of the precedents discussed in this essay, that the children of non-citizen nationals wherever born follow the status of their parents, it may well decide that the Amendment is operative in unincorporated territory, for the rule referred to denudes the problem of its only embarrassing element. Only those children who were born in such territory after its acquisition, of alien and citizen fatherhood, would be citizens at birth under the Amendment. That is, there is one highly desirable result favoring that conclusion and one that may seem adverse. As to those unincorporated territories which the United States intends to retain permanently, such as Puerto Rico, a rule that children

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<sup>84</sup> *Loughborough v. Blake* (1820) 5 Wheat. (18 U. S.) 317, 319.

<sup>85</sup> After referring to the Articles of Confederation, the Ordinance for the Northwest Territory, and the Constitution, he said, "It is sufficient to observe in relation to these three fundamental instruments that it can nowhere be inferred that the territories were considered a part of the United States." 182 U. S. at 251.

<sup>86</sup> Even Justice Brown admitted exceptions to his generality. "There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several States. . . . We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight Amendments is of general and how far of local application." *Ibid.* at 277.

born there of alien fatherhood are citizens would seem a perfectly normal application of an American principle. The legislation for Puerto Rico shows that Congress considers that a desirable result.

As to any unincorporated territory that the United States intends to cast off, Congress may provide that upon independence persons born there since the annexation, of alien parents, though citizens of the United States, shall lose their American citizenship and nationality and become solely nationals of the new nation.

What effect upon the status of our Philippine non-citizen nationals is worked by the Philippine Independence Act of March 24, 1934? Brief summarization of the scheme of the Act will aid. It authorizes a constitutional convention in the Philippines at a date to be fixed by the Philippine legislature, not later than October 1, 1934, to draft a constitution for the new Commonwealth of the Philippine Islands. The Act specifies some provisions which Congress requires shall be contained in the constitution. After the President of the United States certifies that the proposed constitution conforms to these requirements it is to be submitted for ratification to the Philippine voters. On July 4 next after ten years' operation of the government set up under this commonwealth constitution, the President of the United States is to proclaim the withdrawal and surrender of all "jurisdiction, control or sovereignty . . . over the territory and people of the Philippine Islands," and those Islands will become an independent, foreign country.

The constitution of the commonwealth contemplated by the Act is an interim constitution for the ten-year transition period and the one to be in force when the new nation assumes its separate and equal station among the powers of the earth. Amendments made to it during that period must have the approval of the President of the United States. Among the "mandatory provisions" that this transition constitution must contain is this: "All citizens of the Philippine Islands shall owe allegiance to the United States."<sup>87</sup> This means that until independence is proclaimed by the President, which cannot be done until the lapse of at least ten years, the status of non-citizen nationality continues to be possessed by those "citizens of the Philippine Islands" who now possess it.

With this provision may be compared another transition provision of the Act, a provision that became operative upon acceptance of the Act by the concurrent resolution of the Philippine legislature passed on May 1, 1934.<sup>88</sup> It is to be operative from that date until independence is finally proclaimed. This provision is that "for the purposes of"

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<sup>87</sup> §2 (a), par. (1).

<sup>88</sup> The resolution is published in Department of State Press Releases, Weekly Issue No. 240, May 5, 1934, at 243.

the laws of the United States (except section 13 (c) of the Immigration Act of 1924) relating to immigration and to exclusion and expulsion of aliens, "citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens."<sup>89</sup> The people affected are not declared to be aliens; they still owe allegiance to the United States; the Act merely means that migration of these nationals into other parts of the United States, except the Territory of Hawaii,<sup>90</sup> is forbidden on nearly the same terms as is the immigration of aliens. The Act assigns to the Philippine Islands an immigration quota of fifty a year. There are no racial limitations on this quota, a result brought about by the exception above mentioned making section 13 (c) of the Immigration Act of 1924 inapplicable. This quota of fifty is merely sentimental, psychological, or what you will. Annually, fifty "Filipinos," irrespective of race, may enter the continental United States for permanent residence during the transition period. In addition, others may come as temporary residents and visitors under the non-quota provisions of the immigration laws. There is a definite warning in the Act that after independence the race discrimination of section 13 (c) of the Act of 1924<sup>91</sup> will apply to the Philippine Islands. I call the fifty per year quota sentimental because I cannot see that the coming of fifty Philippine citizens a year for *permanent* residence in the United States has any relation whatever to the program of preparing the Philippine Islanders for independence. It is the non-quota immigrants who come and return that may contribute to that program.

The essential thing in this legislation, for the topic of this essay, is that Congress believes now that it has constitutional power to forbid migration of non-citizen nationals from one part of the United States to another. If Congress can forbid all but fifty, it can forbid all. The individual right of a person excluded because the quota is exhausted is the same as it would be if there were no quota. If there were any doubt about Congress' having such a power at any time the present exercise of it may be distinguished as applied to non-citizen nationals who are on the verge of becoming aliens.

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<sup>89</sup> §8 (a), par. (1).

<sup>90</sup> "Citizens of the Philippine Islands who are not citizens of the United States shall not be admitted to the continental United States from the Territory of Hawaii (whether entering such Territory before or after the effective date of this section)" unless they are "nonimmigrants" or "nonquota immigrants," etc. (§8 [a], par. [2]), but Filipino immigration into that Territory "shall be determined by the Department of the Interior on the basis of the needs of industries in the Territory of Hawaii." §8 (a), par. (1).

It is said that in 1931 there were about 64,000 Filipinos in Hawaii, where they are considered an essential labor supply in the sugar and pineapple plantations. LASKER, *FILIPINO IMMIGRATION* (1931) 159, 160, 324.

<sup>91</sup> §14.

There is no provision in the Act to determine the effect of independence upon the nationality of citizens of the United States who may be inhabitants of the Islands when the United States relinquishes its sovereignty. Will the usually stated rule apply, that in the absence of reservations by treaty or otherwise the nationals of the former sovereign, residing in the territory, lose their former nationality and become exclusively nationals of the new sovereign? Congress has surely been remiss in not prescribing that American citizens inhabiting the Islands shall have an election to reject the new Philippine nationality when independence occurs. As we have seen,<sup>92</sup> when Spain relinquished her sovereignty over Cuba, the treaty by which the United States required her to do so gave to Spanish subjects born in Spain, who then resided in Cuba, a privilege of rejecting the new nationality of independent Cuba. So Congress should have prescribed an election in favor of those citizens of the United States, residing in the Philippines, who owe their citizenship to birth in other parts of the United States, and of their citizen children born in the Philippines. This would have excluded from the privilege of election those citizens of the United States who became citizens by reason of birth in the Philippines of alien parents since the cession, assuming my theory of the status of these persons to be correct. Though citizens *jure soli*, they have no attachment to the continental United States and should follow the status of the territory in which they were born; while children born in the Philippines of parents who were citizens of the United States have at least a tie of parentage to the continental United States. Perhaps Congress may yet fill up this hiatus in its legislation. If it does so, the argument for the doctrine that the Fourteenth Amendment has not been applicable in the Philippines will be shorn of the last shred of expediency. The notion that Congress cannot in relinquishing territory cast off some citizens of the United States is a mere abstraction as applied to the children of aliens who became citizens by birth in territory which the United States has temporarily held, a territory which the United States has proclaimed from the beginning was not to be retained permanently against the will of the greater number of its inhabitants.

Upon the independence of the Philippines the status of non-citizen national of the United States will terminate with respect to more than 13,000,000 persons, who will become aliens. The "citizens of Puerto Rico" have passed out of that status in the other direction, by becoming citizens as well as nationals. The Negroes and the Indians also passed out by the latter route.

After the independence of the Philippines will there remain no non-

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<sup>92</sup> *Supra*, p. 593.

citizen nationals of the United States? There are the possible remnants of the 288 intransigent Puerto Ricans who rejected citizenship in 1917. Then there are the Alaskan "uncivilized tribes" under the treaty of 1867. The members of these tribes became nationals without citizenship,<sup>93</sup> notwithstanding that Alaska was "incorporated." Presumably they consisted of both Indians and Eskimos. All Indian non-citizen nationals among them who had not previously acquired citizenship were made citizens by the Act of 1924,<sup>94</sup> which declared "all Indians born within the territorial limits of the United States" to be citizens. Some legislation of the United States indicates that in statutory terminology Congress regards Indians and Eskimos as distinct categories.<sup>95</sup> If Congress intends uniform meaning of its terms, the Act just quoted does not include the Alaskan Eskimos. On this assumption the Eskimos who became non-citizen nationals in 1867 and their descendants have that status now, if the principles propounded in this essay are correct.<sup>95a</sup> Unless it is considered undesirable to give them the privilege of voting, now limited in Alaska to citizens,<sup>96</sup> there is no reason why Congress should not confer citizenship upon the Alaskan Eskimos.

Whether the citizens of the Republic of Hawaii were non-citizen nationals for several months after the transfer of sovereignty to the United States, August 12, 1898, is uncertain. The doubt is unimportant. By an Act of April 30, 1900,<sup>97</sup> United States citizenship was imposed upon all who had been citizens of the Republic of Hawaii on the day of the transfer. This Act also declared the Constitution and all laws of

<sup>93</sup> Mr. Justice White makes this assumption in *Downes v. Bidwell*, *supra* note 17, at 335.

<sup>94</sup> Act of June 2, 1924, 43 STAT. 253, 8 U. S. C. (1926) §3. Some Alaskan Indians acquired citizenship under the Act of Congress of February 8, 1887, which provided: "Every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States." 24 STAT. 390.

<sup>95</sup> See 48 U. S. C. (1926) §§49, 169, 357.

<sup>95a</sup> But see *In re Minook* (1904) 2 Alaska 200.

It has been said that acting under authority conferred by Congress in the Organic Act of 1912 for Alaska, the Alaska Territorial legislature in 1915 "passed a law permitting the Alaska natives to become citizens under the following conditions . . ." This is a double error. First, the Organic Act does not confer the alleged authority. Secondly, the territorial statute (Alaska Stats. 1915, p. 52) does not purport to confer citizenship. Its purpose was to enable those Indians who acquired citizenship under the Act of Congress of February 8, 1887, 24 STAT. 390, quoted in note 94, *supra*, to prove that fact and obtain a certificate that the proof had been made.

The erroneous statement is in Spicer, *The Constitutional Status and Government of Alaska* (1927) 45 Johns Hopkins Studies in Historical and Political Science, No. 4, p. 43, and is repeated in GETTYS, *THE LAW OF CITIZENSHIP IN THE UNITED STATES* (1934) 148.

<sup>96</sup> 48 U. S. C. (1926, §§73, 135.

<sup>97</sup> 31 STAT. 141, 8 U. S. C. (1926) §4.



the United States not locally inapplicable to have the same force and effect in the Territory of Hawaii as elsewhere in the United States.<sup>98</sup> This legislation undoubtedly "incorporated" the Hawaiian Islands,<sup>99</sup> if they were, temporarily, only appurtenant but unincorporated territory.<sup>100</sup> It follows that all persons, including numerous children of Filipino parentage,<sup>101</sup> born in Hawaii since annexation, or at least since April 30, 1900, became citizens of the United States at birth by virtue of the Fourteenth Amendment, unless the thesis of this essay is correct—that no matter where in the United States a child of a non-citizen national is born, the child follows the status of the parent. This brings us to point out that the Philippine Independence Act does not deal specifically with those of our Filipino nationals who have become permanent residents of the continental United States—about 45,000 by the census of 1930. The Act does not require their removal. Will they as "citizens of the Philippine Islands" become aliens, when those Islands become independent—along with persons then residing in the Islands? By some confusion of thought we may say that those who are residents here at that time are not distinguishable from those resident there. But it must be recalled that the status of "citizen of the Philippines" as it exists now is not an international status but a purely internal American status. If we say that those who are residents of the Islands must abide by the majority vote for independence and lose their American nationality without their personal consent, it takes more arbitrary determination to cast off these American nationals who reside in the continental United States and who do not participate in the vote. It takes some obscurity to assume that there is a Filipino nation before it is brought into existence. What precedent is there for holding that, upon a change of sovereignty over a territory, those formerly connected with that territory but permanently removed from it undergo a change of nationality? If *A*, an independent nation, annexes the whole of the territory of *B*, another independent country, it may well be that all nationals of state *B* wherever they reside at the time become nationals of state *A*. Their former state disappears and for them it is the new nationality or none. Our case is quite different. Why should American nationals residing in retained territory lose that nationality because another part

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<sup>98</sup> 31 STAT. (1900) 141, 48 U. S. C. (1926) §495.

<sup>99</sup> See *Neuss, Hesslein & Co. v. Edwards* (C. C. A. 2d, 1929) 30 F. (2d) 620, 622 (dictum); see also *Farrington, Governor of Hawaii v. Tokushige* (1927) 273 U. S. 284, where the Due Process of Law Clause of Amendment V was regarded as operative in the Territory of Hawaii, a result probably not dependent upon "incorporation." Notwithstanding this dearth of judicial decision the statement in the text is a confident prediction of ultimate decision.

<sup>100</sup> See *Hawaii v. Mankichi*, *supra* note 19.

<sup>101</sup> See *supra* note 90.

of our territory is excised, even though the latter is territory in which they or their ancestors resided at the time it was annexed to the United States?

I think that there is no precedent upon which Congress could legislate, nor any principle in the absence of legislation upon which a court could hold, that, upon independence of the Philippines, American nationals of Filipino extraction who then have permanent residence in the United States cease to be nationals. If they do not, they also remain as non-citizen nationals, they and their descendants, even though born in the continental United States, until Congress sees fit to make them citizens. To these should be added several thousands of Filipinos residing in Hawaii, and their descendants.

There remain for brief consideration those persons whose nationality was affected by our acquisition of Guam, of the Virgin Islands, of American Samoa, and of the Panama Canal Zone, and the descendants of those persons.

Guam is one of the islands ceded by Spain by the Treaty of Paris. To it as well as to the Philippines and Puerto Rico the provision of article IX applied—that the political status of the native inhabitants should be determined by Congress. Congress has enacted nothing as yet affecting the status of these native inhabitants of Guam. The treaty denied them citizenship and they and their descendants remain as they came to us, non-citizen nationals. It may be noted that there is no indication of intention to relinquish American sovereignty over Guam.<sup>102</sup>

The contrary is true of the Virgin Islanders. The treaty by which Denmark ceded the Virgin Islands to the United States, effective January 17, 1917, declared that Danish citizens who then resided there and remained there, in default of formally electing to preserve Danish citizenship, "shall be held to have renounced it, and to have accepted citizenship in the United States."

In spite of this definite conferring of citizenship, a respect in which the treaty differed from the Treaty of Paris ceding the Philippines, Puerto Rico, and Guam, the Danish treaty added a clause resembling yet differing from the second paragraph of article IX of the Spanish treaty: "The civil rights and the political status of the inhabitants of the islands shall be determined by the Congress, *subject to the stipulations contained in the present convention.*" No clause like the one that I have italicized appears in the Spanish treaty. It may refer both to the stipulation that these former Danish nationals shall have the status of

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<sup>102</sup> Though Guam was acquired from Spain by the Treaty of Paris, April 11, 1899, and is sometimes thought of as related to the Philippines, it was acquired under article II, whereas independence is now being offered to those islands only which were ceded by article III and the supplemental treaty concluded November 7, 1900.

citizens of the United States and to other stipulations concerning property rights and "private, municipal and religious rights and liberties."

Notwithstanding these differences a circuit court of appeals has said that the Virgin Islands became a part of the United States as "unincorporated territory" and that Congress had not yet done anything to incorporate them.<sup>103</sup> The complete understanding of the Supreme Court's decisions with respect to unincorporated territory shown in Circuit Judge Woolley's opinion is persuasive of the soundness of the specific application to the Virgin Islands.

This conclusion that the Virgin Islands have the status of "unincorporated territory," notwithstanding that most of their inhabitants were made citizens by the treaty of annexation, confirms the theory expressed above that the doctrine of unincorporation is independent of the citizenship of the inhabitants.

I have not undertaken to study the Danish law in order to determine who of the residents of the Virgin Islands were Danish nationals at the cession. It is immaterial to the question who are our non-citizen nationals, because those who were Danish nationals either became aliens to the United States by rejecting American nationality or they became citizens of the United States. It is obvious that the United States did not acquire any non-citizen nationals by the annexation of the Virgin Islands.

Congress in an excess of legislative zeal has purported to confer American citizenship by statute upon the Danish citizens who became American citizens by the treaty.<sup>104</sup> Congress has gone further. It has conferred citizenship upon certain classes of persons born in the Virgin Islands before the cession, provided that on February 25, 1927, the date of the statute, they had no foreign nationality, or, in the language of the Act, "are not citizens or subjects of any foreign country." These classes consist of persons who, born in the Islands, resided there at the cession and resided either in the Islands or "in the United States or Porto Rico" on February 25, 1927; or resided "in the United States" at the cession and resided in the Islands on February 25, 1927. This is not all. Five years later than the above-mentioned Act, Congress conferred citizenship upon all persons born in the Islands before June 28, 1932, and residing at that date in any part of the American empire in its most extensive sense, provided they then were not nationals of any foreign state.<sup>105</sup> The Senate Committee on Immigration, in its

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<sup>103</sup> *Soto v. United States* (C. C. A. 3d, 1921) 273 Fed. 628, 633.

<sup>104</sup> Act of February 25, 1927, c. 192, §1 (a), 44 STAT. 1234, 8 U. S. C. A. (Supp. 1933) §5c.

<sup>105</sup> Act of June 28, 1932, c. 283, §5, 47 STAT. 336, 8 U. S. C. A. (Supp. 1933) §5b (d).

report accompanying the bill, assumed that there were a few stateless aliens ("in the status of 'persons without a country' ")<sup>106</sup> among these persons born in the Virgin Islands and residing in American territory and thought it desirable to confer American citizenship upon them. Obviously, as the Committee reported, very few persons were affected by the Act.<sup>107</sup>

More meaningful legislation is section 3 of the Act of 1927:

"All persons born in the Virgin Islands of the United States on or after January 17, 1917 (whether before or after February 25, 1927), and subject to the jurisdiction of the United States, are hereby declared to be citizens of the United States."<sup>108</sup>

This is a paraphrase of the Fourteenth Amendment. It is a flat application of the *jus soli* rule to birth in the Virgin Islands since the cession. This provision and the treaty which conferred citizenship upon all Danish nationals residing in the Islands at the cession (except those who rejected it) covered the whole ground, especially if "residence" is construed to mean "domicile."

Of course, the question arises whether the citizenship provision of the Fourteenth Amendment was operative in the Virgin Islands from the date of the cession, so that section 3 of this Act, just quoted, was unnecessary. In view of the judgment of Congress that the rule embodied therein may operate there without harm to the people of the continental United States, it seems that a court would not readily have found any reason based upon expediency or statesmanship for holding the citizenship provision of the Amendment inapplicable there. Of course, so long as the *jus soli* rule applies there by statute, it will remain an academic question whether it exists there apart from statute.

What of the natives of American Samoa? There is some doubt in respect to when, and how, those islands became definitely a part of the United States. John Bassett Moore, an eminent authority, states that they passed "under the exclusive jurisdiction of the United States" by virtue of the treaty concluded on December 2, 1899, between the United States, Germany, and Great Britain, although by that treaty the latter two powers merely renounced in favor of the United States all their rights (?) over those islands.<sup>109</sup> In 1902 Attorney General

<sup>106</sup> SEN. REP. NO. 641, 72d Cong. 1st Sess. (1931-1933) 3.

<sup>107</sup> The bill was inspired by Paul M. Pearson, Governor of the Virgin Islands. *Ibid.* at 4-5.

<sup>108</sup> The committee report accompanying this bill said of this section merely this: "Section 3 provides for persons hereafter born in the Virgin Islands of the United States. The rule of citizenship already provided in the fourteenth amendment to the Constitution of the United States." SEN. REP. NO. 650, 69th Cong. 1st Sess. (1926) 2.

<sup>109</sup> 1 MOORE'S DIG. (1906) 553.

Knox seems to have had some doubt<sup>110</sup> but came to the conclusion that the Island of Tutuila had ceased to be foreign territory. One thing is certain, that from soon after that treaty the United States has governed the islands through resident naval officers acting under the direction of the Secretary of the Navy. Congress in a joint resolution, February 20, 1929, after reciting that "certain chiefs" of the eastern Samoan Islands (now called American Samoa) had agreed on April 10, 1900, and July 16, 1904, to cede "all rights of sovereignty" over the islands,<sup>111</sup> resolved "that said cessions are accepted, ratified and confirmed, as of April 10, 1900, and July 16, 1904, respectively." The resolution placed the islands under the government of the President of the United States, until Congress shall provide otherwise.

There is nothing in the treaty of 1899 nor in the joint resolution of Congress touching the political status of the inhabitants of these American islands. It is a safe guess that American Samoa is "unincorporated territory," and another that the subjects of these islands who acquired American nationality when they passed under the jurisdiction of the United States are non-citizen nationals. Both of these guesses correspond with those made by the American Samoan Commission, appointed in 1929 to study conditions there and report recommendations for congressional legislation.

They recommended that the islands "be not erected into an organized Territory at the present time but be given a provincial status as a body politic under the name of 'American Samoa' with its own bill of rights and not the United States Constitution as its guaranty of personal liberties. . . ."<sup>112</sup> Evidently they thought some parts of the Constitution inapplicable there and did not believe immediate "incorporation" wise. Nevertheless, and quite consistently, they proposed that the islanders be made citizens. This is proposed in section 3 of their bill for an Organic Act for American Samoa in these words: "That all persons of full or part Polynesian blood who were inhabitants of American Samoa on February 20, 1929, and their children born subsequent

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<sup>110</sup> He said: "By the treaty referred to, the exclusive sovereignty of the United States over it [Tutuila] appears to be asserted by us and recognized by Great Britain and Germany, which nations formerly shared with us a protectorate." (1902) 23 *OP. ATT'Y GEN.* 630.

<sup>111</sup> "In 1900 an American warship arrived at Pago Pago and anchored in its harbor. At this time the chiefs of the island of Tutuila voluntarily ceded their diminutive domain to the United States. In 1904 the chiefs of the three tiny islands, the Manua group which lay 65 miles farther east, followed suit." MOORE AND FARRINGTON, *AMERICAN SAMOAN COMMISSION'S VISIT TO SAMOA* (1931) 1.

"The sovereignty of the United States over American Samoa is hereby extended over Swains Island, which is made a part of American Samoa . . ." Joint Resolution of March 4, 1925, c. 563, 43 *STAT.* 1357, 48 U. S. C. (1926) §1431.

<sup>112</sup> *SEN. DOC. NO. 249, 71st Cong. 3d Sess.* (1931) 7.

thereto, are hereby declared to be citizens of the United States of America."<sup>113</sup> In the report accompanying the bill, it is said, "the Samoans are capable of accepting and should receive full American citizenship."<sup>114</sup> The bill passed the Senate in the Seventy-first Congress, but died in the House.

If the citizenship provision of the Fourteenth Amendment is operative in unincorporated territory, the provision given above for subsequently born children is unnecessary in respect to those born in the islands, and unnecessary for those born outside the limits of the United States, for, on the assumption that the fathers are made citizens, the Act of 1855 makes such children citizens. If the Fourteenth Amendment has been applicable since American Samoa became a part of the United States, the only legislation necessary for the purpose in hand is to confer citizenship on those Samoans who were living at the date of annexation. If Congress is in doubt about the operation of the Fourteenth Amendment in American Samoa, it should, in addition to declaring those persons living at the date of annexation to be citizens, also declare, as it did with respect to the Virgin Islands, that all persons born there since the cession and hereafter shall be citizens. What possible good can be accomplished by limiting citizenship of the United States to the Polynesians there born? Why not extend it to children born there to fathers who are aliens and even to the children born there of all fathers who are citizens of the United States?

'There is no objection to limiting "citizenship of American Samoa" to persons of full or part Polynesian blood, as this is a purely local status, the object of the restriction being to exclude the white man and others, even those who may be citizens of the United States, from participation in the government. The bill mentioned above and another which has passed the Senate in the Seventy-third Congress and which is now pending in the House both so limit Samoan citizenship.

The new bill proposes to declare: "Section 4 (*a*). All persons of full or any part Samoan blood born in American Samoa after the effective date of this Act . . . to be citizens of the United States."

This assumes that the citizenship provision of the Fourteenth Amendment is not operative in American Samoa, and purports to adopt for that territory a similar statutory rule limited to persons of a particular blood. The new bill also declares "all persons of full or any part Samoan blood who are inhabitants of American Samoa on the effective date of this Act, and their children born subsequent thereto . . . to be citizens of the United States" with the privileges of electing to retain any foreign nationality now possessed, if any. Why substitute

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<sup>113</sup> *Ibid.* at 17.

<sup>114</sup> *Ibid.* at 6.

"Samoan blood" for "Polynesian blood," shifting to the vague from the relatively definite? Why choose the date on which the statute, if enacted, takes effect instead of the date of formal annexation as the time factor in determining what persons are affected by the legislation?

Finally, there is the Panama Canal Zone. The treaty between the Republic of Panama and the United States by which the latter obtained its present rights in the Canal Zone, notwithstanding its ambiguous avoidance of specific language of cession, is assumed by the Supreme Court of the United States to have ceded that area to the United States.<sup>115</sup> The treaty was silent in respect to the effect of the cession upon the nationality of the citizens of the Republic of Panama residing in the ceded area. No provision for election being provided, it seems that all such persons lost their former nationality and became nationals of the United States,<sup>116</sup> doubtless non-citizen nationals. This status they and their descendants retain because no legislation by Congress has prescribed otherwise. The Canal Zone doubtless has the status of "unincorporated territory" and whether birth there to alien parents since the cession confers citizenship is subject to the doubt whether the citizenship provision of the Fourteenth Amendment is operative in such territory.

#### CONCLUSION

For the curious reader who has persisted through this long discussion of an intricate, uncoördinated, and uncertain part of American law I shall summarize what in my opinion is the answer to the question, Who are our non-citizen nationals?

(1) More than 13,000,000 of those persons who bear the statutory designation, "citizen of the Philippine Islands;" but not all of them, because some persons in that category seem to be aliens, and some are undoubtedly citizens of the United States. Independence will leave us a number of Filipino non-citizen nationals, in the absence of further legislation—those then permanently residing in the remainder of the United States, now numbering more than 100,000, including those who reside in Hawaii and the continental United States.

(2) A possible handful of Puerto Ricans.<sup>117</sup>

(3) Doubtfully, the Eskimos in Alaska in 1867 and their descendants wherever born.

(4) Those inhabitants of Guam who acquired American nationality in 1899 and their descendants wherever born.

(5) The Samoan Islanders who acquired our nationality upon annexation and their descendants wherever born.

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<sup>115</sup> *Wilson v. Shaw* (1907) 204 U. S. 24, 32.

<sup>116</sup> (1907) 26 OP. ATT'Y GEN. 376.

<sup>117</sup> *Supra* pp. 605, 624.

(6) Those former citizens of the Republic of Panama who became American nationals upon the cession of the Canal Zone, and their descendants wherever born.

(7) If the Supreme Court holds that the citizenship provision of the Fourteenth Amendment is not operative in Guam, Puerto Rico, American Samoa, or the Canal Zone, the children born there under American sovereignty to alien parents will be aliens unless Congress legislates to make them either citizen nationals or non-citizen nationals. Congress has twice given an election to become citizens to aliens born prior to March 2, 1917, in Puerto Rico, but has made no rule for the future. However, Congress by statute has applied the rule of the Fourteenth Amendment to the Virgin Islands so that all persons born there at any time subsequent to the cession have or will become citizens at birth. Of course the Fourteenth Amendment is operative in Hawaii and Alaska so as to make every person born there a citizen, except, as elsewhere in the United States, children whose fathers are non-citizen nationals.

When one considers the slight distinction between the status of citizen and that of non-citizen national *so long as the person in question resides outside of the States*, a subject for another essay, there is little reason for perpetuating the status of non-citizen national.

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## APPENDIX

### SPANISH NATIONALITY LAW IN FORCE PRIOR TO THE CESSION

The Spanish Constitutions of 1812, 1837, 1845, 1856, and 1876, the last-named being in force at the time of the cession, each declared the following groups to be Spaniards, that is, Spanish nationals:

1. All persons born in Spanish dominions.
2. The children of a Spanish father or Spanish mother, even though born outside of Spain [Spanish territory?].
3. Foreigners who have obtained letters of naturalization.
4. Those who without such letters have acquired *vecindad* in any Spanish town.

If these were the only pronouncements of Spanish law the status of the majority of the residents of the ceded islands would be easy of determination, except only for the obscurities of *vecindad* in rule 4. But there were both a royal decree and legislation that seemed to modify rules 1 and 2 if such methods of law making were operative though in conflict with the constitution in force.



There was the Royal Decree<sup>1</sup> of November 17, 1852, concerning "Aliens and their Classification in Spain," but it seems that this was not extended to the Philippines and Puerto Rico.<sup>2</sup> The Law of July 4, 1870,<sup>3</sup> on the same subject, however, was by its terms extended to the "Spanish provinces beyond the seas." It became effective in the Philippines September 18, 1870.<sup>4</sup> Both these instruments purported to modify rule 1, by declaring children born in Spanish territory of alien parents or of an alien father and a Spanish mother to be aliens unless they "claim" Spanish nationality.<sup>5</sup> The mode of making claim was not specified. Secondly, rule 2 was modified by an enactment stating that a child born outside of Spanish territory of a Spanish mother is not a national if the father is alien.

The Civil Code of 1889,<sup>6</sup> in derogation of the Constitution of 1876, then in force, again qualified rule 1, to the same effect as the Decree of 1852 and the Law of July 4, 1870, adding only a clarification of the mode of claiming Spanish nationality for the child born in Spanish territory of alien parents: first, the parents must record an election of Spanish nationality for the child during its minority, and secondly, upon coming of age the child must record an election for himself. By Royal Decree of July 31, 1889, the Civil Code of 1889 was extended to Cuba, Puerto Rico, and the Philippines to become effective in each, twenty days after publication in the local official gazettes.<sup>7</sup>

It is difficult for an American lawyer to regard as valid legislation in derogation of the reigning constitution, but it is said that Spanish writers support the provisions of the Civil Code of 1889 as against the constitution.<sup>8</sup> If so, the Law of July 4, 1870, would seem superior to the Constitution of 1856. I should add that the Civil Code of 1889 re-announced rule 2 in its original constitutional form, repealing, it seems, the variation made in that rule by the Law of July 4, 1870.

The constitutions mentioned two modes of naturalization, modes by which aliens might acquire Spanish nationality, (1) letters of naturalization and (2) by acquisition of *vecindad*. By the Constitution of 1812 letters of naturalization were obtainable from the Cortez. Subsequent constitutions were silent as to what organ of government might issue

<sup>1</sup> FLOURNOY AND HUDSON, NATIONALITY LAWS (1929) 530.

<sup>2</sup> Sy Joc Lieng v. Sy Quia (1910) 16 Phil. Rep. 137, 182.

<sup>3</sup> FLOURNOY AND HUDSON, *op. cit. supra* note 1, at 531.

<sup>4</sup> Sy Joc Lieng v. Sy Quia, *supra* note 2.

<sup>5</sup> For an example of such a claim, see Gely de Amadeo v. Riefkohl (1910) 5 P. R. Fed. 420.

<sup>6</sup> Its articles on Spanish nationality are translated in FLOURNOY AND HUDSON, *op. cit. supra* note 1, at 537.

<sup>7</sup> This decree is printed in 1 MANRESA, CODIGO CIVIL ESPANOL (2d ed. 1903) 22.

<sup>8</sup> ZEBALLOS, I, 317.

them. It seems that under them until 1860 there was no established mode of obtaining letters; by a law of that year they might be issued by royal decree. The Law of the Civil Register of June 17, 1870, added that letters granted by royal decree were not operative until recorded in the civil register of the town in which the applicant was domiciled and were recordable only upon the applicant's renouncing his former allegiance and swearing to support the constitution.<sup>9</sup> The institution of civil register was not extended to Puerto Rico until the Royal Decree of August 16, 1884,<sup>10</sup> and if ever extended to the Philippines it was not until after 1889.<sup>11</sup> It is a safe assumption that few if any aliens residing in the ceded territory at the time of the cession had become Spanish nationals by receiving letters of naturalization.

Acquisition of *vecindad* may have been a more prolific mode of naturalization of aliens. Not until after the cession, by Royal Decree of November 6, 1916, was the institution of *vecindad* as a mode of acquiring Spanish nationality cleared of the confusion and ambiguities that had existed because of the vague and various provisions of the earlier laws.<sup>12</sup> With this later clarification we are not concerned.

*Vecindad* under the earlier laws was an institution wholly without a parallel in American law. A law of March 8, 1716,<sup>13</sup> enumerated numerous modes of acquiring this status. Each was stated as sufficient in itself. They included conversion to the Catholic faith, establishment of domicile by one who lived on his own resources, marriage with a native-born person, settling and acquiring real estate, settling to practice a profession or a mechanical employment or to run a retail store, and living ten years as a householder. The law seems to indicate that *vecindad* resulted as a matter of law from the existence of any one of these fact situations, without any necessity for governmental consent or approval. An order of August 14, 1841,<sup>14</sup> addressed to the Governor Captain General of the Philippines introduced a requirement of official consent. By it aliens desirous of settling in the Philippines were required to apply to the governor or to the Spanish home government for consent, to be granted if deemed advisable and advantageous to the country. Aliens already settled and those settling thereafter with consent might obtain *vecindad* in the towns of their residence "in accordance with law," presumably the Law of March 8, 1716, but only upon ap-

<sup>9</sup> MANRESA, *op. cit. supra* note 7, at 146.

<sup>10</sup> 2 *ibid.* at 798.

<sup>11</sup> Sy Joc Lieng v. Sy Quia, *supra* note 2, at 185.

<sup>12</sup> The reform is fully explained by Trias de Bes, *La Naturalización española por título de vecindad según las últimas y recientes disposiciones*, REV. GEN. DE LEGIS. Y JUR. (1917) 289.

<sup>13</sup> Translated in FLOURNOY AND HUDSON, *op. cit. supra* note 1, at 528.

<sup>14</sup> *Ibid.* at 529.

plication to the governor, "who may grant it or deny it as may best answer the national interests." Moreover, this order stated: "These grants of *vecindad* which must be preceded by a hearing from the municipal governments concerned, shall be provisional until confirmed by the supreme government." This last expression probably did not refer to the Spanish home government. Even if the governor's consent alone was sufficient, the process of becoming a Spanish national by acquiring *vecindad* had become more like modern processes of naturalization. The Law of July 4, 1870, which extended to the provinces beyond the seas, declared that aliens who obtain *vecindad* in any town of the Spanish provinces beyond the seas in accordance with the law should be regarded as Spaniards. Article 25 of the Civil Code of 1889 further modified this mode of acquiring Spanish nationality. By its provisions the acquisition of *vecindad* no longer operated without further act to confer Spanish nationality. It required that a person who had acquired *vecindad*, in order to become a Spanish national must renounce his former allegiance, take oath to the constitution, and have himself inscribed in the civil register as a Spanish national. We have seen, however, that the institution of the civil register came in Puerto Rico only fifteen years before the cession, and not before 1889, if ever, in the Philippines.

There seems to be only one reported case in which Spanish nationality at the time of cession has been recognized as resulting from the acquisition of *vecindad*. A native of China immigrated to the Philippines in 1839 or 1840. He adopted the Catholic religion, married a woman who was a Spanish national, acquired a domicile first in Vigan, later in Manila, engaged in business, and acquired real estate. The court said that "by virtue of all these acts" he became a "nationalized citizen in accordance with the laws in force in these Islands."<sup>15</sup> That there is only one reported judicial decision does not establish rarity of instances to which the rule was applicable.

One further rule of Spanish law should be mentioned, namely, a Spanish woman married to an alien is an alien. This rule was extended to the provinces by the Law of July 4, 1870. The Civil Code of 1889 added that upon termination of the marital status the woman might regain Spanish nationality by declaration before the Civil Registrar of her domicile.

So much for the rules for determining what inhabitants of the ceded islands had Spanish nationality, and the alienage of the relatively few who were not Spanish nationals. Be it recalled that all who were not aliens to Spain became American nationals except those Peninsulars who elected to reject the new status.

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<sup>15</sup> Sy Joc Lieng v. Sy Quia, *supra* note 2, at 180.