OUR NEW PEOPLES : CITIZENS, SUBJECTS, NATIONALS OR ALIENS

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Among the many unsolved problems incident to our recent annexations none is more complex, nor presents more difficulties, both practical and theoretical, than that of the status of the Islanders, both Porto Ricans and Filipinos. This is mainly owing to the fact that for the first time in our history we have acquired real dependencies. By that term I understand territories inhabited by a settled population differing from us in race and civilization to such an extent that assimilation seems impossible, and varying among themselves in race, development and culture to so great a degree as to make the application of any uniform political system difficult if not impracticable.

It is idle to attempt to find any adequate or guiding precedents in our former territorial acquisitions. The territories transferred from France and Mexico were not sufficiently populated to bring us face to face with the real imperial problem, *i.e.*, the domination over men of one order or kind of civilization by men of a different and higher civilization.

The Nomad tribes of America presented indeed a problem, but only a passing one. North America could not forever, in order that a few hundred thousand red-skinned hunters might indulge their taste for the chase and gain subsistence thereby as they had done in the past. Necessity and the ruthless progress of civilization compelled the opening up and exploiting of the American continent by the overflowing population of Old Europe. The Indian problem was met by taking the land, whether as the result of a bargain or through force as the white man needed it, and the relations of the newcomer with his Nimrod predecessor were gradually reduced to a minor question through the agencies of fire water, gunpowder and well-intended by unwise policy. The logic of events is often more powerful than that of Aristotle.

The populations taken over from France and Mexico were insignificant in number. They were, moreover, largely of Caucasian race and civilization, and a growing stream of immigration soon made the new lands thoroughly American, and thus the question there quickly became academic. Moreover, the two civilizations were in fact equal or nearly so, and the treaties, both of Paris (1800) and of Guadalupe Hidalgo (1848), recognized that fact by according to the new inhabitants the rights of American citizens. Thus the problem as to the legal status of the inhabitants of Louisiana and the territory acquired from Mexico was solved or

solved itself *ab initio*. The underlying theory upon which both treaties were based was expansion rather than imperialism.

But the problem of to-day cannot be solved either by extermination, as in the case of the Indian, nor by assimilation, as in the case of the few Frenchmen and Spaniards. Neither the methods of Miles Standish nor those of Jefferson will suffice us now. We must move on a heretofore untrodden path and seek for precedent upon which to base intelligent legislation and administration, not in our own history, but in that of other nations who have preceded us in attempting to govern non-assimilable peoples.

In such a discussion as this we must begin by defining the necessary terms, otherwise we will end as do most academic discussions in having with much clamor demolished a man of straw. The object is to ascertain exactly what, under existing law, is the constitutional and legal status of the Porto Rican or the Filipino. To call him a citizen when we are in hopeless disagreement as to the meaning of that term will only result in creating added confusion and in arousing excitement in many excellent but possibly not very analytical minds. The necessity for such definition is rendered acute by the decision of the Circuit Court of the United States a few weeks ago in a case which I propose later to examine, holding that the native Porto Rican was still an alien, although concededly not a Spanish alien, from which it is inferable that so far as the law stands to-day we have a new and seemingly paradoxical legal category of "American Aliens." The man without a country is thus transferred from the realm of poetry into that of law and politics. It is, then, true that there exists under American law millions of people who are strangers and foreigners both in our own and in every other land on the globe?

Citizenship, broadly speaking, means simply membership in some political community. In the ancient world it was dependent upon descent (citizenship *jure sanguinis*). The descendant of a citizen was always a citizen wherever born, and the descendant of a foreigner always a foreigner unless actually naturalized by positive legislation. At Rome the rule was "once a peregrine always a peregrine." The *Jus Sanguinis* thus inherited from the Roman law became the law in Europe, but for obvious historic reasons never took root in England. In that country the rule of *Jus Soli,* or citizenship because of birth within the King's allegiance and dominion, was the law from the time of the Norman conquest. As Prof. Pollock says:

"A foreigner at the head of an army recruited from many lands conquered England, became King of the English and endowed his followers with English lands. For a long time after this there could be little law against aliens, there could hardly be such a thing as English nationality."

Thus it came about that by the English law:

"As regards the definition of the two great classes of men which have to be distinguished from each other, the main rule is very simple. The place of birth is all important. A child born within any territory that is subject to the King of England is a natural-born subject of the King of England."

Coupled with this rule which has continued in England to be the law down to the present was the doctrine of indelible allegiance and consequent denial of the right of expatriation. Hence the rule "once a subject always a subject"___but this doctrine was modified at common law and by statute so that the right to change one's allegiance was recognized by allowing British subjects to expatriate themselves and aliens to become subjects by letters patent from the Crown or by Act of Parliament, *i. e.,* by denization or naturalization.

Thus the sole requisite necessary to constitute a British subject is allegiance or subjection. This subjection, whether due to birth within the King's dominion or to a transfer of allegiance from a foreign sovereignty to English sovereignty, is the one essential requisite for determining the political status of the individual. Either he owes allegiance to the sovereign or he does not. In the one case he is a subject, in the other he is an alien. It is quite evident that these two categories include all men and leave no middle class.

Whatever number of classifications may exist as to subjects and what rights, civil or political, belong to each class or how diverse may be the privileges accorded by English law leaves no room for quibble as to who are aliens and who are subjects.

In the United States the law has not been so clear.

First, because by reason of the federal form of government there was a double citizenship, *i. e.*, that of the State and that of the United States, and

Second, because of the disuse in this country of the word "subject" and the general adoption of the term "citizen."

Since the time of the separation of the colonies from Great Britain all through what has been accurately termed "the Confederation Period" of our history, there was doubt as to whether United States citizenship was merely derived from and dependent upon State citizenship or whether it might exist independently of membership in one of the States. It is needless to examine that question here, the civil war solved it and the Fourteenth Amendment crystalized the solution into constitutional dogma.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State in which they reside."

This definition is substantially that of the common law. The phrase "subject to the jurisdiction" is the equivalent of the common law phrase "born under the actual obedience." The Amendment thus made citizenship and subjection identical, and hence the doctrine enunciated in the Dred Scott case that in the United States there were persons who, although subjects, were yet not citizens, was done away with.

Chief Justice Taney in that *cause célèbre* had held that the free Negroes were not citizens, although they were, of course, not aliens. They were in the theory of the opinion subjects but not citizens. Thus, for the first time in our history we had a judicial declaration that there might be subjects who were not citizens. The Fourteenth Amendment settled and was intended to settle the question as to the Negro. How does it affect the Porto Rican and the Filipino?

Before determining this we must remember that the word "citizenship" is used in two senses:

1. It denotes the holders of political rights, *i. e.*, those upon whom the law has conferred the suffrage. Possession of this right usually depends upon various qualifications of sex, education, length of residence, etc. Such citizens are a subdivision or portion of the inhabitants "within the actual obedience of the United States" or subject to the jurisdiction thereof. They may be properly denominated Burghers or Burgesses. They are active citizens.
2. And it is also used as signifying all others born or naturalized in the United States. This includes women, minors, incompetents, etc. Regardless of any political status they are citizens of the United States and entitled to all the "rights, privileges and immunities" guaranteed to such citizens. They are citizens because of their owing allegiance to the United States and hence as to them citizenship and subjection are identical. This class may be termed passive citizens.

If we used the term "subject," all citizens active and passive would be included in that term. That term has now fallen into general disfavor outside of Great Britain because of its usual reference to a monarchical form of government.

A very convenient term not open to any objection on this score is the term "National." National would include all persons owing allegiance to the United States and exclude all persons owing allegiance to any other power. It is the co-

relative of alien, and the two together are universally inclusive. National is one who owes allegiance to any state, whatever its form of government. All citizens must be nationals, but all nationals may not be citizens. Dred Scott was not an alien; he was a national, but he was not, under the famous decision, a citizen. The Fourteenth Amendment settled the question for the African race and made citizens and subject synonymous terms, but the inquiry arises, how new conditions and new legislation given us another class of Dred Scotts, *i. e.*, nationals (or subjects) but not citizens?

Applying the forgoing reasoning to the case of the Porto Rican or Filipino, the first inquiry is not whether he is an alien or a citizen, because these terms may not be necessarily exclusive. But is he an alien or a national?

If he is an alien, the inquiry need go no further; the legal position of an alien is clear enough. If, on the other hand, he is a national, the problem is only partly solved. He is not under the disabilities of alienage, and the laws applying to aliens do not affect him. But do the positive rights of citizenship granted by the Constitution and United States laws apply to him? That, I think, is the only really difficult question. Have we to-day a class of nationals who are not citizens, who though not aliens and entitled to the protection of the United States, cannot, for instance, institute suit in a Federal Court?

The Treaty with Spain of April 11, 1898, provides that:

"Article II.

"Spain cedes to the United States the Island of Porto Rico and other Islands now under Spanish Sovereignty in the West Indies, and the Island of Guam in the Merianas or Ladrones."

"Article III.

"Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the Islands lying within the following line:* * * "

"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 in such territory or may remove therefrom, retaining in either of them all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on in their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners. 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 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.

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

The Treaty thus definitely accomplishes one legal result, it transfer the sovereignty of Spain over the islands and their peoples to the United States and with such sovereignty necessarily the allegiance of the people. The Porto Ricans have thus ceased to owe allegiance to Spain and now owe it to the United States. Whatever consequences follow from this fact cannot be avoided. But their allegiance or subjection having been transferred, they necessarily have become United States nationals or subjects. No other conditions are necessary to constitute American nationality. Even the free negro before the Fourteenth Amendment was a national, he was not an alien. The islanders cannot be aliens unless they owe allegiance to some other government, and even the most advanced anti-Imperialist will not contend that they still subject to Spain, however much he may deprecate the making of the Treaty of Paris.

The man without a country is not known to law. Having ceased to be Spanish subjects or nationals, they are no longer aliens and have necessarily become United States nationals.

This would seem to be as demonstrably obvious and certain as anything can be in the domain of law, public or private, were it not for a judicial decision emanating from a most learned and distinguished Court. A native inhabitant of Porto Rico was detained at the port of New York and ordered sent back to Porto Rico as an indigent alien under the statute giving this power to the Commissioner under certain circumstances in the case of alien immigrants.

The immigrant, Isabella Gonzalez, sued out a writ of *habeas corpus* and was brought before the United States Circuit Court in the Second District. It is not apparent why the Court did not sustain the writ upon the ground that the petitioner, even if an alien, was not an immigrant, the immigration laws not being intended to apply to persons traversing domestic territory of the United States. However, the opinion makes no mention of this point. The Court dismissed the writ and remanded the petitioner to be returned to Porto Rico, upon the ground that as a native Porto Rican she was an alien and amenable to the immigration law.

The reasoning by which the result is reached is contained in the four following propositions:

I. The inhabitants of Porto Rico were aliens prior to the ratification of the Treaty of Paris, April 11, 1899.

II. As such alien inhabitants they could only become citizens of the United States by birth or naturalization.

III. The petitioner having been born before the treaty, must show that she has been naturalized. She could invoke no law save the treaty of annexation. But conceding the possibility of collective naturalization by treaty, the Treaty of Paris expressly reserved the "civil rights and political status of the native inhabitants" to the future action of Congress.

IV. Congress not having legislated as to the naturalization of Porto Ricans, they have not become citizens; *therefore, their original status remains unaffected and they are aliens.* Or to use the learned Judge's exact language:

> "Being foreign born and not naturalized, she remained an alien and subject to the provisions of law regulating the admission of aliens who come to the United States."

Thus, according to this decision, there is no middle ground between citizens and aliens, and any one who is not an American citizen is necessarily an alien.

"An American alien" certainly would seem, at least to one unaccustomed to the startling paradoxes of the law, a strange and monstrous category. It is a logical result? I think not, and for the following reasons:

I. The treaty actually accomplished a cession of the territory and a transfer of allegiance. It made the territory domestic territory. The reservation as to political status and civil rights cannot change that cardinal fact.[1] The country ceased to be a foreign country, yet Judge Lacombe holds the native inhabitants to be foreigners.

II. Aliens are merely foreigners residing or sojourning in the United States. An alien is necessarily a foreigner and must owe allegiance to another country.

> "An alien is a foreigner, a person resident in one country but owing allegiance to another." Ency. Law, Alien.

When the Porto Rican ceased to owe allegiance to Spain, it is difficult to see how he could still remain a foreigner. He was an inhabitant of domestic territory. Certainly he occupied a different relation to the United States from that which he

had previously sustained. He became subject to its laws and its exclusive sovereignty. These facts must have some significance. He was in fact a United States national by virtue of the mere cession of the Island to a new sovereignty and the transfer of his allegiance.

The treaty could not take away his Spanish allegiance, transfer it to the United States and leave him unaffected. The status of alienage or non-alienage depends upon facts. The facts accomplished by the treaty were none the less facts because the power was reserved to Congress to pass upon the status of the Islanders. Congress cannot make red men white men, even by joint resolution, nor can they make Porto Ricans aliens by calling them such. In order to become aliens they would have to pass under another domination. They might be transferred to Spain or ceded to some other power or given independence, but until then they *are and must remain United States nationals.*

I would hardly have discussed the subject so fully, had it not been for the case referred to and the eminence of the Judge who decided it. It would seem that the result there reached was predicated upon the assumption that citizenship and alienage are exclusive categories, and not to fall within the one necessarily implies belonging to the other.

Judge Lacombe's reasoning is very similar to that of Judge Townsend in the Goetze case.[2] That case involved the question subsequently determined by the Supreme Court in the Insular Cases, as to whether goods from Porto Rico were taxable under the general tariff law as goods from "a foreign country."

The Judge reasoned that Porto Rico having been at the date of the Treaty a foreign country and the political status of its inhabitants left in abeyance, they remained foreigners and consequently their country was a foreign country. Truly has that famous clause been a crux to both Lawyers and Judges!

The Supreme Court, however, took the view that the plain facts must be reckoned with, and that *de jure* title and complete possession of the Islands made it domestic territory and it lost its foreign status.

The Gonzalez case, however, holds that though domestic territory, its inhabitants are nevertheless aliens. Thus Judge Lacombe adheres to Judge Townsend's premises, although the Supreme Court has dissented from that judge's conclusion.

Possibly the confidence resulting from a careful study of this question may incline the writer to minimize the strength of the position taken by the learned Judge on the question of alienage.

As we have seen, the fact of alienage necessarily involves the idea of a power to whom allegiance is due. But no man or woman can owe the debt of allegiance without an equivalent. Who feels the advantage should also bear the burden, says the old adage; but it is equally true that he who is called to bear the burden should derive some benefit or compensation therefrom. What "commodum" or advantage does the Senorita reap from her situation? To whom does she owe allegiance, outside of the United States? What nation in the wide world will raise, nay, will be permitted by us to raise a finger or even a voice in behalf of this woman if she is injured in her property and restrained in her liberty? What flag may she look to in her necessity, outside the flag of the United States? Against what Government or nation may she commit treason? And if she should commit such acts, in Porto Rico, against the sovereignty of the United States as constitutes that crime, would she go unwhipped of justice because she had not been naturalized a citizen of the United States?

If it should be claimed that a Treaty alone and without an act of Congress cannot raise her out of her condition as a derelict alien, it is plain that such a claim cannot be sustained. The Treaty became from the date of its ratification the supreme law of the land, and the language here is plain and unequivocal. Spain *cedes to the United States* the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies. This cession, accepted as it was, by the United States necessarily transferred the sovereignty to this Government. That sovereignty plainly is, as it must be, exclusive of any foreign power. Either Miss Gonzalez is an undefined waif, on the sea of political uncertainty, or she *belongs* to the United States, and may look to it for protection against injury, for redress where wrong has been done and for assistance where it may be needed against any Government of the earth, Spain included. The new master, viz., the United States, takes her allegiance with a burden, and having deprived her of all claim on the old master, has taken his place.

Other clauses of the Treaty make these considerations more plausible than they might be if unaided by the terms of that instrument. To some extent, at least, the contracting parties had in contemplation the possible rights of the Spanish citizens who were transferred to a new sovereignty. There is a saving clause allowing an option to *Spanish subjects, natives of the Peninsula*, residing in the territory over which Spain by the Treaty relinquished or ceded her sovereignty. Such residents

might *preserve* their allegiance to the Crown of Spain by making before a court of record a declaration of their intention to preserve such allegiance: otherwise they would be held to have renounced it and to have adopted "the *nationality* of the territory" in which they might reside. This clause may not directly assist Miss Gonzalez, for she is not a native of the Peninsula, and if she were, she has not availed herself of the privilege of filing the necessary declaration within the year. But may it not be fairly argued that she has become vested with the same "nationality" as the Spanish native of the Peninsula who has chosen to sever his connection with Spain by failure to file the necessary declaration? It can hardly have been in the contemplation of the parties to the treaty that she and those similarly situated should be without any "nationality" whatever, while other ex-Spaniards assumed by their non-action the nationality of the territory in which they happened to reside. It seems plain that the intention was to make nationality the rule upon which only one exception was engrafted, in behalf of the native of the Peninsula. If he was satisfied with the "nationality" of American Porto Rico, he need only abstain from acting at all and the general rule of nationality applied to him.

It is true that the same clause (IX) provides that the civil rights and political status of the native inhabitants of the territories ceded to the United States shall be determined by Congress. But this determination belonged to Congress in any event. It cannot be claimed that the natives of Porto Rico became "citizens" in the full sense of the word, by virtue of the Treaty, for the Treaty does not make, or profess to make, them such. It is enough for our purpose that it "nationalizes" them, which may be quite different in its effect from "naturalization."

If there is no difference between a national and an alien it is quite proper to exclude Miss Gonzalez from our country, because she had not gone through the forms of naturalization and renounced her allegiance to some foreign power which she would have found it difficult to name. If she had named Spain, which had rejected and repudiated her, an element of humor might be injected into the case, but would not relieve it of its difficulties.

Assuming then the Islanders to be nationals, as I think we must, still the question remains, Are they citizens?

In endeavoring to arrive at a rational solution of this question, it is necessary to remember that the inhabitants of the Island are of two classes: First, those born prior to the taking effect of the Treaty of Cession, that is to say, April 11, 1899, whom we may properly call the *ante nati*, and, second, those born subsequent to the

ratification of the Treaty, whom we may designate as the *post nati*. The possible distinction between these two classes is due to the wording of the Fourteenth Amendment, that "all persons born or Naturalized within the United States are citizens thereof." Assuming the words United States in the Amendment to comprise the possessions wrested from Spain and ceded by the Treaty the *post nati* would thus be full citizens of the United States.

In view, however, of the decision of the Supreme Court in Downes v. Bidwell,[3] that the words "throughout the United States," in the revenue clause of the Constitution did not comprise the new possessions, it is quite possible that a relevant and proper case being presented to that tribunal the decision (following the reasoning of Downes v. Bidwell) would be to the effect that the language of the Fourteenth Amendment contemplated only those portions of the United States covered by State governments or technically "incorporated" into the United States.

As a discussion of the possible distinction between *ante nati* and *post nati* would involve a discussion and analysis of the Downes case, we will not take it up here. The question will now be considered simply from the standpoint of the inhabitants in existence at the time of the annexation, and we will leave the question as to whether their descendants would, in virtue of the Fourteenth Amendment, have any greater rights than themselves, to the future determination of the Supreme Court of the United States. It is neither necessary nor meet that we should here and now undertake to anticipate all of the possible questions involved and attempt to decide them.

It must be admitted that the Treaty has done whatever it could by its language to prevent the inference that there was any collective naturalization of the people of the Islands. While a Treaty may indeed collectively naturalize a whole people,[4] nevertheless it is fair to assume that the Treaty must intend such naturalization to take place. In this case, "the political status and the civil rights" having been reserved for the future action of Congress, it is fair to argue that no naturalization has taken place; it has, however, already been shown that the Porto Ricans were nationalized, that is to say, their allegiance transferred, but as nationalization does not necessarily mean naturalization, and as naturalization has not been brought about, either by the Treaty or by subsequent act of Congress, it seems that they occupy an intermediate status between citizens of the United States and aliens. In other words, they are entitled to the protection of the government, and as far as foreign nations are concerned are Americans, yet they may not be vested with all the rights of citizens of the United States.

What these rights of citizens of the United States are, it is very difficult to determine. The trend of doctrine in the Supreme Court of the United States seems to be that most of the rights of citizenship are under the protection of the States themselves, that civil liberty was not nationalized by the Fourteenth Amendment, and that only such rights as are expressly secured by the Constitution of the United States belong to the citizen; that for the vindication of all others he must look to the State. Thus the citizen of the United States who is not also a State citizen, but an inhabitant of a Territory, holds his rights subject to the discretion of Congress, except in as far as that body may be limited by the mandates of the Constitution.

In the recent case of Maxwell v. Dow,[5] the Court quotes, with approval, the language of Mr. Justice Miller in the Slaughter House cases, referring to Section 2 of the Fourth Article of the Constitution, wherein it is provided that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. The Court says:

"We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental*; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union from the time of their becoming free, independent and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; … The enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."[6]

It is thus apparent that the rights of citizens of the United States are almost impossible of definition. The general right to life, liberty and property, provided for by the Constitution and more specifically by the ten Amendments in favor of civil liberty, apply to all men alike, whether citizens or aliens.

The only positive right, conferred by the Constitution upon a citizen as such seems to be the right to sue in a Federal Court. This was the right which it was held that Dred Scott did not possess because not a citizen. Thus, as far as the Government of the United States is concerned, the inhabitants of the Islands, assuming them to be nationals, but not citizens, could hardly be said to have any lesser civil rights in fact than full citizens if the United States. While they could not sue in Federal Courts, this would scarcely be an additional burden to those that remained at home, because this right only belongs to a citizen of the United States residing in a State. It is not possessed by the residents of the District of Columbia, nor of the territories of the United States.

As far as the action of the States themselves is concerned, the matter becomes somewhat more complicated. One of the most natural illustrations is as to the holding of real estate in the various States. In many of our States there exists as an obsolete remnant of the old and barbarous *Droit-d'aubaine*, the law by which an alien holder of real estate is subject to an action of forfeiture. This rule, according to the learned Mr. Pollock arose historically from the habit of the English Crown of confiscating the estates of Norman nobles, situated in England, who swore allegiance to the Crown of France after the separation of Normandy from England. This practice ripened with time into a general rule of law. Its illustrious origin has long been forgotten, and it now remains as a remnant of ancient, time-honored law. It is to be noted, however, that the right to hold real estate free from any interference on the part of the Government is not a right inherent in the citizen as such, but that the prohibition is simply a disability of alienage. Thus, if our theory be correct, a Porto Rican might well hold real estate in the City of New York, free from molestation by the Attorney General, because, although not a full citizen, he certainly is not an alien, and, therefore, not under the consequent disabilities.

It is thus apparent that there are very few, if any, civil rights which he would not have in common with citizens.

As to political rights, however, the situation is entirely different. Usually, though not always, the right to vote in the various States is conditioned upon citizenship of the United States, and, if our theory be correct, statutes to this effect would not apply to the Porto Rican national, and thus in the absence of State legislation, especially made to fit his case, he would be allowed to vote in the States. As some of the States, however, allow aliens to vote, after a declaration of intention to become citizens, this disability could and would easily, if the State desired it, be removed for the benefit of those of our new inhabitants who desired to settle in the States.

As a writer in this review recently put it (Mr. Randolph, in his excellent article on "The Insular Cases"), "There is nothing in the Constitution of the United States to prevent a State from inviting an immigrant to go from the wharf to the polls and vote for presidential electors."[7]

It is thus manifest that the distinction here made between aliens and nationals is very important for the Islanders themselves, and if it should be held sound by the Supreme Court of the United States, they will not be under the disability of alienage and will enjoy nearly, if not quite, all the ordinary civil rights pertaining to the citizen.

On the other hand, the distinction between the two classes of nationals, namely, full citizens of the United States, that is to say, those born or naturalized within the United States, and those not born or naturalized therein, but owing allegiance thereto, becomes also important. If they are not citizens of the United States, all the political privileges accorded by law to persons as such citizens would not apply to them, and thus in the absence of special legislation they would have no political rights in the various States until the States chose to change their legalization. In so far as the Islanders remaining at home are concerned, they would, of course, in the absence of any Treaty Clause, be subject to the complete control of Congress in the matter of political rights, the Constitution placing no limitation upon Congress acting in and for the Territories in that respect. In this respect they would be under no greater political disability than inhabitants of the District of Columbia.

It seems to us that this conclusion harmonizes with the general theory of the Treaty makers and the general policy of the government which is to confer the ordinary civil rights upon the new inhabitants, while withholding from them all political privileges.

It may be asked whether they have the right to trial by jury and to the other civil rights guaranteed by the Constitution. It is sufficient to say that these rights are in no wise dependent, either upon citizenship or alienage. They are accorded to all persons.[8]

It is quite possible, however, that the Supreme Court might decide that some of these limitations were only operative upon Congress when acting within the United States proper, and that, therefore they did not apply to the new inhabitants. It is thus seen that this question is entirely beside that of citizenship or alienage and has only to do with the applicability of certain portions of the Constitution when limiting the power of Congress legislating for the new territory.[9]

The theory propounded in this article will doubtless be dissented from by many because of its novelty. *Omne ignotum pro magnifico*. The bugbear of novelty often indisposes conservative minds, but certainly the above constitutes a far less novel theory than that of "American Aliens." While according to our new possessions certain rights, and conferring upon their inhabitants a country, it does not in any way interfere with the policies of the people of the United States by giving to the new people any political power, and hence any voice as to our government or institutions. They are alike cut off, in both cases, from any injurious interference in the destinies of the nation.

In our own history we have but one precedent as indicated above, and that one which Americans can scarcely regard with pride, namely the condition or status of the free negro before the Fourteenth Amendment, as determined by the Dred Scott case. Other nations, however, have for years past had the same problem before them as we have now, and have solved it in line with the theory herein set forth, which is submitted as the true interpretation of the language of the Treaty of Paris in the light of our existing constitutional jurisprudence.

One of the most interesting of recent territorial acquisitions by reason of the mixed character of the population is that of Algeria by France. The French Chambers not having legislated as to the status of the inhabitants of Algeria, the question came before the Court of Appeals of Paris in 1839 as to the status of the natives of Algeria. The question was thus very similar to that involved in the Gonzalez case, as in neither case had the executive or the legislative authorities conferred any rights of citizenship upon the annexed people, but had simply transferred their allegiance from their former sovereign to the new one. The Court there decided that although there was no legislation fixing their status, and it had not been established by any treaty, nevertheless the Ordinance of the 10th of August, 1834, had submitted the Algerians to French law and sovereignty, and from that time it was no longer possible to assimilate them to strangers. On the 14th of July, 1865, only, were the actually declared French by a *senatus consultum,* but although decided to be French they were held to be still governed by the Mussulman law, to which they had been subject at the time of their annexation. The French Government thus recognized a situation which we, until very recent years, refused to recognize in the case of the Indians, namely, that such tribes or peoples living under a different law and civilization, possessing a complete organization of their own, should be treated as nationals of the sovereignty of which they were really subject, but should be in their private relations governed by their tribal law. While we did not interfere with the tribal law of the Indians, we yet affected to assimilate them rather to a foreign people than to nationals, and made treaties with them in preference to legislating for them directly. Our legal theory was thus at variance with the actual facts.

To return to the Algerians. By administrative decrees of the 10th of September, 1886, and of the 17th of April, 1889, the Mussulman law ceased to be the common law for the inhabitants of Algeria, and thereafter the French law was to apply to them. Certain exceptions, however, were notedly retained in what concerns the status of persons, successions and real estate held in community.

The Algerian subject is accorded no political rights whatever and can possess none except by becoming a French citizen. This the Algerian may become by act of law either by legislation, as, for example, the *Décret Crémieux*, October, 1870, which conferred French citizenship on the Israelite inhabitants of Algeria or by naturalization, but this naturalization is somewhat different from the naturalization of an alien. The Algerian has only to make a simple declaration before the mayor, and after the inquiry by the mayor and the recommendation of the Council of state the naturalization is granted as matter of right.

As instancing the difficulties in the treatment of the Algerian population, and which we should endeavor to avoid in the treatment of our new population, especially that of the Philippines, may be cited the following example:

The Arab tribes in Algeria possessed lands in common, which belonged to the tribes as such, and in which the individual had no interest save by reason of membership in such tribe. Prior to the decrees of 1886 and 1889 certain thrifty, but not over-scrupulous, speculators purchased from a member of the tribe his interest in the tribal property. The purchaser, a French citizen, then invoked the principle of French law that no man shall be forced to remain a tenant in common and may always have the property divided among the co-owners by beginning a suit in the French courts. Process was issued and the stolid Arab members of the tribe were duly served by the Huissier with the various legal papers incident to such a litigation. It is easy to imagine that the effect of service of process was not understood by the Arab, and that in all probability the ornamental blue paper, on which process is usually inscribed, was used for the purpose of igniting his pipe. In any event after the given time judgment was taken by default, and the tribal property put up at auction, sold and the bulk of it applied to the payment of the legal expenses incident to the suit against the tribe. Of course this resulted in mere eviction from the communal land, and the abuse grew so great and the injustice so manifest as to lead to serious revolts, and a special act of the 28th of April, 1887, has provided some remedies for these evils, but has not succeeded in eradicating them. The object aimed at was to apply the Mussulman law to this communal property regardless of whether the litigation was between natives or natives and French citizens.

Many other illustrations from the practice and legislation of Great Britain and other foreign countries might be adduced to show that the status of the Islanders as nationals, but not as citizens, has in it nothing anomalous, and that it is far more logical, as well as more just and expedient, to consider them as such rather than to treat them as aliens.

The Attorney General of the United States in his argument in the Insular Cases suggested and ably maintained that the Islanders were American subjects. That term, however, is one which is foreign to our legal system and alien to our trend of political thought. The term "National" fits the case more accurately and bears with it no unpleasant inference of political inferiority or servitude to an individual. "American National" is a term of which no one need be ashamed.

Footnotes:

1. DeLima v. Bidwell, (1901) 182 U. S. 1.
2. (1900) 103 Fed. 72.
3. (1901) 182 U. S., 244.
4. Boyd v. Thayer (1892) 143 U. S., 135.
5. (1900) 176 U. S. 581.
6. pp. 588-9.
7. 1 Columbia Law Review 459.
8. Yick Wo v. Hopkins (1885), 118 U. S. 370.
9. (1901) Downes v. Bidwell, 182 U. S. 244.