CONGRESS GIVETH U.S. CITIZENSHIP UNTO PUERTO RICANS, CAN CONGRESS TAKE IT AWAY*

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If Puerto Rico becomes an independent nation, questions are bound to arise as to the effect that the new political status would have on U.S. citizenship conferred by Congress to those born on the Island. In all likelihood, the issue of citizenship would be a subject of negotiations between the United States and Puerto Rico. A question likely to arise is if Congress can automatically divest Puerto Ricans domiciled on the Island of U.S. citizenship upon United States relinquishing its sovereignty over the Island or if an individual renunciation would be necessary instead.2

This question alone presents several other questions which, because of their complexity or political nature, will not be discussed here. At the moment it should suffice for us to raise the legal issues involved in this question and point in the direction where the solution may lie.

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*This article is dedicated to Professor John I. Passalacqua for renewing my interest in the problem and to Professor José J. Alvarez for allowing me to address the problem in his seminar.

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1 Section 5 of the Organic Act of 1917, An Act to Provide a Civil Government for Puerto Rico and for Other Purposes (Jones Act), 39 Stat. 951 (1917), granted U.S. citizenship to all residents of Puerto Rico who did not reject such status within six months. Sections 5a, 44 Stat. 1418 (1927), 5b, 48 Stat. 1245 (1934), and 5c, 52 Stat. 377 (1938), were inserted by subsequent acts of Congress to grant U.S. citizenship to persons who did not fit under previous categories.


Although nationality or citizenship is a subject of international law, it is accepted that "[e]ach state is free to decide who shall be its nationals, under what conditions nationality shall be conferred, and who —and in what manner—shall be deprived of such status" according to its own law. This principle is contained in Articles 1 and 2 of the 1980 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws:

Article 1. It is for each State to determine under its own laws who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised [sic] with regard to nationality.

Article 2. Any question as to whether a person possesses the nationality of a particular State shall be determined according to the law of that State.

The principle has also been affirmed by U.S. courts in the following terms:

Citizenship depends however entirely on municipal law and is not regulated by international law. Acquisition of citizenship of the United States is governed solely by the Constitution and by Acts of Congress.

The cession of sovereignty has rarely been addressed by U.S. courts. However, when the U.S. granted independence to the Philippines, the U.S. Court of Appeals for the Ninth Circuit addressed the question of continued U.S. nationality of Philippine citizens in Cabobe v. Acheson. The Court held that "upon proclamation of Philippine independence on July 4, 1946, Filipino nationals of the United States lost the status of nationality whether they were inhabitants of the Islands or domiciled in the United States." The Philippine Independence Act provided that:

(1) For the purposes of Chapter 6 of Title 8, this section and all the laws of the United States relating to immigration, exclusion or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens.

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8 General Accounting Office, p. 100.
9 It should be noted that "a distinction is drawn between a national and a citizen of the U.S.A. Nationality is a broader concept than citizenship being based on permanent allegiance, and a national of the U.S.A. includes both an (sic) United States citizen and a non-U.S. citizen who owes permanent allegiance to the United States." Master Meher, K., United States Citizenship, 5 Int'l. Lawyer 324, 326 (1971).
10 Even more important is the difference in legal status between U.S. nationality and citizenship. While nationality is a status based only on statutory law, citizenship is a status of constitutional dimension. General Accounting Office, supra. It has been held that citizenship protected by the Fourteenth Amendment cannot be taken away unless voluntarily renounced. Afroyim, 387 U.S. at 268.
11 Mangaong v. Boyd, 205 F. 2d 553, 554 (9th Cir. 1953).
12 8(a) (1), 48 Stat. 46 (1934).
The power of Congress to divest Filipinos of U.S. nationality was predicated upon U.S. relinquishment of its sovereignty over the Islands.\textsuperscript{11} The Court explained the rationale as follows:

It is well established that the United States has the power the acquire territory as a necessary and proper adjunct of sovereignty and of the power to declare and carry on war and to make treaties [citations omitted]. The Supreme Court has declared: "The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession, is an incident of national sovereignty." [citation omitted]. "By the law of nations, recognized by all civilized states, dominion of territory may be acquired... by cession or conquest." [citation omitted]. And, the "right to acquire territory involved the right to govern and dispose of it [i.e. relinquishing sovereignty over it]." \textit{De Lima v. Bidwell}, 1901, 182 U.S. 1, 196, 21 S. Ct. 745, 753, 45 L. Ed. 1041; United States Constitution, Article IV, Section 3, Clause 2.12.

It could be argued that the Philippine example is not useful to Puerto Rico since Puerto Ricans acquired U.S. citizenship by virtue of legislation and not as a result of its cession to the United States. In the words of the Court in \textit{Cabebe}, Puerto Ricans were "collectively naturalized by legislation."\textsuperscript{13} Following this argument, the loss of U.S. citizenship would not result from the mere relinquishment of sovereignty over Puerto Rico.

Nevertheless, it is hard to forget that in \textit{Americana v. Kaplus},\textsuperscript{14} the U.S. Court of Appeals for the Third Circuit held that the so-called "Commonwealth of Puerto Rico" is a "territory" of the United States under the meaning of Article IV, Section 3, Clause 2 (the Territorial Clause) of the United States Constitution and that Congress could therefore legislate in order to "make all needful Rules and Regulations" respecting to it.\textsuperscript{15} Could the U.S. Congress divest Puerto Ricans of their citizenship by virtue of this power?

It has been already established that the power of Congress to dispose of acquired territory under the Territorial Clause of the Constitution derived from those inherent attributes which are enjoyed by all independent nations by virtue of their sovereignty.\textsuperscript{16} However, the U.S. Supreme Court stated in \textit{Afroyim v. Rusk},\textsuperscript{17} that the power of Congress to take away citizenship "cannot, as Perez indicated (referring to Perez v. Brownell),\textsuperscript{18} be sustained as an implied attribute

\textsuperscript{11} \textit{Cabebe}, 183 F. 2d at 800. The Court further stated that "(t)he status of United States nationality for Filipinos was a direct result of the United States assumption of sovereignty over the Islands. When the United States relinquished its sovereignty, there remained no basis for such status," \textit{ibid.} at 801.

\textsuperscript{12} \textit{ibid.}, at 800.

\textsuperscript{13} \textit{Id.} The significance of this statement shall be a subject of discussion below. We shall determine, if the naturalization of those persons domiciled in Puerto Rico is the kind protected by the Fourteenth Amendment.

\textsuperscript{14} 368 F. 2d 431 (3rd Cir. 1966).

\textsuperscript{15} \textit{Id.} at 136.

\textsuperscript{16} \textit{See Downes v. Bidwell}, 182 U.S. 244, 301-303 (1901).

\textsuperscript{17} 357 U.S. 253 (1967).

\textsuperscript{18} 356 U.S. 44 (1967).
of sovereignty of all nations." 19 Moreover, the Court held that "the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color or race." 20

But, the broad language of Afroyim's holding was to be limited in Rogers v. Bellei, 21 where the Court distinguished between citizenship based upon the Fourteenth Amendment and that which is based only upon Congressional enactment. The Court explained that the pronouncements made in Afroyim were "bottomed upon Fourteenth Amendment citizenship and that Amendment's direct reference to 'persons born in the United States'" and stated:

We do not accept the notion that those utterances are now to be judicially extended to citizenship not based upon Fourteenth Amendment citizenship and to make that citizenship an absolute. That it is not an absolute is demonstrated by the fact that even Fourteenth Amendment citizenship by naturalization, when unlawfully procured, may be set aside. 22

We must therefore ascertain whether Puerto Rican U.S. citizens possess statutory or Fourteenth Amendment citizenship. That is, if citizenship conferred to Puerto Ricans derives solely from Congressional action or if it is instead based on the Fourteenth Amendment. 23

Certainly, Puerto Ricans acquired U.S. citizenship by operation of a statute. However, this does not end our inquiry. We should first determine the scope of the so-called "statutory citizenship".

The first sentence of the Fourteenth Amendment of the U.S. Constitution reads as follows:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

19 Afroyim, 357 U.S. at 257.
20 Id. at 268 (emphasis provided).
22 Id. at 835.
23 It is interesting to note that Serrano-Geyls addressed the problem from a different standpoint. Rather than trying to ascertain whether Puerto Rican U.S. citizens possess statutory or Fourteenth Amendment citizenship, Serrano-Geyls argued that the question to be posed is whether Congress granted citizenship by virtue its the power to "establish a uniform Rule of Naturalization" (U.S. Constitution, Article I, Section 8) or, through its power to "make all needful Rules and Regulations" respecting to its territories (U.S. Constitution, Article IV, Section 3, Clause 2). See Serrano-Geyls, op. cit., p. 445.

However, we could not find any evidence to support the proposition that Congress can confer citizenship by means other than its power to "establish a uniform Rule of Naturalization". Yet, there is evidence to suggest the contrary in United States v. Wong Kim Ark, 169 U.S. 649, 701 (1897), where it was stated that the Fourteenth Amendment contemplates only two sources of citizenship: birth and naturalization, and that the latter can only be acquired "by naturalization under the authority and in the forms of law."
If all citizenship not acquired by birth in the United States was considered statutory, then citizenship acquired by naturalization would not be protected by the Fourteenth Amendment, and this is clearly not so.\textsuperscript{24}

Although the Court in \textit{Bellei} makes a distinction between statutory and Fourteenth Amendment citizenship,\textsuperscript{25} the rationale for holding that Mr. Bellei did not possess Fourteenth Amendment citizenship should be interpreted as being that he acquired his citizenship abroad on the basis of the citizenship of one of his parents and not merely that his citizenship was statutory. We find support in the opinion where the Court states:

\begin{quote}
The central fact in our weighing of the plaintiff’s claim to continuing and therefore current U.S. citizenship, is that he was born abroad. He was not born in the United States. He was not naturalized in the United States. And he had not been subject to the jurisdiction of the United States. All this being so, it seems indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff Bellei. He simply is not a Fourteenth Amendment-first-sentence citizen.\textsuperscript{26}
\end{quote}

Therefrom, the emphasis that the Court placed on the principle of \textit{jus soli},\textsuperscript{27} and its relation to the Fourteenth Amendment definition of citizenship.\textsuperscript{28} Finding support in the seminal case of \textit{United States v. Wong Kim Ark}, the \textit{Bellei} Court concluded that Fourteenth Amendment citizenship is restricted to the combination of three factors, each and all significant: birth in the United States, naturalization in the United States, and subjection to the jurisdiction of the United States. The definition obviously did not apply to any acquisition of citizenship by being born abroad of an American parent. That type, and any other not covered by the Fourteenth Amendment, was necessarily left to proper congressional action.\textsuperscript{29}

The Court did not specify what other types of citizenship, if any, are not covered by the Fourteenth Amendment. However, it should be pointed out that the Court found in \textit{jus soli} the criterion to distinguish Mr. Bellei’s citizenship from the Fourteenth Amendment’s. According to the Court’s Fourteenth Amendment definition, statutory citizenship would be that which is \textit{not} acquired by birth in the United States or by naturalization in the United States with subjection to the jurisdiction of the United States. Thus, statutory citizenship would be that which is only based on the principle of \textit{jus sanguinis}.

\textsuperscript{24} See \textit{Rogers}, 401 U.S. at 829-830, 835.
\textsuperscript{25} 401 U.S. at 835.
\textsuperscript{26} Id. at 827.
\textsuperscript{27} \textit{jus soli}, meaning “law of the soil”, is a principle of international law governing the acquisition of citizenship according to which “mere birth on the soil of a state is sufficient to create the bond of nationality irrespective of the allegiance of the parents.” Von Glahn, \textit{op. cit.}, p. 199. In \textit{Rogers v. Bellei}, d as “the place of birth governs citizenship status.”
Therefore, the real point of inquiry is not if citizenship was conferred to Puerto Ricans by statute but if Puerto Rico is included within the meaning of the term "United States" as construed in the Fourteenth Amendment. Should it simply mean the States of the Union or the corporate name of the nation, there should not be reason for further inquiry. But it can be seriously argued that in the Fourteenth Amendment the term "United States" was used in a geographical sense, meaning to designate the extent of the territory where the United States exercises sovereignty as a nation. In De Lima v. Bidwell,30 the plaintiffs made an excellent argument in support of that proposition.31 Although it is worth quoting at length we can only reproduce certain portions here.

It [the term "United States"] means not only the States united and the body corporate or governmental power which represents them, but it means — and this is its ordinary meaning in the language of the day — that whole portion of the earth’s surface over which the flag of the United States flies in sovereign dominion.32

[The term "United States"] “is not only those political communities called the States, but also those which constitute the political bodies called the Territories and the District of Columbia.” Geofroy v. Rigs, supra.

The question of the meaning of this term rises very clearly under the Fourteenth Amendment in the phrase, “All persons born or naturalized in the United States.” This phrase has been interpreted by the Supreme Court in the famous case of Wong Kim Ark v. United States, 169 U.S. 649 as follows: “The provisions are useful in their application to all persons within the territorial jurisdiction...”33

As was said in the Slaughter House Cases, 16 Wall. 36, 74: “Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within a State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.”

Which is the “United States” as here distinguished from the several “States”?

It has been demonstrated—

That the term “United States” was meant by the framers of the Constitution to include States and Territories or the outlying dominion under the jurisdiction of the United States.34

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30 182 U.S. 1 (1901). De Lima v. Bidwell is the first of the so-called Insular Cases a term which also refers to Downes v. Bidwell, 182 U.S. 244 (1901); Dooley v. United States, 183 U.S. 151 (1901); Pepke v. United States, 183 U.S. 176 (1901); Hawaii v. Mankichi, 190 U.S. 197 (1903); González v. Williams, 192 U.S. 1 (1904); Dorr v. United States, 195 U.S. 138 (1904); Rasmussen v. United States, 197 U.S. 516 (1905); Kopel v. Bingham, 211 U.S. 468 (1909) and People v. Bauta, 258 U.S. 198 (1922).
31 See generally, 182 U.S. at 43-55.
32 Id. at 45.
33 Id. at 51.
34 Id. at 51-52.
This was, according to the plaintiffs, "the meaning intended by the Fourteenth Amendment" for the term "United States". Although in *De Lima*, the Court never addressed this argument, it was nevertheless held that Puerto Rico is not foreign but "domestic territory" of the United States. This follows from the fact that a territory acquired by treaty "is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an act of Congress."  

However, the plaintiff's argument in *De Lima*, was to be rejected in *Downes v. Bidwell*. Mr. Justice Brown in a separate opinion announcing the conclusion and judgement of the Court stated:

This case [*Geofroy v. Riggs*] may be considered as establishing the principle that in dealing with foreign sovereignities, the term "United States" has a broader meaning that when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal government wherever located... This is so, not because the territories comprised a part of the government established by the people of the states in their own constitution, but because the Federal government is the only authorized organ of the territories as well as the states in their foreign relations.

Moreover, Mr. Justice White in a plurality opinion joined by two other Justices decided in *Downes* that although Puerto Rico is not a foreign country "in an international sense" it is "foreign to the United States in a domestic sense" and not a part of the United States but "merely appurtenant thereto as a possession."  

However, the distinction between a territory being a part of the United States in a "domestic sense" or in an "international sense" is elusive at best as demonstrated by the arguments of the U.S. Government against the intervention of the United Nations so-called Decolonization Committee. In a letter addressed to His Excellency Salim A. Salim, Chairman of the Decolonization Committee, on February 28, 1972, Vice President George Bush, who at the time was Ambassador to the United Nations, objected to the inclusion of the question of Puerto Rico in the agenda of the Decolonization Committee as an intervention in the

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55 Id. at 198.
56 Id. at 196.
57 182 U.S. 244 (1901).
58 133 U.S. 258 (1889).
59 182 U.S. at 263. See also, id. at 250-251 and 277-278.
60 Id. at 341-342. It is interesting to note that Justice Brown who in *De Lima* was "unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic," 182 U.S. at 199, voted in *Downes* with a plurality of the Court to validate precisely that assumption. Both cases were decided the same day.
61 The official name of the Decolonization Committee, also known as Committee of 24, is "Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples." Said declaration is contained in U.N. Resolution 1514 (XV) of 14 December 1960.
domestic affairs of the United States in violation of Article 2, Paragraph 7 of the United Nations Charter which reads in pertinent part as follows:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter... [emphasis provided].

This is the same as saying that Puerto Rico is a part of the United States.

Although deciding that Puerto Rico was not an integral part of the United States, Downes v. Bidwell left the door open for the possibility that Puerto Rico could later be incorporated into the Union by Congressional action. In several instances, Justice White provided an indication that there existed a correlation between granting citizenship to the inhabitants of an acquired territory and its incorporation. In his opinion Justice White raised the adverse consequences that would follow from upholding the argument that the treaty-making power of Congress automatically incorporated acquired territory into the United States and stated:

Suppose the necessity of acquiring a naval station or a coaling station on an island inhabited with people utterly unfit for American citizenship and totally incapable of bearing their proportionate burden of the national expense. Could such island under the rule which is now insisted upon should be taken?

...

If the proposition be true then millions of inhabitants of alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the government be overthrown.

Furthermore, Justice White also countered the position that the "evil" resulting from immediate incorporation by cession could be corrected by Congress through its constitutional power to dispose of territory and other property of the United States. The opinion stated as follows:

Observe once again the inconsistency of this argument. It considers, on the one hand, that so

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44 "Puerto Rico is a part of the United States and as such the U.S. Government maintains that the Committee of 24 (or any other international body) has no authority to interfere in the relationship." Svendsen, Eric, "Puerto Rico Libre", Open Forum, Spring/Summer 1979, p. 21. Eric Svendsen was at the time a political officer in U.S. State Department's Bureau of International Organizations. Open Forum is the State Department's in-house organ.
46 Id. at 311.
47 Id. at 313.
vital is the question of incorporation that no alien territory may be acquired by a cession without absolutely endowing the territory with incorporation and the inhabitants with resulting citizenship, because under our system of government, the assumption that a territory and its inhabitants may be held by any other title than one incorporating be impossible to be thought of. And yet to avoid the evil consequences which must follow from accepting this proposition, the argument is that all citizenship of the United States is precarious and fleeting, subject to be sold at any moment like any other property. That is to say, to protect a newly acquired people in their presumed rights, it is essential to degrade the whole body of American citizenship.48

Moreover, to support his argument, Justice White indicated that at the time the Constitution was established, the term "United States" only included territories whose inhabitants were U.S. citizens. In the words of Justice White,

it was that, at the adoption of the Constitution, the United States, as a geographical unit and as a governmental conception both in the international and domestic sense, consisted not only of States, but also of territories, all the native white inhabitants being endowed with citizenship, protected by the pledges of a common union, and, except as to political advantages, all enjoying equal rights and freedom... (emphasis provided)49

However, Justice White also pointed out that a territory not originally incorporated and governed by Congress as a possession could be later incorporated into the United States by "placing it exactly in the position which it would have occupied had it been within the boundaries of the United States as a territory at the time the Constitution was framed." That is, by bestowing its inhabitants with American citizenship. Such was the case with the Territory of Orleans (Louisiana Purchase).50

Justice White's opinion reflected the current concern with the Philippines, which vigorously fought American occupation, and the perceived danger of racial and political problems resulting from incorporating its inhabitants into the United States and its system of government.51 As early as 1900, congressional reports drew a distinction between the Philippines and Puerto Rico. The latter did not demonstrate any significant opposition to U.S. sovereignty and was believed to be inhabited by people who were generally of Caucasian blood.52 It was feared, however, that a decision on Puerto Rico's incorporation would become a precedent that would limit the discretion of Congress in dealing with the Philippine problem.53 Therefore, it was not until after Congress promised

48 Id. at 314-315.
49 Id. at 320.
50 Id. at 332-333.
51 See Torruella, op. cit., pp. 33, 54-55.
independence to the Philippine Islands with the passage of the Jones Act in 1916, that Puerto Ricans were granted U.S. citizenship with the passage of a new Organic Act also known as the Jones Act.

In Balzac v. People of Puerto Rico, the U.S. Supreme Court addressed again the question of whether Puerto Rico was incorporated into the Union — this time in light of the new Organic Act granting citizenship to Puerto Ricans. But, those indications of a correlation between U.S. citizenship and incorporation provided by Justice White in Downes v. Bidwell were blatantly disregarded by Chief Justice Taft who found “no features in the Organic Act of Puerto Rico of 1917 from which...the purpose of Congress to incorporate Porto Rico” could be inferred.

Moreover, as Judge Torruella has pointed out, in Balzac Justice Taft provided no objective or legal standards to explain why the granting of citizenship to Alaskans resulted in the incorporation of the territory while in the case of Puerto Rico such result did not follow.

In Rasmussen v. United States, the Supreme Court, in an opinion delivered by Justice White, held that Alaska was incorporated into the Union after considering the text of the treaty by which Alaska was acquired. The Court stated as follows:

The treaty concerning Alaska, instead of exhibiting, as did the treaty respecting the Philippine Islands, the determination to reserve the question of the status of the acquired territory for ulterior action by Congress, manifested a contrary intention, since it is therein expressly declared in Article 3, that:

“The inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property and religion.”

This declaration, although somewhat changed in phraseology, is the equivalent, as pointed out in Downes v. Bidwell, of the formula employed from the beginning to express the purpose to incorporate acquired territory into the United States, especially in absence of other provisions showing an intention to the contrary.

Notice that the word “incorporated” does not appear in the text of the treaty from which the Court concluded that Congress intended to incorporate Alaska

55 See Cabrana, op. cit., p. 408.
56 258 U.S. 298 (1922).
57 Id. at 313.
59 197 U.S. 516 (1905).
60 Id. at 922.
into the Union. However, Chief Justice Taft required that Congress prove its purpose to incorporate a territory into the Union by means other than conferring citizenship to its inhabitants. In what could be termed as the "theory of incorporation beyond reasonable doubt" the Court stated:

[The Jones Act] does not indicate by its title that it has a purpose to incorporate the island into the Union. It does not contain any clause which declares such purpose of effect. While this is not conclusive, it strongly tends to show that Congress did not have such intention. ...Had Congress intended to take the important step of changing the treaty status of Puerto Rico by incorporating it into the Union, it is reasonable to suppose that it would have done so by the plain declaration and would not have left it to mere inference...incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view. 61

Chief Justice Taft did address Rassmussen, albeit in a totally inconsistent manner with his previous argument. The opinion stated as follows:

It is true that in the absence of other and countervailing evidence, a law of Congress or a provision in a treaty acquiring territory, declaring an intention to confer political and civil rights on the inhabitants of the new lands as American citizens may be properly interpreted to mean an incorporation of it into the Union...But Alaska was a very different case from Porto Rico. It was an enormous territory, very sparsely settled, and offering opportunity for immigration by American citizens. It was on the American continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents. 62

We do not dwell on other consideration which requires us not lightly to infer from acts thus easily explained on other grounds, an intention to incorporate into the Union these distant ocean communities of a different origin and language from those of our continental people. Incorporation has always been a step, and an important one, leading to statehood. 63

Justice Taft first requires that the intention to incorporate be plainly declared only to admit further below that a concession of citizenship can be interpreted as an intention to incorporate without the need of making an express declaration as to the purpose. Moreover, Justice Taft used extra-legal criteria in distinguishing between the concession of citizenship to Alaskans and Puerto Ricans as a means of incorporation. Criteria such as these reflect little more than personal views, based purely on political considerations, on what characteristics a territory fit for incorporation should possess. 64

61 258 U.S. at 306.
62 Id. at 309.
63 Id. at 311. It should be noted that whether a territory is incorporated or not has no bearing on whether Congress can admit it as a state, Serrano-Geyls, op. cit., p. 441. See also, Grupo de Investigadores Puertorriqueños, op. cit., pp. 1384-1385.
64 See Torruella, op. cit., p. 99. See also, Serrano-Geyls, op. cit., pp. 424.
Not only did Justice Taft disregard *Downes* but, in qualifying *Rasmussen*, also ignored views generally held in Congress which led to the concession of U.S. citizenship to Puerto Ricans. We admit, as stated by Cabranes that:

It is difficult if not impossible to ascribe to the Congress of the United States a definite viewpoint or position on a subject as that of the nation's policy toward its new colonial empire. It is possible, however, to note from the record of congressional consideration of Puerto Rican affairs in the two decades following the enactment of the Foraker Act some basic and widely shared assumptions concerning the future development of the island and its people. Most important of all was the belief that the island was permanently to remain under the American flag.  

The following views from Representative Thomas Spight (D.-Mississippi) were presented by Cabranes as characteristic of those widely held in Congress on Puerto Rico:

Its people are, in the main, of Caucasian blood, knowing and appreciating the benefits of civilization, and are desirous of casting their lot with us...

How different the case of the Philippine Islands, 10,000 miles away... The inhabitants are of wholly different races of people from ours — Asians, Malays, negroes and mixed blood. They have nothing in common with us and centuries can not assimilate them... they can never be clothed with the rights of American citizenship not their territory admitted as a State of the Union...

But the case is essentially different with Puerto Rico. Its proximity to our mainland, the character of its inhabitants, and the willingness with which they accept our sovereignty, together with the advantages — commercial, sanitary and strategic — all unite to enable us to make her an integral part of our domain, without any violence to principle or any danger of foreign entanglements.

While we may acquiesce to Justice White's pronouncements in *Downes* regarding the "theory of incorporation", — a theory more pragmatic than legal — we cannot accept the proposition that Puerto Rico remained "unincorporated" after U.S. citizenship was granted to its inhabitants in 1917 and especially so, in light of the considerations propounded by Justice White in his opinion. Moreover, the arguments presented by Justice White in *Downes* contrary to those advanced by the plaintiffs in *De Lima* regarding the meaning of

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65 Cabranes, op. cit., p. 443.  
the term "United States" were left without support after Congress granted U.S. citizenship to Puerto Ricans.69 This is another reason why *Bakke* should be taken as a departure rather than an affirmation of *Downes*. According to Serrano-
Geyls, "in holding that Puerto Rico had not been incorporated into the Union by the Jones Act, the Supreme Court did not only disregard completely the line of decisions which stemmed from the *Insular Cases* but at the same time deprived the doctrine of territorial incorporation of a great deal of its rationale".70 The fact is, however, that as late as 1980 the U.S. Supreme Court has relied on the *Insular Cases, Bakke* included, in deciding that Congress, by virtue of the Territorial Clause of the Constitution, can treat Puerto Rico differently from the States in the allocation of Social Security benefits.71

Yet, it is questionable whether the rationale behind the *Insular Cases* would be applicable to the citizenship question. In *Torres v. Puerto Rico*,72 Justices Brennan, Stewart, Marshall and Blackmun questioned the validity of the *Insular Cases*. And, quoting from the plurality opinion in *Reid v. Covert*,73 the concurring opinion of Justice Brennan stated that "neither the cases nor their reasoning should be given any further expansion."74

If the time comes where the courts of the United States have to determine whether Puerto Rican U.S. citizens possess statutory or Fourteenth Amendment citizenship, from a purely legal point of view, there is no reason why an inconsistent decision in *Bakke* should be given precedence over a theory of nationality as coherent and as firmly established in the United States' constitutional history as *jus soli*.

If one is to give meaning to *jus soli*, once U.S. citizenship is conferred by reason of birth within the territorial limits of Puerto Rico one can hardly escape the conclusion that Puerto Ricans are "Fourteenth Amendment-first-sentence citizens".

69 See e.g., 182 U.S. at 319-320, 336-337. Today it can be argued that the interpretation that Puerto Rico is within the Fourteenth Amendment meaning of the term "United States" was carried to section 302 of the Immigration and Nationality Act, 8 U.S.C.A. section 1402, granting U.S. citizenship to those persons born in Puerto Rico. Section 101 of the Act, which provides definitions for those terms used in Chapter 12 of Title 8 of the U.S. Code, states in pertinent part as follows:

"The term 'United States' except as otherwise specifically provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam and the Virgin Islands of the United States.

8 U.S.C.A. sec. 1101(a) (38).


It should be noted that the basis for differential treatment accorded to Puerto Rico in the application of federal assistance programs is geographical. U.S. citizens residing in any of the States would be subject to the same discriminatory treatment should they change their place of residence to Puerto Rico. See *Califano v. Torres*, 435 U.S. 1 (1977).


73 354 U.S. 1, 14 (1957).

74 442 U.S. at 475-476.
The fact that U.S. citizenship was conferred to Puerto Ricans at birth is consistent with the construction of the Fourteenth Amendment in *United States v. Wong Kim Ark*—a classic case which strikingly illustrates the concept of *jus soli*. Explaining the concept of citizenship by birth, the Supreme Court stated:

Two things usually concur to create citizenship: First, birth locally within the dominions of the sovereign; and secondly, birth within the protection and obedience, or, in other words, within the ligeance of the sovereign. That is the party must be born within a place where the sovereign is at full possession and exercise of its power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to, the sovereign, as such, *de facto*.76

Puerto Rican U.S. citizens meet both criteria. At the time Puerto Ricans were collectively naturalized, not only Puerto Rico was under the sovereignty of the United States,77 but Puerto Ricans were also “within the protection and obedience of the sovereign” since Puerto Ricans became nationals of the United States by Article IX of the Treaty of Paris78 wherein Spain ceded Puerto Rico to the United States.79

*Wong Kim Ark’s* interpretation of “natural-born citizens” is clearly evident in the language of section 302 of the Immigration and Nationality Act, granting U.S. citizenship to those persons born in Puerto Rico. Said section reads as follows:

All persons born in Puerto Rico on or after April 11, 1899, and prior to January 31, 1941, subject to the jurisdiction of the United States, residing on January 13, 1941, in Puerto Rico or other territory over which the United States exercises sovereignty and not citizens of the United States under any other Act, are declared to be citizens of the United States as of January 13, 1941. All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States *at birth* [emphasis provided].80

Sovereignty is the key word here. The United States, for example, cannot collectively naturalize Barbadians or Grenadians because the United States cannot rightfully enforce its laws in either country, but U.S. citizenship could be conferred upon Puerto Ricans precisely because the United States exercised the fullest rights of sovereignty over the Island.81

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75 169 U.S. 649 (1898).
76 *Id.* at 659. See also, *Lam Mow v. Nagle*, 24 F. 2d 316, 317 (1928).
77 *See Downes*, 182 U.S. at 341-342.
78 30 Stat. 1754, 1759 (1899).
79 *See Gonzalez v. Williams*, 192 U.S. 1 (1903). A “national” has been defined as “a person owing permanent allegiance to a state. Nationality, then, is the bond which unites a given person with a given state, which identifies him as a member of that entity which enables him to claim its protection and also subjects him to the performance of such duties as his state may impose on him” Von Glahn, *op. cit.*, p. 198.
81 *See Wong Kim Ark*, 169 U.S. at 683, 689.
Moreover, with respect to citizenship as defined in the Fourteenth Amendment, collective naturalization of Puerto Ricans stands in no different position than individual naturalization in the United States since neither is based on the principle of \textit{jus sanguinis}. Only “derivative naturalization” or “naturalization by descent” is solely dependent on congressional enactment and not protected by the Fourteenth Amendment from involuntary deprivation.\textsuperscript{82} Quoting from \textit{United States v. Wong Kim Ark}\textsuperscript{83} the Supreme Court in \textit{Rogers v. Bellei} stated that the first sentence of the Fourteenth Amendment

\begin{quote}
has not touched the acquisition of citizenship by being born abroad of American parents and has left that subject to be regulated, as it has always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization.\textsuperscript{84}
\end{quote}

Despite what has been said, it is accepted that the question of loss of citizenship is not merely academic in nature and that thorny political considerations would be involved if granting independence to Puerto Rico were subject to congressional debate. It is conceivable, for example, that Congress would want to avert the problem of having a sizeable community of U.S. citizens under the sovereignty of a foreign nation and subject to her competing claims of allegiance—a concern not unlike the dual nationality considerations in \textit{Rogers v. Bellei}.\textsuperscript{85} Considerations of this nature could prompt some political actors into advocating the ultimate extension of the \textit{Insular Cases’} dogma.

Yet, whatever meaning is to be derived from the incorporated/unincorporated dichotomy of the \textit{Insular Cases}, one can hardly argue that Puerto Rican U.S. citizens are “born abroad” or in a “foreign country.”\textsuperscript{86}

\begin{footnotesize}
\footnotesub{83} 169 U.S. at 688.
\footnotesub{84} 401 U.S. at 830. See also \textit{Weedin v. Chin Bow}, 274 U.S. 657, 660 (1927).
\footnotesub{85} 401 U.S. at 831-832. The Court, quoting from the District Court’s opinion in that very case stated: “It is a legitimate concern of Congress that those who bear American citizenship and receive its benefits have some nexus to the United States.” Id. at 832 quoting from \textit{Bellei v. Rusk}, 290 F. Supp. 1247, 1252 (D.C. 1969).
\footnotesub{86} Bellei was deprived of American citizenship without his assent because he acquired U.S. citizenship at birth in Italy as a foreign-born child of an American parent under section 301(b) of the Immigration and Nationality Act, 8 U.S.C.A. sec. 1401(b).

“A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States [citations omitted].” \textit{De Lima}, 182 U.S. at 180.
\end{footnotesize}