

## **TERRITORIAL STAGNATION OF PUERTO RICO: THE IMPACT OF CONGRESS’S LEGISLATIVE DISCRETION**

By: *Jada Anahis Rivera, Staff Editor, Vol. 31*<sup>1</sup>

Why do the residents of Puerto Rico (“PR”)—who are undeniably United States citizens—have no right to vote in presidential elections, receive no Supplemental Security Income (“SSI”) benefits, and obtain no funding for sustainable infrastructure in light of a \$24,000 median household income?<sup>2</sup> There lies a tug-of-war between the constitutional justifications for the territory’s status quo and the countervailing social mandate to improve the quality of life equitably to that of an independent sovereign—but first, this conversation necessitates addressing how we got here.

A Puerto Rico Advisory Committee to the U.S. Commission on Civil Rights met in February 2024 to discuss the ramifications of the *Insular Cases* discussed below and the political and racial framework embedded in this “unequal application” of the law.<sup>3</sup> The Committee considered Associate Justice Edward Douglass White’s concurring opinion in *Downes v. Bidwell*:

Associate Justice Edward Douglass White stated the following in his concurring opinion in *Downes v. Bidwell*: “[T]here may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed although not expressed in so many words in the Constitution.” In other words, ... only the protection of “those rights that are considered fundamental” would have applied to unincorporated territories, although the Court failed to define what rights those were. White’s concurring opinion became the legal justification for the *Insular Cases*.<sup>4</sup>

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<sup>1</sup> Jada Anahis Rivera is a second-year regular division student at Widener University Delaware Law School. Jada currently serves as Staff Editor of *Widener Law Review*, Secretary of the Latin American Law Student Association, and Research Assistant for the Dignity Rights Clinic under Professor Erin Daly. Before law school, Jada graduated from Widener University in just three years, with a B.A. in Psychology and a minor in Legal Studies and Analysis. During the summer following her second year, Jada will be working as a Law Clerk at Burns White LLC in Conshohocken, PA.

<sup>2</sup> *QuickFacts, Puerto Rico, U.S. CENSUS BUREAU*, (Sept. 12, 2024), <https://www.census.gov/quickfacts/fact/table/PR/INC110222>.

<sup>3</sup> U.S. COMM’N ON C. R., PUERTO RICO ADVISORY COMMITTEE, THE INSULAR CASES AND THE DOCTRINE OF THE UNINCORPORATED TERRITORY AND ITS EFFECTS ON THE CIVIL RIGHTS OF THE RESIDENTS OF PUERTO RICO 3 (2024).

<sup>4</sup> *Id.* at 3.

Thus, *Downes v. Bidwell* is perhaps one of the most important of the *Insular Cases* that solidified how Congressional authority over the territory of Puerto Rico should proceed.<sup>5</sup> Such broad power makes it possible for federal programs, benefits and voting rights, otherwise applied to the states in uniformity, to be limited to or inapplicable in Puerto Rico.

This Blog Post will examine (1) a brief history of PR's territorial federalism; (2) the impact of Congress's legislative discretion through denial of rights seemingly "handed" to the states; and (3) the arguments for both independence and statehood under the lens of public policy rationales.

## I. HISTORICAL CONTEXT

"The Treaty of Paris of 1898 sealed the end of the Spanish-American War."<sup>6</sup> "Spain renounced all rights it had over Puerto Rico and ceded all of its territorial possessions to the United States."<sup>7</sup> One provision of the Treaty states that Congress holds control over "the civil rights and political condition" of the territory through this transfer of power.<sup>8</sup> The Supreme Court then presided over several controversial cases known as *The Insular Cases*, in which Congress selectively directed that only certain constitutional rights be applicable to Puerto Rico.<sup>9</sup>

Congress first conferred U.S. citizenship to residents of Puerto Rico in 1918, after passing the Jones-Shafroth Act.<sup>10</sup> Four years later, the Supreme Court granted certiorari over *Balzac v. Porto Rico*, one of many guiding cases exemplifying a vivid pattern of the Court's application of only the utmost "fundamental" rights to PR.<sup>11</sup> In *Balzac*, the Supreme Court held that these citizens will not be guaranteed the Sixth Amendment right to trial by jury in criminal cases, leaving the

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<sup>5</sup> See *Downes v. Bidwell*, 182 U.S. 244 (1901).

<sup>6</sup> U.S. COMM'N ON C.R., *supra* note 3, at 2 (citing Treaty of Paris of 1898 (30 Stat. 1758)).

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> U.S. COMM'N ON C.R., *supra* note 6, at 3.

<sup>11</sup> 258 U.S. 298 (1922).

impression that this longstanding fundamental right as applied to the states is not so fundamental when governing a defendant's rights in Puerto Rico.<sup>12</sup>

One panelist at the Puerto Rico Advisory Committee to the U.S. Commission on Civil Rights stated that *Balzac* “is an example that for the Supreme Court, locality was more important in consideration of how to apply the Constitution than the fact that the affected people were U.S. citizens.”<sup>13</sup> Very quickly, it became evident that merely labeling the residents of Puerto Rico as “citizens” in no way diminished the unincorporated status of Puerto Rico but permitted Congress to contradict the fundamental meaning of the word “citizen” through plenary justification.<sup>14</sup>

In essence, the 1918 grant of statutory citizenship catered to Congress's discretionary ability to decide—in a piecemeal manner—what “fundamental” means when Puerto Ricans' rights lie in the hands of Congress.

## II. DEEP-ROOTED, “LIVING” CONSEQUENCES OF THE INSULAR CASES

The Territory Clause of the United States Constitution—which states that Congress may “make all needful Rules and Regulations respecting the Territory . . . belonging to the United States”—expressly affords Congress this broad authority to legislate with respect to the U.S. Territories.<sup>15</sup> In exercising that authority, Congress has long maintained different federal tax and benefits programs for residents of the territories than for residents of the fifty states.<sup>16</sup>

In *United States v. Vaello Madero*, Justice Kavanaugh held that the tax status of residents of Puerto Rico provided a rational basis for Congress's decision not to make Supplemental

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<sup>12</sup> *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922).

<sup>13</sup> U.S. COMM’N ON C.R., PUERTO RICO ADVISORY COMMITTEE, THE INSULAR CASES AND THE DOCTRINE OF THE UNINCORPORATED TERRITORY AND ITS EFFECTS ON THE CIVIL RIGHTS OF THE RESIDENTS OF PUERTO RICO 7 (2024).

<sup>14</sup> *Id.*

<sup>15</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>16</sup> U.S. COMM’N ON C.R., *supra* note 13, at 17–18 (stating that “SSI is available in all 50 states, the District of Columbia, and the Mariana Islands, and it is estimated that 436,000 people in Puerto Rico can qualify for SSI if not for discriminatory treatment by Congress.”)

Security Income benefits available to residents of Puerto Rico.<sup>17</sup> Surely, moving to New Jersey and leaving the island would guarantee these benefits otherwise available to residents of the States.

Justice Sotomayor, for the dissent, stated, “[t]here is no rational basis for Congress to treat needy citizens living anywhere in the United States so differently from others [and] [t]o hold otherwise, as the Court does, is irrational and antithetical to the very nature of the SSI program and the equal protection of citizens guaranteed by the Constitution.”<sup>18</sup> She supports the contention that “residents of Puerto Rico who would be eligible for SSI are like other SSI recipients in every material respect: they are needy U.S. citizens living in the United States.”<sup>19</sup>

However, the majority states that eligibility for Supplemental Security Income depends on whether an individual is a “resident” within the statute’s confinement of the fifty states and D.C.<sup>20</sup> The Court, relying on precedent and “historical practice,” establishes that Congress may distinguish the territories from the states “so long as Congress has a rational basis for doing so.”<sup>21</sup> Under Congress’s plenary powers, the Court certifies that Congress may accordingly exercise broad discretion over how to apply and structure certain rights in Puerto Rico.<sup>22</sup> In “[e]xercising that discretion, Congress *may* extend Supplemental Security Income benefits to residents of Puerto Rico,” but must they? The majority says in the affirmative, “The answer is no.”<sup>23</sup>

In *Harris v. Rosario*, in a *haste* two-paragraph opinion, the Court relies on the Territory Clause to justify another denial of federal funding under three factors: “(1) Puerto Rican residents

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<sup>17</sup> 596 U.S. 159, 165 (2022).

<sup>18</sup> *Id.* at 190. (Sotomayor, J., dissenting).

<sup>19</sup> *Id.* at 197. (Sotomayor, J., dissenting).

<sup>20</sup> *Vaello Madero*, 596 U.S. at 164–65.

<sup>21</sup> *Id.* at 164.

<sup>22</sup> *Id.* at 165.

<sup>23</sup> *Id.* at 166.

do not contribute to the federal treasury; (2) the cost of treating Puerto Rico as a State under the statute would be high; and (3) greater benefits could disrupt the Puerto Rican economy.”<sup>24</sup>

If anything is taken away from Justice Marshall’s dissent, it is this: the Court *has* held that Puerto Rico is subject to the Due Process Clause of either the Fifth or Fourteenth Amendment<sup>25</sup> and the Equal Protection guarantee of either the Fifth or the Fourteenth Amendments.<sup>26</sup> He admits that “the Fourth Amendment is also fully applicable to Puerto Rico either directly or by operation of the Fourteenth Amendment.”<sup>27</sup> Therefore, while *Downes* and *Balzac* suggest that many protections do not apply to Puerto Rico, “the present validity of those decisions is questionable.”<sup>28</sup>

Justice Marshall believed that *The Insular Cases* thus far suggest “that [federal] programs designed to help the poor should be less fully applied in those areas where the need may be the greatest, simply because the poverty of recipients compared to other persons in the same geographic area will somehow be upset.”<sup>29</sup>

### III. WHAT DO THE PEOPLE THINK MOVING FORWARD?

With respect to the poverty line, PR had a median household income of \$24,002 in 2022.<sup>30</sup> This pervasive poverty in PR remains rooted in its loss of economic comparative advantage in the region and national markets because of congressional actions over which Puerto Rico had little input or leverage – in part, if not mostly, a result of *the Insular Cases*.<sup>31</sup> “Puerto Rico’s economy

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<sup>24</sup> 446 U.S. 651, 652 (1980).

<sup>25</sup> *Id.* at 653 (Marshall, J., dissenting); *see also* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

<sup>26</sup> *Id.*; *see also* Examining Board v. Flores de Otero, 426 U.S. 572 (1976).

<sup>27</sup> *Id.*; *see* Torres v. Puerto Rico, 422 U.S. 465, 471 (1979).

<sup>28</sup> *Id.* at 653. (Marshall, J., dissenting).

<sup>29</sup> *Id.* at 655–56.

<sup>30</sup> *QuickFacts, Puerto Rico*, U.S. CENSUS BUREAU, (Sept. 12, 2024), <https://www.census.gov/quickfacts/fact/table/PR/INC110222>.

<sup>31</sup> Carlos Vargas-Ramos et al., *Pervasive Poverty in Puerto Rico: A Closer Look*, CTR. FOR PUERTO RICAN STUD. 3 (Sept. 2023), <https://centropr.hunter.cuny.edu/app/uploads/2023/09/Pervasive-Poverty-PR-1.pdf>.

is therefore unable to produce sufficient jobs at levels of remuneration that would keep those who are able and willing to work above the federal poverty level.”<sup>32</sup>

Moreover, PR lies 72 billion dollars in debt, and government employees owe more than 50 billion in pensions.<sup>33</sup> Yes—“this island is more than 120 billion in the red” and remains the biggest local government “bankruptcy” ever filed in the United States.<sup>34</sup>

Between the conversation on *The Insular Cases* and the impact on the economic wealth of the island and its people, many cater to the independence conversation posing that Puerto Rico cannot survive without the United States.<sup>35</sup> However, according to Javier Hernández, this is an economist’s take from the colonial perspective.<sup>36</sup> He states, “Puerto Rico could become an economic powerhouse in the Caribbean . . . . [P]eople could do more.”<sup>37</sup> The economist’s or “statehood advocate’s” contribution puts the colonial regime on a silver platter, without understanding that it “creates the poverty, extracts wealth, and when [citizens] want to be free, [the U.S.] uses that same poverty not to free [them].”<sup>38</sup> After all, the point of territorial colonialism is to extract the benefits.<sup>39</sup>

Feasible economic strategies often ensure disregardful perception because of the institutional fear and uncertainty that lies with dismantling territorial federalism over PR.<sup>40</sup> Whether these independence-focused proposals shall be adopted or considered is uncertainty in itself but noteworthy, nonetheless. First, without federal oversight and control, Puerto Rico would

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<sup>32</sup> Vargas-Ramos et al., *supra* note 31.

<sup>33</sup> The Takeaway, *Puerto Ricans Pay the Price for Debt Crises*, WNYC STUDIOS, at 1:15 (Jun. 7, 2018), <https://www.wnycstudios.org/podcasts/takeaway/segments/puerto-ricans-pay-price-debt-crisis>.

<sup>34</sup> *Id.* at 1:28.

<sup>35</sup> *Can Puerto Rico’s Economy Survive Independence? Paseo Podcast: Sharing Puerto Rico Stories*, at 10:46 (Mar. 24, 2022) (downloaded using Apple Podcasts) (hereinafter “*Paseo Podcast*”).

<sup>36</sup> *Id.* at 11:41.

<sup>37</sup> *Id.* at 11:55.

<sup>38</sup> *Id.* at 12:45.

<sup>39</sup> *Id.* at 12:59.

<sup>40</sup> *Id.* at 10:04.

have its own customs and ports of entry, profiting from “billions in revenue” in itself—a big economic boon.<sup>41</sup> Systematically, this could then attract companies.<sup>42</sup> PR could then promote its exports overseas, create free trade agreements, and more.<sup>43</sup> Instead of making this possible by dismantling the territorial hold, the vision is to keep asking for federal funds.<sup>44</sup>

Ultimately, a statehood lens would ask what independence means for SSI, Medicare, Pell Grants, and other federal financial aid.<sup>45</sup> Hernandez says, “[i]t is not a gift. The money is taken from PR paychecks that go to the United States, and then send it right back in the form of federal grants.”<sup>46</sup> PR could do this itself.<sup>47</sup>

#### IV. CONCLUSION

Puerto Rico’s status as an unincorporated territory has “left the island in a state of limbo.”<sup>48</sup> Local needs and broader rights have gone unattended—whether under the illusion of “precedent” (*The Insular Cases*) or because PR is politically powerless without “a direct role in determining their situation.”<sup>49</sup> Passively abiding by this disparity and “inferior treatment arbitrarily restricts PR’s ability to fully develop within the United States.”<sup>50</sup> To improve, we must begin with recognizing the lingering expiration date on *The Insular Cases* which Congress has yet to throw away as easily as it does the rights of U.S. citizens in PR.

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<sup>41</sup> *Paseo Podcast*, *supra* note 35, at 14:25.

<sup>42</sup> *Id.* at 15:05.

<sup>43</sup> *Id.* at 16:16.

<sup>44</sup> *Id.* at 17:30.

<sup>45</sup> *Id.* at 32:30.

<sup>46</sup> *Id.* at 34:00.

<sup>47</sup> *Paseo Podcast*, *supra* note 35, at 34:10.

<sup>48</sup> U.S. COMM’N ON C.R., *supra* note 16, at 10.

<sup>49</sup> *Id.* at 9.

<sup>50</sup> *Id.* at 10.