

Written Testimony of Andrew Kent

Professor of Law, Fordham University School of Law

**Hearing before the Committee on Natural Resources, U.S. House of
Representatives,**

April 13, 2016

**On the Discussion Draft of the “Puerto Rico Oversight, Management, and
Economic Stability Act”**

Chairman Bishop, Ranking Member Grijalva, and distinguished members of the Committee,

Thank you for inviting me to testify today. I am a professor of law at Fordham University School of Law, where I teach constitutional law and other topics.

As I understand the new draft legislation just released publicly, Title I creates a Financial Oversight and Management Board for Puerto Rico, and gives the legislatures of other U.S. territories the option to choose to have such an oversight board created for them. Title II sets out the responsibilities of any oversight board created under Title I. Title III, section 302, allows a U.S. territory or territorial instrumentality to be a debtor and follow specified debt adjustment procedures if it is subject to an oversight board created under Title I, that board has allowed the territory or territorial instrumentality to enter into a debt adjustment process, and the territory “desires to effect a plan to adjust its debts.”

I. The Uniformity Requirement of the Constitution’s Bankruptcy Clause

The Constitution’s Bankruptcy Clause provides that “The Congress shall have power to . . . establish . . . uniform laws on the subject of bankruptcies throughout the United States.” U.S. Const., art. I, § 8, cl. 4. Case law about this uniformity requirement establishes that, although it requires what the Supreme Court calls geographic uniformity, the clause nevertheless grants Congress great leeway. “The uniformity requirement is not a straitjacket . . .” *Railway Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457, 469 (1982). Congress may treat different classes of debtors differently; may incorporate state law in ways that will lead to different results in different states; and may address geographically-isolated problems as long as the law operates uniformly on a given class of debtors and creditors. *See id.* at 465-69; *Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 156-61 (1974); *Schultz v. United States*, 529 F.3d 343, 350-52

(6th Cir. 2008). The Supreme Court has struck down a law as non-uniform, however, where it applied to only a single debtor, one named railroad company. *See Railway Labor Executives' Ass'n*, 455 U.S. at 465-69.

In light of this case law, a question might be raised about whether the draft legislation could be subject to challenge for non-uniformity. The fact that legislation concerns debt adjustment for certain classes of debtors only—territories and territorial instrumentalities—is unlikely to be deemed objectionable under the Bankruptcy Clause uniformity provision. The Supreme Court has held that Congress may treat different classes of debtors differently. But to the extent that the legislation singles out Puerto Rico (and its instrumentalities), because only Puerto Rico has an oversight board created for it by the bill, uniformity questions might be raised.

Nevertheless, my view is that these constitutional concerns can be avoided in this case, because Congress may enact debt adjustment legislation for Puerto Rico under a different clause of the Constitution, a clause that does not require uniformity. That clause is the Territories or Territorial Clause of Article IV, as referenced in § 101(b)(3) of the new draft of the bill (setting out the “Constitutional Basis”).

II. The Territories Clause Allows Non-Uniform Legislation

The Constitution empowers Congress to “make all needful rules and regulations respecting the territory or other property belonging to the United States.” U.S. Const., art. IV, § 3. Congress’s power to use this clause to make rules for the territories has been called an “absolute and undisputed power,” by Chief Justice John Marshall. *Sere v. Pitot*, 10 U.S. 332, 336-37 (1810).

Congress has well-established and long-exercised power under this clause to treat territories differently from each other, and to treat territories differently than it treats U.S. States. In my judgment, this clause serves as an independent and sufficient basis on which Congress may enact the contemplated legislation. The remainder of my testimony will concern the Territorial Clause and the non-uniformity that it allows.

The power of Congress over the territories is vastly different than its power over the States of the Union. Congress’s power is limited in legislating for the States to certain enumerated or implied topics of national concern. But when legislating for the territories, Congress is given additional power by the Territorial Clause—broad, general legislative power that the Supreme Court analogizes to that of a State legislature. *See, e.g., First Nat. Bank v. Yankton Cty.*, 101 U.S. 129, 133 (1879); *Benner v. Porter*, 50 U.S. 235, 242 (1850). Over a territory or dependency “the nation possesses the sovereign powers of the general government plus the powers of a local or a state government in all cases where legislation is possible.” *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317 (1937). Thus, “[t]he powers vested in Congress by” the Territorial Clause “to govern Territories are broad,” *Examining Bd. of Engineers, Architects, & Surveyors v. Flores de*

Otero, 426 U.S. 572, 586 n.16 (1976), “plenary,” *Binns v. United States*, 194 U.S. 486, 491 (1904), and even “practically unlimited,” *Cincinnati Soap Co.*, 301 U.S. at 317.

The Supreme Court has many times emphasized that interpretation of Congress’ ability to legislate for the territories under the Constitution must be marked by “flexibility,” *Cincinnati Soap Co.*, 301 U.S. at 318, and concern for Congress’s practical ability to govern, see *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 470 (1979).

Puerto Rico, though it is now formally a commonwealth, is still a territory of the United States within the meaning of the Territorial Clause. See *Torres*, 442 U.S. at 468-70; *Dávila-Pérez v. Lockheed Martin Corp.*, 202 F.3d 464, 468-69 (1st Cir. 2000); *Americana of Puerto Rico, Inc. v. Kaplus*, 368 F.2d 431, 435 (3d Cir. 1966). In other words, Congress may still today legislate for Puerto Rico pursuant to its plenary power over territorial legislation.¹

The history of congressional regulation of the territories has been one of tailoring legislation to the specific historical, geographic, economic, legal, and political conditions of each particular territory. The history has also shown Congress using the Territorial Clause to enact a wide array of legislation that it could not enact for the States under its Article I powers.

Congress’s first territorial legislation—enacted in 1787 by the Confederation Congress, and re-enacted in 1789 by the first Congress organized under the new Constitution—shows this pattern. See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50. This law, the famous Northwest Ordinance, announced many rules that would apply only in the Northwest Territory. For example, it announced rules concerning intestate succession and conveyance of real estate, but then also provided that “the French and Canadian inhabitants” of the territory could continue to be governed by their own “laws and customs now in force among them.” An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio § 2 (July 13, 1787).

Many other examples could be given of congressional legislation that (1) could not have been enacted under Article I to apply in the States and (2) applied to one territory only and provided specifically tailored rules for that territory. After the Louisiana Purchase, Congress’s legislation under the Territorial Clause provided special rules for that territory concerning the port of New Orleans. See Act of Feb. 24, 1804, ch. 13, §§ 6 & 8, 2 Stat. 251, 253. After the United States acquired Florida from Spain, Congress enacted specific rules regarding revenue collection for Spanish vessels trading with Florida. See Act of March 3, 1821, ch. 39, § 2, 3 Stat. 637, 639. When Congress organized the Territory of Oklahoma, it provided that certain specified chapters of the laws of the State of Nebraska would apply there, concerning mortgages, corporations, railroads, real

¹ See also *Cincinnati Soap Co.*, 301 U.S. at 319 (holding that Congress’ legislative power over the Philippines under the Territorial Clause had not changed as a result of “the adoption and approval of a constitution for the Commonwealth of the Philippine Islands”).

estate, and other topics. *See* Act of May 2, 1890, ch. 182, § 11, 26 Stat. 81, 87. After the United States annexed Hawaii, Congress imposed caps on the amount of real estate that corporations could purchase in that territory only. *See* Act of April 30, 1900, ch. 339, § 55, 31 Stat. 141, 150. After the Philippines became a U.S. territory through the 1898 Treaty of Paris, Congress enacted a detailed set of provisions to govern mining and mining claims in that territory only. *See* Act of July 1, 1902, ch. 1369, §§ 20-50, 31 Stat. 691, 697-704.

Early on Congress recognized the utility of extending many general laws of the United States over the territories, but also recognized that not all laws applicable in the States would work well in some or all territories. As a result, Congress developed a practice of providing in the organic acts for territories that “all laws of the United States which are not locally inapplicable” shall apply in the territory. Act of Sept. 9, 1850, ch. 49, § 17, 9 Stat. 446, 452 (Territory of New Mexico). *See also* Act of March 3, 1863, ch. 117, § 13, 12 Stat. 808, 813 (Territory of Idaho); Act of May 26, 1864, ch. 95, § 13, 13 Stat. 85, 91 (Territory of Montana). This statutory provision was, in effect, a delegation from Congress to the courts to tailor the legislation of the United States to the specific local requirements of each organized territory. The ubiquity of these provisions, and the lack of successful constitutional challenges to them, evidences Congress’ plenary authority to tailor legislation to the needs and circumstances of an individual territory.

The Supreme Court took up Congress’s direction to determine which general laws were locally applicable or inapplicable in specific territories. When Congress specified in a statute that it would apply to “territories” as well as States, the Supreme Court examined “the character and aim of the act” to determine if a particular territory was covered. *People of Puerto Rico v. Shell Co.*, 302 U.S. 253, 258 (1937).

The Foraker Act, the organic act for Puerto Rico passed in 1900, contained this same “not locally inapplicable” tailoring provision, and specified also that Congress’ internal revenue laws would not apply. *See* Act of April 12, 1900, ch. 191, § 14, 31 Stat. 77, 80.² Congress further tailored legislation specifically for Puerto Rico by also specifying in the Foraker Act that preexisting laws from the period of Spanish rule would continue in force unless they were repealed by the United States, in conflict with U.S. statutes, or determined to be “locally inapplicable.” *Id.* § 8.

² Today 48 U.S.C. § 734 provides:

“The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States, except the internal revenue laws other than those contained in the Philippine Trade Act of 1946 [22 U.S.C.A. § 1251 et seq.] or the Philippine Trade Agreement Revision Act of 1955 [22 U.S.C.A. § 1371 et seq.]: *Provided, however*, That after May 1, 1946, all taxes collected under the internal revenue laws of the United States on articles produced in Puerto Rico and transported to the United States, or consumed in the island shall be covered into the Treasury of Puerto Rico.”

Congress enacted the “not locally inapplicable” provision only for so-called organized territories, *see* Revised Statutes § 1891 (1878),³ in which Congress had created a local territorial government. Thus, Congress allowed even greater dis-uniformity in unorganized territories, where general rules of the United States were not extended by any such provision. Even within organized territories, Congress drew distinctions. When Congress organized a government for the Philippines, it provided that § 1891 did not apply, *see* Act of July 1, 1902, ch. 1369, § 1, 31 Stat. 691, 692, indicating an intent that generally applicable U.S. laws would not automatically extend to the Philippines.

In the Insular Cases, the Supreme Court held that the Constitution does not apply in full in so-called unincorporated territories, among which the Court included Puerto Rico and the Philippines. There are “inherent practical difficulties” with “enforcing all constitutional provisions ‘always and everywhere.’” *Boumediene v. Bush*, 553 U.S. 723, 759 (2008). Thus under the Insular Cases, not all structural limitations on congressional power apply to territorial legislation, *see Torres*, 442 U.S. at 468-69, and “[o]nly ‘fundamental’ constitutional rights are guaranteed to inhabitants of those [unincorporated] territories,” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990). Congressional legislation for an “unincorporated territory” like Puerto Rico is “not subject to all the provisions of the Constitution.” *Torres*, 442 U.S. at 469. “In exercising this power [under the Territories Clause], Congress is not subject to the same constitutional limitations as when it is legislating for the United States.” *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 674 (1945).⁴

In contrast to its allowance of flexibility and heterogeneity with territorial legislation, the Constitution prescribes a certain amount of uniformity when Congress is legislating for the States of the Union. Territorial legislation has sometimes been challenged on the grounds that it is dis-uniform and hence unconstitutional, but these challenges have not succeeded.

The Constitution specifies that three kinds of legislation should be “uniform” “throughout the United States”: naturalization legislation, bankruptcy legislation, and certain taxes (“duties, imposts and excises”).⁵ Notwithstanding these clauses, it is well-established that naturalization and tax legislation for the territories need not be

³ This statute provides: “The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.”

⁴ *Hooven & Allison* was overruled in part on other grounds in *Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984).

⁵ *See* U.S. Const., art. I, § 8, cl. 1 (“The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.”); *id.* § 8, cl. 4 (“The Congress shall have power to . . . establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.”).

uniform—either with respect to legislation for States of the Union or with respect to legislation for other territories. It stands to reason that the Bankruptcy Clause, employing identical language about uniformity, also does not bind Congress when it legislates for the territories.

Tax uniformity not required for the territories: The Supreme Court held, in the Insular Cases, that Congress was not bound by the uniformity provision with regard to taxation when it enacted special revenue laws applying only to Puerto Rico. As the Court later summarized the rule:

“In *Downes v. Bidwell*, 182 U.S. 244 (1901), we held that Congress could establish a special tariff on goods imported from Puerto Rico to the United States, and that the requirement that all taxes and duties imposed by Congress be uniform throughout the United States, Art. I, § 8, cl. 1, was not applicable to the island.” *Torres*, 442 U.S. at 468-69.

As *Torres* indicates, *Downes* is still good law on this point.

The tax uniformity requirement has also been held inapplicable with regard to incorporated territories. In organizing and incorporating the Alaska Territory, Congress “created no legislative body” for the territory and so “established a revenue system of its own, applicable alone to that territory.” *Binns*, 194 U.S. at 492. The Supreme Court rejected a claim that these Alaska-specific license and excise taxes enacted by Congress were required to be “uniform” with those “throughout the United States.” *Id.* at 487, 494-96. As the Court noted:

“It must be remembered that Congress, in the government of the territories . . . has plenary power, save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the territories.” *Id.* at 491.

Naturalization uniformity not required for the territories: The Supreme Court has held that under the Territorial Clause or the clause allowing Congress to admit new states into the union Congress can accomplish the naturalization of aliens located in certain territories and adjust their status to that of U.S. citizens. See *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 164-66, 168-70 (1892). The Court quoted with approval a lower court decision that “denied that the only constitutional mode of becoming a citizen of the United States is naturalization by compliance with the uniform rules established by congress.” *Id.* at 165-66. The “plenary power of Congress over the territories” can be used to collectively naturalize specific groups of people on the terms that Congress determines. *Id.* at 169.

Congress has long exercised plenary authority to determine whether residents of insular territories should be made citizens or not, and has made distinctions between different territories. Hawaii, Puerto Rico, Guam, and the Philippines were all acquired by

the United States in 1898, but Congress treated residents of the territories very differently for citizenship purposes. In 1900, citizenship was granted to essentially all Hawaiians. *See* Act of April 30, 1900, ch. 339, § 4, 31 Stat. 141, 141. Not until 1917 did Congress confer U.S. citizenship on many residents of Puerto Rico. *See* Act of March 2, 1917, ch. 145, § 5, 39 Stat. 951, 953. Congress waited until 1940 to comprehensively grant citizenship to residents of Puerto Rico. *See* Nationality Act of 1940, ch. 876, § 202, 54 Stat. 1137, 1139. Not until 1950 did Congress extend citizenship to Guamanians. *See* Act of Aug. 1, 1950, ch. 512, § 4(a), 64 Stat. 384, 384. And Congress never granted citizenship to residents of the Philippines en masse, *see Valmonte v. INS*, 136 F.3d 914, 916-17 (2d Cir. 1998), though they were eligible for naturalization if they came within the terms of generally applicable statutes, *see, e.g., Balzac v. Porto Rico*, 258 U.S. 298, 308 (1922). Samoa, which was acquired by the United States in 1900, has also seen its residents excluded from automatic U.S. citizenship. *See Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015).

Recently the Ninth Circuit confirmed that the uniformity provision of the Naturalization Clause cannot be invoked by residents of unincorporated territories to challenge non-uniform congressional rules. *See Eche v. Holder*, 694 F.3d 1026, 1031 (9th Cir. 2012).

Other uniformity cases: When litigants from the territories have used individual rights provisions of the Constitution to challenge congressional legislation under the Territorial Clause for lack of uniformity, the Supreme Court has rejected these claims. For instance, when individual rights challenges have been raised to social benefits legislation that treated residents of Puerto Rico differently than residents of the States, the Supreme Court has held that Congress “may treat Puerto Rico differently from States so long as there is a rational basis for its actions.” *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (AFDC program, Fifth Amendment Due Process Clause challenge); *see also Califano v. Torres*, 435 U.S. 1, (1978) (per curiam) (SSI program) (holding that Congress could treat Puerto Rico differently without violating the constitutional right to travel “[s]o long as its judgments are rational, and not invidious”). This kind of rational basis review is exceedingly deferential to the government. *See, e.g., FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314-15 (1993).

III. Conclusions

As a general matter, Congress needs only one constitutional grant of power upon which to enact legislation. And if the legislation meets the requirements of one grant, it does not matter if other possibly applicable grants do not support the legislation. *See, e.g., United States v. Morrison*, 529 U.S. 598, 607, 619 (2000).

It is true that the Supreme Court has held that, although general principles governing the reach of the Commerce Clause would allow Congress to enact bankruptcy legislation on that basis, Congress should not be allowed to use the Commerce Clause “to enact nonuniform bankruptcy laws,” because that “would eradicate from the Constitution a

limitation on the power of Congress to enact bankruptcy laws.” *Railway Labor Executives’ Ass’n*, 455 U.S. at 468-69.

The Supreme Court was not addressing and did not consider legislation governing the territories when it made that statement, and the case law and legal principles discussed above suggest that the Court’s concerns about an end run around limitations on congressional power should not apply to the situation at hand, where Congress could act under the Territorial Clause.

The Territorial Clause is not an end run around anything. It is a specially crafted constitutional power designed to allow Congress to flexibly address the myriad practical problems of governing the territories, and to tailor its legislation to the unique circumstances of each territory. In many ways, the entire point of the Territorial Clause is to allow Congress to do things that it cannot otherwise do under Article I. That is how the clause has been consistently used by Congress and interpreted by the Supreme Court over the centuries.

In my judgment, the newly-released draft legislation is within Congress’s power under the Territorial Clause, which is not limited by the uniformity requirement of the Bankruptcy Clause.

That conclusion is supported by the recent decision in *Franklin California Tax-Free Trust v. Puerto Rico*, 805 F.3d 322 (1st Cir. 2015), in which two judges of the First Circuit opined that Congress could enact debt adjustment legislation specifically for Puerto Rico under its plenary power under the Territorial Clause. *See id.* at 337. One judge disagreed with this conclusion, however. *See id.* at 346-48 (Torruella, J., concurring in judgment). The Supreme Court has granted cert in this case, *see Acosta-Febo v. Franklin California Tax-Free Trust*, 136 S. Ct. 582 (2015), but it is not generally thought that the Court’s decision is likely to address Bankruptcy Clause uniformity issues.

Thank you again for the opportunity to testify about this bill.