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The Supreme Court Says No to Equal Treatment of Puerto Rico: A Comment on Harris v. Rosario

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The Supreme Court Says "No" to Equal Treatment of Puerto Rico: A Comment on *Harris v. Rosario*

In the recent case of *Harris v. Rosario*[1], the United States Supreme Court held that federal welfare laws which treat the residents of Puerto Rico differently from residents of the mainland do not conflict with the equal protection guarantees of the U.S. Constitution.[2] The subject of the *Rosario* suit was the Aid to Families with Dependent Children Program (AFDC), initiated in 1935 in order to provide financial support to needy families.[3] The program was extended to Puerto Rico in 1950.[4] Under the AFDC statute the poor receive their payments from state or territorial governments, and those governments are then reimbursed from the federal treasury for a percentage of their expenditures.[5] The law specifies that Puerto Rico and the other U.S. territories are to be treated differently in the reimbursement plan.[6] Reimbursement to the fifty states is set at a higher level than reimbursement to Puerto Rico.[7] Furthermore, the legislation places a ceiling on the aggregate amount that can be spent in Puerto Rico for AFDC and other Social Security programs.[8]

In May 1977, the Legal Services Corporation of Puerto Rico filed a

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[1] 100 S. Ct. 1929 (1980).

[2] *Id.* at 1930.

[3] Pub. L. No. 271, 49 Stat. 627 (1935) (codified as amended at 42 U.S.C. §§ 601-610 (1976)).

[4] Amendments to Child Welfare Provisions of the Social Security Act, Pub. L. No. 734, 64 Stat. 550 (1950) (codified as amended at 42 U.S.C. § 603 (1976)).

[5] 42 U.S.C. § 603 (1976).

[6] Puerto Rico could be reimbursed under the formula provided for in 42 U.S.C. § 603(2) (1976), which is discriminatory; however, *id.* § 1318 gives it the option of seeking reimbursement under the more lucrative Medicaid formulas, *id.* § 1396d(b). As this was the method actually used by the island, § 1396d(b) was the statute challenged in the *Rosario* litigation.

[7] For the states, reimbursement under § 1396d(b) fluctuates between 50% and 83% of the amount they have spent, not counting administrative costs, depending on the per capita income of the particular state. Those states with the highest per capita income receive the least from the federal government and those with the lowest per capita income receive the most. *Id.* § 1396d(b). For Puerto Rico the percentage is fixed at 50%, the lowest rate, even though per capita income on the island is much lower than it is in Mississippi, the poorest state. Keifer, *Treating Puerto Rico as a State Under Federal Tax and Expenditure Programs: A Preliminary Economic Analysis*, 39 REV. C. ABO. P.R. 657, 666 (1978). Congress has altered this procedure for a single year, setting Puerto Rico's reimbursement rate at 75%. Act of Nov. 6, 1978, Pub. L. No. 95-600, § 802(a), 92 Stat. 2945 (codified at 42 U.S.C. § 1318 (Supp. III 1979)).

[8] 42 U.S.C. § 1308 (1976). Congress raised the ceiling for Puerto Rico and other U.S. possessions for one year, 1979. Act of Nov. 6, 1978, Pub. L. No. 95-600, § 802(a), 92 Stat. 2945 (codified at 42 U.S.C. § 1318 (Supp. III 1979)).

class action suit in U.S. District Court in San Juan, challenging this disproportionate dispersal of federal money.[9] The plaintiff class included a wide variety of AFDC recipients. Carmen Rivera Berrios, a widow living with her eleven-year-old son in a squatter community, was one of the named plaintiffs. Her case illustrates the class grievance. Since her husband drowned in 1970, Senora Rivera Berrios had lived on a monthly welfare check of twenty-six dollars.[10] Were she living in any of the fifty states, her check would have been much higher.[11] Legal Services attorneys therefore argued that she was being discriminated against because of her place of residence. Such discrimination, they contended, violated the equal protection guarantee implied in the due process clause of the fifth amendment[12] because Puerto Rican residents, who were granted U.S. citizenship in 1917,[13] were entitled to equal protection under federal law. Counsel for plaintiffs further asserted that the AFDC statute was unconstitutional because it denied the rights of a suspect class—a politically powerless minority that has suffered from purposeful unequal treatment in the past and now is injured by the contested legislation.[14] In other equal protection cases the Supreme Court has given "strict scrutiny" to laws which utilize a suspect classification. Strict scrutiny in practice has meant that such laws are unconstitutional unless the government can show a compelling state purpose that is served by the classification scheme.[15]

Lawyers for the Department of Health, Education and Welfare argued that the AFDC legislation was constitutionally sound because neither a fundamental interest nor a suspect class was involved. That being the case, the true issue was whether the AFDC statute had a rational basis. Defense counsel noted that the United States had ample reason to treat Puerto Rico differently because the island makes little contribution to the U.S. Treasury.[16] Chief Judge Jose V. Toledo of the

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[9] Rosario v. Califano, No. 77-303 (D.P.R. Oct. 1, 1979). For a discussion of the role of Legal Services Corporations in altering the administration of AFDC payments, see Bloch, *Cooperative Federalism and the Role of Litigation in AFDC Eligibility Policy*, 1979 WIS. L. REV. 1.

[10] Jurisdictional Statement, Brief for Appellee, app. II at 37a, Harris v. Rosario, 100 S. Ct. 1929 (1980).

[11] Average AFDC payments in Puerto Rico in 1977 were $47.00, whereas the average payments on the U.S. mainland were $187.00, four times as much. *Id.* at 41a.

[12] Motion for Summary Affirmance, Brief for Appellee at 16-19, Harris v. Rosario, 100 S. Ct. 1929 (1980). The implied equal protection component of the fifth amendment has been recognized in a variety of Supreme Court cases. *See, e.g.*, Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[13] Act of March 2, 1917, ch. 145, § 5, 39 Stat. 951 (Jones Act) (current version at 8 U.S.C. § 1402 (1976)).

[14] Motion for Summary Affirmance, Brief for the Appellee at 16-17, Harris v. Rosario, 100 S. Ct. 1929 (1980).

[15] The standard of strict scrutiny because of a racial classification first emerged in Korematsu v. United States, 323 U.S. 214 (1944). For a discussion of how the test has been applied see, Coven & Fersh, *Equal Protection, Social Welfare Litigation, the Burger Court*, 51 NOTRE DAME LAW. 873, 875-78 (1976).

[16] Jurisdictional Statement, Brief for the Appellant at 10-14, Harris v. Rosario, 100 S. Ct. 1929 (1980).

United States District Court for Puerto Rico rejected these contentions and ruled that the statute was unconstitutional, citing the arguments set forth by plaintiffs.[17]

The U.S. Department of Health and Human Services (which replaced the Department of Health, Education and Welfare) and Secretary Patricia Harris (who replaced Joseph Califano) appealed the decision. In *Harris v. Rosario* the U.S. Supreme Court reversed Judge Toledo, finding that the challenged law did not violate the equal protection guarantee.[18] The two-paragraph *per curiam* opinion of the Supreme Court offered a pair of justifications for summary judgment on the issue: (1) the territorial clause of the U.S. Constitution empowered Congress "to make all needful Rules and Regulations respecting the Territory"[19] and (2) Puerto Rico may be treated differently than the fifty states under federal law if there is a rational basis for the differentiation.[20] The Court found three reasons why the treatment accorded the Puerto Rican residents was rational. First, the majority pointed out that residents of Puerto Rico do not contribute to the U.S. Treasury, primarily because they do not pay federal income taxes.[21] Second, the Justices calculated that treating Puerto Rico as a state would be costly.[22] And, finally, they concluded that the payment of higher Social Security benefits to Puerto Rican residents might disrupt the island's economy.[23]

These three rationale were drawn from the Court's holding in an earlier case, *Califano v. Torres*.[24] In *Torres* the Justices had ruled that the complete exclusion of Puerto Rico from the Supplemental Security Income (SSI) program did not violate the constitutional right to travel because the exclusion had a rational basis.[25] Although the issue in *Torres* had been whether a complete denial of SSI benefits constituted a violation of the right to travel, the Court had mentioned the equal protection issue in a footnote, suggesting that congressional legislation discriminating against island residents could survive an equal protection challenge.[26]

Justices Brennan and Blackmun objected to the summary disposition of *Harris v. Rosario* because they were not persuaded that the *Torres* decision should be controlling.[27] Justice Marshall openly dissented, asserting that *Torres* had left the equal protection question undecided.[28]

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[17] Rosario v. Califano, No. 77-303 (D.P.R.), *reprinted in* Jurisdictional Statement, Brief for the Appellant, app. A at 19a, Harris v. Rosario, 100 S. Ct. 1929 (1980).

[18] 100 S. Ct. at 1930.

[19] *Id.* (citing U.S. CONST., art. IV, § 3, cl. 2).

[20] *Id.*.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] 435 U.S. 1, 5 n.7 (1977).

[25] *Id.* at 5.

[26] *Id.* at 3 n.4.

[27] 100 S. Ct. at 1930.

[28] *Id.* at 1931 (Marshall, J., dissenting). Justice Marshall argued that *Torres* had been

He especially rejected the majority view that congressional action pursuant to the territorial clause need only be rationally based in order to survive an equal protection challenge. According to Justice Marshall, Puerto Ricans, as U.S. citizens, deserve the usual rights of equal protection and, consequently, discriminatory legislation directed at island residents in fact may merit "[h]eightened scrutiny under the equal protection component of the Fifth Amendment."[29] The dissenting Justice also questioned whether there was truly a rational basis for the legislative discrimination.[30] He pointed out that it is not obviously rational to provide lower benefits to citizens who have the greatest need and that a geographic area should not have the level of its anti-poverty aid reduced simply because it has a weak economy.[31] Justice Marshall complained that even when measured by the Court's "deferential equal protection standard," the congressional limitation on AFDC payments to Puerto Rico raised a serious constitutional question that warranted complete briefing and oral argument, not summary judgment.[32]

One can appreciate the effect which the summary holding will have on the rights of Puerto Rican residents only by examining it in light of the legislation and jurisprudence that have determined those rights. Puerto Rico was ceded to the United States in 1898 under the Treaty of Paris,[33] which ended the Spanish-American War. In the Foraker Act of 1900,[34] Congress provided for the administration of the island by the U.S. president and declared that the residents should be "citizens of Porto [sic] Rico,"[35] a category of nationality which brought the islanders under the protection of the U.S. flag without extending to them the benefits of U.S. citizenship.

The opening of the twentieth century marked the emergence of the United States as a world power; shortly after the passage of the Foraker Act, the Supreme Court decided a series of cases which would have a major impact on the treatment of the newly acquired U.S. territories.[36] On their face these cases involved whether or not Puerto Rico was to be treated as a part of the mainland for the purpose of tariff administration. If Puerto Rico and the other possessions were considered to be part of the

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decided entirely on the basis of the right to travel and therefore no equal protection question had been before the Court in that case. *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 Treaty of Peace, Dec. 10, 1898, United States-Spain, art. II, 30 Stat. 1754.

34 An Act Temporarily to provide revenues and a civil government for Puerto Rico, 31 Stat. 77 (1900) (current version codified in scattered sections of 48 U.S.C.).

35 This official misspelling of Puerto Rico, carried over from the Treaty of Paris, continued until 1932 when it was altered by an act of Congress, 47 Stat. 158 (1932) (codified at 48 U.S.C. § 731 (1976)). *See* Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391, 392 n.1 (1978).

36 Downes v. Bidwell, 182 U.S. 244 (1901); Armstrong v. United States, 182 U.S. 234 (1901); Dooley v. United States, 182 U.S. 222 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901).

United States itself, then the uniformity clause of the Constitution, article I, section 8, would bar Congress from imposing any tariff barriers upon trade with the island and, by implication, would guarantee that the Constitution of the United States and the complete body of federal law would be applied equally in both the mainland states and the new possessions. The ultimate result in these "Insular Cases", however, was quite the opposite—Congress was given free reign to impose tariffs on territorial commerce with the mainland.[37] Furthermore, inhabitants of territories like Puerto Rico were not guaranteed the protection of the Bill of Rights.[38] Thus, the lasting significance of the Insular Cases lies not in their effect on tariff administration (although that was crucial to the protection of mainland business interests[39] such as Louisiana sugar producers), but in their establishment of a precedent for unequal treatment of the newly acquired U.S. possessions under both the U.S. Constitution and federal statutes.

The United States Supreme Court justified this position by distinguishing incorporated territories, such as the Louisiana Purchase lands and Alaska, from unincorporated territories, such as Puerto Rico and the Philippines. According to the Court, the former were destined for statehood from the time of their annexation as U.S. possessions—a judgment based on the Court's perception of congressional intent at the time of the annexation—whereas the latter were merely dependencies under the rule of the federal sovereign.[40] Because the unincorporated territories were not to become states, then, theoretically, their residents were not entitled to all the privileges and protections afforded to the residents of the states. The doctrine of unincorporated territories therefore set the stage for unequal treatment of peoples who were subject to federal laws. Geographical discrimination was henceforth permissible. As a result of this judicial interpretation, the inhabitants of unincorporated territories could be denied the full protection of the Constitution in subsequent Supreme Court decisions, even after they were granted U.S. citizenship.

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[37] Downes v. Bidwell, 182 U.S. 244, 287 (1901).

[38] This became apparent in subsequent decisions relying on the Insular Cases. *See, e.g.*, Balzac v. Puerto Rico, 258 U.S. 298 (1921) (denial of right to jury trial); Dorr v. United States, 195 U.S. 138 (1904) (denial of right to jury trial).

[39] *See* Downes v. Bidwell, 182 U.S. 244, 374 (1901) (Fuller, J., dissenting).

[40] The doctrine of unincorporated territories was first mentioned by Justice Edward White in his concurring opinion in Downes v. Bidwell, *id.* at 287-344 (White, J., concurring). It was first adopted by the majority of the Court in Dorr v. United States, 195 U.S. 138 (1904). There were four dissenters in the Downes case (Justices Fuller, Harlan, Brewer, and Peckham) who would have required the uniform application of the Constitution to all U.S. territories. In reference to the majority decision Justice Fuller wrote,

> [T]he contention seems to be that, if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period; and more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of Congress, irrespective of Constitutional provisions.

195 U.S. at 372 (Fuller, J., dissenting).

As the *Rosario* decision demonstrates, the doctrine of unincorporated territories has had an enduring effect on the status of Puerto Rico vis á vis the U.S. government. Undoubtedly, the island's relationship to the federal government has not been completely static. Within the last thirty years there have been significant changes in the political organization of Puerto Rico. In 1950, Congress granted the Puerto Rican people the right to choose their own government under a Puerto Rican Constitution.[41] By 1952, the Commonwealth of Puerto Rico was in existence.[42] The island has since had an autonomous government unlike that in any other U.S. territory. It has become, as the Spanish version of the Puerto Rican Constitution puts it, a "Freely Associated State."[43] In fact, some commentators have asserted that the Commonwealth compact altered the constitutional status of the island so fundamentally that it is no longer subject to the territorial clause of the U.S. Constitution because Puerto Rico is now self-governing.[44] Moreover, in a series of decisions since 1952, the Supreme Court has extended the protections of the Bill of Rights to the island, thus qualifying some of its previous decisions. For example, Puerto Ricans being tried under Puerto Rican law are guaranteed the rights of due process and equal protection in the same way that residents of the states are guaranteed fair treatment under state law by virtue of the fourteenth amendment.[45]

Puerto Rico, however, clearly has not gained the status of statehood; instead it retains many of the attributes of an unincorporated dependency. In its recent due process rulings, the Supreme Court carefully avoided any pronouncement on the new political status of the island. The Justices held that due process rights against the Puerto Rican authorities are guaranteed by either the fifth amendment, which pertains to actions of federal agents, or the fourteenth amendment, which pertains to actions of state agents, without deciding between the two.[46] In this manner, the Court avoided "the Commonwealth question"—whether or not a freely associated state is still a U.S. territory. The 1950 Puerto Rican Federal Relations Act[47] has emphasized the new independent gov-

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[41] An Act to Provide for the Organization of a Constitutional Government by the People of Puerto Rico; Pub. L. No. 600, 64 Stat. 319 (1950) (codified at 48 U.S.C. § 731b (1976)).

[42] Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PITT. L. REV. 1, 12 (1953).

[43] Note, *¿Puede el Congreso Discriminar Contra los Residentes de Puerto Rico al Aprobar Leyes Nacionales que Proveen Beneficios a los Individuous? Rodriguez Cintrón v. Richardson*, 45 REV. JUR. U.P.R. 45, 62 (1976) (*el Estado Libre Asociado*).

[44] Liebowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 GEO. L.J. 219, 233 (1967); *see also*, Montalvo v. Colon, 377 F. Supp. 1332 (1974).

[45] Examining Bd. v. Flores de Otero, 426 U.S. 572, 599-601 (1976) (due process challenge to Puerto Rican statute requiring licensed civil engineers to be citizens); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668-69 n.5 (1974) (due process challenge to seizure of yacht by Puerto Rican authorities).

The Supreme Court has also recently ruled that fourth amendment protections apply in Puerto Rico. Torres v. Puerto Rico, 442 U.S. 465, 471 (1979).

[46] *See, e.g.*, Examining Bd. v. Flores de Otero, 426 U.S. 572, 601 (1975); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668-69 n.5 (1973).

[47] Pub. L. No. 600, 64 Stat. 319 (1950) (codified at 48 U.S.C. § 731b (1976)).

ernment of the island; however, it kept the residents within congressional control.[48] Under the commonwealth compact, Puerto Rico has no power to conduct foreign relations—the stars and stripes are still flying over the Caribbean island. More importantly, U.S. statutes continue to be good law in Puerto Rico despite the absence of Puerto Rican members in the U.S. Congress, other than a Resident Commissioner who has no vote, and despite the absence of Puerto Ricans in the electoral college.[49]

The commonwealth legislation, therefore, had a paradoxical effect. On the one hand, Puerto Ricans gained more control over their own affairs; on the other hand, the federal sovereign maintained responsibility for the governance of the island. Welfare legislation illustrates the problems inherent in the paradox. Since the 1960's Congress has voted to extend social service programs to the island,[50] thus accepting responsibility for the well-being of the residents; but, at the same time, the legislators have strictly limited the federal commitment to social service spending, thus placing the rest of the burden on the Commonwealth government.[51]

Harris v. Rosario raised two questions regarding this system of cooperative territorial government. First, plaintiffs sought to show that Puerto Rican residents are entitled to claim equal protection under the U.S. Constitution where the actions of the federal authorities seem to be discriminatory.[52] The Supreme Court implicitly recognized that islanders have this right by deciding to hear the case. The Court then had to address the essential question of whether the fifth amendment prohibits discriminatory treatment of Puerto Rico in federal legislation. The Court gave a negative answer to this question, basing its result upon congressional authority to make laws necessary for the governance of the U.S. territories.[53] The Court held that legislation regarding the territories may treat them differently as long as the legislation has a rational basis.[54] Arguably, this holding is a throwback to the Insular Cases, where discriminatory legislation regarding unincorporated territories was upheld.[55] In *Rosario*, the Court treats Puerto Rico as if it were an unincorporated territory and thus subject to a lower standard of equal protection scrutiny.

The *Rosario* decision not only demonstrates how the Supreme Court

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[48] Magruder, *supra* note 42, at 8, 17.

[49] Cabranes, *supra* note 35, at 489-90.

[50] There are now twenty-two significant federal grant-in-aid programs that have the same sort of statutory restrictions as those at issue in *Rosario*. Keifer, *supra* note 7, at 677.

[51] For a discussion of the effect this social spending has had on Puerto Rican-U.S. relations, see Leibowitz, *The Drift of the Commonwealth*, 34 REV. C. ABO. P.R. 635 (1973).

[52] Jurisdictional Statement, Brief for the Appellee at 14, Harris v. Rosario, 100 S. Ct. 1929 (1980).

[53] 100 S. Ct. at 1930.

[54] *Id.*

[55] *See* text accompanying notes 36-40 *supra*.

views a U.S. territory, but also underlines the manner in which the Court is now treating equal protection challenges. The Warren Court expanded the concept of equal protection during the 1960's and allowed the judiciary to take an active role in the overthrow of discriminatory legislation.[56] At that time, the Court established a two-tiered equal protection test under which any law utilizing a suspect class, for instance, race,[57] or any law involving a fundamental right, such as the right to interstate travel,[58] would be given "strict scrutiny" under the U.S. Constitution.[59] Unless the Court could discern some compelling state interest to justify a discriminatory classification, the law was declared unconstitutional.[60] If no such fundamental interest or suspect class were present, then the question became whether or not the government had a rational basis for its legislative action; that is, whether the law had a valid governmental purpose.[61] This standard of minimum scrutiny was applied in a variety of regulatory situations in which the Court upheld federal attempts to control business activities.[62]

In the Burger Court, equal protection issues have been given different treatment. The Court has refused to recognize new suspect classes, such as the poor, and, in fact, has rarely engaged in the close scrutiny of an equal protection claim.[63] It has, instead, jumped directly into a search for the rational basis of the alleged discrimination.[64] This is especially true in the area of welfare legislation, where the Court has upheld both state[65] and federal[66] efforts to impose fiscal restraints on aid programs, even when those efforts have caused hardship among an identifiable class of plaintiffs.[67]

The summary judgment in *Harris v. Rosario* follows this pattern precisely. In *Rosario*, the Court failed to consider plaintiffs' demand for close scrutiny of the suspect classification, noting simply that the Constitution empowers Congress to make necessary laws regarding the territories.[68] The majority then examined the rational basis for the welfare legislation being challenged and concluded that the need to contain spending and protect the economy of Puerto Rico gave Congress a rational basis for the legislation.[69]

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56 Coven & Fersh, *supra* note 15, at 874-77.
57 *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).
58 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).
59 Coven & Fersh, *supra* note 15, at 874-76.
60 *Id.* at 875-76.
61 *Id.* at 874-75.
62 Note, *Equal Protection: Modes of Analysis in the Burger Court*, 53 DEN. L.J. 687, 712-13 (1976).
63 *Id.* at 691-92.
64 *Id.* at 688, 702-12.
65 Dandridge v. Williams, 397 U.S. 471 (1970).
66 Richardson v. Belcher, 404 U.S. 78 (1971).
67 Note, *supra* note 62, at 689.
68 100 S. Ct. at 1930.
69 *Id.*

Dissenting Justice Thurgood Marshall attacked the decision of the majority because of its refusal to consider whether close scrutiny of the discriminatory legislation might be appropriate.[70] Was the Court, in fact, ignoring a suspect class in *Rosario*? Certainly the class of Puerto Rican residents eligible for welfare benefits is unlike any other suspect class recognized in constitutional jurisprudence. It is not a racial category, although most of its members are non-white, and it is not a religious category, although most of its members are Catholic. In any event, the welfare legislation does not discriminate on the basis of a previously recognized suspect classification; rather, it relies on geographical boundaries. The purpose of the equal protection right is to assure that a minority does not suffer from prejudicial legislation passed by the majority—laws must be applied uniformly to all. Residents of territorial possessions, however, have historically suffered from unequal treatment under the law;[71] thus, geographical categorization has been seen as acceptable. The arguments of plaintiffs in *Rosario* were therefore quite novel. They were asking the Court to rule that Puerto Rico has been treated unfairly throughout its history because of its status as a territory. There are reasonable arguments in support of this position. Puerto Ricans are powerless to influence the decision-making process of the majority, and they have indeed suffered from unequal treatment in the past. Moreover, it is, on its face, highly inequitable to deny adequate social services to a group of U.S. citizens by cutting back federal funding to the group merely because it is located in a U.S. territory. Nevertheless, it is unlikely that any panel of Supreme Court justices would hold that residents of a territorial dependency are automatically part of a suspect class. To do so would disrupt congressional power to deal with territories as territories because residents of U.S. possessions would have to be treated as citizens of the states. Puerto Rico's commonwealth status complicated the issue but did not change the outcome. In the past the Supreme Court has avoided any ruling on the political significance of commonwealth status.[72] The decision in *Harris v. Rosario* is significant because it closes the door on that problem—an area which has been designated a commonwealth is still a U.S. territory and, as such, is subject to legislative discrimination.

Given that legislative discrimination based on the territorial clause does not demand close scrutiny, was the legislation regarding the AFDC program rationally justified? Did the Court find an appropriate rational basis for the law?[73] First, the majority noted that Puerto Rican residents are exempted from the individual income tax and that, as a consequence, they make no contribution to the federal coffers.[74] It follows from this

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[70] *Id.* at 1931 (Marshall, J., dissenting).

[71] Camacho-Negrón & Larson, *In the Promotion of Well-Being: The Situation of Puerto Rico Under the United States Constitution*, 40 REV. C. ABO. P.R. 11, 14-20 (1979).

[72] *See* text accompanying note 46 *supra*.

[73] 100 S. Ct. at 1932 (Marshall, J., dissenting).

[74] *Id.* at 1930.

line of reasoning that the Puerto Rican government, which imposes and collects its own individual income tax, should use the revenues from that tax to fulfill social security needs on the island. The majority, however, fails to recognize the theoretical and practical fallacies in this rationale. In theory, welfare spending in an area of the United States is not based on that area's ability to contribute to federal revenues. The opposite is true; in the poorest areas of the mainland the federal government makes the largest contribution.[75] The fact that Puerto Rican residents are exempted from the U.S. income tax should not mean that they also are to be denied anti-poverty aid. Moreover, in practice, the island is so poor that individual taxation fails to raise substantial revenues.[76] Puerto Rico is caught in the taxation trap experienced by many poor countries. In order to encourage industrialization and promote economic growth, many developing nations have offered tax incentives to corporations that choose to enter their boundaries.[77] In the case of Puerto Rico, the incentives are two-sided: Puerto Rico waives the right to tax corporations, sometimes for as long as twenty-five years, and the United States does the same, by offering special tax benefits to "possessions corporations."[78] Therefore, a lucrative source of tax revenue is lost to both the Commonwealth and the United States. Both governments are consequently unable to fund anti-poverty programs from money gathered on the island. At the same time, the development strategy, which relies on corporate investment to produce beneficial economic effects, has failed to relieve the massive social problems on the island.[79]

Second, the Court noted that full extension of the AFDC program to Puerto Rico would mean that an additional $30 million per year would be spent from federal revenues.[80] This fact alone is cited as a rational basis for the challenged statute.[81] The Court also was concerned that a decision in favor of plaintiffs might result in the overthrow of other discriminatory aspects of the Social Security system as it is administered in Puerto Rico, with the consequence that the U.S. government would be compelled to spend an extra $240 million annually.[82] While this is a powerful motive for Congress to cut off funds to Puerto Rico at a certain level, the issue facing the Court under its own formulation of the equal protection standard was whether the means employed by Congress were congruent with the purpose of the AFDC program. The Court fails to recognize that Puerto Rico would be entitled to this anti-poverty aid precisely because the island is extremely poor. Cutting off funds to those

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[75] *See, e.g.*, 42 U.S.C.A. § 1396d(b) (West Cum. Supp. 1980).

[76] *See* Keifer, *supra* note 7, at 670-71.

[77] *See, e.g.*, PRICE, WATERHOUSE & CO., INFORMATION GUIDE FOR THOSE DOING BUSINESS IN MEXICO 107 (1979).

[78] Kiefer, *supra* note 7, at 659-63.

[79] *Id.* at 668-69.

[80] 100 S. Ct. at 1930 n.*.

[81] *Id.* at 1930.

[82] *Id.* at n.*.

who are most in need by establishing an arbitrary ceiling on spending is not a rational means of running a social services program.[83]

Finally, the Court noted that increased federal spending in Puerto Rico could seriously disrupt the fragile economy of the island.[84] This basis for denial of benefits is the most troubling of the rationale advanced by the Court.[85] It is undeniable that Puerto Rico's economy is in sad shape—unemployment among those capable of working is calculated at 59% (despite the fact that approximately one-half of the island's population has left for the United States),[86] inflation exceeds levels on the mainland, and per capita income is still 64% below the U.S. average.[87] Significantly, the cost of living in San Juan is comparable to that in Washington, D.C.,[88] making poverty in Puerto Rico a tremendous handicap. Furthermore, economic priorities are not set by Puerto Ricans. The economy is dominated by non-resident investors who own more than half of the capital assets on the island.[89] As Jose Herrero, an economist at the University of Puerto Rico, has noted, the Commonwealth is "an economic parasite of the United States."[90] The Court offers no explanation for the sort of effects that extra AFDC spending would have in this situation. Presumably, the majority was worried about the effect that welfare money would have on unemployment by further discouraging recipients from seeking jobs.[91] Yet, such a disincentive would operate with equal force on the mainland as a drag on economic growth within a depressed area, and could hardly be justification for a cut-off of funds to one of the states. The Supreme Court was not bound to decide the wisdom of a welfare payment scheme as an economic measure; instead, its task was to find whether the discriminatory treatment of Puerto Rico had a rational basis. The argument that Congress afforded Puerto Rico unequal treatment in order to protect the Puerto Rican economy is not supported by the legislative history of the AFDC statutes[92] and is illogical. Congress could not "protect" the Puerto Rican economy by denying the island equal access to federal funding.

The rational bases discussed by the majority in *Rosario* are sorely inadequate. As several commentators have noted, the federal govern-

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[83] *See id.* at 1932 (Marshall, J., dissenting).

[84] *Id.* at 1930.

[85] *See id.* at 1932 (Marshall, J., dissenting).

[86] Herrero, *La Economia de Puerto Rico: El Presente Critico*, 45 REV. JUR. U.P.R. 197, 201-02 (1976) (commentator's translation).

[87] Keifer, *supra* note 7, at 666.

[88] U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, FEDERAL INTERAGENCY STUDY GROUP, ECONOMIC STUDY OF PUERTO RICO, SOCIAL CONDITIONS AND HUMAN SERVICES PROGRAM (1978), *cited in* Jurisdictional Statement, Brief for the Appellee at 24-26, Harris v. Rosario, 100 S. Ct. 1929 (1980).

[89] Keifer, *supra* note 7, at 666.

[90] Herrero, *supra* note 86, at 200. (commentator's translation).

[91] Puerto Ricans share this concern. *Id.*

[92] 100 S. Ct. at 1932 (Marshall, J., dissenting); *accord*, Camacho-Negrón & Larson, *supra* note 71, at 18.

ment has assumed responsibility for the well-being of Puerto Rican residents and there is no good justification for continuing to treat the islanders as second class citizens.[93] Many Puerto Ricans welcomed the advent of the Commonwealth in 1952 as an opportunity for the island to obtain a dignified self-governing status,[94] but the *Rosario* decision clearly highlights the inadequacy of the new form of government. Those Puerto Ricans in favor of statehood may use the *Rosario* holding to argue that only statehood will provide equal treatment for the islanders. On the other hand, those factions favoring independence can use the decision to argue that the economy of the island will be saved only if it is directed by the local population, that Puerto Rico can not be secure socially until the economy is reoriented, and that the United States Supreme Court has shown how commonwealth status relegates Puerto Rico to an inferior, dependent position with regard to the United States.

As the debate over Puerto Rico's future shows, the real significance of the *Rosario* holding lies in its political consequences. The territories of the United States are remnants of the American Empire built at the turn of the century. The decision in *Harris v. Rosario* rests implicitly upon the outmoded concept of unincorporated territories, a convenient paradigm utilized by the Court during past periods of U.S. expansionism.[95] The precedential value of this idea, which originated in the Insular Cases, is highly questionable. The Court itself gradually has extended the benefits of the Bill of Rights to the territories and devitalized the paradigm; nevertheless, in *Rosario* the Court has taken a step backward. It has ruled, in a summary judgment, that the Constitution gives Congress a blank check in dealing with the territories so long as congressional actions have some discernible rational basis. Such a holding could have devastating consequences for the quality of life in U.S. possessions, especially during an era of severe fiscal restraint. Could Congress rationally refuse to provide any AFDC or Medicaid benefits in the territories? Under the rationale advanced in *Rosario* such an action seems quite possible, as it is difficult to find any reason why budgetary necessity would not be enough to give such legislation a rational basis.[96] Moreover, congressional discriminations similar to those at issue in *Rosario* may be, and have been, imposed on the other U.S. territories—Guam, American Samoa, and the Virgin Islands.[97]

The United States should reject neo-colonialism and attempt to aid

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[93] Leibowitz, *supra* note 44, at 270. See also an article supporting this contention, which was written by the defendant in the *Rosario* case, Harris, *Developmental Problems in the Concept of Citizenship with Particular Attention to the United States-Puerto Rico Citizenship*, 15 HOWARD L.J. 47, 53 (1968).

[94] Magruder, *supra* note 42, at 16, 20.

[95] *See* text accompanying notes 36-40 *supra*.

[96] The rational basis test has been the standard applied in recent Social Security cases. *See, e.g.*, Califano v. Aznavorian, 439 U.S. 170 (1978); Dandridge v. Williams, 397 U.S. 471 (1970).

[97] *See, e.g.*, 42 U.S.C. § 1308 (1976 & Supp. III 1979).

both its own territories and the independent, underdeveloped nations in their efforts to achieve economic self-sufficiency. Many Latin American nations have recently attempted to alter their dependent relationship with the developed countries and to redirect their economies so as to benefit internal social development. Puerto Rico needs the same sort of economic redirection; however, it is caught in a paradoxical relationship with the United States that restricts its ability to determine its own destiny. At the same time, the U.S. Congress has refused to extend equality in social services to the island.

At issue in the *Rosario* case was a question which is crucial to the future administration of U.S. dependencies—whether the Constitution of the United States allows Congress to limit aid to the territories, merely because they are territories, and thereby discriminate against their inhabitants. Historically, such discrimination has been allowed; however, one may question whether the territorial clause of the Constitution still should be interpreted to allow for purposeful unequal treatment of the needy citizens who reside in the U.S. possessions. The point is not that territorial residents are entitled to welfare benefits, because no U.S. resident is automatically entitled to welfare benefits.[98] The point is that all of the nation's citizens should be entitled to equal protection under federal law. Since 1900, the U.S. Supreme Court has had the responsibility of determining the rights and privileges of the people of Puerto Rico. In *Harris v. Rosario* the Court summarily rejected an opportunity to correct past injustices. The majority could have overthrown the stale precedent set in the Insular Cases and ordered that the laws be applied uniformly to every area which flies the U.S. flag, or it could have found that geographical discrimination creates a suspect class. Given, however, that the consequence of such rulings would be an emasculation of the power of Congress pursuant to the territorial clause, a less radical alternative would have been more appropriate. For instance, the Justices might have ruled that budgetary expediency cannot be used to justify unequal treatment of territorial residents and that Congress had expressed no other rational basis for the challenged statute. Such a holding would have assured that future legislative discriminations must be rationally related to the purpose of the law and not merely attempts to save money at the expense of a geographically determined group. But, instead of choosing any of these courses, the Court turned back the clock and simply said "no" to equal treatment of Puerto Rico.

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[98] Coven & Fersh, *supra* note 15, at 885. *Cf.* Harris v. McRae, 100 S. Ct. 2671, 2688 (1980) (federal government has no duty to provide funding for abortions).