CONSTITUTIONAL LAW — INCORPORATION — PUERTO RICO DISTRICT COURT HOLDS THAT THE SEVENTH AMENDMENT APPLIES TO STATES, COMMONWEALTHS, AND TERRITORIES. — *Gonzalez-Oyarzun v. Caribbean City Builders, Inc.*, No. 14-1101, 2014 WL 2885027 (D.P.R. June 25, 2014).

All but a handful of the protections of the Bill of Rights have been applied to the states through the doctrine of incorporation.[1] In 2010, the Supreme Court entered its latest pronouncement on incorporation, applying the Second Amendment to the states in *McDonald v. City of Chicago*.[2] This case seemed to open the door for applying the remaining unincorporated rights to the states by casting doubt on the Court's pre–selective incorporation[3] precedents and articulating a "single, neutral principle"[4] for assessing rights by focusing on their importance specifically within the American tradition.[5] Recently, in *Gonzalez-Oyarzun v. Caribbean City Builders, Inc.*,[6] the federal district court in Puerto Rico declared that the Seventh Amendment right to a civil jury trial[7] applied to both the states and the territories in order to enforce a forum-selection clause directing the parties to a jurisdiction that did not provide for civil juries. The court's move on the Seventh Amendment issue was a bold one in light of contrary, binding First Circuit precedent[8] and the Supreme Court's previous refusal to apply the Seventh Amendment to the states.[9] But perhaps initially more remarkable was the district court's almost complete reluctance to discuss Puerto Rico's territorial status and its relevance to a Bill of Rights incorpora-

---

[1] *See* Suja A. Thomas, *Nonincorporation: The Bill of Rights After* McDonald v. Chicago, 88 NOTRE DAME L. REV. 159, 159 (2012). By 2010, the Supreme Court had explicitly held that only the Fifth Amendment right to grand jury indictment, the Sixth Amendment right to jury unanimity in criminal cases, and the Seventh Amendment right to civil jury trial were not incorporated. *Id.* Before *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), and the period of selective incorporation, several cases had held that the Second Amendment was also not incorporated against the states. *See* Thomas, *supra*, at 179–80.

[2] 130 S. Ct. 3020.

[3] Under the theory of selective incorporation, the Court began to apply portions of the Bill of Rights to the states if a particular protection was considered "essential to liberty and justice and therefore was a fundamental right." Thomas, *supra* note 1, at 163.

[4] *McDonald*, 130 S. Ct. at 3048 (plurality opinion).

[5] *See* Thomas, *supra* note 1, at 178–80; *see also McDonald*, 130 S. Ct. at 3034, 3035 n.13 (noting that the cases involving applicability to the states of the Seventh Amendment civil jury trial right and Fifth Amendment right to grand jury indictment "long predate the era of selective incorporation").

[6] No. 14-1101, 2014 WL 2885027 (D.P.R. June 25, 2014).

[7] The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII.

[8] Rivera v. Centro Médico de Turabo, Inc., 575 F.3d 10 (1st Cir. 2009).

[9] Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916).

tion analysis. Under a typical reading of the Supreme Court's *Insular Cases*,[10] the "unincorporated territories" of the United States — which traditionally include Puerto Rico — do not enjoy the full protections of the U.S. Constitution.[11] The analytical gap in *Gonzalez-Oyarzun* can be explained by the presiding judge's prior decision in *Consejo de Salud Playa de Ponce v. Rullan*,[12] which held — in seeming contradiction to the *Insular Cases* — that Puerto Rico was an "incorporated territory."[13] But by dodging the question of Puerto Rico's territorial status and implicitly affirming *Consejo de Salud*'s holding, the federal district court spoke on a question best left to Puerto Rico's political process.

Gonzalez-Oyarzun originated as a simple employment dispute. Faustino Gonzalez-Oyarzun began working as an administrator for Caribbean City Builders[14] on February 5, 2007.[15] Entrusted with handling the joint defendants' real estate properties, he was by all accounts an excellent worker and was never disciplined.[16] Despite Gonzalez-Oyarzun's record, Caribbean City Builders fired him five-and-a-half years later.[17] They never stated a reason for firing him, but weeks earlier had hired Pilar González and Ana Pabón, both in their late thirties to early forties, as his replacements.[18] Gonzalez-Oyarzun was sixty-five years old at the time of his termination.[19] Upon his release, he entered into a termination agreement waiving certain potential causes of action against Caribbean City Builders.[20] The agree-

---

[10] This term is normally used for a series of nine 1901 decisions regarding the territories acquired after the Spanish-American War. Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The* Insular Cases *(1901–1922)*, 65 REV. JUR. U.P.R. 225, 240 & n.40 (1996). Many scholars extend the *Insular Cases* to include later decisions, like 1922's *Balzac v. Porto Rico*, 258 U.S. 298 (1922), which dealt with the same or similar issues. Rivera Ramos, *supra*, at 240–41.

[11] *See* Rivera Ramos, *supra* note 10, at 261. Under these cases, unincorporated territories traditionally enjoy only "fundamental rights." *Id.*

[12] 586 F. Supp. 2d 22 (D.P.R. 2008).

[13] *Id.* at 43.

[14] The court determined that Caribbean City Builders, Inc. and the other co-defendants — Me Salve, Inc.; GIB Development, LLC; John Doe; and Insurance Company X — shared common ownership, worked in an integrated fashion, and exercised sufficient control over the details of Gonzalez-Oyarzun's employment so as to constitute a single employer. *Gonzalez-Oyarzun*, 2014 WL 2885027, at *1, *3. The joint defendants will be referred to solely as Caribbean City Builders.

[15] *Id.* at *3.

[16] *Id.*

[17] *See id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* As consideration for signing the termination agreement, Gonzalez-Oyarzun received a check in the sum of $25,000, which Caribbean City Builders noted he accepted, deposited, and spent. Motion in Compliance with Order Regarding Whether the Seventh Amendment of the United States Constitution Has Been Incorporated at 7, *Gonzalez-Oyarzun*, 2014 WL 2885027 (No. 14-1101) [hereinafter Motion in Compliance with Order].

ment also contained a clause directing the parties to the San Juan Court of First Instance — a territorial court of Puerto Rico — for resolution of any controversy arising from it.[21]

Notwithstanding the waiver, Gonzalez-Oyarzun filed a complaint against his former employers in federal district court under the Age Discrimination in Employment Act and subsequently submitted an amended complaint requesting a jury trial.[22] Caribbean City Builders moved to dismiss the case on several grounds including failure to exhaust administrative remedies, waiver and release of causes of action under Puerto Rico law, and finally forum non conveniens based on the forum-selection clause.[23] Gonzalez-Oyarzun contested the validity of the forum-selection clause on the grounds that the selected forum did not allow for civil jury trials in violation of his Seventh Amendment right.[24] On May 1, 2014, the court ordered both parties to submit supplemental briefing on the question of whether the Seventh Amendment right to civil jury trial had been incorporated to the states, commonwealths, and territories.[25]

Authoring the opinion, Judge Gelpí began his evaluation of the validity of the forum-selection clause with a quick paragraph.[26] First he quoted the seemingly unambiguous language of the clause.[27] Then he declared the clause presumptively valid under the Supreme Court's forum-selection precedents in *Atlantic Marine Construction Co. v. U.S. District Court*[28] and *The Bremen v. Zapata Off-Shore Co.*,[29] which together stand for the proposition that "forum-selection clauses should control except in unusual cases."[30]

In evaluating forum-selection clauses, *Bremen* specifically requires enforcement unless doing so would be unreasonable or unjust or otherwise against public policy.[31] Gonzalez-Oyarzun maintained that

---

[21] *Gonzalez-Oyarzun*, 2014 WL 2885027, at *3.

[22] *Id.* at *1–2.

[23] *Id.* at *1, *3.

[24] *Id.* at *3–4. Gonzalez-Oyarzun claimed his suit was properly before the court as he had exhausted the requisite administrative procedures by initially filing his charge of age discrimination with the Puerto Rico Antidiscrimination Unit and the Equal Employment Opportunity Commission (EEOC) on March 15, 2013. *Id.* at *2. He waited the requisite sixty days after filing with the EEOC to file suit in district court. *See id.* at *2–3. Caribbean City Builders concurrently filed a claim for breach of contract in the San Juan Court of First Instance, the venue specified in the termination agreement's forum-selection clause. *Id.* at *3.

[25] *See id.* at *1.

[26] *Id.* at *4.

[27] *Id.*

[28] 134 S. Ct. 568 (2013).

[29] 407 U.S. 1 (1972). In *Bremen*, the Court held that "the forum clause should control absent a strong showing that it should be set aside." *Id.* at 15.

[30] *Atl. Marine*, 134 S. Ct. at 582.

[31] *See Bremen*, 407 U.S. at 15; *Gonzalez-Oyarzun*, 2014 WL 2885027, at *4.

deprivation of the Seventh Amendment fell within the exception and so the presumptive validity of the clause should not hold here. Judge Gelpí acknowledged that in 2009 the First Circuit in *Rivera v. Centro Médico de Turabo, Inc.*[32] had considered and rejected the "exact argument" raised by Gonzalez-Oyarzun.[33] *Rivera* held that a forum-selection clause directing parties to a Puerto Rican territorial court constituted a valid jury trial waiver since the Seventh Amendment had not been incorporated through the Due Process Clause of the Fourteenth Amendment.[34] Nevertheless, Judge Gelpí determined that recent, post-*Rivera* legal developments suggesting the Seventh Amendment right had been incorporated to the states changed the usual analysis by which courts evaluated forum-selection clauses.[35] Persuaded that deprivation of a fundamental liberty interest would be unreasonable and unjust, and that protection of such an interest would be in furtherance of public policy, Judge Gelpí felt compelled to reevaluate the Seventh Amendment incorporation question despite *Rivera*'s mandate.[36]

The court began by establishing the Seventh Amendment's historical significance as a "fundamental" fixture in American jurisprudence.[37] Citing jurists who considered the jury trial "the most transcendent privilege"[38] and judges who considered it a "bulwark against tyranny,"[39] the court conveyed the "well-documented"[40] attitudes of respected commentators to root the jury trial right in the nation's history and tradition.[41] Swimming in historical evidence, the court felt it could not but affirm the "paramount importance" and fundamental status of the civil jury trial right.[42]

The court turned from the Seventh Amendment's historical pedigree to its incorporation status under Supreme Court and First Circuit jurisprudence. On the one hand, the Supreme Court held in *Minneapolis & St. Louis Railroad Co. v. Bombolis*[43] that the Seventh

---

[32] 575 F.3d 10 (1st Cir. 2009).

[33] *Gonzalez-Oyarzun*, 2014 WL 2885027, at *4.

[34] *Rivera*, 575 F.3d at 23; *see also Gonzalez-Oyarzun*, 2014 WL 2885027, at *4.

[35] *Gonzalez-Oyarzun*, 2014 WL 2885027, at *4.

[36] *See id.*

[37] *Id.* at *4–5.

[38] *Id.* at *5 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *379); *see also id.* (noting Blackstone's additional observation that trial by jury was "the glory of the English law").

[39] *Id.* (quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting)).

[40] *Id.* The court also cited extensively to the writings of the founding era to prove the jury right's fixture in the American system. *See id.* at *5–6.

[41] *Id.*

[42] *Id.* at *7.

[43] 241 U.S. 211 (1916).

Amendment was not incorporated to the states.[44] Moreover, in *Rivera* the First Circuit had relied on *Bombolis* to reject the argument that a forum-selection clause directing litigants to a Puerto Rican court violated the Seventh Amendment.[45] On the other, the district court noted that *McDonald*, decided just one year after *Rivera*, "open[ed] the door to selective incorporation of the Seventh Amendment."[46] By holding that the right to bear arms was "fundamental to *our* scheme of ordered liberty and system of justice,"[47] *McDonald* seemed to "shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause."[48] Moreover, the Court explicitly cast doubt on cases like *Bombolis* that "long predate the era of selective incorporation."[49] Adhering to *McDonald*'s refusal to apply a "watered-down, subjective version" of the Bill of Rights to the states,[50] the court held that — notwithstanding *Rivera* and *Bombolis* — the Seventh Amendment was incorporated.[51]

The court ended on a deferential note despite its consequential holding. While recognizing that the prerogative of expanding *McDonald* beyond the Second Amendment would "[o]rdinarily . . . belong[] to the Supreme Court," the district court determined that *McDonald* directly controlled and thus compelled the present decision despite the contrary holdings of *Bombolis* and *Rivera*.[52] The court expressed a hope that its reviewing court would not "construe [its] opinion as an effort by a lower court to avoid a directive of a circuit decision."[53] After all, according to the district court, ignoring *McDonald*'s mandate and instead following *Rivera* "would be a dereliction of duty" when the Seventh Amendment right hangs in the balance.[54]

More than merely incorporating the Seventh Amendment to the states, *Gonzalez-Oyarzun* incorporated the right to the *commonwealths*

---

[44] *Id.* at 217.

[45] *Gonzalez-Oyarzun*, 2014 WL 2885027, at *7.

[46] *Id.* at *8.

[47] *Id.* (quoting McDonald v. City of Chicago, 130 S. Ct. 3020, 3034 (2010)) (internal quotation mark omitted).

[48] *Id.* (quoting *McDonald*, 130 S. Ct. at 3034) (internal quotation marks omitted).

[49] *Id.* (quoting *McDonald*, 130 S. Ct. at 3035 n.13) (internal quotation mark omitted).

[50] *Id.* (quoting *McDonald*, 130 S. Ct. at 3035).

[51] *Id.* at *12. Judge Gelpí was careful to define the scope and impact of incorporation of the Seventh Amendment in Puerto Rico. He recalled *McDonald*'s limiting language, noting that the Bill of Rights guarantees were not absolute and did not confer on "everyone, everywhere, [the ability] to exercise such rights without restriction whenever they wish." *Id.* at *9 (citing District of Columbia v. Heller, 554 U.S. 570, 595 (2008)). Employing that logic in the present case, Judge Gelpí concluded that the civil jury trial right might not apply to, for instance, admiralty or maritime claims, claims against the sovereign, or "small claims." *Id.* at *9–11.

[52] *Id.* at *12. Despite disagreeing about the issue of civil juries, Judge Gelpí noted that both his decision and *Rivera* ultimately enforced a forum-selection clause. *Id.* at *4.

[53] *Id.* at *13.

[54] *Id.*

and territories of the United States.[55] Significantly, the decision came down in the district court of Puerto Rico, a U.S. territory whose legal status is and has been a subject of intense debate. But the court largely omitted discussion of Puerto Rico's legal status, assuming that a Seventh Amendment right incorporated to the states would necessarily be incorporated to Puerto Rico as well. The district court previously held that Puerto Rico is an incorporated territory in *Consejo de Salud*, and that decision is the necessary background that makes sense of the *Gonzalez-Oyarzun* court's analysis. By delivering an avoidable Seventh Amendment ruling that bolsters Puerto Rico's legal parity with the states, *Gonzalez-Oyarzun* represents a continued commitment to the principle that Puerto Rico is "incorporated" as articulated in *Consejo de Salud*. While the decision entailed a seeming expansion of individual rights, it interposes itself in an institutional question best decided by Puerto Rico's own political processes.

At the outset, the district court seemed to miss a crucial step in its Seventh Amendment inquiry: whether Puerto Rico's legal status affected the outcome of Seventh Amendment incorporation.[56] The *Insular Cases*, beginning with Justice White's concurrence in *Downes v. Bidwell*,[57] introduced the concept of territorial incorporation to address whether the "Constitution follow[ed] the flag" in the newer territories acquired after the Spanish-American War.[58] Unlike the Western continental territories that ultimately achieved statehood, these new island territories were perceived as different: they were "far off, not contiguous to the continent, . . . and, above all, inhabited by alien peoples untrained in the arts of representative government."[59] The territorial incorporation doctrine ultimately held that the Constitution applies fully in incorporated territories destined for statehood but only partially in those newer "unincorporated" territories.[60] The *Insular Cases*, beginning with *Downes v. Bidwell*, and the subsequent case, *Balzac v.*

---

[55] *Id.*

[56] Significantly, the supplemental brief provided by the plaintiff devoted a whole section to this question. *See* Plaintiff's Brief Re: Incorporation of Seventh Amendment's Rights at 2–9, *Gonzalez-Oyarzun*, 2014 WL 2885027 (No. 14-1101) [hereinafter Plaintiff's Brief].

[57] 182 U.S. 244 (1901); *id.* at 287 (White, J., concurring).

[58] Rivera Ramos, *supra* note 10, at 269 (internal quotation mark omitted) (quoting a popular formulation of the controversy); *see also id.* at 237–41.

[59] *Id.* at 237–38. It is difficult to ignore the Anglo-Saxon ethnocentrism that permeated these opinions, which were contemporaneous with the Court's more notorious decision in *Plessy v. Ferguson*. *See* Sanford Levinson, *Installing the* Insular Cases *into the Canon of Constitutional Law*, *in* FOREIGN IN A DOMESTIC SENSE 121, 131 (Christina Duffy Burnett & Burke Marshall eds., 2001); *cf.* Consejo de Salud Playa de Ponce v. Rullan, 586 F. Supp. 2d 22, 30 (D.P.R. 2008) (noting the *Insular Cases* "made no common sense and . . . showed extreme racism as well as ignorance of the realities of the island at the time").

[60] Boumediene v. Bush, 553 U.S. 723, 757 (2008).

Porto Rico,[61] settled the question of whether Puerto Rico specifically had been incorporated into the United States, deciding it had not.[62]

Over one hundred years after the acquisition of Puerto Rico, its status as an unincorporated territory has been cast into some doubt and remains unclear. The *Insular Cases* have been condemned quite fairly for their racist undercurrents,[63] but their holdings have not been outright overruled. Over time the Court has whittled away at the controversial unincorporated status that Puerto Rico ostensibly holds, lending credence to the notion that the island's status may have evolved.[64]

A 2008 District Court of Puerto Rico case, *Consejo de Salud*, also decided by Judge Gelpí, purported to settle the question of Puerto Rico's legal status. Amidst the growing uncertainty regarding Puerto Rico's status, *Consejo de Salud* held that Puerto Rico was an incorporated territory, and therefore protected against disparate treatment in the granting of Medicaid monies.[65] Judge Gelpí acknowledged the unfavorable precedents of the *Insular Cases* but held that case law and congressional action in Puerto Rico's 110-year history as a U.S. territory had effectively incorporated the island.[66] The court concluded that Puerto Rico was "chiseled in the very image and likeness of the United States system of government and laws,"[67] and that allowing Puerto Rico's status as unincorporated to persist was tantamount to allowing Congress to "switch on and off the Constitution."[68]

Gonzalez-Oyarzun unmistakably depended on what was established in *Consejo de Salud*, without which the court would have had to en-

---

[61] 258 U.S. 298 (1922) (holding constitutional provisions guaranteeing criminal jury trial did not apply in an unincorporated U.S. territory). *Balzac* foreclosed the possibility that the Organic Act of Porto Rico of March 2, 1917, Pub. L. No. 64-368, 39 Stat. 951, which bestowed U.S. citizenship to residents of Puerto Rico, could be understood as implicit congressional incorporation of the island. *Balzac*, 258 U.S. at 313.

[62] Rivera Ramos, *supra* note 10, at 249.

[63] *See, e.g.*, WINFRED LEE THOMPSON, THE INTRODUCTION OF AMERICAN LAW IN THE PHILIPPINES AND PUERTO RICO 1898–1905, at 105 (1989) ("To a large extent the *Insular Cases* have come to be viewed in a more pluralistic society as representative of a blatant racism that denied Puerto Ricans and Filipinos citizenship on undisguised racist grounds." (italics added)); Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 307 (2007).

[64] *See, e.g.*, Torres v. Puerto Rico, 442 U.S. 465, 475–76 (1979) (Brennan, J., concurring in the judgment) ("Whatever the validity of the old cases such as *Downes* . . . and *Balzac* . . . , in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment — or any other provision of the Bill of Rights — to the Commonwealth of Puerto Rico in the 1970's."); Plaintiff's Brief, *supra* note 56, at 3 ("Puerto Rico 'seem[s] to have become a State within a common and accepted meaning of the word.'" (alteration in original) (quoting United States v. Laboy-Torres, 553 F.3d 715, 721 (3d Cir. 2009) (O'Connor, J., Ret.))).

[65] Consejo de Salud Playa de Ponce v. Rullan, 586 F. Supp. 2d 22 (D.P.R. 2008).

[66] *Id.* at 27, 41–44.

[67] *Id.* at 40 (emphasis omitted).

[68] *Id.* at 44 (emphasis omitted).

gage in two separate analyses to apply the Seventh Amendment. First, for Bill of Rights incorporation of the Seventh Amendment, it would have had to prove the right was "fundamental to our scheme of ordered liberty and system of justice" or deeply rooted in the nation's history under *McDonald*. Second, to determine whether the right applied in unincorporated territories, the court would have had to prove the Seventh Amendment was one of "those fundamental limitations in favor of personal rights"[69] which are "the basis of all free government."[70] This latter inquiry was absent from the analysis.

Though the word "fundamental" seems central to each question, there is reason to believe the two doctrines embrace different understandings of what qualifies as such.[71] The *Insular Cases* conducted a hierarchical line-drawing between rights that could be considered "fundamental limitations in favor of personal rights" which are "the basis of all free government" and "artificial or remedial rights" that were "peculiar to Anglo-Saxon jurisprudence."[72] For example, at the time of Puerto Rico's acquisition, much of the Bill of Rights was considered applicable to Puerto Rico;[73] the right to trial by jury, however, was not deemed "necessary and fundamental," but instead found to "concern[] procedure mainly" and "constitut[e] a remedial right and a particular method of procedure peculiar to our Anglo-Saxon jurisprudence."[74] Under these precedents and considering the fact that Puerto Rican courts do not provide for juries in their civil system, it would seem incumbent upon the court to show not only that the Seventh Amendment was rooted in the nation's history, but also that it was more than a mere procedural quirk of the American system.

Rather than engage in this analysis, the court not only tacitly affirmed its prior holding that Puerto Rico is an incorporated territory,

---

[69] N. Mariana Islands v. Atalig, 723 F.2d 682, 690 (9th Cir. 1984) (quoting Dorr v. United States, 195 U.S. 138, 146 (1904)) (internal quotation marks omitted).

[70] *Id.* (quoting *Dorr*, 195 U.S. at 147) (internal quotation marks omitted).

[71] *See, e.g.*, Gerald L. Neuman, *Constitutionalism and Individual Rights in the Territories*, *in* FOREIGN IN A DOMESTIC SENSE 182, 192 (Christina Duffy Burnett & Burke Marshall eds., 2001) ("The continuing inapplicability of criminal jury trial rights, however, and the inapplicability of the Citizenship Clause of the Fourteenth Amendment, illustrate that the notion of fundamentality employed in the unincorporated territories has not always coincided with the notion of fundamentality employed for Fourteenth Amendment purposes."); *see also Atalig*, 723 F.2d at 689–90 (noting fair process could exist without jury trial).

[72] EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 111 (2001) (quoting Downes v. Bidwell, 182 U.S. 244, 282, 283 (1901)).

[73] THOMPSON, *supra* note 63, at 150.

[74] *Id.* (quoting Kepner v. United States, 195 U.S. 100, 107–08 (1904) (argument for the United States)); *see also Atalig*, 723 F.2d at 689–90 (declining to apply a fundamental right within the American system, the criminal jury trial, to an "unincorporated territory" since the territory's criminal process could be "fair and equitable" despite not offering trial by jury (quoting Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968))).

but may have gone out of its way to recommit itself to this holding by ruling unnecessarily on the Seventh Amendment's incorporation status. The *Gonzalez-Oyarzun* court viewed *McDonald* as all but dictating incorporation of the Seventh Amendment, but it is not altogether obvious that the court had to extend its opinion beyond a narrow ruling on the motion to dismiss. The most straightforward reason to avoid Seventh Amendment incorporation was the binding precedent of *Rivera*.[75] *Rivera* enforced a similar forum-selection clause identifying a territorial Puerto Rican court and conveniently held that such a clause constituted a perfectly valid jury trial waiver.

Even after minimizing *Rivera*, the Seventh Amendment issue was factored somewhat unnaturally into the court's *Bremen* analysis. To be sure, the court was careful to explain why the Seventh Amendment discussion is unavoidable during the *Bremen* forum-selection analysis: forum-selection clauses are not to be enforced if they are unreasonable or unjust or if they violate public policy; if enforcement of a forum-selection clause were to deprive a litigant of an important right because that right was not available in the chosen forum, such enforcement might be considered unreasonable or unjust.[76] But *Bremen* itself only offered serious inconvenience, "fraud, undue influence, or overweening bargaining power"[77] as the features that might work to make enforcement of a forum-selection clause unjust, unreasonable, or against public policy.[78] In fact, courts routinely enforce forum-selection clauses directing litigants to local fora where civil cases are not tried by jury.[79] The court's expansive understanding of public policy violations would similarly threaten the enforceability of arbitration clauses, which are effectively jury trial waivers, and which lower courts and the Supreme Court have seemed indisposed to call "contra-

---

[75] Caribbean City Builders would have had the court decide the question on the strength of the precedents, and framed the issue generally as one of constitutional avoidance. Motion in Compliance with Order, *supra* note 20, at 2–4; *see also id.* at 2–3 ("In order to avoid an unnecessary, difficult, and consequential constitutional issue, and by virtue of the general principle of constitutional avoidance, Defendants contend that there are other grounds [besides the Seventh Amendment issue] upon which the instant case may be disposed of." (footnote omitted)).

[76] *Gonzalez-Oyarzun*, 2014 WL 2885027, at *5.

[77] The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972).

[78] *See id.* at 12–13.

[79] *See* Motion in Compliance with Order, *supra* note 20, at 11 (citing Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 189–93, 191 n.147 (2004) (collecting cases)); *see also* Rivera v. Centro Médico de Turabo, Inc., 575 F.3d 10, 24 & n.10 (1st Cir. 2009) ("[A]doption of [plaintiffs'] Seventh Amendment argument would render contrary to public policy almost any forum selection clause providing for resolution in a foreign forum, as very few countries provide for jury trials in civil cases." *Id.* at 24 n.10 (second alteration in original) (quoting Holland Am. Line, Inc. v. Wartsila N. Am., Inc., 485 F.3d 450, 457 n.4 (9th Cir. 2007)) (internal quotation mark omitted)).

ry to public policy."[80] Thus, the court could have enforced the forum-selection clause without deciding the constitutional question.

Consejo de Salud made much of the fact that Puerto Rico had governed itself through a well-functioning representative democracy during its time as a U.S. territory.[81] But, perhaps in its zeal to equate Puerto Rico with the U.S. states, *Gonzalez-Oyarzun* ignored the unique legal features and experiments of that history.[82] The resolution of Puerto Rico's status should depend on principles of self-determination rather than judicial interpretation, but *Gonzalez-Oyarzun* focused on individual rights and wrests the decision of both territorial incorporation and, by extension, Bill of Rights incorporation away from the people most invested in its outcome.[83] Affirming the conclusion of *Consejo de Salud* here circumvents democratic resolution of the issue of Puerto Rico's territorial status.[84] As recently as 2012, a plebiscite revealed the deep fissures surrounding residents' preferences about the island's future legal status.[85] Given that the island's residents themselves have not spoken with a unified voice regarding how they want Puerto Rico's status to change, if at all, it seems particularly inadvisable for one federal court to speak for them.

---

[80] *See* Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 674–75 (2001) (reflecting on the Court's "great enthusiasm for binding arbitration"); Ware, *supra* note 79, at 169–70.

[81] *See* Consejo de Salud Playa de Ponce v. Rullan, 586 F. Supp. 2d 22, 35–38 (D.P.R. 2008).

[82] The Commonwealth of Puerto Rico has filed an appeal to the First Circuit questioning the Seventh Amendment holding, an action that suggests *Gonzalez-Oyarzun* might significantly disrupt the domestic Puerto Rican court system. *See* Notice of Appeal, *Gonzalez-Oyarzun*, 2014 WL 2885027 (No. 14-1101). Although the *Gonzalez-Oyarzun* court attempted to fence in the implications of its holding, Puerto Rico's duties regarding juries in its civil courts remain unclear after the case.

[83] *Gonzalez-Oyarzun* accepted and affirmed *Consejo de Salud*, but its focus was on the individual right to civil jury trial. Some commentators have suggested that Puerto Rico's status as incorporated or unincorporated does not carry particularly significant implications for individual rights as Congress might still retain power to treat even incorporated territories differently from states. *See* Adriel I. Cepeda Derieux, Note, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 797, 825 (2010).

[84] *See id.* at 826 ("[R]esolution, to the incorporation question, if it ever comes, must be arrived at democratically.").

[85] Rocio Gonzalez, *Puerto Rico's Status Debate Continues as Island Marks 61 Years as a Commonwealth*, HUFFINGTON POST (July 25, 2013, 9:00 AM), http://www.huffingtonpost.com/2013/07/25/puerto-rico-status-debate_n_3651755.html [http://perma.cc/C6UP-96HN] (showing 828,077 votes in favor of retaining current territorial status and 970,910 votes opposed).