

RACIAL BARRIERS TO EQUAL PROTECTION: *UNITED STATES V. VAELLO MADERO*

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ABSTRACT

For most Americans, United States citizenship guarantees all the rights and privileges provided by the federal constitution. For the 3 million American citizens who reside in Puerto Rico, a population greater than 20 states,² the constitution does not provide for representation in Congress nor participation in federal elections.³ Facing dire needs resulting from hurricanes, earthquakes, and fiscal crises, these American citizens seek the assistance of the judicial branch which has historically ignored their constitutional claims. The relationship between Puerto Rico and the U.S. federal government underscores most of its challenges. The U.S. Supreme Court and U.S. Congress continue to promote a political relationship that contradicts fundamental constitutional principles such as Equal Protection guaranteed by the Fifth and Fourteenth Amendments.⁴ With the century-old “Insular Cases” which define the constitutional contours between the island and the federal government, the court continues to ignore that 98 percent of Americans living in the territories are racial minorities.⁵ *United States v. Vaello Madero*⁶ exemplifies the colonial relationship that will test whether the Supreme Court will ignore its constitutional duty to extend the Equal Protection Clause⁷ to the American citizens of Puerto

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² *The Population of Puerto Rico Exceeds the Populations of 20 States*, Puerto Rico Report (last updated June 25, 2020), <https://www.puertoricoreport.com/population-puerto-rico-exceeds-populations-21-states/#.YfsHrGB0lhB>.

³ Aaron Steckelberg & Chiqui Esteban, *More than 4 Million Americans Don't Have Anyone to Vote for Them in Congress*, WASHINGTON POST (Sep. 28, 2017), <https://www.washingtonpost.com/graphics/2017/national/fair-representation/>.

⁴ “Equal Protection”, LEGAL INFORMATION INSTITUTE (last visited Feb. 9, 2022), https://www.law.cornell.edu/wex/equal_protection#:~:text=Equal%20Protection%20refers%20to%20the,in%20similar%20conditions%20and%20circumstances.

⁵ Hunter Schwarz, *John Oliver on Why U.S. Territories Don't Have Full Voting Rights*, WASHINGTON POST (Mar. 9, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/03/09/john-oliver-on-why-u-s-territories-dont-have-full-voting-rights/>; see also note 14 *infra* for a discussion of the Insular Cases.

⁶ *United States v. Vaello Madero*, 956 F.3d 12 (1st Cir. 2020). Note that some sources use “Vaello Madero” or “Vaello-Madero” inconsistently or interchangeably. The editors have used the spelling “Vaello Madero” throughout the article for clarity.

⁷ James Madison, one of the most influential framers of the U.S. Constitution and author of the Federalist Papers, focused on the concept of equal protection and the dangers of majoritarian attacks against minorities. See James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837 (2004) (“James Madison greatest works of constitutional theory-his writings leading up to the Convention, his speeches there, and Nos. 10 and 51 of The Federalist, following the Convention-focus on the problem of equal protection. His overarching concern-what he called the most ‘dreadful class of evils’ besetting the new nation under the Articles of Confederation, more dreadful even than the weak national government-was the ‘factious spirit’ in the states which chronically drove stable and interested majorities to enact ‘unjust’ measures benefiting themselves while systematically neglecting or harming weaker groups and the public good. In a more modern tongue, the most serious problem the new constitution had to solve was discrimination against persistently disfavored groups through state action lacking a sufficient relationship to legitimate state ends”). *Id.* at 843. The Federalist Papers also place the constitutional duty on judges who are “likewise the best authorities to entrust with the role of enforcing external protections of the few (minorities) from the many (majorities), because they are the least likely to try to aggrandize the kind of power in the few (the government) that most threatens the many (the people).” *Id.* at 926. “Madison’s writings in the constitutional period contain three references to ‘injustices’ or ‘oppression’ based on the victims’

Rico via a heightened scrutiny analysis, or, in the alternative, continue to hold that Congress acting under its plenary power pursuant to the Territorial Clause,⁸ may treat Puerto Rico differently than the states.⁹ Under proper review, Puerto Rico’s population, reflecting a suspect class via ethnicity and race, mandates the court’s application of strict scrutiny in lieu of the rational basis test.¹⁰

INTRODUCTION

Jose Luis Vaello Madero, born in Puerto Rico in 1954, is a U.S. citizen pursuant to the Jones Act of 1917.¹¹ Like any American citizen, Mr. Vaello Madero is free to move between the states to Puerto Rico. In 1985, Mr. Vaello Madero moved to New York and continued to live there until 2013.¹² During his residence in New York, Mr. Vaello Madero became incapacitated and was awarded Supplementary Social Income (SSI).¹³ In 2013, Mr. Vaello Madero relocated to Puerto Rico to care for his wife. On or about July 2016, he received notification that his SSI benefits would be discontinued retroactively to August 1, 2014, because he was “outside of the

personal status. The first two—crucially, given the nation’s subsequent history, are to factions defined by race. The third is to government preferences among practitioners of different occupations. *Id.* at 867.

⁸ The Territorial Clause and its reach were held to be temporary in nature as early as 1787. “And a legislative power “without limitation” is A REPUGNANCY TO CONSTITUTIONAL GOVERNMENT which was expressly avoided by the Framers. There is no form of Federal governance of any kind authorized under the Property Clause, nor is there any form of Federal governance authorized under its progenitor, the Resolution of October 10, 1780. Federal territorial governance of a particular sort is authorized but ONLY under the Northwest Ordinance of July 13, 1787. And by this ordinance, the role of Congress in Federal territorial governance is both temporary and indirect. *See* Bill Howell, *Federal Power over Public Lands: A Critical Analysis of Congressional Research Service Report RL30126*, AMERICAN LANDS COUNCIL (Oct. 1, 2019),

<https://www.congress.gov/116/meeting/house/110088/documents/HHRG-116-III3-20191017-SD043.pdf>.

⁹ *Califano v. Gautier Torres*, 435 U.S. 1, 3 n.4 (1978) (per curiam) (“Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it”).

¹⁰ Classification on which to base disparate treatment of particular groups of people, should be scrutinized to determine if it violates equal protection. *See Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 271-272 (1979). Depending on the classification at issue, courts apply different levels of review. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-441 (1985). Because Puerto Rico is overwhelmingly populated by a minority group, the court should thus apply strict scrutiny, which provides that “Certain suspect classifications—race, alienage and national origin—require what the Court calls strict scrutiny, which entails both a compelling governmental interest and narrow tailoring.” *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 8-9 (1st Cir. 2012) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *see also Cleburne*, 473 U.S. at 439-41 (suspect classifications are often “deemed to reflect prejudice and antipathy, a view that those in the burdened class are not as worthy or deserving as others,” and because “such discrimination is unlikely to be soon rectified by legislative means”); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (noting that a “central purpose” of equal protection “is the prevention of official conduct discriminating on the basis of race”).

¹¹ Jones Act, ch. 145, § 5, 39 Stat. 951, 953 (1917); U.S.C. § 1402.

¹² *Vaello Madero*, 956 F.3d 12 (1st Cir. 2020).

¹³ Funded by the general treasury, SSI provides financial assistance to low-income individuals older than sixty-five, blind or disabled. *See* 42 U.S.C. § 1381. 42 U.S.C. § 1381. *See also* Neil Weare, *Biden Made a Promise to End Discrimination Against Puerto Ricans. He’s About to Break It.*, SLATE (Oct. 18, 2021), <https://slate.com/news-and-politics/2021/10/biden-puerto-rico-vaello-madero-supreme-court.html>: “The SSI program is one of the country’s most essential social safety net programs, recognizing the inherent dignity of millions of the most vulnerable, low-income Americans who are aged, blind, or disabled by providing them with a basic income to help them care for their needs. While these critical benefits are taken for granted in most American communities, they are not available to otherwise eligible citizens in most U.S. territories simply because of where they happen to live.” *Id.*

U.S. for 30 days or more”.¹⁴ This case demonstrates the effects of the Insular Cases,¹⁵ their progeny, and the federal government’s perpetual discrimination against the citizens living in the territories. The legal premise of “not part of the U.S.” was originally applied in *Downes v. Bidwell* to justify exclusion of full constitutional protection for Puerto Rico.¹⁶ Current U.S. President Joe Biden decided to proceed with the appeal to the U.S. Supreme Court despite repeated efforts by Puerto Rico’s delegate Jennifer Gonzalez.¹⁷ The specific issue before the U.S. Supreme Court in the present case is:

Whether Congress violated the equal protection component of the due process clause of the Fifth Amendment by establishing Supplemental Security Income — a program that provides benefits to needy aged, blind and disabled individuals — in the 50 states, the District of Columbia, and in the Northern Mariana Islands pursuant to a negotiated covenant, but not extending it to Puerto Rico.¹⁸

BACKGROUND

Pursuant to the Treaty of Paris, which officially ended the Spanish-American War making Puerto Rico an American territory, “the civil rights and political status of the native inhabitants of the territories ceded to the United States shall be determined by Congress.”¹⁹

¹⁴ Vaello Madero, 956 F.3d at 15-16.

¹⁵ Juan R. Torruella, *The Insular Cases: The Establishment of Regime of Political Apartheid*, 29, U. PA. J. INT’L L. 283, 286 (2007). The Insular Cases are a series of cases decided in the early twentieth century that limited constitutional protections for the territories. The Insular Cases decided in 1901, outline the political framework to define the status of the newly acquired territories after the Spanish American War. *Downes v. Bidwell*, 182 U.S. 244 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *De Lima v Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 243 (1901). The *Downes* decision, arguably the most impactful decision of the Insular Cases established the doctrine of ‘incorporated’ and ‘unincorporated’ territories. The court in *Downes* explained that incorporated territories were part of the United States and were, as such, destined for statehood and enjoy full constitutional protection. *Id.* Puerto Rico is defined as an ‘unincorporated territory’ not destined for statehood and subject only to the constitutional provisions decided by Congress. *Id.* at 339-341. *See also* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-269 (1990) (only fundamental constitutional rights apply in unincorporated territories). *Torres v. Puerto Rico*, 442 U.S. 465 (1979) was the first time the U.S. Supreme Court applied the 4th amendment to Puerto Rico, over 80 years after it became an American territory.

¹⁶ *Downes*, 182 U.S. 244, 244 (1901). “The Island of Porto Rico is not a part of the United States within that provision of the Constitution which declares that “all duties, imposts, and excises shall be uniform throughout the United States.” *Id.*

¹⁷ Absent the Biden Administration’s appeal to the U.S. Supreme Court, the First Circuit’s holding would have allowed the Equal Protection Clause to apply to Puerto Rico with respect to SSI benefits. *See* Zack Budryk, *Supreme Court to decide if Puerto Ricans eligible for SSI*, THE HILL (Mar. 1, 2021), **Error! Hyperlink reference not valid.**<https://thehill.com/regulation/court-battles/540992-supreme-court-to-hear-puerto-rico-aid-case> (last visited April 20, 2022). Moreover, the holding in the First Circuit by Judge Torruella and the urgency to end “political apartheid” in Puerto Rico would have at the minimum, prompted Congress deliberate on the status question. President Biden instead attempts to include Puerto Rico in the SSI program via legislation. “Statement by President Joseph R. Biden, Jr. on Puerto Rico”, THE WHITE HOUSE, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/07/statement-by-president-joseph-r-biden-jr-on-puerto-rico/> (last visited April 20, 2022).

¹⁸ *United States v. Vaello-Madero*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/united-states-v-vaello-madero/>.

¹⁹ Treaty of Paris, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754, T.S. No. 343. Under Article IX, Congress has plenary power over Puerto Rico and its citizens leading to the Insular Cases and more recent cases that perpetuate colonial status. The Treaty of Paris was a radical departure from previous territorial acquisitions under the Northwest Ordinance which provided that all constitutional protections would be bestowed upon the citizens of newly acquired

American courts have defined the colonial relationship as one “that has no parallel in our history.”²⁰ The Treaty of Paris has served as the court’s justification for its holdings in the Insular Cases, and is often cited to justify limited constitutional protections for U.S. citizens in the unincorporated territories.²¹

In *Plessy v. Ferguson*, the Supreme Court ruled that Black people were “separate but equal” to legitimize segregation in public institutions.²² This same court, only several years later, decided the Insular Cases that cemented Puerto Rico’s colonial status under the legal doctrine of territorial incorporation.²³ At the time, several academic camps emerged articulating a variety of views about the newly acquired territories after the Spanish-American War. One in particular, authored by Abbott Lowell and Christopher Columbus Langdell in a series of *Harvard Law Review* articles, argued that there were two categories of territories: incorporated and unincorporated.²⁴ Lowell explained that full constitutional rights apply only to territories that were *incorporated*, or part of, the United States. The *unincorporated* territories, however, are “appurtenant” to, but are not “part” of the United States.²⁵ This legal doctrine, lacking any textual support, empowers Congress to select which constitutional protections apply in the *unincorporated territories* and its citizens.²⁶ This distinction was grounded on the view that

territories. See also Mark Weiner, *Americans Without Law: The Racial Boundaries of Citizenship* (2006). “The final stage outlined by the Ordinance was statehood.... This patterns of territorial transformation in which a territory was acquired and then granted statehood was definitely broken in 1898.... With the Treaty of Paris, the United States thus broke a pattern of republican territorial acquisition and entered into a truly imperial phase of its national development.” FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 65 (Christina Duffy Burnett & Burke Marshall eds. 2001).

²⁰ *Examining Bd. of Eng’rs v. Flores de Otero*, 426 U.S. 572, 596 (1976).

²¹ In *Downes v. Bidwell*, the court stated “the treaty making power cannot incorporate a territory into the United States without the express or implied assent of Congress, that it may insert in a treaty conditions against immediate incorporation, and that on the other hand when it has expressed in the treaty the conditions favorable to incorporation, they will, if the treaty be not repudiated by Congress, have the force of the law land, and therefore by the fulfillment of such conditions cause incorporation to result. It must follow, therefore, that where a treaty contains no conditions for incorporation, and above all, where it not only has no such conditions but expressly provides the contrary, incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family.” 182 U.S. 244, 339. (1901).

²² See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²³ See Torruella, *supra* note 15, at 286.

²⁴ The Insular Cases are often attributed to a series of Harvard Law Review articles. See MARK WEINER, *AMERICANS WITHOUT LAW: THE RACIAL BOUNDARIES OF CITIZENSHIP* 77 (2006); “Christopher Langdell wrote that the guarantees of the Bill of Rights were “so peculiarly and so exclusively English” that they were inapplicable to “ancient” and “alien races”. *Id.* at 77. While favoring the extension of constitutional guarantees, Baldwin admitted that “[o]ur Constitution was made by a civilized and educated people” and conceded the point that it could not fully apply to “the ignorant and lawless brigands that infest Puerto Rico....” *Id.* at 72.

²⁵ The Court adopted Lowell’s constitutional interpretation. *Id.* at 77.

²⁶ The Territory Clause of Article IV nor any other provision of the Constitution remotely supports a distinction of incorporated vs. unincorporated. “The distinction was purely made up for the situation at hand: the fact that America had acquired lands, and peoples unlike those in the rest of North America.” See LUKE PAULSEN & MICHAEL STOKES, *THE CONSTITUTION: AN INTRODUCTION* 202 (2015). The implications of the court’s analysis were clearly racially motivated. According to the court, the Constitution does not follow the flag to protect persons of Latino, Asian, or Pacific Islander race or ethnicity, because their different cultural heritages makes certain provisions of the Constitution unsuitable for them. The court found ways to twist the Constitution to deny the full rights of Americans to certain non-English speaking new Americans in part of America off the shores of the mainland. *Id.* at 202. In *Dorr v. United States*, 195 U.S. 138 (1904), the court held that the “right of criminal defendants to trial by jury could not

unincorporated territories were inhabited by “savages” who belonged to “inferior and alien races”, and thus were incapable of adapting to Anglo-Saxon principles.²⁷

Justice White, writing for the majority, not only embraced Lowell’s view, but also highlighted the constitutionality of territorial status where Congress has limitless power.²⁸ The Treaty of Paris was a radical departure from the Northwest Ordinance which provides the constitutional framework to admit states with full constitutional protection for the inhabitants of the newly acquired territories.²⁹ Article IX³⁰ left it to Congress to decide whether or not the Constitution “followed the flag”, allowing the judicial creation of the incorporated/unincorporated doctrine under the purview of the Territorial Clause.³¹

For over a century, jurists and legal scholars alike have faced the challenges of reconciling the Insular Cases with basic principles of American constitutional law.³² The political climate at the time of the Insular Cases dictated the court’s refusal to extend the constitution to the newly acquired lands.³³

be expected to apply in a territory peopled by savages.” *Id.* at 202. That is the racial legacy and precedent that follows any case involving Puerto Rico in the U.S. Supreme Court. Puerto Rico to date is predominantly Spanish speaking with an allegiance to Latino culture and customs.

²⁷ JOSE TRIAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 74-75* (Yale Univ. Press 1997). Note as well that Justice Henry Brown who authored the *Plessy v. Ferguson* case explained that the inhabitants were savages of alien races and as such could not be afforded full constitutional protection. Justice White added granting citizenship to an uncivilized race would ‘inflict grave detriment on the United States from the immediate bestowal of citizenship on those absolutely unfit to receive it. *Id.* at 27.

²⁸ *Downes*, 182 U.S. 244, 268. (1901), stating “That the power over the territories is vested in Congress without limitation, and that this power has been considered the foundation upon which the territorial governments rest, was also asserted by Chief Justice Marshall in *McCulloch v. Maryland* [...] and in *United States v. Gratiot*[...]”.

²⁹ Weiner, *supra* note 24, at 68.

³⁰ Treaty of Paris art. IX, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754, T.S. No. 343.

³¹ U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make needful Rules and Regulations respecting the Territory or other Property belonging to the United States”).

³² Note that prior to the Spanish American War, Congress explicitly stated in Section 1891 of the Revised Statutes: “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.” Rev. Stat 1891 (1874). Deviating from Section 1891 of the Revised Statutes, the U.S. Supreme Court began to embrace the rationale in *Plessy*’s “separate but equal” doctrine in the insular cases allowing limited provisions of constitutional protection in Puerto Rico. See also Doug Mack, “*The Strange Case of Puerto Rico: How a series of racist Supreme Court decisions cemented the island’s second class status*”, SLATE (Oct. 9, 2017), <https://slate.com/news-and-politics/2017/10/the-insular-cases-the-racist-supreme-court-decisions-that-cemented-puerto-ricos-second-class-status.html>.

³³ Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int’l L. 283, 286 (2007). See also RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893-1946* (1972); “Those who advocated overseas expansion faced this dilemma: what kind of relationship would the new peoples have to the body politic? Was it to be the relationship of the reconstruction period, an attempt at political equality for dissimilar races, or was it to be the southern counterrevolutionary point of view which denied the basic American constitutional rights to people of color? The actions of the federal government during the imperial period and the relegation of the negro to the status of second class citizenship indicate that the southern point of view prevailed. The racism which caused the relegation of the negro to a status of inferiority was to be applied to the overseas possessions of the United States.” *Id.* at 15.

Congress methodically moved to conceal the island’s colonial status by modifying the island’s internal government and relationship with the federal government.³⁴ On July 25, 1952, the island obtained Commonwealth status.³⁵ With this new ‘status’, Puerto Rico drafted a constitution subject to congressional approval.³⁶ Despite its political limitations and lack of full constitutional protections,³⁷ the United States convinced the United Nations that Puerto Rico had achieved a full measure of self-government. The assessment in the “Historical and Statutory Notes”, however, details the true nature of the bill:

The bill would not change Puerto Rico’s fundamental political, social and economic relationship to the United States. Those sections of the Organic Act of Puerto Rico (this chapter) pertaining to the political, social, and economic relationship of the United States and Puerto Rico concerning such matters as the applicability of United States laws, customs, internal revenue, federal jurisdiction in Puerto Rico, Puerto Rican representation by a Resident Commissioner, etc, would remain in force and effect.³⁸

The United Nations adopted the federal government’s position with respect to Puerto Rico defining the new commonwealth status as the following:

³⁴ JOSE TRIAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 74-75* (Yale University Press, 1997); Foraker Act of Apr 12, 1900 provided for a civil government in Puerto Rico, a governor appointed by the president of the United States, a local legislature, and a non-voting delegate to Congress; Puerto Ricans were granted birth right citizens in 1917; Jones Act of Mar. 2, 1917, ch. 145, 39 Stat. 951 (1917) *amended by* ch. 446, 64 Stat. 319 (1950). Further efforts to camouflage the island’s colonial status included the Puerto Rico Elective Governor Act, ch. 490, 61 Stat 770 (1947); Puerto Rico Federal Relations Act, ch. 446, 64 Stat 519 (1950) also referred to as Public Law 600, amended by 48 U.S.C. §§ 731-916; Public Law No. 447, ch 567, 66 Stat 327 (1952).

³⁵ H.R. 3024, 104th Cong. (1996) (“the current ‘Commonwealth of Puerto Rico’ structure for local self government was established through an exercise of authority of Congress under Article IV, Section 3, Clause 2 of the U.S. Constitution (“Territorial Clause”), pursuant to which the process for approval of a local constitution was prescribed and the current Puerto Rico Federal Relations Act was enacted.”). *See also* Act of July 3, 1950, Pub. L. No. 600, 64 State. 319; (codified as 48 U.S.C 731 et seq.) Public Law 600 comprised the process for democratically instituting a local constitutional government in Puerto Rico. The process included authorization for the people of Puerto Rico to organize a government under a constitution approved by the people. Congressional amendment and conditional approval of the locally promulgated constitution was also an element of the process, was acceptance of the congressionally determined amendments by the Puerto Rican constitutional convention.” *Id.* at 10.

³⁶ The United Nations’ objections to colonialism pursuant to U.N. Charter art. 73 prompted the United States to enact Public Law 600, granting Puerto Rico the right to a local constitution, election of a governor, a legislature, and local judges. *See* Public Law 447, 66 Stat. 327 (1952); *see also* Act of July 3, 1950, Pub. L. No. 600, 64 Stat. 319, (codified at 48 U.S.C. § 731 (b) (1994)).

³⁷ H.R. 3024, 104th Cong. (1996); “The extent to which the people of Puerto Rico have rights under the Constitution has been defined incrementally by the Supreme Court. It has been recognized that Congress has broad discretion in making rules and regulations of the unincorporated territories although the Supreme Court also has recognized that the temporary nature of this territorial status and the non-application of the U.S. Constitution as a whole does not mean that the Federal Government can deny “fundamental” personal rights to residents of these U.S. territories.” *Reid v. Covert*, 354 U.S. 1, 13 (1957). The right to due process of law is one of the fundamental rights applicable in the unincorporated territories, including Puerto Rico. *Balzac v. People of Puerto Rico*, 258 U.S. 298, 312–313 (1922). However, this does not preclude Congress from changing the citizenship status which was extended by statute, or unilaterally altering the political status of the territory. *Rogers v. Bellei*, 401 U.S. 815 (1971); *U.S. v. Sanchez*, 992 F.2d 1143 (1993).” H.R. 3024, 104th Cong. (1996) at 9.

³⁸ H.R. 3024, 104th Cong. (1996) at 10.

the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a new constitutional status stemming from documentation provided that the association of the Commonwealth of Puerto Rico with the United States has been established as a mutually agreed association in the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with the attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity.³⁹

The plebiscite in 1952 for status options only included whether to approve Commonwealth status or not. Neither statehood nor independence was on the ballot.⁴⁰ The island has celebrated various non-binding plebiscites in its effort to establish a non-colonial relationship with the federal government, whether through statehood, independence, free association, or some enhanced form of commonwealth status outside of the Territorial Clause.⁴¹ To date, there are competing bills before Congress to address the political status of Puerto Rico which many view as the source of the island's fiscal crisis and lack of full constitutional protection.⁴²

The Failure of the Rational Basis Test

The Supreme Court's judicial review is comprised of a three-tiered scrutiny formulation of substantive due process: strict scrutiny, intermediate scrutiny, and rational basis scrutiny.⁴³ Many legal scholars dispute the validity of the rational basis test as a due process adjudication

³⁹ *Id.* at 13. Remarkably, many lower courts have held different constitutional interpretations of Puerto Rico's political status. In *United States v. Quiñones*, 758 F.2d 40 (1st Cir. 1985), for example, the First Circuit held: "In 1952, Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress as provided by the Federal Constitution. The authority exercised by the federal government emanated thereafter from the compact itself. Under the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally, and the government of Puerto Rico is no longer a federal agency exercising delegated power." *Id.* at 42. See also *Mora v. Mejias*, 206 F.2d 377, 386-88 (1st Cir. 1953). In 2016, however, the U.S. Supreme Court resolved the discrepancy among the circuits and held that Puerto Rico lacks sovereignty. Mark J. Stern, *The Supreme Court Deals a Blow to Puerto Rican Sovereignty*, SLATE, <https://slate.com/news-and-politics/2016/06/the-supreme-courts-blow-to-puerto-rican-sovereignty.html> (last visited November 20, 2021). In *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016), the Court applying the 'dual sovereignty' doctrine, held that unlike a state, Puerto Rico was not a separate sovereign for double jeopardy purposes because its power derives from Congress. Thus, a person who has been acquitted, convicted or prosecuted in federal court cannot be prosecuted under Puerto Rican law for the same crime. *Id.* at 1877.

⁴⁰ *The 1952 Puerto Rico Constitution: A New "Commonwealth" In Name Only*, THE PUERTO RICO REPORT, (Jan. 16, 2013), <https://www.puertoricoreport.com/the-1952-puerto-rico-constitution-a-new-commonwealth-in-name-only/#.YmxwLWhKjIU>.

⁴¹ *A Year After the Plebiscite*, THE PUERTO RICO REPORT, (Nov. 7, 2021), <https://www.puertoricoreport.com/a-year-after-the-puerto-rico-plebiscite/#.YmxvIGhKjIU>.

⁴² Nicole Acevedo, *New Bill on Puerto Rico status introduced by Reps. AOC, Velázquez, Sen. Menendez*, NBC NEWS (Mar. 18 2021, 4:58 PM), <https://www.nbcnews.com/news/latino/new-bill-puerto-rico-status-introduced-reps-aoc-vel-zquez-n1261458>.

⁴³ "In reviewing the constitutionality of a statute, law, or ordinance, U.S. courts employ one of three levels of review: rational basis, intermediate scrutiny, or strict scrutiny. The nature of the right at issue determines which level of scrutiny will be used. Where a fundamental right or a suspect classification is at issue, a higher level of scrutiny is used". *Rational Basis Review-Judicial Scrutiny*, COLUMBO HURD IMMIGRATION BUSINESS ATTORNEYS, <https://www.colombohurdlaw.com/rational-basis-review-judicial-scrutiny/> (last accessed April 1, 2022).

strategy defining it as “illusory” where the court “adheres to it in simpler cases but deviates from it in difficult cases”.⁴⁴ Only rights that are classified as fundamental are subject to strict scrutiny.⁴⁵ Puerto Rico’s status defined by the court as an ‘unincorporated’ territory has limited fundamental rights,⁴⁶ prompting the court to apply rational basis scrutiny⁴⁷ to any constitutional challenge affecting island residents.⁴⁸ This judicial approach by the Supreme Court, as such, often predetermines decisions affecting every aspect of the 3.19 million American citizens, whom according to U.S. census, are almost entirely of Hispanic descent and Spanish-speaking.⁴⁹

In *U.S. v. Vaello Madero*, the U.S. District Court for the District of Puerto Rico held that residents of Puerto Rico are “politically powerless” because of their lack of representation.⁵⁰ The Court added: “if a statute discriminates on the basis of a suspect classification, then it is subjected to a heightened scrutiny standard that must be invalidated unless it is narrowly tailored to achieve a compelling government interest”.⁵¹ The First Circuit, in an opinion authored by the late Judge Juan Torruella, affirmed, explaining that the government failed to justify its “exclusion of otherwise eligible” Puerto Rican residents from SSI on any legitimate government interest.⁵² The First Circuit’s opinion is significant on three grounds: it demonstrates the

⁴⁴ Jeffrey D. Jackson, *Putting Rationality Back Into The Rational Basis Test: “Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment,”* 45 UNIV. OF RICHMOND L. REV. 491 (2011).

⁴⁵ “Under the Court’s current due process adjudication mechanism, rights are either classified as “fundamental” in which case laws infringing upon them are subject to strict scrutiny, a test which is almost always fatal in fact for the infringing law, or they are not classified as fundamental and are subjected to a rational basis test that almost always upholds the infringing law,” Jackson, *supra* note 44, at 492. See also Randy E. Barnett, *Scrutiny Land*, 106 Mich. L. Rev. 1479-80 (1979).

⁴⁶ Torruella, *supra* note 15, at 327.

⁴⁷ James M. McGoldrick Jr., *The Rational Basis Test and Why It Is So Irrational: An Eighty-Year Retrospective*, 55 SAN DIEGO L. REV. 4 752-53 (2018) (“One of the most commonly used constitutional law tests by the United States Supreme Court is the rational basis test. The test may be framed as either a due process or an equal protection issue. Under the due process clause, many laws limiting substantive interests must rationally relate to some legitimate state interest. Under the equal protection clause, the classifications within the law usually must rationally relate to some legitimate state interest. The rational basis test as applied by the Supreme Court is such a permissive level of review that it is effectively not judicial review at all. It permits the most irrational of legislation to become the law of the land, no matter how needless, wasteful, unwise, or improvident it might be.”). See also Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1629 (2016) (footnotes omitted) (first citing *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997); then citing *U.S. Dep’t of Agric. V. Moreno*, 413 U.S. 528, 533 (1973); and then citing *FCC v. Beach Commc’ns*, 50 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring)). “[rational] basis review is the poor stepchild of judicial review. Requiring only that regulations (as a matter of due process) and classifications (as a matter of equal protection) be rationally related to a legitimate governmental interest, it is widely regarded as virtually “no review at all.” It is reserved for those equal protection and substantive due process cases least likely to implicate important issues of equal protection and substantive due process. But rational basis is the one form of review that completely pervades the legal system by virtue of its combination of substantive review and general applicability,” *Id.*

⁴⁸ Jackson, *supra* note 44, at 492 (“Courts have been understandably cautious in recognizing new rights; the only alternative is the weak rational basis test which provides little protection for rights.”).

⁴⁹ “Puerto Rico”, DATA USA, <https://datausa.io/profile/geo/puerto-rico/#:~:text=98.2%25%20of%20the%20people%20in,share%20of%20the%20total%20population> (last visited Jan. 26, 2022).

⁵⁰ *United States v. Vaello Madero*, 356 F. Supp. 3d 208, 211 (D.P.R. 2019).

⁵¹ *Id.* See also *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007); *Rice v. Cayetano*, 528 U.S. 495, 523 (2000) (stating “A de facto classification based on Hispanic origin is constitutionally impermissible”) (holding that Congress cannot authorize classifications based on racial ancestry).

⁵² *Vaello Madero*, 956 F.3d at 32.

constitutional duty of the judicial branch to act as an arbiter between Congress and powerless groups, it calls for heightened scrutiny where it views a group as a suspect class, and it details the economic contributions of Puerto Rican residents to the federal treasury.⁵³

Equal Protection in Puerto Rico: From *Califano* to *Harris* to *Vaello Madero*

For over a century, the U.S. Supreme Court has affirmed the Insular Cases to restrict the Equal Protection clause in Puerto Rico⁵⁴. Several jurists have noted that “the present validity of the Insular Cases is questionable”.⁵⁵ Despite the holdings in the Insular Cases, the Supreme Court has held that: “classifications based on race, alienage, ethnicity, and national origin are inherently suspect”.⁵⁶ Notwithstanding clear precedent on racial classifications, the Social Security Act created a uniform program, known as the Supplemental Security Income (SSI) program for aid to qualified aged, blind, and disabled persons which specifically excluded Puerto Rico.⁵⁷ **Arguably**, the legal consequences of the Insular Cases, *Califano v. Torres*,⁵⁸ and *Harris v. Rosario*,⁵⁹ may well serve as precedent for the United States Supreme Court’s inclination to overturn the lower court’s decision, or, in the alternative, potential willingness to reverse the racially motivated Insular Cases that have kept Puerto Rico in a state of political powerlessness.

In *Califano*, the specific issue before the court was whether Congress, by excluding Puerto Rico from SSI, violated the right to travel of citizens living on the mainland. The claimant in *Califano* was a recipient of SSI, moved from Connecticut to Puerto Rico, and was then deprived of continuous SSI benefits.⁶⁰ The U.S. District Court, applying heightened scrutiny, did not find compelling interest on the part of the government for such an intrusion.⁶¹ The Supreme

⁵³ See generally *id.*

⁵⁴ U.S. CONST. amend. XIV, § 1. The clause provides, “[Nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws.” J. Nowak, R. Rotunda, & J. Young, CONSTITUTIONAL LAW 524 (3d ed. 1986). The Equal Protection Clause has been called “the single most important concept in the Constitution for the protection of individual rights.” *Id.* See also U.S. CONST. amends. V, XIV. “The Fifth and Fourteenth Amendments of the United States Constitution limit the power of the federal and state governments to discriminate.” *Id.*

⁵⁵ *Harris v. Rosario*, 446 U.S. 651, 653 (1980) (Marshall, J., dissenting).

⁵⁶ *Graham v. Richardson*, 403 U.S. 365 (1971); see also *Lyng v. Castillo*, 477 U.S. 635 (1986): “As a historical matter, suspect classes are those that have been subjected to discrimination, exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group, and are a minority or political powerless.” Puerto Ricans as a predominantly Spanish-speaking ethnic and racial minority population, in conjunction with their present status as a powerless political entity without representation in Congress, should be treated as a suspect class triggering the court’s application of strict scrutiny.

⁵⁷ 86 Stat. 1465, 42 U.S.C. § 1381 *et seq.* (1970 ed., Supp. V). Note that the exclusion of Puerto Rico in the amended statute is specified in Section 1611 (f) of the Act in 42 U.S.C. § 1382(f) (1970) ed. Supp. V which states: “no individual is eligible for benefits during any month in which he or she is outside the United States defined as the 50 States and the District of Columbia.” *Id.*

⁵⁸ *Califano v. Torres*, 435 U.S. 1, 3 (1978). “Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it.”

⁵⁹ *Harris v. Rosario*, 446 U.S. 651, 653-54 (1980). The court held that Puerto Rico could be distinguished from the states because Puerto Rican residents did not contribute to the federal treasury, the cost of treating Puerto Rico as a state under the statute would be high, and greater benefits could disrupt the Puerto Rican economy.

⁶⁰ See generally *Califano*, 435 U.S. 1 (1978).

⁶¹ David C. Indiano & Harry O. Cook, *Harris v. Rosario*, 12 CASE W. RES. K. IN’L L., 641, 648 (1980). Note as well that the original complaint in the lower court also alleged constitutional violations under the Fifth Amendment Due Process Clause. *Id.* at 642.

Court, however, chose to apply the much lower standard of rational basis, and explained that the District Court’s reading of the statute would allow “superior benefits to those enjoyed by other residents of Puerto Rico if the newcomer enjoyed those benefits in the State from which he came.”⁶² Moreover, while the lower court in *Califano* ruled on the basis of an equal protection claim, the Supreme Court instead argued that the lower court’s decision was not the basis for its holding.⁶³ In much more explicit language, the Supreme Court embraced the racially motivated Insular Cases, subjecting Puerto Ricans to less than equal citizenship and explained: “so long as its judgments are rational and not invidious, the legislature’s efforts to tackle the problems of the poor and the needy are not subject to a constitutional straightjacket.”⁶⁴ The Supreme Court explained, albeit ineffectively, that SSI would in fact hurt the Puerto Rican economy and justified so by stating that Puerto Ricans do not pay federal taxes.⁶⁵ Strikingly, the Supreme Court did not highlight Puerto Rico’s lack of representation in Congress and that in fact, island residents do pay social security taxes which fund SSI and other federal programs such as Aid to Families with Dependent Children.⁶⁶ More importantly, in *Califano*, the U.S. Supreme Court reversed a *unanimous* three-judge panel of the lower court, an indication once again that lower courts are no longer endorsing the Insular Cases.⁶⁷

In *Harris v. Rosario*,⁶⁸ a class action, the U.S. Supreme Court held that the federal government could provide fewer benefits to Puerto Rico under the Aid to Families with Dependent Children⁶⁹ program than to states as long as Congress had a “rational basis” to discriminate.⁷⁰ Moreover, citing *Califano*, the U.S. Supreme Court in *Harris* relied on economic considerations as grounds for the reversal:

For example, the Secretary estimates that the additional cost of treating Puerto Rico as a State for AFDC purposes alone would cost \$30 million per year, and, if the decision below were to apply equally to various other reimbursement programs under the Social Security Act, the total annual cost would exceed \$240 million.⁷¹

In one of the most vigorous dissents regarding Puerto Rico, Justice Marshall argued that unequal payments to Puerto Rico residents, U.S. citizens at birth, was a violation of the Equal Protection Clause.⁷²

⁶² *Id.* at 650.

⁶³ *Id.* at 642.

⁶⁴ *Id.* at 642.

⁶⁵ *Califano*, 435 U.S. at 5 n.7. <https://supreme.justia.com/cases/federal/us/435/1/>The Court went on to explain that the exclusion of Puerto Rico from SSI program was rational since Puerto Ricans did not pay federal taxes, the cost of extending the program to the island would be overly burdensome and the extension of the program would prove to be destructive to the island’s economy. *Id.*

⁶⁶ *Indiano & Cook*, supra note 61, at 642.

⁶⁷ *Califano*, 435 U.S. at 5.

⁶⁸ *Harris*, 446 U.S. at 656.

⁶⁹ This program provides federal assistance to families in Territories and States with needy dependent children. *See* 42 U.S.C. 601.

⁷⁰ Again, the U.S. Supreme Court reversed a District Court opinion which held that the federal government had violated the claimants Fifth Amendment’s equal protection guarantee. 446 U.S. at 656.

⁷¹ *Id.* at 652.

⁷² *Id.* (Marshall, J. dissenting).

U.S. v. Vaello Madero's Oral Arguments in the U.S. Supreme Court

The federal government's argument is premised on misleading information that island residents do not make contributions to the federal treasury. Specifically, the government claims the following to exclude Puerto Rico from SSI benefits: Puerto Rico's unique tax status and the cost of extending the program to residents of Puerto Rico. The government also relied on *Califano* and *Harris* as binding precedent. Note however, that *Califano* did not rule on the validity of Puerto Rico's exclusion under the equal protection clause but instead ruled on the issue of the right to travel. *Harris* was a class action suit regarding the Aid to Families with Dependent Children, a different federal program.⁷³

Puerto Rico, despite its economic challenges and colonial status, makes significant contributions to the federal treasury. Judge Torruella of the First Circuit explained that Puerto Ricans have consistently made higher contributions than taxpayers in at least six states, averaging about \$3.5 billion despite a recession and catastrophic natural events.⁷⁴ These payments include federal income tax on income from sources outside of Puerto Rico, federal income taxes by all federal employees on the island, and full Social Security, Medicare, and Unemployment Compensation taxes that are paid throughout the United States.⁷⁵ Despite making these payments, Puerto Rico is severely underfunded in many federal programs, including Medicare, despite having a population that exceeds many states.⁷⁶ These findings are significant, and contradict the court's economic analysis in *Califano* and *Harris*. More importantly, the First Circuit took aim at the fiscal argument by the government explaining that "cost alone" could not provide a rational basis.⁷⁷

On November 9, 2021, the U.S. Supreme Court heard oral arguments in *U.S. v Vaello Madero*. The court has a historic opportunity to reverse the Insular Cases which are premised on three unconstitutional grounds: Anglo-Saxon superiority, congress' power to administer territories inhabited by "racially inferior savages" indefinitely, and limited constitutional protections to the citizens in the insular areas.⁷⁸ The court is comprised of a 6-3 conservative

⁷³ United States v. Vaello Madero, 956 F.3d 12, 19-20 (1st Cir. 2020).

⁷⁴ *Vaello Madero*, 956 F.3d 12, 24. ("The residents of Puerto Rico not only make substantial contributions to the federal treasury, but in fact have made them in higher amounts than taxpayers in at least six states, as well as the Northern Mariana Islands.") Note that the Northern Mariana Islands are not exempt from SSI as cited in the statute.

⁷⁵ *Id* at 25.

⁷⁶ Eli Richman, *Medicare Advantage enrollment soared in Puerto Rico. Now it's starving the island's healthcare system*, FIERCE HEALTHCARE (Aug. 8, 2018), <https://www.fiercehealthcare.com/payer/puerto-rico-s-medicare-advantage-participation-through-roof-but-program-s-low-reimbursement> (last visited April 29, 2022).

⁷⁷ The First Circuit went on to illustrate the fallacy in the government's fiscal argument explaining that if "eligibility is premised on the payment of federal income tax," then it is antithetical to the entire premise of the program. "How can it be rational for Congress to limit SSI benefits to exclude populations that generally do not pay federal income taxes when the very population those benefits target do not, as a general matter, pay federal income tax?" *Vaello Madero*, 956 F. 3d 12, 27.

⁷⁸ *Downes*, 182 U.S. at 306. Note as well the residents of the U.S. territories of Guam, U.S. Virgin Islands, and American Samoa are also excluded from SSI, and are majority non-Anglo American citizens who cannot vote in federal elections. See *Exclusion of Guam Resident from SSI Program Violates Equal Protection*, EMPIRE JUSTICE CENTER (July 31, 2020), https://empirejustice.org/resources_post/exclusion-guam-resident-ssi-program-violates-equal-protection/. 76% of Americans in U.S. Virgin Islands are Black/African American. See *Virgin Islands Demographics*, VIMOVINGCENTER, <https://www.vimovingcenter.com/statistics/> (last visited April 29, 2022).

majority. There were some surprising questions from some of the Justices, particularly Justice Gorsuch, a Trump appointee, who asked: "Why shouldn't we just admit that the Insular Cases were incorrectly decided...why shouldn't we just say what everyone knows to be true?"⁷⁹ Justice Thomas questioned the Territorial Clause's⁸⁰ reach as an authority allowing Congress to have a rational basis for excluding Puerto Rico: "Could you do the same thing to Vermont?"⁸¹ Shockingly, no one made issue of the obvious: Vermont's demographics is 94 percent white⁸² while Puerto Rico is 98 percent Spanish-speaking minority⁸³ which should prompt the court to abandon the rational basis test and apply strict scrutiny.⁸⁴ The federal government insisted that it is residence in Puerto Rico and cost, and as such rational basis applies.⁸⁵ The U.S. Supreme Court, as early as 1879, dismissed that rationale:

It is not impossible that a distinct territorial establishment and jurisdiction might be intended as, or might have the effect of, a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district.⁸⁶

During oral arguments, the government relied on the same economic argument in prior cases such as *Califano* and *Harris* claiming Puerto Rico is exempt from excise taxes, and that less money is being taken from Puerto Rico into the general revenues at the federal level. Justice Sotomayor decided to "unpack" the federal government's argument focusing on U.S. citizenship, challenging the 'unique tax status', Puerto Rico's contributions to the federal government, and the design of the SSI program: "It seems to me that you are stating cost alone is not enough, cost plus something else. So let's look at the plus of that."⁸⁷ Moreover, Justice

Guam's demographics include: Chamorro 37.3%, Filipino 26.3%, White 7.1%, Chuukese 7%, Korean 2.2%, other Pacific Islander 2%, other Asian 2%, Chinese 1.6%, Palauan 1.6%, Japanese 1.5%, Pohnpeian 1.4%, mixed 9.4%, other 0.6% (2010 est.) "Guam People 2020", THEODORA, https://theodora.com/wfbcurrent/guam/guam_people.html (last visited April 29, 2022)

⁷⁹ Transcript of Oral Argument at 9, *United States v. Vaello-Madero*, 956 F.3d 12 (U.S. 2021) (No. 20-303) [hereinafter "Transcript"].

⁸⁰ Vaello Madero's attorney Mr. Ferre argued: "Well, we believe the Territory Clause was intended for Congress to have the power to provide all rules and regulations respecting the territory, acting as a state would within the jurisdiction of a state, and we believe that that was intended to be temporary while the territory was in pupillage. The problem here is that the Insular Cases has created a circumstance in which that temporary period has become indefinite. So, there is a concern that the Territory Clause could potentially be abused in the sense that Congress can step in for an indefinite period without actually guiding the territory towards statehood or, if it decides that a territory is to be disposed." *Id.* at 47-48. Justice Kagan questioned whether the Territory Clause has an implicit expiration date. *Id.* at 48; *See also supra* note 7 explaining congressional governance pursuant to the Territorial Clause was defined to be temporary in nature.

⁸¹ *Id.* at 6.

⁸² World Population Review, Vermont Population, <https://worldpopulationreview.com/states/vermont-population> (last visited Feb. 1, 2022).

⁸³ Schwarz, *supra* note 5.

⁸⁴ *United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 553 (5th Cir. 1980). "It may well be, that for certain ethnic groups and in some communities, that proficiency in a particular language . . . should be treated as a surrogate for race under an equal protection analysis." *See also* *Hernandez v. New York*, 500 U.S. 352, 371 (1991). "The use of a particular language is one of the defining characteristics of a suspect classification."

⁸⁵ "Transcript", *supra* note 79, at 4.

⁸⁶ *Missouri v. Lewis*, 101 U.S. 22, 32 (1879).

⁸⁷ "Transcript", *supra* note 79 at 12-13. Justice Sotomayor went on to explain: "This program is fully funded by the federal government, fully administered by the federal government. There's no cost to Puerto Rico. There's no cost to

Sotomayor went on to refute the government’s tax exemption claim, and explained that Puerto Rico’s payments to the federal treasury exceed many of the states.⁸⁸ Justice Breyer’s questioning highlighted the island’s colonial status vis-à-vis the states and their disparate treatment: “I just wonder, is that a reasonable, rational, or arbitrary thing to do for Congress to say, you know what, we discovered a state over here, maybe it's Mississippi or maybe it's California for all I know, that when you look at how much money they contribute to Washington, proportionate to the number of SSI things, it's greater than 14 other states, so we cut them out of the program. How long do you think that would last?”⁸⁹

Justice Coney-Barrett expressed concerns about the fiscal effects of affirming the lower court’s ruling and whether other benefits would apply to the residents of U.S. territories: “if there was equal treatment across the board then questions would be raised over whether Puerto Ricans should pay federal income taxes.”⁹⁰ Justice Brett Kavanaugh found the arguments to affirm the lower court “compelling” but noted that the Territory Clause allows Congress to treat territories differently than states: “It is a part of the Constitution that people would want to change but that

any state. And so I don't understand what the different relationship with Puerto Rico has to do with this program because there's no cost to the government. It's not as if it could take this federal money, Puerto Rico, and distribute it in some other way or put this money to use in some other way because the money's going directly to the people, not to the government. So I don't see how that can be a plus with respect to the self-governance of Puerto Rico . . . As the courts below noted, most of the SSI recipients, if not all of them, don't pay taxes. So it's not as if the recipients of this money are any different among themselves. Puerto Ricans are citizens, and the Constitution applies to them. Their needy people are being treated different than the needy people in the 50 states, the District of Columbia, and the Northern Mariana Islands. So explain how those people, none of whom pay taxes to the federal government, how are they different?”

⁸⁸ Justice Sotomayor refuted the perception that Puerto Rico does not pay its fair share to the federal treasury: “with the record that I see in the First Circuit case, *Peña*, that shows that Puerto Ricans pay, maybe not excise tax, maybe not income tax, but that they pay as much taxes, other combined taxes, as other states in the union, meaning it's nice to sort of cherry-pick one tax, but that's true around the country. The government gives some tax benefits to some things and not others. You've got to look at the structure as a whole to see is there a really substantial difference. But I'm looking at that record, and it shows Puerto Ricans as a community, and all the other taxes they pay, pay more than many states of the union. So I don't know how exempting out one or two taxes gets you away from seeing whether the government's distinction is rationally based on the need of the citizens who are supposed to receive the money.” *Id.* at 14. *See also* *Pena Martinez v. Azar* 376 F. Supp. 3d 191, 207-08 (D.P.R. 2019) (“[N]o one consideration independently sufficed to justify the exclusion of Puerto Rico residents from eligibility from SSI”).

⁸⁹ “Transcript”, *supra* note 79, at 16; To the government’s argument that Puerto Rico has territorial autonomy, Justice Breyer responded: “[I]s this the same government that is bankrupt and that is being run, the economy, by people, some of them anyway, not from Puerto Rico but from -- under a law that applies from the mainland? And is this the same program that would, in fact, give the people on average who need it \$418 a month, as opposed to what Puerto Rico can afford to give them, which is \$58 a month?” *Id.* at 20.

⁹⁰ The U.S. government claims that extending SSI to Puerto Rico would cost \$2 billion. *Id.* at 39.

it is not the court's role to do that.”⁹¹ Moreover, Justice Kavanaugh specifically asked if Mr. Vaello Madero would be eligible for a waiver.⁹²

CONCLUSION

Like the decision in *Brown*,⁹³ over time, the courts began to reverse race-based jurisprudence in violation of equal protection.⁹⁴ Justice Harlan’s dissent in *Plessy* began to serve as the guiding principle for the Court: “In the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. With respect to civil rights, all citizens are equal before the law.”⁹⁵ In a historic move, the lower courts are signaling to the high court that under proper scrutiny, the Insular Cases would not survive today. Specifically, the District Court explained that the Territorial Clause is not ‘carte blanche for Congress to switch on and off at its convenience the fundamental constitutional rights to due process and equal protection’.⁹⁶ More importantly, Congress cannot demean a U.S. citizen while in Puerto Rico with a ‘stigma of inferior citizenship to that of his brethren nationwide, to do so would run afoul of the sacrosanct principle that all men are created equal under the law.’⁹⁷

The U.S. Supreme Court, on the basis of eroding precedent and equal protection, has the constitutional duty to affirm the lower court’s decision. Justices Sotomayor, Breyer, and Gorsuch seemed willing to eradicate second class citizenship by reversing the racially motivated Insular Cases, thereby affirming the First Circuit’s opinion. Justice Kagan’s reference to current legislation allowing Puerto Rico to be included in SSI was perhaps the most troubling as it may justify the court’s deference to Congress, allowing the court to ignore the Insular Cases and their progeny entirely. To do so, the Supreme Court would be conceding to the legal institutionalization of a class of people based on race and/or ethnicity, and the improper exercise of the Territorial Clause.⁹⁸ The Federalist Papers outlines the duty of the court, as an arbiter, to safeguard our Constitution from majoritarian attacks, particularly when race is an issue.⁹⁹

⁹¹ “Transcript”, *supra* note 79, at 55. While Justice Kavanaugh is correct that the judiciary’s role is not to change the constitution, it is undoubtedly within the purview of the judiciary to interpret the constitution’s equal protection clause under heightened scrutiny particularly where “[A]s a historical matter, suspect classes are those that have been subjected to discrimination, exhibiting obvious, immutable, or distinguishing characteristics that define them as a discrete group and are a minority or political powerless”; *Lyng v. Castillo*, 477 U.S. 635 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“The purpose of strict scrutiny is to smoke out illegitimate uses of suspect classifications.”).

⁹² “Transcript”, *supra* note 79, at 38, “I want to make sure that he’s still eligible for a waiver.” Justice Kavanaugh’s reference to the Territorial Clause and availability of waiver indicates his willingness to continue the legacy of the Insular Cases and the clause’s perpetual effects in the territories.

⁹³ See generally *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). The court in *Brown* reversed the “separate but equal” doctrine in *Plessy v. Ferguson*, holding that racial segregation in public schools was unconstitutional.

⁹⁴ The U.S. Supreme Court openly stated that precedent may be reversed where “subsequent developments have eroded their underpinnings.” *Janus v. Am. Fed. of State, Cnty., & Mun. Emps.*, 138 S.Ct. 2448, 2486 (2018) (reversing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

⁹⁵ *Plessy*, 163 U.S. 537 (1896) (Harlan, J dissenting).

⁹⁶ *United States v. Vaello Madero*, 356 F. Supp. 3d 208, 211 (D.P.R. 2019).

⁹⁷ *Id.* at 211.

⁹⁸ *Loughborough v. Blake*, 18 U.S. 317, 319 (1820) The term “United States was not in reference to any particular portion of the country, but instead that it is the name given to our great republic, which is composed of States and

American law values *stare decisis* as a principle that allows for predictability and consistency in similar cases. However, the Insular Cases, like *Plessy*, represent that precedent is not immutable. With many lower courts withdrawing judicial endorsement of race-based decisions, the U.S. Supreme Court has the opportunity to revisit the purpose of *stare decisis* and whether adherence to it necessarily promotes core constitutional values. As in *Brown*, nearly six decades later, the high court reviewed lower court decisions that signaled the need to reverse *Plessy*'s "separate but equal" doctrine because of its violation of the Equal Protection Clause under the Fourteenth Amendment. Puerto Rico has been relegated to second class status and less deserving of constitutional protection for over 120 years because of race. Adherence to *stare decisis* in this case would signify that the U.S. Supreme Court is in fact, a racial barrier to equal protection. Hence, the U.S. Supreme Court acting accordingly, must affirm the First Circuit's decision in *U.S. v. Vaello Madero*, and reverse the Insular Cases.

POSTSCRIPT

On April 21, 2022, the U.S. Supreme Court once again reversed two lower court opinions that strongly denounced the Insular Cases and their progeny.¹⁰⁰ Ignoring the equal protection issue of the *individual citizen* in this case, the Court, in an opinion authored by Justice Kavanaugh, explained that "residents of Puerto Rico are typically exempt from most federal income, gift, estate, and excise tax" but conceded that island residents do pay "Social Security, Medicare, and unemployment taxes."¹⁰¹ The court reasoned that as a whole, Puerto Rico pays fewer taxes than residents on the mainland, and as such, it is rational for island residents to receive less benefits.¹⁰² Thus, the Constitution does not require Congress to extend Supplemental Security Income benefits to residents of Puerto Rico.¹⁰³ The Court clearly ignored that SSI payments go to individual American citizens who are "persons" pursuant to the Equal Protection Clause of the federal constitution.¹⁰⁴ The payments are not directed to local governments who then distribute the monies to citizens within their jurisdiction.¹⁰⁵ As Justice Sotomayor, the only dissenter, explained, "SSI payments go to low income individuals who cannot afford to pay taxes."¹⁰⁶

territories." When the insular territories were acquired, by majority non-Anglo Saxon residents, Congress changed course: "At this point Congress chose to discontinue its previous practice of extending constitutional rights to the territories by statute"; *see also* *Boumediene v. Bush*, 553 U.S. 723 (2008) at 756.

⁹⁹ Liebman & Garrett, *supra* note 7, at 926.

¹⁰⁰ *United States v. Vaello Madero*, 596 U.S. ____ (2022). Full opinion available at https://www.supremecourt.gov/opinions/21pdf/20-303_6khn.pdf.

¹⁰¹ *Id.*

¹⁰² *Id.* The U.S. Supreme Court was persuaded by the federal government's tax argument. The First Circuit, however, specifically highlighted the flawed reasoning by explaining: "If eligibility is premised on the payment of federal income tax, then it is antithetical to the entire premise of the program. How can it be rational for Congress to limit SSI benefits to exclude populations that generally do not pay federal income taxes when the very population those benefits target do not, as a general matter, pay federal income tax?" *Vaello Madero*, 956 F. 3d 12, 27.

¹⁰³ *See Vaello Madero*, 596 U.S. ____ (2022).

¹⁰⁴ *See Id.*; 42 U.S.C. §1381, "SSI provides financial assistance to low-income individuals older than sixty-five, blind or disabled."

¹⁰⁵ *Id.*

¹⁰⁶ *Vaello Madero*, 596 U.S. ____ (2022) (Sotomayor, J., dissenting). Justice Sotomayor explained: "If Congress can exclude citizens from safety-net programs on the ground that they reside in jurisdictions that do not pay sufficient taxes, Congress could exclude needy residents of Vermont, Wyoming, South Dakota, North Dakota, Montana, and

Justice Gorsuch, concurring with the majority, took strong aim at the premise of the Insular Cases which “have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.”¹⁰⁷ Nonetheless, Justice Gorsuch agreed that it was rational for Congress to discriminate against the U.S. citizens in Puerto Rico.¹⁰⁸

The Equal Protection Clause protects against government discrimination and does not make a distinction of “persons” residing in territories or states.¹⁰⁹ In the Court’s muddled analysis, Mr. Jose Luis Vaello Madero, a resident of Puerto Rico, does not meet that constitutional requirement. The U.S. Supreme Court, reversing two lower court opinions, endures as the racial barrier to equal protection for the Spanish-speaking, non-Anglo, U.S. citizens of Puerto Rico.

Alaska from benefit programs on the basis that residents of those States pay less into the Federal Treasury than residents of other States.” *Id.*

¹⁰⁷ *Id.* (Gorsuch, J., concurring). Paradoxically, Justice Gorsuch concedes that the insular cases were wrongly decided. Specifically, he stated “The flaws in the insular cases are as fundamental as they are shameful. Nothing in the Constitution speaks of “incorporated” and “unincorporated” Territories. Nothing in it extends to the latter only certain supposedly “fundamental” constitutional guarantees. Nothing in it authorizes judges to engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion.” *Id.* The premise of the Insular Cases which underscore the present case in Gorsuch’s view is unconstitutional, yet he agreed with the majority to exclude American citizens in Puerto Rico from these benefits that go directly to poor individuals.

¹⁰⁸ *Id.*

¹⁰⁹ “Equal Protection”, *supra* note 4. *See also* “Substantive Due Process”, JUSTIA, <https://law.justia.com/constitution/us/amendment-05/13-substantive-due-process.html> (last accessed April 25, 2022). Regarding discrimination, the Fifth Amendment does not specifically include an Equal Protection Clause, however, courts have held that “equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”