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Racial Barriers to Equal Protection: United States v. Madero

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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,[1] the constitution does not provide for representation in Congress nor participation in federal elections.[2] 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.[3] 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.[4] United States v. Vaello Madero[5] exemplifies the colonial relationship that will test whether the Supreme Court will ignore its constitutional duty to extend the Equal Protection Clause[6] to the American citizens of Puerto 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,[7] may treat Puerto Rico differently than the states.[8] 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.[9]

[1] 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/#.YfsHrGBOlhB.

[2] 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/.

[3] ?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.

[4] 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 infrafor a discussion of the Insular Cases.

[5] 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.

[6] 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. Garett, 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' 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.

[7] 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-II13-20191017-SD043.pdf.

[8] 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?).

[9] 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. Pena, 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?).

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