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United States v. Vaello-Madero: The Impact of Varying Rights to Citizens of the United States

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United States v. Vaello-Madero: The Impact of Varying Rights to Citizens of the United States

*Ana Siracusa**

Since 1917, residents of Puerto Rico have been citizens of the United States. However, because of Puerto Rico's status as a United States territory, residents of Puerto Rico are not automatically guaranteed the same constitutional rights as other citizens of the United States. When faced with the question of what constitutional rights residents of Puerto Rico are entitled to, the Supreme Court has continued to perpetuate the otherness of United States territories. This disposition results from the United States' colonial mindset in the acquisition and government of its territories. The discrimination against United States territories, namely Puerto Rico, has bled into the perception of Americans, both on mainland United States and in Puerto Rico.

In United States v. Vaello-Madero, the Supreme Court decided whether excluding residents of Puerto Rico from benefits of the Supplemental Security Income (SSI) Program violated their constitutional right to equal protection. The Court upheld the exclusion of Puerto Rican residents, relying on the notion that if Puerto Rican residents are exempt from paying certain taxes, such federal income tax, then Congress may exclude them from certain benefits. This Note discusses the United States' imperial past and the cases prior to this decision that established the discrimination against Puerto Rico as a United States territory. This Note also analyzes the Vaello-Madero opinion, including a discussion of the incorrect legal reasoning employed by the Court and its consistency with past cases. Finally, this Note explains the impacts of the Court's decision. Ultimately, this Note illustrates why, 105 years after Puerto Rican residents were granted United States citizenship, Americans on mainland United States and in Puerto Rico remain uncertain of their status.

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INTRODUCTION	3
I. BACKGROUND.....	5
A. <i>The American Empire</i>	5
B. <i>The Insular Cases</i>	9
C. <i>Past Cases Discussing Differential Treatment of Puerto Rican Residents</i>	15
1. <i>Califano v. Torres</i>	15
2. <i>Harris v. Rosario</i>	17
II. DISCUSSION.....	19
A. <i>Facts of the Case</i>	20
B. <i>Procedural Posture of the Case</i>	20
C. <i>The Supreme Court Majority Decision</i>	23
D. <i>Justice Thomas’s Concurrence</i>	25
E. <i>Justice Gorsuch’s Concurrence</i>	27
F. <i>Justice Sotomayor’s Dissent</i>	30
III. ANALYSIS	33
A. <i>Consistency with Prior Cases</i>	34
B. <i>The Majority Decision—A Modern Insular Case</i>	35
C. <i>Failure to Mention the Impacts</i>	37
1. <i>Justice Thomas’s Concurrence</i>	38
2. <i>Justice Sotomayor’s Dissent</i>	40
D. <i>The Wrong Test Was Used</i>	44
IV. IMPACT	47
A. <i>The General Public</i>	47
B. <i>How Puerto Ricans Are Affected</i>	48
C. <i>Puerto Rico: Statehood or Independence?</i>	51
CONCLUSION	55

INTRODUCTION

The United States, through its acquisition of various territories, has created colonies—territories that are “subordinate in various ways”—and has treated them accordingly.¹ United States’ control over Puerto Rico, Guam, and the Philippines as territories was the result of its victory in the Spanish-American War in 1898.² Residents of Puerto Rico were granted United States citizenship; however, most Americans remain ignorant that they are “[f]ellow [c]itizens.”³

The lack of knowledge that Americans have toward the status of Puerto Rican residents contributes to Puerto Ricans feeling as though they are “second-class citizens,” not deserving of the same rights and benefits guaranteed to other United States citizens.⁴ This sentiment, although

1. See Juan R. Torruella, *Ruling America’s Colonies: The “Insular Cases,”* 32 YALE L. & POL’Y REV. 57, 58 (2013) [hereinafter Torruella, *Ruling America’s Colonies*] (citing Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico’s Legal Status Reconsidered*, 50 B.C. L. REV. 1123 (2009)); see also Jacqueline N. Font-Guzmán, *Puerto Ricans Are Hardly U.S. Citizens. They Are Colonial Subjects.*, WASH. POST (Dec. 13, 2017), https://www.washingtonpost.com/opinions/puerto-ricans-are-hardly-us-citizens-they-are-colonial-subjects/2017/12/13/c0f1c700-de9f-11e7-89e8-edec16379010_story.html [https://perma.cc/4K2H-QE3P] (“Puerto Ricans never asked to be colonized, never asked to be denied their Puerto Rican citizenship and never asked to have U.S. citizenship imposed upon them. Puerto Ricans suffering the devastation of Hurricane Maria are not fellow American citizens; they are colonial subjects of the United States.”). This Article explains the dangers of asserting that since Puerto Ricans are American citizens, they should be treated as such. See *id.* (describing this as “dangerous” because designating Puerto Ricans as U.S. citizens is “incomplete,” presupposing “that the solution to Puerto Ricans’ colonial predicament is U.S. citizenship”). Moreover, Guzmán states that this narrative suggests that the United States knows what is best for Puerto Rico, without even considering if Puerto Ricans want to be United States citizens. See *id.* Guzmán asserts that the question is not “[w]hy are Puerto Ricans not treated as U.S. citizens,” but instead the question should be “whether Puerto Ricans want to be U.S. citizens.” *Id.*

2. Torruella, *Ruling America’s Colonies*, *supra* note 1, at 59; see also Tim Webber, *What Does Being a U.S. Territory Mean for Puerto Rico?*, NPR (Oct. 13, 2017, 4:39 AM), <https://www.npr.org/2017/10/13/557500279/what-does-being-a-u-s-territory-mean-for-puerto-rico> [https://perma.cc/Y8CV-U987] (providing historical context).

3. Kyle Dropp & Brendan Nyhan, *Nearly Half of Americans Don’t Know Puerto Ricans Are Fellow Citizens*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/upshot/nearly-half-of-americans-dont-know-people-in-puerto-rico-are-fellow-citizens.html> [https://perma.cc/5CJG-T3LG]; see also Nick Timiraos, *Most Americans Don’t Know the Citizenship of Puerto Ricans*, WALL ST. J. (June 9, 2016, 8:02 AM), <https://www.wsj.com/articles/BL-REB-35887> [https://perma.cc/2WGB-NSL5] (showing poll results to describe why Puerto Rico’s debt crisis has not been a priority to the rest of America).

4. See, e.g., *Some Puerto Ricans Feel Like “Second-Class” Citizens in Wake of Maria*, CBS NEWS (Sept. 30, 2017, 3:58 PM), <https://www.cbsnews.com/news/hurricane-maria-puerto-rico-second-class-citizens/> [https://perma.cc/89CG-KQ3G] (explaining the general consensus shared amongst Puerto Ricans); Julia Reinstein, *Puerto Ricans Are Still Struggling after Hurricane Fiona and Fear They’ll Once Again Be Treated Like Second-Class Citizens*, BUZZFEED NEWS (Sept. 27, 2022, 6:49 PM), <https://www.buzzfeednews.com/article/juliareinstein/puerto-rico-hurricane-fiona-recovery> [https://perma.cc/3UWC-4G8X] (“I think when you live on the island, you get a sense that people on the mainland are completely disconnected from you. . . . But at the end of the day, not only are the people on the island humans, they’re U.S. citizens.”).

likely based on the confusion surrounding the treatment of territories, is reinforced when the United States chooses to treat the residents of Puerto Rico differently under the guise of “rational” basis review. The Supreme Court’s recent decision in *United States v. Vaello-Madero* provides an example; the decision further intensifies not only the uncertainty that Puerto Rican residents have regarding their privileges and status as American citizens, but also the lack of awareness that other Americans have toward Puerto Ricans’ status as citizens.⁵ Puerto Ricans remain “in limbo” concerning the rights they are entitled to, “without either the advantages or burdens that come with being a U.S. state or an independent nation.”⁶ Their position in limbo creates a notion that they are not American, not only in their minds, but in the minds of other American citizens.⁷

Puerto Ricans have suffered, and continue to suffer, from disparate treatment. In May 2022, the Supreme Court had the opportunity to end the irrational wavering of rights between Puerto Ricans and other citizens. However, the “second-class citizen[.]” sentiment was upheld, continuing Puerto Rico’s lack of guaranteed rights.⁸

This Note will examine the Supreme Court’s decision in *United States v. Vaello-Madero*, the foundation of that decision from the past, and the decision’s impact in the future. Part I will introduce background on the United States’ relationship with Puerto Rico as its territory, and how that

5. See generally *United States v. Vaello-Madero*, 142 S. Ct. 1539 (2022).

6. Susan Milligan, *A Territory in Limbo*, U.S. NEWS (June 8, 2018, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2018-06-08/puerto-ricans-are-americans-but-they-dont-get-all-the-benefits> [<https://perma.cc/LT36-KVH6>]; see also Andrés L. Córdova, *Supreme Court Leaves Puerto Rico in Territorial Limbo*, HILL (Apr. 21, 2022, 7:45 PM), <https://thehill.com/opinion/judiciary/3459327-supreme-court-leaves-puerto-rico-in-territorial-limbo/> [<https://perma.cc/S33M-XMKU>] (explaining how the *Insular Cases* laid the foundation for the majority decision in *Vaello-Madero*); see generally *United States v. Vaello-Madero*, 142 S. Ct. 1539 (2022).

7. See Milligan, *supra* note 6 (“After 120 years of a relationship, we still don’t call ourselves ‘Americanos.’ . . . That disconnect goes both ways . . .”); see also Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1253 (2019) (describing how the government “systemically” forgets and mistreats Puerto Ricans and encouraging that the current demeanor towards the U.S. territories have “greater urgency”).

8. See Ediberto Román & Ernesto Sagás, *SCOTUS Declares U.S. Citizens in Puerto Rico Inferior*, BLOOMBERG LAW (May 2, 2022, 3:00 AM), <https://news.bloomberglaw.com/us-law-week/scotus-declares-u-s-citizens-in-puerto-rico-inferior> [<https://perma.cc/N8P3-PPDC>] (“A recent Supreme Court decision denying certain Social Security benefits to U.S. citizens in Puerto Rico ‘rubs salt into the collective wound’ of those citizens by reminding them (again) of their lower status in American society. . . .”); see also Yarimar Bonilla, *For Puerto Ricans, Another Reminder That We Are Second-Class Citizens*, N.Y. TIMES (May 19, 2022), <https://www.nytimes.com/2022/05/19/opinion/puerto-rico-supreme-court-social-security.html> [<https://perma.cc/KL8G-ZVXS>] (explaining that in 1980, the author’s mother was denied SSI benefits only because she lived in Puerto Rico). The author and her mother moved to Kansas, since there was “wider access to federal assistance.” *Id.* Now, “[f]orty years later. . .” the situation has not changed, with Puerto Ricans still unable to access the same rights as other Americans. *Id.*

has translated into the modern-day allocation of certain guaranteed rights of the Constitution. This will include a discussion of the benefits Puerto Rican residents receive, as well as those they are denied. Then, Part I will look at how the Supreme Court has decided issues of differential treatment toward Puerto Ricans in the past. Part II will provide the facts of *United States v. Vaello-Madero*, the lower courts' decisions, and how the case came before the Supreme Court. Part II will include discussion of the majority opinion, as well as the concurring and dissenting opinions. Part III will analyze the Court's decision, including how the majority decision is inconsistent with prior court decisions, how rational-basis review was incorrectly applied in the majority opinion, and the issues within each concurring and dissenting opinion. Finally, Part IV will discuss the impacts of this decision, including the opinion of the general public, the continued lack of attention toward Puerto Rico by fellow Americans, and how these factors might play a role in Puerto Rico's desire for self-government.

The themes of this Note include American imperialism, the Supreme Court's role in the relationship between the United States and its territories, and how these factors affect the American perception of Puerto Rico, for both Americans on mainland United States and Americans in Puerto Rico.

I. BACKGROUND

This Part will discuss the path to the United States' acquisition of territories and the origins of the colonial rule that the United States imposed on the territories, ultimately setting the scene to understand the United States' treatment of its territories today.

A. *The American Empire*

The United States presents a façade of being a “politically uniform space: a union, voluntarily entered into, of states standing on equal footing with one another. But that is not true, and it has never been true.”⁹ As mentioned previously, many Americans are unaware that

9. See Daniel Immerwahr, *How the US Has Hidden Its Empire*, GUARDIAN (Feb. 15 2019, 1:00 PM), <https://www.theguardian.com/news/2019/feb/15/the-us-hidden-empire-overseas-territories-united-states-guam-puerto-rico-american-samoa> [hereinafter Immerwahr, *How the US Has Hidden Its Empire*] [<https://perma.cc/WUQ9-5VD7>] (“The United States likes to think of itself as a republic, but it holds territories all over the world—the map you see doesn’t tell the whole story.”); see also Julian Go, *American Colonial Empire: The Limit of Power’s Reach*, B.U. SOCIO. 18 (2010) (“Wilson reminds us that the United States has long been an empire These acquisitions meant that the United States was not simply an ‘informal’ empire but also a ‘formal’ colonial empire.”) When Go says “these acquisitions,” he is speaking about “Puerto Rico, Guam, Samoa, the Philippines, and the Islamic ‘Moro Province’ of the Philippine archipelago.” *Id.*

Puerto Ricans are citizens just like them.¹⁰ However, this is part of a larger disconnect that Americans have with their own history that is not purely a result of ignorance. Daniel Immerwahr, currently a history professor at Northwestern University, has commented on the American empire and how it is often hidden behind the way it “perceives itself to be a republic.”¹¹ Immerwahr discusses the concept of the United States’ “logo map,” describing the map’s shape as “if the country had a logo.”¹² There is a universal image that comes to mind when people think of the United States in terms of land.¹³ As Immerwahr discusses the inaccuracies and misconceptions presented by the “logo map,” he describes the false overall notion that the map conveys: the absence of the territories.¹⁴

The “logo map” is just one example presented by Immerwahr in his attempt to illustrate the American empire, which is not commonly perceived as an empire.¹⁵ He refers to a government report that stated:

Most people in this country, including educated people, know little or nothing about our overseas possessions. . . . As a matter of fact, a lot of people do not know that we have overseas possessions. They are convinced that only ‘foreigners’, such as the British, have an ‘empire.’ Americans are sometimes amazed to hear that we, too, have an ‘empire.’¹⁶

The imperialism of the United States was stimulated by the “manifest destiny” ideology that was used to justify the United States’ colonialist behavior, through the belief that the United States was “destined” to “expand its dominion.”¹⁷ The United States felt entitled in its right to

10. See Dropp & Nyhan, *supra* note 3 (citing a poll of 2,200 adults revealing that only 54 percent of Americans know that people born in Puerto Ricans are U.S. citizens); see also Milligan, *supra* note 6 (similarly describing how Puerto Ricans are actually born U.S. citizens, but noting that while they must follow federal law, they do not get all of the benefits they deserve).

11. Immerwahr, *How the US Has Hidden Its Empire*, *supra* note 9; see generally Les Jacobson, *Time to Downsize the American Empire: An interview with Northwestern Historian Daniel Immerwahr*, EVANSTON ROUNDTABLE (Nov. 27 2021), <https://evanstonroundtable.com/2021/11/27/northwestern-history-professor-daniel-immerwahr-interview/> [<https://perma.cc/7TX5-LEBG>].

12. Immerwahr, *How the US Has Hidden Its Empire*, *supra* note 9 (citing political scientist Benedict Anderson); *United States Symbols*, LEGENDS OF AMERICA (Apr. 2020), <https://www.legendsofamerica.com/united-states-symbols/> [<https://perma.cc/P2TZ-PAJR>].

13. Immerwahr, *How the US Has Hidden Its Empire*, *supra* note 9 (citing political scientist Benedict Anderson); see also *United States Symbols*, *supra* note 12 (depicting symbols of the United States in a map that does not show the territories, which is the map described as the “logo map”).

14. Immerwahr, *How the US Has Hidden Its Empire*, *supra* note 9.

15. See Immerwahr, *How the US Has Hidden Its Empire*, *supra* note 9 (describing how most people envision the United States).

16. *Id.* (citing an unnamed “governmental report written during the second world war”).

17. *Manifest Destiny*, HISTORY (Nov. 15, 2019), <https://www.history.com/topics/ward-expansion/manifest-destiny> [<https://perma.cc/39UH-WVDF>]. This website page stated,

In 1823, Monroe invoked Manifest Destiny . . . to warn European nations not to interfere

expand, acting as though it had an obligation to improve the rest of North America through its influence and principles. This idea has been referred to as the “white man’s burden” in the context of the United States’ relationship with certain territories it acquired.¹⁸ If this concept sounds familiar, it is because the British justified their violent colonial expansion using the same thought process; the British believed that they were meant to embark on a mission of civilization, analogous to the United States’ “manifest destiny” sentiment.¹⁹ Similar to many English citizens regarding the British empire, Americans are somewhat unaware of their country’s role in an expansion of power that was in no way necessary or peaceful.²⁰

with America’s Westward expansion, threatening that any attempt by Europeans to colonize the ‘American continents’ would be seen as an act of war . . . it would be used as a rationale for U.S. intervention in Latin America.

Id.; see also Torruella, *Ruling America’s Colonies*, *supra* note 1, at 60 (explaining how the expansion of the United States through territories was “cloaked” or “justified” by this ideology).

18. See Rudyard Kipling, *The White Man’s Burden Summary & Analysis*, LITCHARTS, <https://www.litcharts.com/poetry/rudyard-kipling/the-white-man-s-burden>

[<https://perma.cc/PRV4-HWZY>] (last visited Mar. 27, 2023) (“[T]he speaker defines white imperialism and colonialism in moral terms, as a ‘burden’ that the white race must take up in order to help the non-white races develop civilization. . . . The phrase ‘white man’s burden’ remains notorious as a racist justification for Western conquest.”). The poem is encouraging the United States to “conquer and rule the Philippines.” *Id.* The analysis of the poem continues, by stating “‘The White Man’s Burden’ presents the conquering of non-white races as white people’s selfless moral duty. . . not for personal or national benefit, but rather for the gain of others—specifically for the gain of the conquered.” *Id.*; see generally *Modern History Sourcebook: Rudyard Kipling, The White Man’s Burden, 1899*, FORDHAM UNIV., <https://sourcebooks.fordham.edu/mod/kipling.asp> (last visited Mar. 27, 2023) [<https://perma.cc/5KX5-R4CD>].

19. See Arun Venugopal, ‘Legacy of Violence’ Documents the Dark Side of the British Empire, NPR (July 11, 2022, 1:33 PM), <https://www.npr.org/2022/07/11/1110853580/legacy-of-violence-documents-the-dark-side-of-the-british-empire> [<https://perma.cc/ND7P-5WW7>] (explaining that, while the British empire is often masked as an expansion of civilization to other countries, it involved more violence than many people know); see also Caitlin McDermott-Murphy, *Legacy of Liberal Violence*, HARV. GAZETTE (March 28, 2022), <https://news.harvard.edu/gazette/story/2022/03/caroline-elkins-new-book-broadens-story-of-british-empire/> [<https://perma.cc/D2EL-8SJS>] (“[W]hile the British Empire made some mistakes, it also brought education, health care, and the rule of law to its colonies”). The article discusses a book written by Caroline Elkins about the British Empire where Elkins states that labeling the British Empire as “good” or “evil” is not useful, as it ended up being a combination of both. *Id.*

20. See, e.g., Oscar Rickett, *Britain Has Never Faced Up to the Shame of Empire*, VICE (Apr. 27, 2017, 9:29 AM), <https://www.vice.com/en/article/3d9jdw/britain-has-never-faced-up-to-the-shame-of-empire> [<https://perma.cc/YXZ4-G7UU>] (“These imperial crimes—and many more—are either not known or glossed over, lost in the tide of colonial nostalgia and the fog of ignorance.”); accord Robert Booth, *UK More Nostalgic for Empire than Other Ex-colonial Powers*, GUARDIAN (March 11, 2020, 2:00 PM), <https://www.theguardian.com/world/2020/mar/11/uk-more-nostalgic-for-empire-than-other-ex-colonial-powers> [<https://perma.cc/V8V8-QBWV>] (describing British involvement in slavery during the seventeenth and eighteenth centuries); Jon Stone, *British People Are Proud of Colonialism and the British Empire, Poll Finds*, INDEPENDENT (Jan. 19, 2016, 2:34 PM), <https://www.independent.co.uk/news/uk/politics/british-people-are-proud-of-colonialism->

The “manifest destiny” ideology, along with the Spanish-American War, was used to justify the United States’ territorial expansion into Latin America.²¹ Prior to the start of the Spanish-American War, Spain was involved in conflict with Cuba, Puerto Rico, and the Philippines—Spanish colonies that began fighting for their independence.²² The United States, due to the close geographic distance of those countries and the attention surrounding the conflict, felt faced with a decision of whether or not to become involved.²³ The Spanish-American War was the result of America’s intervention, under President William McKinley, in that conflict.²⁴

The United States’ victory secured its acquisition of three territories: Guam, the Philippines, and Puerto Rico.²⁵ With these new territories came confusion about how to govern the acquired land and the people that lived on the land; the question before the United States was whether the Constitution was applicable to these new territories.²⁶ This was

and-the-british-empire-poll-finds-a6821206.html [https://perma.cc/MWC4-9GVT]; Elizabeth Graham, *Young People Are Ignorant about British Colonial History*, GUARDIAN (Sept. 1, 2022, 12:51 PM), <https://www.theguardian.com/world/2022/sep/01/young-people-are-ignorant-about-british-colonial-history> [https://perma.cc/3XHL-UHQH] (describing a general “ignorance” about the harsh realities of British colonial history); Immerwahr, *How the US Has Hidden Its Empire*, *supra* note 9.

21. *Manifest Destiny*, *supra* note 17 (“The philosophy drove 19th-century U.S. territorial expansion and was used to justify the forced removal of Native Americans and other groups from their homes.”); *see also* Torruella, *Ruling America’s Colonies*, *supra* note 1, at 60 (asserting that the Spanish-American War was the result of the United States expansion process that was advanced by the “manifest destiny” theory).

22. *See* DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE* 64–65, 70 (2019) [hereinafter IMMERWAHR, *HOW TO HIDE AN EMPIRE*] (providing historical context).

23. *See The Spanish-American War, 1898*, OFF. OF HISTORIAN, <https://history.state.gov/milestones/1866-1898/spanish-american-war> [https://perma.cc/92WW-4E8V] (“From 1895–1898, the violent conflict in Cuba captured the attention of Americans because of the economic and political instability that it produced in a region within such close geographical proximity to the United States.”); *see also* IMMERWAHR, *HOW TO HIDE AN EMPIRE*, *supra* note 22, at 65 (“The newspapers played it up, portraying Cuba as a damsel in distress. . . . Should the United States enter the fray?”); *see generally* Torruella, *Ruling America’s Colonies*, *supra* note 1.

24. *See* IMMERWAHR, *HOW TO HIDE AN EMPIRE*, *supra* note 22, at 70 (“The United States was . . . a latecomer, supplying a burst of force at the end of a long, bloody conflict that had already nearly destroyed the Spanish Empire.”); *see also* John L. Offner, *McKinley and the Spanish-American War*, 34 PRESIDENTIAL STUD. Q. 50 (2004) (depicting tense international relations at the time).

25. *See* IMMERWAHR, *HOW TO HIDE AN EMPIRE*, *supra* note 22, at 72; *see also* Alejandro J. Anselmi González, *The Flag Can Travel but the Constitution Must Ask Permission: How the First Circuit and the District for Puerto Rico Commit to Equal Protection without Abandoning the Insular Cases Doctrine*, 53 U. MIA. INTER-AM. L. REV. 87, 100 (2021) (“[T]he most crucial aspect of the peace treaty between the United States and Spain was Article IX, by which Spain surrendered its sovereignty over Guam, the Philippines, and Puerto Rico.”).

26. *See* Torruella, *Ruling America’s Colonies*, *supra* note 1, at 64 (“The constitutional question of how to rule these lands and their people—phrased in the prevalent lingo of the times as ‘does the Constitution follow the flag’—was answered by a fractured Supreme Court in 1901 in a series

answered by a series of holdings in the *Insular Cases*, a ruling on the issue that is now stated as, “[D]oes the Constitution follow the flag?”²⁷

B. *The Insular Cases*

While the United States’ victory resulted in the acquisition of Guam, the Philippines, and Puerto Rico, the United States had territories prior to the Spanish-American War: Utah, California, Arizona, New Mexico, and Nevada.²⁸ The post Spanish-American War territories were not only farther away from mainland United States than the other territories, but also comprised of different people.²⁹ The people living in these territories were not white, and there were few United States citizens living in Puerto Rico; this undoubtedly had an impact on its attitude toward these territories.³⁰

The debate on how to govern territories sparked many academic opinions, some of which emerged in Supreme Court decisions.³¹ In 1899, an American law professor at Harvard University School of Law, James

of decisions now known as the *Insular Cases*.”); see also Lia Fiol-Matta, *Introduction to the “The Future of the Insular Cases” Special Issue*, 53 COLUM. HUM. RTS. L. REV. 711, 712 (2022) (footnote omitted) ([I]n the aftermath of . . . the United States’ acquisition of geographically distant territories, the Supreme Court grappled with the scope and applicability of the Constitution to the newly-acquired territories. . .”).

27. Torruella, *Ruling America’s Colonies*, *supra* note 1, at 64; see also Kal Raustiala, *Does the Constitution Follow the Flag? Territoriality and Extraterritoriality in American Law* 1, 5 (UCLA Sch. L., Pub. L. & Legal Theory Rsch. Paper Series, Rsch. Paper No. 08-34) (“Were the islands acquired from Spain subject to the same laws as ordinary American territory, or could the United States rule offshore territories differently simply because they were offshore?”); accord Marybeth Herald, *Does the Constitution Follow the Flag into United States Territories or Can It Be Separately Purchased and Sold?*, 22 HASTINGS CONST. L. Q. 707, 709 (1995) (describing the question before the Supreme Court in the *Insular Cases*).

28. See Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283, 287–88 (2007) [hereinafter Torruella, *Regime of Political Apartheid*] (explaining that these territories were acquired after the Mexican War ended); accord The Editors of Encyclopedia Britannica, *Treaty of Guadalupe Hidalgo*, BRITANNICA (Oct. 11, 2022), <https://www.britannica.com/event/Treaty-of-Guadalupe-Hidalgo> [<https://perma.cc/YD6R-LZ5W>] (“[A]ccording to the [Treaty of Guadalupe Hidalgo] . . . Mexico ceded to the United States nearly all the territory now included in the states of New Mexico, Utah, Nevada, Arizona, California, and western Colorado. . .”).

29. See, e.g., Torruella, *Regime of Political Apartheid*, *supra* note 28, at 288–89; see also Fiol-Matta, *supra* note 26, at 712–14 (citing *Downes v. Bidwell*, 182 U.S. 244 (1901)) (calling the new territories (Guam, Puerto Rico, and the Philippines) “geographically distant territories,” and explaining that the theory of incorporation was based on the fact that these territories had residents of “alien races”).

30. See Torruella, *Regime of Political Apartheid*, *supra* note 28, at 289; see also IMMERWAHR, *HOW TO HIDE AN EMPIRE*, *supra* note 22, at 87 (stating that some territories could have realistic dreams of statehood, if they were comprised of “white settlers”).

31. See *Developments in the Law—The U.S. Territories*, 130 HARV. L. REV. 1617, 1618 (2017) (T[he] lack of specific treaty language left open . . . [the question] . . . to what extent could the United States legally assume the traditional role of a colonial power? Three academic camps emerged.”); see also Torruella, *Ruling America’s Colonies*, *supra* note 1, at 65, 70 (giving attention to the effect that the Harvard and Yale law review articles had on the governing of the territories).

Bradley Thayer, published an article in the Harvard Law Review titled “Our New Possessions.”³² Thayer repeatedly referred to the United States territories as “colonies,” and stated that the people of the “colonies” do not necessarily become entitled to the same rights as the citizens, as that power is left to Congress to decide what their position will be in relation to the United States.³³ Thayer did not try to hide the fact that these territories are treated just as colonies would be treated in the British empire; after explaining the power that the United States had over its newly acquired territories, he stated, “[n]ow observe, this is exactly the process of governing a colony. In fact these territories are, and always have been, colonies, dependencies.”³⁴ Thayer held a belief that the United States “must face and take up the new and unavoidable duties of the new colonial administration,” resting on the theory that the United States was beginning their undertaking of a “new career” of governing “savage” people “unfit to govern themselves.”³⁵ As a result of Thayer’s belief that these territories were in fact colonies, his opinion was that the Constitution solely applied to the states, and the territories were a separate entity to which the Constitution did not extend.³⁶

Another law professor, Simeon E. Baldwin, although expressing racist

32. James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899); see generally Torruella, *Regime of Political Apartheid*, *supra* note 28, at 295 n.45 (explaining Thayer’s view as “reminiscent” of the “white man’s burden,” in that Thayer believed the United States was entitled to teach “nations how to live”).

33. Thayer, *supra* note 32, at 471, 473 (stating that when a new territory is “acquired,” it does not automatically “become part of what we call the ‘territory’ of the United States”); see also Torruella, *Regime of Political Apartheid*, *supra* note 28, at 295–96 (explaining Thayer’s view as “disposing” the stances that Justice Marshall and Justice Taney had and asserting that Thayer believed not only that the Constitution does not apply to territories, but that territories were “subject to the absolute power of Congress”) (quoting Thayer, *supra* note 31, at 480). Torruella writes about earlier opinions from Justice Marshall and Justice Taney that establish that the United States shall not treat territories as colonies, and the Constitution does apply to the entire American empire. *Id.* at 292–95.

34. See Thayer, *supra* note 32, at 474 (quoting a Harvard history professor) (“[T]he United States, for more than a century, ‘has been a great colonial power without suspecting it.’”); see also Torruella, *Regime of Political Apartheid*, *supra* note 28, at 295 (quoting Thayer, *supra* note 32, at 484) (“[T]here is no lack of power in our nation,—of legal, constitutional power, to govern these islands as colonies substantially as England might govern them.”). But see *Colony*, NAT’L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/colony> [<https://perma.cc/K8W7-BZ2Z>] (“A colony is a group of people who inhabit a foreign territory but maintain ties to their parent country. While the group of people can be considered a colony, so too can the territory itself.”).

35. See Thayer, *supra* note 32, at 475, 484 (explaining the governing of the new territories in a way that resembles the manifest destiny ideology explained previously); see also *Developments—The U.S. Territories*, *supra* note 31, at 1618 (comparing Thayer’s beliefs, which are grounded in racism, with another academic belief, developed around the same time, that had “textualist reasoning,” but also had the “mentality” of “‘us’ versus ‘them’”).

36. See Thayer, *supra* note 32, at 475; see also Abbott Lawrence Lowell, *The Status of Our New Possessions: A Third View*, 13 HARV. L. REV. 155, 156 (1899) (explaining that Thayer’s view purports that “United States” means only the States).

sentiments in his theory, believed the Constitution to be applicable to the United States territories.³⁷ His view purported that the territories were possessions of the United States, therefore part of the United States such that the Constitution should apply.³⁸

A third perspective from law Professor Abbott Lawrence Lowell, ultimately became the view that the Supreme Court held.³⁹ Lowell's view, appropriately entitled "A Third View," discussed constitutional intent and historical context to analyze how the Constitution applied to the territories.⁴⁰ Lowell stated:

The theory, therefore, which best interprets the Constitution in the light of history, . . . would seem to be that territory may be so annexed as to make it a part of the United States, and that if so all the general restrictions in the Constitution apply to it . . . but that possessions may also be so acquired as not to form part of the United States, and in that case constitutional limitations, such as those requiring uniformity of taxation and trial by jury, do not apply.⁴¹

Six opinions from the early 1900s comprise the *Insular Cases*, and most used the terms "incorporated" or "unincorporated" to describe Puerto Rico and the other territories whose constitutional rights were being questioned.⁴² This theory, one that creates the existence of two types of territories, "unincorporated" and "incorporated," is based on

37. See *Developments—The U.S. Territories*, *supra* note 31, at 1619 ("Despite [his] denigration of these populations . . . Baldwin viewed the application of the Constitution to these territories as *inescapable*."); see also Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 401 (1899) ("To give the . . . ignorant and lawless brigands that infest Puerto Rico . . . the benefit of such immunities from . . . justice – or injustice . . . would . . . be a serious obstacle to . . . an efficient government."); *id.* at 415.

38. See Lowell, *supra* note 36, at 156 (describing Baldwin's view); see also *Developments—The U.S. Territories*, *supra* note 31, at 1619 (footnote omitted) ("[B]aldwin advanced a different view . . . that the term 'United States' included those newly acquired territories and, thus, that the Constitution applied to them.").

39. See *Developments—The U.S. Territories*, *supra* note 31, at 1619 ("Professor Abbott Lawrence Lowell's 'Third View,' meanwhile was the one that ultimately prevailed."); see also Torruella, *Regime of Political Apartheid*, *supra* note 28, at 296 (presenting Lowell's view as the one that "would most influence" the *Insular Cases*' holdings); see generally Lowell, *supra* note 36.

40. See Lowell, *supra* note 36, at 176; see also *Developments—The U.S. Territories*, *supra* note 31, at 1619 (describing Lowell's view).

41. Lowell, *supra* note 36, at 176; see also *Developments—The U.S. Territories*, *supra* note 31, at 1619 (explaining that Lowell did not see the Constitution's applicability as "an all-or-nothing proposition").

42. See JUAN R. TORRUELLA, FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 248, n.14 (Christina Duffy Burnett & Burke Marshall ed., 2001) (listing the *Insular Cases* as: *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901)). However, Torruella states that there are cases that have holdings concerning the governing of territories, and those are included under the *Insular Cases* as well, such as *Balzac v. Porto Rico*, 258 U.S. 298 (1922). *Id.*; see also Lin, *supra* note 7, at 1284, n.238 (naming many of the same cases as the *Insular Cases*).

Lowell’s “Third View.”⁴³

One of the first *Insular Cases*, *Downes v. Bidwell*, set the tone, with justices relying on the theory of “unincorporated” territories, and what that means for their constitutional rights.⁴⁴ In *Downes*, the Court was presented with the question whether the term “United States” in the Constitution encompassed Puerto Rico; today, this question is commonly stated as “Does the Constitution follow the flag?”⁴⁵ Ultimately, the Court held that the Constitution does not follow the flag automatically.⁴⁶ Justice Brown, writing the opinion, explained that Congress has the authority to decide when the Constitution should apply to a territory.⁴⁷ Justice White’s concurring opinion in *Downes* utilized the “incorporated” versus “unincorporated” territory theory, which caught on for the

43. See Torruella, *Regime of Political Apartheid*, *supra* note 28, at 296 (“In addition to being the most scholarly of these articles, [Lowell’s article] also provided the nomenclature for the legal theory that finally prevailed.”). Torruella also explains that while Thayer based his analysis in the text of the treaties for the acquisition of these territories, Lowell believed that “the treaties determined the *relationship of the territories* to the United States, and that it was this relationship that would determine what rights were possessed by the inhabitants under the Constitution.” *Id.* Torruella states that Lowell believed the language of the treaties for these territories provided for their incorporation into the United States. *Id.*; see also Lowell, *supra* note 36, at 164, 170–71 (“[T]he inhabitants of the ceded territory shall be incorporated in the Union of the United States . . .”).

44. *Downes v. Bidwell*, 182 U.S. 244 (1901); see also *Developments—The U.S. Territories*, *supra* note 31, at 1619 (“In 1901, Justice White in *Downes v. Bidwell* articulated what has come to be known as the “doctrine of territorial incorporation.”).

45. See *Downes v. Bidwell: Does the Constitution Follow the Flag?*, CONST. L. REP., (Mar. 6, 2023), <https://constitutionallawreporter.com/2016/05/24/historicaldownes-v-bidwell-does-the-constitution-follow-the-flag-2/> [<https://perma.cc/C389-KCVD>] (“According to the Court, since Puerto Rico was not part of the United States within the confines of the Constitution, Congress did not have the same power over the territory as it did over the states.”); Alejandro Agustin Ortiz & Adriel I. Cepeda Derieux, *The Most Racist Supreme Court Cases You’ve Probably Never Heard Of*, ACLU (Feb. 10, 2022), <https://www.aclu.org/news/civil-liberties/the-most-racist-supreme-court-cases-youve-probably-never-heard-of> [<https://perma.cc/K7JY-PQYM>].

46. See Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2467 (2022) (explaining the Court’s view on the Constitution’s application to the territories of the United States). See generally *Downes v. Bidwell*, 182 U.S. 244 (1901).

47. See Ponsa-Kraus, *supra* note 46, at 2467 (“Justice Brown, who had authored the *Plessy* decision several years earlier, wrote the opinion for the Court.”); see also IMMERWAHR, HOW TO HIDE AN EMPIRE, *supra* note 22, at 86:

Eight of the nine Justices who decided the Insular Cases also decided *Plessy v. Ferguson* . . . *Plessy* permitted segregation, the division of the country into separate spaces, some reserved for whites, others for nonwhites. The Insular Cases split the country into what one justice called ‘practically two governments,’ one bound by the Bills of Rights, the other not.

Id. This is a particularly important fact because the *Plessy* decision infamously held “separate but equal” to be Constitutional. See generally *Plessy v. Ferguson*, 16 S. Ct. 1138 (1896); see also Lin, *supra* note 7, at 1285 (explaining that the *Downes* decision held that Congress had the authority and discretion to decide when Constitutional provisions apply to the Territories under the Territorial Clause); U.S. CONST. art. IV § 3 cl. 2; *Downes v. Bidwell*, 182 U.S. 244 (1901).

rationale of the remaining *Insular Cases*.⁴⁸ Although never explicitly defined by the Court, the definition of an incorporated territory is a territory intended to ultimately become a state.⁴⁹

Four Justices issued a dissenting opinion in *Downes*.⁵⁰ Justice Harlan, the lone dissenter in *Plessy v. Ferguson*,⁵¹ noted that the Court's decision did not align with the principles of the Constitution.⁵² One of his points was that the Constitution “speaks, not simply to the states in their organized capacities, but to all peoples, whether of states or territories, who are subject to the authority of the United States.”⁵³ The Court's majority opinion was not focused on protecting the people of the United States, but instead perpetuated the false weight the arbitrary “unincorporated” and “incorporated” designations gave to these issues.⁵⁴

In 1922, *Balzac v. People of Porto Rico* further placed restrictions on what is defined as an “incorporated Territory.”⁵⁵ The Court in *Balzac*

48. Torruella, *Ruling America's Colonies*, *supra* note 1, at 71; *see also* Ponsa-Kraus, *supra* note 46, at 2467 (“White’s reasoning came to be known as the doctrine of territorial incorporation, and the affected territories acquired the label of ‘unincorporated territories.’”).

49. *See* Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 834 (1926) (“I surmise, although it is not wholly clear, that Mr. Justice White thought incorporation as a Territory implied a promise of ultimate statehood.”); *see also* United States v. Vaello-Madero, 142 S. Ct. 1539, 1553 (2022) (Gorsuch, J., concurring) (“In some cases, Congress might express an intention to ‘incorporate’ a Territory into the United States at a future date; in a Territory like that the Constitution must apply fully and immediately.”) (citing *Downes v. Bidwell*, 182 U.S. 244, 339 (1901) (White, J., concurring)).

50. Torruella, *Regime of Political Apartheid*, *supra* note 28, at 306; *Downes*, 182 U.S. at 347 (Harlan, J., dissenting).

51. *See* Torruella, *Regime of Political Apartheid*, *supra* note 28, at 310 (shining light on Justice Harlan’s dissent); *Downes*, 182 U.S. at 376 (Harlan, J., dissenting); *Plessy v. Ferguson*, 163 U.S. 537, 553 (1896) (Harlan, J., dissenting); *see also* IMMERWAHR, HOW TO HIDE AN EMPIRE, *supra* note 22, at 86 (describing the similarities between the *Insular Cases* and *Plessy v. Ferguson* in that they both upheld a “separate but equal” sentiment); *infra* note 61, Part III.C. (describing the effectiveness of Justice Harlan’s dissent in *Plessy*).

52. *See Downes*, 182 U.S. at 376 (Harlan, J., dissenting) (“Porto Rico—at least after the ratification of the treaty with Spain—became a part of the United States within the meaning of the section of the Constitution enumerating the power of Congress, and providing that ‘all duties, imposts, and excises shall be uniform throughout the United States.’”); *see also* Torruella, *Regime of Political Apartheid*, *supra* note 28, at 310 (explaining that Justice Harlan’s dissent illustrated the principle issue that the *Insular Cases* gave rise to).

53. *Downes*, 182 U.S. at 378 (Harlan, J., dissenting); *see also* Torruella, *Regime of Political Apartheid*, *supra* note 28, at 310 (“[Justice Harlan’s] emphasis on *people* . . . is in contrast to the dogma of the *Insular Cases*, by which the constitutional rights of U.S. citizens are determined by the status of the *land* on which the citizens are located, rather than by their status as *citizens*”).

54. *See generally* *Downes v. Bidwell*, 182 U.S. 244 (1901); *see also* Torruella, *Regime of Political Apartheid*, *supra* note 28, at 308 (“The opinion in *Downes* by Justice White, joined by Justices Shiras and McKenna, proposed what was to be dubbed the ‘incorporation doctrine,’ and would eventually prevail as the rule of the *Insular Cases*.”).

55. *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *see also* *Developments—The U.S. Territories*, *supra* note 31, at 1620 (footnote omitted) (“Just over two decades later, *Balzac v. Porto Rico* unanimously confirmed *Downes*’s notion of territorial incorporation.”).

decided that only fundamental rights applied to Puerto Rico.⁵⁶ Additionally, the Court determined that it was insufficient that Puerto Ricans were given citizenship by the Jones Act years prior; rather, in order for Puerto Rico to be considered an “incorporated territory,” Congress must convey that as their purpose.⁵⁷

The *Insular Cases* were founded in racism and the Court unequivocally illustrated a consensus that the United States should decide when the Constitution applies to its territories, essentially deciding whether the territories are truly part of our nation, or merely possessions of an empire.⁵⁸ The cases were “deliberately avoiding any blanket rule for the application of the Constitution to overseas territories.”⁵⁹ The *Insular Cases* contained a similar sentiment as in *Plessy v. Ferguson*: “separate but equal.”⁶⁰ However, while *Plessy* is regarded “as one of the court’s

56. See *Balzac*, 258 U.S. at 303 (“The guaranties of certain fundamental personal rights declared in the Constitution, as for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and Porto Rico. . . .”). This case decided that the right to trial by jury was not a fundamental right, therefore it need not be extended to Puerto Rico; the Court’s ruling implied that it did not violate the Constitution if a resident of Puerto Rico was convicted without a jury trial. See *Developments—The U.S. Territories*, *supra* note 31, at 1620 (describing the decision in *Balzac v. Puerto Rico*).

57. See *Balzac*, 258 U.S. at 311. The opinion stated:

Incorporation has always been a step, and an important one, leading to statehood. Without, in the slightest degree, intimating an opinion as to the wisdom of such a policy, for that is not our province, it is reasonable to assume that, when such a step is taken, it will be begun and taken by Congress deliberately, and with a clear declaration of purpose, and not left a matter of mere inference or construction.

Id.; see also Ponsa-Kraus, *supra* note 46, at 2470 (describing the decision in *Balzac v. Puerto Rico*); see also Anselmi González, *supra* note 25, at 103 (explaining the Jones Act).

58. See generally Note, *Civil Rights—U.S. Territories—First Circuit Affirms That Unequal Federal Benefits Program in Puerto Rico Violates Fifth Amendment—United States v. Vaello-Madero*, 956 *F.3d* 12 (1st Cir. 2020), 134 *HARV. L. REV.* 1260 (2021) [hereinafter *Civil Rights—U.S. Territories*] (footnote omitted) (“[T]he Supreme Court has upheld a paradoxical—and widely criticized—legal framework: although Puerto Ricans possess U.S. citizenship, Congress may ‘freely choose[] which portions of the Constitution apply in [Puerto Rico], limited only by vaguely defined ‘fundamental’ rights.”) (citing Susan K. Serrano, *Elevating the Perspectives of U.S. Territorial Peoples: Why the Insular Cases Should Be Taught in Law School*, 21 *J. GENDER, RACE & JUST.* (2018); see also Torruella, *Regime of Political Apartheid*, *supra* note 28, at 286 (“[The *Insular Cases*] skewed outcome was strongly influenced by racially motivated biases and by colonial governance theories that were contrary to American territorial practice and experience.”).

59. See Dennis Schmelzer, *Right Patient, Wrong Diagnosis: How Justice Gorsuch Mistakes the “Rotten Foundation” of the Insular Cases and Why it Matters*, *DECHERT LLP* 1, 2 (June 20, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4137717 [https://perma.cc/3PBP-DPFB] (describing that the *Insular Cases* did not give a straight answer for how territories should be governed, on purpose); Willie Santana, *The New Insular Cases*, 29 *WM. & MARY J. RACE, GENDER & SOC. JUST.* 435, 441 (2023) (“[T]he Court has used, limited, ignored, or worked around [the *Insular Cases*]”) The author explains that this approach is why the the application of the Constitution to the territories is still not comprehensive. *Id.*

60. See IMMERWAHR, *HOW TO HIDE AN EMPIRE*, *supra* note 22, at 86 (“On the face of it, the two rulings have much in common.”). Immerwahr described *Plessy* as allowing “the division of the

greatest mistakes,” the *Insular Cases* remain “good law.”⁶¹

C. Past Cases Discussing Differential Treatment of Puerto Rican Residents

In its recent decision, *United States v. Vaello-Madero*, the Supreme Court relied on two cases, *Califano v. Torres* and *Harris v. Rosario*, suggesting precedent for the differential treatment of Puerto Rican citizens.⁶² These cases invoked two Supreme Court principles to decide whether governmental action violates equal protection: rational basis and strict scrutiny.⁶³ When governmental action does not appear discriminatory, the Court applies rational-basis review, requiring it to find that the action has a rational relation to a “legitimate” government purpose.⁶⁴ On the other hand, if the action appears discriminatory or has a discriminatory effect, the Court will apply a standard of strict scrutiny, which requires finding that the action is “narrowly tailored” to a “compelling government” purpose.⁶⁵

1. *Califano v. Torres*

The first case, *Califano v. Torres*, involved the following facts: plaintiff Torres was living in Connecticut, where he was receiving

country into separate spaces,” and the *Insular Cases* as the creation of “two national governments” within the country. *Id.* He also mentioned that both cases are about race, and letting nonwhite races “within the constitutional fold.” *Id.*; see generally *Plessy v. Ferguson*, 163 U.S. 537 (1986).

61. See IMMERWAHR, HOW TO HIDE AN EMPIRE, *supra* note 22, at 86 (comparing *Plessy* and the *Insular Cases* because they have similar holdings but showing how they are different: the *Insular Cases* have survived, while *Plessy* did not). See generally *Plessy*, 163 U.S. 537.

62. *United States v. Vaello-Madero*, 142 S. Ct. 1539, 1559 (2022); *Califano v. Torres*, 435 U.S. 1 (1978); *Harris v. Rosario*, 446 U.S. 651 (1980).

63. See generally *Califano v. Torres*, 435 U.S. 1 (1978); *Harris v. Rosario*, 446 U.S. 651 (1980).

64. See *Rational Basis Test*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/rational_basis_test (last visited Apr. 4, 2023) [<https://perma.cc/55VQ-8W7T>]:

To pass the rational basis test, the statute or ordinance must have a legitimate state interest, and there must be a rational connection between the statute’s/ordinance’s means and goals The rational basis test is generally used when in cases where no fundamental rights or suspect classifications are at issue.

Id. See also Brett Snider, *Challenging Laws: 3 Levels of Scrutiny Explained*, FINDLAW (Jan. 27, 2014, 9:05 AM), <https://www.findlaw.com/legalblogs/law-and-life/challenging-laws-3-levels-of-scrutiny-explained/> [<https://perma.cc/6M5Z-9SAL>] (“Courts . . . will often deem a law to have a rational basis as long as that law had any conceivable rational basis—even if the government never provided one.”).

65. See *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny (last visited Apr. 4, 2023) [<https://perma.cc/6BS7-ZCUK>] (“To pass strict scrutiny, the legislature must have passed the law to further a ‘compelling governmental interest,’ and must have narrowly tailored the law to achieve that interest.”); see also ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 685 (Wolters Kluwer, 6th ed., 2020) (explaining strict scrutiny).

benefits from the Supplemental Security Income (SSI) program.⁶⁶ The SSI program “is a Federal income supplement program funded by general tax revenues (not Social Security taxes): it is designed to help aged, blind, and disabled people, who have little or no income; and it provides cash to meet basic needs for food, clothing, and shelter.”⁶⁷ Once Torres moved from Connecticut to Puerto Rico, he was no longer able to receive benefits, leading him to file a complaint against the Secretary of Health, Education, and Welfare in the district court of Puerto Rico.⁶⁸ Torres argued that this exclusion of Puerto Rican residents violated the Constitution.⁶⁹

The Court viewed this exclusion “as an interference with the constitutional right of residents of the 50 States and the District of Columbia to travel.”⁷⁰ As a result, it applied strict scrutiny to assess the differential treatment of Puerto Ricans, which requires “a compelling governmental interest that will justify such” treatment.⁷¹ The Secretary of Health, Education, and Welfare argued that the “cost factor and effect of the extension of SSI benefits to Puerto Rico” was the “rational basis” in excluding Puerto Ricans from SSI benefits.⁷²

The district court held that the government lacked “such compelling state interest as to justify penalizing Plaintiff’s right to travel.”⁷³ Therefore, the exclusion of Puerto Rican residents for SSI benefits was deemed unconstitutional as it violated the constitutional right to travel.⁷⁴

The dissenting opinion doubted whether the issue concerned the right to travel, believing the issue to be about the SSI benefits excluding

66. *Gautier Torres v. Mathews*, 426 F. Supp. 1106 (D.P.R. 1977), *rev’d sub nom.* *Califano v. Gautier Torres*, 435 U.S. 1 (1978).

67. *Supplemental Security Income Home Page*, (2022), <https://wwwtest-origin.ssa.gov/ssi/> [<https://perma.cc/NB32-TGYN>]; SOC. SEC. ADMIN, SUPPLEMENTAL SECURITY INCOME, <https://www.ssa.gov/ssi/> [<https://perma.cc/YX4Z-X6CY>]; 42 U.S.C. § 1381.

68. *Torres*, 426 F.Supp. at 1107.

69. *Id.* at 1108 (“[The exclusion] establishes an irrational and arbitrary classification violative of the equal protection component of the due process clause of said Constitutional provision.”); *see generally* U.S. CONST. amend. V.

70. *Califano*, 435 U.S. at 3; *United States v. Vaello-Madero*, 142 S. Ct. 1539, 1543 (2022).

71. *See Torres*, 426 F. Supp. at 1110 (1977) (alterations in original) (“ . . . (I)n moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest is unconstitutional.”) (citing *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969)); *see generally Strict Scrutiny*, *supra* note 65.

72. *See Torres*, 426 F. Supp. at 1112 (1977). The Court took the “rational basis” in the government’s argument to mean “compelling governmental interest,” although the government did not use those words. *See generally Rational Basis Test*, *supra* note 64.

73. *Torres*, 426 F. Supp at 1113.

74. *Id.*

individuals outside of the fifty states and the District of Columbia.⁷⁵ The dissent also questioned whether the constitutional right to travel applies to anywhere outside of the fifty states and the District of Columbia.⁷⁶

The Supreme Court ultimately reversed the district court's decision; the Court believed that the right to travel was misinterpreted by the lower court.⁷⁷ To explain the constitutional right to interstate travel, the Supreme Court stated that when an individual relocates to a new state, they should be guaranteed the same rights as other residents of that state.⁷⁸ However, the Supreme Court stated that the district court's decision suggested that if an individual relocates to a new state, they are entitled to the rights of the prior state they resided in, even if those benefits are superior to those of the new state.⁷⁹ In other words, the Court in *Califano* ruled that when an individual moves to a different state, they are entitled to the same benefits as the other residents of that new state, but the benefits that were provided in the old state do not follow them as they relocate.⁸⁰ Accordingly, the exclusion from SSI benefits was upheld in *Califano*.⁸¹

2. *Harris v. Rosario*

Another case dealing with differential treatment toward Puerto Ricans was *Harris v. Rosario*.⁸² A federal program titled the Aid to Families with Dependent Children Program (AFDC) “provides federal financial assistance to States and Territories to aid families with needy dependent children.”⁸³ Compared to the states, Puerto Rico is given less

75. *Id.* at 1113 (McEntee, J., dissenting). *But see infra* Parts II.B., II.F. (discussing that residents of the Northern Mariana Islands were extended SSI program benefits in 1976, *United States v. Vaello-Madero*, 356 F. Supp. 3d 208, 212 (2019), but the Court does not mention the Northern Mariana Islands in *Califano*).

76. *Torres*, 426 F. Supp at 1113–14 (McEntee, J., dissenting).

77. *Califano v. Torres*, 435 U.S. 1, 3 (1978).

78. *Id.* *But see* Duane W. Schroeder, *The Right to Travel: In Search of a Constitutional Source*, 55 NEB. L. REV. 117 (1975) (“[T]he Supreme Court has generally agreed that there is a right to travel but there has been no consensus concerning the constitutional source of this right.”).

79. *Califano*, 435 U.S. at 3 (1978).

80. *Id.*

81. *Id.*

82. *Harris v. Rosario*, 446 U.S. 651 (1980); *see also Developments—The U.S. Territories*, *supra* note 31, at 1620 (“While not technically an Insular Case, scholars have sought to include it under the umbrella of the ‘doctrine of territorial incorporation.’”).

83. *See Harris*, 446 U.S. at 652; *see also* COMM. ON WAYS & MEANS, 104TH CONG., BACKGROUND MATERIAL & DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WYAS & MEANS 383, 384 (Comm. Print 1996), <https://www.govinfo.gov/content/pkg/GPO-CPRT-104WPRT23609/pdf/GPO-CPRT-104WPRT23609-2-8.pdf> [<https://perma.cc/7623-DS2S>] (“[T]he program provides cash welfare payments for needy children who have been deprived of parental support or care . . . All 50 States, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands operate an AFDC Program.”). There was a requirement imposed on all states in 1988

assistance.⁸⁴ Recipients of AFDC brought a class action against the Secretary of Health, Education, and Welfare contending that the lower level of assistance to Puerto Rico violated the Fifth Amendment's equal protection guarantee.⁸⁵ One of the plaintiffs became widowed after the tragic drowning of her husband, and lived with her son, an eleven-year-old, in "a squatter community."⁸⁶ Each month, they received twenty-six dollars in a welfare check; however, had she resided in any of the fifty states, this amount would have been much higher.⁸⁷

The district court found in favor of the plaintiffs, who argued that Puerto Rican residents should have equal protection under the Fifth Amendment as they were United States citizens.⁸⁸ The plaintiffs also argued that this exclusion was directed toward a suspect class, meaning it was subject to strict scrutiny.⁸⁹ The district court held that providing less assistance to Puerto Rico was a constitutional violation.⁹⁰

The Supreme Court reversed that decision.⁹¹ The Court referred to the *Califano* decision just two years prior, stating that the exclusion was rational on the basis of three factors: Puerto Rican residents do 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.⁹² The Court was brief in their reasoning, stating that there is no apparent reason to deviate from the rationale in *Califano*.⁹³ The Court stated that the Territorial Clause, which grants Congress the power to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States," allows this differential treatment so long as a rational basis exists.⁹⁴ Therefore, relying on the Territorial Clause and the *Califano* holding which established a rational basis, the Court held that providing less assistance

to provide AFDC benefits to needy families that have two parents, but this requirement was not imposed for "American Samoa, Puerto Rico, Guam, and the Virgin Islands until funding ceilings for AFDC benefits in these areas are removed." *Id.* at 395. The ceiling for Puerto Rico is \$82 million. *Id.* at 454.

84. *Harris*, 446 U.S. at 652.

85. *Id.* at 651–52; Stewart W. Fisher, *The Supreme Court Says No to Equal Treatment of Puerto Rico: A Comment on Harris v. Rosario*, 6 N.C.J. INT'L L. & COM. REG. 127, 127–28 (1980).

86. Fisher, *supra* note 85, at 128; *see generally* *Harris v. Rosario*, 446 U.S. 651 (1980).

87. Fisher, *supra* note 85; Torruella, *Regime of Political Apartheid*, *supra* note 28, at 332; *see generally* *Harris*, 446 U.S. 651 (1980).

88. Fisher, *supra* note 85, at 128–29; *see Harris*, 446 U.S. at 651.

89. Fisher, *supra* note 85, at 128; *see Harris*, 446 U.S. at 651.

90. Fisher, *supra* note 85, at 129; *see Harris*, 446 U.S. at 651.

91. Fisher, *supra* note 85, at 129; *see Harris*, 446 U.S. at 651–52.

92. Fisher, *supra* note 85, at 129; *see Harris*, 446 U.S. at 652.

93. *See Harris*, 446 U.S. at 652.

94. *Id.* at 651–52 (alteration in original) (quoting U.S. CONST. art. IV, § 3, cl. 2); Fisher, *supra* note 85, at 129; *see also* *Developments—The U.S. Territories*, *supra* note 31, at 1620–21 ("Because Congress had a rational basis in law, such discrimination was permissible.").

to Puerto Rico did not violate the Constitution.⁹⁵

The dissent emphasized that while the question of interstate travel was before the Court in *Califano*, the question before the Court in *Harris* was not the same.⁹⁶ Justice Marshall, writing the dissent, stated that the majority decision was rushed, as the question before the Court was answered “without full briefing or oral argument.”⁹⁷ Therefore, *Califano* was the only authority for the Court’s decision.⁹⁸ Justice Marshall also stated that there is no cited authority for the Court’s adoption of the theory that under the Territorial Clause, Congress has the authority to treat Puerto Ricans differently as long as its actions are justified by a rational basis.⁹⁹ Disagreeing with the idea that only a rational-basis test needed to be satisfied, Justice Marshall suggested that the denial of heightened scrutiny under the equal protection guarantee should be a matter worth more discussion.¹⁰⁰ Further, Justice Marshall disagreed with the rational basis the Court relied on—the economic effects to Puerto Rico.¹⁰¹ He concluded by stating that it remains unclear how the discrimination toward Puerto Rico survives the rational-basis standard, let alone the heightened scrutiny standard that may be applied under an equal protection challenge.¹⁰²

These two cases provided a background for the Court’s decision in *United States v. Vaello-Madero*, which is discussed in the following Part.

II. DISCUSSION

When presented with yet another opportunity to declare that the people of United States territories are entitled to the same rights as every other American, the Supreme Court rendered a decision based in an inaccurate analysis that will continue to label Puerto Ricans as “second class” to themselves and other Americans.

95. Fisher, *supra* note 85, at 129; *Harris*, 446 U.S. at 651–52 (quoting U.S. CONST. art. IV, § 3, cl. 2); *see also Developments—The U.S. Territories*, *supra* note 31, at 1620–21.

96. *Harris*, 446 U.S. at 654–55 (Marshall, J., dissenting).

97. *Id.* at 652.

98. *Id.* at 652, 654.

99. *Id.* at 653.

100. *Id.* at 654; *see also Developments—The U.S. Territories*, *supra* note 31, at 1621 (“Justice Marshall called into question the validity of the *Insular Cases* themselves and argued that the Equal Protection Clause applied in full to the territories.”).

101. *See Harris*, 446 U.S. at 655–56 (Marshall, J., dissenting) (“This rationale . . . suggests that programs designed to help the poor should be less fully applied in those areas where the need may be the greatest, simply because otherwise the relative poverty of recipients compared to other persons in the same geographic area will somehow be upset.”).

102. *Id.* at 656.

A. Facts of the Case

Jose Vaello-Madero lived in New York from 1985 to 2013.¹⁰³ While in New York, Vaello-Madero received SSI benefits deposited into a New York account.¹⁰⁴ In 2013, Vaello-Madero moved to Puerto Rico, where he continued receiving benefits in his New York account.¹⁰⁵ Because Vaello-Madero was unaware that the SSI benefits did not extend to residents of Puerto Rico, he did not know that his move would render him ineligible to continue receiving benefits.¹⁰⁶ In 2016, once the government was made aware of his relocation to Puerto Rico, Vaello-Madero received two notices informing him that his payments were being stopped.¹⁰⁷ These notices did not mention his obligation to pay the amount that he received while in Puerto Rico back to the government but did inform him that Social Security Administration may “contact him ‘about any payments [the SSA] previously made.’”¹⁰⁸ The United States later brought suit against Vaello-Madero to recover the \$28,081.00 given to Vaello-Madero while he was living in Puerto Rico.¹⁰⁹

B. Procedural Posture of the Case

At the district court level, Vaello-Madero moved for summary judgment, arguing that the exclusion of Puerto Rican residents from the SSI benefits program is a violation of the equal protection guarantee of

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

104. *Id.*; *United States v. Vaello-Madero*, *BALLOTPEDIA*, https://ballotpedia.org/United_States_v._Vaello-Madero [<https://perma.cc/9R8D-J86D>] (last visited Sept. 17, 2022) [hereinafter *BALLOTPEDIA*, *United States v. Vaello-Madero*].

105. *Vaello-Madero*, 356 F. Supp. 3d at 211; *BALLOTPEDIA*, *United States v. Vaello-Madero*, *supra* note 104; *see Civil Rights—U.S. Territories*, *supra* note 58, at 1260 (“[S]SI provides cash assistance to low-income people who are sixty-five or older, or who have disabilities.”).

106. *Vaello-Madero*, 356 F. Supp. 3d at 211; James Romoser, *In Equal Protection Challenge, Court Will Review Puerto Rico’s Exclusion from Federal Safety-Net Program*, *SCOTUSBLOG* (Nov. 9, 2021, 8:15 AM), <https://www.scotusblog.com/2021/11/in-equal-protection-challenge-court-will-review-puerto-ricos-exclusion-from-federal-safety-net-program/> [<https://perma.cc/8L7B-DBRD>].

107. *Vaello-Madero*, 356 F. Supp. 3d at 211; *see also United States v. Vaello-Madero*, 956 F.3d 12, 15–16 (1st Cir. 2020) (“[T]he SSA informed [Vaello-Madero] in a ‘Notice of Planned Action’ that it was discontinuing his SSI benefits retroactively to August 1, 2014, because he was, and had been since that date, ‘outside the U.S. for 30 days in a row or more.’”). In its notification, the SSA used the definition of U.S. as “50 States, the District of Columbia, and the Northern Mariana Islands.” *Id.* at 16.

108. *See Vaello-Madero*, 356 F. Supp. 3d at 211 (“[T]he [SSA] stopped its SSI payments, and retroactively reduced said payments to \$0 for August 2013 through August 2016”); *see also Civil Rights—U.S. Territories*, *supra* note 58, at 1261 (explaining that after being excluded from SSI benefits, Vaello-Madero would have to apply for AABD benefits, which are from a program “more exclusive and less generous than SSI”); *see also infra* Part II.F. (discussing AABD program).

109. *See Romoser*, *supra* note 106 (explaining that these were the “improper payments” that Vaello-Madero had received over three years); *Vaello-Madero*, 356 F. Supp. 3d at 211.

the Fifth Amendment.¹¹⁰ The United States presented the argument that “Congress’ determinations as to eligibility requirements for government benefits hold a strong presumption of constitutionality.”¹¹¹ The United States also asserted that if a rational basis exists, Congress has the authority to enact legislation in the United States territories under the Territorial Clause.¹¹² The district court began by examining the Social Security Act and the SSI program, which was “created to aid the Nation’s aged, blind, and disabled persons who qualify due to proven economic need.”¹¹³ The language of the Act requires individuals to reside in the “United States” in order to receive benefits, which is defined as “the 50 States, the District of Columbia, or the Northern Mariana Islands.”¹¹⁴

Since the United States argued that the Territorial Clause provided authority to exclude Puerto Rico from this Act, the district court examined that first.¹¹⁵ In discussing the Territorial Clause, the court stated that the clause “is not a blank check for the federal government to dictate when and where the Constitution applies to its citizens.”¹¹⁶ The court further stated that while Congress has the authority to treat the United States territories differently than the states under the Territorial Clause, this authority does not permit Congress the discretion of depriving United States citizens of their fundamental constitutional rights whenever it deem it appropriate.¹¹⁷

110. *Vaello-Madero*, 356 F. Supp. 3d at 211–12.

111. *Id.* at 212.

112. *Id.* In its argument, the United States was using the Court’s “interpretation of the clause in *Harris v. Rosario*.” *Civil Rights—U.S. Territories*, *supra* note 58, at 1261; *see also* U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .”).

113. *Vaello-Madero*, 356 F. Supp. 3d at 212; *see also* SOC. SEC. ADMIN., SUPPLEMENTAL SECURITY INCOME (SSI), (2022) (“However, U.S. Treasury general funds, not the Social Security trust funds, pay for SSI.”).

114. *See* SOC. SEC. ADMIN., UNDERSTANDING SUPPLEMENTAL SECURITY INCOME (SSI) ELIGIBILITY REQUIREMENTS—2023 EDITION, <https://www.ssa.gov/ssi/text-eligibility-ussi.htm> [<https://perma.cc/6XKF-5Y9J>] (last visited Mar. 20, 2023). *Inter alia*, one SSI eligibility requirement reads “is a U.S. citizen or national” while another reads “is a resident of one of the 50 States, the District of Columbia, or the Northern Mariana Islands.” *Id.* If an individual residing in Puerto Rico were to read this to determine their eligibility, there would be reasonable confusion as they are a U.S. citizen, but not a resident of one of the 50 States. *See also Vaello-Madero*, 356 F. Supp. 3d at 212, n.2 (“[T]he United States acknowledges that Congress made SSI program benefits available to residents of the Commonwealth of the Northern Mariana Islands by virtue of a joint resolution in 1976.”).

115. *Vaello-Madero*, 356 F. Supp. 3d at 212.

116. *Id.* (“The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.”) (quoting *Boumediene v. Bush*, 553 U.S. 723, 765 (2008)); *Civil Rights—U.S. Territories*, *supra* note 58, at 1261.

117. *See Vaello-Madero*, 356 F. Supp. 3d at 213 (“The authority to treat the territory of Puerto Rico itself unlike the States does not stretch as far as to permit the abrogation of fundamental

The court then looked to the Due Process Clause of the Fifth Amendment.¹¹⁸ The court explained that within the Due Process Clause is the guarantee of equal protection, different from the Fourteenth Amendment in that it acts federally rather than by state; the Due Process Clause imposes a restriction on the *government* to not discriminate.¹¹⁹ The court described the rational-basis test, stating whoever challenges a rule has the burden of proving there are no facts that could plausibly show that the rule is rationally related to furthering a legitimate governmental interest.¹²⁰ In finding that the exclusion did not pass rational-basis review, the court said, “[c]lassifying a group of the Nation’s poor and medically neediest United States citizens as ‘second tier’ simply because they reside in Puerto Rico is by no means rational.”¹²¹ Further, the court acknowledged the fact that the majority of Puerto Ricans are Hispanic, which makes this statute discriminatory based on a suspect classification, subjecting it to heightened scrutiny rather than rational basis.¹²² Under heightened scrutiny, the statute must be “narrowly tailored” to fulfill a “compelling” government goal.¹²³ This standard is difficult to meet, and the SSI exclusion did not come close to meeting heightened scrutiny.¹²⁴ Holding that the fundamental rights of all United States citizens must be protected and “[f]undamental rights are the same in the States as in the Territories, without distinction,” the district court ruled in favor of Vaello-Madero.¹²⁵

The United States appealed the decision; relying on *Califano* and

constitutional protections to United States citizens as Congress sees fit.”); *see also* MAINON A. SCHWARTZ, CONG. RSCH. SERV., EQUAL PROTECTION DOES NOT MEAN EQUAL SSI BENEFITS FOR PUERTO RICO RESIDENTS, SAYS SUPREME COURT 2 (Apr. 28, 2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10737> [<https://perma.cc/Q94N-WN57>] (“Like all of its legislative powers, however, Congress’s territorial authority is bound by the other provisions of the Constitution, including the Fifth Amendment.”).

118. *Vaello-Madero*, 356 F. Supp. 3d at 21.

119. *Id.*

120. *Id.* at 213–14.

121. *Id.* at 214.

122. *Id.*; *see also Civil Rights—U.S. Territories*, *supra* note 58, at 1261 (“[The court] instead determined that the government’s true purpose in denying SSI benefits to Puerto Ricans was ‘to impose inequality’ and, further, suggested that this exclusion amounted to a ‘*de facto* classification based on Hispanic origin’ that should be subject to a more stringent ‘heightened scrutiny standard.’”).

123. *Vaello-Madero*, 356 F. Supp. 3d at 214; *Strict Scrutiny*, *supra* note 65.

124. *Vaello-Madero*, 356 F. Supp. 3d at 214.

125. *Id.* at 215 (“Equal Protection and Due Process are fundamental rights afforded to every United States citizen, including those who under the United States flag make Puerto Rico their home.”) (citing *Examining Bd. of Engineers, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976)); *see also Civil Rights—U.S. Territories*, *supra* note 58, at 1262 (“In its conclusion, the district court reaffirmed the judiciary’s responsibility to invalidate exactly this type of legislation ‘that creates a citizenship apartheid based on historical and social ethnicity within United States soil’”).

Harris, the United States attempted to introduce prior Supreme Court decisions that supported the exclusion of Puerto Rican residents.¹²⁶ However, the court of appeals distinguished these cases from Vaello-Madero's situation, explaining that the Supreme Court was answering a different question in *Califano* and *Harris* than the question posed in *Vaello-Madero*.¹²⁷ In *Califano*, the question posed concerned the right to travel, while the question posed in *Harris* concerned the "differential treatment of block grants."¹²⁸ The United States argued that Puerto Rico's exemption from paying federal income tax and the cost of rendering Puerto Ricans eligible for SSI benefits act as the rational basis for excluding them from social security benefits.¹²⁹ However, the court of appeals held that the exclusion was not justified by a rational basis, upholding the district court's decision.¹³⁰

C. The Supreme Court Majority Decision

In an 8-1 decision, the Supreme Court held that the exclusion of Puerto Rican residents from the SSI program did not violate the Constitution, reversing the decisions of the lower courts.¹³¹

Justice Kavanaugh delivered the majority opinion, reasoning that since Congress has the authority to exempt Puerto Rican residents from paying

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

127. *Id.* at 20–21.

128. *Id.*; see also Civil Rights—U.S. Territories, *supra* note 58, at 1262 (restating Judge Torruella's opinion that both *Califano* and *Harris* "were of limited precedential value" and distinguishable from *Vaello-Madero*).

129. See *Vaello-Madero*, 956 F.3d at 23.

130. See *id.* at 24 ("The residents of Puerto Rico not only make substantial contributions to the federal treasury, but in fact have consistently made them in higher amounts than taxpayers in at least six states, as well as the territory of the Northern Mariana Islands."). The opinion states that until Puerto Rico suffered its most recent recession, "Puerto Rico consistently contributed more than \$4 billion annually in federal taxes." *Id.* The opinion also states that while the Court in *Califano* and *Harris* used the language that Puerto Ricans "do not contribute to the federal treasury," the United States in *Vaello-Madero* used the language that Puerto Ricans "generally do not pay federal income taxes." *Id.* at 25 (citing *Califano v. Torres*, 435 U.S. 1, 3, n.7 (1978); *Harris v. Rosario*, 446 U.S. 651, 652 (1980)). The Court of Appeals "found the tax status argument irrational and arbitrary." *Id.* at 28. In response to the cost argument as a rational basis, the Court of Appeals stated, "what [the United States] plainly fails to grapple with is that cost *alone* does not support differentiating individuals. If it did, how would Congress be able to decide upon whom to bestow benefits?" *Id.* at 29. "Even under rational basis review, the cost of including Puerto Rico's elderly, disabled, and blind in SSI cannot by itself justify their exclusion." *Id.* at 30. The Court of Appeals, in addition to the arguments made by the parties, "considered even conceivable theoretical reasons for the differential treatment," as they must do for examining the "rationality of the legislative classification." *Id.* at 18, 32 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). See also Civil Rights—U.S. Territories, *supra* note 58, at 1263 ("[C]ost constraints are a legitimate legislative interest, and choosing which group to discriminate against in order to save costs requires a rational basis; but if cost can serve as a rational basis, then the initial legislative purpose paradoxically becomes both the motivating and justifying reason for the discrimination.").

131. United States v. Vaello-Madero, 142 S. Ct. 1539, 1541 (2022).

federal taxes, Congress also has the discretion to exclude Puerto Rican residents from receiving federal benefits.¹³² Initially, Justice Kavanaugh explained the Territorial Clause, and how it grants Congress the authority to treat territories differently than the states.¹³³ In exercising that authority and making choices regarding the legislation for territories, Justice Kavanaugh stated that Congress “must make numerous policy judgments that account not only for the needs of the United States as a whole but also for . . . the unique histories, economic conditions, social circumstances, independent policy views, and relative autonomy of the individual Territories.”¹³⁴ In making those decisions, Justice Kavanaugh explained, Congress must arrange taxes and benefits to residents of territories, and it has already treated the territories differently than the fifty states in doing so.¹³⁵ For example, Puerto Rican residents are exempt from “most federal income, gift, estate, and excise taxes,” however they pay “Social Security, Medicare, and unemployment taxes.”¹³⁶ Regarding benefits, Justice Kavanaugh pointed out that residents of Puerto Rico are eligible to receive benefits through Social Security, Medicare, and unemployment.¹³⁷ Social Security Income, Justice Kavanaugh explained, is available to those who are “residents of the 50 states.”¹³⁸ Justice Kavanaugh stated that instead of the SSI program, residents of Puerto Rico are eligible for a “different benefits program—one that is funded in part by the Federal Government and in part by Puerto Rico.”¹³⁹

Justice Kavanaugh discussed *Califano* and *Harris*, relying on them as precedential support for the fact “that Congress may distinguish the Territories from the States in tax and benefits programs . . . so long as Congress has a rational basis for doing so.”¹⁴⁰ Using these cases and his own rational basis analysis, Justice Kavanaugh found that the exclusion

132. *Id.* at 1540.

133. *Id.* at 1541 (citing U.S. CONST. art. IV, § 3, cl. 2) (“The Territory Clause of the Constitution states that Congress may ‘make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.’”).

134. *Id.*

135. *Id.* at 1542.

136. *Id.* (citing 26 U.S.C. §§ 3121(e), 3306(j)); *see also* 26 U.S.C. § 933 (“The following items shall not be included in gross income and shall be exempt from taxation In the case of an individual who is a bona fide resident of Puerto Rico during the entire taxable year, income derived from sources within Puerto Rico . . .”).

137. *Vaello-Madero*, 142 S. Ct. at 1542 (citing 42 U.S.C. §§ 410(h)–(i), 1301(a)(1)).

138. *Id.* at 1542 (quoting 42 U.S.C. § 1382c(a)(1)(B)(i)) (employing the statutory definition of “resident of the United States,” which encompasses residents of the 50 States, the District of Columbia, and the Northern Mariana Islands, a more recent addition); *United States v. Vaello-Madero*, 356 F. Supp. 3d 208, 212 (2019) (citing 42 U.S.C. § 1382(f)).

139. *Vaello-Madero*, 142 S. Ct. at 1542.

140. *Id.* at 1543.

did not violate the Constitution.¹⁴¹ As purported by Justice Kavanaugh, the rational basis was that if Congress can distinguish Puerto Rico in terms of exemption from paying taxes, then Congress can also distinguish Puerto Rico in terms of receiving benefits.¹⁴² He stated that “Congress need not conduct a dollar-to-dollar comparison” of taxes and benefits between the states and the territories, as it is reasonable that Congress considers the “general balance of benefits to and burdens on the residents of Puerto Rico.”¹⁴³

Lastly, Justice Kavanaugh discussed the impact of ruling in favor of Vaello-Madero.¹⁴⁴ He stated that if the SSI program must apply to residents of Puerto Rico, then other federal benefits programs would also need to apply.¹⁴⁵ As a result of benefits requiring identical treatment between the United States and Puerto Rico, Justice Kavanaugh observed that this could mean all burdens must be identical.¹⁴⁶ If that were the case, the people of Puerto Rico and their economy would suffer.¹⁴⁷ While the Court conceded that Congress *may* allow residents of Puerto Rico to be eligible for SSI benefits, the question before the Court was whether Congress *must*, to which it held the answer to be no.¹⁴⁸

D. Justice Thomas’s Concurrence

Justice Thomas joined the majority opinion but issued his own concurring opinion to address the notion that the Fifth Amendment’s Due Process Clause provides an equal protection guarantee analogous to the Fourteenth Amendment’s Equal Protection Clause.¹⁴⁹

Justice Thomas began his concurrence by stating that although he once believed that the Due Process Clause carries a guarantee of equal protection, he is now doubtful of that.¹⁵⁰ Explaining that before the mid-twentieth century, the Court explicitly rejected the idea that the Fifth Amendment contained an equal protection guarantee, Justice Thomas acknowledged that the Court now recognized the Fifth Amendment’s

141. *Id.* at 1543.

142. *Id.*

143. *Id.* (citing *Torres v. Califano*, 435 U.S. 1, 3–5, n.7 (1978); *Harris v. Rosario* 446 U.S. 651, 652 (1980)).

144. *See Vaello-Madero*, 142 S. Ct. at 1543 (describing Vaello-Madero’s position as having “far-reaching consequences”).

145. *Id.*

146. *Id.*

147. *Id.* (“[This] would inflict significant new financial burdens on residents of Puerto Rico, with serious implications for the Puerto Rican people and the Puerto Rican economy. The Constitution does not require that extreme outcome.”).

148. *Id.* at 1544.

149. *Id.* (Thomas, J., concurring).

150. *Id.* at 1546 (referring to his concurrence in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 212–17 (1995)).

Due Process Clause “prohibited ‘such discriminatory legislation by Congress as amounts to a denial of due process’ i.e., legislation that would fail rational-basis review.”¹⁵¹

Criticizing a series of segregation cases that occurred during the Lochner Era in the first part of his concurrence, Justice Thomas argued that these cases contain an erroneous rationale because the Court “fold[ed] an ‘equal protection’ guarantee into the concept of ‘due process.’”¹⁵² First, Justice Thomas did not believe support existed for a “modern substantive due process doctrine.”¹⁵³ Second, Justice Thomas found the reading of “liberty” from these cases too broad.¹⁵⁴ Justice Thomas distinguished that the definition of liberty should maintain an individual’s “freedom *from* governmental action, not as a right *to* a particular government entitlement.”¹⁵⁵ Third, Justice Thomas asked if the Court had previously found the equal protection guarantees in the Fifth Amendment and the Fourteenth Amendment to be identical, then why would the Fourteenth Amendment restate that right?¹⁵⁶ Finally, Justice Thomas explained that the Court has no authority to decide the intentions behind the Constitution regarding whether certain requirements are positioned toward states or the federal government.¹⁵⁷ To conclude, the first section of Justice Thomas’s concurring opinion listed the reasons, both embedded in the text and history of the Fifth Amendment, as to why the idea of the equal protection guarantee might not be supported.¹⁵⁸

However, Justice Thomas stated that the Constitution “may still prohibit the Federal Government from discriminating on the basis of race, at least with respect to civil rights.”¹⁵⁹ Justice Thomas expressed his belief that the Citizenship Clause within the Fourteenth Amendment

151. *Id.* at 1544 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100, 102 (1943)).

152. *Id.* (quoting *Bolling v. Sharpe*, 347 U.S. 497 (1954)); see generally James B. Stewart, *Did the Supreme Court Open the Door to Reviving One of Its Worst Decisions?*, N.Y. TIMES (July 5, 2022), <https://www.nytimes.com/2022/07/02/business/scotus-lochner-v-new-york.html> [<https://perma.cc/H8TC-AAEJ>] (explaining the era of cases that has been known as “the Lochner Era”). These cases are widely acknowledged to be wrongly decided by the Supreme Court. *Id.*

153. *United States v. Vaello-Madero*, 142 S. Ct. 1539, 1545 (2022) (Thomas, J., concurring).

154. *Id.* (citing *McDonald v. Chicago*, 561 U.S. 742, 811 (2010)).

155. *Id.* at 1546 (quoting *Obergefell v. Hodges*, 576 U.S. 644, 725 (2015) (Thomas, J., dissenting)).

156. *Id.*

157. *Id.* (citing *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954)) (“[S]uch moral judgments lie beyond the commission of the federal courts.”). In *Bolling*, the Court found that because “the Constitution prohibits States from racially segregating public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.” *Bolling*, 347 U.S. at 500.

158. *Vaello-Madero*, 142 S. Ct. at 1546–47.

159. *Id.* at 1547.

acted as the “textual source of that obligation.”¹⁶⁰ Justice Thomas explained that after the Civil War, the granting of citizenship often indicated an individual’s entitlement to the rights that all citizens are guaranteed equally.¹⁶¹ Justice Thomas also discussed Congress’s enactment of the Civil Rights Act of 1866; within the Act, Justice Thomas explained, there was a “citizenship clause similar to the Fourteenth Amendment’s.”¹⁶² According to Justice Thomas, that clause insinuated “that the right to be free of racial discrimination with respect to the enjoyment of certain rights is a constituent part of citizenship.”¹⁶³ Therefore, using historical context once again, Justice Thomas’s concurrence demonstrated that the Citizenship Clause of the Fourteenth Amendment could possibly provide protection against unequal treatment by the federal government.¹⁶⁴

E. Justice Gorsuch’s Concurrence

Justice Gorsuch, although agreeing with the majority, wrote a concurring opinion calling for the *Insular Cases* to be overturned.¹⁶⁵ He began by describing the *Insular Cases* as a series of holdings showing “that the federal government could rule Puerto Rico and other Territories largely without regard to the Constitution.”¹⁶⁶

Justice Gorsuch went through the history of the United States’ acquisition of the territories as well as the rationale behind the *Insular Cases*.¹⁶⁷ He explained that some believed the United States was prohibited from “governing distant possessions as subservient colonies without regard to the Constitution,” while others thought “Congress could permanently rule the country’s new acquisitions as a European power might.”¹⁶⁸

Then, Justice Gorsuch described each justice’s rationale in the first

160. *Id.*; see also U.S. CONST. amend. XIV, § 1, cl. 1 (“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

161. *Vaello-Madero*, 142 S. Ct. at 1548 (Thomas, J., concurring) (discussing what it means to be a “citizen” using the context of the Civil War).

162. *Id.* (alteration in original) (quoting Act of Apr. 9, 1886, 14 Stat. 27) (“[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”).

163. *Id.*

164. *Id.* at 1551.

165. *Id.* at 1552 (Gorsuch, J., concurring) (“The *Insular Cases* have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.”).

166. *Id.* at 1540.

167. *Id.* at 1552–54 (describing the Spanish-American War as the source of the debate giving rise to the *Insular Cases*); see also *supra* Part I.B. (discussing the various scholarly opinions regarding the governance of newly acquired Territories, some of which were incorporated into the *Insular Cases*).

168. *Vaello-Madero*, 142 S. Ct. at 1552 (Gorsuch, J., concurring).

Insular Case, Downes v. Bidwell.¹⁶⁹ The question presented in *Downes* was whether the imposition of a tax on goods from or to Puerto Rico violated the Constitution's Tax Uniformity Clause.¹⁷⁰ When deciding whether the Constitution applied to the new territories at all, Justice Gorsuch explained that the justices had conflicting opinions.¹⁷¹ According to Justice Gorsuch, Justice Brown believed that it was reasonable for the Constitution to apply to territories with people of the same race as mainland United States, while the Constitution would not make sense for territories with "alien races."¹⁷² Justice Brown was of the opinion that the Constitution should apply to Puerto Rico "only if and when Congress so directed."¹⁷³

Justice White had a slightly different approach, believing that the Constitution's applicability should be determined by each territory's "situation . . . and its relations to the United States."¹⁷⁴ Further, Justice White reasoned that if Congress was interested in eventually incorporating a territory into the United States, that territory would receive the full application of the Constitution.¹⁷⁵ However, as far as unincorporated territories, Justice White believed that only fundamental rights should apply.¹⁷⁶ Justice White held that Puerto Rico was an unincorporated territory, as Congress has failed to show an interest in incorporating the territory.¹⁷⁷ In his opinion, Justice Gorsuch cautioned that these opinions should not be viewed as different from one other; both opinions were founded on the idea of "the Nation's 'right' to acquire and exploit" other countries.¹⁷⁸

Justice Gorsuch then described Justice Fuller's dissent in *Downes*, which understandably demonstrated shock that Congress had the authority to keep territories in a state of uncertainty for as long as it

169. *Id.* at 1553–55 (citing *Downes v. Bidwell*, 182 U.S. 244 (1901)); see also *supra* Part I.B. (discussing *Downes* within the larger debate of constitutional protections in U.S. Territories).

170. See *Vaello-Madero*, 142 S. Ct. at 1553 (Gorsuch, J., concurring) (citing U.S. CONST. art. § 8, cl. 1; *Downes*, 182 U.S. at 247, 249).

171. *Id.* at 1553; see generally *Downes*, 182 U.S. at 244.

172. *Vaello-Madero*, 142 S. Ct. at 1553; *id.* (quoting *Downes*, 182 U.S. at 287); see also IMMERWAHR, HOW TO HIDE AN EMPIRE, *supra* note 22, at 86 (comparing the *Insular Cases* to *Plessy* as they were decisions rooted in racism); see generally *Plessy v. Ferguson*, 163 U.S. 537 (1986).

173. *Vaello-Madero*, 142 S. Ct. at 1553 (Gorsuch, J., concurring) (citing *Downes*, 182 U.S. at 339).

174. *Id.* (quoting *Downes*, 182 U.S. at 293).

175. *Id.* (citing *Downes*, 182 U.S. at 339).

176. *Id.* (citing *Downes*, 182 U.S. at 291).

177. *Id.* (citing *Downes*, 182 U.S. at 341–42) (distinguishing Congress's actions toward Puerto Rico with other territories in the American West).

178. *Id.* (citing *Downes*, 182 U.S. at 306) (reasoning that Puerto Rico could not be exploited if it were extended constitutional protections).

wished.¹⁷⁹ Additionally, Justice Gorsuch discussed Justice Harlan's dissent in *Downes*, which stated that the Court's decision attempted to transform the United States republican institution into a colonial power.¹⁸⁰ Justice Harlan also disagreed with Justice White, unable to find meaning or justification for the idea of incorporated and unincorporated territories.¹⁸¹

Justice Gorsuch discussed another *Insular Case*, *Dorr v. United States*, which confirmed the distinction between unincorporated and incorporated territories.¹⁸² The Court in *Dorr* used this concept to find that unincorporated territories were entitled only to those constitutional rights deemed fundamental.¹⁸³ In another *Insular Case*, *Balzac v. Porto Rico*, the Court held that because the right to a trial by jury was not fundamental, it was not applicable to Puerto Rico or any other unincorporated territories.¹⁸⁴ Justice Gorsuch stated that the status of United States citizenship that Puerto Ricans held at the time was irrelevant; instead, he cited *Balzac* which stated, "the 'locality [was] determinative of the application of the Constitution, . . . not the status of the people who live in it.'"¹⁸⁵

In the second part of his concurrence, Justice Gorsuch criticized the arbitrary rulings in the *Insular Cases*. He claimed that the rationale regarding "unincorporated Territories," and "segregating Territories and the people who live in them on the basis of race, ethnicity, or religion" had no basis in the Constitution.¹⁸⁶ Instead, Justice Gorsuch claimed that classification was built upon racist and imperialistic theories.¹⁸⁷ He argued that although the *Insular Cases* have been widely acknowledged as a deviation from the Constitution, they have not been overruled.¹⁸⁸ Their status as "good law" allows them to be used as a basis for court decisions despite their lack of logical reasoning.¹⁸⁹ Justice Gorsuch then pointed out that today, pursuant to the *Insular Cases*, certain rights

179. *Id.* at 1554 (citing *Downes*, 182 U.S. at 372).

180. *Id.* (citing *Downes*, 182 U.S. at 380).

181. *Id.* (citing *Downes*, 182 U.S. at 391).

182. *Id.* (citing *Dorr v. United States*, 195 U.S. 138, 148–49 (1904)).

183. *Id.* (citing *Dorr*, 195 U.S. at 148–49).

184. *Id.* (citing *Balzac v. Porto Rico*, 258 U.S. 298, 306, 308–10 (1922)).

185. *Id.* (alterations in original) (quoting *Balzac*, 258 U.S. at 309).

186. *Id.*

187. *Id.* ("The *Insular Cases* can claim support in academic work of the period, ugly racial stereotypes, and the theories of social Darwinists.").

188. *Id.* at 1555.

189. IMMERWAHR, HOW TO HIDE AN EMPIRE, *supra* note 22, at 86 ("Until very recently, it was not unusual for constitutional scholars to have never heard of [the *Insular Cases*]. But they are nevertheless still on the books, and they are still cited as good law."); *Vaello-Madero*, 142 S. Ct. at 1555 (recognizing attempts to incorporate more constitutional guarantees under the umbrella of "fundamental rights" but concluding it is not a long-term solution).

granted to incorporated territories are still not considered fundamental enough to extend to Puerto Rico.¹⁹⁰

Justice Gorsuch also considered the impact of overruling the *Insular Cases*.¹⁹¹ He stated that when courts are presented with the question of what rights territories are entitled to, they would turn to the language of the Constitution instead of the *Insular Cases*.¹⁹² Further, Justice Gorsuch stated that although it may be difficult for courts to decide which constitutional provisions apply to the territories and how, this is still the right question to be asking.¹⁹³

To conclude, Justice Gorsuch stated that because the question before the Court was not whether to overrule the *Insular Cases*, he is in agreement with the majority.¹⁹⁴ However, he indicated that he hopes to soon see the Court overrule the *Insular Cases*, as “[o]ur fellow Americans in Puerto Rico deserve no less.”¹⁹⁵

F. Justice Sotomayor’s Dissent

Justice Sotomayor issued the only dissenting opinion in *Vaello-Madero*. First, Justice Sotomayor discussed the beginnings of the SSI program, and how it was a national benefits program designed “[t]o provide a uniform, guaranteed minimum income for the neediest adults.”¹⁹⁶ Justice Sotomayor also mentioned how the SSI defines the individuals eligible for benefits, using “the United States” to include the fifty states, the District of Columbia, and the Northern Mariana Islands.¹⁹⁷ She explained that in other circumstances, when Congress says “the United States,” they are including Puerto Rico in that definition.¹⁹⁸

Justice Sotomayor then discussed the impact of the Court’s decision on Puerto Rico.¹⁹⁹ She explained that the Aid to the Aged, Blind, and Disabled Program (AABD), a program that Puerto Rican residents are eligible for, provides only a small proportion of what Puerto Rican

190. *Vaello-Madero*, 142 S. Ct. at 1555–56 (Gorsuch, J., concurring) (expressing incredulity that the right to a trial by jury is not considered sufficiently “fundamental” to the millions of U.S. citizens residing in Puerto Rico).

191. *Id.* at 1556 (“To be sure, settling this question right would raise difficult new ones.”).

192. *Id.*

193. *Id.* at 1557 (“Nor, in any event, can the difficulty of the task supply an excuse for neglecting it.”).

194. *Id.*

195. *Id.*

196. *Vaello-Madero*, 142 S. Ct. at 1557 (Sotomayor, J., dissenting).

197. *Id.* at 1558; *see also* *United States v. Vaello-Madero*, 356 F. Supp. 3d 208, 212, n.2 (2019) (discussing the extension of SSI program benefits to residents of the Northern Mariana Islands).

198. *Vaello-Madero*, 142 S. Ct. at 1558 (Sotomayor, J., dissenting).

199. *Id.*

residents could be receiving under the SSI program.²⁰⁰

After restating the facts of the case, Justice Sotomayor discussed the Equal Protection Clause, explaining that the Clause does not prevent the government from classifying people in a discriminatory manner, however, it does prevent classification on the basis of “impermissible criteria” or when the classification is used for the purpose of placing burdens on a specific group of people.²⁰¹ When the class the government is discriminating against is not a “suspect or quasi-suspect class[,]” the law will be invalid under the Constitution if it fails rational-basis review.²⁰² Justice Sotomayor stated that although rational basis is deferential, “it is not ‘toothless,’” and even classifications that do not discriminate must pass the test.²⁰³ Justice Sotomayor concluded that the exclusion of Puerto Rican citizens from the SSI benefits program fails this deferential test.²⁰⁴

Justice Sotomayor’s opinion included an analysis of the Court’s response to the United States’ argument that “a jurisdiction that makes a reduced contribution to the federal treasury should receive a reduced share of the benefits funded by that treasury.”²⁰⁵ The Court responded by using both *Califano* and *Harris*, as these cases depended on the tax status of Puerto Rico, to provide a rational basis for why it may be treated differently than other states.²⁰⁶ However, Justice Sotomayor emphasized the point the lower courts have made as well: *Califano* and *Harris* were

200. *Id.*

In 2021, 34,224 residents of Puerto Rico were enrolled in the AABD program; by contrast, in 2011, the Government Accountability Office estimates that over 300,000 Puerto Rico residents would have qualified for SSI. The 34,224 Puerto Rico residents enrolled in AABD in 2021 received an average of \$82 per month, compared to the \$574 per month that the average SSI recipient received in Fiscal Year 2020. In other words, significantly fewer Puerto Rico residents are eligible for AABD than would be eligible for SSI, and the benefits they receive under AABD are hardly comparable to those they would likely receive under SSI.

Id. (citations omitted); see also Jim Probasco, *Supreme Court Upholds Law Excluding Puerto Ricans from SSI Benefits*, INVESTOPEDIA (Apr. 24, 2022), <https://www.investopedia.com/supreme-court-upholds-law-denying-disability-benefits-to-puerto-rico-residents-5248409>

[<https://perma.cc/TGQ9-XX96>] (“AABD beneficiaries are limited by the program’s annual funding which is capped by federal law for Puerto Rico In 2011, the Government Accountability Office (GAO) estimated that federal spending on AABD was less than 2% of what it would be under SSI.”).

201. *Vaello-Madero*, 142 S. Ct. at 1559 (Sotomayor, J., dissenting).

202. *Id.* (citing *Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973)).

203. *Id.* at 1559–60 (citing *Mathews v. Lucas*, 427 U.S. 495, 510 (1976); *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981)).

204. *Id.* at 1560.

205. *Id.* (quoting Brief for the United States at 17–18, *United States v. Vaello-Madero*, 142 S. Ct. 1539 (2022) (No. 20-303)).

206. *Id.* (citing *Califano v. Torres*, 435 U.S. 1 (1976) (per curiam); *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam)).

not answering the same question.²⁰⁷ Justice Sotomayor explained that the basis for the decisions in both *Califano* and *Harris* mistakenly stated that Puerto Rican residents make no contributions to the Federal Treasury;²⁰⁸ however, in *Vaello-Madero*, the United States stated that Puerto Rican residents do contribute to the Federal Treasury.²⁰⁹

Justice Sotomayor also referenced the fact that the SSI creates a uniform federal program, with no differences for recipients depending on where they reside.²¹⁰ She argued that since the program places no weight on where the recipient lives in terms of carrying out its purpose or meeting its requirements, it does not make sense to base a recipient's eligibility on their residency.²¹¹

Justice Sotomayor identified that the exclusion was upheld based on Puerto Rican residents' exemption from paying certain taxes; however, the individuals eligible for the SSI program are "low-income individuals lacking in monetary resources."²¹² Therefore, Justice Sotomayor agrees with the First Circuit that "it is antithetical to the entire premise of the [SSI] program" that there would be an exclusion based on the lack of taxes paid.²¹³ Justice Sotomayor criticized the justification that Congress conducts a "general balance of benefits to and burdens on the residents of Puerto Rico" to determine eligibility.²¹⁴ Moreover, she illustrated how residents of Puerto Rico who would be eligible for SSI are similar to other eligible SSI recipients in "every material respect."²¹⁵

Further, Justice Sotomayor called attention to the fact that when extending SSI program eligibility to the Northern Mariana Islands, its tax status was irrelevant to Congress, which she argued undermined the justification regarding Puerto Rico's tax status.²¹⁶

Her dissent reasoned that the Court's majority opinion could create impacts for other states: "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 Alaska."²¹⁷

207. *Vaello-Madero*, 142 S. Ct. at 1560 (Sotomayor, J., dissenting).

208. *Id.*; *see generally* *Califano v. Torres*, 435 U.S. 1 (1978); *see generally* *Harris v. Rosario*, 446 U.S. 651 (1980).

209. *Vaello-Madero*, 142 S. Ct. at 1560 (Sotomayor, J., dissenting) (citing Brief for the United States, *supra* 205, at 19).

210. *Id.* at 1560–61.

211. *Id.* at 1561.

212. *Id.* (quoting *United States v. Vaello-Madero*, 956 F.3d 12, 27 (1st Cir. 2020)).

213. *Id.* (quoting *Vaello-Madero*, 956 F.3d at 27).

214. *Id.*

215. *Id.* ("They are needy U.S. citizens living in the United States.").

216. *Id.*

217. *Id.* at 1562 ("[O]n the basis that residents of those states pay less into the Federal Treasury than residents of other States.").

Justice Sotomayor stated that as a result of the Court's majority opinion, that exclusion would be deemed constitutional and in accordance with the equal protection of United States citizens.²¹⁸

In concluding, Justice Sotomayor provided statistics to demonstrate the vulnerability of Puerto Rican residents, highlighting that "Puerto Rico has a disproportionately large population of seniors and people with disabilities."²¹⁹ She also reminded the Court that Puerto Rico does not have voting representation in Congress, therefore its residents are unable to fight against the disparate treatment they have suffered.²²⁰ Lastly, Justice Sotomayor stated that while the Territorial Clause gives Congress the authority and discretion to provide legislation for the United States territories, this authority does not displace the Constitution's call to treat all United States citizens equally.²²¹

III. ANALYSIS

Puerto Rico has been a United States territory since 1898 and, just as those living on the mainland, those living in Puerto Rico are American citizens;²²² however, through its decisions and rationale, the Supreme Court and Congress have expressed no interest in treating the residents of Puerto Rico as such.

United States v. Vaello-Madero was an opportunity to move one step closer to equal treatment of United States territories; however the Supreme Court rendered a decision that moved Puerto Rico even further into limbo by applying the incorrect standard in its review. Arguably, the most important aspect of the decision is the impact it will inevitably have on Puerto Rican residents. This Part begins by analyzing whether the majority opinion was consistent with past cases involving the rights Puerto Ricans are entitled to. This Part also discusses how the majority opinion continues the sentiment that emerged in the *Insular Cases*. This Part then discusses the Court's failure to mention the impacts of each

218. *Id.*

219. *Id.* Citing The Census Bureau, Justice Sotomayor gave statistics from 2019 that estimated 43.5 percent of Puerto Rican residents living below the poverty line, which is over three times larger than the national percentage of 12.3 percent. *Id.*; Craig Benson, *American Community Survey Briefs, Poverty: 2018-2019*, U.S. CENSUS BUREAU 1, 5 (Sept. 2020), <https://www.census.gov/content/dam/Census/library/publications/2020/acs/acsbr20-04.pdf> [<https://perma.cc/UMP3-QR4N>].

220. *Id.*

221. *Id.*

222. See Anselmi González, *supra* note 25, at 99, 103 (explaining that the Jones-Shafroth Act of 1917 extended U.S. citizenship and numerous guarantees to all Puerto Ricans); Andrew Glass, *Puerto Ricans granted U.S. citizenship* *Citizenship, March 2, 1917*, POLITICO (Mar. 2, 2012, 6:02 AM), <https://www.politico.com/story/2012/03/puerto-ricans-granted-us-citizenship-073517> [<https://www.politico.com/story/2012/03/puerto-ricans-granted-us-citizenship-073517>] [<https://perma.cc/97LM-VKPH>] (listing the primary provisions of the Jones Act).

opinion. Lastly, this Part analyzes the choice of review by the Court.

A. Consistency with Prior Cases

The majority opinion relied heavily on the *Califano* and *Harris* decisions, while the lower courts, as well as Justice Sotomayor's dissent, seemed to question whether those cases should apply to *Vaello-Madero*.²²³

Justice Kavanaugh, writing for the majority, described the issue in *Califano* as "whether Congress's decision not to extend Supplemental Security Income to Puerto Rico violated the constitutional right to interstate travel."²²⁴ Then, Justice Kavanaugh explained the issue in *Harris* as whether "Congress's differential treatment of Puerto Rico in a federal benefits program" violated the Fifth Amendment's Equal Protection Clause.²²⁵

First, Justice Kavanaugh makes clear that the question in *Vaello-Madero* differs from the question posed in *Califano* by stating that the issue in *Califano* was whether the constitutional right to interstate travel was violated.²²⁶ The Court in *Califano* ruled solely on the constitutional right of interstate travel; the lower courts in *Califano* suggested that an individual traveling to Puerto Rico from a state with more benefits than Puerto Rico must still be entitled to those benefits under the Constitution, regardless of whether those benefits are available to other residents of Puerto Rico.²²⁷ The Court, citing another Supreme Court decision, stated, "the right of interstate travel must be seen as insuring new residents the same right to vital governmental benefits and privileges in the States to which they migrate as are enjoyed by other residents."²²⁸ This question clearly differs from the question before the Court in *Vaello-Madero*. Here, the question was not whether the benefits to *Vaello-Madero* should be available to him in Puerto Rico merely because he was eligible for those benefits in New York.²²⁹ The question before the Court involved the exclusion of benefits to *all* residents of Puerto Rico, and whether that exclusion violated the equal protection of all United States

223. See *Vaello-Madero*, 142 S. Ct. at 1557–62 (Sotomayor, J., dissenting) ("Neither [*Califano* nor *Harris*] . . . stood for the principle that Puerto Rico's tax status could justify any and all unequal treatment of its residents, and neither addressed the claims at issue here."); see generally *Califano v. Torres*, 435 U.S. 1, 3 (1978); see generally *Harris v. Rosario*, 446 U.S. 651 (1980).

224. *Vaello-Madero*, 142 S. Ct. at 1543; see generally *Califano*, 435 U.S. at 3.

225. *Vaello-Madero*, 142 S. Ct. at 1542; see generally *Harris v. Rosario*, 446 U.S. 651 (1980).

226. *Vaello-Madero*, 142 S. Ct. at 1543; see generally *Califano*, 435 U.S. at 3.

227. *Califano*, 435 U.S. at 3.

228. *Id.* (citing *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 261 (1974)).

229. See *Vaello-Madero*, 142 S. Ct. at 1542–43.

citizens.²³⁰

The second case that the majority relied on as precedent was *Harris v. Rosario*. The question before the Court in *Harris* also differed substantially from the question before the Court in *Vaello-Madero*. In *Califano*, the program at issue was the same as in *Vaello-Madero*, while the constitutional challenge was different; however, in *Harris*, the program was different, but the constitutional challenge was the same.²³¹ Because of their considerable factual differences from *Vaello-Madero*, these cases are insufficient as precedent for the Court. The dissenting opinion in *Harris* noted that the Court’s decision was based entirely on *Califano* with “no briefing or oral argument,” making the decision a hasty one.²³² The Court placed too much precedential value on *Califano* and *Harris* and decided in accordance with cases that presented distinctly different facts relevant to the Court’s constitutional analysis.²³³

B. The Majority Decision—A Modern Insular Case

The *Insular Cases* essentially provided the United States with the power to continue keeping certain territories in limbo; their holdings were based on whether territories were “incorporated,” an arbitrary measure used to determine to what extent they were a part of the United States.²³⁴ What Justice Gorsuch failed to mention in his concurring opinion is that the *Insular Cases* are purposefully unclear in their holdings, not wanting

230. *Id.*; *United States v. Vaello-Madero*, 956 F.3d 12, 14 (1st Cir. 2020); *see* U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property . . .”).

231. *See Vaello-Madero*, 142 S. Ct. at 1542–43 (finding that *Califano* evaluated the SSI on the basis of interstate travel, whereas *Harris* discussed a federal benefits program in the context of equal-protection); *see* *Califano v. Torres*, 435 U.S. 1, 3 (1978); *Harris v. Rosario*, 446 U.S. 651, 652 (1980).

232. *Harris*, 446 U.S. at 652; Romoser, *supra* note 106 (“In *Califano v. Torres* and *Harris v. Rosario*, the court issued short, unsigned opinions (without oral argument or full briefing) . . .”).

233. *See Vaello-Madero*, 956 F.3d at 17–18. The opinion stated,
[W]e would be remiss in complying with our own duty were we to blindly accept the applicability of *Califano* and *Harris* without engaging in a scrupulous inquiry into their relevance, application, and precedential value. Therefore, while we decline to follow the district court’s methodology, our review of the equal protection question at issue – whether the exclusion of Puerto Rico residents from receiving SSI benefits violates the Fifth Amendment – even in a universe where *Califano* and *Harris* remain on the books, leads us to the same result.

Id.; *see also* Romoser, *supra* note 106 (acknowledging differences between *Vaello-Madero*’s argument and *Califano*).

234. *See* IMMERWAHR, HOW TO HIDE AN Empire, *supra* note 22, at 87 (“In distinguishing between ‘incorporated’ and ‘unincorporated’ parts of the United States, these cases enshrined the notions that some places in the country weren’t truly part of the country.”); Santana, *supra* note 59, at 3 (arguing that the Supreme Court has not only failed to overrule the *Insular Cases*, but has established new ones); *supra* Part I.B.

to declare a rule for the governing of territories.²³⁵ As a result, these questions are still being brought before the Court.

Further, although Justice Gorsuch's concurring opinion called for overruling the *Insular Cases*,²³⁶ the majority decision is akin to the decisions rendered in those cases. His concurrence failed to mention the similarity between the decisions and failed to accurately describe the *Insular Cases*.²³⁷ Justice Gorsuch stated that the holding of the *Insular Cases* allowed for the United States to govern territories "largely without regard to the Constitution."²³⁸ This summation is inaccurate—in fact, the reason that questions about Puerto Ricans' rights continue coming before the Court is because the *Insular Cases* did not provide a concrete ruling.²³⁹

Justice Gorsuch also asserted that the *Insular Cases* rest entirely on a foundation of racism with no constitutional support.²⁴⁰ However, just like the majority opinion in *Vaello-Madero*, the *Insular Cases* were decided under the guise of constitutional principles.²⁴¹ Justice Gorsuch's proposed solution is to answer questions before the Court regarding the government of territories by utilizing the language of the Constitution and the nation's historical practices; but this is not a new solution, as this is

235. See Schmelzer, *supra* note 59, at 2 ("[T]he *Insular Cases* reveal a complicated balance struck by a deeply divided Court that kept slightly adjusting the scales while deliberately avoiding any blanket rule for the application of the Constitution to overseas territories."); see also Santana, *supra* note 59, at 8 ("[B]ecause of this piecemeal approach, a listing of all constitutional provisions applicable to the territories remains unclear."). Santana lists the constitutional provisions that the Court has deemed applicable to the United States territories, however, points out that "the Court has not directly addressed the *Insular Cases* or their merits," as they did with *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

236. *United States v. Vaello-Madero*, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring).

237. See Schmelzer, *supra* note 59, at 2 ("Justice Gorsuch dramatically oversimplifies the *Insular Cases* in ways that overstate their holdings and do not align with either the case law or the broader historic record."); see generally Santana, *supra* note 59.

238. *Vaello-Madero*, 142 S. Ct. at 1552 (Gorsuch, J., concurring); Schmelzer, *supra* note 59.

239. See Schmelzer, *supra* note 59, at 2. The author states,

The Court in the *Insular Cases* did not hold that the federal government largely had free rein in the territories. If anything, the *Insular Cases* could be criticized for not being definitive enough. There is a reason why, a century later, we are still asking the same questions. Many were never answered, and intentionally so.

Id.

240. *Vaello-Madero*, 142 S. Ct. at 1552 (Gorsuch, J., concurring).

241. See generally *id.*; see also Schmelzer, *supra* note 59, at 14 ("[T]wo *Insular Cases* held that]. . . only Congress had both the duty and authority to make laws for those territories . . . and both cases were grounded in a discussion of Articles I and II of the U.S. Constitution. . . ."); see generally *De Lima v. Bidwell*, 182 U.S. 1 (1901); see generally *Dooley v. United States*, 183 U.S. 151 (1901); but see Torruella, *Regime of Political Apartheid*, *supra* note 28, at 285 ("[T]he *Insular Cases* are a display of some of the most notable examples in the history of the Supreme Court in which its decisions interpreting the Constitution evidence an unabashed reflection of contemporaneous politics, rather than the pursuit of legal doctrine.").

exactly what the Court did in the *Insular Cases*.²⁴² While his acknowledgment of the *Insular Cases* was important in educating the public,²⁴³ Justice Gorsuch's superficial discussion undermines the soundness of his concurrence.

Currently, residents of Puerto Rico effectively follow an enumerated list of rights to determine what they are entitled to; with every question that arises about those rights, there is still unpredictability surrounding which standard of review courts will apply, and whether the perpetual discrimination against Puerto Rico will impact those decisions. The majority decision in *Vaello-Madero* simply added to the enumerated list of what Puerto Rican residents are *not* entitled to under the United States Constitution. Alongside their inability to receive SSI benefits, Puerto Ricans cannot vote for the president of the United States or representatives in Congress, and are not afforded the right to a jury trial in criminal cases under the Constitution.²⁴⁴ Yet, the majority opinion failed to discuss the *Insular Cases* at all, which established the proscription of certain rights.²⁴⁵

C. Failure to Mention the Impacts

The notions presented in *Vaello-Madero* will have impacts, discussed in Part IV of this Note;²⁴⁶ yet the Court, specifically Justice Thomas and Justice Sotomayor, did not address these impacts within their opinions. Justice Thomas's concurring opinion addressed the basis of the constitutional violation that *Vaello-Madero* brought to the Supreme Court but failed to identify the impacts of his opinion, which was that the appropriate basis for *Vaello-Madero*'s challenge was not the Fifth

242. See Schmelzer, *supra* note 59, at 31 (“[H]e fails to see that he is proposing is exactly the approach embraced by the judicial minimalists who decided the *Insular Cases* in the first place, just in more fashionable attire.”).

243. See IMMERWAHR, *HOW TO HIDE AN EMPIRE*, *supra* note 22, at 86 (“The *Insular Cases* are far less well-known [than *Plessy*, even though they have similar holdings]. Until very recently, it was not unusual for constitutional scholars to have never heard of them.”).

244. See Santana, *supra* note 59, at 1 (“The Puerto Rican constitution will protect your right to a jury trial, but the United States Constitution does not.”). Santana lists out the rights that Puerto Rican residents are entitled to, and are not entitled to, in order to paint a picture of how one's rights change if they move from one of the fifty states to Puerto Rico:

You will not pay federal income tax, but you will pay payroll taxes to the same extent as you did in the mainland. Should you suffer serious health conditions while living in the island, your access to the safety-net programs funded by your taxes . . . will be substantially curtailed or denied. . . . The federal government can discriminate against you and neighbors by satisfying the lowest level of review, rational basis, and they do.

Id. at 2; see also *Vaello-Madero*, 142 S. Ct. at 1562 (Sotomayor, J., dissenting) (explaining the limits that Puerto Rican citizens face).

245. See generally *Vaello-Madero*, 142 S. Ct. at 1560–61 (2022) (Sotomayor, J., dissenting); *Id.* at 1556 (Gorsuch, J., concurring); Schmelzer, *supra* note 59.

246. *Vaello-Madero*, 142 S. Ct. 1539 (2022); *infra* Section IV.

Amendment, but the Citizenship Clause. Additionally, Justice Sotomayor's dissent failed to extensively mention the societal and judicial policy impacts that will undoubtedly arise from the Supreme Court's decision.

1. Justice Thomas's Concurrence

Justice Thomas's concurring opinion made an overarching legal statement about what constitutional provisions guarantee the equal protection of all citizens.²⁴⁷ Instead of discussing the issue in *Vaello-Madero*, Justice Thomas doubted that *Vaello-Madero*'s claims had the correct constitutional basis.²⁴⁸ As an originalist, Justice Thomas believes that the Constitution should be interpreted by analyzing the founders' intent when creating the Constitution; notably, this approach fails to account for evolving societal norms and values.²⁴⁹ Justice Thomas's position as an originalist led to him being labeled "the most conservative justice on a very conservative Court," and often causes him to renounce Court precedent if he believes that it does not comport with the Constitution's original intent.²⁵⁰ While his opinion had no effect on the

247. See *Vaello-Madero*, 142 S. Ct. at 1544 (Thomas, J., concurring) (doubting, from his classically originalist point of view, whether the doctrine comports with the original meaning of the Constitution); accord Dan McLaughlin, *Thomas and Gorsuch Probe American Citizenship, Race, and the Territories*, NAT'L L. REV. (Apr. 21, 2022, 6:36 PM), <https://www.nationalreview.com/2022/04/thomas-and-gorsuch-probe-american-citizenship-race-and-the-territories/> [<https://perma.cc/6LK2-5C8V>] (discussing Justice Thomas' concurrence in *Vaello-Madero* and his various originalist perspectives).

248. See McLaughlin, *supra* note 247 ("For some time now, the other justices have tended to treat Thomas's engagement with constitutional scholarship on these points as irrelevant: The case law has long since gone in a different direction. But Thomas continues to insist on getting it right."); see also *Vaello-Madero*, 142 S. Ct. at 1544 (Thomas, J., concurring) (calling into question the constitutionality of the doctrine); see generally Sheryl Gay Stolberg, *Thomas's Concurring Opinion Raises Questions about What Rights Might Be Next*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/us/clarence-thomas-roe-griswold-lawrence-obergefell.html> [<https://perma.cc/J2GD-7REH>]; Meryl Kornfield et. al., *Biden, Other Critics Fear Thomas's 'Extreme' Position on Contraception*, WASH. POST (June 26, 2022, 3:01 PM), <https://www.washingtonpost.com/politics/2022/06/24/contraception-supreme-court-clarence-thomas-griswold/> [<https://perma.cc/2BYF-UExD>]; Quint Forgey & Josh Gerstein, *Justice Thomas: SCOTUS 'Should Reconsider' Contraception, Same-Sex Marriage Rulings*, POLITICO (June 24, 2022), <https://www.politico.com/news/2022/06/24/thomas-constitutional-rights-00042256> [<https://perma.cc/89Q5-XZHD>]. In all of these rulings, Justice Thomas issues a concurring opinion, but questions whether past questions before the Court were correctly ruled on, as he believes they do not represent an accurate interpretation of the Constitution.

249. See Lyle Denniston, *Justice Thomas, Originalism, and the First Amendment*, NAT'L CONST. CTR. (Feb. 20, 2019), <https://constitutioncenter.org/blog/justice-thomas-originalism-and-the-first-amendment> [<https://perma.cc/ER73-9B4M>] (explaining Justice Thomas's originalist ideology); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 12 (Wolters Kluwer, 6th ed. 2020).

250. See Michael O'Donnell, *Deconstructing Clarence Thomas*, ATLANTIC (Sept. 2019), <https://www.theatlantic.com/magazine/archive/2019/09/deconstructing-clarence-thomas/594775/> [<https://perma.cc/26RZ-FUL6>] (describing his lifelong commitment to originalist legal

ruling, Justice Thomas failed to mention the major impacts that his position would have on the law.

If the Fifth Amendment's Due Process Clause does not have an equal protection guarantee, as Justice Thomas suspects, cases that prohibited "discrimination on the basis of sex, sexual orientation, disability, national origin, and . . . race" would no longer have precedential value.²⁵¹ Justice Thomas mentioned two segregation cases, *Brown v. Board* and *Bolling v. Sharpe*.²⁵² In *Brown*, the segregation was limited to states, therefore the Fourteenth Amendment was clearly applicable.²⁵³ However, in *Bolling*, the segregation was imposed by Congress, which invoked the Fifth Amendment.²⁵⁴ This is logical: if states are prohibited from discrimination based on race, why would the federal government be able to discriminate based on race?²⁵⁵ Justice Thomas believes that even without the Fifth Amendment, citizens are still protected from the federal government's discrimination through the Citizenship Clause, but the key word is *citizen*.²⁵⁶ His thought process has two large impacts: not only would significant discrimination cases lose their legal basis, but only American citizens would be protected against discrimination.²⁵⁷ According to the United States Census Bureau, there are about 21.2 million noncitizens living in the United States.²⁵⁸ This includes immigrants with green cards, work visas, and individuals who have qualified under the Deferred Action for Childhood Arrivals (DACA)

philosophy); *see also* Denniston, *supra* note 249 (characterizing Justice Thomas as an "unwavering originalist").

251. Mark Joseph Stern, *Clarence Thomas' Jurisprudence Is Only Getting More Chaotic*, SLATE (Apr. 22, 2022, 1:03 PM), <https://slate.com/news-and-politics/2022/04/clarence-thomas-equal-protection-citizenship-constitutional-rights.html> [<https://perma.cc/6UUD-9S5D>] (criticizing Justice Thomas); *see generally* *Bolling v. Sharpe*, 347 U.S. 497 (1954).

252. *See Vaello-Madero*, 142 S. Ct. at 1544–47 (Thomas, J., concurring) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Bolling*, 347 U.S. at 497.).

253. *See Brown*, 347 U.S. at 495 (holding that "separate educational facilities are inherently unequal" and violate the Fourteenth Amendment).

254. *See Bolling*, 347 U.S. at 499 ("[R]acial segregation in public schools of the District of Columbia is a denial of the due process of the law guaranteed by the Fifth Amendment to the Constitution.").

255. *See* Stern, *supra* note 251 ("So *Vaello Madero* is an equal protection case – but the court did not apply the 14th Amendment's equal protection clause. Why? Because that clause only applies to the states, not the federal government.").

256. *See Vaello-Madero*, 142 S. Ct. at 1544, 1552–52 (Thomas, J., concurring) (proposing that prohibiting the Federal Government from discriminating on the basis of race is best found in the Fourteenth Amendment); *see also* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."); *accord* Stern, *supra* note 251 (providing historical context for 14th Amendment protections).

257. *See* Stern, *supra* note 251 (describing Justice Thomas's jurisprudence).

258. *See Constitution Day and Citizenship Day: September 17, 2022*, U.S. CENSUS BUREAU, <https://www.census.gov/newsroom/stories/constitution-day-citizenship-day.html> [<https://perma.cc/CWG5-B757>] (last visited July 11, 2023).

program.²⁵⁹; if the Court were to adopt Justice Thomas's stance, a large number of people would have no protection from discrimination by the federal government.²⁶⁰ Although Justice Thomas admitted that he is not resolute in his opinion, his failure to mention these impacts presented his beliefs in an unsettling tone.²⁶¹

2. Justice Sotomayor's Dissent

As the only dissenter, Justice Sotomayor was tasked with describing why eight of the Supreme Court justices got it wrong. While majority opinions are binding authority unlike dissents, dissents still have great value—if “persuasive” and “well-reasoned,” dissents can ultimately lead courts into making the correct choice in future decisions.²⁶² Justice Sotomayor's dissent highlighted the impacts of utilizing rational-basis review to decide whether extending SSI benefits was constitutional.²⁶³ She stated that if the only reason for Puerto Rico's exclusion from SSI benefits is the amount of taxes it pays, this rationale could bear the same

259. See Raul A. Reyes, *Why Noncitizens Should Be Allowed to Vote*, CNN (Dec. 10, 2021, 12:41 PM), <https://www.cnn.com/2021/12/10/opinions/new-york-city-noncitizen-voting-smart-policy-reyes/index.html> [<https://perma.cc/MG9A-L8YA>] (describing a broad group of legal immigrants affected by the legislation); see also *The Three Ways Non-U.S. Citizens Can Legally Live and Work in the United States*, LEXISNEXIS (Dec. 2, 2019), <https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/the-three-ways-non-u-s-citizens-can-legally-live-and-work-in-the-united-states> [<https://perma.cc/6N6L-EBHM>] (similarly describing the comprehensive group of affected people).

260. See Stern, *supra* note 251:

The [C]itizenship [C]ause (obviously) applies to American citizens, leaving everybody else out in the cold. If it replaced the current regime, then the federal government would be free to engage in . . . discrimination against noncitizens. Nonnaturalized immigrants would be relegated to formal second class status, denied the fundamental rights accorded to other Americans.

Id.

261. See *Vaello-Madero*, 142 S. Ct. at 1547 (Thomas, J., concurring) (“While my conclusions remain tentative, I think that the textual source of that obligation may reside in the Fourteenth Amendment's Citizenship Clause.”); cf. Stern, *supra* note 251 (characterizing Thomas as “erratic and capricious”).

262. See David Cole, *The Power of a Supreme Court Dissent*, WASH. POST (Oct. 29, 2015), https://www.washingtonpost.com/opinions/the-power-of-a-supreme-court-dissent/2015/10/29/fbc80acc-66cb-11e5-8325-a42b5a459b1e_story.html [<https://perma.cc/AV63-KT33>]. Cole explains the power of a dissenting opinion:

Majority opinions are exercises in power; dissents are appeals to our better judgment. The majority prevails, but the dissenter's role is by far the more romantic; it is the work of the individual who, on principle, stands against the crowd. While recent demands that justices follow the law, we celebrate as great those who departed from precedent as lone dissenting voices and ultimately saw their views adopted into law. We assign authority to the majority, but we valorize the dissenter.

Id.; see also *Majority, Concurring, and Dissenting Decisions*, CTR. CONST. STUD. (Jul. 28, 2020), <https://www.constitutionalstudies.ca/2020/07/majority-concurring-and-dissenting-decisions/> [<https://perma.cc/BS24-GWXS>].

263. *United States v. Vaello-Madero*, 142 S. Ct. 1539, 1562 (2022) (Sotomayor, J., dissenting).

impact on states that do not pay as much in taxes as others.²⁶⁴ This point was persuasive, as it attacked the entire basis for the Supreme Court’s decision, and clearly demonstrated that the majority decision was based in inaccurate legal reasoning and failed to acknowledge the detrimental impacts on Puerto Ricans.²⁶⁵

Justice Sotomayor, in her discussion of rational-basis review, had sound reasoning when discussing how the amount of taxes paid by Puerto Ricans should not exempt them from receiving benefits.²⁶⁶ While Justice Sotomayor recognized that rational-basis review is the wrong standard to apply in Vaello-Madero, she also stated that even this low-demand test would render the exclusion in Vaello-Madero unconstitutional.²⁶⁷

By the Court’s logic, Justice Sotomayor explained, there are states in the mainland United States that would be excluded as well, on the basis that they do not pay enough taxes to the Federal Treasury.²⁶⁸ Further, this point was mentioned and agreed upon during oral arguments, as Justices Thomas, Sotomayor, Breyer, and Barrett alluded to not truly grasping the difference of excluding Puerto Rico based on their tax

264. *Id.*

265. *See id.* at 1562 (Sotomayor, J., dissenting); *see also* Nina Totenberg, *High Court Upholds Excluding Puerto Ricans from Aid for Disabled and Blind*, NPR (April, 21, 2022, 6:28 PM), <https://www.npr.org/2022/04/21/1094128297/high-court-upholds-excluding-puerto-ricans-from-aid-for-disabled-and-blind> [<https://perma.cc/D5UL-F4S6>]. The author explains,

Blind and disabled residents of Puerto Rico will continue to get benefits of about \$84 a month, she says, whereas the benefits under SSI are about 10 times as much, meaning that some 30,000 of Puerto Rico’s blind and disabled residents would have received about \$800 a month, had the Supreme Court ruled the other way.

Id. (citing Veronica Ferraiuoli).

266. *See Vaello-Madero*, 142 S. Ct. at 1561–62 (Sotomayor, J., dissenting) (describing SSI as a “means-tested” last resort for the poorest Americans who lack the means even to pay taxes); *see also* Garrett Epps, *The Supreme Court’s Callous Blow to Puerto Ricans*, WASH. MONTHLY (Apr. 26, 2022), <https://washingtonmonthly.com/2022/04/26/the-supreme-courts-callous-blow-to-puerto-ricans/> [<https://perma.cc/46YZ-9HWD>] (“[Justice Sotomayor is correct] as a matter of law It will never happen, of course, because those freeloading states have votes in Congress and the Electoral College. Puerto Rico does not, and that leaves its people vulnerable to almost any mistreatment Congress cares to dish out”). The author is referring to Justice Sotomayor’s assertion that based on the rationale of the majority’s decision in *Vaello-Madero*, Congress could also exclude certain states from receiving benefits. *Id.*

267. *See Vaello-Madero*, 142 S. Ct. at 1560–61 (Sotomayor, J., dissenting) (“Rational basis is a deferential standard, but it is not ‘toothless’”) (citing *Mathews v. Lucas*, 427 U.S. 495, 510 (1975)). Justice Sotomayor continued, “Congress’ decision to exclude millions of U.S. citizens who reside in Puerto Rico from the SSI program fails even this deferential test.” *Id.* at 1560. *See also* Rational Basis Test, *supra* note 64 (providing the test’s requirements and comparing rational basis to the other two judicial review tests of intermediate and strict scrutiny); *infra* Part III.D.

268. *See Vaello-Madero*, 142 S. Ct. at 1562 (Sotomayor, J., dissenting); *see also* David Rae, *6 States with the Lowest Overall Tax Burden*, FORBES (July 7, 2022, 10:00 AM), <https://www.forbes.com/sites/davidrae/2022/07/07/6-states-with-the-lowest-overall-tax-burden/?sh=36c61cab19a6> [<https://perma.cc/5WGM-6NK6>] (“State tax burdens aren’t uniform across the country.”).

payments from excluding needy residents of one of the fifty states.²⁶⁹ Despite this, the ultimate decision ignored the fact that the rationale behind the exclusion was not a secure foundation. Thus, Justice Sotomayor's dissent succeeded in invalidating the legal basis of the majority's decision.

Although Justice Sotomayor was understandably attacking the legal reasoning of the majority's opinion, she failed to make persuasive points about the societal impacts, which likely would have made her dissent more effective.²⁷⁰ One example of a famous dissent is that of Justice Harlan, following the majority opinion in *Plessy v. Ferguson*.²⁷¹ In his dissent, Justice Harlan noted that if the segregation at issue was upheld, challenges between the *people* of the United States would arise, which is what Justice Sotomayor's dissent failed to identify.²⁷² Although Justice Harlan still created a foundation in the law for his dissent, he painted a picture of what the holding means for the interactions between the people of the United States.²⁷³ In failing to mention these impacts, Justice Sotomayor's dissent lacks the potential effect that could have impassioned lay people to see what the decision means for Americans

269. See Transcript of Oral Argument at 6, 11, 16, 27, *United States v. Vaello-Madero*, 142 S. Ct. 1539 (2022) (asking counsel for petitioner (the United States) how the exclusion would be different if it was Vermont or Mississippi, rather than Puerto Rico, and whether that would still pass rational basis review); see also Epps, *supra* note 266 (taking into account that if Congress were to exclude Puerto Rican residents who pay insufficient taxes, it could exclude the “needy” residents of Vermont, Wyoming, South Dakota, North Dakota, Montana, and Alaska from benefit programs too, on the basis that they pay less into the Federal Treasury than residents from other states).

270. See *Vaello-Madero*, 142 S. Ct. at 1561–62 (Sotomayor, J., dissenting) (failing to address potential societal impacts outside the bounds of pure legal reasoning).

271. See generally *Plessy v. Ferguson*, 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting); see also *supra* Part I.B (discussing Justice Harlan's dissent in the *Insular Cases*).

272. See *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting):

The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arise race hate, what more certainly create and perpetuate a feeling of distrust between these races . . . ?

Id.; see also Charles Thompson, *Harlan's Great Dissent*, U. LOUISVILLE LOUIS D. BRANDEIS SCH. L. LIBR., <https://louisville.edu/law/library/special-collections/the-john-marshall-harlan-collection/harlans-great-dissent> [<https://perma.cc/9XPS-7LBH>] (recognizing that the decision in *Plessy* “would poison relations between the races”).

273. See generally *Plessy*, 163 U.S. at 552–64 (Harlan, J., dissenting); see also Steve Inskip, *The Supreme Court Justice Who Made History By Voting No on Racial Segregation*, NPR (June 7, 2021, 5:05 AM), <https://www.npr.org/2021/06/07/1002982972/how-a-supreme-court-justice-in-the-1800s-made-history-through-dissent> [<https://perma.cc/2Z7U-AA8B>] (recognizing that in his dissent, Justice Harlan correctly predicted the ensuing “hundreds of years of racial strife”); see also Peter Canellos, *Separate but Equal, the Court Said. One Voice Dissented.*, N.Y. TIMES (May 19, 2021), <https://www.nytimes.com/2021/05/18/opinion/plessy-ferguson-justice-harlan.html> [<https://perma.cc/M6ED-BTT2>] (discussing Justice Harlan's dissent).

and their relationship with other Americans in Puerto Rico.²⁷⁴

In her dissent, Justice Sotomayor could have written more about the decision's impact on the country as a whole. Throughout her opinion, she hardly mentioned race, which is at issue here.²⁷⁵ Similar to Justice Harlan's notion of how the majority decision in *Plessy* would affect America as a whole, Justice Sotomayor had the opportunity to discuss how the treatment of American citizens in Puerto Rico could potentially affect the treatment of Puerto Ricans living on the mainland of the United States as well. The effect that the exclusion of SSI benefits has on Puerto

274. See Chris Schmidt, *What Makes a Great Supreme Court Dissent?*, SCOTUSNOW: IIT CHI. KENT COLL. L. (Oct. 29, 2015), <https://blogs.kentlaw.iit.edu/iscotus/what-makes-a-great-supreme-court-dissent/> [<https://perma.cc/CQ3Y-9F9P>]

[F]or a dissent . . . to play a role in this constitutional dialogue requires not only a measure of eloquence and some quotable lines. It requires people outside the Court who are engaged in this constitutional dialogue to use these dissents to advance their agenda.

And it requires some receptivity among the American people to the vision of law contained in the dissent. Historical circumstances, not justices, make great dissents.

Id. The author of this blog states that dissents often matter because of the context around them, which he calls "historical circumstances" or "constitutional dialogue." *Id.* He states that there are many factors that play into whether a dissent is effective or not, but the context is what really makes a dissent part of a larger national discussion. *Id.* (citing MELVIN I. UROFSKY, *DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE*, (Pantheon Books, 2015)); see also Torruella, *Regime of Political Apartheid*, *supra* note 28, at 310 ("This emphasis on *people*, rather than on other points of reference, such as geography, procedures, or legislation, is a typical Harlan approach, reflecting his concern for the civil liberties of the individual."). Justice Harlan thought of the impact that the Insular Cases would have on the people, and it is likely just an approach to dissenting that is more effective. *Id.* at 310–11.

275. See, e.g., *Vaello-Madero*, 142 S. Ct. at 1561 (Sotomayor, J., dissenting) (rejecting the district court's consideration of whether the differential treatment of Puerto-Ricans requires a heightened standard of review); see also *infra* Part III.D (discussing why Vaello-Madero needs to be subject to strict scrutiny, rather than rational basis); see also Sonia Sotomayor, OYEZ, https://www.oyez.org/justices/sonia_sotomayor [<https://perma.cc/3K7H-4VKK>] (providing Justice Sotomayor's background, including her Puerto Rican descent); accord Tiana Headley, *Ivy-Educated Thomas and Sotomayor Divide on Affirmative Action*, BLOOMBERG LAW (Oct. 29, 2022, 7:12 AM), <https://news.bloomberglaw.com/us-law-week/ivy-educated-thomas-and-sotomayor-divide-on-affirmative-action> [<https://perma.cc/AGT2-JMRE>] (quoting Jonathan Oosting, *Sotomayor at MSU: 'I Was the Perfect Affirmative Action Child'*, DETROIT NEWS (Aug. 27, 2018, 2:19 PM), <https://www.detroitnews.com/story/news/local/michigan/2018/08/27/sonia-sotomayor-michigan-state-affirmative-action/1074597002/> [<https://perma.cc/AMU8-NDZS>] (explaining how Justice Sotomayor's parents moved from Puerto Rico to New York, and how affirmative action helped give Justice Sotomayor the opportunity to receive higher education). Justice Sotomayor did not reference her Puerto Rican descent in her dissent, which was likely intentional as her opinion was aimed toward dismantling the legal reasoning behind the majority. However, her time on the Supreme Court has illustrated her passion for racial equality and her dismay at conservative new Justices. See generally Robert Barnes, *Sotomayor Accuses Colleagues of Trying to 'Wish Away' Racial Inequality*, WASH. POST (Apr. 22, 2014), https://www.washingtonpost.com/politics/sotomayor-accuses-colleagues-of-trying-to-wish-away-racial-inequality/2014/04/22/e5892f90-ca49-11e3-93eb-6c0037dde2ad_story.html [<https://perma.cc/L57N-ZLNS>]; Ariane de Vogue, *Justice Sotomayor Continues Warnings of a Dramatic Conservative Turn at the Supreme Court*, CNN (June 21, 2022, 3:45 PM), <https://www.cnn.com/2022/06/21/politics/sonia-sotomayor-conservative-supreme-court/index.html> [<https://perma.cc/62DA-JSLR>].

Ricans is the most important impact of the Court's decision, and this was mentioned in Justice Sotomayor's dissent; however, since they are "fellow Americans,"²⁷⁶ there should be a discussion of the effect on American society as a whole and how this exclusion affects the relationship that mainland Americans have with Puerto Ricans. This Note will discuss these impacts in Part IV.

D. The Wrong Test Was Used

While Justice Sotomayor would argue that the exclusion does not even pass rational-basis review, the majority's decision presented a deeper, more fundamental issue in assessing whether the exclusion of Puerto Ricans is constitutional. The Court should have employed the strict scrutiny standard, which is reserved for classifications that impact a suspect class.²⁷⁷ The exclusion of residents of Puerto Rico is a "facially-neutral" classification as it only includes the residents of the fifty states; however, as the Court has held in the past, if it is *administered* in a way that discriminates, it should be declared unconstitutional.²⁷⁸

The majority opinion in *Vaello-Madero* held that the exclusion of Puerto Ricans from receiving SSI benefits passed "rational basis" review, because Congress is not mandated to extend these benefits to Puerto Rico; the Court argued that this rational is based on Puerto Ricans' exemption from paying certain taxes.²⁷⁹ However, the Court did not fully appreciate the group excluded from these benefits, despite precedent requiring the Court to identify the following criteria for a suspect class: "(1) a history of being 'subjected to discrimination,' (2) having 'distinguishing characteristics that define them as a discrete group,' and (3) status as 'a

276. *Vaello-Madero*, 142 S.Ct. at 1557 (Gorsuch, J., concurring).

277. See Strict Scrutiny, *supra* note 65 ("To pass strict scrutiny, the legislature must have passed the law to further a 'compelling governmental interest,' and must have narrowly tailored the law to achieve that interest."); see also Brief of LatinoJustice PRLDEF and Ten Amici Curiae in Support of Respondent at 2, *United States v. Vaello-Madero*, 142 S. Ct. 1539 (2022) (No. 20-303) [hereinafter Brief of LatinoJustice] ("Although framed in geographic terms, this classification impermissibly targets a discrete and powerless ethnic and racial minority—Puerto Ricans.").

278. See *Yick Wo v. Hopkins*, 118 U.S. 356, 365 (1886) (holding that although the law was neutral on its face, meaning there were no suspect classifications within the law, it can still violate the Constitution if the law is administered in a way that is discriminatory); see also Brief of LatinoJustice, *supra* note 277, at 27, 29 ("The ostensibly neutral, geographical nature of the classification cannot mask the reality of a classification scheme that impermissibly targets with great precision a politically powerless group—Puerto Ricans.").

279. See *Vaello-Madero*, 142 S. Ct. at 1543 (applying the deferential rational-basis test to uphold Congress's decision); see also Stuart M. Gerson, *Supreme Court Decides Five Cases, Some of Which Lay Down Markers That Could Impact Future Decisions: SCOTUS Today*, NAT'L L. REV. (Apr. 21, 2022), <https://www.natlawreview.com/article/supreme-court-decides-five-cases-some-which-lay-down-markers-could-impact-future> [https://perma.cc/L8DX-9VFH] ("[B]ecause Congress chose to treat residents of Puerto Rico differently from residents of the States for purposes of tax laws, it could do the same for benefit programs.").

minority or politically powerless’ group.”²⁸⁰ Puerto Ricans fit this standard.²⁸¹

The history of discrimination that Puerto Ricans have been subjected to (i.e., the *Insular Cases*) is mentioned in *Vaello-Madero*.²⁸² The discretion used to apply the Constitution to certain United States citizens while withholding its privileges from other citizens is justified by the racist beliefs of the justices when these cases were decided.²⁸³ Further, both their race and ethnicity make them a discrete group, subject to strict scrutiny.²⁸⁴ According to the Census Bureau, “99% of Puerto Ricans identify as Hispanic or Latino”; in addition, the native language for the majority of Puerto Ricans is Spanish, further contributing to their status as a “suspect class.”²⁸⁵ Lastly, Puerto Ricans are “politically powerless” compared to other United States citizens—they are unable to vote in federal elections for the United States President, and do not have voting representation in Congress.²⁸⁶

While the Supreme Court adopted the argument that this classification is based on location and satisfies the rational-basis test based on the tax burden analysis, the way that the exclusion is administered allows the

280. See Brief of LatinoJustice, *supra* note 277, at 27 (citing *Lyng v. Castillo*, 477 U.S. 635 (1986)); see also Brief of the American Bar Association as Amicus Curiae in Support of Respondent at 28, *United States v. Vaello-Madero*, 142 S. Ct. 1539 (2022) (No. 20-303) [hereinafter Brief of the ABA] (explaining how Puerto Ricans satisfy the criteria for the application of strict scrutiny).

281. Brief of LatinoJustice, *supra* note 277, at 27.

282. See *Vaello-Madero*, 142 S. Ct. at 1556 (Gorsuch, J., concurring). He gives an example of the result of the *Insular Cases*, stating,

Still today under this Court’s cases we are asked to believe that the right to a trial by jury remains insufficiently ‘fundamental’ to apply to some 3 million U.S. citizens in ‘unincorporated’ Puerto Rico. At the same time, the full panoply of constitutional rights apparently applies on the Palmyra Atoll, an uninhabited patch of land in the Pacific Ocean, because it represents our Nation’s only remaining ‘incorporated’ territory. It is an implausible and embarrassing state of affairs.

Id. (footnote omitted); see also Brief of the ABA, *supra* note 280, at 29 (describing the *Insular Cases* as a way that Puerto Rico has been treated unequally).

283. See Brief of the ABA, *supra* note 280, at 29 (“The Court need look no further than the *Insular Cases*, which still loom over the federal territories, to see the historical evidence of racial animus and use thereof to justify the unequal application of constitutional protections.”); cf. *Vaello-Madero*, 142 S. Ct. at 1552 (Gorsuch, J., concurring) (“The *Insular Cases* have no foundation in the Constitution and rest instead on racial stereotypes.”).

284. See Brief of LatinoJustice, *supra* note 277, at 4 (“[S]trict scrutiny applies to any classification based on race, ethnicity, or alienage.”); see also Brief of the ABA, *supra* note 280, at 28 (“[D]iscriminations based on ethnicity, language, or race have traditionally been subjected to heightened scrutiny.”).

285. Brief of LatinoJustice, *supra* note 277, at 27; *Quick Facts Puerto Rico*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/PR> [<https://perma.cc/XK3M-GYES>].

286. See Brief of LatinoJustice, *supra* note 277, at 31 (“[R]equir[ing] [a] heightened [level] of judicial protection.”); accord Brief of the ABA, *supra* note 280, at 28 (similarly describing Puerto Ricans as a “politically powerless” minority because they cannot vote in federal elections).

Supreme Court to subject it to heightened scrutiny. The Court's majority decision suggests that the exclusion would be the same for residents of states that pay less tax; so the obvious question is why doesn't the exclusion apply to those needy residents? The way that SSI benefits are administered is suggestive of discrimination. The classification of territories as "outside the United States" is not one that would satisfy heightened scrutiny.²⁸⁷ Consider the Court's holding in *Yick Wo* which stated:

Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.²⁸⁸

This quote describes what is happening in *Vaello-Madero*: the residents of Puerto Rico are being discriminated against when likened to the needy residents of Vermont, Montana, and other states that do not pay as much in taxes.²⁸⁹ Justice Kavanaugh, writing for the majority, stated that if the Court were to hold Puerto Rico's exclusion unconstitutional, it would need to tax Puerto Rico more; this is inaccurate as it still does not address the fact that taxes vary by state.²⁹⁰

287. See Brief of LatinoJustice, *supra* note 277, at 32 (warranting heightened review because Puerto Ricans are a discrete and insular minority); see also Brief of the ABA, *supra* note 280, at 27 ("Even if this Court were to determine that excluding Puerto Rico's residents from SSI benefits somehow satisfies rational-basis review, the Court should nevertheless strike down this discrimination as unconstitutional under a heightened standard of review.").

288. *Yick Wo v. Hopkins*, 118 U.S. 356, 365 (1886); see also Ruthann Robson, *A Constitutional Expert Explains the Issues at Stake in Trump's Travel Ban*, VOX (Feb. 7, 2017, 3:10 PM), <https://www.vox.com/the-big-idea/2017/2/7/14537716/trump-court-immigration-constitution-refugee-ban> [<https://perma.cc/7XR8-KW83>] (explaining that the "evil eye" is hard to prove, as it is "an intent to discriminate"). However, as this article describes Trump's repeated discussion of "a Muslim ban," there is evidence of constant discrimination toward Puerto Rico, demonstrated by the constant denial of rights that other United States citizens are entitled to. *Id.*

289. See *Vaello-Madero*, 142 S. Ct. at 1561 (Sotomayor, J., dissenting); see also Brief of Medicaid and Medicare Advantage Products Association of Puerto Rico ("MMAPA") as Amicus Curiae in Support of Vaello-Madero at 15, *United States v. Vaello-Madero*, 142 S. Ct. 1539 (2022) (No. 20-303) [hereinafter Brief of MMAPA] ("Despite Wyoming and Vermont's reduced contribution to the federal treasury viz a viz California, any eligible resident of either state may receive SSI benefits. But although Puerto Rico's contribution is only 0.03% smaller than Vermont and Wyoming's, none of its residents may receive SSI benefits.").

290. See *Vaello-Madero*, 142 S. Ct. at 1543; see also Brief of MMAPA, *supra* note 289, at 5, 18 (explaining that the Court relying on the lack of federal taxes paid by Puerto Rico is the Court ignoring the public policy that exempted Puerto Ricans from paying federal taxes). "Puerto Rico's fiscal autonomy grew out of Congress belief that Puerto Rico has too small a tax base and thus needs to retain all tax revenues to make ends meet." *Id.*; see also *United States v. Vaello-Madero*, 956 F.3d 12, 30 (1st Cir. 2020) (showing that the residents of the Northern Mariana Islands are eligible for SSI benefits) "[T]he otherwise SSI-qualifying residents of Puerto Rico and of the

By virtue of the reasons discussed throughout this Part, the Supreme Court delivered an opinion that will force the United States territories to endure more irresolution regarding their constitutional rights.

IV. IMPACT

This Part will discuss the impacts of the Court's decision on the general public, the relationship between mainland United States and Puerto Rico, and Puerto Rico's status as a territory.

A. *The General Public*

The Supreme Court's 2021–22 term rendered many shocking decisions, and *Vaello-Madero* seemed to be one that grasped the public's attention.²⁹¹ While many are enraged that, once again, the United States has designated Puerto Ricans as “second-class” citizens, there are some that are hopeful of what could come from Justice Gorsuch's concurrence.²⁹² His concurring opinion urged that an overruling of the *Insular Cases* was necessary, as they currently remain “good law.”²⁹³ These cases created the arbitrary distinction of “incorporated” versus “unincorporated” territories that have controlled decisions regarding the rights guaranteed to residents of territories for decades.²⁹⁴

Northern Mariana Islands have the same legally-relevant characteristics in common, *i.e.*, they are (1) low-income and low-resourced, (2) elderly, disabled, or blind, and (3) generally exempted from paying federal income tax.”)

291. See generally Adam Liptak, *Supreme Court Rules on Stolen Art, Signs and Puerto Rico's Status*, N.Y. TIMES (Apr. 21, 2022), <https://www.nytimes.com/2022/04/21/us/supreme-court-puerto-rico-stolen-art-signs.html> [<https://perma.cc/ZHQ8-9Y3G>]; David Cole & Rotimi Adeoye, *A Radical Supreme Court Term in Review*, ACLU (July 7, 2022), <https://www.aclu.org/news/civil-liberties/a-radical-supreme-court-term-in-review> [<https://perma.cc/FNA4-BVA9>]; Jon Skolink, *5 Supreme Court Decisions from This Term That Are Terrifyingly Radical—and Not about Abortion*, SALON (May 26, 2022, 6:00 AM), <https://www.salon.com/2022/05/26/5-decisions-from-this-term-that-are-terrifyingly-radical--and-not-about-abortion/> [<https://perma.cc/3KT9-K996>].

292. See Sherry Levin Wallach, *The Insular Cases Must Be Overturned*, BLOOMBERG LAW (Aug. 3, 2022, 3:00 AM), <https://news.bloomberglaw.com/us-law-week/the-insular-cases-must-be-overturned> [<https://perma.cc/9Y5P-CA8S>] (fearing that Puerto Ricans are designated as second class citizens yet cautiously optimistic that Justice Gorsuch's concurrence may have set the stage for the overturn of the *Insular Cases*); see also Kimberly Strawbridge Robinson, *Biden Urged to Help Fight Cases Treating Territories as Inferior*, BLOOMBERG LAW (July 12, 2022, 12:12 PM), <https://news.bloomberglaw.com/us-law-week/biden-urged-to-help-fight-cases-treating-territories-as-inferior> [<https://perma.cc/PP5R-NKT9>] (similarly disappointed with the decision yet suggesting Justice Gorsuch's concurrence might be a silver lining).

293. See IMMERWAHR, HOW TO HIDE AN EMPIRE, *supra* note 22, at 86 (recognizing that unlike *Plessy*, the *Insular Cases* have never been outright overturned and remain “on the books” as good law); see also *Vaello-Madero*, 142 S. Ct. at 1552 (Gorsuch, J., concurring) (proposing the overturning of the *Insular Cases* which “have no place in [the] law”).

294. See Fiol-Matta, *supra* note 26, at 713 (“In a series of decisions known as the *Insular Cases* . . . the Supreme Court essentially invented what is known as the territorial incorporation doctrine. This doctrine, which has no constitutional foundation, divided the United States territories into two

Overall, the *Vaello-Madero* opinion received much criticism.²⁹⁵ Whether those upset were the people in Puerto Rico, fellow Americans on the mainland, or most likely, both, the public should be heard. Currently, the public's confidence in the Supreme Court is at an all-time low.²⁹⁶ The Supreme Court's job is to not only interpret the Constitution, but to protect the equal rights of all Americans.²⁹⁷ It needs to do more for the latter.

B. How Puerto Ricans Are Affected

Besides the obvious way that the *Vaello-Madero* decision affects

categories: incorporated and unincorporated.”)(foornote omitted). The article describes the question of whether certain constitutional rights apply to territories as “a contentious debate started in the early twentieth century [that] continues to this day.” *Id.* at 714. Further, the author states, “[d]espite the Insular Cases’ flawed reasoning and blatant racial bias, federal courts continue to lean on them to deny U.S. territories’ residents constitutional rights and protections such as citizenship and equal benefits.” *Id.*; see also *Vaello-Madero*, 142 S. Ct. at 1555–56 (Gorsuch, J., concurring) (“On what basis could any judge profess the right to draw distinctions between incorporated and unincorporated Territories, terms nowhere mentioned in the Constitution and which in the past have turned on bigotry?”). Gorsuch continues his concurring opinion by stating, “perhaps this Court can continue to drain the Insular Cases of some of their poison by declaring provision after provision of the Constitution ‘fundamental’ and thus operative in the ‘unincorporated’ Territories.” *Id.* at 8. He concluded, “But even one hundred years on, that pitiable job remains unfinished.” *Id.*

295. See 5-4 Podcast (@fivefourpod), TWITTER (May 17, 2022, 8:39 AM), <https://twitter.com/fivefourpod/status/1526558052119363586> [<https://perma.cc/PT47-3G43>] (“This week’s episode is U.S. v. Vaello Madero, where the Court held that Puerto Rican residents can’t receive SSI benefits due to our nation’s long tradition of not caring about Puerto Rico.”); see also Guillermo Mena (@GuillermoMena), TWITTER (Apr. 21, 2022, 10:55 AM), <https://twitter.com/GuillermoMena/status/1517170148481945602> [<https://perma.cc/XZ5Y-KJ5J>] (“Today’s majority ruling in US v Vaello Madero shouldn’t surprise anyone. What’s really remarkable is that Justices Breyer, Kagan and Roberts somehow did not see fit to join Justice Gorsuch’s amazingly clear-headed concurrence calling for overruling the despicable Insular Cases.”); Puerto Rican Statehood Action Network (@PRStatehoodNet), TWITTER (Nov. 9, 2021, 4:06 PM), <https://twitter.com/PRStatehoodNet/status/1458194415965646848> [<https://perma.cc/7UDK-KYFZ>] (posting photos of people outside of the Supreme Court with signs about the Supreme Court decision and including “#Statehood4PuertoRico” in the caption of the photos).

296. See Chris Cillizza, *Trust in the Supreme Court Is at a Record Low*, CNN (Sept. 29, 2022, 10:28 AM), <https://www.cnn.com/2022/09/29/politics/supreme-court-trust-gallup-poll> [<https://perma.cc/ZTW2-KQJK>] (discussing a recent poll from Gallup indicating the Court has the lowest approval rating ever recorded by Gallup); accord Kathryn Haglin et. al, *Americans Don’t Trust the Supreme Court. That’s Dangerous.*, WASH. POST (Oct. 10, 2022, 7:00 AM), <https://www.washingtonpost.com/politics/2022/10/10/supreme-court-public-opinion-legitimacy-crisis/> [<https://perma.cc/A2GB-AMBJ>] (“Supreme Court approval relates to whether Americans think the court’s decisions are ‘about right’ or whether they are ‘too liberal’ or ‘too conservative.’”); see generally Joseph Daniel Ura & Patrick C. Wohlfarth, “*An Appeal to the People*”: *Public Opinion and Congressional Support for the Supreme Court*, 72 U. CHI. PRESS J. 939 (2010).

297. See SUP. CT. OF THE U.S., ABOUT THE COURT, <https://www.supremecourt.gov/about/about.aspx> [<https://perma.cc/94NC-8BPF>] (“As the final arbiter of the law, the Court is charged with ensuring the American people the promise of equal justice under law and, thereby, also functions as guardian and interpreter of the Constitution.”).

Puerto Ricans, i.e., not receiving the income benefits that they desperately need, they are affected in other ways due to the United States' conduct indicating that Puerto Rico is low on the priority list.

Puerto Rico has suffered two devastating hurricanes in the last five years. The first, Hurricane Maria, has been labeled the “deadliest U.S.-based natural disaster in 100 years,” which had a death toll of almost 3,000 people.²⁹⁸ While many Puerto Ricans came to the United States mainland following the hurricane, those that stayed in Puerto Rico did not have power for almost an entire year.²⁹⁹ The people of Puerto Rico had not recovered completely from Hurricane Maria when Hurricane Fiona hit on its fifth year anniversary, almost to the day.³⁰⁰

The support, both financial and verbal, was lacking from the United States mainland; this could be because many Americans are unaware that Puerto Ricans are fellow citizens.³⁰¹ This ignorance was exacerbated by

298. See Nicole Acevedo, *Puerto Rico Sees More Pain and Little Progress Three Years after Hurricane Maria*, NBC NEWS (Sept. 20, 2020, 4:30 AM), <https://www.nbcnews.com/news/latino/puerto-rico-sees-more-pain-little-progress-three-years-after-n1240513> [https://perma.cc/YR6N-V8JS] (describing the grim aftermath of Hurricane Maria) [hereinafter Acevedo, *More Pain and Little Progress*]; see also Laura N. Pérez Sánchez & Patricia Mazzei, *On Anniversary of Hurricane Maria, Storm Leaves Puerto Rico in the Dark*, N.Y. TIMES (Sept. 20, 2022), <https://www.nytimes.com/2022/09/19/us/puerto-rico-power-hurricane-fiona.html> [https://perma.cc/ELS7-UX2G] (similarly describing the death toll and damages); accord Sheri Fink, *Nearly a Year after Hurricane Maria, Puerto Rico Revises Death Toll to 2,975*, N.Y. TIMES (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/us/puerto-rico-hurricane-maria-deaths.html> [https://perma.cc/9HWR-BYGV] (explaining the catastrophic consequences).

299. See, e.g., Acevedo, *More Pain and Little Progress*, *supra* note 298 (expounding upon the challenges that Puerto Ricans faced); accord John D. Sutter, *130,000 Left Puerto Rico after Hurricane Maria*, CNN (Dec. 19, 2018, 4:21 PM), <https://www.cnn.com/2018/12/19/health/sutter-puerto-rico-census-update/index.html> [https://perma.cc/F5WM-ABX8] (“An estimated 130,000—almost 4% of the population—left the island of Puerto Rico in the aftermath of Hurricane Maria . . .”).

300. See, e.g., Karina N. González, *Op-Ed: Hurricane Fiona Devastated Puerto Rico. When Will These Americans Get the Support They Need?*, L.A. TIMES (Sept. 27, 2022, 3:05 AM), <https://www.latimes.com/opinion/story/2022-09-27/puerto-rico-hurricane-fiona-power-electricity-climate-disasters-communities> [https://perma.cc/EY3Y-54NT] (“On Sept. 18, nearly five years to the day of Hurricane Maria, the force of Hurricane Fiona and a fragile power grid plunged Puerto Rico into a frightening yet familiar darkness.”); cf. Nicole Acevedo, *A Year after Hurricane Maria, Puerto Ricans Rebuild amid Aetbacks*, NBC NEWS (Sept. 18, 2018, 4:23 AM), <https://www.nbcnews.com/storyline/puerto-rico-crisis/year-after-hurricane-maria-puerto-ricans-rebuild-amid-setbacks-n907086> [https://perma.cc/P2XE-FMDP] (“Some houses here still have blue tarps and the people that live there still haven’t been able to return to their homes . . . [o]thers don’t even have the blue tarps anymore because it’s been so long and the winds and the sun damages them . . .”).

301. See Marco della Cava, *Why Puerto Rico Donations Lag Behind Fundraising for Harvey, Irma Victims*, USA TODAY (Oct. 5, 2017, 11:06 AM), <https://www.usatoday.com/story/money/2017/10/04/puerto-rico-donations-lag-behind-fundraising-harvey-irma-victims-vegas-shooting/731955001/> [https://perma.cc/UA43-W4G4] (explaining that as compared to victims of Hurricane Harvey and Irma, victims of Hurricane Maria in Puerto Rico received far less support); see also Maggie Astor, *Puerto Rico: What Other*

the Trump administration being in office during Hurricane Maria, as President Trump presented no urgency in Puerto Rico's time of need.³⁰² This is presumably a much different approach than if the natural disaster had occurred within one of the fifty states. In 2019, the Trump administration continued treating Puerto Rico as if it was not part of the United States, accusing Puerto Rico of "taking resources from [the U.S.]" and calling Puerto Rico "that country."³⁰³ According to a member of the Trump administration, Trump even asked about the possibility of "selling the island" in an attempt to avoid paying billions of dollars necessary for Puerto Rico to recover.³⁰⁴

Currently, the Biden administration is responding to Hurricane Fiona in a much different way than former President Trump responded to

Americans Should Know, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/us/puerto-rico-hurricane-american.html> [https://perma.cc/M9V2-RLNS] (stating that although "[m]ore than 3.4 million people live in Puerto Rico . . ." there has not been a significant response, likely due to the fact that many Americans do not know that Puerto Ricans are also Americans).

302. See CBS NEWS, *supra* note 4 (describing President Trump's lack of support and even the "images of [him] hitting golf" posted online during Puerto Rico's greatest hour of need); Nicole Acevedo, *Trump administration Administration doubles Doubles down Down on opposition Opposition to Puerto Rico fundingFunding, drawing Drawing criticismCriticism*, NBC NEWS (March 27, 2019, 5:42 PM), <https://www.nbcnews.com/news/latino/trump-administration-doubles-down-opposition-puerto-rico-funding-drawing-criticism-n988181> [https://perma.cc/9349-LM27] ("[President Trump] told Republican legislators at a closed-door Capitol Hill meeting that Puerto Rico had gotten too much money to rebuild after Hurricane Maria . . . 'way out of proportion to what . . . others have gotten . . .'").

303. Aaron Blake, *Trump Keeps Talking about Puerto Rico Like It Isn't the U.S. It Doesn't Seem Like a Mistake.*, WASH. POST (Apr. 2, 2019, 2:00 PM), <https://www.washingtonpost.com/politics/2019/04/02/white-houses-seemingly-deliberate-effort-otherize-puerto-rico/> [https://perma.cc/LG49-TVCE] ("In his tweets, Trump said the hurricane-ravaged island's politicians 'only take from USA' and said Puerto Rico will 'continue to hurt our Farmers and States with these massive payments.'"); see also John Wagner, *White House Spokesman Twice Calls Puerto Rico 'That Country' in TV Interview*, WASH. POST (Apr. 2, 2019, 11:24 AM), https://www.washingtonpost.com/politics/white-house-spokesman-twice-calls-puerto-rico-that-country-in-tv-interview/2019/04/02/5c922e06-5556-11e9-9136-f8e636f1f6df_story.html [https://perma.cc/2QU5-BKEF] (defending a series of tweets by President Trump).

304. See, e.g., Peter Baker & Patricia Mazzei, *Trump Declares He Is Now 'the Best Thing That Ever Happened' to Puerto Rico*, N.Y. TIMES (Sept. 18, 2020), <https://www.nytimes.com/2020/09/18/us/politics/trump-puerto-rico-florida.html> [https://perma.cc/W976-6VGR] (describing how President Trump made an announcement about the distribution of \$13 billion to Puerto Rico, shortly before the 2020 election where he ran for reelection, when three years prior, he had no interest in providing aid to Puerto Rico); see also Warren Rojas & Kayla Gallagher, *Trump Called Puerto Rico a Place with Absolutely No Hope' while Bungling Hurricane Maria Aid Efforts, Book Says*, INSIDER (Oct. 4, 2022, 4:37 PM), <https://www.businessinsider.com/trump-called-puerto-rico-a-place-with-absolutely-no-hope-book-2022-10> [https://perma.cc/SF7G-5RQJ] (explaining how President Trump viewed Puerto Rico as a "distressed property").

Hurricane Maria.³⁰⁵ While this does not erase the years of suffering and rehabilitation that Puerto Rico has experienced, this will hopefully push other Americans to support Puerto Rico.³⁰⁶ The ruling in *Vaello-Madero*, however, showed that once again, Puerto Rico is not a priority to the rest of the United States.

C. Puerto Rico: Statehood or Independence?

As this Note has illustrated, the time has come for Puerto Rico's colonial-like relationship with the United States to end.³⁰⁷ When Puerto Rico has voted in the past, its three options have been to: (1) become a state within the United States, (2) become independent from the United States, or (3) remain a territory of the United States.³⁰⁸ In 2017, 97 percent of voters chose statehood, while in 2020, 52 percent chose

305. Susan Milligan, *Biden Sets Himself Apart From Trump in Tour of Puerto Rico Hurricane Damage*, U.S. NEWS (Oct. 3, 2022, 5:59 PM), <https://www.usnews.com/news/politics/articles/2022-10-03/biden-sets-himself-apart-from-trump-in-tour-of-puerto-rico-hurricane-damage> [https://perma.cc/LK43-KQRL]; Ewan Palmer, *Biden's Response to Puerto Rico's Hurricane Was Very Different to Trump's*, NEWSWEEK (Sept. 19, 2022, 12:17 PM), <https://www.newsweek.com/biden-puerto-rico-hurricane-fiona-response-trump-1744134> [https://perma.cc/LK43-KQRJ]; Brett Samuels & Alex Gangitano, *Biden Draws Contrast with Trump During Post-Hurricane Puerto Rico Trip*, HILL (Oct. 3, 2022, 4:35 PM) <https://thehill.com/homenews/administration/3672444-biden-draws-contrast-with-trump-during-post-hurricane-puerto-rico-trip/>.

306. See Emma Kinery, *Biden Promises Support for Puerto Rico's Hurricane Fiona as Florida Cleans Up After Hurricane Ian*, CNBC (Oct. 3, 2022, 5:09 PM), <https://www.cnbc.com/2022/10/03/joe-biden-vows-support-for-puerto-ricos-hurricane-fiona-recovery.html> [https://perma.cc/2EYT-UCA7] (statement of President Biden) (“We are not leaving here, as long as I’m president, until everything—I mean this sincerely—every single thing that we can do is done . . .”); see also WHITE HOUSE, REMARKS BY PRESIDENT BIDEN ON HURRICANE FIONA RESPONSE AND RECOVERY EFFORTS (Oct. 3, 2022, 3:14 PM), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/10/03/remarks-by-president-biden-on-hurricane-fiona-response-and-recovery-efforts/> [https://perma.cc/B8JY-3YUG] (applauding Puerto Ricans for their resiliency and determination); cf. WHITE HOUSE, FACT SHEET: THE BIDEN ADMINISTRATION CONTINUES TO SUPPORT HURRICANE FIONA RESPONSE EFFORTS IN PUERTO RICO (Sept. 28, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/28/fact-sheet-the-biden-administration-continues-to-support-hurricane-fiona-response-efforts-in-puerto-rico/> [https://perma.cc/Z8H2-5JGE] (detailing President Biden’s concerted effort and recovery response in the wake of Hurricane Fiona).

307. See Torruella, *Ruling America's Colonies*, *supra* note 1, at 58 (“[The Insular Cases] authorized the colonial regime . . . and exploitation—of the territories acquired from Spain . . . It is my view that this regime, in effect to the present day, has since its inception contravened the Constitution, constitutional precedent, and long-established historical practice.”); see also Jaquira Díaz, *Let Puerto Rico Be Free*, ATLANTIC (Sept. 20, 2022), <https://www.theatlantic.com/magazine/archive/2022/11/puerto-rico-independence-not-statehood/671482/> [https://perma.cc/4YSV-VWFX] (“Every day, it becomes more and more obvious that the current government structure—Puerto Rico as a de facto colony of the United States, despite the official language referring to it as a ‘commonwealth’—is a failure.”).

308. See Frances Robles, *23% of Puerto Ricans Vote in Referendum, 97% of Them for Statehood*, N.Y. TIMES (June 11, 2017), <https://www.nytimes.com/2017/06/11/us/puerto-ricans-vote-on-the-question-of-statehood.html> [https://perma.cc/3B3R-A8ZS] (indicating a landslide vote).

statehood.³⁰⁹ These results illustrate the lack of consensus among residents of Puerto Rico, as the conversation remains unsettled—some believe statehood is the solution, while others believe that full independence is the route best suited for Puerto Rico.³¹⁰

The rationale behind the desire for statehood is partly driven by the continued absence of voting power for Puerto Ricans despite being United States citizens for 104 years.³¹¹ Currently, Puerto Ricans feel that Congress exercises complete power over them, as they do not have a voice for themselves politically.³¹² To Puerto Ricans, seeking statehood would also signify access to federal benefit programs equal to the access

309. *Id.* (illustrating Puerto Rican’s overwhelmingly pro-statehood perspective); see also Colin Dwyer, *Puerto Rico Overwhelmingly Votes on U.S. Statehood in Nonbinding Referendum*, NPR (June 11, 2017, 5:52 PM), <https://www.npr.org/sections/thetwo-way/2017/06/11/532482957/puerto-rico-votes-on-statehood-though-congress-will-make-final-call> [<https://perma.cc/HE3F-V7F4>] (“More than 480,000 votes were cast for statehood, more than 7,500 for free association/independence and more than 6,500 for independence, with roughly half of polling centers reporting. The participation rate was nearly 23 percent with roughly 2.26 million registered voters.”). *But see* Vann R. Newkirk II, *Puerto Rico’s Plebiscite to Nowhere*, ATLANTIC (June 13, 2017), <https://www.theatlantic.com/politics/archive/2017/06/puerto-rico-statehood-plebiscite-congress/530136/> [<https://perma.cc/6NSM-7WGJ>] (“Although 97 percent of voters in a Puerto Rico referendum on June 11 voted to start down the path of statehood, the chance of the island becoming a state is still, at best, a long shot. . . . Fewer than a quarter of all voters voted at all”); see also Cristina Corujo, *Puerto Rico Votes in Favor of Statehood. But What Does It Mean for the Island?*, ABC NEWS (Nov. 8, 2020, 10:21 AM), <https://abcnews.go.com/US/puerto-rico-votes-favor-statehood-island/story?id=74055630> [<https://perma.cc/K8BH-NSL2>] (explaining that the journey to statehood will still be difficult for Puerto Rico despite the numerous votes that they have participated in, since the voter turnout is limited, such that the vote is not an accurate representation of every resident in Puerto Rico). In addition, the votes are never binding, so Congress does not need to act on any result of the votes. *Id.*

310. See Corujo, *supra* note 309 (“At [the] plebiscite, residents narrowly favored statehood with 52% of the vote while about 47% of voters were against it, according to the election commission’s website.”); see also Díaz, *supra* note 307 (explaining that through all of the crises that Puerto Rico has endured, they have stood on their own while waiting for support from the United States, which has not proven successful).

311. See Nicole Acevedo, *What’s Behind Calls for Puerto Rico Statehood? Here Are 4 Things to Know*, NBC NEWS (March 3, 2021, 10:16 AM), <https://www.nbcnews.com/news/latino/what-s-behind-calls-puerto-rico-statehood-here-are-4-n1259300> [<https://perma.cc/V7VZ-65A9>] (explaining The Puerto Rico Statehood Admissions Act, legislation created in response to the majority vote favoring statehood for Puerto Rico) [hereinafter Acevedo, *Behind Calls for Puerto Rico Statehood*]; see also Nicole Acevedo, *AOC says Puerto Rico Self-determination Bill ‘Does Not Oppose Statehood’*, NBC NEWS (June 18, 2021, 8:55 AM), <https://www.nbcnews.com/news/latino/aoc-says-puerto-rico-self-determination-bill-does-not-oppose-n1271229> [<https://perma.cc/53J4-Z6KL>] (detailing AOC’s interpretation and advocacy of the self-determination bill).

312. See Acevedo, *Behind Calls for Puerto Rico Statehood*, *supra* note 311 (highlighting Puerto Ricans’ inability to vote for president and their lack of voting representation in Congress); see also *United States v. Vaello-Madero*, 356 F. Supp. 3d 208, 214 (2019) (“United States citizens residing in Puerto Rico are the very essence of a politically powerless group, with no Presidential nor Congressional vote, and with only a non-voting Resident Commissioner representing their interests in Congress.”).

of other Americans.³¹³ The rationale for independence hinges on similar sentiments. However, instead of the desire for voting representation in Congress, independence would allow Puerto Ricans to make their own decisions in response to crises.³¹⁴ Further, supporters of independence are skeptical of whether the desire for statehood would ever materialize into any action by Congress, as Puerto Rico has been labeled “unincorporated” for so many years; under the United States’ definition, that means that Puerto Rico is not supposed to become a state.³¹⁵ Puerto Ricans have also voted six times on referenda given by Congress to gauge what Puerto Ricans wanted for the future, and there has been minimal action taken.³¹⁶

While statehood and independence offer different options to Puerto Ricans, the result is the same: becoming more than just a colony of the United States.³¹⁷ The recent decision of the United States Supreme Court

313. See, e.g., Acevedo, *Behind Calls for Puerto Rico Statehood*, *supra* note 311 (pushing for statehood); accord Díaz, *supra* note 307 (similarly advocating for statehood); see also Nicole Acevedo, *Statehood or Self-Determination? Tensions over Puerto Rico Status Rise amid Opposing Bills*, NBC NEWS (April 15, 2021, 10:14 AM), <https://www.nbcnews.com/news/latino/statehood-or-self-determination-tensions-over-puerto-rico-status-rise-n1264184> [https://perma.cc/X3NF-RNE2] (“As a territory, Puerto Rico is subject either to exclusion from certain programs, such as SSI or to caps in benefit programs . . . statehood is your only option because the other options don’t guarantee you either of those things.”) (quoting Dr. Christina D. Ponsa-Kraus).

314. See Maru Gonzalez, *4 Reasons Independence Is the Right Path for Puerto Rico*, HUFFPOST (July 30, 2016), https://www.huffpost.com/entry/4-reasons-independence-is-the-right-path-for-puerto-rico_b_7907434 [https://perma.cc/MX6U-MV6D] (explaining that Puerto Rico’s “colonial status” does not allow its economy to “thrive on its own,” and is subject to the United States regarding its fiscal and monetary policy). If Puerto Rico was independent, it could “address the debt crisis on its own terms.” *Id.*; see also Díaz, *supra* note 307 (stating that as Puerto Rico experiences crises, they are constantly waiting for the United States to render support, and even though seeking support, “they endure obstacles created by the U.S. government”). The article illustrates that after Hurricane Maria, Puerto Ricans were living “in survival mode,” and doing all the work to rehabilitate the island themselves. *Id.* (dealing with a shortage of drinking water and delayed or unavailable medical services).

315. See Coudert, *supra* note 49, at 834 (describing Justice White’s perspective that the uniformity clause of the Constitution “was not applicable to Congress in legislating for” Puerto Rico); see also Gonzalez, *supra* note 314 (“[Keeping] Puerto Rico as ‘unincorporated’ was a ploy to avoid statehood. . . . A Republican-controlled Congress would never admit Puerto Rico—with its massive debt and overwhelmingly democratic (and non-white, Spanish-speaking) voting base—into the Union, even if such a determination is made by the island’s residents.”).

316. See Corujo, *supra* note 309 (presenting various perspectives on Puerto Rico); see also Rashid Carlos Jamil Marcano Rivera, *Puerto Rico Wants Statehood—but Only Congress Can Make It the 51st State in the United States*, CONVERSATION (Dec. 14, 2020, 8:27 AM), <https://theconversation.com/puerto-rico-wants-statehood-but-only-congress-can-make-it-the-51st-state-in-the-united-states-150503> [https://perma.cc/FM87-HKB7] (describing Puerto Rico’s long history of voting on the issue and its inability to come to a solution).

317. See Coral Murphy Marcos, *Statehood or Independence? Puerto Rico’s Status at Forefront of Political Debate*, GUARDIAN (July 20, 2022, 9:00 AM), <https://www.theguardian.com/world/2022/jul/20/puerto-rico-statehood-independent-free-association-debate> [https://perma.cc/XX6S-TAXZ] (“[E]xactly how Puerto Rico should pave its

in *Vaello-Madero* only emphasized the lack of power that Puerto Rico has in relation to the states; whether that shifted more Puerto Ricans to want statehood or independence is neither clear nor easy to predict.³¹⁸ However, it is worth considering that if Puerto Rico were a state, would the result in *Vaello-Madero* have been any different? The reasoning in the majority opinion of *Vaello-Madero* is flawed already, as it did not recognize that its rationale would permit treating a state that pays less taxes the same as Puerto Rico.³¹⁹ The only difference that would arise in this hypothetical, presumably, is that Puerto Rico would have voting representation in Congress, and perhaps that representation would have prevented this outcome; nonetheless, Puerto Rico would likely still be treated differently.³²⁰ Independence has its downsides as well: the financial security of Puerto Rico could be seriously affected if it no longer had assistance from the United States.³²¹

While these discussions have been occurring for years, Puerto Rico's status as a colony has yet to change.³²² This is largely explained by the disconnect of opinions in Puerto Rico, and the complications that come with both statehood and independence.³²³ Whether the decision of *Vaello-Madero* will cause the consensus to shift one way over the other is difficult to discern; either way, the people of Puerto Rico understand the necessity for change.³²⁴

path towards decolonization is the root of the island's debate."); *see also* Corujo, *supra* note 309 (explaining how Puerto Ricans are tired of the nation being treated as a colony).

318. *See generally* United States v. Vaello-Madero, 142 S. Ct. 1539 (2022); *see also* Díaz, *supra* note 307 ("There are constant reminders in Puerto Rico of its powerlessness.").

319. *See* Vaello-Madero, 142 S. Ct. at 1561–62 (Sotomayor, J., dissenting); *see generally* Epps, *supra* note 266.

320. *See* Díaz, *supra* note 307 (explaining that similar to the United States citizenship for Puerto Ricans, statehood does not mean the United States wants to include Puerto Rico into the nation, but just wants to expand the borders of the nation); *see also* Acevedo, *Behind Calls for Puerto Rico Statehood*, *supra* note 311 (expanding on Puerto Rico's lack of voting representation); *accord* Ryan Struyk, *Here's What Would Happen to US Politics if Puerto Rico Became a State*, CNN (Oct. 14, 2017, 10:51 AM), <https://www.cnn.com/2017/10/14/politics/puerto-rico-state-congress-white-house/index.html> [<https://perma.cc/H67C-KLJ7>] (describing how politics in the U.S. would change if Puerto Rico was given statehood and therefore voting power).

321. *See The Puerto Rican Dilemma: Independence, Statehood, or the Status Quo?*, TRISTAN'S EXPEDITIONS, <https://tristans-expeditions.blog/2019/03/07/the-puerto-rican-dilemma-independence-statehood-or-the-status-quo/> [<https://perma.cc/8K67-UJ6J>] (explaining that a "con" of independence for Puerto Rico would be the loss of aid from the United States, with potentially decreased access to the United States job market, and overall "lower quality of life"). *But see* Gonzalez, *supra* note 314 ("Puerto Rico's serious and worsening economy is largely rooted in its colonial status.").

322. *See* Gonzalez, *supra* note 314 (describing Puerto Rican statehood as a pipe dream); *cf.* Corujo, *supra* note 309 (describing the most recent non-binding referendum as "a barometer of Puerto Ricans' appetite for statehood").

323. *See generally* TRISTAN'S EXPEDITIONS, *supra* note 321; Díaz, *supra* note 307.

324. *See, e.g.,* Marcos, *supra* note 317 ("In the aftermath of Puerto Rico's bankruptcy, there

CONCLUSION

The Supreme Court's decision in *United States v. Vaello-Madero* is a failed chance at redemption for how long the United States has treated Puerto Ricans as "second-class citizens."³²⁵ With rationale rooted in the incorrect legal analysis, the Court's decision rendered an impact that it did not recognize. How the decision will affect the relationship between Puerto Rican residents and other Americans living on the United States mainland is absent from the Supreme Court's discussion. From the moment of its acquisition to today, one thing remains certain about Puerto Rico from the perspective of all Americans, whether on the mainland or in Puerto Rico: Puerto Ricans' uncertain position as Americans.³²⁶

appears to be a far-reaching consensus that the island's colonial condition must come to an end . . .").

325. See *Vaello-Madero*, 142 S. Ct. at 1539 (deciding Congress is not obligated to make Supplemental Security Income benefits available to residents of Puerto Rico); see also CBS NEWS, *supra* note 4 (explaining how Puerto Ricans feel like "second-class citizens" after Hurricane Maria).

326. See Milligan, *supra* note 6 (describing cultural identity issues among Puerto Ricans); cf. Córdova, *supra* note 6 (detailing opposing views in the U.S. government and Supreme Court regarding Puerto Rican's status as U.S. citizens).