UNITED STATES V. VAELLO-MADERO: A "SHAMEFUL" FAILURE TO PROTECT NEEDY AMERICAN CITIZENS LIVING IN THE U.S. TERRITORIES

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INTRODUCTION

José Luis Vaello-Madero is a United States citizen born in Puerto Rico in 1954.[1] He moved to New York in 1985, where he lived until 2013.[2] While he lived in New York, Mr. Vaello-Madero suffered a debilitating illness that left him unable to support himself.[3] In June 2012, he applied for and began receiving Supplemental Security Income (SSI) benefits.[4] In 2013, he relocated to Puerto Rico to be closer to his family and to care for his wife, who was also in ill health. Unbeknownst to him, in doing so he became ineligible for SSI benefits.[5] Because the United States government was not aware of his relocation, it continued to pay him the SSI benefits he applied and qualified for.[6] It was not until June 2016, when Vaello-Madero applied for Title II Social Security benefits in Puerto Rico on his sixty-second birthday, did the government became aware of his relocation and sued him for the return of over $28,000 in benefits it claimed he was no longer eligible for.[7] It claimed, despite the fact that he was living in a United States territory–on an island which maintains United States citizenship–that he was "outside the United States."[8]

The federal government's placement of United States possessions like Puerto Rico "outside the United States" is possible because of the

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[1] *See* United States v. Vaello-Madero, 956 F.3d 12, 15 (1st Cir. 2020), *rev'd*, United States v. Vaello-Madero, 142 S. Ct. 1539 (2022).

[2] *See id.*

[3] *See* Brief for Respondent at 17, United States v. Vaello-Madero, 142 S. Ct. 1539 (2022) (No. 20-303) [hereinafter Brief for Respondent].

[4] *See Vaello-Madero*, 956 F.3d at 15.

[5] *See* Brief for Respondent, *supra* note 3, at 17.

[6] *See Vaello-Madero*, 142 S. Ct. at 1542.

[7] *See id.*

[8] Brief for Respondent, *supra* note 3 at 1.

island's status as an "unincorporated territory" of the United States.[9] This label derives from a series of Supreme Court decisions made between 1901 and 1922, colloquially referred to as the "Insular Cases."[10] In the most significant of these cases, *Downes v. Bidwell*, the Court invented a distinction between "incorporated" territories "surely destined for statehood" and "unincorporated" territories, which could not be "entere[d] into . . . the American family" absent a statement of Congressional intent and where only "fundamental" Constitutional provisions apply.[11] Notably, the Court's reasoning in these cases has been "repeatedly excoriated as suspect and racist"[12] and is widely regarded as being motivated by a fear of incorporating "non-Anglo-Saxons, presumed racial inferiors, [into] . . . the American Empire."[13]

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[9] The five "unincorporated territories" of the United States are: the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, the U.S. Virgin Islands, and American Samoa. *See* Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 1, 1 (Christina Duffy Burnett & Burke Marshall eds., 2001) [hereinafter *Invented and Reinvented*].

[10] *See* Christina Duffy Burnett, *A Note on the Insular Cases*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 389 (Christina Duffy Burnett & Burke Marshall eds., 2001). Although there is "near universal consensus" that the group of cases known as the "Insular Cases" culminates with *Balzac v. Puerto Rico* and that *Downes v. Bidwell* is the most important of these cases, it is less clear what other cases definitively fall under the umbrella term. *Id.* This note focuses its attention on *Downes* and *Balzac*, but for "the most complete list", *see id.* at n.1.

[11] *See* Downes v. Bidwell, 182 U.S. 244, 291, 339 (1901) (opining that when Congress legislates in an unincorporated territory, it is limited only by "restrictions so fundamental . . . [in] nature that they cannot be transgressed . . .").

[12] Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1659 (2021).

[13] Juan F. Perea, *Fulfilling Manifest Destiny: Conquest, Race, and the Insular Cases*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 141 (Christina Duffy Burnett & Burke Marshall eds., 2001). *See, e.g.*, JUAN. R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: A DOCTRINE OF SEPARATE BUT UNEQUAL 23, 26, 27–28, 51 (1985) (examining the racial context of the Insular Cases); Sanford Levinson, *Why the Canon Should Be Expanded to Include the* Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT 241, 257 (2000) (noting that "no one can read Downes without realizing the extent to which the 'unAmericanness' of the people in the new American territories is fundamental to the outcome."); Rogers Smith, *The Bitter Roots of Puerto Rican Citizenship*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 375, 377 (Christina Duffy Burnett & Burke Marshall eds., 2001) (analyzing the underlying racial motivations of the doctrine of incorporation).

Although Congress has bestowed statutory United States citizenship on residents of Puerto Rico,[14] the island still retains its unincorporated status today.[15] Its residents, therefore, cannot vote in federal Presidential elections.[16] Likewise, the only representation Puerto Rico has in Congress is "one single nonvoting Resident Commissioner."[17] Inhabitants of Puerto Rico, therefore, are subject to the whims of a President and Congress they did not elect, and when Congress treats them differently than it does residents of the states, they have no recourse. Legal scholars have argued that this arrangement has resulted in a form of "subordinate" citizenship, under which residents of Puerto Rico are "inferior" to residents of the states.[18]

While the Insular Cases have rightfully drawn near-universal criticism for enabling the United States to hold territories like Puerto Rico in an indefinite "second-class" status,[19] the source of the federal

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[14] *See* 8 U.S.C. § 1402.

[15] *Definitions of Insular Area Political Organizations*, OFF. OF INSULAR AFFS., https://www.doi.gov/oia/islands/politicatypes (last visited Jan. 3, 2023). Notably, there is widespread consensus that any change to Puerto Rico's status should be consented to by both Congress and a majority of residents of Puerto Rico. *See* Adriel I. Cepeda Derieux, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment In Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 797, 826 (2010) ("a general consensus exists–both in Puerto Rico and in the mainland United States–that a resolution to the incorporation question, if it ever comes, must be arrived at democratically."); *see also* Ediberto Román, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1210 (1997) ("The United States must allow the people of Puerto Rico to exercise the fundamental right of self-determination.") [hereinafter *Empire Forgotten*]. This case comment therefore does not purport to take a stance about how or if Puerto Rico's status should change.

[16] *See* Igartúa De La Rosa v. United States, 417 F.3d 145, 148 (1st Cir. 2005) (en banc) (holding that residents of Puerto Rico have no constitutional right to vote for President or Vice President).

[17] Christina D. Ponsa-Kraus, *Political Wine in A Judicial Bottle: Justice Sotomayor's Surprising Concurrence In* Aurelius, 130 YALE L.J. FORUM 101, 130 (2020). Note that the Resident Commissioner can vote in assigned committees, but not in the final vote on proposed legislation. *See* EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 14, n.19. (2001).

[18] Ediberto Román, *The Alien-Citizen Paradox And Other Consequences Of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 4 (1998) [hereinafter *Alien-Citizen Paradox*].

[19] Pedro A. Malavet, *The Inconvenience of A "Constitution [That] Follows the Flag … But Doesn't Quite Catch Up with It": From* Downes V. Bidwell *to* Boumediene V. Bush, 80 MISS. L.J. 181, 243 (2010) ("The most enduring effect of *Downes v. Bidwell* and the Insular Cases is the effective definition of a lesser level of citizenship for territorial subjects of the United States.").

government's power to impose legislation on these territories is found in the United States Constitution's Territory Clause.[20] The Supreme Court has held that when Congress acts pursuant to the Territory Clause, its actions are entitled to rational basis review[21] unless the challenged law results in a "suspect classification."[22] In its equal protection jurisprudence, however, the Court has previously held that territorial residency is not considered a suspect classification.[23] Therefore, when a party challenges Congressional action in a United States Territory on equal protection (or other constitutional) grounds, the Court applies deferential rational basis review.[24]

In the latter part of the twentieth century, the Court used this rationale to reject challenges made by residents of the U.S. Territory of Puerto Rico against their exclusion from various federal welfare programs.[25] In *Califano v. Torres*, decided in 1978, the Court held that the exclusion of residents of Puerto Rico from the SSI program was not a violation of their constitutional right to interstate travel, citing rational basis for the exclusion.[26] Likewise, in 1980, the Court extended its holding from *Califano* to *Harris v. Rosario*, a case in which residents of Puerto Rico receiving aid under the Aid to Families with Dependent Children (AFDC) program brought an equal protection claim on the grounds that they received less aid under the program than did eligible recipients in the states.[27] The Court again found rational basis to support the disparate treatment.[28]

Relying on these precedents, the Court rejected a challenge by residents of Puerto Rico against their exclusion from the SSI program, this time on equal protection grounds, in *United States v. Vaello-Madero*.[29] Citing *Califano* and *Harris*, it held that "the fact that residents of Puerto Rico are typically exempt from most federal income, gift, estate, and excise taxes . . . supplies a rational basis for likewise distinguishing residents of

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[20] The Territory Clause of the United States Constitution gives Congress the power to "dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States. U.S. CONST. art. IV, § 3, cl. 2.
[21] Harris v. Rosario, 446 U.S. 651, 651–52 (1980).
[22] *See* Hammond, *supra* note 12, at 1678.
[23] *Id.* (discussing claims that are not entitled to strict scrutiny).
[24] *Harris*, 446 U.S. at 651–52.
[25] *See Harris*, 446 U.S. at 651–52; Califano v. Torres, 435 U.S. 1, 1–5 (1980).
[26] *See Califano*, 435 U.S. at 1–5.
[27] *Harris*, 446 U.S. at 651.
[28] *Id.* at 652.
[29] *See* United States v. Vaello-Madero, 142 S. Ct. 1539 (2022).

Puerto Rico from residents of the states for purposes of the Supplemental Security Income benefits program."[30]

This case comment argues that *Vaello-Madero* was incorrectly decided. It proceeds in three parts. Part I examines the historic underpinnings of the doctrine of territorial incorporation and subsequent discriminatory treatment experienced by residents of the United States territories. It does so through the lens of Puerto Rico, the most populous unincorporated territory,[31] and the subject of the litigation in *Vaello-Madero*. Part II reviews the Court's holdings in *Vaello-Madero*. Part III argues that *Vaello-Madero* was incorrectly decided. It contends that classifications made on the basis of territorial residency should be subject to strict scrutiny by the Court when challenged on equal protection grounds because territorial residents are both politically powerless and have experienced historical discrimination at the hands of the Federal Government. It then shows that *Vaello-Madero* was incorrectly decided not only because the standard of review should be heightened in cases concerning territorial residency, but also because the Congressional exclusion of residents of Puerto Rico from the SSI program, specifically, does not survive rational basis review.

I. BACKGROUND

A. Manifest Destiny & the United States' Teutonic Origins

In the eighteenth and nineteenth centuries, a "vision of empire" began to take hold of the American consciousness.[32] Prominent political and intellectual voices declared that it was the "manifest destiny" of the United States to spread democracy throughout the North American continent and, in so doing, create an American empire to compete with those of other world powers.[33] Inherent in and inseparable from this belief was a commitment to

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[30] *Id.* at 1543.

[31] *See* Malavet, *supra* note 19, at 199.

[32] Ramos, *supra* note 17, at 28. *See also* Cepeda Derieux, *supra* note 15 at 827 (placing Puerto Rico's acquisition at the end of the Spanish American War within the context of "a broader effort by the United States to enhance its standing on an international stage filled with colonial powers"); Smith, *supra* note 13, at 375 (noting that historians agree the Spanish-American War was not motivated by military or economic necessity but from the desire of some American leaders to build a larger empire and prove American superiority).

[33] *See* BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE 23–30 (1959) (examining the United States's empire-building activities under the influence of "manifest destiny"); Smith, *supra* note 13, at 375 ("By the 1890s, most American political leaders and intellectuals openly and routinely endorsed the alleged racial superiority of peoples of northern European descent and their 'manifest destiny' to,

the "Teutonic origins thesis of American government[,]" a social scientific theory that was popular in the late nineteenth century and centered around the belief that other races and ethnic groups were inferior to the Teutonic and Anglo-Saxon peoples.[34] This school of thought characterized Anglo-Saxons as a race with a "special genius for law and for state-building."[35] Under Teutonic origins theory, therefore, white (Anglo-Saxon) Americans were "innately superior," particularly in the realm of nation-building, while non-Anglo peoples were "destined" to be ruled by them.[36] This "racial-legal"[37] justification of American expansionism was widely accepted and was used to rationalize the growing American appetite for empire.[38] Under it, the United States annexed territory steadily prior to the Spanish-American War, adding the Northwest Territories, the Louisiana Purchase, New Mexico, Washington, Oregon, Alaska, and Texas during this time.[39]

The annexation of each of these territories into the Union followed a pattern established in 1787 under the Northwest Ordinance.[40] Under that pattern, a territory was acquired, temporarily ruled under federal plenary control, and eventually granted statehood.[41] The federal plenary control stage–during which territorial residents had no political representation–was, at that time, not intended to be a permanent status.[42] As a prominent historian wrote, the idea "[t]hat the Territories are to be regarded as inchoate States as future members of the Union . . . has been and is the fundamental basis of our Territorial system."[43] The Ordinance specified,

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quite literally, rule the world."); Torruella, *supra* note 13, at 7 (considering the impact that the concept of "manifest destiny" had on the Spanish-American War).

[34] Sparrow, *supra* note 33, at 59; *see also* Mark S. Weiner, *Teutonic Constitutionalism: The Role of Ethno-Judical Discourse in the Spanish-American War* 49 in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001) (introducing the concept of an "ethno-juridical discourse" and arguing that "Teutonic origins thesis" formed the basis of the ethno-juridical discourse unique to the Spanish-American War).

[35] Weiner, *supra* note 34, at 49.

[36] Sparrow, *supra* note 33, at 58 (internal quotations omitted).

[37] Weiner, *supra* note 34, at 49.

[38] *See* Perea, *supra* note 13, at 141. *See also* Ramos, *supra* note 17, at 35-38.

[39] *See* Weiner, *supra* note 34, at 64.

[40] *See* Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 949 (1995), Ramos, *supra* note 17, at 73. For an explanation of each stage mandated by the Northwest Ordinance, *see, e.g.,* Weiner, *supra* note 34, at 64–65.

[41] Weiner, *supra* note 34, at 64–65.

[42] *Id.* at 65. *See also* Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism,* 39 SAN DIEGO L. REV. 437, 451–52 (2002).

[43] Sparrow, *supra* note 33, at 15.

therefore, that Congress was to administer the acquired territories "for the purpose of temporary government" until it could admit them "on equal footing with the original States."[44]

Given America's own revolutionary history and its constitutional commitment to representative democracy, the assumption that annexed territory was ultimately destined for statehood made sense.[45] Supreme Court precedent comported with this assumption as well: after the Court had explicitly upheld America's ability to annex territories in *American Insurance Company v. 256 Bales of Cotton*,[46] it opined in *Dred Scott v. Sanford* "in the most anti-imperialist passage the Court has ever uttered"[47] that "[t]here is . . . no power given by the Constitution to the Federal Government to establish or maintain colonies . . . to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States."[48]

B. Puerto Rico, Guam, and the Philippines

That assumption was challenged, however, when the United States acquired Puerto Rico, Guam, and the Philippines at the conclusion of the Spanish-American War.[49] Although at the time, "many, if not most," Americans wanted to keep the "spoils" of the war, neither the imperialists[50] nor the anti-imperialists[51] wanted to admit non-Anglo Saxon, non-English speaking, non-contiguous territories as states.[52] The imperialists believed that it was not necessary to do so; they argued that the United States could

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[44] Northwest Ordinance of 1787, reprinted in 1 United States Code, at LV–LVII.

[45] *See* Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in The Territories*, 131 YALE L.J. 2449, 2453 (2022) [hereinafter *Run Amok*].

[46] 26 U.S. 511, 524 (1828) (holding that "[t]he Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.").

[47] Ponsa-Kraus, *supra* note 45, at 2465.

[48] 60 U.S. 393, 446 (1857).

[49] *See* Sparrow, *supra* note 33, at 34, Ramos, *supra* note 17, at 73. For a summary of the academic and political debates triggered by the acquisition of Puerto Rico, *see* Torruella, *supra* note 13, at 24–40.

[50] President William McKinley was the most well-known of these–others included Theodore Roosevelt, Henry Cabot Lodge, and "most other leading Republicans." Sparrow, *supra* note 33, at 29.

[51] The anti-imperialists included former United States Presidents Benjamin Harrison and Grover Cleveland, Andrew Carnegie, Mark Twain, and William Jennings Bryan (President McKinley's opponent in the election of 1900), among others. *Id.*

[52] *See* Sparrow, *supra* note 33, at 29–30; Ramos, *supra* note 17, at 73–74.

hold territories as permanent dependencies of the American empire, much as Britain governed her colonies.[53] Some of the anti-imperialists, for their part, believed this style of colonization ran contrary to the spirit of the Constitution and that territorial acquisitions must eventually be admitted as states; others believed that because the "alien" peoples of the territories were incapable of integrating an Anglo-Saxon government, the territories should be voluntarily relinquished.[54]

This issue sparked widespread debate.[55] It featured prominently in the presidential election of 1900, with William McKinley and William Jennings Bryan debating whether the Constitution "followed the flag."[56] While McKinley's victory was a sign that the court of public opinion at least appeared to sanction colonial imperialism, the debate was raging in more academic circles as well.[57] In a series of articles published in the Harvard Law Review in 1898 and 1899, three camps of thought emerged as to the constitutional status of America's newly acquired territories.[58] Notably, the notions of Teutonic origins theory and manifest destiny influence all three camps.

For the first camp of thought on the territories' constitutional status, Carman R. Randolph and Judge Simeon E. Baldwin argued that the Constitution applied *ex proprio vigore*, by its own force, to any land the United States acquired and thereby prohibited the United States from holding territory indefinitely in colonial status.[59] Concerns that the "half-civilized Moros of the Philippines" and the "ignorant and lawless brigands that infest Puerto Rico" were "irredeemably unfit for statehood" accompanied these facially "anti-imperialist" arguments.[60] To this first

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[53] *See* Ramos, *supra* note 17, at 74.
[54] *Id.*
[55] *Id. See also* Torruella, *supra* note 13, at 24-40.
[56] *Invented and Reinvented*, *supra* note 9, at 4.
[57] *Id.* at 4. For a discussion of whether McKinley's election actually reflected widespread support for imperialism by the electorate, *see* Thomas A. Bailey, "*Was the Presidential Election of 1900 a Mandate on Imperialism*?", MISS. VALLEY HIST. REV. 24, 43-44 (1937).
[58] *See Developments in the Law - The U.S. Territories*, 130 HARV. L. REV. 1616, 1618 (2017) [hereinafter *Developments*].
[59] *See* Torruella, *supra* note 13, at 30.
[60] Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 415 (1899); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 304 (1898).

camp, therefore, while the application of the Constitution was not preferable, it was "inescapable."[61]

The next camp of thought was led by professors Christopher Columbus Langdell and James Bradley Thayer, both of whom believed in "unrestricted Congressional power and the right to rule as a colonial potency."[62] The justification for this absolute power, at least in Thayer's mind, was the "savage" nature of people "unfit to govern themselves" and whom America must "teach[] . . . how to live."[63] While Langdell applied a textualist interpretation of the term "United States" to reach his conclusion,[64] he also opined that the Bill of Rights was "so peculiarly and so exclusively English" that it would be inappropriate to apply it to "alien races."[65]

Professor Abbott Lawrence Lowell's response, appropriately titled "A Third View," introduced the theoretical underpinnings of the doctrine of incorporation which the Supreme Court ultimately adopted in the Insular Cases.[66] Lowell argued that some 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." Certain territory, however, could "be so acquired as not to form part of the United States[,]" and thus, constitutional limits would not universally apply to it.[67] The key, in his eyes, was whether the treaty ceding the land contained text providing that the people should be "incorporated into the Union."[68] Because the Treaty of Paris ceding Puerto Rico to the United States contained no such language, in his view, the territory had never been intended for incorporation.[69] Like the other Harvard articles, Lowell's article specifically discussed those "rights

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[61] *Developments, supra* note 58, at 1619.
[62] *See* Torruella, *supra* note 13, at 30.
[63] *See Developments, supra* note 58, at 1618 ("Thayer's view was informed by racist musings . . . "); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 475, 466 (1899).
[64] C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 371 (1899).
[65] *Id.* at 385.
[66] Abbott Lawrence Lowell, *The Status of Our New Possessions: A Third View*, 13 HARV. L. REV. 155, 174 (1899). Justice White adopted a form of Lowell's argument in his concurrence in *Downes v. Bidwell*, and it was adopted by a majority of the Court in *Balzac v. Puerto Rico*. *See* Downes v. Bidwell, 182 U.S. 244, 239 (1901) (White, J., concurring), Balzac v. Porto Rico, 258 U.S. 298, 306 (1922).
[67] Lowell, *supra* note 66, at 176.
[68] *Id.* at 177.
[69] *Id.* at 171–72. For an argument that the lack of citizenship-conferring language in the Treaty of Paris was intentional and reflected the biases of the age, *see* Smith, *supra* note 13, at 155–56.

guaranteed to the citizens . . . which are inapplicable except among a people whose social and political evolution has been consonant with [that of the domestic United States]," concluding they would not apply.[70]

C. Downes v. Bidwell

The debate was thus being held in both political and academic circles. The Supreme Court, however, was about to end it. In *Downes v. Bidwell*, arguably the most important of the Insular Cases, the Court "gave legal sanction" to the colonization of the United States' new possessions.[71] In *Downes v. Bidwell*, the plaintiff challenged the collection of a tariff levied on goods imported from Puerto Rico into New York in November 1900 as demanded by the Foraker Act.[72] The Court determined that the claim implicated not only the question of whether the Foraker Act ran contrary to the Tax Uniformity Clause of the Constitution, but also whether the United States Constitution applied to Puerto Rico at all.[73] Because the Court in *Downes* established the now widely used doctrine of territorial incorporation, it is worth spending some time examining the opinion in full.

Writing for a fractured court,[74] Justice Brown opined that it could "nowhere be inferred that the territories were considered a part of the United States."[75] This fact was dispositive for Justice Brown because in his view, "the Constitution deals with States, their people, and their representatives."[76] As such, it could not extend further than Congress explicitly intended it to extend.[77] Applying what is known as "extension theory" to the case of Puerto Rico, the Court concluded that because Congress had not decided otherwise, Puerto Rico was "a territory

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[70] Lowell, *supra* note 66, at 176.

[71] *Invented and Reinvented*, *supra* note 9, at 1. For a discussion of which decisions comprise the Insular Cases, and for the argument that *Downes v. Bidwell* is the most important, *see supra* note 9 and accompanying text.

[72] Downes v. Bidwell, 182 U.S. 244, 247–48 (1901). For a comprehensive examination of the importance of the tariff to territorial litigation, *see* Sparrow, *supra* note 33, at 70–76.

[73] *Downes,* 182 U.S. at 248–49.

[74] Justice Brown wrote the opinion of the court, while Justices White and Gray authored separate concurrences. Chief Justice Fuller and Justice Harlan each wrote dissents. Torruella, *supra* note 13, at 48. Judge Torruella notes that "it is . . . ironic that from this potpourri of judicial indecisiveness should be spawned rules of law which would so fundamentally and adversely affect the lives of generations of American citizens." *Id.*

[75] *Downes*, 182 U.S. at 250–51.

[76] *Id.* at 251.

[77] *Id.*

appurtenant and belonging to the United States, but not a part of the United States within the . . . Constitution."[78]

In reaching this conclusion, Justice Brown's opinion emphasized his concern over the possibility of conferring "all the rights, privileges and immunity of citizens" on "savages."[79] He concluded that "administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible" in "possessions . . . inhabited by alien races."[80] From these statements, it is clear that Justice Brown's rationale for his opinion in *Downes* rested at least partially on notions of the racial-legal vision articulated by Teutonic origins scholars.[81]

In Justice White's concurring opinion, he established what would eventually be known as the doctrine of incorporation.[82] Drawing on Abbott Lawrence Lowell's idea that Constitutional application to acquired territories was dependent on whether the treaty ceding the land expressly demanded incorporation,[83] he examined the territories annexed by the United States and determined that in all cases but the Treaty of Paris of 1898, the language expressly provided for "incorporation" of the new possession.[84] He then determined that the application of the Constitution should apply by its own force only where Congress intended that the territory at issue should be "incorporated" into the United States at a future date.[85] In contrast, in an "unincorporated" territory such as Puerto Rico, only "fundamental" aspects of the Constitution should apply.[86] Justice White also expressed concern that the "evil of immediate incorporation" lay in the possibility of extending rights to "millions of inhabitants of alien territory" who could overthrow "the whole structure of the government."[87]

In a powerful dissent, Justice Harlan criticized both the opinion of the court and Justice White's concurrence as "wholly inconsistent with the

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[78] Cepeda Derieux, *supra* note 15, at 804 (discussing "extension theory"); *Downes*, 182 U.S. at 287.
[79] *Id.* at 279.
[80] *Id.* at 286.
[81] *See supra* notes 31-37 and accompanying text.
[82] *See* Torruella, *supra* note 13, at 53.
[83] *See* Lowell, *supra* note 66 and accompanying text.
[84] *Downes*, 182 U.S. at 318–41 (White, J., concurring).
[85] *Id.* at 339 ("the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress").
[86] *Id.* at 365.
[87] *Id.* at 313; *see also* Román & Simmons, *supra* note 42, at 461 (arguing that "[u]nder Justice White's approach, only through incorporation could alien people attain the rights that peculiarly belong to the citizens of the United States.").

spirit and genius as well as with the words of the Constitution."[88] Extending this criticism, commentators and scholars argue since that the majority opinion was "judicial inventiveness at its ultimate height."[89] Additionally, scholars argue that the majority provided no explanation as to how this decision "comport[s] with this country's democratic principles and its representative form of governance."[90] Instead, faced with the choice between relinquishing the American empire, on the one hand, or admitting "alien" peoples into their "innately superior" government, on the other, the Court "simply invented, out of whole cloth" the doctrine of territorial incorporation to justify the indefinite possession of a territory without admitting it into statehood.[91]

D. Balzac v. Porto Rico*,* California v. Torres*, &* Harris v. Rosario

Despite Justice Harlan's criticisms, the majority of the Supreme Court in *Balzac v. Porto Rico* adopted principles espoused by Justice White's concurrence.[92] In *Balzac*, the unanimous Court concluded that despite the passage of the Jones Act of 1917, which bestowed U.S. citizenship on residents of Puerto Rico, Congress had still not evinced a clear intent to "incorporate the island into the Union."[93] It then held that the Constitutional provisions for jury trials "do not apply to territory belonging

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[88] *Downes*, 182 U.S. at 380 (Harlan, J., dissenting).

[89] Torruella, *supra* note 13, at 56.

[90] Román & Simmons, *supra* note 42, at 462.

[91] *Run Amok, supra* note 45, at 2450 (noting additionally that "[t]he distinction between incorporated and unincorporated territories thus served as the cornerstone of a racially motivated imperialist legal doctrine" which "gave sanction to indefinite colonial rule over majority-nonwhite populations at the margins of the American empire."). *See also* Cesar A. Lopez-Morales, *Making the Constitutional Case for Decolonization: Reclaiming The Original Meaning Of The Territory Clause*, 53 COLUM. HUM. RTS. L. REV. 772, 781 (2022) (arguing that the incorporation doctrine was "concocted to treat differently the then-new territories acquired from Spain"); *Invented and Reinvented, supra* note 9, at 2 (explaining that the Court "invented and developed the idea of unincorporated territorial status in order to enable the United States to acquire and govern its new 'possessions' without promising them either statehood or independence."); Gabriel A. Terrasa, *The United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 J. MARSHALL L. REV. 55, 56 (1997) ("Racial animus and commercial protectionism prompted politicians, scholars, and jurists to devise a colonial policy to provide that the newly acquired territories be kept as 'dependencies' without granting them statehood . . .").

[92] 258 U.S. 298, 306 (1922). In most official contexts, the United States government misspelled "Puerto" as "Porto" until 1932. *See* Cepeda Derieux, *supra* note 15, at 804 n.30. This comment uses the misspelling "Porto Rico" only when citing a case name.

[93] *Balzac*, 258 U.S. at 306.

to the United States which has not been incorporated into the Union."[94] In support of this distinction, the Court offered its belief that "[t]he jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire."[95] *Balzac*, therefore, once again affirmed a racialized rationale for disparate treatment, this time for American citizens living in the territories.

Since *Balzac*, courts have applied the doctrine of incorporation to determine on a case-by-case basis which provisions of the Constitution are "fundamental" and therefore apply to America's territorial possessions.[96] Although most of these cases have found the rights at issue to be applicable,[97] and, although the Court has proved reticent in recent years to apply the doctrine in a denial of constitutional rights to territorial residents,[98] the failure of the Court to overrule this case-by-case rule formally means that Puerto Rico is still considered "unincorporated," leaving the door open for lower courts to "rely on and misapply [the doctrine]."[99] It additionally reflects a general apathy towards territorial residents, under which the Supreme Court has ruled that a "rational basis" is enough to discriminate against territorial residents in the administration of federal welfare programs.[100]

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[94] *Id.* at 304–5.

[95] *Id.* at 310.

[96] *See* Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 811 (2005) [hereinafter *Untied States*].

[97] *See* El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 148 n.1 (1993) (holding that the First Amendment guarantee of free speech "fully applies to Puerto Rico"); Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 331 n.1 (1986) (same); Torres v. Puerto Rico, 442 U.S. 465, 470 (1979) (holding that Fourth Amendment protections against unreasonable searches and seizures are applicable in Puerto Rico); Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 600 (1976) (holding that both equal protection and due process guarantees are applicable in Puerto Rico); Montalvo v. Colon, 377 F. Supp. 1332, 1341–42 (D. P.R. 1974) (holding that Roe v. Wade applies with the same force in Puerto Rico as in a state).

[98] *See* Adriel I. Cepeda Derieux & Neil C. Weare, *After* Aurelius*: What Future For The Insular Cases?*, 130 YALE L.J. FORUM 284, 292–95 (2020) [hereinafter *After* Aurelius].

[99] Lopez-Morales, *supra* note 91, at 785. Often, lower courts "invoke the 'fundamental rights' limitation in unincorporated territories" to "deprive[] territorial residents of rights and protections to which they are almost surely entitled." *After* Aurelius, *supra* note 98, at 293–94. For examples of cases, *see id.* at 294 n.65.

[100] *See* Califano v. Torres, 435 U.S. 1, 1–3 (1978); Harris v. Rosario, 446 U.S. 651, 651–52 (1980).

In *Califano v. Torres*, the Court considered whether Congress's failure to extend SSI benefits to residents of Puerto Rico was an unconstitutional interference with the right to interstate travel.[101] Applying rational basis review,[102] the Court concluded in a footnote that Congress could rationally conclude that Puerto Rico's unique tax status, the cost of extending the SSI program to its eligible residents, and the potential for disruption to the Puerto Rican economy warranted its exclusion from the program.[103] *Califano* was a per curiam opinion.[104]

Two years later, in *Harris v. Rosario*, the Court extended its holding from *Califano* to an equal protection challenge against the Aid to Families with Dependent Children (ADFC) program, under which residents of Puerto Rico received less federal benefits than did residents of the states.[105] Pointing to the broad authority conferred by the Territory Clause, the Court again applied rational basis review[106] and held that because the three considerations present in *Califano* were present in *Harris*, Congress could reasonably have had a rational basis for its actions.[107] As the next Part explains, *Califano* set up the decision in *Vaello-Madero*.

II. *UNITED STATES V. VAELLO-MADERO*

This Part reviews the facts, procedural history, and opinions in *United States v. Vaello-Madero*. Justice Kavanaugh authored the majority opinion, in which Chief Justice Roberts, Justices Thomas, Breyer, Alito,

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[101] *See Califano*, 435 U.S. at 1–3.
[102] *Id.* at 5 (quoting Jefferson v. Hackney, 406 U.S. 525, 546 (1972)).
[103] *See id.* at 3 n.4.
[104] *Id.* at 1.
[105] *See* Harris v. Rosario, 446 U.S. 651, 651–52 (1980).
[106] *See id.*
[107] *Id.* at 652 ("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."). Notably, Justice Marshall authored a dissent in *Harris v. Rosario* expressing his opinion that the issues present were not appropriate for what was also a per curiam decision, criticizing the Court's reasoning, and suggesting that the Equal Protection Clause requires the Court to review the ADFC using heightened scrutiny, even though Congress enacted it pursuant to the Territory Clause. *See id.* at 652–56 (Marshall, J., dissenting).

Kagan, Gorsuch, and Barrett, joined him.[108] Justices Thomas and Gorsuch authored concurring opinions.[109] Justice Sotomayor wrote the sole dissent.[110]

A. Facts

Pursuant to the Territory Clause, the United States retains broad legislative authority over its territories, and that authority has at times permitted Congress to legislate differently with respect to territorial residents than it does with respect to residents of the states.[111] For example, while residents of Puerto Rico typically pay Social Security, Medicare, and unemployment taxes, they are generally exempt from "most federal income, gift, estate, and excise" tax liability.[112] Additionally, while residents of Puerto Rico are eligible for Social Security, Medicare, and federal unemployment benefits, they are not eligible for all federal benefits programs.[113]

The SSI program was signed into law in 1972.[114] It provides benefits for "among others, those who are age [sixty-five] or older and cannot financially support themselves."[115] Eligibility for SSI benefits is limited to "resident[s] of the United States," statutorily defined as "the [fifty] States and the District of Columbia" and additionally "residents of the Northern Mariana Islands."[116] Therefore, residents of Puerto Rico are not eligible for the SSI program.[117] Instead, Congress provides supplemental income assistance to a different federal program, which is funded in part by the Federal Government and in part by Puerto Rico.[118]

Jose Luis Vaello-Madero was born in Puerto Rico in 1954.[119] He moved to New York in 1985, where he lived until 2013.[120] While he lived in New York, Vaello-Madero developed severe health problems, and in

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[108] *See* United States v. Vaello-Madero, 142 S. Ct. 1539, 1541 (2022).
[109] *See id.*
[110] *See id.*
[111] *See id.*
[112] *Id.* at 1542.
[113] *See id.*
[114] *See id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* at 1542.
[119] United States v. Vaello-Madero, 956 F.3d 12, 15 (1st Cir. 2020), *rev'd*, United States v. Vaello-Madero, 142 S. Ct. 1539 (2022).
[120] *Vaello-Madero*, 956 F.3d at 15.

June 2012, he became eligible and began receiving SSI benefits.[121] In 2013, he relocated to Puerto Rico, and at that time became ineligible for SSI benefits.[122] Because the United States Government was not aware of his relocation, however, it continued to pay him SSI benefits totaling over $28,000.[123] In June 2016, when Vaello-Madero applied for Title II Social Security benefits in Puerto Rico, the Government became aware of his relocation.[124] Subsequently, it sued Vaello-Madero for restitution; in response, Vaello-Madero argued that "Congress's exclusion of residents of Puerto Rico from the Supplemental Security Income program violated the equal protection component of the Fifth Amendment's Due Process Clause."[125]

B. Procedural History

Vaello Madero's equal protection claim was successful in both the District Court and the First Circuit Court of Appeals.[126] The First Court of Appeals found that, while rational basis review applied to the claim, there was no rational basis to exclude individuals who would otherwise be eligible for benefits under the program based on their residency in Puerto Rico.[127] The United States Supreme Court granted certiorari.[128]

C. Majority Opinion

The Court reversed the judgment of the Court of Appeals, holding that Supreme Court precedent necessitated the application of rational basis review and that Puerto Rico's unique tax status constituted a sufficiently rational basis for excluding its residents from the SSI program.[129] Justice Kavanaugh's majority opinion began by outlining the relevant precedent necessitating the application of rational basis review, emphasizing that the Court's decisions in *Califano v. Torres* and *Harris v. Rosario* broadly established that the Territory Clause authorized Congress to legislate differently in Puerto Rico than it does in the states without violating the Constitution "so long as there is a rational basis for its actions."[130]

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[121] *Id.*
[122] *Vaello-Madero,* 142 S.Ct. at 1542.
[123] *Id.*
[124] *Vaello-Madero*, 956 F.3d at 15.
[125] *Vaello-Madero*, 142 S.Ct. at 1542.
[126] *Id.*
[127] *Id.* at 1559 (Sotomayor, J., dissenting).
[128] *Id.* at 1542.
[129] *Id.* at 1542–43.
[130] *Id.* at 1543.

Justice Kavanaugh then considered whether a rational basis existed to justify Congress's exclusion of residents of Puerto Rico from the SSI program.[131] He drew on the reasoning set forth by the Court in *Califano* and *Harris*, noting that Puerto Rico's lack of certain tax liabilities provided a sufficiently rational basis for "likewise distinguishing residents of Puerto Rico from residents of the states for purposes of the Supplemental Security Income *benefits* program."[132] Congress's authority to weigh the benefits and burdens imposed by tax and benefits programs on residents of Puerto Rico, he reasoned, need not be undertaken through a "dollar-to-dollar comparison" of how federal programs apply in the states compared to how federal programs apply in the territories.[133]

Additionally, Justice Kavanaugh expressed concern that a ruling in the opposite direction would have potentially far-reaching financial consequences, both for the federal government and for residents of Puerto Rico.[134] He emphasized that such a ruling could necessitate the extension of not just SSI benefits to the territories, but any federal benefits program, and pointed out that residents of the states could presumably also insist on the basis of such a ruling that all federal taxes must be imposed on residents of Puerto Rico if they were to receive all federal benefits.[135]

D. Justice Thomas' Concurring Opinion

Justice Thomas wrote a separate concurrence to express his doubt that the Fifth Amendment's Due Process Clause contains an equal protection component equivalent to that of the Equal Protection Clause of the Fourteenth Amendment.[136] Instead, he argued that better protection against discrimination by the federal government resides in the Fourteenth Amendment's Citizenship Clause.[137]

E. Justice Gorsuch's Concurring Opinion

Justice Gorsuch also wrote separately to express his belief that the Supreme Court wrongly decided the Insular Cases and to encourage the Court to overturn them at the first opportunity to do so.[138] The Insular Cases, he argued, "have no foundation in the Constitution and rest instead on racial

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[131] *See id.*
[132] *Id.*
[133] *Id.*
[134] *See id.*
[135] *See id.*
[136] *See id.* at 1544 (Thomas, J., concurring).
[137] *See id.*
[138] *See id.* at 1557 (Gorsuch, J., concurring).

stereotypes."[139] Additionally, he wrote, the flaws in the cases "are as fundamental as they are shameful."[140] He emphasized that the Insular Cases "can claim support in academic work of the period, ugly racial stereotypes, and the theories of Social Darwinists. But they have no home in our Constitution or its original understanding."[141]

F. Justice Sotomayor's Dissenting Opinion

Justice Sotomayor's dissent expressed her view that, while the majority employed the correct standard of review in its equal protection analysis, it reached the wrong conclusion.[142] Opining that "there is no rational basis for Congress to treat needy citizens living anywhere in the United States so differently from others," she argued that the exclusion of residents of Puerto Rico from the SSI program failed even deferential rational basis review.[143]

Justice Sotomayor began by setting out relevant factual characteristics of the SSI program that differentiate it from other federal benefits programs.[144] First, the federal government dispenses SSI benefits directly to qualifying individuals rather than through block grants to the states or territories.[145] Second, the federal government not only determines eligibility for the program but also fully funds it from the general fund of the United States Treasury.[146] Finally, an individual's qualification status or benefit amount does not change based on his or her State or Territory of residence.[147]

In considering the correct legal standards to be applied, Justice Sotomayor echoed the conclusion of the majority, noting that when the federal government legislates differently with respect to two groups and the different is not based on a "suspect classification," the action will survive an equal protection challenge only if it is "rationally related to a legitimate governmental interest."[148] In contrast to the majority, however, she pointed

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[139] *Id.* at 1552.
[140] *Id.* 1554.
[141] *Id.*
[142] *See id.* at 1557 (Sotomayor, J., dissenting).
[143] *Id.*
[144] *See id.* at 1557–58.
[145] *See id.* at 1558.
[146] *See id.*
[147] *See id.*
[148] *Id.* at 1559 (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973)).

out that while rational basis review is a deferential standard of review, "it is not 'toothless.'"[149]

Unlike the majority, Justice Sotomayor rejected the government's argument that Puerto Rico's tax status and the potential financial consequences of including Puerto Ricans in the SSI program justified excluding Puerto Rico from the SSI program.[150] Regarding Puerto Rico's tax status, she argued that the Court's decisions in *Califano* and *Harris* do not mandate a finding of rationality because both cases are distinguishable from the issue before the court; *Califano* because it dealt not with an equal protection claim, but with a right to travel claim, and *Harris* because it dealt not with the SSI program but with a challenge to the distribution of block grants under a different federal benefits program.[151] These cases, therefore, "[did] not preclude an equal protection challenge to a uniform, federalized, direct-to-individual poverty reduction program like SSI."[152] In fact, she argued, in considering the issue independently of the supposedly controlling precedent, it became clear that rationality could not be sustained on the basis of Puerto Rico's tax status.[153] The terms of the SSI program mandate that only low-income individuals qualify for benefits.[154] To exclude these same individuals–individuals who are unlikely to be able to afford to pay any federal taxes–on the basis that they do not pay enough taxes is irrational.[155]

To address the government's second argument for excluding Puerto Rico from SSI benefits, Justice Sotomayor again emphasized the uniquely "uniform, nationalized, and direct" nature of the SSI program to argue that extension of other federal programs would not necessarily follow from a ruling that SSI benefits must be extended to citizens of Puerto Rico.[156] It would be the Court's holding, not be the extension of SSI benefits to Puerto Rico, that would have far-reaching consequences because the Court's holding could allow Congress to not only exclude residents of Puerto Rico from federal benefits programs, but also needy residents of states that contribute less to the Federal Treasury than other states.[157]

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[149] *Id.* (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)).
[150] *See id.* at 1560–61.
[151] *See id.* at 1560.
[152] *Id.*
[153] *See id.* at 1561.
[154] *See id.*
[155] *See id.*
[156] *Id.*
[157] *See id.* at 1562.

III. ANALYSIS

Although Congress retains broad authority under the Territory Clause to legislate in Puerto Rico, that authority is necessarily limited by other provisions of the Constitution, including its equal protection guarantee.[158] When a court considers a challenge to a legislative classification on equal protection grounds, it employs a system of "tiered scrutiny" by which it considers actions under either "strict scrutiny" or "rational basis review."[159] The Supreme Court has held that when Congress acts pursuant to the Territory Clause, its actions are entitled to rational basis review unless the challenged law results in a "suspect classification."[160] In its equal protection jurisprudence, however, the Court has previously held that territorial residency is not considered a suspect classification.[161] Therefore, when a Congressional action is challenged in a U.S. territory on equal protection or other constitutional grounds, the Court applies rational basis review.[162]

This Part will argue that in its equal protection jurisprudence, the Court's standard of review is flawed and that classifications made based on territorial residency should be subject to strict scrutiny, not rational basis review, by the Court. Because territorial residents have experienced historical discrimination at the hands of the federal government empowered by a series of Supreme Court decisions resting on overtly racist reasoning, territorial residency should constitute a suspect classification. That the same set of cases resulted in the indefinite disenfranchisement of territorial residents lends additional support to this contention. This section additionally argues that *Vaello-Madero* was incorrectly decided not only because the standard of review should be heightened in cases concerning

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[158] The Fifth Amendment's equal protection guarantee provides that "[n]o person . . . shall be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. For a discussion of which Constitutional provisions are considered "fundamental" and therefore apply in unincorporated territories, *see supra* note 96 and accompanying text.

[159] Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755 (2011).

[160] *See* Califano v. Torres, 435 U.S. 1, 1–3 (1978); Harris v. Rosario, 446 U.S. 651, 651–52 (1980). *See also* Hammond, *supra* note 12, at 1678 (discussing claims that are not entitled to strict scrutiny).

[161] Hammond, *supra* note 12, at 1678 (noting that equal protection challenges to federal welfare programs are generally unsuccessful whether litigants live in a territory or a state, because courts have ruled that neither poverty nor territorial residency is a suspect classification).

[162] *See Califano*, 435 U.S. at 1–3; *Harris*, 446 U.S. at 651–52.

discrimination against territorial residents, but also because, even considered under deferential rational basis review, the Congressional exclusion of residents of Puerto Rico from the SSI program, specifically, is irrational.

A. Territorial Residency Should Constitute a Suspect Classification Necessitating Strict Scrutiny

Denial of due process occurs when the legislature classifies in a manner that the Court finds "suspect," meaning it discriminates against a class "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[163] In other words, a classification is suspect if it burdens a group that (1) has been subjected to a history of purposeful unequal treatment[164] or (2) is politically powerless to protect itself from the legislative process.[165] A challenge to this type of a suspect classification necessitates the Court's strict scrutiny, and such a classification will be upheld only if it is "narrowly tailored" to "further compelling governmental interests."[166]

1. Territorial Residents Have Been Subjected to a History of Purposeful Unequal Treatment.

The Court applies strict scrutiny to laws that discriminate against a group that it considers a suspect class, for example a group that has experienced "a history of purposeful unequal treatment."[167] Notably, classifications made on the basis of race or national origin are always regarded as suspect and are always subjected to strict scrutiny by the Court.[168] Because even a cursory examination of the treatment of the territories by the federal government reveals persistent discrimination empowered by a series of racist Supreme Court decisions, territorial residency should necessitate strict scrutiny application.

Prior to the Spanish-American War, territory acquired by the United States followed a pattern established by the Northwest Ordinance wherein the new possession was subjected to federal plenary control before it was

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[163] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).
[164] *See id.; see also* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam).
[165] *See Rodriguez,* 411 U.S. at 28, *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
[166] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995).
[167] *Rodriguez*, 411 U.S. at 28.
[168] *Adarand*, 515 U.S. at 222.

ultimately granted statehood.[169] The assumption, importantly, was always that the first stage–under which the annexed territory was subject to federal plenary control–was temporary.[170] Accordingly, territories were "to be regarded as inchoate States."[171] Given America's revolutionary history and its constitutional commitment to representative democracy, and given Supreme Court precedent condemning the idea that possessions not destined for statehood could be established by the federal government, many believed that any other arrangement would be "contrary to the spirit of the Constitution."[172]

However, when the United States acquired Puerto Rico, this belief became inconvenient. The American appetite for empire was growing,[173] but so was a concern that annexing island territories into the national polity would "darken" the American frontier.[174] White Americans influenced by the concept of manifest destiny had been instilled with the belief both that they were inherently superior to other races and ethnic groups and that those other peoples were "destined" to be ruled by them.[175] Therefore, Puerto Rico's population, "composed of a mixture of Negro, Indian, and Spanish ancestry[,]" not only "rendered the island incapable of independent self-government," but also rendered it unfit for integration into the Union.[176]

The majority opinion in *Downes*, authored by Justice Brown, was very cognizant of this perceived threat to American citizenship.[177] It expressed concern over "extremely serious" consequences if "savages" were "entitled to all the rights privileges and immunities of citizens" immediately upon annexation.[178] It alluded to "grave questions" it considered unique to the acquisition of Puerto Rico due to "differences of race, habits, laws and customs of the people."[179] In its conclusion, it reiterated the fear that governance "according to Anglo-Saxon principles" in possessions "inhabited by alien races, differing from us in religion,

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[169] *See supra* notes 39-43 and accompanying text.
[170] *See supra* notes 41-43 and accompanying text. For an examination of the ways the Insular Cases departed from the original meaning of the Territory Clause, under which territorial status was considered temporary, *see* Lopez-Morales, *supra* note 91.
[171] Sparrow, *supra* note 33, at 15.
[172] *See supra* notes 44-47, 53, and accompanying text.
[173] *See supra* notes 31-38 and accompanying text.
[174] *Alien-Citizen Paradox*, *supra* note 18, at 24. *See also supra* Part I.
[175] Sparrow, *supra* note 33, at 58 (internal quotations omitted).
[176] Perea, *supra* note 13, at 156.
[177] *Id.* at 157.
[178] Downes v. Bidwell, 182 U.S. 244, 279 (1901)
[179] *Id.* at 282.

customs, laws, methods of taxation and modes of thought" might be "impossible."[180] Justice White's concurrence likewise expressed concern that the "evil of immediate incorporation" lay in the possibility of extending rights to "millions of inhabitants of alien territory" who could overthrow "the whole structure of the government."[181]

That tension between the desire to expand the American empire and the reluctance to admit non-Anglo-Saxon peoples as American citizens was the driving force behind the Court's invention and adaptation of the doctrine of incorporation.[182] Faced with a choice between "incorporating into the United States people racially and ethnically different from Anglo-Saxon Americans" and relinquishing the "spoils" of the war, the Court manifested a third option.[183] It "simply invented, out of whole cloth," the doctrine of territorial incorporation, and, in so doing, made possible the indefinite possession of territories with no guarantee that they would ever become states.[184] This "racially motivated imperialist legal doctrine . . . gave sanction to indefinite colonial rule over majority-nonwhite populations at the margins of the American empire."[185] The Insular Cases, byproducts of this overtly racist line of thought, resulted in what would be two centuries of purposeful, unequal treatment of the territories by Congress.

As prominent legal scholars argue, the placement of residents of Puerto Rico "outside the polity" in *Downes* create a "second-class, 'subordinated' citizenship" for territorial Americans.[186] As a result, the Supreme Court has permitted the United States to foster economic dependence in the territories unaccompanied by the full spectrum of federal

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[180] *Id.* at 287.
[181] *Id.* at 313 (White, J., concurring).
[182] *See supra* note 90 and accompanying text.
[183] Perea, *supra* note 13, at 157.
[184] *Run Amok*, *supra* note 45, at 2451. For the argument that "even Justice White understood that it would be wrong for the United States to subject a place and its people to territorial status indefinitely," *see id.* at 2539.
[185] *Id.* at 2451.
[186] Sylvia R. Lazos Vargas, *History, Legal Scholarship, and Latcrit Theory: The Case of Racial Transformations Circa the Spanish American War, 1896-1900*, 78 DENV. U.L. REV. 921, 934 (2001). *See also* Torruella, *supra* note 13, at 5 (arguing that the doctrine of incorporation has resulted in "separate and unequal" treatment of territorial residents); Rivera Ramos, *supra* note 17, at 288–90 (linking ethnocentrism and Anglo-Saxon superiority to the exclusion of residents of the territories from "full-fledged" citizenship); *Alien-Citizen Paradox*, *supra* note 18, at 3–4 (coining the term "alien-citizen" to draw a distinction between "first-class U.S. citizens" and residents of the territories).

welfare benefits afforded to United States citizens living in the states.[187] Residents of the territories are often excluded from federal benefits programs altogether; when they are included, the programs are often funded at lower rates than identical programs available in the states.[188] For example, Medicaid programs in the territories are reimbursed there at lower rates than identical programs in the states; food assistance, which is not capped in the states, is capped in some of the territories; and SSI benefits, which extend to all U.S. citizens in the states, do not extend to all U.S. citizens in the territories, as illustrated by *Vaello-Madero*.[189]

Additionally, the possession of the territories, largely consisting of strategically located insular areas, has enabled the United States to project "global hegemonic power" in a way that is unique to these areas.[190] To fully reap this benefit, it has established an enduring military presence in the territories[191] which has often resulted in "economic changes, environmental degradation, and 'local, everyday violences' against residents."[192] For example, the United States Navy has used the Puerto Rican island of Vieques for six decades to conduct training exercises which included live-fire bombing tests.[193] As a result, it is now one of the most "complicated [and] expensive" Superfund sites in the United States, and the contamination

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[187] *See* Staff, Comment, *A Reckoning for "Rational" Discrimination: Rethinking Federal Welfare Benefits in United States-Occupied Islands*, 43 UNIV. HAW. L. REV. 265, 269 (2020) [hereinafter *Reckoning*]; Hammond, *supra* note 12 at 1664–77 (detailing the difference between the administration of food, medical, cash, and disability assistance in the States and in the territories and noting that the territories receive less aid, generally).

[188] *See id.*

[189] *See id.* at 1642–43.

[190] *Reckoning*, *supra* note 187, at 271. *See also supra* note 31 and accompanying text.

[191] *Reckoning*, *supra* note 187, at 271 n.29 (providing examples of the increasing U.S. military presence in the U.S. territories); Román & Simmons, *supra* note 42, at 491 (pointing to "substantial strategic interest in ensuring that Puerto Rico be maintained as an American military enclave"). For a comprehensive examination of the strategic importance of Puerto Rico to the United States military, *see* Rivera Ramos, *supra* note 17, at 64–69. Relatedly, Rivera Ramos notes that more than 200,000 residents of Puerto Rico had served in the United States military through 2001 and had participated in all major armed conflicts the United States was involved in since World War I, with "a very high cost in terms of human lives and suffering." *Id.* at 65.

[192] *Reckoning*, *supra* note 187, at 271.

[193] *See* Susan K. Serrano & Ian Falefuafua Tapu, *Reparative Justice in the U.S. Territories: Reckoning with America's Colonial Climate Crisis*, 110 CALIF. L. REV. 1281, 1297 (2022).

left by the bombings is accompanied by heightened cancer rates among the island's residents.[194]

In *Vaello-Madero*, the Government argued that the discrimination at issue, the exclusion of Puerto Rico from SSI benefits, is purely location-based; the Court, by ruling for the Government, adopted that position as well.[195] That distinction, however, is a legal fiction. It willfully ignores the fact that the Insular Cases, a series of decisions that has been "repeatedly excoriated as suspect and racist," made the indefinite discriminatory treatment of Puerto Rico residents possible in the first place.[196] In his concurrence in *Vaello-Madero*, Justice Gorsuch echoed that opinion, decrying the Insular Cases as "shameful" and tacitly acknowledging that they authorize the government to discriminate based on ethnicity, race, and religion.[197] It is also important to note that 99% of the residents of Puerto Rico identify as Hispanic or Latino.[198] Thus, not only is the reasoning behind the discriminatory treatment of residents of Puerto Rico ethnically motivated, but the practical effect of the "location-based" discrimination at issue burdens a historically disadvantaged minority.[199]

Because the federal government has historically discriminated against the territories by burdening the area for military purposes and excluding or partially excluding them from federal benefits programs, and because the Insular Cases have authorized this disparate treatment on

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[194] Emily Atkin, *Puerto Rico Is Already an Environmental Tragedy. Hurricane Maria Will Make It Even Worse.*, THE NEW REPUBLIC (Sept. 19, 2017), https://newrepublic.com/article/144888/puerto-rico-already-environmental-tragedy-hurricane-maria-will-make-even-worse. *See also* Valeria Pelet, *Puerto Rico's Invisible Health Crisis*, THE ATLANTIC (Sept. 3, 2016), https://www.theatlantic.com/politics/archive/2016/09/vieques-invisible-health-crisis/498428/.

[195] Transcript of Oral Argument at 30, United States v. Vaello-Madero, 142 S. Ct. 1539 (2022) (No. 20-303).

[196] Hammond, *supra* note 12, at 1659.

[197] *See* United States v. Vaello-Madero, 142 S. Ct. 1539, 1554 (2022) (Gorsuch, J., concurring) ("Nothing in [the Constitution] authorizes judges to engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion.").

[198] Hammond, *supra* note 12, at 1659.

[199] At oral argument for *Vaello-Madero*, Justice Sotomayor pressed the Government on this issue, stating "Puerto Ricans are Puerto Ricans. They're Hispanic, and . . . [a]ll you have to do is . . . listen to some of the rhetoric and you know there has been some discrimination shown." Transcript of Oral Argument, *supra* note 195, at 30.

racially and ethnically discriminatory grounds, territorial residence should be considered a "suspect classification" entitled to strict scrutiny review.

2. Territorial Residents Are Powerless to Protect Themselves from the Majoritarian Political Process.

The principle that legislation burdening disenfranchised groups is entitled to strict scrutiny arises from Justice Harlan Fiske Stone's footnote in *United States v. Carolene Products*.[200] "Footnote four's" focus on "political processes which can ordinarily be expected to bring about repeal of undesirable legislation" which can "ordinarily be relied upon to protect minorities" laid the foundation for the Court in subsequent cases to "trigger" strict scrutiny when the challenged classification burdens a group without political protection.[201] Although the Court ordinarily accords a "heavy presumption of constitutionality" to legislative enactments made by "a coequal and representative branch of . . . Government," that presumption must be questioned if the enactment burdens a group that is not adequately represented.[202]

Residents of Puerto Rico, despite their statutory U.S. citizenship, cannot vote in Presidential elections.[203] Their representation in Congress is limited to one non-voting Resident Commissioner, who "is constrained to a role akin to that of a lobbyist."[204] Puerto Rico is "self-governed" in that its people can choose a governor and establish a constitution, but Congress retains plenary authority to revoke this power at any time.[205] Congress could likewise revoke Puerto Ricans' United States citizenship.[206] The "indefinite political subordination" of residents of Puerto Rico, sanctioned by the Supreme Court in the Insular Cases, leaves them defenseless against

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[200] 304 U.S. 144, 152 n.4 (1938).

[201] Cepeda Derieux, *supra* note 15, at 828–29. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (noting "certain groups … have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process'"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (identifying "relegation to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" as one of "the traditional indicia of suspectness").

[202] U.S. Dept. of Labor v. Triplett, 494 U.S. 715, 721 (1990).

[203] *See supra* note 16.

[204] Cepeda Derieux, *supra* note 15, at 831. Cepeda Derieux additionally lists examples of instances in which decisions concerning the territories were made without even seeking the Resident Commissioner's input. *Id.* at 831 n.206.

[205] *See Empire Forgotten, supra* note 15, at 1207.

[206] Rogers v. Belei. 401 U.S. 815, 836 (1971) (holding that Congress can revoke citizenship conferred by statute).

discriminatory legislation, a status that is "not only problematic, but also constitutionally suspect."[207] It should therefore obligate the Court to employ strict scrutiny when evaluating classifications that burden territorial residents.

Nowhere is the effect of Puerto Rico's political powerlessness more dramatically illustrated than in the disaster relief context. As an island territory, Puerto Rico is on the front line of the climate crisis.[208] Residents of Puerto Rico "disproportionately experience sea level rise, extreme temperatures, intense tropical storms, and the resulting damage to ecosystems, health, culture, and infrastructure," despite contributing very little to greenhouse gas emissions.[209] In 2017 alone, the island was devastated by two Category 4 hurricanes, Hurricane Irma and Hurricane Maria.[210] Hurricane Maria, a "near-Category 5" storm that struck within weeks of Hurricane Irma, left almost 3,000 dead and decimated the island's agriculture and aging power infrastructure.[211] In the aftermath of the storm, the island lost power for almost two months, and intermittent outages continued for six months after that.[212] Residents lacked potable water, fuel, and food supplies.[213] In September 2022, six years after Hurricane Maria's landfall, the flooding and rainfall from Hurricane Fiona again left the island's residents powerless and without potable water.[214]

The federal government's actions in the aftermath of the 2017 storms laid bare the enduring effects of Puerto Rico's political powerlessness. For example, the federal government triggers the disaster response component of welfare assistance, designed to offer local governments additional flexibility and funds to cope with disasters like tropical storms, only after

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[207] *Run Amok, supra* note 45, at 2511; Cepeda Derieux, *supra* note 15, at 830.

[208] Press Release, Nat. Res. Comm. Chair Raul M. Grijalva, *Chair Grijalva Unveils Discussion Draft of Bill Providing Climate Solutions for U.S. Territories, Seeks Stakeholder and Public Input* (Oct. 5, 2020) [hereinafter *Chair Grijalva*], https://naturalresources.house.gov/media/press-releases/chair-grijalva-unveils-discussion-draft-of-bill-providing-climate-solutions-for-us-territories-seeks-stakeholder-and-public-input [https://perma.cc/53TM-ZG59].

[209] Serrano & Tapu, *supra* note 193, at 1282.

[210] *Chair Grijalva*, *supra* note 208.

[211] Laura N. Pérez and Patricia Mazzei, *On Anniversary of Hurricane Maria, Storm Leaves Puerto Rico in the Dark*, THE N.Y. TIMES (Sept. 19, 2022), https://www.nytimes.com/2022/09/19/us/puerto-rico-power-hurricane-fiona.html.

[212] Andrew Hammond, *On Fire, Floods, and Federalism*, 111 CALIF. L. REV. (forthcoming 2023) (manuscript at 3) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4232439) [hereinafter *On Fire, Floods, and Federalism*].

[213] Pérez and Mazzei, *supra* note 211.

[214] *Id.*

the President declares a "major disaster" or "emergency" exists in the area requesting aid.[215] As a result, only a President that Puerto Rico residents did not and could not vote for can authorize Puerto Rico's disaster relief funds.[216] Once a "major disaster" is declared, the President instructs federal agencies, including the Federal Emergency Management Agency (FEMA), to "support . . . local efforts in whatever ways authorized by federal law."[217] When, however, FEMA is responding to multiple disasters at once, "extra political pressure and impetus can make a difference" in how the agency prioritizes aid recipients.[218] Puerto Rico's one non-voting member of Congress lacks the political ammo necessary to ensure aid is delivered in an equitable and timely manner, and it likewise lacks the bargaining power necessary to lobby for an aid package from Congress.[219] In this way, Puerto Rico's indefinite disenfranchisement leaves it "shut out from agenda-setting, determining funding and policy priorities, and opportunities to sit at the decision-making table."[220]

Disaster relief access is just one example of the way Puerto Rico's political powerlessness plays out in the legislative setting and accordingly why the Court should treat classifications burdening this disenfranchised group with strict scrutiny. As one commenter points out, an additional argument in support of this contention is "the role the judiciary has played in the entrenchment of Puerto Rico's 'political vacuum.'"[221] He points out that "the indefinite reaffirmation of Congress's plenary power over the island" stated by the Court in *Harris* and *Califano* "raises concerns when combined with Supreme Court statements regarding the 'temporary' character of the arrangement made possible by the Insular Cases and the territorial incorporation doctrine."[222] If the Court "created an intermediate step on the divergent roads to statehood or independence . . . under the presumption that Congress would revisit the matter at a later date," Congress's failure to do so while continuing to pass discriminatory

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[215] *On Fire, Floods, and Federalism, supra* note 212 (manuscript 14). For an explanation of the statutory authority of and process for disaster relief, *see id.* (manuscript 14–15).
[216] *Id.*
[217] *Id.*
[218] Danny Vinik, *How Trump Favored Texas Over Puerto Rico*, POLITICO (March 27, 2018, 5:00 AM), https://www.politico.com/story/2018/03/27/donald-trump-fema-hurricane-maria-response-480557.
[219] *See id.*
[220] Serrano & Tapu, *supra* note 193, at 1289.
[221] Cepeda Derieux, *supra* note 15, at 831–32.
[222] *Id.* at 832.

legislation should be viewed with suspicion.[223] This suspicion should necessitate the application of strict scrutiny.

B. The Exclusion of Residents of Puerto Rico from SSI Benefits Fails Even Deferential Rational Basis Review.

Equal protection does not foreclose the government's ability to classify persons or draw lines when creating and applying laws, but it does "guarantee that the Government cannot base those classifications upon impermissible criteria or use them arbitrarily to burden a particular group of individuals."[224] In other words, a court may uphold a legislative classification only if it bears a rational relationship to a legitimate state purpose.[225] Though deferential, this standard is not "toothless."[226] A court will not uphold a classification if the interest advanced amounts to "a bare congressional desire to harm a politically unpopular group."[227] Additionally, the state may not rely on a classification where the relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.[228]

As both the First[st] Circuit Court of Appeals and Justice Sotomayor's dissent recognized, even if strict scrutiny does not apply to Vaello-Madero's constitutional challenge, Congress's exclusion of residents of Puerto Rico from SSI benefits also does not satisfy the rational basis review test.[229] In its holding, the majority incorrectly relied on non-controlling precedents to find that the Congressional action was rational.[230] Considering this action independently of those precedents, it is clear that there is no rational basis for the action at issue.

1. The Majority Relied on Non-Controlling Precedent to Find the Congressional Action Rational.

In his majority opinion, Justice Kavanaugh expressly stated that the Supreme Court's decisions in *Califano* and *Harris* dictated the results in

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[223] *Id.*

[224] United States v. Vaello-Madero, 142 S. Ct. 1539, 1559 (2022) (Sotomayor, J., dissenting).

[225] *See* Pennell v. City of San Jose, 485 US 1, 14 (1988); Vance v. Bradley, 440 U.S. 93, 97 (1979).

[226] Mathews v. Lucas, 427 U.S. 495, 510 (1976).

[227] U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

[228] Zobel v. Williams, 457 U.S. 55, 61–63 (1982) (holding that a state dividend distribution program's purported objectives were not rationally related to the distinctions sought).

[229] United States v. Vaello-Madero, 956 F.3d 12, 15 (1st Cir. 2020), *rev'd*, United States v. Vaello-Madero, 142 S. Ct. 1539 (2022); *Vaello-Madero*, 142 S. Ct. at 1557 (Sotomayor, J., dissenting).

[230] *See id.* at 1543.

Vaello-Madero.[231] After concluding that the rational basis test applied, he pointed to "Puerto Rico's tax status—in particular, the fact that residents of Puerto Rico are typically exempt from most federal income, gift, estate, and excise taxes" as a satisfactorily rational basis for "likewise distinguishing residents of Puerto Rico from residents of the States for purposes of the Supplemental Security Income benefits program."[232] Thus, the Court relied on *Califano* and *Harris* not only to supply the relevant standard of review, but also to dictate whether or not that standard was met.

That reliance was misplaced. As the Court of Appeals stated in its decision, and as Justice Sotomayor echoed in her dissent, neither case addressed the exact issues at play in *Vaello-Madero*.[233] While *Califano* was factually like *Vaello-Madero* in that it concerned the exclusion of residents of Puerto Rico from the SSI program, *Vaello-Madero* was decided on equal protection grounds, while *Califano* was decided on constitutional right to travel grounds.[234] *Harris*, likewise, was similar to *Vaello-Madero* in that it concerned an equal protection challenge to a federal welfare program; however, the Court in *Harris* permitted only discriminatory treatment in the administration of the AFDC program, which differs from the SSI program in that it dispenses block grants to the territories instead of paying eligible individuals directly.[235]

Finally, and importantly, the First Circuit Court of Appeals noted in its opinion that because in *Califano* and *Harris* the Court issued per curiam opinions, their precedential value extends only to "the precise issues presented and necessarily decided by those actions."[236] Therefore, because *Califano* "was not decided on equal protection grounds" and *Harris* "did not involve a challenge to SSI direct aid to persons[,]" neither case was binding on the Court for the purposes of *Vaello-Madero*, and neither case "foreclose[d] [the] contention that . . . exclusion from SSI violates the equal protection guarantee."[237]

Because the Court in *Vaello-Madero* incorrectly concluded that *Califano* and *Harris* were controlling precedent, it did not consider the purported bases for excluding residents of Puerto Rico from the SSI

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[231] *Id.*
[232] *Id.*
[233] *See id.* at 1560 (Sotomayor, J., dissenting); *Vaello-Madero,* 956 F.3d at 21.
[234] *Vaello-Madero,* 956 F.3d at 21.
[235] *Id.*
[236] *Id.* at 21 (quoting Ill. State. Bd. Of Elections v. Socialist Workers Party, 440 U.S. 173, 182 (1979)).
[237] *Id.*

program.[238] Rather, it adopted these bases as its holdings, finding them rational on the grounds that the Court in *Califano* and *Harris* had found them rational.[239] As Justice Sotomayor noted in her dissent, however, if the Court had engaged in any meaningful analysis of the classification, it would have found neither a legitimate interest nor a rational link between the action and interest to sustain the classification at issue.

2. Limiting SSI Benefits by Tax Status is Not a Legitimate State Interest.

A court will uphold a discriminatory legislative classification only if it bears a rational relationship to a *legitimate state purpose*.[240] A court will not uphold such a classification if the interest advanced amounts to "a bare congressional desire to harm a politically unpopular group."[241] Where a classification's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."[242]

The stated Congressional intent in creating the SSI program was "[f]or the purpose of establishing a national program to provide supplemental security income to individuals who have attained age [sixty-five] or are blind or disabled."[243] Because the exclusion of otherwise-eligible residents of Puerto Rico from the SSI program does not advance that statutory purpose in any way, the exclusion must advance some other legitimate state interest to withstand rational basis review. Again, citing *Califano* and *Harris*, the Court accepted that Puerto Rico's "tax status" constitutes a rational basis for that exclusion.[244] Put differently, the majority accepted that "limiting benefits from the SSI program based on tax status" was a "legitimate interest."

The tax status of the jurisdiction where a prospective SSI recipient lives, however, cannot constitute a legitimate interest that justifies exclusion from a "uniform, federalized, direct-to-individual poverty reduction

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[238] *See Vaello-Madero*, 142 S. Ct. at 1543.
[239] *Id.*
[240] *See* Pennell v. City of San Jose, 485 US 1, 14 (1988); Vance v. Bradley, 440 U.S. 93, 97 (1979) (emphasis added).
[241] U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).
[242] Romer v. Evans, 517 U.S. 620, 632 (1996) (holding that a state constitutional amendment prohibiting all action designed to protect homosexual persons was unrelated to a legitimate state interest).
[243] 42 U.S.C. §1381.
[244] *Vaello-Madero*, 142 S. Ct. at 1544.

program like SSI."[245] SSI is a cash benefit paid to elderly, blind, or disabled Americans, provided they meet "stringent financial criteria."[246] Beneficiaries may have no more than $2,000 in assets for individuals and $3,000 for couples, with certain exceptions.[247] Unlike the Social Security program, which is funded by payroll taxes, general tax revenues fund SSI.[248] Beneficiaries of SSI do not need to have earned an income or paid taxes on that income to qualify for SSI.[249] Instead, the government has conditioned eligibility on a uniform nationwide income threshold.[250] While benefit amounts rewarded may vary based on an individual's income and assets, they do not vary based on jurisdiction.[251] Accordingly, "[r]ather than dispensing money through block grants to the States," thus creating a system that would be illogical where the program is one-hundred percent federally funded, "SSI provides monthly cash benefits directly to qualifying low-income individuals."[252]

Limiting benefits from the SSI program based on the tax status of the jurisdiction where a prospective resident lives, therefore, cannot constitute a legitimate state interest. SSI is a means-tested program paid directly to beneficiaries from the federal government, and eligibility is conditioned only on a beneficiary's income and assets.[253] Excluding otherwise eligible individuals from the program based on the tax status of the jurisdiction where they live, therefore, is not a legitimate interest.

3. The Classification at Issue Is Not Rationally Related to a Legitimate Interest.

Even if the Court accepts that limiting benefits from the SSI program based on tax status is a legitimate government interest, the action here–

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[245] *Id.* at 1560 (Sotomayor, J., dissenting).

[246] CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: SUPPLEMENTAL SECURITY INCOME 2 (updated August 12, 2022), https://www.cbpp.org/research/economy/unemployment-insurance [hereinafter Policy Basics: SSI]. *See also* Hammond, *supra* note 12, at 1672.

[247] *See* Policy Basics: SSI, *supra* note 246, at 1; 42 U.S.C. §1382.

[248] *See* Policy Basics: SSI, *supra* note 246, at 4; SOCIAL SECURITY ADMINISTRATION, FACT SHEET: SUPPLEMENTAL SECURITY INCOME (SSI) (updated June 2022), https://www.ssa.gov/pubs/EN-05-11002.pdf.

[249] *Id.*

[250] *See* Hammond, *supra* note 12, at 1672.

[251] *See* 42 U.S.C. §1382; 20 C.F.R. §§ 416.202(a)–(d) (setting out eligibility criteria for the SSI program).

[252] United States v. Vaello-Madero, 142 S. Ct. 1539, 1558 (2022) (Sotomayor, J., dissenting).

[253] *See* sources cited *supra* notes 243–248.

excluding Puerto Rico from the program–is not "rationally related"[254] to that interest. When the Court considers a classification's rationality, it must decide "whether the classifications drawn in a statute are reasonable in light of its purpose."[255] Although a state does not violate the Equal Protection Clause "merely because the classifications [it makes] are imperfect" and generally allows laws to be both overinclusive and underinclusive,[256] the law still must have some "reasonable basis."[257] Here, the problem is not that the classification at issue, the exclusion of Puerto Rico from SSI benefits, is both over- and under-inclusive, but rather that the classes created by that exclusion are virtually identical. Because neither SSI applicants in Puerto Rico nor SSI applicants in the states pay federal taxes, there is no rational basis upon which the Government can discriminate against one.

The majority's acceptance of Puerto Rico's tax status as a rational basis for excluding needy residents there who do not pay taxes is flawed. To qualify for the SSI program, applicants must have very little income or resources.[258] Fifty-seven percent of SSI recipients in December 2021 had no other source of income,[259] meaning they were paid the full basic monthly SSI benefit of $841 for an individual or $1,261 for a couple.[260] While status and age changes the threshold tax filing requirements in the United States, neither $841 nor $1,261 of income would meet any threshold for any filing status or age.[261] Therefore, fifty-seven percent of SSI recipients do not pay federal taxes. For SSI recipients that do report income, the average of that income for all categories of beneficiaries is still so low[262] that the vast majority of SSI recipients would not meet even the standard deduction for

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[254] *See supra* note 225 and accompanying text.
[255] McLaughlin v. Florida, 379 U.S. 184, 191 (1964).
[256] N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568 n.39 (1979).
[257] Dandridge v. Williams, 397 U.S. 471, 519 (1970) (quoting Lindsley v. Nat. Carbonic Gas Co., 220 U.S. 61, 78 (1911)).
[258] *See* Policy Basics: SSI *supra* note 246, at 1.
[259] SOCIAL SECURITY ADMINISTRATION, SSI ANNUAL STATISTICAL REPORT, 2021 (Sept. 2022), https://www.ssa.gov/policy/docs/statcomps/ssi_asr/2021/ssi_asr21.pdf [hereinafter Annual Statistical Report].
[260] *See id.,* Policy Basics: SSI, *supra* note 246, at 1.
[261] A single taxpayer under age 65 would need to have earned a gross income of $12,950 to meet the filing requirement in 2022. *See* DEPARTMENT OF THE TREASURY, DEPENDENTS, STANDARD DEDUCTION, AND FILING INFORMATION 2–3 (Dec. 9, 2022), https://www.irs.gov/pub/irs-pdf/p501.pdf (setting out the minimum gross income at which the requirement to file a federal income tax return becomes applicable).
[262] *See* Annual Statistical Report, *supra* note 259, at 35. The average income of SSI recipients who have other sources of income is $531. *Id.*

single taxpayers under sixty-five.[263] Because SSI candidates in the states have little, if any, tax liability, it is therefore irrational to conclude that SSI candidates in Puerto Rico may be excluded from the program entirely because they do not have any tax liability.

As the First Circuit Court of Appeals noted in its decision, the Suprme Court's holding is "antithetical to the entire premise of the [SSI] program."[264] Taken to its logical conclusion, Justice Sotomayor noted, it could also have "dramatic repercussions."[265] If Congress can exclude needy citizens from welfare programs on the basis that the Territory does not contribute enough to the federal treasury, presumably it could also exclude needy residents of lesser contributing states.[266] It is worth noting as well that a lesser contributing state would have political recourse if Congress took that action; residents of Puerto Rico, on the other hand, do not.[267] Congress has fashioned a tax scheme it has imposed on the people of Puerto Rico, and now it is punishing them for the same.

IV. CONCLUSION

With its holding in *Vaello-Madero*, the Supreme Court signaled a continued commitment to upholding a pattern of discriminatory legislative action aimed at the residents of the United States territories. Given the opportunity to require more than a rational basis when Congress creates classifications that burden residents of the territories, or alternatively, to reject those classifications on the merits, it instead re-affirmed the strength of the Territory Clause. This judicial heel-digging permits Congress to continue to discriminate against politically powerless United States citizens based solely on their place of residence–a power that is contrary to the constitutional limits imposed on the federal government by the equal protection clause. For these reasons, *Vaello-Madero* was incorrectly decided.

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[263] *See* sources cited *supra* notes 258–59 and accompanying text.
[264] United States v. Vaello-Madero, 956 F.3d 12, 27 (2020).
[265] United States v. Vaello-Madero, 142 S. Ct. 1539, 1562 (2022) (Sotomayor, J., dissenting).
[266] *Id.* ("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 . . . .").
[267] *See supra* Part III, Section A(2).