ISLANDS OF INEQUALITY: THE FOURTEENTH AMENDMENT'S REACH AFTER *VAELLO MADERO*

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ABSTRACT

The Supreme Court's 2022 decision in *United States v. Vaello Madero* has reignited discussions about the application of the Fourteenth Amendment's Equal Protection Clause to residents of U.S. territories. This Article examines how the ruling, which upheld the exclusion of Puerto Rico residents from the Supplemental Security Income (SSI) program, reflects and reshapes the constitutional relationship between the federal government and territorial inhabitants. Although the Court said it was not "irrational" for Congress to exclude Puerto Rico (applying only "rational basis" review), that very ruling underscored a longstanding tension: U.S. citizens in the territories do not receive the same constitutional or statutory protections and benefits as stateside residents. *Vaello Madero* was indeed a "fresh reminder" of a broken system—yet it did more than just remind people. It brought the issue to the front pages and made it harder to ignore that the Court continues to allow (or at least not actively dismantle) the doctrinal underpinnings that let Congress legislate differently for U.S. territories. That, in turn, reignited the discussion of how (and whether) the Fourteenth and Fifth Amendments fully apply there. The ruling in this case was partly a fresh reminder of how the territories remain "outside" many constitutional guarantees, but there was also something more pointed going on in *Vaello Madero*. It did not merely rehash known inequalities; it prompted broader debate in Puerto Rico, in the media, and amongst legal scholars because of how directly the Court's majority (and Justice Gorsuch in concurrence) addressed—and then sidestepped—questions surrounding the *Insular Cases* and the scope of the Constitution in the territories.

While the Court based its decision on the Territorial Clause of the U.S. Constitution and the differential treatment it permits, *Vaello Madero* raises critical questions about the extent to which the Fourteenth Amendment's guarantees apply to residents of U.S. territories. This Article delves into the historical context of the *Insular Cases* and their doctrine of "separate and unequal" constitutional applicability in the U.S. territories, evaluating their continued validity in modern jurisprudence.

This Article argues that *Vaello Madero* perpetuates a second-class citizenship status for territorial residents, which conflicts with

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contemporary interpretations of equal protection and due process. It explores the potential for legislative and judicial remedies to address these disparities and advocates for a reevaluation of outdated legal precedents. By highlighting the tension between constitutional principles and territorial policies—both congressional laws that apply exclusively in the territories and legislation passed by territorial governments—this Article adds to the scholarship in this area by underscoring the need for a more inclusive application of the Fourteenth Amendment. Especially considering current threats to our constitutional rule of government, ensuring that all U.S. citizens receive equal protection under the law, regardless of their geographic location, is more critical than ever.

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INTRODUCTION

On April 21, 2022, the United States Supreme Court handed down its decision in *United States v. Vaello Madero*,[1] a case that grappled with questions of equal protection and congressional authority in the context of federal benefits for residents of Puerto Rico.[2] At issue was whether Congress's decision not to extend the Supplemental Security Income (SSI) program to residents of Puerto Rico violated the Fifth Amendment's guarantee of equal protection—where the equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.[3] In an 8–1 decision authored by Justice Kavanaugh, the Court concluded that Congress did not violate the Constitution by treating Puerto Rico differently from the states for purposes of SSI.[4] By applying a deferential rational basis standard, the majority recognized broad congressional authority to craft tax-and-spend legislation affecting the territories, even when it

1. 596 U.S. 159 (2022).
2. *Id.* at 162.
3. *Id. See also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) (quoting Buckley v. Valeo, 424 U.S. 1, 93 (1976)).
4. *Vaello Madero*, 596 U.S. at 161–62.

leads to disparate treatment of United States citizens living in Puerto Rico.[5]

The Court's majority opinion is riddled with misstatements of fact[6] and veiled threats to the people of Puerto Rico.[7] Even though the ruling was nearly unanimous, the two concurring and one dissenting opinions underscore just how divisive the underlying principles remain.[8] In a pointed concurrence, Justice Gorsuch challenged the longevity and logic of the so-called *Insular Cases*[9]—early twentieth-century opinions that established much of the existing framework for the constitutional rights of inhabitants of U.S. territories.[10] While agreeing that Congress had not violated equal protection in this particular instance, Justice Gorsuch emphasized the need to revisit these century-old precedents and reevaluate the nature and scope of territorial status under the Constitution.[11] His concurrence signaled both a willingness and a desire to critically reassess the constitutional foundations on which federal–territorial relations have long rested.[12]

Justice Thomas joined the opinion of the Court but wrote a separate concurrence devoted to questioning the historical and textual foundations of a Fourteenth Amendment "equal protection component" in the Fifth Amendment, attempting to justify stripping the territory of what little Fourteenth Amendment protection it may have left, through the Fifth Amendment.[13]

Justice Sotomayor penned the lone dissent. She argued that the decision to deny SSI benefits to residents of Puerto Rico effectively denies equal protection of the laws to American citizens based solely on their geographic location.[14] Through a close reading of prior Court decisions

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5. *Id.* at 164–66.

6. Sigrid Vendrell-Polanco, *Puerto Rican Presidential Voting Rights: Why Precedent Should Be Overturned, and Other Options for Suffrage*, 89 BROOK. L. REV. 563, 581 (2024) (citing that it is not true that not all Puerto Rican citizens and residents do not pay federal taxes, as Kavanaugh states in his opinion).

7. *Id.* at 607 n.294 ("Justice Kavanaugh wrote that a consequence of extending SSI to Puerto Rico would be that mainland citizens could then insist that Puerto Ricans pay some other federal taxes, from which they are otherwise mostly currently exempt. [] He then went on to threaten that this would be burdensome for Puerto Rico financially, warning of the economic hardships that may result from receiving certain benefits.").

8. *See Vaello Madero*, 596 U.S. 159 (Thomas, J., concurring; Gorsuch, J., concurring; Sotomayor, J., dissenting).

9. The *Insular Cases* include De Lima v. Bidwell, 182 U.S. 1 (1901), Goetze v. United States, 182 U.S. 221 (1901), Dooley v. United States, 182 U.S. 222 (1901), Armstrong v. United States, 182 U.S. 243 (1901), Downes v. Bidwell, 182 U.S. 244 (1901), Huus v. N.Y. & Porto Rico S.S. Co., 182 U.S. 392 (1901), Dooley v. United States, 183 U.S. 151 (1901), Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901), Hawaii v. Mankichi, 190 U.S. 197 (1903), Dorr v. United States, 195 U.S. 138 (1904), and Balzac v. Porto Rico, 258 U.S. 298 (1922). *See generally* Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 286 (2007).

10. *Vaello Madero*, 596 U.S. at 180 (Gorsuch, J., concurring).

11. *Id.*

12. *Id.* at 184–85.

13. *Id.* at 166–68 (Thomas, J., concurring).

14. *Id.* at 190 (Sotomayor, J., dissenting).

and the text and history of the Fifth Amendment, Justice Sotomayor framed the majority's ruling as perpetuating unjust and harmful distinctions among U.S. citizens.[15] Her dissent sounded a forceful reminder that, while Congress may possess wide latitude in administering social welfare programs, constitutional principles of fairness and equality must remain paramount—even in the unique context of the U.S. territories.[16] Taken together, the majority, concurrences, and dissent in *Vaello Madero* lay bare the enduring tension between broad legislative prerogatives and the fundamental guarantees of equal treatment—an issue that remains central to the legal and political relationship between the United States and its territories.

Part I of this Article traces the history behind both the Territorial Clause[17] and the acquisition of the United States' five inhabited territories, as well as the historical development and application of equal protection concepts under the Fifth Amendment. With a focus on Puerto Rico, this Part explores the territories' colonial status and relationship with the United States, and surveys past applications of the Fifth and Fourteenth Amendments in the territorial context.

Part II examines the Court's decision in *Vaello Madero*, with an in-depth, critical analysis of each part of the opinion, including Justice Thomas's concerning concurring opinion, which supports the elimination of the equal protection component of the Fifth Amendment Due Process Clause as applied to the United States territories. The discussion in this Part not only illuminates the complex legal framework that governs the relationship between the U.S. federal government and the U.S. territories but also exposes the sociopolitical prejudices woven into these judicial rulings.[18]

Finally, Part III addresses the grim outlook for equal protection in the territories and possible paths forward in reevaluating territorial jurisprudence by evaluating both legislative and judicial remedies to the issue—all with uncertain outcomes.

I. EQUAL PROTECTION IN THE U.S. TERRITORIES

The United States currently possesses five inhabited but *unincorporated* territories: Puerto Rico, Guam, the Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands.[19] In the twentieth century, shortly

15. *Id.* at 191.

16. United States v. Vaello Madero, 596 U.S. 159, 197–98 (2022).

17. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.").

18. The rulings on which *Vaello Madero* relies—the *Insular Cases* and every case that came after that continues to reaffirm them. *See* sources cited *supra* note 9.

19. *See* Daniel A. Cotter, *Territories of the United States*, CONSTITUTING AM., https://constitutingamerica.org/territories-of-the-united-states-guest-essayist-daniel-a-cotter/ (last visited Dec. 15, 2024).

after the acquisition of several of these territories,[20] the U.S. Supreme Court formulated a body of jurisprudence known as the *Insular Cases* to assert and clarify the federal government's authority over these lands and any subsequent territorial acquisitions. Through this series of rulings, the Supreme Court solidified that acquired territories would be either "incorporated territories"—territories that were treated as part of the United States, on a path to statehood, and subject to the full protections of the U.S. Constitution—or "unincorporated territories"—lands and peoples that lacked a trajectory toward statehood and were thus "foreign to the United States in a domestic sense."[21]

In order to decide how to govern the newly acquired territories, the Supreme Court upheld the Territorial Clause of Article IV of the Constitution, which declares that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[22] The Court interpreted this provision to grant Congress complete authority over any territory the United States has acquired or will acquire.[23] While Congress can legislate directly on local matters within these territories, it also has the power to delegate that authority to the local territorial legislatures.[24] The *Insular Cases* further held that, as long as acquired territories such as Puerto Rico remained unincorporated, the full scope of constitutional protections will not automatically apply.[25] Under the Territorial Clause, Congress can selectively determine which constitutional rights to extend in the territories and which to withhold, meaning that no constitutional provisions apply

20. "Most of the five unincorporated territories were annexed over a hundred years ago. The United States expanded its territorial reach through various means, marking significant moments in its history with the acquisition of lands that would become territories under its flag. Puerto Rico and Guam were both ceded to the United States in 1898 as a result of the Spanish-American War. American Samoa's acquisition into United States territory came through treaties with Great Britain and Germany in 1900, with formal cession of the islands occurring between 1900 and 1904. Congress formally accepted these cessions in the Ratification Act of 1929. The U.S. Virgin Islands were purchased from Denmark in 1916, with United States citizenship conferred to its residents in 1927. The Organic Act of 1936 and its revision in 1954 established and restructured the government of the Virgin Islands. Finally, the Commonwealth of the Northern Mariana Islands (CNMI) transitioned from being a territory of the Pacific Islands to becoming an American territory with self-governing commonwealth status in 1947. The governance reclassification was administered by the United States under a 1947 United Nations trusteeship through a covenant that also conferred United States citizenship to its residents." Sigrid Vendrell-Polanco, *No Remedy for Colonization*, 28 CUNY L. REV. (forthcoming 2025) (manuscript at 47–48).

21. *"Foreign in a Domestic Sense": U.S. Territories and "Insular Areas,"* NAT'L IMMIGR. F. (Apr. 12, 2021), https://perma.cc/PW3C6A9El; Downes v. Bidwell, 182 U.S. 244, 341 (1901).

22. *Downes*, 182 U.S. at 285–87; U.S. CONST. art. IV, § 3, cl. 2.

23. *See* Harvard Law Review Association, *Developments in the Law: The U.S. Territories*, 130 HARV. L. REV. 1616, 1617 (2017).

24. *See* Rafael Cox-Alomar, *The Puerto Rico Constitution at Seventy: A Failed Experiment in American Federalism?*, 57 NEW ENG. L. REV. 1, 14–15 (2022).

25. *See generally* Balzac v. Porto Rico, 258 U.S. 298 (1922) (ruling that Puerto Rican residents are not entitled the right to trial by jury).

automatically.[26] Instead, Congress is required to explicitly act, should it agree that a certain constitutional provision *does* apply.[27]

In 1901, the Court decided *Downes v. Bidwell*[28] by a narrow 5–4 margin. There, the Court held that although Puerto Rico "belong[s]" to the United States, it is not formally a part of the Union for constitutional purposes.[29] That case dealt with whether certain constitutional provisions applied in the United States' newly acquired territories, such as Puerto Rico, which the Court saw as not really a part of the United States, and designated it unincorporated.[30] This distinction means that certain provisions of the U.S. Constitution do not automatically apply to Puerto Rico—effectively establishing a lesser degree of constitutional protection for the U.S. citizens living there.[31] As a result of these rulings, all provisions of the Constitution apply in incorporated territories, on a path to statehood, whereas the same is not true in unincorporated territories.[32] Only the Constitution's fundamental personal rights apply to those citizens in unincorporated territories.[33] Writing for the majority, Justice Brown reasoned that Congress retains broad authority under the Territorial Clause to determine how constitutional guarantees should extend to newly acquired territories.[34] As a result, the *Downes* decision permitted the imposition of federal tariffs on goods arriving from Puerto Rico (as it would permit it on goods arriving from international countries), even though such duties might have conflicted with constitutional requirements had Puerto Rico been considered an integral part of the United States.[35] This foundational ruling thus set the stage for the ongoing debate about the scope of constitutional rights available to residents of unincorporated territories.

In a 1922 territorial case, Puerto Rico resident Manuel Balzac was convicted of criminal libel under Puerto Rican law.[36] He challenged the conviction, arguing that he was denied a trial by jury, which he claimed was a right that the Sixth Amendment of the U.S. Constitution afforded to him.[37] Relying on *Downes* and applying the Territorial Clause of the Constitution, the Supreme Court upheld the conviction, ruling that the right to a jury trial under the Sixth Amendment does not extend to residents of

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26. U.S. GOV'T ACCOUNTABILITY OFF., GAO/HRD-91-18, U.S. INSULAR AREAS: APPLICABILITY OF RELEVANT PROVISIONS OF THE U.S. CONSTITUTION 5 (1991).

27. *Id.* at 90.

28. *See* 182 U.S. 244 (1901) (holding that Puerto Rico was not an incorporated U.S. territory and that certain constitutional provisions, including tax and tariff restrictions, did not automatically apply there, thus laying the groundwork for the "unincorporated territories" doctrine).

29. *Id.* at 287.

30. *See id.*

31. *See id.*

32. *See id.* at 288, 312–13.

33. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 26, at 4.

34. *Downes*, 182 U.S. at 285–86.

35. *See id.* at 287, 299 (White, J., concurring). Integral part, meaning, not foreign to domestic United States, such as other territories that were on a path to statehood. *See also* Foraker Act of 1900, ch. 191, § 3.

36. Balzac v. Porto Rico, 258 U.S. 298, 300 (1922).

37. *Id.*

Puerto Rico because it is only a territory of the United States.[38] The Court differentiated between rights guaranteed in the states and those applicable in the territories, asserting that not all constitutional provisions apply uniformly and that the people of Puerto Rico, because they live in a territory and not a state, do not automatically receive all the rights that citizens in the states do.[39]

Courts also grappled with whether the Fourteenth Amendment applied in the U.S. territories, and, if so, to what extent. In clarifying that the Fourteenth Amendment Due Process and Equal Protection clauses impose constraints on the states rather than on territorial governments, the Supreme Court reasoned as follows:

> It was contended at the argument that this statute was within the prohibition of the first section of the fourteenth amendment to the constitution, which provides that no state "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It need only be stated, what has been so often decided, that the first amendments of the constitution were limitations upon the government of the United States, and upon the powers granted by the constitution to the national government. But the fourteenth amendment was intended to be, as its language plainly expresses, a limitation upon the states in their sovereign capacity. This section can therefore be of little aid in determining the powers of the territorial legislature. The territory has no powers, legislative, executive, or judicial, except such as are conferred upon it by act of congress. It can have over a given subject no greater powers than congress itself has, and such powers may be as limited as congress may determine. It has no powers, in fact, except such as are expressly, or by fair implication, conferred by congress itself. The sovereignty of the territory, so called, comes from congress, not the people. If congress have not the power under the constitution, it can confer none upon the territory. As has been aptly stated, the territory is "an outlying province of the national government," subject to its direct control through congressional legislation, or its indirect control through congressional supervision of territorial legislation.[40]

Courts viewed the Fourteenth Amendment's restrictions—particularly its Due Process and Equal Protection Clauses—as only applying to states of the United States, not to territorial governments.[41] A territory, unlike a state, derived (and still derives, as the Court continues to uphold the *Insular Cases*) all of its legislative, executive, and judicial powers solely from Congress.[42] Because of this arrangement, territorial governments are constrained by the same constitutional limits that apply to Congress itself (such as those found in the Fifth Amendment), rather than by the

38. *See id.* at 304–05, 309, 314.
39. *See id.* at 304–05.
40. Territory of Dakota ex rel. McMahon v. O'Connor, 41 N.W. 746, 747–48 (N.D. 1889).
41. *Id.*
42. *See* U.S. CONST. art. IV, § 3.

Fourteenth Amendment, which specifically limits state governments.[43] Consequently, any power that a territory exercises must derive from Congress and is limited to what Congress can lawfully do under the United States Constitution.

In another example of this interpretation, in 1928 the First Circuit reviewed *Gallardo v. Questell*,[44] a case about local taxes on coffee beans, and ruled that Puerto Rico is not treated exactly like a state under the Constitution for purposes of the Fourteenth Amendment.[45] Interestingly, however, this opinion indicated that the courts do recognize an equal protection standard that applies to the island's legislative actions.[46] Specifically, the First Circuit acknowledged that Congress grants Puerto Rico's legislature the power to pass local laws—particularly concerning taxation—yet reserves the right to nullify those laws if it chooses.[47] The First Circuit also stated that even though Puerto Rico is not a state, its legislative classifications for taxation must be reasonable and must treat those parties within the same category alike.[48] If the legislature of Puerto Rico does so, there is no violation of either the Fourteenth Amendment's principle of equality or the comparable guarantees in Puerto Rico's Organic Act.[49] The Court's decision in *Gallardo* shows that Puerto Rico's legislature must respect certain core equal protection principles, but the direct, full force of the Fourteenth Amendment applies differently than it does in the states. In other words, Puerto Rico's local laws must still meet a basic standard of reasonableness and nondiscrimination, reflecting an equal protection requirement that is derived from both the Organic Act[50] and (by extension) the Fourteenth Amendment's fundamental protections.[51] Indeed, in another case, the First Circuit ruled that "[s]ince the powers of the Insular Legislature[52] are broad and comprehensive and are very much like the powers

43. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV.

44. 29 F.2d 897 (1st Cir. 1928).

45. *See id.* at 898–900. Puerto Rico's government must comply with basic due process protections recognized under the U.S. Constitution, preventing it from arbitrarily depriving individuals of life, liberty, or property, but birthright citizenship doesn't apply in Puerto Rico. Puerto Ricans are granted citizenship statutorily, not constitutionally.

46. *Id.* at 899.

47. *Id.*

48. *See id.*

49. *Id.* ("Congress has conferred upon the Legislature of Porto Rico general legislative power, reserving to itself the right to declare any act passed by it null and void.").

50. Gallardo v. Questell, 29 F.2d 897, 899 (1st Cir. 1928) ("In accordance with the authority conferred upon it by the Organic Act, the Legislature of Porto Rico could for the purposes of taxation make any classification which was reasonable . . . .").

51. *Id.* It is worth noting that the court did not explicitly say the reverse of this is true. For example, the court did not clarify that if the classifications do not treat similar parties alike, then there is a violation of the Fourteenth Amendment—perhaps another example of how the application of the Fourteenth Amendment differs between territories and states.

52. An insular legislature is the local lawmaking body established in a U.S. territory—often referred to as an "insular area" because of its non-state, island (or remote) status. Unlike state legislatures, which derive their authority directly from the U.S. Constitution through statehood, insular legislatures operate under powers delegated by Congress pursuant to the Territorial Clause (Article IV, Section 3) or other federal statutes. As a result, they can enact local laws and regulations for their

of any state legislature, decisions dealing with the validity of state regulations under the 'due process' clause of the Fourteenth Amendment apply."[53]

Even though Puerto Rico's local legislature is bound by reasonableness and nondiscrimination requirements, by 1946, it was "well settled that the Fourteenth Amendment has no application to territories."[54] The state of affairs had become clear: the Fourteenth Amendment only protects U.S. citizens living in the fifty states.[55] It does not apply in the U.S. territories because of the special status of territorial governments- unincorporated territories are governed by the United States but not fully covered by every provision of the Constitution, including certain protections within the Fourteenth Amendment, effectively creating a legal doctrine under which some constitutional rights extend to the territories, while others—unless deemed "fundamental"—may not.[56] Nevertheless, local territorial governments remained subject to requirements akin, but not equal, to equal protection under congressional statutes, which in turn incorporated (fundamental) Fourteenth Amendment safeguards.[57]

Thus, because the Fourteenth Amendment does not extend to the territories in every respect, the only constitutional avenue that remained for residents of the U.S. territories to challenge Equal Protection of congressional legislation was the Fifth Amendment.[58]

Courts began to recognize an equal protection guarantee under the Fifth Amendment's Due Process Clause—often referred to as "reverse incorporation"[59]—following *Bolling v. Sharpe*,[60] decided in 1954.[61] The Court "maintain[ed] that the Fifth Amendment's Due Process Clause prohibited 'such discriminatory legislation by Congress as amounts to a denial of due process,' i.e., legislation that would fail rational-basis review."[62] In other words, while the text of the Fifth Amendment does not expressly include an Equal Protection Clause, the Supreme Court interpreted the

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territory, but these measures remain subject to oversight and potential revision by Congress, reflecting the unique legal status and limited autonomy that federal law confers upon U.S. territories. *See* U.S. CONST. art. IV, § 3.

53. Roig v. Puerto Rico, 147 F.2d 87, 91 (1st Cir. 1945) (noting that an insular legislature is one created by congress and given broad authority, similar to that of a state legislature).

54. *See* S. Porto Rico Sugar Co. v. Buscaglia, 154 F.2d 96, 101 (1st Cir. 1946).

55. *Id.*

56. *See id.*

57. *Id.* at 100–01.

58. *See* Hirabayashi v. United States, 320 U.S. 81, 100, 112 (1943).

59. *See generally* Jay S. Bybee, *The Congruent Constitution (Part Two): Reverse Incorporation*, 48 BYU L. REV. 303 (2022).

60. 347 U.S. 497 (1954).

61. *See generally id.*

62. United States v. Vaello Madero, 596 U.S. 159, 167 (2022) (Thomas, J., concurring) (quoting *Hirabayashi*, 320 U.S. at 100) (emphasis omitted).

Fifth Amendment to prohibit certain forms of federal discrimination that parallel violations under the Fourteenth Amendment.[63]

Because Puerto Rico is under federal jurisdiction rather than a state's jurisdiction, territorial residents' challenges to federal laws—especially those involving funding or benefits—fall under Fifth Amendment review. In practice, the Supreme Court applies a rational basis test to these challenges. For instance, in *Califano v. Torres*[64] and *Harris v. Rosario*,[65] the Court upheld Congress's authority to offer reduced or altered benefits to residents of Puerto Rico compared to residents of the states.[66] Although the Fifth Amendment's Due Process Clause incorporates a principle of equal protection against the federal government, courts have continued to conclude that differential treatment of Puerto Rico is constitutionally permissible if Congress can show the policy has a rational basis and furthers a legitimate governmental interest.[67]

And that is precisely how the conflict arose in *Vaello Madero*.

II. EQUAL PROTECTION AND THE CONSTITUTIONAL STATUS OF U.S. TERRITORIES AFTER *VAELLO MADERO*

For years, residents of Puerto Rico have sought equality with their mainland counterparts under U.S. law. In 2022, to contest what many view as second-class citizenship, a Puerto Rican resident fought back against the precedent set. While residing in the United States, Vaello Madero, a United States citizen, applied for a federal benefit and continued receiving said benefit after permanently relocating to Puerto Rico.[68] The Government sued Vaello Madero to recover the over $28,000 in SSI benefits he received while living in Puerto Rico.[69] Vaello Madero argued that excluding Puerto Rico from SSI violated the equal-protection guarantee embedded in the Fifth Amendment's Due Process Clause and both the District Court and the Court of Appeals agreed with his constitutional challenge.[70] Surprisingly, but logically, the U.S. District Court for the District of Puerto Rico initially ruled in favor of Vaello Madero, finding that Congress's exclusion of Puerto Rico from the Supplemental Security Income (SSI)

63. *See Bolling*, 347 U.S. at 499–500; *see also* Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 542 (1977) ("Not surprisingly, the Supreme Court found a way to remedy the textual omission, concluding that the fifth amendment's due process clause prohibited arbitrary discrimination by the federal government.").

64. 435 U.S. 1, 2–4 n.6 (1978) (holding that Congress could constitutionally exclude Puerto Rico residents from the Supplemental Security Income program, finding that this distinction satisfied a rational basis review).

65. 446 U.S. 651, 651–52 (1980) (holding that Congress may treat Puerto Rico differently from the states when allocating federal welfare benefits, as long as there is a rational basis for doing so, citing the Territorial Clause of the Constitution).

66. *See generally Califano*, 435 U.S. at 2–4 n.6; *Harris*, 446 U.S. at 651–52.

67. *See Harris*, 446 U.S. at 651–52; United States v. Vaello Madero, 596 U.S. 159, 194 (2022) (Sotomayor, J., dissenting).

68. *See Vaello Madero*, 596 U.S. at 164.

69. *Id.*

70. *Id.*

program violated equal protection principles.[71] The First Circuit affirmed that decision, prompting the federal government to petition the Supreme Court for review.[72] The Supreme Court then granted certiorari to resolve the constitutionality of Congress's differential treatment of Puerto Rico under SSI, setting the stage for a pivotal modern examination of equal protection principles and the constitutional status of U.S. territories.[73]

As a U.S. citizen living in New York, José Luis Vaello Madero received Supplemental Security Income (SSI)—a federal program that provides financial assistance to low-income individuals who are aged, blind, or disabled.[74] However, when Vaello Madero moved from New York to Puerto Rico, he continued to receive SSI payments, unaware that SSI benefits are generally not available to residents of Puerto Rico.[75]After realizing that Vaello Madero had been living in Puerto Rico while receiving SSI, the federal government discontinued his benefits and sought to recover the roughly $28,000 it had paid to him during his residency there.[76] Because, as previously discussed, courts have ruled that the Fourteenth Amendment does not apply in the U.S. territories, Vaello Madero instead argued that denying SSI solely because of his residence in Puerto Rico violated the Fifth Amendment's guarantee of equal protection.[77] However, SSI benefits are available only for "resident[s]" of the United States, and the SSI Income Program legislation states that "[f]or purposes of this title, the term 'United States', when used in a geographical sense, means the 50 States and the District of Columbia."[78]

The case ultimately centered on whether Congress could constitutionally exclude residents of Puerto Rico from receiving SSI benefits.[79] The Supreme Court held that Congress's decision not to extend SSI to residents of Puerto Rico does not violate the Constitution because there is a rational basis[80] to treat unincorporated territories, like Puerto Rico, disparately—the fact that they are still unincorporated territories and Congress

71. *See id.*
72. *Id.*
73. *Id.*
74. United States v. Vaello Madero, 596 U.S. 159, 164 (2022).
75. *Id.*
76. *See id.*
77. *Id.*
78. 42 U.S.C. § 1382c(e); *see also Vaello Madero*, 596 U.S. at 163 ("To be eligible for Supplemental Security Income, an individual must be a 'resident of the United States,' 42 U. S. C. §1382c(a)(1)(B)(i), which the statute defines as the 50 States and the District of Columbia, §1382c(e)."). When referring to "geographic sense," the legislation applies this as citizen residency.
79. *Vaello Madero*, 596 U.S. at 162.
80. "In general, the Equal Protection Clause guarantees that the Government will treat similarly situated individuals in a similar manner. 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. Where a law treats differently two different groups of people that are not members of a suspect or quasi-suspect classification, and the classification does not implicate a fundamental right, the law will survive an equal protection challenge if it is 'rationally related to a legitimate governmental interest.'" *Id.* at 193–94 (Sotomayor, J., dissenting).

has not decided otherwise.[81] However, the case also included notable separate writings—particularly from Justice Thomas and Justice Sotomayor—highlighting broader questions about the territorial status of Puerto Rico and equal protection principles under the Fifth Amendment.[82]

Justice Kavanaugh delivered the majority opinion, and seven other Justices joined.[83] The Court applied a rational basis review (the lowest and easiest standard of review to overcome) because Congress's decision to exclude Puerto Rico from the SSI program did not involve a suspect classification (such as race or religion) and was instead based on Puerto Rico's status as a U.S. territory.[84]Upholding the application of the *Insular Cases* and following its prior rulings in *Califano* and *Harris*, the Court once again affirmed Congress's authority to offer reduced or altered benefits to U.S. citizens residing in Puerto Rico.[85] Below is an excerpt from a separate law review article that closely examines the Supreme Court's reasoning in *Vaello Madero*—particularly the way Justice Kavanaugh and the majority invoked Puerto Rico's partial exemption from certain federal taxes to justify excluding its residents from Supplemental Security Income (SSI) benefits. In that article, I critique the Court's assumption that this tax "protection" meaningfully offsets the denial of equal access to benefits, pointing out both the factual inaccuracy of the "Puerto Ricans don't pay federal taxes" claim and the broader constitutional concerns raised by using selective exemptions to rationalize unequal treatment.[86] The passage below discusses how the Court's reliance on "longstanding historical practice" and precedent ultimately led it to conclude that the equal protection component of the Fifth Amendment does not compel Congress to treat Puerto Rico exactly like the states in federal benefits programs. This critique challenges the premise that reduced tax burdens for some Puerto Ricans can justify their exclusion from full participation in federal social safety nets. Here is the relevant excerpt from that discussion:

> The Court's pretense was that this precedent "protects" Puerto Ricans from "most federal income, gift, estate, and excise taxes." Justice Kavanaugh reasoned that if Puerto Rico were to receive Supplemental Security Income (SSI) and other benefits for which it remained ineligible, mainland citizens might demand that it also pay more federal taxes from which it is currently exempt. Aside from the fact that this statement is factually inaccurate, Justice Kavanaugh went on to hold that "the equal-protection component of the Fifth Amendment's Due Process Clause [does not] require Congress to make Supplemental Security Income benefits available to residents of Puerto Rico to the same extent that Congress makes those benefits available to residents of the

81. *Id.* at 164–65 (majority opinion) (citing precedent where Congress declined to offer U.S. nationals the same benefits as citizens).
82. *Compare id.* at 166 (Thomas, J., concurring), *with id.* at 189–91 (Sotomayor, J., dissenting).
83. *Id.* at 160 (syllabus).
84. *Id.* at 165 (majority opinion).
85. United States v. Vaello Madero, 596 U.S. 159, 164–65 (2022).
86. Vendrell-Polanco, *supra* note 6, at 581 n.132.

> States," because of "longstanding historical practice, and this Court's precedents."[87]

The notion that all U.S. citizens residing in Puerto Rico are exempt from federal income taxes is a proven falsity.[88] Many Puerto Rican residents do, in fact, pay federal income taxes—a point often overlooked in discussions about the territory's tax obligations.[89] Although some residents of Puerto Rico are exempt from specific federal income taxes, the characterization that they contribute significantly less than mainland citizens is misleading.[90] As of April 2020, for instance, the approximately 14,000 federal employees living on the island were all obligated to pay federal income taxes on top of Puerto Rico's own income taxes.[91] While the majority opinion in *Vaello Madero* cited the federal income tax exemption enjoyed by some Puerto Rican residents, it largely ignored these thousands of U.S. citizens residing in Puerto Rico who are subject to the same federal tax rules as "mainland" citizens.

Moreover, even Puerto Ricans who do not pay federal income tax must still pay federal payroll taxes (including taxes for Social Security, Medicare, and unemployment insurance) as well as customs, duties, and commodity taxes—evidence that the notion of broad tax exemptions for Puerto Rican residents is inaccurate.[92] Continuing to rely on that narrative, especially to maintain precedents that many scholars and jurists now view as obsolete,[93] verges on unethical misrepresentation and deliberate ignorance.

Additionally, basic economic data regarding Puerto Rico suggests that due to historically high poverty and unemployment rates—dating

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87. *Id.* at 581.

88. *Id.*; *see also Puerto Rico and Federal Income Tax*, P.R. REP. (Jan. 4, 2019), https://puertoricoreport.com/puerto-rico-and-federal-income-tax ("Puerto Ricans do pay some federal income taxes in addition to the local income tax they pay in Puerto Rico. They pay the federal tax that funds Social Security and Medicare (the Federal Insurance Contributions Act (FICA) tax). There are also exceptions to the general rule. Employees of the U.S. government must file a federal income tax return; their income is understood to come from the States, so they may owe federal income taxes. And any resident of Puerto Rico who earns money from outside of the territory must file a tax return.").

89. *Topic No. 901, Is A Person With Income From Puerto Rico Required to File a U.S. Federal Income Tax Return?*, INTERNAL REVENUE SERV. (Nov. 5, 2024), https://www.irs.gov/taxtopics/tc901.

90. Katerina Martínez Vélez, *Trouble in Paradise: Puerto Rico's Routine Exclusion from Federal Benefit Programs as a Result of the Alien-Citizen Paradox*, 6 BUS., ENTREPRENEURSHIP & TAX L. REV. 132, 140 (2022).

91. *See* Adriana De Jesús Salamán, *U.S. Employees in Puerto Rico and Territories Face Huge Pay Gap*, NOTICEL (May 16, 2019), https://www.noticel.com/economia/english/20190517/u-s-employees-in-puerto-rico-and-territories-face-huge-pay-gap/; *Topic No. 901, Is A Person With Income From Puerto Rico Required to File a U.S. Federal Income Tax Return?*, *supra* note 89.

92. Sindy Marisol Benavides, *After SCOTUS Ruling, Puerto Rico Statehood Even More Imperative*, REALCLEAR POL. (Apr. 28, 2022), https://www.realclearpolitics.com/articles/2022/04/28/after_scotus_ruling_puerto_rico_statehood_even_more_imperative_147532.html.

93. Including Justice Gorsuch, who condemns the *Insular Cases* in his concurrence in this same decision. United States v. Vaello Madero, 596 U.S. 159, 180 (2022) (Gorsuch, J., concurring). *See also* Christina Duffy Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2449 (2022) (noting that "[s]cholars unanimously agree that the *Insular Cases* gave the Court's sanction to U.S. colonial rule over the unincorporated territories—and that the reason for it was racism").

back even before Hurricane Maria[94]—most residents simply do not earn enough to owe federal income tax.[95] This is comparable to the nearly half of mainland U.S. citizens who also pay no federal income tax because their income is too low.[96]

Justice Gorsuch joined the majority opinion but also wrote a scathing concurrence recognizing that continuing to rely on the *Insular Cases* is an atrocity.[97] According to Justice Gorsuch, the Court that decided the *Insular Cases* adopted theories—echoing the racist and imperialist views of prominent legal scholars at the time—that permitted Congress to govern the territories without extending the full benefits of constitutional guarantees to their residents.[98] He emphasized that nothing in the Constitution suggests a distinction between incorporated and unincorporated territories, nor does the Constitution allow courts to classify certain rights as fundamental and exclude others from application in those territories.[99] He reiterated that the *Insular Cases* were steeped in racial prejudices, citing language from the opinions that explicitly questioned whether "alien races" were fit to receive Anglo-American legal protections.[100] In Justice Gorsuch's view, these cases rest on a "rotten foundation," that stands apart from the Constitution's text and original meaning, and have embedded arbitrary distinctions in American law for over a century.[101]

Justice Gorsuch explained that he could not vote to overturn the *Insular Cases* because Vaello Madero did not directly challenge them.[102] However, Justice Gorsuch's concurrence shows that one of the more conservative Justices is at least willing to reevaluate the precedent applicable to Congress legislating in the U.S. territories.[103] He stated his hope that the Court will soon overturn the *Insular Cases* and praised Justice Harlan's early dissents criticizing the creation of a "colonial system" as antithetical to the Constitution.[104] Even though his vote to uphold the ruling in *Vaello Madero* because the *Insular Cases* precedent seems contrary to the reasoning in his concurrence, Justice Gorsuch is correct to acknowledge that overturning the *Insular Cases* would raise difficult practical questions

94. Hurricane Maria significantly reduced incomes in Puerto Rico by causing widespread job losses due to loss of tourism, damaging critical infrastructure, and devastating the agricultural sector, leading to a sharp decline in economic activity, with many residents experiencing a substantial drop in earnings and increased poverty rates following the storm; particularly impacting small businesses and farmers who were severely hit by the damage. *The Facts: Hurricane Maria's Effect on Puerto Rico*, MERCY CORPS (Sept. 9, 2020), https://www.mercycorps.org/blog/facts-hurricane-maria-puerto-rico.

95. *Vaello Madero*, 596 U.S. at 197 (Sotomayor, J., dissenting).

96. Howard Gleckman, *The Number of Those Who Don't Pay Federal Income Tax Drops to Pre-Pandemic Levels*, TAX POL'Y CTR. (Oct. 27, 2022), https://taxpolicycenter.org/taxvox/tpc-number-those-who-dont-pay-federal-income-tax-drops-pre-pandemic-levels.

97. *Vaello Madero*, 596 U.S. at 180 (Gorsuch, J., concurring).

98. *Id.* at 181.

99. *See id.* at 184–85.

100. *See id.* at 182.

101. *See id.* at 189.

102. *See id.*

103. United States v. Vaello Madero, 596 U.S. 159, 189 (2022).

104. *See id.* at 183–84, 189.

about how exactly each constitutional provision would apply to U.S. territories.[105] However, Justice Gorsuch insisted those are the "right" questions to ask, rather than continuing to rely on a racially charged and textually baseless doctrine.[106] For example, would overturning the *Insular Cases* eliminate the unincorporated territory doctrine—or just open the door for Congress to pass legislation making it so? Might that create a ripple effect across nearly every aspect of government and law for the territories? For instance, it could raise questions about other federal benefits—Would residents of all territories immediately become eligible for programs like SSI, Medicaid, SNAP, and other social safety nets, and if so, how would Congress adjust funding formulas to accommodate these newly covered populations? It could also call into question tax classifications—Would certain federal tax exemptions or differentials for the territories remain valid, or would they need to be harmonized with the standards applied to states? And, on a more foundational level, Congress and the courts would need to clarify how full constitutional protections, such as trial by jury and certain other criminal procedure rights, apply in each territory's local courts. Each of these issues would require guidance from legislatures and federal agencies to ensure a smooth and consistent transition, illustrating why overturning the *Insular Cases* would pose substantial practical challenges even as it promises to secure greater constitutional parity for territorial residents.

Justice Sotomayor's dissent provided the soundest legal analysis of the issues raised in *Vaello Madero*. She argued that excluding U.S. citizens residing in Puerto Rico from the SSI program violates the Fifth Amendment's implied guarantee of equal protection.[107] She correctly emphasized that SSI was designed as a uniform, federally administered safety net for the nation's neediest adults, fully funded through the federal Treasury.[108] Because Puerto Ricans are U.S. citizens and many meet SSI's eligibility requirements, Justice Sotomayor contended there is no rational basis for singling Puerto Ricans out for complete exclusion from a benefits program due to Puerto Rico's distinct tax status—especially given that SSI recipients living in any of the fifty states generally have little to no tax liability anyway.[109] Justice Sotomayor also pointed out that Congress has never used a similar "insufficient tax contribution" rationale to exclude low-income citizens of any state from SSI or comparable programs.[110] She concluded that denying SSI to eligible Puerto Rican residents is irrational and places an undue burden on some of the most vulnerable U.S. citizens,

105. *Id.* at 188.
106. *See id.*
107. *Id.* at 189–90 (Sotomayor, J., dissenting).
108. *Id.* at 189.
109. United States v. Vaello Madero, 596 U.S. 159, 190, 195–96 (2022).
110. *See id.* at 195–98.

particularly given Puerto Rico's higher rates of poverty and disability, as well as their lack of voting representation in Congress.[111]

Justice Thomas's concurrence is by far the most alarming part of the *Vaello Madero* decision because it challenges the conventional view that the Fifth Amendment's Due Process Clause implicitly contains an equal protection guarantee identical to the Fourteenth Amendment's Equal Protection Clause.[112] Although he joined the Court's opinion, Justice Thomas devoted his concurrence to questioning the historical and textual bedrock of the "equal protection component" of the Fifth Amendment.[113] According to the other six Justices who voted with the majority, even if the Court continues to uphold the *Insular Cases*, which formed the foundation for not extending the application of the Fourteenth Amendment to the U.S. territories, they all agree that the most sound legal analysis would be to apply the equal protection guarantee implied in the Fifth Amendment even if they don't agree that it leads toto striking down laws that irrationally discriminate against a large population of United States citizens.[114]

However, Justice Thomas would take even that option off the table. Justice Thomas begins his concurrence by noting that, until the mid-twentieth century, the Supreme Court held that the Fifth Amendment "contains no equal protection clause."[115] Historically, the Court treated the Fifth Amendment's Due Process Clause as providing only procedural safeguards and rational basis scrutiny for certain forms of federal legislation—not prohibition on discriminatory classifications akin to the Fourteenth Amendment's Equal Protection Clause.[116]

Justice Thomas cited *Detroit Bank v. United States*[117] and *La Belle Iron Works v. United States*[118] to show that, for much of its history, the

111. *Id.* at 198.

112. *Id.* at 166–80 (Thomas, J., concurring) ("Firmer ground for prohibiting the Federal Government from discriminating on the basis of race, at least with respect to civil rights, may well be found in the Fourteenth Amendment's Citizenship Clause."); *see also* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("[D]iscrimination may be so unjustifiable as to be violative of due process.").

113. *Vaello Madero*, 596 U.S. at 167, 180 ("Rather than continue to invoke the Fifth Amendment's Due Process Clause to justify *Bolling*," the Court should "consider whether" the Fourteenth Amendment's Citizenship Clause is a more pragmatic alternative that "would yield a . . . more supportable [] result.").

114. *See id.* at 162–66, 185–89, 195.

115. *Id.* at 167 (Thomas, J., concurring) (quoting Det. Bank v. United States, 317 U.S. 329, 337 (1943)).

116. *Id.* at 167–69.

117. 317 U.S. 329, 337 (1943) (holding that the procedures were valid under the Fifth Amendment. Significantly, it reaffirmed the principle that the Fifth Amendment did not itself contain an equal protection guarantee parallel to that in the Fourteenth Amendment. Instead, the Court treated the matter as one of rationality under due process—i.e., as long as the federal classification or procedure was not arbitrary or capricious, it would not violate the Fifth Amendment. By declining to apply a heightened level of scrutiny akin to equal protection analysis, the Court confirmed that the Fifth Amendment's text and doctrine did not then encompass a generalized prohibition on discriminatory classifications by the federal government).

118. 256 U.S. 377, 392 (1921) (holding that the tax provisions in question did not violate any constitutional principle found in the Fifth Amendment. Crucially, the Fifth Amendment Due Process

Court recognized no textual or doctrinal basis for an equal protection guarantee in the Fifth Amendment.[119] In those cases, the court evaluated how certain taxes and collected and whether those classifications or processes established under federal law were unfair or unconstitutional under the Fifth Amendment.[120] There, the Court affirmed that the Fifth Amendment did not contain an equal protection requirement on par with the Fourteenth Amendment.[121] Rather, it assessed the dispute through a rationality lens under the Due Process Clause, concluding that a federal classification or procedure is permissible so long as it is not arbitrary or capricious and thus does not violate the Fifth Amendment.[122] Justice Thomas saw *Bolling* as the turning point.[123] As discussed in Part I, in *Bolling*, which was handed down the same day as *Brown v. Board of Education*,[124] the Court held racially segregated public schools in the District of Columbia unconstitutional under the Fifth Amendment's Due Process Clause—essentially reading an equal protection principle into that clause.[125]

Justice Thomas pointed out that *Bolling* relies on substantive due process doctrines from the *Lochner* era that equated unreasonable or arbitrary classifications with deprivations of due process.[126] He questioned the legitimacy of using a provision that speaks to process rather than substance to evaluate the merits of legislative classifications.[127] By reading an equal protection guarantee into the Fifth Amendment, Thomas argued, the Court effectively makes the Fourteenth Amendment's separate guarantees (Due Process and Equal Protection) redundant.[128] He asked: If the Fifth Amendment already provides the same guarantee, why did the Fourteenth Amendment expressly add an Equal Protection Clause distinct from its own Due Process Clause?[129] Thus, he criticized *Bolling*'s moral assertion that it would be "unthinkable" for the Constitution to prohibit only the states—and not the federal government—from racially discriminatory

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Clause was not read to contain the type of "equal protection" standard the Fourteenth Amendment imposes on the states. Instead, the Court treated the challenge as a substantive due process question focused on whether the taxes were rational and not arbitrary. The decision signaled that, at the time, the Court did not interpret the Fifth Amendment's Due Process Clause to include the same robust anti-discrimination component that the Fourteenth Amendment's Equal Protection Clause imposes on state action).

119. *See* United States v. Vaello Madero, 596 U.S. 159, 167 (2022) (Thomas, J., concurring).

120. *See La Belle Iron Works*, 256 U.S. at 391–93; *see also Detroit Bank*, 317 U.S. at 337–38.

121. *See La Belle Iron Works*, 256 U.S. at 391–92; *see also Detroit Bank*, 317 U.S. at 337.

122. *See La Belle Iron Works*, 256 U.S. at 392–94; *see also Detroit Bank*, 317 U.S. at 337–38.

123. *See Vaello Madero*, 596 U.S. at 167 (Thomas, J., concurring).

124. 347 U.S. 483, 495 (1954) (holding that racial segregation in public schools is inherently unequal and therefore violates the Equal Protection Clause of the Fourteenth Amendment).

125. *See Vaello Madero*, 596 U.S. at 167–68 (Thomas, J., concurring) (providing an alternative interpretation of the *Bolling* holding).

126. *Id.*; *see also* Bolling v. Sharpe, 347 U.S.497, 499 (1954) (demonstrating where the Court began to fold an equal protection guarantee into the concept of Fifth Amendment due process and using *Lochner*-era theory that "unreasonable discrimination" is "a denial of due process of law.").

127. *Vaello Madero*, 596 U.S. at 166–68.

128. *Id.* at 170.

129. *Id.* (distinguishing the protections of the Due Process Clause from those of the Equal Protection Clause).

practices.[130] Justice Thomas countered that the Constitution has several provisions applying uniquely to the states or to the federal government, and courts should not override those structural choices based on policy arguments or moral intuitions.[131]

Despite expressing doubts about whether the Fifth Amendment includes an equal protection component, Justice Thomas still agreed the federal government may be constitutionally barred from certain race-based discrimination.[132] He contended that a more textually sound source of that prohibition would be the Fourteenth Amendment's Citizenship Clause.[133] Drawing on Reconstruction-era history, Justice Thomas explained that citizenship was widely understood to possess a guarantee of equality—meaning that those recognized as "citizens" are entitled to certain basic civil rights, free from racial discrimination.[134] He reviewed debates around the Civil Rights Act of 1866 and statements by legislators such as Senator Jacob Howard and Representative Samuel Shellabarger, who linked citizenship status to the right of equal treatment.[135] Likewise, he argued that Justice Harlan's historic dissents in the *Civil Rights Cases*[136] and *Plessy v.*

130. *Id.* at 170–71.

131. *Id.*

132. *Id.* at 171 ("Even if the Due Process Clause has no equal protection component, the Constitution may still prohibit the Federal Government from discriminating on the basis of race, at least with respect to civil rights.").

133. United States v. Vaello Madero, 596 U.S. 159, 171 (2022) (Thomas, J., concurring); *see also* U.S. CONST. amend. XIV, § 1 (stating "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," essentially guaranteeing birthright citizenship to anyone born on American soil, with certain exceptions, and making them a citizen of both the United States and the state they live in).

134. *See Vaello Madero*, 596 U.S at 171–74 (noting that "considerable historical evidence suggests that the Citizenship Clause 'was adopted against a longstanding political and legal tradition that closely associated the status of "citizenship" with the entitlement to legal equality.'").

135. *See id.* at 173–76.

136. 109 U.S. 3, 25, 62 (1883) (holding that Thirteenth and Fourteenth Amendments are not appropriate bases for Congress to pass laws protecting African-Americans from discrimination by private parties, where Justice Harlan dissents, stating:

> "To-day, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race discrimination. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freemen and citizens because of their race, color, or previous condition of servitude. To that decree—for the due enforcement of which, by appropriate legislation, Congress has been invested with express power—every one must bow, whatever may have been, or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect.").

Ferguson[137] further embraced an equal citizenship principle that applies to both the federal and state governments.[138]

Justice Thomas's concurrence called for a reevaluation of the reliance on the Fifth Amendment's Due Process Clause to invalidate federal discrimination.[139] He suggested that "in an appropriate case," the Court should consider whether the Fourteenth Amendment's Citizenship Clause—not the Fifth Amendment—offers the proper textual grounding for a federal prohibition on race-based discrimination.[140] In his view, this approach would better align with the original meaning, textual structure, and historical development of the Reconstruction Amendments while resolving doctrinal confusion around substantive due process in the Fifth Amendment.[141]

Justice Thomas failed to consider the fact that Congress has not yet decided to legislate equal protection for the 3.6 million U.S. citizens living in the territories. In fact, when the Tenth Circuit decided that the Fourteenth Amendment did not fully apply in the territories because of Territorial Clause, as interpreted by the *Insular Cases*, the Supreme Court declined to hear the matter, leaving this precedent in place.[142] Therefore, if Justice Thomas's argument prevailed and the Court eliminated the equal protection aspect of the Fifth Amendment, the residents of the U.S. territories still would not have equal protection rights through the Fourteenth Amendment.[143] Equal protection would have bordered on nonexistent in Puerto Rico, setting contradictory precedent for that same application of law in all other territories, had the Supreme Court decided to apply it there as well.[144] This would have been facially disparate treatment, without justification, of an entire class of persons, the majority of whom belong to

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137. 163 U.S. 537, 559–62 (1896) (Harlan, J., dissenting) ("[I]n the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful . . . . The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.").

138. *See Vaello Madero*, 596 U.S. at 176–79) (Thomas, J., concurring).

139. *See id.* at 180.

140. *Id.*

141. *See id.* at 171.

142. *But see generally id.* at 167–80. *See also* Fitisemanu v. United States, 1 F.4th 862, 864–65, 881 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (demonstrating that although a Tenth Circuit decision, this case relied on *Insular Case* doctrine to hold that the Citizenship Clause of the 14th Amendment does not entitle people born in American Samoa to birthright citizenship. While *Fitisemanu* is not a Supreme Court ruling, it directly invokes and builds on the framework established by the *Insular Cases*–and proved that the Fourteenth Amendment is not applied in the United States Territories). Jae June Lee, Liz Lowe, Cara Brumfield, & Neil Weare, *Advancing Data Equity for U.S. Territories*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (June 6, 2023), https://civilrights.org/blog/advancing-data-equity-for-u-s-territories ("More than 3.6 million U.S. citizens and residents live in the five inhabited U.S. territories: American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.").

143. *Cf. Vaello Madero*, 596 U.S. at 180 (ignoring the implications of such staunch changes upon territorial jurisprudence).

144. *Cf. id.* at 171–79.

racially minoritized groups.[145] This disparate treatment is reminiscent of separate, but equal *Plessy*-era polices that have long since been overturned because of their obvious discriminatory nature.[146]

In keeping with American colonial traditions, the Court continues to deny equal protection to territorial residents, with one Justice doubting whether the Fifth Amendment can even be substituted as an equal protection tool to bring justice and equality to the nearly 4 million U.S. citizens living in the United States Territories.

III. THE PATH FORWARD: REEVALUATING TERRITORIAL JURISPRUDENCE

Territorial residents face significant structural barriers that restrict their ability to advocate for legal and political change, many of which are directly tied to their lack of voting representation and unequal legal status under U.S. law.[147] The primary mechanisms that restrict their advocacy efforts include lack of congressional representation,[148] exclusion from presidential elections,[149] and limited judicial recourse because of congressional plenary power over the territories.[150]

Currently, residents from the territories lack congressional representation, meaning they cannot directly influence federal legislation that affects their rights.[151] While territories elect non-voting delegates to the House of Representatives,[152] these delegates cannot vote on final legislation,[153] limiting their power to advance policies addressing territorial disenfranchisement and lack of equal protection. Moreover, these residents, unlike residents of Washington, D.C.,[154] cannot vote for the President, who is responsible for nominating Supreme Court Justices and other federal officials who interpret and enforce laws affecting the territories.[155] This exclusion removes a key mechanism for influencing federal policy and constitutional interpretation.[156] Additionally, under the *Insular Cases* doctrine, courts have consistently ruled that the Constitution does not fully apply to unincorporated territories and always defer to Congress in

145. *See id.* at 171.

146. Plessy v. Ferguson, 163 U.S. 537, 552 (1896), *overruled by,* Brown v. Bd. of Educ., 347 U.S. 483, 486–88, 494–95 (1954) (holding that racial segregation in public schools is inherently unequal and therefore violates the Equal Protection Clause of the Fourteenth Amendment).

147. *See D.C., Puerto Rico, and the U.S. Territories: An Explainer*, ROCK THE VOTE (Nov. 24, 2021), https://www.rockthevote.org/explainers/washington-d-c-puerto-rico-and-the-u-s-territories/?.

148. *See id.*

149. *See id.*

150. *See* Allison Ripple, *Remedying the* Insular Cases*: Providing Tribal Sovereignty to Unincorporated Territories to Ensure Constitutional Rights for All U.S. Nationals and Citizens*, 32 WM. & MARY BILL RTS. J. 515, 521–22 (2023).

151. *See* Amber L. Cottle, *Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections*, 1995 U. CHI. LEGAL F. 315, 337 (1995).

152. *See id.*

153. *See id.*

154. *See generally D.C., Puerto Rico, and the U.S. Territories: An Explainer*, *supra* note 147.

155. *See* Cottle, *supra* note 151, at 315.

156. *See generally id.* at 337.

determining what does and doesn't apply in the United States Territories.[157] As previously noted, the Territorial Clause gives Congress nearly absolute power over U.S. territories, meaning territorial residents must rely on federal lawmakers—who do not directly represent them—to enact change.[158] As many scholars have noted, this creates a structural imbalance where territories must petition lawmakers who have no electoral incentive to respond.[159]

All of the aforementioned barriers directly undermine the principles of the Equal Protection Clause by creating a system where U.S. citizens in the territories are treated as a separate and unequal class, denied the same democratic and legal rights as those in the states.[160] As a result, territorial residents are caught in a legal paradox—they are subject to U.S. laws and obligations but are denied the full democratic and constitutional mechanisms necessary to advocate for their own political and legal rights. Addressing these disparities would require either judicial intervention to expand Equal Protection Clause protections to territories or congressional action to grant territorial residents full participation in the democratic process. Until such changes occur, the structural barriers embedded in the U.S. legal system will continue to limit the ability of territorial residents to advocate for fundamental rights.

The disparities in the application of the Equal Protection of the 14th Amendment to U.S. territories versus the states stem largely from the ruling of the *Insular Cases* (1901–1922),[161] which created a legal doctrine that limits constitutional rights in unincorporated territories.[162] These disparities affect citizenship rights, equal protection, and due process, making it difficult for territorial residents to access the same legal protections as those in the states.[163] However, *Vaello Madero* served as a stark reminder of a flawed system, but it did more than simply jog memories: it threw the issue into the public spotlight and made it much harder to ignore.[164] It also raises a more disturbing possibility: that the Fourteenth Amendment's equal protection clause might effectively be carved out of the Fifth

157. *See* Ripple, *supra* note 150, at 521–24.

158. *See id.* at 521–22.

159. *Compare* Ripple, *supra* note 150, at 521–22, *with* Cottle, *supra* note 151, at 337 (The absence of a presidential vote denies territorial residents the ability to influence political platforms or policy choices, effectively excluding them from executive branch deliberation and decision-making. Individuals born in unincorporated territories, though subject to the authority of the federal government, are denied representation and participation in the democratic process).

160. *Cf.* Harvard Law Review Association, *Developments in the Law: The U.S. Territories*, 130 HARV. L. REV. 1616, 1621, 1628 (2017).

161. *See* sources cited *supra* note 9.

162. *See id.*

163. *See id.*

164. There have been two symposia on Territorial Law and why it matters since, in part spurred by the ruling in *Vaello Madero*. 2022 Fordham Symposium on the Anomalous Status of the United States Territories and Stetson Law Review Symposium in 2024 on Territories in the Legal Curriculum. There has also been renewed interest in the general scholarly area of Territorial Law. *See Colonial Legacies and Contemporary Legal Challenges in the U.S. Territories*, YALE L.J. (Feb. 10, 2025), https://www.yalelawjournal.org/collection/colonial-legacies-and-contemporary-legal-challenges-in-the-us-territories.

Amendment's application in the territories—one of the only remaining protections that actually apply to United States citizens residing in the territories.[165]

However, there may be legislative and judicial remedies to address these disparities such as congressional intervention, statehood or self-determination legislation, reinterpreting existing case law, recognition of birthright citizenship for the people of the territories who vote for such a remedy, and recognition of territorial resident citizens as "persons" under the Due Process Clause. The path forward likely requires a combination of legislative advocacy, mass education to mainland citizens about the disparities in rights, litigation, as well as political mobilization by the United States citizens living in the territories.

A. Legislative Remedies

Legislatively, Congressional override of the *Insular Cases* could be achieved through legislation explicitly affirming that the 14th Amendment applies fully to U.S. territories, ensuring that residents receive the same constitutional protections as U.S. citizens in the states.[166] This could take the form of a Territorial Equal Rights Act, which would declare that all constitutional provisions, including the Equal Protection and Due Process Clauses, apply uniformly across states and territories. Such legislation could be framed as a civil rights measure, emphasizing that the *Insular Cases* perpetuate outdated, racially motivated doctrines that deny territorial residents fundamental rights. Especially with the current state of congressional controversy, it would be difficult to build bipartisan support.[167] However, Congress could highlight how territorial residents serve in the U.S. military, pay federal taxes in certain circumstances, and contribute to the national economy while remaining excluded from key legal protections.[168] Advocacy efforts might effectively involve congressional hearings, testimony from constitutional scholars and territorial leaders, and pressure from civil rights organizations. If enacted, this law would effectively nullify the legal basis of the *Insular Cases*, requiring courts to apply

165. *See* United States v. Vaello Madero, 596 U.S. 159, 171 (2022) (Thomas, J., concurring) (expressing intent to rule that there should not be an equal projection component to the Fifth Amendment).

166. U.S. CONST. art. I, § 1.

167. The current presidential administration "has been expanding [their] own executive authority and steamrolling Congress as [they] tr[y] to shrink the government and rid it of anyone [they perceive] to be disloyal." Scott Wong, Sahil Kapur, & Ryan Nobles, *Republicans Take a Back Seat as Trump Steamrolls Congress with Flurry of Unilateral Moves*, NBC NEWS (Feb. 3, 2025), https://www.nbcnews.com/politics/congress/republicans-back-seat-trump-steamroll-congress-unilateral-moves-rcna190465.

168. *See* Vendrell-Polanco, *supra* note 6, at 578–79 ("Today, Puerto Ricans remain a big presence in the US military . . . . While serving for any branch of the US Military, Puerto Rican service members must pay federal income taxes as well as Puerto Rican income taxes, as they are considered federal workers employed by the US government. This means that they, unlike any other service member, must pay a double taxation. The same is true for all federal workers residing in Puerto Rico. Any resident of Puerto Rico who is employed by the US federal government, whether it be a district judge or an agency employee, must pay both federal and Puerto Rican income taxes.").

the Fourteenth Amendment equally across all U.S. jurisdictions and eliminating the arbitrary distinction between incorporated and unincorporated territories.[169]

This Article recognizes the consequences of such a monumental shift in policy. Overriding the *Insular Cases* through congressional action would represent a major shift in United States policy, fundamentally altering the legal framework that has governed U.S. territories for over a century. For decades, the courts have relied on the distinction between incorporated and unincorporated territories[170] to justify the selective application of constitutional rights, allowing Congress to legislate for territories under a different set of rules than for the states. Eliminating this framework would require significant clarifications in constitutional application, particularly in areas such as citizenship, voting rights, equal protection, and access to federal benefits. But more importantly, eliminating this framework must anticipate taking into account the cultures, opinions, input, and the self-determination intent of each territory—some of whom do not wish to change the status quo.[171] Questions would arise regarding whether territorial residents gain full birthright citizenship under the Fourteenth Amendment, whether they can vote in presidential elections, and whether they should receive the same federal benefits and legal protections as residents of the states. Additionally, issues of criminal procedure, jury trials, and due process would need to be revisited, as some territories currently operate under distinct legal systems.[172] This shift would not only force the judiciary to reinterpret longstanding precedents but would also require Congress to reevaluate how federal laws and programs apply to territories, marking one of the most significant expansions of constitutional protections in U.S. history.

Another option might include more protection for the statutory citizenship that many of the territorial residents currently hold. Statutory citizenship could be strengthened through congressional amendment of 8 U.S.C. § 1401, explicitly recognizing that birthright citizenship under the 14th Amendment applies to all individuals born in U.S. territories whose governments desire such a protection.[173] While residents of Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands currently

169. *See* Downes v. Bidwell, 182 U.S. 244, 288 (1901) (White, J., concurring).

170. *Id.*

171. *See* Vendrell-Polanco, *supra* note 6, at 593 ("American Samoa, for example, has gone so far as to insert itself as an interested party in a case regarding citizenship for its inhabitants. In that case, the American Samoan government argued against any changes to its own current unincorporated territorial arrangement, because it may endanger its fundamental, traditional practices."); s*ee* Fitisemanu v. United States, 1 F.4th 862, 865 (10th Cir. 2021) ("Also in opposition [were] the intervenor-defendants ('Intervenors'), elected officials representing the government of American Samoa, who argue that not only is the current arrangement constitutional, but that imposition of birthright citizenship would be against their people's will and would risk upending certain core traditional practices.").

172. *See* Balzac v. Porto Rico, 258 U.S. 298, 309 (1922) (detailing a landmark case regarding jury trials in Puerto Rico, where the U.S. Supreme Court ruled that the Sixth Amendment right to a jury trial does not automatically apply to unincorporated territories like Puerto Rico, meaning residents of Puerto Rico are not guaranteed a jury trial in all criminal cases).

173. 8 U.S.C. § 1401.

hold statutory U.S. citizenship, their status is dependent on congressional action and could theoretically be revoked, as it is not constitutionally guaranteed.[174] Meanwhile, residents of American Samoa remain classified as U.S. nationals, following the decision in *Fitisemanu v. United States*,[175] which held that the Citizenship Clause of the 14th Amendment does not extend to unincorporated territories.[176] To remedy this in territories that vote in favor of birthright citizenship,[177] Congress could pass an amendment to 8 U.S.C. § 1401, explicitly affirming that all persons born in U.S. territories are natural-born U.S. citizens under the 14th Amendment, rather than relying on legislative grants of citizenship that vary by territory.[178] This change would ensure that citizenship cannot be revoked by future congressional action, providing permanent constitutional protections to territorial residents and reinforcing the principle that all people born under the U.S. flag are equally entitled to the rights and privileges of citizenship. It is worth mentioning yet again that these efforts should be led by discussions of what kind of self-determination the local residents of each territory desire. But the option must be presented—that is what true democracy requires.

As I've written about before, specifically regarding Puerto Rico, United States territories lack representation in Congress, as well as the Electoral College.[179] A constitutional amendment or statutory expansion of the Voting Rights Act could address voting disenfranchisement in U.S. territories, allowing territorial residents to vote in presidential elections and have full congressional representation.[180] Additionally, Congress could offer pathways to statehood (e.g., for Puerto Rico) or enhanced self-governance (such as free association or independence), allowing territories to determine their political futures and legal status under U.S. law.[181] Judicial remedies might be less effective.

B. Judicial Remedies

There has continued to be a resurgence of scholarship surrounding the *Insular Cases*, particularly after Gorsuch's concurrence in *Vaello Madero*, stating that it is past time for the *Insular Cases* to be overruled.[182] However, even if the Supreme Court could explicitly overturn the *Insular Cases*, which established the distinction between incorporated and unincorporated territories,[183] a ruling affirming that the entire Constitution

174. *See* Vendrell-Polanco, *supra* note 6, at 572.
175. 1 F.4th 862 (10th Cir. 2021).
176. *See id.* at 865.
177. Which American Samoa has expressly stated they do not want. *See* Vendrell-Polanco, *supra* note 6, at 593.
178. *See* 8 U.S.C. § 1401.
179. Vendrell-Polanco, *supra* note 6, at 605.
180. *Id.*
181. *Id.* at 566.
182. United States v. Vaello Madero, 596 U.S. 159, 180, 184–86 (2022) (Gorsuch, J., concurring) (condemning the *Insular Cases* in his concurrence in this same decision).
183. *See* Downes v. Bidwell, 182 U.S. 244, 288 (1901); U.S. CONST. art. IV, § 3, cl. 2.

applies to all U.S. territories might eliminate disparities in the application of the Fourteenth Amendment, but may be extremely difficult to actually implement. If the *Insular Cases* were overturned outright, Congress and the courts would face an immediate and overwhelming need to determine how constitutional rights apply to territorial residents, potentially leading to legal uncertainty, conflicting rulings, and years of administrative challenges in implementation. Such a scenario could result in policy gridlock, as lawmakers and courts struggle to reconcile long-standing disparities with newly recognized constitutional protections. While ensuring full constitutional rights for the people of the territories is a necessary and just goal, an incremental approach may offer a more structured and effective path forward. A phased legislative framework—establishing a clear timeline for extending specific rights and protections—could help manage the transition in an organized and enforceable manner. This approach would allow Congress to address critical rights systematically, ensuring that territorial residents receive full constitutional protections without triggering unnecessary administrative or legal crises.

A legal challenge under the Equal Protection Clause to the exclusion of U.S. territories from presidential elections and congressional representation could provide a pathway for the Supreme Court to reconsider the political status of territories in federal elections. Currently, residents of Puerto Rico, Guam, the U.S. Virgin Islands, the Northern Mariana Islands, and American Samoa cannot vote for the President and lack voting representation in Congress, despite being subject to U.S. federal laws and, in some cases, federal taxation.[184] A case could be brought by territorial residents arguing that this exclusion constitutes unconstitutional discrimination, particularly when compared to U.S. citizens residing in Washington, D.C., who have been granted presidential voting rights through the 23rd Amendment.[185] The Supreme Court, if it were to take up such a case, would need to examine whether the current structure violates the fundamental principle of equal representation and decide whether the rationale satisfies the appropriate scrutiny, without at the same time upholding the same *Insular Case* framework that the Territorial Clause rules.[186] A ruling in favor of territorial voting rights could compel Congress to either extend Electoral College participation and congressional representation to territorial residents or propose a constitutional amendment to rectify the disenfranchisement. Such a decision would have far-reaching implications, potentially forcing the federal government to reassess the status and rights of

184. Vendrell-Polanco, *supra* note 6, at 581.

185. *See id.*

186. Which it has upheld several times in the last 5 years. *See* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 590 U.S. 448, 453 (2020) (ruling that the members could be appointed "without Senate confirmation" because of the Territorial Clause); *see also* Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc., 598 U.S. 339, 351 (2023) (ruling that a federally created Board controlling Puerto Rico's finances enjoys sovereign immunity as a function of the Puerto Rican government without expressly ruling that the Puerto Rican government holds sovereign immunity).

territorial residents within the broader framework of American democracy.

Both legislative and judicial remedies are essential to resolving disparities in the application of the Fourteenth Amendment to U.S. territories. While Congressional action could provide immediate protections, a Supreme Court ruling overturning the *Insular Cases*, while possibly chaotic, might offer a permanent constitutional resolution. The path forward likely requires a combination of legislative advocacy, litigation, and political mobilization by territorial residents and allies.

CONCLUSION

The lack of full constitutional protections—from either the Fourteenth Amendment or the Fifth Amendment's equal protection component—for residents in the U.S. territories directly contradicts the fundamental principles of equality enshrined in American law. By denying more than three million U.S. citizens the same safeguards that apply to residents of the fifty states, the government perpetuates a glaring discrepancy in rights and benefits. This is not merely a technical oversight; it is a systemic inequity that would be plainly unconstitutional if imposed on citizens living in any of the fifty states. It undermines the very premise of equal protection—that all citizens, regardless of where they reside under the American flag, should be treated alike under the law.

Moreover, maintaining disparate treatment has practical consequences that extend beyond abstract legal questions. When significant portions of the population find themselves subject to second-class constitutional treatment, it erodes public trust in our institutions and undercuts the notion that American citizenship guarantees universal rights.[187] As Justice Harlan famously warned, sustaining a "colonial system" is at odds with the republican ideals upon which the nation was founded.[188] This arrangement also restricts the avenues through which territorial residents can effectively advocate for changes to their status—absence of voting representation in Congress, exclusion from presidential elections, and limited judicial recourse, all of which are compounded by Congress's plenary power over the territories—leaving them politically marginalized despite fighting

187. Today, when the denaturalization statutes function as an anonymous, arbitrary enforcement tool, used to target some of the most vulnerable communities in the country, it is time to pull back and reckon with the nation's constitutional conscience. OPEN SOC'Y JUST. INITIATIVE, UNMAKING AMERICANS: INSECURE CITIZENSHIP IN THE UNITED STATES 6–7 (2019), https://www.justiceinitiative.org/uploads/e05c542e-0db4-40cc-a3ed-2d73abcfd37f/unmaking-americans-insecure-citizenship-in-the-united-states-report-20190916.pdf.

188. "[T]he fathers never intended that the authority and influence of this nation should be exerted otherwise than in accordance with the Constitution. If our government needs more power than is conferred upon it by the Constitution, that instrument provides the mode in which it may be amended and additional power thereby obtained. The People of the United States who ordained the Constitution never supposed that a change could be made in our system of government by mere judicial interpretation." *See Downes*, 182 U.S. at 386–87 (Harlan, J., dissenting).

in wars, contributing to the economy, and upholding the responsibilities of citizenship.[189]

In view of this persistent injustice, there is a growing call for courts and policymakers to recognize that the Constitution should follow the flag.[190] Where the United States exercises sovereignty, the Constitution's protections must be fully acknowledged and enforced. In that way, Americans living in the territories—who already bear the obligations and burdens of citizenship—can be assured the same fundamental rights that their fellow citizens enjoy in the fifty states. Anything less falls short of our country's promise of equal justice under the law and risks weakening the democratic ideals that unify our diverse nation.

189. Territorial residents have served and continue to serve in the United States military at great numbers. *Puerto Rico and American Samoa Information for Active Duty Members of the U.S. Armed Forces and Certain Other U.S. Government Employees Using Pub. 570*, INTERNAL REVENUE SERV., https://www.irs.gov/forms-pubs/puerto-rico-and-american-samoa-information-for-active-duty-members-of-the-us-armed-forces-and-certain-other-us-government-employees-using-pub-570 (last visited Aug. 28, 2025). Additionally, they must register for selective service into the U.S. military. *Who Needs to Register*, SELECTIVE SERV. SYS., https://www.sss.gov/register/who-needs-to-register/ (last visited Aug. 28, 2025).

190. *Downes*, 182 U.S. 244.