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The Flag Can Travel but the Constitution Must Ask Permission: How the First Circuit and the District for Puerto Rico Commit to Equal Protection Without Abandoning the *Insular Cases* Doctrine

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For American citizens, one of the most important safeguards guaranteed by the Constitution of the United States is the equal protection of the law. The United States prides itself on the doctrine and jurisprudence of equal protection because of the social progression achieved since the end of the Civil War. The Reconstruction Amendments to the Constitution eliminated the institution of slavery and were supposed to guarantee equal civil and legal status to all citizens. The Constitution, however, has not been consistently interpreted in this way since the end of the Spanish-American War in 1898. The nation emerged from this conflict with a renewed colonial prerogative and with newly acquired territories overseas: Puerto Rico, Guam, and the Philippines. The acquisition of new territory, populated by peoples of wholly different cultures to those of the Anglo-Saxon, European-American political elites of Washington, D.C., necessitated an approach to government that was politically and legally rejected since the founding of the na-

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tion: colonialism. In Puerto Rico and later unincorporated territories—those not intended for eventual statehood—colonial governance meant political and social subjugation. The Supreme Court legitimized the federal government's colonial plans in a series of decisions beginning in the late 19th century, known as the Insular Cases. These decisions influence the legal status of American citizens residing in the unincorporated territories and allow the federal government to evade the constitutional mandate of equal protection of the law. This Note discusses the racist logic of the Insular Cases and the vestiges of colonial appropriation of the unincorporated territories, reflected in the exclusion of Puerto Ricans from the Supplemental Security Income program. In United States v. Vaello-Madero, the District Court for the District of Puerto Rico and the First Circuit Court of Appeals rejected the federal government's exclusion of Puerto Ricans from that program, arguing that equal protection of the law, embodied in the Fifth Amendment's Due Process Clause, does not allow the federal government to abuse its constitutional power under the Territory Clause to regulate the unincorporated territories. This Note concludes, however, that Vaello-Madero is not a vehement rejection of the Insular Cases and their jurisprudential progeny and that it remains unlikely for the Supreme Court to undo its labor from the late 19th and early 20th century, when its opinions treating the subject of the territories were heavily marked by notions of Social Darwinism and racism. Nonetheless, Vaello-Madero is a promising hint that the federal judiciary is sensitive to the inconsistent application of the guarantee of equal protection throughout the U.S. territories overseas and is willing to resist the Insular Cases doctrine.

> It happened a long time ago an' I don't raymimber clearly how it came up, but some fellow said that ivrywhere th' constitution wint, th' flag was sure to go. 'I don't believe wan wurrud iv it,' said th' other fellow. 'Ye can't make me think th' Constitution is goin' thrapezin' around ivrywhere a young liftnant in th' ar–rmy takes it into his head to stick a flag pole. It's too old. It's a homestayin' Constitution with a blue coat with brass buttons onto it, an' it walks with a goold–headed cane. It's old an' it's feeble an' it prefers to set on th' front stoop an' amuse th' childher. It wudden't last a minyit in thim thropical climes. 'T wud get a pain in th' fourteenth amindmint an' die before th' doctors cud get ar–round to cut it out . . . ' 'But,' says th' other, 'if it wants to thravel, why not lave it?' 'But it don't want to.' 'I says it does.' 'How'll we find out?' 'We'll ask th' Supreme Court. They'll now what's good f'r it.'
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> – Finley Peter Dunne, Mr. Dooley's Opinions (1901)[1]

[1]FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 21–22 (R.H. Russell 1901). Speaking in a thick Irish brogue, Mr. Dooley commented on the popular question of whether the "Constitution follows the flag" as the United States expanded into new territories beyond the continental shores. This observation was made in a discussion surrounding the nature of the *Insular Cases*.

I. INTRODUCTION

Puerto Rico faces unprecedented challenges. The Island, which is a United States territory,[2] has experienced a sharp decline in government revenues.[3] Commencing in 1996, the Federal Government "scaled back" a series of tax credit incentives for American corporations doing business in Puerto Rico.[4] The progressive cancellation of tax credit incentives culminated in 2006, after which the Puerto Rican government "increasingly turned to the debt markets" to obtain funding for government spending.[5] According to the United States Government Accountability Office, between the fiscal years 2005 and 2014, Puerto Rico's public debt grew from $39.2 billion to $67.8 billion, representing 66% of its Gross Domestic Product (GDP).[6] In January 2016, Puerto Rico defaulted on its public debt.[7] By then, Puerto Rico's fiscal crater had grown to $72 billion.[8] That same year, Congress passed the Puerto Rico Oversight, Management and Economic Stability Act (PROMESA) to address Puerto Rico's default and fiscal responsibilities.[9]

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[2] Tim Webber, *What Does Being A U.S. Territory Mean For Puerto Rico?*, NPR (Oct. 13, 2017, 4:39 AM), https://www.npr.org/2017/10/13/557500279/what-does-being-a-u-s-territory-mean-for-puerto-rico.

[3] Javier Balmaceda, *Long in Recession, Puerto Rico Needs More Than Just COVID-19 Relief to Overcome Its Crises*, CTR. ON BUDGET & POL'Y PRIORITIES 1 (May 7, 2020), https://www.cbpp.org/sites/default/files/atoms/files/5-7-20econ.pdf.

[4] Diane Lourdes Dick, *U.S. Tax Imperialism in Puerto Rico*, 65 AM. U.L. REV. 1, 7 (2015).

[5] *Id*.

[6] U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-160, U.S. TERRITORIES PUBLIC DEBT OUTLOOK 12 (2017).

[7] Mary Williams Walsh, *Struggling Puerto Rico Defaults on Its Debt Payments*, N.Y. TIMES (Jan. 5, 2016), https://www.nytimes.com/2016/01/05/business/dealbook/puerto-rico-defaults-on-debt-payments.html.

[8] *Id*.

[9] Patricia Guadalupe, *Here's How PROMESA Aims to Tackle Puerto Rico's Debt*, NBC NEWS (June 30, 2016, 1:39 PM), https://www.nbcnews.com/news/latino/here-s-how-promesa-aims-tackle-puerto-rico-s-debt-n601741 ("It creates a fiscal control board comprised of seven members. The board would not be accountable to the island government and would have control over Puerto Rico's budget, laws, financial plans, and regulations. The control board has the power to force the island government to balance its budget and force a restruc-

As of 2019, the percentage of Puerto Rico residents who live in poverty is approximately 43%.[10] According to the U.S. Census Bureau, "poverty in Puerto Rico is still much higher than the U.S. national rate of 13.1% and is more than double the poverty rate of 19.7% in Mississippi," the state with the "highest poverty rates in 2018."[11] Additionally, Puerto Rico's population is becoming older due to a combination of declining birth rates and emigration of young residents.[12]

At the same time, Puerto Rico exhibits a higher rate of adults with some type of disability than the United States.[13] Adult Puerto Rican residents show higher levels of "select functional disability types," showing higher rates of mobility, cognition, independent living, hearing, vision, and self–care limitations than adults in the United States.[14] As of late 2020, Puerto Ricans on the Island, who are U.S. citizens,[15] did not receive the same federally–funded disability benefits as citizens in the States.[16] In fact, the Puerto Rican government resorted to the municipal bond market to fund its Medicaid budget.[17] In 2016, debt accrued to provide for disabled residents' healthcare "constitute[d] an estimated one–third of Puerto Rico's massive $70 billion of outstanding bonds."[18] Instead of receiving Supplemental Security Income (SSI) benefits, Puerto Ri-

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turing with bondholders . . . and other creditors if an agreement is not reached.").

[10] *QuickFacts: Puerto Rico*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/PR (last visited Nov. 7, 2021).

[11] Brian Glassman, *A Third of Movers from Puerto Rico to the Mainland United States Relocated to Florida in 2018*, U.S. CENSUS BUREAU (Sept. 26, 2019), https://www.census.gov/library/stories/2019/09/puerto-rico-outmigration-increases-poverty-declines.html.

[12] *Puerto Rico's Nutrition Assistance Program Helps Seniors*, CTR. ON BUDGET & POL'Y PRIORITIES 1, 2 (2020), https://www.cbpp.org/sites/default/files/atoms/files/6-11-20fa3.pdf.

[13] *Disability Impacts Puerto Rico*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/puerto-rico.html (last updated Jun. 28, 2021).

[14] *Id*.

[15] Jones–Shafroth Act, ch. 145, 39 Stat. 951, 953 (1917).

[16] Robin Respaut, *The disabled in Puerto Rico fend for themselves after decades of U.S. neglect*, REUTERS (Dec. 9, 2016, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-puertorico-disability/.

[17] *Id*.

[18] *Id*.

cans received a "meager and nearly forgotten federal program from the 1960s, called Aid to the Aged, Blind, or Disabled" (AABD).[19] Ordinarily, elderly, blind, and disabled United States citizens "living in any of the 50 states, Washington, D.C., and the Mariana Islands," who "struggle financially" receive SSI benefits.[20] However, Puerto Rican residents are not eligible to receive SSI benefits.[21]

The available assistance for disabled Puerto Rican residents is inadequate, especially when compared to the benefits that other disabled citizens receive in the continental United States and the Mariana Islands.[22] For instance, under AABD, Puerto Rican residents must earn $65 or less per month to be financially eligible for the program.[23] Meanwhile, individuals eligible for SSI benefits must earn $750 or less to satisfy financial requirements.[24] Furthermore, Puerto Rican residents who qualify for AABD receive, on average, $77 per month in assistance while SSI beneficiaries receive an average of $533.[25]

There is a territorial disparity between Puerto Rico, whose residents are not eligible to receive SSI benefits, and the States (and the Northern Mariana Islands), whose residents are eligible for SSI.[26] It is difficult to explain this discrepancy in treatment without understanding Puerto Rico's complicated territorial status.[27] Puerto Rico is neither independent, nor a state of the United States; rather,

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[19] *Id*.

[20] Danica Coto, *US court upholds SSI for Puerto Ricans in key ruling*, ABC NEWS (Apr. 10, 2020, 7:05 PM), https://abcnews.go.com/International/wireStory/us-court-upholds-ssi-puerto-ricans-key-ruling-70095490.

[21] *Id*.

[22] *See id.*

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] WILLIAM R. MORTON, CONG. RSCH. SERV., IF10482, SUPPLEMENTAL SECURITY INCOME (SSI) 3 (2020).

[27] *See* Samuel Issacharoff et al., *What Is Puerto Rico*?, 94 IND. L.J. 1, 2 (2019) ("The events of the day, from hurricane relief to debt restructuring, brought to public attention uncertainty about what it means to be a "Commonwealth," a legal status unmentioned in the U.S. Constitution, a word that lacks a direct translation into Spanish, and indeed a concept without a terribly clear meaning in English.").

it is a commonwealth, the meaning of which is hotly debated.[28] Puerto Rico's unprecedented status is due to 20th century legislation legitimized by the Supreme Court in the infamous *Insular Cases*.[29] The Foraker Act, the Jones–Shafroth Act, Public Law 600, and Public Law 447 crafted a colonial regime[30] whereby the Puerto Rican government lacks true sovereignty.[31] Furthermore, the *Insular Cases* sanctioned the federal government's colonial project and recognized Puerto Rico as a foreign territory "in a domestic sense," legalizing unequal treatment of the laws in the territories.[32] However, the fact remains that Puerto Ricans are United States citizens.[33]

Recognizing this, the District Court for the District of Puerto Rico and the First Circuit Court of Appeals held that it was unconstitutional to exclude Puerto Rican residents from SSI benefits because equal protection of the law and due process guarantees of the Constitution apply equally in the States and in unincorporated territories.[34] As a result, *United States v. Vaello-Madero* elevates Puerto Rico's status, and that of other United States unincorporated territories, vis–à–vis the states and incorporated territories, and signals a shift towards limiting the federal government's capacity to "abuse the territories" by denying them equal rights.[35] Neverthe-

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[28] R. SAM GARRETT, CONG. RSCH. SERV., R44721, POLITICAL STATUS OF PUERTO RICO: BRIEF BACKGROUND AND RECENT DEVELOPMENTS FOR CONGRESS 5–6 (2017).

[29] Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 YALE L. REV. 57, 58 (2013) ("These cases authorized the colonial regime created by Congress, which allowed the United States to continue its administration—and exploitation—of the territories acquired from Spain after the Spanish–American War of 1898").

[30] *Cf. id.* (referring to the colonial relationship created by legislation after 1898, including the Foraker legislation, Jones–Shafroth legislation, Public Law 600, and Public Law 447).

[31] Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REV. JUR. U.P.R. 225, 235 (1996).

[32] *See id.* at 249–50 (explaining Justice White's incorporation doctrine, which later became a central component of the *Insular Cases* doctrine).

[33] Jones–Shafroth Act, ch. 145, 39. Stat. 951, 953 (1917).

[34] United States v. Vaello-Madero, 356 F. Supp. 3d 208, 215 (D.P.R. 2019); United States v. Vaello-Madero, 956 F.3d 12, 31 (1st Cir. 2020).

[35] *See* Mark Joseph Stern, *Judge Blocks Discrimination Against Puerto Ricans, Says Federal Government Is Engaging in "Citizenship Apartheid,"*

less, the federal government has already petitioned for a writ of certiorari to appeal the First Circuit's decision in the Supreme Court.[36] There is much uncertainty, however, surrounding how the Supreme Court would handle an appeal of *Vaello-Madero*, especially because a conservative–appointed majority could "rush to strike down or hollow out long–standing liberal precedents,"[37] like *United States v. Windsor*,[38] where Justice Kennedy reiterated a longstanding principle of equal protection analysis: "The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."[39]

Nonetheless, the Supreme Court has avoided addressing the jurisprudential quagmire that the *Insular Cases* present, even when directly asked to do so, making it unlikely that the Court will explicitly reverse any portion of the *Insular Cases* doctrine.[40] Further decreasing the likelihood that the Justices will offer any direct pronouncements against the *Insular Cases*, *Vaello-Madero* does not rely directly on a rejection of the *Insular Cases* doctrine to strike down the government's effort to treat residents of Puerto Rico differently from residents of the States and the Northern Mariana Islands.[41] Consequently, even if the Supreme Court agrees with the First Circuit, it is unlikely that it will undo the principles from the *Insular Cases*.[42]

SLATE (Feb. 5, 2019, 5:36 PM), https://slate.com/news-and-politics/2019/02/puerto-rico-social-security-benefits-gelpi-ruling-citizenship-apartheid.html.

[36] Brief for Petitioner–Appellant at 1, United States v. Vaello-Madero, No. 20–303 (Sup. Ct. Sept. 4, 2020) [hereinafter Brief for Petitioner].

[37] Amelia Thomson–DeVeaux & Laura Bronner, *How A Conservative 6–3 Majority Would Reshape The Supreme Court*, FIVETHIRTYEIGHT (Sept. 28, 2020, 6:00 AM), https://fivethirtyeight.com/features/how-a-conservative-6-3-majority-would-reshape-the-supreme-court/.

[38] Stern, *supra* note 35.

[39] United States v. Windsor, 570 U.S. 744, 770 (2013) (citing Dep't of Agric. v. Moreno 413 U.S. 528, 534–35 (1973)).

[40] *See* Adriel I. Cepeda Derieux & Neil C. Weare, *After* Aurelius*: What Future of the Insular Cases?*, 130 YALE L.J. F. 284, 285 (2020).

[41] *Id.* at 305.

[42] *See id.* at 286 ("The Court declined to extend the *Insular Cases* and seemed to question 'their continued validity,' but it still dismissed the request to 'overrule the much–criticized' decisions 'and their progeny.'"). *See also* Lyle Denniston, *Constitution Check: Are the Insular Cases Still Binding, After a Cen-*

Vaello-Madero stands for the proposition that fundamental constitutional protections apply in the unincorporated territories, like Puerto Rico, even where there is no explicit congressional proclamation extending the same to these lands.[43] *Vaello-Madero* implicitly represents the judiciary's stance against the incorporation doctrine derived from Justice White's concurring opinion in *Downes v. Bidwell*,[44] which developed to threaten even the most fundamental guarantees in the Constitution when applied in unincorporated territories.[45] While *Vaello-Madero* does not signal the end of the *Insular Cases* doctrine,[46] it does represent a more restrictive reading of the powers granted to Congress by the Territorial Clause and a limitation of overtly racist 20th century jurisprudence regarding the governance of the unincorporated territories.[47]

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tury?, NAT'L CONST. CTR. (Jun. 17, 2016), https://constitutioncenter.org/blog/constitution-check-are-the-insular-cases-still-binding-after-a-century (The Supreme Court has relied upon legal principles derived from the *Insular Cases* despite the impetus of modern civil rights advocacy to "advance the constitutional protection for people in the territories" by urging the Court to abandon such outdated jurisprudence.).

[43] United States v. Vaello-Madero, 356 F. Supp. 3d 208, 213 (D.P.R. 2019).

[44] Rivera Ramos, *supra* note 31, at 247–48.

[45] *See* Marybeth Herald, *Does the Constitution Follow the Flag Into United States Territories or Can It Be Separately Purchased and Sold*, 22 HASTINGS CONST. L.Q. 707, 712 (1995).

[46] *See Vaello-Madero*, 356 F. Supp. 3d at 212 (stating that the opinion will not address the complicated constitutional questions surrounding Puerto Rico's political status).

[47] *See id.* at 210–11; *see also* United States v. Vaello-Madero, 956 F.3d 12, 17–18 (1st Cir. 2020); *see also* Rivera Ramos, *supra* note 31, at 289 ("The discourse of the *Insular Cases* incorporated many of the notions that constituted what I have termed the 'ideology of expansion.' First of all, it was overtly racist. In *Downes*, Justice Brown expressed:

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.

The obvious racism of the Court's expressions cannot be separated from others reflecting an adherence by some members of the Court to the tenets of the ideologies of Manifest Destiny and Social Darwinism, which were part of the ideological framework of the dominant circles in the United States at the time.").

This Note will analyze the issue of Puerto Rico's constitutional status and the role of the *Insular Cases* through an examination of the District Court for the District of Puerto Rico's decision in *United States v. Vaello-Madero* and the First Circuit's affirmation. To aid comprehension of the legality of the federal government's treatment of American citizens in Puerto Rico, Part II will outline the relationship that exists between the United States and Puerto Rico, with a particular emphasis on legislation *appropriating*—not *incorporating*—the Island into the U.S. constitutional framework. Understanding the distinction between appropriation and incorporation is key to accurately perceive the degree to which constitutional protections attach to citizens residing in the territories.

Part III will examine how American jurists approached the question of governance of the territories at the beginning of the 20th century to provide an ideological background to the *Insular Cases*. This analysis will provide the reader with a summary of the salient issues that preeminent legal minds and decision–makers faced in the aftermath of the Spanish–American War, compelling the creation of a framework to organize the relationship between mainland states and the acquired islands. The conclusions drawn at this point in history directly influenced foundational Supreme Court decisions, known as the *Insular Cases*, cementing the jurisprudential thinking of the early 20th century regarding the rights of Anglo–Saxon majorities in relation to the new Hispanic, Pacific–Islander, and Asian subjects. Part III will then analyze the relevance of the *Insular Cases*, explaining how constitutional guarantees apply to residents of unincorporated territories. Particular attention will be dedicated to the development and influence of the territorial doctrine and how it has evolved to deprive U.S. subjects of fundamental constitutional guarantees.

Part IV will present the *Vaello-Madero* decisions and Part V will analyze them in light of precedent and legislation establishing Puerto Rico's status. This analysis will show how *Vaello-Madero* militates against the overexpansion of the *Insular Cases* doctrine by reaffirming that fundamental guarantees, like equal protection of the law and due process, do apply in unincorporated territories. However, it will also show that *Vaello-Madero* is not altogether revolutionary, as it does not advocate for an outright rejection of the *Insular Cases*, and merely promotes a return to the majority's

pronouncement in *Downes v. Bidwell*, which postulated that "certain natural rights" found in the Constitution must extend to all regions under the American flag.[48] Lastly, Part VI will address future possibilities regarding the validity of the *Insular Cases* and the impact of *Vaello-Madero* on the meaning of citizenship and equal protection under the laws.

Comprehending how *Vaello-Madero* contravenes 120–year–old jurisprudence that created a modern colonial system[49] whereby territorial citizens, like Puerto Ricans today, were relegated to second–class status[50] will highlight the implicit understanding among governing circles in Washington that U.S. *citizens* in the territories are not *American* citizens.[51] *Vaello-Madero* is certainly a step in the correct direction to secure the rights of all United States citizens, but it is insufficient to supersede a century's worth of jurisprudential development at the Supreme Court.[52] Modern civil rights advocacy for the territories is pushing the call to reject the *Insular Cases* to the highest court of the land; it is now up to the Supreme Court to decide.

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[48] Downes v. Bidwell, 182 U.S. 244, 282–83 (1901) (discussing the difference between natural rights, like personal liberty, equal protection of the laws and due process, and those rights peculiar to the jurisprudential system of the United States, like citizenship, suffrage, others "unnecessary to the proper protection of individuals.").

[49] *See generally* Rivera Ramos, *supra* note 31 (discussing how the *Insular Cases* created a colonial relationship between the United States and the diverse territories acquired after the Spanish–American War).

[50] 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, 249 (2010).

[51] *See id*. at 249–50 ("[T]he Court's interpretation [in Balzac v. Porto Rico, 258 U.S. 298 (1922),] of the [grant of citizenship to Puerto Ricans] clearly assumes that Puerto Rican U.S. citizens are not the 'American citizens' who could resettle an 'American' state.") (emphasis added). In turn, these implicit understandings of colonial citizens led to a natural conclusion that they were not as deserving of constitutional guarantees as those on the mainland. *See id.*

[52] *Cf. id.* at 256–57 (discussing a case similar in nature to *Vaello-Madero* but underscoring that "the matter remains in the hands of the Supreme Court . . . .").

II. BACKGROUND

A. Puerto Rico's Territorial and Political Status

The United States acquired Puerto Rico from Spain in the aftermath of the Spanish–American War.[53] In the two decades after the conclusion of the war in 1898, it would have been difficult to describe Puerto Rico as anything other than a colony of the United States, which was considered "an international badge of dishonor for America."[54] While U.S. presidents focused on "lectur[ing] other countries about the instabilities of imperial control and the need for self–determination,"[55] Puerto Rico was governed by presidentially–appointed generals between 1898 and 1900.[56] Accordingly, the "military governor in charge of the Army of Occupation" in Puerto Rico was the "administrator of civil affairs" and had the authority to "issue orders with the force of law."[57] Thus, the United States military "controlled" Puerto Rico's "municipal laws and courts."[58] As one scholar commented:

> For two years, between the time that [the Treaty of Paris] was signed in 1898 and the enactment of the Foraker Act in 1900, Puerto Rico became a *part* of the nation. Yet, while Puerto Rico became an integral part of the U.S., the treaty, unlike prior treaties of this nature, *did not provide for the annexation of the island or the naturalization of its inhabitants*. In fact, the open–ended nature of this treaty enabled law and policy makers to invent a new legal status of space that could be located somewhere in between a territory and a possession.[59]

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[53] David Rezvani, *The Basis of Puerto Rico's Constitutional Status: Colony, Compact, or "Federacy"?*, 122 POL. SCI. Q. 115, 115 (2007).

[54] *Id*.

[55] *Id*.

[56] *Military Government in Puerto Rico*, LIBR. OF CONG. (Jun. 22, 2011), https://www.loc.gov/rr/hispanic/1898/milgovt.html.

[57] *Id*.

[58] *Id*.

[59] Charles R. Venator Santiago, Constitutional interpretation and nation building: the Territorial Clause and the Foraker Act, 1787–1900 132 (Sept.

In fact, for the inhabitants of the claimed territories, the most crucial aspect of the peace treaty between the United States and Spain was Article IX, by which Spain surrendered its sovereignty over Guam, the Philippines, and Puerto Rico.[60] Under Article IX, Congress would decide the political status "of the native inhabitants of the territories hereby ceded to the United States."[61]

i. The Foraker Act of 1900: Establishing a Civilian Government in Puerto Rico without Sovereignty or Constitutional Guarantees

On April 12, 1900, Congress enacted the Foraker Act, officially known as the Organic Act of 1900, which "recogni[zed] Puerto Rico as a dependent possession of the United States"[62] and established a civilian government on the Island.[63] Nonetheless, the Foraker Act has been described as a means by which Congress achieved colonialism through legislation.[64] According to Professor Martin J. Collo, the underlying motivations for the Foraker Act were not merely to provide a transition to civilian government, but also to secure an important strategic base in the Atlantic, pursue an "aggressive inter–American trade policy," and commit to bringing the "blessings of civilization" to the Island.[65] Ohio Senator Joseph P. Foraker, sponsor for the legislation, argued: "[T]he sooner this country realizes that it is a power among the nations of the world and wants colonial possessions, the better."[66] Accordingly, a civilian government in Puerto Rico was not the central focus of the Foraker Act; rather, the goal was to delineate "the role of the United

2002) (Ph.D. dissertation, University of Massachusetts Amherst) (on file with author) (emphasis added).

60 *See id*. at 136–38.

61 *A Treaty of Peace between the United States and Spain: December 10, 1898*, AVALON PROJECT, https://avalon.law.yale.edu/19th_century/sp1898.asp (last visited Oct. 25, 2021).

62 Santiago, *supra* note 59, at 127.

63 *See* Foraker Act, ch. 191, 31 Stat. 77, 81–86 (1900).

64 Martin J. Collo, *The Legislative History of Colonialism: Puerto Rico and the United States Congress, 1898 to 1950*, 12 J. OF THIRD WORLD STUD. 265, 268 (1995).

65 *Id.* at 269.

66 *Id.* at 268.

States as a world power."[67] It should be no surprise that the Foraker Act only provided for a civilian government with limited power, as Senator Foraker believed it was important to grant Puerto Ricans "some measure of self–rule," but "only as much as 'it was safe to give them.'"[68] Thus, only the lower chamber of the Island's legislature, the House of Delegates, was to be elected by qualified voters.[69]

While the Foraker Act established a civil government, it made no movement toward granting the Island's residents United States citizenship.[70] Instead, the law states that they ceased to be Spanish subjects but were now "deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States . . . ."[71] Furthermore, the Island's governor and its executive council were to be appointed by the President of the United States.[72] Crucially, the Act subjected Puerto Rico to all laws of the United States[73] and preserved Congress's supremacy over the Island's legislative assembly by providing "[t]hat all laws enacted by the legislative assembly shall be reported to the Congress of the United States, which hereby reserves the power and authority, if deemed advisable, to annul the same."[74] Additionally, the Foraker legislation provided that qualified voters in Puerto Rico would elect a "Resident commissioner to [the] United States."[75] The Resident Commissioner would "be entitled to official recognition as such by all Departments, upon presentation to the Department of State of a certificate of election of the governor of Porto Rico . . . ."[76] but would have no voting power in Congress.[77]

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67 *Id*.

68 *Id.* at 270.

69 Foraker Act, ch. 191, 31 Stat. 77, 83 (1900).

70 *See generally id.* (making no mention of providing residents of Puerto Rico, previously Spanish subjects, with United States citizenship).

71 *Id.* at 79.

72 *Id*. at 81–82.

73 *Id.* at 80.

74 *Id.* at 83.

75 Foraker Act, ch. 191, 31 Stat. 77, 86 (1900).

76 *Id.*

77 Lanny Thompson, *The Imperial Republic: A Comparison of the Insular Territories under U.S. Dominion After 1898*, 71 PAC. HIST. REV. 535, 559 (2002).

The Foraker legislation granted Puerto Rico fewer autonomist powers than what Spain had given to proponents of self–determination rights for the Island in 1897.[78] In the months leading up to the Spanish–American War, Spain attempted to assuage independentist fever in Cuba and Puerto Rico by granting them the right to self–government with the Autonomy Charters of 1897.[79] Puerto Rico's Autonomy Charter granted "a robust form of autonomy, with a local legislature and representation in the [Spanish] Cortes."[80] In that same year, Spain also granted residents of Cuba and Puerto Rico the same rights of Spanish citizens and universal voting rights to all men over twenty–five.[81]

Meanwhile, the Foraker Act subjected all decisions by the Island's legislative assembly to Congressional approval.[82] Additionally, the right to vote was circumscribed by qualifications imposed "under the laws and military orders in force . . . subject to such modifications and additional qualifications and such regulations and restrictions as to registration as may be prescribed by the executive council."[83] The Island's sole elected representative in Congress "had no clearly defined rights or duties" and his status was "practically the same as that of a territorial delegate" or "a nonvoting, second–class member of the House of Representatives."[84] The Foraker legislation also deprived Puerto Ricans of control over the Island's political economy because they had no power to decide

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[78] *See* Collo, *supra* note 64, at 271 ("The reaction of the Puerto Rican political elite to the provisions of the Foraker Act ranged from disappointment to bitter resentment. In view of early U.S. promises of 'liberal institutions' and 'freedoms,' most Puerto Ricans felt defrauded. Not only did Congress grant the island considerably fewer powers of self–governance than were acquired under Spanish rule, but the provisions of the Foraker Act clearly showed that Congress did not intend to prepare the island for eventual statehood.").

[79] *See* Marisabel Brás, *The Changing of the Guard: Puerto Rico in 1898*, LIBR. OF CONG. (Jun. 22, 2011), https://www.loc.gov/rr/hispanic/1898/bras.html.

[80] Christina Duffy Ponsa, *When Statehood Was Autonomy*, *in* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 1, 24 (Gerald L. Neuman & Tomiko Brown–Nagin eds., 2015).

[81] *Autonomy and War*, LIBR. OF CONG., https://www.loc.gov/collections/puerto-rico-books-and-pamphlets/articles-and-essays/nineteenth-century-puerto-rico/autonomy-and-the-war/.

[82] Foraker Act, ch. 191, 31 Stat. 77, 83 (1900).

[83] *Id.*

[84] Thompson, *supra* note 77, at 559.

trade policies or employ tariffs.[85] Consequently, the Foraker Act reversed the majority of the freedoms found in the Autonomy Charter of 1897 and implemented a "system of strict, condescending colonial tutelage" that made Puerto Ricans "dependent wards of the U.S. Congress, without the full guarantees of the U.S. Constitution."[86]

ii. The Jones–Shafroth Act of 1917: Granting United States Citizenship to Puerto Ricans without Incorporating Puerto Rico into the Union

Puerto Rico's second organic law, the Jones–Shafroth Act of 1917, extended a new measure of autonomy and granted United States citizenship to all Puerto Ricans.[87] The Jones–Shafroth legislation extended multiple guarantees, including: due process, equal protection, the right to counsel, habeas corpus, warrant requirements, search and seizure protections, freedom of speech, religious liberty, and prohibitions of ex post facto laws and bills of attainder, among others.[88] Additionally, the law replaced the executive council with an elected senate as the upper chamber of the legislative department of the Island.[89] Most importantly, the law provided "[t]hat all citizens of Porto Rico . . . and all natives of Porto Rico . . . are hereby declared, and shall be deemed and held to be, citizens of the United States."[90] The Jones–Shafroth Act was a definitive step toward cementing the permanence of the "existing relationship" with Puerto Rico, which the Americans believed

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[85] Collo, *supra* note 64, at 272.

[86] *Id.* at 271; *see also* José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391, 396–97 n.12 (1978) ("The status of national, as distinguished from citizen, became a convenient construct for those who favored territorial expansion but did not wish to make the people of the new territory citizens of the United States or otherwise suggest that they might aspire to equality under the American constitutional system.").

[87] Collo, *supra* note 64, at 275.

[88] *See generally* Jones–Shafroth Act, ch. 145, 39 Stat. 951 (1917).

[89] *Id*. at 959 ("Except as herein otherwise provided, the Senate of Porto Rico shall exercise all of the purely legislative powers and functions heretofore exercised by the Executive Council . . . .").

[90] *Id*. at 953.

more tractable and "loyal" than the other 1898 acquisitions.[91] At the same time, the idea that the relationship with Puerto Rico should be perpetuated was reinforced by the "apparent acceptance of colonial rule" in Puerto Rico, given that "expressions of unhappiness with American colonial rule" were "sporadic and modest" and focused on the "limited scope of local self–government," particularly under the Foraker Act.[92] As such, the granting of citizenship was designed as "a means of acknowledging the special place of Puerto Rico among the new colonial territories and of expressing the virtually universal expectation of a permanent relationship."[93]

The grant of citizenship meant that the federal government did not consider independence to be in Puerto Rico's future, and, according to Judge José A. Cabranes,[94] created "a second–class citizenship for a community of persons that was given no expectation of equality under the American system," which in turn "perpetuat[ed] the colonial status of Puerto Rico."[95] In effect, the Jones–Shafroth Act:

> [W]as intended to satisfy Puerto Rican desires for "dignity," while establishing a permanent link between the now strategically important island and the United States. But Puerto Ricans did not receive the same type of citizenship enjoyed by U.S. citizens living on the mainland. Instead, they were awarded a second–class, passive citizenship. The new U.S. citizens in Puerto Rico still remained outside the purview of the protections, rights and liberties of the U.S. constitution. In fact, the U.S. Congress retained the power to determine which rights would

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91 Cabranes, *supra* note 86, at 461 ("The demand for American citizenship on the part of Porto Ricans is genuine and well–nigh universal. It has become a deep popular sentiment, and my experience in the island convinced me that a continued refusal to grant it will gravely wound the sensibilities of this loyal people. It is a practical as well as a sentimental matter. A Porto Rican traveling abroad is literally a man without a country.").

92 *Id.* at 443.

93 *Id* at 444.

94 Judge of the Second Circuit Court of Appeals since 1994.

95 Cabranes, *supra* note 86, at 398.

> be enjoyed by these second–class citizens. Moreover, Puerto Ricans were not granted the right to vote in U.S. presidential elections, nor were they awarded voting representation in the U.S. Congress.[96]

For the first time in American history, prospects of statehood or "the full panoply of rights guaranteed by the United States Constitution" did not accompany the granting of citizenship[97] but it did signal that Puerto Rico belonged to the United States, and, in turn, "affirmed [the United States'] acceptance of the contemporaneous European concept of the ownership of peoples."[98]

iii. Public Law 600 and Public Law 447: Creating the Commonwealth of Puerto Rico without Altering the Colonial Relationship

In the aftermath of the Second World War, "continued colonial prerogatives" became an "international liability" for the United States as a result of the global anticolonialism movement.[99] On July 3, 1950, Congress approved Public Law 600, whereby the United States "fully recogniz[ed] the principle of government by consent . . . so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption."[100] Congress prescribed the mechanism by which Puerto Ricans were to elect local representatives and draft a constitution of their own.[101] The mechanisms of Public Law 600 culminated on July 3, 1952, with Public Law 447 which recognized and approved the "constitution of the Commonwealth of Puerto Rico."[102] In an address to the legislative assembly of Puerto Rico in 1955, Vice President Nixon offered the following about the new form of government:

> To me, it seems that Puerto Rico's Commonwealth status is something new in constitutional governments. Something new in this sense: that at one and

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96 Collo, *supra* note 64, at 276–77.
97 Cabranes, *supra* note 86, at 490.
98 *Id.* at 487.
99 Issacharoff et al., *supra* note 27, at 10.
100 Public Law 600, ch. 446, 64 Stat. 319, 319 (1950).
101 *Id.*; *see also* Issacharoff et al., *supra* note 27, at 10.
102 Public Law 447, ch. 567, 66 Stat. 327, 327 (1952).

> in the same time, Puerto Rico is free; and in spite of the fact, Puerto Rico is associated; a free and associated state. Free because you are, and associated because you want to be.[103]

However, Puerto Rico was not on track to obtaining parity with the states in the Union.[104] Notwithstanding the progressive recognition of Puerto Rico's right to self–governance, "it was clear that what was being created was not a state at all, but something that was without precedent in the history of American jurisprudence."[105] This is made especially visible by Judge Juan R. Torruella,[106] when he remarked that Justice White in *Downes v. Bidwell* "proclaimed that, while 'not a foreign country,' Puerto Rico 'was foreign to the United States in a domestic sense.' This conclusion establishes the untenable . . . concept of a territory that is both foreign and domestic at once."[107]

Furthermore, the purposes of Public Law 600 and Public Law 447 track perfectly with the purposes of the Foraker and Jones–Shafroth legislation: to perpetuate United States' sovereignty over Puerto Rico.[108] Even though Puerto Ricans were allowed to establish the Commonwealth with its own constitution, it did not mean that Puerto Rico was by any means a sovereign nation.[109] Judge

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[103] R.B.S., *Creative Statesmanship vs. the Territorial Clause: The Constitutionality of Agreements Limiting Territorial Powers*, 60 VA. L. REV. 1041, 1065 (1974).

[104] *Id.* at 1065–66 ("Statements in Congress reflecting an intent to make a binding commitment to local autonomy can be countered with statements assuring hesitant congressmen hat the bill 'would not change the status of the island of Puerto Rico relative to the United States . . . [or] alter the powers of sovereignty acquired by the people of the United States over Puerto Rico under the Treaty of Paris.' Such contradictory statements render the legislative history of Public Law 600 highly ambiguous.").

[105] Rezvani, *supra* note 53, at 122.

[106] Chief Judge of the First Circuit Court of Appeals between 1994 and 2001.

[107] Torruella, *supra* note 29, at 71–72.

[108] *See id.* at 80–81.

[109] *Id*. at 80; *see also* Rafael Hernández Colón, *The Evolution of Democratic Governance under the Territorial Clause of the U.S. Constitution*, 50 SUFFOLK U.L. REV. 587, 597 (2017) ("'Both the territorial and federal laws and the courts,' the [Puerto Rico Supreme] Court stated, 'whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty.' Relying on *Shell*, the P.R. Supreme Court concluded that Puerto Rico adopting its own

Torruella notes: "Although the constitutional status of Puerto Rico after this exercise was hotly debated, *constitutionally* speaking, no change was effectuated in its basic colonial relationship with the United States."[110] According to Judge Cabranes, "in permitting the establishment of the Commonwealth of Puerto Rico, Congress expressly disavowed any intention to alter the island's preexisting political relationship with the United States."[111] At the same time, the Puerto Rico Supreme Court recognizes this reality in *Puerto Rico v. Sanchez Valle*, where it stated that Puerto Rico did not cease to be a territory of the United States after enacting its constitution because all of its authority derives from a Congressional grant of power, not from independent sovereignty.[112] Given that Puerto Ricans were granted citizenship and permission to draft their own constitution by Congressional fiat, it is Congress, not the United States Constitution, who determines what rights are granted to the people of Puerto Rico and to what extent they are allowed to enjoy these.[113]

B. The Territorial Clause: Congress's Omnipotent Plenary Powers over the Territories and The Effects on Puerto Ricans

Congress claims to have such plenipotentiary power granted to it by the Constitution via Article IV, Section 3's "Territorial

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constitution by delegation from Congress did not confer sovereignty to Puerto Rico, even though it superseded most of the organic law that established the Puerto Rican territorial government. Despite the presence of its own constitution . . . the power of the Puerto Rican government . . . emanates from the U.S. government, not from its own sovereignty.").

[110] Torruella, *supra* note 29, at 80 ("As cogently summarized by one noted constitutional scholar: 'Though the formal title has been changed, in constitutional theory Puerto Rico remains a territory. This means that Congress continues to possess plenary but unexercised authority over Puerto Rico.' In other words, while Law 600 vested the Puerto Rican people with a measure of direct governance . . . it left wholly unaltered Congress's 'supreme legislative [and administrative] power' over Puerto Rico.").

[111] Cabranes, *supra* note 86, at 491.

[112] *See* Puerto Rico v. Sanchez Valle, 579 U.S. ___ (2016).

[113] *See* Torruella, *supra* note 29, at 73 ("Unfortunately for the inhabitants of the conquered Spanish islands, despite these well–reasoned dissents, the holding in *Downes* laid the grounds for recognition of omnipotent plenary powers in Congress . . . that to this day have allowed the United States to rule over the islands without their consent or their democratic participation.").

Clause."[114] In combination with the provision of Article IX of the Treaty of Paris of 1898, Article IV's Territorial Clause bestows upon Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."[115] However, the precise meaning of the Territorial Clause and how it applies to United States territories has been questioned, and some argue that federal territorial powers can be used for more than "the autocratic creation of nineteenth–century–type territories," like "creative statesmanship" required to create "constitutionally protected spheres of sovereignty" in territories like Puerto Rico.[116] Nonetheless, the federal courts must be the ones to re–shape the meaning of Congress's territorial powers and provide for a more enlightened definition of territorial governance in Puerto Rico.[117]

It is the newly invented legal status of Puerto Rico that operates to deprive its residents equal rights vis–à–vis American citizens in the states.[118] As Professor Linda Bosniak maintains, "citizens and noncitizens are not beings found in nature; they are made and unmade by way of law and politics, and their making and unmaking can have momentous consequences."[119] Logically, then, the concept of citizenship is highly plastic,[120] and in the United

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[114] Rivera Ramos, *supra* note 31, at 235.

[115] U.S. CONST. art. IV, § 4, cl. 2.

[116] Hernández Colón, *supra* note 109, at 603–04 ("Citing *Sanchez Valle*, the court affirmed in *United States v. Maldonado-Burgos* that Law 600 and Law 447, by design, provide Puerto Rico with the degree of autonomy and independence that inheres to states of the Union. The court also posited that Puerto Rico's constitution created a different political status, which is exceptional in nature insofar as Congress relinquished its control over Puerto Rico's internal affairs.").

[117] *Id.* at 604 (discussing how the federal judiciary has recently promoted a more "democratic" understanding of the Territorial Clause, providing more protections for United States citizens in the territories).

[118] *See* Malavet, *supra* note 50, at 189 ("For the territorial citizens this is not a temporary transition on the way to independence, rather it is a permanent status of constitutional inferiority imposed by the U.S. Supreme Court and enforced by the executive and legislative branches now for over one hundred years.").

[119] Linda Bosniak, *Persons and Citizens in Constitutional Thought*, 8 INT'L J. CONST. L. 9, 11 (2008).

[120] *Id.* at 11.

States' constitutional context, it is subject to interpretation by statute and the Supreme Court.[121] In the case of Puerto Rico, Congress, with the aid of the Supreme Court, has warped the means and reasons by which citizenship and incorporation are extended.[122] In the aftermath of America's colonial experiment of the early 20th century, United States citizenship means very little to the rights that Puerto Ricans hold in the American constitutional framework.[123]

This is consequential because, in American constitutionalism, citizenship is the basis upon which individuals assert their claim to many rights and protections guaranteed by the laws and foundational documents.[124] Congress holds the reins of Puerto Rico's status, and with it, the rights of more than three million Puerto Ricans.[125] Without a strong claim to American citizenship, there are little guarantees "in the way of substantive social protection, rights, and responsibilities, and it entails virtually no democratic voice at all."[126] The federal government has recognized the precarious status of Puerto Ricans to argue in favor of its ability to apply consti-

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[121] *Cf.* Lisa María Pérez, *Citizenship Denied: The "Insular Cases" and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1067 (2008) (highlighting the roles of the Supreme Court and Congress when interpreting the Constitution to determine the protections afforded to citizens and conferring citizenship to individuals, respectively).

[122] *See, e.g.*, *id.* at 1039 ("[I]t is within the discretion of the treaty–making powers and Congress to determine the nature of the relationship between a newly acquired territory and the United States. Because Article IX of the Treaty of Paris provided that '[t]he civil rights and political status of the native inhabitants of the territories hereby ceded . . . shall be determined by the Congress,' and Congress had not provided for the incorporation of Puerto Rico into the Union, Justice White concluded that Puerto Rico was an unincorporated territory. As such, the island was not a foreign country . . . .But it was 'foreign to the United States in a domestic sense,' insofar as it was not a member of the American political community. Because Puerto Rico was foreign to the United States under the Constitution, it was a 'necessary consequence' that the Uniformity Clause was 'not applicable to Congress in legislating for Porto Rico.'").

[123] *See* Cabranes, *supra* note 86, at 490.

[124] *See* Bosniak, *supra* note 119, at 15.

[125] *QuickFacts: Puerto Rico*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/PR (last visited Oct. 31, 2021).

[126] Bosniak, *supra* note 119, at 15.

tutional guarantees in some places, but not in others, particularly in the unincorporated territories.[127]

III. THE ROAD TO UNITED STATES V. VAELLO-MADERO

To comprehend the significance of *United States v. Vaello-Madero*, it is necessary to trace the legal history that has situated Puerto Rico within the American constitutional framework and has labeled it a dependency, rather than part of the United States. This section will provide an overview of historical context regarding how the United States approached governing the acquired territories and becoming a colonial authority. This section will also provide an account of the most significant jurisprudence dealing with the rights of the Puerto Rican people and the powers of the Island's government in order to explain *Vaello-Madero*'s nuanced acceptance of the *Insular Cases*.

Preconceptions in American legal, political, and social thinking at the beginning of the 20th century directly influenced the treatment of the newly acquired territories and the rights of their inhabitants.[128] The federal government and Puerto Rico continue to grapple with the consequences of the legal framework created from this basis of racial bias and preconceived notions of political and social underdevelopment in the territories.[129] Therefore, to understand the law, it is important to also understand the federal government's actions at the beginning of the 20th century that led to the development of the *Insular Cases* doctrine.[130]

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[127] Brief for Petitioner, *supra* note 36, at 10–11.

[128] See generally Frederic R. Coudert, Jr., *Our New Peoples: Citizens, Subjects, Nationals or Aliens*, 3 COLUM. L. REV. 13, 13 (1903), for Coudert's understanding of the "colonial problem" that the federal government faced after acquiring the territories in 1898, highlighting the thinking of the era in prominent jurisprudential circles; *see also* Thompson, *supra* note 77, at 539.

[129] Compare Issacharoff et al., *supra* note 27, at 5–7, for a concise summary of how Puerto Rico's status, a product of the *Insular Cases* doctrine, affects multiple facets of life on the island.

[130] *See generally* Torruella, *supra* note 29, at 65–73 (providing a historical and legal timeline of how and why the *Insular Cases* were decided).

A. The Question of Territorial Governance in the Aftermath of the Spanish–American War

Prior to the Spanish–American War, the United States focused on steady expansion of the national territory.[131] Before "Manifest Destiny" emerged in the national lexicon, Americans relentlessly looked ambitiously to the West of the Mississippi for land and resources.[132] After "Manifest Destiny" became emblematic of U.S. expansionist ambitions, the United States waged the Mexican American War, from which the young nation acquired "five hundred thousand square miles" and spread its borders "from the Atlantic to the Pacific Ocean . . . ."[133] Until the United States acquired the Philippine Islands, Guam, and Puerto Rico, all the territories annexed since the founding of the Republic had become States of the Union.[134] According to Professor Lanny Thompson, the United States had until then adhered to a "well established tradition of territorial expansion," which included significant proficiency in "the subjugation of racial minorities on the continent."[135] Thompson specifically refers to African Americans and Native Americans who had been segregated and treated as second class citizens, despite the existence of Due Process and Equal Protection assurances of the Fourteenth Amendment.[136]

Territories acquired before the 20th century "had been intended as European American settler colonies . . . ." but these lands had

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131 *See id.* at 60–62.

132 *Id.* at 61. The term, "Manifest Destiny," was coined by newspaperman John Louis O'Sullivan and became "the rallying cry for U.S. expansionists in the nineteenth century." *Id.* at 60. According to Judge. Torruella, the term "encapsulated a mantra of Darwinian imperialism, containing elements of geopolitical theory, religious righteousness, and economic entrepreneurship aimed at justifying territorial aggrandizement and the conquering, subjugation, and absorption of 'inferior' people and races 'for their own good.'" *Id.* at 60–61.

133 *Id.* at 60–62.

134 *See id.* at 62.

135 Thompson, *supra* note 77, at 536–37 ("By the end of the nineteenth century, African Americans had been socially segregated and effectively excluded from political participation in many states, in spite of the Fourteenth Amendment. Furthermore, American Indians had been decimated, expelled from their lands, or moved to Indian Territory or reservations; at the time they were considered wards of the U.S. government.").

136 *See id.* at 537.

ultimately been admitted to the Union as states.[137] Furthermore, Judge Torruella notes, the Supreme Court's opinion in *Scott v. Sanford*, still valid when the *Insular Cases* were decided between 1901–1922, "clearly expressed the lack of constitutional authority for the United States to rule as a colonial power . . . ."[138] Notwithstanding the Supreme Court's pronouncements about the Republic's lack of constitutional authority to act as a colonial authority, the United States faced an imperial conundrum when it acquired Puerto Rico, the Philippines, and Guam.[139]

In a 1903 Columbia Law Review article, Frederic Coudert, Jr. underscored that the country now controlled what he described as territories "inhabited by a settled population *differing from us* in race and civilization to such an extent that assimilation seems impossible, and *varying among themselves* in race, development, and culture to so great a degree as to make the application of any uniform political system difficult if not impracticable."[140] In the eyes of Americans of the time, the new territories were inhabited by peoples too culturally different and politically underdeveloped to deserve outright incorporation into the Union.[141] Thus, the traditional model of territorial expansion by the addition of states would not be appropriate in the present situation.[142]

i. The Territorial Acquisition and Governance Model Before 1898

The territories acquired after the Louisiana Purchase and the Mexican American War, for instance, were not as densely populated to trigger Coudert's "imperial problem."[143] According to

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137 *Id.*

138 Torruella, *supra* note 29, at 62.

139 Thompson, *supra* note 77, at 537.

140 Coudert, Jr., *supra* note 128, at 13. Coudert became a key player in the battleground over American imperialism when he launched two of the Insular Cases, *DeLima v. Bidwell* and *Downes v. Bidwell*. His impressions on the subject are key to an understanding of the legal and political thoughts surrounding the colonial issue at the beginning of the 20th century.

141 *See id*.

142 *Cf. id.*

143 *See id.* ("It is idle to attempt to find any adequate or guiding precedents in our former territorial acquisitions. The territories transferred from France and Mexico were not sufficiently populated to bring us face to face with the real

Coudert, aside from the fact that the number of people in the territories acquired from France and Mexico was insignificant, these peoples were "largely of Caucasian race and civilization" so that a persistent flow of immigration "soon made the new lands thoroughly American" and the question of imperialism became "academic."[144] More importantly, the concerns over cultural similarity and political sophistication as requisites to incorporation into the American system are salient in Coudert's writing:

> [T]he two civilizations were in fact equal or nearly so, and the treaties, both of Paris (1800) and of Guadalupe Hidalgo (1848), recognized that fact by according to the new inhabitants the rights of *American citizens*. Thus, the problem as to the legal status of the inhabitants of Louisiana and the territory acquired from Mexico was solved or solved itself *ab initio*. The underlying theory upon which both treaties were based was expansion rather than imperialism.[145]

Before the acquisition of Puerto Rico, Guam, and the Philippines, the United States could overpower cultural differences and what they viewed as political underdevelopment with significant population movement.[146] This method of social engineering trans-

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imperial problem, *i.e.*, the domination over men of one order or kind of civilization by men of a different and higher civilization. The Nomad tribes of America presented indeed a problem, but only a passing one . . . .Necessity and the ruthless progress of civilization compelled the opening up and exploiting of the American continent by the overflowing population of Old Europe. The Indian problem was met by taking the land, whether as the result of a bargain or through force as the white man needed it, and the relations of the newcomer with his Nimrod predecessor were gradually reduced to a minor question through the agencies of fire water, gunpowder, and well–intended but unwise policy.").

144 *Id.* at 14.

145 *Id.*

146 Paul Frymer, *"A Rush and a Push and the Land Is Ours": Territorial Expansion, Land Policy, and U.S. State Formation*, 12 PERSP. ON POL. 119, 119 (2014). According to Professor Frymer, the United States accomplished territorial expansion in three phases, including: (1) an assertion by the federal government of legal sovereignty over the "nation's continental borders through a series of diplomatic treatises and purchases signed with recognized nation states . . . .";

formed the character of the population itself, making it more "American;" alternatively, military force could be used to exterminate or forcefully relocate entire populations that did not correspond within the "American" archetype.[147] As a result, the United States could calculate demographic patterns in the sparsely populated and culturally similar territories to make annexation, and the path towards statehood, clearer for the new lands.[148] However, this model of expansionism was made obsolete in 1898.[149]

When the federal government faced integration of a larger, more heterogeneous group of people, it had to make decisions regarding how it "'imagined' the national community" as a product of the political treatment given to the new lands.[150] This situation is more reminiscent of the types of encounters the United States faced with the acquisition of the Spanish colonies in 1898.[151] Professor Paul Frymer underscores the saliency of concerns regarding the race of the inhabitants in the newly acquired territories.[152] He points out that "naturalization laws extended to all Europeans, enabling the relatively swift incorporation of the French population in Louisiana and Germans [sic] settlers in Wisconsin."[153] Meanwhile, he highlights how non–Europeans were given a different kind of treatment; for instance, the Indian Removal Act of 1830 "mandated nearly one hundred thousand people leave their homes for lands

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(2) treaties and "military actions" against Native Americans to "remove hundreds of thousands of people who lived on and held property rights over the land"; and (3) advancement of "a domestic policy agenda" engineered to promote the population, settlement and incorporation of "the vast geographic space into what became, by 1912, the first 48 states." *Id.*

147 *Id.* ("During the first half of the nineteenth century, the territory of the United States nearly tripled in size as the nation expanded across the continent from thirteen Atlantic–side states south to the Rio Grande and west to the Pacific Ocean.").

148 *See id.*

149 *See* Coudert, Jr., *supra* note 128, at 13.

150 Frymer, *supra* note 146, at 120 ("[S]hould these populations be incorporated, should they be removed to areas beyond the incorporated border, or should the nation stop expanding and leave certain populations on the other side of the border? All three of these options were chosen at different times, and race was a critical intervening factor.").

151 *See* Coudert, Jr., *supra* note 128, at 18.

152 *See* Frymer, *supra* note 146, at 120.

153 *Id.*

across the Mississippi River, with reported casualties in the tens of thousands" in direct contravention of democratic ideals.[154]

Coudert contrasts the situations where the United States acquired sparsely populated land, or where the population was mostly of European ancestry, calling for the three–part process Frymer describes, with that which the republic faced after the Spanish–American War.[155] Coudert states that the question about the governance of the acquired Spanish colonies:

> [C]annot be solved either by extermination, as in the case of the Indian, nor by assimilation, as in the case of the few Frenchmen and Spaniards. Neither the methods of Miles Standish nor those of Jefferson will suffice us now. We must move on a heretofore untrodden path and seek for precedent upon which to base intelligent legislation . . . not in our own history, but in that of other nations who have preceded us in attempting to govern non–assimilable peoples.[156]

Consequently, inherent in the approach to how to incorporate the acquired territories after the Spanish–American War, there is a notion of "otherness" permeating political and national thought at the beginning of the 20th century.[157] This notion emphasizes "non–assimilable" cultural differences and presumed political underdevelopment in the acquired territories.[158] "Otherness," as a concept, helps explain the justifications given for embracing a colonial approach to the governance of the acquired territories[159] and the reasons for not applying all constitutional guarantees in these lands.[160]

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154 *Id.*

155 *See* Coudert, Jr., *supra* note 128, at 14.

156 *Id.*

157 Thompson, *supra* note 77, at 538.

158 *See id.*

159 *See id*. at 539–40 ("No doubt the culture of imperialism in the United States drew upon and extended the continental colonial experience in the elaboration of the fundamental alterity of the subject peoples in general. [I]t would seem that the cultural representations of the period . . . demonstrated an acute awareness of the exceptional diversity of the peoples newly under U.S. dominion. Thus, alterity was not only a homogeneous notion, as most of the literature has suggested, but was simultaneously a thoroughly differentiated and hierar-

ii. The Colonial Acquisition and Governance Model Emerges after 1898

In the case of Puerto Rico and the Philippines, the territories "belonged to, but were not a part of, the body politic of the republic" because of the preconceived notion that the islands were "inhabited by peoples of fundamentally different 'races' and 'civilizations who were not capable of self–government.'"[161] Professor Lanny Thompson highlights that the organic laws of these territories—the Foraker Act, the Jones–Shafroth Act, and Public Law 600 in Puerto Rico's case—were watershed moments in the trends underlying American expansionism.[162] These laws essentially created the new system of American imperial colonialism and were a byproduct of racial biases and misconceptions about the levels of social and political development in the territories.[163] Prior to the acquisition of Puerto Rico, Guam, and the Philippines, the federal government pursued expansion through European–American settlement and establishing cultural and political hegemony; this process frequently led to statehood for the acquired lands.[164]

However, the new territories received a new kind of treatment, reminiscent of that under the Indian Removal Act of 1830, because

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chical one. [T]he proposition of the homogeneous other fails to explicate the connections between particular representations of subject peoples and the specific patterns of imperial rule. This is due to the impossibility of addressing *differences* in imperial rule based upon a theory of the *homogeneous* construction of the colonial other.").

[160] *See id.* at 549–51.

[161] *Id.* at 573.

[162] *Id.* ("[F]rom colonialism via settlement to imperialism via political dominion.").

[163] Thompson, *supra* note 77, at 574 ("The creation of different governments for Hawai'i, Puerto Rico, the Philippines, and Guam followed the general principle that operated throughout the imperial archipelago: The multiple imperial subjects were to be ruled differently, according to their level of civilization and capacity for self–government.").

[164] *Id.* at 573 ("Of the insular territories, only Hawai'i approximated the continental experience of European American settlement and local hegemony. For this reason, Hawai'i was the only new territory to be incorporated into the United States and eventually (1959) to be admitted as a state. Hawai'i, then, was a distant frontier of European American settlement, and this distinguished it from the former Spanish colonies acquired in 1898.").

of "essential difference[s]" from previous continental territories.[165] Among these differences, Thompson notes, were their geographical separation from the continental United States, tropical character, dense population, and "alien races," the combination of which created an "inhospitable" environment for potential American immigrants.[166] Thus, Puerto Rico and the Philippines were treated more like British colonies than incorporated territories, like Hawai'i.[167] Thompson explains the political dominion of the territories acquired in 1898:

> The basic structure of these imperial governments resembled that of a territorial government, but one firmly under the control of appointed European American administrators. The executive branch included a presidentially appointed governor and an appointed executive commission. The legislative branch was composed of the same executive commission, which functioned as the upper house, and a lower house of elected representatives. However, while Congress integrated Puerto Rico into the commercial and judicial systems of the United States, it excluded the Philippines as a foreign port, with its own currency, and did not make it subject to U.S. statutes or courts. This followed from the conclusion that *Puerto Rico might somehow become "Americanized,"* but that the Philippines could never be assimilated.[168]

Furthermore, under General George Davis's recommendations regarding the establishment of a civil government in Puerto Rico, the Island would first resemble a British crown colony, but should

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[165] *Id.* at 554.

[166] *Id.* at 555.

[167] *See id.* at 555, 557 ("Gen George Davis, then military governor of Puerto Rico, also drew upon British colonial models . . . .He quickly rejected the model of the independent nation, giving a decidedly unfavorable review of the Dominican Republic. He suggested that the colonial model most appropriate for Puerto Rico was Trinidad, a crown colony with only a partially elected legislative assembly.").

[168] *Id.* at 573 (emphasis added).

eventually develop "responsible representative institutions, combined with elements of the U.S. territorial government."[169] According to Thompson, General Davis's recommendations for Puerto Rico's civil government would create a "'dependency' and decidedly not a territory destined for 'final incorporation within the American Union,' or, statehood."[170]

"Otherness," nonetheless, is not the sole explanation to the decision to treat the new territories as colonies and the concept cannot independently explain "the particular manifestations of imperial rule in different sites."[171] However, "otherness" is a prime example of the type of racial bias contributing to preconceived understanding of the new peoples in the territories.[172] Thompson reminds us that "cultural representations—frequently expressed in gendered, infantilized, and racialized vocabularies—played a fundamental role in the conception, establishment, and justification of different forms of rule" in the new territories.[173] These understandings, in turn, led to the decision to create a sort of inferior citizenship for Puerto Ricans, without fully equal rights, and which continues to impact the relationship between the United States and Puerto Rico.[174]

There is no better example of the inferior status of Puerto Ricans within the United States' legal framework than the federal government's contention that the Constitution allows Congress to treat the territories differently from the states.[175] Congress derived the authority to relegate territorial citizens to a secondary class because of the development of the "longest standing constitutional

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169 Thompson, *supra* note 77, at 557–58.

170 *Id.* at 558.

171 *Id.* at 538 ("[T]his 'doctrine of incorporation' was based upon symbolic construction of 'alien peoples' different from and inferior to European Americans. However, [this] legal analysis does not explain why Congress 'incorporated' Hawai'i—by means of a conventional territorial government—or why different governments were created for each of the unincorporated territories—Puerto Rico, the Philippines, and Guam.").

172 *Cf.* Coudert, Jr., *supra* note 128, at 13 (demonstrating how the differences between civilized nations like the United States and uncivilized and exotic locales like the acquired territories created confusion regarding the best approach to govern the new lands).

173 Thompson, *supra* note 77, at 574.

174 Cabranes, *supra* note 86, at 403.

175 Brief for Petitioner, *supra* note 36, at 11.

aberration in the history of the Supreme Court": The *Insular Cases* doctrine.[176]

B. The Insular Cases Doctrine: Does the Constitution "Follow the Flag?"

The *Insular Cases* constitutionalized "the existence of a second class of citizens not entitled to all the protections afforded other citizens on the mainland."[177] Congress was able to pass the Foraker and Jones–Shafroth legislation, as well as Public Law 600 and Public Law 447, treating Puerto Rico as an unincorporated territory under the powers conferred to it by the *Insular Cases*.[178] Even under the now discredited *Scott v. Sandford* decision of 1857, the Supreme Court was adamant that, while the United States had constitutional power to "expand the territory of the United States" by "the acquisition of territory," it must be acquired with the intention of admitting the territory into the Union "and not to be held as a colony and governed by Congress with absolute authority."[179] Chief Justice Taney's opinion continued:

> Taking this rule to guide us, it may be safely assumed that citizens of the United States who migrate to a Territory belonging to the people of the United States, cannot be ruled as mere colonists dependent upon the will of the General Government, and to be governed by any laws it may think proper to impose. The principle upon which our Government rests, and upon which alone they continue to exist, is the union of States, sovereign and inde-

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[176] 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, 56–57 (1997).

[177] *Id.* at 85 ("Puerto Ricans . . . are denied the Sixth Amendment right to trial by jury, the right to vote for President and Vice–President of the United States, and the right to equal treatment with respect to welfare benefits. The welfare cases . . . underscore the amount of deference given to Congress by the Supreme Court when legislating for the territories.").

[178] *See* Cabranes, *supra* note 86, at 436 ("In resolving these controversies [of the *Insular Cases*] the Court upheld the power of Congress to treat the islands acquired from Spain differently from the 'incorporated territories.'").

[179] Scott v. Sandford, 60 U.S. 393, 447 (1857).

> pendent within their own limits in their internal and domestic concerns, and bound together as one people by a General Government, possessing certain enumerated and restricted powers . . . .A power, therefore, in the General Government to obtain and hold colonies and dependent territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form.[180]

Thus, under Chief Justice Taney's opinion in *Scott*, the federal government may not perpetually bind itself to a territory by establishing a colonial government.[181] The powers of the Territorial Clause, as a result, were meant to be used as transitional tools in the acquired territories to provide "some Government . . . in order to organize society, and to protect the inhabitants in their persons and property" until sufficient organization had occurred, and population accumulated, so that the territory could "assume the position to which it was destined among the States of the Union."[182] It is evident, then, that the Puerto Rican experience in the American constitutional framework is the product of a profound distortion of these governing principles of territorial governance.[183]

Notwithstanding such pronouncements in *Scott*, which is now discredited and described as "evil in constitutional law" because of its distortion of constitutional principles to serve pro–slavery advocates,[184] the *Insular Cases* granted Congress "omnipotent plenary powers" to govern the acquired territories as colonies.[185] Standing in full contrast to Chief Justice Taney's language in *Scott*, Justice Brown in *Downes v. Bidwell* [186] asserts:

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[180] *Id*. at 447–48.

[181] *See id.*

[182] *Id.* at 448.

[183] *See* Torruella, *supra* note 29, at 73.

[184] Paul Finkelman, *Scott v. Sandford: The Court's Most Dreadful Case and How It Changed History*, 82 CHI.–KENT L. REV. 3, 3 (2007). *Scott v. Sandford* was overruled by the enactment of the Fourteenth Amendment. *Dredd Scott Decision Still Resonates Today*, NAT'L CONST. CTR. (Mar. 6, 2020), https://constitutioncenter.org/blog/dred-scott-decision-still-resonates-today-2/.

[185] Torruella, *supra* note 29, at 73.

[186] *See generally Downes*, 182 U.S. 244 (1901) (authorizing Congress to pass, under the Foraker Act, tax provisions that "would have been clearly un-

> That the power over the territories is vested in Congress without limitation, and that this power has been considered the foundation upon which the territorial governments rest, was also asserted by Chief Justice Marshall in *McCulloch v. Maryland* . . . .So, too, in *Mormon Church v. United States*.[187]

Justice Brown invokes Justice Bradley's assertion in *Mormon Church*:

> The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory . . . .It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The territory of Louisiana . . . and the territories west of the Rocky Mountains . . . became the *absolute property and domain* of the United States . . . .Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and *its sovereignty over them was complete* . . . .[188]

The *Downes* plurality concluded that Congress was constitutionally enabled to determine not only when, but also how far constitutional protections attach to the inhabitants of the territories.[189] As a result, Congress was free to "create non–uniform revenue laws for unincorporated territories, such as Puerto Rico."[190] The *Downes* plurality thus resolved the question of whether the Consti-

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constitutional for a U.S. state" because of the Uniformity Clause of Article I of the Constitution, requiring the uniform collection of federal taxes in the states); *see also* U.S. CONST. art. I, § 8 ("[A]ll Duties, Imposts, and Excises shall be uniform throughout the United States . . . .").

187 *Downes*, 182 U.S. at 268 (citations omitted).

188 *Id.* (quoting *Late Corp. of Church of Jesus Christ v. United States*, 136 U.S. 1 (1889)) (emphasis added).

189 *Id*. at 278–79.

190 Dick, *supra* note 4, at 33–34.

tution "follows the flag": it does not do so automatically. More specifically, as Professor Marybeth Herald argues, whether the Constitution follows wherever the U.S. flag is raised depends on "whether the territory is destined for statehood and whether the constitutional right in question is fundamental."[191]

Downes also stands for the proposition that there are certain natural rights in the Constitution that apply in the territories even without explicit extension by Congress.[192] Justice White explains in his concurrence:

> Whilst, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, *although unexpressed*, principles which are the basis of all free government which cannot be with impunity transcended.[193]

Therefore, the *Insular Cases* doctrine appears to contain certain protections for the territories' inhabitants against despotism.[194] Nonetheless these "unexpressed" constitutional guarantees are highly malleable and the federal judiciary benefits from the unfixed nature of these protections as they apply to the territories to reach "creative" decisions when an act of Congress is challenged.[195] Accordingly, "[w]hat particular provisions [of the Constitution] apply depends on 'the situation of the territory and its relation to the United States.'"[196]

According to Justice White, the United States has the inherent right as a sovereign nation to determine which constitutional guarantees apply in the territories.[197] It is unsurprising that the Consti-

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191 Herald, *supra* note 45, at 709.

192 Rivera Ramos, *supra* note 31, at 246.

193 *Downes*, 182 U.S. at 290–91 (White, J., concurring).

194 *See id.*

195 *See, e.g.*, Herald, *supra* note 45, at 709.

196 Rivera Ramos, *supra* note 31, at 248.

197 *See Downes*, 182 U.S. at 302 (citing American Ins. Co. v. Canter, 26 U.S. 511, 542 (1828) ("If [conquered territory] be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is

tution did not follow the flag to Puerto Rico when it came under possession of the United States or when a civilian government was established.[198] The integration of Puerto Rico into the constitutional framework of the United States did not envisage its eventual admission into the Union as a state.[199] Rather, Puerto Rico has always been treated as a perpetual colony, and any grants of autonomy handed to the Island's government have been undergirded by the understanding that all insular authority emanates from Congress.[200] As a result, Puerto Rico remains an unincorporated territory of the United States.[201] It is this unincorporated status that operates to prevent the full application of the Constitution in Puerto Rico.[202]

i. The Doctrine of Territorial Incorporation

An important corollary to the discussion of Congress's omnipotent plenary powers over the territories and the application of fundamental constitutional rights in these lands is whether Congress has enacted legislation that incorporates such territories into the Union.[203] This concept, known as the doctrine of "territorial incorporation," was established by the Supreme Court in the *Insular Cases* and "distinguishes between incorporated territories, which are intended for statehood from the time of acquisition and in which the entire Constitution applies *ex proprio vigore*, and unincorporated territories, which are not intended for statehood and in which only fundamental constitutional rights apply by their own force."[204] While the *Downes* judgment provided a floor of constitu-

annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose.")).

198 *See* Cabranes, *supra* note 86, at 427.

199 *See id.*

200 *See* Torruella, *supra* note 29, at 82 ("What we have in this relationship is not the subordination of Puerto Rico's political power to that of the United States, but rather the lack of *any* political power by Puerto Rico vis–à–vis the United States.").

201 *See id.*; *see also* Rivera Ramos, *supra* note 31, at 235.

202 *Cf.* Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CAL. L. REV. 1181, 1238 (2014) (summarizing the importance of Justice White's incorporation doctrine in *Downes* and its effects on the application of constitutional guarantees in unincorporated territories).

203 *See* Herald, *supra* note 45, at 709.

204 Northern Mariana Islands v. Atalig, 723 F.2d 682, 688 (9th Cir. 1984).

tional guarantees, even though it did not say explicitly which ones, Justice White's concurrence offered a more expansive view of Congress's freedom to act in the territories.[205] Furthermore, according to a unanimous Supreme Court in *Balzac v. Porto Rico*, neither the Foraker nor Jones–Shafroth legislation incorporated Puerto Rico into the Union.[206] According to then Chief Justice Taft:

> [I]t is just as clearly settled that [the Sixth and Seventh Amendments] do not apply to territory belonging to the United States which has not been incorporated into the Union. It was further settled in *Downes v. Bidwell* and confirmed by *Dorr v. United States* that neither the Philippines nor Porto Rico was territory which had been incorporated in the Union or become a part of the United States, as distinguished from *merely belonging to it*; and that the acts giving temporary governments to the Philippines and to Porto Rico had no such effect.[207]

Additionally, the creation of the Commonwealth and the Constitution of Puerto Rico with Public Law 600 has not altered the unincorporated status of the Island.[208] As a result, only those constitutional protections which are deemed "fundamental"[209] and those which are explicitly extended by a grant of Congress are applicable to the territories.[210]

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[205] *See* Herald, *supra* note 45, at 715 (quoting *Downes*, 182 U.S. at 282–83 (White, J., concurring)).

[206] *See* Balzac v. Porto Rico, 258 U.S. 298, 305 (1922).

[207] *Id.* at 304–05 (citations omitted) (emphasis added).

[208] *See* R.B.S., *supra* note 103, at 1068 ("The reality, if not the legal definition, of Puerto Rico's status has been something between colony and independence, similar to statehood, but not the same. Certainly, it is unlikely that the Supreme Court would reverse an act of Congress granting self–government to American citizens. However, it is equally unlikely that the Court would block a later attempt by Congress to reassert its territorial powers. The lapse of time and the anticolonial spirit of the day are perhaps the best advocates for the irrevocability of the compact.").

[209] Another hotly debated issue in the Supreme Court and beyond the scope of this note.

[210] *See* Puerto Rico v. Sanchez Valle, 192 P.R. Dec. 594, 645 (2015).

ii. A Bill of Rights for Puerto Rico: The Supreme Court Defends Fundamental Constitutional Guarantees for Unincorporated Territories

Justice Brown's plurality opinion in *Downes* had already distinguished between "certain natural rights," of a fundamental character, "and what may be termed artificial or remedial rights," specific to the American common law system.[211] Furthermore, among the class of rights which *Downes* considered "natural" or fundamental were: "[T]he right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice*, to due process of law and to an equal protection of the laws* . . . and to such other immunities as are indispensable to a free government."[212] Justice Brown continued:

> Whatever may be finally decided by the American people as to the status of these islands and their inhabitants . . . it does not follow that, in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution, and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property.[213]

The Jones–Shafroth legislation of 1917 included a bill of rights providing that "[N]o law shall be enacted in Porto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws."[214] According to Justice Blackmun's opinion in *Examining Board of Engineers v. Flores De Otero*, the 1917 bill of rights "provided Puerto Ricans with nearly all the personal guarantees found in the United States Constitution."[215] Furthermore, Justice Blackmun notes that the wording of the bill of rights in the Jones–

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211 Downes v. Bidwell, 182 U.S. 244, 282 (1901).
212 *Id.* (emphasis added).
213 *Id.* at 283.
214 Jones–Shafroth Act, ch. 145, 39 Stat. 951, 951 (1917).
215 Examining Bd. of Eng'rs v. Flores De Otero, 426 U.S. 572, 591 (1976).

Shafroth Act was "almost identical with the language of the Fourteenth Amendment; and when Congress selected them, it must have done so with the Fourteenth Amendment in mind . . . ."[216] Despite the repeal of the 1917 bill of rights by Public Law 600, under *Downes* and *Flores De Otero*, the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to the residents of Puerto Rico.[217] As a result, notwithstanding the fact that Puerto Rico is an unincorporated territory of the United States and unlikely to achieve statehood, the plenary and omnipotent territorial powers extended to Congress under the *Insular Cases* do not allow the federal government to deprive Puerto Rican residents of the equal protection of the laws.[218]

iii. *Wabol v. Villacrusis*: How the *Insular Cases* Doctrine Threatens the Most Fundamental Constitutional Guarantees in the Territories

Professor Herald's assertion that constitutional protections may apply in the territories if the rights in question are fundamental requires further scrutiny. Even though the *Insular Cases* recognized equal protection of the laws as a fundamental right and applicable in unincorporated territories, the Ninth Circuit Court of Appeals has found that equal protection guarantees do not automatically apply.[219] In a bizarre decision, the Ninth Circuit placed the "pledge to preserve and protect" the culture and property of the

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[216] *Id.* at 591–92.

[217] *Id.* at 600.

[218] *See id.* at 600–01 ("The Court recognized the applicability of these guarantees as long ago as its decisions in *Downes v. Bidwell*, and *Balzac v. Porto Rico*. The principle was reaffirmed and strengthened in *Reid v. Covert* and then again in *Calero-Toledo*, where we held that the inhabitants of Puerto Rico are protected, under either the Fifth Amendment or the Fourteenth . . . .").

[219] Herald, *supra* note 45, at 712 ("The Ninth Circuit held that equal protection guarantees do not fully bind the United States government in the [Northern Mariana Islands], or, more specifically, that the Congress could mandate a race–based land alienation restriction in the NMI without even the minimal constraints of rational relationship review."); *see also* Wabol v. Villacrusis, 958 F.2d 1450, 1459 (9th Cir. 1992) ("It is well established that the entire Constitution applies to a United States territory *ex proprio vigore*—of its own force—only if that territory is 'incorporated.' Elsewhere, absent congressional extension, only 'fundamental' constitutional rights apply in the territory.").

Northern Mariana Islands above the guarantees of equal protection of the laws.[220] Instead of holding that equal protection applies to the territories as a fundamental constitutional right, defeasible only by fulfilling the requisites of strict scrutiny, the Ninth Circuit basically eliminated these guarantees for the territories.[221]

Judge Poole, for the Ninth Circuit, distinguished between the application of the Fourteenth Amendment to the states and its application to unincorporated territories, like the Commonwealth of the Northern Mariana Islands.[222] According to Judge Poole:

> What is fundamental for purposes of Fourteenth Amendment incorporation is that which "is necessary to an Anglo–American regime of ordered liberty. In contrast, "fundamental" within the territory clause are "'those . . . limitations in favor of personal rights' which are 'the basis of all free government.'" *In the territorial context*, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures. Thus, the asserted constitutional guarantee against discrimination . . . applies only if this guarantee is fundamental in the *international* sense.[223]

The Ninth Circuit refused to apply equal protection guarantees in the Northern Mariana Islands, and instead relied on an "impractical and anomalous" standard crafted in Justice Harlan's concurrence in *Reid v. Covert*, using *Balzac*, part of the *Insular Cases*, as an authority for the standard.[224] Under Justice Harlan's standard, a court is supplied the tools "for finding a delicate balance between

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[220] *Wabol*, 958 F.2d at 1462 ("The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures.").

[221] *See* Herald, *supra* note 45, at 712 ("The *Wabol* court's endorsement of a broad exemption for the United Congress from equal protection constraints when dealing with territories opens the door to future exemptions from other constitutional constraints on government action in the territories.").

[222] *Wabol*, 958 F.2d at 1460.

[223] *Id.* (emphasis added).

[224] Reid v. Covert, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring); *see also* Herald, *supra* note 45, at 717.

local diversity and constitutional command . . . ."[225] and can refuse to extend even a fundamental constitutional protection if it is found to be impractical and anomalous in the territory.[226] According to Professor Herald, the Ninth Circuit's decision is astonishing "because the principle of equal protection embodies far more than procedural rights, and is one of the most basic and fundamental principles" of the Constitution.[227]

Nonetheless, it is clear from the example of the Northern Mariana Islands, and the principles put forth by the *Insular Cases*, that Congress is the gatekeeper of Constitutional rights for the territories.[228] Justice Harlan expressed this sentiment clearly in his explanation for the necessity of the "impractical and anomalous" standard:

> [T]he *Insular Cases* do stand for an important proposition, one which seems to me a wise and necessary gloss on our Constitution. The proposition is . . . not that the Constitution "does not apply" overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place. In other words, it seems to me that the basic teaching of . . . the *Insular Cases* is that there is no rigid and abstract rule that Congress . . . must exercise [power] subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that

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225 Wabol, 958 F.2d at 1461.

226 *Id.* at 1462 ("We think it is clear that interposing this constitutional provision would be both impractical and anomalous in this setting. Absent the alienation restriction, the political union would not be possible. Thus, application of the constitutional right could ultimately frustrate the mutual interests that led to the Covenant. It would also hamper the United States' ability to form political alliances and acquire necessary military outposts. For the NMI people, the equalization of access would be a hollow victory if it led to the loss of their land, their cultural and social identity, and the benefits of United States sovereignty."); *see also* Terrasa, *supra* note 176, at 89 ("The Ninth Circuit appeared to suggest, as the Supreme Court had in the *Insular Cases*, that necessity, expediency, and convenience determined which rights were 'fundamental' for the purpose of territorial incorporation.").

227 Herald, *supra* note 45, at 712.

228 *See id.* at 714.

> would make adherence to a specific guarantee altogether impracticable and anomalous.[229]

It is precisely the lack of any rigid or abstract rule in the *Insular Cases* doctrine regarding the application of the Constitution in the territories that has led to the overexpansion of the doctrine.[230] One commentator has explained the workings of the "impractical and anomalous" standard and its dangers:

> If a constitutional claim arises in a land over which the United States exercises absolute control . . . and if the court deems that the claim involves a "fundamental meaning" of the Constitution, then the court should apply the same standard abroad as would apply if the claim had arisen domestically. But the court should apply an intermediate standard if only one of these conditions is met; under this intermediate standard, the court should apply the Constitution abroad just as it would apply domestically unless doing so would be "impractical and anomalous."
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> A significant weakness in this framework, however, is the ambiguity of the "impracticable and anomalous" standard. Indeed, the syntactic structure of the . . . standard is still unclear, as the Court has not clarified whether it is a disjunctive or conjunctive standard, and there is also confusion about the standard's semantic content, since the Court has provided little insight into what these words mean

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[229] *Reid*, 354 U.S. at 74–75 (Harlan, J., concurring).

[230] See Jesse Merriam, *A Clarification of the Constitution's Application Abroad: Making the Impracticable and Anomalous Standard More Practicable and Less Anomalous*, 21 WM. & MARY BILL RTS. J. 171, 187 (2012), for a discussion of how the "impracticable and anomalous" standard emerged from the *Insular Cases* even though the cases do not explicitly employ this language. *See also* Erman, *supra* note 202, at 1234 ("Coudert described the *Insular Cases* as presenting the Supreme Court a choice between its 'reverence for the Constitution' and allowing 'the United States properly to govern a people so alien.' These two conflicting desires . . . 'were reconciled by [an] ingenious and original doctrine.' The key strength of the doctrine: its 'very vagueness . . . was valuable.'").

> in this context. With so many ambiguities, the doctrine itself is impracticable because judges cannot apply it objectively and predictably, and it is also anomalous in the Court's constitutional jurisprudence, because although many judicial doctrines contain some ambiguity, it is difficult to think of one of whose semantic content and syntactic structure are this amorphous.[231]

Taken to their logical extreme by capitalizing on their amorphous nature, the *Insular Cases* doctrine and its progeny, like the "impractical and anomalous" standard, can potentially classify any constitutional guarantee as non–fundamental, and thus excused from Congressional consideration when exercising its powers over unincorporated territories.[232] The answer to the question of whether the Constitution follows the flag thus changes from "it depends" to "only when Congress wants it to."[233]

As Professor Herald notes, the principle established by the *Insular Cases* and the Ninth Circuit is "boundless and dangerous because the test defers to the negotiating parties to decide whether equal protection guarantees or perhaps any other constitutional restraint should protect individual rights and bridle governmental

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[231] Merriam, *supra* note 230, at 173–74.

[232] Herald, *supra* note 45, at 712.

[233] *C.f.* Balzac v. Porto Rico, 258 U.S. 298, 312 (1922) ("The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted. The Constitution, however, contains grants of power and limitations which in the nature of things are not always and everywhere applicable, and the real issue in the Insular Cases was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but *which of its provisions were applicable* by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.") (emphasis added); Denniston, *supra* note 42 (explaining how federal courts of appeal have relied upon the *Insular Cases* for the proposition that the Constitution applies selectively to the territories, and it is Congress who decides what rights territorial citizens receive); Brief for Petitioner, *supra* note 36, at 10 ("Long ago, [the Supreme Court] held that the Equal Protection Clause of the Fourteenth Amendment concerns 'persons and classes of persons' rather than places, and that the *government thus remains free* to establish 'one system for one portion of its territory and another system for another portion.'") (citations omitted).

action in a territory."[234] Consequently, as is evident in *Wabol*, the *Insular Cases* recognized Congress's ability to treat the territories as analogous to "British crown colon[ies]" rather than "a republican State of America."[235]

iv. The Legacy of the *Insular Cases*: How 19th Century Racism Deprives Present Day Americans of Their Constitutional Rights

The *Insular Cases* showcase the "racial bias that permeated U.S. society at the turn of the century," and which directly contributed to the reasoning behind the *Cases* and the contravention of the Constitution.[236] According to Rivera Ramos, the *Insular Cases* support "a certain vision of democracy" in which political participation is regarded as a privilege and not a right.[237] The prominent 19th century political scientist and constitutional theorist John W. Burgess stated: "The Teutonic nations[238] can never regard the exercise of political power as a right of man; such a right must be based on political capacity of which the Teutonic nations are the only qualified judges."[239] According to Rivera Ramos:

> One thing is to acquire territory, to incorporate that territory into the nation is quite another . . . .To incorporate implies a decision to share with the alien

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234 Herald, *supra* note 45, at 713.

235 Downes v. Bidwell, 182 U.S. 244, 279 (1901).

236 Torruella, *supra* note 29, at 58–59; *see also Downes*, 182 U.S. at 279–80 ("There seems to be no middle ground between this position and the doctrine that if [the territories'] inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights . . . of citizens. If such be their status, the consequences will be extremely serious. [I]t is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions and modes of life, shall become at once citizens . . . .").

237 Rivera Ramos, *supra* note 31, at 293.

238 Burgess employed the labels of "Teutonic nations" or the "North" to refer to nations composed of mostly White men, as opposed to non–Anglo–Saxon races, which he considered "unpolitical and barbaric." *See id.*

239 *Id.* (quoted in RUBIN F. WESTON, RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY 1893–1946 16 (1972)).

> people "the rights which peculiarly belong to the citizens of the United States." Incorporation, then, means bringing the "other" into the political community that was designed for the "we." Again, democracy is viewed not as a matter of right, but of being worthy of belonging to the political community. This was the rationale that had excluded African Americans, Native Americans, Asians, Mexican Americans, women and the poor from the political process throughout American history.[240]

According to Burgess, the colonies were not under the scope of such privilege.[241] The *Insular Cases* reflect this sentiment firstly by supplying Congress with omnipotent plenary powers.[242] Secondly, they define the relationship between the territories and the United States in such a way that reassures the inhabitants of the territories that they possess some measure of equality vis–à–vis the states of the Union, when in actuality they do not.[243] However, as is plain from Justice White's incorporation doctrine and Judge Poole's use of the "impractical and anomalous" standard in *Wabol*, the federal judiciary has allowed Congress to remain the ultimate arbiter of constitutional guarantees in unincorporated territories.[244]

Considering the racist attitudes backing the legislation pertaining to the governance of Puerto Rico since 1900, even "fundamental" constitutional rights are precariously situated when the federal government claims its power to act under the *Insular Cases* doctrine.[245] Even though the *Downes* judgment offers some semblance of constitutional guarantee,[246] the incorporation doctrine and the "impractical and anomalous" standard have been used to circumvent even one of the most fundamental constitutional protections in the territories: equal protection of the laws.[247]

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240 *Id.* at 294.
241 *Id.* at 293.
242 Torruella, *supra* note 29, at 73.
243 *See* Cabranes, *supra* note 86, at 397–98.
244 Herald, *supra* note 45, at 712, 719.
245 *See id.* at 712.
246 Downes v. Bidwell, 182 U.S. 244, 283 (1901).
247 *See* Herald, *supra* note 45, at 712.

The *Insular Cases* were a clear abandonment of the Supreme Court's abhorrence of colonial governance, and they justified the dominion over the new territories by highlighting their geographical distance, non–American communities, and differing races, languages, cultures, religious and legal systems.[248] Even after the grant of citizenship to all Puerto Rican residents in 1917, the *Insular Cases* doctrine cemented the notion of "otherness" that undergirded the decisions on how to govern the 1898 territories.[249] Judge Torruella expresses the concern that John W. Burgess' views of political voice as privilege rather than right have become a reality:

> What we have in this relationship is not the subordination of Puerto Rico's political power to that of the United States, but rather the lack of *any* political power by Puerto Rico vis–à–vis the United States. The United States citizens residing in Puerto Rico do not have the right to vote for national offices. Even more importantly, they lack any voting representation in Congress, the body that has plenary power over Puerto Rico and its citizens, and whose enactments permeate every facet of Puerto Rican society. Supreme legislative power therefore lies solely in an institution that enacts laws without *any effective participation or consent* from the U.S. citizens who are obligated to comply with them.[250]

What Judge Torruella describes is essentially government without consent of the governed[251] and total disregard for the Enlightenment principles that led to the creation of the United States

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248 Torruella, *supra* note 29, at 62–63.

249 Rivera Ramos, *supra* note 31, at 291 ("The 'other' is always inferior, less capable, predestined, of course, to be governed, to be held in tutelage . . . or 'protected,' to be brought within the ideological world of the dominating power, but sufficiently at a distance so as not to confuse the respective communities they inhabit; in short, to be kept at the same time 'within and without' the Constitution.").

250 Torruella, *supra* note 29, at 82.

251 *Id.*

in the first place.[252] Furthermore, as Professor Rivera Ramos postulates, the notion of "otherness" facilitated the current colonial relationship between the United States and Puerto Rico.[253] He describes the principle of the inequality of peoples as the grounds for expanding the American Empire in the Caribbean Sea and the Pacific Ocean:

> The categories [of peoples] were constructed in direct reference to race: the white, Anglo–Saxon race was the privileged pole in the discourse of power; the "others," the non–white and the non–Europeans, those of mixed races, were to be in the receiving end of the exercise of that power. Those "others" were the barbarous, the stagnant, the irrational, the indolent, the disorderly and the undeserving more fit to be governed than to govern. Whereas the temperate zones were thought to be more conducive to hard work . . . and [] capacity for self–government and economic and scientific progress, the "tropics" were considered to be breeders of lazy, ignorant, and inferior populations incapable of self–government and condemned to be governed from outside in order to progress and civilization ever to flourish in their midst.[254]

The "barbaric races," as John W. Burgess would describe them,[255] were undeserving of self–government and incorporation into the American polity by the full extension of privileges accompanying American citizenship.[256]

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[252] *See* Rivera Ramos, *supra* note 31, at 288 ("Just as the American Revolution and the founding of the nation had been permeated by the early rhetoric of the Enlightenment – with its emphasis on a particular conception of freedom, reason, and progress – so the new phase of imperial republicanism . . . was to incorporate the consummate discourse of latter day Enlightenment culture: a true 'imperial culture . . . whose forward march of power and knowledge, of rationality and control led spatially across the globe while penetrating internally with new modes of regimentation.").

[253] *See id.* at 284–85.

[254] *Id.* at 286.

[255] *Id.* at 287.

[256] *See id.* at 285–86.

The combination of these Social Darwinist views and the necessity created by the new challenges that the federal government faced when the United States suddenly acquired the heavily populated and "exotic" territories demanded the creation of a new colonial policy, but the Constitution was a challenge to effective governance.[257] Drawing from the overtly racist discussion of the day, including the corollary concepts of "otherness" and Social Darwinism,[258] the *Insular Cases* regimented American colonial policy into its legal interpretation, allowing Congress to subordinate the unincorporated territories and deprive them of any constitutional guarantee, except those that Congress allows.[259]

IV. UNITED STATES V. VAELLO-MADERO

A. The Facts

The Appellee, José Luis Vaello–Madero was born in Puerto Rico in 1954.[260] Like all others born in Puerto Rico after 1917, he is a United States citizen as a result of the Jones–Shafroth Act and later legislation "granting birthright citizenship to Puerto Rico's native–born inhabitants."[261] The Appellee lived in New York from 1985 until 2013.[262] While still residing in New York, the Appellee "was afflicted with severe health problems" that required him seeking aid under the SSI program.[263] In 2012, he was eligible to receive SSI benefits and began receiving such payments to a checking account in New York.[264]

However, in 2013, Appellee moved to Loíza, Puerto Rico, and did not face any issues with SSI payments connected to his relocation until June 2016.[265] Upon applying for Title II Social Security Disability Insurance (SSDI) benefits, as distinguished from Title XVI Supplemental Security Income (SSI), the Social Security

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257 *See id.* at 287–91.
258 *See* Rivera Ramos, *supra* note 31, at 289–90.
259 *Id.* at 298, 300.
260 United States v. Vaello-Madero, 956 F.3d 12, 15 (1st Cir. 2020).
261 *Id.*; *see also* 8 U.S.C. § 1402 (2020).
262 *Vaello-Madero*, 956 F.3d at 15.
263 *Id.*
264 *Id.*
265 *Id.*

Administration notified him "that it was discontinuing his SSI benefits retroactively to August 1, 2014 because he was, and had been since that date, 'outside of the U.S. for 30 days in a row or more.'"[266] According to the Code of Federal Regulations, the Social Security Administration does not consider Puerto Rico to be a part of the United States in "the geographical sense."[267] Furthermore, the Social Security Administration will not make SSI payments to individuals that are not present in one of the states, the District of Columbia, and the Northern Mariana Islands[268] for more than thirty days[269] because the beneficiary must be a resident of the United States.[270]

A year after discontinuing the Appellee's SSI payments, the federal government filed a suit against him in federal court for the District of Puerto Rico, seeking to collect $28,081.[271] The damages claimed were the amount owed to the Social Security Administration by the Appellee due to the "improper payment of SSI benefits" after he left New York for Puerto Rico.[272]

B. The District Court's Decision

The Appellee raised an equal protection defense, arguing that the exclusion from the SSI program of Puerto Rico residents, who are citizens of the United States, contravened the equal protection guarantees of the Fifth Amendment.[273] Meanwhile, the federal government argued that Congress could exclude Puerto Rican residents from SSI benefits under its "authority to enact social and economic regulation."[274] After realizing that there were "no material facts in contention" and that the resolution of the dispute depended solely on whether exclusion of Puerto Ricans from the SSI

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266 *Id.* at 15–16.

267 20 C.F.R. § 416.215 (2020); *see also* 42 U.S.C. § 1382c (2020).

268 *Vaello-Madero*, 956 F.3d at 16; *see also* 48 U.S.C. § 1801; *see also* 20 C.F.R. § 416.215.

269 *Vaello-Madero*, 956 F.3d at 15–16.

270 *Id.* at 16; *see also* 42 U.S.C. § 1382c (2020) ("For purposes of this title, the term 'aged, blind, or disabled individual' means an individual who . . . is a resident of the United States . . . .").

271 *Vaello-Madero*, 956 F.3d at 16.

272 *Id.*

273 *Id.*

274 United States v. Vaello-Madero, 356 F. Supp. 3d 208, 213 (D.P.R. 2019).

program violated the Fifth Amendment, both parties filed for summary judgment.[275]

The District Court disagreed with the federal government's argument that Congress "can disparately classify United States citizens residing in Puerto Rico" because it would be "counter to the very essence and fundamental guarantees of the Constitution itself."[276] Relying on *United States v. Windsor*, the court states that the "liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws."[277] In *Windsor*, the Supreme Court reaffirmed that the constitutional guarantee of equality "'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group.'"[278] At the same time, according to the District Court, the Territorial Clause of Article IV of the Constitution did not supply the federal government with the ability to determine which rights apply in the Territories and in what circumstances, especially fundamental guarantees like the equal protection of the laws.[279] Under *Boumediene v. Bush*, the court says:

> "Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another." This "would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President . . . say what the law is." The authority to treat the territory of Puerto Rico itself unlike the States does not stretch as far as to permit the abrogation of fundamental constitutional protections to United States citizens as Congress sees fit.[280]

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275 *Vaello-Madero*, 956 F.3d at 16.

276 *Vaello-Madero*, 356 F. Supp. 3d at 213.

277 *Id.* (citing United States v. Windsor, 570 U.S. 744 (2013)).

278 United States v. Windsor, 570 U.S. 744, 770 (2013) (citing Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)).

279 *Vaello-Madero*, 356 F. Supp. 3d at 213.

280 *Id.* (citing Boumediene v. Bush, 533 U.S. 723, 765 (2008)).

The District Court, under these principles, found that Congress's legislative authority to enact economic and social legislation was insufficient justification for excluding Puerto Ricans, United States citizens, from SSI benefits.[281] Judge Gelpí, for the District of Puerto Rico, stated:

> In light of *Windsor*, the discriminatory statute at bar fails to pass rational basis constitutional muster. United States citizens in Puerto Rico are deprived of receiving SSI benefits based solely on the fact that they live in a United States territory. Classifying a group of the Nation's poor and medically neediest United States citizens as "second tier" simply because they reside in Puerto Rico is by no means rational. An overwhelming percentage of the United States citizens residing in Puerto Rico are of Hispanic origin and are regarded as such despite their birthright United States citizenship.[282]

The District Court went on to find that the exclusion of Puerto Rican residents from SSI was a "deprivation of the liberty of the person," guaranteed under the Fifth Amendment.[283] Pursuing governmental efficiency, an essential component of "line drawing" necessary for Congress to enact social and economic legislation, "is never a valid reason for disparate treatment of United States citizen's *fundamental rights*."[284]

Furthermore, the arbitrariness of Congress's decision to exclude Puerto Rican residents from SSI benefits is shown by the inclusion of the Northern Mariana Islands in the program, and "evidences that Congress, in fact, has recognized the importance of extending the program to United States citizens in the territo-

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281 *Id.* at 213.

282 *Id.* at 214.

283 *Id.*

284 *Id.* at 214–15 (Judge Gelpí highlights that the federal government argued that both (1) the high cost of including Puerto Rico in the SSI program and (2) the fact that Puerto Rico does not pay federal income taxes that fund the SSI program were sufficient grounds to exclude Puerto Rico) (emphasis added).

ries."[285] Importantly, the court found for the Appellee because equal protection guarantees are fundamental rights "of all United States citizens" and those rights should apply equally "in the States as in the Territories, without distinction."[286] Congress's attempt to legislate "a citizenship apartheid based on historical and social ethnicity within United States soil" contravenes the fundamental guarantees of personal liberty enshrined in the Constitution and creates "an impermissible second rate citizenship akin to that premised on race and amounts to Congress switching off the Constitution."[287] Ultimately, the District Court found that Congress could use neither its authority to pass social and economic legislation nor the Territorial Clause of Article IV as "blank check[s]" to "dictate when and where the Constitution applies to its citizens," even if these citizens are outside the nation's borders.[288]

C. On Appeal at the First Circuit

The First Circuit Court of Appeals affirmed the District Court's judgment and focused on Supreme Court precedent that the federal government used to justify its exclusion of Puerto Rican residents from SSI benefits.[289] Under the Fifth Amendment's equal protection component, a denial of due process results from discrimination by the federal government.[290] For the equal protection standard, the First Circuit utilizes the rational basis test to determine the con-

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[285] *Vaello-Madero*, 356 F. Supp. 3d at 215 n.8; *see also* United States v. Vaello-Madero, 956 F.3d 12, 30 (1st Cir. 2020) ("[T]he fact that Congress extended SSI benefits to the residents of the Northern Mariana Islands as part of the Islands' covenant to enter the United States undercuts the Appellant's only offered explanations for the exclusion. Aside from where they live, the otherwise SSI–qualifying residents of Puerto Rico and the Northern Mariana Islands have the legally–relevant characteristics in common, i.e., they are (1) low–income and low–resourced, (2) elderly, disabled, or blind, and (3) generally exempted from paying federal income tax.").

[286] *Vaello-Madero*, 356 F. Supp. 3d at 215.

[287] *Id.*

[288] *Id.* (citing Boumediene v. Bush, 533 U.S. 723, 765 (2008) ("The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.")).

[289] *Id.*

[290] *Vaello-Madero*, 956 F.3d at 18 (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

stitutionality of the challenged law.[291] Under rational basis review, "a legislative classification" will be upheld if "the classification itself is rationally related to a legitimate government interest."[292] Furthermore, the standard places the burden of proof on the party challenging the law to defeat "every conceivable basis which might support it."[293] Under the United States Code Title 42's section 1381, the challenged classification are those United States citizens who are otherwise eligible for SSI benefits but for their residence in Puerto Rico.[294] According to the First Circuit, such classification is "clearly irrelevant to the stated purpose of the program, which is to provide cash assistance to the nation's financially needy elderly, disabled, or blind" and must be sustained by "some legitimate governmental interest [not] specifically stated in the [law]."[295]

i. The First Circuit Indirectly Addresses the Relevance of the *Insular Cases* Through Its Treatment of *Califano* and *Harris*

To fulfill the rational basis requirements, the federal government argued that exclusion of Puerto Rican residents serves legitimate governmental interests because of "the unique tax status of Puerto Rico and the costs of extending the program" to its residents.[296] The federal government also proffered *Califano v. Gautier Torres*, a Supreme Court decision from 1978, as a basis on which to exclude Puerto Rican residents from SSI.[297] *Califano* had reversed a district court judgment holding that denial of SSI payments to "a recipient who acquired them while a resident of Connecticut, but was thereafter denied them by reason of his moving to Puerto Rico," contravened his "constitutional right to travel."[298] According to the First Circuit, the federal government regarded *Califano* as valuable precedent because it involved a statutory pro-

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291 *Id.*
292 *Id.* (citing Dep't of Agric. v. Moreno 413 U.S. 533 (1973)).
293 *Id.* (citing FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993)).
294 *Id.*
295 *Id.* at 18–19.
296 *Vaello-Madero*, 956 F.3d at 19.
297 *Id.*; *see generally* Califano v. Gautier Torres, 435 U.S. 1 (1978).
298 *Vaello-Madero*, 956 F.3d at 19.

vision establishing government benefits and is thus entitled to "a strong presumption of constitutionality." [299]

The federal government also relied on *Harris v. Rosario*, in which the Supreme Court held that Congress derived sufficient authority from the Territorial Clause to "treat Puerto Rico differently from States so long as there is a rational basis for its actions."[300] According to the Supreme Court, three factors enunciated in *Califano* were enough to fulfill the rational basis test and uphold the exclusion of Puerto Rican residents from SSI: (1) Puerto Rican residents do not pay federal taxes, (2) the cost of extending SSI to the Island would be high, and (3) the increased benefits would "disrupt the Puerto Rican economy."[301]

The First Circuit underscores that, while still valid Supreme Court precedent, *Califano* and *Harris* dealt with the right to travel and with block grants for the Aid to Families with Dependent Children Program, respectively, not with the "validity of alleged discriminatory treatment . . . as required by the SSI program under the prism of equal protection."[302] As such, neither case was controlling Supreme Court precedent precluding the Appellee's claim that his exclusion from SSI contravened equal protection guarantees.[303] At the same time, despite *Califano* and *Harris*, the First Circuit maintains that the federal government must still have a rational justification to make suspect legislative classification, or else the rational basis test might become a "nullity" and "suspend the operation of the Equal Protection Clause in the field of social welfare law . . . ."[304] Thus, the First Circuit finds that equal protection principles survive *Califano* and *Harris*, and can be grounds to de-

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299 *Id.* (citing Mathews v. De Castro, 429 U.S. 181, 185 (1976)).

300 *Id.* at 20 (citing Harris v. Rosario, 446 U.S. 651, 651–52 (1980)).

301 *Id.* (citing *Califano*, 435 U.S. at 5 n.7).

302 *Id.* at 21.

303 *Id.* ("Of relevance to Appellant's contention that *Califano* and *Harris* control this appeal is an axiomatic legal tenet that must be factored into consideration of our ultimate decision: that [t]he precedential effect of a summary [disposition] can extend no further than 'the precise issues presented and necessarily decided by those actions.'").

304 *Vaello-Madero*, 956 F.3d at 21 (citing Baker v. City of Concord, 916 F.2d 744, 749 (1st Cir. 1990)).

cide the Appellee's claim in *Vaello-Madero* despite valid Supreme Court precedent.[305]

ii. The Federal Government Fails the Rational Basis Test

The First Circuit held that denying SSI benefits to the Appellee, and Puerto Rican residents by extension, does not meet the standards of the rational basis test.[306] The First Circuit found that excluding Puerto Rican residents merely for residing in a territory and not a state bore no "rational relation to a legitimate legislative goal."[307] Furthermore, the First Circuit found unpersuasive the federal government's contention, stated previously in *Califano*, that "the unique tax status of Puerto Rico [by which] its residents do not contribute to the public treasury" because they do not pay federal taxes.[308] Similarly, the court disagreed with the federal government's contention that the cost of including Puerto Rican residents in the SSI program was sufficient to establish a rational basis to exclude them.[309]

The First Circuit initially ascertains that not only does Puerto Rico make "substantial contributions to the federal treasury," but "in fact have consistently made them in higher amounts than taxpayers in at least six states, as well as the territory of the Northern Mariana Islands."[310] Additionally, the court also highlights that Puerto Rican residents do make federal income tax payments when they receive income from sources outside Puerto Rico (when fed-

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[305] *See id.* at 17–23 (distinguishing *Califano* and *Harris* and arguing that equal protection principles survived these cases).

[306] *Id.* at 23.

[307] *Id.*

[308] *Id.* at 24.

[309] *Id.* at 27.

[310] *Vaello-Madero*, 956 F.3d at 24 ("From 1998 up until 2006, when Puerto Rico was hit by its present economic recession, Puerto Rico consistently contributed more than $4 billion annually in federal taxes and impositions into the national fisc. This is more than taxpayers in several of the states contributed, including Vermont, Wyoming, South Dakota, North Dakota, Montana, and Nebraska, as well as the Northern Mariana Islands. Even since 2006 to the present, and notwithstanding monumental economic problems aggravated by catastrophic Hurricane María and serious ongoing earthquakes, Puerto Ricans continue to pay substantial sums into the federal treasury through the IRS: $3,443,334,000 in 2018; $3,393,432,000 in 2017; $3,479,709,000 in 2016 . . . .").

eral employees on the Island make regular payment of income taxes), as well as the full Social Security, Medicare, and Unemployment Compensation taxes that are paid elsewhere in the United States.[311] As a result, according to the First Circuit, the justification of excluding of Puerto Rican residents from SSI by arguing that the island's residents do not contribute to the federal treasury is "no longer available."[312] Moreover, the First Circuit is not able to identify any other instance where the government has used the total absence of federal income tax payments as justification to exclude entire classes of people from welfare programs.[313]

Next, the First Circuit determined that while Congress has ample power to "create classifications that allocate noncontractual benefits under a social welfare program [and] protecting the fiscal integrity of Government programs," considering cost alone is not sufficient justification for "differentiating individuals."[314] In the case at hand, the First Circuit explained that the deference usually afforded to "decisions based on fiscal considerations 'that improve the protection afforded to the entire benefitted class'" is inapplicable where "an entire segment of the would–be benefitted class is excluded."[315] According to the First Circuit, focusing only on the cost of extending SSI to cover Puerto Rican residents falls outside Congress's authority to make decisions to "protect the fiscal integrity" of similar welfare programs and the government itself because "the Fifth Amendment does not permit the arbitrary treatment of individuals who would otherwise qualify for SSI" if not for their residence in Puerto Rico.[316] Thus, according to the First Circuit, considering only the cost of including Puerto Rico's disabled, elderly, and blind in the federally–funded SSI program does not fulfill the rational basis test.[317]

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311 *Id.* at 25.

312 *Id.*

313 *Id.* at 26 (quoting Zobel v. Williams, 457 U.S. 55, 63 (1982) ("Appellants' reasoning would permit the State to apportion all benefits and services according to the past tax . . . contributions of its citizens. *The Equal Protection Clause prohibits such an apportionment of state services*.") (emphasis added)).

314 *Id.* at 28–29.

315 *Id.* at 29.

316 *Vaello-Madero*, 956 F.3d at 30.

317 *Id.*

Importantly, the First Circuit disarms the federal government's final argument that there is "no 'equal footing doctrine'" between the territories that requires the peoples of one territory being treated the same as those of another.[318] The federal government cited *Palmore v. United States* for the idea that "Congress may legislate differently for the territories than for the states, and differently for one territory than for another."[319] The First Circuit found this use of *Palmore* "inapt" because the case did not opine concretely on "Congress's disparate treatment of territorial residents" and focused only on the question on what court could try and convict Palmore.[320] As a result, the court "decline[s] to read *Palmore*'s holding so broadly as to permit Congress to sidestep the Fifth Amendment when it legislates for a territory."[321] Hence, the First Circuit holds, the federal government has no authority supporting the notion that "the Fifth Amendment's equal protection guarantees should likewise stand aside in this case."[322] Thus, the federal government was not allowed to arbitrarily deny SSI benefits to the residents of Puerto Rico because of the equal protection doctrine of the Fifth Amendment.[323]

V. ANALYSIS

The Equal Protection Clause mandates that "all persons similarly circumstanced shall be treated alike."[324] The District Court for the District of Puerto Rico and the Circuit Court of Appeals for the First Circuit move squarely in the direction of making the above statement a reality for the residents of Puerto Rico.[325] The

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318 *See id.* at 31.

319 *Id.*

320 *Id.*

321 *Id.*

322 *Vaello-Madero*, 956 F.3d at 31.

323 *Id.*

324 Plyler v. Doe, 457 U.S. 202, 216 (1982) (citing F.S. Royster Guano Co. v. Virginia, 253 U.S. 415 (1920)).

325 *See, e.g.*, *Vaello-Madero*, 956 F.3d at 23 ("Congress may not invidiously discriminate among such claimants on the basis of a 'bare congressional desire to harm a politically unpopular group,' or on the basis of criteria which bear no rational relation to a legitimate legislative goal." (quoting Weinberger v. Salfi, 422 U.S. 749, 772 (1975))).

Vaello-Madero decisions elevate the status of American citizens residing in Puerto Rico to that of American citizens residing in the fifty states.[326] Referring to the federal government's reliance on Article IV's Territorial Clause, the District Court emphasized that "[t]his clause . . . is not *carte blanche* for Congress to switch on and off at its convenience the fundamental constitutional rights to Due Process and Equal Protection enjoyed by a birthright United States citizen who relocates from a State to Puerto Rico."[327] Judge Gelpí continues: "Congress, likewise, cannot demean and brand said United States citizen while in Puerto Rico with a stigma of inferior citizenship to that of his brethren nationwide."[328] The District Court and the First Circuit reaffirm that the principles of due process and equal protection apply in the territories as "sacrosanct fundamental constitutional protections afforded to United States citizens" in the same way they apply in the states of the Union.[329]

A. Vaello-Madero Is Not the End of the Insular Cases

In rejecting the federal government's contention that the Territorial Clause allows Congress to enact social welfare legislation for the territories and to determine the eligibility for such programs in any way, the District Court and the First Circuit have signaled that the federal judiciary will restrict the omnipotent plenary powers of Congress.[330] However, *Vaello-Madero* is not a repudiation of the *Insular Cases*; nowhere does it grapple with the political relationship between the United States and Puerto Rico.[331] Nonetheless,

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[326] United States v. Vaello-Madero, 356 F. Supp. 3d 208, 214 (D.P.R. 2019) ("Classifying a group of the Nation's poor and medically neediest United States citizens as 'second tier' simply because they reside in Puerto Rico is by no means rational.").

[327] *Id.* at 211.

[328] *Id.*

[329] *Id.* at 213; *see also Vaello-Madero*, 956 F.3d at 31 ("So, for the reasons explained throughout this opinion, we hold that the Fifth Amendment forbids the arbitrary denial of SSI benefits to residents of Puerto Rico.").

[330] *Vaello-Madero*, 356 F.3d at 212–13 (stating that the Territorial Clause does not encompass unlimited power to legislate for the territories).

[331] *See, e.g.*, *id.* at 212 ("Today's ruling will not delve into the complex constitutional issues of Puerto Rico as a territory of the United States for the past 120 years."). The First Circuit's affirmation is based on its interpretation of the federal government's claims under *Califano* and *Harris* and not directly on the *Insular Cases*. *See Vaello-Madero*, 956 F.3d at 21–22.

the decisions are a setback for the federal government's ability to justify treating American citizens in nonincorporated territories as second–class citizens.[332] In turn, this likely entails a stricter reading of the *Insular Cases*, retracting from the federal government's ability to legislate for the territories without adhering to fundamental constitutional guarantees.[333] This aligns closer with Justice Brown's pronouncements in the *Downes* opinion than to Justice White's development of the incorporation doctrine in the plurality opinion of the same case.[334] Curiously, however, in expounding the incorporation doctrine, it was Justice White himself who said: "[E]ven in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."[335] Unfortunately, Justice White did not specify which rights he had in mind.[336]

As has been demonstrated in the Ninth Circuit, federal courts are capable of taking advantage of such lack of specificity regarding the application of constitutional guarantees in the territories.[337] Thus, as Professor Herald laments, the judiciary branch is able to stretch the *Insular Cases* doctrine to circumvent the application of

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[332] *Vaello-Madero*, 356 F. Supp. 3d at 214.

[333] *See id.* at 210–11.

[334] *Compare* Downes v. Bidwell, 182 U.S. 244, 283 ("Whatever may be finally decided by the American people as to the status of these islands and their inhabitants . . . it does not follow that, in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution . . . ."), *with* Downes v. Bidwell, 182 U.S. 244, 293 ("And the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relation to the United States.") (White, J., concurring).

[335] *Downes,* 182 U.S. 244, 291 (White, J., concurring).

[336] *Id.* at 294–95 ("Undoubtedly, there are *general prohibitions* in the Constitution in favor of the liberty and property of the citizen . . . which are an absolute denial of all authority under any circumstances or conditions to do particular acts.") (White, J., concurring) (emphasis added).

[337] *See, e.g.*, Wabol v. Villacrusis, 958 F.2d 1450, 1462 (1990) (Employing the "impractical and anomalous" standard to circumvent equal protection guarantees in the Northern Mariana Islands to "preserve and protect" the islands' culture and land.).

"fundamental" constitutional guarantees.[338] Concurring in *Rassmussen v. United States*, part of the *Insular Cases*, Justice Harlan, the elder, criticized such an approach by the Supreme Court and took a position analogous to the one in *Vaello-Madero*:

> The proposition that a people subject to the full authority of the United States for purposes of government, may, under any circumstances, or for any period of time, long or short, be governed, as Congress pleases to ordain, without regard to the Constitution, is, in my judgment, inconsistent with the whole theory of our institutions.
>
> If the Constitution does not become the supreme law in a Territory acquired by treaty, and whose inhabitants are under the dominion of the United States, until Congress . . . shall have expressed its will to that effect, it would necessarily follow that . . . Congress, under the theory of "incorporation" . . . could forever withhold from the inhabitants of such Territory the benefit of all the guaranties of life, liberty, and property as set forth in the Constitution. I cannot assent to any such doctrine. I cannot agree that the supremacy of the Constitution depends upon the will of Congress.[339]

The elder Justice Harlan's statement highlights the danger of the incorporation doctrine that has taken hold of the federal judiciary when dealing with the territories and has allowed the government more freedom when legislating for unincorporated territories.[340]

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[338] Herald, *supra* note 45, at 712, 768; *see also Wabol*, 958 F.2d at 1463 (concluding that congressionally–enacted provisions of a territorial constitution are not subject to challenge under equal protection guarantees).

[339] Rassmussen v. United States, 197 U.S. 516, 530 (1905) (Harlan, J., concurring).

[340] *See* Rivera Ramos, *supra* note 31, at 254 ("'There is a wide difference,' [Justice Brown] argued, 'between the full and paramount power of Congress in legislating for a territory in the condition of Porto Rico and its power with respect to the States . . . .'" (citing Dooley v. United States, 183 U.S. 151, 155 (1901))).

Despite his grandfather's position in *Rassmussen*, Justice Harlan created the "impractical and anomalous" standard, derived from the *Insular Cases*,[341] and used in *Wabol* to justify circumventing equal protection guarantees.[342] It is precisely against this trend of doctrinal overexpansion that *Vaello-Madero* militates, even though neither the District Court nor the First Circuit relied directly on the *Insular Cases*.[343] Furthermore, it is sadly ironic that federal courts in the 21st century should be struggling with precedent to revert the judiciary branch to Justice Brown's opinion in *Downes*, when a plurality agreed that fundamental constitutional guarantees should apply to the territories.[344] According to the reasonings in *Vaello-Madero*, the Constitution and the *Insular Cases* do not give Congress the ability to cherry–pick which fundamental protections apply to the territories.[345] Hence, like in *Downes* and *Flores de Otero*,[346] *Vaello-Madero* affirms that the Constitution's equal protection and due process guarantees constrain the federal government's use of its broad territorial powers conferred to it by the Territorial Clause.[347]

Nonetheless, *Vaello-Madero* is not by any means a death blow to the *Insular Cases*, but merely reaffirms that fundamental constitutional guarantees should apply in unincorporated territories.[348] As a result, *Vaello-Madero* is only a return to the beginning of the *Insular Cases* doctrine.[349]

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341 Merriam, *supra* note 230, at 181.

342 *Wabol*, 958 F.2d at 1462.

343 *See generally* United States v. Vaello-Madero, 356 F. Supp. 3d 208, 210–11 (D.P.R. 2019) (denying that the Territorial Clause is a blank check for Congress to pick and choose which constitutional provisions apply in the territories in any given time, which is opposed to the *Insular Cases* and their progeny).

344 Downes v. Bidwell, 182 U.S. 244, 268 (1901) (citing Mormon Church v. United States, 136 U.S. 1, 10 (1890)).

345 *See, e.g.*, *Vaello-Madero*, 356 F. Supp. 3d at 213.

346 Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 600 (1976); *see Downes*, 182 U.S. at 282–83.

347 *See* United States v. Vaello-Madero, 956 F.3d 12, 17–18 (1st Cir. 2020); *see also Vaello Madero*, 356 F. Supp. 3d at 210–11.

348 *Vaello-Madero*, 356 F. Supp. 3d at 213 ("The authority to treat the territory of Puerto Rico itself unlike the States does not stretch as far as to permit the abrogation of fundamental constitutional protections to United States citizens as Congress sees fit.").

349 *Downes*, 182 U.S. at 282–83.

i. *Vaello-Madero* Promotes the Development of Democratic Relationships between the United States and the People of the Unincorporated Territories

Vaello-Madero is plainly contrasted with the Ninth Circuit's dangerous extension of the *Insular Cases* doctrine in *Wabol* in holding that the "impractical and anomalous standard" allowed the federal government to circumvent equal protection guarantees in the Northern Mariana Islands.[350] One is well served by remembering Judge Pool's distinction between the fundamental rights that the Equal Protection Clause of the Fourteenth Amendment guarantees to the states versus the fundamental rights incorporated into the Territory Clause to be applied in the unincorporated territories.[351] The Ninth Circuit's understanding of Territorial Clause authority and the *Insular Cases* is much more expansive than the First Circuit's.[352]

Vaello-Madero promotes what future Justice Felix Frankfurter termed in 1914 "inventive statesmanship" because it reinterprets authority under the Territorial Clause and the *Insular Cases* to encourage a more democratic relationship between the United States and its territories.[353] According to Hernández Colón, inventive

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[350] *Compare Vaello-Madero*, 356 F. Supp. 3d at 213 ("[T]he broad power granted under the Territorial Clause does not allow Congress to eradicate the sacrosanct *fundamental constitutional protections* afforded to United States citizens residing in the States and Puerto Rico.") (emphasis added), *and Vaello-Madero*, 956 F.3d at 23 (applying the rational basis test because equal protection guarantees attach to United States citizens residing in Puerto Rico), *with* Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1992) (applying the "impractical and anomalous" standard to circumvent equal protection guarantees).

[351] *Wabol*, 958 F.2d at 1460.

[352] *See id.* ("This court rejected the broad proposition that those guarantees incorporated into the Fourteenth Amendment for application to the states must also be incorporated into the territory clause for application to the Commonwealth. What is fundamental for purposes of Fourteenth Amendment incorporation is that which 'is necessary to an Anglo–American regime of ordered liberty.' In contrast, 'fundamental' within the territory clause are "'those . . . limitations in favor of personal rights' which are 'the basis of all free government.'") (citations omitted).

[353] *See Vaello-Madero*, 356 F. Supp. 3d at 213 ("The powers granted under the Constitution are not infinite. 'The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.'") (citing United States v. Wind-

statesmanship is required "to establish truly democratic arrangements and allocations of powers protected by the U.S. Constitution, based on the principle of consent by the governed."[354] *Vaello-Madero*'s defense of fundamental constitutional guarantees pursues inventive statesmanship by respecting Puerto Rico's right to self–determination and the principle of government by consent, as recognized in the compact created under Public Law 600 in 1950.[355] As one commentator has noted, "[O]nce a society, such as [Puerto Rico], *freely* chooses to become a "part" of the United States, and its inhabitants *freely* choose to become citizens of the United States, then the application of the Constitution should not be subject to negotiation."[356]

Vaello-Madero's refusal to compromise in the application of equal protection guarantees in the territories, as the federal government urged, pursues the principles of individual liberty and true government by consent.[357] Justices Sotomayor and Ginsburg asserted a similar principle in their dissent in *Schuette v. Coalition to Defend Affirmative Action*:

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sor, 570 U.S. 744, 774 (2013)); *see also* Hernández Colón, *supra* note 109, at 603 ("[Cases like *Flores de Otero*] . . . supplied Congress with creative judicial platforms within the Territorial Clause on which to structure democratic relationships with citizens of the United States residing in nonstate areas. Respect for the integrity of these judicial platforms ensures that these relationships—conceived in liberty and by the consent of the governed—protect the rights of Puerto Ricans as American citizens.").

354 *See* Hernández Colón, *supra* note 109, at 589, 593.

355 *Id.* at 593; *see also* Public Law 600 ch. 446, 64 Stat. 319, 319 (1950).

356 Herald, *supra* note 45, at 756 (citing James A. Branch, Jr., *The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting Justify Different Constitutional Standards?*, 9 DENV. J. INT'L L. & POL'Y 35, 38–39 (1980)).

357 *Vaello-Madero*, 356 F. Supp. 3d at 213 ("'The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.'"); *see also* Obergefell v. Hodges, 576 U.S. 644, 672 (2015) ("The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet, in some instances each may be instructive as to the meaning and reach of the other.").

> We are fortunate to live in a democratic society. But without checks, democratically approved legislation can oppress minority groups. For that reason, our constitution places limits on what a majority of the people may do. Although [the guarantee of equal protection of the laws] is traditionally understood to prohibit intentional discrimination under existing laws, equal protection does not end there. Another fundamental strand of our equal protection jurisprudence focuses on process, securing to all citizens the right to participate meaningfully and equally in self–government. That right is the bedrock of our democracy, for it preserves all other rights.[358]

Nonetheless, the Supreme Court must address the validity of the *Insular Cases* in the 21st century if it wants to pursue the ideals of *Vaello-Madero* and elevate American citizens in the territories to the status of American citizens in the states.[359] If not, federal courts are likely to continue pursuing an early 20th century agenda of distinguishing between citizens within the nation's borders and those without.[360] However, it is difficult to see how the Supreme Court could sharply redefine the *Insular Cases* doctrine precisely because of the amorphous nature that has facilitated its progressive expansion to the point where some federal courts are prepared to hold that the federal government is not always bound by fundamental guarantees.[361]

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[358] Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291, 337 (2014) (Sotomayor & Ginsburg, J.J., dissenting).

[359] *See* Hernández Colón, *supra* note 109, at 604.

[360] *Id.* at 593.

[361] See generally Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. 1992), for an example of how the *Insular Cases* doctrine and its progeny, like the "impractical and anomalous" standard, have been used to justify not applying the most basic constitutional protections in the territories; see generally Merriam, *supra* note 230, for an explanation of the vague and manipulable nature of the legal principles derived from the *Insular Cases*.

B. It Is Unreasonable to Expect that the Supreme Court Will Use Vaello-Madero to Overrule the Insular Cases

The major shortcoming of *Vaello-Madero* is that neither of the decisions refers explicitly to the *Insular Cases* when rejecting the federal government's contentions.[362] Instead, *Vaello-Madero* approaches the *Insular Cases* implicitly by how it handles the federal government's reliance on *Califano* and *Harris*.[363] Additionally, the First Circuit does not speak to the validity of *Califano* and *Harris*; instead, it opts to say that those cases are not controlling for *Vaello-Madero*[364] despite knowing that *Califano* and *Harris* rely on the *Insular Cases* doctrine for their reasoning.[365] For instance, in footnote four of *Califano*, the Supreme Court appeared to accept the District Court for the District of Puerto Rico's acknowledgment that "Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it."[366] In the same note, the Supreme Court remarked that "Puerto Rico has a relationship to the United States 'that has no parallel in our history,'" and cited the *Insular Cases* for this proposition.[367] As a result, at the Supreme Court, *Vaello-Madero* has a reduced potential to redefine the *Insular Cases*, particularly because the doctrine from these cases is not a foundational element of the District Court's or the First Circuit's reasoning. This problem is further compounded by the Supreme Court's reticence in recent cases to

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[362] *See Vaello-Madero,* 356 F. Supp. 3d at 212 ("Today's ruling will not delve into the complex constitutional issues of Puerto Rico as a territory of the United States for the past 120 years.").

[363] United States v. Vaello-Madero, 956 F.3d 12, 17 (1st Cir. 2020) (highlighting that the *ratio decidendi* of *Califano* and *Harris* might be outdated).

[364] *Id.* at 21 ("We are of the view that *Califano* was not decided on equal protection grounds, and that *Harris* did not involve a challenge to SSI direct aid to persons, and thus, neither case forecloses Appellee's present contention that his wholesale exclusion from SSI violates the equal protection guarantee. We do not view *Califano* and *Harris* as a carte blanche for all federal direct assistance programs to discriminate against Puerto Rico residents.").

[365] *See* Brief for the Commonwealth of Puerto Rico as Amici Curiae Supporting Respondent at 3, United States v. Vaello-Madero, No. 20–303 (Sup. Ct. Nov. 9, 2020).

[366] Califano v. Torres, 435 U.S. 1, 3 n.4 (1978).

[367] *Id.*

address the validity of the *Insular Cases*, even when encouraged to do so by multiple parties and amici.[368]

In *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*, the *Insular Cases* were explicitly brought to the Supreme Court's attention after parties defending the Board's existence argued that the Appointments Clause of Article II did not apply to Puerto Rico because of the *Insular Cases* doctrine.[369] Jessica Méndez–Colberg, counsel for one of the parties in *Aurelius*, argued that "Equal [J]ustice [U]nder [L]aw," the words at the entrance to the Court's building, represented a principle "stretch[ed] . . . into its breaking point" under the *Insular Cases*.[370] "The court–made doctrine of territorial incorporation," she continued, "means that when my client, and even myself, return to Puerto Rico, we will have a lesser set of constitutional rights than what we have standing here today."[371] Ms. Méndez–Colberg raised the issue of the *Insular Cases* doctrine at multiple points during her oral argument and despite arguing that the opposing party relied on the incorporation doctrine in defense of the Board's existence,[372] the Justices appeared to ignore her pleas.[373] Notwithstanding the impassioned criticism of the *Insular Cases* at oral argument, the Supreme Court in *Aurelius* declined to address their validity in its reasoning for upholding the appointment of Board members.[374]

Vaello-Madero did not make the *Insular Cases* doctrine a central aspect of its rationales, perhaps because the courts wished to avoid addressing its complexity and to reserve judgment for the Supreme Court.[375] However, the Supreme Court has yet to address

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368 *See* Cepeda Derieux & Weare, *supra* note 40, at 286.

369 *Id.* at 285.

370 Transcript of Oral Argument at 81, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (No. 18–1334) [hereinafter Transcript of Oral Argument]; *see also* Cepeda Derieux & Weare, *supra* note 40, at 285.

371 Transcript of Oral Argument, *supra* note 370, at 81.

372 *Id.* at 85–87.

373 *See id.*

374 Cepeda Derieux & Weare, *supra* note 40, at 286.

375 United States v. Vaello-Madero, 956 F.3d 12, 17 (1st Cir. 2020) ("The Supreme Court has not been equivocal in its dictates on this subject, stating that the decisions of that Court 'remain binding precedent until [the Court] see[s] fit to reconsider them . . . .'") (citing Hohn v. United States, 524 U.S. 236, 252–53 (1998)).

the *Insular Cases*, even in situations where it is clearly asked to do so.[376] This suggests that it is unreasonable to expect that the Court will do the same if it decides to hear the federal government's appeal. Hence, the *Insular Cases*, the incorporation doctrine they spawned, and cases relying on such doctrine, like *Wabol*, remain viable for other courts and the Supreme Court.[377] While this remains the case, any constitutional rights that Puerto Rican residents currently enjoy are subject to further manipulation by the federal government and the judiciary.[378]

VI. CONCLUSION

Vaello-Madero should not be viewed as the federal judiciary's repudiation of the *Insular Cases*. Firstly, it only encompasses one case while the *Insular Cases* doctrine was built throughout decades and in at least six cases.[379] It is improbable that, in one fell swoop, the Supreme Court will discredit such an enormous amount of precedent because of one case. If the *Insular Cases* will eventually cease to be good law, they will likely take decades to dismantle, even if the Supreme Court ideologically agrees with the premise of treating American citizens of the unincorporated territories in the same way as citizens of the States.[380]

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[376] *See* Cepeda Derieux & Weare, *supra* note 40, at 286.

[377] *See id.* ("Nonetheless, the Court's clear mistrust of the *Insular Cases*, even as it declined to overrule them, continues a trend wherein the Court says one thing but then permits lower courts to do another. Since at least the 1950s, the Court has expressed skepticism of its territorial incorporation doctrine and has said courts should not extend it further. And yet, because they remain on the books, lower courts continue to rely on the *Insular Cases* to deprive residents of U.S. territories of rights and constitutional safeguards they almost surely enjoy.").

[378] *See* Herald, *supra* note 45, at 713.

[379] Doug Mack, *The Strange Case of Puerto Rico*, SLATE (Oct. 9, 2017), https://slate.com/news-and-politics/2017/10/the-insular-cases-the-racist-supreme-court-decisions-that-cemented-puerto-ricos-second-class-status.html.

[380] *See* Neil Weare, *Why the* Insular Cases *Must Become the Next Plessy*, HARV. L. REV. BLOG (Mar. 28, 2018), https://blog.harvardlawreview.org/why-the-insular-cases-must-become-the-next-plessy/ ("It is long–past time that the *Insular Cases* be placed in the dustbin of history . . . .But to get there, we must rally the same kind of energy and resources that led to the Supreme Court's

Secondly, *Vaello-Madero* does not altogether break from the *Insular Cases* doctrine. The *Insular Cases* stand for the proposition that Congress holds omnipotent plenary powers that allow the federal government "to rule over the islands without their consent or their democratic participation."[381] The incorporation doctrine, derived from Justice White's concurrence in *Downes*, holds that the applicability of fundamental constitutional restrictions on the government's authority to legislate for the territories depends on whether the territory in question is incorporated (*i.e.*, set on a path for statehood) or unincorporated.[382] *Vaello-Madero* does not fight against the tenets of the *Insular Cases*, but it objects the subsequent expansion of their doctrine and seeks to reaffirm the original pronouncement by Justice Brown that "Congress, in legislating for the territories would be subject to those *fundamental limitations in favor of personal rights* which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution . . . ."[383]

Judge Gelpí, for the District of Puerto Rico, echoed this principle in the District Court's opinion: "It is the Government's role to protect the fundamental rights of all United States citizens. *Fundamental rights are the same in the States as in the Territories, without distinction*."[384] *Vaello-Madero* does not aim to redefine the omnipotent plenary powers Congress possesses to legislate for the territories, as is evidenced by the total lack of any reference to the *Insular Cases* in the opinions of the District Court and the First Circuit.[385] Instead, *Vaello-Madero* only aims to ensure that American citizens in the unincorporated territories are treated equally, in recognition of the Supreme Court's original intention in *Downes*.[386]

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historic decision in *Brown*. As history shows, change does not just happen on its own.").

381 Torruella, *supra* note 29, at 73.

382 *See* Rivera Ramos, *supra* note 31, at 247–48.

383 Downes v. Bidwell, 182 U.S. 244, 268 (1901) (emphasis added).

384 United States v. Vaello-Madero, 356 F. Supp. 3d 208, 213 (D.P.R. 2019) (emphasis added).

385 *Id.* at 212 ("Congress indeed possesses a wide latitude of powers to effectively govern its territories.").

386 *Id.* at 210–11.

As such, *Vaello-Madero* militates against the concept of "otherness" inherent in much of the *Insular Cases* doctrine, whereby notions of racial superiority, Manifest Destiny, and Social Darwinism were constituted into the American "ideology of expansion."[387] According to Professor Rivera Ramos, the idea that the peoples of the territories acquired in 1898 "were not fit to become full–fledged members of the American polity" and their incapacity for self–government are ingrained in the *Insular Cases*.[388] *Vaello-Madero* rejects these ideas and considers the American residents of Puerto Rico equal to those of the states.[389] Paradoxically, *Vaello-Madero* promises to modernize the *Insular Cases* doctrine by returning to the original pronouncements of the *Insular Cases* themselves.[390] The modernizing intent of *Vaello-Madero* is evident in the First Circuit's treatment of *Califano* and *Harris*, where the court recognizes that the jurisprudential impetus in the aftermath of *Boumediene* and *Windsor* requires a renewed analysis of the applicability of the arguments raised in the former cases justifying the unequal application of the laws to the unincorporated territories.[391]

Nonetheless, it is still the federal government's position that Congress possesses constitutional authority to single–out the American citizens residing in Puerto Rico, subject only to the per-

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[387] *See* Rivera Ramos, *supra* note 31, at 288–89.

[388] *Id.* at 290.

[389] *Vaello Madero*, 356 F. Supp. 3d at 211 ("To hold otherwise would run afoul of the sacrosanct principle embodied in the Declaration of Independence that 'All Men are Created Equal.'").

[390] *Compare Vaello-Madero*, 356 F. Supp. 3d at 211 ("[The Territorial Clause], however, is not *carte blanche* for Congress to switch on and off at its convenience the *fundamental constitutional rights* to Due Process and Equal Protection . . . ."), *with* Downes v. Bidwell, 182 U.S. 244, 282–83 (1901) ("[T]here may be a distinction between certain natural rights, enforced in the constitution by prohibitions against interference with them, and what may be termed artificial . . . rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights . . . to personal liberty and individual property . . . to due process of law and to an equal protection of the laws . . . .").

[391] United States v. Vaello-Madero, 956 F.3d 12, 17 (1st Cir. 2020) ("Although we, of course, cannot and do not quibble with such forceful and binding mandates, we would be remiss in complying with our own duty were we to blindly accept the applicability of *Califano* and *Harris* without engaging in a scrupulous inquiry into their relevance, application, and precedential value.").

missive rational basis standard of review.[392] According to the federal government's petition for a writ of certiorari, the Equal Protection Clause regards "'persons and classes of persons' rather than places, and that the government thus remains free to establish 'one system for one portion of its territory and another system for another portion.'"[393] Moreover, the federal government maintains that equal protection principles do not mandate equal legal treatment of the territories because these principles "'relate[] to equality between persons, as such, rather than between areas.'"[394] Perhaps the most consequential portion of the federal government's argument is its refusal to recognize that equal protection of the laws does not apply uniformly everywhere that the United States is sovereign.[395] Their petition proceeds: "Some provisions of the Constitution do require geographic uniformity . . . but the Equal Protection Clause simply is not among them."[396] The government's adherence to *Califano* and *Harris* and to principles of *stare decisis* in its arguments reflects its intention to preserve the expanded role of the *Insular Cases* doctrine, despite the First Circuit's suggestions that these cases may be disconnected from the reality of the times.[397]

Now that the Supreme Court has granted certiorari to hear the federal government's appeal of the First Circuit's decision,[398] *Vaello-Madero* represents another opportunity for the Supreme Court to address the folly that is the *Insular Cases* doctrine in light of the progress achieved regarding racial attitudes and the ideals of the politico–socio–economic development of nations since the beginning of the 20th century. While the *Insular Cases* and their progeny continue to be accepted, "basic principles of federalism, government by consent, equal protection of the laws, and the guarantees of a republican form of government" are subjugated to co-

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392 Brief for Petitioner, *supra* note 36, at 10.

393 *Id.* (citing Missouri v. Lewis, 101 U.S. 22, 30–31 (1880)).

394 *Id.* (first citing Ocampo v. United States, 234 U.S. 91, 98 (1914); then citing McGowan v. Maryland, 366 U.S. 420, 427 (1961)).

395 *Id.* at 10–11

396 *Id.* (citations omitted).

397 *See id.* at 12–20.

398 *Supreme Court to Weigh Puerto Rico Access to U.S. Aid*, AP NEWS (Mar. 1, 2021), https://apnews.com/article/supreme-court-puerto-rico-ssi-benefits-b0b96a610a1b9f9e68f2283029c2aade.

lonial prerogatives, expediency and convenience, and to the presumed plenary powers of Congress in the territorial context.[399] As others have observed, the *Insular Cases* and the federal government's ability to enforce disparate treatment of citizens are "obsolete vestige[s] of a racist, imperialist era of our Country which serves no purpose other than to differentiate between continental and non–continental American citizens."[400] If this "dark cloud"[401] of jurisprudence remains on the books, the courts and the federal government will continue to use the doctrine to deprive American citizens of their constitutional rights.

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[399] Terrasa, *supra* note 176, at 92.

[400] *Id.*; *see, e.g.*, Torruella, *supra* note 29, at 94 ("The Constitution does not authorize the United States to hold territory or its citizens in such a condition; the *Insular Cases* . . . validated this colonial status in direct contravention of the words and values of the Constitution. These cases were wrongly decided ab initio.").

[401] Transcript of Oral Argument, *supra* note 370, at 82.