

## DE JURE SEPARATE AND UNEQUAL TREATMENT OF THE PEOPLE OF PUERTO RICO AND THE U.S. TERRITORIES

*Natalie Gomez-Velez\**

*Current efforts to dismantle systemic racism in the United States are often met with the argument that legally sanctioned inequality is a thing of the past. Yet despite progress toward formal legal equality, racism and discrimination in the United States exist not only as the effects of past laws and systems—they exist presently in current laws and systems as well. Current U.S. law discriminates against U.S. territories and their residents with respect to citizenship status, voting rights and representation, and equal access to benefits, among other things.*

*This Essay examines such separate and unequal treatment using the recent case, United States v. Vaello Madero, as a springboard. Vaello Madero shows how an elderly, disabled U.S. citizen receiving benefits from the Supplemental Security Income program can lose access to those crucial federal benefits (or have them clawed back) simply by moving from the U.S. mainland to the U.S. territory of Puerto Rico, pursuant to a federal statute. It explains how the Supreme Court determined that, under the Territorial Clause of the U.S. Constitution, Congress had a “rational basis” for this arbitrary and discriminatory treatment.*

---

\* Professor of Law, City University of New York (CUNY) School of Law. I would like to thank my colleagues Julie Goldscheid, Janet Calvo, and Dolly Caraballo for comments on early drafts of this Essay. I also would like to thank the following participants of the works in progress session at the 2022 inaugural Graciela Olivárez Latinas in the Legal Academy (GO LILA) Workshop for their participation and helpful comments on the presentation of this Essay: Esther Vicente, Rachel Moran, Cori Alonso-Yoder, Ana Otero, Angélica Cházaro, and Brenda Williams. Special thanks to my colleagues Neil Weare and Anthony Ciolli for co-organizing with *Fordham Law Review* Executive Symposia Editor, Maya McGrath, and Editor-in-Chief, Luis del Rosario, the fall 2022 symposium on the American territories, which generated this and other Essays in this issue. Thank you as well to Isabelle Leipziger, Luis del Rosario, Anastasia Lacina, Sonia Autret, and the staff of the *Fordham Law Review* for their close and careful editorial work. Many thanks to New York State Bar Association (NYSBA) president Sherry Levin-Wallach for establishing the NYSBA Task Force on the U.S. Territories, which I cochair with Mirna Martínez Santiago, to task force members Emmanuel Hiram Arnaud, Adriel Cepeda Derieux, Jerry Goldfeder, and the Hon. Jenny Rivera, and to all who participated in the symposium. Finally, my deep gratitude to my husband and partner Robert Velez for his invaluable comments and unwavering support of this work. This Essay was prepared for the Symposium entitled *An Anomalous Status: Rights and Wrongs in America’s Territories*, hosted by the *Fordham Law Review* on October 27–28, 2022, at Fordham University School of Law.

*This Essay then explains Vaello Madero as part of a broader pattern in which the Supreme Court permits and exacerbates separate and unequal treatment of U.S. territories and their residents. The Court's refusal to overturn the Insular Cases and their "incorporation doctrine" interpretation of the Constitution's Territorial Clause has resulted in more than a century of harm to Puerto Rico and other U.S. territories. This Essay provides examples of the arbitrary and absurd treatment of Puerto Rico and other U.S. territories under this doctrine, as well as its devastating impact.*

*This Essay then notes the Court's persistent failure to provide necessary redress, as well as the unwillingness or inability of the legislative and executive branches to address the separate and unequal status of the U.S. territories. These failures are due in large part to political-process problems that result from the U.S. territories' colonial status. It concludes by noting the need to educate the broader American public about the denial of equality, sovereignty, and self-determination of the U.S. territories as a means of fostering the political will necessary to end de jure separate and unequal treatment of the U.S. territories.*

INTRODUCTION.....	1729
I. UNITED STATES V. VAELLO MADERO: AN EXAMPLE OF STARK INEQUALITY IN PUERTO RICO AS A U.S. TERRITORY .....	1731
A. United States v. Vaello Madero.....	1731
B. <i>The Territorial Clause of Article IV of the U.S.     Constitution and the Insular Cases</i> .....	1740
C. <i>The Supreme Court's Arbitrary and Irrational     Treatment of Puerto Rico Under a Colonialist     Territorial Framework</i> .....	1747
II. WHY IS DE JURE SEPARATE AND UNEQUAL TREATMENT OF PUERTO RICO TOLERATED AT A TIME OF RACIAL RECKONING, AMID CONCERNS ABOUT THE IMPACTS OF IMPERIALISM AND COLONIALISM ON SOVEREIGNTY AND SELF-DETERMINATION? .....	1752
A. <i>Invisible Empire: U.S. Colonialism and Inequality     Thrive amid U.S. Narratives of Sovereignty,     Self-Determination, and Racial Progress</i> .....	1753
B. <i>Puerto Rico and the U.S. Territories' Political-Process     Problems: Colonialism Denies Both U.S. Representation     and Economic and Political Autonomy</i> .....	1756
III. FINDING A PATH TO DECOLONIZATION AND EQUAL CITIZENSHIP .....	1757
A. <i>The Court's Role</i> .....	1757
B. <i>Congress's Role</i> .....	1758
C. <i>The Executive's Role</i> .....	1760
CONCLUSION .....	1760

## INTRODUCTION

Today's discourse on racial injustice and discrimination in the United States has a notable gap: it tends to overlook (or understate) current and legally sanctioned discrimination against U.S. territories and their residents. The legal treatment of the U.S. territories and their residents demonstrates that de jure separate and unequal treatment is not a mere vestige of the past—it is current U.S. law. Indeed, the U.S. Supreme Court has recently declined several clear opportunities to address this inequality and has instead reinforced it.<sup>1</sup> The Court has failed to take even the necessary step of overturning the *Insular Cases*.<sup>2</sup> The *Insular Cases* created a sham distinction between “incorporated” and “unincorporated” territories, marking Puerto Rico and other unincorporated U.S. territories as “foreign . . . in a domestic sense”—a distinction that remains law today and drives baldly arbitrary and discriminatory treatment.<sup>3</sup> The *Insular Cases* have been roundly criticized as “hav[ing] no foundation in the Constitution[,] rest[ing] instead on racial stereotypes [and] deserv[ing] no place in our law.”<sup>4</sup> In addition, “[t]he inconsistencies between the constitutional rights afforded to United States citizens living in states as opposed to territories have ‘been the subject of extensive judicial, academic, and popular criticism.’”<sup>5</sup> Yet, federal courts

---

1. See, e.g., *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541–43 (2022); *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1655 (2020) (holding that the “congressionally mandated process for selecting members of the Financial Oversight and Management Board for Puerto Rico does not violate” the U.S. Constitution’s Appointments Clause); *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 118 (2016); *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1867–68 (2016).

2. There is no universal consensus on which decisions constitute the *Insular Cases*, however Professor Efrén Rivera Ramos has compiled the following list of Supreme Court decisions issued between 1901 and 1922 that do: *Balzac v. Porto Rico*, 258 U.S. 298 (1922), *Ocampo v. United States*, 234 U.S. 91 (1914), *Ochoa v. Hernandez*, 230 U.S. 139 (1913), *Dowdell v. United States*, 221 U.S. 325 (1911), *New York ex rel. Kopel v. Bingham*, 211 U.S. 468 (1909), *Kent v. Porto Rico*, 207 U.S. 113 (1907), *Grafton v. United States*, 206 U.S. 333 (1907), *Trono v. United States*, 199 U.S. 521 (1905), *Rassmussen v. United States*, 197 U.S. 516 (1905), *abrogated by Williams v. Florida*, 399 U.S. 78 (1970), *Mendezona v. United States*, 195 U.S. 158 (1904), *Kepner v. United States*, 195 U.S. 100 (1904), *Gonzales v. Williams*, 192 U.S. 1 (1904), *Dorr v. United States*, 195 U.S. 138 (1904), *Hawaii v. Mankichi*, 190 U.S. 197 (1903), *Pepke v. United States (In re Fourteen Diamond Rings)*, 183 U.S. 176 (1901), *Dooley v. United States*, 183 U.S. 151 (1901), *Goetze v. United States*, 182 U.S. 221 (1901), *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901), *Downes v. Bidwell*, 182 U.S. 244 (1901), *Dooley v. United States*, 182 U.S. 222 (1901), *De Lima v. Bidwell*, 182 U.S. 1 (1901), *Crossman v. United States*, 105 F. 608 (C.C.S.D.N.Y. 1900), *rev’d sub nom. Goetze v. United States*, 182 U.S. 221 (1901), and *Armstrong v. United States*, 182 U.S. 243 (1901). See Efrén Rivera Ramos, *Deconstructing Colonialism: The “Unincorporated Territory” as a Category of Domination*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 104, 115–16 n.4 (Christina Duffy Burnett & Burke Marshall eds., 2001).

3. See, e.g., Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 *YALE J. INT’L L.* 229, 240 (2018) (quoting *Downes v. Bidwell*, 182 U.S. 244, 341 (1901) (White, J., concurring)).

4. See *Vaello Madero*, 142 S. Ct. at 1552 (Gorsuch, J., concurring).

5. *Segovia v. Bd. of Election Comm’rs*, 201 F. Supp. 3d 924, 938 (N.D. Ill. 2016) (quoting *Paeste v. Gov’t of Guam*, 798 F.3d 1228, 1231 n.2 (9th Cir. 2015)), *vacated in part on other grounds sub nom. Segovia v. United States*, 880 F.3d 384 (7th Cir. 2018).

continue to rely on the *Insular Cases*.<sup>6</sup> Those cases provide interpretations of the U.S. Constitution's Territorial Clause<sup>7</sup> and form the basis for the entrenched and unacceptable colonial status of the United States's five unincorporated territories, including Puerto Rico.<sup>8</sup>

In 2022, the Supreme Court again declined to overturn the *Insular Cases* in *United States v. Vaello Madero*.<sup>9</sup> *Vaello Madero* provides a stark example of the discriminatory and irrational effects that the *Insular Cases* have on the "unincorporated territories" and their residents. In that case, the Court considered whether denying Supplemental Security Income (SSI) to aged, blind, and disabled citizens who were otherwise eligible for SSI—but were excluded solely because they live in Puerto Rico—violated the Fifth Amendment to the Constitution.<sup>10</sup>

This Essay explores the Court's de jure separate, unequal, and arbitrary treatment of the U.S. territories with a focus on Puerto Rico. Part I examines *Vaello Madero* as a clear example of the Court's unequal treatment of U.S. citizens in Puerto Rico due to the island's continuing status as a de facto colony. It explains that Puerto Rico's colonial status arises from the Court's interpretation of the Territorial Clause of the Constitution, which is grounded in the *Insular Cases*. It also explains how *Vaello Madero* and several other recent cases illustrate the United States's current de jure separate, unequal, and arbitrary treatment of citizens residing in Puerto Rico.

Part II considers the grave implications of such treatment and notes the way in which that treatment implicates broader U.S. discourse about structural and systemic racism. It notes the relative invisibility of U.S. territorial treatment in current law and policy, including within the discourse about how structural racism is grounded in imperialism. It also highlights the political-process problem that Puerto Ricans and other territorial residents face—due to a denial of full citizenship, voting rights, and political and economic autonomy—and explains why increased awareness on the mainland is crucial to spurring societal and political engagement and ending such discrimination.

Part III explores paths to decolonization, equal citizenship, and self-determination, noting the respective roles of the judicial, legislative, and executive branches in addressing the unacceptable separate and unequal treatment of the people of Puerto Rico and the U.S. territories.

---

6. See *Vaello Madero*, 142 S. Ct. at 1555 (Gorsuch, J., concurring).

7. U.S. CONST. art. 4, § 3, cl. 2.

8. The United States includes five populated territories: American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. See *Vaello Madero*, 142 S. Ct. at 1541.

9. 142 S. Ct. 1539 (2022).

10. See *id.*

I. *UNITED STATES V. VAELLO MADERO*: AN EXAMPLE OF STARK  
INEQUALITY IN PUERTO RICO AS A U.S. TERRITORY

Puerto Ricans are U.S. citizens recognized as a discrete and insular minority.<sup>11</sup> On April 21, 2022, the Supreme Court determined that the statutory denial of equal SSI benefits to an eligible U.S. citizen—who was denied SSI simply because he moved from the U.S. mainland to Puerto Rico—does not violate the Equal Protection Clause of the Constitution.<sup>12</sup> In doing so, the Court declined to acknowledge the inappropriate unequal treatment of Puerto Rico residents as discrete and insular minorities, to address and overrule the *Insular Cases*, and to address the problem of perpetual unincorporated territorial status. Instead, the Court conducted a weakened rational basis review of the SSI statute due to Puerto Rico’s status as a territory.<sup>13</sup> *Vaello Madero* exemplifies the consequences of the *Insular Cases*’ incorporation distinctions, which were based on racist doctrine. It provides a glaring example of current discriminatory impacts of the Supreme Court’s failure to overturn them.

*Vaello Madero* demonstrates a blatant denial of equal protection based on Puerto Rico’s territorial status. The Territorial Clause of the Constitution grants Congress the authority to treat U.S. citizens residing in Puerto Rico, and certain other territories, differently from citizens residing on the mainland when structuring federal taxes and benefits.<sup>14</sup> That inequity is based on classifications from the *Insular Cases* marking Puerto Rico and other unincorporated territories as foreign “in a domestic sense.”<sup>15</sup> If that phrase sounds nonsensical, that is because it is. It is a product of a twisted logic established in the *Insular Cases* that was designed to maintain the subordination of territories because of blatantly racist assumptions about their people.

A. *United States v. Vaello Madero*

*Vaello Madero* represents a recent Supreme Court opportunity (and failure) to overturn the *Insular Cases*. The facts of the case provide a clear example of stark inequity and discriminatory treatment of territorial residents.

---

11. See generally Adriel I. Cepeda Derieux, Note, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico’s Political Process Failure*, 110 COLUM. L. REV. 797 (2010).

12. *Vaello Madero*, 142 S. Ct. at 1541.

13. *Id.* at 1542–43.

14. *Id.*

15. See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 341 (1901) (White, J., concurring) (“The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.”).

The plaintiff, Mr. Vaello Madero, was a U.S. citizen.<sup>16</sup> While living in New York City, he suffered a serious illness that left him unable to work.<sup>17</sup> He was eligible for, applied for, and began receiving SSI benefits.<sup>18</sup> A year later, he returned to Puerto Rico to be closer to his family.<sup>19</sup> He continued to receive SSI benefits.<sup>20</sup> About three years later, the Social Security Administration notified Mr. Vaello Madero that it was revoking his benefits retroactively from when he established residency in Puerto Rico because he was allegedly outside the United States.<sup>21</sup> Worse yet, the government sued Mr. Vaello Madero to recover over \$28,000 in alleged SSI overpayments.<sup>22</sup> With the assistance of an appointed attorney, Mr. Vaello Madero fought back.<sup>23</sup> He asserted that denying SSI benefits to eligible U.S. citizens solely because they reside in Puerto Rico violated the Equal Protection Clause of the Fifth Amendment to the Constitution.<sup>24</sup>

The U.S. District Court for the District of Puerto Rico granted Mr. Vaello Madero's motion for summary judgment on the equal protection question.<sup>25</sup> The court distinguished the two Supreme Court cases on which the government relied, *Califano v. Gautier Torres*<sup>26</sup> and *Harris v. Rosario*,<sup>27</sup> which were both per curiam summary determinations. The government interpreted these cases as permitting the differential treatment of persons who resided in Puerto Rico, arguing that the plenary powers granted to Congress under the Territorial Clause allowed "a deferential rational basis review."<sup>28</sup> The court concluded that Congress's actions in this case "fail[] to pass rational basis constitutional muster" because "[c]lassifying a group of the Nation's poor and medically neediest United States citizens as 'second tier' simply because they reside in Puerto Rico is by no means rational."<sup>29</sup>

The court also said that the statute in question discriminated on the basis of a suspect classification because "[a]n overwhelming percentage of the

---

16. *Vaello Madero*, 142 S. Ct. at 1558 (Sotomayor, J., dissenting); *United States v. Vaello-Madero*, 956 F.3d 12, 15 (1st Cir. 2020) ("Then, as now, all those born in Puerto Rico are citizens of the United States pursuant to the Jones Act of 1917, 39 Stat. 953, § 5 (1917), and subsequent legislation granting birthright citizenship to Puerto Rico's native-born inhabitants . . ."), *rev'd sub nom.* *United States v. Vaello Madero*, 142 S. Ct. 1539 (2022).

17. *See Vaello Madero*, 142 S. Ct. at 1558 (Sotomayor, J., dissenting).

18. *Vaello-Madero*, 956 F.3d at 15.

19. *See id.*

20. *See id.*

21. Transcript of Oral Argument at 49, *United States v. Vaello Madero*, 142 S. Ct. 1539 (2022) (No. 20-303), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2021/20-303\\_n75p.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-303_n75p.pdf) [<https://perma.cc/KM6X-TRHW>].

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

23. *Id.*

24. *Id.*

25. *United States v. Vaello Madero*, 356 F. Supp. 3d 208, 213–16 (D.P.R. 2019), *aff'd on other grounds sub nom.* *United States v. Vaello-Madero*, 956 F.3d 12 (1st Cir. 2020), *rev'd sub nom.* *United States v. Vaello Madero*, 142 S. Ct. 1539 (2022).

26. 435 U.S. 1 (1978) (per curiam).

27. 446 U.S. 651 (1980) (per curiam).

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

29. *Id.* at 214.

United States citizens [who] resid[e] in Puerto Rico are of Hispanic origin.”<sup>30</sup> Citing *Boumediene v. Bush*<sup>31</sup> and *United States v. Windsor*,<sup>32</sup> the court concluded that the ratio decidendi in *Califano* and *Harris* predated “important subsequent developments in the constitutional landscape,” and thus required reappraisal.<sup>33</sup>

When the case went on appeal to the U.S. Court of Appeals for the First Circuit, the government offered two primary justifications for its policy: (1) the difference in tax status between Puerto Rico and U.S. states and (2) the costs of extending the program to residents of Puerto Rico, who generally do not pay federal income taxes.<sup>34</sup> The government relied on *Califano* and *Harris*, in which the Supreme Court permitted differential treatment of Puerto Rican residents in the provision of public benefits.

In his opinion, Judge Juan R. Torruella reached a conclusion similar to the district court’s but took a different approach. Citing the Supreme Court’s admonition that “it is [the Supreme] Court’s prerogative alone to overrule one of its precedents,” the First Circuit again applied rational basis review to the government’s exclusion of Puerto Rican residents from SSI benefits.<sup>35</sup>

Judge Torruella first distinguished *Vaello-Madero* from *Califano* and *Harris*. *Califano* was decided on right-to-travel grounds; there was no equal protection question before the Court.<sup>36</sup> *Harris*, meanwhile, did not involve SSI, but rather a different program: Aid to Families with Dependent Children, which was a block grant program that involved federal, state, and local partnerships.<sup>37</sup> Thus, Judge Torruella concluded that “the [Supreme] Court has never ruled on the validity of alleged discriminatory treatment of Puerto Rico residents as required by the SSI program under the prism of equal protection.”<sup>38</sup>

Judge Torruella then explained why the government’s two rational-basis arguments failed. First, the tax-status argument failed because Puerto Rico regularly contributes more than \$4 billion annually in federal taxes—more than at least six states and the Northern Mariana Islands, where SSI benefits are available.<sup>39</sup> Second, he found the government’s narrower argument regarding nonpayment of federal income taxes to be also inadequate because SSI is funded by general revenues, and “SSI eligibility is completely

---

30. *Id.*

31. 553 U.S. 723 (2008).

32. 570 U.S. 744 (2013).

33. *Vaello Madero*, 356 F. Supp. 3d at 215 n.7.

34. *United States v. Vaello-Madero*, 956 F.3d 12, 19 (1st Cir. 2020), *rev’d sub nom. United States v. Vaello Madero*, 142 S. Ct. 1539 (2022). The government provided a third rationale about the effect on the Puerto Rico economy at trial but abandoned it for the appeal. *Id.* at 21–22.

35. *Id.* at 17 (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

36. *Id.* at 19–20.

37. *Id.* at 20–21.

38. *Id.* at 21.

39. *Id.* at 16, 24.

‘divorced from individuals’ tax payment history.’”<sup>40</sup> Judge Torruella also noted that SSI is a “national program distributed according to a uniform federal schedule, funded by appropriations that are not earmarked by state or territory, and disbursed regardless of an individual’s historical residence.”<sup>41</sup>

Moreover, the court concluded that the high cost of including Puerto Rican residents in the SSI program was not a rational basis for their exclusion because government fiscal considerations receive no deference when “an entire segment of the would-be benefitted class is excluded.”<sup>42</sup> Judge Torruella further stated:

[W]hile we respect the legislature’s authority to make even unwise decisions to purportedly protect the fiscal integrity of SSI and the federal government itself, the Fifth Amendment does not permit the arbitrary treatment of individuals who would otherwise qualify for SSI but for their residency in Puerto Rico . . . . Even under rational basis review, the cost of including Puerto Rico’s elderly, disabled, and blind in SSI cannot by itself justify their exclusion.<sup>43</sup>

Despite requests that the U.S. Department of Justice (DOJ) decline to defend the differential treatment of residents of territories for SSI purposes,<sup>44</sup> the U.S. government appealed to the Supreme Court anyway.<sup>45</sup> The Court’s analysis centered on applying the appropriate standard of review to the facts.

During oral argument, key questions included (1) whether the equal protection challenge to the denial and clawback of Mr. Vaello Madero’s SSI benefits should be subject to strict scrutiny or rational basis review, (2) whether the matter could be decided under the Territorial Clause alone, and (3) whether the matter implicated the *Insular Cases*.<sup>46</sup> For example, the first question from Justice Thomas involved whether “the Territory Clause is enough of [a] source of authority for the government or Congress to have a rational basis to do what it’s doing.”<sup>47</sup> The government responded that it was not “resting just on the Territory Clause”: “We agree that the equal protection principle in the Fifth Amendment’s Due Process Clause applies here, and there does need to be a rational basis.”<sup>48</sup> The government thus

---

40. *Id.* at 25 (quoting the appellees). Indeed, those eligible for SSI benefits have incomes that are too low to require them to pay federal income taxes.

41. *Id.*

42. *Id.* at 29.

43. *Id.* at 30.

44. *See, e.g.*, Letter from Hisp. Fed’n to Joseph R. Biden, President (Nov. 4, 2021), [https://www.hispanicfederation.org/images/HF\\_Final\\_Letter\\_to\\_Biden\\_ReSSI.pdf](https://www.hispanicfederation.org/images/HF_Final_Letter_to_Biden_ReSSI.pdf) [<https://perma.cc/25V3-RMHR>].

45. *See United States v. Vaello-Madero*, 141 S. Ct. 1462 (2021) (granting petition for certiorari).

46. Transcript of Oral Argument, *supra* note 21, at 3, 5–6, 36. Mr. Vaello Madero’s attorneys argued that heightened scrutiny should apply because the denial of benefits was based on suspect classifications—specifically, the racial distinctions set forth in the *Insular Cases* that form the basis for Puerto Rico’s subordinate status. *Id.* at 42–43.

47. *Id.* at 5.

48. *Id.*



avoided the *Insular Cases* issue by declining to say that the Territorial Clause alone permitted the inequity at issue.

The government took the position that the *Insular Cases* did not apply.<sup>49</sup> While acknowledging that the “*Insular Cases* were about whether there are different portions of the Constitution that apply differently to different territories,” the government argued that the *Insular Cases* were not implicated because the “Court has previously held that the equal protection component [of the] Fifth Amendment applies to Puerto Rico.”<sup>50</sup> In this way, the government sidestepped key questions about how the Equal Protection Clause interacts with the *Insular Cases*’ interpretation of the Territorial Clause. Perhaps recognizing this, Justice Gorsuch asked: “[I]f that’s true, why . . . shouldn’t we just admit the *Insular Cases* were incorrectly decided?”<sup>51</sup> He then asked the government for its position on the *Insular Cases*.<sup>52</sup> In response, the government’s lawyer stated that “some of the [*Insular Cases*] reasoning and rhetoric . . . is obviously anathema, has been for decades, if not from the outset” and that “the Court has repeatedly declined to extend the *Insular Cases*.”<sup>53</sup> He quickly noted, however, that the *Insular Cases* were “not at issue . . . because the conclusion that parts of the Constitution wouldn’t apply to Puerto Rico doesn’t decide anything that is relevant to this case.”<sup>54</sup>

Once again, the government evaded a key question about how the Constitution should apply to the territories. It offered the compartmentalized argument that, because the Court has agreed that a particular constitutional principle applies to the particular facts, the larger justifications for unequal treatment can simply be ignored as not “relevant.”<sup>55</sup>

Justice Sotomayor, refusing to ignore the most salient issues, asked: “[H]ow does the fact that Puerto Rico residents are a politically powerless minority . . . [that] has been subject to . . . a history of discrimination [as exemplified by the *Insular Cases*] factor into your argument on rational basis?”<sup>56</sup> The government simply replied: “[W]e don’t think that there is any heightened scrutiny here.”<sup>57</sup>

---

49. *Id.* at 8–9.

50. *Id.*

51. *Id.* at 9.

52. *Id.*

53. *Id.* at 9–10.

54. *Id.* at 10–11. The government’s lawyer went on to say, “just as in *Aurelius*, the Court doesn’t need to say anything else about the *Insular Cases* in order to decide this case,” demonstrating the government’s and the Court’s persistent refusal to see the forest for the trees. *Id.* at 11.

55. *See id.* at 10–11. The government studiously avoided the *Insular Cases*’ repulsive rationale that territorial residents were considered “savages” unfit for self-governance and the concomitant view of the Territorial Clause as permitting an imperial government to dictate whatever it desires to its territories. This approach paved the way for a weakened version of the “rational relationship” test, under which the Court accepts the government’s reasoning without honestly examining its rationality. *See infra* notes 144–44 and accompanying text.

56. *Id.* at 29.

57. *Id.*

Oral argument revealed facts contradicting the government's argument that tax distinctions and cost barriers established a rational basis for the government's denial of SSI benefits and discrimination.<sup>58</sup> For example, Justice Sotomayor stated that "Puerto Ricans pay . . . as much taxes . . . as other states in the union" and that "[t]he government gives some tax benefits to some things and not others."<sup>59</sup> She also noted that the record "shows Puerto Ricans as a community . . . pay more than many states of the union."<sup>60</sup> The record contained ample evidence showing that Puerto Rican residents paid more in aggregate taxes than many states and that there was no "real connection" between tax burdens and benefits provided under the SSI program.<sup>61</sup> Nor is cost alone a rational basis for denying equal protection in providing a public benefit.<sup>62</sup>

The Court ruled 8–1 in the government's favor.<sup>63</sup> The majority ignored compelling facts and sound legal arguments showing the government's failure to articulate a rational basis for unequal treatment of Puerto Rican and other U.S. territorial residents with respect to SSI benefits. Justice Kavanaugh's six-page majority opinion gives startlingly short shrift to key arguments about the scope and limits of the Territorial Clause, the *Insular Cases*' impact on the Court's interpretation of that clause, and how that interpretation facilitates indefinite U.S. colonial dominion over Puerto Rico and other territories.<sup>64</sup> The opinion's similarly limited consideration of the Equal Protection Clause argument completely elided important facts and context. For example, it ignored evidence in the record that Puerto Rico's tax burden was greater than that of several states, and that SSI was available even without state or local contribution.<sup>65</sup> It also summarily referred to *Califano* and *Harris* as "dictat[ing] the result"<sup>66</sup> without acknowledging that the First Circuit distinguished both cases. In short, the majority opinion punts. It fails to engage with important facts and context that drive unequal treatment of more than three million residents of Puerto Rico and the U.S.

---

58. *See id.* at 14.

59. *Id.*

60. *Id.*

61. *Id.* at 18; *see also* United States v. Vaello-Madero, 956 F.3d 12, 24–25 (1st Cir. 2020) ("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 Alaska, 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; . . . \$4,036,334,000 in 1998." (footnotes omitted)), *rev'd sub nom.* United States v. Vaello Madero, 142 S. Ct. 1539 (2022).

62. Transcript of Oral Argument, *supra* note 21, at 11–12.

63. United States v. Vaello Madero, 142 S. Ct. 1539 (2022).

64. *See id.* at 1541–43.

65. *See* Transcript of Oral Argument, *supra* note 21, at 14.

66. *See Vaello Madero*, 142 S. Ct. at 1543.

territories, including through the denial of equal SSI benefits to needy citizens.

Indeed, the concurring and dissenting opinions engaged in more developed and substantive analysis of the facts and law than the majority opinion did. Of these, Justice Gorsuch's concurrence, which called for the overruling of the *Insular Cases*, was perhaps most surprising.<sup>67</sup> It began:

A century ago in the *Insular Cases*, this Court held that the federal government could rule Puerto Rico and other territories largely without regard to the Constitution. It is past time to acknowledge the gravity of this error and admit what we know to be true: The *Insular Cases* have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.<sup>68</sup>

Justice Gorsuch then detailed the history of the *Insular Cases* as a product of the Spanish-American War, “a boon for the country’s burgeoning colonial ambitions.”<sup>69</sup> He noted that a “fierce debate” ensued about whether “our republican traditions prevented the United States from governing distant possessions as subservient colonies without regard to the Constitution.”<sup>70</sup> He then explained how “new theories” that originated in the legal academy found their way to the Supreme Court through *Downes v. Bidwell*,<sup>71</sup> in which the “debate over American colonialism made its first appearance.”<sup>72</sup> Justice Gorsuch then discussed the racist basis for the “incorporation doctrine” advanced by Justice Henry B. Brown’s plurality opinion in *Downes*:

Justice Brown saw things in the starkest terms. Applying the Constitution made sense in “contiguous territor[ies] inhabited only by people of the same race, or by scattered bodies of native Indians.” But it would not do for islands “inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought.” There, Justice Brown contended, “the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible.” On his view, the Constitution should reach Puerto Rico only if and when Congress so directed.<sup>73</sup>

Justice Gorsuch then looked to Justice Edward D. White’s concurrence, explaining that Justice White’s version of the incorporation theory would have given force only to unspecified, “fundamental” constitutional rights, and that both opinions

---

67. *Id.* at 1552–57 (Gorsuch, J., concurring). Also surprising is Justice Thomas’s strange concurrence, calling for overruling *Bolling v. Sharpe*, 347 U.S. 497 (1954), the companion case to *Brown v. Board of Education*, 347 U.S. 483 (1954), on the ground that the Fifth Amendment does not have an equal protection component, and proposing that the Citizenship Clause rather than the equal protection component of the Fifth Amendment’s Due Process Clause should be the basis for determining questions of discrimination involving the territories. See *Vaello Madero*, 142 S. Ct. at 1544–47 (Thomas, J., concurring).

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

69. *Id.*

70. *Id.*

71. 182 U.S. 244 (1901).

72. *Vaello Madero*, 142 S. Ct. at 1553 (Gorsuch, J., concurring).

73. *Id.* (quoting *Downes v. Bidwell*, 182 U.S. 244, 282, 287 (1901)).

rested on a view about the Nation's "right" to acquire and exploit "an unknown island, peopled with an uncivilized race . . . for commercial and strategic reasons"—a right that "could not be practically exercised if the result would be to endow" full constitutional protections "on those absolutely unfit to receive [them]."<sup>74</sup>

Justice Gorsuch then detailed Chief Justice Melville Fuller's dissent and "astonishment" at the fact that Congress could "keep [a Territory], like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period."<sup>75</sup> Lastly, Justice Gorsuch addressed Justice John M. Harlan's dissent and his rejection of the constitutionally unmoored territorial "incorporation" idea.<sup>76</sup> Justice Gorsuch found no basis for the *Insular Cases*' doctrine in the Constitution's original meaning or in the Court's long-standing constitutional precedent.<sup>77</sup> He described the Court's increasing discomfort with, and efforts to narrow, the *Insular Cases* but noted that its failure to overrule them has constrained lower courts that must continue to apply them.<sup>78</sup>

Claiming that *Vaello Madero* "only defers a long overdue reckoning," Justice Gorsuch wrote that the parties did not ask the Court to overrule the *Insular Cases* but instead argued only that the Fifth Amendment's equal protection guarantee applied to Puerto Rico.<sup>79</sup> Thus, Justice Gorsuch did not reach the question of the *Insular Cases*'s validity.<sup>80</sup> Still, he concluded: "[T]he time has come to recognize that the *Insular Cases* rest on a rotten foundation. And I hope the day comes soon when the Court squarely overrules them."<sup>81</sup> Yet Justice Gorsuch failed to address how the Court's empty "rational basis" analysis under the Territorial Clause implicated the *Insular Cases*.

Justice Sotomayor, in a lone dissent, took on the majority's deeply inadequate analysis of Mr. Vaello Madero's equal protection claim. Justice Sotomayor began by noting that, given that SSI's uniform federal eligibility criteria apply to vulnerable citizens regardless of individual or state tax contributions, Congress's exclusion of citizen-residents of Puerto Rico constitutes a denial of equal protection because "there is no rational basis for Congress to treat needy citizens living anywhere in the United States so differently from others."<sup>82</sup> Justice Sotomayor advanced key facts about SSI eligibility and the way in which its uniform, direct federal benefits differed from block grants and other federal-state benefit programs.<sup>83</sup> She noted that

---

74. *Id.* (alterations in original) (quoting *Downes v. Bidwell*, 182 U.S. 244, 306 (1901) (White, J., concurring)).

75. *Id.* at 1554 (alteration in original) (quoting *Downes v. Bidwell*, 182 U.S. 244, 372 (1901) (Fuller, C.J., dissenting)).

76. *Id.* (quoting *Downes v. Bidwell*, 182 U.S. 244, 391 (1901) (Harlan, J., dissenting)).

77. *Id.* at 1555.

78. *Id.*

79. *Id.* at 1556–57.

80. *Id.*

81. *Id.* at 1557.

82. *Id.* at 1557–58 (Sotomayor, J., dissenting).

83. *Id.* at 1558.

it was arbitrary for Congress to provide SSI benefits to the states, the District of Columbia, and the Northern Mariana Islands, but not to Puerto Rico or the other territories.<sup>84</sup> Justice Sotomayor further detailed the significant negative impact that this has on needy Puerto Rican citizens.<sup>85</sup> She explained that Puerto Rico’s tax status fails to provide a rational basis for excluding its residents from SSI benefits because SSI, unlike other benefit programs, “establishes a direct relationship between the recipient and the Federal Government.”<sup>86</sup> She echoed a point made by the First Circuit: “[A]ny individual eligible for SSI benefits almost by definition earns too little to be paying federal income taxes. Thus, the idea that one needs to earn their eligibility by the payment of federal income tax is antithetical to the entire premise of the program.”<sup>87</sup> For Justice Sotomayor, it was not rational for Congress to limit SSI benefits based on payment of federal taxes.<sup>88</sup> The dissent exposes that there was little room for the majority’s determination that the government’s unequal denial of SSI benefits to Puerto Rico residents had any rational basis.

Further, countering Justice Kavanaugh’s concern about the “potentially far-reaching consequences” of extending SSI on equal protection grounds, Justice Sotomayor warned:

[I]t is the Court’s holding that might have dramatic repercussions. If Congress can exclude citizens from safety-net programs on the ground that they reside in jurisdictions that do not pay sufficient taxes, Congress could exclude needy residents of Vermont, Wyoming, South Dakota, North Dakota, Montana, and Alaska from benefits programs on the basis that residents of those States pay less into the Federal Treasury than residents of other States.<sup>89</sup>

Justice Sotomayor most likely knows that it is nearly inconceivable that Congress would exclude residents of these states from SSI benefit eligibility as a matter of representative politics. Her analogy highlights the political-process problems faced by Puerto Rico and other U.S. territories.

Justice Sotomayor’s dissent also shows the bankruptcy of the majority’s “rational basis” rationale. The majority decision not only reinforced second-class citizenship for residents of Puerto Rico, but also weakened equal protection under the Fifth Amendment by rendering the rational basis standard almost meaningless in this context.

Justice Sotomayor’s dissent concluded by getting to the heart of the matter when it comes to territorial status: “The Constitution permits Congress to ‘make all needful Rules and Regulations’ respecting the Territories. That constitutional command does not permit Congress to ignore the equally

---

84. *Id.*

85. *Id.*

86. *Id.* at 1560–61.

87. *United States v. Vaello-Madero*, 956 F.3d 12, 27 (1st Cir. 2020), *rev’d sub nom.* *United States v. Vaello Madero*, 142 S. Ct. 1539 (2022).

88. *Vaello Madero*, 142 S. Ct. at 1561–62 (Sotomayor, J., dissenting).

89. *Id.*

weighty constitutional command that it treat United States citizens equally.”<sup>90</sup>

*Vaello Madero* provides a clear and understandable example of the implications of colonial status and the significant consequences of the refusal to redress patently unequal and subordinate status. As long as the *Insular Cases* remain good law, lower federal courts will continue to rely on them:

[B]ecause 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. Further, beyond their doctrinal impact, the *Insular Cases* also continue to implicitly serve as a basis for Congress to maintain discriminatory laws that treat residents of the territories as second-class citizens, much as *Plessy* did for laws that discriminated against African Americans.<sup>91</sup>

The impacts are significant for citizenship, voting rights, and equal protection, among other rights—not to mention sovereign identity and basic human dignity. Worse yet, the Court not only repeatedly declined to overrule the *Insular Cases*, but also continues to shift its rationale for permitting separate and unequal treatment to continue—this time by citing the Territorial Clause without referencing the *Insular Cases*.<sup>92</sup>

#### *B. The Territorial Clause of Article IV of the U.S. Constitution and the Insular Cases*

The United States includes five populated territories: American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. The United States has indefinitely held some of these territories in second-class status for more than a century.<sup>93</sup> The United States’s claimed authority for what can only be described as colonial possession of its territories is the Territorial Clause of the Constitution, along with the notorious and judicially invented<sup>94</sup> “distinction between ‘incorporated’ and

---

90. *Id.* at 1562 (quoting U.S. CONST. art. IV, § 3, cl. 2).

91. Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 YALE L.J.F. 284, 286 (2020) (footnote omitted).

92. See, e.g., Sam Erman, *Status Manipulation and Spectral Sovereigns*, 53 COLUM. HUM. RTS. L. REV. 813, 827–28 (2022); see also Cristina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2536–38 (2022).

93. H.R. Res. 279, 117th Cong. (2021) (“Puerto Rico and Guam have now been a part of the United States since 1898, American Samoa since 1900, the Virgin Islands of the United States since 1917, and the Commonwealth of the Northern Mariana Islands since 1986.”).

94. Chief Judge Gustavo Gelpí of the U.S. District Court for the District of Puerto Rico “has called the *Insular Cases*’ territorial incorporation doctrine ‘a doctrine of pure judicial invention, with absolutely no basis in the Constitution and one that is contrary to all judicial precedent and territorial practice.’” *Id.* (quoting Chief Judge Gustavo Gelpí).

‘unincorporated’ territories.”<sup>95</sup> This justification, known as the “territorial incorporation doctrine,” was established in the *Insular Cases*.<sup>96</sup>

The Territorial Clause of the Constitution states that Congress may “make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.”<sup>97</sup> As Justice Kavanaugh asserted in *Vaello Madero*, “[t]he text of the Clause affords Congress broad authority to legislate with respect to the U.S. Territories.”<sup>98</sup> The Territorial Clause, however, does not authorize Congress to exercise power over U.S. territories indefinitely and requires constitutional safeguards.<sup>99</sup>

The Territorial Clause is part of Article IV of the Constitution, which provides for the admission of new states<sup>100</sup> and the treatment of territories or other “property” belonging to the United States.<sup>101</sup> It gives Congress plenary power over U.S. territories only pending their admission as states.<sup>102</sup> And this understanding of the clause as affording Congress *temporary* plenary power over inhabited U.S. territories prevailed in law and fact with respect to incorporated territories.<sup>103</sup> It also was understood at the time that full constitutional rights and principles of justice extended to all territories under U.S. dominion.<sup>104</sup> But this understanding changed with the signing of the

95. Adriel I. Cepeda Derieux & Rafael Cox Alomar, *Saying What Everyone Knows to Be True: Why Stare Decisis Is Not an Obstacle to Overruling the Insular Cases*, 53 COLUM. HUM. RTS. L. REV. 721, 743 (2022).

96. *See, e.g.*, H.R. Res. 279 (proposing a rejection of the territorial incorporation doctrine by Congress).

97. U.S. CONST. art. IV, § 3, cl. 2.

98. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541 (2022).

99. *See* Cesar A. Lopez-Morales, *Making the Constitutional Case for Decolonization: Reclaiming the Original Meaning of the Territory Clause*, 53 COLUM. HUM. RTS. L. REV. 772, 796 (2022) (“The relevant constitutional text and related historical practice demonstrate that the territorial status under the Constitution was supposed to be transitory.”).

100. U.S. CONST. art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”).

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

102. Lopez-Morales, *supra* note 99, at 800–01, 805.

103. *See id.* at 800 n.131.

104. *See, e.g.*, Charles E. Littlefield, *The Insular Cases*, 15 HARV. L. REV. 169, 170 (1901) (“The Insular Cases, in the manner in which the results were reached, the incongruity of the results, and the variety of inconsistent views expressed by the different members of the court, are, I believe, without a parallel in our judicial history . . . . Until some reasonable consistency and unanimity of opinion is reached by the court upon these questions, we can hardly expect their conclusions to be final and beyond revision.”). *See also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 209–10 (2002) (noting that, “[p]rior to the 1899 Treaty of Peace with Spain, every territorial treaty entered by the United States had provided that the new territory was to be ‘incorporated’ into the United States for future admission as a state and that the inhabitants were to be afforded the rights and privileges of citizenship”); Pedro 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, 253 (2010) (arguing that the more-than-century-old territorial

Treaty of Paris of 1898,<sup>105</sup> which ended the Spanish-American War and ceded several noncontiguous territories to the United States.<sup>106</sup>

The Territorial Clause's original meaning conceived of territorial status as temporary, with the eventual goal of statehood or deannexation.<sup>107</sup> Territorial acquisition was understood to be part of a process toward incorporation into the United States, not a process of indefinite (or permanent) colonization.<sup>108</sup>

Moreover, reading the Territorial Clause as permitting Congress to exercise perpetual plenary power over the territories with limited constitutional application is incompatible with the Constitution's structure. The Supreme Court articulated the notion in *Reid v. Covert*<sup>109</sup> that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."<sup>110</sup> Those restraints should safeguard the principles of individual liberty, separation of powers,<sup>111</sup> an independent judiciary, federalism, and state sovereignty. Thus, both a so-called "originalist"<sup>112</sup> view and a structural understanding of the Territorial Clause support decolonization.<sup>113</sup>

relationship has established a "permanent system for the regulation of our island empire, rather than a transitional process" requiring that full constitutional protections apply).

105. Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754.

106. *Id.*

107. Lopez-Morales, *supra* note 99, at 800–01 (noting that any interpretation of the Territorial Clause allowing perpetual plenary congressional power is contrary to the clause's original meaning and the overall constitutional structure because the original understanding of the clause related to temporary "pupilage"); see also Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 802 (2005).

108. See Michael J. Kelly, *Quiescent Sovereignty of U.S. Territories*, 105 MARQ. L. REV. 501, 515–16 (2022) ("Unlike [in] European states . . . acquisition of territory by the United States was not in furtherance of creating a colonial empire, but to create the country. The systematic acquisition of territories, followed by organization of those territories, incorporation, and then finally statehood, was a fairly linear legal path established by Congress.").

109. 354 U.S. 1 (1957).

110. *Id.* at 16.

111. See generally *Boumediene v. Bush*, 553 U.S. 723, 742 (2008) ("The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty.").

112. This author views originalism as a theory inconsistent with the Constitution's structure and purpose and with fundamental understandings of language, legal developments, and societal progress. See, e.g., Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 9 (2009) ("Most constitutional lawyers consider original understanding relevant but not dispositive: precedent, unwritten implications from constitutional structure, contemporary public understanding, and political consequences are also relevant."). Yet to the extent that a majority of justices on the current Supreme Court subscribes to originalism as an interpretive theory, it is important to note that originalism does not support the *Insular Cases*' interpretation of the Territorial Clause.

113. Cesar Lopez-Morales provides a thorough and persuasive originalist basis for limiting the Territorial Clause. See generally Lopez-Morales, *supra* note 99. However, the better argument is that the text and structure of the Constitution strongly indicate that Congress's plenary power under the Territorial Clause is temporary, and that the territories' colonial status



Other scholars agree.<sup>114</sup> For example, Judge Torruella noted:

[The Supreme Court] clearly expressed the lack of constitutional authority for the United States to rule as a colonial power in *Scott v. Sanford* [sic] . . . .

. . .

Yet, in its treatment of the territories acquired after the Spanish-American War, the United States has followed the colonial formula to this very day, a path authorized by the Supreme Court's unwarranted reversal of established constitutional and historical precedent in the *Insular Cases*.<sup>115</sup>

Whereas the *Insular Cases*' subject matter varied, taken together, they stand for the proposition that overseas territories were unincorporated and not destined for statehood.<sup>116</sup> Suffice it to say that the *Insular Cases* not only invented an incorporation doctrine with absolutely no grounding in the U.S. Constitution,<sup>117</sup> but they also determined that, under that doctrine, the Constitution did not apply in full to the unincorporated territories on a racist and arbitrary basis.<sup>118</sup> Residents of the territories were not guaranteed, for

---

is anathema to the Constitution as a whole. Given the temporary nature of Congress's power and more than a century of a subordinate status, it is time for Congress to grant sovereign status to the heretofore unincorporated territories.

114. See, e.g., Cepeda Derieux & Cox Alomar, *supra* note 95, at 741; James T. Campbell, Aurelius's *Article III Revisionism: Reimagining Judicial Engagement with the Insular Cases and "The Law of the Territories,"* 131 *YALE L.J.* 2542, 2556 (2022); Juan R. Torruella, *Ruling America's Colonies: The Insular Cases,* 32 *YALE L. & POL'Y REV.* 57, 73 (2013); Cepeda Derieux, *supra* note 11, at 832.

115. Torruella, *supra* note 114, at 62.

116. See *supra* note 2 and accompanying text; see also Gerardo J. Cruz, *The Insular Cases and the Broken Promise of Equal Citizenship: A Critique of U.S. Policy Toward Puerto Rico,* 57 *REVISTA DERECHO PUERTORRIQUEÑO* 27, 45 (2017).

117. Indeed, Judge Torruella describes the majority opinion in *Downes v. Bidwell* as "guaranteed to give nightmares to present day originalists." Torruella, *supra* note 114, at 70.

118. For example, note the following language from *Downes v. Bidwell*:

If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them.

182 U.S. 244, 287 (1901).

example, constitutional tax uniformity,<sup>119</sup> jury trial rights,<sup>120</sup> voting rights,<sup>121</sup> or full constitutional citizenship.<sup>122</sup>

The *Insular Cases*' description of the scope of Congress's power and the application of the Constitution in the territories is intolerably ambiguous. Indeed, the *Insular Cases* do not "provide any analytical framework—much less a principled one—on how to determine which constitutional provisions are 'fundamental' enough to apply in unincorporated territories."<sup>123</sup> The *Insular Cases* thus placed unincorporated territories in a perpetual state of limbo,<sup>124</sup> often with a "heads I win, tails you lose"<sup>125</sup> mentality favoring the

119. US CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States . . .").

120. Consider this passage in *Dorr v. United States* explaining the rationale for not extending jury trial rights to so-called "unincorporated" territories:

If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice. Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored, and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition.

195 U.S. 138, 148–49 (1904).

121. See, e.g., Joel Andrews Cosme Morales, *The Centenary of Balzac v. Porto Rico: Second-Class Citizenship in the Context of the Presidential Vote*, 91 REVISTA JURÍDICA DE LA UNIVERSIDAD DE P.R. [REVISTA JURÍDICA UPR] 913, 930 (2022) (noting that for "unincorporated territories," the "Court disassociates citizenship from the right to vote").

122. See, e.g., *Fitisemanu v. United States*, 143 S. Ct. 362 (2022); Cruz, *supra* note 116, at 54.

123. Lopez-Morales, *supra* note 99, at 781.

124. See Torruella, *supra* note 114, at 71–72 ("Perhaps most puzzling is Justice White's conclusion regarding Puerto Rico's territorial status, which is both cryptic and indecipherable. Near the end of his lengthy opinion, he 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." (quoting *Downes v. Bidwell*, 182 U.S. 244, 341–42 (1901) (White, J., concurring))).

125. For example:

*Dooley II* was a companion case to *Downes*, presenting the parallel question whether the Foraker Act duties on U.S. exports to Puerto Rico violated the constitutional requirement that "no tax or duty shall be laid on articles exported from any State." As in *Downes*, the Court construed the constitutional restriction narrowly to allow for broad, unregulated power of Congress over the new territories. Thus, Justice Brown argued, because Puerto Rico was no longer a foreign country under the decision in *De Lima*, goods delivered from the states to Puerto Rico were not "exports" within the meaning of the clause, and Congress had "full and paramount authority" to impose duties unlimited by that section. White argued that the holding in *Downes* was consistent with this ruling, because that case had recognized that Puerto Rico was subject to U.S. sovereignty and simply held that Puerto Rico was not part of the United States for purposes of the Uniformity Clause.

United States while offering limited local leeway in matters regarding taxes, trade, voting, statutory citizenship, legal proceedings, and territorial governance.<sup>126</sup> That leeway allowed for local governance and some territorial constitutions to establish a kind of “spectral sovereignty” while also allowing for continuous “status manipulation” to keep the territories in check and operating in satisfaction of U.S. prerogatives.<sup>127</sup> Professor Sam Erman describes the doctrine as reminiscent of an “Alice in Wonderland” experience:

Rather than decide *how* constitutional rights operate in a territory, the Court focuses on *what* is insulated from their operation: colonial governance. Formally, this *what* is really a *where*: unincorporated territory. And that *where* is at bottom a *who*. Ultimately, colonized people are the ones who lack rights, and it is the ostensible nature of a population that drives Congress’ decisions to incorporate and admit to statehood. The process is not reversible. Knowing *what*, *where*, and *who* does not reveal *how* citizenship, juries, equal protection, and other important constitutional guarantees will operate. The applicability of such guarantees remains largely unsettled where colonized people subject to colonial governance in unincorporated territories are concerned.<sup>128</sup>

Thus, the *Insular Cases* invented the territorial incorporation doctrine, which is the idea that the U.S. territories are subject to Congress’s plenary power indefinitely and that certain constitutional rights do not apply to their residents.<sup>129</sup> The *Insular Cases*’ racist premises and flawed reasoning, and the resulting colonial condition of the territories, have been strongly criticized by scholars,<sup>130</sup> advocates,<sup>131</sup> politicians,<sup>132</sup> and, at times, even by the Supreme Court. *Reid v. Covert* provides an example:

---

Cleveland, *supra* note 104, at 230 (footnotes omitted) (first quoting U.S. CONST. art. I, § 9; and then quoting *Dooley v. United States*, 183 U.S. 151, 157 (1901)).

126. *See supra* notes 119–21 and accompanying text.

127. *See generally* Erman, *supra* note 92.

128. *Id.* at 827–28.

129. Cepeda Derieux & Cox Alomar, *supra* note 95, at 771.

130. *See, e.g.*, Joel Andrews Cosme Morales, *Balzac v. Porto Rico: Cien Años de Historia* [Balzac v. Porto Rico: *One Hundred Years of History*], 61 REVISTA DERECHO PUERTORRIQUEÑO 271, 273 (2022); Cepeda Derieux & Weare, *supra* note 91, at 286; Juan Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283, 346 (2007).

131. *See, e.g.*, Brief of LatinoJustice PRLDEF and Ten *Amici Curiae* in Support of Respondent, *United States v. Vaello Madero*, 142 S. Ct. 1539 (2022) (No. 20-303), 2021 WL 4135120; Letter from Am. C.L. Union, Asian Am. Def. & Educ. Fund, Ayuda Legal P.R., Brennan Ctr. for Just., Dēmos, Hisp. Fed’n, Hum. Rts. Campaign, Lambda Legal, LatinoJustice PRLDEF, Laws.’ Comm. for C.R. Under L., NAACP Legal Def. & Educ. Fund., Inc., OCA—Asian Pac. Am. Advocs. & Wash. Laws.’ Comm. for C.R. & Urb. Affs. to Merrick Garland, Att’y Gen., U.S. Dep’t of Just., and Elizabeth Prelogar, Solic. Gen., U.S. Dep’t of Just. (Feb. 10, 2022), <https://www.aclu.org/letter/civil-rights-group-letter-doj-insular-cases> [<https://perma.cc/7Q9G-8SK6>].

132. *See, e.g.*, *Insular Cases Resolution: Hearing on H. Res. 279 Before the Comm. on Nat. Res.*, 117th Cong. (2021) (statement of Stacey Plaskett, Congresswoman for the U.S. Virgin Islands), <https://docs.house.gov/meetings/II/II00/20210512/112617/HHRG-117-II00-Wstate-P000610-20210512.pdf> [<https://perma.cc/JNP4-US83>].

[I]t is our judgment that neither the [*Insular Cases*] nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.<sup>133</sup>

Later, in *Boumediene v. Bush*, the Court clarified that it has “read the *Insular Cases* to teach that whether a constitutional provision has extraterritorial effect depends on the ‘particular circumstances, the practical necessities, and the possible alternatives that Congress had before it.’”<sup>134</sup> And, quoting from *Reid*, the Court noted that the extraterritorial question depends in particular on “whether judicial enforcement of the provision would be ‘impracticable and anomalous.’”<sup>135</sup> This perplexingly ambiguous “impracticable and anomalous” standard has been used to determine whether a particular constitutional guarantee applies outside of the mainland United States.<sup>136</sup> For example, the U.S. Court of Appeals for the Tenth Circuit reiterated this test in *Fitisemanu v. United States*<sup>137</sup> and characterized it as the “lodestar of the *Insular* framework.”<sup>138</sup> The court then said that, “[a]s with all extraterritoriality questions, the answer turns on ‘objective factors and practical concerns,’” such as “whether the circumstances are such that recognition of the right to birthright citizenship would prove impracticable and anomalous, as applied to contemporary American Samoa.”<sup>139</sup> This standard is so ambiguous as to be no standard at all. It simply gives power to a reviewing court to decide whether and when to extend full constitutional guarantees to U.S. territories and their residents.

The endurance of the *Insular Cases* under current law is an affront to core constitutional notions of equal protection and fair treatment, as well as to basic principles of human dignity and self-determination.<sup>140</sup> While the

133. *Reid v. Covert*, 354 U.S. 1, 14 (1957).

134. 553 U.S. 723, 759 (2008) (quoting *Reid v. Covert*, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring)).

135. *Id.* (quoting *Reid v. Covert*, 354 U.S. 1, 74–75 (1957)).

136. *See, e.g.*, *Fitisemanu v. United States*, 1 F.4th 862, 870 (10th Cir.) (“‘Impracticable and anomalous’ has since been employed as the standard for determining whether a particular constitutional guarantee is applicable abroad.” (quoting *Boumediene v. Bush*, 553 U.S. 723, 759 (2009))), *reh’g en banc denied*, 20 F.4th 1325 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (mem.).

137. 1 F.4th 862 (10th Cir.), *reh’g en banc denied*, 20 F.4th 1325 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (mem.).

138. *Id.* at 879 (citing *Reid v. Covert*, 354 U.S. 1, 75 (1954) (Harlan, J., concurring)).

139. *Id.* (first quoting *Boumediene v. Bush*, 553 U.S. 723, 764 (2008); and then quoting *Tuaua v. United States*, 788 F.3d 300, 309 (D.C. Cir. 2015)).

140. Camila Bustos notes:

In essence, the *Insular Cases* replicated the legal doctrine of *Plessy v. Ferguson*. Their logic directly clashed with the U.S. Constitution, ran contrary to express positions of international treaties ratified by the United States, and violated the equality of all citizens before the law. They also conveniently reflected the racist views prevalent in U.S. society at the time.

Supreme Court has explicitly overruled or minimized other cases rooted in racism and a national self-conception deemed intolerable today—most recently *Korematsu v. United States*<sup>141</sup>—the *Insular Cases* remain “good law.”<sup>142</sup> Indeed, in October 2022, the Supreme Court denied a petition for certiorari in *Fitisemanu*, avoiding a clear opportunity to overrule the *Insular Cases*.<sup>143</sup>

Worse yet, while repeatedly declining to overrule the *Insular Cases*, the Supreme Court appears to be shifting the doctrinal bases for maintaining the colonial subordinated status of the U.S. territories under the Territorial Clause and other constitutional doctrines. For example, in *Vaello Madero*, the Court not only ignored the *Insular Cases*’ influence on its interpretation of the Territorial Clause, but also interpreted the clause to permit a form of rational basis review so weak as to render the Equal Protection Clause meaningless as applied to the U.S. territories.<sup>144</sup> Under this approach, the Court accepts whatever justification the U.S. government offers for its differential treatment of the territories as rational simply because it applies to the territories. It is unclear whether this is an intentional or subliminal adoption of the perpetual plenary power doctrine established under the *Insular Cases*’ incorporation framework.<sup>145</sup> Either way, the rational basis standard applied in *Vaello Madero* is unsound and should be abandoned as being no standard at all.

### C. The Supreme Court’s Arbitrary and Irrational Treatment of Puerto Rico Under a Colonialist Territorial Framework

*Vaello Madero* is just one of several recent decisions in which the Supreme Court simultaneously ignored and doubled down on Puerto Rico’s colonial status<sup>146</sup> to the extreme political, social, and economic detriment of the territory and its residents. A sampling of these cases reveals the arbitrary, unequal, and indeed, irrational treatment of Puerto Rico under U.S. colonial rule.

To begin, in *Puerto Rico v. Sanchez Valle*,<sup>147</sup> the Court determined that Puerto Rico is not a separate sovereign for constitutional double jeopardy

---

Camila Bustos, Note, *The Third Space of Puerto Rican Sovereignty: Reimagining Self-Determination Beyond State Sovereignty*, 32 YALE J.L. & FEMINISM 73, 79 (2020) (footnotes omitted).

141. 323 U.S. 214 (1944), overruled by *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). *But see* Campbell, *supra* note 114, at 2600–03 (criticizing the manner in which the Court claimed to “overrule” *Korematsu* in dicta that “fak[ed] its death” and left key issues unaddressed).

142. Blocher & Gulati, *supra* note 3, at 245.

143. *See* *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (mem.).

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

145. *See supra* notes 72–76, 94–97 and accompanying text.

146. *See, e.g.*, *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020); *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115 (2016); *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016).

147. 136 S. Ct. 1863 (2016).

purposes.<sup>148</sup> The opinion by Justice Kagan notes (without irony) that “Congress granted Puerto Rico additional autonomy” by statute in 1917 and that, “later, Congress enabled Puerto Rico to embark on the project of constitutional self-governance.”<sup>149</sup> Justice Kagan seems to acknowledge the “faux” sovereignty “allowed” to Puerto Rico while glibly concluding that because Puerto Rico was a colony “under Spanish sovereignty,”<sup>150</sup> its prosecutorial “authority derived from, rather than pre-existed association with, the Federal Government.”<sup>151</sup> Without addressing parallels with the U.S. states’ previous status as British colonies, she goes on to dismiss the Constitution of the Commonwealth of Puerto Rico by stating that, “[b]lack of the Puerto Rican people and their Constitution, the ‘ultimate’ source of prosecutorial power remains the U.S. Congress.”<sup>152</sup> Thus, the *Sanchez Valle* Court, in a 7–2 decision, blithely ignored historical facts and mutually agreed upon laws and structures—including the determination of sovereignty with respect to local criminal law in Puerto Rico’s constitution—to determine that Puerto Rico is not a separate sovereign for double jeopardy purposes.<sup>153</sup>

That same year, the Court held in *Puerto Rico v. Franklin California Tax Free Trust*<sup>154</sup> that Puerto Rico could not reorganize its debt under the Puerto Rico Public Corporation Debt Enforcement and Recovery Act,<sup>155</sup> nor could it use the U.S. Bankruptcy Code to do so.<sup>156</sup> According to the Court’s interpretation, the federal bankruptcy code treats Puerto Rico as a state such that the code preempts Puerto Rico’s bankruptcy law but does not treat Puerto Rico as a state for the purposes of accessing the provisions of the code that authorize municipal debt reorganization.<sup>157</sup> Thus, the Court determined that Puerto Rico was a “state for some purposes of the Code but not others,”<sup>158</sup> thereby eliminating Puerto Rico’s ability to address its fiscal crisis through either its own or the federal government’s bankruptcy laws. To respond to

---

148. *Id.* at 1876.

149. *Id.* at 1868.

150. *Id.* at 1875 (quoting Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., art. II, Dec. 10, 1898, 30 Stat. 1754, 1755).

151. *Id.*

152. *Id.* at 1867.

153. As Justice Stephen Breyer explained in dissent, the “history of statutes, language, organic acts, traditions, statements, and other actions, taken by all three branches of the Federal Government and by Puerto Rico [indicate] that the ‘source’ of Puerto Rico’s criminal law ceased to be the U.S. Congress and became Puerto Rico itself, its people, and its constitution.” *Id.* at 1884 (Breyer, J., dissenting).

154. 579 U.S. 115 (2016).

155. 2014 P.R. Laws 371.

156. *Franklin Cal. Tax-Free Tr.*, 579 U.S. at 125.

157. *Id.* (“We hold that Puerto Rico is still a ‘State’ for purposes of the pre-emption provision. The 1984 amendment precludes Puerto Rico from authorizing its municipalities to seek relief under Chapter 9, but it does not remove Puerto Rico from the reach of Chapter 9’s pre-emption provision.”).

158. *Id.* at 127.

this conundrum,<sup>159</sup> Congress did not amend the bankruptcy code<sup>160</sup> but instead passed the Puerto Rico Oversight, Management, and Economic Stability Act<sup>161</sup> (PROMESA). PROMESA established a Fiscal Management and Oversight Board (FOMB) with broad federal statutory powers to reorganize Puerto Rico's debt and manage its fiscal affairs but without any meaningful local representation.<sup>162</sup> FOMB was created by Congress under PROMESA, and its board members are appointed by the president, with no input by the Puerto Rican government or people.<sup>163</sup>

FOMB was the subject of a 2020 case, *Financial Management Oversight Board for Puerto Rico v. Aurelius Investment, LLC*,<sup>164</sup> involving a challenge under the Appointments Clause.<sup>165</sup> Plaintiffs argued that FOMB board members were appointed without the advice and consent of the U.S. Senate

159. See Tina Meng, *The Perfect Storm: Puerto Rico's Evolving Debt Crises Under PROMESA*, 2019 COLUM. BUS. L. REV. 367, 384 (“Likely prompted by the Supreme Court’s decision in *Franklin California* and . . . [concerns about the implications of default] for the island and credit markets, the House and Senate successfully passed H.R. 5278 and S. 2328 respectively in June 2016. A day later, President Obama signed PROMESA into law.” (footnote omitted)).

160. See, e.g., *President Signs PROMESA as Commonwealth Seeks Financial Stability*, HEDGE FUNDS & PRIVATE EQUITY UPDATE (Wolters Kluwer, Chi., Ill.), July 2016, at 1 (“Parallel attempts to move bills that would have allowed Puerto Rico to restructure its public debt under the U.S. bankruptcy code fell short while members awaited a Supreme Court decision that would deny the Commonwealth a self-help work-around to the bankruptcy roadblock.”); see also Laura N. Coordes, *Bespoke Bankruptcy*, 73 FLA. L. REV. 359, 387 (2021).

161. Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified as amended in scattered sections of 15, 29, and 48 U.S.C.); see also *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 478 F. Supp. 3d 190, 193 (D.P.R. 2020) (“The Puerto Rico Oversight, Management, and Economic Stability Act (‘PROMESA’) was enacted on June 30, 2016, to address the fiscal emergency in Puerto Rico that had been created by a ‘combination of severe economic decline, and, at times, accumulated operating deficits, lack of financial transparency, management inefficiencies, and excessive borrowing.’ PROMESA provides for the appointment of a single Financial Oversight and Management Board for Puerto Rico (the ‘Oversight Board’) that acts as the sole statutory representative of a territory and each of its covered territorial instrumentalities in their respective Title III debt adjustment cases.” (footnote omitted) (quoting 48 U.S.C. § 2194(m)(1)).

162. See Elizabeth Whiting, *Puerto Rico Debt Restructuring: Origins of a Constitutional and Humanitarian Crisis*, 50 U. MIAMI INTER-AM. L. REV. 237, 263 (2019) (“PROMESA is but one more example of the way in which Puerto Rico is treated in isolation as compared to the legal standards and protections afforded to the United States. The federal advisory board runs entirely contrary to the ideals of democratic self-determination upheld in the nation’s foundations.”); Jesse Barron, *The Curious Case of Aurelius Capital v. Puerto Rico*, N.Y. TIMES (Nov. 26, 2019), <https://www.nytimes.com/2019/11/26/magazine/aurelius-capital-v-puerto-rico.html> [<https://perma.cc/3HAU-E3PN>] (“PROMESA let the island restructure its debt, but—critics have suggested—at the cost of its sovereignty. To supervise Puerto Rico’s finances, the law created a panel of seven people, which came to include an insurance executive, a bank chief executive and a private-equity manager. Where before the island’s governor and representatives decided what to spend money on, now an unelected board would have veto power over the budget.”).

163. 48 U.S.C. § 2121; see also Julia R. Cummings, *Broken PROMESA: Why the United States Should Abandon Its Use of the Territories Clause to Control the Local Affairs of Puerto Rico*, 87 BROOK. L. REV. 349, 360 (2021).

164. 140 S. Ct. 1649 (2020).

165. *Id.* at 1654.

in violation of the Appointments Clause, while defendants argued that the appointments were valid pursuant to the plenary powers granted by the Territorial Clause of Article IV.<sup>166</sup> Following a determination by the First Circuit that “the Board Members . . . must be, and were not, appointed in compliance with the Appointments Clause,”<sup>167</sup> the Supreme Court reversed and held that the Appointments Clause did not apply to FOMB because the board was a “local” territorial entity.<sup>168</sup> As Justice Stephen Breyer put it, “whether the Board members are officers of the United States such that the Appointments Clause requires Senate confirmation . . . turns on whether the Board members have primarily local powers and duties.”<sup>169</sup> Justice Breyer acknowledged that the Appointments Clause applies to Congress’s actions under Article IV and noted that the “Board possesses considerable power—including the authority to substitute its own judgment for the considered judgment of the Governor and other elected officials.”<sup>170</sup> Yet he concluded that the Board’s “power primarily concerns local matters,” and therefore, the Board members are not “Officers of the United States.”<sup>171</sup>

At the time of this Essay’s publication, there was a case pending before the Supreme Court that involves FOMB resisting a document request by a Puerto Rican nonprofit media organization that relied on the general right of access to public documents enshrined in Puerto Rico’s constitution.<sup>172</sup> In *Financial Oversight & Management Board for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*,<sup>173</sup> FOMB claims that it is entitled to sovereign immunity from private suit under the Eleventh Amendment to the Constitution, and that Congress has neither waived nor abrogated that immunity.<sup>174</sup> For those who, like me, wonder how either Puerto Rico or FOMB can claim either sovereignty or sovereign immunity, the government offers an odd “no-win” rationale. The argument is summarized by the U.S. solicitor general:

As a territory, Puerto Rico is not encompassed within the Eleventh Amendment, which speaks to the sovereign immunity of States. Nevertheless, this Court has long recognized that the government established in Puerto Rico is sovereign and entitled to sovereign immunity

---

166. *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 863 (1st Cir. 2019), *rev'd and remanded sub nom.* *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020).

167. *Id.* at 842–43.

168. *Aurelius*, 140 S. Ct. at 1663–64.

169. *Id.* at 1658.

170. *Id.* at 1662.

171. *Id.* at 1662–63.

172. *See Centro de Periodismo Investigativo, Inc. v. Fin. Oversight & Mgmt. Bd. for P.R.*, 35 F.4th 1, 5 (1st Cir.), *cert. granted*, 143 S. Ct. 82 (2022) (mem.).

173. 35 F.4th 1 (1st Cir.), *cert. granted*, 143 S. Ct. 82 (2022) (mem.).

174. *Id.* at 5.



that prevents the territorial government from being sued without its consent.<sup>175</sup>

Under this argument, even though Puerto Rico’s sovereign immunity does not derive from the Eleventh Amendment, the requirement of a clear statement of intent to abrogate or waive sovereign immunity nonetheless applies.<sup>176</sup> The First Circuit noted that the trial court assumed without deciding that the FOMB “is an arm of the government of Puerto Rico entitled to assert sovereign immunity,” then itself determined that PROMESA provisions providing for federal court jurisdiction abrogated that sovereign immunity.<sup>177</sup> This question was presented to the Supreme Court on a petition for a writ of certiorari.<sup>178</sup>

This situation is absurd. Consider, for example, the following sentence in the solicitor general’s brief: “Congress has the power to organize all of Puerto Rico’s government, and its exercise of that authority does not nullify the sovereign status of the Commonwealth’s government.”<sup>179</sup> One observer notes:

The [FOMB] is an entity created by federal law, pursuant to the most sweeping power of Congress. It responds directly to the federal government, in the form of reports which describe its progress, and its members are only removable by the President of the United States. It does not respond to the people nor to the government of Puerto Rico. It is a force of unbridled federal power, unrelated to the will of Puerto Ricans.<sup>180</sup>

It is bizarre to assert that Puerto Rico has “sovereign status” while attempting to thwart a claim under Puerto Rico’s constitution.

To summarize, recent Supreme Court cases have held that (1) Puerto Rican citizens may be treated unequally in the provision of direct federal SSI benefits;<sup>181</sup> (2) Puerto Rico is *not* a separate sovereign from the U.S. for double jeopardy purposes;<sup>182</sup> (3) Puerto Rico *is* a state for purposes of federal preemption under the U.S. Bankruptcy Code, but is *not* a state for purposes of accessing the code’s reorganization provisions;<sup>183</sup> (4) the FOMB, established by Congress under PROMESA and composed entirely of presidential appointees, is exempt from the Constitution’s Appointments Clause requirements because its power primarily concerns “local matters.”<sup>184</sup> Most recently, FOMB seeks to avoid disclosing documents by claiming

---

175. Brief for the United States as Amicus Curiae Supporting Vacatur at 11, *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. 82 (2022) (No. 22-96), 2022 WL 17330759.

176. *Id.* at 21.

177. *Id.* at 22.

178. *Id.* at 1.

179. *Id.* at 24.

180. Zoé C. Negrón Comas, *Puerto Rico’s Eleventh Amendment Sovereign Immunity and the Financial Oversight Board*, 54 REVISTA JURÍDICA UPR 1, 24 (2020).

181. *See supra* note 66 and accompanying text.

182. *See supra* notes 147–52 and accompanying text.

183. *See supra* notes 154–57 and accompanying text.

184. *See supra* notes 170–73 and accompanying text.

sovereign immunity from an enforcement suit.<sup>185</sup> These cases exemplify the bizarre, untenable relationship wrought by the separate, unequal, and arbitrary colonial relationship between the United States and Puerto Rico and other U.S. territories.

The arbitrary and subordinate treatment of Puerto Rico and its more than three million U.S. citizens should draw outrage across the United States. Yet these cases barely made news on the U.S. mainland. Why?

## II. WHY IS DE JURE SEPARATE AND UNEQUAL TREATMENT OF PUERTO RICO TOLERATED AT A TIME OF RACIAL RECKONING, AMID CONCERNS ABOUT THE IMPACTS OF IMPERIALISM AND COLONIALISM ON SOVEREIGNTY AND SELF-DETERMINATION?

Recent events in the United States and across the globe have highlighted the importance of remedying racial inequality and supporting sovereignty, democratic governance, self-determination, and human rights. The United States is often viewed as a leader in these efforts. Yet, many on the U.S. mainland today might be surprised to learn that the “land of the free” has a “colonies problem.”<sup>186</sup> American identity often revolves around notions of freedom and independence emanating from language in the Declaration of Independence that many U.S. citizens know by heart: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness.”<sup>187</sup> The declaration extols the “just powers” of government as being derived from the “consent of the governed.”<sup>188</sup> It details the ills of British colonial dominance, calling it “despotism” and “tyranny,” while emphasizing the need “to throw off such Government.”<sup>189</sup>

This self-conception is directly at odds with the notion of the United States as a twenty-first century colonial empire that openly discriminates against millions of its own citizens. That may explain the lack of public consciousness on the U.S. mainland that the territories are twenty-first century colonies. As Roberto Ariel Fernández notes, there is “the need for realism in studies of law and society, particularly in the context of United States domination over Puerto Rico.”<sup>190</sup> So why is there a stark disconnect between the United States’s self-conception and its treatment of the territories?

---

185. See *supra* note 172 and accompanying text.

186. See generally Natalie Gomez-Velez, *What U.S. v. Vaello-Madero and the Insular Cases Can Teach About Anti-Critical Race Theory Campaigns*, NYSBA (Feb. 14, 2022), <https://nysba.org/what-u-s-v-vaello-madero-and-the-insular-cases-can-teach-about-anti-crt-campaigns/> [https://perma.cc/X2W2-QDMY].

187. THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

188. *Id.*

189. *Id.*

190. Roberto Ariel Fernández, *Racism, Culture, Law, and the Judicial Rhetoric Sanctioning Inequality and Colonial Rule*, 53 REVISTA JURÍDICA UPR 609, 609 (2019).

A. *Invisible Empire: U.S. Colonialism and Inequality Thrive amid U.S. Narratives of Sovereignty, Self-Determination, and Racial Progress*

Legally sanctioned discrimination against the residents of the U.S. territories hides in plain sight, affecting millions of U.S. citizens, yet barely getting a mention in history classes, law schools, or the media.<sup>191</sup> For example, during the spring of 2022, news of Russia’s invasion of Ukraine made sovereignty and self-determination an urgent priority.<sup>192</sup> It prompted President Joe Biden and other world leaders to extol the values of sovereignty, equality, and self-determination.<sup>193</sup> Yet that same spring, the Supreme Court’s decision in *Vaello Madero*, denying equal treatment to over three million U.S. citizens in Puerto Rico, received exponentially less attention. Nor has the recent spate of Supreme Court cases—reinforcing the separate, unequal treatment and denying sovereignty and self-determination to Puerto Rico—captured the interest or concern of political and/or legal elites or everyday people on the U.S. mainland.<sup>194</sup> This neglect mirrors the way in which Puerto Rico was neglected as Hurricane Maria devastated the region.<sup>195</sup>

This invisibility of the condition and treatment of the territories is by design.<sup>196</sup> The U.S. government perpetuates the territories’ legally ambiguous position, ensuring that they are devoid of political power<sup>197</sup> by repeatedly engaging in “status manipulation” and dangling “spectral sovereignty” through grants of limited, local governance powers. These strategies combine to allow the United States to maintain its exploitative colonial treatment of the territories with little effective resistance.<sup>198</sup> The recent cases summarized above demonstrate the utterly unequal and arbitrary treatment of Puerto Rico.<sup>199</sup> Treatment of the other U.S. territories is similarly arbitrary.<sup>200</sup>

---

191. Dhrumil Mehta, *The Media Really Has Neglected Puerto Rico*, FIVETHIRTYEIGHT (Sept. 28, 2017), <https://fivethirtyeight.com/features/the-media-really-has-neglected-puerto-rico/> [<https://perma.cc/GU2J-JPTV>].

192. See generally Claudio Grossman, *The Invasion of Ukraine: A Gross Violation of International Law*, 25 HUM. RTS. BRIEF 74 (2022).

193. See, e.g., *United with Ukraine*, U.S. DEP’T OF STATE, <https://www.state.gov/united-with-ukraine/#supporting-ukraine> [<https://perma.cc/2G9X-D67U>] (Oct. 21, 2022).

194. See generally Kyla Eastling, Danny Li & Neil Weare, *The Supreme Court Just Passed Up a Chance to Overrule Appallingly Racist Precedents*, SLATE (June 1, 2020, 5:42 PM), <https://slate.com/news-and-politics/2020/06/puerto-rico-insular-cases-supreme-court.html> [<https://perma.cc/KL7C-V5CB>].

195. See generally Mehta, *supra* note 191 (describing disparity in news coverage of Hurricanes Harvey, Irma, and Maria).

196. See, e.g., Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 264–69 (2015) (describing how twentieth-century American colonization efforts aimed to preserve “white settler dominance . . . under conditions of indigenous uprising and growing nonwhite political assertiveness”).

197. See, e.g., Ezequiel Lugo, *The Unfinished Business of American Democracy*, 24 WIS. INT’L L.J. 871, 875 (2007) (“The judicial doctrine of the unincorporated territory has contributed to the dominance and control the United States exerts over Puerto Rico.”).

198. Erman, *supra* note 92, at 858–59.

199. See *supra* Part I.C.

200. See generally Campbell, *supra* note 114, at 2549.

This treatment equates to treating the territories as separate and unequal by law. It is based on long-standing racist assumptions about the “inferiority” and necessary subordination of, as characterized by the *Insular Cases*, “alien races” or “savage peoples” deemed unfit to govern themselves.<sup>201</sup> Several scholars and advocates have long noted this basis,<sup>202</sup> with some highlighting the parallels between the treatment of the people of the territories and the U.S. legacy of colonialism, slavery, and subordination of Indigenous peoples.<sup>203</sup> Others broaden the lens to note that such treatment is rooted in a global history of violent conquest followed by imperial rule.<sup>204</sup> The impacts extend beyond issues of inequality on the U.S. mainland and its territories. Indeed, they draw a through line to the treatment of Latin America and the global South, which face economic challenges, human rights struggles, and migration patterns, including the current immigration crisis that also affects the United States.<sup>205</sup>

And yet, the United States’s dominant self-narrative as a global champion of freedom, equality, and self-determination often excludes this part of the story. This is true with respect both to general accounts of American history and specialized accounts perpetuated in U.S. law schools, such as those provided in constitutional law courses.<sup>206</sup> According to Professor Aziz F. Rana, “[m]ost constitutional analysis ignores one of the defining features of American legal-political reality—the fact that the United States has from the founding been a project of empire.”<sup>207</sup> Rana attributes this oversight to “the classic view of American constitutional law,” which centers around the opposite assumption, “namely, that the United States is at root an anti-imperial legal project.”<sup>208</sup> Yet, the traditional view endures because “the overwhelming approach from the Founding towards administering new territories has been to place acquisitions on a path to statehood, in which the Constitution would eventually follow the flag.”<sup>209</sup> U.S. constitutional law,

---

201. See, e.g., Torruella, *supra* note 130, at 346.

202. See, e.g., Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 486 (2002); Juan R. Torruella, *Outstanding Constitutional and International Law Issues Raised by the United States-Puerto Rico Relationship*, 100 MINN. L. REV. HEADNOTES 79, 88 (2016).

203. See, e.g., Natsu Taylor Saito, *Race and Decolonization: Whiteness as Property in the American Settler Colonial Project*, 31 HARV. J. RACIAL & ETHNIC JUST. 31, 32 (2015) (exploring the relationship between Indigenous people and non-Indigenous people of color in challenges to institutionalized racism).

204. See, e.g., Steven W. Bender, *Foreword: Now, More Than Ever: Reflections on LatCrit at Twenty*, 10 CHARLESTON L. REV. 173, 177 (2016); Natsu Taylor Saito, *Asserting Plenary Power over the “Other”: Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL’Y REV. 427, 466–67 (2002).

205. See, e.g., Torruella, *supra* note 202, at 79, 100.

206. See, e.g., Susan Serrano, *Elevating the Perspectives of U.S. Territorial Peoples: Why the Insular Cases Should Be Taught in Law School*, 21 J. GENDER RACE & JUST. 395, 452 (2018).

207. Aziz Rana, *How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire*, 2020 YALE L.J.F. 312, 315.

208. *Id.*

209. *Id.*

Rana adds, is “almost always presented as a story of the ‘domestic’ nation,” ignoring how “constitutional adjustments” like those in the *Insular Cases* “helped set the stage” for “U.S. imperial primacy.”<sup>210</sup>

Professor Yuvraj Joshi observes: “American exceptionalism presents the United States as a champion of liberty since its founding rather than a society rooted in white supremacy and settler colonialism. Many Americans take democracy as a given instead of recognizing the development of democracy in this country as an ongoing and evolving process.”<sup>211</sup> Indeed, although there are important examples of progress, American exceptionalism and the narrative that the United States is a beacon of liberty, justice, and human rights serve as significant impediments to acknowledging and addressing historic, systemic, and current legal structures of racial subordination and discrimination.<sup>212</sup> Joshi’s discussion of “distancing” and “reckoning” via analyses of race and racism in the United States helps explain uneven progress toward racial equality and justice, including repeated experiences of racial retrenchment.<sup>213</sup>

This history and current context must be communicated to a broader U.S. audience. It should be a central component of American curricula in history, civics, and constitutional law. It must also be more robustly engaged with in public discourse, with the hope that most people of good faith in the United States would view colonization as intolerable, given their country’s constitutional commitments and support for democracy, sovereignty, and self-determination around the world.

As the United States confronts systemic racism and a related backlash ostensibly centered on banning the teaching of “divisive concepts,”<sup>214</sup> this is a particularly salient moment to elevate and address the question of U.S. colonialism and hypocrisy.<sup>215</sup>

---

210. *Id.* at 315, 325.

211. Yuvraj Joshi, *Racial Transition*, 98 WASH. U. L. REV. 1181, 1196 (2021).

212. *See supra* notes 206–10 and accompanying text.

213. *See* Joshi, *supra* note 211, at 1204–05. Joshi notes:

Generally speaking, distancing analyses clearly demarcate a post transitional present from the past, and thus see only a limited set of transitional policies as appropriate. Meanwhile, reckoning analyses see enduring and evolving legacies of the past in the present, and so believe in the necessity of a more expansive transition project. Embedded in these approaches are different understandings of when transition is complete, what harms it should address, over what time horizon, and through what means.

*Id.*

214. *See, e.g.*, Kimberlé Crenshaw, *This Is Not a Drill: The War Against Antiracist Teaching in America*, 68 UCLA L. REV. 1702, 1714 n.21 (2022); Dylan Salzman, *The Constitutionality of Orthodoxy: First Amendment Implications of Laws Restricting Critical Race Theory in Public Schools*, 89 U. CHI. L. REV. 1069, 1071 (2022).

215. *See, e.g.*, Ediberto Román, *Empire Forgotten: The United States’s Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1120–21 (1997).

*B. Puerto Rico and the U.S. Territories' Political-Process Problems:  
Colonialism Denies Both U.S. Representation and Economic and  
Political Autonomy*

The plight of the U.S. territories is further obscured by the very colonial structure they seek to overcome. The territories exist in constitutional limbo, as they are considered to be “foreign in a domestic sense.”<sup>216</sup> They are neither states nor independent sovereigns. Under this unincorporated status, only constitutional guarantees not deemed “impractical and anomalous” apply.<sup>217</sup> The territories lack voting rights and voting representation in Congress under the constitutional structure.<sup>218</sup> They also lack economic and political autonomy. This is evidenced by the unequal and exploitative treatment that caused Puerto Rico’s unsustainable public debt<sup>219</sup> and the denial of Puerto Rico’s self-governance or self-determination in addressing that debt.<sup>220</sup>

This political-process problem places the territories in an impossible position. They consist of populations of discrete, insular, and disfavored minorities without political power who have to persuade the legislative, executive, and judicial branches to address their separate and unequal status.

Recent developments indicate that the Supreme Court will do little, if anything, to address the untenable status of the territories. The current Court shows scant interest in advancing progress toward equality or improving racial equity and justice—*Vaello Madero* is just one example.<sup>221</sup> As Joshi notes, “[i]f the Supreme Court is unable to implement solutions . . . and

216. See Ramos, *supra* note 2, at 104.

217. See, e.g., Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779, 783 (1992).

218. See, e.g., *Romeu v. Cohen*, 265 F.3d 118, 123 (2d Cir. 2001).

Citizens living in Puerto Rico, like all U.S. citizens living in U.S. territories, possess more limited voting rights than U.S. citizens living in a State. Puerto Rico does not elect voting representatives to the U.S. Congress. It is represented in the House of Representatives by a Resident Commissioner who is ‘entitled to receive official recognition . . . by all of the departments of the Government of the United States,’ but who is not granted full voting rights. . . . In addition, citizens residing in Puerto Rico do not vote for the President and Vice President of the United States.

*Id.* (alteration in original) (quoting 48 U.S.C. § 891).

219. See, e.g., Whiting, *supra* note 162, at 256 (“[Puerto Rico’s] dismal economic state is not the result of out-of-control borrowing so much as it is a product of the unique political and territorial circumstances in which Puerto Rico functions.”).

220. See, e.g., Román, *supra* note 215, at 1176 (“The century-long United States-Puerto Rico colonial relationship has remained in place largely because of Puerto Rico’s social, political and economic dependence on the United States.”).

221. See, e.g., Joshi, *supra* note 211, at 1186 (noting the Supreme Court’s departure from precedents regarding racial equality and its trend toward weakening measures designed to redress racial harm); see also *Shelby County v. Holder*, 570 U.S. 529 (2013) (striking section of the Voting Rights Act that had proven effective in preventing states from engaging in targeted, discriminatory voter suppression); *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (holding that Arizona voter suppression law claimed to be racially discriminatory did not violate the Voting Rights Act); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (overturning long-standing precedent recognizing abortion and reproductive choice as fundamental rights).

continues to reinforce rather than resolve disputes over America’s historical legacies, other segments of society will need to take the lead.”<sup>222</sup>

Thus, a full range of tools—organizing, advocacy, legislation, and policy change—is needed. All of this, however, must begin with education, through a full account of U.S. history and law based on facts. Education about the *Insular Cases* as current, de jure discrimination is important to this effort. It encourages those who would otherwise distance themselves from structural and systemic racism to reckon with it. It challenges those who would censor discussions about inequality based on race to argue that the origins and implications of current law should not be taught. Most of all, education highlights the urgent need to examine notions of U.S. identity as a world leader in democracy, liberty, equality, human rights, and anti-colonialism if we are to live up to those ideals.

### III. FINDING A PATH TO DECOLONIZATION AND EQUAL CITIZENSHIP

Overturning the *Insular Cases* and flatly rejecting their racist bases and empty reasoning is a start. But, even after more than a century of trying, that may be the easy part. Establishing that the Territorial Clause absolutely does not support indefinite congressional plenary authority—but rather only temporary authority—over the territories is just as urgent. A process for achieving territorial sovereignty and self-determination (whether via independence or statehood) is required. That process lies with Congress and the territories. Yet the territories’ political-process problem gives Congress little incentive to move forward.

#### A. The Court’s Role

The Supreme Court must overrule the *Insular Cases*. Justice Gorsuch’s concurrence<sup>223</sup> and Justice Sotomayor’s dissent<sup>224</sup> in *Vaello Madero* state clearly why. Yet overruling the *Insular Cases*, although necessary, is not enough. As Justice Kavanaugh’s majority opinion indicates, the Court now seems content to rely on the Territorial Clause as a basis to permit plainly unequal treatment of the territories’ residents, so long as the government offers some rational basis, no matter how weak or unsupported by the facts it is.<sup>225</sup> Thus, in addition to overruling the *Insular Cases*, there is an urgent need for the Court to cabin Congress’s authority under the Territorial Clause. Indeed, given that the plenary powers provided by the Territorial Clause were meant to apply only on a temporary basis, the Court must make clear now, more than a century later, that Congress’s time is up.

The Supreme Court’s failure to address the issue has lower federal courts continuing to rely on doctrine that is plainly wrong. For example, in *Fitisemanu*, the Tenth Circuit claimed that “the distinction between

---

222. Joshi, *supra* note 211, at 1250.

223. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1556 (2022) (Gorsuch, J., concurring).

224. *Id.* at 1562 (Sotomayor, J., dissenting).

225. *Id.* at 1543 (majority opinion).

incorporated and unincorporated territories [is] firmly established in caselaw.”<sup>226</sup> That court went on to say that a decision “rejecting the distinction between incorporated and unincorporated territories . . . is not ours to make.”<sup>227</sup> The Tenth Circuit’s interpretations of the *Insular Cases* and of the Territorial Clause in *Fitisemanu* demonstrate the need to overturn both to spur progress toward decolonization. Yet in October 2022, the Supreme Court declined to hear *Fitisemanu*, avoiding yet another chance to correct these grave errors.<sup>228</sup>

At this point, it appears unlikely that this Court will overrule the *Insular Cases* or take any meaningful steps toward addressing discrimination against the territories and their people. Indeed, the current Court may be poised to inflict more damage on the territories’ sovereignty and self-determination in *Centro de Periodismo Investigativo, Inc.*, which was discussed above.<sup>229</sup> Advocates must then turn to Congress.

### B. Congress’s Role

The Territorial Clause grants Congress a central role in decolonizing the territories. Congress has proposed legislation to address Puerto Rico’s status and to begin decolonization efforts in Puerto Rico and in other territories several times without success.<sup>230</sup> Observers have doubted Congress’s will to change the current relationship,<sup>231</sup> and efforts to change territorial status have thus far gone nowhere.<sup>232</sup>

In December 2022, the U.S. House of Representatives passed a bill that would “enable the people of Puerto Rico to choose a permanent,

226. *Fitisemanu v. United States*, 1 F.4th 862, 876 (10th Cir.), *reh’g en banc denied*, 20 F.4th 1325 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (mem.).

227. *Id.*

228. *See* *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (mem.).

229. *See supra* Part I.C.

230. *See, e.g.*, Lilia Luciano & Cristina Corujo, *Lawmakers Draft Historic Bill on Puerto Rico’s Territorial Status*, CBS NEWS (May 23, 2022, 9:54 PM), <https://www.cbsnews.com/news/puerto-rico-territorial-status-bill/> [<https://perma.cc/BCG5-9GC9>]; Rafael Bernal, *Bipartisan Group Unveils Puerto Rico Status Consensus*, THE HILL (May 19, 2022, 4:59 PM), <https://thehill.com/latino/3494970-bipartisan-group-unveils-puerto-rico-status-consensus/> [<https://perma.cc/6NS4-H84K>]; Javier A. Hernandez, *Opinion, It’s Time to Decolonize Puerto Rico*, NEWSWEEK (Jan. 31, 2023, 8:00 AM), <https://www.newsweek.com/its-time-decolonize-puerto-rico-opinion-1777626> [<https://perma.cc/FA7J-KCUD>].

231. *See, e.g.*, José Javier Colón Morera, *Puerto Rico: A Case of American Imperial Doubts?*, 85 REVISTA JURÍDICA UPR 883, 895–96 (2016) (“The United States Congress does not seem to be inclined, in the short-term, to make way for a new Hispanic state, and it is not clear of the economic net benefit of such move, nor does it want to grant greater power to a Commonwealth exhibiting increasing problems of internal and international legitimacy, or to seriously consider favoring an orderly transition to independence. Herein lies the trap: the status debate that consumes the Island with frequent partisan recriminations hardly resonates in the United States as part as [sic] a comprehensive political solution. The Puerto Rican problem is also an American one.”).

232. *See, e.g.*, Ángel R. Oquendo, *At Rock Bottom: Puerto Rico’s Crises and Self-Determination*, 41 HARBINGER 255, 260 (2017) (“Congress . . . never really confronts Puerto Rico’s situation head on.”).



nonterritorial, fully self-governing political status for Puerto Rico and to provide for a transition to and the implementation of that permanent, nonterritorial, fully self-governing political status.”<sup>233</sup> The bill has some notable features. It was sponsored by representatives across the political spectrum and on both sides of the issue of status. Unlike several prior proposals, it provides for a vote by the Puerto Rican people on status and is followed by a clear path toward self-governance.<sup>234</sup> While the House’s passage of the bill is a positive and hopeful sign, most observers predict that the bill has no chance of garnering the sixty votes needed to pass in the Senate.<sup>235</sup>

In addition to its power to resolve the territories’ colonial status, Congress also has the power to address the separate, unequal, and subordinate treatment of the territories. For example, Congress could have addressed the SSI disparities that were the subject of *Vaello Madero*, as was proposed in the initial version of the Build Back Better Act.<sup>236</sup> But as with most legislation that would alleviate unequal and disadvantageous treatment of territorial residents, the bill’s SSI provision did not pass.<sup>237</sup> That has been the fate of much legislation seeking to address discriminatory laws that harm the territories and their people.<sup>238</sup>

On the other hand, Congress has demonstrated its ability to act when it wants to with regard to Puerto Rico and the territories.<sup>239</sup> The swift passage of the sweeping PROMESA law is a striking example. The trouble is that legislation that benefits federal governmental and corporate economic

---

233. Puerto Rico Status Act, H.R. 8393, 117th Cong. pmb. (2022).

234. See Hernandez, *supra* note 230; *Committee Report: Support for H. Res. 279 Reversing the Insular Cases*, N.Y.C. BAR (Dec. 21, 2022), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/reverse-the-insular-cases-h-res-279> [<https://perma.cc/DZ4R-34AV>].

235. See, e.g., Nicole Acevedo & Eric Bazail-Eimil, *Will a New Congress Stall Momentum on Resolving Puerto Rico’s Territorial Status?*, NBC NEWS (Dec. 23, 2022, 5:45 AM), <https://www.nbcnews.com/news/latino/will-new-congress-stall-momentum-resolving-puerto-ricos-status-rcna62927> [<https://perma.cc/YZH6-MSTR>].

236. H.R. 5376, 117th Cong. (2021); see Javier Balmaceda, *Build Back Better Permanently Extends Economic Security to Puerto Rico and Other Territories*, CTR. ON BUDGET & POL’Y PRIORITIES (Dec. 14, 2021), <https://www.cbpp.org/research/federal-budget/build-back-better-permanently-extends-economic-security-to-puerto-rico-and> [<https://perma.cc/9SUS-EQHR>]; see also WHITE HOUSE, *THE BUILD BACK BETTER FRAMEWORK WILL DELIVER FOR PUERTO RICO* (2021), [https://www.whitehouse.gov/wp-content/uploads/2021/10/Puerto-Rico\\_BBB-State-Fact-Sheet.pdf](https://www.whitehouse.gov/wp-content/uploads/2021/10/Puerto-Rico_BBB-State-Fact-Sheet.pdf) [<https://perma.cc/4SGN-2B3W>].

237. For a final version of the bill that became law, see Act of Aug. 16, 2022, Pub. L. No. 117-169, 136 Stat. 1818 (codified as amended in scattered sections of the U.S.C.). See Alexander Bolton, *Schumer Says Build Back Better Will Be Delayed*, THE HILL (Dec. 17, 2021, 10:50 AM), <https://thehill.com/homenews/senate/586301-schumer-says-build-back-better-will-be-delayed/> [<https://perma.cc/6XZD-MKUG>].

238. See, e.g., Jeaquelyn R.R. Borgonia, *Voting Rights Denied by Residency: Enfranchising Millions of U.S. Citizens in U.S. Territories*, 19 SEATTLE J. FOR SOC. JUST. 841, 878–79 (2021).

239. Meng, *supra* note 159, at 384.

interests has a far better chance of passing than legislation that would establish equal rights and self-determination for territorial residents.<sup>240</sup>

### C. *The Executive's Role*

The executive branch also has the power to either perpetuate the *Insular Cases* or help remove them from the legal canon. For example, the DOJ, which is tasked with defending the United States in court, could determine that it will no longer rely on the *Insular Cases* because they are “anathema” to the government’s policies.<sup>241</sup> Indeed, in 2022, several civil rights groups sent a letter to the DOJ “to encourage the Department . . . to reject the *Insular Cases* and the racist assumptions they represent.”<sup>242</sup>

In addition, the executive could take administrative action within the scope of existing law to blunt or eliminate much of the unequal treatment of the territories with respect to public benefits and other matters. The president also could use the bully pulpit to urge Congress to address the U.S. colonies problem. One of the most frustrating aspects of the territories’ status is the relative political powerlessness of the territories. Notwithstanding valiant efforts by some administration officials and members of Congress, the current colonial structure blunts political incentives to end territorial status.<sup>243</sup>

### CONCLUSION

As *Vaello Madero* and several recent cases show, continued advocacy before the Supreme Court appears necessary, even though it has been largely futile thus far. In particular, persuading the Court to overturn the *Insular Cases*, to apply full constitutional guarantees to the territories, and to limit the sweep of the Territorial Clause by requiring a determination on deannexation or statehood are important. They are, however, likely unrealistic goals at the moment. Perhaps more important is pressuring Congress to address the U.S. colonies problem. Enlisting various communities of interest—both within the United States and beyond—is also essential. Bringing in the broader context of U.S. ideals of freedom, equality, sovereignty, and self-determination, while explaining how territorial status relates to structural racism, can help various constituencies “see” the connections between the colonies problem and the struggle to achieve true reconstruction.

All of these efforts require education about history and the state of the law. The fact that the *Insular Cases* are rarely taught in history classes or law schools shows what erasure from the record can mean for marginalized

---

240. Dean Delasalas, *La Promesa Cumplida (the Promise Fulfilled): How the U.S. Constitution Has Enabled Colonialism*, 67 CATH. U. L. REV. 761, 780 (2018).

241. Transcript of Oral Argument, *supra* note 21, at 10.

242. See Letter from ACLU et al. to Merrick Garland & Elizabeth Prelogar, *supra* note 131.

243. See generally Joel Colón-Ríos & Yaniv Roznai, *A Constitutional Theory of Territoriality: The Case of Puerto Rico*, 70 CLEV. ST. L. REV. 273, 319–20 (2022).

people. The fact that the *Insular Cases* remain on the books even after *Vaello Madero* and other cases clearly demonstrate the stark and cruel effects that the incorporation doctrine has had in denying equal protection to U.S. citizens solely because they reside in the U.S. “colony” of Puerto Rico. And it shows just how difficult the battle for racial justice can be—even when the facts are presented in a clear and direct way.

The truth about American history and its relationship to current law and social organization must continue to be told.<sup>244</sup> This retelling is especially urgent at a time of racial reckoning. Now more than ever, we must confront forces actively engaged in efforts to obscure relevant history, current law, and proven facts as a means of maintaining and reinforcing deeply ingrained and unacceptable inequality in law. Confronting these forces is crucial to fulfilling the American promises of self-governance, equal justice, and equal protection.

---

244. *See, e.g.*, Serrano, *supra* note 206, at 452.