William & Mary Journal of Race, Gender, and Social Justice

Volume 29 (2022-2023)
Issue 2

Article 4

1-2023

The New Insular Cases

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THE NEW INSULAR CASES

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INTRODUCTION

Imagine for a moment that you are a Tennessean who moves to the American territory of Puerto Rico in search of better climate. You do not need a passport to make the trip and you will not go through customs. Other than the time your airplane flies over the Caribbean, you will not leave American soil. Old Glory flies above the Puerto Rican flag there just like it flew above the Tennessee Tri-Star when you left. However, the moment you establish residency in Puerto Rico, you will lose your ability to vote for the President and Vice President.[1] You will lose effective representation in Congress.[2] You will

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1. Leslie Gevirtz, *Puerto Ricans Fight for Right to Vote*, ABC NEWS (Oct. 5, 2000), https://abcnews.go.com/Politics/story?id=122776&page=1 [https://perma.cc/4LLF-MD87].

2. H.R. REP. NO. 105-131, pt. 1, at 4 (1997).

elect only a single nonvoting Representative and no Senators.[3] You will have the right to vote for a territorial legislature and executive, but those officials are subject to the supervision of an unelected board appointed by the U.S. President.[4]

The Puerto Rican constitution will protect your right to a jury trial,[5] but the U.S. Constitution does not.[6] You will not pay federal income tax, but you will pay payroll taxes to the same extent as you did in the mainland.[7] Should you suffer serious health conditions while living in the island, your access to the safety-net programs funded by your taxes, to Supplemental Nutrition Assistance Program (SNAP), Supplemental Security Income (SSI), Medicaid, and Medicare Part D, will be substantially curtailed or denied.[8] Your family will not have access to the pandemic child tax credit program or the refundable portion of the Earned Income Tax Credit.[9] The federal government can discriminate against you and neighbors by satisfying the lowest level of constitutional review, rational basis, and it does.[10] This situation is legal in Puerto Rico and its sister territories because of the Insular Cases.[11]

The Insular Cases is a name given to a series of cases decided by the U.S. Supreme Court dealing with the status of the territories the United States acquired at the turn of the twentieth century.[12] The

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3. *Id.*

4. *See id.* at 2.

5. P.R. CONST. art. II, § 11.

6. Balzac v. Porto Rico, 258 U.S. 298, 298–99 (1922).

7. *See* H.R. REP. NO. 105-131, at 4; Sam, *Do Puerto Ricans pay federal taxes and contribute to the US economy?*, MARCA (Apr. 5, 2022, 6:32 AM), https://www.marca.com/en/lifestyle/us-news/2022/04/22/6262923b268e3e75308b4576.html [https://perma.cc/JQG7-6D35].

8. *See* Brynne Keith-Jennings & Elizabeth Wolkomir, *How Does Household Food Assistance in Puerto Rico Compare to the Rest of the United States?*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 3, 2020), https://www.cbpp.org/research/food-assistance/how-does-household-food-assistance-in-puerto-rico-compare-to-the-rest-of [https://perma.cc/6GDR-JZNM].

9. Carmen Reinicke, *Puerto Rico residents aren't getting monthly child tax credit payments. That could change soon*, CNBC (Sept. 28, 2021, 12:39 PM), https://www.cnbc.com/2021/09/28/puerto-rico-residents-arent-getting-monthly-child-tax-credit-checks.html [https://perma.cc/S3N3-QYCV].

10. *See* Harris v. Rosario, 446 U.S. 651, 651–52 (1980) (per curiam); Califano v. Torres, 435 U.S. 1, 5 (1978) (per curiam).

11. *Harris*, 446 U.S. at 651–52; *Califano*, 435 U.S. at 5.

12. The moniker "Insular Cases" comes from the fact that the overwhelming majority of these cases dealt with disputes related to American island territories. The modern populated American territories are American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. *Dependencies and Areas of Special Sovereignty*, BUREAU OF INTELLIGENCE AND RSCH., U.S. DEP'T OF STATE (Aug. 5, 2022), http://www.state.gov/s/inr/rls/10543.htm [https://perma.cc/YT8F-G7FN] (last visited Jan. 27, 2023). The exact list of Insular Cases is subject to some scholarly debate. While not wading into that debate, this Article will refer to the following list when using the moniker: Balzac

Insular Cases rely on outmoded assumptions about the peoples who live in those islands,[13] ninety-eight percent of whom belong to racial and ethnic minorities,[14] and extend the extraconstitutional doctrine of territorial incorporation,[15] a *Plessy*-style doctrine of separate governance for these territories that is different than the territories that preceded them.[16] These cases, and the doctrine they announced, have been universally decried as at best "incorrectly decided"[17] or anachronistic,[18] and at worst "central documents in the history of American racism."[19] Despite the overwhelming academic[20] and popular[21] consensus against the Insular Cases, the Supreme Court has not only failed to overrule them but has instead unwittingly engaged in a project of establishing *new* Insular Cases.[22] Establishing

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v. Porto Rico, 258 U.S. 298 (1922); Rasmussen v. United States, 197 U.S. 516 (1905); Dorr v. United States, 195 U.S. 138 (1904); De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); and Huus v. N.Y. & Porto Rico Steamship Co., 182 U.S. 392 (1901).

13. *Bidwell*, 182 U.S. at 287, 302 (1901) (using the terms "savages" and "alien races" in discussing the purported implications of extending full constitutional rights to the islands).

14. Stacey Plaskett, *The Second-Class Treatment of U.S. Territories Is Un-American*, ATLANTIC (Mar. 11, 2021), https://www.theatlantic.com/ideas/archive/2021/03/give-voting-rights-us-territories/618246 [https://perma.cc/V7N5-654J].

15. *See Downes*, 182 U.S. at 249 ("The Constitution itself does not answer the question."); Igartúa-de la Rosa v. United States, 417 F.3d 145, 158–59 (1st Cir. 2005) (Torruella, J., dissenting) (arguing that the Territorial Incorporation Doctrine was counter to established precedent and extraconstitutional).

16. *See* MARK S. WEINER, FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 64–65 (Christina Duffy Burnett & Burke Marshall. eds., 2001) (describing the process all former territories followed towards statehood prior to the Insular Cases). *See also* Northwest Territory Ordinance of 1787, 1 Stat. 51 (1789) (establishing a process by the "Northwest Territory" would transition to statehood).

17. Transcript of Oral Argument at 9, United States v. Vaello Madero, 142 S. Ct. 1539 (2022) (No. 20-303) (Gorsuch, J., acknowledging that "the Insular Cases are wrong . . . [and] everyone knows [it] to be true[.]"); Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 286 (2007) (arguing that the Insular Cases were "wrongly decided").

18. Nathan Muchnick, *The Insular Citizens: America's Lost Electorate v. Stare Decisis*, 38 CARDOZO L. REV. 797, 800–01 (2016).

19. Sanford Levinson, *Why the Canon Should Be Expanded to Include* the Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 245 (2000).

20. Lana Birbrair, *The Insular Cases: Constitutional experts assess the status of territories acquired in the Spanish-American War*, HARV. L. TODAY (Mar. 18, 2014), https://today.law.harvard.edu/insular-cases-constitutional-experts-assess-status-territories-acquired-spanish-american-war-video [https://perma.cc/9LGA-VYU3]. *See also supra* notes 17–19 and accompanying text.

21. For examples of reactions to the Insular Cases in the popular media, see Doug Mack, *The Strange Case of Puerto Rico*, SLATE (Oct. 9, 2017, 5:45 AM), https://slate.com/news-and-politics/2017/10/the-insular-cases-the-racist-supreme-court-decisions-that-cemented-puerto-ricos-second-class-status.html [https://perma.cc/SR2R-6SEL] and *U.S. Territories: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Mar. 9, 2015), https://www.youtube.com/watch?v=CesHr99ezWE [https://perma.cc/4QGA-P3ET].

22. The Court has not explicitly set out to undermine the territories' home rule or

a list for the new Insular Cases is the purpose of this Article. Thus far, these cases are: (1) *Puerto Rico v. Franklin California Tax-Free Trust*,[23] (2) *Puerto Rico v. Sanchez Valle*,[24] (3) *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*,[25] (4) *Tuaua v. United States*,[26] and (5) *United States v. Vaello Madero*.[27] While not all of the new Insular Cases explicitly rely on the rationale of the old,[28] all expand upon and solidify the evil that the Insular Cases introduced into our jurisprudence: permanent American colonialism.

I. THE ORIGINAL INSULAR CASES

The Insular Cases stand for the proposition that the territories acquired by the United States during and immediately after the Spanish-American War were mere property because these territories were "foreign . . . in a domestic sense [and] had not been incorporated into the United States."[29] The Insular Cases were a drastic change in the law. Prior to the turn of the 20th Century, the meaning of "within the United States" was understood to include the District of Columbia, the territories, and all the states.[30] The Supreme Court generally held that the "United States . . . is the name given to our great republic, which is composed of States *and* territories."[31] That understanding was widespread and is reflected, perhaps most starkly, in the structure of the Fourteenth Amendment which uses the term "The United States" when addressing citizenship and the "several States" when addressing apportionment.[32] But, in the Insular Cases,

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quasi-sovereignty, but that has been the result of these decisions. *See infra* notes 97–100 and accompanying text.

23. Puerto Rico v. Franklin California Tax-Free Trust, 136 S. Ct. 1938 (2016).

24. Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863 (2016).

25. Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Investment, 140 S. Ct. 1649 (2020).

26. Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015), *cert. denied*, United States v. Walsh, 136 S. Ct. 2461 (2016).

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

28. *Supra* notes 22–27 and accompanying text.

29. Downes v. Bidwell, 182 U.S. 244, 341–42 (1901) (White, J., concurring).

30. Loughborough v. Blake, 18 U.S. 317, 318–19 (1820) ("The [D]istrict of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania."). *See also* Stoutenburgh v. Hennick, 129 U.S. 141, 148 (1889) ("in the matter of interstate commerce the United States are but one country"); *Slaughter-House Cases*, 83 U.S. 36, 72 (1872) (noting that prior to the Fourteenth Amendment "[t]hose . . . born and resided always in the District of Columbia or in the Territories, *though within the United States*, were not citizens.") (emphasis added).

31. *Loughborough*, 18 U.S. at 319 (emphasis added). *See, e.g.*, United States v. Dawson, 56 U.S. 467, 482 (1853); Webster v. Reid, 52 U.S. 437, 460 (1850).

32. *Compare* U.S. CONST. amend. XIV, § 1 (recognizing citizenship of "persons born

the Fuller Court suddenly declared that "it [could] nowhere be inferred that the territories were considered a part of the United States."[33] After all, these territories were populated by "savages" belonging to "alien races" who would have a hard time with "Anglo-Saxon principles" of law and government and treating them as Americans would lead to "extremely serious" consequences.[34] The reasons for this judicial about-face are evident from the language of the cases and also from the social and political dialogue of the time.[35]

The then-recent victory in the Spanish-American War was an important backdrop to the election of 1900.[36] Because, at the time, sitting presidents did not campaign for re-election; vice presidential nominee Theodore Roosevelt shouldered the electioneering burden.[37] Roosevelt, who would later praise "the expansion of the peoples of white, or European, blood"[38] gave speeches in the run-up to the election during which he defended expansionism as a key to maintain peace, warning "that expansion is not only the hand-maid of greatness, but above all the hand-maid of peace."[39] Although McKinley initially resisted the call to war, he embraced the need to "civilize and Christianize" the Philippines and "put [them] on the map of the United States."[40] This sentiment extended to the other insular territories.[41] Eventually, the McKinley-Roosevelt ticket ran on, among other issues, a defense of post-war expansionism.[42] Part of

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or naturalized in *the United States*"), *with* U.S. CONST. amend. XIV, § 2 (apportioning representatives "among *the several States*.") (emphases added).

33. *Downes*, 182 U.S. at 250–51.

34. *Id.* at 279, 287.

35. *Supra* notes 29–34 and accompanying text.

36. Michael Richman, *A 'Splendid Little War' Built America's Empire*, WASH. POST (Apr. 8, 1998), https://www.washingtonpost.com/archive/1998/04/08/a-splendid-little-war-built-americas-empire/0cc1f34f-cfdd-4e93-9c1a-85893e25ebdc [https://perma.cc/A73E-XSVQ].

37. *See* LEWIS L. GOULD, THE PRESIDENCY OF WILLIAM MCKINLEY 207 (Donald R. McCoy et al. eds., 1980) (despite this tradition McKinley did engage in electioneering during the midterm elections in 1898–99).

38. Theodore Roosevelt, U.S. President, Speech on "Expansion of the White Races" (Jan. 18, 1909) (transcript on file with editors).

39. David H. Burton, *Theodore Roosevelt: Confident Imperialist*, 23 REV. POLS. 356, 370 (1961).

40. Nick Kapur, *William McKinley's Values and the Origins of the Spanish-American War: A Reinterpretation*, 41 PRESIDENTIAL STUD. Q. 18, 26–27, 29 (2011).

41. ELIHU ROOT, THE MILITARY AND COLONIAL POLICY OF THE UNITED STATES: ADDRESSES AND REPORTS 161–62, 164–65 (Robert Bacon & James B. Scott eds., 1916) (asserting that the inhabitants of had no right to be treated as citizens of states or U.S. territories but would be able to achieve self-government in time and could demand rights "inherent" in American government).

42. Thomas A. Bailey, *Was the Presidential Election of 1900 A Mandate on Imperialism?*, 24 MISS. VALLEY HIST. REV. 43, 50 (1937) (noting that although imperialism was not central to the 1900 McKinley campaign it was nevertheless a factor and

the discussion about expansionism centered on the question of whether "the Constitution follow[ed] the flag."[43] This debate took place on the popular press and in the legal journals,[44] the White House, and the halls of Congress.[45] McKinley was particularly concerned about having a "free hand" with respect to "colonial policy—especially in the Philippines"[46] as the Filipinos had resisted "American sovereignty" and were in open insurrection, really at war, against their former liberators.[47]

The Supreme Court tacitly adopted the McKinley-Roosevelt position that the Constitution did not follow the flag in the Insular Cases.[48] First, the Court held that the new territories ceased to be foreign countries.[49] It then found that "[t]he Constitution itself [did] not answer the question" of the status of these territories in the American political scheme.[50] Further, the Court reasoned, "the power to acquire territory by treaty" implied the power to decide the "terms" under which the people of those territories would join the "American empire."[51] In the end, only constitutional provisions deemed "fundamental" would apply to these territories.[52] Justice White, writing for Shiras and McKenna, concurred in *Downes* further noting that the new territories were not foreign "in an international sense" but

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commenting on how the campaign linked imperialism with patriotism as a defense to anti-imperial attacks).

43. *Compare 1900 Democratic Party Platform*, UCSB (July 5, 1900), https://www.presidency.ucsb.edu/node/273194 [https://perma.cc/X629-K5NG] ("We hold that the Constitution follows the flag"), *with* William McKinley, *McKinley's Speech Accepting 1900 Republican Nomination*, WALL ST. J. (Sept. 20, 2007, 12:01 AM), https://www.wsj.com/articles/SB119006839291230348 [https://perma.cc/4EKJ-5BEK] ("Congress . . . [has] full legislative power over territory belonging to the United States . . . .").

44. Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition of Government by the United States of Island Territories*, 12 HARV. L. REV. 393, 399 (1899); C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 371 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions: A Third View*, 13 HARV. L. REV. 155, 156 (1899); James B. Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 467 (1899); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 291–92 (1890); *The Constitution does not Follow the Flag. The Republic can Hold Subjects*, LIBERATOR 2 (June 1, 1901).

45. GOULD, *supra* note 37, at 209–14.

46. *Id.* at 209 (internal quotations omitted).

47. *See* Richard E. Welch, "*The Philippine Insurrection" and the American Press*, 36 HISTORIAN 34, 34 (1973) (analyzing the role of the American press in mislabeling the Philippine conflict as an "insurrection.").

48. Most likely informed by Professor Lowell's "Third View." *See* Lowell, *supra* note 44, at 156.

49. De Lima v. Bidwell, 182 U.S. 1, 220 (1901).

50. Downes v. Bidwell, 182 U.S. 244, 249 (1901).

51. *Id.* at 279.

52. Dorr v. United States, 195 U.S. 138, 144–45 (1904); Hawaii v. Mankichi, 190 U.S. 197, 247 (1903) (holding that the right to a jury trial is not "fundamental").

indeed "foreign to the United States in a domestic sense."[53] So, he reasoned, the United States could acquire unincorporated territories where its "people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely *arbitrary* control of Congress."[54] A far cry from the anti-colonial sentiment the nation was founded upon.[55]

In another of the Insular Cases, the Court indicated that certain actions Congress took with respect to Alaska evidenced that territory's incorporation into the United States.[56] Specifically, "extending the laws of the United States relating to the customs, commerce, and navigation over Alaska,"[57] the establishment of appellate jurisdiction over territorial courts,[58] and the status of Alaska's people as "citizens of the United States."[59] However, when Congress took similar actions with respect to Puerto Rico a decade later,[60] the Court held that "incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view" and found Congress had not incorporated Puerto Rico by those acts.[61]

The Insular Cases are a relic of the same Court who decided *Plessy v. Ferguson*.[62] Justice Henry Billings Brown wrote both *Plessy* and *Downes*, and the makeup of the Court was almost identical.[63] However, unlike with *Plessy*, the Court has not directly addressed the Insular Cases or their merits. Instead, the Court has used, limited, ignored, or worked around them.[64] For instance, the Court held that the right to travel is protected by the Constitution in the territories,[65] that territorial citizens are entitled equal protection, and

53. *Downes*, 182 U.S. at 341 (White, J., concurring). Justice White's concurrence in *Downes* became the law in *Dorr*. *Dorr*, 195 U.S. at 143.

54. *Downes*, 182 U.S. at 283 (emphasis added).

55. *See* THE DECLARATION OF INDEPENDENCE para. 2, 22 (U.S. 1776) (objecting to the establishment of an "[a]rbitrary government" in Quebec as an impetus for independence noting that governments "deriv[e] their just Powers from the Consent of the Governed . . . .").

56. Rasmussen v. United States, 197 U.S. 516, 523 (1905), *abrogated by* Williams v. Florida, 399 U.S. 78 (1970).

57. *See id.* at 534.

58. *Id.* at 528.

59. *Id.* at 522 (citing 26 Stat. at L. 549).

60. *See* 38 Stat. 803 § 1 (1915) (extending federal appellate jurisdiction over Puerto Rican courts); 39 Stat. 951 § 9 (1917) (granting birthright citizenship to all Puerto Ricans, establishing a federal district court in the island, and making Puerto Rico subject to federal statutes).

61. Balzac v. Porto Rico, 258 U.S. 298, 306 (1922).

62. Plessy v. Ferguson, 163 U.S. 537, 538–540 (1906).

63. Justice McKenna replaced Justice Field in 1898. *History of the Federal Judiciary—Justice Joseph McKenna*, FED. JUD. CTR., https://www.fjc.gov/history/judges/mckenna-joseph [https://perma.cc/9QNL-6E68] (last visited Jan. 27, 2023).

64. *Infra* notes 65–72 and accompanying text.

65. Califano v. Torres, 435 U.S. 1, 4 n.6 (1978) (per curiam).

that procedural due process considerations,[66] as well as the protections of the Fourth Amendment.[67] That voting rights guarantees are applicable to the territories.[68] Also, that free speech is guaranteed by the Constitution in the territories.[69] Thus, because of this piecemeal approach, a listing of all constitutional provisions applicable to the territories remains unclear.[70]

At times, individual justices and pluralities of justices have called into question the continued validity of the Insular Cases.[71] The Court even opened the door to *de facto* incorporation, commenting that it "may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance."[72] However, it has continued to affirm the principle that "not every constitutional provision applies to governmental activity even where the United States has sovereign power."[73] Furthermore, the Court only requires that Congress have a rational basis for discriminating against citizens in the territories,[74] covering otherwise impermissible or suspect race-based distinctions with a veneer of benign locality-based discrimination.[75] This decades-long supreme vacillation over the status of Americans in the territories continues to this day.[76]

II. A CENTURY OF INSULAR AMERICANIZATION

Whether the Insular Cases were animated by racism or practical considerations, the reality is that the socio-political landscape has radically changed in the century since they were decided. Territorial

66. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668 n. 5 (1974); Examining Bd. v. Flores de Otero, 426 U.S. 572, 581–82 (1976).

67. *Harris*, 446 U.S. at 652–53 (1980); Torres v. Puerto Rico, 442 U.S. 465, 465 (1979). *But see* United States v. Baxter, 951 F.3d 128, 135 (3d Cir. 2020) (applying the border searches exception to the U.S. Virgin Islands).

68. Rodriguez v. Popular Democratic Party, 457 U.S. 1, 12–14 (1982).

69. Posadas de P.R. Ass'ns v. Tourism Co. of P.R., 478 U.S. 328, 331 n.1 (1986).

70. More recent precedent suggests that courts examine whether application of a constitutional provision to a territory would be "impractical and anomalous." United States v. Verdugo-Urquidez, 494 U.S. 259, 277–78 (1990) (Kennedy J., concurring).

71. United States v. Vaello Madero, 142 S. Ct. 1539, 1539 (2022) (Gorsuch, J., concurring); *Harris*, 446 U.S. at 652–55 (Marshall, J., dissenting); *Torres*, 442 U.S. at 474–75 (Brennan J., concurring) (writing for himself and three other justices). *See* Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion).

72. Boumediene v. Bush, 553 U.S. 723, 758 (2008).

73. *Verdugo-Urquidez*, 494 U.S. at 268.

74. Harris v. Rosario, 446 U.S. 651, 651–52 (1980) (per curiam); Califano v. Torres, 435 U.S. 1, 5 (1978) (per curiam).

75. *See Boumediene*, 553 U.S. at 726 (characterizing the rationale of the Insular Cases as based on "[p]ractical considerations" associated with the "difficulties . . . inherent in transforming the former Spanish colonies' civil-law system into an Anglo-American system . . . .").

76. *Supra* notes 62–75 and accompanying text.

Americans are now an integral part of American society, and the institutions of government in the territories are no longer dissimilar to those in the mainland.[77] The collective population of the insular territories is approximately 3.5 million people.[78] There are more than five million Puerto Ricans living in the mainland.[79] Likewise, nearly as many Chamorros[80] live in the mainland as in Guam or the Northern Mariana Islands.[81] More than three times as many American Samoans live in the mainland than in the islands.[82] American Samoa also leads the nation in the number of military enlistments per capita.[83] And, although measuring the mainland Virgin Islander population has proven difficult because the island's diverse population and the unique "two-way movement" of peoples into and out of the islands,[84] all indications are that the social and political integration of the U.S. Virgin Islands into the fabric of the nation has been no less significant than that of the other territories.[85]

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77. *See* THE TERRITORIES: THEY ARE US, NCSL (2018), https://www.ncsl.org/Portals/1/Documents/magazine/articles/2018/SL_0118-Stats.pdf [https://perma.cc/J6S9-87CH].

78. *See* U.S. CENSUS BUREAU, 2020 ISLAND AREAS CENSUSES: AMERICAN SAMOA, POPULATION AND HOUSING UNIT COUNTS tbl. 1 (2021) (population of 49,710); U.S. CENSUS BUREAU, 2020 ISLAND AREAS CENSUSES: GUAM, POPULATION AND HOUSING UNIT COUNTS tbl. 1 (2021) (population of 153,836); U.S. CENSUS BUREAU, 2020 ISLAND AREAS CENSUSES: COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, POPULATION AND HOUSING UNIT COUNTS tbl. 1 (2021) (population of 47,329); U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, THE DISTRICT OF COLUMBIA, AND PUERTO RICO: APRIL 1, 2010 TO JULY 1, 2019; APRIL 1, 2020; AND JULY 1, 2020 (NST-EST2020) tbl. (Puerto Rico population of 3,159,343); U.S. CENSUS BUREAU, 2020 ISLAND AREAS CENSUSES: U.S. VIRGIN ISLANDS, POPULATION AND HOUSING UNIT COUNTS tbl. 1 (2021) (population of 87,146).

79. Luis Noe-Bustamante, Antonio Flores & Sono Shah, *Facts on Hispanics of Puerto Rican origin in the United States, 2017*, PEW RSCH. CTR. (Sept. 16, 2019), https://www.pewresearch.org/ritanni/fact-sheet/u-s-hispanics-facts-on-puerto-rican-origin-latinos [https://perma.cc/32BP-5B95].

80. Guam and the Northern Mariana Islands are politically divided but were once the same people and lie geographically in the same archipelago. The indigenous people of these islands are known as Chamorro or Chamoru. *See Chamorro*, ENCYC. BRITANNICA (Mar. 10, 2021), https://www.britannica.com/topic/Chamorro [https://perma.cc/5XPQ-FQXT]; Daily Post Staff, *Commission: Chamoru, not Chamorro; Guam's female governor is Maga'hågа*, GUAM DAILY POST (Nov. 30, 2018), https://www.postguam.com/news/local/commission-chamoru-not-chamorro-guam-s-female-governor-is-maga/article_045523dc-f3b9-11e8-9b53-5ba21e8bb30a.html [https://perma.cc/BC2B-RUWC].

81. 147,798 Chamorros lived in the mainland as of 2010. *See* LINDSAY HIXSON, BRADFORD B. HEPLER & MYOUNG OUK KIM, THE NATIVE HAWAIIAN AND OTHER PACIFIC ISLANDER POPULATION: 2010, 14 tabl. 5 (2012); *see supra* note 78 and accompanying text for the population of Guam and CNMI.

82. Approximately 180,000 Samoans live in the mainland. *See* U.S. CENSUS BUREAU, NATIVE HAWAIIAN AND OTHER PACIFIC ISLANDER ALONE OR IN ANY COMBINATION BY SELECTED GROUPS (2021); *see supra* note 78 and accompanying text for the population of American Samoa.

83. *See* NCSL, *supra* note 77.

84. *See* Lomarsh Roopnarine, *United States Virgin Islands Migration*, 57 SOC. & ECON. STUD. 131, 147 (2008).

85. *See* William W. Boyer, *The United States Virgin Islands and Decolonization of the*

According to the Court, practical considerations support the rationale of the Insular Cases, specifically because of the need "to govern *temporarily* territories with wholly dissimilar traditions and institutions."[86] A century-long exercise of sovereignty can hardly be considered temporary. Even if that were not fatal to one the Insular Cases' *ratio decidendi*, the cases fail on their other rationale.[87] Political structures in the territories are no longer "wholly dissimilar" to those in the mainland, as institutions grounded in American legal and political traditions have gradually and significantly grown in the territories.[88] All the territories elect nonvoting congressional representatives.[89] With the exception of those born in American Samoa, all people born in the territories are statutory natural-born citizens.[90] They are subject to the military draft and serve in America's all-volunteer military.[91] The people of Puerto Rico contribute more to the federal treasury than their counterparts in "Vermont, Wyoming, South Dakota, North Dakota, Montana, and Alaska . . . ."[92] Finally, all the territories have local governments that mirror the traditional American branches of government.[93] It is true that the degree of Americanization varies.[94] American Samoa is likely the least Americanized of the territories[95] while Puerto Rico is arguably the most

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Eastern Caribbean, REV. REGIONAL STUD. 34, 44 (1984) (noting that, as of 1981, the overwhelming majority of Virgin Islanders desired at least continued relations with the mainland and most wanted closer ties).

86. *See* Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion) (emphasis added).

87. *See id.* at 67.

88. *See id.* at 14.

89. *See* 48 U.S.C.A. § 1731; Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, 122 Stat. 868 (2008); Pub. L. 92-270, 86 Stat. 118 (1972), 86; Act of Apr. 12, 1900, ch. 191, 31 Stat. 86 (Apr. 12, 1900); Guam and Virgin Islands Delegate to the U.S. House of Representatives Act, Pub. L. No. 92-271, 86 Stat. 118 (1972).

90. *See* Guam, 66 Stat. 163 (1952); Northern Mariana Islands, 90 Stat. 266 (1976); Puerto Rico, 39 Stat. 951 (1917); U.S. Virgin Islands, 66 Stat. 237 (1952).

91. *See* 50 U.S.C.A. § 3802; *see also Selective Service—Who Needs to Register*, SELECTIVE SERV. SYS., https://www.sss.gov/register/who-needs-to-register/#p2 [https://perma.cc/B9BE-9V6J] (last visited Jan. 27, 2023).

92. *See* United States v. Vaello Madero, 956 F.3d 12, 24 (1st Cir. 2020), *rev'd*, 2022 WL 1177499 (2022), *cert. granted*, 141 S. Ct. 1462 (2021).

93. Congress has enacted an organic act for all the territories, again excepting American Samoa. *See* 31 Stat. 77 (1900) (Puerto Rico); 39 Stat. 951 (1917) (Puerto Rico); 49 Stat. 1807 (1936) (Virgin Islands); 68 Stat. 497 (1954) (Virgin Islands); 64 Stat. 384 (1950) (Guam); 90 Stat. 263 (1976) (Commonwealth of the Northern Mariana Islands).

94. For a discussion of the slow but significant degree of Americanization in American Samoa, see Arnold Leibowitz, *American Samoa: Decline of a Culture*, 10 CAL. W. INT'L L.J. 220, 252–56 (1980).

95. *See* Michelle Broder Van Dyke, *Why some American Samoans don't want U.S. citizenship*, NBC NEWS (Dec. 17, 2019, 1:04 PM), https://www.nbcnews.com/news/asian-america/why-some-american-samoans-don-t-want-u-s-citizenship-n1103256 [https://perma.cc/77ZJ-3CP6].

Americanized.[96] Despite this degree of variation, the *foreignness* of Territorial Americans is pure fiction in the present if it ever was fact in the past. The people of the territories are no more foreign to those in the mainland than a New Yorker is to a Texan.

III. THE NEW INSULAR CASES

It is with this backdrop that the Insular Cases enter their second century. Although the Court has declared that the Insular Cases should not be expanded, its actions do not meet this sentiment.[97] Since 2015, it has decided four cases, and denied certiorari on a fifth, that have strengthened the *Plessy*-style disparate treatment of Americans living in the territories.[98] These cases pre-empt local fiscal management, erase the trappings of sovereignty, weaken home rule governments, deny constitutional birthright citizenship to Territorial Americans, and weaken equal protection guarantees for those living in America's territories.[99] These are the twenty-first century's New Insular Cases.[100]

A. Puerto Rico v. Franklin California Tax-Free Trust

The turn of the 21st century marked an economic turning point for Puerto Rico that put the island on a path to insolvency and near economic collapse.[101] That was not always the case. During the years following the ratification of the Puerto Rican constitution in 1952, Puerto Rico's economy enjoyed rapid growth.[102] Productivity measured as "GDP per worker" moved towards parity with the mainland[103] and tax policy supported financial and manufacturing investment

96. Puerto Rico is the only territory not governed by the Department of the Interior. *See Islands We Serve*, U.S. DEP'T OF THE INTERIOR (Aug. 1, 2022), https://www.doi.gov/oia/islands [https://perma.cc/KD8B-ALE9].

97. Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion).

98. *See supra* notes 22–26 and accompanying text.

99. *See* Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938 (2016); Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863 (2016).

100. Like their predecessors, most of the New Insular Cases deal with Puerto Rico. That is not unusual given the large population disparity between Puerto Rico and its sister territories. *See, e.g.*, Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938 (2016); Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863 (2016); *In re* Fin. Oversight & Mgmt. Bd. for Puerto Rico, 318 F. Supp. 3d 537 (D.P.R. 2018); Tuaua v. United States, 951 F. Supp. 2d 88 (D.D.C. 2013); United States v. Vaello Madero, 142 S. Ct. 1539 (2022).

101. *See Puerto Rico in Crisis Timeline*, CTR. FOR P.R. STUD. (2017).

102. *See* BARRY P. BOSWORTH & MIGUEL A. SOTO-CLASS, THE ECONOMY OF PUERTO RICO: RESTORING GROWTH 17 (Susan M. Collins et al. eds., 2006).

103. *See id.* at 21 (GDP per worker increased from 31 percent of the U.S. average in 1950 to 74 percent by 1980).

in the island.[104] At the same time territorial debt was, and remains, triple-tax-exempt and attractive to investors.[105] Eventually, Puerto Rico's fortunes turned for a variety of reasons, including the repeal of Section 936 of the Internal Revenue Code.[106] Section 936 allowed subsidiaries of mainland companies to pay no federal taxes on their Puerto Rican profits and its repeal triggered a mass exodus of manufacturing from the island.[107] The island's economy started shrinking.[108] Its people started leaving by the thousands to the mainland.[109] Facing a shrinking tax base, the local government turned to debt to finance operations.[110] The island eventually defaulted, declaring its debt "not payable."[111]

Normally, municipalities and other public corporations have access to bankruptcy protection in the event of default. However, in 1984 without debate or explanation, Congress removed Puerto Rico and the District of Columbia from eligibility for the protections of Chapter 9 bankruptcy.[112] To fill that gap, acting under its purported

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104. *See id.* at 24 (crediting section 936 of the Internal Revenue Code for spurring manufacturing development in the island).

105. *See* 48 U.S.C. § 745 (1917).

106. *See* Scott Greenberg & Gavin Ekins, *Tax Policy Helped Create Puerto Rico's Fiscal Crisis*, TAX FOUND. (June 30, 2015), https://taxfoundation.org/tax-policy-helped-create-puerto-rico-fiscal-crisis [https://perma.cc/6RTN-5H2X].

107. *See* John W. Schoen, *Here's how an obscure tax change sank Puerto Rico's economy*, CNBC (Sept. 26, 2017, 4:14 PM), https://www.cnbc.com/2017/09/26/heres-how-an-obscure-tax-change-sank-puerto-ricos-economy.html [https://perma.cc/C73B-KMSH].

108. *See* Lara Merling, *Puerto Rico's Peculiar Case: Bankruptcy of an Unincorporated Territory*, CTR. FOR ECON. & POL'Y RSCH. (Sept. 2018)

> Between 2005 and 2016, Puerto Rico's economy was shrinking at an annual real rate of 1 percent per year. Investment, which was over 20 percent of GDP in the late 1990s, fell to less than 8 percent of GDP in 2016. As the economy declined, so did the revenues of its government, which started to increasingly finance operations through borrowing.

109. *See* Jaison R. Abel & Richard Deitz, *The Causes and Consequences of Puerto Rico's Declining Population*, 20 FED. RSRV. BANK N.Y., CURRENT ISSUES IN ECON. & FIN. 1, 2 (2014).

110. *See* Laura Sullivan, *How Puerto Rico's Debt Created a Perfect Storm Before the Storm*, NPR (May 2, 2018, 7:10 AM), https://www.npr.org/2018/05/02/607032585/how-puerto-ricos-debt-created-a-perfect-storm-before-the-storm [https://perma.cc/5ZNN-GTCN] ("Rather than cut spending to make up for declining tax revenue, the Puerto Rican government went the other way. It borrowed money.").

111. *See* Michael Corkery & Mary Williams Walsh, *Puerto Rico's Governor Says Island's Debts Are 'Not Payable,'* N.Y. TIMES (June 28, 2015), https://www.nytimes.com/2015/06/29/business/dealbook/puerto-ricos-governor-says-islands-debts-are-not-payable.html [https://perma.cc/4UDH-RYJ3].

112. *See* Bankruptcy Amendments and Federal Judgeship Act, Pub. L. 98-353, § 421(j)(6), 98 Stat. 368 (1984); Transcript of Oral Argument, Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938 (2016) (describing the legislative reasoning for excluding Puerto Rico and D.C. as "a black box" because "there is no legislative history directly on point either way."); Stephen Mihm, *Congress Goofed. Puerto Rico Pays.*, BLOOMBERG (Dec. 3, 2015, 12:34 PM), https://www.bloomberg.com/opinion/articles/2015

police power,[113] Puerto Rico passed a statute authorizing its public corporations to restructure their debt.[114] Franklin California Tax-Free Trust and other similarly situated investors sued to enjoin this law as pre-empted by the Federal Bankruptcy Code.[115] The trial court ruled in their favor and the First Circuit affirmed the lower court's decision.[116] The territorial government appealed to the U.S. Supreme Court.[117]

In *Franklin California Tax-Free Trust*, the Court sought to answer whether Puerto Rico's statute was pre-empted by the Bankruptcy Code despite the island's exclusion from Chapter 9.[118] It ruled that it was.[119] The Court did not discuss the Insular Cases or the territorial clause in its decision but raised, in the oral argument, the question of whether Puerto Rico's exclusion was "irrational" or "anomalous."[120] Those terms are not without meaning, reflecting the emerging standard courts employ to determine whether a constitutional provision applies to a territory[121] and the standard of review courts apply to classifications based on locality.[122] The Court did not address the suggestion by the concurring judge in the First Circuit that Congress's move to strip Chapter 9 bankruptcy protections from Puerto Rico and the District of Columbia lacked a rational basis.[123] Ultimately, the Court engaged in a purely formalist analysis of whether Puerto Rico's exclusion from the definition of "State" for who could be a debtor also excluded it from the definition of "State" in Chapter 9's pre-emption provision.[124] The Court answered that question emphatically: "Puerto Rico is no less a 'State' for purposes of the pre-emption provision than it was before Congress amended

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-12-03/bankruptcy-was-option-for-puerto-rico-before-congress-goof [https://perma.cc/8UYK-3VM9] ("No one debated or discussed it in Congress . . . . The historical record is silent on these questions.").

113. *See Puerto Rico Public Corporation Debt Enforcement and Recovery Act: Puerto Rico Passes New Municipal Reorganization Act*, 128 HARV. L. REV. 1320, 1323 (2015).

114. *See* 2014 P.R. Laws Act No. 71.

115. *See Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1943.

116. *Id.*

117. *Id.*

118. *Id.* at 1944.

119. *Id.*

120. Transcript of Oral Argument, Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938 (2016).

121. *See Rasmussen*, 197 U.S. at 523.

122. *See Harris*, 446 U.S. at 652–53.

123. *See* Franklin Cal. Tax-Free Tr. v. Puerto Rico, 805 F.3d 322, 346 (1st Cir. 2015) (Torruella, J., concurring) (noting that the exclusion Puerto Rico's exclusion "contravene[d] both the Supreme Court's and this circuit's jurisprudence in that there exists no rational basis or clear policy reasons for their enactment.") (citations omitted). Striking down this provision would have also affected the District of Columbia.

124. *See Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1946–47.

the definition. The Code's pre-emption provision has prohibited States and Territories defined as 'States' from enacting their own municipal bankruptcy schemes for 70 years."[125] The rest of the opinion focused on addressing Justice Sotomayor's dissent.[126] The crux of her dissent was that, since Puerto Rico was excluded from the definition of a "State", it is also excluded from the pre-emption provision.[127] Ultimately, the dissent noted, "pre-emption here mean[t] that a government [was] left powerless and with no legal process to help its 3.5 million [American] citizens."[128] Puerto Rico's vaunted special status did not mitigate that powerlessness, it could not help itself.[129] That powerlessness is endemic to the separate and unequal treatment of the American territories.[130] Thus, it is apparent from *Franklin California Tax-Free Trust* that territorial home rule is an illusion, one that can be shattered without sufficient, or any, supporting rationale.

B. Puerto Rico v. Sanchez Valle

For most of the 20th Century Puerto Rico was perceived as *different* from its sister territories.[131] There was wide support for that belief.[132] Unlike the other territories, the island was governed as a *de facto* state.[133] The Federal District Court for Puerto Rico is an Article III Court[134] and all federal agencies treat Puerto Rico as if it were a state.[135] The island even has its own constitution.[136] However, experts disagreed on whether the territorial constitution, styled "in

125. *See id.* at 1947.

126. *See id.* at 1949.

127. *See id.* at 1954 (Sotomayor, J., dissenting) ("[T]he proper understanding of that alteration is that Puerto Rico and its municipalities have been removed entirely from Chapter 9—both from the benefits it provides and from the burden of the pre-emption clause.").

128. *See id.*

129. *See* Lyle Denniston, *Argument analysis: Puerto Rico—special no more?*, SCOTUS BLOG (Jan. 13, 2016, 4:24 PM), https://www.scotusblog.com/2016/01/argument-analysis-puerto-rico-special-no-more [https://perma.cc/YX5Q-MU7J].

130. *See id.*

131. *See* Rafael Matos, Opinion, *Puerto Rico's Rude Awakening*, N.Y. TIMES (July 14, 2016), http://www.nytimes.com/2016/07/14/opinion/puerto-ricos-rude-awakening.html [https://perma.cc/RUQ4-FKRX] (describing the belief in the island that Puerto Rico's status was "something new, called a 'commonwealth' in English and, in Spanish, an 'estado libre asociado' (free associated state).").

132. *See* Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 596 (1976) (noting that Puerto Rico has "a relationship to the United States that has no parallel in our history.").

133. *See supra* note 96. Puerto Rico is the only insular territory not under the supervision of the Department of the Interior.

134. *See* 80 Stat. 764 (1966).

135. *See* 48 U.S.C. § 734 (1917); Memorandum from the President for the Heads of Executive Departments and Agencies, 57 F.R. 57093 (Nov. 30, 1992).

136. *See* Puerto Rican Federal Relations Act, 64 Stat. 319 (1950); 66 Stat. 327 (1952).

the nature of a compact,"[137] truly transformed the relationship between the island and the mainland and, if it did, to what extent.[138] Many, including in the federal legislature, argued Congress maintained its power over the island, the Court ultimately ruled this latter group correct.[139]

In *Sanchez Valle,* the Court was asked to decide whether Puerto Rico was a "separate sovereign" for purposes of the double jeopardy clause.[140] The Court held that the island is not a separate sovereign because the "ultimate source" of its power lies in Congress.[141] The facts of the case were routine. Territorial prosecutors charged two men, Jaime Gómez Vázquez, and Luis Sánchez Valle, with selling guns without a license.[142] After the island charged the men but prior to any conviction, federal prosecutors charged the men with violating federal statutes for the same conduct.[143] They both pled guilty in federal court.[144] After their federal convictions, the two men moved the territorial court to dismiss its charges.[145] They argued any subsequent conviction for the same conduct by Puerto Rico would violate the double jeopardy clause of the U.S. Constitution.[146] The trial court agreed.[147] It reasoned that, since Puerto Rico was not a separate sovereign from the United States, the prosecution was barred.[148] The intermediate territorial court overruled the trial court and reinstated the prosecution,[149] but the Puerto Rico Supreme Court reversed.[150] Puerto Rico's prosecutors appealed to the Supreme Court and the Supreme Court granted certiorari.[151]

In reaching its holding, the Court undertook an examination of the concept of sovereignty that avoided direct application of the Insular Cases.[152] The Court traced Puerto Rico's evolution from a

137. *See* Puerto Rican Federal Relations Act, 48 U.S.C. § 731(b) (1950).

138. For an overview of the debate, see *Hearing on H.R. 856 before the H. Comm. on Resources* 105th Cong. (1997), https://www.congress.gov/congressional-report/105th-congress/house-report/131/1 [https://perma.cc/AGH9-YM3P].

139. *See* KEITH BEA, CONG. RSCH. SERV., RL32933, POLITICAL STATUS OF PUERTO RICO: BACKGROUND, OPTIONS, AND ISSUES IN THE 109TH CONGRESS (2005).

140. *See Sanchez Valle*, 136 S. Ct. at 1870.

141. *See id.* at 1876.

142. *See id.* at 1869.

143. *See id.*

144. *See id.*

145. *See Sanchez Valle*, 136 S. Ct. at 1869.

146. *See id.* Under the dual sovereignty doctrine, subsequent prosecutions for the same conduct by separate sovereigns are not barred. For a discussion of the dual-sovereignty doctrine, *see* Gamble v. United States, 139 S. Ct. 1960, 1964 (2019).

147. *See Sanchez Valle*, 136 S. Ct. at 1869.

148. *See id.*

149. *See id.*

150. *See id.*

151. *See id.* at 1869–70.

152. *See Sanchez Valle*, 136 S. Ct. at 1869.

"Spanish colony" to "a constitutional democracy exercising local self-rule."[153] It noted the importance of various island government's milestones including becoming the first territory in American history to elect its own governor in 1948.[154] Finally, the Court further acknowledged:

> The Puerto Rico Constitution created a new political entity, the Commonwealth of Puerto Rico—or, in Spanish, Estado Libre Asociado de Puerto Rico. Like the U.S. Constitution, it divides political power into three branches—the "legislative, judicial and executive." And again resonant of American founding principles, the Puerto Rico Constitution describes that tripartite government as "republican in form" and "subordinate to the sovereignty of the people of Puerto Rico." The Commonwealth's power, the Constitution proclaims, "emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States."[155]

Notwithstanding such recognition of "indicia of sovereignty," the Court moved on to asking the question that led to its holding. What is "the 'ultimate source' of the power" to prosecute in Puerto Rico?[156] Or, put more broadly, from where does the island's government draw its legitimacy?[157] Answering this question involved distinguishing Puerto Rico from the States and Indian tribes.[158] Commenting that while the latter are "'domestic dependent nations,' subject to plenary control by Congress [and . . .] hardly 'sovereign' in one common sense" the ultimate source of their prosecutorial power was "'primeval' or . . . 'pre-existing'" the United States.[159] After discussing this history, the Court found that *new* Puerto Rico, mere paragraphs earlier described as *distinctive* and *exceptional*,[160] was not different than "an earlier incarnation of . . . itself."[161] The island is a mere municipality of the federal government that derives its authority from the U.S. Congress.[162] So, subsequent prosecutions of Jaime Gómez Vázquez, and Luis Sánchez Valle for the same conduct were

153. *Id.* at 1868.
154. *Id.*
155. *Id.* at 1869 (internal citations omitted).
156. *See id.* at 1870–71.
157. *See Sanchez Valle*, 136 S. Ct. at 1871.
158. *See id.* at 1872.
159. *Id.* at 1872.
160. *Id.* at 1874.
161. *Id.* at 1873.
162. *But see* Denniston, *supra* note 129.

barred by the double jeopardy clause of the U.S. Constitution.[163] Thus, *Sanchez Valle* holds, Puerto Rico and the United States are not separate sovereigns because Puerto Rico (and its sister territories by implication) are not sovereign at all.[164]

C. Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC

Mere weeks after the Court decided Mr. Sanchez Valle's case, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) to fill the gap left by Puerto Rico's exclusion from Chapter 9 bankruptcy protections.[165] PROMESA established a "Financial Oversight and Management Board" enacted explicitly "pursuant to article IV, section 3" of the U.S. Constitution.[166] The statute supersedes any territory's organic act or territorial constitution that conflicts with it.[167] Essentially displacing most, if not all, local control of the island's finances.[168] The Board is responsible for approving the island's budget,[169] enforcing the budget by ordering any necessary spending cuts,[170] and even reviewing any local laws, regulations, and executive orders that may impact the budget and fiscal plan.[171] Unsurprisingly, the Board was unpopular from its inception and criticized as anti-democratic[172] but some argue it needs *more* power to be effective.[173]

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163. *Sanchez Valle*, 136 S. Ct. at 1869.

164. *See id.* at 1876. *But see* Ramirez v. P.R. Fire Serv., 715 F.2d 694, 697 (1st Cir. 1983) ("Puerto Rico, despite the lack of formal statehood, enjoys the shelter of the Eleventh Amendment in all respects.").

165. *See* 48 U.S.C.A. § 2101 (2016). Unironically the word "promesa" means promise in the Spanish language. *See Promesa*, COLLINS DICTIONARY, https://www.collinsdictionary.com/us/dictionary/spanish-english/promesa [https://perma.cc/23NW-BH55] (last visited Jan. 27, 2023).

166. § 2121(b)(1)–(2).

167. § 2103 (PROMESA's "supremacy" clause makes it clear that its provisions "prevail over any general or specific provisions of territory law, State law, or regulation that is inconsistent with" its own terms.).

168. *See* § 2142.

169. § 2142.

170. § 2143(d).

171. § 2144.

172. *See* Patricia Mazzei & Frances Robles, *Puerto Ricans in Protests Say They've Had Enough*, N.Y. TIMES (July 18, 2019), https://www.nytimes.com/2019/07/18/us/puerto-rico-rossello-governor-protests.html [https://perma.cc/UWY9-ZN6S] (noting the dual targets of Puerto Rican protestors over the "Ricky Leaks" scandal as the governor and the fiscal control board).

173. *See Puerto Ricans are demanding better. It's about time Congress and San Juan deliver*, WASH. POST: OP. (July 19, 2019, 7:07 PM), https://www.washingtonpost.com/opinions/puerto-ricans-are-demanding-better-its-about-time-congress-and-san-juan-deliver/2019/07/19/c89eca92-a997-11e9-9214-246e594de5d5_story.html [https://perma.cc/QX2E

Shortly after convening and pursuant to its purpose and grant of authority, the Board filed for bankruptcy on behalf of Puerto Rico and several of its public corporations.[174] Aurelius Investment and several other creditors quickly moved to dismiss the petition on grounds the Board's members acted without authority.[175] The creditors argued that board members were unlawfully appointed and any actions they took purporting to act for the Board was without force.[176] The creditors argued appointments to the Board required senate confirmation notwithstanding the PROMESA's appointment scheme.[177] The law's scheme for selecting Board members gave the President "sole discretion" to choose members.[178] The President could choose from a list submitted by congressional leaders,[179] reject the list and request a new list from Congress,[180] or select individuals not named in those lists for membership on the Board.[181] Only if the President chose to appoint a member that was not named in the congressional list, would that member be subject to Senate confirmation.[182] In the trial court, the Board argued that its members were not "[o]fficers of the United States" but rather "territorial officers" and the trial court agreed.[183] It reasoned that the Board was not a federal entity but rather "an instrumentality of the territory of Puerto Rico."[184] Thus, the Appointments Clause did not apply.[185] The First Circuit reversed the trial court, ruling that Board members were officers of the United States but affirmed the denial of the motion to dismiss because the "de facto officer doctrine" foreclosed dismissal of the bankruptcy petition.[186] The Board appealed, and the Supreme Court granted certiorari.[187]

-J5A3] (arguing for "temporary federal control and oversight" of Puerto Rico's finances akin to that the federal government exercised over D.C. in the 1990s).

174. *See* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1655 (2020); *see also* Luis Valentin Ortiz, *Road map for Puerto Rico's exit from bankruptcy filed in U.S. court*, REUTERS (Sept. 27, 2019, 10:46 AM), https://www.reuters.com/article/us-usa-puertorico/road-map-for-puerto-ricos-exit-from-bankruptcy-filed-in-u-s-court-idUSKBN1WC1QC [https://perma.cc/VBT8-NVPU].

175. *See Aurelius*, 140 S. Ct. at 1656.

176. *Id.*

177. *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 318 F. Supp. 3d 537, 541 (D.P.R. 2018).

178. *See* 48 U.S.C. § 2121(e)(2)(A)(vi).

179. § 2121(e)(2)(B)(i)–(v).

180. § 2121(e)(2)(C).

181. § 2121(e)(2)(E).

182. *Id.*

183. *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 318 F. Supp. 3d at 545, 556.

184. *Id.* at 557.

185. *Id.*

186. Aurelius Inv., LLC v. Puerto Rico, 915 F.3d 838, 862 (1st Cir. 2019).

187. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1650 (2020).

In *Aurelius*, the Court was faced with the question of whether Congress could still create "local offices" for Puerto Rico[188] notwithstanding the island's status as "a constitutional democracy exercising local self-rule."[189] The Court held that Congress could.[190] The Court then applied the test to determine whether the Board's members were territorial or federal officials.[191] Applying the test required an examination of the board members' powers and duties.[192] If the Board exercised "primarily local powers and duties," as the Court found it did, then Board members were territorial officers.[193] Whether the statute creating the Board was federal, as with PROMESA, or local was not controlling.[194] The Court's analysis in *Aurelius* followed a similar formalistic track[195] but differed from *Franklin California Tax-Free Trust* and *Sanchez Valle* in that it discussed the Insular Cases, albeit briefly.[196] The Court noted that it would "not consider the request by some of the parties that [it] overrule the much-criticized 'Insular Cases' and their progeny."[197] It was not necessary to do so in order to reach its decision.[198] However, it reiterated its position that, "whatever [the] continued validity" of the Insular Cases, they should not be extended.[199] Nevertheless, as it ruled in *Sanchez Valle*, Congress retained sovereignty over Puerto Rico and, although Congress had previously relinquished its authority to appoint Puerto Rican officials, it could reverse course and had done so.[200]

D. Tuaua v. United States

People born in U.S. territories are U.S. citizens except for American Samoans.[201] They are classified as non-citizen U.S. Nationals.[202]

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188. *Id.* at 1654.
189. Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1868 (2016).
190. *Aurelius*, 140 S. Ct at 1665.
191. *Id.* at 1658.
192. *Id.*
193. *Id.*
194. *Id.* at 1659.
195. *See Aurelius*, 140 S. Ct at 1661
> We thus conclude that while the Appointments Clause *does* restrict the appointment of "Officers of the United States" with duties in or related to the District of Columbia or an Article IV entity, it *does not* restrict the appointment of local officers that Congress vests with primarily local duties under Article IV, § 3, or Article I, § 8, cl. 17.

196. *See id.* at 1665.
197. *Id.*
198. *See id.*
199. *Id.* (citing Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion)).
200. *See Aurelius*, 140 S. Ct at 1665.
201. *See* U.S. Virgin Islands, 66 Stat. 237 (1952).
202. 8 U.S.C. § 1408(1) (defining a class of individuals who "shall be nationals, but not citizens, of the United States at birth.").

The Territory of American Samoa is unique in several ways. Unlike its sister territories, Samoans maintain their islands were not conquered, purchased, or acquired from another colonial power but rather the islands ceded themselves to the United States and acquiesced to American sovereignty.[203] American Samoa maintains the traditional communal ownership of land.[204] Its constitution and bill of rights, while otherwise rooted in American legal and political traditions, preserves this traditional custom.[205] Nevertheless, American Samoans serve in the armed forces at per capita levels higher than their citizen brethren, the vast majority of Samoans live in the mainland, and the territory is a "permanent part of American political life."[206]

In *Tuaua v. United States*, five American Samoans and a Samoan civil rights organization sued for declaratory judgment that the citizenship clause of the Fourteenth Amendment applies to American Samoa[207] and that 8 U.S.C. § 1408(1) is therefore unconstitutional.[208] The individual plaintiffs, all born in American Samoa, were denied various benefits of citizenship such as the ability to work in law enforcement,[209] access to federal work-study programs,[210] the right to vote,[211] adequate access to care for a military service-related disability,[212] and employment with a state agency.[213] Four of the five individual plaintiffs are veterans of the U.S. armed forces.[214] The United States moved to dismiss the complaint for failure to state a claim.[215] The district court, citing the D.C. Circuit's "commitment" to the Insular Cases, granted the motion.[216] The Court of Appeals for the

203. *See* Cession of Tutuila and Aunu'u, U.S.-Tutuila, Apr. 17, 1900; *see also* Cession of Manu'a Islands, U.S.-Manu'a, July 16, 1904. *But see* 31 Stat. 1878 (1900) (proclaiming a treaty between Great Britain, Germany, and the United States partitioning the Samoan Archipelago).

204. *See* Leibowitz, *supra* note 94, at 222–23.

205. *See* CONST. OF AM. SAMOA art. I, § 3 ("It shall be the policy of the Government of American Samoa to protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language, contrary to their best interests.").

206. *See* Jimmy Carter, *Congressional Delegate for the Territory of American Samoa Statement on Signing H.R. 13702 Into Law*, AM. PRESIDENCY PROJECT (Oct. 31, 1978), https://www.presidency.ucsb.edu/documents/congressional-delegate-for-the-territory-american-samoa-statement-signing-hr-13702-into [https://perma.cc/Y8YU-LGNN]; *see also* NCSL, *supra* note 77; Roopnarine, *supra* note 84, at 153.

207. Complaint at 1, Leneuoti Fiafia Tuaua v. United States, 951 F. Supp. 2d 88 (D.D.C. 2012) (No. 12-1143), 2012 WL 2848713.

208. *Id.* at 2.

209. *Id.* at 4–5.

210. *Id.* at 4.

211. *Id.* at 3.

212. Complaint at 4, *Tuaua*, 951 F. Supp. 2d 88 (No. 12-1143).

213. *Id.*

214. *Id.* at 3, 5.

215. Tuaua v. United States, 951 F. Supp. 2d 88, 90 (D.D.C. 2013).

216. *Id.* at 97.

D.C. Circuit affirmed the lower court's decision and the Supreme Court denied certiorari.[217]

In *Tuaua*, a unanimous panel of the D.C. Circuit Court of Appeals departed from the trend of limiting the Insular Cases and held that people born American Samoa are not entitled to birthright citizenship under the Citizenship Clause of the Fourteenth Amendment.[218] Unlike the formalist analyses in *Franklin California Tax-Free Trust*, *Sanchez Valle,* and *Aurelius*, the D.C. Circuit's analysis is tortured, convoluted, and appears to be results-oriented.[219] An appellate court's decision is results-oriented when the court "depart[s] from the expected norm of judicial decisionmaking [sic]."[220] "An appellate court departs from the norm when, to reach a result, it ignores its limited scope of review . . . or when it disregards or unfairly characterizes precedent."[221] The hallmarks of results-oriented decisionmaking are evident in the D.C. Circuit *Tuaua* decision.[222]

The court rejected the argument that the "text and structure" of the Fourteenth Amendment answered the question before it because it found the phrase "in the United States" to be ambiguous.[223] In light of this perceived ambiguity, the Court then examined the historical record and legal traditions surrounding citizenship.[224] It found unpersuasive references to the legislative history of the Fourteenth Amendment and the contention that doctrine of *jus soli* applied to the territories.[225] The court likewise dismissed the "bevy of cases" the plaintiffs cited for the proposition that citizenship has been uniformly held to be a fundamental right.[226] Perplexingly, after acknowledging that the Supreme Court has held that the Fourteenth Amendment "affirms the ancient and fundamental rule of citizenship by birth *within the territory*, in the allegiance and under the protection of the country,"[227] the court declared that the Fourteenth Amendment was *not* a "constitutional codification of the common

217. Tuaua v. United States, 788 F.3d 300, 302 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016).

218. *See id.* at 302.

219. *See id.* at 311–12.

220. John E. Simonett, *The Use of the Term "Result-Oriented" to Characterize Appellate Decisions*, 10 WM. MITCHELL L. REV. 187, 200 (1984).

221. *Id.*

222. *See Tuaua*, 788 F.3d at 306.

223. *Id.* at 303.

224. *Id.* at 304.

225. *Id. Jus Soli*, or the right of the soil, is the common law principle that a person's citizenship is determined by the place of birth. *See Jus Soli*, BLACK'S LAW DICTIONARY (11th ed. 2019).

226. *Tuaua*, 788 F.3d at 307–08 (citing Afroyim v. Rusk, 387 U.S. 253 (1967); Schneider v. Rusk, 377 U.S. 163, 165 (1964); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159 (1963); Trop v. Dulles, 356 U.S. 86, 103 (1958) (plurality opinion)).

227. United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898) (emphasis added).

law rule as applied to outlying territories."[228] "Territory" as the Supreme Court used the term, did not mean "'territory' in its broader sense" according to the *Tuaua* court.[229] Furthermore, "citizenship d[id] not simply follow the flag" because citizenship traditionally and historically required allegiance to the sovereign.[230] American Samoans' statutory "permanent allegiance to the United States" was not sufficient.[231]

The court then applied the "politically incorrect" Insular Cases and their "pragmatic" analysis to the dispute before it.[232] When it comes to the territories, the court explained, courts eschew formalism in favor of "objective factors and practical concerns" and must inquire not only whether the right claimed is "fundamental" but also whether application of a particular constitutional provision would be "impractical or anomalous" to the territory.[233] Furthermore, the term "'fundamental [right]' has a distinct and narrow meaning" in the territories that limits such rights to those "which are the basis of *all* free government."[234] Those rights are distinguished from those of an "artificial, procedural, or remedial" nature.[235] The court concluded that, because other free governments do not follow the *jus soli* tradition, it could not be endemic to "*all* free government."[236] Thus, despite the weight of authority preponderating otherwise, the court held that American citizenship was not a "fundamental right," at least not in the "United States' unincorporated territories."[237] Furthermore, although the court found that it had an incomplete record, it also held that the "forcible imposition of citizenship" would be impractical and anomalous when applied to American Samoa.[238] The court heavily relied upon opposition to birthright citizenship "by the United States [and] by the democratically elected government of the American Samoan people."[239] This finding is in conflict with the D.C. Circuit's own past application of the impractical or anomalous

228. *Tuaua*, 788 F.3d at 304 (discussing *Wong Kim Ark*, 169 U.S. 649).
229. *Tuaua*, 788 F.3d at 305.
230. *Id.* at 305.
231. *Id.* at 305–06 (citing 8 U.S.C. § 1101(a)(22)).
232. *Tuaua*, 788 F.3d at 307.
233. *Id.* (citations omitted).
234. *Id.* at 308.
235. *Id.*
236. *Id.* at 308–09.
237. *Tuaua*, 788 F.3d at 307–08. By implication, citizenship is an "artificial, procedural, or remedial" right.
238. *Id.* at 311. *But see* King v. Morton, 520 F.2d 1140, 1148 (D.C. Cir. 1975) (the same circuit remanded a case for "more solid evidence of actual and existing conditions" in American Samoa before it could determine whether the right to a jury trial would be impractical or anomalous).
239. *Tuaua*, 788 F.3d at 301–02, 310.

test.[240] It also ignores one of the recognized purposes of the Fourteenth Amendment, to "put [the] question of citizenship . . . beyond the legislative power."[241] Because of the D.C. Circuit's reputation as "the little Supreme Court,"[242] its jurisdiction over most federal agencies, and the Supreme Court's denial of certiorari, *Tuaua's* expansion of the Insular Cases carries substantial weight.[243] Unless and until the Insular Cases are overruled the question of territorial citizenship will be subject to the whims of Congress. While islands of the eastern Samoan archipelago will remain *American*, American Samoans are not entitled to American citizenship until Congress decides otherwise. They apparently remain "absolutely unfit to receive it[.]"[244]

E. United States v. Vaello Madero

The damage that the Insular Cases inflict upon American notions of equal treatment and protection of the laws is pervasive.[245] Disparate treatment of Americans in the territories continues in various fronts.[246] For instance, Congress treats each territory in different ways when it comes to federal safety-net programs.[247] Such classifications, ostensibly based on locality, are only required to satisfy rational basis review.[248]

In *United States v. Vaello Madero*, the Supreme Court was asked to decide whether Puerto Rico's exclusion from the Supplemental Security Income program violated the equal protection guarantees of the Fifth Amendment.[249] The First Circuit Court of Appeals unanimously ruled that the program discriminated against people in the island without an adequate rational basis.[250] The facts of the case

240. *See King*, 520 F.2d at 1144 ("[The test] focuses on the applicability of . . . [U.S. constitutional] principles and not on Samoan laws and customs themselves.").

241. Afroyim v. Rusk, 387 U.S. 253, 263 (1967).

242. Adam Liptak & Sheryl Gay Stolberg, *Shadow of Merrick Garland Hangs Over the Next Supreme Court Fight*, N.Y. TIMES (June 11, 2021), https://www.nytimes.com/2020/09/19/us/ginsburg-vacancy-garland.html [https://perma.cc/UQ9Q-9FVC]; Andrew Kragie, *Trump's New Kavanaugh for the U.S. Court of Appeals*, ATLANTIC (Nov. 25, 2018), https://www.theatlantic.com/politics/archive/2018/11/trump-nominates-rao-replace-kavanaugh-dc-court/576535 [https://perma.cc/MH8P-HV2C].

243. *See, e.g.*, Fitisemanu v. United States, 1 F.4th 862, 868–69, 875, 878–79 (10th Cir. 2021), *cert. denied* (Oct. 17, 2022).

244. Downes v. Bidwell, 182 U.S. 244, 306 (1901) (White, J., concurring).

245. *See supra* Part III.

246. *See infra* note 247 and accompanying text.

247. Editorial Staff, *A Reckoning for "Rational" Discrimination: Rethinking Federal Welfare Benefits in United States–Occupied Islands*, 43 U. HAW. L. REV. 265, 273–74 (2020).

248. *See* Harris v. Rosario, 446 U.S. 651, 651–52 (1980) (per curiam); Califano v. Torres, 435 U.S. 1, 5 (1978) (per curiam).

249. Petition for Writ of Certiorari at 1, United States v. Vaello Madero, 142 S. Ct. 1539 (No. 20-303).

250. *Vaello-Madero*, 956 F.3d at 32.

are illustrative of the injustices that the Insular Cases perpetuate. Mr. Vaello Madero was born in Puerto Rico and subsequently moved to New York. While a mainland resident, he developed serious health conditions and obtained benefits under the SSI program.[251] In 2013, he moved to Puerto Rico to take care of his ailing wife who had previously relocated there.[252] He continued receiving SSI benefits until 2016 when he disclosed his change of residence to the Social Security Administration and the agency terminated his benefits retroactively.[253] The agency then sued to recover $28,081 it had overpaid Mr. Vaello Madero from 2014 until 2016.[254] He raised the "affirmative defense that the exclusion of Puerto Rico residents from the SSI program violated the equal protection guarantees of the Fifth Amendment."[255] Both parties moved for summary judgment and the district court entered judgment in Mr. Vaello Madero's favor.[256] The United States appealed.[257]

The First Circuit affirmed the district court's decision by distinguishing first the bases, then the rationales of *Califano* and *Harris* from the present situation in the island.[258] *Califano* and *Harris* were *per curiam* decisions the Supreme Court issued in 1978 and 1980 that established rational basis as the level of scrutiny for locality-based classifications.[259] Because summary decisions have less precedential value than an opinion on the merits, the First Circuit construed them narrowly.[260] The court noted that both cases were decided on different grounds than the dispute before it.[261] *Califano* involved the "right to travel" and *Harris*, while implicating equal protection, dealt with block grants instead of direct aid.[262] The court then moved on "dubious nature of th[e] once-accepted rationale" that the "tax status" of the island rationally supported its disparate treatment in the SSI program.[263] Instead, it found that "residents of Puerto Rico not only make substantial contributions to the federal

251. *Id.* at 15–16.
252. *Id.* at 15.
253. *Id.* at 15–16.
254. *Id.* at 16.
255. *Vaello-Madero*, 956 F.3d at 16.
256. *Id.* at 16–17.
257. *Id.* at 14–15.
258. *Id.* at 21–23.
259. Harris v. Rosario, 446 U.S. 651, 651–52 (1980) (per curiam); Califano v. Torres, 435 U.S. 1, 5 (1978) (per curiam).
260. Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180–81 (1979) (noting that summary decisions "have considerably less precedential value than an opinion on the merits.").
261. *Vaello-Madero*, 956 F.3d at 20–23.
262. *Id.* at 19–21.
263. *Id.* at 23.

treasury, but in fact have consistently made them in higher amounts than taxpayers in at least six states, as well as the territory of the Northern Mariana Islands."[264] Finally, the court dismissed the contention that the Fifth Amendment did not apply in full force to the case.[265] Having "considered even conceivable theoretical reasons for . . . establishing a rational basis for the exclusion of Puerto Rico residents from SSI coverage" and finding none, the court declared the classification invalid.[266] The United States appealed to the Supreme Court and the Supreme Court granted certiorari.[267]

The Supreme Court chose the path of least resistance and reversed the First Circuit, preserving the *status quo* in a relatively short opinion.[268] Although the Court did not explicitly rely on the Insular Cases, their tacit reliance on the Insular Cases is obvious and insidious.[269] References to "various historical and policy reasons, including local autonomy,"[270] and to "historical practice, and . . . precedents" proved an ineffective guise.[271] Nevertheless, the Court discussed *Califano* and *Harris*[272] and declared that those "precedents dictate[d] the result here."[273] Even so, the Court brushed aside Puerto Ricans' significant contributions to the Federal Treasury, instead balancing a metaphorical tax-benefit ledger to justify Congress's decision to exclude Puerto Ricans living in the island from the SSI program.[274] The Court declared that "[o]n the tax side . . . residents of Puerto Rico are typically exempt" from a number of taxes while "[o]n the benefit side," they are eligible for several federal benefits.[275] Therefore, Congress had a rational basis to exclude citizens living in Puerto Rico from the SSI program.[276] Thus, the Court firmly established rational basis as the standard of review for discrimination on the basis of locality.[277]

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264. *Id.* at 24.
265. *Id.* at 31 ("Appellant points us to no authority suggesting that the Fifth Amendment's equal protection guarantees should likewise stand aside in this case.").
266. *Vaello-Madero*, 956 F.3d at 32.
267. United States v. Vaello Madero, 142 S. Ct. 1539, 1560 (2022).
268. *See id.* at 1544.
269. *See infra* notes 270–71 and accompanying text.
270. *Vaello Madero*, 142 S. Ct. at 1541.
271. *Id.*
272. *See* Harris v. Rosario, 446 U.S. 651, 651–52 (1980) (per curiam); Califano v. Torres, 435 U.S. 1, 5 (1978) (per curiam) (establishing rational basis as the level of scrutiny for locality-based classifications).
273. *Vaello Madero*, 142 S. Ct. at 1543.
274. *Id.* at 1541–43.
275. *Id.* at 1541–42.
276. *Id.* at 1543.
277. *See id.*

While the majority opinion was brief and unexciting, Justices Gorsuch and Sotomayor wrote extraordinary separate opinions that should have an impact on future litigation.[278] Justice Gorsuch's concurrence is especially remarkable from its first paragraph to its last, declaring first that:

> 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.[279]

Justice Gorsuch then clearly and succinctly traced the development of the Insular Cases' territorial incorporation doctrine from its genesis in legal academia, to Justice White's concurrence in *Downes*, and its eventual adoption by the Court.[280] He then took direct aim at the underlying racist rationales that fundamentally taint the Insular Cases; describing their origins in "ugly racial stereotypes[] and the theories of social Darwinists."[281] While acknowledging the Court's later "discomfort" with the Insular Cases and its attempts craft a "workaround," he declared those attempts "ineffectual [and] inappropriate."[282] He likewise dismissed recent attempts to create "a revisionist account of the Insular Cases" as "beneficial . . . [to] safeguarding traditional cultures," describing those attempts as dressing the worst elements of the Insular Cases "in new garb."[283] Finally, Justice Gorsuch invited litigants to stop "work[ing] from the shared premise" of the Insular Cases and attack "the[ir] misguided framework" directly.[284] Ultimately declaring that: "[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. We should follow Justice Harlan and settle this question right. Our fellow Americans in Puerto Rico deserve no less."[285]

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278. Justice Thomas also wrote a remarkable separate opinion, but it mainly focused on whether the Fifth Amendment included an "equal protection component." It is possible, though, that his "tentative" conclusions on the Fourteenth Amendment's citizenship clause could become relevant in the territorial context. *Vaello Madero*, 142 S. Ct. at 1544, 1547 (Thomas, J., concurring).

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

280. *Id.* at 1552–54.

281. *Id.* at 1554.

282. *Id.* at 1555–56.

283. *Id.* at 1557 n.4.

284. *Vaello Madero*, 142 S. Ct. at 1556.

285. *Id.* at 1557.

Justice Sotomayor's dissent was similarly clear and direct.[286] She agreed with the First Circuit that the government's decision lacked a rational basis while not conceding that this test is the appropriate standard of review.[287] Characterizing the majority's opinion as "irrational and antithetical" to the "equal protection" guarantees of the Constitution, Justice Sotomayor would have affirmed the lower court's decision.[288] Like the First Circuit, the dissent distinguished the treatment of individual citizens, like Mr. Vaello Madero, from the treatment of political entities, like the territory of Puerto Rico.[289] Thus, because *Harris* involved block grant to the territory instead of "direct-to-individual" benefits, the dissent argued *Harris* should not be applicable.[290]

Addressing the majority's tax-benefit ledger analysis, the dissent emphasized "that 'residents of Puerto Rico make some contributions to the federal treasury.'"[291] However, the dissent argued those distinctions should be immaterial because "SSI recipients pay few if any taxes at all," that condition did not prevent Congress's extension of SSI benefits to another territory, and there is no other "federal program . . . operat[ing] in such a uniform, nationalized, and direct manner."[292] The dissent noted that "residents of Vermont, Wyoming, South Dakota, North Dakota, Montana, and Alaska" contribute less to the federal treasury than residents of Puerto Rico.[293] Thus, despite the majority's dictum disclaimer that its opinion does not "imply that Congress may exclude residents of individual States from benefits programs," the Court's reasoning supports such a result.[294]

Ultimately, the Insular Cases perpetuate "punishing disparities" for Americans living in Puerto Rico.[295] The Insular Cases leave the "[e]qual treatment of citizens . . . to the vagaries of [a] political process" where Puerto Ricans have no power.[296] Congress's constitutional authority to "'make all needful Rules and Regulations'" for the territories, should not allow the United States to treat its citizens unequally.[297] Unfortunately, the majority opinion in *Vaello Madero* does nothing to remedy the situation.

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286. *See id.* (Sotomayor, J., dissenting).
287. *Id.* at 1557, 1559–60.
288. *Id.* at 1557, 1560 n.4.
289. *See Vaello Madero*, 142 S. Ct. at 1560.
290. *Id.*
291. *See id.* (internal quotations omitted).
292. *Id.* at 1561.
293. *Id.* at 1562.
294. *See Vaello Madero*, 142 S. Ct. at 1539 n.1.
295. *Id.* at 1562 (Sotomayor, J., dissenting).
296. *Id.*
297. *Id.* at 1540 (quoting the Territory Clause of the United States Constitution).

CONCLUSION

The Insular Cases and their progeny continue to be a stain on American constitutional jurisprudence. Their *domestic in an international sense but foreign in a domestic sense* rationale is materially indistinguishable from the *separate but equal* jurisprudence that originated with the same court.[298] Both decisions generated similar results. People in the territories have poverty rates substantially higher than that of even the most impoverished states.[299] They are effectively disenfranchised in the national polity.[300] They are, in fact, separate and unequal. The Supreme Court has written eloquently at times about the *temporary* or *limited* scope of the Insular Cases but has failed to overrule them at every turn.[301] In another terrible about-face, it is in the process of creating New Insular Cases that solidify a colonialism that is anathema to the country's founding principles. It should reverse course.

298. *Compare* Downes v. Bidwell, 182 U.S. 244, 341–42 (1901) (White, J., concurring), *with* Plessy v. Ferguson, 163 U.S. 537, 543–44 (1906) (overruled by *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954)).

299. U.S. CENSUS BUREAU, DASHBOARD—UNITED STATES: PERSONS IN POVERTY, PERCENT (2020); Brief for the District of Columbia, et al. as Amici Curiae Supporting Respondents at 27, United States v. Vaello Madero, 142 S. Ct. 1539, 1560 (2022) (No. 20-303) (collecting statistics).

300. *See* Plaskett, *supra* note 14 ("My constituents in the Virgin Islands—U.S. citizens—remain unable to vote for president, lack any voice in the Senate, and have only a nonvoting delegate in the House.").

301. *Supra* notes 86, 218–22 and accompanying text.