THE SCOURGE OF THE INSULAR CASES: ENDING CONSTITUTIONAL APARTHEID IN PUERTO RICO*

Artículo

Francisca D. Fajana** and Lía Fiol-Matta***

Introduction

A century ago, in the *Insular Cases*,[1] the United States Supreme Court "held that the federal government could rule Puerto Rico . . . largely without regard to the Constitution."[2] As a result, Puerto Rico occupies a permanent state of constitutional apartheid. U.S. citizens residing in Puerto Rico are denied the Sixth Amendment right to a jury trial. They are denied the right to vote in presidential elections. They are excluded from federal social welfare programs and forced to receive lesser benefits, as was the case in *Vaello Madero* in which they were denied Supplemental Security Income—a federal benefits program for needy aged, blind, and disabled individuals.

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* We pay tribute to the late Judge Juan R. Torruella, an ardent advocate for equal treatment of Puerto Ricans, whose article—*The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l. L. 283 (2007)—inspired the title of this article. We thank our legal intern, Mariana Lopez, for her research assistance.

** Francisca D. Fajana, is Director of Racial Justice Project at LatinoJustice PRLDEF, where she leads the organization's racial justice work and also litigates education, employment and other civil rights cases.

*** Lía Fiol-Matta is Senior Counsel at LatinoJustice PRLDEF, where she co-leads the Puerto Rico Pillar and also litigates economic justice cases, particularly related to workers' rights.

1 For a collection of cases known as the Insular Cases, see fn 42, infra.

2 U.S. v. Vaello Madero, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring).

American citizens residing in Puerto Rico ("Puerto Rican citizens") are also excluded from the Supplemental Nutrition Assistance Program (SNAP, formerly known as Food Stamps) and forced to receive lesser benefits under a different program that provides food assistance to needy households. That was not always the case. They, like residents of the 50 states, the District of Columbia, Guam, and the U.S. Virgin Islands, used to receive full benefits under the Food Stamps program until the Reagan Administration decided to exclude them.[3] Puerto Rico was the only region (state or territory) singled out for unequal treatment. President Reagan's well-known hostility to recipients of social welfare programs —a hostility that is racially tinged— tainted the administration's exclusion of Puerto Rico. Should a case challenging unequal treatment under SNAP reach the Supreme Court, it should decide that Puerto Rican citizens were denied equal protection on the basis of race, ethnicity, or national origin and overrule the *Insular Cases*.

The *Insular Cases* have no textual support in the Constitution. They departed markedly from settled law at the time they were decided. They "rest instead on racial stereotypes."[4] The Supreme Court missed an opportunity in *Vaello Madero* to reckon with its past. It must finally lay the *Insular Cases* to an inglorious rest. To do so, the Court must repudiate the notion that Puerto Rico's geographical location —not its inhabitants— is determinative of the Constitution's application. This constitutional dogma stems from the premise that Puerto Rico is appurtenant to but not a part of the U.S.— an incongruity derived from the infamous *Insular Cases* and which the Court erroneously applied in *Vaello Madero*. The Court must stop the unequal provision of federal benefits to citizens who live in Puerto Rico and the denial of equal protection under the Constitution.

We begin with the historical context that created the United States' dominion over Puerto Rico. We then describe the fictional doctrine established in the *Insular Cases* that consigned constitutional apartheid to Puerto Rican citizens. We discuss *Vaello Madero*, decided a century later, that exemplifies the enduring legacy of the *Insular Cases*. Next, we turn to the Supplemental Nutrition Assistance Program—a federal benefits program that also treats Puerto Rican citizens unequally. We argue that racial stereotypes tainted Puerto Rico's exclusion from the program, that, in an appropriate case, Puerto Rican citizens' exclusion merits heightened judicial solicitude, and in applying such scrutiny, the fictional doctrine created in the *Insular Cases* would easily collapse.[5]

I. Historical Context for the U.S.'s dominion over Puerto Rico

For nearly five centuries, Taíno and Carib nations lived on the island of Puerto Rico, which they called Borikén.[6] They developed well organized, self-sufficient communities in which their culture flourished. In 1493, Christopher Columbus claimed the island for

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3 For pertinent historical context, see fn 101 and accompanying text.

4 *Vaello Madero*, 142 S. Ct. at 1552.

5 Although overruling the *Insular Cases* will inure to the benefit of all U.S. territories, we focus exclusively on Puerto Rico because it is the largest of the territories and is the locus of the most consequential of the *Insular Cases*.

6 Pedro A. Malavet, *The Inconvenience of a Constitution [that] follows the U.S. Flag but Doesn't Quite Catch Up to It; From Downes v. Bidwell to Boumediene v. Bush*, 80 Miss. L.J. 181, 199 (2010); Robert M. Poole, *What Became of the Taíno*, Smithsonian Mag. (2011).

Spain.[7] Under Spanish dominance, Puerto Rico acquired its current name and an agricultural system based on sugar cane, coffee, tobacco and other products for which enslaved Africans served as the backbone of the enterprise.[8] By the 1834 census, about 47% of Puerto Rico's population was non-white.[9] Following pro-independence uprisings and anti-slavery rebellions, the Spanish crown acquiesced to a republican government, which, in 1873, decreed the abolition of slavery. However, within five years of self-governance, the Spanish Constitutional Monarchy was reimposed on the island. Puerto Rico's self-governance would be short-lived.[10]

On July 25, 1898, the United States invaded Puerto Rico.[11] The U.S.' invasion was under the guise of lending support to Cuba —another Spanish colony— in its struggle for independence.[12] But in actuality, the U.S. desired to display its naval might and to acquire new markets for its excess manufactured goods. The Spanish-American War would last only four months. In the Treaty of Paris signed shortly thereafter, Spain ceded Puerto Rico, Guam and the Philippines to the U.S. and relinquished its sovereignty over Cuba.[13] The U.S. flag was raised in most public buildings in Puerto Rico and the U.S. gained control of nearly 120,000 acres of land formerly owned by the Spanish crown. The U.S.' easy victory in the Spanish-American War captivated the electorate in 1900. Both political parties hotly contested the status of the newly acquired territories.[14] One party favored the U.S.' empire building project claiming that Congress should decide the fate of the inhabitants of the acquired territories, while the other was professedly against imperialism. The party favoring expansionism easily won the election.[15] Legal scholars also debated the status of the acquired territories. There were three prevailing views: a) unfettered congressional power; b) unfettered authority constrained by fundamental constitutional guarantees; and c) all constitutional guarantees granted to the newly acquired territories.[16] The Supreme Court would choose a side in the debate.

A. DeLima, Downes, and Puerto Rico's Domestic Yet Foreign Status

Three years after acquisition, the Supreme Court would weigh in to decide the fate of the inhabitants of Puerto Rico —a territory of mostly Spanish speaking people— about

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7 *Puerto Rico*, Yale Univ. Genocide Stud. Program, https://gsp.yale.edu/case-studies/colonial-genocides-project/puerto-rico (last visited on February 21, 2023).

8 Paul Finkelman & Seymour Drescher, *The Eternal Problem of Slavery in International Law: Killing of the Vampire of Human Culture*, 2017 Mich. St. L. Rev. 755, 792 (2017) (noting slavery continued to flourish in Puerto Rico after abolition in other territories).

9 *Puerto Rico: Afro-Puerto Ricans*, Minority Rights, https://minorityrights.org/minorities/afro-puerto-ricans/ (last visited on February 21, 2023).

10 *See* e.g. Marisabel Bras, Ph.D., The Changing of the Guard: Puerto Rico in 1989 (2011); Carlito Rovira, The Birth of Puerto's fight for independence (September 1, 2005).

11 *See* Bras, *supra* note 10.

12 Malavet, *supra* note 6, at 200–03, 206–07.

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

14 Malavet, *supra* note 6, at 210.

15 *Id*. at 211–13.

16 *Id*. at 227–29.

40% of whom were non-white.[17] In *DeLima v. Bidwell*,[18] as well as companion cases decided on the same day, collectively designated the "Insular Tariff Cases," the Supreme Court, keeping with the U.S.'s imperialistic ambitions, flagrant economic exploitation, and prevailing racist attitudes, laid the cornerstone for constitutionalizing American apartheid on the island of Puerto Rico.[19] The issue in *DeLima* was whether plaintiff could recover tariffs paid for the importation of sugar from Puerto Rico to New York. Relying, in part, on the treatment of California, Alaska, Florida, and Texas—territories previously acquired by either conquest or purchase—the Court held that Puerto Rico "was not a foreign country within the meaning of the tariff laws but a territory of the United States."[20]

Extending the Court's logic, since Puerto Rico is a territory of the U.S. —i.e., no longer owned by a foreign country— one would expect that it would be subject to the laws of the U.S. Not so. On the same day, the Supreme Court decided *DeLima*, it expediently invented a legal fiction in *Downes v. Bidwell*.[21] The question raised in *Downes* was whether the Foraker Act of 1900, which imposed duties on trade between Puerto Rico and the U.S. to raise revenue for the new territorial government, violated the Uniformity Clause of the Constitution, Art. I, Section 8, which declares that "all duties, imposts and excises shall be uniform throughout the United States."[22] Justice Brown, writing for the majority, declared it did not. While Puerto Rico is "a territory appurtenant and belonging to the United States," the Court stated, it was "not a part of the United States . . . ."[23] Noting that "the liberality of Congress in legislating the Constitution . . . [in previously acquired] contiguous territories has undoubtedly fostered the impression that [the Constitution] went there by its own force," the Court nonetheless declared that "nothing in the Constitution itself and little in the interpretation put upon it . . . " confirmed that the Constitution applied by its own force in newly acquired territories.[24] In other words, although the U.S. flag was hoisted atop public buildings in Puerto Rico, the Constitution did not follow the flag.

The Court reasoned that the treaties through which previous territories, such as Louisiana and Florida, were obtained stipulated that "the inhabitants shall be *incorporated* into the Union of the United States and admitted as soon as possible to . . . the enjoyment of all the rights . . . of citizens of the United States."[25] In contrast, the Treaty of Paris, by which Puerto Rico was acquired, required "that the civil rights and political *status* of the native inhabitants . . . shall be determined by Congress."[26] Since the granting treaty expressly required Congressional action, until such time as Congress deemed it necessary to

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17 *See* Mara Loveman, The U.S. Census and the Contested Rules of Racial Classification in Early Twentieth Century Puerto Rico, Caribbean Studies, Vol. 35, No. 2, 79, 82 (July - December 2007).

18 DeLima v. Bidwell, 182 U.S. 1 (1901).

19 *Id*. at 2.

20 *Id*. at 200.

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

22 U.S. Const. art. I, § 8.

23 *Downes*, 182 U.S. at 287.

24 *Id.* at 379 (we use the Court as shorthand for the opinions of Justices Brown and White which garnered majority support).

25 *Id*. at 280 (emphasis added).

26 *Id.*

act, the people of Puerto Rico were to remain outside of the United States. Tacitly acceding to the U.S.'s imperialistic impulses and adopting the second of the prevailing views among legal scholars set forth above, the Court cautioned against taking a false step that could impede "the development of . . . the American empire."[27]

The Louisiana Purchase was the first time the U.S. acquired territory following ratification of the Constitution,[28] which at Article VI, Section 3, Clause 2, gives Congress the power to "make all needful Rules and Regulations respecting Territory" belonging to the U.S.[29] Under the 1803 agreement through which France sold Louisiana to the U.S., its inhabitants were required to be incorporated into the U.S.[30] Next was Florida in 1819, which Spain ceded, and which like Louisiana, also required treatment of its residents on equal footing with U.S. citizens. Then came the Treaty of Guadalupe Hidalgo (1848) by which Mexico ceded nearly 55% of its land area to the U.S., including the states of Texas, California, Nevada, Utah, and New Mexico.[31] Although the Treaty did not expressly call for incorporation, civil and political rights were begrudgingly accorded to Mexican nationals living in the acquired territories.[32] The Alaska purchase from Russia in 1867 similarly did not explicitly require incorporation, but rights of citizenship were, nonetheless, eventually extended.[33] Hawaii's annexation in 1898, just before Puerto Rico's acquisition, also did not expressly call for incorporation yet rights were accorded before it became a state.[34] Prior to *Downes*, it was settled law that the Constitution followed the flag and applied in territories acquired by the U.S.[35] Except when it didn't.[36]

The dissenting Justices in *Downes* justifiably took umbrage with the fictional incorporation theory. Chief Justice Fuller pointed out that the U.S. "does not derive its powers from international law."[37] Rather, the "national power . . . [comes] from the Constitution of the United States" —the supreme law of the land which no treaty can annul.[38] Although the Treaty of Paris, which the U.S. likely intentionally negotiated without explicit incorporation language, is the law of the land, it cannot be interpreted to trump or run afoul of the Constitution. C.J. Fuller also noted that all officials of a duly constituted civil government imposed by Congress in Puerto Rico, pursuant to the Foraker Act, were "required to . . .

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27 *Id*. at 286; For a discussion of the indefensible rationale of the majority's holding in *Downes* and its pro-empire outcome, *see, e.g*., Pedro A. Malavet, *Inconvenience of a Constitution*, *supra* note 5, at 226.

28 American Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 525 (1828).

29 U.S. Const. art. VI, § 3, cl. 2.

30 Gerardo J. Cruz, *The Insular Cases and the Broken Promise of Equal Citizenship: A Critique of U.S. Policy Toward Puerto Rico*, 57 Rev. D. P. 27 (2017); Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 Case W. Res. L. Rev. 147, 151–152 (2006).

31 *See* De Lima v. Bidwell, 182 U.S. 1, 187-191 (1901); Tauber, The Empire Forgotten, n. 25, 151-54.

32 Tauber, *supra* note 31, at 152-53.

33 *Id.* at 153, n.39.

34 *Id.* at 164.

35 Thompson v. Utah, 170 U.S. 343, 346–47 (1898).

36 Nathan Muchnick, *The Insular Citizens: American's Lost Electorate v. Stare Decisis*, 38 Cardozo L. Rev. 797, 800 (2016) ("The Insular Cases are widely [criticized] as having contradicted precedent of their time and as having been motivated by politics and racial biases").

37 Downes v. Bidwell, 182 U.S. 244, 369 (1901).

38 *Id.*

'take an oath to support the Constitution of the United States' . . . ."[39] It defied logic to contend that the inhabitants of Puerto Rico could swear allegiance to the Constitution yet be outside the protections of the same Constitution. Justice Harlan, also dissenting, summed it up presciently observing that "[t]he idea that the U.S. may acquire territories . . . and hold them as mere colonies or provinces, — the people inhabiting them to enjoy only such rights as Congress chooses to accord them— is wholly inconsistent with the spirit and genius as well as with the words of the Constitution."[40]

Downes's holding was foreshadowed by a decision handed down five years early in the infamous *Plessy v. Ferguson*.[41] Indeed, Justice Brown spoke for the majority in both *Downes* and *Plessy*. In *Plessy*, the Court determined that "distinctions based upon color" were not intended to be abolished by the Fourteenth Amendment's guarantee of equal protection nor was the amendment meant to enforce social equality or commingling of the races.[42] The Court chastened the plaintiff, who challenged a Louisiana law requiring segregated passenger cars on railroads, for assuming that the "enforced separation of the two races stamps the colored race with a badge of inferiority."[43] The Constitution, the Court said, "could not put [the black an

d white races] on the same plane" if one race is socially inferior to the other.[44] Is it any wonder then that the same Court would define the people of Puerto Rico as an "alien race?"[45] Is it any wonder that the same Court would decide in *Downes* that the U.S. flag may fly in Puerto Rico, but its residents were not entitled to social equality under the Constitution?

Taken in tandem, *DeLima* and *Downes* establish that Puerto Rico would be a part of the U.S. such that goods could freely be extracted from it and imported to the U.S., but not a part of the U.S. to the extent that, in return for extracting its resources, it could benefit from the largesse of the U.S. This continues to be the unadorned reality. As Justice Gorsuch aptly noted in *Vaello Madero*, the *Downes* decision "rested on a view about the Nation's 'right' to *acquire and exploit . . .* " Puerto Rico and its people.[46] More troublingly, *Downes*'s incorporation theory, which the Court embraced fully in a 1922 case that marks its centennial anniversary in 2022, foisted constitutional apartheid on Puerto Rican citizens—especially in their exclusion from the Supplemental Nutrition Assistance Program—a federal benefits program afforded to U.S. citizens on the mainland but denied needy Puerto Rican citizens, which we discuss in section III(B).

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39 *Id.* at 349.
40 *Id.* at 380.
41 Plessy v. Ferguson, 163 U.S. 537 (1896).
42 *Id.* at 544.
43 *Id*. at 550–51.
44 *Id.* at 552.
45 *Downes*, 182 U.S. at 287.
46 U.S. v. Vaello Madero, 142 S. Ct. 1553 (2022) (Gorsuch, J., concurring) (emphasis added).
47 See Instrument of Cession Signed on April 17, 1900, by the Representatives of the People of Tutuila, *in* 1 Papers Relating to the Foreign Relations of the United States, 1929, at 1010 (Joseph F. Fuller & Tyler Dennett, eds., 1929), https://history.state.gov/historicaldocuments/frus1929v01/d853 [https://perma.cc/BSN3-HV5G].

II. *Balzac v. Porto Rico* and the Incorporation Doctrine

As indicated in section I, after the Spanish American War, the Supreme Court grappled with the scope and applicability of the Constitution to the newly acquired territories of Puerto Rico, the Philippines and Guam, as well as American Samoa, which became a U.S. territory in 1900 via a deed of cession.[47] The U.S. would later purchase the Virgin Islands from Denmark in 1917.[48]

In a series of cases known as the *Insular Cases*, which span 1901 to 1922, the Supreme Court settled the fate of the territories.[49] In those cases, the Supreme Court created out of whole cloth the *territorial incorporation doctrine* when examining disputes regarding territorial criminal procedure and revenue collection.[50] This doctrine, which has no constitutional foundation, divided United States territories into two categories: incorporated and unincorporated. The incorporated territories, as the Court explained in a 1976 decision, were "those Territories destined for statehood from the time of acquisition, and the Constitution was applied to them with full force."[51] The unincorporated category included "those Territories not possessing that anticipation of statehood."[52] As to them, the Constitution did not fully apply, "only 'fundamental' constitutional rights were guaranteed to the inhabitants."[53] Presumably, Congress determined which category applied to which territories, using some unspecified and undefined criteria. The five inhabited U.S. colonies are considered unincorporated territories. As to which fundamental rights apply to them, a contentious debate started in the early twentieth century and continues to this day.[54]

The last of the *Insular Cases, Balzac v. Porto Rico,*[55] exemplifies the Court's unequal treatment of Puerto Rico with respect to constitutional protections. The case, which held that Puerto Ricans were not entitled to Sixth Amendment rights, enshrined the fictional incorporation theory as a constitutional doctrine.[56] In that case, the Supreme Court denied

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48 Purchase of the United States Virgin Islands, 1917, U.S. DEP'T OF STATE, https://2001-2009.state.gov/r/pa/ho/time/wwi/107293.htm [https://perma.cc/JA8DNUHY]. (The U.S. purchased the islands of St. Thomas, St. John, and St. Croix from Denmark for $25 million. The Philippines became independent on July 4, 1946.); *See* Treaty of General Relations Between the United States of America and the Republic of the Philippines, Phil-U.S., July 4, 1946, 61 Stat. 1174. (The most recent territorial acquisition by the United States was the Northern Mariana Islands in 1975.); *Pact Is Signed to Make North Marianas a U.S. Area*, N.Y. TIMES (Feb. 16, 1975), https://www.nytimes.com/1975/02/16/archives/pact-is-signed-to-make-north-marianas-a-us-area.html [https://perma.cc/9DU3-X2RJ].

49 There is no universally adopted definition of the *Insular Cases*. The Supreme Court has indicated that the *Insular Cases* and their progeny include De Lima v. Bidwell, 182 U.S. 1 (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), Hawaii v. Mankichi, 190 U.S. 197 (1903), Dorr v. United States, 195 U.S. 138 (1904), Ocampo v. United States, 234 U.S. 91 (1914), and Balzac v. Porto Rico, 258 U.S. 298 (1922). *See* Boumediene v. Bush, 553 U.S. 723, 756 (2008); United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990).

50 *See generally Dorr*, 195 U.S. 138 (1904).

51 Examining Board of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 599 n.30 (1976) (citations omitted).

52 *Id.*

53 *Id.*

54 *See generally U.S. Territories Introduction*, 130 Harv. L. Rev. 1617 (2017).

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

56 *Id.*

the right to jury trial under the Sixth Amendment of the Constitution to a newspaper editor charged with libel, even though he was a U.S. citizen.[57] The Court held that, although the *Jones Act of 1917* had granted citizenship to Puerto Ricans, [58] it did not incorporate Puerto Rico into the Union and did not grant Puerto Ricans the full rights outlined in the Bill of Rights.[59] It left to Congress the determination of which aspects of the Bill of Rights applied to U.S. citizens living in Puerto Rico.[60] According to Chief Justice Taft, writing for a unanimous Court, "a people like the . . . Porto [sic] Ricans," who lived in "compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when" they may not "adopt this institution of Anglo-Saxon origin.[61]

The treatment of Puerto Rico regarding the Sixth Amendment right to jury trial, per the ruling in *Balzac*, was in stark contrast to the Court's decision in *Rassmussen v. United States*.[62] There, a resident of Alaska was arrested for running a brothel.[63] According to territorial law, instead of a common law jury of 12 individuals, the defendant was to be tried by a six-man jury.[64] In its ruling, the Court unanimously held that the jury trial guarantee of the Sixth Amendment was applicable to Alaska.[65] Justice White, writing for himself and six Justices, ruled that the 1867 Treaty between Russia and the U.S, which ceded Alaska, made it an *incorporated* territory, and Congress had explicitly incorporated Alaska into the United States through various Acts related to taxation, customs, commerce, and others, thus bringing its residents under complete constitutional protections.[66] This ruling, based on the irrational incorporation doctrine of the *Insular Cases*, extended the constitutional right to a jury trial to Alaska U.S. citizens, while *Balzac* blatantly denied the same constitutional protection to Puerto Rican citizens.

Remarkably, when asking what principles, doctrines or precedents served as the basis for this division of the territories and constitutional consequences, the answer is, simply put, none. The *Insular Cases* declared residents of unincorporated territories unworthy of the same constitutional rights and benefits as citizens of the states and the District of Columbia because they were considered *alien races,*[67] and *savage tribes*.[68] The *Insular Cases* held that the newly acquired territories belonged to, but were not a part of, the United States.[69] They stand for the unsupported and contradictory conclusion that unincorpo-

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57 *Id.* at 303.

58 *See* An Act to Provide a Civil Government for Porto Rico, and for Other Purposes (Jones Act), 39 Stat. 51 (1917).

59 *Balzac*, 258 U.S. at 306–07.

60 *Id.* at 307, 311.

61 *Id.* at 310. (it must be noted that the right to jury trial in the federal court of Puerto Rico is codified in D.P.R. Crim. R. 101 & 123).

62 Rassmussen v. United States, 197 U.S. 516 (1905).

63 *Id.* at 518.

64 *Id.* at 518-19.

65 *Id.* at 528.

66 *Id.* at 523.

67 Downes v. Bidwell, 182 U.S. 244, 287 (1901).

68 *Id*. at 279-80.

69 *Id*. at 287 ("Puerto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States . . . .").

rated territories are "foreign . . . in a domestic sense."[70] Despite the *Insular Cases'* flawed reasoning and blatant racial bias, federal courts continue to lean on them to deny U.S. territories' residents constitutional rights and protections such as citizenship and equal benefits.[71]

For example, in a case on whether Congress can deny U.S. citizenship to individuals born in the territories, the Tenth Circuit Court of Appeals recently ruled, based on the flawed framework of the *Insular Cases*, that Congress has the power to do so. In *Fitisemanu v. United States*,[72] a divided panel of the Tenth Circuit reversed a ruling by a district court that decided that the Citizenship Clause of the Fourteenth Amendment guaranteed citizenship to persons born on U.S. soil, in that case, U.S. non-citizen nationals from the territory of American Samoa. Because they deemed the text and history of the Citizenship Clause to be *ambiguous*, the Tenth Circuit majority determined that "the Insular Cases supply the correct framework for application of constitutional provisions to the unincorporated territories."[73] Despite acknowledging that the *Insular Cases* "are criticized as amounting to a license for further imperial expansion and having been based at least in part on racist ideology,"[74] and that their purpose and reasoning are "disreputable to modern eyes,"[75] the Court ruled that "birthright citizenship does not qualify as a fundamental right under the *Insular* framework,"[76] and the plaintiffs were not entitled to citizenship at birth as a constitutional right.[77]

The territorial incorporation doctrine, with no constitutional basis and a framework under which residents of the territories are continuously treated as second-class citizens, is obsolete and useless. All five inhabited territories of the U.S. are considered unincorporated, and only one incorporated territory exists, without a permanent population. Ironically, under the incorporation doctrine, the Constitution fully applies in the uninhabited territory of Palmyra Atoll.[78] That a set of islands and reefs without people enjoy full constitutional rights while the close to 3.3 million residents of Puerto Rico,[79] in addition to those of the other territories, do not, is an abomination. As stated in *Boumediene v. Bush,* "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."[80]

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70 *Id.* at 341 (White concurring).

71 *See generally* Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 Yale L.J. F. 284 (2020).

72 Fitisemanu v. United States, 1 F.4th 862, 881 (10th Cir. 2021).

73 *Id.* at 869.

74 *Id.*

75 *Id.* at 870.

76 *Id.* at 878.

77 Plaintiffs filed a petition for writ of certiorari in the Supreme Court, yet review was denied without an opinion. *See Fitisemanu v. United States*, 1 F.4th 862, 881 (10th Cir. 2021), *petition for cert. filed*, No. 21-1394 (U.S. Apr. 27, 2022).

78 *See What are the US Territories?*, World Atlas, https://www.worldatlas.com/articles/the-territories-of-the-united-states.html (last visited March 22, 2023).

79 See Quick Facts, Puerto Rico, U.S. Census Bureau, https://www.census.gov/quickfacts/PR (last visited March 22, 2023).

80 Boumediene v. Bush, 553 U.S. 723, 765 (2008).

It's time the *Insular Cases* and the territorial incorporation doctrine become a relic of the past. "The Territorial Incorporation Doctrine is an obsolete vestige of a racist, imperialist era of our Country which serves no purpose other than to differentiate between continental and non-continental American citizens."[81] The ghost of the *Insular Cases* haunted *Vaello Madero*, the most recent Supreme Court case treating Puerto Rican citizens unequally.

III. Aftermath of the Incorporation Doctrine

Puerto Rican citizens endure unequal treatment emanating from the *carte blanche* power the incorporation doctrine confers on Congress. Here, we focus on unequal treatment in the provision of two federal social welfare benefits—Supplemental Security Income, which was at issue in *Vaello Madero*, and the Supplemental Food Assistance Program, which we argue in Section IV, may be ripe for a frontal attack.

A. U.S. v. Vaello Madero and Puerto Rico's Exclusion from Supplemental Security Income

On April 21, 2022, the Supreme Court delivered a strong blow to Puerto Rico by ruling that its neediest residents are not entitled to Supplemental Security Insurance (SSI). *United States v. Vaello Madero* involved a challenge against the exclusion of otherwise eligible residents of Puerto Rico from receiving SSI, a national benefit for needy aged, blind, and disabled individuals.[82] Different from Social Security and Medicare, individuals do not contribute to the SSI program, instead, Congress funds SSI from the general treasury.[83] José Luis Vaello Madero, a longtime resident of New York, started receiving SSI benefits in 2012 after suffering severe health problems.[84] A year later, Vaello Madero relocated to Puerto Rico to be with his family, and continued receiving SSI payments, not knowing that his move would affect his ability to receive SSI disability benefits.

In 2016, after Vaello Madero registered for Social Security retirement benefits, the Social Security Administration (SSA) learned that he had moved to Puerto Rico and revoked Vaello Madero's payments retroactively to the date he became a resident of Puerto Rico because he was living "outside the United States."[85] This determination was a direct parallel to Justice White's concurring opinion in *Downes v. Bidwell*, which provided the basis for the territorial incorporation doctrine, i.e. that Puerto Rico "was foreign to the United States in a domestic sense."[86] The SSA deprives individuals residing *outside the United States* for

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81 Gabriel A. Terrasa, *United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 J. Marshall L. Rev. 55, 92 (1997).

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

83 *See* 42 U.S.C. § 1381 (2023).

84 United States v. Vaello Madero, 356 F. Supp. 3d 208, 211 (D.P.R. 2019) (facts recited are taken from this decision).

85 20 C.F.R. § 416.215 (2023).

86 Downes v. Bidwell, 182 U.S. 244, 341 (1901).

more than thirty consecutive days from receiving benefits under the SSI program.[87] The SSA defines the term *United States* to mean "the 50 States and the District of Columbia."[88] This classification, which excludes Puerto Ricans from receiving SSI benefits, reflects the double constitutional standard or constitutional apartheid created in the *Insular Cases* that justifies providing a lower level of constitutional protection to Puerto Ricans and residents of United States territories.

In addition to revoking Vaello Madero's benefits retroactively, the federal government sued him seeking to recover over $28,000 in alleged overpayments.[89] Vaello Madero, a disabled U.S. citizen unable to work, disputed the liability, asserting that denying SSI to eligible citizens because they live in Puerto Rico violated the Equal Protection Clause of the Fifth Amendment.[90] The District Court of Puerto Rico agreed, ruling that Congress' action to "disparately classify United States citizens residing in Puerto Rico" was "counter to the very essence and guarantees of the Constitution itself," despite the United States' argument that Congress' authority under the Territorial Clause to enact economic and social welfare policies for the territories provided a rational basis for its actions.[91] On appeal by the United States, the First Circuit Court of Appeals affirmed the District Court's ruling, finding that "[t]he categorical exclusion of otherwise eligible Puerto Rico residents from SSI is not rationally related to a legitimate government interest."[92]

Despite the fact that numerous advocacy organizations, attorneys general, labor groups, states and territories, professional associations, public benefits scholars and others filed over 20 amicus briefs supporting Mr. Vaello Madero, the Supreme Court reversed the two lower court decisions which agreed, on an equal protection basis, that excluding otherwise eligible residents of Puerto Rico from SSI violates the Fifth Amendment.[93] In an opinion authored by Justice Brett Kavanaugh, an 8-1 majority rejected the view that Congress must extend SSI to residents of Puerto Rico as it does to residents of the states because the Territory Clause gives Congress the right to make that determination: "that Congress may 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States'."[94] Simply put, according to the Court, Congress has "broad authority to legislate with respect to the U.S. Territories."[95] The Court obviated addressing Vaello Madero's equal protection argument that Puerto Rican citizens have long suffered discrimination on the basis of race and ancestry, which would have required the highest level of judicial review: strict scrutiny analysis. Instead, the Court ruled that, as long as Congress has a rational basis for doing so, it can treat residents of

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87 20 C.F.R. § 416.215 (2023).

88 42 U.S.C. § 1382c(e) (2023); *See* Pub. L. No. 94-241, § 502(a)(1) (residents of the unincorporated territory of the Northern Mariana Islands also became eligible for SSI by virtue of a joint resolution in 1976).

89 *Vaello*, 142 S. Ct. at 1542.

90 *Id.*

91 *Vaello,* 356 F. Supp. 3d at 213.

92 United States v. Vaello-Madero, 956 F.3d 12, 32 (1st Cir. 2020).

93 *See United States v. Vaello-Madero*, SCOTUS Blog, https://www.scotusblog.com/case-files/cases/united-states-v-vaello-madero/ (last visited March 22, 2023); *Vaello-Madero*, 956 F.3d at 31.

94 *Vaello*, 142 S. Ct. at 1540 (citing U.S. Const. art. IV, §3, cl.2).

95 *Id.*

territories differently than residents of the states when it comes to benefits programs such as SSI.[96]

In answering the question presented in *Vaello Madero*, the Court relied primarily on two *per curiam* precedents, which in turn, derived much of their reasoning from the territorial incorporation doctrine of the *Insular Cases.* In *Califano v. Gautier Torres,* the Court held that Congress had a rational basis not to extend SSI to Puerto Rico – that its residents were exempt from paying federal taxes – and thus did not violate the constitutional right to interstate travel of persons who moved to Puerto Rico and lost SSI benefits to which they were entitled while residing in the United States.[97] Two years later, the Court held in *Harris v. Rosario*, that for the same rational basis as found in *Califano,* Congress did not violate the Fifth Amendment's equal protection guarantee by enacting a lower level of reimbursement to Puerto Rico than to the states under the Aid to Families with Dependent Children program.[98] Thus, the Court held in *Vaello Madero* that Congress has "substantial discretion over how to structure federal tax and benefits programs for residents of the Territories" and it *may*, but is not *obligated* to, extend SSI to residents of Puerto Rico as it does to residents of the states.[99]

In *Vaello Madero,* Justices Neil Gorsuch and Sonia Sotomayor expressed hope that the Court will stop relying on the *misguided framework* of the *Insular Cases* when interpreting the Constitution and deciding what rights apply to the territories.[100] Despite voting with the majority to deny SSI benefits to the residents of Puerto Rico*,* Justice Gorsuch affirmed that, "[t]he *Insular Cases* have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law."[101] Justice Gorsuch expressed hope that the Court will one day overrule the *Insular Cases* as they "rest on a rotten foundation.[102]

Justice Sotomayor, the sole voice of reason and compassion on the Court in this case, denounced the decision in a strong dissent as *especially cruel* because Puerto Rico has a disproportionately large number of people who are elderly and/or disabled and 43.5% of residents live below the poverty line. In her words, "there is no rational basis for Congress to treat needy citizens living anywhere in the United States so differently from others."[103] She argued that it is irrational and "'antithetical to the entire premise of the program' to hold that Congress can exclude citizens who can scarcely afford to pay any taxes at all on the basis that they do not pay enough taxes."[104] Denying SSI benefits to eligible Puerto Rican residents on the basis of their tax contribution is irrational, Justice Sotomayor sus-

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96 *Vaello*, 142 S. Ct. at 1540–43.

97 Califano v. Gautier Torres, 435 U.S. 1 (1978).

98 Harris v. Rosario, 446 U.S. 651 (1980).

99 *Vaello,* 142 S. Ct. at 1544.

100 *Id.* at 1556.

101 *Id.* at 1552.

102 *Id.* at 1557.

103 *Id.* at 1561.

104 In a comprehensive footnote, Justice Sotomayor refers to the lower court opinions in *Vaello-Madero* for the proposition that Puerto Rico not only contributes to the federal treasury but does so in a sum larger than the contributions of residents of several states. *See id.* at 1561 (citing *Vaello-Madero*, 956 F.3d at 27).

tains, as "SSI is designed to support the neediest of citizens. As a program of last resort, it is aimed at preventing the most severe poverty."[105]

Besides its exclusion from SSI, Puerto Rico is also excluded from the Supplemental Nutrition Assistance Program. That exclusion, as we explain below, remains vulnerable to a constitutional challenge.

B. Puerto Rico's Exclusion from the Supplemental Nutrition Assistance Program

Enacted as a centerpiece of President Johnson's war on poverty, the Food Stamps Act (now known as Supplemental Nutrition Assistance Program) declared a national policy to "raise the levels of nutrition among low-income households."[106] The Food Stamps program was a means-tested program designed to subsidize eligible households in buying food. Later amendments to the program set national eligibility standards and guaranteed that no needy household would be malnourished.[107] The Food Stamps program became the first universal social welfare program that was based on need and not on household characteristics. The program helps households weather periods of temporary unemployment, family crisis or natural disasters. When it was implemented nationwide in 1974, Puerto Rico, like states on the mainland and the District of Columbia, as well as U.S. territories in Guam and the Virgin Islands, participated fully.[108] That treatment would be short lived. It ended in 1982 during the Reagan presidency.[109]

Nicknamed *El Barbero* or *The Barber* by Puerto Ricans for cutting social welfare programs, President Ronald Reagan and his administration transitioned Puerto Rico's receipt of Food Stamps to a block grant food aid model.[110] Puerto Rico was the only region (state or territory) to be accorded such unequal treatment. The block grant food aid model meant that, regardless of need, funds would be capped annually. The administration also cut the program's total funding by 25%, which meant that households received much less than they previously did.[111] Because the annual cap did not adjust for inflation, the reduction in benefits was even deeper.[112]

President Reagan's disdain for recipients of social welfare programs, like Food Stamps, was in plain view. He is largely credited with popularizing the racist trope of black women

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105 *Id.* at 1562.

106 Congressional Budget Office, The Food Stamp Program: Income or a Food Supplementation? 3 (1977) (quoting Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (1964)).

107 Rodway v. U.S. Dep't of Agric., 514 F.2d 809, 820 (D.C. Cir. 1975).

108 Keith Jennings & Elizabeth Wolkomir, Food Assistance in Puerto Rico Compared to the Rest of the United States 2 (2020), https://www.cbpp.org/sites/default/files/atoms/files/11-27-17fa.pdf.

109 *Id.*

110 H. Claire Brown, *Puerto Rico Faces a Food Crisis that Was Decades in the Making*, The Counter (March 28, 2019), https://thecounter.org/puerto-rico-hurricane-maria-disaster-aid-snap-food-stamps-reagan/.

111 Jennings & Wolkomir, *supra* note 108 at 2. (*See* Mathematica Policy Research, Evaluation of the Nutrition Assistance Program in Puerto Rico, Volume I: Environment, participation, administrative costs, and program integrity (March 1, 1985), https://www.mathematica.org/publications/evaluation-of-the-nutrition-assistance-program-in-puerto-rico-volume-i-environment-participation-administrative-cost-and-program-integrity-formerly-referred-to-as-the-puerto-rico-nutrition-evaluation-i).

112 *Id.*

being "Welfare Queens", who supposedly abused tax payer dollars and lived lavish and promiscuous lifestyles.[113] Reagan is also known to have opposed the 1964 Civil Rights Act, referred, in audio tapes released in 2019, to African delegates to the United Nations as "monkeys" and passionately defended South Africa's racist apartheid regime.[114] More tellingly, one of his advisers called the Food Stamps program "basically a Puerto Rican program."[115] Additionally, some members of the president's party claimed the block grant change was necessary to keep the program for the "truly needy."[116] Ironically, these assertions were made when Puerto Rico accounted for 8% of Food Stamps allocation and unemployment on the island hovered above 22% and as high as 40% in some parts.[117] Given high rates of unemployment, unsurprisingly, about 56% of residents received food stamps.[118] Emblematic of the unequal treatment of Puerto Rico, tribal reservations with poverty rates similar to Puerto Rico were not excluded from the Food Stamps program.[119]

The administration's professed desire to stimulate Puerto Rico's agricultural sector as the reason for the block grant rung hollow. Several legislators called out the unequal treatment meted to Puerto Rico. Rep. Shirley Chisholm made clear that singling out Puerto Rico "violate[d] the basic right to equal treatment—a right to which every American is entitled and has come to expect."[120] Then Resident Commissioner Baltasar Corrada del Río noted it "smack[ed] of latent discrimination, as if Puerto Ricans did not get as hungry as other Americans."[121] He also lamented Puerto Rican citizens "being singled out and discriminated against."[122] Rep. Frederick W. Richmond said Puerto Rico's treatment signaled to the world that the U.S. viewed Spanish-speaking citizens in Puerto Rico as second-class citizens.[123] He also pointedly debunked the economic justifications for the block grant as rooted in falsities.[124] Puerto Ricans, at the time, paid a common-

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113 Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J. L. & Soc. Just. 233, 244 (2014).

114 Tim Naftali, *Ronald Reagan's Long-Hidden Racist Conversation with Richard Nixon*, The Atlantic (July 30, 2019), https://www.theatlantic.com/ideas/archive/2019/07/ronald-reagans-racist-conversation-richard-nixon/595102/; Eugene Scott, *The New Reagan Tapes are Ugly, but not Surprising, to a Lot of Black Americans*, Washington Post (July 31, 2019), https://www.washingtonpost.com/politics/2019/07/31/new-reagan-tapes-are-ugly-not-surprising-lot-black-americans/.

115 Barbara B. Blum, *Who Gets the Food Stamps in New York*, N.Y. Times, June 22, 1982, at A26 (https://www.nytimes.com/1982/06/22/opinion/l-who-gets-the-food-stamps-in-new-york-226080.html).

116 127 Cong. Rec. 24, 870 (1981).

117 Carole Trippe et al., Examination of Cash Nutrition Assistance Program Benefits in Puerto Rico 26 (2015), https://insightpolicyresearch.com/wp-content/uploads/2016/06/Examination-of-Cash-Nutrition-Assistance-Program-Benefits-in-PuertoRico.pdf; Michael Wright, *Puerto Ricans Grapple with 22% Unemployment*, N.Y. Times, Oct. 29, 1982 (https://www.nytimes.com/1982/10/29/us/puerto-ricans-grapple-with-22-unemployment.html).

118 Trippe, *supra* note 117, at 26. The 1950 Census identified 20% of Puerto Rico's population as non-white. *See* Mara Loveman, *The U.S. Census and the Contested Rules of Racial Classification in Early Twentieth-Century Puerto Rico*, 35 Caribbean Studies 79, 82 (2007).

119 *See* Peña Martínez v. U. S. Dep't of Health & Hum. Services., 478 F. Supp.3d 155, 181 (D.P.R. 2020).

120 127 Cong. Rec. 14,666 (1981).

121 Brown, *supra* note 110.

122 127 Cong. Rec. 14,090 (1981).

123 Brown, *supra* note 110.

124 127 Cong. Rec. 24,868.

wealth tax that, by some estimates, exceeded the federal and state taxes (combined) paid by many on the mainland.[125]

In 2008, the Food Stamps program was renamed the Supplemental Nutrition Assistance Program, but the unequal treatment of Puerto Rican citizens endured. The lesser food assistance program on the island, dubbed Nutrition Assistance Program ("NAP"), continues the block grant model and requires Congressional action for additional funding even for disaster relief.[126] For example, when Hurricane Maria wrought devastation in 2017, Florida and Texas swiftly received relief. But weeks passed before Puerto Rico received aid as Congress jostled to pass a relief package.[127]

NAP provides food assistance to the neediest—mostly children, seniors, people with disabilities and adults seeking employment or caring for family members.[128] Today, a family of three receives about $381 in NAP benefits compared to $658 of SNAP benefits in Michigan—a state whose population of food assistance recipients is comparable to Puerto Rico's.[129] On average, Puerto Rico provides maximum monthly household benefits that are 22.5% lower than those on the mainland U.S.[130] Indeed, it matters little whether Puerto Rico is compared to Michigan or much smaller territories with much smaller recipient populations, the difference in food assistance payment is stark. Compared to the Virgin Islands and Guam —much smaller U.S. territories that provide SNAP benefits— the gap in monthly payment is wide: 39% and 46% higher, respectively, than NAP benefits paid in Puerto Rico.[131] Simply put, Puerto Rico is treated differently because the U.S. *can* treat it differently. Puerto Rican citizens do not elect members of Congress and the body is not accountable to them.[132]

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125 Wright, *supra* note 117.

126 Like Puerto Rico, American Samoa and the Commonwealth of the Northern Mariana Islands also operate NAP, but they began in 1994 and 1982, respectively. They did not previously participate in the Food Stamps Program. *See Summary of Nutrition Assistance Program – American Samoa (NAP)*, Dep't of Agric., Food and Nutrition Serv. (Mar. 18, 2021), https://fns-prod.azureedge.us/sites/default/files/resource-files/American%20Samoa%20NAP%20Summary.pdf; *Summary of Nutrition Assistance Program – Commonwealth of Northern Mariana Islands (NAP)*, Dep't of Agric., Food and Nutrition Serv. (Mar. 18, 2021), https://fns-prod.azureedge.us/sites/default/files/resource-files/CNMI%20NAP%20Summary.pdf. Also, while the exclusion or inclusion of territories seem inconsistent, for example, the Virgin Islands participates in SNAP but is excluded from fully funded Medicaid and SSI, and the Northern Mariana Islands participates in SSI but not SNAP and Medicaid, what is entirely consistent is the exclusion of (and provision of lesser benefits to) Puerto Rico from all three programs. *See* Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 Mich. L. Rev. 1636, 1675 (2021).

127 Brown, *supra* note 110.

128 Brynne Keith-Jennings, Introduction to Puerto Rico's Nutrition Assistance Program 2 (2020), https://www.cbpp.org/sites/default/files/atoms/files/1-7-20fa.pdf.

129 *Id*. at 6; Press Release, *Gov. Whitmer Announces Michiganders to Receive Additional Assistance in June to Lower Cost of Groceries* (June 14, 2022), https://www.michigan.gov/whitmer/news/press-releases/2022/06/14/michiganders-to-receive-additional-assistance-in-june-to-lower-the-cost-of-groceries.

130 *Letter from Sen. Kirsten Gillibrand & Rep. Nydia Velázquez to Senate Committee on Appropriations & House Committee on Appropriations* (Feb. 8, 2022), https://www.gillibrand.senate.gov/wp-content/uploads/imo/media/doc/Gillibrand-Velazquez%20PR%20Nutrition%20Funding%20Letter.pdf.

131 *Id*.

132 Although the U.S. Virgin Islands and Guam, as territories, also suffer the inequities of the *Insular Cases*, their Food Stamp Programs did not transition to block grants in 1981 when Puerto Rico was forced to do so, likely because the cost to the federal government, given the size of their recipient populations, was miniscule.

The *Insular Cases*, which cemented constitutional apartheid on Puerto Rican citizens, are at the heart of Puerto Rico's unequal treatment. They should be overruled.

IV. Overruling the *Insular Cases* by Applying Heightened Judicial Scrutiny to Puerto Rico's Exclusion from SNAP

Unequal treatment of Puerto Rican citizens propped up as rational geography-based distinction because the island is appurtenant to, but not a part of the U.S. is an antiquated framework that should be discarded. Puerto Rican citizens are deserving of heightened judicial solicitude. The Supreme Court's analysis of the exclusion of Puerto Rican citizens from social welfare programs and the provision of lesser benefits to them should address that differential treatment based on race, ethnicity, or national origin, instead of the contrived emphasis on their so-called non-contiguous or insular location (i.e. geography-based distinction). In so doing, the Court will not only stop unequal treatment of American citizens, but also stop elevating geography over people. It would also rein in the unfettered discretion it accorded Congress under the outmoded incorporation doctrine and finally lay to rest the odious *Insular Cases*. The Court missed an opportunity to overturn the *Insular Cases* in *Vaello Madero*. The unequal treatment of Puerto Rican citizens under the Supplemental Nutrition Assistance Program (SNAP or Food Stamps) affords another chance.

A. *Exclusion from SNAP Evinces Invidious Discrimination*

The equal protection guarantee, applicable to the federal government under the Fifth Amendment's Due Process Clause, requires that similarly situated individuals be treated in a similar manner.[133] When the law treats people differently based on race, ethnicity, or national origin, "heightened judicial solicitude is appropriate."[134] Approximately 40% of Puerto Ricans identify as non-white, while nearly 98.7% classify as Hispanic or Latino.[135]

At the outset, while on its face, the 1981 legislation that block granted food assistance to Puerto Rico –and continues that unequal treatment to this day– does not expressly classify citizens based on race, ethnicity or national origin, the federal government's action in instituting such unequal treatment is still subject to heightened judicial scrutiny.[136]

Such a change would have magnified the administration's cruelty. *See* U.S. Dep't of Health and Hum. Servs., Off. of the Assistant Sec'y for Plan. and Evaluation, Aid to Families with Dependent Children: The Baseline app. at 133 (1998).

133 United States v. Vaello Madero, 142 S. Ct. 1539, 1559 (Sotomayor, J., dissenting).

134 Graham v. Richardson, 403 U.S. 365, 372 (1971).

135 U.S. Census Bureau, *supra* note 79.

136 Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 116, 95 Stat. 357, 364-66. (Notwithstanding the racial neutrality of the budget act, it is arguable that Puerto Rico's exclusion is, nonetheless, a racial classification. See, for example, Peña Martínez v. Azar, 376 F. Supp.3d 191, 206 (D.P.R. 2019), where the district court declined plaintiffs' invitation to apply heightened judicial scrutiny to Puerto Rico's exclusion from several federal benefits programs. Our argument does not reject the racial classification contention; instead, we propose that racial neutrality analysis is an alternative or complementary approach).

Facially race neutral laws trigger strict judicial scrutiny when they are enforced in a discriminatory manner,[137] or when they have disparate impact and are motivated by discriminatory purpose.[138] Evidence of discriminatory purpose can be inferred, in part, from contemporaneous statements made by members of the decision-making body, the historical background of the decision –particularly if it reveals official action taken for invidious purpose–, and the sequence of events leading up to the decision.[139] If disparate impact and discriminatory purpose are established, a challenged government policy may survive strict scrutiny only if it serves a compelling government interest and is narrowly tailored.[140]

As set forth in section III(B), of the original participants in the Food Stamps program, only Puerto Rico was singled out for unequal treatment when the 1981 legislation removed it from the Food Stamps program. Although unemployment was 22% or higher and thousands of needy residents relied on food stamps, the Reagan administration and Congress capped food assistance to Puerto Rican citizens. Given the Census data recited above, the exclusion from the Food Stamps program adversely affected (and continues to discriminatorily impact) Puerto Rican citizens on account of race, ethnicity, or national origin. That Puerto Ricans can claim race or national origin discrimination is not in dispute.[141] Nor is there serious debate that they can assert ethnicity-based discrimination.[142]

Having established clear disparate impact, indicia of invidious purpose permeate Puerto Rico's arbitrary exclusion from the Food Stamps program. The Reagan administration's disdain for Food Stamps recipients is, perhaps, best exemplified by the statement of the high-ranking official who referred to the Food Stamps program as "basically a Puerto Rican program",[143] at a time when the administration targeted only Puerto Rico for exclusion. Compounding the unequal treatment of Puerto Rico is the continuation of the Food Stamps program for tribal nations with poverty rates similar to Puerto Rico's. The Reagan administration's high-level official's insensitive and racist comment, which was later retracted, is indicative of the administration's hostility toward Puerto Rican citizens. It remains true that Puerto Rico was the only mostly Latino populated region to be removed from the Food Stamps program, and to this day, it remains so.

Members of Congress were also aware that they were treating Puerto Rican citizens unequally. For example, then-Resident Commissioner Corrada del Río warned that it "smack[ed] of latent discrimination",[144] yet Congress went ahead. Indeed, Congress knew –and has always known– that the *Insular Cases* treated Puerto Rican citizens as an "alien

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137 *See* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886)

138 *See* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977).

139 *Id.* at 266-68.

140 Adarand Constructors Inc. v. Peña, 515 U.S. 200, 202 (1995).

141 *See* Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 97 (1st Cir. 1996) (recognizing race and Puerto Rican national origin discrimination).

142 *See* Hernández v. New York, 500 U.S. 352, 371-72 (1991) (stating "[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis").

143 Blum, *supra* note 115.

144 Brown, *supra* note 110.

race", [145] yet it chose, arbitrarily and unjustifiably, to exclude them from SNAP. Further, the budgetary rationale proffered at the time of Puerto Rico's exclusion was resoundingly debunked. Thus, President Reagan's well-known invective against Food Stamps recipients, the contemporaneous racist statement of a high-ranking official in his administration, and Congress's awareness and disregard of clear discriminatory effect point to racially discriminatory animus.[146]

B. *Exclusion from SNAP is Unsupported by a Compelling Government Interest*

Assuming, *arguendo*, that a challenger makes out a *prima facie* case of invidious discrimination, one is hard pressed to conjure a compelling interest that would support the federal government's unequal treatment. Relying on *Califano* and *Harris* —two *per curiam* decisions—to justify provision of inferior federal benefits to Puerto Rican citizens is hardly compelling.[147] Both cases "rested on the mistaken premise that residents of Puerto Rico do not contribute at all to the Federal Treasury."[148] Residents of Puerto Rico do "make some contributions to the federal treasury."[149] Indeed, "Puerto Rico contributes roughly $4 billion in annual tax revenue to the federal government, exceeding the contribution of several states."[150] And if payment of sufficient taxes were a real criterion, instead of a ruse, then needy residents in six states could also be excluded from federal entitlement programs.[151] As to budgetary constraints and disruption to Puerto Rico's economy —two other rationales typically proffered by the government—, those are equally tenuous. For one, if Congress were concerned with budgetary cuts, it could have spread the cuts equally; and two, it is simply irrational to exclude Puerto Rico from the labor-incentivizing strategies of SNAP if the government cares about boosting its economy. [152]

Given that *Califano* and *Harris* have limited precedential value and rest on shaky grounds, if the unequal treatment of Puerto Rican citizens is subjected to strict scrutiny or heightened judicial solicitude, it will not pass constitutional muster. Having stripped *Califano* and *Harris* of their value, the only doctrinal impediment to ending constitutional apartheid against Puerto Rican citizens is the fictional incorporation doctrine premised

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145 *See* José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. Pa. L. Rev. 391, 432–33 (1978).

146 While the *Arlington Heights* framework has not been applied in the social welfare context in a reported Supreme Court case, it is routinely applied in other spheres, including public education. *See, e.g.*, Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Bos., 996 F. 3d 37, 45–46 (1st Cir. 2021) (discussing standard for establishing equal protection violation in a challenge to race-neutral admissions policy). We also recognize that the indicia of discriminatory racial animus discussed here, as well as in section III(B), are likely insufficient to meet a challenger's evidentiary burden, but they provide a useful starting point for further inquiry.

147 *See* Califano v. Torres, 435 U.S. 1 (1978) and Harris v. Rosario, 446 U.S. 651 (1980).

148 United States v. Vaello Madero, 142 S. Ct. 1539, 1560 (Sotomayor, J., dissenting).

149 *Id.* (citation omitted).

150 Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 Mich. L. Rev. 1639, 1683 (citing United States v. Vaello-Madero, 956 F.3d 12 (1st Cir 2020)).

151 *Vaello Madero*, 142 S. Ct. at 1562 (Sotomayor, J., dissenting).

152 *See* Peña Martínez, 478 F. Supp.3d 155 at 163–64; 178-82 (resoundingly rejecting the government's arguments about budgetary concern and disruption to Puerto Rico's economy).

on the *Insular Cases*. That doctrinal fiction need not stand in the way. Because the continued exclusion of Puerto Rican citizens from SNAP smacks of latent discrimination on account of race, ethnicity or national origin, the Supreme Court, in an appropriate challenge, should overrule the *Insular Cases*. It is past time to relegate it to the same fate as another case of the same era and ilk—*Plessy v. Ferguson*.[153] And as a parting shot, it would behoove the federal government to heed the "weighty constitutional command [to] treat United States citizens equally."[154]

Conclusion

The urgency of overruling the *Insular Cases* cannot be overstated. From disputes relating to customs duties, to criminal procedure, citizenship, and federal benefits, among others, this racist line of jurisprudence, in place for over 120 years, does, indeed, "rest on a rotten foundation",[155] and has kept Puerto Rican citizens and other residents of U.S territories relegated to second-class citizenship status. Such abomination cannot continue.

The *Insular Cases* emanated as part of the United States' imperialist expansion to overseas territories. While they were never justified, they are much less so today, as equally odious cases, such as *Plessy v. Ferguson*,[156] in which the Court upheld state-mandated racial segregation, and *Korematsu v. United States,*[157] keeping in place the exclusion and restriction of Japanese Americans, have been overruled. The territorial incorporation doctrine, upon which the denial of *fundamental* constitutional rights to the residents of Puerto Rico rests, is a doctrinal fiction with absolutely no basis in the Constitution.

While the Court's decision in *Vaello Madero*, relying in part on the *Insular Cases* and its progeny —*Califano* and *Harris*— with its concomitant territorial incorporation doctrine, is devastating, a renewed interest and persistence in making sure the *Insular Cases* are discarded into the dust bin of history has emerged. Nevertheless, as this article demonstrates, there is no dearth of arguments and opportunities to challenge the *Insular Cases* in the ambit of federal needs-based benefits. While the battle for SSI may lie in waiting, the door to a constitutional challenge on the transition of Puerto Rico from the Food Stamps program to a lesser-benefit block grant food aid model (from SNAP to NAP) may well be opening. The unequal treatment of Puerto Rican citizens in the lesser food aid program is tinged with racial/national origin animus, and an appropriate challenge

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153 Plessy v. Ferguson, 163 U.S. 537 (1896).

154 *Vaello Madero*, 142 S. Ct. at 1562 (Sotomayor, J., dissenting). We take the position that *Vaello Madero* does not foreclose a future challenge under SNAP. One, we anticipate sufficient changed circumstances will have occurred by the time a challenge is pursued. Moreover, unlike the SSI program at issue in *Vaello Madero*, which Puerto Rico had always been discriminatorily excluded from, it did participate in the Food Stamps program until it was arbitrarily and, arguably, discriminatorily excluded. Two, if the Court's recent decision in Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) is any indication of the precarious status of *stare decisis*, the Supreme Court can certainly revisit *Vaello Madero*. Besides, as argued above, *Vaello Madero* relies on *Califano* and *Harris*, which rest on faulty reasoning. We are also mindful that *res judicata* or issue preclusion may be impediments to a future challenge. Nevertheless, neither is insurmountable.

155 *Vaello Madero,* 142 S. Ct. at 1557 (Gorsuch, J., concurring).

156 Plessy v. Ferguson, 163 U.S. 537 (1896), overruled in Brown v. Board of Education, 347 US 483 (1954).

157 Korematsu v. United States, 323 U.S. 214 (1944), overruled in Trump v. Hawaii, 138 S. Ct. 2392 (2018).

requiring strict scrutiny analysis will leave the Court hard-pressed to find a compelling government interest.

In the words of late Judge Juan R. Torruella, "[o]ver one hundred years of denigrating colonial status should be sufficient evidence of the need for judicial action"[158] as "[t]he basis on which [the *Insular Cases*] were premised —that the United States could hold territories and their inhabitants in a colonial status *indefinitely*— was unprecedented in our history and unauthorized by our Constitution."[159] Judicial action to overrule the *Insular Cases* cannot come soon enough.

158 Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid in Puerto Rico*, 77 REV. JUR. U.P.R. 1, 43-44 (2008).

159 Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid in Puerto Rico*, 29 U. Pa. J. Int. L. 283, 346 (2007).