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Trouble in Paradise: Puerto Rico's Routine Exclusion from Federal Benefit Programs as a Result of the Alien-Citizen Paradox¹

*Kat Martínez Vélez**

ABSTRACT

Puerto Ricans are United States citizens by birthright. The island itself is neither a state nor an independent country, but rather, a territory of the United States. As a territory, Puerto Rico holds a unique tax status, and its residents are exempt from some federal and income taxes. Regardless, Puerto Ricans contribute significantly to the federal treasury by paying customs taxes, federal commodity taxes, and all payroll taxes (also known as FICA taxes), which include Social Security, Medicare, and Unemployment Compensation. Yet, its residents are still subject to discrimination on the basis of residency. In this article, I will explore how, despite being U.S. citizens, paying steep taxes, and contributing to the Social Security trust fund, Puerto Ricans have been deprived of equal financial assistance from the government. This is exemplified by Puerto Rico's exclusion from the Supplemental Security Income (SSI) program. Looking past the Fourteenth Amendment Equal Protection issue presented by this deprivation, I aim to highlight how the federal government takes advantage of Puerto Rico's political status by taxing its citizens without adequate representation in Congress and how the federal government imposes limitations on when and where Puerto Ricans may receive financial assistance from the government, such as SSI benefits, which are easily accessible to U.S. citizens living in the 50 states and the Northern Mariana Islands.

1. Ediberto Roman, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 14 (1998).

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I. THE COLONIAL HISTORY OF PUERTO RICO

A. *Establishing Puerto Rico's Political Status*

After the Spanish-American War, Spain and the United States entered into peace negotiations which led to the signing of the Treaty of Paris, by which the United States took over several Spanish territories, including Puerto Rico in 1898.² Soon after, in the year 1900, the Foraker Act created a civil government for Puerto Rico.³ The new government had a governor and an executive council appointed by the President, a House of Representatives with 35 members elected by the people, a judicial system with a Supreme Court, and a non-voting Resident Commissioner in Congress.⁴ The intent behind the Foraker Act was for all federal laws of the United States to be in effect on the Island.⁵

Finally, in 1917, the Jones Act was enacted.⁶ It extended American citizenship to the people of Puerto Rico; separated the Executive, Judicial, and Legislative branches of the Puerto Rican government; and created a locally-elected bicameral legislature.⁷ The U.S. government maintained control over fiscal and economic matters, and the President of the United States had the power to veto any law passed by the legislature.⁸ Currently, every person born in Puerto Rico is a citizen of the United States pursuant to the Jones Act of 1917 and subsequent legislation granting birthright citizenship to Puerto Rico's native-born inhabitants.⁹

Finally, in 1950, Congress enacted legislation (P.L. 81-600) authorizing Puerto Rico to hold a constitutional convention, and in 1952, the people of Puerto Rico ratified a constitution establishing a republican form of government for the island.¹⁰

B. *Representation of Puerto Rican Residents in the Federal Government*

United States citizens living in the 50 states are represented by a President, senators, and congressional representatives whom they elect. In contrast, Puerto Ricans are represented by a single Resident Commissioner.¹¹ The Resident Commissioner is a member of Congress and an elected official chosen by the people of Puerto Rico to be their authorized representative before the federal government.¹²

2. Rachel Lewis, *Is Puerto Rico Part of the U.S? Here's What You Need to Know*, TIME (Sep. 26, 2017 at 10:23 AM), <https://time.com/4957011/is-puerto-rico-part-of-us>.

3. *The World of 1898: The Spanish-American War – Foraker Act*, LIBR. OF CONG., <https://www.loc.gov/rr/hispanic/1898/fo-raker.html#:~:text=On%20April%20%2C%201900%2C%20U.S.,the%20Organic%20Act%20of%201900> (last visited Feb. 18, 2022).

4. *Id.*

5. *Id.*

6. *The World of 1898: The Spanish-American War – Jones Act*, LIBR. OF CONG., <https://www.loc.gov/rr/hispanic/1898/jonesact.html> (last visited Feb. 18, 2022).

7. *Id.*

8. *Id.*

9. Jones Act of 1917, § 606 (1917) (current version at 48 U.S.C. § 733); 8 U.S.C. § 1402.

10. S. Res. 3336, 81st Cong. (1950) (enacted).

11. *What is the Resident Commissioner?*, U.S. CONGRESSWOMAN JENNIFFER GONZALEZ-COLON, <https://gonzalez-colon.house.gov/about> (last visited Feb. 20, 2022).

12. *Id.*

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The first Resident Commissioner, Federico Degetau, did not even have a chair to sit in while Congress was meeting.¹³ During Degetau's term from 1901 to 1905, he advocated for the Resident Commissioner to be statutorily allowed to speak in Congress.¹⁴ His efforts were not in vain—today's Resident Commissioner can participate in the proceedings of the U.S. House of Representatives, introduce legislation, and speak before the Chamber.¹⁵

However, the Resident Commissioner's ability to represent her constituents remains limited. She may only vote in the committees to which she belongs and has no right to vote on the House floor.¹⁶ Puerto Rico is not represented at all in the Senate, nor can its residents vote in presidential elections.¹⁷

The single Resident Commissioner represents the Island's 3.2 million citizens, which is five times as many citizens as the average Member of the House represents, because there is no apportionment of districts by population for this office.¹⁸ Despite having a population larger than 21 states, Puerto Rico lacks the full representation provided to those who live in the 50 states.¹⁹

II. PUERTO RICO'S UNIQUE TAX STATUS

A. *Puerto Rico's Contribution to the Federal Treasury*

Because Puerto Rico is a territory, its residents do not pay all the same taxes as those who live in the 50 states. Puerto Rico raises revenue with its own local tax system; thus, bona fide residents are generally not required to file a U.S. federal income tax return if their entire and only income is made within the Island.²⁰ Under the Internal Revenue Code, a bona fide resident of Puerto Rico is likely an individual who: (1) is physically present in Puerto Rico for at least 183 days during the taxable year; (2) does not have a tax home outside of Puerto Rico during the taxable year; and (3) does not have a closer connection to the United States or a foreign country than to Puerto Rico.²¹

Regardless, Puerto Ricans contribute significantly to the federal treasury. Puerto Ricans pay customs taxes, federal commodity taxes, and all payroll taxes (also known as "FICA" taxes, which stands for the Federal Insurance Contributions Act), which include Social Security, Medicare, and unemployment compensation.²² In fact, prior to the Island's current economic recession, exacerbated by the destruction that resulted from Hurricane Maria in 2017, Puerto Rico contributed more than \$4 billion annually in federal taxes and impositions into the national public treasury,

13. *Id.*

14. *Degetau, Federico*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/People/Detail/12074?ret=True#biography> (last visited Oct. 1, 2022).

15. GONZALEZ-COLON, *supra* note 11.

16. *Id.*

17. Aaron Steckelberg & Chiqui Esteban, *More than 4 Million Americans Don't Have Anyone to Vote for Them in Congress*, THE WASH. POST (Sep. 28, 2017), <https://www.washingtonpost.com/graphics/2017/national/fair-representation>.

18. *Id.*; GONZALEZ-COLON, *supra* note 11.

19. Steckelberg & Esteban, *supra* note 18.

20. *Topic No. 901*, IRS, <https://www.irs.gov/taxtopics/tc901> (last visited Feb. 20, 2022).

21. 26 U.S.C. § 937 (each of these requirements requires careful consideration of various factors beyond the scope of this article).

22. See 26 U.S.C. §§ 3101, 3111, 3121(e), 3301, 3306(j).

more than at least six other States.²³ Moreover, Puerto Ricans pay several indirect taxes, which tend to be significantly higher than indirect taxes in the 50 states.²⁴

B. Indirect Taxes in PR: Significantly Higher Than the National Average

An indirect tax is a tax imposed on a transaction.²⁵ In contrast, a direct tax is imposed directly on a property, person, or entity.²⁶ Indirect taxes are typically added to the prices of goods or services (e.g., sales tax, value-added tax, excise tax). There are a few indirect taxes in Puerto Rico: the Sales and Use Tax (SUT), locally known as “*Impuesto sobre ventas y uso*” (IVU), and the Excise Tax on manufacturing and imports of various goods (e.g., sugar, cement, vehicles, cigarettes, liquor, and petroleum).²⁷ Excise tax rates depend on the category of goods.

The SUT imposes an 11.5% tax on most goods and services and a 10.5% tax on goods and services not subject to municipal SUT.²⁸ This sales tax is higher than any major city in the 50 states.²⁹ In 2021, the highest combined state and local sales tax rate among major cities in the U.S. was 10.30% in Tacoma, Washington.³⁰ The second highest rate was at 10.25% in Fremont, Los Angeles, and Oakland, California; tied with Chicago, Illinois; and Seattle, Washington.³¹ The Paying Taxes report carried out by the World Bank places Puerto Rico with a total tax rate of 64.4%.³² In other words, for every dollar generated by Puerto Rico’s economy, 64.4 cents go towards paying taxes.

C. The Merchant Marine Act Increases the Price of Goods in PR

The Merchant Marine Act of 1920 requires that goods shipped from one American port to another be transported on a ship that is American-built, American-owned, and crewed by U.S. citizens or permanent residents.³³ Additionally, as a

23. Sindy Mariaol Benavides, *After SCOTUS Ruling, Puerto Rico Statehood Even More Imperative*, LEAGUE OF UNITED LATIN AMERICAN CITIZENS (Apr. 28, 2022), https://lulac.org/news/in_the_news/after_scotus_ruling_puerto_rico_statehood_even_more_imperative.

24. *Puerto Rico – Indirect Tax Guide*, KPMG, <https://home.kpmg/xx/en/home/insights/2018/10/puerto-rico-indirect-tax-guide.html#:~:text=Excise%20tax%3A%20de-pends%20on%20the,not%20subject%20to%20municipal%20SUT> (last visited Mar. 15, 2022).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Jared Walczak & Jeremiah Nguyen, *Sales Tax Rates in Major Cities, Midyear 2021*, TAX FOUND. (Aug. 18, 2021), <https://taxfoundation.org/sales-tax-rates-by-city-2021/#:~:text=Among%20major%20cities%2C%20Tacoma%2C%20Washington,highest%20rate%20of%2010.25%20percent>.

30. *Id.*

31. *Id.*

32. Christian G. Ramon Segarra, *Puerto Rico Among Countries With Worst Tax Systems*, THE WEEKLY JOURNAL (Aug. 4, 2021), https://www.theweeklyjournal.com/business/puerto-rico-among-countries-with-worst-tax-systems/article_617200d8-f54d-11eb-a056-cf601d47d2d0.html#:~:text=Meanwhile%2C%20the%20Paying%20Taxes%20report,tax%20systems%20in%20the%20world.

33. See *infra* Section IV(B).

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result of the Insular Cases³⁴, tariffs must be paid for shipments to or from Puerto Rico.³⁵

Huus v. New York & P.R. S.S. Co. was an Insular Case decided on the same day as another Insular Case, *Downes v. Bidwell*, wherein which the Court specifically considered whether Puerto Rico remained a foreign port after the passage of the Foraker Act.³⁶ The Court held that Puerto Rico “is properly a part of the domestic trade of the country since the treaty of annexation” and New York could not require pilotage fees because a state can only make such claims against a foreign vessel.³⁷ Although this ruling appears to be favorable to Puerto Rico, it has had serious detrimental consequences to the economy of Puerto Rico.

In effect, the *Huus* decision ruled that the federal cabotage statutes are applicable to Puerto Rico.³⁸ Although this saves Puerto Rican vessels the cost of pilotage fees upon entering U.S. ports, it prohibits the use of substantially cheaper foreign vessels in the transportation of goods to and from the continental U.S. and essentially places a freight-induced “premium” on all goods imported to Puerto Rico.

For residents of Puerto Rico, this means that basic importation and exportation of goods must be conducted by expensive protected ships, increasing costs for vendors. This raises the price of common goods, such as cars and groceries. Those costs, which initially burden the vendors, are then passed down to consumers. For instance, cars in Puerto Rico cost 40% more than in the 50 states and groceries cost 21% more.³⁹

III. PUERTO RICAN’S ACCESS TO FEDERAL BENEFIT PROGRAMS

A. *Is Puerto Rico Profitable to the United States?*

The net federal expenditure subtracts federal dollars received from tax contributions to the federal government.⁴⁰ In 2016, the federal government paid \$4.1 billion in federal expenditures to Puerto Rico.⁴¹ The same year, Puerto Rico contributed \$3.48 billion in federal taxes.⁴² Thus, after taxes, Puerto Rico received about \$620 million from the federal government in 2016.⁴³ Based on this figure, Puerto Rico took more from the U.S. government than what it gave back. However, this is not out of the ordinary; in fact, Puerto Rico is in the majority.⁴⁴ Thirty-seven states

34. The Insular Cases are a series of centuries-old Supreme Court cases regarding territorial status, decided between 1901 and 1922, in which the Court justified the differential treatment of Puerto Rico. The Insular Cases established the territorial incorporation doctrine, which states that territories that were not incorporated into the U.S. do not enjoy the full rights of the Constitution, *see, e.g.*, *Downes v. Bidwell*, 182 U.S. 244, 290–91 (1901).

35. *See infra* Section IV(B); *Downes v. Bidwell*, 182 U.S. 222 (1901).

36. *Huus v. New York & P.R. S.S. Co.*, 182 U.S. 392, 395 (1901).

37. *Id.* at 396–97.

38. “Cabotage” refers to the shipping of goods between two points within one country, *see id.* at 393.

39. CNN (@CNN), TWITTER (June 7, 2017, 9:45 PM), <https://twitter.com/cnn/status/872645659496779778>.

40. *Id.*

41. Jorge Cruz Serrallés, *What Does Puerto Rico Cost the US?*, MEDIUM (June 27, 2019), <https://medium.com/@jorgecruzseralles/what-does-puerto-rico-cost-the-us-c179304bab93> (more recent data is not available).

42. *Id.*

43. *Id.*

44. *Id.*

receive more in federal dollars than they contribute to the federal government in taxes.⁴⁵

B. *Distribution of Social Security Benefits to U.S. Citizens*

The Social Security Administration (“SSA”) provides benefits to individuals based on disability through the administration of two programs: the Social Security disability insurance program (Title II of the Social Security Act) and the Supplemental Security Income (“SSI”) program (Title XVI of the Act).⁴⁶

Title II provides for payments of disability benefits to disabled individuals who are “insured” under the Social Security Act by contributing to the Social Security trust fund through the Social Security tax on their income.⁴⁷ Thus, Puerto Ricans who contribute to the Social Security fund through the Social Security tax are entitled to payment of disability benefits.⁴⁸

In contrast, SSI is a needs-based program for individuals with limited income and resources; it provides benefits to low-income individuals who are older than 65, blind, or disabled.⁴⁹ Thus, only those who meet the age, disability, or blindness requirement *and* fall beneath the federally mandated income and asset limits are eligible to receive SSI benefits.⁵⁰ As opposed to Title II Social Security benefits, the SSI program is funded by general tax revenue, not from the Social Security trust fund.⁵¹ An individual’s SSI benefit amount is based on federal and state laws, which consider where one lives, the composition of one’s household, and one’s income.⁵²

In 1972, Congress enacted the SSI program and decided to exclude Puerto Ricans from it.⁵³ A recipient is required to live within the United States, and although Puerto Rico is a U.S. territory, the statute defines the U.S. only to include the “geographical territory of the 50 States, the District of Columbia, and the Northern Mariana Islands.”⁵⁴ As a result, the statute authorizes the termination of benefit payments if the recipient has resided outside of the U.S. (as defined by the statute) for more than 30 consecutive days.⁵⁵

Puerto Ricans are instead eligible for a different government program: Aid to the Aged, Blind, and Disabled (“AABD”).⁵⁶ However, the AABD program is not an adequate substitute for SSI; it is underfunded and does not account for the growing disabled and aging population on the Island.

45. *Id.*

46. *Fact Sheet, Social Security and Supplemental Security Income (SSI): What’s the difference?*, SOC. SEC. ADMIN. (Nov. 2009), <https://www.ssa.gov/sf/FactSheets/aianssavssifinalrev.pdf>.

47. *Id.*

48. *Id.*

49. *Id.*; 42 U.S.C. § 1382(a), 1382(c).

50. SOCIAL SECURITY ADMIN, *supra* note 45.

51. *Id.*

52. *Id.*

53. Nicole Acevedo, *Supreme Court Seems Divided Over Puerto Rico’s Exclusion from Federal Benefits*, NBC NEWS (Nov. 9, 2021, 4:43 PM), <https://www.nbcnews.com/news/latino/supreme-court-seems-divided-puerto-ricos-exclusion-federal-benefits-rcna4969>.

54. 42 U.S.C. § 1382c(e).

55. § 1382 (f)(1).

56. *Policy Basics: Aid to the Aged, Blind, and Disabled*, CTR. ON BUDGET AND POL’Y PRIORITIES, <https://www.cbpp.org/research/aid-to-the-aged-blind-and-disabled#:~:text=Federal%20policymakers%20created%20SSI%20in,to%20operate%20its%20AABD%20program> (last updated on Jan. 15, 2021).

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In the 50 states, citizens and legal immigrants are eligible for SSI payments when their monthly income drops below \$750.⁵⁷ In contrast, to be eligible for AABD, an individual may not earn more than \$65 a month.⁵⁸ Moreover, SSI beneficiaries receive an average of \$574 a month, while those under AABD get an average of \$82 a month.⁵⁹ In 2021, 34,224 residents of Puerto Rico were enrolled in the AABD program.⁶⁰ By contrast, the Government Accountability Office estimates that over 300,000 Puerto Rico residents would have qualified for SSI.⁶¹ In sum, significantly fewer Puerto Rico residents are eligible for AABD than would be eligible for SSI, and the benefits they receive under AABD are not comparable to those they would receive under SSI.

Evidently, the AABD is one of the most underfunded substitute “safety net” government programs. In 2020, the federal government devoted just \$24 million to AABD, the same amount devoted to the program in 2011.⁶² A dollar in 2020 was only worth 85% of a dollar in 2011. Thus, the AABD has not grown, even in nominal terms, or accounted for the growing disabled and aging population on the island.⁶³

C. *The Rationale Behind the Exclusion of Puerto Rico from SSI: The Vaello-Madero Decision*

Puerto Ricans living on the Island are not eligible to receive SSI payments.⁶⁴ As a result, the Supreme Court has considered a number of cases brought by Puerto Rican residents alleging an Equal Protection violation for discrimination based on citizenship. The most recent case is *United States v. Vaello-Madero*, which held oral arguments in November 2021 and was decided in April 2022.

In *United States v. Vaello-Madero*, the Supreme Court considered whether withholding a federal benefits program from a United States territory resident violated Equal Protection.⁶⁵ Although the case presents a constitutional issue, it requires an understanding of the history and justifications for excluding Puerto Rico from federal benefits programs despite Puerto Ricans’ U.S. citizenship by birth-right.⁶⁶

In *Vaello-Madero*, the federal government sued José Luis Vaello-Madero, who had been a recipient of SSI disability benefits, and sought to collect \$28,081 in back

57. Acevedo, *supra* note 51.

58. *Id.*

59. *Id.*

60. Brief for Hon. Jenniffer A. Gonzalez Colon, Resident Commission for Puerto Rico, as Amicus Curiae Supporting Respondent at 28–29, *United States v. Vaello-Madero*, 141 S. Ct. 1462 (2021).

61. *Id.* at 34.

62. Nick Buffie, *Massive Safety Net Loppoles Hurt Poor Puerto Rican Residents*, CAP (Nov. 12, 2021), <https://www.americanprogress.org/article/massive-safety-net-loppoles-hurt-poor-puerto-rican-residents>.

63. In 2019, 42% of adults in Puerto Rico had a disability, *Disability Impacts Puerto Rico*, CDC, <https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/puerto-rico.html> (last visited Feb. 22, 2022). *Cost of Living Calculator: What is Your Dollar Worth Today?*, AM. INST. FOR ECON. RSCH., <https://www.aier.org/cost-of-living-calculator> (last visited Feb. 22, 2022); Nick Buffie, *Massive Safety Net Loppoles Hurt Poor Puerto Rican Residents*, CAP (Nov. 12, 2021), <https://www.americanprogress.org/article/massive-safety-net-loppoles-hurt-poor-puerto-rican-residents>.

64. See generally 42 U.S. § 1382(f)(1).

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

66. *Id.* at 1541–42.

pay.⁶⁷ The dispute arose when the federal government claimed that it had improperly paid SSI disability benefits to Vaello-Madero because he moved from New York to Puerto Rico and, therefore, was no longer entitled to SSI payments.⁶⁸

Vaello-Madero was born in Puerto Rico but had been living in New York since 1985.⁶⁹ He was afflicted with severe health problems, which forced him to seek relief under the SSI program beginning in June 2012.⁷⁰ In 2013, the 67-year-old moved back to Puerto Rico to help care for his wife, who had moved back to Puerto Rico earlier due to her own health issues.⁷¹

Vaello-Madero allegedly became aware of the SSI issues related to his moving back to Puerto Rico in June 2016.⁷² He had filed for Title II Social Security benefits at a local SSA office, and his disclosure to the SSA authorities that he had moved back to Puerto Rico resulted in discontinuation of payment.⁷³ The SSA informed Vaello-Madero that it was discontinuing his SSI benefits retroactively to August 2014 because he had been “outside of the U.S. for 30 days in a row or more.”⁷⁴ About a year later, the United States filed an action against Vaello-Madero to collect the \$28,081 allegedly owed to them for improper payments.⁷⁵

The SSA was acting pursuant to statutory provisions to establish that to be eligible to receive SSI benefits, an individual must be a resident of the United States, as defined in the statute. Congress explicitly excluded Puerto Rico from the definition, and to be a “resident of the United States” for purposes of SSI, one must be “living in the 50 states [or] the District of Columbia.”⁷⁶ However, in 1976, the Northern Mariana Islands were added within the coverage of the SSI, but Puerto Rico and other territories remained excluded.⁷⁷

Lower courts in *Vaello-Madero* ruled Puerto Rico’s exclusion from the SSI program as unconstitutional.⁷⁸ The United States appealed, and the Supreme Court granted certiorari and heard oral arguments in November 2021. In oral arguments, the federal government argued that the differential treatment of Puerto Rican residents is lawful because they are exempt from paying several taxes that apply in the 50 States, which means that the money remains with the Island’s government instead of going into the federal treasury.⁷⁹ In response, Justice Sonia Sotomayor stated that most, if not all, SSI recipients nationwide do not pay taxes “so it’s not as if the recipients of this money are any different among themselves.”⁸⁰

Chief Justice Roberts then inquired as to whether the Insular Cases had anything to do with this litigation.⁸¹ The Insular Cases are centuries-old cases that are

67. *Id.* at 1559 (Sotomayor, J., dissenting).

68. *Id.* at 1541.

69. *Id.* at 1559 (Sotomayor, J., dissenting).

70. *Id.*

71. *Id.* at 1543.

72. *Id.* at 1559 (Sotomayor, J., dissenting).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1542; 42 U.S.C. § 1382c(e).

77. 48 U.S.C. § 1801; Proclamation No. 4534, 42 Fed. Reg. 56,593 (Oct. 24, 1977).

78. *See Vaello Madero*, 142 S. Ct. at 1542.

79. Brett Kendall & Jess Bravin, *Supreme Court Weighs Legality of Federal Benefits Denied to Low-Income Puerto Ricans*, THE WALL ST. J. (Nov. 9, 2021, 3:32 PM), <https://www.wsj.com/articles/supreme-court-puertorico-social-security-11636489388>.

80. Transcript of Oral Argument at 13, *United States v. Vaello-Madero*, 141 S. Ct. 1462 (2021).

81. *Id.* at 8–9.

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still in effect today and allow the differential treatment of Puerto Rico.⁸² The federal government argued that they do not because “[t]he Insular Cases were about whether there are different portions of the Constitution that apply differently to different territories,” and all parties acknowledged that the Equal Protection component of the Fifth Amendment at issue here was applicable to the case.⁸³ However, Justices Gorsuch and Sotomayor pushed back on that contention by the federal government and questioned the continued validity of the Insular Cases. Justice Gorsuch asked: “[F]rom the government’s point of view, if the Insular Cases are wrong and if you’re proceeding on a premise inconsistent with them, why shouldn’t we just say what everyone knows to be true?”—implying that the Court should admit that the Insular Cases were decided incorrectly.⁸⁴

It is naïve to argue that the Insular Cases would not play a role in the *Vaello-Madero* decision. *Vaello-Madero* is a constitutional law case on its face, and the Insular Cases delineated which “fundamental” constitutional rights applied to Puerto Ricans. Although Congress has passed laws changing the treatment of territories with respect to tariffs and citizenship, the implications set forth by the Insular Cases still govern Puerto Rico, and today, they affect much more than import and export duties.

In *Vaello-Madero*, the Court notes that Puerto Rican residents not only significantly contribute to the federal treasury but also have consistently contributed more than at least six other states, as well as the Northern Mariana Islands.⁸⁵ Thus, the argument that Puerto Ricans do not contribute to the federal treasury as a justification to exclude them from federal benefit programs or welfare payments “is no longer available.”⁸⁶ Moreover, Mr. Ferré, counsel for *Vaello-Madero*, argues that “those poor enough to qualify for SSI pay no federal tax, and they don’t have to qualify,” and thus, “tax status is irrelevant [to qualify for SSI].”⁸⁷

The Supreme Court decided the case in April 2022, and, in an 8-1 decision, held that the Fifth Amendment’s Due Process Clause does not require Congress to make SSI benefits available to residents of Puerto Rico to the same extent that Congress makes those benefits available to residents of the states.⁸⁸

Justice Gorsuch’s concurrence examines how the issue in this case relates back to the Insular Cases.⁸⁹ He admits that he only joins the Court’s opinion because neither party asked the Court to overrule the Insular Cases.⁹⁰ He notes that “the time has come to recognize that the Insular Cases rest on a rotten foundation” and states that he eagerly awaits the day when the Court squarely overrules them.⁹¹

In addition, Justice Sotomayor’s dissent focuses on the federal government’s flawed rationalizations for excluding Puerto Rico from the SSI program.⁹² In essence, the federal government argues that Puerto Rico should be excluded from the SSI program because of Puerto Rico’s unique tax status. The federal government

82. See *infra* Section IV.

83. Transcript of Oral Argument, *supra* 77, at 8–9.

84. *Id.* at 9.

85. *United States v. Vaello-Madero*, 956 F. 3d 12, 24 (1st Cir. 2020).

86. *Id.* at 25.

87. Transcript of Oral Argument, *supra* note 77, at 43.

88. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1540 (2022).

89. See *generally id.* at 1552 (Gorsuch, J., concurring).

90. *Id.* 1557.

91. *Id.*

92. *Id.* (Sotomayor, J., dissenting).

states that Congress should rationally conclude that a “jurisdiction that makes a reduced contribution to the federal treasury should receive a reduced share of the benefits funded by that treasury.”⁹³ Justice Sotomayor responds to this argument by noting that, when the SSI program was established, Congress replaced existing programs that differed between States and Territories that involved States and Territories administering the local programs themselves.⁹⁴ Thus, under the current uniform SSI system, the jurisdiction in which an SSI recipient resides is irrelevant to the purposes or requirements of the SSI program.⁹⁵ The federal government also argues that because Puerto Ricans are typically exempt from paying some federal taxes, the government may distinguish them from other SSI recipients who are not exempt.⁹⁶ Justice Sotomayor responds by pointing out that SSI recipients, by definition, pay few if any taxes at all.⁹⁷ Thus, it is “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.”⁹⁸

D. The Exclusion of Puerto Ricans from Other Benefit Programs

The SSI program is not the only benefit program from which Puerto Ricans are excluded. The Island’s residents are also excluded from the Supplemental Nutrition Assistance Program which assists people in buying food if their income and assets fall below specified limits, and from the Medicare Part-D Low-Income Subsidy (“LIS”), which helps cover the cost of a prescription drug plan.

In *Peña Martinez v. U.S. Department of Health and Human Services*, nine plaintiffs, all United States citizens, brought action because they were excluded from the SSI, SNAP, and LIS programs solely because they reside in Puerto Rico.⁹⁹ Just as AABD in Puerto Rico is a substitute program for SSI, the federal government offers Puerto Ricans other substitute programs for SNAP and LIS. However, these substitute programs offer less coverage and (“SNAP”), smaller benefits than their federal counterpart.

Residents of the 50 States, the District of Columbia, Guam, and the U.S. Virgin Islands are eligible for SNAP.¹⁰⁰ Puerto Rican residents instead receive a federal “block grant” to fund a similar substitute program, called the Nutrition Assistance Program (“NAP”).¹⁰¹ However, the requirements to qualify for NAP are stricter, and the benefits are smaller.¹⁰²

Similarly, residents of the 50 States and the District of Columbia may receive LIS benefits if their income does not exceed certain limits.¹⁰³ The LIS subsidizes low-income Medicare beneficiaries so that they can purchase a Medicare Part-D

93. Brief for United States at 17–18, *United States v. Vaello-Madero*, 141 S. Ct. 1462 (2021).

94. *Vaello Madero*, 142 S. Ct. at 1561. (Sotomayor, J., dissenting).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* (internal quotation marks omitted).

99. *Peña Martinez v. U.S. Dep’t of Health and Hum. Servs.*, 478 F. Supp. 3d 155, 162 (D.P.R. 2020).

100. *Id.* at 166.

101. *Id.*

102. *Id.* at 166–67.

103. *Id.* at 167.

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insurance plan.¹⁰⁴ Instead of LIS, Puerto Rico receives “extra money” from the federal government to support prescription drug insurance, but the benefit amounts are substantially smaller than those available to low-income beneficiaries in the 50 States.¹⁰⁵

IV. LAWMAKING IN THE SHADOW OF THE INSULAR CASES

A. *The Insular Cases*

The Insular Cases are a series of centuries-old Supreme Court cases regarding territorial status, decided between 1901 and 1922, in which the Court justified the differential treatment of Puerto Rico. The Insular Cases established the territorial incorporation doctrine, which states that territories that were not incorporated into the U.S. do not enjoy the full rights of the Constitution. The territorial incorporation doctrine is in effect to this day. The precedent set by the Insular Cases still influences court decisions regarding which rights Puerto Rican citizens may enjoy

The first of the Insular Cases was *De Lima v. Bidwell*, which involved an action brought to recover duties paid on goods imported from Puerto Rico to New York.¹⁰⁶ Mr. Bidwell, the customs collector of the port of New York, contended that Puerto Rico was a “foreign country” within the meaning of the tariff laws, and payment of duties required for the goods.¹⁰⁷ In a five-to-four decision, Justice Brown, writing for the majority, stated that upon the ratification of the Treaty of Paris, Puerto Rico became a territory of the U.S., and under statutory interpretation, was no longer a “foreign country.”¹⁰⁸ The dissent argued that the laws of the U.S. did not extend to a territory previously subject to the jurisdiction of another sovereign by the mere act of cession.¹⁰⁹

Goetze v. United States and *Crossman v. United States* followed *De Lima*.¹¹⁰ Both cases involved products imported from island-territories Puerto Rico and Hawaii, respectively.¹¹¹ The Supreme Court, following the precedent set by *De Lima*, reversed the lower court’s decision that Puerto Rico and Hawaii were “foreign countries” within the meaning of the tariff laws.¹¹² Based on how these initial cases were decided, the decisions of the cases that followed are extremely surprising, and the implication that a territory cannot be held indefinitely in a subservient state has seemingly “fallen on deaf ears.”¹¹³

In *Dooley v. United States*, the Court was once again faced with deciding what treatment to give goods imported into Puerto Rico from the United States.¹¹⁴ This

104. *Id.* at 166.

105. *Id.* at 167.

106. *De Lima v. Bidwell*, 182 U.S. 1, 1–2 (1901).

107. *Id.* at 174.

108. *Id.* at 200.

109. *Id.* at 210.

110. *Goetze v. United States*, 182 U.S. 221 (1901); *Crossman v. United States*, 456 U.S. 977 (1982).

111. *See generally* *Goetze v. United States*, 182 U.S. at 221; *See generally* *Crossman v. United States*, 456 U.S. at 977.

112. *See generally* *Goetze v. United States*, 182 U.S. at 222; *See generally* *Crossman v. United States*, 456 U.S. at 977.

113. JUAN TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 44–45 (The University of Puerto Rico) (1985).

114. *See* *Dooley v. United States*, 182 U.S. 222 (1901).

case was difficult for the Court to grapple with because Congress passed the Foraker Act in 1900. Thus, the Court had to decide the treatment to give to goods imported into Puerto Rico throughout the spectrum of three different legal situations that existed in Puerto Rico between 1898 and 1900.¹¹⁵ From July 26, 1898, until August 19, 1898, goods imported into the Island were taxed under the terms of the proclamation of General Miles, directing the exaction of former Spanish and Puerto Rican duties.¹¹⁶ Then, from August 19, 1898, to February 1899, these goods were taxed pursuant to a customs tariff for Puerto Rico proclaimed by the order of the President.¹¹⁷ Finally, from February 21, 1899, to May 1, 1900, they were taxed pursuant to an amended Presidential proclamation.¹¹⁸

In another five-to-four decision, the majority considered April 11, 1899, to be the key date in deciding this case because, up until that point, Puerto Rico was legally a part of Spain, and thus, Puerto Rico and the United States were foreign countries to each other.¹¹⁹ However, *Dooley* had to be reconciled with the decision in *De Lima*, which was decided on the same day. Thus, upon the ratification of the Treaty of Paris, Puerto Rico ceased to be considered a foreign territory to the U.S. and duties could not be imposed on goods imported *into* the United States.

The central case on the question of Puerto Rico's status within the United States was *Downes v. Bidwell*, which was also decided in 1901. The Court was unable to reach a "majority opinion" as it was divided by the issues of acquisition and government of the new territories.¹²⁰ It is concerning that rules that have affected the lives of generations of Americans emerged from such divisiveness. Interestingly enough, the *Downes* plurality was a reversal of the *Dooley* line-up, with the dissenters in *Dooley* joining Justice Brown as swingmen to uphold the constitutionality of the Foraker Act in *Downes*.¹²¹

In a plurality decision, the Supreme Court decided that the Constitution did not extend to Puerto Rico, or any island territories, to make them part of the U.S. with respect to tariffs.¹²² In effect, the Court held that the Constitution does not necessarily "follow the flag." Justice Brown's opinion held that Puerto Rico is an unincorporated territory in which only "fundamental" constitutional guarantees apply and that the Constitution applied to the territories only when Congress specifically provided to such effect, and even then, only to the extent indicated by Congress.¹²³ This was known as the "extension theory," and was actually never followed by the Court after this case. The rationale behind this decision rests partly on American imperialism, as evidenced by parts of the opinion itself:

115. *Id.* at 222.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 230–34.

120. *Dooley v. U.S.*, 182 U.S. 222, n.1 (1901) (the syllabus reads: "In announcing the conclusion and judgment of the court in this case, Mr. Justice Brown delivered an opinion. Mr. Justice White delivered a concurring opinion which was also concurred in by Mr. Justice Shiras and Mr. Justice McKenna. Mr. Justice Gray also delivered a concurring opinion. The Chief Justice, Mr. Justice Harlan, Mr. Justice Brewer, and Mr. Justice Peckham dissented. *Thus, it is seen that there is no opinion in which a majority of the court concurred.*" (emphasis added)).

121. *Id.*

122. *See Downes v. Bidwell*, 182 U.S. 244, 257 (1901) (plurality opinion).

123. *Id.* at 268 (opinion of J. Brown.)

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We are also of the opinion that the power to acquire territories by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitant, and what their status shall be in what Chief Justice Marshall termed the “American Empire.” There seems to be no middle ground between this position and the doctrine that if these inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunity of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitant, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States. . . .¹²⁴

Next was Justice White’s opinion, which gave rise to the “incorporation theory” that would eventually prevail as the rule of the Insular Cases. Legal scholars and critics of the Insular Cases view White’s opinion as “judicial inventiveness at its ultimate height.”¹²⁵ Justice White argues that the issue in the case of the territories is not whether the Constitution “followed the flag,” as that is self-evident, but whether the constitutional provision relied on is applicable.¹²⁶ He then analyzed the different territories acquired by the United States and concluded that, except for those annexed as a result of the Spanish-American War, the treaty of acquisition had specifically provided for the incorporation of the territory and eventual statehood.¹²⁷ Thus, in Justice White’s view, the treaty specifically provided for the non-incorporation of Puerto Rico into the Union.¹²⁸ Justice White concluded that just as a treaty could provide for incorporation, it could also withhold such action.¹²⁹

Next, Justice John Marshall Harlan in his dissent criticized the majority because its holding was contrary to long-established principles that the branches of government could only exercise enumerated powers.¹³⁰ In typical Harlan approach reflecting his concern for civil liberties and individual rights, Justice Harlan writes:

Congress has no existence and can exercise no authority outside of the Constitution. . . . Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this Government may not do consistent with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system. . . . The idea that this country may acquire territories anywhere upon the earth . . . and hold them as mere colonies or provinces the people inhabiting them to enjoy only such rights as Congress chooses to accord to them is

124. *Id.* at 279–80.

125. TORRUELLA, *supra* note 107, at 56.

126. *Id.* at 54.

127. *Id.* at 55.

128. *Id.*

129. *Id.*

130. *Id.* at 59.

wholly inconsistent with the spirit and genius as well as with the words of the Constitution.¹³¹

Justice Harlan's dissent isolates one of the flaws in the majority's analysis and in some of the subsequent cases dealing with the Insular Cases doctrine: "the failure to emphasize that in determining the rights and immunities of citizens and persons subject to the jurisdiction of the United States, the *status of the land* in which they are located should be of secondary importance to the status of those *individual citizens or persons*."¹³²

Lastly, the *Balzac v. Porto Rico* opinion, decided in 1922, affirmed that Puerto Ricans could only enjoy "fundamental" constitutional rights.¹³³ Over the next few years, the Court determined which rights were considered "fundamental." For example, as a result of the *Balzac* opinion, in 1924, the Supreme Court decided that the 19th Amendment, which granted women the right to vote, was not a "fundamental" right, thus, Puerto Rican women were not allowed to vote until 1929, nine years after women living in the 50 states.

B. *The Impact of the Insular Cases*

Contemporary law scholars view decisions such as *Downes* as evidence of racist American imperialism, allowing the U.S. to expand its empire without being compelled by the Constitution to accept as citizens the populations of an "uncivilized race."¹³⁴ In fact, Justice John Marshall Harlan's dissent in *Downes* notes that he objected to the morality and unfairness of the incorporation doctrine.¹³⁵ Additionally, the *González v. Williams* opinion highlights the double standard used by the *Downes* majority when dealing with Puerto Ricans' alien-citizen status.¹³⁶

In 1902, Isabel González, a Puerto Rican resident, flew to New York and was prevented from entering by the Immigration Commission, who claimed she was an "alien immigrant" pursuant to immigration acts¹³⁷ then in effect. Through Chief Justice Fuller, a unanimous Court ruled that after the ratification of the Treaty of Paris, the citizens of Puerto Rico were not "aliens" and thus not subject to exclusion as "alien immigrants" within the meaning of the immigration acts.¹³⁸ González contended that the cession of Puerto Rico accomplished the naturalization of Puerto Ricans.¹³⁹ *Amicus Curiae* Federico Degetau, Puerto Rico's then Resident Commissioner, further argued that the Foraker Act had made all Puerto Ricans citizens of

131. *Downes v. Bidwell*, 182 U.S. 222, 380 (1901) (Harlan, J., dissenting).

132. TORRUELLA, *supra* note 107, at 59; *Cf.*, *Reid v. Covert*, 354 U.S. 1, 65–66 (1957) (Harlan, J., dissenting); *Califano v. Torres*, 435 U.S. 1, 2–3 (1978); *Harris v. Rosario*, 446 U.S. 651, 652 (1980).

133. *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922).

134. See generally TORRUELLA, *supra* note 107.

135. *Downes v. Bidwell*, 182 U.S. 222, 380 (1901) (Harlan, J., dissenting).

136. *Gonzalez v. Williams*, 192 U.S. 1, 12 (1904).

137. *Isabel González and Puerto Rican Citizenship: A Q&A with Historian Sam Erman*, N.Y. HIST. SOC'Y (June 12, 2020), <https://www.nyhistory.org/blogs/isabel-gonzalez-and-puerto-rican-citizenship-a-qa-with-historian-sam-erman>. See generally Act of Mar. 3, 1891, ch. 551 26. Stat. 1084 (1891).

138. See *Gonzalez v. Williams*, 192 U.S. 1, 12 (1904).

139. *Id.* at 7.

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the United States.¹⁴⁰ However, the Court ignored both contentions, and instead limited its ruling to the statutory interpretation of the immigration act.¹⁴¹

This narrow ruling exemplifies the Court's *ad hoc* technique when dealing with Puerto Rican issues; in this case, permitting the free entry of Puerto Ricans into the United States because they are not "aliens," while refusing to extend to them the full protection of the Constitution.¹⁴²

As a result of the Insular Cases, the U.S. government continues to have sovereignty over Puerto Rico, but its citizens are not treated equally despite having to adhere to all federal laws, pay federal taxes, and pay federal import and export taxes. Moreover, the Insular Cases' interpretation of the Territory Clause is the interpretation that governs today. Although the Territory Clause was meant to be temporary while Congress guided the territories towards statehood, the Insular Cases deemed Puerto Rico as "unincorporated" and therefore not destined for statehood, which now essentially allows Congress to abuse the Territory Clause without having any real plan regarding the future of Puerto Rico.¹⁴³

The Insular Cases have been especially damaging for Puerto Ricans because Island residents must adhere to all federal laws and pay federal taxes into Social Security and Medicare, as well as pay federal import and export taxes. More recently, the devastation on the island in the wake of Hurricane Maria was related to the slow response by the U.S. government in sending aid. Because of the Merchant Marine Act of 1920 (*a.k.a.* The Jones Act), only American-built, American-owned, and American-crewed ships are allowed to dock on the island.¹⁴⁴

The Trump administration originally declared that it would not waive the Jones Act to facilitate aid from foreign nations reaching the Island.¹⁴⁵ This declaration was problematic because the Trump administration had previously waived the Jones Act to help Texas and Florida after Hurricanes Harvey and Irma struck those states earlier that same month. In addition, the Bush Administration issued Jones Act waivers after Hurricane Katrina and Hurricane Rita, and the Obama Administration issued a more limited Jones Act waiver after Hurricane Sandy.¹⁴⁶ The federal government had historically waived the Jones Act following a natural disaster; thus, this begs the question: Is there a financially exploitative rationale behind refusing to waive the Jones Act for Puerto Rico?

140. Brief for Federico Degetau, Resident Commissioner from Porto Rico as Amicus Curie, *Gonzalez v. Williams*, 192 U.S. 1 (1904).

141. *Gonzalez*, 192 U.S. at 12.

142. *See generally* *Gonzalez v. Williams*, 192 U.S. 1 (1904).

143. *Id.* at 10.

144. *See supra* Section II(C).

145. Amber Phillips, *Trump Just Lifted the Jones Act for Puerto Rico. Here's What That Does.*, THE WASH POST (Sept. 28, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/09/27/all-about-the-jones-act-an-obscure-shipping-law-thats-stalling-puerto-ricos-recovery>.

146. *President Bush Authorizes Second Jones Act Waiver After Hurricane Rita*, AM. SHIPPER (Sept. 28, 2005), <https://www.freightwaves.com/news/president-bush-authorizes-second-jones-act-waiver-after-rita>; Colin Sullivan, *Obama Admin Waives Jones Act to Help N.Y. Region Cope with Fuel Headaches*, E&E NEWS (Nov. 2, 2012 at 1:22 PM), <https://subscriber.politicopro.com/article/eenews/1059972007>.

V. REBUTTING COMMON JUSTIFICATIONS FOR PUERTO RICO'S EXCLUSION FROM FEDERAL BENEFIT PROGRAMS

A. *The Economic Disruption Theory*

The Economic Disruption theory hypothesizes that because of Puerto Rico's high poverty and unemployment rates, extending benefit programs such as SSI, LSI, and SNAP to the island may have an especially adverse impact on labor incentives.¹⁴⁷ However, as the Court in *Peña Martinez* notes, assuming that this theory is accurate, it makes little sense to wield it against certain groups of people, namely the aged, blind, and disabled, and other groups that, through no fault of their own, are generally not present in the workforce.¹⁴⁸

The Court concedes that the Economic Disruption theory is not completely baseless, however, it may not be rationally used to explain the exclusion of Puerto Rican citizens from these benefit programs.¹⁴⁹ These programs are meant to provide uniform benefits nationwide, regardless of the local poverty rate.¹⁵⁰ Moreover, the exclusion of Puerto Rican citizens encompasses a wide range of financially needy people, including the aged and disabled, for whom no "incentive" is suitable to place a job within their reach.

B. *In Deciding Eligibility for Benefit Programs, Congress Targets Communities, Not Individuals*

In previous litigation regarding the exclusion of territory residents from SSI benefits, the Government has argued that it is rational for Congress to "draw the line" of who qualifies for SSI benefits at a community-wide level, rather than an individual level, because of income fluctuations.¹⁵¹ For instance, an individual with an unstable income may be required to pay income taxes in one year but not another.

However, the Supreme Court considers this argument to be unpersuasive.¹⁵² By that same logic, it is possible for Puerto Rican residents to pay income taxes one year but not another, whether because they were employed by the federal government, had income from outside of the Island, or lived within the 50 States.¹⁵³

C. *The Territory Clause*

The U.S. Constitution grants Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory."¹⁵⁴ The Territory Clause gives Congress a unique source of authority over territories, which allows Congress to legislate differently with respect to a territory than it does with the other fifty

147. *Peña Martinez v. U.S. Dep't of Health and Hum. Servs.*, 478 F. Supp. 3d 155, 175 (D.P.R. 2020).

148. *Id.* at 173.

149. *Id.* at 174.

150. *Id.* at 180.

151. *Id.* at 175.

152. *Id.* at 175.

153. *See supra* Section II(A) (Puerto Ricans may be required to pay federal income tax on income made outside of the U.S. or if they worked for the federal government).

154. U.S. CONST. art. 2, § 3, cl. 2.

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states. The federal government has argued that this Clause is important because it means that the Constitution explicitly allows Congress to draw some distinctions with respect to the territories and do so routinely.

The issue is that the Territory Clause was likely intended to be temporary while Congress guided territories toward statehood. However, the Insular Cases have created a circumstance in which this temporary period has now become indefinite. The Insular Cases deemed Puerto Rico as unincorporated, and therefore not destined for statehood, which now essentially allows Congress to abuse the Territory Clause without any real plan regarding the future of Puerto Rico. For this reason, it is in Puerto Rico's best interest to overrule *Harris v. Rosario*, which holds that, pursuant to the Territory Clause, Congress may treat Puerto Rico differently from how it treats the 50 States if it has a rational basis for doing so.¹⁵⁵ The holding in *Harris* is based on *Califano v. Torres*, in which the Court concluded that Congress had a rational basis for enacting a similar statute based on three factors: (1) residents of Puerto Rico do not contribute to the federal treasury; (2) the cost of treating Puerto Rico as a state under the statute would be high; and (3) the disruption that increased benefits for recipients could bring to Puerto Rico's economy.¹⁵⁶

The first factor is not an entirely accurate statement because Puerto Ricans pay customs taxes, federal commodity taxes, and FICA taxes.¹⁵⁷ The second factor is addressed in Section II(A) of this article, in which it is noted that although Puerto Rico receives more money from the government than what it gives, this is not out of the ordinary, as 37 of 50 states do the same.¹⁵⁸ Thus, treating Puerto Rico as a state for purposes of a statute is likely to be just as costly to the federal government as it currently is for a majority of states. Lastly, the third factor is the Economic Disruption theory dispelled above.¹⁵⁹ As noted, wielding this theory against every financially needy individual makes little sense, since some groups (e.g., the blind, aged, and disabled) are out of the workforce through no fault of their own, and not because they lack the incentive to work.¹⁶⁰

VI. CONCLUSION

Adherence to the Insular Cases, which has no foundation in the Constitution and instead relies on racial stereotypes, has permitted the justification of exclusion from important social benefit programs, as exemplified by the *Vaello-Madero* decision. SSI is designed to support the neediest Americans; it is a program aimed at preventing severe poverty. In 2019, 43.5% of Puerto Rican residents lived below the poverty line, more than triple the national percentage of 12.3%.¹⁶¹ Despite a large portion of Puerto Ricans qualifying as "needy Americans," its residents are continuously denied federal benefits solely based on residency.

155. *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980).

156. *Califano v. Torres*, 435 U.S. 1, 5 n.7 (1978).

157. See 26 U.S.C. §§ 3101, 3111, 3121(e), 3301, 3306(j); See *supra* Section II(A).

158. See *supra* Section II(A).

159. See *supra* Section V(A).

160. See *supra* Section V(A).

161. Javier Balmaceda, *Tax Credit Expansion Expected to Significantly Reduce Poverty in Puerto Rico*, CENTER ON BUDGET AND POLICY PRIORITIES (Mar. 14, 2022), <https://www.cbpp.org/blog/tax-credit-expansions-expected-to-significantly-reduce-poverty-in-puerto-rico#:~:text=The%20two%20credits%20combined%20could,higher%2057%20percent%20for%20children>.

The differential treatment of Puerto Ricans cuts deeper than simply denying them federal benefits. Contemporary law scholars view the Insular Cases as evidence of racist American imperialism, allowing the U.S. to expand its empire without being compelled by the Constitution to accept as citizen populations of an “uncivilized race.” In fact, Justice John Marshall Harlan’s dissent in *Downes*, decided in 1901, noted that he objected to the morality and unfairness of the incorporation doctrine, which is still in effect today.¹⁶² It is important to note that the same Court that decided the 1901 Insular Cases also decided *Plessy v. Ferguson*, in which the Court upheld the legality of racial segregation and of the “separate but equal” doctrine. Notably, Justice Harlan was the lone dissenter in *Plessy*.¹⁶³ It is therefore evident that both the incorporation doctrine of the Insular Cases and the “separate but equal” doctrine were built on the same “racist worldview.” In fact, contemporary critics of the Insular Cases call the resulting doctrine “the doctrine of separate and unequal.”¹⁶⁴

Plessy has long been overturned, yet the Insular Cases remain in effect today. As a result, the U.S. government continues to have sovereignty over Puerto Rico, but its citizens are not treated equally despite having to adhere to all federal laws, pay federal taxes in some cases, and pay federal import and export taxes. However, not all hope is lost; Justice Harlan’s dissent in *Plessy*, along with Justice Thomas’s and Justice Gorsuch’s concurrences in *Vaello-Madero*, set the stage for how the next “modern Insular Case” case should be decided.¹⁶⁵ Justice Harlan’s dissent emphasized equal citizenship; he recognized that citizenship and equality go hand in hand.¹⁶⁶ His reasoning suggests that citizenship itself carries with it a right to equal treatment independent of the “equal protection of the laws” guaranteed to all persons under the Equal Protection Clause.¹⁶⁷ Similarly, Justice Thomas’s concurrence in *Vaello-Madero* notes that “[t]he Citizenship Clause’s conferral of the ‘dignity and glory of American citizenship’ should prohibit the federal government from denying citizens equality with respect to civil rights.”¹⁶⁸

President Woodrow Wilson once spoke of the U.S. territories as lying “outside the charmed circle of our own national life.”¹⁶⁹ He then admitted that, although Puerto Rico was once treated as a mere possession, it is now to be administered with the same sense of responsibility as toward citizens living on the mainland.¹⁷⁰ He said: “We can satisfy the obligations of generous justice toward the people of Puerto Rico by giving them the ample and familiar rights and privileges accorded our own citizens.”¹⁷¹ The question then remains: why has the United States, with its vision of greatness, and self-professed leader of the free world, refused for over 100 years to fully accept or free nearly four million U.S. citizens that make up part of its hidden empire?

162. *Downes v. Bidwell*, 182 U.S. 244, 380 (1901) (Harlan, J., dissenting).

163. *Plessy v. Ferguson*, 163 U.S. 537, 554 (1896) (Harlan, J., dissenting).

164. TORRUELLA, *supra* note 107, at 44–45.

165. John Fitisemanu, Pale Tuli, Rosavita Tuli, and Southern Utah Pacific Islander Coalition v. U.S.

166. *Plessy v. Ferguson*, 163 U.S. 537, 554 (1896) (Harlan, J. dissenting).

167. *Id.* at 555.

168. *United States v. Vaello Madero*, 142 U.S. 1539, 1552 (2022) (Thomas, J., concurring).

169. *Address of the President, Annual*, OFF. OF THE HISTORIAN (Dec. 2, 1913), <https://history.state.gov/historicaldocuments/frus1913/address-of-the-president>.

170. *Id.*

171. *Id.*