
*Fifth Amendment — Due Process Clause — Equal Protection —
U.S. Territories — United States v. Vaello Madero*

Equal protection under the Fifth Amendment guarantees that the federal government will not discriminate against individuals without a rational basis. Not in Puerto Rico. Last Term, in *United States v. Vaello Madero*,¹ the Supreme Court decided that Congress can deny benefits to residents of Puerto Rico on the basis of the tax status of the territory as a whole.² The Court rejected an equal protection claim for social security benefits without considering whether there was a rational basis for discriminating against the class of would-be beneficiaries. To do so, it conflated discrimination between political units with discrimination between individuals. Collapsing its equal protection analysis into its Territory Clause analysis, the Court rendered equal protection claims for discrimination on the basis of territorial residence all but nonjusticiable.

While living in New York, José Luis Vaello Madero started to receive Supplemental Security Income³ (SSI), a federal social security benefit available to any resident of the fifty states, the District of Columbia, or the Northern Mariana Islands⁴ whose income and assets fall below prescribed limits and who are blind, disabled, or sixty-five or older.⁵ In 2013, Vaello Madero moved to Puerto Rico.⁶ He continued to receive SSI payments until 2016, when he received notice that his residence in Puerto Rico disqualified him from receiving the benefit.⁷ A year later, the federal government sued him in the District of Puerto Rico to recoup the \$28,081 that it had accidentally paid him between 2013 and 2016.⁸

The government and Vaello Madero issued a joint statement of fact, and each moved for summary judgment.⁹ Granting Vaello Madero's motion,¹⁰ Judge Gelpí reasoned that fundamental constitutional rights — including Fifth Amendment due process rights and, through them, the equal protection guarantee¹¹ — constrain the federal government's actions in unincorporated territories such as Puerto Rico.¹² Under

¹ 142 S. Ct. 1539 (2022).

² *Id.* at 1544.

³ *Id.* at 1542.

⁴ *Id.*

⁵ *Id.* at 1558 (Sotomayor, J., dissenting).

⁶ *Id.* at 1542 (majority opinion).

⁷ *United States v. Vaello Madero*, 356 F. Supp. 3d 208, 211 (D.P.R. 2019).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 213 (citing *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), for the proposition that “[t]he Fifth Amendment’s Due Process Clause assures that the same equal protection principles of the Fourteenth Amendment generally constrain the federal government, even though the Equal Protection Clause by its terms does not”).

¹² *Id.* at 212–13.

equal protection, the government’s denial of Vaello Madero’s SSI benefits on the basis of his Puerto Rico residency could thus be sustained only if it survived rational basis review.¹³ Judge Gelpí found the classification by residence to be “by no means rational.”¹⁴ The government had justified the classification on the basis of the costs of extending the SSI program to Puerto Rico and the fact that Puerto Rico residents pay no federal income tax on Puerto Rico–derived income.¹⁵ However, these justifications were “belied” by the realities that almost no SSI recipients pay federal income tax due to their indigence, that Puerto Rico residents contribute to the federal treasury in other ways, and that residents of the Northern Mariana Islands as well as noncitizens on the mainland are eligible to receive SSI benefits.¹⁶ Instead, Judge Gelpí found that “[t]he principal purpose [of the classification] is to impose inequality” and that the classification thus could not survive rational basis review.¹⁷ Finally, Judge Gelpí rejected the government’s reliance on *Califano v. Torres*¹⁸ and *Harris v. Rosario*,¹⁹ two factually similar cases in which the Supreme Court found a rational basis for denying benefits to residents of Puerto Rico,²⁰ finding that he could not “ignore important subsequent developments in the constitutional landscape.”²¹

The First Circuit affirmed.²² Writing for the panel, Judge Torruella²³ analyzed the case assuming *Califano* and *Harris* remained good law²⁴ but found them inapposite: *Califano* was about whether the denial of SSI to residents of Puerto Rico violated the right to travel, not equal protection;²⁵ *Harris* was about block grants to states under a different program, not SSI’s individually distributed benefits.²⁶ Because *Califano* and *Harris* were summary dispositions, they were binding only as to

¹³ *Id.* at 213–14. The court applied this rational basis standard despite characterizing residents of Puerto Rico as a “politically powerless group.” *Id.* at 214. Equal protection typically requires that classifications that discriminate against politically powerless groups be reviewed under strict scrutiny. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16, 28 (1973). However, courts often discount this factor when classifications discriminate against disenfranchised residents of the District of Columbia and the U.S. Territories. See, e.g., *Quiban v. Veterans Admin.*, 928 F.2d 1154, 1160 (D.C. Cir. 1991) (R.B. Ginsburg, J.) (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Hodel*, 830 F.2d 374 (D.C. Cir. 1987)); *United States v. Cohen*, 733 F.2d 128, 135 (D.C. Cir. 1984) (en banc) (Scalia, J.) (citing *Swain v. Pressley*, 430 U.S. 372 (1977)).

¹⁴ *Vaello Madero*, 356 F. Supp. 3d at 214.

¹⁵ *Id.* at 214–15.

¹⁶ *Id.* at 215 & n.9.

¹⁷ *Id.* at 214 (first alteration in original) (quoting *United States v. Windsor*, 570 U.S. 744, 772 (2013)).

¹⁸ 435 U.S. 1 (1978) (per curiam).

¹⁹ 446 U.S. 651 (1980) (per curiam).

²⁰ See *Califano*, 435 U.S. at 3, 5; *Harris*, 446 U.S. at 651–52.

²¹ *Vaello Madero*, 356 F. Supp. 3d at 215 n.7 (citing *Boumediene v. Bush*, 553 U.S. 723 (2008); *Windsor*, 570 U.S. 744).

²² *United States v. Vaello-Madero*, 956 F.3d 12, 18 (1st Cir. 2020).

²³ Judge Torruella was joined by Chief Judge Howard and Judge Thompson.

²⁴ *Vaello-Madero*, 956 F.3d at 17–18.

²⁵ *Id.* at 20–21.

²⁶ *Id.*

“the precise issues presented and necessarily decided” and so were not dispositive in this case.²⁷ Moreover, the rational basis that *Califano* and *Harris* found was, in part, the “fact” that extending SSI benefits to Puerto Rico residents would disrupt Puerto Rico’s economy, a fact that had since become doubtful and was not argued in this case.²⁸ Thus treating this case as one of first impression, Judge Torruella found that the justifications offered by the government — the cost of extending SSI to Puerto Rico and the fact that federal income tax is not extended to Puerto Rico — could not serve as a rational basis for the classification.²⁹ Cost alone cannot be a rational basis for denying benefits to some individuals but not others because any benefit incurs costs.³⁰ Further, the income tax argument was inapposite because virtually no SSI recipients pay federal income tax.³¹ Conceding that equal protection permits distinctions that lack “mathematical nicety,” Judge Torruella still found the classification in this case to be “wholly without any rational basis.”³²

The Supreme Court reversed.³³ Writing for the Court, Justice Kavanaugh³⁴ held that the Territory Clause of Article IV “affords Congress broad authority to legislate with respect to the U.S. Territories,” including the authority to legislate “differently with respect to the Territories . . . than it does with respect to the States.”³⁵ This authority lets Congress structure unique packages of taxes and benefits for the territories so long as there is a rational basis for doing so.³⁶ The package Congress designed for Puerto Rico does not include the SSI benefit nor “most federal income, gift, estate, and excise taxes.”³⁷ Though *Califano* and *Harris* were decided in different contexts, each held that Congress’s choice not to extend a tax to residents of Puerto Rico was a rational basis for Congress’s choice not to extend a welfare benefit to residents of Puerto Rico.³⁸ Justice Kavanaugh found those results controlling.³⁹ Regarding the objections to the income tax rationale, he found that “Congress need not conduct a dollar-to-dollar comparison of how its tax and benefits programs apply in the States as compared to the Territories,

²⁷ *Id.* at 21 (quoting *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1979)).

²⁸ *Id.* at 21–23.

²⁹ *Id.* at 23.

³⁰ *See id.* at 29.

³¹ *Id.* at 27. Acknowledging that SSI recipients on the mainland might have paid federal income tax before becoming eligible for SSI, Judge Torruella found that equal protection does not permit the distribution of state services or benefits on the basis of past contributions to the public fisc. *Id.* at 26 (citing *Zobel v. Williams*, 457 U.S. 55, 63 (1982)).

³² *Id.* at 27–28 (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 538 (1973)).

³³ *Vaello Madero*, 142 S. Ct. at 1544.

³⁴ Justice Kavanaugh was joined by Chief Justice Roberts and Justices Thomas, Breyer, Alito, Kagan, Gorsuch, and Barrett.

³⁵ *Vaello Madero*, 142 S. Ct. at 1541.

³⁶ *Id.* at 1542–43.

³⁷ *Id.* at 1543.

³⁸ *Id.*

³⁹ *Id.*

either at the individual or collective level.⁴⁰ Finally, he noted that if equal protection required equal benefits in the states and territories, state residents could challenge the lower taxation of territorial residents.⁴¹

Justice Thomas concurred, writing separately to propose that Fifth Amendment due process does not incorporate Fourteenth Amendment equal protection against the federal government.⁴² In his view, until *Bolling v. Sharpe*,⁴³ Fifth Amendment due process required only a rational basis for legislation and imposed no equal protection limit on federal action.⁴⁴ *Bolling* incorporated this requirement against the federal government using *Lochner*-era substantive due process,⁴⁵ a theory that “strains credulity” because it sits uneasily with the constitutional text and pre-Civil War historical understandings⁴⁶ and relies on an overbroad conception of liberty.⁴⁷ Reading the Fifth Amendment Due Process Clause to include an equal protection guarantee also makes the Fourteenth Amendment Equal Protection Clause redundant in light of the Fourteenth Amendment Due Process Clause.⁴⁸ Further, *Bolling* relied on a “debatable” and out-of-scope “moral judgment[]” that it would be “unthinkable” for the Constitution to hold the federal government to a lower standard than the states.⁴⁹ Instead, according to Justice Thomas, Fifth Amendment due process is just “a separation-of-powers concept designed as a safeguard against unlicensed executive action.”⁵⁰ He “tentative[ly]” concluded that the Fourteenth Amendment Citizenship Clause might “still prohibit the Federal Government from discriminating on the basis of race, at least with respect to civil rights.”⁵¹

Justice Gorsuch also concurred, arguing that the *Insular Cases*⁵² should be overturned.⁵³ After discussing the colonial history of the

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See id.* at 1544 (Thomas, J., concurring).

⁴³ 347 U.S. 497 (1954).

⁴⁴ *Vaello Madero*, 142 S. Ct. at 1544 (Thomas, J., concurring).

⁴⁵ *Id.* at 1544–45 (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

⁴⁶ *Id.* at 1545.

⁴⁷ *Id.* at 1546.

⁴⁸ *Id.*

⁴⁹ *Id.* (quoting *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954)).

⁵⁰ *Id.* at 1545.

⁵¹ *Id.* at 1547. Justice Thomas surveyed pre- and post-Civil War statements to illustrate that the contemporaneous popular, legislative, and judicial understanding, *see id.* at 1547–51, was “that citizenship and equality went hand in hand and that equal citizenship prohibited the Federal Government . . . from discriminating with respect to civil rights,” *id.* at 1551.

⁵² The *Insular Cases*, decided at the turn of the twentieth century, established that only “fundamental” provisions of the Constitution apply in territory that Congress did not intend to “incorporate” into the United States. *See, e.g., Dorr v. United States*, 195 U.S. 138, 143, 146–49 (1904). The Court decided these cases on explicitly white-supremacist grounds, out of fear of politically empowering “alien races” for whom “the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible,” *Downes v. Bidwell*, 182 U.S. 244, 287 (1901), and who “were wholly unfitted to exercise” certain constitutional rights, *Dorr*, 195 U.S. at 145.

⁵³ *Vaello Madero*, 142 S. Ct. at 1552 (Gorsuch, J., concurring).

United States's imperial acquisition of the territories,⁵⁴ he explained that the *Insular Cases*' theory that only unspecified, "fundamental" rights apply in unincorporated territories was based on the racist belief that the peoples of the newly acquired islands were racially or socially "unfit" for the Constitution.⁵⁵ Justice Gorsuch argued that the Constitution does not distinguish between incorporated and unincorporated territories nor between fundamental and nonfundamental rights and does not "authorize[] judges to engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion."⁵⁶ Instead of overruling the *Insular Cases*, the Court has "drain[ed] . . . some of their poison" by declaring more and more rights fundamental, and thus applicable in unincorporated territories, but that solution is "as ineffectual as it is inappropriate," as the task is still "unfinished" and lower courts are still constrained by the *Insular Cases* framework.⁵⁷ Nonetheless, because the litigants in *Vaello Madero* agreed that Fifth Amendment equal protection is fundamental, and thus applicable in Puerto Rico, the case presented no opportunity to reconsider the *Insular Cases* and thus "defer[red] a long overdue reckoning."⁵⁸

Justice Sotomayor dissented, arguing that there was no rational basis for the denial of SSI benefits to residents of Puerto Rico.⁵⁹ Conceding that *Califano* and *Harris* held that Puerto Rico's tax status can justify unequal treatment, she maintained that they cannot justify "any and all unequal treatment"⁶⁰ and argued that they are each distinguishable: *Califano* did not consider SSI under the equal protection framework, and *Harris* considered a block grant program, not a "uniform, federalized, direct-to-individual . . . program like SSI."⁶¹ Further, *Califano* and *Harris* each relied on "the mistaken premise that residents of Puerto Rico do not contribute at all to the Federal Treasury," whereas the government conceded here that they do.⁶² Treating the question as one of first impression, Justice Sotomayor contended that because SSI recipients on the mainland pay no federal income tax, it is irrational to exclude residents of Puerto Rico "on the basis that they do not pay enough

⁵⁴ See *id.* at 1552–53.

⁵⁵ *Id.* at 1553 (quoting *Downes*, 182 U.S. at 291, 306 (White, J., concurring)). Shamefully, a leading platform for these racist theories was the *Harvard Law Review*. See *id.* at 1552–53 (citing C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions — A Third View*, 13 HARV. L. REV. 155 (1899)).

⁵⁶ *Id.* at 1554.

⁵⁷ *Id.* at 1556.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1557 (Sotomayor, J., dissenting).

⁶⁰ *Id.* at 1560.

⁶¹ *Id.*

⁶² *Id.*

taxes,” as that fact does not distinguish the two disparately treated classes.⁶³ Finally, she argued the majority’s holding allowed Congress to exclude beneficiaries from the states that contribute less to the federal treasury.⁶⁴

Despite making overtures to the Territory Clause, Justice Kavanaugh’s majority opinion did not deny that the right to equal protection extends to Puerto Rico, as the judges below had found.⁶⁵ Given the case’s posture and the Court’s precedents, even Justice Sotomayor and the reversed judges below agreed that the case should be analyzed on a rational basis standard.⁶⁶ Because that standard is very deferential,⁶⁷ it is not surprising that the government prevailed. Still, by collapsing the equal protection analysis into the Territory Clause analysis, the majority found a rational basis for only one distinction — between Puerto Rico and the states — and not for the distinction between SSI candidates in Puerto Rico and those on the mainland. The result is the denial of Fifth Amendment equal protection rights to residents of the territories.

Declining to extend SSI to Puerto Rico, Congress implicitly made two distinctions. First, it distinguished Puerto Rico⁶⁸ from the states, treating the two classes differently for social security purposes. Second, it distinguished between would-be SSI recipients living in Puerto Rico and those living on the mainland. Everyone in this case — the parties,⁶⁹ the Justices,⁷⁰ and the courts below⁷¹ — agreed that the Constitution required Congress’s distinction to have a rational basis, but they did not agree on *which* distinction needed a rational basis: the disfavored treatment of Puerto Rico vis-à-vis the states, or that of SSI candidates in Puerto Rico vis-à-vis SSI candidates on the mainland. This question was not squarely addressed by any opinion, was not briefed, and was not analyzed by the courts below. But it decides this case.

While the government’s proposed grounds survive scrutiny when applied to the distinction between Puerto Rico and the states, they are not a rational basis for the distinction between territorial and state residents.

⁶³ *Id.* at 1561 (citing *United States v. Vaello-Madero*, 956 F.3d 12, 27 (1st Cir. 2020)).

⁶⁴ *Id.* at 1562. However, the majority opinion expressly cautioned that the decision “should not be read to imply that Congress may exclude residents of individual States from benefits programs,” as that issue was not before the Court. *Id.* at 1543 n.1 (majority opinion).

⁶⁵ *See id.* at 1542–43.

⁶⁶ *See id.* at 1557 (Sotomayor, J., dissenting); *Vaello-Madero*, 956 F.3d at 18; *United States v. Vaello Madero*, 356 F. Supp. 3d 208, 213–14 (D.P.R. 2019).

⁶⁷ Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2074 (2015).

⁶⁸ Congress also distinguished the other territories, though it later added the Northern Mariana Islands to the SSI program by statute. *See Vaello Madero*, 142 S. Ct. at 1542.

⁶⁹ *See id.* at 1556 (Gorsuch, J., concurring).

⁷⁰ *See id.* at 1557 (Sotomayor, J., dissenting).

⁷¹ *See Vaello-Madero*, 956 F.3d at 18; *Vaello Madero*, 356 F. Supp. 3d at 213–14.

The majority rightly found a rational basis to treat Puerto Rico differently from the states.⁷² Puerto Rico pays into the federal treasury but not as much per capita as do the states.⁷³ The territory is exempt from some burdens imposed on the states — namely, “most federal income, gift, estate, and excise taxes”⁷⁴ — so it is reasonable that it would receive fewer federal benefits. In a sense, Puerto Rico does not purchase all the benefits purchased by the states. Pay less at the pump, expect less gas.

But the picture is very different for the distinction between SSI candidates in Puerto Rico and those on the mainland: the basis for this distinction is not rational at all, as Justice Sotomayor explained.⁷⁵ The government gave only two purportedly rational bases for treating Puerto Rico residents differently for SSI purposes: federal taxation and cost.⁷⁶ However, neither of these distinguishes would-be SSI recipients in Puerto Rico from SSI recipients in the states.⁷⁷ The cost of the benefit is the same wherever the beneficiary lives, and, due to indigence, virtually no SSI recipients pay federal income tax.⁷⁸ Though these considerations differentiate Puerto Rico from the states, they do not differentiate between any individual SSI candidates. The only grounds asserted are thus “wholly irrelevant”⁷⁹ to the unequal treatment of the individuals, so Justice Sotomayor correctly found no rational basis for this classification.

While the majority considered only the territory-state distinction, and Justice Sotomayor considered only the islander-mainlander distinction, the government needed a rational basis for both distinctions to prevail. As Justice Kavanaugh noted, the Territory Clause allows Congress to treat territories differently from the states only “so long as Congress has a rational basis for doing so.”⁸⁰ But Vaello Madero presented a different question: whether equal protection allows Congress to distinguish would-be SSI recipients in Puerto Rico from those on the mainland.⁸¹ Equal protection, which bars improper discrimination against

⁷² See *Vaello Madero*, 142 S. Ct. at 1543.

⁷³ Compare *Vaello-Madero*, 956 F.3d at 24–25 (finding Puerto Rico contributes more to the federal treasury than do the six least-contributing states), with U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2010 TO JULY 1, 2019 (2019), <https://www2.census.gov/programs-surveys/popest/tables/2010-2019/state/totals/nst-est2019-01.xlsx> [<https://perma.cc/YBW5-ZEAB>] (showing Puerto Rico’s population is greater than that of twenty-one states).

⁷⁴ *Vaello Madero*, 142 S. Ct. at 1541.

⁷⁵ *Id.* at 1560–61 (Sotomayor, J., dissenting).

⁷⁶ See *Vaello-Madero*, 956 F.3d at 19.

⁷⁷ *Vaello Madero*, 142 S. Ct. at 1561 (Sotomayor, J., dissenting).

⁷⁸ *Id.*

⁷⁹ *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

⁸⁰ *Vaello Madero*, 142 S. Ct. at 1543; see also *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980) (per curiam).

⁸¹ See *Vaello Madero*, 142 S. Ct. at 1541.

individuals, not against political units,⁸² is an additional constraint on federal action, on top of that of the Territory Clause.⁸³ Further, the Court has recognized that equal protection is a fundamental right and that it thus extends to Puerto Rico⁸⁴ despite the Territory Clause.⁸⁵ So the government still needs at least a rational basis when it classifies individuals and thereby denies them benefits. The Court appears not to have considered this dual requirement, perhaps because both analyses employed a rational basis standard of review and perhaps because *Harris*, a two-page summary disposition, made the same mistake.⁸⁶ Instead, the Court found a rational basis for the territory-state distinction under the Territory Clause without addressing the islander-mainlander distinction under equal protection.

The majority's findings about the tax status of Puerto Rico as a whole cannot support the individual distinction in this case. While rational basis review requires no perfect fit between the traits of the burdened individual and the grounds for disfavoring the burdened class, the distinction in this case is not an overgeneralization but rather a misclassification. In *New York City Transit Authority v. Beazer*,⁸⁷ the City banned narcotics users, including methadone users, from certain government jobs, citing public safety concerns.⁸⁸ A subclass of methadone users showed that they were not nearly as much of a threat to public safety as the other class members, as a "strong majority" . . . [were] free from illicit drug use."⁸⁹ The public safety rationale thus would not distinguish them from nonusers. Nonetheless, the classification survived equal protection review because the basis for the distinction need only

⁸² The Fourteenth Amendment requires that no state government "deny to *any person within its jurisdiction* the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added). The Fifth Amendment Due Process Clause, which incorporates the equal protection restriction against the federal government, *see* *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954), similarly requires that "[n]o *person* shall . . . be deprived of life, liberty, or property, without due process of law," U.S. CONST. amend. V (emphasis added).

⁸³ The Territory Clause appears in the body of the Constitution, *see* U.S. CONST. art. IV, § 3, cl. 2, while the equal protection guarantees appear in later amendments to the document, *see id.* amend. V; *id.* amend. XIV, § 1.

⁸⁴ *See* *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599–601 (1976) (holding that at least one of the Fifth or Fourteenth Amendment equal protection guarantees is fundamental and extends to Puerto Rico); *cf.* *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 & n.5 (1974) (holding that at least one of the Fifth or Fourteenth Amendment due process guarantees is fundamental and extends to Puerto Rico). At the very least, the parties to this suit all agreed that equal protection extends to Puerto Rico. *Vaello Madero*, 142 S. Ct. at 1556 (Gorsuch, J., concurring). That said, in some previous cases, such as *Harris*, the Court made the same mistake as it did here, treating the Territory Clause analysis as dispositive without proceeding to an equal protection analysis. *See Harris*, 446 U.S. at 651–52; *see also id.* at 654 (Marshall, J., dissenting) ("Heightened scrutiny under the equal protection component of the Fifth Amendment, the Court concludes, is simply unavailable to protect Puerto Rico or [its] citizens . . .").

⁸⁵ *Cf. Dorr v. United States*, 195 U.S. 138, 146–47 (1904).

⁸⁶ *See Harris*, 446 U.S. at 651–52.

⁸⁷ 440 U.S. 568 (1979).

⁸⁸ *Id.* at 571–72.

⁸⁹ *Id.* at 575 (quoting *Beazer v. N.Y.C. Transit Auth.*, 399 F. Supp. 1032, 1047 (S.D.N.Y. 1975)).

be true of the disfavored class in general, not of every subclass.⁹⁰ At first glance, Vaello Madero seems to have advanced an argument like the *Beazer* plaintiffs': by hinging indigent Puerto Ricans' SSI eligibility on the tax status of all Puerto Ricans, Congress made an overbroad classification, lumping in a subclass for whom the rationale makes little sense (Puerto Rican SSI candidates) with a broader class for whom it does (Puerto Ricans in general). This argument would fail because rational basis review permits such overgeneralizations.

However, the distinction in this case is not an overgeneralization, but rather a misclassification. In *Beazer*, the distinguished classes were users and nonusers. Though the rationale for the distinction did not apply to the plaintiffs' subclass, it did generally distinguish the disfavored user class from the nonuser class.⁹¹ Here, in the equal protection context, the distinguished classes are would-be SSI recipients in Puerto Rico and SSI-eligible individuals on the mainland. The rationales offered do not distinguish at all, not even in general, between these two classes: the cost of extending SSI to a member of either class is identical, and no federal income tax is received from members of either class. By denying SSI benefits to indigent Puerto Ricans because wealthier Puerto Ricans do not pay federal income tax,⁹² the Court did not simply overgeneralize, denying benefits to an unusual subclass on the basis of traits of the broader class. Instead, it denied a benefit to the entire class on the basis of the traits of a wholly different class that happens to live on the same island.

Another counterargument might suggest that the tax status of wealthier members of the community could constitute a rational basis for treating indigent individuals differently because of a community's duty to look after its own. Because wealthy Puerto Ricans pay less federal tax, they, and not the treasury, should look after Puerto Rico's poor. However, that reasoning is particularly ill suited to Puerto Rico. Many Puerto Ricans, including Vaello Madero himself, move to the mainland to work,⁹³ leaving the elderly and disabled (that is, the would-be SSI beneficiaries) at home.⁹⁴ While on the mainland, Puerto Ricans do pay

⁹⁰ *Id.* at 592–93 (“[I]t is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts of the classification as it is with respect to the classification as a whole.” *Id.* at 593 (citing *Mathews v. Diaz*, 426 U.S. 67, 83–84 (1976))).

⁹¹ *Id.* at 592.

⁹² See *Vaello Madero*, 142 S. Ct. at 1543.

⁹³ See D'VERA COHN, EILEEN PATTEN & MARK HUGO LOPEZ, PEW RSCH. CTR., PUERTO RICAN POPULATION DECLINES ON ISLAND, GROWS ON U.S. MAINLAND 4, 8 (2014) (finding more than a quarter of people born in Puerto Rico live on the United States mainland, with almost half having moved for work).

⁹⁴ Those sixty-five and older make up 16% of the population of the United States, ADMIN. FOR CMTY. LIVING, 2020 PROFILE OF OLDER AMERICANS 3 (2021), https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2020ProfileOlderAmericans.Final_.pdf [<https://perma.cc/4Z6N-UL8D>], and over 21% of the population of Puerto Rico, *American Community Survey: Selected Population Profile in Puerto Rico*, U.S. CENSUS BUREAU (2019), <https://>

federal income tax.⁹⁵ If a Texan worked anywhere on Earth (other than a U.S. territory), she would pay federal income tax, and the treasury would pay SSI to the vulnerable citizens she left behind in Texas.⁹⁶ Despite moving so much for work, residents of the territories (other than the Northern Marianas) are uniquely denied that privilege: when they work on the mainland, they pay the treasury, but the treasury will not look after those they leave behind. The members of the Puerto Rican community that might, in a sense, be responsible for caring for its indigent do pay their share — but they are not counted in the community defined by the majority's line around the island.

While cost and tax status justify treating the territories differently from the states, they cannot serve as a rational basis for treating individual would-be SSI recipients differently based on their residency in Puerto Rico. Thus, while the Court was right to hold that the SSI scheme does not violate the Territory Clause, it was wrong to treat that determination as conclusive regarding Vaello Madero's equal protection claim. Though the Court and the parties in this case all acknowledged that the Constitution's equal protection guarantees apply in Puerto Rico, the result in this case, treating the Territory Clause analysis as dispositive as to the equal protection claim, threatens to make that guarantee nonjusticiable. When the Court made this same mistake in *Harris*, Justice Marshall noted that it threatened to make "[h]eighted scrutiny . . . unavailable to protect Puerto Rico or [its] citizens."⁹⁷ Under *Vaello Madero*, even rational basis review is at risk. So long as claims of discrimination based on territorial residence are analyzed solely under Article IV, the fundamental right of equal protection offers no protection based on territorial residence.

data.census.gov/cedsci/table?q=puerto%20ricans&tid=ACSSPP1Y2019.S0201PR [https://perma.cc/4WLD-XNUF]. Almost 22% of Puerto Rico's population is disabled, *id.*, compared with nearly 13% of the U.S. population, *Anniversary of Americans with Disabilities Act: July 26, 2021*, U.S. CENSUS BUREAU (May 26, 2021), https://www.census.gov/newsroom/facts-for-features/2021/disabilities-act.html [https://perma.cc/9EBM-SGRB].

⁹⁵ See *United States v. Vaello-Madero*, 956 F.3d 12, 25 (1st Cir. 2020).

⁹⁶ See Glen E. Frost & Mary F. Lundstedt, *Tax-Weary Americans Find Haven in Puerto Rico*, FROST LAW, https://www.districtofcolumbiataxattorney.com/articles/tax-weary-americans-find-haven-in-puerto-rico [https://perma.cc/2KJ6-3DJB].

⁹⁷ *Harris v. Rosario*, 446 U.S. 651, 654 (1980) (Marshall, J., dissenting).