



Puerto Rican Rights at SCOTUS and Throughout History

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[00:00:00] Jeffrey Rosen: Hello friends, I'm Jeffrey Rosen, president and CEO of the National Constitution Center. And welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan non-profit chartered by Congress to increase awareness and understanding of the constitution among the American people. This week, the Supreme Court had oral arguments in United States versus Vaello Madero. The case that asked whether the US government violated the constitution by establishing certain government benefits, but not extending them to Puerto Rico. Today we'll unpack the argument and the important legal precedence with two of America's leading experts on Puerto Rico and the constitution. Neil Weir is president and founder of Equally American. Raised in the US territory of Guam, Neil previously worked for Guam's non-voting delegate Madeleine Bordallo. And he was previously litigation council and Supreme Court fellow at the constitutional accountability center. Neil, thank you so much for joining.

[00:01:00] Neil Weir: Thanks so much, really glad to join and appreciate you guys focusing on these issues.

[00:01:04] Jeffrey Rosen: And Christina D. Ponsa Kraus is the George Wellwood Murray professor of legal history at Columbia Law School. Raised in Puerto Rico, she studies the legal issues surrounding Puerto Rico and other US territories and has written widely about these issues. She's currently working on a study of recent legal developments affecting this status of the US territories. Christina, thank you so much for joining.

[00:01:25] Christina D. Ponsa-Kraus: Thank you for having me. It's a pleasure to be here.

[00:01:28] Jeffrey Rosen: Well, so looking forward to learning about this fascinating case. Let's begin with the facts. Neil, what is at issue here and what's the nature of the constitutional dispute?

[00:01:42] Neil Weir: So one of the things that's really interesting about this case involving, you know, kind of a civil rights question, a benefits question is that Mr. Vaello Madero is actually not a plaintiff in the case, he's a defendant. He's an individual. Lived most of his life in Puerto Rico, moved to New York state where he developed health issues, began receiving SSI benefits while living in New York. Moved back home to be with his family and a support network there. And unbeknownst to him, 30 days after moving to Puerto Rico he became ineligible to receive SSI benefits simply because of his zip code. A few years later he changed his address with SSA

there, and they said, "Wait a minute, you've been receiving these benefits that you aren't entitled to." They didn't even give him notice of the nearly \$30,000 that they said he owed them. And instead the US attorney in Puerto Rico filed a lawsuit against him.

[00:02:40] This is an individual who receives SSI benefits only because he's extremely poor and disabled. And yet here you have the US attorney's office asking the guy to pay \$28,000. The case comes before Judge [Helpi 00:02:56] who was recently confirmed to the first circuit and Judge Helpi said, "Wait a minute, this person needs some representation." So he actually appointed pro bono counsel at a New York law firm, Curtis, Mallet to represent Mr. Vaello Madero. Shortly thereafter the United States said, well, um, in that case, uh, we'll withdraw from the case. Uh, we'll withdraw the claim. And Judge Helpi actually said, "No, why don't we see where this goes?"

[00:03:21] Judge Helpi ruled favorably for Mr. Vaello, who defended his- himself by saying the denial of these benefits in Puerto Rico is unconstitutional under the equal protection clause. He won in the district court. He won in a unanimous panel, um, before the first circuit written by the late Judge Toya. And, you know, here we are now at the US Supreme Court, uh, considering whether someone who is otherwise eligible for these federal benefits can be denied them simply based on where they happen to live.

[00:03:51] Jeffrey Rosen: Thank you so much for that and for helping us understand that Mr. Vaello Madero lost his eligibility for social security benefits when he moved from New York state and became a resident of Puerto Rico. Christina, the government in this case argues that Supreme Court precedents from 1978 and 1980 have previously held that residents of Puerto Rico can be treated differently than other US citizens because they're generally exempt from most federal taxes including the income tax and therefore Congress could rationally conclude that a jurisdiction makes a reduced contribution to the general federal treasury should receive a reduced share of benefits funded by the general treasury. Tell us about those central cases that the government is relying on that say that it is rational to treat residents of Puerto Rico differently than other US citizens for these purposes.

[00:04:46] Christina D. Ponsa-Kraus: Sure. So there are two cases, as you said, uh, one from the late seventies and another one from 1980. Those cases concerned, uh, benefits as this one does. The first one, uh, was a challenge to the same exclusion that's at issue in this case, the exclusion of residents of Puerto Rico from the SSI program, uh, the supplemental security income program, which provides benefits for the disabled. And, uh, in that case the challenge was a right to travel challenge.

[00:05:18] So the challenger, uh, argued that, uh, his right to travel from, uh, his home state to Puerto Rico where he relocated had been violated, uh, when he became ineligible for those benefits when he arrived in Puerto Rico. So that case was a per curiam decision which means there was, uh, no, uh, argument. It was a short opinion by the court saying Congress can treat Puerto Rico differently in this way because, as you said, Puerto Rico is a territory. It has a different tax relationship to the federal government. Puerto Ricans are exempt from certain federal taxes, not all for sure, but certain ones including federal income taxes and the court in

that case cited, uh, in a footnote three reasons why it was rational to exclude residents of Puerto Rico from this program.

[00:06:13] Those reasons, uh, included that as the court put it, Puerto Ricans do not contribute to the federal treasury, which is not true. They do contribute some to the federal treasury. So that was a mistake. The second was that it would cost too much to provide these benefits in Puerto Rico because so many people would qualify for them there. And then the third was that providing these benefits would disrupt the local economy, which again is quite a problematic way of reasoning, uh, given that what it seems to imply is that if you have many needy people who need to receive assistance, then you shouldn't give them the assistance, because it will disrupt the economy.

[00:06:53] Those were the reasons that the court went with in this per curiam opinion. The subsequent case was an equal protection challenge like this one, but it concerned a different set of benefits. AFDC, uh, Aid, uh, for Families with Dependent Children. The residents of Puerto Rico were not eligible for those, uh, benefits. They received a different kind of benefit which is capped. And the court once again upheld this exclusion citing Puerto Rico status as a territory, citing these same reasons that it had given in the previous case and holding that it was rational to exclude Puerto Ricans from these benefits on these grounds. So in both cases the court applied rational basis review, reasoning that Puerto Rico is a territory and can be treated differently and then gave these rationales for why the exclusion was rational.

[00:07:44] Jeffrey Rosen: Thank you very much for that very clear explanation of these two important cases, *California v Torres* and *Harris versus Rosario* and their reasons for holding that it was rational to treat Puerto Rico differently for these purposes. Neil, let's put those two cases in historical context, and now let's go back to the earlier cases and tell us about the legal status of Puerto Rico more generally and how has it been treated differently for purposes of the constitution throughout the 20th century?

[00:08:20] Neil Weir: Yeah, absolutely. In those decisions in the seventies and eighties, the court kind of cited in passing a series of decisions that have come to be known as the insular cases. And, and these are Supreme Court decisions decided in the early 1900s by basically the same court that decided *Plessy versus Ferguson*. And in these decisions the court really grappled with a question that was presented to the country, following the Spanish-American war and the acquisition of overseas territories like Puerto Rico, Guam and the Philippines. And the question there really was, as it was known at the time, does the constitution follow the flag to these areas?

[00:09:01] Um, can the United States acquire these areas and, and what constitutional rights necessarily extend to the people who live there? This was a controversial question at the time. Uh, even rose to the level of national politics with president McKinley running his reelection campaign on this idea that America can become an imperial empire and his opponent campaigning against him on the grounds that empire is inconsistent with America's constitutional principles. McKinley won that presidential election, and the pressure was on the court to deliver a result that allowed the United States to acquire and govern these areas, but did not extend the

rights, benefits, and particularly, you know, citizenship and voting power were at issue when the court considered these issues.

[00:09:49] But the cases themselves didn't arise in kind of this grand context of, you know, rights or voting rights. They actually came up in the context of a shipment of oranges from Puerto Rico to New York, and what kind of tariffs could be levied on them. So the most prominent of the cases *Downes versus Bidwell* was a question about whether the uniformity clause of the constitution applied in Puerto Rico and looked at really was Puerto Rico part of the "United States" for purposes of the uniformity clause. The Supreme Court was deeply divided. There actually were five different opinions at a time when this was not very common as, as it is today. The majority actually was three different opinions fractured among the five justices who voted in favor of saying that Puerto Rico is indeed not part of the United States. One of the opinions, uh, written by justice White established this doctrine that became to known as the incorporation doctrine and was later adopted by the court by additional members of the court, that basically established and invented from whole cloth two separate categories of territories.

[00:10:55] One that would known as incorporated territories that were on the path to the statehood where the constitution would apply. The other category of territories, so called unincorporated territories, which was limited to these newly acquired overseas islands inhabited by people of different races, ethnicities who spoke different languages would be called unincorporated territories. They would not be on the path to statehood. And, and the presumption was that certain constitutional rights did not extend to those citizens.

[00:11:25] Now the exact scope and breadth of the Supreme Court cases has been highly debated over the years with the cases themselves only addressing relatively narrow issues about the uniformity clause, about jury trial and just a handful of other issues. But lower courts have relied on the insular cases framework to address a broad range of constitutional issues and it's caused great confusion among the lower court judges, among scholars, among, among litigators. And this idea that Judge Chevalier phrased as a doctrine of separate and unequal, that residents of the territories don't have the same rights as other Americans, simply because where they live and as we could talk about more, this became a hot topic during, uh, the argument in *Vaello Madero*.

[00:12:16] Jeffrey Rosen: Thank you so much for this. It did indeed become a hot topic and it was fascinating that conservative as well as liberal justices were interested in the government's position on the insular cases, Justice Gorsuch says what is the government's position on the insular cases. And Mr. Gannon for the government responded that some of the reasoning and rhetoric is obviously anathema, but they're not an issue in this case because the conclusion that parts of the constitution wouldn't apply to Puerto Rico doesn't decide anything relevant. Here, here the equal protection component of the constitution applies, and the court doesn't have to say anything about whether there might be different provisions of the constitution that apply differently. Christina, there's a fascinating series of debates by originalists arguing that the insular cases were inconsistent with the original understanding of the constitution. Michael Ramsey has a recent blog in the originalism blog, the non-originalist insular cases. Tell us about the originalist case against the insular cases and why some conservatives as well as, uh, liberals, think they should be overturned.

[00:13:20] Christina D. Ponsa-Kraus: Well, as Neil explained, the insular cases created a distinction between two categories or classes of US territories that had never existed. So the United States of course has had territories since the founding. At the very beginning, we had the territories that, that the original 13 states seated to the federal government for its control. And the constitution has a territory clause which empowers Congress to dispose of and make all needful rules and regulations respecting the territory and property of the United States. In other words, empowering Congress to govern the territories. Soon after the founding came the Louisiana purchase and we annexed additional territory and we continued annexing territory across the continent for the entire 19th century. The assumption with respect to every annexed territory until the insular cases was that such territory would eventually be admitted into statehood. The Northwest ordinance was the first organic act that refers to a law establishing a government in a territory.

[00:14:38] So the Northwest ordinance was the first organic act creating a government for the Northwest territory. And it assumed that those territories would eventually become states and subsequent organic acts and Congress' subsequent governance of the territories was simply based on this assumption. So the original understanding, the practice following the original understanding, the assumption surrounding the territories was always we annex territory in order to admit it into statehood eventually. And this is what throughout the 19th century served as a justification for the otherwise colonial status of territories. So territories do not have federal representation. They do have a non-voting representative who serves in the house, the current territories have that along with Puerto Rico, they are the US Virgin islands, the Northern Mariana islands, Guam and American Samoa. So over time there have been variations on how territories were represented. But one thing has always been a constant, no voting representation.

[00:15:42] These representatives have no vote on legislation. So territories never have had senators or representatives or participation in presidential elections. And that colonial state of affairs was justified throughout the 19th century on the ground that territorial status is transitional and temporary. It's a stage on the way to statehood. So the insular cases when they create these two categories of territories, as Neil explained, the doctrine with which they did that is known as the doctrine of territorial incorporation, and that term incorporation refers to whether a territory is so called incorporated into the United States or not. So what the court did in the insular cases was say so far all of the territories we've annexed have been incorporated into the United States. That means the full constitution applies and they're on their way to statehood, that's critical. The court then said now these new territories that we annexed after the Spanish-American war in 1898 which included Puerto Rico, the Philippines and Guam, these territories have not been incorporated into the United States.

[00:16:51] They are the unincorporated territories. They have a different relationship to the constitution. Although as Neil said the court was ambiguous as to what applied and what didn't. But they did raise the question and cause a lot of confusion that last to this day. And then the second quality of these territories, the second defining feature was that they were not necessarily on the way to statehood. That is they could be held as territories indefinitely. That is the limbo that Puerto Rico and the other territories are trapped in today. And that distinction has no

grounding in any original understanding history, practice, nothing anybody ever thought about a territory until the insular cases is consistent with what the insular cases inserted into American constitutional law, which is a cast system in which we have territories that are temporarily colonial because they're on the way to statehood and then permanent colonies, which is where Puerto Rico has ended up.

[00:17:47] Jeffrey Rosen: And at the oral argument Justice Gorsuch asked whether the court should state explicitly what everyone knows to be true, namely that the insular cases were wrongly decided. Neil, was there appetite at the oral argument for overturning the insular cases or were the justices inclined to rule on narrower grounds? Given the widespread concern expressed by several justices that the constitution does not require as Justice Barrett put an equal treatment across the board when it comes to policies that affect territories and Justice Barrett seemed to speak for multiple justices when he acknowledged compelling policy arguments on behalf of Mr. Vaello Madero, but suggested that the constitution did not require all federal laws to treat individuals and states and territories equally.

[00:18:39] Neil Weir: Yeah, so I, I would kind of approach that question maybe in two parts. And so the insular cases in the territorial and corporation doctrine are really kind of adjacent to uh, another source of power which is just Congress's plenary power under the territories clause. So there's a lot of overlap between the two, but really the insular cases are what power even above and beyond Congress's power into territories clause, does it have to govern these areas. With respect to the insular cases it actually did seem like there was broad cross ideological support that perhaps it's time to turn the page on these cases the way the Supreme Court has turned the page on Plessy versus Ferguson, or even more recently the Supreme Court's decision in Korematsu, um, for the reasons that you and Christina set forth. Uh, the other one I would add to that that we haven't really touched too much upon was that these insular cases were really grounded and, and really their reasoning, their actual reasoning was grounded in racial assumptions and racial views towards the inhabitants of these areas that just would shock people today.

[00:19:46] I mean, explicitly referring to the people of these areas as alien races, savages who can't understand Anglo-Saxon principles. Which of course is ironic. Today we have a justice of the US Supreme court whose family ties go back to Puerto Rico. So if she's kind of the paradigmatic example that of course the people from these areas are the same as, as people everywhere else in the United States and should have the same rights associated with that. And so there is, I think there is this appetite with respect to the insular cases. What was interesting was the government's response. I mean Gorsuch pressed the government, not once, not twice, but three times to take a position on whether they thought the insular cases should be overruled, and each time the government's lawyer demurred and did not answer that question. Said simply they're not at issue here. Normally the court doesn't address cases that are not at issue.

[00:20:42] And this really leads me to question whether the Biden-Harris Department of Justice how they square this kind of implicit support for the insular cases, with the values that the Biden-Harris Department of Justice, uh, has, you know, professed publicly. Members of Congress have written to the Department of Justice calling on them to condemn the insular cases. Not received

the response from the Department of Justice on that question. And instead you see the response in, in this argument. We have another case involving citizenship in the territories that the United States Department of Justice recently filed relying squarely on the insular cases to deny even a right to citizenship and the territories much less a right to SSI benefits. And then kind of on the other question you raised with respect to what does plenary power and what does the territories clause mean with respect to the territories?

[00:21:36] I think that's a question that really is what's central to the Vaello Madero case. And you really kind of almost saw some of the justices kind of talking out loud to them about what does this really mean. Different hypotheticals, uh, being presented about rights and responsibilities. And these are some thorny questions. There's no, there's no real easy answers here on what limits should be placed on Congress's plenary powers over the territories. This case presents a slightly different factual scenario though because, you know, plenary power is meant to essentially allow Congress to act as the local legislature for the territory. So Congress has a general power over residents of the territories that it lacks with respect to residents of the states. With respect to them Congress can only act as a national legislature. Of course here with the SSI program, Congress was wearing its hat as a national legislature, passing a uniform national program to address the disability needs, uh, and, and needs of elderly and disabled people. Explicitly a program that applied uniformly throughout the United States to everyone who met its criteria.

[00:22:47] And, and that's why here I think there's a really strong argument that may not be presented with respect to some other programs, and certainly aren't present with respect to decisions Congress might, might make with respect to taxation in each of the territories. Um, that when Congress acts in this national capacity, it can't simply arbitrarily deny these kinds of benefits to citizens in the territories based solely on where they happen to live. And that's really, you know, something Justice Sotomayor, uh, flagged very strongly that, you know, needy is needy, whether you live in the 50 states, the District of Columbia. And by the way, this federal statute actually extends SSI benefits to residents of some territories, the Northern Mariana Islands, while denying them to residents of the other territories. So it's just a complete patchwork, almost seems random which territories get certain benefits and which don't get others. And I think that's gonna be the difficult question that the justices will have to grapple with as they write their opinions in the case.

[00:23:47] Jeffrey Rosen: As you say Justice Sotomayor was pressing both sides on to what extent the federal government can treat states differently based on their tax contributions. She emphasized that Puerto Rico residents are a classic discreet and insular minority, and are essentially politically powerless with respect to the federal government. And in that sense seemed sympathetic to the argument by Mr. Vaello Madero that strict scrutiny should apply to the disparate treatment of SSI benefits because Puerto Ricans are a discreet and insular minority, and the ordinary democratic checks don't exist because of Puerto Rico's attenuated voting status with respect to the federal government. Christina, tell us about the argument that, uh, strict scrutiny should apply to, uh, residents of Puerto Rico and to what degree other justices seemed convinced by it or not.

[00:24:41] Christina D. Ponsa-Kraus: Sure. So strict scrutiny is the level of scrutiny that the court applies to a challenge to what is known as a suspect classification. So if the legislature classifies in a manner that the court finds suspect, uh, and that means classifies in a manner that affects a fundamental right or what is known as a discrete and insular minority, which refers to a historically discriminated against group, strict scrutiny will apply. Vaello Madero's lawyers argued that strict scrutiny should apply to a classification based on residents in Puerto Rico, because Puerto Ricans are politically powerless, and Justice Sotomayor is very aware of that and was very sympathetic and seemed sympathetic to that argument because of the undeniable reality that residents of Puerto Rico are politically powerless.

[00:25:40] They have no voting representation in the federal government. Vaello Madero argued in part that the political powerlessness of, uh, residents of Puerto Rico, I say in part, I should say almost entirely. [laughs] The political powerlessness of residents of Puerto Rico is due to a history of racism. Puerto Ricans live in a territory that is still a territory. Why? Because the insular cases created a category of territories that could be held that way indefinitely. And they did so for racist reasons. And so Vaello Madero argues we are the classic discrete and insular minority. We are literally insular [laughs], uh, easily identifiable, almost entirely non-white and subject to a history of discrimination and political powerlessness.

[00:26:35] And so the argument goes strict scrutiny should apply to a classification that discriminates against us. The Vaello Madero's lawyers, uh, also argued that if strict scrutiny doesn't apply, well then even if rational basis review applies, this discrimination still ought to be struck down because it's irrational. Uh, and that was an argument maybe we wanna discuss more as we continue. Um, but in that argument, the justification that the United States has given, which is that Congress can treat territories differently as long as it, uh, has a rational basis, Vaello Madero's attorney, uh, argued that that discrimination is irrational and arbitrary.

[00:27:26] That because this is, as Neil said, a national program funded by the federal government, administered by the federal government intended to nationalize benefits for the poor and disabled, there was no reason that Puerto Rico's different status as a territory should make any difference in whether an individual who is a US citizen who moves from one place subject to US gov- [laughs] law, uh, uh, to another place subject to US law should lose these benefits. Territorial status shouldn't make a difference. And therefore this discrimination is arbitrary. Um, but the leading argument that they've made is that strict scrutiny should apply for the reasons I explained.

[00:28:06] Jeffrey Rosen: Thank you very much for explaining that so clearly. Uh, We The People Friends, time for a quick constitutional law review, there's not a lot of doctrine in con law but we've gotta make sure we understand it now. Ordinarily laws are subject to what's called rational basis review. They have to be rationally related to a legitimate governmental interest, but laws that affect disadvantaged groups that have been subject to invidious discrimination historically may be subject to heightened scrutiny. They have to be necessary to achieve a compelling governmental interest. And here Mr. Vaello Madero's lawyers are saying here Puerto Ricans by virtue of their Hispanic heritage have been subject to historic discrimination and therefore heightened scrutiny should apply. Neil, Justice Kagan seemed inclined to search for a

limiting principle, uh, and she was perhaps receptive to ruling for Mr. Vaello Madero without subjecting the case to heightened scrutiny, essentially finding that this benefit exclusion lacked a rational basis. That would be a more modest to more narrow ruling. Did you hear that as well from Justice Kagan and, and what would a rational basis ruling in favor of Mr. Vaello Madero look like?

[00:29:13] Neil Weir: Yeah, I think, uh, Justice Kagan, you know, had some concerns, you know, in some ways of, well, what's the limiting principle the other direction? If Congress has such broad powers of the territories, where are the limits on those powers? Um, whether it's with, with respect to equal protection or with respect to other limitations on congressional powers. So she, she certainly expressed, you know, concern in that way. One interesting thing that developed during the argument with respect to the rational basis arguments was a number of the conservative justices actually pressed the government to say, "Well, are you really making your argument solely on the basis of the unique differences of Puerto Rico or does this go further?"

[00:29:57] Could Congress have these same- same kind of limitations on SSI in the states themselves? And somewhat surprisingly perhaps the government's view was yes, absolutely they could. So just as Congress discriminates to deny residents of Puerto Rico SSI benefits, they could say, "Well, these handful of states, they don't contribute to the federal treasury as much as other states. So let's give disabled and poor people there less money." And this kind of caught back, I think caught a number of the justices aback just to drill down and say, "Are, are, are you for real?" That would be the same rational basis standard in denying citizens living in the 50 states in DC these benefits.

[00:30:43] And, and the government stood firm on that position. So it'll be interesting to see how that really kind of breathtakingly broad argument by the government might lead some of the justices to consider whether indeed this kind of discrimination offers a rational basis. Because well, if they can do it in Puerto Rico, they could do it in other states under the government's view. And that just kind of highlights why, again, as Justice Sotomayor said, needy is needy whether in Puerto Rico or in the mainland. That this is the, the class of people being compared here are, you know, elderly, disabled, people of limited economic means, um, not whether you happen to live in a state or territory.

[00:31:31] And there just is no reasonable argument that the government has made or that even was really discussed at the argument itself, the hour long argument. They didn't really go into any more detail beyond saying, um, you know, Puerto Ricans as a whole don't pay certain federal taxes even as they pay others. And that just doesn't come across as very persuasive when you're talking about a class of US citizens who basically by definition because they're poor don't even pay federal income taxes. So ultimately I, I think it's hard to say exactly where the justices land on some of these complicated questions, but I think one thing that is clear is that, you know, they, they are kind of muddling through these difficult questions just like everybody else.

[00:32:21] And so we're gonna have to wait and see, you know, how these decisions come down and, you know, I'd expect to see multiple opinions and maybe some kind of strange, you know, cross-ideological alliances between the justices. I don't think this is gonna be your kind of

normal conservative, liberal dynamic, that there's a lot of cross issues at play here that I think pull the justices in different directions.

[00:32:44] Jeffrey Rosen: Fascinating. Christina, there were indeed some cross ideological sympathies between Justice Kagan and Justice Barrett. Both of them seemed interested in finding a limited principle for the government's argument and both seem to favor Mr. Vaello Madero without overruling those Califano or Rosario cases applying rational basis review. If you were constructing, uh, a narrow ruling along those lines that would get cross ideological agreement, what might it look like?

[00:33:13] Christina D. Ponsa-Kraus: I think that the way to come up with a narrow ruling in favor of Vaello Madero is to focus on the differences between the SSI program and other programs. So other programs, uh, might involve block grants, the government denied there was a distinction. The government claimed that nobody was denying there was a distinction, but actually Vaello Madero does argue that there's a particular feature of the SSI program that should lead the court to strike down this exclusion, which is the one we mentioned before. It's a federally funded program administered by the federal government, benefits go directly to individuals. And so if the court, uh, focuses on that sort of distinct feature of the SSI program, it's not a block grant. It's not a program that involves partial federal and partial state involvement administration cooperation. It's just the federal government taking care of citizens throughout the country. That could be a way to, uh, rule in favor of Vaello Madero while applying rational basis review.

[00:34:17] The court I don't think would need to overrule the, the two cases from the late seventies and early eighties, because the court could acknowledge that facts have changed, uh, facts on the ground have changed. Uh, and there were factual errors, the combination of the error, uh, in saying that Puerto Ricans don't contribute to the fact treasury, and the cost reasoning is very different in a circumstance when you're dealing with a territory that has gone bankrupt as Puerto Rico has. So I should, I should explain this, this context that would come into play in a rational basis. Uh, analysis one has to look at the facts on the ground and the context and Puerto Rico is suffering through a financial crisis. Uh, it is bankrupt, and the federal government Congress has created a federal oversight and management board, uh, which is managing this crisis and it exercises quite a bit of power over Puerto Rico's government. A such extensive power over Puerto Rico's government that Puerto Rico has lost a lot of the self-government and autonomy that it had for a long time as a territory that Congress had given permission to govern itself.

[00:35:29] And so, to talk about what the cost of taking care of needy people would be in a territory that is bankrupt and that you yourself are running through a federal oversight and management board is, it's just a very different situation. So I think that combining change and facts, and facts that were erroneous at the time and therefore don't sustain rational basis review now, the court could hold that rational basis review applies here, but given the nature of the SSI program and the facts on the ground as, as they exist today, this exclusion cannot stand. Uh, I do wanna just, uh, say something about the government's position on whether this could happen in the states. I agree, uh, with Neil that the message was rational basis review would apply to any

such exclusion in a state or within, uh, some region in the United States. That is what the government, uh, acknowledged.

[00:36:23] Uh, I do think that Mr. Gannon left room for a different result in the states by insisting that would create the rational basis in this, the context of Puerto Rico, is that Puerto Rico has a particular structure that he described as a, you know, a unique tax structure, but that he linked to Puerto Rico's territorial status. And he also said that because Puerto Rico's future is uncertain, Congress might have a rational basis to treat it differently in terms of benefits for that reason. And that amounts to Congress can treat Puerto Rico differently because it's a territory. So I don't agree, but I do think that he was trying to leave the door open, even as he acknowledged that rational basis review would apply to this kind of exclusion if Congress imposed it on some state or region that the court could reach a different result. But I think that most of the justices actually seem to be looking for a way, or maybe I'm being overly optimistic. [laughs]

[00:37:26] **Jeffrey Rosen:** Let's, uh, ask if Neil agrees that you're being overly optimistic. And Neil, did you also hear the justices, uh, grappling toward a solution of the kind that, uh, Christina described that might rule for Mr. Vaello Madero on rational basis review? What kind of compromise could you see them converging around and, uh, given your view that the insular cases should be overruled and that the fact that people in the territories don't have constitutional rights leads to real harm? Would a narrow ruling of the kind that Christina describes be adequate in your view?

[00:38:00] **Neil Weir:** Yeah, I think there really is a narrow path here, um, that the court could take and, and, you know, and I think it was pretty clear that really to a person, the justices found Mr. Vaello Madero to be in a very sympathetic position. You know, here's someone who is only getting these benefits because he's extremely poor and suffering from severe medical disabilities. So you could see that kind of some of that, you know, sympathy for Mr. Vaello Madero was perhaps leading some of the justices to really try to dig in to see, you know, is there a way that we can rule favorably, you know, while still ensuring that, you know, Congress retains broad powers to govern the territories. As, you know, the constitution legitimately sets forth. Congress does have broad powers, um, to govern the territories, but, um, they don't have unlimited powers.

[00:38:50] And, and when the constitution does provide checks on congressional power as the equal protection clause does or as the citizenship clause does, or even as the second amendment does, that those limitations should apply equally with respect to Congress, even when acting, uh, in the territories. So, you know, how the, the justices will ultimately sort through those complexities I think is going to remain to be seen. And I mean, I think it, you know, this conversation between the justices I'm sure continued probably pretty passionately as they went to conference, you know, on the case.

[00:39:26] And, you know, oftentimes during the argument itself as, you know, is often the case, uh, you really had the justices, you know, talking to each other as much as they were asking, uh, questions of, of counsel, you know, almost even with, uh, Justice Sotomayor at the end of the government's argument, kind of just taking a moment to have a soliloquy kind of making the case for why the government's broad position here doesn't really make sense.

[00:39:51] I think, you know, she might have been the strongest advocate, you know, in the room on argument day. And so, yeah, we're gonna have to wait and see, and I think there absolutely is a narrow path. And I would say, you know, these broader issues about the insular cases and some of these, these broader issues. There's gonna be future opportunities for the court to tackle those issues and the case that actually it squarely presents them. I mean, the government concedes here that the insular cases aren't relevant that equal protection applies. And so it may well be better to wait and tackle, um, these kind of broader more weighty issues at, at the proper moment. And, and to really just focus on a narrow ruling and a narrow question of this kind of national program that simply discriminates against the neediest Americans who happen to live in a territory.

[00:40:37] **Jeffrey Rosen:** Christina, you so thoughtfully sketched out the narrow argument that I asked you to imagine. What are the future cases that might raise the questions that Neil talked about involving the viability of the insular cases? And when do you see them coming down the line?

[00:40:53] **Christina D. Ponsa-Kraus:** Well, I feel like Neil ought to fill this question although I can start, but the case that I think, uh, would be the most promising, I would love to see the Supreme Court take this case is the case involving a challenge, uh, to the denial of 14th amendment birthright citizenship to residents, persons born in American Samoa, which is one of the unincorporated territories. So that is a case that Neil has brought. And so really to be honest I don't think it's, it's right [laughs] for me to describe it. I have written amicus briefs in it and I think that it is the ideal vehicle and yet, uh, will the court take it? I think if it's okay with you, I'll let Neil describe the case and, and offer his prediction on the prospects of the court taking it.

[00:41:39] **Jeffrey Rosen:** Neil, your prediction. And do you think the court will take the case?

[00:41:43] **Neil Weir:** Yeah. So this is, uh, a case where we represent individuals born in the US territory of American Samoa, who under a discriminatory federal law are labeled as non-citizen US nationals and actually denied recognition as US citizens. Our clients, uh, now live in the state of Utah where because of their non-citizen status, they're not able to vote for president, they're not able to vote for the governor of Utah. They can't even vote for their local school board. Even as they bear all of the same responsibilities as their fellow Americans. They have a US passport. Uh, inside that passport there's a stamp that says the bearer is not a citizen of the United States. This is an absurd classification that runs directly contrary to the text structure and history of the citizenship clause as professor Ramsey and an array of other original scholars have, have pointed out at some length.

[00:42:44] Um, we wanted the district court level with, uh, the district court judge recognizing that the citizenship clause guarantees the right to citizenship for all born on US soil, whether in a state or territory. Before the 10th circuit, we lost two to one with three separate opinions written, um, by each of the judges in that case. We filed a petition for en banc review. Um, filing in that completed about a month and a half or two months ago. Um, and we haven't heard anything back from the 10th circuit yet. So we'll, you know, keep our fingers crossed that the full 10th circuit may take up this issue.

[00:43:23] And then of course after that, whichever direction it goes, these issues could be back before the Supreme Court. We had a previous case in the DC circuit which ruled against our plaintiffs in that case. And so a favorable result from the 10th circuit would create a circuit split with the DC circuit, making it more likely that the Supreme Court could take these issues up. But even if they don't, it's the kind of perfect vehicle to address some of the questions that Justice Gorsuch and others raised at the argument in Vaello Madero about what should the insular cases mean today, and addressing those questions head on in a case where the United States sites to them on almost every page of their brief.

[00:44:05] **Jeffrey Rosen:** That case is *Fitisemanu versus United States*. And if it does go up to the Supreme Court we will certainly love to have both of you back to discuss it. Christina, the Biden administration during the oral argument said, hey Congress can act here. We just don't think the court should. There's some movement for congressional resolutions condemning the insular cases. Is there any immediate prospect for action within Congress relating to the legal status of Puerto Rico?

[00:44:37] **Christina D. Ponsa-Kraus:** Well, Congress, uh, is, uh, attending to the status of Puerto Rico. There are two bills currently pending before the committee on natural resources, which oddly enough has jurisdiction over Puerto Rico's status and future. One of those bills responds to a referendum that was held in Puerto Rico in November of 2020, in which statehood won a, uh, it was a yes or no vote on statehood and statehood won with a majority of 52%. So a slim majority, but a majority. The Admission Act, uh, responds to the referendum by offering Puerto Rico statehood, that is providing for the admission of Puerto Rico into statehood, contingent on a second referendum. So Puerto Ricans would have to vote again and if statehood won again, then the president would declare Puerto Rico admitted into statehood. And then there's a competing bill by opponents of statehood who don't believe that the November referendum, uh, is a sufficient vote in favor of statehood in Puerto Rico.

[00:45:41] And their bill provides for a constitutional convention in Puerto Rico in which Puerto Ricans would define and debate all of their various decolonization options. And then they would hold a plebiscite site on those options, and then they would bring the result to Congress in the hope, I have to say, the desperate hope that Congress would respond. So those bills right now have divided the representatives of Puerto Rican descent and with Puerto Rican constituencies with some of them supporting the Statehood Admission Act and other supporting the constitutional convention, that division mirrors a division in Puerto Rico between the narrow majority that supports statehood and then some strong statehood opposition. So we are deadlocked and I at the moment I'm collaborating with another law professor. We have made a compromise proposal in which we've suggested that the strengths of the two bills should be combined into one compromise bill.

[00:46:41] Our compromise bill would use the same mechanism that the Admission Act uses. So making an offer and letting Puerto Ricans vote on it, and in that way guaranteeing the implementation of the result. But instead of just offering statehood, it would offer all of Puerto Rico's decolonization options, which include statehood, independence, and then, uh, a form of independence that's known as free association. So that, uh, proposal has triggered some debate, a

lot of debate real in Puerto Rico and we hope that the committee on natural resources will take it seriously and that it might help us all find a path forward to decolonize Puerto Rico which is something that is long, long overdue.

[00:47:22] Jeffrey Rosen: Well, it's time for closing thoughts in this fascinating conversation. Thank you both for educating our listeners so much about, uh, a topic that I know many of us have a lot to learn about. And Neil, the first thoughts are to you, just a few sentences about why the Vaello Madero case is important and why We The People listeners should care about it.

[00:47:41] Neil Weir: The Vaello Madero case really highlights a broader question that really all Americans should be grappling with. And, and that's, that, America has a colonies problem. Uh, Puerto Rico, Guam, other territories have now been part of the United States for almost 125 years and yet the residencies areas are denied basic democratic participation, basic government by consent and basic benefits like, uh, SSI and other federal programs. And so it's really incumbent upon the United States as a whole and really all three branches of the federal government to work to find a solution to this. It's a problem that was created by the Supreme Court through the insular cases. I think the, the Supreme Court has a special responsibility to help fix and address these issues, as do the other branches of government. And so I'm hopeful that as these issues have been getting more attention, not just at the Supreme Court, but on audiences like this, that we can find a path forward to ensure that these colonial issues and, and these issues of what it means to be a citizen in the United States can finally be addressed.

[00:48:48] Jeffrey Rosen: Christina, the last word in this fascinating discussion is for you. Please tell We the People listeners why the Vaello Madero case is important and why they should care about it.

[00:48:55] Christina D. Ponsa-Kraus: So I think my last word begins with amen to everything Neil said. I think that the message I wanna leave listeners with is that what's at stake here is the future of Americans, who have been subject to US sovereignty and US law for almost a century and a quarter without any representation in the federal government. And when we have a conversation about an argument on the Supreme Court we understandably and as we should, focus on the legal intricacies of the argument. Should rational basis review apply? Should strict scrutiny apply? Is the SSI program distinguishable from other benefits programs? Could the United States do this in a state or a region? What's the difference? Et cetera. All of these questions are the questions that the lawyers and the justices have to argue about to get to a result. But what's at stake here is equality for US citizens subject to US law.

[00:50:02] And the fact that Puerto Rico's status keeps coming up before the court and the court doesn't quite what to do with it. What do we do with the insular cases? Does it matter that Puerto Rico's a territory? You know, can we go so far as to say that the territory clause has a time limit? These were questions that came up in the argument, and the court doesn't really think it can do anything about Puerto Rico's ultimate status. And yet in the insular cases as Vaello Madero's lawyer said, it was the Supreme Court that stopped the clock on statehood. It said, we can keep you as a permanent colony forever. And so my hope is that the court can find a way, whatever the legal intricacies are, find a way to its approval of permanent colonies, which it introduced

into constitutional law in the insular cases. If it could do that, then surely it can find a way to take that back, uh, and to in that way send the message that decolonization has to happen now.

[00:50:59] Jeffrey Rosen: Thank you so much Neil Weir and Christina Ponsa Kraus for a vigorous illuminating and really educational discussion of the legal status of Puerto Rico and of the Vaello Madero case. Neil, Christina, thank you so much for joining.

[00:51:19] Christina D. Ponsa-Kraus: Thanks to you.

[00:51:19] Neil Weir: Thank you.

[00:51:19] Jeffrey Rosen: Today's show was produced by Jackie McDermot and engineered by Kevin Kilburn. Research was provided by Michael Esposito, Chase Hansen and Lana Olrick, please rate, review and subscribe to We the People on Apple Podcasts and recommend the show to friends, colleagues, or anyone anywhere who is eager for a weekly dose of constitutional education, illumination and debate. And always remember that the National Constitution Center is a private nonprofit, we rely on the generosity, the passion, the willingness to spend an hour educating yourself about complicated and important constitutional issues that people like you from across the country who are inspired by our nonpartisan mission of constitutional education and debate. Support the mission, become a member at constitutioncenter.org/membership. Or give a donation of any amount, five, \$10 or more to support our work, including this podcast at constitutioncenter.org/donate. On behalf of the National Constitution Center. I'm Jeffrey Rosen.