Other People's Poverty

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ABSTRACT: Puerto Ricans have a relationship with the United States that is historically unparalleled. They have been citizens of the United States since 1917, served in every major conflict since World War I, and have been influential members of American culture, politics, and society. Yet, Puerto Rico is not fully part of the United States. The island of 3.2 million people—more than the population of eighteen states—is a U.S. territory. This means the federal government wields its complete and largely unrestrained plenary power over the Island, often treating Puerto Ricans differently than the rest of the United States. This differential treatment is acutely demonstrated in the social welfare context. Puerto Rico is one of the poorest areas of the United States, with forty-three percent of the population living below the poverty line (sitting right behind the poorest state, Mississippi). Despite this reality, Congress discriminates against Puerto Rico in social welfare programs such as Medicaid, Supplemental Security Income ("SSI"), and the Supplemental Nutrition Assistance Program ("SNAP"). In some instances, federal legislators provide people on the Island with less funding, and in other instances, they outright exclude them.

This Article uncovers the analytical underpinnings of a legally sanctioned social welfare regime that consciously refuses to provide assistance to some of the country's neediest individuals. We argue that the federal government maintains and cultivates a selective disregard for other people's poverty—those, like Puerto Ricans, who inhabit the dark agoras of our constitutional regime. Such legal and economic neglect has its origins in the halls of Congress and has been approved by federal courts on numerous occasions. More specifically, we highlight an under thematized mechanism for this exclusion: the Supreme Court's invocation of legal doctrines that are deferential to Congressional discrimination—plenary powers, rational basis review, and territorial incorporation. This framework was recently laid bare in the Supreme Court case United States v. Vaello Madero, *which approved a federal statute excluding American citizens living in Puerto Rico from SSI. Although*

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social welfare programs were meant as a social safety net for our aging and disadvantaged community members, federal officials across all three branches of government have facilitated the exclusion of minoritized communities from that scheme.

But Vaello Madero *was about more than a constitutional challenge to a discriminatory statute. The case invoked fundamental questions of constitutional interpretation, territorial governance, and social welfare. The case and the questions it posed should trouble people across ideological perspectives—from originalists like Justice Gorsuch, who highlighted the constitutional infirmities tied to the treatment of Puerto Rico, to conservative and liberal proponents of federalism, to advocates for racial and economic justice on the left. On the precipice of pending cuts to social welfare programs, this Article offers some normative suggestions on how advocates and the public might reimagine social welfare in ways that align with our democratic commitments.*

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INTRODUCTION

Picture this: It's Madison Square Garden, New York City, with less than two weeks to go in the 2024 presidential election. Presidential candidate and soon-to-be President-elect Donald Trump is hosting a campaign rally described as a "closing message" to the country.[1] Trump's running mate, JD Vance, the

1. Jill Colvin & Michelle L. Price, *Trump's Madison Square Garden Event Features Crude and Racist Insults*, AP NEWS (Oct. 28, 2024, 6:44 AM), https://apnews.com/article/trump-madison-s

world's richest man, Elon Musk, political commentator Tucker Carlson, and many other heavy hitters are in attendance at "the world's most famous arena."[2] But it is the comments of comedian Tony Hinchcliffe that arguably stole the show.

Hinchcliffe's set was rife with jokes about minority groups. Some commentators, like liberal comedian Jon Stewart, considered this kind of racialized humor part of Hinchcliffe's schtick, but others believed his routine was hate speech masked as humor.[3] Amidst the Israel–Gaza War, Hinchcliffe managed to hurl antisemitic and Islamophobic commentary in one fell swoop. Drawing on stereotypes of Palestinians as primitive and caricatures of Jewish people as stingy, he remarked,

> Why is our money involved in these wars when it comes to Israel and Palestine? . . . We're all thinking the same thing—settle your stuff already. Best out of three: rock, paper, scissors. You know, the Palestinians are going to throw rock every time. You also know the Jews have a hard time throwing that paper, you know?[4]

Hinchcliffe described carving watermelon with a Black man—an allusion to the stereotype about African Americans that emerged during the post-Civil War Era to mock their entrepreneurial sale of the fruit and their supposedly excessive consumption of it.[5]

But the comments that were most repudiated focused on Hinchcliffe's discussion of Latinos. "There's so many of them," the comedian remarked.[6] "I welcome migrants to the United States of America with open arms. And by open arms, I mean like this."[7] Hinchliffe proceeded to use a "stop motion."[8] He continued by invoking longstanding tropes of Latino invasion, reproduction, and fertility. "And these Latinos, they love making babies too. Just know that.

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quare-garden-new-york-election-fcfe75be7f8281fde7bffa3adb3bba5d [https://perma.cc/8BEV-LFLR].

2. Shane Goldmacher, Maggie Haberman & Michael Gold, *Trump at the Garden: A Closing Carnival of Grievances, Misogyny and Racism*, N.Y. TIMES (Nov. 6, 2024), https://www.nytimes.com/2024/10/27/us/trump-msg-rally.html (on file with the *Iowa Law Review*).

3. William Earl, *Jon Stewart Defends Tony Hinchcliffe After Controversial Trump Rally Jokes: 'I Find That Guy Very Funny,'* VARIETY (Oct. 28, 2024, 8:43 PM), https://variety.com/2024/tv/news/jon-stewart-defends-tony-hinchcliffe-trump-rally-1236193315 [https://perma.cc/LG6Z-APPC].

4. Christopher Mathias, *Comedian Tony Hinchcliffe Performs Wildly Racist Set at Trump Rally in New York City*, HUFFPOST (Oct. 27, 2024, 5:27 PM), https://www.huffpost.com/entry/tony-hinchcliffe-racist-trump-rally-madison-square-garden_n_671ea0d3e4b0469908 92d742 [https://perma.cc/PC66-AMES].

5. William R. Black, *How Watermelons Became Black: Emancipation and the Origins of a Racist Trope*, 8 J. CIV. WAR ERA 64, 73–76 (2018).

6. Mathias, *supra* note 4.

7. C-SPAN, *Comedian Tony Hinchcliffe Full Remarks at Trump Rally at Madison Square Garden in New York*, YOUTUBE (Oct. 28, 2024), https://www.youtube.com/watch?v=GzjNeA6FPMk [https://perma.cc/G2TQ-TSDP].

8. *Id.*

They do. They do. There's no pulling out. They don't do that. They come inside. Just like they did to our country."[9] He added, "I don't know if you guys know this, but there's literally a floating island of garbage in the middle of the ocean right now. I think it's called Puerto Rico."[10] Some laughed, others in the crowd groaned.[11]

The bipartisan rebuke was swift. Responses from the Kamala Harris–Tim Walz campaign were predictable considering the election battle,[12] but Republicans also criticized Hinchliffe. Republican Congresswoman María Elvira Salazar, who represents Florida's twenty-seventh congressional district (Miami-Dade County) said she was "[d]isgusted" by the "racist comment" about Puerto Rico and claimed that "[t]his rhetoric does not reflect GOP values."[13] Republican Florida Senator Rick Scott claimed: "This joke bombed for a reason. It's not funny and it's not true. Puerto Ricans are amazing people and amazing Americans! I've been to the island many times. It's a beautiful place. Everyone should visit!"[14] Puerto Rico's Republican Party chairman threatened to withhold support for Trump unless he apologized for the remarks.[15] He didn't get that, but Danielle Alvarez, a senior adviser to the Trump campaign, issued a rare statement clarifying that the Puerto Rico joke "does not reflect the views of President Trump or the campaign."[16] This was surprising considering the many other groups that were insulted during Hinchcliffe's set, as well as the reality that Trump "is not known for his contrition."[17] Republican members of Congress and a future Republican President (by way of a spokesperson) made these "antiracist" statements amidst an anti-Diversity, Equity, and Inclusion ("DEI"), anti-Critical Race Theory ("CRT") ethos, as well as longstanding accusations that the party flirts with racial bigots.[18] Nonetheless, Hinchcliffe's

9. *Id.*

10. Colvin & Price, *supra* note 1.

11. C-SPAN, *supra* note 7.

12. *See* Dan Mangan, *Harris Rejects Tony Hinchcliffe's Racist Remarks About Puerto Rico at Trump MSG Rally as 'Nonsense,'* CNBC (Oct. 28, 2024, 6:26 PM), https://www.cnbc.com/amp/2024/10/28/harris-tony-hinchcliffe-puerto-rico-trump-rally-msg.html [https://perma.cc/W4U8-DR9A].

13. María Elvira Salazer (@MaElviraSalazer), X (Oct. 27, 2024, 6:06 PM), https://x.com/MaElviraSalazar/status/1850660461441613952 [https://perma.cc/WEL3-HYB4]; Tara Suter, *GOP Senator, Reps Denounce Comments from Trump Rally Comedian Mocking Puerto Rico*, THE HILL (Oct. 27, 2024, 11:50 PM), https://thehill.com/homenews/campaign/4956414-gop-senator-reps-denounce-comments-from-trump-rally-comedian-mocking-puerto-rico [https://perma.cc/9UG8-8C66].

14. Rick Scott (@ScottforFlorida), X (Oct. 27, 2024, 6:48 PM), https://x.com/scottforflorida/status/1850671024204882016 [https://perma.cc/DBZ2-RAPK]; Suter, *supra* note 13.

15. Neil Vigdor, *Puerto Rico's G.O.P. Chairman Demands Apology from Trump for Comic's Remarks*, N.Y. TIMES (Oct. 29, 2024), https://www.nytimes.com/2024/10/29/us/politics/puerto-rico-gop-chairman-trump-msg.html (on file with the *Iowa Law Review*).

16. *Id.*

17. *Id.*

18. *See generally* DANIEL S. LUCKS, RECONSIDERING REAGAN: RACISM, REPUBLICANS, AND THE ROAD TO TRUMP (2020) (arguing that the Republican Party's history of racism and bigotry began with Ronald Reagan and continues into the current Republican Party).

jokes about Puerto Rico elicited bipartisan condemnation in the immediate run-up to a presidential election.

A different kind of ideological mash-up presented itself two years prior. It also involved Puerto Rico, but instead of being centered around legislators and a past-and-future executive, it focused on the judiciary, executive-branch officials, and a Puerto Rican named Jose Luis Vaello Madero.

Vaello Madero was born on the Island[19] in 1954 and moved to New York in 1985.[20] In 2012, he began receiving Supplemental Security Income ("SSI")[21]—the federal program that provides monthly payments to people with very low incomes who are blind, disabled, or over the age of sixty-four.[22] In 2013, he moved back to Puerto Rico.[23] In 2016, after Vaello Madero went to the Social Security Administration ("SSA") in Puerto Rico, the SSA learned that he had moved back to the island.[24] The SSA nixed his benefits retroactively as of 2013[25] because the SSI program is only applicable to residents of the fifty states, the District of Columbia, and the unincorporated territory of the Northern Mariana Islands.[26] Puerto Rico was excluded, so Madero was considered "outside of the United States" for purposes of the program.[27]

In 2017, the United States sued Vaello Madero in an attempt to recover over twenty-eight thousand dollars in benefits.[28] He argued that the exclusion of Puerto Rico from SSI violated the Fifth Amendment's equal protection guarantee.[29] The district court and the First Circuit agreed, finding no rational basis to exclude otherwise eligible individuals because of their residency.[30] The Biden Administration's Solicitor General brought the case to the Supreme Court and convinced it to overturn the decision.[31] In an 8–1 decision authored by Justice Kavanaugh, the Court found no equal protection violation and concluded that there was a rational basis for excluding Puerto Rico from the benefits program.[32]

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19. This Article will refer to Puerto Rico—an archipelago consisting of various islands—as *la Isla*, or the Island.

20. United States v. Vaello Madero, 142 S. Ct. 1539, 1558–59 (2022) (Sotomayor, J., dissenting).

21. *Id.* at 1558.

22. *Understanding Supplemental Security Income (SSI) Overview—2025 Edition*, SOC. SEC. ADMIN., https://www.ssa.gov/ssi/text-over-ussi.htm [https://perma.cc/3FN6-4TQL].

23. *Vaello Madero*, 142 S. Ct. at 1558.

24. *Id.* at 1559.

25. *See id.*

26. *Id.* at 1542 (majority opinion).

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

28. *Id.*

29. *Id.*

30. *Id.*

31. *See id.* at 1544 (majority opinion).

32. *Id.* at 1543–44.

Justice Gorsuch, the colonial conscience of the Court, wrote a concurrence that one would think was penned by a critical race theorist.[33] The case outcome was influenced by relevant jurisprudence that the parties did not ask the Court to overrule, but that Gorsuch felt compelled to impugn.[34] He took aim at the *Insular Cases*, a series of opinions handed down in the early twentieth century that stand for the proposition that inhabitants of unincorporated territories do not have full constitutional rights even if they are deemed U.S. citizens.[35] In his concurrence, Justice Gorsuch stated: "The Insular Cases have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law."[36] Employing the language of Supreme Court jurists of the time, Gorsuch complained that some of these cases "rested on a view about the Nation's 'right' to acquire and exploit 'an unknown island, peopled with an uncivilized race . . . for commercial and strategic reasons.'"[37] This right to exploit, Gorsuch continued, "could not be practically exercised if" people on that island were "'endow[ed with]' full constitutional protections."[38] Put differently, Gorsuch rightfully complained that the Court of a century ago believed that the Constitution got in the way of colonial ambitions. The *Insular Cases*, he argued, were based on the "academic work of the period, ugly racial stereotypes, and the theories of social Darwinists."[39] The Court's reliance on them represented "an implausible and embarrassing state of affairs."[40] Gorsuch signed off with a clarion call: "[T]he time has come to recognize that the Insular Cases rest on a rotten foundation. And I hope the day comes soon when the Court squarely overrules them. . . . Our fellow Americans in Puerto Rico deserve no less."[41]

The conservative condemnation of Hinchcliffe's set, when coupled with Justice Gorsuch's analysis in *Vaello Madero*, represent important repudiations of discriminatory outlooks—whether packaged in humor or legal precedent. They also provide a window into how American society and law fail to engage

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33. *Id.* at 1552–57 (Gorsuch, J., concurring).

34. Even though Vaello Madero did not ask the Court to overrule the *Insular Cases*, he did criticize them. He also used the cases in arguing for applying strict scrutiny, citing them as evidence of racism behind classifications affecting Puerto Rico. *See* Brief for Respondent at 25–27, United States v. Vaello Madero, 142 S. Ct. 1539 (2022) (No. 20-303).

35. *See id.* at 1553–54. *See generally* De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. New York & Porto Rico S.S. Co., 182 U.S. 392 (1901); Dooley v. United States, 183 U.S. 151 (1901); Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901); Dorr v. United States, 195 U.S. 138 (1904); Balzac v. Porto Rico, 258 U.S. 298 (1922).

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

37. *Id.* at 1553 (quoting *Downes*, 182 U.S. at 306 (White, J., concurring)).

38. *Id.* (quoting *Downes*, 182 U.S. at 306 (White, J., concurring)).

39. *Id.* at 1554.

40. *Id.* at 1556.

41. *Id.* at 1557.

issues of territorial inequality. Puerto Rico has 3.2 million people—more than the population of eighteen states (or approximately thirty-six percent of states).[42] About forty-three percent of its population lives under the poverty line—a figure that is three times higher than the national average and twice the amount of Mississippi, one of the poorest states.[43] The number is even worse for children—fifty-six percent.[44] But these realities only enter the national consciousness when Puerto Rico is hit with hurricanes, earthquakes, floods, and a debt crisis.[45] This temporary recognition of human suffering within the American polity, alongside the fact that only fifty-four percent of polled Americans knew that Puerto Ricans are U.S. citizens,[46] creates the conditions for the Island to be referred to as a "floating island of garbage."[47]

At the same time, the judicial endorsement of Puerto Rico's differential treatment in social welfare programs has much to teach us about the constitutional boundaries of citizenship, the incoherence of American poverty law, and forms of inequality that would generate congressional hearings and national outrage if those conditions existed on the mainland. For these reasons and many more, Puerto Rico presents a compelling case study and a stress test for American democracy. When faced with the simple question of whether American citizens living in Puerto Rico are constitutionally entitled to the same federal benefits as American citizens on the mainland, the Court said no. It used the logic of "rational basis" in ways that are eerily similar to the "separate but equal" doctrine—the legal fiction that knowingly tolerated the denial of legal protections to a historically marginalized group.[48]

This Article uncovers the analytical underpinnings of a legally sanctioned social welfare regime that consciously refuses to provide assistance to some of the country's neediest individuals. We argue that the federal government

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42. Alaska, Arkansas, Delaware, Hawaii, Idaho, Kansas, Maine, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming all have smaller populations than Puerto Rico. *See Quick Facts: Population Estimates, July 1, 2025, (V2025)*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/geo/chart/US/PST045225 [https://perma.cc/WWR3-C3SD].

43. *See* CARLOS VARGAS-RAMOS ET AL., PERVASIVE POVERTY IN PUERTO RICO: A CLOSER LOOK 4 (2023), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1014&context=cpr_pubs [https://perma.cc/5ULA-L4NA].

44. *See id.* at 8.

45. *See id.* at 16–17.

46. Kyle Dropp & Brendan Nyhan, *Nearly Half of Americans Don't Know Puerto Ricans Are Fellow Citizens*, N.Y. TIMES: THE UPSHOT (Sept. 26, 2017), https://www.nytimes.com/2017/09/26/upshot/nearly-half-of-americans-dont-know-people-in-puerto-ricoans-are-fellow-citizens.html (on file with the *Iowa Law Review*).

47. *See* Colvin & Price, *supra* note 1.

48. This parallel should be unsurprising. The Court that decided the early *Insular Cases* had almost the identical lineup of the Court that decided *Plessy v. Ferguson*. JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 3–4 (1985); Adriel I. Cepeda Derieux & Neil C. Weare, *After* Aurelius*: What Future for the* Insular Cases*?*, 130 YALE L.J.F. 284, 296–97 (2020).

maintains a cultivated and selective disregard for other people's poverty— the other people here being geographically distant Puerto Ricans. This kind of structural abandonment involves legislators and courts who rely on doctrinal sleights of hand to overlook the suffering of disabled, elderly, and blind American citizens who would receive benefits if they lived a plane ride away in Florida.

What accounts for the federal government's approval of this explicit discrimination? We highlight three important qualities in the legal administration of social welfare that permit such differential treatment. The first is a long history of minority exclusion and selective inclusion into a far-from-comprehensive safety net. A second feature is a counterintuitive invagination of judicial review as it relates to social and economic policy. Using the plenary power doctrine and rational basis review as their lodestars, courts have unduly deferred to congressional choices that disproportionately impact minority groups. This leads to a third explanation: In their assessments of congressional welfare management, courts have relied on a sterile understanding of the plenary power doctrine and the *Insular Cases* that refuse to draw obvious, colonial connections between the territories and minority vulnerability that would definitionally require heightened scrutiny of government action.

This state of affairs should trouble many across the political spectrum. On the left, liberals and Democrats often champion Puerto Rican rights and statehood, but their governance and jurisprudence tell a more complicated story of inequality maintenance. Administratively, *Vaello Madero* was initially litigated under the first Trump Administration, and by the time the case made it to the Supreme Court, President Biden had taken office. The Biden Administration challenged the lower courts' finding of an Equal Protection violation.[49] While the Department of Justice ("DOJ") often defends cases irrespective of the existing administration's politics, it could have declined to defend a practice that a federal appellate court deemed unconstitutional (as occurred under the Obama Administration),[50] but instead took the conscious step of defending Puerto Ricans' exclusion from life-sustaining public benefits.[51] Moreover, in *Vaello Madero*, Justice Sotomayor was the lone dissenter, with the more liberal Justices Kagan and Breyer accepting the government's

49. United States v. Vaello Madero, 142 S. Ct. 1539, 1559 (2022) (Sotomayor, J., dissenting); *see also* United States v. Vaello-Madero, 956 F.3d 12, 23 (1st Cir. 2020).

50. Press Release, U.S. Dep't of Just., Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), https://www.justice.gov/archives/opa/pr/statement-attorney-general-litigation-involving-defense-marriage-act [https://perma.cc/Q2G8-A7V2].

51. This is especially odd because President Biden supported the extension of SSI to Puerto Rico, and the DOJ disseminated a policy in 2024 that it would not rely on the *Insular Cases* any longer. Letter from Carlos Felipe Uriarte, Assistant Att'y Gen., U.S. Dep't of Just., to Raúl M. Grijalva, Rep., U.S. House of Reps. (May 30, 2024), https://assets.nationbuilder.com/wethepeopleproject/pages/541/attachments/original/1717439860/2024.05.30-OUT-Grijalva-Insular_Cases.pdf [https://perma.cc/93F7-T6BE].

exclusionary rational basis argument.[52] To the extent that liberals want to make minority rights, economic justice, and equal treatment under the law more than rhetorical tropes, they may need to extricate themselves from the mainland-specific ways they think about these issues.

There are at least two prominent strands of conservatism that accord with a recognition of the unfairness of the status quo surrounding Puerto Rican poverty. The first, highlighted by Justice Gorsuch, points to constitutional originalism—the theory of interpretation that he has personally described in *Time* as "the [b]est [a]pproach to the Constitution."[53] His critique of racially bigoted foundations of the *Insular Cases* demonstrates that there is a principled form of originalism and constitutional interpretation that accords with progressive critiques of racial subordination and colonialism.[54] These are things that some skeptics of originalism have solicited.[55] More substantively, there is an underleveraged originalist argument that the Constitution's structure never contemplated indefinite holding of territories, whether under the Territory Clause or the Admissions Clause.[56]

Fiscal conservatives might be more circumspect about further extending public benefits. But there are questions about the efficiency of the status quo, which involves crisis-driven migration to the mainland, where Puerto Ricans can get access to benefits. Such push-pull factors can cause strains on local and state governments when the cost of social welfare programs is shifted onto them. This is especially true in a context where individuals of all ideological stripes are concerned about the toll undocumented immigration has on the social services of large and small cities.[57] If there is fear that those individuals, who are categorically excluded from many welfare programs, are over-

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52. *Vaello Madero*, 142 S. Ct. at 1557 (Sotomayor, J., dissenting).

53. Neil M. Gorsuch, *Justice Neil Gorsuch: Why Originalism Is the Best Approach to the Constitution*, TIME (Sept. 6, 2019, 8:00 AM), https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution [https://perma.cc/WA22-FC54].

54. *Vaello Madero*, 142 S. Ct. at 1554–57 (Gorsuch, J., concurring).

55. *See* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Race, Originalism, and Skepticism*, 25 U. PA. J. CONST. L. 1241, 1244–45 (2023).

56. U.S. CONST. art. IV, § 3, cl. 1–2; Micah Allred, *An Originalist Approach to Puerto Rico: Arguments Against the Status Quo*, 99 NOTRE DAME L. REV. REFLECTION 151, 158 (2024); Cesar A. Lopez-Morales, *Making the Constitutional Case for Decolonization: Reclaiming the Original Meaning of the Territory Clause*, 53 COLUM. HUM. RTS. L. REV. 772, 794–96 (2022); GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE 73–78 (2004); AKHIL REED AMAR, AMERICA'S CONSTITUTION 264–76 (2005); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Constitution of Difference*, 137 HARV. L. REV. 133, 151–53, 170 (2024).

57. Jason Richwine, Of Course *Illegal Immigrants Access Public Health Benefits*, CTR. FOR IMMIGR. STUD. (Oct. 7, 2025), https://cis.org/Richwine/Course-Illegal-Immigrants-Access-Public-Health-Benefits [https://perma.cc/4J4J-Y66M]; Jonathan Cohn, *How Somalis Became the New 'Welfare Queens,'* BULWARK (Jan. 13, 2026), https://www.thebulwark.com/p/how-somalis-became-the-new-welfare-queens [https://perma.cc/4DBH-5ZU3]; Alex Nowrasteh & Jerome Famularo, *Immigrants Used Less Welfare than Native-Born Americans in 2022*, CATO INST. (Feb. 18, 2025, 3:46 PM), https://www.cato.org/blog/immigrants-used-less-welfare-native-born-americans-2022 [https://perma.cc/9RPR-R6Q5].

burdening welfare programs, then there is reason to be concerned about Puerto Ricans—who *are* U.S. citizens—relocating to the mainland to obtain benefits denied to them in Puerto Rico.

This Article proceeds in four parts. Part I provides a brief history of identity-based exclusion from the welfare state. Part II describes the legal and jurisprudential status quo regarding public benefits programs in Puerto Rico. Additionally, Part II describes how the interface of rational basis review and plenary power doctrine has produced the current state of affairs. Part III focuses on the peculiar ways the courts have treated the territories in social welfare cases. Part IV situates the Supreme Court's decision in *Vaello Madero* in this historical and legal context and offers some normative suggestions about how legislators and judges might think about this problem in the midst of pending cuts to social welfare programs.

I. A BRIEF HISTORY OF IDENTITY-BASED EXCLUSION IN AMERICA'S WELFARE STATE

Identity-based forms of exclusion have shaped the American welfare state since the inception of colonial poor laws—legislation designed to provide assistance to the needy and indigent.[58] The exclusionary mechanisms have varied from outright prohibitions (e.g., x group is ineligible for benefits) to administrative discretion (e.g., national devolution of eligibility determinations to local officials).[59] The forms of identity that have served as the basis for exclusion range from more familiar statutorily salient categories like race and sex to constitutionally significant concepts like citizenship and residence. Morality-based ideas about who was worthy and who was undeserving also featured in the equation.

This Part offers a brief and non-exhaustive history of exclusion in the American welfare state, starting with poor laws in Colonial America and the Early Republic. It then discusses the use of pauper removal and immigration restrictions to exclude racialized groups. Finally, it analyzes how these forms of exclusion were often carried into the federal welfare systems as it first developed through the creation of war pensions and then expanded under the New Deal and the Great Society. This history helps explain how early logics of exclusion, moral judgment, and jurisdictional differentiation continue to animate legislative and judicial treatments of territorial poverty.

Colonial America inherited strong ideas about "community" from England. The concept of "settlement"—which is akin to domicile—was at the heart of the

58. WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE 16 (6th ed. 1999).

59. *See, e.g.*, JILL QUADAGNO, THE COLOR OF WELFARE 20–24 (1994) (describing various exclusions in federal welfare programs); CYBELLE FOX, THREE WORLDS OF RELIEF 53–72 (2012) (showing how race and immigration status impacted access to local relief). *See generally* IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE (2005) (discussing the racialized design of New Deal and GI Bill programs).

poor laws.[60] Under English common law, towns were required to support their poor residents, or "paupers," as they were called. As a result, one's inhabitancy of a town was consequential.[61] A person could obtain legal settlement in a jurisdiction by being born there, owning real estate in it, marrying someone from there, or working there (including through apprenticeship or indentured servitude).[62]

In the late eighteenth century and well into the nineteenth century, towns vested with responsibility for indigents had various legal tools available to protect themselves from being unduly liable for the care of poor people. "Warning out," which was used for nonresidents and outsiders, was one. In many states, legislation authorized towns to "warn" newcomers to depart, preventing them from becoming "inhabitants entitled to support in case of poverty," as one legal commentator explained.[63] Historian Ruth Herndon found that in eighteenth-century Rhode Island, one-quarter of the people who were warned out were designated "Indian," "mustee," "mulatto," and "Negro," despite constituting less than ten percent of the population.[64] Within that nonwhite population, Black and Indian women accounted for two-thirds of the warn outs.[65] These early practices reflect a recurring pattern that will reappear throughout this Article: local and national authorities using jurisdictional boundaries and identity markers to shift responsibility for poverty away from themselves and onto marginalized populations.

Vagrancy laws, which are typically associated with the Reconstruction South,[66] were also deployed by local authorities in the Early Republic. In both periods, "fear and the desire to 'protect' communities" from Black people who were "incapable of providing for themselves" played a critical role in the use of vagrancy statutes.[67] Officials leveraged these laws to "safeguard against

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60. Ruth Wallis Herndon, *Women as Symbols of Disorder in Early Rhode Island*, *in* WOMEN AND THE COLONIAL GAZE 79, 81 (Tamara L. Hunt & Micheline R. Lessard eds., 2002).

61. JOSIAH HENRY BENTON, WARNING OUT IN NEW ENGLAND 9 (1911) ("This right of inhabitancy included by the common law of England the right to be supported by the town, if the inhabitant became unable to support himself.").

62. Herndon, *supra* note 60, at 81.

63. BENTON, *supra* note 61, at 51.

64. Herndon, *supra* note 60, at 81.

65. *Id.* The manipulation of racial categories and other taxonomies is by no means unique to the welfare state. For example, scholars have recently made similar arguments in the disability law context. *See, e.g.*, Jasmine E. Harris, *The Political Economy of Conservatorship*, 71 UCLA L. REV. 1364, 1466–67 (2024) (highlighting the malleability of disability categorizations by government and private actors to extract resources from Native and Black Americans).

66. Vagrancy laws criminalized quotidian behavior, like loitering, not having employment, and walking at certain times of day, in an ambiguous and race-neutral manner. These laws were then enforced against recently emancipated people, shuttling them to prison and oftentimes back to forced labor. *See* Noah Smith-Drelich, *The Anti-Discriminatory Right to Travel*, 100 IND. L.J. 1063, 1094 (2025); David H. Gans, *"We Do Not Want to Be Hunted": The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE & L. 239, 270–76 (2021).

67. KRISTIN O'BRASSILL-KULFAN, VAGRANTS AND VAGABONDS 9 (2019).

beggary and the need for poor relief."[68] For example, Pennsylvania began to heavily target Black people in the 1820s after it "passed a 'law to prevent the increase in pauperism in the Commonwealth.'"[69] Under this law, if an individual brought a Black person into the state who was likely to become destitute, this so-called sponsor would be liable for their care.[70] This framework relieved local welfare administrators ("overseers of the poor") of responsibility.[71] In the absence of such "sponsors," Black people were labeled vagrants.[72] In 1826, forty-six percent of the vagrants incarcerated in the Philadelphia Prison were Black and forty-six percent were women.[73] Most generally, vagrancy laws highlighted "the societal demand that all people who could work would work, or face criminal consequences," and they were often "enforced by bounties paid to law enforcement officials for each vagrant apprehended."[74] This fusion of regulation and moralized exclusion reflects an enduring tendency to treat poverty as a problem of social deviance. That framing has repeatedly justified limiting access to meaningful public support for marginalized communities.

Pauper removal, the process of forcibly removing poor people from the jurisdiction, was another tactic towns used to rid themselves of obligations for the poor.[75] Unlike "warning out," which prevented newcomers from gaining settlement, pauper removal forcibly expelled those already present. And although pauper removal operated through local poor law rather than federal immigration policy, it functioned as a form of domestic migration control. In practice, officials removed individuals they believed would need assistance.[76] This was an effort to shift the financial responsibility of the expellees to other jurisdictions while defining who would count as the community's responsibility.[77]

Pauper removal touched on questions tied to race and nationality. Like vagrancy statutes being associated with the Reconstruction South, immigration restrictions are typically understood as a post-Civil War development tied to the Chinese exclusion of the 1870s by the federal government. But well before federal immigration law took shape, local governments deployed the population-control practice of pauper removal to regulate the presence of disfavored

68. *Id.*

69. *Id.* at 89.

70. *Id.*

71. *Id.* at 89–90.

72. *Id.* at 90; *see* Harris, *supra* note 65, at 1397–99, 1418–19 (describing use of conservatorships over Black and Native people as a means of "protecting" against poverty).

73. O'BRASSILL-KULFAN, *supra* note 67, at 53.

74. William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 164 (1997).

75. William P. Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73, 103 (1996).

76. *Id.*

77. *Id.* at 103–04.

populations.[78] This was especially true in a place like Massachusetts, where officials targeted poor people of Irish ancestry.[79] As many historians have noted, during the nineteenth century, Irish people were racialized as not quite white and portrayed as drunk, violent, intellectually inferior, and likely to become drains on welfare budgets.[80] Stereotypes aside, they were recipients of government aid.

In 1833, before the Great Famine in Ireland, the Boston Free Dispensary aided 2,185 people, fifty-six percent of whom were Irish, whereas thirty-nine percent were American.[81] Four years later, Massachusetts passed a law that allowed officers to require shipmasters to post a one thousand dollar bond if they discovered anyone aboard who was a "lunatic, idiot, maimed, aged, or infirm persons" or "who have been paupers in any other country" and was "incompetent in the opinion of the officer."[82] The bond would remain in place for a decade after the ship's arrival.[83] This mechanism allowed local authorities to preemptively avoid responsibility for individuals deemed likely to become dependent—such as the poor, disabled, and other marginalized groups—by shifting the risk of their support onto private parties. When the Famine prompted more migration from Ireland to the United States in the 1840s and 1850s, welfare-based immigration controls tightened even further.[84] Here, as in other moments of American welfare history, fiscal anxiety became a language for marking social and political boundaries.

By the time Irish migration hit Massachusetts, the American reformer and abolitionist Theodore Parker described a racial hierarchy of poverty, or what he called an "ethnology of pauperism."[85] Parker's account is useful here because it shows how judgments about poverty were racialized and ranked in ways that shaped who was understood as a legitimate recipient of relief and who was marked for exclusion. According to Parker, American, English, and Scotch pauperism sat on top and was "easily disposed of"; next was German pauperism, which "give[s] us little trouble"; Jewish pauperism could "take care of itself" because of their "thrift" and the "distributive virtue of that people"; even African

78. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1852 (1993).

79. *Id.*

80. *See generally* NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995) (describing the development and evolution of varied racialized characteristics attached to people of Irish ancestry in the United States).

81. HIDETAKA HIROTA, EXPELLING THE POOR 51 (2017).

82. *Id.* at 55.

83. *Id.*

84. *Id.* at 57. Pauper removal is also closely related to the well-documented history of so-called "ugly laws" and similar government policies aimed at physically purging people that communities found aesthetically objectionable. *See* Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 901 n.26, 917 (2019).

85. 1 JOHN WEISS, LIFE AND CORRESPONDENCE OF THEODORE PARKER 397 (New York, D. Appleton & Co., 1864).

pauperism, which sat below because they were "so pliant that we can do with him as we will," was seen as less problematic.[86] But "Celtic pauperism" was at the bottom.[87] The "bulk of our pauperism," Parker wrote, "is Irish."[88] Emboldened by a nativist, anti-Catholic Know-Nothing Party, Massachusetts commenced with legal and illegal removals of Irish paupers that continued well into the 1870s.[89] These hierarchical judgments about whose poverty was most threatening or burdensome foreshadowed modern distinctions between the deserving and undeserving poor. Those distinctions remain embedded in contemporary welfare and territorial policy.

Private maintenance systems were also options for addressing the needs of the poor. "Vendue" was one example and involved towns auctioning off poor individuals to the lowest bidder.[90] The town would pay the bidder for the care of the poor person, and in exchange, the bidder would benefit from the "pauper's labor power."[91] In instances where the person may have been an elder or disabled, the value proposition of bidding on a person whose labor could not be extracted simply came down to maintaining a person for less than what the town paid them, which often led to accusations of cruelty in the system.[92] Poor individuals could also be auctioned off en masse to a single contractor.[93] In these instances, "the labor of the inmates formed a definite and well-understood part of the legal consideration," sometimes in exchange for care obligations as well as an agreement "to defend the town . . . from claims for poor relief from other towns."[94] Such arrangements reveal a consistent governmental impulse to offload the costs of poverty management onto private actors and local institutions.

Apprenticeships were widely used with children and "provided a sound means of social and economic control" by reducing idleness, instilling forms of discipline, and training workers for the local occupational needs of the town, especially in "the most menial and least lucrative trades."[95] Rhode Island is historically significant because of its early emancipation, free Black population, and detailed records, which provide some insights into how racial exclusion worked in poor relief.[96] The state's emancipation law allowed towns to bind

86. *Id.*

87. *Id.*

88. *Id.*

89. HIROTA, *supra* note 81, at 108–11, 144.

90. Benjamin J. Klebaner, *Pauper Auctions: The 'New England Method' of Public Poor Relief*, *in* XCI HISTORICAL COLLECTIONS OF THE ESSEX INSTITUTE 1–2 (1955).

91. *Id.* at 4.

92. *Id.*

93. *Id.* at 7.

94. ROBERT W. KELSO, THE HISTORY OF PUBLIC POOR RELIEF IN MASSACHUSETTS, 1620-1920, at 112 (1922).

95. TRATTNER, *supra* note 58, at 24.

96. *See* Herndon, *supra* note 60, at 80–88.

out children born to enslaved women until the age of twenty-five for men and the age of twenty-one for women—four years longer than typical apprenticeships.[97] Another law focused specifically on Black children and allowed the town to bind them out after one year if their parents were deemed "unable to support them," due to concerns about poor relief.[98] By focusing specifically on Black parental inability to provide support, apprenticeship became a tool of poverty governance. It converted welfare eligibility into a basis for heightened state intervention in the family lives of a racially subordinated group. That linkage between benefit administration and discretionary state authority offers an early example of how welfare regimes can transform need into a justification for unequal treatment.

The federal government became increasingly active in welfare relief during the nineteenth century in a few directions. The Bureau of Indian Affairs, created in 1789, was initially housed in the War Department and moved around the Washington bureaucracy, but by the 1800s, "[c]ongressional appropriations for the relief of indigent Indians became an annual event."[99] Federal involvement in the welfare of Native Americans deepened amidst land conquest and the Supreme Court ruling that the Indian tribes were not foreign nations but "in a state of pupilage," with their relationship "to the United States resemb[ling] that of a ward to his guardian."[100] As scholars of Federal Indian Law have shown, such provision—typically providing food and medical assistance—came by way of treaty-based contractual obligations (that were often breached) in exchange for land cession.[101] Welfare assistance to Native Americans was distinct from other forms of poverty relief at the time, which were handled on a local and state level, because of a federal responsibility that was tied to this trust relationship.[102] Nevertheless, federal welfare to Native Americans contained similar problems of underfunding, bias, and paternalism.[103] In this respect, federal Indian policy supplied a powerful institutional precedent for deploying plenary power to sustain unequal political and economic arrangements in other territorial settings.

Pensions for military servicemembers provided another entry point for the federal provision of welfare. Beginning in 1776 and continuing into the

97. Gabriel Loiacono, *Poor Laws and the Construction of Race in Early Republican Providence, Rhode Island*, 25 J. POL'Y HIST. 264, 269 (2013).

98. *Id.* at 270.

99. Frank M. Loewenberg, *Federal Relief Programs in the 19th Century: A Reassessment*, 19 J. SOCIO. & SOC. WELFARE 121, 126 (1992).

100. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

101. *See* CLAUDIO SAUNT, UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY 82 (2020).

102. *Id.* at 47.

103. *See* MARY KLANN, WARDSHIP AND THE WELFARE STATE 95–116 (2024); TRESSA BERMAN, CIRCLE OF GOODS: WOMEN, WORK, AND WELFARE IN A RESERVATION COMMUNITY 120 (2003); JULIE L. REED, SERVING THE NATION: CHEROKEE SOVEREIGNTY AND SOCIAL WELFARE, 1800–1907, at 249–56, 266–67 (2016).

early decades of the nineteenth century, the Continental Congress and later the U.S. Congress passed a series of pension laws designed to reward Continental Army officers for their service.[104] Such legislation began with a focus on men with disabilities and later shifted attention to the widows and orphans of these soldiers.[105] By the time the War of 1812 commenced, many Revolutionary War veterans were entering their fifties and sixties and were enmeshed in economic precarity.[106] Some were unable to work because of poor health or were forced to sell their land on the cheap to avoid chronic poverty.[107] In 1817, President James Monroe, who served as an officer in the Continental Army, implored Congress to do something for these veterans who were "not provided for by existing laws" and "reduced to indigence and even to real distress."[108] The Pension Act of 1818 responded to this predicament by providing lifetime pensions to all indigent veterans of the Continental Army and U.S. Navy who served for at least nine months, and it represented a trend toward widening benefits to continental-line soldiers and their families when they could demonstrate need.[109]

The onset of the Civil War and its aftermath widened the federal safety net in the second half of the nineteenth century. Before the War, pension rolls had approximately 25,000 veterans and widows, while twenty years after its end, they had 345,000 veterans, widows, and other dependents.[110] The Pension Act of July 14, 1862, was called "the most liberal pension law ever enacted by this government,"[111] and it provided eight dollars a month to soldiers who suffered from total disability; an act four years later increased it to twenty dollars a month.[112] This pension system was racially equal in form, but there were disparities in practice. Black soldiers were less likely to be hospitalized during the war (which made it harder to demonstrate that their disabilities were war-related), and their claims faced higher scrutiny (they had twice the investigation

104. Ann Becker, *The Revolutionary War Pension Act of 1818*, 47 HIST. J. MASS. 99, 99 (2019).

105. *Id.* at 103.

106. John P. Resch, *Federal Welfare for Revolutionary War Veterans*, 56 SOC. SERV. REV. 171, 172–75 (1982).

107. *See id.* at 183–88; James Monroe, U.S. President, First Annual Message (Dec. 2, 1817), https://millercenter.org/the-presidency/presidential-speeches/december-2-1817-first-annual-message [https://perma.cc/6CFK-VGF8].

108. Monroe, *supra* note 107.

109. Becker, *supra* note 104, at 125 ("The Revolutionary War Pension Act of 1818 provided lifetime pensions of $20 per month for officers and $8 for enlisted men to poverty-stricken continental and US Navy veterans who had served at least nine months or until the end of the war.").

110. Claire Prechtel-Kluskens, *"A Reasonable Degree of Promptitude:" Civil War Pension Application Processing, 1861–1885*, PROLOGUE MAG. (2010), https://www.archives.gov/publications/prologue/2010/spring/civilwarpension.html [https://perma.cc/98XA-3V22].

111. John William Oliver, *History of the Civil War Military Pensions, 1861–1885*, *in* BULLETIN OF THE UNIVERSITY OF WISCONSIN: HISTORY SERIES 1, 9 (1917).

112. Prechtel-Kluskens, *supra* note 110.

rate of white veterans' claims).[113] In this sense, the pension system offers an early federal illustration of how formal inclusion in welfare programs could mask racially discriminatory administration.

The Freedmen's Bureau operated from 1865 to 1872 and served a broad population (formerly enslaved people, as well as Black and white people displaced by the Civil War).[114] This experiment in federal social welfare policy included the provision of food, healthcare, and education, amongst other forms of assistance.[115] But it, too, suffered from underfunding, race-based political opposition, and a broader states-rights-infused rejection of federal involvement in welfare policy.[116] President Andrew Johnson, no fan of the Bureau, captured the mood of a segment of the American population when he complained: "A system for the support of indigent persons in the United States was never contemplated by the authors of the Constitution; nor can any good reason be advanced why, as a permanent establishment, it should be founded for one class or color of our people more than another."[117] The appetite for mass-scale federal assistance waned and would not be replicated for almost half a century.[118]

In the 1930s, the Great Depression recast national thinking about who was responsible for alleviating widespread poverty, with a conservative Supreme Court admitting that "[t]he problem [was] plainly national in area and dimensions" in its decision in *Helvering v. Davis*.[119] The Court was responding to the Social Security Act of 1935, a central part of President Roosevelt's New Deal, which established several important programs relevant to our discussion. The first was the federal pension system, which was funded by payroll taxes on employers and workers, and commonly referred to as Social Security.[120] Agricultural workers and domestic workers (e.g., people employed in private households as cooks, nannies, housekeepers, or assistants) were explicitly excluded from coverage. This exclusion impacted sixty-five percent of Black

113. Sven E. Wilson, *Prejudice & Policy: Racial Discrimination in the Union Army Disability Pension System, 1865-1906*, 100 AM. J. PUB. HEALTH SUPP. 1 S56, S56–S57 (2010).

114. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 68–69, 154 (1988); *The Freedmen's Bureau*, NAT'L ARCHIVES (Oct. 28, 2021), https://www.archives.gov/research/african-americans/freedmens-bureau [https://perma.cc/3NFN-4MDE].

115. FONER, *supra* note 114, at 148.

116. *Id.*

117. Andrew Johnson, U.S. President, Veto Message on Freedmen and Refugee Relief Bureau Legislation (Feb. 19, 1866), https://millercenter.org/the-presidency/presidential-speeches/february-19-1866-veto-message-freedmen-and-refugee-relief [https://perma.cc/R6HF-58KB].

118. To be sure, there were some developments in the welfare state, but these were dwarfed in scale by the initiatives that followed. *See, e.g.*, Sheppard–Towner Maternity and Infancy Protection Act, Pub. L. No. 67-97, ch. 135, 42 Stat. 224 (1921) (providing funding for child and maternal health); Act of Apr. 9, 1912, Pub. L. No. 62-116, ch. 73, 37 Stat. 79 (creating the Children's Bureau within the Department of Health and Human Services).

119. Helvering v. Davis, 301 U.S. 619, 644 (1937).

120. *See* Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70 SOC. SEC. BULL. 49, 51–52 (2010).

workers as well as two-thirds of the nonwhite workers who were lumped into the 1930 Census's "other" category (including Mexican, Indian, Japanese, and Filipino workers).[121] These laborers were also precluded from accessing unemployment insurance—the second big feature of the Social Security Act.[122] Scholars disagree on whether this exclusion was purposely biased or a reflection of the federal government's concern about the administrative feasibility of collecting payroll taxes from domestic and agricultural workers who were scattered across the country.[123] In any event, ostensibly neutral administrative concerns became powerful mechanisms for racialized and regionalized welfare stratification.

The consequences of excluding agricultural and domestic workers from Social Security and unemployment insurance were devastating.[124] Minorities were funneled into the two other major parts of the Social Security Act: Old Age Assistance, a program that provided aid to people over the age of sixty-five, and Aid to Dependent Children ("ADC"), which provided support to single mothers and their children.[125] Unlike Social Security and unemployment insurance, these programs were not understood as tied to earned work but considered forms of cash handouts.[126] Both programs gave states significant discretion in setting benefit levels and allowed them to determine who was eligible. Racialized ideas about deservingness played a role in such determinations.[127]

In the South, "suitable home" rules and "man-in-the-house" rules allowed welfare officials to evaluate the moral character of mothers (especially Black ones) and prevent them from receiving benefits if they were dissatisfied with their living conditions or believed they were violating sexual norms.[128] The

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121. Cybelle Fox, *Unauthorized Welfare: The Origins of Immigrant Status Restrictions in American Social Policy*, 102 J. AM. HIST. 1051, 1055 (2016); DeWitt, *supra* note 120, at 53.

122. DeWitt, *supra* note 120, at 50.

123. *Id.* at 51–54; MARY POOLE, THE SEGREGATED ORIGINS OF SOCIAL SECURITY: AFRICAN AMERICANS AND THE WELFARE STATE 174–78 (2006); Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 98–99 (2011).

124. Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1335–36 (1987) (describing how legislative compromise with southern politicians caused New Deal legislation to become infected with unconstitutional racial motivation at its inception).

125. *See* MARY POOLE, THE SEGREGATED ORIGINS OF SOCIAL SECURITY: AFRICAN AMERICANS AND THE WELFARE STATE 8 (2006).

126. LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935, at 1–5 (1994).

127. ELLEN REESE, BACKLASH AGAINST WELFARE MOTHERS: PAST + PRESENT 20, 21–27 (2005); MARTIN GILENS, WHY AMERICANS HATE WELFARE 68 (1999).

128. "Suitable home" laws allowed states to exclude families from welfare programs based on the mother's perceived sexual immorality. Alison Lefkovitz, *Men in the House: Race, Welfare, and the Regulation of Men's Sexuality in the United States, 1961–1972*, J. HIST. SEXUALITY 594, 598 (2011). Under "man-in-the-house" rules, states could end welfare payments to families where the mother "cohabited," or engaged in a sexual relationship, with a man, by holding her partner financially

Supreme Court ultimately had to strike down such state regulation.[129] In the North, complaints about welfare-seeking minority women proliferated. One New York outlet complained about "Puerto Rican immigrants who have been swamping the Department with requests for public assistance" and noted that the "flood of island immigrants, many of whom land in New York without a penny in their pockets, has been one of the department's biggest relief headaches."[130] By the end of 1947, a city report claimed that "liberal relief allowances are attracting impoverished migrants 'whose sole purpose is to receive public assistance.'"[131] These patterns of suspicion toward Puerto Rican welfare recipients on the mainland exemplify a broader logic that would later be institutionalized through territorial welfare exclusions.

The Welfare Rights and Civil Rights Movements of the 1960s and early 1970s helped address racial stratification in the welfare system. Title VI of the Civil Rights Act of 1964 prohibited racial discrimination in federally funded programs and helped rein in that practice in welfare administration.[132] On the judicial side, *Goldberg v. Kelly*, decided in 1970, established welfare recipients' right to a fair hearing before their benefits could be terminated and provided procedural protections to minority recipients who sometimes faced arbitrary benefits terminations.[133] Meanwhile, the Great Society helped develop new welfare programs such as Medicaid and Food Stamps, while ADC transformed into the Aid to Families with Dependent Children ("AFDC") program, which provided assistance to two-parent households.[134]

But by the 1970s, a welfare retrenchment commenced amidst economic stagflation and a backlash to civil rights developments. The "welfare queen"—oftentimes represented as a profligate Black woman with many children, an excessively fertile Hispanic woman, or a nonwhite, anchor-baby-having immigrant—became the face of public benefits expansion gone wrong.[135] The federal government increasingly became sensitive to welfare spending. Such

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responsible for providing for the family. *Id.* at 600–05; Serena Mayeri, *Foundling Fathers: (Non) Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2305–06 (2016).

129. King v. Smith, 392 U.S. 309, 333–34 (1968).

130. William Murtha, *Fielding Puts Relief Ban on Employables*, DAILY NEWS, Oct. 29, 1947, at 8C.

131. Joseph Martin & Henry Lee, *Relief Waste, Vice Bared in City's Report*, DAILY NEWS, Nov. 13, 1947, at 3; *see also* MICHAEL K. BROWN, RACE, MONEY, AND THE AMERICAN WELFARE STATE 95 (1999).

132. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (2018)). *See generally* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973 (1993) (describing how poverty lawyers engaged in impact litigation during the Great Society and Civil Rights Movement); KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972 (2016) (describing the legal and bureaucratic development of the welfare state from the New Deal era through the post-1965 Civil Rights Movement).

133. Goldberg v. Kelly, 397 U.S. 254, 260–61 (1970).

134. GORDON, *supra* note 126, at 301–02; CHRISTOPHER BOSSO, WHY SNAP WORKS: A POLITICAL HISTORY—AND DEFENSE—OF THE FOOD STAMP PROGRAM 117–18 (2023).

135. Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER SOC. POL'Y & L. 247, 247 (2014).

concerns culminated in the welfare reform of 1996, which ended cash assistance as an entitlement, kicked millions off the rolls, and ushered in a new period of skepticism toward poverty programs that still exists today.[136] This late-twentieth-century backlash against welfare expansion—both cultural and political—shaped the environment in which courts articulated highly deferential doctrines governing public benefits, a development examined in more detail in Part II.

The next phase of welfare retrenchment is certainly here. Passed in 2025, the so-called One Big Beautiful Bill ("OBBB"), provided a devastating hit to federal welfare programs by, among other things, cutting funding to the Supplemental Nutrition Assistance Program ("SNAP")[137] and Medicaid[138]—two vital programs supporting the health and welfare of poor people—and instituting new onerous eligibility requirements.[139] To name a few, by some estimates the OBBB will cut $187 billion in federal funding (roughly twenty percent) for SNAP.[140] Additionally, it shifts the cost-sharing arrangement for the program's administrative costs from a fifty–fifty split between states and the federal government to now requiring states to cover seventy-five percent of the administrative costs.[141] Further, it expands who is subject to the SNAP work requirements. SNAP is a means-tested program for low-income families to supplement their grocery budget so they can access nutritious food. Under the previous requirements, recipients with children under the age of eighteen and recipients over the age of fifty-four were exempt from the eighty-hour-per-month work requirement.[142] Now recipients must meet those work requirements if they have children over the age of fourteen years old and if the recipient is sixty-four years old or younger.[143] At least one organization estimates that the changes to the work requirement will cut SNAP benefits to 2.4 million people.[144]

Changes to the administration of Medicaid—which provides medical insurance to low-income children and adults—are also slated to have devastating

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136. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105; SHARON HAYS, FLAT BROKE WITH CHILDREN: WOMEN IN THE AGE OF WELFARE REFORM 4–6, 226–31 (2003); JOE SOSS, RICHARD C. FORDING & SANFORD F. SCHRAM, DISCIPLINING THE POOR 120–40 (2011).

137. Amelia Coffey & Heather Hahn, *SNAP Cuts in One Big Beautiful Bill Act Leave Almost 3 Million Young Adults Vulnerable to Losing Nutrition Assistance*, URB. INST. (Aug. 6, 2025), https://www.urban.org/urban-wire/snap-cuts-one-big-beautiful-bill-act-leave-almost-3-million-young-adults-vulnerable [https://perma.cc/JW92-9LRT].

138. *See infra* notes 273–94 and accompanying text.

139. One Big Beautiful Bill Act, Pub. L. No. 119-21, 139 Stat. 72 (2025).

140. RANDY ALISON AUSSENBERG, CONG. RSCH. SERV., R48552, SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) AND RELATED NUTRITION PROGRAMS IN P.L. 119-21: AN OVERVIEW 1 (Aug. 15, 2025), https://www.congress.gov/crs-product/R48552 [https://perma.cc/5EWL-Z6CQ].

141. *See id.* at 6.

142. 7 U.S.C. § 2015(o)(3) (2024).

143. *See* AUSSENBERG, *supra* note 140, at 3–4.

144. *President Trump's "One Big Beautiful Bill Act," Explained*, LEGAL DEF. FUND, https://www.naacpldf.org/case-issue/trumps-one-big-beautiful-bill-act-explained [https://perma.cc/2M2W-YH4S].

effects.[145] For example, the bill introduced, for the first time, a work requirement for Medicaid recipients.[146] States will now be required to implement an eighty-hour-per-month work requirement for low-income people ages nineteen to sixty-four, with exemptions for recipients who are thirteen and under or who cannot work for covered reasons.[147] An estimated 5.3 million recipients will likely lose coverage as a result of the work requirement.[148]

Although the OBBB does not mention Puerto Rico specifically, the bill's effect on federal programs will have latent effects in the territory.[149] Puerto Rico's Medicaid allocations are set to expire in 2027.[150] And with the OBBB as context, some healthcare experts on the Island expect massive cuts to funds provided to Puerto Rico for Medicaid.[151] The constitutionality of these cuts, and the logic justifying them, would be further justified by recent Supreme Court decisions, including the logic established in the decision at the heart of this Article: *Vaello Madero*.[152]

A more immediate concern for Puerto Ricans is the change to redetermining eligibility for Medicaid. Medicaid recipients typically must establish continued eligibility around every twelve months.[153] But under the OBBB, the renewal periods for Medicaid will change to every six months.[154] Some commentators fear that given the ages and technological barriers in the territories, and the predictable administrative hurdles, paperwork delays, and backlogged systems, many people may lose coverage simply because their renewals were not processed in time. Not only does this requirement strain an already stressed territorial system, but it is also these types of facially innocuous requirements that cause the most harm to the poorest and most vulnerable

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145. *See id.*

146. *Health Provisions in the 2025 Federal Budget Reconciliation Law*, KFF (Aug. 22, 2025), https://www.kff.org/medicaid/health-provisions-in-the-2025-federal-budget-reconciliation-law/#2ca666ac-5d15-4454-8973-241566e22bb5 [https://perma.cc/AW6Z-Z3R4].

147. One Big Beautiful Bill Act, Pub. L. No. 119-21, § 71119(a)(2)–(3), (9)(A), 139 Stat. 72, 307–13 (2025).

148. *By the Numbers: Harmful Republican Megabill Will Take Health Coverage Away from Millions of People and Raise Families' Costs*, CTR. ON BUDGET & POL'Y PRIORITIES (Aug. 27, 2025), https://www.cbpp.org/research/health/by-the-numbers-harmful-republican-megabill-will-take-health-coverage-away-from [https://perma.cc/LNA7-8EDV].

149. Stephanie L. López, *No Immediate Cut to Medicaid in Puerto Rico, but Concerns Linger*, W J. (July 8, 2025), https://www.wjournalpr.com/top-stories/no-immediate-cuts-to-medicaid-in-puerto-rico-but-concerns-linger/article_d976ed31-d1f5-4258-82cc-dac2ecbd5b3f.html [https://perma.cc/DJC4-8VXQ].

150. *Id.*

151. *Id.*; *see How Will the One Big Beautiful Bill Act Impact Puerto Rico?*, PUERTO RICO REP. (July 9, 2025), https://puertoricoreport.com/how-will-the-one-big-beautiful-bill-act-impact-puerto-rico [https://perma.cc/9TBS-GJ37].

152. *See infra* notes 330–51 and accompanying text.

153. *See Health Provisions in the 2025 Federal Budget Reconciliation Law*, *supra* note 146.

154. *See* One Big Beautiful Bill Act, Pub. L. No. 119-21, § 71107, 139 Stat. 295 (2025); *Health Provisions in the 2025 Federal Budget Reconciliation Law*, *supra* note 146.

among us. Finally, even though Puerto Rico is not singled out, the OBBB affects Nutrition Assistance Program ("NAP") on the Island. The OBBB flattens out the federal cost of living adjustment for a portion of NAP benefits allocated through the Thrifty Food Plan.[155] This means that this component of NAP will not keep up with inflation.[156]

Overall, this brief history demonstrates a few things. First, it shows how ideas about deservingness, identity, and who is an outsider have been central to America's social safety net. Second, though there has sometimes been outright bias in the provision of public benefits, the story is much more complicated; it involves an ebb and flow of inclusion as well as forms of exclusion that have been tied to seemingly neutral concerns about administrability, affordability, and the proper rule of the federal and subnational governments. This mélange of themes helps set the stage for understanding the specific treatment of Puerto Rico and the territories vis-à-vis American welfare.

II. HANDS-OFF JURISPRUDENCE: RATIONAL BASIS REVIEW AND THE ABANDONMENT OF ECONOMIC JUSTICE

The patterns of exclusion traced in Part I persist in contemporary welfare law, where judicial doctrines insulate policy choices from meaningful constitutional scrutiny. To truly understand how this shielding operates in modern public benefits law, this Part examines the Supreme Court's habitual reliance on rational basis review as the dominant framework for constitutional challenges to welfare policy.

As noted above, the Supreme Court's 1937 recognition of poverty as a federal issue in *Helvering v. Davis* marked a significant shift in American jurisprudence and gave Congress the green light to pass legislative measures to address indigency.[157] But the next few decades were characterized by inconsistency and disjointedness. Four years later, the Court decided *Edwards v. California*, which involved a state law that prohibited knowingly bringing a poor person into the state.[158] California rightly argued that the statute had a firm basis in English and American poor laws concerning settlement and residency, but the Court swatted away that argument by suggesting that "the theory of the Elizabethan poor laws no longer fits the facts."[159] California also pointed to "the huge influx of migrants" who entered the state during the Depression, which "resulted in problems of health, morals, and especially finance, the proportions of which are staggering."[160] But the Court also rejected this rationale and noted that relief to the needy was a national concern, which

155. *See* AUSSENBERG, *supra* note 140, at 3; *How Will the One Big Beautiful Bill Act Impact Puerto Rico?*, *supra* note 151.

156. *See How Will the One Big Beautiful Bill Act Impact Puerto Rico?*, *supra* note 151.

157. *See supra* note 119 and accompanying text.

158. Edwards v. California, 314 U.S. 160, 171 (1941).

159. *Id.* at 174.

160. *Id.* at 173.

was evidenced by the passage of the New Deal policies and the fact that the indigent person at the center of the dispute was a recipient of federal relief.[161] In a country where interstate migration is inevitable, the Court ruled that the California law at hand violated the Constitution's Commerce Clause.[162]

One would have expected to see similar rulings in the years following *Edwards*, but the Court stood relatively pat for fifteen years. The cases involving wartime powers and early Cold War challenges involving civil liberties consumed more of the Court's attention.[163] Economically, this period also represented a moment of prosperity that included the flowering of federal public benefits (e.g., the G.I. Bill) and the expansion of the middle class.[164] This is not to say that there were no public benefits-related issues the Court could have addressed—discriminatory administration of veterans' benefits, Social Security, and ADC were some of the many problems that it could have broached but did not. Some of these issues would be addressed in the 1960s, but a firmer juridical groundwork was necessary.[165]

The cases in the mid-twentieth century that helped facilitate the expansion of welfare rights had little to do with public benefits programs and were more concerned with poverty. In 1956, *Griffin v. Illinois* helped inaugurate a line of equal access decisions that fell short of shoring up substantive economic rights but nudged state governments toward creating the conditions for poor people to participate in American legal democracy.[166] In *Griffin*, the Court ruled that the Equal Protection Clause required the state to provide free trial transcripts to indigent defendants.[167] These documents were crucial for people who wanted to challenge their sentences but were out of financial reach for many.[168] The Court acknowledged that "[p]roviding equal justice for poor and rich" was "an

161. *Id.* at 174–75 ("Recent years, and particularly the past decade, have been marked by a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character. The duty to share the burden, if not wholly to assume it, has been recognized not only by State governments, but by the Federal government as well.").

162. *Id.* at 172–73.

163. Christopher W. Schmidt, *The Civil Rights-Civil Liberties Divide*, 12 STAN. J. C.R. & C.L. 1, 16–24 (2016) (discussing civil liberties and civil rights cases). *See generally* CLIFF SLOAN, THE COURT AT WAR: FDR, HIS JUSTICES, AND THE WORLD THEY MADE (2023) (discussing many of the consequential constitutional questions the FDR court encountered).

164. Melissa E. Murray, *Whatever Happened to G.I. Jane?: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91, 104–06 (2002).

165. *See supra* notes 132–34 and accompanying text.

166. *See generally* Griffin v. Illinois, 351 U.S. 12 (1956); Gideon v. Wainwright, 372 U.S. 335 (1963) (extending the right to counsel to indigent defendants in state felony cases and noting that "[p]ortents of today's decision may be found as well in [*Griffin*]"); Douglas v. California, 372 U.S. 353 (1963) (building on Griffin's logic in the context of appellate equality); Neil Sobol, Griffin v. Illinois*: Justice Independent of Wealth*, 49 STETSON L. REV. 399, 400 (2020) ("In many ways, *Griffin* laid the foundation for case law and legislation designed to address equal protection and due process concerns for defendants who lack financial resources.").

167. *Griffin*, 351 U.S. at 18–20.

168. *Id.* at 13–15.

age-old problem" but it believed that denying poor people appellate review when a state could simply furnish the transcripts meant that people could be deprived of their life, liberty, and property because of costs that bore no relationship to their guilt or innocence.[169] The punchline in *Griffin* was this: "In criminal trials, a State can *no more discriminate on account of poverty* than on account of religion, race, or color."[170] This pronouncement seemingly elevated poverty to constitutionally protected class status—and ensuing cases seemed to confirm that promotion.

Gideon v. Wainwright[171] and *Douglas v. California*,[172] decided on the same day in 1963, widened the legal sensitivity to poverty. *Gideon* was one of the landmark cases that extended the right to counsel to indigent state criminal defendants.[173] Unlike *Griffin*, which relied on the Equal Protection Clause, *Gideon* rested on different conceptual grounds, namely the Due Process Clause. "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him," the unanimous Court wrote.[174] There were no references to the rich versus the poor, as in *Griffin* and some of the cases that came after *Gideon*; instead, the focus was on procedural guarantees that should apply irrespective of one's financial status and sometimes necessitated government help.[175]

Douglas picked up the Equal Protection baton by requiring the appointment of counsel for indigents in their first appeal.[176] Again, there was more language that suggested that poverty was a classification that held special legal significance. "[T]he '[d]enial of counsel on appeal [to an indigent] would seem to be a discrimination at least as invidious as that condemned in *Griffin*,'" the Court noted.[177] Three years later, in 1966, the Court struck down a Virginia poll tax as violative of the Equal Protection Clause.[178] Citing *Edwards*, *Griffin*, and *Douglas*, the Court claimed that "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."[179]

By the end of the 1960s, there was a long line of cases that created the conditions for a more muscular judicial approach to poverty and welfare, and

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169. *Id.* at 16.

170. *Id.* at 17 (emphasis added).

171. *See generally* Gideon v. Wainright, 372 U.S. 335 (1963) (finding that the Sixth Amendment's right to counsel requires states to provide indigent defendants with counsel in felony criminal cases).

172. *See generally* Douglas v. California, 372 U.S. 353 (1963) (holding that states must provide counsel to indigent defendants on appeals as a matter of right).

173. *Gideon*, 372 U.S. at 344–45.

174. *Id.* at 344.

175. *See id.* at 344–45.

176. *See Douglas*, 372 U.S. at 356–58.

177. *Id.* at 355 (alteration in original) (quoting People v. Brown, 357 P.2d 1072, 1076 (Cal. 1960) (Traynor, J., concurring)).

178. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 666–70 (1966).

179. *Id.* at 668 (citation omitted).

a few cases exercised those possibilities. In 1969, *Shapiro v. Thompson* returned to ideas about settlement found in Elizabethan poor laws and involved local statutes that imposed one-year residency requirements for welfare eligibility.[180] The Court struck down these restrictions as a form of class discrimination that was violative of the Equal Protection Clause and used powerful language that is worth quoting at length:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.[181]

By rejecting fiscal savings as a rationale for discrimination against the poor, the Court seemed willing to identify welfare as an economic right worthy of constitutional protection. The decision the following year in *Goldberg v. Kelly*, which required an evidentiary hearing before the termination of welfare benefits, was consistent with such a recognition.[182]

With few exceptions, things went downhill for antipoverty legal advocates after *Goldberg* was decided in 1970.[183] *Dandridge v. Williams*, decided a few weeks later, involved a challenge to a cap on how much welfare assistance any one family could receive irrespective of its size—a policy that had the result of providing larger families with less money per person.[184] The Court ruled that this cap was free of invidious discrimination and rationally based on legitimate state interests.[185] It reminded a general audience that constitutional equality guarantees impose only limited constraints on how states structure their responses to poverty: "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."[186] By framing public benefits administration as a matter of permissible line-drawing, the Court granted legislatures wide latitude to

180. Shapiro v. Thompson, 394 U.S. 618, 628–33, 641–42 (1969).

181. *Id.* at 633.

182. Goldberg v. Kelly, 397 U.S. 254, 269–71 (1970).

183. *Graham v. Richardson* invalidated states' restrictions on welfare eligibility applied to immigrants but did so based on alienage. Graham v. Richardson, 403 U.S. 365, 378 (1971). There are, of course, exceptions here. *Jimenez v. Weinberger* struck down provisions of the Social Security Act that denied benefits to certain illegitimate children, on Fifth Amendment Due Process grounds. 417 U.S. 628, 637–38 (1974).

184. Dandridge v. Williams, 397 U.S. 471, 472–75 (1970).

185. *Id.* at 486–87.

186. *Id.*

define social problems while insulating large swaths of welfare policy from meaningful equality-based scrutiny.

Two years after *Dandridge*, a class of welfare recipients challenged Texas's allocation of several categories of welfare benefits under the Social Security Act; Texas furnished one hundred percent of recognized need to older adults and ninety-five percent of need to people who are blind or had disabilities, but only seventy-five percent of need to families who received AFDC, the latter of which was populated with predominantly Black and Hispanic residents.[187] Again, the Court found this scheme lacked invidious discrimination. It concluded that state's arrangement was tied to rational policy choices within the state's discretion and allowed Texas to distribute limited welfare resources as it saw fit.[188] If advocates were confused, the Court ruled a year later that wealth was not a suspect classification triggering strict scrutiny under the Equal Protection Clause, effectively all but eliminating the possibility that welfare-based claims could be robustly addressed in federal courts.[189] Instead, they would be mostly consigned to the land of rational basis review.[190]

This short window represents a critical judicial abandonment of meaningful scrutiny of welfare legislation. The rational basis test allows federal courts to write themselves out of conversations about economic inequality. As long as local, state, and federal governments can muster some form of conceivable legitimate reason for discriminatory practices—a relatively low bar—legal victory is almost predetermined, and courts will grant them constitutional immunity.[191] This deferential posture reshapes the constitutional terrain by placing large swaths of welfare policy beyond meaningful constitutional contestation, even where exclusions fall most heavily on marginalized populations. Indeed, problematic welfare administration can sometimes intersect with discrimination on the basis of constitutionally protected categories like race and alienage, but under rational basis review, courts do not have to entertain that reality.[192] Tragically, this is only one part of the story; the Court's treatment of plenary powers supplies an additional dimension to its retreat from economic justice.

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187. Jefferson v. Hackney, 406 U.S. 535, 537 n.3, 545 (1972).

188. *Id.* at 549–51.

189. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 26–28, 40 (1973).

190. *Id.* at 40; *cf.* U.S. Dep't. of Agric. v. Moreno, 413 U.S. 528, 538 (1973) (striking down a provision in the Food Stamp Act that denied assistance to unrelated persons but did so on statutory and Fifth Amendment Due Process grounds).

191. *Rodriguez*, 411 U.S. at 40 (rational basis review "requires only that the State's system be shown to bear some rational relationship to legitimate state purpose").

192. A court would be able to if discriminatory intent and disparate impact were demonstrated as well as a showing that the legislation was adopted "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). This is a notoriously high bar. *See id.* at 279–80; Washington v. Davis, 426 U.S. 229, 242 (1976).

III. THE SAGA OF SEPARATE AND UNEQUAL: CONGRESS, PLENARY POWERS, AND THE JUDICIAL BLESSING OF TERRITORIAL DISCRIMINATION

Plenary powers generally refer to Congress's authority on a range of issues that invite minimal judicial oversight. Congress exercises plenary power on issues tied to Indian affairs, immigration, commerce, and most importantly for our purposes, the U.S. territories.[193] The administration of federal territories, which today includes Puerto Rico, Guam, the U.S. Virgin Islands, the Northern Mariana Islands, and American Samoa, is chiefly characterized by the supreme and virtually absolute authority vested in the federal government.[194] This Part describes the development of Congress's plenary power over the territories and the related doctrine of territorial incorporation, and then highlights how these have been used to exclude residents of the territories, particularly U.S. citizens in Puerto Rico, from the federal welfare system.

The Founders envisaged a constitutional structure of territorial expansion and administration that balanced temporary inequality with an eventual path to statehood.[195] That vision was influenced, in large part, by the colonists' unquenchable thirst for new lands.[196] In the prelude to the war for independence, British colonists began another war to dispute possession of lands in the Ohio River Valley with the French and Indigenous populations in 1754.[197] And when the British Crown prohibited further western encroachment following the war, the Founders complained about it in the Declaration of Independence.[198] After the Revolution, the federal government organized its first territory, through the Northwest Ordinance, even before the federal Constitution was ratified.[199]

Congress set the pattern for territorial expansion and governance in the Northwest Ordinance.[200] The Ordinance created the internal governance mechanisms for the Northwest Territory, which included land that would

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193. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 7–8, 8 n.26 (2002).

194. *Developments in the Law—the U.S. Territories*, 130 HARV. L. REV. 1616, 1617, 1648–49 (2017).

195. *Id.* at 1644–45.

196. Prior to the Civil War, the United States acquired at least one territory every fifteen years. Sam Erman, *"The Constitutional Lion in the Path": The Reconstruction Constitution as a Restraint on Empire*, 91 S. CAL. L. REV. 1197, 1209 (2018).

197. *See* John Hayden Dossett, *Indian Country and the Territory Clause: Washington's Promise at the Framing*, 68 AM. U. L. REV. 205, 223 (2018) (discussing the French and Indian War, George Washington's participation in the conflict, and his views on territorial expansion).

198. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776) ("He has endeavoured to prevent the population of these States; for that purpose . . . raising the conditions of new Appropriations of Lands.").

199. Northwest Ordinance of 1787, ch. 8, 1 Stat. 50, 51 n.(a) (1789).

200. Bartholomew H. Sparrow, *Empires External and Internal: Territories, Government Lands, and Federalism in the United States*, *in* THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803–1898, at 231, 233–34 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005).

become states like Ohio and Wisconsin.[201] Governance consisted of three stages. The first stage provided for a congressionally appointed governor, secretary, and judges.[202] Once the free white male population grew past five thousand people, rule became more democratic with the introduction of an elected assembly.[203] In the third stage, once the population reached sixty thousand free people, the territory could draft a constitution and request admittance into the Union as a state on equal footing.[204] Importantly, the Ordinance explicitly stated that the territory would be temporary and that states would be admitted to the Union "at as early periods as may be consistent with the general interest."[205] Congress would repeat this pattern of passing an organic act—the statute defining a territory's internal governance—for every territory it acquired until 1900.[206]

What gave Congress the power to create organic acts? The Framers provided Congress with authority to administer territories and admit them as states of the Union. Specifically, the Territory Clause provides Congress with the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[207] From that directive, the Supreme Court has demonstrated a capacious understanding of Congressional authority. It has ruled, for example, that in "legislating for [the territories], Congress exercises the combined powers of the general, and of a state government."[208] In other words, Congress can legislate in two capacities: as a national legislature and as a local legislature for the territories. When Congress creates an organic act or legislates for a territory, it functions as the local or territorial legislature. Further yet, Congress also possesses a more general power over the territories. As the Supreme Court details, "Congress may

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201. Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN ST. L. REV. 413, 473 (2006).

202. Northwest Ordinance of 1787, at 51 n.(a).

203. *Id.* at 52 n.(a).

204. *Id.* at 53 n.(a), art. V; Anthony M. Ciolli, *Needful Rules and Regulations: Originalist Reflections on the Territorial Clause*, 77 VAND. L. REV. 1263, 1286 (2024).

205. Northwest Ordinance of 1787, at 52 n.(a). Indeed, the goal of all territorial acquisition was to admit the territories as states of the Union. This pattern remained unbroken until 1898. ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 6 (1989); Juan R. Torruella, *Ruling America's Colonies: The* Insular Cases, 32 YALE L. & POL'Y REV. 57, 62 (2013) ("Nevertheless, throughout this period in U.S. history, the nation's fundamental goal in extending its borders was creating more States—*not* the acquisition of colonies."); Shively v. Bowlby, 152 U.S. 1, 49 (1894) ("[T]erritories acquired by Congress, whether by deed of cession from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States.").

206. Clarence E. Carter, *Colonialism in Continental United States*, 47 S. ATLANTIC Q. 17, 22 (1948).

207. *See* U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").

208. Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 546 (1828).

not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void."[209] The Court reasoned that this power was necessarily implied in the Constitution because "[t]erritories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations."[210]

Plenary power provides Congress with nearly unfettered authority to govern and administer the territories.[211] And it has, over the course of our nation's history, channeled that power in creative and inventive ways to create unique governmental arrangements.[212] In creating local courts, Congress often used its plenary power in vesting territorial courts with both federal and territorial jurisdiction.[213] With respect to local governance, Congress has at times required federally appointed governors and administrators in certain territories,[214] provided for elected governors for others,[215] and even left one territory under military rule for fifty-one years.[216] Congress exercises discretion in fashioning local statutes for the territories as well. It has acted unilaterally

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209. United States v. McMillan, 165 U.S. 504, 511 (1897) (quoting Nat'l Bank v. County of Yankton, 101 U.S. 129, 133 (1879)). Indeed, the specter and realization of federal interference into local affairs persists to this day. *See* Emmanuel Hiram Arnaud, *Colonizing by Contract*, 124 COLUM. L. REV. 2239, 2291–92 (2024).

210. *County of Yankton*, 101 U.S. at 133.

211. Christina Duffy Burnett [Ponsa-Kraus] & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 1, 4–5 (Christina Duffy Burnett [Ponsa-Kraus] & Burke Marshall eds., 2001).

212. Samuel Issacharoff, Alexandra Bursak, Russell Rennie & Alec Webley, *What Is Puerto Rico?*, 94 IND. L.J. 1, 12–13 (2019) (describing Felix Frankfurter's "inventive statesmanship," a principle which aimed to use Congress' broad powers to create unique governmental arrangements in the territories); Puerto Rico v. Sanchez Valle, 579 U.S. 59, 77 (2016) (noting that "Congress has broad latitude to develop innovative approaches to territorial governance").

213. *356 Bales of Cotton*, 26 U.S. at 546 (providing Florida territorial court with admiralty jurisdiction). Relatedly, Congress has likewise vested some federal district courts in the territories with expanded jurisdiction. The federal district court for the U.S. Virgin Islands has a type of supplemental jurisdiction over local criminal offenses. A federal prosecutor can file both federal and local charges in federal district court. If the federal charges are dismissed, the district court retains jurisdiction over the local offenses. *See* United States v. Gillette, 738 F.3d 63, 70–76 (3d Cir. 2013).

214. *See, e.g.*, Organic Act of Oklahoma, ch. 182, 26 Stat. 81, 88 (1890) (providing for presidentially appointed governor and secretary).

215. Puerto Rico's first organic act provided for a presidentially appointed governor. But, in light of a growing international decolonial movement, Congress provided for the popular election of the governor in 1947. *See* Elective Governor Act of 1947, ch. 490, 61 Stat. 770, 770–71.

216. American Samoa was initially ceded to the United States in 1900 and 1904. The Navy ruled the territory until 1951, when administrative responsibilities were transferred to the Department of the Interior. Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 78 (2013).

in applying penal codes to some territories,[217] and authorized others to create their own over time.[218] Congress has also experimented with providing broad local autonomy in the territories, most recently by creating the Commonwealth of Puerto Rico[219] and the Commonwealth of the Northern Mariana Islands.[220] Congress, at times, also treats the territories differently from the states with respect to laws of national applicability. It has excluded the territories from federal bankruptcy laws,[221] created a unique bankruptcy proceeding for the territories,[222] and, of course, provided people in the mainland United States with greater financial assistance under federal programs than those in the territories.[223]

Treating the territories differently from the states was traditionally seen as a practical necessity. The pattern and practice announced by Congress and the Supreme Court, and suggested in the constitutional text,[224] was that the federal government acquired territory for the purpose of creating new states.[225] Accordingly, any differential treatment was supposed to be temporary. But that all changed in 1898.

Following the Spanish-American War, the United States was left in possession of Puerto Rico, Guam, and the Philippines. For the first time in its history, the federal government acquired noncontiguous territory, with substantial foreign populations, and upon whom the nation had no prior formal influence.[226] The acquisition prompted a vigorous debate about what their

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217. *See* Dora Nevares Muñiz, *Evolution of Penal Codification in Puerto Rico: A Century of Chaos*, 51 REV. JUR. U.P.R. 87, 104–07 (1982).

218. Most territories created their own penal codes over time. *See* William Wirt Blume, *Legislation on the American Frontier*, 60 MICH. L. REV. 317, 333–34 (1962).

219. In 1950, Congress authorized Puerto Ricans to create a constitution of their own making. The constitution, which formally created the "Commonwealth" of Puerto Rico, was initially lauded as producing a change in the constitutional relationship between the territory and the federal government. In reality, the law merely provided the territory with home rule, subject to the plenary power of Congress. *See* Emmanuel Hiram Arnaud, *Llegaron los Federales: The Federal Government's Prosecution of Local Criminal Activity in Puerto Rico*, 53 COLUM. HUM. RTS. L. REV. 882, 913–15 (2022). Similarly, in 1975, the Northern Mariana Islands entered into a covenant establishing a commonwealth in political union with the federal government. Cori Alonso-Yoder, *Imperialist Immigration Reform*, 91 FORDHAM L. REV. 1623, 1627 (2023).

220. *See* Alonso-Yoder, *supra* note 219, at 1627.

221. *See* Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 117–18 (2016).

222. *See* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., 590 U.S. 448, 465–66 (2020).

223. United States v. Vaello Madero, 596 U.S. 159, 162 (2022).

224. AMAR, *supra* note 56, at 274 ("[T]he fact that Article IV addressed both federal territory and new states in a single integrated section both reflected and reinforced a general expectation that territories would indeed mature into new states that in due course would be admitted on equal terms.").

225. Lopez-Morales, *supra* note 56, at 794 ("[T]he Constitution permits the unequal treatment of the territories *only* because such inequality was meant to be temporary.").

226. Emmanuel Hiram Arnaud, *A More Perfect Union for Whom?*, 123 COLUM. L. REV. F. 84, 101 (2023) (reviewing JOHN F. KOWAL & WILFRED U. CODRINGTON III, THE PEOPLE'S CONSTITUTION: 200 YEARS, 27 AMENDMENTS, AND THE PROMISE OF A MORE PERFECT UNION (2021)).

acquisition meant.[227] Several decades earlier, the Reconstruction Amendments promised equal rights and citizenship for all those in the United States,[228] and many in the United States balked at the prospect of bestowing these rights and citizenship on a significantly nonwhite population.[229] On one side were the anti-annexationists. They were not necessarily against annexation, but rather, they opposed the admittance of majority-nonwhite populations into the American polity.[230] On the other side were annexationist Republicans, who likewise feared the absorption of a nonwhite population, but had begun arguing that the Reconstruction Amendments did not pose a restraint on conquest.[231] Between them, the animating question remained the same: Did annexation of these new territories confer citizenship, rights, and eventual statehood?

The Supreme Court entered the debate in the *Insular Cases*. In a series of decisions from the early 1900s, mainly dealing with imported goods and some questions of criminal procedure, the Court explained that the recently acquired territories were different than the territories of old.[232] Influenced by racial animus and a series of law review articles,[233] the Court announced the doctrine of territorial incorporation. According to the doctrine, there were two types of territories: the incorporated and the unincorporated. The incorporated territories were those that were on their way to statehood and were considered as being part of the United States.[234] The unincorporated territories, however, were not statehood-bound, were not entirely a part of the United States, and, as a consequence, some constitutional provisions applicable in the incorporated territories were not applicable in the unincorporated, like the Uniformity Clause or jury trial right.[235] The post-1898 territories were unincorporated because not only did the original treaties of acquisition not confer citizenship to their inhabitants, but even after Congress extended

227. *See* Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 290–300 (2007).

228. SAM ERMAN, ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE 2 (2019).

229. *Id.*

230. Erman, *supra* note 196, at 1219–20; Aziz Rana, *How We Study the Constitution: Rethinking the* Insular Cases *and Modern American Empire*, 130 YALE L.J.F. 312, 318–21 (2020).

231. *See id.* at 1199–200, 1211.

232. *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 248–80 (1901); De Lima v. Bidwell, 182 U.S. 1, 196–98 (1901); Balzac v. Porto Rico, 258 U.S. 298, 309 (1922).

233. *See, e.g.*, Abbott Lawrence Lowell, *The Status of Our New Possessions—a Third View*, 13 HARV. L. REV. 155, 176 (1899) (surveying the contemporary academic debate and providing the basic legal framework for what eventually became the territorial incorporation theory). *See also* Torruella, *supra* note 227, at 291–96; Sam Erman, *Accomplices of Abbot Lawrence Lowell*, 131 HARV. L. REV. F. 105, 107–13 (2018).

234. James T. Campbell, Aurelius*'s Article III Revisionism: Reimagining Judicial Engagement with the* Insular Cases *and "The Law of the Territories,"* 131 YALE L.J. 2542, 2547–49 (2022).

235. *Downes*, 182 U.S. at 270–71 (holding that the territories are not subject to the Uniformity Clause); *Balzac*, 258 U.S. at 304–05 (holding that Sixth Amendment jury trial right was inapplicable to the territories).

citizenship, it did not explicitly announce their incorporation.[236] Today, the federal government holds five unincorporated territories.[237]

The *Insular Cases* did not, as is often suggested, create Congress's plenary power over the territories. As discussed above, that authority is anchored in the Constitution and predated the United States's imperial turn.[238] But the *Insular Cases* did augment those powers. A pivotal consequence of the *Insular Cases* was that by obstructing a path to statehood, the Court sanctioned holding territories in perpetuity—or colonies[239]—and, importantly, opened the door to deannexation.[240] In other words, acquiring territories did not, as was feared by anti-annexationists, necessarily grant citizenship to territorial inhabitants or permanently tether the new territories to the United States. Accordingly, Congress continues wielding its plenary power and promoting inequality in perpetuity. Most recently, Congress explicitly relied on its plenary power when creating a unique bankruptcy provision for the territories in 2016.[241] That federal statute created a fiscal control board that was placed within Puerto Rico's government.[242]

Congress's plenary power is broad and has few limitations. With some exceptions,[243] the Bill of Rights ostensibly applies in the territories.[244] And

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236. *Balzac*, 258 U.S. at 305–12.

237. *See* Campbell, *supra* note 234, at 2549. The federal government holds one incorporated territory, Palmyra Atoll, which is, in Justice Gorsuch's words, an "uninhabited patch of land in the Pacific Ocean." United States v. Vaello Madero, 142 S. Ct. 1539, 1556 (2022) (Gorsuch, J., concurring). Palmyra Atoll was part of the Hawaii Territory when Congress incorporated it. But when Congress admitted Hawaii as a state, it did not include Palmyra Atoll as part of the state, and instead ostensibly remains an unincorporated territory today. *See* Joel Andrews Cosme Morales, *Palmyra Atoll: America's 51st State?*, 49 S.U. L. REV. 97, 98 (2021).

238. *See supra* notes 193–210 and accompanying text.

239. *Downes*, 182 U.S. at 380 (Harlan, J., dissenting) ("The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, 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 wholly inconsistent with the spirit and genius as well as with the words of the Constitution.").

240. Christina Duffy Burnett, Untied *States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 853–70 (2005). The United States granted the territory of the Philippines independence in 1946. Proclamation No. 2695, 3 C.F.R. 86 (1957); Rose Cuison-Villazor, *Creating a Racialized Liminal Status: The 1790 Act and Interstitial Citizenship*, 65 WM. & MARY L. REV. 1157, 1170–71 (2024).

241. *See* Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114-187, § 101(b)(2), 130 Stat. 549, 553 (2016) (codified at 48 U.S.C. § 2121).

242. *See* 48 U.S.C. §§ 2121–2122.

243. Balzac v. Porto Rico, 258 U.S. 298, 305–06 (1922) (holding that Sixth Amendment jury trial right is inoperable in Puerto Rico). *But see* King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977) (applying Sixth Amendment jury trial right in American Samoa).

244. *See* Dred Scott v. Sandford, 60 U.S. 393, 447–48 (1856) (applying the Fifth Amendment Takings Clause to federal territories); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 600 (1975) (explaining that either the Fifth or Fourteenth Amendment Equal Protection Clause applies to Puerto Rico). *But see* Fitisemanu v. United States, 1 F.4th 862, 881 (10th Cir. 2021) (declining to apply the Citizenship Clause to American Samoans).

Congress cannot treat the territories differently from the states unless they have a rational basis for doing so.[245] Congress, exercising its plenary power, is ostensibly subject to "the constitutional limitations that would ordinarily constrain the relevant exercise of power."[246] But these limitations have not been an obstacle to territorial governance. The chameleon-like nature of plenary power, which allows Congress to act as both a general and territorial legislature, permits Congress to avoid many constitutional constraints.[247]

Today, plenary power remains. It permits constitutionally sanctioned inequality in the territories, with few limitations on Congressional action. Through the *Insular Cases*, a constitutional mechanism of temporary and undemocratic rule morphed into an instrument of perpetual discrimination and democratic deficiency. Through these doctrines, federal power remains king in the territories and subjects their residents to differential treatment.

This treatment is most evident in the social welfare context. Although people in the territories tend to be much poorer than their stateside counterparts,[248] Congress has used its plenary power to further differential treatment in the realm of social welfare. As previously described, federal public benefits play an essential role in securing quality of life and meeting basic nutritional needs for poor and disabled members of our community. Nevertheless, Congress, with the Supreme Court's blessing, has withheld many of those essential anti-poverty programs, like SNAP, Medicaid, and SSI, from people in the territories. Puerto Rico is no exception.

Let's begin with SNAP. SNAP is a means-tested program for low-income families to supplement their grocery budget so they can access nutritious food that is essential to health and well-being.[249] Puerto Rico once participated in its

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245. United States v. Vaello Madero, 142 S. Ct. 1539, 1543 (2022); *see also* Lopez-Morales, *supra* note 56, at 794 (noting that the Territory Clause further limits Congressional action to "*needful* Rules and Regulations").

246. Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor's Surprising Concurrence in* Aurelius, 130 YALE L.J.F. 101, 128 n.104 (2020).

247. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC., 140 S. Ct. 1649, 1654–55 (2020) (Appointments Clause does not apply to presidentially appointed officers with territorial responsibilities); Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc., 143 S. Ct. 1176, 1180 (2023) (assuming that Puerto Rico enjoys sovereign immunity from suit).

248. By the 1980s, over half of the Puerto Rican population was eligible for food stamps, with some estimates placing the number at fifty-eight percent of the population. Judith Gaines, *Reagan's Budget Chills 'U.S. Colony,'* BOS. GLOBE, Sept. 20, 1981, at A2; *see also Food Stamps Revolutionize Puerto Rican Eating Habits*, COLUMBIA REC., May 3, 1976, at 8-C. The average per capita income was $2,000, which was less than half of that in the United States, $5,400. Don Bohning, *U.S. Food Stamp Program Proves Lifesaver for Island*, MIA. HERALD, Sept. 29, 1975, at 18-A. Today, the per capita income in Puerto Rico is $17,981. The United States is $44,673. *Quick Facts: Puerto Rico*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/PR/INC110223#INC110223 [https://perma.cc/4UWN-RULZ]; *Quick Facts: United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/INC910223#INC910223 [https://perma.cc/R8BL-27YX].

249. *Supplemental Nutrition Assistance Program (SNAP)*, U.S. DEP'T AGRIC. FOOD & NUTRITION SERV., http://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap [https://perma.cc/R67M-FGG2].

predecessor program, Food Stamps, like all states of the Union.[250] But in 1982, President Reagan sought, and Congress provided, massive cuts to welfare and removed Puerto Rico from Food Stamps, instead placing it into a new block grant program.[251] Puerto Rico still participates in that program, NAP,[252] which has stricter eligibility requirements and fewer benefits than SNAP.[253] The legislative history is unclear as to why Congress did not include Puerto Rico in SNAP. But the political zeitgeist of the time and the federal government's post hoc rationalizations suggest that the choice was motivated partially by racial animus and fiscal austerity.[254] If Puerto Rico were included in SNAP today, it would receive nearly one billion dollars more in funding than it receives under NAP.[255]

Although the legislative history does not provide an explicit explanation for Puerto Rico's treatment, contemporary commentators highlighted at least two justifications.[256] First, Puerto Rico was caught in the crosshairs of President

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250. Food Stamp Act of 1964, Amendments, Pub. L. No. 91-671, sec. 2(c), § 3(j), 84 Stat. 2048, 2048 (1971); Francisca D. Fajana & Lía Fiol-Matta, *The Scourge of the Insular Cases: Ending Constitutional Apartheid in Puerto Rico*, 92 REV. JUR. U.I.P.R. 1, 13 (2023).

251. Rosa L. DeLauro, *Why America Should Save SNAP*, 52 HARV. J. ON LEGIS. 267, 283–84 (2015).

252. About forty percent of the Puerto Rican population receives NAP benefits. *See* ÁNGEL CARRIÓN-TAVÁREZ, INSTITUTO DE LIBERTAD ECONÓMICA, FROM NAP TO SNAP: A BRIDGE TO ECONOMIC LIBERTY FOR RESIDENTS OF PUERTO RICO (AN UPDATE) 9 (2023), https://institutodelibertadeconomica.org/wp-content/uploads/2023/09/From-NAP-to-SNAP-OCT-A-Bridge-to-Economic-Liberty-Web-copy.pdf [https://perma.cc/T8JJ-7A3R].

253. Katerina Martínez Vélez, *Trouble in Paradise: Puerto Rico's Routine Exclusion from Federal Benefit Programs as a Result of the Alien-Citizen Paradox*, 6 BUS. ENTREPRENEURSHIP & TAX L. REV. 132, 141 (2022).

254. *See* Fajana & Fiol-Matta, *supra* note 250, at 13–14 (describing weaponization of the Puerto Rican "Welfare Queens" mythology by political actors); BRYNNE KEITH-JENNINGS & ELIZABETH WOLKOMIR, HOW DOES HOUSEHOLD FOOD ASSISTANCE IN PUERTO RICO COMPARE TO THE REST OF THE UNITED STATES? 2–5 (2020), https://www.cbpp.org/sites/default/files/atoms/files/11-27-17fa.pdf [https://perma.cc/Y498-88GU]; Peña Martínez v. U.S. Dep't of Health & Hum. Servs., 478 F. Supp. 3d 155, 177 (D.P.R. 2020) (rejecting the government's view that Congress rationalized their choice because "SNAP benefits would cost a lot of money"), *vacated and remanded sub nom.* Martinez v. U.S. Dep't of Health & Hum. Servs., No. 20-1946, 2022 WL 4489163 (1st Cir. May 16, 2022).

255. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-31, PUERTO RICO: INFORMATION ON HOW STATEHOOD WOULD POTENTIALLY AFFECT SELECTED FEDERAL PROGRAMS AND REVENUE SOURCES 2 (2014), https://www.gao.gov/assets/gao-14-31-highlights.pdf [https://perma.cc/5WD2-MNAQ]. While it is difficult to determine how many Puerto Ricans would be eligible under SNAP, the consensus points to more than forty percent of the population benefitting from the program. SERGIO M. MARXUACH, CTR. FOR A NEW ECON., NAP VS. SNAP: AN ANALYSIS ON FEDERAL NUTRITION ASSISTANCE FOR RESIDENTS OF PUERTO RICO 7 (2022), https://grupocne.org/wp-content/uploads/2022/08/2022.08-NAP-vs.-SNAP-An-Analysis-on-Federal-Nutrition-Assistance-for-Residents-of-Puerto-Rico.pdf [https://perma.cc/478X-2SMR].

256. *See* Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1670 n.175 (2021); *Peña Martínez*, 478 F. Supp. 3d at 183.

Reagan's austerity measures.[257] Reagan's campaign trail was chiefly characterized by a new perspective on economic vitality and growth. "Trickle down" economics aside, Reagan's administration was focused on cutting the federal budget. And a principal way of achieving this goal was shifting the burden of social welfare programs away from the federal government and into the hands of the states.[258] Indeed, Puerto Rico was, and has always been, a perfect laboratory for experimentation, and the administration was keen on starting there.[259] Further, any political backlash would be minimal. In the words of Puerto Rican Governor Carlos Romero-Barceló, the Administration was "looking for some place to cut [costs] and, since we have no senators or representatives to defend us, well, it's easier to cut us."[260]

Second, the public imagination was flooded with images of lazy, unemployed Puerto Ricans. Puerto Rican women were especially targeted, branded as the mythological "welfare queen"—oversexualized women with large families who were dependent on social welfare programs.[261] Puerto Ricans, the trope went, were "addicted" to food stamps and dependent on federal funds, and, as a result, they were "less willing to work" to support themselves.[262] Moreover, reports described Puerto Ricans as taking advantage of social welfare programs.[263] Food stamps, specifically, created a type of secondary market on the Island where the stamps were being used for anything from "beer to [buying] a car."[264] So when the Puerto Rican government used the NAP grants to fund their local program, which provided cash assistance instead of food stamps, they were surprised by Washington's criticism of the new program.[265]

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257. Robert Pear, *U.S. Proposal Would Prevent States from Cutting Welfare*, THE DESERT SUN, Feb. 3, 1982, at B7 ("Congress, concerned about the growing cost of the food stamp program in Puerto Rico, set up a nutrition assistance grant . . . .").

258. Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 515 (1988).

259. Joanne Omang, *Puerto Rico's Switching from Food Stamps to Cash*, PHILA. INQUIRER, Aug. 18, 1982, at 22-A ("The Reagan administration sees the 'cash-out' approach to aid in Puerto Rico as a trial run for a nationwide block-grant program."); LAURA BRIGGS, REPRODUCING EMPIRE: RACE, SEX, SCIENCE, AND U.S. IMPERIALISM IN PUERTO RICO 112 (2002); Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of "Territorial Federalism,"* 131 HARV. L. REV. F. 65, 66–67 (2018).

260. Gaines, *supra* note 248, at A2.

261. Laura Briggs, La Vida, *Moynihan, and Other Libels: Migration, Social Science, and the Making of the Puerto Rican Welfare Queen*, 14 CENTRO J. 75, 94–95 (2002).

262. Paul Harvey, *Puerto Rico Won't Use Food Stamps in the Future*, ANDERSON HERALD, Dec. 3, 1982, at 4 (explaining that Puerto Ricans were "addicted" to food stamps and so dependent on federal funds that they are "less willing to work, to feed itself, to pay [their] own way"); Julia Preston, *Reagan's Cuts: A Hot Issue in Puerto Rico*, SAN BERNADINO CNTY. SUN, May 31, 1981, at AA.

263. Fajana & Fiol-Matta, *supra* note 250, at 14.

264. *Economic Chaos in Puerto Rico*, DAILY ITEM, Nov. 10, 1982, at 48; *Puerto Rico Food Stamps Replaced*, L.A. TIMES, July 4, 1982, at 4.

265. Omang, *supra* note 259, at 22-A ("'We didn't want to be special, but [they cut us from Food Stamps] . . . [t]hen they provided for us to develop our own cash system, and when we did, they didn't like it. I don't really understand.'").

Despite the dire need for social welfare programs in Puerto Rico, given its fledgling economy in the early 1980s, the head of President Reagan's financial watchdog committee, J. Peter Grace, derided the food stamp program as "a subsidy for Puerto Ricans"[266] both on the Island and the mainland.[267] These programs were not, according to officials, a social safety net. Instead, they were making people, and especially Puerto Ricans, lazy and dependent on the government.

On the Island, government officials and the public expressed significant concern about the effect these cuts would have on the local economy. Particularly, people feared that the cuts would result in mounting unemployment, an exodus to the mainland, increased crime locally, and strained local social services.[268] Puerto Rico's differential treatment fulfilled many of those fears. In the 1980s, the Island sported "an unemployment rate rivaling the mainland's 1930s Depression"[269] and some Puerto Rican representatives blamed much of the unemployment on President Reagan's policies, including cuts in federal social welfare programs.[270] The cuts, coupled with the devastating effects on the Puerto Rican economy, sent a clear message that Puerto Ricans are second-class citizens.[271] In the words of one reporter, "it's as though, after all those years of hard work and success, nobody gives a damn [about Puerto Ricans] any more."[272]

Next, Medicaid provides medical insurance to low-income children and adults.[273] There is a bifurcated scheme for funding the program. The federal government provides funds, but each state and territory must also contribute and administer the program in conformity with federal law.[274] Importantly, the federal government pays a percentage of costs based on a state's per capita income without contribution caps or fixed matching rates.[275] Although not excluded, Puerto Rico receives less in Medicaid benefits than the states. Puerto

266. Mary B. Powers, *Cash Replacing Food Stamps on Island*, HICKORY DAILY REC., June 25, 1982, at 10B.

267. Michelle Lopez, *El Paso Real*, DAY, June 3, 1982, at 28 (criticizing Grace's baseless allegations).

268. Gaines, *supra* note 248, at A2.

269. *Puerto Rico Blames Reagan for Its Crippled Economy*, SALT LAKE TRIB., Nov. 19, 1982, at 4Z.

270. Digby A. Solomon, *Puerto Rico Economy Crippled; Reagan Blamed*, DAILY PRESS, Nov. 21, 1982, at A18; Gaines, *supra* note 248, at A2 (explaining that there were no jobs for folks who lost food stamps to turn to because the local economy had become, in part because of federal policies, reliant on high-technology, banking, and export-oriented services).

271. William Steif, *Puerto Rico's Needs*, EVENING SUN, Apr. 9, 1981, at M-4.

272. Georgie Anne Geyer, *Puerto Rico Merits Better Treatment*, PHILA. INQUIRER, Oct. 3, 1984, at 21-A.

273. EVELYNE P. BAUMRUCKER, SARAH K. BRAUN, ALISON MITCHELL, ANGELA NAPILI & VARUN SARASWATHULA, CONG. RSCH. SERV., R43357, MEDICAID: AN OVERVIEW 1 (2025), https://www.congress.gov/crs_external_products/R/PDF/R43357/R43357.22.pdf [https://perma.cc/R6HK-L5RF].

274. *Id.*

275. Paola Maria Sepulveda-Miranda & Sonja Fernández-Quiñones, *Second-Class Health in the Absence of Self-Determination and Governance: The Effect of Colonial Governance Over the Healthcare System of Puerto Rico in Comparison to Hawaii and Massachusetts*, 14 NE. U. L. REV. 491, 530–31 (2022).

Rico has a lower federal matching rate for Medicaid spending, which is capped by statute at fifty-five percent.[276] If the state formula—which sets matching rates based on per capita income—applied to Puerto Rico, the federal matching rate would be the maximum of eighty-three percent.[277] Further, instead of receiving federal matching funds for all medical assistance provided to eligible people, as states do, the territories are subject to a hard cap on federal matching funds.[278] If Puerto Rico had been treated like a state, federal funding for Medicaid could increase by more than one billion dollars.[279] Finally, unlike the states, the Medicaid funding scheme for Puerto Rico is not based on the local cost of living, "leaving qualifying residents' health care needs underfunded."[280] This scheme significantly impacts local governmental capacity. Because of the Medicaid caps, the federal government provides much less financial support to the Puerto Rican government to administer its program,[281] forcing an already cash-strapped government to make difficult financial decisions that impact human health.[282]

Further, and subject to recent Supreme Court litigation, is SSI. This program provides financial assistance to people who are blind, disabled, or are over the age of sixty-five.[283] Unlike Medicaid, where Puerto Rico receives partial funds, Congress excluded Puerto Rico from SSI altogether.[284] But this was not always the case. Prior to the creation of SSI, Congress administered another program, Aid to the Aged, Blind, and Disabled ("AABD"). AABD is

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276. The matching rate was previously set at fifty percent before the Affordable Care Act increased it to fifty-five percent. Cheryl D. Block, *Federal Policy for Financially-Distressed Subnational Governments: The U.S. States and Puerto Rico*, 53 WASH. U. J.L. & POL'Y 215, 262 (2017).

277. Sepulveda-Miranda & Fernández-Quiñones, *supra* note 275, at 531; Sam F. Halabi, *The Healthcare Legacy of the* Mission Civilisatrice *in Unincorporated U.S. Territories*, 20 NW. J. HUM. RTS. 121, 156 (2022); Hammond, *supra* note 256, at 1667–68.

278. ALISON MITCHELL, CONG. RSCH. SERV., IF11012, MEDICAID FINANCING FOR THE TERRITORIES 1–2 (2023), https://www.congress.gov/crs_external_products/IF/PDF/IF11012/IF11012.11.pdf [https://perma.cc/WG77-KBSG].

279. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 255, at 1.

280. Sepulveda-Miranda & Fernández-Quiñones, *supra* note 275, at 530–31; Hammond, *supra* note 256, at 1668 ("[T]he federal government applies different poverty metrics to the territories, and Puerto Rico's, for instance, has not been updated to reflect inflation since 1998.").

281. Jaime Lluch, *Varieties of Differentiated Citizenship in Multilevel Systems: Asymmetric and Multilevel Citizenship*, 52 REV. JUR. U.I.P.R. 333, 343–44 (2017–18) ("The one billion in annual Medicaid funding that Puerto Rico receives from Washington is about twenty percent of the five billion received by similar-size Oregon.").

282. Halabi, *supra* note 277, at 156; U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-387, PUERTO RICO: FACTORS CONTRIBUTING TO THE DEBT CRISIS AND POTENTIAL FEDERAL ACTIONS TO ADDRESS THEM 45 (May 2018), https://www.gao.gov/assets/gao-18-387.pdf [https://perma.cc/G8KF-XX3T] (noting that the federal government could further help Puerto Rico address its deficits through federal policy like "eliminating the cap on Medicaid funding and calculating the federal matching rate similar to how the rate is calculated in the states.").

283. *Supplemental Security Income (SSI)*, SOC. SEC. ADMIN., https://www.ssa.gov/ssi [https://perma.cc/2SVS-6997].

284. 42 U.S.C. § 1382c(a)(1)(B)(i), (e).

a federal block grant program through which states and territories receive federal funds to administer local programs, subject to federal regulations.[285] In keeping with its differential treatment, Congress provided lower reimbursement rates and an annual cap on federal grants to the territories.[286] But in 1972, Congress created SSI as a replacement for AABD.[287] SSI is especially helpful to poorer states and territories because it is funded solely by the federal government.[288] States may choose to supplement SSI through additional payments, but they need not do so, relieving them of an added financial burden.[289] Further, SSI provides more financial assistance and covers a greater number of people than AABD.[290] Congress, however, excluded Puerto Rico from SSI, subjecting it to the significant burdens of financing AABD to this day.[291] To illustrate, Puerto Rico receives over twenty-four million dollars a year from the federal government under AABD.[292] If they were included in SSI, they would receive almost two billion dollars instead, or 7,900 percent more.[293] Although the legislative history does not shed light on the reason for the exclusion, the federal government's post hoc justifications are clear: Puerto Ricans do not pay certain federal taxes—particularly federal income tax—and therefore do not merit the benefit, and it would simply cost too much money to extend SSI and other programs to Puerto Rico.[294]

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285. *Id.* § 1383 note (Puerto Rico, Guam, and Virgin Islands (a)); *id.* § 1382 note (Puerto Rico, Guam, and Virgin Islands (a)(12), (14)).

286. 42 U.S.C. § 1308; *id.* § 1383 note (Puerto Rico, Guam, and Virgin Islands (a)(2)(A), (B)).

287. *Annual Report of the Supplemental Security Income Program*, 2024 SOC. SEC. ADMIN. ANN. REP. 1, https://www.ssa.gov/OACT/ssir/SSI24/ssi2024.pdf [https://perma.cc/8ABT-H4CE].

288. 42 U.S.C. § 1381. Congress included the Northern Mariana Islands in the SSI program. *Id.* § 1381 note (Application to Northern Mariana Islands).

289. SYLVESTER J. SCHIEBER ET AL., SOC. SEC. ADVISORY BD., STATEMENT ON THE SUPPLEMENTAL SECURITY INCOME PROGRAM, *in* 2007 ANNUAL REPORT OF THE SSI PROGRAM (2007), https://www.ssa.gov/oact/ssir/SSI07/Statement_07.html [https://perma.cc/N7DC-5WJH].

290. Brief for Respondent, *supra* note 34, at 16–17.

291. 42 U.S.C. § 1382c(e) (defining United States for SSI purposes as the fifty states and the District of Columbia).

292. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 255, at 2.

293. Ximena Benavides, *Disparate Health Care in Puerto Rico: A Battle Beyond Statehood*, 23 U. PA. J.L. & SOC. CHANGE 163, 199 (2020).

294. *See* Brief for the United States at 15–20, United States v. Vaello Madero, 142 S. Ct. 1539 (2022) (No. 20-303). The federal government has also expressed concerns over the disruption of the local labor market as a result of an increase in public benefits. *See* Peña Martínez v. U.S. Dep't of Health & Hum. Servs., 478 F. Supp. 3d 155, 173 (D.P.R. 2020), *vacated and remanded sub nom.* Martinez v. U.S. Dep't of Health & Hum. Servs., No. 20-1946, 2022 WL 4489163 (1st Cir. May 16, 2022); *Briefing on Puerto Rico Pol. Status by the Gen. Acct. Off. [GAO] and the Cong. Rsch. Servs. [CRS]: Oversight Hearing Before the Subcomm. on Insular & Int'l Affs. of the Comm. on Interior & Insular Affs. House of Representatives*, 101st Cong. 34 (1990) (statement of Carolyn Merck, Specialist in Social Legislation, CRS) ("[W]hen you raise someone's income by tenfold there can be serious effects on the labor supply and work incentives and disincentives of the non-SSI members in the family, who may not even earn as much as the SSI benefit.").

To be sure, the federal government places Puerto Rico on equal footing with the states with respect to some social welfare programs. Congress, for example, included Puerto Rico in Temporary Assistance for Needy Families ("TANF"). TANF is a federal block grant program created in 1996[295] that temporarily assists families when parents or other relatives cannot provide for the family's basic needs.[296] Puerto Rico receives block grants to administer its own TANF program on the Island, just like states do.[297] Puerto Rico also receives Social Security retirement, or Old-Age (retirement), Survivors, and Disability Insurance ("OASDI") for those who meet the general requirements. This entitlement follows from the fact that people in Puerto Rico pay Federal Insurance Contributions Act ("FICA") taxes, which fund Social Security and Medicare.[298] Despite inclusion in some programs, the differential treatment of poor and disabled Puerto Ricans has a deleterious impact on millions of lives.

Federal courts have long been aware of this disparate treatment, and the Supreme Court, relying on the unique status of the territories, has consistently authorized the practice. Take *Califano v. Torres*.[299] There, plaintiffs received SSI benefits while residing stateside.[300] Upon moving to Puerto Rico, they were shocked to find out that they were no longer eligible for SSI.[301] They filed suit, arguing that Puerto Rico's exclusion from SSI violated their constitutional right to travel and the equal protection component of the Fifth Amendment's Due Process Clause.[302] The U.S. District Court for the District of Puerto Rico found that the exclusion violated plaintiffs' right to travel, but the Supreme Court disagreed.[303] In a per curiam decision,[304] the Court explained that the right to travel ensures the same right to vital government benefits and privileges

295. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105. The block grant amount has not increased since 1996.

296. *What Is TANF?*, U.S. DEP'T HEALTH & HUM. SERVS. (May 9, 2023), https://www.hhs.gov/answers/programs-for-families-and-children/what-is-tanf [https://perma.cc/STJ3-CB7B].

297. Alexis Zabdier Tejeda Marte, *Los Fondos Federales En Puerto Rico: Un* Affair *con los Estados Unidos*, 80 REV. JUR. U.I.P.R. 493, 514 (2011). The Northern Mariana Islands and American Samoa are excluded from TANF. SARAH KNOWLES, ILHAM DEHRY, KATIE SHANTZ & LIMOR GOLDSMITH, GRAPHICAL OVERVIEW OF STATE AND TERRITORY TANF POLICIES AS OF JULY 2022, at 18 n.25 (2023), https://www.urban.org/sites/default/files/2024-02/Graphical%20Overview%20of%20State%20and%20Territory%20TANF%20Policies%20as%20of%20July%202022.pdf [https://perma.cc/7C3X-YDLZ].

298. I.R.C. §§ 1401–1403; *see id.* §§ 3101, 3111, 3121(e), 3301, 3306(j); Francine J. Lipman, *Not Taxing Puerto Rico: Whitewashing Impoverishment in* United States v. Vaello Madero, 77 TAX L. 357, 392 (2024). *See generally* Federal Insurance Contributions Act, Pub. L. No. 117-2, 135 Stat. 171.

299. *See generally* Califano v. Torres, 435 U.S. 1 (1978).

300. *Id.* at 2.

301. *Id.* at 2–3.

302. *Id.* at 3 & n.4.

303. At the time, 28 U.S.C. § 1252 provided for direct appeals to the Supreme Court from decisions invalidating acts of Congress.

304. Justice Brennan stated that he would affirm the decision, while Justice Marshall would have set the case for oral argument. *Califano*, 435 U.S. at 5 (Brennan, J., dissenting). Justice Marshall would elucidate his position just a few years later.

in the state to which a person migrates as are enjoyed by other residents of that state.[305] But that does not mean that a person who travels to Puerto Rico "must be given benefits superior to those enjoyed by other residents of Puerto Rico."[306] The right to travel, in other words, does not implicate the ability of a traveler to invoke the benefits of their origin state in the new state to which they moved. Indeed, this case was much different.

In *Califano*, the Court confronted a federal statute that provided financial benefits partially based on the recipient's location. That type of statute is subject to rational basis review and comes with a strong presumption of constitutionality.[307] The government provided three justifications for the SSI exclusion. First, Puerto Rico does not contribute to the public Treasury because of its "unique tax status," chiefly, the inapplicability of federal income tax.[308] Second, the cost of including Puerto Rico in SSI would be onerous.[309] And "[t]hird, inclusion in . . . SSI . . . might seriously disrupt the Puerto Rican economy."[310] The Court accepted the rationales without explanation.

In *Califano*, the Court did not identify the constitutional justifications for subjecting a statute that facially discriminates against a territory to rational basis review, but it would have an opportunity to explain the choice just two years later in *Harris v. Rosario*.[311] Plaintiff Awilda Rosario was a beneficiary of AFDC, a program that provides federal financial assistance to families with needy dependent children.[312] By statute, Puerto Rico, where Rosario lived,

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305. *Id.* at 4 (quoting Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 261 (1974)).

306. *Id.*

307. *Id.* at 5.

308. *Id.* at 5 n.7. As discussed in Part IV, Puerto Ricans do pay several types of federal taxes, contributing between three and four billion dollars per year to the federal Treasury between 2016 and 2018.

309. *Id.* Contemporary reactions to the decision often provided descriptive accounts that focused on the significant financial burden attached to extending SSI to Puerto Rico. Jim Mann, *Supreme Court Rules that Puerto Rican Returning Home Can Lose Welfare Aid*, BALT. SUN, Feb. 28, 1978, at A6; *Supreme Court Tugs Federal Purse Strings*, BEE, Feb. 28, 1978, at 9-B.

310. *Califano*, 435 U.S. at 5 n.7. These specious justifications have long been derided in public forums. *See, e.g.*, Harvard Law School, *Keynote Address, "The* Insular Cases*: A Declaration of Their Bankruptcy and My Harvard Pronouncement,"* YOUTUBE, at 22:41 (Mar. 5, 2014), https://www.youtube.com/watch?v=aixtvS4Jack [https://perma.cc/2WET-9URW] (remarks of Judge Juan R. Torruella). Soon after *Califano* and the subsequent decision in *Rosario*, commentators criticized the decisions as further cementing Puerto Rico's colonial status and as unfortunate additions to the juridical corpus of equal protection and public benefits jurisprudence. *See* Manuel Del Valle, *Puerto Rico Before the United States Supreme Court*, 19 REV. JUR. U.I.P.R. 13, 66–67 (1984); José A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 462–64 (1986) (reviewing TORRUELLA, *supra* note 48); Arron Guevara, *Puerto Rico: Manifestations of Colonialism*, 26 REV. JUR. U.I.P.R. 275, 293–97 (1992); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1313 (1993); David M. Helfeld, Professor of L., Univ. of P.R., *How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?*, Panel Presentation at the Judicial Conference for the First Circuit (Nov. 4–6, 1985), *in* 110 F.R.D. 449, 461–62 (1986).

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

312. *Id.* at 651.

received less assistance than the states.[313] She brought a class action suit arguing that the lower level of AFDC reimbursements violated the Fifth Amendment's equal protection guarantee.[314] The Court, again, disagreed, but this time revealed the source of Congress's power to treat the territories differently. In another per curiam decision, the Court explained that under the Territory Clause,[315] Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions."[316] Without providing support for that assertion, the Court quickly pivoted and explained that the same three rationales that passed muster in *Califano*—and particularly the cost of treating Puerto Rico as a state for AFDC purposes—were equally sufficient in *Harris*.[317]

There were notable detractors. Importantly, Justice Marshall disagreed with the summary disposition, this time writing in dissent.[318] He made two key points. First, he was unsure why the Court adopted a rational basis standard, since "[n]o authority is cited for this proposition" and "[o]ur prior decisions do not support such a broad statement."[319] He was especially concerned because Congress was discriminating against U.S. citizens in Puerto Rico.[320] The Court, he explained, could not in good conscience justify Congress's differential treatment on the theory of territorial incorporation from the *Insular Cases* because "the present validity of those decisions is questionable."[321] Moreover, the Court had already held that the Due Process Clause of the Fifth Amendment was operable in the territory, suggesting that all tiers of scrutiny applied.[322] Justice Marshall could not understand why the Court did not grant oral argument on the significant question of what level of scrutiny should be applied to the different treatment of Puerto Rico and the states.[323] Second, he was unconvinced that *Califano* was controlling precedent.[324] Indeed, the district court in that case relied entirely on the right to travel, which meant that the equal protection question was never before the Court.[325]

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313. *Id.*

314. *Id.*

315. U.S. CONST. art. IV, § 3, cl. 2.

316. *Harris*, 446 U.S. at 651–52.

317. *Id.* at 652.

318. *Id.* Justice Brennan and Justice Blackmun were skeptical that *Califano* controlled and instead voted to set the case for oral argument. *Id.*

319. *Id.* at 653 (Marshall, J., dissenting).

320. *Id.* ("It is important to remember at the outset that Puerto Ricans are United States citizens . . . and that different treatment to Puerto Rico under AFDC may well affect the benefits paid to these citizens." (citation omitted)).

321. *Id.*

322. *Id.*

323. *Id.* at 652–53.

324. *Id.* at 656 ("Ultimately this case raises the serious issue of the relationship of Puerto Rico, and the United States citizens who reside there, to the Constitution. . . . I would note probable jurisdiction and set the case for oral argument.").

325. *Id.* at 654–55.

Further, Marshall argued that the justifications for discrimination that the government proposed were specious. The rationales "suggest[ed] that programs designed to help the poor should be less fully applied in those areas where the need may be the greatest."[326] Moreover, it was unclear whether Congress agreed with those justifications because there was "no citation . . . to any suggestion in the legislative history that Congress had these economic concerns in mind" when creating the AFDC program.[327] These important questions of territorial administration "deserve[d] far more careful attention than [they] received in *Califano*" and *Harris*, but would remain dormant for decades as Puerto Ricans and other territorial residents were subject to discriminatory treatment.[328] The message of these two cases was clear. In the words of one Puerto Rican Governor, "they can do whatever they want to us. The Supreme Court has ruled that Puerto Rico is a territory."[329]

IV. NOT JUST PUERTO RICO'S PROBLEM: *VAELLO MADERO*, WELFARE DISCRIMINATION, AND THE THREAT TO AMERICA'S SAFETY NET

The Supreme Court would eventually revisit these questions tied to welfare exclusion, rational basis review, and the plenary powers in *United States v. Vaello Madero*.[330] Luis Vaello Madero lived and worked in New York, but after suffering from health issues, he retired and began receiving SSI.[331] In 2013, he moved from New York to Puerto Rico and kept receiving SSI benefits on the Island.[332] Eventually, federal agents learned of the continued payments, and the federal government sued to recover the overpayments.[333] At the district court and the First Circuit, Vaello Madero made a familiar argument: The SSI scheme violated the Equal Protection Clause of the Fifth Amendment.[334] Both courts agreed.[335] Notably, the First Circuit attempted to limit *Califano* and

326. *Id.* at 655.

327. *Id.* at 656.

328. *Id.*

329. Jessica Lee, *Among Puerto Ricans, Political Status Remains Sensitive and Crucial Debate*, PRESS & SUN-BULL. (Binghamton, N.Y.), Oct. 4, 1981, at 51. Some other commentators also pointed out that the decisions did not only affect Puerto Rico, but other territories as well, subjecting them all to second-class citizenship. James Brooks, Opinion, *How the Supreme Court Upheld Second-Classness*, PAC. DAILY NEWS (Agana Heights, Guam), Aug 3, 1980, at 17.

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

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

332. *Id.* at 1558–59.

333. *Id.* at 1559.

334. *Id.*

335. The district court found that the SSI statute failed under a rational basis standard, but strongly suggested that strict scrutiny should apply because the statute discriminates against a territory that is almost entirely Latino. *See* United States v. Vaello Madero, 356 F. Supp. 3d 208, 214 (D.P.R. 2019); United States v. Vaello-Madero, 956 F.3d 12, 32 (1st Cir. 2020), *rev'd*, 142 S. Ct. 1539 (2022).

Harris to their facts.[336] They were, after all, per curiam opinions, which typically have less precedential weight.[337] But the First Circuit still applied the rational basis test, finding that the exclusion of Puerto Rico from SSI was not rationally related to a legitimate government purpose.[338] The court explained that the relevant government interests would be that Puerto Ricans do not pay federal income tax, that "SSI recipients should be financing their own benefits," and the cost of inclusion to the federal government.[339] The Supreme Court granted certiorari, poised to answer Justice Marshall's question of whether Congress "may treat Puerto Rico different from States so long as there is a rational basis for its actions," or if a higher level of scrutiny applied.[340]

The Supreme Court's majority opinion confirmed that rational basis applies to equal protection claims challenging disparate treatment of the territories. But, Justice Kavanaugh, writing for the majority, failed to explain why. The Court relied on the axiomatic pronouncements from *Califano* and *Harris* that the Territory Clause permits Congress to treat the territories differently from the states as long as it has a rational basis for its actions.[341] The Court did not explain the constitutional justification for that standard[342] and relied on the

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336. *Vaello-Madero*, 956 F.3d at 19–21. The court also admonished then-District Judge Gelpí for attempting to apply a different standard than precedent clearly called for. *See id.* at 16–17.

337. *Id.* at 21; *see also* Anderson v. Celebrezze, 460 U.S. 780, 784 (1983) (acknowledging "the limited precedential effect to be accorded summary dispositions").

338. *Vaello-Madero*, 956 F.3d at 23.

339. *Id.* at 26. The First Circuit used the language of "government interests" interchangeably with arguments about why the means of exclusion relate to ends like fiscal savings and tax-benefit parity. Shortly after this decision, a district court judge, relying heavily on *Vaello-Madero*, found that the SSI exclusion, the SNAP exclusion, and Puerto Rico's exclusion from Medicare Part-D violated the Fifth Amendment's Equal Protection Clause. Peña Martínez v. U.S. Dep't of Health & Hum. Servs., 478 F. Supp. 3d 155, 163–64 (D.P.R. 2020). The First Circuit summarily reversed the decision after the Supreme Court's decision in *Vaello Madero*. Martinez v. U.S. Dep't of Health & Hum. Servs., No. 20-1946, 2022 WL 4489163, at *1 (1st Cir. May 16, 2022).

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

341. The Justices seemingly struggled with the applicable level of scrutiny. At oral argument, Justice Thomas asked Hermann Ferré, Vaello Madero's counsel:

> So let's assume that someone who is of Italian descent has lived in New York City all of his life and decides: You know, Puerto Rico's really a nice place. I think I'm going to move to Puerto Rico. And assume after that that the exact same thing happens to him as happened to Respondent here, but he's Italian. How would you analyze that? Would it be any different?

Counsel explained that the analysis would be the same as for Vaello Madero—and you would apply heightened scrutiny—because citizenship status and locality are determinative of the applicable standard of scrutiny. Here, since the policy discriminates against Puerto Rico and the vast majority of people on the territory are people of color, discrimination against the Italian-American who moved to the territory and is no longer receiving SSI should be subject to heightened scrutiny. Transcript of Oral Argument at 39:52–41:43, United States v. Vaello Madero, 142 S. Ct. 1539 (2022) (No. 20-303).

342. Vaello Madero argued for the application of strict scrutiny because Puerto Rico's population is ninety-nine percent Latino. *See* Brief for Respondent, *supra* note 34, at 26 n.6. The government's position in their brief was that the Territory Clause provides the relevant support

familiar justifications from *Califano* and *Harris* in sanctioning the disparate treatment. Puerto Rico's tax status, the Court explained, "supplies a rational basis for . . . distinguishing residents of Puerto Rico from residents of the States for purposes of [SSI]."[343] Justice Kavanaugh summarized the Court's logic by explaining that "just as not every federal tax extends to residents of Puerto Rico, so too not every federal benefit program extends to residents of Puerto Rico."[344] Moreover, the Court feared the "potentially far-reaching consequences" of accepting Vaello Madero's position.[345] Namely, if the Constitution compels the application of SSI to Puerto Rico, "many other federal benefits programs" would likely apply, too.[346] That extension comes with risks because Congress could then extend more federal taxes to the Island to fund the programs. Although the majority[347] provided unsatisfactory answers to the open questions from *Califano* and *Harris*, *Vaello Madero* stands for at least two consequential propositions. First, rational basis is the applicable standard for equal protection challenges to statutes that discriminate against the territories. And second, the Court continues to be deferential to Congressional territorial administration, despite its injurious effects on poor people and people of color.

The Court's justification of differential treatment is alarming for both its eagerness to accept the government's rationales and for the questionable veracity of the government's assertions. First, although it is true that not all

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for rational basis because it clearly gives Congress a broader power over the territories than over the states. Congress has subjected the territories to differential treatment before without it being considered suspect, and, as a result, there was no reason to apply a heightened standard in this case. *See* Brief for the United States, *supra* note 294, at 28–30.

343. *Vaello Madero*, 142 S. Ct. at 1543. The Court described Puerto Rico's special tax status as being exempt from most federal income, gift, estate, and excise taxes. *Id.* While true, as previously explained, Puerto Ricans also pay significant federal taxes, like Social Security and Medicaid. *See infra* note 348 and accompanying text. As discussed above, see Brief for Respondent, *supra* note 34, at 25–27, Vaello Madero had also argued that a classification affecting a territory is a proxy for race and ethnicity, and relied on the *Insular Cases* as evidence. But the Justices did not grasp the argument, perhaps because, as Vaello Madero argued, the classification in his case was not based on unincorporated status but rather simply on territorial status. In other words, Congress excluded Puerto Rico from SSI not because they were an unincorporated territory, but because they are a territory, and territorial status is a proxy for race. Rejecting that argument allowed Justice Gorsuch to condemn the *Insular Cases* while concurring.

344. *Id.* at 1542. The *Vaello Madero* decision also indirectly bolstered the Court's prior decision in *City of Cleburne v. Cleburne Living Center, Inc.*, where it held that different types of disabilities were not suspect classes, meaning that any purported discrimination on those terms would be subject to rational basis review. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442–43 (1985).

345. *Id.* at 1543.

346. *Id.* Apparently, the Court had "a fear of too much justice." McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

347. Justice Gorsuch wrote a concurring opinion deriding the *Insular Cases* as "rest[ing] on a rotten foundation" and calling for their reversals. *Vaello Madero*, 142 S. Ct. at 1557 (Gorsuch, J., concurring). Justice Sotomayor dissented, arguing, similarly to the First Circuit, that the proffered justifications for differential treatment did not satisfy the rational basis standard. *Id.* (Sotomayor, J., dissenting).

federal taxes apply to Puerto Rico, it is not true that they do not pay federal taxes at all, nor that they do not contribute a substantial amount to the federal Treasury. Puerto Ricans are subject to "federal income taxes . . . on income from sources outside Puerto Rico," "federal income taxes on federal employ[ment] in Puerto Rico," and "the full Social Security, Medicare, and Unemployment Compensation taxes that are paid in the rest of the United States."[348] Further, despite the extension of fewer federal taxes, Puerto Rico still contributes more than several states (and included territories) to the federal budget. For example, each year from 1998 to 2006, residents of Puerto Rico contributed in aggregate over four billion dollars to the federal Treasury, a sum larger than the contributions by residents of Vermont, Wyoming, South Dakota, North Dakota, Montana, Alaska, and the Northern Mariana Islands.[349] Puerto Rican residents maintained similar levels of contribution through 2018, despite a massive economic depression on the Island.[350] To be sure, just because fewer taxes are applicable to the Island does not mean they are not contributing to the Treasury at levels equal to or more than several states.[351]

Putting the propriety of premising the right to benefits for poor and needy Americans on their contributions to the Treasury aside,[352] the federal government's justification also ignores the historical context of the territorial tax regime. Congress did not extend the full panoply of federal taxes out of benevolence. Instead, the Congressional record is replete with suggestions that the federal government retained a great deal of benefits by excluding Puerto Rico and other territories.[353] For example, in 1900, Congress, after much debate, chose to extend foreign tariffs and duties on the newly acquired territories in order to protect the domestic sugar industry and extract large

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

349. *Id.* at 24.

350. *Id.* at 24–25 ("Puerto Ricans continue to pay substantial sums into the federal treasury through the IRS: $3,443,334,000 in 2018; $3,393,432,000 in 2017; $3,479,709,000 in 2016; . . . $4,036,334,000 in 1998.").

351. Moreover, at a time when some scholars and public officials perceive an institutional crisis at the Court, the accepted rationale for the differential treatment continues to erode the Court's legitimacy on issues of territorial governance and commitments to equal protection under the law. Taraleigh Davis & Sara C. Benesh, *Procedural Justice and the Shadow Docket*, 73 EMORY L.J. 443, 444–46 (2023).

352. Commentators have thoroughly criticized the Court on this point. The majority of critiques posit that the Court's balancing of analysis of Puerto Rico's contributions to the federal Treasury is incorrect. *See, e.g.*, Natalie Gomez-Velez, *De Jure Separate and Unequal Treatment of the People of Puerto Rico and the U.S. Territories*, 91 FORDHAM L. REV. 1727, 1736–37 (2023); Lipman, *supra* note 298, at 398–400. Others blast the majority opinion's opaqueness as to who they are actually comparing in the balancing of contributions—the territory as a whole or the same poor and disabled folks for whom programs like SSI were created. *See, e.g.*, *The Supreme Court, 2021 Term—Leading Cases*, 136 HARV. L. REV. 360, 366–69 (2022).

353. Alex Zhang, *The Origins of U.S. Territorial Taxation and the* Insular Cases, 134 YALE L.J.F. 556, 588–89 (2025); Lipman, *supra* note 298, at 398.

duties on sugar from Hawaii, Puerto Rico, and the Philippines.[354] Imposing taxes, like a property tax and later federal income tax, on the new territories would have crippled the local economies. But, by imposing tariffs on the territories as if they were foreign countries, the federal government would receive a substantial sum of money to assist in the administration of the territories.[355]

Today, the taxation regime continues to benefit the federal government, but for different reasons. If Congress extended all federal taxes to Puerto Rico, it would, under *Vaello Madero*, have to extend all welfare benefits as well. But, because the sums received by taxing Puerto Rico like a state would not come close to covering the billions of dollars that would need to flow back to the Island, the federal government reaps a benefit from not extending those taxes.[356] This is especially true because the federal tax system is designed in part to supplement the incomes of low-income workers through refundable credits like the EITC. For a population as poor as Puerto Rico's, extending federal taxes would likely mean net transfers to the Island, not net revenue for the federal government. Indeed, if we follow Justice Kavanaugh's balancing of benefits, it is the federal government that has more to gain from excluding Puerto Rico from federal taxes than Puerto Rico has to gain from inclusion.[357] Puerto Rico's formal exclusion from federal taxation obfuscates this reality and exposes the shortcomings of the "pay taxes, get benefits" rationale at the heart of *Vaello Madero*.

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354. Zhang, *supra* note 353, at 565–66, 588. Those debates suggest an apprehension on behalf of senators to incur significant costs in the administration of the territories. For example, some feared the assumption of insular debt and any increased military expenditures as a result of administration. *Id.* at 565–67, 569.

355. Indeed, the federal government had relied on monies produced by tariffs on various commodities, and especially foreign sugar. But with annexation, a new problem emerged. Puerto Rico, Cuba, and the Philippines produced so much sugar that it could meet close to half of the domestic demand. This, in turn, would lead to a massive fiscal shortfall for a budget that relied heavily on sugar tariffs. By excluding harmful federal taxes and relying instead on sugar tariffs, the federal government could fund territorial administration without sacrificing a significant source of income. *Id.* at 565–67. Moreover, domestic sugar corporations benefited greatly from lowered tariffs on raw materials from the Island as well. Diane Lourdes Dick, *U.S. Tax Imperialism in Puerto Rico*, 65 AM. U. L. REV. 1, 30–32 (2015).

356. Zhang, *supra* note 353, at 588.

357. Lourdes Dick, *supra* note 355, at 1, 15 (explaining how federal tax dynamic inhibits local economic development and, in turn, benefits the federal government); Lipman, *supra* note 298, at 357 (suggesting that the failure to include most Puerto Rico residents in the federal income tax system has burdened rather than benefited them and their local economy). Moreover, the federal government's treatment of Puerto Rico and other territories continues to challenge our nation's commitments to our foundational principles. The tax question presented in *Vaello Madero* is particularly ironic. The majority is expecting payment of taxes from a population that is explicitly excluded from any representation in the federal government—a clear analogue to the U.S. foundational moment. *See* 33 CONG. REC. 1844 (1900) (statement of Rep. Robert Miers) ("Has there ever been a consent by the people of Puerto Rico . . . to a government by the United States? . . . Is not this very provision a taxation for the benefit of the United States of the people of Puerto Rico without in any way granting them a representation?").

Further, the consequences of the Court's decision for Puerto Rico go without saying as one of the poorest jurisdictions in the United States is deprived of access to a corner of America's social safety net. "Nearly 1 in 6 [Puerto Rican] residents (15.1 percent) are disabled," compared to 8.6 percent of the general population.[358] Half of Puerto Ricans with disabilities live in poverty, which is twice the national average.[359] Unlike SSI, which is an entitlement program that recipients can access if they meet eligibility requirements, these Puerto Ricans must rely on AABD, which is a block grant program that is partially funded by the federal government. Under the AABD, Puerto Rican recipients received an average of $82 a month in 2021, compared to the average of $574 that SSI recipients received the previous year.[360] In other words, some of the country's poorest received less than they would if they lived on the mainland.

This inequality is permitted because the Supreme Court bought the DOJ's argument that the Equal Protection Clause "concerns unequal treatment of classes of persons, not unequal treatment of regions," while adding that "[t]he text provides no foothold for applying heightened scrutiny to purely geographic distinctions," even if those distinctions just happened to disproportionately impact an island of racialized peoples with limited political representation.[361] Such a result is especially puzzling in light of recent Supreme Court directives. This kind of differential geographical treatment buoyed the Court's decision in *Shelby County v. Holder*, which struck down provisions of the Voting Rights Act that imposed "special obligations on states with a history of racist election practices," where the Court insisted that "rules in one part of the country should be the same as the rules in other parts."[362] But now, that same logic is inapplicable to the extension of welfare benefits throughout the country. At first glance, it's easy to understand this as a niche problem involving other people's poverty—that of a faraway, distant island that appears on the news periodically. But the implications of *Vaello Madero* reach further and should disturb people across the ideological spectrum, especially as the country enters a post-2025 era that

358. CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: AID TO THE AGED, BLIND, AND DISABLED 1 (Jan. 15, 2021), https://www.cbpp.org/sites/default/files/atoms/files/12-18-20bud.pdf [https://perma.cc/57YN-95WK].

359. *Id.*

360. United States v. Vaello Madero, 142 S. Ct. 1539, 1558 (2022) (Sotomayor, J., dissenting).

361. Brief for the United States, *supra* note 294, at 30.

362. Ian Millhiser, *The Surprisingly High Stakes in a Supreme Court Case About $28,000*, VOX (Nov 5, 2021, 7:00 AM), https://www.vox.com/2021/11/5/22751097/supreme-court-puerto-rico-ssi-united-states-vaello-madero-democracy-colonialsm-rational-basis [https://perma.cc/QQJ4-EMJL]; Shelby County v. Holder, 570 U.S. 529, 542, 556–57 (2013) ("[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.").

is already being characterized by welfare retrenchment, most notably by the so-called "One Big Beautiful Bill."[363]

There are strong arguments against the logic of *Vaello Madero* that have been, and should continue to be, advocated by people across the political spectrum. There has been bipartisan criticism based on federalism principles; conservatives have argued it is inconsistent with originalist constitutional interpretation; and liberals have argued it furthers economic injustice.

Starting in the center can show us how the territorial welfare system upheld in *Vaello Madero* subverts federalism principles in ways that should trouble conservatives and progressives who subscribe to that vision of government. Federalism is premised in part on a division of power between national and subnational governments, and is often celebrated because of its accommodation of diversity (e.g., religious and cultural differences), ability to provide checks and balances against tyranny, and promotion of local autonomy.[364] But these values are not achieved in the current approach to territorial welfare. More precisely, people on the left value federalism as a way to secure baseline protections irrespective of one's location.[365] But as legal scholar Andrew Hammond argues, "[l]egislators, judges, and scholars routinely look past who is left outside a welfare state premised on cooperative federalism," with those outsiders referring to territorial residents who are American citizens but "are often placed outside of both the doctrines and the deliberations that govern the American state."[366] The territories are often looked past because they lack the ability to vote in Congress or for the President, and are unable "to challenge the lawmaking of either of the political branches in federal court in the ways that other discrete and insular minorities may."[367] Conservatives have similarly lamented Puerto Rico's outsider status in our system of federalism. Writing in the *National Review*, Kyle Sammin argues that fuller inclusion of Puerto Rico into the polity, "besides being the right thing to do on the merits, would also enhance the nation's appreciation of federalism and further entrench the conservative value of local control."[368]

The differential treatment of American citizens that *Vaello Madero* permits is a gross infidelity to federalism principles and a cause for concern in our current era. Justice Sotomayor warned that allowing Congress to exclude

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363. One Big Beautiful Bill Act, Pub. L. No. 119-21, 139 Stat. 72 (2025); *see supra* notes 137–56 and accompanying text.

364. Ronald L. Watts, *Contemporary Views on Federalism*, *in* EVALUATING FEDERAL SYSTEMS 5–7 (Bertus De Villiers ed., 1994).

365. *See* Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1282 (2011).

366. Hammond, *supra* note 256, at 1646.

367. *Id.*

368. Kyle Sammin, *A Conservative Case for Puerto Rican Statehood*, NAT'L REV. (Mar. 26, 2019, 6:30 AM), https://www.nationalreview.com/2019/03/puerto-rico-statehood-conservative-case [https://perma.cc/3LDR-5CL6].

citizens from safety net programs based on where they reside could set a dangerous precedent.[369] This is especially true in a context where the Executive branch has promoted the disfavored idea of using the impoundment power,[370] has threatened to use "federal funding for political punishment," and, as this Article was being concluded, froze trillions of dollars in funding for various social services and welfare programs.[371] In 2025, Congress was considering a bill that would allow the president to withhold federal funds from so-called sanctuary cities, which would compromise public benefit programs in predictably blue states like New York and California, as well as red states such as North Carolina and Nebraska.[372] This is to say nothing about the powerful incentives to migrate that *Vaello Madero* encourages. When a person can get little to no welfare benefits in Puerto Rico, or simply more benefits on the mainland, this can prompt migration to states like Florida and New York, which have the largest Puerto Rican populations. As a result, increased pressures are applied on local social services in these states,[373] which will only intensify if tax cuts are extended and spending for social welfare is slashed.

In addition to these federalism concerns, *Vaello Madero* should trouble constitutional originalists, who are often, though not exclusively, conservatives, on three grounds.[374] The first is elevated by Justice Gorsuch, who claimed in his *Vaello Madero* concurrence that "[t]he Insular Cases' departure from the Constitution's original meaning has never been much of a secret."[375] Put simply, the incorporation doctrine that permits perpetual differential constitutional treatment of people in the territories is offensive to originalism, and in the words of Justice Gorsuch: "Even commentators at the time understood that the notion of territorial incorporation was a thoroughly modern invention."[376]

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369. United States v. Vaello Madero, 142 S. Ct. 1539, 1562 (2022) (Sotomayor, J., dissenting).

370. Impoundment generally refers to the Executive's refusal to spend money appropriated by Congress. *See* Christian I. Bale, Note, *Checking the Purse: The President's Limited Impoundment Power*, 70 DUKE L.J. 607, 608 (2020).

371. Cody Venzke & Allegra Harpootlian, *Trump's Attempt to Unilaterally Control State and Local Funding Is Dangerous, Dumb, and Undemocratic*, ACLU (Feb. 10, 2025), https://www.aclu.org/news/civil-liberties/trumps-attempt-to-unilaterally-control-state-and-local-funding-is-dangerous-dumb-and-undemocratic [https://perma.cc/KF4D-CH7U].

372. Adriel Orozco, *H.R. 32 Would Empower President to Cut Essential Services in States and Cities*, AM. IMMIGR. COUNCIL: IMMIGR. & CRIME (Feb. 25, 2025), https://immigrationimpact.com/2025/02/25/h-r-32-would-empower-president-to-cut-essential-services-in-states-and-cities [https://perma.cc/6X6H-Q24C]. Although the bill did not pass, the executive continues threatening to withhold federal fundings to so-called "blue states" or cities with sanctuary laws. FOX 32 Chicago, *Trump Says He'll Cut Funding to 'Sanctuary' States Like Illinois*, YOUTUBE (Jan. 20, 2026), https://www.youtube.com/watch?v=QAwa70DJH8M [https://perma.cc/Q4S7-WVHH].

373. *See* BRENO BRAGA & DIANA ELLIOTT, IZA INST. OF LAB. ECON., THE EFFECTS OF MARIA MIGRANTS ON THE FINANCIAL HEALTH OF THE RESIDENTS OF CENTRAL FLORIDA 5–7 (2023).

374. Charles & Fuentes-Rohwer, *supra* note 55, at 1246–47.

375. United States v. Vaello Madero, 142 S. Ct. 1539, 1555 (2022) (Gorsuch, J., concurring).

376. *Id.*; *see* Abbott Lawrence Lowell, *The Status of Our New Possessions: A Third View*, 13 HARV. L. REV. 155, 174 (1899); C. C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365,

The second ground for originalist intervention is articulated by Justice Thomas, who wrote a concurrence challenging the idea that the Fifth Amendment's Due Process Clause contains an implicit equal protection component.[377] Instead, he highlighted the historical circumstances surrounding the Fourteenth Amendment's Citizenship Clause, which he suggests constitutionalized the requirement that the federal government treat citizens equally.[378] But this conclusion does not square with the Court's decisions in the *Insular Cases*, which suggested that citizens were afforded different rights based on their location.[379] If Justice Thomas is right, *Vaello Madero* reveals tensions between the Citizenship Clause and the Territory Clause that underline Justice Gorsuch's concern about nonoriginalist precedents like the *Insular Cases* resting on racial assumptions untethered from the text.

Third, originalist scholars have increasingly argued that the Territory Clause and Admissions Clause are what allow the United States to acquire new territories, but when doing so, the acquired territory must become a state within a reasonable period of time.[380] Possession that is "unreasonably long"—like the 125-year holding pattern in Puerto Rico—"is therefore likely unconstitutional."[381] These three reasons for discontent led one observer to conclude that the "Court's originalist majority could be open to major adjustments in its jurisprudence of the governance of Puerto Rico."[382]

Vaello Madero should also be criticized by those on the left because the welfare status quo it upholds raises concerns about economic justice for one of the country's poorest populations, which is also predominantly Hispanic. In

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377–78 (1899); Frederic R. Coudert, Jr., *Our New Peoples: Citizens, Subjects, Nationals or Aliens*, 3 COLUM. L. REV. 13, 25–26 (1903).

377. *Vaello Madero*, 142 S. Ct. at 1547 (Thomas, J., concurring).

378. *Id.* at 1551 ("While the historical evidence above is by no means conclusive, it offers substantial support for the proposition that, by conferring citizenship, the Citizenship Clause guarantees citizens equal treatment by the Federal government with respect to civil rights.").

379. Indeed, Justice Taft likely did not account for this tension when, writing for a unanimous court in *Balzac*, one of the *Insular Cases*, he announced that it is "locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it." Balzac v. Porto Rico, 258 U.S. 298, 309 (1922). *But see* Reid v. Covert, 354 U.S. 1, 5–6 (1957) (rejecting the view that constitutional protections turn solely on territorial status and emphasizing that the United States may not act free of constitutional restraints merely because it operates abroad).

380. *See generally* Allred, *supra* note 56 (discussing originalist arguments that the Territories and Admissions Clauses do not permit the indefinite holding of territories and arguing that while the Territories Clause may allow the existence of perpetual territories, the Admissions Clause requires that a "newly acquired territory" become a state within a reasonable period of time).

381. *Id.* at 154; LAWSON & SEIDMAN, *supra* note 56, at 83–85; Lopez-Morales, *supra* note 56, at 794; AMAR, *supra* note 56, at 274.

382. Allred, *supra* note 56, at 152. Indeed, Justice Gorsuch and Thomas recently stated that "rightly understood, [does not] endow the federal government with plenary power even within the Territories themselves," further suggesting their openness to revisiting territorial governance jurisprudence. Veneno v. United States, 146 S. Ct. 52, 54 (2025) (mem.) (Gorsuch, J., dissenting from cert. denial).

2020, when former President, then-candidate, Biden was on the campaign trail, and the Trump Administration appealed *Vaello Madero* to the Supreme Court, Biden tweeted "[t]his ends when I'm elected president."[383] But when he took office, he continued to defend the case while simultaneously doubling down on asserting that people in the territories "should be able to receive SSI benefits, just like their fellow Americans in all 50 states and Washington D.C."[384] He and a Democratic-controlled Congress did nothing to eliminate the disparities despite offering spending plans that alluded to this change.[385] The Court's decision in *Vaello Madero* sanctioned a two-tiered system of citizenship for territorial residents that underlined long-standing critiques by scholars of race about how formalistic and ostensibly neutral legal doctrines like "rational basis" and "incorporation" can exacerbate racial inequalities.[386] Again, the cuts in spending for social programs will likely deepen these economic and racial disparities.[387]

Considering the politics of the moment, there are a few modest normative suggestions for different audiences. First, lawyers concerned about territorial inequality might take up the invitation offered by Justice Thomas to consider the Citizenship Clause a potential shield against federal discrimination; this is a feature of the decision that has received less attention.[388] A wider array of advocates might also consider building broad-based coalitions to challenge welfare state retrenchment. As the above discussion demonstrates, there is much that people might agree on as it relates to this issue and federalism, originalism, racial justice, economic justice, and fiscal efficiency. The ideologically polarized politics of the moment might require this kind of coalition-building. Scholars might build on these efforts by erecting normative frameworks that demonstrate how inequality in the territories contradicts these legal theories and goals of racial justice. Finally, courts, if presented with the opportunity, might directly confront the *Insular Cases*, as Justice Gorsuch insists they should in his

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383. Neil Weare, *Biden Made a Promise to End Discrimination Against Puerto Ricans. He's About to Break It*, SLATE (Oct. 18, 2021, 11:55 AM), https://slate.com/news-and-politics/2021/10/biden-puerto-rico-vaello-madero-supreme-court.html [https://perma.cc/9JKQ-U9CF].

384. *Id.*

385. Marga Parés & David Cordero Mercado, *SSI Extension to Puerto Rico Lies in Congress's Court*, CTR. FOR HEALTH JOURNALISM (June 6, 2022), https://centerforhealthjournalism.org/our-work/reporting/ssi-extension-puerto-rico-lies-congresss-court [https://perma.cc/P5MV-ZPSB].

386. Brandon Hasbrouck, *On Lenity: What Justice Gorsuch Didn't Say*, 108 VA. L. REV. 1289, 1303 (2022).

387. *See 2025 Budget Stakes: Poverty and Hardship Could Rise for Millions*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 21, 2025), https://www.cbpp.org/research/poverty-and-inequality/2025-budget-stakes-poverty-and-hardship-could-rise-for-millions (on file with the *Iowa Law Review*).

388. A full account of the negative consequences of this approach is beyond the scope of this Article. In any event, advocates should be mindful of at least three concerns. First, such a framework could leave non-citizen territorial residents without constitutional protection. Second, it could reinforce citizenship as the prerequisite for constitutional rights more broadly. Finally, it could entrench a two-tiered system within the territories themselves that replicates the very inequality this Article critiques.

concurrence.[389] If those decisions rest on a "rotten foundation," courts, with the prompting of lawyers, advocates, and scholars, might approach the issue in a more textually grounded and historically rooted manner, and challenging the notion of perpetual territorial (and discriminatory) rule. The integrity of our democracy, which commentators increasingly fret about, demands these kinds of interventions.

CONCLUSION

The Supreme Court's ruling in *Vaello Madero* highlights some of the many problems of the American welfare state. Despite the polarized nature of American politics, the status quo conflicts with basic ideas about federalism, welfare, and equality. As the nation enters an era of unified Republican control of all three branches, possible cuts to welfare programs, and anxieties about an economic downturn, the constitutional treatment of poor people in the territories illustrates that other people's poverty can strike at the heart of our democratic commitments.

389. Despite the invitation, Justice Gorsuch did not dissent from the denial of certiorari in a recent case that placed the *Insular Cases* squarely before the Court. *See* Fitisemanu v. United States, 20 F.4th 1325, 1326 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022).