THE COLOR OF SOCIAL SECURITY: RACE AND UNEQUAL PROTECTION IN THE CROWN JEWEL OF THE AMERICAN WELFARE STATE

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The Social Security Act is undoubtedly one of the nation's most important accomplishments in addressing Americans' economic insecurity, poverty and human suffering. However, since its enactment in 1935, it has fallen short in delivering on the promise of equitable economic protection for African Americans and similarly situated persons of color. This Article examines two exclusionary and discriminatory statutory provisions which have disproportionately injured African Americans and other persons of color. Although arising from different time periods more than 35 years apart, directed to decidedly different issues, and affecting vastly different communities of color, they are bound by a common thread of the American experience: racism and white supremacy, abetted by political disenfranchisement. These provisions are exemptions, one in the original Social Security Act of 1935 Old Age Insurance program, excluding agricultural and domestic workers who were disproportionately African American, and one in the 1972 Amendments to the Act, excluding residents of U.S. Territories from the Supplemental Security Income program (who are overwhelmingly non-white—Latino/a, Black, AANHPI, or mixed race). These exclusions are grounded in historical racism, stemming from the "badges and incidents" of slavery and solicitude to protecting a postbellum plantation and sharecropping economy; or from American colonialism and imperialism at the turn of the twentieth century in the territories. Although equal protection principles supply a useful lens with which to examine these provisions' racially disparate scope and nature, the equal protection doctrines as applied by courts have proven largely inadequate as a remedial tool to alter policy or redress injury as reflected in the Court's 2022 Vaello Madero decision. The Article concludes with suggestions for advancing racial justice in Social Security programs in addressing the legacy of exclusion and informing responses to other threats of

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programmatic disparate treatment.

INTRODUCTION

The Social Security programs are America's largest social benefit programs, eventually affecting over 96% of all Americans.[1] They provide a lifeline for many, taking more Americans out of poverty than any other program.[2] And they

1. *See Never Beneficiaries, Age 60 or Older, 2020*, SOC. SEC. ADMIN. (Aug. 2021), https://perma.cc/4CC2-US69 (discussing the characteristics of the 3.5% percent who reach age 60 and never become beneficiaries); *see also* Richardson v. Perales, 402 U.S. 389, 399 (1971) ("The Social Security Act has been with us since 1935 . . . . It affects nearly all of us."). *See generally* HELEN HERSHKOFF & STEPHEN LOFFREDO, GETTING BY: ECONOMIC RIGHTS AND LEGAL PROTECTIONS FOR PERSONS WITH LOW INCOME (2020) (excerpts) (describing the coverage and scope of all major social welfare public benefit programs).

2. Kathleen Romig, *Social Security Lifts More People Over The Poverty Line Than Any Other Program*, CTR. ON BUDGET & POL'Y PRIORITIES, (June 2, 2023), https://perma.cc/R9AN-K84C; *see* Elise Gould, *Social Security Kept 27 Million Americans Out of Poverty in 2013*, ECON. POL'Y INST. (Oct. 30, 2014), https://perma.cc/Z9BN-BBB3 ("Social Security is, by far, the most effective anti-poverty program in the United States. Without Social Security, an additional 8.6 percent of Americans, or nearly 27 million, would fall below the [Supplemental Poverty Measure] poverty threshold."); *see also* THE WHITE HOUSE, SOCIAL SECURITY DISABILITY INSURANCE: A LIFELINE FOR AMERICAN WORKERS AND FAMILIES

have become increasingly critical to survival after the major evisceration of the social welfare safety net in the 1990s through the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.[3]

These programs were the "cornerstone" or "crown jewel" of President Franklin Delano Roosevelt's (FDR's) New Deal; they were intended to provide a safety net and a baseline of economic rights and income security commencing at a time when material human suffering was at its apogee during the country's greatest depression.[4] FDR addressed Congress on the proposed Social Security Act of 1935 in the winter of that year. He described the bill's "main objectives" as to protect "the security of the men, women, and children of the Nation against certain hazards and vicissitudes of life" and provide a "more equitable . . . means" for addressing "the consequence of economic insecurity."[5]

The Social Security programs have been and remain of particular importance to African American and other historically subordinated and disproportionately

(2015), https://perma.cc/Q28S-5UEB (noting the Social Security Disability Insurance program alone annually "keep[s] about 3 million Americans out of poverty, and reduces the depth of poverty for another 1.9 million Americans"). "The EITC [Earned Income Tax Credit] . . . is the most effective program other than Social Security at lifting people out of poverty overall." Arloc Sherman, Danilo Trisi & Sharon Parrott, *Various Supports for Low-Income Families Reduce Poverty and Have Long-Term Positive Effects on Families and Children*, CTR. ON BUDGET & POL'Y PRIORITIES (July 30, 2013), https://perma.cc/ZX6G-NPUU; *cf.* John Cassidy, *Lessons in Conquering Child Poverty*, THE NEW YORKER (Sept. 15, 2023), https://perma.cc/4QA5-7V98 (noting that after the expiration of the related, expanded Child Tax Credit at the end of 2021, child poverty more than doubled from 5.2% in 2021 to 12.4% in 2022).

3. See LaDonna Pavetti, Ali Safawi & Danilo Trisi, TANF at 25: A Weaker Cash Safety Net Reaching Fewer Families and Doing Less to Lift Families Out of Deep Poverty, NAT'L TAX J. (2021) (describing American safety net evisceration due to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and its impacts after 25 years). Congress has further contracted the safety net this past year with restrictions on anti-hunger and food relief in the 2023 debt ceiling compromise and legislation. See Annie Lowrey, Work Requirements Won't Die: The Debt Ceiling Deal Rests on a Cruel and Ineffective Policy, THE ATLANTIC (May 31, 2023), https://perma.cc/VM6N-DRVP (describing new (2023) restrictions on Supplemental Nutrition Assistance Program (food stamps) benefits to low-income, near elderly persons through mandatory work requirements in bipartisan dept ceiling compromise legislation). Congress also recently let the expanded Child Tax Credit expire at the end of 2021 by deleting it from the Build Back Better (BBB) Act as part of substantial reductions needed to secure 50 votes in the Senate and not including it in the Inflation Reduction Act (IRA) which replaced BBB and was actually passed in August 2022. See Cassidy, supra note 2; infra note 246 (describing the history behind inability to pass BBB and replacement with the significantly smaller IRA).

4. FDR PRESIDENTIAL LIBRARY, https://perma.cc/YNA4-HRHZ (archived Dec. 4, 2023) ("The crown jewel of FDR's New Deal, Social Security is his greatest legacy to the nation . . . . 'No other New Deal measure proved more lastingly consequential or more emblematic of the very meaning of the New Deal,' notes Stanford historian David M. Kennedy. Roosevelt would have agreed. 'He always regarded the Social Security Act as the cornerstone of his administration,' Secretary of Labor Frances Perkins recalled, 'and . . . took greater satisfaction from it than from anything else he achieved on the domestic front.'").

5. *FDR's Statements on Social Security, Message to Congress on Social Security*, SOC. SEC. ADMIN. (Jan. 17, 1935), https://perma.cc/LC97-YMUN.

impoverished communities of color.[6] This is due to well-documented substantial disparities in generational wealth and savings,[7] lesser access to jobs generating pension and retirement income or access to quality health care and health insurance, lower income levels, and greater dependence on employment involving arduous physical labor and unskilled low wage work.[8] However, aspects of the Social Security programs' origins and history reflect significant racially disparate impacts in the programs' scope and application, limiting the attainment of the Act's lofty objectives and undermining equitable or equal economic protection

6. This Article's principal focus in Part III on race, equal protection, and the original Social Security Act of 1935 is the Black or African American community, acknowledging that this nation in the mainland singled out Blacks/African Americans for enslavement and entrenched racial subordination and segregation by law and practice with present-day consequences and through structural discrimination which persists through the present. *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (explaining the exclusive focus on Black community); *cf.* JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINES THE WAR ON POVERTY (1994) (focusing on the Black community). I use the terms Black and African American interchangeably and have quoted historical material referencing the terms "negro" or "colored" in historical context. I have also included material discussing similarly historically subordinated and disproportionately impoverished communities of color on this point where applicable and where research and/or empirical material support comparable analysis. *Cf.* Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 743 n.15 (1993) (describing focus on the Black community with analysis of Latino/a and other similar communities of color where parallels in circumstances and treatment are apparent). The analysis in Part IV focuses on the role of race in a major Social Security Act benefits program (SSI) and equal protection in the territories of Puerto Rico, Virgin Islands, Guam and American Samoa in the more racially varied Latino/a, Black, mixed-race, and Asian American, Native Hawaiian and other Pacific Islander (AANHPI) populations in those Island communities.

7. *See generally* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (2d. ed. 2006) (chronicling the practices and policies leading to dramatic racial wealth disparities and inequality and present-day consequences); ROTHSTEIN, *supra* note 6, at 177-93 (describing policies and practices adopted in law and leading to substantial intergenerational racial wealth disparities with focus on the effective exclusion of Black families from wealth-generating home ownership); *see generally* MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP (2017) (analyzing the role of structural racial discrimination on credit and banking and impact on racial wealth gap). *See also* DOROTHY BROWN, THE WHITENESS OF WEALTH (2022) (focusing on the role of American tax law and the Internal Revenue Code in contributing to an ever-increasing racial wealth gap).

8. *See* Kilolo Kijakazi, Karen Smith & Charmaine Runes, Urb. Inst., African American Economic Security and the Role of Social Security 3-22 (July 2019), https://perma.cc/GB9K-QEXF; BENJAMIN W. VEGHTE, ELLIOT SCHREUR, & MIKKI WAID, , Nat'l acad. of Soc. Ins., Social Security and the Racial Gap in Retirement Wealth (Dec. 2016), https://perma.cc/G53A-2844; Maya M. Rockeymoore & Meizhu Lui, Comm'n to Modernize Soc. Sec., Plan for a New Future: The Impact of Social Security Reform on People of Color, (2011), https://perma.cc/NL3F-5C7G; *see also* John B. Mitchell, *Suspending Prisoners' Social Security Benefits: Yet Another Blow to Financially Vulnerable African American and Hispanic Families*, 20 Seattle J. Soc. Just. 109, 150-51 (2021) (noting that Social Security "made up half or more of the incomes of 69.4% of African Americans sixty-five and older, lifting 1.3 million out of poverty" and that "the poverty rate for those Black seniors over sixty-five would have gone from 19.4% to 50.7%" without Social Security benefits, while citing similar statistics for Latino/a households and seniors).

against financial hardship and insecurity extended to white Americans.

As with many areas of administrative law, scholarship on Social Security law and the Social Security benefit programs often examines process, procedure and the "technocratic language of government agency action."[9] It also explores bureaucratic functioning or competing theories and explanations for agency dysfunction,[10] or the balancing of efficiency, consistency and process fairness in agency administration.[11] Substantive Social Security law is sometimes perceived as tedious or impenetrable in interpretation, leading courts to observe that "[t]he Social Security Act is among the most intricate ever drafted by Congress [with a] Byzantine construction [which] makes the Act 'almost unintelligible to the uninitiated.'"[12]

However, basic features of the Social Security program, its history and how it has operated are also difficult to understand without considering the history of racism and white supremacy in the United States. This Article attempts to illustrate this point by deconstructing the Act's benefits programs' history and scope through the lens of race and equal protection doctrine and as applied to two major legislative provisions in Social Security Act benefit programs, disproportionately

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9. *See* Natalie Gomez-Velez, Notice and Comment, *Socioeconomic Pedagogy and Administrative Law: Including Issues of Race/Ethnicity and Class in the Administrative Law Course*, YALE J. ON REG. (July 29, 2020), https://perma.cc/YE7K-RKXZ; see, e.g., Jon C. Dubin, *Why Carr v. Saul Should Signal the End of Common Law Issue Exhaustion in Inquisitorial Proceedings*, 29 GEO. MASON L. REV. 627, 627 (2022) (analyzing the unique adjudicative model employed in SSA administrative proceedings and the resulting process implications for federal judicial review).

10. *See generally* JERRY L. MASHAW, BUREAUCRATIC JUSTICE (1983); *compare* Richard J. Pierce, Jr., *What Should We Do About Social Security Disability Appeals?*, REGULATION, Fall 2011, at 34, https://perma.cc/EWG3-PAAT (criticizing SSA ALJ adjudication as a major factor in Social Security trust fund depletion through improper ALJ benefit awards and proposing abolition of ALJ hearings), *with* Jon C. Dubin & Robert E. Rains, *Scapegoating Social Security Claimants* (and the Judges Who Evaluate Them), 6 ADVANCE: J. AM. CONST. SOC. ISSUE GROUPS 109 (2012) (responding to and disagreeing with Pierce's proposal, conclusions, and articulation of the perceived problem).

11. David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform,* 72 STAN. L. REV. 1, 31-40 (2020) (describing the SSA methods to promote adjudicative accuracy and efficiency through quality assurance reviews, including random sampling); *see also* Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1116, 1149 (2018) (analyzing the efficiency and accuracy in "problem-oriented" oversight of SSA high-volume adjudication through judicial review).

12. Schweiker v. Gray Panthers*,* 453 U.S. 34, 43 (1981) (quoting Friedman v. Berger, 547 F.2d 724, 727 n.7 (2d Cir. 1976), *cert. denied,* 430 U.S. 984 (1977)); White v. Shalala, 7 F.3d 296, 300 (2d Cir. 1993) (same, and also referencing the Act as "exceptionally complicated"); *see also* Feld v. Berger, 424 F. Supp. 1356, 1358 (S.D.N.Y. 1976) ("It borders on the absurd that federal, state and local officials charged with the administration of the Social Security Act cannot reach an accommodation as to the meaning of the regulations"—"regulations so drawn that they have created a Serbonian bog from which the agencies seemingly are unable to extricate themselves."); *see, e.g.*, JON C. DUBIN, SOCIAL SECURITY DISABILITY LAW AND THE AMERICAN LABOR MARKET 72-103 (2021) (describing the often extraordinary complexity of labor market work adjustment assessments in Social Security disability substantive law and regulations).

excluding persons of color from program coverage. These statutory exclusions involve different Social Security cash-benefit programs, enacted in different time periods, involving different exclusionary bases, and affecting different communities of color. Yet they arise from a common thread of the American experience emanating from racism and white supremacy and abetted through political disenfranchisement of the excluded communities of color.

Part II will supply an overview of the major Social Security benefits programs. Part III will examine and analyze the original 1935 Social Security Act's complete exclusion of disproportionately Black agricultural and domestic workers from the Old Age Insurance program. It will specifically challenge and critique the Social Security Administration Public Historian's relatively recent conclusion that race played no meaningful role in the social insurance program exclusion's adoption and the resulting impacts on African Americans and other similarly situated persons of color. It will also explore, in somewhat less depth, discrimination facilitated through local administration of the Act's means-tested welfare programs, and the contemporaneous and intertwined racially infused legislative history of the respective means-tested and social insurance old age programs enacted in Titles I and II of the 1935 Act. It includes analysis of the influence of southern legislators' efforts to preserve the postbellum plantation and sharecropping system's exploitation of Black farmworkers on each program's design. It also examines this statutory exclusion through the lens of equal protection doctrine to inform further the inquiry into the relevance of race in the exclusion's enactment.

Part IV will explore the statutory exclusion of residents from the United States Territories of Puerto Rico, the Virgin Islands, Guam and American Samoa—overwhelmingly Latino/a, Black, mixed-race, and/or Asian American, Native Hawaiian and other Pacific Islander (AANHPI)—from the Supplemental Security Income (SSI) program for low-income adults and children with disabilities and the elderly. This includes a critical evaluation of the application of equal protection doctrine in the Supreme Court's 2022 decision in *U.S. v. Vaello Madero*. This section also examines the lingering shadow of the overtly racist *Insular Cases* from the early twentieth century hovering over this controversy—a series of cases launching and reinforcing a separate and unequal regime of rights and benefits for territory residents through the construct of indefinite "unincorporated" territory status.

The Article concludes with suggestions for advancing racial justice in the Social Security programs through public policy, and legislative and administrative fora, to address the legacy of exclusion and disparate treatment, and informing responses to identified future threats of, and present policy actions with, racially disparate impacts in SSA administration and program design. It proposes reconciliation for past injury and inclusionary legislation to remedy the ongoing discriminatory exclusion in the SSI program in the territories.

II. OVERVIEW OF THE SOCIAL SECURITY BENEFIT PROGRAMS

Among the various forms of government social welfare benefit programs established by the Social Security Act and its amendments and administered by the Social Security Administration (SSA), Social Security is a social insurance program. It is also known as Old Age, Survivors, and Disability Insurance (OASDI). It is financed from separate trust funds for the Disability Insurance (DI) and the Old Age and Survivors' Insurance (OASI) programs and supported by payroll taxes on the earnings of insured workers. Premiums in the form of Federal Insurance Contribution Act (FICA) taxes are automatically withheld from most workers' paychecks, enabling workers, and certain family members, to receive monthly benefits if the worker retires, dies, or becomes disabled.[13] SSA also operates a means-tested income support program for low-income disabled and elderly persons titled the Supplemental Security Income (SSI) program, mostly for those lacking insurance coverage for significant OASDI entitlement.[14]

The Social Security Act's history reflects an initial reluctance to address concerns about disability. Although President Roosevelt sought to address many of the significant contributors to unemployment and poverty during the Great Depression through the original Social Security Act of 1935, that initial enactment included only the old age provisions of the current OASDI program. The survivors' benefits program for dependents of insured workers was added shortly thereafter in 1939.[15] No benefits based on disability were included in the New Deal-era legislation.

The obvious omission of the disability category from the initial Act was due in part to Congress and the administration's "inability to determine whether disability benefits should be distributed in the form of 'welfare'—i.e. that is, as means-tested public assistance, as social insurance benefits, or as both."[16] The omission was also due to a second concern that the definition of "disability" would be too subjective and malleable and could not be sufficiently circumscribed to restrain program costs within predictable and manageable limits.[17]

In the 1950s, Congress addressed the first concern by adding disability categories to both the joint federal-state public assistance (or "welfare") program, and then, a few years later, to the federal social insurance program.[18] Congress accomplished the former through amendments to the Social Security Act in 1950,

13. S*ee* 42 U.S.C. §§ 401–422 (statutory authority for OASDI).

14. *See* H.R. REP. NO. 92-231, at 146-47 (1971) ("[C]ontributory social insurance should continue to be relied on as the basic means of replacing earnings that have been lost as a result of old age, disability, or blindness. But some people who because of age, disability, or blindness are not able to support themselves through work may receive relatively small social security benefits . . . [which] therefore, must be complemented by an effective assistance program."); 42 U.S.C. §§ 1381–1383 (providing statutory authority for SSI).

15. *See* Social Security Amendments of 1939, Pub. L. No. 76-379, 53 Stat. 1360 (1939).

16. Dubin, *supra* note 12, at 9.

17. *See id.* For analysis of this second concern *see id.* at *passim.*

18. *Id.*

which added the joint federal-state Aid to the Permanently and Totally Disabled (APTD) welfare program.[19] Congress then replaced the APTD program with the Supplemental Security Income (SSI) program through the Social Security Amendments of 1972, providing means-tested benefits for adults and children with disabilities and for the elderly. Next, Congress transferred the responsibility for welfare benefits for aged, blind, and disabled persons from a joint state-federal, locally controlled, scheme consolidating APTD with programs from Titles I (Old Age—OAA) and X (Blindness AB) of the original Social Security Act of 1935 to a nationally uniform program administered by the federal Social Security Administration. Congress had added the disability insurance, social insurance program—the "DI" in "OASDI"—in 1956.[20]

III. THE SOCIAL SECURITY ACT IN RACIAL AND HISTORICAL CONTEXT: THE AGRICULTURAL AND DOMESTIC WORKER EXCLUSION AND LOCAL DISCRETION

"The allegations of racial bias in the founding of the Social Security program, based on the coverage exclusions, do not hold up under detailed scrutiny."[21] — Larry DeWitt, SSA Public Historian, SSA Office of Publications and Logistics Management, 2010.

Part III presents an alternative viewpoint from that prominently displayed on the SSA's website and expressed in the above quote.

A. The Role of Race in New Deal Remedial Legislation

From the Social Security Act's social insurance program's inception as the centerpiece of President Franklin D. Roosevelt's "New Deal," racial inequity was embedded in the Act. The Social Security Act of 1935 excluded agricultural and domestic workers from coverage—an exclusion which served on the surface as a "race-neutral proxy"[22] for the preclusion of 65% of the entire Black worker

19. *Id.* at 9-10.

20. *Id.* at 10-17. This Article's focus is on the role of race in the design, application, and impact of certain provisions of the ongoing cash benefit programs, OASDI and SSI, under the Social Security Act. These programs utilize the same SSA adjudication system for resolving claims and the same statutory definition of disability in their respective disability components and are frequently analyzed together. *See* FRANK S. BLOCH & JON C. DUBIN, SOCIAL SECURITY LAW AND PRACTICE IN A NUTSHELL 67, 241 (2022). The Article includes a secondary and shorter examination of certain of the Act's means-tested cash benefits public assistance benefits programs to inform context. It does not include analysis of racial disparities in the design or application of the Act's health benefit (Medicaid and Medicare) programs or the temporary benefits for unemployed, "ready, willing and able" workers through the Unemployment Insurance Compensation Program.

21. Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70 SOC. SEC. BULL. 49, 64 (2010), https://perma.cc/T2VU-SPE6 (emphasis added).

22. 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, 96 (2011).

population from coverage under the Social Security old age social insurance benefits program.[23]

The reasons for these exclusions and the resulting disparate racial impact were numerous and are vigorously debated to this day.[24] Scholars who reject the significance of racial considerations, principally point to factors such as the exclusion provision's origin as an amendment from Treasury Secretary Tom Morgenthau and his articulation of administrative and functional concerns with collecting Social Security taxes in these occupational categories. They also note the confinement of southern legislators' most racist rhetoric in debates on the Social Security Act to the Act's Old Age public assistance program (Title I) and not its Old Age social insurance program and the exclusions therein (Title II), and an asserted diversity of opinion within the Southern congressional caucus on the importance of limiting benefit receipt to Black workers under the Act.[25]

Scholars who emphasize the primacy of racial considerations point to factors such as the blatantly racialized and exploitative rhetoric of Southern legislators in debates on the Act and expression of the need to protect the postbellum Southern plantation agricultural economy and labor availability by withdrawing old age pensions and financial support to Black sharecroppers and farmworkers. They also identify Congress's unquestioned knowledge and awareness of the substantial disparate impact of the exclusion amendment on Black workers and the disregard of Black community leaders' advocacy against exclusion in Congressional testimony. Others reference the Act's drafters' initial underscoring of the importance of including agricultural and domestic workers in the social in-

23. KIJAKAZI ET AL., *supra* note 8, at 1.

24. *Compare* IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 59 (2005) ("It is not hard to see why southern members were so intensely concerned with [enactment of an expansive agricultural exclusion] and why, in order to get the Bill passed, other members were prepared to go along. The status of subaltern Black labor in agriculture—a structure that often came close to resembling nineteenth century conditions under slavery—was a consistent concern for southern members in the 1930s when [the New Deal legislation] was being debated."), *and* DAVID STOESZ, CTR. FOR SOC. DEV. RSCH., THE EXCLUDED: AN ESTIMATE OF THE CONSEQUENCES OF DENYING SOCIAL SECURITY TO AGRICULTURAL AND DOMESTIC WORKERS 10 (2016), https://perma.cc/EW3W-DBRC (finding decisively non-racial administrative burden explanations for exclusion of disproportionately Black workforce from Social Security old age insurance "not [] convincing" since Congress had managed to overcome any such administrative problems in the 1950s when these groups were added and other countries found ways to include agricultural and domestic workers in their old age social insurance programs), *with* DeWitt, *supra* note 21, at 64 ("[t]he allegations of racial bias in the founding of the Social Security program, based on the coverage exclusions, do not hold up under detailed scrutiny."), *and* Gareth Davies & Martha Derthick, *Race and Social Welfare Policy: The Social Security Act of 1935*, 112 POL. SCI. Q. 217, 235 (1997) ("the range and probable weight of nonracial factors become so obvious when one takes the trouble to reconstruct the political debate of 1935."). *See generally* Perea, *supra* note 22, at n.1 (collecting historians' conflicting conclusions about the role of racial considerations in the enactment of agricultural and domestic exclusions in New Deal remedial legislation).

25. *See* DeWitt, *supra* note 21; Davies & Derthick, *supra* note 24; *see also infra* notes 55, 72, 73, 74, 76, 77 and accompanying text).

surance program's provisions and these categories' resulting inclusion in the initial version of the legislation. Some also de-emphasize or challenge the seriousness or presumed unmanageability of administrative obstacles to inclusion of these occupational categories. They reference other countries' experiences in surmounting the suggested occupational category obstacles in comparable social insurance legislation prior to the Social Security Act and the ability of Congress and the Administration to do so as well through the Act's inclusion amendments in the 1950s.[26]

The remainder of this Part asserts that the presence of motives identified by each camp are not necessarily contradictory or mutually exclusive. It analyzes these Social Security Act exclusions through the body of jurisprudence developed over 45 years ago on "mixed" or "multiple motive" equal protection analysis of governmental legislation or action. This body of equal protection intent doctrine stresses that the presence of racial considerations or motives has special burden-shifting salience and that the identification of other non-racial considerations behind the same legislation or action is not dispositive. In this context, those non-racial considerations do not demonstrably vitiate the Act's racially discriminatory taint. It also concludes that, regardless of ultimate potential equal protection liability, the foreseen and experienced racially disparate impact of the Social Security Act exclusions is manifest and has had generational deleterious consequences for African Americans.

Viewed in broader context with much of the New Deal's otherwise progressive, remedial social welfare legislation, these exclusions were consistent with FDR's general strategy of appeasement; he viewed the price of passage as compromise and feared that opposition of powerful southern legislators would jeopardize these programs' valuable attributes if he was to address racial inequity in the proposed programs[27] or otherwise pursue progress on the American "race problem."[28] At the time, in the 1930s, the majority of African Americans lived

26. *See* KATZNELSON, *supra* note 24; STOESZ, *supra* note 24; *see also supra* note 22 and accompanying text; *infra* notes 22, 29, 30, 31, 31, 56, 60, 64, 67, 88 and accompanying text.

27. *See* QUADAGNO, *supra* note 6, at 20; ROBERT C. LIEBERMAN, SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE 28 (1998).

28. In the parlance of the day, the country's failure to come to grips with issues emanating from a history of slavery, Jim Crow and pervasive structural racial discrimination—the race problem—was sometimes characterized as "the negro problem." *See, e.g.*, Kenneth O'Reilly, *The Roosevelt Administration and Black America: Federal Surveillance Policy and Civil Rights During the New Deal and World War II Years*, 48 PHYLON 12, 12 (1987) ("The nature of the federal government's response to the 'Negro problem' during the years 1933-1945 has been the subject of a lively historical debate."); *see also* GUNNAR MYRDAL, THE AMERICAN DILEMMA: THE NEGRO PROBLEM AND AMERICAN DEMOCRACY (1944) (concluding that the negro problem is essentially a white man's problem). African American intellectual W.E.B. Du Bois expressed the sentiments of many in the Black community when he famously posited the rhetorical question: "How does it feel to be a problem?" W.E.B. DU BOIS, THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES 2 (1903).

in the south and in rural impoverished areas and worked mostly in unskilled agricultural or domestic employment.[29] The Southern antebellum mode of production focused on coerced labor under slavery and was reestablished postbellum "under a system of sharecropping, which guaranteed planters great control of a subservient, primarily Black labor force."[30] The sharecropping system operated pervasively through the 1940s.[31]

At the same time, representatives from the Jim Crow south dominated Congress and held a majority of committee chairmanships and other leadership positions in every New Deal Congress.[32] In attempting to justify his non-support of anti-lynching legislation in the 1930s, FDR explained to NAACP Executive Secretary Walter White:

> I've got to get legislation passed by Congress to save America. The Southerners by reason of the seniority rule in Congress are chairmen or occupy strategic places on most of the Senate and House committees. If I come out for the anti-lynching bill now, they will block every bill I ask Congress to pass to keep America from collapsing. I just can't take that risk."[33]

At the time, lynchings were not only used to instill terror, but also often conducted near the time for elections in order to suppress the Black vote.[34] FDR also backed off support of legislation to abolish the poll tax which had been used as a device to further disenfranchise Black voters.[35]

Accordingly, in much of the remedial social welfare legislation that followed, efforts to address racial discrimination in the emerging programs were rejected, and racial inequity was reinforced in the legislation ultimately enacted. For example, in the housing area, the National Housing Act of 1934 created the Federal Housing Administration (FHA) to supply mortgage insurance to enable

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29. Perea, *supra* note 22, at 100.

30. JILL QUADAGNO, THE TRANSFORMATION OF OLD AGE SECURITY 16 (1988).

31. *Id.*

32. HARVARD SITKOFF, A NEW DEAL FOR BLACKS 34 (30th anniversary ed. 2009); *see also* QUADAGNO,, *supra* note 30, at 16-18.

33. WALTER WHITE, A MAN CALLED WHITE 169-70 (1948).

34. *See* Brad Epperly, Christopher Witko, Ryan Strickler & Paul White, *Rule by Violence, Rule by Law: Lynching, Jim Crow, and the Continuing Evolution of Voter Suppression in the U.S.*, 18 PERSP. ON POL. 756, 765 (2020) ("[L]ynching and other forms of violence were tools in the widespread suppression of black political participation."); *see also* Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 MINN. J. L. & INEQ. 263, 272-76 & n.98 (2003) (describing the effects of lynching and pervasive forms of voter intimidation and noting: "It took over 100 years for southern blacks to recover from the effects of this disenfranchisement[;] [a]lthough 15% of southern office holders were black in 1870, fewer than 3% were black in 1979").

35. *See STEVEN F. LAWSON,* BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969, at 57 (1976) (noting FDR "withdrew from his clear advocacy of [poll tax] repeal and tried to soothe the feelings of southern politicians . . . [he] explained that 'at no time and in no manner did I even suggest federal legislation of any kind to deprive states of their rights directly or indirectly to impose the poll tax'"); QUADAGNO, *supra* note 6, at 20.

working-class and low-, moderate-, and middle-income families to access low- or no-down-payment mortgages.[36] However, in so doing, the FHA (along with the Veterans Administration, or VA, in its comparable program for veterans) reinforced racial residential segregation and substantially restricted Black homeownership through an underwriting manual warning against integration through "the infiltration of inharmonious racial . . . groups" or "incompatible racial elements" and through redlining policies denying mortgage insurance to communities with Black residents.[37]

The 1937 National Housing Act established the public housing program to supply affordable housing for low income families but, from the program's inception, assigned tenants on a segregated basis and largely located Black-occupied housing in locationally underserved areas.[38] When production goals were significantly expanded a few years later, Congress essentially ensured new public housing would continue to be constructed on a segregated and discriminatory basis by expressly rejecting anti-discrimination amendments to the Act.[39]

In the labor protection and employment area, Congress through the National Industrial Recovery Act (NIRA) of 1933, after expressly debating adoption of a separate and lesser minimum wage for Black subjects of the legislation, settled on the use of agricultural and domestic occupational exclusions which produced known disparate racial impacts in labor protection. The NIRA's use of these occupational categories, and some geographic provisions, had the effect of establishing lower minimum wages for most Black workers.[40]

Indeed, Congress had heard testimony in the debates on the legislation from a southern employer that "a negro makes a much better workman and a much better citizen, insofar as the South is concerned, when he is not paid the highest wage."[41] Juan Perea has pointed out that overtly racist testimony in support of a

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36. Dubin, *supra* note 6, at 751-52.

37. *Id.*; ROTHSTEIN, *supra* note 6, at 59-75; *see also* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 51-57 (1993) (describing redlining and other discriminatory and racially segregative practices at the time).

38. Dubin, *supra* note 6, at 752-53; *see* Joy Milligan, *Plessy Preserved: Agencies and the Effective Constitution*, 129 YALE L. J. 924, 931-32 (2020); ROTHSTEIN, *supra* note 6, at 23-24. In 1933, FDR established the Public Works Administration (PWA) which launched the first federal involvement in public housing; the PWA also enforced racial segregation in all housing built and sited through a "neighborhood composition rule." *Id.*

39. Milligan, *supra* note 38, at 966-72; Dubin, *supra* note 6, at 752-53; Elizabeth K. Julian & Michael M. Daniel, *Separate and Unequal- The Root and Branch of Public Housing Segregation*, 23 CLEARINGHOUSE REV. 666, 668-69 (1989) (citing 95 CONG. REC. 4791-98, 4849-61 (1949)). In their successful advocacy against the anti-discrimination amendments, congressional supporters argued that challenging racial discrimination in public housing would provoke rejection of the entire expanded public housing program and thereby deprive Black families of much-needed housing—even though new housing would be provided on a racially discriminatory and segregated basis. *Id.*

40. Perea, *supra* note 22, at 104-07.

41. *Id.* at 105. The NIRA was invalided in the courts and superseded by subsequent New Deal labor protection legislation. *Id.* at 104 n.50.

separate and lower Black wage scale, including reference to "the superior white race" and subnormal intelligence of "the colored race," "was accepted without challenge or rebuttal at th[e] [congressional] hearing."[42] While a proposed differential minimum wage for Black workers was not ultimately adopted, significant discrimination in wage minimums was accomplished through less crude and explicit means facilitated by the exclusions.[43]

Next, in the National Labor Relations Act (NLRA) of 1936, also known as the Wagner Act, the New Deal Congress protected the rights of low wage and other workers to unionize but rejected measures to prevent unions from excluding Blacks from membership.[44] "The final legislation permitted labor organizations to exclude African Americans, denied the status of 'employee' to Black workers engaged in strike breaking, and permitted the establishment of separate, racially segregated unions."[45] The NLRA also excluded agricultural and domestic workers and rejected proposed anti-discrimination amendments to its provisions.[46]

The Fair Labor Standards Act of 1938, designed to establish minimum wages and maximum hour protections, also expressly excluded agricultural workers and, implicitly, domestic workers.[47] Several representatives also supplied overtly racist statements against utilizing the same wage protections for Black workers as extended to whites and underscored their potential disruption to the Southern economy.[48] Florida Representative J. Mark Wilcox's statement typified this position:

> There has always been a difference in the wage scale of white and colored labor . . . . You cannot put the Negro and the white man on the same basis and get away with it. Not only would such a situation result in grave social and racial conflicts but it would also result in throwing the Negro out of employment and in making him a public charge. There just is not any sense in intensifying this racial problem in the South, and this bill cannot help but produce such a result.[49]

B. Race and the Social Security Act of 1935

The racialized history behind these labor and housing enactments supplies

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42. *Id.* at 105–06 & n.61.

43. See *id.*

44. QUADAGNO, *supra* note 6, at 22-23.

45. *Id.* at 23.

46. Perea, *supra* note 22, at 118-26.

47. Daiquiri J. Steele, *Enduring Exclusion*, 120 MICH. L. REV. 1667, 1678 (2021) (domestic workers were excluded "inasmuch as the bill defined employee as 'engaged in commerce or in the production of goods for commerce'"); Perea, *supra* note 22, at 114 & n.105 (same).

48. *Id.* at 114-16.

49. *Id.* at 115 (quoting 82 CONG. REC. 1404 (1937)).

insight into the New Deal legislative climate animating development and enactment of the Social Security Act.[50] In debates over the Social Security Act's means-tested welfare benefits program legislation (Title I) with benefits for elderly persons (Old Age Assistance—OA), Southern congressmen blocked efforts to bar discrimination in the program or to federalize the program in a manner that would reduce the states' ability to discriminate and exercise discretion in adjusting benefit levels and selecting among recipients. They even defeated an amendment that would have required that Title I benefits be set at a level providing "a reasonable subsistence compatible with decency and health."[51] Senator Harry Byrd of Virginia expressed a common position of the Southern Congressional delegation that this amendment "might serve as an entering wedge for federal interference with the handling of the Negro question."[52] Edwin Witte, the Executive Director of the Council on Economic Security (CES), which drafted much of the Act, testified before committees in both Houses and attended their executive sessions; he related that Senator Byrd's position was "supported by nearly all of the southern members of both committees."[53]

Byrd's fellow Virginian, Congressman Howard Smith, an avowed white supremacist,[54] explained the economic motives behind denying or limiting life-support benefits under the Act, thereby keeping Black sharecroppers and domestic workers vulnerable and dependent on farm owners and other employers.[55]

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50. There is ample record of additional relatively contemporaneous (to the Social Security Act) racially inequitable New Deal remedial legislation and program administration such as in the Agricultural Adjustment Act of 1933. *See* Perea, *supra* note 22, at 107-09, and the Tennessee Valley Authority (TVA) and the Civilian Conservation Corps (CCC). *See* ROTHSTEIN, *supra* note 6, at 19-20.

51. Edwin E. Witte, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT 143-44 (1962).

52. *Id.*

53. *Id.*

54. While serving as Chairperson of the House Rules Committee when the Civil Rights Act of 1957 was before it, Congressman Smith noted that: "The Southern people have never accepted the colored race as a race of people who had equal intelligence and education and social attainments as the whole people of the South." CHARLES EUCHNER, NOBODY TURN ME AROUND: A PEOPLE'S HISTORY OF THE 1963 MARCH ON WASHINGTON 88 (2010). Others described Smith as "an apologist for slavery who cited the Greeks and Romans in its defense." *Civil Rights Act of 1964*, ENCYCLOPEDIA VA., https://perma.cc/3WMX-Z9LW (last updated Jan. 14, 2022). He introduced the "Southern Manifesto" in 1956 assailing the *Brown v. Board of Education* decision; "the document attacked *Brown* as an abuse of judicial power that trespassed on states' rights and urged Southern school districts to exhaust all 'lawful means' to resist the 'chaos and confusion' that it said would result from racial desegregation." Andrew Glass, *Smith, George Introduce 'Southern Manifesto,' March 12, 1956*, POLITICO, (March 12, 2010), https://perma.cc/L55W-E9PA; *see also* David Rosenbaum, *Offending Portrait Succumbs to Black Lawmakers' Protest*, N.Y. TIMES (Jan. 25, 1995), https://perma.cc/AN54-P2F3 (describing protest led by Georgia Congressman John Lewis to hanging of Howard Smith's portrait in the House Rules Committee hearing room, due to Smith's segregationist and white supremacist positions and statements).

55. This is not to suggest that all Southern legislators, including those from less agriculturally significant southern states, shared the same views—a point stressed by SSA Public Historian DeWitt. *See* DeWitt, *supra* note 21 (describing differing perspectives of some Southern representatives such as a liberal congressman from an area in western Maryland more

Congressman Smith stated at the hearings on the Title I old age provisions (in reasoning with comparable applicability to the old age social insurance provisions in Title II):

> It seems to me that it should allow the States to differentiate between persons in this way: As we all know, $30 a month to one individual would be perhaps a mere pittance. To another individual who has lived in comparatively moderate circumstances, as they do in the rural districts, all his life, for 65 years, $30 a month would be affluence. You take the average laborer on the farm, let us say, all through the country districts, and his earning capacity on an average over the past times has been from $20 to $30 a month. To put him on a pension at 65 of $30 a month is not only going to take care of him, but a great many of his dependents, relatives, and so on, who could much better be employed working on a farm."[56]

If there were any question about what "farm laborers" Smith was referencing, later in this same testimony he had the following exchange with Representative Jenkins from Ohio:

> Mr. JENKINS: I was interested in the statement the gentleman made that practically 25 percent of the people over 65 in his State would be within one class. Would the gentleman state what class he means by that?
>
> Mr. SMITH: Of course in the South we have a great many colored people and they are largely of the laboring class.[57]

Around the same time, Southern commentators amplified Smith's concerns about the Social Security legislation. An editorial in the Jackson daily newspaper on the pending Social Security legislation stated:

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similar to Pennsylvania than the deep agricultural south and even a senator from Mississippi who disclaimed possessing the same racial concerns over the Social Security legislation voiced by other southerners). The point is that these overtly racialized sentiments by some were a factor in the Act's shape and enactment. Indeed, no one in Congress from within the Southern delegation came forward during the Congressional debates to challenge, disassociate from, or disavow these statements and sentiments. *See also* BARADARAN, *supra* note 7, at 102 (noting that with respect to New Deal legislation and Southern legislators' racialized interests in domination of Black labor, "[m]ost often Southern senators did not even have to speak against the legislation. They used their seniority position[s] on senate committees to make sure bills were drafted in such a way so as to exclude Blacks; otherwise a bill would never reach the floor for a vote").

56. *Economic Security Act: Hearings on H.R. 4120 Before the H. Comm. on Ways & Means*, 74th Cong. 974 (1935); see also QUADAGNO, supra note 30, at 134 (quoting letter to CES member (WPA Director Harry Hopkins) from a person in Alabama, noting that if Blacks got old age assistance "the entire family would live off the money and [you] could not get them to work for us on our farms . . . . They would be too independent if they should get a federal old age pension").

57. Economic Security Act: Hearings on H.R. 4120 Before the H. Comm. On Ways & Means, *supra* note 56, at 976.

> The average Mississippian . . . can't imagine himself chipping in to pay pensions for able-bodied Negroes to sit around in idleness on front galleries, supporting all their kinfolks on pensions, while cotton and corn crops are crying for workers to get them out of the grass.[58]

Finally, apart from the statements of southern legislators and their constituent commentators about the racial demographics of farm laborers (and the desirability, in their view, that Black sharecroppers and their families remain dependent on white farm owners and prevailing meager wages and working conditions for their survival, even in old age), Congress was well aware of the disparate racial impact of the agricultural and domestic exclusions from testimony on the act. Legendary NAACP Director and Howard Law School Dean Charles Hamilton Houston—who devised the litigation strategy to dismantle the Jim Crow system of racial subordination and segregation commanded by law, leading to the *Brown v. Board of Education* decision[59]—argued that the legislation was inadequate without a provision to include domestic and agricultural workers since the majority of Black workers ("3 out of 5") were employed in those categories. In Houston's words, this bill "looks like a sieve with the holes just big enough for the majority of Negroes to fall through."[60] Other testimony before Congressional committees pointed out that "practically eighty-five percent of [African Americans] in the South are agricultural workers . . . [and] the large majority of domestic and personal workers in the United States are [African American] women."[61] George Edmund Haynes, one of the National Urban League's co-founders,[62] also

58. William E. Leuchtenberg, Franklin D. Roosevelt and the New Deal 1932-1940, at 131 (1963) (quoting Jackson (Miss.) Daily News (June 20, 1935)).

59. *See* Richard Kluger, Simple Justice: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 105–280 (1975).

60. *Economic Security Act: Hearings on S. 1130 Before the S. Comm. on Finance*, 74th Cong. 641-47 (1935) (Statement of Charles Hamilton Houston, Special Counsel, NAACP); *id.* at 644 ("When you realize that out of the 5,500,000 Negro workers in this country, approximately 2,000,000 are in agriculture and another 1,500,000 in domestic service—3,500,000 Negroes dropped through the act right away when it comes to the question of old-age annuity."); *see* Steele, *supra* note 47, at 1677 (noting that after Houston's testimony, "the NAACP's magazine, *The Crisis*, published an editorial titled 'Social Security—for White Folk' that described President Roosevelt and his advisors as 'preparing to dump overboard the majority of Negro workers in this security legislation program by exempting from pensions and job insurance *all farmers, domestics and casual labor'" (*quoting Editorial, *Social Security—for White Folk*, 42 CRISIS 80, 80 (1935))). Congress also excluded agricultural and domestic workers from the Unemployment Insurance program in the Social Security Act. *See generally* QUADAGNO, supra note 6, at 20.

61. *Unemployment, Old Age and Social Insurance: Hearings on H.R. 2827 Before the H. Comm. on Lab.*, 74th Cong. 147 (1935) (Statement of Manning Rudolph Johnson, League of Struggle for Negro Rights); *see also Economic Security Act: Hearings on S. 1130 Before the S. Comm. on Fin.*, 74th Cong. 479-91 (1935) (Statement of George Edmund Haynes, Executive Secretary for race relations, Federal Council of Churches; pointing out that three-fifths of all African Americans will be excluded from coverage due to the exclusions and also urging adoption of an anti-discrimination provision in the bill).

62. Haynes, George Edmund (1880-1960), SOC. WELFARE HIST. PROJECT, https://perma.cc/PCS9-7J5D (archived Mar. 16, 2022).

testified and urged inclusion of a nondiscrimination clause in the Act. He noted: "[T]here have been repeated, widespread, and continued discrimination on account of race or color as a result of which Negro men, women, and children did not share equitably and fairly in the distribution of the benefits accruing from the expenditure of such Federal funds."[63]

As Daiquiri Steele explained: "[U]ltimately, Congress passed the SSA without an antidiscrimination prohibition but with the agricultural and domestic worker exemption, leaving two-thirds of Black workers uncovered."[64] Moreover, the decision to allow local administration in the Social Security Act's Title I (and other Titles establishing the Social Security Act's public assistance programs), without non-discrimination protection, enabled discrimination against even the persons of color included in the legislation as Representative Smith had impliedly urged and George Haynes feared. Political science and sociology scholar Frances Fox Piven has described the resulting rampant racial discrimination in the locally administered Social Security Act's welfare programs:

> Southern congressmen had pressed hard and successfully for the elimination from the Social Security Act of any wording that might have been construed as constraining the states from racial discrimination in the administration of welfare. And they used the latitude they had won to run the welfare program in ways consistent with the racial order of their region . . . . This meant that southern welfare laws and practices were designed to shore up a rigid caste labor system. Blacks were less likely to get aid, and when they did, their benefits were lower than whites so that the welfare check would compare unfavorably with even the miserable earnings of field hands. The average relief payment per person in the southern region was about half the average elsewhere, and black families received less than white families. In rural areas they received much less. And while welfare benefits might be used to sustain some black families at bare subsistence levels when they were not needed in the fields, they were either cut off when seasonal employment became available, or their benefits were reduced.[65]

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63. *Economic Security Act: Hearings on H.R. 4120 Before the H. Comm. on Ways & Means*, 74th Cong. 602 (1935) (statement of George Edmund Haynes, Executive Secretary for race relations, Federal Council of Churches).

64. Steele, *supra* note 47, at 1677.

65. FRANCES FOX PIVEN, *Why Welfare is Racist*, in RACE AND THE POLITICS OF WELFARE REFORM 327 (Sanford F. Schram, Joe Soss & Richard C. Fording Eds., 2003) (citations omitted). *See also* QUADAGNO, *supra* note 30, at 132-37 (providing myriad examples of southern discrimination against African Americans in the administration of the 1935 Social Security Act's old age assistance and other welfare programs to preserve prevailing wages and "intrude as little as possible on the planter-tenant relationship," including cutting benefits to Black recipients in half "when Black labor was in heavy demand . . . while payments to white recipients were made on the usual basis"); Henry A. Freedman, *The Welfare Advocate's Challenge: Fighting Historic Racism in the New Welfare System*, 36 J. POVERTY L. & POL'Y 31, 31 & n.2 (2002) (describing lawsuit successfully challenging Georgia's policy of cutting off Aid to Families with Dependent Children (AFDC) benefits to able-bodied Black women "at cotton-picking time" in *Anderson v. Burson*, 300 F. Supp. 410 (N.D. Ga. 1968)). For examples of judicial evaluation of subsequent discriminatory southern-state administration of and among

Although Congress finally added coverage for domestic and agricultural workers to the Title II social insurance provisions in amendments to the Act in 1950 and 1954[66] (apparently recognizing that perceived administrative obstacles to tax collection and assessment were manageable),[67] Representative Smith still opposed adding these disproportionately Black workers to the Act through these amendments, as did several other Southern members of Congress.[68] Of the eight representatives who voted against the inclusionary amendments, six were Southern Democrats.[69] In the Senate, Mississippi Senator John Stennis also opposed the amendments, and was joined by Virginia Senator Harry Byrd and others.[70] These same Southern legislators also opposed landmark civil rights legislation of the 1960s, which provided tools to chip away some of the underlying racialized structural and systemic political and social conditions undermining Congressional respect for or solicitude to concerns for racial equity in otherwise remedial legislation such as in the 1935 Social Security Act and other New Deal enactments.[71]

Notwithstanding this history, the SSA presently displays a 2010 article on its website by its Public Historian, from the SSA's Office of Publications and Logistics Management, Larry DeWitt, concluding that "[t]he allegations of racial bias in the founding of the Social Security program, based on the coverage exclusions, do not hold up under detailed scrutiny."[72] This conclusion rested on a review of the literature and the history of the Act, focusing largely on the exclusion amendment's origination from Treasury Secretary Morgenthau (and not southern legislators), and concern over administrative and functional obstacles

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the Act's locally administered, means-tested (Title I (OA-old age), Title IV (ADC-aid to dependent children) and Title X (AB-aid to the blind)) programs (along with the Aid to the Permanently and Totally Disabled program adopted in the 1950 Social Security Act Amendments—APTD), *compare* Whitfield v. Oliver, 399 F. Supp. 348, 355-57 (M.D. Ala. 1975) (finding unconstitutional systemic racial discrimination in the provision and allocation of welfare benefits among these programs in Alabama), *aff'd,* 431 U.S. 910 (1977) *with* Jefferson v. Hackney, 406 U.S. 535 (1972) (rejecting claims of systemic race discrimination in the administration and allocation of welfare benefits in Texas's programs after a trial court finding that local welfare officials were fully unaware of the disparate racial impact of their actions).

66. In 1950, Congress "extended coverage to farm and domestic workers regularly employed by a single employer, but not to farmers themselves or farm labor or domestic servants who worked for multiple employers. These latter groups were brought under coverage in 1954." DeWitt, *supra* note 21, n.16.

67. *See* STOESZ, *supra* note 24, at 10 ("problems enrolling farm workers and domestics . . . is not a convincing explanation for their exclusion from a government pension [since] [a]fter all, these groups were folded into Social Security during the early 1950s when the South had not changed appreciably with regard to the nature of low-wage work" and "several European nations—Great Britain, France, Germany, Sweden, and Austria—had encountered similar problems in enrolling farm workers yet had contrived creative ways to enhance the economic security of their farm workers.").

68. LIEBERMAN, supra note 27, at 115-16.

69. *Id.* at 116.

70. *Id.* at 117.

71. See *id.* at 116-17.

72. DeWitt, *supra* note 21.

in covering employees in these categories and collecting the required taxes from employers and employees.[73]

While there were undoubtedly significant non-racial, administrative burdens, functional feasibility, and other factors supporting the 1935 exclusions,[74] SSA Historian DeWitt's conclusion offers a cramped view of the meaning of racial bias and the resulting implication that race played no meaningful role in the exclusions' enactment. It also supplies an exceedingly narrow and compartmentalized view of the underlying racial climate and history animating the Act's passage by isolating Title II's Old Age Insurance program's history from that of the Act's more overtly racialized Title I Old Age Assistance welfare program.[75]

It assumes that legislators' voiced concerns about undermining the southern farm economy by diminishing Black workers' dependence on sharecropping due to receipt of Title I old age welfare benefits would not carry over to these same workers' receipt of Title II old age insurance benefits. Indeed, one would anticipate greater such concern about the latter. Title I old age welfare benefits would be subject to local administration, discretion, and control. On the other hand, Title II old age insurance benefits would be federally uniform and nationally administered. The SSA Historian's conclusion also fails to acknowledge the relevance of the other New Deal programs in labor protection and housing, expressly reinforcing racial exclusion, disadvantage, and segregation emanating largely contemporaneously from these same lawmakers.

Moreover, that the exclusion amendment originated from Secretary Morgan-

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73. See *id.*

74. Gareth Davies and Martha Derthick have catalogued these reasons:

> To summarize the nonracial factors that contributed [to excluding agricultural and domestic workers from the Social Security Old Age Insurance program (Title II)]: legislators had been told that these groups had always been [initially] excluded from new social insurance programs [in other countries], and that the Treasury was not capable of administering the [initial legislation which had included agricultural and domestic workers]; the most active private advocate for social insurance had told them that the inclusion of these groups might endanger the long-term prospects of the entire social security program; Roosevelt was suspected of favoring the Morgenthau amendments [FDR Treasury Secretary's Amendments containing these exclusions, contrary to the intent and wishes of FDR's Labor Secretary Frances Perkins and Works Progress Administration head, Harry Hopkins, in the initial inclusive Bill]; and administration officials, at pains to appear deferential, emphasized that their bill could only benefit from careful congressional scrutiny. If race contributed to the enthusiasm of southern legislators for revision, then it was joined with these other factors.

Davies & Derthick, *supra* note 24, at 226.

75. DeWitt conceded that important administrative observers of the Act's passage identified racial bias behind the Title I Old Age program's enactment. *See* DeWitt, *supra* note 21, at 64. ("It is not as if observers of these events were oblivious to the issue of race as it influenced particular provisions of law . . . . [They] recounted how race was a factor in the development of Title I of the 1935 act . . . [and] pointed an accusing finger at Southern Democrats in Congress when it came to the Title I program." But they "did not report[] any such influence on the Title II program coverage issue.").

thau, who stressed administrative justifications for this provision, does not answer the question of whether race played a significant role in its ultimate adoption. In a report focusing on the domestic worker exclusion's history for the International Labour Organization, cultural anthropologist Harmony Goldberg explained Morganthau's involvement and the "racial politics" surrounding this provision:

> At Roosevelt's urging, the original Act that was presented to Congress did, in fact, include domestic workers and farm workers in UI and OAI [Title II Old Age Insurance], but the administration made it clear to its congressional allies that inclusion of these two populations should be considered expendable bargaining chips in the legislative process. The Act made it through the Senate with the inclusion of farm workers and domestic workers intact, but when it came before the House Ways and Means committee—which was predominantly composed of Southern New Deal Democrats—these workers came to be excluded. The lobbying of Secretary of the Treasury, Henry Morgenthau, was decisive in advancing these exclusions. Morgenthau—himself the owner of a farm in New York State—argued that it was administratively impracticable to include these workers in the Act, given their low wages relative to the administrative costs of collecting their payments to these contributory insurance programs. This pragmatic argument was adopted by the Southern leaders of the Ways and Means committee members in defending the exclusion on the House floor . . . . [W]hile these policymakers' advocacy for exclusion was not based on explicitly racist political arguments but on pragmatic ones—that pragmatism was based on an assessment and acceptance of the state of racial politics in Congress and of the low wages earned by workers in these racially degraded industries.[76]

Indeed, history and political science scholars Gareth Davies and Martha Derthick, who reached a similar conclusion as the SSA's Public Historian-DeWitt (and on whose analysis DeWitt relied), acknowledged that the support of Southerners, necessary for the exclusion amendment's approval and bill's passage, "no doubt reflected racial factors" but noted that the initial suggestion for the exclusion amendment to the initial inclusive draft was not based on race and originated from Treasury Secretary Morgenthau.[77] In short, race was a significant factor in the most dominant Congressional block's support of the exclusions, although not the only factor involved in the exclusions' adoption and history. The Act's history suggests multiple or mixed motives or considerations in its passage. However, the presence of mixed or multiple motives behind the Act's racially disparate exclusions does not negate the presence of "racial bias."

C. The 1935 Social Security Act Through the Lens of Equal Protection

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76. Harmony Goldberg, *The Long Journey Home: The Contested Exclusion and Inclusion of Domestic Workers from Federal Wage and Hour Protections in the United States*, INT'L LAB. ORG. 11-12 (2015) (citations omitted), https://perma.cc/YWX4-A27S.

77. *See* Davies & Derthick, *supra* note 24, at 224 (emphasis added).

Principles

Even formal, usually stringent in application, and regularly diminishing equal protection doctrine supports a more expansive approach to the assessment of racial bias or even actionable, unconstitutional race discrimination, than is suggested in the SSA Historian's analysis.[78] For example, while unconstitutional race discrimination requires proof of discriminatory intent,[79] the presence of multiple reasons or mixed motives for governmental action does not undermine the determination that race played an improper and ultimately unconstitutional role. Rather, in *Village of Arlington Heights v. Metropolitan Housing Development Corp*.[80] the Supreme Court held that intentional discrimination can be established even where race is only one of several factors motivating a defendant's conduct. Recognizing that governmental entities rarely render decisions motivated by a single concern, or even a "'dominant' or 'primary' one," the Court found that "racial discrimination is not just another competing consideration."[81] Evidence that race played any part in motivating the challenged governmental conduct terminates the justification for judicial deference[82] and shifts the burden of proof to the government to establish that "the same decision would have resulted even had the impermissible purpose not been considered."[83]

Decisions by courts applying this standard have also demonstrated that proof of racial animosity, "ill will," or "evil motive" on behalf of public officials is also not necessary to support a finding of discriminatory intent.[84] Nor is it necessary to produce a "smoking gun" since the Court in *Arlington Heights* held that discriminatory intent may be predicated entirely on circumstantial evidence.[85] The Court articulated six categories of circumstantial evidence probative of discriminatory intent: first, the discriminatory impact of the defendant's decision; second, the historical background of the decision;[86] third, the sequence of events

78. The Fifth Amendment's Due Process clause incorporates equal protection doctrine to the federal government and federal legislation. *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

79. *See generally* Washington v. Davis, 426 U.S. 229 (1976).

80. 429 U.S. 252 (1977).

81. *Id.* at 265.

82. *Id.* at 265-66.

83. *Id.* at 270 n.21.

84. S*ee, e.g.,* Williams v. City of Dothan, 745 F.2d 1406, 1414 (11th Cir. 1984); Dowdell v. City of Apopka, 698 F.2d 1181, 1185 (11th Cir. 1983); Baker v. City of Kissimmee, 645 F. Supp. 571, 586 (M.D. Fla. 1986); Ammons v. Dade City, 594 F. Supp. 1274, 1300 (M.D. Fla. 1984), *aff'd per curiam,* 783 F.2d 982 (11th Cir. 1986) (en banc); Johnson v. City of Arcadia, 450 F. Supp. 1363, 1378-79 (M.D. Fla. 1978).

85. Arlington Heights*,* 429 U.S. at 264-68; *see* Lodge v. Buxton, 639 F.2d 1358, 1363 n.8 (5th Cir. 1981) (observing that one cannot expect to find a "smoking gun" in discrimination cases), *aff'd,* 458 U.S. 613 (1982).

86. For example, circumstantial evidence of discrimination in a governmental-defendant's other distinct practices or as applied to other programs and agencies is relevant, probative evidence of discriminatory intent. *See, e.g.,* Rogers v. Lodge, 458 U.S. 613, 624-26 (1982)

leading up to the decision; fourth, departures from normal procedural processes; fifth, departures from normal substantive criteria; and sixth, the legislative and administrative history of discrimination, including "contemporary statements by members of the decision-making body."[87]

Applying these principles to the circumstances of the 1935 exclusions and their history should have unquestionably shifted the burden to the government to establish that the exclusions would have been adopted in the absence of the racial

(holding that evidence of a history of discrimination in employment, education and grand jury selection is probative of intentional voting discrimination); Ammons v. Dade City, 783 F.2d 982, 988 (11th Cir. 1984) (*per curiam*) (affirming trial court's reliance on evidence of discrimination "covering practically every aspect of municipal conduct in Dade City throughout its history" to support a finding of intentional discrimination in municipal services); Whitfield v. Oliver, 399 F. Supp. 348, 355-57 (M.D. Ala. 1975) (finding historical discrimination in public employment, voting, jury selection, and education supporting intentional discrimination finding in the provision of welfare benefits under Titles I, IV, X and XIV of the Social Security Act, as amended, in Alabama), *aff'd,* 431 U.S. 910 (1977).

87. *Arlington Heights*, 429 U.S. at 266-68. Admittedly, equal protection race discrimination doctrine was far more restrictive in the 1930s than in the 1970s and thereafter as *Plessy v. Ferguson*'s "separate but equal" doctrine was still the law. *See* KLUGER, *supra* note 59. It is also conceded that the present Supreme Court has and likely will render equal protection and anti-discrimination doctrine less protective of the rights and interests of African Americans and other historically subordinated persons of color for the foreseeable future. *See generally* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151 (2016) (asserting that the Court has become less vigorous in protecting the rights of racial minorities under the Equal Protection Clause); *see*, *e.g.*, *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.,* 143 S. Ct. 2141, 2277 (2023) (Jackson, J., joined by Sotomayor and Kagan, JJ., dissenting) (noting that the Court's current majority, in "deeming race irrelevant in law does not make it so in life"); *see also* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915-16 (2020) (applying *Arlington Heights* factors and paradigm and rejecting discriminatory intent claims based on rescission of the Deferred Action for Childhood Arrivals (DACA) program, notwithstanding numerous derogatory statements about Mexican immigrants by President Trump before and after taking office and an abrupt change in policy contrary to the usual sequence of events in rescissions); *cf.* Trump v. Hawaii, 138 S. Ct. 2392, 2415-23 (2018) (rejecting challenge asserting religious discrimination against Muslims through third version of Executive Order, re-labelled a presidential proclamation, restricting travel from seven predominantly Muslim countries as rationally related to legitimate national security and immigration purposes); *id.* at 2440 (Sotomayor, J., joined by Ginsburg, J., dissenting) ("Ultimately, what began as a policy explicitly 'calling for a total and complete shutdown of Muslims entering the United States' has since morphed into a 'Proclamation' putatively based on national-security concerns. But this new window dressing cannot conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers."); *see generally* William D. Araiza, *Cleaning Animus: The Path Through* Arlington Heights*,* 74 ALA. L. REV. 541, 553 (2023) (analyzing equal protection discriminatory intent or animus doctrine through 2023, finding that "the *Arlington Heights* factors have become generally accepted as the ostensible guide to determining discriminatory intent," and proposing that the *Arlington Heights* methodology also be used in *Trump v. Hawaii*-type fact patterns involving evaluation of whether re-enacted policies or laws, initially adopted with discriminatory statements or stronger background indicia of invidious intent, have been sufficiently "cleansed" of the taint of the discriminatory intent evidence from the earlier similar enactment). Equal protection doctrine, as developed in modern times and not yet overruled, is applied and discussed below in this section principally as a lens within which to evaluate the salience of racial considerations in the 1935 Act's exclusions.

considerations which at least played a part in the enactment as shown above. In this context, an appropriate rebuttal inquiry might be whether this legislation would have transformed from a bill initially lauding the need to include all categories of workers and specifically referencing the importance of including agricultural and domestic workers[88] to one containing these two large categorical exclusions, if the known putatively-excluded and foreseeably-harmed workers had been disproportionately white? It is not demonstrably apparent, and at least highly questionable, whether the government could have met this rebuttal burden to overcome the taint of the Act's racial considerations and context, and no court has yet applied these equal protection principles and holistic contextual analysis from Arlington Heights and its progeny to this issue.[89]

The few courts that have passed on the constitutionality of these exclusions have ultimately rejected the challenges, but in doing so failed to apply these equal protection principles and resultant burden shifting formulation.[90] Instead, these courts have either determined that the unquestioned disparate racial impact of the agricultural and domestic exclusions in this and/or in other New Deal legislation was not enough standing alone to establish discriminatory intent under the Supreme Court's decision in Jefferson v. Hackney;[91] or, alternatively, that discriminatory intent was not properly alleged in the lower court.

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88. In discussing the initial Social Security legislative proposal, Edwin Witte, the Executive Director of FDR's Committee on Economic Security (CES) that drafted the bill, explained:

> It is a fact that, as the bill stands, it attempts to cover the entire employed population. It is a fact that we cannot overlook that no matter whether a person works in a small establishment or a large establishment, whether he works on a farm or whether he works as a domestic servant, or whether he works in a factory, there is one common characteristic, which is that everybody grows old . . . . [W]e are presenting a program which would cover the entire employed population.

Economic Security Act: Hearings on H.R. 4120 Before the H. Comm. on Ways & Means, 74th Cong. 108 (1935) (Statement of Dr. Edwin. E. Witte, Executive Director, Committee on Economic Security).

89. *See* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 557-58, 584 (2018) (In *Arlington Heights*, "the Supreme Court adopted a burden-shifting framework to address concerns about the mixed motives of legislators[,] . . . rejected an inquiry that would have required a showing of sole purpose or primary purpose, . . . and call[ed] for a holistic review of evidence of discriminatory intent, considering history, context, effects on minority groups, and statements by decisionmakers."); *see also* W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1244 (2022) (noting that "[i]n the normal case where a plaintiff shows the action was motivated in part by proscribed intent," or "where taint supports a prima facie case, the government . . . need only show that legitimate reasons support the policy, that it has accounted for the problematic history, and that any persisting disparate impact is unavoidable and outweighed by the benefits of the legitimate justifications").

90. *See, e.g.*, Fisher v. Sec'y of Health, Educ. & Welfare, 522 F.2d 493, 499-503 (7th Cir. 1975); Doe v. Hodgson, 344 F. Supp. 964 (N.D. Cal. 1970), *aff'd*, 478 F.2d 537 (2d Cir. 1973), *cert. denied*, 414 U.S. 1096 (1973); Romero v. Hodgson, 319 F. Supp. 1201 (N.D. Cal. 1970), *summarily aff'd*, 403 U.S. 901 (1971). Admittedly, these cases were decided a few years before *Arlington Heights*.

91. 406 U.S. 535 (1972).

The Supreme Court in *Jefferson* held that the mere disparate impact of lower benefit levels in the disproportionately Black and Chicano Texas Aid to Families with Dependent Children (AFDC) welfare program, compared with the higher benefit levels in the state's demographically whiter Old Age (OA), Aid to the Permanently and Totally Disabled (APTD) and Aid to the Blind (AB) welfare programs, did not amount to unconstitutional racial discrimination since there was no evidence that the state was even aware of these disparities and no other evidence of intentional discrimination.[92] In contrast, Congress was well aware of the agricultural and domestic exclusions' racial impact, as described above, the desire of some southern legislators to tether Black farm laborers to agricultural work under then-prevailing wages and conditions by removing access to Social Security Act life-sustaining benefits through various means, and the opposition of prominent spokespersons for the Black community to the exclusions based on the obvious harms to disproportionately Black workers in those occupational categories. Indeed, in finding a violation of the Equal Protection Clause through intentional discrimination in the provision of welfare benefits under Titles I, IV and X of the Social Security Act of 1935, as amended, and as implemented in Alabama, a three-judge district court distinguished *Jefferson* and explained: "throughout the history of the programs in Alabama, state officials have been aware of their racial composition . . . . This kind of information, available to legislators and administrators for use in decision making, was not shown to be available to the Texas officials in *Jefferson*."[93]

Finally, as described above, SSA Historian DeWitt's analysis, concluding that race played no meaningful role in the exclusions, relied on a similar non-racially-influenced conclusion reached by Gareth Davies and Martha Derthick.[94] However, Davies and Derthick also provide a disclaimer, acknowledging that if the groups most disadvantaged by the exclusions were not socially and politically

92. *Id.* at 547-48 ('The depositions of Welfare officials conclusively establish that the defendants did not know the racial make-up of the various welfare assistance categories prior to or at the time when the orders here under attack were issued . . . . Appellants are thus left with their naked statistical argument: that there is a larger percentage of Negroes and Mexican-Americans in AFDC than in the other programs."); *see* Fisher, 522 F.2d at 501 (in *Jefferson,* "welfare officials did not know the racial make-up of the categories of recipients and the reduction was not the result of racial or ethnic prejudice"); *id.* at 500 (In *Romero*, "no allegation of racial, sexual or economic discrimination was made in the lower court"); *see also Doe*, 344 F. Supp. at 968 (relying on *Romero* and *Jefferson*).

93. Whitfield v. Oliver, 399 F. Supp. 348, 353 (M.D. Ala. 1975), *aff'd,* 431 U.S. 910 (1977). A body of additional lower court decisions reveals how comparable circumstantial evidence demonstrates equal protection violations in various governmental entities' provision of services or benefits under *Arlington Heights* and its progeny. *See, e.g.,* Williams v. City of Dothan, 745 F.2d 1406, 1414 (11th Cir. 1984); Dowdell v. City of Apopka, 698 F.2d 1181, 1185 (11th Cir. 1983); Baker v. City of Kissimmee, 645 F. Supp. 571, 586 (M.D. Fla. 1986); Ammons v. Dade City, 594 F. Supp. 1274, 1300 (M.D. Fla. 1984), *aff'd per curiam,* 783 F.2d 982 (11th Cir. 1986) (en banc); Johnson v. City of Arcadia, 450 F. Supp. 1363, 1378-79 (M.D. Fla. 1978).

94. DeWitt, *supra* note 21, at 51 (citing Davies & Derthick, *supra* note 24, at 217-35); *id.* at 64 (acknowledging substantial support and feedback from Derthick in drafting the article on the SSA website); *see also supra* note 77 and accompanying text.

subordinated to the degree of Black southerners at the time in the 1930s, and essentially powerless in this process, the fairness issues "might have surfaced [more] explicitly, producing at least a clearer revelation of [the] motives [of Congress] *if not substantively different policy choices [and] [m]ore pressure would have existed to include agricultural workers and domestics, no matter what the administrative difficulties*."[95] That Congress could effectively disregard or ignore the interests of Black workers without electoral consequence, due to systemic racial and political subordination and structural discrimination, is not a non-racial justification for the resulting foreseen and foreseeable racially disparate and disadvantaging Congressional action. Political science scholar Robert Lieberman explained:

> Southern society combined labor-repressive agriculture with racial disenfranchisement and segregation to subdue African Americans both economically and politically. The hegemony of the Democratic Party in the South—built on these twin pillars of planter dominance and racial disenfranchisement—and the institutional structure of Congress combined to give white southerners both a strong interest in directing new social benefits away from African Americans and power beyond their numbers in the federal government, power they used to protect their racial and economic dominance of southern society.[96]

More fundamentally, the SSA's former Acting Commissioner, Kilolo Kijakazi (writing with Karen Smith and Charmaine Runes), has acknowledged: "[i]rrespective of whether the decision to exclude domestic workers and farmworkers from coverage was racially based, this decision created a structural barrier that resulted in a disproportionate share of Black workers being excluded from coverage, compared with white workers."[97] Thus, the overall Social Security Act and its resulting social insurance benefits program disproportionately disadvantaged African Americans and other persons of color[98] from its inception. Although Congress eventually reversed these exclusions, their impacts on Black income insecurity, material deprivation, and intergenerational wealth generation are significant. Social welfare policy scholar David Stoesz explained:

> While the exclusion of these low-wage workers can be quantified, the monetization of their loss of benefits does not address what this income might have purchased for them individually or contributed to these regions economically. While workers in other parts of America were enjoying the benefits of running water, flush toilets, electric refrigerators, automobile travel, plummeting disease rates, and increasing longevity, those in the South and Southwest continued to rely on

95. Davies & Derthick, *supra* note 24, at 235.

96. Robert C. Lieberman, *Race and the Organization of Welfare Policy*, *in* CLASSIFYING RACE 156, 161 (Paul E. Peterson ed., 1995).

97. KIJAKAZI ET AL., *supra* note 8, at 2.

98. *See* STOESZ, *supra* note 24, at 5 (referencing similar impacts from these exclusions on Latino/a agricultural and domestic workers in the southwest).

> hauling water from the pump, using the privy, an unhealthy diet due to absence of refrigeration, travel by foot or wagon, high rates of disease, and significantly shorter longevity . . . . For a withholding tax of as little as $5.00 a year, individual workers could have been provided an annual pension of $240, which would have afforded them a modicum of comfort, security, and dignity. In aggregate, the amount would have been comparable to a domestic Marshall Plan, jump-starting the economy of a poverty belt that spanned the South and Southwest. The order of magnitude represented by these benefits—$618.24 billion in 2016 dollars between the inception of Social Security in 1935 and the amendments of the early 1950s—approximates for the South and Southwest what Congress appropriated as a stimulus to the entire nation to address the Great Recession, the 2009 American Recovery Act projected to expend $787 billion over a decade.[99]

The long-term consequences and present-day effects from the loss of such a large portion of income and the opportunity costs, human suffering, trauma, stress, and perils[100] from the further deprivation of basic income security to a disproportionately Black worker population and the Black community (and to similarly situated persons and communities of color) is manifest. On a more structural and existential level, "the exclusion of agricultural and domestic workers from Social Security is but another event in an American tableau of second-class citizenship for minorities of color."[101]

IV. THE EXCLUSION OF THE SUPPLEMENTAL SECURITY INCOME (SSI) BENEFITS PROGRAM FROM THE PRINCIPAL U.S. TERRITORIES AND THE RACIAL

99. STOESZ, *supra* note 24, at 14.

100. Medical and neurobiological researchers have also documented intergenerational "epigenetic" impacts from the legacy of brutality, human need deprivation, excessive stress and other injury attributable to pervasive systemic racial discrimination. Psychiatrist Robert Post explained:

> New data indicate that environmentally based stressful life events can induce the placement of chemical groups on one's genetic material that have lifelong effects and that can even be transferred across generations. The changes are called epigenetic because they do not affect the DNA sequences that encode genes conveying genetic inheritance of traits, but only affect how easily genes are turned on or off during development and throughout one's life . . . Four centuries of discrimination against black individuals have not only deprived them of economic and social well-being but also fostered an interlocking set of medical factors that affect their risk of illness and their life expectancy.

Robert M. Post, Perspective, *The Epigenetic Connection to Black Disparity*, J. CLIN. PSYCHIATRY, May/June 2021, at e1-e2; *see also* Bridget Goosby & Chelsea Heidbrink, *Transgenerational Consequences of Racial Discrimination for African American Health*, 7 SOC. COMPASS 630-43 (2013) ("The health consequences of racism and discrimination can be persistent and passed from one generation to the next through the body's 'biological memory' of harmful experiences.").

101. STOESZ, *supra* note 24, at 14.

A. The SSI Program and Adverse Racial Impact of Exclusion

The tortured and peculiar 125-plus-year history of the United States' acquisition and colonial domination of the U.S. territories also reveals racial inequity in access to a vital Social Security program. Although Congress has included the territories in the contributory Social Security insurance programs (OASDI),[102] at present, the Social Security Act excludes four of the five major territories, Puerto Rico, Virgin Islands, Guam, and American Samoa, from the critically important SSI program—the entirely federal, means-tested[103] public assistance benefits program for adults and children with disabilities and for the elderly.[104] The SSI program has been described by social welfare policy experts as "a core component of the nation's Social Security system" providing "nothing short of a lifeline for nearly 8 million of the nation's poorest seniors and disabled people, including more than one million disabled children."[105] Through SSI's enactment, Congress sought to assure "that the Nation's aged, blind, and disabled people would no longer have to subsist on below-poverty-level incomes."[106]

The 1972 Social Security Amendments that created the SSI program excluded the territories by confining eligibility to "resident[s] of the United States," which the statute further defined as those residing in "the 50 States and District of Columbia"[107] In later legislation, Congress only added residents of the territory of the Commonwealth of the Northern Mariana Islands (CNMI) to the program, leaving the remaining territories excluded.[108] The absence of SSI in the remaining major territories has a significant deleterious impact due to their extreme levels of poverty,[109] material deprivation, and vulnerability to natural and

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102. *See* 42 U.S.C. § 410(h).

103. The maximum SSI monthly benefit for an individual in 2024 is $943 and a beneficiary with no other income would receive the full amount but the receipt of other countable income would usually reduce the base amount dollar-for-dollar. *See SSI federal payment amounts for 2024*, SOC. SEC., https://perma.cc/FU3X-DWQH (archived Jan. 7, 2024); BLOCH & DUBIN, *supra* note 20, at 227. There is a resource limit of only $2000 in countable assets or savings and a claimant with excess resources is ineligible for benefits. *Id.* at 31.

104. *See supra* notes 16-20 and accompanying text (discussing consolidation of the Social Security Act's historic 1935 New Deal, locally administered, federal-state public assistance programs, and 1950 federal-state ATPD public assistance program into the entirely federal, uniform, and nationally administered SSI program in 1972).

105. Rebecca Vallas, *Testimony: After Decades, It's Past Time to Bring SSI into the Twenty-First Century*, THE CENTURY FOUND. (Sept. 21, 2021), https://perma.cc/4Z7U-E5U6.

106. *Id.* (citing S. Rept. No. 92-1230, Social Security Amendments of 1972, Committee on Finance, U.S. Senate (Sept. 25, 1972), p. 384, available at https://perma.cc/X78H-XQNP.

107. United States v. Vaello Madero, 142 S. Ct. 1539, 1542 (2022) (citing 42 U.S.C. §§ 1382c(a)(1)(B)(i), 1382c(e)).

108. *See id.* at 1542 (citing 48 U.S.C. § 1801 (note); 90 Stat. 268).

109. The poverty rates of these territories for "all individuals" or "all people," are: American Samoa—54.6%; Puerto Rico—43.5%; Guam—20.2%; and Virgin Islands—18.6%. *See 2020: DECIA American Samoa Demographic Profile*, U.S. CENSUS BUREAU, https://perma.cc/ZA8X-KDQZ (archived Jan. 7, 2024); *2020: DECIA Guam Demographic*

man-made disasters.[110] Moreover, the deficient alternatives for subsistence aid in the otherwise scattershot patchwork of safety net public assistance programs fail to fill the void for vulnerable, impoverished, disabled, and elderly territorial residents. For example, Puerto Rico has a joint federal-local welfare program (Assistance to the Aged, Blind and Disabled; AABD) but maximum benefits are only $164 per month[111] compared with $943 per month in SSI. "The Government Accountability Office estimated that in Puerto Rico alone, 2011 federal spending on AABD was less than 2 percent of what it would have been if Puerto Rico residents received full SSI benefits" and would extend to over 435,000 potentially eligible persons as compared to the only 37,000 persons who received AABD in an average month in 2015.[112] Accordingly, the loss of subsistence benefits from the absence of SSI in Puerto Rico is about $780 per month in cash income for the only 37,000 receiving AABD and living in extreme poverty, and more—perhaps as much as $943/month—for the other close-to-400,000 persons who do not currently qualify for AABD but would qualify for SSI.

Puerto Rico and American Samoa residents also lack SNAP/Food Stamps[113] and all four territories have only partial Medicaid with limited funding, causing denial of "coverage to specific groups, such as impoverished children and pregnant women, that would be mandatorily covered in the 50 states and the District of Columbia."[114] The impacts of SSI disability program exclusion are also greater because disability levels are significantly higher in regions with a confluence of high poverty, a lower-skilled, less educated work force, and inconsistent

Profile, U.S. CENSUS BUREAU, https://perma.cc/9P6U-NDP6 (archived Jan. 7, 2024); *2020 Island Areas Censuses Data on Demographic, Social, Economic and Housing Characteristics Now Available for the U.S. Virgin Islands*, U.S. CENSUS BUREAU (Oct. 20, 2022), https://perma.cc/SAM4-XDLA. In contrast, the national poverty rate in 2021 is 11.6% (not including Puerto Rico and the other territories) and the closest state to the territories in poverty rate is Mississippi at 19.6%. *See ACS 1-Year Estimates Data Profiles* [Puerto Rico, 2010-2022], U.S. CENSUS BUREAU, https://perma.cc/LL48-CQXX (archived Jan. 7, 2024); *Poverty in the United States*, U.S. CENSUS BUREAU (Sept. 13, 2022), https://perma.cc/VE4V-PJGM.

110. *See generally* Diane Haase, *Hurricane Recovery Forest and Conservation Nurseries*, U.S. DEP'T OF AGRIC. (Jan. 13, 2020), https://perma.cc/2FZ9-XDXS ("Hurricanes, typhoons and cyclones have caused devastating damage to nearly all of the American-Affiliated islands during the past few years. In 2017, Hurricanes Irma and Maria struck the U.S. Virgin Islands and Puerto Rico. Just a year later, Typhoons Yutu and Mangkhut hit Guam and the Northern Mariana Islands, and then in 2019, Cyclone Gita impacted American Samoa.").

111. *Policy Basics: Aid to the Aged Blind and Disabled*, CTR. ON BUDGET & POL'Y PRIORITIES, (Jan. 15, 2021), https://perma.cc/LA7H-3PTK (Puerto Rico's "AABD benefits comprise a 'basic benefit' of up to $64 a month and a 'secondary benefit' equaling 50 percent of actual shelter costs up to $100 per month").

112. Javier Balmaceda, *Build Back Better Permanently Extends Economic Security to Puerto Rico and Other Territories*, CTR. ON BUDGET & POL'Y PRIORITIES 3 (Dec. 14, 2021), https://perma.cc/RCW5-XQ47.

113. Puerto Rico and American Samoa have a program called NAP (Nutrition Assistance Program), funded at lower levels, offering maximum food assistance benefits that "are roughly 60% of the monthly maximum benefits under SNAP." Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1669-72 (2021).

114. *Staff, A Reckoning for "Rational" Discrimination: Rethinking Federal Welfare Benefits in the United States Occupied Islands*, 43 U. HAW. L. REV. 265, 274-75 (2020).

health insurance and health care quality[115]—a situation present in all four SSI-excluded territories. None of the four territories has a program supplying additional means-tested benefits to children with disabilities, an important component of SSI; this is significant since, for example, Puerto Rico has a child poverty rate of 57% and children are ineligible for AABD.[116]

The SSI territorial exclusions also have a significant racially disparate impact, as the overwhelming majority of residents in each excluded territory are persons of color. Puerto Rico is by far the most populous territory, with over 3.2 million residents, more than twenty states.[117] The 2020 census found that approximately 99% of its population identify ethnically as Latino/a or Hispanic and a substantial majority identify racially as either mixed-race, Black, or another nonwhite racial group, with only 17% designating one race-white.[118] According

115. *See* DUBIN, *supra* note 12, at 118, 129.

116. *See Policy Basics—Aid to the Aged Blind and Disabled*, supra note 111, at 2-3.

117. *See The Population of Puerto Rico Exceeds the Population of 20 States*, P.R. REP. (updated June 25, 2020), https://perma.cc/7N5J-5JEX. Puerto Rico's size reflects the greatest number of fully unrepresented Americans of any territory or non-state/district. The smallest population of any state is that of Wyoming, at approximately 600,000 residents. Id. The smallest Congressional district in 2020 is Montana's 1st District, at 542,704 residents, and Congressional districts average 761,169 residents . See CONG. RSCH. SERV., APPORTIONMENT AND REDISTRICTING PROCESS FOR THE U.S. HOUSE OF REPRESENTATIVES 2, 9 (2021), https://perma.cc/TL9B-EHTP. The remaining territories of Guam (153,836); Virgin Islands (82,146); American Samoa (49,710), and CNMI (47,329) total approximately 339,000 residents. See Stephen Wilson, William Koerber & Evan Brassell, *2020 Population of U.S. Island Areas Just Under 339,000*, U.S. CENSUS BUREAU (Oct. 28, 2021), https://perma.cc/VZZ3-2HQ6. The population of the unrepresented residents of the District of Columbia is 712,836. *See id.*

118. *Decennial Census: Race*, U.S. CENSUS BUREAU (2020), https://perma.cc/UE9C-GTLU; The 2020 census reflects a significant change in the self-identification of race by residents of Puerto Rico and a substantial decrease in those identifying as "white alone" from the 2010 and 2000 censuses. *See generally* Syra Ortiz-Blanes, *In 2000 Most Puerto Ricans Identified as White*, MIA. HERALD (Oct. 19, 2021), https://perma.cc/MD98-FPE3 (attributing changed Puerto Rican residents' self-identification away from "white" designation to greater use of mixed-race or multiple race and "other" categories on the revised census, "historical events that rocked Puerto Rico and local efforts to educate people about race and racism"). The 2020 census reflects greater consistency with mainland constructions of race, where whiteness is historically exclusive of other races. *See id.*; *see generally* NELL IRVIN PAINTER, THE HISTORY OF WHITE PEOPLE (2010) (analyzing and documenting the history of white identity in the West and United States); F. JAMES DAVIS, WHO IS BLACK?: ONE NATION'S DEFINITION (1991) (analyzing the social construction of race and Black identity in the United States, including the historical "one-drop" rule in which Black identity follows one drop of Black blood or any known African ancestry). It is also consistent with some American historical constructions of race in Puerto Rico and racism which follows that construction. For example, the former Speaker of the House, Representative Joseph G. Cannon of Illinois, in opposing the 1917 legislation granting citizenship to Puerto Ricans noted as relevant to his position that the island "is populated by a mixed race. About 30 percent are pure African . . . [and fully] 75 to 80 percent of the population . . . was pure African or had an African strain in their blood." José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 481 (1978) (quoting Remarks of Rep. Joseph G. Cannon, 53 CONG. REC. 1036 (1916)). However, there are potential equality-hindering consequences from the new census categories and 2020 census results in Puerto Rico. *See generally* TANYA KATERÍ HERNÁNDEZ, RACIAL INNOCENCE: UNMASKING LATINO ANTI-BLACK BIAS AND THE STRUGGLE FOR EQUALITY 129

to 2020 census figures for those other three territories, 71.4% of Virgin Island residents are Black/African American and only 13.3 % are one race-white;[119] in Guam,[120] 81.5% are AANHPI—Asian American (35.4%), Pacific Islander/Native Hawaiian (46.0%), with only 6.8% one race-white; in American Samoa, 94.5% are AANHPI—Asian American (5.8%), Pacific Islander/Native Hawaiian (88.7%), with less than 1% one race-white.[121]

B. The Overtly Racist Constitutional Foundation for Inferior Territorial Residents' Rights and Benefits—The Infamous "*Insular Cases*"[122]

The territories' history after U.S. acquisition reveals the centrality of their racial character (and the role of American racism) in the creation and reinforcement of conditions of subordination under which separate and unequal systems of territorial rights and benefits emerged. All of these U.S. territories were acquired on or after 1898, with Puerto Rico, Guam, and the Philippines ceded by Spain following the Spanish-American War through the 1898 Treaty of Paris.[123] They have had somewhat amorphous status, and correspondingly limited access for their residents to the rights and benefits of stateside Americans, since acquisition. In describing the influence of American racism on law and policy in the territories at the turn of the century, historian Rubin Weston observed:

(2022) (analyzing the manner in which the new census categories and dramatic drop in 2020 in the "white alone" census population in Puerto Rico, and in categorizing Latinos elsewhere, has hindered efforts to address pervasive anti-Black discrimination against Afro-Latinos by obscuring colorism and other distinctions between the treatment of predominantly European-phenotype and predominantly African-phenotype Latinos).

119. *2020: DECIA U.S. Virgin Islands Demographic Profile*, U.S. CENSUS BUREAU (2020), https://perma.cc/8AN3-KYJR.

120. *2020: DECIA Guam Demographic Profile*, supra note 109.

121. *2020: DECIA American Samoa Demographic Profile*, supra note 109.

122. The term "insular" as applicable to "Insular Area" (and as the descriptor for the "Insular Cases") is "the U.S. government's organizational term for jurisdictions that are not part of the fifty U.S. states or the District of Columbia. Insular areas include all of the U.S. territories and the freely associated states." Staff, *supra* note 114, at 267 n.10 (citing Off. of Insular Affs., *Definitions of Insular Area Political Organizations*, U.S. DEP'T OF THE INTERIOR, https://perma.cc/6KAK-57MA (archived Jan. 7, 2024)).

123. Staff, *supra* note 114, at 267. The United States acquired American Samoa in the Tripartite Convention of 1899 with Germany and Great Britain, and the Virgin Islands were purchased from Denmark in 1916. *See id.*; *see also* Hammond, *infra* note 143, at 1656-58. The Jones Act of 1916 promised eventual independence to the Philippines and that pledge was finally vindicated after World War II in 1946. *See* The Jones Act of 1916, ch. 416, 39 Stat. 545 (1916) (preamble); 22 U.S.C. § 1394 (recognition of Philippine independence). The Spanish-American War commenced with American fighting in Cuba and Spain also relinquished sovereignty over Cuba in the 1898 Treaty of Paris. *See* ADA FERRAR, CUBA: AN AMERICAN HISTORY 165 (2021). Because fighting in Cuba against Spain had commenced as a revolutionary war by Cubans seeking independence from Spain, the Spanish-American War has been alternatively referenced as "the American intervention in the Cuban War for Independence." *Id.* at 157-66. It led to extended American intervention and involvement in Cuba's governance albeit without formal territorial acquisition as with the other former Spanish colonies relinquished by Spain in 1898. *See id.* at 167-81.

> Those who advocated overseas expansion faced this dilemma: What kind of relationship would the new peoples have to the body politic? Was it to be the relationship of the Reconstruction period, an attempt at political equality for dissimilar races, or was it to be the Southern 'counterrevolutionary' point of view which denied the basic American constitutional rights to people of color? The actions of the federal government during the imperial period and the relation of the Negro to a status of second-class citizenship indicated that the Southern point of view would prevail. The racism which caused the relegation of the Negro to a status of inferiority was to be applied to the overseas possessions of the United States.[124]

The infamous *Insular Cases*[125]—a series of Supreme Court decisions from 1901-22—solidified the subordinate, perpetually uncertain, and unresolved status of the territories and diminished treatment of their residents, and they employed overtly racist and white supremacist reasoning in doing so. These cases have been referenced as "the most racist Supreme Court cases you've probably never heard of"[126], and about which it has been noted, "[t]oday, any judge or lawyer who used the same racist rhetoric . . . would face professional discipline."[127] Scholars and jurists often point out that these decisions and their novel racialized doctrines were initiated by the same Supreme Court that decided Plessy v. Ferguson and created the "separate but equal" doctrine that launched Jim Crow and American apartheid.[128] In those cases and in the Supreme Court's own words, the then-newly acquired territories were not governed by "Anglo-

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124. RUBIN FRANCIS WESTON, RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893-1946, at 15 *(*1972).

125. University of Puerto Rico Law School Dean Emeritus Efren Rivera Ramos has sorted the *Insular Cases* into two groupings: the nine initial such cases in 1901 and subsequent ones decided up through 1922, culminating in Balzac v. Porto Rico, 258 U.S. 298 (1922). *See* EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 74-76 (2001).

126. Alejandro Agustin Ortiz & Adriel I. Cepeda Derieux, *The Most Racist Supreme Court Cases You've Probably Never Heard of*, ACLU NEWS & COMMENT. (Feb. 10, 2022), https://perma.cc/6L5S-6F8Z; *see also* Sanford Levinson, *Why the Canon Should be Expanded to Include* The Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT 241, 242-44 (2000) (confessing that even as a pre-eminent constitutional scholar, leading constitutional law casebook co-author/editor and professor of constitutional law at the University of Texas for over two decades, Levinson had not yet read the *Insular Cases,* nor had other similarly situated colleagues at other schools, and arguing now that they should be added to three major law school/legal community "canons").

127. Anthony M. Ciolli, *Territorial Constitutional Law*, 58 IDAHO L. REV. 206, 212 (2022).

128. *See, e.g.*, Juan Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 77 REV. JUR. U.P.R. 1, 15-24 (2008) (describing overlapping lineup of Justices and their backgrounds in *Plessy* and the 1901-04 *Insular Cases*); *see also* Hammond, *supra* note143, at 1659-60 ("It is not a coincidence that eight of the Supreme Court justices who decided *Downes v. Bidwell*, one of the more infamous *Insular Cases*, also decided *Plessy v. Ferguson*. Indeed, the Court's racist language in *Downes* rhymes with its Jim Crow decisions when it characterizes the people of Puerto Rico as an 'alien race'").

Saxon principles"[129] and were "peopled with an uncivilized race,"[130] who would be "absolutely unfit" for citizenship,[131] on islands inhabited by "alien races,"[132] "savages,"[133] "uncivilized tribes," and "savage tribes."[134] As such, the residents could not be trusted with the rights and privileges of Americans or even self-government.[135]

Statements by members of Congress expressed similar overtly racist sentiments about territorial natives, with particular animus directed against Filipinos. One Senator referenced them as "physically weaklings of low stature, with black skin, closely curling hair, flat noses, thick lips, and large, clumsy feet," or "savages, cannibals, Malays, Mohammedans, head hunters, and polygamists," and urged fellow legislators to "beware of those mongrels . . . with breath of pestilence and touch of leprosy . . . [and] with their idolatry, polygamous creeds, and harem habits."[136] Another Senator argued more broadly about the collective new territories that "the United States could not and would not 'incorporate the alien races, and . . . semi-civilized, barbarous, and savage peoples of these islands into

129. Downes v. Bidwell, 182 U.S. 244, 287 (1901) ("If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible.").

130. *Id.* at 306 (White, J., concurring).

131. *Id.*

132. *Id.* at 287 (holding that "the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution;" as such the Uniformity Clause in Article I, Section 8, Clause 1, did not apply to it and Congress could tax its goods at different rates from products in the states). Second Circuit Judge José A. Cabranes has noted that "[b]etween 1900 and 1932, Puerto Rico was officially misspelled as 'Porto Rico'—a result of the incorrect spelling of the island's name in the English version of the Treaty of Paris . . . . It took the Puerto Ricans 32 years to persuade Congress that the island should have its rightful name restored. Congress changed the island's name to 'Puerto Rico' by joint resolution on May 17, 1932." José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 391 n.1 (1978) (citing Act of May 17, 1932, ch. 190, 47 Stat. 158 (1932)).

133. *See* Dorr v. U.S., 195 U.S. 138, 148 (1904) (rejecting extension of the Sixth Amendment and Article III, Section 2 rights to trial by jury in a "territory peopled by savages" since impracticable and the right is not "fundamental"). In Balzac v. Porto Rico, 258 U.S. 298, 310 (1922), usually identified as the last *Insular Case*, the Court held that the Jones Act of 1917, granting citizenship to Puerto Ricans, had not incorporated Puerto Rico into the United States; therefore, the Sixth Amendment right to trial by jury still did not apply in unincorporated territories such as Puerto Rico based on the Court's earlier reasoning in *Dorr* and reaffirmance of assumptions that Puerto Ricans still lacked capacity or training to navigate or understand a jury system derived from an "institution of Anglo-Saxon origin").

134. De Lima v. Bidwell, 182 U.S. 1, 219 (1901) (McKenna, J., joined by Shiras and White, JJ., dissenting).

135. *Id.* ("There may be no ready test of the civilized and uncivilized, between those who are capable of self-government and those who are not, available to the judiciary or which could be applied or enforced by the judiciary. Upon what degree of civilization could civil and political rights under the Constitution be awarded by courts? The question suggests the difficulties, and how essentially the whole matter is legislative, not judicial.").

136. Cabranes, *supra* note 132, at 431-32 & nn.157-59 (quoting remarks of Sen. William B. Bate, 33 CONG. REC. 3613, 3616 (1900)).

our body politic as States of our Union.'"[137]

Accordingly, although owned, possessed, and governed by the United States, these territories would be "foreign in a domestic sense,"[138] and their residents "nationals, but not citizens,"[139] with only those constitutional rights deemed "fundamental"[140] and such other rights as provided by Congress. Indeed, although not yet deemed citizens by virtue of the Fourteenth Amendment's Citizenship Clause, it took an act of Congress to eventually extend birthright citizenship to persons born in Puerto Rico, Guam, and the Virgin Islands; American Samoans still have not been accorded birthright citizenship.[141]

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137. Cabranes, *supra* note 132, at 432 & n.160 (quoting remarks of Sen. Chauncey M. Depew, 33 CONG. REC. 3622 (1900)). Although some legislators distinguished Puerto Rico from the Philippines on racial grounds, identifying the former as closer to white, stateside Americans—referencing Puerto Ricans as "two-thirds . . . white, of Spanish origin," Cabranes, *supra* note 132, at 462—other legislators contested this account and supplied racist rationales for opposing according Puerto Rico similar treatment to other incorporated territories that became states. For example, the former Speaker of the House, Representative Joseph G. Cannon of Illinois, opposed the 1917 legislation granting citizenship to Puerto Ricans and noted that "[t]he people of Porto Rico have not the slightest conception of self-government," and the island "is populated by a mixed race. About 30 percent are pure African . . . [and fully] 75 to 80 percent of the population . . . was pure African or had an African strain in their blood." *Id.* at 481 (quoting remarks of Rep. Joseph G. Cannon, 53 CONG. REC. 1036 (1916)). Representative Cannon concluded: "God forbid, that . . . there should be statehood for Porto Rico as one of the United States." *Id.* (noting recorded applause of other members of Congress in attendance). The positions of both groups of legislators reveal the pervasive influence of overt racism and conceptions of white supremacy in the treatment of Puerto Rico and its residents.

138. Downes v. Bidwell, 182 U.S. 244, 341-42 (1901) (White, J., concurring) ("The result of what has been said is that whilst in an international sense Porto Rico was not a foreign country, since *it was . . . owned by the United States,* it was *foreign to the United States in a domestic sense*, because the island has not been incorporated into the United States, *but was merely appurtenant thereto as a possession*.") (emphasis added).

139. 8 U.S.C. § 1408.

140. *See, e.g.,* Dorr v. U.S., 195 U.S. 138 (1904).

141. *See* Fitisemanu v. United States, 1 F.4th 862, 865-68 (10th Cir. 2021) (rejecting applicability of the 14th Amendment Citizenship Clause to persons born in American Samoa in reliance on the *Insular Cases* and noting: "Congress has conferred American citizenship on the peoples of all other inhabited unincorporated territories—Puerto Rico, Guam, the U.S. Virgin Islands, and others—but not the people of American Samoa. American Samoans are instead designated by statute 'nationals, but not citizens, of the United States.' . . . [E]very extension of citizenship to inhabitants of an overseas territory has come by an act of Congress . . . . Without such an act, no inhabitant of an overseas territory has ever been deemed an American citizen by dint of birth in that territory"), *cert. denied*, 143 S. Ct. 362 (2022); *see also* Tuaua v. United States, 788 F.3d 300, 308 n.7 (D.C. Cir. 2015) (same). A spirted academic and political debate has emerged around the potential for repurposing the *Insular Cases* to respect indigenous culture, as has been asserted by American Samoan leadership and relied on by the courts in *Fitisemanu* and *Tuaua*. *Compare* Christina D. Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L. J. 2449, 2455 (2022) ("[T]he *Insular Cases* gave rise to nothing less than a crisis of political legitimacy in the unincorporated territories, and . . . no amount of repurposing, no matter how well-intentioned—or even successful—can change that fact."), *with* Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 374 (2005) ("The genius of the [*Insular Cases' doctrine*] is that it allows the insular areas to be full-fledged parts of the United States but, at the same time, recognizes that

Through these cases, the Supreme Court also "invented, out of whole cloth,"[142] the concept of "unincorporated" territories to define the new insular possessions. As distinguished from prior territories which were incorporated into the U.S. upon annexation and deemed to be on the road to statehood (such as Alaska) and therefore with full constitutional coverage and protection, these "alien race" island territories were "annexed but not incorporated."[143] While "what it means to be 'unincorporated' remains contested to this day," there is little dispute that the *Insular Cases* established that "the federal government has the power to keep and govern territories indefinitely, without ever admitting them into statehood (or deannexing them [for independence], for that matter)."[144] The Court's interpretation of the Constitution's Territory Clause[145] supported this result.[146] As Christina Ponsa-Kraus has explained:

> The distinction between incorporated and unincorporated territories thus served as the cornerstone of a racially motivated imperialist legal doctrine:

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their cultures are substantially different from those of the mainland United States and allows some latitude in constitutional interpretation for the purpose of accommodating those cultures."), *and* Rose Cuison-Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127 (2018) (developing a nuanced, non-categorical middle-ground position). Further exploration of this issue is beyond this Article's scope. However, whatever can be said in support of refashioning otherwise historically odious doctrines for the laudable purpose of respecting indigenous culture—the same is not true for the purpose of denying equal access to important government benefits, against the wishes of the same indigenous populations. *See House Passes BBB With Over $1 Billion in Local Hospital, Medicaid, SSI and Other Funds,* CONGRESSWOMAN AUMUA AMATA COLEMAN RADEWAGEN, (Nov. 19, 2021), https://perma.cc/F49T-GB4N (American Samoa's U.S. Congressional-delegate Aumua Amata, lauding it as a "historic first," proposed legislation extending SSI "to help make ends meet" for thousands of disabled and elderly Island residents and as an "important step[] to equality with the states in key areas that provide help to our people").

142. Ponsa-Kraus, *supra* note 141, at 2455; *see also* Igartúa de la Rosa v. United States, 417 F.3d 145, 163 (1st Cir. 2005) (Torruella, J., dissenting) (characterizing the *Insular Cases* as "anchored on theories of dubious legal or historical validity, contrived by academics interested in promoting an expansionist agenda").

143. Ponsa-Kraus*, supra* note 141, at 2452; *see also* Cabranes, *supra* note 132, at 411 ("For the first time in American history, 'in a treaty acquiring territory for the United States, there was no promise of citizenship . . . [nor any] promise, actual or implied, of statehood. The United States thereby acquired not 'territories' but possessions or 'dependencies' and became, in that sense, an 'imperial' power.'" (alteration in original)) (quoting LUELLA GETTYS, THE LAW OF CITIZENSHIP IN THE UNITED STATES 144-45 (1934)).

144. Ponsa-Kraus*, supra* note 141, at 2453.

145. The Territory Clause, Article IV, Section 3, Clause 2, provides: "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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

146. The *Insular Cases* reflected a "departure from the original meaning of the Territory Clause, according to which territorial status was understood as temporary." Ponsa-Kraus, *supra* note 141, at 2454 n.11; *see also* 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 (2022) (documenting the clause's original intent and the impact of the *Insular Cases'* Territory Clause interpretations on unequal treatment of territory residents).

> the idea of the unincorporated territory gave sanction to indefinite colonial rule over majority-nonwhite populations at the margins of the American empire . . . . The unincorporated territory was a judicial innovation designed for the purpose of squaring the Constitution's commitment to representative democracy with the Court's implicit conviction that nonwhite people from unfamiliar cultures were ill-suited to participate in a majority-white, Anglo-Saxon polity. With the creation of the unincorporated territory, the Court implicitly embraced the view that the theory of political legitimacy underlying the Constitution allowed for an exception, born of practical necessity and motivated by racism, permitting a representative democracy to govern people deemed inferior indefinitely without representation. The raison d'être of the *Insular Cases* was, therefore, to provide the constitutional foundation for perpetual American colonies.[147]

In sum, the Insular Cases rendered these territories and their overwhelmingly non-white residents "'doubly marginal': neither fully domestic nor fully foreign, and devoid of both voting representation in the federal government and independent status on the international stage,"—relatively invisible and trapped "in a second-class status with an uncertain future."[148]

C. The Court's Rejection of the Equal Protection Challenge to the SSI Territorial Exclusion in Puerto Rico—*United States v. Vaello Madero*

Under the circumstances governing the territories' legal and social status and history, created and reinforced through the Insular Cases, it should come as no surprise that the government extended only a second-class safety net to territorial residents, which (with the eventual exception of CNMI residents) excluded SSI—one of the most vital means-tested Social Security Act safety net programs.[149] The legislative history surrounding the territorial resident exclusion in the Social Security Act's SSI program amendment is sparse and somewhat opaque. Although the initial SSI legislation which the House passed in 1971 would have extended coverage to Puerto Rico, Guam, and the Virgin Islands with certain per capita income-ratio benefit-level restrictions, the Senate-passed version fully excluded the territories.[150]

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147. Ponsa-Kraus, *supra* note 141, at 2454-55; *see also* Ciolli, *supra* note 127, at 212 (explaining that the *Insular Cases* clearly did permit Congress to draw distinctions between "incorporated" and "unincorporated" territories based on a belief that the "savage," "half-civilized," "ignorant and lawless" "alien races" inhabiting the so-called "unincorporated" territories warranted different treatment than white Americans in the states and the so-called "incorporated" territories).

148. Christina Duffy Ponsa, *When Statehood Was Autonomy, in* RECONSIDERING THE *INSULAR CASES*: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 1, 2 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

149. *See* Hammond, *supra* note 113, at 1675-76 (supplying tables of safety net programs in territories); Staff, *supra* note 114, at 273 (same).

150. *See* WILLIAM R. MORTON, CONG. RSCH. SERV., CASH ASSISTANCE FOR THE AGED, BLIND, AND DISABLED IN PUERTO RICO 15 (2016), available at https://perma.cc/UA9A-T3CG.

The Chairperson of the Senate Finance Committee, Senator Russell Long of Louisiana, in describing the need to reject a proposed amendment to the Senate version to include the territories, referenced the absence of "appropriate answers to address equity and justice in those territories" as the reason to hold off on inclusion amendments until such answers could be provided.[151] Accordingly, those amendments were not taken to the conference on the final SSI legislation enacted in 1972.[152] Senator Long also offered as reasons for SSI exclusion in the territories that "[t]here is a difference in dollar level of earnings and there are tax considerations."[153] However, he supplied no further explanation of how those differences or considerations would undermine "equity and justice" if SSI were extended to territorial residents.

A House staffer on the initial SSI legislation who was a "social legislation specialist" for the Congressional Research Service, Carolyn Merck, testified years later to the House Committee on Interior and Insular Affairs, Subcommittee on Insular and International Affairs, that the primary consideration behind the SSI territorial exclusion was concern about disruption to the territorial economies; SSI receipt could create work disincentives through generous federal safety net benefit levels for low-income aged, blind and disabled territorial residents that could approach the levels of some full-time workers' incomes.[154] In response to a statement that the concerns over SSI inclusion in the territories such as Puerto Rico were about the "disruptive" impact of "money distribution" on the "social and cultural fabric," in the territories, she stated:

> Well, it is certainly true that when 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 earn as much as the SSI benefit. Raising the income from $32 or whatever, tenfold a month, where the amount may be a fair wage on the part of full-time workers, or in some cases, of the primary earner in the family, has been an issue, and continues to be a primary question.[155]

In 1975, when SSI benefits were extended to CNMI in the covenant establishing its commonwealth terms, Senator Long reiterated that SSI was excluded from the other territories because "in view of the different economic and other circumstances in the territories and possessions, the Congress felt it would be inadvisable to provide the Federal SSI income guarantee level in the territories

151. *Id.* (citing and quoting 118 CONG. REC. S33991 (daily ed. Oct. 5, 1972) (statement of Sen. Quentin N. Burdick and Sen. Russell B. Long)).

152. *See id.*

153. MORTON, *supra* note 150, at 16 (citing and quoting 118 CONG. REC. S33991 (daily ed. Oct. 5, 1972) (statement of Sen. Jacob K. Javits and Sen. Russell B. Long)).

154. *See Briefing on Puerto Rico Political Status by the General Accounting Office and the Congressional Research Service*: *Hearing Before the Subcomm. on Insular & Int'l Affs. of the H. Comm. on Interior & Insular Affs.*, 101st Cong. 34 (1990) (statement of Carolyn Merck, Specialist in Social Legislation).

155. *Id.*

and possessions."[156] He suggested instead that it would be preferable to have "locally developed plans" for safety net assistance under the former federal-state welfare programs to low income disabled or aged persons "which can be more appropriated [sic] tailored to the circumstances prevailing in each area."[157] At the same time, Senator Long acknowledged that CNMI would receive SSI and full federal SSI funding and coverage for its eligible residents.[158] He made no effort to distinguish CNMI's economic circumstances, or the desirability of appropriate local tailoring under the pre-existing (and far less generous) federal-state welfare programs, from those considerations pertaining to the other U.S. territories in the sparse legislative history on the inclusion of SSI in the CNMI covenant.[159]

The government has defended the provision of SSI to CNMI residents while continuing to exclude residents of the other principal territories. It has asserted simply that "Congress had a sound reason to treat the Northern Mariana Islands differently than Puerto Rico and other Territories: the United States had committed to extend SSI to the Islands in the covenant establishing the Islands as a commonwealth, but had made no comparable negotiated commitment with respect to other Territories."[160] News accounts suggest the CNMI had greater leverage for negotiating somewhat better terms for its territorial status due to timing and its perceived, unique strategic importance to U.S. national defense interests in the Pacific during the Cold War period.[161] Subsequent bills to extend SSI to the remaining principal U.S. territories in 1976 and 1977 passed in the House but were ultimately not adopted by the Senate with little debate or discussion.[162]

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156. MORTON, *supra* note 150, at 16-17 (quoting 122 CONG. REC. 6244-45 (1976) (statement of Sen. Russell B. Long)).

157. *Id.*

158. *Id.*

159. *See id.*

160. Petition for Writ of Certiorari at 19, United States v. Vaello Madero, 596 U.S. 169 (2022) (No. 20-303), 2020 WL 5441159, at *19.

161. *See, e.g.*, Aurora Kohn & Mar-Vic Cagurangan, *How the CNMI Managed to Negotiate SSI Into the Covenant*, PAC. ISLAND TIMES (May 5, 2022), https://perma.cc/Q5YZ-WWXZ ("Unlike Guam or Puerto Rico, the Northern Marianas directly negotiated their political status with the U.S.—during the Cold War era" and had more leverage for inclusion of some beneficial federal legislation for its residents because "[i]t was all about U.S. national defense . . . [and] the[] islands are vital to the defense of their nation."); *see also* Zaldy Dandran, *Variations, Tinian and the Covenant*, MARIANAS VARIETY (Mar. 2, 2023), https://perma.cc/PRG7-ZLPN (noting that the only reason CNMI was able to have political status negotiations in the 1970s with the United States was the political circumstances of the Cold War; the United States, focusing on defense of the Pacific in that era, wanted another major U.S. defense installation in the key strategic location of the CNMI island of Tinian in the Pacific. The U.S. authorities "wanted Tinian so bad [they] could taste it."); *see generally* HOWARD P. WILLENS & DEANNE C. SIEMER, AN HONORABLE ACCORD: THE COVENANT BETWEEN THE NORTHERN MARIANA ISLANDS AND THE UNITED STATES (2002) (analyzing and detailing the CNMI covenant negotiations); *cf.* note 124 and accompanying text (describing the markedly different manner and time periods in which the United States acquired Puerto Rico, Guam, Virgin Islands, and American Samoa as spoils of war or through purchase from former colonial European governments).

162. *See* MORTON, *supra* note 150, at 17-19.

When the Supreme Court initially addressed the constitutionality under equal protection principles of Puerto Rico's lesser safety net in 1978, it is not surprising that it rejected the claims in extremely short, summary *per curiam* decisions without oral argument or briefing—as if reasoning, analysis or even serious consideration were wholly unnecessary. While the Court did not purport to declare the Fifth Amendment's equal protection principles inapplicable to the territories as "non-fundamental," the specter and taint of the Insular Cases still hovered over and infected these decisions.

First, in 1978, the Court in *Califano v. Torres*[163] rejected a challenge to the SSI exclusion from three claimants who lost their SSI upon moving to Puerto Rico from various states. In the decision's brief text, the Court rejected a right-to-travel challenge to the exclusion as predicated on an unestablished and erroneous theory that "a person who has moved from one State to another might be entitled to invoke the law of the State from which he came as a corollary of his constitutional right to travel."[164] The Court then, in two footnotes, dismissed the plaintiff's conventional equal protection claim, presenting it as almost an afterthought. In the first footnote, it expressly cited three of the principal *Insular Cases—Downes, Dorr, and Balzac*[165]—and at least impliedly relied on concepts emanating from them. The Court applied no perceptible scrutiny to the classification in question or consideration of the alternative possibility of heightened equal protection scrutiny based on important factors often triggering greater judicial suspicion and closer evaluation.

Each footnote matter-of-factly supplied information with scant analysis. The Court's first relevant footnote noted:

> The complaint had also relied on the equal protection component of the Due Process Clause of the Fifth Amendment in attacking the exclusion of Puerto Rico from the SSI program. Acceptance of that claim would have meant that all otherwise qualified persons in Puerto Rico are entitled to SSI benefits, not just those who received such benefits before moving to Puerto Rico. But the District Court apparently acknowledged that Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it. Puerto Rico has a relationship to the United States "that has no parallel in our history." *Examining Board v. Flores de Otero*, 426 U.S. 572, 596 (1976). *Cf. Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Downes v. Bidwell*, 182 U.S. 244 (1901).[166]

Then, in its next relevant footnote, the Court listed three reasons offered by the government to support the disparate exclusion of Puerto Rico from the SSI program, but supplied no analysis, reasoning or even a conclusion of whether any of these specific reasons provided a rational basis for the distinction created.

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163. 435 U.S. 1 (1978).

164. *Id.* at 5.

165. *See supra* notes 129-35, 138-40 and accompanying text.

166. Torres, 435 U.S. at 3 n.4 (further citations omitted).

It stated:

> At least three reasons have been advanced to explain the exclusion of persons in Puerto Rico from the SSI program. First, because of the unique tax status of Puerto Rico, its residents do not contribute to the public treasury. Second, the cost of including Puerto Rico would be extremely great—an estimated $300 million per year. Third, inclusion in the SSI program might seriously disrupt the Puerto Rican economy.[167]

The Court then ended the opinion after rejecting the right-to-travel claim by restating the general principle that "[s]o long as its judgments are rational, and *not invidious*, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket."[168] Yet it also declined to consider whether any invidious considerations infected the SSI exclusion from the cited racially infused *Insular Cases* doctrines and resulting territorial history. The Court, arguably, at least impliedly relied on that history, and its consequences, to support a uniquely deferential rational basis standard not requiring any showing of a specific rational basis for the obviously disadvantaging classification's disparate impact on an overwhelmingly non-white population.

Two years later, the Court issued an even shorter *per curiam* opinion of only one paragraph of reasoning, in *Harris v. Rosario*,[169] rejecting an equal protection challenge to lower reimbursement levels to Puerto Rico than the states and D.C. under the Aid to Families with Dependent Children (AFDC) means-tested public assistance program. In *Rosario*,[170] the Court concluded in one sentence, without any citation to authority other than *Torres*, that the Territory Clause authorized Congress to treat Puerto Rico differently from the states so long as there is a rational basis for doing so.[171] It then relied solely on footnote 7 in *Torres* for the rational bases to reject the challenge, without any independent analysis or reasoning supporting the rationality of those asserted purposes.[172]

Justice Marshall issued a dissent, principally pointing out that the *Insular Cases* such as *Downes* and *Balzac*, which held that various protections of the Constitution do not apply in Puerto Rico, were of "questionable" validity.[173] He then castigated the majority for deciding for the first time, without briefing or argument, that Congress needs "only a rational basis to support less beneficial

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167. *Id.* at 4 n.7.

168. Id. at 4. (quoting Jefferson v. Hackney, 406 U.S. at 546 (1972)) (emphasis added).

169. 446 U.S. 651 (1980).

170. I refer to these cases as "*Torres*" and "*Rosario*," as opposed to their more common designations as "*Califano*" and "*Harris*," for a few reasons: the low-income challengers are often erased in the history of these efforts, and they are the more unique and distinct parties in these cases. Additionally, using the challengers' names averts confusion with the multitude of other reported cases designated by the surnames of these Cabinet Secretaries, who were sued several times each day.

171. Rosario, 446 U.S. at 651-52.

172. *See id.* at 652.

173. *Id.* at 653.

treatment for Puerto Rico" so that, presumably, "[h]eightened scrutiny" under equal protection principles "is simply unavailable" to protect "citizens who reside [in Puerto Rico] from discriminatory legislation as long as Congress acts pursuant to the Territory Clause."[174] He noted that nothing in *Torres* and its equal protection "dictum" in a footnote—the only precedent relied on by the *Rosario per curiam* majority—established these principles.[175]

Justice Marshall was particularly pointed in his rejection of the assertion in *Torres* that the extension of comparably generous safety net benefits as in the states for the most vulnerable low-income residents of Puerto Rico would disrupt the local economy. He stated:

> This rationale has troubling overtones. It suggests that programs designed to help the poor should be less fully applied in those areas where the need may be the greatest, simply because otherwise the relative poverty of recipients compared to other persons in the same geographic area will somehow be upset. Similarly, reliance on the fear of disrupting the Puerto Rican economy implies that Congress intended to preserve or even strengthen the comparative economic position of the States vis–à–vis Puerto Rico. Under this theory, those geographic units of the country which have the strongest economies presumably would get the most financial aid from the Federal Government since those units would be the least likely to be "disrupted."[176]

Accordingly, he dissented from the Court's summary disposition of the case, noting "the serious issue of the relationship of Puerto Rico, and the United States citizens who reside there, to the Constitution."[177]

In 2022, the SSI exclusion for Puerto Rico reached the Supreme Court again in *United States v. Vaello Madero*.[178] As in *Torres*, the SSI claimant had lost his SSI when moving from the states (New York) back to Puerto Rico. The case arose when the SSA sought repayment from him of the benefits he continued to collect while ineligible due to his residence in Puerto Rico.[179] He then asserted an equal protection challenge to the statutory exclusion from SSI of residents of Puerto Rico as a defense to this overpayment collection action.[180]

The case reached the Court after the First Circuit, in an opinion authored by former Chief Judge Juan Torruella, invalidated the SSI exclusion on equal protection grounds, distinguishing *Torres* as a right-to-travel case, *Rosario* as one involving a different benefits program than SSI, and each as having limited precedential value as summary *per curiam* decisions on issues other than those raised

174. *Id.* at 654.
175. *Id.* at 655.
176. *Id*. at 655-56.
177. *Id.* at 656.
178. 142 S. Ct. 1539 (2022).
179. United States v. Vaello Madero, 956 F.3d 12, 15-16 (1st Cir. 2020).
180. *Id*. at 16.

by *Vaello Madero*.[181] The First Circuit also independently analyzed each of the three proffered rationales from footnote 7 in *Torres* and found that none was rationally connected to the SSI exclusion.[182] It first flatly rejected the "economic disruption" rational basis hypothesis from the *Torres* Court's footnote 7—the principal justification proffered in the sparse legislative history of the 1972 SSI exclusion. After pointing out that even the federal government had abandoned reliance on that justification as a rational basis for the exclusion, and quoting Justice Marshall's dissent which rejected this assertion in *Rosario*, the First Circuit stated:

> Referring back to the Court's original endorsement of this rationale in [*Torres*], one might find the Court's citation to the Report of the Undersecretary's Advisory Group on Puerto Rico, Guam and the Virgin Islands perplexing. [*Torres*], 435 U.S. at 5 n.7 (citing Dep't of Health, Educ., & Welfare, Report of the Undersecretary's Advisory Group on Puerto Rico, Guam and the Virgin Islands 6 (1976) [hereinafter 1976 Report]); see Peña Martínez v. Azar, 376 F. Supp. 3d 191, 208 (D.P.R. 2019) (noting that the cited report does not support an economic theory for why Puerto Rico's inclusion in SSI would disrupt the economy and instead highlights the success of the extension of the Food Stamp Program to Puerto Rico). In fact, the 1976 Report expressly rejected concerns about an influx of aid disrupting the economy as a justification for disparate treatment, concluding that "the current fiscal treatment of Puerto Rico . . . is unduly discriminatory and undesirably restricts the ability of these jurisdictions to meet their public assistance needs." 1976 Report, supra at 6-7. Therefore, considering the dubious nature of this once-accepted rationale, we are relieved that we are not called upon to decipher it and note its abandonment only as an additional factor that weakens the relevance of [*Torres*] and [*Rosario*] for this appeal.[183]

181. *Id.* at 19-21.

182. *See id.* at 21-32.

183. *Id.* at 21-23. In its brief before the Supreme Court, the government argued that it had not really abandoned this argument; instead, it had "briefly argued" in the certiorari petition that "extending SSI benefits to Puerto Rico might discourage people from working." Brief for Petitioner at 24 n.2, United States v. Vaello Madero, 596 U.S. 159 (2022) (No. 20-303). It noted that "that proposition, however, has been disputed as an empirical matter. *See* DEP'T OF HEALTH, EDUC., & WELFARE, REPORT OF THE UNDERSECRETARY'S ADVISORY GROUP ON PUERTO RICO, GUAM AND THE VIRGIN ISLANDS 22 (1976)." *Id.* Accordingly, it recast that argument, "following the change in Administration" as the assertion that "economic conditions in Puerto Rico are more appropriately considered as a further justification for Congress's decision to respect Puerto Rico's fiscal autonomy and to leave it to the Commonwealth's legislature to determine the appropriate level of benefits for its aged, blind, and disabled residents." *Id.* However, the government failed to identify how the withdrawal of billions of dollars per year in federal support provided directly to desperately impoverished disabled children and adults, and the elderly, would promote greater territorial autonomy—particularly since none of the territories sought, and most all expressly oppose, such an "autonomy without meaningful funding" approach to subsistence support for their most vulnerable residents. The SSA's Office of the Chief Actuary has estimated expenditures of $1.8 to $2.5 billion per year in the ten-year period from 2021-2030, a total of $23 billion, for extending SSI to Puerto Rico, Amer-

The First Circuit also specifically found that the *Torres* Court's additional footnote 7 suggestion of a rational basis grounded in the assertion that Puerto Rico's "residents do not contribute to the public treasury," was not only "irrational and arbitrary," bearing no connection to the SSI program, but also patently false.[184] Rather, Puerto Rico "consistently contributed more than $4 billion annually in federal taxes and impositions into the national fisc"—more than six states and CNMI.[185]

The First Circuit also rejected the third "cost savings" rationale proffered in *Torres*'s footnote 7, reasoning:

> [C]ost alone does not support differentiating individuals. If it did, how would Congress be able to decide upon whom to bestow benefits? Presumably along the lines of its legislative priorities which, at a minimum, must be supported by some conceivable rational explanation. The circularity of this logic defeats itself.[186]

Put another way, a naked "cost savings from averting government expenditures for territorial residents" justification could support any random or arbitrary elimination or reduction in any form of government benefit, tax credit, opportunity program or aspect of government largesse in the Territories otherwise mandated for state residents. And the government could do so without even the slightest independent rational basis for the expenditure cut. It would proceed on the assumption that any such funding cut to territory residents is rational and not arbitrary or random, simply because it involves cuts to funding for territory residents. Indeed, at oral argument before the Supreme Court, the Deputy Solicitor General [Gannon] conceded that "cost alone" would not be enough to support the SSI exclusion.[187]

However, the Supreme Court then reversed the First Circuit in another rela-

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ican Samoa, Guam, and the Virgin Islands. *See generally* Memorandum from Michael Stephens, Supervisory Actuary, Off. of the Chief Actuary, Soc. Sec. Admin., to Steve Goss, Chief Actuary, Off. of the Chief Actuary, Soc. Sec. Admin. (June 11, 2020), https://perma.cc/FT4J-MP6Q. Indeed, at oral argument before the Supreme Court, Justice Sotomayor questioned how the denial of this substantial SSI funding "can be a plus with respect to the self-governance of Puerto Rico" since "it's not as if it could take this federal money, Puerto Rico, and distribute it in some other way or put this money to use in some other way because the money's going directly to the people, not to the government." *See* Transcript of Oral Argument, United States v. Vaello Madero, 596 U.S. 159 (2022) (No. 20-303), 2021 WL 6051137, at *12. The Deputy Solicitor General [Gannon] conceded in response: "That—that's true, Justice Sotomayor, with respect to the money that's coming back from the federal government to the recipients—of the program." *Id.* at *12-13.

184. Vaello Madero, 956 F.3d at 23-29.

185. *Id.* at 24.

186. *Id.* at 29.

187. *See* Transcript of Oral Argument, United States v. Vaello Madero, 596 U.S. 159 (2022) (No. 20-303), 2021 WL 6051137, at *11-12.

tively short opinion. Justice Kavanaugh's majority opinion commenced by quoting the Territory Clause's text and observing that in exercising authority thereunder, "Congress sometimes legislates differently with the territories, including Puerto Rico, than it does with the States."[188] The Court then reasoned that the *Torres* and *Rosario* "precedents dictate[d] the result" and mandated that the "deferential rational basis test applies."[189] But rather than asserting a rational basis grounded in the erroneous and overbroad assertion that Puerto Rico's residents did not "contribute to the treasury" as in *Torres* and *Rosario*, the Court narrowed that contention to "the fact that residents of Puerto Rico are typically exempt from most forms of federal income, gift, estate, and excise taxes," and that "in devising tax and benefits programs, it is reasonable for Congress to take account of the general balance of benefits to and burdens on Puerto Rico."[190]

The Court's analysis, while somewhat longer than in *Torres* and *Rosario*, still falls short in addressing numerous questions raised by the application of traditional equal protection principles to the SSI territorial exclusion. In its application of this somewhat unique "deferential rational-basis test" based on distinctions between territories and states otherwise authorized by the Territory Clause, it required no independent justification for discrimination with respect to the specific benefit program (SSI) in question or any actual relationship, rational or otherwise, to the tax exemptions identified. Instead, by identifying the government's ability simply "to take account of the general balance of benefits to and burdens on Puerto Rico"[191] without indicating how it has done so and the arguable relationship of that accounting to SSI exclusion, the Court relied solely on a hypothetical general tax/benefit scorecard of sorts to justify the exclusion.

While minimal-scrutiny equal protection is not a particularly "difficult standard for [government] to meet when it is attempting to act sensibly and in good faith, . . . 'the rational-basis standard is 'not a toothless one'[;] the classificatory scheme must [still] '*rationally advanc[e]* a reasonable and *identifiable* governmental objective.'"[192] Although *Dandridge v. Williams*[193] is often cited as an example of the most highly deferential or "low level"[194] application of minimal-scrutiny rational basis review of social welfare legislation, the Court there

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

189. *Id.* at 1542-43.

190. *Id.* at 1543.

191. *Id.*

192. Logan v. Zimmerman Brush Co., 455 U.S. 422, 439 (1982) (emphasis added) (quoting Schweiker v. Wilson, 450 U.S. 221, 234 (1981)); *see also* Vaello Madero, 142 S. Ct. at 1559-60 (Sotomayor, J., dissenting) (offering similar formulation of the rational basis standard); *see generally* Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2076 n.34 (2015) (collecting eighteen cases where the Supreme Court invalidated legislative action under the rational basis standard).

193. 397 U.S. 471 (1970).

194. *See, e.g.*, Donald L. Beschle, *Kant's Categorical Imperative: An Unspoken Factor in Constitutional Rights Balancing*, 31 PEPP. L. REV. 949, 949 n.4 (2004) (citing *Dandridge* as

still identified justifications purporting to actually relate to and establish a specific connection with the legislative classification in question (lesser per capita AFDC benefits for large families vis-à-vis small ones).[195] In contrast, the "deferential test" applied in the *Torres-Rosario-Vaello Madero* line of cases apparently needed no such specific connection or actual relationship to the tax/benefit scorecard purpose. The Territory Clause alone was seemingly enough to bridge the complete lack of a specific relationship between means and ends since it authorizes differential treatment of territories and states by definition.[196]

The result is essentially tautological: Territory-Clause-based differences between states and territories disadvantaging the latter are rational because the Territory Clause authorizes differences in treatment between states and territories. Authorization alone, and Congressional intent to act on that authorization, denotes rationality. However, "a mere tautological recognition of the fact that [the legislature] did what it intended to do" is inadequate as a rational basis.[197] As Alexander Aleinikoff has decried in critiquing the Court's same approach in *Rosario*, this reasoning "would seem to authorize virtually any discrimination against Puerto Rico residents in federal programs" and "constitutional law ought to demand more than judgment by definition."[198]

Moreover, there are several additional reasons why the relationship between the specific tax rationale and the SSI exclusion is inapposite. The claimant in this case, Jose Luis Vaello Madero, is an individual asserting his own rights as a U.S. citizen and resident of Puerto Rico against discrimination by virtue of the SSI exclusion vis-à-vis residents of states (and DC and CNMI) who have access to

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"the essence of what today is commonly referred to as the low-level rational basis test"); Comment, O'Neil v. Baine*: Application of Middle-Level Scrutiny to Old-Age Classifications*, 127 U. PA. L. REV. 798, 801 n.17 (1979) (explaining that *Dandridge* represents "low level" rational basis test).

195. Those justifications included avoiding the undermining of work incentives which would occur when large family welfare budgets without family maximum-size caps would approach minimum wage salaries and promoting equity between low-income workers and welfare recipients. *Dandridge*, 397 U.S. at 486 & n.19. Further underscoring the need for an actual, specific, at least rational connection between means and ends, even in minimal-scrutiny rational basis equal protection challenges to Congressional classifications in public benefits/social welfare programs, the Court found that a "fraud prevention" justification for a Congressional amendment removing food stamps eligibility from indigent households with unrelated household-members was insufficiently rationally related to the specific restriction enacted. *See* Moreno v. U.S. Dep't of Agric., 413 U.S. 528, 535-38 (1973).

196. *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, 1747 (2023) ("[I]n *Vaello Madero*, the Court not only ignored the *Insular Cases'* influence on its interpretation of the Territorial Clause, but also interpreted the clause to permit a form of rational basis review so weak as to render the Equal Protection Clause meaningless as applied to the U.S. territories. Under this approach, the Court accepts whatever justification the U.S. government offers for its differential treatment of the territories as rational simply because it applies to the territories.").

197. Logan, 455 U.S. at 441 (citations omitted).

198. T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 22-24 (1994).

SSI.[199] The question presented for the Court's disposition was whether equal protection principles require Congress to make SSI benefits "available to residents of Puerto Rico to the same extent that Congress makes those benefits available to residents of the states."[200] Viewed as a question of discrimination against putatively SSI-eligible *residents of Puerto Rico versus state residents*—as opposed solely to the broader Territory Clause-induced question of differences in Congressional treatment of *territories versus states*—the Court's federal tax exemption and tax/benefit scorecard analysis is even more attenuated from a rational basis for the challenged discrimination.[201]

Analyzed through the lens of the former question, and as Justice Sotomayor explained in her dissent: "It is antithetical to the entire premise of the [SSI] program to hold that Congress can exclude citizens who can scarcely afford to pay any taxes at all on the basis that they do not pay enough taxes."[202] Further undermining the rational connection between SSI exclusion as a means to the end of federal income tax exemption is the anomalous non-relationship between the different classes of residents respectively benefitted and burdened by these various measures. Putatively SSI-eligible low-income residents of Puerto Rico who also have no tax liability are punished with denial of access to life-support benefits because middle-income and wealthy Puerto Rico residents who would be ineligible for SSI (by being over the SSI income or and/or resource limits) are exempt from federal income tax.[203] In this "reverse Robin Hood" scenario, viewing Congress's actions of giving a tax subsidy to the class of rich and relatively comfortable residents as justification for taking life-supporting benefits away from an entirely different class of disabled and elderly persons in deep poverty (i.e. "Because we subsidize Puerto Rico's rich, we can rationally starve its most vulnerable poor") is additionally irrational.

Similarly, reliance on taxes to justify the SSI exclusion is irrational from a Social Security Act and public benefits policy and law perspective. As described above in Part II, the Social Security system contains both contributory social insurance cash-benefit programs and non-contributory means-tested ones. SSI is a means-tested program, not a contributory social insurance program like OASDI.

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199. *See Leading Case: Fifth Amendment—Due Process Clause—Equal Protection—U.S. Territories—United States v. Vaello Madero*, 136 HARV. L. REV. 360, 365-67 (2022) [hereinafter *Leading Case*].

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

201. *See Leading Case*, *supra* note 199, at 366 (noting that the *Vaello Madero* "majority considered only the territory-state distinction" and not the "islander-mainlander distinction" but "the government needed a rational basis for both distinctions to prevail").

202. Vaello Madero, 142 S. Ct. at 1561 (Sotomayor, J., dissenting) (citation omitted); *see also* Carolyn Fergus-Callahan, United States v. Vaello-Madero*: A "Shameful" Failure to Protect Needy American Citizens Living in the U.S. Territories*, 100 DENV. L. REV. F. 1, 33-34 & nn.260-63 (2023) (noting that 57% of SSI recipients report no income and pay no federal taxes and that for SSI recipients that do report income, the average amounts are so low that "the vast majority of SSI recipients would not meet even the standard deduction" and have "little, if any, tax liability").

203. *See* Leading Case, supra note 199, at 368.

Indeed, SSI was designed, in part, to supply subsistence benefits to disabled and elderly persons lacking sufficient work history for contributory insurance coverage under OASDI.[204] There is no perceptible rational thread for using "a logic of contributory insurance to justify [exclusion from] a non-contributory (i.e., means-tested) program."[205]

Along those lines, and as also described above in Parts II and III, Congress consolidated multiple joint federal-state public assistance programs for persons with disabilities and the elderly, previously administered by the states and with contemplated and resulting state-by-state variation and local control, into a uniform, national program when it created the SSI program in 1972. As a result, and as Justice Sotomayor also explained, this program now "establishes a direct relationship between the recipient and the Federal Government."[206] As such, "the jurisdiction in which an SSI recipient resides has no bearing at all on the purposes or requirements of the SSI program."[207] Accordingly, "[f]or this reason alone, it is irrational to tie an individual's entitlement to SSI to that individual's place of residency."[208]

On a more basic level, the facts do not support an imbalanced tax/benefit scorecard for Puerto Rico vis-à-vis the states, as a rational basis for the exclusion. The Court cited no statistical or numerical basis for its assumption that "the general balance of benefits to and burdens on the residents of Puerto Rico"[209] suggests a negative imbalance inconsistent with the ordinary range of net tax/benefit burdens of the states. A study by economists Arthur MacEwan and J. Tomas Hexner in 2016 used data from 2004 and 2010 to ascertain "net federal expenditures per capita," defined as the amount that the federal government sends to a particular state or territory less the amount that that state or territory sends to the federal government in taxes, adjusted for population; it found that "in more than one-third of all the states . . . the net amount per capita received from the federal government—federal expenditures minus federal taxes—was greater than the net

204. *See* Hammond, *supra* note 113, at 1683; *supra* note 14 (citing SSI legislative history explaining need to supply assistance to persons lacking OASDI contributory insurance); *cf.* Zobel v. Williams, 457 U.S. 55, 63 (1982) ("Appellants' reasoning would . . . permit the State to apportion all benefits and services according to the past tax [or intangible] contributions of its citizens. *The Equal Protection Clause prohibits such an apportionment of state services*." (quoting Shapiro v. Thompson, 394 U.S. 618, 632-33 (1969)); *see also* United States v. Vaello Madero*,* 956 F.3d 12, 26 n.20 (1st Cir. 2020) (applying rational basis test and explaining that "the Court in *Zobel* invalidated a government scheme distributing monetary benefits which were based on the length of residency in the state, rejecting as impermissible the state's argument that the scheme was justified by 'past contributions' to the state" (quoting *Zobel*, 457 U.S. at 60-61, 63)); *see also id.* ("[T]he relationship between residence and contribution to the State [is] so vague and insupportable, that it amounts to little more than a restatement of the criterion for the discrimination it purports to justify. (Brennan, J., concurring) (citing *Zobel,* 457 U.S. at 71)).

205. Hammond, *supra* note 113, at 1683.

206. Vaello Madero, 142 S. Ct. at 1560 (Sotomayor, J., dissenting).

207. *Id.* at 1561.

208. *Id.*

209. *Id.* at 1543.

amount per capita received in Puerto Rico from the federal government."[210] Puerto Rico lagged behind 17 other states (and D.C.) in this tax/benefit balance in the study's tables. The authors concluded: "The reality demonstrated in the tables, then, belies the conventional wisdom and indicates that, by a reasonable comparative standard, Puerto Rico is not treated 'generously' by the federal government."[211] Even looking just on the tax side of the ledger, Puerto Rico contributes more federal taxes than six states and the CNMI.[212]

The Court in *Vaello Madero* also opined that if Congress extended SSI to Puerto Rico residents, it would produce a ripple effect, potentially extending all taxes to Puerto Rico too, with damaging consequences.[213] Without questioning the inevitability of wholesale extension of all tax programs by virtue of inclusion of a single additional benefit program, the assumption of net harm to Puerto Rico residents from such an occurrence is also at least questionable. While exempt from federal income tax, "residents of Puerto Rico pay every other tax known to the imagination," leading multiple commentators to point out that "Puerto Ricans on the island are the most heavily taxed of all U.S. citizens."[214] They pay FICA taxes (described above in Part II, funding OASDI and Medicare); "payroll, business, . . . import and export taxes; commodity taxes; unemployment insurance taxes; and self-employment (SECA) taxes."[215] They are also taxed on income from sources outside of Puerto Rico and on all federal employment.[216] However, since Puerto Rico residents do not pay routine federal income taxes, they cannot generally avail themselves of valuable anti-poverty programs based on tax credits, such as the Earned Income and Child Tax Credit programs.[217] Since poverty levels are unusually high and median income levels low, most residents of Puerto Rico would not shoulder much, if any, tax liability if federal income taxes were extended, but would benefit from tax credits.[218] Therefore, when evaluating the practical implications of a stateside tax/benefit package applied to Puerto Rico, many, if not most, workers in Puerto Rico "might be better off if they had to file

210. Arthur MacEwan & J. Tomas Hexner, *Puerto Rico: Quantifying Federal Expenditures* 3-4 (Ctr. for Glob. Dev. & Sustainability, Working Paper No. 2016-10, 2016), https://perma.cc/F36N-WUSY.

211. *Id.* at 2.

212. United States v. Vaello Madero, 142 S. Ct. 1539, 1561-62 (2022) (Sotomayor, J., dissenting).

213. *Id.* at 1543.

214. LUIS FUENTES-ROHWER & GUY-URIEL CHARLES, AM. CONST. SOC'Y, ISSUE BRIEF, THE US CONSTITUTION MEETS DEMOCRATIC THEORY: THE PUZZLING CASES OF PUERTO RICO AND D.C. 14 (2020), https://perma.cc/4KHF-5ZST (quoting Nelson A. Denis, *Taxing Puerto Rico to Death*, ORLANDO SENTINEL (Jan. 10, 2018)); *but cf. id.* (noting that "D.C. residents pay more federal taxes per capita than any other state and it's not even close" and reaffirming the "colonial-era phrase, no taxation without representation" in commenting on the lack of political representation for Puerto Rico and the District of Colombia).

215. *Id.* at 14.

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

217. FUENTES-ROHWER & CHARLES, *supra* note 214, at 14.

218. *Id.* at 15.

a U.S. tax return."[219]

Finally, curiously absent from the *Vaello Madero* majority's analysis was any discussion of whether some form of heightened scrutiny might apply in an evaluation of the SSI exclusion (as suggested by Justice Marshall in *Rosario*) or the role of, or specter hovering over the case from, the *Insular Cases*. These issues are not unrelated. The Court's first *per curiam* opinion rejecting a challenge to the SSI exclusion in Torres cited and relied on the Insular Cases and, in turn, the *Vaello Madero* majority reasoned that *Torres* (and Rosario, which had followed and relied on *Torres*) "dictated the result." This arguably rendered the *Vaello Madero* decision "fruit of the poisonous Insular Cases tree" from a formalist, precedential perspective.

More fundamentally, the issues are related because, as a result of the I*nsular Cases*, residents of Puerto Rico have been historically subordinated and rendered relatively politically powerless without representation in Congress or rights to vote for the President or Vice President,[220] by being placed in an amorphous "unincorporated" territory ("foreign in a domestic sense") status for over 125 years and counting, based on rationales grounded in overt racism. The inability to compete or garner meaningful attention in the national political arena and/or a history of victimization or subordination are factors significantly contributing to the Court's reasoning in applying heightened equal protection scrutiny of governmental classifications—whether characterized as strict, intermediate or "rational basis with bite" scrutiny[221]—based on race, national origin or gender, or burdening various groups such as immigrant "aliens,"[222] non-marital children,[223] LGBTQ individuals,[224] and children of undocumented immigrants suffering complete deprivation of education.[225]

The case for heightened scrutiny has been succinctly summarized by former First Circuit Chief Judge Juan Torruella, noting the consequences of:

> the total national disenfranchisement and lack of national political clout of the

219. *Id.* at 15.

220. *See* Igartúa-de la Rosa v. United States, 417 F.3d 145 (1st Cir. 2005) (en banc).

221. *See generally* Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1077-80 (2011) (analyzing strict, intermediate, and rational basis levels of equal protection scrutiny as "essentially balancing tests—each test determin[ing] how the weights on the scale are to be arranged"); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755-63 (2011) (examining categories generating heightened equal protection scrutiny and various tiers of review and suggesting that "with respect to federal equal protection jurisprudence, this canon has closed"); Holoszyc-Pimentel, *supra* note 192, *passim* (exploring application of heightened level of scrutiny falling outside of defined tiers, identified as "rational basis with bite").

222. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971).

223. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988).

224. *See* United States v. Windsor, 577 U.S. 744, 754 (2013); *see generally* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151 (2016) (analyzing how the Court has applied heightened equal protection scrutiny to address discrimination directed against LGBTQ individuals and couples).

225. See Plyler v. Doe, 457 U.S. 202, 217& n.17 (1982).

> community of 3.5 million United States citizens who reside in Puerto Rico, a condition which has lasted for the 119 years of U.S. sovereignty over the people who inhabit this territory, and even more significantly, throughout the 100 years since they were granted citizenship in 1917. This situation has, if anything deteriorated in recent times. This regrettable condition calls upon this court to heed the apparently forgotten advice of the Supreme Court in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4, [](1938), to the effect that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[226]

One could add to that reasoning the following 3-step argument or syllogism for heightened scrutiny in *Vaello Madero*: 1) The SSI exclusion intentionally classifies and disadvantages persons based on "unincorporated" territorial residence; 2) the "unincorporated territory" construct is based on and a product of overt racism and historical subordination by race, which has undermined residents' ability to avert damaging national legislation and actions through disenfranchisement in national political processes; 3) therefore, heightened scrutiny should apply to such classifications since grounded in and only made possible through invidious racial considerations which continue to adversely injure largely politically defenseless and overwhelmingly non-white territorial resident populations.[227]

In short, heightened equal protection scrutiny in some form should be triggered by classifications directed to "unincorporated territory" residents. They are a class intersectionally ravaged by a confluence of historical race discrimination with ongoing present day, consequences. They also suffer from extreme and seemingly permanent political powerlessness. Altogether, their status "command[s] extraordinary protection from the majoritarian political process."[228] The tax/benefit scorecard basis offered to justify the SSI exclusion would have most definitely failed to pass muster under any of the heightened scrutiny formulations for the reasons discussed above. If the exclusion from SSI of putatively eligible

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226. Igartúa v. Trump, 868 F.3d 24, 25-26 (1st Cir. 2017) (Torruella, J, dissenting from denial of rehearing en banc); *see also* Fergus-Callahan, *supra* note 202, at 21-29 (arguing for strict equal protection scrutiny of territorial residency classifications based on history of unequal treatment and political powerlessness); Adriel I. Cepeda Derieux, Note, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 797, 827-39 (2010) (developing argument for heightened equal protection scrutiny of Congressional actions towards Puerto Rico based on political process theory stemming from *Carolene Products'* footnote 4 and JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980)).

227. *See* Ponsa-Kraus, *supra* note 141, at 2533-36 (characterizing Vaello Madero's brief as raising these points in similar terms and as justifying strict equal protection scrutiny).

228. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (describing criteria for "strict" equal protection scrutiny based on classifications directed to suspect classes and noting "the traditional indicia of suspectness: the class is . . . subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

territory residents lacks a specific and actual rational connection to an overall tax/benefit scorecard or ledger or other identified "legitimate" interest then *a fortiori* it lacks a substantial or necessary/narrowly tailored relationship to any identified purpose deemed compelling, important or substantial under recognized strict or intermediate heightened scrutiny formulations.[229]

From the perspective of equal protection heightened scrutiny doctrine, there are, however, a number of anomalies and distinctions in evaluating unincorporated territory resident classifications that could present some conceptual concern. In applying some degree of heightened equal protection scrutiny based on denial of free public education to undocumented children in *Plyler v. Doe*, the Court recognized that the class's general status as undocumented immigrants could not be declared categorically suspect or "quasi-suspect" because it is not irrelevant to many lawful classifications on that basis by definition.[230] However, the *Plyler* Court still applied heightened equal protection scrutiny, requiring a "substantial" state goal and not merely a "legitimate" one, in invalidating a law denying free public education to undocumented children.[231]

Similarly, in *Vaello Madero*, pursuant to the Territory Clause, Congress has always had the constitutional power to treat territory residents differently so it could be asserted that "discrimination against residents of a territory is grounded in a distinction drawn by the Constitution itself, which, *ipso facto*, cannot be suspect."[232] However, at oral argument, the Deputy Solicitor General disclaimed insulation from usual equal protection scrutiny principles based on the Territory Clause's presence. He answered Justice Thomas's questions of whether the Territory Clause alone could supply a basis for the SSI exclusion (or the degree to which the Territory Clause might change the equal protection analysis) by asserting that the analysis would be the same; Congress could enact the same exclusion of residents of a state like Vermont if its tax/benefits balance were similar to Puerto Rico's.[233] Of course, the principal difference in his comparison to Vermont is that Vermont is represented in Congress; it is hard to imagine Vermont

229. *See generally* Barnes & Chemerinsky, *supra* note 221, at 1077-80 (describing scrutiny standards and their origins); *see also* United States v. Virginia, 518 U.S. 515, 533 (1996) (noting that on heightened, intermediate equal protection scrutiny of legislation, "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation [] [a]nd it must not rely on overbroad generalizations").

230. *See* Plyler, 457 U.S. at 220-24 ("[U]ndocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action.").

231. *Id.* at 224-25.

232. Ponsa-Kraus, *supra* note 141, at 2536.

233. *See* Transcript of Oral Argument at 5-8, United States v. Vaello Madero, 596 U.S. 159 (2021) (No. 20-303), 2021 WL 6051137 (The DSG [Gannon] noted that "the balance of federal benefits and burdens . . . apply in the territory differently than they do in the states. And so, if Vermont had a different relationship with the federal government on the one side, then it might be easier for the federal government to alter it on the other side. And in this instance, it doesn't"). As a factual matter, the tax/benefit scorecard actually appears even more generous for Vermont than Puerto Rico. In 2015, Puerto Rico sent $3,524,557 in combined federal taxes to the federal government and received $1,314 per person in federal funds in

Senator Bernie Sanders failing to find a way to prevent such discrimination against Vermonters.[234] This political process reality buttresses the representation-reinforcement justification for heightened equal protection scrutiny for territory resident-classifications.[235]

Another anomaly is the potential transience in and out of the class.[236] Vaello Madero himself only garnered this status, and lost his SSI benefits, when he moved from New York to Puerto Rico; he could escape his loss of SSI (and lack of Congressional representation and national voting rights) simply by moving back. While somewhat problematic when compared to other classifications triggering heightened scrutiny which have greater immutability,[237] the rigid geographic territory-residence disqualification and stigma could also be viewed as further reinforcing these islands' historical subordination and lingering colonial second class status—a factor enhancing the justification for greater scrutiny.[238]

Although neither the *Vaello Madero* majority nor its dissent addressed the *Insular Cases* in their differing conclusions on the SSI exclusion's constitutionality under the facts of the case, Justice Gorsuch issued a concurrence, exhorting the Court to someday overrule the *Insular Cases*, and bypassing any analysis of the constitutionality of the SSI exclusion or the facts. He pointed out that the *Insular Cases* "have no foundation in the Constitution and rest instead on racial stereotypes [and] deserve no place in the law," that they originated through "support in academic work of the period, ugly racial stereotypes and the theories of social Darwinists," and no judge can properly "profess the right to draw distinctions between incorporated and unincorporated Territories, terms nowhere mentioned in the Constitution and which in the past have turned on bigotry."[239]

Justice Gorsuch implied that if any of the parties had so requested, he would have perhaps sought to overrule the *Insular Cases* right then and there. But since

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return in 2016; Vermont sent $4,495,280 in taxes but received a substantially greater $8,965 per person in Federal funds in 2016. *See Puerto Rico Lags in Federal Funding*, P.R. REP., (Aug. 16, 2017), https://perma.cc/4BZF-BR2Z; *see also* MacEwan & Hexner, *supra* note 210, at 4 (noting that Puerto Rico was 19th and Vermont was 12th among the 50 states and D.C. (and Puerto Rico), and therefore Vermont received a more favorable federal expenditure/tax balance in "net federal transfers per capita" in 2010 than Puerto Rico).

234. The *Vaello Madero* majority expressly reserved the question of whether Congress possesses the same power to selectively exclude states from various otherwise national federal benefit programs based on this tax/benefit scorecard rationale, noting that "Congress has not done so, and that question is not presented in this case." *See* United States v. Vaello Madero, 142 S. Ct. 1539, 1543 n.1 (2022). In so doing, the Court rendered ambiguous and unresolved the question of whether a different and lesser (second-class) form of watered-down equal protection rational basis doctrine applied to the territories and not the states by virtue of the Territory Clause's presence.

235. *See* Gomez-Velez, *supra* note 196, at 1739; Derieux, *supra* note 226, at 827-39.

236. See Ponsa-Kraus, supra note 142, at 2536.

237. *See* Susan R. Schmeiser, *Changing the Immutabl*e, 41 CONN. L. REV. 1495, 1507-12 (2009) (describing the role of immutability as a factor contributing to criteria triggering heightened equal protection scrutiny).

238. *See* Derieux, *supra* note 226, at 838-39.

239. Vaello Madero, 142 S. Ct. at 1552-56 (Gorsuch, J., concurring).

neither party had so requested, he was compelled to concur with the majority,[240] albeit without the slightest indication why he found the majority's equal protection analysis, and not the dissent's, the proper one. He ended his concurrence emphasizing that he "hope[s] the day comes soon when the Court squarely overrules [the *Insular Cases*]" since "our fellow Americans in Puerto Rico deserve no less."[241] However, by joining the majority, the import of his opinion was to reinforce that what our fellow Americans from Puerto Rico like *Vaello Madero* and the class of vulnerable, indigent, disabled and elderly putative SSI claimants on the island "deserve" is the continuation of a second-class safety net and deprivation of federal life-supporting benefits.[242]

At the end of the majority's opinion, the Court supplied something of a consolation prize, pointing out that "the Solicitor General has informed the Court that the President supports legislation as a matter of policy" to extend SSI to residents of Puerto Rico.[243] That legislation became part of President Biden's "Build Back Better" package of social legislation securing passage in the House; it would have extended SSI to Puerto Rico, the Virgin Islands, Guam, and American Samoa.[244] However, it stalled permanently in the Senate in May 2022, when two Democratic senators joined Republican senators in refusing to support it.[245] Although Congress passed, and the President signed into law, a considerably smaller version of this legislation later in August 2022, rethemed the "Inflation Reduction Act," the package enacted did not include the SSI territory inclusion provisions.[246] Accordingly, the status quo prevails: the overwhelmingly non-

240. *Id.* at 1556-57.

241. *Id.* at 1557.

242. *See* Cari Alonso-Yoder, Response, United States v. Vaello Madero *and the Insulation of the* Insular Cases, GEO. WASH. L. REV. ON THE DOCKET (May 24, 2022), https://perma.cc/6KES-UFN3.

243. Vaello Madero, 142 S. Ct. at 1544.

244. Balmaceda, *supra* note 112, at 1.

245. *See* Connor O'Brien, *Manchin and Sinema 'Sabotaged' Biden's Plans, Sanders Says*, POLITICO (May 15, 2022, 1:19 PM EDT), https://perma.cc/8CK9-XL3T.

246. *See Congress Leaves Disability Community Priorities Out of Inflation Reduction Act*, AUTISTIC SELF ADVOCACY NETWORK (Aug. 12, 2022), https://perma.cc/U63M-FM47 ("It also does not provide fixes to SSI and Medicaid for people with disabilities living in US territories like Puerto Rico. Once again, the policies that our community needs most urgently were left on the cutting room floor."). It is unclear why SSI territorial inclusion was deleted in the transition from the Build Back Better Act (BBB) legislation to the Inflation Reduction Act (IRA) beyond the general insistence of Senators Manchin and Sinema to substantially reduce BBB's total price tag. The original BBB had a $3.5 trillion projected cost and Senator Manchin eventually indicated that he would not support a bill with a total cost greater than $1.5 trillion. See Lindsey McPherson, How Build Back Better Started and How It's Going: A Timeline, ROLLCALL (Jul. 21, 2022, 6:30 AM), https://perma.cc/NRT8-KHKZ. He also expressed concerns about the BBB's energy provisions, suggesting that "the bill will also risk the reliability of our electric grid," "increase our dependence on foreign supply chains," and try to facilitate a transition to clean energy and emission reduction "at a rate that is faster than technology or the markets allow [which] will have catastrophic consequences for the American people like . . . in both Texas and California in the last two years." Press Release, Joe Manchin, U.S. Senate, Manchin Statement on Build Back Better (Dec. 18, 2021), available at https://perma.cc/Y25B-Q248. Senator Sinema expressed strong opposition to BBB's reliance

white indigent disabled and elderly residents of these four U.S. Territories will continue to suffer extreme hardships from the deprivation of subsistence payments for a period now exceeding 50 years since SSI's enactment, based on the consequences of doctrines grounded in racism and creating a fiction under which separate and unequal "unincorporated" territory treatment was enshrined into law and policy.

CONCLUSION

The Social Security Act's statutory exclusions and provisions examined above are from different time periods more than 35 years apart, directed to decidedly different issues, and affecting vastly different communities of color. Yet they are bound by a common thread of the American experience emanating from our original sin: racism and white supremacy.[247] In historical context, the referenced exclusion provisions are, respectively, grounded in historical racism emerging from the "badges and incidents" of slavery and solicitude to protecting the postbellum plantation-sharecropping economy; or from American colonialism and imperialism around the turn of the twentieth century and indefinite separate and unequal treatment facilitated through amorphous unincorporated territory status based on theories of white Anglo-Saxon supremacy over alien races. Each exclusion was also abetted by political disenfranchisement and the relative political powerlessness of the excluded communities. Political disenfranchisement resulted from poll taxes, lynching and myriad forms of voter intimation against African Americans at the time of New Deal legislation;[248] or the absence of Congressional representation or ability to vote for President in the territories, which continues to the present.

Those exclusion provisions also have lingering present-day consequences from the impact of disparate generational well-being and wealth generation, and diminished accrued insurance benefits accumulation, confronting African Americans from the period of disproportionate categorical exclusion, and from unequal and lesser benefits than those extended to white recipients in the Act's means-tested programs. They also include long-term and ongoing adverse impacts of the SSI exclusion, for over 50 years and running, on impoverished and overwhelmingly non-white (Latino/a, Black, AANHPI and mixed-race) disabled

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on increasing taxes on the wealthy to pay for its spending provisions. See Alex Shephard, Kyrsten Sinema's Joe Manchin Moment, THE NEW REPUBLIC (July 28, 2022), https://perma.cc/HCG3-E7YZ. Neither Senator voiced public opposition to the BBB's SSI territorial inclusion provision; nor is there any other accessible public opposition or public reasoning for this provision's omission from the IRA.

247. S*ee generally* JIM WALLIS, AMERICA'S ORIGINAL SIN: RACISM, WHITE PRIVILEGE, AND THE BRIDGE TO A NEW AMERICA (2017) (describing origins and nature of America's original sin of racism).

248. *See supra* notes 34-35 and accompanying text (discussing lynching and poll taxes); *see also supra* notes 96-98 and accompanying text (discussing implications of Black political disenfranchisement during the new deal).

adults and children and the elderly in the territories, who remain categorically barred from the program. Although equal protection principles supply a useful lens with which to examine and evaluate these provisions' racially disparate scope and operation, equal protection doctrine as applied by courts has proven largely inadequate as a remedial tool to alter policy or redress injury—notwithstanding arguments of erroneous or cramped judicial interpretation advanced herein.

Avenues in public policy, and legislative and administrative fora, remain available to ameliorate and advance understandings of the Act's disparate consequences. While there is little that can realistically be done to retroactively remedy the 1935 agricultural and domestic worker exclusions, reversed in the 1950s after nearly two decades of exclusion,[249] recognition of this social injury, its impacts, and the influence of articulated, racially discriminatory reasons by legislators and others behind it should not be forgotten. They should be added to discussions of reparations and reconciliation for a legacy of myriad governmental policies producing intergenerational injuries to the Black community.[250] As a modest first step, SSA should provide more fulsome and inclusive materials on the historical section of its website. Those materials could incorporate accessible writings on the disparate racial impact of the 1935 Social Security Act's exclusions and structure and the undisputed presence of repugnant racist sentiments

249. Phoebe Weaver Williams has pointed out that the Social Security earnings formula perpetuates racial discrimination because the depressed and lower covered earnings of African Americans due to systemic race discrimination produce lower social security benefit levels. She has argued that Congress should adopt a remedial actuarial alteration of the Social Security earnings formula for African Americans to permit a more advantaged formula the same as, or similar to, that which Congress adopted for women to remedy systemic societal gender discrimination in employment, its impact on women's Social Security earnings calculations, and resulting lesser benefit levels. *See* Phoebe Weaver Williams, *Social Security Reform: Transformative Opportunities for African Americans*, 3 ELDER'S ADVISOR 23, 26-28 & 35 nn.68 & 70 (2001) (citing Law of August 1, 1956, ch. 836, tit. 1, § 102(a), 70 Stat. 809 (changing the earnings calculation formula, and timing for early retirement, under 42 U.S.C. § 415(b)(3) until 1972) and Califano v. Webster, 430 U.S. 313, 314-18 (1977) (sustaining the differential and advantaged remedial earnings calculation formula for women against a man's reverse discrimination equal protection challenge)). In *Webster*, the Court reasoned that reducing the economic disparity between men and women caused by a long history of gender discrimination was substantially related to an important government interest and satisfied intermediate equal protection scrutiny used for gender classifications necessary to adjust Social Security benefit calculations. *Webster,* 430 U.S. at 316-20. However, a Congressional advisory committee in 1979 considered but rejected calls for similar action to remedy the legacy of systemic racial discrimination and its impact of lesser Social Security benefit levels for African Americans. *See* Williams, *supra*, at 27-28 (citing H.R. COMM. ON WAYS & MEANS, 64TH CONG., REP. OF THE 1979 ADVISORY COUNCIL ON SOCIAL SECURITY 132 (Comm. Print 1979)). Moreover, even assuming Congress could or would adopt such a measure, a comparable race-based Social Security remedial provision would undoubtedly stand considerably lower chances of surviving a *Webster*-like reverse discrimination challenge before the present Court under the strict scrutiny standards utilized for racial classifications. *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*,* 143 S. Ct. 2141 (2023).

250. *See supra* note 8 (collecting books highlighting those injuries to the Black community through numerous federal, state, and local government policies and their intergenerational consequences).

and considerations supporting an ultimately racially disparate program design with both foreseen and foreseeable adverse consequences. Alfred Brophy has stressed the value of forward-looking reconciliation (as opposed to an exclusive focus on compensatory reparations), which includes the goals of changing public understanding about the present impact of past injustice, acknowledging past contributions and harms, and effecting justice and preventing future harms.[251]

These goals are increasingly important in a political climate and moment when Black history is more broadly under assault[252] and when Congressional and regulatory proposals for Social Security reform are regularly emerging with potential additional racially disparate future consequences. Future racially disparate Social Security program proposals include re-introduction this year of an oft-discussed plan to raise the Social Security full retirement age to 70 to cut benefit outlays and address trust fund depletion, as opposed to proposed revenue-side payroll tax wage-cap formula adjustments and other less-regressive reform alternatives.[253] The retirement age increase would have a foreseeable racially disparate impact on benefit receipt by Black workers due to shorter Black life expectancy and resulting shorter temporal benefit-receipt windows.[254]

Top SSA administrators have also floated proposals to alter the Social Security disability insurance and SSI disability programs' disability definition to eliminate or de-emphasize the vocational factors of age, education, and past work experience in the disability definition and interpretive regulations.[255] Because of disproportionately adverse vocational obstacles confronting Black and Latino/a workers—i.e., lower education, lower skill, arduous past work—this proposal

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251. *See* Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L. J. 811, 835 (2006).

252. *See, e.g.*, Danielle Cohen, *Florida Wants to Teach Kids That Slavery Was Good*, THE CUT (July 21, 2023), https://perma.cc/79QA-ND55; Tori Otten, *Oklahoma Superintendent Brazenly Claims Tulsa Race Massacre Was Not About Race*, THE NEW REPUBLIC (July 7, 2023, 7:13 AM ET), https://perma.cc/8TS8-YMG9 ("The teaching of Black history in public schools is under serious threat. . . . Oklahoma's far-right superintendent of public instruction thinks that schools should teach students about the Tulsa race massacre, so long as teachers don't actually acknowledge that the white supremacist attack was about race.").

253. *See* Prem Thakker, *Republicans Are Bringing Back Their Plan to Gut Social Security and Medicare*, THE NEW REPUBLIC (June 14, 2023, 3:11 PM ET), https://perma.cc/86X3-RHN5; *see also* Taegan Goddard, *Desantis Went Further Than Paul Ryan on Social Security*, POL. WIRE (Feb. 13, 2023, 6:32 AM EST), https://perma.cc/NXY8-B7D3 (noting that as a Congressman, Ron DeSantis supported Paul Ryan's "entitlement reform" plans to partially privatize Social Security and Medicare but went further and also sought to raise the full retirement age to 70); cf. KIJAKAZI ET AL., *supra* note 8, at 22-30 (evaluating proposals to address trust fund solvency and Social Security reform, and outlining options without disparate racial impacts); ROCKEYMOORE & LUI, supra note 8, at 35-44 (same).

254. *See generally* Latoya Hill & Samantha Artiga, W*hat is Driving Widening Racial Disparities in Life Expectancy?*, KAISER FAM. FOUND. (May 23, 2023), https://perma.cc/TY4W-WMMX (noting that in 2021, white life expectancy was 76.4 years whereas Black life expectancy was only 70.8 years).

255. *See* DUBIN, *supra* note 12, at 110-12, 118-19, 227 n.34 (critiquing proposal co-authored by former SSA Deputy Commissioner for Retirement and Disability Policy, Mark Warshawsky (serving from 2017-21) and identifying its inevitable, racially disparate impacts).

would disparately limit coverage in each program for these groups.[256] SSA has also: 1) failed to act over many years on multiple U.S. General Accounting Office reports documenting unexplained and racially disparate outcomes in disability benefits adjudication by SSA's administrative law judges at hearings with statistically significantly lower approval rates for Black claimants;[257] 2) restricted the standards for disability based on medical factors alone in cases involving sickle cell disease (SCD) under the hematological disability listing regulations;[258] and 3) recently eliminated "inability to communicate in English" as a vocational factor and substantially restricted the definition of "literacy," thereby raising the bar for non-English-fluent and literacy-challenged claimants to establish disability based on inability to adjust to jobs in the labor market under SSA's medical-vocational ("grid") guidelines.[259] All of these actions or inactions have disparate adverse consequences on Black and Latino/a claimants. At the same time, previous Social Security legislation from the 1980s through to 2005, adding various criminal justice system-involved restrictions on Social Security benefit receipt,[260] have had increasingly exclusionary, and deleterious consequences on Black and Latino/a individuals and communities, due to the racially

256. *See id.*

257. *See id.* at 146-49 (describing U.S. GEN. ACCT. OFF., SOCIAL SECURITY: RACIAL DIFFERENCE IN DISABILITY WARRANTS FURTHER INVESTIGATION (1992), https://perma.cc/XTL5-95T2; U.S. GEN. ACCT. OFF., SSA DISABILITY DECISION MAKING: ADDITIONAL MEASURES WOULD ENHANCE AGENCY'S ABILITY TO DETERMINE WHETHER RACIAL BIAS EXISTS (2002), https://perma.cc/AQA7-MMZH).

258. *See* CMTY. LEGAL SERVS. OF PHILA., RACIAL DISPARITIES IN ACCESS TO SUPPLEMENTAL SECURITY INCOME BENEFITS FOR CHILDREN 11-12 & nn.59-67 (Dec. 2020), https://perma.cc/FPA7-CXYR (identifying racially disparate impact of, and critiquing as insufficiently supported, 2010 changes in SSA's sickle cell disease listing regulations for adults and children, raising the bar on establishing automatic medical disability based on SCD impairments, promulgated at 20 C.F.R. 404, Appendix 1, Listings 7.05, 107.05); *see generally Sickle Cell Disease (SCD)*, CTRS. FOR DISEASE CONTROL & PREVENTION, (July 6, 2023), https://perma.cc/7Y4L-USB4 (describing that SCD is an evolutionary disease that "occurs more often among people from parts of the world where malaria is or was common," "SCD occurs in about 1 out of every 365 Black births," and "1 in 13 Black babies is born with sickle cell trait (SCT)").

259. DUBIN, *supra* note 12, at 66-67, 120-21 (2021) (critiquing regulations promulgated at 85 Fed. Reg. 10596 (February 25, 2020) and SSR 20-1p, 85 Fed. Reg. 13692 (Mar. 9, 2020)).

260. *See, e.g.*, 42 U.S.C. § 1611(e)(1)(A) (restricting benefits under SSI to otherwise eligible persons in months when one is an inmate in a public institution); 42 U.S.C. § 402(x), (restricting primary benefits under OASDI to otherwise eligible persons in months when incarcerated for a criminal offense); 42 U.S.C. § 423(d)(6)(A)-(B) (permanently precluding consideration after October 17, 1980 under the Social Security Disability Insurance Benefits Program of any physical or mental impairment which arises in connection with a felony and for which such individual is subsequently convicted, or which is aggravated in connection with such an offense to the extent so aggravated, and applying the same restrictions for impairments arising while incarcerated for such a felony); 42 U.S.C. §§ 1382(e)(4)(A), 402(x)(1)(A)(iv)-(v) (rendering ineligible for SSI (after 1996) or OASDI benefits (after 2004) anyone who is: 1) "fleeing to avoid prosecution" for a felony; 2) "fleeing to avoid . . . custody or confinement after conviction" for a felony; or 3) "violating a condition of probation or parole" for any offense).

disparate consequences of overcriminalization and mass incarceration policies from the late 1980s through the 1990s.[261]

With respect to the SSI exclusion in the territories, the path toward reform is more straightforward. The failure of "Build Back Better" in 2022 should not be viewed as the death knell of the SSI Territory Inclusion legislation. That it was approved in the House, and appeared to fail (or on the road to failure before pulled) by only two votes in the Senate as a very small part of a far more costly overall package, can be viewed as a potentially positive political harbinger for the future.[262]

For the affected communities of color injured by either of the Social Security Act exclusion provisions analyzed in this Article, full and equal enjoyment of the benefits of the "crown jewel" of the American welfare state continues to prove elusive. As the Social Security Act approaches 90, it is well past time for our public officials to take greater steps to deliver on the promise of providing a "more equitable means" for addressing "the consequences of economic insecurity."[263] Indeed, "our fellow Americans . . . deserve no less."[264]

261. *See, e.g.,* John B. Mitchell*, Suspending Prisoners' Social Security Benefits: Yet Another Blow to Financially Vulnerable African American and Hispanic Families*, 20 SEATTLE J. SOC. JUST. 109 (2021) (describing and analyzing the racially disparate consequences stemming from, and weakness of policy justifications supporting, the Social Security Act's incarceration restrictions on OASDI benefit receipt in light of mass incarceration policies); *see generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (describing and analyzing more broadly, the racially disparate and deleterious consequences of mass incarcerations policies of the 1980s and 90s and their many collateral consequences).

262. Admittedly, this measure as a stand-alone bill would likely not pass the now-Republican-majority House as presently constituted.

263. *See supra* note 5.

264. *Cf.* United States v. Vaello Madero, 142 S. Ct. 1359, 1557 (2022) (Gorsuch, J., concurring).