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Territorial Exceptionalism and the American Welfare State

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TERRITORIAL EXCEPTIONALISM AND THE AMERICAN WELFARE STATE

Andrew Hammond*

Federal law excludes millions of American citizens from crucial public benefits simply because they live in the United States territories. If the Social Security Administration determines a low-income individual has a disability, that person can move to another state and continue to receive benefits. But if that person moves to, say, Guam or the U.S. Virgin Islands, that person loses their right to federal aid. Similarly with SNAP (food stamps), federal spending rises with increased demand—whether because of a recession, a pandemic, or a climate disaster. But unlike the rest of the United States, Puerto Rico, the Northern Mariana Islands, and American Samoa receive a limited amount of federal food assistance, regardless of need. That’s why, after Hurricane Maria, despite additional congressional action, over a million Puerto Rican residents lost food assistance. And with Medicaid, federal law caps medical assistance for each of these five territories, a limit that does not exist for the fifty states or the District of Columbia.

This Article draws much-needed attention to these discrepancies in legal status and social protection. It surveys the eligibility rules and financing structure of disability benefits, food assistance, and health insurance for low-income Americans in the states and the territories. A comprehensive account of these practices provokes questions about the tiers of citizenship built by a fragmented and devolved American state. Part I invokes the scholarship on social citizenship, the idea that an individual cannot meaningfully participate in society without some modicum of economic security. Part I then explores the tension between that normative commitment and one of the defining features of the American welfare state—federalism. It then elaborates the exceptional legal status of Americans who live in U.S. territories. Part II provides a comprehensive overview of federal food, medical, and disa-

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bility assistance and, in doing so, demonstrates how the American territories inhabit a different and, in many ways, dilapidated corner of the American welfare state. Part III begins with an analysis of ongoing cases in federal court that challenge this facial discrimination. It then canvasses legislation introduced in Congress that would make significant progress in putting territorial Americans on par with Americans in the fifty states. To conclude, Part IV brings the states back in, using the earlier discussion of territories as an invitation to imagine an American welfare state built on a foundation other than a racial order.

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INTRODUCTION

José Luis Vaello-Madero was born in Puerto Rico—a U.S. citizen by birth.¹ Thirty years later, he moved from Puerto Rico to New York. Nearly thirty years after that, in 2012, Vaello-Madero began to receive federal disability benefits through the Supplemental Security Income (SSI) program. In 2013, Vaello-Madero moved back to Puerto Rico. A few years later, the Social Security Administration informed him that it would discontinue his SSI benefits, dated retroactively to his return to Puerto Rico. In its notice, the agency stated that Vaello-Madero had been “outside of the U.S. for 30 days in a row or more” since 2014.² The agency noted that it “consider[ed] the U.S. to be the 50 States of the U.S., the District of Columbia, and the Northern Mariana Islands.”³ Puerto Rico has been a United States territory for 122 years.⁴

Roughly a year later, the United States sued Vaello-Madero to recover the allegedly improper disability benefits over that two-year period, for a total of \$28,081.⁵ An investigator employed by the Social Security Administration got Vaello-Madero, who was without counsel at the time, to sign a stipulated judgment, which the federal government promptly filed in federal court in Puerto Rico.⁶ The district court appointed counsel for Vaello-Madero who raised as an affirmative defense that excluding Vaello-Madero and other Puerto Rican residents from SSI benefits violated the Constitution’s equal protection guarantee.⁷ On cross-motions for summary judgment, the district judge agreed, and last April the First Circuit affirmed, holding that excluding Puerto Rican residents from the SSI program violates equal protection. The Supreme Court granted the government’s petition for certiorari on March 1, 2021.⁸

Vaello-Madero’s exclusion from public benefits epitomizes the extent to which federal law places millions of Americans outside the welfare state. Federal law excludes these American citizens from crucial public benefits simply because they live in the U.S. territories. For instance, Puerto Rico, the

1. See 8 U.S.C. § 1402 (“All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.”). This narrative relies on the filings and judicial opinions in *United States v. Vaello-Madero*, 956 F.3d 12, 15–17 (1st Cir. 2020), *cert. granted*, 141 S. Ct. 1462 (2021) (mem.).

2. *Vaello-Madero*, 956 F.3d at 15–16.

3. *Id.* at 16.

4. See Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754.

5. *Vaello-Madero*, 956 F.3d at 16.

6. *Id.* Congress established a federal court in Puerto Rico in 1900 and conferred Article III status on the district court in 1966. Organic (Foraker) Act of 1900, ch. 191, § 34, 31 Stat. 77, 84–85 (current version at 28 U.S.C. § 119); Act of Sept. 12, 1966, Pub. L. No. 89-571, 80 Stat. 764.

7. *Vaello-Madero*, 956 F.3d at 16.

8. *United States v. Vaello-Madero*, 141 S. Ct. 1462 (2021) (mem.).

Northern Mariana Islands (CNMI), and American Samoa are excluded from SNAP (food stamps). Instead, these three territories receive block grants for food assistance, which do not respond to a surge in increased need.⁹ That's why, after Hurricane Maria decimated the island, Puerto Rico languished as it waited to receive additional temporary aid from Congress.¹⁰ When it comes to healthcare, federal law reimburses territories for their Medicaid programs at significantly lower rates than it does for states.¹¹ And as with food assistance, the federal government caps medical assistance for each of these territories, a limit that does not exist for the fifty states or the District of Columbia.¹² As Vaello-Madero's case illustrates, no American living in Puerto Rico can receive SSI benefits, regardless of age or disability.

These discrepancies surrounding public benefits mirror the exclusion of territorial Americans in other areas of federal law. An American who lives in, say, Florida who then moves to the British Virgin Islands can vote in presidential elections via an absentee ballot.¹³ But if that same person moves to the U.S. Virgin Islands, she cannot.¹⁴ To draw attention to its residents' disenfranchisement, Guam held a presidential straw poll on Election Day.¹⁵ American Samoans possess an even stranger status. While those born in the other four territories are recognized by the federal government as citizens by birth, the State Department stamps American Samoans' passports with the following disclaimer: "The bearer [of this passport] is a United States national and not a United States citizen."¹⁶ Last year, a federal judge disagreed, ruling that a person born in American Samoa is a U.S. citizen within the

9. See *infra* Section II.B.2.

10. Brynne Keith-Jennings, *Puerto Rico Forced to Slash Basic Food Aid While Waiting for Washington to Act*, CTR. ON BUDGET & POL'Y PRIORITIES: OFF THE CHARTS (Mar. 6, 2019, 2:30 PM), <https://www.cbpp.org/blog/puerto-rico-forced-to-slash-basic-food-aid-while-waiting-for-washington-to-act> [<https://perma.cc/KB3N-TC66>].

11. Paige Winfield Cunningham, *The Health 202: Puerto Rico's Problems Include a Medicaid Shortfall*, WASH. POST (Oct. 4, 2017, 9:04 AM), <https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2017/10/04/the-health-202-puerto-rico-s-problems-include-a-medicare-shortfall/59d3d96130fb0468cea81d2d> [<https://perma.cc/7XHK-PV63>]; see also *infra* Section II.A.2.

12. See *infra* Section II.A.2.

13. See 52 U.S.C. §§ 20301–20311.

14. See, e.g., *Ballentine v. United States*, 486 F.3d 806, 811 (3d Cir. 2007) (rejecting a legal challenge to the disenfranchisement of Americans living in the U.S. Virgin Islands because it is "established that citizens choosing to reside within its borders are not entitled to vote for electors even if they are denied a role in the selection of the President and Vice-President").

15. See Mar-Vic Cagurangan, *The US Election That Doesn't Count: Guam Goes to the Polls but Votes Won't Matter*, GUARDIAN (Oct. 30, 2020, 4:00 PM), <https://www.theguardian.com/world/2020/oct/31/the-us-election-that-doesnt-count-guam-goes-to-the-polls-but-votes-wont-matter> [<https://perma.cc/D6KM-K7PH>]; 3 GUAM CODE ANN. §§ 7107, 11130 (2020), <http://www.guamcourts.org/compileroflaws/gca.html>.

16. U.S. DEP'T OF STATE, 8 FOREIGN AFFAIRS MANUAL § 505.2 (2020) (cleaned up), <https://fam.state.gov/fam/08fam/08fam050502.html> [<https://perma.cc/EDF7-4BDC>].

meaning of the Fourteenth Amendment.¹⁷ The Tenth Circuit heard argument on the case last fall.¹⁸ Any inquiry into the public law that governs the U.S. territories necessarily runs up against a persistent democratic deficit.

While some may dismiss these irregularities as mere fodder for academic debate, they ensnare over three million Americans. Five times as many Americans live in the territories than in the District of Columbia. Roughly as many Americans live in the territories¹⁹ as those in Alaska, Delaware, Hawaii, and Wyoming combined.²⁰ While the federal government excludes these Americans from the official poverty measurements for the country, what data we have on poverty levels paints a stark picture.²¹ The Census Bureau estimates that the poverty rate in Puerto Rico in 2018 was 43.5%, compared to 11.8% in the fifty states and the District of Columbia.²² Adults living in the U.S. Virgin Islands are two and a half times more likely to lack health insurance than those in the fifty states.²³

This level of poverty and deprivation will only worsen as the five U.S. territories are particularly vulnerable to the ravages of the climate crisis. Those who live there will face increasingly tenuous living conditions due to extreme weather events made more frequent and more intense by a warming

17. *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah 2019), *argued*, No. 20-4019 (10th Cir. Sept. 23, 2020). There is an argument to exclude American Samoa from the focus of this Article since its residents are typically considered “noncitizen nationals.” See 8 U.S.C. § 1101(a)(22). While the people of American Samoa may have tougher sledding in federal court as a result, I have decided to include that territory in the analysis as their welfare programs parallel those of the other four territories and much of the legislative activity on territorial welfare administration lumps American Samoa together with the other four.

18. Oral Argument, *Fitisemanu v. United States*, No. 20-4019 (10th Cir. argued Sept. 23, 2020), <https://www.courtlistener.com/audio/71814/fitisemanu-v-united-states>; see also Press Release, Aumua Amata, Rep., House of Representatives, Amata’s Statement on Filing of Appeal (Apr. 14, 2020), <https://radewagen.house.gov/media-center/press-releases/amata-statement-filing-appeal> [<https://perma.cc/9UWD-4BPM>].

19. JUSTYNA GOWOROWSKA & STEVEN WILSON, U.S. CENSUS BUREAU, RECENT POPULATION TRENDS FOR THE U.S. ISLAND AREAS: 2000 TO 2010, at 15 (2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p23-213.pdf> [<https://perma.cc/RL6L-NPJX>] (populations for Guam, U.S. Virgin Islands, the CNMI, and American Samoa).

20. Calculation based on the U.S. Census Bureau’s 2019 population estimates. See *State Population Totals and Components of Change: 2010–2019*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html> [<https://perma.cc/XL9M-4DYZ>]; GOWOROWSKA & WILSON, *supra* note 19, at 15.

21. See Francine J. Lipman, (*Anti*)Poverty Measures Exposed, 21 FLA. TAX REV. 389, 404–05 (2017) (pointing out that residents of the five territories “are excluded from the starting population used [by the Census Bureau] to measure poverty [in the United States]”).

22. Compare *Quick Facts: Puerto Rico*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/PR> [<https://perma.cc/VN9A-RFBF>], with JESSICA SEMEGA, MELISSA KOLLAR, JOHN CREAMER & ABINASH MOHANTY, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2018 (2020), <https://www.census.gov/content/dam/Census/library/publications/2019/demo/p60-266.pdf> [<https://perma.cc/UJ7Q-XA7W>].

23. *U.S. Virgin Islands: Fast Facts*, KFF (Dec. 13, 2017), <https://files.kff.org/attachment/Fact-Sheet-US-Virgin-Islands-Fast-Facts> [<https://perma.cc/FEH4-C88B>].

planet.²⁴ In 2018, American Samoa suffered through Cyclone Gita²⁵ and the CNMI withstood Typhoon Yutu—the most powerful storm to hit the United States since 1935.²⁶ Two Category 5 hurricanes struck the U.S. Virgin Islands within a two-week period in 2017.²⁷ One of them, Hurricane Maria, also decimated Puerto Rico.²⁸ Precisely when territories need additional resources to recover from the rolling disaster that is climate change, federal law fails them.

This Article lays bare the ways in which federal law denies certain Americans protection from hunger, sickness, and disability because they live in the country's territories. The Article explores the ways in which federal law disadvantages Americans who live in the territories by impeding their access to basic disability, food, and medical assistance.²⁹ There is a rich scholarly conversation on the exceptional status of the U.S. territories, much of it critical.³⁰ But this literature does not focus on social protection, and it does not cover the distinct domains of disability law, food assistance, and health care.

24. Sarah Kaplan, *The Undeniable Link Between Weather Disasters and Climate Change*, WASH. POST (Oct. 22, 2020, 11:46 AM), <https://www.washingtonpost.com/climate-solutions/2020/10/22/climate-curious-disasters-climate-change> [https://perma.cc/GS2E-DYT5].

25. *Samoa Swept by Cyclone Gita*, AL JAZEERA (Feb. 11, 2018), <https://www.aljazeera.com/news/2018/2/11/samoa-swept-by-cyclone-gita> [https://perma.cc/43XS-N7PT].

26. Chris Mooney, Juliet Eilperin & Allyson Chiu, *Category 5 Typhoon Yutu Devastates the Northern Marianas in Worst Storm to Hit Any Part of U.S. Since 1935*, WASH. POST (Oct. 25, 2018, 5:23 PM), <https://www.washingtonpost.com/energy-environment/2018/10/25/category-typhoon-devastates-northern-marianas-worst-storm-hit-us-since> [https://perma.cc/RT72-DCQ3].

27. See Jeremy W. Peters, *In the Virgin Islands, Hurricane Maria Drowned What Irma Didn't Destroy*, N.Y. TIMES (Sept. 27, 2017), <https://nytimes.com/2017/09/27/us/hurricane-maria-virgin-islands.html> [https://perma.cc/KE8N-HAXW]; Greg Allen, *After 2 Hurricanes, a 'Floodgate' of Mental Health Issues in U.S. Virgin Islands*, NPR (Apr. 23, 2019, 3:00 PM), <https://www.npr.org/2019/04/23/716089187/after-two-hurricanes-a-floodgate-of-mental-health-issues-in-the-virgin-islands> [https://perma.cc/9SPL-YA38].

28. Robinson Meyer, *What's Happening with the Relief Effort in Puerto Rico? A Timeline of the Unprecedented Catastrophe of Hurricane Maria*, ATLANTIC (Oct. 4, 2017), <https://www.theatlantic.com/science/archive/2017/10/what-happened-in-puerto-rico-a-timeline-of-hurricane-maria/541956> [https://perma.cc/LT4M-KX82].

29. See H. COMM. ON WAYS & MEANS, 115TH CONG., GREEN BOOK, app. A (2018) [hereinafter GREEN BOOK], <https://greenbook-waysandmeans.house.gov/2018-green-book/appendix-a-social-welfare-programs-in-the-territories> [https://perma.cc/6HKJ-XMDM] ("Some [social welfare] programs are only available in certain territories and for some programs the territories receive funding based on different formulas or under different circumstances than do the states.").

30. See, e.g., Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1142–44 (2009); Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005); Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1 (2000) (describing how Puerto Ricans are an identifiable culture that lacks a legal citizenship, and how they are deprived of real political power because of their second-class U.S. citizenship); José Julián Álvarez González, *The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans*, 27 HARV. J. ON LEGIS. 309 (1990).

Moreover, this Article adds to the literature by seizing on two recent developments: significant congressional activity over the last several years and litigation winding through the federal courts right now. The groundswell of demands for racial justice and the outcome of the 2020 election may create an opportunity for significant progress in this neglected corner of federal law.

Two caveats are in order. First, this Article risks eliding the different histories, politics, and social dynamics of these five territories. Today, each of these territories have different constituencies, interests, and agendas when it comes to the federal government. These differences make it challenging to capture their respective subordination in our current constitutional order. But by providing a comprehensive comparative analysis of how federal law treats these five territories in the specific field of welfare provision, this Article shows that their treatment compared to states, or even among themselves, is difficult to justify.

Second, bear in mind that those who reside in these territories do not necessarily think American citizenship is an unalloyed good. Indeed, in this context and others, it has often been perceived as a weapon that the federal government can wield to stifle sovereignty and promote assimilation.³¹ And the territories themselves are sites of migration, and not just to and from the United States.³² Indeed, many in the territories insist on some kind of independence from the United States.³³ However, this Article does not question whether the territories should have a different legal relationship to the United States, whether it be statehood, independence or something else. Rather, this Article begins with the fact that most who live in the territories today *are* American citizens and proceeds to focus on what the *social* dimensions of these Americans' citizenship should be.

Social citizenship is defined as the extent to which an individual's membership in a polity includes protection from the social and economic vulnerability that accompanies the common crises of modern life, such as unemployment, sickness, and old age.³⁴ Thus, the purpose of this project is more modest than some of the more wide-ranging scholarship on the U.S. territories. It is grounded in the reality that American public law attempts to protect people from these inevitable misfortunes. Yet the legacies of a racialized welfare state and its architecture of states' rights has undermined the

31. See, e.g., Brief for Intervenor or, in the Alt., *Amici Curiae* the Am. Samoa Gov't & Congressman Eni F.H. Faleomavaega at 23–35, *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015) (No. 13-5272) (opposing constitutional birthright citizenship); Valeria M. Pelet del Toro, Note, *Beyond the Critique of Rights: The Puerto Rico Legal Project and Civil Rights Litigation in America's Colony*, 128 *YALE L.J.* 792 (2019) (“Any articulation of rights, the privileges that come with U.S. citizenship, or even the meaning of the nation’s relationship with the United States, is inherently political in Puerto Rico.”).

32. See Elizabeth Corpus, *Migrants Rebuild Their Lives in Puerto Rico Despite Challenges*, USC ANNENBERG MEDIA (Sept. 30, 2019), <http://www.uscannenbergmedia.com/2019/09/30/migrants-rebuild-their-lives-in-puerto-rico-despite-challenges> [https://perma.cc/VFS4-938V].

33. See, e.g., Pelet del Toro, *supra* note 31, at 813–19.

34. See *infra* Section I.A.

possibility of a legal commitment to a social minimum. This status quo, whether it was ever justified, is ill-suited to the demands of American society today, and Americans who live in U.S. territories are particularly ill-served by the status quo.

Legislators, judges, and scholars routinely look past who is left outside a welfare state premised on cooperative federalism. This Article foregrounds legal regimes that challenge this bias. The Article uses the term “outside” because territorial residents, though American citizens, are often placed outside of both the doctrines and the deliberations that govern the American state.³⁵ They do not have a vote in Congress nor can they vote for President, and they do not have recourse to challenge the lawmaking of either of the political branches in federal court in the ways that other discrete and insular minorities may. But in another sense, the title is as prescriptive as the project. We can no longer afford a legal regime that condemns citizens to their fates in states. We have a thin conception of American citizenship indeed if the rights to food and health—to survival itself—depend on which state Americans happen to reside in. By focusing on American citizens who happen to live outside of states, this Article builds the case for a level of social protection that is not held hostage by the vicissitudes of state politics. Following some of the most sustained protests against racial injustice in decades and a bitterly divisive presidential election, this Article makes the case that a broad-based justice movement could—and should—shake the foundation of the racialized welfare state, including its exclusion of Americans in the territories.

The Article proceeds as follows: Part I introduces the normative framework of social citizenship and applies it to the American welfare state and one of its defining features—federalism. It then elaborates the exceptional status of Americans who live in U.S. territories. Part II provides an overview of food, medical, and disability assistance in the five territories and demonstrates how the American territories inhabit a different and in many ways dilapidated corner of the American welfare state. Part III analyzes two cases in the federal courts that challenge the status quo and then proceeds to canvass proposed legislation that would make significant progress in putting territorial Americans on par with Americans in the fifty states. In Part IV, the Article brings the states back in, using the emphasis on territories as an invitation to others to build the American welfare state on a foundation other than a racial order.

35. See HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 4 (2014) (using “outside” to describe both the exclusion of individuals or groups and the lawlessness of American public law); Berta Esperanza Hernández-Truyol, *Narratives of Identity, Nation, and Outsiders Within Outsiders: Not Yet a Post-anything World*, 14 HARV. LATINO L. REV. 325, 333–34 (2011); Pedro A. Malavet, Afterword, *Outsider Citizenships and Multidimensional Borders: The Power and Danger of Not Belonging*, 52 CLEV. ST. L. REV. 321, 322 (2005) (discussing “the power of deconstructing entrenched power normativities from an outsider perspective, hence, the power of *not* belonging”).

I. SOCIAL CITIZENSHIP OUTSIDE THE STATES

This Part situates Americans who live in U.S. territories in both the intellectual framework of social citizenship and the doctrine of the American constitutional system. It then connects those two contexts to the specific problem of how government furnishes basic services for marginalized citizens. Territorial residents are American citizens who benefit from a different and, in most respects, dilapidated welfare state compared to the rest of the country. This project pins down those differences. But to show how those differences raise some normative hackles, let alone why one might challenge them in the courts or Congress, the Article needs a theoretical baseline. That baseline is the concept of social citizenship.

A. *Why Social Citizenship?*

This Article relies on the concept of social citizenship to organize its analysis of how the American welfare state treats some Americans differently by virtue of their territorial residency. To get to a workable definition of social citizenship, one must contend with its intellectual origins in the social sciences and the legal academy.

Social scientists are indebted to the British sociologist T.H. Marshall for the idea of social citizenship. In a series of lectures shortly after World War II,³⁶ Marshall began using the term to identify rights to economic security and healthcare and distinguish them from the more traditional categories of rights that, at the time, dominated political theory.³⁷ According to Marshall, typical rights talk relies on a binary of political rights, such as the right to vote, and civil rights, such as the right to religious expression.³⁸ Importantly, these rights derive from membership in a polity.³⁹ By enumerating a third category or dimension of citizenship, Marshall's concept of social citizenship became the intellectual counterpart to the societal reality of the British gov-

36. T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS, AND OTHER ESSAYS* 10–11 (1950) (arguing that the rights of social citizenship “range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society”); see also *CITIZENSHIP TODAY: THE CONTEMPORARY RELEVANCE OF T.H. MARSHALL* (Martin Bulmer & Anthony M. Rees eds., Routledge 2016) (1996); Desmond S. King & Jeremy Waldron, *Citizenship, Social Citizenship and the Defence of Welfare Provision*, 18 *BRIT. J. POL. SCI.* 415, 418–22 (1988).

37. See MARSHALL, *supra* note 36, at 48–65 (discussing legal aid, housing, education, and income security as components of social citizenship); see also Keith G. Banting, *Social Citizenship and Federalism: Is a Federal Welfare State a Contradiction in Terms?*, in *TERRITORY, DEMOCRACY, AND JUSTICE: REGIONALISM AND FEDERALISM IN WESTERN DEMOCRACIES* 44, 45 (Scott L. Greer ed., 2006) (describing the concept of social citizenship as “most clearly articulated by the British sociologist T.H. Marshall”).

38. See MARSHALL, *supra* note 36, at 14; see also Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 *LOY. L.A. L. REV.* 1207, 1210 (1992) (drawing this distinction).

39. MARSHALL, *supra* note 36, at 11.

ernment playing a larger role in protecting and regulating its citizens' lives.⁴⁰ Consequently, while some anticipated this social dimension of citizenship long before T.H. Marshall,⁴¹ its prominence dates only to the last century. Social citizenship theorizes that members of a society have something—whether it be a status, a basket of goods, or rights—that empowers them to confront a range of risks: the loss of a job, the loss of a caretaker, the need to become a caretaker, illness, old age, and death.⁴² These social risks strain an individual's ability to live and carry consequences for that individual's family, community, and the larger society.⁴³

For legal academics, social citizenship has a distinctively American provenance. Legal historian William Forbath has shown how both the Populists and Progressives of the late nineteenth and early twentieth centuries as well as the New Deal coalition offered a constitutional vision of social citizenship.⁴⁴ For these Americans, Forbath argues that the social citizenship tradition was “[a]imed against harsh class inequalities” and “centered on decent work and livelihoods, social provision, and a measure of economic independence and democracy.”⁴⁵ For Forbath and others, labor and paid work are central to social citizenship, but social provision, including through the

40. See Michael Ignatieff, *The Myth of Citizenship*, 12 QUEEN'S L.J. 399, 411 (1987) (arguing that T.H. Marshall's definition of social citizenship updates the “purely formal” notions of civil and political citizenship); see also GÖSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 21 (1990) (“Social citizenship constitutes the core idea of a welfare state.”); Margaret R. Somers, *Citizenship and the Place of the Public Sphere: Law, Community, and Political Culture in the Transition to Democracy*, 58 AM. SOCIO. REV. 587, 590 (1993) (“Marshall's core conceptions remain the touchstone for much recent scholarly work on citizenship.”).

41. See, e.g., THOMAS PAINE, *THE RIGHTS OF MAN (1791–1792)*, reprinted in *THE THOMAS PAINE READER* 201, 336–37 (Michael Foot & Isaac Kramnick eds., 1987); see also Adrian Little, *The Politics of Compensation: Tom Paine's Agrarian Justice and Liberal Egalitarianism*, 5 CONTEMP. POL. 63 (1999).

42. See Banting, *supra* note 37, at 44 (“The promise of social citizenship is the equality of treatment of citizens, to be achieved through common social benefits and public services available to all citizens throughout a country.”).

43. Marshall and others saw this concept as reinforcing civil and political rights. See MARSHALL, *supra* note 36, at 75–85; see also RUTH LISTER, *CITIZENSHIP: FEMINIST PERSPECTIVES* 16–17 (2d ed. 2003) (describing social rights as citizenship rights because “they help to promote the effective exercise of civil and political rights by groups who are disadvantaged in terms of power and resources”).

44. William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001). This is not to say that this literature is disconnected from political theory. See William E. Forbath, *Not So Simple Justice: Frank Michelman on Social Rights, 1969–Present*, 39 TULSA L. REV. 597, 621 (2004) (“Rawls's precepts for political economy fall squarely within the social citizenship tradition[] . . . [and] bear[] a strong family resemblance to those of the Populists, Progressives, and New Dealers who fashioned the variants of social citizenship thought in America.”).

45. William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 1 (1999); see also Nancy E. Dowd, *Children's Equality Rights: Every Child's Right to Develop to Their Full Capacity*, 41 CARDOZO L. REV. 1367, 1396 (2020) (characterizing the concept of social citizenship as “a theory of positive rights grounded in Reconstruction and the New Deal”).

Social Security Act, is also a vital manifestation of the tradition.⁴⁶ Importantly, Forbath and other legal scholars attend to the institutional implications of social citizenship. Forbath has explained how, for the Populists, Progressives, and New Deal Democrats, social citizenship is “a majoritarian tradition, addressing its arguments to lawmakers and citizens, not to courts.”⁴⁷

For both social scientists and legal scholars, then, social citizenship is a serviceable framework because it creates a readily identifiable set of benefits for members of a polity.⁴⁸ While an inquiry into the lacking social dimensions of political membership could simply be framed as second-class citizenship, that framing still leaves the following question unanswered: how does that inferior status manifest itself in social provision? Instead, social citizenship begins with that question. It also trains the eye to see individuals *and* institutions.⁴⁹ Thus, it is a concept that foregrounds the state in the scholarly conversation of individual rights while, in the words of legal historian Bill Novak, “deal[ing] directly with what has become a preeminent so-

46. Forbath, *supra* note 45, at 12 (“[T]he social meaning of equal citizenship must include the opportunity to earn a livelihood that enables one to contribute to supporting oneself and one’s family in a minimally decent fashion.”); Vicki Schultz, Essay, *Life’s Work*, 100 COLUM. L. REV. 1881, 1938 (2000) (“Paid work has the potential to become the universal platform for equal citizenship . . .”); cf. Olatunde C.A. Johnson, Essay, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 166 (2011) (“[T]he material commitments manifested in federal spending programs function to establish a set of baseline protections that can be constitutive of citizenship.”).

47. Forbath, *supra* note 45, at 1; see also Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2048 (2006) (“[T]he social citizenship tradition contemplates the development of constitutional meaning through legislation and the political process, not merely through adjudication.”); William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 197 (2001) (“[T]o generations of populists and progressives . . . , courts . . . could not and should not translate the general rights-declaring provisions of the Reconstruction Amendments into specific guarantees of social and economic rights in industrial America.”).

48. For a helpful synthesis of the social science literature and legal scholarship on social citizenship, see Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 785 (2003). See also Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 589 (2010) (connecting Marshall’s and Forbath’s scholarship on social citizenship); Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1196 (2008) (supporting social citizenship as a framework but critiquing it “for its exclusive focus on the formal citizen, reflecting an inattention to immigration and the global dimension of work in today’s economy”).

49. See William J. Novak, *The Legal Transformation of Citizenship in Nineteenth-Century America*, in THE DEMOCRATIC EXPERIMENT: NEW DIRECTIONS IN AMERICAN POLITICAL HISTORY 85, 85 (Meg Jacobs, William J. Novak & Julian E. Zelizer eds., 2003) (“Citizenship directs attention precisely to that point where bottom-up constructions of rights consciousness and political participation meet the top-down policies and formal laws of legislatures, courts, and administrative agencies.”); see also SAM ERMAN, ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE 4 (2019) (arguing for the use of citizenship in this area of scholarship because conceptually it “occupies a powerful middle ground between officialdom and the populace”).

cial and political question in our time—inclusion and exclusion based on identity.”⁵⁰

One conceptual weakness of social citizenship is that some scholars have previously suggested it as the third step in a linear development of ever-expanding rights.⁵¹ But while Marshall and others may have suggested such a progression, there is nothing intrinsic in the concept that requires such an evolutionary outlook. A society can privilege social dimensions of citizenship over civil dimensions. For instance, for decades France has been particularly willing to honor social protections while denying protections for religious expression.⁵² And Forbath, Dorothy Roberts, and others have suggested that “the absence of *political* citizenship led to the defeat of social citizenship in America.”⁵³ Nor should we expect stability in any particular dimension of citizenship over time. Indeed, recent studies of welfare provision in several wealthy democracies suggests that as the citizenry has expanded, welfare resources have not.⁵⁴ Some scholars account for this development by citing a lack of political power in the new members of the polity and others argue it is “due to a rigidification of moral boundaries based on perceptions of deservingness.”⁵⁵

Another challenge is to demarcate the rights and protections that accompany social citizenship. One way to do so is to identify the risks—such as

50. Novak, *supra* note 49, at 85; see JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* (1991).

51. Novak, *supra* note 49, at 93 (criticizing T.H. Marshall’s theory as a “teleological story of unfolding rights of ever higher forms of citizenship”).

52. See RODNEY BENSON, *SHAPING IMMIGRATION NEWS: A FRENCH-AMERICAN COMPARISON* (2013); Shaira Nanwani, Comment, *The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction?*, 25 EMORY INT’L L. REV. 1431 (2011); see also MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* 344 (Univ. of Pa. Press updated ed. 2008) (“Marshall stressed the conflict between civil and social citizenship at the heart of the welfare state.”).

53. Forbath, *supra* note 47, at 209 (“Not only were most black Americans excluded from the benefits of the main New Deal programs, but this constitutional bad faith at black America’s expense also deprived all Americans of the institutional foundations and political-constitutional legacy of social citizenship.”); see also Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1589 (1996) (book review) (“Faith in universalism . . . underestimates America’s problem with Black citizenship.”); Elizabeth M. Iglesias, Foreword, *Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. MIA. L. REV. 575, 593 (1999).

54. See Irene Bloemraad, Will Kymlicka, Michèle Lamon & Leanne S. Son Hing, *Membership Without Social Citizenship? Deservingness and Redistribution as Grounds for Equality*, DAEDALUS, Summer 2019, at 73, 78.

55. *Id.* at 74. Compare Maria Abascal & Delia Baldassarri, *Love Thy Neighbor? Ethnoracial Diversity and Trust Reexamined*, 121 AM. J. SOCIO. 722, 756 (2015) (suggesting that diminished social capital decreases trust levels and makes it more difficult to develop policies that reflect the interests of all members), with Wim van Oorschot, *Making the Difference in Social Europe: Deservingness Perceptions Among Citizens of European Welfare States*, 16 J. EUR. SOC. POL’Y 23 (2006) (examining whether particular demographics tend to differentiate between the deservingness of groups for welfare more strictly than others).

unemployment, sickness, disability, and old age—social citizenship protects against.⁵⁶ Some activists, scholars, and policymakers have also worked to explain how caring for others, whether they are children, sick family members, or ageing loved ones, should also be included in this set of risks.⁵⁷ Another way to conceptualize this dimension of citizenship is to identify basic human needs like food, medical care, and housing. Each of these risks and needs can be contested in the academy and the political arena.

It is important to keep these caveats in mind when relying on social citizenship as an organizing concept,⁵⁸ but social citizenship's malleability makes it well suited to this turbulent moment in American public law. This inegalitarian age—awash in a potent politics of racism, nativism, and fear—cries out for a coherent vision of justice and human dignity. Activists and academics alike increasingly find liberalism wanting.⁵⁹ Many question whether liberalism's reliance on formal rules and rights creates a mere veneer of political and civil equality.⁶⁰ Some are groping toward a new emphasis on collective action, power, and political economy.⁶¹ This Article does not wait for this din of discourse to harmonize. Regardless of what this new poli-

56. See, e.g., Giuliano Bonoli, *The Politics of the New Social Policies: Providing Coverage Against New Social Risks in Mature Welfare States*, 33 POL'Y & POL. 431, 444 (2005).

57. E.g., Ann Shola Orloff, *Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States*, 58 AM. SOCIO. REV. 303, 313 (1993).

58. Perhaps scholars could rely on the concept of human flourishing, vulnerability theory, or earlier work on antisubordination. For an articulation of human flourishing, see THE QUALITY OF LIFE (Martha Nussbaum & Amartya Sen eds., 1993), and in the context of poor families in the United States, see CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS (2014), and Wendy A. Bach, *Flourishing Rights*, 113 MICH. L. REV. 1061, 1070–73 (2015) (reviewing HUNTINGTON, *supra*). See also Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901, 1921 (2001). For vulnerability theory, see, for example, Martha Albertson Fineman, *Injury in the Unresponsive State: Writing the Vulnerable Subject into Neo-liberal Legal Culture*, in INJURY AND INJUSTICE: THE CULTURAL POLITICS OF HARM AND REDRESS 50 (Anne Bloom, David M. Engel & Michael McCann eds., 2018). While attractive in several respects, these alternatives include more than the stakes of social citizenship. Both encompass a panoply of rights and practices far beyond social provision. This project has a narrower focus than the wide-ranging inquiry in human flourishing or how public power oppresses its citizenry. Rather, this Article is trying to demonstrate how American public law provides different protections for some American citizens from the risks inherent in modern life.

59. See Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546 (2021); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 1, 19–23; Joseph Fishkin & William E. Forbath, *The Anti-oligarchy Constitution*, 94 B.U. L. REV. 669, 671–73 (2014).

60. See STEVEN KLEIN, THE WORK OF POLITICS: MAKING A DEMOCRATIC WELFARE STATE 22 (2020).

61. See Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020); K. Sabeel Rahman, *Essay, Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447 (2018).

tics (and political thought) of equality looks like, it will most likely include some social dimension of basic needs. Thus, while the concept of social citizenship was shaped by the liberal tradition in political theory, it also can be used by those working to forge a new discourse on building mass power against oligarchic forces in our politics, economy, and society. Whether the ascendant theoretical paradigm is grounded in rights, power, or some other framework, that discourse cannot overlook the individual's ability to secure basic necessities or the state's obligations to protect its people from hunger and sickness.⁶² By gathering up these types of basic assistance, social citizenship provides an analytical lens to evaluate how government responds to these particular needs of its citizens.

B. *Social Citizenship and American Federalism*

Now that we have some notion of social citizenship, including its limitations and its potential, we can apply it to the more specific history of the American welfare state, and in particular to one of its defining features: federalism. Social scientists often characterize the American welfare state as "residual" and less robust than other wealthy democracies.⁶³ The residual character of the American welfare state is often explained by a variety of factors: the lack of a traditional labor party in national politics, the relatively unsuccessful socialist movement in the twentieth century, the persistence of laissez-faire ideology and interests, and racial and gender hierarchies.⁶⁴ Another mainstay of this discussion is the extent to which federalism in the United States undermined national commitments to social provision.⁶⁵

At first glance, the concept of social citizenship appears to be in tension with federalism. Federalism implies some variation in governance, benefits, and services across subnational units, whereas social citizenship is defined as a basket of rights by virtue of national membership. If social citizenship cannot overcome state boundaries, then it ceases to be the kind of status T.H. Marshall and others envisioned. Of course, it is possible that some federalism arrangements could accommodate a robust understanding of social citizenship. All states could provide health insurance to all citizens but could do so under different schemes of universal coverage, and over time, states could

62. See KLEIN, *supra* note 60, at 5 ("[M]any of the most significant democratic social movements of the late nineteenth and twentieth centuries have mobilized around welfare institutions.").

63. See RICHARD M. TITMUSS, SOCIAL POLICY 30–32 (Brian Abel-Smith & Kay Titmuss eds., Pantheon 1974) (explaining the residual welfare state model); see also ESPING-ANDERSEN, *supra* note 40, at 20, 31, 49 (building on Titmuss's typology and characterizing the United States as a "liberal" welfare state).

64. See, e.g., Nathan Glazer, *The American Welfare State: Exceptional No Longer?*, in CHALLENGES TO THE WELFARE STATE: INTERNAL AND EXTERNAL DYNAMICS FOR CHANGE 7 (Henry Cavanna ed., 1998). For the classic formulation of the power resources theory, see WALTER KORPI, THE DEMOCRATIC CLASS STRUGGLE (1983). See also SEYMOUR MARTIN LIPSET & GARY MARKS, IT DIDN'T HAPPEN HERE: WHY SOCIALISM FAILED IN THE UNITED STATES (2000).

65. See Glazer, *supra* note 64, at 10.

conceivably experiment with policies and programs that become models for national initiatives.⁶⁶ At a conceptual level, then, federalism and social citizenship could work in concert.

As a matter of American governance, though, the relationship between state autonomy and national substantive rights, including but not limited to social rights, is fraught. First, federalism hampered any national commitments to substantive rights until the Civil War.⁶⁷ As Bill Novak has explained, federalism, as “the dominant feature of early American governance . . . wreaked havoc on the substantive articulation of a coherent conception of national citizenship rights.”⁶⁸ But as Novak and others admit, the Fourteenth Amendment “remade the American state.”⁶⁹ Since then, “most of American public law after the Civil War came to be rewritten in terms of the rights of citizens of the national government and the federal powers that would guarantee those rights.”⁷⁰ Most of the controversies that shape public law in the United States are struggles over Reconstruction’s ramifications.

After Reconstruction, federal–state relations continued to define American social provision. Political scientists accept that “[b]y separating national and local authority, American federalism allowed local communities to override national majorities on basic matters of citizenship, even (and especially) in parts of the South where blacks were a majority.”⁷¹ Indeed, in order to get the New Deal through Congress, the Roosevelt Administration had to make significant concessions to Southern legislators who insisted on placing Black Americans outside of welfare schemes like Social Security.⁷² The racial origins of the New Deal—and its role in this first major expansion of the Amer-

66. See, e.g., Daniel Béland & André Lecours, *Nationalism and Social Policy in Canada and Québec*, in *THE TERRITORIAL POLITICS OF WELFARE* 189 (Nicola McEwen & Luis Moreno eds., 2005).

67. See Novak, *supra* note 49, at 92 (“Whereas modern citizenship involves a single, formal, and undifferentiated legal status—membership in a central nation-state—that confers universal and internal transjurisdictional rights upon its holders, nineteenth-century American governance was precisely about differentiation, jurisdictional autonomy, and local control.”); see also ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 33 (1975) (“[T]he concept of citizenship play[ed] only the most minimal role in the American constitutional scheme.”). This was especially true for people with few resources. See KRISTIN O’BRASSILL-KULFAN, *VAGRANTS AND VAGABONDS: POVERTY AND MOBILITY IN THE EARLY AMERICAN REPUBLIC* 13–35 (2019).

68. Novak, *supra* note 49, at 92.

69. *Id.* at 109–10; see JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 224 (1951).

70. Novak, *supra* note 49, at 112.

71. Robert C. Lieberman & John S. Lapinski, *American Federalism, Race and the Administration of Welfare*, 31 *BRIT. J. POL. SCI.* 303, 303 (2001).

72. See Ira Katznelson, Kim Geiger & Daniel Kryder, *Limiting Liberalism: The Southern Veto in Congress, 1933–1950*, 108 *POL. SCI. Q.* 283, 297 (1993); DAVID A. BATEMAN, IRA KATZNELSON & JOHN S. LAPINSKI, *SOUTHERN NATION: CONGRESS AND WHITE SUPREMACY AFTER RECONSTRUCTION* 7–8 (2018); CYBELLE FOX, *THREE WORLDS OF RELIEF: RACE, IMMIGRATION, AND THE AMERICAN WELFARE STATE FROM THE PROGRESSIVE ERA TO THE NEW DEAL* (2012).

ican welfare state—remind us that welfare governance in the United States is simultaneously a site of both inclusion and domination.⁷³

The second major expansion of the American welfare state—President Johnson’s War on Poverty and the Great Society—also had to negotiate how to expand government services against the backdrop of federalism.⁷⁴ The Johnson Administration, in some ways, circumvented the states. Both the national initiatives for community action and legal services used grants that bypassed state and local government and went directly to nonprofit organizations.⁷⁵ The Medicare and Medicaid Act of 1965 also showed the tensions of social citizenship and federalism. Medicare, like Social Security, was placed beyond the vagaries of state governance. Health insurance for the elderly would be financed and administered by the federal government. Medicaid, on the other hand, was designed to be partially funded and mostly administered by states.⁷⁶

The major retrenchment efforts of the 1980s and 1990s used devolution to make cuts to the American welfare state. Both the Reagan and Bush Administrations sought to grant broad waivers giving state governments the discretion to experiment with their welfare programs.⁷⁷ But almost all of that discretion led to governors and state legislatures cutting assistance and punishing recipients.⁷⁸ The Omnibus Budget Reconciliation Act, which will be discussed below as it relates to Puerto Rico, codified other cuts.⁷⁹ When President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), elected officials in both parties presented this retrenchment as giving more authority and discretion to the states.⁸⁰

Even the last major expansion of the American welfare state, the Affordable Care Act, can be understood as a conflict over the proper roles of the federal government, state governments, and markets in providing

73. KLEIN, *supra* note 60, at 21, 28.

74. See ALICE O’CONNOR, *POVERTY KNOWLEDGE: SOCIAL SCIENCE, SOCIAL POLICY, AND THE POOR IN TWENTIETH-CENTURY U.S. HISTORY* (2001).

75. Roger H. Davidson, *The War on Poverty: Experiment in Federalism*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, Sept. 1969, at 1, 1.

76. See Banting, *supra* note 37, at 50–51 (pointing out that “[t]he United States is alone in not having a separate equalization program” that attends to inequities of health care delivered by subnational, i.e., state, governments).

77. See Michael Wiseman, *Welfare Reform in the United States: A Background Paper*, 7 *HOUS. POL’Y DEBATE* 595, 617–18 (1996).

78. See Lucy A. Williams, Essay, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 *YALE L.J.* 719, 726 (1992); Timothy J. Casey, *The Family Support Act of 1988: Molehill or Mountain, Retreat or Reform?*, 23 *CLEARINGHOUSE REV.* 930, 931 (1989) (describing the aim of the legislation as “to reduce sharply the number of families receiving” cash assistance).

79. See Wiseman, *supra* note 77, at 613–14.

80. Andrew Hammond, *Welfare and Federalism’s Peril*, 92 *WASH. L. REV.* 1721, 1729–41 (2017) (discussing PRWORA’s devolutionary measures). Even in the 1990s, scholarly treatments “still locate[d] the core problems of racial inequality in questions of federalism.” Lieberman & Lapinski, *supra* note 71, at 303–04.

healthcare.⁸¹ The national and categorical expansion of Medicaid would have allowed all low-income Americans to receive health care regardless of state residency.⁸² Once the Supreme Court gutted that provision,⁸³ each state had to decide whether to opt-in to the most significant expansion of government assistance to poor Americans since 1965. A similar process unfolded with the marketplace exchanges. The Act allowed each state to set up (or let the federal government set up) an exchange in which individuals who were not otherwise covered could purchase subsidized health insurance. Here, too, the Supreme Court, stepping in to protect states from what it perceived to be a too-coercive federal government, undermined this provision.⁸⁴

Federal action to expand or diminish the American welfare state does not necessarily preclude states from taking action. Yet it is hard to identify an example of sustained commitment by a state or several states to some social right over the last half century other than to public education.⁸⁵ The strongest example is probably the expansion of pre-K at the state level, which is perhaps best seen as the educational exceptionalism of state action rather than as a strictly antipoverty initiative.⁸⁶ Yet even in that area, only nine states have enrolled a majority of their children in pre-K, and only Vermont and the District of Columbia have enrolled a majority of their three-year-olds in early childhood education.⁸⁷ This absence of state leadership in forging some modicum of social citizenship for their residents is not surprising given the fiscal constraints under which states must operate.⁸⁸ Putting aside whether several states trying to finance and administer universal pre-K rises to the level of some social minimum, it is a reminder to enumerate what services comprise social citizenship.⁸⁹

81. See Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689 (2018); Beatrix Hoffman, *Social Citizenship in the U.S. Affordable Care Act*, in DEMOCRACY AND THE WELFARE STATE: THE TWO WESTS IN THE AGE OF AUSTERITY 148 (Alice Kessler-Harris & Maurizio Vaudagna eds., 2018).

82. For an overview of relevant provisions of the Affordable Care Act, see Gluck & Huberfeld, *supra* note 81, at 1727–36.

83. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012) (plurality opinion) (holding that Congress cannot “penalize States that choose not to participate in [the Affordable Care Act] by taking away their existing Medicaid funding”).

84. King v. Burwell, 576 U.S. 473 (2015) (holding that the federal government could establish exchanges in states that chose not to do so by interpreting “state exchanges” to include “federal exchanges”).

85. See JUSTIN DRIVER, THE SCHOOLHOUSE GATE 181 (2018); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92 (2013); Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 240–45 (2008).

86. See DAVID L. KIRP, THE SANDBOX INVESTMENT (2007).

87. ALLISON H. FRIEDMAN-KRAUSS, W. STEVEN BARNETT, KARIN A. GARVER, KATHERINE S. HODGES, G.G. WEISENFELD & BETH ANN GARDINER, NAT'L INST. FOR EARLY EDUC. RSCH., THE STATE OF PRESCHOOL 2019, at 26 tbl.2 (2020).

88. Hammond, *supra* note 80, at 1744–45 (discussing state budgetary rules).

89. See Lieberman & Lapinski, *supra* note 71, at 305 (“[T]he central question of American federalism is not the general matter of where governmental functions are located but the

In light of this unsettled relationship between federalism and social citizenship, one cannot ignore the persistent question of what social rights American citizens enjoy outside of states. A welfare state premised on a federal-state system neglects those Americans who have national citizenship but lack state residency. The two most prominent groups in this predicament are members of tribes and residents of territories. In short, when the federal law governing social provision relies on states, territorial residents cannot rely on federal law.

C. Territories as American Public Law's Outsiders

Before exploring the ways in which American public law treats the U.S. territories as outsiders, it's worth pausing briefly to clarify precisely which territories are subject to this constitutional status and as a result which Americans are the focus of this Article. Five American territories are grouped under this heading: American Samoa, the CNMI, Guam, Puerto Rico, and the U.S. Virgin Islands.⁹⁰

- Puerto Rico looms the largest of this group by virtue of its population and proximity to the rest of the United States. The United States conquered Puerto Rico in the Spanish-American War, and the Foraker Act in 1900 created a territorial government for the island.⁹¹ A little more than 1,000 miles southeast of Florida and about the size of Connecticut, Puerto Rico has a population of over 3 million people, following significant out-migration in the last few years.⁹² According to the U.S. Census Bureau, nearly 99% of Puerto

more specific ways in which powers are allocated between levels of government in particular areas of policy—the terms of individual federal bargains . . . that arise out of the politics of particular policy debates.”).

90. The CNMI and Puerto Rico are technically considered commonwealths, while American Samoa, Guam, and the U.S. Virgin Islands are considered territories. There are other islands over which the United States asserts jurisdiction; according to the U.S. Department of Interior, these islands have “[n]o permanent population” but are “[p]eriodically inhabited by military personnel or scientists.” *How Are U.S. States, Territories, and Commonwealths Designated in the Geographic Names Information System?*, U.S. GEOLOGICAL SURV., https://www.usgs.gov/faqs/how-are-us-states-territories-and-commonwealths-designated-geographic-names-information-system?qt-news_science_products=0#qt-news_science_products [<https://perma.cc/H8UR-CLL7>]. There are also the freely associated states of Micronesia, the Marshall Islands, and Palau. See Compact of Free Association, Micr.-U.S., May 14, 2003, T.I.A.S. No. 04-625; Compact of Free Association, Marsh. Is.-U.S., Apr. 30, 2003, T.I.A.S. No. 04-501; Compact of Free Association, Palau-U.S., Jan. 10, 1986, Hein’s No. KAV 4303.

91. Organic (Foraker) Act of 1900, ch. 191, 31 Stat. 77 (codified as amended in scattered sections of 48 U.S.C.).

92. Antonio Flores & Jens Manuel Krogstad, *Puerto Rico’s Population Declined Sharply After Hurricanes Maria and Irma*, PEW RSCH. CTR.: FACT TANK (July 26, 2019), <https://www.pewresearch.org/fact-tank/2019/07/26/puerto-rico-population-2018> [<https://perma.cc/W8T7-M4DM>]; Jaison R. Abel & Richard Deitz, *The Causes and Consequences of Puerto Rico’s Declining Population*, 20 FED. RSRV. BANK N.Y. CURRENT ISSUES ECON. & FIN.: SECOND DIST.

Ricans identified as “Hispanic or Latino.”⁹³ Most Puerto Ricans identified as White during the last census.⁹⁴

- Guam, like Puerto Rico, was conquered by the United States in the Spanish-American War. Guam became an organized territory in 1950.⁹⁵ Home to more than 150,000 people, Guam is about three times the size of the District of Columbia. According to the U.S. Census Bureau, the largest ethnic group is the Chamorros (indigenous to Guam and the CNMI) and the second is Chuukese (another Micronesian ethnic group).⁹⁶ There is a significant Filipino population as well. Roughly 3,800 miles from Hawaii, Guam is the westernmost territory of the United States.
- Acquired from Denmark in 1917, the U.S. Virgin Islands became an organized American territory in 1936, and Congress passed a revised organic act in 1954.⁹⁷ Located roughly 45 miles east of Puerto Rico and about 1,000 miles southeast of the continental United States, the U.S. Virgin Islands include the three islands of St. Croix, St. John, and St. Thomas. These islands make up about 134 square miles of land—a little less than twice the area of the District of Columbia. Roughly 100,000 people reside there. According to the U.S. Census Bureau, 76% of the population identifies as Black and 17.4% identify as Hispanic, Latino, or Spanish.⁹⁸
- The Northern Mariana Islands (CNMI) have been administered by the United States since 1947, first pursuant to a United Nations resolution.⁹⁹ Just north of Guam, the people of the Northern Mariana Islands had by referendum voted to join with Guam, but in 1969 Guam rejected the proposal.¹⁰⁰ The Northern Mariana Islands entered into a covenant as a commonwealth territory in 1976.¹⁰¹ Near-

HIGHLIGHTS, no. 4, 2014, https://www.newyorkfed.org/medialibrary/media/research/current_issues/ci20-4.pdf [<https://perma.cc/3GNL-8MUQ>].

93. *Quick Facts, Puerto Rico*, *supra* note 22.

94. *Id.*

95. Organic Act of Guam, ch. 512, 64 Stat. 384 (1950) (codified as amended at 48 U.S.C. §§ 1421–1424b).

96. GOWOROWSKA & WILSON, *supra* note 19, at 15.

97. Revised Organic Act of the Virgin Islands, ch. 558, 68 Stat. 497 (1954) (codified as amended at 48 U.S.C. §§ 1541–1645).

98. GOWOROWSKA & WILSON, *supra* note 19, at 18.

99. S.C. Res. 21, art. 2 (Apr. 2, 1947).

100. *Pacific Islanders: Territorial Status and Representation*, U.S. HOUSE REPRESENTATIVES.: HIST., ART & ARCHIVES, <https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Growing-Diversity/Pacific-Islanders> [<https://perma.cc/J6Q7-7SHA>].

101. Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, 264 (codified as amended at 48 U.S.C. § 1801 note (Text of Covenant)); *see also* Exec. Order No. 12,572, 3 C.F.R. 239 (1986).

ly half of the total population identifies as Asian, with Filipinos making up the largest ethnic group.¹⁰² A third of the population identifies as Pacific Islander, with Chamorros making up the most numerous group within that designation.¹⁰³ More than 50,000 Americans live on these fourteen islands.

- American Samoa has been an unincorporated U.S. territory since 1900.¹⁰⁴ About 2,500 miles southwest of Hawaii in the South Pacific, American Samoa consists of five main islands. The total land area is slightly larger than the District of Columbia and home to roughly more than 50,000 people. Most of the people in American Samoa identify as Pacific Islanders, with Samoans making up the majority of this group.¹⁰⁵

With that context in mind, we can proceed to the legal framework that governs these five territories. By and large, the legal academy tends to relegate cases and controversies involving territories to the background of American public law.¹⁰⁶ Some historians have begun to discuss the United States through the analytic lens of settler colonialism.¹⁰⁷ Others have sought to connect the Reconstruction struggle for full citizenship with the nation's fits and starts towards empire.¹⁰⁸ This Section cannot detail all the history or doctrinal developments that have led to territories being considered outside the default arrangements of American public law, but this Section can show

102. GOWOROWSKA & WILSON, *supra* note 19, at 15.

103. *Id.*

104. See Instrument of Cession by the Representatives of the People of Tutuila, Tutuila-U.S., Apr. 17, 1900, T.S. No. 314, <https://history.state.gov/historicaldocuments/frus1929v01/d853> [<https://perma.cc/XB2U-K5XD>]; see also *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1170–74 (D. Utah 2019) (discussing the status of American Samoans' rights following the cessation treaty), *argued*, No. 20-4019 (10th Cir. Sept. 23, 2020). As noted above, American Samoans are deemed “noncitizen nationals.” See *supra* note 16 and accompanying text; Michael Levenson, *American Samoans Should Be Granted U.S. Citizenship, Judge Rules*, N.Y. TIMES (Dec. 13, 2019), <https://www.nytimes.com/2019/12/13/us/american-samoa-us-citizenship.html> [<https://perma.cc/HV2K-UDDP>].

105. GOWOROWSKA & WILSON, *supra* note 19, at 15.

106. See Sanford Levinson, *Why the Canon Should Be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241 (2000).

107. Paul A. Kramer, *Power and Connection: Imperial Histories of the United States in the World*, 116 AM. HIST. REV. 1348, 1361 (2011) (defining settler colonialism “as the seizure of land and natural resources from indigenous populations, the politico-legal production of ‘territory,’ and governance through the rule of colonial difference”) (citing *SETTLER COLONIALISM IN THE TWENTIETH CENTURY: PROJECTS, PRACTICES, LEGACIES* (Caroline Elkins & Susan Pedersen, eds., 2005)).

108. See ERMAN, *supra* note 49, at 3 (“[W]ell into the twentieth century, fights over the past of Reconstruction and the future of empire were inextricably intertwined.”); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019) (connecting doctrinal developments to the treatment of indigenous peoples in the service of American empire).

how territorial Americans are placed outside the default arrangement of federal-state relations and, as a result, possess a status short of full citizenship.

Following the Civil War, the United States returned to its imperial ambitions on the North American continent and beyond. Yet the Civil War's legal legacy meant the acquisition of territory demanded a different legal path than it had in antebellum America. Now territorial expansion could only occur in a way that honored Reconstruction's constitutional amendments and civil rights statutes. But the promise of full, national citizenship enshrined in the Fourteenth Amendment could not overcome the racial beliefs in each of the branches of the national government at the turn of the twentieth century.

In the *Insular Cases*, the Supreme Court extended the sovereignty of the United States to territories without requiring the full extension of constitutional rights to those territories' residents, providing a legal framework for the United States to govern its unincorporated territories.¹⁰⁹ Beginning with *Downes v. Bidwell* in 1901 and arguably ending with *Balzac v. Porto Rico* in 1922, the Supreme Court construed the Constitution to permit Congress to decide whether a newly acquired territory was "incorporated" into the United States or merely a "territory appurtenant" to the United States.¹¹⁰ This formulation, first found in Justice Edward Douglas White's concurrence in *Downes* and then consolidated by Chief Justice Taft in *Balzac*, maintains that residents of U.S. territories do not have the same rights as residents in the states under the U.S. Constitution.¹¹¹

The reasoning deployed by the *Insular Cases* has been repeatedly excoriated as suspect and racist.¹¹² It is not a coincidence that eight of the Supreme

109. See generally RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015); Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 YALE L. & POL'Y REV. 57 (2013).

110. *Downes v. Bidwell*, 182 U.S. 244, 341–42 (1901) (White, J., concurring); *Balzac v. Porto Rico*, 258 U.S. 298, 304–05 (1922). *Downes v. Bidwell* represents the origin of the doctrine of territorial incorporation, "under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories." *Boumediene v. Bush*, 553 U.S. 723, 757 (2008); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-31, PUERTO RICO: INFORMATION ON HOW STATEHOOD WOULD POTENTIALLY AFFECT SELECTED FEDERAL PROGRAMS AND REVENUE SOURCES 82 (2014).

111. *Balzac*, 258 U.S. 298 (holding that the Sixth Amendment jury right does not apply in unincorporated territories); see also James T. Campbell, Note, *Island Judges*, 129 YALE L.J. 1888, 1944 (2020) ("The evolution of territorial courts since 1966 reveals that the justification for their differentiation has collapsed."); Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 590 (1985) ("A traditional explanation is . . . that it was sensible not to require life-tenured judges for the territories because these lands would eventually become states."); Stanley K. Laughlin, Jr., *The Constitutional Structure of the Courts of the United States Territories: The Case of American Samoa*, 13 U. HAW. L. REV. 379, 384 (1991) (discussing the origins of the constitutional doctrine under which Congress is not bound by Article III when appointing federal judges in the U.S. territories).

112. See, e.g., Torruella, *supra* note 109, at 68 ("The rules established in the *Insular Cases* were simply a more stringent version of the *Plessy* doctrine: the newly conquered lands were to be treated not only separately, but also *unequally*."); Doug Mack, *The Strange Case of Puerto Rico: How a Series of Racist Supreme Court Decisions Cemented the Island's Second-Class Sta-*

Court justices who decided *Downes v. Bidwell*, one of the more infamous *Insular Cases*, also decided *Plessy v. Ferguson*.¹¹³ 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[], differing from us in religion, customs, laws, methods of taxation and modes of thought" that are incompatible with "the administration of government and justice, according to Anglo-Saxon principles."¹¹⁴

Moreover, these territories are also constitutionally inferior to the United States' eighteenth and nineteenth century territories, in part because there is no expectation of eventual statehood.¹¹⁵ This status puts the territories in a position different from the two most recently admitted states to the Union (Hawai'i¹¹⁶ and Alaska¹¹⁷) though they share some important connections on the national government's reluctance to incorporate indigenous populations into the United States. As Professor Christina Ponsa-Kraus put it, the *Insular Cases* "rendered these territories essentially invisible . . . [,] neither fully 'domestic' nor fully 'foreign' . . . [,] and] devoid of both voting representation in the federal government and independent status on the international stage [A]t the top of nobody's agenda," the territories were "stripped of the power to set their own."¹¹⁸

tus, SLATE (Oct. 9, 2017, 5:45 AM), <https://slate.com/news-and-politics/2017/10/the-insular-cases-the-racist-supreme-court-decisions-that-cemented-puerto-ricos-second-class-status.html> [<https://perma.cc/2MGT-BBU5>].

113. See *Downes*, 182 U.S. 244; *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Nor is it surprising that Justice John Marshall Harlan dissented in both cases. See *Downes*, 182 U.S. at 375–91 (Harlan, J., dissenting); *Plessy*, 163 U.S. at 552–64 (Harlan, J., dissenting).

114. *Downes*, 182 U.S. at 287.

115. See Juan R. Torruella, *The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement*, in RECONSIDERING THE INSULAR CASES, *supra* note 109, at 64 ("Th[e] doctrine . . . created two kinds of territories: first, incorporated territories, which as it turned out, were all those acquired prior to the Spanish-American War and included Hawaii and Alaska, and second, unincorporated ones, all of which happened to have been annexed after the Spanish-American War, and which included Puerto Rico, the Philippines, Guam, and later, the US Virgin Islands"); see also FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001); JOSÉ A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE: NOTES ON THE LEGISLATIVE HISTORY OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS (1979).

116. See generally ERMAN, *supra* note 49, at 21 (discussing Congress's reluctance to annex Hawai'i, in part, because it would necessarily guarantee full citizenship to Hawaiians under the Fourteenth Amendment); SALLY ENGLE MERRY, COLONIZING HAWAII: THE CULTURAL POWER OF LAW (2000) (describing the law's role in the American conquest of Hawai'i).

117. Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America, Russ.-U.S., Mar. 30, 1867, 18 Stat. 671, 673 (carving out an exception for "uncivilized native tribes").

118. Christina Duffy Ponsa, *When Statehood Was Autonomy*, in RECONSIDERING THE INSULAR CASES, *supra* note 109, at 2. Each of the five territories send nonvoting delegates to the U.S. House of Representatives, but there are noteworthy political differences across the territories, including in the degree of self-government. See *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015) (pointing out that "the American Samoan territory is partially self-governed,

While the territories are a heterogeneous group across several dimensions, they do share a certain level of economic deprivation compared to the fifty states. The territories exhibit higher unemployment rates,¹¹⁹ lower median incomes,¹²⁰ and weaker public infrastructure relative to the rest of the United States.¹²¹ These territories are also particularly vulnerable to extreme weather events, which have become increasingly acute due to climate change.¹²² For instance, in 2017, Hurricane Irma, “one of the strongest and costliest hurricanes on record in the Atlantic basin,”¹²³ passed directly over the Virgin Islands, causing “widespread catastrophic damage.”¹²⁴ Two weeks

possessing a popularly elected bicameral legislature and similarly elected governor” but that the territory “remains under the ultimate supervision of the Secretary of the Interior”) (citing Exec. Order No. 10,264, 3 C.F.R. 447 (1951)). Nor does the difference in some territories being referred to as “commonwealths” appear to impact welfare administration.

119. See, e.g., BUREAU OF LAB. STATS., U.S. DEP’T OF LAB., USDL-19-2049, STATE EMPLOYMENT AND UNEMPLOYMENT—OCTOBER 2019 (2019), https://www.bls.gov/news.release/archives/laus_11192019.pdf [<https://perma.cc/4UPK-H4CP>] (calculating Puerto Rico’s October 2019 unemployment rate as higher than every state and the District of Columbia and more than twice the national average).

120. See ANDREW AUSTIN, CONG. RSCH. SERV., R45235, ECONOMIC AND FISCAL CONDITIONS IN THE U.S. VIRGIN ISLANDS 3 (2020) (“Typical incomes in the USVI are lower than on the U.S. mainland and poverty rates are higher.”)

121. See, e.g., *Puerto Rico Earns a “D-” in ASCE Infrastructure Report Card*, AM. SOC’Y CIV. ENG’RS (Nov. 12, 2019), <https://www.asce.org/templates/press-release-detail.aspx?id=34226> [<https://perma.cc/F23S-4JVD>].

122. See, e.g., Edward H. Allison & Hannah R. Bassett, *Climate Change in the Oceans: Human Impacts and Responses*, 350 SCIENCE 778 (2017); Trevor C. Hall, Andrea M. Sealy, Tannecia S. Stephenson, Shoji Kusunoki, Michael A. Taylor, A. Anthony Chen & Akio Kitoh, *Future Climate of the Caribbean from a Super-High-Resolution Atmospheric General Circulation Model*, 113 THEORETICAL & APPLIED CLIMATOLOGY 271 (2013); Nathan James Bennett, Jessica Blythe, Stephen Tyler & Natalie C. Ban, *Communities and Change in the Anthropocene: Understanding Social-Ecological Vulnerability and Planning Adaptations to Multiple Interacting Exposures*, 16 REG’L ENV’T CHANGE 907 (2016); Kevon Rhiney, *Geographies of Caribbean Vulnerability in a Changing Climate: Issues and Trends*, 9 GEOGRAPHY COMPASS 97 (2015); Joshua E. Cinner et al., *Building Adaptive Capacity to Climate Change in Tropical Coastal Communities*, 8 NATURE CLIMATE CHANGE 117 (2018); EPA, WHAT CLIMATE CHANGE MEANS FOR GUAM (2016), <https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-gu.pdf> [<https://perma.cc/WLM2-Z25F>]; Kate Cimini, *How Climate Change Is Threatening the Navy’s Footprint in the Pacific*, USA TODAY (June 28, 2018, 6:00 AM), <https://www.usatoday.com/story/news/politics/2018/06/28/climate-change-threatening-navys-bases-pacific-guam/710979002> [<https://perma.cc/P5QD-JAKE>]; Hannah Magnuson, *U.S. Territory of Guam Fights the Ravages of Climate Change*, PROGRESSIVE (Jan. 30, 2020), <https://progressive.org/dispatches/guam-fights-climate-change-magnuson-200130> [<https://perma.cc/CLK7-HRHR>]; Rebecca Hersher, *Climate Change Was the Engine That Powered Hurricane Maria’s Devastating Rains*, NPR (Apr. 17, 2019, 10:41 AM), <https://www.npr.org/2019/04/17/714098828/climate-change-was-the-engine-that-powered-hurricane-marias-devastating-rains> [<https://perma.cc/LQA4-JBAB>].

123. JOHN P. CANGIALOSI, ANDREW S. LATTO & ROBBIE BERG, NAT’L OCEANIC & ATMOSPHERIC ADMIN., NATIONAL HURRICANE CENTER TROPICAL CYCLONE REPORT: HURRICANE IRMA 1 (2018), https://www.nhc.noaa.gov/data/tcr/AL112017_Irma.pdf [<https://perma.cc/6JU8-VZK5>].

124. *Id.* at 14.

later, Hurricane Maria hit St. Croix before continuing on to devastate Puerto Rico.¹²⁵ The job losses following Hurricanes Irma and Maria in the U.S. Virgin Islands and Puerto Rico exceeded the job losses in New York City during the Great Recession.¹²⁶

Today, except in American Samoa,¹²⁷ federal law confers U.S. citizenship on everyone born in these territories.¹²⁸ Yet, due to the *Insular Cases*, citizenship for these Americans raise other questions. If the Constitution does not extend all the rights and privileges of citizenship to residents of American territories, then which rights apply?¹²⁹ The Supreme Court has characterized congressional power over territories as plenary.¹³⁰ The consequence of territories outside the constitutional scheme is to deliver them to the whims of

125. RICHARD J. PASCH, ANDREW B. PENNY & ROBBIE BERG, NAT'L OCEANIC & ATMOSPHERIC ADMIN., U.S. DEP'T OF COM., NATIONAL HURRICANE CENTER TROPICAL CYCLONE REPORT: HURRICANE MARIA 2 (2019), https://www.nhc.noaa.gov/data/tcr/AL152017_Maria.pdf [<https://perma.cc/4XVZ-K349>].

126. See JASON BRAM, FED. RSRV. BANK OF N.Y., PUERTO RICO AND THE U.S. VIRGIN ISLANDS AFTER HURRICANES IRMA AND MARIA 14 (2018), <https://www.newyorkfed.org/medialibrary/media/press/PressBriefing-PuertoRico-USVI-February222018.pdf> [<https://perma.cc/WH7K-R4ML>].

127. See 8 U.S.C. § 1408(1); see also *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1157 (D. Utah 2019) (discussing statutory recognition of American Samoans as noncitizen nationals), *argued*, No. 20-4019 (10th Cir. Sept. 23, 2020).

128. 8 U.S.C. § 1402 (Puerto Rico); *id.* § 1406(b) (U.S. Virgin Islands); *id.* § 1407(b) (Guam); 48 U.S.C. § 1801 note (Text of Covenant) (CNMI); see PEDRO A. MALAVET, AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO 38–42 (2004); Pedro A. Malavet, *The Inconvenience of a "Constitution [That] Follows the Flag . . . but Doesn't Quite Catch Up with It": From Downes v. Bidwell to Boumediene v. Bush*, 80 MISS. L.J. 181 (2010); see also Rose Cuisson Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673 (2017) (developing concept of the "noncitizen national"); Christina Duffy Burnett, *"They Say I Am Not an American . . .": The Noncitizen National and the Law of American Empire*, 48 VA. J. INT'L L. 659 (2008). See generally BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE (2006); KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989). Puerto Rico's citizenship status is just one example. Kyle Dropp & Brendan Nyhan, *Nearly Half of Americans Don't Know Puerto Ricans Are Fellow Citizens*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/upshot/nearly-half-of-americans-dont-know-people-in-puerto-ricoans-are-fellow-citizens.html> [<https://perma.cc/RW8A-5YG7>]; cf. DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES 261 (2019) (quoting one of Stephen Sondheim's lyrics from *West Side Story*, "Nobody knows in America, Puerto Rico's in America").

129. See *Tuaua v. United States*, 788 F.3d 300, 308 (D.C. Cir. 2015) ("Under the Insular framework the designation of fundamental extends only to the narrow category of rights and 'principles which are the basis of all free government.'") (quoting *Dorr v. United States*, 195 U.S. 138, 147 (1904)).

130. See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016); U.S. CONST. art. IV, § 3, cl. 2 (granting Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). See generally ERMAN, *supra* note 49, at 34 (describing how President McKinley and members of Congress settled on a middle ground in which Congress would determine the status of Puerto Rico and the Philippines).

Congress, a national legislative body in which they are not represented.¹³¹ This lack of formal and meaningful representation in the federal government means that territories are at a profound disadvantage with respect to relying on the political process to advocate for their interests, including when it comes to social protection.

As a result, Americans who live in U.S. territories lack *both* the political safeguards that constitutional law associates with the federalism of the American system *and* the fundamental rights jurisprudence that constitutional law provides for “discrete and insular minorities.”¹³² By placing territories outside the default arrangement of American public law, the federal government has built a dilapidated welfare state for Americans who happen to be territorial residents.

In light of the earlier discussion, this arrangement should not surprise us. After all, there are no capital “C” constitutional socioeconomic rights in the United States.¹³³ Many debate whether there are constitutional commitments or whether there are social rights embedded in statutes, but those scholarly conversations still agree on the primacy of Congress to instantiate these protections for citizens, whether it is the Social Security Act of 1935 or the pockmarked, but still powerful, Affordable Care Act of 2010.¹³⁴ In this way, residents of territories are not that dissimilar from other Americans in having their social citizenship defined by statutes and regulations.¹³⁵ The difference for these two groups is that the political safeguards upon which the public law process depends are absent where territorial Americans’ welfare is at issue.

To restate, social citizenship is an apt framework for understanding the federal programs that are the focus of this Article, both as they relate to citizens and institutions. Yet this framework is contested, and it operates within an American tradition that has equated whiteness with deservingness and systematically excluded Black Americans, indigenous Americans, immigrant groups, and territorial Americans. This Part has tried to show that we should not define an individual’s status in a polity solely on the basis of the political and civil rights typically associated with liberal constitutionalism but should also incorporate social protections that define modern life. That concept of social citizenship is in tension with a public law system that allows subnational units to provide drastically different services and levels of benefits. A safety net premised on a federal-state system neglects those Americans who have national citizenship but lack state residency, especially residents of ter-

131. Territories have delegates in the House of Representatives, but they cannot vote. CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R40555, DELEGATES TO THE U.S. CONGRESS: HISTORY AND CURRENT STATUS 6 (2015).

132. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

133. See Britton-Purdy et al., *supra* note 61, at 1808–09.

134. See, e.g., Luke Norris, *The Workers’ Constitution*, 87 *FORDHAM L. REV.* 1459, 1481–91 (2019).

135. See *infra* Part IV.

ritories. As the next Part shows, this is not simply a difference in form. The fact that Americans in territories are outside the default arrangement of social provision in the United States carries profound consequences for their lives and their ability to weather the inevitable hazards of our society, such as getting sick, caring for a loved one, losing a job, and growing old. And the lack of political representation in our national government leaves these Americans especially vulnerable to federal experimentation, disregard, and outright cuts.

II. TERRITORIAL WELFARE ADMINISTRATION

As described in Part I, the economic situation of the U.S. territories—combined with their particular vulnerabilities to climate change—means that territorial residents endure a level of need that rivals the poorest areas in the continental United States.¹³⁶ As a result, how the federal and territorial governments provide basic services is critically important to the people of these five territories. What follows in this Part is an analysis of how the federal government funds and territories administer food, medical, cash, and disability assistance.

When scholars enumerate the dimensions of social citizenship, they often agree on basic needs like food and medical assistance, while others add housing and education.¹³⁷ The demands of an all-embracing account would overwhelm a single law review article, but this Article can discuss how federal law addresses the needs of territorial Americans when it comes to disability, food, and medical assistance. As a result, this Article focuses on the three means-tested public assistance programs in the United States designed to address these needs: Medicaid, the Supplemental Nutrition Assistance Program (SNAP), and Supplemental Security Income (SSI). Along with the Earned Income Tax Credit,¹³⁸ these public benefit programs reach more Americans

136. See, e.g., BREAD FOR THE WORLD, FACT SHEET: HUNGER AND POVERTY IN PUERTO RICO (2019), <https://www.bread.org/sites/default/files/hunger-poverty-puerto-rico-march-2019.pdf> [<https://perma.cc/J546-88VK>]; Brian Glassman, *A Third of Movers from Puerto Rico to the Mainland United States Relocated to Florida in 2018*, U.S. CENSUS BUREAU: AM. COUNTS (Sept. 26, 2019), <https://www.census.gov/library/stories/2019/09/puerto-rico-outmigration-increases-poverty-declines.html> [<https://perma.cc/T99B-9LUJ>].

137. See *supra* notes 36–40 and accompanying text.

138. The EITC would be another candidate to include, but territorial residents do not pay federal income taxes and Puerto Ricans only began to qualify for the federal EITC a couple months ago. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9625, 135 Stat. 4, 155 (to be codified at I.R.C. § 7530); SEAN LOWRY, CONG. RSCH. SERV., R44651, TAX POLICY AND U.S. TERRITORIES: OVERVIEW AND ISSUES FOR CONGRESS (2016). Importantly, Puerto Rico implemented its own EITC a couple of years ago to reduce poverty among its people. ROSANNA TORRES & JAVIER BALMACEA, CTR. ON BUDGET & POL'Y PRIORITIES, WHY THE FEDERAL GOVERNMENT SHOULD SUPPORT PUERTO RICO'S NEW EITC (2019), <https://www.cbpp.org/sites/default/files/atoms/files/11-14-19tax.pdf> [<https://perma.cc/CQZ4-2LMX>] (pointing out that the maximum annual credit for a single parent with two children in Puerto Rico is \$1,500, compared to \$5,828 for the federal EITC).

than any other means-tested program¹³⁹ and after Social Security and Medicare represent the largest antipoverty expenditures in the federal budget.¹⁴⁰

Over the last fifty years, Medicaid, SNAP, and SSI have grown dramatically. While weaknesses in each program remain, including complicated applications, outdated asset tests,¹⁴¹ and some unnecessary state variation, each of these programs has become more generous and standardized, and they

139. As one official from the U.S. Government Accountability Office once explained it to Congress, “[m]eans-tested programs are restricted to individuals or families whose income falls below defined levels and who meet certain other eligibility criteria established for each program. To qualify for assistance, applicants generally must show proof of income and other documentation, which administering agencies must then verify.” U.S. GOV’T ACCT. OFF., GAO/T-HEHS-95-76, MEANS-TESTED PROGRAMS: AN OVERVIEW, PROBLEMS, AND ISSUES 1 (1995). The most recent data available for SNAP and Medicaid are from September 2020. Seventy-one million people received Medicaid in March. See *2020 09 Updated Applications, Eligibility Determinations, and Enrollment Data*, MEDICAID.GOV, <https://data.medicaid.gov/Enrollment/2020-09-Updated-applications-eligibility-determina/25zg-3gg8> [<https://perma.cc/UT76-6U2B>]. Nearly forty-three million people received SNAP that same month. *SNAP Data Tables*, U.S. DEP’T AGRIC. FOOD & NUTRITION SERV. (May 16, 2021), <https://fns-prod.azureedge.net/sites/default/files/resource-files/34SNAPmonthly-5.pdf> [<https://perma.cc/9FCT-DDKH>]; see also Manasi Deshpande, *Does Welfare Inhibit Success? The Long-Term Effects of Removing Low-Income Youth from the Disability Rolls*, 106 AM. ECON. REV. 3300, 3300 (2016) (describing SSI as “the largest nonwork-based cash welfare program in the United States”); *TANF Caseload Data 2020*, U.S. DEP’T HEALTH & HUM. SERVS. OFF. FAM. ASSISTANCE, <https://www.acf.hhs.gov/ofa/resource/tanf-caseload-data-2020> [<https://perma.cc/VB29-PB2J>]; *WIC Data Tables*, U.S. DEP’T AGRIC. FOOD & NUTRITION SERV., <https://www.fns.usda.gov/pd/wic-program> [<https://perma.cc/PV4U-A5ZB>]; *HUD User Datasets*, U.S. DEP’T HOUS. & URB. DEV., https://www.huduser.gov/portal/pdrdatas_landing.html#dataset-title [<https://perma.cc/QB6Z-T2XG>].

140. See *Mandatory Spending in 2019: An Infographic*, CONG. BUDGET OFF. (Apr. 15, 2020), <https://www.cbo.gov/publication/56325> [<https://perma.cc/N3AG-4GE2>]. For an overview of the federal budget process, see GRANT A. DRIESSEN, CONG. RSCH. SERV., R45202, THE FEDERAL BUDGET: OVERVIEW AND ISSUES FOR FY2019 AND BEYOND (2018). After Social Security and Medicare, Medicaid is the most expensive domestic program in the federal budget. See *National Health Expenditure Data: Historical*, CTRS. MEDICARE & MEDICAID SERVICES, <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical> [<https://perma.cc/TK99-567Z>]; Alex Boucher & Barb Rosewicz, *Medicaid Consumes Growing Slice of States’ Dollars*, PEW (Apr. 22, 2015), <https://www.pewtrusts.org/en/research-and-analysis/articles/2015/04/medicaid-consumes-growing-slice-of-states-dollars> [<https://perma.cc/4WZC-TMNA>]. The Social Security Administration reports close to \$56 billion spent on SSI last fiscal year. SOC. SEC. ADMIN., BUDGET OVERVIEW, FY 2021 CONGRESSIONAL JUSTIFICATION 3 fig.1, <https://www.ssa.gov/budget/FY21Files/2021BO.pdf> [<https://perma.cc/7XG7-NNEM>]. I focused on these programs, along with TANF, in an earlier article on immigrants and their families’ ability to access public benefits in the United States. See Andrew Hammond, *The Immigration-Welfare Nexus in a New Era?*, 22 LEWIS & CLARK L. REV. 501, 504–07 (2018).

141. See Pamela Foohey & Sara S. Greene, *How Government Rules Prevent Poor Americans from Saving*, POLITICO: THE AGENDA (Sept. 3, 2020, 4:30 AM), <https://www.politico.com/news/agenda/2020/09/03/how-government-keeps-poor-from-saving-407839> [<https://perma.cc/Z9GH-SSCM>].

have proven more difficult to cut than we might expect.¹⁴² For Medicaid and SNAP, that's in part because the fiscal federalism of these programs encourages state policymakers to broaden access to continue receiving federal funding for these programs.¹⁴³ For all three programs, the federal courts have also served as useful fora for benefit recipients to challenge unlawful agency action.¹⁴⁴ While it is important to not overstate the strengths of these programs, especially compared to antipoverty efforts in other wealthy democracies, it is also important to keep in mind that these programs have matured into crucial supports for low-income Americans.

A. Medical Assistance

1. The Federal Framework

Medicaid is the national healthcare program for low-income Americans. The federal expenditures of nearly \$600 billion a year for the program exceed any other domestic spending, save Medicare and Social Security.¹⁴⁵ It now accounts for one in every six dollars spent on health care.¹⁴⁶ As discussed above, for Medicaid to function the federal government requires states to contribute their own funding and administer the program in a manner that comports with various federal statutory and regulatory requirements.¹⁴⁷ The federal government pays a fixed percentage ranging from 50% to nearly 78% of most Medicaid costs.¹⁴⁸ That federal formula allows for a higher match for the Affordable Care Act expansion population and some other costs, as well as the standard 50% match for administrative costs.¹⁴⁹ States, in turn, have to enroll certain eligible groups, provide certain benefits, and follow statutory

142. I develop this argument at length as it relates to Medicaid and SNAP in *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 NW. U. L. REV. 361, 377–86 (2020).

143. See *id.* at 426–29.

144. See *id.* at 387–97; see also, e.g., *Sullivan v. Zebley*, 493 U.S. 521 (1990); *Colon v. Apfel*, 133 F. Supp. 2d 330, 337–38 (S.D.N.Y. 2001) (recounting the attempted congressional override of *Sullivan*).

145. Robin Rudowitz, Kendal Orgera & Elizabeth Hinton, *Medicaid Financing: The Basics*, KFF (Mar. 21, 2019), <https://www.kff.org/medicaid/issue-brief/medicaid-financing-the-basics> [<https://perma.cc/Y4SR-MR5T>]; see DRIESSEN, *supra* note 140, at 7 (“The largest mandatory programs, Social Security, Medicare, and the federal share of Medicaid, constituted 48% of all federal spending in FY2017.”).

146. Rudowitz et al., *supra* note 145.

147. Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PA. J. CONST. L. 431, 446–47 (2011) (describing states’ role).

148. *Federal Medical Assistance Percentage (FMAP) for Medicaid and Multiplier: FY 2021*, KFF, <https://www.kff.org/medicaid/state-indicator/federal-matching-rate-and-multiplier> [<https://perma.cc/Q4UK-KUE4>].

149. KAISER COMM’N ON MEDICAID & THE UNINSURED, KAISER FAM. FOUND., MEDICAID FINANCING: AN OVERVIEW OF THE FEDERAL MEDICAID MATCHING RATE (FMAP) 1 (2012), <https://www.kff.org/wp-content/uploads/2013/01/8352.pdf> [<https://perma.cc/6GCT-C2HE>].

requirements. But beyond those federal requirements, states have multiple options to cover additional people and services and decide how they want to deliver healthcare services.¹⁵⁰

2. Territories as a Medicaid Exception

The most significant difference between Medicaid in the states and Medicaid in the territories is the latter's lower level of federal support.¹⁵¹ The territories receive a lower federal matching rate for Medicaid spending than most states do.¹⁵² For instance, Puerto Rico's federal match rate is set by statute at 55%, a much lower rate than it would be if the rate were based, as it is for states, on per capita income.¹⁵³ Under the Social Security Act, each territory is provided what is sometimes referred to as "base funding" to serve their Medicaid populations.¹⁵⁴ However, instead of receiving federal matching funds for all medical assistance provided to eligible people as states do, the territories are subject to a hard cap on federal matching funds.¹⁵⁵ Thus, there is a certain limit at which the federal government will not finance further health assistance to Americans who live in the territories.¹⁵⁶ Such a cap

150. While states have some discretion in tailoring their own programs, especially through waivers, these efforts have been blocked in federal court. See Hammond, *supra* note 142, at 407–18 (discussing the Medicaid work requirements litigation).

151. Admittedly, Medicaid exhibits significant variation in the states, especially following *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). See Nicole Huberfeld, *The Universality of Medicaid at Fifty*, 15 YALE J. HEALTH POL'Y L. & ETHICS 67, 73 (2015). I take up this issue in Part IV.

152. Another way in which Americans in the territories receive deficient medical assistance compared to those in the states is that elderly Americans who live in the territories are not eligible for Medicare Low-Income Subsidies. Despite not having access to this assistance through Medicare, the territories can sometimes use Medicaid to provide access to prescription drugs. See ANNIE L. MACH, CONG. RSCH. SERV., R44275, PUERTO RICO AND HEALTH CARE FINANCE: FREQUENTLY ASKED QUESTIONS 20, 22 (2016).

153. The Affordable Care Act increased it from the previous rate of 50%. Samantha Artiga, Cornelia Hall, Robin Rudowitz & Barbara Lyons, *Health Care in Puerto Rico and the U.S. Virgin Islands: A Six-Month Check-Up After the Storms (Report)*, KFF (Apr. 24, 2018) <https://www.kff.org/medicaid/issue-brief/health-care-in-puerto-rico-and-the-u-s-virgin-islands-a-six-month-check-up-after-the-storms-report> [https://perma.cc/ASW6-NKT6]. Section 2005 of the ACA approved \$5.5 billion in Medicaid funding for Puerto Rico from July 1, 2011 to September 30, 2019. The Medicaid allotment was capped at \$321 million, but Puerto Rico used another \$803 million from the ACA funding. See MACH, *supra* note 152, at 26–27.

154. 42 U.S.C. § 1308(b)(1) (laying out the Medicaid annual grant formula for the territories).

155. *Id.* § 1308(c)(2)–(4) (defining and setting "mandatory ceiling amount" for each territory); *id.* § 1308(b)(1); see also LARA MERLING & JAKE JOHNSTON, CTR. FOR ECON. & POL'Y RSCH., MORE TROUBLE AHEAD: PUERTO RICO'S IMPENDING MEDICAID CRISIS 1 (2017), <http://cepr.net/images/stories/reports/puerto-rico-medicaid-2017-10.pdf> [https://perma.cc/XN3N-22FX] (describing the Puerto Rico cap "first set by the US Congress in 1968").

156. See Lizette Alvarez & Abby Goodnough, *Puerto Ricans Brace for Crisis in Health Care*, N.Y. TIMES (Aug. 2, 2015), <https://www.nytimes.com/2015/08/03/us/health-providers-brace-for-more-cuts-to-medicare-in-puerto-rico.html> [https://perma.cc/YGP4-QNN8]; Maria

also means that the effective matching is even lower.¹⁵⁷ If the federal expenditures for Puerto Rico's Medicaid were not capped, and were calculated using the same formula used for the fifty states, the federal matching rate would be 83%.¹⁵⁸ Similarly, American Samoa, Guam, the CNMI, and the U.S. Virgin Islands receive federal Medicaid funding at a lower matching rate than the fifty states until they hit the cap.¹⁵⁹

Furthermore, the statutory cap on territorial Medicaid funding has not grown at the same rate as the Medicaid program in the states.¹⁶⁰ Federal funding for Medicaid in the territories would be even greater if the federal government applied the standard federal poverty measurement to the territories. But the federal government applies different poverty metrics to the territories, and Puerto Rico's, for instance, has not been updated to reflect inflation since 1998.¹⁶¹ Even though the federal government funds Medicaid at a lower rate in the territories than it does in the states, a greater share of territorial residents have incomes that qualify for Medicaid. For example, approximately three-quarters of American Samoans are estimated to have

Levis, *The Price of Inequality for Puerto Rico*, HEALTH AFFS. (Dec. 29, 2015), <https://www.healthaffairs.org/doi/10.1377/hblog20151229.052430/full> [<https://perma.cc/4WCD-9KWR>]; Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of "Territorial Federalism,"* 131 HARV. L. REV. F. 65, 104 (2018).

157. EDWIN PARK, CTR. ON BUDGET & POL'Y PRIORITIES, ADDRESSING PUERTO RICO'S MEDICAID FUNDING SHORTFALLS WOULD HELP ENSURE FISCAL STABILITY AND GROWTH 2 (2016), <https://www.cbpp.org/sites/default/files/atoms/files/9-19-16health.pdf> [<https://perma.cc/4CBG-CLC8>].

158. JUDITH SOLOMON, CTR. ON BUDGET & POL'Y PRIORITIES, PUERTO RICO'S MEDICAID PROGRAM NEEDS AN ONGOING COMMITMENT OF FEDERAL FUNDS 1 (2019), <https://www.cbpp.org/sites/default/files/atoms/files/4-22-19health.pdf> [<https://perma.cc/J2SF-43DN>]; see Torruella, *supra* note 156, at 91–92 (discussing how Puerto Rico had to cover shortfalls in federal funding for Medicaid).

159. See *United States Virgin Islands: Medicaid Overview*, MEDICAID.GOV, <https://www.medicaid.gov/state-overviews/usvi.html> [<https://perma.cc/XX7L-UDYK>]; *Guam: Medicaid Overview*, MEDICAID.GOV, <https://www.medicaid.gov/state-overviews/guam.html> [<https://perma.cc/62RS-U4UT>]. Unlike the other U.S. territories, American Samoa operates its Medicaid program under a separate waiver. See 42 U.S.C. § 1396a(j). This provision allows American Samoa's Medicaid program to waive almost any federal requirement except the cap, the statutory matching rate (the FMAP), and the enumerated types of care and services described in section 1905(a) of the Social Security Act. See *id.* § 1396d(a); see also *American Samoa: Medicaid Overview*, MEDICAID.GOV, <https://www.medicaid.gov/state-overviews/american-samoa.html> [<https://perma.cc/USM6-VRJL>]; MEDICAID & CHIP PAYMENT & ACCESS COMM'N, FACTSHEET: MEDICAID AND CHIP IN AMERICAN SAMOA (2020), <https://www.macpac.gov/wp-content/uploads/2019/06/Medicaid-and-CHIP-in-American-Samoa.pdf> [<https://perma.cc/S2CD-4KM5>] ("American Samoa is exempt from all Medicaid data and reporting requirements under its Section 1902(j) waiver."); Fili Sagapolutele, *American Samoa Governor Says Small Economies 'Cannot Afford Any Reduction In Medicaid,'* PAC. ISLANDS REP. (Mar. 2, 2017, 2:31 PM), <http://www.pireport.org/articles/2017/03/02/american-samoa-governor-says-small-economies-cannot-afford-any-reduction> [<https://perma.cc/A38H-T7BR>].

160. See Vann R. Newkirk II, *The Historical Exclusion Behind the Puerto Rico Bankruptcy Crisis*, ATLANTIC (May 2, 2017), <https://www.theatlantic.com/politics/archive/2017/05/medicaid-funding-cap-puerto-rico/524973> [<https://perma.cc/5RK2-9F9E>].

161. See SOLOMON, *supra* note 158.

incomes below 200% of the federal poverty level, the top-line means test for Medicaid.¹⁶² Medicaid covers almost half of Puerto Rico's population;¹⁶³ approximately half of Puerto Rico's 3.2 million residents receive their medical care through a combination of Medicaid and Puerto Rico's other public programs.¹⁶⁴ Given the funding constraints, Puerto Rico is only able to provide ten of Medicaid's seventeen mandatory services.¹⁶⁵ This is especially problematic in light of Puerto Ricans' higher rates of health problems, including heart disease, diabetes, disability, and infant mortality.¹⁶⁶

B. Food Assistance

1. The Federal Framework

Supplemental Nutrition Assistance Program (SNAP) is the main federal assistance program that helps low-income households purchase food. Like Medicaid, SNAP benefits are considered an entitlement—a state needs to cover every eligible household which applies for the benefit.¹⁶⁷ SNAP households may use the benefit to purchase food at grocery stores and retailers authorized by the Food and Nutrition Service (FNS) to participate in the program. Federal law sets national eligibility rules and benefit amounts for food assistance.¹⁶⁸ SNAP's benefit formula calculates that families will spend 30% of their net income on food.¹⁶⁹ Households with no net income receive the maximum amount per month (\$504 for a family of three), but the aver-

162. MEDICAID & CHIP PAYMENT & ACCESS COMM'N, *supra* note 159.

163. PARK, *supra* note 157. Puerto Rico also uses an eligibility threshold based on a local poverty line that is roughly 40% of the federal poverty line. SOLOMON, *supra* note 158.

164. PARK, *supra* note 157; *see also* Selena Simmons-Duffin, *America's 'Shame': Medicaid Funding Slashed in U.S. Territories*, NPR (Nov. 20, 2019, 5:00 AM), <https://www.npr.org/sections/health-shots/2019/11/20/780452645/americas-shame-medicaid-funding-slashed-in-u-s-territories> [<https://perma.cc/JH26-UHHX>].

165. MEDICAID & CHIP PAYMENT & ACCESS COMM'N, FACTSHEET: MEDICAID AND CHIP IN PUERTO RICO (2020), <https://www.macpac.gov/wp-content/uploads/2019/07/Medicaid-and-CHIP-in-Puerto-Rico.pdf> [<https://perma.cc/VP7E-66S8>]. As will be discussed below, Congress has passed additional temporary funding for Medicaid. *See infra* Section III.B.

166. Artiga et al., *supra* note 153.

167. *See* 7 U.S.C. § 2014(a). SNAP benefits are provided on a "household" basis. A SNAP "household" means "an individual who lives alone or who, while living with others, customarily purchases food and prepares meals for home consumption separate and apart from the others; or . . . a group of individuals who live together and customarily purchase food and prepare meals together for home consumption." *Id.* § 2012(m)(1).

168. *See id.* § 2014(c)–(d) (outlining gross income test and exclusions from income); *id.* § 2017(a) (providing for calculation of the benefit amount). To qualify for benefits, a SNAP household's income must be at or below 130% of the federal poverty level, the household's net monthly income (after deductions for other major expenses like housing and childcare) must be less than or equal to 100% of the federal poverty level, and its assets must fall below limits set by the USDA. *See id.* § 2014(c)–(e), (g).

169. *See id.* § 2017(a).

age monthly benefit is roughly half that (\$253).¹⁷⁰ The average monthly benefit per person is \$125 a month or \$1.40 per meal.¹⁷¹ It is not surprising, then, that most SNAP benefits are spent within the first half of a given month.¹⁷²

2. Territories as a SNAP Exception

All fifty states, the District of Columbia, Guam, and the U.S. Virgin Islands participate in SNAP. But federal law excludes Puerto Rico, American Samoa, and the CNMI from participating in SNAP. Instead, these territories receive a capped block grant for basic food assistance. In other words, the United States has a national food assistance scheme for all Americans except those who live in certain territories.¹⁷³ The following subsection digs deeper into how the three territories navigate nutrition assistance.

The Food Stamp Program had previously operated in Puerto Rico, putting its food stamp program on the same footing as the states' programs.¹⁷⁴ As part of the Omnibus Budget Reconciliation Act of 1981, President Reagan and Congress removed Puerto Rico from the national food assistance scheme and created a separate program, the Nutrition Assistance Program (NAP).¹⁷⁵ NAP was permanently authorized in 1985 and continues to be how American citizens in Puerto Rico, American Samoa, and the CNMI receive food assistance. While the block grant is referred to as NAP in each of these territories, the rules vary across each.

170. KATHRYN CRONQUIST, U.S. DEP'T OF AGRIC., REPORT NO. SNAP-19-CHAR, CHARACTERISTICS OF SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM HOUSEHOLDS: FISCAL YEAR 2018, at 9, 45, 109 (2019).

171. *See id.* at 118.

172. Karen S. Hamrick & Margaret Andrews, *SNAP Participants' Eating Patterns over the Benefit Month: A Time Use Perspective*, PLOS ONE (2016), <https://doi.org/10.1371/journal.pone.0158422> [<https://perma.cc/QKT3-AHHV>].

173. *See* ANNE PETERSON ET AL., U.S. DEP'T OF AGRIC., ASSESSING THE FEASIBILITY OF IMPLEMENTING SNAP IN THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 1–2 (2016), <https://fns-prod.azureedge.net/sites/default/files/ops/SNAPCNMI.pdf> [<https://perma.cc/GR9J-UYBY>] (describing how federal legislation gave USDA the authority to fund food assistance in the CNMI via a block grant). SNAP also does not reach members of the more than 250 federally recognized tribes that participate in a commodity food distribution program (FDPIR). *See* FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., FOOD DISTRIBUTION PROGRAM ON INDIAN RESERVATIONS (2020), <https://fns-prod.azureedge.net/sites/default/files/resource-files/fdpir-program-fact-sheet-2020-for%20website.pdf> [<https://perma.cc/N4PR-LYJB>].

174. Food Stamp Act of 1964 Amendments, Pub. L. No. 91-671, sec. 2(c), § 3(j), 84 Stat. 2048, 2048 (1971) (current version at 7 U.S.C. § 2012(s)).

175. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 116, 95 Stat. 357, 364–66. Most sources suggest Congress was motivated to remove Puerto Rico from the food stamps program as part of a broader effort to cut the cost of the program. *See, e.g.*, BRYNNE KEITH-JENNINGS & ELIZABETH WOLKOMIR, CTR. ON BUDGET & POL'Y PRIORITIES, HOW DOES HOUSEHOLD FOOD ASSISTANCE IN PUERTO RICO COMPARE TO THE REST OF THE UNITED STATES? (2020), <https://www.cbpp.org/sites/default/files/atoms/files/11-27-17fa.pdf> [<https://perma.cc/YY53-7CT3>].

The NAP block grants and SNAP share the same purpose: “to provide low-income households with access to a nutritious diet through increased food purchasing power.”¹⁷⁶ However, the delivery and size of the two benefits differ. When Congress created NAP grants, the Food Stamp Program was still coupon-based. NAP, by contrast, was cash-based. Compared to SNAP, the food assistance program for these territories had stricter eligibility requirements and smaller benefit amounts. However, because NAP was cash-based, there were fewer restrictions on what recipients could purchase with the benefit.¹⁷⁷ NAP determines eligibility based on net income and asset limits.¹⁷⁸

Another notable difference between NAP and SNAP is that NAP originally permitted a small portion of the monthly allowance to be redeemed for cash.¹⁷⁹ However, the 2014 Farm Bill mandated a gradual phaseout of the cash withdrawal option, and starting this fiscal year, no benefits will be in the form of cash.¹⁸⁰ SNAP recipients can use their EBT card to purchase plants and seeds that produce food but not prepared meals for immediate consumption (with some exceptions).¹⁸¹

Territorial food assistance also uses different income calculations. For instance, NAP has no set gross income limits.¹⁸² The net income level, though, is lower than SNAP.¹⁸³ But the benefit levels are also different. The maximum monthly food assistance benefits for these territorial residents are roughly 60% of the maximum monthly benefits under SNAP.¹⁸⁴

176. MARY KAY FOX, WILLIAM HAMILTON & BIING-HWAN LIN, U.S. DEP’T OF AGRIC., NO. 19-3, EFFECTS OF FOOD ASSISTANCE AND NUTRITION PROGRAMS ON NUTRITION AND HEALTH: VOLUME 3, LITERATURE REVIEW 286 (2004), https://www.ers.usda.gov/webdocs/publications/46556/30240_fanrr19-3_002.pdf [<https://perma.cc/K6Y6-N3EH>]; ANNE PETERSON ET AL., U.S. DEP’T OF AGRIC., IMPLEMENTING SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM IN PUERTO RICO: A FEASIBILITY STUDY 54 (2010), <https://fns-prod.azureedge.net/sites/default/files/PuertoRico.pdf> [<https://perma.cc/Z26H-UM77>].

177. See FOX ET AL., *supra* note 176, at 286–91 (noting the research gaps relating to the impacts of NAP).

178. *Nutrition Assistance for Puerto Rico*, BENEFITS.GOV, <https://www.benefits.gov/benefits/benefit-details/363> [<https://perma.cc/QTE6-KV6K>]. While “SNAP considers earned income from wages, salaries, tips, commissions, self-employment, and independent contracting, as well as unearned income[,] NAP considers similar categories of income but applies more exemptions and exclusions to some income categories.” KEITH-JENNINGS & WOLKOMIR, *supra* note 175, at 8 n.28.

179. PETERSON ET AL., *supra* note 176, at C-14.

180. U.S. DEP’T OF AGRIC., EXPLANATORY NOTES—FOOD AND NUTRITION SERVICE 34-92 (2021), <https://www.usda.gov/sites/default/files/documents/32fns2021notes.pdf> [<https://perma.cc/XR76-V6Y9>].

181. PETERSON ET AL., *supra* note 176, at 42.

182. *Id.* at C-11 to C-12.

183. *Id.* at C-12.

184. See KEITH-JENNINGS & WOLKOMIR, *supra* note 175, at 12; PETERSON ET AL., *supra* note 176, at C-4. To be sure, not every recipient receives the maximum benefit under either program, so it may not translate into similar benefit disparities across all households.

As a result, the food assistance programs in these three territories are unable to provide sufficient assistance in the face of natural disaster and recessions because unlike SNAP, which operates under the entitlement structure, it cannot serve all applicants that meet eligibility requirements.¹⁸⁵ Thus, these three territories are disadvantaged with respect to household food assistance. Unlike the rest of the United States citizenry, Americans who live in these three territories do not have access to a food assistance program that can expand and contract to accommodate changing need.

C. Disability Assistance

1. The Federal Framework

Supplemental Security Income (SSI) is a cash benefit received by over eight million Americans who are elderly, blind, or have a disability as defined by federal law.¹⁸⁶ The maximum monthly SSI benefit for an individual recipient is set at \$794 and is not based on a recipient's prior earnings.¹⁸⁷ Furthermore, the income threshold is set nationwide and the asset test is much lower than other means-tested programs.¹⁸⁸ Notably, SSI recipients who live alone, or where all household members receive SSI, are eligible for SNAP and typically eligible for Medicaid.¹⁸⁹ Lastly, as a part of the larger Social Security apparatus, SSI recipients have the same recourse to administrative procedure as recipients of benefits through the Social Security Disability Insurance (SSDI) program.¹⁹⁰

185. KEITH-JENNINGS & WOLKOMIR, *supra* note 175, at 1.

186. See 42 U.S.C. § 1382c(a); see also *Sullivan v. Zebley*, 493 U.S. 521, 541 (1990) (ruling that SSI determinations for claims by children were inconsistent with the "comparable severity" standard of the Social Security Act); CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: SUPPLEMENTAL SECURITY INCOME 1 (2020) https://www.cbpp.org/sites/default/files/atoms/files/PolicyBasics_SocSec-IntroToSSI.pdf [<https://perma.cc/N7B9-QKDP>].

187. *SSI Federal Payment Amounts for 2021*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/cola/SSI.html> [<https://perma.cc/G8QZ-FJQM>].

188. See *id.* The asset limit has not been raised since 1984. JACK SMALLIGAN & CHANTEL BOYENS, URB. INST., IMPROVING THE SUPPLEMENTAL SECURITY INCOME PROGRAM FOR ADULTS WITH DISABILITIES 18 (2019), https://www.urban.org/sites/default/files/publication/100096/improving_the_supplemental_security_income_program_for_adults_with_disabilitie_s.pdf [<https://perma.cc/E3NW-HUKL>].

189. SOC. SEC. ADMIN., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) FACTS <https://www.ssa.gov/pubs/EN-05-10101.pdf> [<https://perma.cc/EF7T-RV47>]; Kalman Rupp & Gerald F. Riley, *State Medicaid Eligibility and Enrollment Policies and Rates of Medicaid Participation Among Disabled Supplemental Security Income Recipients*, 76 SOC. SEC. BULL., no. 3, 2016, at 17.

190. *Disability Evaluation Under Social Security*, SOC. SEC. ADMIN., <https://www.ssa.gov/disability/professionals/bluebook/general-info.htm> [<https://perma.cc/2PWQ-GBAS>].

2. Territories as an SSI Exception

The SSI program operates in the fifty states, the District of Columbia, and the CNMI.¹⁹¹ Guam, Puerto Rico, and the U.S. Virgin Islands have no SSI program. SSI benefits are not available to these territorial residents. Instead, these Americans are eligible to receive federally funded benefits through the Aid to the Aged, Blind, and Disabled (AABD) programs that SSI replaced.¹⁹² And neither AABD nor SSI operates in American Samoa.¹⁹³

History provides needed context as to how this came to pass. Prior to 1950, no federal Social Security payments were made to residents of Puerto Rico or the U.S. Virgin Islands. Congress debated whether to extend public benefits to both territories.¹⁹⁴ Ultimately, the enacted bill, H.R. 6000, meant that employment in Puerto Rico and the U.S. Virgin Islands would be covered through Social Security's contributory programs, and Puerto Rico and the U.S. Virgin Islands were treated like states.¹⁹⁵ The Social Security Amendments also meant that Puerto Rico and the U.S. Virgin Islands were able to administer the AABD programs similar to states.¹⁹⁶ In 1958, Congress extended AABD to Guam.¹⁹⁷ The fifty states and the District of Columbia also operated AABD into the 1970s.

In 1972, Congress replaced, and President Nixon signed into law, the various state-administered AABD programs with a national means-tested disability program called Supplemental Security Income (SSI).¹⁹⁸ Congress excluded Guam, the U.S. Virgin Islands, and Puerto Rico from SSI,¹⁹⁹ but extended eligibility to residents of the Northern Mariana Islands a few years

191. 42 U.S.C. §§ 1381–1383f; GREEN BOOK, *supra* note 29.

192. GREEN BOOK, *supra* note 29.

193. *Id.* (“Residents of American Samoa are not eligible for SSI or benefits under the aged, blind, and disabled grants.”).

194. WILLIAM R. MORTON, CONG. RSCH. SERV., MEMORANDUM: CASH ASSISTANCE FOR THE AGED, BLIND, AND DISABLED IN PUERTO RICO 14 (2016).

195. Social Security Act Amendments of 1950, ch. 809, sec. 104(a), § 210(h), 64 Stat. 477, 500.

196. *See* MORTON, *supra* note 194.

197. *See Chronology: 1600s–1800s*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/1950.html> [<https://perma.cc/RE64-RFXQ>].

198. *See* Social Security Amendments of 1972, Pub. L. No. 92-603, sec. 301, §§ 1601–1634, 86 Stat. 1329, 1465–78 (1972) (codified as amended at 42 U.S.C. §§ 1381–1383f).

199. Social Security Amendments of 1972 § 303(a). Section 303(a) repealed Titles I, X, and XIV of the Social Security Act, and section 301 amended Title XVI to create the SSI program effective on January 1, 1974. *Id.* However, section 303(b) provided that the repeals and amendments made to the aforementioned titles do not apply to Puerto Rico, the U.S. Virgin Islands, and Guam. *Id.* (codified at 42 U.S.C. § 301 note (Puerto Rico, Guam, and the Virgin Islands)). Consequently, SSI was not extended to the territories. Guam and the U.S. Virgin Islands continue to operate Old-Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled under Titles I, X, and XIV, while Puerto Rico continues to operate Aid to the Aged, Blind, or Disabled (AABD) under Title XVI.

later.²⁰⁰ There are some exceptions for children who live in one of the excluded territories but whose parents are serving in the U.S. military.²⁰¹ The federal government still provides funding to the territories to help pay for costs of providing cash assistance to the needy, aged, blind, or disabled, but this funding is significantly less than comparable expenditures for SSI.²⁰²

Federal matching grants help fund these disability assistance programs so long as the territories meet certain statutory criteria. To qualify for federal matching grants, a territory must submit a plan to the U.S. Department of Health and Human Services assuring the federal government that the program will be administered in conformity with federal law.²⁰³ Territories can set the income thresholds and the benefit levels for the programs. The federal government will provide 75% of benefit payments, with the territories paying 25%.²⁰⁴ But as with food assistance and healthcare, federal law caps AABD assistance for the territories. This ceiling of support is set by statute and does not reflect inflation.²⁰⁵

200. Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, 268 (codified as amended at 48 U.S.C. § 1801 note (Text of Covenant)).

201. See SOC. SEC. BULL.: ANN. STAT. SUPPLEMENT 18 (2000). One such exception allows for SSI eligibility to be continued for

a disabled or blind child who was receiving SSI benefits while living in the United States and is now living with a parent who is a member of the U.S. Armed Forces assigned to permanent duty ashore outside the United States, but not where the parent is stationed in Puerto Rico or the territories and possessions of the United States.

Id. That provision was extended to a child whose parent is a member of the U.S. armed forces and stationed in Puerto Rico or the territories and possessions of the United States. Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, sec. 13734, § 1614(a)(1)(B)(ii), 107 Stat. 312, 662 (codified at 42 U.S.C. § 1382c(a)(1)(B)(ii)).

202. MORTON, *supra* note 194, at 4, 12. Specifically, the federal government provides funding to “the separate programs of Old-Age Assistance (OAA; Title I), Aid to the Blind (AB; Title X), and Aid to the Permanently and Totally Disabled (APTD; Title XIV); [and] the single program of Aid to the Aged, Blind, or Disabled (AABD; Title XVI).” *Id.* at 4.

203. *Id.* at 6.

204. *Id.*

205. *Id.* at 6–7.

TABLE 1: FOOD, MEDICAL, AND DISABILITY ASSISTANCE
IN THE STATES AND TERRITORIES²⁰⁶

	FOOD ASSISTANCE	MEDICAID ASSISTANCE	DISABILITY ASSISTANCE
STATES / D.C.	SNAP (entitlement, no statutory cap)	MEDICAID (entitlement, no statutory cap)	SSI (entitlement, no statutory cap)
AMERICAN SAMOA	NAP (block grant)	MEDICAID (matching percentage with statutory cap)	NO PROGRAM
GUAM	SNAP (entitlement, no statutory cap)	MEDICAID (matching percentage with statutory cap)	AABD (matching percentage with statutory cap)
CNMI	NAP (block grant)	MEDICAID (matching percentage with statutory cap)	SSI (entitlement, no statutory cap)
PUERTO RICO	NAP (block grant)	MEDICAID (matching percentage with statutory cap)	AABD (matching percentage with statutory cap)
U.S. VIRGIN ISLANDS	SNAP (entitlement, no statutory cap)	MEDICAID (matching percentage with statutory cap)	AABD (matching percentage with statutory cap)

As one can see from Table 1, no American territory can lay claim to a safety net that is comparable to any of the fifty states or the District of Columbia. *Some* territories have access to *one* of the federal public benefits: Americans in Guam and the U.S. Virgin Islands have access to SNAP, and Northern Mariana Islanders have access to SSI. But by and large, Americans who reside in territories face limited federal funding for food, medical, or disability assistance. Consequently, no territory can provide basic services with the kind of federal support states enjoy, and those Americans who do receive assistance in the territories typically receive much lower levels of support.

206. For substantive discussion of each relevant category, see *supra* Section II.B.2 (regarding food assistance); *supra* Section II.A.2 (regarding medical assistance); *supra* Section II.C.2 (regarding disability assistance).

TABLE 2: MAXIMUM GRANTS FOR AMERICANS FOR
FOOD AND DISABILITY ASSISTANCE

	FOOD ASSISTANCE ²⁰⁷	DISABILITY ASSISTANCE ²⁰⁸
STATES/ D.C.	\$535 for 48 states & D.C.; \$659 to \$1,024 (Alaska); \$986 (Hawaii)	\$783
AMERICAN SAMOA	\$127 per person	No program
GUAM	\$789	Unavailable (average grant was \$150 in 2011)
CNMI	\$541 (average benefit \$541 per household)	Unavailable (average grant was \$629 in 2019)
PUERTO RICO	\$315 (average benefit \$149.51) ²⁰⁹	\$75 (plus benefit for shelter costs)
U.S. VIRGIN ISLANDS	\$688	Unavailable (average grant was \$176 in 2011)

As one can see from Table 2, a three-person household in one of lower 48 states could receive up to \$535 in food assistance. A three-person house-

207. Unless otherwise stated, all figures are based on assistance for a three-person household. U.S. DEP'T OF AGRIC., SNAP—FISCAL YEAR 2021 COST-OF-LIVING ADJUSTMENTS (2020), <https://fns-prod.azureedge.net/sites/default/files/resource-files/COLAMemoFY2021.pdf> [<https://perma.cc/E45D-LKK7>]; KEITH-JENNINGS & WOLKOMIR, *supra* note 175, at 12; U.S. DEP'T OF AGRIC., *supra* note 180, at 34-92 to -93.

208. MORTON, *supra* note 194, at 4, 10, 21 tbl.8; SOC. SEC. ADMIN., ANNUAL REPORT OF THE SUPPLEMENTAL SECURITY INCOME PROGRAM 7 (2020); SOC. SEC. ADMIN., PUB. NO. 13-11827, SSI ANNUAL STATISTICAL REPORT, 2019, at 24 tbl.5 (2020), https://www.ssa.gov/policy/docs/statcomps/ssi_asr/2019/sect02.pdf [<https://perma.cc/F7LS-R22G>].

209. Email from Miles Patrie, Food & Nutrition Serv., to author (Sept. 17, 2020, 9:27 AM) (on file with author).

hold in Puerto Rico receives \$315 in food assistance, but forty-five miles away, a similar household in the U.S. Virgin Islands could receive more than twice that amount. Why the discrepancy? One territory is included in SNAP, the other is not. The same is true for disability assistance. An American who receives SSI in the fifty states and the District of Columbia would receive \$783 in monthly benefits. In Puerto Rico, a family would receive \$75 plus a small housing-related benefit.

Medicaid, SNAP, and SSI are manifestations, albeit imperfect ones, of American social citizenship. The ability to weather unemployment and sickness, to live with disabilities and food insecurity, for periods of time or permanently, go to the promise of full citizenship. Americans in the territories may be U.S. citizens, but their social citizenship, as this Part shows, is lacking. As the next Part relates, these differences in how federal law treats Americans in the territories are begging to be challenged—in court and in Congress.

III. CHALLENGING THE STATUS QUO IN COURTS AND CONGRESS

As the previous Part shows, compared to Americans who live in the states, Americans who live in territories experience a different and, in many ways, deficient level of social protection. These deficiencies in territorial welfare administration cut across various federal programs, including the three major programs that provide food, medical, and disability assistance to low-income Americans. However, there are now multiple challenges to this status quo in the federal courts and Congress. This Part begins with an analysis of the most promising litigation strategy—that denying territorial Americans access to federal public benefits violates the Constitution's equal protection guarantee. This Part then investigates various legislative fixes, some offering temporary relief and others focused on structural changes to territorial welfare administration.

A. *Challenging Territorial Welfare Administration in Court*

In a series of recent lawsuits, Americans living in the territories have challenged the status quo of their second-class citizenship. They have done so on various issues including voting rights and birthright citizenship.²¹⁰ Among these challenges is a series of lawsuits brought by Americans seeking to invalidate various provisions of the Food Stamp Act and the Social Security Act that treat Americans who live in territories differently from Ameri-

210. See *Segovia v. United States*, 880 F.3d 384 (7th Cir. 2018) (challenging voting restrictions in Guam, Puerto Rico, and the U.S. Virgin Islands); *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah 2019) (granting plaintiffs' motion for summary judgment that included a declaratory judgment that persons born in American Samoa are citizens of the United States under the Citizenship Clause of the Fourteenth Amendment and accordingly that 8 U.S.C. § 1408(1) is unconstitutional), *argued*, No. 20-4019 (10th Cir. Sept. 23, 2020). *But see* *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015) (holding that the Constitution does not require birthright citizenship for residents of American Samoa).

cans who live in states.²¹¹ This Section provides the doctrinal context and then tests the strength of the various constitutional arguments by the plaintiffs and their government.

1. Doctrinal Context: Equal Protection and the Right to Travel

The Supreme Court has held that discrimination by the federal government violates the Fifth Amendment when it constitutes “a denial of the due process of law.”²¹² The Supreme Court has identified an equal protection component of the Fifth Amendment to strike down federal legislation that discriminates against groups in the provision of public benefits programs, including SNAP.²¹³ However, equal protection has generally not been a promising avenue for Americans to attack federal welfare programs, whether or not they live in the territories.²¹⁴ Federal courts do not approach either issue with strict scrutiny because neither poverty nor territorial residency is considered a suspect classification.²¹⁵ As a result, a federal court will sustain a legislative classification “if the classification itself is rationally related to a legitimate governmental interest.”²¹⁶ The application of equal protection, the Supreme Court has warned, is “not a license for courts to judge the wisdom,

211. See *United States v. Vaello-Madero*, 956 F.3d 12, 15–16 (1st Cir. 2020), *cert. granted*, 141 S. Ct. 1462 (2021) (mem.); *Peña Martínez v. U.S. Dep’t of Health & Hum. Servs.*, 478 F. Supp. 3d 155 (D.P.R. 2020), *appeal docketed*, No. 20-1946 (1st Cir. Oct. 2, 2020); *Schaller v. Soc. Sec. Admin.*, No. 18-1625, 2020 WL 956422, at *4 (W.D. Pa. Feb. 27, 2020), *aff’d in part, rev’d in part*, No. 20-1876, 2021 WL 237273 (3rd Cir. Jan. 25, 2021).

212. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

213. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 532–33 (1973). The Supreme Court has made clear that a federal court’s “[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (per curiam); see also *United States v. Windsor*, 570 U.S. 744, 774 (2013) (“While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.”); *Bolling*, 347 U.S. at 500 (“[I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”).

214. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); see also Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, and Dialogic Default*, 35 *FORDHAM URB. L.J.* 629, 637–44 (2008) (discussing *Dandridge* and its legacy).

215. *Harris v. McRae*, 448 U.S. 297, 323 (1980) (“[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification.” (citation omitted)); see Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 *U. PA. L. REV.* 261, 263–64 (1987). For alternative views from the academy during this period, see Peter B. Edelman, Essay, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 *HASTINGS L.J.* 1, 3 (1987); William H. Clune III, *The Supreme Court’s Treatment of Wealth Discriminations Under the Fourteenth Amendment*, 1975 *SUP. CT. REV.* 289; Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 *HARV. L. REV.* 7, 9 (1969); see also Cary Franklin, *The New Class Blindness*, 128 *YALE L.J.* 2, 17–46 (2018) (discussing these intellectual and doctrinal developments).

216. *Moreno*, 413 U.S. at 533 (citation omitted).

fairness, or logic of legislative choices.”²¹⁷ Equal protection challenges that do not rise to the level of strict scrutiny but require a quasi-heightened review, sometimes referred to as “rational basis with bite,”²¹⁸ have led to some of the most significant constitutional rights cases of the last few decades, including in the area of LGBTQ rights.²¹⁹

Another potential constitutional challenge would be to allege that denying public benefits to some Americans on the basis of where they reside in the United States violates their constitutional right to travel freely across the country. These “right to travel” cases ran headlong into the widespread practice, rooted in the common law, of state and local governments denying entry to or expelling poor people.²²⁰ In *Edwards v. California*, the Supreme Court struck down a California statute, colloquially known as the “Okie law,” that made it a misdemeanor to knowingly assist a poor person in entering the state.²²¹ Roughly thirty years later, legal aid attorneys relying on *Edwards* and the changing jurisprudence on vagrancy began challenging welfare rules that excluded new residents.²²² In *Shapiro v. Thompson*, the Supreme Court considered three consolidated cases challenging welfare residency laws in Connecticut, the District of Columbia, and Pennsylvania. Each case involved a statutory provision imposing a one-year wait period before residents new to the state could receive AFDC, an earlier federal cash assistance program. The Court reasoned that imposing a waiting period on welfare benefits violates a poor American’s fundamental right to travel.²²³ Five

217. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993).

218. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–19 (1972).

219. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 672–73 (2015); *United States v. Windsor*, 570 U.S. 744, 769–70 (2013).

220. See HIDETAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES & THE 19TH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* (2017).

221. 314 U.S. 160 (1941); see also Clare Pastore, *When Paupers Became People: Edwards v. California (1941)*, in *THE POVERTY LAW CANON: EXPLORING THE MAJOR CASES* 13, 23–28 (Marie A. Failinger & Ezra Rosser eds., 2016) (discussing the common law tradition and its implications for *Edwards*).

222. See RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S*, 178–80 (2016).

223. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); see also *Saenz v. Roe*, 526 U.S. 489, 500 (1999) (“The ‘right to travel’ discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.”); KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972*, at 264 (2016) (“*Shapiro* signaled that poor people were citizens of the nation, first and foremost, and that their rights as national citizens could trump the longstanding prerogatives of state and local governments.”). Incidentally, the Social Security Act explicitly allowed states to use durational residence requirements. 42 U.S.C. § 306. As California Attorney General, Earl Warren defended the statute at issue in *Edwards v. California*. Pastore, *supra* note 221, at 23.

years later, the Court struck down Arizona's durational residence requirement for free medical care because it "penalize[d] indigents for exercising their right to migrate to and settle in that State."²²⁴ There, the Supreme Court elaborated that "the right of interstate travel must be seen as insuring new residents the same right to vital government[al] benefits and privileges in the States to which they migrate as are enjoyed by other residents."²²⁵

However, in *Califano v. Torres*, the Supreme Court declined to extend these decisions to Puerto Rican residents.²²⁶ There, the Supreme Court summarily reversed a three-judge District Court ruling that held the SSI program unconstitutionally excluded Puerto Rican residents.²²⁷ In its per curiam opinion, the Court admitted that "[f]or purposes of this opinion we may assume that there is a virtually unqualified constitutional right to travel between Puerto Rico and any of the 50 States of the Union," but that the doctrine has never held that a newcomer to a state should "enjoy[] those benefits in the State from which he came."²²⁸ Instead, the Court fell back on its rational-basis analysis, reminding the lower federal courts 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."²²⁹

The Court in *Torres* then proceeded to examine, in a single footnote, the purported reasons for excluding Puerto Ricans from the SSI program, none of which are particularly persuasive. First, SSI was (and still is) funded by general revenue, and Puerto Rican "residents do not contribute to the public treasury."²³⁰ Second, the cost of treating Puerto Rico as a state under the statute would be "extremely great." And finally, providing federal benefits "might seriously disrupt the Puerto Rican economy."²³¹ The Court determined these reasons were sufficient for rational basis.

Two years later, in *Harris v. Rosario*, Awilda Santiago Rosario and other Puerto Ricans challenged the federal government's lower level of reimbursement for Puerto Rico relative to its financing of Aid to Families with Dependent Children (AFDC), a cash assistance welfare program in the fifty states. In another per curiam opinion, the Supreme Court held that "so long as there is a rational basis for its actions," Congress could treat Puerto Rican

224. *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 261-62 (1974) (citing *Shapiro*, 394 U.S. at 634).

225. *Id.* at 261.

226. 435 U.S. 1, 4 (1978) (per curiam).

227. *Torres*, 435 U.S. at 4-5.

228. *Id.* at 4 & n.6.

229. *Id.* at 5.

230. *Id.* at 5 n.7.

231. *Id.*

residents differently.²³² The Supreme Court, citing the reasons offered by the government in its brief (and the same enumerated in *Torres*), upheld the statutory classification.²³³ Since then, successful court challenges to the exclusion of territorial residents from federal public benefits have been few and far between, until now.

2. Challenging the Exclusion of Territorial Residents from Federal Public Benefits

The Supreme Court will revisit its decisions in *Torres* and *Rosario*, as territorial residents are currently challenging their exclusion from federal public benefits in the lower courts.

Last year, the First Circuit held that excluding Puerto Rican residents from the SSI program violates the equal protection guarantee of the Fifth Amendment.²³⁴ As recounted at the start of this Article, José Luis Vaello-Madero was born in Puerto Rico in 1954 and is hence a U.S. citizen by birth.²³⁵ He moved to New York in 1985. In June 2012, Vaello-Madero began receiving monthly SSI disability benefits, and in 2013, he moved back to Puerto Rico. When Vaello-Madero filed for his old-age Social Security benefits in Puerto Rico in June 2016, the federal agency informed him that it would discontinue his SSI benefits. The agency's "Notice of Planned Action" stated that Vaello-Madero had been "outside of the U.S. for 30 days in a row or more" since August 1, 2014, because the agency "consider[ed] the U.S. to be the 50 States of the U.S., the District of Columbia, and the Northern Mariana Islands."²³⁶

Roughly a year later, the federal government sued Vaello-Madero to collect the allegedly improper benefit payments, for a total of \$28,081. An investigator employed by the agency got Vaello-Madero to sign a Stipulation of Consent Judgment, which the federal government promptly filed in court. The district court then appointed counsel for Vaello-Madero who filed an answer to the complaint raising as an affirmative defense that excluding Vaello-Madero and other Puerto Rican residents from SSI benefits violated equal protection. The federal government then moved to withdraw the stipulation and for voluntary dismissal without prejudice. The district judge accepted the withdrawal of the stipulation but denied the voluntary dismissal. On cross-motions for summary judgment, the district judge ruled in favor of Vaello-Madero. And the First Circuit affirmed, holding that excluding Puer-

232. *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980) (per curiam). See T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 22 (1994) (discussing *Harris*).

233. *Harris*, 446 U.S. at 652.

234. *United States v. Vaello-Madero*, 956 F.3d 12 (1st Cir. 2020), cert. granted, 141 S. Ct. 1462 (2021) (mem.).

235. See Puerto Rican Federal Relations (Jones) Act, ch. 145, § 5, 39 Stat. 951, 953 (1917) (current version at 8 U.S.C. § 1402).

236. *Vaello-Madero*, 956 F.3d at 15–16.

to Rican residents from the SSI program violates the equal protection guarantees of the Fifth Amendment.²³⁷

Similarly, a federal district court judge, in granting a motion for summary judgment, concluded that excluding Puerto Ricans who are U.S. citizens from SSI, SNAP, and Medicare Part D subsidies violates equal protection under the Fifth Amendment.²³⁸ In *Peña Martínez*, nine Puerto Rican residents sued the federal government on the grounds that excluding them from those three federal programs violates the Due Process Clause of the Fifth Amendment's equal protection guarantee.²³⁹ The district court detailed how "[t]he federal safety net is flimsier and more porous in Puerto Rico than in the rest of the nation."²⁴⁰

In both *Vaello-Madero* and *Peña Martínez*, the plaintiffs challenged whether the policy rationales for excluding Puerto Rican residents from certain federal public benefits still hold.²⁴¹ Both cases necessarily implicate the two per curiam reversals by the Supreme Court forty years ago discussed above.²⁴² Obviously, lower courts are bound by Supreme Court precedent, but the lower courts can examine whether the rationales cited by the Court to uphold a legislative classification remain forty years later. Let's look at each of these justifications in turn.²⁴³

Rationale #1: Federal Income Tax. The federal government has argued in both cases that the fact that Puerto Rican residents only pay federal income tax on certain sources of income provides a rational basis from excluding them from SSI, SNAP, and the Medicare subsidies.²⁴⁴ That's true: residents of Puerto Rico do not pay federal income tax on most types of income.²⁴⁵ Unlike other Social Security benefits which are paid for through payroll taxes (taxes that Puerto Ricans pay), SSI is paid for by general tax revenue, includ-

237. *Id.* at 12.

238. *Peña Martínez v. U.S. Dep't of Health & Hum. Servs.*, 478 F. Supp. 3d 155, 163–64 (D.P.R. 2020), *appeal docketed*, No. 20-1946 (1st Cir. Oct. 2, 2020).

239. *Id.* at 162.

240. *Id.*; *see also* *Peña Martínez v. Azar*, 376 F. Supp. 3d 191, 197–98 (D.P.R. 2019) (denying the federal government's Rule 12(b)(6) motion), *appeal docketed sub nom. Peña Martínez v. U.S. Dep't of Health & Hum. Servs.*, No. 20-1946 (1st Cir. Oct. 2, 2020).

241. *See Vaello-Madero*, 956 F. 3d at 27; *Peña Martínez v. Azar*, 376 F. Supp. 3d at 216.

242. *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam); *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam).

243. In *Peña Martínez*, the parties disagreed whether the Supreme Court's decisions in *Torres* and *Harris* saw the three justifications for the policy as providing an independent versus a combined basis for upholding the statute. *See Peña Martínez v. Azar*, 376 F. Supp. 3d at 210.

244. Defendants' Combined Cross-Motion for Summary Judgment & Opposition to Plaintiffs' Motion for Summary Judgment & Inc. Memorandum of L. at 15–28, *Peña Martínez v. Azar*, 376 F. Supp. 3d 191 (No. 18-cv-01206) [hereinafter Defendant's Cross-Motion for Summary Judgment]; Opening Brief for Appellant at 13–15, *Vaello-Madero*, 956 F.3d 12 (No. 19-1390).

245. *See* I.R.C. § 933.

ing income tax receipts.²⁴⁶ Yet, while the Supreme Court in *Rosario* states that Puerto Ricans “do not contribute to the federal treasury,” recent tax receipts suggest otherwise.²⁴⁷ Puerto Rico contributes roughly \$4 billion in annual tax revenue to the federal government, exceeding the contribution of several states.²⁴⁸

More importantly, this is a confused justification for excluding any group of Americans from SSI. As a means-tested program, SSI’s eligibility rules are not based on past or future federal tax payments. SSI is a program that only kicks in when an applicant has been shown to have insufficient work history to qualify for Social Security Disability Insurance and has little or no income.²⁴⁹ The idea that Congress could use a logic of contributory insurance to justify a noncontributory (i.e., means-tested) program is odd.²⁵⁰ The same is true for SNAP. No other group of Americans are excluded from SNAP because they do not pay income taxes. While it is difficult to find national data on tax receipts by these recipients, it is highly unlikely that many Americans who receive SNAP, SSI, or Medicare Part D have any federal income tax liability.²⁵¹ As the First Circuit noted, an individual cannot have more than \$8,796 in countable annual income to receive SSI, which is significantly less than the standard deduction of \$12,400 for single tax filers, let alone for the blind and elderly.²⁵² Perhaps that is why there is no other case where the federal government has defended its exclusion of a group of people from a welfare program on the basis of federal tax contributions.²⁵³

246. See 42 U.S.C. § 1381; see also Department of Defense and Labor, Health, and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981, 3114–15 (2018).

247. *Rosario*, 446 U.S. at 652.

248. *Vaello-Madero*, 956 F.3d at 24 (pointing out that Puerto Rico contributes more to federal taxes “than taxpayers in several of the states . . . including Vermont, Wyoming, South Dakota, North Dakota, Montana, and Alaska” (citing *SOI Tax Stats – Gross Collections, by Type of Tax and State – IRS Data Book Table 5*, INTERNAL REVENUE SERV., <https://www.irs.gov/statistics/soi-tax-stats-gross-collections-by-type-of-tax-and-state-irs-data-book-table-5> [<https://perma.cc/5AQA-GHSQ>])).

249. See *Understanding Supplemental Security Income SSI Eligibility Requirements—2020 Edition*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/text-eligibility-ussi.htm> [<https://perma.cc/JUV9-XCRM>]; *Disability Benefits: How You Qualify*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/disability/qualify.html> [<https://perma.cc/C8LP-XENS>].

250. The best evidence that the federal government could cite for this argument is that some lawfully present immigrants are excluded from SSI. One could argue that this is based on a contributory principle. See Hammond, *supra* note 140, at 517.

251. A stronger contribution-based argument for the federal government would be that SSI recipients may have paid income taxes in the past or will do so in the future. But again, that type of argument misconceives why individuals are eligible for means-tested disability assistance in the first place.

252. *Vaello-Madero*, 956 F.3d at 27 & n.23.

253. 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.*” (emphasis added by court) (quoting *Shapiro v. Thompson*, 394 U.S.

Rationale #2: The Cost of Treating a Territory Like a State. The federal government rightly points out that judicial review of “distinctions that Congress draws in order to make allocations from a finite pool of resources must be deferential,” and that “protecting the fiscal integrity of Government programs, and of the Government as a whole, is a legitimate concern of the State.”²⁵⁴ That said, a federal court must be able to identify a valid reason for the cost savings.²⁵⁵ And in its briefing in both *Vaello-Madero* and *Peña-Martínez*, the government did not identify a reason why Congress would treat some Americans who live in territories differently from other Americans who are eligible for the federal benefits on the basis of their poverty, disability, or age. This is an awkward rationale for programs with nationally defined benefit amounts, as it costs the same amount of money to award SSI benefits to an eligible citizen in Puerto Rico as it does to award those benefits to someone in Florida, Vermont, or the Northern Mariana Islands (CNMI).²⁵⁶ Singling out otherwise-eligible Americans because they reside in territories is the kind of arbitrary decision equal protection is supposed to protect Americans against.

Rationale #3: Economic Disruption. In 1978 and 1980, the Court in *Torres* and *Rosario* noted the federal government’s concerns about the economic disruption that would come from extending federal public benefits to Puerto Rican residents.²⁵⁷ The federal government has cited in its briefing that “published studies have concluded that SSI and SNAP payments are associated with important work-disincentivizing effects.”²⁵⁸ The federal government has also represented that “Congress could . . . rationally conclude that these effects [could] be more severe in Puerto Rico” because of the island’s weaker economic situation compared to the rest of the United States.²⁵⁹

It is beyond dispute that the federal government’s economic policy towards Puerto Rico is markedly different today. At the time *Torres* and *Rosario* were decided, Congress had legislated significant tax incentives for

618, 632–33 (1969)); *Saenz v. Roe*, 526 U.S. 489, 507 (1999) (reasoning that equal protection prohibits the government from apportioning benefits and services “according to the past tax contributions of its citizens” because it “would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection” (quoting *Shapiro v. Thompson*, 394 U.S. 618, 632–33 (1969))).

254. *Lyng v. UAW*, 485 U.S. 360, 373 (1988) (cleaned up); see also *Bowen v. Gilliard*, 483 U.S. 587, 599 (1987) (concluding that statute served Congress’s goal of decreasing federal expenditures by “identify[ing] a group that would suffer less than others as a result of a reduction in benefits”).

255. See *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *Mem’l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974) (“[A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens, so appellees must do more than show that denying free medical care to new residents saves money.” (citation omitted)).

256. See *supra* Section II.C.

257. *Califano v. Torres*, 435 U.S. 1, 5 n.7 (1978) (per curiam); *Harris v. Rosario*, 446 U.S. 651, 652 (1980) (per curiam).

258. Defendants’ Cross-Motion for Summary Judgment, *supra* note 244, at 32.

259. *Id.*

corporations doing business in Puerto Rico.²⁶⁰ Congress repealed those tax exemptions in 1996.²⁶¹ Furthermore, Congress recently created an oversight board to oversee Puerto Rico's budget in light of the economic fallout from Hurricane Maria and the island's bankruptcy.²⁶² But it is not clear which way these changes cut.²⁶³ Should courts interpret this legislative activity as evidence that the *Torres/Rosario* rationales are outdated and therefore the equal protection challenges can proceed? Or should courts look at this new congressional activity as evidence that Congress is actively legislating in this area and the courts should get out of the way?

Beyond the *Torres/Rosario* rationales, it is also difficult to justify the policy in light of the fact that some territories are included in the statutory schemes for SSI, SNAP, and Medicare Part D but Puerto Rico and other territories are not.²⁶⁴ As laid out in Part II, Northern Mariana Islanders are eligible for the SSI program, despite having similar tax liability to Puerto Ricans. Guamanians and Virgin Islanders can receive SNAP even though Americans who reside in other territories cannot. But the federal government argued on appeal in *Vaello-Madero* that there is no doctrine for territories comparable to, say, the equal footing doctrine for tribes.²⁶⁵ This is an inapt analogy. The federal government misapprehends the unit of analysis—it is not the territory, but the American citizen who resides there. Our constitutional order does have an equal footing doctrine—for citizens. Indeed, the question in *Vaello-Madero* is the scope of the Fourteenth Amendment's promise of full, national citizenship and its application to Americans who live in the U.S. territories.

Besides, this is not a question of a gradation of different services. Americans who live in American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands are denied access to the nation's disability assistance program—full stop. And Americans in all the territories confront a federal law that caps aid; if too many of them seek healthcare through Medicaid, they are out of luck. If the oldest democracy and wealthiest country on the planet lacks a

260. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 1051(b), 90 Stat. 1520, 1643 (codified at I.R.C. § 936).

261. See Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1601(a), 110 Stat. 1755, 1827.

262. See Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §§ 2101–2241; *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1942 (2016) (“Puerto Rico and its instrumentalities are in the midst of a fiscal crisis.”).

263. Compare *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016) (recognizing Congress's role in allowing Puerto Rico to alter its governmental structure), with *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1944–46 (explaining that the constitutional status of Puerto Rico provided the rational basis for treating the Commonwealth differently than the states for purposes of Chapter 9 of the U.S. Bankruptcy Code).

264. See *supra* Table 1.

265. *United States v. Vaello-Madero*, 956 F.3d 12, 31 (1st Cir. 2020), *cert. granted*, 141 S. Ct. 1462 (2021) (mem.); see also *Tuaua v. United States*, 788 F.3d 300, 300 (D.C. Cir. 2015) (holding that the Constitution does not require birthright citizenship for residents of American Samoa).

constitutional commitment to protect its citizens from the most elemental of deprivations, what exactly does our equal protection jurisprudence protect?

Looking forward, the Supreme Court's recent decisions, including unanimously upholding Puerto Rico's oversight board, suggests that the Court will be less solicitous of equal protection challenges.²⁶⁶ And some programs may be more vulnerable to constitutional attack than others. Programs like SSI and SNAP that have benefit levels for the entire nation except certain territories seem particularly vulnerable, but Medicaid may be less amenable to litigation by Americans in the territories. Medicaid involves a mix of federal and state funding, and the Supreme Court undid the Affordable Care Act's attempt to create a national standard of eligibility. The unfavorable signals from the Supreme Court and the difference in programs' susceptibility to court challenges suggest that Congress may be a more receptive forum to changing the status quo of placing territorial Americans outside the welfare state. Despite being a national legislature that denies meaningful participation to some Americans, including those who are the focus of this Article, Congress could eliminate the territorial exceptionalism in the American welfare state. The next Section explains how it could do so.

B. *Legislation: Placing Territories on Par with States*

The traditional judicial deference afforded to Congress means that it would most likely have a free hand to end territorial exceptionalism in the American welfare state. Moreover, even if the federal courts entertain constitutional challenges to how federal law treats Americans in U.S. territories, it will ultimately fall to Congress to amend the statutes governing Medicaid, Medicare, SNAP, and SSI.²⁶⁷ Fortunately, recent activity in Congress to shore up funding for food, medical, and disability assistance in the territories suggests that structural reform could be on the horizon. This Section discusses the various instances where, in the wake of financial and climate disasters, Congress has approved additional funding for welfare programs in the territories. It concludes by looking at various legislative proposals that could be combined for structural changes to these programs in the territories.

1. Emergency Relief: Economic Downturns, the Climate Crisis, and COVID-19

In the last decade or so, Congress has repeatedly provided supplemental funds to the American territories to help shore up the public benefits programs. Often Congress has acted in response to a rolling series of crises: the

266. See *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv.*, 140 S. Ct. 1649 (2020).

267. Other commentators have made a similar judgment call about Congress being the most promising forum for changing the status quo. See, e.g., César A. López Morales, Note, *A Political Solution to Puerto Rico's Disenfranchisement: Reconsidering Congress's Role in Bringing Equality to America's Long-Forgotten Citizens*, 32 B.U. INT'L L.J. 185, 191, 209 n.128, 216 (2014).

2008 financial crisis, several hurricanes that have struck the islands, and, most recently, the COVID-19 pandemic.

The 2008 financial crisis and the Great Recession that followed led to dramatic increases in the number of Americans losing their jobs, their health insurance, and their homes.²⁶⁸ In response, President Obama and the 111th Congress enacted the American Recovery and Reinvestment Act of 2009 (ARRA), which increased spending and expanded access to several public benefits programs, including but not limited to Medicaid, SNAP, and SSI.²⁶⁹ Specifically for territories, ARRA made significant increases to SNAP, which included Guam and the U.S. Virgin Islands, as well as temporarily increased food assistance for Puerto Rico and American Samoa.²⁷⁰ SSI recipients, including those in the CNMI, received a one-time \$250 payment.²⁷¹ And Congress increased the cap on Medicaid reimbursement to all five territories by 30 percent.²⁷²

Congress has also had to confront several extreme weather events across the United States. As discussed in Part I, the five U.S. territories are particularly vulnerable to these calamities, which have been (and will continue to be) made more frequent and more intense because of the climate crisis.²⁷³ Congress appropriated additional nutrition assistance funding for Puerto Ri-

268. See SHEILA ZEDLEWSKI, URB. INST., FACT SHEET: SUPPLEMENTAL NUTRITION ASSISTANCE COUNTERS HIGH UNEMPLOYMENT (2011); Marianne Bitler, Hilary Hoynes & Elira Kuka, *Child Poverty, the Great Recession, and the Social Safety Net in the United States*, 36 J. POL'Y ANALYSIS & MGMT. 358 (2017); Marianne Bitler & Hilary Hoynes, *The More Things Change, the More They Stay the Same? The Safety Net and Poverty in the Great Recession*, 34 J. LAB. ECON. S403, S404 (2016).

269. The American Recovery and Reinvestment Act (ARRA) increased SNAP benefit levels, increased eligibility, and reduced administrative costs with an additional 40 billion dollars appropriation. BRYNNE KEITH-JENNINGS & DOTIE ROSENBAUM, CTR. ON BUDGET & POL'Y PRIORITIES, SNAP BENEFIT BOOST IN 2009 RECOVERY ACT PROVIDED ECONOMIC STIMULUS AND REDUCED HARDSHIP (2015), <https://www.cbpp.org/sites/default/files/atoms/files/3-31-15fa.pdf> [<https://perma.cc/724S-AMHY>]. The Earned Income Tax Credit (EITC) was expanded for larger families, and the marriage penalty was reduced. See *Tax Policy Center Briefing Book: Key Elements of the U.S. Tax System; What is the Earned Income Tax Credit?*, TAX POL'Y CTR., <https://www.taxpolicycenter.org/briefing-book/what-earned-income-tax-credit> [<https://perma.cc/2GGL-3XKC>]. Through ARRA, Congress provided a one-time payment of \$250 to roughly fifty-five million Social Security and SSI recipients. *American Recovery and Reinvestment Act 2009*, SOC. SEC. ADMIN., <https://www.ssa.gov/recovery> [<https://perma.cc/6KB4-EBNF>] (“Implementation” tab).

270. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 101, 123 Stat. 115, 120 (increasing “the value of benefits determined under section 8(a) of the Food and Nutrition Act of 2008 and consolidated block grants for Puerto Rico and American Samoa determined under section 19(a) of such Act”).

271. *Id.* § 2201.

272. *Id.* § 5001(d).

273. It is telling that American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands have joined a coalition of small island and low-lying coastal developing states around the world to work collectively on the issue of climate change. See *About Us*, ALL. SMALL ISLAND STATES, <https://www.aosis.org/about> [<https://perma.cc/DZ4B-7H4V>].

co following the devastating hurricanes of 2017.²⁷⁴ Congress also made special appropriations for American Samoa following Cyclone Gita, which struck the island in 2018.²⁷⁵ But additional food assistance funding for Puerto Rico stalled last year. In January 2019, the House of Representatives approved additional disaster funding for Puerto Rico, which included an additional \$600 million in Nutrition Assistance Program (NAP) funds. The Trump Administration referred to the \$600 million needed for food assistance as “excessive and unnecessary.”²⁷⁶ Due to the increased need following Hurricane Maria and the lack of additional funds from the federal government, Puerto Rico cut NAP spending by \$100 million per month.²⁷⁷

Finally, in response to the COVID-19 pandemic, Congress has increased spending on SNAP and Medicaid across the country, including the territories. An exhaustive treatment of these legislative changes for these programs and others can be found elsewhere,²⁷⁸ but it is worth detailing some of these changes as an illustration of the current Congress’s capacity and propensity to change the status quo of territorial exceptionalism. With the Families First Coronavirus Response Act (FFCRA), Congress provided time-limited supplemental federal Medicaid funds to the five territories.²⁷⁹ Congress further

274. Additional Supplemental Appropriations for Disaster Relief Requirements of 2017, Pub. L. 115-72, § 309, 131 Stat. 1224, 1229. As for administrative action, the U.S. Department of Agriculture enabled Puerto Rico and the U.S. Virgin Islands to implement several measures to ease access to food for those Puerto Ricans who are most in need after Hurricane Maria. *E.g.*, Letter from Patricia N. Dombroski, Adm’r, U.S. Dep’t of Agric., Mid-Atl. Region, to Hon. Glorimar Andújar-Matos, Sec’y, P.R. Dep’t of the Fam. (Sept. 30, 2017), <http://redbluedivide.com/wp-content/uploads/2017/10/360622388-USDA-letter.pdf> [<https://perma.cc/H3EB-35LK>]; *FNS Disaster Assistance: U.S. Virgin Islands*, U.S. DEP’T AGRIC. FOOD & NUTRITION SERV. (Sept. 20, 2017), <https://www.fns.usda.gov/disaster/us-virgin-islands> [<https://perma.cc/SYS4-5F5L>]. The USDA commonly grants this flexibility after natural disasters and recently approved similar requests from states like Florida and Texas. *FNS Disaster Assistance: Florida Disaster Nutrition Assistance*, U.S. DEP’T AGRIC. FOOD & NUTRITION SERV. (Sept. 16, 2020), <https://www.fns.usda.gov/disaster/florida-disaster-nutrition-assistance> [<https://perma.cc/F5RG-LJHA>]; *FNS Disaster Assistance: Texas Disaster Nutrition Assistance*, U.S. DEP’T AGRIC. FOOD & NUTRITION SERV. (Aug. 22, 2020), <https://www.fns.usda.gov/disaster/texas-disaster-nutrition-assistance> [<https://perma.cc/36HN-UXTL>].

275. See Additional Supplemental Appropriations for Disaster Relief Act, Pub. L. No. 116-20, 133 Stat. 871, 875 (2019).

276. EXEC. OFF. OF THE PRESIDENT, OFF. OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATIVE POLICY: H.R. 268—SUPPLEMENTAL APPROPRIATIONS ACT, 2019 (Jan. 16, 2019), https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/01/saphr268h_20190116.pdf [<https://perma.cc/M4R5-4LLQ>].

277. Keith-Jennings, *supra* note 10.

278. See generally Andrew Hammond, Ariel Jurow Kleiman & Gabriel Scheffler, *How the COVID-19 Pandemic Has and Should Reshape the American Safety Net*, 105 MINN. L. REV. HEADNOTES 154 (2020) (analyzing stimulus efforts).

279. See Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020). These actions raised American Samoa’s FY 2020 allotment from \$12.4 million to \$86.3 million and its FY 2021 allotment from approximately \$12.7 million to \$85.6 million. See ALISON MITCHELL, CONG. RSCH. SERV., IF11012, MEDICAID FINANCING FOR THE TERRITORIES 1 (2020). The Further Consolidated Appropriations Act of 2020 raised American Samoa’s FYs

increased the federal funding for all states and territories by 6.2 percent until the coronavirus emergency ends.²⁸⁰ In addition, the FFCRA provided increased funding for nutrition assistance for American Samoa, the CNMI, and Puerto Rico.²⁸¹ The Act also enhanced SNAP allotments for Guam and the U.S. Virgin Islands.²⁸² Notably, Congress decided to treat territories in the same manner as states by including all the territories in the new Pandemic Unemployment Assistance (PUA) program.²⁸³ Various bills introduced in the last Congress proposed further assistance to the territories.²⁸⁴ The American Rescue Plan, the new Congress's latest COVID stimulus legislation, provided further assistance to the territories. Among other things, Congress extended the child tax credit to families in the territories,²⁸⁵ provided additional funding for emergency rental assistance,²⁸⁶ and extended additional food assistance funding in the territories.²⁸⁷

This legislative activity suggests that there is an appetite in both houses of Congress for additional support for food, health, and disability assistance for Americans living in the U.S. territories. With the notable exception of the Affordable Care Act, these appropriations seem to be in response to some national or regional emergency. And all of these legislative initiatives were part of omnibus legislation that included significant support to Americans in

2020 and 2021 allotments to \$84 million. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, 133 Stat. 2534. Subsequently, FFCRA further raised the FY 2020 allotment to \$86.3 million and the FY 2021 allotment to \$85.5 million.

280. Families First Coronavirus Response Act § 6008. In order to receive the funds, states and territories may not: (1) reduce eligibility standards, (2) increase premiums, (3) terminate enrollment, (4) conduct more frequent income checks, or (5) fail to cover coronavirus tests, treatments, vaccines, and therapies without beneficiary cost sharing.

281. Families First Coronavirus Response Act § 1102; Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281, 508 (2020).

282. See Lannie Walker, *SNAP Beneficiaries to Get Maximum Allotment*, GUAM DAILY POST (Apr. 9, 2020), https://www.postguam.com/news/local/snap-beneficiaries-to-get-maximum-allotment/article_b52ee186-7953-11ea-a84f-e3faecce3d21.html [<https://perma.cc/5SRGJ-UTGN>]; *Current SNAP Recipients to Receive Additional Benefits April and May; No DSNAP Available as Yet*, VIRGIN ISLANDS CONSORTIUM (Apr. 9, 2020, 5:33 PM), <https://viconsortium.com/vi-coronavirus/virgin-islands-current-snap-recipients-to-receive-additional-benefits-april-and-may-no-dsnap-available-as-yet-> [<https://perma.cc/TY7U-Z934>].

283. Letter from John Pallasch, Assistant Sec'y, U.S. Dep't of Labor, to State Workforce Agencies, Unemployment Insurance Program (Apr. 5, 2020), https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20.pdf [<https://perma.cc/92QQ-YDGG>] (relaying that the PUA "program is available in all 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, [and] the Commonwealth of the Northern Mariana Islands").

284. See, e.g., Coronavirus Medicaid Response Act, H.R. 6539, 116th Cong. (2020); Insular Area Medicaid Coronavirus Recovery Act, H.R. 6658, 116th Cong. (2020); Medicare Crisis Program Act of 2020, H.R. 6674, 116th Cong. (2020); COVID-19 Recovery for Seniors and People with Disabilities Act of 2020, H.R. 6951, 116th Cong. (2020).

285. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9611, 135 Stat. 4, 144.

286. *Id.* § 3201.

287. *Id.* § 1103(b) (nutrition assistance); *Id.* § 1108 (Pandemic EBT).

the fifty states and made other changes to federal law far removed from the social welfare context.

2. A Structural Proposal: Ending Territorial Exceptionalism in Public Benefits

The need for the emergency appropriations and revisions discussed above would be greatly reduced by legislative fixes to the structure and financing of territorial welfare programs. This more ambitious legislation could simply incorporate the five U.S. territories into the existing statutory framework for SNAP, Medicaid, Medicare Part D, and SSI.

Specifically, Congress should make three major changes to the federal social welfare statutes. First, Congress should amend the Food Stamp Act to include American Samoa, the CNMI, and Puerto Rico.²⁸⁸ Second, Congress should also amend Titles XVIII and XIX of the Social Security Act to bring Americans who live in the five U.S. territories into the default eligibility framework for Medicaid and Medicare Part D subsidies.²⁸⁹ Finally, Congress should make all Americans, regardless of where they live in the United States, eligible for SSI, our national means-tested disability assistance. That could be done by simply revising the definition of the “United States” in the Social Security Act to include the remaining territories.

Moreover, each of these legislative fixes could be included in larger pieces of legislation in the coming years. For instance, Congress could revise the SNAP program to include the three excluded territories in the next Farm Bill. Similarly, the Medicaid and Medicare fixes could be incorporated as part of a broader reform bill, just as Congress incorporated additional funds for the territories’ medical assistance in the Affordable Care Act. Of the programs discussed, SSI has been the quietest site of legislative activity, but even there Congress increased SSI benefits as part of its 2009 stimulus package.²⁹⁰ Instead of reacting to a series of rolling crises, Congress could end territorial exceptionalism in Medicaid, SNAP, and SSI, and thereby guarantee food, medical, and disability assistance to Americans in need, regardless of where they live in the United States.

IV. BEYOND THE WELFARE STATE AS A RACIAL ORDER

So far, this Article has sought to focus attention on how federal law disadvantages Americans who happen to live in the U.S. territories by denying them access to the standard set of federal public benefit programs like Medi-

288. Legislation introduced by Sen. Bernie Sanders and Rep. Nydia Velázquez in 2019 would serve as a useful model. *See* Equitable Nutrition Assistance for the Territories Act of 2019, S. 677, 116th Cong. (2019).

289. *See, e.g.*, H.R. 1354, 116th Cong. (2019); H.R. 4666, 116th Cong. (2019).

290. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 2201, 123 Stat. 115, 450–454 (codified at I.R.C. § 6428 note) (authorizing a one-time \$250 Economic Recovery Payment to certain SSI beneficiaries, among others).

caid, SNAP, and SSI. This exclusion of the people of American Samoa, Guam, the CNMI, Puerto Rico, and the U.S. Virgin Islands is vulnerable to equal protection challenges in federal court and worthy of legislative fixes in Congress. In this area of federal law and others, these Americans are outsiders. But what if their outsider status is not an outlier? What if their experience is, in another sense, the quintessence of social protection in the United States? Put another way, perhaps the experience of Americans in the territories is yet one more example in which the American welfare state is predicated on a racial order? This Part runs that suspicion down.

Some might argue that the equal protection doctrine cannot be used to place Americans who live in territories on par with states because it lacks a limiting principle for how federal law accommodates differences in state treatment. It could upend our understanding of social citizenship in the United States. But that's precisely the point. A conventional view would suggest that a woman in Mississippi has more in common, as a constitutional matter, with a woman in Massachusetts than with a woman in Guam. But when we look at social citizenship—that is, the legal protections afforded those Americans—our constitutional order seems to be one that is racialized, excluding Black, Latinx, and indigenous Americans, not to mention those who happen to live in the territories.

Conceptualizing the public law that governs the American welfare state as a racial order is a matter of course for some scholars.²⁹¹ As discussed in Part I, the politics and policies of the New Deal and the Great Society, as well as the retrenchment efforts of Presidents Reagan and Clinton, betray a racial order. In his recasting of social citizenship as an American political tradition, William Forbath has described how “[n]ot only were most black Americans excluded from the benefits of the main New Deal programs, but this constitutional bad faith at black America’s expense also deprived all Americans of the institutional foundations and political-constitutional legacy of social citizenship.”²⁹² Similarly, Dorothy Roberts argued in the midst of the debate over welfare reform in the 1990s that “Black citizenship is at once America’s chief reason for and impediment to a strong welfare state” because “white Americans have resisted the expansion of welfare precisely because of its benefits to Blacks.”²⁹³

Even the continuing controversies over the Affordable Care Act, the landmark legislation of the nation’s first Black president, continue to play out over a racialized political terrain. The law-trained among us may bristle at the notion that a woman in Mississippi has more in common with a woman in Guam than she does with a woman in Massachusetts. But when it

291. See, e.g., MUSTAFA EMIRBAYER & MATTHEW DESMOND, *THE RACIAL ORDER* 285–332 (2015); DEBORAH E. WARD, *THE WHITE WELFARE STATE: THE RACIALIZATION OF U.S. WELFARE POLICY*, 120–21 (2005) (citing 1942 Social Security Bureau report documenting fewer Black and American Indian children receiving cash assistance).

292. Forbath, *supra* note 47, at 209.

293. Roberts, *supra* note 53, at 1566.

comes to their access to healthcare, states that have refused to participate in the Affordable Care Act start to look more like territories. Indeed, in her recent book on Medicaid, political scientist Jamila Michener notes that among the states that refused to implement the Medicaid expansion were eight of the top eleven states with the largest share of the nation's Black population.²⁹⁴ And all of those eight southern states once belonged to the former Confederacy. In short, once we recognize the differences in social protection between states and territories, we begin to see more clearly the differences that persist among states.²⁹⁵ And the experience of the territories suggests that differences across and within the United States rely on a racial hierarchy—one that cannot stand. Just as legal historians have connected the past of Reconstruction politics and doctrine to the American acquisition of U.S. territories,²⁹⁶ so too could lawyers and advocates in the present draw on a renewed attack on discrimination of territorial residents as part of a broader agenda for a Third Reconstruction.²⁹⁷

Public law scholars have looked for a paradigm or framework to promote in service of a legal agenda that makes good on the promises of the more egalitarian aspects of the American legal tradition with a particular fo-

294. JAMILA MICHENER, *FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS* 54–55 (2018).

295. TANI, *supra* note 223, at 279 (discussing how American social welfare law “embrace[s] centralization . . . recogniz[ing] both the states and the federal government as valid centers and hence valid administrators—allowing, in effect, for unequal, nonuniform citizen experiences with authority”).

296. See *supra* notes 109–114 and accompanying text.

297. See Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-slavery America*, 54 ALA. L. REV. 483, 483 (2003); Tracey Meares, *A Third Reconstruction?*, BALKINIZATION (Aug. 14, 2015), <https://balkin.blogspot.com/2015/08/a-third-reconstruction.html> [<https://perma.cc/BN4M-VFK5>] (discussing the framework as foregrounding “the nature of racial inequality and hierarchy in the contemporary United States and what steps we might take to address this”); see also Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1475 (2016) (“I . . . support a frame alignment around the term ‘Third Reconstruction,’ which some activists and scholars have used to refer to a coordinated effort to address institutional racism and inequality. The term is evolving to describe not only changes in public policy and legal doctrines, but also a broad-based social movement focused on racial justice.”). Scholars in constitutional law have also used the term. See, e.g., Richard Primus, *Second Redemption, Third Reconstruction*, 106 CALIF. L. REV. 1987, 1999 (2018) (expressing “the hope for a healthy American constitutional order” that will work toward creating “nothing less than a Third Reconstruction”); Bruce Ackerman, *De-Schooling Constitutional Law*, 123 YALE L.J. 3104, 3131–32 (2014). And Reverend Barber, whose Poor People’s Campaign represents a sustained social movement on many of these issues, has repeatedly used this framework. See WILLIAM J. BARBER II WITH JONATHAN WILSON-HARTGROVE, *THE THIRD RECONSTRUCTION: HOW A MORAL MOVEMENT IS OVERCOMING THE POLITICS OF DIVISION AND FEAR* (2016); William J. Barber II, *We Are Witnessing the Birth Pangs of a Third Reconstruction: We Need a Moral Movement to Create Change*, THINKPROGRESS (Dec. 15, 2016, 12:57 PM), <https://archive.thinkprogress.org/rev-barber-moral-change-1ad2776df7c> [<https://perma.cc/QB7M-R3WY>] (describing the post-Civil War period as the first, the civil rights era that followed Jim Crow as the second, and the backlash to the Obama Presidency as the beginnings of the third).

cus on racial justice. Some have begun to create a vocabulary that captures the sense of constitutional decline or rot.²⁹⁸ As discussed at the start, if this Article puts down any marker in those debates, it is to insist that, however those debates resolve, that agenda cannot ignore the exclusion of Americans who live in U.S. territories from basic services. A broad-based justice movement could and should shake the foundation of the racialized welfare state, including its exclusion of Americans in the territories.

In the end, there are reasons to think that state-based social citizenship may be especially ill-suited to today's America. First, the hyperpolarization of politics has led to most states being dominated by one-party rule.²⁹⁹ Second, the defining global forces of rapid technological change, dramatic concentrations of wealth, and the climate crisis demand responses on an order of magnitude that even California cannot meet. These forces do not respect national boundaries, much less those of a given state. That's why it seems unlikely that the status of the American territories will be static in the coming years. Political and social forces in the territories, as well as the existential threat of the climate crisis, are putting increasing pressure on this creaky corner of the American welfare state. To be sure, the movement of territorial peoples has occurred for generations, but the societal pressures that attend a changing climate are unprecedented.³⁰⁰

What happens when massive internal displacement, including but not limited to territorial peoples, collides with a patchwork of legal infrastructure premised on cooperative federalism? Perhaps state governments will treat new arrivals from neighboring states with generosity. Perhaps states will be able to meet the surge in demand for basic services like food and medical care from their own coffers. Perhaps the federal government will shoulder much of the resulting cost. But past episodes of internal displacement in the United States—including the experiences of Black Americans in the Great Migration, the Okies and Arkies of the Dust Bowl, and migrant farmworkers—is more often chilling than not. And of course, territorial residents have consistently experienced discrimination when migrating to states.³⁰¹ The country's anti-immigrant politics also bodes ill. It would be naive to think

298. See Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018); Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 150–51 (2017) (describing conditions of decay in the American constitutional system and defining “constitutional rot” as “a process of decay in the features of our system of government that maintain it as a healthy democratic republic”); Richard Primus, *The Republic in Long-Term Perspective*, 117 MICH. L. REV. ONLINE 1 (2018).

299. Timothy Williams, *With Most States Under One Party's Control, America Grows More Divided*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/us/state-legislatures-partisan-polarized.html> [<https://perma.cc/QN29-AKFB>].

300. See IMMERWAHR, *supra* note 128, at 251 (pointing out that in 1950, one in seven Puerto Ricans lived on the mainland; five years later, almost one in four did); see also *id.* at 257 (detailing how Congress immediately struck a bill of economic rights from Puerto Rico's proposed constitution).

301. See Anna M. Santiago & George Galster, *Puerto Rican Segregation in the United States: Cause or Consequence of Economic Status?*, 42 SOC. PROBS. 361, 379 (1995).

states will welcome all new arrivals, even if they are their fellow citizens. The new normal of climate migration could be devastating for Americans who have heretofore been placed outside the American welfare state.

CONCLUSION

Federal law has excluded millions of Americans from crucial public benefits simply because they live in the United States territories. This Article details and problematizes that status quo and suggests how the courts, and more likely, Congress, could end this territorial exceptionalism in the American welfare state. The changes to federal law proposed in this Article are necessary to meet the threat of significant internal migration, but they are not sufficient. The United States is entering a perilous phase where the climate crisis will make it increasingly difficult for millions of Americans to meet basic needs, including those who live in American Samoa, the CNMI, Guam, Puerto Rico, and the U.S. Virgin Islands. The existing legal infrastructure of the American welfare state will not withstand the climate crisis without a commitment to social citizenship that rests on a foundation other than a racial order.