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Intersectional Imperial Legacies in the U.S. Territories

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ABSTRACT. Women and people who can become pregnant in the U.S. territories experience particularized harms often rooted in U.S. colonization and the territories' political relationship with the United States. From reproductive harms to economic challenges characterized by dangerously limited access to critical public benefits, women's intersectional lived experiences are often marginalized or ignored. This Essay describes how traditional legal frameworks can sharply constrict available remedies and tend to further—or at least maintain—the U.S. colonial project. It then employs theories of intersectionality and coloniality to sketch the contours of a rational-basis-with-bite framework that would oblige the parties to ventilate issues fully and closely examine likely consequences. In doing so, it begins to chart a theoretical and pragmatic path for assessing territorial residents' challenges to exclusionary laws while leaving room for beneficial laws that promote communities' self-determination.

INTRODUCTION

Only one woman served in the Thirteenth Guam Legislature in 1978. Senator Concepcion Barrett, a CHamoru,[1] quietly spearheaded the passage of a bill decriminalizing abortion in Guam.[2] The law survived for twelve years until the legislature passed a strict abortion ban—born of an unlikely melding of U.S. antiabortion rhetoric and anticolonial efforts focused on "[s]aving the Chamorro

1. Both "CHamoru" and "Chamorro" are used to describe the Indigenous people of the Mariana Islands (Guam and the Commonwealth of the Northern Marianas). *See Commission: CHamoru, Not Chamorro; Guam's Female Governor Is Maga'håga*, GUAM DAILY POST (Nov. 30, 2018), https://www.postguam.com/news/local/commission-CHamoru-not-chamorro-guam-s-female-governor-is-maga/article_045523dc-f3b9-11e8-9b53-5ba21e8bb30a.html [https://perma.cc/C9YQ-EJ6P].

2. *See* Vivian Loyola Dames, *Chamorro Women, Self-Determination, and the Politics of Abortion in Guam*, *in* ASIAN/PACIFIC ISLANDER AMERICAN WOMEN: A HISTORICAL ANTHOLOGY 365, 369 (Shirley Hune & Gail M. Nomura eds., 2003).

People."[3] After resistance led by CHamoru women, a federal court struck down the ban,[4] but struggles over access to abortion persist, particularly in the wake of the U.S. Supreme Court's decision in *Dobbs*.[5]

Only one woman participated in the Constitutional Convention of Puerto Rico in 1951. María Libertad Gómez Garriga, a descendant of enslaved people, proposed a human-rights provision for Puerto Rico's new commonwealth constitution that would ensure women's right to equal participation in government and society.[6] Puerto Rico's populace approved the constitution that included the human-rights provision,[7] but Congress rejected that section.[8] The watered-down language that ultimately passed reflected the United States's formal-equality framing: "All men are equal before the law" and "[n]o discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political

3. *Id*. at 370-72.

4. *See* Guam Soc'y of Obstetricians & Gynecologists v. Ada, 776 F. Supp. 1422, 1428 (D. Guam 1990), *aff'd*, 962 F.2d 1366 (9th Cir. 1992), *as amended* (June 8, 1992); Dames, *supra* note 2, at 374-76 (describing the efforts of CHamoru pro-choice activists).

5. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022); Raidoo v. Moylan, 75 F.4th 1115, 1124 (9th Cir. 2023) (holding, among other things, that a Guam statute requiring in-person government-mandated counseling for abortions was rationally connected to the legitimate state interest of protecting fetal life and the health of the mother).

6. Yanira Reyes Gil, *Women, Gender, Colonialism, and Constitutional Law in Puerto Rico*, *in* WOMEN, GENDER, AND CONSTITUTIONALISM IN LATIN AMERICA 256, 256 (Francisca Pou Giménez, Ruth Rubio Marín & Verónica Undurraga Valdés eds., 2024); Yolanda Martínez Viruet, María Libertad Gómez Garriga y el Proceso de la Asamblea Constituyente del Estado Libre Asociado de Puerto Rico (July 8, 2016) (Ph.D. dissertation, Universidad del País Vasco), https://addi.ehu.es/handle/10810/19589 [https://perma.cc/EPC9-DRD7].

7. *See* Joint Resolution Approving the Constitution of the Commonwealth of Puerto Rico Which Was Adopted by the People of Puerto Rico on March 3, 1952, ch. 567, 66 Stat. 327, 327 (1952).

8. Specifically, Congress rejected Section 20 of Article II of the proposed constitution—modeled on the Universal Declaration of Human Rights—which sought to protect human rights such as the "right of motherhood and childhood to special care and assistance," and "the right of every person to a standard of living adequate for the health." *See id.*; *Constitution of the Commonwealth of Puerto Rico*, REFWORLD art. II, § 20, https://www.refworld.org/legal/legislation/natlegbod/1952/en/29375 [https://perma.cc/JK4R-D7SW]; G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 25 (Dec. 10, 1948) (containing nearly identical language enumerating "the right to a standard of living adequate for the health" and proclaiming that "[m]otherhood and childhood are entitled to special care and assistance"); *see also* Reyes Gil, *supra* note 6, at 256-57 (describing the elimination of the proposed rights); Luis Aníbal Avilés Pagán, *Human Dignity, Privacy and Personality Rights in the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico*, 67 REV. JURÍDICA U. P.R. 343, 367, 382, 394 (1998) (describing the human-rights origins of the Puerto Rico Constitution). Congress approved the constitution subject to elimination of the human-rights provision and other modifications. *See* Joint Resolution Approving the Constitution of the Commonwealth of Puerto Rico, 66 Stat. at 327.

or religious ideas."[9] Today, women in Puerto Rico continue the fight for gender and racial justice in the face of U.S. legal norms and doctrines that tightly constrict equality protections.[10]

Women and people who can become pregnant[11] in the U.S. territories experience particularized harms often rooted in U.S. colonization and the territories' political relationship with the United States. The forces of U.S. colonialism often obscure these experiences, harms, and contemporary struggles; they go unacknowledged by U.S. decision makers and largely unredressed by U.S. legal frameworks. Most of the legal literature on the "law of the territories" does not explore the disproportionate and intersectional harms of U.S. colonization on women in the territories.[12] This Essay begins to fill that void.[13]

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9. *Constitution of the Commonwealth of Puerto Rico*, *supra* note 8, art II, § 1; Constitutional Convention of Puerto Rico, Res. No. 34 of July 10, 1952 (P.R.) (codified at P.R. LAWS ANN. tit. 1, at 144-46 (1952)). The Constitutional Convention accepted the modifications, Puerto Rico's governor promulgated the constitution, and in the 1952 general election Puerto Rico's populace approved the amended constitution, although Article II, Section 20 was not mentioned on the ballot. *See* Jesús G. Román, Comment, *Does International Law Govern Puerto Rico's November 1993 Plebiscite?*, 8 LA RAZA L.J. 98, 109-10 (1995).

10. Reyes Gil, *supra* note 6, at 257 (explaining how U.S. constitutional doctrines limit the development of constitutional protections for women in Puerto Rico).

11. The data on women participants in federal programs are generally centered around cisgendered women; however, the term "women" here includes all people who identify as women and people who can become pregnant. According to the Central Intelligence Agency (CIA) World Factbook, the population of the U.S. territories by gender is as follows: Puerto Rico: female: 1,600,697, male: 1,418,753. World Factbook, *Puerto Rico*, CIA (Aug. 7, 2024), https://www.cia.gov/the-world-factbook/countries/puerto-rico/#people-and-society [https://perma.cc/6QZ8-2YTP]; Guam: female: 82,187, male: 87,345. World Factbook, *Guam*, CIA (Aug. 7, 2024), https://www.cia.gov/the-world-factbook/countries/guam [https://perma.cc/WJK2-TZRN]. U.S. Virgin Islands: female: 54,857, male: 49,520. World Factbook, *Virgin Islands*, CIA (Aug. 7, 2024), https://www.cia.gov/the-world-factbook/countries/virgin-islands/#people-and-society [https://perma.cc/JZ9V-NKNV]; American Samoa: female: 22,091, male: 21,804. World Factbook, *American Samoa*, CIA (Aug. 7, 2024), https://www.cia.gov/the-world-factbook/countries/american-samoa [https://perma.cc/U6YH-S6AQ]; Northern Mariana Islands: female: 24,074, male: 27,044. World Factbook, *North Mariana Islands*, CIA (Aug. 7, 2024), https://www.cia.gov/the-world-factbook/countries/northern-mariana-islands [https://perma.cc/KTV8-SU6Y].

12. *But see* Noralis Rodríguez Coss, *A Feminist Intersectional Analysis of Economic and Resource (In)Equality in Puerto Rico Before and After Hurricane Maria*, 23 GONZ. J. INT'L L. 97, 99 (2019); Yxta Maya Murray, *What FEMA Should Do After Puerto Rico: Toward Critical Administrative Constitutionalism*, 72 ARK. L. REV. 165, 200-01 (2019) (contending that FEMA should adopt a "*critical* administrative constitutionalism" that recognizes victims' intersectionality in the equal distribution of disaster aid to the U.S. territories).

13. Several legal scholars posit solutions to the disproportionate denial of federal benefits to the residents of the U.S. territories generally. *See, e.g.*, Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1642 (2021) (employing a social citizenship framework to critique the lower levels of federal disability, food, and medical

When U.S. decision makers do acknowledge these historical and present-day harms, they often devalue and minimize their impact.[14] These largely reproductive harms include birth-control testing, sterilization, and lack of or limited abortion access.[15] For example, in Puerto Rico, U.S. eugenicists and decision makers embraced pseudoscientific eugenics theories to control women's fertility. Sterilization and birth-control policies—pushed by American eugenicists, subsidized by the federal government, and supported by U.S. corporations—were instituted to control the "overpopulation" of supposedly undesirable people of color.[16] In many of these instances, women's intersectional lived experiences were marginalized and often completely ignored.

Other harms go virtually unseen by the larger U.S. populace and national policymakers. These include the disproportionate impacts of limited access to federal public benefits—particularly for single mothers, pregnant women, and

benefits offered to residents of the U.S. territories); Comment, *A Reckoning for "Rational" Discrimination: Rethinking Federal Welfare Benefits in United States-Occupied Islands*, 43 U. HAW. L. REV. 265, 267 (2020) [hereinafter *A Reckoning*] (examining the discriminatory exclusion of residents of U.S. territories and associated states from federal welfare benefits and contending that "federal welfare program eligibility should be extended to residents of all the territories"); Jon C. Dubin, *The Color of Social Security: Race and Unequal Protection in the Crown Jewel of the American Welfare State*, 35 STAN. L. & POL'Y REV. 104, 108-09 (2024); Adriel I. Cepeda Derieux, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 797, 798 (2010); Evette Ocasio, *Puerto Rico's Second-Class Statehood: The Impact of Restricted Access to Federal Public Benefits Programs on Puerto Rico's Economic Recovery*, 15 DEPAUL J. FOR SOC. JUST. 1, 10-11 (2022) (arguing that restricted access to federal benefits in Puerto Rico has exacerbated poverty, impacted post-Hurricane Maria relief efforts, and stymied economic recovery, and recommending, among other things, equal access to federal benefits); Murray, *supra* note 12, 200-01.

14. *See* Eric K. Yamamoto & Michele Park Sonen, *Reparations Law: Redress Bias?*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 244, 261-62 (Justin D. Levinson & Robert J. Smith eds., 2012).

15. *See* IRIS LÓPEZ, MATTERS OF CHOICE: PUERTO RICAN WOMEN'S STRUGGLE FOR REPRODUCTIVE FREEDOM, at xi (2008); Bonnie Mass, *Puerto Rico: A Case Study of Population Control*, 4 LATIN AM. PERSPS. 66, 67-69, 77-78 (1977).

16. *See* LAURA BRIGGS, REPRODUCING EMPIRE: RACE, SEX, SCIENCE, AND U.S. IMPERIALISM IN PUERTO RICO 9, 17, 121-25 (2002); ANNETTE B. RAMIREZ DE ARELLANO & CONRAD SEIPP, COLONIALISM, CATHOLICISM, AND CONTRACEPTION: A HISTORY OF BIRTH CONTROL IN PUERTO RICO 17-19, 93-104 (1983); LÓPEZ, *supra* note 15, at 9 (contending that "migration and sterilization were used as alternate and reinforcing mechanisms" to control perceived "overpopulation"). By 1965, one out of three Puerto Rican women of child-bearing age were sterilized. *See* Mass, *supra* note 15, at 72; *see also* Theresa Vargas, *Guinea Pigs or Pioneers? How Puerto Rican Women Were Used to Test the Birth Control Pill*, WASH. POST (May 9, 2017, 8:00 AM EDT), https://www.washingtonpost.com/news/retropolis/wp/2017/05/09/guinea-pigs-or-pioneers-how-puerto-rican-women-were-used-to-test-the-birth-control-pill [https://perma.cc/TWR3-PCEA] (recounting the history of how the birth-control pill was tested on women in Puerto Rico); LÓPEZ, *supra* note 15, at 153 (describing how Puerto Rican women were test subjects for U.S. pharmaceutical companies and "targeted for population control via sterilization").

older women,[17] especially in the wake of climate disasters.[18] Generally, territorial residents receive fewer federal benefits than residents of the fifty states.[19] In *United States v. Vaello Madero*, the U.S. Supreme Court confirmed that providing fewer benefits to territorial residents does not violate the equal-protection component of the Fifth Amendment.[20] But here, too, women are often disproportionately impacted. In Puerto Rico, for example, women are overrepresented among those experiencing poverty.[21] In 2021, 69.6% of families headed by single mothers lived below the poverty line.[22] For those families and others, congressional limitations on public benefits, alongside other U.S.-imposed economic policies[23]—linked directly to the island's political relationship with the United States—have wrought dire economic outcomes for working-age women and others.[24]

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17. *See infra* Part III.

18. Complaint at 1, Peña Martínez v. Azar, 376 F. Supp. 3d 191 (D.P.R. 2019) (No. 3-18-cv-01206) (noting that following Hurricane Maria in Puerto Rico, "the number of people in need of governmental food assistance has surged"); Elham Khatami, *Puerto Rico Probably Can't Provide Enough Food Assistance for Hurricane Recovery*, THINKPROGRESS (Oct. 6, 2017, 2:21 PM), https://archive.thinkprogress.org/puerto-rico-food-assistance-program-547672d2c243 [https://perma.cc/QKE4-P6AZ].

19. *See, e.g.*, Paola Marie Sepulveda-Miranda & Sonja Fernández-Quiñones, *Second-Class Health in the Absence of Self-Determination and Governance: The Effect of Colonial Governance over the Healthcare System of Puerto Rico in Comparison to Hawaii and Massachusetts*, 14 NE. U. L. REV. 491, 544-46 (2022) (comparing the health systems of Puerto Rico, Hawai ʻi, and Massachusetts, and concluding that both decolonizing and public-health theories should be applied to address Puerto Rico's lack of democratic governance and limited access to meaningful health care); *A Reckoning*, *supra* note 13, at 266; Hammond, *supra* note 13, at 1641-42; CONG. RSCH. SERV., IN11793, PROPOSED EXTENSION OF SUPPLEMENTAL SECURITY INCOME (SSI) TO AMERICAN SAMOA, GUAM, PUERTO RICO, AND THE U.S. VIRGIN ISLANDS 1-2 (2021).

20. 596 U.S. 159, 162 (2022).

21. Carlos Vargas-Ramos, Laura Colón-Meléndez, Jorge Soldevilla-Irizarry, Damayra Figueroa-Lazu, Jennifer Hinojosa & Yarimar Bonilla, *Pervasive Poverty in Puerto Rico: A Closer Look*, CENTRO HUNTER CUNY 6 (2023), https://centropr.hunter.cuny.edu/app/uploads/2023/09/Pervasive-Poverty-PR-1.pdf [https://perma.cc/5FB8-PRFF] (reporting that "women of prime working age categories (i.e., 25-54 years) living below the poverty level represented a higher proportion of Puerto Rico's population [than men in the same age group]").

22. Health Res. & Servs. Admin. Maternal & Child Health Bureau, *Overview of the State-Puerto Rico-2024*, U.S. DEPT. HEALTH & HUM. SERVS. (2024) [hereinafter Overview of the State-Puerto Rico], https://mchb.tvisdata.hrsa.gov/Narratives/Overview/7e5393aa-8b5c-4b21-a894-10a703529c21[https://perma.cc/UJ73-BKMQ].

23. *See, e.g.*, Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114-187, 130 Stat. 549, 553-576 (2016) (codified at 48 U.S.C. § 2101 (2018)) (creating an unelected oversight board that controls Puerto Rico's finances).

24. Vargas-Ramos et al., *supra* note 21, at 5 (acknowledging the dearth of data on the territories in general, which limits scholarly examination of and governmental efforts to address inequalities). *See* Jae June Lee, Cara Brumfield, & Neil Weare, *Advancing Data Equity for U.S.*

As described below, traditional legal frameworks can sharply constrict available remedies. Existing constitutional frameworks do not acknowledge U.S. colonialism and thus tend to further—or at least maintain—the colonial project.[25] Even local laws and judicial interpretations that tend to protect women's rights in the territories are constrained by U.S. legal norms and the formal-equality lens of U.S. jurisprudence.[26] Because the U.S. territories are not sovereign nations, they cannot sign or ratify the principal international and regional instruments that protect and promote women's rights.[27] And now, after *Dobbs*, conservative politicians in the territories have introduced legislation attempting to limit reproductive rights further, mirroring similar movements on the U.S. continent.[28] Drawing from my earlier writing on the U.S. territories,[29] this Essay

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Territories, CTR. ON POVERTY & INEQ., GEO. L. SCH. 1 (2022), https://www.georgetownpoverty.org/wp-content/uploads/2022/11/AdvancingDataEquityUSTerritories-Nov2022.pdf [https://perma.cc/K2RY-NBQ2].

25. *See* Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 13 (2023).

26. *See* Reyes Gil, *supra* note 6, at 257 (contending that the U.S. constitutional framework and doctrines have "legally, politically, and paradigmatically restricted the development of constitutional doctrines in the protection of women and LGBTQIA+ communities" in Puerto Rico).

27. *See* United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534.

28. Reyes Gil, *supra* note 6, at 279 (reporting that in the last four years, conservative legislators—influenced by the conservative national movement on the U.S. continent—have pushed over ten bills to limit or "prohibit" abortion).

29. *See generally* Susan K. Serrano, *Reframing Environmental Justice at the Margins of U.S. Empire*, 57 HARV. C.R.-C.L. L. REV. 475, 481 (2022) [hereinafter Serrano, *Reframing Environmental Justice*] (employing a racializing environmental justice framework "to account for the unique [environmental justice] experiences of the peoples of the U.S. territories that are deeply linked to U.S. colonialism and militarism in their homelands"); Susan K. Serrano & Ian Falefuafua Tapu, *Reparative Justice in the U.S. Territories: Reckoning with America's Colonial Climate Crisis*, 110 CALIF. L. REV. 1281 (2022) (exploring how the U.S. territories' political status, linked to U.S. colonialism, limits their ability to develop meaningful adaptation efforts to combat the climate crisis); Susan K. Serrano, *A Reparative Justice Approach to Assessing Ancestral Classifications Aimed at Colonization's Harms*, 27 WM. & MARY BILL RTS. J. 501 (2018) [hereinafter Serrano, *A Reparative Justice Approach*] (offering a restorative-justice approach for reviewing ancestry-based classifications that seeks to remedy material and cultural harms of colonization); Susan K. Serrano, *Elevating the Perspectives of Territorial Peoples: Why the* Insular Cases *Should Be Taught in Law School*, 21 J. GENDER, RACE & JUST. 395 (2018) [hereinafter Serrano, *Elevating the Perspectives*] (contending that the *Insular Cases* and their contemporary incarnations should be taught in law schools to shed light on perspectives of those most affected by them); Susan K. Serrano, *Dual Consciousness About Law and Justice: Puerto Ricans' Battle for U.S. Citizenship in Hawai'i*, 29 CENTRO J. 164 (2017) (employing theory of "double consciousness" to examine Puerto Ricans' fight for U.S. citizenship in the Territory of Hawai'i in the face of laws and policies that legitimized unequal treatment); Susan K. Serrano, *Collective Memory and the Persistence of Injustice: From Hawai'i's Plantations to Congress—Puerto Ricans' Claims to*

begins to illuminate these underexplored harms.[30] It does do by employing international scholar Albert Memmi's theory of colonization alongside decolonial feminist scholars' theories on intersectionality[31] and the coloniality of gender. Memmi contended that European-derived colonizers gain and legitimate their control over land and resources in part by "characterizing people as 'different,' less-worthy, or less-human 'others' (threatening, uncivilized, inferior) to make political aggression against the entire group appear necessary."[32]

As I have written elsewhere,[33] this approach was fundamental to the United States's colonization of the territories. The United States "acquired" today's territories for land and resources; to do so, it demonized the people.[34] That branding of the people as inferior, unworthy, and incapable of self-government served to justify confiscating their land and systematically excluding them from political participation.[35] Their subjugation was inscribed in law: the infamous *Insular Cases* drew a sharp distinction between so-called "fundamental" individual rights (which were guaranteed) and the rights of political participation (which were not).[36] This political powerlessness persists today.

Membership in the Polity, 20 S. CAL. REV. L. & SOC. JUST. 353 (2011) [hereinafter Serrano, *Collective Memory*] (employing "collective memory of injustice" as a relevant theoretical framework to analyze the racialization of Puerto Ricans by Hawai ʻi's sugar planters and the legal battle at the center of the voting rights case, *Igartúa de la Rosa v. United States*).

30. This Essay, of course, cannot address or even list all of the hidden or cascading harms facing women in the U.S. territories linked to legacies of U.S. colonialism; rather it considers some of them, albeit in general terms.

31. *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (employing the concept of intersectionality to explore the racialized and gendered dimensions of violence against women of color); *see infra* notes 64-67 and accompanying text.

32. *See* Serrano, *Collective Memory*, *supra* note 29, at 369; ALBERT MEMMI, DOMINATED MAN: NOTES TOWARD A PORTRAIT 186 (1968); ALBERT MEMMI, RACISM 179-80 (Steve Martinot trans., Univ. Minn. Press 2000) (1982).

33. *See* Serrano, *Reframing Environmental Justice*, *supra* note 29, at 481 (connecting legacies of U.S. colonialism to environmental injustice and refining the environmental justice framework "to account for the unique experiences of the peoples of the U.S. territories that are deeply linked to U.S. colonialism and militarism in their homelands").

34. *Id.* (citing Juan R. Torruella, *Ruling America's Colonies: The* Insular Cases, 32 YALE L. & POL'Y REV. 57, 60-61 (2013)).

35. *Id.*

36. *See* Balzac v. Porto Rico, 258 U.S. 298, 312-13 (1922) (holding that peoples of the unincorporated territories are entitled to "guaranties of certain fundamental personal rights declared in the Constitution" and ruling that the right to a jury trial is not "fundamental" under the *Insular Cases* framework); Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The* Insular Cases *(1901-1922)*, 65 REV. JURDÍCA U. P.R. 225, 283-84 (1996); *see also* U.S. CONST. art. IV, § 3, cl. 2 (giving Congress sweeping plenary powers over the U.S. territories).

These lasting colonial harms are not only racial or economic; they are also gendered. This Essay draws upon scholars' articulations of gender in the colonial context[37] as a means of connecting these intertwined legacies of U.S. colonialism to continuing political powerlessness in the present. And building on those concepts, this Essay offers the beginnings of a meaningful rational-basis-with-bite framework for assessing territorial residents' challenges to exclusionary laws rooted in U.S. colonialism. The approach I suggest here admittedly operates within the confines of existing legal frameworks and so does not wholly reckon with the constitution of U.S. colonialism. This proposal is thus both theoretical and pragmatic; it employs theories of intersectionality and coloniality to chart a conceptual path that might be practically feasible for advocates, lawyers, or judges. While this preliminary analysis is important for all territorial residents, it is particularly salient for women who are disproportionately impacted.

Broadly, this Essay suggests that courts assess territorial residents' modern-day "political powerlessness"[38] or related "political unpopularity"[39] as continuing manifestations of the colonial subjugation that has impaired the group both within and outside of the political process. Territorial residents, particularly

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37. Multidisciplinary scholars identify intersectional harms to women in colonized spaces and interrogate the relationship between colonization and racialized gender oppression. *See generally* María Lugones, *Methodological Notes Toward a Decolonial Feminism*, *in* DECOLONIZING EPISTEMOLOGIES: LATINA/O THEOLOGY AND PHILOSOPHY 72 (Ada María Isasi-Díaz & Eduardo Mendieta eds., 2011) ("going beyond" intersectionality and introducing the "coloniality of gender" to explore the relationship between colonialism, race, and gender); Malia Lee Womack, *U.S. Colonialism in Puerto Rico: Why Intersectionality Must Be Addressed in Reproductive Rights*, 16 ST. ANTONY'S INT'L REV. 74, 74-75 (2020) (describing colonial violence committed against Puerto Rican women and how on the U.S. continent women mobilized for an "intersectional definition of reproductive rights."); Rodríguez Coss, *supra* note 12, at 100 (explaining "how Puerto Rico's colonial history has contributed to the feminization of poverty"). This Essay does not seek to traverse that entire body of work.

38. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."). Political powerlessness is one of the factors the Supreme Court has identified as relevant to determining whether to apply heightened scrutiny. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (explaining that the Court considers whether the affected class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

39. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (declaring that if "equal protection of the laws means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"). Courts are said to apply rational basis "with bite" when they determine that a classification involves "a bare desire to harm a politically unpopular group." Romer v. Evans, 517 U.S. 620, 635 (1996) (quoting *Moreno*, 413 U.S. at 534).

women of color, are "intersectionally ravaged by a confluence of historical race discrimination with ongoing present day[] consequences,"[40] and are shut out from political power at the federal level. Based on their presumptive subjugation and political powerlessness linked historically to U.S. colonialism — and where there is a confluence of factors (race, poverty colonization, gender, and potentially Indigeneity[41]) — classifications that exclude them should compel a more meaningful rational-basis review.[42]

A retooled rational-basis-with-bite standard — one that centers on the aggregate nature of the harm and the multifaceted reasons for the government action — would not dictate outcomes in ways that a highly deferential standard would. Instead, it would oblige the parties to ventilate issues and closely examine likely consequences. At the same time, it would provide a voice for vulnerable communities challenging oppressive laws while offering courts room to uphold laws that further the self-determination of colonized peoples.[43]

The value of this approach is twofold. First, it offers a modest path for lower courts to employ now. An expansive — rather than strict — view of existing case law may provide the opening for lower courts to employ this slightly more demanding standard of review, particularly if those courts are troubled by the tendency of highly deferential review to paper over ongoing injustices. Second, this approach begins to lay the theoretical groundwork for future judicial decisionmaking. When the politics of the U.S. Supreme Court change and jurisprudential views of judges' roles in constitutional adjudication shift — as they regularly do — this suggested approach can chart a coherent course for jurists interested in what is disguised by overly deferential review.

Accordingly, Part I describes theoretical frameworks for understanding intersectional harms to women in the U.S. territories. These theories show how race, gender, and colonialism intersect — specifically, how colonizers forcefully deploy race and gender to justify colonization or political "aggression" and minimize harms to those deemed "other."[44] Part II then briefly sketches those harms in two main categories: first, reproductive harms and challenges, and second, economic harms, characterized by dangerously limited access to critical public benefits. The former harms are more widely known, but nonetheless remain largely uninterrogated and unredressed; the latter are even less visible. Part III begins to rethink "political powerlessness" and related "political unpopularity"

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40. Dubin, *supra* note 13, at 152.

41. *See infra* notes 199-201 and accompanying text.

42. *See infra* notes 217-251 and accompanying text.

43. *See infra* notes 236-251 and accompanying text.

44. *See* María Lugones, *Heterosexualism and the Colonial/Modern Gender System*, 22 HYPATIA 186, 201-03 (2007).

(and their connection to the history of subjugation for colonized peoples) as one trigger that courts should use to decide whether a rational-basis-with-bite standard is appropriate when assessing classifications that impact residents of the U.S. territories. Finally, in search of a doctrinal middle ground between doing nothing and wholly revolutionizing the constitutional scheme, Part III then sketches the contours of a meaningful, rational-basis-with-bite framework to assess colonialism's intersectional legacies and begin to envision ways to address harms to U.S. territorial residents.

I. LAW, INTERSECTIONALITY, AND THE COLONIALITY OF RACE AND GENDER

Racialized and gendered meanings are deeply embedded in the process of colonization. This Part describes key theoretical frameworks for understanding the intersection of race, gender, and economics in the ongoing U.S. colonial project. It links those theoretical understandings to relevant law to show how negative racialized images of territorial peoples were inscribed in and reproduced through law to foster present-day exclusion. In later Parts, these theoretical concepts furnish the tools for interrogating underexplored modern-day harms to women in the U.S. territories and for developing a rational-basis-with-bite framework.

A. Summary of Key Scholarship

Scholars worldwide describe how colonization is justified in part through race. "International scholar Albert Memmi, a Tunisian Jew and resister of French colonialism, incisively describe[d] how race is deployed to justify colonization or political 'aggression.'"[45] He described "four . . . discursive strategies . . . used by European-derived cultures to justify the colonization of nonwhite races: (1) stressing the real or imaginary differences between the racist and his victim; (2) assigning values to those differences, to the advantage of the racist and the detriment of [his] victim; (3) trying to make them absolutes by generalizing from them and claiming that they are final; and (4) justifying any present or possible aggression or privilege."[46] Thus, "[r]acism appears then, not as an incidental detail, but as a consubstantial part of colonialism. It is the highest expression of the colonial system and one of the most significant features of the colonialist."[47]

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45. *See* Serrano, *Collective Memory*, *supra* note 29, at 368-69.

46. *Id*. (citing ALBERT MEMMI, DOMINATED MAN: NOTES TOWARD A PORTRAIT 186 (1968)).

47. ALBERT MEMMI, THE COLONIZER AND THE COLONIZED 174 (1957); *see also* Anibal Quijano & Michael Ennis, *Coloniality of Power, Eurocentrism, and Latin America*, 1 NEPANTLA: VIEWS FROM

In other works, I have described how U.S. decision makers at the turn of the twentieth century "deployed . . . Memmi's discursive strategies" to depict the CHamorus of Guam as "ignorant," childlike, and "easily controlled."[48] These negative racialized characterizations served to justify U.S. colonial rule, the "confiscat[ion]" of land, "de jure 'segregation,'" "outlawing of CHamoru cultural practices," and sweeping military control.[49] Elsewhere, I similarly explained how U.S. policymakers and Hawai ʻi's sugar oligarchy employed Memmi's discursive strategies to characterize Puerto Ricans as "uncivilized," "indolent," and unworthy of full participation in the U.S. polity.[50] These efforts, I argued, supported U.S. imperialism in Puerto Rico and justified the exclusion and marginalization of Puerto Ricans as a means of social control in territorial Hawai ʻi.[51]

U.S. decision makers deployed similar racialized narratives to justify the conquest of the territories.[52] The Territorial Clause of the U.S. Constitution gave

SOUTH 533, 533-35 (2000) (exploring conquistadors' use of "race" as a fundamental element of the conquest of the Americas that signified the "differences between conquerors and conquered" and enabled the capitalist colonial/modern system that endures today); Nelson Maldonado-Torres, *On the Coloniality of Being*, 21 CULTURAL STUD. 240, 257 (2007) (describing "[i]nvisibility and dehumanization [as] the primary expressions of the coloniality of Being").

48. Serrano, *A Reparative Justice Approach*, *supra* note 29, at 521, 527-29 (quoting Laurel Anne Monnig, "Proving Chamorro": Indigenous Narratives of Race, Identity, and Decolonization on Guam 83 (2007) (unpublished Ph.D. dissertation, University of Illinois at Urbana-Champaign) (on file with author) (quoting the 1904 comments of U.S. Commander and Naval Governor G.L. Dyer).

49. *Id*. at 521, 529-31; *see also Submission to Mr. Francisco Calí Tzay, Special Rapporteur on the Rights of Indigenous Peoples, Regarding Ongoing Human Rights Violations of the Indigenous Chamorro People of Guam Under U.S. Colonization and Militarization*, UNREPRESENTED NATIONS & PEOPLES ORG. [14]-[18], https://unpo.org/downloads/2658.pdf [https://perma.cc/E7KV-FAJT] (arguing that the massive U.S. military buildup in Guam severely impacts Chamorro culture, well-being, and sovereignty); Anumita Kaur, *Marine Base, Live-Fire Training Range Halfway Complete; 43 Historic Sites Discovered*, PAC. DAILY NEWS (July 13, 2020), https://www.guampdn.com/news/local/marine-base-live-fire-training-range-halfway-complete-43-historic-sites-discovered/article_c918ac37-54bd-5781-bdf1-065714776949.html [https://perma.cc/9EDJ-HGM3] (reporting that the construction of sprawling military buildup projects disturbed multiple ancient burial sites and sites containing "historic[al] artifacts"); Jon Letman, *Proposed US Military Buildup on Guam Angers Locals Who Liken It to Colonization*, GUARDIAN (Aug. 1, 2016, 9:43 AM EDT), https://www.theguardian.com/us-news/2016/aug/01/guam-us-military-marines-deployment [https://perma.cc/9B36-CC9H] (reporting that the deployment of an "additional 5,000 marines" to Guam adds to a long history of "militariz[ation]" on Guam and the "military-industrial complex").

50. Serrano, *Collective Memory*, *supra* note 29, at 358-59, 400, 401, 406.

51. *Id*. at 354, 358-59, 400, 401, 406.

52. *See* Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 452-55 (2002) (describing the United States' use of race to justify the unequal treatment of Native inhabitants of newly acquired territories); *see also* Juan Torruella, *The* Insular Cases*: The Establishment of a Regime of*

Congress a wide berth to exercise power over its colonial conquests.[53] The U.S. Supreme Court codified this colonial relationship and inscribed these racialized depictions in the *Insular Cases*, a series of decisions decided between 1901 and 1922.[54] Pursuant to the *Insular Cases*, Congress wields the power to decide which portions of the Constitution apply to the unincorporated territories, limited only by so-called "fundamental" personal rights.[55] The *Insular Cases* today shape peoples' colonial existence in far-reaching ways—from the political to the economic, from the social to the cultural.

Political Apartheid, 77 REV. JURÍDICA U. P.R. 1, 10-11 (2008) (exploring the racialized academic and political discourse surrounding the *Insular Cases*); José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391, 431-32 (1978) (recounting Congressmembers' racialized characterizations of Puerto Ricans and Filipinos).

53. U.S. CONST. art. IV, § 3, cl. 2 (empowering Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"); Rivera Ramos, *supra* note 36, at 235, 246-47. Rather than directing the territories toward eventual statehood, the Treaty of Paris, which concluded the Spanish-American war, left the determination of the "civil rights and political status of the native inhabitants" to Congress. Treaty of Peace Between the United States of America and the Kingdom of Spain, art. IX, Dec. 10, 1898, 30 Stat. 1759.

54. The *Insular Cases* fall generally into two groups: the 1901 cases and the later cases. The 1901 cases include: De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Crossman v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. New York, 182 U.S. 392 (1901); Dooley v. United States, 183 U.S. 151 (1901); and Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901). The later cases include: Hawaii v. Mankichi, 190 U.S. 197 (1903); Gonzalez v. Williams, 192 U.S. 1 (1904); Kepner v. United States, 195 U.S. 100 (1904); Dorr v. United States, 195 U.S. 138 (1904); Mendezona v. United States, 195 U.S. 158 (1904); Rassmussen v. United States, 197 U.S. 516 (1905); Trono v. United States, 199 U.S. 521 (1905); Grafton v. United States, 206 U.S. 333 (1907); Kent v. Porto Rico, 207 U.S. 113 (1907); Kopel v. Bingham, 211 U.S. 468 (1909); Dowdell v. United States, 221 U.S. 325 (1911); Ochoa v. Hernandez, 230 U.S. 139 (1913); Ocampo v. United States, 234 U.S. 91 (1914); and Balzac v. Porto Rico, 258 U.S. 298 (1922); EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 74-76 (2001).

55. *See Dorr*, 195 U.S. at 146-47 (quoting *Downes*, 182 U.S. at 290-91 (White, J., concurring)). Fundamental rights in the territorial context have a distinct yet imprecise meaning: they are only those "which are the basis of all free government." *Dorr*, 195 U.S. at 147 ((quoting *Downes*, 182 U.S. at 290-91 (White, J., concurring)); *see* Fitisemanu v. United States, 1 F.4th 862, 878 (10th Cir. 2021); *see also Balzac*, 258 U.S. at 305, 309, 312-13 (holding that peoples of the unincorporated territories are entitled to "guaranties of certain fundamental personal rights declared in the Constitution" and ruling that the right to a jury trial is not "fundamental" under the *Insular Cases* framework).

In *Downes v. Bidwell*, the most important of the *Insular Cases*, the Supreme Court held that the Uniformity Clause[56] of the U.S. Constitution does not apply to Puerto Rico because Puerto Rico "belong[s] to the United States, but [is] not a part of the United States."[57] Although no opinion garnered a majority, Justice Brown, who delivered the judgment of the Court, counseled against the "extremely serious" consequences if the offspring of the colonies' inhabitants, "whether savages or civilized," would become "entitled to all the rights, privileges and immunities of citizens."[58] Justice White's concurring opinion, which later became the controlling doctrine of territorial incorporation,[59] devised the concept of the unincorporated territory. Whether particular provisions of the Constitution apply in a territory depends on "the situation of the territory and its relations to the United States."[60] Because Congress did not intend to incorporate Puerto Rico, Justice White concluded that it was unincorporated, or that it was, paradoxically, "foreign . . . in a domestic sense."[61] Many legal experts contend that the *Insular Cases* legitimized a perpetual colonial relationship whereby the United States could exercise nearly unchecked power over largely nonwhite peoples without conferring any rights of political representation.[62] Today, the United States exercises near-complete power over five unincorporated territories—Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands (CNMI)—with a collective population of almost four million people.[63]

These lasting colonial harms are gendered as well as raced. Intersectionality theory helps elucidate these linkages. Scholars of intersectionality theory describe how mainstream legal consciousness silences the interlocking experiences

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56. U.S. CONST. art. I, § 8, cl. 1 (requiring that "[d]uties, [i]mposts and [e]xcises" be "uniform" throughout the United States).

57. *Downes*, 182 U.S. at 249, 279, 286-87.

58. *Id.* at 279.

59. *See* Balzac v. Porto Rico, 258 U.S. 298, 305 (1921).

60. *Downes*, 182 U.S. at 293 (White, J., concurring in the judgment); *see also id.* at 288 (White, J., concurring in the judgment) (announcing that whether the Foraker Act's tax on Puerto Rican goods was proper depended on whether Puerto Rico had been "incorporated into the United States.").

61. *Id.* at 341 (White, J., concurring in the judgment).

62. *See, e.g.*, José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 442-43 (1978); Juan R. Torruella, *¿Hacia Dónde Vas Puerto Rico?*, 107 YALE L.J. 1503, 1509 (1998) (reviewing JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (1997)).

63. 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, 197 (2010) (citing ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 3 (1989)).

of (and resulting harms to) women of color. For legal scholar Kimberlé Crenshaw, the "single categorical axis" view of racial and gender subordination reflected in antidiscrimination law ignores the "multidimensionality" of Black women's experiences and limits available remedies for entwined racial and gender harms.[64] Relatedly, legal scholar Angela P. Harris calls for the rejection of "gender essentialism—the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience."[65] Legal scholar Mari J. Matsuda similarly explains that "multiple consciousness" enables those at the intersections to experience multiple standpoints at once.[66] Together, these and other scholars underscore the "cumulative oppressive impact experienced by people whose identity is constructed along multiple axes."[67]

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64. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139-40; *see also* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1265-75 (1991) (raising a similar critique in the context of violence against women of color).

65. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN L. REV. 581, 585 (1990).

66. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 8-9 (1989).

67. Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY J. CRIM. L. 1, 3 n.8 (2010); *see also* Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 22-30 (1995) (drawing lessons from the concepts of intersectionality and anti-essentialism); Robert S. Chang & Jerome McCristal Culp, Jr., *After Intersectionality*, 71 UMKC L. REV. 485, 489 (2002) (reviewing postintersectionality analysis and contending that oppression, subordination, and privilege must be understood within context); Mary Jo Wiggins, *Foreword: The Future of Intersectionality and Critical Race Feminism*, 11 J. CONTEMP. LEGAL ISSUES 677, 678 (2001) (proposing a "reconsideration" of research on intersectionality and critical race feminism); Adrien Katherine Wing, *Brief Reflections Toward a Multiplicative Theory and Praxis of Being*, 6 BERKELEY WOMEN'S L.J. 181, 194 (1990) (contending that Black women's experience should be understood as "multiplicative"); Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH J. RACE & L. 285, 290-94, 316 (2001) (analyzing the "multidimensional" critiques of essentialism and exploring multidimensionality as "an important tool in the development of an adequate response to subordination"); Miyoko T. Pettit-Toledo, *Collective Memory and Intersectional Identities: Healing Unique Sexual Violence Harms Against Women of Color Past, Present and Future*, 45 U. HAW. L. REV. 346, 363-64 (2023) (highlighting the importance of intersectional race-gender redress to heal unique sexual violence harms against women of color to prevent further silencing and invisibility). Chicana feminist scholar Gloria Anzaldúa offered a related path-breaking critical framework to describe the intersectional consciousness formed when one inhabits borderlands—physical and conceptual sites of oppression and resistance shaped by legacies of conquest. GLORIA ANZALDÚA, BORDERLANDS/LA FRONTERA: THE NEW MESTIZA, at preface (1987); *see also* WALTER D. MIGNOLO, LOCAL HISTORIES/GLOBAL DESIGNS: COLONIALITY, SUBALTERN KNOWLEDGES, AND BORDER THINKING 52, 68 (2d prtg. 2012) (drawing on

Going beyond intersectionality, decolonial scholar María Lugones directly connects gender and race to colonization. Her concept of the "the coloniality of gender" describes the forceful colonial imposition of a racialized gender system onto Indigenous and enslaved societies in the Americas and the Caribbean that erased the lifeways and knowledge of those deemed "other."[68] Via this gendered process of dehumanization, women of color—seen as bestial and promiscuous—were genderless and dehumanized, while European women—viewed as passive and weak in mind and body—were simple reproducers of the race and class standing of white men.[69]

Importantly, this racialized gendering process served as "justification[] for abuse," particularly for colonized women of color.[70] It enabled European male colonizers to simultaneously maintain their status as sexual protectors of European women and brutalize Indigenous and Black women through harsh enslavement and unchecked rape and murder.[71] The colonial imposition of the modern gender system thus helps to explain the particularized gender violence experienced by colonized women of color.[72]

Decades of scholarship illuminate how women of color over time became othered and racialized as "promiscuous," erotic, sexually insatiable, and "submissive" to justify sexual violence against them as a means of colonial control and to discount their claims for repair.[73] Decolonial feminist scholars thus continue to

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Gloria Anzaldúa's "new mestiza consciousness" and Du Bois's "double consciousness" to describe border, or "other," thinking that resides at the borders of the modern/colonial world system).

68. *See* Lugones, *supra* note 44, at 201-02.

69. *Id.* at 201-03, 206. Calling it the "the modern colonial gender system," Lugones describes the ways in which colonialism "introduced many genders and gender itself as a colonial concept and mode of organization of relations of production, property relations, of cosmologies and ways of knowing." *Id.* at 186, 201, 206; *see also* María Lugones, *Toward a Decolonial Feminism*, 25 HYPATIA 742, 742 (2010) [hereinafter Lugones, *Decolonial Feminism*] (proposing "the modern, colonial, gender system as a lens through which to theorize further the oppressive logic of colonial modernity"); María Lugones, *The Coloniality of Gender*, WORLDS & KNOWLEDGES OTHERWISE, Spring 2008, at 1, 1-2 (2008) (placing intersectionality and the coloniality of power in conversation to describe "the modern/colonial gender system"); María Lugones, *Gender and Universality in Colonial Methodology*, 8 CRITICAL PHIL. RACE 25, 28 (2020) (arguing that the "modern/colonial gender system" is not universal, and that many societies are not organized around gender).

70. Lugones, *Methodological Notes Toward a Decolonial Feminism*, *supra* note 37, at 74.

71. Lugones, *supra* note 44, at 206.

72. *Id.* at 201, 206.

73. *See, e.g.*, Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence, and Student Discipline in Education*, 54 WAKE FOREST L. REV. 303, 317-18 (2019) (contending that racialized sex stereotypes of women of color as "promiscuous" or as "prostitutes" contribute to the disproportionate sexual harassment women of color); Miyoko T. Pettit, *Who*

challenge mainstream feminism, traditionally centered on white women, by identifying particularized harms "made invisible by the dynamics of colonization, patriarchy, and capitalism."[74] Drawing on these theories, scholars identify specific intersectional harms to women in the U.S. territories and call for legal approaches that acknowledge not only race and gender, but also coloniality.[75]

As detailed in Part II, the U.S. government subsidized and U.S. corporations supported broad-based birth-control and sterilization programs, in part by characterizing Puerto Rico as overrun by inferior, hypersexualized Black and Brown women.[76] And more implicit harms to women, like the disproportionate impacts of the island's poverty, are also deeply rooted in the legacy of U.S. colonization. Characterizing racialized women of the territories as the inferior "other"—openly or implicitly—enables decision makers to largely overlook or discount both types of harms. These complex, interconnected racialized and gendered legacies point to the gaps in legal and political approaches to repairing the damage.

In other words, colonized women's experience of gender and race is more than the sum of its parts. The harms colonized women experience are not simply gendered harms superimposed onto the violence of colonialism; their experiences are particularized in a way the U.S. legal system is not built to cognize or address.

B. Some Present-Day Responses to Colonialism

Indeed, it is in this racialized and gendered context that the peoples of the territories engage with U.S. colonialism in varying ways. On one hand, U.S. plenary power continues to constrain territorial residents' rights sharply, as revealed by the Supreme Court's sweeping denial of Puerto Rico's inherent sovereignty and exclusion of territorial residents from federal benefits.[77] Moreover, territorial residents have virtually no political power: they cannot vote in U.S. presidential elections because the Constitution provides political representation only

Is Worthy of Redress?: Recognizing Sexual Violence Injustice Against Women of Color as Uniquely Redress-Worthy—Illuminated by a Case Study on Kenya's Mau Mau Women and Their Unique Harms, 30 BERKELEY J. GENDER L. & JUST. 268, 277, 319 (2015) (employing an "intersectional race-gender redress analysis" to illuminate how "white British officials and settlers as well as Kikuyu loyalists deployed cultural racial and gender stereotypes to legitimize mass rape and sexual violence against Mau Mau women").

74. Reyes Gil, *supra* note 6, at 264 (citing Lugones, *Decolonial Feminism*, *supra* note 69).

75. *See, e.g.*, Womack, *supra* note 37, at 81-83; Rodríguez Coss, *supra* note 12, at 98-99; Murray, *supra* note 12, at 200, 206; Reyes Gil, *supra* note 6, at 264.

76. *See infra* notes 91-97 and accompanying text.

77. *See, e.g.*, United States v. Vaello Madero, 596 U.S. 159, 161 (2022) (ruling that Congress need not extend Supplemental Security Income benefits to Puerto Rico residents); Puerto Rico v. Sánchez Valle, 579 U.S. 59, 76-78 (2016) (holding that Puerto Rico and the United States are not separate sovereigns for purposes of the Double Jeopardy Clause).

to the states.[78] Territorial residents also do not have a voting representative in Congress: Puerto Rico has a resident commissioner and the other territories have delegates in the U.S. House.[79] Those individuals can vote in committee but may not vote on the House floor.[80] They may also vote in the Committee of the Whole "subject to immediate reconsideration in the House when their recorded votes have been 'decisive.'"[81]

On the other hand, however, territorial residents assert claims to self-determination to protect Indigenous land, self-governance, and other rights in the Commonwealth of the Northern Mariana Islands, Guam, and American Samoa by employing the very framework that was put in place to limit their participation in the polity.[82] For example, in *Davis v. Guam*, advocates proactively used the *Insular Cases* to promote decolonization and combat reverse-discrimination attacks. Arnold Davis, a white resident of Guam, sued Guam in federal district court, alleging that the territory unlawfully discriminated against him when it prohibited him from registering to vote in a symbolic political-status plebiscite that limited eligibility to "Native inhabitants of Guam."[83] Guam argued that

78. *See* U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."); U.S. CONST. art. I, § 3 ("The Senate of the United States shall be composed of two Senators from each State . . . ."); U.S. CONST. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .").

79. Puerto Rico's representative in the House of Representatives is a "Resident Commissioner," and the representatives from American Samoa, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands are delegates. *See* JASON A. SMITH, CONSTITUTION: JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 116-177, at 381, 396-400 (2021).

80. *See* JANE A. HUDIBURG, CONG. RSCH. SERV., R40170, PARLIAMENTARY RIGHTS OF THE DELEGATES AND RESIDENT COMMISSIONER FROM PUERTO RICO 1 (2022).

81. *Id.* at 2.

82. *See* Brief for Intervenors or, in the Alternative, Amici Curiae the American Samoa Government and Congressman Eni F.H. Faleomavaega at 1, 32, Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015) (No. 13-5272), 2014 WL 4199267 (arguing that that the *Insular Cases* allow American Samoa and Congress together "to maintain a deliberate distance between the territory and the law of the United States" to protect American Samoa's cultural autonomy, and contending that the Fourteenth Amendment's Citizenship Clause should not automatically apply in American Samoa because it would encroach on the Samoan "way of life"); Proposed Intervenors Motion to Dismiss, or in the Alternative, Cross Motion for Summary Judgment at 1, Fitisemanu v. United States, 426 F. Supp. 3d 1155 (D. Utah 2019) (No. 18-cv-00036), 2018 WL 6068535 (contending that U.S. imposition of Fourteenth Amendment birthright citizenship to American Samoa "violates every legal principle of self-determination, sovereignty, and autonomy").

83. Davis v. Guam, No. 11-00035, 2013 WL 204697, at *1 (D. Guam Jan. 9, 2013); *see also* Serrano, *A Reparative Justice Approach*, *supra* note 29, at 502 ("The law allows eligible 'native inhabitants'—those who became U.S. citizens pursuant to Guam's 1950 Organic Act and their

Congress, pursuant to its sweeping plenary power under the Territorial Clause, can treat territories in ways that would otherwise offend the Constitution.[84] Thus, because Congress sought to restore a measure of self-determination to Guam's Native inhabitants in Guam's 1950 Organic Act, and because Guam is an instrumentality of Congress, Guam argued that it could limit its political-status plebiscite to Native inhabitants, even if in part based on ancestry.[85]

As described in the next Part, women in the territories also engage with U.S. colonialism in varying ways. Employing the theoretical and legal understandings just outlined, the Part begins to explore how women inhabit unique spaces and identities (at the intersection of race, class, gender, colonialism, Indigeneity, and religion) and therefore must navigate the legal, political, and social "conflicts that arise from their multiple positioning and belonging to different national communities."[86]

II. INTERSECTIONAL HARMS TO WOMEN IN THE TERRITORIES

This Part briefly sketches some of the particularized and largely unseen[87] harms to women in the U.S. territories—often linked to U.S. colonization and

descendants—to choose between independence, free association with the United States, or statehood, as an expression of their long-awaited self-determination as an integral part of decolonization." (footnotes omitted)).

84. Defendant's Motion for Summary Judgment, *supra* note 83, at 13.

85. *Id.* at 1-3, 13-16. The Ninth Circuit Court of Appeals, on other grounds, held that the political-status plebiscite violated the Fifteenth Amendment because it used ancestry as a proxy for race. Davis v. Guam, 932 F.3d 822, 839 (9th Cir. 2019).

86. Dames, *supra* note 2, at 378 ("How can indigenous women in liberal democracies resolve conflicts that arise from their multiple positioning and belonging to different national communities?").

87. I call these harms "invisible" or "unseen" to characterize the lack of national recognition of and attention paid to harms to women and to other peoples in the U.S. territories. This "invisibility" is likely due to many interlocking factors. First, many scholars have established that women and women of color generally suffer invisible, unnamed, and overlooked harms that are often unrecognized by law. *See, e.g.*, Stephanie M. Wildman, *Ending Male Privilege: Beyond the Reasonable Woman*, 98 MICH. L. REV. 1797, 1797 (2000) (book review); Pettit-Toledo, *supra* note 67, at 364. For a number of reasons, the U.S. territories themselves have long been "invisible" to the larger U.S. populace. Historically, they were treated as geographically "far off . . . unamenable to colonization by settlement on the part of Anglo-Americans, and, above all, inhabited by alien peoples untrained in the arts of representative government." Rivera Ramos, *supra* note 36, at 237-38. In the present day, territories' legal identity and status is separate or "exceptional" and the resulting colonial harms to their peoples easily ignored or left unredressed. Many thus contend that the citizenry is treated as foreign, second class, and thus "invisible." Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 44 & n.336 (1998). U.S. decision makers likewise often

the territories' political relationship with the United States—in two main categories: reproductive harms and challenges, and access to federal benefits.[88] These underexplored intersectional legacies of U.S. colonization, along with the theoretical frameworks described above, then inform the broadly outlined rational-basis-with-bite framework presented in Part III.

A. Reproductive Harms and Challenges

Reproductive harms and obstacles to reproductive-healthcare access are among the many contemporary challenges facing women in the territories. Particularly after *Dobbs*, conservative politicians in the territories have sought to introduce or alter legislation to limit reproductive rights further, mirroring similar movements on the U.S. continent.[89] But for decades, reproductive harms in the U.S. territories have included birth-control testing, sterilization, and lack of or limited abortion access.[90] In many of these instances, women's intersectional lived experiences were often sidelined.

1. Puerto Rico

In Puerto Rico, U.S. eugenicists and decision makers embraced pseudoscientific eugenics theories to control women's fertility. For some, "immoral" and

marginalize the territories. *See* Serrano & Tapu, *supra* note 29, at 1288 (noting that "no sitting president has been to the Commonwealth of the Northern Mariana Islands (CNMI) since the territory came under U.S. control [in 1975] or to American Samoa since Lyndon B. Johnson." (footnote omitted)). As such, the territories' colonial histories and modern-day legal statuses "are largely not taught," even in law schools. *See* Serrano, *Elevating the Perspectives*, *supra* note 29, at 398.

88. Of course, there are many other types of harms, including violence against women, but exploring them all is beyond the scope of this Essay.

89. Reyes Gil, *supra* note 6, at 279-80 (describing recent legislative attempts in Puerto Rico seeking to limit or prohibit abortion); *see also* Yamila Azize-Vargas & Luis A. Avilés, *Abortion in Puerto Rico: The Limits of Colonial Legality*, 5 REPROD. HEALTH MATTERS 56, 63 (1997) (same); Natalia Cárdenas-Suárez, Cayra Ramirez-Santiago, Debora Zamora-Olivencia, Josefina Romaguera, Enid J. Garcia Rivera & Y Yari Vale Moreno, *Telehealth as a Potential Tool for Outreach Among Women in Puerto Rico*, 3 AM. J. OBSTETRICS & GYNECOLOGY 1, 4 (2023) (describing how despite the fact that "abortion continues to be legal" in Puerto Rico, it is "stigmatized, affecting women's receptiveness to learning or educating themselves about the topic").

90. *See* BRIGGS, *supra* note 16, at 108, 124; Mass, *supra* note 15, at 69, 73, 77; Harriet B. Presser, *The Role of Sterilization in Controlling Puerto Rican Fertility*, 23 POPULATION STUD. 343, 343 (1969). The national legal challenges to access to mifepristone via mail will likely further complicate the matter. *See* Ann E. Marimow & Caroline Kitchener, *Why the Supreme Court's Abortion Pill Ruling Might Not End Legal Fight*, WASH. POST (June 4, 2024, 6:00 AM EDT), https://www.washingtonpost.com/politics/2024/06/04/abortion-pill-states-challenge-supreme-court [https://perma.cc/5RMA-VQ9J].

"unintelligent" poor Puerto Rican women and their "relentless" reproduction were to blame for the island's underdevelopment and poverty.[91] U.S. intervention and "benevolent" sterilization policies and birth-control programs were thus necessary to control rampant "overpopulation."[92] U.S. eugenicist Clarence Gamble's population-control project in Puerto Rico, for example, sought to "control the dangerously expanding population of an unambitious and unintelligent group."[93] American eugenicists and U.S. pharmaceutical companies also used Puerto Rican women as subjects for trials of the birth-control pill prior to FDA approval.[94]

As Memmi's framework predicted, U.S. policymakers employed racialized characterizations of Puerto Rican women to justify this harsh treatment. They depicted Puerto Rican women as "demon mothers" whose "dangerous fecundity could only be halted by strong measures—sterilization, high doses of hormones."[95] Thus, the idea that poor, nonwhite Puerto Rican women were "unfit for reproduction" was expressly "incorporated into government policy."[96] Women's reproduction "defined the difference" that made U.S. intervention and governance in Puerto Rico "possible and necessary."[97]

But reproductive control in Puerto Rico involved the complex entanglements of race, gender, colonization, nationalism, and religion. For decades, Puerto Rico's nationalist movement viewed "women's fertility [as] emblematic of the

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91. *See* LÓPEZ, *supra* note 15, at 4.

92. *See* BRIGGS, *supra* note 16, at 9, 18, 121, 125; RAMIREZ DE ARELLANO & SEIPP, *supra* note 16, at 13-15; LÓPEZ, *supra* note 15, at 9 (contending that "migration and sterilization were used as alternate and reinforcing mechanisms" to control perceived "overpopulation"). By 1965, around one out of three Puerto Rican women were sterilized. Presser, *supra* note 90, at 354; *see also* Mass, *supra* note 15, at 72 ("By 1965, approximately 34 percent of women of childbearing age had been sterilized, two thirds of whom were still in their early twenties.").

93. BRIGGS, *supra* note 16, at 125 (quoting Letter from Clarence Gamble to Youngs Rubber Corporation (March 24, 1947) (on file with Countway Library of Medicine, Clarence J. Gamble Papers, Box 46, Folder 759)); LÓPEZ, *supra* note 15, at 12 (describing Law 136, a eugenics sterilization law, authorizing the Commissioner of Health to license doctors to "teach and practice eugenics principles" (quoting KENT C. EARNHARDT, DEVELOPMENT PLANNING AND POPULATION POLICY IN PUERTO RICO: FROM HISTORICAL EVOLUTION TOWARDS A PLAN FOR POPULATION STABILIZATION 28 (Editorial de la Universidad de Puerto Rico, 1982))).

94. Vargas, *supra* note 16.

95. BRIGGS, *supra* note 16, at 110.

96. LÓPEZ, *supra* note 15, at 9, 19.

97. BRIGGS, *supra* note 16, at 4; *see id.* at 108 ("The notion that through overpopulation poor women were responsible for the economic ills of the island simultaneously served to mask U.S. capitalist extraction and to provide an occasion for further U.S. involvement.").

nation"[98] and thus opposed birth control as genocidal U.S. encroachment.[99] Some Puerto Rican feminists, on the other hand, sought both decolonization and freedom from reproduction through contraceptive sterilization, while U.S.-based feminists viewed sterilization as paternalistic social control.[100] Thus, Puerto Rican women navigated complex intersectional identities and relationships in spaces where race, sexuality, and reproduction were fundamental to the U.S. imperial project.[101]

Today, access to reproductive healthcare and maternity care in Puerto Rico is not consistently available.[102] Approximately twenty percent of municipalities are defined as "maternity care deserts,"[103] with some women traveling up to 34.4 miles to reach the nearest birthing hospital.[104] And although Medicaid in Puerto Rico covers family planning,[105] Puerto Rico has only 1.7 Title X clinics per 100,000 women compared to the 5.3 clinics per 100,000 women "in the U.S. overall."[106]

Organizations in Puerto Rico provide education and practical support for women and others in need of reproductive-health services. For example,

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98. Laura Briggs, *Discourses of "Forced Sterilization" in Puerto Rico: The Problem with the Speaking Subaltern*, DIFFERENCES: J. FEMINIST CULTURAL STUD. 30, 46 (Summer 1998).

99. *See id.* at 39 (describing the origins of "Puerto Ricans construc[ing] birth control as part of a genocidal plot by North Americans"); *see also id.* at 38 (noting that the Catholic church adopted the view of birth control as "part of a U.S. federal policy of genocide").

100. In doing so, those U.S. feminists allied themselves with Puerto Rican nationalists without fully realizing "the extent to which nationalist pro-natalism in Puerto Rico had historically been associated with conservative Catholicism and anti-feminism." BRIGGS, *supra* note 16, at 143.

101. LÓPEZ, *supra* note 15, at 18 (contending that Puerto Rican women's reproductive agency was constrained and moderated by forces including American eugenicists, the Nationalist Party and Catholic Church's opposition to birth control, diverging feminist approaches, and "the privatization of Puerto Rico's birth control market"); BRIGGS, *supra* note 16, at 108 (explaining that, in the 1920s through the 1940s, "overpopulation, eugenics, and birth control programs intervened in debates about whether the island was entitled to independence, and whether the 'race' of the island's inhabitants was 'black' or 'Spanish'").

102. Jazmin Fontenot, Ripley Lucas, Ashley Stoneburner, Christina Brigance, Kelly Hubbard, Erin Jones & Kathryn Mishkin, *Where You Live Matters: Maternity Care in Puerto Rico*, MARCH OF DIMES 1 (2023), https://www.marchofdimes.org/peristats/assets/s3/reports/mcd/Maternity-Care-Report-PuertoRico.pdf [https://perma.cc/B2EB-RCEW].

103. *Id.*; *see also id.* (defining "maternity deserts" as "areas without access to birthing facilities or maternity care providers").

104. *Id.* at 2.

105. *See Report to Congress on Medicaid and CHIP*, MEDICAID & CHIP PAYMENT & ACCESS COMM'N 81 tbl.5-2 (June 2019), https://www.macpac.gov/wp-content/uploads/2019/06/June-2019-Report-to-Congress-on-Medicaid-and-CHIP.pdf [https://perma.cc/Q233-8UVC].

106. Fontenot et al., *supra* note 102, at 3.

feminist nonprofit organization Taller Salud is "dedicated to improving women's access to health care, to reducing violence within the community[,] and to encourag[ing] economic growth through education and action."[107] Taller Salud was founded in 1979 in response to the reproductive harms Puerto Rican women experienced in the twentieth century, namely, unethical birth-control testing and mass sterilization. At the time, its founders sought to organize within the community to "guarantee and provide access to abortions and birth control methods, as an alternative to the . . . sterilization of women of low resources [on] the island."[108]

Today, the organization continues to support women and reproductive justice while challenging the injustices that affect all Puerto Ricans.[109] One of its primary initiatives is a culturally competent program that offers services and support for Afro-Puerto Rican women affected by gender-based violence.[110] The organization also educates and trains women to promote community health and protect sexual and reproductive health, and it provides sexual and reproductive education to girls and young women.[111]

Organizations such as Profamilias Puerto Rico and Proyecto Matria likewise support the physical, mental, social, and reproductive health of women and LGBTQIA+ people. Profamilias Puerto Rico was the first organization in Puerto Rico dedicated to family planning when it was established in 1946.[112] Today, it provides sustainable access to sexual and reproductive services for disadvantaged communities while championing reproductive rights for all.[113] One of its clinics, Clínica IELLA, is one of five clinics in Puerto Rico that "offer[s] integrated abortion and contraceptive services."[114] Proyecto Matria provides "support services to overcome the [societal] impediments faced by survivors of gender-based

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107. *Our Story*, TALLER SALUD, https://www.english.tallersalud.com/we-are [https://perma.cc/D33H-93QD].

108. *Id.*; Tina Vásquez, *'Trying to Survive in Puerto Rico': A Conversation with Taller Salud*, PRISM REPS. (June 18, 2020), https://prismreports.org/2020/06/18/trying-to-survive-in-puerto-rico-a-conversation-with-taller-salud [https://perma.cc/6G6M-GEFJ].

109. *Id.*

110. *Women and Health*, TALLER SALUD, https://www.english.tallersalud.com/copy-of-iniciatives-1 [https://perma.cc/2YWL-BE32].

111. *Id.*

112. *Profamilias Puerto Rico*, PROFAMILIAS P.R., https://www.profamiliaspr.org/nosotros [https://perma.cc/AN56-6BJ6].

113. *Id.*

114. Brief of Amici Curiae Campaña Nacional por el Aborto Libre, Seguro y Accesible and Other Puerto Rican Organizations in Support of Respondents at 2-3, Dobbs. v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392); *see Servicios*, PROFAMILIAS P.R., https://www.profamiliaspr.org/servicios [https://perma.cc/B6Z3-WDCR] (listing Clínica IELLA as one of Profamilias Puerto Rico's clinics).

violence or very low-income heads of families" to create economic and educational opportunities.[115] Though Proyecto Matria is not specifically dedicated to health access, it is committed to protecting reproductive justice through its public-policy initiatives.[116]

These efforts, and those described in the following Section on Guam, reflect a vibrant, intersectional, feminist vision for sustaining women's health and bodily autonomy and assuring accessible reproductive care. These organizations do so in the face of draconian proposed laws to limit abortion, colonial legacies that limit political power and self-determination, and ongoing environmental crises that threaten basic livelihood in the territories.

2. Guam

Given the legacy of colonization and resulting dominant Catholic culture in Guam,[117] reproductive healthcare, especially abortion, is both stigmatized and polarizing.[118] CHamoru women historically practiced abortion[119] and have been

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115. *Vision y Mision*, PROYECTO MATRIA, https://www.proyectomatria.org/en/vision-y-mision [https://perma.cc/5RBX-AFDR].

116. *See, e.g.*, Press Release, Hispanic Federation, Alliance for Access to Essential Reproductive Health Celebrates Vote Protecting Reproductive Justice in Puerto Rico (Nov. 16, 2022), https://www.hispanicfederation.org/media/press_releases/alliance_for_access_to_essential_reproductive_health_celebrates_vote_protecting_reproductive_justice_in_puerto_rico [https://perma.cc/Q5EZ-YCJZ] (reporting Proyecto Matria's statement of support for the Alliance for Access to Essential Reproductive Health's advocacy against four bills that would restrict or ban abortion services).

117. Anne Perez Hattori, *Colonialism, Capitalism and Nationalism in the US Navy's Expulsion of Guam's Spanish Catholic Priests, 1898-1900*, 44 J. PAC. HIST. 281, 284-85 (2009) (describing the Spanish imposition of Catholicism in Guam and the CHamoru people's adaptation of it into Indigenous systems and practices); VICENTE M. DIAZ, REPOSITIONING THE MISSIONARY: REWRITING THE HISTORIES OF COLONIALISM, NATIVE CATHOLICISM, AND INDIGENEITY IN GUAM 17, 20-21 (2010) (exploring the complex and interwoven role that Catholicism plays in CHamoru political and cultural life and identity). Today, an estimated 90% of Guam residents are Catholic. *See* Anita Hofschneider, *The Fight over Abortion Access in Guam Has Broad Implications for Women in the Pacific*, HONOLULU CIV. BEAT (Dec. 22, 2022), https://www.civilbeat.org/2022/12/the-fight-over-abortion-access-in-guam-has-broad-implications-for-women-in-the-pacific [https://perma.cc/35HG-X5QE]. Consequently, Guam tends towards socially conservative policies regarding reproductive rights. *See Guam*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/state/guam [https://perma.cc/Z58S-9S6R] (predicting that post-*Dobbs*, "Guam will likely pass a total ban on abortion," as "Guam already prohibits abortion after 13 weeks of pregnancy in almost all situations").

118. *See, e.g.*, David W. Chen, *In Isolated Guam, Abortion Is Legal. And Nearly Impossible to Get.*, N.Y. TIMES (June 27, 2023), https://www.nytimes.com/2023/06/26/us/guam-abortion.html [https://perma.cc/YFN2-MVV8]; Dames, *supra* note 2, at 369.

119. *See* Dames, *supra* note 2, at 369; Donald H. Rubinstein, *Culture in Court: Notes and Reflections on Abortion in Guam*, 94 J. SOCIÉTÉ DES OCÉANISTES 35, 36 (1992) (quoting a Jesuit historian's

at the forefront of securing abortion access in Guam for nearly fifty years.[120] In the 1980s, U.S. right-wing antiabortion politicians and religious leaders' agendas intersected with local CHamoru resistance to American colonization in Guam: "'Saving the Fetus' became an analogue to 'Liberating Guam' and 'Saving the Chamorro People.'"[121] In 1990, the Guam Legislature passed a strict antiabortion law, viewed by some as a bulwark "against a common foe of Chamorro self-determination, namely, the U.S. Constitution."[122] CHamoru women led the successful fight to strike down the law, but CHamoru women stood on both sides of the conflict.[123] As scholar Vivian Loyola Dames observes, the struggle revealed their complex intersectionality: "What is at stake is not only what it means to be a woman but also what it means to be Chamorro, Catholic, and American in an unincorporated U.S. territory."[124]

Although abortion is currently legal in Guam, the last abortion provider left in 2018.[125] The closest location for the procedure is Hawai'i, about four thousand miles away.[126] In 2021, physicians challenged two abortion restrictions in Guam: one requiring abortions to be performed in a clinic or hospital, and another requiring patients to receive in-person government-

account of "[t]he [CHamoru] women, [who] purposely sterilize themselves; or if they conceive, they find ways to abort").

120. *See generally* Declaration of Michael Lujan Bevacqua, PhD., in Support of Plaintiffs' Motion for a Preliminary Injunction at 1-2, Raidoo v. Camacho, No. 21-00009 (D. Guam Feb. 5, 2021), https://www.bloomberglaw.com/product/blaw/document/X7PUP1B7U0V8OU8GEM3M37CC74H/download?criteria_id=e86991c7bcbf5efc0ecf4cee624b716b&imagename=1 [https://perma.cc/88MK-P6ZL] (providing historical context concerning abortion access in Guam and illustrating "in their own words—why Chamoru women have fought to maintain access to safe and legal abortion on the island").

121. Dames, *supra* note 2, at 372.

122. *Id*. at 366; *see also* Guam Soc. of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366, 1368 (9th Cir. 1992) (describing Guam's 1990 law outlawing and criminalizing nearly all abortions except "in cases of ectopic pregnancy, and abortions in cases where two physicians practicing independently reasonably determined that the pregnancy would endanger the life of the mother or 'gravely impair' her health").

123. *See, e.g.*, Declaration of Michael Lujan Bevacqua, PhD., in Support of Plaintiffs' Motion for a Preliminary Injunction, *supra* note 120, at ¶¶ 46-49; *see also* Michael Lujan Bevacqua, *Abolishing Guam's Colonial Past Must Include Protecting Access to Abortion*, ACLU (Feb. 8, 2021), https://www.aclu.org/news/reproductive-freedom/abolishing-guams-colonial-past-must-include-protecting-access-to-abortion [https://perma.cc/DD5A-W4BA] (characterizing Chamoru women's reproductive empowerment as part of Guam's decolonization).

124. Dames, *supra* note 2, at 366, 368 (noting that "Chamorro women activists on both sides of the conflict [were] agents of resistance and transformation in the context of Guam's history of colonization and the unsuccessful attempt of the people of Guam to attain decolonization").

125. *See* Hofschneider, *supra* note 117.

126. *Id.*; *see also* Chen, *supra* note 118 (explaining the challenges of obtaining an abortion in Guam).

mandated counseling before an abortion.[127] Guam's government conceded that telemedicine is permitted under Guam law, and the in-person government counseling requirement was enjoined that same year.[128] But following *Dobbs*,[129] the Ninth Circuit vacated the injunction, reinstating the requirement that a patient seeking abortion medication via telemedicine must first submit to in-person government-mandated counseling.[130] As Vanessa L. Williams, Guam co-counsel in the case, observed, "[T]his [in-person] requirement looks nothing like 'informed consent' and provides no health benefit for people in Guam . . . ."[131] Meanwhile, Guam Attorney General Douglas Moylan attempted to persuade federal courts to vacate a thirty-year-old permanent injunction to resurrect Guam's 1990 abortion ban.[132] The law threatens to ban abortion at all stages of pregnancy, criminalize abortion for both patients and physicians, and make it a crime to inform another where to obtain an abortion.[133]

It is also often difficult for women in Guam to access maternal services in general. Historically, Catholic colonizers and the U.S. military halted traditional

127. Raidoo v. Moylan, 75 F.4th 1115, 1119-20 (9th Cir. 2023); Reprod. Freedom, *Court Cases:* Raidoo et al. v. Camacho et al., ACLU (Nov. 20, 2023), https://www.aclu.org/cases/raidoo-et-al-v-camacho-et-al [https://perma.cc/7EFT-4P87] ("Two Guam laws—a requirement that medication abortions be 'performed' in a clinic or hospital, and an in-person state-mandated counseling law—are preventing physicians from using telemedicine to provide medication abortion.").

128. *See* Reprod. Freedom, *supra* note 127.

129. 597 U.S. 215 (2022).

130. *Raidoo*, 75 F.4th at 1121.

131. Press Release, ACLU, Federal Court Allows Medically Unnecessary Abortion Restriction in Guam to Take Effect Again (Aug. 1, 2023, 6:00 PM), https://www.aclu.org/press-releases/federal-court-allows-medically-unnecessary-abortion-restriction-in-guam-to-take-effect-again [https://perma.cc/4EHY-WUBH].

132. *See* Guam Soc'y of Obstetricians & Gynecologists v. Guerrero, No. 90-00013, 2023 WL 2631836, at *1 (D. Guam Mar. 24, 2023) (denying Attorney General Moylan's motion to vacate permanent injunction); Joe Taitano II, *Governor Moves to Block Resurrection of 1990 Abortion Ban*, PAC. DAILY NEWS (Feb. 28, 2023), https://www.guampdn.com/news/governor-moves-to-block-resurrection-of-1990-abortion-ban/article_182878ce-b669-11ed-afa2-0bdfeb40b892.html [https://perma.cc/5DTE-XZHZ].

133. *See* Reprod. Freedom, *Court Cases: Guam Society of OBGYNs v. Guerrero*, ACLU (Dec. 14, 2023), https://www.aclu.org/cases/guam-society-of-obgyns-v-guerrero [https://perma.cc/5B53-Y48P]; John O'Connor, *Moylan Files Motion to Vacate Injunction Against Abortion Ban*, GUAM DAILY POST (Feb. 2, 2023), https://www.postguam.com/news/local/moylan-files-motion-to-vacate-injunction-against-abortion-ban/article_9bd844e2-a1f6-11ed-a80e-2ba5d42c85a1.html [https://perma.cc/A9GC-XKMU].

CHamoru healers' access to land where key medicinal plants grew.[134] Today, following the closure of the island's only birth center in 2022, birthing options are limited to the general hospital and a handful of doulas.[135] The Birthworkers of Color Collective, a CHamoru women-led nonprofit, seeks to increase access to reproductive care by providing doula services to disadvantaged communities and by educating and empowering marginalized people to become doulas.[136] According to its director, reclaiming traditional Indigenous practices is necessary due to U.S. militarization and Guam's "history of colonial trauma" that has alienated the CHamoru people from their culture.[137] The Birthworkers of Color Collective operated a specialized doula training for CHamoru people "centering indigenous birthing knowledge" in which elders and healers taught participants about local herbs and traditional remedies for various reproductive health issues, and plans to continue similar outreach to Indigenous people in Guam.[138]

Additionally, since 2019, Famalao'an Rights, a reproductive-justice nonprofit, "has been at the forefront of safeguarding reproductive health care and bodily autonomy."[139] The organization is led by CHamoru, Pohnpeian, and Filipina women[140] dedicated to ensuring access to "affordable and timely reproductive healthcare options" in Guam.[141] Famalao'an Rights plans to continue advocating for abortion access and providing social and monetary assistance to women seeking abortions; in the long term, it seeks to establish a reproductive-health clinic to provide services "such as birth control, contraception, abortion services, STD testing and treatment, [and] patient education."[142]

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134. Tamar Celis, *Traditional Healing on Guam Makes a Comeback*, PAC. DAILY NEWS (Nov. 28, 2018, 5:56 PM ET), https://www.usatoday.com/story/beyondliberation/2018/11/18/traditional-healing-guam-makes-comeback/2021925002 [https://perma.cc/98H8-GL4J].

135. Iris Kim, *Indigenous Doulas Lead the Fight for Reproductive Care Access Gap in Guam*, NBC NEWS (May 4, 2024), https://www.nbcnews.com/news/asian-america/indigenous-doulas-lead-fight-reproductive-care-access-gap-gaum-rcna147918 [https://perma.cc/3CRD-BCGZ].

136. *About Birthworkers of Color*, BIRTHWORKERS COLOR COLLECTIVE, https://www.birthworkersofcolor.com/about-us [https://perma.cc/39KW-GWCA].

137. Iris Kim, *Guam's Only Maternity Ward Is Vulnerable to Climate Disasters. Meet the Indigenous Doulas Providing an Alternative*, NBCU ACAD. (Mar. 28, 2024, 3:15 EDT), https://nbcuacademy.com/guam-doulas [https://perma.cc/R2YW-6U58].

138. *Id.*

139. Ha'åni Lucia Falo San Nicolas & Kiana Joy Yabut, *Indigenous and Filipino Women Are Leading the Fight for Reproductive Justice in Guam*, ACLU (Nov. 29, 2023), https://www.aclu.org/news/reproductive-freedom/indigenous-and-filipino-women-are-leading-the-fight-for-reproductive-justice-in-guam [https://perma.cc/S3KN-5GKB].

140. *Id.*

141. *About Us*, FAMALAO'AN RTS., https://www.famalaoanrights.org/about-us [https://perma.cc/H4FX-4JMW].

142. *Id.*

These organizations engage in critical on-the-ground action in communities to provide essential reproductive-health services. Still, widespread poverty, chronically underfunded public healthcare systems, and poor health outcomes — linked directly to the legacies of colonialism and inequality — continue to harm women in the territories. [143] For these reasons, access to federal benefits is important for many. But, as described in the next Section, women are often particularly impacted when those benefits are scarce.

B. Access to Benefits

This Section outlines other largely unseen economic impacts on women in the U.S. territories. Starkly limited access to life-saving federal benefits — particularly for single mothers, pregnant women, and older women, and especially in the wake of disasters and economic emergencies — deepens harsh disparities in healthcare, nutrition access, and disaster relief. [144]

Poverty rates in the U.S. territories are strikingly high. While the poverty rates of Louisiana and Mississippi — the two poorest U.S. states — are around 19%, poverty rates in the U.S. territories are much higher: nearly 23% in Guam, 43.5% in Puerto Rico, and 60% in American Samoa. [145] Women are often uniquely impacted. In Puerto Rico, for example, families headed by females experience marked poverty. [146] In 2021, 69.6% of female-led households with no spouse present lived below the poverty line. [147] A staggering 90% of families with three or more children and a single female head of household lived below the poverty line. [148] According to a comprehensive study by Centro Hunter CUNY,

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143. *See* José G. Pérez Ramos, Adriana Garriga-López & Carlos E. Rodríguez-Díaz, *How Is Colonialism a Sociostructural Determinant of Health in Puerto Rico?*, 24 AMA J. ETHICS 305, 305-07 (2022).

144. *See infra* notes 155-186 and accompanying text.

145. Karl A. Racine & Leevin T. Camacho, *Dear Supreme Court: 3.5 Million Americans in Territories Deserve Same Federal Benefits*, USA TODAY (Nov. 9, 2021, 12:39 PM ET), https://www.usatoday.com/story/opinion/2021/11/09/social-security-puerto-rico-supreme-court-justice/6307011001 [https://perma.cc/438B-BJG3]. The United States's national poverty rate in 2022 was 11.5%. EMILY A. SHRIDER & JOHN CREAMER, U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES: 2022, at 1 (2023).

146. Vargas-Ramos et al., *supra* note 21, at 10; *see also id.* at 6 ("Of the 42% of the population that was poor in Puerto Rico [in 2021], women and girls represented 23% of Puerto Rico's population, while men and boys made up another 19%").

147. *Overview of the State-Puerto Rico*, *supra* note 22, at 3.

148. Vargas-Ramos et al., *supra* note 21, at 10. More households in Puerto Rico are led by a female with no spouse present (46%) than households with married couples (41%) or households headed by men without a spouse present (12%). *Id.* at 19 n.15. In Guam in 2019, families with a female householder with children and no spouse present constituted 44% of families with

these stark "disparities are tied to the underemployment among women in general relative to men, but especially due to the underemployment among prime working-age women."[149]

There is little data on the lack of federal benefits and its impact on women in the territories. Indeed, there is little meaningful data on the U.S. territories in general, which contributes to territorial residents' invisibility in the federal system and stymies efforts by policymakers and others to address socioeconomic inequalities.[150] But existing demographic data suggest that women in the territories experience or are at risk of experiencing poverty at higher levels; are the primary caregivers for children, disabled individuals, and elderly folks in the territories; are more often single heads of household with children under eighteen than men; and at the same time, make up large percentages of single heads of household living below the poverty level.[151]

Thus, congressional limitations on public benefits, alongside other U.S.-imposed economic policies linked to the legacies of U.S. colonialism, contribute to often catastrophic economic outcomes for working-age women and others.[152] And these inequalities have intensified during climate disasters and fiscal emergencies.[153] In broad strokes, this Section identifies some of these harms.[154]

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incomes below the poverty level. Maternal & Child Health Bureau, *Overview of the State-Guam-2024*, U.S. DEPT. OF HEALTH & HUM. SERVS. (2024) [hereinafter *Overview of the State-Guam*], https://mchb.tvisdata.hrsa.gov/Narratives/Overview/9120ddf9-8e9a-4997-a4fe-b9b685f62d6f [https://perma.cc/K2HD-LZJT].

149. Vargas-Ramos et al., *supra* note 21, at 11-12.

150. Several "critical government data collection efforts and publications entirely exclude the U.S. territories." Lee et al., *supra* note 24, at 1. For most U.S. territories, data are not collected in three critical federal datasets about the U.S. population, households, and workforce constructed by the Census Bureau: the American Community Survey, the Population Estimates, and the Current Population Survey. *Id.* at 5 fig.3; *see also id.* at 6 (noting that although the U.S. territories experience higher poverty rates than the United States overall, the Current Population Survey, which "is the basis for poverty measurements in the 50 U.S. states and D.C.," excludes every U.S. territory).

151. *See, e.g.*, Vargas-Ramos et al., *supra* note 21, at 6-7, 9 (discussing the experiences of women in Puerto Rico); *see also Overview of the State-Guam*, *supra* note 148, at 4 (noting the disproportionate poverty rate of women in Guam).

152. Vargas-Ramos et al., *supra* note 21, at 5, 16; *see also* Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114-187, 130 Stat. 149 (codified as amended at 48 U.S.C. §§ 2101-2241 (2018)) (creating an unelected oversight board to govern much of Puerto Rico's finances).

153. *See* Mary Babic, *Fiona in Puerto Rico Exposes, Again, How Disasters Amplify Inequality*, OXFAM (Sept. 27, 2022), https://politicsofpoverty.oxfamamerica.org/fiona-in-puerto-rico-exposes-again-how-disasters-amplify-inequality [https://perma.cc/V9BU-EXBB].

154. For more comprehensive analyses of the discrepancies between federal benefits programs in the states and territories, see Hammond, *supra* note 13, at 1664-77.

Nutrition Assistance. The Supplemental Nutrition Assistance Program (SNAP) provides nutrition assistance to low-income households.[155] Puerto Rico, American Samoa, and CNMI are excluded from SNAP benefits; instead, those territories rely on the Nutritional Assistance Program (NAP).[156] Unlike the states' SNAP program, which can expand based on each state's needs, NAP funding must stay within fixed levels regardless of need.[157] NAP also provides lesser benefits than SNAP: the maximum monthly benefits for NAP recipients are about sixty percent of the maximum monthly benefits for SNAP recipients.[158]

As of April 2019, around 1.32 million people in Puerto Rico participated in NAP (over one-third of the population); fifty-seven percent were women.[159] Of those women who rely on NAP, nearly half of them have some postsecondary education.[160]

Because NAP is a fixed federal grant (unlike SNAP, which serves all those eligible), the three territories excluded from SNAP often cannot sufficiently meet

155. *Supplemental Nutrition Assistance Program (SNAP)*, BENEFITS.GOV, https://www.benefits.gov/benefit/361 [https://perma.cc/2LMQ-HJQ3].

156. *See Nutrition Assistance Program (NAP) Block Grants*, U.S. DEP'T AGRIC., https://www.fns.usda.gov/nap/nutrition-assistance-program-block-grants [https://perma.cc/UCM8-P5A3]. SNAP is unavailable in Puerto Rico, American Samoa, and the Commonwealth of the Northern Mariana Islands, but is available in Guam and the U.S. Virgin Islands. CONG. RSCH. SERV., R42505, SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP): A PRIMER ON ELIGIBILITY AND BENEFITS 1 (2024).

157. *See* Brynne Keith-Jennings, *Introduction to Puerto Rico's Nutrition Assistance Program*, CTR. ON BUDGET & POL'Y PRIORITIES 2 (Nov. 3, 2020), https://www.cbpp.org/sites/default/files/atoms/files/1-7-20fa.pdf [https://perma.cc/C6D3-FWQU].

158. *Disparate Treatment of Puerto Rico Residents with Disabilities in Federal Programs and Benefits*, NAT'L COUNCIL ON DISABILITY 49 (May 25, 2022), https://www.ncd.gov/report/disparate-treatment-of-puerto-rico-residents-with-disabilities-in-federal-programs-and-benefits-1 [https://perma.cc/3BPL-B8LS].

159. *See* Hector R. Cordero-Guzman, *Characteristics of Participants in Puerto Rico's Nutritional Assistance Program (PAN/NAP) and Their Connections to the Labor Market*, CTR. ON BUDGET & POL'Y PRIORITIES 5 (Oct. 26, 2021), https://www.cbpp.org/sites/default/files/10-26-21fa.pdf [https://perma.cc/L97W-NA2C]. The population of Puerto Rico in 2019 was about 3.19 million people. *See* Fernando I. Rivera, *Puerto Rico's Population Before and After Hurricane Maria*, 42 POPULATION & ENV'T 1 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7387120 [https://perma.cc/3WWK-PKQC].

160. Cordero-Guzman, *supra* note 159, at 6.

low-income family need,[161] particularly in times of disaster.[162] During emergencies, additional nutritional aid via NAP must be authorized by Congress.[163] During the aftermath of Hurricane Maria, for example, it took six months for Congress to approve additional funding and for Puerto Rico to begin operating a disaster nutrition program,[164] whereas the U.S. Virgin Islands, which operates under SNAP, received additional funding within two months.[165] By significantly slowing the benefit disbursement to vulnerable communities, the added approval process "created dangerous conditions in the aftermath of the hurricane."[166]

Further, for the territories, no systematized health- and humanitarian-disaster relief exists,[167] and U.S. laws prevent foreign-flagged vessels from transporting goods between U.S. continental ports and some U.S. territories.[168] When

161. Brynne Keith-Jennings & Elizabeth Wolkomir, *How Does Household Food Assistance in Puerto Rico Compare to the Rest of the United States?*, CTR. ON BUDGET & POL'Y PRIORITIES 1-5 (2020) https://www.cbpp.org/research/food-assistance/how-is-food-assistance-different-in-puerto-rico-than-in-the-rest-of-the [https://perma.cc/83VK-DVFX]; Sergio M. Marxuach, *NAP vs. SNAP: An Analysis on Federal Nutrition Assistance for Residents of Puerto Rico*, CTR. FOR A NEW ECON. 3-4 (2022) https://grupocne.org/wp-content/uploads/2022/08/2022.08-NAP-vs.-SNAP-An-Analysis-on-Federal-Nutrition-Assistance-for-Residents-of-Puerto-Rico.pdf [https://perma.cc/TT6P-QWH4].

162. Keith-Jennings & Wolkomir, *supra* note 161, at 3; Sofia Perez Semanaz, *The Impact of the Covid-19 Pandemic in Puerto Rico*, AM. UNIV. (Nov. 1, 2020), https://www.american.edu/cas/news/catalyst/covid-19-in-puerto-rico.cfm [https://perma.cc/6NDE-GLY4].

163. OFF. OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT REPORT 27702-0001-22, REVIEW OF FNS' NUTRITION ASSISTANCE PROGRAM DISASTER FUNDING TO PUERTO RICO AS A RESULT OF HURRICANES IRMA AND MARIA 2 (2019), https://www.oversight.gov/sites/default/files/oig-reports/27702-0001-22_1.pdf [https://perma.cc/U526-U54K] (reporting that while states and territories with SNAP can request disaster benefits directly from the USDA, with NAP, Congress must approve disaster relief legislation to provide additional disaster nutrition assistance to Puerto Rico).

164. *Establishing Food Security: NAP to SNAP in Puerto Rico*, BREAD FOR THE WORLD (June 22, 2023), https://www.bread.org/article/establishing-food-security-nap-to-snap-in-puerto-rico [https://perma.cc/AD9S-TF7J].

165. *Disparate Treatment of Puerto Rico Residents with Disabilities in Federal Programs and Benefits*, *supra* note 158, at 50.

166. *A Reckoning*, *supra* note 13, at 300.

167. *Insular Area Climate Change Act: Hearing on Discussion Draft of H.R. ___ Before the H. Comm. on Nat. Res.*, 117th Cong. 6 (2021) (statement of Ada Monzón, President, EcoExploratorio, P.R. Sci. Museum, Guaynabo, P.R.); *see also* Serrano & Tapu, *supra* note 29, at 1291 ("[T]here is no systematized health and humanitarian disaster relief . . . .").

168. Merchant Marine Act of 1920, Pub. L. No. 66-261, § 27, 41 Stat. 988, 999 (codified at 46 U.S.C. § 50101(b)); JOHN FRITTELLI, CONG. RSCH. SERV., R45725, SHIPPING UNDER THE JONES ACT: LEGISLATIVE AND REGULATORY BACKGROUND 5 (2019) (describing the act's applicability in the U.S. territories); *see also* Carlos E. Rodríguez-Díaz, *Maria in Puerto Rico: Natural Disaster in a Colonial Archipelago*, 108 AM. J. PUB. HEALTH 30, 31 (2018) ("Under the economic and

Congress passed the 2019 Disaster Relief Act, $600 million in food aid and $300 million in construction aid was allotted to Puerto Rico; however, because of the Jones Act and additional shipping costs, the total aid was reduced by $200 million and $100 million, respectively.[169]

Medical Assistance. Medicaid is a "joint federal and state program that helps cover medical costs" for low-income individuals.[170] Medicaid programs in the territories are partial and limited compared to programs in the states.[171] U.S. territories generally receive about "three-to-four times less funding than state Medicaid programs."[172] In the states and the District of Columbia, federal Medicaid matching funds are based on per-capita income, adjusted annually, and are "open ended."[173] In the territories, on the other hand, Medicaid is subject to a

social circumstances imposed by austerity measures in Puerto Rico, it was impossible for individuals and their government to be prepared for hurricanes and their aftermath."); Yxta Maya Murray, *"FEMA Has Been a Nightmare:" Epistemic Injustice in Puerto Rico*, 55 WILLAMETTE L. REV. 321, 374 (2019) ("[T]he people of Puerto Rico were hampered in their abilities to react self-protectively to the storm because they faced a[] 'nonquantifiable risk' that the U.S. government would fail to aid them because of official blindness to their island status, demographics, language, and lack of electrical power."); Marie Olga Luis Rivera, *Hard to Sea: Puerto Rico's Future Under the Jones Act*, 17 LOY. MAR. L.J. 63, 128 (2018) ("Puerto Rico is the poorest jurisdiction in the United States and is the only insular territory where the Jones Act is imposed in its totality at the expense of 3.5 million people."). The U.S. Virgin Islands, America Samoa, and the Northern Mariana Islands are exempt from the Act; Puerto Rico is exempt for passengers only; and for Guam, ships must be U.S.-owned and -crewed, but do not need to be U.S.-built. FRITTELLI, *supra* at 5.

169. *Disparate Treatment of Puerto Rico Residents with Disabilities in Federal Programs and Benefits*, *supra* note 158, at 28.

170. *What's the Difference Between Medicare and Medicaid?*, U.S. DEP'T HEALTH & HUM. SERVS. (Dec. 8, 2022), https://www.hhs.gov/answers/medicare-and-medicaid/what-is-the-difference-between-medicare-medicaid/index.html [https://perma.cc/T96R-LLAB].

171. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-324, MEDICAID AND CHIP: INCREASED FUNDING IN U.S. TERRITORIES MERITS IMPROVED PROGRAM INTEGRITY EFFORTS 7 (2016), https://www.gao.gov/assets/gao-16-324.pdf [https://perma.cc/E4FF-XUMT] (explaining that "federal Medicaid funding in states is not subject to a limit, provided the states contribute their share of program expenditures for services provided," but that "federal Medicaid funding in each territory is subject to a statutory cap . . . [because] once their Medicaid and CHIP funding is exhausted, territories must assume the full costs of their programs").

172. *Territorial Medicaid Funding: Achieving Parity with States Policy Statement*, ASS'N ST. & TERRITORIAL HEALTH OFFS. 2 (Oct. 23, 2023), https://www.astho.org/globalassets/pdf/policy-statements/permanent-sustainable-medicaid-financing-for-us-and-us-territories.pdf [https://perma.cc/BD4U-HY95].

173. *Medicaid and CHIP in the Territories*, MEDICAID & CHIP PAYMENT & ACCESS COMM'N 4 (Feb. 2021), https://www.macpac.gov/wp-content/uploads/2019/07/Medicaid-and-CHIP-in-the-Territories.pdf [https://perma.cc/88BU-XZJ3].

fixed federal matching rate and a statutory annual cap.[174] Generally, once a territory depletes its annual allotment, it must fund its Medicaid program using local funds, suspend services, or cease payments to providers until the next fiscal year.[175]

Data on how many women in Puerto Rico have Medicare coverage are limited. In 2023, approximately 1.5 million Puerto Ricans received coverage[176] and an estimated fifty-five percent of all Medicare beneficiaries are women.[177] In territories like Puerto Rico and American Samoa, some mandatory Medicare benefits that directly impact women are not covered, such as nurse-midwife services and freestanding-birth-center services, among others, because of insufficient funding and lack of infrastructure.[178] This results in coverage denial to vulnerable groups "such as impoverished children and pregnant women, that would be mandatorily covered in the fifty states and the District of Columbia."[179]

Disability Assistance. Supplemental Security Income (SSI) is a uniform, means-tested program that provides monthly payments to very low-income

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174. *See* ALISON MITCHELL, CONG. RSCH. SERV., IF11012, MEDICAID FINANCING FOR THE TERRITORIES 1 (2023); *Medicaid and CHIP in the Territories*, *supra* note 173, at 1; Elizabeth Williams, Robin Rudowitz & Alice Burns, *Medicaid Financing: The Basics*, KFF (Apr. 13, 2023), https://www.kff.org/medicaid/issue-brief/medicaid-financing-the-basics [https://perma.cc/W8Z7-AUBC]; Cornelia Hall, Robin Rudowitz & Kathleen Gifford, *Medicaid in the Territories: Program Features, Challenges, and Changes*, KFF 3 (Jan. 2019), https://files.kff.org/attachment/Issue-Brief-Medicaid-in-the-Territories-Programs-Features-Challenges-and-Changes [https://perma.cc/G9CC-74P4].

175. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 171, at 7, 17 (reporting that prior to additional temporary funding under the Patient Protection and Affordable Care Act, "the territories often exhausted their Medicaid funds anywhere from the first through the third quarter of each fiscal year, and generally utilized all of their [Children's Health Insurance Program] CHIP funding each year"); *see also CNMI Cuts Medicaid Services*, PAC. ISLAND TIMES (May 22, 2023), https://www.pacificislandtimes.com/post/cnmi-cutes-medicaid-services [https://perma.cc/G3NA-JU7E] (describing Medicaid service cuts in CNMI due to financial constraints).

176. P.R. Medicaid Program, *Annual Report to Congress: Public Law 117-328*, DEP'T OF HEALTH 18 (Oct. 2023), https://docs.pr.gov/files/ASES/Sobre%20ASES/Informes%20al%20Congreso/2023/Puerto-Rico-2023-Annual-Report-to-Congress_Final-3.pdf [https://perma.cc/73CY-A4W3].

177. Meredith Freed, Juliette Cubanski, Michelle Long, Nancy Ochieng, Tricia Neuman & Alina Salganicoff, *10 Key Facts About Women with Medicare*, KFF (Apr. 30, 2024), https://www.kff.org/medicare/issue-brief/10-key-facts-about-women-with-medicare [https://perma.cc/A5P8-FF94].

178. *Disparate Treatment of Puerto Rico Residents with Disabilities in Federal Programs and Benefits*, *supra* note 158, at 32-33. Other mandatory Medicare benefits not covered there include nonemergency-medical transportation, nursing-facility services, certified pediatric and family-nurse-practitioner services, and nursing-facility services for individuals aged twenty-one or older. *See* MEDICAID AND CHIP IN THE TERRITORIES, *supra* note 173, at 3.

179. *A Reckoning*, *supra* note 13, at 275.

individuals who are elderly, blind, or disabled and who fall beneath the federally mandated income and asset limits.[180] Residents of Puerto Rico, Guam, U.S. Virgin Islands, and American Samoa are excluded from SSI.[181] Instead, Puerto Rico, Guam, and U.S. Virgin Islands residents rely on inferior alternative assistance programs.[182]

For example, the federal-local Aid to the Aged, Blind, and Disabled (AABD) that operates in Puerto Rico provides significantly fewer benefits. In fiscal year 2020, the average monthly SSI payment to residents of states was $585.86, but the average total monthly AABD benefit for Puerto Rico residents was $82.[183] The Government Accountability Office estimated that in 2011, federal spending in Puerto Rico on AABD "was less than [two] percent of what it would have been if Puerto Rico residents received full SSI benefits."[184] All four territories without SSI experience high disability levels caused by "a confluence of high poverty, a lower-skilled, less educated work force, and inconsistent health insurance and health care quality."[185]

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180. *See Supplemental Security Income (SSI)*, SOC. SEC. ADMIN. 1 (May 2023), https://www.ssa.gov/pubs/EN-05-11000.pdf [https://perma.cc/78U8-6DFM].

181. CONG. RSCH. SERV., *supra* note 19, at 2.

182. *See* 42 U.S.C. § 1382c(e) (2018). Guam and the USVI operate the Old Age Assistance, Grants to States for Aid to the Blind (AB), and Aid to the Totally and Permanently Disabled programs, and Puerto Rico operates Aid to the Aged Blind, and Disabled (AABD). These programs are funded via annual-federal-capped funding at levels that do not adjust for inflation and have been at their current levels since 1997. WILLIAM R. MORTON, CONG. RSCH. SERV., 7-9453, CASH ASSISTANCE FOR THE AGED, BLIND, AND DISABLED IN PUERTO RICO 5-7 (2016). In 2021, 34,224 residents of Puerto Rico were enrolled in AABD. Brief of the Hon. Jenniffer A. Gonzalez Colon, Resident Commissioner for Puerto Rico, as Amicus Curiae in Support of Respondent, United States v. Vaello Madero, 596 U.S. 159 (2022) (No. 20-303), 2021 WL 4117915, at *28 [hereinafter Resident Commissioner Brief]. In contrast, in 2011, over 300,000 Puerto Rico residents would have qualified for SSI. *Id.* at 34; *see also* Katerina Martínez Vélez, *Trouble in Paradise: Puerto Rico's Routine Exclusion from Federal Benefit Programs as a Result of the Alien-Citizen Paradox*, 6 BUS. ENTREPRENEURSHIP & TAX L. REV. 132, 139 (2022) (describing the exclusion of Puerto Rico residents from SSI coverage). The Guam Legislature estimated in 2013 that 24,000 Guam residents would be eligible for SSI benefits if the program were extended to include them. *See* Schaller *ex rel.* Fegurgur v. U.S. Soc. Sec. Admin., No. CV 18-00044, 2020 WL 13219648, at *8 n.5 (D. Guam June 19, 2020), *vacated and remanded*, No. 20-16589, 2022 WL 1197035 (9th Cir. Apr. 19, 2022).

183. Resident Commissioner Brief, *supra* note 182, at 11, 29.

184. Javier Balmaceda, *Build Back Better Permanently Extends Economic Security to Puerto Rico and Other Territories*, CTR. ON BUDGET & POL'Y PRIORITIES 3 (Dec. 14, 2021), https://www.cbpp.org/sites/default/files/12-14-21tax.pdf [https://perma.cc/49XP-AJ5M]; *see* U.S. GOV. ACCOUNTABILITY OFF., GAO-14-31, PUERTO RICO: INFORMATION ON HOW STATEHOOD WOULD POTENTIALLY AFFECT SELECTED FEDERAL PROGRAMS AND REVENUE SOURCES 84 (2014), https://www.gao.gov/assets/gao-14-31.pdf [https://perma.cc/683N-UXRE].

185. Dubin, *supra* note 13, at 131-32. Data on beneficiaries of AABD are limited, but approximately twenty-two percent of people in Puerto Rico have a disability. *Disparate Treatment of Puerto*

Notably, while disabled children are eligible for SSI benefits in the states, none of the territories' grossly underfunded income-assistance programs provide benefits to families with children with disabilities.[186] This places an enormous burden on the many female-headed households, given high child-poverty rates, high rates of single-mother-headed households, and high rates of single-mother caregivers for disabled children.[187]

Despite these stark inequalities, the U.S. Supreme Court in *United States v. Vaello Madero* made clear that territorial residents' exclusion from SSI does not violate the equal-protection component of the Fifth Amendment's Due Process Clause.[188] In *Vaello Madero*, Jose Luis Vaello Madero—who lost his SSI benefits when he moved from New York back to Puerto Rico—contended that Congress's exclusion of Puerto Rico residents from the SSI program transgressed the Fifth Amendment's equal-protection guarantee.[189] The First Circuit, affirming the district court's ruling, held that the "categorical exclusion of otherwise eligible Puerto Rico residents from SSI is not rationally related to a legitimate government interest."[190]

Rico Residents with Disabilities in Federal Programs and Benefits, *supra* note 158, at 21. In 2018, approximately twenty-two percent of women of all ages in Puerto Rico reported a disability. *Disparate Treatment of Puerto Rico Residents with Disabilities in Federal Programs and Benefits*, *supra* note 158, at 21.

186. Brief of the National Disability Rights Network, Disability Rights Center of the Virgin Islands, and Guam Legal Services Corporation-disability Law Center as Amici Curiae in Support of Respondent, United States v. Vaello Madero, 596 U.S. 159 (2022) (No. 20-303), 2021 WL 4117853, at *10 (citing WILLIAM R. MORTON, CONG. RSCH. SERV., 7-5700, CASH ASSISTANCE FOR THE AGED, BLIND, AND DISABLED IN PUERTO RICO 4-5 (2016)); Marga Parés & David Cordero Mercado, *Reduced Assistance in Puerto Rico for the Elderly, Blind or Disabled*, UNIV. S. CAL. ANNENBERG CTR. FOR HEALTH JOURNALISM (June 7, 2022), https://centerforhealthjournalism.org/our-work/reporting/reduced-assistance-puerto-rico-elderly-blind-or-disabled [https://perma.cc/6M3A-T2PP].

187. *See More Disabled Kids Living with Single Women*, NBC NEWS (July 14, 2006, 10:25 AM EDT), https://www.nbcnews.com/health/health-news/more-disabled-kids-living-single-women-flna1c9439071 [https://perma.cc/X4ZC-JAK3] (reporting that, nationally, single mothers care for 24.5% of disabled children, but fewer than 5% of disabled children live with single fathers); *see also* Kathryn A. Levine, *Against All Odds: Resilience in Single Mothers of Children with Disabilities*, 48 SOC. WORK IN HEALTH CARE 402 (2009) (noting the lack of robust research on single mothers of children with disabilities).

188. 596 U.S. 159, 165-66 (2022).

189. *Id.* at 164; United States v. Vaello Madero, 956 F.3d 12, 15 (1st Cir. 2020), *rev'd*, 596 U.S. 159 (2022).

190. *Vaello Madero*, 956 F.3d at 32. Two other courts came to similar conclusions. *See* Schaller *ex rel.* Fegurgur v. U.S. Soc. Sec. Admin., No. CV 18-00044, 2020 WL 13219648, at *1-2, *12 (D. Guam June 19, 2020), *vacated and remanded*, No. 20-16589, 2022 WL 1197035 (9th Cir. Apr. 19, 2022) (ruling in favor of Katrina Schaller, an American citizen living in Guam who suffers from myotonic dystrophy, and holding that the denial of SSI benefits to eligible U.S. citizens residing in Guam (as compared to CNMI, where SSI benefits are available) had no rational

The Supreme Court reversed. It held that Congress is not required to make SSI benefits available to residents of Puerto Rico to the same extent that Congress makes them available to residents of the states.[191] Without historical context or acknowledgment of U.S. colonialism, the Court stated simply that Congress has broad authority under the Territorial Clause to legislate regarding the U.S. territories.[192] Thus, based on two shaky per curiam summary-disposition cases,[193] it held that the "deferential rational-basis test applies."[194] It then focused singularly on the fiscal "balance of benefits to and burdens on" Puerto Rico's residents: "the fact that residents of Puerto Rico are typically exempt from most federal income, gift, estate, and excise taxes — supplies a rational basis for likewise distinguishing residents of Puerto Rico from residents of the States for purposes of the Supplemental Security Income *benefits* program."[195]

Attempts to remedy the unequal distribution of federal benefits outside the courts have stalled.[196] Territorial delegates — without full political power in Congress — have introduced versions of a Supplemental Security Income Equality Act that would extend the SSI program to Puerto Rico, the U.S. Virgin Islands, Guam, and American Samoa in the U.S. House of Representatives at least nine times since 2011, and none moved past referral to committee.[197]

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basis and violated equal-protection guarantees of the U.S. Constitution and Organic Act of Guam); Peña Martínez v. Azar, 376 F. Supp. 3d 191, 196, 211 (D.P.R. 2019), *rev'd and remanded sub nom.*, Martinez v. U.S. Dep't of Health & Hum. Servs., No. 20-1946, 2022 WL 4489163 (1st Cir. May 16, 2022) (ruling in favor of Puerto Rican residents who challenged their ineligibility for SSI, SNAP, and Medicare Part D Low Income Subsidies under the equal-protection component of the Fifth Amendment Due Process Clause and denying defendants' motion to dismiss for failure to state a claim because the three decades-old reasons that the U.S. Supreme Court viewed as rational to support the denial of governmental benefits to residents of the U.S. territories — saving money, Puerto Rico's tax status, and potential disruption to the economy — may no longer be rational).

191. *Vaello Madero*, 596 U.S. at 166.

192. *Id.* at 162.

193. *Id.* at 164-65 (citing Califano v. Gautier Torres, 435 U.S. 1, 3-5, 5 n.7 (1978); Harris v. Rosario, 446 U.S. 651, 651-52 (1980)).

194. *Id.* at 165.

195. *Id.*

196. *See* Dubin, *supra* note 13, at 155 (noting that in 2022, President Biden's "Build Back Better" legislative package that included the extension of SSI to Puerto Rico, the U.S. Virgin Islands, Guam, and American Samoa stalled permanently, and the SSI extension was not included in the "Inflation Reduction Act," the smaller and later-passed version of the legislation). Also, in 2023, Puerto Rico Resident Commissioner Jenniffer González-Colón introduced the Puerto Rico Nutrition Assistance Fairness Act to extend SNAP benefits to Puerto Rico, but it also stalled. *See* Puerto Rico Nutrition Assistance Fairness Act, H.R. 253, 118th Cong. § 2 (2023).

197. *See, e.g.*, Supplemental Security Income Equality Act, H.R. 256, 118th Cong. (2023); *see also* Insular Area Medicaid Parity Act, H.R. 949, 118th Cong. (2023) (seeking to eliminate Medicaid funding limitations for U.S. territories).

In light of these harsh inequities, especially for women, the next Part starts to rethink the notions of "political powerlessness" and "political unpopularity" and their linkage to the history of subjugation for colonized peoples as a potential trigger for heightened scrutiny of classifications that impact residents of the U.S. territories.

III. HEIGHTENED JUDICIAL SCRUTINY FOR THE COLONIZED

This Part preliminarily sketches a rational-basis-with-bite approach to assessing intersectional harms faced by all territorial residents—particularly women, who are often disproportionately impacted.[198] This proposed doctrinal pathway for heightened scrutiny—which falls between the exacting strict-scrutiny standard and the highly deferential rational-basis review in its rigor—admittedly operates within the confines of existing legal paradigms and so does not wholly reimagine U.S. constitutional principles. However, it does draw upon understandings of the contemporary intersectional impacts of U.S. colonialism to rethink legal doctrine in a modest but meaningful way.

As detailed below, *Carolene Products* Footnote Four[199] and Memmi's theory of colonization suggest that when there is a confluence of factors (race, gender, poverty, and potentially Indigeneity[200]) rooted in political powerlessness and U.S. colonization, courts should assess "political powerlessness" or "political unpopularity" as a continuing manifestation of that subjugation and colonialism that has impaired the group both within and outside of the political process.[201] Courts should consequently apply a more meaningful, rational-basis-with-bite standard. In evaluating the classification, then, courts should assess the aggregate nature of the harm and the multifaceted reasons for the government action—the historical and present-day impacts of colonization on the political powerlessness of the targeted people.

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198. A deeper analysis of potential reparations for more widespread, unredressed harms to women of the territories, discussed *supra* Part II, are beyond the scope of this Essay and must be left for another time or author.

199. 304 U.S. 144, 152 n.4 (1938).

200. Indigeneity also presents complex considerations: Equal Protection and individual-rights frameworks are often at odds with Indigenous Peoples' group-based efforts to restore self-determination. Indigenous Peoples do not seek "equality" or integration, but self-determination, including return or restoration of lands, culture, resources, and governmental decision-making. *See* Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 344 (2001); D. Kapua'ala Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 167 (2011).

201. *See* Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1403 (2011).

This more searching rational-basis review would not dictate outcomes; instead, it would compel all sides, especially the government, to put forth evidence to ventilate issues fully and examine likely consequences (which would not be required under a highly deferential standard of review). At the same time, it would provide a voice for vulnerable communities challenging potentially oppressive actions and intersectional harms, while offering enough room for courts to uphold laws beneficial to colonized peoples.

A. Limits of Existing Doctrines

Rethinking legal paradigms as they apply in the territories is crucial for all, but particularly for women of color because they fall through the yawning gaps left by current legal doctrines.[202] U.S. territorial status limits the avenues available for the protection of women's rights. For example, the territories cannot directly benefit from international instruments that protect or promote women's rights. Because the U.S. territories are not sovereign nations, they cannot sign or ratify the Convention on the Elimination of All Forms of Discrimination Against Women[203] or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.[204] And because the territories

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202. Others in the territories also fall through these legal cracks, but a full exploration of these gaps is beyond the scope of this Essay. For an excellent analysis of the doctrinal divisions created by Federal Indian law, race law, and the law of the territories that marginalize Indigenous territorial residents, see Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652 (2022).

203. Adopted by the U.N. General Assembly in 1979, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is the principal international treaty that promotes and protects women's rights. U.N. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. To date, 189 states have ratified CEDAW; the United States has not. *See Convention on the Elimination of All Forms of Discrimination against Women*, U.N. TREATY COLLECTION 1-3, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf [https://perma.cc/K4FZ-3869]. In 1998, Guam issued a proclamation endorsing ratification of CEDAW. Proclamation No. 98-37, Territory of Guam (Apr. 23, 1998). For additional context, see Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1641 (2006).

204. Adopted in 1994 by the member states of the Organization of American States (OAS), the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, or "Convention of Belém do Pará," is an international treaty that establishes mechanisms to protect women's rights and combat violence against women. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534. Although ratified by most OAS member states, the treaty has not been signed or ratified by the United States and Canada. *See* Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará): Status of Signatures and Ratifications, ORG. OF AM. STATES 1,

"belong to" the United States and the United States has not ratified those international instruments, the instruments are not binding.

Even local laws and judicial interpretations that tend to protect women's rights in the territories are limited by U.S. plenary power and constrained by U.S. legal norms and doctrines. As legal scholar Yanira Reyes Gil observes, while Puerto Rico's constitution, related laws, and supreme court are more protective of women's rights, some local court decisions are circumscribed by the formal-equality lens of U.S. jurisprudence.[205] For example, she explains, although "scrutiny for controversies about sex discrimination is stricter in Puerto Rico," the Supreme Court of Puerto Rico applied a "gender-neutral" interpretation to strike down a spousal support statute that supported financially vulnerable women upon divorce.[206] The court did so by relying in part on the formal-equality approach of U.S. case law and "ignor[ed] the material realities of inequity experienced by the majority of women in Puerto Rico" that the statute sought to remedy in the first place.[207]

In the federal context, discrimination claims by women of color are sharply constrained by the Court's equal-protection jurisprudence. Courts review equal-protection challenges to statutes and policies that discriminate against a protected class—such as race or gender—under strict or intermediate scrutiny.[208] If challenged laws are "facially neutral," a plaintiff must show that the governmental actor was motivated by elusive "discriminatory intent"; disparate impact alone is insufficient.[209] This high evidentiary burden sharply limits legal redress for pervasive forms of institutionalized discrimination,[210] and the courts'

https://www.oas.org/en/mesecvi/docs/Signatories-Table-EN.pdf [https://perma.cc/ST9T-7QQS].

205. Reyes Gil, *supra* note 6, at 266-73.

206. *Id.* at 273.

207. *Id.* (citing Frontiero v. Richardson, 411 U.S. 677 (1973)).

208. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (analyzing racial classifications); United States v. Virginia, 518 U.S. 515, 555 (1996) (discussing gender classifications).

209. *See* Washington v. Davis, 426 U.S. 229, 238-42, 246 (1976) (requiring a showing of discriminatory purpose and holding that Black plaintiffs challenging a police department's employment test, while "neutral on its face," did not show that the state had acted with discriminatory purpose); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274, 280-81 (1979) (extending the intent requirement to gender-discrimination cases and determining that a female civil-service worker unsuccessfully challenged a statute preferencing veterans because she could not prove discriminatory intent).

210. *See* Eric K. Yamamoto, Susan K. Serrano, Minal Shah Fenton & James Gifford, *Dismantling Civil Rights: Multiracial Resistance and Reconstruction*, 31 CUMB. L. REV. 523, 559 (2001) (contending that the Court's "intent" requirement "sharply retracted the civil-rights gains of the Second Reconstruction").

problematic single-axis framing of discrimination claims discounts multifaceted and intersectional identities.[211]

Territorial residents — including women of color — are also disadvantaged by the "deferential rational basis" standard applied to equal-protection challenges to their exclusion from federal benefits.[212] That standard does not require the government to show any specific rational basis for a challenged law and takes no account of a law's disparate impact on a historically colonized or "overwhelmingly non-white population."[213] As described above, in *Vaello Madero*, the Supreme Court employed that deferential standard to hold that the denial of SSI benefits to the peoples of the U.S. territories did not violate the Equal Protection guarantee.[214]

The Supreme Court has not considered whether invidious discrimination factored into the exclusion of U.S. territorial residents from federal benefits.[215] It instead routinely points uncritically to the Territorial Clause as the source of sweeping congressional power. Thus, the Court has not acknowledged, and in many instances has actively erased, the multiple intersecting harms to territorial peoples — race, gender, and poverty — grounded in U.S. colonization of the territories.[216] Women, in particular, are multiply burdened by these intersecting harms. At the same time, however, some in the territories may reject an overly stringent standard of review that fails to provide openings for beneficial laws that promote communities' self-determination. For these reasons, a form of meaningful scrutiny that accommodates these complexities is warranted.

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211. *See* Alexsis M. Johnson, *Intersectionality Squared: Intrastate Minimum Wage Preemption & Schuette's Second-Class Citizens*, 37 COLUM. J. GENDER & L. 36, 60 (2018).

212. *See, e.g.*, Califano v. Gautier Torres, 435 U.S. 1, 5 (1978); Harris v. Rosario, 446 U.S. 651, 651-52 (1980); United States v. Vaello Madero, 596 U.S. 159, 165-66 (2022).

213. Dubin, *supra* note 13, at 142.

214. *Vaello Madero*, 596 U.S. at 165-66.

215. *See, e.g.*, *Califano*, 435 U.S. at 5; *Harris*, 446 U.S. at 651-52; Dubin, *supra* note 13, at 142-43.

216. *See Vaello Madero*, 596 U.S. at 165 (applying rational basis and finding that differential treatment was rational based on Puerto Rico's differing tax status but failing to interrogate the lasting impacts of U.S. colonization on its people); *Califano*, 435 U.S. at 5 & n.7 (ruling summarily in a per curiam opinion that the SSI program does not violate Puerto Rico residents' right to travel and noting in a footnote that differential treatment of Puerto Rico residents is rational based on their noncontribution to the federal treasury, high costs, and the potential for economic disruption); *Harris*, 446 U.S. at 651-52 (ruling summarily, without full briefing or oral argument, that a lower level of Aid to Families with Dependent Children reimbursement for Puerto Rican residents is rational for the same three reasons noted in *Califano* and therefore does not violate the Fifth Amendment's equal protection guarantee).

B. Political Powerlessness and U.S. Colonization

When assessing differential treatment of territorial residents generally, some jurists and legal scholars urge the application of some form of heightened scrutiny. This more searching inquiry is linked to the notion of "political powerlessness" rooted in *Carolene Products* Footnote Four.[217] Its general principle is that judicial scrutiny increases when a socially subordinated group cannot compete fairly in the political process; thus, legislative judgments classifying "discrete and insular minorities" are subject to heightened review.[218] John Hart Ely's theory of representation reinforcement raised this idea to a new level.[219] According to Ely, when a group lacks political power (or cannot compete fairly or is shut out of the political process), it is subject to the whims of the majority. This is a malfunction of the political process — a political process failure[220] — and courts therefore need to step in to protect the minority.[221]

Courts have not precisely defined "political powerlessness," and, indeed, have offered inconsistent conceptions of it.[222] Modern cases tend to apply a searching rational-basis-with-bite standard when the court determines that a classification involves "a bare . . . desire to harm a politically unpopular

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217. *See* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) ("Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." (citations omitted)).

218. *Id.*; *see also* Igartúa v. Trump, 868 F.3d 24, 25-26 (1st Cir. 2017) (Torruella, J., dissenting from denial of rehearing en banc) (underscoring the over century-old "total national disenfranchisement and lack of national political clout of the community of 3.5 million United States citizens who reside in Puerto Rico," and calling on the court to "heed the apparently forgotten advice of the Supreme Court in *United States v. Carolene Products Co.*" to conduct a "more searching judicial inquiry" to protect politically powerless "discrete and insular minorities" (original formatting omitted) (quoting *Carolene Prods.*, 304 U.S. at 152 n.4)).

219. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 101-03 (1980).

220. *Id.* at 75-77, 102-03.

221. *Id.* at 77-88. Many scholars have explored the footnote's significance, particularly as the foundation of John Hart Ely's political process theory. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 345-46 (1987). Other scholars — too many to list here — have dissected the meanings of "political powerlessness." *See, e.g.*, William N. Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L.J. 1, 1-2 (2010); Kenji Yoshino, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2012 UTAH L. REV. 527, 537-43.

222. *See* Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1537-40 (2015) (describing the U.S. Supreme Court's differing conceptions of powerlessness, including numerical size, voting rights, underrepresentation in political office, income, and ability to advocate for legislative protections).

group"[223] or an irrational majoritarian fear.[224] Most notably, the Supreme Court has employed a version of this standard to overturn laws that discriminate against LGBTQ people, cohabitating individuals, and developmentally disabled people, among others.[225]

In *Vaello Madero*, Judge Juan Torruella of the First Circuit seemed to employ a more meaningful or searching form of rational-basis review.[226] While declaring that "Puerto Rico residency . . . does not warrant any form of heightened review,"[227] he cited to three cases that employ a heightened "rational basis with bite" standard.[228] The court held that the government's reasons for the exclusion—the tax status of Puerto Rico residents and the costs of extending SSI to them—were not rationally related to a legitimate government interest, and, therefore, no rational basis existed to exclude Puerto Rico's residents from SSI benefits.[229] Although the First Circuit's *Vaello Madero* decision was predictably

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223. Romer v. Evans, 517 U.S. 620, 634 (1996) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973))).

224. *See* Brendan Beery, *Rational Basis Loses Its Bite: Justice Kennedy's Retirement Removes the Most Lethal Quill from LGBT Advocates' Equal Protection Quiver*, 69 SYRACUSE L. REV. 69, 86 (2019) (noting that courts do not employ a more searching rational basis review unless they have found "animus," which means "either a) a bare desire to harm a politically unpopular group, or b) irrational majoritarian fear"); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759-61 (2011) (describing the "rational basis with bite" standard); Recent Case, *Civil Rights—U.S. Territories—First Circuit Affirms that Unequal Federal Benefits Program in Puerto Rico Violates Fifth Amendment.*—United States v. Vaello-Madero, *956 F.3d 12 (1st Cir. 2020)*, 134 HARV. L. REV. 1260, 1265 n.66 (2021) [hereinafter *Civil Rights—U.S. Territories*] (observing that in rational basis with bite cases, courts refer to the status of being "politically *unpopular*" rather than "politically *powerless*," which "suggests that rational basis with bite review is more concerned with animus against a group than with the group's lack of access to political redress," but concluding that "these attributes are likely interconnected and mutually reinforcing—for example, Puerto Ricans' federal disenfranchisement is, at least in part, a product of animus against them").

225. *See, e.g.*, Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 575-76 (2014); Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1336-97 (2018).

226. United States v. Vaello Madero, 956 F.3d 12, 23 (1st Cir. 2020), *rev'd*, 596 U.S. 159 (2022); *see Civil Rights—U.S. Territories*, *supra* note 224, at 1265 (noting that this may have been "perhaps the first time such a review has occurred in the territorial context—in both its approach and its result" (footnote omitted)).

227. *Vaello Madero*, 956 F.3d at 29 n.26.

228. *See id.* at 23 (referencing *Moreno*, 413 U.S. 528; *Romer*, 517 U.S. 620; and City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985)).

229. *Id.* at 26-29 (noting that it made little sense to exclude "a class of people from welfare payments (which are untied to income tax receipts) because they do not pay federal income tax" when individuals eligible for SSI benefits "almost by definition earn[] too little to be paying

reversed by the Supreme Court without careful analysis of history or impacts, Judge Torruella's use of a more meaningful rational-basis standard was apt because territorial residents are a politically powerless people, in large part due to the ongoing impacts of U.S. colonization.

Scholars, too, contend that U.S. territorial residents' political powerlessness warrants heightened review. Employing political-process theory, legal scholar Adriel I. Cepeda Derieux proposes application of heightened judicial scrutiny to assess differential treatment of Puerto Rico residents under the Equal Protection Clause.[230] Similarly, legal scholar Jon Dubin contends that heightened scrutiny is appropriate to assess classifications of territorial residents, like the SSI exclusion, because territorial residents are a politically powerless "class intersectionally ravaged by a confluence of historical race discrimination with ongoing present day, consequences."[231]

Indeed, territorial residents' modern-day "political powerlessness" and related "political unpopularity" are inextricably linked to the history of U.S. colonization and subjugation. As described above and as Memmi outlined,[232] in order to colonize the now-territories for land and resources, the United States demonized the people as inferior, unworthy, and incapable of self-government. That branding justified the lack of representation. That subjugation was inscribed and reproduced in law: the infamous *Insular Cases*—alongside the Territorial Clause—legitimized the systematic exclusion of the largely nonwhite populations of the "unincorporated" territories from political participation and decision-making.[233] That is the political powerlessness that persists in the present day.

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federal income taxes"); *see also Vaello Madero*, 596 U.S. at 196 (Sotomayor, J., dissenting) (contending that it is "'antithetical to the entire premise of the program' to hold that Congress can exclude citizens who can scarcely afford to pay any taxes at all on the basis that they do not pay enough taxes" (quoting *Vaello Madero*, 956 F.3d at 27)).

230. Cepeda Derieux, *supra* note 13, at 801 (arguing that U.S. citizens in Puerto Rico "lack representation at all levels of the federal government, and remain 'locked out' from the political process responsible for statutory schemes treating them differently" than residents of states).

231. Dubin, *supra* note 13, at 152 (contending that classifications based on the "unincorporated territory" construct are "grounded in and only made possible through invidious racial considerations which continue to adversely injure largely politically defenseless and overwhelmingly non-white territorial resident populations"); *see also* T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 24 (1994) (arguing that "some set of justifications beyond those currently indulged in by the Court are demanded when Congress acts to disadvantage a class of the poorest American citizens who, by place of residence, are not entitled to participate in the federal political system"); sources cited *supra* note 13 (referencing other scholarly responses to the denial of benefits to territorial residents).

232. *See* MEMMI, *supra* note 46, at 186.

233. *See* Rivera Ramos, *supra* note 36, at 284-85; U.S. CONST. art. IV, § 3, cl. 2; Igartúa-De La Rosa v. United States, 417 F.3d 145, 151 (1st Cir. 2005) (holding that the U.S. Constitution, treaties,

Practically speaking, the current Supreme Court is unlikely to employ anything approaching strict scrutiny when assessing classifications of territorial residents.[234] And it is not clear whether all in the territories would want it to do so.[235] An appropriate standard should account for the complexities of colonized spaces wherein groups may seek to preserve laws that further self-determination rather than those that promote "equality."[236] The Court's analysis thus should be "inflected explicitly and intentionally" with principles of self-determination, nonintervention in the affairs of the territorial government,[237] or preservation of colonized communities from assimilation or elimination[238] — "principles that can better inform what is 'rational' for Congress than an ad hoc determination."[239]

C. Preliminary Application

A more meaningful rational-basis-with-bite approach is appropriate to assess multiple types of harms described above. Applying the standard to the denial of federal benefits may present an easier scenario. In *Peña Martínez v. Azar*, for example, Sixta Gladys Peña Martínez and nine other residents of Puerto Rico challenged their ineligibility for SSI, SNAP, and Medicare Part D Low Income Subsidies under the equal-protection component of the Fifth Amendment Due

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and customary international law do not require the United States to allow Puerto Rico residents to vote in presidential elections).

234. *See* Aaron Tang, *Rethinking Political Power in Judicial Review*, 106 CALIF. L. REV. 1755, 1765 (2018) (noting that "despite a clear opportunity to revive the political powerlessness doctrine as a tool for heightened judicial scrutiny, the Court has not recognized a new suspect class since the early 1970s").

235. *See, e.g.*, Wabol v. Villacrusis, 958 F.2d 1450, 1452, 1459, 1462 (9th Cir. 1990) (upholding Congress's power under the Territorial Clause to shield restrictions on certain acquisitions of land to persons of Northern Marianas descent from the Equal Protection Clause because applying the Equal Protection Clause in this instance would frustrate the interests of both the people of the Northern Mariana Islands and the United States, as well as threaten Native culture, property, and "social identity"); *see also* Tuaua v. United States, 788 F.3d 300, 302, 310-12 (D.C. Cir. 2015) (holding that it would be "'impracticable and anomalous' . . . to impose" the Fourteenth Amendment's Citizenship Clause on American Samoans, and therefore, American Samoans are not birthright citizens of United States (quoting Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring))); Fitisemanu v. United States, 1 F.4th 862, 880 (2021) (articulating a similar holding to that in *Tuaua*).

236. *See* Yamamoto & Lyman, *supra* note 200, at 344; Sproat, *supra* note 200, at 167.

237. Blackhawk, *supra* note 25, at 143, 110-11.

238. *Id.* at 95 (describing how colonized peoples have preserved their "communities from violence, elimination, and assimilation" and contending that "[e]fforts at preservation . . . begin with recognizing these communities as distinctive political communities and shielding them from assimilation").

239. *Id.* at 143.

Process Clause.[240] The plaintiffs reside at the intersections of race, gender, and poverty: some are female and some male, they are all very poor, some suffer from "incapacitating health conditions,"[241] and all rely on various local benefits programs but contend that they would be eligible for federal benefits programs if they lived in a U.S. state.[242] A rational-basis-with-bite standard would illuminate these intersectional harms of U.S. colonization, along with the actual relevance of the government's stated rationale.

The aforementioned confluence of factors (race, gender, and poverty) rooted in U.S. colonization exists for these plaintiffs, and they are powerless to participate in the political process responsible for these unequal statutory schemes.[243] Thus, a rational-basis-with-bite standard would be fitting. And in assessing the "rationality" of their exclusion from federal benefits programs, courts would not limit their analyses to mere dollars and cents. Instead, the approach would more appropriately acknowledge the ravages of U.S. colonization and consider principles to repair that damage, including whether "offering Social Security benefits to [territorial peoples] who have returned home to retire support[s] self-determination and preserve[s] colonized communities."[244]

Different complexities arise when the defendant is the territorial—rather than federal—government. Territorial governments are in part products of U.S. colonization and plenary power and in part institutions exercising their own self-determination to devise and enact laws that govern local life.[245] In such a scenario—as in *Raidoo*, which upheld the in-person, government-mandated pre-abortion counseling requirement in Guam[246]—the intersectional interests and self-determination implications are particularly complex. In enacting a law to limit access to abortion, Guam's elected officials exercise a measure of self-determination to advance what they believe furthers their citizenry's interests. They do so, though, in the face of important countervailing interests of women and people who can become pregnant to exercise bodily autonomy.

These controversies raise multifaceted complexities that are beyond the scope of this Essay, so it is not appropriate to preordain outcomes. But

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240. Peña Martínez v. Azar, 376 F. Supp. 3d 191, 196 (D.P.R. 2019), *rev'd and remanded sub nom.* Martinez v. U.S. Dep't of Health & Hum. Servs., No. 20-1946, 2022 WL 4489163 (1st Cir. May 16, 2022).

241. Complaint at 7, *Peña Martínez*, 376 F. Supp. 3d 191 (Civil Action No. 18-01206-WGY).

242. *Peña Martínez*, 376 F. Supp. 3d at 199-200.

243. Cepeda Derieux, *supra* note 13, at 827-30.

244. Blackhawk, *supra* note 25, at 141.

245. *See* Blackhawk, *supra* note 25, at 93 n.614 and accompanying text (discussing U.S. recognition of territorial governments as "only delegated federal power"); *id.* at 110-11 (describing the ways that "colonized people have seen success in advocating for self-determination").

246. *See* Raidoo v. Moylan, 75 F.4th 1115, 1125-26 (9th Cir. 2023).

meaningful court engagement is important in itself. An overly exacting level of scrutiny may counterproductively interfere with a territorial government's acts of self-determination. But a lax one can fail to examine ongoing intersectional injustices. Employing a retooled rational-basis-with-bite standard in a way that meaningfully acknowledges colonization and principles of self-determination would allow the examination of issues and likely consequences, and in turn, would provide a voice for vulnerable communities challenging potentially oppressive actions or seeking to uphold beneficial ones. For the same reasons, this proposal does not offer a more exacting standard for women in the territories than for men, but it proffers an approach that supports women's challenges to oppressive laws while providing room for courts to uphold laws benefiting them.

Of course, harms should be repaired according to colonized peoples' sense of what is needed and aligned with their own notions of reparation.[247] Indeed, the ability to determine political status and social and economic development[248] freely is key to colonized peoples' efforts to repair the damage of historical injustice.[249] Thus, this approach is not meant to supplant territorial residents' decisions about their own political status or relationships to the United States. It also would not stymie Congress's and the Executive's ability to repair modern manifestations of U.S. colonialism.[250] But, particularly for territorial residents who have no meaningful voice in federal decision-making, courts can provide an important backstop "to articulate principled limits and logics to [plenary] power."[251] At stake are the lives of millions of territorial residents impacted by

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247. *See* Rebecca Tsosie, *Indigenous Peoples and the Ethics of Remediation: Redressing the Legacy of Radioactive Contamination for Native Peoples and Native Lands*, 13 SANTA CLARA J. INT'L L. 203, 245 (2015); Carlton Waterhouse, *The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparations Programs*, 31 U. PA. J. INT'L L. 257, 267-70 (2009) (contending that reparative justice efforts should focus on victims' material needs and well-being and offer those victims a central role in the design and implementation of schemes to repair harms to their political autonomy).

248. For examples of international recognition of the importance of self-determination, see International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

249. *See* Eric K. Yamamoto, Miyoko Pettit & Sara Lee, *Unfinished Business: A Joint South Korea and United States Jeju 4.3 Tragedy Task Force to Further Implement Recommendations and Foster Comprehensive and Enduring Social Healing Through Justice*, 15 ASIAN-PAC. L. & POL'Y J. 1, 21 (2014); *see also* Sproat, *supra* note 200, at 172 (noting that "a restorative justice approach informed by principles of self-determination" is "particularly apt in light of the ravages of colonization").

250. Blackhawk, *supra* note 25, at 143 (asserting that Congress and the Executive are often the branches best equipped to repair modern harms of U.S. colonialism).

251. *Id.* at 57; *see also* Igartúa-De La Rosa v. United States, 417 F.3d 145, 183 (1st Cir. 2005) (Torruella, J., dissenting) ("There comes a point when the courts must intervene to correct a great

the ongoing racialized and gendered harms of U.S. colonization. Rethinking levels of review in this setting, and formulating a standard that more accurately captures the damage of colonization and the need for repair, are appropriate and urgent tasks.

CONCLUSION

U.S. colonialism has caused ongoing, complex, intersectional, and largely unseen harms to women in the U.S. territories. Women of the U.S. territories thus reside in colonized or borderland places and inhabit unique intersectional spaces and identities (race, class, gender, colonialism, and often religion) that often are not reflected in U.S. legal frameworks or norms. For these reasons, their harms are often invisible or go unredressed by U.S. law and policy. Amidst calls to "reckon with the constitution of American colonialism"[252] and work across doctrinal divisions to expose how "law functions to further the colonizing project,"[253] this Essay has offered a preliminary method to unpack colonialism's intersectional legacies and "envision principles, values, and meaningful constitutional limits"[254] for assessing the complex racialized, gendered, and particularized harms to women and others in the U.S. territories. This initial proposal, sketched broadly, requires further development and refinement. It is my hope, though, that this modest approach sheds bright light on underexplored harms to women in the U.S. territories and moves us to continue interrogating the lasting damage of the U.S. colonial project.

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wrong, particularly one of their own creation, because the political branches of government cannot or will not act.").

252. Blackhawk, *supra* note 25, at 12; *see also* Aziz Rana, *How We Study the Constitution: Rethinking the* Insular Cases *and Modern American Empire*, 130 YALE L.J.F. 312, 331 (2020) (contending that the United States "has never properly confronted its colonial infrastructure or its imperial legacies").

253. Rolnick, *supra* note 202, at 2757.

254. Blackhawk, *supra* note 25, at 133.