
The Origins of U.S. Territorial Taxation and the *Insular Cases*

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ABSTRACT. This Essay examines Congress’s design of territorial revenue systems during 1898–1900. Eager to protect the federal fisc, lawmakers instituted tariffs between Puerto Rico and the mainland. Their choices segregated the territories from the federal fiscal apparatus, prompted the *Insular Cases*, and created the territories’ distinctive tax status as foreign countries.

INTRODUCTION

In April 2022, the Supreme Court decided *United States v. Vaello Madero*.¹ The respondent in that case, Jose Luis Vaello Madero, suffered from serious health problems and received federal benefits from the Supplemental Security Income (SSI) program, a means-tested economic-security program for disabled and elderly people.² In 2015, Vaello Madero moved from New York to Puerto Rico to care for his wife.³ Upon his relocation, the Social Security Administration discontinued Vaello Madero’s SSI benefits and sued him for restitution of an overpayment of \$28,000.⁴ The government cited provisions of the Social Security Act limiting SSI benefits to “resident[s] of the United States,” which the statute defined as “the 50 States and the District of Columbia.”⁵ For the Social Security

1. 596 U.S. 159 (2022).

2. *United States v. Vaello Madero*, 956 F.3d 12, 15 (1st Cir. 2020), *overruled by* 596 U.S. 159 (2022); see KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE*, 1935–1972, at 273 (2016).

3. *Vaello Madero*, 956 F.3d at 15.

4. *Vaello Madero*, 596 U.S. at 164.

5. 42 U.S.C. § 1382c(a)(1)(B)(i), (e) (2018). Congress made residents of Northern Mariana Islands eligible for Supplemental Security Income (SSI) benefits in 1976. See *Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United*

Administration, Vaello Madero was living “outside of the United States.”⁶ The question before the Court was thus constitutional: does the equal-protection component of the Fifth Amendment’s Due Process Clause require Congress to make SSI available to residents of Puerto Rico?⁷

Writing for an 8-1 majority, Justice Kavanaugh answered with a resounding no. He found the *tax status* of Puerto Rico residents a sufficient rational basis to justify their exclusion from federal welfare programs. Congress has exempted Puerto Ricans from federal income, gift, and estate taxation.⁸ Justice Sotomayor alone dissented. She explained that SSI recipients – low-income by definition – pay few if any taxes, and she pointed out Puerto Rico’s vital need for aid as it has by far the highest level of poverty in the country.⁹ The majority was unconvinced. It predicted dire consequences should the Court require Congress to extend SSI benefits to territorial residents: receipt of those benefits could prompt Congress to tax the territories too, imposing on them a heavy fiscal burden.¹⁰

The *Vaello Madero* majority rightly identified the territories’ exemption from most federal taxes. Tax law treats the territories as foreign countries and defines the “United States” as consisting of the fifty states and the District of Columbia.¹¹ Bona fide residents of U.S. territories thus pay one territorial income tax in satisfaction of their fiscal obligations to both the territorial and the federal treasuries.¹² Further, territorial tax systems differ from each other. As to income

States of America, Pub. L. No. 94-241, § 502(a)(1), 90 Stat. 263, 268 (1976); 20 C.F.R. § 416.215 (2024).

6. Joint Appendix at 39, *Vaello Madero*, 596 U.S. at 196 (2016) (No. 20-303) (documenting notice of a planned reduction in Social Security benefits).
7. *Vaello Madero*, 596 U.S. at 162.
8. *Id.* at 165 (citing *Califano v. Torres*, 431 U.S. 1, 3-5 (1978) (per curiam)); 48 U.S.C. § 734 (2018); I.R.C. § 933 (2018) (exempting bona fide residents from taxation of income sourced from within Puerto Rico); I.R.C. § 2209 (2018) (estate taxation).
9. *Vaello Madero*, 596 U.S. at 198 (Sotomayor, J., dissenting); see Craig Benson, *Poverty: 2018 and 2019 – American Community Survey Briefs*, U.S. CENSUS BUREAU 5 tbl.1 (Sept. 2020), <https://www.census.gov/content/dam/Census/library/publications/2020/acs/acsbr20-04.pdf> [<https://perma.cc/GA75-DVQ7>].
10. *Vaello Madero*, 596 U.S. at 165-66.
11. I.R.C. § 7701(a)(9) (2018).
12. The main exceptions to this general rule are incomes sourced to the United States and salaries of employees of the federal government. See, e.g., I.R.C. § 931(d), 933(2) (2018).

taxation, three territories—Guam,¹³ the Northern Mariana Islands,¹⁴ and the U.S. Virgin Islands¹⁵—are “mirror-Code” jurisdictions, in which the federal income tax applies as the local, territorial income tax.¹⁶ By contrast, Congress has authorized Puerto Rico to deviate from federal income-tax rules.¹⁷ Puerto Rico has exercised that power, taxing income at rates and brackets different from the federal government.¹⁸

The dispute in *Vaello Madero* highlights a pressing yet unaddressed issue: how did the U.S. territories come to acquire tax status vastly different from the mainland and from one another?¹⁹ This Essay traces the origins of U.S. territorial taxation to a critical moment at the turn of the twentieth century. It argues

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13. 48 U.S.C. § 1421i(a) (2018) (“The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.”); *accord* Organic Act of Guam, ch. 512, § 31, 64 Stat. 384, 392 (1950) (establishing the applicability of U.S. income-tax laws to Guam).
 14. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, art. VI, § 601(a), 90 Stat. 263, 269 (1976) (codified as amended in the notes of 48 U.S.C. § 1801 (2018)) (“The income tax laws in force in the United States will come into force in the Northern Mariana Islands as a local territorial income tax.”).
 15. 48 U.S.C. § 1397 (2018).
 16. American Samoa is not strictly a mirror-Code jurisdiction but has modeled its tax system on the federal regime. *See* AM. SAMOA CODE ANN. § 11.0403 (2021).
 17. *See* 48 U.S.C. § 734 (2018); Revenue Act of 1918, ch. 18, § 261, 40 Stat. 1057, 1088 (1919) (“The Porto Rican or Philippine Legislature shall have power by due enactment to amend, alter, modify, or repeal the income tax laws in force in Porto Rico or the Philippine Islands, respectively.”).
 18. Above a small exemption amount, Puerto Rico taxes net taxable income at marginal rates ranging from 7% to 33%, while the federal government taxes such income at marginal rates ranging from 10% to 37%. *Compare* P.R. LAWS ANN. tit. 13, § 30061 (2023) (imposing a territorial individual income tax), *with* I.R.C. § 1 (2018) (imposing a federal income tax).
 19. Very little has been written on territorial taxation. One recent contribution is Diane Lourdes Dick, *U.S. Tax Imperialism in Puerto Rico*, 65 AM. U. L. REV. 1, 16-83 (2015), which emphasizes the United States’s economic domination of Puerto Rico through taxation over the past century. *Vaello Madero* itself has generated commentary, focusing primarily on the fiscal *benefits* to which *Puerto Ricans* are entitled. *E.g.*, Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639 (2021) (assessing critically the absence of federal economic-security programs in the territories through the lens of social citizenship); Francine J. Lipman, *Not Taxing Puerto Rico: Whitewashing Impoverishment in United States v. Vaello Madero*, 77 TAX LAW. 357 (2024) (arguing primarily for the extension of welfare benefits to the territory); *see also* Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of “Territorial Federalism,”* 131 HARV. L. REV. F. 65, 90-91, 96-97 (2018) (mentioning briefly federal tax policy in Puerto Rico to criticize the notion of territorial federalism). Other accounts are outdated or designed to provide tax-planning advice. *E.g.*, Zoltan M. Mihaly, *Tax Advantages of Doing Business in Puerto Rico*, 16 STAN. L. REV. 75 (1963); Jason Sampas, *Puerto Rico: America’s Tax Haven or Vacation Paradise*, 21 LAW & BUS. REV. AMS. 49 (2015).

that Congress exempted the territories from federal taxation not out of any consistent concern for their fiscal self-governance. Instead, Congress designed territorial tax systems to guard against erosion of the federal tax base and to test its own power to tax. Under the Constitution, “all Duties, Imposts and Excises shall be uniform throughout the United States.”²⁰ At the turn of the twentieth century, with an income tax barred by the Supreme Court, Congress relied almost exclusively on excises and tariffs to fund the federal government.²¹ Tariffs from sugar constituted one of the most important sources of federal receipts.²² And the overseas territories under consideration for annexation by the United States – Puerto Rico, Hawai’i, and Cuba – all planted sugarcane.

Territorial acquisition posed two foundational threats to the federal fiscal regime. First, if the newly acquired territories were part of the United States subject to the Constitution’s Uniformity Clause, Congress would be powerless to impose tariffs between those territories and the mainland United States. Territorial sugar would come in free of customs, and the federal government would sustain a substantial loss of revenue in the form of sugar tariffs – more than ten percent of the federal budget.²³ Second, after decades of industrial expansion, the United States was looking for foreign markets for its excess production. Congress saw China – a vast market – as the most promising option. But it recognized that open-door trading there required the acquiescence of European colonial powers and would pressure the United States to open the Philippines for free trade. If the Uniformity Clause applied to the territories, the whole tariff system would collapse, as foreign exporters could ship goods to the United States through the Philippines tax-free. That would cause even more damage to the federal tax regime.²⁴

These two fiscal concerns drove Congress to segregate territorial revenue systems from federal taxation. Between 1898 and 1900, Congress engaged in extensive debate about Puerto Rico’s revenue system.²⁵ Despite calls for direct appropriations or property taxation, Congress instituted tariffs between Puerto Rico and the mainland while exempting Puerto Rico from internal-revenue

20. U.S. CONST. art. I, § 8, cl. 1.

21. U.S. DEP’T OF THE TREASURY, NO. 2137, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE FISCAL YEAR ENDED JUNE 30, 1899, at XVII (1899) [hereinafter *TREASURY REPORT OF 1899*]; AJAY K. MEHROTRA, *MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877-1929*, at 6-8 (2013); see also *Pollock v. Farmers’ Loan & Tr. Co.*, 158 U.S. 601, 637 (1895) (declaring unconstitutional the 1894 income tax).

22. See *infra* notes 51-59 and accompanying text (discussing the importance of sugar tariffs).

23. See *infra* notes 60-65 and accompanying text.

24. See *infra* Section I.B.5.

25. See *infra* Part I.

laws.²⁶ It did so to invite the Supreme Court to affirm its power to impose tariffs on goods imported from the territories and to deviate from the Uniformity Clause, in view of fiscal and trade-policy goals in the Philippines and China.²⁷ This resulted in the now-infamous *Insular Cases*.²⁸

This Essay shows that Congress has, since the beginning, designed territorial revenue systems with a keen eye toward their effect on the federal fisc. Despite exempting them from aspects of the federal tax regime, Congress has included the territories as part of its broader calculus in devising what it sees as the optimal revenue system for the mainland. The territories thus bear—albeit indirectly—the costs of *federal* tax design. After all, revenue loss due to imperfect tax systems (structured to preserve the federal tax base) does not differ substantively from paying cash into the federal treasury. In the case of Puerto Rico, Congress’s failure to provide appropriations, authorize borrowing, impose a property tax as urged by locals and federal lawmakers, and enable free trade with the mainland all contributed to the costs the territory bore *due to*, not *despite*, its exemption from federal taxation. Today, these costs entitle the territories to the fiscal benefits that they, in part, fund. Denying welfare benefits based on formal exemption from certain taxes, as the *Vaello Madero* majority did, ignores the territories’ longstanding, indirect contributions to the public fisc.

The remainder of this Essay proceeds in two Parts. Part I provides a historical account of the origins of territorial taxation. It focuses on Congress’s design of Puerto Rico’s revenue system in 1900 and Congress’s imposition of tariffs on the movement of goods between the island and the mainland United States. This critical decision led to a longstanding tradition of exempting territories from federal taxes. Part I shows that Congress did so out of an urgent need to preserve the federal tax base. Lawmakers often invoked local autonomy in their rhetoric, but concern for the federal tax base was ultimately the overriding motivation shaping the fiscal relationship between federal and territorial governments. Part I ends with a discussion about subsequent decisions to exempt other territories (e.g., Guam and the Virgin Islands) from the federal income tax.

Part II explores the doctrinal and scholarly implications of Part I’s historical account. It advances two main arguments. First, it criticizes the majority’s reasoning in *Vaello Madero*. In allowing Congress to deny the SSI program to territorial residents, the majority endorsed a benefits theory of taxation that cognizes

26. See *infra* Sections I.B.3-4; An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes (Foraker Act), ch. 191, § 4, 31 Stat. 77, 79-80 (1900) (“[T]he statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws . . .”).

27. See *infra* Section I.B.5.

28. E.g., *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).

a jurisdiction's formal tax exemption solely as a cost to the federal government.²⁹ If Congress exempts the territories from paying general revenue into its Treasury, the argument goes, it can exclude them from expenditures that the general revenue funds. The dissent casts this theory as inapposite. SSI beneficiaries pay little in taxes because they are low-income by definition.³⁰ This Essay shows that even *within* the logic of the benefits theory, the majority's reasoning is fundamentally flawed. Puerto Rico's longstanding exemption from the internal-revenue system is not a *cost* to the federal government, but a tool to protect the federal tax base. The majority's reasoning is thus internally incoherent.

Second, Part II adds to the chorus of judicial and scholarly voices calling for the repeal of the *Insular Cases*.³¹ All but one of the original *Insular Cases* dealt with taxation and the operation of federal tariffs in the newly acquired possessions.³² In the most consequential case, the Supreme Court held portions of the Constitution – in particular, the Uniformity Clause as to customs – inapplicable to unincorporated territories like Puerto Rico.³³ Fiscal and tax segregation from the mainland soon seeped into other public spheres, laying the foundation for excluding the territories from the American constitutional structure.³⁴ This Essay clarifies the tax-centric origins of the *Insular Cases*. As Congress moved on from the *ancien regime* of tariffs, courts should too.

I. PUERTO RICO, TARIFFS, AND THE FEDERAL TAX REGIME

This Part provides an account of the origins of U.S. territorial taxation. From 1898 to 1900, Congress engaged in extensive debate as it designed the revenue systems of the newly acquired possessions. Section I.A examines lawmakers' anticipation of the fiscal costs of territorial expansion. Section I.B assesses the substantive legislative debate as Congress settled on *territorial* tariffs – and internal-

29. Congress is free to extend SSI benefits to the territories, as it did to residents of Northern Mariana Islands. *See supra* note 5; 20 C.F.R. § 416.215 (2024).

30. *See infra* Section II.A.

31. *See infra* Section II.B.

32. *See* *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *see also* *Huus v. N.Y. & Porto Rico S.S. Co.*, 182 U.S. 392 (1901) (holding that vessels traveling between Puerto Rico and the United States were engaged in domestic coasting trade – a nontax question).

33. *Downes*, 182 U.S. at 287 (“We are therefore of opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution . . .”).

34. *See infra* note 246 and accompanying text.

revenue exemption—for Puerto Rico.³⁵ Lawmakers advanced several arguments for this tax design, despite calls for congressional appropriations, insular borrowing, and property taxes. The most convincing was Congress’s need to confirm its power to deviate from the Uniformity Clause, in view of its trade policies and the constraints of the federal tariff regime.

A. *The Fiscal Costs of Territorial Expansion*

After the Spanish-American War, Spain ceded Puerto Rico, the Philippines, and Guam to the United States.³⁶ Even before the ratification of the Treaty of Paris in 1899, Congress had concerns about the fiscal costs of annexing overseas territories. For the preceding three decades, the federal government had obtained no new land.³⁷ Instead, it projected American interests abroad through intangible means like negotiating favorable treaties, securing access to seaports, and enforcing an exclusive sphere of influence in the Western Hemisphere.³⁸

1. *Territorial Expansion and Federal Expenditures*

Acquisition of Puerto Rico and the Philippines—as well as Hawai’i—thus threatened to impose unaccustomed costs on the operation of the federal machinery. Opponents of annexation identified at least three distinct sources of fiscal distress. First, annexation might result in the federal assumption of insular debts and increased military spending when Congress was short on money.³⁹ In the early 1890s, solid economic growth generated budget surpluses, and federal receipts exceeded expenditures by an average of \$27 million each year.⁴⁰ This

35. By “territorial” tariff regime, I refer to the imposition of tariffs on the movement of goods between a U.S. territory and the mainland United States, as opposed to tariffs on the movement of goods between foreign countries and the United States.

36. Treaty of Peace Between the United States of America and the Kingdom of Spain art. II, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754 (ceding Puerto Rico and Guam); *id.* art. III (ceding the Philippine Islands).

37. Before 1898, the last major territorial acquisition of the United States was the purchase of Alaska from Russia in 1867. See Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russians to the United States of America art. I, Russ.-U.S., Mar. 30, 1867, 15 Stat. 539.

38. See SAM ERMAN, *ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE* 13-14 (2019) (discussing the United States’s distinctive approach to imperialism between 1868 and 1898).

39. 31 CONG. REC. 5999 (1898) (statement of Rep. Johnson) (“[W]e do not want Hawaii or any of these other islands. We do not care to assume their debts and obligations.”).

40. See U.S. DEP’T OF THE TREASURY, NO. 1337 (3D ED.), *ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE YEAR 1890*, at XXII (1890)

string of healthy surpluses dwindled in the mid-1890s. The Panic of 1893 paused industrial expansion and reduced federal revenue.⁴¹ Spending ballooned, roughly doubling between 1890 and 1899.⁴² The Spanish-American War itself cost about \$270 million.⁴³ In 1885, the House stripped the Appropriations Committee of its almost exclusive control over spending decisions and distributed the power of the purse to subject-matter legislative committees.⁴⁴ This decentralization of the budget process led to congressional generosity and increased outlays.⁴⁵ By 1899, the federal government ran a deficit of \$89 million, almost fifteen percent of the total federal receipts in that fiscal year.⁴⁶ Anti-imperialists thus warned that territorial expansion would “tax [federal] resources severely and impose heavy burdens upon [the] people.”⁴⁷

[hereinafter TREASURY REPORT OF 1890] (showing a net surplus of \$57 million in 1890); U.S. DEP’T OF THE TREASURY, NO. 1447 (3D ED.), ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE YEAR 1891, at XXI (1891) (showing a surplus of \$37 million in 1891); U.S. DEP’T OF THE TREASURY, NO. 1535 (3D ED.), ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE YEAR 1892, at XXI (1892) (showing a surplus of \$10 million in 1892); U.S. DEP’T OF THE TREASURY, NO. 1662 (3D ED.), ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE YEAR 1893, at XXVII (1893) (showing a surplus of \$2 million in 1893).

41. See Joseph H. Davis, *An Annual Index of U. S. Industrial Production, 1790-1915*, 119 Q.J. ECON. 1177, 1189 tbl.III (2004).
42. Compare TREASURY REPORT OF 1890, *supra* note 40, at XXI (showing federal expenditures of \$358 million), with TREASURY REPORT OF 1899, *supra* note 21, at XVII (1899) (showing federal expenditures of \$700 million).
43. HUGH ROCKOFF, *AMERICA’S ECONOMIC WAY OF WAR: WAR AND THE US ECONOMY FROM THE SPANISH-AMERICAN WAR TO THE PERSIAN GULF WAR* 35 (2012).
44. Charles Stewart III, *Does Structure Matter? The Effects of Structural Change on Spending Decisions in the House, 1871-1922*, 31 AM. J. POL. SCI. 584, 587-88 (1987).
45. *Id.* at 600.
46. TREASURY REPORT OF 1899, *supra* note 21, at XVII.
47. 31 CONG. REC. 5999 (1898) (statement of Rep. Johnson); see also 31 CONG. REC. 6643 (1898) (statement of Rep. James W. Wadsworth) (claiming that the annexation of Hawai’i would “perpetuate increased taxes”); 32 CONG. REC. 266 (1899) (statement of Rep. Benton McMillin) (predicting “further deficiencies in . . . revenues”); 32 CONG. REC. 450 (1899) (statement of Rep. Claude A. Swanson) (“It is safe to say that the annexation of the Philippines will impose an annual additional charge upon the Treasury of the United States of about \$50,000,000 [due to the military and naval establishments there] . . . [T]he advocates of this new policy claim that the expense can be borne by the revenues derived from the islands, but this is far from true.”). The United States ended up assuming the public debt of the Republic of Hawai’i, but limited its debt exposure to \$4 million. See Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750, 751 (1898).

2. *Sugar and Tariffs*

Annexation of Puerto Rico, the Philippines, and Hawai'i could shake the foundation of the federal tax regime. At this time, the United States was in the middle of a radical fiscal transformation. The federal government would gradually move from taxing commodities—for example, customs and excises—to taxing individual incomes and corporate profits.⁴⁸ But this transformation was far from complete in the 1890s. Congress would not enact the modern income tax until 1913, after the ratification of the Sixteenth Amendment.⁴⁹ Tariffs thus constituted a major source of federal revenue during the critical period in which Congress designed Puerto Rico's tax system. In 1899, for example, customs totaled \$206 million and made up over one-third of federal receipts.⁵⁰

A substantial portion of those customs came from sugar. Domestic production—primarily cane sugar in Louisiana and beet sugar elsewhere—satisfied only a fraction of Americans' enormous taste for sweetness. By the late 1890s, the United States imported the vast majority, over eighty percent, of the sugar it consumed.⁵¹ The federal government has taxed imported sugar from the very beginning, with one notable exception in 1890.⁵² The Tariff Act of 1789, for example, levied a duty of one cent per pound on brown sugar.⁵³ By the late 1880s, tariff receipts on imported sugar reached \$55 million a year—the most important form of customs and a significant part of federal revenue.⁵⁴ This was despite a reciprocal treaty with Hawai'i that forwent duties on sugar and about \$3 million

48. See MEHROTRA, *supra* note 21, at 6–8.

49. Revenue Act of 1913, ch. 16, § 2(A), 38 Stat. 114, 166 (imposing an income tax); U.S. CONST. amend. XVI (authorizing Congress to tax income without apportionment). Congress had previously taxed income to fund the Civil War and attempted (unsuccessfully) to tax income in 1894. See Revenue Act of 1862, ch. 119, 12 Stat. 432, 473–75 (Civil War income tax); Revenue Act of 1894, ch. 349, § 27, 28 Stat. 509, 553 (first peacetime income tax); *Pollock v. Farmers' Loan & Tr. Co.*, 158 U.S. 601, 637 (1895) (declaring unconstitutional the 1894 income tax).

50. See TREASURY REPORT OF 1899, *supra* note 21, at XVII.

51. ROY A. BALLINGER, U.S. DEP'T OF AGRIC., NO. 382, A HISTORY OF SUGAR MARKETING THROUGH 1974, at 16 tbl.2 (1978) (showing that the United States consumed on average 2.373 million short tons of sugar each year between 1896 and 1900, of which 1.945 million short tons were imported).

52. During the nineteenth century, customs burdens ranged from twenty percent to sixty-five percent on the value of imported sugar. See Sumner J. La Croix & Christopher Grandy, *The Political Instability of Reciprocal Trade and the Overthrow of the Hawaiian Kingdom*, 57 J. ECON. HIST. 161, 165 fig.2 (1997).

53. Act of July 4, 1789, ch. 2, § 1, 1 Stat. 24, 25 (levying a duty of 1¢ per pound on brown sugar, 3¢ per pound on loaf sugar, and 1.5¢ per pound on all other sugar).

54. F.W. TAUSSIG, THE TARIFF HISTORY OF THE UNITED STATES 235 (5th ed. 2010); Douglas A. Irwin, *Higher Tariffs, Lower Revenues? Analyzing the Fiscal Aspects of "The Great Tariff Debate of 1888,"* 58 J. ECON. HIST. 59, 70 tbl.3 (1998).

of revenue each year.⁵⁵ In 1890, Congress experimented with free trade for sugar under the McKinley Tariffs. The Revenue Act of 1890 put raw sugar on the duty-free list, levied a light charge on imported refined sugar to protect the domestic sugar-*refining* industry, and provided a bounty at two cents per pound to domestic *producers* of sugar.⁵⁶ Removing sugar tariffs leveled the playing field for raw foreign sugar, in effect repealing the preferential treatment for sugar imported from Hawai'i, and contributed to the overthrow of the Hawaiian Kingdom.⁵⁷ In any event, the experiment was short-lived. As federal surpluses dwindled, the need for tariff receipts returned.⁵⁸ By 1894, Congress returned to its heavy reliance on customs on imported sugar.⁵⁹

Sugar tariffs thus propped up the fiscal state. And all four territories under consideration for annexation in 1898—Hawai'i, Puerto Rico, the Philippines, and Cuba—planted sugarcane. Before wars with Spain caused steep, but brief, drops in output, sugar production in Cuba, Puerto Rico, and the Philippines exceeded one million short tons, capable of meeting more than half of the domestic demand.⁶⁰ The Constitution granted Congress broad power to raise revenue, but provided that “all Duties, Imposts and Excises shall be uniform throughout the United States.”⁶¹ The Uniformity Clause thus appeared to bar Congress from imposing any tariff on sugar produced in any acquired territory. Accordingly, anti-imperialists in Congress declared that under “the language of the Constitution[,] no other duty, no other tariff can be imposed in the Philippines or in Porto Rico.”⁶² As a result, “sugar, tobacco, hemp, and other products raised by

55. See Convention Between the United States and His Majesty the King of the Hawaiian Islands art. I, U.S.-Haw., Jan. 30, 1875, 19 Stat. 625, 625; La Croix & Grandy, *supra* note 52, at 175 tbl.3.
56. Revenue Act of 1890, ch. 1244, §§ 1.231 (Schedule E), 1.237 (Schedule E), 2.726 (Free List), 26 Stat. 567, 583-84, 610.
57. See La Croix & Grandy, *supra* note 52, at 182-85.
58. See *supra* notes 41-46 and accompanying text (discussing the rise of federal deficits in the 1890s).
59. Revenue Act of 1894 (Wilson-Gorman Tariff Act), ch. 349, § 182½ (Schedule E), 28 Stat. 509, 521. The Wilson-Gorman Tariff Act of 1894 levied an *ad valorem* duty on imported sugar, but Congress soon returned to its usual method of charging a fixed rate per pound. See Revenue Act of 1897 (Dingley Tariff Act), ch. 11, § 209 (Schedule E), 30 Stat. 151, 168.
60. BALLINGER, *supra* note 51, at 15 tbl.1.
61. U.S. CONST. art. I, § 8, cl. 1.
62. 32 CONG. REC. 439 (1899) (statement of Rep. Donelson Caffery); *accord* 32 CONG. REC. app. at 86 (1899) (statement of Rep. William H. Fleming). *But see* 32 CONG. REC. 1098 (1899) (statement of Charles A. Gardiner) (expressing the opposite view that newly acquired territories do not automatically become subject to federal statutory and constitutional law, and that “[s]ugar from Cuba and Hawaii, tobacco from Cuba and Porto Rico, and the products of the Philippines and Ladrões will not be admitted duty free, unless Congress so determines”). The *Congressional Record* often misspelled Puerto Rico as “Porto Rico,” until Congress restored

cheap tropical labor” would flood the domestic market free of customs and “injur[e]” agriculture and the labor market in the United States.⁶³ Duty-free importation of sugar in particular would decimate federal receipts.⁶⁴ One lawmaker made a (reasonable) estimate of sixty million dollars of revenue loss each year—a significant portion of federal revenue when the government was already in a budget crunch.⁶⁵

Territorial acquisition thus threatened the backbone of federal taxation. Assimilating insular possessions, according to anti-imperialists in Congress, would devastate customs receipts while increasing expenditures, inevitably forcing an “enormous increase of Federal taxes.”⁶⁶ It seemed unsustainable for the federal government to continue to rely on the tariff regime as a source of revenue.⁶⁷ For some, the inevitable demise of sugar tariffs necessitated structural changes in the federal tax base. Instead of taxing consumption or issuing debt for future generations to pay, the United States should turn to income taxation. One lawmaker stated, for example: “[T]he time will come when the people in the United States will cease to be willing to issue bonds . . . to pay the current expenses of the Government.”⁶⁸ And “the quicker that time comes . . . the better for the American people.”⁶⁹ Of course, Congress had attempted to tax income in 1894, as part of the same Revenue Act that brought back sugar tariffs after the Panic of 1893 reduced federal receipts.⁷⁰ But in a controversial decision, the Supreme Court held the 1894 income tax unconstitutional as an unapportioned direct tax.⁷¹

the island’s name in 1932 by joint resolution. See Act of May 17, 1932, ch. 190, 47 Stat. 158, 158-59 (1932); 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, 392 n.1 (1978). This Essay preserves the historical misspelling in quoted text.

63. 32 CONG. REC. 1320 (1899) (statement of Rep. Johnson).

64. 32 CONG. REC. 266 (1898) (statement of Rep. McMillin) (“If the time comes that the Philippine Islands and Cuba and Porto Rico become a part of the United States, then I predict that the revenue that is now derived from sugar will cease to be an important factor in the revenues of the Government.”).

65. 32 CONG. REC. 450 (1899) (statement of Rep. Claude A. Swanson) (“[W]ith the annexation of the Philippine Islands and Porto Rico, sugar and tobacco will come in free and we will thereby lose about \$60,000,000 annually . . .”); 32 CONG. REC. 266 (1898) (statement of Rep. Benton McMillin) (discussing the federal deficit).

66. 32 CONG. REC. 450 (1899) (statement of Rep. Claude A. Swanson).

67. *Id.* (“Our customs duties have been decreasing each year. They will continue to do so.”).

68. 32 CONG. REC. 266 (1898) (statement of Rep. Benton McMillin).

69. *Id.*

70. Revenue Act of 1894, ch. 349, § 1, 27, 28 Stat. 509, 521, 553.

71. *Pollock v. Farmers’ Loan & Tr. Co.*, 158 U.S. 601, 637 (1895). The Supreme Court had previously upheld as constitutional the Civil War income tax. *Springer v. United States*, 102 U.S.

Anti-imperialists saw both fiscal danger and a glimmer of opportunity in annexation. Many Southern lawmakers opposed territorial expansion during this period, as Republicans in the North rallied behind President McKinley in pushing for territorial expansion.⁷² The South disproportionately bore the customs burden on commonly consumed goods and, with the exception of Louisiana's sugarcane plantations, did not benefit much from the protective-tariff regime.⁷³ Income taxation would have shifted the distribution of tax burdens by extracting more revenue from the richer, manufacturing states in the North.⁷⁴ Annexation of overseas territories thus offered the prospect of structural tax reform. Collapse of customs revenue from sugar could rekindle the conversation over a national income tax when it seemed like a constitutional dead letter.⁷⁵

3. *The Prospect and Inadequacy of Trade with East Asia*

Many in Congress recognized the lucrative trade with East Asia that the Philippines could enable.⁷⁶ But they questioned whether the benefits of trade justified the cost of insular acquisition. One lawmaker pointed to Great Britain, the most successful colonial power in East Asia, with not only access to ports along the eastern Chinese coast but also possession of India and Hong Kong, a major

586, 591, 602 (1880); see Alex Zhang, *Rethinking Eisner v. Macomber, and the Future of Structural Tax Reform*, 92 GEO. WASH. L. REV. 179, 189-94 (2024).

72. ERMAN, *supra* note 38, at 29; Edwina C. Smith, *Southerners on Empire: Southern Senators and Imperialism, 1898-1899*, 31 MISS. Q. 89, 90 (1977). Most of the representatives who voted in favor of annexing Hawai'i, for example, were Republicans. See 31 CONG. REC. 6018-19 (1898).

73. See TAUSSIG, *supra* note 54, at 261-63; MEHROTRA, *supra* note 21, at 47.

74. See TAUSSIG, *supra* note 54, at 262; see also Robin L. Einhorn, *Look Away Dixieland: The South and the Federal Income Tax*, 108 NW. U. L. REV. 773, 780 (2014) (detailing Southern support for income taxation and the Sixteenth Amendment based on economic interests).

75. See 33 CONG. REC. 2655 (1900) (statement of Rep. Henry M. Teller) (criticizing the *Pollock* decision during the legislative debate about the Foraker Act's proposed revenue system for Puerto Rico). Ratified in 1913, the Sixteenth Amendment eventually allowed Congress to tax income and move on from a fiscal regime reliant on customs and excises. See U.S. CONST. amend. XVI. The amendment did not result directly from territorial acquisition, but this constitutional change might prompt rethinking of territorial fiscal segregation from the mainland. See *supra* notes 66-69 and accompanying text.

76. 32 CONG. REC. 450 (statement of Rep. Claude A. Swanson); see also 32 CONG. REC. app. at 86 (1899) (statement of Rep. William H. Fleming) (warning that an open-door policy in the far East and the Philippines could lead to free trade); 33 CONG. REC. 2650 (1900) (statement of Sen. Joseph B. Foraker) (praising as "as one of the greatest diplomatic triumphs standing to the credit of our Government" its success "in securing an open door in the far East, as to China").

emporium.⁷⁷ But federal acquisition of overseas territories to facilitate trade with China was a financial nonstarter: according to one congressional estimate, Britain generated a profit of less than ten million dollars in its trade with China, despite unrivaled colonial infrastructure like treaties, loans, and diplomacy.⁷⁸ The commercial gain that American industries could realize in China would thus be far less than the costs of military appropriations and declines in tariff revenue incurred by territorial expansion.⁷⁹

Overt racism added to the fiscal costs of imperialism. Countless pages of the *Congressional Record* characterized the overseas territories as “populated with races for which we have no affinity or liking,” and potential “ignorant voters” unworthy of representation in the federal government upon annexation.⁸⁰ In the view of lawmakers at the turn of the century, fitting territorial residents for democratic citizenship meant pouring immense resources into education and infrastructure that they, in large part due to their race, might not deserve.⁸¹ Further, the status of the Philippines clearly differed from that of Hawai’i, Puerto Rico, and Cuba.⁸² This was in part due to size. The Philippines had a population of 7.6 million (6.9 million of whom the 1903 Census classified as “civilized” – the criterion for civilization apparently being “Christianity”).⁸³ By contrast, Puerto

77. See, e.g., Wolfgang Keller & Carol H. Shiue, *China’s Foreign Trade and Investment, 1800-1950*, at 13, 21 tbl.1 (Nat’l Bureau of Econ. Rsch. Working Paper No. 27558, 2020), https://www.nber.org/system/files/working_papers/w27558/w27558.pdf [<https://perma.cc/HHB3-8S4J>].

78. 32 CONG. REC. 450 (1899) (statement of Rep. Claude A. Swanson) (“If our trade in China can rival that of Great Britain it is as much as the most sanguine can expect. Great Britain . . . has done everything that diplomacy, force, energy, and capital could accomplish for the last fifty years to develop her Chinese trade. . . . [Y]et last year her imports into the Chinese Empire were less than \$43,000,000, her profits less than \$10,000,000.”).

79. See *id.* (“Thus, should our trade equal that of Great Britain, which is far more than the most sanguine expect, the profits upon it would be less by \$40,000,000 than the costs incurred.”).

80. E.g., 31 CONG. REC. 6532 (1898) (statement of Sen. Benjamin Tillman); 31 CONG. REC. 5998 (1898) (statement of Rep. Henry U. Johnson) (“Have we not enough ignorant voters now within our borders that we need to increase their number?”).

81. See *infra* notes 109-111 and accompanying text.

82. See 31 CONG. REC. app. at 651 (1899) (statement of Rep. John F. Shafroth) (“In regard to the Philippines, it has not yet become clear that those islands in their entirety should become a permanent possession . . . No such difficulty exists in the case of Puerto Rico. It will become a permanent acquisition.”); see also Cabranes, *supra* note 62, at 429 (“The fear that legislation for Puerto Rico would set a precedent for the disposition of the Philippines question was clearly articulated during the Senate debate on the Foraker bill . . .”).

83. Henry Gannett, *The Philippine Census*, BULL. AM. GEOGRAPHICAL SOC’Y 257, 260 (1905); see also UNITED STATES BUREAU OF THE CENSUS, CENSUS OF THE PHILIPPINE ISLANDS TAKEN UNDER THE DIRECTION OF THE PHILIPPINE COMMISSION IN THE YEAR 1903, at 411, 532 (1905) (placing the “Christianized Filipino tribes” at “nearly seven million souls” and equating “wild” with “non-Christian”).

Rico had a population of fewer than one million, and Hawai'i about 150,000.⁸⁴ In fact, if admitted to the union, the Philippines would have been the largest state, surpassing the population of New York by more than 300,000.⁸⁵ Congress also directed especially harsh, race-based vitriol at Asians. For example, one senator favored annexation of Puerto Rico due to its geographic proximity, "civilized people," and willingness to be absorbed into the United States.⁸⁶ By contrast, "a very large population . . . not only uncivilized, but even barbarous and savage," inhabited the Philippines.⁸⁷ Annexing the Philippines would thus force the "precipitat[ion] into our civilization [of Malay, Chinese, and Japanese migrants] absolutely incompetent to assume the duties and responsibilities of citizenship."⁸⁸

* * *

Congress was thus acutely aware of the fiscal costs of territorial acquisition. Lawmakers anticipated that it would drain the federal budget, deprive the government of critical revenue streams like tariffs on sugar, and fail to break even with increased trade with East Asia according to even the rosier estimates. This pre-annexation debate foreshadowed and structured congressional design of Puerto Rico's tax system.

B. Congressional Design of Territorial Tax Systems

By 1900, led by Senator Joseph B. Foraker and after heated debate, Congress enacted an organic act establishing a civilian government in Puerto Rico.⁸⁹ The Foraker Act provided for presidential appointment of the governor, members of

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84. DEP'T OF WAR, REPORT ON THE CENSUS OF PORTO RICO, 1899, at 40 (1900); DEP'T OF COM., BUREAU OF THE CENSUS, FIFTEENTH CENSUS OF THE UNITED STATES: OUTLYING TERRITORIES AND POSSESSIONS 41 tbl.1 (1932).
85. See UNITED STATES CENSUS OFFICE, ABSTRACT OF THE TWELFTH CENSUS OF THE UNITED STATES, 1900, at 164 (1902).
86. 32 CONG. REC. 1067 (1899) (statement of Sen. Stephen R. Mallory).
87. *Id.*; see also 32 Cong. Rec. 639 (1899) (describing residents of the Philippines as "a mongrel and semibarbarous population . . . inferior to but akin to the negro"). These racist attitudes are reminiscent of Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).
88. 31 CONG. REC. 6642 (1898) (statement of Sen. William V. Allen); see also 31 CONG. REC. 6643 (1898) ("[A]nnexation of the Hawaiian Islands, with an ignorant and brutal population of about 115,000, principally Chinese and Japanese coolies and natives, would lead to the annexation of the Philippine Islands, Cuba, Puerto Rico . . . and [] the sudden precipitation into our population of about 15,000,000 undesirable people").
89. An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes (Foraker Act), ch. 191, 31 Stat. 77 (1900).

the Supreme Court, and the executive council (the upper house of the legislature)—what some commentators have called “a classic colonial government for the newly conquered territory, in which all power emanated from the federal government.”⁹⁰ Less noticed is the Foraker Act’s exemption of Puerto Rico from compliance with all federal tax laws: section 14 of the Act made “statutory laws of the United States” generally applicable to the territory but specifically provided that the “internal-revenue laws . . . shall not have force and effect in Porto Rico.”⁹¹ This statutory carveout from the U.S. tax regime laid the foundation for the next century of federal-territorial tax policy. Congress has devised, and continues to devise, territorial tax regimes that feature *formal* fiscal separation from the mainland, to varying degrees.⁹²

Why would Congress segregate territorial revenue systems from federal taxation? Legislative debate in 1900 offers clues about this critical decision. The remainder of this Section analyzes five prominent developments that inform our understanding of how territories acquired their distinctive tax status: (1) the initial call for the abolition of tariffs between Puerto Rico and the mainland after territorial acquisition, in particular from President McKinley; (2) the legislative urge to create a self-sustaining territorial fiscal system, with no need for direct federal appropriations; (3) the argument that Puerto Rico could not bear a direct property tax, in particular from Senator Foraker; (4) the claim that Congress, by directing tariff revenues to territorial rather than federal government, performed an act of unprecedented generosity; and (5) the serious threat of territorial free trade to the health of the federal tax system. This analysis shows that concerns about erosion to the *national* tax base largely motivated congressional choices in the design of territorial taxation.

1. McKinley’s Call for Tariff Abolition

Before the Foraker Act’s tax provisions took shape, both the Executive and some lawmakers opposed any taxes on the movement of commodities between Puerto Rico and the mainland.⁹³ In December 1899, President McKinley

90. *Id.* § 17, 31 Stat. at 81 (regarding the presidential appointment of the governor); *id.* § 18, 31 Stat. at 81 (regarding the executive council); *id.* § 33, 31 Stat. at 84 (regarding the Supreme Court); Torruella, *supra* note 19, at 70. The Foraker Act also established a popularly elected house of delegates and authorized the governor to appoint judges of the district courts. Foraker Act, § 27, 31 Stat. at 82 (regarding the house of delegates); § 33, 31 Stat. at 84 (regarding district courts).

91. Foraker Act, § 14, 31 Stat. at 80.

92. See *supra* notes 13–16 and accompanying text.

93. See Marc-William Palen, *The Imperialism of Economic Nationalism, 1890–1913*, 39 *DIPLOMATIC HIST.* 157, 178 (2015) (describing the McKinley Administration’s preference for a liberal trade

delivered a written message to the Senate requesting the formation of a temporary government for the island.⁹⁴ McKinley unequivocally asked for the abolition of tariffs: “Our plain duty is to abolish all customs tariffs between the United States and Porto Rico and give her products free access to our markets.”⁹⁵ He explained that Spanish cession (as well as a hurricane in 1899) had left Puerto Rico in a state of depression.⁹⁶ Freedom from the Spanish Empire led to the loss of markets on which Puerto Rico had long relied for tariff-free exports.⁹⁷ In a month, Congress followed up on the President’s recommendation. Sereno Payne, the Republican chair of the House Ways and Means Committee, quickly reported a bill to extend all federal tax laws to Puerto Rico.⁹⁸ Payne’s proposed bill would have made applicable in Puerto Rico all “laws of the United States relating to customs and internal revenue, including those relating to the punishment for crimes in connection with the enforcement of said laws.”⁹⁹ Further, the bill would have established a customs collection district and authorized the President to establish an internal-revenue collection district on the island.¹⁰⁰

Congress never enacted the bill from the Ways and Means Committee. The Foraker Act ended up *exempting* Puerto Rico from the federal tax regime, “in view of the provisions of section three” of the Act.¹⁰¹ Section 3 of the Foraker Act imposed a discounted tariff on the movement of goods between Puerto Rico and the mainland—at fifteen percent of the normal rates established under the

policy with Puerto Rico at first); *The President’s Second Thought: He Wisely Considered the Interests of American Labor in the Puerto Rican Case*, 25 AM. ECON. 181, 182 (1900).

94. 33 CONG. REC. 35 (1899) (statement of President McKinley) (“I recommend that legislation to the same end be had with reference to the government of Porto Rico. The time is ripe for the adoption of a temporary form of government for this island.”).
95. 33 CONG. REC. 36 (1899) (statement of President McKinley).
96. *Id.* For an assessment of the 1899 hurricane’s damage, see, for example, Stuart B. Schwartz, *The Hurricane of San Ciriaco: Disaster, Politics, and Society in Puerto Rico, 1899-1901*, 72 HISP. AM. HIST. REV. 303 (1992).
97. 33 CONG. REC. 36 (1899) (statement of President McKinley).
98. 33 CONG. REC. 1010, 1654 (1900) (introducing a bill “to extend the laws relating to customs and internal revenue over the island of Puerto Rico ceded to the United States”).
99. H.R. 6883, 56th Cong. § 1 (1900).
100. *Id.* §§ 2-3.
101. An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes (Foraker Act), ch. 191, § 14, 31 Stat. 77, 80 (1900); *see also id.* § 3, 31 Stat. at 77 (“[A]ll merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries.”).

Dingley Act of 1897 (the “Dingley rates”).¹⁰² But McKinley’s initial call for the abolition of tariffs reverberated in Congress as debate over the Foraker Act dragged on. Anti-imperialists praised his message as, for example, “advis[ing] justice and equal rights as the rules for our action in framing laws for the government of the new citizens of the United States and Puerto Rico.”¹⁰³ They contended that McKinley knew the unconstitutional nature of any tariff between Puerto Rico and the mainland, pointing to both case law and the text of Article I.¹⁰⁴ William Stark, a representative of the Populist Party, referred to the Ways and Means Committee’s immediate presentation of “a bill [abolishing] all tariffs between the United States and the territory of Puerto Rico” in an effort “to carry out the wishes of the President.”¹⁰⁵ The new proposal to maintain tariffs (albeit at a lower rate), he claimed, caught everyone by “surprise.”¹⁰⁶ Even supporters of the Foraker Act noted the importance of free trade to encourage business investment and erect a “wise and economical and progressive government” on the island.¹⁰⁷

2. Territorial Fiscal Self-Governance

Lawmakers favored a self-sustaining territorial revenue stream. Upon the Ways and Means Committee’s withdrawal of its first proposed bill, Congress recognized the territory’s need for public spending and articulated several

102. *Id.* § 3, 31 Stat. at 77-78; An Act to Provide Revenue for the Government and to Encourage the Industries of the United States (Dingley Act of 1897), ch. 11, 30 Stat. 151. The initial draft of the Foraker Act proposed a lower discount at 25% of the Dingley rates. See 33 CONG. REC. 2647 (1900) (statement of Sen. Foraker) (“[W]e could raise [the revenue gap] by imposing a duty of 25 per cent of the Dingley rates upon the commerce between Puerto Rico and the United States. The House bill cut it down to 15 per cent. In my opinion it ought to have remained at 25 per cent.”).

103. 33 CONG. REC. 2642 (1900) (statement of Sen. Pettus). Despite his rhetoric of justice and equal rights, Senator Pettus was a high-ranking leader of the Ku Klux Klan and instrumental in disenfranchising and restraining the civil rights of Black residents in the South. For him—and other anti-imperialist Democrats from the South—to call for the equal rights of citizenship took, as one scholar noted, “breath-taking gall.” ERMAN, *supra* note 38, at 30; Errin Whack, *Who Was Edmund Pettus?*, SMITHSONIAN MAG. (Mar. 7, 2015), <https://www.smithsonian-mag.com/history/who-was-edmund-pettus-180954501> [<https://perma.cc/DYG9-XV4G>].

104. 33 CONG. REC. 2166-67 (1900) (statement of Rep. Ryan) (quoting *Reynolds v. United States*, 98 U.S. 145, 162 (1878)) (stating that the First Amendment bars Congress from prohibiting the freedom of religion in a territory); *Thompson v. Utah*, 170 U.S. 343, 346 (1898) (citing U.S. CONST. art. I, § 8, cl. 1) (stating that the constitutional right to jury applies to the territories).

105. 33 Cong. Rec. 2167 (1900) (statement of Rep. Ryan).

106. *Id.*

107. 33 CONG. REC. 2140 (1900) (statement of Rep. Russell).

possibilities for raising the money. Relying on an account by General Davis, Representative Payne estimated an annual expenditure of \$1.94 million.¹⁰⁸ That budget would have allocated about \$350,000 to education and \$390,000 to the improvement of roads—both critical to Puerto Rico’s economic development.¹⁰⁹ Foraker later proposed a more ambitious budget, allocating \$1 million each to schools and roads, and noting the deplorable state of Puerto Rico’s infrastructure.¹¹⁰ As one lawmaker bluntly put it: “There must be money for schools, for internal improvements, for general administration[, but w]e can get revenue only in one of three ways. By borrowing, by direct appropriations from the Federal Treasury, or by taxation.”¹¹¹

Many—but not a critical mass—in Congress supported appropriations and borrowing. One representative argued, for example, that appropriations were preferable to tariffs because the latter would burden trade and leave Puerto Rico “in a worse condition than . . . under Spanish rule.”¹¹² Others urged Congress to authorize all territories to issue bonds like any state would and contended that it would only be fair for future beneficiaries to pay for improved infrastructure.¹¹³ Indeed, prominent residents of Puerto Rico delivered a memorandum of protest and petition to Congress, in which they made a specific request for an authorization of borrowing.¹¹⁴ They noted that the island was, at the time, free of debt, and contended that it could procure loans at four- or five-percent interest to

108. 33 CONG. REC. 1942 (1900) (statement of Rep. Payne); see GEORGE W. DAVIS, REPORT OF BRIGADIER-GEN. GEO. W. DAVIS, U.S.V., ON CIVIL AFFAIRS OF PUERTO RICO, 1899, at 49 (1900) [hereinafter REPORT OF GENERAL DAVIS].

109. Payne stated that the budget would allocate \$300,000 for the highways, but a figure of \$390,000, later provided by James Lloyd, another representative, was more accurate. 33 CONG. REC. 1942 (1900) (statement of Rep. Payne); 33 CONG. REC. 2150 (1900) (statement of Rep. Lloyd); see REPORT OF GENERAL DAVIS, *supra* note 108, at 50-51.

110. See 33 CONG. REC. 2647-48 (1900) (statements of Sen. Foraker).

111. 33 CONG. REC. 1959 (1900) (statement of Rep. Dalzell); accord 33 CONG. REC. 2051 (1900) (statement of Rep. Long) (“Three courses are open: Bonds must be issued, an appropriation must be made out of the Treasury of the United States, or tariff duties must be imposed that will produce revenue sufficient to pay the expenses of government and establish the much-needed schools.”).

112. 33 CONG. REC. 2043 (1900) (statement of Rep. Bromwell).

113. *Id.* at 2044 (“[W]hat does your State . . . do when [it] wants to meet the expenses of its improvements? It negotiates a loan, it gives out its bonds, it gets its money, and when the bonds fall due it redeems them”); 33 CONG. REC. 2169 (1900) (statement of Rep. Green) (calling for “proper legislation [permitting Puerto Rico] to raise money by a temporary loan and pay it off gradually under the sinking-fund process”).

114. 33 CONG. REC. 2231-32 (1900) (recounting “[m]emorial of protest and petition from the people of Puerto Rico to the Congress of the United States”).

develop industries, build infrastructure, and establish schools, before “prosperity justify[ed] an insular tax.”¹¹⁵

Those voices did not prevail. Congress quickly ruled out appropriations and borrowing, in part due to the size of the budget deficit in the late 1890s, and justified its decision on the ground of territorial fiscal autonomy.¹¹⁶ Lawmakers, mostly but not exclusively Republicans, variously called for Puerto Rico to stay “free from debt,” to develop a “self-supporting” fiscal government, and to go “on the way of taking care of themselves” rather than relying on indefinite “almsgiving.”¹¹⁷ The absence of revenue streams originating from Puerto Rico, they argued, would render residents “charity patients”¹¹⁸ instead of citizens with political independence, running the risk of reducing Puerto Ricans to “the status of mendicants.”¹¹⁹

The rhetoric of autonomy clashed with claims that Puerto Ricans were incapable of citizenship. The legislative debate leading up to the Foraker Act’s passage was replete with characterizations of Puerto Rico as undeserving of democracy. One lawmaker, for example, stated his “firm[] opinion that [residents of Puerto Rico] are not prepared for self-government” due to their “ignorance.”¹²⁰ Senator Foraker justified presidential appointment of the executive council on the ground of Puerto Rico’s inexperience with democratic participation and modern bureaucracy.¹²¹ Demanding “self-supporting” fiscal government from those allegedly unable to govern themselves seemed like a contradiction in terms. Indeed, one lawmaker pointed out that congressional tax legislation—without Puerto Rico’s consent—ran contrary to a foundational principle of the United States: no taxation without representation.¹²² But most members of Congress

115. *Id.* at 2232.

116. See *supra* note 46 and accompanying text (describing federal deficits in the late 1890s); 33 CONG. REC. 2097 (1900) (statement of Rep. Parker) (“We can appropriate from the United States Treasury, but no one thinks that is a proper measure.”).

117. 33 CONG. REC. 2051 (1900) (statement of Rep. Long); 33 CONG. REC. 2141 (1900) (statement of Rep. Russell); 33 CONG. REC. 2648 (1900) (statement of Sen. Foraker).

118. 33 CONG. REC. 2141 (1900) (statement of Rep. Russell).

119. 33 CONG. REC. 2648 (1900) (statement of Sen. Davis).

120. 33 CONG. REC. 1355 (1900) (statement of Rep. Weeks).

121. 33 CONG. REC. 2644-45 (1900) (statement of Sen. Foraker) (“The people of Puerto Rico differ radically from any people for whom we have heretofore legislated. . . . They have had no experience such as to qualify them[] for the great work of organizing a government with all its important bureaus and departments . . .”).

122. 33 CONG. REC. 1844 (1900) (statement of Rep. Miers) (“Has there ever been a consent by the people of Puerto Rico . . . to a government by the United States? . . . Is not this very provision a taxation for the benefit of the United States of the people of Puerto Rico without in any way granting them a representation?”).

viewed Puerto Rico as a “ward.”¹²³ That is, they were devising “a wise code of taxation” that would enable “faithful American officials” to direct expenditures to public needs.¹²⁴

3. *The Impossibility of Territorial Internal Revenue*

After rejecting appropriations and borrowing, Congress decided that Puerto Rico could not bear any internal revenue (i.e., excise taxes on consumption or direct taxes on property). Representative Payne initially introduced a bill to extend federal internal-revenue laws to Puerto Rico.¹²⁵ That would have included excise taxes on alcohol, which in combination with tariffs on sugar accounted for close to half of federal revenues.¹²⁶ But Payne quickly changed his tune. Speaking on the House floor, he noted that Puerto Rico consumed more than one million gallons of rum each year, paying twenty-five to forty cents per gallon.¹²⁷ The extension of the federal internal-revenue system would have imposed an excise tax of \$1.10 per gallon of rum.¹²⁸ It would have crippled the rum-distillation industry and deprived the locals of a key commodity.¹²⁹

Senator Foraker spoke decisively against property taxation. On the floor, he reminded the Senate that Congress would establish a civilian government in Puerto Rico.¹³⁰ The maintenance of “governmental machinery” demanded revenue streams, which Foraker estimated at \$3 million each year.¹³¹ And “direct taxation upon the property in Puerto Rico,” Foraker insisted, was “impossible” because it would impose excessive tax burdens.¹³² Foraker assessed the value of all insular property at about \$150 million, which would enable a 2% property-tax rate to yield the required \$3 million of government revenue each year, but he argued that the “fair value for taxation” was only two-thirds of the property’s

123. 33 CONG. REC. 2097 (1900) (statement of Rep. Parker).

124. 33 CONG. REC. 1358 (1900) (statement of Rep. Weeks).

125. H.R. 6883, 56th Cong. § 1(1900); see, e.g., Revenue Act of 1894, ch. 349, § 48, 28 Stat. 509, 563 (raising the federal excise tax on distilled spirits to \$1.1 per gallon).

126. See MEHROTRA, *supra* note 21, at 72 tbl.1.1; *supra* notes 52-55 and accompanying text.

127. 33 CONG. REC. 1942 (1900) (statement of Rep. Payne).

128. See Revenue Act of 1894, § 48, 28 Stat. at 563.

129. 33 CONG. REC. 1942 (1900) (statement of Rep. Payne).

130. See *supra* notes 89-91 and accompanying text; Organic Act of 1900 (Foraker Act), ch. 191, 31 Stat. 77.

131. 33 CONG. REC. 2645 (1900) (statement of Sen. Foraker).

132. *Id.*

economic value.¹³³ And because the local municipal (rather than territorial) government required an additional \$1 million, Foraker concluded that a 4% property tax would be needed to meet Puerto Rico's revenue needs.¹³⁴ Further, he viewed this "burdensome" tax as beyond the ability of Puerto Ricans to administer.¹³⁵ Unlike mainland Americans, Puerto Ricans were "not familiar with the system" of property taxation.¹³⁶ It would thus run contrary to congressional intent to "authorize a system of taxation that the people of Puerto Rico can conform to and administer successfully."¹³⁷ As a result, Foraker proposed to raise territorial revenue by discounted tariffs at 25% of the Dingley rates on goods between Puerto Rico and the mainland United States, and he only reluctantly acquiesced to the House's amendment to cut the rate to 15%.¹³⁸

Some lawmakers echoed Senator Foraker.¹³⁹ But his arguments were not compelling—at least not enough to have ruled out the partial use of a consumption or property tax to fund the territorial government. Contrary to Foraker's doubts, Puerto Rico had substantial experience in implementing tax regimes under Spanish rule. The island had extracted revenues in the forms of tariffs, excises, and taxes on select commodities (*consumo*).¹⁴⁰ It had also collected an income tax, which Congress had attempted to levy in 1894 before the Supreme Court held it unconstitutional.¹⁴¹ T.S. Adams, a key Treasury official who would later wield significant influence over the development of the federal income tax, described pre-annexation Puerto Rico as having "in appearance at least, a

133. *Id.* at 2646 ("Generally in the Northern States here I think we assess property for taxation at about two-thirds of its market value. That is called its full, fair value for taxation.").

134. *Id.* ("That would mean a tax rate of 4 per cent on every dollar's worth of property belonging to the people of Puerto Rico and situated in that island.").

135. *Id.*

136. *Id.*

137. *Id.* at 2648.

138. *Id.* at 2647.

139. *E.g., id.* at 3395 (1900) (statement of Rep. Benjamin F. Marsh) ("The extension of the internal-revenue system to Puerto Rico would be burdensome upon those people in the depressed condition of their business interests."); *id.* at 3639 (1900) (statement of Sen. George C. Perkins) ("It is hardly possible that a land, poll, or consumption tax on a people such as are here described could with justice to them be imposed."); *see also id.* at 2142 (1900) (statement of Rep. Charles A. Russell) (characterizing proposed congressional treatment of Puerto Rico as designed "to care for and protect and sustain a possession . . . until she be able to stand alone to assume her full stature and responsibility and burdens among the rest of her sisters in one great Republic").

140. *See* T.S. Adams, *The Financial Problems of Porto Rico*, 17 ANNALS AM. ACAD. POL. & SOC. SCI. 48, 48 (1901); Dick, *supra* note 19, at 21-22.

141. Revenue Act of 1894, ch. 349, § 27, 28 Stat. 509, 553; *Pollock v. Farmers' Loan & Tr. Co.*, 158 U.S. 601, 637 (1895).

successful [tax] system.”¹⁴² Adams was serving as an assistant to Puerto Rico’s Treasurer at the time, and he complained about other aspects of Puerto Rico’s tax policy (e.g., the use of indirect taxes, whose burden fell on the poor).¹⁴³ But even Adams conceded the “efficiency” of the pre-annexation tax system, characterizing it as “an administrative process that was mercilessly effective when unimpeded by bribery.”¹⁴⁴ Further, an *ad valorem* tax of about 2% on property was not uncommon at this time: Wisconsin taxed the full value of property at about 3% in 1900, and Utah first levied a territorial property tax at 1% in 1851.¹⁴⁵

These concerns prompted many in Congress to speak in favor of an *internal* revenue system for Puerto Rico. One lawmaker, for example, conjectured that real-estate taxes would “become a profitable source of revenue” given the impending capital investment in the production of coffee, sugar, and tobacco in Puerto Rico.¹⁴⁶ Others attributed the tariff decision to the sugar and tobacco industries’ influence on the House Ways and Means Committee, and suggested that either property taxes or excise taxes on rum could meet territorial revenue needs when combined with other methods of taxation.¹⁴⁷ And prominent citizens of Puerto Rico “repudiate[d] the idea that [they] cannot raise the amount necessary to carry on [territorial] affairs” through internal revenue, pointing to the island’s past success in funding budgets in excess of four million dollars.¹⁴⁸ Indeed, Puerto Rico immediately levied a set of internal-revenue taxes upon establishing the civil government. The island’s revenue act, promulgated in January 1901, provided for a tax of up to one percent on the actual market value of

142. Adams, *supra* note 140, at 48; LAWRENCE ZELENAK, FIGURING OUT THE TAX: CONGRESS, TREASURY, AND THE DESIGN OF THE EARLY MODERN INCOME TAX 90 (2017) (citing JOHN F. WITTE, THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX 91 (1985)).

143. Adams, *supra* note 140, at 49.

144. *Id.*

145. JACK STARK, A HISTORY OF THE PROPERTY TAX AND PROPERTY TAX RELIEF IN WISCONSIN 12 (2018) (presenting a table about “general property assessments and tax levies in Wisconsin, 1900 to 1989”); Act of Feb. 4, 1852, § 2, 1852 Utah Laws 110; UTAH LEGISLATURE OFF. OF LEGIS. RSCH. & GEN. COUNS., A HISTORY OF PROPERTY TAX IN UTAH 3 (2010).

146. 33 CONG. REC. 2044 (1900) (statement of Rep. Jacob H. Bromwell).

147. *Id.* at 2045 (1900) (statement of Rep. Robert L. Henry); *id.* at 2150 (1900) (statement of Rep. Lloyd); *see also id.* at 2272 (1900) (statement of Rep. James Williams) (“[W]hy not give Puerto Rico a government that will enable her people to raise revenue for her roads, schools, and local government, by placing a tax upon the property instead of the poverty of the island[?] . . . With a proper local system of taxation, such as we have in the States, they could make their assessments, levies, and appropriations[.] . . .”).

148. *Id.* at 3609 (1900) (reading into the *Congressional Record* a letter from the Commissioners of Puerto Rico).

real and personal property, excise taxes on alcohol and tobacco, and an inheritance tax at progressive rates.¹⁴⁹

4. Territorial Tariffs

Senator Foraker characterized Congress's decision to impose tariffs on the movement of goods between Puerto Rico and the mainland as an act of "unexampled generosity."¹⁵⁰ To be sure, the Foraker Act directed all tariff revenue to the territorial rather than the federal Treasury.¹⁵¹ But many lawmakers challenged the underlying decision to impose tariffs in the first place. Two main strands of arguments emerged: policy and constitutional.¹⁵²

With respect to policy, lawmakers contended that Puerto Rico needed not tariffs but markets. Severing colonial ties with Spain came at a cost. The island lost the largest markets for its exports like coffee, sugar, and tobacco.¹⁵³ Half of those exports, more than \$8 million for the four years before 1897, went to Spain and Cuba, which soon erected tariff barriers against the entry of Puerto Rican

149. See J.H. Hollander, *The Finances of Porto Rico*, 16 POL. SCI. Q. 553, 571-73 (1901); FIRST ANNUAL REPORT OF CHARLES H. ALLEN, GOVERNOR OF PORTO RICO, COVERING THE PERIOD FROM MAY 1, 1900, TO MAY 1, 1901, at 170-74 (1901).

150. 33 CONG. REC. 2648 (1900) (statement of Sen. Foraker).

151. An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes (Foraker Act), ch. 191, § 4, 31 Stat. 77, 78 (1900) ("[T]he duties and taxes collected in Porto Rico in pursuance of this Act . . . and the gross amount of all collections of duties and taxes in the United States upon articles of merchandise coming from Porto Rico, shall not be covered into the general fund of the Treasury, but shall be held as a separate fund . . . to be used for the government and benefit of Porto Rico.").

152. Lawmakers also accused the tariffs as the product of lobbying by the sugar industry. The reality is more nuanced: Producers of raw sugar (i.e., sugarcane in Louisiana or sugar beets in the Midwest) had an economic interest in erecting trade barriers to raw sugar produced in Puerto Rico. By contrast, the sugar trust (which, for the most part, refined raw sugar in coastal factories) stood to benefit from tax-free importation of raw sugar (but, of course, not from tax-free importation of refined sugar). See 33 CONG. REC. 2042 (1900) (statement of Rep. Jacob H. Bromwell); 33 CONG. REC. 2136 (1900) (statement of Rep. William A. Jones); 33 CONG. REC. 2220 (1900) (statement of Rep. Robert F. Broussard); 33 CONG. REC. 2366 (1900) (statement of Rep. John Franklin Rixey); Sara Fisher Ellison & Wallace P. Mullin, *Economics and Politics: The Case of Sugar Tariff Reform*, 38 J.L. & ECON. 335, 340-41 (1995); Dick, *supra* note 19, at 29-31; TAUSSIG, *supra* note 54, at 297.

153. 33 CONG. REC. 1869 (1900) (report of the Sec'y of War for 1899) ("The principal difficulty now in the island of Puerto Rico is that the transfer of the island from Spain to the United States has not resulted in an increase of prosperity, but in the reverse. The industry of the island is almost entirely agricultural. The people live upon the products of their own soil and upon the articles for which they exchange their surplus products abroad. Their production is in the main of coffee, sugar, and tobacco. The prosperity of the island depends upon their success in selling these products.").

goods.¹⁵⁴ Tariffs—even discounted ones—between the island and the mainland United States would thus deal an additional blow to industrial conditions.¹⁵⁵ Indeed, a petition from prominent residents of Puerto Rico to Congress urged free commerce and predicted “nothing but stagnation, retrogression, and disaster” should tariffs be imposed.¹⁵⁶ Without “free access to the [mainland] markets,” Puerto Rico would have suffered a “withdrawal of Spanish interests and the nonsubstitution of American promotion of prosperity.”¹⁵⁷

Further, lawmakers made constitutional arguments against the imposition of tariffs. A comprehensive assessment of these voluminous objections is unwarranted here. But there was enough doubt about whether Congress had the power to impose tariffs on the movement of goods between the territories and the mainland United States that (1) opponents to the Foraker Act marshaled legal authorities against it,¹⁵⁸ and (2) supporters lauded the Foraker Act for enabling a possible resolution of the doubt by the Supreme Court.¹⁵⁹ The 1787 Constitution required “all Duties, Imposts and Excises [] be uniform throughout the

154. *Id.*

155. *See id.* (“I wish most strongly to urge that the custom duties between Puerto Rico and the United States be removed.”); 33 CONG. REC. 2041 (1900) (statement of Rep. Jacob H. Bromwell) (“The industry of the island is almost entirely agricultural. The people live upon the products of their own soil and upon the articles for which they exchange their surplus products abroad. Their production is in the main of coffee, sugar, and tobacco. The prosperity of the island depends upon their success in selling these products.” (quoting WAR DEP’T, ANNUAL REPORT OF THE SECRETARY OF WAR 30 (1899))); 33 CONG. REC. 2149 (1900) (statement of Rep. James T. Lloyd) (“Have conditions changed in that island since that time? Are the inhabitants less in need of markets for their produce? Has their depressed industrial condition been remedied? I have heard something about the President giving secret instructions.”); 33 CONG. REC. 3047 (1900) (statement of Rep. James A. Hemenway) (“You say, Tax them more by extending the internal-revenue laws to Puerto Rico. We say, Do not tax them any more, but give them the revenues that have been collected up to this time and hereafter to be collected; give it to them to buy food, for educational purposes, and the building of roads.”).

156. 33 CONG. REC. 2231 (1900) (containing a memorial of protest and petition from the people of Puerto Rico to the Congress of the United States).

157. *Id.*; *see also* 33 CONG. REC. 2969 (1900) (statement of Sen. James K. Jones) (“Mr. President, our course toward this island since the ratification of the treaty of peace has been such as to paralyze business . . .”).

158. *See* 33 CONG. REC. 1262 (1900) (statement of Rep. Benjamin R. Tillman); 33 CONG. REC. 1495 (1900) (statement of Sen. Donelson Caffery); 33 CONG. REC. 2644 (1900) (statement of Sen. George F. Hoar); *see also* 33 CONG. REC. 2034 (1900) (statement of Rep. George W. Ray) (arguing that Congress cannot decide to extend the Constitution, *qua* Constitution, to a territory, because the “Constitution is either there as the supreme law of every inch of our territory the moment it becomes the property of the United States, or only extends thereto, and can only be extended thereto, by the admission of the Territory into the Union as a State”).

159. *See infra* notes 160–168 and accompanying text.

United States.”¹⁶⁰ If Puerto Rico formed part of the “United States,” the Foraker Act’s tariffs would violate the Uniformity Clause. And case law before 1900, if anything, gestured toward a broad reading of the Clause. One key case, the infamous *Dred Scott v. Sandford*, had held that Congress could not ban slavery in a territory on the ground of due process.¹⁶¹ *Dred Scott* appeared to dismiss the federal government’s “power . . . to obtain and hold colonies and dependent territories, over which [it] might legislate without [constitutional] restriction.”¹⁶² In an earlier opinion, Chief Justice Marshall had construed Congress’s taxing power—and Article I, Section 8, which contains the Uniformity Clause—as a “general” provision, “without limitation as to place,” and “extend[ing] to all places over which the government extends.”¹⁶³ Opponents to tariffs read these pronouncements as holding the Constitution applicable *ex proprio vigore*—of its own force and without the need for congressional action—to all territories.¹⁶⁴ Article I thus guaranteed “[e]quality of taxation” in all of the United States, including Puerto Rico.¹⁶⁵

5. *China, the Philippines, and Congressional Taxing Power*

Finally, Congress needed to bring a test case to the Supreme Court to confirm its power to impose tariffs between the mainland and overseas territories. This was the most convincing reason—in the views of many contemporary lawmakers—for exempting Puerto Rico from internal-revenue laws. This question cut to the heart of the federal tax base. After astonishing industrial growth in the late nineteenth century, the United States was producing more than it could consume. The federal government searched for foreign markets to direct the excess goods.¹⁶⁶ China was the most promising option: it boasted an enormous base of

¹⁶⁰ U.S. CONST. art. I, § 8, cl.1.

¹⁶¹ 60 U.S. (19 How.) 393, 448 (1857).

¹⁶² *Id.*

¹⁶³ *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 318-19 (1820).

¹⁶⁴ See *supra* note 158. But see 33 CONG. REC. 2643 (1900) (statement of Sen. Joseph B. Foraker) (“[T]he Constitution does not extend into the Territories of the United States proprio vigore.”); 33 CONG. REC. 2654 (1900) (statement of Sen. Joseph B. Foraker).

¹⁶⁵ 33 CONG. REC. 1948 (1900) (statement of Rep. James D. Richardson) (“Equality of taxation, equality of governmental exactions, equality of contributions to the nation’s revenue are the privileges expressly guaranteed every citizen of the Republic.”); accord 33 CONG. REC. 2658 (1900) (statement of Sen. Augustus O. Bacon).

¹⁶⁶ See 33 CONG. REC. 2250 (1900) (statement of Sen. Joseph B. Foraker) (“We want to trade with the far East. We have reached that point in the development of our resources, in the manufacture of products, in the aggregation of capital, and in the command of skilled labor when we are turning out annually millions in value more than we can consume at home In recognition of that fact, an open door to the markets of China is of the highest importance.”).

potential consumers with five times the population of the United States and had little industrial capacity of its own (but enough wealth to pay for imports). Acquisition of the Philippines certainly facilitated trade with China, but because the federal government had just secured open-door trading at Chinese ports at the acquiescence of other colonial powers, it was under pressure to offer open-door trading in the Philippines. Tax-free entry of foreign goods into the Philippines necessitated a tariff regime between the Philippines, a territory, and the mainland. Without it, foreign merchants could have shipped goods destined for the mainland market to the Philippines first, then forwarded them – all tariff-free – to the United States. Tariffs constituted close to half of all federal receipts. The survival of the federal tax system – as constituted in 1900 – thus depended on Congress’s power to impose territorial tariffs.

Anti-imperialists raised this concern even before the Foraker Act. In 1899, for example, one lawmaker expressed worries about the “effect of [territorial] annexation on our revenue laws.”¹⁶⁷ Relying on the Uniformity Clause, he noted that annexed territories would “no longer be ‘foreign,’” and that acquisition would result in “absolute free trade among the States and Territories of the United States.”¹⁶⁸ That is, Congress had “no power to put tariff duties on domestic goods going from a State into a Territory.”¹⁶⁹ At the same time, Congress was considering an open-door trading policy in the Philippines. Throughout the country, industrialists demanded tax-free trading “to reach the hundreds of millions of people in China,” and the federal government could not obtain “such a privilege of open ports” while keeping the ports in the Philippines “practically closed by a prohibitive tariff.”¹⁷⁰ That would be a conspicuous policy failure and affront to other colonial powers given the Philippines’s geographic proximity to China.¹⁷¹ An open-door trading policy in the Philippines would thus result in absolute free trade throughout the United States and the abolition of the tariff system – a “portentous danger.”¹⁷²

Lawmakers echoed these issues during the legislative debate on the Foraker Act. They accused the imposition of tariffs of being more or less solely motivated by the urge to test the outer bounds of congressional taxing power. Speaking on the House floor, Representative Jacob H. Bromwell dismissed other arguments

167. 32 CONG. REC. app. 86 (1899) (statement of Rep. William H. Fleming).

168. *Id.*

169. *Id.*

170. *Id.*

171. *See id.* (“If we hope to extend our trade with other nations in the Orient, it will be the height of folly to give such a striking example of our self-protecting policy right at their very doors by forcing them to pay tribute to us for trading at the Philippines.”).

172. *Id.*

marshaled in support of the tariff regime. He contended that its true intent was to “establish a precedent” and “assert a right to discriminate[] so as to avoid complications when we come to the question of tariffs for the Philippines and possibly for Cuba.”¹⁷³ But Bromwell judged this attempt unnecessary. Many factors distinguished Puerto Rico from the Philippines—voluntary entry into the United States, proximity to the mainland, and ease of administering the federal tax regime—all of which could justify differential treatment of the two as to excises and tariffs.¹⁷⁴ To be sure, these factors might prove doctrinally irrelevant to the question of congressional taxing power if Puerto Rico and the Philippines shared the same territorial status. Even in that case, Bromwell suggested an alternative: Congress could have reduced internal-revenue rates in Puerto Rico.¹⁷⁵ That would have accomplished the same end of creating a variation in duty/excise/impost rates between an overseas territory and the mainland. It would have brought the same doctrinal question—albeit on slightly different facts—to the Supreme Court. And it would not have subjected Puerto Rico to a punishing tariff regime when it was looking for markets for its products. Of course, Congress did not act on this proposal—presumably because it wanted to extract enough revenues from the island to fund the territorial government, rather than rely on appropriations or borrowing. A reduction in internal-revenue tax rates would have run contrary to that goal, especially given Republican lawmakers’ conviction that direct and excise taxation could not produce sustainable insular revenue streams.

Speaking on the Senate floor, Senator Foraker acknowledged these concerns. In fact, he extolled the proposed tariff regime’s potential to confirm Congress’s territorial taxing power as one of its virtues. Foraker noted the recent “diplomatic triumph[]” that the federal government had obtained—an open-door trading policy with China.¹⁷⁶ He was referring to the efforts of John M. Hay, the Secretary of State, at a time when other colonial powers were set to carve up China and acquire “exclusive spheres of influence.”¹⁷⁷ In his capacity as the Secretary of State, Hay sent notes to Britain, Germany, France, Italy, Japan, and Russia to secure assurances that those colonial powers would not impose protective tariffs or dues on exports that reached China in their respective spheres of influence.¹⁷⁸

173. 33 CONG. REC. 2043 (1900) (statement of Rep. Jacob H. Bromwell).

174. *Id.*

175. *Id.* at 2044.

176. 33 CONG. REC. 2650 (1900) (statement of Sen. Joseph B. Foraker).

177. See generally STEPHEN R. HALSEY, QUEST FOR POWER: EUROPEAN IMPERIALISM AND THE MAKING OF CHINESE STATECRAFT (2015) (providing an overview of European imperialism’s operation in China, as well as Chinese responses in state-building).

178. E.g., Note No. 927 from John M. Hay, Sec’y of State, to Andrew D. White, U.S. Ambassador to Ger. (Sept. 6, 1899), in 1 TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA 1894-

These so-called “open door notes” established at the core of American foreign policy the commitment to “safeguard . . . the principle of equal and impartial trade with all parts of the Chinese Empire.”¹⁷⁹

Like others, Senator Foraker recognized that this diplomatic victory came at a cost. If the United States could export its excess industrial production tax-free to China, at the concession of colonial powers, it would face immense pressure to open up the Philippines for free trade.¹⁸⁰ As a result, if the Philippines formed “an integral part” of the United States, and if Congress “[could] not levy an export duty” on goods coming from the Philippines due to the Uniformity Clause, any “protective or [] revenue tariff” would be impossible.¹⁸¹ Foraker reached a stern conclusion: “[Y]ou may as well dismantle your custom-houses and go out of the business of collecting tariff revenues. There is no escape from it.”¹⁸²

But Senator Foraker also saw an opportunity. If Congress imposed tariffs on goods to and from Puerto Rico and exempted the island from federal internal-revenue laws, disgruntled importers would surely sue on constitutional grounds, thus bringing the question cleanly to the Supreme Court.¹⁸³ Foraker explicitly articulated this on the Senate floor. He desired to “have this question submitted

1919, 223, 223 (John V.A. MacMurray ed., 1921) (“[T]he Government of the United States would be pleased to see His German Majesty’s Government give formal assurances . . . [t]hat the Chinese treaty tariff of the time being shall apply to all merchandise landed or shipped to all such ports as are within said ‘sphere of interest’ . . . no matter to what nationality it may belong, and that . . . it will levy no higher harbor dues on vessels of another nationality frequenting any port in such ‘sphere’ than shall be levied on vessels of its own nationality”); accord Note from John Choate, U.S. Ambassador to Gr. Brit., to Lord Salisbury, Prime Minister (Sept. 22, 1899), in 1 TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA 1894-1919, *supra*, at 225-26; Note No. 434 from John M. Hay, Sec’y of State, to William F. Draper, U.S. Ambassador to Italy (Nov. 17, 1899), in 1 TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA 1894-1919, *supra*, at 229-230.

179. H.R. DOC. NO. 56-1, at 299 (1902) (including a circular telegram from Secretary of State John M. Hay to Austria-Hungary sent on July 3, 1900).

180. 33 CONG. REC. 2650 (1900) (statement of Sen. Joseph B. Foraker) (“But does any man imagine that we can demand and receive at the hands of the other nations and powers of the world an open door as to China, and not in turn be at least asked to give an open door in the Philippines?”).

181. *Id.*

182. *Id.*; see also 33 CONG. REC. 4856 (1900) (statement of Sen. Joseph B. Foraker) (“If duties, imposts, and excises must be uniform in Porto Rico as compared with the United States, so must they be in the Philippines. . . . The legislation that has been enacted for Porto Rico raises all these questions, and it is fortunate that it does, for sooner or later, and the sooner the better, they must find their way to the Supreme Court of the United States, where, and where alone, they can be authoritatively settled.”).

183. 33 CONG. REC. 2650 (“[E]very Senator here – Democrat and Republican alike should rejoice at the opportunity this bill provides for raising a question that will put at issue our differences upon that point.”).

to the Supreme Court and passed upon at the earliest possible time,” and it “would be nothing short of criminal stupidity in the Congress of the United States not to legislate when there is necessity for it, so as to raise that question and have it settled.”¹⁸⁴ Even Foraker himself thus acknowledged that tariffs on Puerto Rico were not solely motivated by generosity. They served the critical function of allowing Congress to protect the federal tax base in deciding on trade issues in the Philippines. Another lawmaker put it bluntly: “I understand full well that the Administration does not care a fig for Puerto Rico; that this precedent is about to be established not for the mere sake of deriving a revenue from that island, but as a precedent for our future guidance in the control of the Philippines.”¹⁸⁵

Congress succeeded. Within a year of the Foraker Act’s passage, an importer in New York sued the customs collector to recover duties paid on oranges exported from Puerto Rico.¹⁸⁶ This suit reached the Supreme Court. A splintered Court held that Puerto Rico was “not a part of the United States within the revenue clauses of the Constitution,” in essence giving Congress exactly what it wanted.¹⁸⁷ That, of course, was *Downes v. Bidwell*—one of the now-infamous *Insular Cases*.

C. Interterritorial Tax Variation

Since that critical moment in 1900, Congress has generally treated all territories in the same way by exempting their residents from the federal tax regime.¹⁸⁸ Most bona fide residents of the territories—including U.S. citizens—pay taxes only to their respective territorial governments. As this Part shows, territorial exemption from federal taxation originated in legislative debate about a multiplicity of fiscal concerns, most prominently the need to protect the federal tax base.

184. 33 CONG. REC. 2651 (1900) (statement of Sen. Joseph B. Foraker). Later in the debate, Foraker tried to walk back his claims. He stated that the “purpose” of the bill was not to raise the constitutional question as to Congress’s power to impose territorial tariffs. Instead, that was an incidental benefit of the bill that would allow the federal government to tread carefully on the issue of the Philippines. See 33 CONG. REC. 2655 (1900) (statement of Sen. Foraker) (“I have not said at any time that the purpose of this bill was to raise the question, but I say I recognize that question is raised, and I am glad it has been raised, for I think there are such irreconcilable differences of opinion among Senators that the question ought to be settled by somebody before we come to legislation where legislation in this regard will be more important.”).

185. 33 CONG. REC. 2162 (1900) (statement of Rep. William E. Williams).

186. *Downes v. Bidwell*, 182 U.S. 244, 247 (1901).

187. *Id.* at 287.

188. The primary exception to this rule is payroll taxes. See I.R.C. §§ 3121(e), 3306(j) (2018).

The key variation that emerged concerned each territory's power to deviate from the rules of federal income taxation. In 1913, Congress imposed our current income tax pursuant to its power under the Sixteenth Amendment. At first, Puerto Rico was required to administer federal income-tax rules but received in its insular treasury all income-tax receipts. Under the Revenue Act of 1913, "the provisions of [income taxation] extend[ed] to Porto Rico and the Philippine Islands."¹⁸⁹ But income-tax administration was delegated to territorial officers, and all revenues "accrue[d] intact to the general governments, thereof, respectively."¹⁹⁰ This changed in a few years. As part of the Revenue Act of 1918, Congress delegated to Puerto Rico (and the Philippines) the authority "to amend, alter, modify, or repeal the income tax laws."¹⁹¹ Puerto Rico has exercised that power, and today it collects revenue from a territorial income tax that features rates, exemptions, and rules substantially different from the federal regime.¹⁹² By contrast, other territories are "mirror-Code" jurisdictions. Guam, the U.S. Virgin Islands, and the Northern Mariana Islands are all exempt from federal income taxation, but they are required to institute the federal income-tax regime as the territorial income tax.¹⁹³

The evolution of interterritorial variation in income-tax powers again reflects Congress's focus on safeguarding federal tax receipts. Guam, for example, became a U.S. territory in 1898 along with Puerto Rico.¹⁹⁴ Under an 1898 executive order issued by President McKinley, the Department of the Navy governed Guam for the next half-century, relying on congressional appropriations rather than territorial taxes.¹⁹⁵ In 1950, Congress finally established a civil government in Guam.¹⁹⁶ In doing so, Congress wanted "to set up a [territorial] tax structure

189. Revenue Act of 1913, ch. 16, § 2(M), 38 Stat. 114, 180.

190. *Id.*

191. Revenue Act of 1918, ch. 18, § 261, 40 Stat. 1057, 1088 (1919); see Jones Act of 1917, ch. 145, § 3, 39 Stat. 951, 953.

192. See *supra* note 18.

193. 48 U.S.C. § 1421i(a)-(b) (2018); Organic Act of Guam, ch. 512, § 31, 64 Stat. 384, 392 (1950); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, art. VI, § 601(a), 90 Stat. 263, 269 (1976) (codified as amended in the notes to 48 U.S.C. § 1801 (2018)); 48 U.S.C. § 1397 (2018). American Samoa is not strictly a mirror-Code jurisdiction but has modeled its tax system on the federal regime. See AM. SAMOA CODE ANN. § 11.0403 (2009).

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

195. Exec. Order No. 108-A (Dec. 23, 1898) ("The island of Guam in the Ladrone is hereby placed under the control of the Department of the Navy. The Secretary of the Navy will take such steps as may be necessary to establish the authority of the United States and to give it necessary protection and Government.").

196. Organic Act of Guam, ch. 512, § 3, 64 Stat. 384, 384 (1950).

sufficient to carry [Guam's] own expenses of government without asking for any contribution from the United States," and noted "sufficient sources of revenue right there on the island."¹⁹⁷ The rhetoric of fiscal self-governance thus persisted. Congress again decided to design a territorial tax system that would lessen Guam's fiscal reliance on federal appropriations. For precisely this reason, Congress required Guam to impose the federal income tax as its own territorial income tax. Before the Organic Act of 1950, U.S. citizens with income from Guam paid neither the federal income tax nor any income tax to the territory.¹⁹⁸ Closing this "loophole," Congress concluded, would make Guam fiscally self-sufficient and no longer in need of federal appropriations.¹⁹⁹ Aligning Guam's tax structure with that of the federal income tax would "bring in some money to the United States Treasury."²⁰⁰

The same happened with the U.S. Virgin Islands. By the early 1920s, Congress had grown tired of periodic appropriations to the Virgin Islands.²⁰¹ During the legislative debate surrounding a Navy appropriations bill in 1918, the chair of the House Committee on Insular Affairs noted the "anomalous condition" of Congress's exemption of the Virgin Islands from federal revenue laws.²⁰² As a result, the federal government could collect no revenue from the Virgin Islands and was forced to "furnish money to run the [territorial] government."²⁰³ The appropriations bill then extended the federal income tax to the Virgin Islands to lessen the need for additional federal appropriations.²⁰⁴

197. 96 CONG. REC. 7577 (1950) (statement of Rep. Errett P. Scrivner).

198. See Act of May 28, 1939, ch. 289, 52 Stat. 532, 532 (Supp. J 1939) (exempting U.S. citizens from federal taxation of income derived from territories upon satisfaction of a few conditions, including that those citizens derived more than eighty percent of their gross income from territorial sources).

199. 96 CONG. REC. 7577 (1950) (statement of Rep. Arthur L. Miller) ("The amendment we just adopted in committee provides that the income-tax laws in force in the United States of America and which may hereafter be in force will be the law over there. That will be of great help in plugging certain loopholes. The people of Guam and a large number of civilians and workers over there on construction work, as well as military personnel, pay no income tax or have no withholding tax.").

200. *Id.* Deviations from the federal income tax regime could enable creative tax avoidance. Lower tax burdens, for example, might invite wealthy taxpayers to move their tax residence from the mainland, thus harming the federal tax base. Higher tax burdens might invite migration, thus making the jurisdiction more dependent on federal appropriations.

201. See, e.g., Act of July 1, 1918, ch. 114, 40 Stat. 704, 706 (appropriating \$200,000 for "expenses incident to the occupation of the Virgin Islands").

202. 61 CONG. REC. 3173 (1950) (statement of Rep. Horace M. Towner).

203. *Id.*

204. Act of July 12, 1921, ch. 44, 42 Stat. 122, 123.

* * *

This Part has analyzed the origins of U.S. territorial taxation. Between 1898 and 1900, Congress fiercely debated the fiscal costs and the tax status of newly acquired territories. Early on, lawmakers voiced serious concerns about the collapse of sugar tariffs – a critical source of federal receipts – that would result from tax-free importation of sugarcane from overseas possessions. After annexation, President McKinley proposed to abolish all territorial tariffs at first. But the mood quickly shifted, and the Foraker Act ended up imposing discounted tariffs and exempting Puerto Rico from the internal-revenue regime. Lawmakers attempted several justifications, including the need for the island to have self-sustaining revenue streams and the impossibility of excise or property taxation. But ultimately, the most convincing reason was that Congress needed to confirm its authority to impose territorial tariffs at the Supreme Court. That power would enable the federal government to cement an open-door trading policy with China – and secure a large foreign market for U.S. industrial production – without risking the collapse of tariff revenue. Since that time, Congress has continued to segregate the territories from the federal tax regime, but it has granted territorial governments differing powers to deviate from federal income-tax rules in imposing the territorial income tax.

II. DOCTRINAL AND SCHOLARLY IMPLICATIONS

Part I's analysis yields doctrinal and scholarly insights. Territorial fiscal segregation from the mainland arose from Congress's need to protect the *federal* tax base. As a result, the territories' tax exemption is, properly conceived, not a *cost* to Congress – a point that questions the doctrinal reasoning of *Vaello Madero*. Further, this Essay uncovers the tax-centric origins of the *Insular Cases*. It thus sheds new light on how fiscal concerns paved the way for constitutional deprivations.

A. Doctrinal Implications

This Section explores the doctrinal implications of Part I's analysis, focusing on the Supreme Court's recent decision in *United States v. Vaello Madero*. In that case, the plaintiff-respondent lost entitlement to SSI benefits upon moving to Puerto Rico, and challenged on constitutional grounds the federal government's exclusion of territorial residents from the SSI program.²⁰⁵ Both the district court

205. See *supra* notes 2-5 and accompanying text; 42 U.S.C. § 1382c(a)(1)(B)(i), (e) (2018).

and the appellate court ruled in the plaintiff's favor.²⁰⁶ But Justice Kavanaugh, writing for the Supreme Court majority, held that equal protection did not require Congress to extend the SSI program to territorial residents.²⁰⁷ Applying a deferential rational-basis test, he concluded that "Puerto Rico's *tax status*" – and in particular its residents' exemption from federal income, gift, and estate taxes – supplied a sufficient ground for distinguishing the territory from the mainland for purposes of the SSI program.²⁰⁸ The majority explained: "[I]t is reasonable for Congress to take account of the general balance of benefits to and burdens on the residents of Puerto Rico."²⁰⁹ In short, because territorial residents do not pay most forms of federal income, estate, and gift taxes, the Constitution permits Congress to exclude them from public-welfare spending.

Thus, key to the majority's reasoning is a benefits theory of taxation. Broadly conceived, the benefits principle states that taxpayers should make fiscal contributions to the government to the extent they receive public services.²¹⁰ That is, taxes enable the state to provide goods that the market or private entities cannot effectively produce, and citizens should bear as much the costs of those goods as they benefit from their provision. Those goods, of course, might include welfare benefits for citizens with disabilities or the elderly with no income.²¹¹ Such benefits accrue not only to the recipients of payments but also the public at large as an egalitarian or distributive gain.²¹² As a corollary, citizens with no – or lesser – fiscal obligation to the common treasury should receive no or fewer goods provided by the government. At a minimum, the government should be free to deny them those goods as a matter of political judgment.

The critical link between federal taxation and federal spending therefore becomes the linchpin in the Court's decision. Rational basis allows Congress to conduct a cost-benefit calculus in designing welfare programs and to exclude

206. *United States v. Vaello Madero*, 956 F.3d 12, 32 (1st Cir. 2020); *United States v. Vaello Madero*, 356 F. Supp. 3d 208, 211 (D.P.R. 2019).

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

208. *Id.* at 165.

209. *Id.* (citing *Califano v. Torres*, 435 U.S. 1, 3-5 (1978) (per curiam); *Harris v. Rosario*, 446 U.S. 651, 652 (1980) (per curiam)).

210. See David Elkins, *Horizontal Equity as a Principle of Tax Theory*, 24 YALE L. & POL'Y REV. 43, 80 (2006); Joseph M. Dodge, *Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles*, 58 TAX L. REV. 399, 402 n.10 (2004); LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 16-19 (paperback ed. 2005).

211. *Supplemental Security Income (SSI)*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi> [<https://perma.cc/9JRG-EY7F>].

212. That is, economic-security programs for lower-income and elderly populations have positive externalities. See, e.g., Alex Zhang, *Pandemics, Paid Sick Leaves, and Tax Institutions*, 52 LOY. U. CHI. L.J. 383, 427-29 (2021).

residents of certain jurisdictions from participation if they do not bear the costs of funding the welfare programs in the first place. Thus, Justice Kavanaugh begins his analysis by listing side by side the costs borne by and the benefits accruing to residents of the U.S. territories. He notes, “[o]n the tax side,” that “residents of Puerto Rico are typically exempt from most federal income, gift, estate, and excise taxes” but “generally pay Social Security, Medicare, and unemployment taxes.”²¹³ He then observes, “[o]n the benefits side,” that “residents of Puerto Rico are eligible for Social Security and Medicare[, as well as] federal unemployment benefits,” but not SSI payments.²¹⁴ This comparison of “benefits to . . . burdens” leads him to conclude that Puerto Rico’s tax exemption supplies a sufficient rational basis for its exclusion from SSI.²¹⁵ In other words, if Puerto Rican taxpayers do not pay for the costs, Congress can constitutionally refrain from granting them access to federal programs – the basic thrust of the benefits theory.

But framed in this way, Justice Kavanaugh’s reasoning proves too much. This version of the benefits theory focuses on individuals’ precise contributions to the public fisc to determine what they deserve from federal expenditures. It is unpersuasive for two reasons. First, recipients of means-tested entitlement programs inherently make little fiscal contribution to the federal government. SSI payments are not subject to federal income taxation, and it is unlikely that SSI recipients will end up owning at death property above the estate-tax exemption, currently more than \$10 million.²¹⁶ If the logic behind the *Vaello Madero* opinion concerns what benefits *individual* taxpayers deserve on the basis of their fiscal contributions to the federal government, then no SSI recipient qualifies. And Congress should be able to exclude all lower-income groups (subject to few or even negative income taxes) from spending programs – a conclusion that defies the logic and the purpose of means-tested welfare.

This is a principal critique raised by the dissent. Justice Sotomayor emphasizes that “SSI recipients pay few if any taxes at all” and “must have an income well below the standard deduction for single tax filers.”²¹⁷ Variation in individual

213. *United States v. Vaello Madero*, 596 U.S. 159, 163 (2022) (citing Jones Act of Puerto Rico, ch. 145, 39 Stat. 951, 954 (1917) (codified as amended at 48 U.S.C. § 734); I.R.C. §§ 933, 2209, 3121(e), 3306(j), 4081-4084 (2018)).

214. *Id.* (citing I.R.C. §§ 3121(e), 3306(j) (2018); 42 U.S.C. §§ 410(h)-(i), 1301(a)(1) (2018)).

215. *Id.* at 165.

216. See *Frequently Asked Questions: Regular and Disability Benefits*, INTERNAL REVENUE SERV. (Jan. 24, 2024), <https://www.irs.gov/faqs/social-security-income/regular-disability-benefits/regular-disability-benefits> [<https://perma.cc/K5CZ-T9YQ>]; *What’s New—Estate and Gift Tax*, INTERNAL REVENUE SERV. (Nov. 22, 2023), <https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax> [<https://perma.cc/A73T-T9KH>].

217. *Vaello Madero*, 596 U.S. at 196 (Sotomayor, J., dissenting).

fiscal contribution to government cannot therefore distinguish SSI recipients residing in Puerto Rico from those residing on the mainland. Instead, the differentiating factor on the tax side must be *interjurisdictional* variation.

Second, the majority's reasoning cannot rest on a precise application of the benefits theory as to taxes paid and value received. That is, there is immense variation across jurisdictions in income-tax burdens. On a per capita basis, Massachusetts contributes almost three times as much revenue to the federal government as Mississippi.²¹⁸ Surely Congress cannot exclude residents of Mississippi from the SSI program based on their lower contribution to the federal fisc, or provide residents of Massachusetts with three times the amount of the benefit because they are richer. After all, Congress designed the SSI program to support disabled and elderly populations that are *poor* and unable to earn incomes. As a result, precise variation in each jurisdiction's fiscal contribution to the federal government—that is, in how much taxes they pay into the federal Treasury—also cannot distinguish SSI recipients residing in Puerto Rico from those residing on the mainland.

To be sure, the majority appears to agree when it says, “Congress need not conduct a dollar-to-dollar comparison of how its tax and benefits programs apply in the States as compared to the Territories, either at the individual or collective level.”²¹⁹ Instead, a reasonable accounting of “the general balance of benefits to and burdens on the residents of Puerto Rico” is enough.²²⁰ In the case of Puerto Rico, its “*tax status*” justified Congress's choice to exclude welfare benefits from its residents.²²¹ Under the majority's logic, therefore, what distinguishes the territories from the mainland for SSI purposes is neither varying levels of individual taxpayers' fiscal contribution to the federal government (which would disqualify most SSI recipients themselves from such benefits) nor varying amounts of individual jurisdictions' fiscal contribution to the federal government (which would disqualify residents of poor mainland states from full participation in federal welfare programs).

Instead, the key here must be the formal exemption of the territories from forms of internal revenue. Under current law, bona fide residents of Puerto Rico need not pay federal income taxes on incomes derived from Puerto Rico itself,

218. Alex Zhang, *The State and Local Tax Deduction and Fiscal Federalism*, 168 TAX NOTES 2429, 2436–37 tbl.1 (2020); *New York's Balance of Payments in the Federal Budget*, N.Y. ST. COMPTROLLER app. A, at 14 (Apr. 2024), <https://www.osc.ny.gov/files/reports/budget/pdf/federal-budget-fiscal-year-2022.pdf> [<https://perma.cc/CZ77-5SY7>].

219. *United States v. Vaello Madero*, 596 U.S. 159, 165 (2022).

220. *Id.*

221. *Id.*

unless they are employed by the United States government.²²² According to the majority in *Vaello Madero*, such formal exemption from the federal tax regime constitutes a *cost* to the federal treasury. The loss in federal revenue resulting from the exemption then forms the rational basis for the territories' exclusion from SSI programs. This logic is threefold. It places normative weight on variations (1) across jurisdictions (2) in a formal tax-status-based exemption from the federal income tax, which (3) produces costs to the federal government and consequently detracts from the tax or fiscal-*contribution* side of the calculus. It is a formalist and jurisdiction-based version of the benefits theory of taxation that cognizes tax exemption solely as loss of potential revenue.

This Essay's account casts doubt on the third premise of the majority's reasoning. We might concede that federal benefits should follow tax contributions and that the formal tax status of jurisdictions, not the actual fiscal contributions of individual taxpayers, is the relevant locus of analysis. But formal exemptions from the federal tax regime must still count as *costs* to Congress for the argument to make any sense. For only in that way can the Court contend that the territories qualify for fewer benefits due to their lower fiscal contribution to the federal fisc. By contrast, if territorial tax exemption *benefits* the federal government, that status would add to, not detract from, the tax side of the calculus. In theory, it should render territorial residents eligible for *more*, not fewer, public goods.

As Part I shows, Congress exempted the territories from the federal tax regime not because it generously let go of potential revenues—*pace* Senator Foraker.²²³ Much to the contrary, Congress had serious concerns about the fiscal costs of acquiring overseas territories in the first place, specifically rejected calls to fund insular treasuries with appropriations or borrowing, and designed territorial systems to *preserve* federal tax receipts. In the case of Puerto Rico, Congress exempted it from internal-revenue laws because it needed the Supreme Court to confirm its power to impose territorial tariffs despite the Uniformity Clause. That power would allow Congress to pursue an open-door trading policy in East Asia without risking the collapse of federal customs revenue.

Territorial exemption from the federal tax regime thus served to preserve federal revenue. This is a simple but important point. It means that the territories functionally bear the costs of more effective federal taxation. Their tax status—engineered by Congress for the *benefit* of the federal fisc—cannot constitute a rational basis for their exclusion from federal welfare programs.

222. I.R.C. § 933(1) (2018).

223. See 33 CONG. REC. 2646 (1900) (statement of Sen. Foraker) (describing the Foraker Act as an example of congressional generosity to the territories); *supra* note 150 and accompanying text.

This broader point—that Congress stands to benefit from territorial fiscal segregation—retains vitality today.²²⁴ Territorial economies and tax systems have evolved on the basis of their exclusion from the federal fiscal community, in the process enabling Congress to use tax policy as a tool of domination.²²⁵ By exempting the territories from most of the federal tax regime, Congress saves on expenditures that it would otherwise incur. A recent study by the Government Accountability Office estimates that treating Puerto Rico the same as states for purposes of federal welfare programs could cost Congress several billion dollars a year, *after* accounting for the extension of federal income taxes to the island (and associated behavioral shifts).²²⁶ As in 1900, fiscal costs continue to deter lawmakers from supporting territorial aspirations to secure statehood and full citizenship.²²⁷

Moreover, because equal treatment costs more than federal taxes can raise in the territories, the majority in *Vaello Madero* begs the question. Exemption from federal taxes counts as a cost to the federal government only if it does not allow Congress as a constitutional matter to deny equal participation in federal spending programs to the exemptee. If it does, as the *Vaello Madero* majority holds, exemption from the federal tax regime might accrue to the benefit of the federal government. Should equal participation in federal programs result in larger spending than federal taxes can raise in the exempt jurisdiction, Congress's choice to exclude that jurisdiction from the federal fiscal regime would not be an act of generosity. That is, formal immunity from taxes can operate as a *liability* to the subnational jurisdiction and to the fiscal *advantage* of the central government, after accounting for the spending side of the calculus.

224. Even today, trade tensions and geopolitics threaten to return the federal government to its earlier reliance on customs and tariffs. See Ana Swanson & Alan Rappeport, *Trump Eyes Bigger Trade War in Second Term*, N.Y. TIMES (June 27, 2024), <https://www.nytimes.com/2024/06/27/us/politics/trump-trade-tariffs-imports.html> [<https://perma.cc/K89R-C4CK>]; Erica York, *Tariff Tracker: Tracking the Economic Impact of the Trump-Biden Tariffs*, TAX FOUND. (June 26, 2024), <https://taxfoundation.org/research/all/federal/trump-tariffs-biden-tariffs> [<https://perma.cc/X9JS-FCHH>].

225. Dick, *supra* note 19, at 83-84.

226. U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-31, PUERTO RICO: INFORMATION ON HOW STATEHOOD WOULD POTENTIALLY AFFECT SELECTED FEDERAL PROGRAMS AND REVENUE SOURCES 2-3 (2014), <https://www.gao.gov/assets/gao-14-31.pdf> [<https://perma.cc/J2ZB-M44B>].

227. See, e.g., José A. Hernández Mayoral, *The High Cost of Puerto Rican Statehood*, HILL (Apr. 2, 2014), <https://thehill.com/blogs/congress-blog/civil-rights/202347-the-high-cost-of-puerto-rican-statehood> [<https://perma.cc/Z6Z8-C25M>]; Robert DePosada, *Caution Needed on Puerto Rico Statehood: The Costly, Confusing, and Contentious Repercussions of H.R. 856*, HERITAGE FOUND. (Oct. 2, 1997), <https://www.heritage.org/Americas/report/caution-needed-puerto-rico-statehood-the-costlyconfusing-and-contentious> [<https://perma.cc/GX B2-YX87>].

B. Scholarly Implications

The primary scholarly contribution of this Essay is to uncover the origins of federal territorial taxation. It argues that despite the rhetoric of territorial autonomy, congressional efforts to preserve tariff revenues played a critical—perhaps decisive—role in the Foraker Act’s design of Puerto Rico’s tax system. This joins a burgeoning literature about the United States’s imperialist past.²²⁸ In particular, scholars have alluded to how the Philippines—and the predicament as to its constitutional status—shadowed Congress’s decision-making with respect to Puerto Rico.²²⁹ This Essay’s account fleshes out this entanglement in the context of federal and territorial tax policymaking at the turn of the twentieth century.

Further, recent studies have taken a broad look at the history of federal taxation in Puerto Rico, providing surveys of more than a century of federal-territorial fiscal interactions.²³⁰ Armed with these data, commentators have argued that the United States practiced an especially damaging form of colonialism on the island, using tax-policy tools to advance corporate interests or undermine Puerto Rico’s economic self-determination.²³¹ They have also contended that the Court got it wrong in *Vaello Madero*, and that the majority opinion misunderstands the relationship between tax policy and spending programs while ignoring the racial backdrop of the dispute.²³² This Essay adds to both accounts. First, it provides a localized illustration of the workings of American fiscal imperialism. In exerting its control over the territories, Congress extracts indirect and invisible benefits. It has facially exempted the territories from federal taxation, asserting legislative generosity. In reality, Congress has imposed structural and developmental costs on the territories to help make the federal tax system more effective. Second, the Essay articulates an additional criticism of *Vaello Madero*. Even if we dismiss the underlying racial concerns or the Court’s peculiar understanding of tax and welfare programs, the majority fundamentally errs in viewing territorial tax exemption solely as a cost to the federal government.

Finally, recent case law has provoked both calls to overrule the *Insular Cases* and caution that overruling the *Insular Cases* alone cannot sufficiently remedy

228. See, e.g., DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* (2019); ERMAN, *supra* note 38; Sam Erman, *Truer U.S. History: Race, Borders, and Status Manipulation*, 130 *YALE L.J.* 1188 (2021).

229. ERMAN, *supra* note 38, at 39.

230. See, e.g., Dick, *supra* note 19; Lipman, *supra* note 19.

231. Dick, *supra* note 19, at 9.

232. Lipman, *supra* note 19, at 363-64.

the constitutional landscape.²³³ This Essay clarifies the origins of *Downes v. Bidwell*, the most important of the six original *Insular Cases*.²³⁴ *Downes* arose from an outdated need to preserve the tax base when tariffs and excises formed the overwhelming bulk of federal revenue. At the time, the federal government was small. Its receipts totaled about two to three percent of domestic output.²³⁵ They paled in comparison to states and localities, which collected the majority of government revenues.²³⁶ Congress jealously guarded its limited revenue streams and could not contemplate the collapse of the tariff regime as a consequence of territorial acquisition.²³⁷ Given that fiscal reality, it imposed tariffs on the movement of goods between Puerto Rico and the mainland United States and exempted Puerto Rico from internal-revenue laws.

Both anti-imperialists and supporters of overseas expansion recognized this distinctive territorial tax design as an interbranch tool to force the Supreme Court to decide the outer bounds of congressional taxing power.²³⁸ And decide the Supreme Court did. In *Downes*, the Court upheld Congress's power to deviate from the Uniformity Clause in territories that were "not incorporated" and enabled it to vindicate its free-trade policies in East Asia.²³⁹ On the same day, the Court handed down five other cases about the operation of federal law in the newly acquired territories.²⁴⁰ All but one of the original six *Insular Cases* focused

233. See Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 YALE L.J.F. 284, 291 (2020); James T. Campbell, *Aurelius's Article III Revisionism: Reimagining Judicial Engagement with the Insular Cases and the "Law of the Territories"*, 131 YALE L.J. 2542, 2551 (2022); Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2453 (2022); Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 YALE L. & POL'Y REV. 57, 58-59 (2013); Maggie Blackhawk, *The Supreme Court, 2022 Term—Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 6 (2023).

234. 182 U.S. 244, 287 (1901); see Torruella, *supra* note 233, at 69 ("[*Downes v. Bidwell*] is the crucial Insular Case because its decision squarely required determining whether the Constitution applied to Puerto Rico . . .").

235. Michael Schuyler, *A Short History of Government Taxing and Spending in the United States*, TAX FOUND. 1 (Feb. 19, 2014), <https://taxfoundation.org/research/all/federal/short-history-government-taxing-and-spending-united-states> [https://perma.cc/W5B3-SYBH]; see 25 BUREAU OF STATS., STATISTICAL ABSTRACT OF THE UNITED STATES: 1902, at 37-48 (1903).

236. Schuyler, *supra* note 235.

237. See *supra* Part I.

238. See *supra* Sections I.B.4-5.

239. *Downes*, 182 U.S. at 246-47.

240. *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901).

on taxation.²⁴¹ These tax cases laid the foundation for treating the territories as lands within the control of Congress, but outside of the American constitutional structure.

This account might strike modern readers as odd. Scholarly discussions of the *Insular Cases* rarely focus on tax issues. Commentators have criticized the *Insular Cases* for denying rights to territorial residents as to citizenship, self-governance, marriage equality, or criminal procedure.²⁴² They have also theorized those cases as fueling a “crisis of political legitimacy,” as instantiating the constitutional anticanon, or as resurrecting the specter of *Dred Scott*.²⁴³ Few pay attention to their tax-centric origins. For most, a structural provision about excises and customs like the Uniformity Clause hardly forms a core constitutional guarantee of individual liberty. On the other side, tax scholars today rarely think about the Uniformity Clause and how it might apply to the territories. To be sure, the newly confident Supreme Court has forced scholars to move on from their previous characterization of tax as purely statutory law.²⁴⁴ However, constitutional tax issues today deal with the possibilities of unapportioned federal taxation of net worth and unrealized gains to combat record economic inequality and concentrations of wealth.²⁴⁵ The origin story of U.S. territorial taxation was lost in the shuffle.

Tax thus paved the way for deprivations of key constitutional guarantees in the territories.²⁴⁶ But all the original reasons for *Downes v. Bidwell* are gone. Its key stakeholder, Congress, has abandoned the tariff-centric fiscal regime. The federal government now relies on income taxes for revenue, after the Sixteenth

241. See *De Lima*, 182 U.S. at 1-2; *Goetze*, 182 U.S. at 221; *Dooley*, 182 U.S. at 222; *Armstrong*, 182 U.S. at 243; *Downes*, 182 U.S. at 244; see also *Huus*, 182 U.S. at 392 (concerning pilotage and trade-vessel classification).

242. Blackhawk, *supra* note 233, at 128; Cepeda Derieux & Weare, *supra* note 233, at 298-306; Christopher R. Leslie, *The America Without Marriage Equality: Fa’Afafine, the Insular Cases, and Marriage Inequality in American Samoa*, 122 COLUM. L. REV. 1769, 1769 (2022).

243. Ponsa-Kraus, *supra* note 233, at 2458; Sanford Levinson, *Why the Canon Should Be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 244 (2000); Samuel Issacharoff, Alexandra Bursak, Russell Rennie & Alec Webley, *What Is Puerto Rico?*, 94 IND. L.J. 1, 17-18 (2019).

244. E.g., Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 1 (1999); see generally *Moore v. United States*, 144 S. Ct. 1680 (2024) (rejecting a constitutional challenge to a federal tax provision).

245. See, e.g., Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717, 717 (2020).

246. E.g., *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922); *Ocampo v. United States*, 234 U.S. 91, 98 (1914).

Amendment lifted the critical constraint on state capacity.²⁴⁷ We maintain a trade deficit, not surplus, with China, and we no longer hold the Philippines.²⁴⁸ Congress certainly needs no power to deviate from the Uniformity Clause to protect the federal tax base. If anything, territorial segregation amplifies existing unfairness in the federal tax system by granting wealthy taxpayers shelters for their income.²⁴⁹ All these developments make the *Insular Cases* a relic of the *ancien regime* of federal tariffs. This Essay's account therefore casts further doubt on the legitimacy of that doctrinal strand.

CONCLUSION

This Essay has traced the origins of U.S. territorial taxation to the critical period of 1898-1900. Afraid of the fiscal costs of overseas expansion, Congress designed territorial tax systems to preserve its own revenue and the federal tax base. This history sheds light on the distinctive tax status of U.S. territories as foreign countries under the Internal Revenue Code. It also calls into question the Supreme Court's decision to allow Congress to exclude territorial residents from SSI programs in *United States v. Vaello Madero*. This Essay thus joins a chorus of scholars asking Congress and the Supreme Court to rethink the territories' fiscal and constitutional status within our democracy.

Assistant Professor of Law, Emory University School of Law. I thank Luis Calderon-Gomez, Conor Clarke, Jon Endean, Luis Fuentes-Rohwer, Greg Day, Assaf Harpaz, Matt Lawrence, Michelle Layser, Henry Ordower, Amanda Parsons, Diane Ring, Usha Rodrigues, Erick Sam, Ani Satz, Christine Speidel, Carla Spivak, the audiences at the Critical Tax Conference at the University of Florida School of Law, the Junior Tax Workshop, and the Emory-UGA Summer Faculty Workshop for their feedback, as well as Jared Hirschfeld, Katherine Salinas, Paige Underwood, Lily Moore-Eissenberg, and the editors of the Yale Law Journal for diligent editing.

247. *What Are the Sources of Revenue for the Federal Government?*, TAX POL'Y CTR. (Jan. 2024), <https://www.taxpolicycenter.org/briefing-book/what-are-sources-revenue-federal-government> [https://perma.cc/H7VE-A4PE].

248. *The People's Republic of China*, OFF. U.S. TRADE REPRESENTATIVE (2024), <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china> [https://perma.cc/SF89-KCPZ].

249. *E.g.*, Alberto C. Medina, *Tax Cheats Are Taking Advantage of Puerto Rico — the US Government Can Stop Them*, HILL (Nov. 21, 2023, 11:30 AM ET), <https://thehill.com/opinion/finance/4319700-tax-cheats-are-taking-advantage-of-puerto-rico-the-us-government-can-stop-them> [https://perma.cc/B6ES-88T5].