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Intersectional Imperial Legacies in the U.S. Territories

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

INTRODUCTION

Only one woman served in the Thirteenth Guam Legislature in 1978. Senator Concepcion Barrett, a CHamoru,[1] quietly spearheaded the passage of a bill decriminalizing abortion in Guam.[2] The law survived for twelve years until the legislature passed a strict abortion ban—born of an unlikely melding of U.S. antiabortion rhetoric and anticolonial efforts focused on "[s]aving the Chamorro People."[3] After resistance led by CHamoru women, a federal court struck down the ban,[4] but struggles over access to abortion persist, particularly in the wake of the U.S. Supreme Court's decision in *Dobbs*.[5]

Only one woman participated in the Constitutional Convention of Puerto Rico in 1951. María Libertad Gómez Garriga, a descendant of enslaved people, proposed a human-rights provision for Puerto Rico's new commonwealth constitution that would ensure women's right to equal participation in government and society.[6] Puerto Rico's populace approved the constitution that included the human-rights provision,[7] but Congress rejected that section.[8] The watered-down language that ultimately passed reflected the United States's formal-equality framing: "All men are equal before the law" and "[n]o discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas."[9] Today, women in Puerto Rico continue the fight for gender and racial justice in the face of U.S. legal norms and doctrines that tightly constrict equality protections.[10]

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

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

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

As described below, traditional legal frameworks can sharply constrict available remedies. Existing constitutional frameworks do not acknowledge U.S. colonialism and thus tend to further—or at least maintain—the colonial project.[25] Even local laws and judicial interpretations that tend to protect women's rights in the territories are constrained by U.S. legal norms and the formal-equality lens of U.S. jurisprudence.[26] Because the U.S. territories are not sovereign nations, they cannot sign or ratify the principal international and regional instruments that protect and promote women's rights.[27] And now, after *Dobbs*, conservative politicians in the territories have introduced legislation attempting to limit reproductive rights further, mirroring similar movements on the U.S. continent.[28] Drawing from my earlier writing on the U.S. territories,[29] this Essay begins to illuminate these underexplored harms.[30] It does do by employing international scholar Albert Memmi's theory of colonization alongside decolonial feminist scholars' theories on intersectionality[31] and the coloniality of gender. Memmi contended that European-derived colonizers gain and legitimate their control over land and resources in part by "characterizing people as 'different,' less-worthy, or less-human 'others' (threatening, uncivilized, inferior) to make political aggression against the entire group appear necessary."[32]

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1 [1]. Both "CHamoru" and "Chamorro" are used to describe the Indigenous people of the Marian...

2 [2]. *See* Vivian Loyola Dames, *Chamorro Women, Self-Determination, and the Politics of Abortion in G...*

3 [3]. *Id*. at 370-72.

4 [4]. *See* Guam Soc'y of Obstetricians & Gynecologists v. Ada, 776 F. Supp. 1422, 1428 (D. Guam 1990)...

5 [5] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022); Raidoo v. Moylan, 75 F.4th 1115...

6 [6]. Yanira Reyes Gil, *Women, Gender, Colonialism, and Constitutional Law in Puerto Rico*, *in* Women,...

7 [7] *See* Joint Resolution Approving the Constitution of the Commonwealth of Puerto Rico Which Was Ad...

8 [8] Specifically, Congress rejected Section 20 of Article II of the proposed constitution—modeled...

9 [9] *Constitution of the Commonwealth of Puerto Rico*, *supra* note 8, art II, § 1; Constitutional Conv...

10 [10] Reyes Gil, *supra* note 6, at 257 (explaining how U.S. constitutional doctrines limit the develo...

11 [11] The data on women participants in federal programs are generally centered around cisgendered w...

12 [12]. *But see* Noralis Rodríguez Coss, *A Feminist Intersectional Analysis of Economic and Resource (...*

13 [13] Several legal scholars posit solutions to the disproportionate denial of federal benefits to t...

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

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

Broadly, this Essay suggests that courts assess territorial residents' modern-day "political powerlessness"[38] or related "political unpopularity"[39] as continuing manifestations of the colonial subjugation that has impaired the group both within and outside of the political process. Territorial residents, particularly women of color, are "intersectionally ravaged by a confluence of historical race discrimination with ongoing present day consequences,"[40] and are shut out from political power at the federal level. Based on their presumptive subjugation and political powerlessness linked historically to U.S. colonialism—and where there is a confluence of factors (race, poverty colonization, gender, and potentially Indigeneity[41])—classifications that exclude them should compel a more meaningful rational-basis review.[42]

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

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

14 [14]. *See* Eric K. Yamamoto & Michele Park Sonen, *Reparations Law: Redress Bias?*, *in* Implicit Racial...

15 [15]. *See* Iris López, Matters of Choice: Puerto Rican Women's Struggle for Reproductive Freedom, at...

16 [16] *See* Laura Briggs, Reproducing Empire: Race, Sex, (https://www.yalelawjournal.org/forum/intersectional-imperial-legacies-in-the-us-territories) Puerto Rico ...

17 [17]. *See infra* Part III.

18 [18]. Complaint at 1, Peña Martínez v. Azar, 376 F. Supp. 3d 191 (D.P.R. 2019) (No. 3-18-cv-01206...

19 [19] *See, e.g.*, Paola Marie Sepulveda-Miranda & Sonja Fernández-Quiñones, *Second-Class Health in th...*

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

21 [21] Carlos Vargas-Ramos, Laura Colón-Meléndez, Jorge Soldevilla-Irizarry, Damayra Figueroa-Lazu,...

22 [22] Health Res. & Servs. Admin. Maternal & Child Health Bureau, *Overview of the State-Puerto Rico-...*

23 [23]. *See, e.g.*, Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. N...

24 [24]. Vargas-Ramos et al., *supra* note 21, at 5 (acknowledging the dearth of data on the territories...

25 [25]. *See* Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 Harv. L. Rev. 1...

26 [26]. *See* Reyes Gil, *supra* note 6, at 257 (contending that the U.S. constitutional framework and do...

27 [27] *See* United Nations Convention on the Elimination of All Forms of Discrimination Against Women,...

28 [28]. Reyes Gil, *supra* note 6, at 279 (reporting that in the last four years, conservative legislat...

29 [29] *See generally* Susan K. Serrano, *Reframing Environmental Justice at the Margins of U.S. Empire*,...

30 [30]. This Essay, of course, cannot address or even list all of the hidden or cascading harms facin...

31 [31] *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, an...*

32 [32] *See* Serrano, *Collective Memory*, *supra* note 29, at 369; Albert Memmi, Dominated Man: Notes Towa...

33 [33] *See* Serrano, *Reframing Environmental Justice*, *supra* note 29, at 481 (connecting legacies of U....

Accordingly, Part I describes theoretical frameworks for understanding intersectional harms to women in the U.S. territories. These theories show how race, gender, and colonialism intersect—specifically, how colonizers forcefully deploy race and gender to justify colonization or political "aggression" and minimize harms to those deemed "other."[44] Part II then briefly sketches those harms in two main categories: first, reproductive harms and challenges, and second, economic harms, characterized by dangerously limited access to critical public benefits. The former harms are more widely known, but nonetheless remain largely uninterrogated and unaddressed; the latter are even less visible. Part III begins to rethink "political powerlessness" and related "political unpopularity" (and their connection to the history of subjugation for colonized peoples) as one trigger that courts should use to decide whether a rational-basis-with-bite standard is appropriate when assessing classifications that impact residents of the U.S. territories. Finally, in search of a doctrinal middle ground between doing nothing and wholly revolutionizing the constitutional scheme, Part III then sketches the contours of a meaningful, rational-basis-with-bite framework to assess colonialism's intersectional legacies and begin to envision ways to address harms to U.S. territorial residents.

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

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

A. Summary of Key Scholarship

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

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

34 [34] *Id.* (citing Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 Yale L. & Pol…

35 [35]. *Id.*

36 [36]. *See* Balzac v. Porto Rico, 258 U.S. 298, 312-13 (1922) (holding that peoples of the unincorpor…

37 [37] Multidisciplinary scholars [illegible] women in colonized spaces and inte…

38 [38] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against…

39 [39] *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (declaring that if "equal prote…

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

41 [41]. *See infra* notes 201-203 and accompanying text.

42 [42]. *See infra* notes 219-255 and accompanying text.

43 [43]. *See infra* notes 240-255 and accompanying text.

44 [44]. *See* María Lugones, *Heterosexualism and the Colonial/Modern Gender System*, 22 Hypatia 186, 201…

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

46 [46]. *Id.* (citing Albert Memmi, Dominated Man: Notes Toward a Portrait 186 (1968)).

efforts, I argued, supported U.S. imperialism in Puerto Rico and justified the exclusion and marginalization of Puerto Ricans as a means of social control in territorial Hawaiʻi.[51]

U.S. decision makers deployed similar racialized narratives to justify the conquest of the territories.[52] The Territorial Clause of the U.S. Constitution gave Congress a wide berth to exercise power over its colonial conquests.[53] The U.S. Supreme Court codified this colonial relationship and inscribed these racialized depictions in the *Insular Cases*, a series of decisions decided between 1901 and 1922.[54] Pursuant to the *Insular Cases*, Congress wields the power to decide which portions of the Constitution apply to the unincorporated territories, limited only by so-called "fundamental" personal rights.[55] The *Insular Cases* today shape peoples' colonial existence in far-reaching ways—from the political to the economic, from the social to the cultural.

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

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

Going beyond intersectionality, decolonial scholar María Lugones directly connects gender and race to colonization. Her concept of the "the coloniality of gender" describes the forceful colonial imposition of a racialized gender system onto Indigenous and enslaved societies in the Americas and the Caribbean that erased the lifeways and knowledge of those deemed "other."[68] Via this gendered process of

47 [47] Albert Memmi, The Colonizer and the Colonized 174 (1957); *see also* Anibal Quijano & Michael En...

48 [48]. Serrano, *A Reparative Justice Approach*, *supra* note 29, at 521, 527-29 (quoting Laurel Anne Mo...

49 [49]. *Id.* at 521, 525-31; *see also Submission to Mr. Francisco Calí Tzay, Special Rapporteur on th...*

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

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

52 [52]. *See* Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under U...*

53 [53]. U.S. Const. art. IV, § 3, cl. 2 (empowering Congress "to dispose of and make all needful...

54 [54] The *Insular Cases* fall generally into two groups: the 1901 cases and the later cases. The 1901...

55 [55]. *See Dorr*, 195 U.S. at 146-47 (quoting *Downes*, 182 U.S. at 290-91 (White, J., concurring)). Fu...

56 [56] U.S. Const. art. I, § 8, cl. 1 (requiring that "[d]uties, [i]mposts and [e]xcises" be "uni...

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

58 [58]. *Id.* at 279.

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

60 [60]. *Downes*, 182 U.S. at 293 (White, J., concurring in the judgment); *see also id.* at 288 (White, ...

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

62 [62]. *See, e.g.*, José A. Cabranes, *Citizenship and the American Empire*, 127 U. Pa. L. Rev. 391, 442...

63 [63]. Pedro A. Malavet, *The Inconvenience of a "Constitution [That] Follows the Flag . . . bu...*

64 [64]. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Cri...*

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dehumanization, women of color—seen as bestial and promiscuous—were genderless and dehumanized, while European women—viewed as passive and weak in mind and body—were simple reproducers of the race and class standing of white men.[69]

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

Decades of scholarship illuminate how women of color over time became othered and racialized as "promiscuous," erotic, sexually insatiable, and "submissive" to justify sexual violence against them as a means of colonial control and to discount their claims for rape.[73] Decolonial feminist scholars thus continue to challenge mainstream feminism, traditionally centered on white women, by identifying particularized harms "made invisible by the dynamics of colonization, patriarchy, and capitalism."[74] Drawing on these theories, scholars identify specific intersectional harms to women in the U.S. territories and call for legal approaches that acknowledge not only race and gender, but also coloniality.[75]

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

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

B. Some Present-Day Responses to Colonialism

Indeed, it is in this racialized and gendered context that the peoples of the territories engage with U.S. colonialism in varying ways. On one hand, U.S. plenary power continues to constrain territorial residents' rights sharply, as revealed by the Supreme Court's sweeping denial of Puerto Rico's inherent sovereignty and exclusion of territorial residents from federal benefits.[77] Moreover, territorial residents have virtually no political power: they cannot vote in U.S. presidential elections because the Constitution provides political representation only to the states.[78] Territorial residents also do not have a voting representative in Congress: Puerto Rico has a resident commissioner and the other territories have delegates in the U.S. House.[79] Those individuals can vote in committee but may not vote on the House floor.[80] They may also vote in the Committee of the Whole "subject to immediate reconsideration in the House when their recorded votes have been 'decisive.'"[81]

On the other hand, however, territorial residents assert claims to self-determination to protect Indigenous land, self-governance, and other rights in the Commonwealth of the Northern Mariana Islands, Guam, and American Samoa by employing the very

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

[66] [66] Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*,...

[67] Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 (https://https://www.yalelawjournal.org/forum/intersectional-imperial-legacies-in-the-us-territories)

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

[69]. *Id.* at 201-03, 206. Calling it the "the modern colonial gender system," Lugones describes...

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

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

[72]. *Id.* at 201, 206.

[73] *See, e.g.*, Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual ...*

[74]. Reyes Gil, *supra* note 6, at 264 (citing Lugones, *Decolonial Feminism*, *supra* note 70).

[75] *See, e.g.*, Womack, *supra* note 37, at 81-83; Rodríguez Coss, *supra* note 12, at 98-99; Murray, *s...*

[76]. *See infra* notes 92-98 and accompanying text.

[77] *See, e.g.*, United States v. Vaello Madero, 596 U.S. 159, 161 (2022) (ruling that Congress need...

framework that was put in place to limit their participation in the polity.[82] For example, in *Davis v. Guam*, advocates proactively used the *Insular Cases* to promote decolonization and combat reverse-discrimination attacks. Arnold Davis, a white resident of Guam, sued Guam in federal district court, alleging that the territory unlawfully discriminated against him when it prohibited him from registering to vote in a symbolic political-status plebiscite that limited eligibility to "Native inhabitants of Guam."[83] Guam argued that Congress, pursuant to its sweeping plenary power under the Territorial Clause, could treat territories in ways that would otherwise offend the Constitution.[84] Thus, because Congress sought to restore a measure of self-determination to Guam's Native inhabitants in Guam's 1950 Organic Act, and because Guam is an instrumentality of Congress, Guam argued that it could limit its political-status plebiscite to Native inhabitants, even if in part based on ancestry.[85]

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

II. INTERSECTIONAL HARMS TO WOMEN IN THE TERRITORIES

This Part briefly sketches some of the particularized and largely unseen[87] harms to women in the U.S. territories—often linked to U.S. colonization and the territories' political relationship with the United States—in two main categories: reproductive harms and challenges, and access to federal benefits.[88] These underexplored intersectional legacies of U.S. colonization, along with the theoretical frameworks described above, then inform the broadly outlined rational-basis-with-bite framework presented in Part III.

A. Reproductive Harms and Challenges

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

1. Puerto Rico

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

78 [78]. *See* U.S. Const. art. I, § 2 ("The House of Representatives shall be composed of Members c...

79 [79]. Puerto Rico's representative in the House of Representatives is a "Resident Commissioner,...

80 [80]. *See* Jane A. Hudiburg, Cong. Rsch. Serv., R40170, Puerto Rico: Political Status and Rights of the Delegates and Re...

81 [81]. *Id.* at 2.

82 [82]. *See* Brief for Intervenors or, in the Alternative, Amici Curiae the American Samoa Government...

83 [83] Davis v. Guam, No. 11-00035, 2013 WL 204697, at *1 (D. Guam Jan. 9, 2013); *see also* Serrano, *A...*

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

85 [85] *Id.* at 1-3, 13-16. The Ninth Circuit Court of Appeals, on other grounds, held that the politic...

86 [86] Dames, *supra* note 2, at 378 ("How can indigenous women in liberal democracies resolve confli...

87 [87] I call these harms "invisible" or "unseen" to characterize the lack of national recogn...

88 [88]. Of course, there are many other types of harms, including violence against women, but explori...

89 [89] Reyes Gil, *supra* note 6, at 279-80 (describing recent legislative attempts in Puerto Rico seek...

90 [90]. *See* Briggs, *supra* note 16, at 108, 124; Mass, *supra* note 15, at 69, 73, 77; Harriet B. Presse...

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

But reproductive control in Puerto Rico has involved the complex entanglements of race, gender, colonization, nationalism, and religion. For decades, Puerto Rico's nationalist movement viewed "women's fertility [as] emblematic of the nation"[98] and thus opposed birth control as genocidal U.S. encroachment.[99] Some Puerto Rican feminists, on the other hand, sought both decolonization and freedom from reproduction through contraceptive sterilization, while U.S.-based feminists viewed sterilization as paternalistic social control.[100] Thus, Puerto Rican women navigated complex intersectional identities and relationships in spaces where race, sexuality, and reproduction were fundamental to the U.S. imperial project.[101]

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

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

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

Organizations such as Profamilias Puerto Rico and Proyecto Matria likewise support the physical, mental, social, and reproductive health of women and LGBTQIA+ people. Profamilias Puerto Rico was the first organization in Puerto Rico dedicated to family planning when it was established in 1946.[112] Today, it provides sustainable access to sexual and reproductive services for disadvantaged communities while

91 [91]. *See* López, *supra* note 15, at 4.

92 [92] *See* Briggs, *supra* note 16, at 9, 18, 121, 125; Ramirez de Arellano & Seipp, *supra* note 16, at ...

93 [93] Briggs, *supra* note 16, at ... Clarence Gamble to Youngs Rubber Corporatio...

94 [94] Vargas, *supra* note 16.

95 [95] Briggs, *supra* note 16, at 110.

96 [96] López, *supra* note 15, at 9, 19.

97 [97] Briggs, *supra* note 16, at 4; *see id.* at 108 ("The notion that through overpopulation poor wo...

98 [98] Laura Briggs, *Discourses of "Forced Sterilization" in Puerto Rico: The Problem with the Sp...*

99 [99]. *See id.* at 39 (describing the origins of "Puerto Ricans constru[ing] birth control as part ...

100 [100]. In doing so, those U.S. feminists allied themselves with Puerto Rican nationalists without f...

101 [101] López, *supra* note 15, at 18 (contending that Puerto Rican women's reproductive agency was c...

102 [102]. Jazmin Fontenot, Ripley Lucas, Ashley Stoneburner, Christina Brigance, Kelly Hubbard, Erin J...

103 [103]. *Id.*; *see also id.* (defining "maternity deserts" as "areas without access to birthing f...

104 [104]. *Id.* at 2.

105 [105]. *See Report to Congress on Medicaid and CHIP*, Medicaid & CHIP Payment & Access Comm'n 81 tbl....

106 [106]. Fontenot et al., *supra* note 103, at 3.

107 [107]. *Our Story*, Taller Salud, https://www.english.tallersalud.cor are [https://perma.cc/D33H-9...

108 [108]. *Id.*; Tina Vásquez, *'Trying to Survive in Puerto Rico': A Conversation with Taller Salud*, Pri...

109 [109]. *Id.*

110 [110]. *Women and Health*, Taller Salud, https://www.english.tallersalud.cor of-iniciatives-1 [h...

111 [111]. *Id.*

championing reproductive rights for all.[113] One of its clinics, Clínica IELLA, is one of five clinics in Puerto Rico that "offer[s] integrated abortion and contraceptive services."[114] Proyecto Matria provides "support services to overcome the [societal] impediments faced by survivors of gender-based violence or very low-income heads of families" to create economic and educational opportunities.[115] Though Proyecto Matria is not specifically dedicated to health access, it is committed to protecting reproductive justice through its public-policy initiatives.[116]

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

2. *Guam*

Given the legacy of colonization and resulting dominant Catholic culture in Guam,[117] reproductive healthcare, especially abortion, is both stigmatized and polarizing.[118] CHamoru women historically practiced abortion[119] and have been at the forefront of securing abortion access in Guam for nearly fifty years.[120] In the 1980s, U.S. right-wing antiabortion politicians and religious leaders' agendas intersected with local CHamoru resistance to American colonization in Guam: "'Saving the Fetus' became an analogue to 'Liberating Guam' and 'Saving the Chamorro People.'"[121] In 1990, the Guam Legislature passed a strict antiabortion law, viewed by some as a bulwark "against a common foe of Chamorro self-determination, namely, the U.S. Constitution."[122] CHamoru women led the successful fight to strike down the law, but CHamoru women stood on both sides of the conflict.[123] As scholar Vivian Loyola Dames observes, the struggle revealed their complex intersectionality: "What is at stake is not only what it means to be a woman but also what it means to be Chamorro, Catholic, and American in an unincorporated U.S. territory."[124]

Although abortion is currently legal in Guam, the last abortion provider left in 2018.[125] The closest location for the procedure is Hawai'i, about four thousand miles away.[126] In 2021, physicians challenged two abortion restrictions in Guam: one requiring abortions to be performed in a clinic or hospital, and another requiring patients to receive in-person government-mandated counseling before an abortion.[127] Guam's government conceded that telemedicine is permitted under Guam law, and the in-person government counseling requirement was enjoined that same year.[128] But following *Dobbs*,[129] the Ninth Circuit vacated the injunction, reinstating the requirement that a patient seeking abortion medication via telemedicine must first submit to in-person government-mandated counseling.[130] As Vanessa L. Williams, Guam co-counsel in the case, observed, "[T]his [in-person] requirement looks nothing like 'informed consent' and provides no health benefit for people in Guam . . . ."[131] Meanwhile, Guam Attorney General Douglas Moylan attempted to persuade federal courts to vacate a thirty-year-old permanent injunction to resurrect Guam's 1990 abortion ban.[132] The law threatens to ban abortion at all stages of pregnancy, criminalize abortion for both patients and physicians, and make it a crime to inform another where to obtain an abortion.[133]

It is also often difficult for women in Guam to access maternal services in general. Historically, Catholic colonizers and the U.S. military halted traditional CHamoru healers' access to land where key medicinal plants grew.[134] Today, following the closure of the island's only birth center in 2022, birthing options are limited to the

112 [112]. *Profamilias Puerto Rico*, Profamilias P.R., https://www.profamiliaspr.org/nos [https://p...

113 [113]. *Id.*

114 [114]. Brief of Amici Curiae Campaña Nacional por el Aborto Libre, Seguro y Accesible and Other Pu...

115 [115]. *Vision y Mision*, Proyecto Matria, https://www.proyectomatria.org/er y-mision [https:/...

116 [116]. *See, e.g.*, Press Release, Hispanic Federation, Alliance for Access to Essential Reproductive...

117 [117]. Anne Perez Hattori, *Colonialism, Capitalism and Nationalism in the US Navy's Expulsion of ...*

118 [118] *See, e.g.*, David W. Chen, *In Isolated Guam, Abortion Is Legal. And Nearly Impossible to Get.,...*

119 [119] *See* Dames, *supra* note 2, at 369; Donald H. Rubinstein, *Culture in Court: Notes and Reflection...*

120 [120] *See generally* Declaration of Michael Lujan Bevacqua, PhD., in Support of Plaintiffs' Motion...

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

122 [122]. *Id.* at 366; *see also* Guam Soc. of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366, 1368 ...

123 [123]. *See, e.g.*, Declaration of Michael Lujan Bevacqua, PhD., in Support of Plaintiffs' Motion f...

124 [124]. Dames, *supra* note 2, at 366, 368 (noting that "Chamorro women activists on both sides of t...

125 [125]. *See* Hofschneider, *supra* note 118.

126 [126] *Id.*; *see also* Chen, *supra* note 119 (explaining the challenges of obtaining an abortion in Gua...

127 [127]. Raidoo v. Moylan, 75 F.4th 1115, 1119-20 (9th Cir. 2023); Reprod. Freedom, *Court Cases:* Raid...

128 [128]. *See* Reprod. Freedom, *supra* note 128.

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

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

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

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

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

B. Access to Benefits

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

Poverty rates in the U.S. territories are strikingly high. While the poverty rates of Louisiana and Mississippi—the two poorest U.S. states—are around 19%, poverty rates in the U.S. territories are much higher: nearly 23% in Guam, 43.5% in Puerto Rico, and 60% in American Samoa.[145] Women are often uniquely impacted. In Puerto Rico, for example, families headed by females experience marked poverty.[146] In 2021, 69.6% of female-led households with no spouse present lived below the poverty line.[147] A staggering 90% of families with three or more children and a single female head of household lived below the poverty line.[148] According to a comprehensive study by Centro Hunter CUNY, these stark "disparities are tied to the underemployment among women in general relative to men, but especially due to the underemployment among prime working-age women."[149]

There is little data on the lack of federal benefits and its impact on women in the territories. Indeed, there is little meaningful data on the U.S. territories in general, which contributes to territorial residents' invisibility in the federal system and stymies efforts by policymakers and others to address socioeconomic inequalities.[150] But

131 [131] Press Release, ACLU, Federal Court Allows Medically Unnecessary Abortion Restriction in Guam ...

132 [132]. *See* Guam Soc'y of Obstetricians & Gynecologists v. Guerrero, No. 90-00013, 2023 WL 2631836, ...

133 [133]. *See* Reprod. Freedom, *Court Cases: Guam Society of OBGYNs v. Guerrero*, ACLU (Dec. 14, 2023), ...

134 [134] Tamar Celis, *Traditional Healing on Guam Makes a Comeback*, Pac. Daily News (Nov. 28, 2018, 5:...

135 [135]. Iris Kim, *Indigenous Doulas Lead the Fight for Reproductive Care Access Gap in Guam*, NBC New...

136 [136]. *About Birthworkers of Color*, Birthworkers Color Collective, https://www.birthworkersofcolor...

137 [137]. Iris Kim, *Guam's Only Maternity Ward Is Vulnerable to Climate Disasters. Meet the Indigeno...*

138 [138]. *Id.*

139 [139]. Ha'åni Lucia Falo San Nicolas & Kiana Joy Yabut, *Indigenous and Filipino Women Are Leading t...*

140 [140]. *Id.*

141 [141]. *About Us*, Famalao'an Rts., https://www.famalaoanrights.org/about-us [https://perma.cc/H4FX-4...

142 [142]. *Id.*

143 [143]. *See* José G. Pérez Ramos, Adriana Garriga-López & Carlos E. Rodríguez-Díaz, *How Is Colonialis...*

144 [144]. *See infra* notes 157-188 and accompanying text.

145 [145] Karl A. Racine & Leevin T. Camacho, *Dear Supreme Court: 3.5 Million Americans in Territories ...*

146 [146] Vargas-Ramos et al., *supra* note 21, at 10; *see also id.* at 6 ("Of the 42% of the population...

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

148 [148]. Vargas-Ramos et al., *supra* note 21, at 10. More households in Puerto Rico are led by a femal...

existing demographic data suggest that women in the territories experience or are at risk of experiencing poverty at higher levels; are the primary caregivers for children, disabled individuals, and elderly folks in the territories; are more often single heads of household with children under eighteen than men; and at the same time, make up large percentages of single heads of household living below the poverty level.[151]

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

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

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

Because NAP is a fixed federal grant (unlike SNAP, which serves all those eligible), the three territories excluded from SNAP often cannot sufficiently meet low-income family need,[161] particularly in times of disaster.[162] During emergencies, additional nutritional aid via NAP must be authorized by Congress.[163] During the aftermath of Hurricane Maria, for example, it took six months for Congress to approve additional funding and for Puerto Rico to begin operating a disaster nutrition program,[164] whereas the U.S. Virgin Islands, which operates under SNAP, received additional funding within two months.[165] By significantly slowing the benefit disbursement to vulnerable communities, the added approval process "created dangerous conditions in the aftermath of the hurricane."[166]

Further, for the territories, no systematized health- and humanitarian-disaster relief exists,[167] and U.S. laws prevent foreign-flagged vessels from transporting goods between U.S. continental ports and some U.S. territories.[168] When Congress passed the 2019 Disaster Relief Act, $600 million in food aid and $300 million in construction aid was allotted to Puerto Rico; however, because of the Jones Act and additional shipping costs, the total aid was reduced by $200 million and $100 million, respectively.[169]

Medical Assistance. Medicaid is a "joint federal and state program that helps cover medical costs" for low-income individuals.[170] Medicaid programs in the territories are partial and limited compared to programs in the states.[171] U.S. territories generally receive about "three-to-four times less funding than state Medicaid programs."[172] In the states and the District of Columbia, federal Medicaid matching funds are based on per-capita income, adjusted annually, and are "open ended."[173] In the territories, on the other hand, Medicaid is subject to a fixed federal matching rate and a statutory annual cap.[174] Generally, once a territory depletes its annual allotment, it must fund its Medicaid program using local funds, suspend services, or cease payments to providers until the next fiscal year.[175]

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

150 [150] Several "critical government data collection efforts and publications entirely exclude the ...

151 (https://https://www.Yale al., *supra* note 21, at 6-7, 9 (discussing the experiences of wome...

152 [152]. Vargas-Ramos et al., *supra* note 21, at 5, 16; *see also* Puerto Rico Oversight, Management, an...

153 [153] *See* Mary Babic, *Fiona in Puerto Rico Exposes, Again, How Disasters Amplify Inequality*, Oxfam ...

154 [154]. For more comprehensive analyses of the discrepancies between federal benefits programs in th...

155 [155]. *Supplemental Nutrition Assistance Program (SNAP)*, Benefits.gov, https://www.benefits.gov/ben...

156 [156] *See Nutrition Assistance Program (NAP) Block Grants*, U.S. Dep't Agric., https://www.fns.usda....

157 [157]. *See* Brynne Keith-Jennings, *Introduction to Puerto Rico's Nutrition Assistance Program*, Ctr. ...

158 [158]. *Disparate Treatment of Puerto Rico Residents with Disabilities in Federal Programs and Benef...*

159 [159]. *See* Hector R. Cordero-Guzman, *Characteristics of Participants in Puerto Rico's Nutritional...*

160 [160]. Cordero-Guzman, *supra* note 161, at 6.

161 [161] Brynne Keith-Jennings & Elizabeth Wolkomir, *How Does Household Food Assistance in Puerto Rico...*

162 [162]. Keith-Jennings & Wolkomir, *supra* note 163, at 3; Sofia Perez Semanaz, *The Impact of the Covi...*

163 [163] Off. of Inspector Gen., U.S. Dep't of Agric., Audit Report 27702-0001-22, Review of FNS' Nu...

164 [164]. *Establishing Food Security: NAP to SNAP in Puerto Rico*, Bread for the World (June 22, 2023),...

165 [165]. *Disparate Treatment of Puerto Rico Residents with Disabilities in Federal Programs and Benef...*

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

167 [167]. *Insular Area Climate Change Act: Hearing on Discussion Draft of H.R. __ Before the H. Comm. ...*

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

Disability Assistance. Supplemental Security Income (SSI) is a uniform, means-tested program that provides monthly payments to very low-income individuals who are elderly, blind, or disabled and who fall beneath the federally mandated income and asset limits.[180] Residents of Puerto Rico, Guam, U.S. Virgin Islands, and American Samoa are excluded from SSI.[181] Instead, Puerto Rico, Guam, and U.S. Virgin Islands residents rely on inferior alternative assistance programs.[182]

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

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

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

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

168 [168] Merchant Marine Act of 1920, Pub. L. No. 66-261, § 27, 41 Stat. 988, 999 (codified at 46 U....

169 [169]. *Disparate Treatment of Puerto Rico Residents with Disabilities in Federal Programs and Benef...*

170 [170] *What's the Difference Between Medicare and Medicaid?*, (Dec. 8...

171 [171] U.S. Gov't Accountability Off., GAO-16-324, Medicaid and CHIP: Increased Funding in U.S. Terr...

172 [172]. *Territorial Medicaid Funding: Achieving Parity with States Policy Statement*, Ass'n St. & Ter...

173 [173]. *Medicaid and CHIP in the Territories*, Medicaid & CHIP Payment & Access Comm'n 4 (Feb. 2021),...

174 [174]. *See* Alison Mitchell, Cong. Rsch. Serv., IF11012, Medicaid Financing for the Territories 1 (2...

175 [175] U.S. Gov't Accountability Off., *supra* note 173, at 7, 17 (reporting that prior to additional ...

176 [176] P.R. Medicaid Program, *Annual Report to Congress: Public Law 117-328*, Dep't of Health 18 (Oct...

177 [177]. Meredith Freed, Juliette Cubanski, Michelle Long, Nancy Ochieng, Tricia Neuman & Alina Salga...

178 [178]. *Disparate Treatment of Puerto Rico Residents with Disabilities in Federal Programs and Benef...*

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

180 [180]. *See Supplemental Security Income (SSI),* Soc. Sec. Admin. 1 (May 2023), https://www.ssa.gov/p...

181 [181] Cong. Rsch. Serv., *supra* note 19, at 2.

182 [182] *See* 42 U.S.C. § 1382c(e) (2018). Guam and the USVI operate the Old Age Assistance, Grants to ...

183 [183]. Resident Commissioner Brief, *supra* note 184, at 11, 29.

184 [184]. Javier Balmaceda, *Build Back Better Permanently Extends Economic Security to Puerto Rico and...*

185 [185] Dubin, *supra* note 13, at 131-32. Data on beneficiaries of AABD are limited, but approximately...

186 [186] Brief of the National Disability Rights Network, Disability Rights Center of the Virgin Islan...

187 [187] *See More Disabled Kids Living with Single Women*, NBC News (July 14, 2006, 10:25 AM EDT), http...

188

taxes—supplies a rational basis for likewise distinguishing residents of Puerto Rico from residents of the States for purposes of the Supplemental Security Income *benefits* program."[195]

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

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

II. HEIGHTENED JUDICIAL SCRUTINY FOR THE COLONIZED

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

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

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

A. Limits of Existing Doctrines

Rethinking legal paradigms as they apply in the territories is crucial for all, but particularly for women of color because they fall through the yawning gaps left by current legal doctrines.[202] U.S. territorial status limits the avenues available for the protection of women's rights. For example, the territories cannot directly benefit from international instruments that protect or promote women's rights. Because the U.S.

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

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

190 [190]. *Vaello Madero*, 956 F.3d at 32. Two other courts came to similar conclusions. *See* Schaller *ex...*

191 [191]. *Vaello Madero*, 596 U.S. at 166. (https://https://www.Yale Lo

192 [192]. *Id.* at 162.

193 [193]. *Id.* at 164-65 (citing Califano v. Gautier Torres, 435 U.S. 1, 3-5, 5 n.7 (1978); Harris v. R...

194 [194]. *Id.* at 165.

195 [195]. *Id.*

196 [196]. *See* Dubin, *supra* note 13, at 155 (noting that in 2022, President Biden's "Build Back Bet...

197 [197] *See, e.g.*, Supplemental Security Income Equality Act, H.R. 256, 118th Cong. (2023); *see also* ...

198 [198]. A deeper analysis of potential reparations for more widespread, unredressed harms to women o...

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

200 [200]. Indigeneity also presents complex considerations: Equal Protection and individual-rights fra...

201 [201] *See* Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marr...*

202 [202] Others in the territories also fall through these legal cracks, but a full exploration of the...

territories are not sovereign nations, they cannot sign or ratify the Convention on the Elimination of All Forms of Discrimination Against Women[203] or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.[204] And because the territories "belong to" the United States and the United States has not ratified those international instruments, the instruments are not binding.

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

In the federal context, discrimination claims by women of color are sharply constrained by the Court's equal-protection jurisprudence. Courts review equal-protection challenges to statutes and policies that discriminate against a protected class—such as race or gender—under strict or intermediate scrutiny.[208] If challenged laws are "facially neutral," a plaintiff must show that the governmental actor was motivated by elusive "discriminatory intent"; disparate impact alone is insufficient.[209] This high evidentiary burden sharply limits legal redress for pervasive forms of institutionalized discrimination,[210] and the courts' problematic single-axis framing of discrimination claims discounts multifaceted and intersectional identities.[211]

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

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

[203] Adopted by the U.N. General Assembly in 1979, the Convention on the Elimination of All Forms ...

[204] [204]. Adopted in 1994 by the member states of the Organization of American States (OAS), the Inter...

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

[206] [206]*Id.* at 273.

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

[208] [208]*See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (analyzing racial classifica...

[209] [209]. *See* Washington v. Davis, 426 U.S. 229, 238-42, 246 (1976) (requiring a showing of discrimina...

[210] [210]. *See* Eric K. Yamamoto, Susan K. Serrano, Minal Shah Fenton & James Gifford, *Dismantling Civil*...

[211] [211]. *See* Alexsis M. Johnson, *Intersectionality Squared: Intrastate Minimum Wage Preemption & Schu*...

[212] [212]. *See, e.g.*, Califano v. Gautier Torres, 435 U.S. 1, 5 (1978); Harris v. Rosario, 446 U.S. 651...

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

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

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

[216] [216]. *See Vaello Madero*, 596 U.S. at 165 (applying rational basis and finding that differential tr...

B. Political Powerlessness and U.S. Colonization

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

Courts have not precisely defined "political powerlessness," and, indeed, have offered inconsistent conceptions of it.[222] Modern cases tend to apply a searching rational-basis-with-bite standard when the court determines that a classification involves "a bare . . . desire to harm a politically unpopular group"[223] or an irrational majoritarian fear.[224] Most notably, the Supreme Court has employed a version of this standard to overturn laws that discriminate against LGBTQ people, cohabitating individuals, and developmentally disabled people, among others.[225]

In *Vaello Madero*, Judge Juan Torruella of the First Circuit seemed to employ a more meaningful or searching form of rational-basis review.[226] While declaring that "Puerto Rico residency . . . does not warrant *any form of heightened review*,"[227] he cited to three cases that employ a heightened "rational basis with bite" standard.[228] The court held that the government's reasons for the exclusion—the tax status of Puerto Rico residents and the costs of extending SSI to them—were not rationally related to a legitimate government interest, and, therefore, no rational basis existed to exclude Puerto Rico's residents from SSI benefits.[229] Although the First Circuit's *Vaello Madero* decision was predictably reversed by the Supreme Court without careful analysis of history or impacts, Judge Torruella's use of a more meaningful rational-basis standard was apt because territorial residents are a politically powerless people, in large part due to the ongoing impacts of U.S. colonization.

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

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

217 [217]. *See* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) ("Nor need we enquire ...

218 [218] *Id.*; *see also* Igartúa v. Trump, 868 F.3d 24, 25-26 (1st Cir. 2017) (Torruella, J., dissentin...

219 [219] John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 101-03 (1980).

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

221 [221] *Id*. at 77-88. Many scholars have explored the footnote's significance, particularly as the ...

222 [222]. *See* Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. Rev. 1527, 1537-40 (20...

223 [223] Romer v. Evans, 517 U.S. 620, 634 (1996) ("[I]f the constitutional conception of 'equal p...

224 [224] *See* Brendan Beery, *Rational Basis Loses Its Bite: Justice Kennedy's Retirement Removes the ...*

225 [225] *See, e.g.*, Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 4...

226 [226] United States v. Vaello Madero, 956 F.3d 12, 23 (1st Cir. 2020), *rev'd*, 596 U.S. 159 (2022); ...

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

228 [228]. *See id.* at 23 (referencing *Moreno*, 413 U.S. 528; Romer, 517 U.S. 620; and City of Cleburne v...

229 [229] *Id.* at 26-29 (noting that it made little sense to exclude "a class of people from welfare p...

230 [230]. Cepeda Derieux, *supra* note 13, at 801 (arguing that U.S. citizens in Puerto Rico "lack rep...

231 [231]. Dubin, *supra* note 13, at 152 (contending that classifications based on the "unincorporated...

232 [232]. *See* Memmi, *supra* note 47, at 186.

233 [233]. *See* Rivera Ramos, *supra* note 36, at 284-85; U.S. Const. art. IV, § 3, cl. 2; Igartúa-De L...

234 [234] *See* Aaron Tang, *Rethinking Political Power in Judicial Review*, 106 Calif. L. Rev. 1755, 1765 ...

235 [235] *See, e.g.*, Wabol v. Villacrusis, 958 F.2d 1450, 1452, 1459, 1462 (9th Cir. 1990) (upholding C...

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

C. Preliminary Application

A more meaningful rational-basis-with-bite approach is appropriate to assess multiple types of harms described above. Applying the standard to the denial of federal benefits may present an easier scenario. In *Peña Martínez v. Azar*, for example, Sixta Gladys Peña Martínez and nine other residents of Puerto Rico challenged their ineligibility for SSI, SNAP, and Medicare Part D Low Income Subsidies under the equal-protection component of the Fifth Amendment Due Process Clause.[240] The plaintiffs reside at the intersections of race, gender, and poverty: some are female and some male, they are all very poor, some suffer from "incapacitating health conditions,"[241] and all rely on various local benefits programs but contend that they would be eligible for federal benefits programs if they lived in a U.S. state.[242] A rational-basis-with-bite standard would illuminate these intersectional harms of U.S. colonization, along with the actual relevance of the government's stated rationale.

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

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

These controversies raise multifaceted complexities that are beyond the scope of this Essay, so it is not appropriate to preordain outcomes. But meaningful court engagement is important in itself. An overly exacting level of scrutiny may counterproductively interfere with a territorial government's acts of self-determination. But a lax one can fail to examine ongoing intersectional injustices.

236 [236] *See* Yamamoto & Lyman, *supra* note 202, at 344; Sproat, *supra* note 202, at 167.

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

238 [238]. *Id.* at 95 (describing how colonized peoples have preserved their "communities from violenc...

239 [239]. *Id.* at 143.

240 [240]. Peña Martínez v. Azar, 376 F. Supp. 3d 191, 196 (D.P.R. 2019), *rev'd and remanded sub nom.* M...

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

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

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

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

245 [245]. *See* Blackhawk, *supra* note 25, at 93 n.614 and accompanying text (discussing U.S. recognition...

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

Employing a retooled rational-basis-with-bite standard in a way that meaningfully acknowledges colonization and principles of self-determination would allow the examination of issues and likely consequences, and in turn, would provide a voice for vulnerable communities challenging potentially oppressive actions or seeking to uphold beneficial ones. For the same reasons, this proposal does not offer a more exacting standard for women in the territories than for men, but it proffers an approach that supports women's challenges to oppressive laws while providing room for courts to uphold laws that benefit women.

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

CONCLUSION

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

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247 [247] *See* Rebecca Tsosie, *Indigenous Peoples and the Ethics of Remediation: Redressing the Legacy o...*

248 [248]. For examples of international recognition of the importance of self-determination, see Inter...

249 [249] *See* Eric K. Yamamoto, Miyoko Pettit & Sara Lee, *Unfinished Business: A Joint South Korea and ...*

250 [250]. Blackhawk, *supra* note 25, at 143 (asserting that Congress and the Executive are often the br...

251 [251] *Id.* at 57; *see also* Igartúa-De La Rosa v. United States, 417 F.3d 145, 183 (1st Cir. 2005) (...

252 [252]. Blackhawk, *supra* note 25, at 12; *see also* Aziz Rana, *How We Study the Constitution: Rethinki...*

253 [253]. Rolnick, *supra* note 204, at 2757.

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

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