M-READ

To: Articles Committee
From: Aidan Calvelli
Date: August 3, 2023
Re: **S-19280—The Color of Social Security**

I. Recommendation: Soft no/No to C-Read.

II. Synopsis

Please read Alexandra's detailed Roto for a comprehensive and useful summary. Below is my shorter version of a summary.

The Color of Social Security gives a deep dive on the racism embedded in the Social Security Act, both its 1937 creation and its pseudo-expansion in the 1970s to the U.S. territories.

The Article begins with a history of the racism animating the New Deal generally. It then shows how that racist lens applied to the bill's passage, both in the motivation of southern senators to subjugate the Black laboring class and in the specific exclusions of domestic and agricultural workers. The Article then suggest that under Equal Protection Doctrine, the racial discrimination animating the bill could render it unconstitutional – an argument the courts have too quickly rejected.

The Article then turns to the exclusion of SSI benefits to residents of Puerto Rico, Virgin Islands, Guam, and American Samoa, which were not covered in the 1972 expansion of the SSI. It charts how the history of treating the territories differently derives from the racist *Insular Cases,* then showing how that doctrine inflects the way courts have (briefly) rejected Equal Protection challenges against SSI policies in the territories. It then notes a recent SCOTUS case in which the First Circuit overturned the SSI exclusion, but the Court reversed, quickly disposing the EP question. The Article continues by critiquing that decision as mis-applying equal protection analysis, even if there are some differences between the territories and the states.

The Article concludes by summarizing how the SSA's history is one of racial exclusion with material consequences for people of color today, caused by political powerlessness. We should view the SSA exclusions on par with discussions of forward-looking reparations and consider both judicial and legislative responses to full inclusion in the American social welfare state.

III. Preliminary Literature Review

I'm not sure I think it's literally preempted, but the thrust of the Article seems . . . well-trodden.

Parts III.A and III.B seem almost fully covered by Ira Katznelson's *When Affirmative Action Was White.*[1] There might be some new legislative history quotes here, but I listened to that on audiobook 3 years ago and I didn't pick up anything new from these sections. It's possible that the debates have been revived, as the SSA historian's counter-analysis (p. 10) has prompted new work defending

[1] **Ira Katznelson, When Affirmative Action Was White** (2005).

Katznelson's thesis.[2] Part III.C does not seem to be preempted,[3] but its discussion of equal protection doctrine seems mostly to focus on cases unrelated to the SSA or social science scholarship on the SSA apart from the doctrine.

Part IV's discussion of the SSA amendments in the 1970s seems mostly. Other cited articles discuss the general exclusion of the SSA benefits to the territories.[4] A recent Note in the *Hawaii Law Review* surveys the provision of federal benefits in the territories and discusses *Vaello-Madero* and the SSA more generally; the Note also explicitly takes up whether there is a rational basis for territory-based discrimination.[5] Another recent article discussed Puerto Rico being excluded from the SSA due to its territorial status.[6] But situating this law within the broader history of SSA racism seems new to me.

IV. **Analysis**

A. *Positives*

Important Lens: The author is right that the history of the SSA seems unavoidably racialized. And he's right that this has material, massive consequences on Black welfare and intergenerational Black wealth. This article's detailed elaboration of this claim, done by a leading Black scholar, could thus be a valuable contribution in a debate where legislation is on the table and could do real good.

Detailed History: Despite my later criticism that this is largely trodding well-worn ground (and the footnotes are way too long), the use of legislative history and block quotes, especially in part III.B, helped illustrate the racism of the New Deal southern senators. Similarly, the reference to the *Insular Cases* provided helpful historical context to bring that same lens of a racist backdrop to the 1972 amendments.

Responsive to Developments in the Law: Again, this will come back as a criticism, but the article is tailored to the *Vaello-Madero* case, which Justice Gorsuch suggested could create a vehicle for overturning the *Insular Cases*; this doctrinal uncertainty could make it valuable to publish an article centering the stakes.

Conclusion: I thought the conclusion helpfully tied the purposes of the piece together: hugely consequential SSA exclusions, allowed over the protests of politically disempowered people of color, that can be viewed through the lens of equal protection doctrine, and which should be seen as

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[2] Katznelson himself has engaged with this defense. *See* https://www.bostonreview.net/articles/the-blindness-of-colorblindness/.

[3] My westlaw search for "SSA" /p "equal protection" yielded no articles on this specific subject.

[4] *See, e.g.,* Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1669-72 (2021); Natalie Gomez-Velez, *De Jure Separate and Unequal Treatment of the People of Puerto Rico and the U.S. Territories*, 91 FORDHAM L. REV. 1727, 1747 (2023).

[5] Staff, *A Reckoning for "Rational" Discrimination: Rethinking Federal Welfare Benefits in United States-Occupied Islands*, 43 **Hawaii L. Rev.** 265 (2020).

[6] Katerina Martínez Vélez, *Trouble in Paradise: Puerto Rico's Routine Exclusion from Federal Benefit Programs as a Result of the Alien-Citizen Paradox*, 6 **Bus. Entrepreneurship & Tax L. Rev.** 132 (2022).

primary examples of racism operating through government policy (and in need of reparation). The discussion of legislative fixes here was also helpful (though the 1.5 pages it got felt a bit rushed, and could've been more novel).

B. *Negatives*

Lack of Novelty: I did not learn a ton by reading this article. The driving point – that the SSA regime is racist – seems to be a super common argument. Normally this wouldn't matter for just a background section, but it takes up a ton of the piece. Similarly, in the more novel discussion of the 1972 amendments, the long background on the *Insular Cases* was just recounting the litigation and the general scholarly responses to it – again not adding anything new to the literature. Again similarly, the equal protection discussion in III.C seemed to spend a lot of time on the basics of 14th Amendment law and *Arlington Heights* without doing much to situate the SSA in any bold new framework.

Confusion around the equal protection argument: Seemingly, the new lens this piece is adding is challenging the SSA on Equal Protection grounds. But I found it confusing that at times the article seemed to argue that the law *did* violate 14A, and other times that it *should* (based on a more optimal SCOTUS interpretation). It also wasn't clear to me what the 14A lens did for the 1935 Act, as it seems like the time for legal challenges has passed, meaning that if we're going to critique the law for being racist, we can do so outside the confining lens of doctrine. Relatedly, in the discussion of the 1972 amendments equal protection challenge, the article seems to largely draw on existing dissents (from Marshall and Sotomayor) to raise its main points. Those seem like good arguments, but not novel law review ones. I was also confused what the takeaway from the EP analysis was, as even if we adopted a less deferential rational basis test (p. 49), it felt really easy for Congress to articulate a new rationale that would save the law if it wanted to. Lastly, the article argues that discrimination against the territories should be cognizable under the 14th Amendment (p. 56), but that seems like an article in its own right; not just one part of a paragraph in the midst of this much more specifc argument about federal welfare legislation.

Footnotes and Block Quotes: The footnotes feel like 65% of the piece. The notes themselves are so long at times they take away from the piece. *See, e.g.,*, nn. 3, 5, 6, 7, 11, 12, 13, 21, 25, 27, 33, 38, 53, 59, 64, 73, 77, 85, 90. Additionally, there are so many long block quotes that reinforced my belief that the article is not doing much new. *See, e.g.,* pp. 30, 31, 38, 45, 55. Too much of the article felt like it wasn't arguing anything, but just recounting things other people had said; for a topic that's already itself not breaking ground, I don't think that's enough for our pages.

Structure: I found the structure disjointed. The conclusion attempts to tie everything together, binding the two racist SSA enactments together by virtue of lost political power and the relevance of equal protection principles. But the sections themselves felt like they weren't talking to each other, and each needed more space to be fully fleshed out. For example, in Part IV.C, each new paragraph was just a new argument about equal protection connection to the SSA (and then a bunch of paragraphs on counter arguments); there didn't seem to be an overarching structure, many of the arguments were just discussing parts of the dissents, and I was confused whether this was supposed to be a clear application of doctrine or a bold new approach to EP law. Also, not to be overly attached to tradition, but there are functionally only two real Parts to the article (Part I is the intro,

and Part II is two pages on how Social Security works), so it's failing the classic four-Part structure, and in this case that makes its development less clear.

Case comment: Part IV felt a heck of a lot like a case comment to me. So much of it was just responding to the Court's rejection of the EP claim in *Vaello-Madero* that it was an extended case comment – not doing the kind of broader scholarly analysis that will give the piece purchase beyond any of the doctrinal developments after the case. The extended discussion of the case was useful, but made the lens too narrow, as the piece devolved into just critiquing the specific moves the majority made, rather than making the more overarching connection back to the piece's broader purpose.

C. *Neutrals/Questions*

Maybe it's new for legal academia? I'm negative on this piece largely because I think much of it has already been said before, either by scholars or Justices. But it's possible I'm overestimating this problem because I've read Katznelson's book and had to do research on a similar topic before. So if other folks feel it's important to get *Law Review*-specific depth on the racist SSA origins, and that a legalistic 14th Amendment analysis is the way to do it, I'm open to that.

Could we refocus around the territories? As the Roto mentions, this article is kind of two articles in one. I have way more novelty/preemption issue with the 1930s section than the 1970s section, and the 1970s section seems much more live in current doctrine, so to the extent the history could be the background, and this piece is about the territorial challenges, I might be more positive. (But that feels like beyond a P-read shift).