

Article

Americans, Beyond States and Territories

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INTRODUCTION

Location matters.¹ Where you reside within the United States can affect the education you receive, the air you breathe, the taxes you pay, the food you eat, and many pedestrian and profound matters of daily life.² Despite these differences and disparities based on location, one would think that where you reside

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1. See LISA GENOVA, EVERY NOTE PLAYED 7 (2018) (“Location matters in destiny as much as it does in real estate.”); *Maciver Inst. for Pub. Pol’y, Inc. v. Evers*, 994 F.3d 602, 613 (7th Cir. 2021) (“[A]t the end of the day . . . location matters.”).

2. See BRUCE D. BAKER, EDUCATIONAL INEQUALITY AND SCHOOL FINANCE: WHY MONEY MATTERS FOR AMERICA’S STUDENTS 103–06 (2018) (discussing school funding disparities across varying geographic locales); Nadav Shoked, *An American Oddity: The Law, History, and Toll of the School District*, 111 NW. U. L. REV. 945, 1010–14 (2017) (contending that individual school districts are subject to varying external factors that impact education quality); Christopher W. Tessum, David A. Paoletta, Sarah E. Chambliss, Joshua S. Apte, Jason D. Hill & Julian D. Marshall, *PM2.5 Polluters Disproportionately and Systemically Affect People of Color in the United States*, 7 SCI. ADVANCES 1, 2 (2021) (finding that air pollution disproportionately impacts communities of color); Robert A. Schapiro, *States of Inequality: Fiscal Federalism, Unequal States, and Unequal People*, 108 CALIF. L. REV. 1531, 1559 (2020) (noting differences in tax rates and tax bases across states); KENNETH H. KOLB, RETAIL INEQUALITY: REFRAMING THE FOOD DESERT DEBATE 1–5 (2022) (chronicling the geographic disparities in food access); Emily M. Broad Leib, *All (Food) Politics is Local: Increasing Food Access Through Local Government Action*, 7 HARV. L. & POL’Y REV. 321, 323 (2013) (“Local governments are also beginning to

or choose to relocate within the United States as an American should not affect your citizenship and its accompanying fundamental rights and federal privileges. But it does.

An American living in Puerto Rico or the U.S. Virgin Islands, which are both part of the United States, has no right to vote in a presidential election or receive Supplemental Social Security Income, but an American living abroad on foreign soil can possess this voting right and receive this federal benefit.³ Similarly irrational, an American residing in a State who relocates to Puerto Rico or another U.S. Territory will lose their right to vote in all federal elections, and lose many federal benefits, but if they move to a foreign country, their right to vote in federal elections and many federal benefits are preserved.⁴

Contrary to professed American principle and ideal, not all citizenship is equal.⁵ For the over three million Americans in the

acknowledge that each locality faces its own food-system challenges with differing policy solutions . . .”).

3. See *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541 (2022) (holding that Americans residing in Puerto Rico can be denied the Supplemental Security Income benefit because of their residency in a Territory instead of a State); *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 147–48 (1st Cir. 2005) (holding that American citizens in Puerto Rico do not have a constitutional right to vote for electors in presidential elections); *Voting & Representation Information*, AM. CITIZENS ABROAD, <https://www.americansabroad.org/how-to-vote> [<https://perma.cc/YY3U-9HPX>] (explaining how Americans living abroad can vote in presidential elections); *Spotlight on Special SSI Rules for Children of Military Personnel Living Overseas—2021 Edition*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/spotlights/spot-military-overseas.htm> [<https://perma.cc/F62R-U4ZT>] (highlighting how certain Americans living abroad can continue to receive Supplemental Social Security Income benefits).

4. See, e.g., *Ballentine v. United States*, 486 F.3d 806, 811 (3d Cir. 2007) (holding that citizens “choosing to reside” in the U.S. Virgin Islands are not entitled to vote for electors for President); Adam Liptak, *Supreme Court Looks at Puerto Rico’s Status in Case on Benefits*, N.Y. TIMES (Nov. 9, 2021), <https://www.nytimes.com/2021/11/09/us/supreme-court-puerto-rico-social-security.html> [<https://perma.cc/9GK3-48GN>] (“[Puerto Rico] residents are U.S. citizens but cannot vote in federal elections . . .”); Brief for Amici Curiae AARP, AARP Foundation, Justice in Aging, National Organization of Social Security Claimants’ Representatives in Support of Respondent at 11–12, *United States v. Vaello-Madero*, 956 F.3d 12 (2020) (No. 19-1390) (arguing that discriminating against a population of the poor and medical needy due to their place of residence in Puerto Rico is irrational); Brief Amici Curiae of the SEIU, AFSCME, AFT, and UAW Supporting Respondent at 4–5, *Vaello-Madero*, 956 F.3d 12 (No. 19-1390) (asserting that there is no rational basis for denying Supplemental Social Security Income benefits to residents of Puerto Rico).

5. See, e.g., Kenneth L. Karst, Foreword, *Equal Citizenship Under the*

Territories of American Samoa, Guam, Puerto Rico, the Northern Mariana Islands, and the U.S. Virgin Islands, their citizenship does not confer upon them the same rights and privileges of voting, representation, and entitlement as their fellow citizens residing in States.⁶

Americans living in the Territories have long suffered the indignities of being treated as lesser-than Americans despite holding more than their end of the bargain as citizens.⁷ They defend and die for our country in disproportionate numbers relative to citizens residing in States, but have no right to vote for their Commander in Chief.⁸ They are subject to federal taxes, laws, and regulations, but have no real voice in their passage,

Fourteenth Amendment, 91 HARV. L. REV. 1, 5 (1977) (“Citizenship, in its narrowest sense, is a legal status. In relation to the rights of citizenship, all citizens are equal.”); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1040–41 (2002) (discussing “the history of struggles over equal citizenship for women”); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 346 (2006) (“[T]he concept of citizenship admits variation and inequality in educational opportunity.”); Gregory Ablavsky, *“With the Indian Tribes”: Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1061 (2018) (“[I]n the early United States formal and informal racial exclusions suffused the political category of citizenship, limitations that restricted the egalitarian and inclusive promise of consensual membership.”); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 481 (2005) (“Looking to history, we see that notions of universal equality and democratic inclusion have masked particular exclusions, while proceeding in the name of abstract citizenship.”).

6. Steven Wilson, William Koerber & Evan Brassell, *2020 Population of U.S. Island Areas Just Under 339,000*, U.S. CENSUS BUREAU (Oct. 28, 2021), <https://www.census.gov/library/stories/2021/10/first-2020-census-united-states-island-areas-data-released-today.html> [https://perma.cc/L3BM-NGR3]; America Counts Staff, *Puerto Rico Population Declined 11.8% From 2010 to 2020*, U.S. CENSUS BUREAU (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/puerto-rico-population-change-between-census-decade.html> [https://perma.cc/ZA22-BTSH].

7. As used in this Article, the terms “Territory,” “Territories,” or “territories” refers to five notable, long-inhabited, unincorporated territories of the United States. See *Developments in the Law, The U.S. Territories*, 130 HARV. L. REV. 1616, 1617 (2017) (“American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands—these five localities make up what we know as the U.S. territories. These unincorporated but organized territories exercise self-governance, while still sitting subject to the U.S. Congress’s plenary power.”).

8. *Igartua De La Rosa v. United States*, 32 F.3d 8, 9 (1st Cir. 1994) (interpreting U.S. CONST. art. II, § 1, cl. 2 to hold that “only citizens residing in states can vote for electors and thereby indirectly for the President”); see U.S. CONST. art. I, § 2, cl. 1.; U.S. CONST. art. II, § 1, cl. 2.

enactment, or enforcement.⁹ They have been characterized by the Supreme Court as “alien races,”¹⁰ “utterly unfit for American citizenship,”¹¹ and “foreign to the United States in a domestic sense.”¹² They have been described as “half-civilized,”¹³ “ignorant and lawless,”¹⁴ and “savage”¹⁵ in highly influential and widely cited legal scholarship published in the prestigious pages of the *Harvard Law Review*.¹⁶ They have endured catastrophic death and destruction from disaster and disease, but do not receive the aid and assistance that is freely and generously appropriated to Americans residing in States.¹⁷ They are often left out of national conversations by lawmakers, and literally left off American maps in ways that have not, and would not, happen to citizens of States—even during a pandemic that was killing thousands of Americans across all States *and* Territories on a

9. See Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 565 (2004) (“American citizens living in the federal Territories . . . have no right to vote for president and no voting representation in the Congress.”).

10. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).

11. *Id.* at 311 (White, J., concurring).

12. *Id.* at 341.

13. Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 415 (1899).

14. *Id.*

15. James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 475 (1899).

16. In fairness to the *Harvard Law Review*, it published a series of articles in 2017 that critically examined their role and their prior publications in the development of the law of the Territories. See *Developments in the Law*, *supra* note 7, at 1626 (“Regardless of where one stands on the responsibility scholars—and their publishers—have to consider the consequences of their ideas, one must acknowledge that these ideas have consequences. And in the case of the U.S. territories, the consequences have largely been bad ones.”).

17. See Richard Pérez-Peña, *After Irma and Maria: How 3 Spots on the U.S. Virgin Islands are Faring*, N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/2017/11/10/us/virgin-islands-hurricanes.html> [https://perma.cc/DC7Z-C3RL]; John Wagner, *Trump: “Big Decisions” Ahead on How Much to Spend on a “Destroyed” Puerto Rico*, WASH. POST (Sept. 29, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/09/29/trump-big-decisions-ahead-on-how-much-to-spend-on-a-destroyed-puerto-rico> [https://perma.cc/945C-DHB5]; Frances Robles, Lizette Alvarez & Nicholas Fandos, *In Battered Puerto Rico, Governor Warns of a Humanitarian Crisis*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/us/puerto-rico-maria-fema-disaster.html> [https://perma.cc/G5GB-2VTA].

daily basis.¹⁸ If citizenship is as Chief Justice Warren stated, “nothing less than the right to have rights,” what does this say about the American citizens of the Territories and their treatment under the law?¹⁹

Making matters worse, for too long the law has been seeing and thinking about the U.S. Territories incorrectly—and to their detriment. To the extent they are seen and thought of, scholars, judges, and legislators often view the Territories and their people as an undifferentiated collective in opposition and subservience to States and their residents.²⁰ This is due in large part because the law of the Territories has been built on a troubling foundation of precedents known as the *Insular Cases*, which privileges States and diminishes the Territories based largely on a discriminatory doctrine of “incorporation.”²¹ As such, the law of the Territories has fundamentally been a segregated system of legal dualism, one preferential set of rules for States and one subservient set of rules for Territories.²² It has been a bifurcated system of law whereby Americans residing in States are safely ensconced in the safe harbors of the Constitution while Americans residing in the Territories “exist in a nearly extraconstitutional zone.”²³

This legal dualism at the heart of the law of the Territories has grounded over a century’s worth of scholarly inquiries, legal challenges, and political advocacy.²⁴ It has served as the basis for defending and challenging the fundamental disparity of

18. DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* 7–10 (2019).

19. *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, J., dissenting).

20. See *infra* Part IV.A.

21. See Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2452–55 (2022) (discussing how the *Insular Cases* established the current law of the Territories).

22. See JOAN CHURCH, CHRISTIAN SCHULZE & HENNIE STRYDOM, *HUMAN RIGHTS FROM A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE* 49–50 (2007) (“Legal dualism . . . entails the official application of two legal systems alongside each other The two operate in a relationship of one being the dominant system and the other the servient system.”).

23. Duffy Ponsa-Kraus, *supra* note 21, at 2540.

24. Sam Erman, *Truer U.S. History: Race, Borders, and Status Manipulation*, 130 YALE L.J. 1188, 1230–37 (2021).

rights and privileges denied to Americans living in the Territories vis-à-vis those afforded to Americans living in States.²⁵ The persistence of this legal dualism is understandable and persistent in large part because Americans in all the Territories have been collectively and systemically mistreated by our government—without any real political consequences—in ways that could not happen in the same, sustained manner, if they resided in a State.

However understandable and persistent, this longstanding legal dualism is too narrow, too limiting, and fundamentally wrong in at least two critical ways. One, it largely ignores the contradictions, complexities, and diversity among the Territories themselves. It elides the clear and obvious differences among the Territories when it conceptualizes them as an undifferentiated collective. The lives of fifty thousand people on the small islands of American Samoa, far off in the Pacific, are very different than those of the over three million people on the large island of Puerto Rico a few hundred miles from Florida.²⁶ The traditional, bifurcated view of the Territories as simply non-States neglects the distinct disparities, challenges, and potentials of each Territory. Two, it neglects politically and legally feasible ways to help individual Territories in the near term through executive orders, legislative earmarks, and agency actions that bypass the significant obstacles of outdated legal precedents and ongoing political dysfunction. By allocating so much attention and resources to the differences between Territories and States, not enough focus and capital has been paid to the differences among the Territories themselves. By defining the Territories through a legal framework of opposition and subservience to States for so long, pragmatic solutions have been overlooked and underappreciated to the detriment of millions of Americans.

This Article is about that faulty legal framework, its constraints, and a move beyond the crude segregated framework of States and Territories as a means to improve the lives of people in the Territories through underutilized levers of the law and public policy. Drawing on a rich body of interdisciplinary research that spans law, economics, political science, history, and

25. Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1642 (2021).

26. See *infra* Parts I.A and I.D.

sociology, this Article seeks to offer a different construct for seeing and thinking about the Territories.²⁷ Through a critical descriptive and normative examination of the Territories that draws and builds upon the Author's prior research, this Article highlights the often-overlooked diversity of the Territories, charts their shared struggles, reveals their distinct despairs, and proposes pragmatic solutions for the urgent present.²⁸ During a time of fierce, robust, and pathbreaking discussions about diversity, equity, and inclusion, the longstanding, explicit legal exclusion of millions of American in our Territories calls for greater practical focus and a new sense of intellectual empathy.²⁹ During a period of national awakening, atonement, and activism for past wrongs, the prolonged and persistent mistreatment of our fellow Americans in the Territories demands greater attention and action.³⁰ What appears in this Article is a truer, richer, and more complicated view of the Territories, and the power and progress that may be possible when the law sees them differently.

27. See, e.g., SEAN LOWRY, CONG. RESEARCH SERV., R44651, TAX POLICY AND U.S. TERRITORIES: OVERVIEW AND ISSUES FOR CONGRESS 2 (2016); PEDRO A. MALAVET, AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO 3–4 (2004); ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 403 (1989); Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 286 (2007); Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 800 (2005); Sarah Helene Duggin & Mary Beth Collins, *"Natural Born" in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. REV. 53, 93–95 (2005); José A. Cabranes, *Puerto Rico, Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 458–59 (1986).

28. See Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1250–51 (2019).

29. See, e.g., Meera E. Deo, *The End of Affirmative Action*, 100 N.C. L. REV. 237, 273–77 (2021) (arguing for new diversity, equity, and inclusion policies in higher education); Kenneth W. Mack, *The Two Modes of Inclusion*, 129 HARV. L. REV. F. 290 (2016) (discussing competing theories of inclusion in the context of law and civil rights).

30. See, e.g., Joshua S. Sellers, *Race, Reckoning, Reform, and the Limits of the Law of Democracy*, 169 U. PA. L. REV. ONLINE 167, 167 (2021) ("It is a moment of racial reckoning As befits such moments, assorted conversations are occurring about the significance of race in American life and how to meaningfully improve Black lives. These conversations—debates might be the more accurate noun—have inspired calls for recompense and broad structural reforms."); Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1537 (2018) (discussing the emergence of new dynamic form of social activism that engages business interests with social reforms).

This Article has two chief objectives. First, it aims to provide a compelling, cogent argument against conceptualizing the Territories homogenously, and subserviently to the States. Second, it strives to offer a different perspective that better appreciates the diversity among the Territories with hopes of improving near-term conditions in each of them. In pursuit of these objectives, this Article is fully aware of the powerful elegance and legacy of the conventional binary framework, but it also recognizes that such a perspective has made legal and political reforms on behalf of the Territories so elusive. This legal dualism rooted in the segregation of States and non-States has effectively created a painful legal fatalism for the Territories. As such, instead of proffering an alternative, grand unifying framework that could theoretically cure all the historical wrongs and contemporary injustices afflicted on the Territories, this Article proposes a more modest, but also more meaningful and realistic approach. It is appreciative of the old, sustained paths to progress while offering a novel, workable alternative to empower and enrich the Territories in the near term, given their current challenging conditions. Ultimately, this Article aspires to offer a different, more practical framework for scholars, advocates, and policymakers to think and act anew with greater creativity and urgency about the law of the Territories and our fellow Americans living there.

This Article constructs this new territorial diversity framework in four parts. Part I provides a broad and brief overview of our diverse Territories. It presents a sketch of each Territory's geography, economy, demography, and origins of American control. Part I lays the descriptive groundwork for the ensuing discussions.

Pivoting from descriptive to normative, Part II examines the shared struggles of the Territories. It focuses on how interconnected factors of political disenfranchisement, economic destitution, racial discrimination, and climate change individually and collectively affect all of the Territories. Deploying data, law, history, and science, Part II explains how the Americans of the Territories share the struggles of forgotten, second-class citizens because of unjust laws and legal systems.³¹

Part III moves from similarities to differences. It explores the distinct despairs among the Territories. In particular, it highlights Puerto Rico exceptionalism, military occupation, geographic divergences, and disparate federal benefits among the

31. See Lin, *supra* note 28.

Territories. It reveals how each of these factors has hindered each of the Territories differently. And it describes how territorial diversity has been overlooked by the conventional legal dualism framework that largely sees the Territories collectively as subservient non-States without distinctions. Part III exposes the distinct systemic and structural afflictions of the Territories.

Moving from afflictions to solutions, Part IV offers a new perspective to progress. First, it uncovers the perils of seeing the Territories in opposition to States under the conventional territorial dualism framework. It explains why the longstanding conventional legal view has been so legally and politically ineffective at improving conditions in the Territories. Next, it highlights a different path to progress that is rooted in embracing territorial diversity by seeing the Territories distinctly amongst one another, and not just in opposition to States. It explains and illustrates through case studies involving federal benefits for the indigent and federal maritime regulation why this new vantage point can unlock pragmatic, near-term rewards for the Territories while the larger, longstanding fights on their behalf persist. It recommends that greater attention and resources be dedicated towards pursuing executive orders, legislative earmarks, and agency actions. Furthermore, the Article theorizes that the new framework can be expanded to aid the legal and political fights of Indigenous communities in the United States, who are often mistreated as lesser-than Americans in a similar way to those residing in the Territories.³² Part IV argues for a new, pragmatic turn towards meaningful progress for the Territories that better accounts for contemporary legal and political realities, and reveals the potential power it holds for other marginalized American communities.

Finally, this Article ends with a brief conclusion. It recalls the long struggles of the Territories and looks ahead optimistically towards a better future for the people of our diverse Territories.

I. OUR DIVERSE TERRITORIES

Despite being commonly defined and perceived in law as one, homogenous collective in opposition and subservient to the States, there is great diversity among the Territories. While each

32. See, e.g., Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1859–65 (2019) (describing the mistreatment and misconception of Indian rights under federal and state law).

of the Territories consists of beautiful islands in the Pacific or Atlantic Oceans, each Territory also has its own distinct culture, demography, economy, governance, history, and American origin story.³³ The diversity evidenced in the brief overviews that follow is critical to building a new path forward for improving the standings and conditions of the Territories.

A. AMERICAN SAMOA

American Samoa became a part of the United States through a treaty with Germany and Great Britain in 1900.³⁴ American Samoa is made of five main islands in the South Pacific.³⁵ It formally became an American Territory when Congress approved the Ratification Act of 1929.³⁶ The U.S. Navy governed American Samoa for its first fifty years under American rule before the governance powers were passed on to the Department of Interior in 1951.³⁷ In 1967, American Samoa established a system of self-governance over local matters with a territorial constitution.³⁸

When Congress granted citizenship to the people of all of the other Territories, it did not confer citizenship to the people of American Samoa.³⁹ American Samoans are non-citizen nationals of the United States.⁴⁰ The American passports of American Samoans explicitly state: “THE BEARER IS A UNITED STATES

33. See *Developments in the Law*, *supra* note 7 (“The territories all have unique histories and political perspectives, and their legal relationships with the United States vary accordingly.”).

34. See *Tuaua v. United States*, 951 F. Supp. 2d 88, 90 (D.D.C. 2013), *aff’d*, 788 F.3d 300 (D.C. Cir. 2015).

35. LEIBOWITZ, *supra* note 27, at 403 n.5.

36. See 48 U.S.C. § 1661 (1929).

37. *Tuaua*, 951 F. Supp. 2d at 90.

38. See AM. SAMOA CONST. (1967).

39. See 8 U.S.C. § 1402 (1952); Organic Act of Guam, Pub. L. No. 81-630, 64 Stat. 384 (1950); Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); 8 U.S.C. § 1408; *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015).

40. See 8 U.S.C. § 1408(1) (1988) (stating that a national is a “person born in an outlying possession of the United States . . .”); 8 U.S.C. § 1101(M)(29) (2014) (defining the term “outlying possessions of the United States” to mean American Samoa); see also *Tuaua*, 788 F.3d at 300, *cert. denied*, 136 S. Ct. 2461 (2016) (affirming that the Citizenship Clause of the Fourteenth Amendment “did not guarantee birthright citizenship to persons born in the American Samoa”).

NATIONAL AND NOT A UNITED STATES CITIZEN.”⁴¹ As a result of this second-class designation, American Samoans possess some, but not all, of the rights and privileges that accompany citizenship.⁴² They are ineligible for many federal and State government jobs, benefits, and privileges that are afforded only to citizens of the United States.⁴³ Furthermore, because of their anomalous status as nationals and not citizens, American Samoans are often left in legal and bureaucratic purgatories because state and federal law often bifurcates people into citizens and non-citizens.⁴⁴

American Samoa is represented in the federal government by a locally elected, non-voting delegate in the House of Representatives.⁴⁵ The delegate possesses floor-speaking and committee-voting privileges, but not voting rights on final legislation.⁴⁶ American Samoa has no representation of any sort in the U.S.

41. Michael Levenson, *American Samoans Should Be Granted U.S. Citizenship*, *Judge Rules*, N.Y. TIMES (Dec. 13, 2019), <https://www.nytimes.com/2019/12/13/us/american-samoa-us-citizenship.html> [https://perma.cc/4E4P-MGN6].

42. Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673, 1678 (2017).

43. See *id.* at 1676 (“[American nationals] are ineligible to vote in federal, state, and local elections. They are unable to serve on a jury and bear arms. Moreover, they are excluded from certain federal and state jobs.”); Christina Duffy Ponsa, *Are American Samoans American?*, N.Y. TIMES (June 8, 2016), <https://www.nytimes.com/2016/06/08/opinion/are-american-samoans-american.html> [https://perma.cc/6J4E-YT57] (discussing how American Samoans may be “ineligible for many Civil Service jobs, disadvantaged in sponsoring family members for immigration and denied the right to vote” due to their status as nationals and not citizens); Jayanth K. Krishnan, *The “Impractical and Anomalous” Consequences of Territorial Inequity*, 36 GEO. IMMIGR. L.J. 621, 647–49 (2021) (cataloguing various inequities faced by American Samoans due to their anomalous legal status as nationals).

44. See Krishnan, *supra* note 43, at 648 (“Because the category of noncitizen national is often not part of the lexicon of bureaucrats, nor part of the architecture around bureaucratic processes, those who are American Samoans find themselves in perilous legal situations through no fault of their own with some regularity.”).

45. *Member Profiles*, OFF. OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, http://clerk.house.gov/member_info/memberfaq.aspx [https://perma.cc/4WH4-N32M].

46. *Id.*

Senate, and its citizens cannot vote in presidential elections except in party primaries.⁴⁷ On many federal matters, it is ultimately supervised by the Department of Interior.⁴⁸

American Samoa has a population of about 50,000 residents.⁴⁹ Its economy is heavily reliant on tuna processing, canning, and exportation.⁵⁰

Its economy has been stagnant in recent years, even before the pandemic.⁵¹ Its prosperity is largely beyond its control because it is subject to the unpredictable whims of tuna supply, tuna demand, and international trade policies.⁵² During the COVID-19 pandemic, American Samoa shut itself off to the rest of the world to keep its citizens safe, but this closure has been devastating to its economy.⁵³

B. GUAM

Guam became a part of the United States in 1898 as a result of America's triumph in the Spanish-American War.⁵⁴ During

47. See Duggin & Collins, *supra* note 27 (discussing the limited voting powers of Americans in the Territories); *Frequently Asked Questions*, NAT'L ARCHIVES & RECORDS ADMIN.: THE ELECTORAL COLL. [hereinafter *Frequently Asked Questions*, NAT'L ARCHIVES], <https://www.archives.gov/federal-register/electoral-college/faq.html#territories> [https://perma.cc/Q4DF-BZ36] (last updated Apr. 13, 2020).

48. In 1951, by executive order, President Harry Truman transferred administration of American Samoa from the Secretary of the Navy to the Secretary of the Interior. See Exec. Order No. 10,264, 16 Fed. Reg. 6417 (June 29, 1951).

49. *Census Bureau Releases 2020 Census Population and Housing Unit Counts for American Samoa*, U.S. CENSUS BUREAU (Oct. 28, 2021), <https://www.census.gov/newsroom/press-releases/2021/2020-census-american-samoa.html> [https://perma.cc/Y2UU-P6N7].

50. *Id.*

51. Press Release, Bureau of Econ. Analysis, Gross Domestic Product for American Samoa Increases for the Second Year in a Row 5 (Aug. 8, 2016), https://www.bea.gov/system/files/2019-03/asgdp_080816.pdf [https://perma.cc/5TDZ-Q535] (reporting that the gross domestic product in millions of dollars was 644 in 2012, 639 in 2013, 638 in 2014, and 641 in 2015).

52. Liam Campling & Elizabeth Havice, *Industrial Development in an Island Economy: U.S. Trade Policy and Canned Tuna Production in American Samoa*, 2 ISLAND STUD. J. 209, 213–19 (2007).

53. Simon Romero, *A Place in the U.S. with No Covid-19? Look to American Samoa*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/05/06/us/coronavirus-american-samoa.html> [https://perma.cc/AYD7-24HX].

54. See Treaty of Peace of December 10, 1898, Spain–U.S., art. II, Dec. 10, 1898, 30 Stat. 1754, <https://www.doi.gov/oia/about/treaty1898> [https://perma.cc/2BVW-QEJZ].

World War II, Japan occupied Guam from 1941 to 1944, until its liberation by the United States.⁵⁵ The United States conferred citizenship to the people of Guam under the 1950 Organic Act of Guam.⁵⁶ The Act also established a local form of government with a unicameral legislature, while the later Guam Elective Governor Act made the governor directly elected by the people.⁵⁷

Since 1972, Guam has been represented in the federal government by a locally elected, non-voting delegate in the House of Representatives.⁵⁸ The delegate possesses floor-speaking and committee-voting privileges, but not voting rights on final legislation.⁵⁹ Guam has no representation of any sort in the U.S. Senate, and its citizens cannot vote in presidential elections except in party primaries.⁶⁰ On many federal matters, it is ultimately supervised by the Department of Interior.⁶¹

Guam has a population of about 150,000 people.⁶² Since World War II, Guam has served as a geopolitically important hub for the United States in Asia and the Pacific Rim, hosting numerous large military bases.⁶³ In addition to military activities, the economy of Guam is dependent on tourism from Asia—namely Japan, South Korea, and Taiwan.⁶⁴ Guam's economy has

55. See Wakako Higuchi, *The Japanisation Policy for the Chamorros of Guam, 1941–1944*, 36 J. PAC. HIST. 19, 19–20 (2001).

56. See Organic Act of Guam, Pub. L. No. 81-630, 64 Stat. 384, 384 (1950) (codified as amended at 48 U.S.C. §§ 1421–1425 (1950)).

57. See *id.* at 387; Guam Elective Governor Act, Pub. L. 90-497, 82 Stat. 842, 842 (1968).

58. 48 U.S.C. § 1711 (1972).

59. See *id.*; 48 U.S.C. § 1715 (1996).

60. See Duggin & Collins, *supra* note 27, at 95 & n.224 (discussing the limited voting powers of Americans in the Territories); *Frequently Asked Questions*, NAT'L ARCHIVES, *supra* note 47.

61. See ROBERT F. ROGERS, *DESTINY'S LANDFALL: A HISTORY OF GUAM* 226 (1995).

62. Press Release, U.S. Census Bureau, Census Bureau Releases 2020 Census Population and Housing Unit Counts for Guam (Oct. 28, 2021), <https://www.census.gov/newsroom/press-releases/2021/2020-census-guam.html> [https://perma.cc/MC6Z-TA54].

63. See ROBERT D. KAPLAN, *THE REVENGE OF GEOGRAPHY: WHAT THE MAP TELLS US ABOUT COMING CONFLICTS AND THE BATTLE AGAINST FATE* 224 (2012) (“Andersen Air Force Base on Guam is the most commanding platform in the world for the projection of U.S. hard power.”); Cheryl Pellerin, *Work: Guam is Strategic Hub to Asia-Pacific Rebalance*, U.S. DEP'T OF DEF. (Aug. 19, 2014), <https://www.defense.gov/News/Article/Article/603091/work-guam-is-strategic-hub-to-asia-pacific-rebalance> [https://perma.cc/6KJQ-9M6T].

64. *I Estoria: Guam Visitors Bureau 2016 Annual Report*, GUAM VISITORS

experienced little to no growth in recent years, even before the pandemic.⁶⁵ And the island has historically had greater joblessness than the rest of the country.⁶⁶ During the COVID-19 pandemic, Guam's tourism-driven economy was crippled, as the island closed itself off to foreign guests for more than a year.⁶⁷

C. NORTHERN MARIANA ISLANDS

The Commonwealth of the Northern Mariana Islands (CNMI) formally became a Territory through a covenant with the United States in 1976.⁶⁸ The covenant established the CNMI as a self-governing commonwealth on local matters and conferred American citizenship to the residents of the CNMI.⁶⁹

Despite becoming a Territory in 1976, the CNMI only received the right to federal representation in 2008.⁷⁰ The CNMI is represented by a locally elected, non-voting delegate in the House of Representatives.⁷¹ The delegate possesses floor speak-

BUREAU, 7–8 (2016), <https://www.guamvisitorsbureau.com/docs/reports/annual-reports/2018/2016-annual-report-20180412.pdf> [<https://perma.cc/3EZK-S6JC>].

65. See Press Release, Bureau of Econ. Analysis, Gross Domestic Product for Guam Increases in 2016, at 6 (Sept. 4, 2017), https://www.bea.gov/sites/default/files/2018-01/guamgdp_090417.pdf [<https://perma.cc/9FL9-HB7Q>] (reporting that the real gross domestic product in millions of chained dollars was 5,078 in 2013, 5,157 in 2014, 5,182 in 2015, and 5,200 in 2016).

66. Compare *Labor Force Statistics from the Current Population Survey*, BUREAU OF LAB. STAT. [hereinafter *Labor Force Statistics*], <https://data.bls.gov/timeseries/LNS14000000> [<https://perma.cc/4H8G-A4EE>] (describing the unemployment rate in the fifty United States and the District of Columbia), with *Unemployment, Total (% of Total Labor Force) (Modeled ILO Estimate) – Guam*, WORLD BANK (June 2022), <https://data.worldbank.org/indicator/SL.UEM.TOTL.ZS?locations=GU> [<https://perma.cc/SPZ3-LJH9>].

67. Anne Wen, *Residents Divided over Tourism Reopening*, PAC. DAILY NEWS (June 1, 2021), <https://www.guampdn.com/story/money/2021/06/01/residents-divided-over-tourism-reopening-during-covid-19-pandemic/7424560002> [<https://perma.cc/4JA9-S5J3>]; Romero, *supra* note 53.

68. See Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, 264; U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-553, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS: DHS SHOULD CONCLUDE NEGOTIATIONS AND FINALIZE REGULATIONS TO IMPLEMENT FEDERAL IMMIGRATION LAW 4 (2010) [hereinafter GAO REPORT ON CMNI], <https://www.gao.gov/assets/310/304152.pdf> [<https://perma.cc/HK5D-4SG8>].

69. See Act of Mar. 24, 90 Stat. at 265–66; GAO REPORT ON CMNI, *supra* note 68, at 4–5.

70. 48 U.S.C. § 1751 (2008).

71. 48 U.S.C. §§ 1751–1752 (2008).

ing and committee-voting privileges, but not voting rights on final legislation.⁷² Like the other Territories, the CNMI has no representation of any sort in the U.S. Senate, and its citizens cannot vote in presidential elections except in party primaries.⁷³ On many federal matters, it is ultimately supervised by the Department of Interior.⁷⁴

The CNMI has a population of about 47,000 residents.⁷⁵ Most of them live on the island of Saipan.⁷⁶ The CNMI's economy is driven largely by tourism. Prior to the COVID-19 pandemic, the economy of the CNMI experienced some growth with the construction and opening of the Imperial Pacific Resort, a large casino resort, on the island of Saipan in 2016.⁷⁷ In 2018, Super Typhoon Yutu, one of the strongest storms on record, devastated the CNMI.⁷⁸ Following the storm, much of the CNMI, including the

72. 48 U.S.C. §§ 1751, 1755 (2008).

73. See Duggin & Collins, *supra* note 27, at 95 & n.224; *Frequently Asked Questions*, NAT'L ARCHIVES, *supra* note 47.

74. See Act of Mar. 24, 90 Stat. at 264 (granting the United States "complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands"); Exec. Order No. 12,572, 51 Fed. Reg. 40, 401 (Nov. 7, 1986) (exercising his power under Pub. L. 94-241, President Ronald Reagan transferred supervisory authority to the Department of the Interior).

75. Press Release, U.S. Census Bureau, Census Bureau Releases 2020 Census Population and Housing Unit Counts for the Commonwealth of the Northern Mariana Islands (Oct. 28, 2021), <https://www.census.gov/newsroom/press-releases/2021/2020-census-cnmi.html> [<https://perma.cc/7YTU-2M7B>].

76. *The World Factbook: Northern Mariana Islands*, CIA (Sept. 22, 2022), <https://www.cia.gov/the-world-factbook/countries/northern-mariana-islands> [<https://perma.cc/4MTY-GALQ>].

77. See *CNMI GDP Increases in 2016*, BUREAU OF ECON. ANALYSIS (Oct. 15, 2017), <https://www.bea.gov/news/blog/2017-10-15/cnmi-gdp-increases-2016> [<https://perma.cc/4WX9-7HZX>]; *The World Factbook: Northern Mariana Islands*, *supra* note 76; Matthew Campbell, *A Chinese Casino Has Conquered a Piece of America*, BLOOMBERG BUSINESSWEEK (Feb. 15, 2018), <https://www.bloomberg.com/news/features/2018-02-15/a-chinese-company-has-conquered-a-piece-of-america> [<https://perma.cc/94C7-92UN>] (detailing negative effects of the Imperial Pacific Casino on the CNMI, such as money laundering, fraud, and hazardous working conditions).

78. See Jacey Fortin, "Catastrophic" Super Typhoon Yutu Slams into U.S. Commonwealth in the Pacific, N.Y. TIMES (Oct. 25, 2018), <https://www.nytimes.com/2018/10/24/us/super-typhoon-yutu-pacific-mariana.html> [<https://perma.cc/8BQT-LQ39>]; Brian Resnick, *Super Typhoon Yutu, One of the Strongest Storms Ever, Just Pulverized a U.S. Territory*, VOX (Oct. 25, 2018), <https://www.vox.com/energy-and-environment/2018/10/25/18022678/super-typhoon-yutu-northern-mariana-islands-saipan-tinian> [<https://perma.cc/AV63-V7BE>].

newly built casino resort, closed for an extended period of time.⁷⁹ Just as the Territory was rebuilding itself, the COVID-19 pandemic forced the CNMI to close itself off to much of the world.

D. PUERTO RICO

Like Guam, Puerto Rico became a part of the United States in 1898 as a result of American victory in the Spanish-American War.⁸⁰ Congress conferred American citizenship to the residents of Puerto Rico through the Jones-Shafroth Act in 1917.⁸¹ Following congressional authorization in 1950, Puerto Rico drafted a constitution that was subsequently approved by the people of Puerto Rico and Congress two years later in 1952.⁸² The constitution established Puerto Rico as a “[T]erritory of the United States with commonwealth status.”⁸³ As such, local matters in Puerto Rico are governed by the commonwealth.

In terms of the federal government, since 1950, a non-voting resident commissioner represents Puerto Rico in the House of Representatives.⁸⁴ Like delegates of the other Territories, the resident commissioner possesses floor speaking and committee-voting privileges, but no voting rights on final legislation.⁸⁵ Unlike the delegates of the other Territories who serve for two-year terms, the resident commissioner serves for four-year terms.⁸⁶

79. See Haidee Eugenio Gilbert, *Imperial Pacific International Shuts Down Saipan Casino, No Reopening Date Given*, PAC. DAILY NEWS (Nov. 16, 2018), <https://www.guampdn.com/story/news/2018/11/16/saipan-casino-shuts-down-temporarily-no-reopening-date-set/2021873002> [<https://perma.cc/95NC-N78F>].

80. Treaty of Peace, *supra* note 54 (“Spain cedes to the United States the Island of Porto [sic] Rico, and other islands now under Spanish sovereignty in the West Indies, and the Island of Guam in the Marianas or Ladrões.”).

81. Jones–Shafroth Act, Pub. L. No. 64-368, § 5, 39 Stat. 951, 953 (1917).

82. See Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319 (1950); Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327, 327–28 (1952).

83. *Today in History—October 18*, LIBR. OF CONG., <https://www.loc.gov/item/today-in-history/october-18> [<https://perma.cc/LU2R-FGWD>]; see *Resolution 23: Final Declarations of the Constitutional Convention of Puerto Rico* (Feb. 4, 1952), reprinted in DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 166 (Off. of the Commonwealth of P.R. ed., 2d ed. 1964); see also JORGE DUANY, PUERTO RICO: WHAT EVERYONE NEEDS TO KNOW 74 (2017) (“The Commonwealth formula did not substantially alter [Puerto Rico’s] legal, political, and economic dependence on the United States.”).

84. 48 U.S.C. § 891 (1934).

85. See *id.*

86. Compare *id.*, with 48 U.S.C. § 1712(a) (1998), and 48 U.S.C. § 1752(a)(2) (2008).

And just like the other Territories, Puerto Rico has no representation of any sort in the U.S. Senate, and its citizens cannot vote in presidential elections except in party primaries.⁸⁷

Puerto Rico has a population of about 3.3 million people as of the latest official census figures from 2020, a population larger than that of twenty-one states.⁸⁸ Economically, Puerto Rico has been in dire straits for years as a result of natural and human-made disasters forcing it to declare bankruptcy, the first time that an American State or Territory has ever done so.⁸⁹ Heavy debt, high rates of unemployment, and poverty afflict the Territory.⁹⁰ Puerto Rico has been struggling under the crucible of years of mismanagement and a punishing debt load exceeding \$70 billion.⁹¹ In recent years, the Territory has experienced double-digit unemployment despite a national economic boom.⁹² A 2015 survey estimated that 46% of Puerto Rico's population lives below the federal poverty level, compared to 14.7% for the rest of the nation.⁹³ More alarmingly, 58.3% of children under eighteen live in poverty, and 63.7% of children under five live in poverty—both are more than double their respective national rates.⁹⁴ Two category five hurricanes, Irma and Maria, devastated an already

87. See Duggin & Collins, *supra* note 27, at 95 & n.224.

88. America Counts Staff, *supra* note 6; *2020 Population and Housing State Data*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/visualizations/interactive/2020-population-and-housing-state-data.html> [https://perma.cc/4L4P-9EVT].

89. See Patricia Mazzei & Mary Williams Walsh, *Hurricane-Torn Puerto Rico Says It Can't Pay Any of Its Debts for 5 Years*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/us/puerto-rico-budget-hurricanes.html> [https://perma.cc/4NUJ-PGPM]; Mary Williams Walsh, *Puerto Rico Declares a Form of Bankruptcy*, N.Y. TIMES (May 3, 2017), <https://www.nytimes.com/2017/05/03/business/dealbook/puerto-rico-debt.html> [https://perma.cc/V2XX-7D92].

90. Mazzei & Williams Walsh, *supra* note 89.

91. See Mark DeCambre, *Puerto Rico Has More than \$70 Billion in Debt Because of This*, MARKETWATCH (Oct. 7, 2017), <https://www.marketwatch.com/story/why-does-puerto-rico-have-more-than-70-billion-in-debt-2017-10-04> [https://perma.cc/XF7J-SSKV]; *The World Factbook: Puerto Rico*, CIA (Sept. 22, 2022), <https://www.cia.gov/the-world-factbook/countries/puerto-rico> [https://perma.cc/6PMD-AQM3].

92. *Compare Labor Force Statistics*, *supra* note 66, with *Local Area Unemployment Statistics*, BUREAU OF LAB. STAT. (Oct. 12, 2022), <https://data.bls.gov/timeseries/LASST720000000000004> [https://perma.cc/233E-DKPK].

93. CONG. TASK FORCE ON ECON. GROWTH IN P.R., 114TH CONG., REP. TO HOUSE AND SENATE 10 (2016).

94. *Id.*

struggling island in 2017.⁹⁵ And just as Puerto Rico was rebuilding itself back from those storms, the COVID-19 pandemic struck and exacerbated these cruel and fragile realities even more.⁹⁶ Emblematic of the harsh and frail realities of Puerto Rico, in 2022, Hurricane Fiona, a category one storm, left most of the island without electricity for days on end, despite some of the highest power rates nationally, and five years after hurricanes Irma and Maria devastated the island's power grid.⁹⁷

E. U.S. VIRGIN ISLANDS

The U.S. Virgin Islands became a part of the United States when it was purchased from Denmark for \$25 million in 1917.⁹⁸ Congress conferred American citizenship to the people of the U.S. Virgin Islands in 1927.⁹⁹ The Organic Act of the Virgin Islands of 1936 divided the Territory into the two municipalities of Saint Croix and Saint Thomas, each with its own local government.¹⁰⁰ Nearly two decades later, the Revised Organic Act of 1954 created a unified government with a single legislature.¹⁰¹

In terms of the federal government, the U.S. Virgin Islands has been represented by a locally elected, non-voting delegate in

95. See Mazzei & Williams Walsh, *supra* note 89 (“The devastation wrought by Hurricane Maria has made Puerto Rico’s already dire financial situation even worse: The island’s leaders acknowledged late Wednesday that they will not be able to pay down any portion of their more than \$70 billion debt for the next five years because of the damage.”); Editorial Board, *The Spiraling Diaspora from Puerto Rico*, N.Y. TIMES (Dec. 17, 2017), <https://www.nytimes.com/2017/12/17/opinion/puerto-rico-diaspora.html> [https://perma.cc/SRW8-PPEA].

96. See, e.g., Lin-Manuel Miranda & Luis A. Miranda, Jr., Opinion, *Lin-Manuel and Luis Miranda: How to Get Puerto Rico Help Now*, WASH. POST (Sept. 20, 2022), <https://www.washingtonpost.com/opinions/2022/09/20/lin-manuel-luis-miranda-puerto-rico-hurricane-help> [https://perma.cc/8YZJ-QPE6] (“Maria was followed in quick succession by multiple earthquakes in 2019 that slowed rebuilding and, of course, the covid-19 pandemic in 2020.”).

97. See Laura N. Perez Sanchez, *Puerto Ricans Fear Extended Blackout After Hurricane Fiona*, N.Y. TIMES (Dec. 17, 2017), <https://www.nytimes.com/2022/09/24/us/puerto-rico-power-outages.html>.

98. Off. of Insular Affs., *U.S. Virgin Islands*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/oia/islands/virgin-islands> [https://perma.cc/6V2F-FDZ3].

99. See 8 U.S.C. § 1406 (1952) (conferring citizenship in 1927).

100. See Organic Act of the Virgin Islands of the United States of 1936, Pub. L. No. 74-749, § 2, 49 Stat. 1807, 1807 (1936).

101. Revised Organic Act of the Virgin Islands of 1954, Pub. L. No. 83-517, § 5(a), 68 Stat. 497, 498 (1954).

the House of Representatives since 1972.¹⁰² The delegate possesses floor speaking and committee-voting privileges, but not voting rights on final legislation.¹⁰³ Like the other Territories, the U.S. Virgin Islands has no representation of any sort in the U.S. Senate, and its citizens cannot vote in presidential elections except in party primaries.¹⁰⁴ On many federal matters, it is ultimately supervised by the Department of Interior.¹⁰⁵

The U.S. Virgin Islands has an estimated population of about 87,000 citizens.¹⁰⁶ Its economy is highly dependent on tourism, which accounts for nearly half of all economic activity on the Territory.¹⁰⁷ Even before the pandemic, the economy of the U.S. Virgin Islands had been sluggish.¹⁰⁸ Over the course of just three weeks in 2017, the Territory was devastated with two category five hurricanes, Irma and Maria.¹⁰⁹ While Puerto Rico received much national attention and resources from those two

102. 48 U.S.C. § 1711 (1972).

103. *Id.*; 48 U.S.C. § 1715 (1996).

104. See Duggin & Collins, *supra* note 27, at 95 & n.224 (discussing the limited voting powers of Americans in the Territories); *Frequently Asked Questions*, NAT'L ARCHIVES, *supra* note 47.

105. See Act of Mar. 3, 1917, Pub. L. No. 64-389, 39 Stat. 1132, 1132 (vesting in a governor and in persons appointed by the President “all military, civil, and judicial powers necessary to govern the West Indian Islands acquired from Denmark”); Exec. Order No. 5566 (Feb. 27, 1931), in 2 PROCLAMATIONS AND EXECUTIVE ORDERS: HERBERT HOOVER—MARCH 4, 1929 TO MARCH 4, 1933, at 792–93 (1974) (exercising his power under Pub. L. No. 64-389, President Herbert Hoover transferred supervisory authority to the Department of the Interior); Off. of Insular Affs., *supra* note 98.

106. Press Release, U.S. Census Bureau, Census Bureau Releases 2020 Census Population and Housing Unit Counts for the U.S. Virgin Islands (Oct. 28, 2021), <https://www.census.gov/newsroom/press-releases/2021/2020-census-us-virgin-islands.html> [<https://perma.cc/Z2H6-2HS7>].

107. *The World Factbook: Virgin Islands*, CIA (Sept. 22, 2022), <https://www.cia.gov/the-world-factbook/countries/virgin-islands> [<https://perma.cc/8JPZ-VX9N>].

108. Press Release, Bureau of Econ. Analysis, Gross Domestic Product for U.S. Virgin Islands (USVI), 2016 (Dec. 1, 2017), <https://www.bea.gov/news/2017/gross-domestic-product-us-virgin-islands-usvi-2016> [<https://perma.cc/S3LG-HWQQ>]; Press Release, Bureau of Econ. Analysis, Gross Domestic Product for the U.S. Virgin Islands Increases in 2015 (Dec. 14, 2016), https://www.bea.gov/sites/default/files/2018-02/vigdp_121416.pdf [<https://perma.cc/U9WS-GD7D>].

109. See Mireya Navarro, *Smaller Crowds, Quieter Shores as St. John Slowly Recovers*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/travel/st-john-hurricane-recovery.html> [<https://perma.cc/2AUC-DJ6T>].

hurricanes, the devastation in the U.S. Virgin Islands was similarly catastrophic but received much less attention and resources.¹¹⁰ And just as it was rebuilding towards a sense of normalcy, the COVID-19 pandemic hit, and closed the island off to its lifeline of tourism.¹¹¹

* * *

The Territories are a richly diverse part of America despite often being referred to as an undifferentiated collective, primarily in opposition to states. They have distinct histories, populations, economies, and potential. The Table below outlines the more than half a millennium duration and breadth of American control over these diverse Territories and their people.

110. Pérez-Peña, *supra* note 17.

111. See Alison Fox, *U.S. Virgin Islands Ending All COVID Restrictions for American Travelers—What to Know*, TRAVEL + LEISURE (May 27, 2022), <https://www.travelandleisure.com/travel-news/us-virgin-islands-end-covid-restrictions-for-american-travelers> [<https://perma.cc/YA5U-55FX>] (showing that COVID-related travel restrictions for domestic travelers were in effect until May 31, 2022).

Table 1: Years of American Control and Recent Population by Territory

Territory	Initial Year of American Rule ¹¹²	Population
Puerto Rico	1898	3,284,874 ¹¹³
Guam	1898	153,836 ¹¹⁴
American Samoa	1900	49,710 ¹¹⁵
U.S. Virgin Islands	1917	87,146 ¹¹⁶
CNMI	1975	47,329 ¹¹⁷
Total	527 Years Under American Rule (As of 2023)¹¹⁸	3,622,895 People Under American Rule

II. SHARED STRUGGLES

Despite their diversity, the Territories share significant struggles. Specifically, they share the common interlocking harms of political disenfranchisement, economic destitution, racial discrimination, and climate change. Together, these afflictions shackle the people of the Territories in ways large and small.

A. POLITICAL DISENFRANCHISEMENT

The people of the Territories are politically disenfranchised and lack any meaningful political power at the federal level despite being Americans.¹¹⁹ In contravention of core democratic

112. All data listed in this column is derived from the CIA's World Factbook. See *The World Factbook*, CIA (Sept. 29, 2022), <https://www.cia.gov/the-world-factbook> [<https://perma.cc/K3ZH-2BT2>]; Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, 264.

113. America Counts Staff, *supra* note 6.

114. Census Bureau Releases 2020 Census Population and Housing Unit Counts for Guam, *supra* note 62.

115. Census Bureau Releases 2020 Census Population and Housing Unit Counts for American Samoa, *supra* note 49.

116. Census Bureau Releases 2020 Census Population and Housing Unit Counts for the U.S. Virgin Islands, *supra* note 106.

117. Census Bureau Releases 2020 Census Population and Housing Unit Counts for the Commonwealth of the Northern Mariana Islands, *supra* note 75.

118. This calculation is current as of the year 2023.

119. See *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 595 (1976) (stating that Puerto Rico "occupies a unique status" in

and American constitutional values, they lack any real representation in the federal government despite paying taxes and sacrificing life and limb to defend the country.¹²⁰ The Territories do not have a vote in either chamber of Congress or an electoral vote for the President because the Constitution limits such voting rights to “the People of the several States.”¹²¹ Instead, the Territorial Clause of the Constitution subjects the Territories to the broad plenary powers of Congress, which Congress has never used to enfranchise the people of the Territories.¹²² Due to their lack of political power and access to the political process, the Territories are arguably the definitive “discrete and insular minorities” needing the protection of “more searching judicial inquiry,” as pinpointed in the now famous footnote four of *U.S. v. Carolene Products*, which has come to represent a touchstone of judicial protection of individual rights.¹²³

Because of the lack of political power, the federal government often imposes laws and regulations adverse to the interests

the United States); *Developments in the Law*, *supra* note 7, at 1704 (“The legal relationship between the United States territories and the federal government is contradictory and complex.”).

120. See Guy-Uriel Charles & Luis Fuentes-Rohwer, *No Voice, No Exit, But Loyalty? Puerto Rico and Constitutional Obligation*, 26 MICH. J. RACE & L. 133, 149 (2021) (“Unquestionably, the present constitutional and political status of Puerto Rico is indefensible on grounds of democratic theory and incompatible with American constitutional values.”).

121. U.S. CONST. art. I, § 2, cl. 1; *id.* art. II, § 1, cl. 2 (“Each state shall appoint”); See *Igartúa v. United States*, 626 F.3d 592, 594 (1st Cir. 2010) (interpreting art. I, § 2, cl. 1 to hold that “[s]ince Puerto Rico is not a state, and cannot be treated as a state under the Constitution for these purposes, its citizens do not have a constitutional right to vote for members of the House of Representatives”); *Igartúa De La Rosa v. United States*, 32 F.3d 8, 9 (1st Cir. 1994) (holding that “only citizens residing in states can vote for electors and thereby indirectly for the President”).

122. See *Report by the President’s Task Force on Puerto Rico’s Status*, OBAMA WHITE HOUSE 26 (2011), https://obamawhitehouse.archives.gov/sites/default/files/uploads/Puerto_Rico_Task_Force_Report.pdf [https://perma.cc/ZYF4-XPTH] (stating that Puerto Rico as an American Territory is “subject to the Territory Clause of the U.S. Constitution”); Off. of Legal Couns., U.S. Dep’t of Just., Opinion Letter on Mutual Consent Provisions in the Proposed Guam Commonwealth Act 2–5 (July 28, 1994), <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/10/1994-07-28-guam-mutual-consent.pdf> [https://perma.cc/X4MK-DZE9] (opining that Congress has plenary power over the Territories until they become States “or cease[] to be under United States sovereignty”).

123. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see, e.g., David Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251, 1251–54 (discussing the jurisprudential significance of the footnote).

of the Territories without their input.¹²⁴ These adverse federal actions and inactions touch a wide range of important issues with serious local impact including government benefits, taxes, and local governance.

With regards to government benefits, the American citizens residing in the Territories often receive lower allocations than those residing in the States.¹²⁵ For instance, one study on Medicaid conducted by the Government Accountability Office found that States “averaged \$565 [per capita] compared to between \$33 and \$65” for the Territories.¹²⁶ The poorest States for Medicaid allocation received “more than 12 times the amount” appropriated to any Territory in some recent years.¹²⁷ Furthermore, in many cases, Americans are denied certain federal benefits simply because of their residence in a Territory as opposed to a State. For example, in 2018, federal lawsuits were filed against the U.S. Social Security Administration by a woman who was denied Social Security Supplemental Income disability benefits by virtue of her residence in Guam, while her twin sister residing in Pennsylvania received the federal benefit.¹²⁸ This illogical and unjust result continues to persist in large part because Territories lack any real political power at the federal level to change it.

With regards to taxes, while the Territories have no voice in the drafting or implementation of federal tax laws, they are nevertheless subject to them despite the quintessential American principle of “no taxation without representation.”¹²⁹ In fact, federal law requires the Territories of Guam, CNMI, and the U.S.

124. See *Developments in the Law*, *supra* note 7, at 1624 (“Congress continues to legislate in ways that subject, disadvantage, or quite frankly forget the U.S. territories.”); Juan R. Torruella, *Ruling America’s Colonies: The Insular Cases*, 32 YALE L. & POL’Y REV. 57, 82 (2013) (“Supreme legislative power therefore lies solely in an institution that enacts laws without any effective participation or consent from the U.S. citizens who are obligated to comply with them . . . [W]hat exists is government without consent of the governed.”).

125. GOV’T ACCOUNTABILITY OFFICE, GAO-06-75, U.S. INSULAR AREAS: MULTIPLE FACTORS AFFECT FEDERAL HEALTH CARE FUNDING 29–31 (2005), <https://www.gao.gov/assets/250/248141.pdf> [<https://perma.cc/9GYW-FTWU>].

126. *Id.* at 29.

127. *Id.*

128. See Complaint, Schaller v. U.S. Soc. Sec. Admin., No. 1:18-cv-00044 (D. Guam Dec. 6, 2018); Complaint, Schaller v. U.S. Soc. Sec. Admin., No. 2:18-cv-01625 (W.D. Pa. Dec. 6, 2018); Daily Post Staff, *Twins Sue Social Security Over Denial of Benefits*, GUAM DAILY POST (Dec. 8, 2018), https://www.postguam.com/news/local/twins-sue-social-security-over-denial-of-benefits/article_25b81f06-f9b4-11e8-875d-37b6dc2dfdca.html [<https://perma.cc/33PD-YMNJ>].

129. ERIC FONER, THE STORY OF AMERICAN FREEDOM 13 (1999).

Virgin Islands to have local tax laws that mirror those of the federal Internal Revenue Code.¹³⁰ This means that any changes in federal tax law would apply to these Territories with serious consequences, and without their consent or input.

For example, as a result of the mirroring tax mandate, Guam, CNMI, and the U.S. Virgin Islands lost significant revenue streams because of changes to the tax code from the Trump Administration's Tax Cuts and Jobs Act of 2017, changes that were negotiated and drafted entirely without their input.¹³¹ Because tax regulation motivates so many investment and economic decisions, all of the Territories, even those not subject to the federal mirroring mandate—Puerto Rico and American Samoa—are frequently adversely impacted by the imposition of federal tax regulation without any meaningful representation.¹³² Because investors often consider taxes to be a key factor in capital allocation decisions, the lack of a clear, stable, and fully self-controlled tax code can make it difficult for the Territories to incentivize and attract significant long-term investments.¹³³

Beyond federal benefits and taxes, the lack of political franchise at the federal level also impacts the governance of local matters in the Territories. Because so much law and regulation come from the vast federal administrative state, the Territories really suffer from not having a vote for the presidency and in the Senate, the two bodies that appoint and confirm administrative agency leaders.¹³⁴ As such, thousands of agency rules regulating all matters of daily life and commerce in each Territory are imposed upon them annually without any political vote over the leaders of the various agencies.¹³⁵

130. LOWRY, *supra* note 27, at 2.

131. See Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

132. LOWRY, *supra* note 27, at 15–18.

133. See, e.g., Lily L. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orzag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 42–43 (2006) (denoting various ways tax policy is used to incentivize investments and other socially beneficial actions).

134. Lin, *supra* note 28, at 1266.

135. See, e.g., Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 752 (2007) (highlighting the large number of rules and regulations promulgated by administrative agencies); Tom C.W. Lin, *CEOs and Presidents*, 47 U.C. DAVIS L. REV. 1351, 1375–76 (2014) (discussing the expansion of presidential powers with the growth of the administrative state).

Exacerbating matters, the lack of political franchise on the national level can leave the Territories vulnerable to commandeering by the federal government in ways that could not and would not happen to a State. Notably, in 2016, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), which established a special board to oversee the island's debt restructuring and economic recovery.¹³⁶ The PROMESA oversight board possesses broad, unfettered authority that supersedes the powers of Puerto Rico's legislature and governor.¹³⁷ The board has *in its sole discretion* the power to approve the local budget, reject any fiscal plans, order hiring freezes, demand any information it wants from the government of Puerto Rico, and void any local law that it deems objectionable.¹³⁸ The President of the United States appoints the seven members of the oversight board with recommendations provided by the House of Representatives and the U.S. Senate, without any vote from the people of Puerto Rico.¹³⁹ The Governor of Puerto Rico sits on the board as an ex officio, non-voting member.¹⁴⁰ The net effect is that since 2016, Puerto Rico has been governed in significant ways by a super-governmental board appointed by federal officials that it had no vote or voice in electing to their respective offices.

In sum, the Territories share the struggles of political disenfranchisement that comes with their second-class, inchoate citizenship status. The lack of real political power has rendered the Territories akin to colonies of a bygone imperialist era.¹⁴¹ In fact, the United Nations Special Committee on Decolonization actually lists three of the Territories—American Samoa, Guam,

136. Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified in scattered sections of 15, 29, and 48 of the U.S. Code).

137. See *Developments in the Law*, *supra* note 7, at 1668 (“With its near-total power over the island’s purse strings, the Board can influence nearly any area of policymaking in Puerto Rico.”).

138. Puerto Rico Oversight, Management, and Economic Stability Act, 130 Stat. at 552–69.

139. *Id.* at 555.

140. *Id.*

141. See, e.g., Sasha Davis, *The U.S. Military Base Network and Contemporary Colonialism: Power Projection, Resistance and the Quest for Operational Unilateralism*, 30 POL. GEOGRAPHY 215, 216–22 (2011); *Developments in the Law*, *supra* note 7, at 1624 (“[T]he U.S. territories remain bound to their essentially colonial status.”).

and the U.S. Virgin Islands—as three of the last seventeen remaining non-self-governing colonies in the world.¹⁴²

B. ECONOMIC DESTITUTION

The Territories all share serious economic struggles, despite significant and robust growth in the national economy for more than a decade.¹⁴³ Their neocolonial status renders them unable to fully chart or navigate their own economies. Instead, the economies of the Territories are often dependent on unstable disbursements from the federal government and debt from the private markets.¹⁴⁴

Over the course of the last ten-plus years from about 2009 to 2022, the Territories have each experienced declines or little growth in their local economies, despite a period of record-breaking cumulative growth for the American economy.¹⁴⁵ During this period of national economic boom, the Territories not only missed much of the gains, but suffered from some of the highest

142. *Non-Self-Governing Territories*, U.N. & DECOLONIZATION (May 10, 2022), <https://www.un.org/dppa/decolonization/en/nsgt> [<https://perma.cc/N3NY-BFWD>].

143. See, e.g., Hammond, *supra* note 25, at 1661 (“While the territories are a heterogeneous group across several dimensions, they do share a certain level of economic deprivation compared to the fifty states.”); Christina D. Hovland-Battikha & Erin M. Ludlow, *Territorial Economic Accounts for American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands*, 98 SURV. CURRENT BUS. 1, 2–3 (2018).

144. D. ANDREW AUSTIN, CONG. RSCH. SERV., R46788, PUERTO RICO’S PUBLIC DEBTS: ACCUMULATION AND RESTRUCTURING 3–10 (2022).

145. See, e.g., GUAM ECON. DEV. AUTH., BUREAU OF STATISTICS & PLANS & UNIV. OF GUAM-PACIFIC CTR. FOR ECON. INITIATIVES, GUAM COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGY 14 (2011) (noting “Guam’s slow economic growth between 2000 and 2010”); *American Samoa GDP Turns Down in 2016*, BUREAU OF ECON. ANALYSIS (Aug. 14, 2017), <https://www.bea.gov/news/blog/2017-08-14/american-samoa-gdp-turns-down-2016> [<https://perma.cc/CMN9-XPNY>]; *Puerto Rico GDP Annual Growth Rate*, TRADING ECON., <https://tradingeconomics.com/puerto-rico/gdp-growth-annual> [<https://perma.cc/W4SM-86F9>]; John Cassidy, *Obama’s Economic Record: An Assessment*, NEW YORKER (Jan. 9, 2017), <https://www.newyorker.com/news/john-cassidy/obamas-economic-record-an-assessment> [<https://perma.cc/V82D-GYG3>] (discussing national economic growth); Pedro Nicolaci da Costa, *The U.S. Economy is on the Verge of Breaking 2 Records—But Only One is Good News*, BUS. INSIDER (July 19, 2017), <http://www.businessinsider.com/us-economic-recovery-one-of-longest-on-record-but-also-one-of-weakest-2017-7> [<https://perma.cc/FV9Z-53W6>] (highlighting the long period of economic growth); Hovland-Battikha & Ludlow, *supra* note 143, at 2 (charting GDP declines in the Territories).

rates of unemployment, the lowest standards of living, and the lowest per capita income of all U.S. citizens.¹⁴⁶

Without the full array of political powers and influence possessed by States to chart their own paths, the Territories have had to rely on sporadic subsidies from the federal government and costly debt from the private markets. Each of the Territories depends heavily on federal grants and subsidies for annual budgets and operations.¹⁴⁷ Federal funds account for twenty to forty percent of each Territory's annual revenues.¹⁴⁸ While significant, these funds from Washington are not always reliable, and often come with conditions that are not drafted in the best interest of the Territories.¹⁴⁹ Furthermore, in addition to federal funds, the Territories must rely on attractive but dangerously debilitating debt from the private markets to help fund their economy and operations.¹⁵⁰ According to one recent Government Accountability Office study, each of the Territories is burdened

146. See, e.g., U.S. V.I. BUREAU OF ECON. RSCH., COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGY FOR THE UNITED STATES VIRGIN ISLANDS 2009, 19–20 (2009); *PY 2013 Employment Conditions in the United States Virgin Islands*, U.S. V.I. DEP'T OF LAB. 3 (2013), <https://www.doleta.gov/performance/results/annualreports/PY2012/VI%20Economic%20Analysis.pdf> [<https://perma.cc/6E8D-AC8M>]; *The World Factbook: Guam*, CIA (Sept. 6, 2022), <https://www.cia.gov/the-world-factbook/countries/guam> [<https://perma.cc/XNE4-N7XA>]; MALAVET, *supra* note 27, at 2 (“Puerto Ricans living in Puerto Rico . . . are the poorest of all U.S. citizens, with a per capita income that is less than one-third the average for the fifty states.”).

147. See generally *FY 2016 Report on Federal Financial Assistance to the U.S. Pacific and Caribbean Islands*, U.S. DEP'T OF THE INTERIOR (2017), <https://www.doi.gov/sites/doi.gov/files/uploads/fy16-report-on-federal-financial-assistance-to-the-insular-areas.pdf> [<https://perma.cc/B4TM-78CR>].

148. See *The World Factbook: Guam*, CIA (Sept. 6, 2022), <https://www.cia.gov/the-world-factbook/countries/guam> [<https://perma.cc/XNE4-N7XA>] (noting that forty percent of Guam's GDP is subsidized by the federal government); *Northern Mariana Islands Economy Profile*, INDEX MUNDI (Sept. 18, 2021), https://www.indexmundi.com/northern_mariana_islands/economy_profile.html [<https://perma.cc/6USU-QEZ3>] (“In 2016, federal grants . . . made up 26% of the CNMI government's total revenues.”); *The World Factbook: Virgin Islands*, CIA (Sept. 22, 2022), <https://www.cia.gov/the-world-factbook/countries/virgin-islands> [<https://perma.cc/8JPZ-VX9N>] (“Federal programs and grants . . . contributed 32.2% of the territory's total revenues.”).

149. See generally *FY 2016 Report*, *supra* note 147 (showing budget expenditures for the Territories).

150. AUSTIN, *supra* note 144, at 3–10.

with outsized debt obligations that shackle their economic potential.¹⁵¹

The economic destitution in the Territories, with little political power for change and self-determination, has created a vicious and tragic spiral of decline. Promising young people and talented individuals often migrate from their homelands in the Territories for higher education or better employment and never return.¹⁵² This talent drain and mass outbound migration, in turn, dissuades businesses from making meaningful, long-term investments, which then leads to more economic decline.¹⁵³

Puerto Rico is emblematic of this vicious and tragic economic chain of decline.¹⁵⁴ In 1996, Congress repealed a two-decade-old tax incentive encapsulated in § 936 of the Internal Revenue Code

151. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-160, U.S. TERRITORIES: PUBLIC DEBT OUTLOOK 1 (2017).

152. See, e.g., GUAM ECON. DEV. AUTH., *supra* note 145, at 14 ("It is suspected that there was a high out migration of Guam residents as they sought greater economic opportunities in Hawaii or the continental United States."); Alexia Fernández Campbell, *Calls to Puerto Rico's Suicide Hotline Have Skyrocketed Since Hurricane Maria*, VOX (Feb. 21, 2018), <https://www.vox.com/policy-and-politics/2018/2/21/17032168/puerto-rico-suicide-hotline-hurricane-maria> [<https://perma.cc/QB2L-3LGR>] (describing the exodus after Hurricane Maria); D'Vera Cohn, Eileen Patten & Mark Hugo Lopez, *Puerto Rican Population Declines on Island, Grows on U.S. Mainland*, PEW RSCH. CTR. (Aug. 11, 2014), <http://www.pewhispanic.org/2014/08/11/puerto-rican-population-declines-on-island-grows-on-u-s-mainland> [<https://perma.cc/XHT8-523S>].

153. See, e.g., Frances Robles, *Puerto Ricans Face "Sacrifice Everywhere" on an Insolvent Island*, N.Y. TIMES (May 6, 2017), <https://www.nytimes.com/2017/05/06/us/puerto-rico-insolvency-business-owners-anxiety.html> [<https://perma.cc/H3CJ-ADRR>]; Jaison R. Abel & Richard Deitz, *The Causes and Consequences of Puerto Rico's Declining Population*, 20 CURRENT ISSUES ECON. & FIN. 1 (2014); Faye F. Untalan, *CHamoru Migration to the US*, GUAMPEDIA (June 19, 2021), <http://www.guampedia.com/chamorro-migration-to-the-u-s> [<https://perma.cc/RX64-JE2G>]; Editorial Board, *supra* note 95 (describing the exodus after Hurricane Maria); Stephanie Strom & Lynnley Browning, *Tax Break Bringing Businesses, and Fraud, to the Virgin Islands*, N.Y. TIMES (Sept. 18, 2004), <http://www.nytimes.com/2004/09/18/us/tax-break-bringing-businesses-and-fraud-to-the-virgin-islands.html> [<https://perma.cc/GAU2-6XMN>].

154. See Lara Merling, Kevin Cashman, Jake Johnston & Mark Weisbrot, *Life After Debt in Puerto Rico: How Many More Lost Decades*, CTR. FOR ECON. & POL'Y RSCH. 2–5 (2017), <https://cepr.net/images/stories/reports/puerto-rico-2017-07.pdf> [<https://perma.cc/D8Q5-62QG>] (suggesting that Puerto Rico is in a socioeconomic "downward spiral"); Mary Williams Walsh, *Puerto Rico's Governor Warns of Fiscal "Death Spiral"*, N.Y. TIMES (Oct. 14, 2016), <https://www.nytimes.com/2016/10/15/business/dealbook/puerto-rico-financial-oversight-board.html> [<https://perma.cc/DTZ8-HDF7>].

that had attracted many businesses to Puerto Rico by categorizing certain income in the Territory as tax-free.¹⁵⁵ The section's repeal led to a mass exit of many large businesses and talented labor in the ensuing decade, creating a prolonged recession.¹⁵⁶ Because Puerto Rico does not have a vote in the federal government, it had no real power to influence this calamitous change in the tax code.

This sudden, shocking decline in business tax revenues meant that Puerto Rico would have to rely on federal funds and private debt to support itself. The unreliable nature of federal funds to the Territories meant that Puerto Rico had to engage in massive borrowing at expensive rates to sustain its public services and operations.¹⁵⁷ This massive borrowing was encouraged in part by Congress, which made the municipal debt of Puerto Rico triple tax-free—free from local, state, and federal taxes for any of its holders.¹⁵⁸ As such, even before the horrific hurricanes in 2017, Puerto Rico was already an economic disaster area.¹⁵⁹ Poverty rates on the island were multiples of the national rate for adults and children.¹⁶⁰ Basic public services and infrastruc-

155. See Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1601, 110 Stat. 1755, 1827 (1996); Diane Lourdes Dick, *U.S. Tax Imperialism in Puerto Rico*, 65 AM. U. L. REV. 1, 73–76 (2015) (explaining the consequential repeal of section 936).

156. See Cheryl D. Block, *Federal Policy for Financially-Distressed Subnational Governments: The U.S. States and Puerto Rico*, 53 WASH. U. J.L. & POL'Y 215, 257–59 (2017); Dick, *supra* note 155, at 76–77; *Trouble on Welfare Island*, ECONOMIST (May 27, 2006), <https://www.economist.com/united-states/2006/05/25/trouble-on-welfare-island> [<https://perma.cc/4G5P-4NS2>].

157. AUSTIN, *supra* note 144, at 3–7.

158. Evaluz Cotto-Quijano, *How the Triple Tax Exemption on Puerto Rico's Bonds Financed Its Territorial Status—and Helped Spark Its Debt Crisis*, PROMARKET (Sept. 11, 2018), <https://promarket.org/2018/09/11/triple-tax-exemption-puerto-ricos-bonds-financed-territorial-status-helped-spark-debt-crisis> [<https://perma.cc/2ACB-K53L>].

159. See D. ANDREW AUSTIN, CONG. RSCH. SERV., R44095, PUERTO RICO'S CURRENT FISCAL CHALLENGES 12–13 (2016); Juan R. Torruella, Commentary, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of "Territorial Federalism"*, 131 HARV. L. REV. F. 65, 91 (2018) ("In fact, the Puerto Rican economy had been aggravated even before the disastrous consequences of Hurricane María by both the loss of a substantial and important part of Puerto Rico's tax base by emigration of many of its citizens to the mainland United States, and by the need of the local government to engage in massive borrowing to pay for the social services. . . .").

160. See Mark Weisbrot, *Strangling Puerto Rico in Order to Save It*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/opinion/>

ture, like reliable electricity and clean water, were often in disrepair.¹⁶¹ It had unpaid debt and pension obligations of over \$123 billion.¹⁶² To put this figure into perspective, Detroit, Michigan's bankruptcy in 2013, the largest municipal bankruptcy in U.S. history, only had obligations of about \$18 billion.¹⁶³ In 2022, after nearly five years of negotiations, a federal court approved a federally appointed board's plan to resolve the Territory's bankruptcy, but left the bankruptcies of the local utilities and other essential public entities unresolved to the tune of tens of billions of dollars.¹⁶⁴

Given the economic destitution on the island, many people have left, and more continue to leave Puerto Rico. This mass outward bound migration started even before the catastrophic hurricanes in 2017.¹⁶⁵ It has been estimated that Puerto Rico could lose "40 percent of its population by 2050," relative to its headcount in the 2010 census.¹⁶⁶ According to the 2020 Census, Puerto Rico saw a twelve percent population decline from 2010 to 2020, a loss of about 439,000 people.¹⁶⁷

As previously noted, since 2016, Puerto Rico has been engaged in the largest municipal reorganization in American history under the oversight of the federally appointed PROMESA board with little input or influence from the Territory's people,

puerto-rico-economy-austerity.html [https://perma.cc/GKC3-NW5F].

161. See, e.g., Patricia Mazzei, *In Puerto Rico, Protests Grow As Power Fails*, N.Y. TIMES (Oct. 20, 2021), <https://www.nytimes.com/2021/10/19/us/puerto-rico-electricity-protest.html> [https://perma.cc/7A2J-T4FM]; Caitlin Dickerson & Luis Ferré-Sadurní, *Life in Puerto Rico, "Like Going Back in Time"*, N.Y. TIMES (Oct. 25, 2017), <https://www.nytimes.com/2017/10/24/us/hurricane-maria-puerto-rico-coping.html> [https://perma.cc/HQU7-5VTE]; Mekela Panditharatne, *Puerto Rico Needs More Than Bandages*, N.Y. TIMES (Feb. 12, 2018), <https://www.nytimes.com/2018/02/12/opinion/puerto-rico-water-electricity.html> [https://perma.cc/6LMZ-76XA] (discussing the outdated infrastructure and lack of functioning basic utilities in Puerto Rico).

162. Walsh, *supra* note 89.

163. *Id.*

164. Patricia Mazzei, Frances Robles & Coral Murphy Marcos, *Judge Approves Deal to Resolve Puerto Rico Bankruptcy*, N.Y. TIMES (Jan. 18, 2022), <https://www.nytimes.com/2022/01/18/us/puerto-rico-bankruptcy.html> [https://perma.cc/C76X-MQVE].

165. NELSON A. DENIS, *WAR AGAINST ALL PUERTO RICANS: REVOLUTION AND TERROR IN AMERICA'S COLONY* 260 (2015).

166. *Id.*

167. America Counts Staff, *supra* note 6.

creating much economic uncertainty, understandable fears, and outbound migration on the island.¹⁶⁸

In sum, the Territories all share serious economic struggles. The tragic economic crisis that has befallen Puerto Rico and its people may foreshadow similar fates for the other Territories since they too have similar economic deficiencies and population declines.¹⁶⁹ As such, it should not be surprising that the drafters of the federal law which created the PROMESA board overseeing Puerto Rico defined the term “territory” to include American Samoa, the CNMI, Guam, and the U.S. Virgin Islands, mindful that federal commandeering of another Territory might be necessary in the near future.¹⁷⁰

C. RACIAL DISCRIMINATION

The Territories all share the struggles of the systemic racial discrimination that has existed since they came under American rule. Each of the Territories has been populated by predominantly non-White residents since they came under American rule and subjected to racial discrimination in law and in fact.¹⁷¹ The mistreatment of the people of the Territories is reminiscent of an imperial period of American history when African Americans, Native Americans, and Indigenous peoples were all openly discriminated against based on their race, often brutally and fatally.¹⁷² These painful historical roots of racism continue to reverberate today in how the Territories are perceived and treated

168. See Yasmeen Serhan, *Puerto Rico Files for Bankruptcy*, ATLANTIC (May 3, 2017), <https://www.theatlantic.com/news/archive/2017/05/puerto-rico-files-for-bankruptcy/525258> [<https://perma.cc/7RH2-2F2B>].

169. See Wilson et al., *supra* note 6 (highlighting the declines in populations of the other Territories besides Puerto Rico from the 2010 Census to the 2020 Census).

170. See Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 549, 552 (2016) (codified in scattered sections of 15, 29, and 48 of the U.S. Code).

171. See Hammond, *supra* note 25, at 1656–60 (summarizing the diverse populations in each Territory); Aziz Rana, *How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire*, YALE L.J.F. (Nov. 2, 2020), <https://www.yalelawjournal.org/forum/how-we-study-the-constitution> [<https://perma.cc/4DAT-65NB>] (arguing that the “incorporation theory” developed in the *Insular Cases*, which constitutionalized the United States’ colonial empire, set a legal regime of colonial dependency motivated by white supremacy).

172. See SAM ERMAN, *ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE* 1–5 (2019).

by the federal government.¹⁷³ Today, an estimated ninety-eight percent of all residents of the Territories are racial or ethnic minorities.¹⁷⁴ W.E.B. Du Bois was prescient when he remarked of America's future, "The problem of the twentieth century is the problem of the color-line, — the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea."¹⁷⁵

The legal and political foundations of the persistent mistreatment of the Territories find origins in America's imperial past.¹⁷⁶ The *Insular Cases*—the corpus of Supreme Court cases that serve as the bedrock of public and legal policy for the Territories—and their accompanying legal scholarship—exhibit clearly racist views.¹⁷⁷ They referred to the Territories as "possessions."¹⁷⁸ They characterize the people of the Territories as

173. See generally Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 832 (1926) (highlighting the questions of race and racism at the heart of early legal doctrines concerning the Territories).

174. German Lopez, *Millions of Americans Don't Have Equal Voting Rights. John Oliver Is Not Happy About It.*, VOX (Mar. 9, 2015), <https://www.vox.com/2015/3/9/8174603/john-oliver-US-territories> [<https://perma.cc/JE5S-ZDXL>].

175. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES* 13 (Univ. of Mass. Press 2018) (1903).

176. See, e.g., PAUL A. KRAMER, *THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, & THE PHILIPPINES* 152, 356–58 (2006) (detailing how American imperialists shaped public debate and legislation to maintain control over the Philippines in the face of Filipino resistance).

177. See, e.g., MARTHA MINOW, *RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE*, at vii (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) ("When the Supreme Court reached its judgments in the *Insular Cases*, prevailing governmental attitudes presumed white supremacy and approved of stigmatizing segregation."); RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893–1946*, at 15 (1972) ("The racism which caused the relegation of the Negro to a status of inferiority was to be applied to the overseas possessions of the United States."); Andrew Kent, Boumediene, Munaf, and the Supreme Court's Misreading of the *Insular Cases*, 97 IOWA L. REV. 101, 110 (2011) (opining on the *Insular Cases*' "deplorable discussions of the supposed racial and cultural inferiority of inhabitants of the newly annexed island territories"); Torruella, *supra* note 27, at 286 (theorizing that the *Insular Cases* were "strongly influenced by racially motivated biases and by colonial governance theories that were contrary to American territorial practice and experience").

178. See Thayer, *supra* note 15, at 478.

“savage,”¹⁷⁹ “unfit to govern themselves,”¹⁸⁰ “half-civilized,”¹⁸¹ “ignorant and lawless brigands,”¹⁸² and “impossible” to govern “according to Anglo-Saxon principles.”¹⁸³ In a 2022 concurring opinion for a case that implicated the *Insular Cases*, Supreme Court Justice Neil Gorsuch wrote simply and strongly on the racist roots of this body of law, “The Insular Cases have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.”¹⁸⁴

These troubling historical roots have branched out into discriminatory laws, public policies, and social perceptions that continue to see and treat the citizens of the Territories as foreign and lesser-than Americans.¹⁸⁵ Recent surveys suggest that a significant number of Americans do not know that the Territories are part of America, or that they even exist.¹⁸⁶ Not surprisingly, Americans of the Territories regularly receive fewer rights, fewer benefits, and fewer privileges than Americans living in States.¹⁸⁷ Moreover, politically fraught issues like testing experimental weapons systems, sheltering controversial refugees, or harboring a submarine full of COVID-infected sailors are often relegated to the Territories.¹⁸⁸

179. *Id.* at 475.

180. *Id.*

181. Baldwin, *supra* note 13, at 415.

182. *Id.*

183. Downes v. Bidwell, 182 U.S. 244, 287 (1901).

184. United States v. Vaello Madero, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring).

185. See IMMERWAHR, *supra* note 18, at 11–12 (discussing how colonial subjects were denied voting rights, deprived of full citizenship, called racial slurs, and subjected to medical experimentation).

186. See, e.g., Kyle Dropp & Brendan Nyhan, *Nearly Half of Americans Don't Know Puerto Ricans Are Fellow Citizens*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/upshot/nearly-half-of-americans-dont-know-people-in-puerto-ricoans-are-fellow-citizens.html> [https://perma.cc/7T78-4V2S]; cf. Susannah Cahalan, *Most Americans Can't Find These U.S. Territories on a Map*, N.Y. POST (Feb. 12, 2017), <https://nypost.com/2017/02/12/most-americans-cant-find-these-us-territories-on-a-map> [https://perma.cc/PP6U-HBDJ].

187. See, e.g., Hammond, *supra* note 25, at 1666–74 (detailing discrepancies between Medicare, Supplemental Nutrition Assistance Program, and Supplemental Security Income benefits available in the States compared to the Territories).

188. See Julie Watson & Ben Fox, *Calls Grow to Evacuate Afghans to Guam as U.S. Troops Leave*, ASSOCIATED PRESS (June 23, 2021), <https://apnews.com/article/joe-biden-guam-government-and-politics-fc45df629a6e3b7b0c3d24>

Despite being subjected to the stains and strains of racial discrimination by their own government, the people of the Territories have exhibited incredible sacrifice and love of their country. In every war since World War II involving the United States, the people of the Territories have enlisted and died at one of the highest rates per capita relative to their counterparts from the States.¹⁸⁹ American Samoa actually has “the highest rate of military enlistment” of any State or Territory in the country.¹⁹⁰ Yet, unlike their fellow soldiers, the soldiers of the Territories do not have a say in the political process over foreign policy, military plans, veterans, and the election of their Commander in Chief.¹⁹¹

D. CLIMATE CHANGE

All of the Territories bear the burden of climate change in ways that are much heavier than those for many Americans living in the continental United States.¹⁹² This is due to the immutable, consequential fact that all of the Territories are islands in

cc8a4f4fca [https://perma.cc/U438-9TYK]; Marie Fazio, *Three Sailors Test Positive Aboard U.S.S. Theodore Roosevelt, Site of Spring Outbreak, Officials Say*, N.Y. TIMES (Feb. 16, 2021), <https://www.nytimes.com/2021/02/16/world/covid-coronavirus-uss-roosevelt.html> [https://perma.cc/7V8D-FRB2].

189. See Miyume Tanji, *Chamorro Warriors and Godmothers Meet Uncle Sam: Gender, Loyalty and Resistance to U.S. Military Occupation in Postwar Guam*, in GENDER, POWER, AND MILITARY OCCUPATIONS: ASIA PACIFIC AND THE MIDDLE EAST SINCE 1945, at 103 (Christine de Matos & Rowena Ward, eds., 2012).

190. Mark Joseph Stern, *The Supreme Court Needs to Settle Birthright Citizenship*, SLATE (June 6, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/06/the_supreme_court_needs_to_settle_birthright_citizenship.html [https://perma.cc/NXB9-5N6Z].

191. See Neil Weare, *Equally American: Amending the Constitution to Provide Voting Rights in U.S. Territories and the District of Columbia*, 46 STETSON L. REV. 259, 276 (2017) (“Americans who reside in non-state areas have a long history of distinguished military service. Yet the same people who have sacrificed so much defending democracy overseas are denied full democratic participation at home.”).

192. See *Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaption in the United States*, U.S. GLOB. CHANGE RSCH. PROGRAM 812–19 (2018), https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf [https://perma.cc/45K8-U6ET] (discussing the deleterious impact of climate change on the Territories); Jared H. Bowden, Adam J. Terando, Vasu Misra, Adrienne Wootten, Amit Bhardwaj, Ryan Boyles, William Gould, Jaime A. Collazo & Tanya L. Spero, *High-Resolution Dynamically Downscaled Rainfall and Temperature Projections for Ecological Life Zones Within Puerto Rico and for the U.S. Virgin Islands*, 41 INT’L J. CLIMATOLOGY 1305, 1306–16 (2021) (forecasting dangerous unprecedented droughts and floods in Puerto Rico and the

the Pacific or Atlantic Oceans.¹⁹³ The rising sea levels, warmer oceans, and accompanying catastrophic weather events pose existential threats to the daily lives and livelihoods of the people of the Territories.¹⁹⁴ The horrific storms that devastated Puerto Rico, the CNMI, and U.S. Virgin Islands in recent years make abundantly clear how deadly and serious climate change is for every American, but most especially those living in the Territories.¹⁹⁵ Beyond the obvious extreme weather events, climate change will also have long-term, adverse impacts on the ecosystems, food supplies, and human health of the people of the Territories.¹⁹⁶

Compounding the threats and perils of climate change on the Territories is their lack of political power and financial resources to adapt and prepare for the looming, inevitable consequences.¹⁹⁷ Without a meaningful vote or voice in the national

U.S. Virgin Islands as a result of climate change); Hammond, *supra* note 25, at 1643 (“[T]he five U.S. territories are particularly vulnerable to the ravages of the climate crisis.”).

193. See Edward H. Allison & Hannah R. Bassett, *Climate Change in the Oceans: Human Impacts and Responses*, 350 *SCIENCE* 778, 778 (2015).

194. See *Fourth National Climate Assessment*, *supra* note 192, at 812–14 (predicting that the U.S. Caribbean region will face economic, infrastructural, and health challenges as a result of climate change); Sarah Kaplan, *The Undeniable Link Between Weather Disasters and Climate Change*, *WASH. POST* (Oct. 22, 2020), <https://www.washingtonpost.com/climate-solutions/2020/10/22/climate-curious-disasters-climate-change/> [https://perma.cc/7BDF-LD9E] (describing risks associated with climate change and rising sea levels).

195. See, e.g., Hammond, *supra* note 25, at 1643–44 (arguing that poverty in the Territories is likely to worsen because of the region’s vulnerability to climate change); Rebecca Hersher, *Climate Change Was the Engine That Powered Hurricane Maria’s Devastating Rains*, *NPR* (Apr. 17, 2019), <https://www.npr.org/2019/04/17/714098828/climate-change-was-the-engine-that-powered-hurricane-mariasdevastating-rains> [https://perma.cc/TF8D-LJ8R].

196. See, e.g., JON BARNETT & JOHN CAMPBELL, *CLIMATE CHANGE AND SMALL ISLAND STATES: POWER, KNOWLEDGE AND THE SOUTH PACIFIC* 11–17 (2010) (foreshadowing the dangerous impact of climate change on small islands in the Pacific); Elizabeth Mcleod, Mae Bruton-Adams, Johannes Forster, Chiara Franco, Graham Gaines, Berna Gorong Robyn James, Gabriel Posing-Kulwaum, Magdalene Tara & Elizabeth Terk, *Lessons from the Pacific Islands—Adapting to Climate Change by Supporting Social and Ecological Resilience*, 6 *FRONTIERS MARINE SCI.* 289 (2019), <https://doi.org/10.3389/fmars.2019.00289>.

197. See Susan K. Serrano & Ian Falefuafua Tapu, *Reparative Justice in the U.S. Territories: Reckoning with America’s Colonial Climate Crisis*, 110 *CALF. L. REV.* 1281, 12813 (2022) (highlighting that “climate emergencies expose the lasting second-class status of the U.S. territories”); cf. Allison & Bassett, *supra*

government, the fate of climate change in the Territories is almost entirely subject to the whims of national leaders, many of whom do not see climate change as an urgent, existential threat to their constituents or even as a reality at all.¹⁹⁸ As a result, the Territories share the struggles of feeling and being entirely powerless to adapt and prepare for rising temperatures and rising tides that will invariably and disproportionately devastate their islands.¹⁹⁹

* * *

While our Territories are diverse in numerous ways, they also share similar significant struggles. In particular, they all experience the interrelated perils of political disenfranchisement, economic destitution, racial discrimination, and climate change. These shared struggles are serious and exact a heavy toll on the people of the Territories. Given these cruel burdens exacerbated by law, policy, and history, it is perhaps not entirely surprising that the Territories suffer from some of the highest rates of depression and suicide attempts anywhere in the United States.²⁰⁰

III. DISTINCT DESPAIRS

For all their significant shared struggles, the Territories also possess different challenges that are no less significant. These distinct despairs are part of the overlooked diversity of the

note 193, at 781 (describing how small island developing states, which lack resources and global power, have attempted to leverage “moral power” to secure international agreements to combat climate change).

198. See Lisa Friedman, *Republicans Begin to Tackle an Issue They’ve Long Scorned: Climate Change*, N.Y. TIMES (June 24, 2021), <https://www.nytimes.com/2021/06/23/climate/climate-change-republicans.html> [https://perma.cc/DX4F-MLSR]; Ari Drennen & Sally Hardin, *Climate Deniers in the 117th Congress*, CTR. FOR AM. PROGRESS (Mar. 30, 2021), <https://www.americanprogress.org/issues/green/news/2021/03/30/497685/climate-deniers-117th-congress> [https://perma.cc/46WP-ND58].

199. See, e.g., *What Climate Change Means for Guam*, U.S. ENV’T PROT. AGENCY (2016), <https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-gu.pdf> [https://perma.cc/T5GJ-59CU].

200. See, e.g., Heather Booth, *The Evolution of Epidemic Suicide on Guam: Context and Contagion*, 40 SUICIDE & LIFE-THREATENING BEHAV. 1, 1–5 (2010) (studying the high suicide rates on Guam); Iwalani R. N. Else, Naleen N. Andrade & Linda B. Nahulu, *Suicide and Suicidal-Related Behaviors Among Indigenous Pacific Islanders in the United States*, 31 DEATH STUD. 479, 484–85 (2007) (examining the high rates of suicides and suicide attempts in the Pacific Islands, including the Territories of American Samoa, CNMI, and Guam).

Territories. Chief among these critical differences are Puerto Rico exceptionalism, military occupation, geographic divergences, and disparate benefits.

A. PUERTO RICO EXCEPTIONALISM

Among all the Territories, Puerto Rico is exceptional.²⁰¹ It dominates the scholarship, discussions, and debates about the Territories. This exceptionalism is justified given its large population and general familiarity to Americans on the mainland relative to the other Territories.

In terms of population, Puerto Rico's over three million residents dwarf the combined populations of all the other Territories. Its population size renders it larger than twenty-one States, based on the 2020 Census.²⁰² In fact, based on recent population estimates, Puerto Rico would be around the size of Connecticut, Utah, Iowa, or Nevada.²⁰³ It is hard to imagine denying any rights of citizenship to Americans from those States. Given their small populations, it might be easy to argue that American Samoa, the CNMI, Guam, and the U.S. Virgin Islands do not deserve full federal franchise and representation in the House and the Senate, but the same argument cannot be made against Puerto Rico.²⁰⁴

In terms of familiarity, Americans in the continental United States are better acquainted with Puerto Rico than any of the other Territories. There are actually more Puerto Ricans in the continental United States than in Puerto Rico itself.²⁰⁵ The diaspora of Puerto Rico is estimated to be over five million people in the United States, and growing.²⁰⁶ Furthermore, many Puerto

201. See Samuel Issacharoff, Alexandra Bursak, Russell Rennie & Alec Webley, *What Is Puerto Rico?*, 94 IND. L.J. 1, 4–11 (2019) (discussing the exceptional legal and political situation of Puerto Rico).

202. 2020 *Population and Housing State Data*, *supra* note 88.

203. *Id.*

204. See *supra* Table 1.

205. Jens Manuel Krogstad, *Puerto Ricans Leave in Record Numbers for Mainland U.S.*, PEW RSCH. CTR. (Oct. 14, 2015), <https://www.pewresearch.org/fact-tank/2015/10/14/puerto-ricans-leave-in-record-numbers-for-mainland-u-s> [<https://perma.cc/TST3-NDDN>].

206. See CARMEN TERESA WHALEN, *THE PUERTO RICAN DIASPORA: HISTORICAL PERSPECTIVES* 1–3 (Carmen Teresa Whalen & Víctor Vázquez-Hernández eds., 2005); Ying Wang & Stefan Rayer, *Growth of the Puerto Rican Population in Florida and on the U.S. Mainland*, U. FLA. OF BUREAU OF ECON. & BUS. RSCH. (Feb. 9, 2018), <https://www.bebr.ufl.edu/population/website-article/growth-puerto-rican-population-florida-and-us-mainland> [<https://perma.cc/>].

Ricans or people of Puerto Rican lineage have held prominence in national government, sports, and entertainment. These famous individuals include people like Congresswoman Alexandria Ocasio-Cortez, Supreme Court Justice Sonia Sotomayor, and celebrities and athletes of Puerto Rican descent like Jennifer Lopez, Lin-Manuel Miranda, and numerous professional baseball players.²⁰⁷ It also includes Puerto Rican superstar rapper and singer Bad Bunny, who is one of the most-streamed musicians in the world, and a prominent advocate for Puerto Rico in his interviews and songs.²⁰⁸

All that said, a recent national poll revealed that only fifty-four percent of Americans know that Puerto Ricans are Americans.²⁰⁹ While that number is alarmingly low, one can reasonably infer from that figure that general American knowledge would be much lower for the other Territories—American Samoa, the CNMI, Guam, or the U.S. Virgin Islands.²¹⁰ When natural disasters, global pandemics, and economic crises afflict

ZRK6-MPGX]; *Puerto Ricans on the Mainland United States*, ECONOMIST (Oct. 5, 2017), <https://www.economist.com/united-states/2017/10/05/Puerto-ricans-on-the-mainland-united-states> [https://perma.cc/AC89-BH8Q] (“There are about 5m Puerto Ricans on the mainland now, a fifth of them in Florida—more than remain on the island.”).

207. See, e.g., Benjamin Mueller, *For Immigration Lawyers, a Surprise Speaker Who Asks Them to Change Lives*, N.Y. TIMES (Sept. 4, 2014), <https://www.nytimes.com/2014/09/05/nyregion/for-immigration-lawyers-a-surprise-speaker-justice-sonia-sotomayor-of-the-supreme-court.html> [https://perma.cc/M434-QBQH].

208. See Ashely Iasimone, *Bad Bunny Tops Spotify Records for Most-Streamed Album in 2022, Most-Streamed Artist Globally in a Day*, BILLBOARD (May 7, 2022), <https://www.billboard.com/music/music-news/bad-bunny-spotify-streaming-records-un-verano-sin-ti-1235068308> [https://perma.cc/36KB-HJBA]; Bethonie Butler, *Bad Bunny Wants You to Stop Ignoring Puerto Rico*, WASH. POST. (Sept. 20, 2022), <https://www.washingtonpost.com/arts-entertainment/2022/09/20/bad-bunny-apagon-puerto-rico> [https://perma.cc/5ZP8-P9AX] (highlighting Bad Bunny’s pro-Puerto Rican advocacy).

209. Dropp & Nyhan, *supra* note 186.

210. It may be worth noting that there are some celebrities with ethnic ties to American Samoa and the U.S. Virgin Islands, albeit not in the same volume as those from Puerto Rico. Dwayne “the Rock” Johnson and numerous American football players are American Samoans by birth or lineage; basketball great Tim Duncan and supermodel Hannah Davis Jeter hail from the U.S. Virgin Islands. See, e.g., Graham Young, *The Rock’s on a Roll in Hollywood*, BUS. LIVE (Apr. 10, 2009), <https://www.business-live.co.uk/retail-consumer/rocks-roll-hollywood-3947235> [https://perma.cc/9RFF-Y2WR]; Tim Duncan, *Don’t Forget About the Islands*, PLAYERS’ TRIB. (Sept. 9, 2017), <https://www.theplayertribune.com/en-us/articles/tim-duncan-hurricane-irma-us-virgin-islands> [https://perma.cc/

Puerto Rico, it is frequently national news.²¹¹ The same cannot be said for any of the other Territories.

The fact of the matter is that debates and discussions about the Territories often place Puerto Rico at the forefront, understandably so. Yet this focus and emphasis on Puerto Rico obscures the challenges faced by the other Territories, and the assistance and power that could be conferred to them. Policies, programs, and proposals that may benefit the other Territories are left under-explored and under-pursued because of the focus on Puerto Rico's distinct challenges. As such, under the prevailing territorial legal dualism framework, by seeing and treating the Territories as a homogenous collective, Puerto Rico exceptionalism pushes the other Territories into the shadows of policymaking and debates in ways that are harmful, impractical, and unnecessary.

B. MILITARY OCCUPATION

The American military and its legacy continue to play a significant role in the Territories of Puerto Rico and Guam, in ways that do not exist in the other Territories.²¹² The large, long-term military occupations in Guam and Puerto Rico have left serious economic, environmental, and healthcare damages not experienced in the other Territories.²¹³

XC28-T8XD]; *Hannah Jeter*, IMDB, <https://www.imdb.com/name/nm3726623/> [<https://perma.cc/JSM6-CDHV>].

211. See, e.g., Laura N. Pérez Sánchez, *Drenched by Hurricane Fiona, Puerto Ricans Band Together*, N.Y. TIMES (Sept. 21, 2022), <https://www.nytimes.com/2022/09/21/us/hurricane-fiona-puerto-rico-cleanup.html> [<https://perma.cc/K7KF-QEFR>] (reporting on flooding cleanup efforts in Puerto Rico following Hurricane Fiona); Associated Press, *Puerto Rico Formally Exits Bankruptcy Following Largest Public Debt Restructuring*, NBC NEWS (Mar. 15, 2022), <https://www.nbcnews.com/news/latino/Puerto-rico-formally-exits-bankruptcy-largest-public-debt-restructurin-rcna20054> [<https://perma.cc/6V3S-W4AQ>].

212. See, e.g., Davis, *supra* note 141, at 221–22 (discussing examples of U.S. military buildup in Guam and Puerto Rico and the corresponding resistance and struggle for sovereignty); Erman, *supra* note 24, at 1242–43.

213. See, e.g., LEIBOWITZ, *supra* note 27, at 324–28 (discussing the significant societal impact and influence of the U.S. military presence on Guam); KATHERINE T. MCCAFFREY, *MILITARY POWER AND POPULAR PROTEST: THE U.S. NAVY IN VIEQUES, PUERTO RICO* 43–50 (2002) (analyzing the societal impact of the U.S. military on Puerto Rican culture and identity); Tanji, *supra* note 189, at 104–06 (discussing the psychological and social effects of the U.S. military presence on Guam); Jon Letman, *Proposed U.S. Military Buildup on Guam Angers Locals Who Liken It to Colonization*, GUARDIAN (Aug. 1, 2016), <https://www.theguardian.com/us-news/2016/aug/01/guam-us-military-marines>

In Puerto Rico, the legacy of decades of military presence continues to shape life on the island in prosaic and profound ways. During the World War II era, the Pentagon established large air force and naval outposts like Ramey Air Force Base, Roosevelt Roads Naval Station, and the Atlantic Fleet Weapons Training Facility in Puerto Rico.²¹⁴ It also used many facilities and sites in Puerto Rico for bombing and military exercises. Infamously, the U.S. military used the island of Vieques in Puerto Rico to conduct bombings and extended military exercises for over sixty years.²¹⁵ As a result of more than a generation of bombings and military activities, the residents of Puerto Rico living near Vieques and their progeny suffer from some of the highest rates of illness in the Caribbean, to say nothing of the irreparable damage to their local environment.²¹⁶ Furthermore, as a parting wound, when the Pentagon closed all of its major military facilities in Puerto Rico in the early 2000s, it did so without proper mitigation measures, which caused a major, negative economic shock that continues to reverberate in the local economy decades later.²¹⁷

In Guam, the American military presence is a large, inescapable, and existential fact of daily life.²¹⁸ The military plays a significant role in the island's economy, physical space, and local

-deployment [<https://perma.cc/WB88-CWUR>]; U.S. Gov't Accountability Off., GAO-11-459R, *Military Buildup on Guam 2–7* (2011), <https://www.gao.gov/assets/gao-11-459r.pdf> [<https://perma.cc/CRP6-G7D5>].

214. See Sara Grusky, *The Changing Role of the U.S. Military in Puerto Rico*, 36 SOC. & ECON. STUDIES 37, 40 (1987).

215. See JOHN LINDSAY-POLAND, *THE BASES OF EMPIRE: THE GLOBAL STRUGGLE AGAINST U.S. MILITARY POSTS* 71, 75–79 (Catherine Lutz ed., 2009).

216. See Valeria Pelet, *Puerto Rico's Invisible Health Crisis*, ATLANTIC (Sept. 3, 2016), <https://www.theatlantic.com/politics/archive/2016/09/vieques-invisible-health-crisis/498428> [<https://perma.cc/RQE9-XKF3>] (connecting high rates of illness in Vieques to the heavy metals toxic chemicals used by the U.S. Navy on the island's former military base).

217. Michael A. Fletcher & Steven Mufson, *How Washington Helped Create Puerto Rico's Staggering Debt Crisis*, WASH. POST (July 9, 2015), https://www.washingtonpost.com/business/economy/puerto-ricos-problems-can-often-be-traced-to-one-source-washington/2015/07/09/2cbd401e-21cd-11e5-84d5-eb37ee8eaa61_story.html?utm_term=.e25ceb1f90f6 [<https://perma.cc/TH6B-LWDL>].

218. See Nancy Borowick & Megan Specia, *Guam: A Tiny Territory Caught in a Global War of Words*, N.Y. TIMES (Aug. 9, 2017), <https://www.nytimes.com/2017/08/09/world/asia/guam-north-korea-visual.html> [<https://perma.cc/G8BK-854Z>] (reporting on Guam's reaction to a threatened strike by North Korea).

population.²¹⁹ The military is one of the largest employers on the island and accounts for a significant portion of local economic activity.²²⁰ The military occupies nearly one third of the land on Guam, and military personnel and their families account for almost ten percent of the population.²²¹ Given the longstanding, omnipresent military presence on the island, it should not be surprising that Guam has one of the highest rates of military participation of any State or Territory.²²²

The large U.S. military presence on the island has made Guam a target to foreign adversaries of the United States who may not dare to threaten or launch an attack on the American mainland.²²³ The specter of a foreign attack on the island is very real. With base closures in Okinawa, Japan and the persistent

219. See, e.g., LEIBOWITZ, *supra* note 27, at 348–49 (highlighting the important economic impact of the military on Guam); Michael Lujan Bevacqua, *Guam: Protests at the Tip of America's Spear*, 116 S. ATL. Q. 174, 177–79 (2017) (discussing the impact of the large military presence on Guam).

220. See, e.g., LEIBOWITZ, *supra* note 27, at 349; Catherine Norton, *Military Buildup Seen as Boom, Test for Tiny Island of Guam*, PBS (June 9, 2008), <https://www.pbs.org/newshour/world/military-buildup-seen-boom-test-tiny-island-guam> [<https://perma.cc/8HGE-48EM>]; Peter Pae, *Military's Growing Presence Boosts Economy of Guam*, WASH. POST (Sept. 12, 2004), https://www.washingtonpost.com/archive/politics/2004/09/12/militarys-growing-presence-boosts-economy-of-guam/5ea40bf1-c325-43b2-883e-615f0531a883/?utm_term=.9a2732fe485b [<https://perma.cc/G5AK-K2P5>]; U.S. Gov't Accountability Off., *supra* note 213, at 2–4.

221. See Bevacqua, *supra* note 219, at 177 (“At present, the U.S. military controls close to one-third of Guam’s land mass and already restricts access to several places on Guam”); Borowick & Specia, *supra* note 218 (estimating that “13,000 military members and their dependents” live on Guam with “a population of around 163,000”).

222. See, e.g., Ivan Watson, Pamela Boykoff, Paul Devitt & Joshua Berlinger, *Father and Son Fight for a Country Which Doesn't Allow Them to Vote*, CNN (Aug. 30, 2017), <https://www.cnn.com/2017/08/29/asia/guam-military-families/index.html> [<https://perma.cc/8SSG-N2UV>] (reporting that Guam’s population boasts the highest rate of participation per capita in the U.S. military).

223. See, e.g., Juan M. Rapadas, *Transmission of Violence: The Legacy of Colonialism in Guam and the Path to Peace*, 1 J. PAC. RIM PSYCH. 33, 35 (2007) (“Although generally economically positive, the military build-up engenders the fear within some of the people of being targeted for destruction because of a close relationship with the U.S. military and proximity to the U.S. Air Force and naval bases on Guam.”); Choe Sang-Hun, *North Korea Rails as U.S. Plans Drills with Seoul*, N.Y. TIMES (Oct. 14, 2017), <https://www.nytimes.com/2017/10/13/world/asia/north-korea-renews-guam-threat-ahead-of-joint-naval-exercise.html> [<https://perma.cc/5QQ3-6YAY>].

threats of China and North Korea, Guam's important geopolitical stature has risen even more in recent years.²²⁴

Andersen Air Force Base on Guam is one of the most important American military installations in the world, with over "100,000 bombs and missiles and 66 million gallons of jet fuel at any one time"²²⁵ In 2017, during a particularly tense period in its contentious relationship with the United States, North Korea made detailed threats to attack and bomb Guam in retaliation to perceived American aggressions.²²⁶ As geopolitical tensions rise in Asia, particularly between the United States and China, Guam will continue to play an important role and bear a heavy burden as critical part of America in the Pacific Rim.²²⁷

In sum, the despairs and difficulties that accompany prolonged and persistent military occupation are an existential reality in Guam and Puerto Rico, rendering them ominously different relative to their territorial peers.

C. GEOGRAPHIC DIVERGENCES

The Territories are diverse and distinct in terms of geography. This straightforward fact holds profound implications for territorial laws and policies.²²⁸ The Supreme Court remarked as much a century ago in *Balzac v. Porto Rico*,²²⁹ "[i]t is locality that is determinative of the application of the Constitution"²³⁰ The geographic and literal disconnect between the continental

224. See Dep't of the Navy, *Supplemental Environmental Impact Statement: Guam and Commonwealth of the Northern Mariana Islands Military Relocation (2012 Roadmap Adjustments)*, GUAM MARINES, at ES-1 to ES-4 (2015), <http://guammarines.s3.amazonaws.com/static/SEIS/Download%20Final%20SEIS%20as%20a%20Single%20Document.pdf> [https://perma.cc/2RHM-DE4V]; Davis, *supra* note 141, at 222 ("As of 2011, the planned increase in military operations in Guam is extensive. Guam is not only slated to receive the 8000 Marines from Okinawa as well as 9000 of their dependents, but also a new wharf to host an aircraft carrier, a center for a new Global Hawk UAV (unmanned aerial vehicle) program, a missile defense site, and numerous training areas (some requiring the acquisition of more land).").

225. KAPLAN, *supra* note 63.

226. Sang-Hun, *supra* note 223.

227. See Tom C.W. Lin, *Business Warfare*, 63 B.C. L. REV. 1, 34–35 (2022) (discussing the growing contentious relationship between China and the United States).

228. See, e.g., Torruella, *supra* note 159, at 69 (arguing that Americans in Puerto Rico are "treated unequally from those in the rest of the nation solely by reason of their geographical residence").

229. 258 U.S. 298 (1922).

230. *Id.* at 309.

United States and its laws applies to all of the Territories, but is perhaps most profound among those in the Pacific Ocean—American Samoa, the CNMI, and Guam.

While all of the Territories are at least 1,000 miles away from the nearest major city airport in the continental United States, the Territories in the Pacific are all at least 4,700 miles away from the nearest major city in the continental United States.²³¹ They are literally an ocean and half a world away from most Americans, as illustrated in the map below.

Figure 2: Map of the Territories



While modern transportation and technology have mitigated some of the drawbacks of distance, the insurmountable challenges of geography remain.²³² Traveling from the Territories in the Pacific to the U.S. mainland can take almost half a

231. See *Distance from Pago Pago to San Francisco*, TIMEANDDATE.COM, <https://www.timeanddate.com/worldclock/distanceresult.html?p1=1033&p2=224> [<https://perma.cc/5NWA-EKJE>]; *Distance from Saipan to Seattle*, TIMEANDDATE.COM, <https://www.timeanddate.com/worldclock/distanceresult.html?p1=934&p2=234> [<https://perma.cc/W2KZ-9R9S>]; *Distance Between Hagåtña, Guam and Seattle, Washington, U.S.A.*, DATEANDTIME.INFO, <http://dateandtime.info/distance.php?id1=4044012&id2=5809844> [<https://perma.cc/LV9S-8X8J>].

232. See TIM MARSHALL, PRISONERS OF GEOGRAPHY: TEN MAPS THAT EXPLAIN EVERYTHING ABOUT THE WORLD 1–2 (2016) (“Technology may seem to overcome the distances between us . . . but it is easy to forget that the land where we live, work, and raise our children is hugely important and that the choices of those who lead . . . will to some degree always be shaped by the rivers,

day in the best of circumstances, and often takes nearly twenty-four hours on commercial airlines with multiple layovers.²³³ For instance, a regular flight from Guam to Washington, D.C. could take nearly twenty-four hours with layovers in Tokyo, San Francisco, and Chicago, and cost over two-thousand dollars.²³⁴

Because of the incredible, literal physical space and distance between the Territories in the Pacific and the continental United States, they are often perceived as foreign, or, as the Supreme Court termed, “foreign to the United States in a domestic sense,” even more so than Puerto Rico and the U.S. Virgin Islands.²³⁵ This perception renders them easily omitted, forgotten, and unknown in national policy discourse, and to their fellow Americans.²³⁶ They are literally left off many prominent maps of the United States. During the COVID-19 pandemic, almost all of the major news outlets used American maps that left off all of the Pacific Territories.²³⁷ In fact, the only Territory regularly included was Puerto Rico.²³⁸

Furthermore, the geographic divergences among the Territories cause serious economic and daily burdens for the people of American Samoa, the CNMI, and Guam.²³⁹ Goods and services sent to the Territories in the Pacific bear high transportation costs that are not borne in the same way by Puerto Rico and the U.S. Virgin Islands, which are much closer to the American

mountains, deserts, lakes, and seas that constrain us all—as they always have.”).

233. See Lin, *supra* note 28, at 1278–79 (charting the distances and flight times between each of the Territories and the relative, nearest major airports in the continental United States).

234. Flights from Guam to Washington, D.C., GOOGLE, https://www.google.com/flights?rlz=1C5CHFA_enUS811US811&source=flun&uitype=obAA&hl=en&gl=us&tfs=CAEQAhocagwIAhIIL20vMDM0dGxyDagCEggvbS8wcmg2axocagwIAhIIL20vMHJoNmtYDagCEggvbS8wMzR0bHpQQ2pSSWRVNVNRNRTIEYnpkeE1FbEJhR2s1Tm1kQ1J5MHRMUzB0TFMwdExYbHpiSFV4TTBGQlFVRkJSMGN6YkhwalRERlJZa0ZCRWdFd09BTT0&sa=X&ved=2ahUKEwj4-4_5ueH0AhUxhOAKHSOTBTgQ2DZ6BAGGEAQ [https://perma.cc/PYF2-TLW5].

235. *Downes v. Bidwell*, 182 U.S. 244, 341 (1901) (White, J., concurring).

236. See DOUG MACK, *THE NOT-QUITE STATES OF AMERICA*, at xi–xxv (2017).

237. See, e.g., *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/covid-cases.html> [https://perma.cc/8XKV-WUZZ].

238. *Id.*

239. See, e.g., Suzanne Lowe Gallen, *Micronesian Sub-Regional Diplomacy*, in *THE NEW PACIFIC DIPLOMACY* 177–78 (Greg Fry & Sandra Tarte eds., 2015) (highlighting the geographic challenges faced by Guam and the CNMI).

mainland.²⁴⁰ These high transportation costs result in higher prices and longer wait times for goods and services, some of which are essential to critical infrastructure on the island.²⁴¹ Moreover, unlike their territorial peers in the Caribbean, the people of the Territories in the Pacific also have to travel thousands of miles to Hawai'i or the continental United States for enrichment opportunities, professional services, and life-saving medical procedures at exorbitant cost.²⁴²

Geography undoubtedly impacts all of the Territories, but those in the Pacific are affected differently because of the much longer distances between them and the continental United States. This despair of geography has severe real-world consequences in law, policy, and the daily lives of the people in the Pacific Territories. As such, treating all of the Territories identically without fully recognizing the harsh differences of geography among them does great disservice and injustice to the Territories in the Pacific.

D. DISPARATE BENEFITS

One key distinction among the Territories is the way in which the federal government confers critical benefits to them. While the disparities in federal benefits between the Territories and States are well-documented and litigated, the disparities among the Territories themselves are less known.²⁴³ Two prominent, consequential examples of these inter-territorial disparities are exhibited in the application of federal benefits programs to help the poor and sick as well as the application of the Jones Act, section 27 of the Merchant Marine Act of 1920, which imposes significant costs for all imported goods into Puerto Rico and Guam.²⁴⁴

240. See, e.g., U.N. Conference on Trade & Development, *Small Island Developing States: Challenges in Transport and Trade Logistics* 3–6, U.N. Doc. TD/B/C.I/MEM.7/8 (Sept. 15, 2014).

241. *Id.*

242. See Margaret Carlin, Alison Mendoza-Walters, & Karl Ensign, *Half an Ocean Away: Health in the U.S.-Affiliated Pacific Islands*, 22 J. PUB. HEALTH MGMT. PRAC. 492, 492–95 (2016) (discussing the adverse impact of “geographic remoteness” on public health in the Territories of the Pacific).

243. See, e.g., *United States v. Vaello Madero*, 142 S. Ct. 1539 (2022) (litigating the difference in SSI benefits between citizens of States and Territories).

244. 46 U.S.C. § 883 (2001).

1. Federal Benefits for the Poor and Sick

First, in terms of federal benefits programs for the poor, the Territories do not all receive the same benefits, even though they are similarly situated in terms of the law.²⁴⁵ There is no clear rationale for the disparities among the Territories besides the fact that they are subject to Congress's plenary powers, which need not be exercised consistently or logically.²⁴⁶ This illogical inter-territorial disparity in federal entitlement programs is evident in the programs for Supplemental Security Income for the Aged, Blind, and Disabled (SSI) and Supplemental Nutrition Assistance Program (SNAP).²⁴⁷

SSI and SNAP are conferred consistently across the States but not in the Territories.²⁴⁸ These two programs are freely available to all citizens residing in a State without any statutory caps on funding. In the Territories, SSI is offered in Puerto Rico, Guam, and the U.S. Virgin Islands as Aid to the Aged, Blind, and Disabled (AABD), an older program that SSI replaced almost everywhere else, and is subject to statutory caps.²⁴⁹ In the CNMI, SSI is offered without a statutory cap just like in the States.²⁵⁰ Americans living in American Samoa are deemed eligible for SSI and AABD programs.²⁵¹ For SNAP, Puerto Rico, the CNMI, and American Samoa are excluded from the program but receive a food assistance block grant; in contrast, Guam and the U.S. Virgin Islands are included in the program and treated similarly as States.²⁵²

It should be noted that once an American moves from a Territory with statutory limitations to one that has no statutory limitations on SSI or SNAP benefits, they would be entitled to receive their full benefits for no reason other than simply

245. See Hammond, *supra* note 25 for a discussion of benefits offered to the Territories.

246. *Id.*

247. See *Supplemental Security Income (SSI) and Eligibility for Other Government and State Programs*, SOC. SEC. ADMIN. [hereinafter *SSI Eligibility*], <https://www.ssa.gov/ssi/text-other-ussi.htm> [https://perma.cc/2QDF-KHW9]; *Policy Basics: The Supplemental Nutrition Assistance Program (SNAP)*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/sites/default/files/policybasics-SNAP-6-9-22.pdf> [https://perma.cc/WAY9-UZU6].

248. *SSI Eligibility*, *supra* note 247.

249. Hammond, *supra* note 25, at 1675.

250. *Id.*

251. *Id.*

252. *Id.*

relocating.²⁵³ Only Americans in the Territories are subject to this strange, illogical application of federal rights, privileges, and benefits that are otherwise freely given to their counterparts living and relocating within the States.

2. The Jones Act

Second, in terms of the Jones Act among the Territories, it applies largely only to Guam and Puerto Rico and imposes significant economic burdens on those two Territories. The Jones Act mandates that all commercial shipping within the United States be conducted by ships built domestically, owned at least seventy-five percent by Americans, and staffed with an American crew.²⁵⁴ The stated chief purposes of the Jones Act are the enhancement of our national defense, the promotion of domestic maritime commerce, and the sustainment of domestic shipbuilding capabilities.²⁵⁵ The Jones Act, however, excludes American Samoa, the CNMI, and the U.S. Virgin Islands.²⁵⁶ As such, the federal government is conferring a large benefit to those three Territories in the form of lower import costs.

The Jones Act adds a heavy cost to all goods coming into Guam and Puerto Rico.²⁵⁷ Because of the Jones Act, goods shipped to Guam and Puerto Rico from a foreign state or foreign vessel frequently have to take costly detours to be reloaded on an American vessel.²⁵⁸ Because these two Territories, like the other Territories or any small island for that matter, cannot and

253. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1561 (2022) (Sotomayor, J., dissenting).

254. 46 U.S.C. § 883 (2001).

255. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-260, PUERTO RICO: CHARACTERISTICS OF THE ISLAND'S MARITIME TRADE AND POTENTIAL EFFECTS OF MODIFYING THE JONES ACT 28 (2013); JOHN F. FRITTELLI, CONG. RSCH. SERV., RS21566, THE JONES ACT: AN OVERVIEW 2–3 (2003).

256. 46 U.S.C. §§ 883, 55101 (2001).

257. See, e.g., Torruella, *supra* note 159, at 92 (“Puerto Rico is a captive market of the United States—about half of goods imported are purchased from the mainland United States, and Puerto Ricans are the largest per capita importers of U.S. goods in the world—a large amount of the subsidized funds are in effect repatriated, and go to sustaining U.S. business and enterprises on the mainland . . .”).

258. *Report on the Competitiveness of Puerto Rico's Economy*, FED. RSRV. BANK N.Y. 13–14 (2012), <https://www.newyorkfed.org/medialibrary/media/regional/PuertoRico/report.pdf> [<https://perma.cc/FQ6Z-U9Z5>].

do not produce most of the goods they need, they are highly dependent on imports.²⁵⁹ According to a Federal Reserve study, the Jones Act and its related expenses is one of the leading factors for the lower standards of living and economic stagnation in Puerto Rico.²⁶⁰ In 2022, as the nation experienced the highest inflation in forty years on a number of everyday goods like milk and bread, the Territories of Guam and Puerto Rico had to pay even higher prices because of the Jones Act.²⁶¹

In sum, the disparities in SSI, SNAP, and the Jones Act, inconsistently applied among the Territories, are illustrative of the larger, consequential, and incoherent federal treatment of the Territories in many other aspects of federal law and regulation.²⁶² These cases illustrate, in part, that there is underappreciated disparate federal treatment among the Territories themselves when it comes to federal benefits that needs to be addressed in addition to, if not prior to, ameliorating the differences between the Territories and States.

* * *

The Territories are diverse in many ways, including in the distinct challenges that they each face on their islands. Chief among these critical differences are Puerto Rico exceptionalism, military occupation, geographic divergences, and disparate benefits. The traditional legal dualism approach for the law of the Territories elides these consequential distinctions among the Territories themselves by bluntly and simply categorizing them as non-States. These distinct despairs of the Territories highlight that while much attention and resources have been placed on the differences between the Territories and States, not enough attention has been paid to the differences among the Territories themselves. For too long, territorial diversity has been ignored to the detriment of the Territories themselves.

259. See FRITTELLI, *supra* note 255, at 3; Nelson A. Denis, *The Jones Act: The Law Strangling Puerto Rico*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/opinion/hurricane-puerto-rico-jones-act.html> [https://perma.cc/M7NY-TJX5].

260. See *Report on the Competitiveness of Puerto Rico's Economy*, *supra* note 258.

261. See, e.g., Jeanna Smialek, *Inflation Has Arrived. Here's What You Need to Know*, N.Y. TIMES (Jan. 10, 2022), <https://www.nytimes.com/article/inflation-definition.html> [https://perma.cc/5UUH-UD7J].

262. See Hammond, *supra* note 25, at 1642 (“These discrepancies surrounding public benefits mirror the exclusion of territorial Americans in other areas of federal law.”).

IV. A NEW PERSPECTIVE

The persistent, distinct despairs of the Territories urgently demand a new framework for addressing their historical and structural afflictions. The conventional perspective of viewing the Territories as a homogenous collective, in segregated subservience to States, has long limited the legal and policy imaginations of policymakers and advocates when it comes to the Territories, with perilous results. Rather than seeing the Territories as a collective and as merely non-States, they should be viewed through a richer framework that more fully appreciates their diversity, which will allow for more creative solutions to address their distinct afflictions.

A. THE PERILS OF TERRITORIAL DUALISM

The conventional segregated States/Territories construct that has grounded over a century's worth of advocacy and work on behalf of the Territories denies their diversity and ultimately has yielded little meaningful progress. Viewing the Territories primarily in segregated subservience to States has limited the options and progress available to the Territories as a matter of law and litigation as well as a matter of policy and politics.

1. Of Law and Litigation

The traditional legal perspective of conceptualizing Territories primarily in opposition to States has created a long trail of litigation with little progress. This is due to the fact that the traditional framework comports squarely with more than a century's worth of precedents known as the *Insular Cases* that fundamentally define Territories and the Americans living there as lesser than their counterparts living in States.²⁶³ Litigation on behalf of the Territories based on the traditional framework will not likely yield any meaningful success because courts, namely the U.S. Supreme Court, have been reluctant to overturn the *Insular Cases*.²⁶⁴

The *Insular Cases* are a set of Supreme Court cases from the early 1900s about issues pertaining to Territories acquired by

263. See, e.g., Torruella, *supra* note 27, at 347 (“By its repeated decisions upholding the *Insular Cases* . . . the Supreme Court has created what amounts to a political ghetto in the territories . . .”).

264. Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CALIF. L. REV. 1181, 1200–03 (2014).

the United States in the latter half of the 1800s.²⁶⁵ These cases produced a set of foundational legal doctrines for all future courts adjudicating issues relating to the Territories.²⁶⁶ In particular, the *Insular Cases* established the principles of territorial incorporation and further bolstered the almost unfettered Congressional powers over the Territories which predated this line of precedents.²⁶⁷

First, the *Insular Cases* created the legal doctrine of territorial incorporation.²⁶⁸ Under this doctrine, fully incorporated Territories are afforded all the rights and privileges of the Constitution, while unincorporated Territories are only afforded certain rights and privileges as designated by Congress, as was the established practice prior to the Supreme Court's explicit affirmation via this line of cases.²⁶⁹ As previously noted, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands are all deemed unincorporated.²⁷⁰ Implicit under the doctrine of incorporation, because States are deemed part of the United States and need not be incorporated, they are thus afforded the full panoply of rights and privileges of the Constitution, while Territories only have rights and privileges given

265. See Christina Duffy Burnett, *A Note on the Insular Cases*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 389–90 (Christina Duffy Burnett & Burke Marshall eds., 2001). It should be noted that some scholars believe that the *Insular Cases* include a set of decisions handed down in 1901, plus an additional decision in 1922. See generally *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. N.Y. & P.R. Steamship. Co.*, 182 U.S. 392 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901).

266. See GERALD L. NEUMAN, *RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE*, at xiv (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015); *Developments in the Law*, *supra* note 7, at 1648 (“[T]he Supreme Court in the *Insular Cases* inaugurated a novel and enduring constitutional line in its territorial jurisprudence . . .”).

267. Duffy Burnett, *supra* note 27.

268. *Id.* (“[I]n the *Insular Cases* [the Court] produced the unprecedented doctrine of territorial incorporation.”).

269. See, e.g., *id.* (“This doctrine divided domestic territory . . . into two categories: those places ‘incorporated’ into the United States and forming an integral part thereof (including the states, the District of Columbia, and the ‘incorporated territories’); and those places not incorporated into the United States, but merely ‘belonging’ to it (which came to be known as the ‘unincorporated territories’).”).

270. See *Developments in the Law*, *supra* note 7.

to them at the discretion of Congress.²⁷¹ The doctrine of territorial incorporation essentially bifurcates Americans into two categories: those living in so-called “incorporated” Territories or States versus those living in “unincorporated” Territories.²⁷² This duality is at the root of the conventional view and why Americans of the Territories possess so little political power in the national government relative to their counterparts living in States: they are American citizens or non-citizen nationals living in unincorporated Territories, not States or incorporated lands, that have not been granted full political rights by Congress.²⁷³

Second, in addition to the principle of territorial incorporation, the *Insular Cases* also bolstered the almost boundless plenary power of Congress over the Territories under the Territorial Clause of the Constitution because they were not duly incorporated into the Union like the States by giving it the powerful legal imprimatur of the Supreme Court.²⁷⁴ The *Insular Cases* reversed the Court’s previous position that the U.S. Constitution “follows the flag to our territories,” which would have meant that the Americans of the Territories had similar federal rights and privileges as those living in States because they too were under the rule of the Stars and Stripes.²⁷⁵ Instead, the current harsh reality is that federal rights and privileges afforded to the Americans of the Territories are subject to the whims of a Congress constituted without voting members from the Territories.

271. See Charles & Fuentes-Rohwer, *supra* note 120, at 139 (“The Constitution applied to the territories qua states only after Congress had chosen to incorporate the given territory into the United States. Before that moment, that is, so long as territories remain unincorporated, Congress has ‘power to locally govern at discretion.’”) (citing *Downes v. Bidwell*, 182 U.S. 244, 287–88 (1901) (White, J., concurring)).

272. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1556 (2022) (Gorsuch, J., concurring) (opining that the doctrine of incorporation as applied to Territories in an “implausible and embarrassing state of affairs”).

273. Torruella, *supra* note 27, at 347 (“By its repeated decisions upholding the *Insular Cases* . . . the Supreme Court has created what amounts to a political ghetto in the territories Puerto Rico’s U.S. citizens have no effective way of exercising the political pressure that is normally available to U.S. citizens . . .”).

274. See *Downes*, 182 U.S. at 251 (“The Constitution was created by the people of the United States, as a union of States, to be governed solely by representatives of the States . . .”) (emphasis omitted).

275. Pedro A. Malavet, *The Inconvenience of a “Constitution [That] Follows the Flag . . . But Doesn’t Quite Catch up with It”: From Downes v. Bidwell to Boumediene v. Bush*, 80 MISS. L.J. 181, 185–86 (2010).

While the *Insular Cases* have been subject to much criticism, they nevertheless remain the leading law of the land when it comes to the Territories.²⁷⁶

Recent cases in the Supreme Court and federal appellate courts show little signs of judicial willingness to wholly overturn more than a century's worth of precedents, however misguided.²⁷⁷

In a trio of 2015–2016 cases, *Puerto Rico v. Franklin California Tax-Free Trust*,²⁷⁸ *Puerto Rico v. Sanchez Valle*,²⁷⁹ and *Tuaua v. United States*,²⁸⁰ the Supreme Court and the D.C. Circuit Court of Appeals either expressly cited to the *Insular Cases* or implicitly upheld underlying principles articulated in the *Insular Cases* to the detriment of the Territories.²⁸¹ As an example, in *Franklin California Tax-Free Trust*, the Supreme Court ruled that Puerto Rico was a “State” for the purposes of federal preemption under the Bankruptcy Code, but not a “State” for the purposes of being empowered to establish its own municipal bankruptcy law.²⁸² The Court’s institutionally convenient legal construction in 2016’s *Franklin California Tax-Free Trust* was

276. See NEUMAN, *supra* note 266 (noting that the *Insular Cases* “continue[] to provide the foundation for governing inhabited territories and small islands without permanent populations”).

277. See *Developments in the Law*, *supra* note 7, at 1680 (“[T]he Supreme Court has continued to invoke the *Insular Cases* framework in twenty-first-century disputes involving the struggle against international terrorism among other cutting-edge issues.”); see also *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016) (holding that Puerto Rico is not a “sovereign[]” for the purposes of constitutional double jeopardy considerations based on the *Insular Cases*); *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (2016) (ruling that federal bankruptcy law preempts any local bankruptcy statute in Puerto Rico because Congress has ultimate authority over the Territories); *United States v. Vaello Madero*, 142 S. Ct. 1539, 1555–56 (2022) (Gorsuch, J. concurring) (opining on the judicial endurance of the *Insular Cases*).

278. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1938.

279. *Sanchez Valle*, 136 S. Ct. at 1863.

280. *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015).

281. See *Sanchez Valle*, 136 S. Ct. at 1873 (citing to the *Insular Cases* and its progeny for the position that “this Court concluded in the early decades of the last century that U.S. territories—including an earlier incarnation of Puerto Rico itself—are not sovereigns distinct from the United States”); *Tuaua*, 788 F.3d at 305–06 (citing the *Insular Cases* and its progeny in denying full citizenship to American Samoans).

282. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1945–46.

akin to the legal interpretive sophism in its landmark 1901 ruling in *Downes v. Bidwell*,²⁸³ where it held that Puerto Rico was “foreign to the United States in a domestic sense.”²⁸⁴

A few years later, in the 2020 case of *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*,²⁸⁵ the Supreme Court again affirmed Congress’s powers over the Territories by upholding the selection mechanism of the PROMESA board.²⁸⁶ Once again, the Court based some of its reasoning on the rationales first established in the *Insular Cases*.²⁸⁷

Most recently in 2022, in the case of *United States v. Vaello Madero*, the Supreme Court ruled in an 8–1 decision that American citizens residing in Puerto Rico can be denied the benefits of the federal Supplemental Security Income program, which is eligible to all citizens residing in the States, the District of Columbia, and the Northern Mariana Islands because of Congress’s “broad authority to legislate with respect to the U.S. Territories.”²⁸⁸ While the majority opinion did not expressly cite the *Insular Cases* as the basis of the ruling, its rationale was rooted in understandings and principles that tie back to those precedents which over time constructed a robust legal framework that irrationally divides Americans between those living in States and those living in Territories.²⁸⁹

In sum, the conventional territorial framework presents few viable paths toward progress via law and litigation given the significant roadblocks of steadfast precedents that illogically and unjustly subordinate the Territories.

2. Of Policy and Politics

The traditional legal framework of understanding the Territories primarily in segregated subservience to States has also

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

284. *Id.* at 341–42 (White, J., concurring).

285. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv.*, 140 S. Ct. 1649 (2020).

286. *Id.* at 1665.

287. *Id.*

288. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541 (2022).

289. *See id.* at 1557 (Sotomayor J., dissenting) (“In my view, there is no rational basis for Congress to treat needy citizens living anywhere in the United States so differently from others.”); *id.* at 1556 (Gorsuch J., concurring) (“Rather than ask the Court to overrule the *Insular Cases*, both sides in this litigation work from the shared premise that the equal protection guarantee under which Mr. Vaello Madero brings his claim is a ‘fundamental’ feature of the Constitution and thus applies in ‘unincorporated’ Territories like Puerto Rico.”).

created little progress through policy and politics. This is due to the fact that the conventional legal construct largely narrows the political paths of progress for the Territories to status quo or statehood.²⁹⁰ If one divides Americans into two classes of citizenship whereby first-class citizenship is conferred to those living in States with full rights and privileges while second-class citizenship is conferred to those living in Territories with limited rights and privileges, it is only natural that Americans in the Territories will have to pursue statehood as *the* path to progress.²⁹¹ Unfortunately, statehood is unlikely for all or any of the Territories given most of their relatively small sizes as compared to States, and the harsh realities of contemporary hyper-partisanship.²⁹²

The Americans of Puerto Rico make the strongest case for statehood given the Territory's population of over three million people. Puerto Rico has passed multiple referendums overwhelmingly in favor of statehood in multiple elections.²⁹³ In 2017, an overwhelming ninety-seven percent for statehood in a nonbinding referendum, with independence and status quo as the alternatives.²⁹⁴ It should be noted that the 2017 plebiscite was boycotted by many opponents of statehood.²⁹⁵ Nevertheless, again in 2020, a referendum on whether Puerto Rico should seek statehood received 52.52% approval.²⁹⁶ Such clear expressions of political preference has been met with no meaningful progress in Washington. A few House members drafted and introduced bills multiple times in recent years to jumpstart Puerto Rico's statehood and/or self-determination process, but these bills all died without any meaningful legislative progress.²⁹⁷

290. ERMAN, *supra* note 172, at 140–45.

291. See Hammond, *supra* note 25, at 1662–63.

292. See Raskin, *supra* note 9, at 566.

293. *Puerto Rico Fast Facts*, CNN (Sept. 21, 2022), <http://www.cnn.com/2018/01/17/us/puerto-rico-fast-facts/index.html> [<https://perma.cc/YE5G-L7W6>].

294. Vann R. Newkirk II, *Puerto Rico's Plebiscite to Nowhere*, ATLANTIC (June 13, 2017), <https://www.theatlantic.com/politics/archive/2017/06/puerto-rico-statehood-plebiscite-congress/530136> [<https://perma.cc/K3SF-CVFB>].

295. *Puerto Rico Statehood Referendum*, BALLOTPEdia (2020), [https://ballotpedia.org/Puerto_Rico_Statehood_Referendum_\(2020\)](https://ballotpedia.org/Puerto_Rico_Statehood_Referendum_(2020)) [<https://perma.cc/A97U-JLS6>].

296. *Id.*

297. See Puerto Rico Admission Act, H.R. 260, 115th Cong. (2017) (as introduced by Rep. Jenniffer González-Colón); Puerto Rico Statehood Admission Process Act, H.R. 727, 114th Cong. (2015) (as introduced by Rep. Pedro R. Pierluisi);

Aside from Puerto Rico, all of the other Territories are too small in terms of population to be plausibly considered for statehood, even though there is no minimal population size requirement for being a State.²⁹⁸ Wyoming, the smallest State by population, has approximately 577,000 people.²⁹⁹ Each Congressional district has approximately 761,000 people.³⁰⁰ No Territory except Puerto Rico even has 200,000 people.³⁰¹ Given their relatively small populations, it is hard to imagine Congress conferring statehood to each of the Territories with the accompanying two U.S. Senators and a full voting member of the House of Representatives.

Nevertheless, beyond the issue of population, the gridlocked nature of modern American politics renders it extremely unlikely for any of the Territories to survive the complicated political process to achieve statehood. Article IV of the Constitution authorizes Congress to admit new States into the Union.³⁰² The admission of a new State historically has required a referendum, a congressional enabling act, ratification of a State constitution, and final Congressional review and approval for admission.³⁰³ Every one of these sequential steps requires broad, bipartisan consensus in the Congress, and each step must be fulfilled prior

Puerto Rico Statehood Admission Act, H.R. 1522 117th Cong. (2021) (as introduced by Rep. Darren Soto); Puerto Rico Self-Determination Act of 2021, H.R. 2070, 117th Cong. (2021) (as introduced by Rep. Nydia Velazquez); Puerto Rico Status Act, H.R. 8393, 117th Cong. (2022) (as introduced by Rep. Raúl M. Grijalva).

298. See Raskin, *supra* note 9, at 566 (arguing that it is hard to justify two U.S. Senators for any of the Territories besides Puerto Rico given their small populations).

299. *Wyoming Remains Nation's Least Populous State*, U.S. CENSUS BUREAU (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/wyoming-population-change-between-census-decade.html> [https://perma.cc/X9RA-3BS3].

300. *2020 Census Apportionment: Presentation for Public Distribution*, U.S. CENSUS BUREAU, <https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/presentation-2020-census-apportionment-results.pdf> [https://perma.cc/J4MK-VL9K]; Sarah J. Eckman, CONG. RSCH. SERV., R45951, APPORTIONMENT AND REDISTRICTING PROCESS FOR THE U.S. HOUSE OF REPRESENTATIVES 2 (Nov. 22, 2021), <https://crsreports.congress.gov/product/pdf/R/R45951> [https://perma.cc/4YCJ-J74D].

301. See *supra* Table 1.

302. U.S. CONST. art. IV, § 3, cl. 1.

303. See, e.g., Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 127–29 (2004); Marcos E. Kinevan, *Alaska and Hawaii: From Territoriality to Statehood*, 38 CALIF. L. REV. 273, 278–79 (1950).

to moving forward to the next one.³⁰⁴ This politically complex process of admitting new States into the Union has only happened successfully thirty-seven times in the entire history of our nation, and only five times in the 20th Century, after the original thirteen colonies became States.³⁰⁵ The dysfunctional politics of the last two-plus decades that routinely obstructs budgets, defies Congressional subpoenas, blocks nominations, threatens shut-downs, kills legislation, and challenges legitimate election results almost guarantees that statehood for any of the Territories is a political impossibility in the near term.³⁰⁶

In sum, the longstanding, dichotomous States/Territories legal framework at the heart of the prevailing law of the Territories thus far proffers up a nearly impossible path to statehood as the chief political anecdote to the afflictions of the Territories.

* * *

To be sure, these critiques of the perilous paths of litigation and politics rooted in the conventional framework of the Territories do not mean to suggest that all efforts to overturn the *Insular Cases* or pursue statehood should be abandoned. Instead, these critiques are meant to suggest that a new perspective is needed to create additional and better paths to progress for the people of the Territories. New and different paths must be explored simultaneously to meaningfully help the people of the Territories in the near term, while fights along the traditional paths of litigation and political advocacy endure.

304. See JOHN S. WHITEHEAD, COMPLETING THE UNION: ALASKA, HAWAII, AND THE BATTLE FOR STATEHOOD 6 (2004) (“A statehood bill . . . had to be conducted; committee recommendations had to be made, and above all a majority vote had to be achieved in both houses in the same session of Congress.”).

305. Samuel Shipley, *List of U.S. States’ Dates of Admission to the Union*, BRITANNICA, <https://www.britannica.com/topic/list-of-U-S-states-by-date-of-admission-to-the-Union-2130026> [<https://perma.cc/AY6B-6QTH>].

306. See generally Peter Baker, *A Year Later, Jan. 6 Becomes Just Another Wedge in a Divided Nation*, N.Y. TIMES (Jan. 6, 2022), <https://www.nytimes.com/2022/01/06/us/politics/jan-6-capitol-riot-aftermath.html?searchResultPosition=1> [<https://perma.cc/PPB6-ZBAF>]; JAMES E. CAMPBELL, POLARIZED: MAKING SENSE OF A DIVIDED AMERICA 1–4 (2016); THOMAS E. MANN & NORMAN J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM, at ix–x, 3 (2012); NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 13–14 (2006); David A. Moss, *Fixing What’s Wrong with U.S. Politics*, HARV. BUS. REV. MAG. (Mar. 2012), <https://hbr.org/2012/03/fixing-whats-wrong-with-us-politics> [<https://perma.cc/7H7Y-YQ78>].

B. THE PROMISE OF TERRITORIAL DIVERSITY

A new framework that better recognizes and appreciates the diversity among the Territories is needed for better understanding, seeing, and empowering them. While the old territorial legal dualism construct in law and policy has its merits, it also has serious flaws and drawbacks. It is blind to the diversity among the Territories by treating and seeing them merely as non-States. It needlessly limits policy and legal options to those oriented around Territories and States. It has ultimately produced little meaningful progress for decades. A new legal framework rooted in territorial diversity, as detailed below, holds both theoretical and practical promise for changing the way we address the needs of Americans, beyond States and Territories, and toward more meaningful progress.

1. A New Territorial Diversity Framework

To break away from the old legal dualism at the heart of the law of the Territories, a new legal framework, as proposed here, oriented around the diversity of the Territories is necessary. This new framework focuses on the distinct strengths and challenges of each Territory in offering solutions, rather than seeing and treating them as one, undifferentiated collective non-State entity. Instead of fixating on overcoming legal and political obstacles entrenched in Constitutional law and political status, the territorial diversity legal framework bypasses those historical hinderances and focuses on pragmatic solutions to help the people of the Territories in the present.

In contrast to over a century of proposals aimed squarely at treating the Territories as either States or non-State Territories, the territorial diversity framework moves away from those polarized positions with limited policy options toward a more nuanced center with a wider range of legal and policy tools to improve the lives of the people of the Territories. The diagram below depicts how the new territorial diversity legal framework will open up new pathways for progress relative to the conventional, binary legal framework.

Figure 3: Spectrum of Legal and Policy Solutions



The new framework, in theory, will focus on solving the distinct and discrete problems of individual Territories rather than using those problems as vehicles to litigate the collective unfairness of the States/Territories dichotomy. Instead of arguing that every Territory should be treated equally to every State or that the Territories should receive specially tailored federal treatment, this new framework will focus on the particularized needs and challenges of Americans living within a Territory without attempting to directly answer the longstanding, contentious legal issues. Whereas the prevailing legal dualism framework focuses on a necessarily limited and improbable set of legal and policy solutions, the new framework opens up a wider set of practical possibilities.

To be sure, the new framework is not blind to the fact that the federal government already treats the Territories differently in many respects. As previously noted, certain federal benefits are not conferred equitably to each of the Territories.³⁰⁷ Similarly, the people of the American Samoa are considered non-citizen nationals while the people of each of the other Territories are citizens.³⁰⁸ Whereas current disparate treatments of the territories can seem ad hoc, irrational, or even punitive, the new framework calls for a better and more thoughtful appreciation of the diverse needs and strengths of each Territory.

To illustrate how the new framework works in application, consider the problem of insufficient outpatient care for veterans in Guam.³⁰⁹ Under the traditional framework, the two most

307. See *supra* Part III.D.

308. See 8 U.S.C. § 1408(1) (1988).

309. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-288, VETERANS HEALTH ADMINISTRATION: OPPORTUNITIES EXIST FOR IMPROVING VETERANS' ACCESS TO HEALTH CARE SERVICES IN THE PACIFIC ISLAND 20–28 (2018), <https://www.gao.gov/products/gao-18-288> [<https://perma.cc/YZU4-CBR5>]; Jamie Ward, *Staff*

likely approaches would orient themselves around the bifurcated view of Territories and States. As such, a non-State-oriented solution would make the political argument that all Territories be allocated comparable pro rata funding in the next round of defense appropriation, even though Americans on Guam bear the burden of U.S. military presence unlike any of the other Territories. Alternatively, a State-oriented solution would be to litigate in court that federal appropriations for veterans' outpatient care in the Territories should be equal to those of the States, but the challenge would likely fail after years in the courts.

In contrast, under the new framework that embraces territorial diversity, one solution would be to place an earmark in the next applicable bill for appropriations directed to Guam to alleviate the specific harms caused by the insufficient veterans care resources on the island, given the large military presence on the island which does not exist in the other Territories.³¹⁰ While Congressional representatives of the Territories do not have a vote on final legislation, they have the opportunity to vote in committees, participate in legislative mark-ups, and make community project funding requests in advance of final legislation to procure earmarks for their constituents under the new rules of the House of Representatives.³¹¹

The aforementioned example, while hypothetical and simplified, is nonetheless reflective of the competing approaches when it comes to solving the problems of the Territories under the old, segregated framework, and the pragmatic promise that is possible under the new territorial diversity framework. To be sure, this new framework does not seek to eliminate the old framework entirely. It does not call for the end of the decades of effort in the arenas of politics and courts to gain more rights and justice for the Americans in the Territories. Instead, it offers a

Shortage, Distance Bog Down Care for Veterans, GUAM DAILY POST (Apr. 14, 2018), https://www.postguam.com/news/local/staff-shortage-distance-bog-down-care-for-veterans/article_656d3ec6-3eaa-11e8-9315-e382d427d435.html [https://perma.cc/2YQT-TD2S].

310. John Hudak, *Earmarks Are Back, and Americans Should Be Glad*, BROOKINGS (Mar. 17, 2021), <https://www.brookings.edu/blog/fixgov/2021/03/17/earmarks-are-back-and-americans-should-be-glad> [https://perma.cc/PW6D-U4T2].

311. See *Guidelines for the FY2022 Community Project Funding Member Request Process*, HOUSE COMM. ON APPROPRIATIONS (Mar. 29, 2021), <https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/documents/Guidance%20on%20Community%20Project%20Funding.pdf> [https://perma.cc/7V75-M7K7].

new, alternative perspective at seeing the timely and timeless problems afflicting millions of Americans, where they reside, regardless of whether the place is a State or a Territory. And it calls for some of the resources and efforts currently deployed for costly, time-consuming, and ultimately unfruitful litigation and political solutions under the old framework to be reallocated to more vigorously pursue different solutions under the new framework.

2. Implications and Recommendations

The territorial diversity framework holds practical and theoretical implications and recommendations both in terms of substance and process. In terms of substance, this new framework will focus on solutions that target distinct problems facing Americans in each Territory with a special emphasis on challenges that exhibit illogical disparities among the Territories themselves. In terms of process, this new framework will shift attention and resources away from traditional legislation and federal litigation towards executive orders, agency actions, and legislative earmarks. Furthermore, the proposed framework can also be applied and leveraged by Indigenous communities and their advocates within the States in their longstanding fight for more rights, recognition, and self-governance.³¹²

First, in terms of areas of substantive focus, this framework can be particularly powerful in highlighting and correcting the disparate benefits and treatments among the Territories themselves by the federal government. This diversity in (mis)treatment among the Territories can be spotlighted and fixed without

312. See e.g., *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (holding that States lack jurisdiction over Indian territory for the purposes of the federal Major Crimes Act); *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) (ruling that states and the federal government have concurrent jurisdiction with tribal governments in Indian territories over certain crimes that occur within those territories); Michael Doran, *Redefining Tribal Sovereignty for the Era of Fundamental Rights*, 95 IND. L.J. 87, 144 (2020) (arguing how recent Supreme Court decisions “continue[] by other means the brutal processes of colonialism and subjugation” of Native American tribes and their sovereignty); Blackhawk, *supra* note 32, at 1876 (“The history of American colonialism and its treatment of Native Nations and Native peoples offers different, yet equally important, lessons on the strengths and failings of our constitutional framework.”); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1575 (1996) (discussing how legal precedents and principles have been interpreted to harm Indian sovereignty).

resolving the larger Constitutional issues that juxtapose Territories against States because it focuses on the diverse treatment amongst the Territories themselves.

In concrete terms, advocates for the Territories should focus on receiving favorable federal treatment given to other Territories but irrationally denied to theirs. For instance, adversely impacted Territories should focus on lifting statutory caps on Medicaid and gaining full inclusion into various federal benefits programs like Supplemental Social Security Income and SNAP.³¹³ Similarly, Guam and Puerto Rico should work toward securing a long-term or permanent waiver to the antiquated and burdensome Jones Act that does not apply to the other Territories.³¹⁴

The ripples of substantive areas that can be identified and addressed through the territorial diversity framework are many and significant, encompassing issues of tax law, environmental regulation, defense spending, and immigration policy. The territorial diversity perspective not only recognizes the distinctness of the challenges facing the Territories, but it also recognizes that the solutions needed to address those challenges may have to vary and be tailored for each Territory.

Second, in terms of process, the territorial diversity framework aims to shift attention and resources away from traditional legislation and federal litigation towards executive orders, agency actions, and legislative earmarks as the means to create meaningful, near-term progress for the Territories.³¹⁵ This shift will bypass the legal and political obstacles entrenched by the traditional framework of Territories being wholly subordinate to States, and has the added benefit of the Territories procuring more carefully tailored solutions to their distinct problems.³¹⁶ It also bypasses the dysfunctionality of contemporary politics that

313. See *supra* Part III.

314. *Id.*

315. See, e.g., Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 524–30 (2009) (providing background on legislative earmarks); Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1750–51 (2019) (highlighting “the massive amount of regulatory power that Congress chose to hand over to executive-branch agencies”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277–80 (2001) (discussing the growth of executive orders and directives starting with the Reagan administration).

316. See Lin, *supra* note 28, at 1292–93 (advocating for more executive action to help the Territories as opposed to traditional legislation and litigation).

has made so little progress on so many large and important issues confronting the country, let alone the Territories.

To be sure, this shift in focus and capital under the new framework toward processes like executive orders, agency actions, and legislative earmarks may lead to a corresponding shift in litigation and politicking. Nevertheless, on litigation, courts have historically been quite deferential to the executive branch on executive orders, administrative agencies on agency rules, and Congress on budgetary matters, respectively, in ways that seem more promising relative to the obstacles presented by the *Insular Cases* under constitutional law under the old framework.³¹⁷ Similarly, on politicking, the new territorial diversity framework will offer more pathways for Americans in the Territories as compared to the traditional legislative process under the longstanding conventional framework.

In practice, executive orders, agency actions, and legislative earmarks are much easier relative to the tedious and time-consuming nature of traditional legislation and litigation.³¹⁸ For many of the distinct challenges facing each Territory, significant progress can be achieved through earmarks, executive orders, or agency action bypassing congressional gridlock and dysfunctional polarized politics that are far too common in contemporary federal government.³¹⁹ For instance, Guam and Puerto Rico can receive immediate reprieve from the antiquated maritime toll

317. See, e.g., Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 625 (2021) (“*Chevron’s* presumption of administrative deference has been a foundation of American government.”); Manheim & Watts, *supra* note 315, at 1769 (“Historically, litigants only rarely raised direct challenges to presidential orders.”); Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1100–05 (2021) (discussing the historical lack of litigation on Congressional appropriations).

318. See Matthew Chou, *Agency Interpretations of Executive Orders*, 71 ADMIN. L. REV. 555, 562–63 (2019) (describing the streamlined process of issuing executive orders); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1242 (2017) (discussing “the overall trend towards administrative governance in response to polarized politics and legislative gridlock”).

319. See, e.g., Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1176–77 (2014) (noting how White House review shapes agency action to sidestep hyper-partisan politics); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 17–62 (2014) (describing creative agency actions as a means for addressing policy problems while avoiding legislative gridlock).

imposed on their people by the Jones Act through executive action via requests to the Departments of Defense or Homeland Security.³²⁰ No lengthy legislation or litigation is necessary. In fact, the Jones Act has been waived numerous times in recent memory.³²¹ In the aftermath of hurricanes that devastated Puerto Rico in 2017 and 2022, the Jones Act was waived to allow much-needed goods and relief supplies to enter the island without added costs or delays.³²²

Similarly, the Internal Revenue Service and Department of Health and Human Services can readily cure some of the irrational tax and entitlement disparities that exist among the Territories through interpretive guidance without years of legislation, administrative rulemaking, or litigation that may end up going nowhere.³²³ For instance, these agencies could offer interpretative guidance that the definition of “United States” in a pertinent agency rule or law is deemed to include all of the Territories, even on a time limited basis.³²⁴

Furthermore, beyond the Territories and their people, the new framework holds potentially potent power for Indigenous communities in their fight for more rights and recognition from the government.³²⁵ While the plight of Indigenous communities in the United States is not identical to those shared by the people of the Territories, they share many similar afflictions that are both made harder to ameliorate due to a likewise dark colonial

320. Jonathan Waldron, *How Difficult Is It to Obtain a Jones Act Waiver?*, MARINE LINK (Nov. 25, 2014), <https://www.marinelink.com/news/difficult-obtain-waiver381431.aspx> [<https://perma.cc/778L-WWEY>].

321. See *Request to Waive Navigation Laws*, U.S. CUSTOMS & BORDER PROT. (Apr. 5, 2022), <https://www.cbp.gov/trade/jones-act-waiver-request#> [<https://perma.cc/N63J-SHCH>] (giving guidance on applying for a Jones Act Waiver).

322. See Niraj Chokshi, *Trump Waives Jones Act for Puerto Rico, Easing Hurricane Aid Shipments*, N.Y. TIMES (Sept. 28, 2017), https://www.nytimes.com/2017/09/28/us/jones-act-waived.html?_r=0 [<https://perma.cc/SBP7-LK9R>]; *Statement by Secretary Mayorkas on the Approval of a Jones Act Waiver for Puerto Rico*, U.S. DEP’T OF HOMELAND SEC. (Sept. 28, 2022), <https://www.dhs.gov/news/2022/09/28/statement-secretary-mayorkas-approval-jones-act-waiver-puerto-rico> [<https://perma.cc/AX2W-CKBX>].

323. See Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517, 544–48 (2012) (discussing the rulemaking power of interpretive guidance in administrative law).

324. See, e.g., Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 316–19 (2018) (describing the broad and powerful legal effects of agency interpretative guidance under administrative law).

325. See, e.g., Blackhawk, *supra* note 32 (describing various contests and conceptions of Indian rights and powers within the United States).

history, troubling legal precedents, and dysfunctional contemporary politics.³²⁶ Just as practical progress for the Territories has been entrenched in an oppressive legal framework rooted in antiquated States/Territories distinctions, practical progress for many Indigenous communities has been similarly stunted by restrictive binary frameworks rooted in outdated States/Tribes or Black/White distinctions.³²⁷ As such, the new territorial diversity framework and its accompanying shifts in substance and process can also be leveraged to inform and innovate political and legal advocacy efforts on behalf of Indigenous communities while larger legal and political issues remain unresolved.³²⁸

Ultimately, both in terms of substance and process, the new territorial diversity framework offers promising pragmatic paths to progress that sidestep the deep-rooted legal and political hinderances that have made meaningful change for the Territories so difficult. While the new framework is not revolutionary in aiming to overturn over a century's worth of unjustly discriminatory precedents and practices against the Territories, it can

326. See Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 559–60 (2021) (discussing how tribal law governing and protecting Indigenous people is often ignored by legal scholars and courts); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 278 (2002) (“[D]espite the dismantling of the premises that gave birth to the inherent powers doctrine, the era’s decisions regarding national power over Indians, aliens, and territories remain largely intact.”); Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1084–85 (2014) (highlighting the troubling roots of law relating to Native Americans and people of newly colonized territories); Blackhawk, *supra* note 32, at 1824–25 (tracing Supreme Court jurisprudence on Indian affairs to precedents rooted in the Territorial Clause of the Constitution).

327. See Cleveland, *supra* note 326, at 244–46 (discussing similarities in legal doctrines related to the Territories and Native Americans); Blackhawk, *supra* note 32, at 1824–25 (arguing that much of federal public law has been based on a “black/white racial binary” paradigm that harmed the rights and interests of Native Americans); Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 571–72, 572 n.2 (1995) (recommending other sources discussing the treatment of Native Americans under American law).

328. See James T. Campbell, Aurelius’s *Article III Revisionism: Reimagining Judicial Engagement with the Insular Cases and “The Law of the Territories”*, 131 YALE L.J. 2542, 2632–36 (2022) (discussing cross-learning opportunities between the law of the Territories and federal Indian law); Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652, 2659–60 (2022) (linking judicial doctrines of the Territories to those related to those of Indigenous communities).

provide near-term, tangible assistance through politically feasible paths. While this new framework may leave some longing for more radical structural change, it gives the people of each of the Territories some real reprieve from some of the unjust burdens that they have had to bear for so long.

It should be noted that a post-*Insular Cases* world may finally be closer to reality. As Justice Neil Gorsuch opined in his 2022 concurring opinion in *Vaello Madero*, “[T]he time has come to recognize that the *Insular Cases* rest on a rotten foundation. And I hope the day comes soon when the Court squarely overrules them.”³²⁹ To be sure, an explicit overruling of the *Insular Cases* by the Supreme Court will be significant—symbolically and substantively—but it will not solve or resolve all of the longstanding legal and political issues plaguing the Territories; and it will undoubtedly generate many new complicated issues.³³⁰ Nevertheless, when that day arrives and the *Insular Cases* become truly a legal corpus of the past, the efforts and works with executive orders, legislative earmarks, and agency actions advocated and envisioned under the new framework here will hopefully make the long overdue corrections and remediations on behalf of the Territories more expeditious and efficient.

CONCLUSION

The inequities and mistreatment of the Territories remains one of the most appalling and vexing unfinished legal and political works of justice in our country. The longstanding law of the Territories has been rooted in an outdated and untrue legal framework that defines Territories in segregated subservience to States. This conventional bifurcated law of the Territories has relegated the people of the Territories into a second-class citizenship, living in fragile, unmoored spaces of law and fact.

This Article offers a critical framework that turns the legal lens away from territorial dualism towards territorial diversity. It examines the shared struggles of the Territories as well as their distinct despairs. It explores the origins of their present dire straits, the paths pursued under the preexisting framework, and the possibilities under a new one. Throughout its analysis, this Article is fully aware of the theoretical elegance and steadfast legacy of the conventional legal framework at the heart of

329. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1557 (2022) (Gorsuch J., concurring).

330. Campbell, *supra* note 328, at 2557–58.

the law of the Territories, but it also recognizes that same elegant, steadfast conception has made legal and political reforms on behalf of the Territories so elusive. As such, it offers a more modest, but also more meaningful alternative. Specifically, it introduces a new territorial diversity framework designed to bring about real, near-term aid to millions of Americans living in the Territories through more legally and politically feasible channels of executive orders, legislative earmarks, and agency actions. It does so supportive of the fights that must continue on the larger political and legal questions on behalf of the Territories, but also mindful of the serious need for additional practical paths forward in the present. It aspires to move beyond a conventional, outdated perspective rooted in antiquated notions of superiority and geography towards a truer, richer, and more complicated view of the Territories, and the power and progress that may be possible when we embrace their diversity. In the end, this Article fervently hopes to provide a workable legal framework for seeing, thinking, and acting anew with greater creativity and urgency about the challenges confronting over three million fellow Americans, beyond States and Territories, and toward a better future.