

# Americans, Almost and Forgotten

Tom C.W. Lin\*

*There are millions of Americans who are systematically forgotten and mistreated by our government. They have been described by the Supreme Court as “alien races” and “utterly unfit for American citizenship,” but they continue to fight and die defending our Constitution. They survive catastrophic storms, but do not receive the assistance that is freely given to other Americans. They are subject to federal laws and regulations, but have no meaningful voice or vote in Washington. They are the millions of Americans in Puerto Rico, Guam, American Samoa, the US Virgin Islands, and the Northern Mariana Islands—the unincorporated territories of the United States.*

*This Article is about these forgotten Americans, their longstanding political plight, and the pragmatic legal policies that could improve their lives and make them fully and equally American. It begins by providing a brief overview of each territory. Next, it investigates the plight of the territories, focusing on how interconnected factors relating to political powerlessness, economic dependence, military presence, and geographic isolation have created heavy burdens for people in the territories. Moving from problems to solutions, this Article examines past efforts to aid the territories. In particular, it analyzes past pursuits of litigation, statehood, and independence. It explains why these prior paths did not lead to progress, and discloses critical obstacles that continue to obstruct these routes. Finally, this Article proposes three workable ways for the federal government to assist the territories in the near term. Specifically, it argues that the territories and their supporters should focus on working with the federal government to obtain: (1) an extended temporary waiver of the*

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*costly maritime law known as the Jones Act, (2) most-favored state status in federal veterans and disaster relief appropriations, and (3) special economic empowerment zone designations. Ultimately, this Article aspires to offer a new, workable roadmap for policymakers to think and act with greater urgency about the forgotten Americans of our territories.*

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## INTRODUCTION

There are millions of Americans on islands, near and far, that are systematically forgotten and mistreated by our government. They fight and die for our country, but have no right to vote for their Commander in Chief.<sup>1</sup> They are subject to federal laws and regulations, but have no voice in their enactment.<sup>2</sup>

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1. *Igartua De La Rosa v. United States*, 32 F.3d 8, 9 (1st Cir. 1994) (interpreting art. II, § 1, cl. 2 and holding 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.; *id.* art. II, § 1, cl. 2.

2. 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

They have been characterized as “savage,”<sup>3</sup> “half-civilized,”<sup>4</sup> and “ignorant and lawless”<sup>5</sup> in influential legal scholarship and widely-cited cases by the Supreme Court and lower courts, but continue to strive peacefully for rights and recognition in our judicial system.<sup>6</sup> They endure catastrophic storms, but do not receive the assistance that is freely given to other Americans.<sup>7</sup> They have been described by the Supreme Court as “alien races,”<sup>8</sup> “utterly unfit for American citizenship,”<sup>9</sup> and not of “a foreign country,” but “foreign to the United States in a domestic sense.”<sup>10</sup> They are the over four million Americans on the islands of Puerto Rico, Guam, American Samoa, the US Virgin Islands, and the Northern Mariana Islands.<sup>11</sup> They are the almost and forgotten Americans of the unincorporated territories of the United States.<sup>12</sup>

In 2017, natural and human-made disasters brought the predicaments of several US territories into the national limelight. In August 2017, North Korea

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in the federal Territories . . . have no right to vote for president and no voting representation in the Congress.”).

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

4. 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).

5. *Id.*

6. To their credit, more than 120 years after their publication of several influential articles concerning territorial rights in 1898, the Harvard Law Review published a series of articles in 2017 that examined the role and consequences of their prior scholarship in the development of law relating to the US territories. See Introduction, *Developments in the Law—The U.S. Territories*, 130 HARV. L. REV. 1616, 1626 (2017) (“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.”).

7. See Richard Pérez-Peña, *After Irma and Maria: How 3 Spots in 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/G4ZZ-NUX4>]; Frances Robles et al., *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/WVK7-33Q4>]; 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/ZF57-RNLK>].

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

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

10. *Id.* at 299, 341.

11. This population is based on figures from the 2010 U.S. Census. See *2010 Census Island Areas*, U.S. CENSUS BUREAU, [https://www.census.gov/newsroom/releases/archives/2010\\_census/press-kits/island-areas.html](https://www.census.gov/newsroom/releases/archives/2010_census/press-kits/island-areas.html) [<https://perma.cc/NYA7-G5SW>] (linking to the Population Count spreadsheets of each island area); *QuickFacts: Puerto Rico*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/pr> [<https://perma.cc/5KFG-6P2K>].

12. See Introduction, *Developments in the Law—The U.S. Territories*, supra note 6, at 1617. (“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.”).

announced a detailed plan for a missile attack on Guam in its conflict with the United States.<sup>13</sup> A few weeks later, Puerto Rico endured the onslaught of two cataclysmic Category 5 hurricanes while it was already struggling with an unprecedented bankruptcy and economic crisis.<sup>14</sup> Hurricanes Irma and Maria ravaged an already crumbling island, causing billions of dollars of damage, destroying essential infrastructure, and irreparably changing the daily lives and futures of the people of Puerto Rico.<sup>15</sup> Hurricane Maria alone led to nearly 3,000 casualties in Puerto Rico by 2018.<sup>16</sup> The two storms also had a catastrophic impact on the US Virgin Islands, destroying much of its beautiful habitat and shutting down many of its businesses for extended periods of time.<sup>17</sup> As the American territories continue to struggle with these issues, much of the national and political attention has shifted away from them to the attention-grabbing political topics of the moment. Consequently, the Americans of the territories remain politically powerless, and are forgotten once again.

This Article is about these forgotten Americans, their longstanding political plight, and pragmatic policy reforms that could improve their near-term conditions and make them fully and equally American. Building on a rich body of interdisciplinary research that spans constitutional law, business law, political science, and applied economics, this Article offers an original descriptive and normative examination of these unincorporated American territories (the “Territories”).<sup>18</sup> It charts the histories of these Territories, analyzes their current

13. 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/7MDK-S48U].

14. See Robles et al., *supra* note 7.

15. See *id.*; Jugal K. Patel et al., *Puerto Rico’s Ruins*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/interactive/2018/09/20/us/puerto-rico-hurricane-maria-housing.html> [https://perma.cc/6S29-NXBN] (chronicling the lack of meaningful progress in Puerto Rico one year after Hurricane Maria); John D. Sutter et al., ‘*The Maria Generation*’: *Young People are Dying and Suffering on an Island with a Highly Uncertain Future*, CNN (Sept. 17, 2018), <https://www.cnn.com/2018/09/17/health/sutter-maria-generation-children-puerto-rico/index.html> [https://perma.cc/YKN6-Y6GK] (reporting on the lasting harms of Hurricane Maria on a generation of children in Puerto Rico).

16. See Milken Inst. School of Pub. Health, Geo. Wash. Univ., *Ascertainment of the Estimated Excess Mortality From Hurricane María in Puerto Rico* (2018), <https://publichealth.gwu.edu/sites/default/files/downloads/projects/PRstudy/Acertainment%20of%20the%20Estimated%20Excess%20Mortality%20from%20Hurricane%20Maria%20in%20Puerto%20Rico.pdf> [https://perma.cc/6X6Q-KGEW]; Sheri Fink, *Nearly a Year After Hurricane Maria, Puerto Rico Revises Death Toll to 2,975*, N.Y. TIMES (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/us/puerto-rico-hurricane-maria-deaths.html> [https://perma.cc/3C6A-N2NE].

17. See Pérez-Peña, *supra* note 7; 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/56MN-QAHD].

18. See, e.g., ROBERT D. KAPLAN, *THE REVENGE OF GEOGRAPHY: WHAT THE MAP TELLS US ABOUT COMING CONFLICTS AND THE BATTLE AGAINST FATE* (2012); ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* (1989); KAREN MOSSBERGER, *THE POLITICS OF IDEAS AND THE SPREAD OF ENTERPRISE ZONES* (2000); Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on*

challenges, highlights failed legal reform efforts, and recommends practical policy proposals for the near future.

This Article has two primary objectives. First, it strives to provide a cogent, contemporary narrative for understanding the current difficult legal, political, and economic conditions of the Territories. Second, it aims to recommend politically workable proposals for policymakers in Washington, D.C. and the Territories to improve the conditions of the people of the Territories in the near term. In pursuit of these objectives, this Article recognizes the longstanding legal and political obstacles that have made reforms for the Territories so elusive. As such, this Article does not seek to advance a grand theoretical framework that would hypothetically alleviate all the protracted political problems confronting the Territories. Rather, this Article advocates for more pragmatic, modest proposals that may be less satisfying in theory, but more meaningful in practice in the immediate future, given the current bleak realities in the Territories. Ultimately, this Article aspires to offer a new, workable roadmap for people and policymakers to think and act with greater urgency about the forgotten Americans of the Territories.

This Article unfolds in four parts. Part I offers a historical survey. It presents a brief overview of how each Territory became part of the United States and the current state of affairs of each Territory. It describes each Territory's American origin story, its geography, demography, and economic conditions. Part I lays out the historical contours for the subsequent discussions.

Moving from past to present, Part II examines the contemporary plight of the Territories. Marshaling data, history, and geography, it highlights how the residents of the Territories are frequently forgotten and treated as lesser Americans relative to their peers on the mainland. It focuses on how interconnected factors relating to political powerlessness, economic dependence, military presence, and geographic isolation have created a heavy crucible of burdens for the Americans of the Territories. It exposes the dire realities and outlooks of the Territories absent urgent action. Part II reveals the prosaic and profound impact of these systemic afflictions on the daily life and long-term prosperity of the Territories.

Part III pivots from problems to solutions. It analyzes past paths traveled to alleviate the plight of the Territories. In particular, it focuses on prior endeavors

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*States Entering the Union*, 46 AM. J. LEGAL HIST. 119 (2004); Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503 (1997); Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005); José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391 (1978); Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2001); Diane Lourdes Dick, *U.S. Tax Imperialism in Puerto Rico*, 65 AM. U. L. REV. 1 (2015); 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 (2018).

in connection with litigation, statehood, and independence to illustrate where and how previous paths to progress have fallen short. It explains critical obstacles that continue to obstruct these routes. Part III details the pitfalls of the past, and argues urgently for a new direction towards meaningful near-term progress for the Territories.

Part IV charts new ways forward. It proposes three workable proposals towards achieving tangible progress for the Territories. Specifically, it asserts that the Territories and their supporters should focus on (1) obtaining an extended temporary waiver of the costly maritime law known as the Jones Act,<sup>19</sup> (2) acquiring most-favored state status in federal veterans and disaster relief appropriations, and (3) gaining special economic empowerment zone designations from the federal government. These new paths offer, at best, partial solutions to many of the large and longstanding problems confronting the Territories. At the same time, these proposals represent some of the most pragmatic and feasible means for near-term progress given the constraints of contemporary political realities while the larger open questions concerning political status are being debated and deliberated in the Territories and in Washington.

This Article ends with a brief, optimistic conclusion. It recounts the plight of the American territories, and it looks forward with hope to a future that makes complete and true the esteemed title of the people of the Territories: Americans.

## I.

### A BRIEF OVERVIEW OF THE TERRITORIES

Each of the Territories, except the Northern Mariana Islands, has been part of the United States for more than a century.<sup>20</sup> Each of the territories is also distinct in its local history, culture, economy, population, demography, and governance.<sup>21</sup> Despite their differences, the Territories share a complex and often frustrating relationship with the United States. None of the people of the Territories have a vote in Congress or a vote for the President, as the Constitution limits the right to such votes to “the People of the several States.”<sup>22</sup> Nevertheless, the people of the Territories are considered American citizens or nationals,

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19. The Jones Act refers to Section 27 of the Merchant Marine Act of 1920. *See* 46 U.S.C. § 883 (2012).

20. *See infra* Part I.E. Table 1.

21. *See* Introduction, *Developments in the Law—The U.S. Territories*, *supra* note 12, at 1617 (“The territories all have unique histories and political perspectives, and their legal relationships with the United States vary accordingly.”).

22. U.S. CONST. art. I, § 2, cl. 1.; *id.* art. II, § 1, cl. 2. *See* *Igartúa v. United States*, 626 F.3d 592, 594 (1st Cir. 2010) (interpreting art. I, § 2, cl. 1 and holding 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”); *Igartua De La Rosa v. United States*, 32 F.3d 8, 9 (1st Cir. 1994) (interpreting art. II, § 1, cl. 2 and holding that “only citizens residing in states can vote for electors and thereby indirectly for the President”).

subject to the rule of the federal government.<sup>23</sup> The people of the Territories live under the American flag, but not the American Constitution, contrary to the old anti-imperialist notion that “the Constitution follows the flag.”<sup>24</sup> What follows is a brief overview of each Territory in the order that they became part of the United States, starting with the oldest Territory of Puerto Rico in 1898 to the youngest Territory of the Commonwealth of the Northern Mariana Islands (CNMI) in 1975.

#### A. Puerto Rico

The United States acquired Puerto Rico through the Spanish-American War in 1898.<sup>25</sup> The residents of Puerto Rico were conferred US citizenship in March 1917 under the Jones-Shafroth Act.<sup>26</sup> In 1950, Congress authorized Puerto Rico to create a constitution and organize a government with the passage of what is commonly referred to as Public Law 600.<sup>27</sup> In 1952, Puerto Rico convened a constitutional convention to draft a constitution that was subsequently approved by the people of Puerto Rico and Congress.<sup>28</sup> The constitution established the Commonwealth of Puerto Rico, a unique “territory of the [United States] with commonwealth status.”<sup>29</sup>

Despite being US citizens, residents of Puerto Rico do not have voting representation in Congress and cannot vote in presidential elections, except in party primaries.<sup>30</sup> One non-voting resident commissioner represents Puerto Rico in the House of Representatives.<sup>31</sup> The resident commissioner can serve on House Committees and can speak, introduce bills, and offer amendments while

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23. 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 the United States); *Guam and the Case for Federal Deference, in Developments in the Law—The U.S. Territories*, 130 HARV. L. REV. 1704 (2017) (“The legal relationship between the United States territories and the federal government is contradictory and complex.”).

24. See KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* 3–6 (2009) (discussing the origins and debates surrounding the notion that “the Constitution follow[s] the flag”).

25. Treaty of Paris, U.S.-Spain, art. II, Dec. 10, 1898, 30 Stat. 1754, <https://www.doi.gov/oia/about/treaty1898> [<https://perma.cc/UHM9-YRMQ>] (“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.”).

26. Jones Act of 1917, Pub. L. No. 368, § 5, 39 Stat. 951, 953 (1917).

27. Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319 (1950).

28. Act of July 2, 1952, Pub. L. No. 82-447, 66 Stat. 327, 327–28 (1952).

29. See *Resolution 23: Final Declarations of the Constitutional Convention of Puerto Rico* (Feb. 4, 1952), reprinted in OFF. OF THE COMMONWEALTH OF P.R., DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 166 (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.”).

30. 8 U.S.C. § 1402 (2012) (conferring citizenship in 1899).

31. 48 U.S.C. § 891 (2012).

the House is conducting business as the Committee of the Whole.<sup>32</sup> However, the commissioner cannot vote on any final legislation.<sup>33</sup> The resident commissioner serves a four-year term.<sup>34</sup>

Present-day Puerto Rico is a storm-ravaged Territory with a large, but declining population.<sup>35</sup> The Territory had a population of around 3.7 million people as of the 2010 census, a population larger than twenty-one of the States in the Union.<sup>36</sup> Its economy has been shrinking for the past decade with its per capita income about one-third of that of the United States and its debt exceeding seventy billion dollars.<sup>37</sup> Estimates suggest that the unemployment rate on the island ranged from 9.8–11.5 percent in 2017.<sup>38</sup> According to the US Census, in a 2015 survey, 46 percent of Puerto Rico's population lives below the federal poverty level, compared to the 14.7 percent for the rest of the nation.<sup>39</sup> More alarmingly, 58.3 percent of children under eighteen live in poverty, and 63.7 percent of children under five live in poverty—both figures are more than twice the national rates for these age groups.<sup>40</sup> Consequently, a significant number of residents depend on Medicaid and other forms of federal government assistance for the poor.<sup>41</sup> The 2017 storms exacerbated these troubling conditions.<sup>42</sup> In the aftermath of the recent storms, it has been estimated that hundreds of thousands

32. See SERAFIN MENDEZ-MENDEZ & RONALD FERNANDEZ, *PUERTO RICO PAST AND PRESENT: AN ENCYCLOPEDIA* 348 (2015) (offering a brief historical summary on the powers of the resident commissioner); *Member FAQs*, U.S. H.R.: OFF. CLERK, [http://clerk.house.gov/member\\_info/memberfaq.aspx](http://clerk.house.gov/member_info/memberfaq.aspx) [<https://perma.cc/7ND8-Z8AS>] [hereinafter *Member FAQs*].

33. *Member FAQs*, *supra* note 32.

34. *Id.*

35. 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/9QV5-8C9Z>].

36. *Population, Housing Units, Area, and Density: 2010 - United States - County by State; and Puerto Rico*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> [<https://perma.cc/95PU-JMF6>].

37. See Mark Decambre, *Puerto Rico Has More than \$70 Billion in Debt Because of This*, MKT. WATCH (Oct. 7, 2017, 3:20 PM), <https://www.marketwatch.com/story/why-does-puerto-rico-have-more-than-70-billion-in-debt-2017-10-04> [<https://perma.cc/785A-DXT9>]; *Puerto Rico, The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/rq.html> [<https://perma.cc/3CT9-6BVG>].

38. *Employment at a Glance: Puerto Rico*, BUREAU LAB. STAT., (last updated Feb. 13, 2018), <https://www.bls.gov/eag/eag/pr.htm> [<https://perma.cc/WE4Y-V997>].

39. CONG. TASK FORCE ON ECON. GROWTH IN P.R., *REPORT TO HOUSE AND SENATE 10, 114th Cong.* (2016).

40. *Id.*

41. *MEDICAID AND CHIP IN THE TERRITORIES, MEDICAID & CHIP PAYMENT & ACCESS COMM'N* (2018).

42. See Mazzei & Walsh, *supra* note 35 (“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.”).

of former residents of Puerto Rico, many of them with great reluctance and guilt, have migrated to the mainland to seek refuge from the island's dismal conditions.<sup>43</sup>

### B. Guam

The United States acquired Guam, like Puerto Rico, in 1898 in the Spanish-American War.<sup>44</sup> During World War II, Japan occupied Guam from 1941 until its liberation by American forces in 1944.<sup>45</sup> The residents of Guam subsequently received U.S. citizenship in 1950 under the Organic Act of Guam.<sup>46</sup> The Organic Act also established a local bill of rights and a directly elected unicameral legislative body for the island.<sup>47</sup> Pursuant to Section 3 of the Organic Act, federal supervision over Guam has long resided in the US Department of the Interior.<sup>48</sup>

In 1976, Congress authorized Guam to create a constitution and organize a government.<sup>49</sup> Guam proposed a constitution in 1977 and President Jimmy Carter subsequently approved it in 1978.<sup>50</sup> However, the people of Guam rejected the constitution in a plebiscite in 1979, due in part to major disagreements among local political factions.<sup>51</sup> No constitution has been proposed since that rejection.

Like residents of Puerto Rico, residents of Guam do not have a voting representative in Congress and cannot participate in presidential elections, except during the party primaries.<sup>52</sup> Since 1972, a non-voting delegate has represented Guam in the House of Representatives.<sup>53</sup> The delegate serves a two-

43. See 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/WTJ5-ZTEW]; Rick Rojas, *Added to the Storm's Toll, Guilt and Heartache for Puerto Ricans Who Fled*, N.Y. TIMES (Nov. 26, 2017), <https://www.nytimes.com/2017/11/26/nyregion/puerto-rico-hurricane-maria.html> [https://perma.cc/59YE-SBUB].

44. See Treaty of Paris, *supra* note 25.

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

46. See Organic Act of Guam, Pub. L. No. 81-630, 64 Stat. 384 (1950) (codified as amended at 48 U.S.C. §§ 1421–1425 (2012)).

47. See *id.*

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

49. See Act of Oct. 21, 1976, Pub. L. No. 94-584, 90 Stat. 2899 (1976).

50. *Guam Constitutional Conventions (ConCon)*, GUAMPEDIA, <http://www.guampedia.com/guam-constitutional-conventions-concon> [https://perma.cc/XM3P-Y8UB].

51. ROGERS, *supra* note 48, at 240–42.

52. See 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) (discussing the limited voting powers of Americans in the Territories); *Frequently Asked Questions*, NAT'L ARCHIVES & RECORDS ADMIN.: U.S. ELECTORAL COLLEGE, <https://www.archives.gov/federal-register/electoral-college/faq.html#territories> [https://perma.cc/XQ8W-RFAB] [hereinafter *Frequently Asked Questions*, NAT'L ARCHIVES].

53. 48 U.S.C. § 1711 (2012).

year term<sup>54</sup> and possesses the privilege to speak and vote in House Committees, but does not have any voting powers over final legislation.<sup>55</sup>

Today, like in the past, Guam is geopolitically important to the United States because of its location in the Pacific.<sup>56</sup> It has long served as a strategic hub for US military operations and concerns in Asia and the greater Pacific Rim, as its military bases are the home to “thousands of military personnel” and countless weaponry.<sup>57</sup>

Despite its strategic importance, Guam’s economy suffers from stagnation. As of 2016, the island’s population was roughly 160,000 people.<sup>58</sup> The economy is tourism-based, dependent largely on tourists from Japan and South Korea.<sup>59</sup> Despite being a leading tourist destination in Asia and the booming economic conditions in the United States and many nearby Asian countries, the economy of Guam has experienced no significant growth in recent years.<sup>60</sup> Accordingly, the unemployment rate of the island has historically been greater than the national average. For instance, in 2017, the unemployment rate in Guam was around eight percent compared to the national rate of around four to five percent.<sup>61</sup>

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54. See *Member FAQs*, *supra* note 32.

55. See *id.*

56. See KAPLAN, *supra* note 18, at 224 (“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 DEF. (Aug. 19, 2014), <https://www.defense.gov/News/Article/Article/603091/work-guam-is-strategic-hub-to-asia-pacific-rebalance> [<https://perma.cc/4AJH-T8CQ>].

57. *Guam, The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/gq.html> [<https://perma.cc/63A8-6N3A>].

58. Press Release, Bureau of Economic Analysis, Gross Domestic Product for Guam Increases in 2016, at 6 (Sept. 4, 2017), [https://www.bea.gov/newsreleases/general/terr/2017/guamgdp\\_090417.pdf](https://www.bea.gov/newsreleases/general/terr/2017/guamgdp_090417.pdf) [<https://perma.cc/WV5E-PRUM>].

59. GUAM VISITORS BUREAU, GUAM VISITORS BUREAU 2016 ANNUAL REPORT 7–8 (2016), <https://www.guamvisitorsbureau.com/docs/research-and-reports/reports/annual-reports/2018/2016-annual-report-20180412.pdf> [<https://perma.cc/P4ME-KEQB>].

60. See Paulina Restrepo-Echavarria & Maria A. Arias, *Tigers, Tiger Cubs and Economic Growth*, FED. RES. BANK ST. LOUIS (May 25, 2017), <https://www.stlouisfed.org/on-the-economy/2017/may/tigers-tiger-cubs-economic-growth> [<https://perma.cc/P94V-7P7L>] (discussing the economic growth of East Asian countries over the last several decades); Press Release, Bureau of Economic Analysis, Gross Domestic Product for Guam Increases in 2016, *supra* note 58, 6 (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).

61. *Compare Labor Force Statistics for the Current Population Survey*, BUREAU LAB. STAT., <https://data.bls.gov/timeseries/LNS14000000> [<https://perma.cc/X6NJ-4ZAM>] (describing the unemployment rate in the contiguous United States), with *Guam, The World Factbook*, *supra* note 57 (describing the unemployment rate in Guam).

### C. American Samoa

American Samoa consists of five main islands.<sup>62</sup> The United States claimed the islands through a treaty with Great Britain and Germany in 1900, and the leaders of the territory began ceding the islands to the United States in 1900 and 1904.<sup>63</sup> Congress approved American Samoa's cessations in the Ratification Act of 1929, making American Samoa an American territory.<sup>64</sup> The US Navy initially governed American Samoa for more than half a century beginning in 1900; the Interior Department took over its administration in 1951.<sup>65</sup> While American Samoa has self-governing authority over many local matters under the territorial constitution it enacted in 1967,<sup>66</sup> it is ultimately under supervision by the Department of the Interior.<sup>67</sup>

Like the other Territories, American Samoa has limited political representation in the United States. A non-voting delegate represents American Samoa in the House of Representatives, and serves a two-year term.<sup>68</sup> The delegate possesses speaking and committee-voting privileges, but no voting powers in connection with final legislation.<sup>69</sup> However, unlike the other Territories, where Congress conferred citizenship to the people of each Territory, Congress enacted no such enabling act for the people of American Samoa.<sup>70</sup> Accordingly, American Samoans are non-citizen nationals of the United States.<sup>71</sup> They reside in an "interstitial" space in law and fact, with some, but not all, of the rights and privileges that accompany citizenship.<sup>72</sup> As non-citizen nationals, American Samoans are ineligible for many government jobs, benefits, and privileges that are afforded only to citizens of the United States.<sup>73</sup>

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62. LEIBOWITZ, *supra* note 18, at 403 n.5.

63. *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); LEIBOWITZ, *supra* note 18, at 403.

64. *See* 48 U.S.C. § 1661 (2012).

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

66. *See* AM. SAMOA CONST. June 2, 1967.

67. 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. 6419 (June 29, 1951).

68. *Member FAQs*, *supra* note 32.

69. *Id.*

70. *See* 8 U.S.C. § 1402 (2012); Organic Act of Guam, Pub. L. No. 81-630, 64 Stat. 384 (1950); Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); *id.* § 1408; *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015).

71. *See* 8 U.S.C. § 1408(1) (stating that a national is a "person born in an outlying possession of the United States"); *see id.* § 1101(M)(29) (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 the Second Circuit's holding that the Citizenship Clause of the Fourteenth Amendment "did not guarantee birthright citizenship to persons born in the American Samoa").

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

73. *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

Today, American Samoa remains a small landmass with a simple economy. American Samoa has a population of approximately 50,000 residents.<sup>74</sup> The territory has “a traditional Polynesian economy in which more than 90% of the land is communally owned.”<sup>75</sup> Some economic data shows that the Territory’s economy has been stagnant over the past decade.<sup>76</sup> The tuna industry, particularly canned tuna exporting, is the backbone of the Territory’s economy, with fish processing accounting for 15.5 percent of the employment in the territory in 2015.<sup>77</sup> American Samoa’s heavy reliance on this single industry makes its economic fortunes subject to the changing tides of tuna supply, tuna demand, and trade policies that are often beyond their control.<sup>78</sup>

#### D. US Virgin Islands

The United States purchased the US Virgin Islands from Denmark for twenty-five million dollars in 1917.<sup>79</sup> US citizenship was conferred to the people of the US Virgin Islands in 1927.<sup>80</sup> The Organic Act of the Virgin Islands of 1936 divided the territory into two municipalities—the municipality of Saint Croix and the municipality of Saint Thomas—and established a government for each.<sup>81</sup> The Revised Organic Act of 1954 repealed the previous Act and created a unified government with a single legislature.<sup>82</sup>

In October 1976, Congress passed an act that authorized the people of the US Virgin Islands to “organize governments pursuant to constitutions.”<sup>83</sup> Constitutions were drafted in 1964, 1971, 1977, 1980,<sup>84</sup> and most recently in

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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/BQ8X-U4WC] (stating that lack of citizenship could mean that American Samoans may be “ineligible for many Civil Service jobs, disadvantaged in sponsoring family members for immigration and denied the right to vote”).

74. *American Samoa, The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/aq.html> [https://perma.cc/PXY2-BRQ6].

75. *Id.*

76. Press Release, Bureau of Economic 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/newsreleases/general/terr/2016/asgdp\\_080816.pdf](https://www.bea.gov/system/files/newsreleases/general/terr/2016/asgdp_080816.pdf) [https://perma.cc/92FA-8X2W] (reporting that the gross domestic product in millions of dollars was 644 in 2012, 639 in 2013, 638 in 2014, and 641 in 2015).

77. *American Samoa, The World Factbook*, *supra* note 74.

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

79. *U.S. Virgin Islands*, US DEP’T INTERIOR: OFF. INSULAR AFFAIRS, <https://www.doi.gov/oia/islands/virgin-islands> [https://perma.cc/Y77X-RTEH] [hereinafter *U.S. Virgin Islands*, US DEP’T INTERIOR].

80. See 8 U.S.C. § 1406 (2012) (conferring citizenship in 1927).

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

82. Revised Organic Act of 1954, Pub. L. No. 83-517, annot. 1, 68 Stat. 497 (1954).

83. Act of Oct. 21, 1976, Pub. L. No. 94-584, 90 Stat. 2899, 2899.

84. *The Proposed Virgin Islands Constitution from the Fifth Constitutional Convention: Oversight Hearing Before the Subcomm. on Insular Affairs, Ocean & Wildlife*, 111 Cong. 2nd Sess.

2010.<sup>85</sup> However, due to various objections from ethnic minority groups in the territory, no local constitution has ever been adopted.<sup>86</sup> Federal authority over the US Virgin Islands ultimately resides in the US Department of the Interior.<sup>87</sup>

The political relationship between the US Virgin Islands and the United States resembles that of the other Territories. For example, U.S. Virgin Islanders do not have voting representation in Congress and cannot participate in presidential elections, except in the party primaries.<sup>88</sup> Since 1972, a single non-voting delegate has represented the US Virgin Islands in the House of Representatives.<sup>89</sup> The delegate serves a two-year term<sup>90</sup> and possesses speaking and committee-voting privileges. However, similarly to the structure in other Territories, the delegate has no voting powers in connection with final legislation.<sup>91</sup>

Today, the US Virgin Islands is a moderately populated Territory with a stagnant economy that is highly dependent on tourism. The US Virgin Islands are home to more than 100,000 citizens.<sup>92</sup> Its primary economic activity is tourism, with tourism related activities accounting for nearly forty-seven percent of the Territory's gross domestic product.<sup>93</sup> Despite its reputation as a tourist destination, the economy of the US Virgin Islands has been generally stagnant over the last few years despite occasional periods of tepid growth.<sup>94</sup>

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(2010) (statement of the Hon. Madeleine Z. Bordallo, Chairwoman, *Subcomm. on Insular Affairs, Ocean & Wildlife*), <https://www.gpo.gov/fdsys/pkg/CHRG-111hrg55534/html/CHRG-111hrg55534.htm> [<https://perma.cc/WW85-ZFJ9>] (noting the dates of submissions). The constitutions drafted in 1964 and 1971 were introduced pursuant to local law, whereas the drafts in 1977 and 1980 were introduced after the passage of Public Law 95-584. See WILLIAM W. BOYER, *AMERICA'S VIRGIN ISLANDS: A HISTORY OF HUMAN RIGHTS AND WRONGS* 389-90 (2d ed. 2010) (discussing the constitutional history of the U.S. Virgin Islands).

85. Act of June 30, 2010, Pub. L. No. 111-194, 124 Stat. 1309, 1309-10 (2010).

86. BOYER, *supra* note 84, at 402-05.

87. 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. 5666 (July 3, 1931) (President Herbert Hoover exercising his power under Pub. L. No. 64-389 to transfer supervisory authority to the Department of the Interior); *U.S. Virgin Islands*, U.S. DEP'T OF THE INTERIOR, *supra* note 79.

88. *Frequently Asked Questions*, NAT'L ARCHIVES, *supra* note 52.

89. 48 U.S.C. § 1711 (2012).

90. *Member FAQs*, *supra* note 32.

91. *Id.*

92. *U.S. Virgin Islands, The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/vq.html> [<https://perma.cc/897X-G6UH>].

93. *Id.*

94. Press Release, Bureau of Economic Analysis, *Gross Domestic Product for the U.S. Virgin Islands Increases in 2016* (Dec. 1, 2017), [https://www.bea.gov/newsreleases/general/terr/2017/vigdp\\_120117.pdf](https://www.bea.gov/newsreleases/general/terr/2017/vigdp_120117.pdf).

Unfortunately, the horrific storms in 2017 exacerbated these conditions, hurting the local economy and its near-term economic outlook.<sup>95</sup>

*E. Northern Mariana Islands*

The Commonwealth of the Northern Mariana Islands (CNMI), an archipelago of fourteen islands in the Pacific Ocean, became a Territory in 1976.<sup>96</sup> Prior to 1976, the CNMI was known as the Trust Territory of the Pacific Islands, which came under the administration of the United States pursuant to a trustee agreement with the United Nations in 1947.<sup>97</sup> In 1976, the CNMI entered into a covenant with the United States that made the island an American territory with self-governing commonwealth status, and conferred American citizenship on the people of the CNMI.<sup>98</sup> The CNMI is self-governing under its local constitution, enacted in 1977.<sup>99</sup> Similar to many of the other Territories, the CNMI is under the supervision of the US Department of the Interior.<sup>100</sup>

Like the other Territories, the CNMI does not enjoy full political participation at the national level. The people of CNMI do not have voting representation in Congress and cannot participate in presidential elections, except in party primaries.<sup>101</sup> Since 1972, the CNMI has been represented by a single non-voting delegate in the House of Representatives.<sup>102</sup> The delegate serves a two-year term,<sup>103</sup> and possesses speaking and committee-voting privileges, but no voting powers in connection with final legislation.<sup>104</sup>

The CNMI has experienced recent economic growth, but struggles with unemployment and poor economic diversification, especially in the wake of a

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95. See Navarro, *supra* note 17, at TR 6; Press Release, Bureau of Economic Analysis, Gross Domestic Product for the U.S. Virgin Islands Increases in 2015 (Dec. 14, 2016) [https://www.bea.gov/newsreleases/general/terr/2016/vigdp\\_121416.pdf](https://www.bea.gov/newsreleases/general/terr/2016/vigdp_121416.pdf).

96. See Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, 264 (1976); GOV'T ACCOUNTABILITY OFF., COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS: DHS SHOULD CONCLUDE NEGOTIATIONS AND FINALIZE REGULATIONS TO IMPLEMENT FEDERAL IMMIGRATION LAW 4 (2010), <https://www.gao.gov/assets/310/304152.pdf> [<https://perma.cc/626V-PHML>] [hereinafter GAO REPORT ON CMNI].

97. GAO REPORT ON CMNI, *supra* note 96, at 4 n.11.

98. See Act of Mar. 24, 90 Stat. at 265-66; GAO REPORT ON CMNI, *supra* note 96, at 4.

99. See *Commonwealth of the Northern Mariana Islands*, US DEP'T INTERIOR: OFF. INSULAR AFFAIRS, <https://www.doi.gov/oia/islands/cnmi> [<https://perma.cc/L2E8-94EY>] [hereinafter *Commonwealth of the Northern Mariana Islands*, U.S. DEP'T OF THE INTERIOR]; see also Act of Mar. 24, 90 Stat. at 264 (granting the people of the CNMI the right to self-government and to establish a constitution).

100. 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. 3, 1986) (President Ronald Regan exercised his power under Pub. L. 94-241 to transfer supervisory authority to the Department of the Interior).

101. *Frequently Asked Questions*, NAT'L ARCHIVES, *supra* note 52.

102. 48 U.S.C. § 1711 (2012).

103. *Member FAQs*, *supra* note 32.

104. *Id.*

devastating storm in October 2018. As of the 2010 census, the CNMI had a population of over 50,000 citizens.<sup>105</sup> Most of the CNMI's population lives on the islands of Saipan, Rota, and Tinian.<sup>106</sup> In contrast to the other territories, its gross domestic product is stable and has been increasing for the past several years—by 3.8 percent in 2015 and 28.6 percent in 2016—but its unemployment rate has historically been higher than the national rate.<sup>107</sup> Tourism and private investment primarily accounted for the GDP increase in 2016, particularly the construction and opening of the Imperial Pacific Resort, a large casino resort, on the island of Saipan. The casino project initially created short term increases in jobs and revenues on the CNMI, but it has also caused significant negative socioeconomic effects, such as increased criminal activity.<sup>108</sup> In 2018, Super Typhoon Yutu, one of the strongest storms on record, destroyed the CNMI, leaving much of the island in disrepair.<sup>109</sup> Following the storm, the aforementioned casino resort closed for an extended period of time and laid off many of its employees.<sup>110</sup>

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The Territories have each traveled different paths to become part of the United States. Despite their different histories, they are all subject to the rule and whim of the federal government without any meaningful political power over their self-governance at the national level. The table below summarizes the duration of American rule over each territory and the number of people, as of 2010, subject to this form of forgotten and incomplete American status.

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105. *Northern Mariana Islands – 2010 Census Results*, U.S. CENSUS BUREAU (2010), [https://www.census.gov/2010census/news/pdf/cb11cn178\\_ia\\_cnmi\\_totalpop\\_2010map.pdf](https://www.census.gov/2010census/news/pdf/cb11cn178_ia_cnmi_totalpop_2010map.pdf) [<https://perma.cc/4HD8-KQJL>].

106. *Commonwealth of the Northern Mariana Islands*, US DEP'T OF THE INTERIOR, *supra* note 99.

107. *Commonwealth of the Northern Mariana Islands*, U.S. DEP'T OF THE INTERIOR, *supra* note 99; *National Employment Monthly Update*, NAT'L. CONF. STATE LEGS., <http://www.ncsl.org/research/labor-and-employment/national-employment-monthly-update.aspx> [<https://perma.cc/9ME3-TQDW>]; see Press Release, Bureau of Economic Analysis, CNMI GDP Increases in 2016 (Oct. 15, 2017), [https://www.bea.gov/sites/default/files/2018-02/CNMIGDP\\_101517.pdf](https://www.bea.gov/sites/default/files/2018-02/CNMIGDP_101517.pdf) [<https://perma.cc/AMZ9-GDCU>].

108. *Northern Mariana Islands, The World Factbook*, *supra* note 100; Press Release, Bureau of Economic Analysis, CNMI GDP Increases in 2016, *supra* note 107; see Matthew Campbell, *Paradise Bought: An Impossibly Lucrative Chinese Casino has Conquered a Piece of America*, BLOOMBERG BUS. WK., Feb. 19, 2018, at 54–61 (detailing negative effects of the Imperial Pacific Casino on the CNMI, such as money laundering, fraud, and hazardous working conditions).

109. See Jacey Fortin, *'Catastrophic' Typhoon Hits U.S. Territory in the Pacific*, N.Y. TIMES, Oct. 24, 2018, at A16; Brian Resnick, *Super Typhoon Yutu, One of the Strongest Storms Ever, Just Pulverized a US 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/U6AV-V5LB>].

110. See Haidee V. Eugenio, *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/A4H6-LWR8>].

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

Territory	Initial Year of American Control <sup>111</sup>	2010 Census Population
Puerto Rico	1898	3,725,789 <sup>112</sup>
Guam	1898	159,358 <sup>113</sup>
American Samoa	1900	55,519 <sup>114</sup>
US Virgin Islands	1917	106,405 <sup>115</sup>
CNMI	1975	53,883 <sup>116</sup>
<b>Total</b>	<b>507 Years to date Under American Control<sup>117</sup></b>	<b>4,100,954 People Under American Control</b>

## II.

## THE PLIGHT OF THE TERRITORIES

As a result of their legally peculiar and politically strained relationship with the United States, the people of the Territories suffer from certain longstanding, historical afflictions that hinder them from becoming full Americans and enjoying an equal status as their fellow citizens in the States.<sup>118</sup> Chief among these afflictions are the interrelated pre-existing conditions of political powerlessness, economic distress, military presence, and geographic isolation. Collectively, these afflictions place pedestrian and profound burdens on the people of the Territories.

## A. Political Powerlessness

The Americans of the Territories are largely politically powerless and lack many of the decision-making privileges as compared to the Americans living in the States. As non-states, the Territories are subject to the plenary powers of

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111. All data listed in this column is derived from the CIA's World Fact Book. *See The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook> [https://perma.cc/WHW5-V2TY].

112. *Population, Housing Units, Area, and Density: 2010*, *supra* note 36.

113. *Guam – 2010 Census Results*, U.S. CENSUS BUREAU (2010), [https://www.census.gov/2010census/news/pdf/cb11cn179\\_ia\\_guam\\_totalpop\\_2010map.pdf](https://www.census.gov/2010census/news/pdf/cb11cn179_ia_guam_totalpop_2010map.pdf) [https://perma.cc/V9TQ-QAUG].

114. *American Samoa – 2010 Census Results*, U.S. CENSUS BUREAU (2010), [https://www.census.gov/2010census/news/pdf/cb11cn177\\_ia\\_as\\_totalpop\\_2010map\\_revised.pdf](https://www.census.gov/2010census/news/pdf/cb11cn177_ia_as_totalpop_2010map_revised.pdf) [https://perma.cc/TY8B-XCL6].

115. *U.S. Virgin Islands – 2010 Census Results*, U.S. CENSUS BUREAU (2010), [https://www.census.gov/2010census/news/pdf/cb11cn180\\_ia\\_vi\\_totalpop\\_2010map.pdf](https://www.census.gov/2010census/news/pdf/cb11cn180_ia_vi_totalpop_2010map.pdf) [https://perma.cc/JX74-YT54].

116. *Northern Mariana Islands – 2010 Census Results*, *supra* note 105.

117. This calculation is current as of 2019.

118. *See Guam and the Case for Federal Deference*, in *Developments in the Law — The U.S. Territories*, *supra* note 23, at 1704 (“The legal relationship between the United States territories and the federal government is contradictory and complex. It was born in large part out of colonial impulses, the vestiges of which can still be seen in circuit and Supreme Court precedent today[.]”).

Congress. The Territorial Clause of the Constitution imposes very few limitations on Congress's plenary powers.<sup>119</sup> The Territories have various forms of limited, local self-governance, but they are ultimately subject to the federal laws and regulations enacted in Washington, D.C.<sup>120</sup> Though this is similar to the political condition of the States, one major difference is that unlike the States, the Territories do not have a voting representative in the House or Senate that can advocate on their behalf.<sup>121</sup> Congress has never used its plenary powers to give Congressional voting rights to representatives from the Territories on legislation, regulation, and treaties. The Territories also do not have an electoral vote in the Electoral College for presidential elections.<sup>122</sup> It should be noted that the residents of the District of Columbia also do not have voting representation in Congress, but they do have a constitutionally enshrined right to vote in the Electoral College for President and Vice President under the Twenty-Third Amendment.<sup>123</sup>

The powerlessness of the Territories renders them like colonies of bygone eras.<sup>124</sup> In fact, the United Nations Special Committee on Decolonization

119. See REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 26 (2011), [https://obamawhitehouse.archives.gov/sites/default/files/uploads/Puerto\\_Rico\\_Task\\_Force\\_Report.pdf](https://obamawhitehouse.archives.gov/sites/default/files/uploads/Puerto_Rico_Task_Force_Report.pdf) [<https://perma.cc/G5DE-XC6F>] (stating that Puerto Rico as an American territory is "subject to the Territory Clause of the U.S. Constitution."); Off. of Legal Counsel, U.S. Dep't of Justice, Mutual Consent Provisions in the Guam Commonwealth Legislation, Opinion Letter at 2–5 (July 28, 1994), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/10/1994-07-28-mutual-consent-guam.pdf> [<https://perma.cc/4ARC-G5UY>] (opining that Congress has plenary power over the Territories until they become States "or cease[] to be under United States sovereignty").

120. See STANLEY K. LAUGHLIN, JR., THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS 20–23 (1995); Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 YALE L. & POL'Y REV. 57, 82 (2013).

121. U.S. CONST. art. I, § 2, cl. 1 (granting each state representation in the House of Representatives); *id.* art. I, § 3, cl. 1 (granting each state two senators in the U.S. Senate); see, e.g., Torruella, *Ruling America's Colonies*, *supra* note 120, at 81; Aaron Steckelberg & Chiqui Esteban, *More Than 4 Million Americans Don't Have Anyone to Vote for Them in Congress*, WASH. POST (Sept. 28, 2017), [https://www.washingtonpost.com/graphics/2017/national/fair-representation/?utm\\_term=.0ad12f357513](https://www.washingtonpost.com/graphics/2017/national/fair-representation/?utm_term=.0ad12f357513) [<https://perma.cc/N36F-JXGR>].

122. *Frequently Asked Questions*, NAT'L ARCHIVES, *supra* note 52; see U.S. CONST. art. II, § 1, cl. 1–2.

123. See U.S. CONST. amend. XXIII § 1 (granting the District of Columbia electors for President and Vice President); TOM LEWIS, WASHINGTON: A HISTORY OF OUR NATIONAL CITY 81 (2015) ("[T]he Constitution denied [Washington's citizens] a representative or senator. . . . The Constitution had stripped the residents of the District of Columbia of many of the rights for which the nation's founders had fought and which all other citizens in the new republic enjoyed."); Jamin B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 HARV. C.R.-C.L. L. REV. 39, 40 (1999) ("[C]itizens living in the District of Columbia have no voting representation in the United States Senate or the United States House of Representatives, and little prospect of achieving representation in either through political channels.").

124. See, e.g., PEDRO A. MALAVET, AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO 3–4 (2004) (arguing that Puerto Rico remains an American colony); Sasha Davis, *The US Military Base Network and Contemporary Colonialism: Power Projection, Resistance and the Quest for Operational Unilateralism*, 30 POL. GEOGRAPHY 215, 216–22 (2011) (discussing the "contemporary imperialism" of American military

actually lists three of the Territories—American Samoa, Guam, and the US Virgin Islands—as three of the last seventeen remaining non-self-governing colonies in the world.<sup>125</sup> Senator Elizabeth Warren summed up the political plight of the Americans living in the Territories as follows:

This kind of second-class status is not how our government is supposed to work and it has real implications. . . . The four million people who live in the territories are not the subjects of a King. They are Americans, they live in America. But their interests will never be fully represented within our government until they have full voting rights—just like every other American.<sup>126</sup>

This neocolonial status, as evidenced in part by a lack of political power over self-governance, has created practical consequences for the Territories.<sup>127</sup> For example, normal federal governmental activities—like the statistical collection of data about economic conditions, labor markets, local populations, and disease—do not exist in a reliable way in the Territories, and so policymakers frequently do not have sound data to make policies in connection with the Territories. Moreover, because the modern presidency and the executive branch possess so much power in contemporary governance via a vast federal administrative state, the Territories suffer a real political deficit by not having a vote for the presidency that oversees agencies and regulations that directly impact their people.

Given their lack of political power in Washington, the Territories are frequently subjected to legislation, executive action, and regulation that damage their interests without their consent or input.<sup>128</sup> A 2005 Government Accountability Office study indicated that the Territories received substantially lower federal Medicaid funds relative to the States, and their Medicaid funds are

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forces on Guam and Puerto Rico); Introduction, *Developments in the Law—The U.S. Territories*, *supra* note 12, at 1624 (2017) (“[T]he U.S. territories remain bound to their essentially colonial status.”).

125. *Non-Self-Governing Territories*, UNITED NATIONS & DECOLONIZATION, <http://www.un.org/en/decolonization/nonselfgovterritories.shtml> [<https://perma.cc/7ZX4-2C8J>].

126. *U.S. Senator Elizabeth Warren*, FACEBOOK (Apr. 7, 2016), <https://www.facebook.com/senatorelizabethwarren/videos/580677832094714> [<https://perma.cc/9DYK-7PVL>].

127. See Christina Duffy Ponsa, *When Statehood Was Autonomy*, in RECONSIDERING THE INSULAR CASES 1, 25 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015); David Vine, *Most Countries Have Given Up Their Colonies. Why Hasn't America?*, WASH. POST (Sept. 28, 2017), [https://www.washingtonpost.com/news/made-by-history/wp/2017/09/28/most-countries-have-given-up-their-colonies-why-hasnt-america/?utm\\_term=.639b2d159461](https://www.washingtonpost.com/news/made-by-history/wp/2017/09/28/most-countries-have-given-up-their-colonies-why-hasnt-america/?utm_term=.639b2d159461) [<https://perma.cc/NU55-94UJ>].

128. See Introduction, *Developments in the Law—The U.S. Territories*, *supra* note 12, at 1624 (“Congress continues to legislate in ways that subject, disadvantage, or quite frankly forget the U.S. territories.”); Torruella, *Ruling America’s Colonies* *supra* note 120, at 82 (“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.”).

subject to a cap that does not exist for the States.<sup>129</sup> According to the study, “the states averaged \$565 [per capita] compared to between \$33 and \$65” for the Territories. The poorest States received “more than 12 times the amount” that was appropriated to any Territory.<sup>130</sup> Furthermore, in some instances, American citizens 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 US Social Security Administration by a woman who was denied Social Security Supplemental Income disability benefit by virtue of her residence on Guam, while her twin sister residing in Pennsylvania received the federal benefit.<sup>131</sup>

A particularly consequential area where the lack of political power among the Territories hurts their interests is in the area of tax legislation. Residents of the Territories, with some exceptions, generally do not have to pay federal income tax, but are nevertheless subject to other federal tax laws.<sup>132</sup> In fact, federal law currently requires that Guam, CNMI, and the US Virgin Islands have local tax laws that mirror those of the federal Internal Revenue Code.<sup>133</sup> This means that any changes in federal tax law would apply to these Territories and have serious adverse consequences without their consent or input. For instance, the landmark Tax Cuts and Jobs Act of 2017, which made dramatic changes to the Internal Revenue Code, will have significant adverse effects in the coming years for the Territories.<sup>134</sup> As a result of the mirroring mandate, Guam, for example, has projected significant forthcoming revenue shortfalls in its future budgets due to changes made in the federal tax code in 2017 that the local tax law must mirror.<sup>135</sup>

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129. GOV'T ACCOUNTABILITY OFF., 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/F3JZ-GXL9>].

130. *Id.*

131. See Complaint, Schaller v. U.S. Soc. Sec. Admin., No. 1:18-cv-00044 (D. Guam filed Dec. 6, 2018); Complaint, Schaller v. U.S. Soc. Sec. Admin., No. 2:18-cv-01625 (W.D. Pa. filed Dec. 6, 2018); *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://www.postguam.com/news/local/twins-sue-social-security-over-denial-of-benefits/article_25b81f06-f9b4-11e8-875d-37b6dc2dfdca.html) [<https://perma.cc/2EJA-FJWS>]; see also Guam Supplemental Security Income Equality Act, H.R. 208, 116th Cong. (2019) (as introduced by Rep. Michael San Nicolas).

132. See INTERNAL REVENUE SERV., PUBLICATION 570: TAX GUIDES FOR INDIVIDUALS WITH INCOME FROM U.S. POSSESSIONS (2017), <https://www.irs.gov/pub/irs-pdf/p570.pdf> [<https://perma.cc/A92J-TCF7>]; Dick, *supra* note 18, at 10–11.

133. CONG. RESEARCH SERV., TAX POLICY AND U.S. TERRITORIES: OVERVIEW AND ISSUES FOR CONGRESS 2 (2016) [hereinafter TAX POLICY AND U.S. TERRITORIES].

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

135. Haidee V. Eugenio, *Tax Expert: GovGuam Needs to Plan for Revenue Cut as a Result of Tax Law*, PAC. DAILY NEWS (Jan. 3, 2018), <http://www.guampdn.com/story/news/2018/01/03/tax-expert-govguam-needs-plan-revenue-cut-result-tax-law/998253001> [<https://perma.cc/RD27-JH5V>].

The adverse impact of federal tax legislation also impacts the non-mirroring Territories of American Samoa and Puerto Rico.<sup>136</sup> Most notably, in 1996, Congress repealed a tax incentive encapsulated in section 936 of the Internal Revenue Code that had attracted many pharmaceutical companies and other businesses to Puerto Rico in the previous two decades.<sup>137</sup> Section 936 created a one-for-one tax credit for any income generated in Puerto Rico (and the other Territories) by American businesses that could be used to offset their federal income tax liabilities.<sup>138</sup> This meant that the income generated by the American companies in Puerto Rico was essentially tax-free.<sup>139</sup> As a result of the repeal, there was a mass exodus of businesses from Puerto Rico, and a booming economy became a shrinking one over the course of a decade.<sup>140</sup> More recently, following the passage of the Tax Cuts and Jobs Act of 2017, Puerto Rico has been categorized as a foreign jurisdiction for American businesses based there—as a result, American businesses will be taxed at a new higher rate of 12.5 percent on its intellectual property related income.<sup>141</sup> The adverse impact of the new tax law comes at a time when Puerto Rico is struggling to recover and rebuild from its financial crisis and the devastation left by two hurricanes in 2017.<sup>142</sup>

Beyond tax policy and unfavorable federal legislation generally, the lack of political power for the Territories leaves them vulnerable to the outright commandeering of the territorial government by the national government, as evidenced by the recent efforts in Puerto Rico. In 2016, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) and established a special board to oversee the island's debt restructuring and economic recovery.<sup>143</sup> The President of the United States appointed the seven official members of the PROMESA oversight board with recommendations provided by the House of Representatives and the US Senate, without any vote

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136. TAX POLICY AND U.S. TERRITORIES, *supra* note 133.

137. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1601, 110 Stat. 1755, 1827 (1996); *see* Dick, *supra* note 18, at 73–76 (explaining the enactment and repeal of section 936).

138. I.R.C. § 936 (repealed 1996).

139. *See Territorial Federalism, in Developments in the Law — The U.S. Territories*, 130 HARV. L. REV. 1632, 1638 (2017) (describing how § 936 allowed American companies to “operate in the U.S. territories free from federal income taxation”).

140. *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 18, 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/HAF7-DKWJ>].

141. *See* Jesse Drucker & Alan Rappoport, *Is the Tax Bill a Christmas Gift for You?*, N.Y. TIMES, Dec. 17, 2017, at A25; Patricia Mazzei, *Months After Storm, Puerto Rico Stares Down Another Blow: The Tax Bill*, N.Y. TIMES (Dec. 16, 2017), <https://www.nytimes.com/2017/12/16/us/tax-bill-puerto-rico.html> [<http://perma.cc/4RY2-ENLP>].

142. Mazzei, *supra* note 141.

143. 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).

from the people of Puerto Rico.<sup>144</sup> The Governor of Puerto Rico sits on the board as a non-voting, *ex officio* member.<sup>145</sup>

The PROMESA oversight board possesses broad, unfettered authority that supersedes the powers of Puerto Rico's legislature and governor.<sup>146</sup> 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.<sup>147</sup> It is hard to imagine Congress establishing or even proposing an uber-powerful unelected board to take over the governance of any one of the fifty States. Politically, a PROMESA-like commandeering of any state would be a non-starter. Legally, such a commandeering would likely also run afoul of the Constitution.<sup>148</sup> But because Puerto Rico is not a State and has no political power in Washington, it is now governed by an unelected seven-person board appointed by a President it also had no say in electing to office.<sup>149</sup>

In sum, the lack of political power is a serious affliction for the Territories and their people. It means that they are frequently subjected to laws and regulations in tax and elsewhere that are beyond their control and without their consent, often with dire consequences. Ultimately, the lack of meaningful political power for the Territories makes it difficult for them to advocate for their people, to fully exercise their rights, to fully participate in our democracy, and to fully realize their potential as Americans.

### B. Economic Distress

All of the Territories are under some level of economic distress, despite significant growth in the national economy over the last decade.<sup>150</sup> The lack of political power on the national level makes it difficult for the Territories to chart their own economic paths forward relative to the States and their regional

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144. *Id.*

145. *Id.* at 555.

146. See *The International Place of Puerto Rico, in Developments in the Law—The U.S. Territories*, 130 HARV. L. REV. 1656, 1668 (2017) (“With its near-total power over the island’s purse strings, the Board can influence nearly any area of policymaking in Puerto Rico.”).

147. Puerto Rico Oversight, Management, and Economic Stability Act, 130 Stat. at 552–66.

148. See *Printz v. United States*, 521 U.S. 898, 925–29 (1997) (prohibiting Congress from commandeering States to execute and enforce state laws in accordance to federal policy preferences); *New York v. United States*, 505 U.S. 142, 162 (1992) (holding that Congress cannot commandeer States to legislate state laws in accordance to federal policy preferences).

149. See *Territorial Federalism, in Developments in the Law—The U.S. Territories*, *supra* note 139, at 1641 (“PROMESA is much closer to legislation envisioned within a colonial relationship than a federal one.”).

150. 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. 17–18 (2018).

competitors. The economic distress in the Territories has only exacerbated their plight.

The economies of the Territories are stagnant or in decline compared to the national economy over the last two decades.<sup>151</sup> The Territories have experienced slow or negative growth during a period of national economic boom.<sup>152</sup> While Americans in the States have benefited from a period of growth (albeit unevenly), the people of the Territories have suffered from some of the highest rates of unemployment, the lowest standards of living, and the lowest per capita income of all US citizens.<sup>153</sup> In recent years, during a period of national economic expansion, some of the Territories have had unemployment rates more than double the national rate.<sup>154</sup> Furthermore, critical economic infrastructures—like power plants, water systems, and roads—that help to attract businesses in many parts of the Territories are in disrepair and in need of much improvement, even prior to the catastrophic storms that hit Puerto Rico and the US Virgin Islands in 2017.<sup>155</sup>

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151. See, e.g., *American Samoa GDP Turns Down in 2016*, BEA BLOG (Aug. 14, 2017), <https://blog.bea.gov/2017/08/14/american-samoa-gdp-turns-down-in-2016> [<https://perma.cc/5BH4-Z7GP>]; *Puerto Rico GDRP Annual Growth Rate*, TRADING ECON., <https://tradingeconomics.com/puerto-rico/gdp-growth-annual> [<https://perma.cc/UPN7-7UNW>] (charting the declining economic growth in Puerto Rico).

152. See, e.g., GUAM ECON. DEV. AUTH. ET AL., GUAM COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGY 14 (2011), (noting “Guam’s slow economic growth between 2000 and 2010”); 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/KY5K-G3CA>] (discussing national economic growth); Pedro Nicolaci da Costa, *The US 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/A8A4-87NB>] (highlighting the long period of economic growth); Press Release, Bureau of Economic Analysis, The Bureau for Economic Analysis (BEA) Releases Estimates of Gross Domestic Product for American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands (Sept. 4, 2017), [https://www.bea.gov/newsreleases/general/2010/territory\\_0310.htm](https://www.bea.gov/newsreleases/general/2010/territory_0310.htm) [<https://perma.cc/QMH9-WN9G>].

153. See, e.g., MALAVET, *supra* note 124, 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.”).

154. See U.S. V.I. BUREAU OF ECON. RESEARCH, COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGY FOR THE UNITED STATES VIRGIN ISLANDS 2009 19–20 (2009); U.S. V. I. DEP’T OF LABOR, PY 2013 EMPLOYMENT CONDITIONS IN THE UNITED STATES VIRGIN ISLANDS 3 (2013), <https://www.doleta.gov/performance/results/annualreports/PY2012/VI%20Economic%20Analysis.pdf> [<https://perma.cc/5QTQ-MY9P>]; *Guam, The World Factbook*, *supra* note 57.

155. See COMMONWEALTH ECON. DEV. STRATEGIC PLANNING COMM’N ET AL., COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGIC PLAN 2009–2014, at 16–18 (2009); Diana Degette & Fred Upton, *Rebuilding Puerto Rico and the US Virgin Islands: Better Energy Infrastructure is Key*, HILL (Dec. 6, 2017), <http://thehill.com/blogs/congress-blog/politics/363303-rebuilding-puerto-rico-and-the-us-virgin-islands-better-energy> [<https://perma.cc/JK5P-SUXE>]; Bronti DeRoche, *United States Territory: Infrastructure in American Samoa*, BORGEN PROJECT (Jan. 3, 2018), <https://borgenproject.org/infrastructure-in-american-samoa> [<https://perma.cc/4G5Q-YH6P>]; Mekela Panditharante, *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/B8DB-FT6S>]; Joy White, *Looking Inward, Guam’s Infrastructure in Need of*

Without meaningful organic economic growth, the Territories have had to accumulate significant debt, and rely on subsidies from the federal government. According to a 2017 Government Accountability Office study, each of the Territories has severely onerous debt obligations that impede their fiscal and economic futures.<sup>156</sup> In addition to massive borrowings, due to economic distress, the Territories have had to rely heavily on subsidies and grants from the federal government which now accounts for anywhere between 20 and 40 percent of a Territory's total annual revenues.<sup>157</sup> These subsidies frequently come with conditions, and are ultimately subject to the whims of lawmakers in Washington.<sup>158</sup> The uncertainties that surround federal government appropriations and the lack of meaningful political power in Washington makes long-term planning and investments incredibly difficult in the Territories.

As a result of the prolonged economic distress, there has been a sense of hopelessness in the Territories as evidenced in part by the alarmingly high rates of suicide attempts and mass migration of people away from their homelands.<sup>159</sup> Young and talented individuals frequently leave the Territories for school or better employment opportunities in the continental United States or abroad, and never return.<sup>160</sup> This talent drain from the Territories makes it even more difficult

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*Improvements*, GUAM BUS. MAG. (Sept. 9, 2016), <http://www.guambusinessmagazine.com/looking-inward-guams-infrastructure-in-need-of-improvements> [<https://perma.cc/D5NB-BMZ4>].

156. GOV'T ACCOUNTABILITY OFF., U.S. TERRITORIES: PUBLIC DEBT OUTLOOK 1 (2017).

157. See *Guam, The World Factbook*, *supra* note 57 (noting that 40 percent of Guam's GDP is subsidized by the federal government); *Northern Mariana Islands Economy Profile 2018*, INDEX MUNDI, [https://www.indexmundi.com/northern\\_mariana\\_islands/economy\\_profile.html](https://www.indexmundi.com/northern_mariana_islands/economy_profile.html) [<https://perma.cc/W8V8-7DWG>] ("In fiscal year 2013, federal grants accounted for 35.4% of the [CNMI] Commonwealth's total revenues."); *U.S. Virgin Islands, The World Factbook*, *supra* note 92 ("Federal programs and grants . . . contributed 32.2% of the territory's total revenues.").

158. See generally DEP'T OF THE INTERIOR, FY 2016 REPORT ON FEDERAL FINANCIAL ASSISTANCE TO THE U.S. PACIFIC AND CARIBBEAN ISLANDS (2017), <https://www.doi.gov/sites/doi.gov/files/uploads/fy16-report-on-federal-financial-assistance-to-the-insular-areas.pdf> [<https://perma.cc/C3MR-KZVR>] (outlining various federal financial assistance programs relating to the Territories).

159. See, e.g., GUAM ECON. DEV. AUTH. ET AL., *supra* note 152, 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."); Heather Booth, *The Evolution of Epidemic Suicide on Guam: Context and Contagion*, 40 SUICIDE & LIFE-THREATENING BEH. 1, 1-5 (2010) (discussing the high rates of suicide on Guam); D'Vera Cohn et al., *Puerto Rican Population Declines on Island, Grows on U.S. Mainland*, PEW RES. 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/BKB8-66MN>]; Alexia Fernandez 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/95BL-UJZ9>]; Iwalani R. N. Else et al., *Suicide and Suicidal-Related Behaviors Among Indigenous Pacific Islands in the United States*, 31 DEATH STUD. 479, 484-85 (2007) (analyzing the high rates of suicides and suicide attempts by Americans in the Pacific Islands including the Territories of American Samoa, Guam, and CNMI).

160. See, e.g., Samuel Oakford, *Why Are So Many Young Puerto Ricans Leaving Home?*, VICE NEWS (Apr. 6, 2015), <https://news.vice.com/article/why-are-so-many-young-puerto-ricans-leaving-home> [<https://perma.cc/5N9B-L2H2>]; Eric Platt, *Puerto Rico: An Island's Exodus*, FIN. TIMES (Aug.

for a sustainable, short-term economic recovery, as businesses are unlikely to invest in places with declining populations and scarce high-quality labor; thereby leading to more economic contraction.<sup>161</sup>

This vicious death spiral of economic decline in the Territories is perhaps most evident in Puerto Rico.<sup>162</sup> Even before the disasters of the hurricanes in 2017, Puerto Rico was already in an economic catastrophe.<sup>163</sup> It had unpaid debt and pension obligations of about \$123 billion.<sup>164</sup> By way of comparison, Detroit's bankruptcy in 2013, which was then the largest municipal bankruptcy in U.S. history, was only for obligations of about \$18 billion.<sup>165</sup> In recent years, the poverty rate on the island was "46 percent, and 58 percent for children—about three times that of the 50 states."<sup>166</sup> Its basic utilities that provide modern necessities like power and water were, and continue to be, in shambles.<sup>167</sup> For instance, in the years before the storms of 2017, many residents of Puerto Rico had problems securing safe drinking water, and the situation has only been made

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25, 2016), <https://www.ft.com/content/f9251a80-652b-11e6-a08a-c7ac04ef00aa> [https://perma.cc/RQN5-C3HJ].

161. See, e.g., Jason S. Abel & Richard Deitz, *The Causes and Consequences of Puerto Rico's Declining Population*, 20 CURRENT ISSUES ECON. & FIN. 1 (2014); *Chamorro Migration to the US*, GUAMPEDIA <http://www.guampedia.com/chamorro-migration-to-the-u-s> [https://perma.cc/5NBG-EAWH]; Editorial Board, *The Spiraling Diaspora From Puerto Rico*, *supra* note 43; Frances Robles, *Puerto Ricans Face 'Sacrifice Everywhere' on an Insolvent Island*, N.Y. TIMES (May 6, 2019) <https://www.nytimes.com/2017/05/06/us/puerto-rico-insolvency-business-owners-anxiety.html> [https://perma.cc/JLK2-LDVQ]; Stephanie Strom & Lynnley Browning, *Tax Break Bringing Business, 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/4MMV-JMQJ].

162. See LARA MERLING ET AL., CTR. FOR ECON. & POL'Y RES., *LIFE AFTER DEBT IN PUERTO RICO: HOW MANY MORE LOST DECADES 2–5* (2017) (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. 15, 2016), <https://www.nytimes.com/2016/10/15/business/dealbook/puerto-rico-financial-oversight-board.html> [https://perma.cc/7XJD-BG49].

163. See D. ANDREW AUSTIN, CONG. RESEARCH SERV., *PUERTO RICO'S CURRENT FISCAL CHALLENGES*, 12–13 (2016); Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future*, *supra* note 18, at 91 ("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.").

164. 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/G3CK-68X6].

165. *Id.*

166. Mark Weisbot, *Strangling Puerto Rico in Order to Save It*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/opinion/puerto-rico-economy-austerity.html> [https://perma.cc/7HQG-RBQ9].

167. See, e.g., Caitlin Dickerson & Luis Ferré-Sandurní, *Life in Puerto Rico, 'Like Going Back in Time'*, N.Y. TIMES, Oct. 24, 2017, at A12; Panditharante, *supra* note 155 (discussing the outdated infrastructure and lack of functioning basic utilities in Puerto Rico).

worst by the storms.<sup>168</sup> In light of this economic crisis and its uncertain future, people have been leaving Puerto Rico in droves, even before the storms in 2017.<sup>169</sup> It has been estimated that Puerto Rico will lose about “40 percent of its population by 2050.”<sup>170</sup> In fact, there are more Puerto Ricans in the continental United States than in Puerto Rico.<sup>171</sup> And, as discussed in the previous section, Puerto Rico is now under the oversight of an unelected, federally appointed PROMESA board, to oversee the largest municipal reorganization in US history.<sup>172</sup>

The predicament in Puerto Rico, while dire, may someday also describe the situation of the other Territories.<sup>173</sup> If the current economic distress persists in the other Territories, it is not hard to see a future where all or many of the Territories will suffer from the same fate as Puerto Rico. In fact, the legislation that created the PROMESA board defined “territory” to include Guam, American Samoa, the CNMI, and the US Virgin Islands, in addition to Puerto Rico, so some policymakers have already contemplated a future where other Territories may need intervention similar to present-day Puerto Rico.<sup>174</sup>

### C. Military Presence

The US military and its legacy play a significant role in the Territories, particularly in Puerto Rico and Guam.<sup>175</sup> For both of these Territories, the large military presence and its legacy has brought with it significant benefits as well as serious costs.

For Puerto Rico, US military presence is largely a relic of history, but its impact and influence continues on the island. The US military had a significant

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168. See ASOCIACIÓN NACIONAL DE DERECHO AMBIENTAL EL PUENTE, THREATS ON TAP: DRINKING WATER VIOLATIONS IN PUERTO RICO (2017), <https://www.nrdc.org/sites/default/files/threats-on-tap-drinking-water-puerto-rico-ip.pdf> [<https://perma.cc/9FF9-NCZ5>]; Caitlin Dickerson, *Daily Challenge in Puerto Rico: Finding Enough Bottled Water to Drink*, N.Y. TIMES, Oct. 13, 2017, at A18.

169. NELSON A. DENIS, WAR AGAINST ALL PUERTO RICANS: REVOLUTION AND TERROR IN AMERICA’S COLONY 261 (2015).

170. *Id.*

171. Jens Manuel Krogstad, *Puerto Ricans Leave in Record Numbers for Mainland U.S.*, PEW RES. CTR. (Oct. 14, 2015), <http://www.pewresearch.org/fact-tank/2015/10/14/puerto-ricans-leave-in-record-numbers-for-mainland-u-s> [<https://perma.cc/F4ZE-NLZE>].

172. 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/S38K-7NT3>].

173. See, e.g., Introduction, in *Developments in the Law — The U.S. Territories*, *supra* note 12, at 1617 (“Financial crises have begun to threaten the Virgin Islands and Guam too.”).

174. See Puerto Rico Oversight, Management, and 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).

175. Davis, *supra* note 124, at 216–22.

presence on the island in preparation for World War II.<sup>176</sup> Large air force and naval facilities like Ramey Air Force Base, Roosevelt Roads Naval Station, and the Atlantic Fleet Weapons Training Facility on Vieques are now all closed after decades of operation.<sup>177</sup> These base closures were a major contributing factor to the long term economic decline of Puerto Rico's economy.<sup>178</sup>

In Guam, the US military presence is an ongoing, existential matter that affects almost every part of daily life on the island.<sup>179</sup> The military occupies a significant proportion of the island's limited real estate, accounts for a large part of economic activity, and makes up a big part of the local population.<sup>180</sup> On Guam, the military occupies nearly thirty percent of the land.<sup>181</sup> Anderson Air Force Base on Guam is one of the most important American military installations in the world.<sup>182</sup> It is the home to over "100,000 bombs and missiles and 66 million gallons of jet fuel at any one time."<sup>183</sup> Active duty service personnel and their dependents constitute nearly ten percent of the local population of Guam.<sup>184</sup> The military is also one of the largest employers and economic players on Guam.<sup>185</sup> With base closures in Okinawa, Japan and the rising threats of China and North Korea, the military significance of Guam is rising, as evidenced by

176. John Lindsay-Poland, *U.S. Military Bases in Latin America and the Caribbean*, in *THE BASES OF EMPIRE: THE GLOBAL STRUGGLE AGAINST U.S. MILITARY POSTS* 71 (Catherine Lutz ed., 2009).

177. See, e.g., Sara Grusky, *The Changing Role of the US Military in Puerto Rico*, 36 *SOC. & ECON. STUD.* 37, 46–59 (1987) (documenting the economic impact of the military on Puerto Rico's economy).

178. 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-eb37ee8ea61\\_story.html?utm\\_term=.e25ceb1f90f6](https://www.washingtonpost.com/business/economy/puerto-ricos-problems-can-often-be-traced-to-one-source-washington/2015/07/09/2cbd401e-21cd-11e5-84d5-eb37ee8ea61_story.html?utm_term=.e25ceb1f90f6) [https://perma.cc/2BP2-CVHV].

179. See Borowick & Specia, *supra* note 13.

180. See, e.g., LEIBOWITZ, *supra* note 18, at 348–49 (highlighting the important economic and political influence of the military on Guam); Michael Lujan Bevacqua, *Guam: Protests at the Tip of America's Spear*, 116 *S. ATLANTIC Q.* 174, 177–78 (2017) (discussing the impact of the large military presence on Guam).

181. See Bevacqua, *supra* note 180, at 177 (“At present, the US military controls close to one-third of Guam's land mass and already restricts access to several places on Guam.”).

182. KAPLAN, *supra* note 18, at 224.

183. *Id.*

184. See Borowick & Specia, *supra* note 13 (estimating that “13,000 military members and their dependents” live on Guam with “a population of around 163,000”).

185. See, e.g., LEIBOWITZ, *supra* note 18, at 349; *Military Buildup Seen as Boom, Test for Tiny Island of Guam*, PBS (June 9, 2009), <https://www.pbs.org/newshour/world/military-buildup-seen-boom-test-tiny-island-guam> [https://perma.cc/A6FP-JALA]; 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://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/BR8F-DXP4]; Letter from Brian J. Lepore, Director Defense Capabilities and Management, to The Honorable Tim Johnson, Chairman, and The Honorable Mark Kirk, Ranking Member, Subcommittee on Military Construction, Veterans Affairs, and Related Agencies, Committee on Appropriations 2–7, <https://www.gao.gov/new.items/d11459r.pdf> [https://perma.cc/7ECS-4NEK] [hereinafter Letter on Military Buildup on Guam].

the recent military build-up on the island.<sup>186</sup> Given the large and longstanding military presence on the island, the people of Guam have one of the highest rates of military recruitment and participation of any State or Territory.<sup>187</sup>

While the strong US military presence and its legacy has brought with it some benefits for the Territories, it has also brought significant burdens. First, in every war since World War II involving the United States, the people from the Territories have enlisted and died at one of the highest per capita rates relative to their peers from the States.<sup>188</sup> In fact, American Samoa, has “the highest rate of military enlistment of any U.S. state or territory.”<sup>189</sup> Like their fellow soldiers from the States, they fight and die for the United States, often in disproportionate numbers; unlike their fellow soldiers, they have no say in American foreign affairs, military policy, veterans affairs, or the election of their Commander-in-Chief.<sup>190</sup>

Second, large-scale long-term military exercises and munitions tests in the Territories have left lasting environmental, psychological, and healthcare consequences in ways not experienced by the States.<sup>191</sup> For instance, the US

186. See NAVAL FACILITIES ENGINEERING COMMAND PAC. PEARL HARBOR, HI, SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT: GUAM AND COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS MILITARY RELOCATION (2012 ROADMAP ADJUSTMENTS), at ES-1–ES-4 (2015); Davis, *supra* note 124, 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).”); *Military Buildup Seen as Boom, Test for Tiny Island of Guam*, *supra* note 185.

187. See *Military Statistics > Total Military Recruits: Army, Navy, Air Force (per capita) (most recent)* by State, STATEMASTER, [http://www.statemaster.com/graph/mil\\_tot\\_mil\\_rec\\_arm\\_nav\\_air\\_for\\_percap-navy-air-force-per-capita](http://www.statemaster.com/graph/mil_tot_mil_rec_arm_nav_air_for_percap-navy-air-force-per-capita) [<https://perma.cc/99RL-YQY6>]; Ivan Watson et al., *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/V6XY-7UWX>].

188. See Miyume Tanji, *Chamorro Warriors and Godmothers Meet Uncle Sam: Gender, Loyalty and Resistance to US 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).

189. 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](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/06/the_supreme_court_needs_to_settle_birthright_citizenship.html) [<https://perma.cc/4YRH-P55G>].

190. 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.”).

191. See, e.g., LEIBOWITZ, *supra* note 18, at 324–28 (highlighting the impact of the military on the historical and social development of Guam); KATHERINE T. MCCAFFREY, MILITARY POWER AND POPULAR PROTEST: THE U.S. NAVY IN VIEQUES, PUERTO RICO 43–50 (2002) (examining the cultural impact of the military on Puerto Rican identity); Tanji, *supra* note 188, at 104–06 (discussing the

military used the island of Vieques, Puerto Rico, to conduct bombings and military exercises for over sixty years.<sup>192</sup> As a result of the bombings and tests, the people of Vieques have seen their beautiful environment destroyed, and have long suffered from some of the highest rates of illness in the Caribbean.<sup>193</sup> It is hard to imagine similar scenarios occurring on the American mainland where the people of the States are represented by voting elected officials in Washington and electors in the presidential elections—such damaging large-scale military exercises would likely be met with strong political resistance and consequences.

Third, the significant military presence in some of the Territories renders them particularly susceptible to threats from terrorists and foreign powers. For instance, in 2017, North Korea made specific threats to bomb Guam during its ongoing conflict with the United States.<sup>194</sup> Because of their small size and distance from the continental United States, the large military presence in some of the Territories makes them prime targets for enemies of the United States who may otherwise not launch an attack against the American mainland.<sup>195</sup>

#### D. Geographic Isolation

The Territories are geographically isolated from the continental United States, and this literal disconnect has had profound legal and extra-legal implications for the people of the Territories.<sup>196</sup> Despite advances in technology, the inevitable and sometimes harsh barriers of geography still persist.<sup>197</sup> The geographic gulf between the Territories and the continental United States has

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psychological and cultural impact of the military presence on Guam); Jon Letman, *Proposed US Military Buildup on Guam Angers Locals Who Liken it to Colonization*, THE GUARDIAN (Aug. 1, 2016), <https://www.theguardian.com/us-news/2016/aug/01/guam-us-military-marines-deployment> [<https://perma.cc/A6FP-JALA>]; Letter on Military Buildup on Guam, *supra* note 185.

192. John Lindsay-Poland, *supra* note 176, at 91.

193. 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/DPL6-P9SE>].

194. Choe Sang-Hun, *North Korea Rails as U.S. Plans Drills with Seoul*, N.Y. TIMES, Oct. 14, 2017, at A8.

195. See, e.g., Juan M. Rapadas, *Transmission of Violence: The Legacy of Colonialism in Guam and the Path to Peace*, 1 J. PAC. RIM PSYCHOL. 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 US military and proximity to the US Air Force and naval bases on Guam.”); Sang-Hun, *supra* note 194.

196. See, e.g., Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future*, *supra* note 18, at 69 (arguing that citizens on the Territory of Puerto Rico are “treated unequally from those in the rest of the nation solely by reason of their geographical residence”).

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

been a significant factor in the unfulfilled and forgotten legal and political status of the Americans in the Territories.<sup>198</sup>

First, the Territories are physically disconnected from the continental United States. All of them are at least 1,000 miles away from the nearest major city in the continental United States. Some Territories, like Guam, are over 5,000 miles away from the nearest major city in the continental United States.<sup>199</sup> Because of this geographic distance and isolation, the Territories are frequently viewed as remote and foreign, or as the Supreme Court (in)famously termed “foreign to the United States in a domestic sense.”<sup>200</sup> The map and chart below highlight the physical and geographic isolation of the Territories relative to the continental United States:

Figure 1: Map of the Territories



198. See, e.g., *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922) (“It is locality that is determinative of the application of the Constitution[.]”).

199. See *infra* note 203.

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

Table 2: Distance &amp; Flight Time from Territories to U.S. Mainland

Territory	Distance to nearest US mainland state	Flight time to nearest major US mainland airport
Puerto Rico	1,032 miles <sup>201</sup>	2 h, 28 min. <sup>202</sup>
Guam	5,674 miles <sup>203</sup>	11 h, 14 min. <sup>204</sup>
American Samoa	4,757 miles <sup>205</sup>	9 h, 30 min. <sup>206</sup>
US Virgin Islands	1,103 miles <sup>207</sup>	2 h, 35 min. <sup>208</sup>

201. See *Distance from San Juan to Miami, FL*, TIMEANDDATE.COM, <https://www.timeanddate.com/worldclock/distances.html?n=226> [https://perma.cc/8WLG-75RH]. This measurement was calculated from San Juan, the capital city of Puerto Rico, to Miami, Florida, the closest major city in the contiguous United States.

202. See *Distance from Luis Munoz Marin International Airport (SJU) to Miami International Airport (MLA)*, AIR MILES CALCULATOR, <http://www.airmilescalculator.com/distance/mia-to-sju> [https://perma.cc/S89R-JX2R].

203. See *Distance from Hagåtña, Guam and Seattle, Washington, USA*, TIMEANDDATE.COM, <http://dateandtime.info/distance.php?id1=4044012&id2=5809844> [https://perma.cc/3MCZ-DBNX]. This measurement was calculated from Hagåtña, the capital city of Guam, to Seattle, Washington, the closest major city in the contiguous US. See *Distance from Antonio B. Won Pat International Airport (GUM) to Seattle Tacoma International Airport (SEA)*, AIR MILES CALCULATOR, <http://www.airmilescalculator.com/distance/sea-to-gum/> [https://perma.cc/88BK-BH8H].

204. See *Distance from Antonio B. Won Pat International Airport (GUM) to Seattle Tacoma International Airport (SEA)*, supra note 203.

205. See *Distance from Pago Pago, American Samoa to San Francisco, CA*, TIMEANDDATE.COM, <https://www.timeanddate.com/worldclock/distances.html?n=1033> [https://perma.cc/J2T6-YX9T]. This measurement was calculated from Pago Pago, the capital city of American Samoa, to San Francisco, California, the closest major city in the contiguous United States.

206. See *Distance from Pago Pago International Airport (PPG) to San Francisco International Airport (SFO)*, AIR MILES CALCULATOR, <http://www.airmilescalculator.com/distance/sfo-to-ppg> [https://perma.cc/GSF4-QLH8].

207. See *Distance from Charlotte Amalie, US Virgin Islands to Miami, FL*, TIMEANDDATE.COM, <https://www.timeanddate.com/worldclock/distances.html?n=933> [https://perma.cc/36CH-F79Z].

208. See *Distance from Cyril E. King Airport (STT) to Miami International Airport (MLA)*, AIR MILES CALCULATOR, <http://www.airmilescalculator.com/distance/stt-to-mia> [https://perma.cc/RQA5-TEAJ].

CNMI	5,540 miles <sup>209</sup>	11 h, 0 min. <sup>210</sup>
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Second, the geographic isolation of the Territories makes it easier for them to be overlooked and forgotten by policymakers and their fellow Americans in the mainland. This factor of geography is frequently unappreciated by policymakers, and serves as implicit and explicit motivations to overlook and mistreat the people of the Territories.<sup>211</sup> In 2017, a poll revealed that only fifty-four percent of Americans knew that Puerto Ricans are Americans.<sup>212</sup> This ignorance exists despite the fact that, among the Territories, Puerto Rico has the largest diaspora in the mainland—over five million in the States—which dwarfs the population of all the other Territories combined.<sup>213</sup> Additionally, there have been a number of Congressional representatives, a Supreme Court Justice, and numerous celebrities and athletes of Puerto Rican descent in recent years.<sup>214</sup>

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209. See *Distance from Saipan, Northern Mariana Islands to Seattle*, TIMEANDDATE.COM, <https://www.timeanddate.com/worldclock/distanceresult.html?p1=934&p2=234> [https://perma.cc/Z3ZP-B9WU]. This measurement was calculated from Saipan, the capital city of the Northern Mariana Islands, to Seattle, Washington, the closest major city in the contiguous United States.

210. See *Distance from Francisco C. Ada Saipan International Airport (SPN) to Seattle Tacoma International Airport (SEA)*, AIR MILES CALCULATOR, <http://www.airmilescalculator.com/distance/spn-to-sea> [https://perma.cc/TGF2-GNWX].

211. See, e.g., MARSHALL, *supra* note 197, at 2 (“The physical realities that underpin national and international politics are too often disregarded in both writing about history and in contemporary world affairs.”).

212. 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/3JL3-N3JH].

213. See *Colonialism, Citizenship, and the Making of the Puerto Rican Diaspora: An Introduction*, in *PUERTO RICAN DIASPORA: HISTORICAL PERSPECTIVES 1–3* (Carmen Teresa Whalen & Victor Vázquez-Hernández eds., 2005); *Puerto Ricans on the Mainland United States*, THE ECONOMIST (Oct. 5, 2017), <https://www.economist.com/united-states/2017/10/05/puerto-ricans-on-the-mainland-united-states> [https://perma.cc/USC3-BEM8] (“There are about 5m Puerto Ricans on the mainland now, a fifth of them in Florida—more than remain on the island.”), Ying Wang & Stefan Rayer, *Growth of the Puerto Rican Population in Florida and on the U.S. Mainland*, U. FLA. BUREAU ECON. & BUS. RES. (Feb. 9, 2018), <https://www.bebr.ufl.edu/population/website-article/growth-puerto-rican-population-florida-and-us-mainland> [https://perma.cc/8BE4-LL2M]; *supra* notes 113–116 and accompanying text.

214. Supreme Court Justice Sonia Sotomayor and recent House of Representative members Luis Gutiérrez, Raúl Labrador, Alexandria Ocasio-Cortez, José Serrano, Darren Soto, and Nydia Velázquez are all of Puerto Rican descent. See *About*, U.S. CONGRESSMAN DARREN SOTO, <https://soto.house.gov/about> [https://perma.cc/DVF8-CWW9]; *Biography*, CONGRESSMAN JOSÉ E. SERRANO, <https://serrano.house.gov/about/full-biography> [https://perma.cc/S7FQ-DP5A]; *Biography*, U.S. CONGRESSMAN LUIS V. GUTIÉRREZ, <https://gutierrez.house.gov/about/full-biography> [https://perma.cc/KH5B-5PDE]; *Biography*, CONGRESSMAN RAÚL LABRADOR, <https://labrador.house.gov/biography> [https://perma.cc/GYM9-YA65]; *Biography*, U.S. CONGRESSWOMAN NYDIA M. VELÁZQUEZ, <https://velazquez.house.gov/about/full-biography> [https://perma.cc/CYY6-WJ4F]; 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->

Given the average Americans' ignorance of Puerto Rico, it can be reasonably inferred that the average American knows even less of their fellow Americans from Guam, American Samoa, the Northern Mariana Islands, or the US Virgin Islands.<sup>215</sup> Furthermore, unlike States that possess political power and natural neighboring allies, the Territories do not have consistent, regional political allies for their causes and interests.<sup>216</sup> Representatives from the South or New England, for instance, have shared interests and frequently vote as a bloc.<sup>217</sup> No such natural, geographic political allies exist for the Territories, which are dispersed far and wide from the other States and many of their fellow Territories. While the Puerto Rican diaspora in the American mainland is large, elected officials in areas with large populations of former residents of Puerto Rico still have to prioritize local constituent needs over the needs of Puerto Rico. As such, from a policy perspective, the interests and causes of the Territories—individually and collectively—are often forgotten.

Third, the geographic isolation of the Territories has had a serious economic impact on the lives of their people. Because of their geographic remoteness, the costs of goods and services on the islands are generally higher than those of their fellow Americans in the States, to the extent they are even available locally.<sup>218</sup> The geographic isolation of the Territories means that goods and services frequently have to travel costly routes by sea or air over great

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sonia-sotomayor-of-the-supreme-court.html [https://perma.cc/4JJJ-W2VG]; *Meet Alexandria*, ALEXANDRIA OCASIO-CORTEZ, https://ocasio2018.com/about [https://perma.cc/4WES-H4S2].

215. It may be worth noting that there are some famous national figures, athletes, and celebrities with ethnic ties to American Samoa and the US Virgin Islands, albeit not in the same numbers and prominence as those from Puerto Rico. Congresswoman Tulsi Gabbard of Hawaii, 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 US Virgin Islands. *See, e.g., GABBARD, Tulsi*, U.S. H.R. HIST., ART & ARCHIVES, https://history.house.gov/People/Listing/G/GABBARD,-Tulsi-(G000571) [https://perma.cc/PUS6-83B2]; Graham Young, *The Rock's on a Roll in Hollywood*, BIRMINGHAM POST (Apr. 10, 2009), https://www.birminghampost.co.uk/lifestyle/rocks-roll-hollywood-3947235 [https://perma.cc/ZU59-RMLS]; Tim Duncan, *Don't Forget About the Islands*, PLAYERS' TRIB. (Sept. 8, 2017), https://www.theplayertribune.com/en-us/articles/tim-duncan-hurricane-irma-us-virgin-islands [https://perma.cc/QF4A-PY8N]; *Hannah Jeter*, IMBD, https://www.imdb.com/name/nm3726623 [https://perma.cc/QMU7-97V7].

216. *See* Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 383–88 (2018).

217. *See* ANDREW GELMAN ET AL., RED STATE, BLUE STATE, RICH STATE, POOR STATE: WHY AMERICANS VOTE THE WAY THEY DO 67–70 (2008) (examining the regional voting trends among states); DONALD G. SAARI, GEOMETRY OF VOTING 308 n.19 (1994) (“Regional voting in Congress is becoming increasingly important for many policy factors. Indeed, for many issues, the concerns of a region overtake those of the individual states.”).

218. *See* KRISTA PERREIRA ET AL., URBAN INST., PUERTO RICO HEALTH CARE INFRASTRUCTURE ASSESSMENT 6 (2017) (discussing the increased cost of living in Puerto Rico due to, among other things, groceries); Ed Morales, *Puerto Rico's Soaring Cost of Living, from Giant Electric Bills to \$5 Cornflakes*, GUARDIAN (July 12, 2015), https://www.theguardian.com/world/2015/jul/12/puerto-rico-cost-of-living [https://perma.cc/3JL3-N3JH].

distances to reach the Territories.<sup>219</sup> These transportation costs are then passed on to the people of the Territories, thereby increasing their cost of living. In addition, the people of the Territories frequently have to travel thousands of miles to the American mainland to seek certain opportunities, services, and life-saving medical measures at great cost and risks that do not have to be borne by many of their fellow Americans on the mainland.

In sum, the geographic isolation of the Territories impacts the people living there in passingly prosaic as well as deeply profound ways. For the Territories, as the famed novelist Abraham Verghes wrote, “geography is destiny,”<sup>220</sup> and unfortunately that destiny has largely been shaped by others.

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The people of the Territories are Americans, but they bear a cauldron of burdens that their fellow citizens in the States do not have to carry. They bear the interconnected afflictions of political powerlessness, economic distress, military presence, and geographic isolation that frequently render them lesser and forgotten Americans.

### III.

#### PAST PATHS FOR PROGRESS

The fight for full and fair political rights for the Territories is not new.<sup>221</sup> Many past paths have been traveled for more than a century without meaningful success, and many continue to be pursued by supporters of the Territories. Among the past traveled roads, three are particularly prominent and worthy of closer examination: litigation, statehood, and independence. Each of these three prior paths remains frequently pursued routes by advocates for the Territories, despite the fact that the haunted obstacles of the past continue to exist in the present.

#### A. Litigation

Litigating for more substantive political rights and political change for the Territories is remarkably appealing in a nation of laws, where courtrooms are

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219. See, e.g., GOV'T ACCOUNTABILITY OFF., *PUERTO RICO: CHARACTERISTICS OF THE ISLAND'S MARITIME TRADE AND POTENTIAL EFFECTS OF MODIFYING THE JONES ACT 8–13* (2013) [hereinafter *PUERTO RICO: CHARACTERISTICS OF THE ISLAND'S MARITIME TRADE*], <https://www.gao.gov/products/GAO-18-160?source=ra> [<https://perma.cc/ZE9M-G5N4>]; THOMAS GRENNES, *MERCATUS RESEARCH, AN ECONOMIC ANALYSIS OF THE JONES ACT 14–15* (2017).

220. ABRAHAM VERGHESE, *CUTTING FOR STONE* 8 (2009).

221. See, e.g., Cabranes, *supra* note 18, at 396–402 (chronicling the long political struggles of the Territories, particularly Puerto Rico); Elizabeth A. McKibben, *The Political Relationship Between the United States and Pacific Islands Entities: The Path to Self-Government in the Northern Mariana Islands, Palau, and Guam*, 31 *HARV. INT'L L.J.* 257, 291–92 (1990) (summarizing the decades-long history of the Territories of Guam and CNMI's fight for more political power).

frequently the preferred forums to fight for political rights and social change.<sup>222</sup> As the French political scientist and historian, Alexis de Tocqueville observed nearly two centuries ago: “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.”<sup>223</sup> Judicial intervention may be particularly helpful for the Territories because the protective mechanisms of the political processes within our democracy have either failed them, or are simply unavailable to them. The Territories are in many ways the quintessential “discrete and insular minorities” of constitutional law’s famous *Carolene Products* footnote 4 who need the protection of “more searching judicial inquiry.”<sup>224</sup> Nevertheless, litigation is not a practical primary avenue for achieving meaningful progress in the near future for the Territories. In particular, litigation on behalf of the Territories faces the serious obstacles of time and precedents that stand in the way of producing any tangible political benefits for the people of the Territories in the near future.

### 1. *The (Im)practicalities of Litigation*

Litigation is not a viable path to achieve much-needed short term relief or political progress for the Territories. The length of litigation and inevitable appeals in connection with complex legal disputes with serious political and constitutional implications can take years to navigate through our judicial processes.<sup>225</sup> For instance, the odds are slim that a case involving the Territories will work its way to the Supreme Court and receive a favorable ruling since the Court grants certiorari to only a very small number of cases each year—about 80 out of 8,000 cases filed each term.<sup>226</sup> Furthermore, assuming that there is an improbable victory in the courts, enforcement of any relief granted could also take years through our political processes.<sup>227</sup>

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222. See JEB BARNES & THOMAS F. BURKE, *HOW POLICY SHAPES POLITICS: RIGHTS, COURTS, LITIGATION, AND THE STRUGGLE OVER INJURY COMPENSATION* 1 (2015) (“Litigation is everywhere in American society, casting its long shadow over businesses, schools, public spaces, private lives, and nearly every aspect of government and policymaking.”); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 4 (2d ed. 2004) (“In the United State we have long been accustomed to associating lawyers (albeit a small minority of the bar) with programs to alter the status quo.”); Holly J. McCammon & Allison R. McGrath, *Litigating Change? Social Movements and the Court System*, 9 *SOC. COMPASS* 128, 128 (2015) (“A clear trend in US social movement activism in roughly the last half century has been increased use of litigation in efforts to bring about social change.”).

223. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA AND TWO ESSAYS ON AMERICA* 315 (Gerald E. Bevan trans., 2003).

224. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

225. See SCHEINGOLD, *supra* note 222, at 8 (“[T]he tendency of litigation to break political action down into a multiplicity of individual transactions stretches out the process of implementation to the point that it can become not only tedious but counterproductive—one step forward, two steps back.”).

226. *The Justices’ Caseload*, SUPREME COURT U.S., <https://www.supremecourt.gov/about/justicecaseload.aspx> [<https://perma.cc/XSH4-XE23>].

227. See SCHEINGOLD, *supra* note 222, at 8.

For instance, *Brown v. Board of Education of Topeka* held in 1954 that racial segregation in public education was unconstitutional.<sup>228</sup> In fact, a year after the initial *Brown* decision, the Supreme Court held in a follow-up case, *Brown v. Board of Education II*, that desegregation should happen with “all deliberate speed,” as many localities refused to follow the first *Brown* ruling.<sup>229</sup> Despite these rulings from the Supreme Court, it nevertheless took decades for true desegregation to occur in many parts of the country.<sup>230</sup>

Similarly, litigating to secure political rights, such as full voting rights in Congress and in presidential elections for the people of the Territories, could arguably be just as complex and time consuming as the fight for desegregation in schools, and perhaps even less certain in their outcomes. Using litigation as the primary path towards achieving more political rights for the Territories could also have the unintended consequence of making political processes and other opportunities for progress much more difficult, as limited resources and attention become consumed by the litigation.<sup>231</sup>

Recent cases that implicated the political rights and status of the Territories suggest that litigation is a particularly lengthy and treacherous path as a means to meaningful progress for the Territories in the near term. First, in *Tuaua v. United States*, a case involving the right to full citizenship for the people of American Samoa, the entire litigation from the filing of the initial complaint to the denial for cert from the US Supreme Court took nearly four years to reach the conclusion that American Samoans are not entitled to full citizenship status.<sup>232</sup> Second, in *Puerto Rico v. Sanchez Valle*, a Supreme Court case holding that Puerto Rico was not a “separate sovereign” for the purposes of double jeopardy, the entire litigation also spanned nearly four years.<sup>233</sup> Finally, in *Puerto Rico v. Franklin California Tax-Free Trust*, a Supreme Court case holding that Puerto Rico, as a Territory and not a State, was preempted by federal law to enact its own municipal bankruptcy law, lasted nearly two years.<sup>234</sup> In each of these three cases, advocates on behalf of the Territories lost, so we do not know how

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228. 347 U.S. 483, 483–84 (1954).

229. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

230. CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 306 (2004).

231. See SCHEINGOLD, *supra* note 222, at 6 (explaining why “litigative tactics can impose a heavy burden on the process of political organization”).

232. See *Tuaua v. United States*, 788 F.3d 300, 301–02 (2015), *cert. denied*, 136 S. Ct. 2461 (2016); Complaint for Declaratory and Injunctive Relief, *Tuaua v. United States*, 951 F. Supp. 2d 88 (D.D.C. 2013) (No. 12-1143) 2012 WL 2848713.

233. See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016).

234. See *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1943 (2016).

long the practical judicial enforcements and effects of a courtroom victory may take to become a political reality for the people of the Territories.<sup>235</sup>

In sum, litigation offers a difficult and impractical path to progress in the near term for the Territories. For the people of the Territories, victories in litigation, to the extent they are even achievable, can seem like pyrrhic victories when juxtaposed with the grim long-term outlooks of storm-torn neighborhoods, shuttered businesses, bombing threats, dilapidated schools, and mass exoduses of family and friends.

## 2. *The Problem of Precedents*

Beyond the practical challenges of litigation as a way to meaningful near-term progress, there are also substantive ones: longstanding legal precedents that present serious obstacles for the Territories. In particular, a series of cases decided in the early 1900s, known as the *Insular Cases*, continues to present a strong legal roadblock for territorial political rights as the leading judicial precedents on matters related to the Territories.<sup>236</sup> Recent cases before the Supreme Court suggest that the Court is reticent to use its judicial powers to help address the grievances of the Territories by overturning more than a century of precedents.<sup>237</sup>

The *Insular Cases* refer to a set of Supreme Court cases from the early 1900s about issues pertaining to territories acquired by the United States in the latter half of the 1800s.<sup>238</sup> A more expansive view of this line of cases may also

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235. See SCHEINGOLD, *supra* note 222, at 8 (“The courts are, however, only modestly endowed with coercive capabilities—adequate, perhaps, for dealing with recalcitrant individuals but probably insufficient for bringing large groups or powerful institutions into line.”).

236. See Gerald L. Neuman, *Introduction*, in RECONSIDERING THE INSULAR CASES xiv (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) (noting that the *Insular Cases* “continue[] to provide the foundation for governing inhabited territories and small islands without permanent populations”); Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CALIF. L. REV. 1181, 1200–04 (2014) (discussing the ambiguous and lasting impact of the *Insular Cases* on the Territories).

237. See *American Samoa and the Citizenship Clause: A Study in Insular Cases Revisionism*, in *Developments in the Law — The U.S. Territories*, 130 HARV. L. REV. 1680, 1680 (2017) (“[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 *Sanchez Valle*, 136 S. Ct. at 1863 (holding that Puerto Rico is not a “sovereign” for the purposes of constitutional double jeopardy considerations based on the *Insular Cases*); *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1938 (holding that federal bankruptcy law preempts any local bankruptcy statute because Congress has ultimate authority over the Territories).

238. There is an open debate among legal scholars as to which cases should be categorized as part of the *Insular Cases*. See Christina Duffy Burnett, *A Note on the Insular Cases*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 389–92 (Christina Duffy Burnett & Burke Marshall eds., 2001). Many scholars believe that the *Insular Cases* include a set of decisions handed down in 1901, and possibly another case handed down 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); *Grossman 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.

include a series of opinions involving Alaska, Hawaii, the Philippines, and Puerto Rico.<sup>239</sup> The *Insular Cases* produced a set of key interrelated legal doctrines for all future courts adjudicating issues relating to the Territories.<sup>240</sup>

First, in *Downes v. Bidwell*, the Court held that Congress has virtually unrestricted authority to apply any Constitutional provisions to the Territories pursuant to its powers under the Territorial Clause of the Constitution.<sup>241</sup> This new doctrine reversed the Court's previous position that the Constitution of the United States "follows the flag to our territories."<sup>242</sup>

Second, the *Insular Cases* produced the doctrine of territorial incorporation.<sup>243</sup> This doctrine holds that fully incorporated territories are afforded all the rights and privileges of the Constitution, while unincorporated territories are only afforded the particular Constitutional rights and privileges as designated by Congress.<sup>244</sup> The legal doctrines set forth by the *Insular Cases* explain in large part why the people of the Territories possess so little political power in the national government: they are American citizens or non-citizen nationals living in unincorporated Territories that have not been granted full political rights by Congress.<sup>245</sup>

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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 (The Diamond Rings)*, 183 U.S. 176 (1901).

239. See *Ocampo v. United States*, 234 U.S. 91 (1914); *Ochoa v. Hernandez*, 230 U.S. 139 (1913); *Dowdell v. United States*, 221 U.S. 325 (1911); *New York ex rel. Kopel v. Bingam*, 211 U.S. 468 (1909); *Kent v. Porto Rico*, 207 U.S. 113 (1907); *Grafton v. United States*, 206 U.S. 333 (1907); *Trono v. United States*, 199 U.S. 521 (1905); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Mendezona v. United States*, 195 U.S. 158 (1904); *Dorr v. United States*, 195 U.S. 138 (1904); *Kepner v. United States*, 195 U.S. 100 (1904); *Gonzalez v. Williams*, 192 U.S. 1 (1904); and *Hawaii v. Mankichi*, 190 U.S. 197 (1903).

240. See Neuman, *supra* note 236, at xiv; *Territorial Federalism, in Developments in the Law — The U.S. Territories*, *supra* note 139, at 1648 ("[T]he Supreme Court in the *Insular Cases* inaugurated a novel and enduring constitutional line in its territorial jurisprudence[.]").

241. 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)); see also 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).

242. Malavet, *supra* note 241, at 186.

243. Burnett, *United States: American Expansion and Territorial Deannexation*, *supra* note 18, at 800. ("In the *Insular Cases* [the Court] produced the unprecedented doctrine of territorial incorporation.").

244. 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')."); see also Torruella, *Ruling America's Colonies*, *supra* note 120, at 81.

245. Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 347 (2007) ("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 . . .").

The *Insular Cases* have been viewed by many as controversial cases rooted in outdated, racist logic from a bygone era of American imperialism.<sup>246</sup> Legal scholarship and cases that served as the foundational basis of the *Insular Cases* referred to the Territories as “possessions,”<sup>247</sup> and the people of the Territories as “savage,”<sup>248</sup> “unfit to govern,”<sup>249</sup> “half-civilized,”<sup>250</sup> “ignorant and lawless brigands,”<sup>251</sup> and “impossible” of being governed “according to Anglo-Saxon principles.”<sup>252</sup>

Nevertheless, the *Insular Cases* from over a century ago remain the leading precedents for courts adjudicating issues related to the Territories.<sup>253</sup> In the previously mentioned 2016 cases, *Franklin California Tax-Free Trust*, *Sanchez Valle*, and *Tuau*, the Supreme Court and the D.C. Circuit Court of Appeals either cited explicitly to the *Insular Cases* or implicitly upheld the underlying principles articulated in the *Insular Cases* by opposing more political rights for the Territories.<sup>254</sup> For instance, in *Franklin California Tax-Free Trust*, the Court held 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.<sup>255</sup> The Court’s convenient sophism in *Franklin California Tax-Free Trust* was akin to its convenient sophism from its 1901 ruling in *Downes*, when it claimed that Puerto Rico was “foreign to the United States in a domestic sense.”<sup>256</sup> As such, the long history and precedential

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246. See, e.g., Martha Minow, *Preface*, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE vii, 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.”); José A. Cabranes, *Puerto Rico, Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 458–59 (1986) (critiquing the underlying norms and values of the *Insular Cases*); Andrew Kent, Boumedine, Munaf, and the Supreme Court’s Misreading of the *Insular Cases*, 97 IOWA L. REV. 101, 110 (2011) (commenting on the *Insular Cases*’ “deplorable discussions of the supposed racial and cultural inferiority of inhabitants of the newly annexed island territories”); Torruella, *The Insular Cases*, *supra* note 245, at 286 (opining 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”).

247. See Thayer, *supra* note 3, at 478.

248. *Id.* at 475.

249. *Id.*

250. Baldwin, *supra* note 4, at 415.

251. *Id.*

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

253. See, e.g., Torruella, *The Insular Cases*, *supra* note 245, at 347.

254. See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1873 (2016) (citing to the *Insular Cases* 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”); *Tuau v. United States*, 788 F.3d 300, 305–06 (2015) (citing the *Insular Cases* in denying full citizenship to American Samoans).

255. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1945–46 (2016).

256. *Downes*, 182 U.S. at 341–42 (White, J., concurring).

power of the *Insular Cases* renders litigation a tough route towards meaningful near-term progress for the Territories.

To be clear, these critiques about the uncertainty, length, and precedential obstacles confronting litigation for the Territories are not meant to suggest that litigation should not be pursued at all. Rather, these critiques are offered to suggest that litigation should not be *the* primary path traveled to achieving near-term progress for the Territories. Nevertheless, the fight in the courts should and must continue as one of many paths pursued on behalf of the Territories. Victorious courtroom judgments, while elusive, are possible. The damaging and misguided precedents and legacies of the *Insular Cases* can perhaps be best and most swiftly overturned in the courts.<sup>257</sup> Moreover, litigation can help mobilize people, change institutional norms, and persuade policymakers toward meaningful lasting political changes for the territories.<sup>258</sup> Thus, litigation for full and equal rights must continue, but it should be part of a multifaceted effort to produce tangible near-term and long-term progress for the Territories.

### B. Statehood

Statehood is an appealing pathway to progress for the Territories, but it is ultimately a path with serious, and perhaps insurmountable, obstacles in the near term. The stark realities of our time suggest that achieving statehood for any or all of the Territories would be difficult given the respective sizes of the Territories and the hyper-partisan politics in contemporary Washington.

First, each of the Territories except Puerto Rico does not have the population to be credibly considered a state by many, given the populations of today's states.<sup>259</sup> Wyoming, the smallest state by population as of the most recent census in 2010, has approximately 560,000 people.<sup>260</sup> Each Congressional district as of the last census in 2010 has approximately 711,000 people.<sup>261</sup> None of the Territories except Puerto Rico has even 200,000 people.<sup>262</sup> Given their

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257. See Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future*, *supra* note 18, at 98 (“Clearly, it is up to the courts as guardians of the Constitution, and as the originators of this unequal treatment [of the Territories] when they validated it in the *Insular Cases*, to correct this condition.”).

258. See, e.g., SCHEINGOLD, *supra* note 222, at 8 (discussing how litigation “can be useful for political mobilization” and “reshaping the political arena”); Robert C. Lieberman, *Ideas, Institutions, and Political Order: Explaining Political Change*, 96 AM. POL. SCI. REV. 697, 709 (2002) (suggesting that litigation can work in tandem with other activity to fuel political change).

259. See Raskin, *supra* note 2, at 566 (arguing that it is hard to justify two US Senators for any of the Territories besides Puerto Rico given their small populations).

260. U.S. Census Bureau *QuickFacts: Wyoming*, U.S. DEP’T COM., <https://www.census.gov/quickfacts/fact/table/WY/PST045216> [<https://perma.cc/F6VU-2BKS>].

261. Kristin D. Burnett, *Congressional Apportionment, 2010 Census Briefs*, U.S. CENSUS BUREAU, U.S. DEP’T COM. (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf> [<https://perma.cc/26KJ-VDYT>].

262. See *supra* notes 112–116 and accompanying text.

relatively small populations, it is hard to imagine Congress granting each of the Territories two US Senators and a full voting member of the House of Representatives.

Second, population aside, the highly partisan nature of contemporary politics makes it extremely unlikely for any of the Territories to be admitted into the Union as a State. The highly partisan politicians of the last two decades who routinely obstruct budgets, presidential nominations, debt ceiling hikes, and important legislation would be unlikely to cast aside their differences and come together to make the significant moves necessary to admit one or more of the Territories into the Union as a new State.<sup>263</sup>

Article IV of the Constitution authorizes Congress to admit new states into the Union. It states “[n]ew States may be admitted by the Congress into this Union.”<sup>264</sup> While the Constitution gives Congress the authority to admit new states, it does not prescribe a particular process for the admission of new states. Historically, a territory would hold a referendum and petition Congress for statehood to initiate the process of admission into the Union as a state.<sup>265</sup> If Congress wished to grant statehood thereafter, it had to pass an enabling act establishing a process for the territory to draft a state constitution and elect representatives.<sup>266</sup> Once a state constitution had been drafted and ratified, Congress would review it and pass an admission act or resolution that accepted the territory as a state.<sup>267</sup> This penultimate move by Congress effectively approved the constitution of that prospective state and provided for its admission to the United States; the President would then sign the resolution to acknowledge and proclaim the territory a State.<sup>268</sup>

Every one of these sequential steps requires wide consensus in the Congress, and each step must be satisfied prior to moving forward to the next stage.<sup>269</sup> Given the contemporary norm of political gridlock and obstruction in

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263. See generally 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* ix–x, 3 (2012); NOLAN MCCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 13–14 (2006); David A. Moss, *Fixing What’s Wrong with U.S. Politics*, 90 HARV. BUS. REV. 134 (2012); Carl Hulse & Helene Cooper, *Obama and Leaders Reach Debt Deal*, N.Y. TIMES (July 31, 2011), <https://www.nytimes.com/2011/08/01/us/politics/01FISCAL.html> [<https://perma.cc/RG96-QTXF>]; Bill Scher, *How Liberals Win*, N.Y. TIMES (June 30, 2012), <https://www.nytimes.com/2012/07/01/opinion/sunday/how-liberals-win.html> [<https://perma.cc/CJR6-CZCT>]; Jonathan Weisman & Ashley Parker, *Republicans Back Down, Ending Crisis over Shutdown and Debt Limit*, N.Y. TIMES (Oct. 16, 2013), <https://www.nytimes.com/2013/10/17/us/congress-budget-debate.html> [<https://perma.cc/848C-QSVM>].

264. U.S. CONST. art. IV, § 3, cl 1.

265. See, e.g., Biber, *supra* note 18, at 127–29; Marcos E. Kinevan, *Alaska and Hawaii: From Territoriality to Statehood*, 38 CALIF. L. REV. 273, 278–79 (1950).

266. Biber, *supra* note 18, at 127–28.

267. *Id.*

268. See, e.g., *id.* at 128–29; Kinevan, *supra* note 265, at 278–79.

269. See JOHN S. WHITEHEAD, *COMPLETING THE UNION: ALASKA, HAWAI’I, AND THE BATTLE FOR STATEHOOD* 6 (2004) (“A statehood bill . . . had to be conducted; committee recommendations had

Washington, a large bipartisan effort to admit a new state into the Union or to pass a constitutional amendment to grant the Territories more voting rights short of statehood seems unlikely.<sup>270</sup>

Of all of the Territories, Puerto Rico and its more than three million people can make the strongest case for statehood. In fact, Puerto Rico has pursued statehood for several years after multiple referendums favoring it.<sup>271</sup> For instance, in 2012, Puerto Rico held a public referendum on petitioning for statehood in which a large majority of the voters supported it.<sup>272</sup> In 2013, the Committee on Energy and Natural Resources of the United States Senate received testimony on the 2012 referendum, acknowledging that a majority of Puerto Ricans opposed their current territorial status.<sup>273</sup> Representatives in Congress have introduced bills multiple times in the last few years that were effectively enabling acts to permit Puerto Rico to attain statehood status, but they have not made it out of the committee process.<sup>274</sup> In 2017, Puerto Rico again voted by an overwhelmingly ninety-seven percent for statehood in a nonbinding referendum, with independence and status quo as the alternatives.<sup>275</sup> Following that vote, Puerto Rico Governor Ricardo Rosselló urged Congress to grant statehood to his territory.<sup>276</sup> However, because the referendum was nonbinding, and because Congress has wide discretion in deciding whether to grant

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to be made, and above all a majority vote had to be achieved in both houses in the same session of Congress.”).

270. See, e.g., Katanga Johnson, *Puerto Rico Pressing On in Its Quest for Statehood*, ROLL CALL (Aug. 22, 2017), <https://www.rollcall.com/news/politics/puerto-rico-statehood-congressional-delegation> [<https://perma.cc/NYK9-VBHB>] (“Congress has the power to grant statehood but that remains an unlikely proposition given the current political climate on the Hill . . .”); Frances Robles, *Despite Vote in Favor, Puerto Rico Faces a Daunting Road Toward Statehood*, N.Y. TIMES (June 12, 2017), <https://www.nytimes.com/2017/06/12/us/trump-puerto-rico-statehood-congress.html> [<https://perma.cc/8E49-WC3R>] (“The Republicans are also considered highly unlikely to do something that could result in five more Democrats in the House and two in the Senate.”).

271. *Puerto Rico Fast Facts*, CNN (Dec. 6, 2018), <http://www.cnn.com/2018/01/17/us/puerto-rico-fast-facts/index.html> [<https://perma.cc/FGT3-JHCU>].

272. Mariano Castillo, *Puerto Ricans Favor Statehood for First Time*, CNN (Nov. 8, 2012), <http://www.cnn.com/2012/11/07/politics/election-puerto-rico/index.html> [<https://perma.cc/AME8-AFUQ>] (“Puerto Ricans voted in favor of statehood in a nonbinding referendum, marking the first time such an initiative garnered a majority.”).

273. *Testimony on the Nov. 6, 2012 Referendum on the Political Status of Puerto Rico and the Administration’s Response: Hearing Before the Comm. on Energy & Nat. Res.*, 113th Cong. 1 (2012) (statement of Senator Ron Wyden), <https://www.gpo.gov/fdsys/pkg/CHRG-113shrg82719/html/CHRG-113shrg82719.htm> [<https://perma.cc/PL8X-HQMP>].

274. See Puerto Rico Statehood Admission Process Act, H.R. 727, 114th Cong. (2015) (as introduced by Rep. Pedro R. Pierluisi); Puerto Rico Admission Act, H.R. 260, 115th Cong. (2017) (as introduced by Rep. Jennifer Gonzalez-Colon).

275. 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/ZWA6-XWHV>].

276. Carl Hulse, *Advocates of Puerto Rico Statehood Plan to Demand Representation*, N.Y. TIMES (Jan. 10, 2018), <https://www.nytimes.com/2018/01/09/us/politics/advocates-of-puerto-rico-statehood-plan-to-demand-representation.html> [<https://perma.cc/SJ2P-TVZW>].

statehood, the recent Puerto Rican push for statehood has made no meaningful progress.<sup>277</sup> It is hard to contemplate a plausible near-term scenario in which there would be a broad political consensus to admit into the Union a new state that has been ravaged by storms and burdened by insurmountable debts like contemporary Puerto Rico.

### C. Independence

In addition to litigation and statehood, independence is the other prominent path to progress for the Territories that has received much attention in the past. While independence is generally not perceived to be as appealing as statehood, it is frequently offered as an alternative in referendums in the Territories.<sup>278</sup> Because it is often proffered as a plausible alternative to the people of the Territories, it is worth some examination.

Similar to the path of statehood, the path of independence is full of serious practical and political obstacles. First, there is no broad support in any of the Territories for independence, as many people in the Territories view themselves as Americans and wish to remain a part of America, albeit with their distinct territorial identities.<sup>279</sup> For example, the option of independence has been the least popular choice in recent Puerto Rican referendums about their political status.<sup>280</sup> Second, Congressional action is required for a Territory to become

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277. See *id.*

278. See, e.g., Katy Collin, *Puerto Rico Votes on Statehood on Sunday — for the Fifth Time. Here's What's at Stake*, WASH. POST (June 10, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/10/puerto-rico-votes-on-statehood-on-sunday-for-the-fifth-time-heres-whats-at-stake/?utm\\_term=.e8bfeb22873e](https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/10/puerto-rico-votes-on-statehood-on-sunday-for-the-fifth-time-heres-whats-at-stake/?utm_term=.e8bfeb22873e) [<https://perma.cc/F7A7-FZYJ>].

279. See, e.g., ROGERS, *supra* note 48, at 262, 271 (discussing various political status referendums on Guam where the option of independence received little support); Jorge Duany, *Nation, Migration, Identity: The Case of Puerto Ricans*, 1 *LATINO STUDS.* 424, 428–29 (2003) (“[M]ost Puerto Ricans have repeatedly expressed their wish to retain their US citizenship . . . [T]he majority of Puerto Ricans do not want to separate themselves politically from the United States, but they continually assert their national identity in cultural, largely symbolic, terms.”); Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 *B.C. L. REV.* 1123, 1165–68 (2009) (discussing how the people of Puerto Rico prefer “associated statehood rather than either integration or independence”); Dan Taulapapa McMullin, *The Passive Resistance of Samoans to U.S. and Other Colonialisms*, in *SOVEREIGN MATTERS: LOCATIONS OF CONTESTATION AND POSSIBILITY IN INDIGENOUS STRUGGLES FOR SELF-DETERMINATION* 109 (Joanne Barker ed., 2006) (“Currently there is no great grassroots movement toward independence for American Samoa or reunification with independent Samoa among the American Samoa people, although there is a strong nationalism that identifies as Samoan.”).

280. See, e.g., 1 *ELECTIONS IN THE AMERICAS: A DATA HANDBOOK: NORTH AMERICA, CENTRAL AMERICA, AND THE CARIBBEAN* 555 (Dieter Nohlen ed., 2005) (indicating that only 2.6 percent of the voters favored independence in the 1998 referendum in Puerto Rico); Castillo, *supra* note 272 (Only 6 percent voted for favored independence in a 2012 referendum in Puerto Rico); Jon M. Van Dyke et al., *Self-Determination for Nonself-governing Peoples and for Indigenous People: The Cases of Guam and Hawai'i*, 18 *HAW. L. REV.* 623, 630–31 (1996) (noting that a number of the Territories have expressed a preference to be affiliated with the United States); Frances Robles, *23% of Puerto Ricans Vote in Referendum, 97% of Them for Statehood*, *N.Y. TIMES* (June 12, 2017), <https://www.nytimes.com/2017/06/11/us/puerto-ricans-vote-on-the-question-of-statehood.html> [<https://perma.cc/KWL9-25X8>].

independent and secede from the United States.<sup>281</sup> For instance, the United States granted the Philippines, a former American territory, full independence in 1946.<sup>282</sup> Given the complex geopolitical, legal, economic, and political considerations involved in granting independence to any or all of the Territories, it is difficult to see how a frequently contentious contemporary Congress could ever reach a consensus on such an important matter for one or all of the Territories. In sum, because of its lack of popular and political appeal, independence is not a viable path for progress in the Territories, in the near-term or otherwise.

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Many roads have been traveled by the Territories and their well-intentioned supporters to help them gain more political rights. Among the various roads traveled, the paths of litigation, statehood, and independence are perhaps most notable. Unfortunately, to date none of these three roads have led to any meaningful progress. Nevertheless, the lack of success thus far does not mean that these roads, in particular litigation, are not worth exploring or pursuing at all. Instead, the lack of success along these paths suggests that new alternative routes must be explored while the fight along the well-traveled paths of the past continues in order to bring much-needed tangible progress to the Territories in the near term.

#### IV.

#### NEW WAYS FORWARD

The plight of the Territories urgently demands new ways forward to better help these often-forgotten Americans. While many of the larger legal issues about the political status and political rights of the Territories remain open questions, our nation's obligations to our fellow Americans in the Territories should not be questioned. While larger longstanding issues work through lengthy legal and political processes, the Territories and the federal government can take key actions requiring less consensus and less time in the near term. Until significant progress has been made on those larger issues, policymakers and advocates for the Territories should dedicate more resources and attention to pursuing three new paths forward: (1) a temporary extended waiver of the Jones Act's application to the Territories, (2) a most-favored state status in veteran and

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281. See, e.g., Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 491–92 (2002); Anna Fifield, *Some in Guam Push for Independence from U.S. as Marines Prepare for Buildup*, WASH. POST (June 17, 2016), [https://www.washingtonpost.com/world/asia\\_pacific/some-in-guam-push-for-independence-from-us-as-marines-prepare-for-buildup/2016/06/16/e6152bd2-324b-11e6-ab9d-1da2b0f24f93\\_story.html?utm\\_term=.47e5e1baa324](https://www.washingtonpost.com/world/asia_pacific/some-in-guam-push-for-independence-from-us-as-marines-prepare-for-buildup/2016/06/16/e6152bd2-324b-11e6-ab9d-1da2b0f24f93_story.html?utm_term=.47e5e1baa324) [<https://perma.cc/7RY4-RJK6>].

282. See Treaty of General Relations between the United States of America and the Republic of the Philippines, US–Phil., July 4, 1946, 61 Stat. 1174, T.I.A.S. No. 1568.

disaster relief appropriations, and (3) a special economic empowerment zone designation for each of the Territories. These three new pathways forward offer real and workable opportunities to substantively improve the lives of the people of the Territories in the immediate future.<sup>283</sup>

*A. Extended Jones Act Waiver*

The Territories and their advocates should seek an extended waiver of the Jones Act as a means to achieving some tangible near-term progress. The Jones Act, section 27 of the Merchant Marine Act of 1920, places a significant economic strain on the Territories by restricting what ships may carry goods into its ports. This Act should be waived for an extended period of time of at least five years for the Territories, or until significant progress has been made on the larger question about the political status and powers of the Territories.<sup>284</sup> An extended Jones Act waiver is an appealing, sensible new path forward because it is a politically feasible action that would have an immediate impact on bettering the lives of the Americans in the Territories. In particular, those living in Guam and Puerto Rico would benefit—many aspects of the Jones Act already exempt the Territories of American Samoa, Northern Mariana Islands, and US Virgin Islands from its application.<sup>285</sup>

The Jones Act imposes significant costs on almost all the goods for Territories subject to the Act, particularly Puerto Rico and Guam.<sup>286</sup> 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.<sup>287</sup> The 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.<sup>288</sup> The Jones Act ostensibly prevents foreign ships from operating in American maritime commerce, and renders the applicable Territories particularly reliant on businesses and suppliers in the American mainland.<sup>289</sup> Furthermore, while States

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283. The discussions of these three proposals do not mean to suggest that these are the only three paths forward. There are other innovative proposals being offered and examined to aid the Territories. See, e.g., Weare, *supra* note 190, at 279–92.

284. 46 U.S.C. § 883 (2012).

285. See *id.* § 55101.

286. See FED. RES. BANK N.Y., REPORT ON THE COMPETITIVENESS OF PUERTO RICO'S ECONOMY 13 (2012); Brian Slattery et al., *Sink the Jones Act: Restoring America's Competitive Advantage in Maritime-Related Industries*, HERITAGE FOUND. 1 (May 22, 2014), <https://www.heritage.org/government-regulation/report/sink-the-jones-act-restoring-americas-competitive-advantage-maritime> [<https://perma.cc/7P8B-8GC5>].

287. 46 U.S.C. § 883.

288. See JOHN F. FRITTELLI, CONG. RESEARCH SERV., THE JONES ACT: AN OVERVIEW (2003); PUERTO RICO: CHARACTERISTICS OF THE ISLAND'S MARITIME TRADE, *supra* note 219.

289. See, e.g., Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future*, *supra* note 18, 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

in the continental United States have air, rail, and roads to transport goods from long distances in a cost-effective manner, Guam and Puerto Rico (and Hawaii and Alaska) are largely dependent on shipping for most of the goods not produced within their own locales.<sup>290</sup> As a result 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 that is compliant with the law.<sup>291</sup> This means that almost everything that comes to these two Territories, including necessities like fruits, vegetables, meats, and fuel, are subject to additional costs that otherwise would not exist.<sup>292</sup> For instance, according to estimates by the Federal Reserve Bank of New York, it costs nearly twice the amount to ship the same volume of goods from the American East Coast to Puerto Rico than to nearby destinations in the Dominican Republic or Jamaica as a result of the Jones Act restrictions.<sup>293</sup>

As proposed herein, the Jones Act should be temporarily waived for an extended period of at least five years with a presumption of automatic renewal. This would allow businesses and the Territories more time and certainty to make their plans. Because the legislation was drafted to include only certain Territories, large parts of the Jones Act apply only to Guam and Puerto Rico, an extended waiver would help put these two Territories on a level playing field with their fellow Territories. An extended waiver could immediately help the people of Guam and Puerto Rico by lowering the costs of all goods coming into the island that were previously subject to Jones Act-related expenses.<sup>294</sup> Additionally, an extended waiver could serve as economic stimulus for many of the businesses in the Territories that rely on goods shipped from foreign destinations.<sup>295</sup>

Politically, waiver of the Jones Act, unlike a repeal, does not require Congressional action, and can be achieved through executive agency action,

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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[.]”)

290. See JOHN F. FRITTELLI, CONG. RESEARCH SERV., SHIPPING U.S. CRUDE OIL BY WATER: VESSEL FLAG REQUIREMENTS AND SAFETY ISSUES 17–19 (comparing moving fuel via rail and waterways as implicated by the Jones Act); FRITTELLI, THE JONES ACT, *supra* note 288, at 4–5 (discussing how the Jones Act adds significant costs to consumers in Alaska, Hawaii, and Puerto Rico); Nelson A. Denis, Opinion, *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/QY2S-B785>].

291. See FED. RES. BANK N.Y., *supra* note 286, at 13–14.

292. See *id.*; PUERTO RICO: CHARACTERISTICS OF THE ISLAND’S MARITIME TRADE, *supra* note 219, at 20 n.28.

293. FED. RES. BANK N.Y., *supra* note 286, at 13.

294. See *id.* (emphasizing that advocates have previously supported a 5-year exemption to the Jones Act for Puerto Rico as a means to improve business conditions on the island).

295. See Robert Z. Lawrence & Juan Lara, *Trade Performance and Industrial Policy*, in THE ECONOMY OF PUERTO RICO: RESTORING GROWTH 507, 528–31 (Susan M. Collins et al. eds., 2006).

thereby making it more politically feasible.<sup>296</sup> Waivers of the Jones Act can be granted via requests to the Department of Defense or the Department of Homeland Security.<sup>297</sup> The Jones Act has previously been waived on numerous occasions, albeit for very short periods of time.<sup>298</sup> In the aftermath of the hurricanes that devastated Puerto Rico, the Trump administration waived the Jones Act for ten days to allow much-needed goods and relief supplies to enter the island.<sup>299</sup> While helpful, such a short waiver makes it difficult for businesses and Puerto Rico to plan accordingly. An extended Jones Act waiver will create the stability and certainty necessary to help attract investments and business developments in the Territories of Guam and Puerto Rico.

Furthermore, while the Jones Act impacts the Territories (and Alaska and Hawaii) disproportionately, multiple studies have indicated that the Jones Act may be costing mainland American consumers and businesses between five and fifteen billion dollars annually.<sup>300</sup> As such, there may be some broader political appeal to using the extended waiver as a means to study the effects of a repeal in the long run. For instance, elected officials who favor free market policies and consumer protection may find the extended waiver politically appealing because it allows a time-limited way to challenge a costly protectionist policy without offending some of their key constituents.<sup>301</sup>

To be clear, passing an extended Jones Act waiver for the Territories will not necessarily be a quick and easy political task. The Jones Act, with all its faults, also has some merit and many powerful supporters, like certain national defense advocates, maritime union supporters, and elected officials with political ties to American shipyards and shipbuilders.<sup>302</sup> Nevertheless, an extended waiver of the Jones Act represents one of the more politically plausible paths towards creating immediate tangible benefits for the Territories.

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296. See 46 U.S.C. § 501 (2012); Jonathan K. Waldron, *How Difficult is it to Obtain a Jones Act Waiver?*, MARINE LINK (Nov. 25, 2014), <https://www.blankrome.com/index.cfm?contentID=37&itemID=3449> [<https://perma.cc/VP3Y-32MD>].

297. Waldron, *supra* note 296.

298. See *Jones Act Waiver Request*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/trade/jones-act-waiver-request#> [<https://perma.cc/9FPQ-K5SN>]; *September 2017 Jones Act Waivers*, U.S. DEP'T HOMELAND SECURITY, <https://www.dhs.gov/publication/september-2017-jones-act-waivers> [<https://perma.cc/KH8B-39J3>]; Waldron, *supra* note 296 (discussing previous waivers of the Jones Act).

299. Nirak 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://www.nytimes.com/2017/09/28/us/jones-act-waived.html?_r=0) [<https://perma.cc/JNY6-E95N>].

300. RUSS KASHIAN ET AL., GRASSROOT INST. OF HAW., THE JONES ACT IN PERSPECTIVE: A SURVEY OF COSTS AND EFFECTS OF THE 1920 MERCHANT MARINE ACT 11 (2017).

301. See *id.* at 8–13.

302. See FRITTELLI, THE JONES ACT, *supra* note 288, at 5–6; KASHIAN, *supra* note 300, at 14 (noting that a 1997 Congressional resolution supporting the Jones Act received 244 co-sponsors).

### B. Most-Favored State Appropriations

The Territories and their advocates should seek temporary most-favored state (MFS) status in appropriations related to Veterans Affairs (VA) and the Federal Emergency Management Agency (FEMA).<sup>303</sup> This temporary MFS in VA and FEMA appropriations, lasting for a renewable period of five years, will help alleviate some of the harms that come from being politically powerless in Washington in the critical areas of veteran care and disaster relief.

Funds for veteran care and disaster relief are particularly critical to the Territories. In terms of VA facilities, veterans residing in the Territories do not have the same kind of support as their peers on the mainland despite their high military participation rates and veteran populations.<sup>304</sup> For instance, Guam was ranked last in VA per capita spending in 2012; it does not even have a meaningful in-patient veteran care facility despite having “one of the highest concentrations of military veterans among U.S. states and territories.”<sup>305</sup> Similarly, American Samoa has the highest per capita military enlistment of any state or territory, but its treatment facilities for veterans do not reflect its people’s sacrifices.<sup>306</sup> Veterans from American Samoa and Guam frequently have to travel thousands of miles to seek medical attention in Hawaii or the American mainland.

Furthermore, without any meaningful political power in Washington to advocate for disaster relief assistance, the priorities of the Territories are often left to the whims of elected officials in Washington who care more about their voting constituents than the distant residents of the Territories.<sup>307</sup> The geographic locations of the Territories make them particularly vulnerable to catastrophic hurricanes and typhoons, as evidenced by the destructive storms that ravaged

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303. See *Member FAQs*, *supra* note 32.

304. See *VA Facilities by State*, U.S. DEP’T VETERANS AFFAIRS (2017), [https://www.va.gov/vetdata/docs/SpecialReports/VA\\_Facilities\\_By\\_State.pdf](https://www.va.gov/vetdata/docs/SpecialReports/VA_Facilities_By_State.pdf) [<https://perma.cc/L3K6-2AQQ>].

305. *America by the Numbers: Island of Warriors* at 03:00–03:12 (PBS television broadcast Oct. 11, 2014), available at <http://www.pbs.org/wgbh/america-by-the-numbers/episodes/episode-102> [<https://perma.cc/Y88GM-N5UX>]; *Guam*, U.S. DEP’T VETERANS AFFAIRS, [https://www.va.gov/vetdata/docs/SpecialReports/State\\_Summaries\\_Guam.pdf](https://www.va.gov/vetdata/docs/SpecialReports/State_Summaries_Guam.pdf) [<https://perma.cc/L7W9-VAQW>]; Josh Hicks, *Guam: A High Concentration of Veterans, but Rock-Bottom VA Funding*, WASH. POST. (Oct. 29, 2014), [https://www.washingtonpost.com/news/federal-eye/wp/2014/10/29/guam-a-high-concentration-of-veterans-with-little-va-funding/?utm\\_term=.b7e06d3d6a56](https://www.washingtonpost.com/news/federal-eye/wp/2014/10/29/guam-a-high-concentration-of-veterans-with-little-va-funding/?utm_term=.b7e06d3d6a56) [<https://perma.cc/NKQ9-XHBM>].

306. Stern, *supra* note 189.

307. See John Bresnahan & Heather Caygle, *How Politics Screwed Puerto Rico out of Billions in Disaster Aid*, POLITICO (Dec. 23, 2017), <https://www.politico.com/story/2017/12/23/puerto-rico-disaster-aid-medicaid-315974> [<https://perma.cc/6XBQ-LW3U>]; Emily Cochrane, *Congress Gives Final Approval to Long-Delayed Disaster Aid*, N.Y. TIMES (June 3, 2019), <https://www.nytimes.com/2019/06/03/us/politics/disaster-aid-congress.html> [<https://perma.cc/CNW4-X3J9>]; Danny Vinik, *How Trump Favored Texas over Puerto Rico*, POLITICO (Mar. 27, 2018), <https://www.politico.com/story/2018/03/27/donald-trump-fema-hurricane-maria-response-480557> [<https://perma.cc/47AB-29WG>].

Puerto Rico, US Virgin Islands, and the CNMI in 2017 and 2018. In the aftermath of the two apocalyptic storms in 2017 that devastated Puerto Rico, President Trump openly suggested withdrawing federal disaster relief funds while the island was just beginning its recovery, and Congress took over a year to provide additional disaster relief aid.<sup>308</sup> A year later in 2018, while the island continued to struggle with its recovery, President Trump openly denied the rising death toll connected with Hurricane Maria that was approaching 3,000 casualties. In 2019, President Trump again openly disparaged the local leaders of Puerto Rico and suggested withholding further disaster relief funding.<sup>309</sup> Such denials and suggestions about disaster relief appropriations were not made by the Trump administration or previous administrations for devastating storms that struck Florida, Louisiana, North Carolina, and Texas.

The concept of MFS status is borrowed from the international trade law's concept of the most-favored nation status.<sup>310</sup> Under the seminal legal framework of the General Agreement on Tariffs and Trade of 1947 (GATT), the most-favored nation treatment principle means that "any advantage, favour, privilege or immunity granted by any contracting party . . . shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."<sup>311</sup> In practice, a nation-state that is conferred MFS status will generally receive trading terms co-equal to the nation-state receiving the most preferential treatment from the granting state, subject to certain limitations.<sup>312</sup> As a member of GATT and its successor, the World Trade Organization (WTO), the United States has used the most-favored nation designation to normalize trade relationships with other nation-states.<sup>313</sup> For example, the United States granted permanent most-favored nation status to China when it became a member of the WTO in 2001. As a result, the United States gave China some of the most preferential trading terms relative to other

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308. See Patricia Mazzei, *Hunger and an 'Abandoned' Hospital: Puerto Rico Waits as Washington Bickers*, N.Y. TIMES (April 7, 2019), <https://www.nytimes.com/2019/04/07/us/puerto-rico-trump-vieques.html> [<https://perma.cc/77P8-3GLA>]; Wagner, *supra* note 7.

309. See Peter Baker, *As a New Hurricane Roars in, Trump Quarrels over the Last One*, N.Y. TIMES (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/us/politics/trump-denies-puerto-rico-death-roll.html> [<https://perma.cc/5USB-XRJF>]; Annie Karni and Patricia Mazzei, *Trump Lashes Out Again at Puerto Rico, Bewildering the Island*, N.Y. TIMES (April 2, 2019), <https://www.nytimes.com/2019/04/02/us/trump-puerto-rico.html> [<https://perma.cc/J54Y-T5DH>].

310. See The General Agreement on Tariffs and Trade (GATT 1947) Art. I: General Most-Favoured-Nation Treatment, [https://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm) [<https://perma.cc/FH4M-UXQS>].

311. *Id.*

312. Joanne Gowa & Raymond Hicks, *The Most-Favored Nation Rule in Principle and Practice: Discrimination in the GATT*, 7 REV. INT'L ORG. 247, 248–52 (2012).

313. See Daniel C.K. Chow, *Why China Wants a Bilateral Investment Treaty with the United States*, 33 B.U. INT'L L.J. 421, 432 (2015) (explaining the application of the most-favored nation principle in relation to the United States and its trading partners).

countries and permitted it to permanently bypass the previously contentious annual debates on its designation in Congress.<sup>314</sup>

The Territories should seek to receive renewable temporary most-favored state status in VA and FEMA appropriations on a pro-rata basis from the federal government. This means that the Territories would receive the same appropriations as the States receiving the highest appropriations of VA and FEMA funding for a period of five years, consistent with the Congressional Budget Act's mandated timeline for federal budget resolutions.<sup>315</sup> As a simple illustration, if California were to receive \$5,000 per resident on VA and FEMA appropriations annually, and it represented the highest per capita appropriation level, then each of the Territories would receive that level of appropriation for its people. A narrow focus in these two critical areas of VA and FEMA appropriations may make the proposal more politically palatable. A blanket, across-the-board MFS status for all federal appropriations is likely a political nonstarter in Congress, and many appropriations to the States are inapplicable or unsuitable for the Territories.

MFS status for the Territories would alleviate some of the harms that come from being politically powerless in the national government and unable to fully advocate for the veterans and Americans living in the Territories. Representatives and senators from each of the States frequently advocate for favorable provisions and appropriations for their constituents in a way that non-voting representatives from the Territories simply cannot do for their people.<sup>316</sup> Elected officials from the Territories, due to their lack of political power in Washington, are often left to publicly plea for assistance through the media and hope that their pleas do not fall on deaf ears.<sup>317</sup>

MFS status for the Territories would help remedy this situation by allowing federal appropriations to better reflect the reality that the cost-of-living in the Territories is by many measures higher than in the mainland because of geography.<sup>318</sup> Current appropriations for veteran care and disaster relief through the VA and FEMA, respectively, do not have cost-of-living adjustments despite

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314. Kyle Handley & Nuno Limão, *Policy Uncertainty, Trade, and Welfare: Theory and Evidence for China and the United States*, 107 AM. ECON. REV. 2731, 2732 (2017); see A. Cooper Drury & Yitan Li, *U.S. Economic Sanction Threats Against China: Failing to Leverage Better Human Rights*, 2 FOREIGN POL'Y ANALYSIS 307, 309–11 (2006).

315. Congressional Budget Act of 1974, Pub. L. No. 93-344, Sec. 639(c) (1974).

316. See, e.g., Ella Nilsen, *Key Senators Sold Their Votes on the Tax Bill for Some High-Risk Deals*, VOX (Dec. 20, 2017), <https://www.vox.com/2017/12/20/16796670/gop-tax-bill-flake-collins-immigration-health-care> [<https://perma.cc/P5BV-GZLM>] (detailing how certain key senators negotiated for particular concessions in connection with major tax reform legislation for their constituents).

317. Richard Fausset et al., *San Juan Mayor Rebukes Trump Administration for Rosy Comments on Relief Effort*, N.Y. TIMES (Sept. 29, 2017), <https://www.nytimes.com/2017/09/29/us/san-juan-mayor-trump.html> [<https://perma.cc/E6FC-9L9G>].

318. See, e.g., FED. RES. BANK N.Y., *supra* note 286, at 22 (alluding to the high costs of shipping that lead to price increases for residents of Puerto Rico).

the fact that a dollar in the continental United States frequently has more purchasing power than in the Territories. Put simply, disaster relief efforts are more expensive when goods have to travel thousands of miles across oceans.<sup>319</sup> Likewise, veterans seeking care for complex procedures and treatments have higher travel costs relative to veterans living on the mainland because they must fly thousands of miles to the American mainland, while veterans on the mainland can frequently drive to an appropriately equipped hospital.<sup>320</sup>

In sum, a renewable five-year MFS status for the Territories in federal VA and FEMA appropriations represents a sensible and workable policy that can bring about some immediate relief to the people of the Territories. Moreover, the renewable feature of the proposal will hopefully create a natural, periodic opportunity for the plight of the Territories to receive some meaningful attention in Congress during budget deliberations.

### C. Economic Empowerment Zones

The Territories and their advocates should seek to have Congress temporarily designate each of the Territories as a special economic empowerment zone for a period of ten years. This would create a slate of economic incentives across multiple federal agencies, ideally designed to respond to the unique strengths and weaknesses of each Territory, to help stimulate the economies of the Territories.<sup>321</sup> Similar to the extended temporary waivers of the Jones Act and most-favored state appropriations, this temporary designation can bring significant near-term economic relief and stimulus for the Territories while the larger issues about political status and political power are being deliberated by various stakeholders.

In general, economic empowerment zone designations and their accompanying programs are designed to encourage investment activity and business development in economically distressed communities through a combination of favorable tax laws, grants, subsidies, jobs programs, regulatory

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319. See Fausset et al., *supra* note 317; Jeremy W. Peters, *In the Virgin Islands, Hurricane Maria Drowned What Irma Didn't Destroy*, N.Y. TIMES (Sept. 27, 2017), <https://www.nytimes.com/2017/09/27/us/hurricane-maria-virgin-islands.html> [<https://perma.cc/66NB-G4BW>]; Frances Robles, *\$3,700 Generators and \$666 Sinks: FEMA Contractors Charged Steep Markups on Puerto Rico Repairs*, N.Y. TIMES (Nov. 26, 2018), <https://www.nytimes.com/2018/11/26/us/fema-puerto-rico-housing-repairs-maria.html> [<https://perma.cc/ZL3Q-LMV7>].

320. U.S. GOV'T ACCOUNTABILITY OFF., GAO-HEHS-99-14, VETERAN'S HEALTH CARE SERVICE DELIVERY FOR VETERANS ON GUAM AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 1-4 (1998), <https://www.gao.gov/products/GAO/HEHS-99-14> [<https://perma.cc/4285-4BQC>].

321. A similar idea was previously recommended by the special presidential task force on Puerto Rico of the Obama administration as a means to improve the economic conditions of the island. See REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 9 (2011). Unfortunately, that recommendation never materialized into final legislation or a formal program.

easing, and other economic incentives.<sup>322</sup> In the past, Congress and various States have used such programs to help improve rural and urban communities.<sup>323</sup> For instance, some of the most economically developed portions of present-day Baltimore, Maryland, and Harlem, New York, were due in part to economic empowerment zone programs.<sup>324</sup> Some of these programs have had remarkable successes following implementation, while others have been less fruitful.<sup>325</sup> That said, it is often difficult to establish a clear causal link between the empowerment zone programs and their economic effects, as is the case with many economic incentive programs.<sup>326</sup>

Historically, empowerment zone programs have had bipartisan political support, thus making them a more politically feasible idea. Both Democrats and Republicans have found some appeal in using government incentives and deregulation to stimulate market-oriented, localized community economic development.<sup>327</sup> The most prominent federal and state empowerment zone programs found their origins in the 1980s under the Reagan administration and

322. See STEVEN SOIFER ET AL., COMMUNITY ECONOMIC DEVELOPMENT IN SOCIAL WORK 146 (2014); U.S. GOV'T ACCOUNTABILITY OFF., EMPOWERMENT ZONE AND ENTERPRISE COMMUNITY PROGRAM: IMPROVEMENTS OCCURRED IN COMMUNITIES, BUT THE EFFECT OF THE PROGRAM IS UNCLEAR 6–8 (2006), <https://www.gao.gov/new.items/d06727.pdf> [<https://perma.cc/YK2W-J49H>] [hereinafter EMPOWERMENT ZONE AND ENTERPRISE COMMUNITY PROGRAM]; John C. Ham et al., *Government Programs Can Improve Local Labor Markets: Evidence from State Enterprise Zones, Federal Empowerment Zones and Federal Enterprise Community*, 95 J. Pub. Econ. 779, 781 (2011); Leslie E. Papke, *Enterprise Zones*, in THE ENCYCLOPEDIA OF TAXATION & TAX POLICY 110 (Joseph J. Cordes et al. eds., 2005).

323. See, e.g., Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13301(a), 107 Stat. 543-554, amended by Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §§ 951–52, 111 Stat. 788, 885; The Community Renewal Tax Relief Act of 2000, I.R.C. § 45D (2001).

324. See *Baltimore Urban Round 1 Empowerment Zone*, U.S. DEP'T HOUS. & URBAN DEV., [https://www.hud.gov/program\\_offices/comm\\_planning/economicdevelopment/programs/rc/tour/md/baltimore](https://www.hud.gov/program_offices/comm_planning/economicdevelopment/programs/rc/tour/md/baltimore) [<https://perma.cc/BRY9-PDMF>]; *New York Empowerment Zone*, CITY N.Y., [http://www.nyc.gov/html/sbs/downloads/pdf/biz\\_express/emp-ep4.pdf](http://www.nyc.gov/html/sbs/downloads/pdf/biz_express/emp-ep4.pdf) [<https://perma.cc/UE8R-L6WD>]; *New York Urban Round 1 Empowerment Zone*, U.S. DEP'T HOUS. & URBAN DEV., [https://www.hud.gov/program\\_offices/comm\\_planning/economicdevelopment/programs/rc/tour/ny/newyork](https://www.hud.gov/program_offices/comm_planning/economicdevelopment/programs/rc/tour/ny/newyork) [<https://perma.cc/JQ24-XKBP>].

325. See, e.g., Empowerment Zone and Enterprise Community Program, *supra* note 322, at 32–40 (2006); Scott Herbert et al., U.S. Dep't Hous. & Urban Dev., Interim Assessment Of The Empowerment Zones And Enterprise Communities (EZ/EC) Program: A Progress Report, at 1-9–1-12 (2001), [https://www.huduser.gov/Publications/pdf/ezec\\_report.pdf](https://www.huduser.gov/Publications/pdf/ezec_report.pdf) [<https://perma.cc/CJ4B-PYQR>]. Compare Steven Soifer et al., *supra* note 322, at 146 (discussing the success of empowerment zone programs during the Clinton Administration in the 1990s), and Ham et al., *supra* note 322, at 779–80 (finding that federal empowerment zone programs can create significant job growth), with Jed Kolko & David Neumark, *Do Some Enterprise Zones Create Jobs?*, 29 J. Pol'y Analysis & Mgmt. 5 (2010) (concluding that enterprise zone programs do not create significant employment growth).

326. See, e.g., Papke, *supra* note 322, at 110–11 (explaining the difficulties in empirically assessing the effectiveness of enterprises zones).

327. See MOSSBERGER, *supra* note 18, at 57, 62 (discussing the bipartisan appeals of empowerment zone programs); SOIFER ET AL., *supra* note 322, at 146.

the 1990s under the Clinton administration.<sup>328</sup> More recently, as part of the Tax Cuts and Jobs Act of 2017, areas of each of the Territories were designated as “qualified opportunity zones,” entitled to certain tax incentives and benefits intended to spur investments.<sup>329</sup>

As proposed herein, each of the Territories would be designated a special economic empowerment zone for a period of ten years. This designation would help attract investment and business activity to the Territories, each of which has had stagnant growth and higher unemployment rates compared to national figures over the last decade.<sup>330</sup> Ideally, the designating legislation and accompanying programs would be designed with the input of key stakeholders from the Territories who are most knowledgeable about each Territory’s strengths and needs. If designed properly, economic empowerment zone programs coupled with smart local efforts would help foster near-term economic growth in the Territories, create local job opportunities, improve the daily lives of the people living there, and decrease each Territory’s reliance on uncertain funds from the federal government.<sup>331</sup> For instance, in the aftermath of two catastrophic hurricanes in 2017, the government of Puerto Rico has made modest efforts to attract entrepreneurs and investors in businesses related to filmmaking, financial technology, and cannabis to the island.<sup>332</sup> While the efficacy of these modest local efforts remains to be seen, additional incentives provided via a special federal economic empowerment zone designation could make the island more attractive to entrepreneurs from the American mainland and around the world in the near term.

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328. See MOSSBERGER, *supra* note 18, at 5–6 (noting the federal empowerment zone programs in the 1980s and the 1990s under Presidents Reagan and Clinton); Cummings, *supra* note 18, at 399, 421–27 (chronicling the development of market-oriented community development programs in the 1980s through the 1990s); Enid Beaumont, *Enterprise Zones and Federalism*, in ENTERPRISE ZONES: NEW DIRECTIONS IN ECONOMIC DEVELOPMENT 41, 42 (Roy E. Green ed., 1991) (emphasizing that the concept of an enterprise came to prominence during the presidential campaign of Ronald Reagan); Kara Lamb, *Revitalization from the Inside Out: The Attempts to Move Towards an Urban Renaissance in the Cities of the United States and the United Kingdom*, 19 CONN. J. INT’L L. 159, 168 (2003) (noting that a majority of states had economic empowerment zone programs by 1990s).

329. See Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 § 13823 (2017); Internal Rev. Bul. No. 2018-28, July 9, 2018, at 13, 57, 125 143, 184, <https://www.irs.gov/pub/irs-irbs/irb18-28.pdf> [<https://perma.cc/V92R-N8PK>].

330. See Briffault, *supra* note 18, at 509 (“In theory, by striking the shackles of oppressive taxation and regulation, enterprise zones would encourage private economic activity and cause blighted inner-city areas to flourish without further government intervention.”).

331. See, e.g., P.R. STATEHOOD COUNCIL, A PROPOSAL FOR ECONOMIC GROWTH IN PUERTO RICO SUBMITTED TO THE CONGRESSIONAL TASK FORCE ON ECONOMIC GROWTH IN PUERTO RICO BY THE PUERTO RICO STATEHOOD COUNCIL (2016) (outlining key components of an empowerment zone designation proposal for Puerto Rico).

332. Yalixa Rivera & Jonathan Levin, *Can Crypto, Cannabis, and Nicolas Cage Boost Puerto Rico’s Economy?*, BLOOMBERG BUS. WK. (Sept. 10, 2018), <https://www.bloomberg.com/news/articles/2018-09-10/can-crypto-cannabis-and-nicolas-cage-boost-puerto-rico-s-economy> [<https://perma.cc/W5K6-J5SY>].

In addition to helping the Territories, these programs can create “new markets” for businesses, entrepreneurs, and investors from the mainland.<sup>333</sup> Such programs for each of the Territories may be particularly appealing because they are nimble enough to aid each Territory according to their own specific strengths and needs; the programs are ultimately localized and market-oriented in their design, implementation, and effects to attract a wide and diverse population of investors with different investment preferences and outlooks.<sup>334</sup> While businesses have become more socially conscious and more willing to engage with distressed communities to enhance social and business value, economic incentives nonetheless play a significant role in attracting large, long-term private investments in the first place.<sup>335</sup>

Understandably, the Territories may be reluctant to rely on federal, market-oriented incentive programs following the harrowing experience of Puerto Rico with the enactment and subsequent repeal of the section 936 tax incentive.<sup>336</sup> While this type of skepticism and reticence is warranted, policymakers in both Washington and the Territories will have the benefit of learning from Puerto Rico’s previous experience (and hopefully will make better decisions to avoid similar pitfalls). However, even if similar mistakes are made with the economic empowerment zone programs, the near-term positive impact would likely outweigh the long-term uncertainties associated with such programs, especially since the Territories are all in need of some economic stimulus in the immediate and near future.

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None of the three new pathways proposed here will solve all or even most of the complex and diverse set of problems confronting the Territories, collectively or individually, including complex, deep-seated issues involving the

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333. See Cummings, *supra* note 18, at 428 (discussing how economic empowerment zone programs can create “new markets”).

334. See Briffault, *supra* note 18, at 511 (explaining how economic empowerment zones are “noteworthy” for their flexibility and localized focus); Tom C.W. Lin, *Reasonable Investor(s)*, 95 B.U. L. REV. 461, 466–76 (2015) (discussing various types of investors).

335. See, e.g., Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1566–67, 1579–80 (2018) (discussing the contemporary corporate social responsibility efforts to create social and corporate wealth); *Corporate Responsibility: Invested in Detroit*, JPMORGAN CHASE & CO., <https://www.jpmorganchase.com/corporate/Corporate-Responsibility/detroit.htm> [<https://perma.cc/P9S8-A3ZL>] (“We view our work in Detroit as proof of concept of the model we’ve developed to help more people move up the economic ladder and share in the rewards of a growing economy.”); Matthew Heimer, *J.P. Morgan’s Big Bet on Detroit Is Paying Off*, FORTUNE (May 10, 2017), <http://fortune.com/2017/05/10/jp-morgan-chase-detroit-investment> [<https://perma.cc/RC89-WLX7>] (reporting on the successful partnership of JPMorganChase’s Detroit project involving both large investments from the bank and smart incentives from the city).

336. See *supra* Part II.A for a discussion on the economic impact of the enactment and repeal of § 936 on Puerto Rico.

indigenous people of the Territories.<sup>337</sup> Furthermore, drafting, passing, implementing, and executing these three new proposals may prove difficult. Nevertheless, these proposals offer a pragmatic trio of politically feasible policies to bring about immediate benefits to the people of the Territories while progress is being made on the longstanding, larger political issues. These proposals can hopefully move the conversations and plans of action beyond the well-traveled, but unsuccessful, paths of the past towards a more promising direction of real, tangible progress for the Territories.

#### CONCLUSION

The plight of the Territories presents one of the most vexing legal and political issues confronting national and local policymakers. The longstanding, strained legal status of the Territories frequently renders their residents lesser and forgotten citizens living in dire conditions, without a meaningful voice or vote in our government. Nevertheless, they are Americans in law and in fact. Their struggles are part of the larger struggles of Americans in the past and present for full rights and recognition from our government.

This Article offers an original, critical perspective on the struggles of the Territories, and pragmatic ways to provide them with meaningful assistance in the near term. It examines how we got here, why the Territories are suffering, what has been pursued in the past, and how we can do better in the near future. Throughout its analysis, this Article is mindful of the longstanding legal and political obstacles that have made reforms for the Territories so elusive. Rather than advocate for some grand legal framework that may theoretically solve the political predicaments of the Territories, this Article argues for three workable proposals that may be less satisfying in theory, but more meaningful in practice, given the current struggles in the Territories.

In particular, this Article advances politically feasible policy proposals designed to bring near-term, concrete assistance to the Territories in terms of lower transportation costs, more economic development, additional disaster relief, and upgraded veteran care. In doing so, this Article does not diminish or dismiss the longstanding deliberations and efforts focused on the larger political questions that have chronically confronted the Territories. Instead, it aspires to broaden the discussions and plans of action beyond just those large open political questions towards a new direction of tangible progress. In the end, this Article hopes to provide a workable framework for thinking and acting anew with greater urgency for our often forgotten, fellow Americans in the Territories.

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337. See Jon M. Van Dyke et al., *supra* note 280, at 640–43 (discussing self-determination issues concerning residents of Hawaii and the Territories).