

# Reparative Justice in the U.S. Territories: Reckoning with America's Colonial Climate Crisis

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*This Article links the climate crisis with the ongoing colonization of the U.S. territories. It explores how the U.S. territories' political status—rooted in U.S. colonialism—limits their ability to develop meaningful adaptation efforts to combat the climate crisis in their islands. It offers a developing conceptual framework that draws upon “climate reparations” insights, as well as concepts of reparative justice and human rights notions of self-determination. It then employs this method of inquiry to briefly assess the recently introduced Insular Area Climate Change Act, which seeks to reduce climate crisis impacts on U.S. territories and freely associated states. It concludes that, while the Act is a significant step forward, climate resiliency for the U.S. territories requires an expansive and particularized reparative effort that advances the territories' self-determination and prioritizes the peoples' on-the-ground needs and approaches to decolonization.*

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### INTRODUCTION

For the U.S. territories, the global climate emergency is a “crisis of morality.”<sup>1</sup> America’s five island colonies<sup>2</sup> experience crushing climate change impacts despite contributing very little to greenhouse gas emissions.<sup>3</sup> They disproportionately experience sea level rise, extreme temperatures, intense tropical storms, and the resulting damage to ecosystems, health, culture, and infrastructure—but grapple with limited power to combat these climate disasters.<sup>4</sup> Their lack of equal access to federal funding for climate resiliency is

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1. Rachel Ramirez, *Pacific Islanders Have Been Fighting Environmental Crises for Centuries, If Only the World Would Notice*, GRIST (June 1, 2021) (quoting Moñeka De Oro, coordinator with the Micronesia Climate Change Alliance), <https://grist.org/fix/pacific-islands-climate-change-innovations/> [<https://perma.cc/XSX2-2W33>].

2. See Juan R. Torruella, *Ruling America’s Colonies: The Insular Cases*, 32 YALE L. & POL’Y REV. 57, 58 (2013) (referring to Puerto Rico as a colony). The use of “America” and “Americans” to refer to the country and people of the United States excludes millions of North, Central, Caribbean, and South Americans, and is viewed by many inhabitants of the Americas as reflecting U.S. imperialism. See, e.g., Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 BERKELEY LA RAZA L.J. 387, 390 n.18 (2002) (using “United States” or “U.S.” and “United States/U.S. citizens” or “estadounidenses” to purposefully avoid “the imperialistic appropriation of the terms ‘America’ and ‘American’ to describe only one nation and its citizens”); Berta Esperanza Hernández-Truyol & Christy Gleason, *Introduction*, in MORAL IMPERIALISM: A CRITICAL ANTHOLOGY 15 n.5 (Berta Esperanza Hernández-Truyol ed., 2002) (noting the “the imperialistic practice of denominating the United States as ‘America’”). This Article therefore uses the terms “America” and “American” “to invoke the social meanings that have become associated with those terms as they are commonly used in the United States.” Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 76 n.28 (1997).

3. *Climate Change Response Aid Proposed for Territories, Freely Associated States*, PAC. ISLAND TIMES (Apr. 23, 2021), <https://www.pacificislandtimes.com/post/climate-change-response-aid-proposed-for-territories-freely-associated-states> [<https://perma.cc/8U3H-AZB8>] (“Congress and federal agencies have treated millions of people living in U.S. territories as second-class citizens or worse.”).

4. Press Release, Nat. Res. Comm. Chair Raúl M. Grijalva, Chair Grijalva Unveils Discussion Draft of Bill Providing Climate Solutions for U.S. Territories, Seeks Stakeholder and Public Input (Oct. 5, 2020) [hereinafter Grijalva Unveils Discussion Draft], <https://naturalresources.house.gov/media/press-releases/chair-grijalva-unveils-discussion-draft-of-bill-providing-climate-solutions-for-us-territories-seeks-stakeholder-and-public-input> [<https://perma.cc/53TM-ZG59>]; *Island Nations on Climate Crisis Frontline ‘Not Sitting Idly By,’ U.N. NEWS* (Sept. 26, 2019), <https://news.un.org/en/story/2019/09/1047652> [<https://perma.cc/J77Y-EZRG>].

deeply intertwined with their paradoxical status as “unincorporated” territories.<sup>5</sup> Indeed, the aftermath of Hurricane Maria in 2017 in Puerto Rico and the U.S. Virgin Islands laid bare the enduring links between U.S. colonialism, political power, climate emergency, and humanitarian disaster.<sup>6</sup> And the lesser-known but devastating Super Typhoon Yutu in 2018 in Guam and the Commonwealth of the Northern Marianas similarly caused catastrophic infrastructure damage and sparked a humanitarian crisis, compounded by the peoples’ political disenfranchisement and invisibility.<sup>7</sup>

These climate emergencies expose the lasting second-class status of the U.S. territories. The peoples of the U.S. territories have virtually no political power: they cannot vote for U.S. President or Vice President,<sup>8</sup> and they do not have a voting representative in Congress.<sup>9</sup> The U.S. Supreme Court has held that Congress may provide fewer benefits to residents of the territories as long as there is a rational basis to do so.<sup>10</sup> As a result, when U.S. territories seek to “steward . . . [their] island environment[s],”<sup>11</sup> they have almost no access to federal programs aimed at building climate resiliency.<sup>12</sup> Even in international collaborations that are designed to provide a voice for small islands, the U.S. territories are sidelined because they are not sovereign nations; they are—in essence—mere colonies of the United States.<sup>13</sup>

5. See *Downes v. Bidwell*, 182 U.S. 244, 279 (1901).

6. See Rosa E. Ficek, *Infrastructure and Colonial Difference in Puerto Rico After Hurricane Maria*, 26 *TRANSFORMING ANTHROPOLOGY* 102, 109–10 (2018).

7. See Alia Wong & Lenika Cruz, *The Media Barely Covered One of the Worst Storms to Hit U.S. Soil*, *ATLANTIC* (Nov. 14, 2018), <https://www.theatlantic.com/science/archive/2018/11/super-typhoon-yutu-mainstream-media-missed-northern-mariana-islands/575692/> [<https://perma.cc/ZMP3-HQR5>]; Anita Hofschneider, *‘From Something To Nothing’: Life in Saipan After Super Typhoon Yutu*, *HONOLULU CIV. BEAT* (Jan. 10, 2019), <https://www.civilbeat.org/2019/01/from-something-to-nothing-life-in-saipan-after-super-typhoon-yutu/> [<https://perma.cc/TN4A-5VMW>].

8. See *Igartúa-de la Rosa v. United States*, 417 F.3d 145, 147 (1st Cir. 2005) (en banc); *Att’y Gen. of Guam v. United States*, 738 F.2d 1017, 1020 (9th Cir. 1984).

9. See Juan Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 77 *REVISTA JURÍDICA U. P.R.* 1, 42 (2008) [hereinafter Torruella, *The Insular Cases*]. See also *infra* note 50.

10. See *U.S. v. Vaello Madero*, 142 S. Ct. 1539, 1544 (2022) (holding that the denial of Supplemental Security Income benefits to Puerto Rico residents does not violate the equal protection component of the Fifth Amendment); *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980).

11. Press Release, Nat. Res. Comm. Chair Raúl M. Grijalva, Chair Grijalva Introduces Insular Area Climate Change Act with Vice Chair Sablan, Democratic Lawmakers – Seeks Broad Financial and Technical Support (Apr. 22, 2021) [hereinafter Grijalva Introduces Insular Area Climate Change Act] (quoting The Hon. Lourdes A. Leon Guerrero, Governor of Guam), [https://naturalresources.house.gov/media/press-releases/chair-grijalva-introduces-insular-area-climate-change-act-with-vice-chair-sablan-democratic-lawmakers\\_seeks-broad-financial-and-technical-support](https://naturalresources.house.gov/media/press-releases/chair-grijalva-introduces-insular-area-climate-change-act-with-vice-chair-sablan-democratic-lawmakers_seeks-broad-financial-and-technical-support) [<https://perma.cc/7P5N-UL9E>].

12. See Grijalva Unveils Discussion Draft, *supra* note 4.

13. See Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, *List of SIDS*, U.N. <https://www.un.org/ohrls/content/list-sids> [<https://perma.cc/WG4K-773X>] (listing Puerto Rico, American Samoa and Guam as Non-UN Members/Associate Members of United Nations regional commissions).

In the struggle between local and national control of the environment and the tension between domestic and international responsibility for addressing the impacts of climate change, where do the peoples of the U.S. territories fit? As both Indigenous and colonized peoples,<sup>14</sup> the residents of the U.S. territories often seek treatment similar to the U.S. states to combat the climate crisis and seek a measure of autonomy as unique island communities to enable meaningful stewardship of their homelands. These climate struggles persist alongside U.S. territories' unequal access to broader strategies to tackle poverty, ensure access to housing, improve public health, and meet infrastructure needs.<sup>15</sup>

This Article links the climate crisis with the ongoing colonization of the U.S. territories. It explores how the territories' political status—rooted in U.S. colonialism—limits their ability to develop meaningful adaptation efforts to combat the climate crisis on their islands. Residing in what some call a “geopolitical black hole,”<sup>16</sup> the territories cannot negotiate with other countries or access the same international funding and support as similarly situated island nations. At the same time, they are excluded from benefits offered to the states. In response, U.S. Representative Raúl M. Grijalva recently introduced the Insular Area Climate Change Act, which seeks to reduce climate crisis impacts on territories and freely associated states.<sup>17</sup> Among other things, the Act creates mechanisms to provide increased access to climate change-related federal programs, energy management, conservation programs, and technologies to foster mitigation and adaptation in the territories.<sup>18</sup>

The Article then offers a developing conceptual framework that draws upon climate scholar Maxine Burkett's call for a climate-focused “reparative effort.”<sup>19</sup> For her, such an effort “squarely confront[s] the deep moral questions posed by both the initiating harm—excess emissions—and the continuing harm: the failure to adequately include the plight of the climate vulnerable in the current processes developed to mitigate and adapt to the climate crisis.”<sup>20</sup> Rooted in concepts of reparative justice (repair for U.S. colonization of their homelands) and human rights notions of self-determination,<sup>21</sup> this developing method of

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14. See Julian Aguon, *On Loving the Maps Our Hands Cannot Hold: Self-Determination of Colonized and Indigenous Peoples in International Law*, 16 UCLA ASIAN PAC. AM. L.J. 47, 47 (2010) [hereinafter Aguon, *On Loving the Maps*] (describing international law's distinctions between Indigenous and colonized peoples).

15. See Grijalva Unveils Discussion Draft, *supra* note 4.

16. See Hilda Lloréns & Maritza Stanchich, *Water Is Life, but the Colony Is a Necropolis: Environmental Terrains of Struggle in Puerto Rico*, 31 CULTURAL DYNAMICS 81, 88 (2019) (quoting Puerto Rico governor Ricardo Rosselló's characterization of Puerto Rico as a structurally powerless colony).

17. Insular Area Climate Change Act, H.R. 2780, 117th Cong. (2021).

18. *Id.*

19. Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT'L L. 509, 523 (2009) [hereinafter Burkett, *Climate Reparations*].

20. *Id.*

21. See Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1625 (2007) [hereinafter Tsosie, *Indigenous People and*

inquiry acknowledges the differential empowerment of the territories. In particular, this intersectional perspective considers the territories' legal and political realities and constraints as well as their needs, concerns, approaches, and responses to the climate crisis.<sup>22</sup> In doing so, this conceptual framework seeks to “generate more resonant remedial options.”<sup>23</sup> These options may entail the restoration of sovereignty and political power, the resurrection of Native cultural practices, the return of lands, or simply increased and sustained access to equal funding and support.

The Article then employs this method of inquiry to briefly assess the Insular Area Climate Change Act as a part of a larger reparative environmental effort in the U.S. territories. It concludes that, while the Insular Area Climate Change Act is a significant step forward, climate resiliency for the U.S. territories requires an expansive and particularized reparative effort that advances the territories' self-determination and prioritizes the peoples' on-the-ground needs and approaches to decolonization.

Accordingly, Part I examines the historical and present-day impacts of U.S. territorial status. It traces the legal and political roots of U.S. colonization in the territories then explores how the territories' political status hinders their ability to combat climate change. Part II briefly sketches a developing framework of reparative environmental justice for the peoples of the U.S. territories. That developing framework is rooted in the international human rights principle of self-determination and acknowledges the complexities of environmental impacts and responses in the territories. Part III employs this method of inquiry to broadly assess the Insular Area Climate Change Act. It concludes that the Act—as part

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*Environmental Justice*]; D. Kapua'ala Sproat, *An Indigenous People's Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 STAN. ENV'T. L.J. 157, 158–59 (2016); Susan K. Serrano, *A Reparative Justice Approach to Assessing Ancestral Classifications Aimed at Colonization's Harms*, 27 WM. & MARY BILL RTS. J. 501, 504 (2018) [hereinafter Serrano, *A Reparative Justice*].

22. William A. Gould, Ernesto L. Diaz, Nora L. Álvarez-Berrios, Felix Aponte-González, Wayne Archibald, Jared Heath Bowden, Lisamarie Carrubba, Wanda Crespo, Stephen Joshua Fain, Grizelle González, Annmarie Goulbourne, Eric Harmsen, Azad Henareh Khalyani, Eva Holupchinski, James P. Kossin, Amanda J. Leinberger, Vanessa I. Marrero-Santiago, Odalys Martinez-Sánchez, Kathleen McGinley, Melissa Meléndez Oyola, Pablo Méndez-Lázaro, Julio Morell, Isabel K. Páres-Ramos, Roger Pulwarty, William V. Sweet, Adam Terando & Sigfredo Torres-González, *U.S. Caribbean*, in 2 FOURTH NAT'L CLIMATE ASSESSMENT 809, 813–14 (David R. Reidmiller et al. eds., 2018). The term “intersectionality” was first coined by legal scholar Kimberlé Crenshaw to analyze systems of oppression more effectively—including racism, classism, and sexism among others—and how those systems interact with the full breadth of the human experience. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 156. See generally Jeff Chang, *Race, Class, Conflict and Empowerment: On Ice Cube's "Black Korea"*, 19 AMERASIA J. 87, 103 (1993) (employing the concept of “differential forms of disempowerment” to describe power differences among racial and Native groups in terms of race, locale, time, and economics). Similarly, any discourse about the U.S. territories, especially in the climate context, must necessarily take into consideration their political, social, geographical, and historical realities.

23. Eric K. Yamamoto and Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 351 (2001).

of a larger climate justice strategy—appears to be an important step in fostering climate resiliency in the U.S. territories. At the same time, a deeper U.S. commitment to self-determination and the reallocation of political power to the territories, alongside aggressive commitments to mitigation by major emitters, is needed to foster climate resiliency in the U.S. territories. Part V concludes.

## I.

### U.S. TERRITORIAL STATUS: HISTORICAL AND PRESENT-DAY IMPACTS

Today's stark limits on territorial peoples' self-determination are rooted in the strategic U.S. embrace of "empire" following the Spanish-American War.<sup>24</sup> The Territorial Clause of the U.S. Constitution, which empowers Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,"<sup>25</sup> gave the United States authority to exercise power over its late-nineteenth century colonial conquests.<sup>26</sup> Today, the United States exercises nearly complete power over five of its unincorporated territories—Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands (CNMI)—with a collective population of around 3.5 million people.<sup>27</sup> This makes the United States "the largest overseas territorial power in the world."<sup>28</sup>

#### A. *The Insular Cases and American Colonialism*

The Spanish-American War and the resulting takeover of Puerto Rico, the Philippines, and Guam triggered a change in the settled model of territorial development.<sup>29</sup> Rather than directing the territories toward eventual statehood, the Treaty of Paris, which concluded the war, left the determination of the "civil rights and political status of the native inhabitants" to Congress.<sup>30</sup> Consequently,

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24. See Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 449 (2002).

25. U.S. CONST. art. IV, § 3, cl. 2.

26. Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REVISTA JURÍDICA U. P.R. 225, 246-47 (1996).

27. 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, 197 (2010) [hereinafter Malavet, *The Inconvenience*] (citing ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 3 (1989)).

28. See Susan K. Serrano, *Elevating the Perspectives of U.S. Territorial Peoples: Why the Insular Cases Should Be Taught in Law School*, 21 J. GENDER, RACE & JUST. 395, 402 (2018) [hereinafter Serrano, *Elevating the Perspectives*] (quoting LEIBOWITZ, *supra* note 27, at 3).

29. Malavet, *The Inconvenience*, *supra* note 27, at 204.

30. Treaty of Paris, U.S.-Spain, art. IX, Dec. 10, 1898, 30 Stat. 1759. "According to the Treaty, while Spanish subjects residing in Puerto Rico retained their property rights and could choose to retain Spanish citizenship, the 'civil rights and political status of the native inhabitants . . . [were to] be determined by the Congress.'" Susan K. Serrano, *Collective Memory and the Persistence of Injustice: From Hawai'i's Plantations to Congress—Puerto Ricans' Claims to Membership in the Polity*, 20 S. CAL. REV. L. & SOC. JUST. 353, 372-73 (2011) (citing Treaty of Paris, U.S.-Spain, art. IX, Dec. 10, 1898, 30 Stat. 1759).

the peoples of the territories did not “enter into and form a part of the American family”<sup>31</sup> and were promised no civil or political rights under U.S. rule. Thus, the United States expanded its empire and global reach “without the necessity of fully accepting the people of color that inhabited the newly acquired territories.”<sup>32</sup>

The United States justified its conquest and subordination of territorial peoples by branding them as inferior and unworthy.<sup>33</sup> The U.S. government viewed the peoples as “alien,”<sup>34</sup> “ignorant,”<sup>35</sup> “semicivilized,”<sup>36</sup> and “above all . . . untrained in the arts of representative government.”<sup>37</sup> Decision-makers proclaimed “the United States [should not] ‘incorporate the alien races, [or the] civilized, semi-civilized, barbarous, and savage peoples of [the] islands into [the U.S.] body politic.’”<sup>38</sup>

The *Insular Cases*, a series of Supreme Court cases decided from 1901 to 1922,<sup>39</sup> employed these damaging cultural representations while concocting a new “unincorporated” status for the U.S. territories. In *Downes v. Bidwell*, the most important of the *Insular Cases*, the Court held that the Uniformity Clause of the U.S. Constitution did not apply to Puerto Rico.<sup>40</sup> Although no opinion garnered a majority, Justice Brown, who delivered the judgment of the Court, declared that the Clause does not apply to Puerto Rico because “the island of Porto Rico [sic] is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution.”<sup>41</sup> In doing so, he warned that peoples of different “race[s], habits, laws and customs” from “outlying and distant possessions” threatened the very heart of white Anglo-Saxon dominance, and counseled against the “extremely serious” consequences if the offspring of the colonies’ inhabitants, “whether savages or

31. *Downes v. Bidwell*, 182 U.S. 244, 339 (1901) (White, J., concurring). See José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 411 (1978) (observing that this was the first time in which a U.S. treaty acquiring territory did not promise citizenship or eventual statehood).

32. Román & Simmons, *supra* note 24, at 453.

33. See *id.* at 452–55 (discussing the United States’ use of race to justify the unequal treatment of native inhabitants of newly acquired territories).

34. Cabranes, *supra* note 31, at 432.

35. Torruella, *The Insular Cases*, *supra* note 9, at 10.

36. Cabranes, *supra* note 31, at 432. See also Rivera Ramos, *supra* note 26, at 238–39 n.35; Román & Simmons, *supra* note 24, at 458; Torruella, *The Insular Cases*, *supra* note 9, at 10.

37. Rivera Ramos, *supra* note 26, at 237–38.

38. Cabranes, *supra* note 31, at 432 (citing 33 CONG. REC. 3622 (1900) (remarks of Sen. Depew)).

39. *Id.*

40. *Downes v. Bidwell*, 182 U.S. 244, 279, 282 (1901).

41. *Id.* at 287. For thirty-two years, Puerto Rico was misspelled as “Porto Rico” because of an incorrect spelling in the English version of the Treaty of Paris. Cabranes, *supra* note 31, at 392 n.1. According to Representative William A. Jones, the misspelling was the result of “some Republican politician, ignorant of its derivation and meaning, and insensible to the wishes and the feelings of those who are attached to it, had arbitrarily [sic] and wickedly determined that it shall be so.” *Id.* (citing to 33 CONG. REC. 233 (1900) (remarks of Rep. Jones)). It wasn’t until 1932 that Congress corrected the island’s name. Act of May 17, 1932, ch. 190, 47 Stat. 158.

civilized,” would become “entitled to all the rights, privileges and immunities of citizens.”<sup>42</sup>

Justice White’s concurring opinion, which later became the controlling “doctrine of territorial incorporation,” devised the new “unincorporated” territory. According to Justice White, whether certain provisions of the Constitution apply in a territory depends on “the situation of the territory and its relations to the United States.”<sup>43</sup> Because Congress did not intend to incorporate Puerto Rico by way of the Treaty of Paris, the Foraker Act,<sup>44</sup> or by other means, Justice White determined that it was unincorporated—or “foreign . . . in a domestic sense.”<sup>45</sup> As a result, Congress freely chooses which portions of the Constitution apply in the U.S. territories, limited only by vaguely defined “fundamental” personal rights.<sup>46</sup>

Many legal experts conclude that the *Insular Cases* legitimize American colonialism. Judge José Cabranes recognized, for example, that the U.S. Supreme Court in *Downes* affirmed Congress’ power to distinguish between unincorporated and incorporated territories, and in doing so, “gave judicial approval to the birth of ‘the American Empire.’”<sup>47</sup> Judge Juan Torruella similarly asserted that “the Supreme Court placed its imprimatur on a colonial relationship in which Congress could exercise virtually unchecked power over the unincorporated territories ad infinitum.”<sup>48</sup>

The *Insular Cases* impact the everyday lives of the peoples of the territories in far-reaching ways—from the political to the economic, and the social to the cultural. On the national stage, residents of the territories lack meaningful political power. Because they cannot vote in U.S. presidential elections, it is unsurprising that no sitting president has been to the Commonwealth of the Northern Mariana Islands (CNMI) since the territory came under U.S. control or to American Samoa since Lyndon B. Johnson.<sup>49</sup> U.S. territory residents also have no U.S. senators and instead just one non-voting representative in the U.S. House

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42. *Downes*, 182 U.S. at 279, 282.

43. *Id.* at 293 (White, J., concurring). Therefore, the question whether the Foraker Act’s tax on Puerto Rican goods was proper depended on a determination whether Puerto Rico was “incorporated into the United States.” *Id.* at 288.

44. Pub. L. No. 56-191, 31 Stat. 77 (1900) (establishing a civil government for Puerto Rico).

45. *Downes*, 182 U.S. at 341.

46. See Serrano, *Elevating the Perspectives*, *supra* note 28, at 396; *Dorr v. United States*, 195 U.S. 138, 147 (1904) (holding that fundamental rights in the U.S. territories are only those “which are the basis of all free government”).

47. Cabranes, *supra* note 31, at 436.

48. Juan R. Torruella, *¿Hacia Dónde Vas Puerto Rico?*, 107 YALE L.J. 1503, 1509 (1998) (reviewing JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* (1997)).

49. Doug Mack, *The Biggest Issues in the Places Where Americans Can’t Vote for President*, SLATE (Oct. 21, 2020), <https://slate.com/news-and-politics/2020/10/election-puerto-rico-guam-samoa-virgin-islands.html> [<https://perma.cc/ZV4D-6295>].

of Representatives.<sup>50</sup> Without political power, the territories are shut out from agenda-setting, determining funding and policy priorities, and opportunities to sit at the decision-making table.<sup>51</sup> The Supreme Court also has held that if there is a rational basis for doing so, the federal government can provide less programmatic aid to territorial residents.<sup>52</sup> As a result, while territorial residents experience extreme poverty, they are unable to fully access federal programs such as Medicaid, Supplemental Security Income, and the Supplemental Nutrition Assistance Program.<sup>53</sup>

This stark inequality is particularly salient in the climate context. Whether in times of disaster or at the hands of incremental and inevitable environmental degradation, the U.S. territories are often left exposed due to the lack of access

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50. The U.S. Constitution provides political representation to the states. U.S. CONST. art. I, § 2 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .”); U.S. CONST. art. I, § 3 (“The Senate of the United States shall be composed of two Senators from each State . . . .”); U.S. CONST. art. II, § 1 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .”). Puerto Rico’s representative in the U.S. House is a “[r]esident [c]ommissioner,” and the representatives from American Samoa, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands are “[d]elegates.” See JASON A. SMITH, CONSTITUTION, JEFFERSON’S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. Doc. No. 116–177, at 399–400 (2021). The resident commissioner and delegates can vote in committee but may not vote on the House floor. See CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R40170, PARLIAMENTARY RIGHTS OF THE DELEGATES AND RESIDENT COMMISSIONER FROM PUERTO RICO 1 (2019). They may also vote in the Committee of the Whole “subject to immediate reconsideration in the House when their recorded votes have been ‘decisive.’” *Id.* at 1–2.

51. See Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1264 (2019).

52. See *U.S. v. Vaello Madero*, 142 S. Ct. 1539, 1544 (2022); Press Release, Nat. Res. Comm. Chair Raúl M. Grijalva, Chair Grijalva, Territorial Delegates Introduce Bipartisan Resolution Rejecting Insular Cases as Racist and Contrary to the Constitution (Mar. 29, 2021), <https://naturalresources.house.gov/media/press-releases/chair-grijalva-territorial-delegates-introduce-bipartisan-resolution-rejecting-insular-cases-as-racist-and-contrary-to-the-constitution> [<https://perma.cc/AEL3-3JKC>]. See also Uilisone Falemanu Tua, *A Native’s Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa*, 11 ASIAN-PAC. L. & POL’Y J. 246, 255 (2009) (explaining that American Samoa has no federal court, which requires residents to travel long distances to litigate).

53. See House Nat. Res. Comm. Democrats, *The Insular Cases: Millions of Americans Denied Equal Protection Under the Law*, MEDIUM (May 25, 2021), <https://hnrdeems.medium.com/the-insular-cases-c52a8294b370> [<https://perma.cc/2DBP-PCT7>] (reporting that nearly forty percent of Puerto Rico’s residents and more than sixty-five percent of American Samoa’s residents live below the poverty line); MEDICAID & CHIP PAYMENT & ACCESS COMM’N, MEDICAID AND CHIP IN THE TERRITORIES 1 (Feb. 2021), <https://www.macpac.gov/wp-content/uploads/2019/07/Medicaid-and-CHIP-in-the-Territories.pdf> [<https://perma.cc/77DR-64EN>] (noting that residents of Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands are not eligible for Supplemental Security Income). Medicaid programs in the territories also differ considerably from those in the states. For example, in the states and the District of Columbia, federal Medicaid matching funds are based on per capita income, adjusted annually, and “open-ended.” *Id.* at 1, 4. In the territories, on the other hand, federal Medicaid matching funds are capped annually. *Id.* at 4. Thus, generally, once a territory depletes its annual allotment—which frequently occurs—it must fund its Medicaid program using local funds. *Id.*

to both federal and international funding to support recovery and adaptation efforts.<sup>54</sup>

### B. Modern-Day Climate Vulnerability

The U.S. territories' lasting colonial status sharply curtails their attempts to adapt long-term to the climate crisis. As island territories, they face sea level rise, increasingly intense tropical storms, and extreme temperatures, leading to severe public health crises and damage to already aging infrastructure.<sup>55</sup> Several studies also document coral reef death, risks to freshwater sources, and damage to ecosystems, resulting in negative impacts to health, culture,<sup>56</sup> subsistence practices, agriculture, food security, and economic development.<sup>57</sup>

In American Samoa, for example, climate-related changes have strained already limited resources, directly impacting both the local economy and Samoan culture.<sup>58</sup> For the last three decades, rising water temperatures on the surrounding ocean by 1.8 degrees have contributed to coral bleaching, ocean acidification, and the depletion of key resources like the giant clam and taro.<sup>59</sup>

For Guam and the nearby CNMI, climate change has meant an upheaval of the territories' water infrastructure. The growing frequency of droughts has depleted available surface water, resulting in increased dependence on well water for household use and drinking.<sup>60</sup> Even well water, however, faces saltwater

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54. See Grijalva Introduces Insular Area Climate Change Act, *supra* note 11 (noting that the U.S. territories have “unequal access to federal programs that build climate resiliency”).

55. See Grijalva Unveils Discussion Draft, *supra* note 4. See also Maxine Burkett, *A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy*, 35 U. HAW. L. REV. 633, 640 (2013) [hereinafter Burkett, *A Justice Paradox*] (noting that small island developing states in the Pacific “risk many of the more globally widespread climate impacts, including coastal inundation, rising air temperatures, decreased rainfall, and rising ocean temperatures”).

56. See Ian Falefuafua Tapu, *Finding Fonua: Disappearing Pacific Island Nations, Sea Level Rise, and Cultural Rights*, 62 ARIZ. L. REV. 785, 792 (2020) [hereinafter Tapu, *Finding Fonua*] (asserting that Pacific Islanders’ “cultural rights are directly impacted by climate change, and in particular, by sea level rise”).

57. ZENA GRECNI, WENDY MILES, ROMINA KING, ABBY FRAIZER & VICTORIA KEENER, *CLIMATE CHANGE IN GUAM: INDICATORS AND CONSIDERATIONS FOR KEY SECTORS 5* (2020) [hereinafter GRECNI ET AL., *CLIMATE CHANGE IN GUAM*] (reporting that climate change in Guam threatens, among other things, human health and freshwater resources, and increases wildfires, damage to infrastructure, and typhoons).

58. See NAT'L OCEANIC ATMOSPHERIC ADMIN., *CLIMATE CHANGE IMPACTS: NATIONAL MARINE SANCTUARY OF AMERICAN SAMOA 2–6* (2020).

59. *Id.* at 2–5. See VICTORIA KEENER, ZENA GRECNI, KELLEY ANDERSON TAGARINO, CHRISTOPHER SHULER & WENDY MILES, *CLIMATE CHANGE IN AMERICAN SAMOA: INDICATORS AND CONSIDERATIONS FOR KEY SECTORS 25* (2021); NAT'L MARINE SANCTUARY FOUND., *AMERICAN SAMOA GIANT CLAMS: CLIMATE CHANGE VULNERABILITY ASSESSMENT SUMMARY 3* (2016).

60. GRECNI ET AL., *CLIMATE CHANGE IN GUAM*, *supra* note 57, at 5, 28. See ZENA GRECNI, ERIN M. DERRINGTON, ROBBIE GREEN, WENDY MILES & VICTORIA KEENER, *CLIMATE CHANGE IN THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS: INDICATORS & CONSIDERATIONS FOR KEY SECTORS 30* (2021) [hereinafter GRECNI ET AL., *CLIMATE CHANGE IN CNMI*].

contamination because of increased pumping and sea level rise.<sup>61</sup> The droughts also make the territories more susceptible to wildfires, as evidenced by the rampant wildfires in CNMI in 2019.<sup>62</sup>

For the U.S. territories in the Caribbean, Puerto Rico, and the U.S. Virgin Islands, global warming has exacerbated the frequency and intensity of tropical storms.<sup>63</sup> In 2017, for example, the destruction from Hurricanes Irma and Maria caused billions of dollars in damage and killed thousands of people.<sup>64</sup> These storms, combined with rising ocean and air temperatures, have also led to diseases like vibriosis, malaria, and yellow fever.<sup>65</sup>

These recent catastrophic weather events underscore the disparities between the United States and its island territories. Small island territories are disproportionately impacted when disasters strike because they are “remote and relatively short on . . . food, water, and resources.”<sup>66</sup> Also, “the time to task the response and recovery is enormous.”<sup>67</sup> This is in part because there is no systematized health and humanitarian disaster relief,<sup>68</sup> and in part because U.S. laws prevent foreign-flagged vessels from transporting goods between U.S. continental ports and some U.S. territories.<sup>69</sup>

61. GRECNI ET AL., CLIMATE CHANGE IN GUAM, *supra* note 57, at 5; GRECNI ET AL., CLIMATE CHANGE IN CNMI, *supra* note 60, at 30.

62. GRECNI ET AL., CLIMATE CHANGE IN CNMI, *supra* note 60, at 32.

63. See Gould et al., *supra* note 22, at 840–42.

64. See Nishant Kishore, Domingo Marqués, Ayesha Mahmud, Mathew V. Kiang, Irmay Rodriguez, Arlan Fuller, Peggy Ebner, Cecilia Sorensen, Fabio Racy, Jay Lemery, Leslie Mass, Jennifer Leaning, Rafael A. Irizarry, Satchit Balsari & Caroline O. Buckee, *Mortality in Puerto Rico After Hurricane Maria*, 379 NEW ENG. J. MED. 162, 163 (2018); Jorge L. Ortiz, *Hurricane Maria’s Economic Impact on Puerto Rico: At Least \$43 Billion, Possibly as High as \$159 Billion*, USA TODAY (Dec. 4, 2018), <https://www.usatoday.com/story/news/2018/12/04/hurricane-maria-economic-impact-puerto-rico/2209231002/> [<https://perma.cc/T7WH-Z95V>].

65. EPA, WHAT CLIMATE CHANGE MEANS FOR PUERTO RICO (2016); EPA, WHAT CLIMATE CHANGE MEANS FOR THE U.S. VIRGIN ISLANDS (2016). See Gould et al., *supra* note 22, at 813–14.

66. *Insular Area Climate Change Act: Hearing on Discussion Draft of H.R. \_\_\_ Before the Comm. on Nat. Res.*, 117th Cong. 6 (2021) (statement of Ada Monzón, President, EcoExploratorio, P.R. Sci. Museum, Guaynabo, P.R.) [hereinafter Monzón Statement], <https://www.govinfo.gov/content/pkg/CHRG-117hrrg43630/html/CHRG-117hrrg43630.htm> [<https://perma.cc/GWD4-8LJN>].

67. *Id.*

68. *Id.*

69. See Merchant Marine Act of 1920, Pub. L. No. 66-261, 41 Stat. 988. See also Carlos E. Rodríguez-Díaz, *Maria in Puerto Rico: Natural Disaster in a Colonial Archipelago*, 108 AM. J. PUB. HEALTH 30, 31 (2018) (“Under the economic and social circumstances imposed by austerity measures in Puerto Rico, it was impossible for individuals and their government to be prepared for hurricanes and their aftermath.”); Lin, *supra* note 51, at 1292 (“The Jones Act mandates that all commercial shipping within the United States to be conducted by ships built domestically, owned at least seventy-five percent by Americans, and staffed with an American crew.”); Yxta Maya Murray, “FEMA Has Been a Nightmare:” *Epistemic Injustice in Puerto Rico*, 55 WILLAMETTE L. REV. 321, 374 (2019) (“[T]he people of Puerto Rico were hampered in their abilities to react self-protectively to the storm because they faced a ‘nonquantifiable risk’ that the U.S. government would fail to aid them because of official blindness to their island status, demographics, language, and lack of electrical power.”); Marie Olga Luis Rivera, *Hard to Sea: Puerto Rico’s Future Under the Jones Act*, 17 LOY. MAR. L.J. 63, 128 (2018) (“Puerto Rico is the poorest jurisdiction in the United States and is the only insular territory where the

These issues are further compounded because the territories' ability to advocate in Congress for federal recovery and rebuilding funds is hindered by the political limitation of having only one non-voting representative.<sup>70</sup> As Representative Sheila Babauta, who chairs the CNMI legislature's House Natural Resources Committee, explained:

[W]e are a territory. We are a commonwealth in a political union with the United States, but it's becoming increasingly clear that big decisions are being made without our free, prior, and informed consent. . . . We must have a seat at the table when big issues that affect us are being discussed. . . . We are an afterthought.<sup>71</sup>

Senator Régine Biscoe Lee of the Guam legislature expressed similar concerns and contended that Guam "needs a seat at the table" to address issues including self-determination, Medicaid underfunding, military buildup, and climate change.<sup>72</sup>

While U.S. territories—like small island nations—bear the brunt of the global climate crisis,<sup>73</sup> they contribute very little to environmental pollution.<sup>74</sup> For this reason, any mitigation and adaptation strategies that U.S. territories attempt are grossly disproportionate to their emission footprints.<sup>75</sup> And, in any case, "mitigation [by the territories] alone will not quell the very tangible harms climate change has caused or will cause,"<sup>76</sup> particularly when the territories are

Jones Act is imposed in its totality at the expense of 3.5 million people." The U.S. Virgin Islands, America Samoa, and the Northern Mariana Islands are exempt from the Act; Puerto Rico is exempt for passengers only; and for Guam, ships must be U.S.-owned and -crewed, but do not need to be U.S.-built. See JOHN FRITTELLI, CONG. RSCH. SERV., R45725, SHIPPING UNDER THE JONES ACT: LEGISLATIVE AND REGULATORY BACKGROUND (2019).

70. See Phil McKenna, *Devastated Puerto Rico Tests Fairness of Response to Climate Disasters*, INSIDE CLIMATE NEWS (Sept. 22, 2017).

71. Iva Maurin, *Babauta to Feds: 'Truly Engage with Us,' SAIPAN TRIB.* (July 1, 2021), <https://www.saipantribune.com/index.php/truly-engage-with-us/> [<https://perma.cc/U9N6-JU2F>].

72. Mack, *supra* note 49.

73. *Island Nations on Climate Crisis Frontline 'Not Sitting Idly By,' supra* note 4 (reporting that Small Island Developing States—of which Puerto Rico, Guam, and American Samoa are considered non-UN members—"bear[] the brunt of an increasingly extreme and unpredictable global climate," but produce "little of the harmful greenhouse gases that are fueling climate change").

74. The U.S. territories are powered overwhelmingly by fossil fuels; thus, the price of energy is far above the U.S. norm. See Eric Wesoff, *How US Territories Can Kick Their Oil Addiction*, GREENTECH MEDIA (Aug. 21, 2014), <https://www.greentechmedia.com/articles/read/How-US-Territories-Can-Kick-Their-Oil-Addiction> [<https://perma.cc/2ACG-56F3>].

75. While the purpose of mitigation is to slow, stop, or reverse climate change by reducing greenhouse gas emissions, adaptation seeks to design and institute programs, physical structures, and policies to reduce the impacts of climate change on humans and ecosystems. See James E. Parker-Flynn, *The Intersection of Mitigation and Adaptation in Climate Law and Policy*, 38 ENVIRONS ENV'T. L. & POL'Y J. 1, 7–8 (2014); Margaux J. Hall & David C. Weiss, *Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law*, 37 YALE J. INT'L L. 309, 315 (2012).

76. Tapu, *Finding Fonua, supra* note 56, at 788. See also Grijalva Introduces Insular Area Climate Change Act, *supra* note 11 (noting that the U.S. states "have enjoyed a 25 percent or higher discount tax benefit on the price of solar installations for many years, [but] Puerto Ricans have lacked access to this and other important federal programs").

extremely under-resourced and operate under major political and economic constraints.

At the same time, the U.S. territories, like resource-limited countries, “will suffer the worst impacts [of climate change] because they also have the least capacity for adaptation.”<sup>77</sup> The U.S. territories’ efforts to develop meaningful adaptation strategies are stymied because of their still colonial relationship with the United States. As mentioned above, they do not have the same access to federal monies as do the U.S. states to pursue policies, programs, and technology to reduce climate change impacts.<sup>78</sup> As Stacey E. Plaskett, the non-voting delegate from the U.S. Virgin Islands, testified, “Americans living in the territories are accustomed to being last in line: for hurricane relief, for COVID-19 equipment, for basic health care, education, and more.”<sup>79</sup> Legal scholars have also found that U.S. territories’ constrained and “disparate ability to adapt to the harms of climate change have . . . caus[ed] a type of ‘adaptation apartheid.’”<sup>80</sup>

U.S. territories’ adaptation efforts are further hindered because, unlike sovereign nations, U.S. territories cannot receive assistance from the International Monetary Fund (IMF).<sup>81</sup> The IMF is a critical means of support with current total resources amounting to about 973 billion Special Drawing Rights (SDRs),<sup>82</sup> which translates to about \$1 trillion USD for lending purposes.<sup>83</sup> It provides countries hit by crises with “financial support to create breathing room as they implement adjustment policies to restore economic

77. Tsosie, *Indigenous People and Environmental Justice*, *supra* note 21, at 1660 (citing Dale Jamieson, *Adaptation, Mitigation, and Justice*, in PERSPECTIVES ON CLIMATE CHANGE: SCIENCE, ECONOMICS, POLITICS, ETHICS 217, 225 (Walter Sinnott-Armstrong & Richard B. Howarth eds., 2005)).

78. See Sylvia C. Frain, ‘Make America Secure:’ *Media, Militarism, and Climate Change in the Marianas Archipelago*, 24 PAC. JOURNALISM REV. 218, 219–20 (2018).

79. Edward Hunt, *The U.S. Refuses to Give Up Its Colonies*, PROGRESSIVE MAG. (Aug. 5, 2020), <https://progressive.org/latest/us-refuses-to-give-up-colonies-hunt-200805/> [<https://perma.cc/HX3W-38QN>]. See also R. SAM GARRETT, CONG. RSCH. SERV., R44721, POLITICAL STATUTES OF PUERTO RICO: BRIEF BACKGROUND AND RECENT DEVELOPMENTS FOR CONGRESS 3 (2017) (“[Political] status is an undercurrent in virtually every policy matter on the island.”).

80. Tapu, *Finding Fonua*, *supra* note 56, at 794 (citing Hall & Weiss, *supra* note 75, at 336).

81. See IMF Members’ *Quotas and Voting Power, and IMF Board of Governors*, IMF (Oct. 20, 2021), <https://www.imf.org/external/np/sec/memdir/members.aspx> [<https://perma.cc/NE4X-PCN2>]. See also Rachel L. Wellhausen, *The Political Economy of US Territories and Indian Country*, 50 POL. SCI. & POL. 510, 510 (2017) (“US territories are not traditional subnational units and neither are they sovereign Westphalian states. Instead, they are ‘semi-sovereign’ entities, enabled by a hierarchical power to act with limited autonomy, particularly concerning their political economies.”).

82. The value of SDRs “is based on a basket of five currencies—the U.S. dollar, the euro, the Chinese renminbi, the Japanese yen, and the British pound sterling.” *Special Drawing Rights (SDR)*, IMF (Aug. 5, 2021), <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/14/51/Special-Drawing-Right-SDR> [<https://perma.cc/896M-E5CJ>].

83. *Where the IMF Gets Its Money*, IMF (Apr. 26, 2021), <https://www.imf.org/en/About/Factsheets/Where-the-IMF-Gets-Its-Money> [<https://perma.cc/YF3S-N72E>].

stability and growth.”<sup>84</sup> This lending is often accompanied by commitments to take particular policy actions.<sup>85</sup> The IMF, for example, approved a \$9.95 million disbursement to Tonga, a Pacific Island nation, for financial support and structural reform in light of the “twin shocks from the Covid-19 pandemic and Cyclone Harold.”<sup>86</sup> However, this kind of support is only available to the 190 IMF member countries, and not to the semi- or partially-autonomous islands like the U.S. territories.<sup>87</sup> This inequality in access to financial support became painfully clear during Puerto Rico’s recent financial crisis—because Puerto Rico’s municipalities were neither U.S. states nor sovereign nations, they could not utilize federal bankruptcy laws or seek financing from international sources like the IMF.<sup>88</sup>

Even U.S. federal funds earmarked for Pacific Islands are not accessible to the U.S. territories. The Pacific-American Climate Fund, for example, provides grants “to reduce long-term vulnerabilities associated with climate change” to twelve Pacific Islands, but not to the U.S. territories because of their political status.<sup>89</sup> The federal government similarly committed millions to the same

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84. *IMF Lending*, IMF (Feb. 22, 2021), <https://www.imf.org/en/About/Factsheets/IMF-Lending> [https://perma.cc/688G-GD74].

85. *Id.*

86. *IMF Executive Board Approves a US \$9.95 Million Disbursement to Tonga*, IMF (Jan. 25, 2021), <https://www.imf.org/en/News/Articles/2021/01/26/pr2122-tonga-imf-executive-board-approves-disbursement-to-tonga> [https://perma.cc/B6WF-58ML].

87. *The IMF at a Glance*, IMF (Mar. 22, 2019), <https://www.imf.org/en/About/Factsheets/IMF-at-a-Glance> [https://perma.cc/6QFY-Y4J2]. See also Mary Williams Walsh & Liz Moyer, *How Puerto Rico Debt Is Grappling with a Debt Crisis*, N.Y. TIMES (July 1, 2016), <https://www.nytimes.com/interactive/2016/business/dealbook/puerto-rico-debt-crisis-explained.html> [https://perma.cc/X3AR-XS97] (“Unlike sovereign nations . . . [Puerto Rico] can’t seek emergency assistance from the International Monetary Fund.”); Sumer B. Marquette, *Collective Action Clauses as a Solution to Holdouts in Puerto Rico’s Unique Debt Crisis: Lessons Learned from Argentina*, 38 NW. J. INT’L L. & BUS. 449, 451–52 (2018) (noting that Puerto Rico’s territorial status prevents it from accessing IMF funds); Michael B. Schwebel, *Climate Change Perceptions and Preparation in the United States Territories in the Pacific: American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands*, 13 ISLAND STUD. J. 135, 141 (2018) (“When the US Territories are able to participate in climate-change activities involving those outside of the territory, they ‘look at us like we got a lot of money [ . . . ] every time they look at us they feel like we got all this [sic] US dollars [ . . . ] It benefits us but it also creates hardship for us, because there are lot [sic] of areas where we’re not similar to the States and their jurisdictions.’” (alterations in original)).

88. See *Puerto Rico v. Franklin Calif. Tax-Free Tr.*, 136 S. Ct. 1938, 1942 (2016) (holding that Puerto Rico is not a “State” for purposes of the federal Bankruptcy Code’s provision regarding who may be a debtor, but it is a “State” for the purposes of Chapter 9’s preemption provision, and as such, the Bankruptcy Code preempts Puerto Rico’s Recovery Act); Melika Hadžiomerović, Note, *An Arbitral Solution: A Private Law Alternative to Bankruptcy for Puerto Rico, Territories, and Sovereign Nations*, 85 GEO. WASH. L. REV. 1263, 1273 (2017) (explaining the inability to seek funding from international sources like the IMF).

89. Frain, *supra* note 78, at 219–20. The twelve countries include the Federated States of Micronesia, Fiji, Kiribati, Nauru, the Republic of Palau, Papua New Guinea, the Republic of Marshall Islands, Sāmoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu. *Id.*

twelve Pacific Islands to stabilize and mitigate the countries' infrastructure in light of the Covid-19 pandemic.<sup>90</sup>

Moreover, when it comes to international and regional agreements that are key to environmental justice, like the Paris Agreement, U.S. territorial participation is either severely limited or simply non-existent.<sup>91</sup> Delegates from the United States are typically from Washington D.C. or New York City and have little to no experience with the impacts of climate change on the territories.<sup>92</sup> James Matayoshi, the mayor of Rongelap Atoll in the Marshall Islands, best summarized this dilemma: "People in [the U.S. territory of] Guam have lost a lot of their identity and . . . they have to go through Washington to deal with the global community."<sup>93</sup> In having to rely upon these representatives, the U.S. territories' political, economic, social, and environmental concerns take a back seat.<sup>94</sup>

The U.S. territories are a political conundrum: they are not "American" enough to be completely part of the United States, but they are "too American" to be considered sovereign island nations. This paradox becomes more palpable in light of the United Nations Small Island Developing States (SIDS) and the Alliance of Small Island States—a group of small islands that have come together internationally to assert their concerns, especially regarding the climate

90. See Rep. Raúl M. Grijalva, *Addressing Severe Climate Change Impacts in Puerto Rico, Other Territories While We Still Can*, THE HILL (Mar. 24, 2021), <https://thehill.com/blogs/congress-blog/energy-environment/544761-addressing-severe-climate-change-impacts-in-puerto> [<https://perma.cc/2LU8-M2PR>] ("Federal law and current spending priorities leave millions of Americans to fend for themselves in these [territorial] communities."); *United States Provides Assistance to the Pacific to Respond to Covid-19*, USAID (Apr. 9, 2020), <https://www.usaid.gov/pacific-islands/press-releases/apr-9-2020-united-states-provides-assistance-pacific-response-covid19> [<https://perma.cc/LPU3-9ZFM>]; *U.S. Engagement in the Pacific Islands: 2020 Pacific Pledge*, OFFICE SPOKESPERSON, U.S. DEPT. STATE (Oct. 1, 2020), <https://2017-2021.state.gov/u-s-engagement-in-the-pacific-islands-2020-pacific-pledge/index.html> [<https://perma.cc/B49K-W3YJ>].

91. See Rachel Jones, *The Environmental Movement Is Very White. These Leaders Want to Change That*, NAT'L GEOGRAPHIC (July 29, 2020), <https://www.nationalgeographic.com/history/article/environmental-movement-very-white-these-leaders-want-change-that?loggedin=true> [<https://perma.cc/U8C4-A932>] ("[R]acism and white supremacy have long excluded Black, brown, and Indigenous people in environmental policy, conservation, and public health issues. . . . [E]nvironmental groups have begun publicly examining their role in perpetuating systemic racist policies and practices.").

92. See Schwebel, *supra* note 87, at 145. Schwebel notes that "[a]lthough territories are often invited to regional meetings on climate change, they have to sit out of the decision-making arenas because only Department of State personnel are at the decision-making level of their island peers." *Id.* He adds, however, that the State Department rarely sends a representative to such meetings. *Id.* "If it does," he explains, "that person is often from Washington or New York, without much knowledge regarding Pacific territories, creating confusion and non-movement as sovereign states, with decision-making powers having trouble enough advancing sensitive topics forward on legal issues relating to the effects of climate change." *Id.*

93. Autumn S. Bordner, Caroline E. Ferguson & Leonard Ortolano, *Colonial Dynamics Limit Climate Adaptation in Oceania: Perspectives from the Marshall Islands*, 61 GLOBAL ENV'T. CHANGE 1, 7 (2020).

94. See Schwebel, *supra* note 87, at 145.

crisis.<sup>95</sup> The collective efforts of these similarly situated island nations are unavailable to the U.S. territories; because of the territories' paradoxical status, they cannot in the same way influence and negotiate with other countries or access the same international support.<sup>96</sup>

Even attempted collaborations between the federal government and U.S. territories, which are designed to provide a voice for islands, fall short of meaningful engagement, and instead highlight the territories' colonial status.<sup>97</sup> Federal control of the funds needed for climate adaptation means that those who set the agenda are not from the islands.<sup>98</sup> Local and Indigenous adaptation plans are often discounted because of the enduring colonial narrative that islanders lack technical expertise and sophistication.<sup>99</sup> Moreover, the federal government “consistently prioritiz[es] military projects” at the cost of territories' resiliency planning and adaptation projects.<sup>100</sup>

The impact of the climate crisis also must be viewed in the context of the United States' persistent environmental exploitation of the territories. As climate legal scholar Maxine Burkett recognized, “[c]olonialism's legacy of exploitation fundamentally predisposes the contemporary political economy to degradation, a predisposition that is now baked into the global economy.”<sup>101</sup> Similarly,

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95. See Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, *About Small Island Developing States*, U.N., <https://www.un.org/ohrls/content/about-small-island-developing-states> [https://perma.cc/5K2H-N2V6] (describing the unique environmental challenges that SIDS face and the intergovernmental organizations that have been created to address those challenges, like the Pacific Islands Forum, which, unsurprisingly, has no member island that is a U.S. territory). See also Lauren E. Sancken, *The Price of Sovereignty in the Era of Climate Change: The Role of Climate Finance in Guiding Adaptation Choices for Small Island Developing States*, 38 UCLA J. ENV'T L. & POL'Y 217, 219 (2020) (exploring “the adaptation choices available to SIDS against the backdrop of limited public and private financial mechanisms”). But see Burkett, *A Justice Paradox*, *supra* note 55, at 635 (describing the “failure of the legal regime to provide adequate process and substantive remedy for SIDS—either through the lack of viable legal theories or through uneven power dynamics in the international arena”).

96. See Michael Lujan Bevacqua, *Political Status at Root of Military Buildup Issues*, PAC. DAILY NEWS (Feb. 4, 2021), [https://www.guampdn.com/opinion/bevacqua-political-status-at-root-of-military-buildup-issues/article\\_c3fc3c2f-a99b-59f6-b062-10d880cb25a0.html](https://www.guampdn.com/opinion/bevacqua-political-status-at-root-of-military-buildup-issues/article_c3fc3c2f-a99b-59f6-b062-10d880cb25a0.html) [https://perma.cc/Q6RU-7JBD] (noting that a foreign country can negotiate with the United States, and even states “have greater ability to ensure needs or interests are not ignored or forgotten,” but U.S. territories cannot do either). See also Michael Lujan Bevacqua & Manuel Lujan Cruz, *The Banality of American Empire: The Curious Case of Guam, USA*, 11 J. TRANSNAT'L AM. STUD. 127, 131 (2020) (noting that the UN generally overlooks the colonial subjugation of Guam, Puerto Rico, and other U.S. territories).

97. See Schwebel, *supra* note 87, at 142, 145.

98. See Bordner et al., *supra* note 93, at 7.

99. *Id.* at 5, 7. See Frain, *supra* note 78, at 220.

100. Frain, *supra* note 78, at 218–20 (describing the conflict between a territory's self-determination when seeking to adapt to climate change and the federal government's militarization plans).

101. Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. L. REV. 445, 459 (2018) [hereinafter Burkett, *Behind the Veil*] (citing Carmen G. Gonzalez, *Global Justice in the Anthropocene*, in ENVIRONMENTAL LAW AND GOVERNANCE FOR THE ANTHROPOCENE 223 (Louis J. Kotzé ed., 2017)).

climate legal scholar Carmen González explained that the Global North “exacerbate[s] climate vulnerability through colonial and post-colonial military, economic, and political interventions that increased poverty and inequality in much of . . . the Global South[.]”<sup>102</sup>

These global exploitation phenomena are reflected on the ground in the U.S. territories. For example, scholars Hilda Lloréns and Maritza Stanchich called Puerto Rico an “exploitation colony”—explaining that the island suffers from long-standing United States-sponsored environmental degradation by way of “sugar plantations, military bases, big pharma, fossil-fuel dependent electricity plants, or genetically modified organisms (GMO) experimentation . . . .”<sup>103</sup> Furthermore, a 2016 report found that about seventy percent of Puerto Rico’s municipal landfills violate the Environmental Protection Agency’s (EPA’s) regulations.<sup>104</sup> Puerto Rico is also home to twenty-three Superfund sites, including one on the island of Vieques, where the U.S. Navy conducted live-fire bombing tests for six decades.<sup>105</sup>

Similarly, some scholars describe the recent massive military buildup in Guam—including the construction of a military base, a massive live-fire training range complex, and the influx of thousands of military personnel—as not only destructive to Guam’s environment, culture, infrastructure, and economy, but also linked to decades of U.S. colonialism, imperialism, and militarism.<sup>106</sup>

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102. Carmen G. Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOY. L. REV. 401, 404 (2020). The Global North refers to the West and the developed world, including the United States, Canada, Western Europe, Australia, New Zealand, and the developed part of Asia. Meanwhile, the Global South refers to developing countries. See Md. Kamal Uddin, *Climate Change and Global Environmental Politics: North-South Divide*, 47 ENV’T POL’Y & L. 106, 106–07 (2017). Interestingly enough, despite U.S. territories being a part of the United States, they nonetheless have been grouped together with the Global South terminology. See Andrea M. Feldpausch-Parker, Danielle Endres & Tarla Rai Peterson, *A Research Agenda for Energy Democracy*, 4 FRONTIERS COMM’N. 1, 5 (2019); Alex Schwartz, *Trump’s Puerto Rico Statement Is Too Little, Too Late*, DAILY NW. (Sept. 26, 2017), <https://dailynorthwestern.com/2017/09/26/opinion/schwartz-trumps-puerto-rico-statement-little-late/> [<https://perma.cc/3D73-RA69>].

103. Lloréns & Stanchich, *supra* note 16, at 84–85. See also Carmen M. Concepción, *The Origins of Modern Environmental Activism in Puerto Rico in the 1960s*, 19 INT’L J. URB. REG’L RSCH. 115, 116 (1995) (describing the exploitation of Puerto Rico’s natural resources by United States companies as a “classical pattern of colonial exploitation”); Catalina M. de Onís, *Energy Colonialism Powers the Ongoing Unnatural Disaster in Puerto Rico*, 3 FRONTIERS COMM’N. 1, 1 (2018) (contending that Puerto Rico “has been exploited as a sacrifice zone for empire building and experimentation, corporate greed, and toxic energy projects”).

104. Cong. Task Force Econ. Growth P.R., Report to the House and Senate, 114th Congress, at 73–74 (2016), <https://www.finance.senate.gov/imo/media/doc/Bipartisan%20Congressional%20Task%20Force%20on%20Economic%20Growth%20in%20Puerto%20Rico%20Releases%20Final%20Report.pdf> [<https://perma.cc/P7LL-QGXB>].

105. Emily Atkin, *Puerto Rico Is Already an Environmental Tragedy. Hurricane Maria Will Make It Even Worse*, NEW REPUBLIC (Sept. 19, 2017), <https://newrepublic.com/article/144888/puerto-rico-already-environmental-tragedy-hurricane-maria-will-make-even-worse> [<https://perma.cc/82XC-3G8T>].

106. See Bevacqua & Cruz, *supra* note 96, at 140; Tiara R. Na’puti & Michael Lujan Bevacqua, *Militarization and Resistance from Guåhan: Protecting and Defending Págat*, 67 AM. Q. 837, 848

Scholars Tiara R. Na'puti and Michael Lujan Bevacqua explain that local activists “assert the need for mutual respect and care for” their island environment, while “challeng[ing] the imbalance imposed by the US nation-state—the inequality, lack of representation, and colonial connection.”<sup>107</sup>

This colonial legacy was laid bare following the recent catastrophic hurricanes in the Caribbean<sup>108</sup> and Pacific.<sup>109</sup> In particular, these climate disasters exposed the lack of access to federal support and the territories’ inability to determine their own recovery and adaptation strategies.<sup>110</sup> For the U.S. territories in the Caribbean, the federal response to Hurricanes Maria and Irma in 2017 was telling. Congress authorized three relief packages for Puerto Rico and the Virgin Islands, which contrast sharply with those offered to Florida and Texas after Hurricane Harvey.<sup>111</sup> In the first relief bill, Congress authorized

(2015). See also House Nat. Res. Comm. Chair Raúl M. Grijalva, *Advancing Equity in U.S. Territories*, Mar. 2021, <https://naturalresources.house.gov/imo/media/doc/Advancing%20Equity%20in%20the%20US%20Territories.pdf> [<https://perma.cc/83CC-8YTR>] (reporting that ninety-five percent the U.S. territories’ residents also “identify as a member of one or more racial or ethnic minorities,” thereby implicating environmental justice concerns).

107. See Na’puti & Bevacqua, *supra* note 106, at 848. See also Francisco Delgado, *Remade: Sovereign: Decolonizing Guam in the Age of Environmental Anxiety*, 00(0) MEMORY STUD. 1, 5–6 (2019) (contending that decolonization, grounded in cultural memory, is integral to addressing environmental injustice in Guam, and relies on “the Chamorro people asserting their sovereignty (meaning, their right to self-rule and self-govern)”; Michael Lujan Bevacqua & Isa Ua Ceallaigh Bowman, *I Tano’ i Chamorro/Chamorro Land*, in SUSTAINABILITY: APPROACHES TO ENVIRONMENTAL JUSTICE AND SOCIAL POWER 222, 222–23 (Julie Sze ed., 2018) (deconstructing the portrayal of the U.S. military buildup on Guam as “sustainable” as tied to historical and ongoing militarization and colonization, and reviewing the response of Indigenous Chamorro activists to the buildup proposal).

108. See Rodríguez-Díaz, *supra* note 69, at 31; Lin, *supra* note 51, at 1292; Murray, *supra* note 69, at 333; Ximena Benavides, *Disparate Health Care in Puerto Rico: A Battle Beyond Statehood*, 23 U. PA. J. L. & SOC. CHANGE 163, 188 (2020) (reporting that over 83 percent of the Puerto Rican population experienced “prolonged power outages, employment loss, property destruction, insanitary conditions, and health problems”).

109. See Lin, *supra* note 51, at 1292; 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/P38W-7LEZ>].

110. See Amelia Cheatham, *Puerto Rico: A U.S. Territory in Crisis*, COUNCIL ON FOREIGN RELS. (Nov. 25, 2020), <https://www.cfr.org/background/puerto-rico-us-territory-crisis> [<https://perma.cc/5EAV-36V3>]. See also Antonio Weiss & Brad Setser, *America’s Forgotten Colony: Ending Puerto Rico’s Perpetual Crisis*, FOREIGN AFFS. (Jul./Aug. 2019), <https://www.foreignaffairs.com/articles/puerto-rico/2019-06-11/americas-forgotten-colony> [<https://perma.cc/4D46-247S>] (arguing that the federal government’s recovery response to Hurricane Maria was inadequate in part because of Puerto Rico’s status as a colony of the United States); Rachel Ramirez, *Paradise Lost*, GRIST (Oct. 24, 2019) <https://grist.org/article/a-year-ago-this-island-was-hit-with-the-worst-u-s-storm-since-1935-what-happened-next/> [<https://perma.cc/7JBG-BZLC>] (“The government of the Northern Marianas . . . has not passed any serious policy to combat, or adapt to, the climate crisis.”).

111. See Charley E. Willison, Phillip M. Singer, Melissa S. Creary & Scott L. Geer, *Quantifying Inequities in US Federal Response to Hurricane Disaster in Texas and Florida Compared with Puerto Rico*, BMJ GLOB. HEALTH 1, 2–3 (Jan. 2019).

billions of dollars to directly aid areas affected by the hurricane on the continent as well as billions for the Federal Emergency Management Agency (FEMA) from which Puerto Rico could benefit.<sup>112</sup> Then, in the second package, while the states were given grant money, Congress allocated loan money to Puerto Rico.<sup>113</sup> Congress later refused to disburse the relief because of the territory's high cash balance. Finally, the third relief package required Puerto Rico's governor to establish a twelve-month and twenty-four-month recovery plan that required endorsement by a federally created financial oversight board and monthly reports to Congress.<sup>114</sup> No such funding requirement was imposed on Texas or Florida.<sup>115</sup>

Puerto Rico and the U.S. Virgin Islands' disparate treatment was not limited to funding for direct relief but also applied to the reconstruction of their critical infrastructure. In Texas, FEMA agreed to pay for any cost overruns for critical infrastructure, whereas in Puerto Rico, FEMA forced the territory to adopt a new experimental funding formula that required Puerto Rico to pay for any excess costs.<sup>116</sup>

In the Pacific, CNMI faced a different set of disaster-related responses from the federal government. After Super Typhoon Yutu hit in 2018 and despite the availability of funding, many residents could not meet FEMA requirements to prove homeownership because property is often passed down without formal

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112. See H.R. 601, 115th Cong. (2017); Willison et al., *supra* note 111, at 2.

113. Compare H.R. 601, 115th Cong. (2017), with H.R. 2266, 115th Cong. (2017) (H.R. 601 provided an appropriation to FEMA while H.R. 2266 provided direct loans to local governments). See also Willison et al., *supra* note 111, at 2–3 (“[F]ederal response was faster and more generous across measures of money and staffing to Hurricanes Harvey and Irma in Texas and Florida, compared with Hurricane Maria in Puerto Rico.”). The Community Disaster Loan added to Puerto Rico's preexisting 74 billion dollars of debt. Aja Espinosa, *In the Eye of a Hurricane There Is Quiet: Puerto Rico's Fight for Aid After Hurricane Maria*, 10 GEO. WASH. J. ENERGY & ENV'T L. 91, 95 (2020).

114. Willison et al., *supra* note 111, at 1, 3 (citing H.R. 1892, 115th Cong. (2018)). For more on the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), the federal law that gave sweeping powers to a seven-member financial oversight board to administer Puerto Rico's government finances, see Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2101 et seq. (2016); Derdlim M. Rodríguez Malavé, *P.R.O.M.E.S.A.: Another Consequence of the Constitutionally Infirm Interpretation of the Territorial Clause*, 54 REVISTA JURIDICA U. INTERAMERICANA P.R. 413, 434 (2019); Pedro Cabán, *Puerto Rico and PROMESA: Reaffirming Colonialism*, NEW POL. (2017), [https://newpol.org/issue\\_post/puerto-rico-and-promesa-reaffirming-colonialism/](https://newpol.org/issue_post/puerto-rico-and-promesa-reaffirming-colonialism/) [<https://perma.cc/SNM5-UK4K>].

115. Willison et al., *supra* note 111, at 3.

116. 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/GS7Y-VGSJ>]. “White House officials . . . told Puerto Rico that in order to receive money for permanent work projects, it had to adopt the experimental funding formula for all its projects. . . . On Nov[ember 2, 2017], . . . FEMA published an amendment to its disaster declaration for Puerto Rico that required the use of the experimental funding formula across all projects.” *Id.* (citing FED. EMERGENCY MGMT. AUTH., NO. FEMA-4339-DR, PUERTO RICO; AMENDMENT NO. 5 TO NOTICE OF A MAJOR DISASTER DECLARATION (2017)).

documentation.<sup>117</sup> Furthermore, because the kinds of homes in CNMI tend to be smaller, made of non-traditional materials, and typically not up to building code as found in homes in the states, the property damage did not meet the Real Property FEMA Verified Loss threshold in order to receive direct housing assistance.<sup>118</sup> Many residents were also ineligible for relief because of their immigration status.<sup>119</sup> While those born in CNMI are U.S. citizens, and thus technically eligible for federal aid, a large portion of the population are temporary workers from other Pacific nations, including those from the Compact of Free Association (COFA) nations.<sup>120</sup> As a result, these residents are ineligible for federal disaster aid.<sup>121</sup>

## II.

### A DEVELOPING FRAMEWORK: REPARATIVE ENVIRONMENTAL JUSTICE FOR THE PEOPLES OF THE U.S. TERRITORIES

In the context of these climate crises, a reparative environmental approach—grounded in concepts of reparative justice and human rights notions of self-determination—sheds unique light on the climate injustices in the U.S. territories. Such an approach starts with the notion that the peoples’ adaptation efforts seek to restore a measure of political and economic self-determination over the management of land and resources. The field of climate justice illuminates this idea by grappling with “the direct relationship between social inequality and environmental degradation resulting from climate change.”<sup>122</sup> As Maxine Burkett recognized, the field of climate justice is “[i]nformed by post-colonial and critical legal scholarship, as well as environmental justice principles that emerged in the late 20th century.”<sup>123</sup> As such, climate justice advocates and scholars seek to correct historical injustices and to envision more just futures, while perceiving the limitations of law and legal process.<sup>124</sup>

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117. U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-91, 2018 PACIFIC ISLAND DISASTERS: FEDERAL ACTIONS HELPED FACILITATE THE RESPONSE, BUT FEMA NEEDS TO ADDRESS LONG-TERM RECOVERY CHALLENGES 24–25 (2021).

118. *Id.* at 23.

119. Anita Hofschneider, *After Super Typhoon Yutu, Many Left Without Federal Disaster Aid*, HONOLULU CIV. BEAT (Nov. 6, 2018), <https://www.civilbeat.org/2018/11/after-super-typhoon-yutu-many-left-without-federal-disaster-aid> [<https://perma.cc/4VBM-7P92>].

120. *Id.* The COFA nations are the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau. *Id.*

121. *Id.*

122. Burkett, *Behind the Veil*, *supra* note 101, at 456–57.

123. *Id.* See also Carmen G. Gonzalez, *Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses*, 36 WIS. INT’L L.J. 366, 373 (2019) (“Climate justice, like environmental justice more broadly, is grounded in human rights, including the rights to life, health, and cultural integrity; the right to a safe and healthy environment; the right to be free from race and sex discrimination; and the right to information, participation, and access to justice.”).

124. Burkett, *Behind the Veil*, *supra* note 101, at 456–57.

Similarly, Indigenous legal scholar Rebecca Tsosie identified climate justice as a key aspect of Indigenous Peoples' environmental justice claims.<sup>125</sup> Climate justice claims generally assert that “the global impacts of climate change will fall disproportionately on minority and low-income communities” and on “[I]ndigenous [P]eoples in disparate and unique environments.”<sup>126</sup> She therefore constructs an Indigenous right to “environmental self-determination” grounded in international human rights norms that would enable Indigenous Peoples to protect their traditional, land-based cultural practices and prevent climate change practices that jeopardize their physical and cultural survival.<sup>127</sup>

Native Hawaiian legal scholar D. Kapua'ala Sproat relatedly crafted a restorative justice framework linking Indigenous environmental justice claims and human rights principles of self-determination.<sup>128</sup> Acknowledging the often stark differences between groups seeking “equality” and those seeking a form of self-determination, she asserts that self-determination is “essential . . . to begin to heal the harms flowing from colonization” and articulates an Indigenous right to environmental self-determination to address climate change's impacts on land, water, and Indigenous subsistence and cultural practices.<sup>129</sup>

In similar ways, the peoples of the U.S. territories—many of whom are Indigenous Peoples—seek to restore a measure of self-determination over their land, resources, and community health and well-being. Several scholars, primarily with roots in the U.S. territories, draw close connections between environmental justice advocacy, anti-colonial movements, and self-determination. For example, Catalina M. de Onís explores the interplay between anti-colonialism in Puerto Rico and the environmental justice-informed energy justice movement.<sup>130</sup> de Onís identifies the historical and ongoing colonial exploitation of Puerto Rico that produces its present-day economic, environmental, and energy crises. Informed by this history and context, de Onís rejects energy justice movements and scholarship that fail to create space for “community member control over their own energy futures” and thus also

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125. Tsosie, *Indigenous People and Environmental Justice*, *supra* note 21, at 1644, 1654.

126. *Id.* at 1628, 1633.

127. *Id.* at 1633–46, 1674 (exploring domestic and international Native peoples' claims for environmental justice and proposing a theory of Indigenous environmental self-determination that “would impose affirmative obligations on nation-states to engage in a mitigation strategy in order to avoid catastrophic harm to indigenous peoples”). *See also* Rebecca Tsosie, *Climate Change and Indigenous Peoples: Comparative Models of Sovereignty*, 26 TUL. ENV'T L.J. 239, 255–57 (2013) (contending that “[c]limate justice must transcend narrow accounts of social justice” and proposing an intercultural model of climate equity that respects the unique values at stake for Indigenous peoples and their right to environmental self-determination).

128. D. Kapua'ala Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 137 (2011).

129. Sproat, *supra* note 21, at 160. *See also* Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1164 (1994) (identifying the “decolonizing potential of . . . Indian visions of environmental justice”).

130. de Onís, *supra* note 103, at 1.

centers self-determination as the means to achieving justice for the people of Puerto Rico.<sup>131</sup>

The self-determination principle, enshrined in the United Nations Charter, mandates the development of “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”<sup>132</sup> When a people’s right to self-determination is wrongfully and illegally abrogated, decolonization is a remedy.<sup>133</sup> Article 73 centers on the rights of “subjugated peoples” of the non-self-governing territories who have not yet attained a full measure of self-government, and thereby directs administering states to “accept as a sacred trust the obligation to promote to the utmost . . . the well-being of the inhabitants of these territories.”<sup>134</sup> Resolution 1514 of the United Nations General Assembly affirms “the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations.”<sup>135</sup> As such, it instructs that “[i]mmediate steps” be taken “to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire.”<sup>136</sup> Those colonizing powers must periodically transmit information to the Secretary-General on the measures they have taken to help move territories toward “a full measure of self-government.”<sup>137</sup>

Thus, “meaningful decolonization . . . entails repairing the damage suffered by those who have experienced systemic oppression according to their self-shaped notions of reparation.”<sup>138</sup> This type of repair, or “reparative justice,”

131. *Id.* at 1–2.

132. U.N. Charter art. 1, ¶ 2. Additional U.N. instruments more fully define the right and provide that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” International Covenant on Civil and Political Rights art. 1, ¶ 1, Mar. 23, 1976, 999 U.N.T.S. 171, 173; International Covenant on Economic, Social and Cultural Rights art. 1, ¶ 1, Jan. 3, 1976, 993 U.N.T.S. 3, 5. *See also* Aguon, *On Loving the Maps*, *supra* note 14, at 51 (“[U]nder international law, self-determination remains a comprehensive, unparsed, and inalienable right of all peoples to freely choose their political status.”); EFRÉN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO* 119 (2001) (noting that self-determination “implies the legal or moral right of a people or group . . . to determine its status and associations with other peoples or groups and to fashion the organizing principles of its social existence”).

133. Aguon, *On Loving the Maps*, *supra* note 14, at 52.

134. U.N. Charter art. 73 (instructing colonial powers to “recognize the principle that the interests of the inhabitants of these territories are paramount”).

135. G.A. Res. 1514 (XV), at 66–67 (Dec. 14, 1960).

136. *Id.*

137. G.A. Res. 1541 (XV), at 29–30 (Dec. 15, 1960). Resolution 1541 delineates administering states’ duty to transmit information to the Secretary-General on the status of territories “whose peoples have not yet attained a full measure of self-government,” and establishes criteria by which a non-self-governing territory is considered to have reached a full measure of self-government: emergence as a sovereign independent State; free association with an independent State; or integration with an independent State. *Id.*

138. Serrano, *Elevating the Perspectives*, *supra* note 28, at 425 (citing Rebecca Tsosie, *Indigenous Peoples and the Ethics of Remediation: Redressing the Legacy of Radioactive*

focuses on mending breaches in the polity by healing the persisting wounds of communities harmed.<sup>139</sup> Its goal is to ascertain and respond to groups' self-determined ideas of injury and remedy in order to "build[] new relationships as focal points for fostering an interest-convergence among the victims of injustice . . . and society itself."<sup>140</sup> Reparative justice for U.S. territorial peoples may entail repairing longstanding imbalances of power and agency, and redressing multiple political, economic, cultural, and social harms.<sup>141</sup> For Indigenous inhabitants of the territories, in particular, the following are central to their self-determination and reparative justice: the preservation of their deep connections to the environment (including, where applicable, the return of land); the reclaiming of knowledge systems, language, and life ways; and the regeneration of self-government.<sup>142</sup>

While climate change may impact all U.S. territories, some populations are disproportionately vulnerable, including children, the elderly, low-income communities, and people with disabilities.<sup>143</sup> In the climate context, "it will be critical that the climate vulnerable have a primary role in designing their future ability to adapt."<sup>144</sup> Self-determination and reparative justice account for these existing inequalities by ensuring that the most vulnerable are included in the planning process and that their needs are reflected in management and emergency response plans.<sup>145</sup>

These ideas align with Maxine Burkett's concept of "climate reparations."<sup>146</sup> For her, climate reparations seek "to assure the ability of the climate vulnerable to contemplate a better livelihood in light of future climate challenges."<sup>147</sup> To do so, the process should "assess the harm caused by the past emissions of the major polluters and . . . improve the lives of the climate vulnerable through direct programs, policies and/or mechanisms for significant resource transfers."<sup>148</sup> Her reparations proposal has a strong moral dimension: it must "squarely confront the deep moral questions posed by both the initiating harm—excess emissions—and the continuing harm: the failure to adequately include the plight of the climate vulnerable in the current processes developed to

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*Contamination for Native Peoples and Native Lands*, 13 SANTA CLARA J. INT'L L. 203, 245 (2015) [hereinafter Tsosie, *Indigenous Peoples and the Ethics of Remediation*].

139. See Eric K. Yamamoto, Sandra Hye Yum Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 4 (2007).

140. *Id.*

141. Serrano, *A Reparative Justice*, *supra* note 21, at 523.

142. *Id.*

143. See GRECNI ET AL., CLIMATE CHANGE IN CNMI, *supra* note 60, at 26–27.

144. Burkett, *Climate Reparations*, *supra* note 19, at 533.

145. See GRECNI ET AL., CLIMATE CHANGE IN CNMI, *supra* note 60, at 27.

146. See Burkett, *Climate Reparations*, *supra* note 19, at 525 ("A carefully-conceived and executed reparations effort will allow for a thoughtful approach to the climate change dilemma, provide a means for healing, and . . . further galvanise the perpetrators to act beyond what is mandated by the enumerated reparations measures.")

147. *Id.* at 523.

148. *Id.*

mitigate and adapt to the climate crisis.”<sup>149</sup> Climate reparations may take many forms, but, as she contends, “the reparations frame should be steeped in the possibility of a moral discourse and the reconstitution of society, promoting a more expansive and comprehensive concept of how to compensate for this moral wrong.”<sup>150</sup>

Legal scholar Eric Yamamoto similarly identifies the need for “a kind of justice that aims to heal psychological wounds and repair the material damage of historical injustice.”<sup>151</sup> For him, the appropriate framework centers “on ways to ‘repair’ the deep harms to society (divisions, guilt, shame, lack of moral standing) by healing the continuing [economic and psychological] wounds” of communities experiencing group-based injustice.<sup>152</sup> Repair entails recognition that “all are members of the polity, and injury to one harms the entire community, and therefore healing the injured is the responsibility of all.”<sup>153</sup> Genuine healing requires mutual engagement and simultaneous repair on both the individual and collective level. Participation “must be widespread, and all must see a benefit.”<sup>154</sup> And for repair to be meaningful, “communities must see ‘material change’ in socio-economic conditions.”<sup>155</sup>

As Rebecca Tsosie observed, no single theory of reparative justice “can fit all cultures, all nations, and all peoples.”<sup>156</sup> Instead, “the theory will differ depending on the particular historical context and cultural framework that applies.”<sup>157</sup> For the peoples of the U.S. territories, differing status, power, and access to resources shape U.S. territorial groups’ distinct efforts to mitigate and adapt to climate change impacts. In this way, “climate change not only emphasizes the disparities in terms of environmental vulnerability but also

149. *Id.* (describing reparations as “a process, instigated and propelled by the moral challenge of a massive wrong, to construct methods to improve the lives of current victims into the future”).

150. *Id.* at 524. *See also* BEN ALMASSI, REPARATIVE ENVIRONMENTAL JUSTICE IN A WORLD OF WOUNDS 9 (2021) (contending that environmental injustice and other wrongs “do moral damage to our relationships, which thus calls for a process of moral repair if and when these relationships are to become morally healthier”); Benjamin Hale, Adam Pérou Hermans & Alexander Lee, *Climate Adaptation, Moral Reparation, and the Baseline Problem*, in SUCCESSFUL ADAPTATION TO CLIMATE CHANGE: LINKING SCIENCE AND POLICY IN A RAPIDLY CHANGING WORLD 67, 68 (Susanne C. Moser & Maxwell T. Boykoff eds., 2013) (“[O]ur obligations to assist in adaptation stem from a moral obligation to right prior wrongs.”).

151. Eric K. Yamamoto & Susan K. Serrano, *Reparations Theory and Practice Then and Now: Mau Mau Redress Litigation and the British High Court*, 18 UCLA ASIAN PAC. AM. L.J. 71, 87 (2013).

152. *Id.* (quoting Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A “Social Healing Through Justice” Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 20 (2009)).

153. *Id.* at 86 n.131.

154. *Id.*

155. *Id.* Yamamoto offers a multidisciplinary four-dimensional framework to guide and assess reparatory initiatives (recognition, responsibility, reconstruction, and reparation). *See* Eric K. Yamamoto, Miyoko Pettit & Sara Lee, *Unfinished Business: A Joint South Korea and United States Jeju 4.3 Tragedy Task Force to Further Implement Recommendations and Foster Comprehensive and Enduring Social Healing Through Justice*, 15 ASIAN-PAC. L. & POL’Y J. 1, 20–21 (2014).

156. Tsosie, *Indigenous Peoples and the Ethics of Remediation*, *supra* note 138, at 253.

157. *Id.* at 253–54.

demonstrates that adaptative capacity is ‘distributed unevenly along the lines of age, class, ethnicity, gender, and religion.’”<sup>158</sup> In addition, among differing U.S. territories, “adaptation costs differ, which illustrates . . . varying degrees of economic and infrastructural stability.”<sup>159</sup> Climate repair efforts thus should closely assess the environmental injuries to specific communities and work to rectify harms in ways that prioritize the peoples’ self-determination and account for the lasting impacts of U.S. colonization in the particular setting.

### III.

#### A REPARATIVE JUSTICE ANALYSIS: THE INSULAR AREA CLIMATE CHANGE ACT AND SELF-DETERMINATION IN THE U.S. TERRITORIES

The deep injustices facing the climate vulnerable in the U.S. territories to date have not been sufficiently addressed by existing political and legal systems.<sup>160</sup> Some incremental political or legal processes can offer piecemeal remedies and temporary fixes, but will likely not address the larger, persisting historical wrongs, self-determination struggles, and moral challenges. In addition, as discussed above, many available climate strategies are stymied because they are linked to the U.S. territories’ colonial status.

So, again, this Article asks the question raised at the outset: in the struggle between local and national control of the environment and the tension between domestic and international responsibility for addressing the impacts of climate change, where do the peoples of the U.S. territories fit? And, in light of the developing method of inquiry described above, how can we assess the possibilities for repair? While there are no clear answers, this method of inquiry points to some possibilities.

The Insular Area Climate Change Act (the Act) is one prospect. Recognizing the stark limitations on U.S. territorial ability to address climate change, Chair of the House Natural Resources Committee Raúl M. Grijalva introduced the Act in 2021.<sup>161</sup> It proposes, among other things, the creation of several offices and task forces to foster climate resiliency in the U.S. territories and other insular areas.<sup>162</sup> For example, it would create an Office of Insular Area Energy Policy and Programs within the Department of Energy to handle energy planning and conservation programs in the territories.<sup>163</sup> It would also form a federal interagency task force to provide U.S. territories better access to climate change-related federal programs.<sup>164</sup> The Act also seeks to create an Insular Area National Program Office within the EPA centered on strengthening

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158. Tapu, *Finding Fonua*, *supra* note 56, at 794 (citing Hall & Weiss, *supra* note 75, at 336).

159. *Id.*

160. See Lin, *supra* note 51, at 1281–91 (critiquing past legal and political efforts to secure full political rights for the U.S. territories).

161. Insular Area Climate Change Act, H.R. 2780, 117th Cong. (2021).

162. *Id.*

163. *Id.* § 401.

164. *Id.* § 101.

infrastructure to withstand natural disasters, expanding renewable energy and energy efficiency, providing technical assistance, and centralizing EPA efforts in the insular areas.<sup>165</sup>

The Act further endeavors to remedy a long-standing inequality in funding opportunities for U.S. territories to combat climate change. It would provide grant programs to develop technologies to reduce climate crisis impacts, expand renewable energy, and expand energy efficiency.<sup>166</sup> It also seeks to provide a cost-share waiver for federal “disaster relief, long-term recovery, restoration of infrastructure and housing, economic revitalization, and mitigation,”<sup>167</sup> and would forgive federal Community Disaster Loans to insular areas.<sup>168</sup> Finally, it proposes to fund renewable energy and sustainable infrastructure,<sup>169</sup> improve weather data collection and forecasting,<sup>170</sup> and provide grants to higher education institutions and nonprofits to monitor, collect, and analyze climate change data.<sup>171</sup>

While only one part of a larger climate justice strategy,<sup>172</sup> the Act appears promising. The Act seeks to improve the lives of the climate vulnerable in the U.S. territories through direct programs and policies that foster long-range planning. Delegate Stacey Plaskett of the U.S. Virgin Islands, a co-sponsor of the bill, highlighted the Act’s cost-share waiver on FEMA assistance and forgiveness of Community Disaster Loans which would “free up much-needed local resources to be put towards community needs.”<sup>173</sup> For Dr. Austin Shelton of Guam, the increase in the cost-share waiver to \$750,000 “would greatly increase the ability of islands to implement climate action projects . . . because local funds are limited and often tied up for other federal matching requirements.”<sup>174</sup> And Edison Avilés Deliz of the Puerto Rico Energy Bureau

165. *Id.* § 502; Grijalva Introduces Insular Area Climate Change Act, *supra* note 11.

166. *See* Insular Area Climate Change Act, H.R. 2780, 117th Cong. §§ 404, 503, 504 (2021).

167. *Id.* § 602.

168. *Id.* § 601.

169. *Id.* §§ 503, 504.

170. *Id.* § 303(b)(1).

171. *Id.* § 301.

172. *See Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies*, WHITE HOUSE (Apr. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/> [<https://perma.cc/8ZJ7-ASH6>]. *See also* Joe Biden, Opinion, *Puerto Rico Deserves More Respect than Donald Trump Has Given*, ORLANDO SENTINEL (Dec. 5, 2019), <https://www.orlandosentinel.com/opinion/guest-commentary/os-op-joe-biden-rebuild-puerto-rico-20191205-7qxc6pwz6nbzja2hngsinepire-story.html> [<https://perma.cc/59XT-WQ79>] (pledging to invest in clean energy to prevent the kinds of catastrophic impacts experienced by Puerto Rico during Hurricane Maria, and promising to include Puerto Rico in his infrastructure plan).

173. Grijalva Introduces Insular Area Climate Change Act, *supra* note 11.

174. *Insular Area Climate Change Act: Hearing on Discussion Draft of H.R. \_\_\_ Before the Comm. on Nat. Res.*, 117th Cong. 68 (2021) (statement of Austin J. Shelton, Ph.D., Dir. & Assistant Professor, U. Guam Ctr. Island Sustainability & Sea Grant),

endorsed the bill because the \$10.5 million that FEMA obligated to rebuild the electric system after Hurricanes Irma and Maria requires 10 percent matching from Puerto Rico, which is an added burden for utility ratepayers.<sup>175</sup> Although not monumental resource transfers, it appears that the Act's funding allocations and new strategies will work "to assure the ability of the climate vulnerable to contemplate a better livelihood in light of future climate challenges."<sup>176</sup>

If Congress passes the Act, it will in part demonstrate its acceptance of responsibility for repairing the damage and reallocating some economic power. Indeed, Commissioner Jean-Pierre L. Oriol of the U.S. Virgin Islands applauded the language on "equitable baseline funding" because "[m]any baseline formulas for assistance under federal programs use landmass or population as criteria in the allocation of funds, which means that the islands will likely always receive the least amount of funding[.]"<sup>177</sup> Also, according to PJ Wilson of the Solar and Energy Storage Association of Puerto Rico, the U.S. states benefit from a 25 percent or higher discount tax benefit on the price of solar installations, but the people of Puerto Rico lack access to this program.<sup>178</sup> And Brenda Torres of the San Juan Bay Estuary Program in Puerto Rico praised the "funding for training and technical assistance . . . [because] work related to climate change adaptation/mitigation and green technologies can also be an opportunity for employment, innovation, and economic development."<sup>179</sup> The Act thus appears to foster meaningful "material change" in socio-economic conditions in several ways.

On the other hand, some critique the Act for failing to consider territorial peoples' distinct cultural values and needs. For example, Delegate Amata Radewagen of American Samoa criticized the Act's "one-size-fits-all approach" and argued that it failed to account for how projects such as offshore wind farms may impact Indigenous lands.<sup>180</sup> She testified that her constituents were concerned "about the impact windmills will have on cultural land and sea traditions, scenic views, wildlife impact, and fishing access."<sup>181</sup> She contended

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<https://www.govinfo.gov/content/pkg/CHRG-117hrg43630/html/CHRG-117hrg43630.htm>  
[<https://perma.cc/GWD4-8LJN>].

175. Grijalva Introduces Insular Area Climate Change Act, *supra* note 11.

176. See Burkett, *Climate Reparations*, *supra* note 19, at 523.

177. *Insular Area Climate Change Act: Hearing on Discussion Draft of H.R. \_\_\_ Before the Comm. on Nat. Res.*, 117th Cong. 74 (2021) (statement of Jean-Pierre L. Oriol, Comm'r USVI Dep't Plan. & Nat. Res.), <https://www.govinfo.gov/content/pkg/CHRG-117hrg43630/html/CHRG-117hrg43630.htm> [<https://perma.cc/GWD4-8LJN>].

178. Grijalva Introduces Insular Area Climate Change Act, *supra* note 11.

179. *Id.*

180. *Insular Area Climate Change Act: Hearing on Discussion Draft of H.R. \_\_\_ Before the Comm. on Nat. Res.*, 117th Cong. 77 (2021) (statement of Representative Aumua Amata Coleman Radewagen, Am. Sam.) [hereinafter Radewagen Statement], <https://www.govinfo.gov/content/pkg/CHRG-117hrg43630/html/CHRG-117hrg43630.htm> [<https://perma.cc/GWD4-8LJN>].

181. See Gabrielle Bye, *U.S. Territories May Receive Federal Aid for Climate Change in a New Bill*, COLO. TIMES RECORDER (Mar. 5, 2021), <https://coloradotimesrecorder.com/2021/03/u-s->

that aesthetic views of the ocean are important because Samoans bury their loved ones on their lands in ways that ensure sacred views of the ocean. These “forced changes from Washington,” she asserted, “will impact our islands[’] history, culture, and way of life.”<sup>182</sup>

Others critiqued the Act for overlooking territories’ unique approaches to remedying harms to self-determination and political power. For example, Resident Commissioner Jenniffer González-Colón of Puerto Rico opposed the Act because Puerto Rico is sometimes viewed as a “state” for funding purposes<sup>183</sup> and Puerto Rico did not want to be grouped with other insular areas and lose its existing funding sources.<sup>184</sup> These testimonies highlight the territories’ differing contexts that lead to “differing group goals, identities, and differential group power”<sup>185</sup> in the climate context. Meaningful climate repair should therefore engage in a particularized analysis of environmental injuries to specific communities that ascertains and responds to groups’ self-determined ideas of injury and remedy.<sup>186</sup> It is yet unclear whether the Act will meaningfully account for differential group power and the peoples’ divergent self-determination efforts and goals.

Further, some contend that the Act does not acknowledge the full range of climate and political harms and their underlying causes. Scholars Juan Delet-Barreto and Dr. Adi Martínez-Román contend that the Act does not sufficiently recognize the full historical, cultural, and political context of the continuing suffering.<sup>187</sup> They assert that the Act should therefore “[i]ncorporate more precise definitions that reflect both the climatic and political vulnerability of the island territories.”<sup>188</sup> They also contend that the Act should expressly

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territories-may-receive-federal-aid-for-climate-change-in-a-new-bill/34912/ [https://perma.cc/TVH8-P4MF].

182. Radewagen Statement, *supra* note 180, at 77.

183. *Insular Area Climate Change Act: Hearing on Discussion Draft of H.R. \_\_ Before the Comm. on Nat. Res.*, 117th Cong. 2 (2021) (statement of Hon. Jenniffer Gonzalez-Colon, Resident Comm’r Cong. Territory P.R.) [hereinafter Gonzalez-Colon Statement], <https://www.govinfo.gov/content/pkg/CHRG-117hhr43630/html/CHRG-117hhr43630.htm> [https://perma.cc/GWD4-8LJN]. The American Rescue Plan Act (ARPA) was enacted in April 2021 to provide immediate support for those impacted by the Covid-19 pandemic. There are important ways that ARPA treats Puerto Rico in the same manner as states, including imposing the same qualifying threshold income to receive the economic impact payments (also referred to as stimulus checks) and child tax credits. *Implications of Puerto Rico’s Territory Status in 2021 Economic Stimulus Spending*, P.R. REP. (May 25, 2021), <https://www.puertoricoreport.com/implications-of-puerto-ricos-territory-status-in-2021-economic-stimulus-spending/#.YOVP-JNKhN1> [https://perma.cc/2L6M-9YH2].

184. Gonzalez-Colon Statement, *supra* note 183, at 2.

185. See Yamamoto & Lyman, *supra* note 23, at 346.

186. See *id.*

187. Juan Delet-Barreto & Adi Martínez-Román, *Insular Areas Climate Change Act: Strengthen Territories’ Response to Climate Disasters and Protect the Most Vulnerable*, UNION OF CONCERNED SCIENTISTS (May 10, 2021), <https://blog.ucusa.org/juan-delet-barreto/insular-areas-climate-change-act-strengthen-territories-response-to-climate-disasters-and-protect-the-most-vulnerable/> [https://perma.cc/29W8-BB5Z].

188. *Id.*

“incorporate local actors from the non-governmental sector, grassroots organizations, as well as academics and scientists inserted in community work”<sup>189</sup> to better ensure that appropriate on-the-ground strategies and remedies are sought.<sup>190</sup>

Ironically, because of the territories’ colonial status, no U.S. territory delegate can ultimately vote on the Act. In addition to their climate vulnerability, discussed above, the U.S. territories are further harmed by their exclusion from meaningful participation in national political decision-making. Because the territories belong to, but are not part of, the U.S. polity, the United States exerts near absolute power in agenda setting. In this way, the United States “fail[s] to adequately include the plight of the climate vulnerable in the current processes developed to mitigate and adapt to the climate crisis.”<sup>191</sup>

The Act, overall, appears to be an important step in fostering climate resiliency in the U.S. territories, but without a deeper commitment to self-determination or major reallocation of political power, as well as aggressive commitments to mitigation by major emitters, any incremental or piecemeal policies will make only limited progress. And territories’ inability to develop meaningful adaptation efforts to combat the climate crisis—inextricably linked to territories’ colonial status—is likely to continue absent this broader U.S. undertaking.

Along these lines, some contend that allowing individual U.S. territories to immediately conduct binding political status processes<sup>192</sup> would serve to acknowledge the historical, cultural, and structural context of past and continuing suffering and signal the acceptance of responsibility for repairing the colonial damage.<sup>193</sup> For example, Guam’s Governor Lou Leon Guerrero recently called on the Biden Administration to “rectify its colonial past and resolve Guam’s political status.”<sup>194</sup> For her, Guam is “subject to a colonial relationship”

189. See *id.* (asserting that it is not enough for the law to require only collaboration between executive governments at the local and federal level, especially when we consider that the island territories suffer serious vulnerabilities related to lack of political power and governance).

190. See *id.* (“[E]ven when island territories have very diverse populations and histories, the inclusion of local actors and prioritization of local knowledge will help balance power and correct the systemic failures that have left our populations so vulnerable and injured”). See also Monzón Statement, *supra* note 66, at 6 (“[T]o transform our communities, we need to understand their needs, and only then can we design and implement programs in ways that community members engage to achieve adaptation, resilience, and mitigation.”).

191. See Burkett, *Climate Reparations*, *supra* note 19, at 523.

192. See Tom Perriello & Karina Claudio Betancourt, Opinion, *Self-Determination for Puerto Rico: A Win for Democracy, Not Democrats*, ROLL CALL (Mar. 12, 2021), <https://www.rollcall.com/2021/03/12/puerto-ricos-sovereignty-a-win-for-democracy-not-democrats/> [<https://perma.cc/LV7F-DC63>].

193. See Yamamoto et al., *supra* note 155, at 20–21.

194. Christina Lee, ‘Political Destiny’: Gov. Leon Guerrero Calls on President Biden for Support on Decolonization, PAC. DAILY NEWS (June 18, 2021) (quoting Governor Lou Leon Guerrero), [https://www.guampdn.com/news/local/political-destiny-gov-leon-guerrero-calls-on-president-biden-for-support-on-decolonization/article\\_ee1e0084-f6e1-5779-8905-2c39dbaf7e33.html](https://www.guampdn.com/news/local/political-destiny-gov-leon-guerrero-calls-on-president-biden-for-support-on-decolonization/article_ee1e0084-f6e1-5779-8905-2c39dbaf7e33.html) [<https://perma.cc/8T59-DYGX>].

that is guided by “consultation rather than consent[,] and unilateral authority rather than democratic will,” which “not only hinder[s] the CHamoru people’s right to self-determination, but threaten[s] the social, economic and overall well-being of Guam and her people.”<sup>195</sup> But the United States has not established—and is unlikely to establish—a binding political status vote and process for the U.S. territories given their strategic importance to the U.S. military, among other reasons.<sup>196</sup> The continued militarism and environmental exploitation of the territories indicates the United States’ reluctance to significantly repair the disproportionate environmental burdens on the U.S. island territories.<sup>197</sup>

Others assert that the elimination of the *Insular Cases* is the best method for equalizing treatment and access to benefits for the U.S. territories. As described above, the *Insular Cases* legitimized the power relationship that today undermines equality efforts of U.S. territorial peoples. For many, rejecting the *Insular Cases* would communicate at least a desire to reconstruct and build new productive political relationships. For this reason, representatives from the U.S. territories in 2021 called on the U.S. House of Representatives to pass a resolution condemning the *Insular Cases*, largely because of their markedly racist underpinnings and their sharp constriction of U.S. territorial rights.<sup>198</sup>

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195. Gov. Lou Leon Guerrero, *The Right to Self-Determination*, PAC. ISLAND TIMES (June 17, 2021), <https://www.pacificislandtimes.com/post/the-right-to-self-determination> [https://perma.cc/4KGG-ERYZ].

196. See Blue Ocean L. & Unrepresented Nat’l & Peoples Org., *Submission to Mr. Francisco Cali Tzay, Special Rapporteur on the Rights of Indigenous Peoples, Regarding Ongoing Human Rights Violations of the Indigenous Chamorro People of Guam Under U.S. Colonization and Militarization*, 4 (2021) [hereinafter *Submission to Mr. Francisco Cali Tzay, Special Rapporteur*], <https://unpo.org/downloads/2658.pdf> [https://perma.cc/5XNX-LA2U] (describing the United States courts’ invalidation of a non-binding plebiscite for the native inhabitants of Guam).

197. Although the Biden Administration has pledged to “prioritize action on climate change” in the U.S. territories, the Biden-Harris Plan for Recovery, Renewal and Respect for Puerto Rico made no mention of self-determination. See *The Biden-Harris Plan for Recovery, Renewal and Respect for Puerto Rico*, BIDEN HARRIS DEMOCRATS <https://joebiden.com/the-biden-harris-plan-for-recovery-renewal-and-respect-for-puerto-rico> [https://perma.cc/W4U2-VGF8] (last visited May 2, 2022) (focusing primarily on infrastructure, economic development, debt relief, and education).

198. The resolution “acknowledges that the *Insular Cases* are contrary to the text and history of the Constitution,” recognizes that “the *Insular Cases* are relics of the racial views of an earlier era that have no place in our Nation today,” and, therefore, “rejects the *Insular Cases* and their application to all present and future cases and controversies involving the application of the Constitution in United States territories.” H.R. Res. 279, 117th Cong. (2021). The U.S. Supreme Court would next need to overrule the *Insular Cases*, but it is not clear that the current Court would be willing to do so. See Joe Taitano II, *Guam and Territories Appear Before Congress to Oppose Insular Cases*, PAC. DAILY NEWS (May 13, 2021), [https://www.guampdn.com/news/local/guam-and-territories-appear-before-congress-to-oppose-insular-cases/article\\_906e9221-e7c9-50ae-a8fc-074707d2a19e.html](https://www.guampdn.com/news/local/guam-and-territories-appear-before-congress-to-oppose-insular-cases/article_906e9221-e7c9-50ae-a8fc-074707d2a19e.html) [https://perma.cc/99YS-AEX4] (“[A] serious process and conversation about self-determination for the territories, such as a path to statehood or independence, or even a constitutional amendment would be needed.”). Members of Congress also recently introduced several bills “to end the various forms of discrimination the incorporation doctrine has produced.” House Nat. Res. Comm. Democrats, *supra* note 53 (listing five House Resolutions seeking to cure inequalities in voting rights, Medicaid, Supplemental Security Income, and Temporary Assistance for Needy Families). For a brief analysis of other federal assistance possibilities, see Amelia Cheatham & Diana Roy, *Puerto Rico: A U.S. Territory in Crisis*, COUNCIL ON

But the elimination of the *Insular Cases* raises uncharted complications, particularly for the territories' self-determination efforts and the rights of the Indigenous Peoples of the territories.<sup>199</sup> For example, CHamoru human rights advocate and scholar Julian Aguon suggests that their total rejection “could remove the flexibility that Guam and the territories have in deciding between fully incorporating to the U.S. as a state, or separating in some form of independence.”<sup>200</sup> And the Tenth Circuit Court of Appeals recently determined that “[t]he flexibility of the *Insular Cases*' framework gives federal courts significant latitude to preserve traditional cultural practices that might otherwise run afoul of individual rights enshrined in the Constitution.”<sup>201</sup> In this fashion, the framework “permits courts to defer to the preferences of indigenous peoples, so that they may chart their own course.”<sup>202</sup>

The complete eradication of the *Insular Cases* may indeed open the door to equalized governmental benefits for climate change-induced disaster recovery and adaptation, but it is unclear how the blanket imposition of constitutional provisions to the territories may impact individual territories' climate change adaptation choices and strategies, particularly regarding Indigenous Peoples. As raised by Delegate Amata Radewagen of American Samoa, across-the-board imposed changes could negatively affect American Samoa's “culture[] and way

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FOREIGN RELAT. (Feb. 3, 2022), <https://www.cfr.org/background/puerto-rico-us-territory-crisis> [<https://perma.cc/D6PV-Z5JF>].

199. See, e.g., Joe Taitano II, *Senators Debate Insular Cases During Session*, PAC. DAILY NEWS (May 26, 2021), [https://www.guampdn.com/news/local/senators-debate-insular-cases-during-session/article\\_3b177d84-4b5c-5469-91d5-8c3f395d31fe.html](https://www.guampdn.com/news/local/senators-debate-insular-cases-during-session/article_3b177d84-4b5c-5469-91d5-8c3f395d31fe.html) [<https://perma.cc/DVQ5-TLMY>] (reporting on Guam senators' differing interpretations of the elimination of the *Insular Cases* for Guam's self-determination efforts); Peter S. Watson, *Asking Judges to Decide Status Threatens Self-Determination*, GUAM DAILY POST (May 31, 2021), [https://www.postguam.com/forum/letter\\_to\\_the\\_editor/asking-judges-to-decide-status-threatens-self-determination/article\\_594b1ad0-bdc0-11eb-8a2d-b73802256c70.html](https://www.postguam.com/forum/letter_to_the_editor/asking-judges-to-decide-status-threatens-self-determination/article_594b1ad0-bdc0-11eb-8a2d-b73802256c70.html) [<https://perma.cc/R92M-TRVS>] (arguing that “self-determination by the people of each territory on the real status options” is preferable to judicial imposition of the U.S. Constitution without equal representation); Serrano, *Elevating the Perspectives*, *supra* note 28, at 427–28 (describing the divergent uses of the *Insular Cases* by different territorial communities).

200. Taitano II, *supra* note 199. Both “CHamoru” and “Chamorro” are used to describe the Indigenous people of the Mariana Islands (Guam and the Commonwealth of the Northern Marianas). We use “CHamoru” to defer to the preference of many CHamoru rights activists and to align with the recommendation of the Commission on the CHamoru Language and the Teaching of the History and Culture of the Indigenous People of Guam. See Daily Post Staff, *Commission: CHamoru, not Chamorro; Guam's Female Governor is Maga'håga*, GUAM DAILY POST (Nov. 30, 2018), [https://www.postguam.com/news/local/commission-chamoru-not-chamorro-guam-s-female-governor-is-maga/article\\_045523dc-f3b9-11e8-9b53-5ba21e8bb30a.html](https://www.postguam.com/news/local/commission-chamoru-not-chamorro-guam-s-female-governor-is-maga/article_045523dc-f3b9-11e8-9b53-5ba21e8bb30a.html) [<https://perma.cc/QA3P-QHTA>].

201. *Fitisemanu v. United States*, 1 F.4th 862, 870–71 (10th Cir. 2021).

202. *Id.* See Ian Falefuafua Tapu, Comment, *Who Really Is a Noble? The Constitutionality of American Samoa's Matai System*, 24 UCLA ASIAN PAC. AM. L.J. 61, 79 (2020). For an exploration of the complexities of the *Insular Cases*, and in particular how they can be used as a double-edged sword to both benefit and impair LGBTQ rights and territorial self-determination, see Ian Falefuafua Tapu, Comment, *Is It Really Paradise? LGBTQ Rights in the U.S. Territories*, 19 DUKEMINIER AWARDS J. 273, 275–78 (2020).

of life.”<sup>203</sup> In the absence of the *Insular Cases*, would a court, as the Ninth Circuit did in *Wabot v. Villacrusis*,<sup>204</sup> hold that ancestry-based restrictions on certain acquisitions of land are lawful restorative measures to promote the economic advancement and self-sufficiency of Native peoples?<sup>205</sup> Or, would a court, like the Tenth Circuit recently did in *Fitisemanu v. U.S.*, determine that judicial imposition of a constitutional guarantee would impermissibly interfere with an Indigenous People’s traditional culture and distinctive way of life?<sup>206</sup> These are important questions for the United States to contemplate as it confronts this moral imperative: to both act decisively on the climate crisis and repair the long-standing damage to self-determination in America’s modern-day colonies.

#### CONCLUSION

The EPA recently cautioned that the United States has “entered unprecedented climate territory,”<sup>207</sup> because climate change “has become even more evident, stronger, and extreme.”<sup>208</sup> The U.S. territories disproportionately experience this climate crisis—through rising ocean and air temperatures, massive tropical storms, sea level rise, increased ocean acidity, and drought, causing devastating impacts to health, ecosystems, infrastructure, subsistence practices, agriculture, and food security<sup>209</sup>—while they contribute very little to greenhouse gas emissions.

This Article sought to uncover the deep, yet often invisible, links between the climate crisis and the modern-day colonial status of the U.S. territories. In particular, their paradoxical status as “unincorporated” territories—rooted in U.S. colonialism and plenary power—impedes their ability to develop meaningful adaptation efforts to combat the climate crisis in their homelands. The territories exist in a political limbo: on one hand, they do not have equal

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203. See Radewagen Statement, *supra* note 180, at 77. See also Watson, *supra* note 199 (contending that House Resolution 279 “demands federal courts treat all five territories as a single body politic instead of five separate bodies politic under current organic acts” and that overruling *Downes* would require applying the uniform taxation clause, which would impose federal taxes as they exist in the states, but without corresponding equality of representation).

204. *Wabot v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1990).

205. *Id.* at 1451–52, 1462 (holding that interposing the Equal Protection Clause in that context would be impractical and anomalous because it would lead to “the loss of [Native] land, [and the Native People’s] cultural and social identity,” and “force the United States to break its pledge to preserve and protect NMI culture and property”).

206. See *Fitisemanu*, 1 F.4th at 870–71.

207. See Dino Grandoni & Brady Dennis, *U.S. Has Entered Unprecedented Climate Territory, EPA Warns*, WASH. POST (May 12, 2021), <https://www.washingtonpost.com/climate-environment/2021/05/12/us-has-entered-unprecedented-climate-territory-epa-warns/> [<https://perma.cc/5BEZ-HS72>].

208. EPA, *EPA Relaunches Climate Indicators Website Showing How Climate Change Is Impacting Peoples’ Health and Environment* (May 12, 2021), <https://www.epa.gov/newsreleases/epa-relaunches-climate-indicators-website-showing-how-climate-change-impacting-peoples> [<https://perma.cc/C9E6-8825>].

209. See *supra* notes 55–65 and accompanying text.

access to federal programs aimed at building climate resiliency, and on the other, they cannot access the same international funding and support as similarly situated island nations.<sup>210</sup>

To shed light on this lasting second-class status, the Article briefly sketched a developing reparative justice environmental approach that draws insights from climate scholar Maxine Burkett’s call for climate reparations.<sup>211</sup> Rooted in concepts of reparative justice and human rights notions of self-determination, this developing method of inquiry acknowledges the differential empowerment of the territories as they endeavor to combat the climate crisis.

Employing this framing, the Article then briefly assessed the newly-proposed Insular Area Climate Change Act, which seeks to reduce climate crisis impacts on U.S. territories and freely associated states by creating mechanisms and offering increased access to federal programs to foster mitigation and adaptation.<sup>212</sup> While the Insular Area Climate Change Act is a significant step forward—as part of an extensive climate change strategy<sup>213</sup>—climate resiliency for the U.S. territories requires a substantial reparative effort that advances the territories’ self-determination and prioritizes the peoples’ on-the-ground needs and approaches to decolonization.<sup>214</sup>

Much like small island developing states, the U.S. island territories are “microcosms of our larger society, and . . . grapple with a threat for which they are largely inculpable.”<sup>215</sup> Thus, as many contend, climate resiliency for the U.S. territories must take center stage in U.S. policymaking.<sup>216</sup> At the same time, meaningful solutions should look to the knowledge of Indigenous and colonized peoples to meet the “moral challenge” of repairing this immense wrong. Only then can we, in the words of CHamoru human rights advocate Julian Aguon, “build a new world rooted in reciprocity and mutual respect—for the earth and for each other.”<sup>217</sup>

210. See *supra* notes 69–100 and accompanying text.

211. Burkett, *Climate Reparations*, *supra* note 19, at 523.

212. Insular Area Climate Change Act, H.R. 2780, 117th Cong. (2021).

213. See *U.S. Announces Support for Islands-Led Global Initiative for Climate Solutions*, CISION (Apr. 23, 2021), <https://www.prnewswire.com/news-releases/us-announces-support-for-islands-led-global-initiative-for-climate-solutions-301276195.html> [<https://perma.cc/9EYL-34XP>] (reporting that U.S. Special Presidential Envoy for Climate John Kerry declared U.S. support for the Local2030 Islands Network, a peer-to-peer network that brings together island nations, states, and communities to combat the climate crisis through local island-driven, culturally-informed solutions).

214. See, e.g., *Submission to Mr. Francisco Calí Tzay, Special Rapporteur*, *supra* note 196.

215. Leila Mead, *Small Islands, Large Oceans: Voices on the Frontlines of Climate Change*, IISD EARTH NEGOTIATIONS BULLETIN 7 (Mar. 2021) (quoting Achim Steiner, Former Exec. Dir. U.N. Env’t Programme), <https://www.iisd.org/system/files/2021-03/still-one-earth-SIDS.pdf> [<https://perma.cc/9EZB-GAUS>].

216. Grijalva Unveils Discussion Draft, *supra* note 4.

217. Julian Aguon, *No Country for Eight-Spot Butterflies*, BOS. REV. (June 7, 2021), <https://bostonreview.net/science-nature-global-justice/julian-aguon-no-country-eight-spot-butterflies> [<https://perma.cc/3ZGG-HESX>].