Reframing Environmental Justice at the Margins of U.S. Empire

Susan K. Serrano*

I. Introduction

For the CHamoru people of Guam, the ongoing U.S. military buildup in their homelands—the construction of a military base and massive live-fire training range complex, alongside the influx of thousands of military personnel—is emblematic of longstanding United States militarism and colonization.1 Construction now underway includes five live-fire ranges placed perilously close to the island’s primary source of drinking water and posi-

* Director of Faculty Research; Professor of Law and Associate Director, Ka Huli Ao Center for Excellence in Native Hawaiian Law, William S. Richardson School of Law, University of Hawai‘i at Mānoa. Many thanks to Eric Yamamoto for reviewing drafts of this Article, to Sarah Kelly for her excellent research assistance, and to the editors and staff of the Harvard Civil Rights-Civil Liberties Law Review for their outstanding suggestions and careful editorial work.

tioned over several culturally significant sites, including burials. The destruction of native limestone forest proceeds apace, and a neighboring wildlife refuge is slated to become a surface danger zone, resulting in restricted access for fishers and gatherers of traditional medicines. Guam’s residents, many CHamoru, vigorously oppose the military’s plans in the streets, courtrooms, and international arenas and view the United States’ actions “as the latest course in a long and steady diet of dispossession.”

Thousands of miles away on the island of Vieques, Puerto Rico, residents fight for the removal of toxic waste and pollutants from the U.S. Navy’s decades-long live-fire bombing of their island home. For over sixty years, the Navy used Vieques as a site for air-to-ground bombing, ship-to-shore gun fire, and the testing of chemical and biological weapons. The Navy left behind unexploded ordnance and toxic materials such as depleted

---


uranium, napalm, Agent Orange, mercury, and lead, but has denied any causal link between those toxins and the people’s high rates of sickness. The Navy is tasked with cleaning up unexploded ordnance from the land and water—now expected to continue through 2032—but Viequenses fear the risky cleanup procedures are worsening their already imperiled health and environment. In the wake of the catastrophic federal disaster response to Hurricane Maria, residents renew their calls for safety, access, and accountability, while decrying Vieques’ status as a “colony within a colony.”

These controversies, often invisible to the larger U.S. populace, are partly about the imposition of disproportionate environmental burdens on the residents of the U.S. territories. Environmental destruction is well-documented and ongoing. But these controversies are also about something much more. For the peoples of the U.S. territories, these are hard-fought efforts to restore cultural practices, promote economic self-sufficiency and traditional livelihoods, and exercise a measure of political self-determination over their land, water, and people.

Although it escapes singular definition, “environmental justice” generally refers to the equal distribution of environmental burdens, risks, and benefits based on race. The established environmental justice framework

---


9 Mondal, supra note 8; Pelet, supra note 6.

10 GAO, Defense Cleanup, supra note 8, at 1618.

11 See Pelet, supra note 6.


14 See infra notes 95–113 and accompanying text.


16 Clifford J. Villa, Remaking Environmental Justice, 66 Loy. L. Rev. 469, 476–77 (2020) (exploring the multiple and competing definitions of environmental justice but contending that “[a]ny conception of environmental justice will likely include concerns for the unequal distribution of environmental burdens based upon race”).
centers on the disproportionate siting of hazardous facilities and exposure to environmental toxins and seeks to remediate the injustice by relocating polluting facilities and terminating harm-producing conduct.\(^{17}\) It embraces equal, transparent, and inclusive representation in the administration of environmental laws, regulations, and policies,\(^{18}\) grassroots community empowerment,\(^{19}\) and the recognition that environmental struggles are intertwined with structural poverty and racism.\(^{20}\) Environmental justice—as a movement, policy principle, and field of research—is one of the most important and powerful developments in modern environmentalism.\(^{21}\)

At the same time, the established environmental justice framework often assumes for communities of color that health and equal distribution of environmental burdens are the only, or the main, concerns.\(^{22}\) In doing so, the framework often fails to comprehend complex issues of Indigenous peoples’ spiritual and cultural connections to the land and natural environment and the persistent linkage between U.S. colonialism and environmental injustice.\(^{23}\) A Native community, for example, may describe the nearby siting of a power plant not as unequal treatment but rather as denial of sovereignty over land, resources, and traditional lifeways.\(^{25}\) Similarly, residents of the U.S. territories may view the dumping of toxic byproducts in their communities not as racial discrimination but a symptom of their island’s lasting colonial relationship with the United States.\(^{26}\)

In 2001, legal scholar Eric Yamamoto introduced a “racializing environmental justice” framework that built on concepts of “differential racialization” and “differential empowerment” to examine the ways in which racial and Native groups “acquire differing identities, status, and power, and

---

21 See id. at 1.
22 Yamamoto & Lyman, *supra* note 17, at 311.
23 The terms “Native” and “Indigenous” will be used interchangeably throughout this Article.
how those differences affect their respective connections to ‘the environment.’” The approach recognized that, for some racialized communities and Native peoples, environmental justice is “about cultural and economic self-determination [rather than equal treatment] and belief systems that connect their history, spirituality, and livelihood to the natural environment.”

The approach sought not to supplant the established environmental justice framework but to grow and deepen the existing analysis to reframe how we perceive “the ‘environmental’ problem, the rights claims, and the possible ‘justice’ remedies.”

Since then, environmental justice has grown in prominence and complexity. As part of President Biden’s sweeping approach to the environment, he pledged to “deliver environmental justice in communities all across America.” His selections to head the Interior Department (Native American Deb Haaland) and Environmental Protection Agency (Black American Michael Regan) and for senior positions at the Council on Environmental Quality and the Energy Department signaled his commitment to put “environmental justice front and center.”

Environmental justice scholars and advocates now tackle a growing list of diverse controversies from food supply

27 Yamamoto & Lyman, supra note 17, at 342 (quoting Michael Omi, Out of the Melting Pot and into the Fire: Race Relations Policy, in THE STATE OF ASIAN PACIFIC AMERICA: POLICY ISSUES TO THE YEAR 2020 199, 207 (1993); Jeff Chang, Race, Class, Conflict and Empowerment: On Ice Cube’s “Black Korea,” 19 AMERASIA J. 87, 103 (1993)) (“By acknowledging . . . [those] distinctions, the method also frees those communities and their advocates to identify, and [meaningfully] coalesce around, the similarities of treatment by public and private entities with political and economic power.”).

28 Yamamoto & Lyman, supra note 17, at 311.

29 Id. at 358.


and access to emergency and disaster response.\textsuperscript{34} Environmental justice legal scholarship has begun to scrutinize the complexities and intersections of race, gender, immigrant status, indigeneity, and colonial status and how those groups experience and respond to unique environmental injustices.\textsuperscript{35} These are important developments.

Yet, conceptual and practical challenges remain.\textsuperscript{36} Practically, both environmental and civil rights legal frameworks can limit environmental justice claims, and often diverge in methods, implementation, and available remedies.\textsuperscript{37} Conceptually, the one-size-fits-all approach still often carries the day: environmental justice claims and remedies often fail to capture “what [is] really at stake for differing communities”—and how those communities derive meaning from and connect to “the environment.”\textsuperscript{38} In doing so, the existing environmental justice framework can sideline sovereignty- and self-determination-based Native American claims and can disregard the ways in which race, indigeneity, and political status intersect to produce different manifestations of environmental injustice.\textsuperscript{39} It also tends to obscure U.S. territorial peoples’ unique historical and political statuses, cultural practices, and distinct decolonization claims, and, in so doing, often fails to acknowledge their unique needs for repair. Indeed, much of the legal scholarship has yet to rigorously scrutinize the enduring links between U.S. colonialism, po-


\textsuperscript{38} Yamamoto & Serrano, supra note 36, at 1384.

litical power, and environmental justice in U.S. territories and has not fully explored remedies tailored to those unique colonial contexts.40

Drawing from my earlier writing on the U.S. territories, particularly on Puerto Rico and Guam,41 this Article employs and refines the racializing environmental justice framework to account for the unique experiences of the peoples of the U.S. territories that are deeply linked to U.S. colonialism and militarism in their homelands.42 As I have written, to “acquire” the now-territories for land and resources, the United States demonized the people.43 That branding of the people as inferior, unworthy, and incapable of self-government served to justify their systematic exclusion from political participation and decision-making.44 And that subjugation was inscribed in law: in the infamous Insular Cases, the Supreme Court reaffirmed Congress’ plenary power over the so-called “unincorporated” territories, thereby sanctioning the territories’ exclusion from equal treatment under the U.S. Constitution.45

The peoples of the U.S. territories have virtually no national political power: they cannot vote for U.S. President or Vice President46 and they do not have a voting representative in Congress.47 The Supreme Court has held

40 But see Insular Area Climate Change Act, H.R. 2780, 117th Cong. § 101(c) (2021) (proposing mechanisms to provide increased access to climate change-related federal programs, energy management, conservation programs, and technologies to foster mitigation and adaptation in the U.S. territories and other insular areas).


42 See José M. Atiles-Osoria, Environmental Colonialism, Criminalization and Resistance: Puerto Rican Mobilizations for Environmental Justice in the 21st Century, 6 REVISTA CRÍTICA DE CIENCIAS SOCIALES 3, 4 (2014) (contending that “the struggles for the decolonization of [Puerto Rico] and the movements for environmental justice cannot be understood independently but have to be studied within a common historical framework”).


44 See Serrano, Collective Memory, supra note 41, at 377–79.


46 See Igartúa-de la Rosa v. United States, 417 F.3d 145, 145–47 (1st Cir. 2005) (en banc); Att’y Gen. of Guam v. United States, 738 F.2d 1017, 1018 (9th Cir. 1984).

47 The U.S. territories have no senators and only one non-voting representative in the House of Representatives. Puerto Rico’s representative in the U.S. House is a “resident commissioner,” and the representatives from American Samoa, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands are “delegates.” 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 Jane A. Hudiburg, CONG. RESCH. SERV., R40170, PARLIAMENTARY RIGHTS OF THE DELEGATES AND RESIDENT COMMISSIONER FROM
that Congress may provide fewer benefits to residents of the territories as long as there is a rational basis to do so.\textsuperscript{48} Several federal programs—including those targeting health and environmental resiliency—are limited or completely denied to the U.S. territories.\textsuperscript{49} Many condemn this perpetual colonial arrangement that allows nearly unchecked U.S. power over the territories with no corresponding political rights for the peoples.\textsuperscript{50}

The racializing environmental justice inquiry reframes the environmental injustices of the military buildup in Guam and the lasting impacts of Navy live-fire training in Vieques: it calls on us to inquire into the peoples’ spiritual and economic connections to the environment, historical and contemporary conditions, and the interplay of cultural resurrection and political sovereignty. It asks about the particular ways in which U.S. colonization of and militarization in the territories decimated land, communities, and traditional Indigenous cultural practices. And it illuminates how modern-day environmental justice struggles are also struggles to repair the longstanding damage of U.S. colonization and subjugation, including land dispossession, cultural destruction, and the loss of self-determination.

The central aim of this inquiry is “to theoretically and practically reframe our understanding of environmental justice to better account for [U.S. territorial peoples’] experiences, needs, and goals . . . and to generate more resonant remedial options.”\textsuperscript{51} In this way, the racializing environmental justice framework recasts the remedial imperative. “Repair” involves not just the clean-up of toxic chemicals and the preservation of cultural artifacts\textsuperscript{52} but reparative justice for the peoples of the territories. Among other things, this

\textsuperscript{48} 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).


\textsuperscript{51} Yamamoto & Lyman, supra note 17, at 351–52.

may entail the restoration of political power, the resurrection of Native cultural practices, return of lands, and the reanimation of spiritual and economic interconnections between the land, water, and people.

Accordingly, Part II outlines the historical and present-day second-class status of the U.S. territories that deprives the peoples of meaningful self-determination and political participation. Part III describes the established environmental justice framework that often fails to probe groups’ complex racialized histories, colonial realities, and spiritual and cultural connections to the natural environment. Part IV explores the “racializing environmental justice” framework. In doing so, the Part refines the inquiry to illuminate how the legacies of U.S. colonization and the resulting paradoxical political status of the U.S. territories often stymies environmental justice in the territories. Part V employs the framework to examine two ongoing environmental controversies in Guam and Vieques, Puerto Rico. Viewed through the racializing environmental justice lens, these disputes can be understood not only as classic environmental injustices, but as community struggles over political power, economic resiliency, and Indigenous rights to sacred sites and practices—a more “expansive, group-resonant type of environmental justice.”

II. U.S. TERRITORIES: THE HISTORICAL AND PRESENT-DAY SETTING

Modern-day limits on territorial peoples’ self-determination have deep roots in the United States’ embrace of “empire” following the Spanish-American War. In 1898, the United States invaded and “acquired” Puerto Rico, Guam, and the Philippines, and racialized the peoples to justify that colonial expansion. The Territorial Clause of the U.S. Constitution gave the United States authority to exercise near complete power over these late-nineteenth century conquests. The Clause today governs five unincorporated territories of the United States—Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands—with a collective population of around three-and-a-half million people. This makes the United

53 Yamamoto & Lyman, supra note 17, at 355.
54 Serrano, Elevating the Perspectives, supra note 41, at 402.
56 U.S. CONST. art. IV, § 3, cl. 2.
States “the largest overseas territorial power in the world.” This Part briefly outlines this period of U.S. colonization, situates the Insular Cases in the larger U.S. colonial project, and identifies later domestic and international developments that changed little about the islands’ self-determination.

A. Conquest, Colonization, and the Insular Cases

The Spanish-American War and the resulting takeover of Puerto Rico, Guam, and the Philippines triggered a change in the settled model of territorial development. 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. This meant that, upon the treaty’s signing, the peoples of the territories did not “enter into and form a part of the American family” and were promised no civil or political rights under U.S. rule. The United States thus expanded its global empire “without the necessity of fully accepting the people of color that inhabited the newly acquired territories.”

The United States justified its conquest and subordination of territorial peoples by branding them as inferior and unworthy. Many in the U.S. government viewed territorial peoples as “alien,” “ignorant,” and “above all . . . untrained in the arts of representative government.” Decision-makers warned against incorporating the “semi-civilized, barbarous, and savage peoples of [the] islands into [the U.S.] body politic.” A report by the Committee on the Pacific Islands and Puerto Rico warned against the inclusion of “people of wholly different character . . . and incapable of exercising the rights and privileges guaranteed by the Constitution.” If a territory was inhabited by such people, it argued, Congress should “withhold from

58 LEIBOWITZ, supra note 57, at 3.
59 Malavet, supra note 57, at 204–05.
60 Treaty of Paris, Spain-U.S., 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.’” Serrano, Collective Memory, supra note 41, at 372–73 (quoting Treaty of Paris, supra).
61 Downes v. Bidwell, 182 U.S. 244, 339 (1901) (White, J., concurring); see also 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).
63 See id. at 452–55 (discussing the United States’ use of race to justify the unequal treatment of native inhabitants of newly acquired territories).
64 Cabranes, supra note 61, at 432.
65 Torruella, supra note 50, at 10.
66 Rivera Ramos, supra note 45, at 237–38. See also Cabranes, supra note 61, at 432; Román & Simmons, supra note 62, at 455; Torruella, supra note 50, at 10.
67 Cabranes, supra note 61, at 432 (citing 33 CONG. REC. 3622 (1900)).
68 Román & Simmons, supra note 62, at 455 (quoting S. REP. No. 56-249, at 8–9 (1900)).
The Insular Cases, a series of cases decided by the Supreme Court from 1901 to 1922, provide the constitutional justification for this colonial relationship. Pursuant to the Insular Cases, Congress wields the power to decide which portions of the Constitution apply to the unincorporated territories, limited only by so-called “fundamental” personal rights. Fundamental rights in the territorial context have a distinct yet imprecise meaning: they are only those “which are the basis of all free government.” Thus, rights commonly viewed as fundamental, such as the right to a jury trial, are not “fundamental” under the Insular Cases framework. The Insular Cases today shape the peoples’ colonial existence in far-reaching ways—from the political to the economic, the social to the cultural.

In Downes v. Bidwell, the most important of the Insular Cases, the Supreme Court held that the Uniformity Clause of the U.S. Constitution did not apply to Puerto Rico because it “belongs to . . . but . . . is not a part of the United States[.]” Although no opinion garnered a majority, Justice


63 Id. at 147; see also Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922) (holding that peoples of the unincorporated territories are entitled to “guaranties of certain fundamental personal rights declared in the Constitution”); Boumediene v. Bush, 553 U.S. 723, 758 (2008).

64 See Fitisemanu v. United States, 1 F.4th 862, 878 (10th Cir. 2021). Because the Supreme Court did not define which rights are “the basis of all free government,” appellate courts have interpreted this concept in differing ways. See Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1990) (ruling that the equal right to own land in the Commonwealth of Northern Mariana Islands (CNMI) regardless of race was not “fundamental” and holding that the application of the Equal Protection Clause to land alienation restrictions would be impracticable and anomalous because it would undermine Native culture).

65 U.S. Const. art. I, § 8, cl. 1 (requiring that “duties, imposts and excises” are uniform throughout the United States).

Brown, who delivered the judgment of the Court, counseled against the “extremely serious” consequences if the offspring of the colonies’ inhabitants, “whether savages or civilized,” would become “entitled to all the rights, privileges and immunities of citizens.” Justice White’s concurring opinion, which later became the controlling doctrine of territorial incorporation, devised the concept of the “unincorporated” territory. Whether particular provisions of the Constitution apply in a territory depends on “the situation of the territory and its relations to the United States.” Because Congress did not intend to incorporate Puerto Rico, Justice White determined that it was unincorporated, or that it was, paradoxically, “foreign . . . in a domestic sense.”

Judges, scholars, and advocates have overwhelmingly concluded that the Insular Cases legitimize American colonialism. Judge José Cabranes recognized, for example, that Downes “gave judicial approval to the birth of ‘the American Empire.'” Judge Juan Torruella similarly argued 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.”

Later domestic and international developments led to a limited measure of local governance in the territories, but the United States maintains its strong colonial grip. In 1946, for example, Guam was added to the United Nations’ (UN) list of non-self-governing territories, and it remains on the list today. The United States, as the administering power, is required to submit periodic reports to the UN Secretary-General regarding the steps it has taken to move Guam toward self-government. Guam’s Organic Act, adopted by Congress in 1950, designed a civilian government for the island and gave residents statutory U.S. citizenship. In the Interior Committee’s report rec-

---

76 Id. at 279.
77 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.”)
78 Id. at 341.
79 See Serrano, Elevating the Perspectives, supra note 41, at 396.
80 Cabranes, supra note 61, at 436. See also Lazos Vargas, supra note 55, at 929–30 (contending that the Treaty of Paris reflects the United States’ first step toward colonialism and empire because it departed radically from the Treaty of Guadalupe Hidalgo, which guaranteed Mexicans full de jure U.S. citizenship rights). Many scholars trace the beginnings of U.S. imperialism to the late 19th century, but others view the earlier U.S. westward expansion and conquest of Native peoples as an empire-building project. See, e.g., Paul Frymer, Building an American Empire: Territorial Expansion in the Antebellum Era, 1 UC IRVINE L. REV. 913, 914–15 (2011).
83 See U.N. Charter, art. 73, para. e.
ommending passage of the Act, Congress acknowledged its international obligations to restore to Guam’s native inhabitants a measure of self-determination and assist the peoples in “the progressive development of their free political institutions.”85 Guam does not have its own constitution and is managed by the U.S. Department of the Interior.86

The Jones Act in 1917 conferred statutory U.S. citizenship on Puerto Rico’s inhabitants but did not incorporate Puerto Rico into the United States.87 In 1952, Puerto Rico adopted its own constitution and became the Commonwealth of Puerto Rico.88 The United States then reported to the United Nations that Puerto Rico was no longer a non-self-governing territory and declared that Puerto Rico had reached “the full measure of self-government.”89 The same year, the United Nations removed Puerto Rico from the list of non-self-governing territories, and the UN General Assembly determined that “the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity.”90 But to many, Puerto Rico’s current political status does not resemble “full self-government.”91 The UN Committee on Decolonization has repeatedly reaffirmed Puerto Rico’s people’s right to self-determination and instructed the United States to discharge its responsibility to effectuate that right.92

rather than via the Fourteenth Amendment’s Citizenship Clause. Commentators warn that this statutory citizenship is precarious because it is revocable by Congress. See Lisa Maria Perez, Citizenship Denied: The Insular Cases and the Fourteenth Amendment, 94 Va. L. Rev. 1029, 1032–33, 1039 (2008).

85 S. REP. No. 81-2109 (1950) (describing the United States’ obligations under the Treaty of Paris and Chapter XI of the UN Charter).

86 48 U.S.C. § 1421 (transferring the administration of Guam from the Secretary of the Navy to the Secretary of the Interior as of August 1, 1950).


92 See, e.g., Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Decision of
B. Lasting Environmental Impacts: Guam and Puerto Rico

The lasting colonial U.S.-territorial relationship has significant impacts: territorial residents lack meaningful national political representation and full access to vital federal programmatic aid. These stark inequalities are particularly salient in the environmental context because the U.S. territories cannot access the same levels of federal funding and support as the states for environmental resiliency. This subsection briefly introduces these environmental justice realities as crucial context for the subsequent “racializing environmental justice” analyses of the military buildup in Guam and the aftermath of the Navy bombing in Vieques, Puerto Rico.

1. Guam

In Guam, the largest and southernmost island in the Marianas archipelago, CHamoru scholars and activists closely connect militarism, colonialism, and environmental destruction in Oceania. They contend that the ever-expanding U.S. military presence in Guam and its “combat-oriented” approaches to the environment have dire implications for environmental justice in the region. As part of its century-long presence, the United States confiscated the most culturally valuable CHamoru homelands, converted Guam into a strategic military outpost, and destabilized CHamoru culture and language in an effort to “civilize” CHamorus for U.S. military gain. This is a dark history of which few in the United States are aware.

And the injustice persists. Later environmental injustices include the U.S. military’s dumping and burying of toxic chemicals after World War II.

93 See Chair Grijalva Introduces Insular Area Climate Change Act, supra note 49.
94 See Tiara R. Na’puti & Sylvia C. Frain, Decolonize Oceania! Free Guåhan!, 43 AMERASIA J. 2, 14 (2017) (describing colonialism and military discourse that “has increasingly replaced sustainability with combat-oriented and security approaches to the environment”).
98 Michael Lujan Bevacqua, Guam: Protests at the Tip of America’s Spear, 116 S. ATL. Q. 174, 178 (2017); see also LisaLinda Natividad & Gwyn Kirk, Fortress Guam: Resistance to US Military Mega-Buildup, 8 ASIA-PAC. J. 1, 11 (2010) (describing two dumpsites in Guam found to contain toxins such as antimony, arsenic, barium, cadmium, and lead, among others).
the housing of nuclear weapons and mustard gas,\(^99\) and the use of Agent Orange as a commercial herbicide during the Vietnam and Korean Wars.\(^{100}\) A congressional panel formed to study the radioactive contamination from U.S. nuclear testing in the region between 1946 and 1958 found that the United States “knowingly and with total disregard” endangered Guam’s people.\(^{101}\) These actions have resulted in ecological damage to land and water, high rates of thyroid illnesses, and destruction of CHamoru land and culture.\(^{102}\) As detailed below, today’s construction of military buildup projects, which includes a live-fire training range complex and military base, has unearthed and disturbed multiple ancient burial sites and sites containing historical artifacts.\(^{103}\) The complex also threatens the main water source, the Guam National Wildlife Refuge, and CHamorus’ access to traditional medicine and fishing waters.

2. Puerto Rico

Puerto Rican activists and scholars similarly connect Puerto Rico’s longstanding colonial status with the United States’ persistent environmental exploitation of its territory. They point to federal and local policies that allow massive U.S. industrial expansion, pollution, and control over the island’s economy and land base\(^{104}\) by way of military bases, big pharma, and


\(^{103}\) Kaur, Marine Base, supra note 1; Kaur, BuildUp Projects, supra note 2 (reporting that “seven sites containing artifacts and nine sites containing human remains were disturbed as the first four firing ranges were built as part of the Marines’ live-fire training range complex at Ritidian” and that “the military cleared remnants of the ancient village of Magua” in Dededo during construction of Camp Blaz”).

\(^{104}\) See Carmen M. Concepción, THE ORIGINS OF MODERN ENVIRONMENTAL ACTIVISM IN PUERTO RICO IN THE 1960S, 19 Int’l J. Urb. Regional Research 115, 113 (1995); Catalina M. de Onís, ENERGY COLONIALISM POWERS THE ONGOING UNNATURAL DISASTER IN PUERTO RICO, 3 FRONT COMM’C’N. 1, 1 (2018) [hereinafter de Onís, ENERGY COLONIALISM]. While all of the contributors to Puerto Rico’s financial and environmental crises are too many to mention, some include the Jones Act, also known as the Merchant Marine Act of 1920, Pub. L. No. 66-261, 41 Stat. 988, which mandates that all commercial shipping within the United States is conducted by ships that are built domestically, are at least seventy-five percent American-owned, and are staffed with an American crew; Operation Bootstrap, a policy implemented in the 1940s that sought to industrialize Puerto Rico and provided tax exemptions to U.S. corporations; and the
fossil fuel-dependent power plants. Environmental activists have fought against open pit copper mining, an oil refining “superport,” a nuclear power plant, and the siting of incinerators and hazardous waste facilities in some of Puerto Rico’s most vulnerable communities. A 2016 report found that over half of Puerto Rico’s municipal landfills violate the Environmental Protection Agency’s regulations. Puerto Rico is also home to twenty-three Superfund sites, including one on the island of Vieques, described below. More recently, activists fought the dumping of over two million tons of toxic coal ash—containing high levels of arsenic, heavy metals, and radioactivity—in poor, largely Black communities. Although toxic coal ash dump-
ing is now banned, much of the ash remains. Local activists continue their “struggle for decolonization and environmental justice” in the face of devastating health and environmental impacts worsened by Hurricane Maria. These unique colonial realities in the U.S. territories permeate nearly every facet of people’s lives, including in the realm of environmental justice.

III. The Established Environmental Justice Framework

The environmental justice framework—that emerged from the broader environmental movement—has provided a potent tool to describe and combat environmental injustices in vulnerable communities. In the 1970s, the environmental movement centered on resource conservation, wilderness and wildlife preservation, pollution abatement, and industry regulation. Congress passed powerful environmental laws to protect public health and welfare and promote “productive harmony” between humans and nature. The Clean Air and Clean Water Acts, for example, include citizen suit provisions that allow communities to enforce statutory requirements against polluters, and the National Environmental Policy Act (NEPA) requires agencies to evaluate in their environmental impact analyses the environmental, cultural, and social impacts of proposed projects.
Building on mainstream environmentalism, grassroots activists in the 1980s melded environmental and civil rights laws and approaches to combat “environmental racism.”117 The burgeoning environmental justice movement drew national attention to the unequal distribution of environmental harms in communities of color and offered a “paradigm for community leadership and control.”118 Activists called for a holistic framing of environmental justice, including the right to a safe and healthy environment, community empowerment, and mutual respect for all peoples.119

Although it has varied definitions,120 “environmental justice” often refers to the equal distribution of environmental burdens, risks, and benefits based on race.121 The traditional environmental justice framework centers on the disproportionate siting of hazardous facilities and exposure to environmental toxins within marginalized communities and seeks to remediate the injustice by relocating polluting facilities and terminating harm-producing conduct.122 It embraces equal, transparent, and inclusive representation in the administration of environmental laws, regulations, and policies,123 grassroots


120 See, e.g., Walker, supra note 15, at 1–2, 7–8 (describing various definitions of “environmental justice” and identifying it as simultaneously a campaign slogan, a field of academic research, a policy principle, an agenda, and a political movement); Robert R. Kuehn, A Taxonomy of Environmental Justice, 30 Env’T L. Rep. 10681, 10681–82, 10688 (2000) (articulating four-part definition of environmental justice: distributive justice, procedural justice, corrective justice, and social justice).


122 Yamamoto & Lyman, supra note 17, at 320.

community empowerment, and the recognition that environmental struggles are intertwined with structural poverty and racism.

Federal and state governments have incorporated environmental justice understandings and norms into domestic law and policy. Amidst the accelerating climate crisis and advancing environmental degradation, President Biden has pledged “to combat climate change . . . and address environmental racism.” His Justice40 Initiative seeks to steer 40% of the benefits of federal environmental investments to communities subjected to environmental harm.

More broadly, some view environmental justice as one of the most significant developments in environmental law and discourse. Its language and concepts bring crucial attention to overlooked patterns of inequality. Community groups employ legal tools—environmental statutes, constitutional provisions, civil rights laws, and common law claims—to tackle a growing list of diverse controversies centered on industrialization, energy use, and access to affordable food, among many others. Environmental justice scholarship has begun to interrogate the intersections of race, gender, age, immigrant status, and disability, as well as “the ongoing dispossession of Indigenous peoples, and the colonial and postcolonial domination of the Global South.” These are important advancements.

But conceptual and practical challenges remain. Practically, both environmental and civil rights legal frameworks can sharply limit environmental protection. For example, the Clean Air Act and related regulations often fail to effectively protect communities of color from pollution. Similarly, civil rights laws, such as Title VI of the Civil Rights Act of 1964, are often insufficient to address environmental harms.

The Biden plan to secure environmental justice and equitable economic opportunity includes several significant provisions. For example, the plan establishes a national commission on environmental justice to address systemic discrimination. It also increases funding for environmental justice programs and requires federal agencies to consider environmental justice in their decision-making.

But more needs to be done. The Biden administration must work to address the systemic and institutionalized racism that has caused so much harm to communities of color. This requires a comprehensive approach that goes beyond legal remedies and focuses on systemic change.
justice claims, and often diverge in methods, implementation, and available remedies. The environmental regulatory decision-making process, for example, relies heavily on quantifiable information rather than less quantifiable facets of racism and subordination experienced by groups of color. NEPA prescribes a process for community consultation before projects are undertaken, but provides no mechanism for Native and other communities to halt environmentally or culturally harmful projects in their homelands. In the civil rights context, claims brought under the Equal Protection Clause, the Civil Rights Act, and Section 1983 require a near-impossible showing of racially discriminatory intent based on concepts of race and racial discrimination disconnected from structural racism. The constricted civil rights approach to environmental justice thus has largely failed to protect racialized communities facing environmental hazards.

Conceptually, the mainstream environmental justice framework’s one-size-fits-all approach still often carries the day: “the linguistic lumping together of ‘low-income and minority communities’ flattens the problem and thus remedial pathways.” Both environmental and civil rights claims can sideline sovereignty- and self-determination-based Native American claims, and disregard the ways in which race, indigeneity, and political status inter-

133 See Gauna, supra note 37, at 36, 41–42; Daniels et. al., supra note 37, at 42; see also Clifford Villa, Nadia Ahmad, Rebecca Bratspies, Roger Lin, Clifford Rechtschaffen, Eileen Guana, & Catherine O’Neill, Environmental Justice: Law, Policy and Regulation (3d ed. 2020) (identifying additional challenges to meaningfully integrating environmental justice concerns into broader environmental law and regulation).

134 Yang, supra note 119, at 17–18.


139 Yamamoto & Serrano, supra note 36, at 1387; Atapattu et al., supra note 35, at 10 (noting that environmental justice scholarship has not yet fully developed “a rigorous analysis of the complex ways that poverty, race, gender, indigeneity, age, and disability, among other identity characteristics . . . intersect to produce environmental injustice in specific contexts.”).
sect to produce different manifestations of environmental injustice. The established framework also tends to obscure U.S. territorial peoples’ unique historical and political statuses, cultural practices, and particularized decolonization claims, and in so doing, often fails to acknowledge their unique needs for repair.

The racializing environmental justice framework thus has continuing relevance. As described below, it relies on concepts of differential racialization and disempowerment to grasp the particularities of environmental “injustice” in specific settings. By interrogating the distinctions among groups’ cultural values, histories, hierarchies of power, needs, and goals, the framework empowers communities and advocates to better define environmental injustices and tailor remedies to meet diverse communities’ needs and goals.

IV. THE RACIALIZING ENVIRONMENTAL JUSTICE FRAMEWORK

In light of the mainstream framework’s limitations, legal scholar Eric Yamamoto offered a “racializing environmental justice” framework that sought to “better . . . grapple concretely with the ‘racism’ and ‘justice’ components of environmental justice.” Drawing from Critical Race Theory, the method aims to interrogate racial categories and meanings, account for significant differences between those described as racial minorities and Indigenous peoples, and acknowledge the “influences of whiteness in the formation and implementation of environmental law and policy.” It endeavors not to displace the established environmental justice framework, but to “expand[ ] and deepen[ ] the prevailing analysis and strategic calculations of scholars, lawyers, and activists” to reframe “how we view the ‘environmental’ problem, the rights claims, and the possible ‘justice’ remedies.”

The following subsection describes the concepts of differential racialization and disempowerment that are crucial to the framework’s particularized inquiry. The remaining subsections explore Native peoples’ unique relationships to the land and environment, which are foundational aspects of the racializing environmental justice framework, and then further refines the framework to incorporate the unique colonial experiences of the peoples of the territories.

140 See, e.g., Nagle, supra note 39, at 669; Houdyshell, supra note 39, at 3.
141 MacKenzie et al., supra note 24, at 37–38.
142 See Yamamoto & Lyman, supra note 17, at 341.
144 Yamamoto & Lyman, supra note 17, at 341.
145 Id. at 351, 358.
A. Differential Racialization and Disempowerment

Racializing environmental justice builds on concepts of “differential racialization” and “differential disempowerment” to examine the ways in which racial and Native communities acquire differing identities, status, and power, and how those differences affect their respective connections to the environment.

Crucial to this inquiry is the understanding of race, not as an unalterable, biological characteristic, but as an “unstable and ‘decentered’ complex of social meanings constantly being transformed by political struggle.” This notion of race provides the basis for Michael Omi and Howard Winant’s theory of “racial formation.” Racial formation—or racialization—is a sociohistorical process by which race is created, shaped, and transformed by social and political forces. As races are continually formed and reformed, they are imbued with social meaning.

The racialization process is key to colonization. Colonizing forces exert control over land and resources, and legitimate that power, in part by disparaging colonized peoples. Thus, “racism” is not simply intentional prejudice based on skin color. Rather, it involves characterizing the colonized as “different,” less-worthy, or less-human ‘others’ (threatening, uncivilized, inferior) to make political ‘aggression’ against the entire group for economic or military reasons appear necessary.

Grounded in the theorizing of Omi and Winant, and set within the context of white supremacy, “differential racialization” recognizes substantial differences in the racialization of groups, contributing to differing group status and power. Class divisions, length of residence in the United States,
urban/rural differences, and gender, for example, contribute to differential racialization among and within groups.157 “Differential disempowerment” similarly interrogates power differences among racial and Native groups in terms of race, locale, time, and economics.158 Differential racialization and disempowerment point to significant differences among immigrant communities, Black descendants of enslaved people, and colonized Indigenous peoples.159 For Native peoples, Yamamoto contends, a differential racialization analysis “focuses on the effects of land dispossession, culture destruction, loss of sovereignty, and, in turn, on claims to self-determination and nationhood (rather than to equality and integration).”160

For the peoples of the U.S. territories—many of whom are both Indigenous and colonized161—differential racialization and disempowerment inquiries center on the impacts of U.S. conquest and colonization, resulting political powerlessness, and claims to decolonization and repair for historical harms. At the same time, differing status and power among the territories shapes groups’ distinct efforts to repair the harms of U.S. colonization. Puerto Ricans, for example, may seek equality of treatment and increased civil and political rights within the U.S. paradigm. In two recent cases, Puerto Rico residents argued that their summary exclusion from certain federal government benefit programs violates the equal protection guarantee of the Fifth Amendment’s Due Process Clause.162 For CHamoru in Guam, the preservation of Native culture and the exercise of their self-determination as Indigenous peoples was central to their defense of a political status plebiscite reserved for the “Native Inhabitants” of Guam as part of the United States’ obligation to decolonize Guam.163 Territorial groups’ distinct environmental justice claims, described below, are also marked by this complexity.


157 Yamamoto, Rethinking Alliances, supra note 146, at 61–63; see also Yen Le Espiritu, A Critical Transnational Perspective to Asian America, in THE OXFORD HANDBOOK OF PHILOSOPHY AND RACE 111 (Naomi Zack ed., 2016) (describing “differential inclusion” as the “deliberate and violent peopling of the United States—through conquest, slavery, annexation, and the importation of foreign labor” and explaining “how inclusion for some racialized groups simultaneously means legal subordination, economic exploitation, and cultural degradation”).

158 Chang, supra note 147, at 102–03.

159 Yamamoto & Lyman, supra note 17, at 344.

160 Id.

161 See Aguon, supra note 1, at 48, 62 (describing himself and the communities of Guam as both colonized and Indigenous peoples under international law regimes).


163 See Defendant’s Motion for Summary Judgment at 1, 7–8, 11–12, 17, Davis v. Guam, No. 1:11-cv-00035 (D. Guam Oct. 30, 2015). Relatedly, American Samoans’ recent legal disputes over birthright U.S. citizenship starkly highlight the tensions between the quest for equal rights under the U.S. legal framework, on one hand, and the preservation of Indigenous traditions and ways of life, on the other. See Tuaua v. United States, 788 F.3d 300, 310 (D.C. Cir. 2015); Fitisemanu v. United States, 1 F.4th 862, 880 (10th Cir. 2021).
B. Indigenous Peoples

Native peoples’ nuanced understandings of environmental justice are key to the racializing environmental justice framework. Native scholars and advocates have long critiqued mainstream environmentalism and the established environmental justice framework for their frequent disregard of Native peoples’ spiritual, physical, and social relationships to the environment. As the racializing environmental justice framework illuminates, Native scholars and advocates may not view the siting of a power plant near a Native community as unequal treatment or racial discrimination, but instead would describe it as the denial of control over land, resources, and traditional ways of life. Environmental justice for Native peoples thus may entail the restoration of self-determination wrongly appropriated or destroyed.

Native scholars and advocates expand and refine the racializing environmental justice themes to account for the unique interests and values of Native peoples. Native Hawaiian legal scholar D. Kapua’ala Sproat draws on the racializing environmental justice inquiry to craft a restorative justice framework linking Indigenous environmental justice claims and human rights principles of self-determination. Acknowledging the often stark differences between groups seeking “equality” and those seeking a form of self-determination, she employs the framework to interrogate the legal controversy over the decades-long diversion of water from Nā Wai ʻEhā, the “Four Great Waters” of Central Maui. American Studies scholar Nick Es-
Reframing Environmental Justice

tes similarly contends that a July 2020 court ruling halting oil flow through the Dakota Access Pipeline is “part of a broader movement for decolonization that seeks to restore land to Indigenous people and implement a much more comprehensive framework for environmental justice.” A sampling of other recent books and law review articles also reveals similar themes of Indigenous self-determination in the face of constrained notions of environmental injustice. As described below, these themes also resonate for Indigenous peoples of the U.S. territories who similarly frame environmental destruction as an assault on cultural resources, Indigenous ways of life, and the right to self-determination.

C. The Peoples of the U.S. Territories

Drawing from my earlier writing on the U.S. territories, particularly on Puerto Rico and Guam, this section further refines the racializing environmental justice inquiry to account for the unique experiences of the peoples of the U.S. territories that arise out of the particularized history of U.S. colonialism and militarism in their homelands. Because of the islands’ colonial status, rooted in Congress’ plenary power, the people of the territories...
can do little to exert political pressure on national institutions that wield the power to remedy the damage. This effectively insulates the United States government from the transformative political pressures that could force it to repair centuries of colonization in the territories.

While scholars and activists in the territories often connect environmental injustice and the legacy of colonialism, the established environmental justice framework is ill-equipped to expressly interrogate these connections. As scholars Iokiñe Rodríguez and Mirna Liz Inturias observe, environmental justice theory in the Global North centers primarily on the unequal siting and distribution of toxic health hazards rather than the “colonial and epistemic roots of injustice.” As a result, the literature “rarely mentions the persistence of colonial values (coloniality) as a cause of current injustices and violence, and the need to confront it.” By failing to interrogate why U.S. territorial communities are overburdened by the toxic byproducts of U.S. militarism, the established environmental justice framework fails to confront the United States’ continuing colonial governance of its territories, the gross imbalances in political power and lack of self-determination for territorial peoples, and the territories’ unequal access to methods for addressing environmental and health impacts.

U.S. territorial peoples’ environmental justice claims seek not only to repair physical damage to land and water but also to restore a measure of political and economic self-determination over the management of land and resources. Indeed, several scholars, primarily with roots in the U.S. territories, draw close connections between environmental justice advocacy and anti-colonial movements. And movements on the ground in the territories reflect these connections.

Sociology scholar José M. Atiles-Osoria contends that Puerto Rico’s environmental justice movements and broader anti-colonial movements are

171 See Igartúa-de la Rosa v. United States, 417 F.3d 145, 168 (1st Cir. 2005) (Torruella, J., dissenting) (contending that “no effective political pressure can be exercised by the subjects of this colonial relationship on the national political institutions with power to solve the problem’’); Chair Grijalva Introduces Insular Area Climate Change Act, supra note 49.

172 See, e.g., Atiles-Osoria, supra note 42, at 4 (asserting that environmental justice struggles in Puerto Rico are part of a broader struggle for decolonization).


174 Id. (asserting that, unlike in the Global North, environmental justice theory in the Global South is deeply influenced by decolonial thought).

175 Id.; see also Gonzalez, supra note 34, at 159 (describing the colonial and post-colonial roots of environmental injustice in the Global South); see also Nadia B. Ahmad, “Mask Off”—The Coloniality Of Environmental Justice, 25 WIDENER L. REV. 195, 196 (2019) (contending that “the notion of environmental justice is a continuation of the colonial sociolegal apparatus”).

176 See Principles of Environmental Justice, supra note 119 (“affirm[ing] the fundamental right to political, economic, cultural and environmental self-determination of all peoples,” and “oppos[ing] military occupation, repression and exploitation of lands, peoples and cultures, and other life forms.”).
inherently intertwined because a primary manifestation of colonialism is the exploitation of a territory’s material, cultural, and environmental resources. Atiles-Osoria and others trace the coalitions of anti-colonial and environmental groups that have formed throughout Puerto Rico’s recent history to build community movements against United States-imposed projects and militarization. For example, in the 1990s, community groups mobilized to preserve the Lajas agricultural valley against United States-imposed development, and, as described below, battled to oust the U.S. Navy from Vieques. While these movements were “environmental” because they sought to protect the land from further development and contamination, activists did not simply call for stricter environmental policies, but demanded “the devolution of the lands that belonged to the Puerto Ricans[].”

Similarly, scholar Catalina M. de Onís describes how a system of “energy colonialism” exploits Puerto Rico “as a sacrifice zone for empire building and experimentation, corporate greed, and toxic energy projects.” She identifies the historical and ongoing colonial exploitation of Puerto Rico that produces its present-day economic, environmental, and energy crises, including the United States’ exportation of fossil fuels to Puerto Rico to foster the territory’s dependence upon the United States. Informed by this history and context, de Onís centers self-determination as the means to achieving justice for the people of Puerto Rico and rejects scholarship and energy justice movements that fail to create space for “community member control over their own energy futures.”

One such “green” energy project that de Onís criticizes was proposed following Hurricane Maria in 2017, which ravaged Puerto Rico’s already fragile power grid. Puerto Rico’s then-governor collaborated with Tesla CEO Elon Musk to install solar and massive Tesla powerpacks to provide electricity to the island. De Onís and others recognized the plan as bene-

---

177 Atiles-Osoria, supra note 42, at 48 (describing environmental colonialism in Puerto Rico whereby U.S. environmental exploitation is planned and systematized through the consent and participation of national elites).
178 See, e.g., id. at 12; Miguel Alvelo-Rivera & Kevin Schanning, From Nationalists to Environmentalists: The Puerto Rican Environmental Movement and Social Movement Spillover Theory, 10 McNair Scholars J. U. Wis.-Superior 78 (2009) (tracing the close link between the Puerto Rican environmental and pro-independence movements and the coalition of their respective organizations).
179 Atiles-Osoria, supra note 42, at 12.
180 Id.
181 See id. at 14.
182 de Onís, Energy Colonialism, supra note 104, at 1.
183 See id. at 1–2.
184 Id.
185 See id. at 3. For an application of the traditional “environmental justice” framework to the military impacts in Vieques, see Katherine T. McCaffrey, The Struggle for Environmental Justice in Vieques, Puerto Rico, ENVIRONMENTAL JUSTICE IN LATIN AMERICA: PROBLEMS, PROMISE, AND PRACTICE 263 (David V. Carruthers ed., 2008).
fitting green capitalism and disaster capitalism, exemplifying “the white savior trope,” and positioning Puerto Rico as “a site for experimentation by the United States.”

Rather than acceding to existing power dynamics masquerading as new renewable energy practices, de Onís and others called for a transformational shift to decentralized solar energy projects that can be controlled and maintained by local communities. Thus, according to de Onís, “green” energy is insufficient to create “energy justice” in Puerto Rico; rather, in light of Puerto Rico’s history of colonization, energy justice requires power to change hands.

In Guam, scholars Tiara R. Na'puti and Michael Lujan Bevacqua connect CHamoru resistance to militarization and colonization with “overlapping cultural, environmental, and historical concerns.” They employ a CHamoru cultural framework to illuminate how local activists “assert the need for mutual respect and care for” their island environment while challenging the U.S. colonial apparatus. In the struggle to oppose the construction of a military firing range in the sacred, ancient village of Pågat, CHamoru activists positioned their movement within the broader cultural framework of “inafa’ maolek,” which, translated literally, means “to make things good for each other.” The community employed inafa’ maolek as an organizing strategy to articulate deep cultural connections to Pågat and to galvanize opposition to the military buildup in the area. The concept also served as a “challenge to the imbalance imposed by the US nation-state—the inequality, lack of representation, and colonial connection.”

An environmental justice approach that acknowledges the unique colonization and militarization experiences of the peoples of the U.S. territories also recasts the remedial imperative: “repair” for environmental harms involves not just the clean-up of toxic chemicals and the relocation of cultural
artifacts, but reparative justice for the peoples of the territories. Such a reparative approach acknowledges that the international human rights principle of self-determination—by which peoples “freely determine their political status and freely pursue their economic, social and cultural development”—is key to colonized peoples’ efforts worldwide to repair the damage of historical injustice. In other words, self-determination for groups who have experienced subjugation is essential for repairing the damage according to their notions of reparation.

In the context of environmental justice in the U.S. territories, the harms should similarly be repaired according to the colonized peoples’ sense of what is needed. This may involve repairing longstanding imbalances of power and agency, and redressing multiple political, economic, cultural, and social harms linked closely to environmental destruction. For Indigenous inhabitants of the territories, in particular, the preservation of their deep connections to land (and where applicable, the return of land), the reclaiming of knowledge systems, language, self-government, and ways of life are also central to environmental “justice.” As Indigenous legal scholar Rebecca Tsosie notes, reparative justice for Indigenous peoples facing environmental destruction “ought to engage Native normative frameworks of justice because, for Native peoples, reparative justice is a process that is simultaneously emotional and spiritual, political and social.” As she observes, however, no single theory of reparative justice “can fit all cultures, all na-


199 See Keith L. Camacho, After 9/11: Militarized Borders and Social Movements in the Mariana Islands, 64 AM. Q. 685, 700 (2012) (noting that “Chamorro proponents of indigenous rights discourses have long contested [American multiculturalism] in favor of Chamorro-centered modes of identity, nationhood, and politics” rooted in connections to land); Tsosie, Ethics of Remediation, supra note 197, at 236 (noting that the “[r]epatriation of land is central to Indigenous self-determination, and is fundamentally linked to the political and cultural sovereignty of Indigenous peoples”).

200 Tsosie, Ethics of Remediation, supra note 197, at 253 (interior quotes omitted).
In this way, the racializing environmental justice approach highlights territorial peoples’ differing group identities, goals, and efforts to repair harms appropriate to the particular setting and in ways that account for the histories of U.S. colonization and militarization in their homelands. In this way, the racializing environmental justice approach highlights territorial peoples’ differing group identities, goals, and efforts to repair harms appropriate to the particular setting and in ways that account for the histories of U.S. colonization and militarization in their homelands. Indeed, “[o]nly after grasping the particularities of the ‘injustice’—suffered by groups in specific situations—can we begin to fashion individual or collective reparative approaches to doing environmental justice.”

V. Two Case Studies: Guam and Vieques, Puerto Rico

The racializing environmental justice framework reframes the environmental injustices of the military buildup in Guam and the lasting impacts of Navy live-fire training in Vieques: it calls on us to inquire into the peoples’ spiritual, political, and economic connections to the environment, and historical and contemporary conditions. It asks about the particular ways in which U.S. colonization and militarization in the territories decimated land, communities, and traditional Indigenous cultural practices. And it illuminates how modern-day environmental justice struggles represent a reparative justice movement for self-determination, including the return and restoration of political power, land, and resources.

In the U.S. colonial context, differential racialization and disempowerment provide tools for understanding territorial groups’ unique colonial experiences, the impacts of history and context on community identity, and the “particulars of environmental racism” in the territorial setting. This Part first employs the racializing environmental justice inquiry to examine CHamoru community groups’ attempts to halt the ongoing military buildup through domestic environmental and international approaches. It then explores community groups’ efforts in Vieques, Puerto Rico to employ domestic and international legal approaches to remedy the effects of the sustained Navy bombing of their island.

A. The Military Buildup on Guam

A racializing environmental justice approach reveals that in Guam, environmental justice involves “threats to indigenous lands, resources, [and] environmental and cultural rights.” This subsection first briefly sketches
the history and modern-day context of the military buildup in Guam and then employs the racializing environmental justice framework to examine the CHamoru people’s battles for self-determination in the face of an ever-increasing U.S. military presence.

1. Historical and Present-Day Context

The legacy of U.S. colonialism and militarism in Guam defines environmental justice efforts there. After the United States conquered Guam in 1898, the U.S. Navy took total control over the island and governed it until 1950, except for a period of brutal Japanese occupation from 1941 to 1945. Following World War II, the U.S. military intensified its presence on the island. It seized “some of the best and most valuable real property and water resources that had, for centuries, been in the possession of Chamorros, and den[ied] them access to those ancestral territories.” Many families lost their homes, many CHamoru landowners received little to no compensation for the lost land, and over 11,000 CHamorus—nearly half of the Indigenous population at that time—were displaced.

Because of Guam’s enduring colonial status, the United States continues to reap the benefits of its strategic military presence there. Indeed, the U.S. military still controls major portions of the island, particularly several sites of cultural and environmental significance to the CHamoru people. It has engaged in widespread contamination of Guam—including exposing the people to fallout from radioactive contamination in the Pacific, maintaining toxic sites, housing nuclear weapons and carcinogens, and conducting major military training exercises—with detrimental impacts on human health, the environment, Indigenous practices and spaces, and the economy.

Against this backdrop, the United States and Japan signed a bilateral agreement in 2006 to relocate more than 8,600 Marines from Okinawa to Guam. No Guam representatives were part of those negotiations. Because of its strategic location close to East Asia, the U.S. has long viewed Guam as “America’s unsinkable aircraft carrier” and “the tip of the spear.” The human rights of the environmentally sound management and disposal of hazardous substances and wastes, U.N. Doc. AL USA 7/2021 (Jan. 29, 2021) [hereinafter Mandates of the Special Rapporteur].

209 Id.
210 Id. at 9.
211 Id. at 10.
212 Id. at 10–11.
213 Id. at 11.
214 Anna Fifield, Some in Guam Push for Independence from U.S. as Marines Prepare for Buildup, WASH. POST (June 17, 2016), https://www.washingtonpost.com/world/asia_pacific/
U.S. military now owns around 49,000 acres of Guam’s land—about one-third of the island—and the ongoing military buildup is one of the largest peacetime buildups in U.S. history.\footnote{506}

2. Limitations of the Domestic Legal Framework

For over a decade, CHamorus have fought to stop the buildup both within and outside of the established environmental justice framework.\footnote{215} In 2009, the Department of Defense released its 11,000-page draft Environmental Impact Statement (EIS) assessing, among other things, the massive expansion of military personnel, the acquisition of land, the development of missile defense systems and a military complex, and the dredging of seventy-one acres of coral reef in Apra Harbor to accommodate a nuclear-equipped aircraft carrier.\footnote{216} Given only ninety days to respond,\footnote{217} individuals and groups submitted over 10,000 comments and testimonies\footnote{218} and launched widespread community mobilizations to bring international attention to the buildup.\footnote{219}

The dispute illustrates the limitations of legal and regulatory processes—and the established environmental justice framework—to remedy environmental injustices and preserve sites of profound significance to Guam.

---

\footnote{215}{Guam is known as the “tip of the spear” because of its proximity to North Korea and the South China Sea. See Na'puti & Bevacqua, supra note 96, at 837.}


\footnote{217}{See Na'puti & Bevacqua, supra note 96, at 845.}

\footnote{218}{Joint Guam Program Office, U.S. Dep’t of the Navy, Draft Environmental Impact Statement / Overseas Environmental Impact Statement, Guam and CNMI Military Relocation (Nov. 2009) [hereinafter Draft EIS]. The EIS also assesses the construction of facilities in Tinian, the Commonwealth of Northern Marians. Both Guam and Tinian are located within the Mariana Islands Range Complex, which the Department of Defense uses for readiness training. Id. at ES-3.}


\footnote{220}{See Na'puti & Bevacqua, supra note 96, at 846.}

\footnote{221}{See Guahan Coalition for Peace and Justice, Stop the Military Buildup! (2010), https://famoksaiyanwc.files.wordpress.com/2010/05/newsletter-2-1.pdf, archived at https://perma.cc/S4PY-V4SR (listing member groups and community actions); We ARE GUAHAN, https://www.weareguahan.com/about-weareguahan/, archived at https://perma.cc/V8QD-GLPA (describing over 4000 hours of work researching and informing Guam’s residents about the buildup); Gelardi & Perez, supra note 170.}
the CHamoru people. For example, the environmental justice section of the Navy’s final 2010 EIS\(^{222}\) did not distinguish between those described as racial minorities and Indigenous peoples\(^{223}\) and, indeed, “rendered [all of ] Guam’s people invisible.”\(^{224}\) The Navy determined that its proposals for a deep-draft wharf in Apra Harbor to berth an aircraft carrier did not have “disproportionate impacts” on “racial minorities” because most or all of Guam is a minority population.\(^{225}\) In particular, it found that minority and low-income populations and children were present in the adjacent village of Piti, but “[b]ecause all of Guam [is] a minority population, minorities would not be disproportionately affected by the impacts of construction on fish and coral reefs” there.\(^{226}\) By treating Guam’s population as a monolithic “minority” and finding no disproportionate impact, the Navy’s framing disregarded the nature of the injustice for both the CHamoru people and the broader population of Guam. It ignored the differential disempowerment of the CHamoru people, including how the specific harms of colonization and militarization continue to impact CHamoru cultural ocean resources and ways of life in Piti and the rest of Guam.

In 2011, CHamoru advocacy organization We Are Guåhan, the National Trust for Historic Preservation, and the Guam Preservation Trust filed suit against the Department of Defense on the grounds that the Navy’s plans to build a complex of five firing ranges in Pågat Village, an area sacred to the CHamoru people and listed in the National Register of Historic Places, violated the National Environmental Policy Act, the National Historic Preservation Act, and the Coastal Zone Management Act.\(^{227}\) As scholars Tiara R.


\(^{223}\) See Final EIS, supra note 222, at Vol. 4, Ch. 19, 19-2 (concluding that the majority of Guam’s population meets the criteria of “an Asian Pacific minority group”).

\(^{224}\) E-mail from Julian Aguon, human rights attorney, to Susan Serrano (Aug. 30, 2021, 3:03pm HST) (on file with author).

\(^{225}\) See id. at Vol. 4, Ch. 19, 19-5 (also finding that because all people of Piti and Guam would be affected by the impacts of Navy shore leave on crime and social order, the aircraft carrier berthing there similarly would not adversely affect minority or low-income populations).

\(^{226}\) See Final EIS, supra note 222 at Vol. 4, Ch. 19, 19-1–19-5 (finding that a majority of the Guam population are racial or ethnic minorities and the comparison population group is outside of Guam, “it would be impossible for there to be a disproportionate effect from an identified adverse impact based solely on the impact affecting a minority population”).

Na’puti and Michael Lujan Bevacqua observe, the lawsuit underscored the colonial paradox of arguing simultaneously that the site was part of, yet not part of, the United States. CHamoru groups sought to challenge the United States’ militarism “by articulating Pågåt’s distinctness and the island’s separateness from the U.S.,” but were required to adopt the “endangered historic place” language of domestic U.S. law to show how the space was “significant” and “part of the U.S. nation-state.” After the Navy decided to prepare a supplemental EIS to reevaluate live-fire training range complex alternatives, the suit was dismissed as moot.

As illuminated by the racializing environmental justice framework, domestic labels like “endangered historic place” insufficiently describe places of profound cultural significance for CHamoru scholars and community members. The EIS’s finding of “no disproportionate impact” incompletely assesses the negative impacts for the CHamoru people of dredging and destroying seventy-one acres of pristine and endangered coral reef in their community. And the environmental litigation largely failed to acknowledge what was really at stake: CHamoru cultural connections to land and resources, self-determination, and their political and cultural survival as Indigenous (and colonized) peoples in their homelands.

3. A More Encompassing International Approach: Petition to UN Special Rapporteurs

In the international realm, CHamoru human rights activists frame the buildup controversy as one of environmental justice and self-determination. In line with the racializing environmental justice framework, their recent petition to UN Special Rapporteurs acknowledges CHamoru cultural values, histories, and needs and goals within the context of U.S. militarization. In August 2020, Blue Ocean Law and the Unrepresented Nations and Peoples Organization submitted a petition to the Special Rapporteur on the Rights of Indigenous Peoples on behalf of the Indigenous Chamorro people of Guam and Prutehi Litekyan: Save Ritidian. The petition recounted the

---

228 Na’puti & Bevacqua, supra note 96, at 850.
229 Id.
230 Id. (noting that National Trust for Historic Preservation named Pågåt Village one of the eleven “Most Endangered Historic Places in America for 2010”).
231 Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss Complaint, Guam Pres. Tr. v. Gregory, No. 10-00677 at 11 (D. Haw. Jan. 30, 2012). See also Gelardi & Perez, supra note 170 (reporting that grassroots activism pushed the Navy to modify its buildup plan in 2012). In 2012, the Department of Defense reduced the number of troops to be relocated to 5,000. See Supplemental EIS, at E-1. See also Tinian Women Ass’n v. United States Dep’t of the Navy, 976 F.3d 832, 840 (9th Cir. 2020) (affirming the district court’s dismissal of claim that the Navy should have considered alternate stationing and training locations for Marines relocating from Okinawa to Guam).
232 Submission to Cal´ı Tzay, supra note 208, at 9, 16–17.
233 Id. at 4, 20 (describing Prutehi Litekyan as “a community-based organization dedicated to defending sacred sites and protecting Guam’s natural and cultural resources”).
impacts of the military buildup on the CHamoru people and alleged that the Navy’s actions were violations of international human rights, including the right of permanent sovereignty over natural resources and the right to free, prior, and informed consent.234 The UN Declaration on the Rights of Indigenous Peoples requires states to obtain Indigenous peoples’ free and informed consent prior to the “approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”

The petition placed the massive buildup within the historical and modern context of U.S. land seizures, longstanding environmental contamination, and the denial of CHamoru rights to self-determination.236 And it explicitly linked the military buildup to severe impacts on “Chamorro culture, sovereignty [and] wellbeing” in light of the CHamoru people’s profound connection to the natural environment.237 In failing to consult with the CHamoru people before clearing culturally relevant sites and removing artifacts during construction,238 the military wholly disregarded “the importance of practices of ancestral veneration to the Chamorro people, for whom the skulls of relatives are considered sacred and serve as a conduit between the spirits of the deceased and the living on important spiritual concerns.”239

The petition also challenged the military’s proposed live-fire range at Ritidian Point, a protected wildlife refuge and one of the most culturally significant sites on Guam.240 It contended that building a firing range there would impact seventy ancestral and historical sites in the area, interfere with cultural fishing practices, block access to medicinal plants and herbs, and cause severe damage to ecologically endangered flora and fauna.241 It also highlighted the disconnect between the military’s view of “the Ritidian sites as ‘recreational,’” and the CHamoru belief that the areas are “more aptly termed ‘sacred’ or ‘ancestral’ given their rich cultural features and the fact that they also contain Chamorro graves and burial sites.”242 The petition contended that the United States contravened its international law duties emanating from the law of self-determination through its appropriation of Guam’s land and failure to consult with the CHamoru people before developing the buildup blueprint.

234 See Kaur, Buildup Projects, supra note 2.
235 G.A. Res. 61/295 (Sept. 13, 2007); see also Julian Aguon & Julie Hunter, Second Wave Due Diligence: The Case for Incorporating Free, Prior, and Informed Consent into the Deep Sea Mining Regulatory Regime, 38 STAN. ENV’T. L.J. 3, 34 (2018) (contending that “with respect to extractive industries or large-scale development projects, the [free, prior and informed consent] norm is unquestionably a state requirement, in part because of the high degree of adverse impact affected indigenous communities are likely to experience”).
236 Submission to Cal´ì Tzay, supra note 208, at 3.
237 Id. at 15.
238 Id.
239 Id.
240 Id. at 15–16.
241 Id. at 16–17.
242 Id. at 16.
In the first formal, international recognition of CHamoru concerns over the military buildup, three United Nations Special Rapporteurs sent a letter to the Biden administration framing their acute human rights concerns in the particularized language of environmental injustice for Indigenous peoples. The letter cited the United States’ “failure to protect the indigenous Chamorro people from the loss of their traditional lands, territories, and resources; serious adverse environmental impacts [of the buildup]; the loss of cultural artifacts and human remains; as well as the denial of the right to free, prior and informed consent and self-determination.” It asked President Biden to respond with additional information, including the measures his administration has taken “to ensure that the Chamorro can engage in their cultural and religious practices and protect their cultural heritage in view of the growing militarization,” the “steps taken to respect, protect and fulfill the rights of indigenous peoples to life, health, food, safe drinking water, their right to a safe, clean, healthy and sustainable environment in Guam,” and “planned measures . . . to support and promote the Chamorro peoples’ right to self-determination.” The Biden administration responded in October 2021, but advocates questioned its lukewarm commitment to CHamoru self-determination and its failure to recognize the CHamoru people’s unique rights, needs, and relationships to their homeland.

Although the Rapporteurs’ letter lacks formal enforcement power, the move is significant because it generates international political pressure on the United States and may lead to the development of “a mechanism for better respecting the rights that have already been violated.” CHamoru human rights attorney Julian Aguon expressed hope that the letter will “open the door” to conversations between CHamoru activists and the Biden administration, including Department of the Interior Secretary Deb Haaland to “re-calibrate the relationship at a policy level.” Indeed, the letter is a historic first step toward broadening and deepening understanding of the complex interplay between CHamoru self-determination and environmental justice: it expressly traces environmental and cultural destruction to the historical and
ongoing colonialism and militarism in Guam and the United States’ failure to fulfill its international obligations to decolonize Guam.\textsuperscript{249}

The petition and letter also underscore the CHamoru people’s differential disempowerment. They powerfully connect CHamoru rights to life, health, food, and culture: they examine the painful loss of cultural sites and practices, communal land, and Indigenous lifeways as a result of the U.S. military’s continued occupation of the island.\textsuperscript{250} In doing so, they more accurately define the injustice in this setting and renew calls for restoration of self-determination and the protection of ancestral lands—a group-resonant type of environmental justice.

\section*{B. The Aftermath of the Navy Bombing of Vieques, Puerto Rico}

The racializing environmental justice approach similarly reveals that for many Viequenses, the Vieques controversy is about their historical, cultural, and economic connections to the environment. The framework reveals how the peoples’ deeply-rooted sense of land use and control run headlong into mainstream concepts of “conservation,” formalistic legal processes, and so-called free-market “solutions.”\textsuperscript{251} As scholar Katherine McCaffrey contends, the controversy is ultimately about “broader questions of political authority, control over natural resources, definitions of common property rights—in sum, the rights and privileges of citizenship that are at the heart of state power and national identity.”\textsuperscript{252} This section first briefly traces the history of Vieques and then employs the racializing environmental justice framework to examine community groups’ attempts to repair and restore their lands, waters, and health after decades of Navy bombing.

\subsection*{1. Historical and Present-Day Context}

Environmental devastation in Vieques, “la isla nena,”\textsuperscript{253} is deeply intertwined with the colonial history of Puerto Rico.\textsuperscript{254} In the early 1900s, U.S.
sugar companies dramatically increased sugar cane production in Puerto Rico, and in many areas, the people experienced widespread poverty, landlessness, and social inequality. In that context—alongside the perceived strategic importance of securing bases near the Panama Canal Zone—the United States expropriated the western half of Vieques for the U.S. Navy in 1941. Thousands of people were forcibly removed from their homes with no resettlement plan or title to land, thereby destroying Vieques’ agricultural economy.257 Many were moved to inhospitable brush lands in the center of the island, but never received title to those lands, as they had been promised, after World War II.258 After appropriating another enormous swath of land on the eastern side of the island, the Navy owned 78% of the island, leaving Viequenses wedged “between an ammunition depot and maneuver area.”259

From 1941 to 2003, the U.S. Navy occupied and conducted military exercises on Vieques—bombing, artillery exercises, and chemical and biological weapons testing—that overwhelmed the island’s land, sea, and air. According to the Environmental Protection Agency, the U.S. Navy potentially left behind highly toxic chemicals including mercury, napalm, depleted uranium, and lead.260 Unexploded ordnance and remnants of exploded ord-

---

257 Id., supra note 254, at 26.
258 Berman Santana, Resisting Toxic Militarism, supra note 254, at 39–40. The large sugar corporations that had controlled most of Vieques were well compensated for the property, but the people who owned very small plots or held no title to land “were given scant hours’ notice, offered $25 to $100 for their belongings, and warned they would be bulldozed along with their homes if they didn’t move fast enough.” Id. at 39.
259 Id. at 35. See also GAO, Defense Cleanup, supra note 8, at 6. The eastern portion became the Vieques Naval Training Range, which occupied over 14,500 acres with four distinct areas, including the 900-acre “Live Impact Area” where military ships and planes pummeled the land with bombs. Berman Santana, Resisting Toxic Militarism, supra note 254, at 41. The western portion became the Naval Ammunitions Support Detachment, which spanned about 8,200 acres and stored weapons and explosives. Id. at 40.
261 Id. (also listing copper, magnesium, lithium, perchlorate, TNT, PCBs, solvents, and pesticides). See also Arturo Massol-Deyá. Dustin Pérez, Enrie Pérez, Manuel Berrios, & Elba Díaz, Trace Elements Analysis in Forage Samples from a US Navy Bombing Range (Vieques, Puerto Rico), 2 ISV. J. ENV'T. RSCH. & PUB. HEALTH 263, 264 (2005) (finding levels of lead above safety guidelines in vegetation samples from the former Atlantic Fleet Weapons Training Facility on Vieques).
nance have been identified throughout Vieques, both on land and in the sur-
rounding waters.262

In 1970, the U.S. military’s increased bombing practice on the neigh-
boring island of Culebra “sparked a well-organized, militant, and ultimately
successful protest conceived as anticolonial struggle,” which led to the mil-
tary’s ouster from Culebra in 1971.263 After leaving Culebra, and in the midst
of intensifying Cold War threats, the Navy increased its bombing practice on
Vieques. Because the bombing severely damaged coral reefs and marine life
and interfered with fishing practices, fishermen became leading players in
the struggle to halt the bombing.264 While the movement focused in part on
anti-imperialism,265 activists’ framing of the struggle in the early 1990s be-
gan to shift and broaden to issues of health and the environment.266 During
that period, activists formed the Committee for the Rescue and Development
of Vieques, which advocated “the four D’s: Demilitarization, Decontamina-
tion, Devolution (of land), and (community-based, sustainable) Develop-
ment.”267 Viequenses, environmental organizations, and the Puerto Rican
government also launched decades of litigation to halt the Navy bombing.268

In April 1999, two F-18s dropped 500-pound bombs one and a half
miles off their mark and killed David Sanes, a civilian security guard who
worked for the Navy. This galvanized a “relentless civil disobedience cam-
paign” of local Viequenses, joined by human rights and peace activists,
environmentalists, progressive church groups, celebrities, and national and
international supporters, who set up encampments on the target range and
joined the protests, marches, and pickets to halt the bombing.269 A crucial

262 See GAO, DEFENSE CLEANUP, supra note 8, at 1.
263 Baver, Peace, supra note 254, at 104 (noting that the U.S. military used Culebra for
bombing practice and weapons testing since 1903).
264 Id.
265 See Manuel Rodriguez Orellana, Vieques: The Past, Present, and Future of the Puerto
“[t]he necessity for the immediate and permanent cessation of all military activity and for the
devolution of lands held by the Navy in Vieques . . . was correctly understood internationally
as symbolizing the Puerto Rican people’s cause for self-determination.”).
266 See Sherrie L. Baver, Environmental Justice and the Cleanup of Vieques, 18 CENTRO J.
91, 92 (2006) (observing that environmental justice strategies played a part in the reframing of
the struggle to halt the Navy bombing and are central to current devolution, decontamination,
health care, and sustainable development efforts) [hereinafter Baver, Environmental Justice].
267 Berman Santana, Resisting Toxic Militarism, supra note 254, at 43.
Zenon, 711 F.2d 476, 479 (1st Cir. 1983); Vieques Conservation & Historical Trust v. Bush,
140 F. Supp. 2d 127, 135 (D.P.R. 2001); Water Keeper Alliance v. United States, 271 F.3d 21,
35 (1st Cir. 2001).
269 Baver, Peace, supra note 254, at 106. See also Kathleen Margareta Ryder, Vieques' Struggle for Freedom: Environmental Litigation, Civil Disobedience, and Political Marketing Proves Successful, 12 PENN. ST. ENV'T. L. REV. 419, 443–44 (2004) (contending that broad-
based protest movements, rather than litigation, were crucial in halting the Navy bombing of
Vieques).
factor in the movement’s expansion was its universal framing as a struggle for peace.270

Though the Navy stopped bombing exercises in May 2003, approximately three-quarters of the island remains under federal government control.271 Following land transfers on the western end,272 the U.S. military transferred 14,573 acres on the eastern side—nearly one half of the island273—to the U.S. Fish and Wildlife Service, which it administers as the Vieques National Wildlife Refuge.274 One area within the refuge, the 900-acre Live Impact Area, is designated a “wilderness area” with no public access.275

In 2005, at the urging of Puerto Rico’s governor, the Environmental Protection Agency placed much of Vieques and its surrounding waters on the National Priorities List, a list reserved for the most hazardous sites warranting long-term remediation as part of the Superfund clean-up process.276 The Governmental Accountability Office recently reported that, while the Navy has progressed in its cleanup of Vieques and Culebra, the work will continue through 2032 at a cost of nearly $800 million.277 As of March 2020, the Navy has collected and disposed of over eight million items of material potentially presenting an explosive hazard and over 100,000 munitions.278

271 For a detailed description of the social and political events and maneuvers that led to the end of the bombing, see McCaffrey & Baver, supra note 256.
272 GAO, DEFENSE CLEANUP, supra note 8, at 6 (reporting that in May 2001, the military transferred about 4,200 acres on the western end to the Municipality of Vieques, 3,000 acres to the U.S. Fish and Wildlife Service, and 800 acres to the Puerto Rico Conservation Trust).
275 GAO, DEFENSE CLEANUP, supra note 8, at 6.
277 GAO, DEFENSE CLEANUP, supra note 8, at 22.
278 Id. at 17 (reporting that major decontamination work remains at an 11,500-acre underwater site “where munitions from ... air-to-ground bombing may have been inadvertently fired into the water”); see also Baver, Environmental Justice, supra note 266, at 99 (describing constant shift of unexploded ordnance because of changing climate, hurricanes, and tidal action, among other geological features); ENV’T PROT. AGENCY, OFF. OF LAND AND EMERGENCY
In many ways, the Vieques struggle represents a classic environmental injustice: the decades-long bombardment of and release of toxins into a largely poor community of color, causing widespread environmental destruction and dire threats to human health. But in the struggle to halt the bombing and throughout the cleanup stage, the people of Vieques have framed the issue more broadly—as one not only about threats to human and environmental health, but of human rights, continuing colonialism, and cultural destruction. Framed in this fashion, they continue their multifaceted fight for environmental justice: for safe and meaningful clean-up, the return of lands, remedies for severe health problems and environmental contamination linked to the military’s exercises, and the slowing of rampant real estate speculation.

At the same time, existing legal battles fail to fully comprehend the political, economic, and cultural dimensions of the Vieques struggle. Indeed, the controversy cannot be wholly understood without confronting the disparate power relationship between the United States and Puerto Rico—rooted in U.S. colonialism and militarism—that impedes environmental resiliency and sharply limits available “justice” remedies. As scholar Sherrie Baver contends, the long-term, highly complex decontamination process—like the struggles to stop the bombing—“should be seen within [this] larger context of colonialism” because “[t]he bombing and now its residue are part of Puerto Rico’s history as a military colony.”

---

279 Baver, Environmental Justice, supra note 266, at 103.

280 See McCaffrey, Fish, supra note 7, at 38 (describing the disputes over the Agency for Toxic Substances and Disease Registry’s findings of no toxic contamination on Vieques).

281 Baver, Peace, supra note 254, at 103, 107 (noting that the linking of the Vieques struggle to “the larger context of Puerto Rico’s colonialism” strengthened civil society and self-determination on the island); McCaffrey, Fish, supra note 7, at 39 (arguing that the people’s struggle for “accountability and environmental remediation” forms the foundation of self-determination).

282 Carmen Lugo-Lugo, An Island in Raw Skin: Vieques and the Transnational Activist Challenge to Puerto Rico’s Colonial Invisibility, 8 LATINO(A) RESEARCH REV. 209 (2011-2012) (contending that while Vieques is “Navy free,” it still suffers from the impacts of its “colonial condition,” such as environmental degradation, ongoing human rights violations, and a severely depressed economy); María Alejandra Torres, Vieques, Puerto Rico: U.S. Ecological Militarism and Climate Change, 23 HUM. RTS. BRIEF 19, 20 (2020) (describing the lack of community consultation in the cleanup process and questionable detonation practices as part of the U.S. Navy’s “ecological militarism” on Vieques).

283 See The Insular Cases: Millions of Americans Denied Equal Protection Under the Law, NAT. RES. DEMS, (May 25, 2021), https://hrdems.medium.com/the-insular-cases-c52a8294b370, archived at https://perma.cc/LVU5-5VWM; Phil McKenna, Devastated Puerto Rico Tests Fairness of Response to Climate Disasters, INSIDE CLIMATE NEWS (Sept. 22, 2017); Liz Moyer & Mary Williams Walsh, How Puerto Rico Debt is Grappling with a Debt Crisis, N.Y. TIMES (July 1, 2016) (“Unlike sovereign nations . . . [Puerto Rico] can’t seek emergency assistance from the International Monetary Fund.”).

284 Baver, Environmental Justice, supra note 266, at 103.
2. Limitations of the Domestic Legal Framework

The community’s attempts to fit their claims into the constricted domestic legal framework illustrate the practical limitations of domestic law to remedy multifaceted environmental injustices and repair damage to community health. Indeed, some Viequenses expressed concern that legal action would not sufficiently repair the communal or societal harms of the bombing.285 They feared that individual compensation would not provide the much-needed medical infrastructure to aid ill residents, and that a civil judgment or settlement would foreclose broader strategies.286 In a series of cases, courts concluded that the Viequenses’ claims were barred under the discretionary function exception to the Federal Torts Claims Act (FTCA).

In *Sanchez v. United States*,287 7,125 Vieques residents filed a class action under the FTCA.288 They argued that the Navy’s negligent emission, storage, and disposal of hazardous and toxic waste caused adverse health outcomes including increased infant mortality, cancer, hypertension, cirrhosis of the liver, and diabetes.289 They asserted that the United States negligently or intentionally exposed Vieques residents to contamination, hazardous waste, and environmental damage by releasing explosives, ordnances, and contaminants into the environment during its weapons testing programs.290 Unlike in previous lawsuits,291 they also argued that the Navy breached its duty to warn them of the health dangers posed by its hazardous activities, and instead knowingly invited residents into the contaminated areas for fishing and cattle herding.292 The First Circuit Court of Appeals af-


287 *Sanchez ex rel. D.R.-S. v. United States*, 671 F.3d 86 (1st Cir. 2012).


289 *Sánchez*, 671 F.3d at 90.

290 *Sanchez*, 707 F.Supp.2d at 221. Among other injuries, the Navy’s actions caused an increased cancer rate among Vieques residents, which is 30% higher than on the main island of Puerto Rico. *Id.*


292 The United States argued the discretionary function exception applied because its challenged conduct was a discretionary matter of national security, not a mandatory duty, and its challenged conduct was based in public policy because it was a matter of balancing “competing concerns of secrecy and safety, national security and public health.” *Sanchez*, 707 F.Supp.2d at 230. The residents countered that the Navy’s duties were not discretionary be-
firmed the district court’s holding that the residents’ claims were barred because the Navy’s challenged conduct constituted an exercise of its discretion.293

In dissent, Judge Juan Torruella rebuked the majority for disregarding longstanding U.S. militarism in Puerto Rico and the structural disempowerment of the Puerto Rican people. By creating an “unwarranted exception”294 to the FTCA for military activity, he argued, the court slammed shut the courthouse doors on a people lacking the political means to remedy harsh environmental injustices. He first recounted the “turbulent history” of the Navy bombardment that impacted “the daily lives of the civilian residents of Vieques and Culebra.”295 Pointing to caselaw sanctioning lesser civil and political rights for Puerto Ricans, he excoriated the majority for “depriving U.S. citizens who live in Vieques of the only effective remaining forum in which to seek redress for their alleged wrongs” because they are unable to “access . . . the political forum available to most other citizens of the United States.”296 Because Puerto Rico’s residents have no meaningful access to Congress, he contended, the majority’s call for political solutions underscored the “intolerable and undemocratic situation” at the heart of the Vieques controversy. By broadly construing the discretionary function exception to the FTCA, and instead pointing the plaintiffs to an unrealistic political remedy for their injuries in light of their inability to vote,297 the court discounted their unique colonial experiences, the impacts of history and U.S. plenary power on community health and well-being, and the “particulars of environmental racism” in this territorial setting.

3. A More Encompassing International Approach: Inter-American Commission on Human Rights

The following year, the National Lawyers Guild and four other legal and human rights groups filed a Petition before the Inter-American Commiss-
sion on Human Rights, contending that the U.S. Navy’s military exercises caused serious and chronic illnesses as well as pollution of the land, air, and sea in violation of the United States’ obligations under the American Declaration of the Rights and Duties of Man. The rights invoked included rights to life, health and a healthy environment, access to information, judicial remedies, residence and freedom of movement, and work and fair remuneration. The petitioners applied insights from the environmental justice movement to demonstrate how as “non-white, low income, Spanish-speaking inhabitants of a United States colony, the residents of Vieques are subjected to multiple modes of subordination” and bear a correlating “disproportionate share of adverse environmental burdens[.]” Although the claim’s outcome is unclear, it acknowledges Viequenses’ differential racialization and disempowerment: it expressly connects the environmental injustice to Puerto Rico’s territorial status and how its status “exacerbates the burden imposed by intersection of multiple oppressions of race, ethnicity, culture, class and gender.” Accordingly, it more accurately portrays the injustice: that Viequenses lack the political power to “access remediation for the damage to their environment, their health and their livelihoods.”

4. Tensions Between “Conservation” and Self-determination

The racializing environmental justice framework also reveals the tensions between concepts of “conservation” and the peoples’ expressed desires to exercise control over their land and resources. Traditional notions of conservation view humans as separate from and incompatible with “the environment;” land and resources therefore must be safeguarded against human occupation and intrusion. The Vieques National Wildlife Refuge—simultaneously an “environmental refuge” and a “toxic disaster”—occupies approximately 17,771 acres of Vieques land and seeks to “protect and

---

299 Id. at 17.
300 Id.
301 Id. at 16.
302 Id. at 16–17.

306 DAVID BEARDEN, CONG. RSCH. SERV., RL32533, VIEQUES AND CULEBRA ISLANDS: AN ANALYSIS OF CLEANUP STATUS AND COSTS 2 (2005) (concluding that “the Navy may be permitted to remove fewer munitions and clean up related contamination to a less stringent degree than would otherwise be required for less restrictive land uses, such as tourism or residential development”).


308 Id. at 160.

309 McCaffrey, The Battle, supra note 251, at 137 (noting that activists’ plans for the land “clash with a U.S. conservationist ethic”).

310 Id. at 126.
nanny," \footnote{311} an obstacle to meaningful cleanup, and “the gatekeeper blocking access to the land for which they have fought for decades.” \footnote{312}

In this way, the refuge also thwarts the exercise of customary practices and hinders community approaches to development. Historically, Viequenses gathered fruit and wood for making charcoal, fished off shore and in lagoons, and collected blue land crabs and sea snails. \footnote{313} Many of those practices that endured through the Navy occupation are now prohibited or sharply restricted by the Fish and Wildlife Service. \footnote{314} Likewise, the refuge is considered a barrier to “recreational, farming, and other civilian uses for future generations” \footnote{315} and an obstacle to “local visions of socioeconomic development,” such as job creation, housing, natural and historical resource conservation, and agriculture, that depend on access to the land and resources. \footnote{316} The racializing environmental justice framework thus illustrates that environmental injustice concerns encompass not just the health and ecological impacts of the siting of toxic waste producing facilities, but also militarism’s impacts on traditional and customary practices and community-based strategies for land use and development.

5. A “Tsunami of Gentrification”

The racializing environmental justice framework also points to the impacts of gentrification in magnifying environmental injustice. Vieques residents face a post-Maria “tsunami of gentrification” \footnote{317}—an explosion of North American investors and vacation home buyers snapping up properties, pricing out local families, and worsening the local population’s already perilous economic footing. \footnote{318} Real estate speculation and exclusive property development began soon after the Navy halted its bombing, but Viequenses,
whose median household income is $16,261, now face “a vicious fight for access to the island.” The federal government’s withholding and delay of federal disaster recovery funds following Hurricane Maria, alongside Puerto Rico’s ongoing economic crisis, exacerbated those harms.

Viequenses thus battle to hold onto ancestral homes, launch ecotourism efforts, and implement sustainable development plans, but tax incentives for outsiders with more money and leverage deepen the islands’ inequality, displace local residents, and as some assert, “encourage] modern-day colonization.” As one resident declared: “We have all the negative impacts of colonialism, all the negative impacts of disaster capitalism in the wake of Maria, but there is an ongoing 50-year disaster of militarism in Vieques that creates a different situation. . . . It makes [Vieques] supra [sic] vulnerable to the forces of speculation, gentrification, displacement and population substitution.” The differential disempowerment of Vieques residents vis-à-vis western property speculators reflects the colonial legacies of the U.S./Puerto Rico relationship and contributes to environmental injustice in this setting.

6. Collective Community Action

The persistent environmental problems, complex rights claims, and need for justice remedies in Vieques illustrate the need for particularized

---

319 Bayne & Dieppa, supra note 251 (reporting that close to 500 homes on Vieques, many owned by nonresidents, are currently listed as Airbnbs); Berman Santana, La Lucha, supra note 316, at 119 (describing the development of luxury housing that is pricing out Viequenses).


321 See Berman Santana, La Lucha, supra note 316, at 119 (describing community members’ opposition to plans by New York-based company SunBay to erect a luxury tourism complex on over 500 acres of land, and the potential of a Community Land Trust, similar to one established on the main island by the Puerto Rico legislature to control land price inflation).


323 Bayne & Dieppa, supra note 251 (quoting Vieques resident Robert Rabin).


325 See Vieques Recovery and Redevelopment Act of 2019, H.R. 4605, 116th Cong. (2019) (articulating a framework for monetary compensation for Vieques residents for exposure to heavy metals and chemicals during and after weapons testing); Federico de Jesus & Laura Rodríguez, An Urgent Rescue Plan for Puerto Rico, CENTER FOR AM. PROG. (Apr. 28,
approaches to racialized environmental justice. McCaffrey and others suggest that because of Puerto Rico’s ongoing colonial status, collective community action is critical to ensure sustainable development and real peace for Vieques.\textsuperscript{326} In addition to opposing open detonation of unexploded ordnance and open air burning of toxic waste,\textsuperscript{327} and forcing the EPA to set up an air-monitoring station,\textsuperscript{328} community leaders urge strategies that seek not only to preserve natural resources, but to empower the people through small-scale economic development and ecotourism.\textsuperscript{329} In the face of steep barriers to securing health services, reliable transportation, employment, and education, as well as remedies for poverty and other legacies of colonialism and militarism, the community strives to realize “an alternate vision of security based on a culture of peace, cooperation, and community control.”\textsuperscript{330}

For many individuals and community groups, environmental justice means complete demilitarization; decontamination not only of military sectors, but also the civilian ones; meaningful community participation on the advisory board tasked with advising the cleanup planning process;\textsuperscript{331} access to quality health care;\textsuperscript{332} devolution of land to Viequenses to enable future generations to stay there; and a sustainable development plan to bolster the local economy while preserving natural resources.\textsuperscript{333} Activists report that

\textsuperscript{326} McCaffrey, The Battle, supra note 251, at 127 (noting that “collective action [is] the primary vehicle for asserting alternatives to top-down development schemes”); Baver, Environmental Justice, supra note 266, at 102; Berman Santana, La Lucha, supra note 316, at 110.


\textsuperscript{328} See Former Atlantic Fleet Weapons Training Area - Vieques, Community Outreach, NAVAL FACILITIES ENG’G SYSS. COMMAND, https://www.nuvfac.navy.mil/products_and_services/ev/products_and_services/env_restoration/installation_map/navfac_atlantic/vieques/outreach.html, archived at https://perma.cc/S7Z4-TK5A (describing the Restoration Advisory Board); but see McCaffrey, Environmental Remediation, supra note 328, at 87, 90 (identifying the limitations of the Advisory Board).

\textsuperscript{329} Berman Santana, Resisting Toxic Militarism, supra note 254, at 45. For an extensive description of many of the community’s strategies for demilitarization, decontamination, devolution, and development, see Berman Santana, La Lucha, supra note 316.


\textsuperscript{331} See Berman Santana, Resisting Toxic Militarism, supra note 254, at 45. For an extensive description of many of the community’s strategies for demilitarization, decontamination, devolution, and development, see Berman Santana, La Lucha, supra note 316.

\textsuperscript{332} Berman Santana, Resisting Toxic Militarism, supra note 254, at 45. For an extensive description of many of the community’s strategies for demilitarization, decontamination, devolution, and development, see Berman Santana, La Lucha, supra note 316.

\textsuperscript{333} Bayne & Dieppa, supra note 251.
none of those goals has been met. Nonetheless, advocates employ an expansive conception of environmental justice as they testify about harms of gentrification and the Navy’s superficial cleanup before the UN Special Committee on Decolonization, and supporters locally and nationally attempt to repair the lasting environmental and health harms. As one resident lamented, “Vieques was rescued for the Viegues, so that the people of Vieques could keep living and populate here. . . . The idea is to rescue it for our grandchildren, great-grandchildren and great-great-grandchildren so that they have an inheritance. Not so that we could disappear from history.”

VI. CONCLUSION

The racializing environmental justice framework acknowledges that racial and Native groups are differently situated according to their “socio-economic needs, political power, cultural values, and group goals.” This Article refined the racializing environmental justice inquiry to illumine the enduring links between environmental injustice and the U.S. territories’ paradoxical political status, deeply rooted in histories of colonialism and militarism. Viewed through the racializing environmental justice lens, these controversies are about much more than “the environment;” they are also efforts to restore cultural practices, promote economic self-sufficiency and traditional livelihoods, and exercise a measure of political self-determination.

The inquiries into the military buildup in Guam and the aftermath of the Vieques bombing highlighted the complexity of crafting environmental justice claims and remedies that fully consider the needs and goals of the peoples of the U.S. territories in specific settings. The inquiries also illuminated the inadequacy of domestic legal frameworks and concepts to acknowledge the United States’ continuing colonial governance of its territories and the gross imbalances in political power that impede attempts to repair environmental harms. Without examining the differential disempowerment and the political, cultural, economic, and spiritual impacts on the peoples of the ter-

---


337 Bayne & Dieppa, supra note 251 (quoting Zaida Torres Rodríguez).

338 Yamamoto & Lyman, supra note 17, at 359.
territories, remedies fell far short of meaningfully repairing the communities’ persisting wounds.

If the controversies had been conceived differently—in language, framing, and scope—would the outcomes have changed? What might be possible steps—politically and legally—moving forward? The racializing environmental justice framework does not point to definitive answers, but it suggests that without a deeper U.S. commitment to self-determination, the territories’ inability to craft self-determining and meaningful solutions to environmental injustices will likely persist. Nonetheless, the framework helps us to think expansively—to rethink environmental injustice in light of differential group power, access to resources, and distinct group relationships to the environment. This expansive view goes beyond rectifying the discriminatory siting of toxic facilities. It embraces the complexity of group experience in defining environmental problems and fashioning meaningful remedies.