

# To Lift a Dark Cloud: The *Insular Cases*' Stubborn Vitality, Their Place in Civil Rights Law, and the Need to Overrule Them

Adriel I. Cepeda Derieux\*

## I. INTRODUCTION

In February 2022, thirteen national civil and human rights groups wrote a letter to the Department of Justice (DOJ) asking it to formally condemn the Supreme Court's *Insular Cases*—a group of early twentieth century decisions that largely define the constitutional relationship between the United States and its overseas territories.<sup>1</sup> The group included the ACLU and other leading organizations like the NAACP, Legal Defense Fund, Hispanic Federation, and LatinoJustice PRLDEF among others. The letter was noteworthy, in part, because national groups often direct their advocacy at the DOJ, but rarely urge government lawyers to purposefully avoid specific cases or arguments. In this letter, however, national groups urged government lawyers to responsibly advocate and not rely on cases that fall so far outside what should be accepted as law.

An example of those cases is *Korematsu v. United States*,<sup>2</sup> which sanctioned the mass incarceration of Japanese Americans during World War II.<sup>3</sup> Even as it stayed on the books—so to speak—*Korematsu* became increasingly (and rightly) infamous. Eventually, the Supreme Court acknowledged that the case had been “overruled in the court of history.”<sup>4</sup> The *Insular Cases* are like *Korematsu* and other rebuked cases such as *Plessy v. Ferguson*.<sup>5</sup> They are all glaringly racist and rooted in white supremacy.

The groups asked Generals Garland and Prelogar to disavow the *Insular Cases*, just like then-Solicitor General Neil Katyal did in 2011 when he publicly

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\* Adriel I. Cepeda Derieux is the Deputy Director of the American Civil Liberties Union's Voting Rights Project. Mr. Cepeda Derieux served as counsel to amici in *United States v. Vaello-Madero*, 142 S. Ct. 1539 (2022) and *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investments, LLC*, 140 S. Ct. 1649 (2020). Mr. Cepeda Derieux writes in his personal capacity and the views expressed should not be attributed to his employer. He is indebted to Christina Duffy Ponsa-Kraus, Neil Weare, Alejandro Ortiz, and Luis Fuentes-Rohwer for their invaluable feedback, guidance, and friendship.

1. See *Civil Rights Group Letter to DOJ on Insular Cases*, ACLU (Feb. 10, 2022), <https://www.aclu.org/letter/civil-rights-group-letter-doj-insular-cases> [https://perma.cc/PJ3U-BN27].

2. 323 U.S. 214 (1944).

3. See *id.* at 223 (justifying confinement on basis of military urgencies).

4. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (emphasizing *Korematsu* decision was “gravely wrong”).

5. 163 U.S. 537 (1896).

apologized for the DOJ's role in *Korematsu*.<sup>6</sup> This marked the first time a coalition of national civil rights groups addressed the *Insular Cases* like this. It was an exciting piece of advocacy to be a part of, to watch come together, and to continue to push forward. As the letter explained, it was particularly timely for these groups (and the DOJ) to rebuke the *Insular Cases* because 2022 marked the 100th anniversary of *Balzac v. Porto Rico*,<sup>7</sup> a decision commonly understood to be the last of the cases catalogued under the “*Insular Cases*” label.

With that anniversary looming—and this letter as a starting point—I would like to speak tonight about the *Insular Cases*, and, in particular, the way they have come up in recent cases before the Supreme Court. I will also address the way those decisions have become reviled, yet somehow have shifted into something that has become more difficult to pin down or overrule. Ultimately, I will highlight the ways the cases remain deeply problematic, especially their continued impact on the 3.5 million people who live in U.S. territories—98% of whom are people of color.<sup>8</sup>

## II. HISTORY

The *Insular Cases* are a series of Supreme Court decisions from the early 1900s that addressed legal questions arising from the United States' annexation of several islands from Spain at the end of the Spanish-American War.<sup>9</sup> Scholars and courts differ on which cases are “*Insular Cases*,” but it is generally understood that the most important of them came down in 1901 and the last one in 1922.<sup>10</sup>

In 1898, the United States went to war, ostensibly to “liberate” Cuba, which had been fighting a war for independence against Spain for several decades.<sup>11</sup> But the United States quickly ended that war.<sup>12</sup> In just a few months, the United States not only defeated Spain in Cuba, but also annexed the last bits of the

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6. See Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, U.S. DEP'T OF JUST. ARCHIVES (May 20, 2011), <https://www.justice.gov/archives/opa/blog/-confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> [https://perma.cc/W2-C8-BPJ5].

7. 258 U.S. 298 (1922).

8. See Stacey Plaskett, *The Second-Class Treatment of U.S. Territories Is Un-American*, THE ATLANTIC (Mar. 11, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/give-voting-rights-us-territories/618246/> [https://perma.cc/9FPG-HVCM] (noting more than 3.5 million Americans cannot vote in presidential elections in U.S. Territories).

9. See Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2449 (2022) (introducing *Insular Cases*' origin).

10. See generally *Downes v. Bidwell*, 82 U.S. 244 (1901); *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

11. See *The World of 1898: International Perspectives on the Spanish American War*, LIBR. OF CONG., <https://www.loc.gov/rr/hispanic/1898/intro.html> (2022) [https://perma.cc/L5DA-FVT2] [hereinafter *The World of 1898*] (describing Spanish-American war).

12. See *id.* (outlining events leading to Spain's unconditional surrender).

empire that Spain had built in the Caribbean and Pacific—specifically, Guam, the Philippines, and Puerto Rico.<sup>13</sup>

It is hardly controversial today to acknowledge that the United States had imperialist motivations to fight the Spanish-American War. In fact, denying this would be more controversial. The result of the war was that once Spain left those islands, the United States annexed them.<sup>14</sup> It did so, practically, because the war ended with U.S. troops on foreign soil.<sup>15</sup> It did so, formally, by signing a treaty with Spain in 1898.<sup>16</sup>

That annexation triggered major legal and policy questions at all levels of public discourse and, eventually, in the courts. It makes sense to take a step back and consider: What were those questions and why were they even asked? The short answer is that the United States' sudden addition of islands populated by millions of nonwhite, non-English-speaking peoples brought with it some thorny issues. Indeed, bringing millions of non-English-speaking people of color into what was understood to be the United States created complications. The fact that the country absorbed, almost overnight, extensive lands where up to 10% of the country's population at the time already lived, sparked a deep nationwide moment of reflection and controversy. The questions were obvious: Could the Nation expand this way by overseas conquests, and if so, what was the status of the new islands vis-à-vis the United States? Did the new islands have to become states or could the United States—a republic and democracy—keep them as colonies instead?

Here, a point of clarification seems proper. The United States had *always* been an expansionist nation. It always had territories, and importantly, the national government *always* had vast powers to govern or administer its territories.

Article IV of the Constitution states that Congress has the power to “dispose of and make all needful Rules” for “[t]erritory . . . belonging to the United States,” and this clause had been read very broadly to afford Congress “plenary” power over federal territories.<sup>17</sup> But this most recent expansion brought questions related to the political future of those new territories. The understanding had always been that as the United States added territories, that land—and the people who lived there—would *politically* join the Nation by becoming states, as every territory that the United States added to the Nation before 1898 eventually did. That was the way the country avoided the undemocratic conundrum of

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13. See *id.* (providing terms of treaty resulting in United States' control of Guam, Puerto Rico, and Philippines).

14. See OFF. OF HISTORIAN, *The Spanish-American War, 1898*, U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1866-1898/spanish-american-war> [<https://perma.cc/2HKX-HY8L>] (explaining annexation of Guam and Puerto Rico to United States).

15. See *The World of 1898*, *supra* note 11 (describing how U.S. troops landed in Puerto Rico and marched to San Juan with no opposition).

16. See *id.* (explaining Spain and United States signed peace treaty in December 1898).

17. See U.S. CONST. art. IV, § 3 (granting Congress power to dispose of and make rules and regulations).

otherwise having these territories peopled with inhabitants that had no say in the national government.

Connected to the questions about those territories' political future were questions about the obligations that the United States owed people who lived in the new territories: Would they automatically become citizens? Just fifty years earlier, the country had fought a Civil War largely premised on answering questions over whether certain people could be somehow within the country but never fully part of it.<sup>18</sup> The infamous *Dred Scott v. Sandford*<sup>19</sup> case said one thing: Slaves and their descendants would *never* be part of the Nation.<sup>20</sup> The Reconstruction Amendments then said another: Anyone born in the United States—whether in a state or territory—was a citizen.<sup>21</sup>

If residents of the territories could somehow still be something less than citizens, how long could Congress keep them in that state? If the answers to this question *bound* the United States, geographically, to add the new territories as states, or politically, to make the people who lived there U.S. citizens, then did it even make sense for the country to expand overseas?

At the time, those questions were crucial because debates between so-called imperialists—those who thought the United States *should* keep these territories—and anti-imperialists—or those who thought the country *must* let them go—did enrapt the Nation. The *New York World*, Joseph Pulitzer's newspaper at the time, wrote of one of the *Insular Cases* that “no case ever attracted wider attention.”<sup>22</sup> That is noteworthy, considering the Court had already decided constitutional blockbusters like *Plessy* and *Dred Scott*.

Frankly, it is easy to see why these questions took over the national conversation. This was a pivotal point for the Nation. For the first time, it had brashly projected its power outward and won territory by entering the world stage as a new overseas power. With that process came a turning point. Could the United States—a constitutional republic—hold overseas possessions like European powers did at the time, or did it have to fold them *and* their people into the national fabric?

Professor Daniel Immerwahr has characterized this hinge point as a trilemma.<sup>23</sup> The United States could have two of three things—republicanism, white supremacy, or overseas expansion.<sup>24</sup> It could not have all three. “In the past,” he wrote, “republicanism and white supremacy had been jointly maintained by carefully shaping the country's borders. But absorbing populous

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18. See Paul Finkelman, *Review: Francis Lieber and the Modern Law of War*, 80 U. CHI L. REV. 2071, 2116 (2013) (arguing slavery ultimately caused Civil War).

19. 60 U.S. 393 (1857).

20. See *id.* at 407 (mentioning Declaration of Independence intended to exclude some classes of people).

21. See U.S. CONST. amend. XIV, § 1 (redefining citizen).

22. See Krishanti Vignarajah, *The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the Insular Cases*, 77 U. CHI. L. REV. 781, 815 (2010).

23. See DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* 80-81 (2019) (recalling arguments and solutions to America's trilemma).

24. See *id.*

nonwhite colonies would wreck all that.”<sup>25</sup> This heated debate seems so difficult to imagine 120 years later, largely because of the Supreme Court’s answers to many of these questions in the *Insular Cases*. This is the second reason the contemporary accounts are fascinating to me. It is somewhat shocking—looking back from our perch where advocates and scholars have had to pull the *Insular Cases* back into the limelight—to imagine a time when these questions dominated the national discourse.

#### A. *The Insular Cases Explained*

In 1901 the Supreme Court took up many of these questions. The leading case, *Downes v. Bidwell*,<sup>26</sup> involved tariffs on a crate of oranges sent to New York from Puerto Rico.<sup>27</sup> The Court had to determine whether Puerto Rico was part of the United States for purposes of the Constitution’s Uniformity Clause.<sup>28</sup> The plaintiff paid duties on Puerto Rican oranges as if they came from a foreign country.<sup>29</sup> But was Puerto Rico part of the United States or not? It is easy to see how the implications went further than just a crate of oranges. And speaking to the constitutional issue, the Supreme Court concluded—in a very fractured ruling—that Puerto Rico was part of the United States for some purposes, but not others.<sup>30</sup> After *Downes*, Puerto Rico was not “in” the United States for Uniformity Clause purposes. The reason: a completely new doctrine that had never been part of the law.

Specifically, in a concurrence that eventually received the full Court’s approval, Justice Edward Douglass White said there would now be two types of territories: *incorporated* ones and those, like Puerto Rico, that were *unincorporated*.<sup>31</sup> The difference between the two depended on whether Congress had said that the specific territory was on the path to become a state. If Congress had, then the territory was incorporated. If it had not, then that was an unincorporated territory. Unincorporated territories remained “*foreign to the United States in a domestic sense*.”<sup>32</sup>

#### B. *This Is the “Territorial Incorporation Doctrine”*

Guam, Puerto Rico, and the Philippines, were all—over the course of various Court decisions—described as *unincorporated*; and that was true even after

25. *Id.* at 80.

26. 182 U.S. 244 (1901).

27. *See id.* at 247-48 (discussing dispute of potential back duties owed for import of oranges).

28. *See id.* at 249 (noting Court must determine Puerto Rico’s status per Article I, Section 8 of Constitution).

29. *See id.* at 247-48 (explaining dispute over taxing Puerto Rican oranges as foreign or domestic imports).

30. *See Downes*, 182 U.S. at 287 (establishing Puerto Rico territory “belonging” to U.S. but not subject to revenue clauses of Constitution).

31. *See id.* at 289-90 (explaining Constitution grants Congress ability to give power to incorporated and unincorporated territories).

32. *Downes v. Bidwell*, 182 U.S. 244, 341-42 (1901) (highlighting provisions of Constitution sometimes inapplicable to Congress when legislating Puerto Rico).

Congress legislated to declare people born in Puerto Rico to be U.S. citizens in 1917.<sup>33</sup> With the exception of the Philippines, which became an independent nation in the 1940s, Guam and Puerto Rico remain to this day *unincorporated territories*.<sup>34</sup> They are now joined by American Samoa, the Northern Mariana Islands (CNMI), and the U.S. Virgin Islands, which became U.S. territories in the twentieth century.<sup>35</sup>

At this point, it makes sense to discuss why the *Insular Cases*, as Professor Luis Fuentes-Rohwer writes, “have nary a friend in the world.”<sup>36</sup> The notion that Congress should have flexibility to deal with national territories is, on its face, uncontroversial. And the idea that there would be two different types of territories—incorporated and unincorporated—is not immediately offensive. The problem comes in when we factor in *why* the Supreme Court, standing at the turn of the century, felt Congress needed more flexibility to deal with *these* territories, and why it needed a new doctrine. In truth, there is really no mystery why the Court felt the need to create the classification of unincorporated territories.

I, like many before me, would argue that the short answer—the *only* answer—is that the Court felt that the people of the new territories were unqualified to be part of the Nation because they were overwhelmingly people of color. In the words of the Justices—because they did not mince them—the “alien,” “uncivilized,” “savage and restless” people who lived in the territories were “unfit” to be part of the Nation.<sup>37</sup> Ultimately, the *Insular Cases*’ core holding, and territorial incorporation, necessarily rest on the idea that an exception needed to be made in 1901 because, for the first time, the United States annexed territories full of nonwhite peoples and it was unlikely that white, Anglo-Saxons would resettle those territories.<sup>38</sup>

For the first time in history, the Court sanctioned the notion that the United States could govern certain territories forever without bringing them into the Union.<sup>39</sup> As Professor Christina Duffy Ponsa-Kraus recently wrote: Incorporation was “a judicial innovation designed for the purpose of squaring the commitment

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33. See Jones-Shafroth Act, ch. 145, § 5, 39 Stat. 951, 953 (1917) (current version at 48 U.S.C. § 733a) (granting citizenship to those born in Puerto Rico after April 11, 1899).

34. See Press Release, U.S. Census Bureau, Philippines Independence Day (1898) (June 12, 2023), <https://www.census.gov/newsroom/stories/philippines.html> [<https://perma.cc/DL6H-DT9W>] (noting Philippines achieved independence in 1946); Developments in the Law, *The US Territories: Introduction*, 130 HARV. L. REV. 1617, 1617 (2017) (designating Guam and Puerto Rico unincorporated territories).

35. See Luis Fuentes-Rohwer, *The Land That Democratic Theory Forgot*, 83 IND. L.J. 1525, 1527, 1536 (2008) (describing unincorporated territories “in constitutional limbo” and on “road to nowhere”); Daniel A. Cotter, *Territories of the United States*, CONSTITUTING AM., <https://constitutingamerica.org/territories-of-the-united-states-guest-essayist-daniel-a-cotter/> [<https://perma.cc/CAT8-6VP3>] (providing full list of unincorporated territories).

36. See Fuentes-Rohwer, *supra* note 35, at 1536.

37. See *Downes v. Bidwell*, 182 U.S. 244, 306, 311-13, 324, 335 (1901) (White, J., concurring).

38. See Gustavo A. Gelpí, *The Insular Cases: A Comparative Historical Study of Puerto Rico, Hawai‘i, and the Philippines*, 2011 FED. LAW. 22, 22-23 (providing history of territorial incorporation).

39. See Ponsa-Kraus, *supra* note 9, at 2453 (supporting assertion U.S. can govern territories indefinitely, without admitting into statehood or deannexing them).

to representative democracy with the Court's implicit conviction that nonwhite people . . . were ill-suited to participate in a majority-white, Anglo-Saxon polity."<sup>40</sup> And I submit—as many do—that even if that were the only problem with the *Insular Cases*, it would still be enough for them to go the way of other cases—like *Plessy* and *Korematsu*—that rested legal doctrine on awful and glaring racial classifications. Even if that was all they did, they established a dignitary harm on the millions of people who live in U.S. territories today, whom “good” case law still describes as “savages” or simply “unfit.”

But importantly, that is not all the *Insular Cases* did. I have mentioned *Downes* and how it concluded that the Uniformity Clause, at least, did not constrain Congress when it legislated Puerto Rico.<sup>41</sup> And it is that notion—the idea that the Constitution does not apply “fully” in unincorporated territories—that has been the hallmark of the *Insular Cases* for over a hundred years.

Over the course of two decades, between 1901 and 1922, the Supreme Court expanded on territorial incorporation. By the time it was done, it held that a few, *specific* constitutional provisions did not apply in specific territories. And by and large, those provisions were narrow—*significant*, but narrow. They concerned taxes and jury rights. For example, in 1914 and 1922, respectively, the Court held that the Sixth Amendment right to jury trial did not apply to defendants in local courts in the Philippines and Puerto Rico.<sup>42</sup> That is really all the *Insular Cases* said about which rights applied or not: tariffs, taxes, and certain jury rights. Since its 1922 ruling in *Balzac*, each time the Court has considered whether a specific right “applies” in a territory, it has said that it does.<sup>43</sup>

But, problematically, the decisions also introduced the very *incorrect* idea that only “fundamental rights” apply in “unincorporated territories.” They did that in dicta. Two Justices in the *Downes* majority observed, for example, that *even in unincorporated territories*, the Constitution’s “fundamental limitations” would constrain Congress.<sup>44</sup> This dictum is a problem because it immediately suggests that if “fundamental limitations” applied, then something else did not.

40. *Id.*

41. See *Downes*, 182 U.S. at 285-86 (inferring Congress’s power to acquire new territory unhampered by constitutional provisions).

42. See *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (noting language of Philippine Act has no requirement of indictment by grand jury); *Balzac v. Porto Rico*, 258 U.S. 298, 304-05 (1922) (explaining jury trial requirements do not apply to territories not incorporated into United States).

43. See *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976) (holding inhabitants of Puerto Rico entitled to equal protection and due process); *Torres v. Puerto Rico*, 442 U.S. 465, 471 (1979) (holding right to Fourth Amendment protection against Puerto Rican government for unreasonable search and seizure); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10 (1982) (confirming inhabitants of Puerto Rico have right to voting equality); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 331 n.1 (1986) (confirming First Amendment free speech protection applies to Puerto Rico); see also Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 YALE L.J.F. 284, 289, 292 (2020) (referencing *Downes v. Bidwell* among other cases).

44. See *Downes v. Bidwell*, 182 U.S. 244, 283, 287-88 (1901) (noting some constitutional protections to unincorporated territories).

Unfortunately, it is precisely *that* construction that stuck. It is now common and regrettable to see lawyers and courts cite the *Insular Cases* for the overblown notion that “only fundamental rights apply” in unincorporated territories. That is not true. The Supreme Court has never said it is true. In fact, even in the *Insular Cases*, that reference to “fundamental rights” was *expansive*—not restrictive. The point was not that *only* fundamental rights applied in the new territories. It was that *even if* Congress had broad powers, it *certainly did not* have the freedom to ignore “fundamental restrictions” on its authority. And those were many. For example, the *Downes* Court provided a nonexhaustive list that included personal liberty, individual property, freedom of speech, due process, equal protection, safeguards from unreasonable searches and seizures.<sup>45</sup> A virtual hit list of constitutional rights—then and now.

### C. Retrenchment after 1922

So far, in this retelling, I have suggested that the *Insular Cases* put the square peg of nineteenth century colonialism into the round hole of a republican constitutional democracy. They did that for white supremacist reasons, and yet are still good law. This reality is worth getting worked up about—whether you have any personal ties to the territories or not.

But I have also just mentioned that maybe the *Insular Cases* do not stand for much. Read carefully, they, at best, suggest that a very narrow set of constitutional provisions are not applicable in the territories. And I will double down on that. *Carefully read, there should be very little left to territorial incorporation.* And here is why: Incorporation had a very limited shelf life at the Supreme Court as a viable doctrine. Since at least the 1950s, the Supreme Court started undercutting its own doctrine. Halfway through the twentieth century, with U.S. troops stationed abroad, the Court had to decide whether servicemembers living in foreign bases had a right to be tried by a jury.<sup>46</sup>

In *Reid v. Covert*, a majority of the justices said that they did.<sup>47</sup> And *some* suggested that the *Insular Cases* already answered that question. But importantly, four of the eight justices wrote separately to explain that not only were the *Insular Cases* irrelevant, but they should no longer be “given any further expansion.”<sup>48</sup> That plurality then said that the core principle behind territorial incorporation—that Congress could possibly decide whether certain constitutional provisions apply—would “destroy the benefit of a written Constitution.”<sup>49</sup>

While that perspective is heavy, it also reflects the attitude that the Supreme Court has held towards these cases for almost seventy years. Each time the

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45. See *id.* at 282-83 (highlighting certain natural rights enforced in Constitution).

46. See *Reid v. Covert*, 354 U.S. 1, 3-5 (1957) (discussing case background of servicewomen who killed their husbands and entitlement to jury trial).

47. See *id.* at 5 (holding military authority’s actions unconstitutional).

48. See *id.* at 14 (emphasizing narrow nature of *Insular Cases*).

49. See *id.* (rejecting notion Constitution only operational when convenient).

*Insular Cases* come forward for discussion before the Court, it has said that the *Insular Cases* either do not apply to the question before it, or that those cases should not be expanded.<sup>50</sup> The high watermark of territorial incorporation was *Balzac* in 1922, and the Supreme Court has repeatedly cautioned it should go no higher.<sup>51</sup>

This is what the Court did, for example, in a case decided two years ago, titled *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment*.<sup>52</sup> As the name suggests, *Aurelius* involved the oversight Board that Congress created through the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) to handle Puerto Rico's recent bankruptcy.<sup>53</sup>

The Board—or “la Junta” as it is well-known on the island—has been controversial from the start.<sup>54</sup> Under federal law, the Board approves or disapproves Puerto Rico's budget.<sup>55</sup> It can reject any law the Puerto Rico Legislature passes.<sup>56</sup> And a Congress and President for whom the people of Puerto Rico cannot vote, appoints its members.<sup>57</sup> In short, it is hard to view the Board as anything other than deeply undemocratic. In 2017, a group of plaintiffs challenged the Board's authority, claiming that its members were unconstitutionally appointed because they were not confirmed by the Senate.<sup>58</sup> The Appointments Clause requires “Officers of the United States” to be subject to the Senate's advice and consent.<sup>59</sup> The Board defended against that challenge mostly by claiming that Congress has very broad powers to legislate for the territories; and that is true—by almost any account Congress does.<sup>60</sup> But at the district court, the Board tried another

50. See *Boumediene v. Bush*, 553 U.S. 723, 758-59 (2008) (claiming true issue in *Insular Cases* dealt with determining limiting provisions of executive, legislative powers); *Torres v. Puerto Rico*, 442 U.S. 465, 476 (1979) (Brennan, J., concurring) (setting aside possibility *Insular Cases* informed Bill of Rights incorporation in Puerto Rico).

51. See *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922) (recognizing Court's difference of opinion regarding *Insular Cases*); see also *supra* note 43 and accompanying text (recounting Court's incorporation decisions in Puerto Rico post-*Balzac*).

52. 140 S. Ct. 1649 (2020) (holding Board members not “Officers of United States” therefore not governed by Appointment Clause).

53. See *id.* at 1654-55 (discussing creation of Financial Oversight and Management Board); Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §§ 2101-2241 (2016).

54. See Mariely Lopez-Santana, *A Controversial ‘Oversight Board’ Could Take Over Puerto Rico’s Hurricane Rebuilding Effort*, WASH. POST (Nov. 30, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/30/a-controversial-oversight-board-could-take-over-puerto-ricos-hurricane-rebuilding-effort/> [<https://perma.cc/9E8C-YBU3>] (detailing controversy surrounding Board as threat to democratic rights).

55. See *Aurelius*, 140 S. Ct. at 1655 (describing role of Board).

56. See *id.* (discussing Board's ability to modify Puerto Rico's laws).

57. See *id.* at 1654 (noting presidential appointment of Board members without Senate confirmation).

58. See *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 318 F. Supp. 3d 537, 542-44 (D.P.R. 2018) (discussing creation of Board via PROMESA).

59. See U.S. CONST. art. II, § 2, cl. 2 (authorizing Congress to appoint inferior officers “as they deem proper”).

60. See *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1656 (2020) (noting Board argued appointments constitutionally valid); see also *Petition for Writ of Certiorari* at 17, *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2019) (No. 18-1334) (arguing Congress has broad authority over territories because it need not comply with separation-of-powers constraints).

argument: It said that the Appointments Clause did not apply *because* of the *Insular Cases*.<sup>61</sup> So, the argument went: Since Puerto Rico is an unincorporated territory, only “fundamental” constitutional provisions apply.<sup>62</sup> And if that is true, then the Appointments Clause did not apply because it was not “fundamental.”<sup>63</sup> And if that is also true, then, plaintiffs lose.

Now, interestingly, by the time *Aurelius* reached the Supreme Court, the Board had cut that argument. It was nowhere in its briefs. And, I have suggested that the reason for this is quite likely that very smart lawyers do well not to hitch their wagon to cases that refer to people as “savages” or “uncivilized.”

When the *Aurelius* ruling came down, the Supreme Court did two interesting things: First, it took as a parting premise that the *Insular Cases* had nothing to do with the case.<sup>64</sup> The Appointments Clause speaks of “Officers of the United States”—*wherever* they may serve.<sup>65</sup> Territorial incorporation just had nothing to offer. And because Board members were not U.S. officers (the law defined them, instead, as *territorial* officers), the plaintiffs lost.<sup>66</sup>

But second, the Supreme Court went out of its way to say that it was just not in the business of the *Insular Cases* anymore. The high watermark of *Balzac* held. The Court again said incorporation would not be further extended.<sup>67</sup> And it explained that the *Insular Cases* did not matter because they said *nothing* about the Appointments Clause.<sup>68</sup> Finally, the Court cast doubt on the *Insular Cases* as a whole, suggesting their “continued validity” was dubious.<sup>69</sup>

Taken together, in 2022—and properly read—the *Insular Cases*, not only appear to speak to very little—tariffs, taxes, and certain jury rights—but, also, that they should be something close to a dead letter as a matter of modern doctrine. Wherever they were in 1922, that is as far as they went. So, unless you are fighting over a crate of oranges going from Puerto Rico to New York in 1901, the *Insular Cases* should be irrelevant.

#### D. Does Congress Even Need the *Insular Cases*?

I would also argue that *Aurelius* did a *third* interesting thing: It reasserted Congress’s broad powers to legislate for U.S. territories—regardless of the *Insular Cases*. As noted, Congress has very broad powers to make rules for federal territories. When the Court ruled against the *Aurelius* plaintiffs it turned to those

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61. See *In re Fin. Oversight and Mgmt. Bd. for P.R.*, 318 F.Supp.3d at 545 (examining Board’s argument deeming appointment’s clause “not fundamental”).

62. See *id.*

63. See *id.*

64. See *Aurelius*, 140 S. Ct. at 1665 (asserting Appointments Clause does apply to Puerto Rico and *Insular Cases* inconsequential to case).

65. See *id.* at 1658 (noting Appointments Clause restricts appointment power even in Puerto Rico).

66. See *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1661 (2020) (explaining PROMESA defines Board as territorial one).

67. See *id.* at 1665.

68. See *id.*

69. See *id.*

broad powers.<sup>70</sup> The Court said it was enough that Congress made the Board's members "territorial officials."<sup>71</sup> They were not U.S. officers. Congress has very broad powers to do that *independent* of the *Insular Cases*. This is a theme that the Supreme Court has turned to in other cases involving U.S. territories—namely, Puerto Rico—in the past decade.

In 2016, the Court decided *Puerto Rico v. Sánchez-Valle*.<sup>72</sup> This case came before the Court from a criminal appeal coming out of Puerto Rico's courts.<sup>73</sup> The Court held that the Fifth Amendment's Double Jeopardy Clause prevents Puerto Rico and the federal government from prosecuting the same defendant for the same offense.<sup>74</sup>

Ordinarily, federal and state governments may each punish people for the same crimes because they are "dual" or "separate" sovereigns.<sup>75</sup> But in *Sánchez-Valle*, the Court said Puerto Rico could not do that, and the reason was that, as a territory, Puerto Rico's "ultimate source of . . . power is the Federal Government."<sup>76</sup>

*Sánchez-Valle* clarified that territories "are not distinct sovereigns."<sup>77</sup> But the Court did not rely on the *Insular Cases*.<sup>78</sup> Former Puerto Rico Governor Rafael Hernández Colón aptly articulated, "the Court ignored the *Insular Cases* in its extensive analysis of the current relationship between Puerto Rico and the United States."<sup>79</sup> The point is that it arguably did not have to, because it was Puerto Rico's status as a territory that mattered, for constitutional purposes. And just like the Appointments Clause applied to Puerto Rico in *Aurelius*, the Court could figure out how and whether to follow its Double Jeopardy cases without turning to the *Insular Cases*.

Further, I would suggest that this makes it obvious that it is not the *Insular Cases* that are at the heart of the territories' continually confusing relationship with the United States. If the *Insular Cases* disappeared tomorrow, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and CNMI would most likely continue to be "territories" subject to Congress's broad powers. They would not

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70. See *Aurelius*, 140 S. Ct. at 1654 (stating Constitution empowers Congress to create local offices in Puerto Rico).

71. See *id.* at 1662-63 (concluding Appointments Clause constraints do not apply to Board members due to legislation's local focus); see also *id.* at 1666 (Thomas, J., concurring) (distinguishing between "territorial officials" and federal officers).

72. 579 U.S. 59 (2016).

73. See *id.* at 62 (reviewing application of double jeopardy from Puerto Rico case).

74. See *id.* at 77 (holding Puerto Rico derives prosecuting power from federal government thus double jeopardy applies).

75. See *id.* at 62 (explaining dual sovereignty theory allowing separate sovereigns to prosecute same crime).

76. See *Sánchez-Valle*, 579 U.S. at 77 (determining U.S. and Puerto Rico same sovereign thus no dual sovereignty to prosecute same crime).

77. See *id.* at 72 n.5.

78. See *id.*

79. Rafael Hernández Colón, *The Evolution of Democratic Governance Under the Territorial Clause of the U.S. Constitution*, 50 SUFFOLK U.L. REV. 587, 610-11 (2017).

necessarily be *incorporated* or, for that matter *unincorporated*. They would just be territories, as that distinction was understood for more than 120 years.

### III. WHY IS CONDEMNING THE *INSULAR CASES* SO IMPORTANT IF IT IS SOMEWHAT CLEAR THAT THEIR DOCTRINE IS A RELIC?

There are four reasons why it remains important to condemn the *Insular Cases*. The first, and I would say most important reason, is that the *Insular Cases* are still race-based, offensive, archaic, and deeply problematic and *are somehow still good law*. That *must* matter. Even if the Supreme Court has cabined them, they are anomalous. They stand for the notion that certain people get certain rights because of their race and where they are from. They are the backbone to “America’s colonies problem,” as a good friend and collaborator Neil Weare has called the issue.<sup>80</sup> They depend on *awful* racial assumptions about the residents of U.S. territories and the doctrine they stand for has no place in modern law.

But let us be practical; if overruling the cases would not change the very fact that the United States has territories, then why do they have to go? Well, I started my remarks by highlighting the recent letter that civil rights organizations sent the DOJ, urging it to disavow territorial incorporation as good law. From that, you can gather that government lawyers still depend on the *Insular Cases*, even if the Supreme Court does not. The fact that advocates might and do continue to depend on deeply troubling case law that the Supreme Court has tried to limit is a huge issue; and I would argue that today the most pressing issue with the *Insular Cases* is that advocates and the lower courts continue to use them at all.

So, that is the second reason it is important to be rid of the *Insular Cases*—because the Court has not overruled territorial incorporation, even as it limited it, the cases are always in play, and this manifests itself in very strange ways. It is what happened in *Aurelius*—and it is very common: Advocates and even courts cite the cases for the overblown notion that they apply in *every* single constitutional case involving U.S. territories. They come up constantly, even when they add nothing to the actual legal questions being considered.

In fact, it sometimes feels like the Supreme Court *is* clear on what the *Insular Cases* mean; it just keeps stopping short of overruling them. It is instead the lower courts, advocates, and policymakers that pose the greatest day-to-day threat, because they continue to look to the *Insular Cases* *whenever* a dispute involves a constitutional provision or right in the territories.

This leads to a third and related problem. When disputes do involve constitutional provisions or rights in the territories, what you hear is reference to the incorrect notion that “only fundamental rights” apply in the overseas island territories of American Samoa, CNMI, Guam, Puerto Rico, and U.S. Virgin Islands.

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80. See *America Has a Colonies Problem: Constitutional Rights and U.S. Territories*, N.Y. STATE BAR ASS’N (June 17, 2021), <https://nysba.org/events/america-has-a-colonies-problem-constitutional-rights-and-u-s-territories/> [<https://perma.cc/U7QB-P7XK>] (summarizing speaker Weare’s program on legal issues facing U.S. territories).

This has become a mirror through which litigants and courts consistently view all constitutional provisions.

Again, there is nothing in the *Insular Cases* or in later cases of the Supreme Court saying that only fundamental rights apply, but that shorthand has been irresistible. And when it comes up, it almost invariably leads to what I believe are incorrect results that deprive residents of the territories protections that almost certainly apply to them.

I will highlight a few examples. Lower federal courts have held: (1) that protections against unreasonable searches are inapplicable when someone travels from a state into the U.S. Virgin Islands because Congress can treat the U.S. Virgin Islands as foreign for those purposes;<sup>81</sup> (2) that citizenship is not a “fundamental right” applicable to people born in American Samoa;<sup>82</sup> (3) that the “one person, one vote” principle did not apply in the CNMI;<sup>83</sup> and (4) that same-sex couples did not have a right to marry in Puerto Rico because the territory was unincorporated.<sup>84</sup>

To date, none of these rulings or arguments have made it to the Supreme Court. The circuit courts of appeal most often have the final say. And there are many reasons for that—the fact that circuit splits on these issues are rare, for example, certainly plays a role.

The short of it is that even if the Supreme Court has by now essentially rejected the notion that “*only fundamental rights apply*” in these territories, lower courts and advocates have not necessarily heard the message. I would argue that they likely have not because territorial incorporation—however hobbled it might be—remains on the books. Only the Supreme Court can stop this troubling pattern, by directly addressing and reversing the *Insular Cases*.

This leads neatly into a *fourth* reason; that anyone who cares about dismantling systemic racism should also care about being rid of the *Insular Cases* and making clear that their race-based reasoning cannot support good law. The cases and territorial incorporation doctrine have unfortunately *infected* other constitutional doctrine just by virtue of being in the books.

Here, I will speak of a case that the Supreme Court recently decided titled *United States v. Vaello-Madero*.<sup>85</sup> *Vaello-Madero* is fascinating, and easy enough to understand. The case involved the Supplemental Security Income Program (SSI), a national program that applies everywhere except four U.S.

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81. See *United States v. Baxter*, 951 F.3d 128 (3d Cir. 2020), *cert. denied*, 141 S. Ct. 1269 (2021) (analyzing border-search exception at customs border’s application *within* Virgin Islands’s territory).

82. See *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015), *cert. denied*, 579 U.S. 902 (2016) (analyzing imposing citizenship on American Samoa people).

83. See *Rayphand v. Sablan*, 95 F. Supp. 2d 1133, 1139 (D. N. Mar. I. 1999) (analyzing whether “one person, one vote” principle applied to CNMI).

84. See *Conde Vidal v. Garcia-Padilla*, 167 F. Supp. 3d 279, 287 (D.P.R. 2016) (analyzing same-sex couples right to marry in Puerto Rico).

85. 596 U.S. 159 (2022).

territories.<sup>86</sup> It is a quintessential safety net that affords modest welfare payments to people of limited means who are also elderly, blind, or disabled.<sup>87</sup>

The problem for residents of most U.S. territories is that federal law denies them SSI Benefits.<sup>88</sup> It draws a classic categorization between people who live in one of the fifty states and those who live in the territories. Mr. Vaello-Madero's experience highlights this arbitrary carve-out. While Mr. Vaello-Madero was living in New York he suffered a debilitating illness that made him eligible for SSI.<sup>89</sup> He started receiving SSI benefits in 2012.<sup>90</sup> A year later he moved to Puerto Rico to be closer to family.<sup>91</sup> He continued receiving SSI payments by direct deposit into his bank account, unaware that his change in residence from New York to Puerto Rico now made him ineligible.<sup>92</sup>

A couple of years later, the government became aware that Mr. Vaello-Madero had been getting SSI payments in Puerto Rico and sued him to recover \$28,081.<sup>93</sup> Mr. Vaello-Madero defended against that collection by arguing that denying him SSI benefits just because he lived in Puerto Rico violated his rights to equal protection under the law.<sup>94</sup>

Mr. Vaello-Madero won his case at the district court, in a judgment by Suffolk alumnus and then-District Judge Gustavo Gelpí, who now sits on the First Circuit.<sup>95</sup> Mr. Vaello-Madero then won again when the government appealed, in a ruling that was, sadly, one of the last opinions that my former boss and friend, the late-Judge Juan Torruella, wrote before his passing in late 2020.<sup>96</sup> The Justice Department then took the case to the Supreme Court.

*Vaello-Madero* is fascinating because it should have really been a straightforward equal protection case. The government argued it that way, and it said that the statute—which, again, *on its face* plainly discriminates against people like Mr. Vaello-Madero—should get the most deferential form of scrutiny, rational review, because it is, at bottom, a welfare program.<sup>97</sup>

I would argue this analysis was never that simple—and so did Mr. Vaello-Madero. The truth is much more complicated. The fact that this is the kind of

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86. See *id.* at 163-64.

87. See *Supplemental Security Income*, SSA, <https://www.ssa.gov/ssi/> [<https://perma.cc/FFD4-K478>] (detailing eligibility for SSI).

88. See *id.* (disclosing benefits do not extend to citizens in territories listed on SSA website).

89. See *Vaello-Madero*, 596 U.S. at 192 (Sotomayor, J., dissenting).

90. See *id.*

91. See *United States v. Vaello-Madero*, 596 U.S. 159, 192 (2022) (continuing to receive \$733-\$808 each month in benefits).

92. See *id.* (ceasing SSI disbursements swiftly upon SSA realizing Mr. Vaello-Madero lived “outside” U.S.).

93. See *id.* (Sotomayor, J., dissenting) (explaining issue in case).

94. See *id.* (outlining Mr. Vaello-Madero's defense).

95. See *United States v. Vaello-Madero*, 356 F. Supp. 3d 208, 216 (2019) (reflecting court's decision to grant defendant summary judgment); see also U.S. CT. OF APPEALS FIRST CIR., *Gustavo A. Gelpí*, <https://www.ca1.uscourts.gov/gustavo-gelp%C3%AD> [<https://perma.cc/4N7H-UKYA>].

96. See generally *United States v. Vaello-Madero*, 956 F.3d 12 (2020).

97. See *United States v. Vaello-Madero*, 596 U.S. 159, 165 (2022) (reasoning Puerto Rico exempt from forms of taxation so also exempt from benefits).

statute that usually gets deferential review cannot obscure that Puerto Rico residents have no say in the political process that passed that law. Puerto Rico will continue to be locked out from that process as long as it is a territory. Unincorporated territories are a direct result of the racism and white supremacy evident in the *Insular Cases*.

But all of that could have been dealt with through usual equal protection principles. Equal protection law has, for decades, looked to the political power, or lack thereof, of a harmed class, and where political processes do not work, courts have been a recourse for the people shut out from them.

There is a problem, however: The Supreme Court, at least once already, has *tied* the level of scrutiny that it gives equal protection challenges like *Vaello-Madero* to the *Insular Cases*. The Court did so very quickly and in a short, unsigned order in the 1980 case *Harris v. Rosario*,<sup>98</sup> where the Court rejected a challenge against another welfare program.<sup>99</sup>

All of this came to a head at oral argument. A few minutes into the government's presentation, Chief Justice Roberts jumped in to ask the Deputy Solicitor General—somewhat unprompted—whether the *Insular Cases* had anything to do with the case.<sup>100</sup> The Deputy Solicitor General said he did not believe so, because the Fifth Amendment and its equal protection safeguards clearly apply to Puerto Rico residents. So far, so good. Then, Justice Neil Gorsuch jumped in with a question. He asked to clarify the government's view on the *Insular Cases*, and, specifically, whether the Justice Department thought that the Constitution applied fully. If so, Justice Gorsuch said, then “why shouldn't we just admit the *Insular Cases* were incorrectly decided? . . . why not just say what everyone knows to be true?”<sup>101</sup>

That exchange, I would argue, really captured everything the *Insular Cases* today are—and are not. The Court has said that they should be limited to their specific holdings—it said so as recently as two years ago.<sup>102</sup> So, Chief Justice Roberts is right to beg the question. But at the same time, as Justice Gorsuch suggested: Why not do what everyone knows to be true? These are terrible cases. They are flawed. We all know it. Why not be done with it?

When Justice Gorsuch pressed the Deputy Solicitor General, he acknowledged “what everyone knows to be true”: The *Insular Cases*' “reasoning and rhetoric is obviously anathema” and “has been for decades, if not from the outset.”<sup>103</sup>

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98. 446 U.S. 651 (1980).

99. See *id.* at 651-52 (rejecting equal protection under Territory Clause).

100. See Transcript of Oral Argument at 8, *United States v. Vaello-Madero*, 596 U.S. 159 (2021) (No. 20-303) (asking about relation to *Insular Cases*).

101. *Id.* at 9.

102. See *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020) (noting Court would not extend *Insular Cases* because they did not address disputed issue).

103. See Alison Durkee, *Supreme Court Justice Neil Gorsuch Argues 'Racist' Decisions Against Puerto Ricans Should Be Overturned—Here's What That Could Mean*, FORBES (Apr. 21, 2022), <https://www.forbes.com>.

Unfortunately, Justice Gorsuch's view—and the Deputy Solicitor General's concession—did not move the needle. When the Supreme Court's decision came down in *Vaello-Madero*, the Supreme Court held that Congress's broad powers over U.S. territories in essence allowed it to deny certain benefits to those jurisdictions as its prerogative.<sup>104</sup> Justice Gorsuch concurred, but also penned a scathing opinion that called on his colleagues to “recognize that the *Insular Cases* rest on a rotten foundation.”<sup>105</sup> He wrote that their flaws, among them, their basis in “ugly racial stereotypes,” were “as fundamental as they are shameful.”<sup>106</sup> In dissent, Justice Sotomayor agreed. She wrote that the decisions were “premised on beliefs both odious and wrong.”<sup>107</sup>

One thing is clear: In *Vaello-Madero*, territorial incorporation and the *Insular Cases* obscured what should have really been a straightforward equal protection case. Mr. Vaello-Madero should have won against the government—not because the *Insular Cases* said anything about his case, but, at least in part, because those decisions “reflect the reality that the United States' relationship with its territories was forged in a spirit of bigotry and subordination.”<sup>108</sup> It is impossible—as Mr. Vaello-Madero argued—to separate Congress's now seemingly indefinitely broad powers over U.S. territories from their “shameful” and “rotten” foundations in “ugly racial stereotypes.”<sup>109</sup>

#### IV. WHAT HAS TAKEN THE CIVIL RIGHTS COMMUNITY SO LONG?

I started my remarks highlighting the recent work of thirteen civil and human rights organizations, who wrote the Justice Department asking it to repudiate the *Insular Cases*. But if I may take a step back—I would have to acknowledge that this also begs the question: Why has the national civil rights community not engaged to date with the *Insular Cases* as vibrantly as it has tackled other threats to civil and human rights? And why is it important that it does so now?

If you will allow me some self-serving contemplation, I think at least three reasons are behind this. First, the unavoidable intersectionality of these issues; and not just the *Insular Cases*, but the undemocratic relationship between the

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com/sites/alisondurkee/2022/04/21/supreme-court-justice-neil-gorsuch-argues-racist-decisions-against-puerto-ricans-should-be-overturned-heres-why-that-matters/?sh=30082ed856d6 [https://perma.cc/CH3G-4KPN] (recapping Justice Gorsuch's oral argument).

104. See *United States v. Vaello-Madero*, 142 S. Ct. 1539, 1544 (2022) (holding Congress has broad discretion in implementing taxes to U.S. territories).

105. See *id.* at 1557 (Gorsuch, J., concurring) (noting Court should recognize rotten foundation of *Insular Cases*).

106. See *id.* at 1554 (Gorsuch, J., concurring) (explaining *Insular Cases* have no home in Constitution).

107. See *id.* at 1560 (Sotomayor, J., dissenting) (agreeing with Justice Gorsuch's view of misguided framework regarding *Insular Cases*).

108. See Brief of the Am. Civ. Liberties Union Found. et al. as Amici Curiae Supporting Respondent, *United States v. Vaello-Madero* 142 S. Ct. 1539 (No. 20-303) (explaining *Insular Cases* history of subordination, predicated on racial stereotypes).

109. See *Vaello-Madero*, 596 U.S. at 184-85, 189 (Gorsuch, J., concurring) (pointing to flaws in *Insular Cases*).

United States and its territories. It deeply colors almost all aspects of life in the islands, and as I have said, the notion that the rights of people who live there are different also *wrongly* colors every constitutional question. That is a problem because most national civil rights lawyers—like all lawyers—gravitate towards some specialty. I am, primarily, a voting rights litigator. Others might specialize in human rights, international law, LGBTQ rights, policing, criminal reform, and many others.

But I would argue that the prism we have been discussing—this idea that constitutional rights are just different in the territories—is so broad that it makes it difficult for someone practicing in one area to tackle all of it. The continuing relationship between the United States and its territories is, I believe, deeply undemocratic. I also believe that this democratic deficit has white supremacy at the root. But is that then a voting rights issue best addressed by constitutional law? Is it an issue of international law? Is it both?

Increasingly, the territories' disenfranchisement looks like an economic justice issue. All of it is tied up, of course, on concerns over racial justice. These labels may not be exclusive and should be malleable, but they have made it difficult for lawyers with a specific focus to cover all the needed ground.

Second, I believe that a well-placed concern in not overstepping onto very sensitive questions of self-determination and the territories' political status with the United States can sometimes have an unfortunate chilling effect on well-meaning advocates. Debates over whether certain territories should remain in their current state, become independent, or become states are fractious will always be an (if not *the*) elephant in the room. In places like Puerto Rico, these debates are the stuff of daily news, and the fault lines that shape the broader political discourse.

That has led some well-intended advocates to pull their punches, even if they recognize the white supremacist character of the *Insular Cases*. When it comes to incorporation, for example, some have the concern that “overruling” them would have the effect of pulling the territories closer to the United States. Calling for their repeal would be, in effect, taking a side in a political debate that many do not feel either equipped or entitled to be a part of.

I believe that this proves too much—and that nobody is entitled to sit out these questions. If the United States has a colonies problem, then that problem is the result of policies followed in the American public's name for the past 120 years. We all have skin in the game, in a very real sense. To put it another way, good law still says that 3.5 million people (most of them U.S. citizens; and vastly people of color) live in places that “belong to but are not a part of” the United States—*because people of color live there*. Everyone who cares about dismantling systemic racism should care about that.

So, I would separate—conceptually—the very necessary processes of self-determination that the United States owes the people of the territories, from the obligations that it also owes them as a matter of its own foundational law. Self-determination turns on whether the people of the territories choose to be a part

of the United States—and they must have that choice; but the Constitution defines the United States. The notion that people have different rights because of their race is, I believe, deeply unconstitutional.

Lastly, the national civil rights community is in no way immune to the same insularity that has kept the U.S. territories out of mainstream national discourse for more than a century. Residents of U.S. territories have been, for the most part, structurally (if not formally) shut out from most national civil rights conversations—they remain foreign in a domestic sense—even in this space. Too often, it is only advocates with a direct link to those communities—for example, members of the islands’ vibrant diasporas—who speak up for them. That is not true for other civil rights spaces that national groups have so bravely tackled: We care about injustices that affect others because we care about injustice, and we do not like injustices to be carried out in our name, even when it does not directly affect us.

I believe the *Insular Cases* have unfortunately and *efficiently* kept the constitutional rights of territory residents in the shadows. They “hover like a dark cloud,” like the late Judge Torruella wrote in 2018, and it is high time for that cloud to lift.<sup>110</sup>

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110. See *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 854-55 (1st Cir. 2019).