INTRODUCTION

Lía Fiol-Matta*

I want to thank the *Columbia Human Rights Law Review* for the invitation to open this important and timely Symposium on a topic that should concern every person, and certainly every attorney who supports racial justice as well as civil and human rights.[1] On behalf of LatinoJustice, the Puerto Rican Legal Defense and Education Fund, we are proud to join our voice to this distinguished Symposium alongside all those who are advocating for the Biden administration to denounce the *Insular Cases*, and for the Supreme Court of the United States to finally overrule them.

Throughout our fifty-year history, LatinoJustice has challenged the injustices Puerto Ricans face, both on the Island[2] and in the mainland United States. We address the systemic discrimination, neglect and abuse of Puerto Ricans by both private sector actors as well as the federal and Island governments. All of our work on behalf of Puerto Ricans is geared towards eradicating the economic, social, and political barriers that keep Puerto Ricans, particularly those who live on the Island, in a subjugated position in relation to the United States.

Today we will hear from an illustrious panel, moderated by renowned Columbia Law School Professor Christina Ponsa-Kraus who has published and presented extensively on the topic of the *Insular*

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1. This Introduction is an adapted version of the Keynote Address Lía Fiol-Matta delivered at the *Columbia Human Rights Law Review* Symposium at Columbia Law School on April 8th, 2022. It has been edited for publication. Lía Fiol-Matta, LatinoJustice PRLDEF, Keynote Address at *Columbia Human Rights Law Review* Symposium: The Future of the *Insular Cases* (Apr. 8, 2022), https://bit.ly/3rkL6bh (on file with the *Columbia Human Rights Law Review*).

2. Puerto Rico is, in fact, an archipelago. Here, I use the term "Island" as is customary. *Puerto Rico Facts & Stats,* BRITANNICA, https://www.britannica.com/facts/Puerto-Rico [https://perma.cc/8XA9-GZKN].

Cases.[3] I am, as I hope you are, looking forward to an engaging discussion on the widespread ramifications of the *Insular Cases* as well as on where we go from here in our quest to sweep them to the dustbin of history. It is time that all residents of the United States territories[4] are treated with the dignity and respect accorded to American citizens in the fifty states of this nation.

Let us start with a general understanding of the *Insular Cases* and their historical context. I do not assume that everyone has the same level of knowledge and understanding of this line of jurisprudence. I, myself, knew nothing about the *Insular Cases* until fairly recently. I did not learn about them in college or in my graduate studies in Puerto Rico, nor as I studied law in New York. I have been surrounded by lawyers all my life, both personally and professionally, and no one ever spoke about the *Insular Cases*. Now, that is changing. To quote our panel's moderator, "[t]he *Insular Cases* have been enjoying an improbable—and unfortunate—renaissance."[5]

At the beginning of the twentieth century, in the aftermath of the Spanish-American War of 1898 and the United States' acquisition of geographically distant territories,[6] the Supreme Court grappled with the scope and applicability of the Constitution to the newly-acquired territories of Puerto Rico, the Philippines and Guam, as well as American Samoa, which became a U.S. territory in 1900 via a deed of cession.[7] In later years, the United States purchased the Virgin

3. *See, e.g.*, Christina Duffy Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor's Surprising Concurrence in* Aurelius, 130 YALE L.J. F. 101 (2020) (analyzing Justice Sotomayor's concurrence in *Aurelius*); Christina Duffy Burnett [Ponsa-Kraus], *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005) (arguing that a properly revised understanding of the *Insular Cases* is critical).

4. The terms "territories" and "colonies" will be used interchangeably throughout.

5. Christina Duffy Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. (forthcoming 2022) (manuscript at 1) (on file with the *Columbia Human Rights Law Review*).

6. Under the 1898 Treaty of Paris, the United States acquired sovereignty over Puerto Rico, Guam, and the Philippine Islands. *See* Treaty of Paris, Dec. 10, 1898, 30 Stat. 1754. Hawaii was annexed separately that same year. Newlands Resolution, J. Res. No. 55, 55th Cong., 30 Stat. 750 (July 7, 1898).

7. *Instrument of Cession Signed on April 17, 1900, by the Representatives of the People of Tutuila*, U.S. DEP'T OF STATE, OFF. OF HISTORIAN (1929), https://history.state.gov/historicaldocuments/frus1929v01/d853 [https://perma.cc/BSN3-HV5G].

Islands from Denmark[8] and the Philippines gained independence.[9] The most recent territorial acquisition by the United States was the Northern Mariana Islands in 1975.[10]

In a series of decisions known as the *Insular Cases*, spanning from 1901 to 1922, the Supreme Court essentially invented what is known as the territorial incorporation doctrine.[11] This doctrine, which has no constitutional foundation, divided United States territories into two categories: incorporated and unincorporated. The incorporated territories, as explained by the Court in a 1976 decision, were "those Territories destined for statehood from the time of acquisition, and the Constitution was applied to them with full force."[12] The unincorporated category included "those Territories not possessing that anticipation of statehood."[13] As to them, the Constitution did not fully apply "only 'fundamental' constitutional rights were guaranteed to the inhabitants." [14] Presumably, Congress determined which category applied to which territories, using some unspecified and undefined criteria. The five inhabited U.S. colonies aforementioned are considered unincorporated territories. As to whether fundamental

8. *Purchase of the United States Virgin Islands, 1917*, U.S. DEP'T OF STATE, https://2001-2009.state.gov/r/pa/ho/time/wwi/107293.htm [https://perma.cc/JA8D-NUHY]. The U.S. purchased the islands of St. Thomas, St. John, and St. Croix from Denmark for $25 million.

9. The Philippines became independent on July 4, 1946. *See* Treaty of General Relations Between the United States of America and the Republic of the Philippines, U.S.–Phil., July 4, 1946, 61 Stat. 1174.

10. *Pact Is Signed to Make North Marianas a U.S. Area*, N.Y. TIMES (Feb. 16, 1975), https://www.nytimes.com/1975/02/16/archives/pact-is-signed-to-make-north-marianas-a-us-area.html [https://perma.cc/9DU3-X2RJ].

11. There is no universally-adopted definition of the *Insular Cases*. The Supreme Court has indicated that the *Insular Cases* and their progeny include *De Lima v. Bidwell*, 182 U.S. 1 (1901), *Dooley v. United States*, 182 U.S. 222 (1901), *Armstrong v. United States*, 182 U.S. 243 (1901), *Downes v. Bidwell*, 182 U.S. 244 (1901), *Hawaii v. Mankichi*, 190 U.S. 197 (1903), *Dorr v. United States*, 195 U.S. 138 (1904), *Ocampo v. United States*, 234 U.S. 91 (1914), and *Balzac v. Porto Rico*, 258 U.S. 298 (1922). *See* Boumediene v. Bush, 553 U.S. 723, 756 (2008); United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990). *See also* Adriel I. Cepeda Derieux, Note, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 797, 799 n.7 (2010) (listing all 23 possible *Insular Cases*).

12. Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 599 n.30 (1976) (citations omitted).

13. *Id.*

14. *Id.*

rights apply to them, a contentious debate[15] started in the early twentieth century and continues to this day.

What principles, doctrines or precedents served as the basis for this division of the territories and constitutional consequences? Simply put, none. The *Insular Cases* declared residents of unincorporated territories unworthy of the same constitutional rights and benefits as citizens of the states and the District of Columbia because they were considered "alien races"[16] and "savage tribes."[17] The *Insular Cases* held that the newly acquired territories belonged to, but were not a part of, the United States.[18] They stand for the unsupported and contradictory conclusion that unincorporated territories are "foreign in a domestic sense."[19]

Despite the *Insular Cases*' flawed reasoning and blatant racial bias, federal courts continue to lean on them to deny U.S. territories' residents constitutional rights and protections such as citizenship and equal benefits.[20] It is appalling that the Biden administration continues to rely on judicial precedent set by the same court that justified racial segregation in *Plessy v. Ferguson*,[21] thus giving rise to the "separate but equal" doctrine that was struck down almost sixty years later in *Brown v. Board of Education*.[22] Inexplicably, and despite the public outcry against them,[23] the Biden administration has refused to repudiate the *Insular Cases* and continues to rely on them to deny Puerto Ricans and other residents of territories benefits and rights necessary for their survival, such as Supplemental Security Income ("SSI"), at stake in *United States v. Vaello-Madero*,[24] currently before the Supreme Court.

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15. *See generally U.S. Territories Introduction*, 130 HARV. L. REV. 1617 (2017).

16. *Downes*, 182 U.S. at 287.

17. *Id.* at 219.

18. *Id.* at 287 ("[Puerto Rico is] a territory appurtenant and belonging to the United States, but not a part of the United States.").

19. *Id.* at 341.

20. *See generally* Adriel I. Cepeda Derieux & Neil C. Weare, *After* Aurelius*: What Future for the* Insular Cases*?* 130 YALE L.J. F. 284 (2020).

21. 163 U.S. 537 (1896).

22. 347 U.S. 483 (1954).

23. Lía Fiol-Matta, *The* Insular Cases*: It's Time to Turn the Page*, BL (Mar. 14, 2022), https://news.bloomberglaw.com/us-law-week/the-insular-cases-its-time-to-turn-the-page [https://perma.cc/WS8K-5K6R].

24. 141 S. Ct. 1462 (2021).

The authors of this Special Issue bring a wealth of knowledge and deep understanding of the meaning and implications of the *Insular Cases*. Professor Rafael Cox Alomar and Adriel Cepeda Derieux answer questions I, and perhaps many of you, have. For instance, why are the *Insular Cases* still considered "good law"?[25] What needs to happen for the Supreme Court to overrule them? How can the territorial incorporation doctrine be successfully challenged? Professor Rafael Cox Alomar and Adriel Cepeda Derieux present a clear and revealing analysis of the doctrine of stare decisis. As the Supreme Court stated in *Ramos v. Louisiana*, "*stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true. Of course, the precedents of this Court warrant our deep respect as embodying the considered views of those who have come before. But stare decisis has never been treated as 'an inexorable command.'"[26]

Professor Rafael Cox Alomar and Adriel Cepeda Derieux delve into the history of the territorial incorporation doctrine and demonstrate that courts have been hostile to the *Insular Cases* even when they have stopped short of repealing them.[27] They explain how the *Cases* and the incorporation doctrine underlying them meet every factor the Supreme Court considers relevant in deciding to overturn its own precedent.[28]

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25. Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. Rev. 1123, 1146 (2009). Although the *Insular Cases* remain good law, the Supreme Court has been hesitant to deny constitutional rights or protections in U.S. territories using the territorial-incorporation doctrine. Nevertheless, a host of cases since the mid-1970s have consistently held that specific constitutional rights and freedoms operate with their own force within the U.S. territories. *See* El Vocero de P.R. v. Puerto Rico, 508 U.S. 147 (1993) (holding that the First Amendment Free Speech Clause fully applies to Puerto Rico); Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982) ("[I]t is clear that the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States."); Torres v. Puerto Rico, 442 U.S. 465 (1979) (holding that Fourth Amendment protections against unreasonable searches and seizures are applicable against the Puerto Rican government); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976) (holding that equal protection and due process are applicable in Puerto Rico).

26. Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (citations omitted).

27. Adriel I. Cepeda Derieux & Rafael Cox Alomar, *Saying What Everyone Knows to Be True: Why Stare Decisis Is Not an Obstacle to Overruling the* Insular Cases, 53 COLUM. HUM. RTS. L. REV. 721 (2022).

28. *Id.*

A reasonable question that arises when analyzing stare decisis and the prospect of the Supreme Court overruling the *Insular Cases* is whether abolishing the doctrine of territorial incorporation will have a significant positive impact on U.S. territories. According to Cesar Lopez-Morales, another author of this Special Issue, the answer is no, with some exceptions. He proposes that renouncing the *Insular Cases* "will not change the separate and unequal status of the territories as compared to the states under the Constitution."[29] That is because, in his view, in order to achieve complete equality, a land must cease to be a territory and that can only be accomplished through statehood or independence.[30]

Lopez-Morales presents a comprehensive analysis of federalism, separation of powers, and the Territorial Clause of the Constitution. He argues that the incorporation doctrine has no textual or historical basis.[31] Also, in his view, it was not intended for Congress to govern the territories as permanent possessions of the United States, under "indefinite colonial rule".[32] The reader should be very interested in reading his analysis, as most U.S. colonies have been subject to Congress' authority for over 120 years, which hardly seems impermanent.

Professor Sam Erman adds an interesting dimension to the discussion of U.S. colonialism under the concept of "status manipulation", which shields the U.S. government from pressing anti-colonial reform.[33] He examines controversies around status in the smallest and largest populated U.S. colonies, American Samoa and Puerto Rico. Should American Samoans be U.S. citizens? Is it right to offer statehood to Puerto Rico? How do residents of these territories grapple with what Professor Erman calls "a choice of evils" between forfeiting participation in the sovereign that governs them or abandoning cultural survival and self-determination?[34]

Professor Erman details the history of Puerto Rico's inclusion in the United Nations' list of Non-Self-Governing Territories and the

29. Cesar A. Lopez-Morales, *Making the Constitutional Case for Decolonization: Reclaiming the Original Meaning of the Territory Clause,* 53 COLUM. HUM. RTS. L. REV. 772, 772 (2022).

30. *Id.* at 780.

31. *Id.* at 785.

32. *Id.* at 804.

33. Sam Erman, *Status Manipulation and Spectral Sovereigns*, 53 COLUM. HUM. RTS. L. REV. 813 (2022).

34. *Id.* at 817.

United States' efforts to secure its removal from the list by "cloak[ing] the Island in self-determination," while remaining a territory subject to congressional control.[35] Three of the five U.S. colonies, Guam, American Samoa, and the U.S. Virgin Islands, remain on the list of Non-Self-Governing Territories to this day.[36] I was most intrigued by Professor Erman's concept of "spectral sovereignty" as applied to Puerto Rico, which he defines as "a novel, beneficial status that never quite arrives."[37]

And then, *llegaron los federales* (the feds arrived)! Anyone interested in criminal justice or more aptly stated, *in*justice, and the reality of mass incarceration will certainly appreciate Professor Emmanuel Hiram Arnaud's incisive examination of the role that federal criminal law plays in demonstrating the continued plenary power Congress has over territories.[38] Professor Arnaud explains how federal prosecution of local criminal activity in Puerto Rico, "is an explicit manifestation of the federal government's continued colonial grasp over the Island."[39] It is appalling, as Professor Arnaud expounds, that Puerto Ricans are subject to federal criminal statutes in a way that federal prosecutors have no power to do in any of the fifty states of the Union.

Professor Arnaud's thorough historical account of the transition of Puerto Rico as a Spanish colony to Puerto Rico as a U.S. colony, as well as his account of the creation of the Island's local government, sheds light on the centuries-long meddling of the federal government in local criminal affairs in Puerto Rico. He contends that common conversations on Puerto Rico amongst scholars, political leaders, and activists ignore the role that federal criminal law plays in maintaining colonialism.[40] After reading his piece, the reader will

35. *Id.* at 854.

36. *Non-Self-Governing Territories,* UNITED NATIONS (Aug. 17, 2021), https://www.un.org/dppa/decolonization/en/nsgt [https://perma.cc/F42Y-H8M3]. ("[T]erritories whose people have not yet attained a full measure of self-government.").

37. Erman, *Status Manipulation and Spectral Sovereigns*, *supra* note 33, at 878.

38. Emmanuel Hiram Arnaud, *Llegaron los Federales: The Federal Government's Prosecution of Local Criminal Activity in Puerto Rico*, 53 COLUM. HUM. RTS. L. REV. 882 (2022).

39. *Id* at 882.

40. *Id.*

certainly be more cognizant of the significance of this analysis when discussing U.S. colonialism and its underlying doctrinal justification.

We are also fortunate to have with us at this Symposium the Supreme Court Counsel of Record for José Luis Vaello-Madero, Hermann Ferré, who will deliver closing remarks. As mentioned, *United States. v. Vaello-Madero*[41] is currently before the Supreme Court and a decision is expected at any moment.

Vaello-Madero involves a challenge against the exclusion of otherwise eligible residents of Puerto Rico and other U.S. territories, with the exception of the Northern Mariana Islands, from SSI, a national benefit for needy aged, blind, and disabled individuals.[42] Mr. Vaello-Madero, a disabled U.S. citizen, received SSI while living in New York and continued getting payments after relocating to Puerto Rico to be with his family.[43] A few years later, the Social Security Administration revoked Mr. Vaello-Madero's benefits retroactively to the date he became a resident of Puerto Rico, because he was considered to be living "outside the United States."[44] The government sued Mr. Vaello-Madero seeking to recover $28,000 in alleged overpayments.[45] Mr. Vaello-Madero disputed the liability, asserting that denying SSI to eligible citizens only because they live in Puerto Rico violated Equal Protection under the Fifth Amendment.[46]

LatinoJustice, along with several national civil rights organizations and bar associations, was proud to submit an *amicus curiae* brief to the Supreme Court in support of Vaello-Madero.[47] We urged the Supreme Court to overrule the *Insular Cases*, under equal protection, as they are premised on racist assumptions and rationales and lack any validity. The Social Security Administration's exclusion of residents of Puerto Rico from receiving SSI benefits is grounded on impermissible and invidious race, ethnicity and alienage animus, warranting strict scrutiny review.

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41. United States v. Vaello-Madero, 141 S. Ct. 1462 (2021) (No. 20-303).

42. 20 C.F.R. §416.215.

43. Transcript of Oral Argument at 42, United States v. Vaello-Madero, 141 S. Ct. 1462 (No. 20-303).

44. *Id.*

45. *Id.*

46 *Id.*

47. Brief for Amicus Curiae LatinoJustice PRLDEF and Ten Amici Curiae in Support of Respondent, United States v. Vaello-Madero, 141 S. Ct. 1462 (2021) (No. 20-303), 2021 WL 4135120.

Last fall, Justice Neil Gorsuch, pressed the Solicitor General at Oral Argument in *Vaello-Madero*, asking, "If the Insular Cases are wrong[,] . . . why shouldn't we just say what everyone knows to be true? Why shouldn't we just admit the Insular Cases were incorrectly decided?"[48] The questions are on point and the Court has answered them in other cases. For instance, even though *Trump v. Hawaii* was a devastating decision upholding blatant discrimination against Muslims, the Supreme Court there overruled *Korematsu v. United States*[49] as being "gravely wrong the day it was decided" and having "no place in law under the Constitution." [50] It is yet to be seen how the Court answers in *Vaello-Madero*.

This weekend marks the 100th anniversary of the last of the *Insular Cases*, *Balzac v. Porto Rico*.[51] In that case, a unanimous Supreme Court denied the right to jury trial under the Sixth Amendment of the Constitution to a newspaper editor charged with libel, even though he was a U.S. citizen.[52] The Court held that, although the Jones Act of 1917 had granted citizenship to Puerto Ricans, it did not incorporate Puerto Rico into the Union and did not grant Puerto Ricans the full rights outlined in the Bill of Rights.[53] It left to Congress the determination of which aspects of the Bill of Rights applied to U.S. citizens living in Puerto Rico.[54]

In closing, I cannot explain forcefully enough how deeply the *Insular Cases* and the U.S. policy that Professor Erman calls "status manipulation" have harmed Puerto Rico. I write as the daughter of my father, a decorated U.S. Army colonel and veteran of the Korean War, who wanted nothing more than to see Puerto Rico become a state of the Union, and my mother, who in her youth marched from the University of Puerto Rico to the Capitol in support of our independence and yearned all her life to see Puerto Rico become a sovereign nation.

More than a century has been spent debating Puerto Rico's confusing and demeaning relationship with the United States, legitimized by the *Insular Cases*. And in recent years we have learned, again in Professor Erman's terminology, that it has all been an exercise

48. Transcript of Oral Argument, *Vaello-Madero*, *supra* note 43, at 9.
49. Korematsu v. United States, 323 U.S. 214 (1944).
50. Trump v. Hawaii, 138 S. Ct. 2392 (2018) (rejecting a challenge to President Trump's Muslim travel ban).
51. 258 U.S. 298 (1922).
52. *Id.*
53. *Id.*
54. *Id.*

in "spectral sovereignty". Like a magician drawing a rabbit from a hat, the United States has distracted the Puerto Rican people, and the United Nations, with the idea of a "compact", a "commonwealth" and a permanent self-government that has not survived PROMESA, the law imposing a Fiscal Board of non-elected officials to restructure Puerto Rico's financial debt,[55] nor *Aurelius Investment*, the 2019 Supreme Court ruling that the selection of Fiscal Board members did not violate the Appointments Clause of the Constitution even though it was done without Senate confirmation,[56] or *Puerto Rico v. Sanchez-Valle*, the Supreme Court case holding that the U.S. federal government and the Puerto Rican government are the "same sovereign" for the purpose of the Double Jeopardy Clause.[57]

Over 120 years have passed since the first of the *Insular Cases*, and 100 years since the last. It is time that this line of racist jurisprudence, which includes the *Insular Cases* and their progeny, is discarded and never relied upon again. While we are not holding our breath in expectation that the Supreme Court will overrule the *Insular Cases*, we are prepared to continue fighting until they are.

55. Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified at 48 U.S.C. § 2101).

56. Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020).

57. Puerto Rico v. Sanchez-Valle, 579 U.S. 59 (2016).