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The *Insular Cases* Run Amok: Against Constitutional Exceptionalism in the Territories

Christina D. Ponsa-Kraus (/author/christina-d-ponsa-kraus)

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ABSTRACT. The *Insular Cases* have been enjoying an improbable—and unfortunate—renaissance. Decided at the height of what has been called the "imperialist" period in U.S. history, this series of Supreme Court decisions handed down in the early twentieth century infamously held that the former Spanish colonies annexed by the United States in 1898—Puerto Rico, the Philip- pines, and Guam—"belong[ed] to, but [were] not a part of, the United States." What exactly this meant has been the subject of considerable debate even as those decisions have received unanimous condemnation. According to the standard account, the *Insular Cases* held that the "entire" Constitution applies within the United States (defined as the states, the District of Columbia, and the so-called "incorporated" territories) while only its "fundamental" limitations apply in what came to be known as the "unincorporated" territories (today, Puerto Rico, Guam, the U.S. Virgin Islands, the Northern Mariana Islands, and American Samoa). Scholars unanimously agree that the *Insular Cases* gave the Court's sanction to U.S. colonial rule over the unincorporated territories— and that the reason for it was racism. Yet courts and scholars have recently sought to hoist the *Insular Cases* on their own racist petard—by "repurposing" them to defuse constitutional objections to certain distinctive cultural practices in the unincorporated territories. Adopting the standard account of the *Insular Cases*, according to which they created a nearly extraconstitutional zone, proponents of repurposing argue that the relative freedom from constitutional constraints that government action enjoys in the unincorporated territories can and should be exploited now to vindicate their peoples' right to cultural self-preservation. This Article disagrees. Although I share the view that the Constitution should not ride roughshod over the cultural practices of the people of the unincorporated territories, I do not agree that the Constitution necessarily must bend to any such practices it finds there or that the *Insular Cases* present a legitimate—let alone desirable— doctrinal vehicle for preserving such practices. Instead, constitutional doctrines available outside of the *Insular Cases* present the most promising—and the only legitimate—doctrinal means for making the constitutional case in favor of cultural accommodation. Against the repurposing project, I argue that the *Insular Cases* gave rise to nothing less than a crisis of political legitimacy in the unincorporated territories, and that no amount of repurposing, no matter how well-intentioned— or even successful—can change that fact. On the contrary: repurposing the *Insular Cases* will pro- long the crisis. They should be overruled.

AUTHOR. George Welwood Murray Professor of Legal History, Columbia Law School. I'm grateful to Adriel Cepeda Derieux, Rose Cuison-Villazor, Erin Delaney, Jody Kraus, Kal Raustiala, and Neil Weare for their generous feedback, to Valeria Flores and Daimiris García for their excellent research assistance, and to the editors of this Special Issue for their superb work. I dedicate this Article to my mother, Edda P. Duffy *née* Ponsa Flores.

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The *Insular Cases* have been enjoying an improbable—and unfortunate—renaissance. Decided at the height of what has been called the "imperialist" period in U.S. history, this series of Supreme Court decisions handed down in the early twentieth century infamously held that the former Spanish colonies annexed by the United States in 1898 —Puerto Rico, the Philippines, and Guam—"belong[ed] to . . . but [were] not a part of the United States."[1] Although previous U.S. territories were "incorporated" into the United States upon annexation, these new ones had been annexed but not incorporated.[2]

What exactly this meant has been the subject of considerable debate even as those decisions have received widespread condemnation.[3] According to the standard account, the *Insular Cases* held that the entire Constitution applies within the United States—defined as the states, the District of Columbia, and the incorporated territories —while only its fundamental limitations[4] apply in what came to be known as the "unincorporated" territories. According to an alternative account (to which I subscribe), the *Insular Cases* did not carve out a largely extraconstitutional zone of territory subject to formal, internationally recognized U.S. sovereignty where none of the Constitution applies except for certain fundamental limitations. Instead, when it comes to which constitutional provisions apply where, the *Insular Cases* stand for a more modest twofold proposition. First, provisions defining their geographic scope with the phrase "United States" may or may not include unincorporated territories. Second, either way, fundamental limitations certainly apply within unincorporated territories, though what counts as "fundamental" may vary from one unincorporated territory to the next.[5]

Although what it means to be "unincorporated" remains contested to this day, every account of the *Insular Cases* agrees that they also stand for a considerably less modest proposition: that the federal government has the power to keep and govern territories indefinitely, without ever admitting them into statehood (or deannexing them, for that matter).[6] Before 1898, territories annexed by the United States were presumed to be on a path to statehood.[7] However, the annexation in 1898 of three territories populated largely by nonwhite people gave rise to a public debate over whether the United States, for the first time in its history, could continue to hold a territory indefinitely without eventually admitting it as a state.[8] The Court found a way. It simply invented, out of whole cloth, the distinction between incorporated territories, which were on their way to statehood, and unincorporated territories, which might never become states, and placed these newly annexed territories in the latter category.[9] The distinction between incorporated and unincorporated territories thus served as the cornerstone of a racially motivated imperialist legal doctrine[10]: the idea of the unincorporated territory gave sanction to indefinite colonial rule over majority-nonwhite populations at the margins of the American empire.[11]

Since the Founding, territories had been subject to U.S. sovereignty but denied federal representation. The political illegitimacy of unrepresentative federal rule over their inhabitants had been justified by the shared understanding, confirmed by consistent practice, that territorial status was a temporary necessity that would end when a territory became a state.[12] But by giving constitutional sanction to the new and subordinate category of unincorporated territories, which might never become states, the *Insular Cases* raised the possibility that the United States could, if it so desired, govern unincorporated territories indefinitely despite the fact that their residents had neither representation in the federal government nor the assurance that such

1 Downes v. Bidwell, 182 U.S. 244, 287 (1901). The issue of exactly which decisions belong under the...

2 *Downes*, 182 U.S. at 287. The Court first used the term "unincorporated" with respect to U.S. t...

3 *See* Sparrow, *supra* note 1, at 99-110 (describing a range of views on the significance of the *Insul*...

4 "Limitations" here refers to rights, such as the Bill of Rights and constitutionally protected...

5 As I have noted in earlier scholarship challenging the standard account, that account is so ubiqui...

6 I have argued that the *Insular Cases* also introduced into U.S. constitutional law a doctrine of te...

7 *See generally* Peter Onuf, Statehood and Union: A History of the Northwest Ordinance (Univ. Notre D...

8 Earlier territories had nonwhite inhabitants as well, but on these contiguous lands, the United St...

9 Balzac v. Porto Rico, 258 U.S. 298, 311 (1922) (explaining the relationship between incorporation ...

10 *See, e.g.*, Adriel I. Cepeda Derieux & Neil C. Weare, *After* Aurelius*: What Future for the* Insular C...

11 On the *Insular Cases*' departure from the original meaning of the Territory Clause, according to w...

12 *Balzac*, 258 U.S. at 311. See generally sources cited *supra* note 7, all of which support the propos...

representation would be forthcoming upon their territory's eventual admission as a state. After the *Insular Cases*, that possibility became a reality that has persisted for nearly 125 years.

The unincorporated territory was a judicial innovation designed for the purpose of squaring the Constitution's commitment to representative democracy with the Court's implicit conviction that nonwhite people from unfamiliar cultures were ill-suited to participate in a majority-white, Anglo-Saxon polity.[13] With the creation of the unincorporated territory, the Court implicitly embraced the view that the theory of political legitimacy underlying the Constitution allowed for an exception, born of practical necessity and motivated by racism, permitting a representative democracy to govern people deemed inferior indefinitely without representation. The raison d'être of the *Insular Cases* was, therefore, to provide the constitutional foundation for perpetual American colonies.

But recent efforts to "repurpose" the *Insular Cases* have breathed new life into those reviled decisions.[14] Adopting the standard account of the *Insular Cases*, according to which they created a nearly extraconstitutional zone for the unincorporated territories, proponents of repurposing argue that precisely because the *Insular Cases* swept aside most constitutional restraints upon government action in those territories, they now—counter-intuitively—hold the key to the survival of the unique and diverse cultures of these places: today, Puerto Rico, Guam, the U.S. Virgin Islands, the Northern Mariana Islands (NMI), and American Samoa.[15]

These territories, all unincorporated, remain subject to U.S sovereignty, and overwhelming majorities of their populations apparently want to keep it that way.[16] At the same time, several of them have certain traditional cultural practices that could be in tension or outright conflict with the U.S. Constitution.[17] The practices at issue include, for example, racial restrictions on the alienation of land in the Pacific U.S. territories, which are meant to protect native land ownership where land is scarce and central to cultural identity.[18] Ordinarily—in what most people think of as the United States—racial restrictions on the alienation of land would clearly violate the Equal Protection Clause.[19] But here the repurposed *Insular Cases* come into play. If, as the standard account has it, these decisions relegated the unincorporated territories to a nearly extraconstitutional zone, then the Constitution does not stand in the way of territorial cultural practices deserving of protection. Or so the argument goes.

A recent *Harvard Law Review* Special Issue features several contributions explaining the repurposing view and arguing that it might offer the best way to protect the distinctive cultures of the unincorporated territories.[20] As one of them explains, "[w]here the doctrine [of the *Insular Cases*] once served colonial interests in an era of mainland domination of the territories, a revisionist argument would see it repurposed today to protect indigenous cultures from a procrustean application of the federal Constitution."[21] Another advocate of the repurposing project argues that judicial adoption of the repurposing view is "defensible and perhaps even necessary" in order to protect culture and promote self-government in the U.S. territories.[22] An early defender of repurposing, Stanley Laughlin, sums up the argument like this:

> The genius of the [doctrine of the *Insular Cases*] is that it allows the insular areas to be full-fledged parts of the United States but, at the same time, recognizes that their cultures are substantially different from those of the mainland United States and allows some latitude in constitutional interpretation for the purpose of accommodating those cultures.[23]

13 On the popularity of the idea of Anglo-Saxon superiority and its relationship to U.S. imperialism ...

14 *See infra* notes 20-23 and accompanying text.

15 For a general introduction to the law of the unincorporated territories, see Arnold H. Leibowitz, ...

16 This is certainly the case in Puerto Rico, where the independence movement has never gained the su...

17 I say "several" because Puerto Rican cultural practices do not conflict with the Constitution ...

18 *See* sources cited *infra* notes 20-23; *see also* discussion *infra* Part III (describing cases concerni...

19 *See* Shelley v. Kraemer, 334 U.S. 1, 20-23 (1948) (holding that judicial enforcement of racially re...

20 *Developments in the Law: The U.S. Territories*, 130 Harv. L. Rev. 1616, 1632 (2017) (Territorial Fe...

21 *See Territorial Federalism*, *supra* note 20, at 1686. I use the term "repurposing" rather than ...

22 Russell Rennie, Note, *A Qualified Defense of the* Insular Cases, 92 N.Y.U. L. Rev. 1683, 1707 (2017...

23 Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Consti...*

As these quotations make clear, the repurposing project aims to achieve not one but two interrelated goals: cultural accommodation *and* continued U.S. sovereignty. That is, if the territories were to remain separate from the United States through independence would render irrelevant any tension with the U.S. Constitution and no repurposing would be necessary. But since support for independence in the territories is minimal at best, it becomes necessary to reconcile the cultural practices at issue with the U.S. Constitution. Enter the standard account of the *Insular Cases*, providing support for the idea that constitutional obstacles can be swept aside in the unincorporated territories.

This Article makes the case against the repurposing project.[24] My argument is that the *Insular Cases* gave rise to nothing less than a crisis of political legitimacy in the unincorporated territories and that no amount of repurposing, no matter how well-intentioned—or even successful—can change that fact. On the contrary: repurposing the *Insular Cases* will prolong the crisis.

The felt imperative to derail the recently annexed territories from the statehood track, while still permitting the United States to retain them, drove the Court to abandon a settled understanding that otherwise would have constrained it: that annexed territories would eventually become states. The famously unclear and erroneous reasoning of the *Insular Cases* is famously unclear and erroneous precisely because it simply could not be reconciled with that settled understanding. To accomplish the end of giving constitutional sanction to permanent colonies, the Court had to carve out an exception to settled constitutional law. The doctrine of territorial incorporation it produced has long been the source of serious judicial confusion and even incoherence.[25] The cases and scholarship seeking to repurpose the *Insular Cases* now pursue a defensible end, but in the process they not only inherit but dramatically exacerbate a legacy of resorting to shoddy legal reasoning in pursuit of an end that otherwise appears out of reach.[26]

My case against the repurposing project begins with a refutation of the standard account, but it does not end there. Refuting the standard account is necessary because its error with respect to the applicability of constitutional provisions forms the basis for the repurposing project, which relies on the idea of a nearly extraconstitutional zone to pursue the goal of cultural accommodation. This keeps the *Insular Cases* alive—and as long as the *Insular Cases* remain alive, the Court's imprimatur will remain on permanent colonialism. But refuting the standard account is not sufficient because even on the alternative account, the *Insular Cases* constitutionalized permanent colonialism by introducing the unincorporated territory into American constitutional law. What defines unincorporated territories is that they can remain territories, subject to U.S. sovereignty and federal laws but denied representation in the federal government, forever. So while I argue that the *Insular Cases* did not create a nearly extraconstitutional zone, and I explain and clarify what they did hold, I do not argue that the solution to the problem of the *Insular Cases* lies in a correct interpretation of them. Instead, it lies in overruling them and erasing the doctrine of territorial incorporation from American constitutional law.[27]

Ironically, it may be possible to achieve the objective of cultural accommodation in the territories by employing ordinary constitutional doctrines, such as standard equal-protection doctrine or the plenary power jurisprudence under the Territory Clause.[28] I argue below that many, perhaps all, of the claims advanced under the rubric of the repurposing project could and should be decoupled from the *Insular Cases* jurisprudence and reframed and adjudicated under precisely these doctrines.[29] However, even if one believes, as the advocates of repurposing do, that it would be tragic not to find a way to accommodate cultural practices in the U.S. territories, those ends cannot justify their doctrinal means, because the cost of resorting to such means is

24 For other work criticizing the repurposing project (not always described with that phrase), see, f...

25 *See* Brief of Former Federal and Local Judges as Amici Curiae Supporting the First Circuit's Ruli...

26 I should note that I do not take a position or intend to imply one with respect to Federal Indian ...

27 I am far from alone in calling for the overruling of the *Insular Cases*. *See, e.g.*, Adriel Cepeda D...

28 U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all nee...

29 *See infra* Part III.

the perpetuation of a system of permanent colonies. In my view, even if certain diverse cultural practices in the territories cannot be reconciled with the Constitution, this fact should not matter if the remedy would be worse than the violation.

To put it bluntly: arguing that we need to repurpose the *Insular Cases* to accommodate culture is like arguing that we need to repurpose *Plessy v. Ferguson* to accommodate benign racial classifications.[30] We do not. We must not. Just as we cannot turn a blind eye to the racist premise driving *Plessy*, even if doing so appeared necessary to constitutionalize benign racial classifications, neither can we tolerate, let alone expiate, the racist premise of the *Insular Cases*, and the flagrant political illegitimacy it licenses, in order to pursue the independently laudable goal of preserving important cultural practices in U.S. territories. Like *Plessy*, the *Insular Cases* are bad law. They cannot be redeemed, even by conscripting them into service for the noble goal of protecting their victims from a certain harm. Democratic representation is an inviolable commitment of the Constitution's own bedrock conception of political legitimacy. Perpetual territorial status violates it.

Part I explains the *Insular Cases*, criticizing the standard account and clarifying what those decisions held. My goal here, in short, is to refute the claim that forms the basis of the repurposing project: that the *Insular Cases* relegated the unincorporated territories to a nearly extraconstitutional zone. While those decisions did introduce the distinction between incorporated and unincorporated territories into the Court's constitutional law on the territories, the standard account misunderstands it.[31] The doctrine of territorial incorporation does not mean, as the standard account holds, that the "entire" Constitution applies in the incorporated territories while "only" its fundamental limitations apply in the unincorporated territories.

Part II describes several Supreme Court decisions relying on the *Insular Cases* since the original series came down between 1901 and 1922.[32] Each of them concerns a constitutional challenge originating in formally foreign territory where the United States exerts some form of control. One involves trials of civilians on U.S. military bases abroad; another, a search by U.S. agents of a Mexican national's home in Mexico; still another, the detention of persons labeled enemy combatants in Guantánamo, a place the Court concluded is subject to de facto U.S. sovereignty though located in de jure foreign (Cuban) territory.[33] Together, these cases kept alive the standard account of the *Insular Cases* by endorsing an understanding of those cases according to which constitutional provisions do not apply abroad if it would be "impracticable and anomalous" to apply them. Developed in the context of foreign territory, the impracticable-and-anomalous test soon made its way into the jurisprudence on the Constitution in the domestic yet unincorporated territories.

Part III describes, examines, and criticizes the evolution of the Supreme Court's latter-day spin on the *Insular Cases* in a series of lower-court decisions involving constitutional challenges in the unincorporated territories. These courts have expressly taken up the repurposing project, relying on the *Insular Cases* and engaging in avowedly teleological reasoning with a view toward finding ways to accommodate cultural practices that might otherwise violate constitutional requirements. A close reading of these cases illustrates the pitfalls of the repurposing project, which proceeds as if, whenever a constitutional challenge arises in an unincorporated territory, the laws of constitutional physics are suspended. Endorsing the standard account of the *Insular Cases*, these decisions expand upon a poorly reasoned approach to the question of which constitutional provisions apply where, while leaving untouched the politically illegitimate status of the territories. Creating the illusion of solicitude toward territorial self-determination, they inadvertently and perversely entrench federal power while prolonging the subordination of territorial inhabitants.

30 Neil Weare, *Why the* Insular Cases *Must Become the Next* Plessy, Harv. L. Rev. Blog (March 28, 2018)...

31 *See* Burnett [Ponsa-Kraus], *supra* note 5, at 808 n.40 (citing articles offering the standard accoun...

32 As noted above, there is some disagreement as to which cases belong on the list. *See supra* note 1....

33 Reid v. Covert, 354 U.S. 1 (1957); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Boumedi...

Part III also argues that the repurposing project is not only misguided, but gratuitous. Even if one believes the United States must find ways to accommodate territorial cultural practices in tension with the Constitution, it is not true that even without the *Insular Cases*, constitutional law contains sufficient flexibility to accommodate most, if not all, of the cultural practices at issue. In most, if not all, of the cases discussed here, either the courts could have reached the same results without reliance on the *Insular Cases* or the opposite result would have posed no threat to territorial cultural practices.

Part IV turns to a recent development in the repurposing project, examining current litigation over whether the Citizenship Clause of the Fourteenth Amendment applies in the unincorporated territory of American Samoa. Two federal courts of appeals have now relied on an updated version of the impracticable-and-anomalous test to hold that the Citizenship Clause of the Fourteenth Amendment does not apply in American Samoa.[34] These courts reasoned that extending the Citizenship Clause to American Samoa would be anomalous because, according to the territory's elected representatives, most American Samoans do not want it to apply.[35] Neither of these courts conducted a factual inquiry into or a legal analysis of the territorial cultural practices at issue in order to determine whether the application of the Citizenship Clause would actually threaten them. Instead, they took the word of the territory's elected representatives with respect to the purported wishes of a territorial majority and, on that basis, held that a constitutional provision did not apply in an unincorporated territory—in effect holding a constitutional provision inapplicable by popular demand.[36] This, I argue, is the *Insular Cases* run amok.

Part V illustrates how the *Insular Cases* sow doubts about the applicability of constitutional provisions in the unincorporated territories even when there is no plausible argument that they are relevant. Here I describe two examples. First, I examine recent litigation in Puerto Rico involving the Appointments Clause, in which the *Insular Cases* repeatedly came up despite a consensus among the parties and courts involved that the question presented did not turn on their validity. The case, *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment LLC*, involved a challenge to the selection mechanism for the members of the Board, which Congress created in 2016 to handle Puerto Rico's economic crisis.[37] The selection mechanism does not require Senate confirmation, and the plaintiffs challenged it as a violation of the Appointments Clause of the Constitution, which requires Senate confirmation of all Officers of the United States. The question was not whether the Appointments Clause applies in Puerto Rico; it was whether the officers of the Board are Officers of the United States. But because the challenge arose in an unincorporated territory, doubts over whether the Appointments Clause "applies" there inevitably came up at various stages in the litigation. The First Circuit opinion in *Aurelius* described the *Insular Cases* as a "dark cloud" over the case.[38] The Supreme Court allotted ten minutes of oral argument for a discussion of the *Insular Cases*, during which a Puerto Rican lawyer implored the Court to overrule them, while several Justices expressed puzzlement over why they had even come up.[39] The opinion upholding the selection mechanism confirmed their irrelevance to the issue in *Aurelius*, questioning their validity and refusing to extend them beyond their facts, but understandably did not overrule them.[40]

The second example is the case of *United States v. Vaello Madero*, an equal-protection challenge to Puerto Rico's exclusion from the Supplemental Security Income (SSI) program, which provides aid to persons who are needy and disabled or elderly.[41] Once again, the applicability of the relevant constitutional guarantee of equal protection was not in question. Once again, the *Insular Cases* came up anyway, this time in the Respondent's argument that they constitute evidence of a history of racism against Puerto Ricans that should lead to strict scrutiny of the challenged classification. Once

34 Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015); Fitisemanu v. United States, 1 F.4th 862 (1...

35 *Tuaua*, 788 F.3d at 310; *Fitisemanu*, 1 F.4th at 880. In *Fitisemanu*, Judge Lucero's opinion for th...

36 *Tuaua*, 788 F.3d at 310; *Fitisemanu*, 1 F.4th at 880.

37 140 S. Ct. 1649 (2020).

38 Aurelius Inv., LLC v. Puerto Rico, 915 F.3d 838, 855 (1st Cir. 2019).

39 Transcript of Oral Argument at 82, 86-87, *Aurelius*, 140 S. Ct. 1649 (No. 18-1334); *see also* Cepeda...

40 *Aurelius*, 140 S. Ct. at 1665.

41 United States v. Vaello Madero, 142 S. Ct. 1539 (2022). Justice Gorsuch concurred in *Vaello Madero*...

42

again, the oral argument featured a confused and confusing exchange about the *Insular Cases*, with one Justice wondering what they had to do with *Vaello Madero* and another [illegible] to learn why the Court should overrule them.[42] The Deputy Solicitor General expressed puzzlement over the idea that the Court would overrule cases on which the government did not even rely.[43] Meanwhile, the Respondent decried the racism of the *Insular Cases*, but stopped short of asking the Court to overrule them.[44]

As their perplexing appearance in *Vaello Madero* suggests, the *Insular Cases* deserve to be overruled, and soon. But when the Court finally overrules them, it must do so clearly and unequivocally, in a case that squarely presents the doctrine of territorial incorporation and requires the Court to weigh in on its validity. That case, I argue at the end of Part V, is *Fitisemanu v. United States*.[45]

The haunting of *Aurelius* and *Vaello Madero* by the *Insular Cases* was yet another instance of the unending constitutional uncertainty to which the people of the unincorporated territories have been subjected for nearly a century and a quarter. To them, the *Insular Cases* are an oppressive omnipresence constantly sowing doubt about the applicability of constitutional guarantees. Yet to the Justices—the only people in a position to do something about it—they have so far registered as a mere oddity, albeit a distasteful one.[46] These wrongly decided racist, imperialist decisions have run amok long enough. The Court should overrule them once and for all.

42 Transcript of Oral Argument at 7-8, 8-11, United States v. Vaello Madero, 142 S. Ct. 1539 (2022) (No. 20-...

43 *Id.* at 8, 11.

44 Brief for Respondent at 2-3, *Vaello Madero*, 142 S. Ct. 1539 (2022) (No. 20-303) (attributing the *I*...

45 Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021), *reh'g en banc denied*, 2021 WL 6111908 (...

46 As noted above, *see supra* note 41, Justices Gorsuch and Sotomayor recently went further in *Vaello M*...

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