

After *Aurelius*: What Future for the *Insular Cases*?

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ABSTRACT. The Supreme Court recently missed its best opportunity in decades, *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*, to overrule the *Insular Cases*. There is good reason to overrule the *Insular Cases*—a series of early 1900s rulings that drew constitutional distinctions between so-called “incorporated” and “unincorporated” U.S. territories. These cases are analytically flawed and driven by offensive racial assumptions about the territories’ inhabitants. Yet in *Aurelius*, the Supreme Court continued its decades-long trend of narrowing the reach of the *Insular Cases* while still coming up short of overruling them altogether. Continuing to leave the *Insular Cases* on the books leaves lower courts to wrestle with an unworkable and indefensible doctrine. Three cases involving the denial of citizenship, warrantless searches, and unequal benefits in U.S. territories demonstrate the *Insular Cases*’ continuing harm while offering hope for their possible reconsideration by the Supreme Court.

INTRODUCTION

Standing at the Supreme Court lectern for the first time, Puerto Rican attorney Jessica Méndez-Colberg explained to the Justices that because of “the court-made doctrine of territorial incorporation” established by the *Insular Cases*, “when my client, and even myself, return to Puerto Rico, we will have a lesser set of constitutional rights than [] we have standing here today.”¹ In invoking the controversial *Insular Cases*, Ms. Méndez-Colberg alluded to a series of decisions from the early 1900s in which it is commonly said the Court held that the Constitution only applies “in part” in unincorporated U.S. territories like Puerto Rico.² Her client, an electrical workers’ union in Puerto Rico,³ had challenged

1. Transcript of Oral Argument at 81, *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020) (No. 18-1334).

2. *Boumediene v. Bush*, 553 U.S. 723, 757 (2008).

3. Unión de Trabajadores de la Industria Eléctrica y Riego.

the Financial Oversight and Management Board for Puerto Rico (FOMB)—a democratically unaccountable body with near total control over Puerto Rico’s financial affairs—as unconstitutional under the Appointments Clause because Congress did not require its members to be confirmed by the Senate. Some parties defending the FOMB argued that the Appointments Clause did not even apply to Puerto Rico because of the *Insular Cases*.⁴

Ms. Méndez-Colberg drew attention to the words inscribed on the Court’s entrance: “Equal [J]ustice [U]nder [L]aw,” she argued, meant “reject[ing] classifications grounded in ideas of alien races and savage people” that the *Insular Cases* made law after the United States acquired Puerto Rico, Guam, and other islands following the Spanish-American War. Invoking the First Circuit’s observation that the *Insular Cases* “hover[] like a dark cloud over this case,”⁵ she expressly urged the Court to overrule the *Insular Cases*—to the authors’ knowledge, a historical first at a Supreme Court oral argument.⁶

Justice Breyer agreed in part—the *Insular Cases* are “a dark cloud,” he said—but then demurred, stating “whether you have the *Insular Cases* or not . . . it doesn’t matter here because the [Appointments Clause] *does* apply” to Puerto Rico.⁷ Chief Justice Roberts also assumed that the Appointments Clause applies and that the only question before the Court was whether it also required Senate confirmation of FOMB members. He stated: “I just don’t see the pertinence . . . of the *Insular Cases*.”⁸ Based on his view⁹ that “none of the other parties rely on the *Insular Cases* in any way,” Chief Justice Roberts pressed Ms. Méndez-Colberg: “[I]t would be very unusual for us to address them in this case, wouldn’t it?”¹⁰ Ms. Méndez-Colberg noted¹¹ that the Chief Justice took that very approach in *Trump v. Hawaii*, the Muslim travel ban case, when it overruled the

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4. See Brief for the Petitioner Official Committee of Unsecured Creditors of All Title III Debtors (Other than COFINA) at 23, *Aurelius*, 140 S. Ct. 1649 (No. 18-1334) [hereinafter Official Committee Brief] (“The Appointments Clause, grounded in the separation of powers doctrine, creates no intimately personal rights comparable to the individual liberties that have been applied by the courts to the territories.”).
 5. Transcript of Oral Argument, *supra* note 1, at 82, (quoting *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 855 (1st Cir. 2019)).
 6. *Id.* at 85-87.
 7. *Id.* at 82-83 (emphasis added).
 8. *Id.* at 87.
 9. In fact, at least one party sought reversal of the First Circuit’s holding that the *Insular Cases* did not apply to the question of the Appointments Clause’s application in Puerto Rico. See Official Committee Brief, *supra* note 4, at 23 (“The Appointments Clause, grounded in the separation of powers doctrine, creates no intimately personal rights comparable to the individual liberties that have been applied by the courts to the territories.”).
 10. Transcript of Oral Argument, *supra* note 1, at 85-86.
 11. *Id.* at 87.

infamous decision in *Korematsu v. United States*, the Japanese internment case, even though the Chief Justice acknowledged “*Korematsu* ha[d] nothing to do” with the issues presented.¹²

When the Court handed down a decision in *Financial Oversight and Management Board v. Aurelius Investment, LLC* seven months later, the *Insular Cases* did not get the same treatment as *Korematsu*. But they did not go altogether ignored either. The Court declined to extend the *Insular Cases* and seemed to question “their continued validity,” but it still dismissed the request to “overrule the much-criticized” decisions “and their progeny.”¹³ And Justice Sonia Sotomayor, whose invocation of *Korematsu* in her *Trump v. Hawaii* dissent had prompted the Chief Justice’s pointed response, observed only that “territorial status should not be wielded as a talismanic opt out of prior . . . constitutional constraints,” with no mention of the *Insular Cases*.¹⁴ Not pressed to engage with the *Insular Cases*, the majority in *Aurelius* declined to go any further than it did. Thus, the invitation of multiple parties and amici on both sides¹⁵ to place the *Insular Cases* alongside *Korematsu* in the dustbin of history went unanswered.

Nonetheless, the Court’s clear mistrust of the *Insular Cases*, even as it declined to overrule them, continues a trend wherein the Court says one thing but then permits lower courts to do another. Since at least the 1950s,¹⁶ the Court has expressed skepticism of its territorial-incorporation doctrine and has said courts should not extend it further. And yet, because they remain on the books, lower courts continue to rely on the *Insular Cases* to deprive residents of U.S. territories of rights and constitutional safeguards they almost surely enjoy.¹⁷ Further, beyond their doctrinal impact, the *Insular Cases* also continue to implicitly serve as a basis for Congress to maintain discriminatory laws that treat residents of the territories as second-class citizens, much as *Plessy* did for laws that discriminated against African Americans.¹⁸

Ultimately, the Court’s discussion of the *Insular Cases* in *Aurelius* raises significant questions about those decisions’ future, both at the Supreme Court level and in the lower courts. This Essay considers the lessons that can be drawn from

12. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

13. *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020).

14. *Id.* at 1671 (Sotomayor, J., concurring).

15. See *infra* notes 73 and 74.

16. See *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion) (“[N]either the [*Insular Cases*] nor their reasoning should be given any further expansion.”).

17. See *infra* note 65.

18. See, e.g., Neil Weare, *Why the Insular Cases Must Become the Next Plessy*, HARV. L. REV. BLOG (Mar. 28, 2018), <https://blog.harvardlawreview.org/why-the-insular-cases-must-become-the-next-plessy> [<https://perma.cc/PL6N-ZPAA>].

Aurelius and how the Court’s reasoning might inform ongoing litigation. It begins by providing an overview of the legal doctrine and racial context of the *Insular Cases* and explaining how the Supreme Court has since consistently acted to narrow the scope of their application in U.S. territories. Next, it examines the Supreme Court’s missed opportunity to overrule the *Insular Cases* in *Aurelius* and what lessons lower courts should take from its statements on the *Insular Cases*. Finally, it discusses three cases involving the Citizenship Clause, the Fourth Amendment, and Equal Protection that could allow the Court to address longstanding injustices that have impacted residents of U.S. territories as a result of the *Insular Cases*. The ongoing specter of the *Insular Cases* demonstrates why it is so critical that the Supreme Court take decisive action to finally overrule them.¹⁹

I. THE INSULAR CASES

A. Overview and Racial Context

In a series of controversial and initially fractured cases between 1901 and 1922,²⁰ the Supreme Court devised a novel distinction between “incorporated” territories “surely destined for statehood” and so-called “unincorporated” ones, where there was no such promise of eventual political equality.²¹ As commonly

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19. When we say the Supreme Court should overrule the *Insular Cases*, we use this as shorthand for overruling any of its decisions that rely on the distinction between “incorporated” and “unincorporated” territories. The four clearest examples are *Downes v. Bidwell*, 182 U.S. 244 (1901), which concerns the Uniformity Clause; *Hawaii v. Mankichi*, 190 U.S. 197 (1903), which considers grand juries; *Dorr v. United States*, 195 U.S. 138 (1904), which discusses jury trials; and *Balzac v. Porto Rico*, 258 U.S. 298 (1922), which also concerns jury trials.
 20. Courts and commentators often cite different decisions when they refer to the *Insular Cases*. However, there is general agreement that the list starts with cases the Court decided in 1901; that *Downes v. Bidwell*, 182 U.S. 244 (1901), was “[t]he most significant” of the early decisions, *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976); and that the roster ends with *Balzac v. Porto Rico*, 258 U.S. 298 (1922). Most of the decisions in the Court’s foundational *Insular Cases* were pluralities. See *Downes*, 182 U.S. at 347 (Fuller, C.J., dissenting) (“The majority widely differ in the reasoning by which the conclusion is reached.”); *Armstrong v. United States*, 182 U.S. 243, 244 (1901); *De Lima v. Bidwell*, 182 U.S. 1, 200 (1901). In *Downes*, Justice Henry Billings Brown delivered an opinion “announc[ing] the conclusion and judgment of the court,” which none of the other Justices joined. 182 U.S. at 247. There was “no opinion in which a majority of the court concurred.” *Id.* at 244 n.1; see also BATHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 87 (2006) (“[N]o single opinion among the five opinions in *Downes* attracted a majority on the bench.”).
 21. See *Dorr*, 195 U.S. at 143 (1904) (“Until Congress shall see fit to incorporate territory ceded by treaty into the United States . . . the territory is to be governed under the power existing in

understood, the Constitution applies “in full” in incorporated territories,²² but only “in part” in unincorporated territories like Puerto Rico. However, what that means as a practical matter is far from clear.²³ Confusion over the *Insular Cases* framework has led many lower courts and litigants to misapply dicta from those decisions to say *only* “fundamental” protections apply in unincorporated U.S. territories unless Congress says otherwise.²⁴ Notably, none of the *Insular Cases* support the broad assertion that “only” certain “fundamental” rights apply to residents of the territories; indeed, such a view turns the actual language from these cases on its head.²⁵

Now “much-criticized,” as *Aurelius* noted,²⁶ this “territorial incorporation” doctrine ostensibly afforded Congress greater flexibility to govern these newly acquired overseas territories than it had to administer its prior territories.²⁷ By purportedly freeing Congress from certain constitutional limitations, jurists have understood the *Insular Cases* to allow the Court and Congress to avoid “inherent practical difficulties”²⁸ in governing islands lacking “experience in . . . Anglo-American legal tradition[s].”²⁹ In this way, as Justice Harlan explained in one of his powerful dissents, the *Insular Cases* introduced the circularly flawed “theory that Congress . . . [could] *exclude* the Constitution from a domestic territory of the United States, acquired . . . *in virtue of* the Constitution.”³⁰

Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation.”).

22. *Boumediene v. Bush*, 553 U.S. 723, 757 (2008).

23. *Id.*

24. See, e.g., *Davis v. Commonwealth Election Comm’n*, 844 F.3d 1087, 1095 (9th Cir. 2016) (“The *Insular Cases* held that [the] Constitution applies in full to ‘incorporated’ territories, but that ‘elsewhere, absent congressional extension, only fundamental constitutional rights apply.’” (citations omitted)); *Wabol v. Villacrusis*, 908 F.2d 411, 421 (9th Cir. 1990); *Tuaua v. United States*, 951 F. Supp. 2d 88, 94-95 (D.D.C. 2013) (“In an unincorporated territory, the *Insular Cases* held that only certain ‘fundamental’ constitutional rights are extended to its inhabitants.”), *aff’d*, 788 F.3d 300 (D.C. Cir. 2015); see also Official Committee Brief, *supra* note 4, at 21 (“[O]nly those ‘guaranties of . . . fundamental personal rights declared in the Constitution’ limit Congress when it exercises its Article IV powers.”).

25. See Brief for Equally American Legal Defense & Education Fund as Amicus Curiae Supporting Neither Party at 13-15, *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020) (No. 18-1334).

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

27. But see Christina Duffy Burnett [Ponsa-Kraus], *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 814-16, 875 (2005) (“[T]he *Insular Cases* offered Congress no more latitude in governing territories than it already enjoyed: Congress had *always* exercised plenary power over territories . . .”).

28. *Boumediene*, 553 U.S. at 759.

29. *Id.* at 757.

30. *Downes v. Bidwell*, 182 U.S. 244, 386 (1901) (Harlan, J., dissenting) (emphasis added).

Even if that were all they stood for, the *Insular Cases* would be overdue for a reckoning. Supreme Court Justices, lower court judges, and scholars have long warned that allowing Congress to decide for itself when constitutional limits constrain its actions would all but quash the idea of constitutional constraints.³¹ “The Constitution,” after all, “grants Congress . . . the power to acquire, dispose of, and govern territory, *not* the power to decide when and where [the Constitution’s] terms apply.”³²

But the core defect of the *Insular Cases*—their original sin—provides an even greater justification for overruling them: namely, any flexibility they granted Congress to administer newly acquired overseas territories outside constitutional restraints sprang from the desire to keep the mostly nonwhite people who lived there outside the national polity. In *Downes v. Bidwell*, for example, Justice Brown—*Plessy*’s author—warned that Congress should have added flexibility to govern distant “possessions [] inhabited by alien races.”³³ Justice White spoke of the “evils” of admitting “millions of inhabitants” of “unknown islands, peopled with an uncivilized race,” who he believed would be “absolutely unfit” for citizenship.³⁴ Put simply, the *Insular Cases* and the doctrine of territorial incorporation not only ratified but *constitutionalized* the era’s racism and racial hierarchies.

Chief among the “practical difficulties”³⁵ that the Court helped Congress avoid were questions over the rights and duties that the nation owed the new territories’ inhabitants. A century after the founding, it was “self-evident”³⁶ that the United States could both hold territories³⁷ and that constitutional protections applied in those lands.³⁸ And it was generally understood that organized territories were not only states-in-waiting,³⁹ but also that Congress could not

31. See, e.g., *Boumediene*, 553 U.S. at 765 (2008) (“To hold the political branches have the power to switch the Constitution on or off . . . would permit a striking anomaly in our tripartite system of government.”); *Downes*, 182 U.S. at 389 (Harlan, J., dissenting) (“[T]he National Government is one of enumerated powers to be exerted only for the limited objects defined in the Constitution.”).

32. *Boumediene*, 553 U.S. at 765 (emphasis added).

33. 182 U.S. at 287.

34. *Id.* at 306, 313, 342 (White, J., concurring).

35. *Boumediene*, 553 U.S. at 759.

36. *Downes*, 182 U.S. at 292 (White, J., concurring).

37. See *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820) (“[The United States] is the name given to our great republic, which is composed of States and territories.”).

38. See *id.* (“[T]erritory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania.”); see also *Downes*, 182 U.S. at 353-69, 359 (Fuller, C.J., dissenting) (citing numerous Court decisions “[f]rom *Marbury v. Madison* to the present day” establishing that constitutional limits apply in a U.S. territory).

39. See *Duffy Burnett* [Ponsa-Kraus], *supra* note 27, at 799.

keep them in territorial limbo forever.⁴⁰ When the country began to acquire overseas territories almost exclusively inhabited by non-English speaking people of color, however, “Congress . . . discontinu[e]d its previous practice of extending constitutional rights to [U.S.] territories by statute”⁴¹ and abandoned its custom of formally outlining a path for territories to “mature” into statehood.⁴² The prospect of absorbing millions of people of color into the body politic divided the political branches “over how, and to what extent, the Constitution applied” to new territories.⁴³ Leading voices on both sides deployed explicitly racist arguments to make their points.⁴⁴

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40. See *Scott v. Sandford*, 60 U.S. 393, 446 (1857) (“[N]o power [is] given by the Constitution to the Federal Government to establish or maintain colonies . . . to be ruled and governed at its own pleasure . . .”); see also GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 203 (2004) (“The American Constitution . . . does not permit full-fledged colonialism in which territorial inhabitants are treated as subjects beyond the range of the Constitution.”).
41. *Boumediene v. Bush*, 553 U.S. 723, 756 (2008).
42. See José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391, 431 (1978) (“For the first time in American history, ‘in a treaty acquiring territory for the United States, there was no promise of citizenship . . . [nor any] promise, actual or implied, of statehood.’” (quoting J. PRATT, *AMERICA’S COLONIAL EXPERIMENT* 68 (1950))).
43. *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976); see also Kal Raustiala, *Empire and Extraterritoriality in Twentieth Century America*, 40 SW. L. REV. 605, 607 (2011) (noting that the “acquisition of . . . formerly-Spanish ruled islands led to significant national debate” in part due to consequences of “annex[ing] distant islands that were, at the time, many days journey by sea from any American territory and which contained large populations that did not speak English”); Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L. L. 283, 299-300 (2007) (noting that national and congressional debate over territories pit “those of the view that the[ir] inhabitants . . . were unfit to become citizens or to be integrated in a path towards eventual statehood” against “those who adhered to the century-old tradition and practice that the Constitution automatically attached to all territories over which the United States gained sovereignty”).
44. See SAM ERMAN, *ALMOST CITIZENS* 28-30 (2018) (discussing reliance on racialized arguments by both proponents and opponents of territorial expansion); Cabranes, *supra* note 42, at 431-32 (quoting 33 Cong. Rec. 3622 (1900) (statement of Sen. Depew)) (noting that both the anti-imperialist Senator William Bate, who opposed the Foraker Act establishing a civil government in Puerto Rico, and Senator Chauncey Depew, a proponent of the islands’ annexation, deployed racist language, arguing that United States should not “incorporate the alien races, and . . . semi-civilized, barbarous, and savage peoples of these islands into our body politic as States of the Union”); B.R. Tillman, *Causes of Southern Opposition to Imperialism*, 171 N. AM. REV. 439, 445 (1900) (arguing that the United States should not “incorporat[e] any more colored men into the body politic”).

The *Insular Cases* and territorial incorporation were a judicial response to this debate,⁴⁵ and they gave constitutional cover to proponents of expansionism and the theories of race and social Darwinism that fueled such expansion.⁴⁶ The decisions raised questions over whether overseas territories—and the people who inhabited them—would ever be “incorporated” into the national fabric. Language in the Court’s leading *Insular Cases* opinions left no doubt of the Justices’ racialized reasons for devising the new territorial-incorporation doctrine the way they did.⁴⁷ Rather than force Congress to answer “grave questions” based on “differences of race,”⁴⁸ the Court gave it a way out.

Scholarly consensus⁴⁹ and the ever-growing number of lower courts wrestling with the *Insular Cases*’ uglier implications⁵⁰ increasingly show that the cases cannot be separated from their racialized justifications. Sanford Levinson was

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45. See, e.g., Christina Duffy Burnett [Ponsa-Kraus], *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 984-85, 987 (2009) (noting that the “contentious question [of whether the Constitution followed the flag to the new territories] made its way to the Supreme Court” in *Downes*); Torruella, *supra* note 43, at 287 (“[T]he *Insular Cases* represent a constitutional law extension of the debate over the Spanish-American War of 1898 . . .”).
46. See EFRÉN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO* 113 (2001); Burnett, *supra* note 45, at 989 (“Despite the vigorous disagreement among the Justices, the holding in *Downes* soon put an end to the popular and political debate. The imperialists had won the day; that much was clear.”).
47. See, e.g., Andrew Kent, *Citizenship and Protection*, 82 FORDHAM L. REV. 2115, 2128 (2014) (noting that the Court offered “frankly racist” rationales in the *Insular Cases*); Torruella, *supra* note 43, at 286 (noting that the “outcome [of the *Insular Cases*] was strongly influenced by racially motivated biases and by colonial governance theories that were contrary to American territorial practice and experience”).
48. *Downes*, 182 U.S. at 282.
49. E.g., sources cited *supra* note 46; ERMAN, *supra* note 44; Juan R. Torruella, *Ruling America’s Colonies: The Insular Cases*, 32 YALE L. & POL’Y REV. 57 (2013).
50. See, e.g., *Igartúa v. Trump*, 868 F.3d 24, 25-26 (1st Cir. 2017) (Torruella, J., dissenting) (“At the heart of this controversy lies the total national disenfranchisement and lack of national political clout of the community of 3.5 million United States citizens who reside in Puerto Rico.”); *Tuaua v. United States*, 788 F.3d 300, 307 (D.C. Cir. 2015) (“[S]ome aspects of the *Insular Cases*’ analysis may now be deemed politically incorrect . . .”); *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah 2019); *United States v. Vaello-Madero*, 313 F. Supp. 3d 370, 375 (D.P.R. 2018) (“Whatever pros and cons may have evolved from [the *Insular Cases*], the fact remains that they were grounded on outdated promises.”); *Segovia v. Bd. of Election Comm’rs.*, 201 F. Supp. 3d 924, 938-39 (N.D. Ill. 2016) (citing “extensive judicial, academic, and popular criticism,” but noting that the “court’s task, however, is not to opine on wisdom or fairness of” the doctrine).

correct: the cases should rightly be viewed as “central documents in the history of American racism.”⁵¹

B. Supreme Court’s Skepticism over Its Own Doctrine

Even as the *Insular Cases* have remained “good law,” the Supreme Court has proven increasingly reticent about applying the territorial-incorporation doctrine to deny constitutional rights or protections in U.S. territories. The last time the Court found a constitutional provision not “applicable” to unincorporated territories was in 1922, when it held in *Balzac v. Porto Rico* that the Sixth Amendment right to a jury trial was inapplicable to defendants tried in Puerto Rico’s local courts.⁵² Since then, each time a new constitutional question has arisen, the Court has consistently held that specific rights and constitutional provisions operate by their own force in the territories.⁵³ The Court has been openly skeptical and even hostile to the *Insular Cases*, warning that they should not be extended. Yet they persist.

That skepticism has been clear since a 1957 plurality opinion in *Reid v. Covert* and culminates, for now, with the unanimous Court’s judgment in *Aurelius*. In *Reid*, six Justices held that criminal-defendant civilian spouses of servicemen stationed abroad had a right to be tried by a jury.⁵⁴ Addressing the *Insular Cases*’ relevance, Justice Hugo Black voiced four Justices’ “judgment that neither the [*Insular Cases*] nor their reasoning should be given any further expansion.”⁵⁵ Thirty-five years after *Balzac*, it was clear to a plurality of the Court that switching off the “Bill of Rights and other constitutional protections . . . when they become inconvenient” would “destroy the benefit of a written Constitution.”⁵⁶ Had

51. Sanford Levinson, *Why the Canon Should Be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 245 (2000).

52. 258 U.S. 298, 310, 312 (1922).

53. See *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 148 n.1 (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, 470 (1979) (holding that Fourth Amendment protections against unreasonable searches and seizures are applicable against the Puerto Rican government); *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) (assuming there is a “virtually unqualified constitutional right to travel between Puerto Rico and any of the 50 States”); *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976) (holding that equal protection and due process are applicable in Puerto Rico).

54. *Reid v. Covert*, 354 U.S. 1 (1957).

55. *Id.* at 14.

56. *Id.*

Justice Black found a fifth vote for his opinion, the territorial incorporation doctrine would have ended with *Reid*.

Justice Black's plurality in *Reid* played a large role in Justice William J. Brennan's four-Justice 1979 concurrence in *Torres v. Puerto Rico*, which cast added doubt on the territorial incorporation as a defensible doctrine.⁵⁷ In *Torres*, the Court unanimously held that Fourth Amendment protections applied in Puerto Rico, in part because Congress already assumed they did.⁵⁸ But, relying on the *Reid* plurality, Justice Brennan and three other Justices dismissed outright the possibility that the *Insular Cases* any longer raised "question[s] [about] the application of the Fourth Amendment — or any other provision of the Bill of Rights" to Puerto Rico.⁵⁹ "Whatever the validity" those cases had in their "particular historical context," they no longer held such power.⁶⁰ But, yet again, there was no fifth vote for this view.

Finally, in *Boumediene v. Bush*, which addressed the reach of the constitutional right of habeas corpus to detainees housed in the U.S. naval base in Guantánamo Bay, Cuba, a majority of the Court cited approvingly to the *Reid* plurality and Justice Brennan's *Torres* concurrence in its discussion of what the *Insular Cases* mean for U.S. territories today.⁶¹ *Boumediene* emphasized that a territory's ties to the United States could strengthen over time in constitutionally significant ways.⁶² Far from carving out an extra-constitutional zone in the territories where only "fundamental" protections applied, *Boumediene* said, the *Insular Cases* merely spoke to whether specific provisions limited executive and legislative power given "conditions and requirements" unknown to the country in the early 1900s.⁶³ After *Boumediene*, a leading scholar fittingly said, the *Insular Cases* looked like "sheep in lion's clothing."⁶⁴

But the *Insular Cases* are still dangerous. Because the Supreme Court has not overruled them, lower courts reflexively rely on and often misapply the *Insular*

57. See 442 U.S. at 476 (Brennan, J., concurring in the judgment) (citing *Reid*, 354 U.S. at 14).

58. *Id.* at 470 ("Congress' implicit determinations . . . and long experience establish that the Fourth Amendment's restrictions on searches and seizures may be applied to Puerto Rico . . .").

59. *Id.* at 475-76 (Brennan, J., concurring in the judgment) (emphasis added).

60. *Id.*

61. See 553 U.S. 723, 758-59 (2008).

62. *Id.* at 758.

63. *Id.* (citations omitted).

64. Duffy Burnett [Ponsa-Kraus], *supra* note 45, at 984.

Cases,⁶⁵ regardless of the Court's recent narrowing language. Absent clear guidance from the Court, lower courts have created their own, often expansive applications of the *Insular Cases*. Too frequently, their decisions invoke the “fundamental rights” limitation on the Constitution's operation in unincorporated territories that is not only contrary to the language of the *Insular Cases* themselves,⁶⁶ but also now to *Reid*, *Torres*, *Boumediene*, and *Aurelius*. Too often, this misplaced reliance on the *Insular Cases* by lower courts deprives territorial residents of rights and protections to which they are almost surely entitled.⁶⁷

II. MISSED OPPORTUNITY

Lower courts misapply the *Insular Cases* so frequently that it is a welcome result when a court analyzes them in their appropriate scope and context. In *Aurelius*, the First Circuit faithfully adhered to Supreme Court precedent to read the *Insular Cases* narrowly and expressly declined to “expand the reach of the ‘*Insular Cases*.’”⁶⁸ Quoting *Reid*, it called the *Insular Cases* a “relic from a different era”⁶⁹ and “historically and juridically, an episode of the dead past.”⁷⁰ The First

65. See, e.g., *Tuaua v. United States*, 788 F.3d 300, 307-09 (D.C. Cir. 2015) (holding that the Fourteenth Amendment guarantee to birthright citizenship is not “fundamental” and thus inapplicable in American Samoa); *Eche v. Holder*, 694 F.3d 1026, 1031 (9th Cir. 2012) (explaining that noncitizens' residence in the Commonwealth of the Northern Mariana Islands did not count towards the physical-presence requirement for naturalization and that the “Naturalization Clause does not apply of its own force” there); *Conde Vidal v. Garcia-Padilla*, 167 F. Supp. 3d 279, 282, 286-87 (D.P.R. 2016) (ruling that the constitutional right of same-sex couples to marry, “fundamental . . . in all States,” had not been incorporated to Puerto Rico (quoting *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015)), *overruled by In re Conde Vidal*, 818 F.3d 765, 767 (1st Cir. 2016)).

66. See Brief for Equally American Legal Defense and Education Fund as Amicus Curiae Supporting Neither Party at 13-15, *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020) [hereinafter *Equally American Brief*].

67. See cases cited *supra* note 65.

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

69. *Aurelius*, 915 F.3d at 854-55 (quoting *Reid v. Covert*, 354 U.S. 1, 12 (1957)) (describing the “discredited lineage of cases which ushered the unincorporated territories doctrine,” but underscoring that the Court lacked authority to “engage in an ultra vires act” by reversing them), *rev'd sub nom.*, *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv. LLC*, 140 S. Ct. 1649 (2020).

70. *Aurelius*, 915 F.3d at 854-55 (quoting *Reid*, 351 U.S. at 492 (1956) (opinion of Frankfurter, J., reserving judgment)).

Circuit did not speak unprompted – various parties invoked the *Insular Cases* before the lower courts to say that the Appointments Clause lacks force in Puerto Rico.⁷¹

At the Supreme Court, however, most parties shifted their strategies, focusing less on the *Insular Cases*. The unstated reason seems obvious: as a strategic matter, advocates seldom rely on indefensible case law before the one Court that can overrule it. But Chief Justice Roberts still overstated things by saying “none of the parties” relied on the decisions; at least one continued to argue that “only” certain “fundamental” rights applied in Puerto Rico and that the Appointments Clause, as a result, did not.⁷² Meanwhile, parties on both sides of the merits⁷³ and various amici urged the Court to finally overrule the *Insular Cases*.⁷⁴

Although the Supreme Court stopped well short of overruling the *Insular Cases* in *Aurelius*, its refusal to do so⁷⁵ was not exactly a punt either. Rather, the Supreme Court did three things that lower courts and litigants should pay close attention to when considering constitutional questions concerning U.S. territories.

First, the Court relied on *Reid v. Covert* for the proposition that the *Insular Cases* “should not be further extended.”⁷⁶ The specific passage in *Reid* the *Aurelius* majority cited cabined the *Insular Cases* to narrow questions on the applicability of just four constitutional provisions concerning tariffs, taxes, and jury-

71. See, e.g., FOMB for Puerto Rico’s Opposition to the Motion to Dismiss Title III Petition at 23-36, *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 301 F. Supp. 3d 290 (D.P.R. 2017) (No. 17-BK-03283) (“[E]ven if it were not the case that Congress’s exercise of its Article IV authority is unconstrained by the Appointments Clause, that Clause would still be inapplicable here because Puerto Rico is an unincorporated territory and the Appointments Clause is not ‘fundamental’”); see also Brief of Appellee American Federation of State, County & Municipal Employees at 9-16, *Aurelius Inv. LLC v. Puerto Rico*, 915 F.3d 838 (1st Cir. 2019) (No. 18-1671) (arguing that the *Insular Cases* “should be overruled, but, until they are, the Appointments Clause does not apply in Puerto Rico”).

72. See Official Committee Brief, *supra* note 4, at 21.

73. Brief for Puerto Rico Fiscal Agency and Financial Advisory Authority at 14-17, *Aurelius*, 140 S. Ct. 1649 (No. 18-1334) (seeking to uphold the Board); Brief for Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. in Opposition at 12, *Aurelius*, 140 S. Ct. 1649 (No. 18-1334) (seeking to strike down the *Insular Cases*).

74. See Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Puerto Rico Supporting the First Circuit’s Ruling on the Appointments Clause Issue at 15, 140 S. Ct. 1649 (No. 18-1334); Equally American Brief, *supra* note 66, at 7; Brief of Amicus Curiae Virgin Islands Bar Association Supporting the Ruling on the Appointments Clause at 3-18, *Aurelius*, 140 S. Ct. 1649 (No. 18-1334); Brief of Former Federal and Local Judges as Amici Curiae Supporting the First Circuit’s Ruling on the Appointments Clause at 10, *Aurelius*, 140 S. Ct. 1649 (No. 18-1334).

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

76. *Id.* at 1665 (quoting *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion)).

trial rights.⁷⁷ By heeding *Reid*'s admonition that extending the *Insular Cases* further “would destroy the benefit of a written Constitution and undermine the basis of our Government,”⁷⁸ *Aurelius* suggests that the *Insular Cases* are irrelevant outside the exceedingly narrow subset of litigation that involves those clauses. Second, the Court underscored the significance of its reliance on *Reid* by remarking that since the *Insular Cases* “did not reach th[e] issue” of the Appointments Clause’s applicability to the appointment of U.S. officers in Puerto Rico, the Court would “not extend them in [*Aurelius*].”⁷⁹ And finally, the Court spoke in undeniably questioning terms on the *Insular Cases*’ perdurance, noting that “whatever their continued validity” it would not expand on their framework.⁸⁰ That is hardly the stuff that worthwhile doctrine is made of.⁸¹

Still, the Supreme Court’s unwillingness to set aside the territorial-incorporation doctrine in *Aurelius* was surely a missed opportunity to turn the page on this regrettable period of American jurisprudence. If the *Insular Cases*’ continuing validity is so questionable – and their import, at this point, so limited – the Court would have done well to accept the invitation of multiple parties and amici to overrule them once and for all.

That is significant because, few, if any, doctrines remaining on the books today so squarely spring from such unabashedly racist assumptions.⁸² The *Insular*

77. See *Balzac v. Porto Rico*, 258 U.S. 298, 309–10 (1922) (holding the Sixth Amendment right to jury trial inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (holding the Fifth Amendment grand jury provision inapplicable in the Philippines); *Dorr v. United States*, 195 U.S. 138, 143 (1904) (holding the right to a jury trial inapplicable in the Philippines); *Downes v. Bidwell*, 182 U.S. 244, 347 (1901) (Gray, J., concurring) (holding that the reference to “the United States” in the Uniformity Clause did not include Puerto Rico); *Dooley v. United States*, 183 U.S. 151, 156–57 (1901) (holding that the Export Clause bar on taxation of exports from any state is inapplicable to goods shipped from Puerto Rico).

78. *Reid*, 354 U.S. at 14.

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

80. *Id.* (emphasis added).

81. Cf. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984) (“Whatever the validity of *Coffey v. United States*, 116 U.S. 436 (1886) on its facts, its ambiguous reasoning seems to have been a source of confusion for some time. . . . To the extent that *Coffey v. United States* suggests otherwise, it is hereby disapproved.” (emphasis added)).

82. See sources cited *supra* note 44.

Cases are most often compared to the similarly abhorrent *Plessy v. Ferguson*,⁸³ decided by essentially the same Supreme Court.⁸⁴ But of course *Plessy* has long been overturned while the *Insular Cases* continue to wait for their own *Brown v. Board of Education*.⁸⁵ The better modern comparator for the *Insular Cases* might be not *Plessy*, but *Korematsu v. United States*.⁸⁶ Like the *Insular Cases* and *Plessy*, *Korematsu* sanctioned “an odious, gravely injurious racial classification.”⁸⁷ Like the *Insular Cases*, *Korematsu*’s justification for discriminatory treatment was “rooted in dangerous stereotypes about, *inter alia*, a particular group’s supposed inability to assimilate.”⁸⁸ And, like *Korematsu*, the *Insular Cases* have, at least outside the courts, now been long “overruled in the court of history,”⁸⁹ as Justice Breyer intimated when he agreed they are now a “dark cloud.”⁹⁰

The Supreme Court’s approach to *Korematsu* in *Trump v. Hawaii*, however, differed vastly from its approach to the *Insular Cases* in *Aurelius*. In both cases, the majority observed that the earlier, morally repugnant decision was not squarely presented.⁹¹ But whereas Chief Justice Roberts’s majority opinion in *Trump v. Hawaii* recognized the necessity of formally overruling *Korematsu*’s

83. See, e.g., Igartúa-De La Rosa v. United States, 417 F.3d 145, 162 (1st Cir. 2005) (Torruella, J., dissenting) (“[T]he *Insular Cases* are on par with the Court’s infamous decision in *Plessy v. Ferguson* in licensing the downgrading of the rights of discrete minorities within the political hegemony of the United States.”); José Trías Monge, *Injustice According to Law: The Insular Cases and Other Oddities*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 226, 230 (Christina Duffy Burnett & Burke Marshall eds., 2001) (arguing that the *Insular Cases* “stand for just another version of the separate but equal doctrine, but with a twist: there is not even the mirage of equality”).

84. Excepting Justice Joseph McKenna, all of the Justices who decided *Plessy* also featured in *Downes* and the 1901 *Insular Cases*. See Pedro A. Malavet, “*The Constitution Follows the Flag . . . But Doesn’t Quite Catch Up with It*”: *The Story of Downes v. Bidwell*, in RACE LAW STORIES 111, 144 (Rachel F. Moran & Devon W. Carbado eds., 2008).

85. 347 U.S. 483 (1954).

86. 323 U.S. 214 (1944).

87. *Trump v. Hawaii*, 138 S. Ct. 2392, 2447 (2018) (Sotomayor, J., dissenting) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 275 (1995) (Ginsburg, J., dissenting)).

88. *Id.*

89. *Id.* at 2423.

90. Transcript of Oral Argument, *supra* note 1, at 82; see also *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020) (noting that the *Insular Cases* are now “much-criticized”).

91. *Aurelius*, 140 S. Ct. at 1665; *Trump v. Hawaii*, 138 S. Ct. at 2423 (“*Korematsu* has nothing to do with this case.”).

“morally repugnant order,”⁹² the *Aurelius* majority declined to overrule the *Insular Cases*, even as it recognized the extent of their criticism and questioned their “continued validity.”⁹³

The Court’s failure to overrule this similarly “morally repugnant” series of cases perpetuates “gravely injurious” discriminatory treatment rooted in “dangerous stereotypes.”⁹⁴ Furthermore, allowing the *Insular Cases* to remain “good law” presents real risks that lower courts will continue to misapply them. It is hardly an idle concern. Litigants in docketed cases, including the U.S. government, continue to argue that the *Insular Cases* deprive residents of the territories of all but the Constitution’s “fundamental” protections.⁹⁵ Like *Aurelius*, those cases might well soon find their way to the Court. Thus, *Aurelius* raises the question: if and when another case brings the *Insular Cases* more squarely before the Court, will it finally reconsider the troubling territorial incorporation doctrine or once again take a pass?

III. FUTURE POSSIBILITIES

While the Supreme Court missed an important opportunity in *Aurelius* to reconsider the *Insular Cases* and the legacy of structural inequality they have perpetuated, a string of cases coming from the lower courts give the Court another opportunity. In the very near future the Supreme Court could take cases examining whether people born in U.S. territories have a constitutional right to citizenship under the Fourteenth Amendment; whether Fourth Amendment protections against unreasonable searches apply equally in the U.S. Virgin Islands; and whether the denial of certain federal benefits programs to residents of Puerto Rico violate the Constitution’s guarantee of equal protection. These issues are raised in *Fitisemanu v. United States*, *United States v. Baxter*, and *United States v. Vaello Madero*, respectively.

92. *Trump*, 138 S. Ct. at 2423.

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

94. *Trump*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting).

95. E.g., Reply Brief for Defendants-Appellants at 20, *Fitisemanu v. United States*, No. 20-4017 (10th Cir. filed Feb. 11, 2020), 2020 WL 2765948, at *2-3 (arguing, and relying on the *Insular Cases*, that “birthright citizenship is not a ‘fundamental right’ in the constricted sense in which that term is used for purposes of territorial incorporation”). In this way, the stakes are even higher when it comes to the *Insular Cases* than they were for *Korematsu*, which by the time it was overruled had long been considered a part of the anticanon. See, e.g., Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 400 (2011) (“[I]t appears that at no time since September 11 has any U.S. government lawyer publicly used the *Korematsu* decision as precedent in defending executive detention decisions.”).

A. *Fitisemanu v. United States*

John Fitisemanu was born on U.S. soil in American Samoa – a U.S. territory since 1900.⁹⁶ Yet the federal government refuses to recognize him as a U.S. citizen, labeling him instead as a “national, but not a citizen, of the United States.”⁹⁷ Last December, the U.S. District Court for the District of Utah ruled this denial of citizenship unconstitutional and recognized Mr. Fitisemanu as a full U.S. citizen based on the Citizenship Clause of the Fourteenth Amendment, although it stayed its decision pending appeal.⁹⁸ On appeal to the Tenth Circuit, the United States has relied almost entirely on the *Insular Cases* to argue that American Samoa and other so-called “unincorporated” territories are not “in the United States” for purposes of the Citizenship Clause.⁹⁹

Oral argument before the Tenth Circuit was September 23, 2020; a ruling before Election Day is uncertain. All this will likely leave Mr. Fitisemanu – a tax-paying, law-abiding, and U.S. passport-holding¹⁰⁰ resident of Utah for more than twenty years – unable to vote this year for President, Governor, or even his local school board, despite the district court’s recognition that he has been a U.S. citizen since the day he was born.

The Supreme Court’s language in *Aurelius* limiting the scope of the *Insular Cases* may prove critical as the Tenth Circuit considers whether to follow the narrow approach to the *Insular Cases* taken by the district court, or the expansive approach taken by the U.S. Court of Appeals for the District of Columbia in *Tuaua v. United States* in 2015.¹⁰¹ The district court in *Fitisemanu* held that “because *Downes* did not construe the Citizenship Clause, and because the controlling opinion’s statements in *Downes* related to citizenship are not binding on this court, *Downes* does not control the outcome of this case.”¹⁰² In contrast, the D.C. Circuit held in *Tuaua* that “[a]nalysis of the Citizenship Clause’s application to

96. *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1157, 1170 (D. Utah 2019).

97. 8 U.S.C. § 1408 (2018) (applying this second-class status to persons born in an “an outlying possession of the United States,” which under § 1408(a)(29) is currently limited to American Samoa and Swains Island).

98. *Fitisemanu*, 426 F. Supp. 3d at 1156.

99. The *Insular Cases* are cited on a quarter of the pages in the United States’ opening brief and fully half the pages of its reply brief. See Brief for Defendants-Appellants, *Fitisemanu*, No. 20-4017, 2020 WL; Reply Brief, *supra* note 95.

100. Individuals born in American Samoa are provided a U.S. passport that states in capital letters: “THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN.” See DEP’T OF STATE, FOREIGN AFFAIRS MANUAL, 8 F.A.M. § 301.1-1(b)(1); 7 FAM 1130 Appendix H Certificate of U.S. Non-Citizen National Status (2018).

101. *Tuaua v. United States*, 788 F.3d 300, 300 (D.C. Cir. 2015).

102. *Fitisemanu*, 426 F. Supp. 3d at 1194-95.

American Samoa would be incomplete absent invocation of the sometimes contentious *Insular Cases*,¹⁰³ and applied their framework to conclude people born in American Samoa are not U.S. citizens absent congressional action. It is hard to square the D.C. Circuit's approach with the Supreme Court's conclusion in *Aurelius*, based on *Reid*, that "the *Insular Cases* should not be further extended."¹⁰⁴

The district court in *Fitisemanu* identified other compelling reasons why the Supreme Court's precedent requires a narrow reading of the *Insular Cases*. In particular, the district court justified not relying on dicta from Justice White's controlling opinion in *Downes*¹⁰⁵ because "the Supreme Court has, since *Downes*, thoroughly rejected the bigoted premise upon which Justice White's dicta is founded—that some groups are inferior to others based simply on their race."¹⁰⁶ The court reached a similar conclusion when it rejected Justice Brown's opinion: "Justice Brown's digression related to citizenship is largely premised on notions of white supremacy that the Supreme Court has long ago rejected."¹⁰⁷ This approach clashes with *Tuaua*'s embrace¹⁰⁸ of Justice Brown's racially motivated¹⁰⁹ "distinction between certain natural rights . . . and what may be termed artificial or remedial rights,"¹¹⁰ the latter of which included "the rights to citizenship" and "suffrage," and which, according to Justice Brown, were not automatically protected in newly acquired territories.¹¹¹

Should *Fitisemanu* end up before the Supreme Court after the Tenth Circuit rules, the *Insular Cases* will figure prominently, presenting a more attractive opportunity for their reconsideration. The United States has made the *Insular Cases* a core element of its defense in *Fitisemanu* and the territorial incorporation doctrine was central to the D.C. Circuit's holding *Tuaua*.¹¹² In contrast, in *Aurelius* the United States only relied on the *Insular Cases* before the district court and

103. *Tuaua*, 788 F.3d at 306.

104. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020).

105. *Fitisemanu*, 426 F. Supp. at 1193.

106. *Id.* at 1194.

107. *Id.* at 1193 n.31.

108. *Tuaua*, 788 F.3d at 308 ("Regardless of its independently controlling force, we . . . adopt the conclusion of Justice Brown's dictum in his judgment for the Court in *Downes*.").

109. *See Downes v. Bidwell*, 182 U.S. 244, 282 (1901) ("It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race . . .").

110. *Id.*

111. *Id.* at 283.

112. *See supra* notes 101–108 and accompanying text.

expressly disclaimed them once the case reached the Supreme Court. Still, as the district court's decision in *Fitisemanu* properly demonstrates, there are clear alternative grounds to resolving the case that do not require *any* consideration of the *Insular Cases* at all. So the Court could be tempted to simply dust off its language from *Aurelius* and rule that “[t]hose cases did not reach this issue, and whatever their continued validity we will not extend them [here].”¹¹³

That kind of judicial minimalism may often be appropriate or even prudent. But there is nothing normal about the *Insular Cases*. As First Circuit Judge Juan R. Torruella has pointedly argued, the decisions themselves created an impasse “from which there is no escape or solution by its inhabitants . . . [who] lack the political power to influence the political institutions that can make the necessary changes to th[eir] situation.”¹¹⁴ Territorial incorporation represents *both* judicial sanction of discrimination *and* a perpetuation of disenfranchisement from the political channels by which to challenge that discrimination.¹¹⁵ And just as “[o]ne cannot imagine the 1965 Voting Rights Act and other landmark civil rights legislation . . . in the absence of *Brown v. Board of Education* overturning *Plessy*,” it will surely “take a rejection of the *Insular Cases* . . . [for] fundamental changes to the undemocratic status quo in the territories [to] finally become possible.”¹¹⁶ The solution for the “constitutional antediluvian anachronism” of the *Insular Cases* is clear: “The Supreme Court, as it did with *Plessy*, must step forward to correct the wrong it created by sanctioning the *Insular Cases* and their progeny.”¹¹⁷

Thus, if *Fitisemanu* ends up being taken up by the Supreme Court, the Justices should finally cross the path they have laid in *Aurelius*, *Boumediene*, *Torres*, and *Reid* to rule that the *Insular Cases*, like *Korematsu*, were “gravely wrong the day [they were] decided, ha[ve] been overruled in the court of history, and . . . ‘ha[ve] no place in law under the Constitution.’”¹¹⁸

B. United States v. Baxter

In 2017, during a routine inspection of mail coming into the U.S. Virgin Islands, a drug-sniffing dog alerted federal-customs agents to a package arriving

113. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020).

114. Torruella, *supra* note 43, at 347.

115. *See id.* at 346-47.

116. Weare, *supra* note 18.

117. Torruella, *supra* note 43, at 347.

118. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (quoting *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

from South Carolina.¹¹⁹ In any of the fifty states (and even Puerto Rico), the agents would have been constitutionally required to obtain a warrant before opening the parcel.¹²⁰ But rather than follow this standard procedure, the agents opened the box without a warrant and found unassembled gun parts and ammunition wrapped in clothing that smelled strongly of marijuana. The recipient, Steven Baxter, was arrested and charged under federal law with two counts of illegal transport of a firearm. At trial, he moved to suppress the evidence on grounds that the “warrantless search of the two packages violated his Fourth Amendment rights.”¹²¹

After Mr. Baxter prevailed at the district court, the Third Circuit reversed, holding that no warrant was required to search his packages in the Virgin Islands. The court reached that result by extending the Fourth Amendment’s “border search exception” to transit from the mainland United States to the U.S. Virgin Islands. But the Virgin Islands are *domestic* territory. While the Supreme Court has repeatedly upheld customs searches at international boundaries or their functional equivalent,¹²² there is no more of an international boundary between South Carolina and the Virgin Islands than there is between California and Hawaii. The difference, the Third Circuit emphasized, is that the Virgin Islands is an “unincorporated territory” where Congress has statutorily established an artificial-customs border between it and the rest of the United States.¹²³

The Third Circuit’s decision in *Baxter* flows almost entirely from its ruling in *United States v. Hyde*,¹²⁴ which relied squarely on the *Insular Cases* and the notion that unincorporated territories are not “integral part[s] of the United States,” but “merely appurtenant thereto as [] possession[s].”¹²⁵ The Virgin Islands is an “unincorporated” territory, so the Third Circuit assumed Congress could create an artificial-customs border where “warrantless searches without probable cause” are not unreasonable for Fourth Amendment purposes.¹²⁶ But it could only do so by distinguishing *Torres v. Puerto Rico*, where the Supreme

119. *United States v. Baxter*, 951 F.3d 128, 129-30 (3d Cir. 2020), *petition for cert. filed*, No. 20-5133 (U.S. July 14, 2020).

120. *See, e.g., Torres v. Puerto Rico*, 442 U.S. 465, 470-71 (1979).

121. *Baxter*, 951 F.3d at 129.

122. *E.g., United States v. Montoya de Hernandez*, 473 U.S. 531, 537-41 (1994).

123. *Baxter*, 951 F.3d at 133-34, 133 n.11.

124. 37 F.3d 116 (3d Cir. 1994).

125. *Id.* at 120 (quoting *Downes v. Bidwell*, 182 U.S. 244, 342 (1901) (White, J., concurring)).

126. *Id.* at 122.

Court ruled that a warrantless search at a Puerto Rico airport by local law enforcement agents violated the Fourth Amendment.¹²⁷ *Torres* rejected “any analogy to customs searches at a functional equivalent of the international border,”¹²⁸ explaining that the border-search exception was “based on [the United States’s] inherent sovereign authority to protect its territorial integrity,” which Puerto Rico lacked.¹²⁹ The Third Circuit interpreted this language to imply only that Puerto Rico lacked the power to establish a border where the Fourth Amendment’s border-search exception would apply, not that the United States could not do so.¹³⁰

Hyde’s reasoning to distinguish *Torres* is flawed in multiple respects. First, *Torres* dismissed reliance on the border-search exception not because the law authorizing the search was passed by the Puerto Rican legislature rather than Congress, but because there was no “territorial integrity” to protect between Florida and Puerto Rico.¹³¹ Second, *Torres* directly grappled with the *Insular Cases* to conclude “that the constitutional requirements of the Fourth Amendment apply” to Puerto Rico,¹³² making *Hyde*’s reliance on them to carve out an exception to the Fourth Amendment improper.¹³³ Finally, to the extent *Hyde* relies on a distinction between criminal enforcement laws passed by Puerto Rico versus those passed by the United States, that reasoning is undermined by the Supreme Court’s recent decision in *Puerto Rico v. Sanchez Valle*, which held that “the ultimate source of Puerto Rico’s prosecutorial power is the Federal Government.”¹³⁴ If Puerto Rico’s criminal-law enforcement is just an extension of federal-law en-

127. 442 U.S. 465, 474 (1979).

128. *Id.* at 472.

129. *Id.* at 473.

130. *Hyde*, 37 F.3d at 122-23.

131. *Torres v. Puerto Rico*, 442 U.S. at 470-71 (1979) (“Puerto Rico is not unique because it is an island; like Puerto Rico, neither Alaska nor Hawaii are contiguous to the continental body of the United States.”).

132. *Id.* at 471.

133. Justice Brennan’s concurrence in *Torres* reinforces this understanding, stating that “[w]hatsoever the validity of the [*Insular Cases*] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico” today. 442 U.S. at 475-76 (Brennan, J., concurring). Justice Brennan based this conclusion on Justice Black’s language narrowing the *Insular Cases* in *Reid v. Covert*, *see id.* at 476. This is the same language the Supreme Court affirmatively cites in *Aurelius*, Fin. Oversight & Mgmt. Bd. v. *Aurelius*, 140 S. Ct. 1649, 1655 (2020). Thus, particularly after *Aurelius*, the Third Circuit’s expansive application of the *Insular Cases* to restrict the Fourth Amendment in the Virgin Islands is inappropriate.

134. 136 S. Ct. 1863, 1876 (2016).

forcement for purposes of Double Jeopardy, as *Sanchez Valle* held, then it is unclear why a distinction should be drawn between territorial versus federal-law enforcement for purposes of Fourth Amendment protections.

Both *Torres* and *Aurelius* reject the kind of expansive application of the *Insular Cases* relied upon by the Third Circuit in *Baxter* and *Hyde* to justify a carve-out to Fourth Amendment rights in the Virgin Islands. With a petition for certiorari filed in *Baxter* on July 21, 2020, the Supreme Court has the opportunity to further clarify whether, particularly post-*Aurelius*, the *Insular Cases* can be read as restricting Fourth Amendment rights in U.S. territories today.¹³⁵

C. United States v. Vaello Madero

In 2012, José Luis Vaello-Madero began receiving disability benefits under the Supplemental Social Security (SSI) program after he became afflicted with severe health issues.¹³⁶ The SSI program provides critical financial support of about \$800 a month to low-income people who are older than sixty-five, blind, or disabled.¹³⁷ The next year, Mr. Vaello-Madero moved from New York to Puerto Rico to help care for his wife, who also had significant health concerns. Not realizing his change in address meant he was no longer eligible for SSI—federal law does not extend SSI benefits to residents of Puerto Rico—he had no reason to question anything when his benefits continued. In 2016, the Social Security Administration realized the significance of his change in address and ceased payments. In 2017, the Administration filed a civil suit against Mr. Vaello-Madero to recover the \$28,081 in SSI benefits it had paid him while he was a resident of Puerto Rico. Unable to pay, he argued that SSI discrimination against residents of U.S. territories violated the Constitution's guarantee of Equal Protection. The district court and a unanimous panel of the U.S. Court of Appeals for the First Circuit agreed, concluding that discrimination against residents of

135. Petition for Writ of Certiorari, *Baxter v. United States*, No. 20-5133 (U.S. July 1, 2020), https://www.supremecourt.gov/DocketPDF/20/20-5133/147728/20200714132942179_Pet%20for%20Cert%20final%20071320_Redacted%20FINAL.pdf [<https://perma.cc/V9KL-3GW4>]. See also Brief Of Amicus Curiae Virgin Islands Bar Association In Support Of Petition For Certiorari, *Baxter v. United States*, No. 20-5133 (U.S. July 1, 2020), https://www.supremecourt.gov/DocketPDF/20/20-5133/157322/20201009131406486_VIBA%20Amicus%20Brief.pdf [<https://perma.cc/B75W-XZ84>] (urging review “to prevent further extension of the *Insular Cases*”).

136. *United States v. Vaello-Madero*, 956 F.3d 12, 15 (1st Cir. 2020).

137. *SSI Federal Payment Amounts for 2020*, SOC. SECURITY ADMIN., <https://www.ssa.gov/oact/cola/SSI.html> [<https://perma.cc/4V4V-LV39>].

Puerto Rico with respect to the SSI program did not pass muster under even rational basis review.¹³⁸

The *Insular Cases* figured prominently in the lower court briefing and at oral argument, with Vaello Madero arguing that the *Insular Cases* were evidence of racial animus towards residents of Puerto Rico and so reliance on them should warrant heightened scrutiny of Congress's denial of SSI benefits in Puerto Rico.¹³⁹ The United States disclaimed any reliance or relevance of the *Insular Cases*, conceding "there is no dispute . . . that equal protection principles apply to Puerto Rico," therefore "neither the incorporation doctrine nor the *Insular Cases* are relevant."¹⁴⁰ Ultimately, the *Insular Cases* were not part of either the First Circuit or District Court's analysis.

The United States has sought review of the First Circuit's decision by the Supreme Court.¹⁴¹ Its request for summary reversal¹⁴² is audacious, given both the First Circuit panel's unanimous affirmation of the District Court's decision and the significant stakes involved. Absent summary reversal, review is probable given that the lower courts struck down a federal statute as unconstitutional. At the Supreme Court, the *Insular Cases* are likely to continue to figure prominently in the arguments raised by Vaello Madero and amici. But if *Aurelius* is any indication, the United States' express nonreliance on the *Insular Cases* may make the Court unwilling to reconsider the *Insular Cases* in the context of *Vaello Madero*, leaving other similar equal protection cases working their way through lower courts¹⁴³ to also be resolved without reference to the *Insular Cases*. Whatever the

138. *Vaello-Madero*, 956 F.3d, *aff'g*, United States v. Vaello-Madero, 356 F. Supp. 3d 208 (D.P.R. 2019).

139. *E.g.*, Oral Argument at 34:46, *Vaello-Madero*, 956 F.3d 12 (No. 19-1390), https://www.courtlistener.com/audio/66340/united-states-v-vaello-madero/?type=oa&q=&type=oa&order_by=score%20desc&case_name=vaello-madero%20&court=ca1 [<https://perma.cc/96PS-VAVE>]; Jose Luis Vaello Madero's Motion for Summary Judgment at 18-25, *Vaello-Madero*, 356 F. Supp. 3d (No. 17-02133); *see also* Brief of Amicus Curiae Virgin Islands Bar Ass'n at 6-15, *Vaello-Madero*, 956 F.3d 12 (No. 19-1390); Commonwealth of Puerto Rico's Amicus Brief at 6-23, *Vaello-Madero*, 956 F.3d 12 (No. 19-1390).

140. Reply Brief for Appellant at 11, *Vaello-Madero*, 956 F.3d (No. 19-1390); *see also* Reply Brief in Support of United States of America's Cross-Motion for Summary Judgment at 8 n.2, *Vaello-Madero*, 356 F. Supp. 3d ("[E]ven if the *Insular Cases* were to be overturned by the Supreme Court, that would not affect the outcome here.").

141. Petition for Writ of Certiorari, United States v. Vaello Madero, No. 20-303 (U.S. July 1, 2020), https://www.supremecourt.gov/DocketPDF/20/20-303/153244/20200904184238974_Vaello-Madero%20Pet.pdf [<https://perma.cc/2YSU-H6G7>].

142. *Id.* at 20.

143. *See, e.g.*, *Pena Martinez v. Azar*, 376 F. Supp. 3d 191 (D.P.R. 2019); *Schaller v. Soc. Sec. Admin.*, No. 20-1837 (3d Cir. filed Apr. 27, 2020); *Schaller v. Soc. Sec. Admin.*, No. 1:2018cv00044 (D. Guam motion to dismiss denied June 19, 2020); *Consejo de Salud v. United States*, No. 18-1045 (GAG) (D.P.R. motion for summary judgement granted Mar. 30. 2020).

Supreme Court says or does not say about the *Insular Cases*, its decision in *Vaello Madero* will either reject or confirm the underlying structural inequality that the *Insular Cases* have allowed to perpetuate these many years. And the fact that the United States is left to expressly disclaim any relevance or reliance on the *Insular Cases* in cases like *Vaello Madero* only serves to highlight the mischief they continue to cause in all manner of constitutional cases.

CONCLUSION

After *Aurelius*, at least one thing ought to be clear: neither the *Insular Cases* nor the territorial incorporation doctrine for which they commonly stand “should [] be further extended.”¹⁴⁴ Where those decisions “did not reach [an] issue,” they have nothing to offer lower courts considering the operation of constitutional provisions or safeguards in current U.S. territories. If the *Insular Cases* were irrelevant in *Aurelius* because none of them touched upon the Appointments Clause’s application in Puerto Rico, then the *Insular Cases* should not inform *any* other questions that they did not squarely address.

Although the Supreme Court may have largely cabined the *Insular Cases* in *Aurelius*, that does not mean the Supreme Court should hesitate in a future case to place the *Insular Cases* in the dustbin of history alongside *Plessy* and *Korematsu*, where they belong. As framing documents for the continuing relationship between the United States and territories, the *Insular Cases* hold a power that goes far beyond the scope of their formal legal doctrine. Their rejection would loudly signal that residents of the territories “are constitutionally no different from, and thus not inferior to, their fellow citizens on the mainland.”¹⁴⁵ To paraphrase Justice Black, the *Insular Cases*’ “interment,” when it comes, cannot be “tactfully accomplished, without ceremony, eulogy, or report of their demise.”¹⁴⁶ The Supreme Court played a central role in creating the structural, political, and economic inequalities afflicting residents of America’s territories; it must also assume a leading role in dismantling them.

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144. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020) (citing *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion)).

145. José A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 463 (1986) (reviewing JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985)).

146. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 555 (1949) (Black, J., dissenting).

WHAT FUTURE FOR THE *INSULAR CASES*?

Loeb LLP. The authors served as counsel to amici in Financial Oversight & Management Board for Puerto Rico v. Aurelius Investments, LLC, 140 S. Ct. 1649 (2020), and as counsel to plaintiffs or amici in Fitisemanu v. United States, 426 F.Supp.3d 1155 (D. Utah 2019), appeal docketed, Nos. 20-4017, 20-4019 (10th Cir. Feb. 11, 2020) and Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015). They write in their personal capacity, and the views expressed herein should not be attributed to their employers. They are grateful to Sam Erman and Christina Duffy Ponsa-Kraus for valuable feedback and to Rosa Hayes for excellent research assistance. Lastly, the authors dedicate this essay to the memory of their friend and mentor Judge Juan R. Torruella (1933-2020), a tireless advocate for the civil rights of the residents of U.S. territories and a major inspiration to the authors' work.