The New Insular Cases and the Maintenance of Empire

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TABLE OF CONTENTS

I. INTRODUCTION

Law review articles seldom address U.S. Supreme Court certiorari denials. However, when such a denial upholds racism, imperialism, and the subjugation of millions of U.S. citizens, it warrants not only mention but universal condemnation. This is exactly what occurred in the high court's recent refusal to review *Fitisemanu v. United States*.[1] The Court had to decide whether persons born in United States territories are entitled to birthright citizenship under the Fourteenth Amendment's Citizenship Clause, including whether the century-old *Insular Cases* should be overruled.[2] By refusing to grant certiorari, the Court upheld the status quo, thereby refusing to recognize birthright citizenship to persons born in Puerto Rico, a right that is available to all mainland U.S. citizens. As a result, the Court upheld the validity of the openly racist and imperialist *Insular Cases*.[3]

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[1] Fitisemanu v. United States, 143 S. Ct. 362 (2022).

[2] Petition for Writ of Certiorari, *Fitisemanu*, 143 S. Ct. 362 (No. 21-1394).

[3] For a general introduction to the law of the unincorporated territories, *see generally* ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF THE UNITED STATES TERRITORIAL RELATIONS (1989); EDIBERTO ROMAN, THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES' NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS (2005).

What is perhaps even more surprising is just a year earlier the Court had an opportunity to reject the *Insular Cases* in *U.S. v. Vaello-Madero*.[4] In that case, the petitioners requested the Equal Protection component of the Fifth Amendment's Due Process Clause to apply the Supplemental Security Income benefits to residents of Puerto Rico to the same extent those benefits are available to residents of the United States.[5] The *Vaello-Madero* Court answered in the negative, concluding Congress had been granted broad oversight of United States territories by Article IV of the United States Constitution, and the exclusion of the territories by Congress from programs like Supplemental Security Income did not violate the Due Process Clause of the Fifth Amendment.[6] In doing so, the Court held notions of Equal Protection do not apply equally to the residents of Puerto Rico. At the same time, the Court failed to overrule the *Insular Cases*, implicitly reaffirming the subordinate status of the U.S. citizen residents of Puerto Rico.[7] With these decisions, especially when the Court refused to even hear arguments on the validity of the *Insular Cases*,[8] the Court embraced colonialism, despite its universal condemnation, and in doing so, ushered in the imperialistic era of the *New Insular Cases*.

What is nothing short of tragic is that these two decisions, one written and the other in the form of a certiorari denial, upheld the Court's most racist Supreme Court decisions, comparable only to the *Dred Scott* decision, over a century earlier, which infamously used racist language and characterizations to uphold the denial of citizenship to an African-American former slave.[9] While *Dred Scott* and subsequent cases such as *Korematsu v. U.S.*[10] received uniform condemnation and rejection for their underlying racial bias,[11] the *Insular Cases*—which are at least as biased and arguably more openly bigoted—sadly remain good law and today are actually defended by some pro-expansionist apologists on both the Court and in the ivory towers of American elite law schools that are woefully underrepresented by the Latina and Latino communities.[12] These latest decisions, which represent the continued

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[4] United States v. Vaello Madero, 142 S. Ct. 1539 (2022).

[5] *Id.* at 1541.

[6] *Id.* at 1541, 1544.

[7] *See id.* at 1556 (Gorsuch, J., concurring) ("The case before us only defers a long overdue reckoning.").

[8] The Court elected to hear the case that did not ask it to reconsider the Insular Cases, but it denied the case that did present this specific question. *Compare Vaello Madero*, 142 S. Ct. at 1540 (presenting a question not involving overruling the Insular Cases, which the Court elected to hear) *with* Petition for Writ of Certiorari, *Fitisemanu*, 143 S. Ct. (No. 21-1394) (asking "whether the Insular Cases should be overruled").

[9] *See generally* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[10] Korematsu v. United States, 323 U.S. 215 (1944).

[11] *See* Jeannie Suk Gersen, *The Importance of Teaching Dred Scott*, THE NEW YORKER (June 8, 2021), https://www.newyorker.com/news/our-columnists/the-importance-of-teaching-dred-scott.

[12] Latino Critical Race Scholars like Michael Olivas, Juan Perea, and Richard Delgado long have argued that racism against the Latina and Latino community goes virtually

endorsement of the invisibility and silencing of civil rights abuses against the Latina and Latino community, albeit stemming from overseas colonial possessions, are nothing short of shameful. It was shameful one hundred years ago when the original *Insular Cases* were decided and remain nothing short of atrocious by the Court in the twenty-first century. This is simply indefensible and an open sore on the Court and this country's racial legacy. Before a further critique of the decisions making up this Court's latest support for colonialism and the reaffirmance of subordinate membership, an inquiry into the *Old Insular Cases* is in order.

II. THE SPANISH-AMERICAN WAR AND THE NEW EMPIRE

With the ending of the Spanish-American War came the question of what the newly created empire, the United States, would do with its newly acquired territories and their residents resulting from the U.S. victory over Spain. Prior to this war, Congress governed the territories, which for the most part were lands that were part of what is now considered the continental United States, through organic acts, which either required territorial legislatures to pass laws consistent with the applicable provisions of the Constitution or expressly "extended" the Constitution.[13] To situate the leading political debate of the time, with the United States' eleventh-hour intervention in Cuba's war for independence against Spain, the United States was able to ensure Cuba's victory as well as its own evolution as a world power.[14] With the victory over Spain, the United States acquired the lands of Puerto Rico, Guam, and the Philippines, and effectively maintained control over Cuba, despite it attaining independence.[15] Upon acquiring these lands, debates ensued within the federal government over how to treat the inhabitants of these new acquisitions—the popular term of the day was whether "the Constitution followed the flag."[16]

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unnoticed in legal jurisprudence. *See, e.g.*, Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y. L. REV. 965, 969 (1995), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433825 [https://perma.cc/Q8CV-2U4H].

[13] Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2464 (2022).

[14] *Id.* at 2466.

[15] *See* H.R.J. Res. 24, 55th Cong. (Apr. 20, 1898) (enacted). *See generally* HUGH THOMAS, CUBA, OR THE PURSUIT OF FREEDOM 402 (2d ed. 1998) (recounting the history of the war from the United States' intervention to its end in the U.S. occupation of Cuba).

[16] *E.g.*, JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 44–50 (1997); EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 101–42 (2001); KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 77–79 (2009); BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE 257–58 (2006); CHRISTINA DUFFY BURNETT, *A Note On the Insular Cases*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 389, 389 (Christina Duffy Burnett &

Originally, President McKinley's administration planned to annex the newly acquired territories into the United States.[17] In his message to Congress on December 5, 1899, President McKinley proclaimed that it was "[o]ur plain duty . . . to abolish all custom tariffs between the United States and P[ue]rto Rico and [to] give her products free access to our markets."[18] President McKinley also recommended that civil government be established on the Island.[19] Most politicians believed that all the inhabitants of the territories had become United States citizens upon cession and that annexation was the natural consequence of acquisition.[20] However, "[r]acism towards Filipinos and concerns about foreign competition with local products led politicians, jurists, and scholars to find alternative ways to deal with the territories."[21] As discussed below, similar racist or blissful ignorance is the basis for the continued support for the denial of equal citizenship today.[22]

President McKinley thus miscalculated the impact that his policy would have on American public opinion.[23] According to statements made by political, judicial, and political leaders of the day, the prospect of assimilating the "half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest[ed] Puerto Rico" was enough to tame the wildest of the expansionist spirits.[24] Accordingly, the status of the territories became a prominent issue in the 1900 presidential campaign.[25] President McKinley, who had won the 1896

Burke Marshall eds., 2001); JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 40–84 (1985).

[17] *See* Jose A. Cabranes, U. PENN L. REV. 391, 392 n.3 (1978) (quoting F. FREIDEL, THE SPLENDID LITTLE WAR 3 (1958)). In his letter to President Theodore Roosevelt, John Hay, the U.S. Ambassador to England, stated that the Spanish-American War "has been a splendid war; begun with the highest motives, carried on with magnificent intelligence and spirit, favored by that fortune which loves the brave." *Id.*

[18] 33 CONG. REC. 36 (1899) (message from Pres. William McKinley to Cong., Dec. 5, 1899).

[19] *Id.*

[20] *See* Cabranes, *supra* note 17, at 412–13.

[21] Gabriel A. Terrasa, *United States, Puerto Rico, and the Territorial Incorporation: United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 J. MARSHALL L. REV. 55, 61 (1997).

[22] *See infra* notes **Error! Bookmark not defined.**–**Error! Bookmark not defined.**, **Error! Bookmark not defined.** and accompanying text.

[23] *Id.*

[24] Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 415 (1899) ("Our Constitution was made by a civilized and educated people. It provides guaranties of personal security which seem ill adapted to the conditions of society that prevail in many parts of our new possessions. To give the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila, the benefit of such immunities. . . would . . . be a serious obstacle to the maintenance there of an efficient government.").

[25] *See* JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 33 (1985).

presidential elections on a Republican protectionist platform,[26] shortly thereafter changed his position.[27] Representative Sereno Payne then introduced a bill providing for a tariff on goods imported into the United States from Puerto Rico and vice versa.[28] Debates ensued with respect to how to treat the newly acquired territories.[29] Democrats maintained that the Constitution applied with equal force to the territories and that Congress did not have the power to enact a tariff bill for Puerto Rico.[30] Republican politicians contended that the term "United States," as used in the Constitution, did not encompass the territories and that Congress had plenary power under the Territorial Clause to levy import and export taxes on the Island.[31] Moreover, the Republicans argued that in legislating for the territories, "Congress ha[d] all the powers of the State and of the United States combined," and thus, all the powers enjoyed by a sovereign nation under international law.[32] Republicans argued that because the law of nations recognized the power of a sovereign to acquire and dispose of a territory, Congress had absolute power to govern its new possessions as "dependencies."[33] The Republicans urged Congress to pass the tariff bill and to avoid any action that could impair Congress's flexibility to legislate for the Philippines and, if necessary, Cuba.[34]

Ultimately, the political debate over what to do and how to treat the newly acquired territories was decided by the Supreme Court in the original *Insular Cases*.

III. THE ORIGINAL INSULAR CASES

The territorial political debate was confronted and ultimately addressed by the U.S. Supreme Court in *Downes v. Bidwell*.[35] *Downes* involved a dispute over

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[26] *See generally* Tariff of 1897, ch. 11, 30 Stat. 151 (1897); Cabranes, *supra* note 17, at 395.

[27] *See* Lisa Maria Perez, Note, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1037 (2008).

[28] 33 CONG. REC. 1940 (1900); Cabranes, *supra* note 17, at 417.

[29] *See id.* at 418.

[30] 33 CONG. REC. 1947 (1900) (statement of Rep. Richardson). The Constitution provides that, "Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1. In Representative Richardson's opinion, "unequal taxation of the island as a portion of the United States is the baldest form of imperialism." 33 CONG. REC. 1947 (1900) (statement of Rep. Richardson).

[31] 33 CONG. REC. 2423 (1900).

[32] *See* 33 CONG. REC. 1945 (1900) (statement of Rep. Payne). Representative Payne further argued that the power to dispose of a territory was incidental and inherent to the power to acquire it, a power which, in his view, had been universally recognized as within Congress's purview. *Id.*

[33] 33 CONG. REC. 1953–54 (1900) (statement of Rep. Dalzell).

[34] 33 CONG. REC. 1946 (1900) (statement of Rep. Payne).

[35] Downes v. Bidwell, 182 U.S. 244, 247 (1901).

the imposition of duties by the customs collector of New York on a shipment of oranges from Puerto Rico.[36] The Court was asked whether the phrase "United States" as used in the Uniformity Clause included Puerto Rico.[37] If Puerto Rico was part of the United States, the duties violated the Uniformity Clause of the Constitution.[38] The Court concluded that Puerto Rico was not considered part of the United States under the Uniformity Clause, and thus, there was no constitutional violation.[39]

Justice Brown wrote for the Court, observing Puerto Rico "is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution."[40] Brown's opinion, which was not joined by any other justice but nonetheless is good law to this day, concluded that the term "United States" did not include any of this country's territories.[41] Justice Brown proclaimed, "[t]he Constitution was created by the people of the United States, as a union of States, to be governed solely by representatives of the States."[42]

Justice White's concurring opinion rejected the notion that territories could not be part of the United States.[43] Instead, he developed what was to become the incorporation doctrine that remains the law to this day. White argued for a difference in constitutional status between those territories that had been "incorporated" into the Union that "form a part of the American family," and those "unincorporated" territories belonging to the United States.[44] Under this framework, it is within the discretion of the treaty-making powers of the federal government and Congress to determine the nature of the relationship between a newly acquired territory and the United States.[45]

In the context of the *Downes* case, Article IX of the Treaty of Paris provided that "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."[46] Further, in that context, Congress had not provided for the incorporation of Puerto Rico into the Union.[47] Given these facts, Justice White concluded that Puerto Rico was an unincorporated territory, and therefore, the Constitution did not fully apply to it.[48] Professor Gerald Neuman aptly observed the *Downes* Court created a "geographically restrictive social compact

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[36] *Id.* at 247.
[37] *Id.* at 249.
[38] *Id.*
[39] *Id.* at 287.
[40] *Id.*
[41] *See Downes*, 182 U.S. at 286–87.
[42] *Id.* at 251.
[43] *See id.* at 336–37.
[44] *See id.* at 336, 339.
[45] *See id.* at 300, 336.
[46] Treaty of Peace, U.S.-Spain, art. IX, Dec. 10, 1898, 30 Stat. 1754.
[47] *Downes*, 182 U.S. at 341–42.
[48] *Id.* at 340.

approach" in determining the scope of the Constitution.[49] Neuman found that the *Downes* methodology limited the applicability of constitutional provisions to a territorially defined class of beneficiaries, and excluded many people whom Congress was prepared to regard as equals.[50] Yet, even when Congress subsequently explicitly granted equality via the 1917 Jones Act declaration of U.S. citizenship to these people, the territorial island people would still not be viewed as equal citizens—the Court would use fictions, oxymorons, and paradoxes to declare U.S. citizenship declarations really do not mean U.S. citizenship, even if granted by Congress.[51]

Justice White's framework in *Downes* was reaffirmed just three years later in *Dorr v. United States*.[52] The *Dorr* Court fully endorsed Justice White's framework, noting "the United States may have territory, which is not incorporated into the United States as a body politic."[53] The *Dorr* Court found:

> The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the Constitution of the United States declares that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Accordingly we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans. Congress has given them a legislative, an executive, and a judiciary, with such powers as it has been their will to assign to those departments respectively.[54]

Twenty-one years after *Downes*, the Court in *Balzac v. Porto* [sic] *Rico*, once again used condescending, bigoted, and demeaning language when ruling Puerto Rico and its inhabitants did not form part of the American polity, and that incorporation of such a "*distant ocean communit[y] of a different origin and language* from those of our continental people" would require a clear declaration from Congress.[55] *Balzac*, decided five years after Congress extended U.S. citizenship to Puerto Ricans by statute, culminated the series.[56] This decision concerned a challenge to the denial of a right to a jury trial in a local Puerto Rican court.[57] If the grant of citizenship had incorporated Puerto Rico, the federal jury trial right would apply there.[58] But, the Balzac Court held that

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[49] GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 83 (1996).

[50] *Id.* at 83–84.

[51] *See* Balzac v. United States, 258 U.S. 298, 305–06 (1922).

[52] Dorr v. United States, 195 U.S. 138, 142–43 (1904).

[53] *Id.*

[54] *Id.* at 140–41.

[55] *Balzac*, 258 U.S. at 311(emphasis added).

[56] *See id.*

[57] *Id.* at 300.

[58] *Id.* at 309.

even the collective naturalization of the people of Puerto Rico had not incorporated the territory of Puerto Rico.[59] It thus clarified one aspect of the doctrine of territorial incorporation. Whereas Justice White's concurrence in *Downes* had not explained what the act of incorporation looked like, but had assumed that it would be a consequence of citizenship, *Balzac* made clear that Congress must expressly state its intention. The irony is Congress did express its intention by the 1917 Jones Act grant of U.S. citizenship.

The *Balzac* Court went as far as to put the proverbial boot on the Puerto Rican People's neck when despite being granted U.S. citizenship pursuant to the passage of the 1917 Jones Act,[60] that grant according to the Court was somehow not a grant of citizenship in the constitutional sense. Huh?

The plaintiff in *Balzac* argued the Sixth Amendment's right to trial by jury applied in Puerto Rico because Section 5 of the Jones Act of 1917, which declared all "citizens of Porto [sic] Rico" to be citizens of the United States, had essentially incorporated the island into the Union.[61] But, the *Balzac* Court held the grant of U.S. Citizenship under the Jones Act did not really mean a grant of full constitutional citizenship.[62]

Using yet another legal fiction, the *Balzac* Court held that the incorporation of such "distant ocean communities" as Puerto Rico may not result from a statutory grant of U.S. citizenship absent a clear congressional statement.[63] Despite Congress' explicit grant of U.S. citizenship to the people of Puerto Rico under the Jones Act, the *Balzac* Court astonishingly somehow found no clear statement of intent to incorporate Puerto Rico.[64] Here again, the Court conflates its interests with reality. The petitioner in *Balzac* argued the Jones Act specifically granted the people of Puerto Rico U.S. citizenship along with the rights associated with it by virtue of the explicit grant of such status in the Jones Act itself.[65] The Court nonetheless stressed that Section 5 of the Jones Act had merely given the Puerto Ricans a "boon," consistent with their long-standing "yearning . . . to be American citizens."[66] Yet, despite this so-called boon, the *Balzac* Court made an odd and huge logical leap, endorsing the *Downes* Court's assertion that native-born Puerto Ricans somehow had no constitutional right associated with U.S. citizenship because there was not a statement to provide such a grant. But the Jones Act by its own words did just that: it granted the people of Puerto Rico U.S. citizenship.

Hence, with the absurdity of *Balzac's* illogical analysis, the Court insisted on a clear congressional grant, yet the Jones Act was such a clear congressional

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[59] *Id.* at 312.

[60] Jones-Safroth Act, ch. 145, § 5, 39 Stat. 951, 953 (1917) (current version at 8 U.S.C.A. § 1402 (2000)).

[61] *Balzac*, 258 U.S. at 307.

[62] *Id.* at 308–09.

[63] *Id.* at 311.

[64] *Id.*

[65] *Id.* at 307.

[66] *Id.* at 308.

mandate to grant U.S. citizenship to the people of Puerto Rico. What did the *Balzac* Court need? Perhaps it required a tablet from the top of Mount Sinai? Nevertheless, the Balzac's Court tortured logic carried the day and the people of Puerto Rico remain *sui generis* statutory citizenship under the U.S. constitutional framework, and consequently did not have the same rights as U.S. citizen counterparts on the mainland. In the end, the last of the *Insular Cases*, the *Balzac* Court, solidified the *Downes* Court's assertion that native-born Puerto Ricans had no constitutional right to U.S. citizenship.[67]

IV. THE NEW INSULAR CASES

While the *New Insular Cases* as described here are decisions of this past term, there have been a host of decisions that have sought to overturn the original *Insular Cases*, and in each instance, the Court, often with little or no analysis endorsed century-old decisions based on principles modern society finds repugnant today: racism and imperialism. Yet, until recently, there is typically almost no mention of these decisions in law school curricula—one of many examples of Latina and Latino invisibility in American jurisprudence, education, legal education, and political and community awareness. And perhaps what is more offensive, similar to a century ago, today leading academics and leading scholarly journals such as the Harvard Law Review, much like it did over a century ago, use apologist sentiments to support colonialism, albeit today with coded terminology and euphemisms to defend the indefensible: U.S. colonialism.

A. *The Original Insular Cases Revisited*

For nearly half a century, the *Insular Cases* remained infrequently mentioned. During this period only a handful of cases addressed the question of the territories, and despite the 20th Century being the era where the world condemned colonialism as well as the period that purportedly eradicated imperialism,[68] the high court addressed issues concerning the application of the Constitution to the territorial people and in each instance the Court upheld the colonial relationship.

Despite the *Insular Cases* being decided around the turn of the 20th Century, it was only until the 1957 case of *Reid v. Covert*,[69] and the 1956 case of *Kinsella v. Krueger*,[70] that the question of whether the inhabitants of the territories have constitutional rights arose again. In these cases, the question was

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[67] *See* Lisa Maria Perez, Note, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1041–42 (2008).

[68] *See* Elliot Ross, *The Past is Still Present: Why Colonialism Deserves Better Coverage*, THE CORRESPONDENT (Oct. 9, 2019), https://thecorrespondent.com/32/the-past-is-still-present-why-colonialism-deserves-better-coverage [https://perma.cc/F6BV-RKUB].

[69] Reid v. Covert, 354 U.S. 1, 3 (1957).

[70] Kinsella v. Krueger, 351 U.S. 470, 474 (1956).

whether the rights to a grand jury and a trial by jury applied to capital murder trials of U.S. citizen civilian spouses of American servicemembers living on U.S. military bases in foreign territories—in those cases, Great Britain and Japan respectively.[71] As one might expect, in each of these cases, the Court held they did not.[72] After a rehearing the following year, two dissenting Justices wanted to uphold the 1956 decisions, including their reliance on territorial case law.[73] Justices Harlan and Frankfurter for their part concurred, finding the *Insular Cases* remained valid.[74] Justice Harlan explained that "the Insular Cases stand for . . . a wise and necessary gloss on our Constitution."[75] In elaborating on his view, Justice Harlan endorsed the colonial prerogative of the mother country:

> The proposition is, of course, not that the Constitution "does not apply" overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place. In other words, it seems to me that the basic teaching of . . . the Insular Cases is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.[76]

In 1978, in *Califano v. Torres*, the Court addressed whether Congress's decision not to extend Supplemental Security Income to Puerto Rico violated the constitutional right to interstate travel.[77] Instead of even considering whether the Equal Protection Clause was violated, which would have been a successful claim for any other U.S. citizen or citizens, the Court applied the deferential rational-basis test, and upheld Congress's decision.[78] The Court explained because Congress has exempted residents of Puerto Rico from federal taxes, it could likewise treat residents of Puerto Rico differently from residents of the State in the Supplemental Security Income benefits program.[79] Of course,

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[71] *See Reid*, 342 U.S. 1, 3–5 (1957) (a U.S. military base in Great Britain); *Kinsella*, 351 U.S. at 471–72 (a U.S. military base in Japan).

[72] *See Reid*, 351 U.S. at 5; *Kinsella*, 351 U.S. at 479.

[73] *See Reid*, 354 U.S. at 79 (Clark, J., dissenting) ("Mr. Justice Burton and I remain convinced that the former opinions of the Court are correct and that they set forth valid constitutional doctrine under the long-recognized cases of this Court.").

[74] *Id.* at 50–53 (Frankfurter, J., concurring in result); *id.* at 67 (Harlan, J., concurring in result).

[75] *Id.* at 74.

[76] *Id.* at 74 (Harlan, J., concurring in the result).

[77] Califano v. Torres, 435 U.S. 1, 1–4 (1978).

[78] *Id.* at 5.

[79] *Id.* at 5 n.7.

Congress could not do so without violating the Equal Protection Clause for any other U.S. citizen on the mainland.[80]

In 1980, in *Harris v. Rosario*, the Court followed the *Insular Cases* and held that a lower amount of aid to Puerto Rican families with dependent children than such aid given to families on the mainland did not violate the Equal Protection Clause because in U.S. territories Congress can discriminate against its citizens applying a rational basis review.[81] The two-paragraph opinion of the Supreme Court offered two justifications for summary judgment on the issue: (1) the Territorial Clause of the U.S. Constitution empowered Congress "to make all needful Rules and Regulations respecting the Territory,"[82] and (2) Puerto Rico may be treated differently than the fifty states under federal law if there is a rational basis for the differentiation.[83] Justice Thurgood Marshall wrote a staunch dissent, noting that Puerto Ricans are U.S. citizens and that the *Insular Cases* are questionable.[84]

In 1990, in *U.S. v. Verdugo-Urquidez*, the Court had to decide if the Fourth Amendment's protections against unreasonable searches and seizures, including the warrant requirement, applied to a joint search by U.S. and Mexican agents of a Mexican national's home in Mexico City, following the suspect's apprehension and transfer to the U.S.[85] The *Verdugo* Court held the Fourth Amendment did not apply to searches of noncitizens' homes abroad because the reference to "people" in the Fourth Amendment did not include a person involuntarily brought to and held in the United States.[86] Justice Kennedy wrote separately arguing for the adoption of Justice Harlan's test in *Reid*.[87] Supporting the *Reid* concurrence that the *Insular Cases* remain good law, Kennedy observed: "we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad."[88]

In 2008, in *Boumediene v. Bush*, Justice Kennedy writing for the majority relied on the *Insular Cases* and Harlan's concurrence in *Reid*.[89] The Court observed that Harlan "read the Insular Cases to teach that whether a constitutional provision has extraterritorial effect depends upon the 'particular circumstances, the practical necessities, and the possible alternatives which

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[80] *See, e.g.*, Mem'l Hospital v Maricopa Cnty, 415 U.S. 250, 269 (1974) (holding it is unconstitutional to withhold benefits from similarly situated citizens based on their length of residency); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (recognizing this basic concept of treating similarly situated individuals equally in another context involving individuals with intellectual disabilities).

[81] Harris v. Rosario, 446 U.S. 651, 651–52 (1980).

[82] *Id.* at 651 (quoting U.S. CONST., art. IV, § 3, cl.2).

[83] *Id.*

[84] *Id.* at 653.

[85] U.S. v. Verdugo-Urquidez, 494 U.S. 259, 262–63 (1990).

[86] *Id.* at 265–66, 274–75.

[87] *See id.* at 277 (Kennedy, J., concurring).

[88] *Id.*

[89] Boumediene v. Bush, 553 U.S. 723, 756–59 (2008).

Congress had before it,' and, in particular, whether judicial enforcement of the provision would be 'impracticable and anomalous.'"[90]

It then adopted a three-pronged analysis considering "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[91] The *Boumediene* Court, following previous decisions endorsing the *Insular Cases*, expanded upon Justice Harlan's test in *Reid* by clarifying that it constituted one factor in a multipronged test.[92]

At first blush, the test developed in *Boumediene* suggests a thoughtful analysis expanding upon century-old law. But in truth, all that it did was further obfuscate the true issue of the *Insular Cases*: the maintenance of the inferior status of U.S. citizens and nationals living in U.S. overseas colonies. Ironically, in *Reid*, Harlan considered the citizenship status of civilians living on U.S. military bases abroad and concluded that such individuals did not have the complete cache of rights associated with true U.S. citizenship.[93] Conversely, the *Boumediene* Court considered whether similar constitutional rights were applicable to foreign nationals in a U.S.-controlled land.[94] Whereas U.S. citizens did not have full constitutional protections in *Reid*, foreign nationals accused of waging war against this country in *Boumediene* were in fact granted constitutional protections.[95] The irony of the subordination of U.S. citizens in such circumstances went virtually unnoticed after *Boumediene*.

B. *The Apologists Then and Now*

During the turn of the 20th Century, as mentioned above, the public tenor focused on whether the Constitution followed the flag. The sentiment that it didn't carry the day was championed by politicians and jurists alike. Others such as prominent legal scholars and top law journals were influential in providing rationale for the denial of rights for the new members of the American landscape.

Sadly, a century later well after the global condemnation of colonial and imperial undertakings, scholars in the very same law journal continue to forget about the democratic ethos of equality, or the international law norm of self-determination for that matter, and instead recast old racist tropes that while avoiding references such as "savages" and "alien races," nevertheless support "repurposing" the basic tenets of *Insular Cases* in order to "protect indigenous

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[90] *Id.* at 759.
[91] *Id.* at 766.
[92] *Id.* at 764.
[93] *See Reid*, 354 U.S. at 64.
[94] *See Boumediene*, 553 U.S. at 732.
[95] *Id.* at 797.

cultures," and their unique cultural differences.[96] Others have essentially accepted the *Insular Cases* in order to order to preserve and maintain the distinct culture of the territorial people,[97] Certainly, today the supporters of colonialism are a bit more delicate and sound politically correct, but sadly merely accept the *Insular Cases* as good law without questioning their morally corrupt roots.[98] Thus, these authors essentially support silencing U.S. citizens of color solely because of where they live, despite holding a status where they were supposed to be free and full members of the body politic. While today, a claim of racism isn't as easy because their comments and justifications are not openly racist, these apologists nevertheless defend the subordination of people of color who have been part of our country for well over a century.

Condemnation of such contemporary stances is not only merited but imperative for an offspring of said savages to confront such thinly veiled defenses of racist holdings.[99] This colonial shame must not go largely unchallenged. Fortunately, their unchallenged apologies end here, and perhaps it is equally fortunate that this native son is armed with a scholarly record that easily overwhelms that of the vast majority of the apologists. More importantly, democratic ethos and countless judicial and political proclamations on the importance of membership and equality scream for an overturning of the *Insular Cases*. The Court with all *Insular Cases* has silenced and subordinated millions of U.S. citizens for over a century. These decisions do not comport with democratic principles; and will continue to be a dark spot in our history that devalues brave loyal Americans whose only wrong is being people of color living on our island possessions.

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[96] *See* Sam Erman, *U.S. Territories Commentary Series: Accomplices of Abbott Lawrence Lowell*, 131 HARV. L. REV. 105 (2018) (describing a defender of the *Insular Cases*: "*American Samoa and the Citizenship Clause* argues that federal courts are now following the lead of legal academics who propose to repurpose the *Insular Cases* from colonial facilitators into means to 'protect indigenous cultures' from hostile constitutional provisions.").

[97] Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 374 (2005) ("[A] rule that allows the residents of U.S. territories to enjoy the core constitutional rights of U.S. citizens while at the same time avoiding a mechanical application of constitutional interpretations from the mainland that might damage or destroy their indigenous cultures.").

[98] *Id.*

[99] It is an iconic cultural call of the People of Puerto Rico to be as we say: "Presente," or in other words, to be present to challenge authority, especially colonial authority and stand up to defend what is right and fair. This progeny of so-called savages is in fact presente and provides an open invite to any and all so-called apologist scholars, virtually none of which can compare favorably the volume of my own work, to debate the virtues of the *Insular Cases*, both new and old.

1. *The Apologists Then:*

During the period of the original *Insular Cases*, academics weighed in on this country's new colonial venture. In a series of articles published in the Harvard Law Review developing differing views on the treatment of the newly acquired territories: (1) The Constitution applied to the Territories ex propio vigore and Congress, therefore, lacked the power to permanently hold Territories without annexing them into the Union,[100] (2) the Constitution only applied to States and Congress had plenary power over the Territories, which of course included allowing them to remain part of a colonial undertaking,[101] and (3) the treaty effectuating the transfer of sovereignty over a territory determined whether the Constitution applied to the acquired territory.[102] However, one common sentiment was the fear of accepting the people of these newly acquired lands.

All of the authors shared a common view: Filipinos and Puerto Ricans were not worthy of American citizenship. The first four articles were written prior to the ratification of the Treaty of Paris. Langdell and Thayer believed that because Congress had plenary power to act over the Territories, Filipinos and Puerto Ricans could be permanently held as subjects of the Union.[103] The Randolph piece warned of the consequences of full annexation into the Union:[104]

> After many of the islanders had been relegated to the condition of undesirable, troublesome, and expensive "wards," there would remain probably several millions whose claims to citizenship by allegiance might not be rejected, and whose children would be unquestionably citizens of the United States . . . [that the] Malays [could] be induced to come here in sufficient numbers to lower the rate of wages in any part of the country [or that] they may gain a residence in any State, and cannot be refused the suffrage therein on account of "race, color, or previous condition of servitude."[105]

Using similar racist language and sentiments, the Langdell article observed:

> None of these islands have been acquired with a view to their being admitted as States, and it is to be sincerely hoped that they never will be so admitted, *i.e.*, that they will never be permitted to share in the

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[100] *See* Baldwin, *supra* note 24, at 411; Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 298 (1898).

[101] *See* Charles C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 364, 391 (1899); James B. Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 471 (1899).

[102] *See* Abbott L. Lowell, *The Status of Our New Possessions-A Third View*, 13 HARV. L. REV. 155, 176 (1899).

[103] *See* Langdell, *supra* note 101, at 391; Thayer, *supra* note 101, at 483.

[104] *See* Randolph, *supra* note 100, at 304.

[105] *Id.* at 309–10.

> government of this country, and especially to be represented in the United States Senate.[106]

Judge Baldwin's interpretation was similarly influenced by racial animus. He expressed his concern about granting the right to vote to the people of the Territories:

> [T]he people of Puerto Rico and the natives of Hawaii will certainly be fully subject to our jurisdiction. Their children, born after the ratification of the Spanish treaty, if it should be ratified, will all be citizens of the United States. They must, therefore, by the XV Amendment have the same right of suffrage which may be conceded in those territories to white men of civilized races. One generation of men is soon replaced by another, and in the tropics more rapidly than with us. In fifty years the bulk of the adult population of Puerto Rico, Hawaii, and the Philippines, should these then form a part of the United States, will be claiming the benefit of the XV[] Amendment.[107]

Baldwin Continued:

> Our Constitution was made by a civilized and educated people. It provides guaranties of personal security which seem ill adapted to the conditions of society that prevail in many parts of our new possessions. To give the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila, the benefit of such immunities . . . would. . . , be a serious obstacle to the maintenance there of an efficient government.[108]

Another writer comparing the newly acquired territories to the Northwest Territory, commented: "[w]hat was appropriate in the case of some territories might not be in other cases. A cannibal island and the Northwest Territory would require different treatment; and restraints beneficial in the one case would be harmful in the other."[109]

Thayer concluded by noting:

> Let us beware, at every step, promising to the islands, not excepting Hawaii, any place in the Union. Here, as elsewhere, we shall find England's sensible policy our best guide. We cannot imagine Great Britain's letting in her colonies to share the responsibility of governing the

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106 *See* Langdell, *supra* note 101, at 391.
107 Baldwin, *supra* note 24, at 407.
108 *Id.* at 415.
109 Thayer, *supra* note 101, at 481.

> home country and all the rest of the empire . . . Never should we admit any extra-continental State into the Union; it is an intolerable suggestion.[110]

The Congressional Record for its part is replete with similar racist comments such as those of Senator Bate who observed:

> Let us not take the Philippines in our embrace to keep them simply because we are able to do so. I fear it would prove a serpent in our bosom. Let us beware of those mongrels of the East, with breath of pestilence and touch of leprosy. Do not let them become a part of us with their idolatry, polygamous creeds, and harem habits.[111]

Representative Thomas Spight made similar comments in the House:

> How different the case of the Philippine Islands, 10,000 miles away. . . The inhabitants are of wholly different races of people from ours —Asiatics, Malays, negroes and mixed blood. They have nothing in common with us and centuries can not assimilate them . . . They can never be clothed with the rights of American citizenship nor their territory admitted as a State of the American Union.[112]

2. *The Apologists Today*

Somewhat shockingly, despite a century having passed and despite our so-called enlightened sensibilities, the current scholarly debate concerning the U.S. territories at times echoes the tenor of politicians and scholars of the past, albeit with coded language that nonetheless supports the maintenance of empire.

In what is described as the repurposing project, contemporary scholars once again in the Harvard Law Review undertook what Professor Christina Duffy Ponsa-Kraus termed, "breath[ing] new life into [the reviled *Insular Cases*]."[113] Despite nicely worded euphemisms, the basic tenor of the so-called repurposing project is a means to justify the current subordinate and colonial project created by the *Insular Cases*. A primary defense for the *Insular Cases* and the incorporation doctrine is that it "might offer the best way to protect the distinctive cultures of the unincorporated territories."[114] The current defenders of the *Insular Cases*, unlike their predecessors, do not use overtly racist comments, but instead in a paternalistic fashion argue that the *Insular Cases* are

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[110] Thayer, *supra* note 101, at 484.

[111] 33 CONG. REC. 3616 (1900).

[112] 33 CONG. REC. 2105 (1900).

[113] Duffy, *supra* note 13, at 2455.

[114] *See id.* at 2456 (citing *Developments in the Law: The U.S. Territories*, 130 HARV. L. REV. 1616, 1632 (2017)); *cf.* Rose Cuison-Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127, 142 (2018) (offering a more tentative argument for the repurposing view).

perhaps the best way to protect "the culture" of the territorial island people.[115] Indeed, one defender of this approach argues repurposing is "defensible and perhaps even necessary" in order to protect culture and promote self-government in the U.S. territories.[116] Another defender of the repurposing project argues:

> 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.[117]

While on its face the repurposing project is far less overt in any condemnation of the territorial island people, many of its defenders maintain a thinly veiled, imperial, and condescending tone. For a moment, imagine defenses of the Dred Scott decision to argue against U.S. citizenship for African-Americans, or freed slaves if one prefers to situate the argument with the verbiage of the day, to assert that the subordinate status of slaves allows them to continue to maintain their culture and distinct modes of self-governance within plantations and perhaps even peasant farms post-civil war. Such an argument is almost too absurd to even pen here. Yet, defenders of the subordinate status of U.S. citizens in our colonial possessions are told just that—"your lack of the right to vote, representation in Congress, birthright citizenship (for some), and substantially lower government aid is for your benefit to ensure you maintain your distinct culture.[118] Self-determination be damned, we know what is best for you."

Whether it is a century ago or today, and irrespective of whether it is stated in fancy law journals or by savvy politicians, using obscure references to have the subjugated believe that the status quo is best for them. The world has long

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[115] For other defenders of this repurposing project, see Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 ASIAN-PAC. L. & POL'Y J. 69, 92–97, 107 (2001). *Cf.* Ian Falefuafua Tapu, *Who Really is a Noble?: The Constitutionality of American Samoa's Matai System*, 24 UCLA ASIAN-PAC. AM. L.J. 61, 79–89 (2020) (assessing the constitutionality of a feature of American Samoan culture that has not been the subject of a constitutional challenge, but that may conflict with the Nobility Clause of the U.S. Constitution, U.S. CONST. art. I, § 9, cl. 8, and arguing both that it survives under the Insular Cases and that it survives without them).

[116] Russell Rennie, Note, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683, 1707 (2017).

[117] Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 334 (2005).

[118] *Compare* Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 334—35 (2005), *with* Ediberto Roman, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FL. ST. L. REV. 1, 3 (1998), *and* Ediberto Roman, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1183—86 (1997).

proclaimed that colonialism is wrong, and the *Insular Cases* must be overturned.[119]

C. *The New Insular Cases*

If there was any question concerning the Court's acceptance of the *Insular Cases*, this past term of the Court made clear that the *Insular Cases* are alive and well. Heck, they may be uncontestable. This is the Court's term for the *New Insular Cases*, though one could argue all the territorial cases since *Downes v. Bidwell*, make up the litany of decisions representing the *Insular Cases*, as each of them endorses the subordinate status of the island dependencies and their people. In this term, however, it appears the Court effectively, and sadly, may have ended this debate.

Indeed, normally, when the Supreme Court denies a certiorari petition, such a decision isn't noteworthy. However, in this term, the Court's denial endorsed racism, colonialism, and the subjugation of millions of U.S. citizens living in the island dependencies. Thus, the denial of certiorari on a plea to overturn the *Insular Cases* was not only worthy of mention, it demands vociferous condemnation.

In *Fitisemanu v. United States*, the high court was asked to overturn the *Insular Cases*.[120] John Fitisemanu, who was living in Utah, was born in American Samoa.[121] His US passport noted that he was a non-citizen US national.[122] Fitisemanu argued people born in the unincorporated territory are entitled to "birthright citizenship," which is automatic for those born on U.S. soil.[123] Instead of appreciating the logic of this argument, the Court concluded this argument did not even merit review, essentially foreclosing the need to even listen to an argument on the validity of the *Insular Cases*. In other words, to the Court, it appears the issue is dead, and the imperialist sentiments of the *Insular Cases* are good law.

Thus, despite the shameful racist underpinnings of the *Insular Cases*, and repeated efforts over several cases to overturn them, the Supreme Court for over a century has repeatedly endorsed the original *Insular Cases* by not only upholding them, but effectively endorsing their tortured logic and the tragic tenor of their conclusions. One would think this Court would be more enlightened, or at the very least knowledgeable of what they are upholding—the language and logic of these decisions are utterly shameful and embarrassing not only then, but even more so now. To have this high court repeatedly endorse such holdings is nothing short of unconscionable.

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[119] EDIBERTO ROMAN, THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES' NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS xxv (Carolina Acad. Press 2006).

[120] Petition for Writ of Certiorari, *Fitisemanu*, 143 S. Ct., i (No. 21-1394).

[121] *Id.* at 10.

[122] Fitisemanu v. U.S., 1 F.4th 862, 884 (10th Cir. 2021).

[123] Petition for Writ of Certiorari, *Fitisemanu*, 143 S. Ct., 2 (No. 21-1394).

Not only did this Court refuse to strike down the *Insular Cases* in *Fitisemanu* and the consequent denial of birthright citizenship of the inhabitants of the American island territories, but it did also so twice in the same term. Two weeks prior to the certiorari denial in *Fitisemanu*, the Court in *U.S. v. Vaello Madero*,[124] fully embraced the logic of the *Insular Cases*, rejecting the view that U.S. citizen inhabitants of the U.S. territories should receive equal treatment with respect to the Social Security Income program. Perhaps highlighting the subordinate status of residents of U.S. territories, the petitioner upon moving to Puerto Rico automatically became ineligible to receive the same benefits he received when he lived in New York.[125] In essence, the only justification for making U.S. citizens of the U.S. territories ineligible for government benefits programs is that he now resided in a colonial possession. Such unequal treatment of U.S. citizens reeks of naked violations of the Fourteenth Amendment's Equal Protection Clause. But sadly, because of the *Insular Cases*, the is no equal protection for the U.S. citizen inhabitants of the U.S. colonies.

Perhaps ironically, that conclusion is held not only by this academic, but also by conservative Supreme Court Justice Neil Gorsuch, who in *Vaello-Madero*, wrote a separate decision describing the *Insular Cases* as shameful and called for overturning of them. In his powerful and scathing critique of the *Insular Cases*, Gorsuch was far from restrained in his assessment:

> A century ago in the Insular Cases, this Court held that the federal government could rule Puerto Rico and other Territories largely without regard to the Constitution. It is past time to acknowledge the gravity of this error and admit what we know to be true: *The Insular Cases have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law*.[126]

Justice Gorsuch ends his powerful dissent with a similar force of logic and emotion:

> [T]he time has come to recognize that the Insular Cases rest on a rotten foundation. And I hope the day comes soon when the Court squarely overrules them. We should follow Justice HARLAN and settle this question right. Our fellow Americans in Puerto Rico deserve no less.[127]

Sadly, only Justice Sotomayor, whose family is from the territory of Puerto Rico, shared this view.[128] Sotomayor's dissent observes:

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124 *Vaello Madero*, 142 S. Ct. at 1543.

125 *Id.* at 1540.

126 *Id.* at 1552 (Gorsuch, J., concurring) (emphasis added).

127 *Id.* at 1557.

128 *See id.* (Sotomayor, J., dissenting); Damien Cave, *In Puerto Rico, Supreme Court Pick with Island Roots Becomes a Superstar*, N.Y. TIMES (May 29, 2009), https://www.nytimes.com/2009/05/30/us/politics/30puerto.html.

> [T]here is no rational basis for Congress to treat needy citizens living anywhere in the United States so differently from others. To hold otherwise, as the Court does, is irrational and antithetical to the very nature of the SSI program and the equal protection of citizens guaranteed by the Constitution.[129]

Another question arises: where were the other liberal justices on this obviously shameful denial of rights? And as one might expect, sadly Justice Kavanaugh and the ill-informed rest of the majority used the shame of the *Insular Cases* to continue to deny rights.[130]

V. THE MORE THINGS CHANGE…

The *Insular Cases* are over a century old; they support empire, racism, subordination, silencing, and subjugation. The time to overturn these decisions is well overdue. Yet, with the Supreme Court even refusing to grant certiorari to hear argument on the matter, despite Justice Gorsuch's and Justice Sotomayor's accurate, powerful, and impassioned condemnation of the *Insular Cases*, it appears this Court this term ushered in the era of the *New Insular Cases*.

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[129] *Vaello-Madero*, 142 S. Ct. at 1557.
[130] *Id.* at 1544.