OVERRULING THE INSULAR CASES ON THEIR OWN TERMS

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INTRODUCTION

In 1898, at the end of the Spanish-American War, the United States acquired from Spain several island territories, including Puerto Rico, Cuba, the Philippines, and Guam.[1] Although this was not the first time the United States had signed a treaty and acquired territory outside its borders from a foreign nation, it was the first time that the treaty 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."[2] Prior to the Treaty of Paris, which ended the war, treaties with foreign governments, including Spain, had all provided that citizens of the ceded lands would receive the same civil and political rights that American citizens possessed.[3]

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1 Treaty of Peace, Spain- U.S., arts. I-III, Dec. 10, 1898, 30 Stat. 1754.

2 *Id.* at art. IX.

3 *See, e.g.*, Cession of Louisiana, Fr.-U.S., art. III, April 30, 1803, 8 Stat. 200 (Louisiana Purchase) ("The inhabitants of the ceded territory shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess."); Treaty of Amity, Settlement, and Limits, Spain, art. VI, 8 Stat. 252 (Adams–Onís) (same); Treaty of Peace, Friendship, Limits, and Settlement, Mex.-U.S., art. IX, Feb. 2, 1848, 9 Stat. 922 (Treaty of Guadalupe Hidalgo) ("The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic . . . shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution . . . ."); Treaty Concerning the Cession of Russian Possessions in North America, Russ.-U.S., art. III, Mar. 30, 1867, 15 Stat. 539 ("The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion.").

Immediately, questions arose about the status of these islands within the American system. Scholars quickly divided into three camps, and articles were published in leading law reviews.[4] Some scholars argued that the United States consisted of the states alone, and thus the Constitution had no sway in these far-flung island territories.[5] Others argued that the United States was composed of the states and territories, and thus the Constitution applied *ex propio vigore*, of its own power, to these newly acquired lands.[6] Finally, the third view, proposed by future Harvard President Abbott Lawrence Lowell, argued that the term "United States" was not limited exclusively to the states, but did not automatically include the territories.[7] Instead, what mattered was the language of the treaties ceding the territory and any subsequent legislation enacted by Congress.[8]

The issue quickly reached the Supreme Court, and in a series of decisions spanning from 1901 to 1922, the Court adopted Lowell's view, also known as the "Territorial Incorporation Doctrine." This doctrine held that, while the Constitution generally applied to so-called unincorporated territories, not every provision of the Constitution applied. These latter provisions would only apply following action by Congress to make the territories an integrated part of the United States.[9] These are known as the *Insular Cases*.[10]

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4 *See, e.g.*, Carman Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 291-315 (1898); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 393-416 (1898); Christopher C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 365-92 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 464-85 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions – A Third View*, 13 HARV. L. REV. 155, 155-76 (1899); George P. Costigan, Jr. *The Third View of the Status of Our New Possessions*, 9 YALE L.J. 124, 124-133 (1899).

5 *See, e.g.*, Langdell, *supra* note 4, at 388; Thayer, *supra* note 4, at 478-80.

6 *See, e.g.*, Baldwin, *supra* note 4, at 404-05; Randolph, *supra* note 4, at 296-97.

7 *See* Lowell, *supra* note 4, at 176.

8 For a fuller discussion of these three theories and their various proponents, *see* BARTHOLOMEW H. SPARROW, THE *Insular Cases* and the Emergence of American Empire 40-55 (Peter Charles Hoffer & N.E.H. Hull eds., Univ. Press of Kansas 2006).

9 *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 290-95 (1901) (White, J. concurring); Hawaii v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904); Dowdell v. United States, 221 U.S. 325 (1911); Ocampo v. United States, 234 U.S. 91 (1914); Balzac v. Porto Rico, 258 U.S. 298 (1922) The U.S. Government used the anglicized name "Porto Rico" until 1932. *See* S.J. Res. 36, 72d Cong. (1932) (enacted).

10 An ongoing scholarly debate exists about which cases make up the *Insular Cases*. *See* Christina Duffy Burnett, *A Note on the* Insular Cases, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 389 (Christina Duffy Burnett & Burke Marshall, eds., Duke Univ. Press 2001). Professor Sparrow notes that almost all scholars

The driving force behind the decisions was a racist concern about the inhabitants of these far-flung islands and whether they were "fit" for American citizenship.[11] Called out by scholars on numerous occasions,[12] this racism is not surprising, as Justice Henry Brown, the

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who write in the area have their own list "from as few as three to as many as twenty-three," and for his part, he lists thirty-five such cases, building from a list of twenty-four identified by Professor Efrén Rivera Ramos. *See* Sparrow, *supra* note 8, at 257; Efrén Rivera Ramos, *Deconstructing Colonialism: The "Unincorporated Territory" as a Category of Domination*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 10 at 104, 115-16 n.4 (including *Ochoa v. Henandez*, 230 U.S. 139 (1913), which Ramos seems to have added to an earlier list that Sparrow worked from). I will identify by name which cases I am discussing as they arise.

11 *See, e.g.*, *Downes*, 182 U.S. at 287 ("If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible . . . ."); *Id.* at 306 (White, J., concurring) ("Can it be denied that such right could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States . . . and to inflict grave detriment on the United States to arise . . . from . . . the immediate bestowal of citizenship on those absolutely unfit to receive it?"); *Dorr*, 195 U.S. at 145 (denying application of the Sixth Amendment right to a jury trial in the Philippines because "the civilized portions of the islands had a system of jurisprudence founded upon the civil law, and the uncivilized parts of the archipelago were wholly unfitted to exercise the right of trial by jury."); *Id.* at 148 ("If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to statehood, if this doctrine [that the Constitution applies *ex propoio vigore*] is sound, it must establish the trial by jury.").

12 *See, e.g.*, Adriel I. Cepeda Derieux & Neil C. Weare, *After* Aurelius: *What Future for the* Insular Cases?," 130 YALE L.J. F. 284, 289 (2020) ("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 constraints sprang from the desire to keep the mostly nonwhite people who lived there outside the national polity."); Nathan Muchnick, *The Insular Citizens: America's Lost Electorate v. Stare Decisis*, 38 CARDOZO L. REV. 797, 800 (2016) ("The Insular Cases are widely recognized as having contradicted precedent of their time and as having been motivated by politics and racial biases."); Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 10, at 6 (noting that while Abbot Lawrence Lowell's arguments—which were adopted by the reasoning of the *Insular Cases*—were "subtle and persuasive" they "were driven in large part by somewhat less subtle views of Anglo-Saxon superiority"). *See also* Mark S. Weiner, *Teutonic Constitutionalism: The Role of Ethno-Juridical Discourse in the Spanish-American War*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 10, at 65 ("Among the many reasons the insular possessions were not perceived to be destined for statehood, one played a central role: a sense of Anglo-Saxon racial superiority."); *Id.* at 71 ("[F]or Justice Brown, the solution to the *Downes* case seemed almost simple: the residents of the insular territories, in effect, were not entitled to the guarantees of the Constitution because they were a racially alien people incapable of maintaining Anglo-Saxon notions of law."); Ramos, *supra* note 10, at 113 ("The discourse of the *Insular Cases* was undeniably racist . . . ."); Sanford Levinson, *Installing the Insular Cases into the Canon of Constitutional Law*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 10, at 123 ("[O]ne might well view the *Insular Cases* as central documents in the history of American racism."); *Id.* at 131 ("No one can read *Downes* without realizing the extent to which

author of the lead opinion in *Downes v. Bidwell* and many of the other *Insular Cases*, was also the author of *Plessy v. Ferguson*, which upheld the doctrine of separate but equal.[13] Recently, Justice Neil Gorsuch, in his concurring opinion in *United States v. Vaello-Madero*, recognized this racist history.[14] My article, by contrast, while fully acknowledging and supporting this common critique of the *Insular Cases*, will not seek to add to it.[15] Instead, my goal is to examine the *Insular Cases* through the lens of the Court's traditional criteria for overruling prior precedent to determine if there is any vitality left in these cases. In so doing, this article will build on Justice Gorsuch's observation that leaving the *Insular Cases* on the books is not a solution.[16] Indeed, the Court's refusal to overrule the *Insular Cases* in *Vaello-Madero* warrants a reexamination of whether these centuries-old cases withstand judicial scrutiny.

Based on the various justifications the Court traditionally examines, the *Insular Cases* are ripe for overruling. Whether using the factors identified in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[17] or analyzing the *Insular Cases*' departure from prior and subsequent doctrine, specifically in *Adarand Constructors v. Pena*,[18] it is clear that the *Insular Cases* do not hold up. Quite simply, they were wrong when they were decided, they have been narrowly construed since they were issued, and the time has come to consign them to the dustbin of history. Using the language of Chief Justice John Roberts when speaking of *Korematsu v. United States*, the *Insular Cases* were "gravely wrong the day [they were] decided, [have] been overruled in the Court of history, and . . . '[have] no place in law under the Constitution.'"[19]

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the 'un-Americanness' of the people in the new American territories is fundamental to the outcome."); Gerald Neuman, *Constitutionalism and Individual Rights in the Territories*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 10, at 189 (noting "the frank racism and enthusiastic colonialism that formed part of the explicit justification for the *Insular Cases*").

13 *See* 163 U.S. 537, 550-51 (1896); *Id.* at 552-53 (Harlan, J., dissenting).

14 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring).

15 For a further discussion on the racist nature of the *Insular Cases*, *see* Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 CASE W. L. REV. 147, 168-70 (Fall 2006).

16 *Vaello-Madero*, 142 S. Ct. at 1555 (Gorsuch, J., concurring).

17 505 U.S. 833, 864-68 (1992).

18 515 U.S. 200, 234-35 (1995).

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

This article proceeds in three parts. First, it identifies the particular *Insular Cases* that are ripe for overruling. It offers a brief description of the holdings of those cases, with a focus on the factual underpinnings that underlay the racist rhetoric used by the Justices. Next, this article discusses the factors the Court has used in determining when a precedent is no longer protected by *stare decisis*. This article then applies those factors to the *Insular Cases* to determine which holdings are no longer good law. Finally, this article determines that in every case, apart from the application of the requirement for indictment by a grand jury, the *Insular Cases* have no remaining vitality and should be overruled.

BACKGROUND

I. THE *INSULAR CASES* AND WHAT THEY HELD

There is no set definition of what scholars and courts mean when they discuss the *Insular Cases*. The term comes from nine cases decided in 1901 that dealt with our island territories and specifically whether U.S. tariff laws would apply there.[20] As Professor Efrén Rivera Ramos notes, the designation was expanded to include cases handed down from 1903 to 1914 and one handed down in 1922, dealing with similar or related issues.[21] Professor Bartholomew Sparrow has the most comprehensive list, identifying thirty-five cases that could fall under the *Insular Cases* label.[22] These cases cover several

20 Professor Rivera Ramos identifies these nine cases as De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Crossman v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901) (*Dooley I*); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. New York & Porto Rico S.S. Co., 182 U.S. 392 (1901); Dooley v. United States, 183 U.S. 151 (1901) (*Dooley II*); and Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901). *See* Ramos, *supra* note 10, at 115-16 n. 4.

21 These later cases include the following: Hawaii v. Mankichi, 190 U.S. 197 (1903); Gonzales v. Williams, 192 U.S. 1 (1904); Kepner v. United States, 195 U.S. 100 (1904); Dorr v. United States, 195 U.S. 138 (1904); Mendezona v. United States, 195 U.S. 158 (1904); Rassmussen v. United States, 197 U.S. 516 (1905); Trono v. United States, 199 U.S. 521 (1905); Grafton v. United States, 206 U.S. 333 (1907); Kent v. Porto Rico, 207 U.S. 113 (1907); New York ex rel. Kopel v. Bingham, 211 U.S. 468 (1909); Dowdell v. United States, 221 U.S. 325 (1911); Ochoa v. Hernandez, 230 U.S. 139 (1913); Ocampo v. United States, 234 U.S. 91 (1914); Balzac v. Porto Rico, 258 U.S. 298 (1922). Ramos, *supra* note 10, at 115-16 n. 4.

22 To Professor Rivera Ramos's list, above, Sparrow adds Neely v. Henkel, 180 U.S. 109 (1901); Binns v. United States, 194 U.S. 486 (1904); Lincoln v. United States, 197 U.S. 419 (1905) (*Lincoln I*); Warner, Barnes v. United States, 197 U.S. 419 (1905) (consolidated and reheard cases, 202 U.S. 484 (1906)); Lincoln v. United States, 202 U.S. 484 (1906) (*Lincoln II*); United

territories, including Cuba,[23] Puerto Rico,[24] the Philippines,[25] Hawaii,[26] and Alaska.[27]

Although the *Insular Cases* are usually described as standing for the proposition that the Constitution does not apply to U.S. territories, that is an overgeneralization. In *Downes v. Bidwell*, Justice Brown's majority opinion—which no other justice joined—held that Congress had the power to govern the territories as it saw fit, save for the application of provisions that limited Congress's powers to act at all.[28] *Downes* also saw the advent of the Territorial Incorporation Doctrine in Justice White's concurrence, joined by Justices Shiras and McKenna.[29] Additional cases expanded on this doctrine,[30] but several

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States v. Heinszen, 206 U.S. 370 (1907); Ponce v. Roman Catholic Church, 210 U.S. 296 (1908); Weems v. United States, 217 U.S. 349 (1910); Gavieres v. United States, 220 U.S. 338 (1911); Porto Rico v. Rosaly, 227 U.S. 270 (1913); Porto Rico v. Muratti, 245 U.S. 639 (1918); and Porto Rico v. Tapia, 245 U.S. 639 (1918). Finally, although he does not mention it as an addition to Professor Rivera Ramos's list, Professor Sparrow also includes Bd. of Pub. Util. Comm'rs v. Ynchausti & Co., 251 U.S. 401 (1920). *See* BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE 257 (2006) (collecting cases).

23 *Neely*, 180 U.S. at 112-13.

24 *De Lima*, 182 U.S. at 180-81; *Goetze*, 182 U.S. at 221; *Dooley I*, 182 U.S. at 233-34; *Armstrong*, 182 U.S. at 244; *Downes*, 182 U.S. at 247-48; *Huus*, 182 U.S. at 395; *Dooley II*, 183 U.S. at 154-55; *Gonzales*, 192 U.S. at 7; *Kent*, 207 U.S. at 113-14; *Ponce*, 210 U.S. at 303; *Bingham*, 211 U.S. at 471-74; *Ochoa*, 230 U.S. at 143; *Rosaly*, 227 U.S. at 273; *Muratti*, 245 U.S. at 639; *Tapia*, 245 U.S. at 639; *Balzac*, 258 U.S. at 300.

25 *Fourteen Diamond Rings*, 183 U.S. at 177-78; *Kepner*, 195 U.S. at 110-11; *Dorr*, 195 U.S. at 139-40; *Mendezona*, 195 U.S. at 158; *Lincoln I*, 197 U.S. at 427-28; *Trono*, 199 U.S. at 528; *Lincoln II*, 202 U.S. at 495-96; *Grafton*, 206 U.S. at 340; *Heinszen*, 206 U.S. at 377-82; *Weems*, 217 U.S. at 357; *Gavieres*, 220 U.S. at 340; *Dowdell*, 221 U.S. at 362-27; *Ocampo*, 234 U.S. at 92-93; *Ynchausti & Co.*, 251 U.S. at 402.

26 Hawaii v. Mankichi, 190 U.S. 197, 209 (1903); Crossman v. United States, 182 U.S. 221, 221-22 (1901).

27 Rassmussen v. United States, 197 U.S. 516, 519 (1905); *Binns*, 194 U.S. at 490 (1904).

28 Downes v. Bidwell, 182 U.S. 244, 277 (1901) (holding that the term "United States" means "the *States* whose people *united* to form the Constitution, and as such have since been admitted to the Union upon an equality with them"). As a result, the Uniform Duties Clause did not apply to Puerto Rico and Congress could, under the Foraker Act, provide duties on goods shipped to and from the mainland United States to and from Puerto Rico. *See id.* at 287. *But see id.* at 276-77 ("To sustain the judgment in the case under consideration it by no means becomes necessary to show that none of the articles of the Constitution apply to the Island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place and such as are operative only 'throughout the United States' or among the several states.").

29 *Id.* at 292 (White, J. concurring) ("In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable."). Justice White would look to the status of the territory to determine the answer. *Id.* at 294 (White, J. concurring) ("[T]he *status* of the particular territory has to be taken in view

of the *Insular Cases* also recognized the application of the Constitution to the territories.[31] Others were statutory cases, answering questions such as whether U.S. tariff laws applied to the territories following their annexation or cession and how these new island residents should be treated under immigration law.[32]

In discussing the need to overturn the *Insular Cases*, therefore, I do not mean to suggest that all of these cases should be overturned. Instead, my conception of the *Insular Cases* which are ripe for overruling are those, beginning with *Downes* and ending with *Balzac*, which rely on the territorial incorporation doctrine. Each case is examined below.

A. Downes v. Bidwell: *The Constitutional Status of U.S. Territories*

Although the Supreme Court handed down seven cases dealing with the status of Puerto Rico and Hawaii on May 27, 1901, *Downes v. Bidwell* has been widely recognized as the most significant of the original *Insular Cases*.[33] *Downes* dealt with the question of whether Congress had the power when it passed the Foraker Act, setting up a civilian government for Puerto Rico, to impose duties on goods com-

when the applicability of any provisions of the Constitution is questioned . . . ." (emphasis in original)).

30 *See, e.g.*, *Mankichi*, 190 U.S. at 217-18 (1903); Dorr v. United States, 195 U.S. 138, 149 (1904); *Dowdell*, 221 U.S. at 329-30 (1911); *Ocampo*, 234 U.S. at 101-03 (1914); Balzac v. Porto Rico, 258 U.S. 298, 309, 313 (1922).

31 *See, e.g.*, Kepner v. United States, 195 U.S. 100, 121-22, 124 (1904) (double jeopardy clause of Philippine Bill of Rights mirrors federal protections); Kopel v. Bingham, 211 U.S. 468, 473-74 (1909) (upholding right of Governor of Puerto Rico to seek extradition of a felon who had fled to New York); Weems v. United States, 217 U.S. 349, 367 (1910) (protection against cruel and unusual punishment applies in the Philippines); Porto Rico v. Rosaly, 227 U.S. 270, 273 (1913) (Puerto Rico has sovereign immunity). While the Philippine Bill of Rights in *Kepner* was statutory, the Court relied on its Eighth Amendment jurisprudence to determine the content of that statutory right and did not differentiate between the two on that basis.

32 *See, e.g.*, De Lima v. Bidwell, 182 U.S. 1, 200 (1901) (holding that Puerto Rico was part of the United States for tariff purposes); Fourteen Diamond Rings v. United States, 183 U.S. 176, 177 (1901) (same for the Philippines); Crossman v. United States, 182 U.S. 221, 221-22 (1901) (same for Hawaii); Dooley v. United States, 182 U.S. 222, 235 (1901) (upholding the collection of duties on goods shipped from Puerto Rico during the period of military occupation prior to the ratification of the Treaty with Paris); Gonzales v. United States, 192 U.S. 1, 13 (1904) (citizens of Puerto Rico were not aliens within the meaning of the Immigration and Nationality Act in effect at the time).

33 *See, e.g.*, Derieux & Weare, *supra* note 12, at 287, n. 20; Jose D. Roman, *Trying to Fit an Oval Shaped Island into a Square Constitution: Arguments for Puerto Rican Statehood*, 29 FORDHAM URB. L.J. 1681, 1686 (2002); Muchnick, *supra* note 12, at 804.

ing from Puerto Rico into the mainland United States.[34] In *De Lima v. Bidwell*, decided the same day, the Court held that Puerto Rico was part of the United States for purposes of the Dingley Act, which imposed tariffs on goods entering the United States from foreign countries and thus goods imported to Puerto Rico from abroad were subject to those duties.[35] The question in *Downes* was whether duties could be imposed on goods imported from Puerto Rico to the mainland, or whether the duties imposed by the Foraker Act violated the Uniform Duties Clause of the Constitution, which provides that "all duties, imposts and excises shall be uniform throughout the United States."[36]

Justice Brown, in his lead opinion, held that it could not be inferred that the territories were part of the United States as that term is used in the Constitution.[37] Instead, according to Brown, the Constitution was "created by the people of the *United States*, as a union of *States*, to be governed solely by representatives of the *States* . . . . In short, the Constitution deals with the *States*, their people, and their representatives."[38] Looking at history, Brown stated that:

> [T]he practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct.[39]

In reaching this conclusion, Justice Brown relied on several practical concerns that would arise in immediately subjecting Puerto Rico to the Uniform Duties Clause. Among these concerns were the following:

- It would bring them at once within the internal revenue laws of the United States, including stamps, licenses, excises, and the accoutrements of that system when the people of the island had no experience with them.

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34 Downes v. Bidwell, 182 U.S. 244, 248-49 (1901).

35 *De Lima*. 182 U.S. at 180, 200.

36 U.S. CONST. art. I, § 8, cl. 1. Justice Brown's majority opinion also noted that such duties would violate Art. I, § 9, cl. 6, which states that vessels bound from one state to another cannot "be obliged to enter, clear, or pay Duties in another." *Downes*, 182 U.S. at 249.

37 *Downes*, 182 U.S. at 250-51.

38 *Id.* at 251 (emphases added).

39 *Id.* at 278-79.

- No system of property taxation was or ever had been in place on the island.
- It would take a minimum of two years to set up such a system.
- Revenues had always been raised by duties on imports and exports.
- Applying our internal revenue laws would be ruinous and oppressive.
- Applying such high taxes would lead to violations so numerous as to be impossible to prosecute.
- Enforcing US tariffs would alienate and destroy the goodwill of Puerto Ricans for the United States.[40]

Along with the above-mentioned concerns, Justice Brown noted the differing nature of the island's inhabitants:

> [I]n religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may *for a time* be impossible; and the question at once arises whether large concessions ought not to be made *for a time*, that, ultimately, our own theories may be carried out, and the blessings of government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.[41]

Thus, even when denying the application of every provision of the Constitution to our newly acquired territory, Justice Brown did not envision this status as unending.[42] Indeed, he explicitly recognized that the "blessings of government under the Constitution" would eventually extend to Puerto Rico.[43]

Justice White, in suggesting the Territorial Incorporation Doctrine in his concurrence, also believed that large portions of the Constitution would apply in the territories.[44] What separates White's

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40 *See* Downes v. Bidwell, 182 U.S. 244, 284 (1901).

41 *Id.* at 287 (emphasis added).

42 *See id.*

43 *Id.*

44 *Id.* at 291 (White, J., concurring) ("As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limits its power on this subject. It follows also that every provision of the Constitution which is applicable to the territories is also controlling therein.").

opinion from Brown's is the focus on the status of the territory. Determining whether a particular constitutional provision is applicable "involves an inquiry into the situation of the territory and its relations to the United States."[45] What situation justifies applying a constitutional provision? White answers that resolving this dispute requires asking, "had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?"[46]

Unfortunately, Justice White does not provide any guidance as to what it means to be incorporated into the United States. All that he explains in this regard is that the cession of Puerto Rico to the United States "was accompanied by such conditions as prevented that island from becoming an integral part of the United States, at least temporarily, and until Congress had so determined."[47] Apparently, White believed that organizing Puerto Rico via the Foraker Act did not serve as a sufficient determination by Congress. He pointed to two practical concerns—applying the internal revenue laws would visit financial ruin on the territory by displacing its fiscal system, and citizens of Puerto Rico, though owing their allegiance to the United States, were not citizens.[48] In fact, White pointed out that a provision, which would have conferred citizenship on the inhabitants of Puerto Rico who chose not to retain Spanish citizenship, was stricken from the Foraker Act in the Senate.[49] Thus, the lack of citizenship was a key concern for Justice White and played a substantial role in his analysis.

B. Hawaii v. Mankichi: *The Constitution and Incomplete Incorporation*

The next *Insular Case* to question the application of the Constitution to the territories addressed whether the Sixth Amendment right to a unanimous jury and the Fifth Amendment right to presentment before a grand jury applied in Hawaii in the time between 1898, when Congress passed the Newlands Resolution accepting Hawaii's cession

45 *Id.* at 293 (White, J., concurring).

46 *Downes*, 182 U.S. at 299 (White, J., concurring).

47 *Id.*

48 Here, Justice White uses undeniably racist language, insisting that to automatically incorporate the island would result in the "immediate bestowal of citizenship on those absolutely unfit to receive it . . . ." Downes v. Bidwell, 182 U.S. 244, 306 (1901).

49 *Id.* at 340-41 (White, J., concurring).

to the United States, and 1900, when Congress passed an organic act for the territory of Hawaii.[50] The question arose because the Newlands Resolution, by which Hawaii became "a part of the territory of the United States, and subject to the sovereign dominion thereof," declared the following:

> The municipal legislation of the Hawaiian islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution *nor contrary to the Constitution of the United States* nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.[51]

The Court concluded that, although Hawaii had enjoyed "a system of jurisprudence modeled largely upon the common law of England and the United States"[52] since 1847, the provisions of the Fifth and Sixth Amendments requiring indictment by a grand jury and a unanimous verdict from a petite jury did not apply of their own force. Once again, Justices Brown and White split in their reasoning for coming to this conclusion. Justice Brown laid out his reasons for finding that the Newlands Resolution was not meant to disturb these provisions of Hawaiian law:

- It was apparent from the terms of the Newlands Resolution that the resolution was only intended to be temporary.
- The Hawaiian Organic Act[53] specifically provided for indictment by a grand jury and unanimous jury verdicts, indicating Congress did not believe they had been required by the Newlands Resolution.
- The provisions of the Constitution must have been unfamiliar to a large number of inhabitants and no prior preparations had been made.
- Applying the Sixth Amendment would have required the release of every felon convicted between August 12, 1898, and June 14, 1900.

50 Hawaii v. Mankichi, 190 U.S. 197, 211-12 (1903).

51 *Id.* at 209 (quoting Newlands Resolution, 30 Stat. 750 (1898)).

52 *Id.* at 211.

53 Hawaiian Organic Act, Pub. L. No. 56–339, § 83, 31 Stat. 141 (1900).

- Applying the unanimous jury requirement would nullify every civil verdict given by a less-than-unanimous jury during the same period.
- The rights alleged to be violated are not fundamental, but merely concern a method of procedure that has been in place for 60 years, and adequately protects the rights of Hawaiian citizens.[54]

This last reason has been read by some lower courts and scholars to argue that the *Insular Cases* stand for the proposition that only fundamental rights apply to territories.

Justice White, joined by Justice McKenna, concurred in the majority but added a reason he deemed more elementary: the Newlands Resolution failed to incorporate Hawaii into the United States.[55] Again, Justice White neglected to explain what incorporation means or how it is achieved. But he provided some hints when discussing the difference between the Newlands Resolution and the Organic Act. Specifically, he noted that under the prior resolution, the government of the islands was left to a commission appointed by the president, while the Organic Act, which set up an organized government, "undoubtedly made [Hawaii] a part of the United States in the fullest sense and given a territorial form of government."[56] Thus, for Justice White, the forming of an organized territory appeared to be the key to incorporation.[57]

C. Dorr v. United States: *The Court Embraces the Territorial Incorporation Doctrine*

Dorr v. United States addressed the question of whether the right to a trial by jury applied in the Philippines.[58] It also marked the first time the territorial incorporation doctrine was adopted by a majority

[54] *Mankichi*, 190 U.S. at 217-18. Some lower courts and scholars have read this last reason to argue that the *Insular Cases* stand for the proposition that only fundamental rights apply to territories. *But see, e.g.*, Derieux & Weare, *supra* note 12, at 288 (contesting this reading of the *Insular Cases*).

[55] Hawaii v. Mankichi, 190 U.S. 197, 218-19 (1909) (White, J., concurring).

[56] *Id.* at 220 (White, J., concurring).

[57] The Hawaii Organic Act also explicitly extended the Constitution to Hawaii. *See* Pub. L. No. 56–339, § 5, 31 Stat. 141 (1900). This explains why Justice White viewed the Act as incorporating Hawaii into the Union, while finding that Puerto Rico remained unincorporated despite Congress also providing an organic act for it. *See* Foraker Act, Pub. L. No. 56–191, 31 Stat. 77 (1900).

[58] 195 U.S. 138, 139 (1904).

of the Court.[59] *Dorr* is also important because it is the first time in the *Insular Cases* that the Court directly addressed Section 1891 of the Revised Statutes of 1878.[60] Under this statute, Congress directed that the Constitution would apply to all organized territories and all those recognized after 1878.[61] However, in providing for a government for the Philippines, Congress explicitly excluded the application of § 1891 of the Revised Statutes of 1878.[62] Furthermore, Congress had expressly declaimed any intention of incorporating the Philippines into the United States.[63]

In holding that the Constitution did not apply of its own force, Justice Day, writing for the Court, provided the following reasons:

- In instructing the Philippine Commission to draft a Bill of Rights for the Philippines, the President specifically ordered them not to include the right to a jury trial.
- That this instruction was "doubtless due to the fact that the civilized portions of the islands had a system of jurisprudence founded upon the civil law, and the uncivilized parts of the archipelago were wholly unfitted to exercise the right of trial by jury."
- The then existing laws provided an adequate and efficient method of protecting the rights of the accused.[64]

Justice Day concluded by arguing that because the jury system was unknown and that to enforce it would disregard the will of the people (which he wrongly described as savages), reading the Constitution as requiring the imposition of this unknown and unwanted system would be a mistake.[65] Although the decision was eight to one, three justices—Peckham, Brewer, and Chief Justice Fuller—concurred on the grounds that *Hawaii v. Mankichi* controlled the outcome, and specifically rejected reliance on *Downes* and the territorial incorporation doctrine because it had not received a majority.[66]

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59 *Id.* at 142-43.

60 *See id.* at 143.

61 XXIII Rev. Stat. § 1891 (1878).

62 Philippine Bill of 1902, Pub. L. No. 235, §1, 32 Stat. 691, 692 ("The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands.").

63 32 CONG. REC. 1846-47 (Feb. 14, 1899).

64 Dorr v. United States, 195 U.S. 138, 145-46 (1904).

65 *Id.* at 148-49.

66 *Id.* at 153-54 (Peckham, J., concurring).

D. Dowdell v. United States: *Constitutional Rights Inapplicable in States are Inapplicable in Territories*

In *Dowdell v. United States*, the Supreme Court was faced with the claim that Dowdell's constitutional rights had been violated in two respects.[67] First, that he was denied the right to confront his accusers when the Supreme Court of the Philippines confirmed that he and his co-defendants had been arraigned by taking testimony from the judge and clerk outside their presence.[68] Second, that he had not been indicted by a grand jury.[69] The Court did not deny that the Sixth Amendment right to confront one's accuser applied in the Philippines but held that because the witnesses were not testifying as to the underlying crime with which Dowdell had been accused, he was not denied his right to confront witnesses against him.[70]

As for the claim that the Fifth Amendment requires that all infamous crimes be subject to indictment by a grand jury, the Court quickly disposed of this claim.[71] Relying on *Hurtado v. California*,[72] the Court noted that the due process of law does not require an indictment by a grand jury.[73] Thus, while the Court held that this right did not apply in the territories, in this case, that was equally true of states and thus territories were treated no differently.[74]

E. Balzac v. Porto Rico: *The Need for Express Territorial Incorporation*

Finally, in 1922, the Court closed out its decisions about the reach of the Constitution in our insular areas in *Balzac v. Porto Rico*, once again addressing the application of the Sixth Amendment's right to a jury trial in Puerto Rico.[75] Although the question raised appeared to be settled by *Hawaii v. Mankichi* and *Dorr v. United States*, the peti-

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67 221 U.S. 325, 928-29 (1911).

68 *Id.* at 331-32.

69 *Id.* at 332.

70 *Id.* at 329-31.

71 *Id.* at 332.

72 110 U.S. 516, 538 (1884).

73 Dowdell v. United States, 221 U.S. 325, 332 (1911).

74 *Id.* at 332. The Court would reiterate this finding in Ocampo v. United States, 234 U.S. 91, 98 (1914). This was also true regarding criminal jury trials until Duncan v. Louisiana, 391 U.S. 145, 151-52 (1968). To this day, the Supreme Court has never reversed *Hurtado* and incorporated the grand jury requirement against the states.

75 258 U.S. 298, 304 (1922).

tioners in *Balzac* argued that because Congress had passed a second Organic Act for Puerto Rico (the Jones Act) in 1917, which granted Puerto Ricans U.S. citizenship, the island had been incorporated into the United States so that the Sixth Amendment applied of its own force.[76]

Chief Justice Taft, writing for the unanimous Court, held that it did not. According to the Court, any incorporation of an insular area must be accompanied by an express declaration and could not be merely inferred.[77] Furthermore, the Jones Act itself provided for a Bill of Rights for Puerto Rico which did not include protections for the right to indictment by a grand jury nor the right to a jury trial in civil or criminal cases.[78] Like the Court in *Dorr*, the *Balzac* Court listed some practical issues with enforcing the Sixth Amendment in Puerto Rico:

- To work, the jury system needs citizens trained to the responsibility of being jurors.
- Given their existing systems and history, Congress had left it to the islands to determine if and when they wished to adopt Anglo-Saxon judicial institutions.
- The District Court of Puerto Rico was not a true Article III court.[79]

As a result of prior precedent and these practical concerns, the Court determined that Puerto Rico had not been incorporated into the United States and therefore the Sixth Amendment's requirement for trial by jury was not applicable.[80]

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76 *Id.* at 305.

77 *Id.* at 306.

78 *Id.*

79 *Id.* at 310, 312. While *Balzac* did not involve a prosecution in the federal district court, his counsel argued that several factors weighed in favor of finding that Congress had incorporated Puerto Rico in 1917. *Id.* One of those factors was that Congress created an Art. III district court in Puerto Rico, something previously reserved to incorporated territories. *Id.* at 311. The Court rejected this argument, holding that the District Court for Puerto Rico established in 1917 was an Article I court. *Id.* at 312.

80 *Id.* at 305, 313. *Balzac* was a libel case and a second assignment of error was raised that Balzac's speech was protected by the First Amendment. *Id.* at 300. The Court rejected this claim on the merits, holding that the newspaper articles at issue went beyond the bounds of protected speech. *Id.* at 314. It was also true that in 1922, the Sixth Amendment did not apply to states. But unlike territories, the Supreme Court extended the Sixth Amendment's protections in 1968. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

II. STARE DECISIS AND OVERTURNING PRECEDENT

The decision to overturn precedent is a weighty one and should not be taken lightly. As the Court has noted, "*[s]tare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions and contributes to the actual and perceived integrity of the judicial process."[81] As a result, "any departure from the doctrine of *stare decisis* demands special justification."[82] However, while the decision to follow precedent is a wise policy, it is not an "inexorable command."[83] In constitutional cases, the pull of *stare decisis* is especially weak.[84] And the concerns underlying *stare decisis* are at their weakest in cases involving procedural and evidentiary rules.[85]

The Court has laid out a variety of "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming or overruling a prior case."[86] Although *Casey* is often credited as the authoritative source of the factors the Court considers, the *Casey* plurality itself noted that the four factors it identified were only examples.[87] Indeed, other cases have provided additional factors that, alone or together, justify overturning precedent. Based on a survey of relevant precedents, the following factors have all been weighed by the Court when deciding whether to overturn precedent.

A. *The Case Defies Practical Workability in the Lower Courts*

This factor looks at whether the precedent being examined has provided enough guidance that courts, which are asked to implement

81 Payne v. Tennessee, 501 U.S. 808, 827 (1991).

82 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231 (1995) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

83 *Payne*, 501 U.S. at 828.

84 *Id.* ("This is particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'") (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)); Edelman v. Jordan, 415 U.S. 651, 671 (1974) ("Since we deal with a constitutional question, we are less constrained by the principle of *stare decisis* than we are in other areas of the law."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("It is common wisdom that the rule of *stare decisis* is not an "inexorable command" and certainly it is not such in every constitutional case." (citations omitted)).

85 *Payne*, 501 U.S. at 828.

86 *Casey*, 505 U.S. at 854.

87 *Id.* at 854-55

the rule in different contexts, can do so.[88] In general, clear lines provide more guidance than esoteric factors. Although the Court has acknowledged that many constitutional standards involve gray areas, one expects that case-by-case development would lead to a workable standard.[89] When this workable standard fails to coalesce, even after repeated efforts, the Court is willing to abandon it.

B. *It is Subject to Reliance Interests that Would Make Overturning It Especially Hard*

This factor looks at whether parties structure their relationships based on the existence of precedent.[90] The Court has noted that these reliance interests are greatest when considering property and contract interests.[91] They are of less concern when "the rule set forth in the case is unlikely to affect primary conduct . . . ."[92] This factor is the reverse of the others, in that it is a reason not to overturn a prior decision. The greater the reliance interests, the less likely the Court will be to vote to abandon a prior precedent.

C. *Whether Related Principles of Law Have Developed as to Leave the Decision a Remnant of an Abandoned Doctrine*

In addressing this concern, the Court looks to see if the precedent at issue has been consistently followed, or if subsequent decisions have undercut the legal foundation of the case.[93] A legal doctrine that has been continually upheld will require a greater justification to abandon, while one which has been consistently undercut or left to lie fallow is more likely to be ripe for overruling. Thus, when subsequent developments have "removed or weakened the conceptual underpinnings" from a prior decision, it is subject to overruling.[94]

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88 *Id.* at 854; Payne v. Tennessee, 501 U.S. 808, 830 (1991).

89 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 540 (1985).

90 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

91 Payne v. Tennessee, 501 U.S. 808, 828 (1991).

92 Adarand Constructors, Co. v. Pena, 515 U.S. 200, 234 (1995).

93 *Casey,* 505 U.S. at 855

94 Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989).

D. *Whether the Facts Have so Changed or Come to Be Seen so Differently, as to Have Robbed the Old Rule of Significant Application or Justification*

In evaluating this factor, the Court looks both at whether the initial facts relied upon were incorrect[95] and whether the facts have changed in the intervening years.[96] Under this analysis, even if the facts were correct (or correctly understood) at the time the initial decision was rendered, subsequent changes in the conditions on the ground can result in the need to rethink precedent. As the Court made clear in *Casey*, in some circumstances, a change in facts—or our understanding of those facts—is enough, on its own, to justify reversing an earlier precedent.[97]

E. *Whether the Case was Decided by Narrow Margins Over Spirited Dissents Challenging the Basic Underpinning of Those Decisions*

Cases which initially divided the courts are more likely to be overruled than unanimous or nearly unanimous decisions.[98] This is particularly the case when either the Court cannot coalesce behind a unified rationale for its decision or when the doctrinal arguments for those decisions are challenged.[99] A mere disagreement over the application of an agreed-upon test to different facts is more likely to be respected than a precedent in which the underlying legal basis for the Court's decision is challenged by the dissenters.

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95 *Casey*, 505 U.S. at 861-62 (noting that the factual assumptions underlying the Court's decision in Adkins v. Children's Hospital of District of Columbia, 261 U.S. 525 (1923), were incorrect, as demonstrated by subsequent developments, which justified the Court's decision to overrule it in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937)).

96 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 863 (1992) (discussing the facts underlying the Court's decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896)) ("[W]hatever may have been the understanding in *Plessy*'s time of the power of segregation to stigmatize those who were segregated with a 'badge of inferiority,' it was clear by 1954 that legally sanctioned segregation had such an effect . . . we must also recognize that the *Plessy* Court's explanation of its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required.").

97 *Id.* at 863-64.

98 Payne v. Tennessee, 501 U.S. 808, 828-29 (1991).

99 *See id.*

F. *Whether the Case is Wholly Inconsistent with Earlier Precedent and, of Which the Great Weight of Scholarly Opinion Has Been Critical*

Here, the Court argues that, because the challenged precedent breaks with a long line of earlier precedent, the values protected by *stare decisis* are better served by "[r]emaining true to an 'intrinsically sounder' doctrine . . . ."[100] Although this factor is especially weighty when the deviation from past precedent is recent, the age of a deviation will be relevant only if reliance interests have developed.[101] Also of interest to the Court is how the deviation from precedent has been received by scholars.[102] When the "great weight" of scholarly opinion is against the change in prior precedent, the Court is more likely to correct its error.[103]

G. *The Quality of a Case's Reasoning*

Finally, the quality of the underlying reasoning in the challenged case is an important consideration.[104] Where the Court determines that the reasoning of a prior precedent leaves something to be desired, the Court is more likely to overrule the precedent. Reasoning that "does not withstand careful analysis" does not justify respecting *stare decisis*.[105] If neither party will defend the reasoning of an earlier precedent, "the principle of adhering to that precedent through *stare decisis* is diminished."[106]

In practice, the Court has not utilized any of these considerations as part of a multi-factor test, but rather uses each factor as an individual determination of whether the "special justification" to overcome *stare decisis* exists.[107] Thus, one need not determine that the *Insular Cases* fail all seven of the above factors, or even a majority of them, to

100 Adarand Constructors, Co. v. Pena, 515 U.S. 200, 231 (1995) 231, 233-34.

101 *Id.* at 233-34 (noting that reliance on Metro Broadcasting Inc. v. FCC, 497 U.S. 547, 563-66 (1990) is unlikely to be great because, among other things, it was decided so recently).

102 *See* Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47-49 (1977).

103 *See id.*

104 Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31, 138 S. Ct. 2448, 2479 (2018). *See also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 363-64 (2010); Lawrence v. Texas, 539 U.S. 558, 577-78 (2003).

105 *Lawrence*, 539 U.S. at 577.

106 *Citizens United*, 558 U.S. at 363.

107 Muchnick, *supra* note 12, at 828.

determine that the cases should be overruled. The following analysis will show, however, that, under virtually every factor that the Court has identified as a basis for abandoning precedent, the *Insular Cases* are appropriate candidates for overruling.

ANALYSIS

I. ARE THE *INSULAR CASES* RIPE FOR OVERRULING ON THEIR OWN TERMS?

Looking at the factors the Court uses to determine if a prior case should be overruled, the *Insular Cases*—embodying the Territorial Incorporation Doctrine—do not deserve the protection of *stare decisis* and should be overturned. Virtually none of the concerns that *stare decisis* are designed to protect are implicated by the *Insular Cases*. The Territorial Incorporation Doctrine itself is ill-defined, providing little to no guidance to lower courts.[108] There is little to no reliance placed on the decisions in the *Insular Cases*. When allowed to extend the *Insular Cases*, the Court has largely shied away, demonstrating that related principles of law have developed in a way to leave them as a remnant of an abandoned doctrine. Perhaps most importantly, the facts have changed in our territories so as to eliminate any justification for the cases. Moreover, until 1922, when the Court decided *Balzac*, the decisions were largely split, issued over vigorous dissents. The cases themselves marked a sharp break with prior precedent and have been criticized almost since they were originally decided. Finally, the decisions themselves were poorly reasoned, even aside from their racist underpinnings. They created the Territorial Incorporation Doctrine out of whole cloth, ignored relevant statutes and constitutional text, and provided absurd practical justifications for their outcomes.

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108 For more on this, *see* Brief of Former Federal and Local Judges as *Amici Curiae* Supporting the First Circuit's Ruling on the Appointments Clause, at 7-8, *Fin. Oversight and Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020) (Nos. 18-1334, -1496, -1514, -1521, -1475).

A. *The Territorial Incorporation Doctrine Defies Practical Workability*

There are two key issues with the Territorial Incorporation Doctrine, as far as its workability is concerned. First, there is no definition of what it means for a territory to be "incorporated" or how a territory gains that status. Second, even assuming the doctrine has vitality, there is no guidance to lower courts to help them determine if a particular constitutional provision is "applicable." As a result, when faced with a constitutional claim, lower courts are left trying to guess whether to enforce constitutional protections or not, prompting mixed results.

The Court failed to provide any discussion of the Incorporation Doctrine's impact within its opinions,[109] nor has it offered any guidance on how a territory becomes incorporated. In early cases, organization by Congress appeared to be enough to constitute incorporation.[110] In *Balzac*, however, Chief Justice Taft added a requirement that territorial incorporation must be express.[111] But, as various commentators have noted, "[b]eyond that, the Supreme Court has not elaborated on the scope of Congress's discretion with respect to the final status of unincorporated territories."[112] Indeed, the Supreme Court has explained that the Territorial Incorporation Doctrine "was itself flexible . . . [and not] a hard-and-fast guide for territorial policy."[113] One need only look at the Supreme Court's decision in *Binns v. United States*, a case arising out of territorial Alaska, to observe the difficulties generated by this approach.[114] Despite acknowledging that Alaska was a fully incorporated territory, the Court still held that Congress had the authority to impose an excise tax on licenses that weren't uniform throughout the United States.[115] As Professor Sparrow noted, "[t]he Incorporation Doctrine thus did

109 *See, e.g.*, Burnett & Marshall, *supra* note 12, at 9 ("Thus, despite the central role of the idea of incorporation in [Justice] White's opinion, the consequences of incorporation remain unclear.").

110 Binns v. United States, 194 U.S. 486, 492-94 (1904).

111 258 U.S. 298, 306 (1922).

112 Burnett & Marshall, *supra* note 12, at 17. *See also* Sparrow, *supra* note 8, at 172 (when discussing *Mankichi*, noting "the fact that Hawai'i had been incorporated and organized by the Newlands Resolution did not matter").

113 Sparrow, *supra* note 8, at 208 (emphasis removed).

114 194 U.S. 486, 494 (1904).

115 *Id.*

not brightly distinguish between Congress's plenary authority over the incorporated territories and its constitutionally limited power in the incorporated territories . . . ."[116]

An examination of the Court's Alaska cases is instructive. In two cases, *Binns v. United States*[117] and *Rassmussen v. United States*,[118] the Court determined that Alaska was an incorporated territory. Importantly, the Court explained the factors it relied upon in making this determination. In *Binns*, the Court focused on the treaty between the United States and Russia, the assignment of Alaska to the Ninth Judicial District, the establishment of a court of last resort in the territory, and the fact that Alaska was an organized territory.[119] In *Rassmussen*, the Court, in reviewing the status of Alaska, looked to the treaty with Russia and considered that Congress had extended the internal revenue laws and customs laws of the United States to the territory, established a customs collection district there, and assigned the territory to the Ninth Judicial District.[120]

Other than the treaties acquiring our island territories, many of the other aspects that made Alaska an incorporated territory are present in territories currently considered unincorporated. With the exception of American Samoa, Congress has provided organic acts for our other territories.[121] Courts in the territories, again excepting those in American Samoa, have been assigned to circuit courts.[122] Despite these similarities, the territories continue to be defined as unincorporated.[123]

116 Sparrow, *supra* note 8, at 148.

117 194 U.S. 486, 490-91 (1904).

118 197 U.S. 516, 525 (1905).

119 *Binns*, 194 U.S. at 490-91.

120 *Rassmussen*, 197 U.S. at 522-23.

121 *See, e.g.*, Foraker Act, Pub. L. No. 56–191, 31 Stat. 77 (1900) (Puerto Rico); Jones Act, Pub. L. No. 64–368, 39 Stat. 951 (1917) (Puerto Rico); Organic Act of the Virgin Islands of the United States, Pub. L. No. 74–749, 49 Stat. 1807 (1936) (Virgin Islands); Revised Organic Act of the Virgin Islands, Pub. L. No. 90–496, 68 Stat. 497 (1954) (Virgin Islands); Guam Organic Act of 1950, Pub. L. No. 81–630, 64 Stat. 384 (1950) (Guam); Approval of Covenant to Establish a Commonwealth of the Northern Mariana Islands, Pub. L. No. 94–241, 90 Stat. 263 (1976) (Commonwealth of the Northern Mariana Islands).

122 *See* 38 Stat. 803 (1915) (assigning Puerto Rico to the First Circuit); Pub. L. No. 64-389, 39 Stat. 1132 (1917) (assigning the Virgin Islands to the Third Circuit); Pub. L. No. 81-630, § 23, 64 Stat. 390 (1950) (assigning Guam to the Ninth Circuit); Pub. L. No. 94-241, § 401, 90 Stat. 263 (1976) (assigning the Commonwealth of the Northern Mariana Islands to the Ninth Circuit).

123 The Revised Organic Act of the Virgin Islands specifically defines the territory as unincorporated. 48 U.S.C. § 1541(a) (1954). The same is true of the Guam Organic Act. 48 U.S.C. § 1421(a) (1950).

Even setting aside the lack of guidance from the Supreme Court on the meaning of incorporation, there is a similar lack of clarity as to which rights are "applicable" in territories. When laying out the Territorial Incorporation Doctrine, Justice White noted that the Constitution applied to territories.[124] The only question for him, and one which the Court never deviated from, is whether the particular provision relied upon is applicable.[125] Nowhere in any of the various *Insular Cases*, however, does the Court provide guidance as to how lower courts can determine which clauses are inapplicable. At best, the Court provides the following guidance: clauses that go to the very power of Congress to act are applicable in territories.[126] Among these are prohibitions on bills of attainder, the passage of *ex post facto* laws, and granting of titles of nobility.[127] Furthermore, the Court noted that there *may* be a difference between natural or fundamental rights—which have universal application—and those that are peculiar to the American system of jurisprudence—which does not.[128] But, the Court

124 Downes v. Bidwell, 182 U.S. 244, 292 (1901) (White, J., concurring) ("In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.").

125 *Id.*

126 *Id.* at 277. *See also id.* at 294-95 (White, J., concurring) ("Undoubtedly, there are general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which an are absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power.").

127 *Id.* at 277.

128 *Id.* at 282-83 ("We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the right to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage, and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals.") (internal citations omitted). *See also* Hawaii v. Mankichi, 190 U.S. 197, 217-18 (1903) ("We would go even further, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation, but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of

provides no clear indication of how to determine which rights qualify as fundamental and which are merely peculiar artifacts of our system.[129] In fact, Justice White, the author of the Territorial Incorporation Doctrine suggested in *Downes* that the jury right would extend to the insular territories,[130] something the Court rejected both in *Mankichi* (an opinion White joined) and *Balzac*.[131] Thus, lower courts are left with little guidance as to which rights are "applicable" to territories and which are not.[132]

B. *There are No Reliance Interests that Would Make Overturning Especially Hard*

The second concern supporting the application of *stare decisis* is that reliance interests may have formed since the decision was issued. Although many of the discussions of reliance focus on the specific reliance of individuals, groups, or organizations, Professor Randy Kozel has identified four types of reliance interests that courts should be concerned about: (1) specific reliance, (2) legislative and executive reliance, (3) court reliance, and (4) societal reliance.[133] Since court reliance overlaps with the third *Casey* factor—whether related principles of law have evolved to leave the decision a remnant of an abandoned doctrine—this section focuses on the other three categories of reliance.

procedure . . . ."); Balzac v. Porto Rico, 258 U.S. 298, 312-13 (1922) ("The guarantees of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law, had from the beginning full application in the Philippines and Porto Rico . . . .").

129 True, Justice Brown gives a fairly extensive list in his opinion in *Downes*, but he was writing for himself and not in the context of the Territorial Incorporation Doctrine. Therefore, his list is of limited utility to courts trying to apply the test adopted in *Dorr* and *Balzac*.

130 Downes v. Bidwell, 182 U.S. 244, 293 (1901) (White, J., concurring) ("[A]lthough the judge presiding over a jury need not have the constitutional tenure, yet the jury must be in accordance with the Constitution.").

131 One is left to wonder how a right protected three separate times in the Constitution could not be considered fundamental. *See* U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI; *id.* amend VII.

132 *See also* Derieux & Weare, *supra* note 12, at 288 (contending that "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"). Given this, even Justice Brown's guidelines in *Downes* do not provide useful guidance.

133 Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH & LEE L. REV. 411, 452 (Spring 2010).

1. Specific Reliance

Many pertinent facts have changed in the territories since the *Insular Cases* were decided.[134] As a result of these changes, many specific reliance interests that might otherwise have formed have not. For example, Puerto Rico was made part of the customs territory of the United States in 1932.[135] However, reliance interests in the terms of contracts for shipping of goods between the United States and other territories, including the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa, do exist as far as paying duties goes.[136] Currently, contracts for importing some goods from the territories, other than Puerto Rico, provide for the payment of tariffs.[137] Any disruption triggered by overturning the *Insular Cases*, however, would run in favor of those currently paying tariffs, thus lowering their costs for importing goods. Although there would be some disruption to these agreements in overturning *Downes*, the disruption is not so great as to continue the unequal treatment of our insular areas, especially when regulations already exempt many of the goods which originate in insular areas from such tariffs.[138]

2. Governmental Reliance

It is hard to determine what sorts of reliance interests could arise in the case of denying procedural constitutional rights, such as jury trials. But even if such reliance interests could arise and climb to the level of being so great as to counsel against disregarding *stare decisis*, again the facts have so changed as to make such reliance interests unlikely, if not impossible, to have formed in this case. Congress or the territorial legislatures have provided for trial by jury in each of the territories.[139] As on the mainland, the defendant remains free to

134 *See infra* Analysis Part I. D.

135 48 U.S.C. § 738.

136 19 C.F.R. § 7.2(a) (2022) (governs customs duties on all insular possessions other than Puerto Rico).

137 *Id.* (provides that goods imported from the territories other than Puerto Rico are subject to the Harmonized Tariff Schedule of the United States). *But see* 19 C.F.R. § 7.3 (2022) (exempts several goods from tariffs on certain conditions).

138 19 C.F.R. § 7.3(a)(1) (2022) (with some exceptions, goods which are the growth or product of insular possessions, or goods which are manufactured from such growth or product, are allowed to be imported duty free to the United States customs territory).

139 P.R. CONST. art. II, § 11, cl. 2 (providing for jury trials in felony cases); 48 U.S.C. § 1421b(u) (extending numerous provisions of the Bill of Rights, including the Sixth Amend-

waive trial by jury. Thus, any reliance on the lack of trial by jury can be met by honoring a defendant's request to waive his or her rights. To the extent that the governments of the territories claim reliance interests on not having to provide jury trials, the requirements imposed by every territorial legislature undercut any such claims.

On the other hand, the legislative and executive branches had certainly relied on the Territorial Incorporation Doctrine in their handling of the territories and the position the executive takes in court. For example, the U.S. Code explicitly defines both Guam and the Virgin Islands as unincorporated territories.[140] Congress has continually legislated in the territories on the basic assumption that they are different from previously held territories.[141] The executive has also relied on the logic of the Territorial Incorporation Doctrine, including some of the *Insular Cases* in making arguments to the Supreme Court.[142]

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ment, to Guam); 8 GUAM CODE ANN. § 85.10 (providing trial by jury in Guam courts); 48 U.S.C. § 1561 (extending numerous provisions of the Bill of Rights, including the Sixth Amendment, to the Virgin Islands); V.I. CODE ANN. tit. V, § 3601 (2019) (providing trial by jury in Virgin Island courts); 48 U.S.C. § 1801 Note, Sec. 501(a) (extending numerous provisions of the Bill of Rights, including the Sixth Amendment, to the Commonwealth of the Northern Mariana Islands, except for local trials where local law does not provide for a jury); N. MAR. I. CONST., art. I, § 8 (allowing the legislature to provide for trial by jury in criminal or civil cases); 7 N. MARI. I. CODE § 3101(a) (2022) (providing for trial by jury in all criminal trials where the defendant faces 5 years imprisonment, a $2000 or greater fine, or both); *id.* § 3101(b) (providing for trial by jury in all civil cases where the amount in controversy exceeds $1000 exclusive of interest and costs); AM. SAMOA CODE ANN. § 3.0232 (providing for trial by jury before the High Court of American Samoa in all cases where a defendant is charged with an offense carrying a maximum penalty of greater than six months imprisonment). As for federal trials, the U.S. government transports American Samoans to Hawaii to stand trial before a jury in the District of Hawaii. *See* Michael Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 PAC. RIM. L. & POL'Y J. 325, 352 (2008) (noting that due to a lack of cohesive federal judicial presence in American Samoa, American Samoa residents are removed to other jurisdictions to stand trial).

140 48 U.S.C. §§ 1421a ("Guam is hereby declared to be an unincorporated territory of the United States . . . ."); 1541(a) ("The Virgin Islands as above described are hereby declared an unincorporated territory of the United States of America.").

141 *See, e.g.*, Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114–187, 130 Stat. 549 (2016); Virgin Islands Elective Governor Act of 1968, Pub. L. No. 90–496, 7 Stat. 569 (1968); Guam Elective Governor Act of 1968, Pub. L. No. 90–497, 82 Stat. 842 (1968); Puerto Rico Federal Relations Act of 1950, Pub. L. 81–600, 62 Stat. 605 (1950); Jones Act, Pub. L. No. 64-368, 39 Stat. 951 (1917).

142 *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondents, at 17-18, Puerto Rico v. Sanchez-Valle, 136 S. Ct. 1863 (2016) (No. 15-108) (citing Grafton v. United States, 206 U.S. 333, 354 (1907)); Brief for Respondents in Opposition to Certiorari, at 14, Igartúa v. United States, 626 F.3d 592 (1st Cir. 2010), *cert. denied* 566 U.S. 986 (2012) (No. 11-837)

Yet Congress has also taken steps to undercut the Territorial Incorporation Doctrine by, *inter alia*, extending the Bill of Rights and other constitutional provisions fully to U.S. territories.[143] There is still some governmental reliance on the Territorial Incorporation Doctrine that the Court would have to address, however, in deciding whether to overrule that portion of the *Insular Cases*.

3. Societal Reliance

Societal reliance arises from the "effect of the precedent on shaping societal perceptions about our country, our government, and our rights."[144] Two examples of this societal reliance come from the Court's decisions in *Dickerson v. United States*[145] *and Casey* itself. In *Dickerson*, the Court was called upon to overrule *Miranda v. Arizona* based on a subsequently enacted statute, 18 U.S.C. § 3501.[146] In rejecting this request, the Court noted that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[147] In *Casey*, the Court was concerned with the costs engendered with overturning *Roe* by those "who have ordered their thinking and their living around that case[.]"[148] Unlike in *Casey* and *Dickerson*, in relation to the *Insular Cases*, no such societal reliance exists. No one's life is ordered around the notion that territories are not entitled to the full panoply of constitutional rights. The Territorial Incorporation Doctrine is not "part of our national culture." On the contrary, it tells a dark tale about "our country, our government, and our rights" that many wish to forget.

In the final analysis, the question of reliance is something of a mixed bag. And it is important to remember that merely determining if there is reliance is not the end of the inquiry. Even if the Court finds reliance interests exist, it still must determine whether those interests are so strong as to prevent the Court from reaching the right

(arguing that as a territory, Puerto Rico was not entitled to representation in the House of Representatives).

143 48 U.S.C. §§ 1421b(u), 1561. *See infra* Analysis Part I. D. for fuller discussion.

144 Kozel, *supra* note 133, at 460.

145 530 U.S. 428, 443 (2000).

146 *See id.* at 442-43.

147 *Id.* at 443.

148 *Casey*, 505 U.S. at 856. While this blurs the line a bit with specific reliance, the Court was not talking about any specific individuals who had ordered their lives around the availability of abortion, but rather the broader society as a whole.

result dictated by its own understanding of the law and the other factors discussed here.

C. *Related Principles of Law Have so Developed as to Leave the Decision a Remnant of an Abandoned Doctrine*

Over the previous century, since the last of the *Insular Cases* were decided, the law has largely moved on, leaving those cases behind. Although courts have continued to cite *Downes*, the Court has not extended the Territorial Incorporation Doctrine. Indeed, the Supreme Court has appeared to back away from the doctrine in nearly every instance where the Court has been offered the opportunity to extend it.[149] Additionally, the Supreme Court has recently issued a decision, *Ramos v. Louisiana*,[150] which undercuts a key aspect of its decision in *Hawaii v. Mankichi*. Finally, although the Court was very concerned about the impacts of its decision in *Mankichi*, more recent precedent indicates that the Court is no longer willing to weigh the practical impacts as heavily when a clear violation of law occurs.[151]

Since deciding *Balzac v. Puerto Rico*, the Supreme Court has largely steered clear of extending the Territorial Incorporation Doctrine. In virtually every decision since 1922, the Court has limited the reach of those decisions. For example, in 1957, in *Reid v. Covert*, when extending the jury right to military dependents facing the death penalty outside the United States, a plurality of the Court explained that "neither the [*Insular Cases*] nor their reasoning should be given any further expansion."[152] It continued to expand the reach of the jury right to non-capital cases which occurred at military installations in *Kinsella v. United States ex rel Singleton*.[153] In 2020, the Court cited *Reid*'s statements regarding the *Insular Cases* with approval.[154] Since

149 Derieux & Weare, *supra* note 12, at 292-94.

150 140 S. Ct. 1390, 1395-99 (2020) (by affirming Louisiana's duty to mandate unanimous juries under U.S. CONST. amend. VI, overruling Apodaca v. Louisiana, 406 U.S. 404 (1972) and Johnson v. Louisiana, 406 U.S. 356 (1972)).

151 *See, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2468-69 (2020) (finding that the Creek Reservation had never been disestablished, despite putting thousands of criminal convictions into doubt).

152 Reid v. Covert, 354 U.S. 1, 14 (1957).

153 361 U.S. 234, 248 (1959).

154 Fin. Oversight and Mgmt. Bd. for Puerto Rico v. Aurelius, 140 S. Ct. 1649, 1665 (2020).

at least 1976, when asked if a constitutional provision applies to U.S. territories, the Court has consistently held that it does.[155]

Turning specifically to *Hawaii v. Mankichi*,[156] two aspects of that case have been undercut by recent Court decisions. First, the Court held that the Republic of Hawaii was allowed to provide for juries without requiring unanimity.[157] But in *Ramos v. Louisiana*, the Supreme Court held that non-unanimous juries violated the Sixth Amendment.[158] In so holding, the Court declared that "the Sixth Amendment right to a jury trial [which includes a requirement for unanimity] is 'fundamental to the American scheme of justice' and incorporated against the States under the Fourteenth Amendment."[159] Additionally, in deciding not to apply the Sixth Amendment to Hawaii, the Court identified two practical concerns: (1) it would have required the release of every felon convicted between August 12, 1898, and June 14, 1900, and (2) it would nullify every civil verdict given by a less-than-unanimous jury during the same period.[160] But the Court has indicated in a recent case that such concerns do not

155 *See, e.g.*, Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 600 (1976) (applying the Equal Protection and Due Process Clauses in Puerto Rico); Califano v. Torres, 435 U.S. 1, 4 n. 6 (1978) (applying the right to travel to Puerto Rico); Torres v. Puerto Rico, 442 U.S. 465, 469-71 (1979) (applying the Fourth Amendment to Puerto Rico); Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982) (voting rights of Puerto Ricans are protected to the same extent as American citizens); El Vocero de P.R. v. Puerto Rico, 508 U.S. 147, 148 n. 1 (1993) (affirming the First Amendment applies to Puerto Rico); Puerto Rico v. Sanchez-Valle, 136 S. Ct. 1863, 1876 (2016) (applying the Double Jeopardy Clause to Puerto Rico); *Fin. Oversight and Mgmt. Bd.*, 140 S. Ct. at 1665 (2020) (applying the Appointments Clause to Puerto Rico). *But see Califano*, 435 U.S. at 3, n. 4; Harris v. Rosario, 446 U.S. 651, 651-52 (1980) (holding that Congress could discriminate against residents of Puerto Rico in the extension of benefits programs). While *Rosario* did not present strictly constitutional questions, the questions presented arguably implicated the Fourteenth Amendment's Equal Protection Clause and the Fifth Amendment's judicially-recognized "equal protection component" of its Due Process Clause. 446 U.S. at 653-54 (Marshall, J., dissenting). And while the Court reaffirmed this statutory disparate treatment in *United States v. Vaello-Madero*, one Justice advocated for overruling the *Insular Cases*. 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring).

156 190 U.S. 197 (1903).

157 *Id.* at 217-18.

158 140 S. Ct. 1390, 1397 (2020) (plurality opinion) (overruling Louisiana's non-unanimous jury rule, in part, on its racist origins). While the goal of this article is not to engage with the racist history of the *Insular Cases*, to the extent that weighs in, *Ramos* indicates that it would militate in favor of overruling.

159 *Id.* at 1397. While this does not necessarily undercut the argument that the jury right is unique to a system of Anglo-Saxon jurisprudence, every territory provides for a trial by jury. *See* Kozel, *supra*, note 133, at 452-63.

160 *Mankichi*, 190 U.S. at 215-16.

outweigh the requirements of the law.[161] In *McGirt v. Oklahoma*, a similar claim was raised, recognizing that the continued existence of the Creek Reservation would call into question thousands of convictions.[162] The Court rejected these arguments noting that "the magnitude of the legal wrong is no reason to perpetuate it."[163] Similar claims about upsetting thousands of convictions were made in *Ramos*, and again, the Court rejected them.[164]

Of course, what the Court says and what the Court does are not always synchronized. Although not relying on the *Insular Cases* by name, the Court's holdings in cases such as *Puerto Rico v. Sanchez-Valle* and *Financial Oversight and Management Board for Puerto Rico v. Aurelius, LLC* fall squarely within the analysis of those cases holding that Congress has plenary power over "unincorporated territories."[165] And, of course, the Supreme Court is not the only court to examine to determine whether legal principles still have life. Lower courts have continued to issue rulings relying on the Territorial Incorporation Doctrine, particularly regarding the question of birthright citizenship for American Samoans.[166] Thus, lower courts have not been as reticent as the Supreme Court to rely on the *Insular Cases*.

Despite this, the Territorial Incorporation Doctrine appears to be a relic of its times, a jurisprudential dead end, which should not be extended. It is but a remnant of an abandoned frolic and detour, which the Court consistently refuses to extend, and from which it has even backed away. When looking at this factor, nothing in the way that the Court has interpreted the Constitution argues in favor of providing the protection of *stare decisis* to the *Insular Cases*.

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161 McGirt v. Oklahoma, 140 S. Ct. 2452, 2480-81 (2020).

162 *Id.* at 2479. Pursuant to the Major Crimes Act, 18 U.S.C. § 1153(a), certain crimes committed by tribal members within "Indian Country" are the exclusive jurisdiction of the federal government. "Indian Country" includes land within the limits of an Indian reservation. Thus, if the Creek Reservation was never disestablished, the state lacked jurisdiction to try Indians, such as McGirt, for various crimes committed within its boundaries, throwing all the convictions the state had secured against tribal members into doubt.

163 *Id.* at 2480.

164 140 S. Ct. at 1406-08 (plurality opinion).

165 *See, e.g.*, Puerto Rico v. Sanchez Valle, 579 U.S. 59, 71-72, 77 (2016); Fin. Oversight and Mgmt. Bd. for Puerto Rico v. Aurelius, LLC, 140 S. Ct. 1649, 1679 (2020).

166 *See, e.g.*, Fitisemanu v. United States, 1 F.4th 862, 864-65, 869-70 (10th Cir. 2021); Tuaua v. United States, 788 F.3d 300, 306-10 (D.C. Cir. 2015).

D. *The Facts Have Changed, or Have Come to Be Seen so Differently, as to Have Robbed the Old Rule of Significant Application or Justification*

This is one of the strongest factors for removing the protections of *stare decisis* from the *Insular Cases*. As the Court noted in *Casey*, the racist underpinnings of *Plessy v. Ferguson* had come to be seen so differently by the Court which decided *Brown v. Board of Education* that that alone justified reversing.[167] So too, with the *Insular Cases*. The overtly racist justifications for the decisions were wrong when the cases were decided, but even more, have come to be seen so differently as to rob the *Insular Cases* of their justification. In addition to this, the practical, factual concerns raised by the Court in these cases have also been wiped out with the passage of time.

Several of the concerns raised by the Court, and discussed in Part I, were by their nature temporary. Even Justice Brown, who advocated for the greatest amount of congressional freedom to rule the territories as Congress saw fit, acknowledged that the problems highlighted only made full participation in the American system impossible "for a time."[168] Into this category fall the following concerns: (1) it would bring Puerto Rico at once within the internal revenue laws of the United States, including stamps, licenses, excises, and the accoutrements of that system when the people of the island had no experience with them; (2) no system of property taxation was or ever had been in place in Puerto Rico; (3) it would take a minimum of two years to set up such a system; (4) revenues in Puerto Rico had always been raised by duties on imports and exports; (5) it would visit financial ruin on Puerto Rico by displacing its fiscal system; (6) that it was apparent from the terms of the Newlands Resolution that it was only intended to be temporary; (7) the provisions of the Constitution must have been unfamiliar to a large number of inhabitants of Hawaii and no prior preparations had been made; (8) the rights alleged to be violated are not fundamental, but merely concern a method of procedure which has been in place for 60 years, and adequately protects the rights of Hawaiian citizens; (9) to work, the jury system needs citizens

167 Planned Parenthood v. Casey, 505 U.S. 833, 863 (1992).

168 Downes v. Bidwell, 182 U.S. 244, 287 (1901). Additionally, Justice White took it as a given that if Congress determined that a territory was unfit for eventual incorporation, it would uphold its constitutional duty to release the territory from the dominion of the United States. *Id.* at 343-44 (White, J., concurring).

trained to the responsibility of being jurors; and (10) given their existing systems and history, Congress has left it to the islands to determine if and when they wish to adopt Anglo-Saxon judicial institutions.[169]

Each of these facts, which the Court used to justify its decision not to extend the full protections of the Constitution to our insular territories, is no longer true. After a century of U.S. rule, the citizens of our insular territories are well-familiar with the U.S. system of government and have been subject to our internal revenue and customs laws for a long period of time. Although the citizens of territories do not pay federal income taxes into the U.S. Treasury, Puerto Rico alone paid over $3 billion to the federal government in 2018.[170] Thus, the first five concerns no longer provide support to the *Insular Cases*. The peoples of the insular territories have extensive experience with the federal revenue laws and their accoutrements, they are familiar with property taxes, the system has long been in place in all of our territories, revenues are no longer raised exclusively by duties. and the systems have not proven ruinous to them.[171]

The Court's concern with the Newlands Resolution was moot by the time the Court decided *Hawaii v. Mankichi*, as the Court acknowledged.[172] It is also no longer true that the peoples of our island territories are unfamiliar with the Constitution. Furthermore, adequate preparations were made to apply their provisions. Congress has extended the protections of the Bill of Rights to nearly all U.S. territories by statute.[173] Additionally, the territories have all adopted the

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169 *See supra* Background Part I (collecting cases).

170 United States v. Vaello-Madero, 956 F.3d 12, 24 (1st Cir. 2020).

171 *See* 48 U.S.C. § 734. It is true that Puerto Rico has been experiencing fiscal difficulties, but that is a fairly recent phenomenon, and cannot be attributed to the imposition of the U.S. tax system which has been in place since at least 1946. For a brief history of Puerto Rico's current fiscal crises, *see generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-387, PUERTO RICO: FACTORS CONTRIBUTING TO THE DEBT CRISIS AND POTENTIAL FEDERAL ACTIONS TO ADDRESS THEM (2018).

172 190 U.S. 197, 210-11 (1903). By limiting its review to cases decided between August 12, 1898 and June 14, 1900, the Court acknowledged that Hawaii was incorporated into the United States on that latter date.

173 *See, e.g.*, 48 U.S.C. § 737 (extending U.S. CONST. art. IV, § 2, cl. 1 to Puerto Rico); 48 U.S.C. § 1421b(u) (extending U.S. CONST. art. 1, § 9, cls. 2-3; *id.* art. IV, §§ 1-2, cl. 1; *id.* amends. I-IX, XIII, XV, XIX, and the second sentence of Amend. XIV, § 1 to Guam); 48 U.S.C. § 1561 (extending the same provisions as to Guam, and adding Art. VI, cl. 3. This section also provides that certain offenses may be prosecuted by information, vice indictment by the grand jury); 48 U.S.C. § 1801 Note, Sec. 501(a) (extending U.S. CONST. art. 1, § 9, cls. 2, 3, 8; *id.* art. I, § 10, cls. 1 & 3; *id.* art. IV, §§ 1 & 2, cls. 1 & 2; *id.* amends. I-IX; amend. XIII; amend. XIV, § 1; amend. XV;

jury system, as well as Bills of Rights that largely mirror the protections of the U.S. Constitution.[174] Citizens of the territories are thus "trained to the responsibility of being jurors" and they have made a voluntary choice to incorporate that system into their local criminal justice institutions and these rights have been determined by the people of the territories to be fundamental to justice. Therefore, holding that the Sixth Amendment—or any of the other provisions of the Bill of Rights—applies to territories would not displace any equally adequate system.

Two other explanations proffered by the Court in these cases have since been undone by Congress. These two explanations were: (1) citizens of Puerto Rico, though owing their allegiance to the United States, were not citizens,[175] and (2) the District Court of Puerto Rico was not a true Article III Court.[176] Both of these facts are no longer true. Puerto Ricans were granted U.S. citizenship in 1917 as part of the Jones Act.[177] Congress further provided for citizenship for those not covered by any other act in 1952.[178] Citizenship for nearly all other territories, except for American Samoa, has followed.[179] The District Court of Puerto Rico, while initially an Article I court,

amend. XIX; and amend. XXVI to the Commonwealth of the Northern Mariana Islands. The Covenant carves out an exception for indictment by a grand jury and any provision which would conflict with Sections 203, 506, and 805). *But see* Fitisemanu v. United States, 1 F.4th 862, 864-65, 869-70 (10th Cir. 2021); Tuaua v. United States, 788 F.3d 300, 306-10 (D.C. Cir. 2015) (clarifying that Congress has not extended the Constitution to American Samoa).

174 For information on territorial jury requirements, *see supra*, note 139. For territorial bills of rights, *see* P.R. CONST art. II (Puerto Rico Bill of Rights); 48 U.S.C. § 1421b (Guam Bill of Rights); 48 U.S.C. § 1561 (Virgin Islands Bill of Rights); N. MAR. I. CONST. art. I; AM. SAMOA REV. CONST. art. I.

175 Downes v. Bidwell, 182 U.S. 244, 306 (1901) (White, J., concurring).

176 Balzac v. Porto Rico, 258 U.S. 298, 312 (1922).

177 Jones Act, Pub. L. No. 64–368, 39 Stat. 951 (1917).

178 *See* 8 U.S.C. § 1402 (providing that all persons born in Puerto Rico and subject to the jurisdiction of the United States between April 11, 1899 and January 12, 1941, and who were residing anywhere in U.S. territory, who weren't already U.S. citizens were granted citizenship; and that all persons born on or after January 13, 1941 and subject to the jurisdiction of the United States are citizens at birth).

179 *See* 8 U.S.C. § 1406 (providing citizenship to residents of the U.S. Virgin Islands and those born there as of February 25, 1927); 8 U.S.C. § 1407 (providing citizenship to residents of Guam and those born there as of August 1, 1950); 48 U.S.C. § 1801, Note Sections 301 & 302 (providing citizenship to residents of the Commonwealth of the Northern Marianas and those born there as of March 24, 1976). Residents of American Samoa remain American nationals, but not citizens. *See* 8 U.S.C. § 1408(a).

became an Article III court in 1966.[180] The District Courts in Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands remain territorial courts under Article I. American Samoa lacks a federal court entirely.[181] However, the Court relied on this fact when denying the jury right to residents of territories. Given the other factual changes, this alone does not justify retaining the *Insular Cases*.

The last three concerns raised are more *sui generis* to the cases which gave rise to them. They are: (1) that the Organic Act of Hawaii specifically provided for indictment by a grand jury and unanimous jury verdicts, indicating Congress did not believe they had been applied by the Newlands Resolution; (2) extending the Uniform Duties Clause would alienate and destroy the goodwill of Puerto Ricans for the United States; and (3) applying such high taxes would lead to violations so numerous as to be impossible to prosecute.

The first of these, on the surface, seems like a compelling argument. But the Newlands Resolution mirrored language that had been used in extending the Constitution to other territories for nearly half a century.[182] Additionally, the act creating a government for the Territory of New Mexico is instructive. After declaring in Section 17 that the Constitution applies to the Territory of New Mexico in terms identical to those used in other territories—and the Newlands Resolution—Section 19 provides: "*And be it further enacted*, That no citizen of the United States shall be deprived of his life, liberty, or property, in said Territory, except by the judgment of his peers and the law of the land."[183] But the right to be secure in one's life, liberty, and property is already protected by the Fifth Amendment. This just goes to

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180 Pub. L. No. 89-571, 80 Stat. 764 (1966) (providing life tenure for judges appointed in the United States District Court for the District of Puerto Rico). *See also* 28 U.S.C. § 119.

181 Because of this lack of a federal court, and due to physical proximity, American Samoans charged with federal crimes tend to be tried in Hawaii, where the Sixth Amendment's strictures apply. *See, e.g.,* United States v. Lee, 159 F. Supp, 2d 1241, 1248-49 (D. Hawaii 2001) (discussing venue questions under 18 U.S.C. 3238).

182 *See, e.g.*, 9 Stat. 453 (1850) (extending the Constitution to the Territory of Utah); 9 Stat. 446 (1850) (extending the Constitution to the Territory of New Mexico); 10 Stat. 277 (1854) (extending the Constitution to the Territories of Nebraska and Kansas); 12 Stat. 808 (1863) (extending the Constitution to the Territory of Idaho); 13 Stat. 85(1864) (extending the Constitution to the Territory of Montana).

183 9 Stat. 446 (1850). This language mirrors Chapter 39 of the original Magna Carta, which has been understood to protect Due Process. *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1607 (2019).

show that Congress sometimes took a "belt and suspenders" approach to protecting rights in the territories.[184]

Furthermore, as of 1900, when Congress passed the Organic Act, the Court had not determined that the Sixth Amendment required unanimous jury verdicts. It did not make that determination until it decided *Ramos v. Louisiana*, over a century later.[185] Thus, even if the Court had held that the Sixth Amendment applied to the territory of Hawaii in 1898, there would be no requirement that jury verdicts be unanimous. Additionally, to this day the Court has failed to reverse its decision in *Hurtado v. California*, which refused to apply the requirement for indictment by a grand jury against the states.[186] Again, even if the Newlands Resolution had fully extended the Constitution to the Hawaiian Islands, it would still have been necessary for Congress to provide for unanimous jury verdicts and indictment by a grand jury in the Organic Act. Thus, this is merely a phantom concern.

Additionally, this argument is undercut by the Court's reasoning in *Rassmussen v. United States*.[187] There, the Court was faced with an argument that Revised Statute 1891 did not apply to Alaska, because it only applied to organized territories, which Alaska was not.[188] Therefore, the United States argued that the Sixth Amendment did not apply. The Court rejected this argument, holding that "the act or acts of Congress purporting to extend the Constitution were considered declaratory merely of a result which existed independently by the inherent operation of the Constitution."[189] By that logic, the Organic Act of Hawaii could also have been merely declaratory of rights that already applied in Hawaii.

As for the second argument, that applying U.S. customs laws to Puerto Rico would harm the goodwill of the island's citizens toward the United States, the response is two-fold. First, as noted above, Puerto Rico has been part of the customs territory of the United States for nearly a century.[190] Any concerns about that situation

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184 The Court recognized this approach in Rasmussen v. United States, 197 U.S. 516, 526 (1905). *See also*, *infra*, notes 194-96 and accompanying text (discussing *Rassmussen*).

185 140 S. Ct. 1390, 1397 (2020).

186 110 U.S. 516, 557-58 (1884).

187 197 U.S. 516, 528 (1905).

188 *Id.* at 517-18.

189 *Id.* at 526.

190 *See* Kozel, *supra* note 133.

harming goodwill are long past. Second, it appears that the current status of being subjected to the Territorial Incorporation Doctrine does far more harm to the goodwill of the people of Puerto Rico than welcoming them fully into the constitutional family would.[191]

Finally, the Court offers an argument that is unique when discussing a criminal law, arguing that attempting to enforce the customs laws of the United States within Puerto Rico would lead to so many violations it would be impossible to prosecute them all. First of all, as noted above, this concern has been overcome by subsequent events, as the U.S. customs and revenue laws are in force on the island. But second, it is just absurd for the Court to argue that the potential violations of a properly enacted statute justify its non-enforcement. In no other area of the law would the Court refuse to enforce a statute on this basis.

In sum, the Court relied on racist notions about the inhabitants of our insular territories to justify its decisions in the *Insular Cases*. To mask that reality, the Court offered several pretextual factual bases for ruling as it did. However, after more than a century of rule in these territories, the factual underpinnings the Court allegedly relied upon are no longer true. As a result, even taking the Court at its word that the fifteen concerns identified above were the real reasons for imposing the Territorial Incorporation Doctrine, none of them are currently entirely correct and most are entirely wrong or moot. The facts underlying these decisions have so changed since they were decided that they do not deserve the protection of *stare decisis* and should be overturned.

E. *The Cases Were Largely Decided by Narrow Margins Over Spirited Dissents Challenging the Basic Underpinning of Those Decisions*

Although the Court eventually coalesced around the Territorial Incorporation Doctrine, to the point that the final case, *Balzac v. Puerto Rico* was unanimous, the vast majority of the cases were decided by the narrowest of margins over powerful dissents. *Downes*

[191] *See, e.g.*, Brief for Commonwealth of Puerto Rico as Amicus Curiae in Support of Respondent, at 19, United States v. Vaello-Madero, 956 F.3d 12 (1st Cir. 2020) (No. 20-303) ("The *Insular Cases* have established a regime that discriminates against Puerto Rican United States citizens on the basis of their race and national origin.").

was a five to four decision that produced no majority opinion.[192] Justice Brown, with the ostensible opinion of the Court, wrote for himself.[193] Justice White, who introduced the Territorial Incorporation Doctrine, wrote a concurrence for three.[194] Justice Gray wrote a solo concurrence.[195] In fact, the opinion with the greatest support was Chief Justice Fuller's dissent, which challenged the very basis for the opinions that made up the majority.[196]

In *Hawaii v. Mankichi*, Justice White actually lost a vote in support of the doctrine. He wrote for himself and Justice McKenna—who joined him in *Downes*—to ground his vote on the Territorial Incorporation Doctrine.[197] Four justices again dissented, arguing that the right to a jury trial was fundamental and that the people of Hawaii had enough familiarity with the common law system to impanel both grand and petit juries.[198] In *Dorr*, although the Territorial Incorporation Doctrine received the support of a majority, three of the justices who concurred wrote separately to reject the doctrine as the basis of their decision.[199] Justice Harlan filed a dissent arguing that jury trials are fundamental and should extend to the territories.[200] Thus, the Court split five to four on the use of the Territorial Incorporation Doctrine.

Dowdell, decided in 1911, was an 8-1 decision, with Justice Harlan noting his dissent, but without providing a written explanation. But *Dowdell*'s only discussion of the Territorial Incorporation Doctrine applied to the question of whether the grand and petit jury requirements of the Fifth and Sixth Amendments applied.[201] Its discussion of the Confrontation Right was grounded on the argument that the particular testimony did not require confrontation, not that

192 Downes v. Bidwell, 182 U.S. 244, n. 1 (1901). This reporter's note, distinct from the opinion's first footnote describing the government's supremacy "within its lawful sphere,", acknowledges the lack of majority opinion and declares that each assenting Justice's name will be attached to each "headnote[ ] of. . .the sustaining opinions . . . ." *See id.*

193 *Id.* at 247 (opinion of Brown, J.).

194 *Id.* at 244, n. 1. *See also id.* at 287 (White, J., concurring); Rassmussen v. United States, 197 U.S. 516, 533-32 (1905) (Brown, J., concurring) (clarifying the Territorial Incorporation Doctrine did not control in *Downes*).

195 *Downes,* 182 U.S. at 345 (Gray, J., concurring).

196 *Id.* at 347 (Fuller, C.J., dissenting).

197 Hawaii v, Mankichi, 190 U.S. 197, 218-19 (1903) (White, J., concurring).

198 *Id.* at 221-26 (Fuller, C.J., dissenting).

199 Dorr v. United States, 195 U.S. 138, 154 (Peckham, J., concurring).

200 *Id.* at 154-55 (Harlan, J., dissenting).

201 Dowdell v. United States, 221 U.S. 325, 332 (1911).

the Confrontation Clause did not apply in the Philippines.[202] Relying on *Hurtado v. California* and *Dorr*, the Court held that both arguments were foreclosed by its earlier decisions.[203]

This factor is something of a mixed bag. As the *Insular Cases* became more entrenched and as the justices who initially dissented departed the Court and were replaced, support for the decisions became more solidified. However, in only two of the decisions did the Court resoundingly support the doctrine, and the one instance of unanimous support was the very last of the *Insular Cases*. When dissents occurred, they were not based on arguments over how to apply the doctrine, but instead were attacks on the fundamental logic of the Territorial Incorporation Doctrine itself. Beginning in *Downes*, the dissent argued that the Constitution applied *ex proprio vigore*, a different view from the position advocated by Justice White and eventually adopted by the Court. Had the Court continued to rely on the Territorial Incorporation Doctrine, this factor would weigh more heavily in favor of *stare decisis*. But given the vigorous dissents, which challenged the basic underpinning of the decision, and the Court's abandonment of the doctrine, as discussed above, this factor does not outweigh the arguments against applying *stare decisis*.

F. *The Cases are Wholly Inconsistent with Earlier Precedent, of Which the Great Weight of Scholarly Opinion Has Been Critical*

The *Insular Cases* represented a sharp break with the Court's prior decisions dealing with Congress's power to regulate territories.[204] In the words of Chief Justice Taft, "[b]efore the question became acute at the close of the Spanish War, the distinction between acquisition and incorporation was not regarded as important. . . ."[205] Professor Rivera Ramos is blunter, declaring that the *Insular Cases* created "a new legal and political reality."[206] Professor Neuman identifies four phases of Supreme Court precedent dealing with the applicability

202 *Id.* at 329-30.

203 *Id.* at 332.

204 Muchnick, *supra* note 12, at 800 ("The Insular Cases are widely recognized as having contradicted precedent of their time . . . .").

205 Balzac v. Porto Rico, 258 U.S. 298, 306 (1922).

206 Ramos, *supra* note 10, at 106.

of constitutional limitations in territories.[207] In the first phase, from 1789 to the early decades of the nineteenth century, things were unsettled.[208] In the second phase, from the middle to the end of the nineteenth century, "courts routinely held that generally phrased constitutional limitations applied in the District of Columbia and the territories as well as the states."[209] The *Insular Cases* overthrew this settled understanding.[210]

Two cases, in particular, had been decided by the Supreme Court and stood for the proposition that the Constitution reigned supreme everywhere the United States was sovereign. The first of these, *Loughborough v. Blake*, upheld Congress's power to tax the residents of the District of Columbia.[211] In interpreting Congress's power to lay and collect duties, imposts, and excises throughout the United States, the Court was asked to determine the meaning of that latter phrase. It held:

> Does this term designate the whole, or any particular portion of the American empire? Certainly, this question can admit of but one answer. It is the name given to our great republic, which is composed of states and territories. The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties and excises should be observed in the one, than in the other.[212]

Thus, the Court had previously addressed the application of the Uniform Duties Clause to U.S. territories and determined that it applied everywhere. Justice Brown argued that these words, as applied to the territories, were mere *dicta*.[213] Ironically, Justice White rejected this argument.[214] Instead, he argued that the power to tax territories arose

207 Neuman, *supra* note 12, at 184.

208 *Id.*

209 *Id.*

210 *Id.*

211 18 U.S. 317, 325 (1820).

212 *Id.* at 319.

213 *See* Downes v. Bidwell, 182 U.S. 244, 262 (1901) ("So far as applicable to the District of Columbia, these observations are entirely sound. So far as they apply to the territories, they were not called for by the exigencies of the case.").

214 *Id.* at 292 (White, J., concurring) ("To question the principle above stated on the assumption that the rulings on this subject of Mr. Chief Justice Marshall in *Loughborough v. Blake* were mere *dicta* seems to me to be entirely inadmissible.").

from Article IV, Section 3, not the general power to lay and collect taxes.[215]

Additionally, scholars have pointed to the Supreme Court's decision in *Dred Scott v. Sanford*[216] as standing for the proposition that the Constitution applies in its entirety in U.S. territories.[217] While *Dred Scott* is rightly derided for its holding, even the dissent did not deny that the Constitution applied everywhere the United States was sovereign.[218] Other cases decided in this period also extended the Constitution to territories.[219] Courts continued to extend the Constitution to territories during and after the Civil War.[220] Thus, the *Insular Cases* represented a break from the cases which had come before it.

Furthermore, this break with prior case law has been almost universally condemned by scholars. Law review articles have charged the *Insular Cases* with furthering colonialism,[221] compared them to apartheid,[222] accused them of fulfilling manifest destiny,[223] and

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215 *Id.*

216 60 U.S. 393, 454 (1857) (*overruled* by U.S. CONST. amend. XIV, § 1).

217 *See, e.g.*, Neuman, *supra* note 12, at 187.

218 *Id. See also Scott*, 60 U.S. at 542 (McLean, J., dissenting) ("In organizing the Government of a Territory, Congress is limited to means appropriate to the attainment of the constitutional object. No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit, so that, whether the object may be the protection of the persons and property of purchasers of the public lands, or of communities who have been annexed to the Union by conquest or purchase, they are initiatory to the establishment of State Governments, and no more power can be claimed or exercised than is necessary to the attainment of the end. This is the limitation of all federal power."); *Id.* at 544 ("I would here simply remark, that the Constitution was formed for our whole country. An expansion or contraction of our territory required no change in the fundamental law."); *Id.* at 614 (Curtis, J., dissenting) ("If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power? To this I answer, that, in common with all the other legislative powers of Congress, it finds its limits in the express prohibitions on Congress not to do certain things; that in the exercise of the legislative power, Congress cannot pass an ex post facto law or bill of attainder, and so in respect to each of the other prohibitions contained in the Constitution.").

219 *See, e.g.*, United States v. Dawson, 56 U.S. 467, 482 (1853) (U.S. CONST. art. III, § 2's venue requirements); Webster v. Reid, 52 U.S. 437, 454 (1850) (U.S. CONST. amend. VII's civil jury right).

220 Neuman, *supra* note 12, at 187.

221 *See, e.g.*, Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225, 295 (1996); Carlos R. Soltero, *The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism*, 22 CHICANO-LATINO L. REV. 1, 6 (2001); Ramos, *supra* note 10, at 140; Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 YALE L. & POL'Y REV. 57, 74-75 (2013).

222 Juan R. Torruella, The Insular Cases: *The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 286 (2007).

referred to them as morally bankrupt.[224] What few defenses are offered are qualified.[225] Some scholars acknowledge that the *Insular Cases* may have some benefits in favor of self-determination.[226] But even that is often hedged heavily.[227] Thus, it is fair to say that the great weight of scholarly opinion is against the decisions in the *Insular Cases* and this factor counsels against offering the protection of *stare decisis*.

G. *The* Insular Cases *Are Poorly Reasoned*

The final factor that the Court looks to in deciding whether to overturn a case is whether the original opinion was poorly reasoned. The *Insular Cases* which espouse the Territorial Incorporation Doctrine meet this test. They run counter to the plain text of the Constitution, are internally inconsistent, focus on the status of the territory while addressing individual rights, and ignore statutes that were in place at the time.

From a purely textual standpoint, the Territorial Incorporation Doctrine lacks foundation. As Professor Levinson points out, the words "unincorporated territory" appear nowhere in the text of the Constitution, nor in the debates surrounding its ratification.[228] The

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223 *See* Juan F. Perea, *Fulfilling Manifest Destiny: Conquest, Race, and the* Insular Cases, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 140, 157 (Christina Duffy Burnett & Burke Marshall, eds. 2001).

224 JUAN R. TORRUELLA, *The* Insular Cases*: A Declaration of their Bankruptcy and My Harvard Pronouncement*, *in* RECONSIDERING THE *Insular Cases*: The Past and Future of the American Empire 61, 63 (Gerald L. Neuman & Tomiko Brown-Nagin, eds. 2015).

225 *See, e.g.*, Russell Rennie, *A Qualified Defense of the* Insular Cases, 92 NYU L. REV. 1683, 1687 (2017) (arguing that the *Insular Cases* allow for local self-determination).

226 *See, e.g.*, Levinson, *supra* note 12, at 133 ("Nor, if one is to be honest, can one simply dismiss as irrelevant the questions asked by Justice Brown, even if they are phrased in a decidedly odious manner. Only the most naïve, and indeed chauvinistic, American could believe that our particular Constitution is a one-size-fits-all model of how *all* societies, whatever their particular histories, social structures, traditions, or state of economic development, should be governed."); Neuman, *supra* note 12, at 191 ("The *Insular Cases* doctrine was emphatically not designed for the purpose of accommodating the self-determination of the people of the territories; . . . But the flexibility it creates can also be used to modify constitutional structures in response to local customs and preferences."); Sparrow, *supra* note 8, at 226-27 ("Some of these constitutional exceptions are not so much instances of political or judicial discrimination, however, as they are designed to preserve indigenous customs and lifestyles among special populations, not unlike those granted to American Indians that were designed to protect indigenous peoples and special populations within the United States . . . .").

227 *See, e.g.*, Ramos, *supra* note 10, at 109.

228 Levinson, *supra* note 12, at 125.

first case to espouse the doctrine, *Downes*, asked whether Puerto Rico was properly within the definition of "United States" as used by the Uniform Duties Clause.[229] What the Court failed to account for is that when the Constitution means to limit its reach to the states, it explicitly does so.[230]

The decisions are internally inconsistent. In every opinion in the *Insular Cases*, both Justice Brown, who espoused the broadest view of Congress's power over the territories, and Justice White, who championed the Territorial Incorporation Doctrine, acknowledged that powers that were wholly denied to Congress could not be exercised in the territories.[231] Yet, the power to enact unequal duties within the United States is wholly denied to Congress, just as much as the authority to grant titles of nobility or enact bills of attainder and *ex post facto* laws. And the Court consistently held these territories were "within the United States."[232]

An additional flaw in the Court's holding was anticipated by Congressman Newlands during a debate about Puerto Rico's status under the Constitution. As he pointed out, if the Constitution only applies to territories by statute, such a statute could be amended or repealed by Congress at any time.[233] Although Justice Brown believed that once extended, such a statute could not be repealed, he provided no support for that belief.[234] And such a statutory extension would provide no protection from future unconstitutional acts by Congress, because of the traditional statutory rule of construction that a later-in-time statute trumps an earlier enacted statute to the extent they conflict. Thus, a statutory extension of the Constitution is no protection at all.

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229 Downes v. Bidwell, 182 U.S. 244, 249 (1901).

230 Several constitutional clauses exclude federal territories where states are concerned. *See, e.g.,* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). *See also* Levinson, *supra* note 12, at 125 (citing U.S. CONST art. I, § 2; *id.* § 3; and *id.* art. IV, § 2 for Congressional representation and comity protections); Neuman, *supra* note 12, at 182-83 (citing U.S. CONST. art. I, § 2; *id.* art. II, § 1, cl. 2; and *id.* art. III, § 2, cl. 2 for Congressional representation, Electoral Vote representation, and party representation before the Supreme Court).

231 *See id.* at 277; *id.* At 294-95 (White, J., concurring).

232 *See, e.g.,* De Lima v. Bidwell, 182 U.S. 1, 186-88 (1901); Fourteen Diamond Rings v. United States, 183 U.S. 176, 178-80 (1901); Goetze v. United States, 182 U.S. 221, 221 (1901); Crossman v. United States, 182 U.S. 221, 221 (1901).

233 *Trade of Puerto Rico,* 33 CONG. REC. 1993-99 (Feb. 20, 1900).

234 Rasmussen v. United States, 197 U.S. 516, 535-36 (1905) (Brown, J., concurring).

Although the Court's treatment of the territories in the early *Insular Cases* was inconsistent and poorly reasoned, at least it made sense to discuss the status of the *territories* when discussing the Uniform Duty Clause. But when the Court continued to use this analysis when discussing the rights of *individuals*, the focus on location loses all justification. According to the Court's logic, a Puerto Rican or Filipino citizen visiting the United States is entitled to all the protections of the Sixth Amendment, while U.S. citizens visiting or living in our territories do not.

Professor Neuman discusses the idea of membership approaches to the Constitution, a form of social contract wherein certain members, or locales, participate in a "privileged relationship with the constitutional project."[235] This is the more restrictive view of constitutional protection, which Neuman contrasts with mutuality of obligation, the idea that constitutional restrictions are the price of exercising power.[236] Yet, even under the more restrictive view of constitutional protection, citizens are entitled to the full panoply of rights. Simply put, if the Court's goal was to safeguard the benefits of American citizenship from those "unfit" to receive it, the *Insular Cases* do not achieve that goal.

Finally, in deciding *Balzac*, and other cases arising from organized territories, the Court ignored prevailing statutory authority. Revised Statute § 1891, originally codified in 1878, provided that:

> The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the organized territories, and in every Territory hereafter organized as elsewhere within the United States.[237]

The Supreme Court held that following the Foraker Act, Puerto Rico was "a completely organized territory."[238] Thus, by its plain terms, Revised Statute § 1891 should apply to Puerto Rico.

Congress was well aware of the Revised Statute § 1891 and knew how to exempt a territory from its reach. Two years after enacting the Foraker Act, Congress passed an act providing for a temporary civil government for the Philippines in which it specifically exempted the

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235 Neuman, *supra* note 12, at 185.

236 *See id.*

237 Rev. Stat. § 1891. *See also*, 48 U.S.C. § 1490 (1925) (Supp. 6).

238 New York ex rel. Kopel v. Bingham, 211 U.S. 468, 476 (1909).

territory from § 1891.[239] The Court noted this exemption in *Dorr*.[240] The Court does not explain in its early cases why Revised Statute § 1891 does not apply to Puerto Rico, particularly in light of its specific exclusion from the Philippines. Its only response, in *Balzac*, was to create a new requirement that any act purporting to incorporate a territory into the United States must be explicit.[241] But this does not answer the argument that Congress had incorporated Puerto Rico in 1900 when it created it as an organized territory without exempting it from Revised Statute § 1891.[242]

Thus, based on the lack of reasoning, demonstrated by the failure to follow constitutional text, the contradictory interpretation of that text, the nonsensical focus on the status of the location when examining individual rights, and the failure to follow the clear statutory text in place at the time, the *Insular Cases* do not deserve the protection of *stare decisis*.

CONCLUSION

The Supreme Court is loath to overturn precedent, and rightfully so. This is particularly true when the precedent is aged. But the Court recognizes that, regardless of a precedent's longevity, erroneous decisions must sometimes be corrected. To determine when a precedent is ripe for overruling, the Court has established several criteria it considers to ensure that mere whim does not dictate the direction of the law.

As the preceding pages have shown, by any measure, the *Insular Cases* meet the Court's criteria for losing the protection of *stare decisis*. The Territorial Incorporation Doctrine defies practical workability; the underlying facts, and society's understanding of them, have changed dramatically since the cases were decided; the cases were largely decided by sharply divided courts, over vigorous dissents; they

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239 Philippine Organic Act, 32 Stat. 691, (1902) ("The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands."). This was in furtherance of a Congressional resolution issued on February 14, 1899, which declared that it was not the intention of the United States to permanently annex the Philippine Islands, but rather, like Cuba, to assist them in achieving self-government. *See Change of Reference*, 32 CONG. REC. 1846-63 (1899).

240 Dorr v. United States, 195 U.S. 138, 143-44 (1904).

241 Balzac v. Porto Rico, 258 U.S. 298, 306 (1922).

242 Rev. Stat. § 1891, *recodified as* 48 U.S.C. § 1490 in 1925, remained on the books until 1933. *See* Pub. L. No. 72-418 (1933).

represented a sharp break from precedent which has been roundly criticized by scholars; and they are poorly reasoned. Even crediting the reliance interests of the legislative and executive branches and recognizing that subsequent treatment by the courts may be mixed, weighed against the other factors the Court has identified, there is reason to overturn the *Insular Cases* and their Territorial Incorporation Doctrine.

Of the rights the *Insular Cases* examined and determined did not apply in territories, the continued inapplicability of only one—the requirement for indictment by a grand jury—retains any support. And in that area, territories are not unique. Instead, they are treated exactly like states, which are also free of that requirement unless local law requires otherwise. To the extent the Territorial Incorporation Doctrine retains any value, it lies in the freedom it gives the territories to determine for themselves what aspects of our system of jurisprudence they wish to implement. But that was certainly not the basis for their reasoning.

Were the decisions in the *Insular Cases* driven by racism? Undoubtedly. Is that enough to justify overturning the Territorial Incorporation Doctrine? Yes. But to the extent some disagree, this article has endeavored to demonstrate that, even under more traditional methods of interpretation, overturning the *Insular Cases* is an idea whose time has come.