IS THE END FINALLY NEAR FOR THE INFAMOUS *INSULAR CASES*?

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INTRODUCTION

IN A POST-*DOBBS* WORLD, SHOULD THE *INSULAR* CASES FINALLY BE OVERTURNED?

After years of adherence to discriminatory, admittedly wrongly-decided, and constitutionally foundationless case law, should the Court finally turn the page and overrule the *Insular Cases*?[1] The Court's recent jurisprudence in *Dobbs* seems to provide the appropriate framework for doing just that. Striking away at the traditional reverence for precedent, the *Dobbs* Court elaborates against the "continued acceptance of *Roe* and *Casey*," stating that it has long been established "that *stare decisis* is 'not an inexorable command.'"[2] The Court buffers this argument in footnote 48 with an expansive line of over thirty "overruled important constitutional decisions."[3] With this foundation present, the Court then overruled two uniquely important decisions in the face of *stare decisis*, using five factors that may now provide the structural analysis necessary to overrule a separate line of cases: the *Insular Cases*.

The factors set out by the Court are as follows: (1) "the nature of the Court's error"; (2) "the quality of the reasoning"; (3) "the 'workability' of the rules they imposed on the country"; (4) "their disruptive effect on other areas of the law"; and (5) "the absence of concrete reliance."[4] After providing the historical context and modern consequences of the *Insular Cases* in Part II, as well as an overview of the abortion jurisprudence leading up to and through *Dobbs* in Part III. In Part IV, this article seeks to both discuss the erosion of *stare decisis* and explain each of the five above factors, as well as to compare these factors to those previously used by the Court in overruling other cases. This article will then conclude in Part V, after demonstrating how the application of these factors militates in favor of overturning the *Insular Cases*. Part VI, post-conclusion, will have an Afterword providing insight regarding recent Congressional action concerning these cases.

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[1] *See generally* Adriel I. Cepeda Derieux & Rafael Cox Alomar, *Saying What Everyone Knows To Be True: Why Stare Decisis Is Not An Obstacle To Overruling The Insular Cases*, 53 Colum. Hum. Rts. L. Rev. 721, 748-51 (2022) (discussing generally that the *Insular Cases* are rooted in discrimination and that both the Territorial Incorporation Doctrine and differential treatment between lands that are incorporated and lands that are not incorporated are not found or provided for anywhere within the Constitution).

[2] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2262 (2022).

[3] *Id.* at 2263 (detailing over thirty important constitutional decisions that have been overruled).

[4] *Id*. at 2265-66.

Furthermore, Part V will explain the arguments both for and against overruling these decisions. It will show how the Court's recent jurisprudence, especially *Dobbs*, may aid the argument that *stare decisis* should not act as a barrier, standing in the way of overturning a line of cases that were "'egregiously wrong' on the day [they were] decided."[5] Instead, "the Court has acknowledged that *stare decisis* 'is at its weakest' when the Court considers its own constitutional interpretations since those 'can be altered only by constitutional amendment or by overruling [its] prior decisions," unlike statutory interpretations, which can be overruled by Congress."[6] Here, with *stare decisis* at its weakest, both the *Insular Cases* and the Territorial Incorporation Doctrine (to be discussed later) deserve little reverence, especially when critically viewed through the lens of the *Dobbs* factors—as will be done in Part V of this article.[7] In line with the First Circuit Court's apt description, in *Aurelius Inv., LLC v. Puerto Rico*, of the *Insular Cases* as a "discredited lineage of cases," "'[t]oday no scholar defends [them] as correctly decided,' and even litigants and courts that rely on them today decline to 'defend their actual reasoning.'"[8] Thereby, "the *Insular Cases*

[5] *Id.* at 2265.

[6] Derieux & Alomar, *supra* note 1, at 745-46.

[7] *Id.* at 746; *See generally* Downes v. Bidwell, 182 U.S. 244, 277-78 (1901) (Justice Brown's majority opinion was formative in the creation of the Territorial Incorporation Doctrine finding that the definition of "United States" was limited to states and not territories, essentially, due to the Constitution mentioning states and people of states but with no reference to territories, thereby excluding Puerto Rico under the United States' plenary power. This plenary power, more or less derived from the Territories Clause of Article 4, is found to consist of Congress's power to make all needful rules and regulations respecting the territory, which arises from the right to acquire the territory itself. Later, the Court, in the future *Insular* cases, also ended up adopting the reasoning of Justice White's extensive concurrence in *Downes*, as seen in Balzac v. Porto Rico, 42 S. Ct. 343, 346 (1922) ("the *Dorr* Case shows that the opinion of Mr. Justice White of the majority, in *Downes v. Bidwell,* has become the settled law of the court. We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in article 4, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made part of the United States by congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated") .); *Cf.* Derieux & Alomar, *supra* note 1, at 751 (arguing that the distinction between incorporated territories and unincorporated territories was founded in racism and imperialism, stating, "[i]n *Downes*, Justice White panned extending citizenship to people of 'an uncivilized race' 'absolutely unfit to receive it,' and quoted approvingly from treatise passages suggesting that conquering peoples ought 'govern' 'fierce, savage, and restless people[s] 'with tighter reign.'" "And in De Lima v. Bidwell, De Lima v. Bidwell, 21 S. Ct. 743, 762 (1901), [another Insular case], Justice McKenna starkly warned against admitting 'savage tribes into American Society.").

[8] *Id*. at 753 (expanding upon these notions, both in text and in footnotes 186 and 187); *See also* Aurelius Inv. LLC v. P.R., 915 F.3d 838, 854-55 (1st Cir. 2019); *Cf.* Juan R. Torruella,

disreputable and offensive origins have put them in an exceedingly narrow class of Supreme Court decisions with 'nary a friend in the world.'"[9] Perhaps most aptly stated by revered Justice Juan R. Torruella in his striking article, *The Insular Cases: The Establishment of A Regime of Political Apartheid*, "the present legitimacy of the *Insular Cases* is untenable. The system of governance promoted thereunder can no longer be reconciled with a rule of law in which all citizens are entitled to equality."[10]

The Insular Cases: The Establishment of A Regime of Political Apartheid, 29 U. Pa. J. Int'l L. 283, 285 (2007) ("contend[ing] that the Insular Cases are a display of some of the most notable examples in the history of the Supreme Court in which its decisions interpreting the Constitution evidence and unabashed reflection of contemporaneous politics, rather than the pursuit of legal doctrine").

[9] *Id.* (referring to the *Insular Cases* as a "discredited lineage of cases, which ushered the unincorporated territories doctrine" and "hovers like a dark cloud").

[10] Torruella, *supra* note 8, at 286-87 (striking additionally at the *Insular* cases with a stark comparison to *Plessy v. Ferguson*, 163 U.S. 537 (1896), finding that "[a]s in the instance of the legal framework established by *Plessy*, the *Insular Cases* have had lasting and deleterious effects on a substantial minority of citizens. The 'redeeming difference is that *Plessy* is no longer the law of the land, while the Supreme Court remains aloof about the repercussions of its actions in deciding the *Insular Cases* as it did, including the fact that these cases are responsible for the establishment of a regime of de facto political apartheid, which continues in full vigor"). For more about Justice Juan R. Torruella, see Sam Roberts, *Juan Torruella, Groundbreaking U.S. Appeals Judge, Dies at 87*, THE NEW YORK TIMES (Oct. 28, 2020), https://www.nytimes.com/2020/10/28/us/juan-torruella-groundbreaking-us-appeals-judge-dies-at-87.html (describing Chief Judge of the United States Court of Appeals for the First Circuit, Juan R. Torruella, as "a groundbreaking Hispanic federal judge in New England who championed the rights of his fellow Puerto Ricans." Not only was Chief Judge Torruella "the only Hispanic to serve on the First Circuit court in Boston," he was also "the first and only Puerto Rican to serve on the First Circuit, which covers Main, Massachusetts, New Hampshire and Rhode Island, as well as Puerto Rico." In addition to his time on the First Circuit, Justice Torruella wrote a book, *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal* (1988), in which "he argued that 'colonial rule and the indignities of second-class citizenship' could be eliminated not by granting independence, as the United States did to the Philippines in 1946, but 'by securing for Puerto Rico equality under American law'—including statehood." Directly affected by the Territorial Incorporation Doctrine, Chief Judge Torruella stated to the Boston University alumni magazine, *Bostonia*, that even he "cannot vote for the president and vice president and [has] no voting representative in Congress simply because [he is] a resident of Puerto Rico," further elaborating that "[t]he bottom line is that U.S. citizens who live in Puerto Rico have no political equality"); *Cf.* U.S. CT. OF APP. FOR THE 1ST CIR., Juan R. Torruella, https://www.ca1.uscourts.gov/juan-r-torruella (last visited Dec. 31, 2022).

I. THE INSULAR CASES IN CONTEXT: A HISTORICAL ACCOUNT AND OVERVIEW OF THE AFTERMATH

"Today, largely viewed by courts through a formalist, ahistorical lens, and devoid of racial reality, the *Insular Cases* still shape the colonial experience of millions of territorial peoples in the United States."[11] These cases, and their aftermath, arose out of an event that took place over a century ago: the Spanish-American War.[12] As stated by the Honorable Gustavo A. Gelpi, "[i]n 1898, the United States became an overseas empire. With the signing of the Treaty of Paris ending the Spanish-American War, the former Spanish territories of Guam and the Philippines in the Pacific Ocean and Puerto Rico in the Atlantic Ocean came under the American flag."[13] The annexation of these former Spanish territories thereby "raised complex constitutional questions" such as whether Congress could hold them "in a permanent state of 'colonial dependence,'" whether these territories must "stand on equal footing with the pre-1898 territories," and, ultimately, whether and "[w]hich constitutional provisions applied to America's newly acquired overseas territories?"[14]

In answering these complex constitutional questions, the Court decided twenty-three cases between 1901 and 1922, now known as the *Insular Cases*. [15] These cases, in an attempt to deal with the cumbersome issues at hand, fashioned the Territorial Incorporation Doctrine.[16] This doctrine "created a then-unprecedented distinction between 'incorporated' territories on their way to becoming states, and 'unincorporated' ones left somewhere in the middle."[17] Whereby the Constitution's limitations on the national government applied fully to the incorporated territories, these limitations would only apply partially to the unincorporated territories, such as Puerto Rico.[18]

Resting on a doctrine "found nowhere in the Constitution," the myriad effect of this doctrine and these cases follow persons in unincorporated territories in an unrelenting manner.[19]

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[11] Susan K. Serrano, *Elevating The Perspectives of U.S. Territorial Peoples: Why The Insular Cases Should Be Taught In Law School*, 21 J. Gender, Race, and Just. 395, 396 (2018).
[12] Gustavo A. Gelpi, *The Insular Cases: A Comparative Historical Study of Puerto Rico, Hawai'i, and the Philippines, The Federal Lawyer*, Apr. 2011, at 1.
[13] *Id.*
[14] Derieux & Alomar, *supra* note 1, at 731-32.
[15] *Id.* at 734.
[16] *Id*. at 721.
[17] *Id.* at 733.
[18] *Id.*
[19] *Id.*at 746.

> In concrete terms, that exclusion impacts the every day lives of the peoples of Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, and the Northern Mariana Islands in far-reaching ways—from the political to the economic, and the social to the cultural. Residents of the territories lack political power on the national stage—they cannot vote in U.S. presidential elections and have no voting representatives in Congress. Territorial residents are statutory citizens (except for American Samoans, who are U.S. nationals), and, as some scholars have argued, this citizenship is second-class because Congress can revoke it at any time.[20]

A. The Court, in Balzac, held that residents of unincorporated territories have no Sixth Amendment right to a jury trial.

The consequences of allowing Congress the power to provide different rights to different persons, depending on whether they are within an unincorporated, as opposed to incorporated territory, have affected and continue to affect the lives of these persons in additional peculiar ways.[21] For instance, after the "Court ruled that the Jones Act, which had conferred U.S. citizenship on Puerto Rico's inhabitants in 1917, did not operate to 'incorporate Porto Rico into the United States,'" the Court, in *Balzac v. Porto Rico*, then went on to find that "residents of Puerto Rico could not demand a [Six Amendment] trial by jury because '[i]t is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it.'"[22] Like many of the determinations by the Court at this time, here, the view of the Court had underlying tones of racism and colonialism.[23] As stated by Professor Serrano, "[u]nlike Alaska, which was 'sparsely settled' and amenable to settlement by white American citizens, the Court again viewed the Philippines and Puerto Rico as 'distant ocean communities of a different origin and language from those of our continental people'"; the Court further reasoned that a jury right

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[20] Serrano, *supra* note 11, at 411-12.
[21] *Id.* at 409-14.
[22] *Id.* at 409; *See also Balzac v. Porto Rico*, 258 U.S. 298, 301-10 (1922) (rejecting Balzac's contention that "he was entitled to a jury in such a case under the Sixth Amendment to the Constitution" and finding that residents in unincorporated territories, such as Puerto Rico, have no Sixth Amendment right to a jury trial).
[23] *Id.* at 409-10.

should not "be imposed on these 'ancient communities' with little knowledge of popular government."[24]

B. Due to the definition of the United States only including the fifty states and the District of Columbia, the residents of unincorporated territories, such as Puerto Rico, suffer discrimination in the extent of aid from federal programs to territorial residents.

Similar to the denial of the Sixth Amendment right to a jury trial based on Puerto Rico's unincorporated status, the Court has also held, in *Harris v. Rosario*, "that if there is a rational basis for doing so, federal programs can provide less aid to territorial residents."[25] Likewise, the Court found, in *Califano v. Gautier Torres*, that "it is constitutional for the Social Security Administration to discontinue Supplemental Security Income benefit payments to aged, blind, and disabled persons who move to the territories."[26] A recent example of this same problem occurred in *United States v. Vaello Madero*.[27]

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[24] *Id.* at 409.

[25] *Id.* at 412; *See also Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (holding that providing less federal financial assistance through the Aid to Families with Dependent Children program to families in Puerto Rico with needy children than "families with needy dependent children" in states and incorporated territories did not violate the Fifth Amendment's equal protection guarantee. The Court reasoned that three factors "suffice to form the rational basis for the challenged statutory classification": (1) "Puerto Rican residents do not contribute to the federal treasury"; (2) "the cost of treating Puerto Rico as a State under the statute would be high"; and (3) "greater benefits would disrupt the Puerto Rican economy").

[26] *Id.*; *See also Califano v. Gautier Torres,* 435 U.S. 1, 1-2 (1978) (finding that "[c]ertain benefits under the Social Security Act, as amended in 1972, are payable only to residents of the United States, defined as the 50 States and the District of Columbia … One of the 1972 amendments to the Social Security Act created a uniform program, known as the Supplemental Security Income (SSI) program, for aid to qualified aged, blind, and disabled persons").

[27] *See generally U.S. v. Vaello Madero*, 142 S. Ct. 1539, 1541-44 (2022) (holding that, "[i]n light of the text of the Constitution, longstanding historical practice, and this Court's precedents," "the equal-protection component of the Fifth Amendment's Due Process Clause" does not require "Congress to make Supplemental Income benefits available to residents of Puerto Rico to the same extent that Congress makes those benefits available to residents of the States." The Court reasoned that "Congress need only have a rational basis for its tax and benefits programs" and "the fact that residents of Puerto Rico are typically exempt from most federal income, gift, estate, and excise taxes—supplies a rational basis for likewise distinguishing residents of Puerto Rico from residents of the States for purposes of the Supplemental Security Income *benefits* program." The Court further reasoned that "if this Court were to require identical treatment on the benefits side, residents of the States

In *U.S. v. Vaello Madero*, the respondent received Supplemental Security Income benefits while residing in New York; however, he lost his eligibility to receive these benefits by moving to Puerto Rico.[28] Despite loss of his eligibility, the government continued to provide the benefits until it found out that he resided in Puerto Rico; at which time, the government sought to sue the respondent to recover the monetary worth of those benefits.[29] In response, the respondent argued that excluding Puerto Rican residents from these benefits was unconstitutional.[30] The Court rejected this argument and found that the Constitution does not require Congress to extend Supplemental Security Income benefits to persons that reside in Puerto Rico; essentially, the Court reasoned that "Congress may distinguish the Territories from the States in tax and benefit programs such as Supplemental Security Income, so long as Congress has a rational basis for doing so."[31]

C. As residents of an unincorporated territory, persons residing in Puerto Rico have no constitutional or international law right to vote in U.S. presidential elections.[32]

Despite the Court's acknowledgement of "the loyalty, contributions, and sacrifices of those who are in common citizens of Puerto Rico and the United States," the Court provides that "Puerto Rico has no electors" and its residents may not participate in presidential voting unless "they take up residence in one of the 50 states."[33] The Court further reasoned that the path to changing this "lies not through the courts but through the constitutional amending process" and that "the road to statehood—if that is what Puerto Ricans want—runs through Congress."[34] The Court elaborates on this notion by stating that "to resolve the asserted infirmity of having Puerto Ricans classed as citizens of the United States but unable to vote for President, [f]or

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could presumably insist that federal taxes be imposed on residents of Puerto Rico and other Territories in the same way that those taxes are imposed on residents of the States." This, the Court reasoned, "would inflict significant new financial burdens on residents of Puerto Rico, with serious implications for the Puerto Rican people and the Puerto Rican economy." The Court then summarizes that "[t]he Constitution does not require that extreme outcome").

[28] *Id.*at 1542.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 1542-43.

[32] Serrano, *supra* note 10, at 412; *See generally Igartua-De La Rosa v. U.S.*, 417 F.3d 145, 147-52 (1st Cir. 2005) (rejecting Puerto Rican residents' claims that their inability to vote for the U.S. president violated both constitutional rights and international obligations).

[33] *Igartua-De La Rosa*, 417 F.3d at 148.

[34] *Id.*

example, Puerto Rico could be made a state or, alternatively, could be recognized as an independent nation."[35]

D. Due to their status as residents of an unincorporated territory, the people of Puerto Rico lose out on essential constitutional safeguards such as the Fifth Amendment right to presentment or indictment by a grand jury and the Sixth Amendment right to confront witnesses.[36]

Professor Ediberto Roman aptly describes, as follows, the devastating effect that often results from the differential treatment often provided to unincorporated territories, such as Puerto Rico, that primarily derives from the questionable distinction created by the Territorial Incorporation Doctrine:

> The Court in *Balzac v. Porto* [sic] *Rico*, held that the Sixth Amendment guarantee of a speedy and public trial, by an impartial jury in criminal prosecutions does not apply to the residents of Puerto Rico, unless such rights are made applicable by the local legislature. In *Ocampo v. United States*, the Court held that the Fifth Amendment right to presentment or indictment by a grand jury is inapplicable to the inhabitants of unincorporated territories. In *Dowdell v. United States*, the Court denied a criminal defendant in an unincorporated territory the Sixth Amendment right to confront witnesses. In *Dorr*, the Court held that the Sixth Amendment right to a jury trial was not a fundamental right as applied to the unincorporated territories. Finally, in *Balzac*, the Court reasoned that these rights were not fundamental rights, but procedural rights established by those societies of more sophisticated Anglo-Saxon origin.[37]

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[35] *Id*. at 152.

[36] Ediberto Roman, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 Fla. St. U. L. Rev. 1, 12-13 (1998) (discussing how "several Supreme Court decisions [have] highlighted a difference in the constitutional safeguards available to the people of Puerto Rico").

[37] *Id.*; *See also Balzac*, 258 U.S. 298 (discussed above); Ocampo v. U.S. 234 U.S. 91, 98 (1914) (finding that "Section 5 of the act of Congress contains no specific requirement of a presentment or indictment by grand jury, such as is contained in the 5th Amendment of the Constitution of the United States. And in this respect the Constitution does not, of its own force apply to the Islands"); Dowdell v. U.S., 221 U.S. 325, 332-33 (1911) (sustaining a Phillipine conviction that likely would have violated the defendant's Sixth Amendment rights had the Phillipines been an incorporated, rather than unincorporated, territory); Dorr

E. Threatening customary rights and creating harm in unincorporated territory residents' everyday experiences, the framework and aftermath of the Insular Cases have created lasting and continuous negative consequences in the daily life of Puerto Rican, Filipino, and other unincorporated territory residents alike.[38]

As evident from the non-comprehensive examples above, which perhaps only scratch the surface of the sweeping effects that have had—and continue to have— "long-lasting detrimental impacts on the peoples of the U.S. territories"; essentially, "the *Insular Cases* reflect a discourse of exclusion and frame territorial peoples as perpetual 'foreigners,' 'outsiders,' and 'others,' thereby facilitating their marginalization."[39] Likewise, for many in the territories, "the inability to decide their own political fate is deeply subordinating."[40] Thereby, a question is propounded: does the Constitution really stand for this?

II. THE ROAD TO *DOBBS*: THE DISMISSAL OF ABORTION JURISPRUDENCE IN THE FACE OF *STARE DECISIS*

With *Dobbs v. Jackson Women's Health Organization*, the jurisprudence on abortion appears to have come full circle.[41] "For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens."[42] Then, "[o]n January 22, 1973, the Supreme Court of the United States issued its opinion in *Roe v. Wade*, and held that a woman has a fundamental right under the United States Constitution to decide whether to end her pregnancy."[43] Essentially, as Justice Alito provides in the majority opinion of *Dobbs*, "[e]ven though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one."[44] Under the trimester framework provided in *Roe*, "each trimester of pregnancy was regulated differently, but the most critical line was drawn at roughly the end of the second trimester, which at the time, corresponded to the point at which a fetus was thought to

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v. U.S., 195 U.S. 138, 144-45 (quoting Justice Brown and stating that such rights "are not fundamental in their nature, but concern merely a method of procedure").

[38] Serrano, *supra* note 11, at 411-13.

[39] *Id.* at 411.

[40] *Id.* at 412.

[41] *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[42] *Id.* at 2240.

[43] Linda L. Schlueter, *40th Anniversary of Roe v. Wade: Reflections Past, Present, and Future,* 40 Ohio N.U. L. Rev. 105, 107 (2013).

[44] *Dobbs*, 142 S. Ct. at 2240.

achieve 'viability,' *i.e.*, the ability to survive outside the womb."[45] Elaborating on the lack of explanation for the sudden framework and analysis provided in *Roe*, Justice Alito states "even abortion supporters have found it hard to defend *Roe*'s reasoning."[46]

The Court, in 1992, partially overruled *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey* by displacing the trimester framework and substituting "a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an 'undue burden' on a woman's right to have an abortion."[47] Despite the plurality's failure to recognize the depth and new found difficulties this "constitutionally amorphous 'undue burden' standard would create, 'undue burden' generally remained the standard until *Dobbs*.[48] This standard required the Court to determine whether a proposed abortion-related regulation placed a substantial obstacle in the way of a woman's right to choose.[49]

Moreover, at the time, "the opinion [in *Casey*] concluded that *stare decisis*, which calls for prior decisions to be followed in most instances, required adherence to what it called *Roe*'s "central holding"—that a State may not constitutionally protect fetal life before 'viability'—even if that holding was wrong."[50] The Court then steered away from the prior adherence to *stare decisis* in *Casey* in its most recent seminal case on abortion, *Dobbs v. Jackson Women's Health Organization*.[51] In *Dobbs*, the State of Mississippi asked the Court "to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as 'viable' outside the womb"; the state argued for the Court to entirely "overrule *Roe* and *Casey*

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[45] *Id.* at 2241.
[46] *Id*.
[47] *Id.* at 2242.
[48] Jeffrey A. Van Detta, *"Constitutionalizing Roe, Casey, and Carhart: A Due-Process Anti-Discrimination Principle To Give Constitutional Content To The "Undue Burden" Standard of Review Applied To Abortion Control Legislation*, 10 So. Cal. Rev. L. & Women's Studies 211, 217, 286 (Spring 2011) (providing, in footnote 264, that "[t]he plurality erred in failing to recognize that the undue burden standard must do more than merely ask whether a particular statute places 'a substantial obstacle'—an incredibly malleable and difficult to use test—to the exercise of the rights of choice and of reproductive autonomy").
[49] *Id.* at 286; *See also* Planned Parenthood of Se. Pa.v. Casey, 505 U.S. 833, 888-99 (1992) (providing some vague guidelines for what constitutes a substantial obstacle such as to constitute an undue burden; the opinion, essentially, describes the following as a substantial obstacle: a spousal consent requirement, a spousal notice requirement, a total ban on pre-viability abortions, and a requirement for minors to get parental consent without judicial bypass).
[50] *Dobbs*, 142 S. Ct. at 2241.
[51] *Id.*

and once again allow each State to regulate abortion as its citizens wish."[52] The Court then gave them exactly that wish, returning the law largely to the state it was for the "[f]irst 185 years after the adoption of the Constitution," in which each state is now permitted to address the issue "in accordance with the views of its citizens."[53] Thereby, the decision on whether and how to regulate abortion is now, essentially, left up to each state and is reviewed under rational basis review, as opposed to the previous and more stringent undue burden standard.[54]

III. THE EROSION OF *STARE DECISIS*: HAS THE COURT KNOCKED DOWN THE BARRIERS TO OVERRULING DISCRIMINATORY PRECEDENT?

Generally, "[p]rinciples of *stare decisis* [have held] that subsequent decisions must give deference to prior rulings in the absence of a strong basis for a different ruling."[55] Proponents of adhering to this doctrine argue that "[*s*]*tare decisis* creates and fosters predictability in the meaning and application of the law" and that "[r]especting *stare decisis* means sticking to some wrong decisions."[56] However, *stare decisis* will not always create a bar to deviating from precedent; courts have repeatedly found that "[t]he law is not static, and *stare decisis* does not mandate that a rule of law once established may never change."[57] Although, for the rule of law to change, "a rule once adopted may be changed only by the court that adopted it, a higher court within the same jurisdiction or the United States Supreme Court."[58]

Recently, in *Dobbs*, the United States Supreme Court was particularly inclined to change the rule of law it previously adopted, straying away from any conventional loyalty to the doctrine of *stare decisis*.[59] This deviance from *stare decisis* becomes strikingly evident as Justice Alito, in the majority opinion, starts the heart of the Court's analysis with "as the Court has reiterated time and time, again, adherence to precedent is not an 'inexorable command.' There are occasions when past decisions should be overruled, and as we will explain, this is one of them."[60] Justice Alito continues to elaborate

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[52] *Id.*
[53] *Id.* at 2240-42.
[54] *Id*.
[55] C.J.S. *Courts* § 184 (2022) 1 Martin D. Carr & Anna Taylor Schwing, *California Affirmative Defenses Expert Series* § 14:62 (2d ed. 2022).
[56] *Id.*
[57] *Id.*
[58] *Id*.
[59] *Dobbs*, 142 S. Ct. at 2261.
[60] *Id.*

that *stare decisis* "is at its weakest when we interpret the Constitution" and that "when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake."[61] Demonstrating the importance of being able to overrule past constitutional decisions, Alito further provides that "[a]n erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. Therefore, in appropriate circumstances, we must be willing to reconsider and, if necessary, overrule constitutional decisions."[62] The Court then demonstrates that it, time and time again, has been willing to overrule its past constitutional decisions, even providing a footnote displaying over thirty examples of when it has done so in the past.[63] Justice Alito further bolsters the Court's argument, stating that "[n]o Justice of this Court has ever argued that the Court should *never* overrule a constitutional decision."[64] "Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country."[65]

The Court then lays out a new framework, based largely upon the previous frameworks provided by *Janus v. State, County, and Municipal Employees*, as well as *Ramos v. Louisiana*, that contains five factors to help decide when precedent should be overruled.[66] Using these five factors to the Court's advantage, the Court overrules and changes the legal landscape of nearly fifty years of abortion jurisprudence, squarely in the face of *stare decisis*.[67] This treatment of the doctrine, seemingly demonstrates that the Court has done away with its traditional reverence for *stare decisis* and, more

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[61] *Id.* at 2262.
[62] *Id.*
[63] *Id.* at 2263 (footnote 48 providing a non-exclusive, yet expansive list, of cases and principles that have been overruled, despite the Court's alleged adherence to the doctrine of stare decisis).
[64] *Id.* at 2264.
[65] *Id.* at 2263-64.
[66] *Id.* at 2264.
[67] *Id.* at 2265-84; *See also Janus v. Am. Fed. of State, Cnty., and Mun. Emp.*, 138 S. Ct. 2448, 2478-79 (2018) (looking to past Supreme Court cases and finding five factors that counsel against adhering to stare decisis and counsel towards overturning prior decisions; these five factors are set forth as follows: "the quality of the [case's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision"); *Cf. Ramos v. La.*, 140 S. Ct. 1390 (2020) (J. Kavanaugh concurring in part and, after citing to thirty "of the Court's most notable and consequential decisions hav[ing] entailed overruling precedent," stating the following seven factors identified by the Supreme Court in overruling past cases: "the quality of the precedent's reasoning; the precedent's consistency and coherence with previous or subsequent decisions; changed law since the prior decision; changed facts since the prior decision; the workability of precedent; the reliance interests of those who have relied on the precedent; and the age of the precedent").

or less, created a soft, multi-factor-balancing test for whether and when the Court will adhere to precedent; although perhaps a stark contrast from its previous dealings with case precedent, this may create a novel argument for finally turning over a set of disfavored constitutional decisions, the *Insular Cases*.[68]

IV. CONCLUSION: THE *DOBBS* FACTORS MILITATE IN FAVOR OF OVERRULING

A. In light of the far-reaching and damaging effects of the Insular Cases, the nature of the Court's error demonstrates a profound need for the cases to be re-visited and overruled.

Like in *Dobbs*, where the "five factors weigh[ed] strongly in favor of overruling *Roe* and *Casey*," these five factors could and should be used to overrule the *Insular Cases*; as previously listed, the five factors are as

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[68] *Id.* (generally, a soft-multi-factor balancing test takes into account of non-exclusive factors that are often, more or less, equally weighted and where no particular factor is dispositive of the issue, such as the Forum Non Conveniens doctrine, discussed in Gulf Oil Corp., 330 U.S. 501, 508-09 (1947) which weighs a series of public and private interest factors, with none of them being dispositive, in its determination of whether to transfer the case to a more convenient forum); *See also Gulf Oil Corp.*, 330 U.S. at 512 (Justice Black criticizing such tests in his dissent, stating "[t]he broad and indefinite discretion left to federal courts to decide the question of convenience from the welter of factors which are relevant to such judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible"); *See generally The Irony of Instrumentalism: Using Dworkin's Principle-Rule Distinction To Reconceptualize Metaphorically A Substance-Procedure Dissonance Exemplified By Forum Non Conveniens Dismissals In International Product Injury Cases*, 87 Marquette L. Rev. 425, 431-32 (2004) (discussing Justice Black's *Gulf Oil* dissent and the issue with the Forum Non Conveniens doctrine; moreover, referring generally to Gary B. Born & David Westin, *Int'l Civil Litigation in United States Courts* 289-92 (Kluwer 2d ed. 1992) as an informative source that "illustrat[es] the typically conclusory 'application' of these factors to justify a particular result"); *Cf. Justice Restored: Using A Preservation-Of-Court Access Approach To Replace Forum Non Conveniens In Five International Product-Injury Cases*, 28 Northwestern J. of Int'l L. & Bus. 53, 58-60 (Fall 2003) (also discussing Justice Black's *Gulf Oil* dissent and the overarching issue with the Forum Non Conveniens soft multi-factor-balancing test); *Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. and Placement et al.*, 326 U.S. 310, 323 (1945) (Justice Black dissenting, criticizing soft-multi-factor balancing tests and finding that the "uncertain elements" introduced by the Court "confus[e] the simple pattern and ten[d] to curtail the exercise of State powers to an extent not justified by the Constitution"); *See generally* Jeffrey A. Van Detta & Shiv K. Kapoor, *Extraterritorial Personal Jurisdiction For The Twenty-First Century: A Case Study Reconceptualizing The Typical Long-Arm Statute To Codify And Refine International Shoe After Its First 60 Years*, 3 Seten Hall Circuit Review 339 (2007) (discussing Justice Black's criticism of *Int'l Shoe*).

follows: "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[69] Beginning with the first factor, "the nature of the Court's error," the Court states that "[a]n erroneous interpretation of the Constitution is always important, but some are more damaging than others."[70] Comparing *Roe* to *Plessy v. Ferguson*, Justice Alito finds *Roe* was also "'egregiously wrong' on the day it was decided"; he finds this, in large part, because "*Roe*'s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed."[71]

Likewise, the reliance on incorporated versus unincorporated territories is "outside the bounds of any reasonable interpretation" of the Territories Clause or any other provision pointed to.[72] The Territories Clause, in full, states that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."[73] Nowhere in that Clause, or the Constitution in general, does it appear to explicitly or implicitly mention anything about a differentiation between an incorporated and an unincorporated territory.[74]

Moreover, like *Roe* and *Casey*, whose alleged "errors do not concern some arcane corner of the law of little importance to the American People," the "errors" associated with the *Insular Cases* and the Territorial Incorporation Doctrine create "question[s] of profound moral and social importance."[75] Perhaps stated best by Puerto Rican jurist and former Chief Judge of the United States District Court for the District of Puerto Rico, Juan R. Torruella argues that the *Insular Cases* "contravened established doctrine that, as based on sound constitutional principles, substitut[ed] binding jurisprudence with theories that were unsupported in our traditions or system of government and which were specifically created to meet the political and racial agendas of the times."[76] He elaborates that "the basis on which they were premised—that the United States could hold territories and their inhabitants in a colonial status indefinitely—was unprecedented in our

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[69] *Id.* at 2265.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] U.S. Const. Art. IV, § 3, cl. 2.
[74] *Id.*
[75] *Dobbs*, 142 S. Ct. at 2265.
[76] Torruella, *supra* note 8, at 346.

history and unauthorized by our Constitution."[77] Furthermore, he expounds that "the continued vitality of these cases represents a constitutional antediluvian anachronism that has created a de jure and de facto condition of political apartheid for the U.S. citizens that reside in Puerto Rico and the other territories."[78] A political apartheid in which, solely because of their status as residents of an unincorporated territory, persons who live in the territories generally cannot vote in U.S. presidential elections, have no voting representatives in Congress, do not have the right to demand a trial by jury, may lose their Supplemental Security Income benefit payments, and, in addition to other far-reaching consequences, essentially have revocable, second-class citizenship.[79] "As the Court's landmark decision in *West Coast Hotel* illustrates, the Court has previously overruled decisions that wrongly removed an issue from the people and the democratic process."[80] If the nature of such an error favored overruling the precedent at hand, does it not naturally follow that removing people from the democratic process altogether, such as by taking away the ability to vote, also militates in favor of overruling precedent?[81]

B. Founded in racist and imperialist notions, the quality of the Court's reasoning, in concocting an elaborate distinction between incorporated and unincorporated territorial lands, supports overturning the cases to prevent reliance on discriminatory and ungrounded precedent.

Following the Court's analysis on the "nature of Court's error," the Court then addresses "the quality of the reasoning" as a factor favoring overturning prior jurisprudence.[82] One thing, in particular, that the Court looks at under

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[77] *Id.*
[78] *Id.* at 347.
[79] *See generally* Serrano, *supra* note 10, at 409-14.
[80] *Dobbs*, 142 S. Ct. at 2265; *See generally* W. Coast Hotel v. Parrish, 300 U.S. 379 (1937) (overruling Adkins v. Children's Hosp., 261 U.S. 525 (1923)); *Cf.* Jason D. Ray, *Judicially Imposed Limits on the Sanction Authority of Texas Agencies,* 2016 TXCLE Advanced Admin. L. 6.II (2016) (providing that West Coast Hotel v. Parrish "signaled an end to the *Lochner* era"); *Cf.* 1 Tex. A&M L. Rev. 129, 143 (Fall 2013) (providing in footnote 79 that "[t]he Court in *West Coast Hotel* upheld the state of Washington's law providing for a minimum wage to women, even though the Court had struck down a nearly identical law in Adkins v. Children's Hospital, 261 U.S. 525 (1923). The year 1937 is widely recognized as the date when the *Lochner* era ended and substantive due process no longer recognized property and contract rights as fundamental in nature").
[81] *Id.*
[82] *Id.* at 2265-72.

this factor is whether the precedent "stood on exceptionally weak grounds."[83] Essentially, these "exceptionally weak grounds" appear to be found by the Court when the precedent lacks "firm grounding in constitutional text, history, or precedent" and these weak grounds can be shown, to an extent, by the Court having not defended or preserved the reasoning of that precedent in future cases.[84] Like the lack of defense or preservation of *Roe* in *Casey*, "defenders do not attempt to defend [the] actual reasoning" of the *Insular Cases* and territorial incorporation.[85] Further, the quality of the reasoning of "the Territorial Incorporation Doctrine could doubtfully 'withstand careful analysis' because it is clearly at odds with other enduring precedent, fails to consider 'authorities pointing in an opposite direction,' and—perhaps most critically—discriminates against and demeans the residents of the U.S. territories."[86]

Looking back at Justice Alito's analysis of *Roe*, in the same vein, he found that *Roe* "relied on an erroneous historical narrative," devoting "great attention to and presumably rel[ying] on matters that have no bearing on the meaning of the Constitution."[87] "It concocted an elaborate set or rules, with different restrictions for each trimester of pregnancy, but it did not explain how this veritable code could be teased out of anything in the Constitution, the history of abortion laws, prior precedent, or any other cited source."[88] Similarly here, with the *Insular Cases*, the Court concocted an elaborate distinction between incorporated and unincorporated lands, a distinction "found nowhere in the constitutional text." Analogously to Justice Alito's argument against elaborate concoctions, one may argue that "[i]nterpretative canons should have then—as they should now—disfavor a judicially-created, novel, and atextual gloss on Congress' territorial power," i.e., an elaborate concoction of rules with seemingly no "firm grounding in constitutional text, history, or precedent."[89]

> The distinction between different kinds of territories also lacked historical precedent: Members of the Supreme Court only made the doctrinal leap to 'incorporation' in the 1901 *Insular Cases*. Justices who dissented from those *Insular Cases* pointedly and correctly cited cases '[f]rom *Marbury v. Madison* to the present day,' establishing that constitutional

[83] *Id.* at 2266.
[84] *Id.* at 2266-71.
[85] Derieux & Alomar, *supra* note 1, at 746.
[86] *Id.* at 747.
[87] *Dobbs*, 142 S. Ct. at 2266.
[88] *Id.*
[89] Derieux & Alomar, *supra* note 1, at 748.

> limits to Congress' power applied with full force in the territories. Congress, after all, Justice Harlan stressed in his *Downes* dissent, is a 'creature of the Constitution. It [lacks] powers … not granted, expressly or by necessary implication.' The *Insular Cases* upended that premise by proposing that undefined parts of the Constitution that constrained the national government's power could lay dormant or inapplicable in 'unincorporated' domestic territory until Congress decided otherwise. That the *Insular Cases* manufactured a then-unprecedented and controversial distinction between the two types of territories with no basis on the constitutional text is now well understood.[90]

Being at odds with precedent thus "gravely undermines the respect owed territorial incorporation under *stare decisis*."[91] Such precedent also indicates that whereas Congress' authority over territories may be broad, it is not "unfettered"; it may not be "unfettered, even when Congress acts outside of places within its "sovereign control."[92] Accordingly, "the Court's statements have been consistently more in line with the *Insular Cases*' dissents than with their authoritative rulings."[93]

The quality of the reasoning of the *Insular Cases* is also faulty in its reliance on "discredited racialized concerns over adding millions of nonwhites—in other words, inhabitants of then newly-annexed lands like Puerto Rico" to the United States.[94] Even in the leading *Insular Case*, *Downes*, it "panned extending citizenship to people of an uncivilized race'" and endorsed "treatise passages suggesting that conquering people ought 'govern' 'fierce, savage, and restless people[s] 'with a tighter rein.'"[95] Likewise, in another seminal *Insular Case*, *De Lima v. Bidwell*, the Court "starkly warned against admitting 'savage tribes' into American Society."[96]

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[90] *Id*. at 749-50.
[91] *Id.*
[92] *Id.*
[93] *Id.* at 751.
[94] Derieux & Alomar, *supra* note 1, at 751.
[95] *Id.*
[96] *Id*.; *See also* De Lima v. Bidwell 182 U.S. 1, 180, 219 (1901) (holding that the goods transported from Puerto Rico after Spain's cession of Puerto Rico to the U.S. were not transported from a foreign country for the purposes of U.S. tariff laws and that the U.S. could not collect customs duties through classification of Puerto Rico as a foreign county; the Court found that Puerto Rico no longer constituted a foreign country, reasoning that "[a] foreign country was defined by Mr. Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States." In addition to the primary reasoning propounded by the Court, it appears that it had alternative motives such as to avoid the nationalization of Puerto Rican peoples as can be

With such racial and colonial concerns at the center of the reasoning of the *Insular Cases*, the cases' "purpose and reasoning are unavoidably 'disreputable to modern eyes.'"[97] Thereby, the racist, imperialist, and constitutionally and precedentially foundationless quality of the reasoning of the *Insular Cases* also militate in favor of overruling them.[98]

C. The unworkability of the Insular Cases militates in favor of them being overruled due to the ambiguity in their application, the inconsistency and unpredictability of what rights and protections may be afforded to citizens of unincorporated territories, and the ineffectual workarounds created by the Court.

The Court, in *Dobbs*, next analyzes the workability of precedent as yet another factor that decides whether a case or a line of cases should be overruled.[99] As the Court provides, "[o]ur precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner."[100] In *Dobbs*, the Court elaborates as to when precedent is unworkable; the Court states, for instance, that "*Casey*'s 'undue burden' test has proved to be unworkable" because, "'[p]lucked from nowhere,' it 'seems calculated to perpetuate give-it-a-try litigation' before judges [are] assigned an unwieldy and inappropriate task."[101] Determining whether there was an undue burden, defined as "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability," was inherently difficult for judges, given the ambiguity of the word "substantial" and the general lack of standards for

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seen here: "It is only true to say that counsel shrink somewhat from the consequences of their contention, or if 'shrink' be too strong an expression, deny that it can be carried to the nationalization of uncivilized tribes. Whether that limitation can be logically justified we are not called upon to say. There may be no ready test of the civilized and uncivilized, between those who are capable of self-government and those who are not, available to the judiciary, or which could be applied or enforced by the judiciary. Upon what degree of civilization could civil and political rights be awarded by courts? The question suggests the difficulties, and how essentially the whole matter is legislative, not judicial. Nor can those difficulties be put out of contemplation, under the assumption that the principles which we may declare will have no other consequence to affect duties upon a cargo of sugar. We need not, however, dwell on this part of the discussion. From our construction of the powers of the government and the treaty with Spain in danger of the nationalization of savage tribes cannot arise").

[97] *Id.* at 752.

[98] *Id.* at 751-52.

[99] *Dobbs*, 142 S. Ct. at 2272.

[100] *Id.*

[101] *Id.* at 2275.

determining when a burden was "undue."[102] Thus, the Court found that the lack of workability of the undue burden test militated towards overruling *Casey* because "[c]ontinued adherence…would undermine, not advance, the 'evenhanded, predictable, and consistent development of legal principles.'"[103]

Moreover, "[l]ack of workability has been clear when, for example, precedent makes a distinction that 'prove[s] to be impossible to draw with precision,' has 'been questioned by Members of the Court in later decisions,' or 'defie[s] consistent application.'"[104] From the start of the *Insular Cases*, the unprecedented distinction between incorporated and unincorporated created much difficulty in determining what constitutional provisions, rights, and protections apply in what territories.[105] This, in turn, has led to continuous misapplication and misinterpretation of the *Insular Cases* and the associated Territorial Incorporation Doctrine.[106]

Furthermore, one member of the Court, Justice Gorsuch, has recently thoroughly questioned the *Insular Cases* in his *Vaello Madero* concurrence, both in the quality of their reasoning and their workability as precedent.[107] Justice Gorsuch makes his disdain clear, stating at the very beginning of his concurrence: "[i]t is past time to acknowledge the gravity of [the Court's] error and admit what we know to be true: [t]he *Insular Cases* have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law."[108] As an example of how these cases rest on racial stereotypes, Justice Gorsuch states that both "theories advanced by Justice White and Justice Brown" in the seminal *Insular Case*, *Downes v. Bidwell*, "rested on a view about the Nation's 'right' to acquire and exploit 'an unknown island, peopled with an uncivilized race … for commercial and strategic reasons'—a right that 'could not be practically exercised if the result would be to endow' full constitutional protections 'on those absolutely unfit to receive [them].'"[109]

Justice Gorsuch then provides that he is not alone in questioning the *Insular Cases*, their foundation, and their application; in doing so, quoting justices such as Chief Justice Fuller and Justice Harlan.[110] For instance, in

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[102] *Id.* at 2272.
[103] *Id.* at 2275.
[104] Derieux & Alomar, *supra* note 1, at 756.
[105] *Id*. at 759.
[106] *Id.* at 756.
[107] *Vaello Madero*, 142 S. Ct. at 1552-57.
[108] *Id.* at 1552.
[109] *Id.* at 1553.
[110] *Id.* at 1554.

Downes v. Bidwell, Justice Fuller indicated his dismay that Congress could "keep [a Territory], like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period."[111] Justice Harlan likewise expressed his dismay of the Court "engraft[ing] upon our republican institutions a colonial system such as exists under monarchial governments."[112] Additionally, Justice Gorsuch provides that "Justice Harlan dismissed Justice White's supposed middle ground, which he could find nowhere in the Constitution's terms."[113] Justice Harlan states, in *Downes*, "I am constrained to say that this idea of 'incorporation' has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel."[114]

Justice Gorsuch further contends that the Court itself, not just individual justices, has come to have an issue with these cases; "[w]ith the passage of time, this Court has come to admit discomfort with the *Insular Cases*."[115] Instead of overruling the *Insular Cases* in light of their unworkability and "instead of confronting their errors directly, [Justice Gorsuch argues] this Court has devised a workaround."[116] As a workaround, he argues the Court employs "the specious logic of the *Insular Cases*" and "has proceeded to declare 'fundamental'—and thus applicable even to 'unincorporated' Territories—more of and more of the Constitution's guarantees."[117]

Highlighting the ambiguities created by these cases and the further inconsistency in the application thereof, Justice Gorsuch provides some of the questions created: "[w]hat provision of the Constitution could any judge rightly declare less than fundamental?"[118] Moreover, "[o]n what basis could any judge profess the right to draw distinctions between incorporated and unincorporated Territories, terms nowhere mentioned in the Constitution and which in the past have turned on bigotry?"[119] He then provides a striking example of the inconsistency.[120] Despite the "right to jury trial remain[ing] insufficiently 'fundamental' to apply to some 3 million U.S. citizens in 'unincorporated' Puerto Rico," "the full panoply of constitutional rights apparently applies on the Palmyra Atoll, an uninhabited patch of land in the

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[111] *Id.*; *Downes*, 182 U.S. at 372 (Chief Justice Fuller dissenting).
[112] *Id.*; *Downes*, 182 U.S. at 380 (Justice Harlan concurring in Chief Justice Fuller's dissent).
[113] *Id.*
[114] 21 S. Ct. at 391.
[115] *Id.* at 1555.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.* at 1555-56.
[120] *Id.* at 1556.

Pacific Ocean, because it represents our Nation's only remaining 'incorporated' Territory."[121] Aptly stated, Justice Gorsuch terms this "an implausible and embarrassing state of affairs."[122] This "implausible and embarrassing state of affairs" underscores the unworkability of these cases, featuring why their unviability weighs in favor of them being overruled.[123]

D. Given the unprincipled and unintelligible development of the law created by the Insular Cases, like Dobbs, these cases, as well as the associated Territorial Incorporation Doctrine, create a disruptive effect that counsels in favor of them being overturned.

The Court, in *Dobbs*, then proceeds to analyze its precedent for its "disruptive effect on other areas of the law" under the section, "*Effect on other areas of the law*."[124] The majority provides that "*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions."[125] Listing some of the effects the Court's prior abortion jurisprudence had, the Court states that the "cases have diluted the strict standard for facial constitutional challenges," "ignored the Court's third-party standard doctrine," "disregarded standard *res judicata* principles," "flouted the ordinary rules on the severability of unconstitutional provisions," and "distorted First Amendment doctrines." Most of all, the Court provides "[w]hen vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine 'has failed to deliver the 'principled and intelligible' development of the law that *stare decisis* purports to secure.'"[126]

"[L]ooking within the *Insular Cases*' four corners—as well as related decisions—leaves territorial incorporation as nothing less than the result of a 'very different legal backdrop."[127] As can be seen from the Justice Gorsuch's concurrence described in the above section, the doctrine has "failed to deliver the 'principled and intelligible' development of the law that *stare decisis* purports to secure'" through its interpretation and application being so unstable that the Court had to develop workarounds instead of continued development.[128] Arguably, there is nothing more unprincipled or

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[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Dobbs*, 142 S. Ct. at 2265-76.
[125] *Id.* at 2275.
[126] *Id.* at 2275-76.
[127] Derieux & Alomar, *supra* note 1, at 765.
[128] *Dobbs*, 142 S. Ct. at 2275.

unintelligible than "the continuing notion, embodied in the doctrine of territorial incorporation, that Congress can, on a whim, 'switch the Constitution on and off' in 'unincorporated territories."[129] Moreover, the disruptive effect of these cases is so virulent that, "since the 1950s, the Supreme Court has cabined the *Insular Cases* to their specific facts and holdings, warning [in *Reid v. Covert*] that the territorial incorporation framework was a 'very dangerous doctrine' that should not be given any 'further expansion.'"[130] Therefore, the engineered workarounds to the Territorial Incorporation Doctrine and the *Insular Cases*, the unprincipled and unintelligible development of these cases and the surrounding law, and their overall disruptive effect, all counsel towards overruling the *Insular Cases*.[131]

E. The disfavored treatment of the Insular Cases by the Supreme Court, the lack of clear standards and application of the cases and associated doctrine, and the retention of broad territorial power in the absence of these cases, militate in favor of overturning them.

The final factor that the Court looked at in whether to overrule its precedents was whether overruling the precedent would "upend substantial reliance interests."[132] The Court found, in *Dobbs*, that overruling *Roe* and *Casey* would not upend these interests.[133] The Court stated that [t]raditional reliance interests arise 'where advance planning is most obviously a necessity.'"[134] In agreement with *Casey*, the Court found that "concrete reliance interest [were] not present here" because "those traditional reliance interests were not implicated [since] getting an abortion is generally 'unplanned activity,' and reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.'"[135] The Court also looked to "intangible form[s] of reliance."[136] Finding that the "Court is ill-equipped to assess 'generalized assertions about the national psyche," the Court did not find concrete reliance interests in the notion that "'people [had] organized intimate relationships and made choices that define their views of themselves and their places in society … in reliance on the availability of abortion in the event that contraception should fail' and

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[129] Deriuex & Alomar, *supra* note 1, at 743.
[130] *Id.* at 766-67.
[131] *Dobbs*, 142 S. Ct. at 2275-76.
[132] *Id.* at 2276.
[133] *Id.* at 2276-78.
[134] *Id.* at 2276.
[135] *Id.*
[136] *Id.*

that '[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives'"; the Court instead found that this notion of reliance "finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in 'cases involving property and contract rights.'"[137] The Court further noted that "[w]hen a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter."[138]

Here, whereas the Territorial Incorporation Doctrine has governed for over a century, any reliance is misplaced due to it being treated "as an anomaly" by the Supreme Court for more than half of that time period.[139] Moreover, its lack of clear standards and inconsistent application also counsel against any form of tangible reliance.[140] Criticized avidly from the start, reliance on the reasoning of these cases is also often misguided and misplaced.[141] Additionally, given the vast amount of power and broad authority given over territories, even in the absence of these cases, reliance is unfounded; "recent Supreme Court cases [such as *Sanchez Valle*, *Fitisemanu*, and *Vaello Madero*] have notably reaffirmed Congress' expansive powers over U.S. territories without mentioning the *Insular Cases*—or whether the territories at issue are 'unincorporated.'"[142] Thus, with the advent of the Court being unwilling to look into intangible reliance interests and the seeming scarcity of substantial tangible reliance to be upended here, the dearth of reliance also militates in favor of overturning the *Insular Cases*.[143]

F. The depreciated value of stare decisis, in conjunction with the strength of the five Dobbs factors weighing in favor of overturning them, mandates the Insular Cases being overruled once and for all.

Overall, the arguments for keeping these cases on the books are largely only those underlying the doctrine of *stare decisis*; Justice Powell provided these three primary reasons for why to adhere to *stare decisis*: "first, *stare decisis* makes the work of judges easier because courts need not reexamine the merits of every relevant precedent on each appeal; second, it

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[137] *Id.*
[138] *Id.* at 2277.
[139] Derieux & Alomar, *supra* note 1, at 767-68.
[140] *Vaello Madero*, 142 S. Ct. at 1552-57 (see J. Gorsuch's concurrence, generally).
[141] *Id.*
[142] Derieux & Alomar, *supra* note 1, at 769-770.
[143] *Dobbs*, 142 S. Ct. at 2276-77.

enhances stability in the law by supporting a predictable set of rules on which to base behavior; and third, it supports public legitimacy of the decisions of the courts."[144] As demonstrated in the analysis of the above factors, these three reasons for adhering to precedent should serve as no barrier to overruling the *Insular Cases* in the face of *stare decisis*.[145] First, the continued application and adherence arguably makes the work of judges more difficult due to the cases' and doctrine's ambiguity and inconsistent use, as well as the workarounds that have had to be created; it would likely be easier on the judges to reconsider and overrule the cases then to continue to attempt to work with unworkable precedent.[146] Second, the lack of stability and the unpredictable inconsistency of these cases, and the application thereof, tend to undermine the conceptual underpinnings of *stare decisis*.[147] Third, the Court would be hard-pressed to demonstrate public legitimacy in these decisions, given the workarounds it has had to create—and the overall imperialistic and racist undertones of the reasoning and foundation underlying the *Insular Cases*.[148]

Moreover, having deviated from *stare decisis* "145 times in cases requiring interpretation of the Constitution," the Court, especially in light of the treatment of *stare decisis* in *Dobbs*, should not fear doing so yet again with the *Insular Cases*.[149] Noting the strikingly disingenuous nature of process arguments, "Barone's law," named after political commentator Michael Barone, states that "all process arguments are insincere."[150]

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[144] C.J.S. *Courts* § 184 (2022) 1 Martin D. Carr & Anna Taylor Schwing, *California Affirmative Defenses Expert Series* § 14:62 (2d ed. 2022); *See also* Russell Rennie, *A Qualified Defense Of The Insular Cases*,
N.Y.U. L. Rev. (2017) (setting forth an unusual argument in support of the *Insular Cases*; "this [n]ote argues that this accommodationist turn in Insular doctrine complicates the legacy of the cases—that their use to enable local peoples to govern themselves as they desire, and to protect their cultures, means the Insular doctrine is not merely defensible but perhaps even necessary, and finds support in arguments from political theory. Moreover, this [n]ote contends, such constitutional accommodation has a long pedigree in the American Constitutional system.")

[145] *Id.*

[146] *See generally* Derieux & Alomar, *supra* note 1; *See generally Vaello Madero*, 142 S. Ct. at 1552-57 (J. Gorsuch, concurring).

[147] *Id*.

[148] *Id.*

[149] Devin Dwyer, *After Roe Ruling, Is 'Stare Decisis' Dead? How The Supreme Court's View of Precedent is Evolving*, ABC NEWS (June 24, 2022, 12:20 PM), https://abcnews.go.com/Politics/roe-ruling-stare-decisis-dead-supremecourtview/story?id=84997047#:~:text=In%20thousands%20of%20rulings%20over,The%20overturning%20of%20Roe%20v.

[150] E-mail from Lance McMillian, Assoc. Prof., Atlanta's. John Marshall L. Sch., to Jacob Gregory, Exec. Legis. Ed., Atlanta's John Marshall L. Sch. (Oct. 3, 2022, 10:47 AM ET).

> Stare decisis is a process argument. Under Barone's law, adherents to it are mostly insincere. When precedent supports the outcome that a judge wants to reach, judges are quick to invoke it. But the doctrine only rarely functions as an actual brake on judicial will, i.e. the Court would reach a totally different result but for following stare decisis, especially in the context of constitutional interpretation. Judges who complain about the Court not following stare decisis routinely disregard it in other cases, hence the insincerity. The malady is universal among Supreme Court justices.[151]

In a similar vein, the respect for *stare decisis* has depreciated for quite some time now, not just in recent treatment; more than twenty years ago, Justice Scalia "opined that 'the doctrine of *stare decisis* has appreciably eroded. Prior decisions that even the cleverest mind cannot distinguish can nowadays simply be overruled.'"[152] The Court will often overrule its precedent when "judicial decisions [are] proven wrong in principle," "are unsuited to modern experience," and "which no longer adequately serve the interests of justice."[153] Essentially, "precedent may not be sufficient reason, in itself, to sustain a rule of law. Where justice demands, reason dictates, equality enjoins, and fair play decrees a change in judge-made law, courts will not lack in determination to establish that change."[154] Thereby, *stare decisis* should, "by no means," act as a "completely consistent or even [as] a strong barrier to revision."[155] With *stare decisis* weakened and the Court's recent jurisprudence weighing heavily in favor, it is time that the Court finally overrule the *Insular Cases* and pull their "rotten foundation" right out from underneath them.[156]

V. AN AFTERWORD: THE APRIL 15, 2024, LETTER TO THE DEPARTMENT OF JUSTICE

Whereas the agonizing effect of these rotten cases is likely to continue for an indeterminate period, Congress has finally taken a step forward in its recent request to the Department of Justice to condemn them once and for

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[151] *Id.*
[152] Yavar Bathaee, *Incompletely Theorized Agreements: An Unworkable Theory of Judicial Modesty*, 34 Fordham Urb. L.J. 1457, 1466 (2007).
[153] 1 John J. Dvorske, John Kimpflen, & Karl Oakes, *Standard Pennsylvania Practice* 2d § 2:254 (2022).
[154] *Id.*
[155] Bathaee, *supra* note 136, at 1466.
[156] *Vaello Madero,* 142 S. Ct. at 1557.

all.[157] Congress promptly evinces its disquietude in the beginning of its letter, expressing its "deep concerns with the Department of Justice's continued reliance on and defense of the *Insular Cases*."[158] Congress then hides no ball, when it addresses the Justice Department directly in its introductory paragraph, arguing that "[t]he Justice Department should similarly recognize the racist logic that the *Insular Cases*' doctrine of territorial incorporation represents and expressly reject this case law."

Congress supports this notion, acknowledging what perhaps both Congress and the Department of Justice likely should have acknowledged long ago, by enumerating the following:

> The people in these territories have been denied essential constitutional protections and human rights for the last 125 years. The key historical moment for this shift away from America's anti-colonial founding was the signing of the Treaty of Paris ending the Spanish-American War and its subsequent ratification by the U.S. Senate on February 6, 1899. Today, residents of the territories pay over $3 billion in federal taxes and serve in the military at rates that exceed any state, but are excluded from life-saving federal benefits, including Supplemental Security Income ("SSI") and the Supplemental Nutrition Assistance Program ("SNAP"). Poverty rates in the U.S. territories range from approximately 23 percent to 60 percent, compared to the national poverty rate of approximately 11 percent. All of this has contributed to double-digit population declines across the territories, disrupting communities and separating families.[159]

Prospectively, this gives rise to a line of questions. Is this matter fully on the shoulders of the Department of Justice? Is this paragraph, in a two-page letter, enough of a response to the endless torment suffered by those affected, day-in and day-out "for the last

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[157] Letter from United States Congress to the Department of Justice (Apr. 15, 2024) (available for viewing at https://www.documentcloud.org/documents/24549508-congressional-request-to-doj-to-condemn-the-insular-cases_41524_updated).
[158] *Id.* (asserting, at the start of its letter, that "[t]he *Insular Cases* broke from the anti-colonial values of our nation's founding to hold that the 'half-civilized,' 'savage,' 'alien races' living in Puerto Rico, Guam, and other U.S. territories were not entitled to the same constitutional rights and democratic participation afforded to people in the continental United States because they were 'unfit' and could not understand 'Anglo-Saxon principles.'")
[159] *Id.*

125 years"?[160] A simple reading breathes excitement and hope, but what are the undertones of this recognition? The whirlwind of devastating consequences that have arisen from this line of cases seemingly require a cumulative effort on behalf of all of those who may lend a helping hand, if we are to sufficiently remedy their on-going disastrous effects.

Notably and furthermore, this is not the first time that Congress has reached out about the matter; back in 2021, a coalition of its members wrote a previous letter addressing these issues.[161] It appears to not be an overstatement that this nation may be applauded for addressing the long-lived elephant in the room, and that one would be filled with dismay and a striking sense of injustice by those not concurring with Congress's assertion that "[t]oday, the Department of Justice has the opportunity to redress this historic error by unequivocally rejecting the discriminatory and racist doctrine of territorial incorporation established by the *Insular Cases*." However, one must also not overlook Congress's putative role in remedying the same.

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[160] *Id*.

[161] *Id*. (providing, in pertinent part, "[a] coalition of Members of Congress previously wrote to you about this issue in 2021." "Since then, the Department has at times seemed to criticize the *Insular Cases*, while at others, it has actively relied upon and continued defending them. This problematic dynamic will likely continue repeating itself, absent the Department taking clear action to condemn the *Insular Cases* and their doctrine of territorial incorporation.")