

SAYING WHAT EVERYONE KNOWS TO BE
TRUE: WHY STARE DECISIS IS NOT AN
OBSTACLE TO OVERRULING THE *INSULAR*
CASES

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ABSTRACT

At no other point in recent history have the so-called *Insular Cases*, and their enduring colonial legacy, elicited as intense a debate in Congress, the U.S. Department of Justice, the federal courts, and the territories as right now. Today, these early-twentieth-century cases—which notoriously established a continuing distinction between “incorporated” and “unincorporated” territories—face unprecedented hostility from policymakers, courts, and scholars. Grounded on white supremacist notions of the inferiority of inhabitants in U.S. territories, the *Insular Cases* finally appear indefensible to modern eyes.

But even if the Supreme Court ever reconsiders the *Insular Cases*, case law more than a century old will not easily fall away. The Court will still have to wrestle with stare decisis if a majority of the Court is willing to overrule the territorial incorporation doctrine. Arguments against territorial incorporation will need to grapple with the notion that “the respect accorded prior decisions *increases*, rather

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than decreases, with their antiquity”¹ Further, experience shows that however ill-reasoned the *Insular Cases* may be, judicial reverence (or inertia) might be a powerful counterweight to their repeal.²

This Article argues that this should not be the case. Whatever the *Insular Cases*’ continued validity,³ neither stare decisis nor their antiquity should protect them from abrogation. The *Insular Cases*—and specifically, the territorial incorporation doctrine that they stand for—meet every factor that the Supreme Court needs to overrule its own precedent.

1. *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) (emphasis added).

2. *See, e.g.*, Michael H. LeRoy, *Death of a Precedent: Should Justices Rethink Their Consensus Norms?*, 43 HOFSTRA L. REV. 377, 395 (2014) (comparing 205 pairs of overruled and overruling Supreme Court cases, finding overruled precedents lasted an average of 29.11 years and that 51% of decisions overruling cases happened within 20 years of a decision).

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

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INTRODUCTION: RENEWED AND WIDESPREAD INTEREST IN
OVERRULING THE *INSULAR CASES*

On March 26, 2021, Congressman Raúl Grijalva (D-AZ), introduced House Resolution No. 279 (“H. Res. 279” or the “*Insular Cases* Resolution”) decrying the Supreme Court’s decisions in the early-twentieth-century *Insular Cases* as “contrary to the text and history of the United States Constitution.”⁴ Denouncing them for “rest[ing] on racial views and stereotypes from the era of *Plessy v. Ferguson* that have long been rejected,”⁵ Grijalva and other sponsors want the U.S. House of Representatives to make clear that the *Insular Cases* no longer apply to “present and future cases and controversies involving the application of the Constitution in [U.S.] territories.”⁶

Following H. Res. 279’s introduction, the House Committee on Natural Resources—which Grijalva chairs—then heard public testimony on May 12, 2021. All witnesses, even those opposing the resolution, denounced the *Insular Cases* “for their racist origins and racial subordination of people in the U.S. territories.”⁷ Congresswoman Stacey Plaskett (D-Virgin Islands) framed the decisions as standing “[a]t the core of the disenfranchisement of territory residents” and creating “a near permanent colonial status.”⁸ She agreed with Northwestern University Professor of History, David Immerwahr’s claim that the *Insular Cases*—much like *Plessy v. Ferguson*—relegated

4. H.R. Res. 279, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-resolution/279/text> [<https://perma.cc/V6RV-AUKR>].

5. *Id.* at 1.

6. *Id.* at 6.

7. *Hearing on H. Res. 279 Before the H. Comm. on Nat. Res.*, 117th Cong. 1 (2021) (statement of Professor Rose Cuison-Villazor, Rutgers Law School), <https://naturalresources.house.gov/imo/media/doc/Testimony,%20Prof.%20Rose%20Cuison-Villazor%20-%20FC%20OIA%20Leg%20Hrg%205.12.21.pdf> [<https://perma.cc/DCA9-6S2J>]; see also *Hearing on H. Res. 279 Before the H. Comm. on Nat. Res.*, 117th Cong. 2 (2021) (statement of Hon. Talauega Eleasalo Va’alele Ale, Lieutenant Governor, Am. Sam.), <https://naturalresources.house.gov/imo/media/doc/Testimony,%20Lt.%20Gov.%20Talauega%20Ale%20-%20FC%20OIA%20Leg%20Hrg%205.12.21.pdf> [<https://perma.cc/QA3L-FV2L>]; *Hearing on H. Res. 279 Before the H. Comm. on Nat. Res.*, 117th Cong. 7 (2021) (statement of Neil Weare, President and Founder, Equally American Legal Def. & Educ. Fund), <https://naturalresources.house.gov/imo/media/doc/Testimony,%20Mr.%20Neil%20Weare%20-%20FC%20OIA%20Leg%20Hrg%205.12.21.pdf> [<https://perma.cc/X3DS-JFSU>].

8. *Hearing on H. Res. 279 Before the H. Comm. on Nat. Res.*, 117th Cong. 1, 3 (2021) (statement of Congresswoman Stacey Plaskett, V.I.), <https://docs.house.gov/meetings/II/II00/20210512/112617/HHRG-117-II00-Wstate-P00061020210512.pdf> [<https://perma.cc/M5PC-5PKT>].

the territories and their peoples “to the back of the constitutional bus.”⁹ Moreover, on March 31, 2021, Guam Vice Speaker Tina Rose Muña Barnes introduced Resolution 56-36 in the Legislature of Guam, which both mirrors and supports Congressman Grijalva’s H. Res. 279.¹⁰

Elsewhere, in June 2021, the U.S. Court of Appeals for the Tenth Circuit took a different tack by embracing the *Insular Cases*’ much maligned territorial incorporation doctrine and reversing the District of Utah’s ruling in *Fitisemanu v. United States*.¹¹ The fractured panel rejected the claim that the Fourteenth Amendment’s Citizenship Clause’s geographic scope includes U.S. territories like American Samoa and, thus, concluded that persons born in American Samoa are not entitled to birthright citizenship. In an opinion authored by Judge Carlos Lucero,¹² the Tenth Circuit leaned into the *Insular Cases*, ruling that because American Samoa is a so-called unincorporated territory—“not intended for statehood”¹³—the Constitution does not command that its residents have a right to U.S. citizenship. But even Judge Lucero criticized the *Insular Cases* for their grounding “on racist ideology” as a way to “license . . . imperial expansion.”¹⁴ The purposes of the decisions, he acknowledged, are “disreputable to modern eyes.”¹⁵

The debate over the *Insular Cases*’ nature, reach, and obsolescence somewhat unexpectedly resurfaced again just a week later—this time, in a Senate confirmation hearing for Puerto Rico Chief District Judge Gustavo Gelpí to the First Circuit.¹⁶ Senator

9. *Id.*; see *Hearing on H. Res. 279 Before the H. Comm. on Nat. Res.*, 117th Cong. 2 (2021) (statement of Dr. Daniel Immerwahr, Prof. of Hist., Northwestern Univ.), <https://naturalresources.house.gov/imo/media/doc/Testimony,%20Dr.%20Daniel%20Immerwahr%20-%20FC%20OIA%20Leg%20Hrg%205.12.21.pdf> [<https://perma.cc/G87B-7DS9>] (“The *Insular Cases* relegated millions to the back of the constitutional bus.”).

10. Leg. Res. 56-36, 36th Leg., 1st Sess. (Guam 2021), [https://www.guamlegislature.com/36th_Guam_Legislature/COR_Res_36th/Res.%20No.%2056-36%20\(COR\).pdf](https://www.guamlegislature.com/36th_Guam_Legislature/COR_Res_36th/Res.%20No.%2056-36%20(COR).pdf) [<https://perma.cc/52AK-FWBV>].

11. 426 F. Supp. 3d 1155, 1195–97 (D. Utah. 2019) (ruling that persons born in American Samoa are citizens of the United States under the Citizenship Clause of the Fourteenth Amendment).

12. *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021).

13. *Id.* at 865 n.1.

14. *Id.* at 869.

15. *Id.* at 870.

16. On May 12, 2021, President Biden nominated Judge Gelpí to the seat of the late-Judge Juan R. Torruella in the U.S. Court of Appeals for the First Circuit. Press Release, The White House, President Biden Announces Third Slate of Judicial Nominees (May 12, 2021), <https://www.whitehouse.gov/briefing->

Michael Lee (R-UT) asked Judge Gelpí, an avowed *Insular Cases* critic, to expound on the legal and policy implications that might follow if the Supreme Court someday overrules the *Insular Cases*.¹⁷

Meanwhile, at the Supreme Court—which has seen a steady number of cases involving the constitution’s applicability in U.S. territories¹⁸—the “much-criticized”¹⁹ *Insular Cases* have “hover[ed] like a dark cloud.”²⁰ Despite the Court’s insistence that the *Insular Cases* were irrelevant its decision in *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, the Court still cast doubt on their continued vitality.²¹ And the dark cloud again looms, most imminently in *United States v. Vaello-Madero*, which the Court heard oral argument for in November 2021.²² There, the U.S. Department of Justice at least glancingly looked to the territorial incorporation doctrine to justify Puerto Rico’s categorical exclusion from the Supplemental Security Income Program at the certiorari stage,²³ only to disclaim the *Insular Cases*’ relevance when

room/statements-releases/2021/05/12/president-biden-announces-third-slate-of-judicial-nominees/ [https://perma.cc/T42E-YL8S]. Judge Gelpí’s confirmation hearing took place on June 23, 2021. Nate Raymond & Mike Scarcella, *U.S. Senate Confirms Puerto Rican Judge Gelpi to 1st Cir. Seat*, REUTERS (Oct. 8, 2021), https://www.reuters.com/legal/legalindustry/us-senate-confirms-puerto-rican-judge-gelpi-1st-circ-seat-2021-10-18/ [https://perma.cc/7EWZ-YJE2].

17. José Delgado, *Gelpí Se Enfrentó a Elogios y Críticas*, EL NUEVO DÍA (June 24, 2021), PressReader, Doc. No. 281586653564434. The Senate confirmed Judge Gelpí in October 2021. He now serves as a judge on the U.S. Court of Appeals for the First Circuit.

18. See *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1942 (2016) (holding that Congress validly excluded Puerto Rico from allowing its municipalities to seek Chapter 9 bankruptcy relief while also finding that Congress had validly kept Puerto Rico bound to Chapter 9’s pre-emption provision); *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876–77 (2016) (holding dual sovereignty carve out of the Double Jeopardy Clause is inapposite to Puerto Rico because the Island, different to the States and the Indian Tribes, is an “Article IV entity” subject to Congress’ plenary territorial powers).

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

20. Transcript of Oral Argument at 82, *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020) (No. 18-1334).

21. *Aurelius*, 140 S. Ct. at 1665 (“[W]hatever [the *Insular Cases*] continued validity we will not extend them in these cases.”). *Aurelius* called on the Court to consider whether the members of the federally created board overseeing Puerto Rico’s debt restructuring were appointed in violation of the Constitution’s Appointments Clause.

22. 141 S. Ct. 1462 (2021).

23. The government’s certiorari petition, filed under the Trump Administration, directly referenced the *Insular* decision of *Ocampo v. United*

pressed at oral argument.²⁴ But, notably, at oral argument, Justice Neil Gorsuch directly asked the Deputy Solicitor General whether the Court should “just admit the *Insular Cases* were incorrectly decided.”²⁵ If the decisions “are wrong” and the government did not argue otherwise, Justice Gorsuch pressed, “why shouldn’t [the Court] just say what everyone knows to be true?”²⁶

Even if the Court opts not to discard the *Insular Cases* and their territorial incorporation doctrine in *Vaello-Madero*, parties in other cases working their way up the courts, including *Fitisemanu*,²⁷ may again soon give the Court another chance. In ongoing cases in the lower federal courts, parties continue to argue that the *Insular Cases* deprive residents of the territories of their basic constitutional rights.²⁸ Indeed, it is more likely at present than at any time in recent memory that at least one of those cases will finally put the territorial incorporation framework squarely before the Court.²⁹ If and when one does, it also seems more likely than at any time in recent

States. 234 U.S. 91 (1914); see Petition for Writ of Certiorari at 10, *United States v. Vaello-Madero*, 141 S. Ct. 1462 (2021) (No. 20-303), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-303.html> [<https://perma.cc/R8J5-3Q7G>].

24. See Transcript of Oral Argument at 8, *United States v. Vaello-Madero*, 141 S. Ct. 1462 (No. 20-303).

25. *Id.* at 9.

26. *Id.*

27. The Tenth Circuit denied a petition to rehear the case en banc in December 2021. The *Fitisemanu* plaintiffs have made clear that they will seek review of the Tenth Circuit’s decision at the Supreme Court. William-Jose Velez Gonzalez, *US Territories Birthright Citizenship Case to Be Appealed to Supreme Court*, PASQUINES (Jan. 4, 2022), <https://pasquines.us/2022/01/04/us-territories-birthright-citizenship-case-to-be-appealed-to-supreme-court/> [<https://perma.cc/2PAU-4JTB>].

28. See generally Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 YALE L.J. F. 284, 298–306 (2020) (discussing whether people born in U.S. territories have a constitutional right to citizenship under the Fourteenth Amendment; whether the Fourth Amendment is incorporated in the U.S. Virgin Islands; and whether exclusion from certain federal benefits programs to Puerto Rico’s residents violates the Fourteenth Amendment’s equal protection guarantee).

29. See *id.* at 298 (noting that cases such as *Fitisemanu* involving the Citizenship Clause of the Fourteenth Amendment could soon find their way to the Supreme Court).

memory that a majority of the Court could finally be ready to overrule their “discredited lineage.”³⁰

What would happen then? While there is growing consensus that the *Insular Cases* stand on par with *Plessy* in their grotesque use of the rule of law to constitutionalize racism, white supremacy, and colonialism, a host of questions remains with respect to the viability of their revocability. To start, what does it mean to overrule the *Insular Cases*? Is it at all possible to completely abrogate the decisions that are usually grouped together under that shorthand? What about partially? And perhaps most importantly, what weight would the Court give the decisions’ longstanding status as “good law”?

Indeed, if the Supreme Court takes up a case that squarely puts territorial incorporation in the balance, the fact that leading *Insular Cases* decisions, such as *Downes v. Bidwell*, are well over a century old will surely weigh heavily. Stare decisis—“fidelity to precedent”³¹—will put a thumb on the scales against overruling territorial incorporation. Even if a majority of the Court is willing to hold that the territorial incorporation doctrine is ill-reasoned (it is), the Court—and, more likely, advocates arguing against for its repeal—will have to wrestle with that doctrine. Arguments against territorial incorporation will have to grapple with the well-understood notion that “the respect accorded prior decisions *increases*, rather than decreases, with their antiquity”³² And experience shows that however ill-reasoned the *Insular Cases* may be, judicial reverence (or inertia) might be a powerful counterweight to their repeal.³³

After briefly surveying the landscape from which the *Insular Cases* sprang, this Article argues that this should not be the case. “[W]hatever [the *Insular Cases*] continued validity[,]”³⁴ neither stare decisis nor their antiquity should protect them from abrogation. The *Insular Cases*—and, specifically, the territorial incorporation doctrine

30. *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 854–55 (2019), *overruled on other grounds* by *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020).

31. *June Med. Servs., LLC v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring).

32. *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) (emphasis added).

33. LeRoy, *supra* note 2, at 395.

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

that they commonly stand for—meet every factor that the Supreme Court has said might merit the Court to overrule its own precedent.³⁵

I. The *Insular Cases*

A. The Geopolitical Context

The so-called Spanish American War marked the United States' coming of age as an imperial power.³⁶ Born of imperialistic ideas at a time when European powers scrambled for holdings in Africa and Asia,³⁷ the War brought Manifest Destiny full circle by “culmina[ting] a national expansionist process” started at the Founding that reached the Pacific Ocean through the “acquisition, by diverse means, of . . . [contiguous] continental lands.”³⁸

The chief purported rationale behind Congress' decision to declare war was liberating Cuba from Spanish colonialism.³⁹ Washington's objectives were more expansive; seizing Spain's remaining outposts in the Caribbean and the Pacific by force, the

35. See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (listing the state decisis factors the Court has identified in past cases).

36. Scholars have long underscored that the “Spanish-American War” nomenclature obscures that Cuban and Filipino independence fighters waged a war of liberation against the Spanish colonial regime for at least three years before the United States declared war against Spain. See Ernesto Hernández López, *Boumediene v. Bush and Guantanamo, Cuba: Does the “Empire Strike Back”?*, 62 S.M.U. L. REV. 117, 154 (2009). See generally Thomas G. Paterson, *U.S. Intervention in Cuba, 1898: Interpreting the Spanish-American-Cuban-Filipino War*, 12 OAH MAG. HIST. 5 (1998) (“Spanish-American-Cuban War . . . is used here in order to represent all of the major participants and to identify where the war was fought and whose interests were most at stake.”); Philip S. Foner, *THE SPANISH-CUBAN-AMERICAN WAR AND THE BIRTH OF AMERICAN IMPERIALISM, 1895-1902*, at vii–viii (1972) (“[Spanish-American War] reflects ignorance of and contempt for the Cubans and their struggle for independence.”).

37. See Ross Dardani, *Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa*, 60 AM. J. LEGAL HIST. 311, 319 (2020) (“U.S. policymakers in the later part of the nineteenth century were . . . influenced by the ascendance of formal empire by European powers, when empire was viewed as morally good and as part of a ‘civilizing mission’”); Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 8–9 (2004) (linking the Spanish-American War and the American colonial aspirations).

38. Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 287–88 (2007) [hereinafter Torruella, *Political Apartheid*].

39. See JUAN R. TORRUELLA, *GLOBAL INTRIGUES: THE ERA OF THE SPANISH-AMERICAN WAR AND THE RISE OF THE UNITED STATES TO WORLD POWER* 107 (2007) (stating that the idea of seizing Cuba was not foreign to the founding generation).

United States brought not just Cuba, but also Guam, the Philippines, and Puerto Rico under its sovereignty.⁴⁰ After waging this “splendid little war” in less than four months,⁴¹ the United States annexed extensive overseas lands for the first time in its history, gaining “an area nearly as large as the entire United States had been in 1784,” inhabited by 8.5 million people—“a population of more than twice the size” at the Founding.⁴²

Consistent with the novelty of an imperialist overseas war, the 1898 Treaty of Paris that capped the Spanish-American conflict also departed from U.S. treaty practice in significant ways.⁴³ Unlike previous treaties resulting in continental expansion,⁴⁴ the 1898 Treaty did not carry an implicit promise of statehood to the former Spanish colonies as a way to resolve the antidemocratic problem of unrepresentative governance⁴⁵—nor did it recognize American

40. Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1759. Signed on December 10, 1898, in Paris, the Treaty’s ratification in the U.S. Senate faced intense opposition. If it were not for Vice President Hobart’s casting his tie-breaking vote, the treaty would have been rejected. JAY SEXTON, *THE MONROE DOCTRINE: EMPIRE AND NATION IN NINETEENTH-CENTURY AMERICA* 211–12 (2011).

41. See WILLIAM R. THAYER, *THE LIFE AND LETTERS OF JOHN HAY* 337 (1915) (excerpt from Letter from John Hay, U.S. Ambassador to the U.K., to Theodore Roosevelt, Lieutenant Colonel, 1st U.S. Volunteer Cavalry (July 27, 1898) referring to the conflict as a “splendid little war”).

42. DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* 80 (2019).

43. JOSE TRIAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 27–28 (1997) (explaining that the Treaty of Paris’s text was a “substantial departure from the normal language” the United States had used in prior acquisition treaties).

44. Treaties preceding the 1898 Treaty of Paris involving the geographic extension of the United States: An Act to Provide for the Government of the Territory of the United States North-West of the River Ohio, ch. 8, 1 Stat. 50 (1789); Louisiana Purchase Agreement, U.S.-Fr., Apr. 30, 1803, 8 Stat. 200; Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252; Treaty Establishing the Boundary in the Territory on the Northwest Coast of America Lying Westward of the Rocky Mountains, U.S.-Gr. Brit., June 15, 1846, 9 Stat. 869; Guadalupe Hidalgo, Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922; Convention Ceding Alaska, U.S.-Russ., Mar. 30, 1867, 15 Stat. 539.

45. See Christina D. Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 *YALE L.J.* (forthcoming 2022) (manuscript at 4) (on file with the *Columbia Human Rights Law Review*) (“The political illegitimacy of unrepresentative federal rule over [territories] inhabitants had been justified by the shared understanding, confirmed by consistent practice,

citizenship for their people.⁴⁶ Instead, Article 9 of the Treaty vested in Congress plenary power to unilaterally determine inhabitants' civil rights and political status.⁴⁷ An uncharted path then lay ahead for America's new colonies.

B. The Constitutional Context

1. The Novelty of Territorial Incorporation

The annexation of Puerto Rico, the Philippines, and Guam raised complex constitutional questions of first impression.

By 1898, it was already settled that Congress "possessed the power of acquiring territory either by conquest or by treaty."⁴⁸ But absorbing Spain's dwindling empire raised other, unexplored constitutional questions.⁴⁹ Could Congress hold the newly annexed

that territorial status was a temporary necessity that would end when a territory became a state.").

46. See *Boumediene v. Bush*, 553 U.S. 723, 756 (2008) ("[A]t this point Congress chose to discontinue its previous practice of *extending* constitutional rights to [U.S.] territories by statute."); José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 411 (1978) ("For the first time in American history, 'in a treaty acquiring territory for the United States, there was no promise of citizenship . . . [nor any] promise, actual or implied, of statehood.'") (alterations in original).

47. The text of Article 9 establishes 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." Treaty of Peace Between the United States of America and the Kingdom of Spain, *supra* note 40, at 1759.

48. James Lowndes, *The Law of Annexed Territory*, 11 POL. SCI. Q. 672, 675 (1896); see also *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (explaining Chief Justice Marshall's thinking that good title to land could be acquired by conquest); *Serè v. Pitot*, 10 U.S. (6 Cranch) 332, 336 (1810) ("The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory."). Chief Justice Taney, however, embraced the opposite view in the infamous *Dred Scott* case. 60 U.S. (19 How.) 393, 446 (1857) ("There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States.").

49. A debate raged on about the many constitutional questions that followed the Spanish-American War in the *Harvard Law Review*. See, e.g., Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 293–93 (1898) (contending that the principles of separation of powers and limited government found in the Constitution apply in all areas governed by the United States); Christopher Columbus Langdell, *Status of Our New Territories*, 12 HARV. L. REV. 365–368 (1899) (arguing that the Constitution only applies to states and not annexed territories); Simeon E. Baldwin, *Constitutional Questions Incident to the*

islands in a permanent state of “colonial dependence”?⁵⁰ Did the Constitution in any way limit Congress’ power to govern national territory? Did it require that they stand on equal footing with the pre-1898 territories? Which constitutional provisions applied to America’s newly acquired overseas territories? Did the Constitution *always* follow the American flag of its own force, or, in contemporary legalese, “*ex proprio vigore*”?

These questions and many others fell to the Supreme Court, then under Chief Justice Melville Fuller, to answer. Erratic and reactionary,⁵¹ the Fuller Court (over Justice Harlan’s lone dissent) had by then concocted the “separate but equal” doctrine announced in the infamous *Plessy v. Ferguson* decision.⁵² *Plessy* was grounded in notions of the inferiority of non-white peoples, and these same racial prejudices, in many judges’ and commentators’ views, drove the outcome of the *Insular Cases*.⁵³

Acquisition and Government by the United States of Island Territory, 12 HARV. L. REV. 393, 405 (1899) (claiming that under the Constitution, territories are a part of the United States); Abbott Lawrence Lowell, *Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155–61 (1899) (arguing that sections of the Constitution placing restraints on Congress apply to annexed territories but not rights guaranteed to citizens of the United States).

50. Baldwin, *supra* note 49, at 412.

51. See, e.g., Richard A. Epstein, *James W. Ely, The Chief Justiceship of Melville W. Fuller 1888-1910*, 40 AM. J. LEGAL HIST. 109, 109 (1996) (“The twenty-two-year period of the Fuller Court has often been regarded as a black hole of American Constitutional law whose twin low points are *Plessy v. Ferguson* and *Lochner v. New York*.”). In addition to opening the door to *Lochnerism* and the “separate but equal” doctrine, the Fuller Court also eviscerated Congress’ power to regulate trusts under the Commerce Clause in *United States v. E.C. Knight*, 156 U.S. 1 (1895). One of its most senior members, Justice Gray, voted with the majority in the *Civil Rights Cases*, 109 U.S. 3 (1883) and, a year later, authored the court’s opinion in *Elk v. Wilkins*, 112 U.S. 94 (1884), finding that Native Americans were not natural-born citizens under the Fourteenth Amendment.

52. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896). With the exception of Justice McKenna, all other eight Justices who decided *Plessy* also decided the *Insular Cases* in 1901. See Pedro A. Malavet, “*The Constitution Follows the Flag . . . But Doesn’t Quite Catch Up with It*: The Story of *Downes v. Bidwell*,” in RACE LAW STORIES 111, 144 (Rachel F. Moran & Devon W. Carbado eds., 2008) (describing the parallels between the cases).

53. See, e.g., *Ballentine v. United States*, 486 F.3d 806, 813 (3d Cir. 2007) (noting “regret” for the “enduring ‘vitality’ of the *Insular Cases*” and approvingly citing comparisons to *Plessy*); *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 162 (1st Cir. 2005) (Torruella, J., dissenting) (“[T]he *Insular Cases* are on par with the Court’s infamous decision in *Plessy* . . . in licensing the downgrading of the rights of discrete minorities within the political hegemony of the United States.”); *Consejo de Salud Playa de Ponce v. Rullan*, 586 F. Supp. 2d 22, 28 (D.C. Cir. 2008)

And what was their outcome? In short, the Supreme Court did its best to square American constitutionalism with European-style, *fin de siècle* colonialism.⁵⁴ It created a then-unprecedented distinction between “incorporated” territories on their way to becoming states, and “unincorporated” ones left somewhere in the middle. In the former, the Constitution’s limitations on the national government ostensibly applied “in full,”⁵⁵ whereas they would only apply “in part” in the latter. Distinguishing between the two was left to Congress. Whether or not Congress spoke to a territory’s incorporation or eventual statehood became the doctrine’s touchstone.⁵⁶ Seeking refuge in an expansive reading of Congress’ plenary powers under the Territorial Clause, the Court afforded the political branches far-reaching authority to govern the new Caribbean and Pacific territories without fully welcoming them into the political and constitutional Union until Congress desired to do so.⁵⁷ At the same time, as Columbia Law Professor Christina Ponsa-Kraus has argued, the decisions of the *Insular Cases* also made it less controversial to suggest that the newly-annexed islands could, at some point, be *de-annexed* from the United States.⁵⁸

Despite this, it is impossible to divorce the added discretion territorial incorporation ostensibly gave Congress to act in the new territories from the reasons why many felt Congress needed that flexibility in the first place. Specifically, the *Insular Cases* answered

(connecting *Insular Cases* and *Plessy*); JOSE TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 45–51 (1997) (surveying the Fuller Court’s membership and the position taken by each Justice in *Plessy* and in the 1901 *Insular Cases*).

54. See KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? 86 (2009) (“[Cases] facilitated the imperial ambitions of turn of the century America while retaining a veneer of commitment to constitutional self-government.”).

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

56. Christina Duffy Burnett [Ponsa-Kraus], *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 802 (2005) [hereinafter Christina Duffy Burnett [Ponsa-Kraus], *Untied States*]; see *Dorr v. United States*, 1915 U.S. 138, 143 (1904) (“Until Congress shall see fit to incorporate territory ceded by treaty into the United States . . . the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon . . . that body as are applicable to the situation.”).

57. The bounds of Congress’ authority over *incorporated* territories, for example, are far from settled. See Duffy Burnett [Ponsa-Kraus], *Untied States*, *supra* note 56, at 802 (“While it is true that the *Insular Cases* rejected the assumption that all U.S. territories were on their way to statehood . . . Congress could withhold statehood indefinitely from an incorporated territory too . . .”).

58. *Id.*

concerns that the Constitution would stand in the way of expansionism by forcing the Nation to integrate its new lands and the mostly non-white people who lived there into the American family. “Are the United States so bound and tied by this Constitution . . . that it can never acquire an island of the sea?” asked the Government in one of its 1901 briefs to the Court.⁵⁹ With territorial incorporation, the Court said “no” and confirmed its understanding that any other answer would be a “false step . . . fatal to the development of . . . the American Empire.”⁶⁰

2. The *Insular* Decisions

While scholars and courts often include different Supreme Court decisions under the “*Insular Cases*” umbrella,⁶¹ at its most expansive, the shorthand refers to twenty-three decisions that the U.S. Supreme Court decided between 1901 and 1922.⁶²

By far, the most influential of those cases was *Downes v. Bidwell*,⁶³ where a highly fractured court found that Puerto Rico was not “part” of the United States for purposes of the federal Constitution’s Uniformity Clause—even after Congress organized a civil government there in 1900.⁶⁴ Because, in the words of (*Plessy* author) Justice Henry Billings Brown, Puerto Rico was “a territory appurtenant and belonging to the United States, but not a part of the United States,”⁶⁵ Congress was free to levy tariffs on Puerto Rico imports in ways it could not if they came from one of the states.

59. Brief for the United States at 69, *Goetze v. United States*, 182 U.S. 221 (1900) (No. 340).

60. *Downes v. Bidwell*, 182 U.S. 244, 286 (1901).

61. See, e.g., Claribel Morales, *Constitutional Law—Puerto Rico and the Ambiguity Within the Federal Courts*, 42 W. NEW ENG. L. REV. 245, 248 (2020) (“Legal scholars disagree on the number of *Insular Cases* . . . with some stating that there are six, while others contend that there are more than two dozen.”).

62. See Christina Duffy Burnett [Ponsa-Kraus], *A Note on the Insular Cases*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 389, 389–90 (Burnett & Marshall eds., 2001) (noting “near[-]universal consensus that the series” begins with cases decided in 1901 and “culminates with *Balzac v. Porto Rico*” in 1922); see also Adriel I. Cepeda Derieux, Note, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico’s Political Process Failure*, 110 COLUM. L. REV. 797, 799 n.7 (2010) (listing and describing all 23 possible “*Insular Cases*”).

63. *Downes*, 182 U.S. at 287 (1901).

64. An Act Temporarily to Provide Revenues and a Civic Government for Puerto Rico, and for Other Purposes, Pub. L. 56-191, 31 Stat. 77 (1900) [hereinafter *Foraker Act*].

65. *Downes*, 182 U.S. at 287.

Writing for a fractured court,⁶⁶ Justice Brown argued that the “United States,” as a political concept, only comprised the states not the territories.⁶⁷ According to Justice Brown, the Constitution only placed limitations on the power Congress exercised “within the United States,”⁶⁸ and not on Congress’ power over the territories. In Brown’s view, both with respect to the pre-1898 territories and to their post-1898 counterparts, Congress was not constitutionally required to extend to their inhabitants any of the rights or structural safeguards available under the federal constitutional text.⁶⁹ The Bill of Rights’ extension to the pre-1898 territories was a mere “liberality”⁷⁰ on Congress’ part—in Brown’s view, nothing in the Constitution required it. In “legislating for the territories,” he warned, however, Congress was nonetheless “subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution.”⁷¹

None of the other Justices adopted Justice Brown’s “radical view.”⁷² In a separate, concurring opinion, Justice White agreed that “restrictions of [a] fundamental nature”⁷³ did limit Congress’ plenary power under the Constitution’s Territorial Clause. But White’s opinion—which first laid out the territorial incorporation doctrine—cast a longer shadow. In Justice White’s view, which soon became the Court’s “unquestioned position,”⁷⁴ the new territories were different from those that came before. Far from it. Pre-1898 territories, had been “incorporated” to the Union and, hence, were “part” of it. The ratifications, for instance, of the Louisiana Purchase Treaty in 1803 and the Alaska Cession Treaty in 1867 “incorporated” those lands into the Union—along with most constitutional protections, American

66. Of the four Justices concurring with Justice Brown’s conclusion, not one joined his opinion. Justice White’s concurrence was joined by Justices Shiras and McKenna, while Justice Grey wrote a separate concurring opinion.

67. *Downes*, 182 U.S. at 285–86.

68. *Id.* at 285.

69. *Id.* at 286.

70. *Id.*

71. *Id.* Justice Brown famously said very little else about how to determine whether a specific “limitation in favor of personal rights” was “fundamental.” Among those he did list were limitations on bills of attainder, ex post facto laws, and titles of nobility. *Id.*

72. Andrew Kent, *Citizenship and Protection*, Boumediene, Munaf, and the Supreme Court’s Misreading of the Insular Cases, 97 IOWA L. REV. 101, 157 (2011).

73. *Downes*, 182 U.S. at 291.

74. EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 80 (2001).

citizenship for their inhabitants, and eventual statehood. Before 1898, the Constitution had indeed followed the flag.

The “new” islands were different in Justice White’s view, and the treaty that annexed them “did not stipulate for incorporation,”⁷⁵ ostensibly leaving the civil and political rights of the people of Puerto Rico, the Philippines, and Guam in Congress’ hands. These were, in White’s view, “unincorporated” territories at the political branches’ mercy. As Chief Justice Taft, two decades later, stressed in *Balzac v. Porto Rico*,⁷⁶ transforming Puerto Rico from an “unincorporated” to an “incorporated” territory would require “a clear declaration of purpose”⁷⁷ from Congress.

Thus, Puerto Rico, the Philippines,⁷⁸ and Guam were left in a new form of constitutional limbo, and “territorial incorporation” constitutionalized colonialism under the American flag.⁷⁹ The “American Empire” that Justice Brown had worried about grew over the next century—even as the Philippines eventually attained independence—when American Samoa, the Northern Mariana Islands, and the U.S. Virgin Islands joined Puerto Rico and Guam.

C. The Doctrinal Context

For all the criticism they (rightly) engender as continuing “good law,” the Supreme Court has treated the *Insular Cases* and the territorial incorporation doctrine as somewhat of an anomaly since at least 1957, when a Court plurality said in *Reid v. Covert* that “neither the [*Insular Cases*] nor their reasoning should be given further

75. *Downes*, 182 U.S. at 340.

76. *Balzac v. Porto Rico*, 258 U.S. 298 (1922). The U.S. Government intentionally misspelled Puerto Rico as “Porto Rico” in most official contexts between 1898 and 1932 over Puerto Ricans’ objections, eventually yielding to pressure to correct its spelling. See, e.g., José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391, 392 n.1 (1978); see also JAMES L. DIETZ, *ECONOMIC HISTORY OF PUERTO RICO: INSTITUTIONAL CHANGE AND CAPITALIST DEVELOPMENT* 85 (1986) (“The first peacetime military governor . . . ordered that the name be changed to ‘Porto’ Rico”).

77. *Balzac*, 258 U.S. at 311.

78. The Philippines, however, acceded to full independence on July 4, 1946.

79. See Efrén Rivera Ramos, *The Insular Cases: What Is There to Reconsider?*, in *RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE* 29, 35 (2015) (“[T]he decisions . . . legitimized, via constitutional argument, the possibility of an indefinite condition of political subordination. In that sense, the[y] put the US Constitution at the service of colonialism.”).

expansion.”⁸⁰ Accordingly, the Court has cabined the decisions’ reach and refused to find constitutional provisions “inapplicable” in unincorporated U.S. territories since 1922.⁸¹ In fact, Court pluralities and majorities have been repeatedly hostile to the *Insular Cases* even as they stop short of repealing them.⁸² Most recently, in *Aurelius*, the Court refused to “extend” the territorial incorporation framework in a case where the *Insular Cases* “did not reach th[e] issue” of the constitutional question at hand.⁸³ At their most expansive, the Court’s recent statements suggest that the *Insular Cases* and territorial incorporation stand only for the narrow propositions they stood for in 1922, when *Balzac*, the last *Insular* decision, was issued. Anything they “did not reach” then should not be reached now.

Cabining the *Insular Cases* has proved easier said than done, however, as the Tenth Circuit’s recent decision in *Fitisemanu* illustrates. Put simply, so long as the *Insular Cases* remain “on the books,” courts keep turning to them when faced with questions concerning the applicability of constitutional provisions in U.S. territories.⁸⁴ In *Fitisemanu*, the Tenth Circuit reasoned its way

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

81. See *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 148 n.1 (1993) (First Amendment Free Speech Clause “fully applies to Puerto Rico”); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (“[Right to vote in Puerto Rico is] constitutionally protected to the same extent as those of all other citizens of the United States”); *Torres v. Puerto Rico*, 442 U.S. 465, 470 (1979) (Fourth Amendment safeguard against unreasonable searches applicable in Puerto Rico); *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) (recognizing a “virtually unqualified” right to travel between Puerto Rico and the fifty states); *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976) (equal protection and due process applicable in Puerto Rico); *Cepeda Derieux & Weare*, *supra* note 28, at 292 (“[E]ach time a new constitutional question has arisen [since 1922] the Court has consistently held that specific rights and constitutional provisions operate by their own force in the territories”); Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779, 783 (1992) (“[The *Insular Cases*] only denied unincorporated territories the right to trial by jury, the right to presentment by a grand jury, and the right to confront witnesses”).

82. See *Boumediene v. Bush*, 553 U.S. 723, 758–59 (2008); *Torres*, 442 U.S. at 476 (Brennan, J., concurring) (dismissing the possibility that *Insular Cases* informed “incorporation of the Bill of Rights to Puerto Rico, notwithstanding the decisions’ historical value”).

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

84. See *Eche v. Holder*, 694 F.3d 1026, 1031 (9th Cir. 2012) (relying on the *Insular* decisions to hold that the Naturalization Clause does not apply by itself in the Commonwealth of the Northern Mariana Islands); *Conde Vidal v. Garcia-*

through the *Insular Cases* to conclude that the Fourteenth Amendment's Citizenship Clause—which entitles anyone “born or naturalized in the United States, and subject to the jurisdiction thereof” to birthright citizenship⁸⁵—was inapplicable to so-called “unincorporated” territories like American Samoa. But the *Fitisemanu* court's reasoning, that the “approach developed in the *Insular Cases*” has somehow “carried forward in recent Supreme Court decisions,” nowhere mentioned that cases like *Reid*, *Boumediene*, and *Aurelius* have all expressly limited the *Insular Cases*' reach, and expressly disclaimed the notion that they should inform questions—like the one in *Fitisemanu*—that they did not address.⁸⁶

The Tenth Circuit's reasoning in *Fitisemanu* is also the latest in a trend where courts and commentators aim to “repurpose” the *Insular Cases* to hold that practices in likely tension with the U.S. Constitution need not yield to constitutional safeguards.⁸⁷ The *Insular Cases*, the argument goes, could be read to “protect indigenous cultures from a procrustean application of the federal Constitution.”⁸⁸ In the *Fitisemanu* panel's view, the *Insular Cases*' constitutional “approach” “preserve[s] the dignity and autonomy” of the people of American Samoa by requiring courts to “defer” to their government's purported opposition to birthright citizenship.⁸⁹ In a similar vein, the Ninth Circuit has cited the *Insular Cases* to hold that the constitutional guarantee to equal protection does not invalidate racial restrictions on land alienation designed to protect native land ownership.⁹⁰

However well-meaning this repurposing project might be, its implications are troubling and its reasoning misguided. As Tenth Circuit Judge Robert Bacharach underscored in his dissent from *Fitisemanu*, courts ought to “interpret the constitution regardless of the popularity of [their] interpretation”⁹¹ in either Congress or territories' local governments. That is especially true when

Padilla, 167 F. Supp. 3d 279, 282, 286–87 (D.P.R. 2016) (holding that the right of same-sex couples to marry had not been “incorporated” to Puerto Rico).

85. U.S. CONST. amend. XIV.

86. *Aurelius*, 140 S. Ct. at 1665 (“[Since *Insular Cases*] did not reach th[e] issue” of the Appointments Clause's applicability to the appointment of U.S. officers in Puerto Rico, Court would not “extend them”).

87. *Fitisemanu v. United States*, 1 F.4th 862, 870 (10th Cir. 2021).

88. *Developments in the Law—U.S. Territories*, 130 HARV. L. REV. 1616, 1686 (2017); see also Russell Rennie, Note, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. Rev. 1683, 1707 (2017).

89. *Fitisemanu*, 1 F.4th at 870.

90. See *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1992).

91. *Fitisemanu*, 1 F.4th at 905 (Bacharach, J., dissenting).

constitutional personal rights are at stake. “The very purpose of a Bill of Rights,” after all, “was to withdraw certain subjects from the vicissitudes of political controversy, [placing] them beyond the reach of majorities and . . . establish[ing] them as legal principles to be applied by the courts.”⁹² That being the case, “fundamental rights may not be submitted to vote” and “depend on the outcome of no elections.”⁹³ Ultimately, the repurposing approach to territorial incorporation suffers the same grievous flaw that a plurality of the Court ascribed to the doctrine in *Reid*: “[I]f allowed to flourish [it] would destroy the benefit of a written Constitution”⁹⁴

Moreover, as Professor Ponsa-Kraus has put it, using the *Insular Cases* to “accommodate culture is like arguing that we [could] repurpose *Plessy v. Ferguson* to accommodate benign racial classifications.”⁹⁵ Of course, the notion that laws could “permit[], and even requir[e]” the separation of Blacks from whites without “imply[ing] the inferiority of either race to the other” was one of *Plessy*’s core tenets.⁹⁶ But the Court rightly and firmly repudiated that canard by the mid-twentieth century.⁹⁷ And the understanding that law cannot depend on racial classifications, or on a “particular group’s supposed inability to assimilate” is, by now, well-settled.⁹⁸ Resting, as they do, on undeniably offensive, racialized foundations, the *Insular Cases* cannot be “redeemed,” since what they ultimately stand for is a colonial framework that defers to Congress and subordinates the territories’ inhabitants.

And that is why the renewed and steady call for the *Insular Cases*’ overruling is both long overdue and welcome. The Court should certainly put an end to the racist, offensive, and mischievous doctrine

92. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

93. *Id.*

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

95. Ponsa-Kraus, *The Insular Cases Run Amok*, *supra* note 45, at 3.

96. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

97. *Brown v. Bd. of Topeka*, 347 U.S. 483, 495 (1954) (“Separate educational facilities are inherently unequal”).

98. *Trump v. Hawaii*, 138 S. Ct. 2392, 2447 (2018) (Sotomayor, J. dissenting) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting)). Justice Sotomayor’s statements concerned the infamous decision of *Korematsu v. United States*, which sanctioned the internment of U.S. citizens of Japanese ancestry during World War II. 323 U.S. 214 (1944). The *Trump* majority then took the opportunity to overrule *Korematsu* in a case it “ha[d] nothing to do with,” finally recognizing that the invidious “relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race,” “has no place in law under the Constitution.” *Trump*, 138 S. Ct. at 2423.

that it has, by now, repeatedly disclaimed. But while demanding the abrogation of the *Insular Cases* has become today a *cause célèbre*, it is not automatically clear which aspects of the many cases in the *Insular Cases* grouping can—or even should—be overruled or set aside consistent with otherwise sound and settled constitutional principles. The *Insular Cases*, to put it another way, covered a lot of ground, not all of which might need correction.⁹⁹ Getting rid of them is easier said than done, and calls for their repeal should more precisely focus on which parts of their enduring effect the Supreme Court should finally disavow.

Thus, before moving any further, it is essential to pause on the following question that University of Puerto Rico School of Law Professor Efrén Rivera Ramos has posed elsewhere: [W]ith respect to the *Insular Cases*, “what is there to reconsider”?¹⁰⁰ Professor Rivera Ramos’s answer to that question began by outlining what the *Insular Cases*, broadly speaking, now stand for—that is, by looking at “the cases and their aftermath from the perspective of twenty-first century values and political and jurisprudential understandings.”¹⁰¹ But another starting point focuses on the premises that the *Insular Cases* were built *from*. It can be simultaneously true that the *Insular Cases* (or, at least, their more notoriously-known parts) are glaringly flawed *and* that some of the principles on which they stand are not just defensible, but prudent and sound. Accordingly, we begin by listing propositions in the *Insular Case* that even their most ardent critics doubt the Supreme Court should repudiate even if the Court finally “overrules” them. Among these are:

1. The notion that “[t]he Constitution confers absolutely” on the federal government “powers of making war and of making treaties,” and “consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.”¹⁰²
2. That any sovereign government “within its sphere of action possesses as an inherent attribute the power to acquire territory by discovery, by agreement or treaty, and by conquest.”¹⁰³

99. See Rivera Ramos, *supra* note 79, at 33 (“As [in] all canonical texts . . . the opinions in the *Insular Cases* are full of ambiguities, contradictions, and paradoxes.”).

100. *Id.* at 35.

101. *Id.* at 30.

102. *Downes v. Bidwell*, 182 U.S. 244, 303 (1901) (White, J., concurring).

103. *Id.* at 300.

3. “[P]ower over the territories is vested in Congress without limitation.”¹⁰⁴
4. “[T]he right to acquire territory involves the right to govern and dispose of it.”¹⁰⁵
5. “[T]he power to locally govern at discretion has been declared to arise as an incident to the right to acquire territory.”¹⁰⁶
6. The fact that the power to govern locally is incidental to the right to acquire territory, “does not imply that the authority of Congress to govern the territories is *outside* of the Constitution, since in either case the right is founded on the Constitution.”¹⁰⁷
7. “[T]he power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants”¹⁰⁸

Distasteful as “conquest” and even notions of “unlimited” power over territories might seem today, by the time the Fuller Court decided the first nine *Insular Cases* in 1901, these principles were “settled by an unbroken line of decisions and [were] no longer open to question.”¹⁰⁹ The proposition that Congress, in the exercise of its constitutional authority, “to make war, and peace, and to make treaties,”¹¹⁰ also possessed an implied power to acquire and govern foreign territory dated back to the Founding. Indeed, as others have explained,¹¹¹ the premise found its way into Alexander Hamilton’s early defense of a proposed national bank. In speaking to the incidental—or “resulting” powers—that Congress undoubtedly possessed, Hamilton saw no room for “doubt[] that if the United States should make a conquest on any of the territories of its neighbours, they would possess sovereign jurisdiction over the conquered territory.”¹¹²

104. *Id.* at 267–68 (plurality opinion).

105. *De Lima v. Bidwell*, 182 U.S. 1, 196 (1901) (plurality opinion).

106. *Downes*, 182 U.S. at 290 (White, J., concurring).

107. *Id.* (emphasis added).

108. *Id.* at 279 (plurality opinion).

109. *Kepner v. United States*, 195 U.S. 100, 124 (1904).

110. *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 524 (1828).

111. Luis Fuentes-Rohwer, *The Land that Democratic Theory Forgot*, 83 *IND. L.J.* 1525, 1530 (2008).

112. Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank*, in 8 *THE PAPERS OF ALEXANDER HAMILTON* 97, 100 (Harold C. Syrett ed., 1965).

The Supreme Court under Chief Justice John Marshall then affirmed the point in decisions involving the Indian tribes as well as the Louisiana and Florida territories—acquired by treaty with France and Spain, respectively. In *Johnson v. M'Intosh*,¹¹³ Chief Justice Marshall announced that good title to land could be acquired, inter alia, by conquest. And the Court revisited that principle in *Jones v. United States*,¹¹⁴ where it resolved that “dominion of new territory may be acquired by discovery and occupation as well as by cession or conquest.”¹¹⁵

Similarly, the idea that the right to acquire foreign territory brings along with it the right to govern and dispose of it stood on solid ground by 1901. In *Serè v. Pitot*,¹¹⁶ a case arising from the former French territory of Orleans, the Chief Justice explained that “[t]he power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory.”¹¹⁷ And again, in *American Insurance Co. v. 356 Bales of Cotton*,¹¹⁸ the Court found that Congress, in the exercise of its plenary territorial powers, possessed essentially unbridled authority to establish a territorial court with admiralty jurisdiction in Key West.

The Marshall Court's ample construction of Congress' territorial powers was echoed by the Waite and early Fuller Courts in a series of post-Civil War cases stemming from the Dakota and Utah territories, acquired by treaty following the Louisiana Purchase and the Mexican American War, respectively. In *Late Corporation of the Church of Jesus v. United States*,¹¹⁹ the Supreme Court suggested that Congress' power over the territories was at once “general and plenary.”¹²⁰ In *First National Bank v. Yankton County*,¹²¹ Chief Justice

113. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 583 (1823) (finding that a purchase and conveyance of land issued by the Piankeshaw Indians did not effect good title in the courts of the United States).

114. *Jones v. United States*, 137 U.S. 202 (1890) (finding that the criminal jurisdiction of the United States extended to the Caribbean island of Navassa in the vicinity of Haiti).

115. *Id.* at 212.

116. *Serè v. Pitot*, 10 U.S. 332 (1810).

117. *Id.* at 336.

118. *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 524 (1828).

119. *Late Corp. of the Church of Jesus v. United States*, 136 U.S. 1, 42 (1890).

120. *Id.* Note that the Supreme Court had hinted at this dual conception of Congress' territorial powers in, for instance, *Benner v. Porter*. 50 U.S. 235, 242 (1850).

121. *First Nat'l Bank v. Yankton Cnty.*, 101 U.S. 129, 133 (1879) (holding that Congress may unilaterally abrogate an otherwise valid territorial statute).

Waite found: “Congress may . . . abrogate laws . . . or legislate directly [locally] . . . it has full and complete legislative authority over the people [and Territory government departments] . . . It may do for the Territories what the people, [constitutionally] do for the States.”¹²²

These founding principles continued undisturbed through 1901 and still seem now doctrinally unassailable. But after the *Insular Cases*, they became refracted through the problematic and unsupported lens of territorial incorporation doctrine—a legal construct devoid of precedential value or historical pedigree¹²³ that constitutionalized an arbitrary distinction between “incorporated” and “unincorporated” territories. This dichotomy has proven the source of acute controversy—imbued in an openly racist legal discourse that has relegated the Caribbean and Pacific territories to a colonial limbo.

Admittedly, overruling the territorial incorporation doctrine of the *Insular Cases* will not do away with Congress’ plenary powers over the territories. In fact, it would not even abrogate all of the cases that have been over time described as belonging to the “*Insular Cases*,” since not all of those decisions relied or depended on the Court’s territorial incorporation doctrine. But it would dispense with 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.¹²⁴ And this is precisely what requires

122. *Id.*

123. Chief Justice Taft’s observation in *Balzac v. Porto Rico*, cannot go unheeded: “Before the question became acute at the close of the Spanish War, the distinction between acquisition and incorporation was not regarded as important, or at least it was not fully understood and had not aroused great controversy.” 258 U.S. 298, 306 (1922).

124. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008). While the Supreme Court had described Congress’ plenary powers over federal territories in expansive terms before the 1901 *Insular Cases*, it had also been clear that even those powers were “subject [to] restrictions as are expressed in the Constitution, or [] necessarily implied in its terms . . .” *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885).

Dispensing with territorial incorporation would most likely mean directly overruling, at least, the following decisions, all of which relied on the doctrine to find certain constitutional provisions “inapplicable” in certain unincorporated territories: *Balzac*, 258 U.S. at 309 (holding Sixth Amendment right to jury trial inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (Fifth Amendment grand jury provision inapplicable in the Philippines); *Dowdell v. United States*, 221 U.S. 325, 329–30 (1911) (holding jury trial inapplicable in Philippines); *Dorr v. United States*, 195 U.S. 138, 149 (1904) (finding constitutional right to trial by jury did not extend to Philippines unless provided by Congress); *Hawaii v. Mankichi*, 190 U.S. 197, 223 (1903) (noting grand jury and unanimous verdict guarantee inapplicable in Hawai’i); *Downes v. Bidwell*, 182 U.S. 244, 347 (1901) (holding Uniformity Clause inapplicable in Puerto Rico). Notably, four of the

reconsideration at the present time. Is the doctrine of territorial incorporation susceptible to abrogation under the Roberts Court's view of stare decisis?

II. Stare Decisis and Territorial Incorporation

A. Stare Decisis Generally

The Supreme Court has long emphasized the importance of stare decisis as “a foundation stone of the rule of law.”¹²⁵ The doctrine arguably “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.”¹²⁶ Accordingly, in its most expansive formulations, the Court has explained that “[r]especting stare decisis means sticking to some wrong decisions.”¹²⁷ Most famously, Justice Brandeis said that “in most matters it is more important that the applicable rule of law be settled than that it be settled right.”¹²⁸

But stare decisis is not in play in every case. Two conditions must be in place to invoke the doctrine. First, the cited precedent must clearly deal with identical issues raised in the case before the court,¹²⁹ so that either the result or the reasoning necessary to reach that result

six decisions—i.e., *Mankichi*, *Dorr*, *Dowdell*, and *Ocampo*—would now seem obsolete and overruled de facto, because the “conditions . . . that existed when they were rendered are different or no longer exist . . .” BRYAN GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 178 (2016). Specifically, each addressed the applicability of constitutional provisions in either the Philippines (by now, an independent republic for over seven decades), or Hawai'i (a state since 1959).

125. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014), *quoted in* *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015).

126. *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991).

127. *Kimble*, 576 U.S. at 471.

128. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); *see also* *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (“[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is . . . indispensable.”); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (“[Stare decisis is a] basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion’” (quoting *THE FEDERALIST* NO. 78, at 40 (Alexander Hamilton) (Kesler ed., 1999))).

129. Stare decisis is also appropriate where the precedent deals with similar issues. *See Humphrey's Ex'r v. United States*, 295 U.S. 602, 626–27 (1935) (discussing the narrowness of points of law decided in cases cited by the parties).

are controlling on the court considering the matter.¹³⁰ Otherwise, the language from the supposedly precedential case is dicta, which courts treat with respect, but are otherwise free to distinguish or set aside.¹³¹ Second, and perhaps counterintuitively, the court applying precedent must have at least some sympathy for the argument that the invoked decision is wrong.”¹³²

But the Supreme Court has also recognized various factors that may properly counsel against adhering to stare decisis and instead cut in favor of overruling precedent.¹³³ Most neatly, *Janus v. AFSCME* set forth several of these factors, including but not limited to: (1) “the quality of [the precedent’s] reasoning”; (2) “the workability of the rule it established”; (3) “its consistency with other related decisions”; (4) “developments since the decision was handed down”; and (5) “reliance on the decision.”¹³⁴ In this analysis, the Court requires “strong grounds”¹³⁵ or a “special justification”¹³⁶ to overrule precedent, “not just an argument that the precedent was wrongly decided.”¹³⁷ Still, the Court has acknowledged that stare decisis “is at its weakest” when the Court considers its own constitutional interpretations since those “can

130. Stare decisis is also appropriate where the reasoning from the precedent is compelling on the court. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (“When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.”); *City of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring and dissenting) (“As a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.”).

131. That is, “stare decisis has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up.” *Kimble*, 135 S. Ct. at 2409; see *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) (“[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.”); *Sarnoff v. Am. Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986) (Posner, J.) (“[Dictum is a] statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding . . .”).

132. *Kimble*, 135 S. Ct. at 2409.

133. See *June Med. Servs., LLC, v. Russo*, 140 S. Ct. 2103, 2134 (Roberts, C.J., concurring) (“Stare decisis is not an ‘inexorable command.’” (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020))).

134. See *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478–79 (2018); see also *Ramos*, 140 S. Ct. at 1414 (citing the same factors); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (citing the same factors, except for workability).

135. *Ramos*, 140 S. Ct. at 1413–14 (Kavanaugh, J., concurring).

136. *Kimble*, 135 S. Ct. at 2409.

137. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014).

be altered only by constitutional amendment or by overruling [its] prior decisions,”¹³⁸ unlike statutory interpretations, which can be overruled by Congress.

Viewed through these factors, the *Insular Cases* and the “territorial incorporation doctrine” merit little loyalty as precedent. Insofar as the cases recognized a distinction between “incorporated” and “unincorporated” territories found nowhere in the Constitution, the *Insular* decisions fail all five of the *Janus* factors. They also have a weak claim to privileged treatment because they hinge on the Court’s own constitutional construction and cannot be abrogated by an act of Congress.¹³⁹ While the Supreme Court is the only court that can overrule the *Insular Cases*, lower courts have an important alternative available to them: They can carefully follow the Supreme Court’s repeated warning to read the cases as narrowly as possible. This limited approach both acknowledges the Supreme Court’s authority and recognizes, at the very least, that the *Insular Cases* should no longer be recognized as good law except for the narrowest propositions for which they stood at that time.

B. Quality of Precedent’s Reasoning and Consistency with Prior Precedent

The first factor the Court considers in deciding whether to overrule precedent is “the quality of reasoning,”¹⁴⁰ that supports that precedent. Reasoning is presumptively weak when its rationale “does not withstand careful analysis.”¹⁴¹ And its quality lies on the weak end when its “defenders . . . do not attempt to defend its actual reasoning.”¹⁴² Both are true of the *Insular Cases* and territorial incorporation.

138. *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

139. *See, e.g., St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring in result) (“The doctrine of stare decisis . . . has only a limited application in the field of constitutional law.”); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (“Our willingness to reconsider our earlier decisions has been ‘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))).

140. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2479 (2018).

141. *Id.* at 2481 n.25.

142. *Id.* (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 363 (2010) (Roberts, C.J., concurring)).

The *Insular Cases*' flaws and departure from precedent have been widely catalogued elsewhere¹⁴³; comprehensive discussion of their errors lies beyond this Article's scope. For present purposes, it suffices to sum up ways in which the territorial incorporation doctrine could doubtfully "withstand careful analysis" because it is clearly at odds with other enduring precedent,¹⁴⁴ fails to consider "authorities pointing in an opposite direction,"¹⁴⁵ and—perhaps most critically—discriminates against and demeans the residents of U.S. territories.¹⁴⁶

First, territorial incorporation is—and was from the start—at war with foundational precedent articulating notions of limited and enumerated federal powers.¹⁴⁷ By 1901, when the first of the *Insular Cases* came before the Court, Congress' "plenary power" over U.S. territory was largely settled.¹⁴⁸ But it was also understood that federal authority in territorial lands yielded to "restrictions . . . expressed [in the Constitution]" or "necessarily implied" in the Constitution.¹⁴⁹ In governing territory, Congress was "supreme" and boasted "all the powers of the people of the United States."¹⁵⁰ But those powers were always subject to clear reservations set forth in the Constitution.¹⁵¹ Even in U.S. territory—and even as it exercised its broad authority—Congress' powers served only constitutionally-defined "limited objects."¹⁵²

To be sure, early authority did not speak with a single voice on the Constitution's exact scope in the territories.¹⁵³ Antebellum

143. See *supra* Part I.

144. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

145. *Id.* at 572.

146. *Id.* at 575.

147. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 325–26 (1816) ("The government . . . of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."); see also *Downes v. Bidwell*, 182 U.S. 244, 389 (1901) (Harlan, J., dissenting) ("[T]he national government is one of enumerated powers, to be exerted only for the limited objects defined in the Constitution.").

148. See *Cepeda Derieux*, *supra* note 62, at 806 n.45.

149. *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885).

150. *First Nat'l Bank v. Yankton Cnty.*, 101 U.S. 129, 133 (1879)

151. See *id.*; see also *Reynolds v. United States*, 98 U.S. 145, 162 (1878) ("Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion.").

152. *Downes*, 182 U.S. at 389 (Harlan, J., dissenting).

153. See *Duffy Burnett [Ponsa-Kraus]*, *Untied States*, *supra* note 56, at 824–27 (describing debates over whether certain constitutional provisions "appli[ed] of their own force" in U.S. western territories).

disputes over Congress' ability to ban slavery in the territorial periphery hinged on whether the Constitution "followed the flag"—in which case Congress could hardly limit slavery in the territories any more than it could in the states—or whether the national government could curb slavery's reach into territorial lands.¹⁵⁴ In *Dred Scott v. Sandford*, the Supreme Court offered an answer: The Constitution's Due Process Clause barred Congress from restricting slavery in the territories.¹⁵⁵ But *Dred Scott* "was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox . . ."¹⁵⁶ And ambiguity over the Constitution's scope in the territories endured through the century's balance, in part, because "Congress [] always 'extended' the Constitution to the territories by statute, [which] left open the question of whether constitutional prescriptions would have applied of their own force . . ."¹⁵⁷

Still, as nineteenth-century courts found their way to answers on the extent of Congress' authority in the territories,¹⁵⁸ they never turned to a distinction between "incorporated" and "unincorporated" lands. Looking back, that is unsurprising—the distinction is found nowhere in the constitutional text.¹⁵⁹ Interpretative canons should have then—as they should now—disfavored a judicially-created, novel, and atextual gloss on Congress' territorial power.¹⁶⁰

154. See generally DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* ch. 6 (1978) (describing the historical circumstances that brought the question of slavery in the antebellum territories to the Supreme Court).

155. *Sturgis v. Honold*, 60 U.S. (19 How.) 393, 393 (1856).

156. *Obergefell v. Hodges*, 576 U.S. 644, 696 (2015) (Roberts, C.J., dissenting).

157. Duffy Burnett [Ponsa-Kraus], *Untied States*, *supra* note 56, at 824–26.

158. *McAllister v. United States* found Article III life tenure provisions inapplicable in territories, noting: "How far the exercise of [Congress'] power [over territories] is restrained by the essential principles upon which our system of government rests, and which are embodied in the constitution, we need not stop to inquire . . ." 141 U.S. 174, 188 (1891).

159. See, e.g., U.S. CONST. art. IV, § 3, cl. 2; see also *United States v. Cotto-Flores*, 970 F.3d 17, 50 (1st Cir. 2020) (Torruella, J., concurring) ("[U]nincorporated territory [is] not a term you will find anywhere in the Constitution."); GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY 196–97* (2004) ("[T]here is nothing in the Constitution that even intimates that express constitutional limitations on national power apply differently to different territories once that territory is properly acquired.")

160. See, e.g., *South Carolina v. United States*, 199 U.S. 437, 448 (1905) ("The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when adopted it means now.")

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*.¹⁶¹ Justices who dissented from those *Insular Cases* pointedly and correctly cited cases “[f]rom *Marbury v. Madison* to the present day,” establishing that constitutional limits to Congress’ power applied with full force in the territories.¹⁶² 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.”¹⁶³ 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.¹⁶⁴ That the *Insular Cases* manufactured a then-unprecedented and controversial distinction between two types of territories with no basis on the constitutional text is by now well understood.¹⁶⁵ The decisions were from the start at odds with erstwhile

161. Doctrinally, territorial incorporation debuted in Justice Edward White’s concurrence in *Downes*, which only two other Justices joined. 182 U.S. 244, 293 (1901). It then developed in subsequent cases and by 1922 was “the settled law of the [C]ourt.” *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922). Outside of Supreme Court decisions, however, territorial incorporation was not a novel idea. In years leading up to 1901, prominent scholars had argued for the Court to read into the Constitution a distinction between “incorporated” and “unincorporated” territories. See Lowell, *supra* note 49, at 176.

162. *Downes*, 182 U.S. at 359–69 (Fuller, C.J., dissenting).

163. *Id.* at 382 (Harlan, J., dissenting).

164. See Christina Duffy Ponsa-Kraus, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 982–83 (2009) [hereinafter Ponsa-Kraus, *Extraterritoriality After Boumediene*] (“[The *Insular Cases*] introduced . . . an unprecedented distinction between ‘incorporated’ and ‘unincorporated’ territories”).

165. See Torruella, *Political Apartheid*, *supra* note 38, at 286 (“[T]he *Insular Cases* . . . squarely contradicted long-standing constitutional precedent.”).

“enduring precedent.”¹⁶⁶ That gravely undermines the respect owed territorial incorporation under *stare decisis*.¹⁶⁷

Looking onwards from 1901, territorial incorporation has also been at odds with the Supreme Court’s later pronouncements on the scope of the federal government’s authority over U.S. territory and other held lands. There, the Court has been clear that Congress has particularly broad authority to govern,¹⁶⁸ but has never gone so far as to suggest that its discretion may be unfettered, or that certain constitutional rights or provisions may be inapplicable in U.S. lands—“incorporated” or not. Instead, the Court has consistently found constitutional provisions “applicable” in overseas territories when it has considered them.¹⁶⁹ And it has refused to hold that constitutional safeguards “stay home” even when Congress acts outside places over which the United States has sovereign control—that is, even then, “the political branches [cannot] switch the Constitution on or off at will.”¹⁷⁰

166. See Henry Wolf Bickl , *The Constitutional Power of Congress over the Territory of the United States*, 49 AM. L. REG. 11, 94 (1901) (“[In 1901,] no case in regard to jurisdiction within the territory of the United States has a limitation of the power of Congress over personal or proprietary rights been held inapplicable”); see also Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405, 463 (2020) (“The idea of imperial possessions—places, as the Supreme Court described in the *Insular Cases*, owned by but not fully within the United States—was not part of pre- or post- Civil War thinking.”).

167. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405–06 (2020) (holding that the Sixth Amendment requires jury unanimity and overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972), in part, because it “s[at] uneasily with 120 years of preceding case law”).

168. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

169. See *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 148 n.1 (1993) (“The Free Speech Clause of the First Amendment fully applies to Puerto Rico.”); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (“Puerto Rico is subject to the constitutional guarantees of due process and equal protection of the laws.”); *Torres v. Puerto Rico*, 442 U.S. 465, 470 (1979) (“[T]he constitutional requirements of the Fourth Amendment apply to the Commonwealth.”); *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 602 (1976) (“[T]he protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico.”); *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) (“For purposes of this opinion we may assume that there is a virtually unqualified constitutional right to travel between Puerto Rico and any of the 50 States of the Union.”).

170. *Boumediene*, 553 U.S. at 765. Most notably, in addressing the reach of the right of habeas corpus to the U.S. naval base in Guant namo Bay, Cuba, in 2008, the Supreme Court stressed that the “Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, *not* the power to decide when and where its terms apply.” *Id.*

In short, the Court's statements have been consistently more in line with the *Insular Cases*' dissents than with their authoritative rulings.¹⁷¹

Second, and more starkly, the *Insular Cases*' doctrine of territorial incorporation could no longer withstand "careful analysis" (if it ever could) because it squarely rests on discredited racialized concerns over adding millions of nonwhites—in other words, inhabitants of then newly-annexed lands like Puerto Rico, Guam, and the Philippines—to the nation. In *Downes*, Justice White panned extending citizenship to people of an "uncivilized race" "absolutely unfit to receive it,"¹⁷² and quoted approvingly from treatise passages suggesting that conquering peoples ought "govern" "fierce, savage and restless people[s]" "with a tighter rein."¹⁷³ Justice Brown meanwhile spoke of the "grave questions" asked by island residents' "differences of race," and the knotty issues those presented for a predominantly Anglo-American nation. And in *De Lima v. Bidwell*, Justice McKenna starkly warned against admitting "savage tribes" into American society.¹⁷⁴

It is now well-settled that these racialized and imperialist concerns lay at the heart of the *Insular Cases*,¹⁷⁵ and that any greater latitude the Court gave Congress to govern new territories was "grounded [in a] theory of democracy that viewed it as a privilege of the 'Anglo-Saxon race.'" ¹⁷⁶ "[R]acially motivated biases and [] colonial

171. See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 380 (Harlan, J., dissenting) ("Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this Government may not do consistently with our fundamental law.").

172. *Id.* at 306 (majority opinion).

173. *Id.* at 302 (internal quotation marks omitted).

174. 182 U.S. 1, 219 (1901) (McKenna, J., dissenting).

175. See, e.g., *United States v. Vaello-Madero*, 313 F. Supp. 3d 370, 375 (D.P.R. 2018) ("[T]he 'alien race' of the inhabitants in the far-flung territories acquired from Spain . . . was pivotal to the reasoning behind the bold imperialist doctrine formulated by the Court." (quoting RICHARD THORNBURGH, *PUERTO RICO'S FUTURE: A TIME TO DECIDE* 47 (2007)); *Segovia v. Bd. of Election Comm'rs for City of Chi.*, 201 F. Supp. 3d 924, 938 (N.D. Ill. 2016) (noting that the decisions are premised on racist views); Hon. Gustavo A. Gelpí & Dawn Sturdevant Baum, *Manifest Destiny: A Comparison of the Constitutional Status of Indian Tribes and U.S. Overseas Territories*, 63 *FED. LAW.* 38, 39–40 (2016) ("The . . . insular cases framework [is] increasingly criticized by federal courts as . . . founded on racial and ethnic prejudices."); Torruella, *Political Apartheid*, *supra* note 38, at 286 ("[Decisions'] outcome was strongly influenced by racially motivated biases").

176. Efrén Rivera Ramos, *Puerto Rico's Political Status: The Long-Term Effects of American Expansionist Discourse*, in *THE LOUISIANA PURCHASE AND*

governance theories . . . contrary to American territorial practice and experience,”¹⁷⁷ were a key feature of the *Insular Cases*, not a bug. Thus, as the Tenth Circuit recently remarked—even as it extended them—the cases’ purpose and reasoning are unavoidably “disreputable to modern eyes”; their “ignominious history” is well known and understood.¹⁷⁸

That central reasoning, history, and pedigree should today be fatal to territorial incorporation.¹⁷⁹ While the Supreme Court has yet to squarely revisit the *Insular Cases*, the racial principles animating the Court’s territorial incorporation rulings clearly offend modern constitutional analysis.¹⁸⁰ Notably, the Court has, over time, rejected classifications based on “dangerous stereotypes about . . . a particular group’s supposed inability to assimilate,”¹⁸¹ identical to those driving the *Insular Cases*. And while commentators and jurists have increasingly found justified parallels between the *Insular* decisions and other infamous “aberrations” like *Plessy v. Ferguson*, and *Korematsu v. United States*,¹⁸² the Court has continued to clean up its “anticanonical”¹⁸³ jurisprudence—most recently, by going out of its way to overrule *Korematsu* in a case that “ha[d] nothing to do”¹⁸⁴ with World War II Japanese internment.

AMERICAN EXPANSION, 1803-1898, at 170 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005); see also Cepeda Derieux & Weare, *supra* note 28, at 289 (“[A]ny flexibility th[e] [Insular Cases] granted Congress to administer newly acquired overseas territories outside constitutional restraints sprang from the desire to keep the mostly nonwhite people who lived there outside the national polity.”).

177. Torruella, *Political Apartheid*, *supra* note 38, at 286.

178. *Fitisemanu v. United States*, 1 F.4th 862, 870 (10th Cir. 2021).

179. *Cf. Ramos v. Louisiana*, 140 S. Ct. 1390, 1401 (2020) (striking down the allowance of non-unanimous juries in part because of Louisiana and Oregon’s discriminatory reasons for adopting the non-unanimous jury as reasons).

180. See Ponsa-Kraus, *Extraterritoriality After Boumediene*, *supra* note 164, at 992 (noting *Insular Cases*’ rationales are “now recognize[d] as illegitimate”).

181. *Trump v. Hawaii*, 138 S. Ct. 2392, 2447 (Sotomayor, J., dissenting).

182. See, e.g., *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 162 (1st Cir. 2005) (Torruella, J., dissenting) (comparing to *Plessy*); Gabriel A. Terrasa, *The United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 J. MARSHALL L. REV. 55, 56–57 (1997) (same); see also Torruella, *Political Apartheid*, *supra* note 38, at 284–86 (comparing *Insular Cases* to *Plessy*).

183. See generally Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380–81 (2011) (describing a closed set of “the Supreme Court’s worst decisions” including *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu*, as “the American anticanon”).

184. See *Trump v. Hawaii*, 138 S. Ct. at 2423.

Thirdly, the *Insular Cases*' disreputable and offensive origins have put them in an exceedingly narrow class of Supreme Court decisions with “nary a friend in the world.”¹⁸⁵ “Today no scholar defends [them] as correctly decided,”¹⁸⁶ and even litigants and courts that rely on them today decline to “defend [their] actual reasoning.”¹⁸⁷ Most clearly, Justice Department lawyers now routinely sidestep the *Insular Cases*' uglier aspects when relying on them in court filings. Take, for example, the Tenth Circuit's holding in *Fitisemanu* that persons born in American Samoa are “U.S. nationals”¹⁸⁸ with no right to U.S. citizenship under the Fourteenth Amendment.¹⁸⁹ Both the briefing and the Tenth Circuit majority's reasoning to that effect relied primarily on *Downes* and other *Insular* decisions' discussion of the federal government's ostensible need for “flexibility in acquiring, governing, and relinquishing territories.”¹⁹⁰

That much could be true—perhaps flexibility to administer overseas territories remains desirable as a practical matter more than a century after the United States acquired them.¹⁹¹ But it is still notable that government lawyers commonly stay well away from key, unabashedly imperialist language in the decisions they cite. They omit, for example, that Court members first gave Congress wide berth to act in annexed overseas lands out of concerns that a more rigid constitutional application (and a more robust judicial role) in

185. Fuentes-Rohwer, *supra* note 111, at 1536.

186. Riley Edward Kane, *Straining Territorial Incorporation: Unintended Consequences from Judicially Extending Constitutional Citizenship*, 80 OHIO ST. L.J. 1229, 1237 (2019); *see also* Aurelius Inv., LLC v. Puerto Rico, 915 F.3d 838, 854–55 (1st Cir. 2019) (describing *Insular* decisions as “discredited lineage of cases” and pointing to scholarly consensus against them); Ponsa-Kraus, *Extraterritoriality After Boumediene*, *supra* note 164, at 982 (noting decisions have “long been reviled” in scholarship).

187. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps. Council*, 138 S. Ct. 2448, 2481 n.25 (2018) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 363 (Roberts, C.J., concurring)).

188. *See* 8 U.S.C. § 1408 (designating persons born in American Samoa as “nationals, but not citizens” of the United States).

189. *Fitisemanu v. United States*, 1 F.4th 862, 868–69 (10th Cir. 2021).

190. Appellants' Brief at 12, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017, 20-4019).

191. To be sure, government lawyers do not explain why applying the Constitution to the territories would hinder the government's ability to acquire, govern, or relinquish territories, but it is also not clear why the government should be able to dispose of the *inhabitants* of the territories at will—particularly when those inhabitants are descendants of those who lived on the islands before the islands' annexation rather than new settlers on “large areas of mostly uninhabited land masses.”

administering territories risked ending the American imperial project in 1901.¹⁹² So even as they defend what the *Insular Cases* now stand for as shorthand, lawyers representing the United States do not defend their origins or rationale. That is, as the Supreme Court has explained, strong evidence of the poor reasoning supporting *Downes* and related decisions.¹⁹³

Perhaps wary of their offensive lineage and language, private litigants have also prudently avoided leaning heavily on the *Insular Cases* before the Supreme Court—even when they stand to benefit from it. In recent litigation over the constitutionality of the Financial Oversight and Management Board for Puerto Rico (“FOMB”)—a statutorily-created body with near complete control over Puerto Rico’s financial affairs—FOMB defenders argued against the applicability of structural provisions like the Appointments Clause to the lower courts, claiming that the *Insular Cases* freed Congress from separation-of-powers concerns when legislating for the territories.¹⁹⁴ At the Supreme Court, however, most parties defending the FOMB shifted their focus from the *Insular Cases*, chiefly arguing instead that Congress had broad authority to create the FOMB under its traditional Article IV

192. See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 282 (1901) (“[I]t is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions and modes of life, shall become at once citizens of the United States.”); *id.* at 307–08 (White, J., concurring) (“Would not [a] war, even if waged successfully, be fraught with danger if the effect of occupation was to necessarily incorporate an alien and hostile people into the United States?”); see also Aziz Rana, *How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire*, 130 *Yale L.J. F.* 312, 324–25 (2020) (“In [Justice White’s] view, the realities and needs of global expansion required both developing dual structures of territorial governance and providing the political branches the full capacity to make judgments about how to impose those structures.”).

193. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 363 (2010) (“When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished.”).

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

territorial powers.¹⁹⁵ That strategy proved astute. At oral argument, Justice Stephen Breyer agreed with an advocate representing one of the challengers that the *Insular Cases* are a “dark cloud,” but suggested that they did not inform the case.¹⁹⁶ Likewise, Chief Justice John Roberts remarked that the decisions were irrelevant because “none of the . . . parties rel[ie]d on [them] in any way.”¹⁹⁷ When the Court issued its ruling in *Aurelius*, it sided with the parties defending the FOMB’s constitutionality and largely left the *Insular Cases* alone, noting that the cases “did not reach” the specific issue at hand.¹⁹⁸

The litigants’ choice to rely on the *Insular Cases* at the lower courts, then jettison them at the Supreme Court points to the decisions’ poor reasoning. “The unstated reason” to hesitate to defend the *Insular Cases* at the Supreme Court “seems obvious”—“advocates seldom rely on indefensible case law before the one Court that can overrule it.”¹⁹⁹ Cognizant of alternative grounds to win their case, those parties have likely opted to avoid “defend[ing] the reasoning of a precedent”²⁰⁰ grounded on anachronistic and offensive racial biases.

Finally, the Court’s stare decisis jurisprudence includes consistency with related decisions as a factor to consider when determining whether a given case merits precedential treatment.²⁰¹ But as already noted, the *Insular Cases* are unique and, to some extent, were acknowledged as such when they were decided.²⁰² Even those in the majority in *Downes* realized the uniqueness of the case before them and attempted to explain the first semblance of the incorporation doctrine by noting how “obvious” it is that Congress would act differently as to “outlying and distant possessions”—in the presence of “differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production”—than as to “contiguous

195. *But see* Brief for the Petitioner Official Committee of Unsecured Creditors of All Title III Debtors (Other than COFINA) at 23, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2019) (No. 18-1334) (“The Appointments Clause . . . creates no intimately personal rights comparable to the individual liberties that have been applied by the courts to the territories.”).

196. Transcript of Oral Argument at 82–83, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (No. 18-1334).

197. *Id.* at 85.

198. *In re* Fin. Oversight & Mgmt. Bd. for P.R., 140 S. Ct. at 1665–66.

199. Cepeda Derieux & Weare, *supra* note 28, at 295.

200. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 363 (2010).

201. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (“Looking to *Apodaca* consistency with related decisions and recent legal developments compounds the reasons for concern.”).

202. *See supra* notes 25–26 and accompanying text.

territory inhabited only by people of the same race, or by scattered bodies of native Indians.”²⁰³ In other words, to the extent *Downes* departs from prior precedent, it does so explicitly on racial grounds, a feature that makes it consistent with cases of its time²⁰⁴ but not with the Court’s equal protection and other jurisprudence since.²⁰⁵

C. Workability of Precedent in Question

The ease with which courts can administer particular precedent—or “workability”—is another “relevant consideration in the stare decisis calculus.”²⁰⁶ Lack of workability has been clear when, for example, precedent makes a distinction that “prove[s] to be impossible to draw with precision,”²⁰⁷ has “been questioned by Members of the Court in later decisions,” or “defie[s] consistent application.”²⁰⁸

Despite attempts to articulate the doctrine coherently, territorial incorporation is tenaciously unworkable: Lower courts consistently misapply or misinterpret the doctrine. Far too often they “deprive[] territorial residents of rights and protections to which they are almost surely entitled.”²⁰⁹ And even as they apply territorial incorporation because they are bound by vertical precedent, lower federal courts consistently and growingly find themselves at pains to rely on a flawed doctrine with indefensibly racist origins.²¹⁰

203. *Downes v. Bidwell*, 182 U.S. 244, 282 (1901).

204. *See Plessy v. Ferguson*, 163 U.S. 537 (1896). This infamous case was decided five years before *Bidwell* and found state-mandated racial segregation to be constitutional.

205. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“[T]his Court has consistently repudiated distinctions between citizens solely because of their ancestry as being odious to a free people whose institutions are founded upon the doctrine of equality.”) (internal citation and alterations omitted).

206. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2481 (2018).

207. *Id.*

208. *Payne v. Tennessee*, 501 U.S. 808, 829–30 (1991). In more colorful language, an unworkable precedent is one that “[j]urists and commentators” find to be “an unpredictable jumble,” “a mass of contradictions and obscurities,” “a series of inconsistent and bizarre results . . . left entirely undefended,” “notoriously unhelpful,” or “a conclusion rather than a starting point for analysis.” *Carpenter v. United States*, 138 S. Ct. 2206, 2244 (2018) (Thomas, J., dissenting).

209. *Cepeda Derieux & Weare*, *supra* note 28, at 294.

210. *See, e.g., Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 854–55 (1st Cir. 2019) (“This discredited line of cases, which ushered the unincorporated territories doctrine, hovers like a dark cloud over this case.”), *overruled by Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv. LLC*, 140 S. Ct. 1649 (2020); *Paeste v. Gov’t of Guam*, 798 F.3d 1228, 1231 n.2 (9th Cir. 2015) (“[T]he so-called ‘Insular

Courts at all levels have struggled to understand precisely what territorial incorporation implies for unincorporated territories and their residents—and which rights do or do not apply there.²¹¹ The Supreme Court has acknowledged as much, candidly noting in 1976 that, at least when speaking as to Puerto Rico, its “decisions respecting the rights of [island] inhabitants . . . have been neither unambiguous nor exactly uniform.”²¹² Almost fifty years later, that ambiguity has only deepened, and members of the judiciary now openly acknowledge territorial incorporation as an unworkable doctrine.²¹³ In recent years, for example, former federal and local judges from Guam, Puerto Rico, and the Virgin Islands have appeared as amici in the Supreme Court to stress that the concept of territorial incorporation remains “fractured and incoherent,” and “incapable of providing meaningful guidance to modern courts.”²¹⁴

Those former judges were right: confusion surrounding the administrability of the *Insular Cases*’ territorial incorporation doctrine

Cases[]” . . . ha[ve] been the subject of extensive judicial, academic, and popular criticism.”); *Tuaua v. United States*, 788 F.3d 300, 307 (D.C. Cir. 2015) (“[S]ome aspects of the *Insular Cases*’ analysis may now be deemed politically incorrect[.]”); *Peña Martínez v. Azar*, 376 F. Supp. 3d 191, 209–11 (D.P.R. 2019) (“[T]his Court is bound to follow [the *Insular Cases*] unless and until the Supreme Court states otherwise.”); *Segovia v. Bd. of Election Comm’rs*, 201 F. Supp. 3d 924, 938–39 (N.D. Ill. 2016) (“The inconsistencies between the constitutional rights afforded to United States citizens living in states as opposed to territories have been the subject of extensive judicial, academic, and popular criticism.”) (internal quotation marks omitted).

211. Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1662 (2021) (“[D]ue to the *Insular Cases*, citizenship for these Americans raise other questions. If the Constitution does not extend all the rights and privileges of citizenship to residents of American territories, then which rights apply?”).

212. *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599 (1976). In *Examining Board*, the Court arguably compounded this ambiguous treatment by declining to resolve whether it was the Fifth or the Fourteenth Amendment that barred Puerto Rico from restricting aliens from practicing as civil engineers. *Id.* at 601.

213. See, e.g., Gustavo A. Gelpí, *The Insular Cases: A Comparative Historical Study of Puerto Rico, Hawai‘i, and the Philippines*, 58 FED. LAW. 22, 22 (“The highest court of the land, whose justices had decided *Plessy v. Ferguson* only years earlier (in 1896), added insult to injury. In . . . the ‘*Insular Cases*’—the U.S. Supreme Court constitutionally justified imperialist policy toward the territories of Hawai‘i, Puerto Rico, and the Philippines.”).

214. Brief of Former Federal and Local Judges as *Amici Curiae* in Support of Petitioners at 5, *Tuaua v. United States*, 579 U.S. 902 (2016) (No. 15-981). The Supreme Court denied the petition for a writ of *certiorari*.

followed from the start.²¹⁵ The early *Insular Cases*—which the Court then described as the “Insular Tariff Cases”²¹⁶—only resolved issues related to the applicability of specific and narrow taxation and tariff laws by slim pluralities.²¹⁷ For example, *Downes* settled that Puerto Rico was not part of “the United States” for purposes of the Constitution’s requirement that tariffs on goods must be uniform “throughout the United States.” But the Court only had five votes for that proposition over three, with deeply-fractured opinions on which no “majority of the court concurred.”²¹⁸ Indeed, Justice Brown’s opinion for the Court—which reasoned that the Constitution’s terms were inapplicable in the new territories until Congress affirmatively extended them²¹⁹—had no takers.²²⁰ Four Justices concurred only in the judgment, not in its reasoning.²²¹ Thus, as a doctrinal result, the Court’s decision in *Downes* should never have had any precedential value outside of cases involving *Downes*’s precise facts;²²² the Supreme

215. See, e.g., Charles E. Littlefield, *The Insular Cases*, 15 HARV. L. REV. 169, 170 (1901) (“The Insular Cases, in the manner in which the results were reached, the incongruity of the results, and the variety of inconsistent views expressed by the different members of the court, are, I believe, without a parallel in our judicial history.”).

216. *De Lima v. Bidwell*, 182 U.S. 1, 2 (1901).

217. See, e.g., *Dooley v. United States*, 183 U.S. 151, 156–57 (1901) (determining that for the purposes of import and export taxes Puerto Rico is not considered a foreign nation); *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392, 396–97 (1901) (finding that trade with Puerto Rico is considered “coastwise” and those engaged in this trade are engaging in “coasting trade”); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (determining that for the purposes of the revenue clause Puerto Rico is not a part of the United States).

218. See *Downes*, 182 U.S. at 244 n.1 (opinion syllabus).

219. See *id.* at 277.

220. See *Kent*, *supra* note 72, at 157 (“The other eight justices rejected Brown’s radical view.”).

221. See *Downes*, 182 U.S. at 287, 345 (White, J., & Gray, J., concurring). The remaining four Justices—Harlan, Brewer, Peckham, and Chief Justice Fuller—authored or joined “vigorous dissents . . . [which] took the position that all the restraints of the Bill of Rights and of other parts of the Constitution were applicable to the United States Government wherever it acted.” *Reid v. Covert*, 354 U.S. 1, 13 n.24 (1957).

222. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’”). While the fractured nature of cases like *Downes* means the rule of *Marks* should apply, this only compounds the difficulty for lower courts of properly applying the *Insular Cases*—indeed, the Supreme Court has pointed that the *Marks*

Court owes *Downes* and other fractured decisions in the *Insular* catalogue considerably less loyalty than it commonly would under *stare decisis*;²²³ and it is difficult to view lower courts that have taken an expansive view of *Downes*—for example, by looking to it to determine whether the Fourteenth Amendment’s Citizenship Clause applies to American Samoa²²⁴—as doing anything other than flatly erring when they do.²²⁵ *Downes*’s holding, as some judges have rightly recognized, is “limited to the ‘position taken by the concurring justices on the narrowest grounds.’”²²⁶

Of course, it was Justice White’s separate premise that Puerto Rico could not be anything other than a “possession” until Congress formally “incorporated,” that eventually “bec[ame] the settled law of the court,”²²⁷ and proved most consequential. But that approach only confuses matters further for lower courts groping to determine whether a specific constitutional provision “applies” in an unincorporated territory. Notably, Justice White’s *Downes* concurrence offered a useful metric to determine whether a given constitutional provision applies to a specific territory.²²⁸ That “determination,” he offered, “in all cases, involves an inquiry into the situation of the territory and its relations to the United States.”²²⁹ As former judges have explained, that is hardly a helpful standard: It “offers no clue as to how a judge might conduct such an inquiry . . . and further leaves unresolved how a court

rule is “more easily stated than applied” and noted that it has “baffled and divided” lower courts. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

223. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1402 (2020) (“[A] single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected . . . is not the rule, and for good reason—it would do more to destabilize than honor precedent.”); see also *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring) (“It is unfortunate that no opinion [of the Court] command[ed] a majority . . . on precisely how to read Congress’ limits on the reach of the Clean Water Act [because] [l]ower courts and regulated entities w[ould] have to feel their way on a case-by-case basis.”).

224. See *Tuaua v. United States*, 788 F.3d 300, 306–08 (D.C. Cir. 2015).

225. See BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 199 (2016) (“Under the *Marks* rule, lower courts must follow the position taken by the Justices who concurred in the judgment on the narrowest grounds.”); *id.* at 202 (“The *Marks* rule is somewhat less important for the Supreme Court itself than it is for the lower courts. The Supreme Court . . . has flexibility to interpret, clarify, or refashion its precedents, not to mention overturn them.”).

226. *Fitisemanu v. United States*, 1 F.4th 862, 899–900 (10th Cir. 2021) (Bacharach, J., dissenting) (quoting *Nichols v. United States*, 511 U.S. 738, 745 (1994)).

227. *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922).

228. *Downes v. Bidwell*, 182 U.S. 244, 293 (1901) (White, J., concurring).

229. *Id.*

should construe constitutional rights whose scope remains unclear”²³⁰

And yet, the *Insular Cases*’ fractured origins are barely the start of the problem for lower courts. Today, much of the continuing confusion surrounding territorial incorporation stems from language in *Downes* suggesting that the only obvious limitations on Congress’ power in governing territories might be “restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.”²³¹ That language—dicta, at best, in an opinion carrying three votes—has time and again led lower courts astray to assert that only “fundamental” constitutional rights or provisions apply in incorporated territories while the entire Constitution applies elsewhere.²³² Professor Ponsa-Kraus has explained that this understanding of the *Insular Cases* deeply “overstate[s] their holding.”²³³ Indeed, “[t]he ‘entire’ Constitution does not apply, as such, anywhere. Some parts of it apply in some contexts; other parts in others.”²³⁴ Consistent with that premise—and contrary to what is commonly assumed of the *Insular Cases*—the Supreme Court has *never* demarcated areas where the Constitution applies “in full,” or said that only fundamental provisions apply in unincorporated territories.²³⁵ It has said the opposite, describing the *Insular Cases* as holding “that the Constitution has independent force in

230. Brief of Former Federal and Local Judges as *Amici Curiae* in Support of Petitioners at 7, *Tuaua v. United States*, 579 U.S. 902 (2016) (No. 15-981).

231. *Downes*, 182 U.S. at 290–91 (White, J., concurring); see Duffy Burnett [Ponsa-Kraus], *Untied States*, *supra* note 56, at 808–09.

232. See *Davis v. Commonwealth Elections Comm’n*, 844 F.3d 1087, 1095 (9th Cir. 2016) (“The *Insular Cases* held that [the] Constitution applies in full to ‘incorporated’ territories, but that elsewhere, absent congressional extension, only ‘fundamental’ constitutional rights apply”); *Tuaua v. United States*, 951 F. Supp. 2d 88, 94–95 (D.D.C. 2013), *aff’d*, 788 F.3d 300 (D.C. Cir. 2015) (“In an unincorporated territory, the *Insular Cases* held that only certain ‘fundamental’ constitutional rights are extended to its inhabitants.”); *Wal-Mart P.R., Inc. v. Juan C. Zaragoza-Gomez*, 174 F. Supp. 3d 585, 647–48 (D.P.R. 2016) (“To this day, only fundamental constitutional rights are guaranteed to inhabitants of . . . territories.”).

233. Ponsa-Kraus, *Extraterritoriality After Boumediene*, *supra* note 164, at 984.

234. Duffy Burnett [Ponsa-Kraus], *Untied States*, *supra* note 56, at 821.

235. See BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 149, 190 (2006) (“[The Court] left open *which* constitutional provisions and *which* individual protections applied to the residents of the unincorporated territories.”).

[unincorporated] territories” that is “not contingent upon acts of legislative grace.”²³⁶

Still, because the Supreme Court suggested that in unincorporated territories *some* constitutional provisions could be “[in]applicable by way of limitation upon . . . executive and legislative power,”²³⁷ lower courts have often latched onto the flawed shorthand that only “fundamental” rights apply there. In truth, between 1901 and 1922, the Court deemed only a handful of constitutional provisions—concerning tariffs, taxation, jury rights, and double jeopardy protection—inoperable in specific territories based on specific historical contexts.²³⁸ Since then, the Court not only warned against expanding the list,²³⁹ it has at times been openly hostile to its own territorial incorporation doctrine.²⁴⁰ But because the Court has stopped short of overruling the territorial incorporation thesis at the heart of the *Insular Cases* and never offered clear principles through which to apply them, lower courts continue to turn to the overblown “fundamental right” limitation ostensibly gleaned from the *Insular Cases* to answer questions the decisions neither addressed nor inform.²⁴¹

In practice, this has worked against the rights of people residing in the territories, as lower courts work themselves into jurisprudential corners to hold that certain constitutional rights have no force there. In one stark example, in *Conde Vidal v. Garcia-Padilla*, a Puerto Rico district court ruled in 2016 that the constitutional right of same-sex couples to marry—which the Supreme Court had deemed “fundamental . . . in all States” in *Obergefell v. Hodges*²⁴²—did not

236. *Boumediene v. Bush*, 553 U.S. 723, 764 (2008).

237. *Id.* at 758.

238. *See Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922) (noting that the Sixth Amendment right to jury trial is inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (noting that the Fifth Amendment grand jury provision is inapplicable in Philippines); *Dorr v. United States*, 1915 U.S. 138, 143 (1904) (noting that the Sixth Amendment right to jury trial is inapplicable in Philippines); *Downes v. Bidwell*, 182 U.S. 244, 347 (1901) (Gray, J., concurring) (reference to “United States” in Uniformity Clause did not include Puerto Rico); *Dooley v. United States*, 183 U.S. 151, 156–57 (1901) (Export Clause bar on taxation of exports from any state inapplicable to goods shipped from Puerto Rico).

239. *See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1665 (2020) (noting *Insular Cases* “should not be further extended” (quoting *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion))).

240. *See Boumediene*, 553 U.S. at 755–60.

241. *Fitisemanu v. United States*, 1 F.4th 862, 878 (10th Cir. 2021).

242. 135 S. Ct. 2584, 2607 (2015).

apply in Puerto Rico.²⁴³ Because the Supreme Court decided *Obergefell* while the case was on appeal to the First Circuit, the district court's task at that point boiled down to entering the appellate court's mandate agreeing with all "parties' joint position" that Puerto Rico's same-sex marriage ban was "unconstitutional."²⁴⁴ Instead, the court went out of its way to view the case through the *Insular Cases*, and concluded that whether or not "the right to same-sex marriage" applied to Puerto Rico was an open question that only the Supreme Court could resolve.²⁴⁵ The First Circuit reversed, holding that the guarantees of due process and equal protection—from which the right to same-sex marriage derived—had long applied to Puerto Rico.²⁴⁶ In suggesting otherwise, the district court "err[ed] in so many respects," the First Circuit explained, "that it [was] hard to know where to begin."²⁴⁷

The *Insular Cases* present yet another complicating factor that lower courts find unworkable: determining, as a threshold matter, whether a territory is "incorporated" or "unincorporated" in the first place. Here, confusion stems from the Supreme Court's more recent statements on territorial incorporation, because the 1922 case of *Balzac* seems to provide a straightforward answer—namely, no territories are incorporated until Congress unequivocally says so.²⁴⁸ But in 2008, the Court suggested in *Boumediene* that "over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional

243. See *Conde Vidal v. Garcia-Padilla*, 167 F. Supp. 3d 279, 286–87 (D.P.R. 2016).

244. *Id.* at 281.

245. *Id.* at 286.

246. See *In re Conde Vidal*, 818 F.3d 765, 766 (1st Cir. 2016) ("The constitutional rights at issue here are the rights to due process and equal protection, as protected by both the Fourteenth and Fifth Amendments to the United States Constitution. Those rights have already been incorporated as to Puerto Rico.").

247. *Id.* Indeed, while the First Circuit left the issue unaddressed, the district court also likely erred in minimizing the right the Supreme Court recognized in *Obergefell*, construing it as a "right to same-sex marriage." *Conde Vidal*, 167 F. Supp. 3d at 281 (emphasis added). *Obergefell* itself rejected this approach, explaining that fundamental rights are defined comprehensively, not by reference to who those seeking to exercise them or those "who exercised them in the past." 135 S. Ct. at 2602; see also *id.* ("*Loving [v. Virginia]* did not ask about a 'right to interracial marriage'").

248. *Balzac v. Porto Rico*, 258 U.S. 298, 306 (1922) ("Had Congress intended to [incorporate Puerto Rico], it is reasonable to suppose that it would have done so by the plain declaration, and would not have left it to mere inference.").

significance.”²⁴⁹ At a glance, that argument at least suggests “that it is possible for the bundle of rights applicable in a particular territory to change over time.”²⁵⁰ But the Court did not explain how those changes might take place or what their “constitutional significance” may or may not be, making it difficult for lower courts to determine when to apply certain constitutional provisions to the territories—whichever those might be—and when not to do so.²⁵¹

Lastly, the “repurposing argument,”²⁵² has sought to revitalize territorial incorporation to protect cultural practices that might conflict with constitutional safeguards.²⁵³ This new read on the *Insular Cases* should not suggest that the doctrine is somehow workable—or salvageable. As the Tenth Circuit’s analysis in *Fitisemanu* highlights, the courts that have followed this example have largely done so with open eyes: they have “repurposed” the cases’ framework *despite* their clearly “ignominious history” and obviously “disreputable” purpose and reasoning.²⁵⁴ That is to say, the argument that territorial incorporation can now be deployed to arguably benefit the residents of unincorporated territories is, admittedly, a new gloss and attempt to find palatable outcomes “notwithstanding” the *Insular Cases*’ “beginnings.”²⁵⁵

Arguments to repurpose the *Insular Cases* and territorial incorporation to preserve particular cultural practices in

249. *Boumediene v. Bush*, 553 U.S. 723, 758 (2008).

250. Pedro A. Malavet, *The Inconvenience of a “Constitution [that] Follows the Flag But Doesn’t Quite Catch Up with It: From Downes v. Bidwell to Boumediene v. Bush*, 80 MISS. L.J. 181, 194 (2010).

251. At least one lower court found license in *Boumediene* to take the *Insular Cases* head on, evaluate Puerto Rico’s evolving relationship with the United States, as of 2008, and determine whether its “ties [had] strengthen[ed] in ways that are of constitutional significance.” 553 U.S. at 758. In *Consejo de Salud Playa de Ponce v. Rullan*, then-District of Puerto Rico Judge Gustavo Gelpi held that congressional treatment towards Puerto Rico since 1898 indicated that the Island had been de facto “incorporated” into the United States. 586 F. Supp. 2d 22, 43 (D.P.R. 2008). That ruling has never been challenged or overruled, even if its reasoning appears foreclosed by *Balzac*. See 258 U.S. at 306 (“[I]ncorporation is not to be assumed without express declaration [of Congress], or an implication so strong as to exclude any other view.”).

252. See generally Ponsa-Kraus, *The Insular Cases Run Amok*, *supra* note 45, at 4.

253. See, e.g., *Wabol v. Villacrusis*, 958 F.2d 1450, 1460 (9th Cir. 1992) (upholding, under equal protection challenge, racial restrictions on sale of land in the Northern Mariana Islands meant to benefit persons of local descent).

254. *Fitisemanu v. United States*, 1 F.4th 862, 870 (10th Cir. 2021).

255. *Id.*

unincorporated territories from federal disruption ought not, as a result, weigh much in the stare decisis analysis. As Chief Justice John Roberts has underscored, “[s]tare decisis is a doctrine of preservation, not transformation.”²⁵⁶ So even if flawed doctrine could be retrofitted to serve different aims than those it had at the outset— notwithstanding reasons to suggest it should not—that new reasoning cannot sustain it for stare decisis purposes.²⁵⁷ Given the chance to rewrite its own case law and with territorial incorporation squarely before it, the Court could clearly uphold these courts’ reading of its *Insular Cases*, but that would, effectively, result in new doctrine with no basis in the original decisions. Solicitude for the cultures of peoples in so-called unincorporated territories played no part in the *Insular Cases*’ leading decisions—those were instead justified by “prevailing governmental attitudes presum[ing] white supremacy and approv[ing] of stigmatizing segregation.”²⁵⁸ Repurposing arguments are thus, in other words, “literally *un*precedented.”²⁵⁹ They would have to either “stand or fall on their own.”²⁶⁰

The confusion and unworkability of these issues are not collateral to the territorial incorporation doctrine—they are central to it. They pose problems for courts and litigants alike as they try to understand their rights, privileges, and responsibilities under the Constitution. In navigating a doctrine already unmoored from the constitutional text, the *Insular Cases* have left judges unable to decide which rule to “apply . . . to particular cases” and even less able to “expound and interpret that rule.”²⁶¹

D. Developments Since Precedent

This factor allows the Supreme Court to acknowledge that earlier Justices may have “decided [a given precedent] against a very different legal and economic backdrop” and that these developments

256. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring).

257. *See id.* (“There is [] no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited.”).

258. Martha Minow, *Preface: The Enduring Burdens of the Universal and the Different in the Insular Cases*, in *RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE*, at vii (Neuman & Brown-Nagin eds., Harvard Univ. Press 2015).

259. *Citizens United*, 558 U.S. at 385 (Roberts, C.J., concurring).

260. *Id.*

261. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

may have changed circumstances in a way that an earlier Court could not have “fully appreciate[d]” or perhaps anticipated.²⁶² Developments may be legal, such as when a decision has “its underpinnings eroded[] by subsequent decisions,”²⁶³ or factual, such as when new realities undercut the applicability of prior doctrine.²⁶⁴ Both the legal and factual developments since the *Insular Cases* undermine the territorial incorporation doctrine’s utility, particularly given the overt racial assumptions that otherwise distinguish the *Insular Cases*.

Factually, as much time—120 years—has passed from the first *Insular* decisions as between the Founding and the *Insular Cases*. That ought to matter, because territorial incorporation was, from the onset, a stopgap. The early *Insular Cases* repeatedly highlighted the Court’s concern over allowing Congress the flexibility it needed to address the result of holding lands after a then-novel burst of overseas military activity.²⁶⁵ Those concerns continued and at midcentury the Court described the *Insular Cases* as decisions “involv[ing] the power of Congress . . . to govern *temporarily* territories with wholly dissimilar traditions and institutions.”²⁶⁶ And more recently, the Court has described the cases as concerning “territories the United States did not intend to govern indefinitely.”²⁶⁷ Thus, looking 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.”²⁶⁸

In the time since the *Insular* decisions, all of the territories’ inhabitants, except for American Samoans, have been recognized as

262. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2483 (2018).

263. *United States v. Gaudin*, 515 U.S. 506, 521 (1995).

264. *See Janus*, 138 S. Ct. at 2483 (discussing new economic conditions related to public-sector unions in the decades since relevant precedent was decided).

265. *See Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (Brown, J., concurring) (“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 a free government under the Constitution extended to them.”); *id.* at 343–44 (White, J., concurring) (“[I]t would be a violation of duty under the Constitution for the legislative department, in the exercise of its discretion, to accept a cession of and permanently hold territory which is not intended to be incorporated . . .”). In the context of Alaska refer to *Rasmussen v. United States*, 197 U.S. 516, 521 (1905) (White, J.) (“[I]t is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly acquired possessions.”).

266. *Reid v. Covert*, 354 U.S. 1, 14 (1957) (emphasis added).

267. *Boumediene*, 553 U.S. at 768–69.

268. *Janus*, 138 S. Ct. at 2483.

citizens,²⁶⁹ and tens of thousands of residents of the territories serve in the U.S. military.²⁷⁰ Structurally, Congress has established an Article III court in Puerto Rico,²⁷¹ and the Supreme Court receives appeals on writ of certiorari from the supreme courts of Puerto Rico and the Virgin Islands, just as it does from the states and the District of Columbia.²⁷² Even assuming arguendo that they ever did, it would be difficult to say, as an objective matter, that the territories now have “entirely different cultures and customs from those of this country,” “with wholly dissimilar traditions and institutions.”²⁷³ Cultural and even legal differences surely remain and ought not go understated, but these could hardly continue to justify (if they ever could) the “switching off” of constitutional provisions in U.S. territories.

Importantly, and as noted, the Supreme Court no longer indulges the sort of racial assumptions at the *Insular Cases*’ foundation. In recent years, the Court has cautioned against legal principle resting on “impermissible racial stereotypes,” “the assumption . . . that all individuals of the same race think alike,” or “inquiries and categories dependent on demeaning stereotypes.”²⁷⁴ Of course, those stereotypes lie at the heart of the incorporation doctrine itself.²⁷⁵

Most importantly, the Court’s own treatment of the *Insular Cases* has shifted dramatically, and modern cases support the view that territorial incorporation is now an anomalous and aberrant doctrine. Not once since 1922 has the Supreme Court declared that a constitutional provision or right is inoperative in an overseas territory. Instead, since the 1950s, the Supreme Court has cabined the *Insular Cases* to their specific facts and holdings, warning that the territorial incorporation framework was a “very dangerous doctrine” that should

269. See 8 U.S.C. § 1101(a)(29) (defining outlying possessions for purposes of noncitizen nationality as American Samoa and Swains Island), § 1401 (CNMI), § 1402 (P.R.), § 1406 (V.I.), § 1407 (Guam). *But see* *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah Dec. 12, 2019) (order granting summary judgment).

270. THE TERRITORIES: THEY ARE US, NAT’L CONF. OF STATE LEGISLATURES (Jan. 27, 2018), https://www.ncsl.org/Portals/1/Documents/magazine/articles/2018/SL_0118-Stats.pdf [<https://perma.cc/3BU3-WEZR>].

271. See Pub. L. No. 89-571, 80 Stat. 764 (tying the tenure of federal judges in Puerto Rico to good behavior).

272. Compare 28 U.S.C. § 1258; *id.* § 1260 with *id.* § 1257.

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

274. *Schuetz v. Coalition to Defend Affirmative Action, Integration & Immigr. Rts. & Fight for Equality by Any Means Necessary (“BAMN”)*, 572 U.S. 291, 308 (2014) (internal quotation marks and citations omitted).

275. See *supra* Part II.D.

not be given any “further expansion.”²⁷⁶ And just two years ago, when parties and amici asked the Court to overrule the *Insular Cases* in *Aurelius*, the Court was adamant that since the decisions “did not reach” the main constitutional issue there, the Court would neither apply them nor “extend them.”²⁷⁷ These developments all weigh heavily against applying stare decisis to the *Insular Cases*.

E. Reliance on Precedent

Lastly, the Supreme Court has identified reliance as “a strong reason for adhering to established law.”²⁷⁸ Stare decisis, the Court has explained, has greater “force when the legislature, in the public sphere, and citizens, in the private realm, have [relied] on a previous decision.”²⁷⁹ Not all reliance is equal, however. Where precedent lacks “a clear or easily applicable standard,” “arguments for reliance based on its clarity are misplaced.”²⁸⁰

Admittedly, reliance may be the closest factor in the *Insular Cases*’ favor, insofar as territorial incorporation has been the constitutional principle governing the United States’ relationship with its noncontiguous territories for over 120 years.²⁸¹ But the fact that Congress or state (or territorial) legislatures have legislated under the shadow of flawed precedent is neither dispositive nor a “compelling interest” under the Court’s stare decisis factors.²⁸² Otherwise, the Court has explained, “legislative acts could prevent” it “from overruling [its] own precedents, thereby interfering with [its] duty ‘to say what the law is.’”²⁸³

Moreover, notwithstanding its antiquity, territorial incorporation’s claim to reliance is remarkably weak. To start, of

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

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

278. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2484 (2018).

279. *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991).

280. *Janus*, 138 S. Ct. at 2484 (quoting *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2086 (2018)).

281. As opposed to Hawaii and Alaska, which were incorporated territories that became states in 1959, and Palmyra Atoll, the sole incorporated (though unorganized) U.S. territory as of Hawaii’s entrance into the Union. *See* Exec. Order No. 10967, 26 Fed. Reg. 9667 (Oct. 11, 1961) (Administration of Palmyra Island).

282. *Janus*, 138 S. Ct. at 2485 n.27 (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803))).

283. *Id.*

course, the Supreme Court has treated it as an anomaly for almost seventy years—since at least *Reid*, when a four-justice plurality described territorial incorporation as “a very dangerous doctrine” that did nothing less than “undermine the basis of our government.”²⁸⁴ Moreover, the Court has not applied the territorial incorporation doctrine to find a single constitutional provision *inapplicable* in the territories since *Balzac* in 1922.²⁸⁵ And it has questioned their continued vitality as recently as 2020.²⁸⁶ Meanwhile, no Justice has defended decisions that the Court has itself described as “much-criticized,”²⁸⁷ even as it has repeatedly considered issues relating to the federal government’s governance of Puerto Rico in recent years.²⁸⁸ To the contrary, recent remarks at oral argument suggest that various Justices harbor concerns about the *Insular Cases*’ reasoning and origins.²⁸⁹ This recent history undermines any reliance interest ascribable to the cases, because both public and private actors have “been on notice for years regarding [the] Court’s misgivings” on the decisions and their doctrine.²⁹⁰

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

285. *Id.*

286. *See* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020) (noting “whatever the[] [*Insular Cases*] continued validity” the Court would not expand their framework).

287. *Id.*

288. *See, e.g.,* Puerto Rico v. Sanchez-Valle, 579 U.S. 59 (2016) (deciding whether the dual sovereign exception to the Double Jeopardy Clause applies to Puerto Rico and the United States; *Aurelius*, 140 S. Ct. at 1649 (deciding whether members of Puerto Rico’s Financial Oversight and Management Board are subject to the Appointments Clause); Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938 (2016) (deciding whether Puerto Rico is a “State” for the purposes of Chapter 9 of the Bankruptcy Code); United States v. Vaello-Madero, 313 F. Supp. 3d 370 (D.P.R. 2018) (deciding whether Congress can lawfully deny Social Security insurance benefits to residents of Puerto Rico).

289. Transcript of Oral Argument at 82–83, Fin. Oversight & Mgmt. Bd. for Pr. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (No. 18-1334) (Breyer, J., agreeing with counsel that the *Insular Cases* are “a dark cloud”); Transcript of Oral Argument at 9, United States v. Vaello-Madero, 141 S. Ct. 1462 (2021) (No. 20-303) (Gorsuch, J.) (“[I]f the *insular Cases* are wrong . . . why shouldn’t we just say what everyone knows to be true?”); *id.* at 29 (Sotomayor, J.) (noting *Insular Cases* “are a prime example” of the “history of discrimination” against Puerto Rico residents).

290. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2484 (2018); *see also* *Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019) (citations omitted) (overruling a decision that had “come in for repeated criticism over the years from Justices of this Court and many respected commentators”).

Further, reliance on the *Insular Cases* is undermined by the fact that territorial incorporation increasingly appears to be a doctrine of surplusage: It is doubtful that Congress would have *less* authority to govern U.S. territories without it. As noted, the national government's vast power over federal territories has been settled since the Founding, and the *Insular Cases* did not suggest that Congress' powers would be any more constrained when it legislates for an incorporated territory, as opposed to one it has declined or neglected to incorporate. Consistent with these principles, recent Supreme Court cases have notably reaffirmed Congress' expansive powers over U.S. territories without mentioning the *Insular Cases*—or whether the territories at issue are “unincorporated.”

Take *Puerto Rico v. Sanchez-Valle*, where the Court held that the Fifth Amendment's Double Jeopardy Clause bars Puerto Rico and the United States from successively and separately prosecuting the same defendant for the same offense under Puerto Rico and federal criminal laws, respectively. Ordinarily, under the Court's “dual sovereignty” doctrine, federal and state governments may each punish individuals for the same conduct “giv[ing] rise to distinct offenses . . . if it violates the laws of [the] separate sovereigns.”²⁹¹ But in *Sanchez-Valle*, the Court held that Puerto Rico cannot invoke dual sovereignty to prosecute a defendant already subject to federal penalties for the same criminal acts. The reason was that, as a U.S. territory, the Commonwealth of Puerto Rico's “ultimate source of . . . prosecutorial power is the Federal Government.” Subject, as it is, to Congress' plenary authority, Puerto Rico's power to prosecute individuals under its criminal laws may only be “trace[d] all the way back [to] the doorstep of the U.S. Capitol”²⁹²

Thus, *Sanchez-Valle* clarified that U.S. territories, subject to Congress' expansive constitutional authority, “are not distinct sovereigns from the United States because the powers they exercise are delegations from Congress.”²⁹³ But the Court did not rely on territorial incorporation or the *Insular Cases* to reach that conclusion.²⁹⁴ It did not have to, because it was Puerto Rico's status as

291. 579 U.S. at 62.

292. *Id.*

293. *Id.* at 72 n.5.

294. Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT'L L. 229, 246 (2018) (“[The *Sanchez Valle*] majority seemed to go out of its way to avoid directly citing the *Insular Cases*.”); Rafael Hernández Colón, *The Evolution of Democratic Governance Under the Territorial Clause of the U.S. Constitution*, 50 SUFFOLK L. REV. 587, 610–11 (“In *Sanchez Valle*, the Court ignored

a territory—not as an “unincorporated” one—that deprived it of the authority to successively prosecute someone convicted of federal crimes for offenses against Puerto Rico. To put it another way, it was the fact that the “roots” of the Commonwealth’s “power to prosecute lie in federal soil” that drove *Sanchez Valle*.²⁹⁵ Neither the *Insular Cases* nor territorial incorporation did the Court’s heavy lifting.

Sanchez Valle’s omission of discussion on the *Insular Cases* thus shows that Congress’ broad authority to govern U.S. territories does not need to rely on the flawed and offensive doctrine of “incorporation.” Even without it, Congress’ powers over the territories are extensive, as evidenced by U.S. government lawyers in cases like *Fitisemanu* and *Vaello-Madero* avoiding the *Insular Cases* as well.

Lastly, territorial incorporation’s notoriously unworkable nature makes any claims to reliance interests in the *Insular Cases* even weaker.²⁹⁶ The Supreme Court has “never felt constrained to follow precedent” “when [its] decisions are unworkable or are badly reasoned,”²⁹⁷ and the *Insular Cases* are both. Because they are so poorly reasoned and glaringly race-based, it is doubtful that their substance could even merit reliance.²⁹⁸ But even if their flaws could be set aside, the decisions have never advanced “the evenhanded, predictable, and consistent development of legal principles” or “contribute[d] to the actual and perceived integrity of the judicial process.”²⁹⁹ They cannot now “foster[] reliance” in any meaningful way.³⁰⁰

CONCLUSION

“[I]f the *Insular Cases* are wrong . . . why shouldn’t we just say what everyone knows to be true?”³⁰¹ That was Justice Gorsuch’s recent

the *Insular Cases* in its extensive analysis of the current relationship between Puerto Rico and the United States.”).

295. *Sanchez Valle*, 579 U.S. at 62.

296. See *supra* Part III.C. for a discussion on the *Insular Cases*’ unworkability.

297. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 651 (1944)).

298. *Cf. Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995) (“In this case, as between that principle and ‘its later misapplications,’ the principle must prevail.”).

299. *Payne*, 501 U.S. at 827.

300. *Id.*

301. Transcript of Oral Argument at 9, *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020) (No. 18-1334).

question to the U.S. Deputy Solicitor General at oral argument for *United States v. Vaello-Madero*. In response, the government conceded that the decisions’ “reasoning and rhetoric [] is obviously anathema [and] has been for decades, if not from the outset.”³⁰² Still, it is doubtful that *Vaello-Madero* will close the door on the shameful *Insular* decisions or territorial incorporation, not least, because—as the government was quick to explain—the Court can likely decide the case without tackling the doctrine head on.

But the exchange between Justice Gorsuch and the government was still momentous. Finally, a member of the Court and a lawyer representing the United States pointed to what has been obvious from the start—especially, to the millions living in Puerto Rico and other U.S. territories—the doctrine of territorial incorporation that the *Insular Cases* established was “not correct when it was decided, and it is not correct today. It should not remain binding precedent.”³⁰³ The *Insular Cases* now stand alone as an explicitly racialized anomaly in the American constitutional landscape.

Ridding the Supreme Court’s jurisprudence of more-than-century-old case law, however anomalous, would understandably raise concerns over what follows and whether the change can be neatly done without interfering with other constitutional norms. At the end of the day though, the Court could cleanly and easily dispense with “territorial incorporation”—the *Insular Cases*’ core invention—with little issue. The distinction between “incorporated” and “unincorporated” territories—dependent on offensive racial assumptions from the start—could fall away without doing damage to broader (and more justifiable) principles concerning the national government’s authority over annexed territories.

That still leaves *stare decisis*—should the Court owe the *Insular Cases* any loyalty as precedent? This Article has argued it should not. All the factors that the Court has identified as counseling against holding onto precedent cut against territorial incorporation. Due to their racial assumptions, distance from reality, and repudiation over time, these cases are prime examples of “the kind of doctrinal dinosaur or legal last-man-standing for which [the Court] sometimes depart[s] from *stare decisis*.”³⁰⁴

302. *Id.* at 10.

303. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

304. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 458 (2015).