THE INSULAR CITIZENS: AMERICA'S LOST ELECTORATE V. STARE DECISIS

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† Associate Editor, *Cardozo Law Review*. J.D. Candidate (June 2017), Benjamin N. Cardozo School of Law; B.A., The George Washington University, 2014. Thank you to John Oliver for inspiring me to write this Note. Thank you to Judge Juan R. Torruella and Lin-Manuel Miranda for your dedication to educating the world about Puerto Rico's enduring inequities. Thank you to the entire *Cardozo Law Review* team for your diligence and expertise in preparing this Note for publication. Thank you to my family for your patience, support, and encouragement during my journey through law school. Finally, thank you to Professor Deborah Pearlstein—this Note would not have been possible without your guidance and mentorship.

INTRODUCTION

The United States Citizenship and Immigration Services describes citizenship as the common thread that connects all Americans through the shared values of freedom, liberty, and equality.[1] U.S. citizenship is made up of a bundle of rights and responsibilities essential to the freedom and prosperity of the nation.[2] However, millions of U.S. citizens living in America's territories lack many of these important rights,[3] such as the right to vote, due to their locality.[4] Over 3.5 million U.S. citizens currently reside on the island of Puerto Rico,[5] and live under U.S. federal law, yet lack the ability to elect any voting representatives to federal government.[6] Consequently, U.S. citizens

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1 *Citizenship Rights and Responsibilities*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/citizenship/learners/citizenship-rights-and-responsibilities (last visited Dec. 27, 2015).

2 *Id.* These *rights* include: freedom of expression; trial by jury; and the ability to vote in elections for public officials. *Id. Responsibilities* of citizenship include: supporting and defending the Constitution; remaining informed about issues affecting one's community; participating in the democratic process; participating in the community; respecting and obeying federal, state, and local laws; and paying taxes. *Id.*

3 Persons born in Puerto Rico on or after April 11, 1899 are citizens of the United States pursuant to 8 U.S.C. § 1402 (2012).

4 *See* Igartúa-de la Rosa v. United States (*Igartua III*), 417 F.3d 145 (1st Cir. 2005) (en banc) (en banc rehearing, which affirmed *Igartua II*); Igartua de la Rosa v. United States (*Igartua II*), 229 F.3d 80 (1st Cir. 2000) (holding that U.S. citizens residing in Puerto Rico do not possess a constitutional right to participate in the U.S. national election for President and Vice-President).

5 Puerto Rico has a larger population than twenty-one states and has the second largest population of any state or territory in the First Circuit, only behind Massachusetts. *See* U.S. CENSUS BUREAU, POPULATION DIV., ANNUAL ESTIMATES OF THE RESIDENT POPULATION: APRIL 1, 2010 TO JULY 1, 2014 (Dec. 2014), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2014_PEPANNRES&src=pt [hereinafter CENSUS REPORT] (estimating a population of 3,548,397 residents in Puerto Rico as of July 1, 2014).

6 *See Igartua II*, 229 F.3d at 86 & n.6 (stating that Puerto Rico is represented in Congress by a Resident Commissioner, "but that official's lack of a vote obviously diminishes his ability to effectively represent them"); Amber L. Cottle, Comment, *Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections*, 1995 U. CHI. LEGAL F. 315, 320.

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement

residing in Puerto Rico are placed in a precarious position: they hold American passports,[7] pledge their allegiance to the U.S. government, abide by Federal Law, and many even serve in the military,[8] yet these citizens have no say in electing their Commander-in-Chief or influencing laws—which may adversely impact or oppress them—through a voting federal legislative representative.[9]

Perhaps the most interesting aspect of this disenfranchisement is the fact that it is not tied to a "type" of citizen, but is based on the citizen's locality of residence. For example, a U.S. citizen born in New York City who is hired for a job in a U.S. territory—such as Puerto Rico—and consequently changes their domicile from New York to the territory, surrenders their voting rights and representation in Congress.[10] Conversely, a Puerto Rican-born U.S. citizen who moves to New York City and establishes domicile, is able to vote in the presidential election and is represented by New York's elected officials in Congress.[11] This exposes a troubling disparity in the rights of citizenship, where constitutional entitlements to enfranchisement and representation can be added or removed from a citizen's bundle of rights and responsibilities solely due to their location of domicile "within" the United States. The disparity is a function of the status of the unincorporated territories, decided by the *Insular Cases*[12] more than a century ago.[13]

> or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Reynolds v. Sims, 377 U.S. 533, 555 (1964) (citing South v. Peters, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

7 Issuance of Passports by Governor of Porto Rico, 31 Op. Att'y Gen. 151 (1917).

8 *See* Cottle, *supra* note 6, at 326 ("United States citizens in Puerto Rico have served with distinction in every armed conflict involving the United States since 1917." (footnote omitted)).

9 *See Igartua II*, 229 F.3d at 86.

10 Igartua De La Rosa v. United States (*Igartua I*), 32 F.3d 8, 10 (1st Cir. 1994).

11 The current economic crisis in Puerto Rico has caused a mass exodus to Florida, as Puerto Ricans hope to find better working opportunities. *See* Mary Jordan, *Exodus from Puerto Rico Could Upend Florida Vote in 2016 Presidential Race*, WASH. POST (July 26, 2015), https://www.washingtonpost.com/politics/exodus-from-puerto-rico-could-upend-florida-vote-in-2016-presidential-race/2015/07/26/d73bc724-3229-11e5-8353-1215475949f4_story.html. Once in Florida, these U.S. citizens gained the right to vote in U.S. national elections, shifting the demographics for the swing state. *See id.*

12 *See* Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 284 n.4 (2007). The *Insular Cases* include:

> De Lima v. Bidwell, 182 U.S. 1 (1901) (holding that once Puerto Rico was acquired by the United States through cession from Spain it was not a "foreign country" within the meaning of tariff laws); Goetze v. United States, 182 U.S. 221 (1901) (holding that Puerto Rico and Hawaii were not foreign countries within the meaning of tariff laws); Dooley v. United States, 182 U.S. 222 (1901) (holding that the right of the President to exact duties on imports into the United States from Puerto Rico ceased with the ratification of the peace treaty between the United States and Spain);

The *Insular Cases* are widely recognized as having contradicted precedent of their time and as having been motivated by politics and racial biases.[14] Yet despite the test of time, they have been upheld as the "law of the land," continually influencing America's policies towards colonial governance through the present day.[15] The *Insular Cases* translated America's political dispute of how to govern and classify the territories acquired as a result of the Spanish-American War of 1898[16] into the United States Constitution's vocabulary.[17] The holdings established an unprecedented and complex form of colonial governance, which classified the territories' relationship to America as "unincorporated," and, consequently, defined the extent to which the United States Constitution and American laws applied to the territories.[18] However, the Court's attitude in the *Insular Cases* towards "alien races" seems anachronistic and inapposite to the current situation facing what this Note will call "Insular Citizens"[19]—one does not

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Armstrong v. United States, 182 U.S. 243 (1901) (invalidating tariffs imposed on goods exported from the United States to Puerto Rico after the ratification of the treaty between the United States and Spain); Downes v. Bidwell, 182 U.S. 244 (1901) (holding that Puerto Rico did not become a part of the United States within the meaning of Article I, section 8 of the Constitution); Huus v. N.Y. & P.R. S.S. Co., 182 U.S. 392 (1901) (holding that a vessel engaged in trade between Puerto Rico and New York is engaged in the coasting trade and not foreign trade).

Id.

13 The "unincorporated territories" are "those for which, at the time of acquisition, the United States did not express an intention of incorporating into the Union." *Igartua III*, 417 F.3d at 164 (Torruella, J., dissenting). The "unincorporated territory" doctrine represents that "only those parts of the Constitution dealing with 'fundamental' rights apply" to the unincorporated territories. *Id.*

14 Torruella, *supra* note 12, at 286. Judge Torruella's dissent in *Igartua III* recognized that "[t]he *Insular Cases*, would today be labeled blatant 'judicial activism'" which "are anchored on theories of dubious legal or historical validity, contrived by academics interested in promoting an expansionist agenda." *Igartua III*, 417 F.3d at 163 (Torruella, J., dissenting) (footnote omitted). Additionally, in order to place the *Insular Cases* on the historical timeline of the Supreme Court's constitutional jurisprudence, it is worth recognizing that the decisions were written by the same Court that created the "separate but equal doctrine." *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

15 Torruella, *supra* note 12, at 285–86.

16 *See* Treaty of Peace, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754 [hereinafter Treaty of Paris] ("Spain relinquishes all claim of sovereignty over and title to Cuba" and "cedes to the United States the island of Porto Rico[,] . . . the island of Guam in the Marianas or Ladrones[,] . . . [and] the archipelago known as the Philippine Islands . . . .").

17 Torruella, *supra* note 12, at 285.

18 *See id.* at 308, 284 n.4.

19 This Note coins the terms "Insular Citizens" and "Insular Citizenship." The "Insular Citizens" are a class of U.S. citizens residing in America's unincorporated territories who lack the right to vote in U.S. national elections based solely on their domicile. The "Insular Citizens" possess an inferior class of "Insular Citizenship"—the diminished rights of U.S. citizenship resulting from the *Insular Cases* and their progeny. *See infra* Sections I.A–II.A; *see also* Ediberto Roman, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 7–15 (1998) (discussing U.S. citizenship and, specifically, the unequal citizenship of

become more or less qualified to participate in the democratic process based on where one maintains a residence.

Without rights to meaningful representation or the power to vote, the Insular Citizens living in Puerto Rico face discrimination, constraint, and oppression under federal law with no remedy.[20] Three potential solutions have been proposed by judges and scholars in order to enfranchise the Insular Citizens of Puerto Rico: (1) granting statehood to Puerto Rico;[21] (2) adopting a constitutional amendment;[22] and (3) overruling precedent, including the *Insular Cases* and their progeny.[23] The first two solutions present arguably insurmountable political challenges, while the third solution poses a unique challenge to the judicial role.

This Note explores the third option—overruling precedent—to determine whether the Supreme Court's own practice of departing from traditional commitments to stare decisis can be used to support a decision to overturn the *Insular Cases* and enfranchise the Insular Citizens. First, this Note examines the problem facing Puerto Rico, followed by a discussion of the shortcomings of a political remedy.[24] Next, by assessing the Supreme Court's modern interpretation of stare decisis in several seminal cases, the Note sheds light on how the Court decides whether to uphold or overturn precedent.[25] Finally, this Note proposes that the Court's modern interpretation of stare decisis enables it to invoke judicial discretion as an appropriate and necessary method

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Puerto Ricans, based on Roman's theory of the "alien-citizen paradox"). The "Insular Citizens" could possess the right to vote immediately upon declaring domicile in an American state. This Note uses the term "Insular Citizens" specifically in reference to the group of U.S. citizens living in Puerto Rico, who lack voting rights to influence federal government simply because they reside on Puerto Rican soil.

20 Judge Torruella points out that this is ironic because the United States "touts itself throughout the world as the bastion of democracy." *See* The Honorable Juan Torruella, Judge, United States Court of Appeals for the First Circuit, Keynote Address at Harvard Law School Conference: Reconsidering the Insular Cases, The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement (Feb. 19, 2014) [hereinafter Harvard Law School, Keynote Address], https://www.youtube.com/watch?v=aixtvS4Jack (00:45:31).

21 *See Igartua II*, 229 F.3d at 83–84 (denying voting rights for Puerto Rican residents absent a change in status, incorporating the territory into a State).

22 *Id.* (denying voting rights for Puerto Rican citizens absent a constitutional amendment similar to the 23rd Amendment, which granted voting rights to residents of the District of Columbia).

23 *Id.* at 84 (denying voting rights to Puerto Rican citizens based on stare decisis and discussing exceptions to the doctrine). The Honorable Juan Torruella advocates for another solution: protesting and lobbying through the use of "time honored civil rights actions" such as "economic boycott to attract attention to ongoing civil rights violations." Harvard Law School, Keynote Address, *supra* note 20 (00:46:45). This is not a legal solution but acts as a catalyst for the other three solutions. *See id.*

24 *See infra* Parts I–II.

25 *See infra* Part III.

of awarding voting rights to the Insular Citizens residing in Puerto Rico.[26]

I. UNDERSTANDING THE STATUS OF PUERTO RICO AND THE INSULAR CITIZENS

In order to fully comprehend the seriousness and implications of the Insular Citizens' status, it is necessary to understand the relationship between Puerto Rico and America, and the historical context through which it evolved. At the end of the Spanish American War of 1898, the United States acquired Puerto Rico, Guam, and the Philippines through the Treaty of Paris.[27] Article IX of the Treaty of Paris left the civil rights and political status of native inhabitants of America's newly acquired territories to Congress.[28] The newly acquired land sparked national debate, bringing into question whether America—at the time a relatively new country created through colonialism itself—could govern a colonial empire of its own.[29] After an initial period of American military governance in Puerto Rico, Congress attempted to settle the debate by enacting the Foraker Act, which established civil government for Puerto Rico.[30] The Act also levied taxes, established judicial enforcement of American laws through the United States District Court for the District of Puerto Rico, and awarded the protection of the United States to Puerto Rican citizens.[31]

One year later, through a series of highly contentious Supreme Court decisions collectively known as the *Insular Cases*,[32] the Court effectively established the political status of the territories and the extent

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26 *See infra* Part IV.

27 Treaty of Paris, *supra* note 16.

28 *Id.* at art. IX, ¶ 2.

29 *See* Krishanti Vignarajah, *The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the Insular Cases*, 77 U. CHI. L. REV. 781, 781–82, 782 n.2 (2010) ("In the last Congress, when discussing the relations of these newly acquired islands to the United States, I undertook to show that by the historic argument, if I may so term it, it was impossible that the men who fought the Revolutionary war and made the Constitution of 1789 could ever have contemplated establishing a colonial system in this country." (citing 33 CONG. REC. S2128 (Feb. 23, 1900) (statement of Sen. George G. Vest))).

30 *See* Puerto Rico Civil Code (Foraker Act), ch. 191, 31 Stat. 77 (codified as amended at 48 U.S.C. §§ 733, 736, 738–40, 744, 864 (1900)).

31 *Id.*

32 *See* Vignarajah, *supra* note 29, at 782, 783 n.4 (citing Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REVISTA JURÍDICA [REV. JUR. U. P.R.] 225, 303 (1996) (U.S.) ("The intense debate that had accompanied the process of acquisition of new territories had to be settled in order for the process to continue its course. There was a need to develop a truly *common sense* among the organic intellectuals of the metropolitan state. The decisions of the *Insular Cases* had precisely that effect.")).

to which the United States Constitution applied.[33] Puerto Rico's status as an "unincorporated territory" under the *Insular Cases* limited its rights under the United States Constitution.[34] Consequently, when Puerto Rican citizens were eventually awarded U.S. citizenship through the Jones Act,[35] the bundle of rights that they received was diminished in comparison to the privileges enjoyed by the citizens domiciled on the mainland United States.[36]

A. *The* Insular Cases

In the first *Insular Case*, *De Lima v. Bidwell*,[37] the Supreme Court held that Puerto Rico was not a foreign country within the meaning of tariff statutes that exacted duties on foreign imports.[38] The Court explained that upon ratification of the Treaty of Paris, Puerto Rico ceded to the United States and became a territory, belonging to the United States and subject to the disposition of Congress.[39] No additional act was necessary to make the territory domestic.[40] Consequently, duties could not be levied upon imports from Puerto Rico as a foreign country within the meaning of the tariff laws.[41]

The Court refused to enforce the theory that a country can remain foreign with respect to tariff laws until Congress embraces the territory within the Customs Union because it presumes that a country can be "domestic for one purpose and foreign for another."[42] Such a theory presupposes that the United States may hold a territory indefinitely and treat it as domestic in every way, except for tariff purposes.[43] The Court recognized that under this theory, the newly defined status of the territories could remain static for over a century, until Congress declared otherwise.[44] The majority concluded that enforcing such a

33 The *Insular Cases* arose out of disputes over commercial operations with the newly acquired territories. *See* cases cited *supra* note 12. All but one case, *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901), were 5-4 decisions, suggesting that the classifications given to the territories were the subject of judicial dispute between the justices even over one hundred years ago. *See* Torruella, *supra* note 12.

34 *See* Balzac v. Porto Rico, 258 U.S. 298, 304–06 (1922).

35 Jones Act, ch. 145, 39 Stat. 951 (1917).

36 *See* Igartua de la Rosa v. United States, 107 F. Supp. 2d 140, 142 (D.P.R. 2000).

37 182 U.S. 1 (1901).

38 *Id.* at 200.

39 *Id.* at 196–97.

40 *Id.*

41 *Id.* at 199–200.

42 *Id.* at 198.

43 *Id.*

44 *Id.*

theory would be "pure judicial legislation," without warrant in the Constitution and beyond the scope of the Court's powers.[45]

In *Downes v. Bidwell*[46]—generally recognized as the seminal *Insular Case*[47]—the Court expanded on *De Lima* to decide whether Puerto Rico was a part of the United States within the meaning of the revenue clauses of the Constitution.[48] Downes sued to recover the tax he paid on his oranges that were "imported" from Puerto Rico to a New York port.[49] He argued that since Puerto Rico was not a foreign country to the United States after the Treaty of Paris, his imports should be taxed in accordance with the Uniformity Clause of the Constitution.[50] The Court held that the increased duties on Puerto Rican imports were valid because the territories did not fall under the definition of "throughout the United States" in the Uniformity Clause.[51]

The Court's holding relied on the justification that the territories were "appurtenant and belonging to . . . , but not a part of the United States" for purposes of the Constitution's revenue clauses.[52] The majority concluded that the territories were United States "possessions," "inhabited by alien races," who differed from U.S. citizens in "religion, customs, laws, methods of taxation, and modes of thought," rendering "the administration of government and justice, according to Anglo-Saxon principles," impossible.[53] Consequently, *Downes* established a new status for the territories—somewhere between a territory and a

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45 *Id.*

46 182 U.S. 244 (1901).

47 *Downes* was "the lead decision among the Insular Cases" that "involve[d] consequences of the most momentous character." *See* Vignarajah, *supra* note 29, at 789 (quoting *Downes*, 182 U.S. at 379 (Harlan, J., dissenting) (alteration in original)).

48 *Downes*, 182 U.S. at 248–49. "The case also involves the broader question whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories." *Id.* at 249. Because the answer is not contained in the text of the Constitution, the Court used its powers to decide. *Id.* This decision is surprising in contrast with the majority's acknowledgement of "pure judicial legislation" in *De Lima*, 182 U.S. at 198.

49 *Downes*, 182 U.S. at 247.

50 U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."); *Downes*, 182 U.S. at 248–49.

51 *Downes*, 182 U.S. at 250–51 (quoting U.S. CONST. art. I, § 8, cl. 1).

52 *Id.* at 287 (stating that the territories are "*appurtenant and belonging to* the United States, but *not a part of the United States* within the revenue clauses of the Constitution" (emphasis added)). Justice White concurred:

> [T]hat while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was *foreign to the Unites States in a domestic sense*, because the island had not been incorporated into the United States . . . .

Id. at 341–42 (White, J., concurring) (emphasis added).

53 *Id.* at 287 (majority opinion).

domestic state—which enabled Congress to maintain the ability to govern and to prescribe terms under which the United States would receive the territorial inhabitants.[54]

The combination of these two holdings shaped the overall doctrine of the *Insular Cases.* The minority from *De Lima* established what became the main components of American colonial law derived from the *Insular Cases*: (1) unfettered congressional power and discretion over the island territories, inherited through the Treaty of Paris; and (2) a distinction between the former Spanish territories and all other acquisitions.[55] *Downes* established the "Incorporation Doctrine," which recognized Puerto Rico and the other former Spanish territories as "unincorporated territories"—appurtenant to but not part of the United States.[56] The "Incorporation Doctrine" remains relevant today because it extends only the "fundamental" rights contained in the United States Constitution to the residents of the unincorporated territories,[57] and grants power to Congress in situations where the Constitution does not expressly provide.[58]

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54 *See id.* at 279; Vignarajah, *supra* note 29, at 790–91.

55 *See* Torruella, *supra* note 12, at 304. Judge Torruella explains that there is also a third component of American Colonialism derived from the *Insular Cases*: (3) rules for dealing with the "Philippine problem," which left a legacy of considerations even after America relinquished the Philippines. *Id.* This Note will not focus on this third component, but it is important to acknowledge that concerns about the Philippines were operating in the background and influenced the holdings of the *Insular Cases*.

56 *Downes*, 182 U.S. at 287. The "unincorporated territories" are the acquired territories that were not incorporated into the Union. *See Igartua III*, 417 F.3d at 164 (Torruella, J., dissenting).

57 In *Downes*, the Court distinguished the "fundamental" or "natural" constitutional rights from the "artificial or remedial rights which are peculiar to [the United States'] own system of jurisprudence." 182 U.S. at 282. The "fundamental" rights included:

> [T]he rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government.

Id. at 282–83. The "artificial" or "remedial" rights included "rights to citizenship, to suffrage, and to the particular methods of procedure pointed out in the Constitution." *Id.* at 283 (citation omitted).

58 *Igartua III*, 417 F.3d at 164 (Torruella, J., dissenting); Igartua de la Rosa v. United States, 107 F. Supp. 2d 140, 142 (D.P.R. 2000). In *Downes*, the Court stated that the extent to which the Constitution applies to Puerto Rico is "found in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress, and in the decisions of [the Supreme Court]." 182 U.S. at 249. In contrast, all of the Constitution's provisions and accompanying rights apply to the territories that are already incorporated into the United States or are assured eventual statehood. *See* Roman, *supra* note 19, at 12.

Although Puerto Rico retains its unincorporated status through the present day, the creation of the theoretical basis for the incorporation doctrine was rooted in the *Insular Cases*' interpretation of the Territorial Clause of the Constitution[59]—a reading that directly conflicted with the precedent of its day.[60] Forty-five years prior to hearing the *Insular Cases*, the Supreme Court determined the scope of Congress' authority to manage, control, and hold territories under the Territorial Clause in *Dred Scott*.[61] Through analyzing whether an act of Congress prohibiting slavery in the Territory of Missouri was constitutional pursuant to the Territorial Clause, Chief Justice Taney proclaimed that the Constitution did not give the Federal Government the powers to establish, maintain, or govern colonies, nor to enlarge its territorial limits, except through the admission of new States.[62] The Constitution similarly did not grant the power to acquire, hold, and govern territories in a permanently colonial status.[63] Thus, despite being treated in a negative manner based on its interpretation of the Due Process Clause, *Dred Scott*'s core proposition represented that the Constitution fully applied to the territories to the same extent that it applied to the States.[64]

Contrasting the doctrine from the *Insular Cases* with both the Court's interpretation of the Territorial Clause in *Dred Scott* and the fact that "[*i*]*ndefinite* colonial rule . . . [was] not something . . . contemplated by the Founding Fathers"—given that the United States was founded upon principles of "consent and self-determination"[65]—reveals an

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59 U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").

60 *See* Torruella, *supra* note 12, at 291–93 (referring to *Loughborough v. Blake*, 18 U.S. 317 (1820) and *Dred Scott v. Sandford* (*Dred Scott*), 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV). In 1820, the Court decided *Loughborough*, which held that Congress had the power to impose a direct tax on the District of Columbia under the Uniformity Clause. *See* Torruella, *supra* note 12, at 292. *Loughborough* established that the Court read the Constitution to apply "to all of the 'American empire,' regardless of whether it involved a state or territory, as in the case of the District of Columbia." *Id.* (quoting *Loughborough*, 18 U.S. at 319). In 1901, *Downes* confronted essentially the same question but departed from the *Loughborough* reading to conclude that increased duties on Puerto Rican imports were valid because the territories did not fall under the definition of "throughout the United States" in the Uniformity Clause. *See supra* notes 49–52 and accompanying text.

61 60 U.S. 393. Although *Dred Scott* was subsequently overturned by the Fourteenth Amendment, the rationale undergirding the Court's attitude toward the territories was not overturned. *See* Torruella, *supra* note 12, at 293–94.

62 *Dred Scott*, 60 U.S. at 446.

63 *Id.*

64 *See* Torruella, *supra* note 12, at 294. Torruella states that *Dred Scott*'s essential holding was in consonance with the holding in *Loughborough*. *Id.; see* discussion *supra* note 60.

65 Héctor L. Ramos, Case Note, Igartua de la Rosa v. United States*: Puerto Rico and the Right to Vote in Presidential Elections—Is the Time Ripe for Judicial Interventions?*, 18 T.M.

apparent tension in the underpinnings that inform Puerto Rico's unincorporated political status. Such paradoxes notwithstanding, the Incorporation Doctrine[66] has remained precedent and consequently perpetuates much of the dilemma facing Puerto Rico today.

B. *After the* Insular Cases*: Puerto Rico from 1901–2016*

Even though the *Insular Cases* are 115 years old, they still apply today and, together with subsequent developments, have serious consequences for Puerto Rico's Insular Citizens. By 1917, Puerto Rican citizens were awarded U.S. citizenship through the Jones Act.[67] However, the *Insular Cases* and their progeny continued to counteract the legislative intent of the Jones Act by carving out a unique status for Puerto Rico and derogating the Insular Citizens' rights.[68]

Two decades after the *Insular Cases* were decided, the Supreme Court further diminished the rights of citizens of the territories, this time specifically targeting Puerto Rico. In *Balzac v. Porto Rico*, the Court held that U.S. citizens residing in Puerto Rico did not possess the right to trial by jury.[69] *Balzac* expanded on the *Insular Cases* to establish that the bundle of rights obtained through American citizenship is a "function of the *political status* of the venue in question."[70]

Despite these restrictions, relations between the United States and Puerto Rico have also progressed. The United States enacted the Nationality Act of 1940, granting United States birthright citizenship to all persons born in Puerto Rico on or after January 13, 1941.[71] Ten years later, Congress passed the Puerto Rican Federal Relations Act of 1950 (Public Law 600), allowing Puerto Rico to draft its own constitution.[72]

COOLEY L. REV. 429, 450–51 (2001) (quoting *Igartua II*, 229 F.3d at 89 (Torruella, J., concurring)); *see* Vignarajah, *supra* note 29, at 782 n.2 (quoting Sen. George G. Vest).

66 *See supra* notes 56–58 and accompanying text.

67 Jones Act, ch. 145, 39 Stat. 951 (1917).

68 The ordinary rights and privileges of citizenship are implied. *See Igartua III*, 417 F.3d at 165–66 (Torruella, J., dissenting). Nowhere in the Act does it suggest that there should be diminished rights of citizenship. Further, this is relevant because the restrictions are tied to the land not the person. *See supra* text accompanying notes 10–13 (regarding locality of citizenship and residency hypotheticals).

69 258 U.S. 298 (1922) (holding trial by jury was not a fundamental right that extended to Puerto Rico based on its unincorporated status pursuant to the Incorporation Doctrine).

70 Igartua de la Rosa v. United States, 107 F. Supp. 2d 140, 142 (D.P.R. 2000) (emphasis added); *Balzac*, 258 U.S. at 309 (Chief Justice Taft, explicitly stating "[i]t is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it").

71 8 U.S.C. § 1402 (2012).

72 Pub. L. No. 81-600, 64 Stat. 319 (1950). Public Law 600 abolished restrictions on structure and organization of Puerto Rico's government under the Jones Act. *Id.*

The Puerto Rican Constitution was approved in February of 1952, establishing Puerto Rico as a commonwealth. Even though Puerto Rico resembles "commonwealths" like Pennsylvania, Massachusetts, and Virginia, for most practical and political purposes, the island's status under the United States Constitution remains stagnant—it is still not part of the United States and remains an unincorporated territory as classified by the *Insular Cases*.[73]

C. *The First Circuit, Puerto Rico's Insular Citizens, and the Denial of a Constitutional Right to Vote*

Puerto Rico's inferior status was further affirmed through *Igartua I–III*, a series of cases in the First Circuit, which ultimately held that the Insular Citizens residing in Puerto Rico lacked the constitutional right to vote in presidential elections.[74] In *Igartua II*, two groups of plaintiffs

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[73] José A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 460–62 (1986) (reviewing JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (1985)). As recently as June of 2016, the Supreme Court followed this construction, ruling that despite Puerto Rico's self-governance, it is not a separate sovereign from the United States for double jeopardy purposes. Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1876 (2016). In *Puerto Rico v. Sánchez Valle*, the Supreme Court held that the Double Jeopardy Clause barred Puerto Rico and the United States from successively prosecuting a single person for the same conduct pursuant to equivalent criminal laws. *Id.* The Court reasoned that under the dual-sovereignty doctrine, the only way for separate sovereigns to successively prosecute is if their undergirding power to prosecute flows from a different "ultimate source." *Id.* Consequently, because Congress conferred the authority for Puerto Rico to draft and adopt its own constitution pursuant to Public Law 600, the original source of Puerto Rico's power to prosecute also flows from the U.S. Federal Government. *Id.* at 1874–77. When Puerto Rico was ceded to America through the Treaty of Paris, Congress inherited the power to determine the island's "civil rights and political status." *Id.* at 1868 (quoting Treaty of Peace, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754, art. IX, ¶ 2). Congress used the power to later enact Public Law 600, which established the flow because "the territorial and federal laws [were] creations emanating from the same sovereignty." *Id.* at 1873 (alteration in original) (quoting Puerto Rico v. Shell Co., 302 U.S. 253, 264 (1937)). Thus, "the oldest roots of Puerto Rico's power to prosecute lie in federal soil." *Id.* at 1868.

[74] The First Circuit considered a series of lawsuits by Gregorio Igartúa, a U.S. citizen-resident in Puerto Rico, alleging that the Insular Citizens possessed a constitutional right to vote in presidential elections. The series included: *Igartua I*, 32 F.3d 8 (1st Cir. 1994); *Igartua II*, 229 F.3d 80 (1st Cir. 2000); *Igartua III*, 417 F.3d 145 (1st Cir. 2005) (the First Circuit's third rehearing of *Igartua II*). Five years later, in 2010, Igartúa and other citizen-residents of Puerto Rico filed a punitive class action, supported in part by the government of the Commonwealth of Puerto Rico, claiming that the Insular Citizens had "a right to vote for a Representative to the U.S. House of Representatives from Puerto Rico and a right to have Representatives from Puerto Rico in that body." Igartúa v. United States (*Igartua IV*), 626 F.3d 592, 594 (1st Cir. 2010). After the First Circuit dismissed *Igartua IV*, it denied petitions for rehearing and rehearing en banc. Igartúa v. United States (*Igartua V*), 654 F.3d 99, 100 (1st Cir. 2011) (Gregorio Igartúa and other resident-citizens petitioned for rehearing and rehearing en banc, while "[i]ntervenor Commonwealth of Puerto Rico [also] filed a petition for rehearing en banc").

residing in Puerto Rico argued that they possessed the constitutional right to vote for President and Vice-President.[75] The first group was comprised of Puerto Rican residents born on the island, while the second group consisted of former U.S. residents who were eligible to vote while living in the United States, yet were disenfranchised of their voting rights upon establishing residency in Puerto Rico.[76] The second group particularly challenged the constitutionality of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[77] The UOCAVA gives rights to U.S. citizens residing outside of the United States to submit absentee votes in federal elections.[78] However, according to the First Circuit, because Puerto Rico is considered to be "within" the United States under the statute, its citizens must be considered disenfranchised.[79]

Before *Igartua II* reached the First Circuit, the district court held that both groups of plaintiffs possessed the right to vote because "Article II, section 1, clause 2, does not *preclude* the [U.S.] citizens in Puerto Rico from voting in Presidential elections."[80] Rather, Article II simply presents the mechanism for the right to vote to be implemented.[81] The district court supported this proposition by recognizing the right to vote as a fundamental right, constituting the essence of a democratic society.[82] The court further justified its holding by acknowledging the trend towards enfranchisement, through which multiple constitutional amendments "entrench[ed]" the right to vote: (1) the Fifteenth Amendment enabled former slaves the right to vote; (2) the Nineteenth Amendment enfranchised women; (3) the Twenty-Third Amendment enabled the District of Columbia to vote in presidential elections; (4) the Twenty-Fourth Amendment eliminated poll taxes as hurdles to voting; and (5) the Twenty-Sixth Amendment gave voting rights to citizens at age eighteen.[83] Through exposing the logical disparity that the arguments used to award voting rights to these other groups of U.S. citizens did not carry over to the U.S. citizens in Puerto Rico, the district

75 *Igartua II*, 229 F.3d at 82.

76 *Id.*

77 52 U.S.C. § 20301 (2012).

78 *Igartua II*, 229 F.3d at 82.

79 *Id.*

80 Igartua de la Rosa v. United States, 107 F. Supp. 2d 140, 145 (D.P.R. 2000) (emphasis added).

81 *Id.*

82 The court relied on the Supreme Court's famous quote in *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), "[t]he right to vote freely for the candidate of one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Igartua de la Rosa*, 107 F. Supp. 2d at 146.

83 U.S. CONST. amends. XV, XIX, XXIII, XXIV, XXVI; *Igartua de la Rosa*, 107 F. Supp. 2d at 145.

court inferred that the Insular Citizens possessed the fundamental constitutional right to vote in presidential elections.[84]

On appeal, in *Igartua II*, the First Circuit was required to reverse the district court's holding.[85] The First Circuit stated that under the doctrines of stare decisis and res judicata,[86] it was bound by the precedent of *Igartua I*, which held that "Article II of the Constitution explicitly provides that the President of the United States shall be elected by electors who are chosen *by the States*, in such manner as each state's legislature may direct."[87] Between *Igartua I* and *II*, Puerto Rico did not become a state, no constitutional amendment or act of Congress expanded the franchise, and the Supreme Court did not decide that the right to vote in presidential elections is derived from any source other than Article II.[88] Consequently, the First Circuit concluded that voting is not an inherent right of citizenship, leaving the Insular Citizens lacking a voice in presidential elections.[89]

Half a decade later, in *Igartua III*, the First Circuit reaffirmed *Igartua II* on en banc review.[90] After stating that the First Circuit had rejected the constitutional claim that Puerto Rican U.S. citizens possessed a constitutional right to vote for president three times, and that the Supreme Court had denied certiorari in both *Igartua I*[91] and a similar Ninth Circuit case[92]—rejecting claims seeking voting rights for U.S. citizens residing in Guam—the First Circuit put the constitutional claim "fully at rest."[93]

II. THE FAILURE OF POLITICAL SOLUTIONS

The Supreme Court's holdings in the *Insular Cases* established a limited applicability of constitutional rights to the territories, which consequently engendered differentiated citizenship as a form of

84 *Igartua de la Rosa*, 107 F. Supp. 2d at 145 ("Yet, somehow the arguments that have justified these amendments have not carried over to Puerto Rico.").

85 *Igartua II*, 229 F.3d at 82–83.

86 *Id.* at 82.

87 *Id.* at 83 (citing U.S. CONST. art II, § 1, cl. 2).

88 *Igartua II*, 229 F.3d at 83–85.

89 *Id.* at 85.

90 *Igartua III*, 417 F.3d at 146–47.

91 Igartua v. United States, 514 U.S. 1049 (1995).

92 Att'y Gen. of the Territory of Guam v. United States, 738 F.2d 1017 (9th Cir. 1995), *cert. denied*, 469 U.S. 1209 (1985).

93 *Igartua III*, 417 F.3d at 148 (the majority concluding, "[i]n this *en banc* decision, we now put the constitutional claim fully at rest: it not only is unsupported by the Constitution but is contrary to its provisions").

membership in a modern republic.[94] Despite civil rights struggles against forms of second-class citizenship and overwhelming evidence throughout the Constitution that citizens of republics should be equal before the law, Puerto Rican citizens not only remain disenfranchised in presidential elections, they also lack voting representation in Congress.[95] This leaves Puerto Rico and its citizens completely subordinate to the control of the United States, with no political influence or electoral significance, and only the ability to ask for charity and favors from the United States.[96] The Puerto Rico-United States "relationship is government without the consent or participation of the governed."[97] Understanding how to begin to remedy this problem within the structure of U.S. government requires an understanding of the driving forces, which perpetuate this inequality.

A. *Preservationist Policies*

The seminal explanation for limiting voting rights, equal citizenship, and representation for territorial citizens is "preservationist" policies of civic differentiation.[98] "Preservationist" policies embrace the values of powerful political actors to distinguish and limit civic statuses of minority groups for economic, national security, cultural, or ideological reasons.[99] In order to understand why and how

94 Rogers M. Smith, *The Insular Cases, Differentiated Citizenship, and Territorial Statuses in the Twenty-First Century*, *in* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 103 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

95 *Id.* at 104.

96 *See* Harvard Law School, Keynote Address, *supra* note 20 (00:21:05). This situation is the current problem facing Puerto Rico with its debt crisis, where the federal government will not allow the territory to file for bankruptcy, yet the territory has no voting rights to correct the situation on its own electorally. *See* Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct 1938, 1942 (2016) (holding that the Federal Bankruptcy Code pre-empted Puerto Rico's Recovery act, "bar[ring] Puerto Rico from enacting its own municipal bankruptcy scheme to restructure the debt of its insolvent public utilities companies"); Noah Feldman, *Puerto Rico's 'Colonial' Power Struggle*, BLOOMBERGVIEW (July 8, 2015, 12:18 PM), http://www.bloombergview.com/articles/2015-07-08/puerto-rico-s-colonial-power-struggle. In the summer of 2016, Puerto Rico faced over $70 billion of debt and defaulted on its payments multiple times. Mary Williams Walsh & Liz Moyer, *How Puerto Rico Debt is Grappling With a Debt Crisis*, N.Y. TIMES (July 1, 2016), http://www.nytimes.com/interactive/2016/business/dealbook/puerto-rico-debt-crisis-explained.html?_r=0. "Unlike American cities such as Detroit, Puerto Rico isn't allowed to file for a court-arranged bankruptcy reorganization. And unlike sovereign nations such as Greece, it can't seek emergency assistance from the International Monetary Fund." *Id.* Consequently, Puerto Rico's "lack of statehood status is now hurting the island at its time of greatest need[,]" leaving only Congress with the ability to legislate ways to remedy the situation. *Id.*

97 *See* Harvard Law School, Keynote Address, *supra* note 20 (00:45:17).

98 *See* Smith, *supra* note 94, at 116.

99 *Id.* at 105. Preservationist differentiations often require innovation of civic statuses to protect those in power from changes and challenges posed by subordinate groups. *See id.*

preservationist policies inhibit rights of the Insular Citizens, it is helpful to compare Puerto Rico with the District of Columbia (D.C.).[100]

The District of Columbia is not a state, yet in 1961, U.S. citizens residing in D.C. were awarded the right to vote for President and Vice-President through the Twenty-Third Amendment.[101] The Twenty-Third Amendment appoints electors in presidential elections equal to the number of Senators and Representatives in Congress that D.C. would be entitled to if it were a state, but no more than the least populous state.[102] Puerto Rico's population of over 3.5 million[103] is over five times larger than the D.C.'s population of 658,893.[104] Because D.C.'s population is only larger than those of Wyoming and Vermont,[105] the Twenty-Third Amendment's limitation that D.C. cannot have more electors than the least populous state does not raise issues of equal voting protection.[106] On the other hand, Puerto Rico's population is larger than that of twenty-one states,[107] meaning if a similar provision were passed, it would violate equal voting representation, diluting Puerto Rican citizens' votes.[108] If granted rights to vote in the presidential election, Puerto Rico's population would entitle the territory to approximately eight electoral votes.[109]

The prospect of Puerto Rico voting in presidential elections, with electoral votes proportional to the amount of votes that the island would have if it were a state, raises implications of "preservationist" policies, including changes in national security, economic welfare, and law enforcement.[110] Consequently, Republicans in Congress would likely oppose enfranchising the territory because Puerto Rico would probably contribute more votes to the Democratic Party.[111] Additionally, due to Puerto Rico's complex political status, "preservationist" policies are

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100 *See* José D. Román, Comment, *Trying to Fit an Oval Shaped Island Into a Square Constitution: Arguments for Puerto Rican Statehood*, 29 FORDHAM URB. L.J. 1681, 1712–13 (2002).

101 U.S. CONST. amend. XXIII.

102 *Id.* (referring to the least populous state in the United States of America).

103 CENSUS REPORT, *supra* note 5.

104 *Id.* (estimating a population of 658,893 residents in D.C. as of July 1, 2014).

105 *Id.* (estimating a population of 584,153 residents in Wyoming and 626,562 residents in Vermont as of July 1, 2014).

106 *See* U.S. CONST. amend. XIV, § 1 (The Equal Protection Clause).

107 *See* CENSUS REPORT, *supra* note 5.

108 *See* Román, *supra* note 100, at 1713.

109 *See id.* In comparison, D.C., Vermont, and Wyoming all have only three electoral votes. *Historical Election Results*, NAT'L ARCHIVES AND RECORDS ADMIN., http://www.archives.gov/federal-register/electoral-college/votes/2000_2005.html#2012 (last visited June 29, 2016).

110 *See* Smith, *supra* note 94, at 126.

111 *Id.* at 118; Jason Koebler, *Despite Referendum, Puerto Rico Statehood Unlikely Until at Least 2015*, U.S. NEWS & WORLD REP. (Nov. 7, 2012, 4:52 PM), http://www.usnews.com/news/articles/2012/11/07/despite-referendum-puerto-rican-statehood-unlikely-until-at-least-2015.

rooted in "legacy" differentiations, following patterns of "path dependency"—the theory that outcomes are shaped by their systematic historical precedent.[112] Under "legacy" policies, even though policies were adopted for reasons that are no longer championed, there is no agreement on how to change the policies today.[113] Thus, even if all of Congress agreed that the *Insular Cases* were wrongly decided, disagreement over how to change Puerto Rico's "unincorporated" status and the consequences of such an action would prevent a clear direction for obtaining a solution.[114] These roadblocks force Puerto Rico and its citizens to achieve voting rights through a solution that either combats or avoids the implications of these policies.

B. *Three Potential Solutions*

In principle, there are three potential methods in which Puerto Rico can obtain voting rights: (1) through obtaining statehood;[115] (2) through a constitutional amendment;[116] and (3) through judicial remedy.[117] Each solution presents its own individual obstacles, yet all of

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112 Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 604 (2001). "'[P]ath dependence' means that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it." *Id.* "Legacy" differentiations cause "legacy" policies. *See* Smith, *supra* note 94, at 104–05.

113 *See* Rogers Smith, Professor and Associate Dean for Social Sciences, University of Pennsylvania, Address at Harvard Law School Conference: Reconsidering the Insular Cases, Panel II: Contemporary Issues Regarding the Territories (Feb. 19, 2014), https://www.youtube.com/watch?v=05Kwh_UOg6g (00:29:36).

114 *See id.* (00:29:43, 00:30:11).

115 *See Igartua II*, 229 F.3d at 83–84 (denying voting rights to Puerto Rican residents absent a change in status for to become a State).

116 *See id.* at 84 (denying voting rights to Puerto Rican residents absent a constitutional amendment similar to the Twenty-Third Amendment, which granted voting rights to residents of the District of Columbia).

117 *See id.* at 84 (denying voting rights to Puerto Rican citizens based on stare decisis and discussing exceptions to the doctrine). Judge Juan Torruella advocates for peaceful social and economic avenues as another potential method to obtain relief from Puerto Rico's enduring inequities. Harvard Law School, Keynote Address, *supra* note 20 (00:44:37). He argues that because the inequities facing Puerto Rico are civil rights issues that have persisted for over 100 years and that the government is exercising "preservationist" and "legacy" policies, the people must form social movements to implement historically successful, "time honored civil rights actions." *Id.* (00:46:26) (citing several successful examples of peaceful protests, including the Boston Tea Party and the Montgomery Bus Boycott). Judge Torruella suggests that creating an economic impact through a simple boycott could be equally, if not more effective, than exercising political clout to attract attention from the American public to bring change because Puerto Rico's consumers are one of the most important markets for the United States' products. *Id.* (00:47:40, 00:48:40). A combination of social and economic action in conjunction with lobbying in Washington may help bring attention to the inequities facing Puerto Rico and

the methods could yield the same result—awarding voting rights to Puerto Rico's Insular Citizens in presidential elections.

1. Statehood

Statehood is the most effective mechanism to award the full bundle of rights and privileges of American Citizenship.[118] The rights of statehood include equal representation in the U.S. House of Representatives and U.S. Senate, complete control over local affairs, and the right to vote.[119] As explained in *Igartua I–III*, awarding statehood would give Puerto Rico the ability to participate in presidential elections.[120] This solution has been thoroughly covered in academic literature,[121] but ultimately confronts hostile political behavior based on "legacy differentiations" and "preservationist" incentives. Although statehood would be sufficient to solve Puerto Rico's disenfranchisement issue, this Note does not argue for strategies to obtain statehood in light of these seemingly intractable "preservationist" incentives.

2. Constitutional Amendment

Territorial residents could also achieve presidential voting rights by constitutional amendment in accordance with Article Five.[122] This solution would mirror past amendments that awarded voting rights to

influence reform. However, these actions alone will not change the law to enfranchise Insular Citizens living in Puerto Rico.

118 *See* D.C. Bar, *DC Statehood "Why It Matters*," YOUTUBE (July 22, 2016), https://www.youtube.com/watch?v=9qmHs5oLGA0 (00:00:30); *About DC Statehood,* NEW COLUMBIA STATEHOOD COMMISSION, http://statehood.dc.gov/page/about-dc-statehood (last visited Sept. 8, 2016); *see also* D.C. COUNCIL, CONSTITUTION AND BOUNDARIES FOR THE STATE OF WASHINGTON, D.C. APPROVAL RESOLUTION OF 2016, 21-621, at 1 (2016).

119 *See* NEW COLUMBIA STATEHOOD COMMISSION, *supra* note 118.

120 *Igartua III*, 417 F.3d at 148; *Igartua II*, 229 F.3d at 83; *Igartua I*, 32 F.3d at 9–10.

121 *See, e.g.*, Koebler, *supra* note 111; Román, *supra* note 100 at 1712–13. Although literature argues for statehood, it also faces preservationist policies. In his keynote address, Judge Torruella described an anecdote about a meeting with Senator John Chaffee of Rhode Island. Harvard Law School, Keynote Address, *supra* note 20 (00:19:00). The Senator expressed that he could not vote for Puerto Rican Statehood because Rhode Island only has two Senators and one Congressman, while Puerto Rico would have two Senators and seven or eight Congressmen. *Id.* (00:20:40). The Senator was further worried that the Puerto Rican Senators and Congressmen would all be Democrats. *Id.*

122 *See* U.S. CONST. art. V; Cottle, *supra* note 6, at 321–31. Under Article Five, a constitutional amendment requires a proposal by either two thirds of both houses of Congress or by a convention called by two thirds of the several states' legislatures, followed by ratification of the proposed amendment by either the legislatures of three fourths of the several states or by conventions in three fourths of the states. U.S. CONST. art. V.

groups such as: the Fifteenth Amendment—enfranchising former slaves; the Nineteenth Amendment—enfranchising women; the Twenty-Third Amendment—enfranchising D.C.; the Twenty-Fourth Amendment—abolishing poll taxes in federal elections; and the Twenty-Sixth Amendment—enfranchising citizens over eighteen years of age.[123] A constitutional amendment for the enfranchisement of Puerto Rico would have to be awarded in the same manner as was used to enfranchise D.C.[124] Even though this solution is expressly stated in *Igartua I–III*,[125] political methods of opposing or circumventing "preservationist" and "legacy" policies to endorse and ultimately achieve a constitutional amendment are beyond the scope of this Note.

3. Judicial Discretion

In the face of "preservationist" and "legacy" policies, the most viable option for relief and protection against Puerto Rico's enduring inequities is through the Court's discretion to depart from stare decisis and overrule the *Insular Cases* and their progeny.[126] The Supreme Court possesses the power to act in accordance with *Downes* and revisit principles of America's administration of government and justice to Puerto Rico, which were intended only to govern "for a time."[127] Among the many principles that the Court could revisit, three relevant considerations include: (1) determining whether voting in presidential elections is a "fundamental" constitutional right; (2) differentiating between the application of the Constitution to U.S. citizenship in general as opposed to the Constitution's application to the unincorporated territories—enabling the Court to award all constitutional rights to citizens independent of their locality, with or

123 U.S. CONST. amend. XV, XIX, XXIII, XXIV, XXVI; *see* Lisa M. Kömives, Comment, *Enfranchising a Discrete and Insular Minority: Extending Federal Voting Rights to American Citizens Living in United States Territories*, 36 U. MIAMI INTER-AM. L. REV. 115, 120 (2004). Six of the sixteen amendments to the United States Constitution since the Bill of Rights deal with voting rights—including the five listed earlier in this footnote and the Seventeenth Amendment, providing for the direct election of U.S. Senators. *See* Cottle, *supra* note 6, at 321–22.

124 *See supra* Section II.A (discussing D.C.'s voting rights and the Twenty-Third Amendment).

125 *Igartua III*, 417 F.3d at 148; *Igartua II*, 229 F.3d at 83–84; *Igartua I*, 32 F.3d at 10.

126 "There comes a point when the courts must intervene to correct a great wrong, particularly one of their own creation, because the political branches of government cannot or will not act." *Igartua III*, 417 F.3d at 183 (Torruella, J., dissenting) (citing Brown v. Bd. Of Educ., 347 U.S. 483 (1954)). If the judiciary "avert[s] its gaze" and does not correct the disenfranchisement of Puerto Rico's Insular Citizens, the court will effectively act as "an accomplice to this monumental injustice." *Id.* (Torruella, J., dissenting) (citation omitted).

127 Downes v. Bidwell, 182 U.S. 244, 287 (1901).

without changing the Constitution's application to the unincorporated territories; or (3) adjusting Puerto Rico's territorial status under the Territorial Clause.

III. STARE DECISIS AND THE JUDICIAL ROLE

Without question, the use of judicial discretion carries significant drawbacks. While there are several schools of thought concerning the position and power of judges within the judicial system,[128] it is widely accepted that the judicial duty confines judges to operate within a system of precedent.[129] Stare decisis is the doctrine of precedent, by which a court must follow earlier judicial decisions when the same points repeatedly arise in litigation.[130] The fourth Chief Justice of the Supreme Court, Chief Justice John Marshall, believed that courts are instruments of the law, created for the purpose of giving effect to the will of the legislature—and therefore the will of the law—rather than the will of the judge.[131] Even though the state of the law has transformed over the past two centuries, the current Chief Justice, John Roberts, still describes the judicial role in a similar manner. In Chief Justice Roberts's famous opening statement during his 2005 confirmation hearing before

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128 For example, some judges embrace "purposivism," traditionally arguing that Congress passes statutes with certain aims, and therefore, the legislation should be enforced in accordance with the spirit and Congressional intent rather than the strict letter of the law when the two conflict. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 70 (2006). In contrast, other judges embrace textualism, which requires the judge to uphold their constitutional duty to give effect to the duly enacted text, when clearly stated, rather than ruling based on evidence of legislative purpose. *Id.* Chief Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit embraces the "purposivism" approach, while other judges, like the late Justice Antonin Scalia, of the U.S. Supreme Court, embrace "textualism." Jeffrey Rosen, Opinion, *John Roberts, the Umpire in Chief*, N.Y. TIMES (June 27, 2015), http://www.nytimes.com/2015/06/28/opinion/john-roberts-the-umpire-in-chief.html?_r=0.

129 *See* Chris Cillizza, *John Roberts, Umpire.*, WASH. POST (June 28, 2012), http://www.washingtonpost.com/blogs/the-fix/post/john-roberts-umpire/2012/06/28/gJQAx5ZM9V_blog.html (quoting Chief Justice John Roberts: "Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath. And judges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench."); discussion *infra* Section III.B.

130 *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014). "[T]he doctrine of stare decisis is one of policy and practice only, not a strict rule of law or an inherent prescriptive power of the judiciary to bind present or future courts with its past decisions." Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1170 (2008) (footnote omitted).

131 Osborn v. Bank of U.S., 22 U.S. 738, 866 (1824) (Chief Justice Marshall discussing judicial discretion, stating that "[j]udicial power, as contradistinguished from the power of the laws, has no existence").

the Senate Judiciary Committee, Roberts analogized the position of a judge to the role of an umpire in a baseball game.[132] Chief Justice Roberts explained that the role of an umpire, like the role of a judge, is limited in its capacity to enforce the rules of the game and "call balls and strikes, . . . not to pitch or bat."[133] For the majority of cases this is true. However, sometimes the age-old dilemma arises, posing the question of when it is appropriate for a judge to depart from the formal requirements of legal interpretation.[134]

A. *The Meaning of Stare Decisis in the Judicial Language*

In *Justice Accused*, Robert Cover famously addressed the judge's role in the judicial interpretation process through the "rules of the game."[135] Cover explained that while the judicial function can be compared to a bishop in the game of chess, only able to move diagonally,[136] a more accurate analogy is to the use of language.[137] A speaker or writer of language adopts rules based on how the language has been used in the past.[138] If the speaker makes a mistake of grammar or syntax, the speaker may be speaking incorrectly, but the speaker is still speaking English.[139] Breaking these rules, however, can create

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132 Cillizza, *supra* note 129.

133 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005), https://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf. Chief Justice Roberts stated:

> Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire. Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath . . . .

Id. at 55.

134 The formal requirements of legal interpretation fall more along the lines of textualism, playing the role as an umpire, and sometimes even purposivism, while a deviation is the judge's application of law that strays away from traditional methods and adjudicates based on morals and principles in order to obtain justice. *See* Manning *supra* note 128, at 79–80.

135 ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 123–25 (1975). Cover examined the dilemma facing judges when ruling on laws that the judge deems unjust or oppressive, through the example of laws relating to slavery in nineteenth century America. *Id.*

136 *Id.* at 124. If a chess player moves the bishop any other way than diagonally, the player is "cheating" and no longer playing "chess." *Id.* While this is similar to the way precedent confines a judge, it is not the perfect analogy to adjudication. *Id.* at 124–25.

137 *Id.* at 126.

138 *Id.*

139 *Id.* at 126–27.

changes in the rules themselves when the departures from the formal rules reflect "good usage" by society.[140] This process is an integral part of the evolution of language, in the same way that judicial decisions, which follow precedent, can lead to changes in the law by reconsidering formalistic notions of limitations on a judge.[141]

The question of when judges can and should depart from formal requirements of legal interpretations arises particularly often in cases presenting hard decisions, where the law noticeably falls out of equilibrium, contradicts the morals of society,[142] or seems fundamentally unjust.[143] The Supreme Court is often confronted with "moral-formal" dilemmas, which it must decide in order to uphold, clarify, and further the law. While it is beyond the scope of this Note to resolve the age-old "moral-formal" dilemma, a close analysis of three seminal cases may shed light on the Court's reasoning and rationale in deciding whether to uphold or overturn precedent in morally charged disputes.[144]

Through understanding the Supreme Court's four-factor analysis of stare decisis in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[145] and comparing and contrasting the Supreme Court's actual application of stare decisis in *Dickerson v. United States*[146]—which

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140 *Id.* This process is a primary vehicle for the evolution of languages and introduces new words, rules, syntax, and phrasing to society, through subtle changes in normal usage of the language.

141 *Id.* at 127–28. "A language that does not grow in this way is a language continually in the process of becoming obsolete." *Id.* at 127.

142 *Id.* at 197–99. Cover explained that during the period of antebellum slavery, judges faced "moral-formal" dilemmas, where they had to wrestle with the immorality of slavery yet were constrained by formal principles such as: (1) the governing role as judge, his place among lawmaking bodies, and his subordination to precedent, the constitution, and laws; (2) the hierarchical system of the judicial system; (3) standards of professional responsibility; and (4) the judicial craft. *Id.*

143 *See id.*; Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); J. C. Oleson, *The Antigone Dilemma: When the Paths of Law and Morality Diverge*, 29 CARDOZO L. REV. 669 (2007). Oleson states that "judicial adherence to law freed from the tethers of prevailing morality . . . lacks a powerful internal check against injustice." *Id.* at 670. "[J]udges must not forget that law is a means to an end, and not an end in itself. They must not become myopically fixated upon the minutiae of . . . statute[s] [and] rule[s], and forget that the end of law is justice." *Id.* at 701. Ultimately, judges "must remain alert to the moral consequences of their decisions, . . . [because] human lives are changed [and society is shaped] in the courtroom." *Id.* However, judges face "Antigone-like" choices between command and conscience. *Id.* at 670. An Antigone-like dilemma refers to Sophocles' story of Antigone, a woman prohibited by penalty of death to bury her brother, yet felt morally compelled to do so. *Id.* at 670 n.5.

144 The first case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–55 (1992), offers the Supreme Court's most comprehensive analysis of the doctrine of stare decisis. The following two cases, *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Dickerson v. United States*, 530 U.S. 428 (2000), demonstrate precedent of how the Court has actually acted when facing questions of departing from stare decisis after *Casey*.

145 505 U.S. at 854–55.

146 530 U.S. 428.

upheld precedent—and *Lawrence v. Texas*[147]—which departed from precedent—it is evident that the Court recognizes its discretion to deviate from stare decisis principles in at least some situations. While there are many cases that present "moral-formal" dilemmas, the insights achieved from *Casey*, *Dickerson*, and *Lawrence* are critical to exposing when and how the Court is willing to use the judicial role and its discretion to protect the rights of individuals.[148] The following cases suggest that the Supreme Court has formalized a process of overturning precedent through considering the Court's characterization of the societal understanding of the facts within the context of the national culture. The Court's use of this process is the key to remedying the enduring inequities suffered by Puerto Rico's Insular Citizens as a consequence of the *Insular Cases* and their progeny.

B. Planned Parenthood of Southeastern Pennsylvania v. Casey*: The Supreme Court and Stare Decisis*

The doctrine of stare decisis[149] serves as the foundation of the common-law system, which allows judge-made law to be created using principled reasoning that provides predictability, stability, and efficiency in order to promote the Court's legitimacy.[150] However, stare decisis is not an "inexorable command," especially when the Supreme Court reconsiders precedent of constitutional law.[151] Consequently, in rare cases, the Court will act contrary to the doctrine and overturn past decisions. No discussion of stare decisis and the unique situations where

147 539 U.S. 558.

148 These cases are used here in the same way that the *Casey* Court used *Lochner v. New York*, 198 U.S. 45 (1905), and *Brown v. Board of Education*, 347 U.S. 483 (1954), in order to examine when the Court had overturned precedent in the past. *See* 505 U.S. at 861–63; cases cited *infra* note 161.

149 *See Stare Decisis*, *supra* note 130 and accompanying text.

150 *See* Julie E. Payne, Comment, *Abundant Dulcibus Vitiis, Justice Kennedy: In* Lawrence v. Texas*, an Eloquent and Overdue Vindication of Civil Rights Inadvertently Reveals What Is Wrong with the Way the Rehnquist Court Discusses Stare Decisis*, 78 TUL. L. REV. 969, 973 (2004); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1345 (1990).

151 Agostini v. Felton, 521 U.S. 203, 235 (1997) ("[Stare decisis] is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions."); *Casey*, 505 U.S. at 854 ("[I]t is common wisdom that the rule of *stare decisis* is not an 'inexorable command,' and certainly it is not such in every constitutional case." (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–11 (1932) (Brandeis, J., dissenting))). This idea further arises in *Casey* when the majority implies that a development of constitutional law may "implicitly or explicitly" render a prior ruling "a mere survivor of obsolete constitutional thinking." *Id.* at 857.

prior holdings may be overturned is complete without an analysis of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[152]

In *Casey*, the Supreme Court engaged in its most famous and extensive discussion and consideration of the doctrine of stare decisis.[153] Abortion clinics and physicians challenged the constitutionality of five amendments to the Pennsylvania Abortion Control Act of 1982 for violations of due process.[154] The case required the Rehnquist Court to consider whether to overrule the central holding of *Roe v. Wade*.[155] In the Court's analysis, it distilled stare decisis precedent into four "prudential and pragmatic considerations," which provide a framework for the Court to test whether it can and should overrule prior decisions, while gauging the costs to the Court's legitimacy.[156] The *Casey* considerations test: (1) whether the holding has been proven "unworkable;"[157] (2) whether the rule is subject to a kind of "reliance" that would create a special hardship as a consequence of overruling and produce inequity as a cost of repudiation;[158] (3) whether related principles of law have developed in a way as to disturb or threaten to diminish a recognized protection, rendering the holding nothing more than a remnant of abandoned doctrine;[159] and (4) whether the facts have changed or are currently viewed so differently that the old rule has been robbed of significant application or justification.[160]

In addition to the four-part analysis, the Court explained that in cases concerning very significant and widely debated holdings—like how *Casey* questioned the contested central holding of *Roe*—the

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152 505 U.S. 833.

153 Drew C. Ensign, Note, *The Impact of Liberty on Stare Decisis: The Rehnquist Court from* Casey *to* Lawrence, 81 N.Y.U. L. REV. 1137, 1144 (2006).

154 *Casey*, 505 U.S. at 844–45.

155 Roe v. Wade, 410 U.S. 113 (1973). The *Casey* court considered three parts of *Roe*'s essential holding, including: (1) the recognition of a woman's right to choose to have an abortion before fetal viability and to choose to do so without undue interference from the State; (2) a confirmation of the State's power to restrict abortions after viability; and (3) that States have legitimate interests from the start of pregnancy in protecting the health of the woman and the life of the fetus. *Casey*, 505 U.S. at 833–34.

156 *Casey*, 505 U.S. at 854–55. When the Court reexamines prior holdings, its judgment is informed by "a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Id.* at 854. When the Court lists the considerations, it presents them as four independent "examples" that it "may ask" in its stare decisis analysis. *Id.* The considerations are separated by the word "or," rather than the word "and," suggesting that the factors are not meant to be applied as a rigid four-part test requiring the satisfaction of each factor. *See id.* at 854–55.

157 *Id.*

158 *Id.* at 854–56.

159 *Id.* at 855, 857 (questioning if the law has developed in such a way as to render the prior holding "a mere survivor of obsolete constitutional thinking").

160 *Id.* at 855, 860.

analysis should be taken one step further. The Court should compare the case in question to others of "comparable dimension," which have responded to national controversies.[161] However, the Court must be extremely careful how this power is exercised because the Court's command lies in its legitimacy.[162] The legitimacy that makes the Court fit to determine what the law means and allows its conclusions to be accepted by the nation is "a product of substance and perception."[163] Yet the Court's legitimacy can be lost if the American people reject that the Court's decisions are truly grounded in legal principles, uncompromised by social and political pressures.[164]

Even though *Casey* explicitly offers four prudential and pragmatic considerations for testing stare decisis and determining when it is appropriate to overrule precedent, the Court has not uniformly adopted the factors as a rigid four-part test.[165] Rather, the Court has substantively utilized one or more of the considerations without necessarily citing

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161 *Id.* at 861. The Court compared two lines of cases to determine the *Casey* analysis. *Id.* First, the Court reviewed a line of cases identified with *Lochner v. New York*, 198 U.S. 45 (1905), which imposed limitations on legislation limiting economic autonomy in favor of health and welfare regulation, in accordance with the laissez-faire theory. *Casey*, 505 U.S. at 861. The Court explained that *Lochner* was expanded upon by other cases, which protected liberty of contract and held it unconstitutional to require employers to satisfy minimum wage standards for women. *Id.* However, subsequent developments, including the Great Depression, exposed that the interpretation of contractual liberty used by *Lochner* and its progeny "rested on fundamentally false factual assumptions." *Id.* at 861–62. Once "[t]he facts upon which the earlier case[s] had [been] premised . . . had proven to be untrue," the Court was justified and required to create a new constitutional principle that undermined the central holding in *Lochner* when deciding *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). *Casey*, 505 U.S. at 862. The second line of cases followed the Court's creation "separate-but-equal rule" created in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which held that racial segregation was not a denial of the "Fourteenth Amendment's equal protection guarantee." *Casey*, 505 U.S. at 862 (citing *Plessy*, 163 U.S. 537, *overruled by* Brown v. Bd. of Ed., 347 U.S. 483 (1954)). Half a century later, when hearing *Brown*, 347 U.S. 483, the Court analyzed the effects of discrimination to determine "that racially separate public educational facilities were . . . inherently unequal." *Casey*, 505 U.S. at 863. "Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896." *Id.* The holdings in both *West Coast Hotel* and *Brown* relied on the understanding of facts that changed from those used in the earlier decisions. *Id.* The *Casey* Court justified these decisions by stating, "[i]n constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty." *Id.* at 864.

162 *Id.* at 865.

163 *Id.*

164 *Id.* at 866.

165 *See* Payne, *supra* note 150, at 983–84, 984 n.102; *supra* note 156 and accompanying text; *see also infra* Section III.C (demonstrating how the *Dickerson* Court upheld *Miranda* without directly applying the *Casey* test); *infra* Section III.D (demonstrating how *Lawrence* overruled *Bowers* without applying an exhaustive *Casey* analysis, but while substantively covering the *Casey* factors).

Casey.[166] This is not surprising given the Supreme Court's greater flexibility with regards to stare decisis when reconsidering precedent of constitutional issues.[167] Consequently, the Supreme Court possesses the uniquely lower burden when justifying decisions to overrule constitutional precedent without compromising its legitimacy. Therefore, while the Court should consider the underlying substance of the applicable *Casey* considerations, it can ultimately use its judicial discretion to contrast the rule in question with the Court's past practices in comparable situations—before and after *Casey*—to support a "special justification" for departing from stare decisis.[168]

C. Dickerson v. United States*: Upholding Challenged Precedent*

After *Casey*, the next prominent case to challenge stare decisis and a Supreme Court ruling pertaining to a constitutional liberty interest was *Dickerson v. United States*.[169] In *Dickerson*, Petitioner Dickerson was indicted for numerous federal crimes, including conspiracy to commit bank robbery.[170] Before the criminal trial, Dickerson moved to suppress statements that he had made to the Federal Bureau of Investigation, alleging that he did not receive the "*Miranda* warnings" before he was interrogated.[171] The "*Miranda* warnings" were created through the Supreme Court's decision in *Miranda v. Arizona*,[172] which held that certain rights must be disclosed before a suspect's statements in a

166 Some scholars point out that *Casey*'s "unworkability," "abandoned law," and "changed facts" considerations are actually just reiterations of "special justifications" that were used by the Court to justify overturning precedent in the cases that are cited after each factor. *See* Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 605 (2002). Viewing the considerations as "special justifications," the "reliance" consideration actually serves as a justification for why the Court should *not* overrule precedent. *Id.* This inconsistency further suggests that the Court should not require all four *Casey* considerations to overturn precedent, but rather look at the "special justifications" in accordance with the Court's past practices. *See id.* at 604–06.

167 *See supra* note 151 and accompanying text.

168 *See supra* note 161 and accompanying text. These "comparable situations" are portrayed in Sections III.C–D.

169 530 U.S. 428 (2000); *see* Ensign, *supra* note 153, at 1149.

170 *Dickerson*, 530 U.S. at 432.

171 *Id.*

172 384 U.S. 436 (1966).

custodial interrogation can be admissible into evidence.[173] In response to *Miranda*, Congress enacted 18 U.S.C. § 3501, legislating that admissibility of statements should be determined based on criteria regarding whether or not the statements were voluntarily made.[174]

Based on § 3501, the Fourth Circuit reversed the district court's suppression order, holding that the statute enabled the admissibility of statements based on voluntariness, regardless of whether the suspect received the "*Miranda* warnings."[175] In order to determine if Dickerson's statements were admissible, the Supreme Court had to establish whether § 3501 or *Miranda* was the controlling law. By establishing that the holding in *Miranda* was a constitutional rule, the Court was able to strike down the statute and preserve *Miranda*'s central holding—requiring the "*Miranda* warnings" be given to a suspect before self-incriminating statements are made in order to be admissible evidence—because Congress is not able to legislatively supersede the Court's decisions interpreting and applying the Constitution.[176]

Strikingly, even though *Dickerson* explicitly considers whether the Court should overrule *Miranda*, the majority only discussed stare

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173 *Dickerson*, 530 U.S. at 431–32. These rights became known as the "*Miranda* warnings" or "*Miranda* rights." *Id.* at 435. The *Miranda* rights state that a suspect:

> [H]as the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda, 384 U.S. at 479.

174 *Dickerson*, 530 U.S. at 432. The statute was intended to overrule *Miranda* and presented a nonexclusive list of factors to consider in determining admissibility of statements. *Id.* at 435–36 (quoting 18 U.S.C. § 3501 and discussing the statute's intent). The statute "explicitly eschews a requirement of preinterrogation warnings in favor of an approach that looks to the administration of such warnings as only one factor in determining the voluntariness of a suspect's confession." *Id.* at 442.

175 *Id.* at 432.

176 *Id.* at 431, 437. The Court followed *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to establish that acts of Congress, such as § 3501, are unenforceable by the courts where the act violates the United States Constitution. *Dickerson*, 530 U.S. at 432. While the majority does not directly cite *Marbury*, Justice Scalia cites *Marbury* for the same proposition in his dissent. *Id.* at 445 (Scalia, J., dissenting) (citing *Marbury*, 5 U.S. (1 Cranch) 137). The *Miranda* holding was constitutional because it protected the suspect's rights against self-incrimination and individual liberty under Fifth Amendment and Fourteenth Amendment Due Process Clause. *Id.* at 433–35 (majority opinion). The *Dickerson* Court established that *Miranda* was a constitutional decision by exposing that subsequent cases applied the rule to state court proceedings. *Id.* at 438. Additionally, the Court recognized that the *Miranda* opinion began by stating that the Court granted certiorari to explore problems "of applying the privilege against self-incrimination to in-custody interrogation, *and to give concrete constitutional guidelines for law enforcement agencies and courts to follow*." *Id.* at 439 (quoting *Miranda*, 384 U.S. at 441–42). Finally, the *Dickerson* Court acknowledged that the *Miranda* opinion further established its constitutional base by inviting legislative action to protect the constitutional right against coerced self-incrimination. *Id.* at 440.

decisis for two pages and never once cited *Casey*.[177] Instead of applying the *Casey* framework, the Court simply stated that stare decisis is not an inexorable command, especially when interpreting the Constitution, but is a heavily persuasive force that requires a "special justification" to depart from precedent.[178] The Court concluded that no such justification existed to overrule *Miranda* because the *Miranda* holding had become part of the "national culture."[179] This holding exemplifies a situation where the Court ignored a direct application of the *Casey* analysis as a rigid four-part test. Instead, the Court protected the liberty rights of a group of people—suspects—by focusing on the underlying substance of individual *Casey* considerations in the forms of "special justifications," societal reliance, and understandings of the facts through the lens of the "national culture."[180]

D. Lawrence v. Texas*: Departing from Challenged Precedent*

Lawrence v. Texas[181] is one of the Supreme Court's most recent, innovative, controversial, and politically salient opinions, which exemplifies where the Court is willing to use judicial discretion to directly overturn its own prior decision.[182] In *Lawrence*, two men were

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177 *See id.* at 443–44. The dissent also mentions stare decisis briefly. *See id.* at 456, 461, 465 (Scalia, J., dissenting).

178 *Id.* at 443 (majority opinion).

179 *Id.* at 443–44. The 7-2 majority stated, "[w]e do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Id.* at 443 (citation omitted). The majority quotes Justice Scalia, the dissenter in *Dickerson*, for his comments in *Mitchell v. United States*, 526 U.S. 314, 331–32 (1999) (Scalia, J., dissenting), "stating that the fact that a rule has found 'wide acceptance in the legal culture' is 'adequate reason not to overrule' it." *Dickerson*, 530 U.S. at 443. However, the Court explains that this result is due to principles of stare decisis, not whether the Court agrees with the *Miranda* reasoning or its rule. *Id.*

180 Even though the *Dickerson* Court uses a truncated approach to stare decisis that relied on "special justifications," the holding arguably embraced the underpinnings of three *Casey* factors. *See* Lee, *supra* note 166, at 614–15. *Dickerson* rejected the idea that subsequent case law had chipped away at *Miranda*'s doctrinal underpinnings and established the presence of "reliance interests" by discussing the "national culture," while also stating that § 3501 was disadvantageous and harder to implement than *Miranda*, making the rule less workable. *See id.*; *Dickerson*, 530 U.S. at 443–44. Nevertheless, the *Dickerson* Court consciously disregarded citing *Casey*, suggesting that the *Casey* factors are not four conclusive factors, which all must be present to overrule precedent, but can be used as one-off considerations to support a different standard—a "special justification." *See id.* at 443.

181 539 U.S. 558 (2003).

182 Ensign, *supra* note 153, at 1151; Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1575 (2004) (criticizing that "[f]reed from the chains even of rational argument, the Lawrence Court issued an ukase wrapped up in oracular riddles"); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 96–97 (2003).

arrested, detained, charged, and criminally convicted for the violation of a Texas statute criminalizing intimate sexual conduct between members of the same sex.[183] The Court faced three issues: (1) whether the Texas statute criminalizing sexual intimacy between same-sex couples, but not the same behavior between different-sex couples, violated the Equal Protection Clause; (2) whether the Texas statute deprived the petitioners of their vital interests of privacy and liberty to engage in consensual sexual intimacy in the home under the Due Process Clause; and (3) whether *Bowers v. Hardwick*[184]—the 1986 case that had held a Georgia sodomy statute did not violate the fundamental rights of homosexuals—should be overruled.[185] The Court held that the Texas statute *was* unconstitutional because it violated the Due Process Clause.[186] Consequently, in a rare pronouncement, the Court explicitly overruled its holding in *Bowers*, which was decided only seventeen years earlier.[187]

In order to overrule *Bowers*,[188] depart from traditional notions of stare decisis,[189] and hold the statute in *Lawrence* unconstitutional, the Court relied on its own vision of the value judgments at stake in the case rather than strictly interpreting objective facts.[190] However, *Lawrence* remains the law of the land and did not destroy the Court's legitimacy in the eyes of the American people. Thus, the decision is recognized as an acceptable use of judicial power, which consequently established a base

183 *Lawrence*, 539 U.S. at 562–63.

184 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558. In *Bowers*, the Supreme Court considered the issue "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Id.* at 190. The Court concluded that the Georgia Statute prohibiting sodomy, whether or not the participants were of the same sex, *was* constitutional. *Id.* at 190–91.

185 *Lawrence*, 539 U.S. at 564.

186 *Id.* at 578. The Court further justifies their decision because "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.*

187 *Id.* ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

188 *Id.* (overruling *Bowers*, 478 U.S. 186).

189 *Id.* at 560 ("*Stare decisis* is not an inexorable command" and thus the *Bowers* "holding has not induced detrimental reliance" that would prevent overturning the precedent "once there are compelling reasons to do so." (citations omitted)).

190 *Id.* at 602 (Scalia, J., dissenting) (stating "that the Court has taken sides in the culture war"); Post, *supra* note 182, at 96. Post explains that the *Lawrence* Court articulates its own vision of societal truths and the fundamental importance of defining the rights of persons. *Id.* The opinion also does not apply Blackmun's dissent in *Bowers* in order to link the behavior regulated by the Texas statute to a constitutional dimension of autonomy, but rather "the theme of autonomy floats weightlessly through Lawrence, invoked but never endowed with analytic traction." *Id.* at 97; *see also* Lund & McGinnis, *supra* note 182, at 1575–77 (discussing the uncertain meaning of the first six sentences of the *Lawrence* opinion).

for further cases that have changed the landscape of civil rights for homosexual people in America.[191]

The *Lawrence* Court invalidated *Bowers* by first explaining the history behind American sodomy laws and then proclaiming that *Bowers* relied on an oversimplification of those historical grounds.[192] Kennedy, writing for the majority, acknowledged that history and tradition are only starting points, not always the ending points, in the Due Process inquiry.[193] The *Lawrence* majority argued that the *Bowers* Court failed to "appreciate the extent of the liberty at stake."[194] Kennedy focused on the themes of respect, liberty, dignity, autonomy, and stigma to appeal to value judgments towards the petitioners and to combat *Bowers*' central holding.[195] Although the Texas statute in *Lawrence* was only a misdemeanor, it remained a criminal offense, resulting in criminal records for the petitioners, which generated stigma and carried serious collateral consequences.[196] The Court believed that these consequences demeaned the dignity of and imposed second-class citizenship on homosexual persons as an identifiable class.[197] Thus, the Court struck down the statute on Due Process grounds and overruled *Bowers*.[198]

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191 *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding the right to marry as a fundamental right inherent in the liberty of persons under the Due Process and Equal Protection Clauses, thus recognizing same sex-marriage as Constitutional in the United States); United States v. Windsor, 133 S. Ct. 2675 (2013) (holding that the Defense of Marriage Act's definition of "marriage"—causing restrictions and restraints against same-sex marriages, legally entered into under the State laws—was unconstitutional under both the Due Process Clause and Fifth Amendment).

192 *Lawrence*, 539 U.S. at 566–71.

193 *Id.* at 572 (citing Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)). This discussion concerning the Due Process inquiry is only used to demonstrate how the Court reasoned that *Lawrence* was an appropriate situation to depart from stare decisis and overrule *Bowers*. The formal application of the Due Process inquiry to Puerto Rico is beyond the scope of this Note and is not essential to understanding how stare decisis should be utilized to enfranchise the Insular Citizens. *See infra* Part IV.

194 *Lawrence*, 539 U.S. at 567.

195 *Id.* at 575. "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects . . . ." *Id.* The Court concluded that *Bowers*' holding was demeaning to the lives of homosexual persons. *Id.*

196 *Id.* at 575–76. Among the consequences are notation of the incident on the criminal record provided to potential employers during job applications and the legal responsibility to abide by registration laws in at least four states. *Id.*

197 *See* Post, *supra* note 182, at 98. The Court also discusses that forty-five European Nations enforce the holding by the European Court of Human Rights invalidating laws prohibiting consensual homosexual conduct. *See Lawrence*, 539 U.S. at 573.

198 *See* Post, *supra* note 182, at 99. The Court used Due Process to invalidate the statute because Equal Protection grounds would be insufficient. *Id.* Using Equal Protection grounds would enable States to respond by prohibiting all sodomy under state laws, which would not mitigate the stigma. *Id.* at 99–100. This proposition has been criticized as the Court using unfettered discretion in cherry-picking desirable decisions from around the world as

The majority's holding sparsely referred to *Casey* and never applied a strict four-factor test. Rather, the Court briefly touched on the substantive considerations—specifically discussing reliance coupled with liberty interests—and circumvented stare decisis by stating that it is not an inexorable command.[199] The Court concluded that the ruling was appropriate because even though historical times can "blind [society] to certain truths[,]" future generations are able to "see that laws once thought necessary and proper[,]" are simply unjust and oppressive, and should be changed to award persons greater freedom.[200]

In response, Justice Scalia dissented, criticizing the Court for straying from the judicial role by taking sides in a cultural war and signing on to the so-called "homosexual agenda,"[201] and highlighting the majority's failure to apply the *Casey* test.[202] Scalia reasoned that the Court's holding exposed *Casey*'s deference to precedent as a "result-oriented expedient."[203] Similarly to how the Court in *Brown v. Board of Education*[204] reconsidered the *Plessy v. Ferguson*[205] "separate but equal"

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justification for its Due Process argument. *See* Lund & McGinnis, *supra* note 182, at 1581.

199 *See Lawrence*, 539 U.S. at 577.

> In *Casey* we noted that when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. . . . *Bowers*, however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. . . . The rationale of *Bowers* does not withstand careful analysis.

Id. The fact that the Court could have reached the same result by applying the *Casey* factors as a rigid four-part test, but rather substantively touched on the underlying *Casey* factors, suggests that the majority made a deliberate choice to use a more lenient standard for approaching stare decisis. *See* Payne, *supra* note 150, at 972–73. However, some fear that the Court's failure to use a uniform approach in situations like *Lawrence*—where using the *Casey* considerations as a test would enable an identical outcome—may threaten the Court's legitimacy. *Id.* Nevertheless, the *Lawrence* decision continues to govern as the law of the land and the American people trust the Supreme Court.

200 *Lawrence*, 539 U.S. at 579. Justice Kennedy concluded: "[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Id.* This statement directly implicated the Court's own vision of the value judgments at stake in *Lawrence* and the overall understanding of the facts pertaining to cultural controversy. *See* discussion *supra* note 190 and accompanying text.

201 *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting). Justice Scalia stated that he had nothing against homosexuals or any other groups. *Id.* at 603. He simply argued that the so-called homosexual agenda should not be established by a ruling by the Court, but rather through ordinary democratic practices, leaving the decision to the States and federal legislature. *Id.*

202 *Id.* at 591.

203 *Id.* at 592.

204 347 U.S. 483 (1954).

205 163 U.S. 537 (1896), *overruled by Brown*, 347 U.S. 483.

doctrine—analyzing the effect of segregation on public education as inherently unequal because it created inferiority and deprived African American students of the benefits of a racially integrated school[206]—the Court in *Lawrence* acted against formal interpretations of the letter of the law and stare decisis to protect the dignity and autonomy of an identifiable group of individuals being oppressed as second-class citizens under the law.[207]

E. *The Current State of Stare Decisis*

The majority's reasoning in *Lawrence* and Justice Scalia's categorization of the Court's use of *Casey* as a "result-oriented expedient,"[208] remained consistent with the Court's holding in *Dickerson*, to expose an established precedent of actual practice in cases challenging stare decisis. In practice, the Court does not directly apply the four *Casey* factors as an exacting four-prong test that requires fulfillment of each individual factor to overturn precedent, but rather as four "prudential and pragmatic considerations"[209] to be analyzed in determining "special justifications" based on societal reliance, the current understanding of the facts, and the "national culture."[210] This suggests that the fundamental analysis underlying the determination of whether the Court can overturn its own precedent relies on the Court's characterization of the societal understanding of the facts within the context of the national culture.

IV. PROPOSAL: USING JUDICIAL DISCRETION TO DEPART FROM STARE DECISIS, OVERTURN PRECEDENT, AND ENFRANCHISE THE INSULAR CITIZENS IN PUERTO RICO

The Court faces an acute "moral-formal" dilemma in resolving the status of the Insular Citizens: the United States holds itself out to the world as "the bastion of democracy,"[211] yet a group of over 3.5 million

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206 *Brown*, 347 U.S. at 492, 494–95.

207 *Lawrence*, 539 U.S. at 579 (majority opinion). *Lawrence* established once and for all the necessary conditions and reasoning for the Court to successfully overturn its own precedent after the Court delineated the stare decisis analysis in *Casey*. *See* discussion *infra* Section III.E.

208 *Lawrence*, 539 U.S. at 592 (Scalia, J., dissenting).

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

210 Dickerson v. United States, 530 U.S. 428, 443–44 (2000); s*ee* discussion *supra* notes 180, 190, 200–07 and accompanying text.

211 *See* Harvard Law School, Keynote Address, *supra* note 20 (00:45:20). Judge Torruella explains that the Puerto Rico-United States relationship is "government without the consent or participation by the governed." *Id.* (00:45:17). Judge Torruella suggests that there is no more of

citizens—larger than the population of twenty-one individual states[212]—has no participation and nearly no representation in the democratic process that governs them.[213] This inequity exists because the precedent of the *Insular Cases* and their progeny, including *Igartua I–III*, established the existing law of differentiated citizenship.[214] Differentiated citizenship treats a faction of U.S. citizens—the Insular Citizens—as an identifiable group of second-class citizens that lack rights cherished by the Court as essential core values of a democratic republic.[215] This situation seems "un-American," based on the trend towards enfranchisement throughout American history.[216]

The Supreme Court has never directly faced a question of Puerto Rican voting rights.[217] Consequently, when the First Circuit heard *Igartua I*, it was bound by the Supreme Court's previous decisions and was required to follow the implications of the *Insular Cases* and their progeny,[218] which awarded plenary power to Congress over Puerto Rico

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an "egregious civil rights violation, particularly in a country that touts itself throughout the world as the bastion of democracy." *Id.* (00:45:26).

212 *See* CENSUS REPORT, *supra* note 5 (estimating a population of 3,548,397 residents in Puerto Rico as of July 1, 2014). Puerto Rico has a larger population than twenty-one states and has the second largest population of any state or territory in the First Circuit, only behind Massachusetts. *Id.*

213 *See Igartua II*, 229 F.3d 80, 86 & n.6 (1st Cir. 2000) (stating that Puerto Rican residents are represented in Congress by a Resident Commissioner, "but that official's lack of a vote obviously diminishes his ability to effectively represent them").

214 Smith, *supra* note 94, at 103.

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> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Reynolds v. Sims, 377 U.S. 533, 555 (1964) (citing South v. Peters, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

216 *See supra* note 83 and accompanying text. Judge Torruella responded to the First Circuit's denial to rehear *Igartua III* en banc by stating, "[i]t has now been over half a century since *Brown* . . . was decided, and well over a century since Puerto Rico's colonial status was legitimized by the courts of this Nation." *Igartua V*, 654 F.3d 99, 111 (1st Cir. 2011) (internal citations omitted). "By their veto, the opponents of en banc review continue to support the outdated anachronisms that maintain the United States citizens of Puerto Rico in their pervasively undemocratic and 'un-American' condition." *Id.*

217 Cases claiming U.S. citizens in Puerto Rico have a constitutional right to vote have been considered many times in the First Circuit. *See supra* note 74. However, the Supreme Court has denied certiorari to hear each case. *See Igartua IV*, 626 F.3d 592 (1st Cir. 2010), *cert. denied*, 132 S. Ct. 2376 (2012); *Igartua III*, 417 F.3d 145 (1st Cir. 2005), *cert. denied*, 547 U.S. 1035 (2006); *Igartua I*, 32 F.3d 8 (1st Cir. 1994), *cert denied*, 514 U.S. 1049 (1995). A similar case considering Guam reached the Ninth Circuit and was also denied certiorari. *See* Att'y Gen. of the Territory of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984), *cert. denied*, 469 U.S. 1209 (1985).

218 *Igartua I*, 32 F.3d at 9. In *Igartua II*, Judge Torruella wrote separately, stating, "I join the Court's opinion in this appeal because I believe it to be technically and, as the law now stands,

as an "unincorporated territory" and established the extent to which the Constitution applies to Puerto Rico.[219] Yet Judge Torruella wrote separately in *Igartua II*[220] and dissented in *Igartua III*[221] to argue that if the Federal Government will not take appropriate corrective measures against the diminished rights of a segment of the American citizenry, then the Federal Courts are justified and required to take extraordinary measures to protect the Insular Citizens.[222]

Although the majority in *Igartua III* stated that it put the constitutional claim for voting rights at rest,[223] a voting rights case can still reach the Supreme Court based on one of two exceptions recognized by the First Circuit to allow departure from its earlier

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legally correct in its conclusion that the Constitution does not guarantee United States citizens residing in Puerto Rico the right to vote in the national Presidential election." 229 F.3d at 85 (Torruella, J., concurring). However, Torruella continues that he is "compelled to write separately because [he] can no longer remain silent to the subjacent question, because . . . there are larger issues at stake." *Id.*

219 *See* discussion *supra* notes 55–68 (explaining the primary components of American colonial law derived from the *Insular Cases* and the Incorporation Doctrine's impact on the Federal Constitution's applicability to the former Spanish territories); discussion *supra* Section I.C (discussing *Igartua I*, 32 F.3d 8; *Igartua II*, 229 F.3d 80; *Igartua III*, 417 F.3d 145).

220 229 F.3d at 85, 90 (Torruella, J., concurring) (stating that his decision was not "*carte blanche*" but he agreed that *Igartua II* was not the appropriate case for judicial intervention since the issue was governed by explicit language in the Constitution).

221 417 F.3d at 158, 158–59 (Torruella, J., dissenting).

222 In *Igartua II*, Judge Torruella concurred, stating:

> [I]t *is* time to serve notice upon the political branches of government that it is incumbent upon them, in the first instance, to take appropriate steps to correct what amounts to an outrageous disregard for the rights of a substantial segment of its citizenry. A failure to do so countenances corrective judicial action. . . . It may be that the federal courts will be required to take extraordinary measures as necessary to protect discrete groups "completely under the sovereignty and dominion of the United States."

229 F.3d at 90 (internal citations omitted) (emphasis in original). In *Igartua III*, Judge Torruella dissented, stating:

> Considering that justice and equity are the handmaidens of the law, I believe it is the duty of this court to exercise its equitable power . . . in its decision of the issues that are properly before the en banc court, and to declare that the United States has failed to take any steps to meet obligations that are cognizable as the supreme law of the land regarding plaintiff-appellants' voting rights. "This is of the very essence of judicial duty."

417 F.3d at 159 (footnote omitted) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803)). These comments reinforce the idea that political gridlock caused by "preservationist" and "legacy" policies precludes enfranchisement through political avenues, making the most viable method of relief the Supreme Court's use of judicial discretion—the power to depart from precedent. *See supra* Sections II.B.1–II.B.2 (political remedies include obtaining statehood or a constitutional amendment); *supra* Section II.B.3, Parts III–IV (discussing the Court's ability to depart from precedent).

223 *Igartua III*, 417 F.3d at 148. The majority's statement to "put [*Igartua's*] constitutional claim fully at rest" is likely intended to be "the constitutional equivalent of 'rest in peace[.]'" *Id.* at 158 & n.17.

decisions[224]: (1) when an earlier panel decision is undermined by subsequently announced controlling authority, such as a new Supreme Court opinion; or (2) in rare instances, where non-controlling authority post-dating the original decision offers a legitimate reason to believe that the earlier panel would change its collective mind in light of new developments.[225] Having established that a claim for voting rights is not eternally left to rest in peace, judicial discretion can still be utilized to enfranchise Puerto Rico's Insular Citizens.[226]

The Supreme Court can utilize the *Casey* considerations in one of two ways: (1) as an exacting rigid four-part test; or (2) as four one-off "prudential and pragmatic considerations" that can be applied as underlying subject matter to establish a "special justification."[227]

Applying the *Casey* considerations as an exacting four-prong test is likely unnecessary, and possibly even the wrong approach, given the Supreme Court's enhanced freedom to depart from stare decisis when considering constitutional issues and its precedent in overruling prior holdings.[228] This method would enable the Court to legitimately overcome stare decisis, redefine Puerto Rico's relationship to the Federal Constitution, and enfranchise the Insular Citizens where all four *Casey* factors were present. However, applying a rigid four-part test would yield uncertain results, because the voting rights case may fail such a test on the first factor[229]—even though the law seems unfair, it is arguably not "unworkable" since elections have operated without the Insular Citizens for decades.

The better, and likely correct, approach would be to adhere to the Supreme Court's actual practice in addressing stare decisis cases after

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224 *Igartua II*, 229 F.3d at 84.

225 *Id.* The majority in *Igartua II* states that "*Igartua I* is based on Supreme Court opinions which that court has not reconsidered and we are not free to do so" without a change in the law based on a "special justification." *Id.* at 84 n.1 (citing Dickerson v. United States, 530 U.S. 428 (2000)). The two factors recognized by the First Circuit for departing from an earlier panel's decision encompass all four *Casey* considerations. The First Circuit's first factor encompasses *Casey's* considerations of workability, reliance, and related developments undermining the earlier holding. *See supra* notes 157–59 and accompanying text. Similarly, the First Circuit's second factor focuses on *Casey*'s consideration of changed facts yet can be viewed to encompass all four *Casey* considerations. *See supra* notes 157–60 and accompanying text.

226 *See Igartua III*, 417 F.3d at 158–84 (Torruella, J., dissenting). Torruella believes that "the majority [chose] to overlook the issues actually before [the] en banc court as framed by the order of the rehearing panel." *Id.* at 158. Judge Torruella's dissent presents arguments that are only the starting point for future plaintiffs to litigate and prevail on similar claims. *See id.* at 158–84.

227 *See supra* notes 157–60, 180 and accompanying text.

228 *See* cases cited *supra* note 151; *supra* Section III.E (explaining the current state of stare decisis in 2016).

229 *See supra* note 157 and accompanying text. Whether the holding has proven "unworkable" is the first *Casey* factor. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).

Casey. In practice, the Court has consistently chosen not to apply the *Casey* factors as a strict four-prong test, but rather as four, one-off, "prudential and pragmatic considerations."[230] Each factor can be taken into account individually to determine the existence of "special justifications" based on societal reliance, the current understanding of the facts, and the "national culture."[231] In *Dickerson*, although the Court never cited *Casey*, the majority addressed the underlying substantive considerations and ultimately rooted its holding in societal reliance and the Court's understandings of the facts through the lens of the "national culture" to establish a "special justification."[232] Similarly, in *Lawrence*, the Court touched on the substantive *Casey* considerations—specifically reliance coupled with liberty interests—but departed from stare decisis based on value judgments that the dignity and autonomy of an identifiable group of oppressed second-class citizens presented a "special justification."[233] These practices demonstrate that the ultimate ruling of whether to overturn the prior cases relied heavily on the Court's characterization of the facts within the context of the "national culture."[234]

The underlying facts facing the Insular Citizens of Puerto Rico echo the main themes portrayed in *Dickerson* and *Lawrence*, including autonomy, liberty, dignity, and stigma.[235] Over the past 115 years since the *Insular Cases* were decided, the facts used to rationalize the Court's holdings have changed and are viewed so differently that the old holdings have been robbed of significant justification.[236] The people living in Puerto Rico are no longer understood in the terms of the *Insular Cases* as "alien races"[237] who differ from U.S. citizens in "religion, customs, laws, methods of taxation, and modes of thought," rendering the administration of government and justice, according to

230 *See id.* at 854. *See supra* notes 209–10 and accompanying text.

231 *See* discussion *supra* notes 180, 190, 200–07 and accompanying text.

232 *See* discussion *supra* note 180. The Court never cited *Casey* in *Dickerson*. *See supra* note 177 and accompanying text.

233 *See supra* notes 190, 200 and accompanying text.

234 Paulsen, *supra* note 130, at 1206 (critiquing the difficulty of determining changed political, social, and hard facts in the stare decisis analysis).

235 *See supra* notes 174–76, 195 and accompanying text (discussing autonomy against self-incrimination as a main factor in *Dickerson*, and the themes highlighted by the Court in *Lawrence*).

236 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992). Whether there has been a change in facts is the fourth *Casey* factor. *Id.* "[T]he present legitimacy of the *Insular Cases* is untenable. The system of governance promoted thereunder can no longer be reconciled with a rule of law in which all citizens are entitled to equality." Torruella, *supra* note 12, at 286–87.

237 *The World Fact Book: Puerto Rico*, CENT. INTELLIGENCE AGENCY (Sept. 28, 2016), https://www.cia.gov/library/publications/the-world-factbook/geos/rq.html (describing Puerto Rico's involvement in the U.S. federal legal system, the U.S. House of Representatives, and the Democratic and Republican primaries).

"Anglo-Saxon principles," impossible.[238] Additionally, the underlying statutory facts have changed to reclassify the people of Puerto Rico as American citizens that live under U.S. federal law and serve in the U.S. military.[239] The Insular Citizens only lack voting rights based on their locality and could immediately rectify their disenfranchisement by moving to a U.S. state and declaring domicile.[240] Thus, the Insular Citizen status no longer relies on the assumption that the people residing in Puerto Rico are incapable of participating in the democratic process. One does not become more or less qualified to participate in the democratic process based on where they are domiciled.

Society has acknowledged the collateral consequences that result from a lack of representation for groups of citizens[241] and the national culture has experienced a pervasive trend toward enfranchisement.[242] The current state of the law facing Puerto Rico establishes an identifiable group of second-class citizens—the Insular Citizens—in a manner that contradicts the current understanding of the facts based on social, cultural, and demographic shifts. Therefore, any "reliance" supporting these laws depends on "preservationist" and "legacy" policies that follow patterns of "path dependency"—where the overall culture disagrees with the policies, yet has failed to reach a political resolution.[243] As a result, the Court can establish that enfranchising the Insular Citizens would *not* create any special hardship based on this "reliance."[244] Similarly, the principles of law surrounding citizenship and voting rights have changed so drastically since the *Insular Cases* that the disenfranchisement of U.S. citizens based solely on their residency

238 Downes v. Bidwell, 182 U.S. 244, 287 (1901).

239 *See* Jones Act, ch. 145, 39 Stat. 951 (1917); Cottle, *supra* note 6; *supra* note 71 and accompanying text (discussing the U.S. Nationality Act of 1940, 8 U.S.C. § 1402 (2012)).

240 *See supra* text accompanying notes 10–13 (regarding locality of citizenship and residency hypotheticals).

241 *See* discussion *supra* Section II.A. A concrete example of these consequences is the current debt crisis facing Puerto Rico, where the federal government and Supreme Court denied the territory the ability to resolve its debt crisis, yet the territory has no voting rights to correct the situation on its own electorally. *See* discussion *supra* note 96 and accompanying text.

242 The district court in *Igartua de la Rosa* acknowledged the trend towards enfranchisement: the Fifteenth Amendment enabled former slaves the right to vote; the Nineteenth Amendment enfranchised women; the Twenty-Third Amendment enabled the District of Columbia to vote in Presidential elections; the Twenty-Fourth Amendment eliminated poll taxes as hurdles to voting; and the Twenty-Sixth Amendment gave voting rights to citizens at age eighteen. Igartua de la Rosa v. United States, 107 F. Supp. 2d 140, 145 (D.P.R. 2000); *see supra* text accompanying note 83. The disenfranchisement of Puerto Rican Insular Citizens poses similar consequences to the sodomy laws in *Lawrence*, which were overturned because of the liberty interests at stake and the negative stigma attached to a class of people. *See supra* notes 192–98 and accompanying text.

243 *See* discussion *supra* notes 112–14 and accompanying text.

244 This refers to the second *Casey* factor. *See* discussion *supra* note 158.

"within" the United States has been rendered obsolete constitutional thinking.[245]

The changes in facts and perspective of the national culture, coupled with the shift in doctrinal underpinnings of the law and lack of reliance interests, suggest that the Insular Citizens possess the "special justification" necessary to enable the Court to remedy the situation by overcoming stare decisis.[246] This could allow the Court to redefine the United States Constitution's relationship to Puerto Rico or to declare the right to vote as a "fundamental" right entrenched in the Constitution, in order to ultimately enfranchise the Insular Citizens.

CONCLUSION

Sometimes in history the law needs to catch up to the national culture and morals of society. Many Americans are unaware that the Insular Citizen status even exists—where U.S. citizens lack the right to vote based on their locality—and will likely find the situation unjust and "un-American" based on the national culture's underlying beliefs of American democracy. Times can blind society to certain truths.[247] However, when future generations can see that laws, once thought necessary and proper, are simply unjust and oppressive[248]—rendering U.S. citizens helpless with no relief—the Court should use its discretion to remedy the problem in a way that protects the national culture's perception of fundamental rights and promotes "liberty and justice for all."[249] The time has come for the Supreme Court to step up to the plate, play umpire, and enfranchise the Insular Citizens.

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245 This refers to the third *Casey* factor. *See* discussion *supra* note 159.

246 The Court's role is essential to reconcile the constitutional doctrine with factual, statutory, and cultural shifts.

247 Lawrence v. Texas, 539 U.S. 558, 579 (2003).

248 *Id.*

249 4 U.S.C. § 4 (2013) ("The Pledge of Allegiance to the [American] Flag").