

Is It Really Paradise? LGBTQ Rights in the U.S. Territories

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ABSTRACT

This Note analyzes LGBTQ rights in the United States territories against the backdrop of the *Insular Cases*, a series of United States Supreme Court decisions at the turn of the twentieth century that reclassified these island territories as “distant possessions” no longer destined for statehood, and therefore no longer bound to the same constitutional requirements as the states. Although the *Insular Cases* distinguish the territories both legally and politically from states in a manner that has been largely harmful for the rights of their residents, this Note argues that the doctrine can be reimagined from a colonial tool to a mechanism with which to better assert and protect LGBTQ rights in the territories.

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INTRODUCTION

Five United States territories—Puerto Rico, Virgin Islands, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands (CNMI)—possess a unique historical and geopolitical classification distinct and separate from the fifty states and the “quasi-sovereignty” of Native American tribes.¹ Against the backdrop of this carefully constructed designation, companies regularly laud the territories as “long-distance getaway[s] . . . [to] faraway places overseas” that “offer paradise without a passport.”² These islands are even described as “exotic when comparing to their continental counterparts”³ and with an “ocean so blue, the sky is jealous.”⁴ Colloquially, some of the U.S.

1. See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1865–66 (2016) (“[T]he States are separate sovereigns from the Federal Government and from one another For similar reasons, Indian tribes also count as separate sovereigns And most pertinent here, this Court concluded in the early 20th century that U.S. territories—including an earlier incarnation of Puerto Rico itself—are not sovereigns distinct from the United States.”); see also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978); see generally Rose Cuison Villazor, *Blood Quantum Land Laws and the Race versus Political Identity Dilemma*, 96 CAL. L. REV. 801, 828 (2008) (arguing that Indigenous peoples in the United States are treated differently with those that are able to be classified as federally recognized tribes and therefore a political group as opposed to other Indigenous groups such as Samoans, Chamorros, and Native Hawaiians who are deemed to be a racial classification).

2. Dara Continenza, *Five Exotic Places You Go Can Without a U.S. Passport*, USA TODAY (June 20, 2013, 7:56 AM), <https://www.usatoday.com/story/travel/destinations/2013/06/20/five-exotic-places-you-can-go-without-a-us-passport/2438979> [<https://perma.cc/5FX8-V2AH>].

3. Gina Tagliarino, *7 Destinations That Offer Paradise Without a Passport*, TRAVELocity (Mar. 1, 2018), <https://www.travelocity.com/inspire/7-destinations-that-offer-paradise-without-a-passport> [<https://perma.cc/4N97-DDF8>].

4. Marek Biernacinski, *3 Reasons to Visit U.S. Territories*, TRAVEL TRIVIA (Aug. 5, 2019), <https://www.traveltrivia.com/3-reasons-to-visit-u-s-territories> [perma.cc/GD9U-HTCF].

5. Michael J. Keyser, *The Best Kept Secret in the Law: How to Get Paid to Live on a Tropical Island*, 15 J. TRANSNAT’L L. & POL’Y 219, 224 (2006) (quoting Ted Miller, *Talented Players From Tiny American Samoa Are Changing the Face of Football*,

territories have been given various affectionate nicknames, including “America’s Paradise”⁶ (Virgin Islands), “*La Isla del Encanto*,”⁷ or “Island of Enchantment” (Puerto Rico), and “*Motu o Fiafiaga*,”⁸ or “Islands of Paradise” (American Samoa).

While the U.S. territories may be touted as paradise, such a description fails to capture the lived experiences of one of the most vulnerable communities on the islands: the lesbian, gay, bisexual, transgender, and queer (LGBTQ or queer)⁹ population. Similarly, while reports may have characterized the Supreme Court’s historic decision in *Obergefell v. Hodges* as having had a national reach, this description fails to capture the impact (or lack thereof) that the Court’s decision had on these territories. The reasons behind each of these failures are one and the same: the Constitution does not have equal force in the territories.¹⁰

In a series of decisions at the turn of the twentieth century collectively known as the *Insular Cases*,¹¹ the United States Supreme Court

SEATTLE POST-INTELLIGENCER (Aug. 31, 2000), <http://seattlepi.nwsourc.com/cfootball/samo29.html>).

6. Gary Sorensen, *America’s Paradise: U.S. Virgin Islands*, THE SPECTRUM (June 11, 2016), <https://www.thespectrum.com/story/life/2016/06/11/americas-paradise-us-virgin-islands/85620026> [<https://perma.cc/EZ53-CUUK>].

7. *Candelaria v. Rodriguez*, 218 F. Supp. 2d 79, 81 (D.P.R. 2002); Julie Schwietert, *America’s ‘Island of Enchantment’: Environmental Hazards and Hope in Puerto Rico*, SCIENTIFIC AM. (May 9, 2011), <https://www.scientificamerican.com/article/environmental-hazards-hope-puerto-rico> [perma.cc/KYB4-BEDU].

8. Tara Molle, *Honor, Respect, Devotion to Duty: Coast Guard Auxiliaries Mike and Paula McDonald*, COAST GUARD COMPASS (Sept. 30, 2016), <https://coast-guard.dodlive.mil/2016/09/honor-respect-devotion-to-duty-coast-guard-auxiliaries-mike-and-paula-mcdonald> [<https://perma.cc/3KRH-XW2G>]; *Looking Back and Looking Forward to the 10th Tattoo Fest*, SAMOA NEWS (Nov. 17, 2013, 5:51 PM), <http://www.samoanews.com/op-ed-looking-back-and-looking-forward-10th-tattoo-fest> [<https://perma.cc/WS6X-DFPU>].

9. The author understands that the label LGBTQ may not be as inclusive of the diverse experiences of those outside the conventional heterosexual and cisgender norms. The term “queer,” a formerly pejorative term, will be used interchangeably with the label LGBTQ as a form of empowerment. For a more expansive list of LGBTQ terms and definitions, see *Glossary of LGBTQ Terms*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/youth-glossary-lgbtq-terms> [perma.cc/RN7L-ZN8Q]. The term cisgender will also be used to give context and contrast the staggering differences in the experiences of LGBTQ people. Cisgender is defined as an individual whose sense of identity corresponds with their gender assigned at birth. See *Cisgender*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/cisgender> [<https://perma.cc/53V5-SFLD>].

10. See *infra* Part II.

11. There exists no set line of cases that comprise the *Insular Cases*. See, e.g., Juan R. Torruella, *One Hundred Years of Solitude: Puerto Rico’s American Century, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 243 (Christina Duffy Burnett & Burke Marshall eds., 2001) (listing eight cases as the *Insular Cases*); Jose P. Mafnas Jr., *Applying the Insular Cases to the Case of Davis v. Commonwealth Election Commission: The Power of the Covenant and the Alternative Result*, 22 U.C. DAVIS J. INT’L L. & POL’Y 105, 119 n.105 (2016) (defining the

articulated a wholly unprecedented standard for the country's then newly-established territories.¹² Prior to these cases, the end goal of United States territorial acquisition was always seen as eventual statehood; the *Insular Cases* replaced this expectation with what has been termed the incorporation doctrine.¹³ This legal fiction and colonial tool was applied to the newly acquired noncontiguous territories at the conclusion of the Spanish-American War.¹⁴ Through the *Insular Cases*, the Court classified Puerto Rico, Guam, and the Philippines as “distant possessions” not slated for statehood, and as such determined that the full weight of the U.S. Constitution was not available to those in the territories in the same way it would otherwise be fully applied to those living in the states.¹⁵ Additionally, the Court held that only certain constitutional

Insular Cases as a series of seven cases); Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1284 n.238 (2019) (citing ten cases but acknowledging the “open debate among legal scholars as to which cases should be categorized as part of the *Insular Cases*.”). For a list of cases commonly associated with the *Insular Cases*, see *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Haw. v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904); *Balzac v. Porto Rico*, 258 U.S. 298 (1922). Throughout this Note, the *Insular Cases* is italicized in the same way that other legal scholars have referred to the cases. See Susan K. Serrano, *Elevating the Perspectives of U.S. Territorial Peoples: Why the Insular Cases Should be Taught in Law School*, 21 J. GENDER RACE & JUST. 395, 396 (2018); T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 17 (1994); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 915 (1991).

12. See Gerald L. Neuman, *Closing the Guantánamo Loophole*, 50 LOY. L. REV. 1, 13 (2004) (“The *Insular Cases* doctrine was emphatically not designed for the purpose of accommodating the self-determination of the people of the territories—it was designed to facilitate ruling over them. The doctrine’s flexibility allows it to be used to modify constitutional structures in response to local customs and preferences.”).

13. ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 6 (Kluwer Academic 1989) (“The Northwest Ordinance not only set forth the pattern for territorial development which exists even today but also stated the underlying principle of territorial evolution in U.S. law and tradition: that the goal of all territorial acquisition eventually was to be Statehood.”). According to Justice White’s concurrence which later became the controlling case law and set forth the incorporation doctrine, “[W]hilst 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 a foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.” *Downes*, 182 U.S. at 341–42 (White, J., concurring).

14. See Sylvia R. Lazos Vargas, *History, Legal Scholarship, and Latcrit Theory: The Case of Racial Transformations Circa the Spanish American War, 1896–1900*, 78 DENV. U.L. REV. 921, 933–34, 941 (2001).

15. *Boumediene v. Bush*, 553 U.S. 723, 756 (2008) (“Fundamental questions regarding the Constitution’s geographic scope first arose at the dawn of the 20th century when the Nation acquired noncontiguous Territories: Puerto Rico, Guam, and

provisions would be applied on a case-by-case, and territory-by-territory, basis.¹⁶ The same classification was eventually imposed on American Samoa, Virgin Islands, and CNMI—other territories the United States later acquired.¹⁷ Pedro Malavet observes that, as a result of the *Insular Cases*, the Territorial Clause of the Constitution was reinterpreted “to abandon the old rule that the Constitution follows the flag to our territories *in toto*, and instead gives Congress almost unfettered authority to deal with the territorial possessions by picking and choosing the constitutional provisions that will be allowed to apply in the territory.”¹⁸

While the disparate and constitutionally separate treatment of the U.S. territories was established through the *Insular Cases* over a century ago, the cases continue to have a lasting impact on the lives of people in the islands today, in particular with respect to those who are LGBTQ. While it was likely not a foreseen outcome by the deciding Court, the *Insular Cases* have in practice served to lessen the impact that the United States LGBTQ civil rights movement has had on LGBTQ people living in the territories, even in cases where all other LGBTQ people in the country stand to benefit.¹⁹ To some, this may ring similar to federalism,

the Philippines—ceded to the United States by Spain at the conclusion of the Spanish-American war—and Hawaii—annexed by the United States in 1898. At this point Congress chose to discontinue its previous practice of extending constitutional rights to the territories by statute.”)

16. Pedro A. Malavet, *The Inconvenience of a ‘Constitution [That] Follows the Flag . . . But Doesn’t Quite Catch Up with It’: From Downes v. Bidwell to Boumediene v. Bush*, 80 Miss. L.J. 181, 185–86 (2010); see *infra* Part II.

17. Jon M. Van Dyke, *The Evolving Legal Relationship Between the United States and its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 449–50 (1992) (“Territories that have become formally ‘incorporated’ are usually thought to be in a transition stage on their way to becoming a state All five of the current U.S.-flag insular political communities—American Samoa, Guam, the Northern Marianas, Puerto Rico, and the U.S. Virgin Islands—are now considered . . . to be ‘unincorporated territories.’”).

18. *Id.* at 186.

19. I use the term “LGBTQ civil rights movement” generally to refer to groups that have addressed the various social and political challenges asserted by LGBTQ activists. I acknowledge that while the movement has led to successful campaigns for LGBTQ rights such as marriage equality, it has often done so without the meaningful participation of transgender and gender nonconforming people, those of low income, and communities of color. See Gwendolyn M. Leachman, *Institutionalizing Essentialism: Mechanisms of Intersectional Subordination Within the LGBT Movement*, 2016 Wis. L. REV. 655, 656–67 (2016) (“Critics have documented how mainstream LGBT rights groups, dominated by White and class-privileged gay men and lesbians, have engaged in strategies and discourse that marginalize the needs and obscure the existence of low-income queers of color LGBT Rights groups end up neglecting the needs of low-income LGBT people and queers of color, restricting effective intersectional representation.”); Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement’s Agenda*, 47 U.C. DAVIS L. REV. 1667, 1679 (2014) (“Although the substantive goals of the mainstream LGBT movement have been varied since the 1980s, the pattern has been to prioritize issues that seek formal equality

where states have been declared to be laboratories of democracy that may, “if [their] citizens choose [,] . . . try novel social and economic experiments without risk to the rest of the country[.]”²⁰ In fact, just as in the territories, the status of LGBTQ-related protections in the states is often described as a checkerboard, as rights can vary between states unless established at the federal level.²¹ For example, there is no federal law that explicitly prohibits employment discrimination on the basis of sexual orientation or gender identity,²² and only 22 states, two U.S. territories, and the District of Columbia explicitly provide both protections by statute.²³ However, such a comparison fails to recognize the distinction between the two systems: for those in the territories, even rights established at the federal level are not guaranteed because of the *Insular Cases*.

through legal and policy reform.”) [hereinafter Leachman, *From Protest to Perry*].

20. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932); Henry M. Hart Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 493 (1954) (“The federal system has the immense advantage of providing forty-eight separate centers for . . . experimentation.”).

21. See Christopher Zara, *It’s 2019, and Your Boss Can Still Fire You for Being Gay in These States*, FAST COMPANY (June 25, 2019), <https://www.fastcompany.com/90369004/lgbt-employee-protections-by-state-map-shows-where-gay-workers-can-be-fired> [<https://perma.cc/3CS4-3X3D>] (“[T]he steady march toward LGBTQ equality in the United States has largely been seen as one of the most significant cultural victories of our time, including a Supreme Court ruling in 2015 that made same-sex marriage legal in all fifty states. But when it comes to workplace protections for LGBTQ employees, things have not progressed as quickly as you may think. Notably, there is no federal law that explicitly protects workers for being fired for their sexual orientation or gender identity.”); Everdeen Mason et al., *The Dramatic Rise in State Efforts to Limit LGBT Rights*, WASH. POST (June 29, 2017), https://www.washingtonpost.com/graphics/national/lgbt-legislation/?utm_term=.a3756ca4cb0e [<https://perma.cc/7VYY-2ZRS>] (“While the lesbian, gay, bisexual, and transgender community has become more visible and won more legal protections in recent years, state lawmakers have increased attempts to pass legislation that could restrict civil rights for LGBT people. Since 2013, legislatures have introduced 348 bills, 23 of which became law.”).

22. However, such a protection was recently interpreted by the Supreme Court as being part of Title VII’s existing prohibition on sex discrimination in employment. See *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

23. KERITH J. CONRON & SHOSHANA K. GOLDBERG, *LGBT PEOPLE IN THE U.S. NOT PROTECTED BY STATE NON-DISCRIMINATION STATUTES*, WILLIAMS INST. (2020), <https://williamsinstitute.law.ucla.edu/publications/lgbt-nondiscrimination-statutes>; see Susan Miller, ‘Shocking’ Numbers: Half of LGBTQ Adults Live Where No Laws Ban Job Discrimination, USA TODAY (Oct. 8, 2019), <https://www.usatoday.com/story/news/nation/2019/10/08/lgbt-employment-discrimination-half-of-states-offer-no-protections/3837244002> [<https://perma.cc/C4B4-T8L2>] (“About half of LGBTQ people in the U.S.—52 %—live in states where they could be fired, nixed for a promotion, refused training or harassed at their jobs, all because of their gender identity and sexual orientation.”); Shalyn L. Caulley, *The Next Frontier to LGBT Equality: Securing Workplace-Discrimination Protections*, 2017 U. ILL. L. REV. 909, 919 (2017) (“Our current employment scheme leaves the estimated 1 million LGBT workers in the public sector, and 7 million workers in the private sector in varying protected states.”).

Queer activists generally look to engaging in work at the federal level, whether through Congress or the Supreme Court, to ensure that protections and rights are uniform across the nation. Indeed, in 2015, the Supreme Court's landmark ruling in *Obergefell v. Hodges* immediately invalidated the laws of 13 states that did not previously allow same-sex couples to marry and extended the constitutional right to marry to virtually all same-sex couples, even if in states not involved in the underlying litigation.²⁴ However, while the Court's pronouncement of marriage equality across the *states* was clear, its applicability to the U.S. territories was left murky at best; the *Insular Cases* left unsettled the question whether the constitutional guarantees in which the Court grounded the fundamental right to marry were available to those in the territories.²⁵

This question has yet to be fully answered. Through subsequent litigation, the majority of the U.S. territories have been found to be bound by the Court's decision in *Obergefell*, and therefore now recognize a fundamental right to marry for same-sex couples. However, American Samoa remains an exception.²⁶ Chimene Keitner, a legal scholar on territorial law, has commented that in order for same-sex marriage to be recognized in American Samoa, there would need to be a voluntary decision to that effect by the local government or a ruling from the territory's judiciary.²⁷ And yet, as of the publication of this Note more than five years following *Obergefell*, neither has occurred.²⁸

The fact that American Samoa has not yet fully established marriage equality within its borders is, at least in part, attributable to the Supreme Court's doctrine established in the *Insular Cases*, a judicial relic

24. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html> [<https://perma.cc/YK67-JLGP>] (noting that *Obergefell* invalidated thirteen states that had banned same-sex marriage).

25. Michael K. Lavers, *Lambda Legal, MAP Release Report on LGBT Rights in US Territories*, WASH. BLADE (June 11, 2019), <https://www.washingtonblade.com/2019/06/11/lambda-legal-map-release-report-on-lgbt-rights-in-us-territories> [<https://perma.cc/TJJ6-QUG3>]; see *Obergefell*, 135 S. Ct. at 2608 ("They ask for equal dignity in the eyes of the law. The Constitution grants them that right."). It is outside the scope of this Note to delve into or critique Samoa's lack of a federal court. However, the territory does have the High Court of American Samoa which is the court of general jurisdiction. For a more detailed analysis of Samoa's judicial system, see generally Uilisona Falemanu Tua, *A Native's Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa*, 11 ASIAN-PAC. L. & POL'Y J. 246 (2010).

26. Zachary Davies Boren, *Same-Sex Marriage: American Samoa May Be the Only Territory in the US Where the Historic Supreme Court Ruling Does Not Apply*, INDEPENDENT (July 10, 2015), <https://www.independent.co.uk/news/world/americas/same-sex-marriage-american-samoa-may-be-the-only-territory-in-the-us-where-the-historic-supreme-10379804.html> [<https://perma.cc/3RKB-7V65>].

27. *Id.*

28. *Id.*

that has survived over a hundred years and continues to determine how territories self-govern.²⁹ However, this is but one example of the impact that the *Insular Cases* have had on the checkerboard of often limited protections available for queer people in each of the territories;³⁰ this Note will demonstrate that the cases have had and could have significantly greater impact. Specifically, notwithstanding the history of the *Insular Cases* as a colonial tool, this Note argues that the Indigenous people of the territories can reimagine the doctrine laid out in the *Cases* to instead aid in their decolonization efforts and protect their queer populations.³¹

Part I traces the history of the *Insular Cases* and how their colonial and racist roots reflect the treatment of the territories as “distant possessions”³² that are “foreign to the United States in a domestic sense.”³³ Next, Part II assesses the status of territorial law and its protections for LGBTQ people by territory, utilizing an existing report’s two evaluative categories of laws and policies based on sexual orientation and gender identity, and noting how the *Insular Cases* have already shaped some of these policies. Finally, Part III illuminates that although the *Insular Cases* were originally established to maintain the United States’ supremacy over the islands, territorial governments have reconceptualized this doctrine with varying degrees of success to instead protect their claims to self-determination, in some cases against the interests of their LGBTQ residents. However, Part III will also demonstrate the elasticity of the *Cases*, and in particular the fact that they can be used by the territories both to harm *and* protect their queer populations. As such, this Note argues that the islands can—and must—take affirmative steps to protect the rights of their LGBTQ populations precisely because of the *Insular Cases*, and they can do so without compromising self-government as the new age “laboratories of democracy.”

I. THE *INSULAR CASES* AND THE TREATMENT OF U.S. TERRITORIES AS “DISTANT POSSESSIONS”

The five territories are vastly distinct from each other in culture, language, history, and whether and how they wish to protect, if at all, their queer populations. Understanding the legal evolution of the

29. See *infra* Subpart I.B.

30. See *infra* Subpart I.B.

31. The term “Indigenous” is capitalized in this Note to denote a proper noun and to recognize that Indigenous peoples have a unique place in historical, legal, and political language. See, e.g., D. Kapua’ala Sproat, *Wai Through Kānāwai: Water for Hawai’i’s Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 127 n.3 (2011).

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

33. *Id.* at 341. (White, J., concurring). Justice White distinguished Puerto Rico by making clear that the territory was neither a state nor a foreign country. *Id.* The territory was not “incorporated into the United States” and was “merely appurtenant . . . as a possession.” *Id.*

unincorporated territories will help shed light on this Note's normative approach of cautiously flipping the colonial relic of the *Insular Cases* into a tool for affirming LGBTQ rights. This Note focuses narrowly on the judiciary as the vehicle for this progress for two reasons.³⁴

First, the use of the *Insular Cases* is a more accessible and powerful tool to be wielded by or against the territories than are the mechanisms available to on the other branches of government. Second, the territories hold no voting power or authority in Congress and do not have the right to vote in presidential elections, essentially leaving them "politically powerless."³⁵ Despite the territorial governments maintaining some control over local affairs, Congress continues to be the "ultimate source of power pursuant to the Territory Clause of the Constitution."³⁶ As will be noted *infra*, the *Insular Cases* have created a legal landscape wherein residents of the territories can only enjoy constitutional rights that have been extended to them by Congress. Therefore, a lack of proper representation in national politics is particularly devastating, as the territories lack a direct line of access to the one authority that can, without question, grant them constitutional rights that others throughout the country may enjoy. This in turn means that the judiciary, which has the power to interpret congressional grants of rights in the absence of clarity to that effect, is a key tool for residents of the territories seeking recognition of their fundamental rights.

34. See 18 U.S.C. § 249 (2009) ("Offenses involving actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability" are applied to the "special maritime or territorial jurisdiction of the United States.").

35. Under the U.S. Constitution, only states are provided political representation. U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States"); U.S. CONST. art. I, § 3 ("The Senate of the United States shall be composed of two Senators from each State"); U.S. CONST. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."). According to Tom Lin, the territories "are largely politically powerless and lack many of the decision-making privileges as compared to the Americans living in the States." Lin, *supra* note 11, at 1264.

36. *United States v. Sanchez*, 992 F.2d 1143, 1152–53 (11th Cir. 1993) (citing to U.S. CONST. art IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make needful Rules and Regulations respecting the Territory or other Property belonging to the United States.")); see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 250 (2002) ("If territories indeed remain subject to ultimate congressional power, this potentially would mean that Congress could rescind their constitutions and withdraw all but the most fundamental constitutional protections at will. And if territorial citizenship exists only at the behest of Congress, then territorial inhabitants, like Indians, potentially remain vulnerable to certain forms of expatriation.").

A. *The History of the Incorporation Doctrine*

The legal foundation that keeps the U.S. territories at arm's length can be traced to the *Insular Cases*, decided at the turn of the twentieth century, and the Territorial Clause of the United States Constitution.³⁷ In particular, the impetus for and “centerpiece” of the constitutional doctrine was a dispute over a shipment of oranges from Puerto Rico to New York.³⁸ In *Downes v. Bidwell*, the first of the *Insular Cases*, the petitioner argued that the duty imposed on the goods as mandated by the Foraker Act violated the Uniformity Clause of the Constitution. Under the Uniformity Clause, all “Duties, Imposts and Excises shall be uniform throughout the United States.”³⁹ The Court held in a five-to-four vote that the Foraker Act was constitutional because the Uniformity Clause did not apply to Puerto Rico.⁴⁰ The Justices, however, differed in their rationale.⁴¹

While the decision of the Court was written by Justice Henry Billings Brown, no other Justice joined the opinion.⁴² Justice Brown explained that the full weight of the Constitution, and in this case specifically, the Uniformity Clause, did not apply because “the island of Porto Rico [sic] is a territory appurtenant and belonging to the United States,

37. U.S. CONST. art. IV, § 3, cl. 2. See also Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT'L L. 229, 234 (2018). “[T]he key to the *Insular Cases* is not how much sovereign control over Puerto Rico they approved but how much they held back.” *Id.* at 243. For a list of the decisions that comprise the *Insular Cases* see *supra* note 11; see also *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922) (“[T]he real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico [sic] when we went there, but which ones of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.”); *Dorr v. United States*, 195 U.S. 138, 143, 148 (1904) (concluding that the Philippines had not been incorporated into the United States and that trial by jury was not a “fundamental right.”). The arm’s length treatment of the Pacific territories can be attributed to the acquisition of islands “separated by thousands of miles from the political and economic epicenter of the American polity, and inhabited by large numbers of subject peoples of difference races, languages, cultures, religions, and legal systems than those of the then-dominant Anglo-Saxon society of the United States.” Juan Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 289 (2007).

38. Adriel I. Cepeda Derieux, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 797, 803 (2010).

39. U.S. CONST. art. I, § 8, cl. 1; *Downes v. Bidwell*, 182 U.S. 244, 288 (1901).

40. See generally *Downes*, 182 U.S. 244.

41. *Id.*

42. *Id.* at 247 (“Mr. Justice Brown announced the conclusion and judgment of the court.”). Four Justices—White, McKenna, Gray, and Shiras—concurred with Justice Brown’s ruling. *Id.* at 345 (White, J., concurring). The remaining four justices—C.J. Fuller, Harlan, Brewer, and Peckham—instead argued that the Constitution was not diminished or limited in the territories but were applied in full. *Id.* at 347 (Fuller, C.J., dissenting).

but not a part of the United States within the revenue clauses of the Constitution.”⁴³ In putting forth this “extension theory,” he declared that the Constitution was to be applied to territories only if Congress chose to “extend” it to them.⁴⁴ Moreover, according to Justice Brown, because the “alien races” are so distinct “from us in religion, customs, laws, methods of taxation, and modes of thought” the territories “can nowhere be inferred” to be part of the United States.⁴⁵

The most important opinion, and the one that was treated as settled law in subsequent *Insular Cases*, was the concurrence written by Justice Edward Douglass White, who wrote for himself and two other justices.⁴⁶ Justice White emphasized congressional deference and reaffirmed the legislative branch’s plenary authority under the Territorial Clause.⁴⁷ In creating a new legal standard known as the “incorporation doctrine,” Justice White articulated that the Constitution would apply in full only to “incorporated territories,” or those destined for statehood, because they are “worthy . . . of such [a] blessing.”⁴⁸ Therefore, for the newly classified “unincorporated territories” *not* slated for statehood, “the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.”⁴⁹ As such, because Puerto Rico was deemed an unincorporated territory since “it was foreign to the United States in a domestic sense,” only “fundamental rights” created under the Constitution would be applied.⁵⁰

The *Insular Cases* birthed a new legal fiction, boxing the territorial islands into a gray area by classifying them as “unincorporated” territories. Following the Northwest Ordinance of 1787, common practice was that new territories would always ultimately be incorporated into the union as states; the *Insular Cases*, however, changed what was once a transitional status (being “unincorporated”) into a completely new

43. *Id.* at 287. The U.S. government misspelled Puerto Rico as the “Americanized corruption” “Porto Rico” until 1932. See JAMES L. DIETZ, *ECONOMIC HISTORY OF PUERTO RICO: INSTITUTIONAL CHANGE AND CAPITALIST DEVELOPMENT* 85 (1986).

44. *Downes*, 182 U.S. at 251.

45. *Id.* at 250–51, 287.

46. *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922) (“The *Insular Cases* reveal much diversity of opinion in this Court as to the constitutional status of the territory acquired by the Treaty of Paris ending the Spanish War, but the *Dorr* Case shows that the opinion of Mr. Justice White of the majority, in *Downes v. Bidwell*, has become the settled law of the court.”); Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 343 (2005).

47. U.S. CONST. art. IV, § 3, cl. 2; *Downes v. Bidwell*, 182 U.S. 244, 287–345 (1901) (White, J., concurring).

48. *Downes*, 182 U.S. at 311–12 (White, J., concurring); Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 103 (2013).

49. *Downes*, 182 U.S. at 292 (White, J., concurring).

50. *Id.* at 341 (White, J., concurring); Laughlin, Jr., *supra* note 46.

category that a territory might never leave.⁵¹ In fact, the doctrine was so unprecedented that Justice John Marshall Harlan declared in his dissent that, “I am constrained to say that this idea of ‘incorporation’ has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel.”⁵² Soon after the *Downes* decision was announced, a legal commentator remarked that the “*Insular Cases*, in the manner in which the results were reached, the incongruity of the results, and the variety of inconsistent views . . . [were] without a parallel in our judicial history.”⁵³

The incorporation doctrine comports with notions of Manifest Destiny and racist principles prevalent during the time.⁵⁴ It allowed the United States to “expand its sphere of political, economic, and military influence through direct and indirect annexation of other lands, while at the same time denouncing imperialism elsewhere and remaining comfortable with its conscience.”⁵⁵ In contextualizing the decision, it should come as no surprise that the membership of the Court that decided the *Insular Cases* was almost exactly the same as that of the Court that espoused the “separate but equal” doctrine in *Plessy v. Ferguson*.⁵⁶

51. Arnalda Cruz-Malavé, *The Oxymoron of Sexual Sovereignty: Some Puerto Rican Literary Reflections*, 19 *CENTRO J.* 51, 61–62 (2007); Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 *SAN DIEGO L. REV.* 437, 451 (2002) (“Congress produced [the] Northwest Ordinance of 1787 to address the political and economic problems of the Northwest Territory. It eventually became the archetype for development of all territorial acquisitions.”).

52. *Downes*, 182 U.S. at 391 (Harlan, J., dissenting).

53. Charles E. Littlefield, *The Insular Cases*, 15 *HARV. L. REV.* 169 (1901).

54. Although the concept of Manifest Destiny originally encompassed the continental expansion to the Pacific Ocean and was considered a tactic for increasing the number of pro-slavery States, after the Civil War similar themes were adopted by the Republican expansionists as a slogan for overseas conquests. Juan R. Torruella, *Ruling America’s Colonies: The Insular Cases*, 32 *YALE L. & POL’Y REV.* 57, 60 n.12 (2013). See also STANLEY K. LAUGHLIN, JR., *THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS* § 10.10, 181 (1995) (“Ironically, the incorporation doctrine which originally legitimated popular desire to fulfill America’s manifest destiny now provides the theoretical basis for assuring a large measure of territorial self-determination.”); Torruella, *supra* note 37, at 287 (“When placed in their historic context, the *Insular Cases* represent a constitutional law extension of the debate over the Spanish-American War of 1898 and the imperialist/manifest destiny causes which that conflict promoted.”).

55. Ediberto Román, *Empire Forgotten: The United States’ Colonization of Puerto Rico*, 24 *VILL. L. REV.* 1119, 1148 (1997). The United States government distanced itself from its imperialistic past by creating the unincorporated territory which “did not fit in the vocabulary of classic colonialism.” *Id.* By “deceptively chang[ing] traditional colonial doctrinal parlance,” the United States sought to avoid being labeled a colonizer. *Id.*

56. JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 3–5 (1988) (drawing comparisons between *Plessy v. Ferguson* and the *Insular Cases*); see *Plessy v. Ferguson*, 163 U.S. 537 (1896).

B. *The Impractical and Anomalous Standard*

The *Downes* opinion and subsequent decisions comprising the *Insular Cases* established the rule that only Constitutional rights so “fundamental in nature” to “the basis of all free government, which cannot be with impunity transcended,” are available to the inhabitants of the U.S. territories.⁵⁷ What is fundamental in the territorial context, however, is separate and distinct from the fundamental rights guaranteed in a due process context.⁵⁸ Legal scholar Stanley Laughlin recognized the intrinsic problems of such an amorphous definition.⁵⁹ This flexible standard “encourage[s] judicial legislation and unwarranted judicial activism. These rights more often than not turned out to be the rights of the rich and powerful and were used to prevent reform.”⁶⁰ Because the Court failed to articulate a clear rule, circuit courts have split in subsequent decisions in evaluating which rights are sufficiently fundamental to apply to the territories.⁶¹ For example, in evaluating challenges brought by residents of the territories, the D.C. Circuit ruled that the Sixth Amendment right to a criminal jury trial was a fundamental right, while the Ninth Circuit concluded otherwise.⁶²

In response to this doctrinal ambiguity, various courts have drawn upon Justice Harlan’s concurrence in *Reid v. Covert*, another of the

57. *Downes v. Bidwell*, 182 U.S. 244, 291 (1901) (White, J., concurring); *Dorr v. United States*, 195 U.S. 138, 147 (1904); see *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring) (“[T]he question is which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it.”); *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922) (“The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire.”).

58. Marybeth Herald, *Does the Constitution Follow the Flag into the United States Territories or Can It Be Separately Purchased and Sold?*, 22 HASTINGS CONST. L.Q. 707, 714–715 (1995); Carlos R. Soltero, *The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism*, 22 CHICANO-LATINO L. REV. 1, 18 (2001).

59. Laughlin, Jr., *supra* note 46, at 372.

60. See Malavet, *supra* note 16, at 187 (“[T]he Supreme Court articulated a flexible test that gives great deference to the political branches of government. The Court chose to engage in a case-by-case and right-by-right analysis to decide which of the individual protections guaranteed in the Constitution to U.S. citizens in the territory. . . .”).

61. Adam Clanton, *Born to Run: Can an American Samoan Become President?*, 29 UCLA PAC. BASIN L.J. 135, 151 (2012); see Gerald L. Neuman, *Closing the Guantánamo Loophole*, 50 LOY. L. REV. 1, 14 (2004).

62. *Northern Mariana Islands v. Atalig*, 723 F.2d 682, 690 (9th Cir. 1984) (right to jury trial is not a fundamental right); *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975) (requesting on remand that there be a finding if trial by jury would be “impractical and anomalous”); *King v. Andrus*, 452 F. Supp. 11, 17 (D.D.C. 1977) (finding jury trials to be a fundamental right because it is not “impractical and anomalous.”); Clanton, *supra* note 61.

Insular Cases, in which he established that analysis into whether a fundamental right is applicable to a territory will depend on “the particular local setting, the practical necessities, and the possible alternatives.”⁶³ By considering these factors, a court will be able to ascertain whether a right is “impractical and anomalous” and therefore unsuited for a territory.⁶⁴ The “impractical and anomalous” test represents a “workable standard for finding a delicate balance between local diversity and constitutional command.”⁶⁵ Indeed, it was this standard that the Court later adopted in *Boumediene v. Bush* when it ruled that enemy combatants have a constitutional right to habeas corpus review while detained at Guantanamo Bay.⁶⁶

According to Laughlin, two questions are at the center of the test. First, the impracticality determination requires an inquiry into whether the territory’s culture will make the right unworkable.⁶⁷ Second, in analyzing anomalousness, the question is whether applying the asserted constitutional provision would damage or destroy the territory’s culture.⁶⁸

The Ninth Circuit’s decision in *Wabol v. Villacrusis* illustrates how a court engages in an “impractical and anomalous” analysis.⁶⁹ At issue was whether the CNMI was able to impose race-based restrictions on Commonwealth land.⁷⁰ The court reconfirmed the holding of the *Insular Cases* and clarified that the United States Constitution applies “*ex proprio vigore*—of its own force—only if that territory is ‘incorporated.’”⁷¹ As such, only fundamental constitutional rights that are neither impractical nor anomalous would be applicable to the CNMI.⁷² The court concluded that application of equal protection principles to the territory’s land alienation restriction would “interfere with . . . our international

63. Reid v. Covert, 354 U.S. 1, 75, 77 (1957) (Harlan, J., concurring).

64. *Id.* at 74–76.

65. *Wabol v. Villacrusis*, 958 F.2d 1450, 1461 (9th Cir. 1990).

66. *Boumediene v. Bush*, 553 U.S. 723, 770–771 (2008); Serrano, *supra* note 11, at 410–411.

67. Laughlin, Jr. *supra* note 46, at 331–32. It is important to note that the word culture itself is fluid. According to anthropologists and sociologists, “the term is generally recognized as the set of ‘learned traits shared by a group of people’ including beliefs, values, language, and religion.” Rose Cuison Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127, 146–47 (2018) (quoting Kim Forde-Mazrui, *Does Racial Diversity Promote Cultural Diversity?: The Missing Question in Fisher v. University of Texas*, 17 LEWIS & CLARK L. REV. 987, 995 (2013)).

68. Laughlin, Jr., *supra* note 46, at 331–32. These two questions were asked in a case in which the issue was whether the right to a jury trial was applicable to American Samoa. “The twofold question was whether juries would work in American Samoa and whether it would be feasible, practically speaking, to institute them.” Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 1006 (2009); see *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975).

69. See generally *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1990).

70. *Id.*

71. *Id.* at 1459.

72. *Id.*

obligations” and the United States’ “pledge to preserve and protect [C]NMI culture and property.”⁷³ The Ninth Circuit announced that this aspect of equality is not “fundamental in the international sense” and is therefore “impractical and anomalous,”⁷⁴ and held that the race-based restrictions survived legal challenge.

II. THE CURRENT STATE OF LGBTQ RIGHTS IN THE U.S. TERRITORIES

A. *LGBTQ Rights and Public Opinion in the United States*

The beginning of the United States LGBTQ rights movement is often attributed to the Stonewall riots in 1969, during which queer patrons protested a police raid at a New York bar.⁷⁵ Since then, the movement has evolved from being run by small liberationist groups which arguably often centered the experiences of white gays and lesbians to efforts to include the transgender community and intersectional experiences, *inter alia*, of class and race.⁷⁶ Historically, queer advocates have focused on finding commonalities within the LGBTQ spectrum in order to best inform and strategize how issues are to be decided and “what strategies best serve[] sexual minorities in America.”⁷⁷ In other words, advocates have often viewed their work through a national lens, anticipating that their work would ultimately have an impact on all LGBTQ people across the country.

While stigma and discrimination against LGBTQ people persist to this day, there have been signs of progress as a result of this approach. For example, the United States was heralded by one news source in 2019 as “rapidly becoming a post-gay country.”⁷⁸ Once deemed “criminal subver-

73. *Id.* at 1462.

74. *Id.* at 1460, 1462.

75. Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1702–03 (1993) (“By consensus, the Stonewall rebellion in June 1969 marks the beginning of the lesbian and gay political movement.”); Vern Bullough, *When Did the Gay Rights Movement Begin?*, HIST. NEWS NETWORK (April 17, 2005), <http://historynewsnetwork.org/article/11316> [<https://perma.cc/LM3A-D7LM>].

76. See Marie-Amélie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 WIS. L. REV. 503, 526 (2018) (“Those on the sexual margins of American society have long divided themselves based on how closely they hewed to gender norms, with the more transgressive members of the community typically at the bottom of the social hierarchy.”); Leachman, *From Protest to Perry*, *supra* note 19, at 1677–78 (“Lesbians and gay men often organized separately, splintering movement organizations along gender lines. Movement organizations were often further diversified by specific intersectional identities, such as intersectional racial-sexual identities, creating organizations with names like the Gay Asian Pacific Alliance and Gay American Indians.”).

77. George, *supra* note 76, at 541.

78. James Kirchick, *The Struggle for Gay Rights is Over*, ATLANTIC (June 28, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/battle-gay-rights-over/592645>

sives,” “deviants,” and “mentally ill,” today LGBTQ people are viewed as “benign” and “ubiquitous” by “most of America.”⁷⁹ In fact, according to a 2020 study by the Public Religion Research Institute, nearly three-quarters of the 40,000 Americans surveyed opposed LGBTQ discrimination in employment and housing; approximately 62 percent of respondents supported same-sex marriage.⁸⁰

For transgender Americans, progress has not followed the same trajectory: The law and public policy have often been used to fight *against* progress for transgender rights, as evidenced by the Trump Administration’s ban on transgender people serving in the U.S. military and the recent slate of state-level bills seeking to restrict access to gender-affirming care for transgender youth (with eight such bills introduced in the first few weeks of 2020).⁸¹ However, a 2019 survey found that 62 percent of respondents had become “more supportive of transgender rights” compared to their views five years ago.⁸²

B. *LGBTQ Rights in the Territories*

The LGBTQ rights movement has achieved notable gains at the local, state, and federal levels. However, outside of enjoying the protection granted by the limited number of federal statutes that explicitly

[<https://perma.cc/2PL9-DMSV>].

79. See *id.*; George, *supra* note 76, at 504.

80. Oscar Lopez, *Most Americans Seen Backing LGBT+ Rights, but Religion Still a Flashpoint*, REUTERS (Apr. 15, 2020), <https://www.reuters.com/article/us-lgbt-survey-trfn/most-americans-seen-backing-lgbt-rights-but-religion-still-a-flashpoint-idUSKCN21X356> [<https://perma.cc/YHS7-XR8L>]; *Homosexuality, Gender and Religion*, PEW RESEARCH CTR. (Oct. 5, 2017), <https://www.people-press.org/2017/10/05/5-homosexuality-gender-and-religion> [<https://perma.cc/25D5-WG2C>]. It is important to note that, despite increasing public support, more than half the states and the federal government maintain laws and policies that discriminate against (or otherwise fail to prevent discrimination against) LGB people. See generally Gregory B. Lewis & Seong Soo Oh, *Public Opinion and State Action on Same-Sex Marriage*, 40 STATE & LOCAL GOV’T REV. 42 (2008) (finding that public opinion drives “morality policy” except for gay rights issues.).

81. See Kirchick, *supra* note 78; *Trump Administration Announces Beginning of Transgender Military Ban on April 12*, NAT’L CTR. TRANSGENDER EQUAL. (Mar. 12, 2019), <https://transequality.org/press/releases/trump-administration-announces-beginning-of-transgender-military-ban-on-april-12> [<https://perma.cc/6CAP-FXK5>]; Kristin Lam, *National Firestorm on Horizon as States Consider Criminalizing Transgender Treatments for Youths*, USA TODAY (Feb. 6, 2020), <https://www.usatoday.com/story/news/nation/2020/02/06/transgender-youth-transition-treatment-state-bills/4605054002> [<https://perma.cc/J7MD-LKEZ>].

82. Daniel Greenberg et al., *America’s Growing Support for Transgender Rights*, PUB. RELIG. RESEARCH INST. (June 11, 2019), <https://www.prrri.org/research/americas-growing-support-for-transgender-rights> [<https://perma.cc/N9AH-AKL3>]. In one Gallup poll, 71 percent of adults support openly transgender men and women in the military. Justin McCarthy, *In U.S., 71% Support Transgender People Serving in Military*, GALLUP (June 20, 2019), <https://news.gallup.com/poll/258521/support-transgender-people-serving-military.aspx> [<https://perma.cc/BFW6-SX3E>].

protect against sexual orientation and gender identity discrimination,⁸³ LGBTQ people in the territories have seen little of that federal-level progress because of the *Insular Cases*.⁸⁴

A report by the Movement Advancement Project and Lambda Legal (the MAP Report) provides a helpful starting framework for analyzing the state of LGBTQ rights in the territories because of its consideration of laws and policies implicating sexual orientation *and* gender identity, including those shaped by post-*Obergefell* lawsuits necessitated by the *Insular Cases*.⁸⁵ As a preliminary matter, sexual orientation laws and policies are defined as those that take into consideration “a person’s pattern of emotional, romantic, or sexual attraction (or lack thereof) to people. Laws that explicitly mention sexual orientation primarily target, whether for protection or harm, lesbian, gay, and bisexual people. Transgender people can also be affected by laws that explicitly mention sexual orientation.”⁸⁶ Laws and policies that target gender identity and expression are independent and distinct from those that target sexual orientation.⁸⁷ Additionally, these laws can apply to people who may not

83. There appear to only two such statutory protections at the federal level: the Matthew Shepard and James Byrd J. Hate Crimes Prevention Act and the Violence Against Women Act. See 18 U.S.C. § 249 (2009); 42 U.S.C. §§ 13701–14040 (2006). However, the Violence Against Women Act expired in February 2019, with its reauthorization stalled in the Senate as of this writing. See Jay Willis, *Why Can't the Senate Pass the Violence Against Women Act?*, GQ (Dec. 13, 2019), <https://www.gq.com/story/senate-violence-against-women-act> [https://perma.cc/BC4P-F794].

84. For example, covered employers in the territories are subject to Title VII’s requirements (just as they would be if in the states) based on the text of the law as enacted by Congress, meaning that the Court’s recent decision in *Bostock* applies to the territories and is therefore an instance, albeit a rare one, of federal-level progress reaching both the states and territories. See 42 U.S.C. § 2000e (2018) (defining “covered employers” without reference to their geographic location and instead based on number of employees and whether in an “industry affecting commerce;” defining “industry affecting commerce,” in part, as activities which would hinder or obstruct commerce or its free flow; defining “commerce” as “trade, traffic, commerce, transportation, transmission, or communication among the several States; . . . or within . . . a possession of the United States” and noting that “States” for the purposes of the subchapter include “Puerto Rico, the Virgin Islands, American Samoa, [and] Guam. . . .”).

85. *LGBT Policy Spotlight: LGBT Equality in the U.S. Territories*, MOVEMENT ADVANCEMENT PROJECT & LAMBDA LEGAL 7 (June 2019), <http://www.lgbtmap.org/policy-spotlight-us-territories> [https://perma.cc/S3ZD-5RDV] [hereinafter *LGBT Policy Spotlight*].

86. *Snapshot: LGBTQ Equality By State*, MOVEMENT ADVANCEMENT PROJECT, <http://www.lgbtmap.org/equality-maps> [https://perma.cc/8MWN-3BNR].

87. Andrew Park, *Comment on the Definition of Sexual Orientation and Gender Identity Submitted to the Drafting Committee, Yogyakarta Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity*, WILLIAMS INST. (Feb. 17, 2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Yogyakarta-Review-SOGI-Definition.pdf> (“[T]he definition clarifies gender identity and sexual orientation as independent concepts. This clarification is important as

be transgender, “but whose sense of gender or manner of dress does not adhere to gender stereotypes.”⁸⁸

Due to the scope of this Note, the following Part will only analyze laws and policies that are specific to each U.S. territory, and as such will not discuss applicable federal statutes and regulations. However, it is noted that the few federal laws that do contain express protections for LGBTQ people, such as the Matthew Shepherd and James Byrd Hate Crime Prevention Act of 2009, extend to the U.S. territories.⁸⁹ Additionally, this Note’s discussion of existing nondiscrimination protections inclusive of sexual orientation and gender identity will focus on laws which *explicitly* include such bases within their protections. That being said, it is likely that other nondiscrimination protections which do not explicitly include sexual orientation and gender identity, but do explicitly protect against sex discrimination, nonetheless provide protections against such discrimination (as forms of sex discrimination) per the Court’s reasoning in *Bostock v. Clayton County*.⁹⁰

This Part will survey territorial laws using the MAP Report’s seven broad categories: relationship and parental recognition, nondiscrimination laws, religious exemption laws, LGBT youth laws and policies, health care policies, criminal justice policies, and accurate identity documents.⁹¹ The MAP Report ranks territories based on their positive and negative laws and policies: Puerto Rico is ranked “high” in terms of protections with a score of 21.75 (out of a total of 40.5).⁹² The other four territories

many people conflate sexual orientation and gender identity based on the assumption that same-sex desire steers, or is steered by, an individual’s gender identity.”); see Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII and an Argument for Inclusion*, 24 BERKELEY J. GENDER, L. & JUST. 166, 199 (2009) (demonstrating that folding LGBTQ identities into a single personhood “may under-protect gender nonconforming heterosexuals. . . . [since] the harms associated with discrimination and harassment based on gender nonconformity cut across sexual orientations.”); Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 572 (2007) (“It is inaccurate to conflate sexual orientation with gender nonconformity, and such semantic sloppiness has no place in the law. . . .”).

88. *Methodology/More Information*, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/rubric.htm?v=9> [<https://perma.cc/C92S-KCZS>].

89. See *supra* note 82.

90. 140 S. Ct. 1731 (2020).

91. See *LGBT Policy Spotlight*, *supra* note 85, at 7.

92. *Id.* at 7. The MAP Report issues positive points to territories for LGBTQ-inclusive or protective policies and laws, while points are deducted for discriminatory or harmful policies and laws. *LGBTQ Policy Spotlight: Mapping LGBTQ Equality: 2010 to 2020*, MOVEMENT ADVANCEMENT PROJECT 3, <https://www.lgbtmap.org/file/2020-tally-report.pdf> (last visited March 17, 2020). The territories are given three tallies: a Sexual Orientation tally, a Gender Identity tally, and an Overall tally. *Id.*

are ranked “low.”⁹³ Guam has a total score of 7, the Virgin Islands a 5.5, American Samoa a 1.5, and the CNMI a 0.5.⁹⁴

1. Puerto Rico

Puerto Rico is celebrated as the most progressive U.S. territory for its LGBTQ protections.⁹⁵ In fact, the territory markets itself to tourists as the “LGBT capital of the Caribbean.”⁹⁶ This self-designation arguably represents a cultural shift away from the conservative and religious values sometimes considered to be at the core of the territory.⁹⁷ Perhaps reflective of such a shift, in 2016 the Puerto Rico Senate confirmed Associate Justice Maite Oronoz Rodriguez as Chief Justice of the Commonwealth’s highest court—making her the first openly queer chief justice in the United States.⁹⁸ Some have characterized the Chief Justice’s confirmation as representing a “momentous step towards achieving a judiciary that reflects the full and rich diversity of our country.”⁹⁹

Puerto Rico offers expansive protections for LGBTQ people, at times explicitly covering both sexual orientation and gender identity. For example, in 2013, the territory promulgated two pro-LGBTQ laws

93. *LGBT Policy Spotlight*, *supra* note 85, at 7.

94. *Id.* When comparing the rankings between the territories and the states, there are 4 states that rank in the “Negative Overall Policy Tally,” 22 states and 4 territories in the “Low Policy Overall Tally,” 6 states in the “Medium Overall Policy Tally, and 18 states and Puerto Rico in the “High Overall Policy Tally.” *Id.*

95. Alys Brooks, *In Puerto Rico, LGBTQ Political Victories Pile Up. But Challenges Remain.*, REWIRE NEWS GRP. (July 10, 2019), <https://rewire.news/article/2019/07/10/in-puerto-rico-lgbtq-political-victories-pile-up-but-challenges-remain> [<https://perma.cc/CH8G-E5QL>]; *LGBT Policy Spotlight*, *supra* note 85.

96. Maria Soledad Dávila Calero, *Puerto Rico Marketing Organization Pitching Island’s Inclusiveness*, CARIBBEAN BUS. (June 11, 2019), <https://caribbeanbusiness.com/puerto-rico-marketing-organization-pitching-islands-inclusiveness> [<https://perma.cc/6LP9-JZGE>]; see Alejandra Rosa & Patricia Mazzei, *‘A Space Where You Could Be Free’: Puerto Rico’s L.G.B.T. Groups Rebuild After a Hurricane*, N.Y. TIMES (July 7, 2019), <https://www.nytimes.com/2019/07/07/us/puerto-rico-lgbtq-religious-freedom.html> [<https://perma.cc/RD5Y-YKC2>].

97. Brooks, *supra* note 95 (“Fifty-six percent of residents of the territory are Catholic, according to the Pew study, which is about the same proportion of all U.S. Latinos. (A third of Puerto Ricans are Protestant, and the same study found that Puerto Rico Protestants were less likely than Catholics to support marriage equality.”); Mark B. Padilla et al., *Trans-Migrations: Border-Crossing and the Politics of Body Modification Among Puerto Rican Transgender Women*, 28 INT’L J. SEXUAL HEALTH 261, 263 (2016) (“Puerto Rico has often been described in the Social Sciences literature as possessing conservative cultural norms and beliefs regarding gender and sexuality.”).

98. Omar Gonzalez-Pagan, *Lambda Legal Applauds Historic Confirmation of First Openly Lesbian Chief Justice in the Country to Puerto Rico Supreme Court*, LAMBDA LEGAL (Feb. 23, 2016), https://www.lambdalegal.org/blog/20160223_historic-confirmation-first-openly-lesbian-chief-justice-puerto-rico-supreme-court [<https://perma.cc/TWU2-58MY>].

99. *Id.*

inclusive of both—a prohibition on employment discrimination and protections against domestic violence.¹⁰⁰ Under the antidiscrimination law, private employers are prohibited from discriminating against employees on the basis of sexual orientation or gender identity with respect to their salary, rank, job privileges, and hiring.¹⁰¹ The Commonwealth similarly redefined the “merit principles” for the territory’s educational system,¹⁰² career opportunities within municipalities,¹⁰³ and appointments to community boards¹⁰⁴ and executive agencies,¹⁰⁵ to prohibit sexual orientation and gender identity discrimination. With respect to the Commonwealth’s domestic violence law, its update contained language to reaffirm “its constitutional commitment to protect the life, security, and dignity of men and women regardless of . . . sexual orientation [or] gender identity”¹⁰⁶ and redefined “[c]ohabitation,” “[i]ntimate relationship,” and “[d]omestic abuse” to be inclusive of sexual orientation and gender identity.¹⁰⁷ Just as importantly, this law now also requires that law enforcement agents take every measure to protect a domestic violence victim, regardless of whether they are LGBTQ.¹⁰⁸

Other areas with statutory protections explicitly inclusive of both sexual orientation and gender identity in Puerto Rico include public utilities and health care. Under one law, the territory prohibits public utilities from refusing to offer or provide electric power service on the bases of

100. *See* P.R. LAWS ANN. tit. 29 § 146 (2013); P.R. LAWS ANN. tit. 8 § 601 (2013).

101. P.R. LAWS ANN. tit. 29 § 146 (2013).

102. P.R. LAWS ANN. tit. 18 § 274p (d) (2013) (“Meriti principle.—Refers to the concept that all employees of the education system should be selected, trained, promoted, retained and treated in all that concerns their job, based on their capabilities, without discrimination on the basis of . . . sexual orientation, [and] gender identity. . .”).

103. P.R. LAWS ANN. tit. 21 § 4557 (2013) (“Ever municipality shall offer the opportunity to compete for career positions to any qualified person who wishes to participate in the public functions of the municipality. This participation shall be established according to merit, without discrimination based on . . . sexual orientation, [and] gender identity. . .”).

104. P.R. LAWS ANN. tit. 21 § 4608 (2013) (“Members shall hold office during the term of their appointments or until their successors take office. Said Boards shall be the representative bodies of various ideological, social, and economic sectors of the community in which they are constituted. To that end, the municipality shall not discriminate based on . . . sexual orientation, [and] gender identity. . .”).

105. P.R. LAWS ANN. tit. 3 § 1462b (2013) (“Agencies shall offer the opportunity of competing in their recruitment and selection procedures, to any qualified person . . . without discrimination on the basis of . . . sexual orientation, [and] gender identity. . .”).

106. P.R. LAWS ANN. tit. 8 § 601 (2013).

107. P.R. LAWS ANN. tit. 8 § 602 (2013). The Puerto Rico legislature also ensured protections against physical, psychological, and sexual abuse. P.R. LAWS ANN. tit. 8 § 631 (2013); P.R. LAWS ANN. tit. 8 § 632 (2013); P.R. LAWS ANN. tit. 8 § 635 (2013).

108. P.R. LAWS ANN. tit. 8 § 640 (2013).

sexual orientation or gender identity.¹⁰⁹ If such discrimination is found, the Puerto Rico Energy Commission is authorized to revoke an offending company's certification.¹¹⁰ Similarly, a 2013 law provides that no "patient, consumer or user of health care medical and hospital services shall be discriminated" against for reasons including sexual orientation.¹¹¹ While this law does not specifically enumerate gender identity, a 2009 statute allows a patient to file an administrative complaint if "a provider or an insurer has acted discriminatorily against a patient for reasons of . . . sexual orientation, [or] gender identity."¹¹²

Turning to sexual orientation-specific laws and policies, Puerto Rico currently follows the Court's mandate in *Obergefell v. Hodges* and recognizes same-sex marriages, but this was not the case immediately following that decision (unlike in most states).¹¹³ Instead, litigation was necessary, as a result of the *Insular Cases* as discussed later in this Note, to confirm whether the fundamental right to marry recognized by the Court was extended to those in Puerto Rico, even in spite of their status as U.S. citizens. In a *per curiam* opinion, the U.S. Court of Appeals for the First Circuit concluded that "[t]he constitutional rights at issue here are the rights to due process and equal protection, as protected by both the Fourteenth and Fifth Amendments to the United States Constitution. Those rights have already been incorporated as to Puerto Rico."¹¹⁴ As such, the First Circuit determined that Puerto Rico's ban on same-sex marriage was unconstitutional.¹¹⁵

With respect to laws and policies specific to gender identity and expression, Puerto Rico's Department of Transportation and Public Works does not require that transgender persons show proof of a medical procedure or updated birth certificate to correct their gender designation on an identification document.¹¹⁶ This policy directly aligns with statements from professional medical organizations such as the World Professional Association for Transgender Health, which prescribe that "[n]either genital appearance nor reconstruction is required for social

109. P.R. LAWS ANN. tit. 22 § 1054b (2016).

110. P.R. LAWS ANN. tit. 22 § 1054m (2014).

111. P.R. LAWS ANN. tit. 24 § 3048 (2000).

112. P.R. LAWS ANN. tit. 24 § 3055 (2009).

113. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding the right to marry is a fundamental right and the Due Process and Equal Protection Clauses of the Fourteenth Amendment prohibit same-sex couples from being denied that right).

114. *In re Conde Vidal*, 818 F.3d 765, 766 (1st Cir. 2016) (*per curiam*) (*citing* Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 600 (1976)).

115. *Id.* at 767.

116. Complaint for Declaratory and Injunctive Relief at 14, 17, Arroyo Gonzalez v. Rossello Nevares, 305 F. Supp. 3d 327 (D.P.R. 2018) (No. 3:17 Civ. 01457).

gender recognition, and so no surgery should be a prerequisite for identity document or record changes.”¹¹⁷

A federal court in 2018 required the territory to implement the same policy for birth certificates.¹¹⁸ Prior to this decision, the Commonwealth allowed the gender marker on birth certificates to be changed through a strike-out line format, which in turn could disclose one’s transgender identity.¹¹⁹ Judge Carmen Consuelo Cerezo determined that this “forced disclosure . . . violates [transgender people’s] constitutional right to decisional privacy. Much like matters relating to marriage, procreation, contraception, family relationships, and child rearing, ‘there are few areas which more closely intimate facts of a personal nature’ than one’s transgender status.”¹²⁰ Judge Cerezo opined that forcing one to disclose their transgender identity “chills speech and restrains engagement in the democratic process in order for transgenders [sic] to protect themselves from the real possibility of harm and humiliation. The Commonwealth’s inconsistent policies not only harm the plaintiffs before the Court; they also hurt society as a whole by depriving all from the voices of the transgender community.”¹²¹

As a result of the original policy and this litigation, Puerto Rico’s identification policy is more liberal even than those in some of the states.¹²² Even positive policies, however, may fail certain subpopulations of the LGBTQ community. For example, despite these developments for gender marker changes on driver’s licenses and birth certificates in

117. *Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the USA*, WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH 3 (Dec. 21, 2016), <https://www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH-Position-on-Medical-Necessity-12-21-2016.pdf>.

118. Arroyo Gonzalez, 305 F. Supp. 3d at 335.

119. *Id.* at 334.

120. *Id.* at 333.

121. *Id.*

122. Each state and U.S. territory promulgates its own rules and processes for IDs, resulting in a hodgepodge of inconsistent policies. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 766–72 (2008). Currently, there are fifteen states and one territory that mandate proof of gender confirmation surgery to correct a gender marker on a birth certificate. *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/identity_document_laws [<https://perma.cc/LF6J-QPAD>]. The fifteen states and one territory include: Arizona, North Dakota, Nebraska, Louisiana, Arkansas, Missouri, Iowa, Wisconsin, Michigan, Kentucky, Alabama, Georgia, North Carolina, Maine, New Hampshire, and Guam. *Id.* Three states—Idaho, Ohio, and Tennessee—prohibit gender markers from being amended altogether. *Id.* According to the 2015 U.S. Transgender Survey, only 11 percent of transgender respondents had their correct name and gender on *all* identification documents. SANDY E. JAMES ET AL., NAT’L CTR. TRANSGENDER EQUAL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY* 82 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>. The survey also found that 49 percent of respondents did not have an ID with their preferred name and 67 percent did not have an ID with their identifying gender. *Id.*

Puerto Rico, the Commonwealth currently does not provide a nonbinary gender option for either document.¹²³

While the MAP Report gave Puerto Rico the highest overall positive tally amongst the U.S. territories for its sexual orientation and gender identity policies, it is important to note that Puerto Rico still lacks a full panoply of explicit statutory protections for queer people.¹²⁴ For example, Puerto Rico does not provide explicit protections for second-parent adoptions involving unmarried couples and against discrimination in adoption or foster care for transgender parents, or an LGBTQ-inclusive definition of spouse/partner under its family leave laws.¹²⁵ Under its nondiscrimination laws, the territory does not have laws that explicitly protect against sexual orientation and gender identity discrimination in housing, public accommodations, or credit and lending.¹²⁶ Additionally, Puerto Rico does not offer explicit protections for queer youth in the child welfare system, and has not banned the use of the gay and transgender “panic” defenses. And, there are no laws that explicitly proscribe insurance providers from excluding coverage for transgender-specific care.¹²⁷

Furthermore and quite importantly, LGBTQ people in the Commonwealth continue battling against homophobia and transphobia, even within their highest offices of government.¹²⁸ In the summer of 2019, for example, Puerto Rico Governor Ricardo Rosselló resigned amid a scandal over a series of homophobic, transphobic, and sexist texts among

123. *Puerto Rico's Equality Profile*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality_maps/profile_state/PR [perma.cc/3F8B-4AAC]; Brooks, *supra* note 95. Currently, sixteen states and the District of Columbia provide a nonbinary option for IDs. These states include California, Colorado, Indiana, Illinois, New Hampshire, Pennsylvania, Maryland, Minnesota, Massachusetts, Nevada, Utah, Hawai'i, Maine, Vermont, Oregon, Arkansas. Mey Rude, *This State Just Became the 16th to Roll Out Nonbinary IDs*, OUT (Nov. 13, 2019), <https://www.out.com/transgender/2019/11/13/state-just-became-16th-roll-out-nonbinary-ids> [https://perma.cc/6MN8-3K29].

124. *Puerto Rico's Equality Profile*, *supra* note 123.

125. *Id.* While Puerto Rico has no law that provides protection for transgender persons seeking to adopt or become foster care parents, the territory does protect LGB parents due to protections based on sexual orientation. *Id.* In 2015, following the *Obergefell* decision, a Puerto Rico court allowed a same-sex couple to adopt a child, just two years after the Puerto Rico Supreme Court narrowly voted 5–4 to maintain the territory's ban on adoptions by same-sex couples. Associated Press, *For the First Time, Puerto Rico Allows Same-Sex Couple to Adopt*, LGBTQ NATION (Dec. 10, 2015), <https://www.lgbtqnation.com/2015/12/puerto-rico-for-first-time-allows-same-sex-couple-to-adopt> [https://perma.cc/WJ9S-KK2R]; Jaclyn Clifford, *Puerto Rico Supreme Court Upholds Same-Sex Adoption Ban*, JURIST (Feb. 22, 2013), <https://www.jurist.org/news/2013/02/puerto-rico-supreme-court-upholds-same-sex-adoption-ban> [https://perma.cc/RNN4-A54W] (*citing* Ex parte A.A.R., 187 P.R. Dec. 835 (P.R. 2013)).

126. *Puerto Rico's Equality Profile*, *supra* note 123.

127. *Id.*

128. *LGBT Policy Spotlight*, *supra* note 85.

his inner circle.¹²⁹ Additionally, while there has been a rise in media reports documenting violence against transgender women, there are “few well-developed mechanisms for reporting and documenting violence against them.”¹³⁰ Similarly, the Puerto Rico police force does not accurately track anti-LGBTQ violence, compounding the difficulty of addressing such hate crimes.¹³¹

2. Virgin Islands

Approximately 40 to 50 miles east of Puerto Rico are the Virgin Islands, which consist of three larger islands—St. Croix, St. John, and St. Thomas—along with fifty smaller islands.¹³² While the Virgin Islands are near Puerto Rico, the territory does not share in the same level of protections for LGBTQ individuals. In fact, only one statute in the entire territory specifically enumerates protections on the bases of both sexual orientation and gender identity.¹³³ The Hate-Motivated Crimes Act lists various penalties for a “person who willfully commits, causes to be committed or attempts to commit any crime and whose conduct is maliciously motivated by prejudice of the victim’s actual or perceived . . . sexual orientation or gender identity.”¹³⁴

The territory has promulgated two statutes that provide explicit protections based on sexual orientation, but make no mention of gender or gender identity and expression.¹³⁵ The first law created a bullying prevention and gang resistance education program.¹³⁶ The program’s purpose is to combat the negative effects of bullying, which “creates a climate of fear among students, inhibits their ability to learn, and leads to other

129. Bobby Allyn & Scott Neuman, *Puerto Rico Gov. Ricardo Rosselló Resigns in Wake of Text Message Scandal*, NPR (July 25, 2019), <https://www.npr.org/2019/07/25/744802981/puerto-rico-gov-ricardo-rossello-resigns-in-wake-of-text-message-scandal> [<https://perma.cc/VB6P-WH5Z>]. Many expressed concerns that the homophobic and transphobic remarks by the governor “validated their widespread suspicions of government corruption, especially post-Maria, as well as the anti-LGBTQ attitudes of lawmakers.” Jhoni Jackson, *For Puerto Rico’s LGBTQ Community, Fight Doesn’t End with Rosselló*, NBC NEWS (July 26, 2019), <https://www.nbcnews.com/feature/nbc-out/puerto-rico-s-lgbtq-community-fight-doesn-t-end-rossell-n1035011> [<https://perma.cc/Q3CQ-DEY7>].

130. Sheilla L. Rodríguez-Madera et al., *Experiences of Violence Among Transgender Women in Puerto Rico: An Underestimated Problem*, 64 J. HOMOSEXUALITY 209, 210 (2017).

131. *Id.* at 215–16 (according to the study, there are “high levels of exposure to violence from multiple sources, combined with an underdeveloped infrastructure and system for tracking cases of anti-transgender violence or hate crimes”); Jackson, *supra* note 129.

132. Luther Harris Evans, *Virgin Islands*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Virgin-Islands> [<https://perma.cc/QUZ3-7S4G>].

133. V.I. CODE ANN. tit. 14, § 3048 (2019).

134. *Id.*

135. *See* V.I. CODE ANN. tit. 17, § 781 (2019); V.I. CODE ANN. tit. 32, § 646 (2019).

136. V.I. CODE ANN. tit. 17, § 781 (2014).

antisocial behavior” such as “discrimination due to sexual orientation.”¹³⁷ The second law concerns telecommunication services, and requires that Master Service Providers “provide consistent and equal telecommunication services to all licensees and [that they] not discriminate with regard to its operation based on . . . sexual orientation.”¹³⁸

With respect to marriage equality, unlike in Puerto Rico, litigation was not necessary to extend the Court’s *Obergefell* ruling to the residents of this territory. In the days following the *Obergefell* decision, the presiding judge of the territory’s Superior Court¹³⁹ and the governor¹⁴⁰ both announced their intention to voluntarily comply with the ruling. Shortly thereafter, the governor issued an executive order requiring the territory’s various agencies under his control to comply,¹⁴¹ making marriage equality the policy of the territory.

Unlike Puerto Rico, the Virgin Islands fail to provide expressly employment or health care protections for LGBTQ individuals.¹⁴² In fact, the territory’s statutory civil rights provisions in these areas do not include sexual orientation or gender identity as protected characteristics.¹⁴³ Furthermore, although the legislature declared that “racial discrimination, segregation, and other forms of bias and bigotry are not part of the way of life of the people of the United States Virgin Islands,”¹⁴⁴ these sentiments did not explicitly include sexual orientation or gender identity.¹⁴⁵

For IDs, the territory allows name changes through court order.¹⁴⁶ There is, nevertheless, no statute or policy that speaks directly to amending a gender designation.¹⁴⁷ According to a report by the National Center for Transgender Equality, the territory’s Bureau of Motor Vehicles

137. *Id.*

138. V.I. CODE ANN. tit. 32, § 646 (2019).

139. Jonathan Austin, *Judge: V.I. Will Follow Gay Marriage Law*, VIRGIN ISLANDS DAILY NEWS (June 27, 2015), <https://web.archive.org/web/20150701000235/http://virginislandsdailynews.com/news/judge-v-i-will-follow-gay-marriage-law-c-1.1904684> [<https://perma.cc/Z9E8-RCT9>].

140. *Mapp Signs Marriage Equality Executive Order; Measure Awaits James’ Final Action*, ST. CROIX SOURCE (July 9, 2015), <https://stcroixsource.com/2015/07/09/mapp-signs-marriage-equality-executive-order-measure-awaits-james-action> [<https://perma.cc/6A8N-VNED>].

141. *Id.*

142. V.I. CODE ANN. tit. 24, § 451 (2019). “For the purposes of this section, the terms ‘because of sex’ or ‘as to sex’ include, but are not limited to: (1) because of sexual harassment and; (2) because of or as to pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes[.]” *Id.* at § 451(b).

143. *Id.*

144. V.I. CODE ANN. tit. 10, § 1 (2019).

145. *See id.*

146. V.I. CODE ANN. tit. 16, § 181 (2019); *Driver’s Licenses*, U.S. VIRGIN ISLANDS BUREAU OF MOTOR VEHICLES, <https://bmv.vi.gov/drivers-license> [<https://perma.cc/SUV2-3JVR>].

147. *See* U.S. VIRGIN ISLANDS BUREAU OF MOTOR VEHICLES, *supra* note 146.

may allow a gender marker to be changed if a court order reflects the change.¹⁴⁸ Multiple representatives of the Superior Court, however, report being “unaware of a single instance of a petition being received for changing a gender marker.”¹⁴⁹ There is no legal standard for changing a gender marker on a birth certificate in the Virgin Islands.¹⁵⁰ Furthermore, the territory does not provide gender-neutral options on driver’s licenses or birth certificates.¹⁵¹

According to the MAP Report, the Virgin Islands do not explicitly prohibit anti-LGBTQ discrimination in adoption or foster care, do not recognize *de facto* parents, and lack LGBTQ-inclusive definitions of spouse/partner and children/parents in family leave laws.¹⁵² Under the nondiscrimination laws category, the territory provides no explicit employment, housing, public accommodation, or credit and lending protections covering sexual orientation and gender identity.¹⁵³ Additionally, despite having anti-bullying policies that explicitly cover sexual orientation (but not gender identity), the territory has no laws or policies that explicitly protect queer youth in the child welfare system, and does not ban the use of conversion therapy on minors.¹⁵⁴ Finally, the Virgin Islands criminalize the transmission of HIV under certain circumstances, with a maximum fine of \$10,000 and/or imprisonment of no more than ten years, and does not ban the use of the gay or trans panic defenses.¹⁵⁵

The lack of substantive, explicit legal protections for LGBTQ people in the Virgin Islands may be the result of homophobia and transphobia seen in the territory.¹⁵⁶ Such anti-queer sentiments have been

148. *Virgin Islands*, NAT’L CTR. TRANSGENDER EQUAL., <https://transequality.org/documents/state/us-virgin-islands> [<https://perma.cc/6W3B-J65J>].

149. *Id.*

150. *Id.*

151. *U.S. Virgin Islands’ Equality Profile*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality_maps/profile_state/VI [<https://perma.cc/2ACY-LGX7>].

152. *Id.*

153. *Id.* See V.I. CODE tit. 10, § 1 (2019) (“Whereas it is the cultural and demographic heritage of the people of the United States Virgin Islands to respect the human and civil rights of all people and to judge all persons according to their individual merit without reference to race, creed, color, or national origin; and to cherish the racial equality, harmony, and good will that exists in the United States Virgin Islands.”).

154. *U.S. Virgin Islands’ Equality Profile*, *supra* note 151.

155. See V.I. Code tit. 14, § 888(a) (2019); *U.S. Virgin Islands’ Equality Profile*, *supra* note 151. Conversion therapy is a practice that is intended to change or eliminate a person’s sexual orientation or gender identity. CHRISTY MALLORY ET AL., CONVERSION THERAPY AND LGBT YOUTH UPDATE, WILLIAMS INST. (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-Update-Jun-2019.pdf>. More than thirty states criminalize HIV, making it illegal for someone with HIV to have sex with someone without first disclosing their status. Paige Pflieger, *Some Push to Change State Laws that Require HIV Disclosure to Sexual Partners*, NPR (Jan. 22, 2020), <https://www.npr.org/2020/01/22/797359483/some-push-to-change-state-laws-that-require-hiv-disclosure-to-sexual-partners> [<https://perma.cc/82KV-MPME>].

156. See Jessica Cohen, *U.S. Virgin Islands Hold First Pride Parade*, PASQUINES

traced back to a number of factors, including the influence of other nations throughout the territory's history.¹⁵⁷ As one example, despite the fact that the territory has a population of only about 100,000, the Centers for Disease Control and Prevention reports that the territory has the third highest per capita rate of HIV infections.¹⁵⁸ According to one study, a partial explanation for such high rates may include men refusing to be tested or choosing not to disclose their status because of "societal homophobia" and stigma associated with same-sex behavior, including the stigma-driven link made between HIV-positive status and one's perceived sexual orientation.¹⁵⁹ In contrast, however, the Virgin Islands celebrated its first Pride parade in 2018, which may signal changing sentiments in the territory.¹⁶⁰

(July 17, 2018), <https://pasquines.us/2018/07/17/us-virgin-islands-hold-first-pride-parade> [<https://perma.cc/35J2-ALEM>]; Trudy Ring, *Amid Threat of Massacre, St. Croix Holds First Pride Parade*, *ADVOCATE* (June 11, 2018), <https://www.advocate.com/pride/2018/6/11/amid-threat-massacre-st-croix-holds-first-pride-parade> [<https://perma.cc/RUW8-TU5R>]; Edward Benfield, *LGBTQ Community See Losses in Territory, But Reason for Hope*, *ST. THOMAS SOURCE* (July 31, 2017), <https://stthomassource.com/content/2017/07/31/lgbtq-community-see-losses-in-territory-but-reason-for-hope> [<https://perma.cc/H6D3-22MW>].

157. See, e.g., Toni Holness, *Chapter 7 Same-Sex Marriage in the Commonwealth Caribbean: Is it Possible?*, 42 *IUS GENTIUM* 163, 166 (2015) ("The Region's faith-based resistance to LGBTI rights can be traced to colonialism, during which a tradition of Christianity was imposed upon the Caribbean by the British Empire."); Cohen, *supra* note 156 ("[C]ultural influence from Jamaica, which has become known as one of the most homophobic countries in the world, has increased intolerance in the US Virgin Islands."); see Benfield, *supra* note 156. Time Magazine declared Jamaica "the most homophobic place on earth" in 2006. See Tim Padgett, *The Most Homophobic Place on Earth?*, *TIME* (Apr. 12, 2006), <http://content.time.com/time/world/article/0,8599,1182991,00.html> [<https://perma.cc/5BTY-ELKT>].

158. Kamila A. Alexander et al., *'Some Men Just Don't Want to Get Hurt': Perspectives of U.S. Virgin Islands Men Toward Partner Violence and HIV Risks*, 25 *ETHNICITY & HEALTH* 1, 2 (2020); Veronica Njie-Carr et al., *Experiences of HIV-Positive African-American and African Caribbean Childbearing Women: A Qualitative Study*, 23 *J. NAT'L BLACK NURSES ASSOC.* 21, 23 (2012); see *CTR. FOR DISEASE CONTROL & PREVENTION*, 27 *HIV Surveillance Report* 99–101 (2015), <https://www.cdc.gov/hiv/pdf/library/reports/surveillance/cdc-hiv-surveillance-report-2015-vol-27.pdf> (noting that, in 2014, the Virgin Islands had the highest rate of AIDS among the U.S. territories and was also ranked third across the entire United States, with only Louisiana and Rhode Island reporting higher rates of AIDS than the territory).

159. Alexander et al., *supra* note 158, at 9–10.

160. See Cohen, *supra* note 156; Ring, *supra* note 156.

3. Guam

While Puerto Rico boasts a population of approximately 3.2 million,¹⁶¹ Guam has a population of only 167,772.¹⁶² Despite its size, Guam has promulgated numerous LGBTQ-related protections, and several laws are explicitly inclusive of both sexual orientation and gender identity. In 2015, the territory amended the Guam Employment Relations Act to prohibit anti-LGBTQ discrimination in employment.¹⁶³ Private employers are precluded from refusing to hire, discharging from employment, and discriminating in compensation or employment privileges based on sexual orientation or gender identity.¹⁶⁴ The law also prevents employers and employment agencies from printing, publishing, or advertising in a directly or indirectly discriminatory manner, and bans labor organizations from excluding or expelling a member based on these protected characteristics.¹⁶⁵ The law similarly extends to government employees.¹⁶⁶ The Guam Administrative Rules capture the spirit of the government's public policy, which is "to protect and safeguard the civil rights of all individuals to seek, have access to, obtain and hold employment without discrimination because of . . . sex and/or age, sexual orientation and/or gender identity."¹⁶⁷

Outside of the employment context, Guam mandates that the Transportation/Taxicabs Network Company (TTNC) protect against sexual orientation and gender identity discrimination.¹⁶⁸ According to the Transportation/Taxicab Network Company Services Act, the TTNC cannot discriminate on these bases with respect to its drivers, riders, and potential riders.¹⁶⁹ This is particularly relevant considering that rideshare giants like Uber and Lyft are not available in the territory, resulting in limited transportation options outside of the TTNC.¹⁷⁰

161. Antonio Flores & Jens Manuel Krogstad, *Puerto Rico's Population Declined Sharply After Hurricanes Maria and Irma*, PEW RESEARCH CTR. (July 26, 2019), <https://www.pewresearch.org/fact-tank/2019/07/26/puerto-rico-population-2018> [https://perma.cc/A3JZ-EQ5R].

162. *The World Factbook: Guam*, CENT. INTELLIGENCE AGENCY (2018), https://www.cia.gov/library/publications/the-world-factbook/geos/print_gq.html [https://perma.cc/CG8S-EUFP].

163. 22 GUAM CODE ANN. § 5201(a) (2018).

164. *Id.*

165. 22 GUAM CODE ANN. §§ 5201(c), (d) (2018).

166. 4 GUAM CODE ANN. § 4101(a)(1)(A) (2018).

167. 17 GUAM ADMIN. R. & REGS. § 6102(a) (2018).

168. 16 GUAM CODE ANN. § 28119 (2018).

169. 16 GUAM CODE ANN. § 28119 (2018).

170. Stroll is the only ride sharing service in the territory. See Gaynor Dumat-ol Daleno, *Uber-Like Ride-Sharing Business Plans Guam Launch in April*, PAC. DAILY NEWS (Mar. 15, 2016, 12:29 AM), <https://www.guampdn.com/story/news/2016/03/14/uber-like-ride-sharing-business-plans-guam-launch-april/81750156> [https://perma.cc/4ZN7-2SCE]; see also *Stroll*, <http://strollguam.com> [https://perma.cc/4KGX-872E] ("Stroll is Guam's only ride sharing service.").

Guam has several policies that make explicit mention only of sexual orientation. For example, the territory prohibits “harassment, intimidation, or bullying” in educational settings, including “a gesture or written, verbal, or physical act that is reasonably perceived as motivated by a pupil’s . . . sexual orientation.”¹⁷¹ Similar language is found in the “Commitment to the Students” regulation that mandates that educators not “(i) exclude any student from participation in any program; (ii) deny benefits to any student; or (iii) grant any advantage to any student” on the basis of sexual orientation.¹⁷² Neither policy specifically includes gender identity or expression, or expands the definition of sex.¹⁷³ Similarly, Guam’s nondiscrimination policy for social workers states that a social worker shall not discriminate against a supervisee, student, or client based on sexual orientation (but not gender identity or expression).¹⁷⁴ However, the statute gives the social worker the ability to make a referral if they are “unable to offer services because of a concern about potential discrimination against a client, student, or supervisee.”¹⁷⁵

Guam previously defined marriage as “the legal union of persons of opposite sex.”¹⁷⁶ However, in 2015, Guam became the first U.S. territory to legally recognize same-sex marriage.¹⁷⁷ That year, Judge Frances M. Tydingco-Gatewood granted summary judgment to a gay couple, upholding their right to marry and permanently enjoining the “Territory of Guam and its officers, employees, agents, and political subdivisions from enforcing [Guam’s marriage statute.]”¹⁷⁸ Notably, this decision came a few weeks prior to the Supreme Court’s landmark decision in *Obergefell v. Hodges*.¹⁷⁹ Following these two decisions in favor of marriage equality, Guam subsequently amended its law to now define marriage as “the legal union between two persons without regard to gender.”¹⁸⁰

Guam’s recognition of marriage equality prompted concerns from the religious and conservative sectors of the territory. Governor Eddie Calvo, in a letter to the legislature, sought better protections of the territory’s “religious conscience”:

171. 17 GUAM CODE ANN. § 3112.1(a)(2) (2018).

172. 5A GUAM ADMIN. R. & REGS. § 8116(a)(1)(H) (1997).

173. *See* 17 GUAM CODE ANN. § 3112.1 (2018); 5A GUAM ADMIN. R. & REGS. § 8116 (1997).

174. *See* 10 GUAM CODE ANN. § 122331(b)(3) (2018).

175. *Id.* It is also important to note that the statute does include the term “gender” but does not provide a definition or state specifically gender identity or expression. *Id.*

176. 10 GUAM CODE ANN. § 3207(h)(8) (1994); *see* *Aguero v. Calvo*, No. 15-00009, 2015 WL 3573989, 1 (D. Guam June 8, 2015).

177. *Federal Judge Strikes Down Guam’s Gay Marriage Ban*, ASSOCIATED PRESS (June 4, 2015), <https://apnews.com/498b12a248344d67a9eebaa2193a6af8> [<https://perma.cc/EH2T-FVV9>].

178. *See* *Aguero*, *supra* note 176, at 2..

179. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

180. 10 GUAM CODE ANN. § 3207(h) (2015).

When the government was sued earlier this year, I was particularly concerned that such an important social issue as marriage would not be decided by the people of Guam through our democratic process, but by the courts. With respect to the same-sex marriage law, it is regrettable that public debate on marriage was muted by the courts . . . I would ask our Legislature to amend the law to ensure that the pendulum of social conscience is not swung so far to one side as to restrict the legitimate expression of religious conscience, and to ensure that that right is balanced with the other personal rights that are being newly-defined.¹⁸¹

As a result, the legislature promulgated a religious exemption to the Guam Employment Relations Act, which specifically applies to the provisions that prohibit discrimination based on sexual orientation and gender identity or expression.¹⁸² The exemption provides that an employer who, for religious reasons, fails to abide by the law shall not be subject to “any action by the government to penalize or withhold licenses, permits, certifications, accreditation, contracts, grants, guarantees, tax-exempt status, or any benefits or exemptions from that employer, or to prohibit the employer’s participation in programs or activities sponsored by that government.”¹⁸³

While some protections for LGBTQ people exist in Guam, the MAP Report also highlights its numerous deficiencies.¹⁸⁴ For example, the territory does not provide for second-parent adoption for unmarried couples or protection for LGBTQ foster parents.¹⁸⁵ Guam does not have housing, public accommodations, or credit and lending nondiscrimination laws explicitly inclusive of sexual orientation and gender identity discrimination.¹⁸⁶ Also, despite the current safeguards for students, the territory does not ban conversion therapy or maintain protections for LGBTQ youth in the child welfare system.¹⁸⁷ Additionally, there are no gender-neutral options for IDs and no official policy that allows a gender marker on driver’s licenses to be amended.¹⁸⁸ For birth certificates, gender markers can be changed only with an affidavit from a

181. Letter from Gov. Eddie Calvo to Judith T. Won Pat, Speaker, Guam Legislature (Sept. 8, 2015), http://www.guamlegislature.com/Public_Laws_33rd/P.L.%20No.%2033-64.pdf [<https://perma.cc/8BD8-DN9P>].

182. 1 GUAM CODE ANN. § 705 (2015) (“This provision applies only to the specific amendments made pursuant to P.L. 33-064, which were: amendments to subsections (a), (b), (c) and (d) of 22 GCA § 5201 and 4 GCA § 510 (a), and the addition of subsections (h), (i), and (j) to 22 GCA § 5202.”).

183. *Id.*

184. *Guam’s Equality Profile*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality_maps/profile_state/GU [<https://perma.cc/PZA3-HKAA>].

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

physician attesting to gender affirmation surgery.¹⁸⁹ The territory has no private health insurance nondiscrimination laws or protections against exclusions of coverage for transgender-specific care, and state employees' health benefits do not include gender-affirming care.¹⁹⁰ Lastly, Guam criminalizes engaging in sex work while living with HIV as a first-degree felony, punishable by five to 20 years imprisonment and a fine of up to \$10,000 (which when committed while not living with HIV is a misdemeanor punishable by one year in prison and up to a \$1,000 fine).¹⁹¹ Notably, however, use of condoms or other preventative measure to stop the spread of HIV, or disclosure to sexual partners of HIV-positive status, can be used as a defense by those charged under this statute.¹⁹²

4. American Samoa

American Samoa is less than half the size of Guam, with a total area of 224 square kilometers and a population of approximately 51,000 people (as compared to Guam's total area of 544 square kilometers and population of 167,772).¹⁹³ Perhaps the most unique territory in terms of legal standing, American Samoa's citizens are classified as U.S. nationals instead of citizens unlike in the other territories, and over 90 percent of its land is communally owned.¹⁹⁴

Most relevant for this Note is the fact that American Samoa stands apart from both the other U.S. territories and the states regarding

189. *Guam*, NAT'L CTR. TRANSGENDER EQUALITY, <https://transequality.org/documents/state/guam> [<https://perma.cc/J3BR-7RNC>].

190. *Guam's Equality Profile*, *supra* note 184.

191. Guam Code Ann. tit. 9, §§ 28.10(b)(3), 80.34(a), 80.50(c) (2015).

192. HIV CRIMINALIZATION IN THE UNITED STATES: A SOURCEBOOK ON STATE AND FEDERAL HIV CRIMINAL LAW AND PRACTICE, CTR. HIV LAW & POL'Y 596 (2017), <http://www.hivlawandpolicy.org/sites/default/files/HIV%20Criminalization%20in%20the%20U.S.%20A%20Sourcebook%20on%20State%20Fed%20HIV%20Criminal%20Law%20and%20Practice%20062519.pdf>.

193. See *The World Factbook: American Samoa*, C.I.A (2018) https://www.cia.gov/library/publications/the-world-factbook/geos/print_aq.html [<https://perma.cc/LU76-B93A>]; *The World Factbook: Guam*, *supra* note 162.

194. Michael Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 PAC. RIM L. & POL'Y J. 325, 325 (2008); see *supra* note 13, at 449–51. Every territory's citizens, except American Samoa, are classified as U.S. citizens. However, neither citizens nor nationals of the U.S. territories vote in national elections or pay federal taxes. *American Samoa*, U.S. DEPT. OF INTERIOR OFFICE OF INSULAR AFFAIRS, <https://www.doi.gov/oia/islands/american-samoa> [<https://perma.cc/W2TC-B8HB>]. The issue of whether American Samoans should be granted birthright citizenship is hotly contested. Compare *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015) (determining that the Citizenship Clause did not grant birthright citizenship to persons born in American Samoa), with *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah 2019) (finding that American Samoans have birthright citizenship by virtue of the Fourteenth Amendment's citizenship clause). The Utah District Court has issued a stay of its ruling pending the Tenth Circuit's decision on appeal. *Fitisemanu v. United States*, No. 18-36 (D. Utah Dec. 13, 2019).

same-sex marriage. As noted *supra*, application of the *Insular Cases* could raise questions about whether the right to same-sex marriage is sufficiently “fundamental” under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to apply in each of the territories.¹⁹⁵ Litigation therefore became necessary in the territories that were unwilling to take action themselves to comply with the ruling (unlike the Virgin Islands) to answer that question. However, for those in American Samoa, there were two threshold questions: where would one file suit, and who would one file suit against?

These questions are unique to American Samoa because, alone among the territories, it lacks a federal district court.¹⁹⁶ The reason for this appears to be historical, with Congress rejecting calls to establish such a court for this territory following criticism by Samoans that such action would represent unwanted additional federal encroachment on the territory and could be incompatible with the island’s culture.¹⁹⁷ While this choice to forego a federal district court ultimately affirms the self-governance of the Samoan people, it simultaneously has made it more difficult for LGBTQ Samoans to obtain protections that their peers in other territories have successfully obtained.

To ensure that American Samoa was not left entirely without some form of a federal judiciary, Congress granted limited power to some of the territory’s local courts to hear disputes based in federal law.¹⁹⁸ However, these courts’ jurisdiction is limited to specific types of matters including “food safety, protection of animals, conservation, and shipping issues.”¹⁹⁹ Over time, federal courts have heard other types of cases; for example, Samoan criminal matters have been brought in the districts of Hawaii and Washington, D.C.²⁰⁰ But there is no clarity about where many more should be filed, including the types of cases filed by the litigants in the Puerto Rico and Guam marriage equality cases (which originated in their territory’s district courts). Additionally, because of the status of the territory’s government, Samoan litigants in noncriminal matters have at times chosen to file suit against the Secretary of the U.S. Department of the Interior, rather than a member of the Samoan government, because the Secretary is the legal administrator of the Samoan government under U.S. law.²⁰¹ It is therefore unclear against whom same-sex couples hoping to enforce *Obergefell* in American Samoa would file suit. This author is

195. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (“The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States.”).

196. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-1124T, AMERICAN SAMOA: ISSUES ASSOCIATED WITH SOME FEDERAL COURT OPTIONS (2008).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

unaware of any such suit ever being filed or attempted with regard to the status of same-sex marriage in American Samoa.

The experience of the Virgin Islands shows that litigation is not always necessary to extend marriage equality to the territory, but that in the absence of such successful litigation, action by members of the territorial government to that effect certainly is. However, in contrast to the Virgin Islands government, American Samoa's government has not amended its pre-*Obergefell* marriage statute or reinterpreted the language to align with the Court's ruling.²⁰² Indeed, when the *Obergefell* decision was announced, American Samoa Attorney General Talauega Ale commented that the government was reviewing whether the Court's decision applied to the territory—and it still seems to be.²⁰³ While territorial law may not explicitly prohibit same-sex marriage, the language draws distinctions between males and females in terms of the minimum age for a valid marriage contract.²⁰⁴ The law also requires that, if the minister, justice, or judge performing the ceremony fails to transmit a copy of the marriage certificate to the Registrar, witnesses must attest that the couple “lived as husband and wife” in order to validate the marriage record.²⁰⁵ While a number of states in the territorial United States also maintain codified language that refers to husbands and wives, or other gendered terms that do not contemplate same-sex marriages, the *Obergefell* ruling makes it clearly unconstitutional for them to enforce those statutes as written. However, in American Samoa, because no court has yet to extend the *Obergefell* ruling to the territory, it is unclear whether the local statute can be enforced as written. As a result, the local government could attempt to ban same-sex marriages or refuse to recognize those performed elsewhere—even though *Obergefell* has been settled law in the United States for more than five years.

Moving beyond marriage equality, two statutes in American Samoa provide explicit protections relevant to this Note, but only with respect to sexual orientation. In 2007, the legislature passed the American Samoa Public Health Act, which established that the Department of Health's mission is to “protect and promote the public's health” by the “[a]voidance of explicit or implicit discrimination in an unlawful manner” on the basis of, *inter alia*, sexual orientation.²⁰⁶ The second statute prohibits a

202. Daniel Villarreal, *A Gay Criminal Case Could Help Bring Marriage Equality to American Samoa*, LGBTQ NATION (Nov. 27, 2019), <https://www.lgbtqnation.com/2019/11/gay-criminal-case-help-finally-bring-marriage-equality-american-samoa> [<https://perma.cc/VW3Q-8LFC>].

203. Boren, *supra* note 26.

204. AM. SAMOA CODE ANN. § 42.0101 (1981).

205. AM. SAMOA CODE ANN. § 42.0106 (1981).

206. AM. SAMOA CODE ANN. § 13.0204 (2007); *see* AM. SAMOA CODE ANN. § 13.0207 (2007); AM. SAMOA CODE ANN. § 13.0306 (2007) (“The department and director shall not discriminate in an unlawful manner against individuals on the basis of their . . . sexual orientation.”).

notary from refusing to perform a notarial act based on gender or sexual orientation.²⁰⁷ While the statute does cover gender, there is no subsequent law or judicial interpretation that defines the term or addresses whether this includes gender identity or expression.²⁰⁸ Notably, only one other statute uses the term “gender:” Under the prisoner rehabilitative release program, “an inmate’s gender . . . shall not be a reason to deny participation in the release program if otherwise qualified.”²⁰⁹

Similar to the Virgin Islands, American Samoa does not provide explicit employment protections for LGBTQ individuals on the bases of sexual orientation or gender identity.²¹⁰ The law only explicitly bars discrimination “in employment against any person on the basis of race, religious beliefs, political beliefs, color, age, sex, national origin, marital status, or physical and mental handicap, except for bona fide occupational or legal requirements.”²¹¹

For IDs and birth certificates, the territory lacks statutory guidelines for name changes.²¹² Under common law, a person is “free to adopt and use whatever name he or she chooses” as long as it is not sought for “any fraudulent purpose or if it infringes on the rights of others.”²¹³ Citing a prior decision, the High Court of American Samoa in 1995 determined that actual and constructive notice of a name change must be given by “way of publication in a newspaper.”²¹⁴ Additionally, amended birth certificates are added to the individual’s official file, but “the original record shall not be altered.”²¹⁵ For transgender people, this can be especially troublesome as it may out a person as transgender, leading to discrimination and potential violence. For example, birth certificates are often used to register K–12 students for school, since most do not have other forms of ID such as a driver’s license.²¹⁶ If a transgender student submits an amended birth certificate, it will include both the original and changed document. Exposing their transgender status to the school may result in harassment, anti-transgender bias, bullying, or incorrectly categorizing the student in physical education and other sex-segregated activities.²¹⁷

207. AM. SAMOA CODE ANN. § 31.0322 (2008).

208. *See id.*

209. AM. SAMOA CODE ANN. § 46.2523 (1999).

210. AM. SAMOA CODE ANN. § 4.0106.

211. *Id.*

212. *In re Amataga*, 8 Am. Samoa 3d 289, 290 (1995).

213. *Id.*

214. *Id.* The High Court of American Samoa is the highest legal authority in the territory, which is headed by a chief justice and associate justices all appointed by the U.S. Secretary of the Interior. *Judicial Branch of American Samoa*, American Samoa, <https://www.americansamoa.gov/judicial-branch> [<https://perma.cc/XYU7-52W3>].

215. AM. SAMOA CODE ANN. § 13.0530 (1981).

216. Kyle Velte, *Mitigating the “LGBT Disconnect”: Title IX’s Protection of Transgender Students, Birth Certificate Correction Statutes, and the Transformative Potential of Connecting the Two*, 27 AM. U. J. GENDER SOC. POL’Y & L. 193, 215 (2019).

217. *Id.*

In 2004, the High Court of American Samoa again grappled with the issue of name changes.²¹⁸ In interpreting the statute, the court determined that amending a birth certificate mandates a showing of “improper recordation of [one’s] name at the time the original birth certificate was created.”²¹⁹ In that case, the plaintiff did not demonstrate that his name was incorrect at the time of birth.²²⁰ As a result, the court allowed him to change his name legally, but not to amend his birth certificate.²²¹

While the facts of that case only concerned a name change, the court notably drew its analysis from a Texas appellate court decision because of similar statutory language being considered.²²² In *Littleton v. Frange*, the Texas court questioned whether a transgender woman could amend her name and gender marker after undergoing gender affirmation surgery.²²³ The Texas court looked into the legislative intent of the applicable statute and ruled that amendments were meant to correct “inaccurate” information at the time of birth.²²⁴ Because the plaintiff, according to the court, was “both anatomically and genetically” male at birth, there was no inaccurate statement or error.²²⁵ Therefore, the court pronounced, “[w]e hold, as a matter of law, that Christie Littleton is a male.”²²⁶ The *Littleton* court’s ruling was telling, with the court finding that the petitioner “was created and born a male” and as such “[t]here are some things [the court] cannot will into being. They just are.”²²⁷ The Samoan court’s reliance on *Littleton* may point to how a future Samoan court might rule if a transgender person were to file a petition for a gender marker change.²²⁸

The territory’s current lack of explicit legal protections for transgender people is particularly surprising considering the cultural significance and prevalence of American Samoa’s third gender.²²⁹ Known as the

218. *See In re to Change Name of Tia’i Mase*, 9 Am. Samoa 3d 125 (2004).

219. *Id.* at 128.

220. *Id.*

221. *Id.*

222. *Id.* at 127–28. The territorial law provides that “[w]henever the facts are not correctly stated in any certificate of birth, death, or marriage already registered, the person asserting the error may make an affidavit under oath stating the changes necessary to make the record correct. . . .” AM. SAMOA CODE ANN. § 13.0530 (1981). The Samoan court found similarities between the territorial law and Texas law which states that “[an] amending certificate may be filed to complete or correct a record that is incomplete or proved by satisfactory evidence to be inaccurate.” *See* TEX. HEALTH & SAFETY CODE ANN. § 191.028(b).

223. *Littleton v. Prange*, 9 S.W. 3d 223, 224 (Tex. App. 1999).

224. *Id.* at 231.

225. *Id.*

226. *Id.*

227. *Id.*

228. *See In re Tia’i Mase*, 9 Am. Samoa 125, 127–28 (2004).

229. *See* Blaise Vanderhorst, *Whither Lies the Self: Intersex and Transgender Individuals and a Proposal for Brain Based Legal Sex*, 9 HARV. L. & POL’Y REV. 241, 249 (2015); *see also* James Montague, *A First in Cup Qualifying for a Player and a Team*, N.Y. TIMES (Nov. 25, 2011), <https://www.nytimes.com/2011/11/26/sports/soccer/>

fa'afafine, individuals identifying along this line are valued in the home and village because they can carry out roles of both genders and are also known in the tourism and hotel industry for “their skills and flair.”²³⁰ They have developed a niche for entertaining tourists and locals with productions such as drag shows, fashion parades and cabarets.²³¹ Scholars have asserted that the dissonance between culturally valuing the *fa'afafine* and rejecting protections for them under the laws of the territories can be attributed to the introduction of Christianity.²³² One scholar noted that Christian missionaries indoctrinated the people of Samoa and claimed western civilization to be superior to Indigenous ideologies. As a consequence, colonialism was “largely successful concerning matters of sexuality, . . . [which] aimed to erase the cultural memory of Pacific people.”²³³

Ranked “low” in LGBTQ protections according to the MAP Report, American Samoa is deficient in all categories.²³⁴ Additionally, despite otherwise recognizing parents who use assisted reproduction technology, the territory’s laws are completely silent with respect to the relationship and parental rights of LGBTQ people.²³⁵ American Samoa also does not have sexual orientation and gender identity protections in housing, public accommodations, or credit and lending nondiscrimination laws.²³⁶ The territory does not collect data on LGBTQ youth and lacks laws and policies that address bullying, conversion therapy, and discrimination in education.²³⁷ Lastly, the territory’s statutes and policies are silent in regard to the gay or transgender panic defenses and whether the territory criminalizes HIV.²³⁸

jonny-saelua-transgender-player-helps-american-samoa-to-first-international-soccer-win.html [https://perma.cc/6PA2-WXND] (“The *fa'afafine* are culturally accepted They have a role in Samoan society.”); see also Pausa Kaio Thompson, ‘*Saili Le Tofa: A Search for New Wisdom’ Sexuality and Fa'afafine in the Samoa Context* at 46, (May 4, 2017) (unpublished M.A. thesis, Union Theological Seminary) (on file with Columbia University Academic Commons).

230. Sue Farran & Alexander Su’a, *Criminal Law and Fa'afafine and Fakaleiti in the South Pacific*, 31 COMMONWEALTH. L. BULLETIN 19, 20 (2005); see *infra* Subpart III.B.

231. Farran & Su’a, *supra* note 230, at 20; see Yvette Tan, *Miss Fa'afafine: Behind Samoa's 'Third Gender' Beauty Pageant*, BBC (Sept. 1, 2016), <https://www.bbc.com/news/world-asia-37227803>.

232. Thompson, *supra* note 229, at 26.

233. *Id.*

234. *American Samoa's Equality Profile*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality_maps/profile_state/AS [http://perma.cc/J4ZH-R3BW]. The MAP Report claims that Samoa recognizes same-sex marriage. However, as clarified earlier, Samoa has yet to accede to the *Obergefell* decision.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

5. Commonwealth of the Northern Mariana Islands

The Commonwealth of the Northern Mariana Islands (CNMI) consists of fourteen islands located just north of Guam.²³⁹ It became the last U.S. territory to join the United States politic when the covenant to establish the Commonwealth was approved in 1976.²⁴⁰ The CNMI is remarkable not simply because of its relatively recent addition to the United States, but because it is the only territory with a statutory code that does not explicitly list, allude to, or categorize sexual orientation or gender identity as protected characteristics in any fashion.²⁴¹ The CNMI, however, does provide protections through its administrative regulations.

The CNMI has six administrative regulations that explicitly address both sexual orientation and gender identity. For example, the “Public School System must be concerned with the best interests of each and every student, regardless of . . . sex, gender, [or] sexual orientation.”²⁴² While the regulations may not specifically state gender identity, they do distinguish between sex and gender.²⁴³ This chapter also defines bullying as those actions “[m]otivated by an actual or perceived personal characteristic including . . . sexual orientation, [or] gender identity.”²⁴⁴ Furthermore, LGBTQ individuals are guaranteed protection when employed by the Commonwealth government,²⁴⁵ the Commonwealth Ports Authority,²⁴⁶ and casinos.²⁴⁷ Lastly, under the Commonwealth Respite Service Program, “[d]iversity in family composition is acknowledged and supported,” which includes LGBTQ families.²⁴⁸

There are numerous regulations that explicitly provide only sexual orientation–related, and not gender identity–related, protections. The Board of Education’s nondiscrimination provision ensures that students, employees, and parents will be free from discrimination and harassment on the basis of sexual orientation.²⁴⁹ The same language is also

239. *Commonwealth of the Northern Mariana Islands*, U.S. DEPT. OF INTERIOR OFFICE OF INSULAR AFFAIRS, <https://www.doi.gov/oia/islands/cnmi> [<https://perma.cc/GZX3-VR8V>].

240. Lin, *supra* note 11, at 1262, 1264. The CNMI is distinct considering that while it became a U.S. territory in 1976, the other four territories were added decades prior and in close proximity to each other. The Virgin Islands was added in 1917, American Samoa in 1900, and Guam and Puerto Rico in 1898.

241. See *Northern Mariana Islands’ Equality Profile*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality_maps/profile_state/MP [<https://perma.cc/TV9S-5DWN>].

242. 60 N. MAR. I. ADMIN. CODE § 60-20-105(b)(3) (2004).

243. *Id.*

244. 60 N. MAR. I. ADMIN. CODE § 60-20-403(b)(1)(i) (2019).

245. 10 N. MAR. I. ADMIN. CODE § 10-10-310(a) (2013).

246. 40 N. MAR. I. ADMIN. CODE § 40-40-020 (2018); 40 N. MAR. I. ADMIN. CODE § 40-40-005(c) (2018).

247. 175 N. MAR. I. ADMIN. CODE § 175-10.3-310 (2019).

248. 75 N. MAR. I. ADMIN. CODE § 75-60.1-125 (2014).

249. 60 N. MAR. I. ADMIN. CODE § 60-20-401 (2019).

incorporated into the Head Start Program.²⁵⁰ These provisions, however, do not adopt language from the anti-harassment provision, which does include gender identity.²⁵¹ Likewise, the Board of Education's equal employment opportunity provision is inclusive of the sexual orientation of certified and noncertified personnel, but does not mention gender identity or expression.²⁵² Within the Marianas Visitors Authority,²⁵³ a public corporation, and the Northern Marianas Housing Corporation,²⁵⁴ a public housing agency, employment discrimination on the basis of sexual orientation is unlawful.

Like the other territorial jurisdictions (aside from American Samoa), the CNMI currently recognizes the right to same-sex marriage, consistent with the Court's decision in *Obergefell*.²⁵⁵ In fact, one month after the Supreme Court's ruling, the territory's first same-sex marriage was performed in Saipan, the capital of the CNMI.²⁵⁶ Notably, it does not appear that direct litigation was necessary in the CNMI for its residents to obtain marriage equality. That being said, the fact that the territory has a federal district court would likely have impacted the outcome of any such litigation should it have been necessary. Because the CNMI has a district court, it is (as one would likely naturally presume) assigned to a federal circuit court of appeals: the Ninth Circuit. Decisions of these circuit courts are generally binding on their lower courts, and so when the Ninth Circuit invalidated the same-sex marriage bans of Nevada and Idaho in 2014, the CNMI likely became precluded from being able

250. 60 N. MAR. I. ADMIN. CODE § 60-60-505 (2003); 60 N. MAR. I. ADMIN. CODE § 60-60-905 (2003); 60 N. MAR. I. ADMIN. CODE § 60-60-970 (2003).

251. See 60 N. MAR. I. ADMIN. CODE § 60-20-403 (b)(1)(i) (2019).

252. 60 N. MAR. I. ADMIN. CODE § 60-30.2-501 (1997); 60 N. MAR. I. ADMIN. CODE § 60-30.2-605 (1997); 60 N. MAR. I. ADMIN. CODE § 60-30.3-264 (1996); 60 N. MAR. I. ADMIN. CODE § 60-30.3-401 (1996); 60 N. MAR. I. ADMIN. CODE § 60-30.3-505 (1996) (the CNMI Head Start Program provides early childhood services and education and collaborates with the community to provide more effective services to children and families); *id.* at § 60-60-001.

253. 90 N. MAR. I. ADMIN. CODE § 90-40-010 (2013); 90 N. MAR. I. ADMIN. CODE § 90-40-025 (2013); 90 N. MAR. I. ADMIN. CODE § 90-40-446 (2013); 90 N. MAR. I. ADMIN. CODE § 90-40-501 (2013).

254. 100 N. MAR. I. ADMIN. CODE § 100-50-340 (1997). For more information regarding the agency, see NORTHERN MARIANAS HOUS. CORP., <https://www.nmhcgov.net/default.asp?secID=1> [<https://perma.cc/JST3-ANU7>].

255. Raymond Roca, *Micronesia: A Diverse Region with Diverse LGBTI Laws*, STAR OBSERVER (Dec. 14, 2015), <https://www.starobserver.com.au/news/international-news-news/micronesia-a-diverse-region-with-diverse-lgbti-laws/143887> [<https://perma.cc/DQ9A-L7VP>]. Additionally, once CNMI recognized same-sex marriage post *Obergefell*, the territory saw record numbers of same-sex marriages being performed. In fact, in 2018, same-sex marriages outnumbered marriages between members of different sexes. *Same-Sex Marriage Top Licenses on CNMI's Saipan*, RNZ (Jan. 7, 2019, 6:57 AM), <https://www.rnz.co.nz/international/pacific-news/379577/same-sex-marriages-top-licences-on-cnmi-s-saipan> [<https://perma.cc/F8R7-FV2Y>].

256. *Id.*

to argue that its own marriage statute was constitutional despite its *de facto* prohibition on same-sex marriage.²⁵⁷ Of course, this would have depended on a court first finding that the constitutional rights creating a right to marry have been incorporated to the CNMI, as found by the First Circuit with respect to Puerto Rico, but nonetheless being able to point to the Ninth Circuit's precedent on these types of bans as being even *potentially* binding would likely have been of great assistance to advocates fighting for the recognition of *Obergefell* in their territory if litigation had become necessary. In sharp contrast, advocates in American Samoa lack these tools, and of course very well may need to engage in future litigation to attempt to extend the Court's ruling in *Obergefell* to American Samoa, because of their lack of a federal district, and therefore an affiliated circuit, court.

For IDs, transgender persons in the CNMI must petition the court for a name change.²⁵⁸ Additionally, the individual must publish the requested change in a newspaper prior to the court hearing.²⁵⁹ When amending a gender marker on a birth certificate or driver's license, the territory requires a court order and a notarized affidavit from a physician attesting to gender affirmation surgery.²⁶⁰ This same procedure is mandated for the Tinian and Aguiguan Municipal IDs.²⁶¹

According to the MAP Report, the CNMI is ranked "low" for its LGBTQ protections.²⁶² Beside its legal recognition of same-sex marriage and the rights of nongestational and nongenetic parents, the territory provides no other explicit protections under the relationship and parental recognition category.²⁶³ Furthermore, the Commonwealth has no housing, public accommodations, or credit and lending nondiscrimination laws

257. See *Latta v. Otter*, 771 F.3d 456, 476 (9th Cir. 2014) (stating that a ban on same-sex marriage imposes "profound legal, financial, social and psychic harms on numerous citizens" and is in violation of the Equal Protection Clause); Cheryl Wetzstein, *Gay Marriages in Idaho Put on Hold by Justice Kennedy*, WASH. TIMES (Oct. 8, 2014), <https://www.washingtontimes.com/news/2014/oct/8/gay-marriages-in-idaho-put-by-hold-by-justice-kenn> [<https://perma.cc/EM2R-HRCQ>]. To be clear, the Ninth Circuit found that preventing same-sex couples from marrying was unconstitutional, but did not go so far as to state that it was a fundamental right. See *Latta*, 771 F.3d at 477 (Reinhardt, J., concurring).

258. *Commonwealth of the Northern Mariana Islands*, NAT'L CTR. TRANSGENDER EQUALITY, <https://transequality.org/documents/state/commonwealth-of-the-northern-mariana-islands> [<https://perma.cc/9SP7-QEPR>].

259. *Id.*

260. *Id.*

261. 170 N. MAR. I. ADMIN. CODE § 170-20.3-401 (b) (2007) ("For those persons desiring alteration of their TPIC based on a change of sex, a medical document certifying the completion of a sex change or other certified document indicating the same shall be presented.").

262. *Supra* note 241.

263. *Id.*

explicitly inclusive of sexual orientation or gender identity.²⁶⁴ Additionally, for LGBTQ youth, the territory provides anti-bullying protections and data collection, but is silent regarding conversion therapy or protections for LGBTQ youth in the child welfare system.²⁶⁵ Lastly, the territory provides no health care and criminal justice–related protections expressly on the bases of either sexual orientation or gender identity.²⁶⁶

III. HOW THE *INSULAR CASES* INFORM LGBTQ RIGHTS IN THE U.S. TERRITORIES

A number of factors, including federalism and the competing interests of federal, state, and local actors, have led to a patchwork of explicit LGBTQ protections in the United States as a whole.²⁶⁷ However, the U.S. territories have often been neglected in the U.S. movement for LGBTQ rights because of the territories’ inherent legal, political, and geographical separation from the United States.²⁶⁸ As such, as Christina Duffy Ponsa-Kraus points out, the U.S. territories are “essentially invisible” in the greater context of the LGBTQ civil rights movement.²⁶⁹

This Part addresses how the *Insular Cases* affect the continued struggle for LGBT rights in the territories.²⁷⁰ The development of same-sex marriage rights in Puerto Rico is instructive in this regard. While a lower court drew upon the incorporation doctrine to reject the argument that the rights recognized in *Obergefell* applied to Puerto Rico, the U.S. Court of Appeals for the First Circuit ultimately concluded that same-sex marriage in Puerto Rico is a fundamental right, utilizing the *Insular Cases*’ doctrine.²⁷¹ The history of this case illustrates the competing nature of different applications of the *Insular Cases*: while they have been (and can

264. *Id.*

265. *Id.*

266. *Id.*

267. Clint W. Alexander, *The Masterpiece Cakeshop Decision and the Clash Between Nondiscrimination and Religious Freedom*, 71 OKLA. L. REV. 1069, 1107 (2019); Elizabeth Kristen & David Nahmias, *The Writing on the Wall: The Future of LGBT Employment Antidiscrimination Law in the Age of Trump*, 39 BERKELEY J. EMP. & LAB. L. 89, 100 (2018).

268. See Christina Duffy Ponsa, *When Statehood Was Autonomy, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE* 1, 2 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

269. *Id.* For example, natural disasters in Puerto Rico illustrate the stark difference in both the public and the federal government’s response as compared to other natural disasters that happen in the continental United States. Rose Cuison Villazor gives two reasons for the distinct treatment: lack of political participation and the misperception that Puerto Rico is not part of the United States. Villazor, *supra* note 67, at 136–37.

270. See Serrano, *supra* note 66, at 400; *Guam and the Case for Federal Deference*, 130 HARV. L. REV. 1704, 1705 (2017).

271. See generally *In re Conde Vidal*, 818 F.3d 765 (1st Cir. 2016); *Conde Vidal v. Garcia-Padilla*, 167 F. Supp. 3d 279, 287 (D.P.R. 2016).

again be) used in attempts to curb progress for queer people in the territories, they can also be deployed to protect LGBTQ people and their rights.

A. *The Insular Cases Have Been Used to Negatively Implicate LGBTQ Rights in the U.S. Territories*

First, we turn to the ways in which the *Insular Cases* have been used by those seeking to limit the applicability of constitutional rights to people in the territories. There are a number of examples where this was done specifically to curb progress for LGBTQ people. As noted above, the U.S. District Court for the District of Puerto Rico attempted to block the application of *Obergefell* in that territory by stating that “the fundamental right to marry . . . has not been incorporated [in]to the juridical reality of Puerto Rico.”²⁷² In order to consider the *Obergefell* ruling applicable to Puerto Rico, the court requested a showing of an express incorporation of the right to marry by the “Supreme Court of the United States, the Supreme Court of Puerto Rico, Congress, or the Puerto Rico Legislature.”²⁷³ Utilizing a strict textualist approach, the court held that *Obergefell* only banned *states* from refusing to recognize a lawful same-sex marriage, not territories.²⁷⁴ Specifically, the court stated that:

Under that Amendment, concluded the Supreme Court, same-sex couples are guaranteed the right to marry and to have their marriages recognized in all States. One might be tempted to assume that the constant reference made to the “States” in *Obergefell* includes the Commonwealth of Puerto Rico. Yet, it is not the role of this court to venture into such an interpretation.²⁷⁵

In effect, the court read the *Insular Cases* narrowly, inferring that if any decision by the Supreme Court establishing a right grounded in the Constitution did not expressly mention the U.S. territories as being bound by the ruling, then the right was not a fundamental right that could be applied to those in the territories. Notwithstanding the First Circuit’s later reversal, this district court’s narrow analysis could be applied by lower courts in other jurisdictions not bound by the First Circuit to the possible detriment of LGBTQ people.²⁷⁶

It is important to note that while the District Court did not expressly use the “impractical and anomalous” framework, its analysis mirrors

272. *Conde Vidal*, 167 F. Supp. 3d at 287.

273. *Id.* at 282–284.

274. *Id.*

275. *Id.* at 287.

276. Of course, such attempts may nonetheless fail. For example, the defendant in *United States v. Mendoza* attempted to borrow the *Conde Vidal* court’s reasoning by arguing that the Sixth Amendment does not apply to Guam. *United States v. Mendoza*, 2016 WL 8679239 at *1 (D. Guam June 3, 2016). Ultimately however, the District Court of Guam concluded otherwise, stating that the Sixth Amendment applies to Guam “in its entirety with the same force and effect as in the United states or in any state of the United States. . . .” *Id.* at *2.

this “workable standard.”²⁷⁷ The court considered the “underlying cultural, social, and political currents that have shaped over five centuries of Puerto Rican history” and the “particular condition of Puerto Rico” and found the right “impractical and anomalous.”²⁷⁸ Moreover, the court relied on the U.S. Supreme Court decision in *Boumediene v. Bush* and on Justice Harlan’s concurrence in *Reid v. Covert*, which both outlined the “impractical and anomalous” framework.²⁷⁹

A comparable analysis—and another example of how the *Insular Cases* have led to negative impacts for LGBTQ people in the territories—was used by the Ninth Circuit to determine whether the federal Religious Freedom Restoration Act (RFRA) applied to Guam.²⁸⁰ The federal RFRA, passed by Congress in 1993, was promulgated to “provide a claim or defense to persons whose religious exercise is substantially burdened by government.”²⁸¹ Some have described the evolution of case law under RFRA as shifting it from a “shield protecting free exercise into a sword for inflicting discrimination,”²⁸² or a vehicle “to legitimize discrimination, especially against the LGBTQ community.”²⁸³ As Kyle Velte opines, “[w]hat was once a narrative that attacked and pathologized LGBT people in the 1950s through the 1980s is today a narrative that frames the Religious Right as victims of secularism—embodied, in part, in the law—that infringes on their religious liberty.”²⁸⁴ Through RFRA, a plaintiff is able to file a discrimination lawsuit alleging infringement upon their religious views, or can rely on RFRA as a defense when being challenged for engaging in otherwise illegal discrimination.²⁸⁵

In 1997, the Supreme Court held in *City of Boerne v. Flores* that RFRA was unconstitutional as applied to the states because Congress improperly used its Enforcement Clause powers under the Fourteenth Amendment to extend RFRA’s reach beyond the federal government.²⁸⁶

277. See *Wabol v. Villacrusis*, 958 F.2d 1450, 1461 (9th Cir. 1990).

278. *Conde Vidal*, 167 F. Supp. 3d at 286; *Wabol*, 958 F.2d at 1461.

279. *Conde Vidal*, 167 F. Supp. 3d at 287 (citing *Reid v. Covert*, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring) (“The proposition is, of course, not that the Constitution does not apply overseas, but that there are provisions in the Constitution which do not necessarily apply in every foreign place.”)).

280. *Guam v. Guerrero*, 290 F.3d 1210 (2002).

281. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2018)).

282. Laura Keeley, *Religious Liberty, Immigration Sanctuary, and Unintended Consequences for Reproductive and LGBTQ Rights*, 37 COLUM. J. GENDER & L. 169, 194 (2019).

283. Lucien J. Dhooge, *The Religious Freedom Restoration Act at 25: A Quantitative Analysis of the Interpretive Case Law*, 27 WM. & MARY BILL RTS. J. 153, 156 (2018).

284. Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right’s Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1, 5 (2016).

285. See Alexander, *supra* note 267, at 1073.

286. *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997).

In *Guam v. Guerrero*, however, the Ninth Circuit determined that while RFRA was unconstitutional in relation to the states, it is nonetheless constitutional within the “federal sphere.”²⁸⁷ Consequently, because Guam is “an instrumentality of the federal government over which the federal government exercises plenary control,” it was held to not be covered under the Court’s decision in *City of Boerne v. Flores* and therefore remains subject to RFRA.²⁸⁸ The Ninth Circuit underscored that as an unincorporated territory, the U.S. Constitution does not apply to Guam, with the exception of certain “fundamental” rights.²⁸⁹ Therefore, Guam, unlike the states, is subject to RFRA and is prohibited from substantially burdening religious rights absent a showing that would meet RFRA standards. In other words, the Ninth Circuit used the incorporation doctrine to create a loophole for territories from Supreme Court precedent by clarifying that the territories are legally and politically distinct from states and instead are part of the “federal sphere.”²⁹⁰ The result of this holding is to strengthen the rights of those who claim that compliance with nondiscrimination principles violates their religious beliefs, subjecting Guam to a higher standard than would otherwise apply to justify the broad-based application of nondiscrimination laws.²⁹¹

While some states, in the wake of the Court’s decision in *City of Boerne v. Flores*, passed their own “mini-RFRAs” to nonetheless allow religious challenges to neutral, generally applicable laws, here the *Insular Cases* have been applied to make that choice for the territories and therefore robbed them of their self-government. This particular example is of concern to LGBTQ people because existing and future nondiscrimination protections and other laws meant to protect LGBTQ people in

287. *Guam v. Guerrero*, 290 F.3d 1210, 1221 (9th Cir. 2002).

288. *Id.* at 1222.

289. *Id.* at 1214. The court distinguishes RFRA’s applicability to the states as opposed to the federal sphere by noting that RFRA is unconstitutional *per se* as applied to the states as a violation of the separation of powers. *Id.* at 1219. However, as applied to Guam, “when Congress is acting pursuant to its plenary power, it has the ability, and duty, to legislate according to its own interpretation of the Constitution.” *Id.* at 1221.

290. *Id.* at 1221 (“Certainly Congress can provide more individual liberties in the federal realm than the Constitution requires without violating vital separation of powers principles, and we now join our sister circuits in holding RFRA constitutional as applied in the federal realm.”).

291. See generally *Employment Division v. Smith*, 494 U.S. 872 (1990) (setting the constitutional standard that the Free Exercise Clause “does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”). In 2020, the Supreme Court granted certiorari on a case that may directly implicate the *Smith* standard. *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (Feb. 24, 2020).

Guam, the CNMI,²⁹² and possibly the other territories,²⁹³ could be invalidated under RFRA if subjected to a challenge.²⁹⁴

B. *Advancing LGBTQ Rights in the U.S. Territories by Bringing the Insular Cases to the Fore*

Despite these examples, the incorporation doctrine can also be used to protect queer persons until federal-level legislation creating explicit statutory protections on the bases of sexual orientation and gender identity is passed and applied to the territories, or is promulgated by the territories themselves. Reimagining the *Insular Cases* is not a novel approach. Indeed, while the *Insular Cases* were rooted in colonialism, their doctrine has “turned out to be nimble enough to support the opposite aim: decolonization.”²⁹⁵ The “impractical and anomalous” framework offers queer advocates the opportunity to take into consideration the culture, history, and context of a given territory in order to foster LGBTQ progress within that island.

As the MAP Report demonstrates, the territories currently appear largely homophobic and transphobic, which sharply contrasts with some accounts of their precolonial understandings of sexuality and gender. Indeed, current norms of sexuality and gender in the territories are argued by some to be foreign imports.²⁹⁶ For Indigenous peoples, sexuality, for example, is “an integral force of life—indeed the cause of the life of

292. As the Ninth Circuit holds appellate jurisdiction over the District of the Northern Mariana Islands, the court’s decision in *Guam v. Guerrero* would apply to this territory as well.

293. See generally Diana Beltré Acevedo, *Employment Discrimination: How Hobby Lobby Enables a RFRA Affirmative Defense Against Title VII’s Protections for LGBT People in the Workplace*, 86 REV. JUR. U.P.R. 1191, 1220 (2017) (“RFRA applies to actions by the Commonwealth of Puerto Rico as a covered entity of the United States, RFRA, and is not affected by the United States Supreme Court decisions in *City of Boerne v. Flores* . . . which found application of RFRA to the states to be unconstitutional.”).

294. Following *City of Boerne*, only two courts have applied RFRA to a U.S. territory or possession. *People v. Felix*, 2018 WL 4469867 at *2 (V.I. Super. Ct. Sept. 11, 2018). These two cases include *Guam v. Guerrero*, as discussed *supra*, and *Rasul v. Rumsfeld*, where the court found that RFRA applies to Guantanamo Bay because it is a location where “the United States exercises perhaps as much control as it possibly could short of ‘ultimate sovereignty.’” *Id.* at *2 (citing *Rasul v. Rumsfeld*, 433 F. Supp. 2d 58, 65 (D.D.C. 2006)). Neither case has been brought to the Supreme Court, which leaves the question of whether RFRA applies to the other territories “unsettled.” *Id.*

295. Russell Rennie, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683, 1703 (2017).

296. Scott Lauria Morgensen, *Theorising Gender, Sexuality and Settler Colonialism: An Introduction*, 2 SETTLER COLONIAL STUDIES 2, 3 (2013) (“Gender and sexuality are intrinsic to the colonization of [I]ndigenous peoples and the promulgation of European modernity by settlers, whether in pursuit of what Patrick Wolfe has theorized as logic of [I]ndigenous ‘elimination,’ or of what Lorenzo Veracini, Philip Deloria, and scholars in [I]ndigenous studies have examined as the indigenization of settlers.”); Thompson, *supra* note 229, at 29.

the universe—and not a separable category of behavior and existence.”²⁹⁷ As a result of colonization, “no stone was left unturned as Europeans made their way to the Pacific to Christianize island people, and sexuality was a main concern to be addressed as first line of business.”²⁹⁸ Western settlers viewed Indigenous cultures as “sexually corrupt,” which justified disrupting traditional relationships and cultural structures even through violent means.²⁹⁹ Despite colonization’s impact on the territories, the nimbleness of the *Insular Cases* offers an avenue to begin to decolonize sexuality and gender.

The *Insular Cases*, which center the distinctive Indigenous cultures and people of the territories as basis for different treatment, can be what Professor Natsu Taylor describes as “a first step in moving beyond colonial dynamics of power and privilege . . . [by] chang[ing] the stories we live by.”³⁰⁰ The decolonization process and assertions of self-determination include reclaiming “our histories, refusing to concede to narratives that erase our identities, our lived realities and, often, even our humanity.”³⁰¹ If the flexibility of the *Insular Cases* is that they can be used as a “meaningful” decolonization tool, they must be able to repair “the harms suffered by those who have experienced systemic oppression according to their self-shaped notions of reparation.”³⁰² In other

297. Lisa Kahaleole Chang Hall & J. Kehaulani Kauanui, *Same-Sex Sexuality in Pacific Literature*, in *ASIAN AMERICAN SEXUALITIES: DIMENSIONS OF THE GAY & LESBIAN EXPERIENCE* 114 (Russell Leong ed., 1995).

298. Thompson, *supra* note 229, at 29. While sexuality between Indigenous peoples were demonized, the same could not be said between Indigenous peoples and White foreigners. For example, Captain Cook “admitted that his culture was exploitative in favor of the ‘selfish’ men under his command who treated these women as commodities. The complexity of women’s lives had been restructured to accommodate the sexual ‘needs’ of his men. These ‘needs’ were based upon male sexual gratification.” PATTY O’BRIEN, *THE PACIFIC MUSE: EXOTIC FEMININITY AND THE COLONIAL PACIFIC* 90 (2006).

299. See *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism*, HUM. RTS. WATCH (Dec. 17, 2008), <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism#page> [<https://perma.cc/W2BJ-4JJ5>]; see also Manuela L. Picq & Josi Tikuna, *Indigenous Sexualities: Resisting Conquest and Translation*, in *SEXUALITY AND TRANSLATION IN WORLD POLITICS* 64–65 (Caroline Cottet & Manuela Lavinias Picq eds., 2019) (“Yet the colonial destruction of native sexualities is more than a mere inability to see otherness. Labeling native sexualities as unnatural justified violent repression, and the heterosexualization of [Indigenous peoples] was as much a process of modernization as of dispossession.”).

300. See Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 *FLA. AGRIC. & MECHANICAL U. L. REV.* 1, 101 (2014) (internal quotations omitted). “Changing the stories by which we live keeps alive our histories of survival, resistance, and contributions to humanity. But it also entails acknowledging that contemporary American society is neither postracial nor postcolonial, confronting harsh and unpleasant truths we may wish to deny.” *Id.* at 102.

301. *Id.* at 101.

302. Serrano, *supra* 11, at 400.

words, such reparations should include a return to Indigenous framings of gender and sexuality.

The incorporation doctrine can be used to give territories just that opportunity to dismantle Western structures grounded in heterosexism and a gender binary. In their scholarship, M. Alexander Pearl and Kyle Velte describe two roles of law. First, the “legal” role of the law is to regulate behaviors. Second, the “expressive” function of the law “sends a normative and cultural message about the shared values of a community. The law’s ‘expressive power’ is thus the power of the law to influence norms”³⁰³ In addition to providing a framework for courts to apply, the incorporation doctrine has the expressive power to spark decolonization efforts within territories by having Indigenous values influence the law rather than the law erasing queer identities, stories, and experiences. Dismantling colonized views of gender and sexuality can benefit the collective Indigenous identity.³⁰⁴ The *Insular Cases* can therefore be deployed to reclaim Indigenous values and to protect their unique cultural identities.

King v. Andrus is a helpful illustration of how courts engage in this territory-by-territory analysis, and gives weight to the argument that the *Insular Cases*’ doctrine can actually support the extension of LGBTQ rights in the territories.³⁰⁵ On remand from the D.C. Circuit, the U.S. District Court for the District of Columbia determined that incorporating the right to a trial by jury to American Samoa would not be “impractical or anomalous.”³⁰⁶ Despite the Samoan government’s claims that there are substantial cultural differences that would make applying a western concept like jury trials unworkable, the court concluded that those cultural assertions were “too weak” to support their claims.³⁰⁷ The court acknowledged the “obviously major cultural difference between the United States and American Samoa is that land is held communally in Samoa.”³⁰⁸ Therefore, according to the court, since jury trials do not implicate communal land, the claim did not reach the level of cultural harm asserted by the Samoan government.³⁰⁹ The court thus found the right to jury trial to be fundamental in American Samoa.

303. See M. Alexander Pearl & Kyle Velte, *Indigenizing Equality*, 35 YALE L. & POL’Y REV. 461, 489 (2017).

304. *Id.* at 494.

305. *King v. Andrus*, 452 F. Supp. 11, 17 (D.D.C. 1977) (“The fact is that all of the hard evidence which bears on the actual situation in American Samoa today in terms of its legal and cultural development cuts the other way, and leads me to the inescapable conclusion that trial by jury in American Samoa as of the time when Jake King went to trial on the criminal charges here involved would not have been, and is not now, ‘impractical and anomalous.’”).

306. *Id.*

307. *Id.*

308. *Id.* at 15.

309. *Id.* (“The obviously major cultural difference between the United States

King v. Andrus provides a useful vantage point regarding the reasoning and analysis advocates are likely to encounter as they work to extend LGBTQ rights in the territories. In American Samoa, as noted previously, the territory does not have any statutory protections for gender identity or expression.³¹⁰ However, assume that the United States Supreme Court were to extend to transgender persons the fundamental right, grounded in one of the Constitution's existing guarantees, "to define and express their identity on equal terms with non-transgender people," or to informational privacy to prevent the forced disclosure of one's transgender status on birth certificates and IDs.³¹¹ Notwithstanding the lack of the statutes and judicial opinions on the topic, applying these fundamental rights in American Samoa would likely not be "impractical or anomalous."

First, similar to the point made by the court in *King v. Andrus*, gender expression does not implicate communal land, a focal point of Samoa's culture. In other words, there is no cultural *barrier* to extending this right in American Samoa. Second, and perhaps most importantly, Samoa's *fa'afafine*, or the Indigenous third gender, are "tolerated and accepted as part of society" and a valuable part of the fabric of Samoan culture.³¹² In other words, the argument in extending these rights would be significantly stronger here than the prevailing argument in *King v. Andrus*, as it can be argued that giving rights to people outside of the gender binary is not only not improper or anomalous with Samoan culture, but it is actually a part of its cultural *tradition* that colonialist forces have simply obscured.

Taking the history and impact of colonization into account, the *fa'afafine* were looked on "as high profile members of society" until western influences arrived in the territory introducing Christianity.³¹³ As a result, they are recognized culturally and socially, but not legally.³¹⁴ This current lack of legal recognition does not defeat the fact that the *fa'afafine* are part of Samoan culture, creating an opportunity for the argument

and American Samoa is that land is held communally in Samoa. The jury trial requirement in criminal proceedings would have no foreseeable impact on that system.").

310. In fact, according to the MAP Report, American Samoa has a score of 0 out of 20 for its "Gender Identity Policy Tally" because it has no law that speaks directly on transgender rights. *LGBT Policy Spotlight*, *supra* note 85, at 8.

311. See Jennifer L. Levi & Kevin M. Barry, *Transgender Tropes & Constitutional Review*, 37 *YALE L. & POL'Y REV.* 589, 604–05 (2019).

312. See Sue Farran, *Transsexuals, Fa'afafine, Fakaleiti and Marriage Law in the Pacific: Considerations for the Future*, 113 *J. POLYNESIAN SOC'Y* 119, 119–20 (2004). "Fa'afafine identities provide a cultural 'space' for males who do not conform to the ideals of hegemonic masculinity without being marginalized as deviant 'men.'" Johanna Schmidt, *Being 'Like a Woman': Fa'afafine and Samoan Masculinity*, 17 *ASIA PAC. J. ANTHROPOLOGY* 287, 300 (2016).

313. *Id.*

314. Farran, *supra* note 312, at 119–20.

that legal recognition for rights grounded in the constitution and meant for those of diverse gender expressions (i.e., for those like the *fa'afafine*) is not impractical or anomalous with respect to American Samoa and should therefore be applicable there as well.

A Supreme Court ruling granting rights grounded in the Constitution to transgender persons, and then extending that grant of rights those in the territories, would not only legally affirm this Samoan sub-population already highly integrated into the territory,³¹⁵ but would also help begin to repair some of the harms of colonization. Doing so would “would signal a stand against colonialism and a simultaneous reclaiming and celebration of . . . two-spirit and third-gender people.”³¹⁶

There are, however, limitations to this. As discussed in this Note, the *Insular Cases* require that a challenge be grounded in a case-by-case, and territory-by-territory, analysis.³¹⁷ This means that not only would litigants in each territory need to assert their own challenges, but they would also need their own independent bases for asserting that extending such a right to their territory is not improper and anomalous. Additional research is needed to evaluate whether, similar to Samoa, there are ways that litigants in the other territories can ground their efforts to advance LGBTQ rights in precolonial understandings of gender and sexuality such that they can show that their territories are not only lacking in cultural barriers to such rights, but actually hold cultural traditions supporting those rights.

Nonetheless, the *Insular Cases* have the potential to be refashioned, as Indigenous Chamoru legal scholar Julian Aguon asserted, to “throw off the colonial yoke.”³¹⁸ As territories engage in decolonization and reempower Indigenous values and culture, LGBT advocates may assert that the territories should also untether themselves from a colonial framework that othered and criminalized Indigenous sexuality and gender identity.³¹⁹ Indeed, “[f]rom the moments of first contact,” western

315. See Robert Carney, *The Health Needs of the Fa'afafine in American Samoa and Transgender Research Methodology*, J. GLOBAL HEALTH, Spring 2015, at 1, 39 (“[F]a'afafine simultaneously seek to keep the *fa'asamoa* (the Samoan way). For example, they would take great pride and effort in the annual pageant which involved Western drag queen lip-synching performances and run-way fashion shows In addition, the fa'afafine . . . were all active in their church or religious communities, participated in traditional dances and rituals.”).

316. Pearl & Velte, *supra* note 303, at 491.

317. See *Reid v. Covert*, 354 U.S. 1, 75, 77 (1957) (Harlan, J., concurring); Malavet, *supra* note 16.

318. Serrano, *supra* note 11, at 425.

319. See Keith L. Camacho, *Homomilitarism: The Same-Sex Erotics of the U.S. Empire in Guam and Hawai'i*, 123 RADICAL HIST. REV. 144, 146 (2015). “In the twentieth century . . . prosecutors and judges in Canada and the United States ‘created racialized and sexualized typologies of masculinity to police the relationships of roaming youth and foreign migrants,’ to which we can add the [I]ndigenous peoples and nonnative settlers of the Pacific.” *Id.*

notions of sexuality “have consistently distorted, misrepresented, and degraded the experiences” of those who have been colonized.³²⁰

The *Insular Cases* may thus offer a valuable tool for importing constitutional protections for LGBT people, once recognized by the Supreme Court, even over the objections of territorial governments or those who would oppose the extension of LGBT rights. In a challenge brought against a territory that refused to recognize fundamental rights grounded in the Constitution (or, alternatively, a challenge brought by an opponent of LGBT rights to a territory’s decision to extend them), a court would engage in an *Insular Cases*-informed analysis, asking (1) whether the fundamental right at issue had been expressly extended to the territory in question, and (2) if not, whether extending that right would be improper and anomalous. Where a territory has precolonial cultures and practices that affirm LGBTQ people, that tradition would support an argument that extending such a right would not be improper and anomalous.

For example, were the Supreme Court to recognize constitutional protections for the parenting and family rights of same sex couples, the application of those rights in Guam would be bolstered by the territory’s tradition of *poksai*, meaning “to nurture” or “to welcome.”³²¹ Under *poksai*, “people are absorbed into an extended family, the clan” and represent a full responsibility to land, people, and the ocean.³²² This broader and fluid concept of adoption is not limited to Guam but can be found in other territories, including Samoa and the CNMI.³²³ And that tradition would in turn bolster arguments that extensions of same sex couples’ parental rights was not only not “improper and anomalous,” but affirmatively supported by the territory’s history and practices.

CONCLUSION

Because of the *Insular Cases*, the U.S. territories are relegated to “second-class legal status[.]” which in turn continues to erase LGBTQ individuals living on the islands.³²⁴ The lack of data, and the failure of studies to include the territories in their national research, has only compounded the issue.³²⁵ Although Puerto Rico and Guam have

320. See Lisa Kahaleole Chang Hall & J. Kehaulani Kauanui, *Same-Sex Sexuality in Pacific Literature*, in *ASIAN AMERICAN SEXUALITIES: DIMENSIONS OF THE GAY & LESBIAN EXPERIENCE* 115 (Russell Leong ed., 2014).

321. *Id.* at 161–62.

322. *Id.*; see also Tiare R. Na’puti, *Speaking of Indigeneity: Navigating Genealogies Against Erasure and #RhetoricSoWhite*, 105 Q. J. SPEECH 495, 495 (2019).

323. Elizabeth Barrett Ristroph, *The Survival of Customary Law in the Northern Mariana Islands*, 8 CHI.-KENT J. INT’L & COMP. L. 32, 47–48 (2008); *Cultural Adoption Practices*, N.Z. L. COMM’N 345, <http://www.nzlii.org/nz/other/nzlc/pp/PP38/PP38-12.html> [<https://perma.cc/3REA-XCCQ>].

324. Malavet, *supra* note 16, at 182.

325. See Rodriguez-Madera, *supra* note 130, at 210; *LGBT Policy Spotlight*,

been territories since 1899, American Samoa since 1900, Virgin Islands since 1917, and the CNMI since 1976, the 2019 report conducted by the Movement Advancement Project and Lambda Legal represent the “first comprehensive review of LGBT laws and policies in U.S. territories.”³²⁶ That report calls for more research to be conducted to better understand the experiences of queer people living in the territories, as does this Note.³²⁷

Even in spite of the absence of current data, the U.S. territories are key jurisdictions in which LGBTQ rights can and should be asserted. LGBTQ individuals there are more vulnerable than their stateside counterparts because the territories lack voting representation in Congress and are unable to elect the President and Vice President, meaning that their particularized concerns are not likely to receive the same political weight, if any at all.³²⁸ And, as this Note points out, this is of particular concern against the backdrop of the *Insular Cases*, as those cases require that Congress expressly extend constitutional rights to territory residents for them to apply, so a seat at their table is of particular worth to those in the territories. In the absence of such a seat, and notwithstanding their colonial origins, the *Insular Cases* actually provide a key opportunity for the territories to go beyond the rights provided by the federal government to become new age laboratories of democracy. As long as the *Insular Cases* remain good law, they must be folded into any fundamental rights legal analysis involving LGBTQ rights in the territories. This Note demonstrates that the *Insular Cases* have already been used to attack the rights of LGBTQ people in the territories. However, when used properly and taking into consideration the culture, people, and historical context of each territory, this doctrine can be reclaimed to instead protect Indigenous cultural values that affirm LGBTQ people.

supra note 85, at 6.

326. *First Comprehensive Review of LGBT Laws and Policies in U.S. Territories Released Today*, MOVEMENT ADVANCEMENT PROJECT (June 11, 2019), <http://www.lgbt-map.org/release-2019-us-territories> [<https://perma.cc/E63D-PUZZ>]. Other reports have only looked at some U.S. territories, but not all. See, e.g., JAMES ET AL., *supra* note 122 (“The sample included respondents from all 50 states, the District of Columbia, Puerto Rico, Guam and the U.S. Virgin Islands.”).

327. *LGBT Policy Spotlight*, *supra* note 85.

328. See Derieux, *supra* note 38, at 801 (“[R]esidents of Puerto Rico lack representation at all levels of the federal government, and remain ‘locked out’ from the political process responsible for statutory schemes treating them differently than U.S. citizens residing in the fifty states.”); Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 ASIAN-PAC. L. & POL’Y J. 180, 229–30 (2003).