

## ESSAY

### THE AMERICA WITHOUT MARRIAGE EQUALITY: FA'AFAFINE, THE *INSULAR* CASES, AND MARRIAGE INEQUALITY IN AMERICAN SAMOA

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*American Samoa is the only U.S. jurisdiction that does not recognize gender-neutral marriage despite the Supreme Court's Obergefell decision invalidating laws that limit marriage to male–female couples. Among U.S. territories, American Samoa has five unique features: It is the only territory that the United States acquired through negotiation with ruling sovereigns, whose land is largely communally owned, whose residents lack birthright citizenship, that remains under control of the Secretary of the Interior, and that lacks a federal court. This Essay explains how these characteristics have combined to thwart marriage equality in American Samoa.*

*American Samoa's denial of marriage equality is surprising because for centuries Samoan culture has respected third-gender individuals, called fa'afafine. Despite this heritage and the Obergefell opinion recognizing the constitutional right to gender-neutral marriage, American Samoa does not allow fa'afafine to marry their male partners.*

*After documenting the centuries-old Polynesian tradition of respecting third-gender individuals, this Essay shows how current leaders in American Samoa are using suspect precedent to prohibit marriage equality for the fa'afafine. In a series of racist opinions from 1901, known as the Insular Cases, the Supreme Court held that the U.S. Constitution does not apply to U.S. territories because their residents cannot be entrusted with rights and self-governance. Although all other U.S. territories acceded to Obergefell, American Samoa's politicians have relied on Insular logic to block marriage equality from reaching America's most distant territory. This Essay explains the inherent unfairness of allowing the anachronistic Insular Cases to prevent fa'afafine from having marriage rights today.*

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#### INTRODUCTION

Marilyn lives in a house with her closest friends, whom she calls her sisters.<sup>1</sup> Sharing their hopes, dreams, and dresses, this family of choice is closer than most families. Although some sisters have boyfriends, they lament that their plans for the future cannot include marriage, because they are fa‘afafine, members of American Samoa’s traditional third gender.<sup>2</sup> They were all born and raised on American soil, and if they lived in any state or any other U.S. territory, they would be able to legally marry whom they please. But Marilyn and her sisters live in American Samoa, the U.S. territory that stands alone in refusing to recognize gender-neutral marriage. This denial of rights inflicts significant harm on male–fa‘afafine couples. In addition to the dignitary harm that these couples experience when the government labels their relationships as unworthy, they face discrimination in healthcare, taxation, estate planning, and everyday life.<sup>3</sup>

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1. Marilyn is a composite reflecting how many fa‘afafine in American Samoa live their lives. See Jeanette M. Mageo, *Male Transvestism and Cultural Change in Samoa*, 19 *Am. Ethnologist* 443, 454 (1992) (“In towns one finds fa‘afafine houses where a number of ‘girls’ live and congregate; the house in downtown American Samoa is called Hollywood. A fa‘afafine will often adopt a fancy English name, usually one that begins with the same letter as her Samoan name.”).

2. See *infra* notes 48–60 (explaining gender terminology in American Samoa).

3. See *infra* notes 279–282 and accompanying text; see also Christopher R. Leslie, *Dissenting From History: The False Narratives of the Obergefell Dissents*, 92 *Ind. L.J.* 1007, 1035–51 (2017) (detailing harms to same-sex couples denied marriage rights).

Marriage equality unfurled across America in the summer of 2015. In *Obergefell v. Hodges*,<sup>4</sup> the Supreme Court struck down the same-sex marriage bans of Kentucky, Michigan, Ohio, and Tennessee, observing that “the Court has long held the right to marry is protected by the Constitution.”<sup>5</sup> While the opinion immediately brought marriage equality to all fifty states, the Attorney General of American Samoa, Talauega Eleasalo Ale, declined to recognize the decision as binding. Instead, Ale deferred judgment of *Obergefell*’s “applicability to American Samoa”<sup>6</sup>—a determination he never made in the next six years before becoming the territory’s Lieutenant Governor in 2021. More transparent in his obstruction, the Governor of American Samoa, Lolo Matalasi Moliga, announced days after the opinion was issued that the *Obergefell* “ruling will not apply to our preamble, our constitution and our Christian values . . . . [T]he Supreme Court ruling does not apply to our territory.”<sup>7</sup> The executive branch was not alone in blocking marriage equality in American Samoa. Months later, during his confirmation hearing to become a local judge, the territory’s former Attorney General, Fiti Alexander Sunia, testified that he had not read the *Obergefell* opinion and would not perform same-sex weddings unless American Samoan law were changed.<sup>8</sup> The American Samoa Senate then unanimously confirmed his appointment.<sup>9</sup>

This Essay explores why American Samoan leaders believe they can ignore the U.S. Supreme Court. This is a modern problem, but one rooted in America’s history of colonial expansion. The fa’afafine of American Samoa are denied marriage rights because of a series of Supreme Court opinions from 1901, before the United States acquired the eastern islands of the Samoan archipelago and transformed them into a U.S. territory.

America doesn’t see itself as an empire, but it is.<sup>10</sup> The modern United States would not exist but for settler colonialism.<sup>11</sup> Instead of colonies, however, America maintains and controls territories, districts, and

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4. 576 U.S. 644 (2015).

5. *Id.* at 664.

6. Fili Sagapolutele & Jennifer Sinco Kelleher, American Samoa Questions Gay Marriage Validity in Territory, Associated Press (July 10, 2015), <https://apnews.com/c1deb598da6a482587fdd5bac501fc94> [<https://perma.cc/282Z-VH22>] (quoting Attorney General Ale).

7. Same Sex Marriage Rejected by Local Church Leaders, Samoa News (July 13, 2015), <https://www.samoanews.com/same-sex-marriage-rejected-local-church-leaders?qt-quicktabs=1> [<https://perma.cc/T4J9-BP5A>].

8. American Samoa Judge Objects to Same Sex Marriage, Radio N.Z. (Jan. 20, 2016), <https://www.rnz.co.nz/international/pacific-news/294500/american-samoa-judge-objects-to-same-sex-marriage> [<https://perma.cc/JR2N-6LT8>].

9. *Id.*

10. See Daniel Immerwahr, *How to Hide an Empire: A History of the Greater United States 14–17* (2019) (discussing the evolution and concealment of America’s empire).

11. See Roxanne Dunbar-Ortiz, *An Indigenous Peoples’ History of the United States 2* (2014) (“The history of the United States is a history of settler colonialism . . .”).

possessions.<sup>12</sup> The year 1898 was momentous in America's empire building, with the annexation of Hawai'i through subterfuge<sup>13</sup> and of Spain's former colonies of the Philippines, Puerto Rico, and Guam as the spoils of winning the Spanish-American War.<sup>14</sup> These acquisitions raised the issue of how U.S. law, including the Constitution, would apply to these new possessions.<sup>15</sup>

In the early twentieth century, the Supreme Court issued a slate of opinions known as the *Insular Cases*.<sup>16</sup> Though elastic, the label of *Insular Cases* generally refers to several Supreme Court cases decided in 1901 and their close-following progeny.<sup>17</sup> None of the *Insular Cases* arose from legal disputes in American Samoa, but the opinions would nevertheless define and constrain the Constitution's reach into America's most faraway territory.<sup>18</sup>

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12. Immerwahr, *supra* note 10, at 7–10 (noting that the use of the word “colony” to describe U.S. territorial acquisitions “became taboo”).

13. 20 U.S.C. § 7512 (2018) (presenting congressional findings that “[i]n 1893, the sovereign, independent, internationally recognized, and indigenous government of Hawaii, the Kingdom of Hawaii, was overthrown by a small group of non-Hawaiians,” including a number of United States government officials, and was later annexed by the United States in 1898); see also Danielle Conway-Jones, *Safeguarding Hawaiian Traditional Knowledge and Cultural Heritage: Supporting the Right to Self-Determination and Preventing the Co-Modification of Culture*, 48 *How. L.J.* 737, 751 (2005) (“Because of Captain James Cook’s accidental sighting of the islands in 1778, Hawai’i became a target for colonization and the focus of threats of political, social, and economic manipulation from the 1800s to the present.”).

14. Andrew Kent, *The Jury and Empire: The Insular Cases and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 *S. Cal. L. Rev.* 375, 377 (2018) (“As a result of the 1898 war against Spain, the United States annexed the Spanish colonies of the Philippines, Puerto Rico, and Guam and temporarily occupied Cuba.”).

15. See *id.* (“Starting in 1901, the *Insular Cases* addressed the legal status of new overseas possessions and their peoples under the U.S. Constitution and statutes.”).

16. See Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 *Revista Jurídica Universidad de Puerto Rico* 225, 228 (1996) (laying out the history, ideology, and effects of the *Insular Cases*).

17. Juan R. Torruella, *One Hundred Years of Solitude: Puerto Rico’s American Century, in Foreign in a Domestic Sense: Puerto Rico, the American Expansion, and the Constitution* 241, 248 n.14 (Christina Duffy Burnett & Burke Marshall eds., 2001) (“The *Insular Cases*, strictly speaking, are the original six opinions issued in 1901 involving the status of the territories acquired as a result of the 1898 Treaty of Paris . . .”). The cases are: *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. N.Y. & P.R. Steamship Co.*, 182 U.S. 392 (1901).

Many scholars include as *Insular Cases* several additional opinions between 1901 and 1922. See Kal Raustiala, *Does the Constitution Follow the Flag?: The Evolution of Territoriality in American Law* 80 (2009) (“The set of Supreme Court decisions known as ‘the Insular Cases’ addressed the legal status of the new overseas territories. There were approximately twenty such cases, decided between 1900 and 1922, with the majority handed down between 1901 and 1904.”); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 *Colum. L. Rev.* 973, 975 n.4 (2009) (“The *Insular Cases* include a long list of decisions handed down between 1901 and 1922 . . .”).

18. See *infra* Part III.

Although U.S. territories are technically part of the United States of America, from a constitutional perspective the lacuna between technicality and reality is vast. The *Insular Cases* limited and continue to limit constitutional protections for Americans in U.S. territories by holding that “the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct.”<sup>19</sup> In the absence of congressional direction, the *Insular Cases* framework provides that courts should extend a constitutional right to protect citizens of a U.S. territory only if the right is judged to be “fundamental”—which has a narrow meaning in the *Insular* context—and if recognizing the right would not be “impracticable and anomalous.”<sup>20</sup> The *Insular Cases* prevent current Supreme Court opinions that recognize or expand constitutional rights from automatically applying to U.S. territories, as these opinions do to U.S. states.

The *Insular Cases* created the illusion of constitutional self-government in America’s far-flung territories even though the residents of these various islands were entitled neither to full constitutional protections nor to true autonomy.<sup>21</sup> The Supreme Court justices who authored the opinions did not trust the people of the former Spanish colonies to govern themselves, but the justices also “repeatedly voiced concern that native inhabitants of the unincorporated territories were simply unfit for the American constitutional regime.”<sup>22</sup> By not denying constitutional protections outright, the *Insular Cases* clothed colonialism in democracy’s garb.<sup>23</sup>

Given their colonial premises and racist reasoning, the *Insular Cases* have long been controversial and are generally held in disrepute.<sup>24</sup> Yet

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19. *Downes*, 182 U.S. at 279.

20. *Fitisemanu v. United States*, 1 F.4th 862, 878, 881 (10th Cir. 2021).

21. See Raustiala, *supra* note 17, at 86 (noting that the *Insular Cases* “facilitated the imperial ambitions of turn of the century America while retaining a veneer of commitment to constitutional self-government”).

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

23. See Burnett, *supra* note 17, at 989 (“Despite the vigorous disagreement among the Justices, the holding in *Downes* soon put an end to the popular and political debate. The imperialists had won the day . . . .”); see also Raustiala, *supra* note 17, at 223 (“Yet by holding that only some rights applied in the new island possessions, whereas others lost their strength at the water’s edge, the early-twentieth-century *Insular Cases* cobbled together an odd and unstable marriage of imperialism and constitutionalism.”).

24. See *United States v. Vaello Madero*, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring) (“It is past time to acknowledge the gravity of this error and admit what we know to be true: The *Insular Cases* have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.”); *Fitisemanu*, 1 F.4th at 869 (“The *Insular Cases* . . . are criticized as amounting to a license for further imperial expansion and having been based at least in part on racist ideology.”); see also Igartúa de la Rosa v. *United States*, 417 F.3d 145, 163 (1st Cir. 2005) (Torruella, J., dissenting) (describing the *Insular Cases* as “anchored on theories of dubious legal or historical validity, contrived by academics interested in promoting an expansionist agenda”); *King v. Morton*, 520 F.2d 1140, 1153

despite abundant refutations of their logic and holdings, the cases remain influential because the Supreme Court has not overruled them.<sup>25</sup> As a result, lower courts continue to apply—and sometimes expand—the *Insular Cases* in ways that “deprive[] territorial residents of rights and protections to which they are almost surely entitled.”<sup>26</sup> Their enduring influence is both tragic and perplexing because they are anachronisms. The 1901 *Insular Cases* were decided before the Wright Brothers’ first flight<sup>27</sup> and the opening of the Panama Canal,<sup>28</sup> when America’s Pacific territories were inaccessible, abstract concepts generally omitted from maps of the United States.<sup>29</sup> Constitutional jurisprudence was still in its early stages, as the Supreme Court had not yet meaningfully incorporated the provisions of the Bill of Rights to apply to the states, let alone to recently acquired territories.<sup>30</sup> Yet even though the Age of the *Insular Cases* is in many ways unrecognizable today, these opinions continue to limit constitutional protections in U.S. territories.

This Essay explores one less-appreciated problem with the *Insular Cases*: This body of jurisprudence can deprive sexual minorities living in U.S. territories of constitutional rights, such as the right to marriage equality in American Samoa.<sup>31</sup> The *Obergefell* decision invalidated any same-sex

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(D.C. Cir. 1975) (Tamm, J., dissenting) (“The *Insular Cases*, in the manner in which the results were reached, the incongruity of the results, and the variety of inconsistent views expressed by the different members of the court, are, I believe, without parallel in our judicial history.”).

25. *Fitisemanu*, 1 F.4th at 870 (noting that despite their racist origins, “the Supreme Court has continued to invoke the *Insular* framework when it has grappled with questions of constitutional applicability to unincorporated territories”); Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 *Yale L.J. Forum* 284, 293–94 (2020) (“[T]he *Insular Cases* are still dangerous. Because the Supreme Court has not overruled them, lower courts reflexively rely on and often misapply the *Insular Cases*, regardless of the Court’s recent narrowing language.”); see also *Vaello Madero*, 142 S. Ct. at 1557 (Gorsuch, J., concurring) (“But the time has come to recognize that the *Insular Cases* rest on a rotten foundation. And I hope the day comes soon when the Court squarely overrules them.”).

26. Derieux & Weare, *supra* note 25, at 294.

27. *McCarran Int’l Airport v. Sisolak*, 137 P.3d 1110, 1120 n.23 (Nev. 2006) (“The first successful controlled powered flight by the Wright Brothers occurred in 1903.”).

28. David McCullough, *The Path Between the Seas: The Creation of the Panama Canal 1870–1914*, at 12 (1977) (noting that the passage of the first ship through the Panama Canal occurred in 1914).

29. See Immerwahr, *supra* note 10, at 8–9 (noting how even today U.S. maps tend to exclude territories such as American Samoa, Guam, and Puerto Rico).

30. Raustiala, *supra* note 17, at 24 (“If the Bill of Rights did not fully apply within the United States, many reasoned, surely it did not fully apply outside the United States either. Thus the *Insular Cases* enabled American empire by limiting the reach of the Constitution.”).

31. Because of the 1899 colonial partition of the islands, see *infra* notes 169–170 and accompanying text, two Samoas currently exist. This Essay uses “American Samoa” to refer to the U.S. territory and “sovereign Samoa” when discussing the independent island nation

marriage ban in all fifty states. But the *Insular Cases* insulated the residents of U.S. territories from automatic protection. Soon after the Supreme Court announced *Obergefell*, however, officials in Guam, the Commonwealth of the Northern Mariana Islands (CNMI), the U.S. Virgin Islands (USVI), and Puerto Rico acquiesced to the opinion, leaving American Samoa as the exception—the only U.S. territory that does not recognize gender-neutral marriages.<sup>32</sup>

Beyond the marriage issue, American Samoa is exceptional among the U.S. territories in myriad ways. For example, American Samoa has a unique origin story. The United States acquired its other current territories from rival colonial powers. Puerto Rico, Guam, and the CNMI had all been Spanish colonies. The United States acquired Puerto Rico and Guam directly from Spain following the Spanish-American War,<sup>33</sup> while it gained control over the CNMI through a more circuitous route.<sup>34</sup> The United States purchased the USVI—then known as the Danish West Indies—from Denmark in 1917 for \$25,000,000.<sup>35</sup> In contrast to these territories, the United States acquired American Samoa through a combination of negotiation, religious imperialism, and promises to protect the local customs and culture.<sup>36</sup> Flowing from its distinctive genesis, American Samoa is the only territory whose people lack birthright citizenship, meaning that individuals born there are U.S. nationals, not U.S. citizens.<sup>37</sup>

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to the west known today as “Samoa.” Sovereign Samoa was formerly a German colony and was then under New Zealand control until it gained independence as “Western Samoa” in 1962, renaming itself “Samoa” in 1997. Ruiping Ye, *Torrens and Customary Land Tenure: A Case Study of the Land Titles Registration Act 2008 of Samoa*, 40 *Victoria U. Wellington L. Rev.* 827, 829 (2009). The Essay uses the term “Samoa” when referencing the history, culture, and traditions shared across the islands.

32. See *infra* section II.A.

33. Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., art. 2, Dec. 10, 1898, 30 Stat. 1754.

34. Between Magellan’s landing on its shores in 1521 and its administration by the United States following World War II, the Northern Mariana Islands had been controlled by a string of colonial powers, including Spain, Germany, and Japan. Gretchen Kirschenheiter, *Resolving the Hostility: Which Laws Apply to the Commonwealth of the Northern Mariana Islands When Federal and Local Laws Conflict*, 21 *U. Haw. L. Rev.* 237, 240–41 (1999). After Japan’s defeat in World War II, the islands became part of the United Nations Trust Territory of the Pacific Islands with the United States as trustee. *Id.* at 241. The islands later negotiated commonwealth status with the United States and became a U.S. territory. *Id.* at 241–42.

35. Convention Between the United States and Denmark, Etc. on Cession of the Danish West Indies, Den.-U.S., art. 5, Aug. 4, 1916, 39 Stat. 1706. Denmark and the United States ratified the exchange treaty in 1916 and 1917, respectively. *Id.*

36. See *infra* notes 170–177 and accompanying text.

37. See 8 U.S.C. § 1408(1) (2018) (designating those born in “an outlying possession of the United States” as U.S. nationals, but not U.S. citizens); *id.* § 1101(29) (defining “outlying possessions of the United States” as American Samoa and Swains Island, which is part of American Samoa); *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015)

In addition, American Samoa has distinctive political and social structures. Unlike other U.S. territories, American Samoa “remains under the ultimate supervision of the Secretary of the Interior.”<sup>38</sup> It is the only U.S. territory without a federal court.<sup>39</sup> American Samoa is also the only state or territory composed primarily of communal land.<sup>40</sup> Its society is structured around extended families, known as ‘aiga.<sup>41</sup> Over ninety percent of American Samoan land is owned and controlled by ‘aiga, not individuals.<sup>42</sup> Although some land is individually owned, American Samoan law restricts land ownership to individuals who are at least fifty percent American Samoan.<sup>43</sup> Communal land ownership and related restrictions are part of fa’a Samoa—translated as “the Samoan way”—the governing principle of Samoan law and society.<sup>44</sup> Fa’a Samoa provides the foundation for both daily life and generational governance.<sup>45</sup>

American Samoa is also America’s only Polynesian territory, ever since the Territory of Hawai‘i became a state in 1959.<sup>46</sup> This status is significant because Polynesian social and legal culture is distinct. In particular, Polynesian concepts of land, family, sexuality, and identity do not map

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(“Unlike those born in the United States’ other current territorial possessions—who are statutorily deemed American citizens at birth— . . . the Immigration and Nationality Act of 1952 designates persons born in American Samoa as non-citizen nationals.”).

38. *Tuaua*, 788 F.3d at 302 (citing Exec. Order No. 10,264, 16 Fed. Reg. 6417 (June 29, 1951) (transferring administration of American Samoa from the Secretary of the Navy to the Secretary of the Interior)).

39. *Barlow v. Sunia*, No. 18-00423, 2019 WL 5929736, at \*4 (D. Haw. Nov. 12, 2019); Uililone Falemanu Tua, Note, A Native’s Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa, 11.1 *Asian-Pac. L. & Pol’y J.* 246, 255 (2009).

40. *Fitiseanu v. United States*, 1 F.4th 862, 866 (10th Cir. 2021); *Tuaua*, 788 F.3d at 309.

41. *Fitiseanu*, 1 F.4th at 866.

42. *Id.*

43. *Id.* (citing Am. Samoa Code Ann. § 37.0204(a)–(b) (1982)).

44. See *Hueter v. Kruse*, No. CV 21-00226, 2021 WL 5989105, at \*5 (D. Haw. Dec. 17, 2021) (“Samoan land tenure law is part of *Fa’a Samoa*—the Samoan way of life.”); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. *Hodel*, 637 F. Supp. 1398, 1401 (D.D.C. 1986) (“The importance of communal landholding to the Fa’a Samoa is evidenced by the fact that, since their earliest contacts with the West, Samoans have insisted on protecting the communal land system from encroachment.”), *aff’d*, 830 F.2d 374 (D.C. Cir. 1987); see also *id.* (defining fa’a Samoa as “the Samoan way of thinking and doing”).

45. *Hodel*, 637 F. Supp. at 1401; Ivy Yeung, The Price of Citizenship: Would Citizenship Cost American Samoa Its National Identity?, 17 *Asian-Pac. L. & Pol’y J.* 1, 8 (2016) (“*Fa’a Samoa* has continued for generations and is intrinsic in all of American Samoa’s socio-political and cultural existence.”).

46. See How Did Hawaii Become a US State?, WorldAtlas, <https://www.worldatlas.com/articles/how-did-hawaii-become-a-us-state.html> [https://perma.cc/E3VF-4S3V] (last visited Aug. 17, 2022). America’s other four territories are also island societies, but none are Polynesian, with Puerto Rico and the USVI in the Caribbean and Guam and the CNMI in Micronesia. See What Are the US Territories?, WorldAtlas, <https://www.worldatlas.com/articles/the-territories-of-the-united-states.html#:~:text=The%20US%20Territories%20are%3A,US%20Virgin%20Islands> [https://perma.cc/5ESM-8XFW] (last visited Aug. 4, 2022) (listing and describing the U.S. territories).



neatly onto their Anglo-American counterparts or those of other U.S. territories.<sup>47</sup> Given its Polynesian roots, American Samoa shares more cultural commonalities with Hawai‘i than with the other U.S. territories. For example, Polynesian cultures recognize a category of individuals who are anatomically male and spiritually female, an identity called fa‘afafine in Samoa and māhū in Hawai‘i.<sup>48</sup> Fa‘afafine is a compound word, combining the prefix fa‘a—“in the way of”—and fafine, the Samoan word for “woman.”<sup>49</sup> Dressing in traditional women’s garments, the fa‘afafine of Samoa and the māhūs of Hawai‘i are not crossdressers; they are a third gender.<sup>50</sup> Although many have romantic and intimate relationships with men,<sup>51</sup> fa‘afafine are not gay because they are not men in Samoan culture.<sup>52</sup> Fa‘afafine and

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47. See Yeung, *supra* note 45, at 4 (“The Samoan islands’ ability to sustain its culture and customs alongside modern influences is unique in the South Pacific, as many neighboring island nations are now largely devoid of their traditions.”); *id.* at 8–9 (noting that American Samoa’s tradition of collective land ownership is an idea “not widely held in the United States where concepts of private property are prevalent”).

48. See Niko Besnier, Polynesian Gender Liminality Through Time and Space, *in* *Third Sex, Third Gender: Beyond Sexual Dimorphism in Culture and History* 285, 286 (Gilbert Herdt ed., 1994). This Essay follows the convention of treating the word “fa‘afafine” as both singular and plural. See, e.g., Jinghua Qian, Fa‘afafine Yuki Kihara Celebrates Samoa’s Third Gender: “Galleries Think They Can Tick the Box With Me”, *Guardian* (Apr. 28, 2022), <https://www.theguardian.com/artanddesign/2022/apr/29/faafafine-yuki-kihara-celebrates-samoas-third-gender-galleries-think-they-can-tick-the-box-with-me> [<https://perma.cc/F9FQ-N7QP>] (using this convention). But see Besnier, *supra*, at 286 (including a diacritic marking to denote the plural form (i.e., “fa‘afāfine”) (emphasis omitted)).

49. Serge Tchekézoff, Transgender in Samoa, *in* *Gender on the Edge: Transgender, Gay, and Other Pacific Islanders* 115, 116 (Niko Besnier & Kalissa Alexeyeff eds., 2014).

50. This Essay uses the term “third gender,” acknowledging that such a term may nonetheless be an imperfect means of describing Polynesian “gender liminality.” See Besnier, *supra* note 48, at 286 (opting not to refer to fa‘afafine and māhūs as a “third gender” but acknowledging that “the phenomenon is primarily an issue of *gender* rather than *sex*”). Fa‘afafine are sometimes described as “males who have been reared as females and see themselves as females.” Sue Farran, Transsexuals, Fa‘afafine, Fakaleiti and Marriage Law in the Pacific: Considerations for the Future, 113 *J. Polynesian Soc’y* 119, 120 (2004).

51. Most third-gender Polynesians have sexual relationships with men, not women or other third-gender individuals. Besnier, *supra* note 48, at 300 (“Western-style lesbian and gay identities further differ from gender-liminal Polynesians in a fundamental way: if the latter engage in sexual relations, they always do so with nonliminal men, never with members of their own category.”).

52. Douglass Paul Michael St. Christian, *Body/Work: Aspects of Embodiment and Culture in Samoa* 124 (Oct. 1994) (Ph.D. dissertation, McMaster University), <https://macsphere.mcmaster.ca/bitstream/11375/12997/1/fulltext.pdf> [<https://perma.cc/77FP-8YGW>] (“[T]he fa‘afafine are not male and their penises are not male sex organs. They are fa‘afafine organs. That is, sex organs, but not ones which define the fa‘afafine as male.”); Ashleigh McFall, “When Did You First Know You Were a Fa‘afafine?”, *E-Tangata* (Oct. 14, 2018), <https://e-tangata.co.nz/reflections/when-did-you-first-know-you-were-a-faafafine/> [<https://perma.cc/3XCN-GXGT>] (“The most common misconception is that fa‘afafine are gay.”). Samoan culture lacks the concepts of heterosexuality and homosexuality. Johanna Schmidt, *Migrating Genders: Westernisation, Migration, and Samoan Fa‘afafine* 18 (Pamela J. Steward & Andrew Strathern eds., 2016); see also Robert Carney, *The Health Needs of the Fa‘afafine in*

māhūs represent a separate, distinct gender in their respective societies.<sup>53</sup> Fa‘afafine identity is innate.<sup>54</sup> This concept of identity can be difficult for some non-Polynesians to comprehend. As one scholar who is fa‘afafine explained, “[F]a‘afafine is a cultural identity and for one to understand it, one must first understand the Samoan culture.”<sup>55</sup>

Discussing Polynesian concepts through the English language is difficult. Scholars can invoke Hawaiian and Samoan words—transliterated into the Roman alphabet—but these words have no meaning to an English-speaking audience unless described in English words, which will inherently fail precisely because there is no English equivalent to these Polynesian concepts. This is particularly true with gender identity and sexual orientation. In recent years, American society has progressed in recognizing a greater range of sexual orientations and gender identities, many of which are included in the ever-expanding acronym of LGBTQIA+. But none of the Polynesian concepts map perfectly onto the sexual alphabet of English-language discourse. The categories of māhū and fa‘afafine are not identical to transgender identity.<sup>56</sup> In contrast to the Western concept of transgender or transsexual identity, in which a person is anatomically one sex but feels themselves to be in the “wrong body,” fa‘afafine are in the “correct” body but are a gender unrecognized in the Western binary.<sup>57</sup> The Western sexual lexicon contains no equivalent to

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American Samoa and Transgender Research Methodology, 5 Colum. U. J. Glob. Health, Spring 2015, at 38, 39 (“Samoans do not consider relations among fa‘afafine to be homosexual.”).

53. Schmidt, *supra* note 52, at 67–68 (explaining why fa‘afafine are neither men nor women); Deborah Elliston, Queer History and Its Discontents at Tahiti: The Contested Politics of Modernity and Sexual Subjectivity, *in* Gender on the Edge: Transgender, Gay, and Other Pacific Islanders, *supra* note 49, at 33, 34 (“[M]āhū is a gender category . . .”). But see Besnier, *supra* note 48, at 326 (arguing that fa‘afafine should not be treated as having a distinct gender status).

54. Schmidt, *supra* note 52, at 2 (noting that “most fa‘afafine experience their particular gendered identities as beyond their control”); *id.* at 63 (noting that fa‘afafine experience their femininity as innate). This is important to note because there is a popular—but disproven—misconception that Samoan families raise boys as girls to compensate for a lack of daughters. *Id.* at 16.

55. Ashleigh McFall, A Comparative Study of the Fa‘afafine of Samoa and the Whakawahine of Aotearoa/New Zealand 3, 23 (2013) (M.A. thesis, Victoria University of Wellington), <http://researcharchive.vuw.ac.nz/bitstream/handle/10063/3179/thesis.pdf?sequence=8> [<https://perma.cc/Q3VD-3WU5>] [hereinafter McFall, A Comparative Study].

56. See Schmidt, *supra* note 52, at 5 (defining the Western concept of “transsexual” as a “person who [is] biologically one sex, but [feels] themselves to be the ‘opposite’ gender”); Emily Blincoe, Sex Markers on Birth Certificates: Replacing the Medical Model with Self-Identification, 46 Victoria U. Wellington L. Rev. 57, 58 (2015) (noting that terms such as fa‘afafine and māhū depart from Western conceptions of gender identity and “can only be understood within their cultural context.”); cf. Farran, *supra* note 50, at 137 (arguing that the “fa‘afafine and fakaleiti [of Tonga] do not neatly fit into Western categories of male, female, heterosexual, homosexual or transsexual, but are unique to the Pacific region” (citation omitted)).

57. See Schmidt, *supra* note 52, at 5; Blincoe, *supra* note 56, at 58; Farran, *supra* note 50, at 137.

māhū or fa‘afafine.<sup>58</sup> Because māhū and fa‘afafine do not seamlessly map to the “T” in LGBTQIA+ and have a more nuanced meaning than any of the remaining letters, this Essay sometimes uses the terms “third gender” and “sexual minorities.” Because these phrases are also Western constructs written in English, they are not perfect either.<sup>59</sup> For now, though, these terms are the best available given the limitations of language.<sup>60</sup>

With these linguistic caveats in mind, this Essay proceeds in five parts. Part I discusses pre-Western-contact Polynesian societies,<sup>61</sup> especially Tahiti, Hawai‘i, and Samoa, the latter two of which would become U.S. territories, with Hawai‘i eventually becoming a state. In particular, Part I describes how all these societies recognized and respected third-gender individuals. Part II discusses why American Samoa is now the only part of the United States that does not recognize gender-neutral marriages. American Samoa prevents both same-sex couples and fa‘afafine–male couples from exercising their constitutional right to marry.<sup>62</sup> This is a function of territorial law, including the *Insular Cases*.<sup>63</sup>

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58. Carol E. Robertson, The Māhū of Hawai‘i, 15 *Feminist Stud.* 312, 314 (1989) (noting that “the *māhū* phenomenon . . . defies reduction to any of the notions of gender familiar to us in the West”).

59. Using Western words to describe Polynesian concepts can privilege the Western understanding and devalue Polynesian identity. Linda L. Ikeda, Re-Visioning Family: *Māhūwahine* and Male-to-Female Transgender in Contemporary Hawai‘i in *Gender on the Edge: Transgender, Gay, and Other Pacific Islanders*, supra note 49, 135, 137–38 (observing that “juxtaposing an indigenous term with a Western understanding[] arguably serve[s] to privilege the Western understanding and render the ‘alternative’ indigenous understandings unintelligible, except in translation or as borrowings”). Some commentators reject the terminology of “sexual minorities.” See Adam R. Chang, A Non-Native Approach to Decolonizing Settler Colonialism Within Hawaii’s LGBT Community, 14 *Asian-Pac. L. & Pol’y J.* 132, 144 (2013) (opposing the term “sexual minority” because “[c]ategorizing *aikāne* and *māhū* as a ‘sexual minority’ disenfranchises Native LGBT people in both the Hawaiian and non-Native community because ‘minority’ is by default a group that is ‘less than’”).

60. The evolving concept of “genderfluidity” may be more appropriate than any of the letters in the current sexuality acronym. But while identifying as “genderfluid” has the advantage of flexibility for individuals uncomfortable pegging their sexuality to a single letter, many fa‘afafine see themselves as part of a distinct, long-lived identity within Samoan society and culture. See Chang, supra note 59, at 142.

61. Although most of these societies would evade American colonization—either by retaining their independence or being colonized by another Western power—their histories are important to appreciating the near universality of sexual diversity across the South Pacific. See infra Part I.

62. It would be inaccurate to describe a marriage between a man and a fa‘afafine or between a woman and a fa‘afafine as a same-sex marriage because a fa‘afafine is neither a man nor a woman but a third gender. Schmidt, supra note 52, at 44–47. When appropriate, this Essay uses the phrase gender-neutral marriage to refer to the right protected by *Obergefell v. Hodges*, 576 U.S. 644 (2015), for individuals to marry the adult of their choice regardless of gender.

63. Ian Tapu, Note, Is It Really Paradise: LGBTQ Rights in the U.S. Territories, 19 *UCLA Dukeminier Awards J.* 273, 279 (2020) (“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* . . .”).

Part III discusses how American Samoa became a U.S. territory and how the *Insular Cases* operate to prevent American Samoans from automatically receiving the protections of the U.S. Constitution. Although the *Insular Cases* never considered the constitutional rights of sexual minorities, these cases nonetheless have important implications for the fa'afafine. Part III also makes the case for why *Obergefell* should apply to American Samoa despite the *Insular Cases*.

Part IV examines the inherent unfairness of allowing the 1901 *Insular Cases* to prevent fa'afafine from having marriage rights in the 2020s. American Samoa is the only American territory or state that prohibits fa'afafine from marrying their intended husbands. Yet American Samoa is precisely the communal and ancestral land that is most important and sacred to the fa'afafine. While litigation for marriage equality defined the LGBT movement in the United States at the beginning of the twenty-first century, because of its territorial status and related constraints, such litigation is less likely to occur and to be successful in American Samoa. This denial and delay of constitutional rights is an affront to the dignity of fa'afafine and other sexual minorities in American Samoa.

Part V highlights the broader issue of how to protect minority rights in the shadow of colonialism. Expanding marriage equality to American Samoa over the opposition of local leaders arguably smacks of legal imperialism. While a seemingly narrow issue, the denial of marriage rights in American Samoa is a microcosm of the larger tension between empire and democracy, between colonialism and self-determination. Part V explains why, in the context of the individual right to marry, constitutionalism trumps self-rule.

The issue of marriage equality has important implications for how the U.S. Constitution should apply to U.S. territories. This Essay advances three points. First, it exposes an unappreciated harm caused by the *Insular Cases*: the denial of minority rights in U.S. territories, in this case the constitutional right to gender-neutral marriage in American Samoa.

Second, the Essay makes the case for why *Obergefell* protects the marriage rights of sexual minorities in American Samoa. Although the *Insular Cases* present a hurdle to marriage equality, the barrier is not insurmountable. But because of the *Insular* framework, the legal issues are unnecessarily complicated. And even if the challengers win, the litigation process imposes an unacceptable burden on sexual minorities seeking constitutional protections.

Third, the Essay situates these above discussions in the context of the larger issue of self-determination of U.S. territories. What does it mean for the United States to exert control over a territory? On the surface, a tension seems to exist between the importance of recognizing the fundamental right of marriage equality and the importance of respecting self-determination in a territory. When a territory declines to recognize a

constitutional right—such as marriage equality in American Samoa—should federal officials (whether Congress or Article III judges) override local decisionmakers? This Essay argues that when the right is fundamental and personal, the answer is affirmative, even though there is a countervailing interest in territorial self-determination.

### I. SEXUAL IDENTITIES IN AMERICAN POLYNESIA

For better or worse, most current understanding of precontact Polynesian societies comes from the contemporaneous accounts of visiting Westerners.<sup>64</sup> European explorers made their first sustained and well-documented contacts with Polynesian societies in the late eighteenth century. The captains, sailors, missionaries, and sundry Western visitors recorded and detailed their interactions with native populations. Some of the most important records were generated by the crews commanded by Captain Bligh in Tahiti and Captain Cook in the Hawaiian Islands.<sup>65</sup>

Sex between two people with male anatomy was common in Polynesian societies<sup>66</sup> and generally took one of two forms. First, Polynesian societies recognized a third gender—the fa’afafine in Samoa and the mähū in Hawai’i and Tahiti—in which individuals with male genitals presented as women, including dressing as women, working as women, and, in many cases, having sexual relations with men.<sup>67</sup> Second, men who presented as men formed relationships with each other that often included sex. For example, male Hawaiian leaders engaged in same-sex relationships known as aikāne, which generally had both social and sexual components.<sup>68</sup>

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64. Robert J. Morris, *Aikāne: Accounts of Hawaiian Same-Sex Relationships in the Journals of Captain Cook’s Third Voyage (1776–80)*, 19 *J. Homosexuality* 21, 44 (1990) [hereinafter Morris, *Aikāne*] (“Much of our received knowledge and interpretation of pre-Contact Hawaii, imperfect as it may be, has come through the lens of non-Hawaiians, beginning with the European frame of reference.”).

65. See *infra* section I.A (discussing these historical sources).

66. David F. Greenberg, *The Construction of Homosexuality* 60 (1988) (collecting sources that “indicate that [same-sex sexual activity] was common in Hawaii before contact, at least among the aristocracy”).

67. See *infra* notes 69–90 and accompanying text.

68. J. Kēhaulani Kauanui, *Paradoxes of Hawaiian Sovereignty: Land, Sex, and the Colonial Politics of State Nationalism* 161–63 (2018) [hereinafter Kauanui, *Paradoxes of Hawaiian Sovereignty*] (discussing the historical prevalence and social function of aikāne in Hawai’i); see also *id.* at 156 (“The aikāne was a same-sex intimate friendship that typically included sexual relations within the chiefly class and also among the maka’āinana.”); Morris, *Aikāne*, *supra* note 64, at 40 (noting that “the *aikāne* concept, with its homosexual content, was not localized on the Big Island”); Sean M. Smith, *The “Hawaiianness” of Same-Sex Adoption*, 30 *U. Haw. L. Rev.* 517, 532 (2008) (“Historical evidence indicates at least that same-sex, or *aikāne*, relationships were commonplace and accepted in pre-1778 Hawaiian society.”) (citing Lilikalā Kame’eleihiwa, *Native Land and Foreign Desires* 161 (1992)).

A. *Of Māhūs and Fa'afafine*

The first Western reports of third-gender individuals in Polynesia came from late eighteenth-century explorers and missionaries who visited Tahiti and observed men who dressed as women, performed the labor of women, and engaged in sex with men.<sup>69</sup> Captain William Bligh—infamous captain of the *Bounty*<sup>70</sup>—wrote about the men he referred to as “Mahoos,” who “lived, observed the same ceremonies, and eat as the Women did” and who were “kept with the Women solely for the car[.]esses of the men.”<sup>71</sup> Upon meeting a young māhū, Captain Bligh noted that “Women treat him as one of their Sex, and he observed every restriction that they do, and is equally respected and esteemed.”<sup>72</sup>

James Morrison, who had been stranded on Tahiti in 1789 following the mutiny on the *Bounty*,<sup>73</sup> wrote that the māhūs plucked their beards and dressed as women, danced and sang as women, had effeminate voices, made cloth, and performed all manner of women’s labor.<sup>74</sup> He also noted that māhūs were “esteemed Valuable friends” who “[c]onverse[d]” with men as women did, a euphemism that Morrison seemingly used for sexual activity.<sup>75</sup> Western visitors reported māhūs performing fellatio on their fellow Tahitians.<sup>76</sup> In at least some cases, European sailors mistook māhūs for women, pursued them as sexual partners, and then were shocked to learn the truth, much to the amusement of the Indigenous hosts who delighted in the foreigners’ confusion and bewilderment.<sup>77</sup>

69. See 2 William Bligh, *The Log of the Bounty* 16–17 (Owen Rutter ed., 1937); Douglas L. Oliver, *Ancient Tahitian Society* 369 (1974).

70. See Caroline Alexander, *Captain Bligh’s Cursed Breadfruit*, *Smithsonian Mag.* (Sept. 2009), <https://www.smithsonianmag.com/travel/captain-blighs-cursed-breadfruit-41433018/> [https://perma.cc/BJ2X-U3NS] (describing the “infamous” mutiny against Bligh as “one of the great sea sagas of all time”).

71. Bligh, *supra* note 69, at 17.

72. *Id.*

73. Robert I. Levy, *The Community Function of Tahitian Male Transvestitism: A Hypothesis*, 44 *Anthropological Q.* 12, 12 (1971).

74. Oliver, *supra* note 69, at 370 (quoting James Morrison, *The Journal of James Morrison, Boatswain’s Mate of the Bounty, Describing the Mutiny and Subsequent Misfortunes of the Mutineers, Together With an Account of the Island of Tahiti* 238 (Owen Rutter ed., 1935)); see also James Wilson, *A Missionary Voyage to the Southern Pacific Ocean, Performed in the Years 1796, 1797, 1798, in the Ship Duff, Commanded by Captain James Wilson* 157 (1799) (“In various districts of the island there are men who dress as women; work with them at the cloth; are confined to the same provisions and rule of eating and dressing; may not eat with the men, or of their food, but have separate plantations for their peculiar use.”).

75. See Oliver, *supra* note 69, at 370 (quoting James Morrison, *The Journal of James Morrison, Boatswain’s Mate of the Bounty, Describing the Mutiny and Subsequent Misfortunes of the Mutineers, Together With an Account of the Island of Tahiti* 238 (Owen Rutter ed., 1935)).

76. *Id.* at 371–72.

77. See *id.* at 369–70 (citing George Mortimer, *Observations and Remarks Made During a Voyage* 47 (1791)) (relating a firsthand account from the late eighteenth century).

Within Tahitian society, stable relationships between a man and a mähü were common. Tahitian high chiefs kept relations with mähüs.<sup>78</sup> At least some Polynesian chiefs, such as Pomare II of Tahiti, lived with their mähüs, essentially entering into marriages with them.<sup>79</sup>

Although less documented than in Tahiti, Hawai‘i had a similar tradition of mähüs.<sup>80</sup> The historic reverence of mähüs across Polynesian cultures can be witnessed today in four boulders in Waikiki, Hawai‘i that commemorate the sixteenth-century visit of four mähüs from Tahiti who reportedly performed healing miracles for the Hawaiians.<sup>81</sup> The Tahitian mähüs placed the large stones at Waikiki after “transferring their *mana*, or spiritual power, to them before they returned to their homeland.”<sup>82</sup> As in Tahiti, the “*mähü* were given a specific place in traditional Hawaiian society for their healing skills, their ability to simultaneously occupy both male and female spaces, and their talent in *hula* and *mele* (chanting and song), among other attributes.”<sup>83</sup>

Similarly, the fa‘afafine have long been open fixtures in Samoan society.<sup>84</sup> In her bestselling and genre-defining 1928 book, *Coming of Age in Samoa*, American cultural anthropologist Margaret Mead described Sasi, an individual she encountered who was likely fa‘afafine.<sup>85</sup> Mead reported

78. Wilson, *supra* note 74, at 200–01.

79. See Greenberg, *supra* note 66, at 58 (noting that the “principal chiefs” in late eighteenth-century Tahiti “took [mähüs] as wives”); Oliver, *supra* note 69, at 372 (“The prominent chief Pomare II was much addicted to homosexual practices, his favorite having been an individual (perhaps a *mahu*) named Toetoe, with whom, according to the Reverend Crook, he once ‘lived in a horrid manner at Matavai.’” (quoting William Pascoe Crook, *Extract From the Journal of W.P. Crook Containing Particulars of His Visit to the Marquesas* (Mar. 2, 1821), in *Transactions of the Missionary Society*, London (October) (1826))).

80. Will Roscoe, *Sexual and Gender Diversity in Native America and the Pacific Islands*, in *Identities and Place: Changing Labels and Intersectional Communities of LGBTQ and Two-Spirit People in the United States* 58, 63 (Katherine Crawford-Lackey & Megan E. Springate eds., 2020) (“In native Hawaii, males who preferred the work of women and formed relationships with other men were called mähü, a status present in several Polynesian societies.”).

81. See *id.* at 65.

82. *Id.* at 65–66.

83. Ikeda, *supra* note 59, at 138.

84. Greenberg, *supra* note 66, at 60.

85. Margaret Mead, *Coming of Age in Samoa: A Psychological Study of Primitive Youth for Western Civilization* 148 (1928). Mead did not use the word “fa‘afafine,” but her description is clear. Some fa‘afafine, notably Ashleigh McFall, have critiqued Mead for treating Sasi as homosexual instead of fa‘afafine. McFall, *A Comparative Study*, *supra* note 55, at 14 (arguing, in a discussion of Mead’s misrepresentations of Samoan culture, that Mead’s description of Sasi as homosexual and not fa‘afafine was erroneous).

Some later anthropologists, most notably New Zealander Derek Freeman, sought to challenge the accuracy of Mead’s research on Samoan sexual practices. See, e.g., Derek Freeman, *The Fateful Hoaxing of Margaret Mead: A Historical Analysis of Her Samoan Research* 149 (1999) (arguing that Mead’s research timeline was “an impossibly brief period in which to have completed the systemic research on which these sweeping generalizations

how Sasi did women's work, made passes at males, and "maintained a more easy-going friendship with [girls] than any other boy on the island."<sup>86</sup> Early evidence indicates that this third gender was institutionalized in precontact Samoa, as it was in Hawai'i.<sup>87</sup> Notably, the whakawahine, hinehi, and hinehua of the Māori people, the fakaleitī of Tonga, and the akava'ine of the Cook Islands are all variants of the mähū and fa'afafine identity.<sup>88</sup> Third-gender individuals were prevalent throughout Polynesia,<sup>89</sup> and the region has a rich history of respecting them.<sup>90</sup>

Some scholars have incorrectly inferred that fa'afafine must be a modern construct in Samoa because Western missionaries did not discuss them in their reports.<sup>91</sup> Any such inference is flawed. Compared to Captain Bligh and his crew's reports of mähūs in Tahiti, the explorer and

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could be validly based"). See generally Derek Freeman, *Margaret Mead and Samoa: The Making and Unmaking of an Anthropological Myth Refuted* (1983) (critiquing Mead's research). The consensus among modern anthropologists, however, supports Mead's work. See, e.g., Paul Shankman, *The Trashing of Margaret Mead: Anatomy of an Anthropological Controversy* 11–12 (2009) ("There is now a large body of criticism of Freeman's work . . . in which Mead, Samoa, and anthropology appear in a very different light than they do in Freeman's work. Indeed, the immense significance that Freeman gave his critique looks like 'much ado about nothing' to many of his critics.").

Regardless of the competing views on Mead's scholarship and legacy, many current Samoans, including fa'afafine, are now reticent to cooperate with modern anthropologists and ethnographers. McFall, *A Comparative Study*, supra note 55, at 16 ("Mead's fieldwork has undermined the trust attributed to ethnographers . . . [and] has had a negative lasting impact on Samoan people in general."). Mead's work has made Samoans wary of foreign "researchers, especially those who evidence any interest in sexuality." Schmidt, supra note 52, at 23 ("[S]uch research is usually a compounding of the processes of exoticizing and eroticizing the Pacific Islands that started with the voyages of Captain Cook . . .").

86. Mead, supra note 85, at 148.

87. Greenberg, supra note 66, at 60 (citing Bengt Danielsson, *Love in the South Seas* 450 (1956) (erroneous citation corrected)) ("The translation of *mähū* as 'gentle' or 'feminine' in early missionary dictionaries for Samoa and Hawaii suggests that the role was institutionalized in both places.").

88. Blincoe, supra note 56, at 58 ("These terms can only be understood within their cultural context and are not translations of English concepts.").

89. Other regions of the South Pacific also have third gender individuals and customs, but those societies are significantly less studied than Polynesia. Kalissa Alexeyeff & Niko Besnier, *Gender on the Edge: Identities, Politics, Transformations*, in *Gender on the Edge: Transgender, Gay, and Other Pacific Islanders*, supra note 49, at 1, 21–24 (noting the lack of scholarship on nonheteronormative sexuality in the Melanesian region, Micronesia, and Papua New Guinea).

90. See Besnier, supra note 48, at 285 (noting that Polynesian "intermediate" gender categories have "captivated Westerners' curiosity" for centuries and that "the adoption by certain individuals of attributes associated with a gender other than their own is deeply embedded in dynamics of Polynesian cultures and societies"); Elliston, supra note 53, at 36 ("Polynesians commonly represent *mähū* as 'natural,' with their 'naturalness' explained and authorized in a variety of ways that draw on and use 'history.' . . . [T]he 'naturalness' of *mähū* is commonly authorized by reference to Polynesian cultural history and 'tradition.'").

91. McFall, *A Comparative Study*, supra note 55, at 84 (critiquing the arguments of other scholars and noting research that demonstrates the historical existence of fa'afafine in Samoan society).



missionary records from nineteenth-century Samoa do not regale readers with tales of the fa'afafine.<sup>92</sup> But contemporaneous Western reports exist. Notably, in the mid-1800s, Reverend George Pratt of the London Missionary Society identified fa'afafine in Samoa and suggested that they had sexual relations with Samoan men.<sup>93</sup> Moreover, the fa'afafine may have gone unaccounted for in other seafarers' journals for many reasons, including Westerners' inability to recognize fa'afafine for what they were.<sup>94</sup> Upon having mähūs identified and explained to him by his Tahitian hosts, Englishman John Turnbull described mähūs as "so completely . . . unsexed from their manhood, that had they not been pointed out to me, I should not have known them but as women."<sup>95</sup>

A void in the historical record does not prove an absence of third-gender individuals in Polynesian societies.<sup>96</sup> Notably, although many early explorers extensively documented the prominence of mähūs in Tahiti, the historical record fell silent for the next century and a half until Western researchers again turned their attention to the role of the mähū in Tahitian society.<sup>97</sup> This is not entirely surprising given that the early chroniclers of Tahitian mähūs lamented that they were "obliged here to draw a veil over other practices too horrible to mention."<sup>98</sup> In Tahiti, Englishman John Turnbull described mähūs as "a set of men . . . whose open profession is of such abomination, that the laudable delicacy of our language will not admit it to be mentioned."<sup>99</sup> Similarly, Christian

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92. Besnier, *supra* note 48, at 294 ("In contrast to the copious early accounts of mähū in Tahiti and, more equivocally, of comparable categories in Hawaii, the Marquesas and New Zealand, no mention is made of the phenomenon in Western Polynesia, despite the fact that it is equally conspicuous in all regions today.").

93. McFall, *A Comparative Study*, *supra* note 55, at 18 (noting Pratt's "claim[] that the [fa'afafine] identity is a sexual one in which a man has sex with another man").

94. See *id.* at 18–19 ("American Samoa's well known fa'afafine, Talitiga Dr. Venasio Sele, asserts that fa'afafine were present at the arrival of the missionaries to Samoa but they all looked the same to the missionaries . . . and perhaps did not stand out as different."); see also Besnier, *supra* note 48, at 294 ("The absence of historical documentation on gender liminality in Western Polynesia does not necessarily mean that it is a post contact phenomenon. While the mention of a social category in the historical record . . . [shows] it was present at the time of contact, little can be inferred from historical silence.").

95. John Turnbull, *A Voyage Around the World in the Years 1800, 1801, 1802, 1803, and 1804; in Which the Author Visited the Principal Islands in the Pacific Ocean and the English Settlements of Port Jackson, and Norfolk Island* 308 (1810).

96. Of course, any Indigenous written record of fa'afafine would be sparse because Samoan history was passed down through oral traditions. McFall, *A Comparative Study*, *supra* note 55, at 93 (noting "the problems of trying to confirm the existence of both fa'afafine and whakawahine identities prior to colonization . . . given that both Maori and Samoan cultures were oral before the arrival of missionaries").

97. Besnier, *supra* note 48, at 295 ("The initial flurry of historical testimonies on Tahitian gender liminality in the early voyager and missionary literature was followed by a century and a half of relative silence on the subject.").

98. Wilson, *supra* note 74, at 201.

99. Turnbull, *supra* note 95, at 308.

missionaries excised references to Hawaiian mähūs from their writings in order to suppress interest in such “immoral practices.”<sup>100</sup> Thus, even if they recognized the nature of Samoan fa‘afafine, Christian missionaries were reticent to report their findings.<sup>101</sup> Yet, despite these limitations, much research documents the long-lived presence of fa‘afafine in Samoa.<sup>102</sup>

B. *Fa‘afafine in Modern American Samoa*

The London Missionary Society—described as “an extraordinary mixture of Bible Christianity, fussily Puritan morality and lower-middle-class economic ideas and aspirations”—landed in Samoa in the 1830s, intent on conversion.<sup>103</sup> Non-Samoan Christians improperly conflated fa‘afafine identity with homosexuality, despite the fact that gender and sexual identity are distinct.<sup>104</sup> Under pressure from Christian missionaries, Samoans began to adopt heteronormative attitudes that devalued the contributions of the fa‘afafine.<sup>105</sup> This process of subordination parallels the Hawaiian ex-

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100. Roscoe, *supra* note 80, at 63 (“Christian missionaries and travelers, in their zeal to suppress what they considered immoral practices, recorded little about mähū, but a vibrant oral tradition credits them with a variety of significant roles, from healing to caretaking, naming infants, and above all teaching and leading the hula dance.”). Scholar Robert J. Morris has also noted this phenomenon:

In 1848, when Hawai‘i Foreign Minister R. C. Wyllie asked the missionaries what they knew about the “unnatural crime” of sodomy among the natives, they replied that it was “doubtless very prevalent,” though difficult to learn about because “they have fled to hide themselves in darkness, away from the light of the pure gospel.”

Robert J. Morris (Kapā‘ihiahilina), *Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture & Values for the Debate About Homogamy*, 8 *Yale J.L. & Humans* 105, 130 (1996) [hereinafter Morris, *Configuring the Bo(u)nds of Marriage*] (quoting *Answers to Questions Proposed by His Excellency, R. C. Riley, His Majesty’s Minister of Foreign Relations, and Addressed to All the Missionaries in the Hawaiian Islands* 65 (R. Armstrong, L. Chamberlain & S.N. Castle eds., Honolulu 1848)).

101. Moreover, the mismatch between Western and Polynesian cultures and values helps explain this void. Still today, English lexicon lacks the words to accurately explain fa‘afafine; early explorers and missionaries were even less equipped to describe fa‘afafine identity with nineteenth-century vocabulary. McFall, *A Comparative Study*, *supra* note 55, at 23 (“More recent research rejects western labels . . . . Translating fa‘afafine into English is difficult.”).

102. *Id.* at 84 (listing sources by fa‘afafine researchers that document the historical existence of fa‘afafine).

103. Joseph Kennedy, *The Tropical Frontier: America’s South Sea Colony* 5 (2009) (quoting Clinton Hartley Grattan, *The United States and the Southwest Pacific* 88 (1961)).

104. Elliston, *supra* note 53, at 34 (noting that an individual fa‘afafine or mähū may be attracted to men, women, or both); see also McFall, *A Comparative Study*, *supra* note 55, at 26 (“The arrival of Christianity in Samoa and American Samoa changed the lives of the Samoan people . . . . The strong association of homosexuality with fa‘afafine created more intolerance in the culture, therefore suggesting fa‘afafine were now looked on as sinful and evil deviants.” (citations omitted)).

105. See McFall, *A Comparative Study*, *supra* note 55, at 26 (“When Christianity taught the evils of homosexuality to the Samoan people . . . , it directed the attention to

perience in which Western missionaries colonized the region while demoting the status of *māhūs*, rendering them virtually invisible.<sup>106</sup> But in recent years, Polynesia's third-gender culture has experienced a renaissance.<sup>107</sup>

Today, *fa'afafine* play several important roles in Samoan society. Like *māhūs* in Hawai'i and Tahiti, *fa'afafine* help the Samoan economies.<sup>108</sup> They perform in a variety of entertainment venues, including drag performances, fashion shows, and cabarets, bolstering the tourism industry upon which the Samoan economies depend.<sup>109</sup> In both Samoas—sovereign and American—*fa'afafine* beauty contests are regularly held, with proceeds donated to charities like rest homes to show support for “the ideologies of *fa'aSamoa* that espouse caring for the elderly.”<sup>110</sup> In sovereign Samoa, “[t]he social status of the [*fa'afafine*] pageants is both evidenced and reinforced by the fact that they are sponsored by local businesses, assisted by volunteers from the highly respected Peace Corps, and patronised by those with high political and cultural status.”<sup>111</sup> In addition to jobs in entertainment, *fa'afafine* are also employed as teachers and office workers, dressing in traditional Samoan women's clothing and wearing flowers in their hair, tucked behind their ears.<sup>112</sup>

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*fa'afafine* . . . . The strong association of homosexuality with *fa'afafine* created more intolerance in the culture, therefore suggesting *fa'afafine* were . . . sinful and evil deviants . . . .” (citations omitted)).

106. See Kauanui, *Paradoxes of Hawaiian Sovereignty*, supra note 68, at 181 (noting that the term “*māhū*” has “been used as a derogatory epithet,” which may “signal[] a diminished social status within Hawai'i at large . . . and/or within the [Native Hawaiian] community more specifically”); Meldrick Ravid, *The Māhū*, *Manoa Now* (Feb. 11, 2018), [https://www.manoanow.org/kaleo/special\\_issues/the-m-h/article\\_ba1911540dd9-11e8-ba11-bbb0d1090a78.html](https://www.manoanow.org/kaleo/special_issues/the-m-h/article_ba1911540dd9-11e8-ba11-bbb0d1090a78.html) [<https://perma.cc/PF6H-8ZD4>] (noting that in Hawai'i the word “*māhū*” became a “derogatory term . . . after missionaries set foot on the islands”).

107. Alexeyeff & Besnier, supra note 89, at 7 (noting the resurgence of *māhū* culture); see also Robertson, supra note 58, at 314–15 (“Because the *māhū* embody the synthesis of the female/male principle in Hawai'ian culture and cosmology, they have been intimately associated with the Hawai'ian renaissance movement and the revival of the ancient *hula* tradition.”).

108. “Economies” is used to reflect that *fa'afafine* serve these roles in both American Samoa and sovereign Samoa.

109. Schmidt, supra note 52, at 92 (noting the practice of *fa'afafine* pageants during the annual Teuila Festival as well as the news coverage of various *fa'afafine* performances); Tapu, supra note 63, at 308 (“They have developed a niche for entertaining tourists and locals with productions such as drag shows, fashion parades and cabarets.”). Even though *fa'afafine* may perform in “drag” shows, *fa'afafine* are not drag queens because “*fa'afafine* femininity . . . is experienced as ‘natural’, not ‘drag’, allowing *fa'afafine* to ‘legitimately’ lay claim to that femininity.” Schmidt, supra note 52, at 65.

110. Schmidt, supra note 52, at 93; see also Kris Poasa, *The Samoan Fa'afafine: One Case Study and Discussion of Transsexualism*, 5 *J. Psych. & Hum. Sexuality* 39, 42 (1992) (discussing a *fa'afafine* from sovereign Samoa who “is a two-time winner of the American Samoan Drag Queen contest, which is held annually on the island to raise money for charities”).

111. Schmidt, supra note 52, at 91.

112. Poasa, supra note 110, at 40 (discussing sovereign Samoa).

On a more personal level, many fa'afafine continue to perform tasks associated with femininity in Samoan culture, including house cleaning, washing, cooking, and weaving mats, as well as helping to raise children and caring for the sick and elderly.<sup>113</sup> In sovereign Samoa, “even in fairly urban villages, many fa'afafine continue to serve their 'aiga traditionally. These roles give them a source of pride, and they are accountable as any other member of the family and society.”<sup>114</sup> This is consistent with Polynesian customs. Today in the Society Islands of French Polynesia, for example, māhūs are considered perfectly natural and a valuable part of Polynesian cultural history.<sup>115</sup>

Today, fa'afafine in American Samoa can do almost everything that American Samoan women can do.<sup>116</sup> But because of local reticence and American Samoa's territorial status, the fa'afafine are denied the constitutional right to marriage that all other Americans enjoy. Part II explains why.

## II. THE DOWNSIDE OF AMERICAN SAMOAN EXCEPTIONALISM

American Samoa is exceptional. But sometimes that exceptionalism comes at a cost. American Samoa's leaders, political structure, and lack of a federal court have coalesced to make American Samoa the least hospitable place in the nation for marriage equality. This Part explores how America's other territories easily transitioned to marriage equality. Guam, the CNMI, and the USVI recognized gender-neutral marriages quickly and with little fanfare. Puerto Rico's evolution entailed litigation but was ultimately straightforward. The unique features of American Samoa present unique obstacles to marriage equality. This Part explains how American Samoan leaders have denied fa'afafine the right to marry their male partners despite the Supreme Court's opinion in *Obergefell* that brought marriage equality to all other U.S. jurisdictions.

### A. *Four Territorial Routes to Marriage Equality*

In *Obergefell*, the Supreme Court recognized a constitutional right to gender-neutral marriage.<sup>117</sup> The Justices in the *Obergefell* majority did not have fa'afafine in mind when they held that state laws limiting marriage to couples comprising one man and one woman were unconstitutional.

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113. McFall, A Comparative Study, *supra* note 55, at 61.

114. Schmidt, *supra* note 52, at 40.

115. Elliston, *supra* note 53, at 36.

116. McFall, A Comparative Study, *supra* note 55, at 61 (discussing the broad range of “womanly” roles fa'afafine identity encompasses).

117. Although the opinion is generally interpreted as permitting same-sex marriage, *Obergefell* recognized the right to gender-neutral marriages. See *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (“[T]he right to marry is a fundamental right inherent in the liberty of the person . . .”). This Essay uses the phrase gender-neutral marriage because a marriage between a man and a fa'afafine is not a same-gender one.

Nonetheless, by invalidating gender-specific marriage laws, the opinion should protect the rights of fa'afafine to marry the man, woman, or fa'afafine of their choice.<sup>118</sup>

Although the *Obergefell* opinion automatically protected Americans living in all U.S. states, the *Insular Cases* caused Americans living in territories to face additional hurdles.<sup>119</sup> Of the four U.S. territories that recognize gender-neutral marriages, each took a distinctly different path to marriage equality. A federal district judge in Guam struck down that territory's same-sex marriage ban mere weeks before the Supreme Court's *Obergefell* opinion, making Guam the first U.S. territory to recognize same-sex marriages.<sup>120</sup> The federal district court reasoned that it was bound by the Ninth Circuit's opinion in *Latta v. Otter*,<sup>121</sup> which had struck down same-sex marriage bans in Idaho and Nevada for violating the Equal Protection Clause.<sup>122</sup> Guam's legislators subsequently amended their relevant statute to define marriage as "the legal union between two persons without regard to gender."<sup>123</sup>

The CNMI transitioned to marriage equality effortlessly following the *Obergefell* opinion. The leadership of the CNMI quickly recognized marriage equality without any litigation to determine whether the right to marriage had been incorporated into the territory.<sup>124</sup> The first same-sex marriage in the CNMI took place in the capital of Saipan one month after *Obergefell*.<sup>125</sup> Perhaps surprisingly, since the *Obergefell* decision, same-sex marriages in the CNMI have outnumbered opposite-sex marriages,<sup>126</sup> to

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118. Historically, some fa'afafine did marry women, sometimes retaining their fa'afafine dress and behavior, leading some of these women to jest "that fa'afafine were excellent husbands because they did all the housework." Schmidt, *supra* note 52, at 72; see also Paul L. Vasey, David S. Pocock & Doug P. VanderLaan, Kin Selection and Male Androphilia in Samoan Fa'afafine, 28 *Evolution & Hum. Behav.* 159, 161 (2007) ("There are no social prohibitions against fa'afafine marrying women and having children, but examples of this are very rare (approximately two to three reported cases) . . . . Nonetheless, [such fa'afafine] are still considered to be fa'afafine by members of the fa'afafine community . . . .").

Currently, many fa'afafine would consider marriage to a woman as "akin to lesbianism." Schmidt, *supra* note 52, at 82. Most fa'afafine are sexually attracted to men. *Id.* Finally, although fa'afafine do not date or engage in sexual relations with each other, *id.*, and probably would not marry each other, they should have the constitutional right to do so.

119. Tapu, *supra* note 63, at 279.

120. *Aguero v. Calvo*, No. 15-00009, 2015 WL 3573989, at \*2 (D. Guam June 8, 2015); Tapu, *supra* note 63, at 301.

121. *Aguero*, 2015 WL 3573989, at \*2 (citing *Latta v. Otter*, 771 F.3d 465 (9th Cir. 2014)) ("[T]he application of *Latta* in this case is not in question.").

122. *Latta*, 771 F.3d at 476.

123. Guam Marriage Equality Act of 2015, Guam Pub. L. 33-65, § 3 (2015) (codified at 10 Guam Code Ann. § 3207(h) (2021)).

124. Tapu, *supra* note 63, at 310.

125. *Id.*

126. Same-Sex Marriage Top Licenses on CNMI's Saipan, Radio N.Z. (Jan. 7, 2019), <https://www.rnz.co.nz/international/pacific-news/379577/samesex-marriages-top-licences->

the point that during the first three quarters of 2018, there were three times more same-sex marriages than opposite-sex ones.<sup>127</sup>

The day after the Supreme Court announced its *Obergefell* opinion, the presiding judge of the U.S. Virgin Islands' Superior Court promised that the territory would follow the opinion and would make its marriage forms "non-gender specific."<sup>128</sup> The USVI's governor followed suit almost a week later, issuing an executive order that required the territory's agencies to permit and recognize same-sex marriage.<sup>129</sup> As in the CNMI, Americans in the USVI did not need to take any further action against their leaders to ensure marriage equality; they merely had to obtain a marriage license, now easily done.<sup>130</sup>

In contrast to the first three U.S. territories that embraced gender-neutral marriage with minimal conflict, Puerto Ricans had to engage in post-*Obergefell* litigation. Before *Obergefell*, a group of Puerto Rico's legislators fought to defend the territory's same-sex marriage ban in federal court in *Conde-Vidal v. Garcia-Padilla*.<sup>131</sup> The many opinions comprising the *Conde-Vidal* litigation straddled the Supreme Court's opinion in *Obergefell*.<sup>132</sup> Before *Obergefell*, the federal district judge in *Conde-Vidal* invoked the lack of binding federal precedent in his opinion upholding Puerto Rico's law.<sup>133</sup> After *Obergefell*, the First Circuit vacated the district court's opinion and noted it "agree[d] with the parties' joint position that the ban is unconstitutional. Mandate to issue forthwith."<sup>134</sup> With all of the litigants agreeing that Puerto Rico's refusal to recognize same-sex marriage violated the U.S. Constitution, this should have been the end of the litigation.

Instead, the federal district judge ignored the First Circuit's mandate and discounted the new Supreme Court precedent whose absence it had

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on-cnmi-saipan [https://perma.cc/B2MS-CJTX] ("Same-sex marriages out-numbering heterosexual, or marriages between the opposite sex, have been a trend on Saipan the past couple of years since 2015 when the U.S. Supreme Court made it legal.").

127. *Id.* ("From January through September 2018, the mayor's office conducted a total of 96 same-sex marriages, 59 of which were female and 37 male. Within the same span, the office recorded only 31 heterosexual marriages.").

128. Jonathan Austin, Judge: V.I. Will Follow Gay Marriage Law, V.I. 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/QKN6-KQJ8].

129. Tapu, *supra* note 63, at 297.

130. See *id.* ("[L]itigation was not necessary to extend the Court's *Obergefell* ruling to the residents of the [U.S. Virgin Islands].").

131. 54 F. Supp. 3d 157, 167 (D.P.R. 2014), vacated and remanded *sub nom.* *Conde-Vidal v. Rius-Armendariz*, No. 14-2184, 2015 WL 10574261 (1st Cir. July 8, 2015).

132. See *id.*

133. He reasoned that "[b]ecause no right to same gender marriage emanates from the Constitution, the Commonwealth of Puerto Rico should not be compelled to recognize such unions." *Id.*

134. *Conde-Vidal*, 2015 WL 10574261, at \*1.

depended on in its previous opinion upholding Puerto Rico's same-sex marriage ban. Given the island's territorial status, the judge invoked *Insular* reasoning to assert that whether *Obergefell* applied to Puerto Rico depended on giving "due consideration of the underlying cultural, social and political currents that have shaped over five centuries of Puerto Rican history."<sup>135</sup> Without much analysis, the judge invoked the incorporation doctrine to hold that "the fundamental right to marry, as recognized by the Supreme Court in *Obergefell*, has not been incorporated to the juridical reality of Puerto Rico."<sup>136</sup> Ultimately, the federal district court in Puerto Rico read the *Insular Cases* restrictively, interpreting *Obergefell* as applying automatically only to states, not U.S. territories.<sup>137</sup> The First Circuit again reversed, reasoning that "the rights to due process and equal protection, as protected by both the Fourteenth and Fifth Amendments to the United States Constitution"<sup>138</sup>—which provided the basis for the Supreme Court's opinions in *Obergefell*<sup>139</sup> and *Windsor*<sup>140</sup>—"have already been incorporated as to Puerto Rico."<sup>141</sup>

Moreover, the First Circuit noted that, following the *Obergefell* opinion, all parties in the litigation agreed that Puerto Rico's same-sex marriage ban was unconstitutional and that the appellate panel had already issued its mandate, which the district judge disregarded and seemed to overrule. Observing that "[t]he district court's ruling errs in so many respects that it is hard to know where to begin,"<sup>142</sup> the appellate judges noted that the district judge misconstrued both constitutional law and federal procedure.<sup>143</sup> Suspiciously, the district judge seemingly tried to circumvent appellate review "by failing to enter a final judgment to

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135. *Conde Vidal v. Garcia-Padilla*, 167 F. Supp. 3d 279, 286 (D.P.R. 2016), rev'd sub nom. *In re Conde Vidal*, 818 F.3d 765 (1st Cir. 2016) (per curiam) (issuing a writ of mandamus ordering the District Court for the District of Puerto Rico to enter judgment for the petitioners).

136. *Id.* at 287.

137. *Id.* ("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.")

138. *In re Conde Vidal*, 818 F.3d at 769 (per curiam).

139. See *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty.")

140. In *United States v. Windsor*, the Supreme Court struck down the federal Defense of Marriage Act (DOMA), which defined marriage as exclusively opposite-sex for federal purposes, because "it violates basic due process and equal protection principles applicable to the Federal Government." 570 U.S. 744, 769 (2013).

141. *In re Conde Vidal*, 818 F.3d at 766 (per curiam).

142. *Id.*

143. See *id.* at 767 ("In ruling that the ban is not unconstitutional because the applicable constitutional right does not apply in Puerto Rico, the district court both misconstrued that right and directly contradicted our mandate.")

enable an appeal in ordinary course.”<sup>144</sup> The appellate panel thwarted this attempt by employing its mandamus jurisdiction to grant the parties’ petition and remitting the case to a different judge so that the original recalcitrant judge could not again try to block the First Circuit’s mandate.<sup>145</sup> Through all these machinations, three lessons stand out: First, prejudiced judges in U.S. territories may try to block marriage equality; second, prejudiced judges may use the *Insular Cases* as a tool to block civil rights more broadly; and third, because Puerto Rico maintains a federal district court assigned to a circuit court, the litigation process was relatively straightforward, and the district judge’s many errors could be rectified by the federal appellate court. The Puerto Rico district judge’s abuses of process—and the First Circuit’s correction—have important implications for American Samoa’s refusal to recognize gender-neutral marriage.

It’s clear that American Samoan leaders are unlikely to follow the paths of Guam, the Northern Mariana Islands, or the U.S. Virgin Islands—because they haven’t done so.<sup>146</sup> This inaction is why fa’afafine, as well as LGBT residents of American Samoa, find themselves in a legal limbo, unable to marry another adult with similar anatomy. In contrast to Guam, American Samoa does not fall within the jurisdiction of any federal circuit, so no circuit precedent binds it. Nor has the American Samoan legislature amended its marriage laws, as the Guam legislators did. In contrast to the leaders of the CNMI, American Samoan officials have neither performed nor committed to gender-neutral marriages.<sup>147</sup> Unlike the USVI, no local American Samoan judge has promised to follow *Obergefell* nor has the governor issued an appropriate executive order. If American Samoan officials wind up in court, they may be less likely to concede like the Puerto Rican anti-LGBT legislators did after the *Obergefell* opinion was announced. The following discussion explains why.

#### B. *Navigating Marriage Equality in American Samoa*

Although residents of American Samoa are currently denied their constitutional right to gender-neutral marriage, three paths to marriage equality are theoretically possible. First, Congress could enact legislation that extends *Obergefell* to American Samoa. The *Insular Cases* and the recent circuit cases rejecting birthright citizenship for American Samoans all make clear that Congress retains the power to make specific constitutional

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144. *Id.*

145. *Id.*

146. See *infra* notes 151–157 and accompanying text.

147. See David Cary, In Far-Flung US Territories, Gay Marriage Hasn’t Arrived, N.Y. Daily News (Mar. 14, 2015), <https://www.nydailynews.com/sdut-in-far-flung-us-territories-gay-marriage-hasnt-2015mar14-story.html> [<https://perma.cc/N5Z5-3AH6>] (noting that American Samoa does not recognize same-sex marriage despite having no formal ban).



rights applicable to U.S. territories.<sup>148</sup> The other U.S. territories, for example, have birthright citizenship because Congress enacted laws providing it.<sup>149</sup> Congressional action on marriage equality for American Samoans, in contrast, seems unlikely.<sup>150</sup> The issue is simply not salient to enough voters or members of Congress. To date, there has been no movement on this front.

Second, American Samoan leaders could acquiesce to the *Obergefell* holding, as officials in other U.S. territories did. This, too, is unlikely.<sup>151</sup> American Samoa maintains no legal protections based on sexual orientation and gender identity, meaning that sexual minorities can face discrimination in housing, lending, and access to public accommodations.<sup>152</sup> In 2015, the American Samoa Attorney General indefinitely delayed implementing marriage equality despite calls to do so after *Obergefell*.<sup>153</sup> This Essay contemplates that because of American Samoa's territorial status, its local leaders believe they can refuse to recognize gender-neutral marriages, whether performed in the territory or in a

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148. See *Fitisemanu v. United States*, 1 F.4th 862, 864 (10th Cir. 2021) (“Congress plays the preeminent role in the determination of citizenship in unincorporated lands, and . . . the courts play but a subordinate role in the process.”); see also *Tuaua v. United States*, 788 F.3d 300, 310 n.10 (D.C. Cir. 2015) (noting that Congress has the general authority to naturalize persons residing in the United States’ unincorporated territories).

149. *Fitisemanu*, 1 F.4th at 877 (“Residents of Puerto Rico, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands each enjoy birthright citizenship by an act of Congress.”).

150. Historically, Congress has not been hospitable to marriage equality or LGBT rights in general. Christopher R. Leslie, *The Geography of Equal Protection*, 101 *Minn. L. Rev.* 1579, 1610 (2017) (noting how “Congress and federal agencies have enacted unequivocally anti-gay laws and policies”).

151. Joyetter Luamanu, *Associate Minister Sounds Same Sex Marriage Alarm*, *Samoa Observer* (Nov. 29, 2017), <https://www.samoobserver.ws/category/samoa/7780> [<https://perma.cc/265B-DBPT>] (quoting the Associate Minister’s opposition to legalizing marriage equality: “I am somewhat comforted by the recent move by our country to be declared as a Christian State because [same-sex marriage] will never be allowed in Samoa”). Samoan opposition to marriage equality may reflect the same concern many Samoans have about foreign researchers “giving the outside world the impression that Samoa is a ‘gay paradise’, a perception the predominantly Christian Samoan community very much wish to avoid.” Schmidt, *supra* note 52, at 23.

152. Tapu, *supra* note 63, at 308 (“American Samoa also does not have sexual orientation and gender identity protections in housing, public accommodations, or credit and lending nondiscrimination laws.”); American Samoa’s Equality Profile, *Movement Advancement Project*, [https://www.lgbtmap.org/equality-maps/profile\\_state/AS](https://www.lgbtmap.org/equality-maps/profile_state/AS) [<https://perma.cc/6EPZ-Z2S8>] (last visited July 25, 2022) (presenting data on LGBTQ rights in American Samoa).

In contrast, the Supreme Court’s opinion in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)—which interpreted Title VII’s prohibition on sex discrimination in employment to apply to gender identity and sexual orientation—does apply to American Samoa because Title VII’s text explicitly provides so. 42 U.S.C. § 2000e(i) (2018) (defining “State[s]” to which the law applies as including American Samoa).

153. Sagapolutele & Kelleher, *supra* note 6 (discussing the American Samoan Attorney General’s reluctance to implement *Obergefell* because he claimed he “d[id]n’t know” if it applied in the territory).

jurisdiction where gender-neutral marriage is legal and constitutionally protected.<sup>154</sup> To date, this is their chosen path.<sup>155</sup>

Third, American Samoans could litigate for their right to enter a gender-neutral marriage. Unfortunately, litigating for marriage equality is uniquely difficult in American Samoa.<sup>156</sup> Although American Samoa is governed by local leaders, the territory remains under the authority and supervision of the U.S. Department of the Interior, and, thus, it is “unclear against whom same-sex couples hoping to enforce *Obergefell* in American Samoa would file suit.”<sup>157</sup>

American Samoan couples seeking the protection of *Obergefell* must confront an additional hurdle that no other Americans face: *Where* can they bring their complaint? Local courts are unlikely to provide any relief. The American Samoan Constitution does not have an equal protection clause.<sup>158</sup> Although Congress granted limited power to the High Court of American Samoa to adjudicate claims based on federal law, the scope of jurisdiction is restricted to “certain issues, such as food safety, protection of animals, conservation, and shipping issues.”<sup>159</sup> Moreover, the local courts lack some of the procedural guarantees of federal courts.<sup>160</sup> Procedurally and substantively, federal court represents the best hope of bringing marriage equality to American Samoa.

Unlike the other four U.S. territories, American Samoa has no federal court.<sup>161</sup> This is unfortunate. In Guam, same-sex couples filed suit at the federal district court in Guam’s capital of Hagåtña, where the judge followed binding Ninth Circuit precedent in requiring the territory to

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154. Tapu, *supra* note 63, at 305 (“[B]ecause no court has . . . extend[ed] the *Obergefell* ruling to [American Samoa] . . . 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.”).

155. *Id.*

156. *Id.* at 304 (highlighting that American Samoa “lacks a federal district court,” and even though “some of the territory’s local courts [can] hear disputes based in federal law . . . these courts’ jurisdiction is limited to specific types of matters”).

157. *Id.*

158. *Craddick Dev. Inc. v. Craddick*, 2 Am. Samoa 3d 20, 26 (1998) (noting that “the equal protection clause . . . does not appear in the Revised Constitution”).

159. U.S. Gov’t Accountability Off., GAO-08-655, *American Samoa: Issues Associated With Potential Changes to the Current System for Adjudicating Matters of Federal Law 4* (2008); see also *supra* note 156.

160. See U.S. Gov’t Accountability Off., *supra* note 159, at 9–10 (noting that the associate judges of the American Samoa High Court “are not required to have legal training”); Tua, *supra* note 39, at 274 (“[T]he High Court of American Samoa operates differently from federal district courts. [Its] ‘piecemeal nature’ . . . sometimes lead[s] to ‘parallel litigation in the High Court and a federal court.’” (quoting William O. Jenkins, U.S. Gov’t Accountability Off., GAO-08-1124T, *American Samoa: Issues Associated With Some Federal Court Options 14* (2008))).

161. U.S. Gov’t Accountability Off., *supra* note 159, at 1 (“American Samoa is unique among U.S. insular areas in that it does not have a federal court.”).

perform and recognize same-sex marriages.<sup>162</sup> Puerto Rico presented a harder hill to climb, but even there proponents of marriage equality could easily bring litigation in the federal district court in San Juan.<sup>163</sup> And although the federal district judge appeared derelict in his duties while on his mission to uphold the territory's ban on same-sex marriage, the First Circuit remedied the problem on appeal and brought *Obergefell*'s protections to the people of Puerto Rico.<sup>164</sup> No such mechanisms exist in American Samoa because it lacks both a federal district court and a direct appeals process to a circuit court.<sup>165</sup>

In order to bring a federal claim, an American Samoan male-female couple would have to file suit thousands of miles from home, probably in either Honolulu or Washington, D.C.<sup>166</sup> At 2,500 miles away from American Samoa, the closest U.S. district court in Hawai'i functions as American Samoa's de facto federal court for some purposes.<sup>167</sup> But if the federal judge in Hawai'i determines that the Secretary of the Interior is the proper respondent, an American Samoan couple seeking a marriage

162. *Aguero v. Calvo*, No. 15-00009, 2015 WL 3573989, at \*1–2 (D. Guam June 8, 2015) (“[O]nce a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court’s decision as binding authority[.]” (alterations in original) (quoting *Yong v. Immigr. & Naturalization Serv.*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000))).

163. See generally *Conde Vidal v. Garcia-Padilla*, 167 F. Supp. 3d 279 (D.P.R. 2016), rev’d sub nom. *In re Conde Vidal*, 818 F.3d 765 (1st Cir. 2016) (per curiam) (providing a forum for marriage equality litigation in San Juan).

164. *In re Conde Vidal*, 818 F.3d at 767 (per curiam).

165. See 28 U.S.C. § 41 (2018) (failing to include American Samoa in the constitution of any federal circuit court of appeals); Michael W. Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 *Pac. Rim L. & Pol’y J.* 325, 351 (2008) (noting that “American Samoa is outside the jurisdiction of any United States District Court or United States Court of Appeals” and that “[d]irect appeals to other courts, such as the U.S. Supreme Court, are not available”).

166. Gretchen C.F. Shappert & Adam F. Sleeper, *International & Territorial Border Searches: The Border-Search Exception as Applied in the U.S. Territories of the Virgin Islands, Guam, the Northern Mariana Islands, American Samoa, & Puerto Rico*, 69 *DOJ J. Fed. L. & Prac.* 205, 243 (2021) (“Issues of federal law arising in American Samoa are usually adjudicated in the U.S. District Courts in Hawaii or the District of Columbia.”); see also William O. Jenkins, U.S. Gov’t Accountability Off., *GAO-08-1124T, American Samoa: Issues Associated With Some Federal Court Options 2* (2008) (“Because of the limits to the High Court’s federal jurisdiction, other matters of federal law arising in American Samoa—principally criminal cases—have been adjudicated in U.S. district courts, mainly in Hawaii or the District of Columbia.”).

167. See *United States v. Lee*, 159 F. Supp. 2d 1241, 1249 n.4 (D. Haw. 2001) (declining to endorse outright defendant’s argument that “Hawaii will become the de facto district court for American Samoa” but nonetheless finding jurisdiction in Hawai’i to be proper for an offense committed in American Samoa); Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 *Hastings Const. L.Q.* 71, 77 (2013) [hereinafter Morrison, *Foreign in a Domestic Sense*] (“Pago Pago is more than 2,500 miles from Hawaii, the nearest U.S. neighbor, which may explain the federal government’s tendency to overlook American Samoa.”).

license could be forced to litigate 7,000 miles away in Washington, D.C.<sup>168</sup> No other couple seeking marriage rights must bear such an extraordinary burden. Assuming that they can make it into the proper federal court, the couple then faces another unique legal problem—the *Insular Cases*.

### III. LITIGATING MARRIAGE EQUALITY IN AMERICAN SAMOA

If the local leaders in American Samoa continue refusing to take appropriate action, fa'afafine who wish to marry their male partners would be forced to litigate in federal court. Due to the *Insular Cases*, however, marriage litigation in American Samoa will pose unique challenges unseen in the dozens of marriage equality cases heard before *Obergefell*. This Part explains how federal courts have applied the *Insular Cases* framework to cases involving the issue of birthright citizenship in American Samoa. It then applies this framework to *Obergefell*. This Part explains why the fa'afafine are entitled to marriage equality, even though the *Insular* framework complicates the analysis.

The story of these complications begins in the late nineteenth century. Eastern Samoa transformed into American Samoa through negotiations with sovereign chiefs, albeit in the shadow of colonialism.<sup>169</sup> In 1899, the colonial powers of America and Germany partitioned Samoa into eastern and western regions, each deferring to the other in their respective spheres of influence.<sup>170</sup> On February 16, 1900, the United States ratified a treaty with Germany and Great Britain in which the latter two nations renounced any claims they might have over the eastern Samoan islands of Tutuila and Aunu'u.<sup>171</sup> Two months later, the Samoan chiefs of Tutuila and Aunu'u signed a cession treaty that granted the U.S. government the “full powers and authority to govern the islands.”<sup>172</sup> Four years later, the King of Manu'a (Tui Manu'a) and the chiefs of the eastern Samoan island group of Manu'a followed suit by signing a cession treaty,

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168. See, e.g., *Barlow v. Sunia*, No. 18-00423, 2019 WL 5929736, at \*8 (D. Haw. Nov. 12, 2019) (noting that the Secretary of the Interior is the proper respondent, and because the Secretary resides in Washington, D.C., “the District of Hawaii is not the proper venue”).

169. See Yeung, *supra* note 45, at 5–6 (detailing how American Samoa became a U.S. territory in the context of “western nations vying for control over the South Pacific”).

170. *Id.*

171. *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1170–71 (D. Utah 2019).

172. *Id.* at 1170 (quoting Brief of the Samoan Federation of America, Inc. as Amici Curiae in Support of Plaintiffs at 12, *Fitisemanu*, 426 F. Supp. 3d 1155 (No. 1:18-cv-00036-CW), ECF No. 55); see also Instrument of Cession, Apr. 17, 1900, U.S.-Tutuila, reprinted in *I Papers Relating to the Foreign Relations of the United States, 1929*, Doc. No. 853 (Joseph V. Fuller & Tyler Dennett eds., 1943), <https://history.state.gov/historicaldocuments/frus1929v01/d853> [<https://perma.cc/5DCH-VSLW>] [hereinafter *Cession Treaty of Tutuila and Aunu'u*]; *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015) (“The South Pacific islands of American Samoa have been a United States territory since 1900, when the traditional leaders of the Samoan Islands of Tutuila and Aunu'u voluntarily ceded their sovereign authority to the United States Government.”).

ceding their sovereignty to the United States and joining their fellow eastern Samoans to form a larger American Samoa.<sup>173</sup>

During this stepwise acquisition of eastern Samoa, American leaders promised to protect and respect Samoan values.<sup>174</sup> Thus, the cession treaties should be interpreted in light of the American promise to preserve native Samoan culture.<sup>175</sup> American regulations implemented in 1900 by the U.S. naval commander in charge of American Samoa, B.F. Tilley, instructed the commander to apply “U.S. laws to the territory, as long as they did not conflict with Sāmoan customs.”<sup>176</sup> This was essentially a promise to respect fa’a Samoa—Samoan culture and traditional way of life.<sup>177</sup>

The negotiated territorial status of American Samoa created a constitutional limbo for its residents. Americans residing in the fifty states are necessarily protected by Supreme Court opinions that recognize new rights under the U.S. Constitution.<sup>178</sup> The *Insular Cases*, however, block these Supreme Court opinions from automatically applying to the residents of U.S. territories.<sup>179</sup> Instead, determining whether a constitutional provision protects American Samoans requires legal triangulation among Samoan culture, the U.S. Constitution, and the *Insular Cases*.

173. *Fitisemanu*, 426 F. Supp. 3d at 1171; see also Instrument of Cession, July 14, 1904, U.S.-Manu’a, reprinted in 1 Papers Relating to the Foreign Relations of the United States, 1929, Doc. No. 855 (Joseph V. Fuller & Tyler Dennett eds., 1943), <https://history.state.gov/historicaldocuments/frus1929v01/d855> [<https://perma.cc/A3N3-CJKE>] [hereinafter Cession Treaty of Manu’a].

174. Pacific Island Pelagic Fisheries; Exemption for Large U.S. Longline Vessels to Fish in Portions of the American Samoa Large Vessel Prohibited Area, 81 Fed. Reg. 5619, 5623 cmt. 27 (Feb. 3, 2016) (to be codified at 50 C.F.R. pt. 665) (“[I]n the Deed of Cession with the chiefs of the islands of Tutuila, Aunuu, and Manua Islands, the United States promised to protect the lands, preserve the traditions, customs, language and culture, Samoan way of life, and the waters surrounding the islands . . .”).

175. Jeffrey B. Teichert, Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa, 3 Gonz. J. Int’l L. 35, 44 (2000) (“The policy goal of preserving native cultures while establishing a republican government designed to protect liberty, was at the heart of U.S. expansionism in the early 1900’s, and provides valuable context for interpreting the Cession Treaties affecting American Samoa.”).

176. JoAnna Poblete-Cross, Bridging Indigenous and Immigrant Struggles: A Case Study of American Sāmoa, 62 Am. Q. 501, 503 (2010).

177. See *supra* notes 44–45 and accompanying text (defining fa’a Samoa).

178. For example, although the decision struck down a Texas statute, *Lawrence v. Texas*, 539 U.S. 558 (2003), eliminated all state laws that prohibited private, noncommercial sodomy between consenting adults. Courtney G. Joslin, The Gay Rights Canon and the Right to Nonmarriage, 97 B.U. L. Rev. 425, 437 (2017) (“In one stroke, the *Lawrence* Court struck down all remaining sodomy statutes . . .”); Christopher R. Leslie, *Lawrence v. Texas* as the Perfect Storm, 38 U.C. Davis L. Rev. 509, 542 (2005) (noting that “[t]he privacy approach” taken by the *Lawrence* Court “eliminated all sodomy laws”).

179. See Raustiala, *supra* note 17, at 24.

A. *The Insular Framework in American Samoa*

For American Samoans, the most prominent application of the *Insular Cases*' rubric focuses on the issue of birthright citizenship.<sup>180</sup> American Samoa is unique from other U.S. territories in that American Samoans are not U.S. citizens but U.S. nationals.<sup>181</sup> Because they are not citizens, "American Samoans are denied the right to vote, the right to run for elective federal or state office outside American Samoa, and the right to serve on federal and state juries."<sup>182</sup> Beyond these rights, their noncitizen status renders American Samoans ineligible for many government jobs and benefits.<sup>183</sup>

American Samoan representatives have expressed concerns that U.S. citizenship could undermine fa'a Samoa.<sup>184</sup> Many American Samoans argue that "the extension of citizenship would have harmful consequences for American Samoan governance, culture, customs, and traditions."<sup>185</sup> Supporters of noncitizenship for American Samoans have defended the status quo by emphasizing fa'a Samoa in terms of maintaining the territory's communal land customs.<sup>186</sup>

In recent years, some U.S. nationals born in American Samoa have challenged their legal status, arguing that the denial of birthright citizenship violates the Fourteenth Amendment's Citizenship Clause.<sup>187</sup> Even while acknowledging the problematic origins and premises of the *Insular Cases*, federal courts apply their framework in these cases.<sup>188</sup> Adjudicated

180. See, e.g., *Fitisemanu v. United States*, 1 F.4th 862, 865 (10th Cir. 2021) (declining to extend birthright citizenship to American Samoans).

181. *Id.* On the differences between being a U.S. national and a U.S. citizen, see Benjamin E. Mannion, Note, "A People Distinct From Others": Service, Sacrifice, and Extending Naturalized Citizenship to American Samoans, 27 *Transnat'l L. & Contemp. Probs.* 477, 480–84 (2018).

182. *Fitisemanu*, 1 F.4th at 865.

183. Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 *Calif. L. Rev.* 1249, 1259 (2019).

184. *Tuaua v. United States*, 788 F.3d 300, 310 (D.C. Cir. 2015). These representatives include American Samoa's congressperson and other elected officials in the territory. *Id.*

185. Yeung, *supra* note 45, at 4 (noting arguments of those opposed to a change in status for American Samoans).

186. See *Fitisemanu*, 1 F.4th at 880 ("Constitutional provisions such as the Equal Protection Clause, the Takings Clause, and the Establishment Clause are difficult to reconcile with several traditional American Samoan practices, such as . . . communal land ownership . . .").

187. See *Tuaua*, 788 F.3d at 301 ("Appellants are individuals born in the United States territory of American Samoa. Statutorily deemed 'non-citizen nationals' at birth, they argue the Fourteenth Amendment's Citizenship Clause affords them citizenship by dint of birthright.").

188. *Fitisemanu*, 1 F.4th at 870 ("Insular's framework was not to be left in the past; instead, '[t]his century-old doctrine informs our analysis in the present matter.'" (quoting *Boumediene v. Bush*, 553 U.S. 723, 759 (2008))); *Tuaua*, 788 F.3d at 307 ("Although some aspects of the *Insular Cases*' analysis may now be deemed politically incorrect, the

through the lens of the *Insular Cases*, these legal battles pit fa'a Samoa against the U.S. Constitution.<sup>189</sup>

Some aspects of fa'a Samoa are at odds with certain constitutional provisions because “several traditional American Samoan practices, such as the *matai* chieftain social structure, communal land ownership, and communal regulation of religious practice” seem inconsistent with the Equal Protection Clause, the Takings Clause, and the Establishment Clause.<sup>190</sup> Local American Samoan courts uphold the racial restrictions that bar non-Samoans from owning land.<sup>191</sup> Many American Samoans are concerned that federal courts would be less attuned and less deferential to Samoan practices.<sup>192</sup>

Federal courts have largely deferred to arguments that birthright citizenship would conflict with fa'a Samoa. For example, the D.C. Circuit in *Tuaua v. United States* was persuaded by the “long[-]expressed concern that the extension of United States citizenship to the territory could potentially undermine these aspects of the Samoan way of life[,]” which is the definition of fa'a Samoa.<sup>193</sup> More recently, in its June 2021 decision in *Fitisemanu v. United States*, the Tenth Circuit reversed a district court opinion that extended U.S. citizenship to people born in American Samoa.<sup>194</sup> The split appellate panel noted that “[t]here is simply insufficient caselaw to conclude with certainty that citizenship will have no effect on the legal status of the *fa'a Samoa*.”<sup>195</sup> To reach this result, the court invoked the framework from the *Insular Cases* to determine whether a constitutional right applies to the residents of a U.S. territory: (1) Is the right “fundamental”?; and (2) Would recognizing the right be “impracticable and anomalous”?<sup>196</sup> None of these legal concepts is well-defined or well-understood, despite

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framework remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories.”).

189. *Fitisemanu*, 1 F.4th at 866 (“[T]he people of American Samoa have maintained a traditional and distinctive way of life: the fa'a Samoa. It is this amalgam of customs and practices that Intervenor argue would be threatened if birthright citizenship were imposed.”); *Tuaua*, 788 F.3d at 309 (“To find a natural right to jus soli birthright citizenship would give umbrage to the liberty of free people to govern the terms of association within the social compact underlying formation of a sovereign state.”).

190. *Fitisemanu*, 1 F.4th at 880.

191. See Yeung, *supra* note 45, at 32 (discussing *Craddick v. Territorial Registrar of American Samoa*, 1 Am. Samoa 2d 10, 14 (1980), which justified a government decision to prevent a non-Samoan from owning land as “preserving the land and culture of the Samoan people”).

192. See *Fitisemanu*, 1 F.4th at 866 (“There are also racial restrictions on land ownership requiring landowners to be at least 50% American Samoan . . . . Intervenor worry that these and other traditional elements of the American Samoan culture could run afoul of constitutional protections should the plaintiffs in this case prevail.” (citation omitted)).

193. *Tuaua*, 788 F.3d at 310; see also *supra* notes 44–45 and accompanying text.

194. 1 F.4th at 881.

195. *Id.*

196. *Id.* at 878–79; Morrison, *Foreign in a Domestic Sense*, *supra* note 167, at 119.

the longevity of the *Insular Cases*.<sup>197</sup> One thing, however, is certain: The inquiry into “fundamental rights” differs from how federal courts use this concept in equal protection and substantive due process litigation.<sup>198</sup>

The *Fitisemanu* court held that the right to birthright citizenship is not “fundamental,” as that concept was used in the *Insular Cases*.<sup>199</sup> The *Insular* rubric defines “fundamental” relatively narrowly, describing “only those ‘principles which are the basis of all free government.’”<sup>200</sup> The inquiry is both more complicated and more straightforward when the right is truly “personal” because courts are more likely to deem a “personal right” to be fundamental (in an *Insular* context), but courts haven’t fully defined when a right is “personal.”<sup>201</sup> In declining to view birthright citizenship for American Samoans as fundamental, the Tenth Circuit reasoned that citizenship is not “properly conceived of as a personal right at all.”<sup>202</sup> Instead, “the right is more jurisdictional than personal, a means of conveying membership in the American political system rather than a freestanding individual right.”<sup>203</sup> In part because the right at issue was jurisdictional, not personal, the Tenth Circuit held the right was not “fundamental” for *Insular* purposes.<sup>204</sup>

The *Fitisemanu* and *Tuaua* courts both also applied the “impracticable and anomalous” standard, which the Tenth Circuit crowned as “the lodestar of the *Insular* framework.”<sup>205</sup> In the context of the citizenship question, courts “must ask whether the circumstances are such that recognition of the right to birthright citizenship would prove impracticable and anomalous, as applied to contemporary American Samoa.”<sup>206</sup> The D.C. Circuit held that it would be “anomalous to impose citizenship over the

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197. See Morrison, *Foreign in a Domestic Sense*, supra note 167, at 120–23 (explaining that the terms “fundamental” and “impracticable” are not clearly defined as applied to territories).

198. See *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel*, 830 F.2d 374, 385–86 (D.C. Cir. 1987) (noting that courts define “fundamental rights” differently in territorial contexts because of the *Insular Cases*).

199. *Fitisemanu*, 1 F.4th at 878.

200. *Id.* (quoting *Dorr v. United States*, 195 U.S. 138, 147 (1904)); see also *Tuaua v. United States*, 788 F.3d 300, 308 (D.C. Cir. 2015) (“‘Fundamental’ has a distinct and narrow meaning in the context of territorial rights.”).

201. Morrison, *Foreign in a Domestic Sense*, supra note 167, at 120–21 (explaining that the “personal rights” courts “typically” deem fundamental encompass “more than constitutional rights” but that the full scope of these personal rights is unsettled).

202. *Fitisemanu*, 1 F.4th at 878.

203. *Id.*

204. *Id.* (“[B]irthright citizenship does not qualify as a fundamental right under the *Insular* framework.”).

205. *Id.* at 879; see also Morrison, *Foreign in a Domestic Sense*, supra note 167, at 119 (“The presumption is that a constitutional provision does apply [in unincorporated territories] unless it is impractical or anomalous to that particular territory.”).

206. *Fitisemanu*, 1 F.4th at 879 (quoting *Tuaua v. United States*, 788 F.3d 300, 309 (D.C. Cir. 2015)).



objections of the American Samoan people themselves.”<sup>207</sup> The court emphasized that citizenship imposes burdens on individuals and that federal judges should not “forcibly impose a compact of citizenship—with its concomitant rights, obligations, and implications for cultural identity.”<sup>208</sup> The court concluded it could “envision little that is more anomalous, under modern standards, than the forcible imposition of citizenship against the majoritarian will.”<sup>209</sup> The burdens that birthright citizenship would impose on American Samoa—especially the risk it posed to the communal land system—made that right impracticable.

Ultimately, *Fitisemanu* interpreted the *Insular* framework as requiring courts to examine the totality of the circumstances.<sup>210</sup> Under this holistic approach, both the Tenth Circuit and D.C. Circuit held that birthright citizenship should not extend to American Samoans.<sup>211</sup> These opinions supply the legal landscape for examining the issue of marriage equality in American Samoa.

#### B. *Applying Insular Logic to Marriage Rights*

If marriage advocates pursue federal litigation, they will have to travel thousands of miles either to Honolulu or to Washington, D.C., where the Secretary of the Interior is located. Once in federal court, the *Insular Cases* present additional hurdles that none of the stateside marriage advocates had to overcome. Judges and scholars alike have widely critiqued the *Insular Cases*.<sup>212</sup> But even within the *Insular* framework, a strong argument exists that the right to gender-neutral marriage extends to U.S. territories, especially American Samoa. Juxtaposing birthright citizenship and marriage equality, the following discussion reviews how civil rights attorneys could argue that *Obergefell* applies to American Samoa, despite the *Insular Cases*.

1. *Marriage as a Fundamental Right.* — In the birthright citizenship cases, the Tenth and D.C. Circuits noted that the *Insular* framework involves an inquiry into whether the right at stake is fundamental.<sup>213</sup> The *Obergefell* Court declared “the right to marry is a *fundamental* right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex

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207. *Tuaua*, 788 F.3d at 310.

208. *Id.* at 311.

209. *Id.*

210. *Fitisemanu*, 1 F.4th at 880 (“The *Insular* framework demands a holistic review of the prevailing circumstances in a territory; any future case would consider the totality of the relevant factors and concerns in the territory.”).

211. *Id.* at 881; *Tuaua*, 788 F.3d at 302.

212. See *supra* notes 23–25 and accompanying text.

213. See *Fitisemanu*, 1 F.4th at 878–79 (pursuing this line of inquiry); *Tuaua*, 788 F.3d at 307–09 (“‘Fundamental’ has a distinct and narrow meaning in the context of territorial rights.”).

may not be deprived of that right and that liberty.”<sup>214</sup> Under *Insular* jurisprudence, however, the concept of “fundamental” rights is constrained.<sup>215</sup> The D.C. Circuit in *Tuaua* explained that “the Insular Cases distinguish as universally fundamental those rights so basic as to be integral to free and fair society.”<sup>216</sup> Consequently, the concept of fundamental rights in the territorial context “is separate and distinct from the fundamental rights guaranteed in a due process context.”<sup>217</sup>

In *Fitisemanu*, however, the Tenth Circuit held that, according to the framework established by “the *Insular Cases*, constitutional provisions that implicate fundamental *personal* rights apply without regard to local context.”<sup>218</sup> The phrase “personal rights” here is meant to distinguish from jurisdictional considerations. For example, the judge who authored *Fitisemanu* wrote, “I also question whether citizenship is properly conceived of as a personal right at all. As I see it, citizenship usually denotes jurisdictional facts . . . .”<sup>219</sup> Similarly, in ruling that birthright citizenship is not a fundamental right, the D.C. Circuit in *Tuaua* defined “non-fundamental” rights for territorial purposes as “those artificial, procedural, or remedial rights that—justly revered though they may be—are nonetheless idiosyncratic to the American social compact or to the Anglo-American tradition of jurisprudence.”<sup>220</sup> Thus, if a constitutional right is personal—not jurisdictional, artificial, or procedural—the *Insular Cases* should not prevent its incorporation in U.S. territories.

The right to marry is *personal*, not jurisdictional. Justice Anthony Kennedy held in *Obergefell* that that “the right to *personal* choice regarding marriage is inherent in the concept of *individual* autonomy.”<sup>221</sup> In American jurisprudence, marriage has been largely adjudicated as a constitutional right of individuals.<sup>222</sup> In *Tuaua*’s language, the constitutional right to

214. *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (emphasis added).

215. *Tuaua*, 788 F.3d at 308.

216. *Id.*

217. *Tapu*, supra note 63, at 285.

218. *Fitisemanu*, 1 F.4th at 878 (emphasis added).

219. *Id.*

220. *Tuaua*, 788 F.3d at 308.

221. *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015) (emphasis added).

222. *Id.* at 675 (“[T]he right to marry is a fundamental right inherent in the liberty of the person.” (emphasis added)); *Bostic v. Schaefer*, 760 F.3d 352, 376–77 (4th Cir. 2014) (invalidating Virginia’s same-sex marriage ban by noting that “[t]he Supreme Court’s unwillingness to constrain the right to marry . . . meshes with its conclusion that *the right to marry* is a matter of ‘freedom of choice[]’ . . . that ‘resides with the individual’” (emphasis added) (first quoting *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978); then quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967))); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003) (noting that the state’s ban on same-sex marriage “deprives *individuals* of access to an institution of fundamental legal, personal, and social significance” (emphasis added)); Christopher R. Leslie, *Embracing Loving: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 *Cornell L. Rev.* 1077, 1115 (2014) (explaining how “the current struggle for marriage equality is a battle for individual rights”).

marriage equality is not artificial nor procedural nor remedial.<sup>223</sup> To the extent that the constitutional right to marry is a “fundamental personal right,” the *Insular Cases* should not defeat *Obergefell’s* application to the LGBT and fa’afafine communities of American Samoa.

2. *Not Impractical and Anomalous.* — The *Insular* framework also asks whether extending a particular right to a territory would be “impracticable and anomalous.”<sup>224</sup> In the context of the *Insular Cases*, impracticability “connotes difficulty of implementation or such a substantial degree of inconvenience that it makes the likelihood of success in realizing such a right very low.”<sup>225</sup> Thus, this consideration “focuse[s] on the difficulty of applying the right in a given territory.”<sup>226</sup> “Anomalous,” relatedly, “connotes incongruity, a wrong fit between the right and the culture of the place where it is sought to be claimed.”<sup>227</sup> The government of American Samoa should bear the burden of proving that recognizing the constitutional right to marriage equality would be impractical and anomalous.<sup>228</sup>

It would not be impractical or anomalous to recognize marriage equality in American Samoa. As Part I explored, the cultural history of American Samoa reflects a society tolerant of sexual diversity. America’s other Polynesian former colony, Hawai’i, as well as its other territories in the South Pacific, have all recognized gender-neutral marriages without incident or injury to their cultural traditions and institutions.<sup>229</sup> Polynesian

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223. Moreover, marriage equality is not “idiosyncratic to the American social compact.” See *Tuaua*, 788 F.3d at 308. Dozens of nations across all inhabited continents recognize and protect gender-neutral marriage, and the list of such nations is growing. See Marriage Equality Around the World, Hum. Rts. Campaign, <https://www.hrc.org/resources/marriage-equality-around-the-world> [<https://perma.cc/8KFC-MQ2U>] (last visited Aug. 25, 2022) (listing all countries that, as of 2022, have legalized same-sex marriage, as well as those that have taken steps to legalize it or are likely to do so).

224. *Fitisemanu*, 1 F.4th at 879.

225. Anna Su, Speech Beyond Borders: Extraterritoriality and the First Amendment, 67 *Vand. L. Rev.* 1373, 1417 (2014).

226. *Fitisemanu*, 1 F.4th at 902 (Bacharach, J., dissenting).

227. Su, *supra* note 225, at 1417.

228. See *Fitisemanu*, 1 F.4th at 902 (Bacharach, J., dissenting) (“So the burden falls on those who would decline to apply a given constitutional right based on impracticability or anomalousness.” (citing *Reid v. Covert*, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring))).

229. See Robert J. Morris (Kapā’ihiahilina), *Hulihia ke Au*: Implications of Hawai’i Same-Sex Marriage for Policy, Practice, & Culture, 20 *UCLA Asian Pac. Am. L.J.* 1, 21–22 (2015) (“The salutary impact of same-sex marriage on Hawai’i seems to be assured . . . . Same-sex marriage became the law in Hawai’i on November 13, 2013 . . . . It was by all accounts a victory for indigenous culture.”); Haidee Eugenio Gilbert, Same-Sex Couple From Japan Makes Guam Their Wedding Place, *Pac. Daily News* (Sept. 24, 2019), [https://www.guampdn.com/news/local/same-sex-couple-from-japan-makes-guam-their-wedding-place/article\\_4778178a-d256-508d-b544-7fd18df1f34e.html](https://www.guampdn.com/news/local/same-sex-couple-from-japan-makes-guam-their-wedding-place/article_4778178a-d256-508d-b544-7fd18df1f34e.html) [<https://perma.cc/3Y65-SWDB>] (“Between June 2015 and March 15 this year, Guam saw 362 same-sex marriages . . . . The Guam Visitors Bureau has been building Guam’s reputation as a diverse and welcoming place to visit, and even get married, among members of the LGBTQ community.”).

societies, including American Samoa, had precontact customs and cultures that tolerated or embraced sexual diversity, including relationships between a male and a fa'afafine.<sup>230</sup> Ian Tapu has 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.”<sup>231</sup> Ultimately, it would be eminently practical to extend the marriage rights protected in every state and every other U.S. territory to American Samoa given the islands’ long history of embracing sexual diversity.

Arguments against treating gender-neutral marriage as impractical and anomalous apply even more strongly in American Samoa than in other U.S. territories. Although the (repeatedly reversed)<sup>232</sup> Puerto Rico federal district judge in *Conde Vidal* invoked the “five centuries of Puerto Rican history” to hold that marriage equality was beyond “the juridical reality of Puerto Rico[,]”<sup>233</sup> those arguments do not apply to American Samoa, which has centuries of history embracing sexual diversity.<sup>234</sup> Compared to America’s other territories—with their relatively repressive colonial backgrounds—American Samoa presents the weakest cultural case for rejecting marriage equality.<sup>235</sup> Yet all these non-Polynesian territories transitioned to marriage equality without incident. Recall that in the years following *Obergefell*, the Northern Mariana Islands celebrated more same-sex marriages than opposite-sex marriages.<sup>236</sup> And its society thrived. The fact that every other U.S. territory and its one Polynesian state have recognized gender-neutral marriages without changing their underlying cultures or values shows that it would not be impractical for American Samoa to do so as well.

3. *No Conflict With Fa’a Samoa*. — Ultimately, the birthright citizenship cases instruct judges to take a holistic approach. As the Tenth Circuit explained in *Fitisemanu*, the *Insular Cases* framework is flexible.<sup>237</sup> In the

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230. See supra section I.A.

231. Tapu, supra note 63, at 319 (emphasis added).

232. See supra notes 133–145 and accompanying text.

233. *Conde Vidal v. Garcia-Padilla*, 167 F. Supp. 3d 279, 286–87 (D.P.R. 2016), rev’d sub nom. *In re Conde Vidal*, 818 F.3d 765 (1st Cir. 2016) (per curiam); see also Tapu, supra note 63, at 314; supra notes 133–145 and accompanying text.

234. See supra section I.A.

235. Cf. Tapu, supra note 63, at 307 (“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.”).

236. See supra note 126.

237. *Fitisemanu v. United States*, 1 F.4th 862, 870–71 (10th Cir. 2021) (“The flexibility of the *Insular Cases*’ framework gives federal courts significant latitude to preserve traditional cultural practices that might otherwise run afoul of individual rights enshrined in the Constitution.”); see also *id.* at 869 (“The proposition the *Insular Cases* came to stand for is that constitutional provisions apply only if the circumstances of the territory warrant their application.”).

context of determining the applicability of constitutional rights to American Samoa, the overriding concern is whether recognizing that particular right would contradict fa'a Samoa.<sup>238</sup> The Tenth and D.C. Circuits suggested that birthright citizenship would conflict with fa'a Samoa,<sup>239</sup> but marriage equality is different.

Allowing a couple comprising a male and a fa'afafine—or a same-sex couple—to marry does not damage fa'a Samoa. Although the right to marry is an individual right,<sup>240</sup> and some may contend that Samoan culture has less emphasis on individual rights than on group responsibility,<sup>241</sup> fa'a Samoa is not hostile to individual rights. Even if fa'a Samoa does not *emphasize* individual rights, the U.S. treaty of cession with eastern Samoa chieftains promised to recognize both Samoan cultural customs and the *individual* property rights of American Samoans. The Cession Treaty of Tutuila and Aunu'u provided that “[t]he Government of the United States of America shall respect and protect the *individual* rights of all people dwelling [on those islands] to their lands and other property . . . .”<sup>242</sup> Similarly, the Instrument of Cession for Manu'a struck a balance between protecting the American Samoans’ *individual* rights and preserving the Chiefs’ *property* rights.<sup>243</sup> Recognizing the right to gender-neutral marriage does not upset this balance.

The *Fitisemanu* and *Tuaua* birthright citizenship cases focused on the core concern of fa'a Samoa in the *Insular* context: whether the recognition of a particular constitutional right would undermine Samoan policies regarding communal land.<sup>244</sup> Many American Samoans wish to prevent their traditional practices from receiving “greater scrutiny under the Equal Protection Clause of the Fourteenth Amendment.”<sup>245</sup> But this reticence is not founded on an aversion to individual rights, such as marriage, but on a desire to avoid “imperiling American Samoa’s traditional, racially-based land alienation rules.”<sup>246</sup> Samoans are rightfully concerned that strict ap-

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238. See *supra* notes 184–195 and accompanying text.

239. See *supra* notes 193–195 and accompanying text.

240. See *supra* section III.B.1.

241. See, e.g., Teichert, *supra* note 175, at 40–41 (quoting the former American Samoa Governor Peter Tali Coleman, saying that while American culture has a “more pronounced emphasis on the rights of the individual,” Samoan society “has a different foundation: the Matai system, which emphasizes group responsibility”).

242. Cession Treaty of Tutuila and Aunu'u, *supra* note 172 (emphasis added).

243. Cession Treaty of Manu'a, *supra* note 173 (“[T]here shall be no discrimination in the suffrages and political privileges between the present residents of said Islands and citizens of the United States dwelling therein, and . . . the rights of the Chiefs in each village and of all people concerning their property according to their custom shall be recognized.”).

244. See *Fitisemanu v. United States*, 1 F.4th 862, 866 (10th Cir. 2021); *Tuaua v. United States*, 788 F.3d 300, 309 (D.C. Cir. 2015).

245. *Tuaua*, 788 F.3d at 310.

246. *Id.*

plication of the Fourteenth Amendment's Equal Protection Clause would override American promises at the time of cession that Samoan leaders would retain autonomy over their land.<sup>247</sup> The D.C. Circuit and the Tenth Circuit denied application of the Constitution's Citizenship Clause to American Samoans in order to protect the territory's communal land rules whose supremacy had been negotiated as part of the treaties of cession.

In contrast, marriage equality conflicts with neither the cession treaties nor American Samoa's unique land ownership policies. Fa'afafine are part of fa'a Samoa.<sup>248</sup> In discussing sovereign Samoa,<sup>249</sup> anthropologist Sue Farran posited that gender-neutral marriage is consistent with Samoan cultural values and that local customs would suggest allowing both same-sex couples and fa'afafine-male couples to marry. After noting that Pacific Island "society and the church do accept and value *fa'afafine*," she asked, "should *fa'afafine* . . . be denied the right to marry? It could be argued that to allow them to do so would be in harmony with social and community arrangements and values."<sup>250</sup> Discrimination against fa'afafine is neither a pillar nor a principle of fa'a Samoa.<sup>251</sup>

In sum, preserving American Samoa's culture hinges on protecting the territory's communal land—not on legally enforcing rigid binary gender classifications or prohibiting gender-neutral marriages.<sup>252</sup> Marriage equality does not infringe upon fa'a Samoa. Thus, consistent with the *Insular Cases*, the U.S. Constitution protects sexual minorities in American Samoa. American Samoa's territorial status presents no insurmountable impediment to affording marriage rights to all of its people.

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247. See Yeung, *supra* note 45, at 30 (noting that the Equal Protection Clause might "undercut" Samoan autonomy over its land and culture, which the United States agreed to protect). Many American Samoans view Hawai'i as a cautionary tale for how—given the chance—Washington, D.C. tramples Polynesian culture, especially regarding communal land ownership. *Id.* ("American Samoans believe that when the Native Hawaiians lost their sovereignty and rights, they also lost their culture. They are cognizant not to repeat this in American Samoa because changes to Hawai'i's land rights altered the landscape of Hawai'i.").

248. See Schmidt, *supra* note 52, at 93 ("That [fa'afafine] pageant organizers and participants return a large part of their profits to the Samoan community is also a realisation of fa'a Samoa."); Reevan Dolgoy, "Hollywood" and the Emergence of a *Fa'afafine* Social Movement in Samoa, 1960–1980, *in* *Gender on the Edge: Transgender, Gay, and Other Pacific Islanders*, *supra* note 49, at 56, 71 ("The Hollywood [i.e., the fa'afafine district of sovereign Samoa] *fa'afafine* promoted a new, somewhat Westernized persona for themselves and others while remaining within the *fa'a-Sāmoa* or 'the Samoan way.'").

249. Farran, *supra* note 50, at 124.

250. *Id.* at 140.

251. Of course, discrimination exists, but its existence does not convert it into a principle. See, e.g., Alan Weedon, *Fa'afafine, Fakaleitī, Fakafafine—Understanding the Pacific's Alternative Gender Expressions*, ABC News (Austl.) (Aug. 30, 2019), <https://www.abc.net.au/news/2019-08-31/understanding-the-pacifics-alternative-gender-expressions/11438770> [<https://perma.cc/9GWA-RDMG>] (discussing the discrimination that fa'afafine may face in society).

252. See Tapu, *supra* note 63, at 319 ("[G]ender expression does not implicate communal land, a focal point of Samoa's culture.").

IV. THE UNAPPRECIATED CONSEQUENCES OF TERRITORIALIZATION AND THE  
*INSULAR CASES*

The residents of American Samoa did not receive the marriage rights bestowed by *Obergefell* for one underlying reason: the confusing and outdated jurisprudence of the *Insular Cases*. Depending on how courts interpret and apply these disreputable holdings,<sup>253</sup> the *Insular Cases* could result in American Samoa being the only U.S. jurisdiction never to follow *Obergefell*. Several years after *Obergefell*, it remains unclear how exactly courts would apply the *Insular* framework to marriage rights in U.S. territories.<sup>254</sup> This uncertainty is unnecessary and unacceptable.

Even if a federal court is persuaded that the *Insular Cases* do not preclude marriage equality in American Samoa,<sup>255</sup> the legal regime of the *Insular Cases* imposes significant harms on sexual minorities in American Samoa. The first harm is the indignity of forced reliance on local officials' magnanimity or sympathy regarding constitutional rights. The residents of the fifty states did not depend on their governors' (or any other officials') acceptance of the Supreme Court's authority to invalidate unconstitutional marriage laws in their states. The leaders of the other four major U.S. territories decided not to challenge *Obergefell's* applicability to their citizens.<sup>256</sup> Although this was good news for the LGBT residents of those territories, it underscored the precarious nature of their rights.

By contrast, marriage rights in American Samoa continue to depend on the benevolence of local leaders or judicial intervention.<sup>257</sup> Local leaders seem unlikely to accept marriage equality given that they do not tend to protect LGBT rights generally.<sup>258</sup> Constitutional rights should not depend on the caprice of elected officials.<sup>259</sup> Relying on the kindness of governors is not how democracies protect minority rights.

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

254. See *supra* section III.B.

255. For an in-depth discussion of this issue, see *supra* Part III.

256. Sagapolutele & Kelleher, *supra* note 6 (noting that the leaders of Puerto Rico, the U.S. Virgin Islands, Guam, and the Northern Mariana Islands each announced their intent to comply with *Obergefell*).

257. See, e.g., 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/samesex-marriage-american-samoa-may-be-the-only-territory-in-the-us-where-the-historic-supreme-court-ruling-does-not-apply-10379804.html> [<https://perma.cc/4TDB-NNHM>] (recounting territorial law scholar Chimene Keitner's observation that a local political or judicial decision would be necessary to recognize gender-neutral marriage rights in American Samoa).

258. See, e.g., Movement Advancement Project, *supra* note 152 (concluding American Samoa's laws and policies provide a "low" level of support for LGBTQ people); see also *supra* note 152 and accompanying text.

259. Cf. *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015) ("The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental

Some may argue that the denial of marriage rights is harmless because many fa'afafine do not desire marriage equality.<sup>260</sup> While some fa'afafine do not wish to rock the boat by lobbying for gender-neutral marriage, other fa'afafine do desire to marry a man they love.<sup>261</sup> And even if the majority of fa'afafine decline to marry male partners, any fa'afafine and LGBT American Samoans who do wish to enter gender-neutral marriages deserve to exercise their constitutional rights. After all, a number of LGBT people in mainland America opposed same-sex marriage,<sup>262</sup> but that did not affect the fact that marriage is a constitutional right open to all LGBT Americans, whether they intend to exercise that right or not. Moreover, despite claims that same-sex couples did not desire marriage, as of 2019, well over one million Americans were in same-sex marriages.<sup>263</sup> There could be a similarly enthusiastic response to marriage equality in American Samoa.<sup>264</sup> Who would have predicted that same-sex marriages would outnumber

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right.”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections.”).

260. See, e.g., Sagapolutele & Kelleher, *supra* note 6 (quoting Princess Auva'a, a well-known fa'afafine, as attributing some fa'afafine opposition to gender-neutral marriage to their “respect for our Samoan culture and religious beliefs”); Same-Sex Marriage Not a Priority for Samoa Fa'afafine Association, Radio N.Z. (Dec. 13, 2017), <https://www.rnz.co.nz/international/pacific-news/346065/same-sex-marriage-not-a-priority-for-samoa-fa-afafine-association> [<https://perma.cc/DH8X-K9A7>] [hereinafter Same-Sex Marriage Not a Priority, Radio N.Z.] (describing some fa'afafine's religious and political opposition to pursuing marriage equality). Some fa'afafine may be wary of marriage equality because they “believe that if gay marriage is legalised they will likely be classified under the ‘gay’ label . . . and . . . many reject the label ‘gay’.” McFall, *A Comparative Study*, *supra* note 55, at 12. And fa'afafine are not “gay”; they are a third gender. See *supra* notes 50–55 and accompanying text.

261. See Mitch Kellaway, *American Samoa Remains Lone Holdout Over U.S. Marriage Equality*, *Advocate* (July 10, 2015), <https://www.advocate.com/politics/marriage-equality/2015/07/10/american-samoa-remains-lone-holdout-over-us-marriage-equality> [<https://perma.cc/39U8-5GJQ>] (“[I]t's clear that there are American Samoans who desire same-sex marriages.”); Sagapolutele & Kelleher, *supra* note 6 (noting a fa'afafine named “Princess Auva'a said she wants gay marriage to be legal in American Samoa”); The Pacific's “Third Gender”, *The Free Libr.* (Sept. 22, 2008), <https://www.thefreelibrary.com/Fa%27afafine%3A+the+Pacific%27s+%22third+gender%22.-a0203336107> [<https://perma.cc/C6DK-KYV6>] (“Occasionally [fa'afafine] live openly with male partners.”).

262. See Daniel Dunson, *A Right to a Word? The Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage*, 5 *Alb. Gov't L. Rev.* 552, 582 n.140 (2012) (noting that “some in the LGBT community opposed the quest for the designation ‘marriage’ as being impolitic”); see also Kathleen E. Hull, *Legal Consciousness in Marginalized Groups: The Case of LGBT People*, 41 *Law & Soc. Inquiry* 551, 562 (2016) (“In a recent interview-based study of LGBT people, . . . [o]nly a small minority of the respondents actually opposed the LGBT rights movement's pursuit of legal same-sex marriage.”).

263. Amanda Barroso & Richard Fry, *On Some Demographic Measures, People in Same-Sex Marriages Differ From Those in Opposite-Sex Marriages*, *Pew Rsch. Ctr.* (July 7, 2021), <https://www.pewresearch.org/fact-tank/2021/07/07/on-some-demographic-measures-people-in-same-sex-marriages-differ-from-those-in-opposite-sex-marriages/> [<https://perma.cc/3HRL-N3V2>].

264. Recall that in Tahiti, chiefs historically formed marriage-like relationships with their mähūs, the Tahitian equivalent of fa'afafine. See *supra* note 79 and accompanying text.



opposite-sex marriages in the U.S. territory of the Northern Mariana Islands?<sup>265</sup> Many third-gender Polynesians do wish to marry men or, at least, entertain the possibility of doing so.<sup>266</sup> But even if one believes that fa'afafine do not desire male–fa'afafine marriages, the recognition of marriage rights would cause no harm if no fa'afafine marry men. If, on the other hand, fa'afafine do opt to marry men, that shows that their constitutional rights were being meaningfully deprived during the period of delay. The U.S. Constitution protects their right to dream of the same options and possibilities as other Americans.

Unfortunately, the denial of rights, combined with the possibility of litigation, invites slander against fa'afafine and sexual minorities and forces them to defend their dignity. For example, some scholars have contrasted fa'afafine–male relationships to traditional opposite-sex relationships, describing the former as “promiscuous, transient and lacking in significance.”<sup>267</sup> Such arguments would be publicly amplified in any litigation, as those wishing to deny these rights argue that fa'afafine are unfit for marriage. These same arguments were used in the mainland United States to diminish the dignity of homosexual relationships and to argue that same-sex relationships should receive no legal recognition or protection.<sup>268</sup> Opponents of equal rights for same-sex couples described gay people as promiscuous and uninterested in long-term relationships, and they repeated this argument to justify denying marriage rights to same-sex couples.<sup>269</sup> The proliferation of same-sex marriages across the country disproved

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265. See *supra* notes 126–127.

266. Elliston, *supra* note 53, at 38 (noting that “the vast majority of *māhū* are sexually involved with men . . . [and some have] hopes and aspirations for a future blissful life in a couple with a particular man”). Samoan men who have sex with fa'afafine are not considered gay because the sex is not considered to be between two men. Schmidt, *supra* note 52, at 71. Some fa'afafine in sovereign Samoa have “expressed a possible preference for a gay *pālagi* [non-Samoan] man, pragmatically expecting that there would be greater chances of such a relationship being more long-term.” *Id.* at 87. Evidence suggests that many fa'afafine are looking for commitments, which suggests that at least some would exercise their right to marriage, if allowed.

267. Besnier, *supra* note 48, at 302. Of course, relationships involving a fa'afafine may seem impermanent precisely because the law refuses to recognize them as permanent. See Holning Lau, *Beyond Our Hearts: The Ecology of Couple Relationships*, 4 *Calif. L. Rev. Cir.* 155, 161 (2013) (“[T]here are many additional ecological factors that influence the stability of same-sex relationships, including the denial of marriage rights that could help to solidify some same-sex unions.”).

268. See, e.g., George W. Dent, Jr., *No Difference? An Analysis of Same-Sex Parenting*, 10 *Ave Maria L. Rev.* 53, 64 (2011) (“Many gay men are promiscuous to an extent incompatible with marriage.”); George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 *BYU J. Pub. L.* 419, 424 (2004) (asserting without evidence that “because the majority of gays who are male tend to be promiscuous, many gay marriages would be marriages of convenience entered into primarily for the tangible benefits”); Mark Strasser, *The Future of Same-Sex Marriage*, 22 *U. Haw. L. Rev.* 119, 130 (2000) (critiquing claims that same-sex marriages lack a desirable “civilizing” effect because “individuals seeking to marry their same-sex partners are . . . promiscuous”).

269. See *supra* note 268.

this stereotype of the LGBT community.<sup>270</sup> Eventual marriages between men and fa'afafine may be similarly enlightening. But in the meanwhile, the slurs that fa'afafine are promiscuous and incapable of marriage are damaging, and they are difficult to disprove absent access to legal marriages.

Requiring American Samoans to initiate and endure further public litigation to assert their right to marriage equality is unduly burdensome and costly, both financially and personally. Litigation is taxing on couples seeking marriage rights. One's relationship is put on public display, held up for scrutiny, and often ridiculed. For example, the named-plaintiff couple in Hawai'i's pathbreaking marriage equality litigation, *Baehr v. Lewin*,<sup>271</sup> eventually separated because of the pressure and publicity of the litigation.<sup>272</sup> The personal toll of litigating for marriage rights in American Samoa would be far greater because the territory is relatively religious and exceedingly small.<sup>273</sup> Moreover, Samoan culture is nonconfrontational,<sup>274</sup> meaning that "more western style agitation for equal rights on the part of . . . fa'afafine . . . would be likely to engender a negative backlash."<sup>275</sup> This could deter marriage-minded fa'afafine (and other

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270. See William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. Rev. 275, 314 (2013) ("[I]n the new millennium, with marriage equality spreading swiftly through the country, . . . the connection between LGBT people and family has sunk in for many Americans."); *id.* at 315 (observing that public support of marriage equality increased between 1996 and 2012).

271. 852 P.2d 44, 67 (Haw. 1993) (holding that Hawai'i's gendered marriage policies discriminated based on sex and, therefore, had to survive strict scrutiny in order to comply with the equal protection provision of the Hawaiian Constitution).

272. William N. Eskridge Jr. & Christopher R. Riano, *Marriage Equality: From Outlaws to In-Laws* 102 (2020).

273. See Boren, *supra* note 257 ("[Law professor Rose Cuison Villazor] fears the legal review [of same-sex marriage in American Samoa] may . . . have a chilling effect: 'I would think there are cultural barriers to begin with. The Attorney General might present some other legal and social barriers, too.'"); Kellaway, *supra* note 261 ("Cultural expectations may be one of the reasons that no American Samoan same-sex couple has yet come forward to seek a marriage license . . . . Such a couple would have to become quite 'public' in their stance, notes [law professor Chimene] Keitner—a reality that could be daunting.").

274. Schmidt, *supra* note 52, at 94 ("[A]n overtly confrontational political movement would be significantly unSamoan . . .").

275. *Id.* In sovereign Samoa, for example, the Samoan Fa'afafine Association has chosen not to advocate for marriage equality, despite the desires of some of its members to marry their male partners, possibly out of fear of angering the Samoan Prime Minister, who is adamantly opposed to marriage equality. See Same-Sex Marriage Not a Priority, Radio N.Z., *supra* note 260 (noting concerns of one Samoan Fa'afafine Association member that "a discussion on marriage equality would just be really out of the ballpark and it could potentially risk all the other sorts of projects"). The Prime Minister of Samoa, Tuilaepa Sa'ilele Malielegoai, stated in March 2013, "My view as the leader of Samoa on this gay marriage issue is simple: There is no way, none whatsoever, that this issue will ever be considered in Samoa." Lealaialoto F. Tauafiafi, PM Firm on Rejection of Same-Sex Marriage, Samoa Observer (Mar. 13, 2013), <https://web.archive.org/web/20130401235115/http://www.samoobserver.ws/samoans-abroad/4174-pm-firm-on-rejection-of-same-sex-marriage> [<https://perma.cc/GH8R-KT23>].

sexual minorities) from litigating for their rights—litigation that would be unnecessary but for the *Insular* regime.

Forcing fa‘afafine—or any member of the LGBT community—to secure judicial approval before receiving Supreme-Court-established constitutional rights unnecessarily postpones their access to those rights and may put them at the mercy of biased judges. The Puerto Rican case of *Conde Vidal* shows how the *Insular Cases* allow judges to exercise their prejudice against protecting sexual minorities in U.S. territories.<sup>276</sup> The federal district judge in *Conde Vidal* seemed dead set on upholding Puerto Rico’s ban on same-sex marriage.<sup>277</sup> Because Puerto Rico has a federal district court, whose appeals are heard by the First Circuit, the judge’s multiple mistakes could be corrected.<sup>278</sup> But for the *Insular Cases*, the citizens of Puerto Rico would have been automatically protected by *Obergefell* and would not have had to wait almost a full year longer than the mainland for marriage equality. The situation is far worse in American Samoa. Over six years since the *Obergefell* decision, American Samoans are still denied marriage equality, and (unlike Puerto Ricans) they lack a federal court in which to seek redress.

Even if marriage equality eventually reaches American Samoa, the delay inflicts significant injuries on fa‘afafine and other sexual minorities in American Samoa. In addition to being forced to “suffer a multitude of daily harms, for instance, in the areas of child-rearing, healthcare, taxation, and end-of-life planning,”<sup>279</sup> the denial of marriage equality inflicts stigmatic harm.<sup>280</sup> In his *Obergefell* opinion, Justice Kennedy emphasized the dignitary harm to same-sex couples denied the right to marry.<sup>281</sup> The

276. See *supra* notes 132–145 and accompanying text.

277. Recall that the judge disregarded a binding First Circuit mandate, *Conde Vidal v. Garcia-Padilla*, 167 F. Supp. 3d 279, 287 (D.P.R. 2016), *rev’d sub nom.* In re *Conde Vidal*, 818 F.3d 765 (1st Cir. 2016) (*per curiam*), diminished the Supreme Court’s *Obergefell* opinion, *id.* at 283, and narrowly interpreted the *Insular Cases*, *id.* at 285, all in the service of denying marriage rights to the island’s LGBT population.

278. See *In re Conde Vidal*, 818 F.3d at 767 (*per curiam*).

279. *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 421 (M.D. Pa. 2014).

280. *Id.* (“Writing for the majority in *Windsor*, Justice Kennedy opined that discrimination caused by the non-recognition of same-sex couples’ marriages ‘impose[s] a disadvantage, a separate status, and so a stigma upon’ same-sex couples in the eyes of the state and the broader community.” (quoting *United States v. Windsor*, 570 U.S. 744, 770 (2013))); see also *Bostic v. Schaefer*, 760 F.3d 352, 383 (4th Cir. 2014) (“[T]he APA explains that, by preventing same-sex couples from marrying, the Virginia Marriage Laws actually harm the children of same-sex couples by stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters.”); cf. Christopher R. Leslie, *Standing in the Way of Equality: How States Use Standing Doctrine to Insulate Sodomy Laws From Constitutional Attack*, 2001 *Wis. L. Rev.* 29, 29–30 (noting how anti-gay laws, such as sodomy statutes, harm gay people by stigmatizing them).

281. *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015) (“There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such

adage that justice delayed is justice denied is particularly apt in the context of marriage because the “harm of impaired human dignity and denial of . . . [the] tangible benefits” of marriage are ongoing, and “delaying judicial resolution . . . would compound the harms [same-sex couples] suffer each day that their marital status remains unrecognized.”<sup>282</sup> These injuries flow directly from the *Insular* framework that prevents individuals in U.S. territories from automatically receiving the protections of the Supreme Court’s constitutional jurisprudence.

Despite all these harms, if a federal court were to reach the merits of a claim challenging American Samoa’s ban on gender-neutral marriage, the *Insular Cases* could still prevent a court from applying *Obergefell* to the territory: A judge could find the right to marry not fundamental in the territorial context, even though the Supreme Court declared it a fundamental constitutional right.<sup>283</sup> Or a court could find the right to be impracticable and anomalous as applied to American Samoa because neither of these concepts has been fully explained in over a century of *Insular* jurisprudence.<sup>284</sup> Constitutional rights should not depend on drawing the right, unprejudiced judge. This uncertainty is yet another problem caused by the *Insular Cases*: They create the real possibility that the unjust status quo could become permanent, and the fundamental right to gender-neutral marriage could extend everywhere in America except one territory.

#### V. INDIVIDUAL RIGHTS AND TERRITORIAL SELF-DETERMINATION

Extending *Obergefell*’s protections to American Samoa would not occur in a vacuum. Achieving marriage equality through federal court implicates issues of self-rule in U.S. territories. An argument can be made that the application of *Obergefell* to American Samoa smacks of colonialism, with federal judges requiring that local officials recognize gender-neutral

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profound choices.”); see also *id.* at 678 (“Dignitary wounds cannot always be healed with the stroke of a pen.”).

282. *Caspar v. Snyder*, 77 F. Supp. 3d 616, 636 (E.D. Mich. 2015); see also *Kitchen v. Herbert*, No. 2:13-CV-217, 2013 WL 6834634, at \*3 (D. Utah Dec. 23, 2013) (noting “there is no dispute that same-sex couples face harm by not being allowed to marry” and that delaying a judicial decision is unjust for couples “facing serious illness or other issues that do not allow them the luxury of waiting for such a delay”).

283. See *Fitisemanu v. United States*, 1 F.4th 862, 878 (10th Cir. 2021) (“[F]undamental’ has a distinct and narrow meaning in the context of territorial rights.” (quoting *Tuaua v. United States*, 788 F.3d 300, 308 (D.C. Cir. 2015))). Writing for himself, Judge Carlos Lucero, the author of the lead opinion in *Fitisemanu*, expounded: “Assessing whether a personal right meets some instrumental threshold to qualify for fundamental status under the *Insular* framework is not only an unusual mode of inquiry, but one that is in some tension with the nature of individual rights . . .” *Id.* at 878. In an understatement, he described this as an “uncomfortable inquiry.” See *id.* The inquiry is both uncomfortable and unsound. See *supra* notes 23–25 and accompanying text.

284. See *supra* note 197 and accompanying text.

marriages. Some American Samoan politicians have invoked the concept of self-determination to justify banning same-sex marriage.<sup>285</sup>

Self-determination is a critical value. But when issues of self-determination conflict with individual rights, the former does not automatically eclipse the latter. That is not to say that the constitutional right to marriage simply outweighs any interest in self-determination. Rather, merely invoking the phrase or concept of self-determination should not supplant individual rights, especially in the context of marriage.

Applying *Obergefell* to American Samoa is not an act of subjugation but of equity. States are sovereign in the American constitutional system, but their sovereignty is overridden when state laws, policies, or practices violate a fundamental constitutional right. This is precisely what happened in the marriage litigation leading up to and including *Obergefell*. The vast majority of states—through legislative acts or ballot initiatives—banned same-sex marriages.<sup>286</sup> Even though states are sovereign, federal courts did not afford any state self-determination on the issue of marriage equality. Of course, state sovereignty and territorial self-determination are different concepts with different cultural and legal implications. The point is simply that the federal overriding of local officials' desire for marriage discrimination is not unique; it is not inherently an act of colonization. The Supreme Court routinely limits or overrides state sovereignty when an individual's fundamental rights are infringed.<sup>287</sup> To extend *Obergefell* to U.S. territories does not improperly denigrate their autonomy but treats them as similar to U.S. states. Seen from this perspective, enforcing the right to same-sex marriage is less a mark of colonialism than a badge of equality across jurisdictions—as well as equality within American Samoa.

Using the rubric of self-determination to embrace the *Insular Cases* framework against marriage equality is a shortsighted folly. The *Insular Cases* fueled American colonialism by allowing Washington leaders to acquire control over territory while assuring stateside Americans that the territorial residents would not dilute their votes.<sup>288</sup> The entire premise of the *Insular Cases* is that territorial residents were incapable of self-government and could not be trusted with constitutional rights. The

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285. Kellaway, *supra* note 261 (“In the meanwhile, same-sex marriage has become considered by some American Samoan politicians to be a matter of their government’s self-determination, an expression of the territory’s independence from U.S. rule and culture.”).

286. Elaine S. Povich, *Without Obergefell, Most States Would Have Same-Sex Marriage Bans*, Pew Charitable Trs. (July 7, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/07/without-obergefell-most-states-would-have-same-sex-marriage-bans> [https://perma.cc/XC8Y-MV6H].

287. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (striking down Virginia’s miscegenation statutes); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (striking down a state law banning the use of contraceptives).

288. Raustiala, *supra* note 17, at 24 (“Thus the *Insular Cases* enabled American empire by limiting the reach of the Constitution.” (citing T. Alexander Aleinikof, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* 25 (2002))).

*Insular Cases* were based on the racist foundation that the inhabitants of unincorporated territories had inferior cultures and were incapable of self-government—and therefore, territories could be treated differently than states.<sup>289</sup> Expanding marriage equality to American Samoa would treat it in an equal manner to American states that had banned same-sex marriages. Applying *Obergefell* to the territories does not impugn their local cultures or self-governance any more than the opinion calls into question state sovereignty, which is to say, “not at all.”

To see how American marriage laws have historically constituted a vestige of colonialism in American Samoa, one need look no further than the discriminatory marriage restrictions that American overseers imposed on the territory during the early twentieth century. During the nineteenth century, before the Samoan Islands were split into American Samoa and Western Samoa (known today as “Samoa”),<sup>290</sup> Western missionaries foisted their conception of monogamous marriage onto Samoa and many other kingdoms throughout the Pacific.<sup>291</sup> In 1913, U.S. President Woodrow Wilson appointed Josephus Daniels—an unabashed racist who owned and edited a North Carolina newspaper that supported white supremacy and Jim Crow laws—as Secretary of the Navy, thus giving Daniels authority over American Samoa.<sup>292</sup> Daniels, in turn, installed his friend (and fellow known racist) A.M. Noble into a position to influence policy in American Samoa, where Noble implemented a miscegenation law that forbade marriages between white sailors and Samoan women.<sup>293</sup> Deeming Samoans racially inferior, the American-imposed marriage restriction angered many Samoans.<sup>294</sup> In an early display of support for marriage equality, the Samoan chiefs demanded that this unpopular law be repealed.<sup>295</sup>

While American-imposed miscegenation laws were affirmatively discriminatory, extending *Obergefell* to American Samoa is an antidiscrimination move. Moreover, as explained previously, marriage equality does not meaningfully conflict with the core principles of self-determination

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289. Ross Dardani, *Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa, 1899–1960*, 60 *Am. J. Legal Hist.* 311, 323 (2020) (“[P]olicymakers and legal elites argued that the people living in Puerto Rico, Guam, and the Philippines were inferior races and cultures, thus ineligible for inclusion in the U.S. polity . . . [T]he U.S. unincorporated territories[] . . . [were] able to be treated differently than states.”).

290. See *supra* note 31.

291. See Sally Engle Merry, *Colonizing Hawai‘i: The Cultural Power of Law* 244–45 (2000) (noting how Christian missionaries imposed monogamous marriage on Hawai‘i); Paul Shankman, *Interethnic Unions and the Regulation of Sex in Colonial Samoa, 1830–1945*, 110 *J. Polynesian Soc’y* 119, 123 (2001) (“The missionary ideal of monogamous Christian marriage would eventually become the Samoan ideal . . .”).

292. Kennedy, *supra* note 103, at 110, 117.

293. *Id.*

294. *Id.* at 117–19.

295. *Id.* at 132.

embodied in fa'a Samoa.<sup>296</sup> Fa'a Samoa is premised on communal land ownership, not marriage inequality.<sup>297</sup> To the extent that some American Samoans may perceive a conflict, the individual's right to self-determination in matters of marriage trumps any government official's perception of self-determination as requiring marriage discrimination.

Ironically, in American Polynesia, the opposition to same-sex marriage is a product of colonialism. For centuries, Polynesian societies embraced same-sex relationships.<sup>298</sup> In precontact Hawai'i, mähūs entered marriage-like relationships with men.<sup>299</sup> Pre-American Hawaiian law recognized same-sex aikāne relationships in some seemingly non-marriage contexts, such as probate and family law.<sup>300</sup> These customs "might be evidence for the earliest forms of marriage."<sup>301</sup> Although Hawaiian conceptions of marriage did not map perfectly to the Christian missionaries' constricted definition of marriage, these committed same-sex aikāne relationships arguably constituted marriages as that term is properly understood.<sup>302</sup>

Yet when the modern nationwide debate over same-sex marriage began in Hawai'i, opponents of marriage equality incorrectly argued that legal recognition of same-sex marriages represented an affront to Hawaiian culture and traditions. In the 1990s, Western churches sought to replace Hawaiian values with outside religious dogma as Catholic and Mormon leaders worked in close tandem, agreeing that "the Catholics would take the leading position in an alliance to stop gay marriage that would be financed by the Church of Jesus Christ."<sup>303</sup> But the Mormon

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296. See *supra* notes 285–289 and accompanying text.

297. See *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel*, 830 F.2d 374, 377 (D.C. Cir. 1987) ("Communal ownership of land is the cornerstone of the traditional Samoan way of life—the 'Fa'a Samoa.'"); U.S. Gov't Accountability Off., *supra* note 159, at 10–11.

298. See *supra* Part I.

299. See Eskridge & Riano, *supra* note 272, at 87 ("*Mahus* were biological men who presented themselves as women and often married or formed relationships with men."); Smith, *supra* note 68, at 532 ("In the 1700s, Big Island Chief Lonomakahiki lived in a marriage-like relationship with his *aikāne* Kapa'ihī."); see also *infra* note 302 and accompanying text.

300. Morris, *Configuring the Bo(u)nds of Marriage*, *supra* note 100, at 133 (discussing "Jocelyn Linnekin's research . . . show[ing] that *aikāne* relationships were recognized at law in probate proceedings as part and parcel of the Hawaiian extended family"); see also *supra* note 68 and accompanying text (discussing *aikāne* relationships).

301. Morris, *Configuring the Bo(u)nds of Marriage*, *supra* note 100, at 135.

302. *Id.* at 129–30 (noting that *aikāne* relationships satisfy Justice Douglas's definition of "marriage" from *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)). In Tahiti, too, stories abound of mähūs living as spouses of men. See Levy, *supra* note 73, at 16 n.7 (noting "semi-legendary stories of men occasionally living with a mahu as a spouse"). But see Oliver, *supra* note 69, at 374 ("Some transvestites appear to have formed long-lasting sexual and domestic relationships with their male partners, but there is no evidence that any such relationships achieved the institutional status of 'marriage,' for example, with respect to exchanges of goods.").

303. Eskridge & Riano, *supra* note 272, at 95.

Church provided more than money; Elder Loren Dunn “would devote more time and effort than anyone else to stopping gay marriage in Hawai‘i.”<sup>304</sup> In 2013, when the Hawai‘i legislature again debated same-sex marriage, “both proponents and opponents invoked Indigenous Hawaiian cultural models to their advantage, leading to contested discourses regarding Kanaka Maoli [Native Hawaiians] tradition and sexuality.”<sup>305</sup> But only the forces of equality had history on their side. Native civil rights “activists traced same-sex relations [to] mark them as an integral part of ‘Indigenous tradition.’”<sup>306</sup> This history had been buried by American missionaries and colonizers who sought to change those non-European aspects of the Polynesian societies that conflicted with church doctrine.<sup>307</sup> The entire concept of monogamous, non-consanguine, heterosexual marriages is a Western construct imposed on Polynesian societies by Western invaders, conquerors, and influencers.<sup>308</sup> Bringing marriage equality to Polynesia is less a show of colonialism than a restoration of precontact culture.

Many who invoke Samoan culture to oppose marriage equality are ignoring Polynesian history. For example, in opposing marriage equality in 2012, the Prime Minister of sovereign Samoa, Tuilaepa Sa‘ilele Malielegaoi, proclaimed: “[G]ay marriage will never be a part of Samoan culture and society . . . . Just because it is being legalized everywhere else does not mean we should bow to the influence of the outside world.”<sup>309</sup> Ironically, in renouncing outside influences, the Prime Minister relied on Christianity, the ultimate foreign import that supplanted traditional Samoan culture and beliefs.<sup>310</sup>

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304. *Id.* at 94.

305. Kauanui, *Paradoxes of Hawaiian Sovereignty*, *supra* note 68, at 186.

306. J. Kēhaulani Kauanui, *Indigenous Hawaiian Sexuality and the Politics of Nationalist Decolonization*, in *Critically Sovereign: Indigenous Gender, Sexuality, and Feminist Studies* 45, 50 (Joanne Barker ed., 2017).

307. See Greenberg, *supra* note 66, at 60 (noting that reliable historical sources refute other sources’ assertions that “homosexuality was rare in Samoa, Hawaii, and the Marshall Islands, and the subject of scorn when it occurred”); Nicholas Thomas, *Islanders: The Pacific in the Age of Empire* 294 (2010) (“Yet in due course the revolutionary introduction of a Christian order, backed by the chiefs, and organized to sustain their kingdom, had its ramifications everywhere. Architecture, dress, sex, work and the daily routine were all reshaped.”); *id.* at 114–15 (“[I]n various parts of the Austral and Cook Islands, as well as in Samoa, the arrival of Islander missionaries and in some cases brief visits by their white brethren resulted very rapidly in the destruction of idols, the construction of churches, and the adoption of Christian dress and ritual.”).

308. See *supra* note 291.

309. Kellaway, *supra* note 261 (noting that some politicians have taken a strong stance, including Samoan Prime Minister Tuilaepa Sa‘ilele Malielegaoi, who asserted that gay marriage “contradicts everything Samoa stands for” and “will never be a part of Samoan culture and society”).

310. *Id.* (noting Prime Minister Tuilaepa’s reliance on Samoan conservatism and Christianity in his opposition to gay marriage).



Marginalizing the fa'afafine perpetuates the colonial impulse to suppress sexual minorities. The renaissance of fa'afafine is a chapter of decolonization. For example, although European and American colonizers drove most fa'afafine underground, in sovereign Samoa decolonization has coincided with public reemergence of fa'afafine.<sup>311</sup> After sovereign Samoa gained its independence from New Zealand in 1962, the “[f]a'afafine emerged in the urban area of Samoa at the end of the colonial period as a fledgling, fluid, esteem-based identity movement.”<sup>312</sup> In sovereign Samoa today, “fa'afafine are part of almost all aspects of Samoan life,”<sup>313</sup> even if they are denied the right to marry their male partners. Meanwhile, on the eastern side of the Samoan archipelago, fa'afafine in American Samoa live in a state of legal limbo, remaining unclear whether the U.S. Constitution reaches them and their relationships.<sup>314</sup> Their precarious legal status is not a product of respect for Indigenous culture but a byproduct of colonialism.<sup>315</sup>

Ultimately, fa'a Samoa can be protected without resort to the dubious reasoning of the *Insular Cases*. Although the Tenth Circuit and D.C. Circuit both invoked the *Insular* framework to reject birthright citizenship for American Samoans,<sup>316</sup> the *Insular Cases* are not necessary to preserve the territory's unique government and property structures. None of the disputes in the *Insular Cases* involved American Samoa, so those decisions were never designed to safeguard fa'a Samoa. But the cession treaties were.<sup>317</sup> These treaties require the United States to recognize and respect the Samoan tradition of communal land ownership.<sup>318</sup> The United States has indeed historically been inconsistent in honoring its treaty obligations with territories<sup>319</sup>—but embracing the *Insular Cases*, which are premised

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311. Dolgoy, *supra* note 248, at 71.

312. *Id.*

313. Schmidt, *supra* note 52, at 31.

314. See *supra* Part III.

315. See *supra* note 23 and accompanying text.

316. See *supra* notes 193–195 and accompanying text.

317. See *supra* notes 171–177 and accompanying text.

318. The district court in *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel*, 637 F. Supp. 1398 (D.D.C. 1986), *aff'd*, 830 F.2d 374 (D.C. Cir. 1987), quoted Attorney General of American Samoa, L. Su'esu'e Lutu, who explained during oral argument in the case:

Every Western power that has entered the Samoan islands, not just the United States, in their official documents and treaties, has recognized what anyone who has ever visited Samoa or knows anything about Samoa knows, that the culture is integrally involved in communal ownership of land, and to upset or destroy that feature of Samoan society would ultimately destroy the society.

*Id.* at 1401 n.2.

319. For a more exhaustive history of the United States' treaty powers and relationships with territories, see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens,*

on territorial inferiority, is not the solution. Rather, fa'a Samoa could be protected through treaty enforcement, an approach premised on the equality of the sovereigns who negotiated the treaties.<sup>320</sup> Viewed through this lens, expanding *Obergefell* to recognize the marriage rights of fa'afafine is legitimate because it is perfectly consistent with America's treaty obligations, which are focused on respecting Samoan property rights, not disregarding individual rights.<sup>321</sup>

#### CONCLUSION

Around the globe, sexual minorities are often the most likely to need legal protections and the least likely to receive them. Unfortunately, this is the reality for those American Samoans deprived of marriage rights. Unlike the mähūs of Hawaii, the fa'afafine and other sexual minorities in American Samoa are denied the constitutional right to marry. To be born and live one's life on American soil and yet not receive the constitutional protections that all other Americans enjoy reveals one of the unappreciated costs of colonialization through territorialization. Despite the important roles that fa'afafine have played in Samoan society for centuries, they remain unprotected by either the U.S. Constitution or local laws, and they lack an established means of seeking protection.

This predicament flows from the *Insular Cases*. Contentious at inception,<sup>322</sup> these cases remain controversial and problematic as the world around them has changed. Decided before the discovery of flight and the construction of the Panama Canal, the *Insular Cases* were of an era when it would have taken weeks to travel from Washington, D.C. to American Samoa. Though owned by the United States, American Samoa is a constitutional afterthought—out of sight and out of mind. The world has chan-

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Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs, 81 *Tex. L. Rev.* 1, 199 (2002) (discussing U.S. treaty abrogation).

320. See Brad R. Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order* 67 (2011) (noting that sovereign equality of states establishes the strong presumption that "a state is . . . obligated only to the extent of its actual or constructive consent").

321. See Cession Treaty of Tutuila and Aunu'u, *supra* note 172 ("The Government of the United States of America shall respect and protect the individual rights of all people dwelling [on these islands] to their lands and other property . . ."); see also *supra* notes 242–243 and accompanying text.

322. See Kent, *supra* note 14, at 380 ("Starting immediately after these decisions were first issued in 1901, and continuing to the present, the *Insular Cases* and the doctrine of territorial incorporation have been subjected to withering attack."); Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 *U. Pa. J. Int'l L.* 283, 300 (2007) (noting that the *Insular Cases* were five-to-four outcomes); Elizabeth K. Watson, Comment, *Citizens Nowhere: The Anomaly of American Samoans' Citizenship Status After Tuaua v. United States*, 42 *U. Dayton L. Rev.* 411, 428 (2017) ("Further diluting the persuasive power of the *Insular Cases*, the opinions were contentious at the time the decision was rendered, with no majority opinion setting forth a cohesive rationale for treating the island territories differently than the states and the continental territories.").

ged since the *Insular Cases* were decided, but constitutional protections in America's most remote territory remain locked 120 years in the past.

These archaic cases should not impede marriage equality in U.S. territories. The American government can honor its treaty promises to respect Samoan traditions regarding communal land without limiting or delaying the constitutional right of individuals to marry. An examination of the marriage issue in American Samoa exposes why the *Insular* framework is unsound. In today's world, it should be constitutionally unacceptable that an individual right can be "fundamental" for Americans born in U.S. states but not for Americans born in U.S. territories. This is no way to dole out rights in a democracy.

Regardless of whether fa'afafine (and other members of the LGBT community in American Samoa) would win or lose in any future litigation for marriage equality in American Samoa, forcing them to litigate for access to fundamental rights already recognized by the Supreme Court is wrong. Marriage litigation is costly, both financially and psychologically. Even if the residents of American Samoa eventually obtain marriage equality in the future, it is appalling that Americans living in a culture with one of the deepest traditions of recognizing sexual minorities are forced to wait years to enjoy the same rights recognized in all other states and territories.

