42 U. Mich. J.L. Reform 651

University of Michigan Journal of Law Reform
Spring 2009

Article

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CONNECTING THE DOTS BETWEEN THE CONSTITUTION, THE MARSHALL TRILOGY, AND UNITED STATES V. LARA: NOTES TOWARD A BLUEPRINT FOR THE NEXT LEGISLATIVE RESTORATION OF TRIBAL SOVEREIGNTY

This law review Article examines: (1) the underpinnings of tribal sovereignty within the American system; (2) the need for restoration based on the Court's drastic incursions on tribal sovereignty over the past four decades and the grave circumstances, particularly tribal governments' inability to protect tribal interests on the reservation and unchecked violence in Indian Country, that result from the divestment of tribal sovereignty; (3) the concept of restoration as illuminated by United States v. Lara, and finally (4) some possible approaches to partial restoration.

The Article first evaluates the constitutional provisions relating to Indians and the earliest federal Indian law decisions written by Chief Justice Marshall on the premise that these two sources shed light on the upper limits of a potential legislative restoration of tribal sovereignty. Next, the Article examines the judicial trend of divestment of tribal sovereignty, focusing particularly on the latest decisions that evidence this trend. The Article further examines the negative effects of this divestment in Indian Country, from impeding tribes' ability to provide governmental services and to protect their unique institutions, to problems of widespread on-reservation violence, particularly against Indian women. The Article concludes that the judicial trend of divesting tribal sovereignty combined with these dire effects clearly demonstrate a need for restoration. Finally, the Article examines the Lara holding and its implications for the types of restoration that will be upheld by Court, concluding with an examination of options for potential legislative restorations.

*652 Introduction

This Article examines tribal sovereignty[1] under United States federal law, both as it exists presently in the weak and degraded state created by the Supreme Court's and Congress' divestment of tribal sovereignty and as it existed historically. The Article also examines the Supreme Court's watershed decision, United States v. Lara,[2] which upheld Congress' restoration of tribal criminal jurisdiction over Indians who are not members of the tribe exercising jurisdiction. Based on this federal law framework and the severe problems in Indian Country that have resulted from the divestment of tribal sovereignty, this Article explores the possibilities for other legislative restorations of tribal sovereignty.

Part I addresses early American legal conceptions of tribal sovereignty with the goal of illuminating the maximum feasible scope of restoration under the current system. Part II looks at the current, depressed and precarious state of tribal sovereignty as formulated under federal law. Part III examines the concept of restoration as illuminated by the Lara decision (and informed by other Supreme Court case law). Finally, Part IV outlines some of the most promising types of partial restoration.

I. Tribal Sovereignty as a Historical Concept: Why Early Tribal Sovereignty Jurisprudence Matters Today

Although legislative restoration is only one of many possible approaches to the problem of judicially divested tribal sovereignty,[3] ***653** this Article is primarily concerned with elucidating the restoration option, and it takes as its basis the following premises. Assuming tribes remain within the federal system, the possible scope of restoration is arguably limited to the most expansive range of sovereignty tribes possessed within this system, which presumably would have been immediately after the formation of the United States.[4] Under this view, legislative restoration of any sovereignty that is absolutely incompatible with tribes' continued relationship to, and location within, the United States would be extremely unlikely.[5]

Among the best sources as to the scope of sovereignty tribes possessed immediately after the creation of the United States are: (1) constitutional provisions referring to tribes and (2) the Supreme ***654** Court's earliest federal Indian law jurisprudence.[6] Accordingly, this Article will give a very brief overview of tribal sovereignty prior to Columbus' discovery of the New World and the European occupation of America and then turn to what is more relevant for purposes of restoration: tribal sovereignty's constitutional underpinnings and early Supreme Court conceptions of tribal sovereignty.

A. Pre-contact Sovereignty

Prior to European contact, tribes enjoyed the full panoply of sovereign rights.[7] This sovereignty "arose out of a history in which distinct communities of American Indian peoples lived, created institutions and systems, and governed themselves, sharing territories within North America."[8] Moreover, "although the degree and kind of organization varied widely among them," most tribes were politically organized as "independent, self-governing societies . . . ."[9] This sovereignty "'by nature and necessity'" meant that tribes "'conducted their own affairs and depended upon no outside source of power to legitimize their acts of government.'"[10]

It was European contact and the eventual establishment of the United States, at least under the Supreme Court's understanding of tribal sovereignty,[11] that disrupted and fundamentally changed the numerous ancient systems of tribal governance.

*655 B. The Constitution's Implications for Tribal Sovereignty

The Constitution is a seminal source for understanding the Framers' conception of tribal sovereignty and hence the maximum possible scope of restoration (absent a constitutional amendment). Although the Constitution does not contain many references to tribes or textual provisions that otherwise relate to them,[12] the text that does pertain to tribes is implicitly supportive of tribal sovereignty. Furthermore, given that tribes were functioning as governments at the time the Constitution was drafted and that the Constitution did not purport to alter tribal sovereignty (except insofar as providing Congress with authority to regulate commerce with tribes effected an alteration), the Constitution, through its very silence on the subject, affirms tribal sovereignty.[13]

1. Explicit Textual References

The Constitution has a scant three references to Indians. Two are generic references to "Indians not taxed," which simply exclude them from legislative apportionment.[14] The final reference is contained in the Commerce Clause, which provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with ***656** foreign Nations, and among the several States, and with the Indian Tribes."[15]

Scholars have noted that these provisions envision tribes to be largely outside of the political system of the United States,[16] and thus that tribal sovereignty is both pre-constitutional and extra-constitutional.[17] At the same time, the Commerce Clause "clearly recognizes some kind of significant and enduring sovereignty in Indian tribes" in that they are listed "in a series that includes the states and sovereign nations."[18] Moreover, as Gloria Valencia-Weber explains, the viability of the incipient United States depended upon developing a federalist framework that could procure a peaceful coexistence with tribes, and, thus,"[b]y its very existence, the Indian Commerce Clause demonstrates the unique role that tribes as nations played in constructing the foundations of the Constitution."[19]

***657** 2. The Treaty Clause

The only other constitutional text relating to tribes is the Treaty Clause, authorizing the President, "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[20] The Treaty Clause affirms tribal sovereignty in several different ways. First, the fact that the federal government utilized the treaty power so extensively to make agreements with tribes prior to, during the formation of, and in the early years of the Republic evidences a strong federal recognition of tribal sovereignty as a practical matter.[21] Moreover, given that several Indian treaties pre-dated the Constitution, the Treaty Clause, which did not retroactively or prospectively limit the power to make such treaties with tribes, affirms this power as a matter of constitutional intent.[22] Next, and relatedly, although the Clause does not explicitly reference tribes, the Court has consistently construed the Clause as authorizing the President to make treaties with tribes.[23] Thus, given that "the federal judiciary is supreme in the exposition of the law of the Constitution,"[24] the Clause legally embodies an understanding of tribes as sovereign nations who have the power to enter into treaties. Accordingly, both the history of treaty-making with tribes prior to adoption and ratification of the Constitution and subsequent judicial review and validation of tribal treaties affirm that the Clause constitutes a strong recognition of tribal sovereignty. Finally, the Clause's allocation of federal treating power to the President underpins and validates the numerous treaties ratified between tribes and the federal government, many of which included strong recognitions of tribal sovereignty.[25] Thus, in this additional sense, the Clause indirectly recognizes tribal sovereignty.

***658** Although Congress, in 1871, passed a statue prohibiting the President from making further treaties with tribes but protecting existing treaty rights,[26] this statute merely evidences the 1871 Congress' negative view of tribal sovereignty.[27] As a statute, it can have no effect on the constitutional status of tribes,[28] and, moreover, scholars have argued persuasively that the statute itself, as a congressional attempt to curb constitutionally accorded executive power, is unconstitutional.[29]

3. The Contrast Between the Textual Implications of These Constitutional Provisions and Their Judicial Interpretations

Taken together, the three explicit constitutional references to Indians and the Treaty Clause embody a view that tribes are sovereign, and permanently so, but that their sovereignty operates largely outside of the constitutional

framework. Despite the positive implications of these constitutional provisions for tribal sovereignty, the lack of explicit structural protections for such sovereignty ***659** has, as a practical matter, harmed tribes. Indeed, the oblique provisions appear to have functioned as a Rorschach ink blot test for the Court,[30] enabling adoption of radical, seemingly baseless principles such as Congress' unbounded (or, at the very least, nearly unbounded) plenary power over tribes.[31] In United States v. Wheeler,[32] for example, the Court described tribal sovereignty as being wholly under Congressional control and further held, broadly extending a recent holding regarding tribal criminal jurisdiction over nonmembers to other contexts,[33] that tribal sovereignty would be considered implicitly divested any time it appeared to be inconsistent with tribes' dependent status:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.[34]

***660** Thus, the Court has held that Congress wields vast plenary power over tribes in Wheeler and other cases despite the bedrock constitutional principle that "[t]he powers of the legislature are defined and limited" by the Constitution[35] and the fact that neither the Commerce Clause nor the Treaty Clause supports such broad constitutional authority.[36]

***661** Starting with the Indian Commerce Clause, the textual authorization to regulate commerce with tribes cannot be logically interpreted to authorize the legislative annihilation of tribes' political existence sanctioned in Wheeler.[37] Even the broadest Commerce Clause cases outside of the Indian law context[38] require that there be some nexus between commerce and the regulated activity,[39] despite the "plenary" quality of federal Commerce power.[40] Moreover, the Court has required stronger nexuses in recent years.[41] Looking at the ordinary meaning of the text of the Indian Commerce Clause, the Clause appears to authorize federal regulation regarding what entities may trade with Indians and the ***662** types of trading that may occur.[42] Regarding tribal sovereignty itself, it implies only that tribes are separate sovereigns and will remain so.

Similarly, as the Court has recently acknowledged,[43] the President's treaty power cannot logically give rise to congressional plenary power because the two powers reside in separate entities.[44] Moreover, to the extent the Treaty Clause can be construed to be applicable to the issue of plenary power, it would appear to authorize, at most, federal good faith negotiation with tribes regarding their continued political existence, not unilateral annihilation of tribes as legal entities.[45]

To briefly sum up, as a textual matter the Constitution does recognize tribal sovereignty in the Indian Commerce Clause and the ***663** Treaty Clause. Furthermore, the lack of Congressional power to limit tribal sovereignty (except in the course of regulating commerce with Tribes) calls into serious question the constitutionality of Congress' non-commerce-based limitations on sovereignty as well as the Supreme Court's conclusion that tribal sovereignty is subject to complete defeasement.[46]

Nonetheless, as previously noted, the Supreme Court has the last word on the meanings of constitutional provisions,[47] and given the number of decisions already on the books that link plenary power to the Constitution, the Supreme Court is unlikely to invalidate plenary power at any point in the foreseeable future.[48] Thus, constitutional provisions relating to tribes, while textually positive overall, have been irretrievably associated

with Congress' often damaging plenary power. The good news from a restoration perspective is that, outside of the realm of commerce[49] and judicial contortions of commerce into congressional plenary power, there are no constitutionally imposed limits on tribal sovereignty. Moreover, as tribes appear to be stuck with plenary power for the time being, an exploration of the positive uses that can be made of such power serves tribal interests.[50]

*664 C. The Supreme Court's Early Indian Law Jurisprudence

Along with the federal constitutional provisions relating to tribes, the Supreme Court's early Indian law jurisprudence also helps inform the potential extent of legislative restoration of tribal sovereignty. Widely termed the "Marshall Trilogy" because Chief Justice Marshall authored them,[51] the first Supreme Court Indian law cases[52] wrestled with the meaning of the fact that the United States housed within its borders separate tribal nations who, by treaty (and also as a result of brute force), had ceded some portion of their power to the United States. While it is not entirely clear that a legislative restoration effort would have to operate within the framework of the Marshall Trilogy,[53] the decisions nonetheless are crucial to understanding the federal law framework that governs the exercise of tribal sovereignty.[54] Furthermore, regardless of whether Congress could theoretically overrule the decisions, it is highly unlikely both that Congress would attempt to do so and that the Supreme Court would uphold such an attempt.[55] Accordingly, ***665** analysis of the Marshall decisions is essential to an understanding of the realistic potential for legislative restoration.

1. Johnson v. M'Intosh

The first such case, Johnson v. M'Intosh,[56] involved two non-Indian parties and concerned the validity of land title purchased from Indians as opposed to land title obtained from the United States.[57] In Johnson, the Court first sets forth the doctrine of discovery, under which the European nation that "discovers" a certain portion of the New World gains, despite Native peoples' pre-existing occupancy, a superior claim to it vis-à-vis the other European nations engaged in colonization.[58] According to the Johnson Court, while this imperialist doctrine did not "entirely disregard []" the rights of native inhabitants, who retained a right of occupancy in the discovered lands, it "necessarily, to a considerable extent, impaired" their rights.[59] Justice Marshall's opinion in Johnson also implicitly ***666** recognizes some degree of tribal sovereignty in that it suggests that, when non-Indians purchase lands from Indians, those transactions, to the extent they are valid at all, are governed by tribal law and custom.[60]

Given that the opinion relies to a large extent not on legal theory but on assumptions that this "discovery" gave rise to powers and legal rights, assumptions that were shared among the European nations and defended by England especially,[61] the Johnson decision is perhaps remarkable for the pretensions it does not make. For example, the Johnson Court recognizes that "[t]he history of America"[62] is one of the primary bases of its decision that Indian sovereignty has been limited so that Indians can no longer unilaterally convey a fee simple title to a private party, and the Court further acknowledges that this history is based on bloodshed.[63] Since the course of history itself is hardly a legal justification,[64] we might conclude from this reliance on history that Chief Justice Marshall felt constrained in drafting the opinion by the practical realities of the day.[65] Indeed, as Chief Justice Marshall himself recognizes later in the opinion, his and the entire Court's authority is contingent upon the validity of the United States' claim to Indian land:

> Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been asserted. . . . These claims have been maintained and established as far west as the river

> Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the Courts of this country ***667** to question the validity of this title, or to sustain one which is incompatible with it.[66]

Thus, with what now seems like startling candor, Chief Justice Marshall elucidates the central conundrum of Indian law: the courts must be disinterested in order to dispense justice, but, when it comes to tribal land claims (and perhaps all tribal sovereignty claims), they have a very serious conflict of interest.[67]

Johnson, then, relies in large part on the fact of colonialism in holding that European "discovery" of Indian lands diminished full tribal land ownership rights and that this discovery, at least in terms of land ownership rights, impaired tribal sovereignty.

***668** 2. Cherokee Nation v. Georgia

In Cherokee Nation v. Georgia,[68] the Court again relies to some extent on such assumptions in deciding that Indian tribes are not "foreign States" for purposes of federal court jurisdiction, as the term is defined in the Constitution:[69]

> The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of the same restraints which are imposed on our own citizens.[70]

In addition to these widely held colonial assumptions, the Court relies on the construction of the Indian Commerce Clause,[71] and specifically the fact that it differentiates between tribes and foreign nations, to support the holding that the Cherokee Nation is not in fact a foreign state.[72] It is in Cherokee Nation, in the course of distinguishing between foreign nations and tribes, that the Court first uses the much-quoted term "domestic dependent nations" to describe tribes.[73] The Court further explains that tribes are in "a state of pupilage" and that "[t]heir relation to the United States resembles that of a ward to his guardian."[74]

Despite implying that tribal sovereignty has been diminished by the Cherokee Nation's relationship with the United States and describing tribes as subject to the protective power of the United States as a result of this wardship arrangement, Cherokee Nation also has strong language affirming tribal sovereignty. For instance, in accepting the Tribe's argument regarding the extent of its sovereignty, the Court acknowledges the tribe "as a state, [and] as a distinct political society, separated from others, capable of managing its own affairs and governing itself . . . ."[75] The Court elaborates that:

> ***669** They [the Cherokees] have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties.

> The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.[76]

Thus, despite struggling to define the Tribe's relationship to the United States and ultimately holding that the Tribe lacked recourse to the courts of the United States for very severe abuses suffered at the hands of Georgia,[77] the Cherokee Nation Court, at the same time, reaffirms tribal sovereignty in several important respects.[78]

3. Worcester v. Georgia

Worcester v. Georgia[79] addresses the same course of conduct by the State of Georgia described in Cherokee Nation. However, this time the complainant is a white minister who has been charged, convicted, and sentenced in Georgia Superior Court to four years of hard labor for the state crime of residing within the limits of the Cherokee Nation without having obtained a license from the State.[80] In overturning the conviction,[81] the Supreme Court affirmed tribal sovereignty with language that was its strongest yet.

***670** The Court starts by defining the discovery doctrine narrowly so as to limit its effects on tribal sovereignty. With regard to the doctrine's effects on aboriginal land ownership rights, the Court states that the doctrine:

> regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.
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> . . . .
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> . . . The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man.[82]

Thus, the Court in Worcester scales back the view expressed in Johnson that discovery considerably impaired the rights of tribes,[83] instead concluding that discovery wrought only very limited changes on tribal sovereignty, solely affecting to whom tribes might sell land. Later in the opinion, the Court affirms this view, explaining with respect to colonial charters that "[t]he crown could not be understood to grant what the crown did not affect to claim"[84] and "that these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned."[85]

In addition to clarifying that discovery effected only a very limited alteration of tribal sovereignty, the Court concludes that the United States and its predecessor, the "United Colonies," considered tribes to possess full-fledged sovereignty. The Court gleans this from the fact that the United States (and the United Colonies) ***671** attempted to make treaties and other agreements with tribes.[86] The Court also derives this understanding from the United States' and United Colonies' need for the tribes' lands, allegiance, and other resources and their decisions

to fill these needs through agreements such as treaties and other methods that demonstrated mutual respect.[87] For example, the Court notes that the United Colonies earnestly sought reconciliation with tribes at the beginning of the Revolutionary War, since most tribes had historically been aligned with Britain and could be formidable adversaries. At the commencement of the War, "'securing and preserving the friendship of the Indian nations"' was deemed "'a subject of utmost moment to . . . [the] colonies."'[88] In other words, both the fact that the United Colonies approached the tribes respectfully, as it would any other sovereign, and the fact that the Colonies desperately needed tribal assistance with the War reaffirm that the Colonies viewed the tribes as sovereign and that the tribes were functioning as sovereign political entities.

Furthermore, in the course of construing one of the treaties between the United States and the Cherokee Nation, the Court concludes, despite ambiguous language,[89] that the Cherokee Nation consented only to federal management of its trading activities, rather than of its entire system of self-government.[90] The Court also makes the point (which regrettably seems to have become lost in later years[91]), that although, by treaty, the Cherokees acknowledged ***672** themselves to be under the protection of the United States, "[p]rotection does not imply the destruction of the protected."[92]

Finally, the Court concludes that the Trade and Intercourse Acts[93] evidence a strong view of tribal sovereignty on the part of the federal government: "All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States."[94]

Thus, the Court bases its decision to overturn the state conviction of Samuel Worcester in large part on the vitality of tribal sovereignty, with which the state law in question had unlawfully interfered. Importantly, the Court also views tribal jurisdiction as exclusive within the jurisdictional boundaries of Indian reservations.[95]

4. The Marshall Trilogy's Implications for Tribal Sovereignty.

Trenchant criticisms have been leveled at the decisions that comprise the Marshall Trilogy, in large part with good reason.[96] ***673** However, while the Court has undoubtedly used the Marshall decisions to support incursions on tribal sovereignty,[97] the ends for which they are used do not necessarily reflect the decisions' actual content: as the first decisions in a stare decisis framework, it makes sense that they would be cited over and over again regardless of what level of substantive support they lend to whatever holding the Court is announcing at the moment. Nonetheless, it is important to recognize that the decisions do contain colonialist constructs that were cobbled together to support a fundamentally unjust situation. The doctrine of discovery, the notion of tribes as wards who are in a state of pupilage, and the concept of domestic dependent nations have all lived on and continue to cause harm to tribes.[98] Given Justice Marshall's self-acknowledged conflict of interest as a colonial jurist, it is perhaps not surprising that the Court of the Conqueror would feel compelled to justify the source of its own power in rendering a decision on facts that so clearly called it into question. However, it might have been hoped that contemporary jurists would understand the harmful constructs in these decisions as politically-motivated justifications rather than sound legal doctrines. Indeed Marshall himself questioned and doubted the principles even as he laid them down; subsequent generations should be able to see the defects in them more, not less, clearly than he did.

Despite their damaging aspects, the Trilogy decisions do, in many ways, provide a view of tribal sovereignty that is functionally robust, at least compared to the current federal construction. As discussed above, Cherokee Nation reaffirms tribes' well-entrenched status as independent, functional governments. Worcester, which is ***674**

regarded as the most important of the Trilogy decisions,[99] builds on this conclusion. In particular, it elucidates the extent to which tribes were understood to be respected sovereigns during and immediately after the formation of the nation. Worcester is also important for its holding that tribes have exclusive jurisdiction within their reservations. Finally, Worcester imposes important limitations on the doctrine of discovery and federal power over tribes generally[100] and recognizes that states cannot interfere with the federal-tribal relationship.[101] Johnson, which is probably the least positive for tribes, is notable for its acknowledgment of continuing tribal land rights, its implicit recognition of some measure of tribal jurisdiction, and its frank admission that the dominance of the United States in relation to tribes is based largely on the fact of conquest, rather than on any firm legal justification.[102] The potential scope of restoration apparent from these early decisions is thus quite extensive compared to the current state of tribal sovereignty.[103]

II. Tribal Sovereignty in the Early Twenty First Century

A. The Current Depressed State of Tribal Sovereignty Under Federal Law

As many scholars have documented, the Court has persistently diminished tribal sovereignty over the past three decades.[104] The trend of divestment of tribal sovereignty has continued, in one way or another, with nearly every Indian law case decided by the Court. Even when the Court announces a holding that is positive for tribes, it often adds harmful language to undercut the next case or ***675** spur congressional action to divest sovereignty.[105] Generally, the cases have moved from a territorially-based vision of tribal sovereignty, under which tribes have complete or nearly complete jurisdiction over their entire reservations, to a consent-based vision, under which only tribal members are subject to tribal jurisdiction, under the theory that through voluntary membership in the tribe these members consented to tribal jurisdiction.[106]

Oliphant v. Suquamish Indian Tribe[107] was one of the first cases to evidence this trend of divestment of tribal sovereignty. In Oliphant, the Court held that the Suquamish Tribe's criminal jurisdiction over non-Indians had been implicitly divested as a result of the Tribe's dependent status. As many have pointed out, the Court relied on very suspect sources in reaching this conclusion.[108] The trend progressed[109] with Montana v. United States,[110] Brendale v. Confederated Tribes of the Yakima Indian Nation,[111] Duro v. Reina,[112] Strate v. A-1 Contractors,[113] Atkinson Trading Co. v. Shirley,[114] Nevada v. Hicks,[115] and, finally, Plains Commerce Bank v. Long Family Land and Cattle Co.[116] Other cases during this period also whittled away at tribal sovereignty over nonmembers in slightly different and sometimes quite creative ways.[117]

***676** In Montana, which the Court later described as its "pathmarking case concerning tribal civil authority over nonmembers,"[118] the Court expanded Oliphant and held that Indians' "dependent status . . . within our territorial jurisdiction" had implicitly divested[119] tribal civil regulatory authority over nonmembers on fee lands. Thus, the Court held that a tribe's civil regulatory authority over nonmembers on fee lands was extant only in two very limited circumstances, which are now commonly termed "the Montana exceptions":

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[120]

***677** As evidenced in the above quote, one of the fundamental attributes of this trend of divestment of tribal sovereignty is the transmutation of the longstanding presumption in favor of tribal sovereignty into a presumption that such sovereignty, at least over nonmembers, has been divested.[121] Another important attribute is the watering down of the canons of construction that had previously protected tribes in treaty interpretation as well as in the interpretation of statutes enacted for their benefit.[122] Finally, some of the decisions also evidence the Court's abandonment of the search for congressional intent in applicable statutes in favor of enacting its own rules,[123] as well as other encroachments on congressional authority.[124] Several scholars have linked this disturbing trend of divestment to the Court's espousal and enforcement of liberal values.[125] Other scholars have linked the trend to the Court's estimation of the effects of Congress' abandoned and repudiated policy of allotting Indian reservations in the hopes of assimilating Indians.[126]

To evaluate the current status of this trend of divestment of tribal sovereignty, it is useful to examine the language of the Court's most recent decisions on tribal sovereignty, Atkinson Trading Co., Hicks, and Long Family Land and Cattle. Atkinson Trading Co. concerned the Navajo Nation's ability to tax the guests of a hotel located on fee land.[127] The Atkinson Trading Co. Court stated, contrary to the Court's earlier jurisprudence treating taxing authority more favorably than other types of tribal regulation,[128] that tribal taxing power over nonmembers on non-Indian fee land within the ***678** reservation was "sharply circumscribed."[129] It further explicitly limited tribal taxing authority over nonmembers to activities occurring on tribal lands.[130]

In so holding, the Court summarily dismissed the potential applicability of both Montana exceptions. With respect to the consensual relationship exception, the Court held that the trading post owner had not consented to the tax simply by applying to become an Indian trader. The consent evidenced in his application to become a trader did not give rise to jurisdiction because the relationship lacked the required nexus to the challenged regulation.[131] Thus, the Atkinson Trading Co. Court injected a new, stringent nexus requirement into the Montana test.[132] With respect to Montana's second exception for activities threatening or having a direct effect on tribal health or welfare, political integrity, or economic security, the Court "fail[ed] to see" how the trading post and hotel could have such a direct effect,[133] despite the fact that the tax paid for valuable tribal services used by the trading post and the hotel.[134]

In Nevada v. Hicks,[135] the Court refused to allow a tribal member to bring a § 1983 claim[136] in tribal court against a state officer for actions undertaken in executing a state search warrant on the reservation. The Court expanded the Montana test to tribally-owned land, holding that the status of land ownership was only "one factor" to consider in applying the test.[137] The Court also declined to apply its longstanding rule requiring that a party who objects to tribal court jurisdiction fully exhaust all tribal remedies before seeking relief in federal court, holding that exhaustion would ***679** "'serve no purpose other than delay.'"[138] Finally--and perhaps most disturbingly for tribal sovereignty's future if left in the Court's unforgiving hands--the Court noted in dicta that "we have never held that a tribal court had jurisdiction over a nonmember defendant."[139]

Finally, in Long Family Land and Cattle Co., the Court struck down, due to lack of tribal court jurisdiction, a discrimination claim verdict that the jury had issued in favor of the plaintiff, a corporation that was located on the reservation and majority-owned by tribal members.[140] The defendant, an off-reservation bank, had been held liable (and required to set aside a subsequent land sale) based on its disparate treatment of the "overwhelmingly

tribal" corporation because of the race and tribal affiliation of the corporation's owners.[141] The federal district court in South Dakota and the Eighth Circuit both upheld the tribal jury verdict, as did the Cheyenne River Sioux Tribal Court of Appeals.[142] The lower federal courts and tribal court of appeals had all determined that tribal jurisdiction was proper because the bank had entered into a consensual relationship with the corporation and its owners.[143] Moreover, the lower federal courts particularly noted, as did Justice Ginsburg, who concurred in part and dissented in part, the fact that the bank had knowingly benefited from loan guarantees from the Bureau of Indian Affairs, which are reserved for businesses that are majority-owned by tribal members.[144]

***680** The Supreme Court, however, rather than confronting the applicability of Montana's consensual relationship exception head on, framed the question in a way that obscured the true importance of the case to the Tribe and its members.[145] By focusing exclusively on one of the remedies sought in the case, specific performance, the Court converted the transaction to one between the nonmember bank and the subsequent nonmember purchasers: "[t]his case concerns the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals."[146] This twist in presentation is analogous to stating that a Title VII discrimination case brought by a person of color seeking a remedy of reinstatement against an employer really concerned not the plaintiff, but the white employee who was subsequently hired to fill the plaintiff's position.[147] As Justice Ginsburg's opinion implicitly recognized, it was unconscionable for the Court to write the plaintiff tribal members out of the very case they brought to protect their right to be treated with "a minimum standard of fairness."[148] Indeed, the bulk of the majority opinion reads as if the Court had difficulty seeing that the tribal members existed at all,[149] an ironic ***681** twist on the concept of color-blindness that the Court has extolled in recent years.[150]

Given that the Long Family Land & Cattle Co. Court's holding is primarily based on its reading of the consensual relationship exception but that its analysis of that exception is only cursory, it is difficult to know precisely how the Court will construe the majority opinion in future cases. A narrow view of the holding is that it exempts land sales from Montana's consensual relationship exception and holds that tribal courts lack jurisdiction to impose specific performance as a remedy when such a remedy would in any way affect nonmembers who are not directly involved in the case at issue.[151] More broadly, the opinion arguably narrows further Montana's consensual relationship exception by prefacing the question of whether a consensual relationship with a sufficient nexus exists with the question of whether the challenged regulation is "necessary to protect tribal self-government [and] to control internal relations."[152] Furthermore, the case may signify that the Court will continue to narrow the definition of what qualifies as a nonmember "activit[y]" for purposes of the consensual relationship exception so as to further limit the applicability of the exception.[153] ***682** One thing that is clear from the opinion is that the newly constituted Supreme Court is unlikely to be of any help to tribes in their pursuit of orderly, well-governed reservations.

Thus, Atkinson Trading Co., Hicks, and Long Family Land & Cattle Co. equally lend the impression that the Court has little patience for tribal sovereignty whenever it threatens to inconvenience a nonmember. Rather, the Court seems willing to work hard to construct rationales to avoid the reach of the Montana exceptions; indeed, in the Supreme Court, their primary function may well be to exist in theory but never actually apply.[154] It is difficult to see, for example, how a tax that pays for services that are used by a trading post and hotel owner and that are available to his customers would lack the required nexus to his status as an Indian trader. Similarly, though perhaps less obviously, state officers' on-reservation activities may well imperil a tribe's political integrity.[155] Finally, it is ***683** difficult, if not impossible, to make sense of both the Long Family Land & Cattle Co. Court's implicit conclusion that discrimination against tribal members has no discernable effect on the tribe or its members and the Court's holding that the sale of land is not an activity.[156]

Indeed, despite the tortuousness of the reasoning it adopts in favor of nonmembers, the Court appears unwilling to give tribal interests genuine weight or to make the effort necessary to grasp the genuine import of tribal interests. Instead, the Court seems eager to drive tribes further down the road to assimilation,[157] having transformed itself from the "court of the conqueror into the court as the conqueror."[158] Given this exigent situation, it behooves tribes, so far as possible, to remove themselves from the Court's reach. An examination of the negative practical effects of this trend of divestment of tribal sovereignty on tribes and reservation life confirms this conclusion.

*684 B. The Negative Effects of the Sovereignty Divestment Trend on Tribes and Reservation Life

The negative effects of the Court's divestment of tribal sovereignty, combined with related institutional ills, such as the federal government's failure to adequately fund tribal justice systems, reverberate throughout Indian country. These effects are pervasive but are most acute in the criminal context. In the criminal context, due largely to the ineffective jurisdictional framework on reservations created by divestment, Native Americans, particularly females, are victimized at an alarming rate. Below is a brief overview of some of the documented effects of the divestment of tribal sovereignty followed by a more detailed exploration of its effects in the criminal context.

1. Overview of the Effects of the Divestment of Tribal Sovereignty

The effects of divestment of tribal sovereignty on tribal life cannot be overestimated. Sarah Krakoff, for instance, has documented that some tribal officials see the move toward divestment as an attempt to "'eliminate tribes.'"[159] Taking this idea a step further, she and others have shown (or documented others' conclusions) that the on-reservation lawlessness that flows from this divestment may be evidence of Native American genocide.[160]

***685** The practical effects of divestment[161] include (1) erosion of tribal culture and institutions,[162] (2) disempowerment of tribal courts in cases involving nonmembers,[163] (3) lack of respect for tribes and ***686** tribal governments among litigants and the general public (which both drives and results from divestment),[164] (4) lack of funding for tribal justice systems (also a reaction to and a driving force behind divestment),[165] (5) waste of resources due to the resource expenditures necessary to evaluate jurisdictional issues in the face of chronic uncertainty and the multiple layers of proceedings before different sovereigns that also commonly take place because of this same uncertainty,[166] (6) inability to protect tribal interests on the reservation,[167] and (7) finally lawlessness.[168]

***687** While most of the problems outlined above are self-explanatory, it is useful in terms of formulating solutions to look a bit more closely at (6) and (7).

2. Tribes' Inability to Protect Their Governmental Interests

Beginning with (6), I will focus particularly on the problems in the civil regulatory arena that demonstrate tribes' increasing inability to protect their governmental interests on-reservation. For instance, in her focused study of the effects of divestment of tribal sovereignty on the Navajo Nation, Sarah Krakoff discusses the increased resistance the Navajo government now faces to its consumer protection and repossession statutes.[169] She further documents the important interests that the Nation's repossession law serves in "warding off unscrupulous business practices by car dealers," a significant problem on the Navajo reservation.[170] Other problems include the Nation's inability to protect its interest in gaining higher levels of employment for its members.[171] This is due ***688** to the perceived vulnerability of the Navajo Preference in Employment Act[172] and the Nation's inability to attract businesses to the

Focus on Indian Law

by Ann E. Tweedy

Tribes, Same-Sex Marriage, and *Obergefell v. Hodges*

Now that the U.S. Supreme Court has confirmed that the Constitution protects the right of same-sex couples to marry under the due process and equal protection clauses of the 14th Amendment, Indian tribes are suddenly the only governmental entities in the United States that have the option not to allow same-sex couples to marry within their jurisdictions. After having been largely left out of conversations about the right to marry, tribes, and particularly those tribes with Defense of Marriage Acts (DOMAs), have overnight become the last frontiers in the fight for marriage equality. And yet, outside of the Indian law bar, little is known about the relationship of federal law to tribal law and about the diverse approaches that tribes take to marriage equality. This article summarizes tribal approaches to same-sex marriage and ends with recommendations to tribal courts examining challenges to tribal DOMAs.

Summary of Tribal Approaches to Marriage

In fact, tribes take widely divergent approaches to marriage in general and to same-sex marriage in particular. Many tribes do not issue marriage certificates at all.[1] These tribes are unlikely to have laws relating to same-sex marriage, although at least one, the Iipay Nation of Santa Ysabel, passed a resolution of governmental policy supporting same-sex marriage.[2] Located near San Diego, California, the Iipay Nation enacted its resolution, before same-sex marriage became legal in California, as a result of the Supreme Court's decision in *Hollingsworth v. Perry*.[3] The Nation therefore was choosing to participate in the ongoing debate about same-sex marriage in a very visible way.

Tribes that do have laws governing marriages may explicitly allow same-sex marriage, have laws that tie the requirements for marriage to those under the law of the state in which the reservation is located, have laws that are ambiguous as to same-sex marriage, or explicitly disallow same-sex marriage. Besides three tribes that have tied their marriage laws to state law (and which now allow same-sex marriage because states must), at least 13 tribes are known to allow same-sex marriages under tribal law.[4] Beginning with Coquille in 2008, most of these tribes changed their laws either to explicitly permit same-sex marriage or to make their laws gender-neutral. The tribes that affirmatively passed marriage equality include: Coquille, Colville, Keweenaw Bay, Little Traverse, Mashantucket Pequot, Oneida Tribe of Wisconsin, Pokagon, Puyallup, Siletz, Suquamish, and Tlingit and Haida.[5] Leech Lake (in Minnesota) and Cheyenne and Arapaho (in Oklahoma) allow same-sex marriage under pre-existing, gender-neutral marriage laws.[6]

Interestingly, most of these laws (and interpretations) were the products of advocacy by lesbian, gay, bisexual, and transgender (LGBT) tribal members who either wanted to marry their partners under tribal law or who simply wanted their tribes to have equitable marriage laws.[7] In some cases, such as those of Little Traverse and Mashantucket Pequot, the new marriage laws replaced tribal DOMAs. In others, such as Colville, the new law replaced a tribal law that was ambiguous as to whether same-sex marriage was permitted. The fact that advocacy has made such a difference is cause for hope for citizens of tribes that do have DOMAs, especially for those who are members of smaller tribes (given that most tribes that have passed marriage equality have been on the smaller side). Tribal members like Kitzen Branting of Coquille, Heather Purser of Suquamish, Danny Perez (né Hossler) of Pokagon, and Denise Petoskey of Little Traverse, among many others, have definitively shown that advocacy and organizing for marriage equality can be very effective in Indian country.

The second approach—tying tribal law on marriage to state law—has been espoused by at least three tribes: the Sault Ste. Marie tribe on Michigan's Upper Peninsula and the Eastern Shoshone and Northern Arapaho tribes on the Wind River Reservation in Wyoming. This approach may appear to have at least the virtue of simplicity—tribal law and state law mirror one another, and all marriages performed under tribal law will presumably be recognized in the state. In fact, in Sault Ste. Marie's case, when same-sex marriage was of uncertain legality in Michigan due to court decisions and stays on favorable rulings, tribal law, too, became uncertain.[8] As a result of

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Wyoming's decision not to defend its marriage ban after a federal district court invalidated it,[9] the Eastern Shoshone and Northern Arapaho tribes' path to marriage equality was more straightforward. The tribes began issuing marriage licenses to same-sex couples once same-sex marriage became legal in Wyoming.[10]

In addition to tribes that legally allow same-sex marriage, there are tribes with marriage laws that are ambiguous as to same-sex marriage, including tribes with largely gender-neutral laws and tribes with sex-specific marriage laws that don't necessarily evince an intent to preclude same-sex marriage. Additionally, some tribes in both of those groups have laws similar to state laws providing for recognition of all marriages performed elsewhere that are valid in the jurisdiction in which they were celebrated.[11] All of these laws are ambiguous in that it is not known how any of these tribes would respond to a request by a same-sex couple to either marry under tribal law or to receive recognition for their same-sex marriage performed elsewhere.

However, there are at least a dozen tribes that have their own DOMAs—laws specifically designed to preclude same-sex marriage. These tribes—including Blue Lake Rancheria, Cherokee Nation, Chickasaw Nation, Navajo, Oneida Indian Nation (in New York state), Osage, and several others—have chosen to send a direct message to tribal citizens and their partners that their relationships are not legitimate in the eyes of their tribes. The big question after *Obergefell v. Hodges*[12] is what the case means for such tribes. The short answer is that tribes are not bound as a matter of federal law to follow *Obergefell,* and so tribal responses are likely to vary widely by tribe. However, if faced with a tribal court challenge to a tribal DOMA, it does appear likely, at least if tribal approaches to other Indian Civil Rights Act (ICRA) claims are any guide, that many tribes would choose to follow *Obergefell* as persuasive authority.[13]Nonetheless, whether tribal members will bring such cases at all is uncertain because, to date, my research has not uncovered any tribal member who has sued to invalidate a tribal DOMA, although Navajo citizens have expressed the intent to initiate such a lawsuit.[14]

Tribal Courts and Tribal DOMAs

Why are tribes not bound by *Obergefell*? The first part of the answer is that the provisions in the Bill of Rights bind states or the federal government—and sometimes both—but do not bind tribes. We know this from a Supreme Court case in the 1800s called *Talton v. Mayes*, but the principle has been reaffirmed repeatedly since then.[15] Thus, tribes are not required to adhere to the 14th Amendment or the Fifth Amendment—the sources of equal protection and due process rights under the Constitution. The second part of the answer is that, although tribes are required to abide by a federal statute that contains equal protection and due process rights, namely the ICRA, tribes are empowered to interpret those rights according to their own cultures and traditions and need not follow the federal courts' interpretations of what those rights mean.

This is because ICRA reflects a compromise between protecting tribes' rights to self-determination and protecting the rights of individual tribal citizens and others who are subject to tribal jurisdiction. If tribes were required to interpret ICRA rights in the same manner federal courts interpret constitutional rights, this would have an assimilating effect on tribes. Many Indian cultures in the United States have been nearly destroyed in the past by federal policies aimed at assimilating Indians into mainstream, Western culture. Often these efforts were stark and unapologetic, even genocidal, such as Capt. Richard H. Pratt's 1892 call, in the course of his advocacy of assimilative boarding schools, to "kill the Indian … and save the man."[16] ICRA is intended to moderate the imposition of a requirement that tribes protect certain individual rights with a recognition that tribes need to interpret these rights in a way that is consonant with their cultures and traditions. The potential assimilative force of ICRA is also held in check by the fact that the statute is only enforceable in federal court via a habeas corpus petition, a procedure for the most part available only in criminal cases.[17]

If faced with a lawsuit challenging a tribal DOMA under the ICRA, however, it appears that many tribes would apply *Obergefell* as persuasive authority and strike down the tribal DOMA. This is because many tribes do tend to rely on federal constitutional decisions to interpret the rights available under the ICRA (as well as tribal constitutional rights to equal protection and due process), especially in the absence of direct precedent and information on tribal culture and tradition with respect to a particular issue. Historical information about tribes' support for gender nonconformity and same-sex relationships is available for only a very few tribes.[18] For the vast majority, there is little or no information available. If faced with a lack of information as to tribal culture and tradition, as most tribal courts would be, many would likely apply *Obergefell*. Also, given the dearth of tribal cases on same-sex marriage, there is likely to be a corresponding lack of tribal case law addressing related issues, such as sexual-orientation discrimination, that could provide precedent relevant to a DOMA challenge.

Nonetheless, some tribal courts may be reluctant to apply *Obergefell*. For instance, when same-sex marriage became legal in North Carolina as the result of two federal district court decisions applying *United States v. Windsor* (the predecessor to *Obergefell*), the Eastern Band of Cherokee's response was to enact a DOMA.[19] There are compelling reasons that tribal courts should carefully scrutinize DOMAs, however, whether using the tools of federal or tribal law. One is that DOMA is a heteronormative construct designed to enshrine the traditional nuclear family as the building block of civilization and the singular path to social legitimacy. But tribes have been persecuted because of their perceived lack of adherence to such norms, including historical attacks on tribes for permitting plural marriages and promiscuity, for espousing gender roles that were seen as contrary to nature (such as women being farmers), and both currently and historically for being invested in the extended—rather than the nuclear—family.[20] In light of this continuing history of oppression, tribes should be wary of enforcing closely related norms on their own members. The DOMA, which is a law designed to broadcast the illegitimacy of a certain class of relationships and of those involved in such relationships, is a Western construct. As Joe Medicine Crow, a Crow elder, once explained, "We don't waste people like the white world does; everyone has their gift."[21] More particularly, it appears that the Cherokee Nation's DOMA and Navajo's DOMA were adopted in response to developments at the state and federal levels, respectively, and thus largely out of a concern for intergovernmental relations.[22]

Finally, lest there be any doubt, DOMAs cause real harm. As public health Professor Mark L. Hatzenbuehler and his colleagues have found, LGBT persons living in jurisdictions that have DOMAs have higher rates of psychiatric disorders, especially mood disorders and generalized anxiety disorder; further, living in a highly homophobic

community takes 12 years on average off of an LGBT person's life.[23] Colonialism has already wrought immeasurable harms on tribal cultures. In this situation, tribes have the choice whether to import an oppressive colonial law with real potential to harm their own citizens into their communities.

Tribal courts that are presented with DOMA challenges under ICRA will have the difficult task of weighing tribal sovereignty against the health and individual rights of tribal citizens, with thorny questions thrown into the mix about how tribal a Western-style law becomes as a result of adoption by the tribal government. Each tribe must make this determination for itself. From the standpoint of individual justice, however, DOMAs have little to recommend them. ⊙

Endnotes

[1]*See, e.g.,* Ann E. Tweedy, *Tribal Laws & Same-Sex Marriage, Theory, Process, & Content*, 46 Colum. Hum. Rts. L. Rev. 104, 139 & n.208 (2015), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=2377817.

[2]*Id.* at 125.

[3]133 S. Ct. 2652 (2013); *see also* Tweedy, *supra* note 1, at 125.

[4]Many reports cite a larger number of tribes that permit same-sex marriage. This appears to be because the articles erroneously view tribes that lack marriage laws but that express favorable sentiments toward same-sex marriage or are in states that allowed same-sex marriage (before the *Obergefell* decision) as authorizing same-sex marriage as a legal matter. *See, e.g.*, "Same-sex marriage under United States tribal jurisdictions," Wikipedia.org. However, tribes that choose not to govern marriages should not be viewed as legally authorizing same-sex marriage.

[5]Tweedy, *supra* note 1, at 110-11; Oneida Code of Laws, ch. 71, §§ 71.3-1(d), 71.5-4(f); *Confederated Tribes of Siletz Indians Officially Recognize Same-Sex Marriage*, Lincoln County Dispatch (June 5, 2015); Dan Roblee, *KBIC legalizes tribally sanctioned same-sex marriage*, MiningJournal.net (June 10, 2015).

[6]*See, e.g.,* Tweedy, *supra* note 1, at 122-24.

[7]*Id.* at 142.

[8]Sault Ste. Marie Tribe of Chippewa Indians Tribal Code ch. 31, § 31.104 (1995); *see, e.g.,* Ann Tweedy, *Same-Sex Marriage Quandaries*, Turtle Talk Blog (March 28, 2014); *see also DeBoer v. Snyder,* 973 F. Supp. 2d 757 (E.D. Mich 2014); *DeBoer v. Snyder,* No. 14-1341, Doc. 22-1 (6th Cir. Mar. 25, 2014); *DeBoer v. Snyder,* 772 F.3d 388 (6th Cir. 2014). It is not known whether the uncertainty of Sault Ste. Marie's laws had a practical effect on same-sex couples wishing to marry.

[9]Shoshone & Arapaho Law & Order Code tit. IX, § 9-5-2 (2015); *Guzzo v. Mead*, No. 14–CV–200–SWS, 2014 WL 5317797 (D. Wyo. Oct. 17, 2014); Order Lifting Temporary Stay, *Guzzo v. Mead,* No. 14–CV–200–SWS (D. Wyo. Oct. 21, 2014).

[10]*Wind River Tribal Judge Presides Over First Same-Sex Marriage*, Indianz.com (Nov. 17, 2014), www.indianz.com/News/2014/015673.asp.

[11]Tweedy, *supra* note 1, at 128-131, 140-42.

[12]__ S Ct. __, 2015 WL 2473451 (June 26, 2015).

[13]*See* Tweedy, *supra* note 1, at 146-153 (examining the closely related question of tribal courts' likely application of *United States v. Windsor*, 570 U.S. __, 133 S. Ct. 2675 (2013)); *see also Matthew L.M. Fletcher, Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. Colo. L. Rev. 59, 77–80 (2013); Ann E. Tweedy, *Sex Discrimination Under Tribal Law*, 36 Wm. Mitchell L. Rev., 392, 415-16 (2010).

[14]Tweedy, *supra* note 1, at 109, 135 & n.182; John Wright, Navajo LGBT Advocates Consider Lawsuit, Bill to Legalize Gay Marriage, Towelroad.com (Aug. 1, 2015) The one known tribal court case involves a same-sex Cherokee couple who married *before* Cherokee Nation had a DOMA. Tweedy, *supra* note 1, at 109 (citing In the Matter of Appeal of the Adverse Order of the District Court Against Kathy Reynolds and Dawn L. McKinley, JAT-04-15 (Judicial App. Tribunal of the Cherokee Nation, Aug. 3, 2005)).

[15]*Talton v. Mayes,* 163 U.S. 376, 384–85 (1896); Tweedy, *supra* note 1, at 147.

[16]*See, e.g.,* Troy A. Eid & Carrie Covington Doyle, *Separate But Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. Colo. L. Rev. 1067, 1078 & n.50 (2010).

[17]Tweedy, *supra* note 1, at 147-153 (discussing ICRA, 25 U.S.C. §§1301-04 (2014)).

[18]Tweedy, *supra* note 1, at 150-54.

[19]Eastern Band of Cherokee Indians, Ordinance No. 381 (Dec. 11, 2014); *see* Jonathan Drew, *Tribes Dig In on Same-Sex Union: Some Forbid It on Reservations*, Boston Globe (April 7, 2015).

[20]Tweedy, *supra* note 1, at 154-58.

[21]Wilhelm Murg, *Momentum Mounts to Again Embrace Two Spirits*, Indian Country Today (June 6, 2011).

[22]Tweedy, *supra* note 1, at 134-38, 143.

[23]Mark L. Hatzenbuehler *et al.*, *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, [vol. 100 no. 3] Am. J. Pub. Health 452, 452 (Mar. 2010); Mark L. Hatzenbuehler *et al.*, *Structural Stigma and All-Cause Mortality in Sexual Minority Populations*, 103 Soc. Sci. & Med. 33 (2014).

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

Ian Tapu*

Abstract

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

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* A.B., Dartmouth College, 2008; J.D., University of Hawai'i William S. Richardson School of Law, 2020. First, *fa'afafetai tele lava* to my partner Alika for his unwavering patience and support. I would not have been able to write this Note if it were not for his unconditional love. Thank you to Julian Aguon and Professor Susan Serrano for inspiring me to think more critically of the space Indigenous peoples can occupy in legal scholarship. I would also like to express my gratitude to the Ulu Lehua Scholars Program for being my anchor in law school. And finally, *fa'afetai* to the editors and advisors of the *Dukeminier Awards Journal* for their professionalism and exceptional work. Their meticulous and thought provoking feedback has elevated this Note in unanticipated ways.

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INTRODUCTION

Five United States territories—Puerto Rico, Virgin Islands, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands (CNMI)—possess a unique historical and geopolitical classification distinct and separate from the fifty states and the "quasi-sovereignty" of Native American tribes.[1] Against the backdrop of this carefully constructed designation, companies regularly laud the territories as "long-distance getaway[s] . . . [to] faraway places overseas"[2] that "offer paradise without a passport."[3] These islands are even described as "exotic when comparing to their continental counterparts"[4] and with an "ocean so blue, the sky is jealous."[5] Colloquially, some of the U.S.

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

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

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

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

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

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

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

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

Seattle Post-Intelligencer (Aug. 31, 2000), http://seattlepi.nwsource.com/cfootball/samo29.html).

6. Gary Sorensen, *America's Paradise: U.S. Virgin Islands*, The Spectrum (June 11, 2016), https://www.thespectrum.com/story/life/2016/06/11/americas-paradise-us-virgin-islands/85620026 [https://perma.cc/EZ5J-CUUK].

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

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

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

10. *See infra* Part II.

11. There exists no set line of cases that comprise the *Insular Cases*. *See, e.g.*, Juan R. Torruella, *One Hundred Years of Solitude: Puerto Rico's American Century*, *in* Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution 243 (Christina Duffy Burnett & Burke Marshall eds., 2001) (listing eight cases as the *Insular Cases*); Jose P. Mafnas Jr., *Applying the* Insular Cases *to the Case of* Davis v. Commonwealth Election Commission*: The Power of the Covenant and the Alternative Result*, 22 U.C. Davis J. Int'l L. & Pol'y 105, 119 n.105 (2016) (defining the

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

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

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

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

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

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

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

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

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

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

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

18. *Id* at 186.

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

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

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

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

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

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

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

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

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

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

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

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

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

27. *Id.*

28. *Id.*

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

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

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

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

29. *See infra* Subpart I.B.

30. *See infra* Subpart I.B.

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

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

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

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

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

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

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

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

A. *The History of the Incorporation Doctrine*

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

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

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

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

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

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

41. *Id.*

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

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

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

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

43. *Id.* at 287. The U.S. government misspelled Puerto Rico as the "Americanized corruption" "Porto Rico" until 1932. *See* James L. Dietz, Economic History of Puerto Rico: Institutional Change and Capitalist Development 85 (1986).

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

45. *Id.* at 250–51, 287.

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *The Impractical and Anomalous Standard*

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

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

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

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

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

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

61. Adam Clanton, *Born to Run: Can an American Samoan Become President?*, 29 UCLA Pac. Basin L.J. 135, 151 (2012); *see* Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 Loy. L. Rev. 1, 14 (2004).

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

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

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

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

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

64. *Id.* at 74–76.

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

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

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

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

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

70. *Id.*

71. *Id.* at 1459.

72. *Id.*

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

II. The Current State of LGBTQ Rights in the U.S. Territories

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

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

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

73. *Id.* at 1462.

74. *Id.* at 1460, 1462.

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

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

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

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

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

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

B. *LGBTQ Rights in the Territories*

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

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

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

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

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

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

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

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

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

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

85. *LGBT Policy Spotlight: LGBT Equality in the U.S. Territories*, Movement Advancement Project & Lambda Legal 7 (June 2019), http://www.lgbtmap.org/policy-spotlight-us-territories [https://perma.cc/S3ZD-5RDV] [hereinafter *LGBT Policy Spotlight*].

86. *Snapshot: LGBTQ Equality By State*, Movement Advancement Project, http://www.lgbtmap.org/equality-maps [https://perma.cc/8MWN-3BNR].

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

be transgender, "but whose sense of gender or manner of dress does not adhere to gender stereotypes."[88]

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

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

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

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

89. *See supra* note 82.

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

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

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

are ranked "low:"[93] Guam has a total score of 7, the Virgin Islands a 5.5, American Samoa a 1.5, and the CNMI a 0.5.[94]

1. Puerto Rico

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

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

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

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

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

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

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

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

99. *Id.*