
RESPECT FOR MARRIAGE IN U.S. TERRITORIES

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The 2010s were a watershed decade for marriage equality in the United States. In 2013, the Supreme Court in *United States v. Windsor* struck down section 3 of the so-called Defense of Marriage Act (“DOMA”),¹ which denied federal recognition to valid state marriages between same-sex couples. The opinion left intact section 2 of DOMA, which “allow[ed] States to refuse to recognize same-sex marriages performed under the laws of other States.”² Two years after *Windsor*, the Supreme Court in *Obergefell v. Hodges* invalidated all state laws against same-sex marriage.³ The opinion effectively invalidated section 2 of DOMA and went one step further: states had to not merely recognize out-of-state same-sex marriages but also had to perform same-sex marriages in state as well. *Obergefell* brought marriage equality to every state.⁴

Although *Obergefell* seemed to guarantee same-sex couples the constitutional right to marry, marriage equality became vulnerable in the summer of 2022. In addition to providing the critical fifth vote to reverse *Roe v. Wade* in *Dobbs v. Jackson Women’s Health Organization*,⁵ Justice Thomas wrote a concurrence calling for the complete repudiation of substantive due process.⁶ Ominously, he wrote “in future cases, we should reconsider all of this Court’s substantive due process precedents,

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1. *United States v. Windsor*, 570 U.S. 744, 752, 775 (2013).

2. *Id.* at 752.

3. *Obergefell v. Hodges*, 576 U.S. 644, 680–81 (2015).

4. *Id.* But it did not bring marriage equality to every territory. Christopher R. Leslie, *The America Without Marriage Equality: Fa’afafine, The Insular Cases, and Marriage Inequality in American Samoa*, 122 COLUM. L. REV. 1769, 1771 (2022) [hereinafter Leslie, *The America Without Marriage Equality*] (noting how American Samoan officials disregarded *Obergefell*). See *infra* Part I.

5. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

6. *Id.* at 2301 (Thomas, J., concurring).

including . . . *Obergefell*.⁷

Justice Thomas's concurrence in *Dobbs* reinvigorated congressional efforts to pass the Respect for Marriage Act ("RFMA"), a statute that would require states to grant full faith and credit to out-of-state marriages regardless of race, gender, ethnicity, or national origin.⁸ The marriage equality movement succeeded when President Biden signed the RFMA into law in December 2022.⁹ Despite the recent controversy of Thomas's *Dobbs* concurrence, the RFMA was not new legislation; versions of the RFMA had been proposed in Congress for over a decade, before either the *Windsor* or *Obergefell* opinions were issued.¹⁰ The RFMA did not simply codify *Obergefell*, as the Act does not invalidate any state's prohibition on licensing same-sex marriage within its own borders. Instead, the RFMA effectively repealed section 2 of DOMA and affirmatively requires states to recognize same-sex marriages legally performed in other states.¹¹

7. *Id.* Justice Thomas asserted that "[b]ecause any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents." *Id.* (citation omitted). Justices Breyer, Sotomayor, and Kagan, in dissent, expressed concern that *Dobbs* would be used to eliminate substantive due process and to reverse *Obergefell*, see *id.* at 2331 (Breyer, Sotomayor & Kagan, JJ., dissenting), while the majority opinion's author, Justice Alito, claimed that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion," and that the "rights regarding contraception and same-sex relationships are inherently different from the right to abortion," *id.* at 2277–78, 2280 (majority opinion). His assurances, however, provide little solace given his prior dishonesty when adjudicating the constitutional rights of same-sex couples. See Christopher R. Leslie, *Dissenting from History: The False Narratives of the Obergefell Dissents*, 92 IND. L.J. 1007, 1021 n.104 (2017) [hereinafter Leslie, *Dissenting from History*]. See generally Christopher R. Leslie, *Justice Alito's Dissent in Loving v. Virginia*, 55 B.C. L. REV. 1563 (2014) [hereinafter Leslie, *Justice Alito's Dissent in Loving*] (criticizing Justice's Alito's arguments against marriage equality in *Windsor*).

8. Kevin Breuninger, *House Passes Same-Sex Marriage Protections in Response to Roe Ruling, with Murky Senate Path Ahead*, CNBC (July 19, 2022, 8:07 PM), <http://www.cnn.com/2022/07/19/house-votes-on-same-sex-marriage-bill-after-supreme-court-ro-ruling.html> [<http://perma.cc/P63C-NSS9>].

9. Domenico Montanaro, *Biden Signs Respect for Marriage Act, Reflecting His and the Country's Evolution*, NPR (Dec. 13, 2022, 4:36 PM), <http://www.npr.org/2022/12/13/1142331501/biden-to-sign-respect-for-marriage-act-reflecting-his-and-the-countrys-evolution> [<http://perma.cc/VGG7-7NXT>].

10. See S. 598 (112th): *Respect for Marriage Act of 2011*, GOVTRACK, <http://www.govtrack.us/congress/bills/112/s598> [<http://perma.cc/F3AY-BEMW>]; see also Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle": The Inevitability of Marriage Equality After Windsor*, 23 TUL. J.L. & SEXUALITY 17, 20–21 (2014) ("At the congressional level, the Respect for Marriage Act, repealing DOMA in its entirety, was reintroduced on June 26, 2013, with 161 Sponsors in the House of Representatives and 41 sponsors in the Senate.").

11. Respect for Marriage Act, Pub. L. No. 117–228, 136 Stat. 2305 (2022) ("No person acting under color of State law may deny . . . full faith and credit to any public act, record, or judicial proceeding of any other State pertaining to a marriage between 2 individuals, on the basis of the sex, race, ethnicity, or national origin of those individuals . . ."). The RFMA is not limited to recognition of same-sex marriage. The statute also prohibits states from refusing to recognize interracial marriages performed in other states. The Supreme Court in *Loving v. Virginia* struck down anti-miscegenation laws. *Loving*, unlike *Obergefell*, is not currently under assault. Ironically, however, opponents of same-sex marriage

Opponents of the RFMA argued that the legislation was unnecessary because *Obergefell* already protects marriage equality.¹² They seem unimpressed with Justice Thomas’s shot across the bow in *Dobbs*.¹³ For example, one month after Justice Thomas announced his intention to reconsider and perhaps reverse *Obergefell*, Senator Marco Rubio belittled the RFMA as a “stupid waste of time.”¹⁴ Iowa Senator Chuck Grassley voted against the RFMA, asserting that the “legislation is simply unnecessary. No one seriously thinks *Obergefell* is going to be overturned so we don’t need legislation.”¹⁵ He implied that RFMA supporters were seeking “to fabricate unnecessary discontent in our nation.”¹⁶

The argument that the RFMA was unnecessary because marriage equality was already the law of the land failed to appreciate how constitutional law reaches the shores of U.S. territories. Even if Justice Thomas fails in his mission to overturn *Obergefell*, the RFMA is still essential now to bring the protections of *Obergefell* to all corners of the American empire. Before the RFMA, the U.S. territory of American Samoa refused to follow *Obergefell* and continued to restrict marriage licenses to opposite-sex couples.¹⁷

consistently recycle the precise arguments used in the 1950s and 1960s against interracial marriage, yet they currently only attack the former. Leslie, *Justice Alito’s Dissent in Loving*, *supra* note 7, at 1569–1608. For example, while repeatedly attacking same-sex marriages, Justice Thomas never condemns interracial marriages, perhaps because he is in one.

12. Julia Mueller, *Baldwin Pushes Back on GOP Arguments Against Same-Sex Marriage Legislation*, HILL (Sept. 12, 2022, 12:00 PM), <http://www.thehill.com/homenews/senate/3638918-baldwin-pushes-back-on-gop-arguments-against-same-sex-marriage-legislation> [http://perma.cc/R45J-U42C] (“Some Republicans have said the Respect for Marriage Act, which would make marriage a constitutional right regardless of a couple’s sex, race, ethnicity or national origin, is moot because the U.S. Supreme Court has already protected marriage equality.”).

13. Brooke Migdon & Al Weaver, *Florida Students Protest Sasse Appointment over LGBTQ Issues*, HILL (Oct. 10, 2022, 4:10 PM), <http://www.thehill.com/homenews/senate/3681727-florida-students-protest-sasse-appointment-over-lgbtq-issues> [http://perma.cc/W2TJ-2QQ3] (“Momentum for the Respect for Marriage Act increased after Thomas issued his concurrent opinion, but [Senator Ben] Sasse told reporters in July that it was unnecessary, accusing Democrats of voting in favor of the bill to further divide Americans.”).

14. Julia Mueller, *Baldwin Says She Confronted Rubio After He Called Vote to Codify Same-Sex Marriage a ‘Stupid Waste of Time’*, HILL (July 22, 2022, 11:33 AM), <http://www.thehill.com/homenews/senate/3570443-baldwin-says-she-confronted-rubio-after-he-called-vote-to-codify-same-sex-marriage-a-stupid-waste-of-time> [http://perma.cc/53MQ-RFDZ].

15. Valeree Dunn, *Grassley Calls Respect for Marriage Act “Unnecessary,” and a “Threat to Religious Liberty,”* (Nov. 16, 2022) (typeface convention added), <http://www.msn.com/en-us/news/politics/grassley-calls-respect-for-marriage-act-unnecessary-and-a-threat-to-religious-liberty/ar-AA14cnfA> [http://perma.cc/66KC-28KY].

16. *Id.*

17. Leslie, *The America Without Marriage Equality*, *supra* note 4, at 1771. Various states and localities have historically provided differing degrees of protection for LGBT+ rights. Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1616–24 (2017) (noting that historically some states and cities are more protective of LGBT+ rights than others). American Samoa is unique, however, in singularly rejecting the holding of *Obergefell*.

While *Obergefell* instantly brought marriage equality to every state, the path toward marriage rights has been more complicated in U.S. territories: American Samoa, Guam, the Commonwealth of the Northern Mariana Islands (“CNMI”), the U.S. Virgin Islands (“USVI”), and Puerto Rico.

Acquired primarily from colonial powers by purchase or as the spoils of war, U.S. territories hold a precarious position in our constitutional structure. Beginning in 1901, the Supreme Court issued a series of opinions known as the *Insular Cases*.¹⁸ This line of authority prevented constitutional rights from automatically protecting territorial residents. Instead, the Court held that “the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct.”¹⁹ In the absence of congressional directive, the *Insular* rubric provides that federal courts can hold that a constitutional right applies to one or more territories when the court determines that the right is “fundamental” and that recognizing the right would not be “impracticable and anomalous” for that territory.²⁰ Under this test, for example, the district court in *King v. Andrus*²¹ struck down rules denying jury trials in criminal cases in American Samoa, finding that it would not be impractical and anomalous to require American Samoa to provide jury trials to criminal defendants, given the structure of the American Samoan judicial system.²²

Conversely, in rejecting calls to provide birthright citizenship to individuals born in American Samoa,²³ The Court of Appeals for the D.C. Circuit in 2015 in *Tuaua v. United States* held that it would be “anomalous to impose citizenship over the objections of the American Samoan people themselves”²⁴ and federal judges should not “forcibly impose a compact of citizenship—with its concomitant rights, obligations, and implications for cultural identity.”²⁵ In 2021, the Tenth Circuit in *Fitisemanu v. United States* followed suit and used the *Insular* framework to block birthright citizenship for American Samoans.²⁶

18. KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 79–80 (2009).

19. *Downes v. Bidwell*, 182 U.S. 244, 279 (1901).

20. Leslie, *The America Without Marriage Equality*, *supra* note 4, at 1773; *Fitisemanu v. United States*, 1 F.4th 862, 878–79 (10th Cir. 2021).

21. *King v. Andrus*, 452 F. Supp. 11 (D.D.C. 1977).

22. *See id.* at 17.

23. American Samoans did not have a right to birthright citizenship. *Fitisemanu*, 1 F.4th at 865. American Samoans are U.S. nationals, not U.S. citizens, and thus do not have the right to vote or run in federal or state elections outside American Samoa or the right to serve on federal and state juries. *Id.*

24. *Tuaua v. United States*, 788 F.3d 300, 310 (D.C. Cir. 2015).

25. *Id.* at 311.

26. *Fitisemanu*, 1 F.4th at 864–65.

The *Fitisemanu* plaintiffs petitioned the Supreme Court for certiorari.²⁷ Some commentators saw the case as the perfect vehicle for challenging the *Insular Cases*.²⁸ The hope was not far-fetched. Respected scholars advocate the reversal of the *Insular Cases*.²⁹ Significantly, in his concurrence in *United States v. Vaello Madero* in April 2022,³⁰ Justice Gorsuch observed the following:

A century ago in the *Insular Cases*, this Court held that the federal government could rule Puerto Rico and other Territories largely without regard to the Constitution. It is past time to acknowledge the gravity of this error and admit what we know to be true: The *Insular Cases* have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.³¹

On October 17, 2022, however, the Supreme Court denied certiorari in *Fitisemanu*,³² thus leaving the *Insular Cases* intact. While not obvious at first glance, that decision has implications for marriage equality in U.S. territories.

This Article proceeds in three parts. Part I examines how the governments of the five U.S. territories responded to the *Obergefell* decision. Because of the *Insular Cases*, *Obergefell* did not necessarily automatically apply to the territories. Of the most concern, the territorial government of American Samoa has refused to recognize either *Obergefell* or marriage equality. Part II explains how the RFMA provides a partial solution to the problem created by the *Insular Cases*. It discusses the unappreciated significance of the RFMA for residents of U.S. territories. The RFMA brings a form of marriage equality to American Samoa for the first time. Less historic, but also important, the RFMA would ensure the continuation of marriage equality in those U.S. territories where the right to same-sex marriage is currently recognized but uniquely vulnerable because of the *Insular Cases*. Part III exposes some of the limitations of the RFMA. For example, the RFMA requires that states and territories provide full faith and credit to marriages legally performed in other states and territories; same-sex couples still cannot get legally married in American Samoa. They must leave home to get married, a burden not imposed on opposite-sex couples.

27. *Fitisemanu v. United States*, 143 S. Ct. 362 (2022).

28. James T. Campbell, Aurelius's *Article III Revisionism: Reimagining Judicial Engagement with the Insular Cases and "The Law of the Territories"*, 131 YALE L.J. 2542, 2607 (2022) (noting "the efforts to market *Fitisemanu* as a vehicle for overturning the *Insular Cases*").

29. See, e.g., Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449 (2022).

30. *United States v. Vaello-Madero*, 142 S. Ct. 1539 (2022).

31. *Id.* at 1552 (Gorsuch, J., concurring) (typeface convention added).

32. *Fitisemanu*, 143 S. Ct. at 362.

I. MARRIAGE EQUALITY IN U.S. TERRITORIES

Because of the *Insular Cases*, U.S. territories do not experience constitutional rights in the same manner as U.S. states. Supreme Court opinions recognizing new or expanded constitutional rights do not automatically apply to the territories. Nonetheless, after the Supreme Court issued its opinion in *Obergefell*, governmental leaders in CNMI, USVI, and Guam quickly acquiesced to the opinion.³³ A group of Puerto Rican officials had been actively fighting to preserve the island's prohibition against same-sex marriage but abandoned the litigation not long after *Obergefell*.³⁴

In American Samoa, however, *Obergefell* received a particularly hostile reception. When the Supreme Court announced its decision in *Obergefell*, the then-Governor of American Samoa, Lolo Matalasi Moliga, proclaimed that the “ruling will not apply to our preamble, our constitution and our Christian values. . . . [T]he Supreme Court ruling does not apply to our territory.”³⁵ The territory's Attorney General and other officials followed suit.³⁶ American Samoa is currently the only part of the United States that does not recognize same-sex marriages.³⁷

The hostility to marriage equality in American Samoa is painfully ironic, as its Polynesian culture has historically welcomed and embraced gender diversity. For centuries, Samoan society has recognized fa'afafine, who are members of American Samoa's traditional third gender.³⁸ “Fa'afafine is a compound word, combining the prefix fa'a—[which means] ‘in the way of’—and fafine, the Samoan word for ‘woman.’”³⁹ Having male genitalia but dressing in traditional women's garments and performing traditionally female roles and tasks, the fa'afafine of Samoa are not crossdressers; they are a separate and distinct gender.⁴⁰ The English language does not have adequate vocabulary to accurately describe fa'afafine because “fa'afafine is a cultural identity and for one to understand it, one must first

33. Leslie, *The America Without Marriage Equality*, *supra* note 4, at 1789–90.

34. *Vidal v. Garcia-Padilla*, 167 F. Supp. 3d 279 (D.P.R. 2016), *rev'd sub nom In re Conde Vidal*, 818 F.3d 765 (1st Cir. 2016); Order Declaring Unconstitutionality of Puerto Rico Same-Sex Marriage, *Vidal v. Garcia-Padilla*, No. 14-1253 (Apr. 7, 2016), <http://www.scotusblog.com/wp-content/uploads/2016/04/Judge-Gelpi-order-PR-marriage-4-7-16.pdf> [<http://perma.cc/3A8L-3LWP>].

35. *Same Sex Marriage Rejected by Local Church Leaders*, SAMOA NEWS (July 13, 2015, 2:35 PM), <http://www.samoanews.com/same-sex-marriage-rejected-local-church-leaders> [<http://perma.cc/FD52-8FEN>].

36. Leslie, *The America Without Marriage Equality*, *supra* note 4, at 1771.

37. *Id.* at 1775.

38. *Id.* at 1777–78, 1782–84.

39. *Id.* at 1777; see also Serge Tchérkezoff, *Transgender in Samoa: The Cultural Production of Gender Inequality*, in *GENDER ON THE EDGE* 115, 116 (Niko Besnier & Kalissa Alexeyeff eds., 2014).

40. Leslie, *The America Without Marriage Equality*, *supra* note 4, at 1777, 1781.

understand the Samoan culture.”⁴¹ The refusal to recognize *Obergefell* effectively blocks fa’afafine from marrying their male partners even though they would not be considered same-sex couples in traditional Polynesian culture because male and fa’afafine are different genders.⁴²

The denial of marriage rights inflicts significant harms and hardships upon same-sex couples and male-fa’afafine couples in American Samoa. Couples denied marriage rights may endure higher taxes, reduced access to healthcare, and more complicated and expensive legal planning.⁴³ They also experience dignitary harms by being denied basic rights that others enjoy freely.⁴⁴ The text of the RFMA notes that all couples, including interracial and same-sex couples, “joining in marriage deserve to have the dignity, stability, and ongoing protection that marriage affords to families and children.”⁴⁵ With respect to children, the *Obergefell* majority explained, “[w]ithout the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life.”⁴⁶ Marriage is more than just a bundle of rights; it is dignity, respect, and belonging. All these benefits and virtues are denied to same-sex and male-fa’afafine couples in American Samoa.

Marriage equality may seem like a done deal in the other U.S. territories, where governments put up little or no resistance to *Obergefell*. In the Northern Mariana Islands, for example, the number of same-sex marriages performed in the post-*Obergefell* era significantly exceeds the

41. Ashleigh McFall, A Comparative Study of the Fa’afafine of Samoa and the Whakawahine of Aotearoa/New Zealand 23 (2013) (Master of Arts thesis, Victoria University of Wellington), <http://researcharchive.vuw.ac.nz/bitstream/handle/10063/3179/thesis.pdf> [<http://perma.cc/MY5Z-WVF3>].

42. Leslie, *The America Without Marriage Equality*, *supra* note 4, at 1809 n.266; Douglas Paul Michael St. Christian, Aspects of Embodiment and Culture in Samoa 124 (Oct. 1, 1994) (Ph.D. thesis, McMaster University), <http://macsphere.mcmaster.ca/handle/11375/12997> [<http://perma.cc/36S9-H3ZX>] (“[T]he fa’afafine are not male and their penises are not male sex organs. They are fa’afafine organs. That is, sex organs, but not ones which define the fa’afafine as male.”); JOHANNA SCHMIDT, *MIGRATING GENDERS: WESTERNISATION, MIGRATION, AND SAMOAN FA’AFAFINE* 47 (Pamela J. Stewart & Andrew Strathern, eds., 2010).

43. *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 421 (M.D. Pa. 2014); Leslie, *Dissenting from History*, *supra* note 7, at 1041–45.

44. *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015) (“There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.”); *see also id.* at 678 (“Dignitary wounds cannot always be healed with the stroke of a pen.”).

45. Respect for Marriage Act, Pub. L. No. 117–228, § 2, 136 Stat. 2305 (2022).

46. *Obergefell*, 576 U.S. at 646; *see also* *United States v. Windsor*, 570 U.S. 744, 771 (2013) (“And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”).

number of opposite-sex marriages.⁴⁷ After *Obergefell*, Guam amended its relevant statute to define marriage as “the legal union between two persons without regard to gender.”⁴⁸ Same-sex marriages have not caused social upheaval in the territories. Indeed, they have seemingly increased marriage tourism, helping territorial economies.⁴⁹

But a change in territorial leadership could conceivably lead to regression on marriage equality. If American Samoa does not have to recognize *Obergefell*,⁵⁰ then a new conservative governor in another territory could argue that neither should they have to follow *Obergefell*. Today, this is hypothetical, and a retreat on marriage equality seems unlikely. But until the summer of 2022, it seemed unlikely that the Supreme Court would reverse *Roe* and signal the possibility of eliminating substantive due process altogether, including the rights to marriage, contraception, and private intimacy between consenting adults. Justice Thomas, in his *Dobbs* concurrence, sought to put all these rights in play.⁵¹ Even absent the overturning of *Obergefell*, marriage rights are less secure in the territories. And while marriage reversal seems unlikely, the *Insular Cases* make it possible in U.S. territories in a way that is impossible for U.S. states. Marriage equality is more fragile in the territories. That is one reason the RFMA is so important, as Part II explains.

II. THE SIGNIFICANCE OF THE RFMA IN U.S. TERRITORIES

While the public debate over the RFMA focused on preventing states from resurrecting their prior prohibitions against same-sex marriage and then refusing to recognize such marriages performed in other states, the states are not the only jurisdictions of interest. Over three million Americans live in U.S. territories, and the text of DOMA explicitly included territories and

47. *Same-Sex Marriage Top Licenses on CNMI's Saipan*, RNZ (Jan. 7, 2019, 6:57 AM), <http://www.rnz.co.nz/international/pacific-news/379577/samesex-marriages-top-licences-on-cnmi-s-saipan> [<http://perma.cc/68S2-CDNN>].

48. 10 GUAM CODE ANN. § 3207(h) (2022).

49. See LGBTQ, GUAM VISITORS BUREAU, <http://www.visitguam.com/planning/lgbtq> [<http://perma.cc/3NB3-9BW3>] (touting Guam as a destination location for same-sex weddings); see also Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 752–818 (1995) (documenting the economic advantages for states to recognize same-sex marriages).

50. A strong argument can be made that *Obergefell* should apply to American Samoa, even in the face of the *Insular Cases*. Leslie, *The America Without Marriage Equality*, *supra* note 4, at 1801–07.

51. In addition to calling out *Obergefell* as illegitimate, Justice Thomas targeted other rights granted through substantive due process, including the right to contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and the right of consenting adults to engage in private sexual acts, *Lawrence v. Texas*, 539 U.S. 558 (2003), for “reconsider[ation].” *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring).

possessions.⁵² Thus, through section 2 of DOMA, Congress had granted territories the right to refuse to recognize same-sex marriages performed in other U.S. jurisdictions.

The *Obergefell* decision seemed to make DOMA a dead letter. The *Windsor* opinion had already struck section 3 of DOMA, thereby requiring the federal government to recognize state-sanctioned same-sex marriages. Section 2 of DOMA remained in place, thus allowing states to refuse to recognize same-sex marriages performed in other states. *Obergefell*, however, rendered section 2 superfluous by invalidating all state bans on same-sex marriage as well as holding that the Constitution requires states to recognize same-sex marriages lawfully performed elsewhere.⁵³ Now, every state must license same-sex marriages and recognize those performed in other states. The operative sections of DOMA were no longer enforceable. To the extent that the original purpose of the RFMA was to repeal DOMA, the new act might seem unnecessary.

But the RFMA is critically important in American Samoa precisely because *Obergefell* did not breach that territory's shores. The government of American Samoa neither licenses same-sex marriages nor recognizes same-sex marriages performed in other American jurisdictions. This leaves same-sex couples and male-fa'afafine couples in American Samoa without legal protections.

The RFMA protects the residents of U.S. territories against marriage discrimination based on race and gender. Its text provides, "No person acting under color of State law may deny . . . full faith and credit to any public act, record, or judicial proceeding of any other State pertaining to a marriage between 2 individuals, on the basis of the sex, race, ethnicity, or national origin of those individuals."⁵⁴ Neither can state officials deny any rights or claims associated with marriage based on the argument that their state would not recognize a particular marriage based on the gender or race of the individuals in that marriage.

Because the operative language refers to states, the RFMA might seem inapplicable to couples in American Samoa, a territory. But the statute provides that "the term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, or *any other territory* or possession of the United States."⁵⁵ By explicitly bringing all U.S. territories and possessions into the fold, the RFMA prevents American Samoan officials from arguing

52. Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996) (repealed 2022).

53. *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

54. 28 U.S.C. § 1738C(a)(1).

55. 1 U.S.C. § 7(b) (emphasis added).

that the law does not apply to them.

The RFMA overcomes the hurdle created by the *Insular Cases*. As noted, the *Insular Cases* hold that constitutional rights only apply to U.S. territories as provided by Congress or by federal courts employing the *Insular* framework. In some ways, the RFMA evokes the first mechanism. Although the RFMA does not require states and territories to perform same-sex marriages, it nevertheless supplies an express congressional mandate to recognize out-of-state same-sex marriages. The RFMA is statutory protection, as opposed to constitutional protection as such. Even so, the RFMA still prevents territorial governments from invoking the *Insular Cases* to justify their refusal to recognize same-sex marriages or marriages for male-fa'afafine couples that were legally performed in other states or territories.

The opponents of the RFMA argued that the law was unnecessary. Although passage of the RFMA would not have an immediate effect on most U.S. jurisdictions, the RFMA is nevertheless still important for three sets of residents: the residents of American Samoa, of other U.S. territories, and of U.S. states.

First, the RFMA remedies ongoing discrimination in American Samoa. The RFMA brings a form of marriage equality to America's most distant territory. Although couples challenging the American Samoan policy against marriage equality could make a strong case in court,⁵⁶ American Samoans are relatively nonlitigious. This makes the RFMA particularly important. Many same-sex or male-fa'afafine couples may be unwilling to publicly challenge marriage discrimination in American Samoa.⁵⁷ The RFMA solves this problem because, while providing for a private right of action, it also authorizes the U.S. Attorney General to sue violators for declaratory and injunctive relief. This could relieve individual couples from some of the burdens of initiating litigation.

Second, the RFMA also guarantees the continuity of marriage equality in the remaining U.S. territories. If American Samoa has the legal power to refuse to perform or recognize same-sex marriages, then new leaders of other U.S. territories could potentially invoke the *Insular Cases* to argue that they, too, can discriminate. The RFMA prevents them from refusing to recognize same-sex marriages performed elsewhere in the United States. Members of the LGBT+ communities of those territories would not have to worry that a change in government could eliminate their marriage rights.

56. Leslie, *The America Without Marriage Equality*, *supra* note 4, at 1801–07.

57. *Id.* at 1810–11.

Third, the RFMA acts as an insurance policy for LGBT+ communities in the states. Although *Obergefell* established a constitutional right to same-sex marriage, rights dependent on a single precedent can be fragile, as the *Dobbs* overruling of *Roe* recently proved. Because many state penal codes retained their (then-unconstitutional) criminal prohibitions against abortions, the Supreme Court's reversal of *Roe* led to an instant recriminalization of abortion in some states. Similarly, many states have retained their (currently unconstitutional) statutory and state constitutional bans on same-sex marriage, bans that would be quickly resurrected upon a reversal of *Obergefell*. For example, the governor of South Carolina avowed in late October 2022 that if the Supreme Court overturned *Obergefell*, he would enforce his state constitution's prohibition on same-sex marriage.⁵⁸ The RFMA ensures that these states would have to continue to recognize gender-neutral marriages performed in other states and U.S. territories, even if *Obergefell* were overturned.

Thus, the RFMA brings marriage equality to American Samoa for the first time and guarantees continued recognition of gender-neutral marriages in all U.S. territories and states. While the RFMA was both necessary and beneficial, it is not a complete solution, as Part III explains.

III. A LIMITATION OF THE RFMA

For some LGBT+ couples in American Samoa, the RFMA is only a second-best solution. Unlike the effect of *Obergefell* on states, the RFMA would not compel American Samoan officials to license and perform same-sex or male-fa'afafine marriages within the territory. The new law would simply forbid them from denying recognition to marriages that were legal where performed elsewhere in the United States. Thus, if the American Samoan government remains intransigent, its same-sex and male-fa'afafine couples would have to travel thousands of miles to get married. That is an unreasonable burden to impose on a loving couple. Requiring same-sex and male-fa'afafine couples to leave the territory to get married imposes unique burdens on them. It makes it harder for their families and friends to attend their weddings, and it uniquely prevents less-wealthy households from solemnizing their marriages with their loved ones.⁵⁹

58. Seanna Adcox, *Gov. McMaster Makes Clear in Debate He Still Opposes Gay Marriage*, POST & COURIER (Oct. 26, 2022), http://www.postandcourier.com/politics/gov-mcmaster-makes-clear-in-debate-he-still-opposes-gay-marriage/article_709610e2-5580-11ed-be4a-e753752e45bd.html [<http://perma.cc/7A99-LSWG>] (“Gov. Henry McMaster said he’d support South Carolina’s voided bans on same-sex marriage if the U.S. Supreme Court ever overturned its 2015 ruling that guaranteed that right to gay couples nationwide.”).

59. Deborah A. Widiss, *Leveling Up After DOMA*, 89 IND. L.J. 43, 44–45 (2014) (requiring same-

The RFMA approach of requiring officials to recognize out-of-state marriages—but not requiring them to perform same-sex or male-fa’afafine marriages—would have apparently been acceptable to some LGBT+ residents of American Samoa. Days after the *Obergefell* opinion was announced, members of the LGBT+ community in American Samoa “welcomed the Supreme Court ruling” but “did not support it being done in the territory, with one gay woman saying she and her partner were going to get married . . . in the U.S.” due to cultural sensitivity.⁶⁰ These initial reactions may, of course, have changed to desiring on-island same-sex marriages as attitudes towards same-sex marriage have evolved to be more supportive.

Moreover, because American Samoan officials announced that they will not follow *Obergefell*, an open question exists over how and where same-sex and fa’afafine-male couples in American Samoa could seek relief if officials continue their anti-marriage-equality stance after passage of the RFMA. The RFMA provides that “[t]he Attorney General may bring a civil action in the appropriate United States district court against any person who violates subsection (a) for declaratory and injunctive relief.”⁶¹ American Samoa, however, is the only state or territory that lacks a federal district court.⁶² That probably means couples denied their right to have their marriages recognized in American Samoa must travel abroad again to seek relief.

The best-case scenario requires couples to seek relief in the federal district court in Hawaii. But because American Samoa is a territory administered by the U.S. Secretary of the Interior, courts sometimes require American Samoans to file claims—such as claims for habeas relief—in Washington, D.C.⁶³ Which court is the appropriate United States district court for RFMA purposes is unclear, though a strong case can be made for Hawaii. Either jurisdiction, however, imposes an additional travel and logistical burden on couples already denied their right to have their marriages recognized. If American Samoa licensed, performed, and recognized gender-

sex couples to travel out-of-state to get married “impos[es] an unfair burden . . . which will likely further exacerbate class-based variation in marriage rates. It also all but guarantees that many same-sex couples will be unable to celebrate their marriage in the company of their friends and family.”)

60. *Columbia Law School Civil Rights Attorney Responds to Question of Gay Marriage in the Territory*, SAMOA NEWS (July 7, 2015, 12:34 PM), <http://www.samoanews.com/columbia-law-school-civil-rights-attorney-responds-question-gay-marriage-territory> [<http://perma.cc/U53Y-2UXA>].

61. 28 U.S.C. § 1738C(b).

62. *Hueter v. Kruse*, 576 F. Supp. 3d 743, 768 (D. Haw. 2021) (“[T]here is no federal district court in American Samoa and American Samoa is not a part of any federal judicial district.”).

63. *Barlow v. Sunia*, No. 18-00423, 2019 U.S. Dist. LEXIS 196182, at *25 (D. Haw. Nov. 12, 2019) (granting territory’s motion to dismiss and transferring habeas petition for petitioner imprisoned in American Samoa to Washington D.C.).

neutral marriages—like all other U.S. states and territories—these legal uncertainties and potential problems would not exist.

CONCLUSION

Full marriage equality should still be brought directly to American Samoa. Its local officials should license and perform marriages regardless of the couple's gender composition. If local officials continue in their obstinance, litigation should compel them to follow *Obergefell*. The constitutional right to gender-neutral marriage should apply to American Samoans, despite the hurdle posed by the *Insular Cases*.⁶⁴

Even if Justice Thomas succeeds in stripping substantive due process from constitutional jurisprudence, the RFMA ensures that access to gender-neutral marriage remains recognized in every U.S. state and every U.S. territory so long as even one state licenses same-sex marriages. If Congress had codified *Roe* before the Supreme Court's reversal in *Dobbs*, women seeking reproductive healthcare nationwide would have been far better off. Enactment of the RFMA staves off a similar lapse or loss of rights for same-sex couples.

The perception that *Obergefell* rendered the RFMA superfluous was simply not true for Americans living in U.S. territories. Marriage equality was uniquely vulnerable—or nonexistent—in U.S. territories. The RFMA represented straight-forward legislation to remedy a clear and present denial of rights in American Samoa. And the legislation provides stability and peace of mind for same-sex couples across the country. Still, the battle for full marriage equality in American Samoa continues.

64. See Leslie, *The America Without Marriage Equality*, *supra* note 4, at 1801–07 (explaining constitutional marriage rights should apply in American Samoa under the *Insular* framework); see also Christopher R. Leslie, *Embracing Loving: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077, 1089–96 (2014) (explaining how gender-specific marriage laws, such as American Samoa's, should be subject to heightened scrutiny).