Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories

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I. AMERICAN SAMOA IN PERSPECTIVE
   A. Historical and Cultural Background
   B. Traditional Life and Government

II. LEGAL BACKGROUND

III. THE U.S. CONSTITUTION AND AMERICAN SAMOA

IV. A SUGGESTED ANALYSIS FOR APPLYING THE CONSTITUTION TO TERRITORIES

V. CURFEWS IN AMERICAN SAMOA

VI. THE U.S. CONSTITUTION AND AMERICAN SAMOAN CURFEWS
   A. Due Process Liberty Interest: Adults
   B. Due Process Liberty and Equal Protection Interests: Juveniles
   C. Due Process Liberty Interest: Parental Control
   D. First Amendment Establishment Issue

VII. CONCLUSION

In 1998, I traveled to American Samoa in the South Pacific to conduct field research. During one of my first evenings on the island of Tutuila, a group of young men wearing brightly colored and identically patterned lavalavas¹ and carrying large wooden sticks motioned to my friend to stop our automobile. They asked us our business and, upon learning that I was a tourist and my friend was an attorney who worked for the American Samoan government, they allowed us to pass--but with an admonition not to venture into the village during curfew hours. I learned

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My gratitude is extended to the people of American Samoa who participated in this research. The efforts of Douglas Juergens, J.D., formerly of the American Samoan Governor’s Office, in establishing contacts and assisting with research are also appreciated. Finally, thanks to Jeffrey Teichert, J.D., formerly of the High Court of American Samoa, for reviewing this article. The opinions and conclusions contained herein are the author’s alone and do not necessarily reflect those held by any of these people.

¹ A lavalava is a piece of material worn around the waist that typically extends to below the knee.
later that the men were village police officers enforcing an early evening curfew. Discussions with village chiefs in the days that followed revealed a concern that their culture could be threatened by an increased application of U.S. law in their islands. Specifically, they were worried that their customs would be lost in a wave of U.S. law. The curfew was a case in point to these men.

In response to the request of many of the Samoans I met, I write this article. The purpose of this research was to document the use of curfews in American Samoa, to determine if and why curfews are important to the leaders of American Samoa, and to examine whether application of the U.S. Constitution threatens the Samoan curfew. In the larger context of analyzing this issue, I discovered that the application of the U.S. Constitution to American Samoa is not clear, causing apparent disharmony in lower court decisions. Accordingly, this paper suggests an analysis to be applied in cases where the application of the U.S. Constitution to a U.S territory is at issue.

Section I begins with a short description of the historical and cultural setting and then presents some background on traditional Samoan life and the structure of the American Samoan government. Sections II and III discuss the basic law of American Samoa and the application of the U.S. Constitution to the islands. In Section IV, I suggest a method that accurately synthesizes cases applying the Constitution to the territories. The discussion then turns to curfews. Section V reports data concerning the nature and significance of curfews to American Samoans, and Section VI reviews the law of curfews in the mainland United States. Finally, Section VII presents my conclusions and analysis concerning whether American Samoan curfews are constitutional.

I. AMERICAN SAMOA IN PERSPECTIVE

A. Historical and Cultural Background

Five islands comprise the Territory of American Samoa, which lies in the heart of the South Pacific Ocean. The entire land area of the islands

2 Much of the data in this article was collected through field research conducted by the author on the island of Tutuila in February 1998 and through a mail survey conducted during 1999 and the early months of 2000. The survey was sent to all members of the Fono (American Samoan legislature). This group was selected because they represent both popularly elected individuals in the lower chamber and traditional chiefs (matai) in the upper chamber. The author assumes that the members of the Fono are a valid source of information concerning leadership, culture, and law in American Samoa. There are 38 members of the Fono. Twelve members or 32% of the Fono responded to the survey.
is only slightly larger than Washington, D.C. The islands are mountainous, with elevations reaching 966 meters on the main island, Tutuila. The islands are lush and tropical with virtually no seasonal temperature variation.

Historically, the islands have been of strategic importance to nations due both to their location and the presence of a natural deep-water harbor at Pago Pago, which is on the island of Tutuila. The population of American Samoa was estimated to be 62,093 in 1998. The islanders are highly literate and most people speak both their native Samoan language as well as English. One hundred percent of Samoans report being Christian. Tuna fishing and tuna processing are the two largest industries of American Samoa. The government is also a major employer.

B. Traditional Life and Government

Samoan life centers on the family. Anthropologist Lowell D. Holmes described the relationship between the individual Samoan and the family as follows:

The Samoan individual is identified with three familial groups: the immediate family, the household (fua'ifale), and the 'aiga (or extended family). The immediate family, of course, is the most basic unit in the social system, and the household, made up of one or more immediate families, is presided over by a matai. The extended family ('aiga) includes all the members of the matai's household plus individuals in other households who are related to him through blood, marriage, or adoption. Each village has from ten to fifty matai titles. In addition to directing the day-to-day affairs of his

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3 UNITED STATE CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK 8 (1998) [hereinafter WORLD FACTBOOK].

4 Id.

5 The government is located on the island of Tutuila. The Constitution of American Samoa requires the seat of the government to be in Fagatogo on Tutuila. AM. SAMOA CONST. art. V, § 9.

6 WORLD FACTBOOK, supra note 3.

7 Id.

8 Id.

9 Id.
household, the *matai* represents them in the village hierarchy of titles. . . . In some families the household group works the land in common, moving as a single work force. . . . [T]he fruits of the family's labor are nominally the property of the family head, but since he is responsible for the welfare of all living with him and is concerned about keeping his household satisfied so they will continue to help him work the land, an equitable distribution is made. . . .

The village is an important feature of life in Samoa. It is more than a political subdivision, like a county or city in the United States. It is an integral part of how Samoans organize and, more importantly, how they view their social and family lives. The untitled young men (*aumaga*) as well as the unmarried girls (*aualuma*) of the village are expected to work for the village and to participate in social activities. Today, this includes enforcing village regulations under the direction of the *matai*. As is true to many traditional peoples, land is very important to Samoans. Over 90% of all land is communally owned, and attempts to return privately held lands to communal status continue today.

The United States first acquired American Samoa as a territory in 1900 when the chiefs of Tutuila and Manua ceded the islands. Congress ratified this cession that same year. Today, the government of American

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11 *Id.* at 43.

12 *Id.* at 42-43.

13 In response to the question “Who is responsible for enforcing the curfew?,” all respondents wrote *matai*. Several wrote *aumaga* under the direction of *matai*. In interviews with government and traditional leaders, the latter was confirmed as the practice in all villages.

14 *Id.* See also Presiding Bishop v. Hodel, 830 F.2d 374, 377 (D.C. Cir. 1987).

15 Interview with Sala Samiu, Deputy Director, Office of Samoan Affairs, Tutuila, American Samoa (Feb. 24, 1998) [hereinafter Samiu Interview].


Samoa is modeled after that of the United States with a few modifications intended to preserve Samoan culture. Pursuant to statute, the President of the United States is the Chief of State. 48 U.S.C. § 1661(c) provides, in part:

Until Congress shall provide for the government of the islands, all civil, judicial and military powers shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have the power to remove said officers and fill the vacancies so occasioned.18

Congress delegated the administration of the islands to the Secretary of the Interior in 1951. The Secretary of the Interior has since provided for popular rule of American Samoa and, in 1967, then-Secretary Stewart L. Udall approved a Constitution for American Samoa that had been drafted at the 1966 Constitutional Convention and approved by plebiscite.19 Subsequently, the U.S. Congress limited the authority of the Secretary over American Samoa by requiring congressional approval of amendments to the American Samoan Constitution.20

Pursuant to the 1967 Constitution, the chief executive officer of American Samoa is a Governor who is chosen by popular election.21 Law is made by a bicameral legislature, the Fono.22 The Fono has a House of Representatives and a Senate.23 Representatives are elected by popular vote.24 All adult U.S. nationals who have lived in Samoa for at least five years are eligible for election to the House of Representatives.25 The

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19 AM. SAMOA CONST., Preamble and Ratification.
21 AM. SAMOA CONST. art. IV, § 2.
22 See AM. SAMOA CONST. art. II, § 1; Fact Sheets, supra note 16.
23 AM. SAMOA CONST. art. II, § 1.
24 AM. SAMOA CONST. art. II, § 7 provides that “[e]very person of the age of 18 years or upwards who is a United States national and who has lived in American Samoa for a total of two years and has been a bona fide resident of the election district where he offers to vote . . . shall be deemed a qualified elector at such election.”
25 Section three of the American Samoa Constitution provides that a representative shall “(a) be a United States National; (b) be at least 25 years of age at the time of his election; and (c) have lived in American Samoa for a total of at least five years and have been a bona fide resident of the representative district from which he is elected for at least 1 year next preceding his election.”
Senate, on the other hand, is a chamber of matai. In addition to U.S. national status, a minimum age of thirty and five years residence in American Samoa with one year residence in the district represented, a Senator must “be [a] registered matai of a Samoan family who fulfills his obligations as required by Samoan custom in the county from which he is elected.” Senators are “elected in accordance with Samoan custom by the county councils of the counties they are to represent.”

In addition to the law created by the Fono, each village council “may enact village regulations concerning the cleanliness of the village, planting of the lands, making and cleaning of the roads, and other matters of a strictly local nature.” The Office of Samoan Affairs must approve all regulations of the village councils in order for them to be effective. Violations of village regulations may be punished with fines not to exceed $25.00 and village work not to exceed 25 hours. All other forms of punishment must be imposed by a court of law. The Code provides for village police officers to be appointed by the Governor. In reality, however, the appointment authority has been delegated to local authorities. Village police officers work under the supervision of the pele nuanced, who also prosecute violators of village regulations in the village courts.

Like the United States, the judicial branch is comprised of a High Court, district court, “and such other courts as may from time to time be

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26 According to one source, even though matai status is not required for membership in the House of Representatives, it is common for matai to be elected to the House. Samiu Interview, supra note 15.

27 AM. SAMOA CONST. art. II, § 3.

28 Id. § 4.


30 AM. SAMOA CODE ANN. § 5.0305(b).

31 AM. SAMOA CODE ANN. § 5.0305(c).

32 AM. SAMOA CODE ANN. § 5.0305(e).


34 Correspondence with Douglas Juergens, J.D., Counsel to the Governor of American Samoa, Sept. 1, 1999 [hereinafter Juergens Correspondence].

35 AM. SAMOA CODE ANN. § 5.0306. Pelenuus are village officials appointed by the Governor. See AM. SAMOA CONST. art. IV, § 11.

created by law." The Secretary of the Interior appoints the Chief Justice and the Associate Justice of the High Court. The Associate Judges of the High Court come to office through Gubernatorial nomination and Senate confirmation. They are subject to removal for “just cause” by the Chief Justice. The Associate Judges of the Court are Samoan leaders with knowledge of Samoan custom. The independence of American Samoan courts has been questioned because the appointment and removal power of the Chief Justice and Associate Justice lies with the Secretary of the Interior and because the Secretary also possesses the authority to reverse or amend the decisions of the courts. This authority has not been exercised, however, for at least the past twenty years. Pursuant to its creation power, the Fono has established a system of village courts. The Chief Justice appoints one judge of the High Court and a village matai as judges of these courts.

In addition to the island-wide governmental agencies, there are district, county, and village governmental bodies. Most of these local bodies are governed by custom, and matai status is an expressed qualification to hold local office. The village councils, matai, and

37 AM. SAMOA CONST. art. III, § 1.
38 AM. SAMOA CONST. art. III, § 3.
40 Presiding Bishop, 830 F.2d at 386.
41 Id. at 377.
43 Telephone interview with Martin Yerlick, Legislative Director, Office of Congressman Faleomavaega (Mar. 24, 2000) [hereinafter Yerlick Interview].
46 For example, the islands are divided into three districts. Each district is administered by a district governor who is appointed by the Governor of American Samoa after consulting the village and district councils. American Samoan code limits eligibility to be a district governor to “leading matais.” AM. SAMOA CODE ANN. § 5.0103 (1981). Similarly, the Governor of American Samoa appoints a leading chief for each village (referred to as the pulenuu) to preside over village council meetings, to enforce village regulations, and to protect the welfare of the people. AM. SAMOA CODE ANN. § 5.0302 (1981). Village council membership is limited to “chiefs and heads of families.” AM. SAMOA CODE ANN. § 5.0303 (1981).
The use of *matai* to resolve disputes is formalized through the activities of the Office of Samoan Affairs and through legislation.48

II. LEGAL BACKGROUND

The law of American Samoa has both Western and traditional features.49 “Transitional societies,” societies that fall between traditional and modern, employ several methods employed to preserve customary law and traditional life using the legal system. One method incorporates the values (customs) of the traditional system into the western system. Another method incorporates the leaders of the traditional system into the western system. In the neighboring island nation Federated States of Micronesia (“FSM” or “Micronesia”), for example, there is no constitutional requirement that traditional leaders play a direct role in the Congress or courts. The positive law of Micronesia, however, provides for the integration of the values of the traditional system. For example, a constitutional provision requires judges to render decisions that are “consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia.”50 American

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48 For example, before an action concerning land or *matai* title may be filed in the High Court, the Secretary of Samoan Affairs must certify to the High Court that at least two attempts to resolve the dispute out of court have occurred. Samiu Interview, supra note 15.

49 American Samoa is of the Common Law tradition. Section 1.0201 of the American Samoan Code provides that the law of the islands consists of the Constitution of American Samoa, the United States Constitution to the degree that it applies in the islands, the American Samoan Code and other law, and the common law of England that is suitable to Samoa. AM. SAMOA CODE ANN. § 1.0201 (1981).

50 FEDERATED STATES OF MICRONESIA CONST. art. XI, § 11. Other attempts to incorporate the values of the traditional system into the western system in Micronesia can be found. For example, Article IX of the Constitution admonishes the national Congress to give “due regard for local customs and tradition” when defining national crimes. Additionally, Article V, § 2 empowers the national Congress to recognize custom by statute. In such cases where a “codified custom” is in conflict with a right found in the Constitution’s Bill of Rights, “protection of Micronesian tradition shall be considered a compelling social purpose warranting such governmental action.” The FSM Constitution also provides for the integration of traditional leaders in article V. First, in section one, the role and function of such leaders is preserved. Second, section three empowers the national Congress to establish a Chamber of Chiefs. However, the former has not developed into a significant source of authority for traditional leaders and the latter has never been created. Exceptions in the FSM at the state level can be found. The Constitution of Yap, for example, establishes a fourth branch of the state’s government comprised of two bodies of traditional leaders, the Councils of Pilung and Tamol.
Samoans, on the other hand, have attempted to fuse the traditional and western systems by incorporating both the matai and values of the traditional system into the western system.

The matai are incorporated into all three branches of the western form of government. As discussed earlier, this is done by incorporating matai into the legislative process, by establishing an executive branch headed by a “leading” matai responsible for coordinating village affairs, through the appointment of matai to serve as local executive officials, and by having matai serve as judges. The integration of customs occurs in the Constitution, statues, and other law of the territory. The Constitution of American Samoa, for example, provides that

[i]t shall be the policy of the Government of American Samoa to protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language, contrary to their best interests. Such legislation as may be necessary may be enacted to protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry, and to encourage business enterprises by such persons. No change in the law respecting the alienation or transfer of land or any interest therein, shall be effective unless the same be approved by two successive legislatures by a two-thirds vote of the entire membership of each house and by the Governor.52

The code also recognizes customary law. It provides that the customs of the Samoan people shall be respected, so long as they do not conflict with other law of American Samoa or the law of the United States that concerns American Samoa.53 The code further states that hereditary chiefs and talking chiefs shall retain their roles in the villages of the

Interestingly, Yap is commonly regarded as the State within the FSM that has been most successful in preserving traditional culture. In spite of these exceptions, the Micronesians have not integrated their traditional leaders into the western legal system to the extent the Samoans have.

51 AM. SAMOA CONST., art. I, § 3.
52 Id.
53 AM. SAMOA CODE ANN. § 1.0202 (“The customs of the Samoan people not in conflict with the laws of American Samoa or the laws of the United States concerning the American Samoa shall be preserved”). This provision has been interpreted to mean that the code of American Samoa is superior to custom. See Taeleifi v. Willis, 21 Am. Samoa 2d 118 (App. D. 1992) (holding that a customary claim concerning property was void because it was in conflict with the American Samoan Code).
Another statute recognizes the traditional dispute resolution ceremony, the *Ifoga*, by permitting a judge to reduce a sentence in a criminal case when it has been performed. The courts of the territory also have an obligation to preserve the customs of the people, however, custom must give way when it is in conflict with other law. When not in conflict, Samoan courts must recognize customary law.

III. THE U.S. CONSTITUTION AND AMERICAN SAMOA

Before the constitutionality of Samoan curfews can be examined, an examination of the extent to which the U.S. Constitution applies to American Samoa is necessary. Several legal scholars have described the application of the U.S. Constitution to U.S. territories. The analysis must begin with Article IV, § 3 of the U.S. Constitution, which provides, in part: “The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . . .”

Through Article IV, Congress has broad authority over all U.S. territories and can regulate both the

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54 AM. SAMOA CODE ANN. § 1.0202 (“The village, country, and district councils consisting of the hereditary chiefs and talking chiefs shall retain their own form or forms of meeting together to discuss affairs of the village”).

55 The *Ifoga* is an apology ceremony where the family of an offender presents themselves at the house of the victim. The offender’s family members sit under woven mats as a statement of apology. The head of the victim’s family decides whether to accept the apology (and any offered gifts and compensation). If accepted, the head of the victim’s family removes the mats. For more on the *Ifoga*, see La’auli Filoiali’i & Lyle Knowles, *The Ifoga: The Samoan Practice of Seeking Forgiveness for Criminal Behavior*, 53 OCEANA 384 (1983).


57 Kaliopa v. Salao & Harris, 2 Am. Samoa 2d 1, 2 (1983) (upholding the *matai*’s power to evict where a defendant had failed to render services to the *matai*).

58 Taeleifi, 21 Am. Samoa 2d at 120-21; AM. SAMOA CODE ANN. § 1.0202.


61 U.S. CONST. art. IV, § 3.
inhabitants of those regions and their governments in ways that it cannot regulate mainland citizens or the states.

All discussions of the application of the U.S. Constitution to U.S. territories begin with several Supreme Court cases from the early twentieth century, commonly known as the Insular Cases. Of all of the Insular Cases, it has been the 1901 decision in Downes v. Bidwell that has had the greatest impact on the jurisprudence of the area. In Downes, a New York importer of goods challenged a duty that was imposed on oranges he had received from Puerto Rico. The duty did not apply to goods imported from other states, and he challenged the duty as violating the Duty Uniformity Clause of Article I, which provides that “all duties, imposts and excises shall be uniform throughout the United States.” The government asserted that territories are not included in the mandate of the Uniformity Clause. Justice Brown, writing for a divided Court, held that with the exception of certain natural rights, Congress must intend to extend the Constitution to a territory before it will have force there. Justice White concurred in the result but disagreed as to the central question. Justice White began his analysis by concluding that the Constitution applies to all territories. If it did not, he asserted, then Congress’ authority to regulate territories under Article IV would be ultra vires. So, the central issue to Justice White was not whether the Constitution applied, but what provisions of the Constitution applied. He concluded that if a territory had been incorporated into the United States, the entire Constitution was effective. If a territory had not been

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62 Important Insular Cases include: Downes v. Bidwell, 182 U.S. 244 (1901); Hawai‘i v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904); Rassmussen v. United States, 197 U.S. 516 (1905); and Balzac v. Puerto Rico, 258 U.S. 298 (1922).

63 182 U.S. 244 (1901).

64 Id. at 247.

65 Id. at 249 (citing U.S. CONST. art. I, § 8).

66 Id.

67 Id. at 279.

68 Id. at 287 (White, J. concurring). Justice White was joined by Justices Shiras and McKenna.

69 Id. at 289-90.

70 Id.
incorporated, then only fundamental constitutional rights are enforceable there.\textsuperscript{71}

As to the first prong of his test, White wrote that a territory is incorporated if Congress intends to grant statehood at some future date.\textsuperscript{72} He concluded that Puerto Rico was not incorporated, even though Congress had provided for civil government of the islands.\textsuperscript{73} Accordingly, he joined Justice Brown’s conclusion that the Constitution did not fully apply to Puerto Rico.\textsuperscript{74} Justice White’s incorporation doctrine was applied by a majority of the Court in a later case involving Puerto Rico, \textit{Balzac v. Porto Rico},\textsuperscript{75} in which the Court held that a congressional grant of citizenship to the inhabitants of Puerto Rico was insufficient to establish incorporation.\textsuperscript{76} Justice White’s incorporation formulation was so well established by the date the Court decided \textit{Balzac} that Chief Justice Taft commented that the “opinion of Mr. Justice White of the majority in \textit{Downes v. Bidwell}, has become the settled law of the court.”\textsuperscript{77} Only one territory, Alaska, has ever been found to be incorporated under the Incorporation Doctrine.\textsuperscript{78}

Pursuant to Justice White’s analysis, fundamental rights are applicable in unincorporated territories. The question then is what are fundamental rights. In determining the answer to this question, Justice White employed a natural rights analysis. Subsequent cases have made it clear that “fundamental right” and “incorporation” for purposes of limiting state authority under the Fourteenth Amendment mean something different than they do in the territory context.\textsuperscript{79} For example, the Supreme Court has held that freedom from ex post facto laws and bills of attainder are fundamental,\textsuperscript{80} but that the Fifth Amendment’s right to grand jury

\begin{flushright}
\textsuperscript{71} \textit{Id.} at 291.
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{Id.} at 340.
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} 258 U.S. 298 (1922).
\textsuperscript{76} \textit{Id.} at 308.
\textsuperscript{77} \textit{Id.} at 305.
\textsuperscript{78} Rassmussen v. United States, 197 U.S. 516 (1905).
\textsuperscript{79} See \textit{CNMI v. Atalig}, 723 F.2d 682, 689-90 (9th Cir. 1984); King v. Morton, 520 F.2d 1140, 1147 (D.C. Cir. 1975).
\textsuperscript{80} \textit{Downes}, 182 U.S. at 277.
\end{flushright}
indictment and the Sixth Amendment’s right to a jury trial are not. As shown later in this article, no precise test is used to determine if a right is fundamental, and the decision may be contextual. This explains why at least one lower federal court has held, contrary to earlier Supreme Court decisions, that the right to a jury trial is fundamental.

The Supreme Court continues to recognize the Incorporation Doctrine, but recent cases have refined, or altered, the Doctrine. *Reid v. Covert,* a 1957 Supreme Court decision, involved two women convicted of murdering their husbands. In both cases, which were unrelated except in law, the wives, who were civilians, were alleged to have killed their soldier husbands on United States military bases in foreign lands. Each woman was convicted in a court-martial. Both sought reversal of their convictions, asserting that their Sixth Amendment rights to jury trials had been violated. Writing for the majority, Justice Black stated, as had Justice White in *Downes,* that the Court reject[s] the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.

The Court further held that, although Congress has the authority under the Constitution to provide for trial without jury for military personnel, it does not have such authority over the dependents of military personnel while abroad.

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81 Ocampo v. United States, 234 U.S. 91, 98 (1914).
84 354 U.S. 1 (1957).
85 *Id.* at 3-4.
86 *Id.*
87 *Id.*
88 *Downes,* 182 U.S. at 264.
89 *Reid,* 354 U.S. at 5-6.
90 *Id.* at 5.
Justice Harlan issued a concurring opinion in *Reid*.\(^{91}\) In his opinion, Justice Harlan took issue with Justice Black’s dismissal of the *Insular Cases* as immaterial.\(^{92}\) He also took issue with the Court’s conclusion that Congress’ power over the military under Article I is limited solely to those individuals in the actual service of the military. Instead, he argued, the question is whether the regulation is rationally connected to Congress’ power.\(^{93}\) Even if Congress has the authority to regulate the subject at bar, Justice Harlan opined that a second question must be asked. That is, does some specific constitutional provision limit this general authority?\(^{94}\) Justice Harlan concluded that a right should be extended unless it can be established that such an extension is *impractical and anomalous*.\(^{95}\) He concluded that in capital cases, such as were at bar in *Reid*, it would not be impractical or anomalous for the government to provide jury trials. In dicta, he opined that the government had made an “impressive showing” that jury trials would be impractical and anomalous in “run-of-the-mills cases.”\(^{96}\)

What is practical and anomalous? Harlan did not announce a precise formulation, but he did indicate that the “particular local setting, the practical necessities, and the possible alternatives” are to be considered.\(^{97}\) Justice Harlan enumerated several practical problems with requiring a jury trial for all civilians accused of crimes abroad. First, the United States could bring the defendant home for trial.\(^{98}\) Bringing every defendant to the United States for trial, however, would be financially burdensome.\(^{99}\) Also, he questioned the ability of the United States to bring the witnesses and evidence home in every case, and he presented the possibility that a foreign government may prevent or object to trying a defendant thousands of miles from where the crime was committed.\(^{100}\) A second alternative is to provide a civilian, jury trial overseas. Justice

\[^{91}\text{Id. at 65 (Harlan, J. concurring).}\]
\[^{92}\text{Id. at 67.}\]
\[^{93}\text{Id. at 70-71.}\]
\[^{94}\text{Id. at 70.}\]
\[^{95}\text{Id. at 75 (emphasis added).}\]
\[^{96}\text{Id. at 75-76.}\]
\[^{97}\text{Id.}\]
\[^{98}\text{Id. at 78.}\]
\[^{99}\text{Id.}\]
\[^{100}\text{Id.}\]
Harlan noted difficulties with this option as well, including whether foreign governments would permit extraterritorial jurisdiction of U.S. courts and whether Americans could be found to sit as jurors.\footnote{Id. at 79.} The third option is to provide for trial in foreign courts, but Justice Harlan found this no less problematic than the first two options.\footnote{Id. at 78 n.12.}

Like Justice White’s concurring opinion in \textit{Downes}, Justice Harlan’s concurring opinion in \textit{Reid} has taken hold. In particular, it is Justice Harlan’s impractical and anomalous formulation that has been subsequently adopted. The impractical and anomalous test was applied, for example, by the District of Columbia Court of Appeals in the 1975 case \textit{King v. Morton}.\footnote{520 F.2d 1140 (D.C. Cir. 1975).} At issue in \textit{King} was the right of an American citizen and resident of American Samoa to a jury trial in a tax evasion case. King lost in the Appellate Division of the High Court in American Samoa because it found, inter alia, that the application of the Anglo-American jury system would be an “arbitrary, illogical, and foreign imposition.”\footnote{Id. at 1143.} The circuit court stated that the application of such a right should not be dependent upon whether a territory is “incorporated” or a right “fundamental.” Instead, a court should seek to apply the principles of the earlier cases (e.g. \textit{Insular Cases}) to the contemporary conditions in the territory.\footnote{Id. at 1147.}

The Court explained that

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[t]he importance of the constitutional right at stake makes it essential that a decision in this case rest on a solid understanding of the present legal and cultural development of American Samoa. That understanding cannot be based on unsubstantiated opinion; it must be based on facts. Specifically, it must be determined whether the Samoan mores and \textit{matai} culture with its strict societal distinctions will accommodate a jury system in which a defendant is tried before his peers; whether a jury in Samoa could fairly determine the facts of a case in accordance with the instructions of the court without being unduly influenced by customs and traditions of which the criminal law takes no notice; and whether the implementation of a jury system would be practicable. In short, the question is whether in American Samoa “circumstances are such that trial by jury
\end{quote}
would be impractical and anomalous.” Reid v. Covert, 354 U.S. at 75, 77 S. Ct. at 1260. That the Samoan system of criminal justice is in many respects similar to the Anglo-American system does not supply the answer to this specific and crucial question. Nor is the answer to be found in the failure of the Samoan Constitution, originated by the Samoan people, to provide for trial by jury in criminal cases.\(^{106}\)

The court concluded that there was insufficient evidence in the record to determine if jury trials would be impractical or anomalous in American Samoa.\(^{107}\) Accordingly, it remanded the case for further findings.\(^{108}\) On remand, the trial court’s analysis focused on the practicability of having jury trials in American Samoa rather than on whether a right to a jury trial is consistent with, or disruptive to, native culture, as advanced by the government.\(^{109}\) The government attempted to establish that the very aspects of the jury system that made it inconsistent with the Samoan way of life (fa’a Samoa)\(^{110}\) also made it impractical to impose.\(^{111}\) The district court rejected these arguments, finding that the traditional way of life in Samoa had changed considerably, and what remained of ancient ways would not frustrate the operation of a jury system.\(^{112}\) Additionally, the district court noted that an adversarial criminal justice system was in place, with prosecutors, judges, and defense attorneys that could easily accommodate a jury system.\(^{113}\)

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\(^{106}\) Id. (citations omitted).

\(^{107}\) Id. at 1148.

\(^{108}\) Id.


\(^{110}\) Jeffrey B. Teichert defined fa’a Samoa as “more than merely a set of laws, norms, and social conventions. The fa’a Samoa is the essence of being Samoan, and includes a unique attitude toward fellow human beings, unique perceptions of right and wrong, the Samoan heritage, and fundamentally the aggregation of everything that the Samoans have learned during their experience as a distinct race.” Jeffrey B. Teichert, Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa, 2 ACROSS BORDERS GONZ. INT’L L.J. 2, ¶ 4 (1999), at http://law.gonzaga.edu/borders/somoa.htm (emphasis in original).

\(^{111}\) The differences between the United States and Samoa that were put forth include, inter alia, the presence of the matai system, differing roles for family members, and the existence of non-judicial, traditional dispute resolution (Ifoga ceremony). Andrus, F.Supp. at 13.

\(^{112}\) Id. at 14-18.

\(^{113}\) Id. at 17.
Court conjectured that the projected number of jury trials would not overburden the High Court of Samoa and that a sufficient number of jurors could be found in the islands to sustain the system.\textsuperscript{114} Finally, many of the witnesses, including those called by the government, testified that \textit{fa’a Samoa} would not interfere with the successful functioning of a jury system.\textsuperscript{115} For example, several \textit{matai} testified that they did not attempt to control the voting of their families in popular elections, nor would they attempt to influence juror voting.\textsuperscript{116}

The right to a jury trial was examined in another case involving an unincorporated territory, the Commonwealth of the Northern Mariana Islands (“CNMI”). In \textit{CNMI v. Atalig},\textsuperscript{117} the Ninth Circuit determined that the right to a jury trial did not extend to the Mariana Islands.\textsuperscript{118} The court stressed flexibility in the analysis of the incorporation of rights, found that there was basic due process in the CNMI criminal justice system, and emphasized that local conditions and customs should be taken into consideration.\textsuperscript{119} The Ninth Circuit decided that, although incorporation of rights under the Fourteenth Amendment for application to the states requires that a right be part of the “Anglo-American regime of ordered liberty,” the test for application in the territories should be more universal or international.\textsuperscript{120} The court held that a right is fundamental in the territorial context if it is the basis of all free governments.\textsuperscript{121}

The Ninth Circuit addressed this issue again in \textit{Wabol v. Villacrquis}.\textsuperscript{122} In analyzing an equal protection claim arising out of the Northern Mariana Islands, the court applied the impractical and anomalous test to determine if the right under review was the basis of free government.\textsuperscript{123} Reaffirming its decision in \textit{Atalig} that the impractical and anomalous test incorporates a cultural dimension, the court said “[i]n the

\textsuperscript{114} \textit{Id.} at 16.

\textsuperscript{115} \textit{Id.} at 14-15.

\textsuperscript{116} \textit{Id.} at 15.

\textsuperscript{117} 723 F.2d 682 (9th Cir. 1984).

\textsuperscript{118} \textit{Id.} at 690.

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Id.} at 689-90.

\textsuperscript{121} \textit{Id.} at 690.

\textsuperscript{122} 908 F.2d 411 (9th Cir. 1992), \textit{amended and superseded by} Wabol v. Villacrquis, 958 F.2d 1450 (9th Cir. 1990).

\textsuperscript{123} \textit{Id.} at 422 (citing \textit{Reid}, 354 U.S. at 75).
terrestrial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures.”124 In short, a right is fundamental in the territorial context if it is fundamental in the international sense.125

Using this formulation, the court rejected the theory that the Equal Protection Clause prohibited the CNMI from restricting land ownership to persons of Northern Mariana Island descent.126 In support of its decision, the Ninth Circuit indicated that the interests of both CMNI and the United States were at stake.127 As to local concerns, the court noted that land is scarce in the islands and that land is important to the preservation of the social and cultural stability of the Mariana people.128 As for the interests of the United States, the court found that, without the alienation restriction, the political union between the United States and the islands would be threatened because the United States had promised to curtail land alienation in an effort to persuade the people of the CNMI to agree to Commonwealth status.129 This was, the Court said, a legitimate attempt to protect local culture.130

American Samoa has had its own land alienation case, Presiding Bishop v. Hodel.131 In Presiding Bishop, the D.C. Circuit, like the Ninth Circuit in Wabol, held that a statute restricting land ownership to Samoans did not violate the equal protection of the laws.132 The court also determined that access to a court independent of the executive is not a fundamental right in Samoa.133 The court focused on the cultural side of the impractical and anomalous side of the equation in reaching its decision in this case.134 The court found that “communal ownership of land is the cornerstone of the traditional Samoan way of life—the fa’a Samoa.”135

124 Id. at 421.
125 Id. at 422.
126 Id. at 422, 424.
127 Id. at 422.
128 Id.
129 Id. at 423.
130 Id. at 422, 424.
131 830 F.2d 374 (D.C. Cir. 1987).
132 Id. at 386.
133 Id.
134 Id.
135 Id. at 377.
The intention of the United States to respect local tradition and local control of land was also important to the court.\textsuperscript{136} The D.C. Circuit’s consideration of local culture, U.S. interests, and U.S. intentions to empower the Samoans to chart their own course in \textit{Bishop} parallels the Ninth Circuit’s analysis in \textit{Atalig} and \textit{Wabol}.\textsuperscript{137}

IV. A SUGGESTED ANALYSIS FOR APPLYING THE CONSTITUTION TO TERRITORIES

One author characterized the jurisprudence of this area as in a state of “disorder.”\textsuperscript{138} It is true that on first blush the law of the area appears to be indeterminate and unpredictable. Robert Katz, in his 1992 article, attempts to explain the differences in the Ninth Circuit’s \textit{Atalig} and \textit{Wabol} decisions and the District of Columbia Circuit’s decision in \textit{King v. Morton} using legitimacy theory.\textsuperscript{139} He posits that the D.C. Circuit’s decision in \textit{King} and the Ninth Circuit’s decisions in \textit{Wabol} and \textit{Atalig} all support the legitimacy of U.S. governance of the two respective territories.\textsuperscript{140} Katz understands American Samoa to be an “executive fiefdom,”\textsuperscript{141} because the formal authority to govern the islands rests with the Secretary of the Interior. Governance of the Commonwealth of the Northern Marianas Islands is different. Katz states that the people of the NMI . . . solemnly and formally acceded to the United States’ sovereignty. As a precondition to their consent, however, they sought exemption from certain requirements of the Constitution and demanded that the federal government not disturb such exemptions unilaterally. The NMI community sought to loosen the constitutional yoke in order to secure more space for the unique and fragile aspects of their culture. The federal government essentially promised the NMI people that the

\begin{itemize}
\item \textit{Atalig} and \textit{Wabol} decisions
\item \textit{King v. Morton}
\item Legitimacy theory
\item \textit{Atalig} and \textit{Wabol}
\item NMI
\item Commonwealth of the Northern Marianas Islands
\item Constitutional yoke
\item Unique and fragile aspects of culture
\end{itemize}

\textsuperscript{136} \textit{Id.} at 386.

\textsuperscript{137} \textit{See also} Craddick v. Territorial Registrar, 1 AM. SAMOA 2d 10 (App. Div. 1980) (ruling that “[r]estriction whereby native land may not be held by persons who have not fifty per cent or greater Samoan blood is racial classification which must be afforded strict scrutiny in constitutional challenge”).


\textsuperscript{139} \textit{Id.} at 779.

\textsuperscript{140} \textit{Id.} at 780.

\textsuperscript{141} \textit{Id.} at 799.
Constitution’s provisions would apply to them only the extent provided for and agreed to in the Covenant.\textsuperscript{142}

Accordingly, Katz concludes that there is an inverse relationship between democratic control and constitutional rights. The greater the democratic control possessed by a territory, the less need for constitutional extension.\textsuperscript{143} For Katz, this inverse relationship explains why a jury trial right was held to be applicable in American Samoa, a territory he believes is governed by executive fiat, and was not found in the CNMI, where he believes there is greater local governance.\textsuperscript{144}

Although legitimacy may partly explain the jurisprudence of the courts of appeals\textsuperscript{145} and although I agree with his suggestion that legitimacy should be made an explicit element of the analysis, legitimacy theory fails to fully explain the differing rationales of the courts. In fact, the theory rests upon the unfounded assumption that American Samoa is an executive fiefdom. On the contrary--formalism aside,\textsuperscript{146} American Samoans are largely self-governed. American Samoans are governed by their own Constitution that was approved by the people.\textsuperscript{147} Although the Constitution and any amendments must also be “approved” by the Secretary of the Interior, the Secretary has never altered the Constitution, and pursuant to a post-	extit{King} statute, the Secretary no longer has the

\textsuperscript{142} \textit{Id.} at 797 (citations omitted).

\textsuperscript{143} \textit{Id.} at 798.

\textsuperscript{144} \textit{Id.} at 799-80 (“The people of American Samoa, unlike those of the NMI, have no acknowledged legal right to govern themselves”). Katz also explains some of the pre-incorporation territory cases using this theory. In many of the early territories, statehood was an expressed goal. In this, Katz finds his legitimacy. “Viewing the territories’ eventual statehood as a constitutional certainty, the [U.S. Supreme] Court felt no need to cure the temporarily undemocratic nature of such rule.” \textit{Id.} at 794.

\textsuperscript{145} For additional cases that discuss the importance of Samoan self-governance and U.S. interests to these issues, see \textit{Saipan Stevedore Company, Inc. v. Director}, 133 F.3d 717 (9th Cir. 1998) (holding that the Longshore and Harbor Workers’ Compensation Act applied to the CNMI), and \textit{United States v. Guerrero}, 4 F.3d 749 (9th Cir. 1993) (holding that “enforcement of administrative subpoena mandating release to Inspector General of tax records necessary to conduct audit did not offend [the] Commonwealth’s right of local self-government as defined under Covenant establishing the Commonwealth”).

\textsuperscript{146} The author recognizes the authority Congress has to govern the islands. Because Congress rarely exercises this authority and for the other reasons outlined in this article, however, American Samoans are in reality self-governed.

\textsuperscript{147} \textit{See supra} note 19 and accompanying text.
authority to unilaterally amend it.\textsuperscript{148} Today, congressional action is required to amend the Constitution,\textsuperscript{149} but Congress has never exercised this power.\textsuperscript{150} The Governor\textsuperscript{151} and the members of the lower house of the Fono are freely elected,\textsuperscript{152} the members of the upper house of the Fono are \textit{matai} selected in customary manners in their respective villages,\textsuperscript{153} and the villages, including the village councils and other local leaders, are all self-governed.\textsuperscript{154} The Secretary of the Interior continues to appoint the Chief Justice who then appoints the associate judges.\textsuperscript{155} Although the Secretary has the authority to remove the Chief Justice, today that authority is limited “for cause.”\textsuperscript{156} Also worth noting, the current Chief Justice is native Samoan.\textsuperscript{157} Formally, the Secretary retains the authority to review the decisions of the High Court. For at least the past 25 years, however, the Secretary has not altered any decision of that court.\textsuperscript{158} Even more significant, one past Secretary opined that such meddling into Samoan affairs is inappropriate.\textsuperscript{159} As the District of Columbia Court of Appeals stated in \textit{Presiding Bishop,

\textquotedblleft}the Secretary explained that a decision to intervene in the judicial system of American Samoa “cannot be taken lightly,” as any intervention might jeopardize the United States policy of “fostering greater self-government and self-sufficiency without disturbing the traditional Samoan cultural values.” Turning to the dispute over Malaeimi, the Secretary explained:

As Secretary, I have held no hearing and read no briefs. To have done so, or to do so now, with a view toward

\textsuperscript{148} See supra note 20 and accompanying text.
\textsuperscript{149} 28 U.S.C. § 1662a (1993) requires congressional approval of changes.
\textsuperscript{150} Yerlick Interview, supra note 43.
\textsuperscript{151} See supra note 21 and accompanying text.
\textsuperscript{152} See supra note 24 and accompanying text.
\textsuperscript{153} See supra notes 26-28 and accompanying text.
\textsuperscript{154} See supra notes 29-36 and accompanying text.
\textsuperscript{155} See supra notes 38-40 and accompanying text.
\textsuperscript{156} See supra note 40 and accompanying text.
\textsuperscript{157} See supra note 41 and accompanying text.
\textsuperscript{158} Yerlick Interview, supra note 43.
\textsuperscript{159} \textit{Presiding Bishop}, 830 U.S. at 378-79.
overruling the High Court’s decision, in what I perceive to be a highly complicated case, puts the Secretary in the position of an appellate court, superimposed over the duly constituted judiciary. Moreover, I am aware of no evidence that this case jeopardizes United States policy. Nor, does this case appear to present such a clear abuse of judicial discretion that intervention is dictated. For these reasons I choose not to intervene.\textsuperscript{160}

Further, a point that Katz failed to address, the District of Columbia Court of Appeals has in its post-\textit{King} years recognized the legal imperative of incorporating Samoan culture into the analysis.\textsuperscript{161} Appellant’s offer of proof is beside the point, since we could assume the facts it offers to prove and we would still be constrained to uphold the judicial scheme applicable to Samoa as being rationally designed to further a legitimate congressional policy, viz., preserving the \textit{fa’a} Samoa by respecting Samoan traditions concerning land ownership. There can be no doubt that such is the policy. First, the Instruments of Cession by which these islands undertook allegiance to the United States provided that the United States would “respect and protect the individual rights of all people . . . to their land,” and would recognize such rights “according to their customs.” Second, the Samoan Constitution expressly provides that “[i]t shall be the policy of the Government of American Samoa to protect persons of Samoan ancestry against alienation of their lands . . . .” Such transfers would inevitably spell the end of the \textit{fa’a} Samoa. Congress initially delegated “all civil [and] judicial” power over American Samoa to the Executive, but after the Secretary had approved the present Constitution of American Samoa, Congress in 1983 provided that any amendments could be “made only by Act of Congress.” To some extent, therefore, Congress may be viewed as having ratified the Samoan Constitution, at least in principle. Congress’ policy of respecting Samoan traditions concerning land ownership is furthered by the special composition of the High Court in land cases, as provided by American Samoan statute law. Section 3.0220 of the American Samoa Code provides that ordinarily appeals to

\textsuperscript{160} \textit{Id.} (citations omitted).

\textsuperscript{161} Katz only makes passing reference to the \textit{Bishop} case in footnote 119 of his article. Katz, \textit{supra} note 60, at 800 n.19.
the High Court “shall be held before 3 justices and 2 associate judges,” but if there is a difference of opinion among the members of the panel, “the opinion of 2 of the justices shall prevail.” Am. Samoa Code § 3.0221. In cases involving “land or matai title,” however, “the opinion of the majority of the five judges shall prevail and shall be recorded by the clerk as the opinion and decision of the court.” As the district court noted, “[T]he distinction is made presumably because associate judges”—who are typically local matai, knowledgeable in the fa’a Samoa but not necessarily educated in United States law—“are familiar with local land law and customs.”

Finally, American Samoa is not only self-governing in local affairs but has a voice in national politics through a non-voting representative in the U.S. House of Representatives. Because of the presence of these elements of self-governance, one scholar has commented that American Samoa is no longer a strictly “unorganized” territory. Contrary to Katz’ conclusion, an increased application of the U.S. Constitution may actually delegitimize law in American Samoa to the extent it conflicts with the fa’a Samoa. Jeffrey Teichert, a former law clerk of the High Court, suggests, for example, that only those provisions of the Constitution that have been consented to by the people of a territory, as evinced in the treaty and cession documents, should apply. In the case of American Samoa, this limits the application of the U.S. Constitution in favor of preserving tradition, because the cession treaties explicitly provide for the preservation of Samoan tradition.

It is not that there is no merit in Katz’s proposal that legitimacy should be made an expressed element in the analysis. I take issue with his perception of legitimacy. Instead of focusing on the formal, structural

162 Presiding Bishop, 830 F.2d at 386-87.
164 Stanley Laughlin has remarked that the requirement of congressional approval of amendments to the Constitution and the other self-governance features in American Samoa have changed its status from total dependence upon the executive branch of the U.S. government (unorganized) to less dependence (unorganized) in legal terms. See LAUGHLIN, LAW OF U.S. TERRITORIES, supra note 60, at 87, 139.
165 Teichert, supra note 110, pt. III.A.
dimension of governance of the islands, I suggest the question should be answered through a Samoan lens and through the actual state of affairs in American Samoa. This perspective, most likely, will be more collectivist than the highly individualistic legal perspective of mainland Americans. I will return to legitimacy later in my proposal for how the constitution should be applied in the territories.\textsuperscript{167}

I propose that the incongruence in these cases is as much a product of unclear analysis as it is a difference of opinion between the Ninth and D.C. Circuits. One defect in the current analysis is the absence of a meta-test that reflects a synthesis of the law of the area. Even more, the test needs to be ordered. What follows is a proposed analytic map to be applied in cases where extension of a constitutional provision to an unincorporated territory is at issue.

Step One: Is the Territory Incorporated?

The first step is the easiest. If a territory is incorporated, the entire Constitution is effective. If not, then the analysis must proceed to determine if the specific right at issue is to be applied.

Step Two: Is the Right Fundamental?

The second step focuses on the nature of the right. Namely, is the right fundamental? Justice White, in \textit{Downes}, provided little guidance in how to determine if a right is fundamental, except to say that natural rights theory could be used to make the determination.\textsuperscript{168} Regardless, later courts have not employed a natural rights methodology. So, what of the fundamental rights doctrine? Several theories have developed since Justice White’s fundamental rights proclamation. First, some scholars have criticized the Supreme Court for creating a caste system of constitutional rights, asserting that rights should not be classified as fundamental or not. The Supreme Court’s decision in \textit{Reid} provides some support for this by focusing not on whether the right to a jury trial was fundamental but instead on whether the right applied in a given context.\textsuperscript{169} The District of Columbia Court of Appeals saw this in the jurisprudence, as evinced by that court’s statement that the “decision in the [\textit{King}] case does not depend on key words such as ‘fundamental’ or ‘unincorporated territory’ . . . but can be reached only by applying the principles of the

\textsuperscript{167} See infra Section V.

\textsuperscript{168} \textit{Downes}, 182 U.S. at 280-81.

\textsuperscript{169} See supra notes 84-87 for discussion of \textit{Reid}.
earlier case, as controlled by their respective contexts, to the situation as it exists in American Samoa today.”

If this approach is adopted, the “fundamental” v. “not fundamental rights” distinction is removed and the question simply becomes, is the right protected by the Constitution?

Another alternative is to apply those rights defined as fundamental for purposes of Fourteenth Amendment incorporation. This would greatly increase the constitutional rights applicable in the territories because nearly all the individual rights found in the Constitution have been incorporated.

Yet a third perspective, most notably held by the Ninth Circuit, is to use the impractical and anomalous test to determine if a right is fundamental. Stanley Laughlin believes there is merit to this method. This approach raises its own unique problem, however, namely that if the impractical and anomalous test is used alone, it is possible for a right that is not fundamental in the mainland to be fundamental in a territory. At least one federal court has rejected this possibility. The U.S. District Court for the District of the Northern Marianas Islands stated in Olopai v. Tagabuel that the “claimed right is not a fundamental right in the rest of the United States, and consequently, it could not possibly be one in the CNMI either.” Yet, the court applied the impractical and anomalous test in its analysis. To remedy the problem of having broader rights in the territories than in the mainland, the court melded the Fourteenth Amendment definition with the practical and anomalous test. The resulting analysis is two-staged: first, it must be determined if the right is fundamental for purposes of application to the states, and if so, then it must be determined if its application to the territory in question is impractical and anomalous. The impractical and anomalous test, in essence, substitutes for the Fourteenth Amendment’s compelling governmental interest test used to determine if a state encroachment of a fundamental right is valid. Using this approach, the definition of what is

170 King v. Morton, 520 F.2d at 1147.

171 See Wabol, 908 F.2d at 422.

172 LAUGHLIN, LAW OF U.S. TERRITORIES, supra note 60, at 167.


174 Id. at *2. In this case, the court found that there was no fundamental right to have certain tax information withheld from the public. Id. at *4.

175 Id. at *2-*3.

176 Id.

177 Id.
fundamental will always be narrower in the territories than it is in the states. Of the three, this approach is the most logical and consistent with the existing case law. Accordingly, all fundamental constitutional rights should be applied in the territories, subject to the impractical and anomalous test.

Step Three: Is the Right Impractical?

Justice Harlan’s concurrence, in Reid, did not discuss whether the phrase impractical and anomalous identified one or two separate ideas.\(^{178}\) Two interpretations are possible: one assumes that each term has independent meaning and the other assumes redundancy. The Ninth Circuit interpreted Harlan’s language as requiring either impracticability or anomaly.\(^{179}\) At least one scholar agrees that the two terms have independent meanings.\(^{180}\)

A reading of the definitions of the terms anomalous and impractical supports the conclusion that they have different meanings. Webster’s New World Dictionary defines anomalous as either “deviating from the regular arrangement, general rule, or usual method; abnormal” or “being or seeming to be inconsistent, contradictory, or improper.”\(^{181}\) Impractical is first defined as either “not workable or useful,” and its secondary definitions include “not handling practical matters well,” or “given to theorizing; idealistic.”\(^{182}\) Accordingly, the definitions of each term express related, but different ideas; the anomalous prong focuses on the degree to which the right “deviates” from or is “abnormal” to the local culture, whereas the impractical prong should focus on the degree to which local culture might interfere with the successful implementation of the right. The conclusion that there are two different ideas expressed is further supported by Olopaï, the Ninth Circuit’s decisions in Atalig and Wabol, as well as by the District of Columbia Circuit’s decision in Presiding Bishop.

The impractical prong of the test, thus, requires an examination of the likelihood of success in implementing a right in a territory. The standard, however, is very high for nonapplication of a right due to impracticability.

\(*\) 178 Reid, 354 U.S. at 65.

\(*\) 179 Wabol, 908 F.2d at 421.

\(*\) 180 Laughlin, Law of U.S. Territories, supra note 60, at 165.


\(*\) 182 Id. at 56.
The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written constitution and undermine the basis of our government. 183

U.S. foreign affairs interests also factor into the equation. The Ninth Circuit recognized U.S. interests in Wabol: “absent the alienation restriction, the political union would not be possible. Thus, application of the constitutional right could ultimately frustrate the mutual interests that led to the Covenant. It would also hamper the United States’ ability to form political alliances and acquire necessary military outposts.” 184

Reduced to elements, the impracticability prong of the test considers:

1. The degree to which implementation of the rule will be frustrated by local culture.

2. The degree to which implementation of the rule will frustrate United States foreign policy and diplomatic interests. In Samoa, this includes the degree to which implementation of the rule will interfere with self-governance of the indigenous people since the United States has formally committed itself to this policy.

3. The availability of alternatives.

If impractical, then a right should not to be extended to a territory. If it is determined that the rule is practical, then it must be determined if the rule is anomalous.

Step Four: Is the Right Anomalous?

At this point, the analysis shifts from the likelihood of successful implementation to the relationship between the right and the indigenous culture where the right is to be applied. When reviewing the constitutional necessity for juries in Puerto Rico in the 1920’s, the U.S. Supreme Court commented that Congress thought that a “people like the Filipinos or the

183 Reid, 354 U.S. at 14.

184 Wabol, 908 F.2d at 423. The Ninth Circuit has also indicated that self-governance over local matters and the broader foreign and diplomatic interests of the United States are to be taken into consideration when extending the authority of a statute to the CNMI. See Saipan Stevedore Company Inc. v. Director, Office Workers’ Compensation Programs, 133 F.3d 717, 722, 725 (9th Cir. 1998) (upholding application of the Longshore and Harbor Workers’ Compensation Act to the CNMI).
Porto [sic] Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin.\textsuperscript{185} Later, the Ninth Circuit stated in \textit{Wabol} that “[t]he incorporation analysis must be undertaken with an eye toward preserving Congress’ ability to accommodate the unique social and cultural conditions and value of the particular territory. Moreover, we must be cautious in restricting Congress’ power in this area.”\textsuperscript{186} That court continued:

\begin{quote}
It would truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property. The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures. . . . Its bold purpose was to protect minority rights, not to enforce homogeneity.\textsuperscript{187}
\end{quote}

In that same opinion, the Ninth Circuit poignantly distinguished between the two concerns embodied in Harlan’s test when it penned that, in some instances, applying a right may be impractical, not because it will not work, but because it would work too well.\textsuperscript{188} Despite emphasizing impracticability in the \textit{King} case, the District of Columbia Court of Appeals also recognized the importance of local culture in \textit{Presiding Bishop}.\textsuperscript{189}

Accordingly, the following are to be considered at this stage:

1. The degree to which the rule will alter indigenous culture, or cause conflict or disharmony. Here, a different dimension of legitimacy than discussed by Katz is at play. Katz, in an attempt to understand the decision-making of U.S. judges, focused on legitimacy in a constitutional checks and balances sense. For purposes of determining anomaly, legitimacy is to be seen through the eyes of the indigenous people who will be subject to the rule. It is

\textsuperscript{185} \textit{Balzac}, 258 U.S. at 310.

\textsuperscript{186} \textit{Wabol}, 908 F.2d 422.

\textsuperscript{187} \textit{Id.} at 423-24.

\textsuperscript{188} \textit{Id.} at 421 n. 21 (citing Stanley K. Laughlin, \textit{The Application of the Constitution in United States Territories: American Samoa, A Case Study}, 2 U. HAW. L. REV. 337, 386 (1980)).

\textsuperscript{189} \textit{Supra} note 132 and accompanying text.
possible that a rule that legitimizes law to mainland Americans is delegitimizing to some indigenous peoples.

2. The availability of alternatives.

What remains is to apply this test to American Samoan curfews.

V. CURFEWS IN AMERICAN SAMOA

In order to better understand curfews in American Samoa, data was collected through interviews and a survey.\(^{190}\) The data reveals that the curfew is a common feature of village life; all but one (92%) of the respondents in this research indicated that his village had a curfew. Not only are curfews common, they are a longstanding tradition in the islands. Several respondents reported that their village curfews were one hundred years or older and one respondent wrote that his village’s curfew existed since “time immemorial.”\(^{191}\)

There are substantive differences between curfews in the mainland and Samoan curfews. Unlike curfews in the mainland United States, most curfews in American Samoa apply to both adults and juveniles. The times of the curfews are also different than found in mainland curfew laws. In most villages in American Samoa, there are both early evening “prayer” curfews as well as nocturnal curfews.\(^{192}\) This variation in curfew times evidences one of the differing objectives of curfews between the mainland and American Samoa. The commonly stated purposes of curfews by American legislative bodies are to control juvenile crime, to protect juveniles, and to empower parents. In American Samoa, the early evening curfew has, inter alia, a religious purpose. One hundred percent of the villages with an early evening curfew require all members of the community—regardless of age—to observe the curfew.

\(^{190}\) See supra note 2.

\(^{191}\) Eighty-three percent of the respondents answered this question. Of that group, thirty percent indicated that their curfew was 10 years old, ten percent indicated that the curfew was forty years old, twenty percent indicated that their curfews were approximately fifty years old, twenty percent reported that their curfews were one hundred years old, ten percent reported having a one hundred seventy year old curfew, and ten percent reported that his village’s curfew has existed since “time immemorial.”

\(^{192}\) Fifty-four percent of the respondents indicated that their villages had two separate curfews, one in the early evening for prayer as well as a nocturnal curfew. The total number of villages with a prayer curfew is higher than 54% since several villages apparently incorporate prayer time into a single curfew that typically begins earlier (and runs until morning) than in curfews in those villages with both prayer and nocturnal curfews.
On the other hand, the purposes of the Samoan nocturnal curfews more closely resemble the stated objectives of mainland curfews: to control crime and delinquency and to reinforce the authority of the family. The nocturnal curfews apply to juveniles in all the villages and adults in the vast majority of the villages. The age of majority for the few villages that distinguished between adults and minors was 18 or school age.

The aumaga, under the direction of the village matai, enforce the curfews. Sixty-seven percent of the respondents provided information on the frequency of violation of their village curfews. Thirty-eight percent of those respondents indicated that their village curfew was violated daily, 25% reported one violation a week, 13% reported one violation monthly, and 25% percent reported less than one violation monthly. The village council or a matai decides the punishment for a violation. Although statute limits the authority of the village to punish violations of village rules to a $25.00 fine and village work not to exceed 25 hours, a variety of sanctions outside these limitations are issued for curfew violations. These include requiring the offender to feed the entire village or the village council, fining the offender as much as $100, reprimanding the offender, withdrawal of titles in extreme cases, banishment, and withholding village protection of the family of the offender.

VI. THE U.S. CONSTITUTION AND AMERICAN SAMOAN CURFEWS

American Samoan curfew laws raise several constitutional issues. To identify the issues and determine whether “fundamental” rights are at issue, an examination of curfew law in the mainland United States is necessary. Such an examination reveals a growing body of case law. Although the constitutional attacks on curfews have stretched the Bill of Rights spectrum, the most significant constitutional questions include whether the restriction of movement violates the liberty interest protected by the Fourteenth Amendment, whether distinguishing between juveniles and adults violates equal protection, and whether curfews unlawfully encroach upon parental authority under the Fourteenth Amendment.\(^{193}\)

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A. Due Process Liberty Interest: Adults

American Samoa has not been incorporated, so the following discussion is concerned with whether “fundamental” rights are implicated and whether the imposition of those rights would be impractical or anomalous. First, it is assumed that, in the mainland United States, adult curfews are invalid encroachments upon a fundamental right to move about freely absent extraordinary circumstances. Two scholars stated that “[whereas] an emergency curfew imposed on juveniles and adults alike might be constitutional, an adult blanket curfew would not be constitutional.” This conclusion is indirectly supported by one Supreme Court decision and at least one lower court decision.

Is it impractical to enforce this due process right in American Samoa? To do so does not involve the imposition of a foreign institution (like a jury); instead, it is a negative sanction--thou shalt not restrict the movement of adults. Accordingly, implementation is not as much of a concern as it is when a foreign institution is thrust upon a people of a territory. Furthermore, such a proscription does not act to require the opposite of the status quo. So, evidence that the great majority of people would continue to respect the curfew even if stricken as unconstitutional does not prove “frustration of purpose.” The application of the Fourteenth Amendment, however, would be impractical to the extent that it interferes with the interests of the United States in respecting the local culture and providing for local governance of the islands, as set out in the cession document. This alone is not likely to stand in the way of enforcement of the right in American Samoa.

The analysis, therefore, turns to whether such an application is anomalous in this setting. Several questions asked of the interviewees and survey respondents were designed to develop an understanding of the significance of the curfews to Samoan cultural life.

The survey and interview data reveal that Samoans possess a very different attitude than that of mainland Americans. First, Samoans like their curfews. Of those responding to the survey, 100% of those who lived in a village with a curfew rated the importance of curfews in

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194 Bast & Reynolds, supra note 193, at 2.


196 E.g., Smith v. Avino, 91 F.3d 105 (11th Cir. 1996), abrogated on different grounds by Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) (affirming curfew imposed on persons in Dade County, Florida following Hurricane Andrew as a valid exercise of the police power to protect persons and property).
controlling crime as very important, seven on a seven-point scale. The results were identical for the question asking the respondents to rate the importance of the curfew in controlling juvenile delinquency. As to the role curfew plays in preserving their culture, all but one respondent rated the importance of curfew as a seven. Ten respondents rated the overall importance of having a curfew to village life as a seven, and two respondents assigned a rating of five. When asked if there was a different objective than provided in the survey (crime control, juvenile delinquency, and cultural preservation) for having a curfew, several free responses were provided. The most common was the promotion of religion, although there were several others. Nearly all reflected a collectivist perspective. To Samoans, curfews are more than a tool of crime control; they are part of the larger social web, the fa’a Samoa. They are created by the islands’ village councils, enforced by the matai, and serve both family and civic purposes. Frequency of violation is not high, and the punishment for violations reflects a communal purpose, not a retributive one.

In short, curfews are an integral part of Samoan cultural life. Furthermore, the United States has an interest in preserving the curfew because the creation and enforcement of the curfews are powers within the province of the matai, a traditional system the United States has pledged to protect. For these reasons, it would be anomalous to remove the authority of the villages to establish adult curfews. Therefore, adult curfews in American Samoa do not violate the U.S. Constitution.

B. Due Process Liberty and Equal Protection Interests: Juveniles

The Supreme Court of the United States has not decided if juveniles possess the same freedom of movement as adults, and the lower courts are divided on this question. The consensus, however, is that the state has greater authority to impose a curfew on juveniles than on adults. Nocturnal juvenile curfews are not a recent development in the United

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197 One respondent rated the importance of curfews to cultural preservation as a four. This respondent was the one respondent who also reported living in an area that does not have a curfew.

198 The comments were as follows: To promote religion and prayer, unity of the people, to encourage school children to study and to have adequate sleep for school, to teach the importance of following rules, respect for elders, self-discipline, to control the consumption of alcohol, to distribute information and keep the people informed of village and county issues, and for control and accountability.

199 Teichert, supra note 110, Section III.
States, and their popularity have seen a rebirth in recent years. Many of these laws have been challenged under several different constitutional theories.

The Fifth Circuit heard a challenge to a Dallas, Texas curfew that applied to people sixteen years of age and younger in *Qutb v. Strauss*. The curfew prohibited juveniles from being in public places from eleven p.m. to six a.m. on weeknights and twelve a.m. to six a.m. on weekends. A number of exceptions were included, such as for juveniles accompanied by a guardian, juveniles engaged in work activities, juveniles responding to emergencies, and juveniles engaged in religious and other First Amendment protected activities. It was a misdemeanor for a child to be in public during the curfew hours, and a misdemeanor for a guardian and certain other adults to permit a juvenile to violate the curfew.

The plaintiffs asserted several different theories why the ordinance was unconstitutional, including equal protection and due process claims. Citing *Gregory v. Ashcroft*, a 1991 Supreme Court decision, the Fifth Circuit rejected the plaintiff's assertion that age is a suspect class for purposes of equal protection analysis. Nevertheless, the court held that juveniles do possess a fundamental right to move about freely. Accordingly, the court applied the strict scrutiny test to determine if the ordinance violated due process. The court found that the ordinance was constitutional, because the government had a compelling interest in reducing juvenile crime and promoting juvenile safety. In response to the plaintiff's allegation that the City's statistical proof was weak, the court emphasized judicial deference to reasonable legislative decisions. Finally, the ordinance was found to be narrowly tailored, as required to

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200 An early case dealing with curfews is *Ex parte McCarver*, 46 S.W. 936 (Tex. Crim. App. 1898). Citing other sources, Chen notes that by 1997, 75% of cities with populations greater than 100,000 had state or local curfews in effect. Chen, *supra* note 193, at 131.


202 *Id.* at 490.

203 *Id.* at 490-491.

204 *Id*.


206 *Qutb*, 11 F.3d at 492.

207 *Id*.

208 *Id.* at 494.

209 *Id.* at 493.
survive strict scrutiny, because the City had crime data to support its decision and because the law contained several exceptions, including carving our First Amendment activities from the reach of the curfew.210

In the 1997 case Nunez v. City of San Diego,211 the Ninth Circuit Court of Appeals heard a challenge to a San Diego curfew ordinance that applied to juveniles under eighteen years of age. The curfew, which had been enacted in 1947, was in effect from ten p.m. to daylight and prohibited activities included “loiter[ing], idl[ing], wander[ing], stroll[ing] or play[ing] . . .” in public places.212 Like the Dallas ordinance, exceptions to the curfew were included in the ordinance.213 Juveniles were allowed to be out after ten p.m. if accompanied by a parent, if there was an emergency, if the juvenile was returning from a school event, or if the juvenile was employed.214 The ordinance did not have a general exception for First Amendment protected activity, as did the Dallas, Texas ordinance in Qutb.215

The court struck down the San Diego ordinance’s description of prohibited activities for vagueness.216 Like the Fifth Circuit in Qutb, the Ninth Circuit held that minors possess a fundamental right to move about freely.217 Unlike the Fifth Circuit, however, the Ninth Circuit reached a different outcome when applying the strict scrutiny test. It found the ordinance to be overbroad because it did not make sufficient exception for First Amendment protected expression.218

The Fourth Circuit has also examined the constitutionality of juvenile curfews. At issue in Schliefer v. Charlottesville219 was a Charlottesville, North Carolina ordinance that prohibited persons under seventeen years old to be in public places from twelve a.m. to five a.m. on weeknights and one a.m. to five a.m. on weekends.220 The ordinance,

210 Id. at 494.
211 114 F.3d 935 (9th Cir. 1997).
212 Id. at 938.
213 Id. at 938–939.
214 Id.
215 Id. at 940.
216 Id. at 943.
217 Id. at 944.
218 Id. at 951.
220 Id. at 846.
which became effective in 1997, was enacted to control crime, to protect minors, and to promote parental responsibility.\textsuperscript{221} The ordinance contained several exceptions similar to those found in the Dallas ordinance reviewed in \textit{Qutb}, including an exception for First Amendment activity.\textsuperscript{222}

Unlike the Fifth and Ninth Circuits, the Fourth Circuit concluded that minors are a special class under equal protection analysis.\textsuperscript{223} Due to the history of limited juvenile rights, however, the court chose to apply an intermediate level of scrutiny.\textsuperscript{224} The court found not only that the city satisfied the test, but it also stated in dicta that the government’s showing would satisfy the more demanding compelling interest test if applied.\textsuperscript{225} The court rejected the claim of parents that the curfew violated their substantive due process right to rear their children without undue influence of the government.\textsuperscript{226}

Finally, most important to American Samoa, the District of Columbia Circuit Court of Appeals passed on the District of Columbia’s curfew in its 1999 case \textit{Hutchins v. District of Columbia}.\textsuperscript{227} The D.C. ordinance applied to persons sixteen years old and younger.\textsuperscript{228} Its scope was from eleven p.m. to six a.m. on weekdays and twelve a.m. to six a.m. on weekends.\textsuperscript{229} Like the curfew laws discussed above, the ordinance contained several exceptions.\textsuperscript{230} The plaintiffs prevailed at the trial level.\textsuperscript{231} On appeal, a three-judge panel affirmed the trial judge’s decision.\textsuperscript{232} However, when reheard en banc, the panel’s decision was reversed. The court of appeals, in a plurality opinion, held that juveniles

\textsuperscript{221} Id.

\textsuperscript{222} Id.

\textsuperscript{223} Id. at 846-847.

\textsuperscript{224} Id.

\textsuperscript{225} Id. at 851.

\textsuperscript{226} Id. at 853.

\textsuperscript{227} 188 F.3d 531 (D.C. Cir. 1999).

\textsuperscript{228} Id. at 534.

\textsuperscript{229} \textit{Hutchins}, 188 F.3d at 534.

\textsuperscript{230} Id. at 535.

\textsuperscript{231} Id.

\textsuperscript{232} \textit{Hutchins by Owens v. District of Columbia}, 156 F.3d 1267 (D.C. Cir. 1998) (En banc).
do not possess a fundamental right to be on the streets without the supervision of an adult. \(^{233}\)

Accordingly, American Samoan curfews do not implicate a fundamental right to the extent they regulate people under the age of seventeen. Even if a fundamental right were found, the imposition of this right would be anomalous for the same reasons it is for adults.

C. **Due Process Liberty Interest: Parental Control**

Parents have also challenged curfews as unconstitutional encroachments upon parental authority over their children. The District of Columbia Circuit addressed this issue in *Hutchins*. \(^{234}\) Although the court recognized that parents might have a right to rear their children without undue governmental interference, it did not believe that right was implicated by the curfew. \(^{235}\) In spite of this conclusion, the court carried its analysis further, stating that “even if the curfew implicated fundamental rights of children or their parents, it would survive heightened scrutiny.” \(^{236}\) Other courts are split on similar issues. \(^{237}\) Even if parents do possess a fundamental right to the exclusion of the government, the District of Columbia Court of Appeals held that the District government satisfied heightened scrutiny under the Fourteenth Amendment. \(^{238}\) This leaves little doubt that the elevation of the parental right as superior to that of the extended family and village in American Samoa would be deemed anomalous by that court.

D. **First Amendment Establishment Issue**

An issue in Samoa that has not presented itself in any of the mainland cases is the religious nature of the early evening and Sunday curfews in many of the villages. \(^{239}\) The First Amendment’s free exercise

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\(^{233}\) *Id.* at 538.

\(^{234}\) *See supra* notes 227-233 and accompanying text.

\(^{235}\) *Hutchins*, 188 F.3d at 540.

\(^{236}\) *Id.* at 541.


\(^{238}\) *Hutchins*, 156 F.3d at 541.

\(^{239}\) According to the United States Central Intelligence Agency, 100% of American Samoans are Christian, and they have been Christian for over one hundred fifty years. *Infra* note 4; HOLMES, *supra* note 10, at 55. One anthropologist found that ancient
and establishment clauses are fundamental, incorporated rights under the Fourteenth Amendment. 240

A “prayer curfew” can be analogized to requiring prayer of public school children. In this context, the Supreme Court has held that prayers organized by public school officials amount to an establishment of religion. 241 This includes “moments of silence,” 242 prayers at commencement ceremonies that are organized by public school officials, 243 as well as by student initiated prayers at public school sporting events. 244 Unquestionably then, a curfew that has as its stated purpose the promotion of prayer implicates the fundamental right to be free from an establishment of religion.

The Samoan curfew, however, is factually more complex than mandatory school prayer. To begin with, Samoan curfews serve more than one purpose. The respondents indicated that curfews are not only prayer time, but time for the family and village to meet and make decisions. Curfews are also a vehicle for the delivery of information. Because religion, family, village, and “civic” life are inextricable, the degree to which religion is the motivation for these curfews may be difficult to determine. Also, there is a state action question. The village may be more analogous to a family than to a government. If familial, there is no First Amendment issue to address.

beliefs continue today, living within a uniquely Samoan version of Christianity. Today, several denominations of Christianity are present in the islands. Id. at 65-67.

240 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (reversing conviction of persons convicted under statute prohibiting the solicitation of money for religious purposes without approval of Secretary of Public Welfare); Abington v. Curlett, 374 U.S. 203 (1963) (holding that a rule providing for opening exercises in public schools embracing reading of the Bible or recitation of the Lord’s Prayer violated the Establishment Clause).

241 See Engel v. Vitale, 370 U.S. 421 (1962) (that public school system’s encouragement of daily prayer violated Establishment Clause, although students were not required to participate over their or their parents’ objection).


243 Lee v. Weisman, 505 U.S. 577 (1992) (holding that “nonsectarian” prayer in graduation ceremonies of city public schools by a clergyman selected by school was an establishment of religion).

Additional research is necessary to fully understand, inter alia, the role religion plays in the community, the degree to which the early evening and Sunday “prayer” curfews are actually intended to serve religious purposes, what other purposes are served, the extent to which the authority of the matai would be diminished by a prohibition of these curfews, and whether Samoans regard religious choice as a collective or individual right. The degree to which prayer is expected or coerced may also be a factor in this analysis.  

Also relevant, the American Samoan Constitution has both an establishment prohibition and a free exercise guarantee.  

VII. CONCLUSION

The applicability of the U.S. Constitution to American Samoa needs clarification and development from the Supreme Court. It may be time to change the territorial paradigm altogether. Until there is change, distilling a test from the case law is important. The first step in the test is to determine if the territory is incorporated. If so, then the Constitution applies fully. If a territory is unincorporated, then the right to be applied must be examined through a Fourteenth Amendment incorporation lens. If the right is not deemed fundamental using Fourteenth Amendment analysis, then it is inapplicable in the territory. If it is fundamental, then the impractical and anomalous test determines whether the right is extended to the inhabitants of a territory.

Both definitional and legal analyses lead to the inescapable conclusion that the terms impractical and anomalous represent two different tests, and the omission of either from the analysis may result in a decision that is illegitimate to the people of a territory or contrary to the foreign affairs interests of the United States. Accordingly, a fundamental right will apply in a territory only if it can be shown to be both practical and not anomalous.

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245 Religious practices and beliefs were outside the scope of this project. One report of violence against five men for practicing something other than an official village religion in Western Samoa was found. According to the report, villagers may leave their villages to practice other religions. But the victims in that case were caught practicing something other than the required religion in their village. See Amnesty International Studying Samoa Religious Rights Issues, SAMOA NEWS, Oct. 26, 1998, available at http://pidp.ewc.hawaii.edu/PIReport/1998/October/10-27-11.htm. See also U. S. Dep’t. of State, Annual Report on International Religious Freedom for 1999 (Sept. 9, 1999), at http://www.state.gov/www/global/human_rights/drl_religion.html.

246 AM. SAMOA CONST. art. I, § 1.

247 Jeffrey Teichert, for example, proposes analyzing these issues under the treaty power and not the Territory Clause. See Teichert, supra note 110, Section III.A.
Similar to the curfews in the mainland United States, American Samoan curfews serve to control crime and juvenile delinquency. Unlike mainland curfews, however, American Samoa curfews also serve cultural purposes. They are not only a part of, but act to protect, fa’a Samoa. Additionally, the elimination of the adult or juvenile curfews on due process or equal protection grounds would undermine U.S. foreign affairs interests. Accordingly, American Samoan curfews, both adult and juvenile, do not violate due process or equal protection because the application of those rights in the curfew context would be anomalous. Additional research is necessary, however, to determine if the special prayer curfews of American Samoa are consonant with the First Amendment.