

Report  
Center for the Study of Federalism

**Same-sex Marriage; Unsame Law:  
Cultural Preservation and Individual Rights in American Samoa\***

By

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## Abstract

Most federalism research examines the state government to federal government relationship. There is another federal relationship that directly impacts millions of Americans, and for geopolitical and philosophical reasons, is important to all Americans: territorial federalism.

In this research, the investigators collected opinion data using surveys of the general population and interviews of traditional leaders to determine whether the legal right to same-sex marriage, as protected by the U.S. Constitution in the states and federal government, applies to American Samoa.

Applying the Insular Cases, evidence addressing whether same-sex marriage would be “impractical or anomalous” was collected. Significant moral objection to legal recognition of same-sex marriage was found, but no other evidence of impracticality or anomaly were found. Accordingly, it is concluded that the right to same-sex marriage is protected in American Samoa.

### I. Background and Scope

Federalism research typically examines the state government to federal government relationship. There is another federal relationship that directly impacts millions of Americans, and for geopolitical and philosophical reasons is important to all Americans: territorial federalism.

America's Founders believed territorial expansion was necessary to grow and sustain their new nation. Indeed, American colonists objected to British limitations on their rights to colonize new lands.<sup>1</sup> The Confederation Congress provided for expansion into present day Ohio, Indiana, Wisconsin, Michigan, Illinois, and part of Minnesota in the Northwest Ordinance of 1787,<sup>2</sup> and the Constitution of 1789 explicitly included provisions for the creation of both territories and new states. By the middle of the 19th century, Manifest Destiny, the belief that it was inevitable for the United States to expand westward across North America, was widely held.<sup>3</sup> Over time, dozens of territories were acquired, thirty-one eventually becoming states.<sup>4</sup> Today, the United

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<sup>1</sup> The Treaty of Paris of 1763, which was entered into to end the Seven Years' War and French and Indian War, forbade, inter alia, colonists from settling on specified Native American lands. The Treaty was implemented by Royal Proclamation. Jerald Sabin, *What is a territory? Comparative federalism and state formation in North America*, Territory, Politics, Governance, Sept. 2022, at 1 - 2. <https://doi.org/10.1080/21622671.2022.2158922>

<sup>2</sup> National Archives. *Northwest Ordinance (1787)*. <https://www.archives.gov/milestone-documents/northwest-ordinance#:~:text=Citation:%20Ordinance%20for%20the%20Government,Archives%20Building%2C%20Washington%2C%20DC>.

<sup>3</sup> *Manifest Destiny and Westward Expansion*. Smithsonian American Art Museum. nd. [Americanexperience.si.edu](http://americanexperience.si.edu)

<sup>4</sup> *Supra*, note 2 at 2.

States has at least fourteen insular areas.<sup>5</sup> Five are inhabited: American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the United States Virgin Islands.

Because the circumstances under which each territory joined the United States vary, and because the Constitution delegates considerable authority over the territories to Congress, each has a unique constitutional and political status. American Samoa is the most politically and legally independent territory of the United States. Unlike the residents of America's other territories, American Samoans are classified as "U.S. Nationals," not citizens.<sup>6</sup> Although they enjoy most of the benefits of citizenship, they are disqualified from receiving many federal benefits, from voting in presidential elections, serving on state and federal juries, and holding the highest offices, including President. Like the other territories, American Samoans have no representation in the United States Senate and one non-voting member in the United States House of Representatives. Also, the Constitution of the United States is more limited in application in American Samoa than in the other territories. This is a consequence of a set of decisions of the Supreme Court of the United States (SCOTUS), collectively known as the *Insular Cases*.

## II. Research Question

In 2015, the Supreme Court of the United States issued a decision in *Obergefell v. Hodges*, where it held that same-sex marriage is a right protected by the Fourteenth Amendment's Equal Protection and Due Process Clauses.<sup>7</sup> Shortly after the *Obergefell* decision was issued, then Governor of American Samoa, Lolo Matalasi Moliga, stated, "My personal opinion is, this ruling will not apply to our preamble, our constitution and our Christian values. Also, our political status is still unorganized and unincorporated, so the Supreme Court ruling does not apply to our territory."<sup>8</sup>

The question this study intends to answer is whether the American Samoan policy to not license same-sex marriage is constitutional, applying *Obergefell* and the *Insular Cases*.<sup>9</sup>

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<sup>5</sup> American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Atoll, Navassa Island, Northern Mariana Islands, Palmyra Atoll, Puerto Rico, United States Virgin Islands, and Wake Island. The U.S. also claims sovereignty over many areas that are disputed by other nations, including Machias Sea Island and Serranilla Bank. Also, three former U.S. territories that are now independent nations, Federated States of Micronesia, Republic of Marshall Islands, and the Republic of Palau, are in "free association" with the United States.

<sup>6</sup> 8 U.S.C. §1408

<sup>7</sup> 576 U.S. 644 (2015).

<sup>8</sup> *Same Sex Marriage Rejected by Local Church Leaders*, Samoa News (July 13, 2015), <https://www.samoanews.com/same-sex-marriage-rejected-local-church-leaders> and Fili Sagapolutele & Jennifer Sinco Kelleher, *American Samoa Questions Gay Marriage Validity in Territory*, Associated Press (July 10, 2015), <https://apnews.com/c1deb598da6a482587fdd5bac501fc94> [<https://perma.cc/282Z-VH22>] (quoting Attorney General Ale).

<sup>9</sup> In 2022, the Defense of Marriage Act (DOMA) was repealed and replaced with the Respect for Marriage Act (RMA). Through RMA, Congress mandated full faith and credit to any public act, record, or judicial proceeding of any other State pertaining to a marriage between two individuals, with no discrimination on the basis of the sex, race, ethnicity, or national origin. The statute defines a state to include America's territories. Accordingly, American Samoan officials must recognize same-sex marriages performed in another territory or in a state. The law doesn't require the American Samoan government to issue marriage licenses in the first instance. While RMA offers a way for American Samoans to

### III. The Setting

The Samoan islands are an archipelago in the South Pacific. Archaeologists estimate that the islands were first settled about 3,000 years ago.<sup>10</sup> There was considerable contact between Samoans and other Polynesians dating back over two thousand years. The first known contact with Europeans was with Dutch explorers in 1722.<sup>11</sup> Thereafter, traders and Christian missionaries from several European nations engaged with the Samoan people. The first formal contact between the islands and the United States came in 1872 when the U.S. Navy and a High Chief entered into an agreement to permit the installation of a coaling station on Tutuila Island. Six years later the United States and the people of the islands executed a treaty of friendship. The coaling station would eventually morph into a United States naval base.<sup>12</sup> The strategic location of the islands and the presence of a deep water harbor in Pago Pago were the reason for the Navy's interest in the islands, and today, both continue to be important to the national security of the United States.<sup>13</sup>

By the late 19<sup>th</sup> century, conflicts between Great Britain, Germany, and the United States, and internal conflicts between Samoans, led to new political arrangements.<sup>14</sup> Through the Tripartite Convention of 1889, the islands were divided between Germany, which created a colony out of the western islands, and the United States, which created a territory in the east. The western islands eventually changed from German to New Zealand control, with the Samoans obtaining their independence from New Zealand in 1962. Known as Western Samoa after independence, the country was renamed Samoa in 1997.

In the east, the traditional leaders of Tutuila, the largest island in what is now American Samoa, ceded to the United States in 1900. In a document of cession, the chiefs, referred to as matai, agreed that in the interest of

the promotion of the peace and welfare of the people of said Islands, for the establishment of a good and sound Government, and for the preservation of the rights

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legally legitimize their marriages in American Samoa, it doesn't offer a solution to same-sex couples who can't or don't want to travel to one of the states or to another territory to marry. The expense and inconvenience of travel, the possibility of future Congressional reversal, and the desire of couples to marry in their own community limit the practical effect of RMA for American Samoans.

<sup>10</sup> Buhi, J., *Citizenship, Assimilation, and the Insular Cases: Reversing the Tide of Cultural Protectionism at American Samoa*, 53 Seton Hall Law Rev. 779, 784 (2023)

<sup>11</sup> Serge Tcherkézoff, *First Contacts in Polynesia: The Samoa Case (1722 – 1848)*. ANU Press (2008), Ch. 1, p. 15.

<sup>12</sup> Buhi, Jason, *Citizenship, Assimilation, and the Insular Cases: Reversing the Tide of Cultural Protectionism at American Samoa*, 53 Seton Hall Law Review, 779, 785 (2023). Available at SSRN: <https://ssrn.com/abstract=4172532>

<sup>13</sup> An increasing presence of the People's Republic of China in the islands, and elsewhere, is the reason some strategists are calling for greater investment in America's existing pacific island relationships, and an expansion into new alliances. See Congressional Research Service. November 7, 2024, *The Pacific Islands: Background and Issues for Congress*. <https://crsreports.congress.gov/> and Andrew Harding, *The Pacific Pivot: An American Strategy for the Pacific Islands*, The Heritage Foundation, October 1, 2024. Heritage.org.

<sup>14</sup> The term colonization is avoided here, because many American Samoans reject the suggestion that they have been colonized by the United States because their matai ceded, and they continue to choose to be affiliated with the United States.

and property of the inhabitants of said Islands, the Chiefs, rulers and people thereof are desirous of granting unto the said Government of the United States full power and authority to enact proper legislation for and to control the said Islands . . .<sup>15</sup>

The United States promised to “respect and protect the individual rights of all people dwelling in Tutuila to their lands and other property . . . and [t]he Chiefs of the towns will be entitled to retain their individual control of the separate towns, if that control is in accordance with the laws of the United States of America concerning Tutuila.”<sup>16</sup> In 1904, the King of Manu’a, the next largest and most populous eastern island, ceded.<sup>17</sup>

There being no obvious home in the United States federal structure for the territory, President William McKinley assigned the administration of the islands to an old ally, the Navy Department. In 1929, Congress enacted a resolution that provided “Until Congress shall provide for the government of such 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 power to remove said officers and fill the vacancies so occasioned.”<sup>18</sup> In 1951 President Harry S. Truman transferred the responsibility for American Samoa from the Secretary of the Navy to the Secretary of the Department of the Interior, where it remains today.<sup>19</sup>

Successive Interior Secretaries have respected Samoan self-governance, including the creation of an American Samoan constitution, which was debated and drafted at a Constitutional Convention in 1966. The Constitution became effective in 1967 after having been approved by the American Samoan people.<sup>20</sup> Two years later, American Samoa rejected unification with Western Samoa, favoring association with the United States.<sup>21</sup> Today, federal statute requires amendments to the Constitution to be approved by 3/5 of each house of the legislature, the Fono, by a majority of American Samoa voters, the Secretary of Interior, and finally, by the United States Congress.<sup>22</sup>

Congress never fully provided for the government of the islands. Territories are referred to as being organized or unorganized, the former having a congressionally enacted organic act(s) that provide for the governance of a territory. Congress also has the authority to extend the entire, or portions, of the Constitution to a territory. American Samoa is commonly regarded as unorganized because of the absence of an organic act. Yet, Congress’ recognition of the Samoan constitution and its statutory limitations on the authority of the Secretary of Interior to amend it, the long history of the Department of the Interior respecting Samoan self-governance, and

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<sup>15</sup> In informal conversations and one formal interview, the self-determinative nature of this history was emphasized as important to American Samoan identity.

<sup>16</sup> *Instrument of Cession Signed on April 17, 1900, by the Representatives of the People of Tutuila*. U.S. State Department. <https://history.state.gov/historicaldocuments/frus1929v01/d853>

<sup>17</sup> *Cession of Manu’a Islands*. American Samoa Bar Association. <https://asbar.org/cession-of-manua-islands/>

<sup>18</sup> 48 U.S.C. § 1661, et seq.

<sup>19</sup> Exec. Order No. 10264 (1951)

<sup>20</sup> AM. SAMOA CONST., Preamble

<sup>21</sup> *Making the Most of Two-Samoa Talks*, Samoa Observer, Editorial, May 9, 2024. SamoaObserver.ws.

<sup>22</sup> 48 U.S.C. § 1662(a).

the development of a robust legal and political system by the Samoan people challenge the characterization of American Samoa as “unorganized.”

The framers of the American Samoan Constitution sought to preserve Fa'aSamoa by weaving traditional actors and processes into the formal American form of government. It provides for three branches of government, with a popularly elected Governor, a legislature (Fono), and a judiciary.

The Fono is bicameral, with a House of Representatives and Senate. The members of the House are elected by popular vote. Eligibility to sit in the House is extended to all adult U.S. nationals who have lived in American Samoa for at least five years. Eligibility to be a senator is an example of the pluralistic blending that is baked into the Constitution. A person must be a national, at least 30 years old, have five years of residence with one year of residence in the district represented, and 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.”<sup>23</sup>

Other blending can be seen in local government. Village councils, which are comprised of chiefs and heads of family,<sup>24</sup> “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,” subject to the approval of the Office of Samoan Affairs, which is led by a *matai*.<sup>25</sup> Enforcement of village regulations is delegated to village police,<sup>26</sup> who report to *pulenu'u*, *matai* that act as village mayors. Enforcement authority is held concurrently with the American Samoa Department of Public Safety, the islands-wide general law enforcement department.<sup>27</sup>

The judicial branch comprises a High Court, district court, “and such other courts as may from time to time be created by law.”<sup>28</sup> The Secretary of the Interior appoints the Chief Justice and the Associate Justice of the High Court.<sup>29</sup> The Associate Judges of the High Court are nominated by the Governor, subject to Senate confirmation, and are removable by the Chief Justice with “just cause.”<sup>30</sup> The Fono has established a system of village courts, where village *matai*, who are appointed by the Chief Justice, serve as judges.<sup>31</sup>

The decisions of the High Court may be appealed to the Secretary of Interior who may affirm, reverse, or amend them. The Secretary hasn't exercised this authority in decades, leaving the Samoan courts largely autonomous. The High Court is the final word on local law. Federal

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<sup>23</sup> AM. SAMOA CONST. art. II, §3

<sup>24</sup> AM. SAMOA CODE ANN §5.0303

<sup>25</sup> *Id.* at §5.0305(b)

<sup>26</sup> *Id.* at §5.0306

<sup>27</sup> *Id.* at §5.0302

<sup>28</sup> AM. SAMOA CONST. art. III §1

<sup>29</sup> *Id.* at art. III, §3

<sup>30</sup> AM. SAMOA CODE ANN §3.1004

<sup>31</sup> Am. SAMOA CODE ANN. §§3.0101 and 3.0401.

questions are answered in the first instance by the High Court, with appeals to federal district courts possible. Because American Samoa is the only territory without a dedicated federal district court, appeals from the High Court often are taken to district courts in Hawaii or the District of Columbia.<sup>32</sup> The distance from New York City to San Francisco, California is less than the distance from Tutuila to Honolulu. Consequently, the practicalities of filing and maintaining a lawsuit has limited American Samoan access to federal courts.

### *The People*

There are five islands and two atolls in American Samoa. Combined, the islands are slightly larger than Washington, D.C., with a population, which has been declining for years, of 43,914 in 2023.<sup>33</sup> Over 200,000 individuals of Samoan descent live in the states.<sup>34</sup> The vast majority of the population is literate in both Samoan and English. Over 98% of American Samoans identify as Christian.<sup>35</sup> Although small in raw numbers, American Samoa has the largest per capita representation in the U.S. Army of all the states and territories.<sup>36</sup>

Historically, and today, American Samoans are more collectivistic than the residents of the 50 states. The Samoan way of life, known as Fa'aSamoa, is collectivistic in responsibilities, social organization, and worldview. As a salient element of the constitutional analysis that will be discussed later in the paper, Fa'aSamoa will be briefly introduced.

Fa'aSamoa, commonly defined as the Samoa way of life, has been described as “the essence of being Samoan” as well as 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.”<sup>37</sup>

### Primacy of family, land, Matai, and religion

Central to Fa'aSamoa is land, matai, and family. The distinguished anthropologist Lowell D. Holmes described Samoan structure in this way:

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<sup>32</sup> There have been attempts to locate a United States district court in American Samoa. They have met with resistance, both in American Samoa and in Congress. See Michael Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 Pac. Rim Policy L Pol’y J. 325 (2008) and Government Accounting Office, *American Samoa: Issues Associated With Some Federal Court Options*, Testimony before the Committee on Natural Resources, Subcommittee on Insular Affairs, House of Representatives, 110<sup>th</sup> Congress, Sept. 18, 2008. Available at <https://www.govinfo.gov/content/pkg/GAOREPORTS-GAO-08-1124T/html/GAOREPORTS-GAO-08-1124T.htm>

<sup>33</sup> The World Bank. World Development Indicators (2024). Washington, D.C. <https://datatopics.worldbank.org/world-development-indicators>

<sup>34</sup> *Fitisemanu v. United States*, 1 F.4th 862, 866 (10th Cir. 2021)

<sup>35</sup> *American Samoa*. CIA World Factbook 2024. United States Central Intelligence Agency.

<sup>36</sup> Press Release, *Amata Honors Birthday of US Army*, Congresswoman Aumua Amata (June 13, 2022), <https://radewagen.house.gov/>

<sup>37</sup> Ian Tapu, *Who Really Is a Noble?: The Constitutionality of American Samoa’s Matai System*, 24 UCLA Asian Pacific Amer. L. J. 61, at fn 12, citing Jeffrey B. Teichert, *Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa*, 3 Gonz. J. Int’l L. 35, 41–42 (2000).

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 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. . .<sup>38</sup>

Land is a key component of Fa'aSamoa. Interwoven with fa'amatai and aiga, land is communally held and administered for the welfare of the people. Today, more than 90% of the land in American Samoa is communally held. For the small amount of land that may be owned by individuals, ownership is limited to persons who have no less than 50% Samoan blood, and in most cases, the individual must have been born in American Samoa, born of Samoans, "lives with Samoans as a Samoan," have no less than five years of residence, and officially declare their intention of living in American Samoa for life.<sup>39</sup>

Another pillar of Samoan society is religion, which is deeply embedded in the cultural and social framework of American Samoa. Over 98% of American Samoans are Christian, of varying denominations.<sup>40</sup> The prominence of faith is evident in the presence of churches in nearly every village, emphasizing the importance of spiritual values and community worship in daily life. This close relationship between religion and society extends into governance, as seen in the inclusion of prayers at the start of government functions and school activities. The significance of faith is further encapsulated in the Government Seal of American Samoa, which bears the inscription "*Samoa Muamua le Atua*"—translated as "*Samoa, Let God Be First*"—highlighting the centrality of God as a guiding principle in both cultural identity and institutional practice.

### *Collectivism*

The emphasis of community over the individual is the heart of these cultural systems.

I am not an individual; I am an integral part of the cosmos. I share divinity with the ancestors, the land, the sea and skies. I am not an individual, because I share a 'tofi' (an inheritance) with my family, my village and my nation. I belong to my family and my

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<sup>38</sup> Lowell D. Holmes, *Quest for the Real Samoa: The Mead/Freeman Controversy and Beyond* (1987). For a dated, but thorough, background on matai, see A.P. Lutali and William J. Stewart, *A Chieftal System in Twentieth Century America: Legal Aspects of the Matai System in the Territory of American Samoa*, 4 Ga. J. Int'l & Comp. L. 387 (1974)

<sup>39</sup> 37.0204

<sup>40</sup> *American Samoa*, The World Factbook 2025. Washington, DC: Central Intelligence Agency, 2025.

family belongs to me. I belong to my village and my village belongs to me. I belong to my nation and my nation belongs to me. This is the essence of my sense of belonging.<sup>41</sup>

Maintaining social harmony is a priority, as is serving family and village. What would be considered a duty in the states is seen as a privilege in American Samoa.<sup>42</sup>

### *Sexuality in American Samoa*

Sexuality in Samoan culture is deeply intertwined with traditional understandings of gender, particularly through the recognition of *fa'afafine*, a third-gender category that has long existed within Samoan society. *Fa'afafine*, which translates to “in the manner of a woman,” are individuals assigned male at birth who embody both masculine and feminine traits, often taking on gender roles distinct from conventional binary classifications.

Although the term implies that the members of this category are uniformly very feminine, they are, in fact, a heterogeneous group in many ways . . . Most self-identify as *fa'afafine*, not as men. A minority self-identify as women, even though they recognize, as do all Samoans, that they differ physically and socially from biological women. In appearance and mannerisms, although most would be considered effeminate, they range from strikingly feminine to unremarkably masculine, although instances of the latter are rare. Despite this heterogeneity in gender role presentation, *fa'afafine* are, with very few exceptions, exclusively androphilic. Despite the fact that almost all *fa'afafine* are exclusively androphilic, they do not engage in sexual activity with each other. Instead, *fa'afafine* are attracted to, and engage in sexual interactions with, males who self-identify as “straight men”

In a Samoan cultural context, “straight men” are those who self-identify as men and are masculine in terms of their gender role presentation. Inclusion in this category is not contingent on exclusive sexual activity with women. Most self-identified straight men are gynephilic (sexually attracted to women), but may engage in sexual activity with *fa'afafine* or other straight men on a temporary basis, particularly if female sexual partners are unavailable. Our participants informed us that most straight men in Samoa have engaged in sexual interactions with *fa'afafine* at least once in their lives (also see Paradise Bent 1999). In Independent Samoa, the categories “gay” or “homosexual” are not terms that androphilic males employ to construct their identities. In fact, the majority of *fa'afafine* are quite resolute in their assertion that Samoan “gays” and “homosexuals” do not exist [internal citations omitted].<sup>43</sup>

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<sup>41</sup> April Henderson, *The I and the We: Individuality, Collectivity, and the Samoan Artistic Responses to Cultural Change*, 28 *The Contemporary Pacific* 316 (2016), citing another source.

<sup>42</sup> There are traditional processes that enforce the harmony objective. See Tuilaepa Sailele Malielegaoi, Opinion. A “Harmony Agreement” is a Core Tradition for Maintaining Peace in Our Peaceful Samoa, Samoa Observer, n.d., Samoaobserver.ws.

<sup>43</sup> Paul L. Vassey and Nancy H. Bartlett, *What Can the Samoan “Fa’afafine Teach Us About the Western Concept of Gender Identity Disorder in Childhood*, 50 *Perspectives in Biology and Medicine* 481, 484 (2007)

Fa'afafine are generally accepted and integrated into Samoan communities, reflecting the society's historically fluid approach to gender identity. However, this cultural acceptance exists alongside the influence of Christianity, which has shaped contemporary Samoan values and moral frameworks. Many Samoans navigate a complex intersection between their indigenous understanding of gender diversity and the Christian doctrines that emphasize heteronormative structures. This dynamic creates a nuanced social landscape where traditional respect for *fa'afafine* coexists with varying degrees of personal and religious tension regarding sexual orientation, gender identity expression and characteristics (SOGIESC).<sup>44</sup>

#### IV. The Insular Cases

The United States has a long history of territorial expansion. For over a century, most of the expansion was in North America, and was of lands destined to be states. This changed in the late 19<sup>th</sup> century, when the United States acquired several territories following the Spanish-American War. This included Guam, Puerto Rico, and the Philippines. In this period, the United States also acquired American Samoa and Hawaii, the former by mutual consent, and the latter, forcibly. Subsequently, the U.S. Virgin Islands was purchased from Denmark in 1917.

These lands and waters, far from the contiguous states, presented new political, cultural, and legal issues. The Supreme Court of the United States was quickly engaged to answer some of the legal questions, which it did in several cases that are commonly known as the Insular Cases. Although scholars don't fully agree on all of the cases that fall into the Insular Cases bucket, there is consensus as to a core group of decisions.<sup>45</sup>

Much has been written about the Insular Cases. Because one of the investigators of this study, as well as many other scholars, have previously detailed the holdings of these cases,<sup>46</sup> only a summary of them is offered herein, followed by a more detailed discussion of the key component of the Insular Cases; the impractical and anomalous test.

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<sup>44</sup> The authors use *fa'afafine* to refer to *fa'afafine* and *fa'afatama*, the former being "in the manner of a woman" and the latter, "in the way of a man." The designation LGBTQ+ is not used because several interviewees expressed concern over the use of it in American Samoa. To quote one, "I reject the western classifications. They are divisive and not representative of sexuality in American Samoa." Because the distinction between *fa'afafine* and gay and lesbian people is important for this analysis, the label LG is used for gay and lesbian persons.

<sup>45</sup> Among the most important Insular cases are *Downes v. Bidwell*, 182 U.S. 244 (1901); *De Lima v. Bidwell*: 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901); *Hawai'i v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904); *Rasmussen v. United States*, 197 U.S. 516 (1905); and *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

<sup>46</sup> See Jason Buhi, *Citizenship, Assimilation, and the Insular Cases: Reversing the Tide of Cultural Protectionism at American Samoa*, 53 Seton Hall L. Rev. 7779 (2023); Christopher R. Leslie, *The America Without Marriage Equality: Fa'afafine, the Insular Cases, and Marriage Inequality in American Samoa*, 122 Columbia L. Rev. 1770 (2022); Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 Asian-Pacific L. & Policy J. 69 (2001); General Accounting Office, U.S. Insular Areas: Application of the U.S. Constitution, OGC-98-5 (1997); #; Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. R. 779 (1992); Stanley K. Laughlin, *The Constitutional Structure of the Courts of the United States Territories: The Case of American Samoa*, 13 U. Haw. L. Rev. 379 (1991); Maurice H. McBride, *The Application of the American Constitution to American Samoa*, 9 J. Int' l. & Econ. 325 (1974).

Before the law is discussed, a policy controversy should be acknowledged. The same justices who issued the infamous separate but equal decision, *Plessy v. Ferguson*,<sup>47</sup> also decided the Insular Cases. This may explain why the Insular Cases have, at times, an imperialistic tone, and in some instances, a patently racist one. For example, various justices referred to the inhabitants of the territories as savages, and Justice White expressed concern about extending citizenship to the uncivilized, the unfit to receive it.<sup>48</sup> Some critics have suggested that the Insular Cases are even more objectionable than *Plessy* because they establish a regime of *separate but unequal* for territorial residents.<sup>49</sup> Undergirding this perspective are progressive ideas about post-colonialism, universal rights, and systemic racism. For these reasons, some judges and academics<sup>50</sup> have called for the Insular Cases to be overruled. SCOTUS Justice Neil Gorsuch, for example, strongly renounced the Insular Cases in 2022:

The flaws in the Insular Cases are as fundamental as they are shameful. . . . The Insular Cases can claim support in academic work of the period, ugly racial stereotypes, and the theories of social Darwinists. But they have no home in our Constitution or its original understanding. In this country, the federal government “deriv[es] its powers directly” from the sovereign people. . . . A century ago in the Insular Cases, this Court held that the federal government could rule Puerto Rico and other Territories largely without regard to the Constitution. It is past time to acknowledge the gravity of this error and admit what we know to be true: The Insular Cases have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.<sup>51</sup>

While racial animus can be seen in the writings of some of the justices, other justifications for the Insular Cases holdings can be found in the Court’s opinions, including the ambiguity of the future of the newly acquired lands, the desire to respect America’s promises to respect the culture and self-determination of the peoples of the territories, and concerns about the

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<sup>47</sup> 163 U.S. 537 (1896). In *Plessy*, the Court held that racial segregation policies didn’t violate the 14th Amendment’s Equal Protection Clause, so long as the races were treated equally in their separate spaces.

<sup>48</sup> *DeLima v. Bidwell*, 182 U.S. 1, 119 (1901) and *Dorr v. United States*, 195 U.S. 138, 148 (1904) and *Downes*, *supra* note 44.

<sup>49</sup> Natalie Gomez-Velez, *De Jure Separate and Unequal Treatment of the People of Puerto Rico and the U.S. Territories*, 91 *Fordham L. Rev.* 1727 (2023).

<sup>50</sup> For example, Judge Juan R. Torruella of the First Circuit Court of Appeals wrote that the case created an apartheid regime. See Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 *U. Pa. J. Int’l L.* 283, 286 (2007). Justice William J. Brennan questioned the legitimacy of the Insular Cases in his 1979 concurring opinion in *Torres v. Puerto Rico*:

Whatever the validity of [the Insular Cases], in the particular historical context in which they were decided, those cases are clearly not the authority for granting the application of ... any ... provision of the Bill of Rights to the Commonwealth of Puerto Rico in the 1970s. ... 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.

<sup>51</sup> *United States v. Vaello Madero*, 596 U.S. \_\_\_\_ (2022)

feasibility of the Common Law, adversarial tradition being imposed on systems that were more traditional, or of the Civil Law, inquisitorial tradition were among them.<sup>52</sup>

Regardless of their history, there are utilitarian and democratic arguments that favor the continued application of the Insular Cases; specifically, they enable American Samoans to preserve their culture while enjoying membership in the United States family. Also, the desire for self-determination, particularly over policy matters that touch on Fa'aSamoa, is fundamentally important. The distinguished territorial law scholar Stanley Laughlin referred to the repurposing of the Insular Cases into a tool of cultural preservation as a benign good idea that is constitutional.<sup>53</sup>

Advocates of the self-determinist, preservationist position reject the progressive view, which they interpret as the newest iteration of colonial dominance and paternalism. This perspective sees the territories not as blank slates awaiting the mapping of the Constitution upon them, but as robust, developed societies that have ways of life that need to be shielded from constitutional annihilation. When asked in an interview if the racist history of the cases should result in their reversal, one matai responded, "Fuck western liberal academics. The cases give us the law to preserve our culture. To tell us how to live our lives today is no different than what the colonial westerners did in the past."<sup>54</sup>

The tension between cultural accommodation and cultural annihilation is real. In the words of Judge Lucero of the 10th Circuit:

Fundamental elements of the Fa'aSamoa rest uneasily alongside the American legal system. Constitutional provisions such as the Equal Protection Clause, the Takings Clause, and the Establishment Clause are difficult to reconcile with several traditional American Samoan practices, such as the matai chieftain social structure, communal land ownership, and communal regulation of religious practice. "In American Samoa's case, 'partial membership' works to protect the customary institutions and traditions, and so a push for full equality [as American citizens] is not readily embraced by the American Samoan citizenry."<sup>55</sup>

Regardless of this debate, the Insular Cases remain binding precedent. Accordingly, Insular Cases analysis is employed to answer the same-sex question. That analysis begins with the Territory Clause, found in Art. IV, sec. 3 of the U.S. Constitution. Section 3 reads, in full:

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<sup>52</sup> It is easy to reduce the concerns about familiarity with the Anglo-American legal system to racism. But a large body of democratic theory advances the principle that democracy is not an easy form of governing; that robust civic education and experience with democratic institutions and processes are necessary ingredients to a successful democracy. See Dewey, J. (1916). *Democracy and education: An introduction to the philosophy of education*. Macmillan Publishing. and John J. Patrick, *Essential Elements of Education for Democracy: What Are They and Why Should They Be at the Core of the Curriculum in Schools?*, October 16, 2003. Sarajevo, Bosnia and Herzegovina.

<sup>53</sup> Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still A Good Idea — and Constitutional*, 27 U. Haw. L. Rev. 331, 344 (2005). See also Russell Rennie, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. Rev. 1683 (2017) who suggests that one of the strengths of the Insular Cases is their flexibility and adaptability.

<sup>54</sup> Anonymous interview with Daniel E. Hall.

<sup>55</sup> *Fitisemanu v. United States*, 1 F.4th 862, 880 (10th Cir. 2021)

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

This provision delegates authority to Congress over the territories that it doesn't have over its co-sovereign states. It is through the Insular Cases that SCOTUS framed the legal status of the territories and the Americans living in them.

In the seminal territorial case *Downes v. Bidwell*,<sup>56</sup> the Court heard a challenge to a mainland tariff on oranges from Puerto Rico. The plaintiff alleged that the tax violated Article I, section 8 of the Constitution, which requires that “all duties, imposts, and excises shall be uniform throughout the United States.” The justices split in several directions. The majority held that the territories are not subject to the taxing and administrative rules of the Constitution, although acknowledging that the Constitution's protections of liberties may extend to the territories. But it is the concurring opinion of Justice Edward D. White that proved to be the most consequential. He laid out an analysis that would subsequently take hold.

Justice White's analysis first asks if Congress intends to admit the territory as a state. If it does, the territory is “incorporated” and the Constitution applies *ex proprio vigore*. The inhabitants of an incorporated territory are fully enfranchised, enjoy full constitutional protections, and the territory may not secede, be severed, or sold. On the other hand, if unincorporated, the territory may be sold, severed, or secede. Also, Congress can extend all or some of the provisions of the Constitution.<sup>57</sup> In the absence of an extension, only fundamental rights apply.<sup>58</sup> In the words of Justice White in *Downes*, the territory is foreign in a domestic sense.<sup>59</sup>

Although Justice White's Incorporation Doctrine did not command the support of the majority of justices in *Downes*, the Court began to apply it in 1905<sup>60</sup> and Chief Justice William Howard Taft referred to it as settled law two decades later in *Balzac*.<sup>61</sup> To establish incorporation,

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<sup>56</sup> 182 U.S. 244 (1901)

<sup>57</sup> See, for example, *Davis v. Commonwealth Election Comm'n*, 844 F.3d 1087, 1095 (9th Cir. 2016) where an attempt to restrict voting to persons of Northern Mariana descent was invalidated under the 5th Amendment because the Covenant between the CNMI and the U.S. provided for the application of the 5th Amendment and *Davis v. Guam*, No. 17-15719 (9th Cir. 2019) where it was determined that Congress had extended the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment's voting requirements, invalidating Guam's attempts to limit voting to Chamorros.

<sup>58</sup> Later decisions make it clear that rights may also be extended to unincorporated territories through legislation. See *Mullaney v. Anderson*, 342 U.S. 415 (1952) and *Torres v. Puerto Rico*, 442 U.S. 465 (1979).

<sup>59</sup> *Supra* note 45 at 341

<sup>60</sup> *Rasmussen v. United States*, 197 U.S. 516 (1905)

<sup>61</sup> *Supra*, note 45 at 305 (1922)

Congress' intent to confer statehood must be clear. The extension of citizenship to the inhabitants of a territory does not, in itself, prove Incorporation. Nor does the enactment of an organic act.<sup>62</sup> Only one territory, Alaska, has been Incorporated under this test. All of America's current territories, including American Samoa, are unincorporated. The next step in the analysis is to determine what rights are fundamental to American Samoans.

Confusingly, a fundamental right in the territorial context is not synonymous with a fundamental right under the Fourteenth Amendment.<sup>63</sup> In *Reid v. Covert*, Justice Harlan wrote, in a concurring opinion, that "[t]here is no rigid or abstract rule" that guarantees Americans in the territories the application of a constitutional rule if "impractical and anomalous."<sup>64</sup> Subsequently, impracticability and anomaly, as a test to determine if a right applies in an unincorporated territory where Congress has not expressly spoken to the status of a right, took hold.

The meaning of the terms impractical and anomalous weren't clear at the time Justice Harlan penned them, and they remain ambiguous today. For example, do the terms describe different phenomena, and if so, are the terms disjunctive or conjunctive? Further confusion was caused by Justice Harlan's use of both impractical and impracticable, which according to one scholar had very different meanings at the time *Reid* was handed down.<sup>65</sup>

Yet another question asks what is being defined. The assumption of most scholars and judges is that the impractical and anomalous standard defines *if* a right is fundamental. At least one scholar suggests that the test should not be used to determine whether a right is fundamental, but to determine *how* fundamental rights, as defined by the Fourteenth Amendment's Incorporation Doctrine, are to be applied.<sup>66</sup> Yet another theory holds that fundamental rights apply to unincorporated territories and the impractical and anomalous test is only used to determine the applicability of non-fundamental rights.

For reasons detailed in this author's analysis of Samoan curfew (Sa) this analysis proceeds with the assumptions that the impractical and anomalous test defines what rights are fundamental and that as disjunctive terms, they independently constrain the application of the Constitution.<sup>67</sup> Textually, when boiled down, impracticability asks if a right is defeated by culture, and anomaly asks if a culture is defeated by a right.

Because SCOTUS hasn't fully explicated the two elements of the test, examining the facts of cases where it has been applied is helpful in identifying the variables that reveal if a right would

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<sup>62</sup> *Id.*

<sup>63</sup> See *CNMI v. Atalig*, 723 F.2d 682, 689-90 (9th Cir. 1984); *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975).

<sup>64</sup> 354 U.S. 1, 75 (1956)

<sup>65</sup> For a thorough discussion of the difference in meaning of the two words at the time Harlan articulated the test see Jesse Merriam, *A Clarification of the Constitution's Application Abroad: Making the "Impracticable and Anomalous" Standard More Practicable and Less Anomalous*, 21 Wm. & Mary Bill Rts. J. 171 (2012).

<sup>66</sup> See Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 981 (2009)

<sup>67</sup> See Hall, *supra* note 59, at 106 and Merriam, *supra*, at 233.

be impractical or anomalous. Justice Harlan provided guidance when he wrote that "the particular local setting, the practical necessities, and the possible alternatives" are to be considered.<sup>68</sup> SCOTUS and lower court precedent further elaborate the standard.

The suitability of jury trials in the territories has been considered on a couple of occasions. In *Balzac*, where SCOTUS held that a newspaper editor defendant charged with misdemeanor libel was not entitled to a jury trial, the Court reasoned that the right might be impracticable:

[t]he jury system needs citizens trained to the exercise of the responsibilities of jurors. In common law countries, centuries of tradition have prepared a conception of the impartial attitude jurors must assume. The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire. One of its greatest benefits is in the security it gives the people that they, as jurors, actual or possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse. Congress has thought that a people like the Filipinos, or the Porto 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, and when.<sup>69</sup>

The Court went further in questioning whether juries would also be anomalous:

Congress has thought that a people like the Filipinos, or Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient societies, 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, and when.<sup>70</sup>

Over fifty years later the question of jury suitability in American Samoa was litigated in *King v. Morton*.

The 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 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 would be impractical and anomalous." *Reid v. Covert*, 354 U.S. at 75, 77 S.Ct. at 1260.

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<sup>68</sup> *Reid* at 75.

<sup>69</sup> *Supra*, at 310.

<sup>70</sup> *Id.*

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.<sup>71</sup>

The court remanded the case for fact finding and further legal analysis. Dissenting, Judge Tamm found no conflicts between Samoan culture and the jury system. He likened the close family and social network of Samoa to small towns in the United States, which successfully employ juries. Further, he concluded, traditional acts of atonement are consistent with the norms of jury decision making.<sup>72</sup>

On remand, the trial court rejected the government's contention that jury trials would undermine the social fabric of the islands. It determined that trial by jury isn't impractical or anomalous because the western criminal justice processes had fused with traditional life, as evinced by the many matai who served as judges and prosecutors. Further, matai testified they would not attempt to sway juries, as they hadn't imposed themselves on voting, the infrastructure existed to call and seat jurors, there was a sizeable pool of prospective jurors, language wasn't a problem, law trained judges and attorneys were present, and the addition of juries wouldn't overtax the existing judicial system. Finally, the judge noted the decline in tradition and the presence of a fully developed liberal democratic form of government.<sup>73</sup>

Justice Kennedy, applying the impractical and anomalous test in his concurrence with a majority of the Court in holding that a Mexican citizen is not protected by the Fourth Amendment in Mexico, wrote that "[t]he absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country."<sup>74</sup>

In the 1992 case *Wabol v. Villacrusis*,<sup>75</sup> the 9th Circuit Court of Appeals was faced with an equal protection challenge to a Commonwealth of the Northern Mariana Islands (CNMI) law that restricted land ownership to people of CNMI descent. The Court wrote that

[t]he land alienation restriction are properly viewed as an attempt, albeit a paternalistic one, to prevent the inhabitants from selling their cultural anchor for short-term economic gain, thereby protecting local culture and values and preventing exploitation of the

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<sup>71</sup> *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975).

<sup>72</sup> *Id.* at 1160+

<sup>73</sup> *King v. Andrus*, 452 F. Supp. 11 (D.D.C. 1977). Note that the jury trial right was not incorporated in the Northern Marianas Islands. Although the Court acknowledged the Insular Cases, it didn't employ the impractical and anomalous standard. The Court also rejected the 14th Amendment's standard. Instead, it took a democratic approach, emphasizing that the U.S. and the islands had entered into a Covenant, through which it defined criminal processes, including when juries would be empaneled. See *Commonwealth of Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir. 1984).

<sup>74</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990)

<sup>75</sup> 958 F. 2d 1450, 1461 (9th Cir. 1992)

inexperienced islanders at the hand of resourceful and comparatively wealthy outside investors. . . . free alienation is impractical in this situation not because it would not work, but because it would work too well.”<sup>76</sup>

Interestingly, the Court ignored the anomalous half of the test, causing it to reshape impracticability to fit its reasoning. Clearly, the Court was concerned with the equal protection’s power to injure CNMI culture, not with whether a system of equal land alienation could be successfully administered.

In this vein, the judges wrote:

[The] “vital role native ownership of land plays in the preservation of NMI social and cultural stability can’t be underestimated . . . Land is the only significant asset of the Commonwealth people and "is the basis of family organization is the islands. It traditionally passes from generation to generation creating family identity and contributing to the economic well-being of family members." It appears that land is principally important in the Commonwealth not for its economic value but for its stabilizing effect on the natives' social system.”<sup>77</sup>

In further support of its conclusion that the racial classification was constitutional, the Court pointed out that the United States pledged to protect CNMI culture, specifically cultural ways about land:

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.<sup>78</sup>

In two cases where American Samoans claimed birthright citizenship under the 14th Amendment, two different appellate courts found American Samoan birthright citizenship to be anomalous. In *Tuaua v. United States*,<sup>79</sup> the U.S. Court of Appeals for the District of Columbia concluded that it would be anomalous “to impose citizenship by judicial fiat—where doing so requires us to override the democratic prerogatives of the American Samoan people themselves.”<sup>80</sup> The Court continued, “To hold the contrary would be to mandate an irregular intrusion into the autonomy of Samoan democratic decision-making; an exercise of paternalism—if not overt cultural imperialism—offensive to the shared democratic traditions of the United States and modern American Samoa.”<sup>81</sup> Although the decision rested on democratic

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<sup>76</sup> *Id.* at 423

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 423, 442

<sup>79</sup> *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015);

<sup>80</sup> *Id.* at 302

<sup>81</sup> *Id.* at 312

principles, the Court also recognized that Samoans were concerned that citizenship threatened Fa'aSamoa, specifically aiga, matai, and property.<sup>82</sup>

The Tenth Circuit reached the same outcome six years later in *Fitisemanu*,<sup>83</sup> where concerns about the impact of citizenship on Fa'aSamoa were melded with a respect for American Samoan self-government, as well as the authority of Congress, not the judiciary, to decide the citizenship question. That the American Samoan government opposed the citizenship claims was important to the court.

Although it is unclear whether the Constitution will charge, in full force, into Pago Pago if citizenship is extended, the Court acknowledged that there was “insufficient caselaw to conclude with certainty that citizenship will have no effect on the legal status of the Fa'aSamoa.”<sup>84</sup> It exercised judicial “caution,” leaving it to Congress, in conversation with American Samoans, to make the decision.

## V. Methodology

Institutional Review Board approval was obtained for this research.

The current literature addressing the same-sex question in American Samoa is made up of theoretical, doctrinal, and philosophical investigations. Yet, the determination of impracticability and anomaly is fact sensitive. In the words of Justice Harlan, the particular local setting, the practical necessities, and the possible alternatives are to be considered. As one of the authors to this article did in a previous study examining the constitutionality of the American Samoa Sa,<sup>85</sup> this study adds to the scholarship by collecting cultural evidence to inform the Insular Case analysis.

Data was collected using a survey questionnaire of the general population, and a similar interview questionnaire of matai. The survey and interviews were preceded by an explanation of the research and the execution of an informed consent form. Survey subjects were selected using a modified snowball sampling strategy that employed (1) paper surveys; and (2) a digital Qualtrics survey that was distributed using advertisements in the Samoa News, the primary news outlet in American Samoa, and through social media. The survey was offered in both English and Samoan languages. Additionally, a reporter for the Samoa News, Andrew Fa'asau, wrote an article describing the study and encouraging public participation.<sup>86</sup>

Built around the Insular Cases analysis, the questionnaire was designed to discover how same-sex marriage would be impractical or anomalous in American Samoa. Specifically, the investigation sought to identify if there would be any practical barriers to conducting and

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<sup>82</sup> *Id.* at 309 - 310.

<sup>83</sup> *supra* note 45

<sup>84</sup> *Id.* at 881.

<sup>85</sup> Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 Asian-Pacific L. & Policy J. 69 (2001)

<sup>86</sup> Asi Andrew Fa'asau, *Survey Conducted On-Island Focuses on Local Same Sex Marriage Ban*, Samoa News, July 2, 2024.

recording marriages, and whether same-sex marriages would up-end the matai system, village life, or the peoples' relationship to land. In addition to the surveys, three matai, three fa'afafine, and several heterosexual persons were confidentially interviewed.

## VI. Results

### *Demographics*

In total, 213 surveys were collected. Two responses were excluded from the analysis due to missing consent agreements. The ages of the respondents varied from 18 to over 60, with a relatively even distribution between the ages of 20 and 59. The sample was heavily weighted female, 73%, with 24% identifying as male, and 3% as other.

Eighty % of the sample identified as heterosexual, 6% as fa'afafine or fa'afatama, 5% as gay or lesbian, and 11% chose to not answer.

Ten % of the sample completed 11 years of education or less, 11% completed high school, 57% reported having completed 13 – 16 years of education, and 21% reported 17 years or more of education.

Thirty-four % of the sample identified as Catholic, 26% as Protestant/not Catholic, 28 % as other (with most identifying as Church of Latter-Day Saints), and 12% as not religious. When asked to rate the importance of religion in their lives from 1 to 10, 66% reported 10, 4% as 9, and 10% as 8. Only 3% said religion rated at 3 or below in importance in their lives.

The vast majority of the sample was ethnically Samoan, 85%, with another 4% identifying as non-Samoan Polynesian. The remainder of the respondents were Asian, Micronesian, or other.

### *Social Status, Treatment, and Community Involvement of Fa'afafine and LG*

A large majority, 91%, of the sample were friends, acquaintances, or co-workers with fa'afafine, gay, or lesbian people. Seventy-five % of the respondents reported that fa'afafine are not treated differently from heterosexuals in family, school, village, or employment settings. Of the 25% who reported otherwise, 29 offered a variety of comments. These are representative:<sup>87</sup>

- I believe there are still some who do not acknowledge nor accept the fa'afafine lifestyle. But I would say that our community/Island has been more inclusive and accepting of our fa'afafine community.
- They are laughed at when they act, do jokes or walk as faafafine.
- Maybe. Due to religion/christianity being such an impact, some may still find it difficult to accept faafafine or gay.
- I know a colleague who is not given major promotion opportunities or given lesser roles in church.

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<sup>87</sup> All of the narrative responses appear verbatim. Grammar, spelling, and syntax errors are original to the respondents. Responses in Samoan have been translated into English.

- They are more recognized as outgoing jokers and creative crafters. People like being around them because of their energy.
- Well, I guess they are expected to do be involved with everything (Church obligations Youth activities, song choir, bingo ushers) School functions (dances/entertainment, competitions) and help decorate and generally be of service in anything that needs to be done. If they aren't involved, they can be seen as useless and be treated badly because of their lack of participation.
- There has been a prevalent trend of discrimination among our fa'afine community. In schools, these individuals are the forefront to bullying and assault. Yet, these wrongdoings will always be covered as a "joke"
- Fa'afine in American Samoa sometimes experience different treatment from heterosexual people. In families, they are usually accepted and often take on caregiving roles. In villages, some are respected and included, while others may face discrimination. At work, Fa'afine hold various jobs but can still encounter discrimination or fewer opportunities. In schools, some are accepted, while others may deal with bullying. In churches, they may be welcomed by some but judged or excluded by more conservative groups. Despite being recognized in Samoan culture, Fa'afine still face discrimination, especially where Western ideas about gender are strong.
- They are a part of our society in very way but I think they are still second class citizens in that that culture won't allow for marriages with this group of people.
- We love and adore them for their organizing and creative talents and skills and sense of humor, yet at the same time don't support their personal choices with their bodies and relationships.

When the same question was asked about LG persons, the quantitative results were nearly identical as for Fa'afine, 74% said they were treated the same as heterosexuals. The 25 narrative comments from the 26% who said they were treated differently reflected a distinction between the two groups, as seen in this sample:

- I feel that the fa'afine community is more dominant than the way and lesbian community. Sometimes I think they feel left out (not always, because there's not much of a solid organization that focuses solely on the way and lesbian community)
- I guess Lesbians are treated worse than actual faafafine and gay men. Gay men and faafafine are kind of grouped in together. But lesbians are seen as kind of unholy. I guess mostly stems from religious views of people. Faafafine are seen as useful and thus widely accepted where as lesbians are still victimized and kind of seen as weird or unholy.
- It's just not normal
- Maybe. Due to religion/christianity being such an impact, some may still find it difficult to accept faafafine or gay.
- They are often expected to do chores of the sex they impersonate or identify with.
- They are looked down upon because of our religious beliefs. Our people choose to tear them down and live off of the "Na faia e Le Atua Atamu mo Eva". Because of our beliefs and our values in the Fa'aSamoa, most of our gays/lesbians are more likely to be turned away. They are deemed to have a 'disease' for liking their own gender.
- I think the gays and lesbians have it a bit tougher than faafafines. It's almost taboo to be this and not really culturally accepted.

- There's a feeling or unspoken stigma around a man and man or woman and woman. I feel like people here are more lenient towards fa'afafine and man.
- They are in other ways considered the backbone in some families

When asked if fa'afafine are welcome in village life, 52% said they were fully welcome, 33% said somewhat less welcome, 5% reported that they are much less welcome, and 10% said they didn't know. There is less acceptance of gay and lesbian people, with the results being 30%, 37%, 10%, and 22% respectively.

When asked if fa'afafine hold matai titles, 60% responded yes, 25% no, and the remainder didn't know. The numbers were lower for gay and lesbian persons, with 47% replying yes, 29% no, and 24% unsure.

Sixty-seven % of the respondents said that fa'afafine, and 56% of LG, hold government or elected positions, although many respondents disagreed, 20% and 25% respectively.

A large majority, 82%, of the subjects reported that fa'afafine, and 74% of LG, own businesses and possess lands.

The question asking why the American Samoan government doesn't license same-sex marriages, and their opinion about the policy, elicited 105 narrative responses. Nearly all identified religious beliefs as the reason for the ban, and most agreed with it. Culture and tradition were also mentioned.

- American Samoa is a deeply religious place, with Christianity being the largest religion. Also, it's literally in the motto, "Samoa, God is First". Although the US calls for the separation of church and state, that line isn't very clear in American Samoa. The clergy hold much influence and status in the communities and I believe this plays a significant role in this decision.
- American Samoa is a Christian Island and we strongly believe that Adam and Eve will produce warriors and leaders and workers. Cause Adam and Steve will have No kids
- We are Christians. The Samoan God was founded. When we obey the law in marriage between a woman and a man, God will bless us. But if we do things that displease God, we will not find happiness and peace in our families. Unfortunately, sisters and brothers are children of God. Our Heavenly Father loves them dearly. We support them and their decisions. Only God can judge them. All we do is to help and love them.
- I'm not well versed with the law but I would imagine that religion and the teachings of Christianity played a major factor in this decision.
- I don't fully know why but I believe it is because some people view it as that it is not allowed in the Bible and to permit same sex marriage is to go against the teachings of the Bible and to go against the Word of God. But, they still lie, cheat, and steal, etc. But I digress.
- Samoa's foundation is built on religion and their decision to not permit same-sex marriage falls under that reason. However, our cultural values are hospitality, service to others, and respect. These three serve as pillars in the Samoan way of life. This leads one to question whether they will utilize these principles to individuals who deem themselves

as “normal”, leaving out the LGBTQ+ community. I find it unfair and disrespectful to uphold such values but will not consider acceptance among others.

- I believe it has more to do with our religion rather than our culture, because Christianity is such a prominent value Samoans hold dearly and it would contradict our religious beliefs if American Samoa government were to permit same-sex marriage. It has more to do with religious contradiction, and religion plays a major role in our Samoan culture. It probably also seems to do with the preservation of culture since we've adopted so much of Western values and government roles since becoming a territory.
- Am. Samoa is a highly religious country who firmly believe in the sacredness of marriage between a man and woman, to procreate as the Lord instructed in the Bible. Any other union that is falsely called marriage is unacceptable. Majority of Samoan's Faafafiaga support this same belief.
- This type of decision is neither necessary nor appropriate. In the beginning God made Adam, God saw that he was happy and then he made Eve to be his helper.. but God did not make another boy to be Adam's helper.
- It's a culture thing. Samoans are also considered very religious.
- maybe because it is because it goes against their culture and elders will view this a bad omen

A small minority of respondents disagreed with the ban, as represented in these responses:

- I don't know why, but I'm guessing it's because opponents say same marriage is prohibited by the Bible. It's tricky because I think people should have the freedom to love and build a life (and that life be protected) with whomever they want, as long as they are fully consenting and legal adults.
- Im not sure why the decision was made but in ny opinion we should just leave the judging to God and continue living life and be happy for each other no matter if your staright or gay.
- That is only based on religious belief. However, I belief we should have this approve. Love shouldn't be limited.

#### *Impact of Same-Sex Marriage on Fa'asamoa*

The impact that same-sex marriage would have on Fa'aSamoa was also explored. Thirty percent of the people said it would have no impact, 7% opined a positive impact, 30% a negative impact, and 34% thought it would have an impact, but they were unsure if it would be positive or negative. The following positive outcomes were noted:

- It could diversify our beliefs and change our morals. Our culture is still beautiful because we still hold onto to it til this day but there are something's that requires changes in our society today.
- it would eliminate the official “otherness” status of LGBT people.
- It would allow people to be more open-minded and see that there's no impact but accepting change . We need t accept our people and understand love is love
- Peoples rights
- It influences people about self-love and self-confidence

- Same sex marriage is a breakaway from traditional marriage but it can be good in a way of showing growth and acceptance in modern society and can also be challenging the christian faith which is a very large and integral part of life in AS. I believe the older more traditional people will be challenged mostly but I've seen a lot more people be accepting of people's happiness which may include being of a different sexual orientation than their own.
- Yes, same-sex marriage could influence Fa'aSamoa by challenging traditional beliefs about family and gender roles. On the positive side, it could promote greater acceptance and inclusivity within the community. However, it might also clash with established cultural and religious norms, leading to tension or resistance. The overall impact would depend on how well the community adapts to these changes while balancing tradition with new social values.

The most common concern was morality. Other concerns were raised as well:

- I guess a lot of people will have problems with it. One of the core values of fa'asamoa is God. Thus, the teachings of the bible. A lot of people will see it as going against the Lord.
- A big negative. Since Samoa is a religious country. Increase of discrimination between sexuality
- Samoans are set in a structured way that they don't want change in the system especially deals with the faa samoa
- It would represent the federal government imposing cultural values that are foreign to Samoan culture
- They can't have children
- It would change the Samoan traditions
- Even though it says in the law it still doesn't apply to a persons right to free speech. Others aren't as open minded therefore it could lead to bullying.

Most responses were generalized. A few offered an explanation of how same-sex marriage would negatively affect Fa'aSamoa:

- Its effect will be that there will be no counselor in a family, 2..the population will not die too much, 3..there will not be another generation..4..the universe will be empty..5..it is not beautiful to see this kind of situation.
- Culturally it would greatly affect the Matai system, being both of the same gender, would be regarded physically as male - likewise women -

When asked more specifically about the impact same-sex marriage would have on village life, the respondents were vocal, offering 83 narratives, many detailed. The comments can be organized into several buckets. The comments in the largest bucket expressed concern that same-sex marriage would be controversial, cause disharmony in families, or bring shame to the couples, their families, and the community. A concern that violence would be inflicted upon fa'afafine and LG persons was expressed by two respondents. On the other hand, two respondents believe that these groups would benefit from the change in policy because it would hasten full social acceptance. A related concern that same-sex marriage will erode religious values was voiced by many of the same respondents.

- Huuuge impact—love the sinner but HATE the sin
- the impact would be shocking and might cause division between traditionalists and those willing to embrace change. it would go as far as maybe banishment from the village if they intend to uphold the law.
- It would impact everything about the samoan way of life because it goes against the beliefs and standards that our ancestors had carried throughout many generations up until now.

Concern for the impact on families, particularly a blurring of the traditional roles of men and women fill a smaller second bucket.

- I believe that it would definitely turn heads in the village. Especially when there are a lot of villages that are very strict to the Fa'aSamoa lifestyle and traditions. A lot of villages still dont accept women to hold titles too.

A third bucket of equal size to the second represents concerns that same-sex marriage does not form “genetic life” and as a result, the population will fade away.

Conversely, many people opined that the introduction of same-sex marriage would have no effect, or a positive effect, on Fa'aSamoa.

- Not sure it will have much effect on day to day village life as each household manages their own homes and communal land in a way in which it belongs to the family as a whole and not necessarily each family individually. . . Impact on Fa'aSamoa... it's widely known and accepted for the most part on our island that the LGBTQ+ exists and is thriving. Fa'aSamoa is the holisitc view of the way of life which to me entails, God, family, service, respect and love. All of those things don't change if we have same sex marriage on the island in fact it quite possible could impove life with the approval or acceptance of the people of american samoa regardless of sexual orientation.
- Not much, just a few whispers and looks. There are already some who affiliate in same-sex relationships, and are not entirely outcasted from village life. Therefore, a same-sex marriage wouldn't have much impact at all.
- I think it would positively impact the community. LGBTQ community would face less adversities as it becomes more normalized. I think more people would be more honest about what they like. Im not really sure how it would impact a Matai title.
- It would have the same impact as a heterosexual marriage would have. It shouldn't be different from a the conventional marriage. However, it's impact on Samoa is only the contradiction to the normal saying, "Samoa muamua Le Atua." Putting God first means to put His Word first, that includes His commandments, His scripture, His teachings -all would include the abomination of same-sex marriage, do not confuse this as hate though. Just because God despises sodomy does not mean He despises people of the lbgtq community. That's what people often get stuck. So would it impact village life? Not so much. Would it impact the role of the Matai? I don't think so. Would it impact Fa'aSamoa? Seeing as we already welcome the fa'afafine community, not so much. It is only the religious aspect of it.

Age and sex were marginally predictive of the respondents' opinions about the cultural impact of same-sex marriage. For example, 23% of the respondents under the age of 29, and 35% above the age of 40, and 32% of men, 24% of women, and 25% of people who identified as other believe that same-sex marriage would be culturally harmful.

### *Who Should Decide*

Respondents were asked who should decide whether same-sex marriage should be legally sanctioned. They were presented with several home rule choices, including the Fono, matai, Governor, and the American Samoan people. Other choices included the courts, U.S. Congress, and the Secretary of Interior. The most popular choice was the American Samoan people (48%). The respondents were evenly split between limiting the vote to American Samoans in residence in the islands, and all American Samoans, regardless of residence. This is significant given that an American Samoans diaspora has resulted in more American Samoans living off-island than on-island.<sup>88</sup> The next most popular choices were the Fono (21%) and the matai (11%).

## VII. Discussion, Conclusions, and Limitations

For the U.S. territories, the Insular Cases establish a compact that enables preservation of culture while simultaneously embracing the inhabitants as members of the American family. However, tensions are inherent in all legally pluralistic societies. There must be a give and take in both territorial culture and U.S. legal culture. The design of the Insular Cases allow for the preservation of the most significant aspects of culture while adopting fundamental U.S. principles that may displace lesser cultural values or practices.

### *Would Same-Sex Marriage Be Impractical?*

The first step in the Insular Cases analysis is easy. American Samoa is an unincorporated territory and Congress hasn't spoken to the same-sex matter, so an impractical or anomalous determination is necessary. As to being impractical, the marriage process must be investigated to determine if on the ground barriers will prevent couples from marrying. This analysis starts with the statutory requirements to marry: a couple shall not be biologically related nearer than the fourth degree of consanguinity, shall be 18 years or old if a male and 14 years or older for a female (with parental consent if under 18), shall be unmarried, shall be acting voluntary, and, important to this study, shall be a man and woman. Also, the marriage ceremony must be performed by an authorized Christian minister or judge in front of two witnesses. Registering a marriage license in American Samoa is similar to elsewhere in the United States. A person shall obtain, complete, in both English and Samoan, and submit the application, along with the required fee, to the Registrar of Vital Statistics.<sup>89</sup>

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<sup>88</sup> *Supra* note 46.

<sup>89</sup> AM. SAMOA CODE ANN §41.0101, et seq.

One practical barrier to same-sex couples marrying is identifying a qualified officiant. Given the conservative religiosity of religious leaders,<sup>90</sup> it is possible that none would agree to officiate. However, a second pool of officiants is recognized by statute; judges.<sup>91</sup> The statute authorizing judges to perform weddings doesn't, however, require them to perform them. Indeed, a sitting Associate Justice of the High Court testified during his confirmation hearing for a district court judgeship that he wouldn't perform same-sex marriages without a change in local law.<sup>92</sup> The possibility that judges would refuse to perform same-sex marriage ceremonies raises confounding, circular problems. On the one hand, the refusal of judges (and ministers) to perform the services would be evidence, possibly conclusive, of impracticability.

On the other hand, American Samoan judges have a duty to support and defend the Constitution of the United States. Justices and judges in American Samoa are constitutionally required to take an oath that they will "support and defend the Constitution of the United States against all enemies foreign and domestic . . . and that I will well and faithfully uphold the laws of the United States applicable to American Samoa, and the Constitution and laws of American Samoa. "So help me God.""<sup>93</sup> Accordingly, their refusal to perform same-sex ceremonies would not end the inquiry because they could be compelled, through mandamus or other processes, to fulfill their constitutional duties. Following this line of thought, the refusal of judges to participate would be evidence of cultural disagreement, but it would not conclusively establish that same-sex marriages would be unworkable.

Consequently, if a federal court (or an American Samoan court) were to decide that *Obergefell* is not impractical or anomalous, either a judge could be ordered to perform the ceremony, or more simply, the Registrar of Vital Statistics could be ordered to issue the license without ceremony. The latter would mirror the remand facts of *Obergefell* where the Rowan County, Kentucky clerk, Kim Davis, refused to issue the license, claiming that it would violate her religious beliefs in violation of the First Amendment. Her claim was rejected, largely because her duty was of a public, not private, nature. She continued to refuse to issue the license, was jailed for contempt, a deputy clerk issued the license, and subsequently, other same-sex couples for whom she refused to issue a license won a civil rights judgment in the amount of \$100,000 against her.<sup>94</sup>

Turning to the factors considered in the jury cases, concerns about the lack of understanding of the Anglo legal system, specifically the role and operation of juries, and the impact that the

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<sup>90</sup> The restriction of officiants to Christian ministers raises its own First Amendment question which doesn't need to be addressed in this investigation.

<sup>91</sup> A question that is not presented by the facts is what would happen if judges were not permitted to officiate weddings, leaving only Christian ministers. One possibility is that the statute would be stricken as violative of the First Amendment. Another scenario is that ministers - the only statutorily approved officiants - would be deemed state actors under the marriage statute. A third and unlikely possibility is that the unavailability of officiants would be conclusive proof of impracticability.

<sup>92</sup> Regardless of the judge's statement, there is no history of that judge, or any American Samoan judges or officials, refusing to follow United States law or an order of a federal court. See *American Samoa Judge Objects to Same Sex Marriage*, Radio New Zealand, January 20, 2016. <https://www.rnz.co.nz/>

<sup>93</sup> AM. SAMOA CONST., ART. V, SEC. 6.

<sup>94</sup> Laurel Wamsley, *Kim Davis is ordered to pay \$100,000 to same-sex couple she denied marriage license*, NPR, September 14, 2023. NPR.com

matai system could have on juror neutrality were considered. These barriers are not in play with same-sex marriage.

This research uncovered no significant obstacles to the imposition of same-sex marriage. It is not, therefore, impractical.

### *Would Same-Sex Marriage Be Anomalous?*

Several factors can be teased from precedent and scholarship that bear on anomaly. In *Verdugo-Urquidez*, family identity and organization, economic well-being, and social stability were all important factors in deciding that a land alienation restriction was constitutional. None of these factors are implicated by the licensing of same-sex marriage.

No concrete effects on the matai system were gleaned from the surveys, and none of the matai who were interviewed thought their role or authority would be harmed by the legal recognition of same-sex marriage. As to another important factor, land, there would be no impact because LG and fa'afafine persons are already treated equally in business ownership and land rights.

In his study of the Sa, Hall concluded that the 14th Amendment's limitations on curfews in the states would be anomalous in American Samoa because the elimination of the curfew would weaken social order. Specifically, the data revealed that at the time of the research, the late 1990s, the Sa served to control crime and juvenile delinquency, reinforced the role of matai and the centrality of the aiga, and it was an important channel of communication in the villages.<sup>95</sup> None of these effects would be seen with same-sex marriage. With the exception of two respondents who thought violence against couples could occur, there is no evidence that crime or juvenile delinquency will rise, or that traditional channels of communication will be choked.

The courts in *Fitisemanu* and *Tuaua* heavily relied on the democratic principle of majoritarianism in their decisions to not extend citizenship to American Samoans. But citizenship status is an inherently political matter. The original agreement between the Samoan people, as well as the contemporary relationship between the islands and the United States, was central to these decisions. Same-sex marriage is different. It isn't inherently political, and it doesn't impinge on the relationship of the territory to the federal government. As to the majoritarian dimension of the citizenship cases, anomaly has to be more than simple majoritarianism, lest the impractical and anomalous formulation would be pointless.

There is a very long history of non-binary sexuality in American Samoa. This research evinces an awareness of this history, and an ongoing social acceptance of fa'afafine and LG. Over 90% of the people reported having a friendship or working relationship with fa'afafine or LG persons, and three quarters were of the opinion that both groups are treated equally with heterosexual persons in family, school, work, and village settings. Several respondents commented that fa'afafine are involved in family life. In interviews, fa'afafine emphasized the importance of their contributions to family and village life, not as a burden, but as a privilege.

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<sup>95</sup> *Supra*, note 38.

One clear result clear is the normative aspect of same-sex marriage. A majority of Samoans, of all ages, object to same-sex marriage on religious grounds. Concern that same-sex marriages will cause disharmony in families and villages, contribute to a degradation of morals, and will cause the population to decline, was expressed by many respondents.

This leads to this question: Is a right impractical or anomalous solely because it involves conduct that American Samoans believe is immoral? Like the democratic reasoning in the citizenship cases, if immorality is enough, the impractical and anomalous test would be rendered moot. These authors conclude that majority disapproval of a right isn't adequate, in itself, to prove impracticability or anomaly.

To summarize, mandating same-sex marriage under the 14th Amendment would not be impractical or anomalous because:

- There is a process to marry same-sex couples
- The matai system would not be materially disrupted
- The communal land tenure system would be unchanged
- The prominence and organization of the aiga would not be materially disrupted
- Social control (crime, delinquency) would not be affected
- Even though there were be considerable moral disapproval, causing disharmony in some families, it is unlikely to cause social disorder or to materially disrupt social institutions
- The long history of acceptance and prevalence of fa'afafine may set the stage for the change
- It would have no impact on the territory's relationship with the United States

In interviews, many people, including fa'afafine, expressed a concern about having a judicially mandated change. Reflecting a collectivist worldview, they believed the change should be the result of collective wisdom and traditional processes. At the least, the decision needs to be made through referendum. This is a space where the differing worldviews of Samoans and the residents of the States collide. With an individualism backbone, the Constitution's protections may be enforced by individuals. Yet, most Samoans would defer to their families, or to Fa'aSamoa, to define their rights and obligations. Frustration, sometimes anger, with the American Samoan plaintiffs in the citizenship cases was voiced in the interviews. In the words of one interviewee, "Who are they to speak for us? To speak for their families?" But, as the plaintiffs in these cases proved, it only takes one person to raise an individual right in the American constitutional scheme. As the presence of western culture becomes ubiquitous, the number of "ones" will increase.

Several possible limitations to this research are identified. Respondents were self-selected, disproportionately female, and had more formal education than the general population, possibly skewing the results. The willingness of Christian ministers to perform same-sex weddings, and the reactions of American Samoan judges to a federal court finding that *Obergefell* applies in the territory, were not investigated. The largest limitation is in the law itself; the ambiguity of the impractical and anomalous standard.

## VIII. Conflict of Interest

This research was funded by the Center for the Study of Federalism. The authors have no conflict of interests to report.