

Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa

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I. Introduction

American Samoa is a place of spectacular natural beauty and rich cultural tradition, and is held by its highest court to be the "actual historic location of the Garden of Paradise."¹ At dawn and twilight in this South Pacific territory the sky becomes a colossal prism, showering light through multi-faceted clouds. Sunrises and sunsets transform the sky to flames of orange, pink and purple, reflected on the surrounding ocean in brilliant splendor. Sunrises and sunsets in the Samoan islands seem to fill the whole sky. The assortment of lights in the sky is enchanting even at midday as it produces surreal silver reflections within immense accumulations of cloud, sometimes resembling a Maxfield Parrish painting. The tropical moon mirrored on the ocean or gliding serenely among luminous clouds, amid the sound of wind in the palms, rarely fails to summon the romantic sense of imagination that is so often associated with the islands of the south seas.

The Samoan archipelago itself is a luxuriant tropical rain forest in the center of the Polynesian chain. Lush volcanic mountains and cliffs carpeted with dense jungle rise inspiringly out of beautiful aquamarine waves. Blue tide pools, lava beaches and cliffs, and geyser-like blow holes add color and charm to a magnificent coastline.

In American Samoa, a European style home may be seen in the same village with a traditional Samoan *fale* (fah-lay), which consists of a roof supported by a series of pillars. Most *fales* are now made of concrete, have roofs made of tin, and are often painted bright colors. There are dozens of picturesque little villages manifesting these *fales* throughout the country areas of *Tutuila* (the most populous island of American Samoa). In the evening, children wearing *lavalavas* (traditional knee length skirt) can be seen playing football, cricket, or volleyball in the center of the village; or swimming in the ocean, which is often as warm as bath water. At 6:30 p.m. the people of each village assemble for *Sa* (prayer service). At night, a group of untitled men known as the *Amauga* (ah-mung-ah), patrol the village to prevent mischief. Beautiful Spanish style churches rise out

of the center of a number of villages. Some of these churches were built during the missionary period, and reveal tasteful architecture and craftsmanship.

This article examines the legal implications of American Samoa's efforts to preserve its unique culture, the *fa'a Samoa* ("Samoa way"), amid the inevitable changes that it continually confronts as it takes its place in the modern world. The *fa'a Samoa* is difficult to define because it is 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.²

Part I of this article examines the advantages and challenges of protecting Samoan culture; Part II examines various legal mechanisms for protecting Samoan culture; and Part III provides a model for interpreting Article I Section 3 of the Revised Constitution of American Samoa, as a unique tool for preserving Samoan culture.

II. Why Protect Samoan Culture?

Unlike Great Britain and its former American colonies, which developed common law principles gradually over centuries of evolution and experience,³ Samoa adopted its westernized legal and political system only a generation ago. Only one year after the cession of *Tutuila*, the U.S. Supreme Court considered the legal and practical difficulties of imposing an "Anglo-Saxon" Constitution upon an indigenous culture with dissimilar customs and traditions. In that case, the Court held that the United States Constitution was not fully applicable in the territories.⁴ In American Samoa, western liberal philosophy was abruptly overlaid upon a legal and political tradition, which had evolved in a very different direction. This mixing of political cultures created a society with the forms of democracy, but not yet the attitude or experience of a self-governing people.⁵

In a similar way, modern technology has been introduced abruptly in Samoa, unlike western nations where it developed over centuries. As the west has developed technologically, moral and ethical rules have evolved to deal with the resulting problems. Most western people now view conduct such as driving while intoxicated or littering the countryside with trash to be morally disgraceful, in addition to being illegal. Samoa did not have the benefit of centuries of technological evolution, and western visitors are frequently astonished at the sight of beaches, roadsides, and forest trails littered with plastic containers and beer bottles (which is a chronic but improving problem for Samoa). One simple reason for this problem is that the western mores dealing with non-bio-degradable waste have not yet been fully embraced, even though vigorous laws against littering are on the books and are endorsed by Samoan leaders.⁶ Furthermore, it is possible that traditional indigenous rituals for waste processing have not been effectively utilized by the imported political system, because the colonial rulers of the past did not understand these rituals.⁷ Prior to contacts with Europeans, the Samoan people developed a political system which was grounded in the harmony of community and ecology. Encouraging preservation of the forest and species diversity was culturally enforced.⁸ The

arrival of new attitudes, technologies, and ways to harness the resources of the land, however, has created a series of ecological and aesthetic problems which Samoan society was not adequately prepared for.⁹ One simple manifestation of this principle can be observed by driving from the *Pago Pago* harbor area to either the eastern or western shores of *Tutuila*. The scenery and attire of the people becomes gradually more traditional and less westernized as one travels further from the harbor area (which is dominated by the westernized central government). Similarly, the cleanliness of the villages seems to gradually increase in proportion to their distances from the harbor area. This is attributable, in part, to the fact that traditional government by local *matai* and village councils engenders a healthy degree of local pride, and provides the villages with the freedom to implement solutions with which the people are culturally familiar. Furthermore, the Samoans traditionally feel a genuine bond with their family land such that the land, itself, is virtually considered a member of the family.

In much the same way as the abrupt introduction of technology in Samoa has led to widespread litter, the abrupt introduction of a republican form of government, individual property ownership, and the paper money system has led to political corruption and pervasive "misuse and theft of government funds and property."¹⁰ Former American Samoa Governor Peter Tali Coleman explains that these difficulties are the natural result of exporting western style democracy to non-western cultures:

[T]he problem of white-collar crime is not unique to Samoa, nor is it unique to the American territories. Stories of political corruption abound on virtually a daily basis from French Polynesia in the East to Paupa New Guinea in the West.

Why? Because we're all trying to cope with [a] western governmental system implanted by now departed administering authorities, systems which were built on western experiences and assumptions of human behavior and instincts which do not necessarily always translate well or fully into island societies.¹¹

Some have attributed problems with government corruption to a carry over effect of communal ownership habits into the public sector.¹² Appropriation of communal property for one's private gain is actually contrary to the *fa`a Samoa*, and most Samoan leaders reject the notion that the *fa`a Samoa* is responsible for government theft.¹³ The *fa`a Samoa* is, in fact, founded on sharing and selflessness, and not on greed and the hoarding of resources for oneself.

A better explanation of the problem of government fraud is that Samoan culture has no tradition of private property and stealing is, therefore, not a problem which Samoans have traditionally faced and developed adequate ethical rules against. Also, many Samoans believe that some resort to theft because of family pressure to contribute large amounts of money and food to *fa`alavelaves*--which are traditional Samoan family gatherings for important life cycle events such as weddings, funerals, *kava* ceremonies installing new chiefs, or other such occasions. Just as it is a matter of pride for individuals in the United

States to expend large amounts of money to "keep up with the Joneses," it is a matter of pride for individuals and family clans to be seen contributing vast amounts of money to family *fa`alavelave* in Samoa.¹⁴ Furthermore, extended family connections, alliances between families, and the genuine culturally based desire of Samoans to cooperate harmoniously make it difficult for those who witness illegal conduct to report it. The most important reason for government corruption, however, is perhaps the traditional Samoan reluctance to directly confront those in power, which contributes to a lack of political pressure for government leaders to discharge the public trust properly.¹⁵ This reluctance to debate with or even make strong suggestions to one's leaders, and the accompanying expectation of deference to the wisdom of authorities also impedes many Samoans from meaningful participation in the political process, leading to a government which struggles to be truly democratic in the western sense.¹⁶ Although Samoa has the forms of democracy, the spirit and attitude of western democracy does not yet pervade Samoan society. Considering the fact that the first legislature of American Samoa convened less than 50 years ago,¹⁷ this is a situation which requires more patience than criticism.¹⁸ As the population gradually becomes more experienced in using the political process, key policy reforms can be enacted. For instance, American Samoa should phase in a system of electing its Attorney General, rather than having him/her appointed by the Governor. This would help to insulate the Attorney General from loyalty to the executive branch and would, therefore, permit abuses of executive power to be more carefully monitored.

Notwithstanding inevitable growing pains, Samoans generally believe that the transition to a republican form of government has been a success, and they view the imported system as legitimate and beneficial.¹⁹ They are proud to be identified with the United States, and appreciative of the "wisdom and foresight" of their ancestors who participated in forming American Samoa's unique relationship with the United States.²⁰ American Samoans are quick to point out that American Samoa entered into its covenant with the United States "enthusiastically and willingly," and not merely as a result of liberation from a foreign power.²¹

Despite their acceptance of western ideas of government, Samoans largely desire to preserve the *fa`a Samoa* against forces that would entirely subjugate it to the imported political system. A person's culture is integral to his/her identity and definition of self,²² and the source of many basic conceptions of morality.²³ For example, Americans tend to be highly individualistic, treating each person as conceptually separate from other individuals, and viewing rights and responsibilities as pertaining primarily to individuals. This is reflected in behavior, in American moral rules, and it is basic to the American legal system. One example of this principle is the constitutional provision that treason will not "work corruption of the blood," meaning that treason cannot require punishment of the criminal's innocent relatives.²⁴ The founders believed it to be "rank injustice" that "children" should bear "the iniquity of their fathers."²⁵

In contradistinction to American thinking, strong identification with a large extended family group called an *aiga* (eye-ing-ah) is basic to the Samoan concept of self.²⁶ In Samoan culture, a crime committed against an individual is an affront to that individual's

entire family,²⁷ and "corruption of the blood" is the traditional law of the land. Before American rule, retaliation for a crime was carried out against any member of the family of the criminal, and not merely against the criminal himself/herself. This traditional view of responsibility for crime gave rise to the *ifoga* (eye-fong-ah) or Samoan apology ritual, wherein the family of the wrongdoer made a formal public apology to the family of the victim by begging for forgiveness and presenting gifts, which belonged to the entire family, and not to the victim alone.²⁸ Once this apology is accepted, the family of the criminal is forgiven and absolved of any further retaliation.²⁹ The Samoan view of responsibility for crime and the traditional methods of punishment and forgiveness reflected a policy preference for a society designed to engender family pressure upon individuals to behave according to social norms. To be properly understood, this cooperative family effort to encourage social responsibility must be considered in the context of a small and relatively isolated society where family formed the basis of civil government.

Other evidence of the Samoan family group identity is the fact that extended family members routinely travel thousands of miles by airplane to attend *fa`alavelave*, something which they did by canoe voyage in ancient times.³⁰ It is common for Samoans to abandon lucrative professional careers in other areas of the world to return to Samoa to care for ill or aging family members.³¹ Nursing homes are virtually unheard of in Samoan society, and are viewed as an abdication of family responsibilities. Identification with a family group is deeply embedded in the *fa`a Samoa*, and is basic to the way a Samoan views himself/herself in relationship to the rest of the world.

Samoa culture is centered in the family village, and lives through the *aiga*. Within each *aiga* there is a hierarchy of ruling chiefs known as *matai*, who are traditionally selected for their leadership ability in addition to hereditary birthright. This quasi-democratic selection process, as with other major decisions of a Samoan family, operates on principles of consensus decision making. Consensus governance is not democracy by ballot, where the majority wins and the minority loses.³² It is a system designed to promote harmony within the family, wherein the members of the family gradually come together in a melding of opinions and wills so that all objections are eventually resolved, or at least withdrawn.

When one becomes a *matai*, he/she inherits a special name or "title" pertaining to the office, and that name becomes his/her proper public identity. Ninety percent of the land in American Samoa is held communally within family villages. The land is controlled by a *matai* on behalf of his/her family, with the requirement of consensus family support for major decisions.³³ This basic concept³⁴ of communal ownership of land, and to some extent chattels, is an expression of the Samoan view that persons are conceptually part of an *aiga* rather than independent individuals. This basic concept difference with American culture was summarized eloquently by former American Samoa Governor Peter Tali Coleman.

Our American legal system--which also operates in Samoa--is based on English jurisprudence as it has evolved over the centuries. It's a system of

conflict resolution which produces clearly identifiable winners and losers. Our Samoan culture, on the other hand, is based on thousands of years of the evolution of a Polynesian heritage of conflict resolution by consensus building. Whenever possible, we, as Polynesians, try to avoid conflict. When we can't avoid conflict, we try to resolve it so everyone goes away a winner if at all possible.

Even more central to this discussion is our own unique American culture, which--although it comes from Europe--has an even more pronounced emphasis on the rights of the individual, which is firmly rooted in the Bill of Rights of our cherished U.S. Constitution. The Samoan society on the other hand, has a different foundation: the Matai system, which emphasizes group responsibility.

I could go on to develop an entire college course on these two points: conflict resolution, and individual rights vs. collective responsibility³⁵

The Samoan sense of self is deeply rooted in the *fa`a Samoa*, and stripping away Samoan cultural heritage would deprive the Samoans of their identity. The foundational values of Samoan society are interdependence, sharing, and cooperation.³⁶ Samoans still identify very closely with traditional values and raise their children accordingly.³⁷ A child who is ignorant of the *fa`a Samoa* and traditional Samoan rules of courtesy brings embarrassment upon the entire family.³⁸

If the *fa`a Samoa* disappears, the Samoan values system, sense of responsibility, and social morality would surely disappear with it. One only need observe the heartbreaking social, moral, and economic struggles of the Native Americans, native Hawaiians, New Zealand Maoris, and a number of other indigenous groups who have lost their cultural identities, to understand the benefit of protecting living cultures. In many ways, American Samoa faces the predicament so well portrayed in "Fiddler on the Roof," a timeless story about a community torn between the newly discovered freedoms of a changing world and the peaceful stability of their Jewish traditions. The leading character had this to say:

How do we keep our balance? That I can tell you in one word: Tradition! . . . Because of our traditions we've kept our balance for many, many years . . . Because of our traditions everyone of us knows who he is, and what God expects him to do. . . . Without our traditions our lives would be as shaky as a Fiddler on the Roof.³⁹

Preservation of the social order and mores of the community is one of the fundamental reasons why history and tradition play such an important and civilizing role in English common law countries. Preservation of the *fa`a Samoa* has precisely the same value for American Samoans, because the moral code of Samoan society is intrinsic to its culture and traditions.

Aside from the abstract theoretical benefits of preserving the *fa`a Samoa* is the practical reality that the people of Samoa are in fact Samoan. It would be impossible to legislate Samoan culture out of existence, even if it were somehow decided that doing so would be best for the Samoan people. The *fa`a Samoa* is the only way of life that many Samoans know, and it is deeply rooted in many Samoans who have experienced other ways. Providing a government that accommodates Samoan culture is the only practical way to find workable solutions to the problems that confront Samoan society. "[W]estern style remedies have been tried all over the Pacific in the past and have failed," largely because they have been externally imposed by people who do not understand the problems.⁴⁰ Acknowledging the important and complex role of culture in the way people think about and react to government authority is an essential first step toward making government an effective tool for the protection of the people and the promotion of their well-being. Environmental protection again provides an illustrative example. The typical American approach to protecting the natural environment is to enact statutes and regulations to limit and govern the uses of the land. In Samoa, however, the best potential tool for protection of the land is the traditional bond between the people of the village and the land itself. Efforts by the government to regulate land use, if not undertaken carefully with the active participation of village leaders, can weaken that traditional bond between the people and the land to the eventual detriment of the natural environment. This should be evident in the area surrounding Pago Pago Harbor, where the local villages have the least amount of influence. Consequently, the litter and stray dogs problem are the worst of any area in the territory. It follows that the best environmental policy will empower the village leaders to keep their traditional cultural commitments with regard to land under their care.

The foregoing analysis is, of course, predicated on the theoretical premise that culture is resilient and resistant to change. While this premise is useful, the opposite premise should also be considered, namely, the assumption that culture is fluid and ever-changing. Although cultures naturally resist rapid and pervasive restructuring in order to preserve their traditions, they must also maintain a degree of flexibility to adapt and survive amid changing conditions. Therefore, a culture flourishes when it strikes a balance between the resistance to change necessary to preserve cultural identity and the fluid evolutionary process necessary for the culture to adapt to changing times and outside influences.

The most important challenge facing American Samoa in the next century is how best to embrace the core principles of social contract theory, which have been priceless in fostering inalienable rights and human dignity in the United States; meanwhile preserving the core principles of the *fa`a Samoa*, which are vital to the Samoan quality of life, family, identity, and sense of right and wrong. Political Scientist James Q. Wilson articulated the delicate hazards inherent in rapid cultural restructuring:

The Enlightenment defined the West and set it apart from all of the other great cultures in the world. But in culture as in economics, there is no such thing as a free lunch. If you liberate a person from ancient tyrannies, you may also liberate him from familial controls. If you enhance his freedom to create, you will enhance his freedom to destroy. If you cast out the dead hand of useless custom, you may also cast out the living hand of essential

tradition. If you give him freedom of expression, he may write *The Marriage of Figaro* or he may sing gangster rap. If you enlarge the number of rights he has, you may shrink the number of responsibilities he feels.⁴¹

American Samoa, like other indigenous cultures, faces the challenge of embracing the precious freedoms of the western Enlightenment, while simultaneously attempting to preserve central elements of the indigenous culture that foster identity, encourage morality and encourage social responsibility. In the process of integrating the cultural traditions of two separate worlds, it is useful to utilize the "sustainable development" ecological metaphor, which suggests that the rate of extracting a resource from the earth should be less than or equal to the rate of recuperation for that resource.⁴² Ecology (as a metaphor for culture) suggests a "go slow" approach to cultural evolution, in order to give both cultures the time to assimilate and to appreciate the implications of the change which is occurring.⁴³

III. Mechanisms for Preserving Samoan Culture

The communal land and *matai* systems are the "twin cornerstones" of Samoan culture, providing unity and leadership, and tying the *aiga* together in a common village and family organization.⁴⁴

A. *The Cession Treaties---The Foundation*

Meeting the challenge of preserving native cultures while establishing democracy was an important element of American foreign policy at the time the Samoan islands were ceded to the United States, and no doubt influenced the Cession Treaties for Eastern Samoa. President McKinley's instructions to the Philippine Commission, given April 7, 1900, (ten days prior to the signing of Cession Treaties for *Tutuila* and *Anu'u*), included the instruction that:

[T]he commission should bear in mind that the government which they are establishing is not designed for our satisfaction or for the expression of our theoretical views, but for the happiness, peace, and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government.⁴⁵

President McKinley's instructions insisted, however, that:

[T]here are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom . . . and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness,

however much they may conflict with the customs or laws of procedure with which they are familiar.⁴⁶

The policy goal of preserving native cultures while establishing a republican government designed to protect liberty, was at the heart of U.S. expansionism in the early 1900's, and provides valuable context for interpreting the Cession Treaties affecting American Samoa.

The communal land and *matai* systems have received legal protection from the very earliest moments of American control over Eastern Samoa. The Cession Treaties entered in the early 1900's are the supreme law of American Samoa, second only to applicable portions of the United States Constitution.⁴⁷ The U.S. Supreme Court has recognized that American constitutional principles cannot be rigidly applied in indigenous societies with different traditions and institutions from the United States, although rights which are "fundamental" apply universally.⁴⁸ I do not believe it possible to make a principled distinction between specific constitutional rights which are "fundamental" and those which are not, and, therefore, I disagree with the U.S. Supreme Court's doctrine on that point. In interpreting the language of the Cession Treaties, however, it is undoubtedly useful to consider the broad foreign policy aims of the United States at the time the treaty was signed. These foreign policy goals included the preservation of native cultures where doing so would not conflict with "essential" principles of democracy.⁴⁹ In this light the fundamental principles analysis cannot be entirely disregarded, but should be used only as a means of understanding the historical context of treaty language. This is a profoundly different approach from using the fundamental principles analysis as a legal standard for determining applicability of the U.S. Constitution independent of treaty provisions.

When a nation cedes sovereignty to the United States by treaty, the language of the treaty itself should determine how much sovereignty is surrendered and, likewise, what portions of the U.S. Constitution apply. The underlying theory behind this principle derives from the social contract model. At the U.S. constitutional convention, Pennsylvania delegate James Wilson argued that the sovereign states were analogous to individuals in a "[s]tate of nature" with sovereignty in themselves, and that such states were entering a larger social contract, surrendering a specified amount of sovereignty to the whole in return for their mutual protection.⁵⁰ When a group of people or sovereign states enter into a social contract, they grant the resulting government limited powers to be exercised in their behalf, and the central government is not justified in exceeding these powers. The Ninth and Tenth Amendments to the U.S. Constitution codified this social contract principle, making it clear that the people and the respective states yielded to the federal government only the powers specifically enumerated in the Constitution, and retained residual sovereignty in themselves.⁵¹ Although this rule of construction was codified in the Ninth and Tenth Amendments, it was clearly intended when the original Constitution was written, regardless of later amendments.⁵² The United States Constitution governs the relationship of states to the central government and represents the social contract within which the states and the people operate.

When the United States entered into its treaties with American Samoa, the treaties, not the U.S. Constitution, established the terms of the social contract between American Samoa and the United States. No other legal authority should be permitted to override or modify the terms of the treaties. The United States should exercise its sovereignty over American Samoa only to the extent that such sovereignty has been yielded to the United States by treaty. Although the United States has sometimes considered the Cession Treaties as "deeds of cession" (indicating a complete surrender of sovereignty), it is clear from the Samoan translation of the treaties that Samoan leaders believed that they were signing treaties between one sovereign and another sovereign.⁵³ Furthermore, a deed cannot convey a larger interest than it purports to convey, and the language of the treaties themselves clearly indicate something less than an absolute conveyance.

The concurring opinion of Justice Gray in the landmark case *Downes v. Bidwell* is a noteworthy argument for the proposition that Cession Treaties (and other U.S. law concerning foreign countries) govern the relationship between the United States and a ceded territory until such time as Congress makes the U.S. Constitution fully applicable to that territory.⁵⁴ Justice White's opinion in the same case also suggests that the power of the United States to alter its relationship with a territory may be limited by the cession agreement, holding that "[t]he general principle of the law of nations, already stated, is that acquired territory, *in the absence of agreement to the contrary*, will bear such relation to the acquiring government as may by it be determined."⁵⁵ Justice White further argued that treaties may implement binding language that a territory is not part of the union, thus directly limiting the applicability of the U.S. Constitution, stating: "I do not understand how foreign territory which has been acquired by treaty can be asserted to have been incorporated into the United States as a part thereof despite conditions to the contrary inserted in the treaty."⁵⁶ It is clear from Justice White's opinion that he did not consider American Samoa's Cession Treaties to incorporate American Samoa into the United States.

Let me, however, eliminate the case of war and consider the treaty-making power as subserving the purposes of the peaceful evolution of national life. Suppose the necessity of acquiring a naval station or a coaling station on an island utterly unfit for American citizenship and totally incapable of bearing their proportionate burden of the national expense.⁵⁷

The foregoing statement unquestionably refers to the acquisition of American Samoa for use as a naval coaling station.

The Cession Treaties for American Samoa promised that the land and traditional culture would be preserved insofar as they did not interfere with the "peace" and "civilization" process, and applicable United States law. The Cession Treaty for *Tutuila* and *Anu`u* provides, in relevant part:

Know now ye...:

2. The Government of the United States of America shall respect and protect the individual rights of all people dwelling in Tutuila to their *lands and other property* in said district

3. The *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, and if not obstructive to the peace of the people and the advancement of the civilization of the people⁵⁸

The Cession of the *Manua* provided a similar promise to the one given in the foregoing language, stating: ". . . the *rights of the Chiefs in each village* and of all people concerning their *property according to their customs* shall be recognized."⁵⁹ The substance of this two-tiered arrangement continues in modern times. American Samoa's central government follows a western democratic model, while its local governments are administered through the traditional *matai* and village council system.

The promises of the Cession Treaties received a certain measure of fulfillment by order of Navy Commander B.F. Tilley less than a month after the Cession Treaty for *Tutuila* and *Anu`u* was signed, and today's statute employs almost identical language, stating:

The *customs of the Samoan people* not in conflict with the laws of American Samoa or the laws of the United States concerning American Samoa shall be preserved. The village, county 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, county, or district according to their own Samoan customs.⁶⁰

Federal investigators have recently questioned whether Samoan custom or Anglo-American common law should prevail in case of a conflict.⁶¹ The foregoing statutory language seems to give Samoan custom priority over other sources of non-statutory law. This language, supported by the Cession Treaties, appears to grant Samoan custom priority over English common law as a source of traditional law in American Samoa, particularly in view of the statute adopting the common law.

The following are declared to be in full force and to have the effect of law in American Samoa:

. . . .so much of the common law of England *as is suitable to conditions in American Samoa*⁶²

The subordination of the common law to local custom was apparently recognized in American Samoa from the earliest period of American control, as evident in the preface to American Samoa's 1917 codification of executive orders:

It will be seen that the written law of American Samoa deals with only a few subjects. Most questions arising have to be settled according to the *principles of Common Law*, as generally administered in the United States, and *subject to native customs* and local needs.⁶³

In some areas of common law, Samoan custom does not provide guidance or direction which courts can follow, or is so antiquated as to be inapplicable to modern Samoan society. Notwithstanding these considerations, Samoan custom still receives treatment in a large number of judicial opinions and, if directly tested in conflict with the common law, probably has a historical and statutory basis under which to prevail in most cases.

B. Government Recognition of Matai

The treaties (enforced by the Navy Commander's order, which continues in present law) promised protection for Samoan culture by official recognition of the local authority of *matai*, and by protecting the continued existence of communally owned property. Recognition of traditional leaders lent legitimacy to the imported Navy government, while at the same time permitting Samoans to preserve important elements of their culture.⁶⁴ In modern times local government in American Samoa continues to be administered by traditional leaders in the traditional system, while the central government follows the tripartite model of western democracies, with important modifications to accommodate the traditional culture.

In 1901 the first High Court of American Samoa adjudicated a land dispute, in which it became necessary to adjudicate the conflicting assertions of two individuals claiming a *matai* title with authority over the disputed land.⁶⁵ This landmark case began the practice of litigating the right to *matai* titles. In 1906 the U.S. Navy Governor of American Samoa implemented a formal policy requiring the registration of *matai* titles with the government, and providing legal channels for the resolution of disputes regarding succession to titles.⁶⁶ The policy of registering titles, and providing legal channels for the resolution of disputes were implemented in order to prevent bloodshed and civil war, which sometimes resulted from title disputes prior to American control,⁶⁷ and to prevent the dignity and authority of existing *matai* titles from being diluted by a multiplication of titles.⁶⁸ The registration and recognition of existing titles continues in the present law of American Samoa. When a family is unable to reach consensus, the right to the title is litigated in the courts. Am. Samoa Code Ann. § 1.0409(c) (1992) attempts to codify the traditional criteria for selecting *matai*:

In the trial of title cases, the High Court shall be guided by the following consideration, in the priority listed:

- (1) the best hereditary right, as to which the male and female descendants are equal in families where this has been customary; otherwise; the male descendent prevails over the female;

(2) the wish of the majority or plurality of those clans of the family as customary in that family;

(3) the forcefulness, character and personality of the persons under consideration for the title, and their knowledge of Samoan customs;

(4) the value of the holder of the title to the family, village, and country.

When the courts adjudicate a *matai* title, a panel of four Associate Judges who are traditional chiefs render the decision.⁶⁹ Associate Judges need not be trained in western law, but rather are selected for their understanding of Samoan customary law.

This system of *matai* title litigation should be changed. At one time it may have been necessary for the courts to take an affirmative role in selecting *matai* to prevent intra-family war. Court selection of *matai*, however, is contrary to Samoan traditions of consensus decision-making, and violates the family's traditional right to select its own leader. At present, those aspiring to a title who lack real family support can simply wait until someone else makes a claim, and then object to that claim, bringing the matter to court where it is sometimes possible to prevail under the other statutory criteria.⁷⁰ This result often causes disharmony and family strife.

The legislature should replace the present system with a certification system, wherein a claimant for title registration would be required to present affidavits from relevant family and village officials, certifying that the family had reached consensus in the traditional manner. Rival claimants could assert procedural defects and ask the court to deny registration, but could not ask the court to decide the inherently subjective substantive issues affecting *matai* selection. Samoan families have inherent incentives to select a *matai*, such as the legal necessity of a family representative when leasing or otherwise administering family communal lands where a legal representative is needed.

C. The Senate

The Revised Constitution of American Samoa further reflects the desire to protect the land and traditional culture. The "*Fono*"⁷¹ or Legislature of American Samoa represents the unique blend of traditional Samoan law and the imported system. The Senate is composed exclusively of government registered *matai* who are selected to be Senators according to Samoan custom, while the House of Representatives is democratically elected according to population.⁷² This system resembles the British Parliament composed of the House of Lords representing the traditional nobility, and the House of Commons elected from the general population. The Senate appropriately represents Samoan *aigas*, as the foundation of government in Samoa, in much the same way United States Senators represent the states. Furthermore, since Senators must be registered *matai*, they are an important check against laws which would be detrimental to Samoan custom.

The constitution of American Samoa provides that a Senator must be "a registered matai of a Samoan family who fulfills his obligations as required by Samoan custom," and is chosen "in accordance with Samoan custom by county councils consisting of other matais."⁷³ This reflects the traditional status of that body in ensuring "sober second thought" with regard to measures concerning land and culture.

D. Associate Judges of the High Court

Justices of the High Court of American Samoa are appointed by the Secretary of the Interior,⁷⁴ perhaps to discourage local political influence of the judiciary, because American Samoa is a relatively small society. Justices are required to be law trained.⁷⁵ Associate Judges of the High Court are appointed by the Governor upon recommendation of the Chief Justice, and are subject to confirmation by the Senate of American Samoa.⁷⁶ Associate Judges are not required to be law trained, and generally are not, but are traditionally chosen for their expertise in Samoan custom.⁷⁷

In the trial or appeal of civil and criminal matters, the role of the Associate Judges is advisory,⁷⁸ and the judgment of the presiding Justice or panel of Justices will prevail over the opinion of the Associate Judges if there is a conflict.⁷⁹ In the trial of *matai* title disputes, however, the decision of the majority of Associate Judges prevails unless they are evenly divided, in which case the presiding Justice casts the tie-breaking vote.⁸⁰ In the trial of matters relating to land, the opinion of the presiding Justice prevails over that of the Associate Judges,⁸¹ but on appeal of decisions relating to either land or *matai* titles, each Associate Judge has a vote equal to that of a Justice.⁸²

Although the Associate Judges' ability to cast outcome determinative votes is limited to cases involving land and *matai* titles, their role in other cases should not be underestimated. Associate Judges are present on the bench at all court proceedings and in conferences, and their voices are routinely heard by the presiding justices. They are regularly consulted for advice concerning factual issues and interpretations of Samoan custom and, of course, they have an official vote in all *matai* title disputes, and in appeals involving land. These powers are significant in light of the centrality of land and *matai* titles to Samoan culture. Furthermore, as ranking *matai* themselves, their signatures on most court decisions lend additional legitimacy to those decisions in the eyes of the Samoan people.

E. Statutes Protecting Communal Land

The Revised Constitution declares it the policy of the government to protect Samoan culture, gives the *Fono* authority to enact appropriate legislation, and protects American Samoa's land alienation laws from repeal by requiring that "overwhelming political tests"⁸³ be satisfied before the land statutes may be altered.⁸⁴ By protecting the land statutes with overwhelming political barriers to amendment, the framers of the American Samoa's Constitution elevated the language of these statutes "near to the level of the Constitution itself."⁸⁵ In keeping with its constitutional mandate, the *Fono* has enacted vigorous racial restrictions on land ownership, and other protections against the alienation

of family communal land, in an effort to preserve the family village and traditional Samoan way of life.⁸⁶ To eliminate communal land in Samoa would essentially "destroy the society."⁸⁷

Beginning with their very "earliest contacts with the West, Samoans have insisted on protecting the communal land system from encroachment," because of its central importance to the *fa`a Samoa*.⁸⁸ A regulation enacted by Navy Commander B. F. Tilley on April 30, 1900 (less than two weeks after the raising of the U.S. Flag in Samoa) reflects a historical commitment to the preservation of communal lands, stating: "From and after the coming into force of this Regulation the alienation of native lands within the limits of American Samoa to a non-native shall be prohibited."⁸⁹ Present day land alienation laws prevent the alienation of land to non-Samoans,⁹⁰ and require approval from the Governor before communal family lands may be alienated to Samoan or non-Samoan grantees.⁹¹

The High Court of American Samoa considered the constitutionality of race-restrictive land alienation laws under the Fourteenth Amendment to the U.S. Constitution in the landmark case *Craddick v. Territorial Registrar* (hereinafter "*Craddick I*").⁹² The *Craddick I* Court held the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment to be "fundamental" and therefore applicable in American Samoa as an unincorporated U.S. Territory.⁹³ The court further held that strict judicial scrutiny should be applied to the land-alienation laws, as with any other race restrictive law, but upheld the law based on a finding that "American Samoa has demonstrated a compelling state interest in preserving the lands of American Samoa for Samoans and in preserving the Fa`a Samoa, or Samoan culture."⁹⁴ The Ninth Circuit has, since then, upheld a racially restrictive land law in the Commonwealth of the Northern Mariana Islands, holding that the Bill of Rights was not "intended to operate as a genocide pact for diverse native cultures,"⁹⁵ and that the equal right to purchase scarce native land in a small indigenous society is not "fundamental" for purposes of the Fourteenth Amendment.⁹⁶

The essential purpose of the land protective statutes is to preserve the family village, which is the cornerstone of the *fa`a Samoa*. Under the present system, however, Samoans can register title to individually-owned lands which have been carved out of family communal lands and conveyed to individuals. The race-restrictive land alienation statute applies, by its terms, to prevent the alienation of individually-owned lands from Samoans to non-Samoans.⁹⁷

Mandatory Samoan ownership of individually-owned lands is of little real value in preserving Samoan culture, since individually-owned land is not a property interest protected by traditional Samoan law. More important, the essence of Samoan culture is the family village where family members live in close proximity to one another on family land. The objectives of the land alienation statutes would be better served if the statute were amended to outlaw any new creation or registration of individually-owned lands not already registered as individually-owned, thus preserving the status of previously unregistered lands as communal lands. Existing individually-owned lands should then be made freely alienable. These statutory changes would provide stronger protection for the

family village system by preventing the conversion of family communal land into parcels of individually-owned land, which could later be sold to non-family members, thereby gradually disintegrating the family village. These changes would also place American Samoa's land alienation statutes on stronger federal constitutional footing by eliminating the explicitly racial restriction on individual land ownership, and replacing it with a limited measure directly designed to protect Samoan culture.

F. The Secretary of Samoan Affairs

American Samoa's constitution provides for a "Secretary of Samoan Affairs" to be appointed from "among the leading registered matais," to coordinate the affairs of local government in American Samoa.⁹⁸ The Secretary of Samoan Affairs originally served as a liaison between the traditional local governments and the U.S. Navy government. Although this function has changed somewhat over the years, the basic purpose of the office remains. For instance, parties involved in disputes regarding *matai* title succession or controversies regarding family communal land are required by law to attempt to resolve their differences in the Samoan way (by consensus), using the Office of Samoan Affairs as a mediator, before they are permitted to resort to the western-style court system.⁹⁹

IV. The "Policy" Clause of Article I Section 3 of American Samoa's Constitution

Article I Section 3 of the Revised Constitution of American Samoa consists of three sentences, the first is directive, the second is permissive, and the third is prohibitive.¹⁰⁰ The "directive" sentence or Policy Clause is the focus of this portion of the article, and it reads as follows:

It 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.

While primarily directive, the foregoing sentence is also prohibitive. In addition to a clear affirmative obligation upon the government to enact "policy" protecting Samoan custom the language also has a prohibitive component. The language "shall be," is a state of being verb, indicating that public policy encouraging "alienation of lands" from native Samoans, destruction of the Samoan language, or harming the "Samoan way of life" is contrary to the order of things envisioned by the framers of the Revised Constitution of American Samoa. According to the High Court of American Samoa in *Craddick Development v. Craddick*, (hereinafter *Craddick II*) the enforcement mechanism for this sentence is twofold.¹⁰¹ The courts may apply it as a rule of statutory construction¹⁰² or, alternatively, use it to strike down legislation which manifests an intention which is plainly contrary to the "policy"¹⁰³ of protecting Samoan lands, language and culture.¹⁰⁴ The High Court has implied that a law may also "contravene the [cession] treaty"¹⁰⁵ if it is inconsistent with Samoan custom.¹⁰⁶ If this position ultimately holds, it is possible that the Cession Treaties could provide an additional basis for invalidating certain statutory law as destructive of custom. The remainder of this article will suggest standards that the

courts of American Samoa may apply in effectuating the enforcement mechanisms of the Policy Clause.

A. The Policy Clause as a Rule of Construction

The High Court of American Samoa has stated in *Craddick II* that the Policy Clause could be used to strike down statutes that are plainly contrary to the purpose of protecting Samoan custom.¹⁰⁷ Following this analysis, it makes sense that the Policy Clause could be used to justify an exception to laws of general applicability which do not directly impair Samoan custom, but nonetheless have a harmful effect upon it as a byproduct of regulating in the legitimate public interest. The Bill of Rights in the United States Constitution is often construed as protecting such things as free speech¹⁰⁸ and religious worship¹⁰⁹ from the requirements of generally applicable law which indirectly burden protected practices. Culture, while not a religion, is a basic and important element of the way people live, and the Samoans have enacted constitutional protection to practice their culture as a matter of right.

The High Court of the former Trust Territory of the Pacific Islands explained that custom protective language in its Bill of Rights created an exception to other portions of the Bill of Rights and could be used only to protect present-day custom, not to revive antiquated custom.¹¹⁰ Read for all it is worth, this decision meant that custom was protected but not enacted. In simple terms, custom was not set in stone and would be allowed to evolve as the practices and circumstances of the people changed. In that evolutionary process, however, the imported law and political system would not be permitted to extinguish living customs. The Appellate Division of American Samoa's High Court gave the same construction to American Samoa's Cession Treaties and to Article I section 3 of the Revised Constitution of American Samoa:

These provisions [meaning the Cession Treaties and the Revised Constitution, Article I section 3], fairly read, do not carve "Fa`a Samoa" into stone. Rather, they insulate the same from erosion due to any influence other than the natural progression of time. They are not intended to force the retention of custom, culture, and tradition upon Samoans, but instead to assure that the Samoan way of life is allowed to follow its own path. As such, these provisions establish a presumption in favor of the customs and traditions prevailing in the territory.¹¹¹

When applying custom as an exception to laws of general applicability, the courts of American Samoa should follow customs which are time honored,¹¹² but not antiquated, since the *fa'a Samoa* is a living and evolving culture.¹¹³

B. The Best Interests Test

Although the Policy Clause is vigorously protective of Samoan custom, it protects Samoan custom only against government action that would be "contrary" to the "best interests" of "persons of Samoan Ancestry."¹¹⁴ It is acknowledged that "best interests" is

a highly subjective term, and, if not carefully applied, could open the door to activist judicial policy making and unbridled judicial discretion. The alternative to applying the "best interests" language, however, is to declare it too vague for principled interpretation and therefore dead letter. In light of the foregoing history, it is clear that the Policy Clause was very important to the framers of American Samoa's Constitution, and declaring it to be "dead letter" would be the most unprincipled position possible. The ensuing paragraphs will outline principles to guide the courts of American Samoa in applying the "best interests" language in a principled fashion.

Not all Samoan customs are equally important. Certain customs are mentioned specifically in the Policy Clause. Other customs not singled out in the Constitution are nonetheless pervasive and well-known, and still others are localized and idiosyncratic. A rule of construction for the "best interests" language of the Policy Clause must take into account the relative importance of various customs to the overall survival of the culture. The more important a custom, the more difficult it is for a countervailing policy to be in the "best interests" of the Samoan people.

1. Strict Scrutiny

Since the Policy Clause gives specific treatment to protection against the "alienation" of Samoan "lands," and against destruction of the Samoan "language," strict scrutiny may properly be applied to policy which undermines these objectives, either generally or in an exceptional case. Although not directly mentioned in the Policy Clause, the "traditional Samoan family organization" or *matai* system is specifically mentioned elsewhere in Article, I Section 3 of American Samoa's Constitution, and is universally recognized as one of the twin pillars of the *fa`a Samoa*. Accordingly, policy which runs contrary to the preservation of the Samoan language, Samoan lands, and the Samoan *matai* system should be sustained only upon the showing of a compelling governmental interest.¹¹⁵ An interest satisfying this test must involve a "clear and present danger" and "[o]nly the gravest abuses, endangering paramount interests."¹¹⁶ Such abuses should "invariably" involve "some substantial threat to public safety, peace, or order."¹¹⁷ Furthermore, where a compelling governmental interest is present, the government must "narrowly achieve[]"¹¹⁸ its objective by using the "less drastic" method of regulating.¹¹⁹ Absent a compelling governmental interest, the Policy Clause mandate to preserve Samoan lands, the *matai* system, and the Samoan language should provide exceptions to laws which are otherwise generally valid, and strike down policies which are generally destructive to either purpose.

2. Mid-Tier Scrutiny

The Policy Clause includes general language protecting the "Samoan way of life." Although many commonalities exist, the "Samoan way of life" varies from one *aiga* to the next and ultimately from one Samoan to another.¹²⁰ The problem of protecting culture, without allowing it to become an excuse for destructive individual misbehavior or anti-social non-conformity, is not unique to American Samoa. As one professor noted:

It is important to note that the dividing line between "individuals" and "the culture" is not always clear. Shifting national boundaries and worldwide immigration and emigration have created nations which, although they will often have a dominant national culture, often have a number of subcultures within the unified national entity. International law has recognized the rights of minority groups to preserve their own cultural traditions. The question of when a group of individuals are struggling to preserve their own minority culture and when they are an anachronistic part of a larger culture who can be rightfully punished for failing to change with the natural dynamism of that single culture is a difficult one.¹²¹

The difficult questions raised by the foregoing statement are highly relevant to the relationship of American Samoa as a minority subculture within United States jurisdiction; as well as to individuals, families, and villages as subcultures of the larger Samoan society. The idea of protecting the practice of culture in some way necessitates defining the indefinable, or answering the question: what is culture? In order to determine which actions or behaviors are truly manifestations of culture, and to what extent preserving certain elements of the culture is in the "best interests" of the Samoan people, it is necessary to establish some articulate legal test to balance these interests against countervailing policy, as the Policy Clause requires. Accordingly, customs which are not specifically mentioned in American Samoa's constitution must be evaluated for their relative importance, in order to determine the degree of protection which they may receive under the Policy Clause as part of the "Samoan way of life." In order to be adjudicated as tending toward the "best interests" of the Samoan people, policies tending to harm generally practiced and pervasive customs should require a very important counterbalancing governmental interest.

Samoan customs, which are general and pervasive throughout American Samoa, should be protected by mid-tier constitutional scrutiny. To withstand a constitutional challenge, policies which harm general and pervasive customs should be required to "serve important governmental objectives" and should be "substantially related to the achievement of those objectives."¹²² When these criteria are not satisfied, the Policy Clause should provide the means of striking the policy down or providing an exception to generally valid law which has the effect of harming a pervasive custom in a particular case.¹²³ In cases where a particular custom has not been previously adjudicated or interpreted, the existence, importance, and proper interpretation of the custom are mixed questions of law and fact.¹²⁴

3. Rational Basis Review

In American Samoa many families, villages, or districts have customs which, although frequently ancient in origin, are not generally practiced throughout the territory.¹²⁵ It could be argued that localized customs are worthy of protection in much the same way as the various religious faiths receive protection under the First Amendment to the United States Constitution. Family traditions are a very important part of Samoan life, but the "Samoan way of life", as conceived in the Policy Clause, probably envisions more

vigorous protection for generalized Samoan traditions than for family or village traditions, and probably protects family or village traditions only because their existence is a part of the larger "Samoan way" of doing things. A policy which harms a custom of an individual village is probably a weaker overall threat to the ultimate survival of the *fa`a Samoa* than a policy which harms a Samoan custom which is generally accepted and practiced. Accordingly, a policy harming only localized custom need not be considered as important as a policy harming a more universal custom, in order to be deemed in the "best interests" of the Samoan people.

The weakest standard of constitutional scrutiny, rational basis review, should protect Samoan customs that are localized or idiosyncratic. This means that the offending policy must have some "reasonable" purpose other than the suppression of custom, and that it must have "a fair and substantial relation to the object of the [policy]." ¹²⁶ Although rational basis review is the weakest standard of constitutional protection, it is not a "toothless" standard. ¹²⁷ To survive rational basis review, policy must be "rational," and not an "invidious" attempt to suppress custom. ¹²⁸

C. Statutes Codifying Samoan Law

With the Foregoing principles in mind, special deference should be given to statutes which are specifically designed to protect or codify Samoan custom. The *per curiam* High Court of American Samoa, led by Chief Justice Rees made this statement:

This Court has become all too familiar with the contention that a law enacted by the Fono can be violated or ignored whenever the person who does not like it claims that the law is contrary to custom or tradition In fact, the statutes concerning Matai titles and other customary matters represent the best effort of the Fono --- whose membership includes many of the most important traditional leaders of Tutuila and Manu`a --- to incorporate custom into written law and to provide procedures for its preservation and enforcement. ¹²⁹

In this light, statutes enacted with the deliberate intent to preserve Samoan custom should be accorded a higher degree of deference than generally applicable laws that have incidental (and perhaps unintended) effects on Samoan custom. Among the best *prima facie* interpretations of Samoan custom are the statutes and resolutions approved by the traditional leadership for the purpose of preserving the culture.

D. Dangers in Using Custom to Override Statutory Law

The question of when the Policy Clause may be used to declare a statute unconstitutional, or to provide an exception to generally applicable law, is one which must be approached carefully. It is not, however, without precedent in common law systems of government for subjective traditional doctrines to trump statutory law. When the Bill of Rights in the U.S. Constitution is used against democratically enacted legislation, the U.S. Supreme Court has held:

In ascertaining the meaning of the phrase taken from the Bill of Rights it must be construed with reference to the common law from which it was taken. In this, as in other respects, [a constitutional provision] must be interpreted in light of the common law, the principles and history which were familiarly known to the framers of the Constitution. The language of the Constitution, as has been well said, could not be understood without reference to the common law.¹³⁰

One example of the use of customary law is where traditional notions of "cruel and unusual punishment" inform judicial interpretation of the U.S. Constitution's Eighth Amendment, which has been used to strike down methods of punishment prescribed by codified law.¹³¹ Another example is where the English common law meaning of the words "due process of law," informs judicial understanding of the Fifth and Fourteenth Amendments to the U.S. Constitution as a means of striking down contrary statutes. The danger of inquiry into subjective norms is that it can open the door to judge made law which is not truly based on custom. This has been evident in the Supreme Court's occasional reading of substantive content into the Due Process Clauses of the Fifth and Fourteenth Amendments¹³² or the Court's use of "the evolving standards of decency that mark the progress of a maturing society" to define "cruel and unusual punishments," thereby transforming the non-democratic, life-tenured Supreme Court into a barometer of social norms.¹³³

V. Conclusion

Custom and tradition are important stabilizing forces in society. They define and teach basic mores, values, and social responsibilities. Although culture is dynamic and evolving, deliberate efforts to change or abolish customs should be undertaken slowly and carefully in order for the culture to assimilate, and so that those affected may fully understand the magnitude and consequences of the transformation. American Samoa has a rich history of protecting its core customs and traditions over the past century of American rule. The Cession Treaties provided for the retention of customary rights to native land by the Samoan people, as well as preserving the authority of traditional chiefs to administer local government in their customary manner. The land tenure and *matai* systems are the twin cornerstones of the *fa`a Samoa*. The Constitution and laws of American Samoa provide additional statutory and institutional protections for Samoan land and culture, and award Samoan custom primacy over all other sources of traditional law, including the common law of England.

The Policy Clause of Article I Section 3 of the Revised Constitution of American Samoa is one of the most important protections for Samoan land and culture. The Policy Clause declares it the policy of the Government of American Samoa to protect against the alienation of Samoan lands, and against the destruction of the Samoan culture and language. This provision should be used to interpret statutes in a manner favorable to Samoan custom whenever possible; to strike down policy which is in general conflict with the declared policy; and to provide exceptions to policies which are in conflict with the declared policy in a particular case.

The Policy Clause is a basis for striking down or providing exceptions to policy only where the offending policy is contrary to the "best interests" of the Samoan people. To determine whether a policy meets the "best interests" test, three familiar levels of scrutiny are useful. Policy conflicting with the express aims of the Policy Clause to protect Samoan lands, the Samoan language, and the matai system, should be required to survive strict scrutiny, meaning that it is not justified unless it furthers a compelling governmental interest, and is the least damaging means of furthering that interest. Policy conflicting with the general language protecting the "Samoan way of life," which damages pervasive and generalized customs, should be required to survive mid-tier review, meaning that it is justified only if it furthers an important governmental interest and is substantially related to the achievement of that objective. Policy conflicting with the general language protecting the "Samoan way of life," which damages only localized custom should be required to survive rational basis review, meaning that it is justified only if it is rationally related to the achievement of a legitimate government interest, and is not an invidious attempt to suppress custom.

When undertaking a "best interests" analysis, it is important for judges to remember the inherent danger in using subjective tradition to overrule democratically enacted law, and to be mindful that they give constitutional protection only to genuine, time-honored custom. Additionally, Judges should give special deference to statutes enacted deliberately for the purpose of interpreting and protecting Samoan custom.

The preservation of basic elements of the *fa`a Samoa* is critical to the Samoan identity and values structure. American Samoa should remember this as it takes its place as a small society in a vast world community, lest that vastness effortlessly swallow the Samoan way of life, banishing the Samoan people from their land in the "Garden of Paradise" to wander aimlessly without a homeland and without tradition, as so many other indigenous peoples have done before them. If American Samoa remains cognizant of the value of its traditions, it can serve as a model for other developing nations and indigenous peoples desiring to retain their cultural identities while embracing the blessings of the western enlightenment.

¹ Talili v. Momosea, 4 Am. Samoa 2d 23, 26-27 (Land & Titles Div. 1987). To Samoans of old, Samoa was the whole earth. Brother Fred Henry, History of Samoa 18 (3d prt. 1992). One account of the naming of Samoa indicates that the earth was pregnant, and that *Salevao*, the god of rocks, observed motion in the *moa*, or center of the earth. *Id.* at 19. When the child named *Moa* was born, *Salevao* provided water, which was made *sa* (sacred) to wash the child, and afterward created springs to bring the sacred water to the rocks to sustain life, making everything growing on the earth "*sa*," or sacred to "*Moa*." *Id.* This legend is a striking metaphor for the actual volcanic activity known to have created Samoa.

² Matthew Wells & David Flandro, *Ecology and Indigenous Legal Systems*, in Colonialism and Indigenous Peoples 32 (Paul Cox & Peter Driggs eds., 1994).

³ "... the British Constitution `works by a body of understanding which no writer can formulate and of habits which centuries have been needed to instill.'" Amos J. Peaslee, 3 *Constitutions of Nations* 289 (1950) (quoting Lord Bryce). *See also* Pierce Lively, *A Tribute and Challenge to Exceptional Law Students*, 77 *Ky. L.J.* 759, 761 (1988).

⁴ If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible;

Downes v. Bidwell, 182 U.S. 244, 287 (1901).

⁵ A unique situation in Samoa which has limited the effectiveness of U.S.-style Checks and Balances is our colonial history. American Samoa has only a few decades of experience in electing our political leaders and the model that was in existence for decades was either a military model or a non-political colonial model, neither of which was conducive to the development of political opposition.

Lave Tuiletufuga, *Not Enough Politics; In Need of Voter Activism*, Samoa News, Feb. 9, 1995, at 4.

⁶ Am. Samoa Code Ann. § 22.1301-.1308 (1992).

⁷ Wells & Flandro, *supra* note 2, at 30.

⁸ *Id.* at 33-34.

⁹ *Id.*

¹⁰ Ronni B. MacLaren et. al., American Samoa White Collar Crime Assessment: A Special Report to the U.S. Dep't of Interior, U.S. Dep't of Justice and Am. Samoa Gov't 16 (1994). "While it is not known how much of the deficit is due to fraud and abuse, there is no question that government fraud of the kind cited in this report has contributed significantly to the territory's worsening financial condition." *Id.* at 20.

¹¹ Peter Tali Coleman, *Peter Tali Coleman on the FBI Report*, Samoa News, Aug. 7, 1995, at 10-11.

¹² "Stealing, I learned, was a Western term and was never to be used in connection with a Samoan, particularly Samoan relatives. Property, mine included, belonged to the entire family." Fay G. Calkins, *My Samoan Chief* 44 (1962) (*quoted in* MacLaren et. al, *supra* note 10, at 19). Most Samoans today understand that republican government is a "Western" idea, and are capable of separating their government jobs from their lifestyle within the *aiga*. Generally, when the family communal system is used explain theft from the government, it is simply an excuse. House Speaker Savali T. Ale, *Savali Comments*

on *FBI Report*, Samoa News, Aug. 8, 1995, at 15; Sen. Moa`ali`itele L.K. Tu`ufuli, in Lave Tuiletufuga, *Moa`ali`itele Complains About "Racist" FBI Report*, Samoa News, July 14, 1995, at 6. The presence of several thriving Samoan-owned and managed corporations in the private sector demonstrates that the Samoan people are capable of responsible management.

¹³ Ale, *supra* note 12 at 1; Tu`ufuli, *supra* note 12.

¹⁴ I do not mean to suggest in any way that *fa`avelave* are a corrupting influence. Quite the contrary, they generate valuable family support during important life-cycle rituals. Like every other culture, however, Samoans are not immune to pride, which unfortunately corrupts valuable customs in every culture.

¹⁵ There is a lack of constructive political tension in this territory and as a result, unacceptable burdens are foisted on the public. Those burdens range from inadequate trash collection, to long lines at the hospital, to a lousy education system, to frozen increments for an excessive number of government workers, to unfair (biased) application of the law and of course to sweetheart deals like the Fono roof shakes saga.

Tuiletufuga, *supra* note 5.

¹⁶ One of the problems with the political system in American Samoa is that the Checks and Balances have not been very well developed here, partially for reasons that are unique to American Samoa. Culturally, the idea of Checks and Balances is understood and appreciated, but in the specific form of governing that the Americans pressed upon the Samoans, it is sometimes culturally rude for individuals to exercise their Checks and Balances role. For example, when a chief has an idea that others disagree with, there are many subtle and not-so-subtle ways for the family or the village or the district to counter implementation of the idea without embarrassment to any of the involved parties, and direct confrontation can almost always be avoided .

The American system adopted here doesn't work very well without direct and public criticism, and direct criticism and confrontation is an uncomfortable situation for us Samoans to be in. The reluctance to engage in such behavior to some extent weakens the Checks and Balances system.

Tuiletufuga, *supra* note 5.

. . [I]t seems that the Matai are boycotting the [constitutional review] proceeding because their role of representing their families has been undermined. On the other hand, the non-Matai populace are not exactly flocking to what I would think would be the perfect opportunity for them to speak their minds.

Have they been told not to go to the meetings; are they not attending out of fear of

retribution, or is it possibly out of respect for their Matai?

Whatever the reason(s) for the low turnout at these hearings, we can be assured of one thing; if by the end of this year, some change to our constitution does eventuate, there is no guarantee this change will represent the desire of the masses--but rather, only a few!

Lemanatele Mark Kneubuhl, *Con[stitutional] Con[vention] Comment... Where are the Voices?*, Samoa News, March 1, 1995, at 5.

¹⁷ Am. Samoa Code, *Preface* xiii (1969).

¹⁸ [A]s compared to the United States, American Samoa has had only two elected governors, a very short time in history. Dynamic Leadership and time will remedy our situation [involving government theft].

Tu`ufuli, *supra* note 12, at 6, 7 (quoted from Sen. Tu`ufui's letter to F.B.I. Director Louis J. Freeh).

¹⁹ Gov. A.P. Lutali, *Governor Honors Fourth of July*, Samoa News, July 5, 1995, at 15.

²⁰ *Id.*

²¹ *Id.*

²² Mr. President, we are a law abiding and God-fearing people. In every society, there is an element that may reflect the image of anti-society . . . There are also people who may become entangled in the law. Nevertheless, it does not justify condemning a culture or race. We were born Samoans and we shall die Samoans. *Our culture the "Fa`a Samoa", is our identity in this world.* A culture can never corrupt the people; it is the people who corrupt the culture.

Tu`ufuli, *supra* note 12, at 6, 7 (emphasis added) (quoted from Sen. Tu`ufuli's letter to President Bill Clinton).

²³ The author does not intend to convey the belief that culture and tradition are the only sources of morality, nor even that they are the most important sources. Furthermore, the author readily concedes that certain traditions within any given culture may be anti-social, and deleterious to the peace, liberty, and progress of the people and should, therefore, be discarded. The idea is inescapable, however, that most customs and traditions survive the test of time because they encourage loyalty to family and friends, socially responsible conduct, and basic respect for others. The idea that religious

devotion, the influence of parents, or other factors may be more important than culture in encouraging morality, cannot refute the idea that culture remains an important and pervasive influence.

²⁴ U.S. Const. art. III, § 3, cl. 2..

²⁵ Wallach v. Van Riswich, 92 U.S. 202, 210 (1875).

²⁶ The range and depth of possibilities of the human soul were so much more vast and promising than I had ever conceived. While my American culture was pioneering the way toward human prosperity through the release of the individual, Samoan culture was making its own valid discoveries about the human satisfaction and security of close communal relationships. How much we would lose if we were both the same!

Calkins, *supra* note 12, at 207. From the beginning of American rule, American ideas regarding individual rights were in tension with certain communitarian principles of the *fa`a Samoa*. For example, the following executive order was issued a little more than two years following American occupation of Eastern Samoa:

Whereas in some villages of American Samoa, there is an old custom of law that persons who belonged to a religious denomination and changed their belief to some other sect, had to leave their village etc.

It is hereby ordered:

1. That all customs that interfere with religious beliefs be and are hereby abolished.
2. That no person shall be anywise moles'ed, punished, disquieted or called in question for any differences of opinion and beliefs in matters of religion.

Codification of the Regulations and Orders for the Gov't of Am. Samoa § 75(1)-(2) (1917) (order of August 30, 1902 by Navy Captain U. Sebree).

²⁷ Leota v. Faumuina, 4 Am. Samoa 2d 11, 12-13 (App. Div. 1987) (opinion by visiting Justice Anthony M. Kennedy, who went on to serve on the U.S. Supreme Court).

²⁸ *Id.* In ancient times, the *ifoga* was a "customary humiliation" ritual which often served to end bloodshed when a war had been lost, or to avert a war which would be futile. *See* Henry, *supra* note 1, at 85, 180.

²⁹ In present times, an *ifoga* is a factor which may be taken into consideration to reduce, but not to waive, a criminal's sentence. Am. Samoa Code Ann. § 46.1910(b) (1992).

³⁰ See Henry, *supra* note 1, at 95-96.

³¹ See Joel Wright et al., *Economics and Indigenous Knowledge Systems, in Colonialism and Indigenous Peoples* 127 (Paul Cox & Peter Driggs eds., 1994).

³² *In re Le'aeno*, 24 Am. Samoa 2d 117, 121 (Land & Titles Div. 1993).

³³ *Corp. of the Presiding Bishop v. Hodel*, 830 F.2d 374, 377 (D.C. Cir. 1987); 637 F.Supp. 1398, 1402 (D.D.C. 1986). The matai may not transfer communal land without consensus permission from his family and approval from the Governor. *Id.* at 377 (D.C. Cir. 1987); *Fanene v. Taaseu*, 23 Am. Samoa 2d 1, 5 (Land & Titles Div. 1992).

³⁴ "I, with my superior resources, felt poor and insecure. She with nothing but the respect of her village, obviously felt rich. Maybe the difference was that she was part of a tribe. I was merely one lonely individual." Calkins, *supra* note 12, at 205.

"Samoan society is based upon the existence of extended families that may consist of hundreds of members." *Corp. of the Presiding Bishop Hotel*, 830 F.2d 374, 377 (D.C. Cir. 1987).

In ancient Samoan society, family connections and alliances between families determined the power structure of the nation. Henry, *supra* note 1, at 152-153. This power structure frequently gave rise to politically motivated marriages or "matrimonial alliance[s]," and occasionally kidnapping of high born children in order to secure high titles for a family. *Id.* at 116-117, 152-153, 166.

³⁵ Coleman, *supra* note 11, at 10.

³⁶ Wright et al., *supra* note 31, at 126.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Fiddler on the Roof* (MGM Pictures 1971).

⁴⁰ Coleman, *supra* note 11, at 11.

⁴¹ James Q. Wilson, *The Moral Life*, Address at Brigham Young University Commencement 5-6 (April 21, 1994) (transcript available at Brigham Young University Alumni House).

⁴² Wells & Flandro, *supra* note 2, at 31.

⁴³ *Id.*

⁴⁴ Calliope v. Silao, 2 Am. Samoa 2d 1, 2 (Land & Titles Div. 1983).

⁴⁵ President William McKinley, Instructions to the Philippine Commission, Pub. Laws and Resolutions of Philippine Comm'n 6-9 (April 7, 1900), *quoted in* Kepner v. United States, 195 U.S. 100, 122 (1903).

⁴⁶ *Id.*

⁴⁷ Reid v. Tavete, 1 Am. Samoa 2d 85, 87 (App. Div. 1983).

⁴⁸ Reid v. Covert, 354 U.S. 1, 13 (1957) (*construed in* Corp. of Presiding Bishop v. Hodel, 637 F.Supp. 1398, 1405 n.12 (D.C. Cir. 1986)).

⁴⁹ McKinley, *supra* note 45.

⁵⁰ James Madison, Notes of Debates in the Federal Convention of 1787 Reported by James Madison 90, 97-98 (quoting James Wilson) (W.W. Norton & Co., 1987); *see also* *Id.* at 153 (paraphrasing Maryland Delegate Luther Martin).

⁵¹ Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 Temp. L. Rev. 361, 366 (1993).

⁵² The Federalist No. 84, at 437 (Alexander Hamilton) (Bantam ed., 1982).

⁵³ Congressman Eni Faleomavaega, *Eni's Statement Regarding the FBI Report*, Samoa News, Aug. 7, 1995, at 6.

⁵⁴ 182 U.S. 244, 346 (1901). Opinions by Justice Brown and Justice White stated the view that the authority to acquire new territory flows from the U.S. Constitution, article I section 7, enumerating the power to make war, and article II section 2, enumerating the power to make treaties, and that provisions within a treaty may define and modify the relationship of the territory to the United States. *Id.* at 251-66; 279-80; 302-307.

⁵⁵ Downes v. Bidwell, 182 U.S. 244, 306 (1901) (emphasis added).

⁵⁶ *Id.* at 326.

⁵⁷ *Id.* at 311.

⁵⁸ Cession of Tutuila and Anu`u, April 17, 1900, U.S.-Tutuila Samoa, *preface to* Am. Samoa Code Ann. at 2 (1992) (emphasis added). *See also* Corp. of Presiding Bishop v. Hodel, 830 F.2d 374, 386 (D.C. Cir. 1987).

⁵⁹ Cession of Manu`a Islands, July 16, 1904, U.S.-Manua Samoa, *preface to* Am. Samoa Code Ann. at 4 (1992). *See also* Corp. of Presiding Bishop v. Hodel, 830 F.2d 374, 386 (D.C. Cir. 1987). It is interesting and somewhat important to note that the

Manua Islands, although ethnically and culturally Samoan, have no historical political ties to the other major Samoan islands of *Tutuila*, *Upolu* and *Savai'i*. Prior to the aforementioned treaties *Manua* was an independent kingdom. Henry, *supra* note 1, at 138. *Tutuila*, by contrast, was politically tied to *Upolu* and *Savai'i*, (the islands which now make up the nation of Western Samoa), sometimes serving as a penal or exile colony. *Id.* at 157, 164, 169, 180. The islands comprising American Samoa (*Tutuila* and the *Manua* group) are not traditionally united.

⁶⁰ Am. Samoa Code Ann. § 1.0202 (1992) (emphasis added). The original order of the Navy Commander stated, in relevant part:

2. The *customs of the Samoans*, not in conflict with the laws of the United States concerning American Samoa, shall be preserved, unless otherwise requested by the representatives of the people.

3. The village, county and district councils consisting of the *hereditary chiefs and their faleupolo* [or talking chiefs] . . . shall retain their own forms of meeting together to discuss affairs of the village, county or district according to their own Samoan Custom.

Codification of the Regulations and Orders for the Gov't of Am. Samoa § 3 (1917) (emphasis added) (regulation enacted May 1, 1900 by Navy Commander B.F. Tilley). Compare the similar provision in the law of the former Trust Territory of the Pacific Islands, which was possibly modeled after American Samoa's provision:

The customs of the inhabitants of the Trust Territory not in conflict with the laws of the Trust Territory shall be preserved. The recognized customary law of the various parts of the Trust Territory shall have the full force and effect of law so far as customary law is not in conflict with [the Trusteeship Agreement, applicable U.S. law, and local statutes].

1 Trust Terr. Code § 102 (1966).

⁶¹ MacLaren et. al., *supra* note 10, at 55-56.

⁶² Am. Samoa Code Ann. § 1.0201 (1992). Compare the law of the former Trust Territory of the Pacific Islands:

The rules of the common law, as expressed in restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Trust Territory in cases to which they apply, in the absence of written law . . . or *local customary law* . . . to the contrary . . . PROVIDED, that no person shall be subjected to a criminal prosecution except under the written law of the Trust Territory or recognized *local customary law* not inconsistent therewith.

1 Trust Terr. Code § 103 (1966) (*italics added*).

⁶³ Alexander Stronach, *Preface to Codification of the Regulations and Orders for the Gov't of Am. Samoa* (1917) (Approved by Governor J. M. Poyer) (*emphasis added*).

⁶⁴ Stanley K. Laughlin, *United States Government Policy and Social Stratification in American Samoa*, 53 *Oceania* 29, 31 (1982).

⁶⁵ *Id.* at 30-31 (citing *Tiumalu v. Fuimaono*, 1 Am. Samoa 17, 19 (Trial Div. 1901)).

⁶⁶ Codification of the Regulations and Orders for the Gov't of Am. Samoa § 45 (Order of Governor, Commander C.B.T. Moore).

⁶⁷ *Talala v. Logo*, 1 Am. Samoa 166, 171 (1907); *Tiumalu v. Fuimaono*, 1 Am. Samoa 17, 19 (Trial Div. 1901). Cession of Tutuila and Anu'u, *supra* note 57. *See also* Henry, *supra* note 1, at 147, 185, 192.

⁶⁸ *Mailo v. Fuimaono*, 4 Am. Samoa 757, 761-62 (Trial Div. 1967). Laughlin, *supra* note 64, at 36. The registry closed to newly created *matai* names in 1969, pursuant to Am. Samoa Code Ann. § 1.041 (1992).

⁶⁹ *Id.* at § 3.0241(b) (1992).

⁷⁰ Am. Samoa Code Ann. §§ 1.0407-0409 (1992).

⁷¹ *Fono* is a Samoan word literally meaning a "gathering of titles," or gathering of chiefs.

⁷² Revised Const. of Am. Samoa, art. II, § 1-2. This system is a modified version of the system set up during the Naval administration of American Samoa, which utilized a bicameral legislature consisting of the House of *Alii* and the House of Representatives. The House of Representatives was popularly elected, while the House of *Alii* was reserved for the paramount chiefs, the most powerful *matai* in the Samoan Islands. *Alii* literally means "paramount chief." Code of Am. Samoa § 75-83 (1949).

⁷³ *Tuika v. Governor*, 4 Am. Samoa 2d 85, 95 (Trial Div. 1987).

⁷⁴ Revised Const. of Am. Samoa, art. III, § 3; Am. Samoa Code Ann. § 3.1001(a) (1992).

⁷⁵ Am. Samoa Code Ann. § 3.1001(a) (1992).

⁷⁶ *Id.* at § 3.1004(a).

⁷⁷ *Ale v. Falealili*, 4 Am. Samoa 2d 7 (App. Div. 1987).

⁷⁸ Am. Samoa Code Ann. § 3.0210 (1992).

⁷⁹ *Id.* at §§ 3.0231, .0241(a), .0221 (1992).

⁸⁰ *Id.* at § 3.0241(b).

⁸¹ *Id.* at § 3.0241(a).

⁸² *Id.* at § 3.0221.

⁸³ *Craddick Development v. Craddick*, CA No. 43-89 slip op. at 4 (Trial Div. 1995) [hereinafter *Craddick II*].

⁸⁴ Changing the land statutes requires two successive legislatures to approve the changes by a two-thirds majority in both houses, and approval from the Governor. Revised Const. of Am. Samoa, art. I, § 3.

⁸⁵ *Craddick II*, *supra* note 83, at 4.

⁸⁶ Am. Samoa Code Ann. §§ 37.0201-.0230 (1992).

⁸⁷ Every Western Power that has entered the Samoan islands, not just the United States, in their official documents and treaties has recognized what anyone who has ever visited Samoa or knows anything about Samoa knows, that the culture is integrally involved in communal ownership of land, and to upset or destroy that feature of Samoan Society would ultimately destroy the society.

Corp. of the Presiding Bishop v. Hodel, 637 F.Supp. 1398, 1401-02 n.2 (D.D.C. 1986) (quoting American Samoa Attorney General L. Su`esu`e Lutu), *aff'd*. 830 F.2d 374 (D.C. Cir. 1987).

The hallmark of the Samoan way of life is the communal land system. Without communal land, a Matai has little purpose. There is nothing new about communal land. It is the original form, the essence of what all the aforementioned provisions sought to protect. Since all land was once communal land, there is a presumption [sic] that all land still is.

Reid v. Tavete, 1 Am. Samoa 2d 85, 87 (App. Div. 1983).

⁸⁸ *Corp. of the Presiding Bishop v. Hodel*, 830 F.2d 374, 377 (D.C. Cir. 1987), *aff'g* 637 F.Supp. 1398, 1401 (D.D.C. 1986).

⁸⁹ Codification of the Regulations and Orders for the Gov't of Am. Samoa § 40(2) (1917). It is noteworthy that much of the language in section 40 permitting and regulating trusts for the benefit of non-Samoan descendants, and the leasing of native land to non-

Samoans, survives to the present day in Am. Samoa Code Ann. §§ 37.0205 and 37.0221 (1992).

⁹⁰ Am. Samoa Code Ann. § 37.0204(b) (1992) prevents alienation of any land other than freehold land to individuals with less than fifty percent Samoan blood. The precise language of this provision dates back at least as far as the 1949 Code of Am. Samoa § 1282.

⁹¹ Am. Samoa Code Ann. § 37.0204(a) (1992) prevents matai from alienating communal land without written approval of the Governor. The precise language of this provision dates back at least as far as the 1949 Code of Am. Samoa § 1282.

⁹² 1 Am. Samoa 2d 10 (App. Div. 1980).

⁹³ *Id.* at 12. For a fine discussion of the application of the U.S. Constitution to the territories see Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, a Case Study*, 2 Haw. L. Rev. 337 (1980-81). See also *Wabol v. Villacrusis*, 908 F.2d 411, 421 (9th Cir. 1990).

⁹⁴ *Craddick II*, *supra* note 83, at 12.

⁹⁵ *Wabol v. Villacrusis*, 908 F.2d 411, 423 (9th Cir. 1990).

⁹⁶ *Id.* at 424. 1990). Federal courts have left open the question of whether they would uphold American Samoa's racially restrictive land alienation laws. *Corp. of Presiding Bishop v. Hodel*, 830 F.2d 374, 382 (D.C. Cir. 1987) *aff'g* 637 F.Supp. 1398, 1410-11 (D.D.C. 1986).

⁹⁷ *Craddick*, *supra* note 83, slip op. at 4.

⁹⁸ Revised Const. of Am. Samoa, art. IV, § 4.

⁹⁹ Am. Samoa Code Ann. § 43.0302 (1992).

¹⁰⁰ *Craddick II*, *supra* note 83, at 3.

¹⁰¹ *Id.*

¹⁰² *Craddick II*, *supra* note 83, at 3. ("We may apply [the policy clause] to interpret the intent of existing policy as vigorously protective of Samoan lands and culture, or to strike down legislation which manifests an intention which is plainly contrary to this purpose.")

¹⁰³ *Reid v. Tavete*, 1 Am. Samoa 2d 85, 88 (App. Div. 1983).

¹⁰⁴ *Craddick II*, *supra* note 83, at 3

¹⁰⁵ Craddick II, *supra* note 83, at 3

¹⁰⁶ Craddick II, *supra* note 83, at 3

¹⁰⁷ Craddick II, *supra* note 83, at 3.

¹⁰⁸ *Schneiderman v. United States*, 320 U.S. 118, 137-140, 167 (1943).

¹⁰⁹ *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). The Author realizes that *Sherbert* is undermined by *Employment Division v. Smith*, 110 S.Ct. 1595 (1990), but finds it useful to illustrate principles of rights theory.

¹¹⁰ *Mesechol v. Trust Territory*, 2 Trust Terr. 84, 91 (D.Palau 1959).

Due Recognition shall be given to local customs in providing a system of law, and nothing in this Chapter shall be construed to limit or invalidate any part of the existing customary law, except as otherwise provided by law.

1 Trust Terr. Code § 14 (1966).

¹¹¹ *Reid v. Tavete*, 1 Am. Samoa 2d 85, 87 (App. Div. 1983).

¹¹² *Lalou v. Aliang*, 1 Trust Terr. 94, 99-100 (D.Palau 1954).

¹¹³ *See Toleafoa v. Imo*, 7 Am. Samoa 2d 117, 121 (Land & Titles Div. 1988).

¹¹⁴ Revised Const. of Am. Samoa, art. I, § 3.

¹¹⁵ *Cf., e.g., Dunn v. Blumstein*, 405 U.S. 330, 342-345 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403, 408 (1963).

¹¹⁶ *Cf., e.g., Thomas v. Collins*, 323 U.S. 516, 530 (1945) (*construed in Sherbert v. Verner*, 374 U.S. 398, 403, 408 (1963)).

¹¹⁷ *Cf., e.g., Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

¹¹⁸ *Cf., e.g., Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

¹¹⁹ *Cf., e.g., Dunn V. Blumstein*, 405 U.S. 330, 343 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

¹²⁰ *See Mauga v. Lutu*, 10 Am. Samoa 2d 115, 119-20 (Trial Div. 1989) (quoting *Faiivae v. Mola*, 4 Am. Samoa 834, 836 (Trial Div. 1975)).

¹²¹ Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 Colum. Human Rights L. Rev. 189, 247 n.272 (1992).

¹²² *Cf.*, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹²³ *Id.*

¹²⁴ *Lajutok v. Kabua*, 3 Trust Terr. 630, 634 (App. Div. 1968); *Kenyul v. Tamangin*, 2 Trust Terr. 648, 650 (App. Div. 1964); *Bulele v. Loek*, 4 Trust Terr. 5, 16 (D.Marshall Is. 1968); *Basilius v. Rengiil*, 2 Trust Terr. 430 (D.Palau 1963).

¹²⁵ *Cf.*, e.g., *Mauga v. Lutu*, 10 Am. Samoa 2d 115, 119-20 (Trial Div. 1989); *Toleafoa v. Imo*, 7 Am. Samoa 2d 117, 121 (Land & Titles Div. 1988).

¹²⁶ *Cf.* e.g., *Reed v. Reed*, 404 U.S. 71, 76 (1971); *see also Mathews v. DeCastro*, 429 U.S. 181, 185 (1976).

¹²⁷ *Cf.*, e.g., *Mathews v. Lucas*, 427 U.S. 495, 510 (1976); *Mathews v. DeCastro*, 429 U.S. 181, 185 (1976).

¹²⁸ *Cf.*, e.g., *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972).

¹²⁹ *In Re Matai Title Sotoa*, 6 Am. Samoa 2d 91, 94 (App. Div. 1987).

¹³⁰ *Kepner v. United States*, 195 U.S. 100, 125 (1903) (citations omitted).

¹³¹ *See Wilkerson v. People*, 99 U.S. 345 (1879).

¹³² *Cf. Lochner v. New York*, 198 U.S.45, 53-54 (1905).

¹³³ *See Hudson v. McMillan*, 117 L. Ed 2d 156 (1992) (Thomas, J., dissenting); and *Helling v. McKinney*, 125 L. Ed 2d 22 (1993) (Thomas, J., dissenting). Unlike the *custom protecting* clauses of American Samoa's Constitution and Cession Treaties, I believe that the Eighth Amendment to the U.S. Constitution was a *custom enacting* provision, and therefore intended to "carve" common law notions of cruel and unusual punishment "into stone," rather than to facilitate a continuing re-interpretation of a changing custom. *See Reid*, supra note 111. Notwithstanding this difference, Eighth Amendment jurisprudence remains a valuable illustration of the dangers inherent in judicial interpretation of custom.