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# ARTICLES

## BORN TO RUN: CAN AN AMERICAN SAMOAN BECOME PRESIDENT?

Adam Clanton\*

### ABSTRACT:

*American Samoa holds the unique distinction of being the only American jurisdiction whose residents have been declared by Congress to be U.S. “nationals” at birth, and not U.S. “citizens.” This article examines the question of whether an American born on U.S. soil as a “national” can become president within the meaning of the “natural born citizen” clause of Article II, Section I of the United States Constitution, or whether Congress can, by statute, deprive an American Samoan of presidential eligibility. The article explores the uphill battle an American Samoan candidate will face in light of Congress’ broad Article IV power over U.S. territories and case law surrounding the Fourteenth Amendment’s citizenship clause, and details legal avenues that may prove successful for presidential eligibility. The article argues that even if an American Samoan were technically ineligible under Article II, jurisdictional doctrines of political question and standing to challenge presidential elections, accompanied by possible Congressional reluctance to nullify an election, may prevent litigation from arising in the first place, and allow the ineligible candidate to prevail in obtaining the presidency.*

### TABLE OF CONTENTS

I. INTRODUCTION .....	136
II. A POLITICAL AND HISTORICAL SNAPSHOT OF AMERICAN SAMOA .....	138

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III. ARTICLE II AND AMERICAN SAMOAN ELIGIBILITY .....	141
IV. ARTICLE IV AND FOURTEENTH AMENDMENT HURDLES .....	148
A. THE FOURTEENTH AMENDMENT AS A BAR TO AMERICAN SAMOAN ELIGIBILITY .....	151
B. THE FOURTEENTH AMENDMENT AS A SURMOUNTABLE HURDLE.....	154
V. STANDING AND POLITICAL QUESTION ISSUES .....	159
A. STANDING LIMITATIONS AND THEIR BENEFITS TO THE AMERICAN SAMOAN CANDIDATE.....	160
B. THE POLITICAL QUESTION DOCTRINE .....	167
1. <i>It Is Unclear How a Court Would Resolve the Political Question Issue</i> .....	169
2. <i>Either Interpretation of the Political Question Issue May Benefit the Candidate</i> .....	171
VI. AN ALTERNATE AVENUE FOR ARTICLE II ELIGIBILITY .....	173
VII. CONCLUSION.....	175

## I. INTRODUCTION

Article II, Section 1 of the United States Constitution sets forth the well-known legal maxim that “[n]o Person except a natural born Citizen . . . shall be eligible to the Office of President.”<sup>1</sup> This section has been interpreted to stand for the general proposition that those born on American soil may serve as president, while those who are foreign born may not.<sup>2</sup> But the rule is not as simple as that. Indeed, if one happens to have had the fortune of being born in the U.S. Territory of American Samoa, he is born on American soil, but strangely, may not be eligible under Article II. American Samoans hold the unique distinction of being the only Americans in any U.S. state or territory, whom Congress has given the status of U.S. “national” and not U.S. “citizen” at birth.<sup>3</sup> As Justice Ruth Bader Ginsburg has ob-

1. U.S. CONST. art. II, § 1, cl. 4.

2. See Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 BYU L. REV. 927, 928 (2005) (“[T]he Constitution preserves the presidency for those born within the boundaries of the United States.”); Christina S. Lohman, *Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause*, 36 GONZ. L. REV. 349, 349 (2000) (observing that the presidency has been available to those “born within the territory of the United States.”).

3. See 8 U.S.C. §§ 1408 (2006), § 1101(a)(29) (2006) (declaring American Samoans as “nationals” and “not citizens.” Congress has granted citizenship status to all other territorial residents.). Compare with 8 U.S.C. § 1402 (2006) (persons born in Puerto Rico are citizens); 8 U.S.C. § 1403 (2006) (persons born in Panama

served, “one can be a national of the United States and yet not a citizen. The distinction has little practical impact today, however, for the only remaining noncitizen nationals are residents of American Samoa . . . .”<sup>4</sup>

While Justice Ginsburg is correct that only a small subset of the American population is affected by this classification, to the extent that an American Samoan ever decides to run for president, and presents a viable candidacy, she misses the mark in her conclusion that the distinction has little practical impact, for such a candidacy directly calls into question how this bizarre statutory classification would fare against the constitutional backdrop of Article II. This article examines the question of whether a person born in the United States as a “national” – that is, a person born in the U.S. Territory of American Samoa – can become President of the United States, and concludes that, despite an uphill legal battle, there is a legal pathway to obtaining the presidency.

After providing a historical and cultural backdrop of American Samoa in Section II of this article, Section III examines Article II and the legal viability of an American Samoan candidacy by looking at English common law, Supreme Court precedent, and the “original meaning” of the phrase at the time of its implementation. This section argues that when considered in isolation, Article II can be broadly construed to include all those born on American soil owing allegiance to the U.S. government, including those born as U.S. “nationals” in American Samoa. Section IV highlights a different set of legal obstacles, demonstrating that when Article II is considered in conjunction with the meaning of citizenship under the Fourteenth Amendment and Congress’ Article IV powers, Congress may have the authority to restrict who is regarded as a citizen by statute, and thus limit presidential eligibility under Article II. While the section explores the difficulties presented by the Fourteenth Amendment, it shows that these difficulties may not be insurmountable, and offers a legal avenue by which an American Samoan candidacy remains permissible. Section V shows that even if an American Samoan were barred from the presidency as a technical legal matter, he may find that the courts will not be an obstacle. Looking at the frivolous voter and elector lawsuits that attacked the “natural born Citizen” sta-

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Canal Zone are citizens); 8 U.S.C. § 1406 (2006) (persons born in the U.S. Virgin Islands are citizens); 8 U.S.C. § 1407 (2006) (persons born in Guam are citizens).

4. *Miller v. Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting) (Justice Ginsburg also mentioned Swains Island, but Swains is itself part of American Samoa.) *See* 48 U.S.C. § 1662 (2006) (“The sovereignty of the United States over American Samoa is extended over Swains Island, which is made a part of American Samoa.”).

tus of Barack Obama and John McCain, this section demonstrates that the courts may choose not to intervene into the issue because of standing problems, the political question doctrine, and because the Electoral College or Congress may find it politically inexpedient to overturn the will of the people.

It may seem absurd that someone born as an American can face so many hurdles in the quest to become president based on the simple and often overlooked problem that he or she has been statutorily classified as a “national” at birth. While the article hopes to bring to light the injustice posed by such a unique classification, it ultimately attempts to demonstrate that even amidst the status quo, a person born in American Samoa has a legal claim to the U.S. presidency.

## II. A POLITICAL AND HISTORICAL SNAPSHOT OF AMERICAN SAMOA

Most Americans know little, if anything, about the distant U.S. territory of American Samoa. American Samoa is an unincorporated territory located 2,500 miles southwest of Hawaii, 1,800 miles northeast of New Zealand, and is the only U.S. territory south of the equator.<sup>5</sup> The territory is admittedly small both geographically and demographically. Although the American Samoan land group is comprised of a total of five islands and two atolls, ninety-five percent of the territory’s approximately 65,000 residents live on the island of Tutuila, with the whole territory comprising an area slightly larger than Washington, D.C.<sup>6</sup> Historically, the Polynesian islands that make up present-day American Samoa were once the disputed territory of the United States, Great Britain, and Germany, but an 1889 treaty among these nations led Great Britain and Germany to renounce any claims of sovereignty.<sup>7</sup> On April 17, 1900, the United States further cemented its sovereign control over American Samoa by entering into a treaty with the local American Samoan chiefs of Tutuila, where those leaders agreed to cede “all sovereign rights” to the United States, and declared that they and their heirs would “obey and owe allegiance to the Government of the United

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5. See U.S. CENSUS BUREAU, *Brief History of the Island Areas* (last visited July 25, 2012), [http://www.census.gov/population/www/proas/pr\\_ia\\_hist.html](http://www.census.gov/population/www/proas/pr_ia_hist.html).

6. See *id.*; CIA, THE WORLD FACTBOOK: AMERICAN SAMOA (2009) (last visited July 25, 2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/aq.html>.

7. *Id.*; see also Tripartite Convention of 1899, U.S.-Gr. Brit.-Ger., art. II, Dec. 2, 1899 (last visited July 25, 2012), <http://www.house.gov/faleomavaega/treaties.shtml>.

States of America.”<sup>8</sup> A similar treaty was entered into between the United States and the chiefs of the remaining smaller American Samoan islands on July 14, 1904.<sup>9</sup> As a result of these treaties, Congress, under 48 U.S.C. § 1661, subsequently declared that “all civil, judicial, and military powers [over American Samoa] . . . shall be exercised in such manner as the President of the United States shall direct.”<sup>10</sup>

Despite being far flung and largely forgotten, American Samoan residents are today active participants in American life. At the outset, American Samoans have disproportionately sacrificed their lives for their country. During the war in Iraq, American Samoa incurred the highest per capita death toll of any state or territory in the United States, with a per capita death rate of more than four times that of Vermont, the state with the highest rate.<sup>11</sup> American Samoa ranks first, per capita, among all U.S. states and territories in the number of its residents that have volunteered to serve in the U.S. Army,<sup>12</sup> and when taking into account per capita military service in the Army, Navy, and Air Force combined, American Samoa ranks sixth among the states and territories, falling just ahead of Texas, and just behind Alabama.<sup>13</sup> In addition to their devotion to the U.S. military, American Samoans make a dent, albeit small, in the national political landscape. American Samoa has been represented in the U.S. House of Representatives since 1981, and is currently repre-

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8. Cession of Tutuila and Aunu'u, April 17, 1900 (last visited July 25, 2012), <http://www.house.gov/faleomavaega/cession-tutuila-aunuu.shtml> [hereinafter TUTU-ILA TREATY].

9. Cession of Manu'a Islands, July 14, 1904 (last visited July 25, 2012), <http://www.house.gov/faleomavaega/cession-manua.shtml> (local chiefs ceding “all sovereign rights thereunto belonging and possessed by us . . . unto the Government of the United States of America.”) [hereinafter MANUA TREATY].

10. 48 U.S.C. § 1661 (2006). President McKinley directed that the U.S. Navy control the territory. Exec. Order No. 125-A (Feb. 19, 1900). In 1951, control over the territory was transferred from the Navy to the U.S. Department of the Interior, where it remains today. Exec. Order No. 10,264, 16 Fed. Reg. 6,419 (June 29, 1951).

11. See Rep. Eni Faleomavaega, *American Samoan Death Rate in the Iraq War is Highest Among All States and Territories* (Mar. 23, 2009) (last visited July 25, 2012), [http://www.house.gov/list/press/as00\\_faleomavaega/asdeathratehighestamongstates.html](http://www.house.gov/list/press/as00_faleomavaega/asdeathratehighestamongstates.html); see also StateMaster, *Military Statistics - Iraqi War Casualties By State* (last visited July 25, 2012), at [http://www.statemaster.com/graph/mil\\_ira\\_war\\_cas\\_percap-iraqi-war-casualties-per-capita/](http://www.statemaster.com/graph/mil_ira_war_cas_percap-iraqi-war-casualties-per-capita/).

12. StateMaster, *Military Statistics - Total Army Recruits By State* (last visited July 25, 2012), [http://www.statemaster.com/graph/mil\\_tot\\_arm\\_rec\\_percap-total-army-recruits-per-capita/](http://www.statemaster.com/graph/mil_tot_arm_rec_percap-total-army-recruits-per-capita/) (examining 2004 total U.S. army recruits).

13. See StateMaster, *Military Statistics - Total Military Recruits: Army, Navy, Air Force By State* (last visited July 25, 2012), [http://www.statemaster.com/graph/mil\\_tot\\_mil\\_rec\\_arm\\_nav\\_air\\_for\\_percap-navy-air-force-per-capita/](http://www.statemaster.com/graph/mil_tot_mil_rec_arm_nav_air_for_percap-navy-air-force-per-capita/) (analyzing total military recruits in the Army, Army reserves, Navy, Navy reserves, and the Air Force in 2004).

sented in Congress by Representative Eni F.H. Faleomavaega.<sup>14</sup> While not able to vote on the House floor, Congressman Faleomavaega is able to vote in committee, and currently serves as a member of the U.S. House Committee on Foreign Affairs and the Committee on Natural Resources.<sup>15</sup> Although American Samoans, as U.S. territorial residents, are prohibited from voting in the general presidential election,<sup>16</sup> the political parties allow American Samoans to actively participate in the nomination process of presidential candidates, with American Samoa holding Democratic and Republican territorial caucuses during the presidential primaries,<sup>17</sup> and American Samoans serving as voting delegates at both the Republican and Democratic National

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14. See Pub. L. No. 95-556, 92 Stat. 2078 (1978); see also Rep. Eni Faleomavaega, *Law Authorizing That American Samoa be Represented in the U.S. Congress by a Delegate to the House of Representatives* (last visited July 25, 2012), <http://www.house.gov/faleomavaega/delegate.shtml>.

15. See Rep. Eni Faleomavaega, *Biography* (last visited July 25, 2012), <http://www.house.gov/faleomavaega/bio.shtml> (noting further that “Congressman Faleomavaega has been representing the territory of American Samoa in the United States Congress since 1989.”).

16. This results from the Constitution giving authority to the states, and not individuals, to elect the president. See *Igartua de la Rosa v. United States*, 229 F.3d 80, 83–84 (1st Cir. 2000) (right to vote reserved to states, and not territories); *Igartúa de la Rosa v. United States*, 32 F.3d 8, 9 (1st Cir. 1994) (“Only citizens residing in states can vote for electors and thereby indirectly for the President.”); Att’y Gen. of the Terr. of Guam v. United States, 738 F.2d 1017, 1019 (9th Cir. 1984) (“The right to vote in presidential elections under Article II inheres not in citizens but in states.”); see also U.S. CONST. amend. XII (“in choosing the President, the votes shall be taken by states”). Although the District of Columbia is not a state, its residents were given the right to vote in presidential elections under the Twenty-Third Amendment to the Constitution. See U.S. CONST. amend. XXIII, § 1 (permitting “Electors for District of Columbia.”).

17. As a result of these caucuses, John McCain received nine unpledged American Samoan Republican delegates in the 2008 election. The American Samoan Democratic delegates were divided on “Super Tuesday,” with Hillary Clinton receiving two pledged delegates, Barack Obama receiving one pledged delegate, and the remaining six delegates unpledged. *American Samoa Caucus Results* (2008), N.Y. TIMES (last visited July 25, 2012), at <http://politics.nytimes.com/election-guide/2008/results/states/AS.html>; see also Peter Grier, *Did Ron Paul get robbed of Virgin Island victory?*, CHRISTIAN SCIENCE MONITOR, March 14, 2012 at <http://www.csmonitor.com/USA/Politics/DC-Decoder/2012/0314/Did-Ron-Paul-get-robbed-of-Virgin-Island-victory> (noting that in 2012 “Romney won nine delegates from the caucus in American Samoa” and that American Samoa’s delegates “erase[d] [Romney’s] loss in the Alabama primary, where Rick Santorum won 19 delegates to Romney’s 12.”).

Conventions.<sup>18</sup> Outside of American Samoa itself, the former Mayor of Honolulu, Mufi Hanneman, is American Samoan.<sup>19</sup>

Historically, American Samoa was a familiar sight in NASA's Apollo space program in the 1960s and 1970s, with its remote waters and U.S. affiliation serving as an ideal splashdown point for the Apollo 10, 12, (the nearly ill-fated) 13, 14, and 17 missions upon their reentry into the Earth's atmosphere.<sup>20</sup> Apart from politics and history, American Samoa has over twenty-eight National Football League players claiming American Samoan heritage,<sup>21</sup> and over two-hundred American Samoans in NCAA Division I college football.<sup>22</sup> With a number so disproportionately large, ESPN has characterized American Samoa as being "to the NFL what the Dominican Republic is to Major League Baseball."<sup>23</sup> In short, American Samoans, although geographically isolated from their mainland counterparts, are very much Americans.

### III. ARTICLE II AND AMERICAN SAMOAN ELIGIBILITY

Despite American Samoa being a political and cultural part of the United States, the "natural born Citizen" requirement of Article II, on its face, appears to automatically place the presidency out of reach for an American Samoan presidential candidate for the simple reason that American Samoans are classified as "nationals" and not "citizens" at birth. Indeed, Congress has expressly singled out American Samoans as noncitizens, declaring under 8 U.S.C. § 1408 that persons "shall be nationals, but not citizens, of the United States at birth" if they are "born in an

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18. See Tom Curry, *Nominating, but Not Voting for President*, MSNBC (July 25, 2012, 11:05 AM), <http://www.msnbc.msn.com/id/24839059/> (observing that "each political party has decided to give people in the U.S. territories a role in the nominating process" and that "[i]n theory, delegates' votes from American Samoa . . . could decide who the presidential nominees are.").

19. Mayor Mufi Hannemann was born in 1954 in the Territory of Hawaii to an American Samoan mother and Samoan father. See Johnny Brannon, Hannemann Offers Local Roots, Wide Experience, and 'Passion,' THE HONOLULU ADVERTISER, Sept. 8, 2004, available at <http://the.honoluluadvertiser.com/article/2004/Sep/08/In/In08a.html>.

20. See David J. Herdrich, *Samoa and Apollo: Introduction*, (last visited July 25, 2012), [http://members.tripod.com/~tavita\\_herdrich/index.html](http://members.tripod.com/~tavita_herdrich/index.html); see also David J. Herdrich, *Apollo Splashdowns Near American Samoa*, (last visited July 25, 2012), [http://members.tripod.com/~Tavita\\_Herdrich/apollosummary.html](http://members.tripod.com/~Tavita_Herdrich/apollosummary.html).

21. See Greg Garber, *The Dominican Republic of the NFL*, ESPN, (May 28, 2002), <http://espn.go.com/gen/s/2002/0527/1387626.html>.

22. See Scott Pelley, *American Samoa: Football Island*, 60 MINUTES (last visited July 25, 2012), [http://www.cbsnews.com/2100-18560\\_162-6875877.html](http://www.cbsnews.com/2100-18560_162-6875877.html) ("From an island of just 65,000 people, there are more than 30 players of Samoan descent in the NFL and more than 200 playing Division I college ball.").

23. Garber, *supra* note 21.



outlying possession of the United States,” and clarifying under 8 U.S.C. § 1101(a)(29) that “[t]he term ‘outlying possessions of the United States’ means American Samoa and Swains Island.”<sup>24</sup> Yet, a closer look at Article II does not make ineligibility a foregone conclusion. As constitutional scholars Laurence Tribe and Theodore Olson have argued with regard to John McCain’s 2008 presidential candidacy and his birth in the Panama Canal Zone, “[i]f the Panama Canal Zone was sovereign U.S. territory at the time of Senator McCain’s birth, then that fact alone would make him a ‘natural born’ citizen under the well-established principle that ‘natural born’ citizenship includes birth within the territory and allegiance of the United States.”<sup>25</sup> Exploring this conclusion further, this section shows that Article II does not present a bar to a U.S. national.

No court has had occasion to definitively resolve what the phrase “natural born Citizen” actually means, and the Constitution, as originally adopted, does not define citizenship.<sup>26</sup> The Su-

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24. See *Miller v. Albright*, 523 U.S. 420, 467 n. 2 (1998) (Ginsburg, J., dissenting) (stating that the only remaining noncitizen nationals are residents of American Samoa); *U.S. v. Jimenez-Alcala*, 353 F.3d 858, 860 (10th Cir. 2003) (See comment above); *Igartúa De La Rosa v. United States*, 229 F.3d 80, 86 n. 12 (1st Cir. 2000) (per curiam) (Torruella, J., concurring) (same); see also *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 967-72 (9th Cir. 2003) (discussing history of term “national”).

25. 154 Cong. Rec. S3645-46 (Apr. 30, 2008) (statement of Sen. Leahy, incorporating opinion of Laurence H. Tribe and Theodore B. Olson) [hereinafter OLSON/TRIBE OPINION]. The fact that Tribe and Olson relied in part on this broad proposition may relate to the unique circumstances of John McCain’s 1936 birth. Unlike American Samoans, those born in the Panama Canal Zone are statutorily regarded as U.S. citizens. 8 U.S.C. § 1403(a) (1952) states that “[a]ny person born in the Canal Zone on or after February 26, 1904 . . . whose father or mother or both at the time of the birth of such person was or is a citizen of the United States, is declared to be a citizen of the United States.” While § 1403 would seem to cover McCain’s eligibility, it was enacted by Congress in 1937 to apply retroactively, and thus was not in effect to offer a statutory grant of citizenship on McCain’s actual day of birth. See Gabriel J. Chin, Commentary, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, 107 MICH. L. REV. FIRST IMPRESSIONS 1, 2 (2008) (last visited July 25, 2012), <http://www.michiganlawreview.org/assets/fi/107/chin.pdf>. Because § 1403 does not provide firm footing in the defense of McCain’s candidacy, Tribe and Olson may have preferred to rely on the broader view that all those born on U.S. territory are sufficiently “natural born Citizens” under Article II.

26. See *Hollander v. McCain*, 566 F. Supp. 2d 63, 65 (D.N.H. 2008) (“The phrase has . . . spawned a largely academic controversy.”); see also *Rogers v. Bellei*, 401 U.S. 815, 828 (1971) (“The Constitution as originally adopted contained no definition of United States citizenship.”); Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881 (1988) (last visited July 25, 2012), [http://heinonline.org/HOL/Page?public=false&handle=hein.journals/ylr97&men\\_hide=false&men\\_tab=citnav&collection=journals&page=881&id=900](http://heinonline.org/HOL/Page?public=false&handle=hein.journals/ylr97&men_hide=false&men_tab=citnav&collection=journals&page=881&id=900) (“the natural-born citizen clause of the Constitution has never been completely understood.”). A number of academic articles discuss the history behind the inclusion of this language in detail, focusing on the founder’s fears of foreign influence on the new U.S. government. See, e.g.,

preme Court itself has acknowledged that the Article II phrase is ambiguous, commenting in *Minor v. Happersett* that “[t]he Constitution does not, in words, say who shall be natural-born citizens” and that “[r]esort must be had elsewhere to ascertain that.”<sup>27</sup> In *United States v. Wong Kim Ark*, the Supreme Court elaborated on what that “elsewhere” source should be, stating that “[t]he Constitution nowhere defines the meaning of these words” but that “[t]he interpretation of the Constitution of the United States” should be read in accordance with the “language of the English common law.”<sup>28</sup> The modern Supreme Court has also taken an “originalist” interpretive approach, albeit in a slightly different vein, recommending that courts look at the meaning an ambiguous constitutional phrase would have had to the average person at the time of drafting. As the Court in *District of Columbia v. Heller* recently observed with regard to the Second Amendment:

[i]n interpreting this text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” . . . Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.<sup>29</sup>

Turning to the relevant historical understanding of the phrase, English common law refers to “natural born subjects,” and not “natural born citizens,” but adopts the view that those born on sovereign soil are “natural born.” This principle can be traced back to as early as 1608 to *Calvin’s Case*, in which Sir Edward Coke wrote that those who “are born under the obedience, power, faith, ligealty, or ligeance of the King, are natural sub-

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Lohman, *supra* note 2, at 352-53; Seymore, *supra* note 2, at 937-41; J. Michael Medina, *The Presidential Qualification Clause in this Bicentennial Year: The Need to Eliminate the Natural Born Citizen Requirement*, 12 OKLA. CITY. UNIV. L. REV. 253, 258-61 (1976) (last visited July 25, 2012), <http://heinonline.org/HOL/Page?handle=hein.journals/okcu12&collection=journals&id=263>.

27. *Minor v. Happersett*, 88 U. S. 162, 167 (1874). This ambiguity has prompted the label, by some, as the “Constitution’s worst provision.” See Lohman, *supra* note 2, at 349.

28. *Wong Kim Ark v. United States*, 169 U. S. 649, 654-55 (1898) (quoting *Smith v. Alabama*, 124 U. S. 465, 478 (1888)).

29. *D.C. v. Heller*, 554 U.S. 570 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)); *Heller* involved the interpretation of the phrase “right to keep and bear arms” which was faced with a similar dearth of judicial interpretation. In this case Justice Scalia’s approach would be a bit odd in that it asks, in part, what the word “citizen” would have meant to an “ordinary citizen.” See also Lawrence B. Solum, Commentary, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22, 24 (2008).

jects, and no aliens.”<sup>30</sup> Blackstone’s *Commentaries*, described by the Supreme Court as “the most satisfactory exposition of the common law of England,”<sup>31</sup> and by James Madison as “a book which is in every man’s hand,”<sup>32</sup> similarly observed that “[n]atural-born subjects are such as are born within the dominions of the crown of England, that is, within the ligeance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it.”<sup>33</sup> The Supreme Court itself has subsequently emphasized that this concept of “natural born subjects” includes those who are born in the sovereign’s far-away territorial possessions, with Justice Thompson acknowledging in *Inglis v. Trustees of Sailor’s Snug Harbor*, that “[i]t is universally admitted both in the English courts and in those of our own country that all persons born within the colonies of North America whilst subject to the Crown of Great Britain were natural born British subjects,”<sup>34</sup> and Justice Story likewise concluding that “[b]efore the Revolution, all the colonies constituted a part of the dominions of the King of Great Britain, and all the colonists were natural born subjects.”<sup>35</sup>

With this historical understanding, widely disseminated among ordinary American citizens in the form of Blackstone’s *Commentaries*, the American Samoan presidential candidate would undoubtedly be classified as a “natural born subject” as that term was commonly understood. First, as 48 U.S.C. § 1662 expressly states, there is “sovereignty of the United States over American Samoa.” Those born in American Samoa are thus undoubtedly born in U.S. sovereign territory.<sup>36</sup> Moreover, those born in American Samoa owe allegiance to the United States. Indeed, in the treaty ceding the island of Tutuila to the United

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30. Calvin’s Case, (1608) 77 Eng. Rep. 377, 383 (K.B.) (July 25, 2012, 11:34 AM), [http://www.heinonline.org/HOL/Page?handle=hein.engrep/engrf0077&collection=engrep&set\\_as\\_cursor=0&men\\_tab=srchresults&id=387](http://www.heinonline.org/HOL/Page?handle=hein.engrep/engrf0077&collection=engrep&set_as_cursor=0&men_tab=srchresults&id=387); see also *id.* at 382 (“ligeance and obedience is an incident inseparable to every subject: for as soon as he is born he oweth by birth-right ligeance and obedience to his Sovereign.”); Seymore, *supra* note 2, at 934 (discussing Calvin’s Case).

31. *Schick v. United States*, 195 U.S. 65, 69 (1904). The Court noted further “that undoubtedly the framers of the Constitution were familiar with it.” *Id.*

32. Solum, *supra* note 29, at 26; see also *Schick*, 195 U.S. at 69 (noting that “more copies of the work had been sold in this country than in England.”). These observations obviously lend support to Justice Scalia’s “original meaning” approach.

33. Solum, *supra* note 29, at 26.

34. 28 U. S. 99, 120 (1830).

35. *Id.* at 157.

36. See also MANUA TREATY, *supra* note 9 (observing that the American Samoan islands would fall “under the full and complete sovereignty of the United States of America” and had “become a part of the territory of said United States.”); see also *Boyd v. Nebraska ex Rel. Thayer*, 143 U.S. 135, 162 (1892) (“the nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass.”).

States, the local leaders specifically declared that they would “obey and owe allegiance to the Government of the United States of America.”<sup>37</sup> Today, under 8 U.S.C. § 1101(a)(22) Congress itself has defined a “national” as “a person who . . . owes permanent allegiance to the United States.”<sup>38</sup> Having been born under the dominion of, and with allegiance to the United States government, an American Samoan, at the very least, satisfies the understood definition of a “natural born subject.”

Admittedly, Article II uses the phrase “natural born Citizen” and not “natural born subject.” Does use of the word “citizen” give Article II a meaning different from the English common law understanding? Likely not. Supreme Court case law demonstrates that the word “citizen” was deliberately meant to distinguish those living under a republican form of government from those “subjects” living under a monarchy, and that the concept of who was “natural-born” was not clouded by this change in language. As early as 1793, Chief Justice John Jay made clear that the word “citizen” as used in the Constitution was a purposeful departure from the English word “subject,” and embodied a different political concept. He stated in *Chisholm v. Georgia* that:

[i]t will be sufficient to observe briefly that the sovereignties in Europe, and particularly in England, exist on feudal principles. That system considers the Prince as the sovereign, and the people as his subjects; it regards his person as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a Court of justice or elsewhere. . . . No such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, *but they are sovereigns without subjects* . . . and have none to govern but themselves; *the citizens of America are equal as fellow citizens*, and as joint tenants in the sovereignty.<sup>39</sup>

Justice James Wilson stated the sentiment more directly, concluding in the same case that the terms “sovereign” and “subject” have “no object in the Constitution of the United States.”<sup>40</sup>

Although the Court has made clear that the words “subject” and “citizen” were understood to convey different meanings as to

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37. See TUTUILA TREATY, *supra* note 8. The Manua Treaty is not as direct, but the Samoans there agreed to “cede[ ] territory unto the Government of the United States of America, to erect the same into a territory or district of the said Government.” MANUA TREATY, *supra* note 9.

38. The status of American Samoans is therefore distinguishable from that of the Native American in *Elk v. Wilkins*, 112 U.S. 94 (1884), who the Supreme Court regarded as a non-citizen, having being born in U.S. territory, but owing allegiance to a foreign tribal sovereign.

39. 2 U.S. 419, 471-72 (1793) (emphasis added).

40. *Id.* at 456.

an individual's role within his own particular political society, the Court has also noted that when used in the Constitution, the word "citizen" did not indicate a departure from the earlier English common law, but was understood simply to refer broadly to a person's membership in his political community. As the Court reasoned in *Minor v. Happersett*:

[f]or convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words 'subject,' 'inhabitant,' and 'citizen' have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense *it is understood as conveying the idea of membership of a nation, and nothing more.*<sup>41</sup>

Following this reasoning behind substituting the word "citizen" with "subject," a "natural born citizen" can be regarded as conceptually indistinguishable from a "natural born subject" in that both phrases refer simply to membership in their respective political systems based on one's birth there. American case law bears this out. For example, in *United States v. Rhodes*, Supreme Court Justice Noah Swayne, sitting on circuit court, observed that "[a]ll persons born in the allegiance of the King are natural

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41. 88 U.S. 162, 166 (1875) (emphasis added). This view is also evident in the majority opinion of the infamous *Dred Scott* case. See *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1856) (noting that "'people of the United States' and 'citizens' are synonymous terms, and mean the same thing."). Similarly, in *United States v. Cruikshank*, 92 US 542, 549 (1875), the Court defined the word "citizen" broadly, stating that:

[c]itizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights.

See also *Minor*, 88 U.S. at 165-66 ("the Constitution of the United States did not in terms prescribe who should be citizens of the United States. . . . The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association."); *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 968 (9th Cir. 2003) ("[T]he term national was used to include these noncitizens in the larger group of persons who belonged to the national community."); but c.f. *Boyd*, 143 U.S. at 158 (1892) (noting that despite the language in *Cruikshank*, "[t]here is no attempt in this definition . . . to exclude those members of the state who are citizens in the sense of participation of civil rights, though not in the exercise of political functions.").

born subjects, and all persons born in the allegiance of the United States are natural born citizens. . . . [w]e find no warrant for the opinion this great principle of the common law has ever been changed in the United States.”<sup>42</sup> In the 1838 case of *State v. Manuel*, the Supreme Court of North Carolina likewise recognized that:

[b]efore our Revolution, all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, were native-born British subjects; those born out of his allegiance were aliens. . . . The term ‘citizen,’ as understood in our law, is precisely analogous to the term ‘subject’ in the common law . . .<sup>43</sup>

Similarly, Justice Story has elsewhere commented that “[p]ersons who are born in a country are generally deemed *citizens and subjects of that country*.”<sup>44</sup> Other authorities indicate the same.<sup>45</sup>

In light of all this, one can see that despite having been ambiguously labeled by Congress as a U.S. “national,” an American Samoan presidential candidate should find solace that the common understanding of the Article II “natural-born Citizen” favors his presidential eligibility, and that Laurence Tribe and Theodore Olson are correct in their discussion of John McCain’s candidacy that “‘natural born’ citizenship includes birth within the territory and allegiance of the United States.”<sup>46</sup> Indeed, in

42. 27 F. Cas. 785, 789 (C.C. Ky. 1866) (quoted by *Wong Kim Ark*, 169 U. S. at 662-63).

43. *State v. Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) 20, 24-26 (1838).

44. See *Wong Kim Ark*, 169 U. S. at 661 (extensively discussing the relationship between English common law and citizenship in the context of the Fourteenth Amendment).

45. *Id.* at 658 (“[t]he same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the constitution as originally established.”); *Dred Scott*, 60 U. S. at 576 (1857) (Curtis, J. dissenting) (“The first section of the second article of the Constitution uses the language, ‘a natural-born citizen.’ . . . Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth.”); *Gardner v. Ward*, 2 Mass. 244 (1805) (“a man, born within the jurisdiction of the common law, is a citizen of the country wherein he is born.”); *Lynch v. Clarke*, 1 Sandf.Ch. 583 (1844) (“every person born within the dominions and allegiance of the United States, whatever the situation of his parents, is a natural born citizen.”) (cited by *Wong Kim Ark*, 169 U. S. at 664); 113 CONG. REC. 15875, 15877 (Jun. 14, 1967) (statement of Rep. Dowdy discussing the presidential candidacy of George Romney, born in Mexico to U.S. citizen parents); James C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 CONST. COMMENT. 575 (Winter 2000) (“[a]t common law, children born within the sovereign’s territorial jurisdiction were citizens at birth.”); Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1, 7 (1968) (“‘[n]atural-born citizen’” doubtless was regarded as equivalent to ‘natural-born subject,’ adjusted for the transition from monarchy to republic.”).

46. See OLSON/TRIBE OPINION, *supra* note 25.

light of the Supreme Court's "original meaning" directive in *District of Columbia v. Heller*, a court examining Article II will likely not focus extensively on Congress' contemporary label of American Samoans as "nationals" when undertaking its Article II analysis because rejection of a candidacy based on this contemporary statutory classification would improperly rely on a "technical meaning[ ] that would not have been known to ordinary citizens in the founding generation."<sup>47</sup> Because Congress has both declared U.S. sovereignty over American Samoa, and declared that an American Samoan "owes permanent allegiance to the United States,"<sup>48</sup> a court guided by the *Heller* analysis could reasonably conclude that the "natural born citizen" clause is not a legal hurdle to the American Samoan, and that the candidate meets all the Article II eligibility requirements.

#### IV. ARTICLE IV AND FOURTEENTH AMENDMENT HURDLES

While the discourse above appears to present a relatively clean resolution of the question of American Samoan eligibility, the problem with the Tribe-Olson approach is that Article II does not stand alone. Critics observe that other constitutional provi-

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47. *D.C. v. Heller*, 554 U.S. 570 (2008).

48. 8 U.S.C. § 1101(a)(22); see also Lisa Maria Perez, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1056 (2008) ("[t]here is no question that persons born in the so-called unincorporated territories are born 'within the allegiance' of the United States as that term was understood at common law."); Some have argued further that birth in the Panama Canal Zone, an area under the control of the United States, but outside its jurisdiction, would also confer "natural born" citizen status. See Stephen E. Sachs, Commentary, *Why John McCain Was a Citizen at Birth*, 107 MICH. L. REV. FIRST IMPRESSIONS 49 (2008). Jill Pryor contends that the ambiguity of the "natural born Citizen" clause must evince an intent by the founders to leave the specific definition of the phrase up to Congress in its naturalization powers. Pryor, *supra* note 26, at 883-84. Under her approach, then, courts should be "[l]ooking to contemporary law rather than early American or British law," and determine who is a "natural born" citizen based on who Congress has given that label. *Id.* at 898. Adopting this method, Puerto Ricans would be "natural born" based on Congress giving them citizenship by statute, and even further, she acknowledges, Congress could permissibly declare "that all heirs to the throne of England will henceforth be citizens of the United States at birth and thus eligible for the presidency." *Id.* at 898-99. If accepted, her approach would pose an obvious obstacle to the American Samoan candidate, for Congress has not declared them citizens. The Pryor approach is not without flaws, however. Despite her novel call to look at the meaning of the phrase in light of contemporary naturalization statutes, we have seen that the Supreme Court has instructed courts to examine the provision within the context of early common law and its "original meaning." See *Wong Kim Ark v. United States*, 169 U. S. 649, 654-55 (1898). Moreover, others are critical of Pryor's analysis, observing that "her approach allows Congress to change a constitutional provision without following the amendment procedures set forth in Article V of the Constitution . . . [and] suggests that the meaning of the Constitution is alterable at the whim of Congress." Seymore, *supra* note 2 at 354.

sions reveal that Congress' decision to label American Samoans as non-citizens may be much more critical to the inquiry of Article II eligibility than the previous section suggests.<sup>49</sup> Although no court has squarely analyzed the question of presidential eligibility, these critics' views have some merit, but may nevertheless be surmountable for the American Samoan candidate.

Looking at the Constitution more holistically, the ultimate question is how Article II should be construed in light of Congress' power over the territories granted under Article IV, as well as judicial interpretations of the Fourteenth Amendment citizenship clause as it relates to the U.S. territories. Article IV, Section 3, known as the Territorial Clause, broadly declares that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>50</sup> On its face, the Territorial Clause does not make clear whether Congress' Article IV statutory power is so absolute that Congress can take away by statute the constitutional rights afforded to other Americans in the states, or instead whether Congress' legislative authority in the territories is proscribed by certain basic constitutional guarantees. Of course, if the former is true, then Congress' statutory decision to deny birthright citizenship to American Samoans may be a legitimate legislative exercise that can properly deprive American Samoans of Article II eligibility.

Case law reveals that the answer lies somewhere in the middle – that is, Congress has the power under Article IV to deprive territorial residents of some, but not all, rights, depending both upon which U.S. territory is affected, and the nature of the rights at issue. At the turn of the Twentieth Century, as America began to acquire overseas possessions like Puerto Rico, the Philippines, and American Samoa, the Supreme Court adopted the "Insular Doctrine." Under the Court's solution, in territories labeled by Congress as "incorporated" – such as those in the contiguous United States that Congress had designated for statehood – all the guarantees of the Constitution would automatically apply in full force, and could not be undermined by Congressional legislation, effectively granting the incorporated territorial resident the same political rights as Americans living in the states.<sup>51</sup> However, for territories labeled by Congress as "unincorporated" – territories not yet designated for statehood, such as Puerto Rico

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49. Chin, *supra* note 25, at 4 ("natives of unincorporated territories are not citizens").

50. U.S. CONST. art. IV, § 3, cl. 2; *see also* Downes v. Bidwell, 182 U. S. 244, 250 (1901) (discussing this provision).

51. *See* Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 600 n.30 (1976).



and American Samoa – only “fundamental” constitutional rights would automatically apply, giving Congress wide latitude to enact legislation affecting the unincorporated resident that runs counter to certain constitutional rights guaranteed elsewhere in the United States.<sup>52</sup> That Congress can permissibly create a system of tiered constitutional applicability based on the geographical location of the particular American resident has been justified by the Supreme Court, somewhat disappointingly, on racial grounds. As the Court observed in *Downes v. Bidwell*:

[i]t is obvious that in the annexation of outlying and distant possessions, grave questions will arise from differences of race, habits, laws, and customs of the people . . . which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race or by scattered bodies of native Indians.<sup>53</sup>

Regardless of how distasteful a racial justification of a tiered system of constitutional applicability may seem today, the Insular Cases remain good law,<sup>54</sup> and the relevant question surrounding the inquiry of American Samoan presidential eligibility requires analysis of whether Article II “natural born Citizen” status should be considered a “fundamental” right in American Samoa that cannot be abrogated by Congress’ exercise of its Article IV statutory authority over the territory.

In taking on the unenviable task of discerning (and explaining) whether a particular right articulated in the Constitution is “fundamental” and applicable in the unincorporated territories within the meaning of the Insular Cases, courts have adopted several formulas.<sup>55</sup> One popular judicial approach has been taken from Justice Harlan’s concurrence in *Reid v. Covert*, and calls on courts to ask whether, based on “the particular local setting, the practical necessities, and the possible alternatives,” ap-

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52. *Id.* Others in the line of Insular Cases include *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138, 146 (1904); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 183 U.S. 151, (1901). See generally *Armstrong v. United States*, 182 U.S. 243 (1901); *The Diamond Rings*, 183 U.S. 176 (1901); Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779, 781 (1992).

53. 182 U.S. at 282.

54. See generally *Boumediene v. Bush*, 553 U.S. 723 (2008); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990); *Torres v. Puerto Rico*, 442 U.S. 465 (1979); see generally *Rayphand v. Sablan*, 95 F. Supp. 2d 1133 (D.N.Mar.I. 1999).

55. Courts have concluded that the question of whether a right is “fundamental” in the territories is different than the question of whether a right is a “fundamental” right incorporated to the states through the Due Process Clause of the Fourteenth Amendment, and thus some rights that may be “fundamental” in the states, may not be so in the territories. See *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975).

plication of the provision would be “impractical and anomalous” in the territory.<sup>56</sup> If, after a thorough examination of conditions on the ground, the court finds that the effect of the provision’s application would be impractical and anomalous, the provision should be considered *not* fundamental and inapplicable. Another approach, adopted from the Insular Case of *Dorr v. United States*, urges courts not to look at the unique cultural circumstances of the particular territory, but to instead analyze from a more general philosophical standpoint whether the constitutional provision involves “those fundamental limitations in favor of personal rights . . . [which are] the basis of all free government.”<sup>57</sup> If the constitutional provision at issue does affect a universal human freedom, the right is “fundamental.” Obviously, the choice of which approach to take, the difficulty in rendering a philosophical valuation of liberties, and the subjective evaluation of cultural conditions on the ground can lead to confusion, with no clear roadmap in place as to what language of the Constitution is in fact “fundamental” and what is dispensable. Indeed, circuit splits have arisen when applying the Insular Cases analysis, with, for example, the District of Columbia Circuit concluding that a territorial defendant’s Sixth Amendment right to a criminal jury trial is “fundamental,” and the Ninth Circuit concluding that it is not.<sup>58</sup>

While no direct precedent exists to assist a court in deciding whether Article II “natural born citizen” eligibility is “fundamental” and whether it automatically extends to American Samoans, the case law surrounding the citizenship clause of the Fourteenth Amendment may prove problematic.

#### A. THE FOURTEENTH AMENDMENT AS A BAR TO AMERICAN SAMOAN ELIGIBILITY

Under the Fourteenth Amendment, “all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein

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56. See *id.* (citing *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring)).

57. 195 U.S. 138, 146-47 (1904); see also *Northern Mariana Islands v. Atalig*, 723 F.2d 682, 690 (9th Cir. 1984). In *Atalig*, the court asserted that “a cautious approach . . . is appropriate in restricting the power of Congress to administer overseas territories.” *Id.*

58. *Morton*, 520 F.2d at 1147 (instructing district court on remand to ask whether “circumstances are such that trial by jury [in American Samoa] would be impracticable and anomalous.”); *King v. Andrus*, 452 F.Supp. 11, 17 (D.D.C. 1977) (jury trial fundamental right because “trial by jury in American Samoa . . . is not now ‘impractical and anomalous.’”); *Atalig*, 723 F.2d at 690 (right to jury trial not fundamental right).

they reside.”<sup>59</sup> If courts were left only with the Supreme Court’s determination in *Wong Kim Ark* that this citizenship clause “affirms the ancient and *fundamental* rule of citizenship by birth within the territory, in the allegiance and under the protection of the country,”<sup>60</sup> it would seem fair to conclude that the Fourteenth Amendment citizenship is a “fundamental” right applicable in American Samoa. However, in the later Insular Case of *Downes v. Bidwell*, the Supreme Court expressed two reasons why the citizenship clause may not extend citizenship to those living in the unincorporated territories. First, the *Downes* Court seemed to separate birthright citizenship extended to those born in the states from citizenship in the territories, observing that:

the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be . . . There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States.<sup>61</sup>

Under this rationale, racist as it may be, Congress has no obligation to extend constitutional rights of citizenship to those with foreign traditions newly within its borders. In other words, under *Downes*, Fourteenth Amendment citizenship is not a “fundamental” right, and Article IV powers supersede Fourteenth Amendment guarantees if the treaty of annexation so permits.

The *Downes* court also articulated a second rationale for concluding that territorial residents are not automatically afforded citizenship, concluding that the language of the Fourteenth Amendment’s citizenship clause, *by its own express terms*, fails to extend the rights of citizenship to those who do not live in the states. The *Downes* Court observed that in dissecting the language of the Fourteenth Amendment’s citizenship clause, the language of the Thirteenth Amendment provides particular in-

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59. The qualifying language “and subject to the jurisdiction thereof” was interpreted by the Supreme Court as distinguishing Native Americans, who were regarded as living in the mainland United States, but not subject to the jurisdiction of the federal government, from U.S. citizens living in the states. See *Elk*, 112 U.S. at 102 (1884).

60. 169 U.S. 649, 693 (1898) (emphasis added).

61. 182 U.S. 279-80.

structive guidance. Under the Thirteenth Amendment, slavery is prohibited “within the United States, or in any place subject to their jurisdiction.”<sup>62</sup> To the *Downes* Court, this Thirteenth Amendment distinction between the United States and additional jurisdictional holdings meant that the Constitution regards territorial holdings as separate and apart from the United States itself. Because, the Fourteenth Amendment guarantees citizenship only to those born “in the United States,” the *Downes* Court reasoned it is not as expansive as the anti-slavery clause of the Thirteenth Amendment, and thus does not further extend the right of citizenship to those born in a place merely subject to U.S. jurisdiction. In short, under this approach, the territories are not part of the “United States” within the meaning of the Fourteenth Amendment, and thus the Fourteenth Amendment grant of citizenship has no bearing there.<sup>63</sup>

Making matters worse, although the American Samoan candidate could correctly argue that the Fourteenth Amendment discussion in *Downes*, a case examining whether the revenue clause of Article I, Section 8, was applicable in Puerto Rico,<sup>64</sup> is merely *dicta*, a recent body of federal case law directly addressing the Fourteenth Amendment question has embraced the *Downes* interpretation. For example, in *Valmonte v. INS*, a resident of the Philippines born there during the time in which the Philippines was an unincorporated U.S. territory, argued that she was entitled to U.S. citizenship because Congress had violated the Fourteenth Amendment when it classified Filipino territorial residents as merely U.S. “nationals”<sup>65</sup> – the same status held today by American Samoans. Adopting verbatim the first rationale in *Downes*, the Second Circuit stated that the “‘power to acquire territory by treaty implies . . . the power to . . . prescribe upon what terms the United States will receive its inhabitants.’”<sup>66</sup> Looking further at the 1898 Treaty of Paris, made between the United States and Spain and governing the conditions of acquisition of the Philippines, the Second Circuit reasoned that Congress could act under Article IV to label Filipinos as mere “nationals,” because the Treaty specifically contained language

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62. *Id.* at 251 (emphasis added).

63. *Id.* (“[I]t can nowhere be inferred that the territories were considered a part of the United States.”).

64. *Id.* at 287 (holding that Puerto Rico was “not a part of the United States within the revenue clauses of the Constitution.”).

65. *Valmonte v. INS*, 136 F.3d 914, 920 (2d Cir. 1998).

66. *Id.* at 920-21 (quoting *Downes*, 182 U.S. at 279).

that “the civil rights and political status of the native inhabitants [of the Philippines] . . . shall be determined by Congress.”<sup>67</sup>

Federal courts have also continued to embrace the second rationale in *Downes* that Fourteenth Amendment citizenship extends only to the states. For example, in *Rabang v. INS*, in which Filipino residents brought a similar Fourteenth Amendment challenge against U.S. “national” status before the Ninth Circuit, the court concluded, contrasting the language of the Fourteenth Amendment with that of the Thirteenth, that it is “incorrect to extend citizenship to persons living in United States territories simply because the territories are ‘subject to the jurisdiction’ or ‘within the dominion’ of the United States, because those persons are not born ‘in the United States’ within the meaning of the Fourteenth Amendment.”<sup>68</sup> The *Valmonte* court also adopted this reasoning, similarly concluding that U.S. “nationals” born in the Philippines “during its status as a United States territory were not ‘born . . . in the United States’ under the Fourteenth Amendment” and are thus “not a United States citizen by virtue of [their] birth in the Philippines during its territorial period.”<sup>69</sup> The Third Circuit has reached a similar conclusion when analyzing Filipino rights to citizenship.<sup>70</sup>

With these case law developments, a court has sufficient ammunition to conclude that an American Samoan, by analogy, does not qualify under Article II to become president. Congress has the authority to deny American Samoans Fourteenth Amendment citizenship under its Article IV powers. Because Congress may pick and choose the citizenship status of the residents of an acquired territory, it can be argued that American Samoans neither reside in the United States, nor are they guaranteed “natural born” status. If courts were to continue to embrace *Downes*, and apply the Fourteenth Amendment logic to Article II, the question of eligibility may be resolved in the negative based on Congress’ extensive Article IV authority.

#### B. THE FOURTEENTH AMENDMENT AS A SURMOUNTABLE HURDLE

Despite the critics who look at this Fourteenth Amendment case law and conclude that it must also mean that Article II does

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67. *Id.* at 920; see also John R. Hein, Comment, *Born in the U.S.A., But Not Natural Born: How Congressional Territorial Policy Bars Native-Born Puerto Ricans from the Presidency*, 11 PENN. J. CONST. L. 423, 446 (Jan. 2009) (discussing the significance of the Treaty of Paris language).

68. *Id.* at 453. In *Friend v. Reno*, 172 F.3d 638 (9th Cir. 1999), the Ninth Circuit reached the same conclusion.

69. *Valmonte*, 136 F.3d at 920.

70. See *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir.1998) (per curiam).

not apply to the territories,<sup>71</sup> the American Samoan candidate has ample authority to demonstrate that *Downes* does not serve as a bar to eligibility, and that Article II may yet be regarded as a “fundamental” right applicable in American Samoa.

First, the framework articulated in *Downes* that would appear to deny Fourteenth Amendment citizenship in the territories arguably favors Article II applicability in American Samoa. Accepting the first *Downes* rationale that the United States may define citizenship rights according to the applicable annexation treaty language, the case of American Samoa differs greatly from that of the Philippines in the *Valmonte* case. Neither the Treaty of Tutuila, nor the Treaty of Manua (governing American Samoa) contains a similar provision to that of the Treaty of Paris (governing the Philippines and Puerto Rico) that expressly gives Congress the power to define American Samoan citizenship.<sup>72</sup> To the contrary, the Treaty of Manua specifically affords American Samoans with political rights on par with those in states, asserting that “*there shall be no discrimination in the suffrages and political privileges between the present residents of said Islands and citizens of the United States dwelling therein.*”<sup>73</sup> Because Congress ratified the language of these treaties into law at 48 U.S.C. § 1661, it can be argued that, unlike the broad authority Congress afforded itself to regulate the political status of native inhabitants of the Philippines under the Treaty of Paris, Congress chose to exercise its treaty power over American Samoa in a limited manner such that it cannot deny American Samoans the right to presidential eligibility under Article II. In other words, even if *Downes* were to remain good law, it does not implicate

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71. See Hein, *supra* note 67 at 453 (relying on Fourteenth Amendment cases to conclude that “persons born in Puerto Rico cannot claim natural born citizenship through the common law principle of *jus soli* because Puerto Rico, as an unincorporated territory, was not made part of the United States in the fullest sense.”); Chin, *supra* note 25, at 5 (“persons born in the Canal Zone are not citizens under the citizenship clause of the Fourteenth Amendment because they were not born in ‘the United States.’ . . . Contrary to the Tribe-Olson Opinion, under existing Supreme Court decisions, Senator McCain’s birth in the Canal Zone, by itself, cannot make him a natural born citizen; it did not make him a citizen at all.”); Sarah Helene Duggin & Mary Beth Collins, ‘*Natural Born*’ in the USA: *The Striking Unfairness and Dangerous Ambiguity of the Constitution’s Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. REV. 53, 96 n.229 (2005) (concluding, without elaboration, that “American Samoans are not born United States citizens, but are ‘nationals’ who may subsequently become citizens . . . it is unlikely that Americans born in these territories are natural born citizens within the meaning of Article II.”); Pryor, *supra* note 26, at 882 n.7 (noting that territorial residents “are not born in the United States and would therefore be excluded under an interpretation that limits the clause to native borns.”).

72. See TUTUILA TREATY, *supra* note 8; MANUA TREATY, *supra* note 9.

73. MANUA TREATY, *supra* note 9.

Article II eligibility, because Congress has, by treaty, voluntarily extended equal political rights to American Samoan residents.

Second, the *Downes* Court's alternative textual rationale – that the Fourteenth Amendment, when read in conjunction with the Thirteenth Amendment, has no applicability to the territories – may also be used as fuel to *support* American Samoan Article II eligibility. The argument goes that a territorial resident is not himself actually living in a *state*, and that only those living in the states are entitled to citizenship under the limiting geographic language of the Fourteenth Amendment.<sup>74</sup> However, what may be true for the Fourteenth Amendment is not true for Article II. Indeed, if Article II had been drafted to include a geographic limitation restricting presidential eligibility to a “natural born Citizen of the United States,” the *Downes/Rabang* rationale would make sense, for those born in the territories would not be born in the “United States.” But applying the same approach to Article II leads to a broadening, rather than a narrowing, of citizenship for purposes of presidential eligibility. Under Article II, a person is eligible for the presidency if he is “a natural born Citizen, or a Citizen of the United States at the time of the Adoption of this Constitution.”<sup>75</sup> Article II, then, itself makes an internal textual distinction, ensuring that the narrow class of founders, as citizens of the “United States” are eligible, regardless of where born, but that thereafter, a broader class of “natural born” citizens, are also eligible, with no restriction as to whether they are specifically born in the states or territories. That the provision is itself conscious of the limiting geographic language is evident, because it is included in the latter part of the sentence, but not the former. In short, while the *Downes/Rabang* textual analysis may limit the scope of citizenship under the Fourteenth Amendment, the same argument may be used as textual evidence to show that Article II was drafted more broadly to include those born in any American territory, regardless if it was part of a state.<sup>76</sup>

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74. *Rabang v. INS*, 35 F.3d 1449, 1453 (9th Cir. 1994).

75. U.S. CONST. art. II, § 1, cl. 4 (emphasis added).

76. A court could also align Article II with the Fourteenth Amendment by concluding that the dicta in *Downes* wrongly concluded that U.S. territories were not part of the United States. This approach – to reject, rather than distinguish the circuit courts' decisions – follows the vigorous dissent of Judge Pregerson in *Rabang*. Judge Pregerson reasoned that the Ninth Circuit's acceptance of a geographic restriction in the scope of the phrase “United States” in the Fourteenth Amendment ran against the Supreme Court's discussion in *Wong Kim Ark*, that “the Citizenship Clause ‘affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country. . . .’” 35 F.3d at 1458 (Pregerson, J., dissenting) (quoting *Wong Kim Ark*, 169 U.S. at 693). Adhering to this position, the American Samoan candidate can argue that *Rabang* wrongly interpreted the Fourteenth Amendment, that the Fourteenth Amendment guaran-

Third, an American Samoan candidate may prevail by arguing that *Downes* is an outdated case with racial underpinnings that should today be disregarded. Some courts, including the Supreme Court, have hinted that the doctrine relies on antiquated values that will no longer be readily embraced. As the Court stated in *Reid v. Covert*:

it is our judgment that neither the [Insular] cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.<sup>77</sup>

Accordingly, while a court over a hundred years ago may have been willing to deny the extension of constitutional protections to those living on American soil based, in part, on whether those people were “savages or civilized,”<sup>78</sup> a modern court, faced with this observation, may be unwilling, in a case of first impression, to breathe life back into the Insular Cases by concluding that Article II rights are not “fundamental” and may be denied to a certain group of U.S. residents. That a doctrine with such racial

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tees territorial residents citizenship by virtue of birth on sovereign soil, and in turn, makes them eligible under the “natural born Citizen” clause of Article II. As *Wong Kim Ark* sought to interpret the Fourteenth Amendment, and *Downes* only addressed it in *dicta*, it may be reasonable that the Supreme Court would give more weight to the former in interpreting the meaning of the provision, and thus credit Judge Pregerson’s position. See also *Perez*, *supra* note 48, at 1055-56 (“it is readily apparent that birth ‘in the United States’ within the meaning of the Fourteenth Amendment is tantamount to birth in ‘the King’s dominion’ at common law. . . . [and that] the *Downes* Court’s novel interpretation of the term ‘United States’ was an impermissible modification of the Fourteenth Amendment.”). Moreover, some scholars have noted that the deprivation of Fourteenth Amendment citizenship to territorial residents is an identical injustice to the former denial of citizenship to black Americans imposed in the long-discredited *Dred Scott* decision. See *id.* at 1058 (describing the *Downes* reading of the Fourteenth Amendment as “a facially race-neutral reinstatement of *Dred Scott*.”); Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 *FORDHAM L. REV.* 2521, 2527 (2007). See also *Dred Scott*, 60 U.S. 393 (1856). If viewed as an analogous miscarriage of justice, a court may be willing to disregard *Downes* and its progeny and thus extend Fourteenth Amendment citizenship to the territories.

77. *Reid*, 354 U.S. at 14 (footnotes omitted). Justice Harlan’s dissent in the Insular Case of *Downes* similarly expresses disdain at the doctrine, contending that “[t]he idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces – the people inhabiting them to enjoy only such rights as Congress chooses to accord them – is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution.” 182 U.S. at 379 (1901) (Harlan J., dissenting). See also *Rabang*, 35 F.3d at 1463 (Pregerson, J., dissenting) (“it is important to remember that the Insular Cases are a product of their time, a time when even the Supreme Court based its decisions, in part, on fears of other races.”).

78. *Downes*, 182 U. S. at 279.



underpinnings, and with the Supreme Court's own reticence, would serve as a significant bar is made even more unlikely in a case in which a court finds itself faced with the question of nullifying the election of a widely popular presidential candidate or popularly elected president-elect.

Fourth, and lastly, to the extent that critics of American Samoan eligibility rely on the *Downes* rationale to conclude that the presidency is out of reach for territorial residents, that argument is a red herring, for *Downes* looks only at the Fourteenth Amendment, but fails to examine whether the separate provision of Article II is a "fundamental" right that applies to the unincorporated territories. While no court has analyzed whether or not Article II's "natural born" citizenship clause is a fundamental right, it would be difficult, under the legal formulas used to define "fundamental" rights, to conceive of how a court could conclude that recognition of "natural born" citizenship would somehow be "impractical and anomalous"<sup>79</sup> in American Samoa. So too, in a federal territory governed exclusively by Congress and the President, would it seem that permitting a resident of that territory the right to participate in government and one day run for President is a universal human freedom that involves "those fundamental limitations in favor of personal rights . . . [which are] the basis of all free government."<sup>80</sup> Thus, even if a court may be willing to recognize existing case law, which accepts Congress' authority to limit Fourteenth Amendment citizenship, it may simultaneously conclude that a U.S. national is not prohibited from running for president under Article II, and decline to extend such case law by analogy.

Ultimately, despite Article IV and Fourteenth Amendment jurisprudence, the American Samoan candidate has a legal foundation to emerge as a "natural born Citizen." Even if a court were to conclude that *Downes*, and its interpretation of the Fourteenth Amendment was also controlling over Article II, the result could favor the candidate, for Congress did not limit the political status of American Samoans in its annexation treaties. More importantly, *Downes* appears inapposite, with both its textual analysis and interpretation of "fundamental" rights to be inapplicable and outdated. Stated differently, while a court may possibly use Fourteenth Amendment case law to reject the American Samoan presidency, there is an ample basis to slice

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79. *Reid*, 354 U.S. at 75 (plurality opinion) (Harlan, J., concurring).

80. *Dorr*, 195 U.S. at 146-47; see also William T. Han, *Beyond Presidential Eligibility: The Natural Born Citizen Clause as a Source of Birthright Citizenship*, 58 *DRAKE L. REV.* 457, 471 (Winter 2010) ("jus soli forms a part of the constitutional minimum implicit in the Natural Born Citizen Clause.").

through the hurdles of Article IV and the Fourteenth Amendment and find the American Samoan candidate eligible.

## V. STANDING AND POLITICAL QUESTION ISSUES

If we assume, for sake of discussion, that these legal gymnastics will fail in the courts, that Congress' Article IV authority permits the limitation of Article II eligibility, and that a political change in the status of American Samoan residents is not forthcoming from Congress, some scholars suggest that the issue ends there – that the territorial American is inevitably barred from becoming president.<sup>81</sup> But this is too defeatist a view, and overlooks the practical realities of litigation. A lack of reform, by itself, does not necessarily terminate a successful American Samoan presidential candidacy. While the candidate may technically fail to meet the legal eligibility requirements detailed in Article II, what remains in the candidate's favor is that we live in a nation in which courts must resolve specific cases or controversies before them, and not issue advisory opinions.<sup>82</sup> Taking advantage of the fact that a court, state or federal, cannot from the heavens divine an order declaring him ineligible, the candidate can rely on restrictive principles of standing and justiciability, coupled with the political inexpediency of litigation, to prevent any viable lawsuit from being brought against him in the first place. Indeed, the lack of legal challenge may have saved Vice President Charles Curtis, who, bound by the Twelfth Amendment requirement that a vice-president must also be a natural born citizen, nevertheless served alongside President Herbert Hoover, despite legal ambiguity surrounding the fact that he was born in the Territory of Kansas, one year before Kansas became a state.<sup>83</sup> In short, the ineligible candidate can fairly say, "who

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81. See Hein, *supra* note 67, at 427 ("native-born citizens of Puerto Rico—as well as those native-born of other United States territories—are ineligible for the presidency.").

82. U.S. CONST. art. III, § 2. The Supreme Court has recently emphasized that the fact that Article III "restricts the federal 'judicial Power' to the resolution of 'Cases' and 'Controversies'" is a "basic doctrinal principle." See generally *Sprint Comm. Co. v. APCC Serv.*, 554 U.S. 269 (2008).

83. OLSON/TRIBE OPINION, *supra* note 25; U.S. CONST. amend. XII ("But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."). Other candidacies raise similar concerns including the presidential bid of Barry Goldwater who was born in the Arizona territory, and George Romney, born in Mexico to U.S. citizen parents. See Hein, *supra* note 67, at 425, 435; see also Lawrence Friedman, *An Idea Whose Time Has Come – The Curious History, Uncertain Effect, and Need for Amendment of the "Natural Born Citizen" Requirement for the Presidency*, 52 St. Louis U. L.J. 137, 138 (2008) (noting the ambiguity surrounding the candidacies of Franklin D. Roosevelt, Jr., born in Canada to American parents, and Governor Christian Herter of Massachusetts, born to American parents in France).

cares?” Courts may be unable to declare the American Samoan president-elect constitutionally ineligible because there may be no one capable or willing to bring a lawsuit under which such a declaration can be made.<sup>84</sup>

#### A. STANDING LIMITATIONS AND THEIR BENEFITS TO THE AMERICAN SAMOAN CANDIDATE

If the “ineligible” American Samoan were to run, the first question arises as to who could bring an actionable suit against him. The Supreme Court has determined that to have standing under Article III of the Constitution, a plaintiff must have suffered an “an injury in fact” that is causally connected to the defendant’s challenged conduct, and in which a favorable judicial decision will likely redress the injury.<sup>85</sup> A “generally available grievance about government” relating to “every citizen’s interest in proper application of the Constitution and laws” is insufficient to create Article III standing.<sup>86</sup>

Although voters may be the most likely to sue, they will lack Article III standing against the American Samoan president. This is highlighted by cases relating to the 2008 presidential election. In *Hollander v. McCain*, for example, a Republican voter challenged the presidential candidacy of Arizona Senator John McCain alleging that McCain was not a natural born citizen because he was born in the Panama Canal Zone.<sup>87</sup> In *Berg v. Obama*, a voter similarly asserted that Barack Obama’s purported birth “in Kenya” made him ineligible for the presidency.<sup>88</sup> In both cases, the courts found that voters cannot impede the candidate in the courtroom.

First, a voter will not be able to show standing based on the argument that they were harmed by the placement of an ineligible candidate on the ballot. In *Hollander*, for example, the plain-

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84. See Daniel P. Tokaji, Commentary, *The Justiciability of Eligibility, May Courts Decide Who Can Be President?*, 107 MICH. L. REV. FIRST IMPRESSIONS 31, 33 (2008) (“it is questionable whether anyone would have standing to challenge a presidential candidate’s eligibility in federal court as an initial matter, due to the prudential limitations on standing) (emphasis in original); see also Anthony D’Amato, *Aspects of Deconstruction: The “Easy Case” of the Under-Aged President*, 84 NORTHWESTERN L. REV. 250, 253 (1990) (“[w]aiting in the wings should the standing argument be insufficient to dismiss the claim [of presidential ineligibility] is the political question doctrine.”).

85. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

86. *Id.* at 573-74; see also *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974) (citizens did not have standing in suit challenging eligibility of members of Congress to serve in the military reserves because that was an “abstract injury” affecting “only the generalized interest.”).

87. *Hollander*, 566 F.Supp. at 68.

88. 586 F.3d 234 (3d Cir. 2009).

tiff asserted disenfranchisement on the theory that Republican primary votes, in primaries in which McCain appeared, counted “less” than the primary votes cast for other parties, because those Republican votes permitted the allocation of delegates to a constitutionally ineligible candidate.<sup>89</sup> The *Hollander* court determined that there was not standing on this basis because the inclusion of McCain on the ballot caused no true injury to the voter.<sup>90</sup> It reasoned that while a voter may be able to allege disenfranchisement when his candidate has been improperly *excluded* from the ballot, there is no comparable voter injury where an ineligible candidate has been improperly *included*, because “the mere inclusion of . . . [an ineligible candidate] does ‘not impede the voters from supporting the candidate of their choice’ and thus does not cause the legally cognizable harm necessary for standing.”<sup>91</sup> Stated differently, the *Hollander* court explained that “McCain’s candidacy for the presidency, whatever his eligibility, is ‘hardly a restriction on voters’ rights’ because it in no way prevents them from voting for somebody else.”<sup>92</sup> Not surprisingly, the Third Circuit dismissed Berg’s challenge to Obama’s placement on the ballot for the same reason, noting that “[a]s a practical matter, Berg was not directly injured because he could always support a candidate he believed was eligible.”<sup>93</sup>

Voters will also lack standing if they argue that they will suffer injury based on the fact that the ineligible president would later be removed from office, because such an argument fails to show causation of injury, and is merely speculative. Indeed, recognizing that standing requires a plaintiff to show that his injury was caused by the *defendant’s* conduct, the *Hollander* court rejected Hollander’s assertion that he had standing as a result of McCain’s possible subsequent removal, because defendant McCain would not be the cause of his own removal, were it to occur. It explained that:

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89. *Hollander*, 566 F. Supp. at 67.

90. *Id.* at 69-70.

91. *Id.* at 69 (quoting *Gottlieb v. Fed. Elec. Comm’n*, 143 F.3d 618, 622 (D.C. Cir. 1998)).

92. *Id.* To make the matter perfectly clear, the court stated that “voters have no standing to complain about the participation of an ineligible candidate in an election, even if it results in the siphoning of votes away from an eligible candidate they prefer.” *Id.*; see also *Crist v. Comm’n on Presidential Debates*, 262 F.3d 193, 195 (2d Cir. 2001) (“a voter fails to present an injury-in-fact when the alleged harm . . . is only derivative of a harm experienced by a candidate.”); *Becker v. Federal Election Comm’n*, 230 F.3d 381, 390 (1st Cir. 2000) (Ralph Nader voters were not injured by Nader’s failure to participate in a presidential debate, because Nader’s name appeared on the ballot, and they were still able to vote for him).

93. *Berg*, 586 F.3d at 239.

[McCain's subsequent removal] does not establish Hollander's standing because it does not 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct,' . . . but to the conduct of those – whoever they might turn out to be – responsible for ultimately ousting McCain from office. Indeed, McCain and the RNC are trying to achieve the opposite.<sup>94</sup>

Moreover, the Third Circuit rejected Berg's similar argument noting that "Berg's worry that Obama, if elected, might someday be removed from office was not an injury cognizable in a federal court because it was based on speculation and was contingent on future events."<sup>95</sup>

If a voter were to challenge an American Samoan candidate based on the argument that they, and the general voting population, would be denied their right to a constitutionally eligible president were the American Samoan elected, this argument has also been rejected, with the *Hollander* court concluding that this "harm, 'standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance,'"<sup>96</sup> and the *Berg* court stating that "Berg lacks standing to bring this suit because he has suffered no injury particularized to him."<sup>97</sup>

Lest there be any doubt relating to voter standing after *Hollander* and *Berg*, the Third Circuit expressly affirmed the district court's proclamation, stating, more to the point, that, "[t]he alleged harm to voters [like Berg] stemming from a presidential candidate's failure to satisfy the eligibility requirement[s] of the Natural Born Citizen Clause is not concrete or particularized enough to . . . satisfy Article III standing."<sup>98</sup> Thus a voter initi-

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94. *Hollander*, 566 F. Supp. at 70 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

95. *Berg*, 586 F.3d at 239.

96. *Hollander*, 566 F. Supp. at 68 (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974)).

97. *Berg*, 586 F.3d at 239. Cf. *Ex parte Lévit*, 302 U.S. 633, 634 (1937) (citizen lacked standing to challenge Justice Hugo Black's appointment to the Supreme Court); see also *Jones v. Bush*, 122 F. Supp. 2d 713, 715-18 (N.D. Tex. 2000) (voters could not show particularized injury in claim that Texas members of the Electoral College could not cast vote for George W. Bush and Dick Cheney because they were both inhabitants of Texas); cf. *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (citizen lacked standing to challenge Justice Hugo Black's appointment to the Supreme Court).

98. *Berg*, 586 F.3d at 238 (quoting *Berg v. Obama*, 574 F. Supp. 2d 509, 518 (E.D. Pa. 2008)). Numerous other cases relating to the 2008 election involving a challenge to the natural born citizen status of both candidates resulted in similar results. See, e.g., *Hollister v. Soetoro*, 601 F. Supp. 2d 179, 181 (D.D.C. 2009) (dismissing Obama challenge); *Kerchner v. Obama*, 612 F.3d 204 (3rd Cir. 2010); *Taitz v. Obama*, 707 F. Supp. 2d 1, 3-4 (D.D.C. 2010) (plaintiff had no standing against Obama because she raised only a generally available grievance.); *Kerchner v. Obama*, 669 F. Supp.2d 477, 481-83 (D.N.J. 2009); *Hollister v. Soetoro*, 601 F. Supp. 2d 179, 181 (D.D.C. 2009) (dismissing Obama challenge); See generally *Robinson v.*

ated federal suit alleging that an American Samoan presidential candidate or president-elect is unable to serve pursuant to Article II will be dismissed for lack of standing. The American Samoan candidate should therefore be safe from the disgruntled voter's legal challenge.<sup>99</sup>

Although presidential electors might be a probable party to challenge an American Samoan candidate, they, most likely, will

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Bowen, 568 F. Supp. 2d 1144 (N.D. Cal. 2008) (dismissing McCain challenge); Cohen v. Obama, No. 08-2150, 2008 WL 5191864 (D.D.C. 2008) (dismissing Obama challenge), *aff'd*, 332 F. App'x 640 (D.C. Cir. 2009); Robinson v. Bowen, 567 F. Supp. 2d 1144 (N.D. Cal. 2008) (dismissing McCain challenge); Stamper v. United States, No. 1:08 CV 2593, 2008 WL 4838073 (N.D. Ohio 2008) (dismissing challenge against both Obama and McCain).

99. See Duggin & Collins, *supra* note 71, at 115 ("it is difficult to believe that a voter claiming an alleged injury shared by tens of millions of Americans could, without more, establish standing to challenge the natural born citizenship credentials of a Presidential candidate."). Prof. Daniel Tokaji suggests that a voter may have better luck in state court. Tokaji, *supra* note 84, at 31. Tokaji raises the possibility, more specifically, that a voter could have standing to bring "a lawsuit seeking to keep a presidential candidate off the primary or general election ballot, on the ground that he or she does not satisfy the requisite qualifications." *Id.* at 37. While state court standing is yet to be fully resolved, and is dependent on local statutory schemes, state court litigation faces several hurdles. At the outset, a state court might conclude that state legislation does not require a state official to judge a candidate's constitutional qualifications before permitting that candidate to appear on the ballot, and therefore conclude that a suit against that official lacks merit. Indeed, in Wrotnowski v. Bysiewicz, 958 A.2d 709, 713 (Conn. 2008), the state court dismissed a challenge against the secretary of state for her failure to verify Barack Obama's "natural born Citizen" status, observing that "the election statutes neither require nor authorize the defendant to verify the constitutional qualifications of a candidate for the office of president of the United States." The same is true in California, with the California Court of Appeal concluding that a suit against the Secretary of State is not viable because the Secretary "does not have a duty to investigate and determine whether a presidential candidate meets eligibility requirements of the United State Constitution." Keyes v. Bowen, 189 Cal. App. 4th 647, 651-52 (2010), *review denied* (Feb. 2, 2011), *cert. denied*, 132 S. Ct. 99 (2011). Another problem Tokaji does not discuss with state court litigation is the potential political question issues touched on in Ankeny v. Governor of Indiana, 916 N.E.2d 678 (Ind. App. Ct. 2009). There, the court determined that a suit against a governor for failure to assess Barack Obama or John McCain's qualifications ignored the fact that the governor's role was merely to certify the slate of electors pledged to the winning candidate's party, and had nothing to do with certifying the legitimacy of that candidate himself. See generally *id.* Because, under Article II of the Constitution, state appointed electors have the duty of choosing the president, rather than election by popular vote, it is unclear how a voter challenge against state officials will fare when addressing purported irregularities in the popular voting process, when the actual election depends only on the Electoral College process. Finally, looking at the issue of state court litigation for a practical perspective, courts hoping to avoid the controversy of a single state court invalidating a national election will no doubt go to great lengths to find a legal theory upon which to conclude that the state court plaintiff's claim lacks procedural or substantive merit. While a plaintiff in state court will obviously face significant friction in state court, Tokaji is correct, however, that state court litigation presents a possible viable alternative avenue for review. See generally In re John McCain's Ineligibility to be on Presidential Primary Ballot in Pa., 944 A.2d 75 (Pa. 2008).

also lack standing.<sup>100</sup> The case of *Robinson v. Bowen*<sup>101</sup> is instructive in which a candidate on the ballot *hoping to become* an elector to Alan Keyes' American Independent Party maintained that John McCain was not a natural born citizen, and was therefore unfit to become president.<sup>102</sup> Focusing on the fact that the plaintiff had not yet become an elector, the court concluded that the plaintiff lacked standing because his injury as a prospective elector was not yet particularized and that he had "no greater stake in the matter than a taxpayer or voter."<sup>103</sup> In *dicta*, however, the court suggested that even if the plaintiff had already been an elector, there would still be no standing because "plaintiff himself is not a candidate in competition with John McCain – the harm plaintiff alleges is . . . merely derivative of the prospects of his favored obscure candidate."<sup>104</sup> Stated differently, an elector will lack standing in a case against an American Samoan candidate because he will fail to personally suffer an "injury in fact."

Even if an elector did have Article III standing, the *Robinson* court also indicates that an elector will have prudential standing problems in challenging a candidate's eligibility. Whereas Article III standing enforces the "case or controversy requirement," a party may also be barred by "prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'"<sup>105</sup> As the Supreme Court has recently explained in *Elk Grove Unified School District v. Newdow*, "prudential standing encompasses 'the general prohibition on a litigant's raising another person's legal rights, [and] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches.'"<sup>106</sup> In addition to its observation that an elector merely enforces the rights of his candidate, the *Robinson* court also noted that "[a]rguments concerning qualifications or lack thereof can be laid before the voting public before the election and, once the election is over, can be raised as objections as the electoral votes are counted in Congress."<sup>107</sup> Given the derivative nature of an elector's suit, and the fact that an elector's objections may be more appropriately raised in an alternative forum in conjunction with the Elec-

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100. See Tokaji, *supra* note 84, at 33 (an elector's "interest may be somewhat stronger than that of other members of the public, [but] such a plaintiff still has a serious Article III standing problem.").

101. 567 F. Supp. 2d 1144 (N.D. Cal. 2008).

102. *Id.* at 1145.

103. *Id.* at 1146.

104. *Id.*

105. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (*quoting* *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

106. *Id.*

107. *Robinson*, 567 F. Supp. 2d at 1147.

toral College process,<sup>108</sup> the American Samoan candidate should most likely be safe from the disgruntled elector's legal challenge based on prudential standing concerns.<sup>109</sup>

The set of plaintiffs the American Samoan candidate should fear most are opposing party candidates or an opposing political party itself. Unlike voters or electors, opposing parties will have standing to challenge the ineligible candidate. In *Gottlieb v. Fed. Election Comm'n*, for example, the District of Columbia Circuit observed that while a voter's injury is only derivative of the candidate's, "another candidate could make such a claim" under a "competitor standing" theory.<sup>110</sup> Elaborated in *Schulz v. Williams*, in which an opposing party asserted that the libertarian party candidate failed to gather enough signatures to appear on the ballot, the Second Circuit found competitor standing on the basis that "a 'party' . . . stood to suffer a concrete, particularized, actual injury – competition on the ballot from candidates that . . . were able to 'avoid complying with the Election Laws' . . . resulting [in] loss of votes."<sup>111</sup> In addition to injury arising from vote loss, the Fifth Circuit has pointed to the competitor's more direct economic injury of having "to raise and expend additional funds and resources to prepare a new and different campaign" due to the possibility that a candidate may be removed based on ineligibility.<sup>112</sup> The Ninth Circuit has placed a significant limitation on competitor standing, however, noting that if the competitor waits

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108. The electoral process is set forth at U.S. CONST. art. II, § 1, *amended* by U.S. CONST. amend. XII, as well as by statute at 3 U.S.C. § 15.

109. The Court in *Newdow* expresses this likelihood further noting that absent prudential standing, "courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Newdow*, 542 U.S. at 12 (*quoting* *Warth v. Seldin*, 422 U.S. 490, 500 (1975)); *see also* Tokaji, *supra* note 84, at 34 ("prudential standing presents formidable difficulties for these plaintiffs and, indeed, for anyone seeking to challenge a presidential candidates' qualifications in federal court.").

110. *Gottlieb v. Fed. Election Comm'n*, 143 F.3d 618, 621 (D.C. Cir. 1998). The issue in *Gottlieb* was not Article II eligibility, but the ability of a candidate to receive matching funds. *Id.* The Supreme Court long-ago implicitly recognized competitor standing when it heard *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 142 (1892), in which a competitor challenged a Nebraska governor-elect's gubernatorial eligibility on the ground that he was not a U.S. citizen.

111. *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994).

112. *Texas. Dem. Party v. Benkiser*, 459 F.3d 582, 586-87 & n.4 (5th Cir. 2006) (holding that Democratic party had standing to challenge Republican party's decision to remove Representative Tom DeLay based on eligibility grounds). The Supreme Court has concluded that economic injury is a quintessential injury upon which standing may be based. *See* *Barlow v. Collins*, 397 U.S. 159, 163-64 (1970). In bringing a suit based on competitor standing, the named defendant need not be the ineligible candidate. For example, in *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990), the Seventh Circuit acknowledged that the injury of increased competition on the ballot also "is fairly traceable to the action of the [state]officials who allowed"



to bring suit until after the President has been sworn into office, and does not indicate an intent to run against the President in the future, the “Plaintiffs’ competitive interest in running against a qualified candidate ha[s] lapsed” and thus, the former candidate’s standing to raise a claim is “extinguished by the time the complaint [is] filed.”<sup>113</sup>

Yet, while another presidential contender is a clear legal threat to the American Samoan candidate,<sup>114</sup> the mere viability of competitor standing alone does not necessarily mean that the American Samoan should give up hope of facing a litigation-free path to his presidential bid. Despite the availability of legal action, an opposing candidate or party may conclude that the political consequences of challenging a candidate’s “natural born” status may weigh against the benefits that a possible legal victory may bring. Indeed, as the 2008 election once again illustrates, despite the plethora of voter lawsuits challenging candidates’ Article II eligibility,<sup>115</sup> the parties capable of bringing suit against John McCain – Barack Obama and the Democratic Party – did not do so. In fact, quite the opposite occurred. On April 10, 2008, during the heat of the election campaign season, the Senate passed Senate Resolution 511, entitled “Recognizing that John Sidney McCain III, is a natural born citizen.”<sup>116</sup> The Resolution acknowledged in part:

Whereas the term ‘natural born Citizen’, as that term appears in Article II, Section 1, is not defined in the Constitution of the United States; . . .

Whereas John Sidney McCain, III, was born to American citizens on an American military base in the Panama Canal Zone in 1936: Now, therefore, be it

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the ineligible candidate on the ballot in the first place. *But see, supra* note 99 for discussion of problems surrounding litigation against state court officials.

113. *Drake v. Obama*, 664 F.3d 774, 784 (9th Cir. 2011). In *Drake*, the plaintiffs filed suit the day after President Obama was sworn into office. *Id.* at 778. In addition to denying standing to the former candidates with no stated intention to run against Obama in the future, the *Drake* court further highlighted standing hurdles by concluding that neither active military personnel, former military personnel, state representatives, federal taxpayers, nor relatives of President Obama had standing to challenge the President’s eligibility. *Id.* at 778-84.

114. *But see Tokaji, supra* note 84, at 35 (suggesting that standing may still be a problem for a competitor, noting that “Obama could plausibly claim that he is suffering an injury that satisfies Article III . . . The more difficult obstacle for Obama would be prudential standing.”); *see also Duggin & Collins, supra* note 71, at 115 (observing that in addition to the competitor, “[a]n individual in the line of succession” may also have standing).

115. *See supra* note 98.

116. S. Res. 510, 110th Cong. (2008).

Resolved, That John Sidney McCain, III, is a 'natural born Citizen' under Article II, Section 1, of the Constitution of the United States.<sup>117</sup>

Most interesting, for the purposes of this discussion, is that not only did Barack Obama support the resolution, but he, along with Hillary Clinton, were its co-sponsors.<sup>118</sup> One can envision that when faced with a nationally popular American Samoan candidate, an opposing party or candidate may find that it is politically expedient to simply let the issue go, and not garner public discord by filing a lawsuit that blocks the natural progression of the voting process.<sup>119</sup> The dispute over the 2000 presidential election, and resulting public rancor surrounding the *Bush v. Gore* decision,<sup>120</sup> may counsel further against the likelihood that a candidate or party will conclude that pre or post-election litigation is a wise endeavor. Although it is no guarantee, politics and not the law may save the American Samoan from a competitor's legal challenge.

#### B. THE POLITICAL QUESTION DOCTRINE

Of course, the courts may not be the only body capable of evaluating the American Samoan president-elect's Article II eligibility. Immediately after the election, the American Samoan would still have to contend with the Electoral College and Congress, and possibly face a determination by them of constitutional ineligibility. Perhaps surprisingly, it remains unclear whether the courts or the political branches have the ultimate authority to resolve Article II eligibility questions.

Under the "political question" doctrine, a court may conclude that a case is non-justiciable and refuse to hear it, regardless if the plaintiff has standing, under the notion that the political branches of government, and not the courts, are the ap-

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117. *Id.*; see also Adam Liptak, *A Hint of New Life to a McCain Birth Issue*, N.Y. TIMES, Jul. 11, 2008, at A11 (July 22, 2012, 11:53 AM), available at <http://www.nytimes.com/2008/07/11/us/politics/11mccain.html>.

118. S. Res. 510 ("Mrs. McCaskill (for herself, Mr. Leahy, Mr. Obama, Mr. Coburn, Mrs. Clinton, and Mr. Webb) submitted the following resolution . . .") (emphasis added). Similarly, the House of Representatives unanimously resolved the same for President Obama, asserting that "the 44th President of the United States, Barack Obama, was born in Hawaii on August 4, 1961." H.R. Res. 593, 111th Cong. (2009).

119. See Peter J. Spiro, Commentary, *McCain's Citizenship and Constitutional Method*, 107 MICH. L. REV. FIRST IMPRESSIONS 42, 43 (2008) (noting that "there has been little effort by McCain's opponents – either in the Republican primaries or now in the general election – to press the case that, if elected, McCain would be constitutionally barred from serving.").

120. *Bush v. Gore*, 531 U.S. 98 (2000).

appropriate arbiters of the issue.<sup>121</sup> In *Baker v. Carr*, the Supreme Court proffered that the test for whether a case presents a question beyond the proper scope of judicial review turns on whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department."<sup>122</sup> While the question of justiciability of Article II eligibility is unresolved, the Supreme Court case of *Powell v. McCormack* is instructive on how a court may address the issue.<sup>123</sup> In *Powell*, Adam Clayton Powell, Jr., was elected to serve in the House of Representatives, but, pursuant to a House resolution asserting incidents of prior official misconduct, was denied his seat.<sup>124</sup> Powell sued in federal court, arguing that the House resolution was unconstitutional because the House could only exclude him based on the age, citizenship, and residence requirements, but not on other grounds.<sup>125</sup> To determine whether it could even hear the case, the Supreme Court analyzed the question of whether resolution of conflicts over expulsion from the House were textually committed to the legislature under Article I, § 5 of the Constitution, such that they were at the sole discretion of the House, or whether that provision permitted judicial review of Powell's case.<sup>126</sup> The Court concluded that the Constitution permitted judicial review. The Court recognized that the language of Article I, § 5, that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members," alone did not clearly elaborate whether Congress, and not the courts could resolve the Powell dispute.<sup>127</sup> Looking at additional language in Article I, § 5, stating that each House needs a two-thirds vote in order to expel a member, as well as the conventional history of the provision, the Court nevertheless concluded that the House's judging powers were limited to age, citizenship, and residency qualifications, and that the House's further decision to exclude Powell through a simple majority resolution exceeded those powers. The Court held:

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121. See *Powell v. McCormack*, 395 U.S. 486, 518 (1969) (holding that "federal courts will not adjudicate political questions.").

122. 369 U. S. 186, 217 (1962).

123. See Tokaji, *supra* note 84, at 36 ("*Powell v. McCormack* is the political question case that presents the closest analogy to the presidential eligibility issue.").

124. *Powell*, 395 U.S. at 489-93 (1969).

125. *Id.*; see also U.S. CONST. art. I, § 2.

126. *Powell*, 395 U.S. at 520 (noting that "[i]f examination of § 5 disclosed that the Constitution gives the House judicially unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications, further review of the House determination might well be barred by the political question doctrine.").

127. *Id.* at 521-522; U.S. CONST. art. I, § 5.

the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote. . . . [and] that Art. I, § 5, is, at most, a ‘textually demonstrable commitment’ to Congress to judge only the qualifications expressly set forth in the Constitution. Therefore, the ‘textual commitment’ formulation of the political question doctrine does not bar federal courts from adjudicating petitioners’ claims.<sup>128</sup>

### 1. *It Is Unclear How a Court Would Resolve the Political Question Issue*

An application of the *Baker/Powell* analysis to the issue of Congress’ power to judge presidential eligibility suggests the possibility that the political question doctrine will not bar federal courts from adjudicating disputes over “natural born” citizenship, but this is far from certain. The Twelfth Amendment provides for the manner in which the members of the Electoral College elect the president, stating that:

[t]he electors shall meet in their respective states and vote by ballot for President and Vice-President . . . and they shall . . . transmit [their votes] sealed to the seat of the government of the United States, directed to the President of the Senate; – The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates *and the votes shall then be counted*; – The person having the greatest number of votes for President, shall be the President . . .<sup>129</sup>

Under its plain language, then, the Twelfth Amendment states only that the “votes shall be counted,” but does not itself indicate whether Congress’ power amounts only to a ministerial counting act, or in turn, the power to further scrutinize whether the Electors voted for an eligible candidate. That the person with the greatest number of votes “shall” be declared president, suggests that the counting power involves a simple ratification of the Electors’ majority decision, without any Congressional judgment of that majority.<sup>130</sup> The Twentieth Amendment also does not, on its face, demonstrate Congressional power to resolve issues of eligibility, stating only that “*if the President elect shall have failed to qualify*, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified.”<sup>131</sup> While this language gives Congress the power to act once the president-elect has been

128. *Powell*, 395 U.S. at 548.

129. U.S. CONST. amend. XII.

130. See Vasani Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1711 (2002) (noting in the context of the Twelfth Amendment that “the word ‘shall’ is a word of obligation.”).

131. U.S. CONST. amend. XX, § 3 (emphasis added).

deemed unqualified, nowhere does it indicate whether it is Congress, the courts, or any other body that has the authority to make this initial eligibility determination. No other constitutional provision indicates a textual commitment to Congress' authority to make an eligibility determination.

It is true that despite this constitutional ambiguity, courts addressing the 2008 election have found that judicial resolution of Article II eligibility *is* barred by the political question doctrine. The reasoning, however, appears to be somewhat flawed. For example, in *Robinson v. Bowen*, in which the plaintiff challenged John McCain's status as a "natural born Citizen," the Northern District of California found the political question doctrine served as a bar, concluding that "the challenge presented by plaintiff is committed under the Constitution to the electors and the legislative branch."<sup>132</sup> Yet, in so concluding, the court did not simply rely on the ambiguous constitutional text above, but improperly focused on 3 U.S.C. § 15, a statute enacted by Congress detailing the process for counting electoral votes. It is true that 3 U.S.C. § 15 provides, in relevant part, that when the electoral votes are counted by the President of the Senate:

the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision . . . No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

Yet, while the *Robinson* court no doubt found it easy to rely on Congress' own statutory declaration that Congress has the power to resolve objections,<sup>133</sup> the Supreme Court in *Powell* made clear that "[i]n order to determine whether there has been a textual commitment to a coordinate department of the Government, [a court] *must interpret the Constitution* . . . [and] determine what power *the Constitution* confers upon [Congress]."<sup>134</sup> A court making a political question determination regarding the proper

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132. 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008).

133. Note that even Section 15 itself does not make clear whether the objections Congress can address are ministerial issues, or whether it may further judge the substance of the elector's votes.

134. 395 U. S. at 519 (emphasis added).

adjudication of “natural born Citizenship” must therefore ignore 3 U.S.C. § 15, regardless of its clarity, because the proper focus is on the “constitutional commitment” of the issue, not a subsequent statutory commitment that the Congress has conferred upon itself.<sup>135</sup> *Robinson*, then, provides inadequate guidance, and a court left with the ambiguous language of the Twelfth and Twentieth Amendments could still conclude either way.<sup>136</sup>

## 2. *Either Interpretation of the Political Question Issue May Benefit the Candidate*

If a court were to determine that Congress’ vote counting powers under the Twelfth Amendment were simply ministerial, there would be no textual commitment giving Congress the power to further judge presidential eligibility, permitting the ultimate question of “natural born Citizen” status for judicial resolution. For the reasons described earlier, a determination of justiciability could be significantly beneficial to the American Samoan president-elect, for disgruntled members of Congress seeking a political resolution would have no binding input, leaving resolution of the issue available only in a courtroom and only to the narrow class of presidential competitor-plaintiffs with standing, who may or may not decide to bring suit.

Yet, even if courts conclude that Article II eligibility is a non-justiciable issue subject to Congressional resolution, there is still hope for the American Samoan presidency. Of course, the first hurdle for the American Samoan is the technical risk that the Electors will choose not to vote for him, on the basis that

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135. Some scholars have argued that section 15 is unconstitutional. See Kesavan, *supra* note 129. Kesavan suggests that section 15 undermines the powers given to the Electoral College under the Constitution. See *id.* at 1661 (noting that “[i]f the joint convention could judge electoral votes, it could reject enough votes to thwart the electors’ will.”). Kesavan further observes that “the Twelfth Amendment contain[s] no special provision empowering Congress to enforce it by appropriate legislation, in contrast to a host of other . . . amendments to the Constitution.” *Id.* at 1745; see also Vasani Kesavan, *The Very Faithless Elector?*, 104 W. VA. L. REV. 123, 139 (2001) (“it is far from clear whether this law is constitutional and whether Congress may refuse to count electoral votes given by very faithless Electors.”) [hereinafter *Faithless Elector*].

136. See Tokaji, *supra* note 84, at 40 (“[i]t is anyone’s guess, however, whether the Supreme Court would . . . deem this a nonjusticiable political question.”); Duggin & Collins, *supra* note 71, at 122 (“[t]here is no readily apparent answer to the question of a demonstrable textual commitment in connection with the natural born citizenship proviso.”); see also *Barnett v. Obama*, 2009 U.S. Dist. LEXIS 101206, at 47-49 (C.D. Cal. Oct. 29, 2009) (observing in a case involving third party competitor plaintiffs, that once the president has been elected, and the court is called on to remove a sitting president, the political question doctrine bars review, because it is the within Congress’ sole authority to remove a president through the impeachment process).

despite the popular vote, he is ineligible.<sup>137</sup> But, the problem of the “faithless elector” is highly unlikely. In *Ray v. Blair*, the Supreme Court upheld state laws requiring electors to pledge their vote for the winning candidate, and, in turn, at least seven states have enacted laws that punish faithless electors who fail to follow the popular vote.<sup>138</sup> Perhaps more importantly, electoral slates are made up of party loyalists.<sup>139</sup> Thus, if the winning candidate is the American Samoan, it is difficult to conceive that enough loyalists in the American Samoan’s own political party will choose to cast their electoral votes against him so as to influence the outcome of the election in favor of an opposing party candidate. Indeed, to date, faithless electors have been few and not determinative, with one each in 1948, 1956, 1960, 1968, 1972, 1976, and 1988, and an abstention cast in 2000.<sup>140</sup> Given the partisan composition of the Electoral College, it is highly improbable that electoral votes transmitted to the President of the Senate will seek to undermine the American Samoan’s popular victory.

And second, even if courts determine that Congress has sole constitutional authority to address objections to electoral votes in the manner set forth in 3 U.S.C. § 15, there is a chance that members of Congress may simply permit the votes in favor of the American Samoan president-elect. That is, Congress may find it politically inexpedient to question the American Samoan’s eligibility after the people have already voted for him. Recent historical precedent suggests this. Indeed, during the counting of votes by the President of the Senate during the notably controversial 2000 election, members of the House of Representatives raised

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137. The potential problem of unfavorable electoral votes will exist regardless of any political question determination, because even if Congress’ power to count electoral votes is deemed merely ministerial, the electoral votes themselves may still vary depending on how members of the Electoral College have chosen to cast their votes.

138. *Ray v. Blair*, 343 U.S. 214 (1952); *Keyes v. Bowen*, 189 Cal. App. 4th 647, 651-52 (2010) (noting that under California law, “[t]he Electors did not have an affirmative duty to discover whether the candidate is a natural born citizen and, in fact, were required by statute to vote for their party’s nominee.”); see also *Faithless Elector*, *supra* note 135, at 125 (further noting that it remains questionable whether these state laws are themselves constitutional).

139. Thomas H. Neale, CONG. RESEARCH SERV., RS20273, THE ELECTORAL COLLEGE: HOW IT WORKS IN CONTEMPORARY PRESIDENTIAL ELECTIONS 3-4 (2003) (noting that electors are “nominated by a party or other political group, and pledged to support the candidates of that party” and that under the “winner-take-all” approach the slate of electors pledged to the party candidate receiving the most popular votes will be elected).

140. *Id.* at 4 (these are the faithless electors in the Twentieth Century); see also *Faithless Elector*, *supra* note 135, at 124 (noting that “it appears that only a dozen or so Electors have voted in contravention of the popular vote.”).

objections to electoral votes cast in favor of George W. Bush.<sup>141</sup> Al Gore, acting as President of the Senate, rejected those House objections that would have favored his own presidential candidacy, because they were not accompanied by a corresponding written objection by at least one member of the Senate, as required by 3 U.S.C. § 15.<sup>142</sup> Although not a forgone conclusion, recognizing that an American Samoan is born on U.S. soil, and faced with a popular vote in favor of his candidacy, members of the Senate, as in the case of the 2000 election, may simply choose to accept the electoral votes as they are, and begrudgingly decline to submit a written objection so as to avoid a Congressional determination that clashes with the will of the people.<sup>143</sup> Ultimately, regardless of a court's determination as to which branch of government is capable of resolving "natural born Citizen" questions, politics may still allow the American Samoan president-elect to emerge unscathed.

## VI. AN ALTERNATIVE AVENUE FOR ARTICLE II ELIGIBILITY

While the previous sections offer a legal outline to demonstrate Article II eligibility under the status quo, there remains the significant possibility that once a court asserts jurisdiction over the question of a candidate's eligibility, it may find it difficult to hold that a "national" is somehow a "citizen," be unwilling to disregard seemingly analogous Fourteenth Amendment jurisprudence, and be reluctant to restrict Congress' Article IV powers.

Despite all of this, there is one surefire means by which the American Samoan can guarantee Article II eligibility. Although somewhat of a stopgap measure, the easiest and most effective tool actually lies in the hands of the American Samoans themselves. By making clever use of the laws that Congress already has in place in the territory, the current generation of American Samoans can apply for U.S. Citizenship, and, after obtaining it, pass on citizenship at birth to their offspring.

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141. See 147 CONG. REC. H34-36 (daily ed. Jan. 6, 2001); see also Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 646 n.649 (2004).

142. Siegel, *supra* note 141, at 646 n.649 ("Vice President Gore, in his role as Senate President, enforced this [3 U.S.C. § 15] requirement during the 2001 electoral count, ruling out of order a series of objections to Florida's certificate because they were signed by a House member but no Senator.").

143. Duggin & Collins, *supra* note 71, at 123 ("[e]ven if an overwhelming majority of the members of Congress believed the President-elect to be constitutionally unqualified on natural born citizenship grounds, at this point in the process action to preclude a popularly elected candidate from taking office could prove disastrous . . . and very probably fracture the legislative branch and the country along party or other factional lines.").



Under 8 U.S.C. § 1101(a)(29), we have seen that an American Samoan born in American Samoa is born in an "outlying possession," and that under 8 U.S.C. § 1408(1), "person[s] born in an outlying possession of the United States" are "[n]ationals but not citizens of the United States at birth." Read together, it would appear that these two statutes operate to quash the American Samoan's presidential ambitions. But the complete body of laws is much more nuanced than that. For example, turning to 8 U.S.C. § 1408(3), the law states more specifically that if "[a] person of *unknown parentage* [is] found in an outlying possession of the United States" that person will be considered a U.S. national. On the other hand, 8 U.S.C. § 1401(e) states that "person[s] born in an outlying possession of the United States *of parents one of whom is a citizen of the United States* who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person[s]" will be considered "nationals *and citizens of the United States at birth.*" This more expansive statutory language demonstrates that if an American Samoan with U.S. national status has a child with another U.S. national on American Samoan soil, or if a child is simply found in American Samoa, that child will, in turn, be regarded at birth as a U.S. national only. But if one of the parents of a child born in American Samoa is a U.S. Citizen who has been present in American Samoa or any state or territory for a year before that child's birth, that child will not be considered a "national" at birth, but instead will be a citizen. That this latter circumstance is not that unique only aids the American Samoan candidate. Indeed, it is not that difficult for an American Samoan to obtain U.S. citizenship. As commentators have observed, "[r]esidence as a national in American Samoa satisfies the permanent residency requirement for naturalization, and American Samoans can freely enter the United States and become naturalized after three months."<sup>144</sup>

Accordingly, under the statutory scheme now in place, 8 U.S.C. § 1408(1) does not present an insurmountable hurdle to Article II eligibility in the long run. While it involves an intergenerational endeavor, Congress has provided a means by which American Samoans can become citizens at birth without any additional legislative or constitutional reform, thereby reducing doubt as to their Article II status. Of course, another alternative for reform would be for Congress to simply rewrite the current statute to give American Samoans the same citizenship status afforded to those in all the other states and territories, to abandon the natural born citizen requirement altogether, or to

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144. See Duggin & Collins, *supra* note 71, at 96 n.229.

create a constitutional amendment stating that all territorial residents are natural born citizens.<sup>145</sup>

## VII. CONCLUSION

At first blush, one might think that someone who is born as a U.S. “national” must by definition not be a “natural born Citizen” within the meaning of Article II, and therefore ineligible to serve as president. Yet, as with most legal questions, the issue is much more nuanced. Looking at the scope of the “natural born Citizen” clause with reference to the English common law and the “original meaning” of the phrase as the Supreme Court instructs courts to do, a “natural born Citizen” can be understood to be the same as a “natural born” subject, and thus include all those born within the sovereign’s domain who owe allegiance to the sovereign. American Samoans clearly fit this bill. Fourteenth Amendment jurisprudence and Congress’ Article IV powers, although daunting, do not appear to present an insurmountable legal obstacle against this argument in that there is no indication that Article II was meant to apply only to the states, or that the Insular Cases would prevent application of Article II in American Samoa.

Yet, even if insurmountable, the American Samoan can still find ways to become president. We have seen that an American Samoan can naturalize, and that his children born in American Samoa will themselves be U.S. citizens at birth. Moreover, because voters and electors may find that the courts will keep their doors closed to any legal challenge, and that political competitors or Congress may find it politically unwise to overturn the will of the people, justiciability doctrines of standing or political question may prevent the U.S. national’s electoral victory from ever facing fierce legal or political scrutiny. In short, the issue of the relationship between the “natural born Citizen” clause and the American Samoan is far from resolved, but also far from simple. An American Samoan candidate can rest assured that amidst current precedent, he has a legal and political leg to stand on if he decides to run.

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145. Congress has done so in other circumstances when it “expressly extended the Constitution and federal laws to the District of Columbia.” *Valmonte*, 136 F.3d at 914, 919 n.9 (2d Cir. 1998); see also Lawrence Friedman, *An Idea Whose Time Has Come – The Curious History, Uncertain Effect, and Need for Amendment of the “Natural Born Citizen” Requirement for the Presidency*, 52 Sr. Louis U. L.J. 137, 149 (2008) (recommending “removing this anachronistic provision.”); Duggin & Collins, *supra* note 71, at 144-52 (offering proposals for reform).