

# The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty

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*No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . .*

United States Constitution, article II

Despite its apparent simplicity, the natural-born citizen clause of the Constitution<sup>1</sup> has never been completely understood. It is well settled that “native-born” citizens, those born in the United States, qualify as natural born.<sup>2</sup> It is also clear that persons born abroad of alien parents, who later become citizens by naturalization,<sup>3</sup> do not.<sup>4</sup> But whether a person born

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1. The rest of the clause reads, “neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.” U.S. CONST. art. II, § 1, cl. 5. The Twelfth Amendment extended these requirements to the Vice Presidency in 1804. U.S. CONST. amend. XII (“[N]o person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”).

2. See, e.g., Freedman, *Presidential Timber: Foreign Born Children of American Parents*, 35 CORNELL L.Q. 357 (1950); Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1 (1968); Means, *Is Presidency Barred to Americans Born Abroad?*, U.S. NEWS & WORLD REP., Dec. 23, 1955, at 26; Morse, *Natural-Born Citizen of the United States—Eligibility for the Office of President*, 66 ALB. L.J. 99 (1904); McElwee, unpublished article reprinted in 113 CONG. REC. 15,875 (1967).

Native-born citizens are natural born by virtue of the nearly universal principle of *jus soli*, or citizenship of place of birth. See *infra* note 24. Section 1 of the Fourteenth Amendment confirmed this birthright citizenship, and guaranteed its application to groups that had previously been excluded, such as the descendants of former slaves, see *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); see *infra* Section II-B. See generally *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (child born on American soil of alien parents is American citizen); *Von Schwertdner v. Piper*, 23 F.2d 862 (D. Md. 1928) (same); *Tomasichio v. Acheson*, 98 F. Supp. 166 (D.D.C. 1951) (same); *infra* note 65.

A few commentators have argued or assumed that only native-born citizens qualify as natural-born. See *infra* note 8.

3. “Naturalization” here refers to the procedure codified at 8 U.S.C. §§ 1421–1459 (1982 & Supp. IV 1986), whereby a citizen of another country elects to become a citizen of the United States. For more on use of the term, see *infra* notes 35, 70–72 and accompanying text; Section III.

4. The ineligibility of subsequently naturalized citizens for the Presidency is mentioned in *Schneider v. Rusk*, 377 U.S. 163, 165, 177 (1964); *Knauer v. United States*, 328 U.S. 654, 658 (1946); *Baumgartner v. United States*, 322 U.S. 665, 673 (1944); *Luria v. United States*, 231 U.S. 9, 22

abroad of American parents, or of one American and one alien parent,<sup>5</sup> qualifies as natural born has never been resolved.<sup>6</sup> Eligibility for children of American Indians born on reservations, persons born in United States territories, children born on American military bases, and children of United States diplomats stationed abroad is also uncertain.<sup>7</sup>

Constitutional scholars have traditionally approached the uncertainty surrounding the meaning of the natural-born citizen clause by inquiring into the specific meaning of the term "natural born" at the time of the Constitutional Convention. They conclude that a class of citizens should be considered natural born today only if they would have been considered natural-born citizens under the law in effect at the time of the framing of

(1913).

5. Whether, in cases of one citizen and one alien parent, the father or the mother is the alien might also affect natural born status since, under American naturalization statutes in effect around the time of the Constitutional Convention, the citizenship of the child depended upon the citizenship and residency of the father. See Act of Mar. 26, 1790, 1 Stat. 103, 104. The American naturalization acts were based on earlier British statutes. See, e.g., An act . . . For naturalizing . . . the children of natural-born subjects of the crown, 4 Geo. 2, ch. 21 (1731). The Supreme Court in *Montana v. Kennedy* concluded that the Naturalization Act of 1802, the controlling statute at the time of the petitioner's birth, made children born abroad citizens only if their fathers were or had been citizens. *Montana v. Kennedy*, 366 U.S. 308, 310-11 (1961). Until 1934, citizenship of the mother could not be passed on to her foreign-born children. See *Rogers v. Bellei*, 401 U.S. 815, 826 (1971).

6. The Supreme Court has mentioned the natural-born citizen clause in dicta but has never ruled on its meaning. See, e.g., *Rogers v. Bellei*, 401 U.S. at 829; *supra* note 4.

This constitutional uncertainty persists despite the fact that the issue has arisen frequently over the past twenty years in discussions over the potential candidacies of foreign-born politicians such as Barry Goldwater, Lowell Weicker, George Romney, Christian D. Herter, and Franklin D. Roosevelt, Jr. Goldwater was born in the territory of Arizona before it became a state; Weicker, in Paris of an American father and British mother; Romney, of American parents in Mexico; Herter, of Americans in France; Roosevelt, in Canada. See Gordon, *supra* note 2, at 1; see also Safire, *The Constitution's Flaw*, N.Y. Times, Sept. 6, 1987, at E15, col. 2 (proposing constitutional amendment explicitly allowing naturalized citizens to become President).

The 1980 Census showed that over seven million United States citizens had been born abroad, over a million of these to American parents. Both groups of citizens have increased significantly since 1950. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 36-37 (107th ed. 1987). The increasing number of Americans (here, persons with a claim to U.S. citizenship at birth under current naturalization laws, see *infra* note 89) born abroad increases the chances that foreign-born American citizens will seek the Presidency or occupy offices that are high on the list for presidential succession. See U.S. CONST. art. II, § 1, cl. 6; *id.* amends. XX, XXV; 3 U.S.C. § 19 (1982). This Note is an attempt to resolve a question that is now more likely than ever to be asked.

7. Natural born status is uncertain for these groups either because they would not have been citizens of the United States in the past, or because they are not born in the United States and would therefore be excluded under an interpretation that limits the clause to native borns.

In 1790 the first naturalization statute applied only to free white inhabitants. The status of American Indians and people born in U.S. territories was unclear or inferior under the laws in effect at the time of the framing. See e.g., *Elk v. Wilkins*, 112 U.S. 94, 102 (1884) (American Indians do not acquire citizenship at birth even though born in U.S.). Today these groups are given citizenship at birth under 8 U.S.C. § 1401(b) (1982). Many of the pre-constitutional statutes that could have served as models for the framers granted citizenship to foreign-born children where the father was a citizen and the mother an alien, but not vice versa. See *supra* note 5.

In 1870 the naturalization laws were amended to explicitly include blacks. The Chinese Exclusion Acts of 1882, 1888, and 1892 placed restrictions on the naturalization of Japanese, Chinese, Hindus, Afghans, Burmese, and Hawaiians; the last of these restrictions was not removed until 1952. See Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769, 791 n.95 (1971) [hereinafter Note, *Constitutional Limitations*].

the Constitution.<sup>8</sup> The traditional approach has not established the clause's full and precise meaning, however, because it fails to adequately consider<sup>9</sup> a critical analytical question that must inform our understanding of the constitutional text: What is the proper role for Congress in giving specific content to the natural-born citizen clause? This Note argues that the natural-born citizen clause can only be properly understood if we appreciate the interplay of that clause with the naturalization powers clause of article I,<sup>10</sup> as modified by section one of the Fourteenth Amendment.<sup>11</sup>

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8. These writers assume that the phrase "natural born citizen" was a term of art during the pre-constitutional period since the phrase is not defined in either the Constitution or the records of the Constitutional Convention. See Gordon, *supra* note 2, at 2 ("The only explanation for the use of this term is the apparent belief of the Framers that its connotation was clear."); Freedman, *supra* note 2, at 358 (quoting Morse, *supra* note 2, at 100). But see Means, *supra* note 2, at 27 ("'Natural born Citizen' . . . never was an expression in common use. . ."). They examine the records of the Convention and the contemporaneous law in Britain and the colonies to determine whether the framers intended to include U.S. citizens born abroad when they chose the words "natural born citizen." But they disagree over the lessons these sources teach. For example, on the issue of who was "natural born" under the common law, and to what extent the framers adopted the common law definition, one writer asserts: "It is clear that *under the English common law* this term 'natural born' meant 'native born.' . . . It was this genuine 'native-born' citizen . . . to which the framers of the Constitution referred when they used the term 'natural-born citizens' as one of the qualifications for the President." McElwee, *supra* note 2, at 15,876 (emphasis added); see also *id.* at 15,879-80 (author criticizes Morse, Freedman, and Means articles, *supra* note 2). Another concludes exactly the opposite: "The framers of the Constitution did not limit eligibility for the Presidency to 'native-born citizens,' but used the *broader* term of 'natural born citizen' with its *common law background*." Freedman, *supra* note 2, at 364 (emphasis added). A third contends that the common law by itself is not determinative of the framers' intent:

[T]he leading British authorities agree that *under the early common law*, status as a natural-born subject probably was acquired only by those born within the realm, but that the statutes . . . enabled natural-born subjects to transmit equivalent status at birth to the children born to them outside of the kingdom.

. . . There was no warrant for supposing that the Framers wished to deal less generously with their own children.

Gordon, *supra* note 2, at 7-8 (emphasis added).

Thus, it is not surprising that the traditional approach has led some to conclude that children born abroad of Americans are natural-born citizens, see Gordon, *supra* note 2; Means, *supra* note 2; Freedman, *supra* note 2; Morse, *supra* note 2; one to conclude that persons born abroad to an American and an alien are natural born, see Seligman, *A Brief for Gov. Romney's Eligibility For President*, N.Y.L.J., Nov. 15, 1967, at 1, col. 5; and others to conclude that "natural-born citizens" must be born on American soil. See Blum, *Is Gov. George Romney Eligible to be President?*, N.Y.L.J., Oct. 16, 1967, at 1, col. 5; Safire, *supra* note 6; McElwee, *supra* note 2; sources cited in Freedman, *supra* note 2, at 357 n.2; Press release of Senator Thomas Eagleton (Nov. 26, 1982); see also Weedin v. Chin Bow, 274 U.S. 657, 663 (1927) (court observes in dicta, "under the common law which applied in this country, the children of citizens born abroad were *not* citizens but were aliens") (emphasis added).

9. Several sources raise but do not answer the question of whether Congress may modify the categories of persons included under the natural-born citizen clause. See Freedman, *supra* note 2, at 364; Gordon, *supra* note 2, at 9; Means, *supra* note 2, at 29.

10. U.S. CONST. art. I, § 8, cl. 4. (Congress shall have power "[t]o establish an uniform Rule of Naturalization").

11. U.S. CONST. amend. XIV, § 1 ("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 they reside.").

The natural-born citizen clause and the naturalization powers clause come together in section one of the Fourteenth Amendment since the Amendment both distinguishes native-born and naturalized citizens ("born [in] or naturalized") and equalizes them (both are guaranteed the same rights under the Amendment). See *infra* Section II-B. By the terms of the Amendment, at the very least, native-

To succeed where the traditional approach has failed, this Note pursues a broadened scope of inquiry, examining all of the constitutional provisions related to defining citizenship and presidential eligibility.<sup>12</sup> It treats the clause not as defining by itself whom the framers meant to include; instead, it recognizes Congress' role, through legislation, to determine who is a natural-born citizen.<sup>13</sup> Finally, it argues that a broadened inquiry should consider why a "bright line" prospective test might be more consistent with other structural principles of the Constitution.

Section I follows the traditional method of approaching the natural-born citizen clause, and illustrates the fundamental indeterminacy and incompleteness of this approach.<sup>14</sup> Section II demonstrates that Congress'

born citizens must be natural born. See *supra* note 2; *infra* note 65. But the three provisions then pose the question, who else of these persons "born or naturalized" is natural born, if any?

For an example of the consequences of failing to interpret the three definitional citizenship provisions together, see *infra* notes 70-71 and accompanying text.

12. Many other constitutional provisions contain the term "citizen." See U.S. CONST. art. I, § 2, cl. 2, and § 3, cl. 3; art. III, § 2, cl. 1; art. IV, § 2, cl. 1; amend. XI; amend. XV, § 1; amend. XIX; amend. XXVI. These provisions are distinguishable from the three with which we are presently concerned in that they do not tend to define or make distinctions among types of citizens; other than describing the rights that citizens hold or the requirement that one be a citizen in order to have those rights, they do nothing to elucidate the meaning of "citizen."

13. In 1790 Congress enacted a bill pursuant to its naturalization powers that provided: "And the children of citizens of the United States, that may be born beyond the sea, or out of the limits of the United States, shall be considered as *natural born citizens*. . . ." Act of Mar. 26, 1790, 1 Stat. 103, 104 (emphasis added). This bill, and those that followed it, Act of Jan. 29, 1795, 1 Stat. 414, 415; Act of Apr. 14, 1802, 2 Stat. 153, 155; Act of Feb. 10, 1855, 10 Stat. 604, have been discussed mainly as near contemporaneous evidence of whom the framers meant to identify by the natural-born citizen clause, rather than as definitions in their own right of which groups will have natural born status.

The wording of the first Act probably indicates the early Congress' belief in its power to declare who would be natural-born citizens. See *infra* text accompanying note 76. Another interpretation is that in passing the Act Congress meant to follow the English tradition of statutes "clarifying" the common law. These statutes rarely simply clarified; instead, they expanded, created exceptions to, or narrowed the application of, the common law. See, for example, the debate among Parry, C. PARRY, NATIONALITY AND CITIZENSHIP LAWS OF THE COMMONWEALTH AND OF THE REPUBLIC OF IRELAND 32-33 (1957), Piggott, F. PIGGOTT, NATIONALITY 41 (1907), and Plowden, F. PLOWDEN, A DISQUISITION CONCERNING THE LAW OF ALIENAGE AND NATURALIZATION ACCORDING TO STATUTES IN FORCE BETWEEN THE 10TH OF JUNE, 1818, AND THE 25TH OF MARCH, 1819, at 13 (1818), over whether *De Natis Ultra Mare*, 25 Edw. 3, stat. 2 (1350), was declaratory of the common law or law-enacting. It seems less likely that the Act of 1790 was declaratory, however, since the principle of *jus sanguinis*, see *infra* note 24, on which it is based, was not originally a common law principle. See A. MORSE, A TREATISE ON CITIZENSHIP BY BIRTH AND BY NATURALIZATION 9 (1881); F. PLOWDEN, *supra*, at 19; Freedman, *supra* note 2, at 359-60, 361 n.26. *But cf.* Ludlam v. Ludlam, 26 N.Y. 356, 362-63 (1863) (children of English parents, though born abroad, are regarded by common law as natural born).

For a discussion of limitations on Congress' power to interpret the clause, see *infra* note 65.

14. Gordon, for example, concludes that Congress "might pass a clarifying statute" but "[a]t most, it would express the opinion of the present Congress concerning the proper construction" of the clause. Gordon, *supra* note 2, at 27. He does not discuss the possibility of the clause falling within Congress' naturalization powers. *Id.* Morse argues that if the framers had meant to include only native-born citizens, they would have said so, and bases his conclusion that foreign-born citizens are natural-born on the age old doctrine of *jus sanguinis* (citizenship by descent), see *infra* note 24: "[I]t is not the statute that constitutes children of American parentage citizens; it is the fact of American descent, the *jus sanguinis*, that makes them citizens at the moment of birth—a fact which . . . the legislative power of the State recognizes and announces to the world." Morse, *supra* note 2, at 100.

Freedman elaborates on the Morse thesis and suggests that an American born abroad would be natural born if she or her parents were "subject to the jurisdiction of the United States" at her birth. Freedman, *supra* note 2, at 364, 365. What he means by "subject to the jurisdiction of" is unclear,

naturalization powers under the Constitution enable it to *naturalize* citizens from birth. Section III marshals textual and structural support for the alternative “naturalized born” approach, which reads the clause to require that the presidential candidate be a citizen at the time of birth. Under that approach, Congress has the power to define which classes of people will be citizens upon birth, but it may not declare any person a “citizen at birth” retroactively.<sup>15</sup>

## I. THE TRADITIONAL APPROACH: ASKING THE WRONG QUESTIONS

The traditional approach begins with a look at how the natural-born citizen clause came to be included at the Constitutional Convention and ends with an examination of British law in effect at the end of the 18th century.

### A. *The Constitutional Convention*

The records of the adoption of the clause by the delegates of the 1787 Constitutional Convention provide no evidence of the intended meaning of the phrase “natural-born citizen.”<sup>16</sup> The Committee on Detail of the Convention, given the task of converting the Convention’s general ideas about the office of Chief Executive into a concrete proposal, submitted without comment a recommendation that the President be a “citizen” and a resident of the United States for at least twenty-one years.<sup>17</sup> The “natural born” requirement, along with a proposed reduction in the residency requirement and addition of a “grandfather clause,”<sup>18</sup> first emerged two weeks later, on September 4,<sup>19</sup> from the Committee of Eleven, whose responsibility it was to revise the draft in accord with the suggestions of the

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but it appears to be based on something like the old English principle of allegiance. See *infra* Section I-B. Because of the focus on ancient legal principles instead of current naturalization statutes, Morse and Freedman cannot resolve whether or not *both* parents must be citizens; and under their approach the facts of each person’s case must be examined individually in order to determine natural born status. Furthermore, they are unable to define satisfactorily “subject to the jurisdiction of” because of the vagueness of their historical sources.

15. For example, Congress could not declare in 1987 that John Smythe, born an alien in 1952, “shall henceforth be a citizen at birth.” Nor could Congress declare an entire class of living John Smythes (*e.g.*, “all persons descended from Henry VIII”) to be citizens at birth. For a discussion of what might happen if Congress said in 1987, “all persons born after this day who are descended from Henry VIII shall be citizens at birth,” see *infra* text accompanying notes 92–94.

16. This is particularly surprising given that the Articles of Confederation contained no provision for a Chief Executive and the framers of article II were “writing on a clear slate.” Gordon, *supra* note 2, at 3.

17. 1 J. ELLIOT, *THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 256–57 (2d ed. 1836).

18. The grandfather clause appears in article II: “No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . .” U.S. CONST. art. II, § 1, cl. 5 (emphasis added). For a discussion of the importance of this provision, see *infra* notes 81–82 and accompanying text.

19. See 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 498 (rev. ed. 1937).

delegates.<sup>20</sup> The Committee did not explain the change to "natural born" citizen, and the Convention approved the revisions without debate.<sup>21</sup> The Committee on Style and Arrangement, or Committee on Revision,<sup>22</sup> retained the presidential qualifications without substantial change, and the provision was adopted without debate.<sup>23</sup> The deliberations of the Constitutional Convention, therefore, provide no clue to the meaning of the phrase.

### B. *British and Colonial Law Prior to Adoption of the Constitution*

The guiding principle of nationality law in England was that anyone born on British soil, with few exceptions, was a "natural-born British subject."<sup>24</sup> In 1350, British statutes began to provide that persons born abroad, whose parents were both British subjects, would enjoy the same rights of inheritance as those born in England.<sup>25</sup> In 1709, a statute declared that children born abroad of a natural-born father and alien mother were natural-born subjects at the time of their birth.<sup>26</sup> By 1731, an English statute extended natural born status to the foreign-born grandchildren of natural-born subjects.<sup>27</sup> Prior to 1740, the British Act of Settlement had prevented British subjects born abroad from sitting in Parliament or holding other high public office.<sup>28</sup> The Act of 1740 declared

20. Thach explains that the Committee of Eleven was created to dispose of unfinished business; the presumption was that whatever it decided would be accepted by the Convention. The Committee was most concerned with the electoral college provision. See C. THACH, *THE CREATION OF THE PRESIDENCY 1775-1789*, at 131-32 (1923).

21. 1 J. ELLIOT, *supra* note 17, at 284, 302; 5 *id.* at 507.

22. This Committee was charged with giving a "final literary polish" to the finished Constitution. C. THACH, *supra* note 20, at 138.

23. 1 J. ELLIOT, *supra* note 17, at 302; 5 *id.* at 507, 562.

24. This was the common law principle of *jus solis*. Civil law, however, was founded on the principle of *jus sanguinis*, which granted citizenship at birth by descent or inheritance. Colonists inherited primarily, but not exclusively, English common law; the juxtaposition of both sources of law made nationality law in the colonies even more complex. See generally Fluornoy, *Dual Nationality and Election*, 30 *YALE L.J.* 545, 548 (1921).

A number of exceptions to *jus solis* further complicated matters. Neither children born on British soil to foreign ambassadors or occupying forces, nor children born on foreign ships in British waters were natural-born subjects. Conversely, children born on ships in international waters to British parents were natural born. See *id.*; *United States v. Wong Kim Ark*, 169 U.S. 649, 659-60, 682 (1898).

25. See *De Natis Ultra Mare*, 25 Edw. 3, Stat. 2 (1350). In 1699 a statute removed another of the common law disabilities preventing inheritance by aliens by providing that a natural-born subject could inherit, even where the mother or father or both were aliens. See An act to enable his Majesty's natural-born Subjects to inherit . . . notwithstanding their mother or father were aliens, 11 & 12 Will. 3, ch. 6 (1699).

26. An Act for naturalizing Foreign Protestants, 7 Anne, ch. 5, § 3 (1709), clarified, see *supra* note 13, by An act . . . For naturalizing the children of natural-born subjects of the crown, 4 Geo. 2, ch. 21 (1731).

27. An Act . . . For naturalizing the children of natural-born subjects of the crown, 4 Geo. 11, ch. 21 (1731). The grandchildren thereby acquired all rights of natural-born subjects, except the ability to pass natural born status on to their offspring. See J. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608-1870*, at 15 n.10 (1978).

28. Act of Settlement, 12 & 13 Will. 3, ch. 2 (1701); An Act to explain the act made in . . . the reign of King William the Third, 1 Geo. 1, stat. 2, ch. 4 (1714). It is not clear whether or not the Act of Settlement applied to the colonies after the Declaration of Independence. See J. KETTNER, *supra*

these newly created "natural-born subjects" eligible to hold all public offices in the colonies that previously had been barred to them under the Act of Settlement.<sup>29</sup>

But the extent to which the colonies adopted British nationality law varied widely.<sup>30</sup> It was unclear how existing precedents of nationality law applied to the colonies, since these cases dealt specifically with England or previously independent lands acquired by conquest or descent.<sup>31</sup> Prominent jurists of the time disagreed over the proper legal analogy for the colonies, while the colonists wanted the protection of the British common law without being subject to control by Parliament.<sup>32</sup> This already complex heritage became more complicated when the colonies passed their own naturalization laws prior to the Declaration of Independence.<sup>33</sup>

After independence, no uniform rules of naturalization existed prior to the first exercise by Congress of its naturalization powers, the Naturalization Act of 1790.<sup>34</sup> Thus, at the time of the framing of the Constitution,

note 27, at 77, 123-26.

It has been suggested that the framers meant to copy the British Act of Settlement in excluding citizens born abroad from holding high public office. This seems unlikely since the colonists were angered by the Act, which they perceived as an attempt to limit immigration to the colonies. *Id.* at 124-26. The Declaration of Independence accused George III of having "endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; [and] refusing to pass others to encourage their migration hither." The Declaration of Independence para. 9 (U.S. 1776).

29. An Act for naturalizing such foreign Protestants . . . as are settled, or shall settle, in any of his Majesty's colonies, 13 Geo. 2, ch. 7 (1740), clarified by 13 Geo. 3, ch. 25 (1773). The Acts of 1740 and 1773 did not, however, allow colonists to hold public office in Ireland or Great Britain.

30. See J. KETTNER, *supra* note 27, at 78, 90-93; see also E. BROWN, *BRITISH STATUTES IN AMERICAN LAW 1776-1836*, at 14 (1964) (There was "wide variety in the degree to which both common and statute law was 'received' into the colonies . . . [and] unlikeness of local law . . . became the rule").

The doctrinal confusion was due in part to variations of citizenship drawn from both *jus solis* and *jus sanguinis* principles. See *supra* note 24. There was also a good deal of uncertainty over whether and/or when the colonists ceased to be British subjects. See, e.g., Kettner, *Subjects or Citizens? A Note on British Views Respecting the Legal Effects of American Citizenship*, 62 VA. L. REV. 945 (1976); *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242 (1830) (persons born in America ceased to be British subjects as of Declaration of Independence); *Teare v. White's Adm'rs*, 4 N.C. (Car. L. Rep.) 210 (1815) (date of reference is adoption of Constitution); *Palmer v. Downer*, 2 Mass. 179 (1806) (same); *State v. Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) 20, 24 (1838) (British subjects in North Carolina became North Carolina citizens "[u]pon the Revolution").

31. J. KETTNER, *supra* note 27, at 80-82, 135-36.

32. *Id.* at 134, 148-56.

33. At the outset little uniformity of procedure existed among the various colonies . . . Several colonies permitted naturalization by enrollment, establishing general requirements for admission to be administered by local courts. Elsewhere, admission to freemanship served as the analogue of naturalization, particularly in New England, where both the towns and the central government were involved. Royal governors and lords proprietary issued patents of denization, and local assemblies passed both general and special acts of naturalization.

*Id.* at 83.

34. See F. VAN DYNE, *A TREATISE ON THE LAW OF NATURALIZATION OF THE UNITED STATES* 6 (1907); Note, *Limitations on the Power of Congress to Confer Citizenship by Naturalization*, 50 IOWA L. REV. 1093, 1094 (1965) [hereinafter Note, *Limitations*]; Note, *Constitutional Limitations*, *supra* note 7.

there was no common understanding of what "natural born citizen" meant.<sup>35</sup>

### C. *Jay's Letter to Washington and Hamilton's Draft*

The phrase "natural born citizen" appears once in the papers of the founders.<sup>36</sup> In a letter predating the appearance of the phrase in the Committee of Eleven report by six weeks, John Jay wrote to George Washington:

Permit me to hint, whether it would not be wise . . . to provide a strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in chief of the American army shall not be given to, nor devolve on, any but a natural *born* Citizen.<sup>37</sup>

The letter is generally assumed to be the source of the phrase in the Constitution.<sup>38</sup> Some writers have suggested that Jay was responding to rumors that foreign princes might be asked to assume the Presidency.<sup>39</sup> But the only firm conclusions that may be drawn from the letter are that Jay was interested in creating some guarantee of allegiance to the United States for high office holders and that he placed special significance on the word "born."

35. However, nothing in British or early American precedent requires a mutual exclusivity of "naturalized" and "natural-born" or "citizen at birth." "To the Framers in 1787 there would have been no incongruity in suggesting that a citizen by parentage was both 'naturalized' and 'natural-born'; to them 'native' and 'naturalized' were the mutually exclusive terms . . ." Means, *supra* note 2, at 27; see also J. KETTNER, *supra* note 27, at 16 & n.13, 17, 30, 33-34 (naturalization originally meant to put subject in exactly the same legal position as a natural-born subject).

In a five-year study by a Cabinet commission, undertaken to revise U.S. nationality law and resulting in the Nationality Act of 1940, ch. 876, 54 Stat. 1137 (repealed 1952), the commission, noting that it was "still a subject of debate" whether natural-born citizens include persons born abroad to American citizens, acknowledged the possibility "that the framers might have contemplated a broader connotation of 'naturalization,' which would include the acquisition of citizenship at birth by children born abroad to American citizens." Gordon, *supra* note 2, at 15.

British statutes have provided for this result for British subjects since the 14th century. See *supra* notes 25-29.

36. See Gordon, *supra* note 2, at 4-5.

37. 3 M. FARRAND, *supra* note 19, at 61 (emphasis in original).

38. See Gordon, *supra* note 2; Means, *supra* note 2; Safire, *supra* note 6.

39. See C. THACH, *supra* note 20, at 137 (The name of Baron von Steuben was often mentioned; Thach contends, "[T]here can be little doubt that it was [von Steuben] . . . with his sympathies for the followers of Shay, and his evidently suspected dealings with Prince Henry of Prussia, whom Jay had in mind when he penned these words."); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1473 (1833). To assuage the public's fears about rumors of foreign princes being asked to assume the presidency, the framers "leaked" the following unofficial statement to the Philadelphia press:

We are informed that many letters have been written to the members of the Federal Convention . . . respecting the reports idly circulating that it is intended to establish a monarchical government to send for (Prince Frederick Augustus), &c. &c.—to which it has been uniformly answered, 'though we cannot, affirmatively, tell you what we are doing, we can, negatively, tell you what we are not doing—we never once thought of a king.

Means, *supra* note 2, at 28 (quoting from the Pennsylvania Journal, Aug. 22, 1787).

For more on the framers' distrust of foreigners, see *infra* note 48 and accompanying text.

These conclusions are strengthened by the existence of another document, which, oddly enough, has never been mentioned in previous discussions of the clause. On June 18, a little over a month before Jay's letter, Alexander Hamilton submitted a "sketch of a plan of government which 'was meant only to give a more correct view of his ideas, and to suggest the amendments which he should probably propose . . . in . . . future discussion.'"<sup>40</sup> Article IX, section 1 of the sketch provided: "No person shall be eligible to the office of President of the United States unless he be now a Citizen of one of the States, or hereafter be born a Citizen of the United States."<sup>41</sup> Hamilton's draft, which appears to be an early version of the natural-born citizen clause, contains two distinct ideas: first, that those currently citizens will not be excluded from presidential eligibility, and second, that the President must be *born* a citizen. Without the modifier "natural," the essence of the text is apparent: The President need not be native born, but must be a citizen from birth.

The indeterminacy of the traditional search for specific intent is evident.<sup>42</sup> The records of the Convention provide no answer<sup>43</sup> as to whether children born abroad of citizens might be considered natural born. The laws of Britain tell us only that they would have been natural-born subjects of Britain and, arguably, only up until independence.<sup>44</sup> Nor does the Jay letter or the Hamilton draft, without reference to subsequent naturalization statutes, tell us anything about which categories of people would be included by their phrases.

## II. THE NATURALIZATION POWER: DEFINING CITIZENSHIP FOR PURPOSES OF THE NATURAL-BORN CITIZEN CLAUSE

### A. *The Breadth of Congress' Naturalization Powers*

Section I demonstrated that a study of the framers' intent yields no conclusive definition of "natural born citizen." This Section suggests that the Constitution grants Congress the power to give precise meaning to the natural-born citizen clause.<sup>45</sup> This conclusion is based on an analysis of

40. 3 M. FARRAND, *supra* note 19, at 617.

41. *Id.* at 629.

42. See Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1198-99 (1987) (discussing difference between specific and general or "abstract" intent).

43. In contrast to the traditional approach, this Note treats the records and history of the Convention not as dispositive on the meaning of the text, but only as confirming what a commonsense reading of the text already suggests.

44. See *supra* Section I-B.

45. This Note does not argue that because the law of the time was muddled, Congress gains the power to give the clause definition merely by default. Rather, it demonstrates that in an area where the common law was in flux, the framers explicitly left to later Congresses the task of filling in the specifics. Cf. 2 M. FARRAND, *supra* note 19, at 235-238 (discussion of possibility of leaving to Congress the duty of providing specific citizenship and property requirements for congressional officeholders).

the historical development and application of Congress' naturalization power and the Fourteenth Amendment's modification of the boundaries of that power.

1. *A Brief History of Naturalization in the United States*

a. *Constitutional Convention Revisited*

The failure to enact effective naturalization rules under the Articles of Confederation<sup>46</sup> led to the Constitutional Convention's adoption of uniform naturalization rules with relatively little dispute.<sup>47</sup> By contrast, the related issue of citizenship and residency requirements for Congressional offices was hotly debated. That debate—which reflected a tension between the desire to encourage immigration and reward foreigners who had served the new nation well, and the fear of disloyal foreigners acquiring positions of power<sup>48</sup>—informs our understanding of the framers' view of Congress' constitutional role in exercising its naturalization power.

In the debates, the framers expressed concern about retroactively depriving those currently citizens of the right to hold office.<sup>49</sup> But the requirement of citizenship was eventually agreed upon “without any considerable opposition”<sup>50</sup> because it signified to the framers that the individual had some permanent interest in or attachment to his government.<sup>51</sup> At the same time, James Madison thought, and Hamilton seemed to agree, that while citizenship should be required, the number of years should not be specified in the Constitution; to do so *would infringe upon the legislature's duty of naturalization*.<sup>52</sup>

46. Article IV of the Articles of Confederation had been an attempt to remedy the lack of uniform naturalization rules in the colonies. See *supra* Section I-B. Article IV provided that, “[T]he free inhabitants of each of these states . . . shall be entitled to all privileges and immunities of free citizens in the several states . . .” Articles of Confederation, art. IV (U.S. 1781). But article IV created new difficulties: the strange wording seemed to allow an *inhabitant* of one state to become a *citizen* of another simply by crossing the border. See THE FEDERALIST No. 42, at 269–71 (J. Madison) (C. Rossiter ed. 1961). Even if, as some argued, “inhabitants” and “citizens” were interchangeable, the lax naturalization requirements of some states allowed circumvention of the stricter rules of others through article IV. See F. FRANKLIN, THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES 17–18 (1969); 3 M. FARRAND, *supra* note 19, at 120, 359, 548.

47. See 1 M. FARRAND, *supra* note 19, at 245, 247; 2 *id.* at 144, 167, 182, 569; 3 *id.* at 120, 359, 548; F. FRANKLIN, *supra* note 46, at 30.

48. See 2 M. FARRAND, *supra* note 19, at 235–238, 243.

Those in favor of having no citizenship requirement, or a very short or unspecified one, argued that meritorious foreigners would feel “discouragement & mortification,” *id.* at 237, from being “marked with suspicious incapacitations.” *Id.* at 236; see also *id.* at 122; THE FEDERALIST No. 52, at 326 (J. Madison) (C. Rossiter ed. 1961). Others claimed that foreigners “bring with them, not only attachments to other Countries, but ideas of Govt. so distinct from ours that in every point of view they are dangerous.” 2 M. FARRAND, *supra* note 19, at 236; see *id.* at 216–18; 235–38, 243.

49. See 2 M. FARRAND, *supra* note 19, at 237, 270–72.

50. 3 *id.* at 147.

51. *Id.*

52. [Madison] thought any restriction (however) in the *Constitution* unnecessary, and improper. unnecessary; because the Natl. Legisre. is to have the right of regulating naturalization, and can by virtue thereof fix different periods of residence as conditions of enjoying different privileges of Citizenship: Improper: . . . because it will put it out of the power of the

b. *Naturalization Act of 1790*

Congress' first act concerning citizenship, the Naturalization Act of 1790, was consistent with Madison's and Hamilton's understanding. In that act Congress provided that "the children of citizens of the United States, that may be born beyond the sea, . . . shall be considered as *natural born citizens* . . ."<sup>53</sup> Although the phrase was deleted in a later act for unknown reasons,<sup>54</sup> the Act was never challenged as being beyond the scope of Congress' naturalization power.

c. *Subsequent Legislation*

Congress' broad discretion to determine who shall be a citizen of the United States, under its power to "establish an uniform Rule of Naturalization,"<sup>55</sup> is implicitly acknowledged in subsequent statutory and judicial authority.

Current immigration and naturalization statutes make certain classes of foreign-born children citizens at birth, as have naturalization statutes since the first naturalization act in 1790.<sup>56</sup> That these statutes have never been challenged on the grounds that they are outside the authority delegated by the naturalization clause establishes de facto Congress' power to naturalize from birth.<sup>57</sup> In *United States v. Wong Kim Ark*,<sup>58</sup> a landmark opinion which held that a child born in the United States to foreign nationals is a United States citizen at birth, the Supreme Court described legislation making certain classes of foreign-born persons citizens at birth as an exercise of the naturalization power. It thus acknowledged that Congress' naturalization power was not limited to establishing rules for making *former* foreign nationals into citizens:

This [first] sentence of the Fourteenth Amendment is declaratory of

Nat'l Legislature . . . to confer the full rank of Citizens on meritorious strangers . . . .

2 *id.* at 235-36 (emphasis in original); *see also* 5 J. ELLIOT, *supra* note 17, at 411.

53. Act of Mar. 26, 1790, 1 Stat. 103, 104 (emphasis added).

54. One writer has speculated that the phrase was deleted accidentally, *see* Freedman, *supra* note 2, at 362, while another suggests that "[p]ossibly the [phrase] was deemed archaic or superfluous." Gordon, *supra* note 2, at 11; *see also* Weedin v. Chin Bow, 274 U.S. 657, 665 (1927) ("Congress must have thought that the questions of naturalization and of the conferring of citizenship on sons of American citizens were related."); *cf.* *United States v. Wong Kim Ark*, 169 U.S. 649, 714 (1898) (Fuller, C.J., dissenting) (statute "passed out of abundant caution to obviate misunderstandings" about citizenship of foreign-born children of Americans).

55. U.S. CONST. art. I, § 8, cl. 4; *cf.* Note, *Constitutional Limitations*, *supra* note 7, at 770, 810 (arguing that unfettered congressional power to deny naturalization should be limited by "normal standards of constitutional adjudication"); Note, *Limitations*, *supra* note 34, (arguing that congressional power to deny naturalization should be subject to limits of First and Fifth Amendments and bill of attainder clause). Neither of these pieces deny the unlimited power of Congress to bestow citizenship. Furthermore, their basic arguments are consistent with this Note's approach to reading the Fourteenth Amendment "back into" the original Constitution. *See infra* note 66.

56. *See supra* note 13.

57. *See* 8 U.S.C. §§ 1401-1409 (1982 & Supp. IV 1986).

58. 169 U.S. 649 (1898).

existing rights. . . . But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization.<sup>59</sup>

### B. *The Fourteenth Amendment*

In response to *Dred Scott v. Sandford*,<sup>60</sup> which held that blacks—even though born in the United States and of emancipated parents—were not citizens, the Fourteenth Amendment provided a constitutional definition of citizenship: “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 they reside.”<sup>61</sup> While there is no discretion left to Congress in the first phrase of the Fourteenth Amendment,<sup>62</sup>—“[a]ll persons born” in the United States are ipso facto citizens<sup>63</sup>—the second phrase of that clause, “or naturalized in the United States,” is the exclusive province of Congress.<sup>64</sup>

The effect of the Amendment is to deny Congress the power to determine who shall be native-born citizens, despite its naturalization powers.<sup>65</sup> But how does this limitation intersect with the natural-born citizen clause?<sup>66</sup> It seems that “natural born” cannot be a category outside of

59. *Id.* at 688.

60. 60 U.S. (19 How.) 393 (1857).

61. U.S. CONST. amend. XIV, § 1.

62. See *supra* note 2; *infra* note 65.

63. *But cf.* P. SCHUCK & R. SMITH, CITIZENSHIP WITHOUT CONSENT (1985) (arguing that native-born children of illegal aliens might not be citizens for purposes of Fourteenth Amendment based on phrase “subject to the jurisdiction thereof”).

64. *United States v. Wong Kim Ark*, 169 U.S. 649, 701 (1898); *Boyd v. Nebraska ex rel Thayer*, 143 U.S. 135, 162 (1892); *Chirac v. Chirac's Lessee*, 15 U.S. 259, 268 (1817); *Ly Shew v. Acheson*, 110 F. Supp. 50 (N.D. Cal.), *vacated on other grounds*, 219 F.2d 413 (9th Cir. 1953); F. VAN DYNE, *supra* note 34, at 6-9 (1907). The exclusive power of Congress to naturalize was also recognized by the framers. See, e.g., 3 M. FARRAND, *supra* note 19, at 120; THE FEDERALIST NO. 32 (A. Hamilton); *id.* No. 42 (J. Madison).

65. Citizenship acquired by birth in the United States is granted by the Fourteenth Amendment itself, not by Congress. Hertz, *Limits to the Naturalization Power*, 64 GEO. L.J. 1007, 1044 (1976); see *Bell v. Maryland*, 378 U.S. 226, 249 (1964) (“The Fourteenth Amendment . . . makes every person who is born here a citizen.”) (Douglas, J., concurring); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Wong Kim Ark*, 169 U.S. at 702.

Nor has Congress any power over the natural born status of native-born citizens. See *supra* note 2. It has never been suggested that Congress has the power to deny natural born status to native borns. Here it might be helpful to distinguish between the power to define the clause (e.g., to say that “natural born” means “born in California”) and the power to naturalize from birth (to include additional classes of people within the scope of the clause). Congress has only the latter power under the Constitution. Thus Congress can expand the category of natural-born citizens to encompass more than simply native borns, but it may not contract the category below the native born minimum set by the Fourteenth Amendment. See P. SCHUCK & R. SMITH, *supra* note 63, at 50; F. VAN DYNE, CITIZENSHIP OF THE UNITED STATES 6 (1904) (“[O]ur Constitution, in speaking of natural born citizens, uses no affirmative language to make them such, but only recognizes and reaffirms the universal principle . . . that the people born in a country do constitute the nation.” (quoting 10 Op. Att’y Gen. 394 (1862))).

66. The relative paucity of primary source materials on the adoption of the Thirteenth, Four-

“born . . . in the United States” and “naturalized,” or it would be outside of constitutionally defined and protected citizenship.<sup>67</sup> Thus, “natural born” must be either synonymous with “native born” or also include a subset of “naturalized.”

### III. THE “NATURALIZED BORN” APPROACH

The first sentence of the Fourteenth Amendment has been interpreted to mean that there are only two methods of acquiring citizenship: by birth in or by naturalization in the United States.<sup>68</sup> But this dichotomy is not a proper basis for concluding, as the circuit court in *Zimmer v. Acheson*<sup>69</sup> did, for example, that the only two classes of citizens are native born and naturalized, where “*naturalized*” is limited to citizens who do not acquire their citizenship at birth.<sup>70</sup> The misconception that naturalization only refers to the acquisition of citizenship after birth remains a potential stumbling block for the courts.<sup>71</sup>

teenth, and Fifteenth Amendments has resulted in less attention being focused on their original intent and history. See Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 289 (1987). Nevertheless, the importance of reading them “back into” the original Constitution cannot be overstated in order to preserve the coherence and integrity of the document. *Id.* at 290-93. For an argument that the Reconstruction Amendments can be seen as “perfecting the original Constitution,” especially in their creation of a constitutional definition of citizenship, see Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1463-64 (1987).

67. *Contra* Gordon, *supra* note 2, at 15.

But this is exactly what happened in *Rogers v. Bellei*, 401 U.S. 815 (1971), when the Supreme Court held that “the first sentence of the Fourteenth Amendment has no application to” a foreign-born child of an American parent. *Id.* at 827.

Since the Supreme Court in [*Rogers v. Bellei*] held that *jus sanguinis* citizens [*i.e.*, children born abroad of Americans] are not citizens within the meaning of the citizenship clause [of the Fourteenth Amendment], it follows that their privileges and immunities are not protected from State action in the next sentence of the amendment.

Comment, *Congressional Versus Constitutional Citizenship: Goodbye Section 301(b); the Song is Gone but the Melody Lingers On*, 2 GEO. MASON U. L. REV. 331, 342-43 & n.60 (1978). *But see infra* notes 91-92.

68. See *Schneider v. Rusk*, 377 U.S. 163, 165 (1964); *Wong Kim Ark*, 169 U.S. at 702.

69. 191 F.2d 209 (10th Cir. 1951).

70. *Id.* at 211. *Contra* *Rogers v. Bellei*, 401 U.S. at 840-44 (Black, J., dissenting) (citizenship limited to two modes of Fourteenth Amendment, but “naturalized” includes citizenship acquired at birth by statute); *Perez v. Brownell*, 356 U.S. 44, 58 n.3 (1958) (Fourteenth Amendment sets forth two “but by no means the only [modes]” for acquiring citizenship), *overruled on other grounds*, *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Wong Kim Ark*, 169 U.S. at 702-03 (citizens at birth created by “naturalization” powers).

71. See *supra* notes 68-70. Some of the confusion is reflected in the fact that Congress and the courts have been describing types of citizenship in different terms. Courts have characteristically distinguished between “native-born” and “naturalized” citizens, asserting that their status is the same except that the latter are ineligible for the Presidency. See cases cited *supra* note 4; see also *Osborn v. Bank of the United States*, 22 U.S. 738 (1824). Yet, since 1795, naturalization statutes have spoken in terms of “citizens” and “citizens at birth,” see 8 U.S.C. §§ 1401-1409 (1982 & Supp. IV 1986); while the Fourteenth Amendment refers to persons “born” or “naturalized” in the United States. U.S. CONST. amend. XIV, § 1.

The Court might refer to dicta from *Schneider v. Rusk*, 377 U.S. at 165, and similar cases, see *supra* note 4, if the natural-born citizen question arose over a candidate claiming to be natural born under statutes making non-native-born persons “citizens at birth.” See *e.g.*, 8 U.S.C. §§ 1401 (c)-(f) (persons born outside U.S. and/or its outlying possessions); *id.* § 1402 (persons born in Puerto Rico); *id.* § 1406(b) (persons born in U.S. Virgin Islands); *id.* § 1409 (persons born out of wedlock) (1982 &

Recognition of these “naturalized-born”<sup>72</sup> citizens—those made citizens at birth by naturalization statutes, or treaties—as natural born best comports with the text, history, and structure of the presidential eligibility, naturalization, and citizenship provisions of the Constitution.

### A. Textual and Historical Support

Discarding suggestions that “natural” might refer to legitimacy or to the medical or physical circumstances of birth,<sup>73</sup> the obvious connection between “natural” in article II and “naturalization” in article I supports the conclusion that the terms are not diametrically opposed; rather, *naturalization* can create *natural* citizens.

This reading is bolstered by the Naturalization Act of 1790.<sup>74</sup> The Congress that passed the Act of 1790 included some of the delegates to the Constitutional Convention;<sup>75</sup> to that extent, the Act reflects the Convention’s original understanding<sup>76</sup> of the delegation of power to Congress to

Supp. IV 1986). In striking down a statute providing that a naturalized citizen who resides in her (foreign) country of birth for three years loses her U.S. citizenship, the Supreme Court in *Schneider* observed that naturalized citizens, although equal to native-born citizens for all other purposes, are ineligible for the Presidency under the natural-born citizen clause. A court might therefore conclude that persons eligible for citizenship at birth under the aforementioned statutes [hereinafter “statutory citizens at birth”] are ineligible for the Presidency. The two assumptions implicit in such a conclusion—that statutory citizens at birth are naturalized and that naturalized citizens cannot be natural born—are incorrect under the analysis of this Note when used together in such a way as to exclude statutory citizens at birth from Presidential eligibility. Repudiation of either assumption—*i.e.*, stating that statutory citizens at birth are not naturalized, or stating that some naturalized citizens are eligible for the presidency—would remove the barrier to these citizens becoming President under the aforementioned decisions. This Note’s analysis requires an acceptance of statutory citizens at birth as naturalized (*i.e.*, falling under Congress’ naturalization powers) and a rejection of the second assumption, thus broadening the definition of “natural born” to include those naturalized at birth.

Justice Black is the only member of the Court who has ever recognized this as a possible reading. He states in his dissent in *Rogers v. Bellei*:

Although those Americans who acquire their citizenship under statutes conferring citizenship on the foreign-born children of citizens are not popularly thought of as naturalized citizens, the use of the word “naturalize” in this way has a considerable constitutional history. . . . [T]he First Congress conceived of this and most likely all other purely statutory grants of citizenship as forms or varieties of naturalization. . . . As shown in *Wong Kim Ark*, . . . [a]ll means of obtaining American citizenship which are dependent upon a congressional enactment are forms of naturalization.

401 U.S. at 839–41 (Black, J., dissenting); see also *supra* note 35.

72. This Note coins the term “naturalized born” rather than using “citizen at birth” or simply “natural born” for two reasons: first, to emphasize that persons may be naturalized from birth—that naturalization need not be *ex post*—and second, to make clear that the definition of such citizenship is legitimately within the naturalization powers of Congress.

73. See Letter to the Editor, *N.Y. Times*, Sept. 20, 1987, at E6, col. 2. No one, however, has attempted to argue it seriously. Two writers use it rather facetiously in examples. See J. ELY, *DEMOCRACY AND DISTRUST* 13 (1980); Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U.L. REV.* 204, 207 (1980).

74. Act of Mar. 26, 1790, 1 Stat. 103, 104. For additional discussion of this Act, see *supra* notes 5, 13, 53 & 54 and accompanying text.

75. Twenty of the 79 members of the first Congress had been delegates to the Convention. Of these, eight had been members of the Committee of Eleven, the drafters of the presidential eligibility clause. Gordon, *supra* note 2, at 8 n.57.

76. Arguing in terms of framers’ intent requires some discussion of methodology. The purpose of this Note is not to advocate a particular interpretative strategy. It is, instead, to find the most plausible

make rules of naturalization. The first Congress not only exercised its naturalization power to make citizens of children born abroad of United States citizens, but it designated these citizens as "natural born." Thus, a Congress nearly contemporaneous with the adoption of the clause believed it had the power to define "*natural* born citizen" under its *naturalization* powers.

But the constitutional text says not only "natural," it also says "born." To be "born" something is to be it "from the time of birth." This is surely what Jay had in mind when he emphasized "born": In the context of his admitted concern over "the admission of Foreigners" into the national government, requiring that the President be a citizen *from birth* would prevent foreign princes from attaining that highest executive office. The Hamilton draft makes the point even more starkly. Thus the text means, literally, "naturalized" (natural) "at birth" (born).<sup>77</sup>

The constitutional text provides secondary support for the naturalized born reading as well. First, set as it is among the other presidential eligibility requirements, the natural-born citizen clause is surrounded by bright-line rules. The framers required the President to be at least thirty-five years old, not "mature."<sup>78</sup> They also specified a fourteen-year residency requirement, even though some might have the requisite loyalty, knowledge, and experience after a much shorter time.<sup>79</sup> This placement in the text suggests that the framers considered the natural born qualification to require not an investigation but simply reference to the naturalization statutes in effect at the candidate's birth, which would yield an unambiguous answer.<sup>80</sup>

Second, the clause is juxtaposed with the "grandfather" provision that exempts "Citizen[s] of the United States, at the time of the Adoption of th[e] Constitution"<sup>81</sup> from the natural born requirement; both provisions reflect a certain wariness of arbitrary congressional action. The grandfather provision recalls the framers' fear of retrospective legal rules, ex-

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interpretation of the natural-born citizen clause. The ideal interpretation is most consistent with constitutional text, history, structure, and policy concerns, considered as a whole. If such coherence is possible, no normative principle about the relative validity of these interpretative elements need be expressed. See Fallon, *supra* note 42; see also *supra* note 43.

77. The *Oxford English Dictionary* defines "natural born" as "[h]aving a specified position or character by birth." 7 OXFORD ENGLISH DICTIONARY 38 (1961); see also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1507 (1981). The seeming redundancy of "natural" and "born" in the phrase perhaps explains why Hamilton left "natural" out of his draft. See *supra* note 41.

The *Oxford English Dictionary* also indicates that "natural born" is not necessarily synonymous with "native born": "Cf. native born." 7 OXFORD ENGLISH DICTIONARY 38 (1961). The framers used the term "native" citizen several times in speeches in the Convention; if the framers intended to limit "natural born" to "native born" they would have done so explicitly. See 2 M. FARRAND, *supra* note 19, at 236, 243; THE FEDERALIST No. 52, at 326 (J. Madison) (C. Rossiter ed. 1961).

78. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341, 1358-59 (1983).

79. See, e.g., 2 M. FARRAND, *supra* note 19, at 235-38.

80. See *infra* text accompanying notes 87-89.

81. U.S. CONST. art. II, § 1, cl. 5.

pressed in their absolute prohibition of ex post facto laws and bills of attainder.<sup>82</sup> Similarly, the natural-born citizen clause, by requiring citizenship from birth, prevents Congress from using its naturalization power ad hoc to qualify candidates it favors or disqualify those it does not. Naturalization statutes creating citizenship at birth logically can create natural-born citizens only prospectively.

### B. *Structural Support*

A structural argument may be drawn from these textual observations. A bright-line test makes the most sense for eligibility requirements; there should not be any significant doubt as to who is eligible. As Professor Carter points out, "One can imagine a Constitution providing that elected representatives be 'mature' or 'of good character,' but there is something disturbing, almost counterintuitive, about such provisions . . ."<sup>83</sup> If the natural born requirement seems unclear, perhaps we have been asking the wrong questions.

Under the naturalized born approach, however, a "natural born citizen" may be either of two things: a native-born citizen, or a naturalized-born citizen designated under Congress' power to confer citizenship at birth upon any category of persons. This system is singularly uncomplicated when compared to the traditional approach discussed in Section I. The naturalized born approach enables courts to forgo a misdirected search for specific intent regarding the facts of each case, for which there are little or no primary source materials.<sup>84</sup> Once the approach is established, in order to determine whether or not a person is a natural-born citizen, a court need only interpret the federal naturalization statutes in effect at the time of his or her birth.<sup>85</sup> Under current law it could easily

82. U.S. CONST. art. I, § 9, cl. 3; see also THE FEDERALIST No. 78, at 466 (A. Hamilton) (C. Rossiter ed. 1961) (danger of bills of attainder and ex post facto laws).

83. Carter, *supra* note 78, at 1358-59. This point is related to the textual observation about bright-line rules, *supra* notes 78-80 and accompanying text, but its emphasis is different. The textual argument demonstrates that the other constitutional eligibility requirements surrounding the natural-born citizen clause are bright-line rules. The argument here is that there are good reasons why all eligibility rules should be bright-line. This does not mean that there could never be a case in which the natural born requirement might have to be construed in its application to a particular circumstance, but it would never require looking beyond any individual's lifetime.

84. See Fallon, *supra* note 42, at 1215-17, 1242, 1255-58 (suggesting that proper level of generality of original intent should be determined by what creates most plausible and coherent interpretation in light of text, history, structure, and social policy).

85. This Section assumes that the natural-born citizen question would arise in federal court litigation. There are a number of ways in which litigation might arise: An opponent might try to keep the candidate's name off the ballot at the nominating convention or keep the electors from voting for the candidate in the electoral college. An opponent also might challenge the validity of bills signed by the candidate once in office. Means, *supra* note 2, at 30; see also Gordon, *supra* note 2, at 28-31.

The Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. §§ 431-455 (1982 & Supp. IV 1986), the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 (1982 & Supp. III 1985), and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042 (1982), which place certain limits on campaign fundraising and spending and provide for the disbursement of matching funds to qualified presidential candidates, could bring new actors into the

be decided,<sup>86</sup> for example, that a child born today would be a natural-born citizen if born in the United States or if born abroad to at least one

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resolution of any natural-born citizen clause dispute over a candidacy. Under the FECA and the Presidential Primary Matching Payment Account Act, the Federal Election Commission ("FEC") must certify to the Treasury that a candidate meets the enumerated statutory eligibility requirements to receive funds under the applicable act. *See* 11 C.F.R. § 9036 (1987). None of these acts refer to the constitutional eligibility of candidates for federal office. Nevertheless, the issue of eligibility under the natural-born citizen clause might be raised under the federal election laws, on a theory that constitutional eligibility to hold office is an implicit condition to certification for receiving funds under the Acts. A potential candidate could seek an advisory opinion regarding qualification as a natural-born citizen through the formal process established by the FECA. 2 U.S.C. § 437f. An opposing candidate might file a complaint with the FEC challenging the candidate's eligibility. 2 U.S.C. § 437g(a)(1). In the alternative, the FEC could raise the issue *sua sponte*, or an individual voter could spur the FEC into conducting an investigation. *See* 2 U.S.C. §§ 437d(a)(9), 438(b) (investigations). *See generally* 2 U.S.C. § 437d, g, h.

While the FEC might have a constitutional obligation to ensure that candidates to whom funds are dispersed meet constitutional standards, it also has limited resources and limited expertise for making constitutional interpretations. Thus, whatever the action taken by the FEC, the matter is likely to reach its final resolution in the federal courts.

86. One final question that might complicate the determination is the status under this approach of laws which make citizenship at birth subject to conditions and requirements *after birth*, such as a loss of citizenship for the foreign-born child who does not reside in the U.S. for at least two years between the ages of fourteen and twenty-eight. 8 U.S.C. § 1401(b) (1976) (repealed 1978). These conditional clauses pose serious constitutional problems under the Fourteenth Amendment. *See* Comment, *supra* note 67. The courts and Congress have insisted that native-born and naturalized citizens are equal in all rights under the Constitution except for eligibility for the presidency. *See, e.g.,* *Bell v. Maryland*, 378 U.S. 226, 249 (1964) ("there is no second or third or fourth class of citizenship"); *see also* cases cited *supra* note 4. The naturalized born approach would remove the exception for certain classes of naturalized citizens.

Congress has begun to correct such inequities—for example, its repeal in 1978 of section 1401(b) of title 8 (repealing requirement of two years residence between ages of 14 and 28 in U.S. for foreign-born child claiming U.S. citizenship). 8 U.S.C. § 1401(b) (1976), *repealed by* Pub. L. No. 95-432, §§ 1, 3, 92 Stat. 1046 (1978); *see also* Comment, *supra* note 67, at 331. Another example is the 1986 amendment of § 1401(g), which lessened the residency requirements for citizen parents to pass on citizenship to their offspring from ten years to five. 8 U.S.C. § 1401(g) (1982) (amended 1986); *see also infra* note 89.

Even if conditional clauses remain in force, however, their impact on the interpretation of the natural-born citizen clause need not be significant. Professor Van Dyne rejects the idea of "qualified" citizenship altogether by concluding that a child born abroad of an American father [parent] is a natural-born citizen regardless of conditions subsequent to birth. F. VAN DYNE, *supra* note 65, at 32, 50. Professor Gordon points out that there is "no support whatever in the language or antecedents of the Constitution" for the proposition that conditions subsequent negate natural-born status. Gordon, *supra* note 2, at 23. In fact, conditional clauses have appeared in naturalization legislation since the first Naturalization Act in 1790: *natural-born* status under that Act was subject to a requirement that the person's father have resided in the United States. Act of Mar. 26, 1790, 1 Stat. 103, 104; *see also* Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1137 (repealed 1952); Immigration and Nationality Act of 1952, § 301(a)(7), 8 U.S.C. § 1401(a)(7) (repealed 1972).

Furthermore, it is not clear that native-born, as opposed to naturalized, citizens are immune from losing their status subject to a condition subsequent. Foreign-born children acquire *full* citizenship at birth by parentage, even though that citizenship may be lost later under specified circumstances. Thus, native-born citizens with a claim to dual citizenship by parentage must elect citizenship of one country or the other; to that extent, even native citizenship may be considered qualified up until the time of election. *See* Freedman, *supra* note 2, at 362-63.

Finally, citizenship acquired at birth but subject to a residency requirement should be held to qualify as natural-born citizenship, since natural-born citizenship is relevant only to Presidential eligibility—and the Presidential eligibility provisions of the Constitution themselves impose a residency requirement. *See* U.S. CONST. art. II, § 1, cl. 5. We can conclude, then, that a subsequent residency requirement is at least not inconsistent with the other constitutional Presidential qualifications, and, at least to the extent that the requirement does not exceed 14 years, it would not offend either their spirit or letter.

American parent, including American diplomatic and military personnel stationed abroad.<sup>87</sup> The child would be natural born if born on an Indian reservation, or in Puerto Rico.<sup>88</sup> A child born abroad with American grandparents and alien parents or a person born in the Virgin Islands before February 25, 1927 or a child born today in Guam would not be natural born because he or she is not granted citizenship at birth under current statutes.<sup>89</sup>

Looking to contemporary law rather than early American or British law makes sense especially where, as in this case, the underlying assumptions about which groups are entitled to rights under the law have changed significantly.<sup>90</sup> Consistent with Fourteenth Amendment ideals concerning due process and broadened political participation, this approach will most likely result in an expansive reading of who will be eligible to run for office.<sup>91</sup> Expanding the categories of natural-born citizens makes the eligible candidates more representative of the voting population, thereby increasing the rights of voters to select their representatives as well as the rights of individuals to vie for the office of President.<sup>92</sup>

The prospectivity of the naturalized born approach is also supported by structural considerations. One might argue that Congress could exercise its naturalization power by declaring that all heirs to the throne of Eng-

87. 8 U.S.C. §§ 1401(a), (c)-(g), 1401a (1982 & Supp. IV 1986).

88. *Id.* §§ 1401(b), 1402.

89. *Id.* §§ 1406-1407. Under current immigration law, a person born after December 2, 1952 is a U.S. citizen if at least one parent was a citizen of the U.S. and had a principal residence in the U.S. before the child's birth. If both parents were citizens, there is no set term of residence. If one parent was a U.S. citizen and the other an alien, the term of residence is five years, two before the birth of the child. If one parent was a citizen and the other was born in an outlying possession of the United States, the term of residence is one year. *See* 8 U.S.C. §§ 1401-1401a (1982 & Supp. IV 1986).

90. In areas where the law in effect at the time of the framers was discriminatory—and in the area of naturalization it clearly was, *see supra* note 7—courts are especially likely to “modify” the law on equal protection grounds in order to remove the discriminatory effects. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982) (intermediate scrutiny for classification based on alienage); Trimble v. Gordon, 430 U.S. 762 (1977) (illegitimacy); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (gender); *Reed v. Reed*, 404 U.S. 71 (1971) (gender).

91. Under the naturalized born approach, natural born status is not limited to native borns; also, Congress may grant natural born status (citizenship at birth) to additional groups not included under current naturalization laws. Congress and the courts have historically broadened citizenship rights rather than narrowed them. *See* *Rogers v. Bellei*, 401 U.S. 815, 826 (1971); *see also supra* note 7.

92. The significance of denying the right to hold office, even where the individual does “not covet the public honors,” 2 M. FARRAND, *supra* note 19, at 236, was recognized by the framers. *See supra* notes 48-52 and accompanying text.

The Supreme Court has invalidated certain restrictions on candidacy on the grounds that they impair voters' rights under the Fourteenth Amendment. *See* *Lubin v. Panish*, 415 U.S. 709 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972); *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968). Courts have occasionally suggested that there might be a fundamental right to candidacy, independent of the right to vote. *See* *Mancuso v. Taft*, 476 F.2d 187 (1st Cir. 1973); *Zeilenga v. Nelson*, 4 Cal. 3d 716, 94 Cal. Rptr. 607 (1971); *Gordon, The Constitutional Right to Candidacy*, 25 U. KAN. L. REV. 545 (1977) (suggesting that right to candidacy be grounded in footnote four of *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)).

Furthermore, the openness of the presidency is often held out as a symbol: “Part of the American dream has long been the idea that any child, no matter how humble their origins, could grow up to be President.” Press release of Sen. Eagleton, *supra* note 8; *see also* *Freedman, supra* note 2, at 357.

land will henceforth be citizens of the United States at birth and thus eligible for the presidency. This would seem to contradict the framers' desire to keep foreign royalty out of their nation's highest office—unless, as this Note argues, the issue is not keeping royalty out per se, but rather ensuring a minimum loyalty arising out of citizenship from birth. There is some tension here, but prospectivity at least ensures that no *particular* prince could be made a natural-born citizen and asked to run. It is reasonable to posit that the framers agreed that Congress was a suitable body to which to entrust such discretion, in spite of their occasional distrust of popular legislatures.<sup>93</sup> They were interested in creating a workable system of government, and the naturalized born approach allocates power to a body reasonably suited to the exercise of that power in a manageable way.<sup>94</sup>

#### IV. CONCLUSION

If the eligibility of a presidential candidate born outside the territorial United States were challenged under the natural-born citizen clause today, the outcome, based on traditional methods of approaching the clause, would be unpredictable and unsatisfactory. This Note's approach removes the confusion caused by Supreme Court dicta asserting that there are only two classes of citizens, native-born and naturalized. As historical and textual analysis has shown, a citizen may be *both* "naturalized" and "natural born." Under the naturalized born approach, any person with a right to American citizenship under the Constitution, laws, or treaties of the United States at the time of his or her birth is a natural-born citizen for purposes of presidential eligibility.

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93. See, e.g., THE FEDERALIST No. 10 (J. Madison) (dangers of popular "factions"); *id.* No. 48, at 310–11 (J. Madison) (C. Rossiter ed. 1961) (tendency of legislature to encroach on other departments of government); *id.* No. 49 (J. Madison) (same), No. 78, at 469–70 (A. Hamilton) (C. Rossiter ed. 1961) (judiciary to guard against ill-considered acts of legislature). See generally Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985) (discussing Federalists' distrust of legislatures).

94. See J. ELY, *supra* note 73, at 92 (Constitution "overwhelmingly dedicated to concerns of process and structure").

