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## An Idea Whose Time Has Come—The Curious History, Uncertain Effect, and Need for Amendment of the “Natural Born Citizen” Requirement for the Presidency

Lawrence Friedman  
*Thompson Coburn LLP*

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**AN IDEA WHOSE TIME HAS COME—THE CURIOUS HISTORY,  
UNCERTAIN EFFECT, AND NEED FOR AMENDMENT OF THE  
“NATURAL BORN CITIZEN” REQUIREMENT FOR THE  
PRESIDENCY**

LAWRENCE FRIEDMAN\*

It has been called “the Constitution’s worst provision.”<sup>1</sup> It is the “unresolved enigma” of the United States Constitution.<sup>2</sup> It embodies “striking unfairness and dangerous ambiguity.”<sup>3</sup>

It was written into the Constitution in 1787 without any record of discussion at the constitutional convention or among the Framers.<sup>4</sup> It has been unchanged ever since. Its meaning has never been construed by the United States Supreme Court or any federal court. The provision in question is Article II, Section I, Clause V of the Constitution: “No Person except a *natural born Citizen* . . . shall be eligible to the Office of President . . . .”<sup>5</sup>

Those three italicized words appear nowhere else in the Constitution.<sup>6</sup> They have mystified and sometimes enraged commentators for more than 200 years. This phrase has been the impetus for repeated calls for amendment, most recently in 2004.<sup>7</sup>

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\* Partner, Thompson Coburn LLP; J.D., Columbia University; M.P.A., Princeton. I am grateful to Brenda Foote, Assistant Reference Librarian at Thompson Coburn LLP, for her assistance with the research required for this article.

1. Robert Post, *What is the Constitution’s Worst Provision?*, 12 CONST. COMMENT 191 (1995).

2. Charles Gordon, *Who Can be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1, 1 (1968).

3. 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, 53 (2005).

4. Gordon, *supra* note 2, at 3–4.

5. U.S. CONST. art. II, § 1, cl. 5 (emphasis added).

6. Charles Gordon, *The Citizen and the State: Power of Congress to Expatriate American Citizens*, 53 GEO. L. J. 315, 318, 334 (1965).

7. Four resolutions to amend the Constitution to make naturalized citizens eligible for the presidency were introduced during the Reconstruction era. Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 BYU L. REV. 927, 947 nn.109 & 110 (citing H.R. Res. 166-169, 42d Cong. (3d Sess. 1872); CONG. GLOBE, 42d Cong., 3d Sess. 226 (1872); H.R. Res. 52, 42d Cong. (2d Sess. 1871); S. Res. 284, 41st Cong. (3d Sess. 1871); H.R. Res. 269, 40th Cong. (2d Sess. 1868); CONG. GLOBE, 40th Cong., 2d Sess. 2526 (1868)). Beginning in 1960,

For decades, the “natural born citizen” requirement has cast doubt on the eligibility to the presidency of any number of candidates. The 1916 Republican nominee, Charles Evans Hughes, was born in the United States of non-citizen parents.<sup>8</sup> The Republicans’ 1964 candidate, Barry Goldwater, was born in Arizona while it was still a territory and, therefore, not one of the “United States.”<sup>9</sup> When George Romney Sr. was a leading Republican contender in 1968, his birth in Mexico to American parents was mentioned as a possible impediment to his eligibility to the office, and was the subject of discussion by commentators.<sup>10</sup> Franklin D. Roosevelt Jr., a California congressman who was considered a presidential prospect in the 1950s, was born in Canada to Franklin and Eleanor Roosevelt.<sup>11</sup> Governor Christian Herter of Massachusetts, a Republican presidential prospect in 1960, was born to American parents in France.<sup>12</sup>

The clause has practical impact today. “[I]t prevents over 12.8 million Americans from being eligible for the presidency . . . including . . . former

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proposals to amend or repeal the “natural born citizen” clause include H.R.J. Res. 38, 95th Cong. (1977); H.R.J. Res. 127, 94th Cong. (1975); H.R.J. Res. 33, 94th Cong. (1975); H.R.J. Res. 1051, 93d Cong. (1974); H.R.J. Res. 993, 93d Cong. (1974); H.R.J. Res. 896, 93d Cong. (1974); H.R.J. Res. 589, 93d Cong. (1973); S.J. Res. 137, 93d Cong. (1973); H.R.J. Res. 491, 93d Cong. (1973); H.R.J. Res. 1255, 92d Cong. (1972); H.R.J. Res. 1245, 92d Cong. (1972); H.R.J. Res. 1220, 92d Cong. (1972); S.J. Res. 161, 92d Cong. (1971); H.R.J. Res. 795, 90th Cong. (1967); H.R.J. Res. 511, 90th Cong. (1967); H.R.J. Res. 16, 89th Cong. (1965); H.R.J. Res. 397, 88th Cong. (1963); H.R.J. Res. 127, 87th Cong. (1961); and H.R.J. Res. 547, 86th Cong. (1960). *See also* Memorandum from Ira Shapiro, Senator Tom Eagleton’s staff, to Staff Members Handling Judicial Matters (Mar. 1, 1983) (on file with author) (citing H.R.J. Res. 491, 93d Cong. (1973); H.R.J. Res. 1255, 92d Cong. (1972); H.R.J. Res. 1245, 92d Cong. (1972); H.R.J. Res. 1220, 92d Cong. (1972); S.J. Res. 161, 92d Cong. (1971)). More recent proposals include S. 2128, 108th Cong. (2004); H.R.J. Res. 104, 108th Cong. (2004); and S.J. Res. 15, 108th Cong. (2003). GPO Access, <http://www.gpoaccess.gov/bills/search.html> (select “108th Congress (2003–2004) under “Select a Congress(es):”; then search “S. 2128”; “H.R.J. Res 104”; and “S.J. Res. 15”). These proposals vary in their specifics. Some, for example, require naturalized citizens to reside in the United States for a certain number of years before they are eligible for the presidency. Others require that naturalization be acquired for a specified number of years before the citizen is eligible. A few, like S. 2128 introduced in 2004, are proposed statutes. *See* text accompanying *infra* notes 50–66 (for discussion on Congress’s authority to enact legislation with respect to the eligibility of “natural born citizens”).

8. Breckinridge Long, *Is Mr. Charles Evans Hughes a “Natural Born Citizen” Within the Meaning of the Constitution?*, 49 CHI. LEGAL NEWS 146 (1916); J. Michael Medina, *The Presidential Qualification Clause In This Bicentennial Year: The Need to Eliminate The Natural Born Citizen Requirement*, 12 OKLA. CITY U. L. REV. 253, 267 n.72 (1987).

9. Gordon, *supra* note 2.

10. Isidor Blum, *Is Gov. George Romney Eligible to Be President?*, N.Y.L.J., Oct. 16, 1967 at 1, col. 7; Eustace Seligman, *A Brief for Governor Romney’s Eligibility for Presidency*, N.Y.L.J. Nov. 15, 1967 at 1, col. 7, reprinted in 113 CONG. REC. 26, 35019 (1967).

11. Gordon, *supra* note 2, at 1.

12. *Id.*

Secretaries of State Madeleine Albright and Henry Kissinger . . . and over 700 Medal of Honor Winners.”<sup>13</sup> The “natural born citizen” requirement appears to disqualify (on a bi-partisan basis) prospective candidates such as California’s Republican Governor Arnold Schwarzenegger (born in Austria) and Michigan’s Democratic Governor Jennifer Granholm (born in Canada).<sup>14</sup> The requirement could jeopardize the eligibility of Arizona Senator John McCain, a Republican contender in 2000 and currently a candidate for the Republican nomination in 2008, who was born in the Panama Canal Zone to American citizen parents.<sup>15</sup> Some scholars have suggested that Native Americans, i.e., “American Indians,” may not be “natural born citizens” for purposes of Article II because, among other reasons, they “are technically considered naturalized rather than natural born.”<sup>16</sup>

As this (partial) list indicates, the “natural born citizen” clause raises a number of issues. “Natural born citizen” is nowhere defined in the Constitution and does not appear to have been a term of art with a well-defined meaning under common law at the time the Constitution was adopted. The Framers never explained what they meant by this phrase or why they inserted it into the Constitution with virtually no deliberation. Is someone (like John McCain) born outside the United States of American to citizen parents a “natural born citizen?” This and every other question regarding the meaning of the clause was never discussed by the Framers and has never been

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13. Sarah P. Herlihy, *Amending the Natural Born Citizen Requirement: Globalization as the Impetus and the Obstacle*, 81 CHI.-KENT L. REV. 275, 275–76 (2006).

14. See *infra* text accompanying notes 68–73 for a more detailed analysis concerning the argument that foreign-born naturalized citizens are eligible for the presidency now, notwithstanding the “natural born citizen” clause.

15. Lowell Ponte, *Is John McCain Ineligible To Be President?*, NEWS MAX, July 14, 2007, <http://www.newsmax.com/archives/articles/2007/7/14/85538.shtml>. For an argument that Senator McCain is eligible notwithstanding his birth in the Canal Zone, see James C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 CONST. COMMENT. 575, 579 n.21 (2000).

16. Christina S. Lohman, *Presidential Eligibility: The Meaning of the Natural Born Citizen Clause*, 36 GONZ. L. REV. 349, 351 n.18 (2000–2001). In summary, this commentator notes:

It appears the last word from the Supreme Court on the status of Native Americans, admittedly very long ago, was that although they are subject to the laws of the United States, they serve a tribal sovereign. Thus, Native Americans are not under the “jurisdiction” of the United States per the Fourteenth Amendment, and therefore only obtain United States’ citizenship via naturalization . . . Native Americans are technically considered naturalized rather than natural born.

*Id.* (citing Jonathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 690–91 (1995) (citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1856)); Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881, 889 n.7 (1988) (citing *Elk v. Wilkins*, 112 U.S. 94, 102 (1884))).

considered by any federal court.<sup>17</sup> This dearth of contemporaneous definition and explication has made the clause a *tabula rasa* of constitutional interpretation on which proponents of different schools of interpretation may write afresh.

Originalists seek to determine what the Framers intended based on the textual language and cite this provision as an example of “narrowly drawn” constitutional language that “allows little or no room for interpretation.”<sup>18</sup> Opponents of that school point out that if the term “natural born” were given its plain meaning, there would be a plausible argument that candidates like Warren Harding, who were born by caesarean section, are ineligible to be president.<sup>19</sup> Proponents of the theory of a “living Constitution” debate what principle the Framers sought to effect in the “natural born citizen” clause and how that principle should be implemented today.<sup>20</sup> Some scholars argue that the Constitution can be interpreted with reference to rules of construction analogous to those applicable to statutes, and on that basis propound different theories as to how the clause should be construed.<sup>21</sup>

For these reasons, the “natural born citizen” clause presents a unique example of an opaque provision of our original Constitution for which definitive textual or interpretive definitions are inconclusive but which has a very practical impact on important aspects of our political system today.

Senator Thomas Eagleton, who was a skilled practitioner of practical politics as well as an avid student of constitutional history and theory, weighed in on the “natural born citizen” clause in 1982 when he issued a press release

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17. The Supreme Court and the lower federal courts have from time to time mentioned the clause, but only to illustrate that under our constitutional scheme, “a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the [p]residency.” *Luria v. United States*, 231 U.S. 9, 22 (1913); see also *In re Goldberg*, 269 F. 392, 392–93 (E.D. Mo. 1920); *United States v. Ginsberg*, 244 F. 209, 213 (W.D. Mo. 1914). One of the dissenters in the *Dred Scott* case mentioned the “natural born citizen” clause as illustrating that the Framers understood that United States citizenship could be acquired at birth, and that this applied to “every free person born on the soil of a State,” including persons of color. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 576 (1856) (Curtis, J., dissenting).

18. Alex Kozinski, *What I Ate For Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 996 (1993).

19. Michael C. Dorf, *Truth, Justice and the American Constitution*, 97 COLUM. L. REV. 133, 170 (1997); M.B.W. Sinclair, *Postmodern Argumentation: Deconstructing the Presidential Age Limitation*, 43 N.Y.L. SCH. L. REV. 451, 457 n.30 (1999). These commentators point out that Shakespeare used analogous reasoning in *MACBETH*, explaining that a prophecy that “none of woman born shall harm Macbeth” was true because Macbeth’s assassin MacDuff “was from his mother’s womb/Untimely ripp’d,” i.e., born by Caesarean section. WILLIAM SHAKESPEARE, *MACBETH* act 4, sc.1, ll. 94–95, act 5, sc. 8, ll. 15–16 (Sylvan Barnet, ed. 1963).

20. E.g., Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L. J. 881, 886–99 (1988).

21. E.g., Seymour, *supra*, note 7, at 971–73.

announcing his intention to propose a constitutional amendment.<sup>22</sup> A few months later, Senator Eagleton proposed an amendment that made naturalized citizens eligible for the presidency eleven years after naturalization.<sup>23</sup>

This Article discusses the history of the “natural born citizen” clause, summarizes the issues that have been raised from time to time regarding its meaning and scope, and evaluates the arguments that have been advanced regarding the clause’s continued viability. It will conclude, as Senator Eagleton did in 1983, that the clause is an anachronism that has long since ceased to serve whatever purpose the Framers had in mind when they included it in the Constitution. While attempts can be made to ignore or explain away that anachronism through creative interpretation, the most intellectually coherent approach is the one advocated by Senator Eagleton in 1982: amendment of the Constitution to make clear once and for all that eligibility to the presidency is open to all citizens of the United States.

The Framers had no antecedents to draw on when creating the presidency and determining the qualifications for the office. There was no executive officer under the Articles of Confederation. The Framers’ only model was a negative one: they wanted an executive officer who would not have the attributes of a hereditary monarch.<sup>24</sup>

After the Constitutional Convention decided on the concept of a government of coequal branches, it delegated to a Committee on Detail the task of drafting specific provisions, including the provisions regarding the Executive Branch.<sup>25</sup> A Committee of Eleven, consisting of one member from each state participating in the Convention, was appointed to revise the draft prepared by the Committee on Detail.<sup>26</sup> The Committee of Eleven prepared a draft on August 22, 1787 that included presidential qualifications (but no reference to a “natural born citizen” requirement). On September 4, 1787, the Committee prepared another draft that included the “natural born citizen”

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22. Pryor, *supra* note 20, at 883 n.8.

23. S.J. Res. 72, 98th Cong. (1983). *See also* 129 CONG. REC. 7055–56 (1983). Senator William Proxmire of Wisconsin was a co-sponsor. *Id.* When he introduced this resolution on the Senate floor, Senator Eagleton mentioned the article written by Gordon, *supra* note 2. 129 CONG. REC. 7055–56 (1983) (statement of Sen. Eagleton, citing Gordon, *supra* note 2, at 3–4).

24. *See e.g.*, THE FEDERALIST NO. 69 (Alexander Hamilton) (“In these circumstances there is a total dissimilitude between [the President of the United States] and a king of Great Britain, who is an *hereditary* monarch . . .”) (emphasis in original). This is a recurring theme throughout Alexander Hamilton’s discussion of the Executive Branch in THE FEDERALIST NOS. 67–77. Hamilton’s advocacy in this regard may have been motivated in part by the controversy that occurred during the Convention when he was perceived to be advocating an executive with monarchical attributes; at one point Hamilton apparently endorsed the idea of a president elected for life. 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 298–301, 304–11 (rev. ed. 1937) (emphasis in original).

25. 1 JONATHAN ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 217 (2d ed. 1836).

26. *Id.* at 280.

clause.<sup>27</sup> That language remained in subsequent drafts and was adopted by the Convention without comment.<sup>28</sup>

Many scholars have found the origin of the “natural born citizen” language in a letter that John Jay sent to George Washington six weeks before the Committee of Eleven drafted the original clause. On July 25, 1787, Jay wrote to Washington:

Permit me to hint, whether it would be wise and seasonable 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>29</sup>

Washington wrote to Jay on September 2, 1787, thanking him for the “hints contained in [his] letter.”<sup>30</sup> The Committee of Eleven added the “natural born citizen” requirement two days later. Meanwhile, the Convention debated and, encouraged by James Madison, considered and rejected requirements that senators or representatives be native born.<sup>31</sup>

Scholars have advanced several theories regarding Jay’s motivations. It has been suggested that Jay was concerned about a particular individual, Baron Von Steuben, a Prussian nobleman who had served in the Revolutionary War but who Jay may have suspected of harboring monarchial or dictatorial ambitions.<sup>32</sup> Others, including Justice Story, posit a more general concern that a foreign monarch might be invited to assume the presidency.<sup>33</sup> Others argue 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.’”<sup>34</sup>

The clause was evidently not directed at Alexander Hamilton, who was born on the Caribbean island of Nevis, despite the misgivings some of his contemporaries had about his ambitions. A person who, like Hamilton, was a “Citizen of the United States, at the time of the Adoption of this Constitution” was eligible to be president under the clause drafted by the Committee of

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27. Gordon, *supra* note 2, at 4.

28. *Id.*

29. 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 61 (rev. ed. 1937) (emphasis in original).

30. 113 CONG. REC. 13170 (1967).

31. ARTHUR TAYLOR PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 218–27, 266–72 (1941).

32. CHARLES COLEMAN THACH, THE CREATION OF THE PRESIDENCY 1775–1789 137 (1922); Gordon, *supra* note 2, at 5.

33. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1473 (1883); Gordon, *supra* note 2, at 5.

34. Pryor, *supra* note 20, at 888.

Eleven and later approved by the Convention.<sup>35</sup> Nor was Hamilton averse to the idea of restricting the foreign-born from the presidency. Even before the Jay letter, Hamilton had proposed that the President be “now a Citizen of one of the States, or hereafter be born a Citizen of the United States.”<sup>36</sup>

It is now generally assumed that the term “natural born” is synonymous with “native born.”<sup>37</sup> “It [therefore] is clear enough that native-born citizens are eligible [for the presidency] and that naturalized citizens are not.”<sup>38</sup> There is a general agreement among commentators, whether or not they are advocates of an originalist approach to constitutional interpretation, that “whether someone born of American parents abroad would be considered a natural born citizen” is an open question.<sup>39</sup>

Here the question becomes one of constitutional hermeneutics. What are the permissible sources for construing the meaning of a phrase that the Framers left undefined and did not discuss in any contemporaneous account? Some have argued that English common law in effect at the time of the adoption of the Constitution is a reliable source of interpretation.<sup>40</sup> Under this interpretation, children born abroad to American citizen parents acquire citizenship at birth because this was a long standing principle of English common law.

But on closer examination, it is at least questionable whether this could be considered a common law principle in 1789. As early as 1350, Parliament enacted a statute providing that persons born “beyond the sea” to English subjects “shall have and enjoy the same benefits and advantages” as their parents with respect to inheritance.<sup>41</sup> A 1677 statute made children of English subjects who had fled the country during Cromwell’s protectorate natural born subjects of the Crown.<sup>42</sup> A 1708 statute stated that any foreign born child of a natural born British subject was a natural born subject of the kingdom.<sup>43</sup> Subsequent legislation in 1731 and 1773 extended the principle to the grandchildren of natural born subjects and stated that these foreign-born

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35. U.S. CONST. art. II, § 2, cl. 4.

36. 3 FARRAND, *supra* note 29, at 629.

37. *Schneider v. Rusk*, 377 U.S. 163, 165 (1964).

38. Gordon, *supra* note 2, at 1.

39. *E.g.*, Kozinski, *supra* note 18, at 996. *See generally* Warren Freedman, *Presidential Timber: Foreign Born Citizens of American Parents*, 35 CORNELL L.Q. 357 (1950).

40. *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898) (citing Natural Born Citizen clause as an example of an undefined constitutional term that “must be interpreted in light of the common law, the principles and history of which were familiarly known to the framers of the constitution”).

41. Statute Made of Those That Be Born Beyond the Sea, 1350, 25 Edw. III, c. 2 (Eng.).

42. Act for the Naturalizing of Children of his Majesty’s English Subjects, born in Foreign Countries during the Late Troubles, 1676, 29 Car. II, c. 6 (Eng.).

43. Act for Naturalizing Foreign Protestants, 1708, 7 Ann., c. 5, § 3 (Eng.).



“natural born subjects” were eligible to hold all offices in the American colonies (although not in England).<sup>44</sup>

Because of the duration of the pendency of these statutes, it has been suggested that by the time of the drafting of the Constitution it was a principle of the common law that a child born abroad of a citizen was a “natural born” citizen.<sup>45</sup> This is at best questionable, because before independence, the colonies were not consistent in their adoption of English law generally and the English law of nationality in particular. The colonies also passed differing laws regarding naturalization.<sup>46</sup>

The colonies tended to adopt only those aspects of the common law that were “of a general nature, not local to [England].”<sup>47</sup> It has also been observed that the colonists did not agree with how the English law of citizenship and naturalization was being enforced in the colonies, and expressed these objections in the Declaration of Independence.<sup>48</sup> For these reasons, it is questionable whether English common law in existence at the time of the adoption of the Constitution provides definitive guidance as to the meaning of the phrase “natural born citizen.”<sup>49</sup>

Another possible source of interpretation of the constitutional clause is the actions of the First Congress. That Congress included twenty members who had been delegates to the Constitutional Convention, including eight members of the Committee of Eleven that drafted the “natural born citizen” clause.<sup>50</sup> The First Congress enacted the country’s first citizenship law, the Naturalization Act of 1790.<sup>51</sup> That statute provided, among other things, that

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44. Act Amending the Act for Naturalizing Foreign Protestants, 1773, 13 Geo. III, c. 21 (Eng.); Act Naturalizing Such Foreign Protestants, and Others Therein Mentioned, as Are Settled, or Shall Settle, in Any of His Majesty’s Colonies in America, 1740, 13 Geo. II, c. 7 (Eng.); Act Explaining a Clause in the Act for Naturalizing Foreign Protestants, 1731, 4 Geo. II, c. 21 (Eng.).

45. Gordon, *supra* note 2, at 7.

46. JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608–1870*, 83 (1978).

47. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 110 (Simon & Schuster, Inc. 1985) (1973) (quoting WILLIAM WALTER HENNING, 9 *STATUTES AT LARGE OF VIRGINIA* 127 (1821)).

48. Lohman, *supra* note 16, at 356 (quoting *THE DECLARATION OF INDEPENDENCE* para. 9 (U.S. 1776) (stating that King George had attempted “to prevent the population of these States; for that purpose obstructing the laws of naturalization of foreigners; refusing to pass other to encourage their migration hither, and raising the conditions of new appropriations of lands”)).

49. This was also the conclusion of an authoritative article that was cited with approval by the Supreme Court in *Wong Kim Ark*. That article reached the same conclusion that the common law did not confer citizenship on the foreign born children of English subjects resident abroad. HORACE BINNEY, *THE ALIENIGENAE OF THE UNITED STATES* 14, 20; *reprinted in* 2 *Am. Law Reg.* 193, 199, 203; *see* *United States v. Wong Kim Ark*, 169 U.S. 649, 670–71 (1898).

50. 113 CONG. REC. 13170 (1967).

51. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103–04 (1790).

“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 . . . .”<sup>52</sup> One scholar suggests that this is probative that the Framers intended such persons to be “natural born citizens” for purposes of the presidential eligibility clause.<sup>53</sup>

The suggestion that a Congress, even one that included some of the drafters of the constitution, can by statute interpret the Constitution, raises serious questions. The Supreme Court has expressed skepticism at the notion that terms in the original Constitution can be construed with reference to subsequent congressional enactments.<sup>54</sup> Nor did the First Congress and other early Congresses act consistently in this regard so as to make clear that they intended these statutes to be interpretive of the “natural born citizen” clause.

Because the 1790 statute was called “An Act to Establish a Uniform Rule of Naturalization,”<sup>55</sup> it can plausibly be argued that Congress was acting pursuant to its constitutional authority to establish uniform rules of naturalization, rather than with respect to making any determination with respect to eligibility for the presidency. Moreover, Congress repealed the 1790 statute in 1795,<sup>56</sup> and enacted a new one. The 1795 statute, and all subsequent ones, including the version currently in effect, do not use the “natural born” language.<sup>57</sup> For these reasons, there is no definitive answer to the question of the meaning of the phrase “natural born citizen” or its applicability to children of American citizens who were born abroad. Such persons are citizens at the moment of birth solely by reason of legislation, which Congress can choose (and, for periods of time, has chosen) not to enact.<sup>58</sup>

*Wong Kim Ark* is a cautionary example of the unintended consequences that constitutional language may create. The issue in that case was whether a child born in California of Chinese immigrants who were not American citizens acquired United States citizenship at birth under the Fourteenth

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52. *Id.* at 104.

53. Gordon, *supra* note 2, at 10–11.

54. *Freytag v. C.I.R.*, 501 U.S. 868, 886–87 (1991).

55. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 104.

56. Act of Jan. 29, 1795, ch. 20, §3, 1 Stat. 414, 415.

57. 8 U.S.C. §§ 1401–09 (2000); Immigration Technical Corrections Act of 1988, sec. 8, § 13, 102 Stat. 2609, 2617–19; Immigration and Nationality Act Amendments of 1986, secs. 12, 13, §§ 301(g), 309(a), 100 Stat. 3655, 3657; Act of Aug. 27, 1986, sec. 15, § 308, 100 Stat. 837, 842–43; Immigration and Nationality Act Amendments of 1981, sec. 18, §§ 301(a)(7), 309, 95 Stat. 1611, 1620–21; Act of Oct. 10, 1978, secs. 1, 3, § 301, 92 Stat. 1046, 1046; Act of Oct. 27, 1972, secs. 1–3, §§ 16, 301, 86 Stat. 1289, 1289; Gordon, *supra* note 2, 11–27 (analyzing statutory amendments from 1790 to 1968).

58. *United States v. Wong Kim Ark*, 169 U.S. 649, 674 (1898) (“[D]uring the half century intervening between 1802 and 1855, there was no legislation whatever for the citizenship of children born abroad, during that period, of American parents who had not become citizens of the United States before the act of 1802.”).

Amendment, which states that “[a]ll 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>59</sup> The San Francisco Collector of Customs sought to bar Wong Kim Ark’s reentry into the United States from China, where he had traveled for a visit. The Collector of Customs asserted that Wong Kim Ark was not a citizen and that he could be excluded from entering the country under the terms of so-called “Chinese Exclusion Acts” that prohibited “persons of the Chinese race, and especially Chinese laborers, from coming into the United States.”<sup>60</sup> The Supreme Court observed:

[the] main purpose [of the Fourteenth Amendment] doubtless was, as has been often recognized by this court, to establish a citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in [Dred Scott] and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States.<sup>61</sup>

Notwithstanding that evident purpose of the Amendment, the Court observed that “the opening words, ‘all persons born,’ are general, not to say universal, restricted only by place and jurisdiction, and not by color or race . . . .”<sup>62</sup> The Court accordingly ruled that the Amendment that had been intended to normalize the status of emancipated slaves also conferred citizenship at birth on anyone born within the territory of the United States (and subject to the jurisdiction thereof) including persons like Wong Kim Ark whose parents were not citizens. In other words, the Fourteenth Amendment makes clear that the United States recognizes the fundamental principle that all persons born on American soil are American citizens.<sup>63</sup>

The wording of the Fourteenth Amendment, and the construction given those words by *Wong Kim Ark*, is the source of America’s current citizenship regime in which children born within American territory of undocumented aliens are citizens at birth as a matter of constitutional imperative, while the children of American citizens who happen to be born abroad are citizens only

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59. U.S. CONST. amend. XIV, § 1.

60. *Wong Kim Ark*, 169 U.S. at 651–53.

61. *Id.* at 676.

62. *Id.*

63. The Court noted that the phrase “and subject to the jurisdiction thereof” excluded members of Indian tribes, “standing in a peculiar relation to the National Government, unknown to the common law,” and “children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State,” which were “recognized exceptions to the fundamental rule of citizenship by birth within the country.” *Id.* at 682.

at the sufferance of Congress, which must enact legislation making such individuals citizens.<sup>64</sup>

Recognizing the lack of certainty in interpreting the “natural born citizen” clause, particularly with respect to foreign born children of American citizens, and cognizant of the difficulties in amending the Constitution, scholars have begun to advance creative arguments why an amendment is actually unnecessary. One scholar has suggested that because Congress has the authority to “establish an uniform Rule of Naturalization,” it has the inherent authority to determine who is a citizen at birth, without regard to whether that person was born within the territory of the United States.<sup>65</sup> Under this analysis, Congress may provide by statute that persons (like John McCain) born overseas of American parents are citizens at the moment of birth, and such persons would be “natural born citizens” for purposes of presidential eligibility.<sup>66</sup> This theory is susceptible to the argument that interpretations of the Constitution that give Congress the authority to vary the meaning of other constitutional provisions are disfavored.

A possible way for Congress to claim the authority to eliminate the “natural born citizen” requirement without amending the Constitution is by claiming the authority under Section V of the Fourteenth Amendment “to enforce, by appropriate legislation, the provisions of this Article.”<sup>67</sup> One of the express purposes of the Fourteenth Amendment was to provide that naturalized citizens and persons who are citizens because they were “born in the United States” are to be treated equally.<sup>68</sup> Although the Equal Protection Clause only applies to the states, the Fifth Amendment Due Process Clause, which applies to the federal government, includes an equal protection component that is subject to essentially the same standards as apply to equal protection under the

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64. *Id.* at 659–60. The dissenters in *Wong Kim Ark* specifically pointed to this anomaly as a reason not to interpret the Fourteenth Amendment in the manner adopted by the majority. *Id.* at 714 (Fuller, C.J., dissenting).

65. Pryor, *supra* note 20, at 890–99.

66. A recent example of proposed legislation that defines who is a “natural born citizen” for purposes of the presidential eligibility clause is S. 2128, 108th Cong. (2d Sess. 2004), introduced by Senators Nickles, Landrieu, and Inhofe. That proposed statute, the Natural Born Citizen Act, states, among other things, that Congress “finds and declares that the term ‘natural born Citizen’ in Article II, Section 1, Clause 5 of the Constitution of the United States means . . . any person born outside the United States who derives citizenship at birth from a United States citizen parent or parents pursuant to an Act of Congress.” *Id.* If Congress has the authority to enact such a statute, there would be no conceptual reason it could not enact a statute that would “find and declare” that any naturalized citizen is a “natural born citizen.”

67. U.S. CONST. amend. XIV, § 5.

68. Section I of the Fourteenth Amendment states that naturalized citizens and citizens by reason of birth are citizens. The Amendment also includes the Equal Protection Clause, which prohibits any State from denying “to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

Fourteenth Amendment.<sup>69</sup> Thus, there is a meritorious argument that under Section V of the Fourteenth Amendment, Congress has the power to enact legislation to eliminate any inequality between the status of naturalized and “natural born” citizens.<sup>70</sup> Another creative idea is for Congress to exercise its statutory authority to provide for succession in the event of the disability of the President or Vice President to permit any citizen to serve as acting president in that eventuality.<sup>71</sup>

The most creative recent suggestion regarding the “natural born citizen” clause is that it has effectively been repealed by the Fourteenth Amendment. The same Fourteenth Amendment that makes “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof . . . citizens of the United States” also states that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>72</sup> It has been argued that by abolishing the distinction between native born and naturalized citizens, and by requiring all citizens to enjoy “the privileges or immunities of citizens of the United States” and to be treated equally, Congress impliedly repealed the distinction in Article II that makes a “natural born,” but not any other, citizen eligible for the presidency.<sup>73</sup> Further support for this argument is found in the fact that the same Congress that proposed the Fourteenth Amendment was the first to propose repealing the “natural born citizen” requirement for presidential eligibility.<sup>74</sup>

The idea that a constitutional provision can be repealed by implication is based on the premise that rules of statutory construction apply to the Constitution. Just as a statute that is inconsistent with a prior enactment is deemed to impliedly repeal the earlier statute, a later constitutional amendment that is inconsistent with an existing provision can be interpreted as impliedly repealing the earlier provision.<sup>75</sup> There are other theories of constitutional interpretation, such as the premise that the Constitution is a contract between the states and should be interpreted in the same manner as contracts.<sup>76</sup> But if

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69. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

70. In upholding Congress’s authority to bar literacy requirements for voters, the Supreme Court held that Section V conferred broad authority on Congress to determine what state actions were discriminatory and required remedial legislation. *Katzenbach v. Morgan*, 384 U.S. 641, 653–56 (1966).

71. Ho, *supra* note 15, at 582–84.

72. U.S. CONST. amend. XIV, § 1.

73. Elwood Earl Sanders, Jr., *Could Arnold Schwarzenegger Run for President Now?*, 6 FLA. COASTAL L. REV. 331, 333 (2005).

74. Seymore, *supra* note 7, at 947.

75. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985).

76. *Id.* at 927–35.

the Constitution is subject to the same principles that apply to interpretation of statutes, then the Fourteenth Amendment can be said to have impliedly repealed the “natural born citizen” requirement, because the Amendment’s mandate to treat naturalized citizens equally with citizens by reason of birth equally is in “irreconcilable conflict” with making naturalized citizens ineligible for the presidency.<sup>77</sup>

The repeal by implication theory faces a number of hurdles. First, the Constitution expressly provides the manner in which it may be amended.<sup>78</sup> If the Framers intended for the Constitution to be amended by other means such as by implication through subsequent inconsistent amendments, they did not specify this method and therefore it can be assumed that they did not intend the Constitution to be amended in such a manner. It has also been suggested that eligibility for the presidency is not one of the “privileges or immunities of citizens of the United States” that Congress intended to protect when it enacted the Fourteenth Amendment.<sup>79</sup> For these reasons, among others, at least one leading scholar has concluded that it would “take a lunatic” to argue that the Fourteenth Amendment impliedly repealed the “natural born citizen” requirement.<sup>80</sup>

If the implied repeal or statutory authority arguments are inconclusive, the “natural born citizen” requirement will remain in our Constitution, a disquietingly atavistic phrase with a potential for mischief and an implicit message of exclusion to millions of naturalized citizens. In a contemporary political scene where immigration remains a bitterly divisive issue, perhaps our political parties can find common ground in removing this anachronistic provision. In this regard, Congress would be wise to follow the advice of Thomas Eagleton, who deserves the last word here.

When he introduced the resolution he co-sponsored with Senator Proxmire in 1983 to amend the Constitution to enable naturalized citizens to be eligible for the presidency, Senator Eagleton stated:

The best guess of scholars is that the language was placed in the Constitution by a drafting committee in response to a letter sent by John Jay to George Washington, and probably to other delegates, on July 25, 1787. . . .

. . . .

This brief history confirms my intuitive belief that the constitutional provision which absolutely bars U.S. citizens from becoming President or Vice

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77. Seymore, *supra* note 7, at 973–75.

78. U.S. CONST. art. V.

79. Seymore, *supra* note 7, at 981–82 (referring to U.S. CONST. amend. XIV, § 1).

80. John Hart Ely, *Interclausal Immunity*, 87 VA. L. REV. 1185, 1186–87 (2001). While Professor Ely’s tone was jocular, his article makes the serious point that implied repeal of the Natural Born Citizen clause is unsupported by the constitutional text or the history of the adoption of the Fourteenth Amendment.

President, simply because they were born in a foreign country, is an anachronism. It was an understandable part of the Constitution in a new nation trying to establish a republic, a nation which had fresh and vivid memories of fighting for its independence against a foreign foe. But whatever fears prompted it, they have no place in the United States nearly 200 years later.

Today, as we approach the 200th anniversary of the Constitution, we should be concerned instead about the unfairness of a provision which denies to some of our citizens the opportunity to aspire to the Nation's highest offices. We should be concerned about a provision which says, in essence, that we are not self-confident enough as a nation to leave the choice of President and Vice President to our citizens, without imposing arbitrary bars on those who are eligible. We should also be embarrassed by the continued existence of such a provision given the historic contributions made in all fields of endeavor by foreign-born citizens since the time the Republic was founded. . . .

. . . .

I hope that this resolution will prove to be an idea whose time has come.<sup>81</sup>

Permitting naturalized citizens to be eligible for the presidency was an idea whose time had come in 1983 when Senator Eagleton proposed it. Today it is still an idea whose time has come.

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81. 129 CONG. REC. 7055-56 (1983) (statement of Sen. Eagleton).