

The Presidency and the Meaning of Citizenship

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No Person except a natural born Citizen . . . of the United States . . . shall be eligible to the Office of President.

U.S. Constitution¹

Who is the “us” in the U.S.?

Leti Volpp²

The fundamental political relation of citizenship . . . [is] a relation of citizens within the basic structure of society, a structure we enter only by birth and exit only by death.

John Rawls³

I. INTRODUCTION

In “Only in America,” songwriters Lieber and Stoller extolled the rags-to-riches American myth:

Only in America
Can a guy from anywhere
Go to sleep a pauper and wake up a millionaire.

Only in America
Can a kid without a cent
Get a break and maybe grow up to be President.⁴

* Professor of Law, Texas Wesleyan University School of Law. This Article is dedicated to my mother and daughters, United States citizens who cannot be President. I offer thanks to Stephen Alton, Susan Ayres, and Cynthia Fountaine for valuable comments on earlier drafts; to Dianna Zuniga for invaluable research assistance; and to Texas Wesleyan University School of Law for generous financial support of my research. This Article was not written to advance the political candidacy of anyone currently on the political scene.

1. U.S. CONST. art. II, § 1, cl. 4.

2. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1598–99 (2002).

3. JOHN RAWLS, *POLITICAL LIBERALISM* xlv (1993).

4. JERRY LIEBER, MIKE STOLLER, BARRY MANN & CYNTHIA WEIL, *Only in America* (Colgems EMI Music, Inc.). Lieber and Stoller certainly got it right—a “guy from anywhere” might become a millionaire, but he will not become President of the United States (though a

Every American child has heard the stories: Abraham Lincoln was raised in a log cabin without the benefit of electricity and became the sixteenth President of the United States.⁵ Harry S. Truman was a failed shopkeeper and became President of the United States.⁶ William Jefferson Clinton was born fatherless in Hope, Arkansas and became President of the United States.⁷ We are told, as an expression of the openness of opportunity before us, the myth⁸ that every American child can grow up to be President.⁹ But my daughters are not part of the “every American child(ren)” who can become President. My daughters were born in China, adopted by an American citizen, and became American citizens on October 17, 2001 and March 24, 2005, respectively—the dates they landed on

native-born “kid without a cent” might). Inclusion of these lyrics is not to suggest that it is “only in America” where limitations of the presidency to natives exist. *See, e.g.*, ALB. CONST. art. 86, cl. 2 (1999) (“[o]nly an Albanian citizen by birth”); BRAZ. CONST. art. 12, § 3 (2004) (“restricted to native-born Brazilians”); FIN. CONST. § 54, cl. 1 (2000) (“The President shall be a native-born Finnish citizen.”); MACED. CONST. art. 80, cl. 3 (1993) (“shall be a citizen”); MEX. CONST. art. 82(I) (2004) (“In order to be president it is required . . . [t]o be a Mexican citizen by birth.”); MONG. CONST. art. 30, cl. 2 (2003) (“[a] citizen born a Mongol”); SLOVK. CONST. art. 103, cl. 1 (2001) (“[a]ny citizen [who has the right to vote]”); *id.* art. 74, cl. 2; UKR. CONST. art. 103, cl. 2 (1997) (“[a] citizen of Ukraine who has the right to vote and has command of the state language”). Indeed, one author has traced the preference for natural-born citizen rulers to Biblical times: “Since Biblical times, it has been common practice to preclude foreigners from serving as political leaders. The Old Testament dictates, ‘Thou shalt in any wise set him king over thee, whom the LORD thy God shall choose one from among thy brethren shalt thou set king over thee: thou mayest not set a stranger over thee, which is not thy brother.’” Alon Harel, *Economic Culturalism: A Comment on Dennis Mueller, Defining Citizenship*, 3 THEORETICAL INQUIRIES L. 167, 173 (2002) (quoting *Deuteronomy* 17:15).

5. DAVID HERBERT DONALD, *LINCOLN: HOW PRESIDENT LINCOLN BECAME FATHER TO AN ARMY AND A GENERATION* 22 (1996).

6. DAVID MCCULLOUGH, *TRUMAN* 151 (1993).

7. DAVID MARANISS, *FIRST IN HIS CLASS: A BIOGRAPHY OF BILL CLINTON* 3 (1996).

8. I use “myth” as described by Michael Ignatieff in the noble sense (“the word myth refers to some ancient story which, in allegorical form, tells us a truth about the universe and how we are in it”) and in the ironical sense (“the word [myth] as a synonym for everything that is fanciful, dubious, inflated, and untrue. In this sense we think of myths as an inheritance from the past that deserves a dip in the acid bath of our skepticism”). Michael Ignatieff, *The Myth of Citizenship*, in *THEORIZING CITIZENSHIP* 53, 53 (Ronald Beiner ed., 1995).

9. *See* DAN GUTMAN, *THE KID WHO RAN FOR PRESIDENT* 5 (1996). When 12-year-old Lane tries to convince 12-year-old Moon to run for president, his pitch goes like this: “‘The point is, this is America, Moon,’ he said excitedly. ‘The land of opportunity. You know what they say—this is the country where *any* kid can grow up to be President. Moon, that kid could be *you*.’” *Id.*

American soil.¹⁰ They cannot grow up to be President of the United States because Article II, Section 1, Clause 4 of the Constitution reads, “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.”¹¹

My daughters are not alone in being unable to attain the office of Commander-in-Chief. Thousands of children born abroad and subsequently adopted by American citizens are barred from the presidency, despite their “automatic” citizenship by virtue of the Child Citizenship Act of 2000.¹² Nor can naturalized citizens—like Henry Kissinger,¹³ Madeleine Albright,¹⁴ Arnold Schwarzenegger,¹⁵

10. The Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (codified in scattered sections of 8 U.S.C. (2000)), provides for derivative citizenship of foreign-born orphans adopted by American citizens.

11. U.S. CONST. art. II, § 1, cl. 4. As Mark Brandon notes, the clause has the effect of “making the office [of the President] an inchoate but hereditary privilege of the native population.” Mark E. Brandon, *Family at the Birth of American Constitutional Order*, 77 TEX. L. REV. 1195, 1224 (1999) (arguing that the natural-born citizen requirement and the institution of slavery were two exceptions to the Constitution’s “explicit and implicit bans on inherited status.”). The restriction affects the vice-presidential candidate as well.

12. 114 Stat. 1631.

13. As Randall Kennedy puts it, “There are many reasons why Henry Kissinger should not have become President, but his having been born in Germany is certainly not one of them.” Randall Kennedy, *A Natural Aristocracy?*, 12 CONST. COMMENT. 175, 176 (1995). See *infra* text accompanying notes 122–29 (discussing Kissinger’s ineligibility for the presidency).

14. Secretary of State Albright, who served during the Clinton administration, was born in Prague, Czechoslovakia. MADELEINE ALBRIGHT, MADAME SECRETARY 4 (2003). Mark Tushnet creates a hypothetical exploring an Albright candidacy for President:

Imagine that voters scattered throughout the country have become dissatisfied with the leading candidates for the presidency in 2000. They organize a grassroots movement to nominate the person they believe most qualified for the presidency—Secretary of State Madeleine Albright. Imagine as well that her supporters are concentrated in the twelve largest states, where polls indicate she could beat the Republican and Democratic nominees. Elsewhere in the country, though, Albright has some support, but not enough to win any other state’s electoral votes. Still, winning in the twelve largest states would give Albright 283 votes in the electoral college, enough to make her our next president.

But she can’t be. She was born in what was then Czechoslovakia, and the Constitution says, “No person except a natural born Citizen . . . shall be eligible to the Office of President.”

Mark Tushnet, *Resolving the Paradox of Democratic Constitutionalism?*, 3 GREEN BAG 2d 225, 225 (2000) (reviewing FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY (1999), and pointing out the paradox that “[d]emocracy means self-government; constitutionalism limits self-government. How can a people be self-governing when their constitution bars them from adopting the policies they think will enhance their ability to govern themselves?”).

and Jennifer Granholm¹⁶—become President. There is even some question about whether the biological children of American citizens, born abroad, can become President¹⁷ and whether American Indians, born on U.S. soil, qualify as natural-born citizens.¹⁸ On its face, the Constitution preserves the presidency for those born within the boundaries of the United States and, in this way, enshrines John Rawls’s vision of a society that is truly “entered only by birth.”¹⁹

15. California Governor Schwarzenegger is an Austrian immigrant. Brian Levin, *Arnold for President? Let the Voters Choose*, CHRISTIAN SCI. MONITOR, Oct. 5, 2004, at 9. Long before Schwarzenegger became governor of California, his ascendancy to the presidency was forecast in the movies. See DEMOLITION MAN (Warner Bros. 1993) (Sylvester Stallone: “Hold it! The Schwarzenegger Library?” Sandra Bullock: “Yes, the Schwarzenegger Presidential Library. Wasn’t he an actor . . . ?” Stallone: “Stop! He was President?” Bullock: “Yes. Even though he was not born in this country, his popularity at the time caused the Sixty-first Amendment, which states that . . .”).

16. Granholm is Governor of Michigan, was born in Canada, and was raised in the United States since age four. George F. Will, *Not to the White House Born*, WASH. POST, Nov. 17, 1992, at B7.

17. See, e.g., Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1 (1968); James C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 CONST. COMMENT. 575 (2000); Christina S. Lohman, *Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause*, 36 GONZ. L. REV. 349 (2000); Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881 (1988); see also James C. Ho, *President Schwarzenegger—or at Least Hughes?*, 7 GREEN BAG 2d 108 (2004) (citing *United States v. Wong Kim Ark*, 169 U.S. 649 (1898)). Ho argues that the Natural-Born Citizen Clause “was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth” and notes that it makes it uncertain whether the children of military service personnel born abroad—like Karen Hughes, advisor to President George W. Bush—qualify for the presidency.

18. See Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 248 n.461 (2002).

A further interesting question posed by *Elk v. Wilkins* [112 U.S. 94 (1884)] and the federal citizenship laws involves whether a tribal Indian who is also a citizen of the United States constitutes ‘a natural born Citizen’ for purposes of eligibility to be President. . . . Since *Elk* holds that the Citizenship Clause of the Fourteenth Amendment does not apply to tribal Indians who can only become United States citizens through naturalization, and since the federal citizenship laws continue a distinction between natural born citizens and Indians born in the United States, . . . and cannot, in any event, constitutionally overturn *Elk v. Wilkins*, a reasonable argument can be made that all tribal Indians, even those born in the United States to Indian parents who are United States citizens, are only *naturalized* citizens of the United States.

Id.; see also Anna Williams Shavers, *A Century of Developing Citizenship Law and the Nebraska Influence: A Centennial Essay*, 70 NEB. L. REV. 462, 516 (1991).

19. RAWLS, *supra* note 3. Seyla Benhabib criticizes Rawls’s vision of political membership for ignoring “the movement of peoples across borders and transnational justice

Although citizenship is not limited to those born into American society, that society exhibits deep-seated suspicions of the foreign-born. Although naturalized citizens take an oath of allegiance to the United States²⁰ and are required to renounce citizenship in other countries, strong notions persist that the foreign-born are not completely loyal to their new country.²¹ Immigration is viewed with suspicion, and many draw no distinction between legal and illegal immigrants.²² Similarly, society often draws no distinction between naturalized citizens and resident aliens, seeing only that both were born outside the United States.²³

concerns which such movements give rise to.” Seyla Benhabib, *The Law of Peoples, Distributive Justice, and Migrations*, 72 *FORDHAM L. REV.* 1761, 1761–63 (2004).

20. See 8 U.S.C. § 1448 (2000). The oath currently reads:

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.

8 C.F.R. § 337.1 (2004).

21. See Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 *U. COLO. L. REV.* 59, 80 (2004). Professor Engle notes that during the McCarthy era, there was great concern that Communist foreigners were seeking naturalized citizenship in order to infiltrate American society. She further argues that justification for the Internal Security Act of 1950 included “[o]ne device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.” *Id.*

22. See, e.g., Tanya Broder & Clara Luz Navarro, *A Street Without an Exit: Excerpts from the Lives of Latinas in Post-187 California*, 7 *HASTINGS WOMEN’S L.J.* 275 (1996) (noting that California’s Proposition 187, “[t]outed as an attack only on ‘illegal immigrants,’ . . . has extended far beyond the intended target, giving license to expressions of hatred against Latinos and Asians, including legal residents and United States citizens.”); Robert S. Chang, *A Meditation on Borders, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES*, 244, 249 (Juan F. Perea ed. 1997) [hereinafter *IMMIGRANTS OUT!*] (“Blaming illegal immigrants slides quickly into blaming all immigrants. . . . [P]roblems arise because [legal immigration] status is not evident on an individual’s features. Foreign-ness then becomes a proxy for questionable immigration status.”); Juan F. Perea, *Introduction to IMMIGRANTS OUT!*, *supra*, at 2; Symposium, *Challenges in Immigration Law and Policy: An Agenda for the Twenty-first Century, Panel Three: Immigration and Social Policy*, 11 *N.Y.L. SCH. J. HUM. RTS.* 559, 560–61 (1994) (remarks of Rebecca Clark, Research Associate, Urban Institute Population Study Center).

23. See Nora V. Demleitner, *The Fallacy of Social “Citizenship,” or the Threat of Exclusion*, 12 *GEO. IMMIGR. L.J.* 35, 44 (1997) (noting that the 1993 World Trade Center

Contrary to these societal notions, the United States Supreme Court has stated, “Citizenship obtained through naturalization is not a second-class citizenship.”²⁴ Yet there are countless ways in which our concept of “true” citizenship resides in blood and birth, not in legal acts like naturalization. The constitutional restriction on the Office of the President is just one, albeit a powerful one. As one commentator notes, “The natural-born citizen requirement embodies the presumption that some citizens of the United States are a bit more authentic, a bit more trustworthy, a bit more American than other citizens of the United States, namely those who are naturalized.”²⁵

This Article uses the issue of presidential qualification as a vehicle to examine the meaning of citizenship today, arguing that the Natural-Born Citizen Clause perpetuates a second-class citizenship that is inappropriate and inapposite in modern American society. Upon this premise, this Article proposes that a constitutional amendment may be necessary since the argument that the Fourteenth Amendment serves as an implicit repeal of the Natural-Born Citizen Clause has proved historically insufficient. Part II of this Article examines the origins of the constitutional requirement that the President be a “natural born Citizen” and discusses the unsuccessful attempts to amend this requirement. This Part seeks to place the proposals to amend the presidential eligibility clause against

bombing “served as a dire and specific warning as to how neither resident aliens nor naturalized citizens could be trusted since both were among the convicted perpetrators”); Engle, *supra* note 21, at 82–86; Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdictions over Disputes Involving Noncitizens*, 21 YALE J. INT’L L. 1, 64 (1996) (“[N]aturalized citizens, especially those of certain national origin groups, may be just as subject to bias as aliens. Both groups, because of color, accent, and possibly other characteristics, may be perceived as foreign and subject to discrimination.”); Volpp, *supra* note 2, at 1592–99. In discussing the immigration reforms of 1996, which restricted illegal immigrants’ eligibility for welfare benefits, Professor Aleinikoff considers whether Congress might introduce legislation “distinguishing naturalized citizens from native-born citizens for purposes of eligibility for federal benefits” because of concern that people are seeking naturalization in order to acquire those benefits. T. Alexander Aleinikoff, *The Tightening Circle of Membership*, in IMMIGRANTS OUT!, *supra* note 22, at 324, 331. He queries, “Might not some be inclined to make a naturalized citizen’s immediate receipt of federal benefits grounds for denaturalization?” *Id.*; see, e.g., *Naturalized Citizens May Lose Benefits*, DAYTON DAILY NEWS, Oct. 1, 1995, at A5 (describing bills to eliminate eligibility for sixty benefit programs including food stamps, Supplemental Security Income, Aid to Families with Dependent Children, and Medicaid for recently naturalized citizens).

24. *Knauer v. United States*, 328 U.S. 654, 658 (1946).

25. *Kennedy*, *supra* note 13, at 176.

the backdrop of historical events and concludes that the failure to amend the clause demonstrates a fear and distrust of the foreign-born citizen, continuing from this nation's earliest history. Part III considers cultural notions of citizenship, citizenship as identity-formation, and the obligations of citizenship, including the obligation to participate in the political life of the nation. This Part ultimately argues that excluding naturalized citizens from participation in the presidency creates a second-class citizenship and perpetuates the notion that naturalized citizens are less loyal and less American than natural-born citizens. Part IV considers whether passage of the Fourteenth Amendment, some seventy-five years after the adoption of the Natural-Born Citizen Clause, has repealed by implication the natural-born citizenship requirement, concluding that there is such an irreconcilable conflict between the requirement and the Amendment as to satisfy the elements of implied repeal. Part V concludes that despite the compelling argument for implied repeal, historical precedent demonstrates that a constitutional amendment to repeal the Natural-Born Citizen Clause is still merited.

II. THE NATURAL-BORN CITIZEN CLAUSE

The distinction between naturalized citizens and natural-born citizens that has been constitutionalized in the presidential eligibility clause has its origins in the English common law. This Section examines the historical basis for the Natural-Born Citizen Clause and considers the unsuccessful attempts to amend this requirement. I place the origins of the clause, and the unsuccessful proposals to amend the clause, against the backdrop of historical events. This analysis leads me to conclude that the clause originated in a fear and distrust of the foreign-born citizen and that the failure to amend the clause rests in that skepticism of the foreign-born, which has continued since this nation's earliest history.

A. Natural-Born Citizen: The English Tradition

Where did the concept of "natural-born citizen" come from? Not surprisingly, concepts of citizenship in the New World can be

traced to England.²⁶ James H. Kettner traces American notions of citizenship to “quasi-medieval ideas of seventeenth-century English jurists about membership, community, and allegiance.”²⁷ He notes that English law stressed the personal nature of the subject-king relationship, which had its roots in medieval ideas of personal subjection: “the medieval notion of ‘allegiance’ reflected the feudal sense that personal bonds between men and lords were the primary ligaments of the body politic.”²⁸ Kettner says, however, that the English theory of allegiance and subjectship was not fully articulated until Sir Edward Coke wrote his influential opinion in *Calvin’s Case* in 1608:²⁹ “The central conclusion of this decision was that subjectship involved a personal relationship with the king, a relationship rooted in the laws of nature and hence perpetual and immutable.”³⁰

In seventeenth-century English jurisprudence, there were two categories of natural subjects: those born on English soil and those who descended from natural-born English subjects.³¹ According to Coke, natural-born subjects owed “true and faithful obedience of the subject due to his sovereign. This ligeance and obedience [was] an incident inseparable to every subject: for as soon as he [was] born, he oweth by birth-right ligeance and obedience to his sovereign.”³² That allegiance was perpetual: “no subject could ever lose his natural allegiance. He might abjure the kingdom and leave the country, but he could not break the tie that bound him to his king, the father of his country.”³³

England had also long recognized subjectship by acquisition—naturalized subjectship. “Men and laws completed what nature had begun. Aliens, born out of the protection of the English king and owing their natural obedience to another sovereign, could become adopted subjects and share the rights that others enjoyed as their

26. JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 3 (1978).

27. *Id.*; see also Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case (1608)*, 9 *YALE J.L. & HUMAN.* 73, 73 (1997).

28. KETTNER, *supra* note 26, at 3–4.

29. *Id.* at 7 (citing 7 Co. Rep. 1a, (1608) 77 Eng. Rep. 377 (K.B.)).

30. *Id.* at 7–8.

31. *Id.* at 32–38.

32. *Id.* at 18.

33. *Id.* at 19.

natural inheritance.”³⁴ Naturalization was said to place a subject in “exactly the same state as if he had been born in the king’s ligeance.”³⁵ Becoming naturalized was highly desirable, because aliens suffered a number of disabilities, including the inability to own real property:

Since “every Man” was “presumed to bear Faith and Love to that Prince and Country where first he received Protection during his Infancy,” the loyalty of an alien was not to be trusted. Property and other restrictions were imposed in part “that one Prince might not settle Spies in another’s Country; but chiefly that the Rents and Revenues of one Country might not be drawn to the Subjects of another.”³⁶

One major advantage of naturalization was that it overcame the presumption that an alien’s loyalty rested with the Prince of his infancy through a fancy legal fiction. Naturalization was considered retroactive,³⁷ and, thus, “the law deemed the alien actually to have been born within the protection of the king.”³⁸ Indeed, the fact of the naturalized subject’s alien birth was obliterated.³⁹ Even children born to an alien who was later naturalized became natural-born subjects because their parent was deemed to have been a natural-born subject at the time of their birth.⁴⁰ As Kettner puts it, “The very terminology of admission—‘naturalization’—led to the conclusion that the alien must be considered reborn as a natural subject.”⁴¹

As early as the turn of the seventeenth century, naturalized English subjects enjoyed the same political rights as native-born English persons. While aliens could not serve in Parliament, “if . . . naturalized . . . then he is eligible to this or any other place of judicature.”⁴² However, this came to an end in the eighteenth

34. *Id.* at 29.

35. *Id.* at 30 (quoting WILLIAM BLACKSTONE, 2 COMMENTARIES 373–74 (Wayne Morrison ed. 2001) (1765–69)).

36. *Id.* at 30–31 (quoting MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 76 (Henry Gwyllim et al. eds., 5th English ed. 1876) (1736)).

37. *Id.* at 33.

38. *Id.*

39. *Id.* at 42.

40. *Id.* at 33.

41. *Id.* at 42.

42. *Id.* at 34.

century. In 1701, Parliament enacted the Act of Settlement, which forbade naturalized citizens from holding important public offices:

No person born out of the dominions of the kingdoms of England, Scotland, and Ireland or of the dominions thereunto belonging (although he be naturalized or made a citizen) except such as are born of English parents shall be capable to be of the Privy Council, or a Member of either House of Parliament, or to enjoy any office or place of trust, either civil or military, or to have any grant of lands, tenements or hereditaments from the Crown to himself or to any others in trust for him.⁴³

Kettner argues that this status change occurred because of the influx of William's Dutch followers after 1688. Kettner also argues that the Act was reaffirmed in 1714 to exclude the German adherents of the Hanoverian George I.⁴⁴

The 1701 Act of Settlement provisions restricting naturalized citizens from serving on the Privy Council or in Parliament were not repealed until 1914, with the passage of the British Nationality and Status of Aliens Act.⁴⁵ It is logical to assume that the Constitution's Framers were familiar with the state of the law in England when they considered naturalized citizenship and government service.⁴⁶ While the Framers rejected English law with regard to naturalized citizens serving in Congress, they preserved the skepticism of such citizens with the requirement that the President be a natural-born citizen.⁴⁷

43. *Id.* at 35.

44. *Id.*

45. British Nationality and Status of Aliens Act, 1914, 4 & 5 Geo. 5, c. 17, § 28, sched. 3 (Eng.).

46. Consider, for example, *Schick v. United States*, 195 U.S. 65, 69 (1904):

Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution, it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that undoubtedly the framers of the Constitution were familiar with it.

See also *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898) ("In this, as in other respects, [the Constitution] must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution.").

47. Akhil Reed Amar, *Natural Born Killjoy: Why the Constitution Won't Let Immigrants Run for President, and Why That Should Change*, LEGAL AFF., Mar.-Apr. 2004, at 16-17. Admittedly, the Act of Settlement allowed for foreign-born kings. However, the circumstances leading to kingship and to the presidency are very different. While they are both arguably the highest seats of power in their respective governments, the presidency is an elected position and the kingship is a birthright. It would seem to be outside Parliament's authority to place limitations on who could accede to the throne. The role of United States President is more

B. The Origins of the Natural-Born Citizen Clause

The Natural-Born Citizen Clause of the U.S. Constitution was adopted against the backdrop of English law that codified distrust of the foreign born. This distrust of foreign-born citizens became codified in the Constitution. Article II, Section 1, Clause 4 “is remarkably innocent of both legislative history and judicial gloss.”⁴⁸ The apparent purpose of the clause limiting the presidency to natural-born citizens was to “cut off all chances for ambitious foreigners, who might otherwise be intriguing for the office.”⁴⁹ One commentator traces the genesis of the clause to a letter from John Jay, who later became the Chief Justice of the United States, to George 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 Commander in Chief of the American army shall not be given to nor devolve on, any but a natural *born* Citizen.⁵⁰

The issue of natural-born citizenship as a qualification for federal office first arose in extensive debates on the qualifications for senators and representatives. The requirement of natural-born citizenship for those offices was debated, but ultimately rejected.⁵¹ James Madison successfully argued that such a limitation would

analogous to the Prime Minister in the British system of government, and the Act of Settlement would require the Prime Minister to be native-born.

48. Robert Post, *What Is the Constitution's Worst Provision?*, 12 CONST. COMMENT. 191, 192 (1995).

49. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 541 (Carolina Academic Press 1987) (1833).

50. Gordon, *supra* note 17, at 5 (quoting U.S. DEP'T OF STATE, 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 237 (1905)); *see also* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 61 (Max Farrand ed., 1966). One author suggests that Jay's letter was a response to rumors that the Constitutional Convention was considering inviting the second son of King George III to accept an American crown. 91 CONG. REC. 13, 170 (1967) (quoting Cyril C. Means, Jr., *Is the Presidency Barred to Americans Born Abroad?* U.S. NEWS & WORLD REP., Dec. 23, 1955 [hereinafter Means]). Another suggests that Jay was distrustful of Baron Von Steuben, whose loyalty he questioned. Gordon, *supra* note 17, at 5.

51. *See* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 50, at 116–17, 121–26; DRAFTING THE FEDERAL CONSTITUTION 218–27, 266–72 (Arthur Prescott ed., 1941).

discourage able and dedicated foreigners from coming to the United States.⁵² Further, he argued, the offered justification for such a restriction on senators and representatives—preventing foreign governments from gaining influence—would not be advanced by the limitation. After all, natural-born citizens were not immune to bribery and corruption by foreign governments.⁵³ Finally, Madison argued that such a limitation would convey an air of illiberality.⁵⁴ The provisions ultimately passed merely required that members of the House of Representatives be citizens for seven years⁵⁵ and that senators be citizens for nine years.⁵⁶

When the first draft of the presidential qualification clause was presented to the Convention, it required the President to be a citizen, but contained no mention of how that citizenship must be attained.⁵⁷ Shortly thereafter, George Washington wrote Jay, thanking him for the “hints contained in your letter.”⁵⁸ Two days later, a second version of the presidential qualifications clause was presented to the Convention.⁵⁹ This version contained the natural-born requirement and was adopted as presented with no discussion of the natural-born citizen provision.⁶⁰

Because the second version of the presidential requirements came a mere two days following Jay’s letter to Washington and was adopted without discussion, and considering Washington’s considerable presence at the convention, it is entirely possible that Jay’s reasons for including the natural-born requirement were the

52. DRAFTING THE FEDERAL CONSTITUTION, *supra* note 51, at 268–69. James Wilson is one of the most important examples of dedicated foreigners who played important roles in the founding of the United States. As Catherine Drinker Bowen points out, James Wilson also opposed a natural-born citizenship requirement for senators and representatives because it would “deprive the government of the talents, virtue and abilities of such foreigners as might choose to remove to this country.” CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* 207 (1966).

53. DRAFTING THE FEDERAL CONSTITUTION, *supra* note 51, at 268–69.

54. *Id.*

55. U.S. CONST. art. I, § 2, cl. 2.

56. *Id.* cl. 3.

57. DRAFTING THE FEDERAL CONSTITUTION, *supra* note 51, at 614.

58. Means, *supra* note 50, at 13, 170. See *supra* text accompanying note 50 for the relevant text of Jay’s letter to Washington.

59. DRAFTING THE FEDERAL CONSTITUTION, *supra* note 51, at 622.

60. See *id.* at 621–53; 2 GEORGE BANCROFT, *HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES 192–93* (1882); CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 639 (1993).

primary motivations behind the provision: namely, fear of foreign dominance of government. Thus, Justice Story rightly concluded that the natural-born requirement was motivated by a fear of foreign involvement in the government.⁶¹

Professor Akhil Amar argues that the Founders' fear was not of foreigners per se, but that "[i]n repudiating foreign-born heads of state, the framers meant to reject all vestiges of monarchy."⁶² He notes that while the delegates to the Constitutional Convention were toiling in secret to draft the Constitution, there was "widespread speculation that the delegates were working to fasten a monarchy upon America."⁶³ He concludes that the Natural-Born Citizen Clause "gave the lie to such rumors and thereby eased anxieties about foreign nobility."⁶⁴ But surely if the clause was added to persuade people that the Convention did not intend to "fasten a monarchy upon America," the requirement of citizenship, taken together with the fourteen-year residency requirement, would also have quelled the rumors of the installation of a foreign monarchy. Professor Amar simply concludes, "[T]hat alone wouldn't have been enough to quiet people's fears."⁶⁵ Fear of monarchy in general, however, is clearly not a convincing rationale for the addition of a natural-born citizenship requirement for President. The Framers could have intended to fasten a home-grown monarchy upon the country, with a natural-born citizen as king. Indeed, some approached George Washington, born in Virginia, with the suggestion that he be made king, an offer he summarily rejected.⁶⁶

Rather than fear of monarchy, the Natural-Born Citizen Clause seems motivated by fear that foreign-born, naturalized citizens' loyalty could not be assured. Anti-immigrant sentiment among the founding fathers was not unusual or isolated, and much of that sentiment seems based on fears that foreigners were disloyal. Thomas Jefferson, speaking of immigrants from countries with absolute monarchies, said,

61. STORY, *supra* note 49, at 541.

62. Amar, *supra* note 47, at 16-17.

63. *Id.* Professor Amar notes that a leading rumor was that the Framers intended to invite the second son of George III to become King of the new America. *Id.*

64. *Id.*

65. *Id.*

66. KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 36 (1989).

They will bring with them the principles of the governments they leave, imbibed in their early youth; or, if able to throw them off, it will be in exchange for an unbounded licentiousness, passing, as is usual, from one extreme to another. It would be a miracle were they to stop precisely at the point of temperate liberty. These principles, with their language, they will transmit to their children. In proportion to their numbers, they will share with us the legislation. They will infuse into it their spirit, warp and bias its directions, and render it a heterogeneous, incoherent, distracted mass.⁶⁷

Alexander Hamilton also expressed a fear of foreign intrigue when he explained the benefits of the Electoral College:

Nothing was more to be desired, than that every practicable obstacle should be opposed to cabal, intrigue and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the union?⁶⁸

Moreover, in his inauguration address, John Adams identified “the pestilence of foreign influence,” in part, as the “angel of destruction to elective governments.”⁶⁹

George Washington was sufficiently wary of foreign-born citizens that he ordered that no man could be appointed as a sentry during the Revolutionary War unless he be “Native of this Country, or has a Wife, or Family in it, to whom he is known to be attached.”⁷⁰ In his farewell address, President Washington adjured, “Against the insidious wiles of foreign influence, I conjure you to believe me, fellow-citizens, the jealousy of a free people ought to be *constantly*

67. THOMAS JEFFERSON, NOTES ON VIRGINIA (1782), *in* THE FOUNDERS OF THE REPUBLIC ON IMMIGRATION, NATURALIZATION, AND ALIENS 60 (Madison Grant & Charles Stewart Davison eds., 1928).

68. THE FEDERALIST NO. 68, at 459–60 (Alexander Hamilton). Nowhere in the Federalist Papers is the issue of presidential citizenship addressed.

69. John Adams, Inaugural Speech to Both Houses of Congress (Mar. 4, 1797), *in* THE FOUNDERS OF THE REPUBLIC ON IMMIGRATION, NATURALIZATION, AND ALIENS, *supra* note 67, at 3.

70. George Washington, General Order to the Army (July 7, 1775), *in* THE FOUNDERS OF THE REPUBLIC ON IMMIGRATION, NATURALIZATION, AND ALIENS, *supra* note 67, at 82.

awake, since history and experience prove that foreign influence is one of the most baneful foes of republican Government.”⁷¹

Although much of the Constitution might be argued to be immigrant-friendly,⁷² the Natural-Born Citizen Clause reflects the Founders’ fear that foreigners—even those who became citizens of the United States through naturalization—would not have the unquestionable loyalty to the United States necessary to the office of President. The natural corollary of this fear was that such loyalty was more likely to be found in those of native birth.

C. Attempts To Change the Natural-Born Citizen Clause

1. Early attempts to further restrict eligibility

a. Background: Alien and Sedition Acts. The first attempts to change the Natural-Born Citizen Clause came shortly after the Constitution was adopted, against the backdrop of possible U.S. involvement in the war between France and England in the 1790s. Although the issue first arose at New York’s state convention to ratify the Constitution,⁷³ no proposals to change the Natural-Born Citizen Clause were introduced in the United States Congress until after the passage of the Alien and Sedition Acts.⁷⁴ Much has been written about the Alien and Sedition Acts,⁷⁵ with much of the

71. George Washington, Farewell Address to the People of the United States (Sept. 17, 1796), in *THE FOUNDERS OF THE REPUBLIC ON IMMIGRATION, NATURALIZATION, AND ALIENS*, *supra* note 67, at 91.

72. Professor Amar notes that, under the English Act of Settlement of 1701, no naturalized citizen could ever serve in the House of Commons or in the House of Lords. Amar, *supra* note 47, at 16. Under the U.S. Constitution, naturalized citizens could serve in the House of Representatives, the Senate, the cabinet, and the federal judiciary. *Id.* Furthermore, he notes, “Seven of the 39 signers of the Constitution in Philadelphia in 1787 were foreign born, as were thousands of the voters who helped ratify the Constitution.” *Id.*

73. See HERMAN V. AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY* 74, in *THE ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION* (1897), *reprinted in* *PROPOSED AMENDMENTS TO THE U.S. CONSTITUTION 1787–2001* (John R. Vile ed., 2003).

74. *Id.*

75. See, e.g., MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE,” STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY* (2000); JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* 48–50 (1951); Gregg Costa, *John Marshall, The Sedition Act, and Free Speech in the Early Republic*, 77 *TEX. L. REV.* 1011 (1999); Michael Kent Curtis, *Judicial Review and Populism*, 38 *WAKE FOREST L. REV.* 313 (2003); Steven J. Heyman, *Ideological Conflict and the First Amendment*, 78 *CHI.-KENT L. REV.* 531 (2003); David Jenkins, *The Sedition Act of 1798 and the Incorporation of*

scholarly focus on the Sedition Act.⁷⁶ Although neither the Alien Act nor the Sedition Act were explicit attempts to further restrict presidential eligibility, the Acts, together with two other contemporaneous legislative enactments, provide illuminating evidence of the fear of foreign influence in American government that was prevalent shortly after the founding, and shed light on the early attempts to further restrict eligibility that are discussed in Part II.C.1.b.

The Alien Act allowed the President to summarily deport⁷⁷ non-citizens who were thought to be a danger to the peace and safety of the United States.⁷⁸ The Act gave the President “virtually unlimited power over all aliens in the United States.”⁷⁹ Passed during John Adams’ presidency, the Alien Act attempted “to cancel the perceived threat to the nation from the radical ideas emanating from the French Revolution”⁸⁰ at a time when war with France seemed

Seditious Libel into First Amendment Jurisprudence, 45 AM. J. LEGAL HIST. 154 (2001); James P. Martin, *When Repression is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117 (1999); Geoffrey R. Stone, *The Origins of the “Bad Tendency” Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411.

76. As Gerald Neuman notes, “[H]istorians of the period have devoted primary attention to the Sedition Act.” GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 52 (1996). The same holds true for legal scholars.

77. See MILLER, *supra* note 75, at 52–53. Miller states the following:

There was no requirement that the government prove its case before a judicial authority; no provision was made for use of the writ of habeas corpus; there was no possibility of release by judicial authority. Aliens imprisoned under this Act might be removed from the country on the order of the President; and if they returned without permission, they ran the risk of being imprisoned for a term wholly at his discretion.

Id.

78. Act of July 6, 1798, ch. 58, 1 Stat. 577 (expired June 25, 1800). For the legislative history, see An Act Concerning Aliens, 5th Cong., 2d Sess., 1 Stat. 570–72; An Act Concerning Enemy Aliens, 5th Cong., 2d Sess., 1 Stat. 577–78; see also David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 15–16 (2003) (discussing Enemy Alien Act of 1798 (codified as amended at 50 U.S.C. §§ 21–24 (2000))); Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 TULSA J. COMP. & INT’L L. 63, 69–73 (2002); Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 LAW & HIST. REV. 69, 73 (2003).

79. MILLER, *supra* note 75, at 52.

80. Thomas E. Crocco, *Inciting Terrorism on the Internet: An Application of Brandenburg to Terrorist Websites*, 23 ST. LOUIS U. PUB. L. REV. 451, 453 n.7 (2004); see also NEUMAN, *supra* note 76, at 53–60 (discussing the Alien Act debates).

imminent.⁸¹ The Act was “to rid the nation of aliens who were believed at the time to be plotting against the U.S. and generally creating an atmosphere of hostility.”⁸² The explicit targets of the Alien Act were two suspected French spies, though neither was actually deported under the Act.⁸³ Nonetheless, there was widespread concern that France was planning an invasion of the United States and that countless French spies and sympathizers were among the population:

Federal officials feared parts of America were rife with French agents and sympathizers who might rise up in support of an invasion. St. George Tucker . . . predicted that 100,000 U.S. inhabitants, including himself, would join a French invading army. Washington anticipated that, if the French invaded America, they would invade the Southern states “because they will expect from the tenor of the debates in Congress, to find more friends there.” Further north, U.S. District Judge Richard Peters discreetly reported “some dangerous aliens in the neighborhood of Philadelphia.” Philadelphia, then America’s capital and largest city, teemed with French emigrés. French emigré Médéric Louis-Elie Moreau de Saint-Mery wrote in his diary of the nation’s anxiety: “People acted as though a French invasion force might land in America at any moment. Everybody was suspicious of everybody else: everywhere one saw murderous glances.”⁸⁴

Perhaps not surprisingly, the passage of the Alien Act “led several shiploads of French aliens to leave America.”⁸⁵

81. Crocco, *supra* note 80, at 453 n.7.

82. *Id.*

83. Fehlings, *supra* note 78, at 105–10. Only one alien was expelled during the two years the Alien Act was in effect. *Id.* at 105.

84. *Id.* at 66–67 (footnotes omitted); see also RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY 193–273* (1975); MILLER, *supra* note 75, at 40–43 (Federalists were convinced that “the root of all the evil in the United States was the large foreign-born population.”). Miller argues that apprehension about the motives of the 30,000 Frenchmen in the U.S. was largely unfounded since most were hostile to the new French government after the French Revolution. *Id.* at 42.

85. Fehlings, *supra* note 78, at 105 (quoting letter from Thomas Jefferson to James Madison (May 3, 1798), in 7 *THE WRITINGS OF THOMAS JEFFERSON* 248 (Paul L. Ford ed., 1896) (“Thomas Jefferson wrote: ‘The threatening appearance from the alien bills have so alarmed the French who are among us, that they are going off.’”)); see also KARST, *supra* note 66, at 86.

At the same time, Congress passed the Naturalization Act, which greatly increased the residency requirement for attaining citizenship⁸⁶ from the initial five-year residency requirement to fourteen years.⁸⁷ The Naturalization Act also required immigrants to register with the federal government and prohibited the naturalization of aliens originating from countries at war with America.⁸⁸ This Act was not, however, rationalized simply as Congress's power to regulate immigration. Rather, it was viewed as a national security measure "to promote investigation and monitoring of potentially subversive aliens."⁸⁹ There was also a political motive behind the Naturalization Act—the Federalists hoped to make the rival "Republican party wither on the vine by cutting off its supply of foreign-born voters."⁹⁰

A third act, the Alien Enemies Act, passed at the same time, allowed the President to deport or incarcerate the citizens of countries with whom the United States was at war.⁹¹ The Alien Enemies Act was not controversial, despite the fact that it ceded considerable authority to the President.⁹² Specifically, the Alien Enemies Act gave the President the authority to arrest, detain, and deport enemy aliens without a hearing and without requiring that they be dangerous.⁹³ It is, however, applicable only in the event of a declared war.⁹⁴ The Alien Enemies Act is still in force.⁹⁵

The Sedition Act also deserves mentioning because it too was actually connected to suspicion of the foreign-born, although it was facially concerned only with criticism of government officials.⁹⁶ As Kenneth Karst notes, "This law *was* enforced, chiefly against foreign-

86. Naturalization Act, ch. 54, 1 Stat. 566 (1798), *repealed by* Act of Apr. 14, 1802, ch. 28, § 5, 2 Stat. 153, 155.

87. Fehlings, *supra* note 78, at 69. It was thought that fourteen years was required "to transform rebels and incendiaries into respectable, peace-loving American citizens." MILLER, *supra* note 75, at 47.

88. Fehlings, *supra* note 78, at 69.

89. *Id.*

90. MILLER, *supra* note 75, at 47.

91. The Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (current version codified at 50 U.S.C. §§ 21–23 (2000)); see David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1013–14 (2002); J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402 (1992).

92. Fehlings, *supra* note 78, at 75.

93. *Id.*

94. MILLER, *supra* note 75, at 51.

95. 50 U.S.C. §§ 21–23 (2000).

96. KARST, *supra* note 66, at 86.

born critics of the government.”⁹⁷ After all, “those who corrupt our opinions . . . are the most dangerous of all enemies.”⁹⁸

b. Further restricting eligibility. It is against this backdrop that the first changes to presidential eligibility were proposed. These early proposed changes actually sought to further restrict presidential eligibility on citizenship grounds rather than to expand that eligibility. As enacted, the “natural born citizen” language had a grandfather clause that allowed those who were not born in America to ascend to the presidency so long as they were citizens at the time the Constitution was ratified.⁹⁹ In 1798, Senator Goodhue of Massachusetts proposed that the Constitution be amended to alter this grandfather clause to limit the ability of foreign-born persons from seeking the presidency to only those foreign-born persons who “shall have been a resident in the United States at the time of the declaration of independence, and shall have continued either to reside within the same or to be employed in its service from that period to the time of his election.”¹⁰⁰

Herman Ames, a historian writing in 1896, explained this early attempt to restrict eligibility as follows: “This resolution was not introduced in the First Congress, but in [July] 1798, when the country was excited by the foreign complication, and the alien and sedition acts had just been passed”¹⁰¹ Ames further notes that the proposed amendment was “a Federalist affront to Gallatin, who had strongly opposed the alien and sedition act.”¹⁰² The affront to Representative Albert Gallatin would have been manifestly clear. Gallatin was Swiss-born and emigrated to the United States in 1783—after the Declaration of Independence was authored but before the Constitution was ratified. Further, Gallatin had had citizenship problems before. His election to the Senate in 1794 was contested on the grounds that he had not been a United States

97. *Id.*

98. *Id.* (quoting MALDWIN ALLEN JONES, *AMERICAN IMMIGRATION* 88 (1960)).

99. U.S. CONST. art. II, § 1, cl. 4 (“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.”).

100. 7 ANNALS OF CONG. 602 (1798). A similar measure was introduced in the House of Representatives by Representative Foster of Massachusetts. 8 ANNALS OF CONG. 2132–33 (1798); see MILLER, *supra* note 75, at 48–50.

101. AMES, *supra* note 73, at 74.

102. *Id.*

citizen for the requisite nine years.¹⁰³ In fact, after a hearing and a heated debate, the Senate rejected his election.¹⁰⁴ He immediately rejoined Congress, this time being elected to the House of Representatives, which required only seven years of citizenship.¹⁰⁵ As John Miller puts it,

The Federalists never forgave Gallatin for defying their mandate to stay out of politics. His foreign birth made him specially vulnerable: “the sly, the artfull, the insidious Gallatin,” it was said, imported his ideas direct from Paris: “if the French had an agent in that house, it would have been impossible for him to act his part better.”¹⁰⁶

This attempt to restrict eligibility for the presidency, in light of considerable skepticism of the role of the foreign-born citizen, reinforces ideas of blood loyalty.¹⁰⁷ Despite the excitement of this “foreign complication,” however, the 1798 resolution was tabled.¹⁰⁸

103. MILLER, *supra* note 75, at 49.

104. *Id.*

105. *Id.*

106. *Id.* at 49–50.

107. Theodora Kostakopoulou recognizes the role of blood loyalty in exclusionist notions of citizenship:

The exclusionist model denies minority groups civic standing and respectful participation in the polity by perpetuating primordial and ethnonationalist narratives which place emphasis on blood loyalty, common ethnic origin and a homogeneous culture. Assimilation requires minority communities to renounce their particular ethnic or cultural identity and embrace the culture of the majority community . . .

Theodora Kostakopoulou, “*Integrating*” *Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms*, 8 COLUM. J. EUR. L. 181, 184–85 (2002); see also MICHAEL IGNATIEFF, *BLOOD AND BELONGING* (1993); Lea Brilmayer, *The Moral Significance of Nationalism*, 71 NOTRE DAME L. REV. 7 (1995); Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT’L L. 359 (1996). *But see* Harold J. Berman, *The Western Legal Tradition in a Millennial Perspective: Past and Future*, 60 LA. L. REV. 739, 762 (2000). Berman argues the following:

True spiritual integration, however, involves not suppression of loyalties of blood and soil, and surely not the homogenization of diverse local and regional and national communities, or their subordination to some sort of world state, but rather their transcendence by a common faith in a sacred spiritual reality that will guide the processes, including the legal processes, by which all the cultures of the world are gradually being brought together and their common concerns met.

Id.

108. 7 ANNALS OF CONG. 602 (1798); MILLER, *supra* note 75, at 48–50.

2. Post–Civil War attempts to expand eligibility

The first attempts to liberalize eligibility came after the Civil War around the time of the adoption of the Fourteenth Amendment when four resolutions were introduced to amend the presidential eligibility clause to include naturalized citizens.¹⁰⁹ The last of these, introduced in 1872 by Representative Morgan of Ohio, directly referenced the Fourteenth Amendment in its preamble:

The preamble states that political equality is the true basis of republican governments; that, under the Constitution as amended, all citizens of the United States, without regard to race, color, or previous conditions, are eligible to the offices of President and Vice President, except naturalized citizens, who alone are excluded.¹¹⁰

The measure was faced with a procedural vote to suspend the rules and was defeated because it did not attain the required two-thirds vote to do so.¹¹¹ Nonetheless, there appeared to be some indication that the newly adopted Fourteenth Amendment supported a change in presidential eligibility to include naturalized citizens.¹¹²

3. Civil rights era attempts to change eligibility

Starting in 1960, a flurry of new proposals was presented in Congress seeking to repeal the Natural-Born Citizen Clause.¹¹³ The proposals seemed to be motivated by the civil-rights-era concepts of

109. The first resolution, predating the ratification of the Fourteenth Amendment by two months, was introduced by Representative Robinson of New York on May 18, 1868. H.R. Res. 269, 40th Cong. (2d Sess. 1868); CONG. GLOBE, 40th Cong., 2d Sess. 2526 (1868). In 1871, a similar resolution was introduced by Senator Yates of Illinois. S. Res. 284, 41st Cong. (3d Sess. 1871). That proposal was referred to the Committee on the Judiciary, but due to subsequent adverse reporting, it was postponed indefinitely. See AMES, *supra* note 73, at 75, 392. The third post–Civil War proposal was introduced by Representative Morgan of Ohio and was lost on a vote to suspend the rules. H.R. Res. 52, 42d Cong. (2d Sess. 1871).

110. H.R. Res. 166–169, 42d Cong. (3d Sess. 1872); CONG. GLOBE, 42d Cong., 3d Sess. 226 (1872).

111. CONG. GLOBE, 42d Cong., 3d Sess. 226 (1872). The vote was 82 to 71, with 88 not voting. *Id.*

112. See discussion *infra* Part IV.

113. H.R.J. Res. 1255, 92d Cong. (1972); H.R.J. Res. 1245, 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); H.R.J. Res. 547, 86th Cong. (1960).

equality¹¹⁴ and by the potential presidential candidacies of various men born outside the United States, including Christian A. Herter,¹¹⁵ Franklin D. Roosevelt, Jr.,¹¹⁶ Herbert Hoover, Jr.,¹¹⁷ Barry Goldwater,¹¹⁸ and George Romney.¹¹⁹ Although none of the potential candidates acquired their American citizenship through naturalization, all were born outside the United States to U.S.-citizen parents. Governor George Romney of New York, for example, was born of American parents in a Mormon colony in Mexico.¹²⁰ Because of uncertainty about whether a person had to be born on U.S. soil before qualifying as a natural-born citizen, there was some question about whether these individuals met the constitutional requirements to be President.¹²¹ But as the potential candidacies of these contenders faded, so did interest in the constitutional amendments; none of the civil-rights-era presidential-eligibility proposals moved beyond assignment to committee.

114. For example, in speaking in favor of a proposal to repeal the “natural-born citizen” requirement, Senator Fong relates, “[F]or long years, I have been in the forefront of the fight to treat all persons equally and fairly.” 92 CONG. REC. 33,604–05 (1971) (statement of Sen. Fong).

115. Christian D. Herter was born to American parents in France, served as Secretary of State during the latter years of the Eisenhower administration, and was a potential Republican candidate for President in 1952 and 1960. Gordon, *supra* note 17, at 1; Cyril C. Means, *Is Presidency Barred to Americans Born Abroad?*, U.S. NEWS & WORLD REP., Dec. 23, 1955; *Natural Born Citizen*, WASH. POST & TIMES HERALD, Oct. 30, 1955, at E4 (“It is suggested that Gov. Christian Herter of Massachusetts, who was born in Paris of American parents, may enter the New Hampshire presidential primary next March to put the clause to a court test.”).

116. The junior FDR was born at his parents’ summer home on Campobello Island, New Brunswick, Canada. *Natural Born Citizen*, *supra* note 115; Chalmers M. Roberts, *FDR’s Foes Are Laying for ‘Junior,’* WASH. POST, May 29, 1949, at B1 (In a discussion with friends about his eligibility for the presidency in light of his birth in Canada, he remarked, “I’d like to see anyone use that against me!”).

117. See 113 CONG. REC. 13,169 (statement of Rep. Kupperman).

118. Goldwater was born in the Territory of Arizona before it became a state. Gordon, *supra* note 17, at 1.

119. See 113 CONG. REC. 35,019 (1967) (statement of Sen. Javits); 113 CONG. REC. 15,875 (1967) (statement of Rep. Dowdy); see also Anthony D’Amato, *Aspects of Deconstruction: The “Easy Case” of the Under-Aged President*, 84 NW. U. L. REV. 250, 252–54 (1989); *Romney Ineligible?*, WASH. POST & TIMES HERALD, May 20, 1967, at A12.

120. 113 CONG. REC. 35,019 (1967) (statement of Sen. Javits); Gordon, *supra* note 17, at 1.

121. See, e.g., Gordon, *supra* note 17, at 1; Ho, *supra* note 17, at 375; Lohman, *supra* note 17, at 349; Pryor, *supra* note 17, at 881.

4. Kissinger for President?

The surge of proposed amendments in the mid-to-late 1970s¹²² was also possibly prompted by the potential presidential candidacy of Henry Kissinger, who served as National Security Advisor to President Richard Nixon and as Secretary of State to Presidents Nixon and Ford.¹²³ Kissinger was born in Germany, emigrated to the United States when he was fifteen years old,¹²⁴ and became an American citizen through naturalization at age twenty.¹²⁵ In 1973, the *Washington Post* reported, “From a relatively obscure beginning as a foreign policy expert in the first Nixon administration, Henry Kissinger has become so familiar to the American public that his name is today a household word.”¹²⁶ The *Post* article goes on to opine, “Although Kissinger, a naturalized citizen, is not eligible to run for President, his high name-awareness score and wide popularity represent invaluable political assets should he ever decide to run for Congress.”¹²⁷ When Representative Bingham introduced his proposal for a constitutional amendment, the *Washington Post* reported, “‘My proposed constitutional amendment does not amount to an endorsement of Henry Kissinger for the presidency,’ Bingham said. ‘But I must say in all candor that his achievements as Secretary of State have highlighted the problem.’”¹²⁸ Representative Bingham introduced four bills in 1974 and one in 1977, all seeking to repeal the Natural-Born Citizen Clause.¹²⁹

122. 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. 890, 93d Cong. (1974); H.R.J. Res. 880, 93d Cong. (1974); H.R.J. Res. 740, 93d Cong. (1973); H.R.J. Res. 589, 93d Cong. (1973); H.R.J. Res. 491, 93d Cong. (1973).

123. WALTER ISAACSON, *KISSINGER* 491–510 (1993).

124. *Id.* at 28.

125. *Id.* at 39. He was naturalized as an Army recruit since the Army routinely naturalized recruits who were immigrants. *Id.*

126. George Gallup, *Respected at Home as Well*, WASH. POST, Apr. 22, 1973, at L10.

127. *Id.*

128. *Bingham Wants ‘Foreign Born’ Clause Deleted*, WASH. POST, Jan. 29, 1974, at A6; see also John P. MacKenzie, *Administration Backs Step To Drop Foreign-Birth Bar*, WASH. POST, May 4, 1974, at A2 (reporting that the Nixon administration had “warmly endorsed” the amendment).

129. H.R.J. Res. 38, 95th Cong. (1977); H.R.J. Res. 993, 93d Cong. (1974); H.R.J. Res. 896, 93d Cong. (1974); H.R.J. Res. 890, 93d Cong. (1974); H.R.J. Res. 880, 93d Cong. (1974).

5. Current proposals to change presidential eligibility

Review of the Natural-Born Citizen Clause is especially timely since there are several proposals before the 108th Congress that are designed to expand eligibility for the presidency to include at least some non-native-born citizens. These bills also seem motivated, at least in part, by a desire to allow two prominent foreign-born state governors—both naturalized American citizens—to be eligible for the presidency. Senate Joint Resolution 15, introduced by Senator Orrin Hatch July 10, 2003, and House Joint Resolution 104, introduced September 15, 2004, by Representative Dana Rohrabacher, propose an amendment to the Constitution to read as follows:

A person who is a citizen of the United States, who has been for 20 years a citizen of the United States, and who is otherwise eligible to the Office of President, is not ineligible to that Office by reason of not being a native born citizen of the United States.¹³⁰

Another bill seeks to achieve a similar result for a smaller class of persons. Senate Bill 2128, introduced by Senator Don Nickles February 25, 2004 and entitled the Natural-Born Citizen Act, seeks to change the definition of natural-born citizen in the Constitution to include children of American citizens who were born abroad and foreign-born children adopted by American citizens.¹³¹ The bill does not purport to amend the Constitution's Natural-Born Citizen Clause; instead, it seeks to offer a statutory definition of natural-born citizenship. Of course, Congress lacks the authority to change the

130. H.R.J. Res. 104, 108th Cong. (2004); S.J. Res. 15, 108th Cong. (2003). House Joint Resolution 67, introduced by Representative John Conyers, Jr. on September 3, 2003, is identical to the language of Senator Hatch's and Representative Rohrabacher's proposal. House Joint Resolution 59, introduced by Representative Snyder on June 11, 2003, seeks a constitutional amendment that would allow a person who had been a United States citizen for 35 years, and a United States resident for at least 14 years, to be eligible for the presidency.

131. S. 2128, 108th Cong. (2004). The "Natural Born Citizen Act" would extend eligibility to

any person born outside the United States—

(A) who derives citizenship at birth from a United States citizen parent or parents pursuant to an Act of Congress; or

(B) who is adopted by 18 years of age by a United States citizen parent or parents, who are otherwise eligible to transmit citizenship to a biological child pursuant to an Act of Congress.

Id.

Constitution by statute. Thus, to the extent that the Natural-Born Citizenship Act is seen as expanding or changing the Constitution's meaning, it would be unconstitutional.

On October 5, 2004, the Senate Committee on the Judiciary held a hearing to consider opening the presidency to naturalized Americans.¹³² The hearing addressed both proposals to amend the Constitution and statutory attempts, like the Natural-Born Citizenship Act.¹³³ Participants at the Senate committee hearing included members of the House of Representatives who were sponsoring changes and scholars who addressed the origins and purposes of the Natural-Born Citizen Clause.¹³⁴ Professor Akhil Amar argued that the constitutional provision was motivated by the Framers' desire to "reject all vestiges of monarchy."¹³⁵ Because we no longer fear such a possibility, he concluded, the provision has outlived its usefulness and should be repealed.¹³⁶ He poignantly argued that this country "should be more than a land where every boy or girl can grow up to be . . . Governor."¹³⁷ Professor John Yinger argued that the Framers were fraught with doubt about the natural-born citizen requirement. The grandfather clause that allowed some foreign-born citizens to ascend to the presidency, the Framers' recognition that second-class citizenship for naturalized citizens was illiberal, and the Framers' trust in naturalized citizens as demonstrated by their willingness to place them in high government positions are proof of that doubt.¹³⁸

Dr. Matthew Spalding sounded a cautionary note, arguing that the Framers' concern was not just with foreign monarchy taking over the fledgling government, but more broadly with foreign influence. He also argued that "[w]hile the practical circumstances have changed—there is no threat of a foreign takeover—the underlying

132. *Maximizing Voter Choice: Opening the Presidency to Naturalized Americans: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 1 (2004) [hereinafter *Hearing*].

133. *Id.*

134. *Id.* The witness list included Senator Don Nickles (Okla.), Representative John Conyers (Mich.), Representative Vic Snyder (Ark.), Representative Barney Frank (Mass.), Representative Dana Rohrabacker (Cal.), Representative Darrell Issa (Cal.), Professor Akhil Amar (Yale Law Sch.), Dr. Matthew Spalding (Heritage Found.), and Professor John Yinger (Syracuse Univ.). *Id.*

135. *Id.* at 17 (statement of Akhil Amar, Professor, Yale Law Sch.).

136. *Id.*

137. *Id.*

138. *Id.* at 10–25 (statement of John Yinger, Professor, Syracuse Univ.).

concerns about foreign attachments and allegiance still make sense.”¹³⁹ He notes, however, that it might be possible to ensure that foreign-born citizens have the necessary loyalty and allegiance with a significant citizenship requirement, such as citizenship status for thirty-five years before a naturalized citizen is eligible to run for president.¹⁴⁰ He raises some caveats to such an expansion, however. First, he notes that naturalized citizens “in theory but often not in practice have renounced their past allegiances” and that dual citizenship might be problematic.¹⁴¹ Second, he believes that allowing foreign-born citizens to be eligible for the presidency has to be “part of a renewed effort, a deliberate and self-confident policy to assimilate and Americanize immigrants.”¹⁴²

6. Summary

Although proposals to amend the Constitution to render naturalized citizens eligible for the presidency have come with some regularity, all have failed. While most seem to agree that the original reasons supporting the inclusion of the restriction, if valid then, are no longer valid, there does not appear to be a groundswell of support for removing the restriction. Even when the proposals are offered to make particularly popular foreign-born citizens eligible, the public does not seem motivated to change the Constitution. For example, although polls have given California Governor Arnold Schwarzenegger high approval marks, sixty percent of those polled at that time of high popularity said that they did not support a constitutional amendment to allow naturalized citizens to run for President.¹⁴³ This indifferent attitude among the general public is

139. *Id.* at 19. (statement of Dr. Matthew Spalding, Dir., B. Kenneth Simon Ctr. for Am. Studies, Heritage Found.).

140. *Id.*

141. *Id.* Incidentally, Arnold Schwarzenegger is a dual citizen of Austria and the United States. NIGEL ANDREWS, *TRUE MYTHS: THE LIFE AND TIMES OF ARNOLD SCHWARZENEGGER, FROM PUMPING IRON TO GOVERNOR OF CALIFORNIA* 97 (rev. ed. 2004).

142. *Hearing, supra* note 132, at 19 (statement of Dr. Matthew Spalding). Dr. Spalding is also concerned by the politicization of the issue and is “tempted to suggest that any amendment should include language that it would not take effect for ten years or so, when the current candidates are not on the scene.” *Id.* Finally, he expresses a preference for a legislative approach of defining “natural-born citizen,” rather than a constitutional amendment. *Id.*

143. Lynda Gledhill, *Field Poll: Majorities Oppose Schwarzenegger Bid*, S.F. CHRON., Oct. 8, 2004, at B-3. The same poll showed that sixty-five percent of voters approve of Governor

illustrated well by a letter to the editor during Kissinger's time: "Congressman Bingham's proposal to permit other than natural-born citizens to serve as President is absurd. It is too bad that Secretary Kissinger and other naturalized citizens cannot become President. However, there are far more significant injustices that require the attention of our legislators."¹⁴⁴

The origin of the Natural-Born Citizen Clause and the early attempts to further restrict presidential eligibility on source-of-citizenship grounds illustrate a distrust of foreignness, an assumption that naturalized citizens are potentially disloyal to a far greater degree than are natural-born citizens, and that some Americans are more equal than others. The failure of more recent attempts to expand presidential eligibility to include foreign-born citizens shows that we have not progressed very far from our historical roots on this issue.

III. THE MEANING OF CITIZENSHIP

Aristotle noted that "[t]he nature of citizenship . . . is a question which is often disputed: there is no general agreement on a single definition."¹⁴⁵ A dictionary defines "citizen" quite simply as "a native or inhabitant of a city or town."¹⁴⁶ If this is all we mean by

Schwarzenegger's work as governor. *Id.* Schwarzenegger is even popular among Democrats; "Whenever more Democrats give a Republican governor a higher approval than disapproval rating, it is time to take note," [poll director Mark] DiCamillo said. "It's not very common." *Id.*

144. Edward A. Ryan, Letter to the Editor, *Constitutional Tinkering*, WASH. POST, Feb. 25, 1974, at A21.

145. ARISTOTLE, *POLITICS* 93 (E. Barker ed., 1946). Modern writers have not reached agreement on a definition either. *See, e.g.*, RUTH LISTER, *CITIZENSHIP: FEMINIST PERSPECTIVES* 3 (N.Y.U. Press 2003) ("Vocabularies of citizenship' and their meanings vary according to social, political and cultural context and reflect different historical legacies."); JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION I* (1991) ("There is no notion more central in politics than citizenship, and none more variable in history, or contested in theory."); Etienne Balibar, *Propositions on Citizenship*, 98 *ETHICS* 723, 723 (1988) ("[H]istory still shows that this concept has no definition that is fixed for all time. It has always been at stake in struggles and the object of transformations."); Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447, 450 (2000) ("As it happens, the meaning of citizenship has been, and remains, highly contested among scholars.")

146. *NEW LEXICON WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE* 180 (1989). Noelle McAfee argues that the concept of citizenship is a modern creation:

Even though the Greeks had an analogous term, the word citizen is peculiarly modern. Though its coinage is Latin, it came into usage only in the fourteenth century, when it meant an inhabitant of a city. Not until the sixteenth century was it

citizenship, then Alexander Bickel was right to dismiss it as “at best a simple idea for a simple government.”¹⁴⁷ Arguably, however, the term is more complex, having “an extraordinarily broad range of uses; it is invoked to characterize modes of participation and governance, rights and duties, identities and commitments, and statuses.”¹⁴⁸ Thus, we can address citizenship “as a legal status, as a system of rights, as a form of political activity, or as a form of identity and solidarity.”¹⁴⁹ This Section will focus on three aspects of naturalized citizenship in the United States: (1) citizenship as legal status, (2) citizenship as identity, and (3) citizenship as participation in political activity. The Natural-Born Citizen Clause, in its restriction of presidential eligibility, establishes naturalized citizens as second-class citizens in all three aspects.

A. Legal Status of Naturalized Citizens

The Fourteenth Amendment to the United States Constitution declares: “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.”¹⁵⁰ The Supreme Court has held that “the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive.”¹⁵¹ A naturalized citizen “becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native.”¹⁵² Thus, the Court says that

associated with the rights of membership in a city. Since the eighteenth century it has also connoted certain obligations or duties. . . . In short, the development of the term citizen has paralleled the development of modernity’s idea of what it means to belong to a political community and to be an individual subject. To this day, our notions of citizenship rest upon our notions of subjectivity.

NOELLE MCAFEE, HABERMAS, KRISTEVA, AND CITIZENSHIP 13 (2000).

147. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 54 (1975).

148. Bosniak, *supra* note 145, at 450; *see also* Richard B. Bilder & Gerald L. Neuman, Book Review, 96 AM. J. INT’L L. 514, 514 (2002) (reviewing *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* (T. Alexander Aleinoff & Douglas Klusmeyer, eds. 2001)) (“The term citizenship has many meanings in sociology, political theory, and law. It can denote a relationship to a polity, a social status, an activity, a package of rights, or a package of responsibilities.”).

149. Bosniak, *supra* note 145, at 452.

150. U.S. CONST. amend. XIV, § 1.

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

152. *Id.* at 166 (quoting *Osborn v. Bank of United States*, 22 U.S. (1 Wheat.) 738, 827 (1824)).

“citizenship obtained through naturalization carries with it the privilege of full participation in the affairs of our society, including the right to speak freely, to criticize officials and administrators, and to promote changes in our laws including the very Charter of our Government.”¹⁵³ The Court pithily states, “Citizenship obtained through naturalization is not a second-class citizenship.”¹⁵⁴ As will be seen, however, this statement is overly simplistic and ignores certain legal realities that do, in effect, treat naturalized citizens as something less than first-class citizens.

The Court has noted that there are indeed some differences in treatment of native-born and naturalized citizens. When noting that birthright citizens and naturalized citizens’ rights and prerogatives are equal, the Court has added the proviso, “save that of eligibility to the Presidency.”¹⁵⁵ The Court also notes that the eligibility rules for members of the House and Senate require a naturalized citizen to wait seven and nine years after naturalization, respectively, to become members of Congress.¹⁵⁶

In addition, the Court has held that a naturalized citizen could be stripped of citizenship on grounds less than those that would cause a birthright citizen to be stripped of citizenship.¹⁵⁷ In *Knauer v. United States*, the Court approved the denaturalization of a German-born man who was “a thorough-going Nazi and a faithful follower of Adolf Hilter”¹⁵⁸ on the grounds that he fraudulently

153. *Knauer v. United States*, 328 U.S. 654, 658 (1946).

154. *Id.*

155. *Id.* (quoting *Luria v. United States*, 231 U.S. 9, 22 (1913)); see also *Schneider*, 377 U.S. at 165 (“The only difference drawn by the Constitution is that only the ‘natural-born’ citizen is eligible to be President.”).

156. *Knauer*, 328 U.S. at 658 n.3 (citing U.S. CONST. art. I, §§ 2–3). The requirement would not delay a natural-born citizen because Senators and Representatives are not able to serve at the ages of nine and seven.

157. See *id.* at 673–74. For a discussion of World War II denaturalization cases concerning German-American Nazis, see Geoffrey R. Stone, *Free Speech in World War II: “When Are You Going To Indict the Seditious?”*, 2 INT’L J. CONST. L. 334, 364–65 (2004). He notes that “[b]y the end of 1943, the United States had issued 146 decrees canceling naturalized citizenship.” *Id.* at 364.

158. *Knauer*, 328 U.S. at 660. In two other cases, however, the Court refused to allow denaturalization of citizens with unpopular political views. See *Baumgartner v. United States*, 322 U.S. 665 (1944) (holding that denaturalization of a Nazi sympathizer was unwarranted because “the expression of views which may collide with cherished American ideals does not necessarily prove want of devotion to the Nation”); *Schneiderman v. United States*, 320 U.S. 118, 135–36. (1943) (holding that denaturalization of a Communist Party leader was inappropriate because Communists could be “attached to the principles of the Constitution”).

obtained his United States citizenship by falsely swearing renunciation of Germany and allegiance to the United States.¹⁵⁹ In dissent, Justice Rutledge noted that Knauer was, indeed, “a thorough-going Nazi, addicted to philosophies altogether hostile to the democratic framework in which we believe and live”;¹⁶⁰ but since “[n]o native-born American’s birthright could be stripped from him for such a cause or by such a procedure as has been followed here” and that in order “[t]o suffer that great loss he must forfeit citizenship by some act of treason or felony,” the Court’s decision in this case inappropriately made naturalized citizens “second-class citizens.”¹⁶¹

A naturalized citizen is also in danger of losing U.S. citizenship by relocating to a foreign country, which danger is not applicable to birthright citizenship. In order to become a naturalized citizen, an applicant must intend to reside permanently in the United States. Relocation to another country may cause a court to conclude that the applicant did not intend to reside permanently in the United

For a thorough discussion of *Schneiderman*, see David Fontana, *A Case for the Twenty-First Century Constitutional Canon: Schneiderman v. United States*, 35 CONN. L. REV. 35 (2002).

159. *Knauer*, 328 U.S. at 671–74. See the discussion of loss of citizenship in T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471 (1986). In *Fedorenko v. U.S.*, 449 U.S. 490, 516–18 (1981), the Court allowed denaturalization on the mere showing of statutory ineligibility for permanent residence, without a demonstration of fraud in obtaining naturalization.

160. *Knauer*, 328 U.S. at 675 (Rutledge, J., dissenting). In *Klapprott v. U.S.*, 335 U.S. 601 (1949), Justice Rutledge wrote separately to condemn the Court’s treatment of denaturalization as creating “two classes of citizens in this country, one secure in their status and the other subject at every moment to its loss by proceedings not applicable to the other class.” *Id.* at 619 (Rutledge, J., concurring).

161. *Knauer*, 328 U.S. at 676 (Rutledge, J., dissenting); see also Catherine Yonsoo Kim, *Revoking Your Citizenship: Minimizing the Likelihood of Administrative Error*, 101 COLUM. L. REV. 1448, 1448 (2001) (citing *Afroyim v. Rusk*, 387 U.S. 253, 267–68 (1967)) (“For individuals born in the United States, the government may not revoke citizenship against an individual’s will: expatriation of these individuals must be voluntary.”). In fact, for a United States citizen to lose citizenship in a manner other than through denaturalization like in *Knauer*, the birthright citizen must voluntarily perform a specified act with the subjective intention of severing his citizenship ties to the United States. See *Vance v. Terrazas*, 444 U.S. 252 (1980); *Afroyim*, 387 U.S. at 253. Section 349 of the Immigration and Naturalization Act provides a list of acts that might lead to a loss of birthright citizenship, including entering or serving in the armed forces of a foreign state, serving in a foreign governmental position, naturalization in a foreign state, attempting to overthrow the government of the United States, or committing an act of treason. 8 U.S.C. § 1481 (2000). Once a naturalized citizen is denaturalized, he can be deported under a statute that requires the deportation of aliens for the commission of a crime, even if the crime was committed while he was a naturalized citizen. See *United States ex rel. Eichenlaub v. Shaughnessy*, 338 U.S. 521 (1950).

States, and therefore committed a fraud in obtaining citizenship.¹⁶² Although the Supreme Court has rejected a statute that called for automatic loss of naturalized citizenship on relocation to a foreign country where the citizen was born or formerly a citizen,¹⁶³ the current statute contains a very similar provision allowing denaturalization for relocation. Section 340(d) of the Immigration and Naturalization Act creates a presumption that a naturalized citizen who takes up permanent residence in a foreign country within five years of naturalization misrepresented the intention to reside permanently in the United States at the time of his naturalization.¹⁶⁴ If that presumption of fraud is not rebutted, the naturalized citizen can have his citizenship revoked.¹⁶⁵ Conversely, relocation to a foreign country is *not* grounds for loss of citizenship for natural-born citizens.¹⁶⁶

One might argue that these differences between the legal status of birthright citizens and naturalized citizens are minimal, thus justifying the Court's ringing declaration that naturalized citizens are not second-class citizens. However, these differences, which are arguably unconstitutional,¹⁶⁷ are also symptomatic of the larger problem with naturalized citizens' rights: a presumption that birthright citizens are automatically loyal and trustworthy, and automatically committed and connected to the United States, while naturalized citizens are less—less loyal, less trustworthy, less committed, and less connected to their adopted country. In sum, the differences in presidential eligibility and the denaturalization laws for naturalized citizens demonstrate that in many ways the law treats naturalized citizens as lesser citizens. This presumed lack of commitment and loyalty also manifests itself in notions of citizenship as identity and citizenship as participation.

162. See *Luria v. United States*, 231 U.S. 9 (1913); *United States v. Banafshe*, 616 F.2d 1143 (9th Cir. 1980).

163. *Schneider v. Rusk*, 377 U.S. 163, 168–69 (1964).

164. 8 U.S.C. § 1451.

165. See, e.g., *Banafshe*, 616 F.2d at 1143; *United States v. Cuccaro*, 138 F. Supp. 847 (E.D.N.Y. 1956). *But see* *United States v. Delmendo*, 503 F.2d 98 (9th Cir. 1974).

166. See 8 U.S.C. § 1481 (listing the elements of denaturalization that apply to natural-born citizens).

167. See *Knauer v. United States*, 328 U.S. 654, 677 (1946) (Rutledge, J., dissenting).

B. Naturalized Citizenship as Identity

Ruth Lister argues that “[t]he notion of citizenship identity derives from the most basic meaning of citizenship: membership of a community.”¹⁶⁸ Thus, citizenship is more than legal status; “citizenship has its ‘subjective dimension’ as well.”¹⁶⁹ Lister further explains,

An understanding of citizenship in terms of membership and identity underlines that what is involved is not simply a set of legal rules governing the relationship between individuals and the state but also a set of social relationships between individuals and the state and between individual citizens. These relationships are negotiated, and therefore, fluid. Their nature and how they are understood reflects national context and culture.¹⁷⁰

Kenneth Karst also focuses on the concept of citizenship as belonging.¹⁷¹ For him, the importance of citizenship starts “in the formal recognition of membership in the community.”¹⁷² He argues, however, that formal recognition alone is insufficient. The principle of equal citizenship means that “[e]ach individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member.”¹⁷³ Although naturalized

168. LISTER, *supra* note 145, at 3.

169. William B. Allen, *The Truth About Citizenship: An Outline*, 4 CARDOZO J. INT’L & COMP. L. 355, 355 (1996).

170. LISTER, *supra* note 145, at 15 (citation omitted); *see also* DOUGLAS B. KLUSMEYER, BETWEEN CONSENT AND DESCENT: CONCEPTIONS OF DEMOCRATIC CITIZENSHIP vii (1996). Klusmeyer states:

Fundamental attitudes toward membership and belonging are expressed in the ways that societies define who may enjoy the privileges and shoulder the obligations of citizenship. Is citizenship a right that should be accessible to all permanent residents? Is it an exclusive domain of those born within a certain political space? Is it a mark of blood heritage, of commonly held values and beliefs, a definition of common identity? Or is it the vehicle for free participation in self-governance?

Id.

171. KARST, *supra* note 66, at 9; *see also* Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281 (2000). For Karst, belonging is a basic human need, akin to the need for food or water, and without belonging to a community, an individual cannot formulate a complete sense of self. Kenneth Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 306 (1986).

172. KARST, *supra* note 66, at 9.

173. *Id.* at 3.

citizens have achieved the legal status of “citizen,”¹⁷⁴ it is less clear whether they have been accorded the sense of belonging that goes beyond formal recognition to grant meaningful membership in the community.¹⁷⁵

Being “foreign” seems to trump “citizenship” for naturalized citizens.¹⁷⁶ Many naturalized citizens, especially when non-white, are seen as permanently foreign.¹⁷⁷ Robert Chang argues that the figure of “perpetual internal foreigners” has been necessary to construct America’s sense of identity because immigration/naturalization restrictions “were based on a sense of who properly belonged in the national community.”¹⁷⁸ Without restrictions on who could be a citizen, there would be no “them” to compare “us” to.¹⁷⁹ Once the foreign born become citizens through naturalization, the “myth of a historically homogeneous American identity” must be preserved by devaluing naturalized citizens.¹⁸⁰ One might argue that it is different today where immigration laws are no longer based on race and where, as Nathan Glazer puts it, “[a] strong accent, a distant culture, is no bar to citizenship.”¹⁸¹ But even Professor Glazer is forced to concede that “whatever we mean by the American nation, the new citizen may not yet be considered a full member of it by many of his fellow citizens, because of race or accent.”¹⁸² He continues:

174. *See supra* text accompanying notes 152–55.

175. Benhabib, *supra* note 19, at 1762 (“Membership . . . is only meaningful when accompanied by rituals of entry, access, belonging and privilege.”).

176. In fact, “foreign-appearing” seems to trump “citizenship” for those of foreign descent who are born on American soil. *See* Volpp, *supra* note 2, at 1576 (arguing that since the terrorist attacks on the World Trade Center on September 11, 2001, a new identity category of people who “appear Middle Eastern, Arab, or Muslim” has been created, and that the members of this group are “identified as terrorists, and are disidentified as citizens”).

177. Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 2 (2002).

178. Chang, *supra* note 22, at 247.

179. *Id.*

180. Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185, 223 (1998). Kelly argues that there is a multitiered hierarchy of citizenship, where “generational citizens”—those citizens born into families claiming several generations of citizenship—occupy the highest level. First-generation birthright citizens and naturalized citizens are at the bottom. *Id.*

181. Nathan Glazer, *Reflections on Citizenship and Diversity*, in *DIVERSITY AND CITIZENSHIP: REDISCOVERING AMERICAN NATIONHOOD* 85, 87–88 (Gary Jeffrey Jacobsohn & Susan Dunn eds., 1996).

182. *Id.* at 88.

Many of us, perhaps most of us, have a mind-set in which certain races and nationalities, despite their formal equality in American law, despite the fact that distinctions of race are not recognized in immigration or naturalization law, have a greater claim to becoming American and are accepted as more legitimately American than others.¹⁸³

In America, it seems, some citizens are more equal than others.

I would argue that the public is resistant to natural-born citizens becoming President because there is still considerable suspicion of the foreign-born citizen and therefore a reluctance to allow the foreign-born citizen full membership in the American community. America's skepticism of the foreign born, embedded in the constitutional qualifications for the presidency, pervades American culture.¹⁸⁴ Rogers M. Smith has argued that American restrictions on immigration and naturalization have "manifested passionate beliefs that America was by rights a white nation, a Protestant nation, a nation in which true Americans were native-born men with Anglo-Saxon ancestors."¹⁸⁵ Therefore, the "true" citizen is a native-born, Anglo-Saxon, Protestant man. If that is the conception of American citizenship, then, arguably, the President must meet those qualifications. Smith argues that political elites create citizenship restrictions to meet two political imperatives:

First, aspirants to power require a population to lead that imagines itself to be a "people"; and, second, they need a people that imagines itself in ways that make leadership by those aspirants appropriate. These needs drive political leaders to offer civic ideologies, or myths of civic identity, that foster the requisite sense of peoplehood, and to support citizenship laws that express those ideologies symbolically while legally incorporating and empowering the leaders' likely constituents.¹⁸⁶

183. *Id.*

184. *See, e.g.*, Volpp, *supra* note 2, at 1575 (arguing that after 9/11, people who appear "Middle Eastern, Arab, or Muslim" are "identified as terrorists, and disidentified as citizens").

185. ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 3 (1997).

186. *Id.* at 6.

Under this view, political leaders require a homogeneous “people,” and they must fit neatly within that homogeneous group.¹⁸⁷ The foreign born disturb that homogeneity. Under that definition, naturalized citizens are not full and equal members of this nation and are therefore not suitable for the presidency.

As previously discussed, the original motivation behind the Natural-Born Citizen Clause was that foreign born citizens retained their loyalty to the land of their birth and that naturalization might not transfer that loyalty to the United States.¹⁸⁸ As Professor Thomas Joo puts it, “the presumption of foreignness gives rise to a further presumption that these ‘permanent foreigners’ are loyal to those nations [of their birth] and disloyal to America.”¹⁸⁹

America has a long tradition of distrusting foreign-born citizens.¹⁹⁰ Benjamin Franklin decried immigration in the following terms:

187. Consider Alexander Hamilton’s concern about immigration and the danger of heterogeneity: “The influx of foreigners must, therefore, tend to produce a heterogeneous compound; to change and corrupt the national spirit; to complicate and confound public opinion; to introduce foreign propensities.” Alexander Hamilton, *Examination of Jefferson’s Message to Congress of December 7th, 1801*, in THE FOUNDERS OF THE REPUBLIC ON IMMIGRATION, NATURALIZATION, AND ALIENS, *supra* note 67, at 50. Alon Harel would likely call Hamilton a “culturalist”—one who “places importance on cultural homogeneity amongst the political unit’s citizenry. To the culturalist, membership in the political community presupposes membership in one, unified cultural community.” Harel, *supra* note 4, at 168. Harel contrasts the culturalist’s view of citizenship with that of liberals and multiculturalists. Liberals see citizenship in universalistic terms and find cultural affiliation irrelevant. *Id.* at 167–68. Multiculturalists, on the other hand, “place high intrinsic value on cultural diversity.” *Id.* at 168. For multiculturalists, citizenship requires “diversity in which plurality of ways of belonging are acknowledged and accepted.” *Id.*

188. *See supra* Part II.B.

189. Joo, *supra* note 177, at 2.

190. KARST, *supra* note 66, at 85–92 (“Suspensions of disloyalty had surrounded various [ethnic and cultural] minorities since the colonial era.”). Adeno Addis argues as follows:

The attitude of the United States towards “foreigners” has always been ambiguous. On the one hand, as a country of immigrants, it has encouraged foreigners to feel that they belong and that this is indeed a diverse and tolerant country where diverse commitments and convictions can and do coexist. . . . On the other hand, there has always been an undercurrent of suspicion about foreigners and “foreign values.”

Adeno Addis, *Who’s Afraid of Foreigners? The Restrictions on Alien Ownership of Electronic Media*, 32 COLUM. HUM. RTS. L. REV. 133, 134 (2000). Professor Addis identifies this suspicion of foreigners in “criticism directed at the United Nations, international trade, immigration (especially immigration of non-whites), [and] controversies surrounding ‘English-only’ rules.” *Id.*

[W]hy should the Palatine boors be suffered to swarm into our settlements, and, by herding together, establish their language and manners, to the exclusion of ours? Why should Pennsylvania, founded by the English, become a colony of aliens, who will shortly be so numerous as to Germanize us, instead of our Anglifying them, and will never adopt our language or customs any more than they can acquire our complexion?¹⁹¹

Another founding father, Alexander Hamilton, also objected to foreigners coming to America: “The influx of foreigners must, therefore, tend to produce a heterogeneous compound; to change and corrupt the national spirit; to complicate and confound public opinion; to introduce foreign propensities.”¹⁹² Although many of the founding fathers were immigrants themselves, they did not approve whole-heartedly of immigration, especially from countries where the peoples were ethnically, linguistically, and religiously different from themselves.

In 1798, when there was much concern about America being pulled into a war to support France against Great Britain, Federalists suggested that “[f]oreigners, whether naturalized or not, ought . . . to be forbidden to teach school or edit newspapers.”¹⁹³ In 1814, the Hartford Convention sought a constitutional amendment barring naturalized citizens from all federal offices.¹⁹⁴ For a brief time during the 1850s, the Massachusetts state constitution prohibited naturalized citizens from voting until they had been citizens for two years.¹⁹⁵ During and after World War I, German Americans were sufficiently suspicious to motivate a number of states to prohibit the speaking or teaching of the German language.¹⁹⁶ Paul Carrington

191. Benjamin Franklin, *Observations Concerning the Increase of Mankind and the Peopling of Countries (1751)*, in THE FOUNDERS OF THE REPUBLIC ON IMMIGRATION, NATURALIZATION, AND ALIENS, *supra* note 67, at 26; *see also* Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 281–82 (1992).

192. Hamilton, *supra* note 187, at 50.

193. MILLER, *supra* note 75, at 48. The concern with these professions was that the foreign born would be able to influence politics too much in these positions. *Id.*

194. KARST, *supra* note 66, at 86.

195. *Id.* at 87.

196. Fifteen states banned foreign language teaching in public schools, and the Governor of Iowa issued a proclamation “forbidding the use of foreign languages in public and private schools, in church services, and even in conversations in public places or over the telephone.” *Id.* at 85; *see also* William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical*

notes that “no sooner was the armistice signed in November 1918 than the popular fear and loathing [of German-Americans] was redirected against aliens and naturalized citizens from Eastern Europe who might be suspected of Bolshevik sympathies.”¹⁹⁷ He goes on to say that “[d]uring World War II, the Japanese American internment provided the most vivid and notorious example of the outrages the disloyalty presumption can create.”¹⁹⁸ Also during World War II, 146 naturalized citizens of German birth had their citizenship revoked.¹⁹⁹ In the 1950s, during the McCarthy era, there was great concern that Communist foreigners were seeking naturalized citizenship in order to infiltrate American society.²⁰⁰ In the 1990s, suspicion of the Chinese led to the prosecution of naturalized American citizen Dr. Wen Ho Lee for allegedly selling atomic secrets to the Chinese.²⁰¹ Today, after the terrorist attacks of September 11, 2001, the suspicion of foreigners is directed at Middle Easterners, Muslims, and Arabs, and at those who appear to be Middle Easterners, Muslims and Arabs—regardless of their citizenship status.²⁰² And when anti-France sentiment ran high after disagreements between France and the United States over war in

Perspective, 57 U. CIN. L. REV. 125, 133–34 (1988) (“The proliferation of language laws during the immediate post-war period is attributable in part to lingering hostility against German-Americans.”); Perea, *supra* note 191, at 330–32.

197. Paul Carrington, *Fearing Fear Itself*, 5 GREEN BAG 2d 375, 377 (2002).

198. *Id.* Sixty percent of the internees were American citizens. As General DeWitt, who ordered the internment of the Japanese would say, “It makes no difference whether he is an American citizen, he is still a Japanese.” ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG & FRANK H. WU, RACE, RIGHTS AND REPARATIONS: LAW AND THE JAPANESE AMERICAN INTERNMENT 99 (2001). Kenneth Karst quotes DeWitt’s shameful remark as “A Jap’s a Jap.” KARST, *supra* note 66, at 87. Those involuntarily displaced Japanese-Americans who were citizens were likely birthright citizens, since prior to 1952, U.S. law prohibited naturalization for non-whites. See *Ozawa v. United States*, 260 U.S. 178 (1922) (holding that a Japanese man is not a “free white person” who can be naturalized).

199. See Stone, *supra* note 157, at 364–65.

200. See Engle, *supra* note 21, at 80. The notion that immigrants have ulterior motives to naturalize reappeared in perhaps a more benign form in the 1990s, when anti-immigrant sentiment caused Congress to cut off federal benefits to legal immigrants. The consequential rush to naturalize was widely seen as a desire for immigrants to remain on the public dole, rather than as an act of allegiance.

201. See Spencer K. Turnbull, *Wen Ho Lee and the Consequences of Enduring Asian-American Stereotypes*, 7 ASIAN PAC. AM. L.J. 72 (2001). It does not seem to matter that Dr. Lee was originally from Taiwan, and would not have a natural allegiance to China. His Chinese ethnicity not only trumped loyalty to the United States, it trumped loyalty to Taiwan.

202. Volpp, *supra* note 2, at 1592–99; Engle, *supra* note 21, at 86–89.

Iraq, the suspicion extended to French Americans as well.²⁰³ The distrust expressed by some of the founding fathers,²⁰⁴ and demonstrated in our national history,²⁰⁵ is codified in the constitutional bar to naturalized citizens becoming President.²⁰⁶

Citizenship can be utilized as a means of exclusion or as a means of inclusion,²⁰⁷ and “[t]he more inclusionary the response [to immigration/naturalization], whether it be at the level of citizenship rights or at that of acceptance of ‘the other’ as a fellow citizen with cultural rights, the better will citizenship match up to its universalistic claims.”²⁰⁸ Although the legal distinctions between those who acquire citizenship by birth on American soil and by naturalization are few, there is still considerable difference in perceptions of whether they “belong to America.” Distinctions between natural-born citizens and naturalized citizens are exclusionary, and when included in the presidential eligibility requirements, they symbolically state that naturalized citizens do not fully belong. As Randall Kennedy notes, “One concrete way of measuring the extent to which people affiliated with different social groups are full and equal members of this nation is to ask whether a person associated with that group could plausibly be elevated to the highest office in the land.”²⁰⁹ As the law currently stands, not only is it implausible that a naturalized citizen would become President, it is impossible.

203. See, e.g., Rachel Graves, *Anti-France Backlash Grows Ugly: Vandal Hits Friendswood Home*, HOUS. CHRON., Mar. 17, 2003, at A13 (reporting that a quiet neighborhood was “invaded by the anti-France backlash spurred by American and French differences over the threat of war with Iraq,” when a woman from France found “angry red letters” spray-painted on her garage door, reading, “Scum go back to France”); Sebastien Taveau, *Whatever Happened to Vive la Difference?*, NEWSWEEK, Apr. 28, 2003, at 15; John Edgar Wideman, *Opinion: Why We Scapegoat the French*, NEWSWEEK, May 8, 2003.

204. See *supra* text accompanying notes 194–95.

205. See *supra* text accompanying notes 196–206.

206. See discussion *supra* at text accompanying notes 48–73 (discussing the origins of the Natural-Born Citizen Clause in the U.S. Constitution).

207. See LISTER, *supra* note 145, at 44 (“Whether the focus is the nation-state or the community, or particular groups within these localities, boundaries and allocative processes serve to include and exclude simultaneously. These boundaries operate both as visible physical borders and as less tangible structural and symbolic barriers.”).

208. *Id.* at 50.

209. Kennedy, *supra* note 13, at 175.

C. Naturalized Citizenship and Political Participation

A third theory of citizenship links citizenship to political participation. Political participation would encompass at the very least the right and obligation to vote and the right and obligation to serve in political office. The Supreme Court says, “citizenship obtained through naturalization carries with it the privilege of full participation in the affairs of our society, including the right to speak freely, to criticize officials and administrators, and to promote changes in our laws including the very Charter of our Government.”²¹⁰ Naturalized citizenship does not, however, extend to full political participation since naturalized citizens are excluded from the presidency.

The preeminent theories of citizenship in the twentieth century have been liberal ones, focusing on citizenship as rights and entitlements.²¹¹ This “thin” concept of citizenship has been criticized from the perspective of civic republicanism, which offers a “thick” version of citizenship as “robust civic involvement and citizenly commitment.”²¹² The United States is experiencing a resurgence of civic republicanism in its modern political theory.²¹³ Civic

210. *Knauer v. United States*, 328 U.S. 654, 658 (1946).

211. “Most modern accounts of citizenship take as their starting point [T.H.] Marshall’s celebrated exposition of its three elements: civil, political and social rights.” LISTER, *supra* note 145, at 16 (referring to T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (1950)). David Martin critiques the role of courts in “magnifying self-regarding rights talk and diminishing notions of duty or virtue or responsibility or restraint,” which he attributes to the period between the 1950s and 1980s, when there was an “unmooring of liberalism from its hidden republican anchorage.” David A. Martin, *The Civic Republican Ideal for Citizenship, and for Our Common Life*, 35 VA. J. INT’L L. 301, 305–06 (1994). He argues that citizenship—harkening to the naturalization process—is a “domain where we find we can assert unashamedly our attachment to the notion of public duties, to civic virtue, to engagement in the political life of the nation largely for its own sake, not for its instrumental contribution to the advancement of private preferences.” *Id.* at 306.

212. Ronald Beiner, *Introduction: Why Citizenship Constitutes a Theoretical Problem in the Last Decade of the Twentieth Century*, in *THEORIZING CITIZENSHIP* 1, 19 (Ronald Beiner ed., 1995); see also Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352, 354 (1994); Gerald Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT’L L. 237, 240 (1994) (arguing that for civic republicans, citizenship is about “committed engagement in the life of the polity”).

213. Kymlicka & Norman, *supra* note 212, at 355–57; see also LISTER, *supra* note 145, at 25 (noting that the reemergence of civic republicanism in the United States is “an expression of disenchantment with the increased fragmentation of society and with the apathy and parochial self-interest seen as typical of modern American democracy”).

republicanism harks back to Aristotle's vision of citizenship. As Michael Ignatieff explains,

A citizen, said Aristotle, is one who is fit to both govern and obey, fit both to make the laws and to observe them. Citizenship thus implies both an active and a passive mode: participation through office holding and election in the governance of the state; and obedience to the laws made by other citizens. Civic virtue, the cultural disputation apposite to citizenship was thus two-fold: a willingness to step forward and assume the burdens of public office; and second, a willingness to subordinate private interest to the requirement of public obedience.²¹⁴

Aristotelian notions of citizenship and republicanism are not immune to critique,²¹⁵ but Professor Cass Sunstein outlines and defends a modern version of liberal republicanism.²¹⁶

In Professor Sunstein's view, liberal republicanism is "characterized by commitments to four central principles": (1) deliberation in politics, where self-interest is secondary to the public good; (2) equality of political actors, which enables political participation; (3) universalism, supported by a belief that agreement about the common good can be achieved; and (4) citizenship, guaranteeing broad political participation as a way to inculcate civic virtue.²¹⁷ The four principles are interrelated—the commitment to deliberative decision-making makes political equality necessary and makes citizenship as participation crucial.²¹⁸ Citizenship is not purely instrumental, functioning merely to assist the deliberative process.²¹⁹ Civic republicanism places emphasis on the "intrinsic value of

214. Ignatieff, *supra* note 8, at 55–56.

215. For example, Aristotle advocated slavery and the inferiority of women. *See, e.g.*, ARISTOTLE, *THE POLITICS* 62–74, 182 (T.A. Sinclair trans., Penguin Books 1992).

216. Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539 (1988). Ruth Lister notes that modern civic republicanism's appeal "is not confined to any one point in the political spectrum." LISTER, *supra* note 145, at 25. Supporters of radical democracy, communitarians, and feminists have all appropriated at least some elements of civic republicanism. *Id.* Will Kymlicka and Wayne Norman attribute a resurgence of interest in civic republicanism to "the new Right," and its attack on the welfare state. Kymlicka & Norman, *supra* note 212, at 355–57.

217. Sunstein, *supra* note 216, at 1541, 1547–59.

218. *Id.* at 1557.

219. *Id.* at 1556. Active citizenship is "not a means to an end but an end in itself" and contributes to the "self-development of the individual citizen: it is only through political engagement that the Self fulfils its full potential." LISTER, *supra* note 145, at 25.

political participation for the participants themselves.”²²⁰ Citizenship as participation in the polity inculcates “empathy, virtue, and feelings of community.”²²¹

It would be misleading to overstate a requirement of political participation to be considered a citizen. As Will Kymlicka and Wayne Norman note:

[M]ost writers believe that an adequate theory of citizenship requires greater emphasis on responsibilities and virtues. Few of them, however, are proposing that we should revise our account of citizenship-as-legal-status in a way that would, say, strip apathetic people of their citizenship. Instead, these authors are generally concerned with the requirements of being a ‘good citizen.’ But we should expect a theory of good citizen to be relatively independent of the legal question of what it is to be a citizen, just as a theory of the good person is distinct from the metaphysical (or legal) question of what it is to be a person.²²²

Even taken independent of whether political participation actually defines the legal status of naturalized citizenship, analyzing whether naturalized citizens are “good citizens” under the civic republicanism theory is dangerous because it raises questions of identity and belonging that can be further detrimental to political participation and perpetuate a sense of second-class citizenship.²²³ Robert Chang argues:

Increasingly, in order for a justice claim to be heard, you must be able to assert membership in the national community. Insofar as you are perceived as foreign, your claim to membership in the national community is weakened, and accordingly, your justice claim may be ignored. This attitude gives rise to the response, “If you don’t like it here, go back where you came from.”²²⁴

220. Kymlicka & Norman, *supra* note 212, at 362; Sunstein, *supra* note 216, at 1556.

221. Sunstein, *supra* note 216, at 1556.

222. Kymlicka & Norman, *supra* note 212, at 353. As Peter Schuck notes, “[O]ur law does not view citizenship as a reward for civic virtue.” Peter H. Schuck, *The Re-Evaluation of American Citizenship*, 12 GEO. IMMIGR. L.J. 1, 1 (1997).

223. *See supra* Part III.C.

224. Chang, *supra* note 22, at 244.

If we take seriously the civic republican notion of citizenship as participatory, then arguably, under the Constitution, the naturalized citizen is not a complete citizen. He or she is not “fit to govern” and is not free to “participate through office holding”²²⁵ when the office is the presidency of the United States. This can be problematic since “American identity is closely bound up with participation in the American civic culture.”²²⁶ Although Sunstein’s analysis only requires broad participation, taken as a whole, the lack of political equality among actors leaves naturalized citizens in an inferior position. If civic virtue includes “a willingness to step forward and assume the burdens of public office,”²²⁷ then placing an absolute bar on the presidency indicates that American society views naturalized citizens as less virtuous simply by their place of birth. This limitation on participation devalues naturalized citizenship and perpetuates the notion that naturalized citizens do not fully belong to America, and that they are less virtuous and less loyal.

Although the Supreme Court insists that naturalized citizens and natural-born citizens share the same legal status, there are indeed legal differences; and these legal differences rest on the notion that naturalized citizens are less committed and less loyal to the United States. These legal differences confirm that the identity of foreign-born citizens is linked in public perception with their countries of birth, rather than with their adopted country. To the extent that one views natural-born citizens as belonging to some other country rather than to America, one can justify different legal treatment on the grounds of disloyalty. This prejudice then offers further justification for denying foreign-born citizens the right to political participation at the highest level of government—the presidency. These three aspects of citizenship work together to maintain the natural-born citizen requirement for presidential eligibility. Then the constitutional requirement works to reinforce the negative perceptions of the foreign-born citizen.

225. Ignatieff, *supra* note 8, at 55–56 (describing Aristotle’s view of the citizen).

226. KARST, *supra* note 66, at 84.

227. Ignatieff, *supra* note 8, at 55–56 (describing Aristotle’s view of the citizen).

IV. NATURALIZED CITIZENS, THE PRESIDENCY,
AND THE FOURTEENTH AMENDMENT

So, if a second-class citizenship is created—even intended—by the Natural-Born Citizen Clause, is the Constitution then unconstitutional? In a light-hearted essay, John Hart Ely says that it would “take a lunatic” to argue that passage of the Fourteenth Amendment effectively amended Article II, Section I, Clause 4, and thereby eliminated any distinction between natural-born citizens and naturalized citizens when it comes to presidential eligibility.²²⁸ He then cautions, however, that the argument should not be dismissed so quickly,²²⁹ and that “some further digging is in order.”²³⁰ An argument that the Natural-Born Citizen Clause has already been amended out of the Constitution has pragmatic appeal to those who desire to expand presidential eligibility. The traditional amendment process of Article V has not been successful in removing this discriminatory provision from the Constitution. Despite dozens of proposed amendments, the natural-born citizen provision remains in the Constitution.²³¹ This Section engages John Hart Ely’s “lunatic” argument by considering whether adoption of the Fourteenth Amendment could be construed as repealing by implication the Natural-Born Citizen Clause and concludes that although a very compelling case can be made that the Fourteenth Amendment does, in fact, implicitly repeal the Natural-Born Citizen Clause, some significant obstacles to recognition of that repeal still remain and some alternative means of overcoming the Clause may still be both practically and symbolically required.

A. Constitutional Amendment by Implication

Article V of the Constitution made provision for amending the Constitution,²³² and subsequently passed amendments have clearly

228. John Hart Ely, *Interclausal Immunity*, 87 VA. L. REV. 1185, 1186–87 (2001).

229. *Id.* at 1187.

230. *Id.* at 1188. He ultimately concludes that the Natural-Born Citizen Clause is still in the Constitution. *See infra* Part IV.C.

231. For a discussion of the proposed amendments, see *supra* Part II.C.

232. U.S. CONST. art. V. Although David Strauss argues that Article V is largely irrelevant given that “the amendment process has not been an important means of constitutional change,” David Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1458 (2001), the Framers obviously viewed the inclusion of an amendment process as crucial to allow for constitutional change. *See, e.g.*, THE FEDERALIST

changed constitutional text. The Seventeenth Amendment²³³ changed Article I, Section 3, which originally provided that senators be elected by the state legislatures.²³⁴ The Twentieth Amendment²³⁵ changed the date of meeting for Congress, which was contained in Article I, Section 4.²³⁶ The Thirteenth Amendment²³⁷ changed the provision of Article IV, Section 2, Clause 3, regarding fugitive slaves.²³⁸ While these amendments seem to be explicit and unambiguous changes to the text of the Constitution, only one of these amendments contained direct repealing language in the resolution that proposed it.²³⁹ Furthermore, even less obvious changes to constitutional text have been recognized as within the broad purpose of certain amendments.²⁴⁰ Thus, the idea that the

NO. 43, at 268–69 (James Madison); THE FEDERALIST NO. 85, at 534–38 (Alexander Hamilton); *see also* Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 TUL. L. REV. 247 (2002).

233. U.S. CONST. amend. XVII.

234. *Id.* art. I, § 3.

235. *Id.* amend. XX.

236. *Id.* art. I, § 4.

237. *Id.* amend. XIII.

238. *Id.* art IV, § 2, cl. 3.

239. *See* H.R.J. Res. 39, 37 Stat. 646 (1912). The joint resolution helpfully provides: “That in lieu of the first paragraph of section three of Article I of the Constitution of the United States, and in lieu of so much of paragraph two of the same section as relates to the filling of vacancies . . . ,” before proposing what became the 17th Amendment, making changes in the election of Senators.

240. Consider the Eleventh Amendment, which uses fairly straightforward language to amend the judicial power of federal courts as embodied in Article III of the Constitution. It reads: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. Yet, as Professor John Manning notes, the Supreme Court views the amendment much more broadly than its language suggests, prohibiting lawsuits brought against states in federal courts by “a state’s own citizens, by federal corporations, by tribal sovereigns, and by foreign nations.” John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1666 (2004) (citing *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (suits by a state’s own citizens); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775 (1991) (suits by tribal sovereigns); *Monaco v. Mississippi*, 292 U.S. 313 (1934) (suits by foreign nations); *Smith v. Reeves*, 178 U.S. 436 (1900) (suits by federal corporations)). The Court views the prohibition to extend to admiralty suits, despite the reference only to suits in law and equity. *Id.* (citing *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 486 (1987) (plurality opinion); *Ex parte New York*, 256 U.S. 490 (1921)). Despite the Eleventh Amendment’s direct reference to the “Judicial power of the United States,” the Court has extended its reach to state court actions based on federal law and federal administrative courts. *Id.* (citing *Alden v. Maine*, 527 U.S. 706 (1999) (federal causes of action in state courts); *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) (proceedings before federal

Constitution can be amended by implication is not without precedent.

1. Applying statutory construction rules to the Constitution

Professor Gabriel Chin argues that constitutional provisions can be repealed or modified by implication.²⁴¹ He recognizes that the implicit repeal rules are rules of statutory construction but argues persuasively that these rules apply to constitutional interpretation as well.²⁴² Jefferson Powell's seminal work on interpreting the Constitution concludes that the Framers expected that the Constitution would be construed like other legal documents and that "they clearly assumed that future interpreters would adhere to then-prevalent methods of statutory construction."²⁴³ During the ratification debates, both Federalists and anti-Federalists agreed that the Constitution would be interpreted as statutes were interpreted.²⁴⁴ The Supreme Court in Justice Marshall's time also viewed the

administrative tribunals)). Professor Manning further argues that the Court has accomplished this expansion by relying, at least in part, on the Eleventh Amendment's broad background purpose. *Id.* at 1673–92.

241. See Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right To Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 275–77 (2004); cf. Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 216 (2002) ("The adoption of later amendments to a state constitution that are inconsistent with earlier provisions constitutes a repeal by implication.").

242. See *United States v. Wong Kim Ark*, 169 U.S. 649, 653–54 (1898); *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809), *overruled in part on other grounds by* *Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497 (1844); Chin, *supra* note 241, at 275 n.92 (quoting *Dillon v. Gloss*, 256 U.S. 368, 373 (1921)) ("[W]ith the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed."); see also CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 199–203 (1996) (discussing Justice Marshall's application of traditional rules of statutory construction to interpretation of the Constitution); SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 3–4, 119–23, 172–75 (1990) (noting how Justice Marshall applied rules of statutory construction to the Constitution); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985) ("Early interpreters usually applied standard techniques of statutory construction to the Constitution."). *But see* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 572–573 (2003) (questioning whether the Framers of the Constitution believed that conventional rules of statutory construction applied to the Constitution); Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 3 (2004) (recognizing but criticizing the notion "that constitutional and statutory interpretation should converge").

243. Powell, *supra* note 242, at 903–05.

244. See *id.* at 905.

Constitution as a species of statute, to which traditional rules of statutory interpretation applied.²⁴⁵ There were arguments to the contrary (i.e. that the Constitution, like the Bible, should not be interpreted at all,²⁴⁶ or that the Constitution was a contract between the states and thus should be interpreted as such),²⁴⁷ but notwithstanding these arguments, “[e]arly interpreters usually applied standard techniques of statutory construction to the Constitution.”²⁴⁸

This historical practice of using rules of statutory construction to interpret the Constitution would have been familiar to the Framers and to the ratifiers of the Fourteenth Amendment.²⁴⁹ As both the 1857 edition and the 1874 edition of Sedgwick’s treatise on constitutional interpretation made clear, “[t]he general rules of interpretation are the same, whether applied to statutes or Constitutions,”²⁵⁰ and antebellum law recognized the statutory doctrine of repeal by implication.²⁵¹

245. See *id.* at 922–24 (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)). Powell notes that in *Chisholm*, “the Court signaled its approval of a traditional statutory approach to construing the nation’s fundamental law.” Powell, *supra* note 242, at 921–22. See also HOBSON, *supra* note 242, at 199–203 (discussing Justice Marshall’s application of traditional rules of statutory construction to interpretation of the Constitution); SNOWISS, *supra* note 242, at 3–4, 119–23, 172–75 (noting how Justice Marshall applied rules of statutory construction to the Constitution); Hans W. Baade, “*Original Intent*” in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1034–35 (1991) (agreeing that Justice Marshall used traditional rules of statutory construction to the Constitution).

246. See Powell, *supra* note 242, at 890–94, 905.

247. See *id.* at 927–35.

248. *Id.* at 948.

249. See F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS (1839); T. SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW (1857) [hereinafter SEDGWICK 1857]; E. SMITH, COMMENTARIES ON STATUTE AND CONSTITUTIONAL LAW AND STATUTORY AND CONSTITUTIONAL CONSTRUCTION (1848). Even the titles of these well-known works show that statutory interpretation and constitutional interpretation were seen to converge. Baade, *supra* note 245, at 1064–66.

250. SEDGWICK 1857, *supra* note 249, at 24.

251. See *Ex parte Yenger*, 75 U.S. (8 Wall.) 85 (1868); *Furman v. Nichol*, 75 U.S. (8 Wall.) 44 (1868); *United States v. Scott*, 70 U.S. (3 Wall.) 642 (1865); *Doolittle’s Lessee v. Bryan*, 55 U.S. (14 How.) 563 (1852); *Beals v. Hale*, 45 U.S. (4 How.) 37 (1846); *Davies v. Fairbairn*, 44 U.S. (3 How.) 636 (1845); *Bogert v. United States*, 3 Ct. Cl. 18 (1867); *Morlot v. Lawrence*, 17 F. Cas. 770 (C.C.S.D.N.Y. 1850) (No. 9,815); *Milne v. Huber*, 17 F. Cas. 403 (C.C.D. Ohio 1843) (No. 9,617); *Johnson v. Byrd*, 13 F. Cas. 735 (C.C.D. Ark. 1841) (No. 7,376); *West v. Pine*, 29 F. Cas. 714 (C.C.D.N.J. 1827) (No. 17,423); *Ogden v. Witherspoon*, 18 F. Cas. 618 (C.C.D.N.C. 1802) (No. 10,461); *Pearce v. Bank of Mobile*, 33

Professor Chin notes that there is a presumption against implied repeal or amendment but argues that the law allows such implicit changes when two provisions are in “irreconcilable conflict.”²⁵² He concludes that “it makes sense to apply the doctrine [of amendment by implication] to the Constitution; it would be undesirable to obligate courts and Congress to apply an earlier provision even though it was in ‘irreconcilable conflict’ with a subsequent amendment.”²⁵³ Professor Vicki Jackson seems to agree. She argues that because “textual amendment of the Constitution is unusually difficult,” courts should read newer enactments like the Fourteenth Amendment as having infused a deeper commitment to equality into the body of the Constitution.²⁵⁴ Because of the difficulty of amending the Constitution, she contends, “giving more weight to more recent amendments is an appropriate way” of providing “constitutional legitimacy in a representative democracy.”²⁵⁵

2. *Repeal by implication and irreconcilable conflict*

One can craft a plausible argument that, based on its broad background purposes, the Fourteenth Amendment is in “irreconcilable conflict” with the constitutional requirement that the President be a natural-born citizen, such that the Natural-Born Citizen Clause has been repealed by implication. Distinctions between the foreign born and American born run afoul of the

Ala. 693 (1859); *Ex parte Osborn*, 24 Ark. 479 (1866); *Union Branch R.R. v. E. Tenn. & Ga. R.R.*, 14 Ga. 327 (1853); *Oni v. Meek*, 2 Haw. 87 (Haw. King. 1858); *Bd. of Supervisors v. Campbell*, 42 Ill. 490 (1867); *DePauw v. City of New Albany*, 22 Ind. 204 (1864); *Edgar v. Greer*, 8 Iowa 394 (1859); *Elliott v. Lochnane*, 1 Kan. 126 (1862); *Nixon v. Piffet*, 16 La. Ann. 379 (1861); *Dugan v. Gittings*, 3 Gill. 138 (Md. 1845); *Southern R.R. v. City of Jackson*, 38 Miss. 334 (Miss. Err. & App. 1860); *State ex rel. Vastine v. McDonald*, 38 Mo. 529 (1866); *Brunswick County Tr. v. Woodside*, 31 N.C. 496 (1849); *Indus. Sch. Dist. v. Whitehead*, 13 N.J. Eq. 290 (1861); *Geck v. Shepherd*, 1 N.M. 346 (N.M. Terr. 1859); *Farley v. DeWaters*, 2 Daly 192 (N.Y. Comm. Pl. 1867); *Ludlow’s Heirs v. Johnston*, 3 Ohio 553 (1828); *Palmer v. State*, 2 Or. 66 (1863); *Gwinner v. Lehigh & D.G.R. Co.*, 55 Pa. 126 (1867); *State v. Alexander*, 14 Rich. 247 (S.C. 1867); *Furman, Green & Co. v. Nichol*, 43 Tenn. 432 (1866); *Neill v. Keese*, 5 Tex. 23 (1849); *Fox’s Admin’rs v. Commonwealth*, 57 Va. 1 (1860); *Conley v. Calhoun County Supervisors*, 2 W. Va. 416 (1868); *Attorney Gen. ex rel. Taylor v. Brown*, 1 Wis. 513 (1853); *see also* SEDGWICK 1857, *supra* note 249, at 123–29.

252. Chin, *supra* note 241, at 275–76 (citing *Branch v. Smith*, 538 U.S. 254, 273 (2003)).

253. *Id.* at 276.

254. Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fissian Freedoms*, 58 U. MIAMI L. REV. 265, 280 (2003).

255. *Id.*

Fourteenth Amendment in many different contexts.²⁵⁶ One scholar has opined, “If any of the states were to put a similar restriction upon state or local offices, it would certainly be unconstitutional under the Equal Protection Clause.”²⁵⁷ John Hart Ely concludes,

The classification certainly seems “suspect” for all the reasons alienage was held to be, on top of which, unlike alienage, it is immutable. One cannot be encouraged (at least with any hope of success) to change her place of birth. More fundamentally, the right to serve in high federal elective office is paradigmatically political and thus “fundamental.” The fit (whether it be with “loyalty” or “familiarity with American institutions”) is obviously lousy (viz Henry Kissinger, Madeleine Albright), on top of which there is in place about as good an individualized hearing respecting the presence or absence of such traits as one could devise—we call it a presidential election—rendering any claimed need for the Constitution’s stereotypical disqualification unconvincing.²⁵⁸

The issue, then, is whether the Natural-Born Citizen Clause is in irreconcilable conflict with the Fourteenth Amendment.

Irreconcilable conflict will not be found merely because two statutes compel different results in a particular case.²⁵⁹ Rather, there must be a “repugnancy” between the words or purposes of the two enactments.²⁶⁰ Cases talk in terms of “such a positive repugnancy between the two statutes that they cannot stand together,”²⁶¹ where the statutes are “plainly inconsistent,”²⁶² and where “harmony was impossible,”²⁶³ “such that [the two statutes] cannot mutually

256. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982) (invalidating state statute disallowing school funds for illegal alien children); Sugarman v. Dougall, 413 U.S. 634 (1973) (invalidating civil service law disallowing aliens in permanent positions); Graham v. Richardson, 403 U.S. 365 (1971) (invalidating state welfare laws discriminating against aliens).

257. Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 93–94 (1997).

258. Ely, *supra* note 228, at 1186–87 n.9.

259. See, e.g., Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1989); United States v. Batchelder, 442 U.S. 114, 122 (1979).

260. See, e.g., United States v. Borden Co., 308 U.S. 188, 199 (1939); Lujan-Armendariz v. I.N.S., 222 F.3d 728, 744 (9th Cir. 2000) (repugnancy between “the words or purpose” of the two).

261. Arthur v. Homer, 96 U.S. 137, 140 (1877).

262. United States v. Yuginovich, 256 U.S. 450, 463 (1921).

263. State v. Stoll, 84 U.S. (17 Wall.) 425, 425 (1873).

coexist.”²⁶⁴ The conflict must be a “clear repugnancy”;²⁶⁵ it “must be obvious and not merely apparent.”²⁶⁶

The clear purpose of the Natural-Born Citizen Clause is to exclude from the presidency naturalized citizens.²⁶⁷ The next Section will consider the purposes of the Fourteenth Amendment, showing that the purposes conflict with the purposes of the Natural-Born Citizen Clause such that the two “cannot mutually coexist.”²⁶⁸

B. Irreconcilable Conflict of Purposes

The Fourteenth Amendment “so changed the heart of the original American constitution as to constitute what could fairly be called a second American constitution.”²⁶⁹ However, the “original intent” of the Fourteenth Amendment’s framers is unclear and has long been the subject of legal debate.²⁷⁰ Although much of the scholarly debate has focused on the meaning of the Equal Protection Clause, recent scholarship includes consideration of the Citizenship Clause, the Due Process Clause, and the Privileges or Immunities Clause.²⁷¹ Still, “few have come up with a theory of Section One [of

264. *Patten v. United States*, 116 F.3d 1029, 1029 (4th Cir. 1997) (quotations omitted).

265. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 457 (1945).

266. *West v. Pine*, 29 F. Cas. 714, 716 (C.C.D.N.J. 1827) (No. 17,423).

267. See discussion *supra* Part II.B.

268. *Patten*, 116 F.3d at 1037.

269. HOWARD N. MEYER, *THE AMENDMENT THAT REFUSED TO DIE: A HISTORY OF THE FOURTEENTH AMENDMENT* xix (updated ed., 2000).

270. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); CHESTER JAMES ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* (1997); RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869* (1990); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988); MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* (1999); Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 671 (2003); Thomas B. McAfee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 WAKE FOREST L. REV. 747 (2001); Douglas G. Smith, *A Lockean Analysis of Section One of the Fourteenth Amendment*, 25 HARV. J.L. & PUB. POL’Y 1095, 1096 (2002).

271. See Smith, *supra* note 270, at 1096. Although Smith references only the Equal Protection Clause, the Due Process Clause, and the Privileges and Immunities Clause, the argument pertains equally to the Citizenship Clause.

the Fourteenth Amendment] comprehensive enough to account for all four clauses or to delineate carefully the intended purpose of each.”²⁷²

This Section will consider the background purposes of the Fourteenth Amendment’s Citizenship Clause, Privileges or Immunities Clause, and Equal Protection Clause, recognizing that “the roles ascribed to the clauses seem to overlap.”²⁷³ It will ultimately conclude that because of irreconcilable conflict with the purposes of the Fourteenth Amendment, the case for implicit repeal of the Natural-Born Citizen Clause is compelling.

1. Passage of the Fourteenth Amendment

The story of the passage of the Fourteenth Amendment is well known. After the Civil War, the Thirteenth Amendment, abolishing slavery, was passed and ratified.²⁷⁴ Almost immediately thereafter, Southern states passed “Black Codes” that all but reimposed slavery on Black Americans.²⁷⁵ Feeling that a broader guarantee of equality was needed, Congress turned its attention to the passage of a Civil Rights Act.²⁷⁶ Some legislators questioned whether Congress had the authority to pass such an act,²⁷⁷ while others argued that the

272. *Id.* As Smith notes, one difficulty in this endeavor is that there is much overlap between the purposes of the separate clauses. *Id.*; see also Michael J. Perry, *Brown, Bolling, & Originalism: Why Ackerman and Posner (Among Others) Are Wrong*, 20 S. ILL. U. L.J. 53, 59–60 (1995) (noting overlap of Privileges or Immunities Clause and Equal Protection Clause).

273. Smith, *supra* note 270, at 1096; see also KARST, *supra* note 66, at 52 (“There was no serious effort [on the part of the drafters] to differentiate the functions of the various clauses.”).

274. The Thirteenth Amendment began its trip through the Thirty-eighth Congress on December 14, 1863. CONG. GLOBE, 38th Cong., 1st Sess. 19 (1863) (introduced by Representative Ashley). The Senate version was introduced on January 13, 1864 by Senator Henderson. CONG. GLOBE, 38th Cong., 1st Sess. 145 (1864). The proposed amendment passed both houses a little over a year later. See Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 541 (2002).

275. See CONG. GLOBE, 39th Cong., 1st Sess. 1123–24 (1866) (remarks of Representative Cook, describing the Black Codes as “calculated and intended to reduce them to slavery again”); *id.* at 603 (remarks of Senator Wilson, addressing the issue of Black Codes in the South); *id.* at 474 (remarks of Senator Trumbull, reciting the laws of former slave states that discriminated against free blacks).

276. The bill was introduced on January 5, 1866 and referred to the Committee on the Judiciary. *Id.* at 129. It was referred out of that Committee on January 12, 1866. *Id.* at 211. Congress took up debate on the bill, S. 61, on February 1, 1866. *Id.* at 569.

277. See, e.g., *id.* at 1291 (remarks of Representative Bingham, who drafted and advocated for the Fourteenth Amendment to give Congress the authority he felt they lacked);

Thirteenth Amendment had granted Congress such authority.²⁷⁸ President Andrew Johnson disagreed and vetoed the bill on the constitutional grounds that Congress lacked authority.²⁷⁹ Congress rapidly passed the Civil Rights Act over the President's veto,²⁸⁰ but questions as to its constitutionality remained.²⁸¹ The Fourteenth Amendment was passed to ensure the constitutionality of the Civil Rights Act,²⁸² but the Amendment also appeared to go further than that Act in protecting the rights of citizens of the United States and other persons resident in the United States.

When passed, the first section of the Fourteenth Amendment read:

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. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²⁸³

id. at 1120 (remarks of Representative Rogers, claiming Congress lacked constitutional authority to pass the bill); *id.* at 499–500 (remarks of Senator Cowan, claiming willingness to vote for a constitutional amendment to do what the Civil Rights Act attempts to do, but asserting a lack of power in Congress to pass the Act as legislation); *id.* at 476–77 (remarks of Senator Saulsbury, that the bill is among the “most dangerous” ever introduced, because Congress lacked authority to legislate, and the Thirteenth Amendment did not grant such authority).

278. *See, e.g., id.* at 1152 (remarks of Representative Thayer); *id.* at 503–04 (remarks of Senator Howard, that as member of the Judiciary Committee that proposed the Thirteenth Amendment, he was in a position to assure the Senate that the intention was to convey power to Congress to pass an act such as the Civil Rights Act).

279. *See id.* at 1679–81 (presidential veto message read in the Senate).

280. *See id.* at 1809 (bill passed the Senate over President's veto); *id.* at 1861 (bill passed the House of Representatives, overriding the President's veto) (“This announcement was received with an outburst of applause, in which members of the House, as well as the throng of spectators, heartily joined, and which did not subside for some moments.”).

281. *See, e.g., id.* at 2896 (remarks of Senator Doolittle); *id.* at 2896 (remarks of Senator Fessenden).

282. The proposed amendment passed the House of Representatives on May 10, 1866. *Id.* at 2545. It passed the Senate on June 8, 1866. *Id.* at 3042.

283. U.S. CONST. amend. XIV, § 1.

2. *The Citizenship Clause*

The Citizenship Clause is found in the first sentence of the Fourteenth Amendment, which reads, “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.”²⁸⁴ One might argue that the Citizenship Clause is a dead letter after Justice Miller’s opinion in the *Slaughter-House Cases*,²⁸⁵ but modern scholars have argued that that case was wrongly decided²⁸⁶ and that the Fourteenth Amendment’s framers intended the Citizenship Clause to encompass certain rights of federal citizenship.²⁸⁷ Professor Rebecca Zietlow argues that the Fourteenth Amendment framers intended to establish federal citizenship with broad inherent rights.²⁸⁸ Those citizenship rights, she says, are broader than the privileges and immunities protected in the second sentence²⁸⁹ of the Fourteenth Amendment.²⁹⁰ One of the inherent

284. U.S. CONST. amend. XIV, § 1, cl. 1.

285. 83 U.S. (16 Wall.) 36 (1873).

286. See, e.g., Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627 (1994) (stating that “everyone” agrees the Court incorrectly interpreted” the Fourteenth Amendment in the *Slaughter-House Cases*); Thomas B. McAfee, *Constitutional Interpretation—the Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 282 (1986) (concluding that Miller’s decision was “clearly wrong,” and this is a view “about which virtually every modern commentator is in agreement”); Bryan H. Wildenthal, *How I Learned To Stop Worrying and Love the Slaughter-House Cases: An Essay in Constitutional-Historical Revisionism*, 23 T. JEFFERSON L. REV. 241, 241–42 (2001) (“All the scholarly greats, it seems—yea, the verdict of history itself—have condemned it . . .”).

287. See ANTIEAU, *supra* note 270, at 12. (“The proponents of the Fourteenth Amendment in Congress fully recognized that, when they conferred citizenship upon Black Americans and others by the first sentence of the Fourteenth Amendment, they were implicitly conferring at the same time a body of rights customarily seen as concomitants of citizenship.”); Aynes, *supra* note 286, at 627; Zietlow, *supra* note 171, at 307–16; see also CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP* 58–60 (1969); Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 DUKE L.J. 1, 44–46 (1993); Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham’s Theory of Citizenship*, 36 AKRON L. REV. 717, 738–47 (2003).

288. See Zietlow, *supra* note 171, at 307–16; see also BLACK, *supra* note 287; Eisgruber, *supra* note 287; Zietlow, *supra* note 287.

289. This sentence reads as follows:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1, cl. 2.

rights of federal citizenship Professor Zietlow identifies is equality. The “notion of equality among citizens was an important value to the Framers, and was expressed not only in the Equal Protection Clause, but also in the notion of citizenship itself.”²⁹¹ She argues that “the citizenship clause states strongly and unequivocally that there is only one class of United States citizens; they have certain rights that cannot be denied them due to the very nature of their federal citizenship.”²⁹²

Other than equality, what substantive rights did the Framers believe were inherent to federal citizenship? Professor Zietlow notes that the Framers distinguished between “civil rights” and “political rights,” believing that political rights, such as a right to vote, were not inherent to citizenship.²⁹³ However, she argues that

[a]n analysis of the Court’s rulings on the rights of federal citizenship reveals a pattern that generally tracks the themes of belonging, protection, and equality of citizenship rights, all of which were intended by the Framers to be incorporated into the Citizenship Clause. The modern Court has extended the theme of belonging to also include political participation. That is, the Court has enforced the rights to vote, to petition Congress, and to appear in court, without outside interference, as essential to the nature of citizenship because citizenship implies the right to participate in one’s community.²⁹⁴

290. See Zietlow, *supra* note 171, at 308 (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 843 (1995) (Kennedy, J., concurring)).

291. *Id.* at 313; see also Zietlow, *supra* note 287, at 743 (“Congress intended the Citizenship Clause and rights of federal citizenship to be a broad font of nationally uniform individual rights.”); Jack M. Balkin, *History Lesson*, LEGAL AFF., July–Aug. 2002, at 44, 49 (“The clause establishes a principle of equal citizenship, prohibiting the idea of first- and second-class citizens.”). Michael Kent Curtis quotes Senator Trumbull’s statements in support of the Civil Rights Act of 1866, which led to the passage of the Fourteenth Amendment, as saying that citizenship carried with it “those inherent, fundamental rights which belong to free citizens or free men in all countries,” and included “equality of rights.” CURTIS, *supra* note 270, at 73.

292. Zietlow, *supra* note 171, at 311; see also Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 768–69 (1999) (arguing that the Supreme Court’s opinion in *Bolling v. Sharpe*, 347 U.S. 497 (1954), decided the same day as *Brown v. Board of Education*, 347 U.S. 483 (1954), and extending *Brown*’s equality promise to the federal government, was based on the Fourteenth Amendment’s Citizenship Clause).

293. Zietlow, *supra* 287, at 742; Zietlow, *supra* note 171, at 315–17.

294. Zietlow, *supra* note 171, at 316.

Thus, it follows that “because citizenship implies the right to participate in one’s community,”²⁹⁵ including participation at the highest level of government, the Citizenship Clause would allow a naturalized citizen to become President. Indeed, Chester James Antieau states that the framers of the Fourteenth Amendment considered the right to qualify for public office a customarily concomitant right of citizenship.²⁹⁶ The Citizenship Clause, therefore, is in “irreconcilable conflict” with the Natural-Born Citizen Clause.²⁹⁷

3. *The Privileges or Immunities Clause*

As with the Citizenship Clause, many assumed that the Privileges or Immunities Clause died in the *Slaughter-House Cases*,²⁹⁸ however, in *Saenz v. Roe*,²⁹⁹ the Supreme Court revived the Clause, and, by so doing, spawned a large body of work considering the Clause’s current effect.³⁰⁰ The Clause reads, “No State shall make or enforce

295. *Id.*

296. ANTIEAU, *supra* note 270, at 33–35. Legislative history supports Antieau’s argument. *See infra* text accompanying notes 329–34, 336, concerning the Thirty-ninth Congress’s view of the eligibility of the newly created citizens to be President.

297. Professor Zietlow further argues that the Framers intended Congress actively to define rights of national citizenship through legislation, Zietlow, *supra* note 287, at 311–12, and expansively to exercise enforcement powers under section five of the Fourteenth Amendment to give meaning to federal citizenship. *Id.*; Zietlow, *supra* note 171, at 311; *see also* BLACK, *supra* note 287, at 58–60 (arguing that Congress has the authority to regulate private discrimination based on the Citizenship Clause standing alone); Eisgruber, *supra* note 287, at 44–46; Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1099–1102 (2001). Under this argument, Congress would be empowered to pass the Natural Born Citizen Act, discussed *supra* at text accompanying note 131, which is intended to extend presidential eligibility to

[a]ny person born outside the United States—

(A) who derives citizenship at birth from a United States citizen parent or parents pursuant to an Act of Congress; or

(B) who is adopted by 18 years of age by a United States citizen parent or parents, who are otherwise eligible to transmit citizenship to a biological child pursuant to an Act of Congress.

S. 2128, 108th Cong. (2004). Based on the Citizenship Clause’s promise of equality, Congress could also expand eligibility to include any naturalized citizen.

298. 83 U.S. (16 Wall.) 36 (1873).

299. 526 U.S. 489 (1999).

300. *See, e.g.*, Kenyon D. Bunch, *The Original Understanding of the Privileges and Immunities Clause: Michael Perry’s Justification for Judicial Activism or Robert Bork’s Constitutional Inkblot*, 10 SETON HALL CONST. L.J. 321 (2000); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071 (2000); John C. Eastman, *Re-Evaluating the*

any law which shall abridge the privileges or immunities of citizens of the United States.”³⁰¹

There has been considerable scholarly debate about what should be considered a privilege or immunity protected by the Clause. As William Rich notes, scholars argue that “protecting privileges or immunities means enforcing the Bill of Rights against state governments, or . . . broad protection for economic liberties, participatory rights, self-governance, or fundamental rights more broadly defined.”³⁰² There are, however, several difficulties in interpreting the Privileges or Immunities Clause as repealing by implication the Natural-Born Citizen Clause. In the debate in the Thirty-ninth Congress concerning the breadth of the Privileges or Immunities Clause, Democrats repeatedly argued “that with the enforcement provision of section five, the clause amounted to an open-ended invitation to Congress to create and protect a new set of nationally defined interests.”³⁰³ In listing the parade of horrors that might be included in the Clause, one Democrat argued that “the right to be . . . President of the United States is a privilege.”³⁰⁴ Republicans, however, “almost certainly viewed the privileges and immunities clause as guaranteeing only a relatively small, fixed group

Privileges or Immunities Clause, 6 CHAP. L. REV. 123 (2003); James W. Fox, Jr., *Re-Readings and MisReadings: Slaughter House, Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67 (2002–03); Nicole I. Hyland, *On the Road Again: How Much Mileage is Left on the Privileges or Immunities Clause and How Far Will It Travel?*, 70 FORDHAM L. REV. 187 (2001); April Dawn Lashbrook, *Back From a Long Vacation: The Privileges or Immunities Clause of the Fourteenth Amendment in Saenz v. Roe*, 29 CAP. U. L. REV. 481 (2001); William J. Rich, *Privileges or Immunities: The Missing Link in Establishing Congressional Power To Abrogate State Eleventh Amendment Immunity*, 28 HASTINGS CONST. L.Q. 235 (2001); William J. Rich, *Taking “Privileges or Immunities” Seriously: A Call To Expand the Constitutional Canon*, 87 MINN. L. REV. 153 (2002) [hereinafter Rich, *Taking “Privileges and Immunities” Seriously*]; Douglas G. Smith, *A Return to First Principles? Saenz v. Roe and the Privileges or Immunities Clause*, 2000 UTAH L. REV. 305; Mark Strasser, *The Privileges of National Citizenship: On Saenz, Same Sex Couples, and the Right To Travel*, 52 RUTGERS L. REV. 553 (2000); Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999).

301. U.S. CONST. amend. XIV, § 1, cl. 2.

302. Rich, *Taking “Privileges and Immunities” Seriously*, *supra* note 300, at 156 (citations omitted).

303. MALTZ, *supra* note 270, at 107.

304. *Id.* (citing CONG. GLOBE, 39th Cong., 1st Sess. 2538 (1866) (statement of Andrew Rogers)). Other rights included on Andrew Roger’s list were the right to vote, the right to marry, the right to contract, the right to be a juror, and the right to be a judge. *Id.*

of rights.”³⁰⁵ Thus, Congress’s intent does not seem in favor of implicit repeal.

Further, in the *Slaughter-House Cases*, the Supreme Court, seeking to provide content to the privileges or immunities protected by the Fourteenth Amendment, held that the Clause protected only those rights that “owe their existence to the Federal government, its National character, its Constitution, or its laws.”³⁰⁶ William Rich contends that the Supreme Court correctly identified the intentions of the Fourteenth Amendment’s framers, which was to establish the supremacy of the federal government over the states.³⁰⁷ Thus, the Privileges or Immunities Clause “reinforced national supremacy of rights derived from the Constitution or from federal law.”³⁰⁸ If this was the intention of the Clause, then it would leave constitutional provisions, including the Natural-Born Citizen Clause, intact. Another difficulty, according to Chester James Antieau, is that the Privileges or Immunities Clause’s framers intended only to restore civil rights that predated the Constitution, not to create new rights.³⁰⁹

However, Daniel Levin argues that the Privileges or Immunities Clause was designed to protect “participatory privileges of citizenship.”³¹⁰ He contends that the privileges or immunities of United States citizenship are “embedded in conceptions of structural participation of self-government rather than in more general notions of personal liberty.”³¹¹ Thus, the ratifiers of the Privileges or Immunities Clause intended to protect “the participatory privileges that make up a citizen’s architectural role in the political and judicial process of civil government.”³¹² If this is the broad purpose of the

305. *Id.*

306. 83 U.S. (16 Wall.) 36, 79 (1873).

307. Rich, *Taking “Privileges and Immunities” Seriously*, *supra* note 300, at 168–73.

308. *Id.* at 173.

309. ANTIEAU, *supra* note 270, at 178.

310. Daniel J. Levin, *Reading the Privileges or Immunities Clause: Textual Irony, Analytical Revisionism, and an Interpretive Truce*, 35 HARV. C.R.-C.L. L. REV. 569, 570 (2000).

311. *Id.* at 571.

312. *Id.* Levin defends this position, despite the fact that women were disenfranchised even after the Privileges or Immunities Clause was adopted. He notes that while voting might have been considered a privilege or immunity, the Clause still allowed governments to withhold certain structural rights from some citizens. *Id.* at 581–82. He cites *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230), for this proposition. *Corfield* is considered by scholars to be the most influential case on the Fourteenth Amendment framers’

Privileges or Immunities Clause, then preventing full participation by naturalized citizens by excluding service as President would seem to be in irreconcilable conflict with the Fourteenth Amendment.

4. *The Equal Protection Clause*

The Equal Protection Clause is the Fourteenth Amendment's best-known promise of equality, providing that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."³¹³ The Clause is broader than the Privileges or Immunities Clause in that it offers equal protection to "any person," not just the "citizens of the United States" protected against abridgment of privileges or immunities.³¹⁴ The drafters and ratifiers of the Equal Protection Clause recognized that the primary beneficiaries of the clause were African Americans.³¹⁵ However, "[t]he evidence is fully as strong that those responsible for the Equal Protection Clause intended it to protect all persons, Black, White, Indians, Orientals, aliens, etc., who were within the jurisdiction of a State."³¹⁶ In speaking of the Equal Protection Clause, Senator Charles Sumner of Massachusetts expounded:

These are no vain words. Within the sphere of their influence no person can be created, no person can be born, with civil or political privileges not equally enjoyed by all his fellow citizens; nor can any institution be established recognizing

view of what constituted privileges or immunities of citizenship. In *Corfield*, Justice Washington Bushrod famously declared that identifying privileges or immunities would be "more tedious than difficult to enumerate" but included

[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state . . . to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.

Id. at 551–52 (emphasis added). Levin argues that at the time the Fourteenth Amendment was adopted, the concept of privileges and immunities was not seen as having enunciated unenumerated personal liberties, but rather as having "sketched out the structural role of citizens in a representative government." Levin, *supra* note 310, at 576. Thus, voting was not an individual liberty interest that could not be regulated by states; rather, it was thought of as "distinctively a right of citizenship" that applied only to the citizens to whom the states chose to apply it. *Id.* at 577.

313. U.S. CONST. amend. XIV, § 1, cl. 2.

314. *Id.*

315. ANTIEAU, *supra* note 270, at 237; KARST, *supra* note 66, at 51.

316. ANTIEAU, *supra* note 270, at 238.

distinction of birth. Here is the great charter of every human being drawing vital breath upon this soil, whatever may be his condition and whoever may be his parents. He may be poor, weak, humble or black; he may be Caucasian, Jewish, Indian or Ethiopian race; he may be of French, German, English, or Irish extraction; but before the constitution all these distinctions disappear. He is not poor, weak, humble or Black; nor is he Caucasian, Indian or Ethiopian; nor is he French, German, English or Irish. He is Man, the equal of all his fellow men. He is one of the children of the State, which, like an impartial parent, regards all its off-springs with an equal care.³¹⁷

It did not take long for the Supreme Court to recognize that the Equal Protection Clause applied not only to African Americans but also to aliens and other racial groups as well.³¹⁸

In several instances, the Court has held that discrimination based on alienage violated the Equal Protection Clause.³¹⁹ The Court has also said that discrimination based on national origin is violative of the Equal Protection Clause,³²⁰ which, by implication, prohibits discrimination against naturalized citizens.

Discrimination against naturalized citizens is also explicitly prohibited by the Equal Protection Clause. In *Fernandez v. Georgia*,³²¹ a federal district court considered the constitutionality of a Georgia statute that excluded naturalized citizens from being

317. *Id.* at 239–40 (citing ALBERT H. PUTNEY, UNITED STATES CONSTITUTIONAL HISTORY AND LAW 438–39 (1908)).

318. *See* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that a state law, which discriminatorily applied to Chinese aliens, violated the Equal Protection Clause); *see also* Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 16 (1985) (noting that the *Yick Wo* decision “confirmed that the Constitution, including the Equal Protection Clause, protects aliens”).

319. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982) (violation found where the state prohibited illegal alien children from enrolling in public schools); *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (violation found where a state made aliens ineligible for student financial aid); *In re Griffiths*, 413 U.S. 717 (1973) (violation found where a state restricted admission to the bar to citizens); *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (violation found where a state barred all permanent state government employment to noncitizens); *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (violation found where a state denied welfare benefits to resident aliens who failed to meet residency requirements different from those for citizens); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 426–27 (1948) (violation found where a state denied commercial fishing licenses to alien Japanese).

320. *Hernandez v. Texas*, 347 U.S. 475, 479 (1953).

321. 716 F. Supp. 1475 (M.D. Ga. 1989).

uniformed state troopers.³²² First, the court noted that the statute created two classes of citizens and that the United States Supreme Court had recognized that naturalized citizens are not second-class citizens.³²³ Next the court considered whether there were grounds for treating these similarly situated groups differently. The court determined that strict scrutiny of the state's reason for differential treatment was appropriate since the statute classified on the basis of national origin.³²⁴ Applying strict scrutiny, the court found that the state failed to offer a satisfactory purpose for the statutory classification; indeed, the state failed to offer any purpose for the classification.³²⁵ Thus, the court concluded that "given the holdings of the Supreme Court . . . any purpose offered by the State of Georgia must fail equal protection scrutiny."³²⁶

The court was undoubtedly correct in *Fernandez*. If distinctions between aliens and citizens violate the Equal Protection Clause, and distinctions based on national origin violate the Equal Protection Clause, then distinctions between natural-born citizens and naturalized citizens also violate the Equal Protection Clause.³²⁷ Thus, the Natural-Born Citizen Clause is in fatal conflict with the Equal Protection Clause because equal protection of the laws is irreconcilably repugnant to excluding naturalized citizens from the presidency.³²⁸

322. *Id.* at 1478. The Georgia statute read: "No person shall be eligible for appointment as an officer or trooper of the Uniform Division unless such person is a native-born citizen of the United States." GA. CODE ANN. § 35-2-43(a) (repealed 1998).

323. *Fernandez*, 716 F. Supp. at 1479 ("Thus, native-born and naturalized citizens of the United States are persons similarly situated in the view of the Constitution and should be treated alike.").

324. *Id.*

325. *Id.*

326. *Id.*

327. Ely, *supra* note 228, at 1186 n.9 ("The classification certainly seems 'suspect' for all the reasons alienage was held to be, on top of which, unlike alienage, it is immutable. One cannot be encouraged (at least with any hope of success) to change her place of birth."); *see also* Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellations in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 607 (1994) ("The Supreme Court has consistently held that equal protection guarantees apply to aliens as well as to naturalized citizens.").

328. Note that the "state action" requirement of the Equal Protection Clause is satisfied by the election of the President. *Bush v. Gore*, 531 U.S. 98 (2000) (discussing the State's role in selecting presidential electors). Indeed, since the Constitution itself vests in the legislature of each state the responsibility for choosing presidential electors, it would be odd to argue there is no state action. U.S. CONST. art. I, § 1, cl. 2.

The purposes of the three clauses, independently and collectively—to broaden the extent of citizenship and to bring all citizens onto equal footing before the law and within the nation—are in irreconcilable conflict with the purpose of the Natural-Born Citizen Clause—to distinguish between types of citizens in defining the office of the presidency. The tension between the earlier constitutional clause and the later constitutional amendment fits the irreconcilable conflict language: the two are profoundly inconsistent and cannot coexist in a way that will give meaning to both; they cannot be harmonized; and there is profound repugnancy between the text and purposes of the two. Being thus in irreconcilable conflict, there is a convincing argument that the Natural-Born Citizen Clause has been impliedly repealed by the Fourteenth Amendment.

C. Constitutional Interpretation and Overarching Concerns

Despite the strength of the argument for implied repeal of the Natural-Born Citizen Clause, John Hart Ely refuses to conclude that the Fourteenth Amendment implicitly repealed the Natural-Born Citizen Clause. He rests his conclusion on two bases. First, there is no specific mention of repeal in the debates of the Civil Rights Act or the Fourteenth Amendment. In fact, there are only a few mentions of the Presidential Eligibility Clause during the debate on the Fourteenth Amendment, and they appear to be incidental. For example, in speaking to the advisability of including a definition of citizenship in the Fourteenth Amendment, Senator Johnson noted that the Constitution makes only two references to citizenship: the Natural-Born Citizen Clause and the nine-year citizenship requirement for the office of Senator.³²⁹

Also, Senator Turnbull responded to the complaint of Senator Doolittle, who objected to the provision of the Fourteenth Amendment barring some Southern rebels from federal office by saying:

Why, sir, who has ever heard of such a proposition as that laid down by the Senator from Wisconsin [Doolittle], that a bill excluding men from office is a bill of pains and penalties and punishment? The Constitution of the United States

329. CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866).

declares that no one but a native-born citizen of the United States shall be President of the United States. Does, then, every person living in this land who does not happen to have been born within its jurisdiction suffer pains and penalties and punishment all his life, because by the Constitution he is ineligible to the Presidency?³³⁰

During debate on the Civil Rights Act, there was also one reference to the Presidential Eligibility Clause by Representative Raymond, who declared,

There are only two classes of citizens, so far as I can detect, provided for in the Constitution of the United States. In the second article, I think, it is declared that none but a “natural born citizen” shall be President of the United States. That clause, and the one pertaining to naturalization, implying that there may be naturalized citizens, are the only two clauses designating the classes of citizens within the contemplation of the Constitution of the United States.³³¹

Although neither Senator Johnson nor Representative Raymond suggested any difficulty with distinctions between citizens for purposes of presidential eligibility, Representative Raymond’s remarks are interesting in the context of another issue prevalent in the debates. In the debates on the foundation for congressional authority³³² to declare newly freed black citizens of the United States, some cited the Naturalization Clause as the source of congressional authority to declare them citizens.³³³ Those who opposed the Civil Rights Act and the Fourteenth Amendment raised the possibility that passage of the bill would “allow the negroes of this country to compete for the high office of President of the United States.”³³⁴ Of

330. *Id.* at 2901.

331. *Id.* at 1266.

332. *See, e.g., id.*

333. *See* U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have Power . . . To establish an uniform Rule of Naturalization.”).

334. CONG. GLOBE, 39th Cong., 1st Sess. 1122 (1866) (statement of Representative Rogers in opposition to the Civil Rights Act). In response, an unnamed Member of the House interjected, “Are you afraid of that?” Rogers replied, “I am afraid of degrading this Government.” *Id.*; *see also id.* at 2538 (statement of Representative Rogers in opposition to the Fourteenth Amendment). Rogers complained that the Fourteenth Amendment will “prevent any state from refusing to allow anything to anybody embraced within this term privileges and immunities,” since “[t]he right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or

course, if the newly freed Blacks became citizens by naturalization, they would not be eligible for the presidency, making Congressman Roger's fears superfluous.³³⁵ However, no one seriously linked these two arguments—the ability to naturalize and the ability to be President, and those concerned that “negroes of this country [could] compete for the high office of President” also argued that Congress lacked authority to pass the Civil Rights Act by virtue of the Naturalization Clause.³³⁶

These debates in Congress make it quite clear that members of the legislative branch understood that the Fourteenth Amendment would expand eligibility for the presidency. The supporters of expansion, who ultimately prevailed, were quite comfortable in expanding eligibility to include Black Americans, while those opposed to the Fourteenth Amendment, although they were not comfortable with the idea of expansion, also recognized that it would, indeed, expand presidential eligibility. Thus, one can say that one of the broad background purposes of the Fourteenth Amendment was to expand presidential eligibility.³³⁷ It is apparent that the Thirty-ninth Congress anticipated the effects of some of its actions on the foreign born (i.e. the Equal Protection Clause), but whether Congress specifically contemplated the particular effects on presidential eligibility for naturalized citizens is uncertain. Nonetheless, the equality promise of the Fourteenth Amendment would appear broad enough to include expanded presidential eligibility to *all* citizens.

Although legislative history suggests that Congress never explicitly considered repealing the Natural-Born Citizen Clause, this

President of the United States is a privilege.” *Id.* In reply to Representative Rogers’ speech of March 1, 1866, Representative Windom said, “As for this fear which haunts the gentleman from New Jersey [Rogers], if there is a negro in this country who is so far above all the white men of the country that only four millions of his own race can elect him President of the United States over twenty-six millions of white people, I think we ought to encourage such talent in the country.” *Id.* at 1158 (statement of Representative Windom).

335. Recall the uncertainty surrounding whether American Indians are natural-born citizens, even if born within the United States. *See supra* note 18 and accompanying text.

336. In fact, Representative Rogers himself said that if the Civil Rights Act was passed, the new citizens would be “within the meaning and letter of the Constitution of the United States, which allows all natural born citizens to become candidates for the Presidency.” CONG. GLOBE, 39th Cong., 1st Sess. 1122 (1866).

337. Professor John Manning argues that the Court has accomplished considerable expansion of the Eleventh Amendment by relying, at least in part, on the Eleventh Amendment’s broad background purpose. Manning, *supra* note 240, at 1673–93.

is not fatal to a claim of implicit repeal because an irreconcilable conflict between an earlier and a later enactment gives rise to an inference of intent.³³⁸ Certainly, repeals by implication are disfavored and will not be found unless the intent to repeal is clear and manifest,³³⁹ but clear and manifest intent to repeal can be inferred when the two enactments are in irreconcilable conflict, as is the Natural-Born Citizen clause and the Fourteenth Amendment. Thus, one can conclude that the Fourteenth Amendment has repealed the Natural-Born Citizen Clause, making it a dead letter since 1868.

Second, John Ely argues that “no provision remotely intended or fairly read to repeal” the Natural-Born Citizen clause “has since been enacted”³⁴⁰ and that the Constitution has provided a sanctuary for discrimination against natural-born citizens with regard to the presidency. He contends that the Fourteenth Amendment cannot have changed that.³⁴¹ Furthermore, a disagreement exists as to whether the rules of statutory construction are appropriate for the Constitution.³⁴² Even if such rules are what the Framers intended,

338. See, e.g., *Estate of Flanigan v. Comm’r*, 743 F.2d 1526 (11th Cir. 1984) (arguing that it is appropriate to use implicit repeal doctrine where there is irreconcilable conflict, despite lack of affirmative showing of intent to repeal).

339. See *supra* text accompanying notes 257–67, for a discussion of repeal by implication.

340. Ely, *supra* note 228, at 1199.

341. Ely compares the Natural-Born Citizen Clause to the clause mandating two Senators for each state, “wherein the two Senators from California represent over sixty-nine times as many people as the two Senators from Wyoming.” *Id.* at 1186. He concludes that this skewed representation would violate the one person, one vote principle of the Fourteenth Amendment. But, he argues, the Senate rightly persists because the Constitution provides it sanctuary. In this way, he argues, the Senate make-up and the Natural-Born Citizen Clause are the same, as the “Constitution says in no uncertain terms that each state is to have two Senators and the President is to be a native-born citizen.” *Id.* at 1199. But in one important way, the Senate membership clause is profoundly different from the presidential eligibility clause. Article V of the Constitution makes the Senate membership clause unrepealable. After providing for the amendment of the Constitution, Article V says that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” U.S. CONST. art. V. One can argue that the Framers intended it to persist even though it is discriminatory; thus, it is not in irreconcilable conflict with the Fourteenth Amendment and one cannot argue its implicit repeal. No such explicit statement of intentional discrimination has been made in relation to the Natural-Born Citizen Clause. *But see* Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 995 n.133 (2002) (“[C]urrent doctrine requires close judicial scrutiny of some distinctions between naturalized and natural-born citizens, even though the Constitution expressly approves such a distinction in its requirement that the President be a natural-born citizen. Arbitrary distinctions in the Constitution’s text may have to be swallowed.”).

342. See Stack, *supra* note 242, at 3 (criticizing the notion “that constitutional and statutory interpretation should converge”); Nelson, *supra* note 242, at 572–73 (questioning

they may not have intended the rule of implicit repeal to apply. Most scholars addressing the applicability of statutory construction rules to the Constitution are concerned with issues other than implicit repeal.³⁴³

One could also argue that the Constitution, the fundamental law of the land, should only be changed by express amendment and that “the whole concept of an amendment assumes and requires a commitment to the ‘basic’ aspects of the document being amended; otherwise, what would occur would not be an ‘amendment’ but a ‘new’ deal.”³⁴⁴ If the Natural-Born Citizen Clause is a “basic” aspect of the document, and the Fourteenth Amendment and the Natural-Born Citizen Clause are in irreconcilable conflict, then the Fourteenth Amendment is in some sense unconstitutional.³⁴⁵ Even so, it would be hard to argue that the Natural-Born Citizen Clause is such a basic part of the Constitution that it cannot be changed without materially altering the important premises of the document.³⁴⁶ The provision was adopted without debate,³⁴⁷ and far

whether the Framers of the Constitution believed that conventional rules of statutory construction applied to the Constitution).

343. Most are concerned with originalism—whether the Framers intended courts to examine legislative history to determine the intent of the Framers. *See, e.g.*, HOBSON, *supra* note 242, at 199–203 (discussing Justice Marshall’s application of traditional rules of statutory construction to interpretation of the Constitution); SNOWISS, *supra* note 242, at 3–4, 119–23, 172–75 (noting how Justice Marshall applied rules of statutory construction to the Constitution); POWELL, *supra* note 242, at 948 (“Early interpreters usually applied standard techniques of statutory construction to the Constitution.”). *But see* NELSON, *supra* note 242, at 572–73 (questioning whether the Framers of the Constitution believed that conventional rules of statutory construction applied to the Constitution); STACK, *supra* note 242, at 3 (criticizing the notion “that constitutional and statutory interpretation should converge”).

344. Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1285 (2001) (citation in original); *see also* Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3, 14 (Douglas Greenberg et al. eds., 1993) (arguing that “an ‘amendment’ corrects or modifies the system without fundamentally changing its nature: An ‘amendment’ operates within the theoretical parameters of the existing constitution”).

345. *Cf.* Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1073 (1991) (arguing that the proposed Flag Burning Amendment would have been unconstitutional because it is inconsistent with natural rights).

346. Jackson, *supra* note 344, at 1286 (“But the fact that there may be some changes that are so radically inconsistent with the existing document that they would not be legitimate amendments does not resolve the question of whether, if an amendment is legitimate—that is, is not so radically inconsistent with existing structures that it itself is unconstitutional—it should be given special weight in understanding what the Constitution has come to be.”).

347. *See supra* text accompanying notes 48–61.

from being a “basic” aspect of the Constitution, the natural-born citizen provision was a bit of an anomaly when adopted in an otherwise immigration-friendly document.

The third and perhaps the most compelling argument that the Fourteenth Amendment did not repeal the Natural-Born Citizen Clause is the frequency with which proposals to amend that provision have been introduced in Congress. Particularly noteworthy are the proposals to amend the Constitution in order to repeal the clause that were made soon after enactment of the Fourteenth Amendment. The first predated the ratification of the Fourteenth Amendment by two months,³⁴⁸ with three more proposals before 1873.³⁴⁹ Would these proposals have been made if Congress had understood that the Fourteenth Amendment repealed the Natural-Born Citizen Clause? Would they have been as soundly defeated if the consensus of Congress was to expand eligibility for the presidency?

V. A CONSTITUTIONAL AMENDMENT

While John Hart Ely’s “lunatic” argument is not quite as lunatic as it might appear at first blush, a number of impediments to the argument that the Fourteenth Amendment has by implication repealed the Natural-Born Citizen Clause remain. Given these impediments and the symbolic effect of a constitutional amendment, perhaps an official amendment to repeal that Clause is warranted. Such an amendment would certainly do more to convey that naturalized citizens are as trustworthy, as loyal, and as American as natural-born citizens of the United States.

Many theories have been advanced as to whether constitutional amendments are even effective and when, if ever, such amendments are justified.³⁵⁰ The nonpartisan Constitution Project has developed

348. H.R. 269, 20th Cong. (2d Sess. 1868); CONG. GLOBE, 40th Cong., 2d Sess. 2526 (1868).

349. S.R. 284, 41st Cong. (3d Sess. 1871); CONG. GLOBE 41st Cong., 3d Sess. 538 (1871); H.R. 52, 42nd Cong. (2d Sess. 1871); H.R. 166–169, 42d Cong. (3d Sess. 1872); CONG. GLOBE, 40th Cong., 3d Sess. 226 (1872). All three proposals were soundly defeated. See AMES, *supra* note 73, at 392.

350. See, e.g., David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459 (2001). But see THE CONSTITUTION PROJECT, “GREAT AND EXTRAORDINARY OCCASIONS”: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE (1999); George Anastaplo, *Constitutionalism and the Good: Explorations*, 70 TENN. L. REV. 737, 831 (2003); Denning & Vile, *supra* note 232, at 247; Jackson, *supra* note 254, at 279;

guidelines for constitutional amendments, some of which seem relevant in determining whether a constitutional amendment repealing the Natural-Born Citizen Clause is worth doing:

1. Does the proposed amendment address matters that are of more than immediate concern and that are likely to be recognized as of abiding importance by subsequent generations?
2. Does the proposed amendment make our system more politically responsive or protect individual rights?
-
4. Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves intact?³⁵¹

Under this analysis, a constitutional amendment to repeal the Natural-Born Citizenship Clause is justified. First, identifying naturalized citizens as fully American and removing the badge of disloyalty from them is of “abiding importance.” In fact, as the United States becomes increasingly open to immigration and international adoption, future generations are likely to see the Natural-Born Citizenship Clause as being akin to hate speech directed at the foreign born. Erasing a powerful symbol of suspicion of the foreign born is not only an immediate concern, but is one that will positively affect future generations.

Second, the amendment would make our system more politically responsive in the same way as previous amendments that broadened the franchise.³⁵² Broadening the eligibility of voters to encompass women, Black Americans, and the poor undoubtedly made the U.S. government more politically responsive to the concerns of these

Thomas L. Jipping, *Legislating from the Bench: The Greatest Threat to Judicial Independence*, 43 S. TEX. L. REV. 141 (2001); Stephen B. Presser, *Constitutional Amendments: Dangerous Threat or Democracy in Action?*, 5 TEX. REV. L. & POL. 209 (2000); Kathleen M. Sullivan, *Chapter 9: What's Wrong with Constitutional Amendments?*, in ALAN BRINKLEY, NELSON W. POLSBY, & KATHLEEN M. SULLIVAN, *NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION* (1997).

351. THE CONSTITUTION PROJECT, *supra* note 350, at 7.

352. *See, e.g.*, U.S. CONST. amend. XV (expanding the franchise to Black Americans); *id.* amend. XIX (expanding the franchise to women); *id.* amend. XXIV (expanding the franchise by lifting poll tax requirements); *id.* amend. XXVI (expanding the franchise to those between the ages of 18 and 21).

groups. Broadening the eligibility for the presidency will also enhance political participation, the kind of participation in government expected of all citizens.³⁵³ Also, by removing a powerful symbol of second-class citizenship status for naturalized citizens, the amendment would be protective of the individual rights of foreign-born citizens whose rights have often been ignored in the United States.³⁵⁴

Finally, the amendment would be fully consistent with the Fourteenth Amendment, which embodies the requirement of equal citizenship.³⁵⁵ Furthermore, the Fourteenth Amendment has already effected the change that should be ratified by a constitutional amendment. A constitutional amendment would merely complete the work of the Fourteenth Amendment by stating clearly that naturalized citizens are not second-class citizens and are as capable as natural-born citizens to lead the country.

Having justified the amendment, what form should it take? The previously proposed constitutional amendments on presidential eligibility have been very similar. All of the amendments include language that either removed the Natural-Born Citizen Clause³⁵⁶ or included a provision that there should be no discrimination between natural-born citizens and naturalized citizens to be eligible for the presidency.³⁵⁷ All of the proposals have retained the age requirement,³⁵⁸ and most have retained the fourteen-year residency requirement,³⁵⁹ although some have directly or indirectly lengthened

353. See *supra* text accompanying notes 209–11 for a discussion of the importance of political participation for civic republican conceptions of citizenship.

354. See *supra* text accompanying notes 150–67 for a discussion of some of the disparities in the legal treatment of naturalized citizens.

355. See *supra* text accompanying notes 325–30.

356. See, e.g., H.R. 269 (“No person, except a citizen of the United States shall be eligible”); S.R. 284, 41st Cong. (3d Sess. 1871); CONG. GLOBE, 41st Cong., 3d Sess. 538 (1871) (“Every person, whether a natural born or a foreign born citizen of the United States . . . shall be eligible.”).

357. See, e.g., H.R.J. Res. 491, 93d Cong. (1973) (“[A] citizen shall not be ineligible to the Office of the President by reason of not being native born.”).

358. See, e.g., H.R. 269, S.R. 284; H.R.J. Res. 491. For an interesting discussion of the presidential age requirement, see D’Amato, *supra* note 119; see also M.B.W. Sinclair, *Postmodern Argumentation: Deconstructing the Presidential Age Limitation*, 43 N.Y.L. SCH. L. REV. 451 (1999).

359. See, e.g., H.R. 269; S.R. 284, H.R.J. Res. 491.

that requirement.³⁶⁰ An amendment lengthening the residency requirement while expanding eligibility to include naturalized citizens is problematic, despite attempted justification on the grounds that the President should be familiar with American politics and culture. Such amendments perpetuate the notion that naturalized citizenship is somehow less authentic or less American than natural-born citizenship. After all, the fourteen-year residency requirement is perfectly adequate to ensure that a person born in the United States, who immediately departs the United States only to return fourteen years before becoming President, is sufficiently familiar with American politics, culture, and traditions. Why is the same time period inadequate for the naturalized citizen?

I suggest that the current amendment proposals before the One Hundred Eighth Congress should be adopted, if amended as follows:

A person who is a citizen of the United States, who has been a citizen of the U.S. for fourteen years, and who is otherwise eligible to the Office of President, is not ineligible to that office by reason of not being a native born citizen of the United States.³⁶¹

This language would remove the natural-born citizen requirement, while retaining the notion already existing in the Constitution that the office of President requires fourteen years of residency to be familiar with American culture. It also rejects the lengthier residency requirement of the Hatch proposal.³⁶²

VI. CONCLUSION

In most respects today, discrimination against the foreign born is *de facto*, not *de jure*—the Supreme Court has invalidated many laws that discriminate on the basis of foreign birth and has declared that naturalized citizens are not second-class citizens. However, there

360. *See, e.g.*, H.R.J. Res. 67, 108th Cong. (2003) (“A person who has been a citizen of the United States for at least 20 years shall be eligible to hold the Office of President.”); S.J. Res. 15, 108th Cong. (2003); H.R.J. Res. 104, 108th Cong., (2004); H.R.J. Res. 59, 108th Cong., (2003) (a person must be a U.S. citizen for 35 years and a resident for 14 to be eligible for the office of president).

361. S.J. Res. 15 (introduced by Senator Orrin Hatch); H.R.J. Res. 104 (introduced by Representative Dana Rohrabacher). Each of these resolutions require citizenship for twenty years, effectively replacing the fourteen-year requirement for naturalized citizens.

362. S.J. Res. 15, 108th Cong. (2003).

remains in the Constitution an explicit—even intentional—means of discrimination in that only natural-born citizens can be President. When a country's founding document privileges natural-born citizens by reserving the presidency for them, it would not be surprising for naturalized citizens to feel that they still do not quite belong to America, and a "sense of belonging is a basic human need, vital to every individual's sense of self."³⁶³ Professor Randall Kennedy sees in the Natural-Born Citizen Clause an "idolatry of mere place of birth," and an "instance of rank superstition"³⁶⁴ since "place of birth indicates nothing about a person's willed attachment to a country, a polity, a way of life. It only describes an accident of fate over which an individual had no control."³⁶⁵ Thus, "[f]ormally barred from the Presidency . . . are people who may have invested their all, even risked their lives, on behalf of the nation, some of them even before becoming citizens, many others afterward."³⁶⁶ Second-class citizenship, as preserved in different legal treatment of birthright citizens and naturalized citizens, in the identity of naturalized citizens as not quite American, and in the restrictions on full political participation by naturalized citizens, is justified by the continued existence of the Natural-Born Citizen Clause.

Perhaps the problem of a tiered citizenship has already been addressed through the Fourteenth Amendment. A close examination of the broad purposes of the Fourteenth Amendment, together with an understanding that the Framers expected rules of statutory construction to apply to constitutional interpretation, demonstrates an irreconcilable conflict between the amendment and the Natural-Born Citizen Clause and indicates that the Clause was repealed by implication. Despite the compelling evidence that the clause has been impliedly repealed—that after the Fourteenth Amendment, it is a dead letter—history has shown that the specter of second-class citizenship still remains; thus, formal repeal through a new

363. Karst, *supra* note 171, at 306; *see also* Jackson, *supra* note 254, at 279; Jipping, *supra* note 350; Presser, *supra* note 350; Ann Hubbard, *The Major Life Activity of Belonging*, 39 WAKE FOREST L. REV. 217, 217 (2004) ("Belonging has two aspects: personal relationships, including bonds of love, friendship and shared purpose; and social acceptance, or the regard of others that fosters integration into the mainstream of society. Belonging is central to most people's lives.").

364. Kennedy, *supra* note 13, at 176.

365. *Id.*

366. *Id.*

constitutional amendment is both practically and symbolically important. As Robert Post eloquently said in describing the Natural-Born Citizen Clause as the Constitution's worst provision:

Thus, at the very heart of the constitutional order, in the Office of the President, the Constitution abandons its brave experiment of forging a new society based upon principles of voluntary commitment; it instead gropes for security among ties of blood and contingencies of birth. In a world of ethnic cleansing, where affirmations of allegiance are drowned in attributes of status, this constitutional provision is a chilling reminder of a path not taken, of a fate we have struggled to avoid. It is a vestigial excrescence on the face of our Constitution.³⁶⁷

If the Fourteenth Amendment has not already removed this vestigial excrescence, then all political action necessary should be taken to promptly amend the Constitution to do so.³⁶⁸

The Constitution is an extraordinarily powerful symbol for Americans. George Anastaplo said, “[T]here is something touching in the form that the faith which many have in the Constitution can take; a change in the Constitution, they seem to believe, can cure this or that distressing problem.”³⁶⁹ Kenneth Karst argues that Americans “[l]acking common ancestral origins, religion, ethnic traditions—that is, lacking many of the usual forms of cultural glue . . . have been required to found a nation on something else.”³⁷⁰ That “something else” is a constitutional ideal. President Woodrow Wilson, addressing newly naturalized American citizens in 1915, stated, “You have just taken an oath of allegiance to the United States. . . . You have taken an oath of allegiance to a great ideal, to a great body of principles, to a great hope of the human race.”³⁷¹ That touching faith in the Constitution, that belief that the Constitution is worthy of allegiance, is foundational to American society. Yet the Constitution, on its face, is exclusionary because the Constitution

367. Post, *supra* note 48, at 193.

368. See *supra* text accompanying note 361 for the text of my proposed constitutional amendment.

369. Anastaplo, *supra* note 350, at 831.

370. KARST, *supra* note 66, at 29.

371. *Id.* at 30 (quoting Mona Harrington, *Loyalties: Dual and Divided*, in *THE POLITICS OF ETHNICITY*, (M. Walzer et al. eds., 1982)).

plants a sign outside the White House—“Foreign-Born Need Not Apply.”

Also, the Constitution, the “great body of principles” to which President Wilson referred in 1915, is not the same Constitution as the one drafted by the Founders. As Justice Thurgood Marshall noted, “the government they [the Founders] devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today.”³⁷² Just as the Constitution was defective in having excluded African Americans from personhood, it was defective in making the presidency the exclusive province of the natural-born. We recognize the role of the Civil War amendments in removing one terrible exclusion. The time has come to recognize the role of the Fourteenth Amendment in removing another.

372. Justice Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987), *reprinted in* MEYER, *supra* note 269, at 265.

