

## LEAD ARTICLE

### “NATURAL BORN CITIZEN”

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*Article II of the U.S. Constitution states that a person must be a “natural born Citizen” to be eligible to be President. This Article surveys relevant evidence and explains what the phrase likely meant when the Constitution was adopted between 1787 and 1789. The phrase at the time encompassed three categories of persons: (1) persons born within the United States; (2) persons born outside of the United States to U.S. citizens in government service; and (3) persons born outside of the United States to U.S. citizen fathers who had resided in the United States but went abroad temporarily for a private purpose, like merchants who traveled on business. This definition corresponded with contemporaneous English law understandings of “natural born subjects,” the natural law birthright principles of jus soli (the law of soil) and jus sanguinis (the law of blood or parentage), and the law of nations—the key jurisprudential sources consulted by Americans on matters of citizenship in the late eighteenth-century world order. This novel interpretation of the original meaning of “natural born Citizen” departs from the conventional wisdom that the phrase refers to a person who is a citizen under the U.S. naturalization statutes in effect at the person’s*

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*birth, a view recently espoused by two former Solicitors General of the United States, Paul Clement and Neal Katyal. My interpretation also differs from the leading alternative view of the original meaning of the phrase, namely that it refers to persons born in the United States or outside of the United States to U.S. officials only. A brief conclusion explores the implications of the recovered original meaning of “natural born Citizen” for presidential eligibility today.*

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#### INTRODUCTION

The U.S. Constitution provides: “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.”<sup>1</sup> This Article offers a comprehensive account of the original meaning of “natural born Citizen.” This is an important contribution for three reasons. First, the U.S. Supreme Court has never decided what the words mean, and the phrase’s original meaning is sure to loom large in any future ruling, even for non-originalists.<sup>2</sup> Nevertheless, intense

1. U.S. CONST. art. II, § 1, cl. 5.

2. I do not mean to suggest that originalism is the only method of constitutional interpretation or that it is the best method; my point is that the original meaning is

prior scrutiny and scholarship has yielded no definitive answer to date,<sup>3</sup> and this Article mines newly discovered evidence. Second, several presidential candidates, including Barry Goldwater, George Romney, and John McCain, faced allegations that they were not natural born citizens.<sup>4</sup> Accusations were also leveled against President Barack Obama on the specious theory that he was born outside the United States to a foreign father and a U.S. citizen mother.<sup>5</sup> Most recently, doubts were raised during the 2016 presidential primaries whether Senator Ted Cruz, who was born in 1970 in Canada to a U.S. citizen mother and a non-U.S. citizen father, was a natural born citizen.<sup>6</sup> The

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the starting point for any approach to constitutional interpretation. Nor is this Article addressed to methodological debates within originalism itself, e.g., intent versus public meaning. Rather, the aim is to provide an accurate and complete understanding of what the words “natural born Citizen” in Article II likely meant between 1787 and 1789 when the Constitution was adopted.

3. Commentators have noted “speculation on the scope of the language,” its “[d]angerous [a]mbiguity,” and referred to the Clause as an “[u]nresolved [e]nigma.” JACK MASKELL, CONG. RESEARCH SERV., R42097, QUALIFICATIONS FOR PRESIDENT AND THE “NATURAL BORN” CITIZENSHIP ELIGIBILITY REQUIREMENT 1 (2016); *see also* Sarah Helene Duggin & Mary Beth Collins, “Natural Born” in the USA: *The Striking Unfairness and Dangerous Ambiguity of the Constitution’s Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. REV. 53, 147 (2005); Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1, 1 (1968). Other prominent examples of scholarship on the meaning of “natural born Citizen” include EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1984*, at 38–40 (5th rev. ed. 1984); CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY* 137 (1923); Christina S. Lohman, *Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause*, 36 GONZ. L. REV. 349, 369–71 (2000); J. Michael Medina, *The Presidential Qualification Clause in this Bicentennial Year: The Need to Eliminate the Natural Born Citizen Requirement*, 12 OKLA. CITY U. L. REV. 253, 262–68 (1987); Michael Nelson, *Constitutional Qualifications for President*, 17 PRESIDENTIAL STUD. Q. 383, 396 (1987); Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 BYU L. REV. 927, 937–41 (2005); John Yinger, *The Origins and Interpretation of the Presidential Eligibility Clause in the U.S. Constitution: Why Did the Founding Fathers Want the President to Be a “Natural-Born Citizen” and What Does this Clause Mean for Foreign-Born Adoptees?* (rev. ed., Apr. 6, 2000) (unpublished commentary), <http://faculty.maxwell.syr.edu/jyinger/citizenship/history.htm>.

4. *See* Carl Huse, *McCain’s Canal Zone Birth Prompts Queries About Whether That Rules Him Out*, N.Y. TIMES (Feb. 28, 2008), <http://www.nytimes.com/2008/02/28/us/politics/28mccain.html> (discussing the allegations Barry Goldwater, George Romney, and John McCain faced during their respective presidential campaigns).

5. *See, e.g.*, *Elliott v. Cruz*, 137 A.3d 646, 653 (Pa. Commw. Ct. 2016), *aff’d*, 134 A.3d 51 (Pa. 2016), *cert. denied*, 137 S. Ct. 169 (2016).

6. *See* *Williams v. Cruz*, OAL DKT. NO. STE 5016-16, 2016 WL 1554252, at \*17 (N.J. Admin. Apr. 12, 2016) (holding Cruz to be a “natural born Citizen” and thus an eligible candidate for the U.S. presidential election in New Jersey); Thomas Lee,

specific issue is almost certain to arise again: for instance, Cruz may run for President in 2020 or thereafter, and there will likely be future U.S. presidential candidates with international ties given the pace and scope of globalization. Finally, the Natural Born Citizen Clause provides an illuminating case study in how to do originalism and the types of sources it entails. The original meaning of constitutional provisions is often elusive; however, the Natural Born Citizen Clause is a rare case in which careful examination of all relevant evidence supplies a meaning.

There are two leading views of the original meaning of the constitutional requirement to be a “natural born Citizen” for presidential eligibility. The first, espoused most recently by Professors Einer Elhauge and Mary Brigid McManamon, is that a natural born citizen who is eligible to be President is any person born within the United States, unless the person is the child of a foreign ambassador or enemy soldier.<sup>7</sup> By the same token, any person born outside of the United States to a U.S. ambassador or to a U.S. soldier in a hostile army would also be a “natural born Citizen” of the United States.<sup>8</sup> The idea that membership in a polity is determined principally by birthplace is known by the Latinism *jus soli*—the “law of soil.”<sup>9</sup> Proponents of this view assert that *jus soli* was the common law of England as to who was a “natural born subject,” and that the U.S. Constitution’s “natural born

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Opinion-Editorial, *Is Ted Cruz a “Natural Born Citizen”? Not if You’re a Constitutional Originalist.*, L.A. TIMES (Jan. 10, 2016, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-lee-is-ted-cruz-eligible-to-be-president-20160110-story.html> (explaining that because Cruz was born in Calgary, Canada to a non-citizen father, an originalist interpretation of the Constitution would bar him from becoming president).

7. See Brief Amicus Curiae of Professor Einer Elhauge on the Justiciability and Meaning of the Natural Born Citizen Requirement at 12, *Elliott v. Cruz*, 134 A.3d 51 (Pa. 2016) (No. 29 MAP 2016), 2016 WL 2732221, at \*12; Mary Brigid McManamon, *The Natural Born Citizen Clause as Originally Understood*, 64 CATH. U. L. REV. 317, 347 (2015) (concluding that no one born outside the United States to U.S. citizen parents is “a ‘natural born [C]itizen’” eligible to be President “aside from children born to U.S. ambassadors or soldiers in hostile armies”).

8. See McManamon, *supra* note 7, at 347; see also Brief Amicus Curiae of Professor Einer Elhauge on the Justiciability and Meaning of the Natural Born Citizen Requirement, *supra* note 7, at 17 (describing the narrow exception to the native-birth requirement as including children born to military personnel serving in a foreign country).

9. Gordon, *supra* note 3, at 6 (defining *jus soli* as a “basic tenet of the English common law”).

Citizen” requirement for presidential eligibility adopted the same English meaning.<sup>10</sup>

This viewpoint is wrong on both counts: *jus soli* was not the exclusive rule at English common law, and the English common law of natural born subjectship was not the exclusive source of the meaning of “natural born Citizen” in Article II of the U.S. Constitution. “Common law” in this context means the evolving customary law of England as reflected not only in judicial decisions, but also in landmark statutes. Further, early Americans also consulted treatises summarizing English law, most importantly William Blackstone’s *Commentaries*.<sup>11</sup>

First, *jus soli* may have been the ancient Anglo-Saxon common law before the Norman conquest of 1066, but it was not the sole principle of natural born subjectship at English common law when the U.S. Constitution was adopted centuries later. As historian James Kettner put it, “English jurists had no conscious attachment to the *jus soli* . . . . Ancestry could also determine who was a ‘natural-born subject.’”<sup>12</sup> In fact, starting in 1350, Parliament passed statutes bestowing subject status upon the foreign-born children of English subjects, thereby invoking the other great Western natural law birthright principle, *jus sanguinis*—the “law of blood” or parentage.<sup>13</sup> *Jus sanguinis* was the Roman rule of citizenship, and it was long dominant on the European continent with its shifting borders and overlapping allegiances.<sup>14</sup> But, *jus sanguinis* penetrated England and then Great Britain, especially in its eighteenth-century mercantilist phase, by which time Parliament had long extended “natural born” status to the foreign-born children of British subjects in government service and of British *fathers*

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10. See McManamon, *supra* note 7, at 320–21. Although the U.S. Supreme Court has never decided the meaning of the Natural Born Citizen Clause, it has asserted that the U.S. constitutional law of citizenship adopts *jus soli* via English common law. See *Miller v. Albright*, 523 U.S. 420, 434 n.11 (1998) (affirming citizenship at birth for persons born within the United States but noting that U.S. “citizenship does not pass by descent” other than as provided by congressional statute); *Rogers v. Bellei*, 401 U.S. 815, 828 (1971) (acknowledging that the United States follows the English standard of *jus soli* where the place of birth governs citizenship).

11. See generally 1–4 WILLIAM BLACKSTONE, COMMENTARIES.

12. JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608–1870 13 (1978).

13. A Statute for Those Who Are Born in Parts Beyond Sea 1350, 25 Edw. 3 stat. 1 (Eng.); see GORDON, *supra* note 3, at 6 (defining *jus sanguinis* as the rule determining nationality in most European countries where “nationality could be transmitted by descent at the moment of birth”).

14. See KETTNER, *supra* note 12, at 17–28 (discussing the complications of nationality arising from allegiances to different countries within the United Kingdom).

generally.<sup>15</sup> Some of the most settled of these statutes, by virtue of their ancient and uncontroversial status, had become part of the common law tradition, not departures from it. However, descent by parentage had a gender skew under natural law in late eighteenth-century Europe and America: the father's blood determined the political allegiance of free persons at birth; the mother was legally irrelevant.<sup>16</sup>

Second, although English common law was the principal source of U.S. constitutional law, it was not the only source. The common law was the taproot of U.S. constitutional provisions with an English pedigree like habeas corpus and the criminal and civil jury trial rights, but early Americans did not reflexively adopt the British law of natural born *subjects* in defining who was a natural born *citizen* eligible for the Presidency. The British Empire had "subjects" whose allegiance to the Crown was viewed as analogous to a child's obeisance to a parent, a bond the Americans had fought to escape.<sup>17</sup> "Citizens" of the American republic, by contrast, were seen as bound by explicit or implicit consent to a society of equals, analogous to a social contract.<sup>18</sup> The ramifications of this political-theory distinction between subject and citizen for "natural born" status are underappreciated. The concept of citizenship that Americans embraced attributed greater independence and agency to individuals to pass on their political allegiance, by contrast to subjectship which presumed that allegiance was solely a function of birth within the sovereign's domains.

Because of the misfit between English monarchical notions of subjectship and the general republican concept of citizenship, the law of nations and natural law are also important sources in determining what "natural born Citizen" in Article II means. Indeed, even prominent English common law judges like Lord Coke always believed natural law was the ultimate source of "natural born subject" status and of the common law generally.<sup>19</sup> And there was a direct link between

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15. See ALEXANDER COCKBURN, NATIONALITY: OR THE LAW RELATING TO SUBJECTS AND ALIENS, CONSIDERED WITH A VIEW TO FUTURE LEGISLATION 28–31 (London, William Ridgway 1869) (describing the development of laws governing nationality in England and pointing out the long history of English antecedents for the subject status of children born abroad to English fathers and royal servants).

16. See *id.* at 11–12 (noting that children born to alien fathers did not inherit citizenship even if the mother was English).

17. See KETTNER, *supra* note 12, at 3–4.

18. See *id.* at 9–10.

19. See *Calvin v. Smith* (Calvin's Case), 77 Eng. Rep. 377 391–92 (K.B. 1608) (affirming the rule that one born on English soil is a natural born subject of the English king as part of the common law and *jura natura*—natural laws). See generally

the law of nature and the law of nations: Emer de Vattel, the Swiss republican jurist who rivaled Blackstone as an essential reference for Americans on defining citizenship,<sup>20</sup> called the law of nations “the law of nature, applied to the conduct and affairs of nations and sovereigns.”<sup>21</sup> The “law of nations” in Vattel’s usage, shared by early Americans, included general principles common to all civilized nations, such as *jus sanguinis*. In sum, the adopters of the U.S. Constitution likely accepted both natural law principles, *jus soli*—for persons born within the country—and *jus sanguinis*—for persons born outside the country to American fathers, in their understanding of what it means to be a “natural born Citizen” eligible to be President. And, as a more general matter, they embraced both principles of citizenship as a means to grow the population and trans-Atlantic commerce of their new nation.

The other leading view of the original meaning of “natural born Citizen” in Article II holds that it refers not only to any person born in the United States (and thus a citizen by *jus soli*) but also to any person born abroad who is a U.S. citizen at birth under then-applicable congressional statutes.<sup>22</sup> Proponents of this view, espoused by a majority of modern commentators, including former U.S. Solicitor General Paul Clement and former Acting Solicitor General Neal Katyal,<sup>23</sup> Professors Michael Ramsey and Akhil Amar,<sup>24</sup> and Judge Jill

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Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case (1608)*, 9 YALE J.L. & HUMAN. 73, 74 (1997) (noting Coke’s influence on early American courts and his assertion that he and his fellow judges were to decide *Calvin’s Case* on “divine law of nature” principles that were part of English law and the Creator’s law).

20. A telling marker of the co-equal, canonical status of Blackstone’s and Vattel’s two books as references on foreign relations law for early Americans was the fact that they were the first two books the Senate purchased for its library in 1794. See S. JOURNAL, 3rd Cong., 1st Sess. 44 (1793) (ordering the purchase of the Blackstone and Vattel books for the Senate).

21. EMER DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS I* (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1797).

22. See McManamon, *supra* note 7, at 341.

23. See Paul Clement & Neal Katyal, Commentary, *On the Meaning of “Natural Born Citizen,”* 128 HARV. L. REV. F. 161 (2015), <http://harvardlawreview.org/2015/03/on-the-meaning-of-natural-born-citizen>.

24. See Michael D. Ramsey, *The Original Meaning of “Natural Born,”* 20 U. PA. J. CONST. L. (forthcoming 2018) (manuscript at 3) (on file with author); Akhil Reed Amar, *Why Ted Cruz Is Eligible to Be President*, CNN (Jan. 14, 2016, 11:59 PM), <http://www.cnn.com/2016/01/13/opinions/amar-cruz-trump-natural-born-citizen>.

Pryor (in her *Yale Law Journal* Note authored while a student),<sup>25</sup> argue that Congress's Article I, Section 8 power "[t]o establish an uniform Rule of Naturalization"<sup>26</sup> encompasses the power to establish birthright citizenship for presidential eligibility purposes. With specific respect to Senator Cruz, many of these commentators assert that he is eligible to be President because the controlling statute when he was born declared that children born abroad to one U.S. citizen parent were U.S. citizens at birth, subject only to a residency requirement for the parent and child, which Cruz had met.<sup>27</sup> This 1952 statute, which had replaced an earlier 1934 version, codified *jus sanguinis* subject to parental and child residency requirements.<sup>28</sup>

The relevant evidence indicates that this view of complete congressional discretion over who counts as a "natural born Citizen," like the *jus soli*-only view, is incorrect as a matter of original meaning, particularly because it paradoxically rejects natural law and embraces positive law as the basis for natural born citizenship. The founding Americans who adopted the Constitution did not seek to grant plenary power to Congress in setting the citizenship standards for presidential eligibility. Indeed, a proposal by Alexander Hamilton at the 1787 Constitutional Convention to permit Congress to use its uniform Naturalization Power to set citizenship standards for *congressional* eligibility was decisively rejected.<sup>29</sup> Nor is there any affirmative evidence from the Constitution's drafting or ratifying conventions, or any sources whatsoever, that supports the claim that Congress's Article I Naturalization power encompassed power to tinker with Article II's separate "natural born Citizen" requirement. If Congress did have such a power to define the citizens eligible to be President, then what was the point of specifying in the Constitution that someone had to be a *natural* born citizen to be President? The Constitution could have simply stated, "No person shall be eligible to the office of President of the United States unless he . . . be born a Citizen of the United States,"

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25. See Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 *YALE L.J.* 881, 889–90 (1988).

26. U.S. CONST. art. I, § 8, cl. 4.

27. See Immigration and Nationality Act of 1952, tit. 3, ch. 1, § 301(a)(7), 66 Stat. 163, 236.

28. Act of May 24, 1934, Pub. L. No. 73-250, 48 Stat. 797, *repealed by* Immigration and Nationality Act of 1952, tit. 3, ch. 1, § 301(a)(7), 66 Stat. 163, 236.

29. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 563 (Max Farrand ed., 1911) [hereinafter RECORDS OF THE FEDERAL CONVENTION] (reporting the vote as ten-to-one against the proposal); 3 *id.* at 629 (describing the Hamilton plan's citizenship requirements for members of Congress).

which was what Alexander Hamilton proposed in his alternative plan for a national constitution.<sup>30</sup>

In summary, both the *jus soli* and congressional naturalization power interpretations are incomplete theories of the original meaning of “natural born Citizen” in Article II. They share a disregard of the word “natural” and its plain invocation of natural law birthright principles that were foundational to the intellectual firmament of the time. Both theories focus too much on specific English and U.S. naturalization statutes, without regard for the broader historical and political contexts in which the statutes were passed and the Article II requirement was adopted. More generally, both existing theories do not account for the complexity and evolution in conceptions of “natural born” membership in England and the early United States. The right way to ascertain what “natural born Citizen” in Article II means is to scrutinize all the primary sources to comprehend this complexity and how the words reflect the intellectual climate and historical circumstances of the time.

Early Americans, desirous of increasing the immigration of ambitious Europeans and of encouraging American merchants to go and trade with Europe, adopted both natural law territorial and parentage principles to define “natural born” citizenship in their new republic. Consequently, a careful parsing of all the relevant primary sources indicates that the Americans who adopted the Constitution likely considered three categories of persons as natural born citizens: (1) persons born within the United States; (2) persons born outside of the United States to U.S. citizens in government service; and (3) persons born abroad to U.S. citizen fathers who had resided in the United States but went abroad temporarily for a private purpose, like merchants. These three categories of persons tracked the two natural law principles ordaining membership in political communities at birth by territory (*jus soli*) and by parentage when children were born extraterritorially (*jus sanguinis*). Importantly, however, *jus sanguinis* in the late eighteenth century was limited to the foreign-born children of government servants and of men; it did not encompass descent

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30. 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 629 (reprinting Article IX § 1 of the Hamilton Plan). Hamilton presented his constitutional plan during a long speech on June 18, 1787, early in the Convention; however, he did not circulate a written draft then. Hamilton did give James Madison a draft of his plan later at the Convention. *Id.* at 619.

through a private citizen mother where her nationality differed from the father's—a much rarer combination at the Founding than today.<sup>31</sup>

This Article proceeds in four parts. Part I parses evidence from 1787 to 1789, when the U.S. Constitution was drafted and adopted, regarding the original meaning of “natural born Citizen” in Article II. It begins by describing the relevant constitutional provisions and discussions at the 1787 Constitutional Convention regarding methods of selecting the President and eligibility requirements for Congress. It then analyzes an important letter written by John Jay to George Washington during the Convention proposing the “natural born Citizen” provision. Finally, Part I details an important, oft-quoted intervention by James Madison, one of the principal architects of the Constitution, in 1789 during a controversy over the citizenship eligibility of a South Carolina member of the House of Representatives. Part II surveys the history of natural born subjects as understood at English common law, including judicial decisions, Parliamentary statutes, and Blackstone's monumental treatise, the *Commentaries*, an important source of original American constitutional meaning. It then discusses early American treatises that referred to Blackstone and the English sources. Part III recounts the treatment of natural born Citizenship under natural law and the law of nations. Part IV examines two American statutes that use the phrase “natural born Citizen”: a previously undiscovered 1784 Maryland statute, and the First Congress's 1790 Naturalization Act which has been the subject of intense scrutiny. A brief conclusion explores the implications of the recovered original meaning of “natural born Citizen” in Article II of the U.S. Constitution for presidential eligibility today.

#### I. THE ORIGINAL MEANING OF “NATURAL BORN CITIZEN” IN ARTICLE II

This Part presents and analyzes all the evidence from 1787 to 1789, when the U.S. Constitution was adopted, relevant to ascertaining the

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31. Among prior commentators, my position is closest to that of Edward Corwin (1878–1963), who also concluded that “natural born Citizen” encompassed both natural law principles, but without specifying the late eighteenth century natural law scope of *jus sanguinis*. Corwin, *supra* note 3, at 38–39. Corwin asserted, however, that Congress had broad discretion to define the scope of *jus sanguinis* by statute. *Id.* This position diverges from my claim that the Constitution when adopted between 1787 to 1789 presumed a fixed core of natural law regarding citizenship by birth in the sovereign's territory or by parentage limited to the children born outside of the United States to U.S. citizens serving the government or to private citizen fathers.

original meaning of Article II’s requirement that a person must be a “natural born Citizen” to be eligible to be President. There is some difference of opinion about what exactly an original constitutional meaning is: is it the intent of the fifty-five drafters, the understanding of the two thousand or so who participated in up-or-down state ratification conventions, or the collective views of the American people from 1787 to 1789 when drafting and ratification occurred? If it is the last, how is it possible to reconstruct what hundreds of thousands of people two centuries ago understood “natural born Citizen” to mean?<sup>32</sup> For present purposes, I am not going to engage in this methodological debate<sup>33</sup> and will presume that the original meaning we are looking for is a best estimate of what “natural born Citizen” meant as a constitutional presidential eligibility provision in 1787 to 1789, based on a comprehensive analysis of all relevant discussions and sources that Americans of the time had available to them and would likely have consulted.

A. *Article II’s Presidential Eligibility Conditions*

Because the U.S. Constitution is framed in a written document, any theory of constitutional meaning must start with its words. Article II, Section 1 provides in full:

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; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.<sup>34</sup>

Article II’s three eligibility criteria of age, residence, and citizenship are also imposed by Article I for eligibility to be a member of Congress. Representatives and Senators must be twenty-five and thirty years of age respectively “when elected.”<sup>35</sup> In terms of residence, all members of Congress must be “Inhabitant[s] of that State in which”

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32. According to the 1790 census, there were 807,094 free white males over the age of sixteen in the United States. RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES 3 (1793), <https://www.census.gov/prod2/decennial/documents/1790a.pdf>.

33. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 3–22 (1996) (describing the challenges of ascertaining original meanings).

34. U.S. CONST. art. II, § 1, cl. 5.

35. *Id.* art. I, §§ 2–3. Interestingly, the timing of the age requirement appears to differ from Article II, which would seem to require a presidential candidate to be thirty-five years of age to be eligible, not “when elected.”

(Representatives) or “for which” (Senators) “chosen.”<sup>36</sup> There is no constitutional requirement of residential duration for members of Congress; however, Article II specifies that a person must be “fourteen Years a Resident within the United States” to be eligible for President.<sup>37</sup> With respect to citizenship, Representatives and Senators must be seven or nine years “a Citizen of the United States,” respectively.<sup>38</sup> By contrast, the Article II citizenship requirement has two non-durational options: a person must be “a natural born Citizen” or “a Citizen of the United States, at the time of the Adoption of this Constitution.”<sup>39</sup> The alternative citizenship prong is often neglected because it is now extinct. But, as described below, an analysis of the prong provides insight into the meaning of the “natural born Citizen” requirement.<sup>40</sup>

There is one other provision of the Constitution possibly relevant to understanding the original meaning of “natural born Citizen.” Article I, Section 8 of the Constitution lists among the powers that Congress “shall have” the power “[t]o establish an uniform Rule of Naturalization.”<sup>41</sup> In the pre-constitutional period of the Articles of Confederation, there was no uniform law of citizenship. Instead, each state determined who was a citizen, and state citizens were collectively “citizens of the United States.”<sup>42</sup> The Naturalization Clause is the provision relied upon by advocates of the view that Congress has the power to make a foreign-born person a “natural born Citizen” for purposes of Article II by enacting a statute specifying that such a person is a U.S. citizen at birth, without having to take a loyalty oath or any other naturalization procedure.

### B. *The Constitutional Convention of 1787*

The U.S. Constitution was drafted at a convention in Philadelphia, Pennsylvania, from May 26 to September 17, 1787.<sup>43</sup> The Convention debates are worth examining not only because they show what the

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36. *Id.* The differing prepositions likely reflected the fact that Senators were to be chosen “for” each state by its legislature under the original Constitution.

37. *Id.* art. II, § 1, cl. 5.

38. *Id.* art. I, §§ 2–3.

39. *Id.* art. II, § 1, cl. 5.

40. *See infra* Section I.B.

41. U.S. CONST. art. I, § 8.

42. *See* KETTNER, *supra* note 12, at 213–24 (discussing the notions of citizenship that developed in the states between the Declaration of Independence and the making of the Constitution).

43. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at xi–xii.

delegates who drafted the Constitution were thinking (“original intent”), but also because the diverse positions taken likely reflected the views of informed citizens at large (“original public meanings”).<sup>44</sup> After several weeks of discussions among all the delegates—totaling fifty-five, at peak attendance—a five-person “Committee of Detail,” chaired by John Rutledge, was elected on July 24, 1787, to prepare the first draft of the Constitution.<sup>45</sup> The Committee’s marching orders included instructions to draft “a clause or clauses, requiring certain qualifications of . . . property and citizenship in the United States for the Executive, the Judiciary, and . . . Members of both branches of the Legislature.”<sup>46</sup>

The Committee’s first draft was reported to the full Convention on August 6, 1787.<sup>47</sup> Interestingly, the draft only included qualifications for Congress, not for the President or the Judiciary.<sup>48</sup> It stated a citizenship requirement for Congress but omitted a property requirement and included age and residence conditions unmentioned in its mandate.<sup>49</sup> The age qualifications did not spark discussion at the Convention. The citizenship and “Inhabitants” requirements, however, were roundly debated on August 8 and 9, for reasons that illuminate the presidential eligibility provisions adopted four weeks later.<sup>50</sup>

The first proposed citizenship standards for Representatives and Senators were three years and four years respectively.<sup>51</sup> According to James Madison’s notes of the Convention, on August 8, George Mason of Virginia objected to the three-year citizenship threshold for Representatives because he did not desire “to let foreigners and adventurers make laws for us [and] govern us.”<sup>52</sup> Three years of citizenship were “not enough for ensuring that local knowledge which ought to be possessed by the Representative.”<sup>53</sup> Mason continued: “It might also happen that a rich foreign Nation, for example Great Britain, might send over her tools who might bribe their way into the

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44. See RAKOVE, *supra* note 33, at 6.

45. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 97–98.

46. *Id.* at 116–17. The original proposal specified “landed property” as a qualification but the word “landed” was voted to be struck. See *id.* (noting the movement and passage of striking the word “landed”); see also *id.* at 121–25 (providing James Madison’s notes regarding discussion of a property qualification).

47. *Id.* at 176–77.

48. See *id.* at 164–65, 178–79.

49. See *id.*

50. *Id.* at 213, 216–17, 230–31.

51. See *id.* at 164–65.

52. *Id.* at 216.

53. *Id.*

Legislature for insidious purposes.”<sup>54</sup> He proposed seven years instead, which was agreed to by all the delegations except for Connecticut.<sup>55</sup>

Mason’s remarks about foreign influence in government mirrored a speech that his fellow Virginian Madison had made two weeks earlier on July 25, 1787.<sup>56</sup> The context of Madison’s speech was a heated discussion as to whether the Executive should be chosen by the national legislature, state governors, the people, or some other electors.<sup>57</sup> The issue was a thorny one that was debated over several days at the Convention.<sup>58</sup> On July 24, 1787, the discussion had run in favor of a President chosen by Congress with a long term limit to ensure that whomever was elected would not be beholden to the legislators who had picked him.<sup>59</sup> The danger with this design, as Gouverneur Morris, the New York émigré who was part of Pennsylvania’s delegation, pointed out, was dictatorship.<sup>60</sup> The President might “cease to be a man . . . unwilling to quit his exaltation,” but insulated from removal by “possession of the sword.”<sup>61</sup> The leading counter-proposal was championed by Eldridge Gerry of Massachusetts who believed allowing the national legislature to pick the President was “radically and incurably wrong.”<sup>62</sup> Gerry proposed that state governors “with advice of their Councils” appoint the President.<sup>63</sup>

It was at this point that Madison spoke firmly against Congress selecting the Executive in large part because it would allow “foreign powers” to manipulate, bribe, or influence legislators into picking the President they wanted. Madison reasoned that:

The Ministers of foreign powers would have and make use of, the opportunity [to] mix their intrigues & influence with the Election. Limited as the powers of the Executive are, it will be an object of great moment with the great rival powers of Europe who have American possessions, to have at the head of our Governmt. a man attached to their respective politics & interests. No pains, nor

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54. *Id.*

55. *See id.*

56. *Compare id.* at 109–11 (Madison’s remarks), *with id.* at 216, 218 (Mason’s remarks).

57. *Id.* at 95, 98–101, 103, 105, 108–09, 115, 118–19.

58. *See id.*

59. *Id.* at 99–104.

60. *Id.* at 103–04.

61. *Id.* at 105.

62. *Id.* at 109.

63. *Id.*

perhaps expence, will be spared, to gain from the Legislature an appointmt. favorable to their wishes.<sup>64</sup>

Madison's point about the national legislature's vulnerability to foreign influence in selecting a President resonated with diverse delegates. Mason, for instance, said he “preferred on the whole” Congress picking the President, but that “[c]andor obliged him to admit, that there was great danger of foreign influence, as had been suggested. This was the most serious objection with him that had been urged.”<sup>65</sup> Pierce Butler of South Carolina opined: “The two great evils to be avoided are cabal at home, & influence from abroad. It will be difficult to avoid either if the Election be made by the Natl Legislature.”<sup>66</sup> Hugh Williamson of North Carolina was also “sensible that strong objections lay agst an election of the Executive by the Legislature, and that it opened a door for foreign influence.”<sup>67</sup>

In sum, the convention debates on presidential selection indicate a broad consensus that Congress ought not to select the President directly because it was too vulnerable to foreign influence.<sup>68</sup> The debate occurred a month before the “natural born Citizen” language for presidential eligibility was adopted. Why then, should the Constitution be interpreted to give Congress a free hand in defining who is a “natural born Citizen” eligible to be President? If early Americans feared that a powerful foreign state like Great Britain might influence Congress to select the President it wanted, why would they not have feared that Congress might enact a statute making any person

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64. *Id.* Madison saw the same problem with appointment by state governors, although it would be more diffuse: “An appointment by the State Executives, was liable . . . to this insuperable one, that being standing bodies, they could & would be courted, and intrigued with by the Candidates, by their partizans, and by the Ministers of foreign powers.” *Id.* at 110.

65. *Id.* at 112.

66. *Id.*

67. *Id.* at 113. A month later, Charles Pinckney of South Carolina proposed a new provision, now Article I, Section 9, Clause 8 (with only minor revisions from Pinckney's suggestion), also to protect against foreign influence of national officials which the delegates unanimously adopted, apparently without discussion: “No person holding any office of profit or trust under the [United States], shall without the consent of the Legislature, accept of any present, emolument, office, or title of any kind whatever, from any King, Prince or foreign State.” *Id.* at 389. As Edmund Randolph explained at the Virginia ratifying convention: “It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states.” 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 327.

68. *See supra* note 64 and accompanying text.

to be born in England eligible to be President? Those who believe that Congress has power to say who is a “natural born Citizen” eligible to be President under the Naturalization Clause have pointed to no evidence from the time when the Constitution was adopted to support their theory. This is unsurprising. The Article I Naturalization Clause takes away the states’ power to determine who can be a citizen of the United States and gives it to Congress for uniformity’s sake. It does not have anything to do with giving Congress the power to set citizenship eligibility conditions for the Presidency. Only Article II of the Constitution says who can be President; it would be a violation of the Constitution’s separation of powers if Congress could do so by enacting a statute under its Article I powers.

Let us return, then, to the constitutional convention debates about congressional citizenship requirements to see how they illuminate the constitutional rule of presidential citizenship. On August 8, 1787, Mason’s motion to increase citizenship rules for Representatives from three to seven years passed.<sup>69</sup> The next day, there was extensive discussion of a new proposal introduced by Gouverneur Morris to raise the citizenship requirement for Senators from four to fourteen years.<sup>70</sup> An increase seemed called for, given that the citizenship duration for the lower chamber of Congress now stood at seven years.<sup>71</sup> To support his motion, Morris pointed to the “danger of admitting strangers into our public Councils.”<sup>72</sup> Charles Pinckney added that there was “peculiar danger and impropriety” in permitting members with “foreign attachments” into the Senate given its foreign affairs powers.<sup>73</sup> George Mason “highly approved” of Morris’s motion and opined that “[w]ere it not that many not natives of this Country had acquired great merit during the revolution, he should be for restraining the eligibility into the Senate, to natives.”<sup>74</sup> Pierce Butler, Pinckney’s fellow South Carolinian, also favored a long citizenship condition, on the view that “foreigners . . . bring with them, not only attachments to other Countries; but ideas of Govt. so distinct from ours that in every point

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69. See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 213, 216–17.

70. *Id.* at 235.

71. See *id.* at 239 (statement of John Rutledge) (explaining that the Senate citizenship requirement should be longer than the citizenship cut-off for the House of Representatives because the Senate was a more powerful body).

72. *Id.* at 235.

73. *Id.*

74. *Id.*

of view they are dangerous . . . . He mentioned the great strictness observed in Great Britain on this subject.”<sup>75</sup>

Prominent members of the Convention objected to Morris’s proposal. Oliver Ellsworth of Connecticut, future Chief Justice of the U.S. Supreme Court, thought it would “discourag[e] meritorious aliens from emigrating to this Country.”<sup>76</sup> Benjamin Franklin of Pennsylvania was of similar mind, noting that it looked “illiberal” and that “we have many good Friends in Engl. & other parts of Europe” who “ought not to be excluded” from the possibility of high office as an inducement to immigrate.<sup>77</sup>

We found in the Course of the Revolution, that many strangers served us faithfully—and that many natives took part agst. their Country. When foreigners after looking about for some other Country in which they can obtain more happiness, give a preference to ours, it is a proof of attachment which ought to excite our confidence & affection.<sup>78</sup>

Future first U.S. Attorney General Edmund Randolph of Virginia “could never agree” to a proposal “disabling” foreigners for fourteen years from “participat[ion] in the public honours.”<sup>79</sup> He “reminded the Convention of the language held by our patriots during the Revolution, and the principles laid down in all our American Constitutions. Many foreigners may have fixed their fortunes among us under the faith of these invitations.”<sup>80</sup> Future Supreme Court Justice James Wilson, who had emigrated from Scotland to Pennsylvania in his twenties, “rose with feelings,” confessed to “not being a native,” and pointed out that “if the ideas of some gentlemen should be pursued,” he would be “incapacitated from holding a place under the very Constitution which he had shared in the trust of making.”<sup>81</sup>

James Madison also spoke against increasing the constitutional U.S. citizenship requirement for Senators from four to fourteen years. He began by stating he “was not averse to some restrictions on this subject; but could never agree to the proposed amendment.”<sup>82</sup> His next points

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75. *Id.* at 236.

76. *Id.* at 235.

77. *Id.* at 243.

78. *Id.* at 236–37.

79. *Id.* at 237.

80. *Id.*

81. *Id.*

82. *Id.* at 235.

are highly significant to the current debate about the original meaning of the Natural Born Citizen Clause.

[A]ny restriction . . . in the *Constitution* [is] unnecessary and improper. unnecessary; because the Natl. Legislre. is to have the right of regulating naturalization, and can by virtue thereof fix different periods of residence as conditions of enjoying different privileges of Citizenship: Improper: because it will give a tincture of illiberality to the Constitution: because it will put it out of the power of the Natl Legislature even by special acts of naturalization to confer the full rank of Citizens on meritorious strangers . . . .<sup>83</sup>

Madison was clearly proposing that the citizenship requirements for Senators be left to future Congresses under what would become their Article I naturalization powers. This is precisely the view championed by those who favor an interpretation of the Natural Born Citizen Clause as giving Congress discretion to determine presidential eligibility by statutes on the books at the time of birth like Akhil Amar, Paul Clement, Neal Katyal, and Michael Ramsey.<sup>84</sup> The other delegates decisively rejected Madison's suggestion of leaving citizenship conditions for eligibility to office up to Congress in favor of hard-wiring a term-of-years requirement. Morris, for instance, spoke directly against Madison's idea because "[t]here was no knowing what Legislatures would do."<sup>85</sup> Morris's motion to increase the citizenship requirement from four to fourteen years failed by a vote of four states to seven; he then moved for thirteen years which failed by the same vote.<sup>86</sup> Pinckney moved for ten years which also failed four-to-seven.<sup>87</sup> Randolph proposed nine years as a compromise, which was finally accepted by a vote of six-to-four.<sup>88</sup>

The next day, August 10, 1787, James Wilson moved to reconsider the citizenship requirement for the House of Representatives and prevailed by a narrow six-to-five vote.<sup>89</sup> The debates to reconsider took

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83. *Id.* at 235–36. Madison's position here is admittedly somewhat at odds with his position against direct election of the President by Congress for fear of foreign influence.

84. *See* Amar, *supra* note 24 (arguing that Congress has the authority to interpret the presidential eligibility rules under the Constitution); *see also* Ramsey, *supra* note 24, (manuscript at 33–34) (asserting that the Naturalization Clause permits Congress to define who is a "natural born Citizen" eligible to be President because the British Parliament passed statutes defining "natural born subjects").

85. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 238.

86. *See id.* at 238–39.

87. *See id.* at 239.

88. One state's delegates were evenly divided. *See id.*

89. *Id.* at 251.

place three days later on August 13, 1787.<sup>90</sup> Wilson and Randolph from Virginia proposed to decrease it to four years from the seven years Mason had successfully urged.<sup>91</sup> Gerry from Massachusetts was vehemently opposed and asserted that eligibility should be exclusively “confined to Natives”<sup>92</sup>:

Foreign powers will intermeddle in our affairs, and spare no expence to influence them. Persons having foreign attachments will be sent among us & insinuated into our councils, in order to be made instruments for their purposes. Every one knows the vast sums laid out in Europe for secret services—He was not singular in these ideas. A great many of the most influential men in Massts. reasoned in the same manner.<sup>93</sup>

Williamson of North Carolina was of similar sentiment and urged an upward revision “to insert [nine] years instead of seven.”<sup>94</sup>

It was at this point that Alexander Hamilton of New York, himself a juvenile emigrant born in the British Crown possession of Nevis in the West Indies, intervened. While conceding the “possible danger” of foreign influence, he asserted that “the advantage of encouraging foreigners was obvious & admitted”<sup>95</sup>:

Persons in Europe of moderate fortunes will be fond of coming here where they will be on a level with the first Citizens. He moved that the section be so altered as to require merely Citizenship & inhabitancy. The right of determining the rule of naturalization will then leave *a discretion to the Legislature* on this subject which will answer every purpose.<sup>96</sup>

James Madison seconded Hamilton’s motion, which was unsurprising since it was the same idea Madison himself had suggested as to the Senate citizenship requirements four days earlier on August 9, 1787.<sup>97</sup> He continued:

There was a possible danger he admitted that men with foreign predilections might obtain appointments but it was by no means probable that it would in any dangerous degree. For the same

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90. *Id.* at 267.

91. *Id.* at 268. Madison’s notes for August 10 reported that Wilson had moved for a reduction back to the original requirement of three years. *See id.* at 251. The Journal reported the motion and the vote but not the specifics. *See id.* at 247.

92. *Id.* at 268.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* (emphasis added).

97. *Id.*; *see supra* note 83 and accompanying text.

reason that they would be attached to their native Country, our own people wd. prefer natives of this Country to them. Experience proved this to be the case. Instances were rare of a foreigner being elected by the people within any short space after his coming among us—If bribery was to be practised by foreign powers, it would not be attempted among the electors, but among the elected; and among natives having full Confidence of the people not among strangers who would be regarded with a jealous eye.<sup>98</sup>

Wilson withdrew his own separate motion for three years and supported Hamilton's motion for Congress to set citizenship conditions, offering evidence from Pennsylvania.<sup>99</sup> "He remarked that almost all the Genl. officers of [the Pennsylvania militia] were foreigners. And no complaint had ever been made against their fidelity or merit. Three of her deputies to the Convention (Mr. R. Morris, Mr. Fitzsimmons & himself) were also not natives."<sup>100</sup> Pierce Butler of South Carolina, however, remained "strenuous" against "admitting foreigners into our public Councils."<sup>101</sup> His sentiments appeared more in line with the majority view. In fact, Hamilton's motion to leave congressional citizenship requirements to Congress under its Naturalization Clause power failed by a vote of four (Connecticut, Pennsylvania, Maryland, and Virginia) in favor and seven against.<sup>102</sup>

The August 13, 1787, failure of Alexander Hamilton's motion is a highly significant piece of evidence that other commentators on the Natural Born Citizen Clause have neglected. Like Madison on August 9, Hamilton proposed to "leave a discretion to the Legislature" to decide the "rule of naturalization" for Representatives pursuant to Congress's Article I naturalization power.<sup>103</sup> Unlike Madison, Hamilton actually put the proposal to a vote, where it was rejected by a vote of seven-states-to-four.<sup>104</sup> True, it was a discussion of the constitutional citizenship requirements for Congress, not President. But, if early Americans were so concerned about leaving discretion to Congress on citizenship standards for the legislative branch, there would have been an even stronger case for not doing so with respect

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98. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 268–69.

99. *Id.* at 269.

100. *Id.*

101. *Id.*

102. *Id.* Williamson's motion to increase the requirement to nine years and Wilson's renewed motion to decrease it to four years also failed, both by three-to-eight votes.

103. *Id.* at 268.

104. *Id.* at 269.

to the chief executive, who would be commander-in-chief of the armed forces, and whose qualifications and powers were separately set forth in Article II of the Constitution.

After Hamilton’s motion to leave citizenship standards for the Legislative Branch to Congress under its naturalization power was rejected, Gouverneur Morris proposed a “proviso” exempting “any person now a Citizen” from the requirement of seven years of citizenship.<sup>105</sup> John Mercer of Maryland seconded the motion in order to prevent “disfranchisement” of foreigners who had become citizens believing they were to be “level in all respects with natives.”<sup>106</sup> Roger Sherman of Connecticut rejoined that the individual states made such foreigners citizens, not the United States, which “have not invited foreigners nor pledged their faith that they should enjoy equal privileges with native Citizens” and were “therefore . . . at liberty to make any discriminations they may judge requisite.”<sup>107</sup> Madison vehemently disagreed with Sherman’s suggestion that the new United States would owe no obligation undertaken by the states, decrying it as a “subt[lety] by which every national engagement might be evaded,” including public debts and foreign treaties.<sup>108</sup>

The proviso was defeated by a five-to-six vote, for reasons that remain unclear.<sup>109</sup> It may have been because, as Morris pointed out, the carveout was only justified for foreigners who were citizens when the new republic was founded. Consequently, it would have had a brief lifespan and might have seemed unnecessary, since the minimum age to be a Representative was only twenty-five years of age.<sup>110</sup> But, as we shall see, the concept of an exception for foreigners who were already citizens of the states when they adopted the Constitution between 1787 and 1789 would reappear in Article II regarding the Presidency, which has a minimum age of thirty-five years.<sup>111</sup>

Although the Committee of Detail had been tasked to draft qualifications for all three branches, its draft only contained requirements for the legislative.<sup>112</sup> Accordingly, Eldridge Gerry of Massachusetts moved on August 20, 1787, to instruct the Committee “to report proper

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105. *Id.* at 270.

106. *Id.*

107. *Id.*

108. *Id.*

109. *See id.* at 272.

110. *See id.* at 271.

111. *See infra* notes 124–25 and accompanying text.

112. *See* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 177–89.

qualifications for the President.”<sup>113</sup> The Committee presented its first draft of what would become Article II’s presidential eligibility provision on August 22, as part of a list of “additions” to the draft constitution it had delivered on August 6.<sup>114</sup> The draft provision stated: “[H]e shall be of the age of thirty five years, and a Citizen of the United States, and shall have been an Inhabitant thereof for Twenty one years.”<sup>115</sup>

As the Convention deliberated on other more pressing aspects of the draft constitution, the Committee of Detail’s presidential eligibility draft provision was referred on August 31, 1787, to a “Committee of Eleven” (also known as the “Committee on Postponed Matters”)<sup>116</sup> composed of members from each of the states represented at the Convention including James Madison as the member from Virginia.<sup>117</sup> On September 4, this Committee reported the first version of the Natural Born Citizen Clause to the Convention at large:

No Person except a natural born Citizen, or a Citizen of the U. S. at the time of the adoption of this Constitution shall be eligible to the office of President: nor shall any Person be elected to that office, who shall be under the age of 35 years, and who has not been in the whole, at least 14 years a resident within the U. S.<sup>118</sup>

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113. *Id.* at 344. Interestingly, no one moved for eligibility provisions for the judicial branch, despite their mention in the original guidance to the Committee of Detail, and so there are none in Article III.

114. *Id.* at 366–68.

115. *Id.* at 367.

116. *See id.* at 367, 473 (noting that the Convention moved forward without voting on the proposed presidential eligibility provision; therefore, it was postponed by default).

117. *See id.* at 473. This was the third “Committee of Eleven” composed of members representing each attending State. The first Committee had been proposed and appointed on July 2, 1787, to tackle the thorny question of equal representation of the States in the Senate. *See* 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 516. The second Committee of Eleven had been proposed and appointed on August 25 to deal with uniform customs duties and fees. 2 *id.* at 410.

118. *Id.* at 494. The notes of Pierce Butler, South Carolina’s member on the third Committee of Eleven, present a slightly different version, which may have been a working draft in committee:

“No Person shall be eligible to the Office of President who shall not have arrived at the Age of 30 Years; neither shall any person so eligible who shall not be a natural born Citizen of the United States, excepting those who now are or at the time of the Adoption of this Constitution shall be a Citizen of the said States any one of whom may be President, provided that at the time of his Election He shall have been an Inhabitant for fourteen Years.”

SUPPLEMENT TO MAX FARRAND’S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 253 (James H. Hutson ed., 1987).

This provision was approved without objection or discussion on September 7, 1787.<sup>119</sup> It was slightly modified to the present version by a five-person Committee of Style and Arrangement (on which Madison also served) appointed on September 8 that produced the final draft on September 12.<sup>120</sup>

The August 22 first draft of the presidential eligibility provision differed from the September 12 final version of Article II in three important respects. First, the simple requirement of citizenship was replaced by a requirement of being a “*natural born Citizen*, or a Citizen of the United States, at the time of the Adoption of [the] Constitution” (i.e., 1787 to 1789).<sup>121</sup> Second, the qualification of being an “Inhabitant” of the United States was changed to one of being a “Resident within the United States.”<sup>122</sup> Third, the prior requirement of twenty-one years as an “Inhabitant” was reduced to fourteen years as a “Resident.”<sup>123</sup> We shall see below what happened between August 31—the date that the presidential eligibility provision was sent to the Committee on Postponed Matters—and September 4—the date on which the first version of the Natural Born Citizen Clause was introduced for discussion.

The thorough dissection above of the convention debates of July 25 and August 8, 9, 10, and 13, 1787, yields valuable insights about two of these changes and some circumstantial evidence about the third and most important—the incorporation of the “natural born Citizen” requirement. First, the debates of August 9 confirm the commonsense impression that the substitution of “Resident” for “Inhabitant” was intended to mandate a greater level of presence in the United States,

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119. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 536.

120. Again, the final version stated:

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; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

U.S. CONST. art. II, § 1, cl. 5. None of the changes seem substantive—possibly, the final version might be construed as requiring fourteen years of continuous residence as opposed to “in the whole.”

121. Compare U.S. CONST. art. II, § 1, cl. 5 (emphasis added), with 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 367 (August 22 draft presidential eligibility provision).

122. Compare U.S. CONST. art. II, § 1, cl. 5, with 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 367.

123. Compare U.S. CONST. art. II, § 1, cl. 5, with 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 367.

akin to an intent to stay there permanently. Mere presence for fourteen years would not suffice. The longer quantitative requirement of twenty-one years as an “Inhabitant” was exchanged for a deeper qualitative durational threshold of fourteen years as a “Resident.”

Second, the August 13, 1787, debate about Morris’s proviso for foreigners who were currently citizens foreshadows Article II’s provision “grandfathering” any person who was a “Citizen of the United States” at the time of the adoption of the Constitution.<sup>124</sup> Since there was no uniform national citizenship standard under the pre-constitutional Articles of Confederation, the reference must be construed as a requirement that any person who was a citizen of one of the United States was eligible to be President.<sup>125</sup> This alternative criterion for presidential eligibility is now extinct, but its mere existence is highly significant. It is absolute: there is no requirement of citizenship duration, residence, or inhabitation. A person need not have been a citizen of one of the United States at birth; thus, Alexander Hamilton, for instance, would plainly have been eligible. Indeed, a person could have been a citizen for less than a year and still have qualified to be President, including foreigners who had gained citizenship by coming to fight in the Revolutionary War.

Why was it viewed as a sufficient qualification to be President to have been a citizen at the creation of the country? Its rationale seems plain enough. The only plausible explanation is a belief that participation in forming the new political community of the United States as a “Citizen” gave a person the right to run to lead it. Joseph Story reasoned that the one-time exception emerged “out of respect to those distinguished revolutionary patriots who were born in a foreign land, and yet had entitled themselves to high honours in their adopted country. A positive exclusion of them from the office would have been unjust to their merits and painful to their sensibilities.”<sup>126</sup> It is a powerful statement about the privileges and rights of “citizenship” in the new Republic: in their prior lives as “subjects” of the British King, no American could aspire to be the head of state (i.e., the king or queen).<sup>127</sup> This is one key reason why it is dangerous to rely uncritically on usages of “natural born subject” in English common law for insight

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124. U.S. CONST. art II, § 1, cl. 5.

125. See KETTNER, *supra* note 12, at 213–24 (summarizing the states’ varying naturalization requirements under the Articles of Confederation).

126. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1479 (Melville M. Bigelow ed., William S. Hein & Co., 5th ed. 1994) (1891).

127. See COCKBURN, *supra* note 15, at 27–29.

into the meaning of “natural born Citizen” as a constitutional requirement to be the U.S. President. Semantic similarities should not override a fundamental difference in the two political orders.

A third clue gained from scrutinizing the debates of congressional citizenship eligibility was the presence of a broad consensus that the purpose for the requirements was a fear of foreign influence on the new federal government. As Story explained, echoing the concerns voiced by Constitutional Convention delegates regarding the methods of selecting the President and congressional citizenship requirements:

[T]he general propriety of the exclusion of foreigners, in common cases, will scarcely be doubted by any sound statesman. It cuts off all chances for ambitious foreigners, who might otherwise be intriguing for the office; and interposes a barrier against those corrupt interferences of foreign governments in executive elections, which have inflicted the most serious evils upon the elective monarchies of Europe. Germany, Poland, and even the Pontificate of Rome, are sad, but instructive examples of the enduring mischiefs arising from this source.<sup>128</sup>

This concern about foreign influence was balanced against the strong desire to encourage Europeans to emigrate to the United States, particularly men of merit who were hospitable to the new republic’s political ideals.<sup>129</sup> But why, then, did the delegates not simply follow the pattern of the congressional provisions and add a longer term of years, say, fourteen years for the President, as compared to seven years for Representatives and nine years for Senators? Such an option may have seemed impractical because a “citizen of the United States” only came into being upon declaration of independence from Great Britain on July 4, 1776.<sup>130</sup> That was just eleven years before the Convention, and so using any duration longer than the nine years for Senators was problematic. But, as we shall see, there is persuasive evidence that the

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128. See Story, *supra* note 126, § 1479.

129. See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 235 (noting the concern of Convention members that increasing certain residency requirements would discourage immigration).

130. See DAVID RAMSAY, A DISSERTATION ON THE MANNER OF ACQUIRING THE CHARACTER AND PRIVILEGES OF A CITIZEN OF THE UNITED STATES 7 (Charleston 1789) (“This accounts for the use of the word *resident* in that paragraph of the new constitution, which describes the qualifications of the president of the *United States*. The Senators must be *citizens* nine years, and the representatives seven years; but it is not said, that the president must be a citizen for fourteen years. The thing was impossible, for independence was then not quite twelve years declared; therefore the word *resident* was introduced in order to comprehend time before the declaration of independence.”).

Article II phrase “natural born Citizen” was not arrived at by a process of elimination, but rather, affirmatively originated by a letter written by John Jay in late July 1787 to George Washington at the Constitutional Convention.

C. *Jay Letter of July 25, 1787*

At the time of the Convention, John Jay, who had led the negotiations on the Peace Treaty with Great Britain, was the Continental Congress’s Secretary for Foreign Affairs in his native New York.<sup>131</sup> On July 22, 1787, a couple days before the Convention at large in Philadelphia adjourned to entrust the Committee of Detail with the task of coming up with the first draft of the Constitution, Washington wrote a letter for Commodore John Paul Jones of the Continental Navy to carry to France.<sup>132</sup> He mailed the letter to Jay in New York with a cover note for Jay to deliver it to Jones, who was awaiting transport there.<sup>133</sup> Jay wrote a brief, three-sentence note to Washington dated July 25, 1787, to acknowledge receipt of the letter and to explain why Jones had not shipped out right away. The note also offered Washington a “hint.”

Dear Sir

I was this morning honored with your Excellency’s Favor of the 22d Inst: & immediately delivered the Letter it enclosed to Commodore Jones, who being detained by Business, did not go in the french Packet, which sailed Yesterday.

Permit me to hint, whether it would not be wise & seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government, and to declare expressly that the Command in chief of the american army shall not be given to, nor devolved on, any but a natural *born* Citizen.<sup>134</sup>

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131. *Jay, John, (1745–1829)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=J000065> (last visited Nov. 30, 2017).

132. See Letter from George Washington to John Paul Jones (July 22, 1787), in 5 THE PAPERS OF GEORGE WASHINGTON, CONFEDERATION SERIES, 1 FEBRUARY 1787–31 DECEMBER 1787 268 (W. W. Abbot ed., 1997).

133. “Will you permit me to give you the trouble of the inclosed for Commodore Jones—It is at his request I do it—I offer best wish to Mrs Jay and with every sentiments of esteem and regard. I have the honor to be Dr Sir Yr very Affe. Serva[n]t G. Washington.” *Id.* at 268 n.2 (alteration in original).

134. Letter from John Jay to George Washington (July 25, 1787), in 5 THE PAPERS OF GEORGE WASHINGTON, CONFEDERATION SERIES, 1 FEBRUARY 1787–31 DECEMBER 1787, *supra* note 132, at 271–72.

Washington did not write back for several weeks. When he did reply, he wrote an equally brief note to Jay from Philadelphia dated September 2, 1787, which thanked him for the “hints contained in your letter.”<sup>135</sup>

Dear Sir,

I avail myself of the polite assurance of your last, to trouble you with the enclosed. If the Commodore should have left New York, you would oblige me by forwarding it.

....

I thank you for the hints contained in your letter, and with best wishes for Mrs Jay, and great affection for yourself I am—Dear Sir Yr Most Obedt Servt.<sup>136</sup>

The September 2, 1787, date of Washington’s reply to Jay supports a strong inference that Washington had passed Jay’s “hint” to others at the Convention.<sup>137</sup> Washington was unanimously voted President of the Convention at its start and said very little during it<sup>138</sup>—surely, anything he suggested would have had an effect. And, as noted above, the Committee of Detail’s draft presented to the Convention on August 22, 1787, had not included the phrase “natural born Citizen.” The draft constitution had been referred to the third Committee of Eleven on August 31, 1787, on which Madison served as the Virginia representative.<sup>139</sup> Madison was close to Washington, a fellow Virginian, and had been instrumental in persuading Washington to attend the Convention.<sup>140</sup> The Committee reported its version of the presidential eligibility provision with “natural born Citizen” to the Convention at large on September 4, 1787, exactly two days after the date of Washington’s reply to Jay.<sup>141</sup>

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135. Letter from George Washington to John Jay (Sept. 2, 1787), in 5 THE PAPERS OF GEORGE WASHINGTON, CONFEDERATION SERIES, 1 FEBRUARY 1787–31 DECEMBER 1787, *supra* note 132, at 208.

136. *Id.* at 207–08.

137. It is also possible that Jay wrote to others at the Convention, although I was unable to find any other relevant letters in Jay’s papers.

138. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 3.

139. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 473.

140. See William P. Kladky, *Constitutional Convention*, GEORGE WASHINGTON’S MOUNT VERNON, <http://www.mountvernon.org/digital-encyclopedia/article/constitutional-convention> (last visited Nov. 30, 2017) (explaining that Washington was worried that his attendance would be perceived as a power play, but that Madison and General Henry Knox persuaded him to attend the Convention).

141. See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 493–94 (reporting the presentation of the draft, including the Natural Born Citizen Clause).

Given these striking coincidences of timing, scholars have coalesced around the view that Jay's letter was the smoking-gun source of the use of "natural born Citizen" in Article II. What was Jay's reason for writing the letter to Washington, presumptively shared by the Constitution's framers, ratifiers, and the public at large? The conventional view touts the concern about foreign influence in domestic American politics that had fueled the Convention debates about congressional citizenship requirements: the fear that a European pretender would become President and import monarchy as the political order of the new United States. As Akhil Amar tartly put it, "Foreign-born princes might be good enough to rule in the Old World but should be kept out of the New World order—or at least the New World presidency."<sup>142</sup> The Congressional Research Service summarized the standard thinking this way in 2011:

The apparent purposes . . . were thus to assure the requisite fealty and allegiance to the nation from the person to be the chief executive of the United States, and to prevent wealthy foreign citizens, and particularly wealthy foreign royalty and their relatives, from coming to the United States, becoming naturalized citizens, and then scheming and buying their way into the Presidency or creating an American monarchy.<sup>143</sup>

Scholars have surmised that Prince Frederick Augustus of Great Britain, the second son of George III and Duke of York and Albany, and Prince Henry of Prussia, one of the younger sons of King Frederick William I of Prussia, may have been the "foreign born princes" that people had in mind.<sup>144</sup> Charles Thach fingered a third suspect, asserting "there can be little doubt" it was Baron Friedrich Wilhelm von Steuben "whom Jay had in mind when he penned these words," given von Steuben's "sympathies" for Shays' Rebellion and "suspected dealings with Prince Henry."<sup>145</sup>

But the conventional view of protecting against an "Old World" European "creating an American monarchy," as asserted by the

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142. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 165 (2005).

143. MASKELL, *supra* note 3, at 8.

144. *Id.* at 7.

145. THACH, *supra* note 3, at 137. Despite Thach's surmise about Jay's intent, von Steuben in fact was likely eligible, as he appears to have been granted citizenship in at least two states (New Jersey and New York) and possibly a third (Pennsylvania) before the adoption of the Constitution. See *infra* note 350 and accompanying text. Thus, even if he was not a "natural born Citizen," he would be eligible for President by virtue of having been a citizen when the Constitution was adopted. See U.S. CONST. art. II, § 1, cl. 5.

Congressional Research Service report and Amar, is only half the story. Nor are the usual suspects credible. True, Jay’s letter advised “a strong check to the admission of Foreigners into the administration of our national Government.”<sup>146</sup> Jay’s words mirrored Mason’s remarks against letting “foreigners and adventurers make laws for us & govern us” that resulted in the enhanced seven- and nine-year citizenship requirements for Congress.<sup>147</sup> But, either the original draft’s twenty-one-year “Inhabitant” requirement or the adopted fourteen-year “Resident” requirement would have addressed this issue of European princes with no connection to the United States becoming President. Why, then, the additional felt need for a “natural born Citizen”?

The answer begins with the observation that Jay’s hint specifically addressed the President’s role as military commander, not as head of state or chief executive of the domestic political order. To wit, he advised that the Constitution ought “to declare expressly that the Command in chief of the american army shall not be given to, nor devolved on, any but a natural *born* Citizen.”<sup>148</sup> But why was it so important to him that the army not fall into the hands of someone who was not a natural born citizen? Whom did Jay have in mind?

I believe that Jay was thinking not about Prince Frederick William, Prince Henry, or Baron von Steuben, but rather about the Marquis de Lafayette. Jay wrote to Washington on July 25, 1787, to tell him he had passed on Washington’s letter for John Paul Jones to take to France. If Jay did not know for sure, then he must have guessed that the likely recipient of this letter was Lafayette, Washington’s beloved former aide-de-camp. Two letters that Washington wrote Lafayette during the Constitutional Convention survive: one dated June 6, 1787,<sup>149</sup> and the other dated August 15, 1787.<sup>150</sup> Washington also wrote one letter to

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146. Letter from John Jay to George Washington, *supra* note 134, at 271–72.

147. See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 216 (arguing that three years of citizenship was not enough to ensure knowledge of local customs and problems).

148. Letter from John Jay to George Washington, *supra* note 134, at 271–72.

149. See 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 29, at 34.

150. *Id.* at 69.

Altho’ the business of the Fœderal Convention is not yet clos’d, nor I, thereby, enabled to give you an account of its proceedings; yet, the opportunity afforded by Commodore Paul Jones’ Return to France is too favourable for me to omit informing you, that the present expectation of the members is, that it will end about the first of next month; when, or as soon after as it shall be in my power, I will communicate the result of our long deliberation to you.

Thomas Jefferson, the American Minister to France dated May 30, 1787, early in the Convention.<sup>151</sup> Even if Jay saw Jefferson as a possible recipient of Washington's letter, he would likely have thought of Lafayette anyway; Jefferson was widely known to have become close to Lafayette, whose republican ambitions for France he heartily supported.<sup>152</sup>

Like the two foreign princes and the baron, Lafayette had military experience.<sup>153</sup> But, unlike the princes, Lafayette was wildly popular among the American people and their senior leaders, most notably George Washington himself.<sup>154</sup> The Frenchman had named his son George Washington.<sup>155</sup> Lafayette had heroically led actual elements of the "American army" in battle and was personally instrumental in the critical American victory at Yorktown.<sup>156</sup> Jay himself, of French-Huguenot descent, was fond of Lafayette;<sup>157</sup> leading Americans like Jefferson feared for the Frenchman's safety given his leadership in the pro-democracy movement in France.<sup>158</sup> Indeed, Jay expressed relief that some American states had granted Lafayette land in case he were exiled for his political agitation.<sup>159</sup> In sum, Lafayette was a person who

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*Id.* Farrand reports the date of this letter as August 15, 1787, but its reference to "Jones' Return to France" suggests that it may have been the original letter Washington had sent to Jay on July 22, 1787, which triggered Jay's momentous reply note.

151. *Id.* at 31. "The business of this convention is as yet too much in embryo to form any opinion of the conclusion." *Id.*

152. See Thomas Jefferson: *A Revolutionary World*, LIBR. CONGRESS, <https://www.loc.gov/exhibits/jefferson/jeffworld.html> (last visited Nov. 30, 2017) (explaining that Jefferson became a galvanizing figure for the French Revolution and let Lafayette-led rebels use his French home as a meeting point).

153. See Lloyd S. Kramer, *America's Lafayette and Lafayette's America: A European and the American Revolution*, 38 WM. & MARY Q. 228, 229 (1981) (noting that Lafayette's "presence in the Continental army lent an aura of legitimacy and of European support to the American struggle").

154. See *id.* at 229 (asserting that Washington's acceptance, praise, and support of Lafayette contributed to his unprecedented popularity among Americans).

155. JAMES R. GAINES, FOR LIBERTY AND GLORY: WASHINGTON, LAFAYETTE, AND THEIR REVOLUTIONS 8 (2007).

156. Kramer, *supra* note 153, at 240 ("Lafayette had closed off Cornwallis's escape from Yorktown, thereby assuring the military victory that achieved the war's most important political goal.").

157. See WALTER STAHR, JOHN JAY: FOUNDING FATHER 176 (2005) ("Jay disliked the French government, but he liked many individual Frenchmen, notably the Marquis de Lafayette.").

158. See GAINES, *supra* note 155, at 214, 224, 339 (noting that Jefferson's fear for Lafayette's safety later proved to be justified since Lafayette was imprisoned for his role in the French Revolution).

159. See *id.* at 214 (highlighting Jefferson's desire for the states to make an honorary gift of land to Lafayette because "the day might be coming 'when it might serve as an

might actually be elected President of the United States, and thus its military chieftain, without the need for foreign intrigue or bribes.

I do not mean to suggest that Jay was proposing a constitutional bar to presidential eligibility specifically to block Lafayette. Rather, I believe that what Jay feared was the possibility of the election to the U.S. Presidency of someone like Lafayette with strong sympathies with the republican cause in Europe who would then seek to deploy American armies in aid of revolutionary war there. The concern was certainly not far-fetched. After the French Revolution the following year, there was great support for coming to revolutionary France's military assistance.<sup>160</sup> Some, like Secretary of State Thomas Jefferson, believed that the United States was legally obligated to assist revolutionary France because of the U.S.-French alliance treaty.<sup>161</sup> In other words, there were two fundamental, inter-related concerns animating the Natural Born Citizen Clause: not only preventing European intervention in American domestic politics, but also preventing American military intervention in European domestic politics. Limiting the Presidency to persons with “natural born” loyalty exclusively to the United States was a way to mitigate conflicting loyalties that might entangle the new nation in European wars.

D. *James Madison and the 1789 Citizenship Controversy  
in the First Congress*

One other key piece of evidence involving James Madison (Jay's co-author of *The Federalist*) regarding the original meaning of the Natural Born Citizen Clause comes from Madison's speech in the First Congress defending the House of Representative's decision in an early challenge to the citizenship of one of its members. On April 29, 1789, in the inaugural session of Congress, a specially empaneled House Committee on Elections, rendered a decision in *Ramsay v. Smith* after

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useful asylum for him” and the United States may become “a safe residence for him” (quoting Thomas Jefferson)).

160. See Office of the Historian, *The United States and the French Revolution, 1789–1799*, U.S. DEP'T ST., <https://history.state.gov/milestones/1784-1800/french-rev> (last visited Nov. 30, 2017) (contrasting the pro-French republican group in Washington's Cabinet led by Secretary of State Thomas Jefferson with the pro-neutrality supporters led by Treasury Secretary Alexander Hamilton).

161. See Thomas Jefferson, Opinion on the Treaties with Franch, in 25 THE PAPERS OF THOMAS JEFFERSON, 1 JANUARY–10 MAY 1793 608–19 (John Catanzariti ed., 1992).

reviewing evidence and hearing witnesses.<sup>162</sup> The case involved a challenge to the election of William Loughton Smith to the House as a Representative from South Carolina.<sup>163</sup> The challenger was David Ramsay, a South Carolina physician, delegate to the Continental Congress and state legislature, and a historian of repute who authored a short “dissertation” about citizenship.<sup>164</sup> Ramsay asserted that Smith was not a citizen of the United States for seven years, as required by Article I.<sup>165</sup>

The facts supported Ramsay’s claim. Smith was born in 1758 in Charleston, South Carolina, then a British colony.<sup>166</sup> His family, a respected clan of planters with deep roots in the colony, sent him to schools in England from 1770 to 1774.<sup>167</sup> He subsequently studied law at the Middle Temple in London in 1774 and also studied in Geneva from 1774 to 1778.<sup>168</sup> He was a seventeen-year-old student in Geneva when the United States declared independence in 1776.<sup>169</sup> Smith did not return to South Carolina until after the war in November 1783 at the age of twenty-four, whereupon he began a law practice and entered local politics.<sup>170</sup> He was elected to Congress as a Federalist and began his two-year term in the House of Representatives on March 4, 1789.<sup>171</sup> At the time of his election, Smith had been a citizen of South Carolina and then of the United States for between five and six years.<sup>172</sup> But, he had not been a citizen for the requisite seven years, unless he had somehow been a “citizen of the United States” for at least one of the seven years he had been abroad from 1776, when the United States declared its independence, to 1783, when he returned to South Carolina.<sup>173</sup> Because Smith’s parents had apparently been Loyalists, they had presumptively been loyal British subjects during that time—

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162. *Ramsay v. Smith* (1789), *reprinted in* CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM THE YEAR 1789 TO 1834, INCLUSIVE 23 (M. St. Clair Clarke & David A. Hall eds., 1834).

163. *Id.* at 23.

164. *See generally* RAMSAY, *supra* note 130.

165. *Ramsay v. Smith*, *reprinted in* CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM THE YEAR 1789 TO 1834, INCLUSIVE, *supra* note 162, at 23.

166. *Id.* at 31.

167. *Id.* at 24, 26, 33.

168. *Id.* at 26.

169. *Id.* at 26, 31.

170. *Id.* at 28.

171. *Id.* at 23.

172. *Id.* at 28.

173. *Id.* at 23, 32–33.

an allegiance that could plausibly be imputed to their minor children.<sup>174</sup> It was by no means easy to make the case that Smith had in fact been a citizen of the United States for his time abroad as a minor during the war.

Nevertheless, the Committee on Elections and the full House confirmed Smith’s election, a result that Madison defended in remarks delivered a month later in May 1789.<sup>175</sup> A fragment of that speech has been plucked out and featured as evidence in chief for the view that “natural born Citizen” in Article II means someone born in the United States.<sup>176</sup> But an appreciation of the context of Madison’s remarks and Smith’s facts reveals the conclusion to be fundamentally mistaken.

Madison began by asserting “that Mr. Smith, was on the declaration of independence, a citizen of the United States; and unless it appears that he has forfeited his right by some neglect or overt act, he had continued a citizen until the day of his election to a seat in this House.”<sup>177</sup> He observed that the question of Smith’s citizenship was a matter of “the laws and constitution of South Carolina, so far as they can guide us; and where the laws do not expressly guide us, we must be guided by principles of a general nature.”<sup>178</sup> What were these general principles?

It is an established maxim that birth is a criterion of allegiance. Birth, however, derives its force sometimes from place, and sometimes from parentage; but, in general, place is the most certain criterion; it is what applies in the United States; it will therefore be unnecessary to investigate any other. Mr. Smith founds his claim upon his birthright; his ancestors were among the first settlers of that colony.<sup>179</sup>

Madison asserted that Ramsay “erred” in supposing that when America declared independence from Great Britain, a “tie of allegiance” continued between Americans and the King.<sup>180</sup>

Madison’s reasoning to support his position is a fascinating discourse on his, and presumably other early Americans’, views on citizenship, political theory, and social contract theory. He began by

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174. *Id.* at 31.

175. *See id.* at 33.

176. *See, e.g.,* McManamon, *supra* note 7, at 330 (noting that Madison is a reliable source of interpreting the Constitution since he helped draft the document and construing his May 1789 speech as support for the *jus soli* interpretation of the Natural Born Citizen Clause).

177. Ramsay v. Smith, *reprinted in* CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM THE YEAR 1789 TO 1834, INCLUSIVE, *supra* note 162, at 32.

178. *Id.*

179. *Id.* at 33.

180. *Id.*

distinguishing the “primary allegiance” persons owe to a “particular society of which we are members” and “the secondary allegiance we owe to the sovereign established by that society.”<sup>181</sup> Thus, a South Carolina citizen, before independence, owed a *secondary* allegiance to the British King as a member of South Carolina society to which he owed a *primary* allegiance. When South Carolina and the King separated in 1776, the secondary allegiance was broken, but the primary allegiance between the citizen and South Carolina remained. If that primary allegiance—“the original compact, which made them altogether one society”—had “dissolved,” then every former member “must individually revert into a state of nature.”<sup>182</sup> Madison did not believe a reversion to the state of nature had occurred; rather, the enduring society of South Carolina upon independence “substitute[ed] a new form of Government in the place of the old one.”<sup>183</sup> Using this reasoning, Madison explained why Smith’s continuing status as a citizen of South Carolina was relevant:

Mr. Smith being, then, at the declaration of independence, a minor, but being a member of that particular society, he became, in my opinion, bound by the decision of the society, with respect to the question of independence and change of Government; and if afterwards he had taken part with the enemies of his country, he would have been guilty of treason against that Government to which he owed allegiance, and would have been liable to be prosecuted as a traitor.<sup>184</sup>

Madison acknowledged that this would mean that all South Carolina “natives of America,” whether children or adults or within the state or abroad, automatically became members of the independent South Carolina.<sup>185</sup> Those who then made a choice to “take part with Britain,” who were “of mature age,” and “had the power of making an option between the contending parties” (like Smith’s parents) would thus be guilty of “high treason” against South Carolina.<sup>186</sup> But a minor, like Smith made no such choice; in other words, his “primary” allegiance to South Carolina continued and he made no affirmative choice to abandon it. Accordingly, Madison concluded that:

So far as we can judge by the laws of Carolina, and the practice and decision of that State, the principles I have adduced are

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181. *Id.*

182. *Id.* at 34.

183. *Id.*

184. *Id.*

185. *Id.* at 34–35.

186. *Id.*

supported; and I must own that I feel myself at liberty to decide that Mr. Smith was a citizen at the declaration of independence, a citizen at the time of his election, and, consequently, entitled to a seat in this Legislature.<sup>187</sup>

Of course, Madison’s argument importantly presumed that Smith, by not returning to the United States or acting to advance the United States’ interests abroad, did not affirmatively choose the British cause between 1777 and 1783 when he was no longer a minor. But Ramsay did not make this point and presented no evidence in the record to suggest otherwise.

Thus, the full context of Madison’s May 1789 remarks reveals how little they had to do with birthright citizenship, whether by place of birth or parentage. That should be obvious from the start because, unlike the Presidency, there is no constitutional requirement for the kind of citizenship a member of Congress must possess, only the condition of seven years of it.<sup>188</sup> Accordingly, the crux of the matter was the citizenship status of individuals who had obtained citizenship through birth or parentage and were minors at the time of the American declaration of independence. With respect to the nature of birthright citizenship, Madison’s observations, as noted, were cursory and secondary: it comes “*sometimes from place, and sometimes from parentage.*”<sup>189</sup> Place was logically the “most certain criterion,” since there is no need to reconstruct a person’s genealogy, and, according to Madison, “what applies in the United States.”<sup>190</sup> This made it unnecessary to query Smith’s birthright, since he was born in South Carolina. Madison added, however, in a remark that would be superfluous if *jus sanguinis* were entirely irrelevant, that “Mr. Smith founds his claim upon his birthright; his ancestors were among the first settlers of that colony.”<sup>191</sup> This last point suggests that Madison might have concluded that, given his parentage, Smith was an American citizen even if he had been born outside the United States. And recall that Madison qualified that place of birth was the criterion “in general,” implying that it was not dispositive in all places. It is beyond doubt, however, that since Smith was born in South Carolina,

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187. *Id.* at 35.

188. U.S. CONST. art. II, § 2, cl. 2 (“No Person shall be a Representative who shall not have . . . been seven Years a Citizen of the United States . . .”).

189. See *Ramsay v. Smith*, reprinted in CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM THE YEAR 1789 TO 1834, INCLUSIVE, *supra* note 162, at 33 (emphasis added).

190. *Id.*

191. *Id.*

Madison's remarks simply cannot be construed to rule out the possibility of American citizenship to children born to Americans extraterritorially at or after the time of Declaration of Independence, a factual context that was not present in the case.

In summary, Madison's May 1789 comments in the *Smith* controversy do not illuminate the Natural Born Citizen Clause in the way that some other commentators have presumed as precluding anything but *jus soli* as a natural birthright principle of citizenship in the United States, or as a full-throated adoption of British imperial precedent.<sup>192</sup> To the contrary, Madison's thinking illuminated the contractual nature of the American conception of natural citizenship—volitional, except for minors—and how it differed from British natural born subjectship. If anything, then, Madison's speech shows the fallacy of relying blindly on the English-British example for interpretive insight into the Natural Born Citizen Clause. That is not to say that the prior history of “natural born subjects” in England was unimportant. Rather, it must be examined and interpreted carefully, which I endeavor to do in Part II.

## II. ENGLISH COMMON LAW AND NATURAL BORN SUBJECTS

The foregoing discussion in Part I featured American founding evidence directly relevant to the original meaning of “natural born Citizen” as a condition of presidential eligibility in Article II of the Constitution. It is plain that the answer to this narrow interpretive question is linked to general conceptions of natural born subjectship in England and Great Britain, and natural born citizenship in Europe and the early United States.<sup>193</sup> Commentators have focused most on the English example, given the importance of English common law as a jurisprudential source of the U.S. Constitution.<sup>194</sup> Some of these Anglo-centric commentators have concluded that *jus soli* was the sole rule under English common law, implicitly denying the importance of

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192. See McManamon, *supra* note 7, at 330 (arguing that Madison's assertion that “place is the most certain criterion” of allegiance should be taken as a reliable interpretation of the Constitution (quoting *Ramsay v. Smith*, reprinted in *CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM THE YEAR 1789 TO 1834, INCLUSIVE*, *supra* note 162, at 33)).

193. See *id.* at 330 (explaining that no substantive distinction exists between “natural born subject” and “natural born Citizen” and that the shift from the use of “subject” to “citizen” is a result of the change from English common law to the new United States government).

194. See *id.* at 320 (noting that the U.S. Constitution derives important jurisprudential phrases from English common law such as “ex post facto,” “writ of habeas corpus,” “bill of attainder,” and “natural born Citizen”).

*jus sanguinis* with respect to the special case of children of English subjects born abroad.<sup>195</sup> This denial of the role of *jus sanguinis* in English common law, in my view, is fundamentally mistaken.

By the late eighteenth century, the common law of England recognized both *jus soli* and *jus sanguinis* as principles of natural birthright citizenship.<sup>196</sup> It was true, as Chief Justice Alexander Cockburn of Queen’s Bench observed in 1869, that the ancient common law had recognized *jus soli* only:

This rule, when originally established, was not unsuited to the isolated position of this island, and the absence of intercourse with foreign nations in Saxon times. No children of English parents being born abroad, or children of foreign parents being born within the realm, the simple rule that to be born within the dominions of the Crown constituted an Englishman answered every purpose. But when the foreign possessions of our kings and the increase of commerce had led to greater intercourse with the Continent, and children of English parents were sometimes born abroad, the inconvenience of the rule which made the place of birth the sole criterion of nationality soon became felt.<sup>197</sup>

For the reasons Cockburn noted, starting in 1350, Parliament enacted statutes applying *jus sanguinis* to children born to English subjects abroad.<sup>198</sup>

Proponents of the idea that *jus soli* alone was the rule at English common law point to such statutes as evidence that *jus sanguinis* was not “common law” but required Parliamentary action for activation.<sup>199</sup> As a jurisprudential matter, this viewpoint unduly simplifies the English understanding of lawmaking and the interaction between

195. See *id.* at 321 n.27, 327–28 (acknowledging that *jus sanguinis* had only a limited effect since it only applied to one generation of children); see also Pryor, *supra* note 25, at 886 (observing that although *jus sanguinis* existed, *jus soli* was the “guiding principle of nationality law in England”).

196. See McManamon, *supra* note 7, at 321 & n.25, 327 (finding that during the eighteenth century, *jus soli* standards were relaxed through the adoption of new statutes, and England began recognizing citizenship through *jus sanguinis* principles).

197. COCKBURN, *supra* note 15, at 7 (detailing that Cockburn was himself the son of an English envoy extraordinary and minister plenipotentiary to the German Kingdom of Wurttemberg, and so had a personal interest in the issue of a foreign-born subject’s eligibility for high government office).

198. See A Statute for Those Who Are Born in Parts Beyond Sea 1350, 25 Edw. 3 stat. 1 (Eng.).

199. See McManamon, *supra* note 7, at 323 n.43, 324 n.44 (denouncing the belief that the passing of A Statute For Those Who Are Born In Parts Beyond Sea 1350 proves that *jus sanguinis* was common law by pointing out that the statute’s language itself says it will apply to children born “henceforth” and if the statute was actually common law, there would have been no need for subsequent legislation that clarified the statute’s meaning).

statutes and the “common law” tradition.<sup>200</sup> Sometimes Parliament’s statutes were seen as breaking from that tradition; at other times, they were declaratory of it.<sup>201</sup> Indeed, “some lawyers genuinely regarded the acts of the medieval high court of parliament as the decisions of a supreme court of law.”<sup>202</sup>

How, then, can we distinguish between statutes that were constitutive of the common law and those that were not? The answer lies in the vintage and continuity of rules declared in statutes and their subsequent validation by courts and treatise writers. With specific respect to English and later British “natural born” subject status, *jus sanguinis* as applied to the children born abroad of the Crown’s officials such as ambassadors, courtiers, or soldiers had been memorialized in statutes since 1350 and had clearly congealed into custom by the late eighteenth century.<sup>203</sup> The same inaugural 1350 statute adopted *jus sanguinis* for the children of *private* subjects abroad such as merchants, which had also become part of the common law.<sup>204</sup> But, during the eighteenth century, Parliament passed new statutes deeming foreign-born persons to be natural born subjects on the basis of a paternal grandfather who was an Englishman,<sup>205</sup> belief in the

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200. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 169–70 (2d ed. 1979) (arguing that a static view of common law is not supported by “historical fact” since “few legislative acts . . . could be regarded as radical departures from the common law tradition” and that although Parliament makes new law, they “do so within the framework of common law”).

201. See *id.* at 181–82 (explaining that judges had discretion to interpret common law into Parliament’s statutes or could firmly reject Parliament’s statutes if they were seen as “unreasonable”).

202. *Id.* at 170.

203. See, e.g., An Act to Naturalize the Children of such Officers and Souldiers & Others The Natural Borne Subjects of this Realme Who Have Been Borne Abroad During The Warr the Parents of such Children haveing Been in the Service of this Government 1698, 9 Will. 3 c. 20 (Eng.); An Act for the Naturalizing of Children of his Majestyes English Subjects Borne in Forreigne Countryes Dureing the Late Troubles 1677, 29 Car. 2 c. 6 (Eng.) (extending *jus sanguinis* principles to foreign-born children of royalist retainers); A Statute for Those Who Are Born in Parts Beyond Sea 1350, 25 Edw. 3 stat. 1 (Eng.) (declaring that certain children who were born abroad would have the same inheritance rights as children born “within the same Ligeance”).

204. See A Statute for Those Who Are Born in Parts Beyond Sea 1350, 25 Edw. 3 stat. 1 (Eng.) (“And that all Children Inheritors, which from henceforth shall be born without the Ligeance of the King, whose Fathers and Mothers at the Time of their Birth be and shall be at the Faith and Ligeance of the King of England, shall have and enjoy the same Benefits and Advantages . . .”).

205. See The British Nationality Act 1772, 13 Geo. 3, c. 21 (Eng.).

Protestant religion,<sup>206</sup> or service on British warships or merchantmen, or whaleboats.<sup>207</sup> These newer more experimental statutes had not become part of the common law; indeed, one such *nouveau* statute was hastily repealed.<sup>208</sup>

Where, then, did the notion that English common law was limited solely to *jus soli* four centuries after the first *jus sanguinis* statute was enacted in 1350 come from? The conventional (and mistaken) perception is that it originated in the iconic 1608 decision in *Calvin's Case*.<sup>209</sup> The case involved the property, inheritance, and litigation rights in England of persons born in Scotland after King James VI of Scotland acceded to the English throne as James I in 1603.<sup>210</sup> The issue was deemed important enough that all fourteen judges of the three common law courts—Court of Common Pleas, King's Bench, and the Court of the Exchequer—were mustered to hear it.<sup>211</sup> The most famous of the judges was Sir Edward Coke, who was Chief Justice of Common Pleas at the time.<sup>212</sup>

The central holding in *Calvin's Case* was that a subject owed allegiance to the King who is sovereign of the land into which the subject was born.<sup>213</sup> Accordingly, a person born in Scotland *after* James acceded to the English throne was also a natural born subject under English law. Such a person, a *postnatus* (“born after”) like Calvin,<sup>214</sup> could consequently own property in England, inherit property, and

206. See The Foreign Protestants Naturalization Act 1708, 7 Ann., c. 5 (Eng.), repealed by An Act To Repeal the Act of the Seventh Year of Her Majesties Reign Intituled An Act for Naturalizing Foreign Protestants 1711, 10 Ann., c. 9 (Eng.).

207. See An Act for the Further Encouragement and Enlargement of the Whale Fishery, and for Continuing such Laws as are therein Mentioned Relating Thereto; and for the Naturalization of Such Foreign Protestants, as Shall Serve for the Time Therein Mentioned, on Board Such Ships as Shall be Fitted out for the Said Fishery 1749, 22 Geo. 2, c. 45. (Eng.).

208. See 10 Ann., c. 9 (Eng.) (repealing 7 Ann., c. 5 (Eng.)).

209. See *Calvin v. Smith* (*Calvin's Case*), 77 Eng. Rep. 377 (K.B. 1608).

210. *Id.* at 379.

211. See Price, *supra* note 19, at 82.

212. See *id.* at 74, 83 (calling Coke's analysis of the case “the most influential” and “one of the most important English common-law decisions adopted by courts in the early history of the United States”).

213. See *Calvin's Case*, 77 Eng. Rep. at 409 (“[A]ll those that were born under one natural obedience while the realms were united under one sovereign, should remain natural born subjects, and no aliens; for that naturalization due and vested by birthright, cannot by any separation of the Crowns afterward be taken away: nor he that was by judgment of law a natural subject at the time of his birth . . .”).

214. Calvin's real surname was Colville. See Price, *supra* note 19, at 81.

sue or be sued in the English courts. By the same token, the judges proclaimed that someone who was born in Scotland *before* James became king of England, an *antenatus* (“born before”), could not own property, inherit it, and sue or be sued in the English courts.<sup>215</sup> In Coke’s own words, a rule of allegiance by place of birth was not only a “part of the law of England,” but it was also “*jura natura*” (natural laws), the “law of Nature,” and the “eternal law of the Creator.”<sup>216</sup> Thus, the question whether *jus sanguinis*, the other great principle of birthright *jura natura*, operated with respect to children born to Englishmen outside of England did not come up at all in *Calvin’s Case*.<sup>217</sup>

Nonetheless, what has led scholars to conclude that *jus sanguinis* is not a part of the common law, even as to the foreign-born children of English subjects, was the enactment of statutes to confirm the “natural born subject” status of children born outside the realm, beginning with the aforementioned statutes passed in 1350.<sup>218</sup> If *jus sanguinis* was also part of the common law of England and would have been recognized by the common law courts, then why were the statutes necessary? In part, as noted above, they were necessary because the common law judges did not rule on *jus sanguinis* in *Calvin’s Case* or any other case of the era. Indeed, *Calvin’s Case* was litigated in the courts in the first place because Parliament had refused to enact a statute giving the *postnati* (and the *antenati*) rights to hold property in England and to sue and be sued in English courts.<sup>219</sup> Ironically, if Parliament had enacted such a statute, *Calvin’s Case* would never have been decided, and *jus soli* and *jus sanguinis* would have stood on the same footing in England, both having been implemented by statutes. Modern commentators would then have easily understood that both natural law principles were equally the common law of England.

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215. *Calvin’s Case*, 77 Eng. Rep. at 391–92.

216. *Id.*; see Price, *supra* note 19, at 74 (emphasizing that the “law of nature” and thus “the eternal law of the Creator” required the *Calvin’s Case* judges to hold that place of birth determined one’s status).

217. Colville’s father, an early supporter of James VI, was a Scotsman, not an Englishman.

218. See A Statute for Those Who Are Born in Parts Beyond Sea 1350, 25 Edw. 3 stat. 1 (Eng.); see also McManamon, *supra* note 7, at 321 n.27, 327–28 (acknowledging that *jus sanguinis* had a limited effect since it only applied to one generation of children); Pryor, *supra* note 25, at 886 (finding that although *jus sanguinis* existed, *jus soli* was the “guiding principle of nationality law in England”).

219. See Price, *supra* note 19, at 85 (noting that the underlying legal question of *Calvin’s Case* concerned “an unsettled theory of sovereignty under which the question of who is a subject and who is an alien had to be reconciled”).

Instead, Parliament continued, in the absence of an iconic decision like *Calvin's Case* to that effect, to enact *jus sanguinis* statutes to ensure that courts would recognize the subject status of English children born abroad in lawsuits that came before them.<sup>220</sup> The statutes were, accordingly, not creative of a new category of birthright subject status. Rather, they were confirmative, but passed on the suspicion that the common law courts would be unduly favorable to *jus soli* and hostile to foreign-born descendants in cases before them.<sup>221</sup> This fear was exacerbated after Henry VIII's split from Rome and establishment of the Church of England, and resultant paranoia of foreign Catholic intrigues.<sup>222</sup> For this reason, starting in the mid-sixteenth century, some Protestant English subjects sought and obtained private bills of naturalization for their foreign-born children because they were doubtful that the courts would honor natural law and the general statutes.<sup>223</sup>

#### A. *Natural Born Subject Statutes*

What were the defining characteristics of these English statutes extending subject status to persons who could not benefit from *jus soli* by virtue of having been born in England? To start with, there were a great number of them: I have found nearly a hundred statutes referencing “natural born subjects,” most of them passed in the seventeenth and eighteenth centuries. Not all the “natural born subject” laws implemented *jus sanguinis*, as we shall see. The basic structure of the statutes of greatest interest for present purposes was to “esteem,” “deem,” “adjudge,” “take,” or “hold” certain persons or

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220. See *id.* at 77–78 (“[E]ven before *Calvin's Case*, various acts and proclamations provided that a child born out of the territory of England could also be a natural-born subject . . . . In the history of both Britain and the United States, the *jus sanguinis* has always been established by statute, never by judge-made law.”).

221. See John W. Salmond, *Citizenship and Allegiance: Nationality in English Law*, 18 LAW Q. REV. 49, 53 (1902) (discussing the shift in emphasis from *jus sanguinis* to *jus soli* in feudal English law).

222. See J.J. SCARISBRICK, HENRY VIII 392 (Yale Univ. Press 1997) (1969) (describing Henry VIII's efforts to eradicate the papist influence in England).

223. See, e.g., The Titles of the Private Acts 1695–1696, 7 & 8 Will. 3 (Eng.) (listing “Private Acts” enacted in 1695 and 1696 “for the naturalization” of named persons); see also McManamon, *supra* note 7, at 348–58 (providing a partial list of naturalized Children who were born abroad to English parents between 1509 and 1800). It appears that most of the commoner children naturalized were born to Englishmen with foreign wives. There were several children born to English noblewomen, likely in service at the court when William and Mary held court in Holland. See *infra* note 244 and accompanying text.

groups of persons born outside of England to be “natural born subjects,” sometimes subject to conditions. The chief aim of these statutes seems to have been to ensure that those declared natural born subjects were granted the same rights as those born within England with respect to the rights to inherit, hold property, and sue. This was a particularly sensitive issue for Norman and other foreign-origin nobles (e.g., Dutch, German) in medieval and early modern England with deep ties to the continent, many of whom were also engaged in the King’s or Queen’s military campaigns there. Indeed, a central focus of statutes from the fourteenth through the seventeenth centuries was to clear up the inheritance rights of knights and courtiers serving the king outside of England who might have children born while abroad.<sup>224</sup> The inheritance rights of these children might be prejudiced vis-à-vis children of the same parents born in England, should the latter contest them in the king’s courts.

The first and most famous of these statutes, *De Natis Ultra Mare* (“On Those Born Beyond the Sea”) was enacted by Parliament during the reign of King Edward III in 1350.<sup>225</sup> This monumental and ancient statute, was cited repeatedly and with approval by the common law judges in *Calvin’s Case*. *Ultra Mare* did not use the precise words “natural born subject,” but conveyed the same concept by confirming that certain foreign-born children had the same inheritance rights “as those . . . born within the same Ligeance” of England.<sup>226</sup> The seed of the statute was planted in 1343 when questions were raised regarding the inheritance right of the king’s sons born outside of England.<sup>227</sup> The Chamber of Lords unanimously opined that they could but admitted doubt as to the right to inherit of the foreign-born children of English subjects.<sup>228</sup> The Chamber of Commons agreed, but the matter was deferred for deliberation.<sup>229</sup> The Black Plague occasioned more delay; *De Natis Ultra Mare* was ultimately enacted seven years later.<sup>230</sup>

The statute began by explaining why it was enacted: “[O]ur Lord the King, willing that all Doubts and Ambiguities” regarding “if the Children born in the Parts beyond the Sea, out of the Ligeance of

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224. See J. GRAHAM JONES, *THE HISTORY OF WALES 19–21* (2014) (explaining the order of rights to inheritance).

225. A Statute for Those Who Are Born in Parts Beyond Sea 1350, 25 Edw. 3 stat. 1 (Eng.).

226. *Id.*

227. See COCKBURN, *supra* note 15, at 7–8.

228. See *id.* at 8.

229. See *id.*

230. See *id.* at 7–8.

England, should be able to demand any Inheritance within the same Ligeance.”<sup>231</sup> It stated that “the Law of the Crown of England is, and always hath been such, that the Children of the Kings of England, in whatsoever Parts they shall be born, in England or elsewhere, be able and ought to bear the Inheritance after the Death of their Ancestors.”<sup>232</sup> The statute then declared that two named sons and one named daughter of three English barons,

and other which the King will name, which were born beyond the Sea, out of the Ligeance of England, shall be from henceforth able to have and enjoy their Inheritance after the death of their Ancestors, in all Parts within the Ligeance of England, as well as those that should be born within the same Ligeance.<sup>233</sup>

The three named nobles, the Second Baron de Beaumont, the First Baron de Bryan, and the Second Baron D’Aubigny, were renowned knights. It is unsurprising that the King and Parliament sought to protect the inheritance rights of children whom these loyal soldiers might have fathered while resting between battles fought on his behalf abroad.<sup>234</sup>

The next part of the statute applied to commoners and declared that:

[A]ll Children Inheritors, which from henceforth shall be born without the Ligeance of the King, whose Fathers and Mothers at the Time of their Birth be and shall be at the Faith and Ligeance of the King of England, shall have and enjoy the same Benefits and Advantages, to have and bear the Inheritance within the same Ligeance, as the other Inheritors aforesaid in Time to come; so always, that the Mothers of such Children do pass the Sea by the Licence and Wills of their Husbands.<sup>235</sup>

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231. A Statute for Those Who Are Born in Parts Beyond Sea 1350, 25 Edw. 3 stat. 1 (Eng.).

232. *Id.*

233. *Id.* The children granted citizenship by name were Henry, the son of the Second Baron John de Beaumont; Elisabeth, daughter of the First Baron Guy de Bryan; and Giles, son of the Second Baron Ralph D’Aubigny. *Id.*

234. The statute made a special provision for illegitimate children, which tends to support the conclusion that the intended noble beneficiaries of the law were soldiers on campaign:

And if it be alledged against any such born beyond the Sea, that he is a Bastard, in case where the Bishop ought to have Cognisance of Bastardy, it shall be commanded to the Bishop of the Place where the Demand is, to certify the King’s Court where the Plea thereof hangeth, as of old Times hath been used in the Case of Bastardy alledged against them which were born in England.

*Id.*

235. *Id.* The commoners’ part of the statute states that it applies to children “born without the Ligeance of the King” rather than children “born in the Parts beyond the

Unlike the statutory provision as to nobles, the commoners' provision required both "Fathers and Mothers" to be subjects of the King. Nor did it extend to a child born of a mother abroad who did not go there with her husband's permission. As such, the statute reflected a gender skew that English, American, and European *jus sanguinis* laws would exhibit until the mid-nineteenth century, well after the Natural Born Clause was adopted.<sup>236</sup> More fundamentally, the reason for extending inheritance rights to the foreign-born children of commoners was, as Justice Cockburn noted, to facilitate foreign commerce, not to reward and protect loyal service to the King as with knights of the realm.<sup>237</sup> The absence of reference to such rules as perpetual (i.e., "the Law of the Crown of England always") supports the plausible inference that both rules as to the foreign-born children of Englishman nobles and commoners was of more recent provenance in 1350.

The history of English "natural born subject" statutes enacted after *De Natis Ultra Mare* reflected the twists and turns of English history in subsequent centuries. As noted above, anti-Catholic sentiment in the late sixteenth and early mid-seventeenth centuries triggered clouds of suspicion over English subjects who spent long periods of time abroad, particularly in Catholic kingdoms or jurisdictions.<sup>238</sup> The English civil wars, however, resulted in large numbers of English royalists who went into exile abroad (including Charles II himself) for sustained periods of time, during which many had children.<sup>239</sup> After Charles II returned to England in 1660 and the monarchy was restored, Parliament passed a statute in 1677 recognizing the inheritance rights of children born to royalist retainers abroad.<sup>240</sup> The statute used the words "Naturall borne Subjects" with regard to the children of subjects who "did . . . by reason of their attendance upon his Majestie or for feare of the then

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Sea, out of the Ligeance of England" like the nobles' part. *Id.* The difference in phraseology seems to be shorthand, not an intentional differentiation.

236. See generally RUTH DONNER, *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW* 32 (2d ed. 1994) ("Another mode of acquiring nationality at birth by direct operation of law was by descent, according to the nationality of one, or both, of the parents, usually of the father alone . . .").

237. See COCKBURN, *supra* note 15, at 7–8.

238. See Harvey Couch, *The Evolution of Parliamentary Divorce in England*, 52 TUL. L. REV. 513, 522 n.51 (1978) (noting that "[l]aws against Catholics and feelings against Catholicism" pervaded England in the 17th century).

239. P. H. Hardacre, *The Royalists in Exile During the Puritan Revolution, 1642–1660*, 16 HUNTINGTON LIBR. Q. 353, 353–54, 362 (1953).

240. See An Act for Naturalizing of Children of His Majestyes English Subjects Borne in Forreigne Countryes Dureing the Late Troubles 1677, 29 Car. 2 c. 6 (Eng.).

Usurped Powers reside in parts beyond the Seas out of his Majestyes Dominions.”<sup>241</sup> It provided that any person who, between June 14, 1641, and March 20, 1660, was

borne out of his Majestyes Dominions and whose Fathers or Mothers were Naturall borne Subjects of the Realme are hereby declared and shall for ever be esteemed and taken to all Intents and Purposes to be and to have beene the Kings Naturall borne Subjects . . . shall be adjudged reputed and taken to be and to have beene in every respect and degree Naturall borne Subjects and free to all intents purposes and constructions as if they and every of them had beene borne in England.<sup>242</sup>

The 1677 statute is the first one to use the phrase “natural born subjects” and merits sustained reflection. First, it was limited in explicit terms and effect to royalist nobles who had stayed loyal to Charles II, even to the point of leaving their homes in England to go into exile with him. The underlying rationale was to reward and protect loyal servants of the Crown, akin to the barons’ provision of *De Natis Ultra Mare* enacted three centuries earlier.<sup>243</sup> Second, unlike the commoners’ prong of *Ultra Mare*, the statute applied to children born to “Fathers or Mothers” in “attendance upon his Majestie.”<sup>244</sup> Presumably, there were ladies-in-waiting among the courtiers who had followed Charles II, and their children were explicitly covered. Third, it is easy to comprehend the special circumstances that gave rise to the felt need for the retroactive enactment. The statute was one part of a bundle of legislative efforts to restore the rights of returned Royalists who had in many cases been absent from the realm for as long as nineteen years.<sup>245</sup> As such, there would have been legitimate doubts about the loyalty of their children, even if the rule of *jus sanguinis*, as applied to the foreign-born children of public servants, had been absorbed into the common law during the 327 years since *De Natis Ultra Mare*.

The next great event in English political history was the “Glorious Revolution” of 1688 to 1689, when the Dutch prince William of Orange and his English wife Mary assumed the British crown jointly as William

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241. *Id.*

242. *Id.*

243. *See supra* notes 233–34 and accompanying text (discussing *De Natis Ultra Mare* provisions).

244. 29 Car. 2 c. 6 (Eng.).

245. *See id.* (specifying children born outside of “his Majestyes Dominions” between June, 14, 1641 and March 24, 1660).

III and Mary II.<sup>246</sup> Even after he became King of England, William spent considerable time outside England on military campaigns, mostly in France and Ireland.<sup>247</sup> Mary herself returned to England in January 1689, a few months after William's bloodless invasion, and ruled alone when her husband was abroad fighting.<sup>248</sup> These were the circumstances behind the enactment of a "natural born subject" statute in 1697 entitled: "An Act to Naturalize the Children of such Officers and Souldiers & Others the Natural Borne Subjects of This Realme Who Have Been Borne Abroad During the Warr the Parents of Such Children Haveing Been in the Service of This Government."<sup>249</sup> The statute noted that

during the late Warr with France divers of His Majesty's good and lawfull Subjects . . . did by reason of their Attendance on His Majesty in Flanders and bearing Armes under His said Majesty against the French King and other His Majesties Enemies reside in Parts beyond the Seas out of his Majesties Dominions.<sup>250</sup>

"[D]ivers Children" had been born to these "good and lawfull Subjects" during their government service abroad who, "by reason of their being borne" outside England "may be interpreted to be incapable of taking receiving or enjoying any Mannors and Lands or any other Privileges and Immunities belonging to the liege People and natural borne Subjects of his Kingdome."<sup>251</sup> Taking its lead from the 1677 statute, Parliament provided that persons who, between February 13, 1688 and March 25, 1698,

are or shall be borne out of His Majesties Dominions and whose Fathers or Mothers were natural borne Subjects of this Realme and were then actually in the Service of His Majesty or of His Majesty and the late Queen of Blessed Memory are hereby declared and shall forever be esteemed and taken to all Intents & Purposes to be and to have been the Kings natural borne Subjects of this Kingdome and that the said Children . . . and every of them are and shall be

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246. See STEVE PINCUS, 1688: THE FIRST MODERN REVOLUTION 285 (2009) ("[O]n 6 February, [1689,] the House of Lords agreed that James II had abdicated . . . . They then agreed to have William and Mary declared king and queen of England.").

247. *Id.* at 298, 339 (describing "William's departure to fight in Ireland" and his "war against France").

248. Richard Price, *An Incomparable Lady: Queen Mary II's Share in the Government of England, 1689-94*, 75 HUNTINGTON LIBR. Q. 307, 307-08 (2012) (detailing the Queen's appointment to sole royal authority during William II's absence in 1689).

249. 1697, 9 Will. 3 c. 20 (Eng.).

250. *Id.*

251. *Id.*

adjudged reputed and taken to be in every respect and degree natural borne Subjects and free to all Intents Purposes & Constructions as if they & every of them had been borne in England.<sup>252</sup>

Again, like the 1677 statute, the 1698 statute was limited to the children of loyal subjects who were abroad “in the Service of this Government.”<sup>253</sup> It too applied to government servants who were either “Fathers or Mothers,” the latter presumably referring to ladies-in-waiting who had served Queen Mary in the Netherlands in 1688 before she had returned to England.<sup>254</sup> Finally, commoners were unmentioned as in the 1677 statute, by contrast to *De Natis Ultra Mare*.

Another statute enacted during the reign of William III as part of the 1700 Act of Settlement blocked any person “born out of the Kingdoms of England Scotland or Ireland” from government or military office, positions of trust, or crown grants.<sup>255</sup> It provided that

no Person born out of the Kingdoms of England Scotland or Ireland or the Dominions thereunto belonging (although he be naturalized or made a Denizen (except such as are born of English Parents) shall be capable to be of the Privy Councill or a Member of either House of Parliament or to enjoy any Office or Place of Trust either Civill or Military or to have any Grant of Lands Tenements or Hereditaments from the Crown to himself or to any other or others in Trust for him.<sup>256</sup>

The statute explicitly carved out from the restriction on government service any person “such as are born of English Parents.”<sup>257</sup> It was likely enacted to close off the prospect that the new royal House of Hanover

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252. *Id.*

253. *Id.*

254. See LISA JARDINE, TEMPTATION IN THE ARCHIVES: ESSAYS IN GOLDEN AGE DUTCH CULTURE 21 (2015) (summarizing a royal servant’s account of Princess Mary’s departure from the Netherlands on February 5, 1689).

255. The Act of Settlement 1700, 12 & 13 Will. 3 c. 2, § 3 (Eng.). The Short Titles Act of 1896, 59 & 60 Vict. c. 14 (Eng.), did not assign the Act of Settlement a year, but, under the official Parliamentary convention of dating a statute according to the year the originating Parliamentary session commenced, the Act should be dated as 1700. However, it is also commonly referred to as the 1701 Act of Settlement, because that was the year Parliament enacted it. Because William and Mary had no surviving heirs, the Act of Settlement provided for succession to the Irish and English thrones to the lawful descendants of Sophia of Hanover in modern-day Germany, a granddaughter of James I. *Id.* Sophia and the House of Hanover were Protestants, by contrast to the Catholic sympathies of the claimants to the thrones in the House of Stuart. See A. W. Ward, *The Electress Sophia and the Hanoverian Succession*, 1 ENG. HIST. REV. 470, 477 (1886) (detailing a Hanoverian historian’s description of Sophia as “a staunch protestant”).

256. 12 & 13 Will. 3 c. 2, § 3.

257. *Id.*

would import German advisers to displace English ministers and officers.<sup>258</sup> Michael Ramsey has suggested that this provision may have been “the original English precedent” for the Natural Born Citizen Clause.<sup>259</sup> There is no evidence for the surmise, although it strikes me as plausible enough given that the Act of Settlement was a prominent enactment of which the early Americans were surely aware. If Ramsey is right, then it is yet more evidence that the Natural Born Citizen Clause does incorporate *jus sanguinis*, given the explicit carve-out for foreign-born children with English parents.

To summarize the state of English law at the start of the eighteenth century, several statutes declared that children born outside England to English subjects in government service were deemed “natural born subjects” or entitled to the same inheritance rights as persons born within the realm. This applied regardless of whether the parent in service was a father (e.g., a knight in Edward III’s army or a courtier to Charles II in exile) or mother (e.g., a lady in waiting to Queen Mary).<sup>260</sup> Such persons were unencumbered in their right to occupy any position open to subjects in the government and to the Crown’s largesse. Second, *De Natis Ultra Mare* also granted inheritance rights to the foreign-born children of private English commoners like merchants to promote foreign commerce.<sup>261</sup> Both parents had to be English subjects.<sup>262</sup> The seventeenth century “natural born subject” statutes, cued to royal retainers exiled or campaigning abroad, did not replicate *Ultra Mare*’s extension to commoners; that would change in the eighteenth century.<sup>263</sup> Regardless, *De Natis Ultra Mare*, a great and

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258. See I. Naamani Tarkow, *The Significance of the Act of Settlement in the Evolution of English Democracy*, 58 POL. SCI. Q. 537, 542, 551 (1943) (discussing the theory that “the English Crown was offered to the House of Hanover on condition that whosoever accepted it should not at the same time hold any German dominions”).

259. See Ramsey, *supra* note 24, at (manuscript at 18).

260. See *supra* note 244, 254 and accompanying text.

261. A Statute for Those Who Are Born in Parts Beyond Sea 1350, 25 Edw. 3 stat. 1 (Eng.).

262. See *id.* (requiring that any children granted inheritance rights must be those “whose Fathers and Mothers at the Time of their Birth be and shall be at the Faith and Ligeance of the King of England”).

263. Compare An Act to Naturalize the Children of such Officers and Souldiers & Others the Natural Borne Subjects of This Realme Who Have Been Borne Abroad During the Warr the Parents of Such Children Haveing Been in the Service of This Government 1698, 9 Will. 3 c. 20, § 1 (Eng.) (conferring natural born subject status on children “whose Fathers or Mothers were natural borne Subjects of this Realme and were then actually in the Service of His Majesty or of His Majesty and the late Queen of blessed Memory”), with An Act for Naturalizing Foreign Protestants 1708, 7 Ann. c. 5 (Eng.) (extending the scope of naturalization to “the Children of all natural

famous statute enacted in 1350 during the fifty-year reign of one of England’s greatest kings, Edward III, cast its centuries-old shadow over the enactments of all subsequent Parliaments.

The eighteenth century witnessed dynamic evolution in the *jus sanguinis* principle in England and Europe. Change followed the rise of a global economy and the ideology of mercantilism. The conventional wisdom of the time was that a country’s strength was measured by its population, its armies and navies, and its gold.<sup>264</sup> Accordingly, European monarchies raced to build empires and to swell the ranks of those they called subjects.

The laws of the British Empire, in particular, underwent a seismic shift from a closed membership approach, anchored in insularity, to a more open-ended one, suited to a mercantilist empire (with the exception of Catholics). For example, some British statutes took *jus soli* or *jus sanguinis* to new levels, as detailed below. One 1740 *jus soli* statute granted “natural born subject” status to foreign Protestants, Quakers, or Jews who had lived in the American colonies for seven years.<sup>265</sup> Parliament also stretched *jus sanguinis* beyond parentage to second-generation ancestry in a 1772 statute deeming any child born abroad with an English paternal *grandfather* a “natural born subject.”<sup>266</sup> Indeed, some innovative British statutes in this era of high mercantilism declared persons to be “deemed . . . and taken to be” natural born subjects on principles other than *jus soli* or *jus sanguinis*, such as co-religionists without any residence requirement,<sup>267</sup> hardship service aboard warships,<sup>268</sup> merchant ships in wartime,<sup>269</sup> or on whaling

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born Subjects”), *repealed by An Act to Repeal the Act of the Seventh Year Her Majesties Reign Intituled An Act for Naturalizing Foreign Protestants 1711*, 10 Ann. c. 9 (Eng.).

264. See D. C. Coleman, *Mercantilism Revisited*, 23 *HIST. J.* 773, 775 (1980) (articulating the commonly held belief that “gold and silver constituted wealth and a favourable balance of trade was the national means to acquire that wealth”).

265. See *An Act for Naturalizing Such Foreign Protestants, and Others Therein Mentioned, As Are Settled or Shall Settle, in Any of His Majesty’s Colonies in America 1740*, 13 Geo. 2 c. 7 (Eng.).

266. See *The British Nationality Act, 1772*, 13 Geo. 3 c. 21 (Eng.).

267. See 7 Ann. c. 5.

268. *An Act for the Encouragement of Trade to America 1707*, 6 Ann. c. 64, § 20 (Eng.) (naturalizing foreign seamen serving as privateers, on warships, or on merchant ships during Queen Anne’s War).

269. *An Act for the Better Supply of Mariners and Seamen to Serve in His Majesty’s Ships of War, and On Board Merchant Ships, and Other Trading Ships, and Privateers 1739*, 13 Geo. 2 c. 3 (Eng.).

boats.<sup>270</sup> These statutes, applying what might be called the principles of *jus religionis* (“right of religion”) and *cuius regio, ejus religio* (“whose realm, his religion”); and *jus muneris* (“right of service”), were plainly departures from natural law, and accordingly never incorporated into English common law.<sup>271</sup> As such, statutes awarding “natural born subject” status based on something other than the natural law birthrights of territory or parentage typically required oaths or declarations of loyalty and were constrained by statutory limitations on holding political or military office.<sup>272</sup>

Despite these innovations, *jus sanguinis* in the eighteenth century never evolved to encompass natural birthright subjectship or citizenship through the *mother* where her allegiance differed from the father’s, whether in England, continental Europe, or the United States. European and American society in 1787 to 1789 was extremely sexist by modern standards. People believed that a child inherited a father’s allegiance and political ties, not the mother’s. The idea that citizen or subject status could be derived by matrilineal descent did not gain a foothold until 1844 in Victorian England.

The first of a series of eighteenth century “natural born subject” statutes was passed in 1708.<sup>273</sup> The preamble nakedly asserted its mercantilist aim: “Whereas the Increase of People is a Means of advancing the Wealth and Strength of a Nation.”<sup>274</sup> Parliament declared that “the Children of all natural born Subjects born out of

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270. An Act for the Further Encouragement and Enlargement of the Whale Fishery, and for Continuing Such Laws as Are Therein Mentioned Relating Thereto; and for the Naturalization of Such Foreign Protestants, as Shall Serve for the Time Therein Mentioned, on Board Such Ships as Shall be Fitted Out for the Said Fishery 1749, 22 Geo. 2 c. 45, § 8 (Eng.).

271. Parliament repealed the Foreign Protestants Naturalization Act of 1708 in 1711. See KETTNER, *supra* note 12, at 72 (detailing the repeal of the general naturalization act by the Tories after they captured a majority in Parliament in the 1710 elections).

272. See, e.g., An Act for Naturalizing Such Foreign Protestants, and Others Therein Mentioned, As Are Settled or Shall Settle, in Any of His Majesty’s Colonies in America 1740, 13 Geo. 2 c. 7 (Eng.) (requiring all persons born in “His Majesty’s Colonies in America” to “take and subscribe the Oaths” for naturalization); 13 Geo. 2 c. 3, § 3 (clarifying that “no Person who shall be naturalized by virtue of this Act, shall thereby be enabled to be of the Privy Council, or a Member of either House of Parliament, or to take any Office or Place of Trust, either civil or military”).

273. The Foreign Protestants Naturalization Act 1708, 7 Ann. c. 5 (Eng.), *repealed by* An Act to Repeal the Act of the Seventh Year of Her Majesties Reign Intituled An Act for Naturalizing Foreign Protestants 1711, 10 Ann. c. 9 (Eng.).

274. *Id.*

the Ligeance of her Majesty Her Heires and Successors shall be deemed adjudged and taken to be natural born Subjects of this Kingdom to all Intents Constructions and Purposes whatsoever.”<sup>275</sup> A hyper-mercantilist part of the Act went even further, in the hope that foreign Protestants “would be induced to transport themselves and their Estates into this Kingdom.”<sup>276</sup> They would be deemed “natural-born Subjects” upon taking oaths of loyalty and the sacrament of the Holy Supper to join the Church of England.<sup>277</sup> This provision was promptly repealed by 1711.<sup>278</sup>

The 1708 statute differed in one significant detail from the 1350 *De Natis Ultra Mare*, the only predecessor statute extending *jus sanguinis* to the children of parents who were not abroad in government service or because of support for the Crown. It was ambiguous whether both father and mother had to be English subjects, or just one parent; *Ultra Mare* had plainly required both parents to be English.<sup>279</sup> Parliament passed a statute two decades later to “explain” away the ambiguity:

[A]ll Children born out of the Ligenace of the crown of *England*, or of *Great Britain*, or which shall hereafter be born out of such Ligeance, whose Fathers were or shall be natural-born Subjects of the Crown of *England*, or of *Great Britain*, at the Time of the Birth of such Children respectively, shall and may . . . be adjudged and taken to be, and all such Children are hereby declared to be natural-born Subjects of the Crown of *Great Britain*, to all Intents, Constructions and Purposes whatsoever.<sup>280</sup>

Thus, the 1730 clarification confirmed that the 1708 statute had relaxed the two-parent *jus sanguinis* rule for commoners of *De Natis Ultra Mare* in 1350 to a requirement that only the father had to be a natural born subject for a child born abroad to be “adjudged,” a natural born subject “to all Intents, Constructions and Purposes

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275. *Id.*

276. *Id.*

277. *Id.*

278. *See* 10 Ann. c. 9.

279. *Compare* 7 Ann. c. 5, § 3 (“And be it further enacted by the Authority aforesaid, That the Children of all natural-born Subjects born out of the Ligeance of her Majesty, her Heirs and Successors, shall be . . . natural-born Subjects of this kingdom.”), *with* A Statute for Those Who Are Born in Parts Beyond Sea 1350, 25 Edw. 3 stat. 1 (Eng.) (“And that all Children Inheritors, . . . whose Father and Mothers at the Time of their Birth be and shall be at the Faith and Ligeance of the King of England, shall have and enjoy the same Benefits and Advantages . . .”).

280. The British Nationality Act, 1730, 4 Geo. 2 c. 21, § 1 (Eng.).

whatsoever.”<sup>281</sup> The 1730 statute further specified that neither it nor the 1708 Act “did, doth or shall extend, or ought to be construed, adjudged or taken to extend, to make” any such children natural-born subjects whose fathers were “attainted of High Treason” or “were or shall be in the actual Service of any foreign Prince or State then in Enmity with the Crown.”<sup>282</sup> The 1708 statute, as clarified by the 1730 statute, marked the extent of statutory definition of “natural born subject” that was incorporated into English common law by the time of the American founding. The relevant rules dated back to 1350, with the only significant modification being the relaxation of the parentage rule for subjects born abroad to English father only, as opposed to both parents. In my view, it is this state of play—natural born status to children born abroad to government servants of fathers—that informed the *jus sanguinis* part of the “natural born Citizen” requirement in Article II of the U.S. Constitution.

The next four decades witnessed a series of statutes enacted by Parliament extending natural born subject status to groups based on new theories, in the spirit of the co-religionist statute enacted and quickly repealed during Queen Anne’s reign. In 1739, Parliament passed “An Act for Naturalizing Such Foreign Protestants, and Others Therein Mentioned, as Are Settled, or Shall Settle, in Any of His Majesty’s Colonies in *America*.”<sup>283</sup> The aim was so that “many Foreigners and Strangers from the Lenity of our Government, the Purity of our Religion, the Benefit of our Laws, the Advantages of our Trade, and the Security of our Property, might be induced to come and settle in some of his Majesty’s Colonies in *America*.”<sup>284</sup> The statute provided that Protestants who had lived for seven years in the colonies—with no absence of more than two months at one time—who swore loyalty oaths to the Crown and took the Sacrament of the Holy Supper; Quakers who met the residence requirements and subscribed to a Declaration of Fidelity; and Jews who met the residency requirements and took the Oaths omitting some Christian expressions,

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281. *Id.*

282. *Id.* § 2. An exception to the exception was made for, among others, “any Child” of a treasonous Father who “professed the Protestant religion” and had resided in Great Britain or Ireland “for the Space of two Years” between the enactments of the 1708 and 1730 statutes, or had possessed, received, sold, or settled “any Lands, Tenements or Hereditaments” within Great Britain or Ireland during the same period. *Id.* § III.

283. 1739, 13 Geo. 2 c. 7 (Eng.).

284. *Id.* § 1.

“shall be deemed, adjudged, and taken to be, his Majesty’s natural-born Subjects of this Kingdom, to all Intents, Constructions, and Purposes, as if they, and every of them, had been or were born within this Kingdom.”<sup>285</sup> The Act contained no limitation on where the relevant natural born subjects were born or who their parents were, thus going far beyond the *jus soli* and *jus sanguinis* principles. However, the statute did contain the same exclusion from government offices set forth in the 1700 Act of Settlement vis-à-vis persons not born to English subjects. Parliament enacted a statute in 1747 extending the terms of the 1739 statute.<sup>286</sup>

Starting with a statute in 1707 during Queen Anne’s War, the eighteenth-century Parliament also enacted a slew of statutes extending natural born subject status to foreigners who served in the British military, navy, or in other hazardous or hardship duties.<sup>287</sup> All of the statutes required oaths of loyalty and came with the formulae of restrictions on government service and crown largesse featured in the 1700 Act of Settlement.<sup>288</sup> The 1707 statute extended natural born subject status to foreign seamen who served for at least two years aboard British warships, privateers, or merchantmen during wartime.<sup>289</sup> A 1749 law extended the proffer of *jus muneris* like the 1707 statute but with respect to seamen who had served for three years on whaleboats, not warships.<sup>290</sup> A 1761 statute offered natural born subject status to “all such foreign Protestants, as well Officers as Soldiers, who have served,

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285. *Id.*

286. An Act to Extend the Provisions of an Act Made in the Thirteenth Year of His Present Majesty’s Reign, Intituled, *An Act for Naturalizing Such Foreign Protestants, and Others Therein Mentioned, as Are Settled or Shall Settle in Any of His Majesty’s Colonies in America, to Other Foreign Protestants Who Conscientiously Scruple the Taking of an Oath* 1747, 20 Geo. 2 c. 44 (Eng.).

287. *See, e.g.*, An Act for the Further Encouragement and Enlargement of the Whale Fishery, and for Continuing Such Laws as Are Therein Mentioned Relating Thereto; and for the Naturalization of Such Foreign Protestants, as Shall Serve for the Time Therein Mentioned, on Board Such Ships as Shall be Fitted Out for the Said Fishery 1749, 22 Geo. 2 c. 45, § 8 (Eng.) (extending natural born subject status to foreign Protestants who serve aboard English whaling ships for at least three years); An Act for the Encouragement of the Trade to *America* 1707, 6 Ann. c. 36, § 20 (Eng.) (extending natural born subject status to mariners and seamen who served on English warships or merchant ships in wartime for two years).

288. *See supra* note 272 and accompanying text.

289. 6 Ann. c. 36, § 20.

290. 22 Geo. 2 c. 45, § 8.

or shall hereafter serve, in the Royal *American* Regiment, or as Engineers in *America*, for the Space of Two Years.”<sup>291</sup>

Yet another variety of experimentation was a 1772 statute extending *jus sanguinis* to a second generation by making natural born subject-ship available to the *grandchildren* of Englishmen who were Protestants.<sup>292</sup> Parliament made clear its mercantilist aim:

Whereas divers natural born Subjects of *Great Britain* who profess and exercise the Protestant Religion, through various lawful Causes, especially for the better carrying on of Commerce, have been, and are obliged to reside in several trading Cities and other Foreign Places, where they have contracted Marriages and brought up Families: And whereas it is equally just and expedient that the Kingdom should not be deprived of such Subjects, nor lose the Benefit of the Wealth that they have acquired; and therefore that not only the Children of such natural born Subjects, but their Children also, should continue under the Allegiance of His Majesty, and be intituled to come into this Kingdom, and to bring hither and realize, or otherwise employ, their Capital . . . .<sup>293</sup>

The statute then incorporated by reference the 1708 statute as “explained” by the 1730 statute deeming the foreign-born children of English fathers natural born subjects and proclaimed that “all Persons born, or who hereafter shall be born, out of the Ligeance of the Crown of *England*” to those fathers “are hereby declared and enacted to be, natural born Subjects of the Crown of *Great Britain*, to all Intents, Constructions and Purposes whatsoever, as if he and they had been and were born in this Kingdom.”<sup>294</sup> Like the 1708 Act, this statute did *not* come with restrictions on government offices.

The 1772 Act was the last major “natural born subject” statute Parliament enacted before the American revolutionary war. Accordingly, it is worth pausing to survey the four centuries of past statutes responsive to larger developments in England and the European world order. Some commentators, like Michael Ramsey, have concluded based on this diverse thicket of “natural born subject” statutes that it had become a shape-shifting legal term of art meaning

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291. An Act for Naturalizing Such Foreign Protestants as Have Served, or Shall Serve for the Time Therein Mentioned, as Officers or Soldiers in His Majesty’s Royal *American* Regiment, or as Engineers in *America* 1761, 2 Geo. 3 c. 25, § 1 (Eng.).

292. See The British Nationality Act, 1772, 13 Geo. 3 c. 21 (Eng.).

293. *Id.* § 1.

294. *Id.*

whomever Parliament designated.<sup>295</sup> The implication for “natural born Citizen” is that Congress has similar discretion to define the term, including its use in Article II as a citizenship requirement for presidential eligibility.<sup>296</sup> Accordingly, any person who is a citizen at birth under the statutes then on the books is eligible for the presidency. Now Judge Jill Pryor, Akhil Amar, and a thorough Congressional Research Service report by Jack Maskell, also take this position regarding the meaning of the Natural Born Citizen Clause, albeit without as self-conscious a commitment to originalism as Ramsey.<sup>297</sup>

I disagree with those esteemed commentators and believe that the English statutes yield three basic principles that can inform our understanding of the meaning of “natural born Citizen” in Article II. The thicket of “natural born subject” statutes emphatically does not stand for the proposition that “natural born” had become a term of art that positive law can declare without basis in natural law. First, there was an unbroken four-hundred-year-old rule dating back to *De Natis Ultra Mare* that the children of English fathers or mothers sent abroad in government service were natural born subjects without any disability as to rights to inherit, hold property, sue in English Courts, hold high office, or receive the Crown’s largesse.<sup>298</sup> Indeed, it would have been perverse to penalize loyal government servants who went abroad on their sovereign’s orders by encumbering the rights of any children they might have during their service abroad.

Second, there was also a rule grounded in *De Natis Ultra Mare* that children born to English merchant fathers abroad were natural born subjects, similarly without impediments.<sup>299</sup> *De Natis* required mothers

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295. See Ramsey, *supra* note 24, at (manuscript at 18–19) (determining that while the statutory and common law definitions of “natural born subjects” were synonymous in the beginning of the eighteenth century, Parliament changed the definition as it saw fit through the eighteenth-century statutes).

296. See *id.* at 4 (explaining that Congress’s discretion comes from the power to “establish an uniform Rule of Naturalization” (quoting U.S. CONST. art. I, § 8, cl. 4)).

297. See MASKELL, *supra* note 3, at 50 (including children born abroad to U.S. parents who meet residency requirements as “natural born Citizens” and therefore eligible for Executive Office); Pryor, *supra* note 25, at 899 (creating a “naturalized born” approach which would extend presidential eligibility to any person with a right to American citizenship at birth); Amar, *supra* note 24 (considering any foreign born child who had at least one U.S. citizen parent who met residency requirements to be a “natural born Citizen” and therefore eligible to be President).

298. See *supra* notes 224–45 and accompanying text (detailing the first English naturalization statute, *De Natis Ultra Mare*, which allowed certain foreign-born children the same rights as those born within England).

299. See *supra* note 204 and accompanying text.

to be English subjects as well, but its mandate was loosened by a 1708 statute as clarified by a 1730 statute. Of course, the rights could be taken away from these *jus sanguinis* natural born subjects as they could be from *jus soli* subjects if the fathers committed treason, were banished, or served foreign enemies.

Third, there were mercantilist statutes minted for the first time in the eighteenth century that deemed persons “natural born subjects” based on religion, military, or nautical service, and an Englishman as paternal grandfather.<sup>300</sup> However, unlike natural born subjects in the first two categories, the newer statutes required those made subjects under their terms to take loyalty oaths and barred them from government office and Crown largesse.

The first two rules ordained by *De Natis Ultra Mare*, one of the most famous laws of the realm enacted by one of its greatest kings, Edward III, had surely been absorbed into the common law of England by the late eighteenth century, 400 years after its enactment. Their vintage, pedigree, fame, and constant reaffirmations through statutes cemented their status as *jura natura*, to use Coke’s expression for natural law birthright rules in *Calvin’s Case*.<sup>301</sup> It is likely that common law courts of England in 1787 to 1789 would have enforced the two rules of *jus sanguinis* as to the foreign-born children of public servants or of Englishman merchant fathers, even without the existence of pertinent statutes, just like *jus soli* in the 1608 *Calvin’s Case*, which cited *Ultra Mare* with approval. The newer eighteenth-century statutes were jurisprudential bushes by comparison to the towering live oak of *Ultra Mare*, and any natural born subjects they created would likely not have been recognized as such by the common law courts in the absence of the statutes. Likewise, these rules of subjectship had not become part of the common law by 1787 to 1789, when the National Born Citizen Clause was adopted in the United States. The modern American commentators who have concluded from the diversity of English statutes that “natural born subject” had become a legal term of art devoid of intrinsic meaning and wholly distinct from the common law have not examined the evidence and traced the evolution of English law with sufficient attention to the relevant history.

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300. See *supra* notes 235–62 and accompanying text (discussing various statutes passed in order to facilitate foreign commerce, granting “natural born subject” status to various children born abroad to commoners).

301. See *supra* note 216 and accompanying text (discussing Coke’s opinion that allegiance is not just a part of England but a law of nature).

B. *Blackstone’s Commentaries and Early American Treatises*

A careful reading of William Blackstone’s *Commentaries*, the treatise of English law most valued by the American founders, confirms my threefold interpretation regarding whether the “natural born subject” rules in the statutes were part of the common law. First, Blackstone acknowledged that “the children of the king’s ambassadors born abroad were *always* held to be natural subjects: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of *postliminium*) to be born under the king of England’s allegiance, represented by his father, the ambassador.”<sup>302</sup> The same might be said of any subject who is posted outside of England in government service. Second, with respect to commoners, he wrote:

To encourage also foreign commerce, it was enacted by statute [25 Edw. 3 stat. 1] that all children born abroad, provided *both* their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband’s consent, might inherit as if born in England; and accordingly it hath been so adjudged in behalf of merchants. But by several more modern statutes these restrictions are still farther taken off: so that all children, born out of the king’s ligeance, whose *fathers . . .* were natural-born subjects, *are now natural-born subjects themselves*, to all intents and purposes, without any exception; unless their said ancestors were attainted, or banished beyond sea, for high treason; or were . . . in the service of a prince at enmity with Great Britain.<sup>303</sup>

Blackstone confirmed the shift from the two-parent rule of *De Natis Ultra Mare* for commoners to father only and that the foreign-born children of an English father were unconditionally natural born subjects. He also explained the mercantilist aim of this extraterritorial extension of *jus sanguinis*. Finally, he pointed out that a court had already “so adjudged in behalf of merchants,” indicating that the rule had become a part of the common law by judicial validation.<sup>304</sup>

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302. 1 BLACKSTONE, *supra* note 11, at \*373 (emphasis added). *Postliminium* was a concept of Roman law origin that was much used in the law of nations at the time. It meant a right that was regained upon reentry after being lost abroad. See COCKBURN, *supra* note 15, at 7, 9–10; A. V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 173–78 (London, Stevens and Sons & Sweet and Maxwell 1896) (discussing the rules of British nationality in the late 1800s).

303. 1 BLACKSTONE, *supra* note 11, at \*373 (last emphasis added).

304. *Id.*

What did Blackstone have to say about the non-*jus sanguinis* statutes that deemed certain persons natural born subjects on the basis of religion or service? He discussed them in a brief, two-paragraph section detached from his discussions of *Ultra Mare* and the other statutes affording natural born subject-ship to children born abroad to ambassadors and English merchant fathers.<sup>305</sup> He explained that naturalization could only be “performed” by an act of Parliament that put an alien

in exactly the same state as if he had been born in the king’s ligeance; except only that he is incapable . . . of being a member of the privy council, or parliament, [etc.]. No bill for naturalization can be received in either house of parliament, without such disabling clause in it.<sup>306</sup>

As we have seen, the requirement of a disabling clause did not apply to the foreign-born children of public servants and English merchant fathers.<sup>307</sup> After this, Blackstone described the short-lived 1708 “general naturalization act,” which was repealed in 1711, by which Parliament deemed all foreign Protestants who took the Sacrament and loyalty oaths natural born subjects.<sup>308</sup> He then explained the other experimental non-*jus sanguinis* statutes:

[E]very foreign seaman, who in time of war serves two years on board an English ship is *ipso facto* naturalized . . . and all foreign protestants, and Jews, upon their residing seven years in any of the American colonies, without being absent above two months at a time, . . . shall be . . . upon taking the oaths . . . naturalized to all intents and purposes, as if they had been born in this kingdom . . . and therefore are admissible to all such privileges . . . as protestants or Jews born in this kingdom are entitled to.<sup>309</sup>

The takeaway is that Blackstone believed that the *jus sanguinis* statutes originating with *De Natis Ultra Mare*, deeming the foreign-born children of British public servants and merchant fathers natural born subjects based on English ancestry, were fundamentally different from the *jus religionis* and *jus muneris* statutes for foreigners. The former were part of the common law tradition and natural law; the latter were not.

Chancellor James Kent of New York interpreted English common law of natural born subjects in much the same way that Blackstone did in his lectures delivered at Columbia University starting in 1794. Those

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305. *Id.* at \*374–75.

306. *Id.* at \*374.

307. *See supra* Section II.A.

308. 1 BLACKSTONE, *supra* note 11, at \*375.

309. *Id.* at \*375.

lectures were subsequently published as his four-volume *Commentaries on American Law* between 1826 and 1830.<sup>310</sup> Kent explained:

An alien is a person born out of the jurisdiction of the United States. There are some exceptions, however, to this rule, by the ancient English law, as in the case of the children of public ministers abroad, (provided their wives be English women) for they owe not even a local allegiance to any foreign power. So, also, it is said, that in every case, the children born abroad, of English parents, were capable, at common law, of inheriting as natives, if the father went and continued abroad in the character of an Englishman, and with the approbation of the sovereign. The statute of [25 Edw. 3 stat. 1], appears to have been made to remove doubts as to the certainty of the common law on this subject, and it declared, that children thereafter born without the ligeance of the king, whose father and mother, at the time of their birth, were natives, should be entitled to the privileges of native subjects, except the children of mothers who should pass the sea without leave of their husbands. The statute of 7 Ann, c. 5. was to the same general effect; but the statute of [4 Geo. 2 c. 21.], required only that the father should be a natural born subject at the birth of the child, and it applied to all children then born, or thereafter to be born. Under these statutes it has been held, that to entitle a child born abroad to the rights of an English natural born subject, the father must be an English subject; and if the father be an alien, the child cannot inherit to the mother, though she was born under the king's allegiance.<sup>311</sup>

Thus, Kent, perhaps the most famous of the earliest commentators on the U.S. Constitution, clearly acknowledged the role of *jus sanguinis* with respect to extraterritorial natural born subjects under English common law. He diverged from my interpretation in requiring an English mother in the case of public servants and failing to acknowledge the statutes of Charles II and William III that suggest the children of English mothers attending the Crown were also natural born subjects.<sup>312</sup> It is also noteworthy how much he emphasizes the sexist, patrilineal orientation of the rules, specifically emphasizing that “the father must be an English subject; and if the father be an alien, the child cannot inherit to the mother,” even if she were an English subject.<sup>313</sup>

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310. See generally 1–4 JAMES KENT, COMMENTARIES ON AMERICAN LAW (New York, O. Halsted 1826–1830).

311. 2 *id.* at 43–44 (citations omitted).

312. See *supra* notes 233–37 and accompanying text.

313. 2 KENT, *supra* note 310, at 44.

Unfortunately, other early American treatise writers were not as astute as Chancellor Kent in their assessment of English common law and Blackstone's treatise. Several early American jurists misread Blackstone to say that English common law recognized only *jus soli* as a natural birthright principle, and that Parliament had to pass statutes for *jus sanguinis* to apply extraterritorially to the children of English government servants and merchants.<sup>314</sup> We have seen that this was not an accurate reading of Blackstone, but it was an understandable one given the black-and-white manner in which Blackstone drew a line between aliens and natural born subjects elsewhere in the *Commentaries*: "The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England . . . and aliens, such as are born out of it."<sup>315</sup>

St. George Tucker<sup>316</sup> who published the first U.S. constitutional law treatise in 1803 as an American law update of Blackstone's *Commentaries*, paraphrased him in the following way:

Prior to the adoption of the constitution, the people inhabiting the different states might be divided into two classes: natural born citizens, or those born within the state, and aliens, or such as were born out of it. The first, by their birth-right, became entitled to all the privileges of citizens; the second, were entitled to none, but such as were held out and given by the laws of the respective states prior to their emigration.<sup>317</sup>

Both Blackstone's sweeping statement and Tucker's adaptation of it to the American context did not contemplate the case of the children of citizens/subjects who were born in a foreign land while the parents were there temporarily, for instance, because the government had sent

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314. See, e.g., 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 257 (1803) [hereinafter TUCKER] (concluding that only an act of Parliament could grant subject status to a foreign-born person).

315. 1 BLACKSTONE, *supra* note 11, at \*366.

316. Tucker had moved from the British colony of Bermuda to Virginia 1772 at nineteen, fought in the Revolutionary War, and started a law practice and teaching career after independence. See Mary Ann Kernan, *St. George Tucker: A Biographical Sketch*, 46 L. LIBR. J. 98-103 (1953). He did not attend the Constitutional Convention or the Virginia ratifying convention, but he was a respected lawyer, judge, and teacher in Virginia, and was appointed a federal district judge by his fellow Virginian James Madison in 1813. *Id.* at 102-03.

317. TUCKER, *supra* note 314, at 256 (quoting Letter from George Nicholas to His Friend in Virginia (1799), at 7).

them there. Kent, of course, did. Indeed, Blackstone, too, explicitly acknowledged such cases: “An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now.”<sup>318</sup> If that Englishman should happen to have a child while abroad, why should the infant be deemed a natural-born subject of the French king or the Chinese emperor, and not of the king of England?

It is unsurprising that Tucker and other early Americans, with the exception of Kent, were prone to make general statements overlooking Blackstone’s explicit references to the status of children born to English officials and merchants abroad. The sea that separated the British islands from the European continent was only eighteen nautical miles at their closest point; the United States was separated by a moat of thousands of miles. The frequent conflation of “native born” and “natural born” citizen in early American treatises illustrates the extent to which early Americans were centrally concerned with what was happening within the United States, not extraterritorially. As we saw from the Constitutional Convention debates, the words “native” or “native born” had a place-bound connotation, and were used to refer to persons born in the United States, typically to distinguish immigrants or foreign late arrivals.<sup>319</sup> Plainly, “native” was a factual, descriptive adjective, without any jurisprudential implication of “natural” law generally or “natural” law birthright principles specifically.<sup>320</sup> But Tucker’s *Commentaries* mistakes “natural born” for “native born” in his discussion of the Article II, Section 1 citizenship requirement for President. Tucker wrote:

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318. 1 BLACKSTONE, *supra* note 11, at \*369–70.

319. See, e.g., *supra* text accompanying notes 105–07 (discussing the remarks of John Mercer of Maryland and Roger Sherman of Connecticut on August 13, 1787); see also MASKELL, *supra* note 3, at 31 (“In common usage with respect to U.S. citizenship, it may also more narrowly mean anyone born physically within the geographic boundaries of the United States . . .”).

320. The preeminent modern U.S. immigration law treatise defines “native-born citizens” thusly:

This is by far the largest group of U.S. citizens, and their status is acquired simply through birth in the United States . . . . The Constitution does not refer to native-born citizens, although it does mention natural-born citizens. Nor does this term appear in the statute, which includes the native born among various categories who acquire citizenship at birth. However, the designation of the native born is an accurate and convenient one, generally used in colloquial and legal discussions.

7 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 91.02(4) (a) (rev. ed. 2017).

That provision in the constitution which requires that the president shall be a *native-born citizen* (unless he were a citizen of the United States when the constitution was adopted,) is a happy means of security against foreign influence, which, wherever it is capable of being exerted, is to be dreaded more than the plague.<sup>321</sup>

To summarize, *jus soli* was the major principle of natural birthright citizenship *within* the United States, but it did not follow that *jus sanguinis* could not operate extraterritorially as to children born to certain Americans parents. That was the rule in England promulgated by *De Natis Ultra Mare* in 1350 and part of the common law tradition four hundred years later as confirmed by Blackstone and the early American jurist James Kent.<sup>322</sup> But, post-founding American treatises, starting with St. George Tucker's American law update of Blackstone's *Commentaries* published in 1803, tended to emphasize the first proposition only, making it seem as if *jus soli* was the only principle inside or outside the United States.<sup>323</sup> The emphasis is understandable: the early writers' focus was on persons *inside* the United States after the adoption of the Constitution between 1787 and 1789. The birth *outside* of the United States of children to parents who were U.S. citizens was a negligible concern at the time: the United States had only a few merchants and a handful of ambassadors abroad, and no soldiers on foreign expedition or governments in exile.<sup>324</sup> Put another way, *jus soli* was discussed in absolute terms because the geographical separation of the United States from Europe and the geopolitical realities of the new republic's military and economic weakness rendered operation of *jus sanguinis* vis-à-vis American citizens abroad a small concern as compared to the magnitude of the issue for the British Empire. Accordingly, with the exception of Kent's *Commentaries*, early nineteenth century American treatises generally followed Tucker's lead and did not address the question of whether a child born extraterritorially to U.S. parents is a natural born citizen. As we shall see, the one time that early Americans were clearly focused on the question of extraterritorial

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321. TUCKER, *supra* note 314, at 323 (emphasis added).

322. See 1 BLACKSTONE, *supra* note 11, at \*373 (confirming foreign-born children of ambassadors were considered "natural subjects"); 2 KENT, *supra* note 310, at 57 (stating no person may be eligible for the Presidency if not a "natural born Citizen").

323. See *supra* notes 314–18.

324. See Office of the Historian, *Principal Officers and Chiefs of Mission by Year: 1788*, US DEP'T OF ST., <https://history.state.gov/departmenthistory/people/by-year/1788> (last visited Nov. 30, 2017) (listing three ambassadors sent abroad by the United States in the year the Constitution was ratified).

births to American citizens was when the First Congress enacted the inaugural Naturalization Act of 1790.<sup>325</sup> And on that occasion, founding-era Americans adopted a *jus sanguinis* rule modeled on the great *De Natis Ultra Mare*. But, before we turn to the American statutes, it is worth considering the influence of non-English sources on early American conceptions of natural born citizenship.

### III. NATURAL LAW AND THE LAW OF NATIONS

Most Article II “natural born Citizen” scholars dismiss the possibility that the Clause relied importantly on non-English sources.<sup>326</sup> Just as commentators tend to over-emphasize the exclusivity of English common law as a source of the meaning of “natural born Citizen,” they under-emphasize the importance of natural law and the law of nations. This is strange, given that the constitutional word “natural” is most plausibly an invocation of natural law birthright principles, and the reality that Lord Coke recognized in *Calvin’s Case*. English lawyers of the time believed the common law was a reflection of natural law.

The most important law of nations reference for founding-era Americans was the *Law of Nations, or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, a 1758 treatise by Emer de Vattel of Neufchatel.<sup>327</sup> As I noted in the Introduction, the U.S. Senate bought Vattel’s book and Blackstone’s book, and those books alone, for its official use in 1794 to deal with foreign relations issues.<sup>328</sup> Experts in U.S. foreign relations law have long been aware of Vattel’s importance to U.S. constitutional history.<sup>329</sup> However, it has only been in the twenty-first century that scholars have mined his broader influence on U.S. law, including constitutional provisions

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325. See ch. 3, 1 Stat. 103 (1790), *repealed by* ch. 20, 1 Stat. 414 (1795).

326. See, e.g., MASKELL, *supra* note 3, at 22. (“It would appear to be somewhat fanciful to contend that in employing terms in the U.S. Constitution the framers would disregard the specific and express meaning of those precise terms in British common law, the law in the American colonies, and subsequently in all of the states in the United States after independence, in favor of secretly using, without comment or explanation, a contrary, non-existent English translation of a phrase in a French-language treatise on international law.”).

327. See generally VATTEL, *supra* note 21.

328. See *supra* note 20.

329. See *Introduction* to VATTEL, *supra* note 21, at ix (discussing the importance of Vattel’s works in shaping early American political discourse).

without direct connection to foreign affairs, such as the Eleventh Amendment, which addressed state sovereign immunity.<sup>330</sup>

Unlike the English statutes and treaties, the Swiss republican Vattel wrote of *citizens*, not subjects. He began:

The citizens are the members of the civil society: bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. The natives, or natural-born citizens [the French word is *indigene*], are those born in the country, of parents who are citizens . . . . I say, that, in order to be of the country, it is necessary that a person be born of a father who is a citizen; for, if he is born there of a foreigner, it will be only the place of his birth, and not his country.<sup>331</sup>

In Vattel's view, *jus sanguinis* trumped *jus soli* in determining "natural born" citizenship: a child born in the territory of one sovereign was not a citizen of the sovereign if the child's father was not a citizen.<sup>332</sup> The idea was that a child, as a minor, inherited the allegiance of the father through a "tacit consent" which the child could renounce upon coming of age.<sup>333</sup> Note the resemblance of Vattel's logic here to Madison's reasoning in his May 1789 speech. "[E]very man is born free; and the son of a citizen, when come to the years of discretion, may examine whether it be convenient for him to join the society for which he was destined by his birth."<sup>334</sup> Vattel's conclusion that a child could consent to give up natural born citizenship as an adult diverged from Blackstone's characterization of natural born subjectship in England as indefeasible.<sup>335</sup> Tellingly, both Kent and Tucker agreed with Vattel and disagreed with Blackstone, in terms of what they viewed as the more universal principle.<sup>336</sup> The reason for this flowed from the

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330. See, e.g., Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1061 (2002) (explaining that Vattel's treatise "was one of the most influential legal treatises in American constitutional law").

331. See VATTEL, *supra* note 21, at 217–18.

332. *Id.*

333. *Id.* at 218.

334. *Id.* at 220.

335. See 1 BLACKSTONE, *supra* note 11, at \*360 ("Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature.").

336. See 2 KENT, *supra* note 310, at 36–37 (agreeing with the general presumption that citizens have the right to emigrate from their native country); TUCKER, *supra* note 314, at 97 (stating that if a citizen renounces himself from his native country, he is no longer responsible to that government's laws).

difference between citizenship and subjectship. Citizenship was grounded in consent which can logically be withdrawn; subjectship was bestowed and therefore created a permanent obligation of allegiance to the king.

Vattel also had a different view of naturalization than Blackstone. He wrote:

A nation . . . may grant to a foreigner the quality of citizen, by admitting him into the body of the political society. This is called *naturalization* . . . . [T]here are states, as, for instance, England, where the single circumstance of being born in the country, naturalizes the children of a foreigner.<sup>337</sup>

Blackstone did not characterize the operation of *jus soli* in England as to an alien as “naturalization.” Rather, he saw subjectship as a natural state of being for any person born in England, even of foreign parents, owing to the Crown’s protection that enveloped all at birth. Vattel then proceeded to talk about the citizenship of children born to parents abroad.

It is asked whether the children born of citizens in a foreign country are citizens? . . . By the law of nature alone, children follow the condition of their fathers, and enter into all their rights; the place of birth produces no change in this particular, and cannot, of itself, furnish any reason for taking from a child what nature has given him.<sup>338</sup>

With specific regard to diplomats or soldiers abroad, Vattel reasoned that because they had

not quitted their native country to settle elsewhere[,] . . . children born out of the country, in the armies of state, or in the house of its minister at a foreign court, are reputed born in the country; for, a citizen who is absent with his family, on the service of the state, but still dependent on it, and subject to its jurisdiction, cannot be considered as having quitted its territory.<sup>339</sup>

In this regard, Vattel is in perfect agreement with Blackstone. He believed that a child born outside of the father’s country, to an ambassador, soldier, “on the service of the state,” or even a private father is “by the law of nature” born a citizen of the father’s state.<sup>340</sup>

To summarize, it was only intra-territorially that English common law and the law of continental European countries like France differed

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337. VATTEL, *supra* note 21, at 218.

338. *Id.* at 219.

339. *Id.*

340. *Id.* at 218–19.

as to who counted as natural born subjects or citizens. The law within England was *jus soli*; the law within the continental nations was *jus sanguinis*. But, all European nations agreed that, with regards to the children of subjects born extraterritorially, *jus sanguinis* applied. In England, this was not the ancient common law of the Saxons, but it was surely common law by the late eighteenth century, 400 years after the first promulgation of the rule in *De Natis Ultra Mare*—“On Children Born Beyond the Sea.”<sup>341</sup> The English hybrid model of *jus soli* and *jus sanguinis* was precisely what the United States adopted—*jus soli* within the United States and *jus sanguinis* outside of the United States for the children of citizen public servants and fathers.<sup>342</sup> Both Vattel and Blackstone confirm the reality that late eighteenth century Europe and America were sexist by modern standards: *jus sanguinis* operated through patrilineal descent only.<sup>343</sup> The early United States did not adopt the rule of *jus sanguinis* over *jus soli* domestically, or at least that was the holding in the 1898 decision in *Wong Kim Ark*. Where early Americans did opt for Vattel over Blackstone, however, was in the former’s conviction that allegiance was not permanent.<sup>344</sup> And this was the natural consequence of the belief that citizenship, unlike subjectship, was based on consent.

#### IV. “NATURAL BORN CITIZEN” STATUTES IN THE UNITED STATES

The five years between the end of the Revolutionary War in 1783 and the adoption of the Constitution between 1787 and 1789 were marked with great change, turmoil, and experimentation. Among other things, state legislatures enacted statutes using the words “natural born citizen” or “natural born subject.” The purpose of these statutes was to declare that persons born outside of the relevant state were to have rights to inherit, hold property, and sue in the state’s courts; they did not address the specific issue of the rights or status of the children of state citizens born outside the state.<sup>345</sup> Commentators like Ramsey

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341. See *supra* notes 287–97 (detailing two examples of 18th century statutes incorporating “natural born subject” status to foreign-born children of English fathers).

342. See Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790), *repealed by* ch. 20, 1 Stat. 414 (1795).

343. See 1 BLACKSTONE, *supra* note 11, at \*373 (noting that if a child’s father was a natural-born subject, so was the child); VATTEL, *supra* note 21, at 219 (“[C]hildren follow the condition of their fathers.”).

344. See *supra* note 336 and accompanying text.

345. See, e.g., Ramsey, *supra* note 24 (manuscript at 28–29) (collecting state statutes using the phrases “natural born citizen” or “natural born subject”); *infra* Section IV.A.

have emphasized these statutes’ seeming continuity with English common law, even to the point of using “natural born subject” long after the revolutionary war had been won.<sup>346</sup> But, as I have pointed out earlier, these statutes did not envision or deal with the issue of the children of citizens who were born outside of the United States.<sup>347</sup> Moreover, any out-of-state citizens born in other U.S. states, as opposed to foreign states, would have been entitled to the same privileges and immunities as in-state citizens under both the Articles of Confederation and the Constitution.<sup>348</sup> Nor, for that matter, is continuity with English common law inconsistent with my argument, since, as demonstrated above, the common law had incorporated *jus sanguinis* extraterritorially with respect to public servants and the children of Englishmen by the late eighteenth century.<sup>349</sup> Accordingly, these statutes are largely irrelevant for present purposes.

A. *1784 Maryland Statute Making Lafayette and His Male Heirs  
“Natural Born Citizens”*

There was another kind of state statute in the postwar, pre-constitutional period that has not been examined by prior Natural Born Citizen Clause scholars. Several state legislatures enacted laws granting citizenship status to foreign soldiers who had fought with distinction in the Revolutionary War, most notably the Marquis de Lafayette and Baron Friedrich von Steuben.<sup>350</sup> Because these state statutes made the foreign soldiers citizens before “the time of the adoption of this Constitution,” they were constitutionally eligible to be President, since state law necessarily determined who was a “citizen of the United States” at the time.<sup>351</sup>

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346. See Ramsey, *supra* note 24, (manuscript at 27–31) (discussing the tendency of states to follow the English use of “natural born subjects” in defining citizenship).

347. See *supra* Section II.B (explaining the lack of early American treatises dealing with the issue of citizenship for subjects born outside the United States).

348. See U.S. CONST. art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

349. See *supra* Section II.A (detailing the development of *jus sanguinis* throughout the eighteenth century English empire).

350. See, e.g., 1784 Conn. Pub. Acts 439 (considering Marquis de Lafayette to be a “Citizen[] of this State”); 1785 Va. Acts 8 (declaring Lafayette to be a “citizen of this State”).

351. U.S. CONST. art. II, § 1, cl. 5; see KETTNER, *supra* note 12, at 213–14 (noting that states “assumed sovereign control over naturalization,” and they granted citizenship to many British persons who served for America in the Revolutionary War).

A law titled “An Act for the Naturalization of the Marquis de la Fayette” passed by the Virginia General Assembly in 1785 is an illustrative example:

Whereas the Marquis de La Fayette is eminently distinguished, by early and signal exertions in defence of American liberty; And whereas this illustrious Nobleman continues to afford testimonies of unceasing affection to this State, and the General Assembly being solicitous to bestow the most decisive mark of regard which a Republic can give;

*Be it enacted*, That the Marquis de la Fayette be henceforth deemed and considered a citizen of this State, and that he shall enjoy all the rights, privileges, and immunities, thereunto belonging.<sup>352</sup>

The Connecticut legislature, in October 1784, went one step further and gave citizenship to La Fayette and his son:

Whereas the Right Hon<sup>ble</sup> the Marquis De La Fayette Mareschal De Camp of the Armies of the King of France and Major General in the late Army of the United States of America in their late War with the King of Great Britain has exhibited his disinterested Attachment to the Liberties of Mankind in a very illustrious and disinterested manner—

*Therefore Resolved by this Assembly* that the Marquis De La Fayette, and his Son George Washington Esq<sup>r</sup> be and they are hereby declared free Citizens of this State to all Intents constructions and purposes whatsoever.<sup>353</sup>

Most interesting of all, the Maryland General Assembly, also in 1784, passed an act making Lafayette “and his male heirs for ever . . . natural born citizens,” the very words used in the Constitution.<sup>354</sup> By operation of this statute, Lafayette was presumptively eligible to be President under *both* citizenship prongs of Article II—as a citizen of the United States at the time of the Constitution’s adoption and as a “natural born Citizen.” Furthermore, because the Maryland statute appears never to have been rescinded, it would appear that any male heir of Lafayette, even today, could plausibly claim presidential eligibility as a “natural born Citizen” under the statute. Despite its clear importance to the meaning of “natural born Citizen” in the U.S. Constitution, no prior scholarship on the Natural Born Citizen Clause has discussed it. The

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352. 1785 Va. Acts 8.

353. 1784 Conn. Pub. Acts 439.

354. *See* An Act to Naturalize the Major-General the Marquis de la Fayette and His Heirs Male For Ever, 1784 Md. Laws 378.

statute, entitled “An ACT to naturalize major-general the marquis de la Fayette and his male heirs forever,” provided:

Whereas the general assembly of Maryland, anxious to perpetuate a name dear to the state, and to recognize the marquis de la Fayette for one of its citizens, who, at the age of nineteen, left his native country, and risked his life in the late revolution; who, on his joining the American army, after being appointed by congress to the rank of major-general, disinterestedly refused the usual rewards of command, and fought only to deserve what he attained, the character of patriot and soldier; who, when appointed to conduct an incursion into Canada, called forth by his prudence and extraordinary discretion the approbation of congress; who, at the head of an army in Virginia, baffled the manœuvres of a distinguished general, and excited the admiration of the oldest commanders; who early attracted the notice and obtained the friendship of the illustrious general Washington; and who laboured and succeeded in raising the honour and the name of the United States of America: Therefore,

Be it enacted, *by the general assembly of Maryland*, That the marquis de la Fayette, and his heirs male for ever, shall be, and they and each of them are hereby deemed, adjudged, and taken to be, natural born citizens of this state, and shall henceforth be entitled to all the immunities, rights and privileges, of natural born citizens thereof, they and every of them conforming to the constitution and laws of this state, in the enjoyment and exercise of such immunities, rights and privileges.<sup>355</sup>

The Maryland legislature’s 1784 grant of “natural born citizenship” to Lafayette and his male heirs forever because of his heroic military service and labor in “raising the honour and the name of the United States of America” generates three key insights.<sup>356</sup> First, it suggests that Americans of the time accepted that a legislature might grant natural born citizenship to someone not born in the United States or born abroad to U.S. parents for proven loyalty to the political community of the United States. It was in this sense similar to the British *jus muneris* for soldiers and seamen.<sup>357</sup> But, unlike those British natural born subject statutes, natural born citizenship under the 1784 American

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355. *Id.*

356. *Id.*

357. *See* An Act for the Encouragement of Trade to America 1707, 6 Ann. c. 64, § 20 (Eng.) (granting citizenship to soldiers and seamen who served for at least two years during Queen Anne’s War).

statute was without limitation on office-holding or contingent on oaths of loyalty or on any other condition.

Second, the statute reinforces the patrilineal understanding of “natural born Citizen” in the 1780s and the prominence of *jus sanguinis* as a natural birthright principle. Not only was Lafayette himself made a natural born citizen because of his loyal service, but the statute also presumes that his descendants, who have his blood, will also be loyal.<sup>358</sup> But only his *male* descendants are declared to be natural born citizens “for ever.”<sup>359</sup>

Third and most importantly, the statute suggests that a U.S. legislature might deem a person a “natural born Citizen” based on a connection to the United States other than birthplace. At first glance, this appears to validate the congressional naturalization power theory of Ramsey, Maskell, Pryor, and Amar, regarding the meaning of “natural born Citizen.”<sup>360</sup> On their view, if Congress were to pass the same statute today with respect to Lafayette’s descendants declaring them “natural born Citizens,” then any descendant of Lafayette born after the statute was enacted could be President of the United States.<sup>361</sup> Ramsey, for instance, concludes that Congress’s power to enact a statute conveying natural born status could not be applied to persons “with no connections to the United States at birth.”<sup>362</sup> But, Lafayette’s heirs surely have a very strong connection to the United States by virtue of being the lineal descents of a founding father, akin to present-day lineal descendants of Alexander Hamilton or Benjamin Franklin. And the 1784 Maryland statute’s extension of natural born citizen status to Lafayette’s “heirs male for ever” supplies direct founding-era evidence that they have the requisite connections to the United States at birth that Ramsey would require.

In my opinion, the reason why the 1784 Maryland statute ultimately does *not* support a general naturalization power under Article I to confer natural born citizenship sufficient for presidential eligibility on any deserving foreigner or similarly situated group of foreigners is found in the other citizenship option for presidential eligibility. Recall

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358. See 1784 Md. Laws 378.

359. *Id.*

360. See *supra* notes 24–26 and accompanying text.

361. Congress does still grant honorary citizenship (e.g., to Winston Churchill), but it does not come with the rights of natural born citizenship or even regular U.S. citizenship. See H.R. Rep. No. 113-548, at 2 (2014) (granting honorary citizenship to Bernardo de Gálvez y Madrid and noting that Churchill had previously been granted honorary citizenship).

362. Ramsey, *supra* note 24, (manuscript at 42).

that Article II provides that any person who was a citizen of the several United States at the time of the adoption of the Constitution is also eligible to be President.<sup>363</sup> Thus, Lafayette would have been eligible to be President by operation of the pre-constitutional Virginia and Connecticut statutes conferring citizenship on him, without the need for the “natural born citizens” provision of the Maryland statute. As discussed in Section I.B above, the purpose of Article II’s provision of presidential eligibility for citizens at the time of the Constitution’s adoption was to recognize the special contribution of foreign soldiers like Lafayette who had fought to establish the new Republic. This was the same purpose animating the 1784 Maryland statute. This sort of special recognition, however, was a unique, one-time exception, not a justification that might be replicated by Congress or any state legislatures in the future. This may explain why neither the United States nor the states enacted any more statutes like the 1784 Maryland statute granting non-honorific, natural born citizenship to foreigners after the Constitution was adopted. Let us turn now to the first naturalization statute enacted by the new Congress six years later in 1790, which also used the words “natural born citizens.”

*B. 1790 Naturalization Statute and Subsequent U.S. Naturalization Statutes*

The First Congress’s inaugural uniform naturalization statute became law on March 26, 1790.<sup>364</sup> The 1790 statute is the only U.S. national law other than Article II to use the words “natural born citizens.”<sup>365</sup> The use of those extinct words, coupled with the fact that the 1790 statute was enacted only two years after the Constitution’s adoption by a Congress that included several members who had played leading roles the Constitution’s drafting and ratification, explains its rightful prominence in all existing accounts of the meaning of the Natural Born Citizen Clause.

The particular context in which the words “natural born citizens” are used in the 1790 statute, however, had nothing to do with presidential eligibility. The phrase was used in a secondary part of the statute to designate certain persons born outside of the United States who did not have to apply and meet the residence, oath, and good character requirements for any other person born outside the United

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363. See U.S. CONST. art. II, cl. 5.

364. Naturalization Act of 1790, ch. 3, 1 Stat. 103, *repealed by* ch. 20, 1 Stat. 414 (1795).

365. *Id.* at 104.

States to become a U.S. citizen.<sup>366</sup> The statute's primary purpose was to specify these "naturalization" requirements.

Thus, the statute's first and main provision stated that "any alien being a free white person" who had resided two years within the United States "may be admitted to become a citizen" by applying to "any common law court of record" in a state "wherein he shall have resided" for a year, "making proof" of good character, and taking an oath or affirmation to support the U.S. Constitution.<sup>367</sup> The statute continued, "the children of such persons so naturalized, dwelling within the United States" and "under the age of twenty-one years at the time of such naturalization, shall also be considered as citizens of the United States."<sup>368</sup> The last sentence of the statute, in which the words "natural born citizens" appeared, provided in full:

And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States: *Provided also*, That no person heretofore proscribed by any state, shall be admitted a citizen aforesaid, except by an act of the legislature of the state in which such person was proscribed.<sup>369</sup>

A few observations are in order about the statute. First, it bears a remarkable resemblance to the 1350 statute *De Natis Ultra Mare* which literally means "on children born beyond sea." As noted above, this landmark statute did not use the exact words "natural born subjects," but it was the undisputed ancestor of Parliament's later "natural born subject" statutes, such as the Act of 1708, as Blackstone acknowledged in the *Commentaries*.<sup>370</sup> However, Blackstone did not quote the precise words "children born beyond sea," instead writing "all children born abroad."<sup>371</sup> This suggests that the First Congress knew the original source or knew about it from a source other than Blackstone. The bottom line is that the four centuries-old *De Natis Ultra Mare* was a monumental statute, likely known not just to the lawyers among the founding Americans like John Adams or Alexander Hamilton, but to

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366. *Id.*

367. *Id.* at 103.

368. *Id.* at 104.

369. *Id.*

370. See *supra* notes 341–44 and accompanying text.

371. See 1 BLACKSTONE, *supra* note 11, at \*373.

many in the United States who had themselves been “children born beyond sea” in their former lives as British subjects.

Second, like the 1708 English statute, the American statute appears ambiguous about whether both parents had to be U.S. citizens or only one parent, possibly a mother, had to be a U.S. citizen. Recall, however, that Parliament enacted a statute in 1730 to “explain” that the ambiguous 1708 statute referred to the children of English fathers only.<sup>372</sup> And *De Natis Ultra Mare* had required both parents to be English. Two esteemed modern commentators, Paul Clement and Neal Katyal, however, resolve the ambiguity in the 1790 U.S. statute to mean that only one parent, either mother or father, had to be a U.S. citizen: “The Naturalization Act of 1790 expanded the class of citizens at birth to include children born abroad of citizen mothers as long as the father had at least been resident in the United States at some point.”<sup>373</sup> A crucial step in their analysis is the statute’s command that the father must have been “resident in the United States.”<sup>374</sup> They conclude from this condition that the statute applied to a foreign-born child of a U.S. citizen mother and non-citizen father so long as the foreign father was “resident in the United States” before the child’s birth.<sup>375</sup>

This is an utterly implausible reading of the 1790 statute. The only way to read the father’s residence requirement in light of the practical realities of the late eighteenth century is to read it as implicitly presuming that the *father* of the child was a U.S. citizen with prior residence in the United States. The notion that the First Congress contemplated an American woman meeting a foreign man in the United States and followed him back to his country to have a child

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372. See The British Nationality Act 1730, 4 Geo. 2 c. 21, § 1 (Eng.). The 1790 U.S. statute also carved out of “natural born” citizen status the children of *fathers* who had not been proscribed by any States, which is similar to the 1730 statute’s exception from natural born subject status foreign-born children whose fathers were “attainted of high Treason” or “or was in the actual Service of any foreign Prince or State then in enmity with the Crown.” *Id.* § 3. An exception to the exception was made for, among others, “any Child” of a treasonous Father who “professed the Protestant Religion” and had resided in Great Britain or Ireland “for the Space of two Years” between the enactments of the 1708 and 1731 statutes, or had possessed, received, sold, or settled “any Lands, Tenements or Hereditaments” within Great Britain or Ireland during the same period. *Id.* The U.S. 1790 statute likely substituted the word “proscribed” for “attainted of High treason” because of the U.S. Constitution’s dual prohibitions on bills of attainder. See U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder . . . shall be passed.”); *id.* § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder.”).

373. Clement & Katyal, *supra* note 23.

374. *Id.*

375. *Id.*

there, however ordinary it may seem today, is anachronistic. Even now, no national immigration statute, in the United States or otherwise, provides that a person may be a citizen if a mother is a citizen and the foreign father lived at some point in the mother's country. All modern statutes require only the parent (whether mother or father) from whom the child's citizenship is derived to have resided in the country; the foreign parent's residence in the country is irrelevant.

Why then, one might wonder, did the First Congress require that a U.S. citizen father have resided in the United States for him to pass U.S. citizenship on to his child born abroad? The answer is simple enough. If there were no residency requirement, then it would be possible for a future child, generations later, to have "natural born" U.S. citizenship, despite being long removed from any ancestors who lived there and possessed residual loyalty to the United States. A child born outside of the United States, who derived her U.S. citizenship from her father who was born and lived his entire life abroad and who derived his U.S. citizenship from his father (her grandfather) who was the last ancestor to have lived in the United States would still be a "natural born citizen." The chain could regress infinitely.<sup>376</sup> The parental residency requirement is intended to prevent this potentially infinite regress.

Indeed, the specific residency duration requirement for a U.S. citizen father who originates derivative citizenship for his foreign-born child is the one aspect of who counts as a "natural born Citizen"

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376. James Wilson, who, as we have seen, played a leading role in the congressional citizenship requirement debates at the Constitutional Convention, may have suggested in a pamphlet that he wrote in 1768 that this infinite regress was consistent with natural law. See generally James Wilson, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*, in 1 COLLECTED WORKS OF JAMES WILSON 3–31 (Kermit L. Hall & David Mark Hall, eds., 2007). He quoted Lord Bacon's opinion in *Calvin's Case* for the following proposition:

Hence all children born in any part of the world, if they be of English parents continuing at that time as liege subjects to the king, and having done no act to forfeit the benefit of their allegiance, are *ipso facto* naturalized: and if they have issue, and their descendants intermarry among themselves, such descendants are naturalized to all generations.

*Id.* at 29. Wilson is clearly thinking of the condition of the American colonists, who would have had a claim to British natural born subjectship by virtue of *jus soli* if they were born within the British Empire. To the extent he refers explicitly to *jus sanguinis*, however, it seems he is suggesting that children born outside of England (but in the colonies) whose parents are both loyal British subjects, or the children of loyal subject couples, would be natural born subjects, too, potentially *ad infinitum*. I am grateful to John Mikhail for pointing me to this discussion.

eligible to be President under Article II that the Constitution leaves to Congress’s discretion. The natural law principle of *jus sanguinis* in the late eighteenth century only dictated that a child born extraterritorially inherits the father’s nationality.<sup>377</sup> It did not necessarily compel prior residence in the country in question, much less a specific term of years to establish the citizen father’s prior residence—that was the office of positive law via enactment.<sup>378</sup> In a recent case, *Sessions v. Morales-Santana*,<sup>379</sup> the U.S. Supreme Court held that Congress may not, consistent with the Equal Protection Clause, enact different period-of-residence requirements for unwed fathers and mothers to pass U.S. citizenship to their children.<sup>380</sup> The Court in *Morales-Santana* did not purport to address the constitutional meaning of “natural born Citizen” as a condition for presidential eligibility in Article II.<sup>381</sup> However, the Court’s decision would presumably apply to hold Congress to enacting the same residency requirement for U.S. citizenship of fathers and mothers of children born abroad who are entitled to U.S. citizenship by birth.

One last point worth mentioning about the 1790 U.S. statute, as compared to the prior English statutes, is that it underscores the difference between natural born “subjectship” and “citizenship.” Recall that the experimental eighteenth-century, British “natural born subject” statutes for foreigners who were Protestants or served in the military, merchant ships, or whaleboats, came with conditions on holding government offices.<sup>382</sup> The limitation illustrated the subordinate nature of “subjectship” to the Crown bestowed by Parliament, which could impose prohibitions on what those whom it deemed natural born subjects could do. Natural born “citizenship” in the United States, by contrast, could not be granted subject to conditions on office-holding that Congress deemed proper.

Subsequent Congresses replaced the phrase “natural born Citizens” in the 1790 statute with “citizens of the United States” in the next four naturalization statutes of 1795,<sup>383</sup> 1798 (one of the infamous Alien and

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377. See MASKELL, *supra* note 3, at 2 (describing the long-standing tradition of incorporating *jus sanguinis* into British law).

378. *Id.* at 2–3.

379. 137 S. Ct. 1678 (2017).

380. *Id.* at 1693–94.

381. See *id.* at 1687 (discussing citizenship requirements generally).

382. See *supra* notes 273–94.

383. An Act to Establish an Uniform Rule of Naturalization, and to Repeal the Act Heretofore Passed on That Subject, ch. 20, 1 Stat. 414 (1795).

Sedition Acts),<sup>384</sup> 1802,<sup>385</sup> and 1855.<sup>386</sup> The 1795 statute is particularly important because it was the enactment that repealed the 1790 statute and substituted “citizens of United States” for “natural born citizens.”<sup>387</sup>

The 1795 statute was more demanding as to the requirements for naturalization, consistent with greater concern for foreign monarchical influence during a time of revolutionary turmoil in Europe.<sup>388</sup> For example, although the new statute provided that any foreigner who was a “free white person” then residing in the United States was grandfathered into the two-year residence requirement of the 1790 statute, in the future, any aliens would have to reside for *five* years.<sup>389</sup> They would also have to make an oath or affirmation of “bona fide” intent to become citizens of the United States at least three years before becoming citizens.<sup>390</sup> And, in addition to taking the oath or affirmation to support the Constitution prescribed by the 1790 law, any foreigner seeking to be admitted had to “absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty whatever, and particularly by name, the prince, potentate, state, or sovereignty, whereof he was before a citizen or subject.”<sup>391</sup>

Another important change from the 1790 Act was the structure of the statute. Instead of the final sentence of the 1790 statute, in which “natural born citizens” was used to signify who did *not* require naturalization, the 1795 statute combined the two “children of”

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384. An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798); An Act in Addition to the Act, Entitled “An Act for the Punishment of Certain Crimes Against the United States,” ch. 74, 1 Stat. 596 (1798); An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1790).

385. An Act to Establish an Uniform rule of Naturalization, and to Repeal the Acts Heretofore Passed on That Subject, ch. 28, 2 Stat. 153 (1802), *amended by* 10 Stat. 604 (1855).

386. An Act to Secure the Right of Citizenship to Children of Citizens of the United States Born Out of the Limits Thereof, ch. 71, 10 Stat. 604 (1855).

387. *See* ch. 20, 1 Stat. 414 (“And be it further enacted, That the act intituled ‘An Act to establish an uniform rule of naturalization,’ passed the twenty-sixth day of March, one thousand seven hundred and ninety, be, and the same is hereby repealed.”).

388. *See* Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT’L L. 237, 253 (1994) (noting that the 1795 statute required renunciation of titles of nobility and judicial finding of fidelity to the Constitution).

389. *See* ch. 20, 1 Stat. 414.

390. *Id.*

391. *Id.* Any such alien who “shall have borne any hereditary title, or been of any of the orders of nobility, in the kingdom or state from which he came” also had to “make an express renunciation of his title or order of nobility.” *Id.*

provisions of the prior statute.<sup>392</sup> Thus, section 3 of the 1795 statute provided that the following shall be “considered as citizens of the United States”: (1) children of “persons duly naturalized” living within the United States who were less than twenty-one years of age at the time of the parent’s naturalization and (2) “the children of citizens of the United States, born out of the limits and jurisdiction of the United States.”<sup>393</sup> The provision continued the requirements that fathers had to have been resident in the United States and that no person proscribed by a state could be admitted absent the consent of the relevant state legislature.<sup>394</sup> But, a new condition was added barring any person “who has been legally convicted of having joined the army of Great Britain during the late war.”<sup>395</sup> This last provision echoed the 1730 English statute’s exclusion of the children of fathers who had served in the armies of foreign enemies from natural born subject status.<sup>396</sup>

The 1795 statute’s formulation grouped together as U.S. citizens the children of naturalized citizens living within the United States who were less than twenty-one years old with the children of U.S. citizens born abroad, whom the 1790 statute had declared to be “natural born citizens.” But, the children in the former group were not necessarily “natural born citizens” by operation of *jus soli* because they might have been born abroad like their naturalized parents. The 1790 statute, by contrast, had distinguished the children of naturalized citizens who became U.S. citizens through derivative citizenship as minors. Thus, when St. George Tucker observed that “Persons naturalized according to these acts [of 1790 and 1795], are entitled to all the rights of natural-born citizens, except . . . they are forever incapable of being chosen to the office of president of the United States,”<sup>397</sup> he was referring to these children of naturalized citizens, not the children of U.S. citizens born “beyond sea” who had been deemed “natural born citizens” by the 1790 Act.

It bears remembering that the 1790 U.S. statute and its successors were *naturalization* statutes defining who does—and does not—have to follow legislated naturalization procedures (oaths, residence

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392. Compare An Act to Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 104 (1790), with ch. 20, 1 Stat. 414.

393. Ch. 20, 1 Stat. 415.

394. See *id.*

395. *Id.*

396. See The British Nationality Act 1730, 4 Geo. 2 c. 21, § 1 (Eng.).

397. See TUCKER, *supra* note 314, at 374 n.12.

requirements) to be a U.S. citizen.<sup>398</sup> Under the statutes, children born abroad to U.S. citizen fathers who previously resided in the United States, “natural born citizens,” did not have to follow these procedures. The 1790 statute explicitly used the words “natural born citizens” to designate this category of extraterritorially born citizens.<sup>399</sup> The 1795 statute that repealed it referred to them as simply “citizens of the United States,” lumping them together with children within the United States who obtained derivative citizenship when their parents naturalized.<sup>400</sup> But, there was no shift in purposes from 1790 to 1795, that is, to revise the set of persons eligible to be President. In fact, *none* of the statutes were designed to address eligibility to be President or even a member of Congress. From the fourteenth to eighteenth centuries, the key legal benefit of being deemed “natural born” under the English statutes and the 1790 U.S. statute was the right to hold property, and, as corollary, to inherit—rights denied to aliens at the time.<sup>401</sup> Furthermore, the ambiguity in the 1790 statute about whether a foreign-born child had to have both parents be U.S. citizens, just the father be a U.S. citizen, or either parent be a U.S. citizen, is resolved in favor of just the father when one considers the context of the residency requirement for the father and the English statutory precedents, namely the 1730 statute.

One important feature of this account is the sexism implicit in the original meaning of the Natural Born Citizen Clause, something that other scholarship has not emphasized. We forget today how sexist American and European society was in the late eighteenth century. As the doctrine of coverture demonstrates, the conventional wisdom of the time was that women were not made to have active political lives independent of their husbands.<sup>402</sup> When viewed in the broader

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398. See Neuman, *supra* note 388, at 253 (discussing ideological qualifications necessary for citizenship under the statutes).

399. An Act to Establish a Uniform Rule of Naturalization, ch. 3, 1 Stat. 104 (1790).

400. See ch. 20, 1 Stat. 415.

401. Another benefit of subject or citizen status in the nineteenth century age of imperialism was the right to have one’s country use armed force to protect the bodily and property interests of nationals. An expansive definition of who counted as a country’s national was a frequent pretext for war during this period. See Thomas H. Lee, *The Law of War and the Responsibility to Protect Civilians: A Reinterpretation*, 55 HARV. INT’L L.J. 251, 266 (2014) (noting how “injury or the threat of injury to a citizen” was a frequent cause of war).

402. See Claudia Zaher, *When a Woman’s Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 BRITISH. L. LIB. J. 459, 461–62 (2014) (explaining the legal non-recognition of women under the doctrine of coverture).

context of these contemporaneous social norms, it becomes evident that *jus sanguinis* did not operate by matrilineal descent when parents differed in citizenship or subjectship (a much rarer combination than now). A child took the nationality of the father, not the mother. The idea was so deeply embedded that it did not need to be spoken or written about—it was an omnipresent presumption.

It was not until the mid-nineteenth century that the notion that nationality could pass through the mother began to take root, in large part because of historical political developments, similar to the evolution of earlier English “natural born subject” statutes. Great Britain, under Queen Victoria in 1844, was the first European nation to enact a statute extending natural born subject status to the lawful children of Englishwomen born outside of her majesty’s dominions.<sup>403</sup> The statute was enacted under a Queen at a time when the British Empire was greatly expanding. In medieval times, the primary reason for extending *jus sanguinis* to the foreign-born children of public servants or English merchants was domestic: to protect these children’s inheritance and property rights in England.<sup>404</sup> In the eighteenth century, mercantilism supplied a new justification for growing the numbers of British subjects. But, by the mid-nineteenth century, there was another important international reason for expanding the numbers of British nationals. The primary justification for the use of armed force in international affairs during the mid-nineteenth to early twentieth centuries was the protection of the property and persons of a country’s nationals abroad.<sup>405</sup> By increasing the numbers of those who might claim British nationality, the British Empire increased its ability to claim lawful grounds to use force.

The U.S. Congress rejected the model of British Parliament’s 1844 extension of *jus sanguinis* to matrilineal descent for extraterritorial births under Queen Victoria. American progressives subsequently proposed a similar bill, but Congress not only failed to enact it, it passed a statute in 1855 *prohibiting* U.S. citizenship to children born

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403. See H.S.Q. HENRIQUES, *THE LAW OF ALIENS AND NATURALIZATION* 5–6 (1906) (explaining how the U.K. Naturalization Act of 1844 expanded women’s ability to confer British nationality upon spouses and children).

404. See Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 *YALE L.J.* 2134, 2137, 2140 (2014) (discussing *jus sanguinis* citizenship in the context of family structure and preservation of rights for legitimate children of U.S. citizens).

405. See Lee, *supra* note 401, at 266.

outside the United States to U.S. citizen mothers.<sup>406</sup> In fact, it was not until 1934 that Congress enacted a law declaring children born abroad to U.S. citizen mothers who had resided in the United States to be citizens if they entered the United States before age eighteen and lived there for five years.<sup>407</sup> This was several decades after the Equal Protection Clause of the Fourteenth Amendment was ratified in 1868, and fourteen years after the Nineteenth Amendment granted women suffrage in 1920.<sup>408</sup> This chronology indicates that the Equal Protection Clause was not viewed as implicated by the differing citizenship treatment of foreign-born children of U.S. fathers as opposed to mothers until the mid-twentieth century,<sup>409</sup> long after American jurists had abandoned natural law as a direct source of jurisprudence regarding citizenship.

The Fourteenth Amendment also provides: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>410</sup> This provision does not address the requirement of being a “natural born Citizen” to be eligible to be President, or, for that matter, eligibility for any high national office. Instead, it articulates a non-discrimination principle among persons who are “born or naturalized in the United States” and subject to its jurisdiction with respect to their U.S. and state citizenship.<sup>411</sup> By its express terms, the Fourteenth Amendment’s Citizenship Clause does not address persons “born or naturalized” outside the United States. The U.S. Supreme Court, in *Wong Kim Ark v. United States*,<sup>412</sup> interpreted this provision to mean that a person born in U.S. territory to Chinese parents was a U.S. citizen,

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406. See An Act to Secure the Right of Citizenship to Children of Citizens of the United States Born Out of the Limits Thereof, ch. 71, 10 Stat. 604 (1855). The rule of patrilineal descent was reaffirmed twice, in 1907 and 1926. See An Act in Reference to the Expatriation of Citizens and Their Protection Abroad, ch. 2535, Pub. L. No. 59-193, 34 Stat. 1228 (1907) and 8 U.S.C. § 6 (1926).

407. See Immigration and Nationality Act of 1952, 66 Stat. 163 (1952); Equal Nationality Act of 1934, Pub. L. No. 250, ch. 344, 48 Stat. 797, *modified by* The Equal Nationality Act of 1940, Pub. L. No. 853, 76th Cong., 3d Sess. (effective Jan. 13, 1941). See generally Lester B. Orfield, *The Citizenship Act of 1934*, 2 U. CHI. L. REV. 99, 99–100 (1934) (discussing the passage of the Citizenship Act of 1934).

408. See U.S. CONST. amend. XIX.

409. See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693–94 (2017); *Nguyen v. INS*, 533 U.S. 53, 58–59 (2001); *Miller v. Albright*, 523 U.S. 420, 426 (1998).

410. U.S. CONST. amend. XIV, § 1.

411. *Id.*

412. 169 U.S. 649 (1898).

regardless of the parent’s presumptive allegiance to the Chinese emperor.<sup>413</sup> The Court, in its opinion, embraced the principle of *jus soli* as a constitutional birthright principle and rejected the idea that *jus sanguinis* trumped it as to the child of private Chinese subjects born on American soil.<sup>414</sup> However, it had no occasion to decide upon the application of *jus sanguinis* to the U.S. citizenship of children born of American parents abroad.

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To sum up Parts II through IV, the two natural law birthright principles of *jus soli* and *jus sanguinis* co-existed in the early modern European legal order, although *jus soli* had deeper roots in England, an island nation, and *jus sanguinis* was dominant on the European continent. But, both jurisdictions recognized that *jus sanguinis* operated vis-à-vis children born to public servants or private fathers abroad. Jurisprudentially speaking, the rule that *jus sanguinis* applied extraterritorially was English common law *and* the law of nations—both in turn were instantiations of natural law. This understanding was affirmed by the greatest English and American legal treatise writers of the late eighteenth century, William Blackstone and James Kent, respectively. A close reading of the First Congress’s Naturalization Act of 1790 also confirms this original understanding and the extent to which early Americans were aware of the landmark 1350 statute *De Natis Ultra Mare*, the earliest English legal manifestation of *jus sanguinis* as applied to the children of English subjects born beyond the sea.

Nor does a 1784 Maryland Statute making Lafayette and “his male heirs forever” lead to the conclusion that early Americans believed that legislatures could bestow natural born citizen status on any person with a connection to the United States, even foreigners. The provision in Article II of the Constitution making any citizen at the time of the adoption of the Constitution eligible for the President took care of any foreigner worthy of being deemed eligible for the President by having participated in founding the country. Thus, the Maryland statute manifested a one-time historical exception, not a precedent for plenary congressional power to determine who is a “natural born Citizen” eligible to be President. The one area of discretion Congress did have pertaining to natural born citizen status was setting a

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413. *Id.* at 693.

414. *Id.* at 731–32.

residency requirement on the U.S. citizen father from whom a foreign-born child derived U.S. citizenship.

Finally, no after-enacted constitutional provision addresses or modifies Article II's requirement that a person must be a "natural born Citizen" to be eligible to be President. Nor has the Supreme Court decided a case regarding the meaning of the Natural Born Citizen Clause or whether any after-enacted amendments like the Fourteenth Amendment's Equal Protection Clause has altered the Article II conditions for presidential eligibility. Consequently, the original meaning of that provision when it was adopted between 1787 and 1789 remains an important and unanswered question of constitutional interpretation.

#### CONCLUSION

Article II of the U.S. Constitution requires a President to be a "natural born Citizen." But, as the Supreme Court once observed: "The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that."<sup>415</sup> The words appear not to have been used in any law in the United States for the past two centuries, and have not been used in any U.S. *national* law since 1790. To date, no one has offered a clear and persuasive account of the phrase's original meaning.

Original meanings are rarely ascertainable, but this case is a rare exception. The relevant historical evidence, which was exhaustively reviewed in this Article—Constitutional Convention debates, English common law, natural law, law of nations, canonical Anglo-American treatises like Blackstone's and Kent's, the 1784 Maryland Lafayette statute, the 1790 U.S. Naturalization Statute—all lead to the conclusion that the original meaning of "natural born Citizen" in Article II refers to a person either born in the United States, or outside it to a parent in government service or to a U.S. citizen father. This answer is faithful to then-universal natural law principles of *jus soli* and *jus sanguinis*, and to the material condition of the early United States as a new nation geographically distant from Europe but dependent on it for trade and commerce.

What should we do with this original meaning today, when no one believes in natural law principles of "born" citizenship and has not for a long time? I venture only preliminary thoughts here. Any attempt

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415. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 167 (1874).

to translate the original meaning to present-day reality is stymied by the fact that the anchor concept is now extinct. To underscore the point, imagine that Article II had limited presidential eligibility to “a citizen under ancient Roman republican principles” instead. (The possibility is not as outrageous as it may seem, given the framing generation’s deep respect for the ancient Roman republic and its institutions—e.g., the Senate and the Consulship, which was an inspiration for the Presidency itself.) This hypothetical provision would more transparently require us to analyze a candidate’s eligibility under extinct historical standards. Modern constitutionalists might very well decide to ignore such an anachronistic condition altogether despite its plain-language clarity, or strongly urge a constitutional amendment. Others more favorably disposed to original meanings might insist on the necessity of historical research to figure out who counted as a citizen under ancient Roman republican principles, and on enforcing the fruits of the research as a requirement on presidential eligibility today. The more elusive historicity of Article II’s “natural born Citizen” requirement, however, has sparked neither politically prominent demands to abolish or amend it, nor a more coherent conception of what implementing the original meaning entails.

My findings on the original meaning of the Natural Born Citizen Clause reveal that it was not grounded exclusively on *jus soli* or *jus sanguinis*, but rather incorporated both natural law principles. This realization has important implications for modern applications. For instance, a strict adherence to *jus soli* might compel the conclusion that a person born in the United States of foreign parents within the country on a temporary but non-diplomatic status such as students or in violation of U.S. immigration laws, would be a natural born citizen eligible to be President of the United States. But an understanding that the concept of “natural born Citizen” in Article II also encompassed *jus sanguinis* throws doubt on sole reliance on *jus soli* to determine who is eligible to be President. On the other hand, relying exclusively on *jus sanguinis* might lead one to conclude that a person born abroad to a U.S. citizen father himself born overseas to a U.S. citizen father might count as a “natural born Citizen.” But the adopters of the Constitution did not eschew connection to U.S. soil altogether, for instance, by enacting statutes requiring the citizen father’s residence in the United States, like the 1790 Naturalization Act.

From a present-day perspective, the greatest misgivings about implementing the original meaning of the Natural Born Citizen Clause arise from the blatant sexism of the natural law principle of *jus*

*sanguinis*. Even in the twentieth century when natural law had receded as a wellspring of citizenship jurisprudence and long after the Fourteenth Amendment's Equal Protection Clause had been adopted, American laws proceeded on the assumption that children inherited the citizenship status of their fathers, not their mothers. Indeed, in many states, courts hewed to the view that married women (not just children) acquired the citizenship or domicile status of their husbands well into the twentieth century. But those sexist doctrines and laws have been retired for decades now.

On the other hand, it is difficult to see how Article II's "natural born Citizen" requirement violates any other provision of the Constitution by limiting presidential eligibility to children born abroad of U.S. citizen fathers but not mothers, unless the mother is in government service. No one has a right to be President of the United States, and so denial of presidential eligibility is not like denial of the right to vote or to equal treatment in schools or in the general workplace. Moreover, it is of no consequence whether the child of a U.S. citizen father born abroad is a male or a female: the *jus sanguinis* prong of the "natural born Citizen" requirement operates at the level of the parent, not the child. And the Supreme Court's decisions on the citizenship status of children born abroad to U.S. citizens abroad have not focused at all on Article II presidential eligibility; nor are they directly relevant, with the exception of *Sessions v. Morales-Santana*,<sup>416</sup> which commands the same prior residence requirement for citizen fathers as citizen mothers to children born abroad.

Given these considerations, what the courts should do with the natural-law original meaning of the Natural Born Citizen Clause—e.g., whether to stick by it or to hold it outdated by present realities of gender and globalism—in cases before them is beyond the scope of the Article. Indeed, some courts have held the Clause to be non-justiciable,<sup>417</sup> but, as one state judge has concluded,<sup>418</sup> that view seems misguided since the question is one of constitutional interpretation

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416. See text accompanying notes 379–81.

417. See *Keyes v. Bowen*, 117 Cal. Rptr. 3d 207, 215–16 (Ct. App. 2010); *Berg v. Obama*, 574 F. Supp. 2d 509, 518 (E.D. Pa. 2008) ("The alleged harm to voters stemming from a presidential candidate's failure to satisfy the eligibility requirements of the Natural Born Citizen Clause is not concrete or particularized enough to constitute an injury in fact sufficient to satisfy Article III standing."), *aff'd*, 586 F.3d 234 (3d Cir. 2009).

418. See *Williams v. Cruz*, OAL DKT. NO. STE 5016-16, 2016 WL 1554252, at \*17 (N.J. Admin. Apr. 12, 2016).

that does not trespass on the constitutional powers of the political branches. The aim of this Article, rather, has been to present all the historical evidence and analyze it in an even-handed way. One very strong impression I have formed from the exercise is the startling contingency of this enigmatic constitutional provision. If John Jay had never written his two-sentence note to Washington in late July 1787, the original draft would likely have prevailed, and any U.S. citizen who had been an inhabitant of the United States for twenty-one years would have been eligible to be President. At least for me, this contingency raises doubt whether commitment to our Constitution requires blind fidelity to every single word in its text. Words, after all, are only as perfect as their creators, and so is our written Constitution.