CONGRESS'S POWER TO DEFINE "NATURAL BORN": A RESPONSE TO PROFESSOR LEE

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Professor Thomas Lee and I independently wrote recent Articles on the original meaning of the Constitution's "natural born Citizen" clause, reaching somewhat different conclusions. This brief Response comments on our agreements and differences. Two points of agreement merit particular emphasis. First, we agree that the original meaning of "natural born" in the eligibility clause can be understood in significant part through its English law antecedents, specifically the English law concept of natural born subjectship. Second, we agree on the basic evolution of English subjectship law—specifically, that it began in ancient times as almost exclusively based on the principle of jus soli*, or subjectship arising from a person's birth within sovereign territory, and evolved through a series of statutes to also include elements of the continental European principle of* jus sanguinis*, deriving subjectship from the subjectship of a person's parents. We principally disagree on how the Constitution, through the eligibility clause, adopted English law's incorporation of* jus sanguinis*. In Professor Lee's view, the eligibility clause adopted English subjectship law's definition of "natural born" largely as it stood in 1787. My view, as described in more detail in* The Original Meaning of "Natural Born," *is that the clause—combined with Congress's power over naturalization—gave Congress some power to adopt and define the parameters of* jus sanguinis *citizenship, similar to parliament's power to adopt and define the parameters of* jus sanguinis *subjectship in seventeenth and eighteenth century England.*

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INTRODUCTION

Coincidentally, Professor Thomas Lee and I independently wrote recent Articles on the original meaning of the Constitution's "natural born Citizen" clause,[1] reaching somewhat different conclusions.[2] The *American University Law Review* invited me to comment on the relationship between the Articles' approaches, and I am pleased to do so in the following contribution.

I. OVERVIEW: AGREEMENTS AND DISAGREEMENTS

Professor Lee's Article is characteristically thorough and insightful, and I agree with much of it. Two points of agreement merit particular emphasis. First, we agree that the original meaning of "natural born" in the eligibility clause can be understood in significant part through its English law antecedents, specifically the English law phrase "natural born subject."[3] Second, we agree on the basic evolution of English subjectship law—specifically, that it began in ancient times as almost exclusively based on the principle of *jus soli*, or subjectship arising from a person's birth within sovereign territory,[4] and evolved through a

1. U.S. CONST. art. II, § 1 (providing that "[n]o Person except a natural born Citizen . . . shall be eligible to the Office of President").

2. Thomas H. Lee, *"Natural Born Citizen*," 67 AM. U. L. REV. 327 (2017); Michael D. Ramsey, *The Original Meaning of "Natural Born*," 20 U. PA. J. CONST. L. 199 (2017).

3. Lee, *supra* note 2, at 362–82; Ramsey, *supra* note 2, at 210–24; *see also* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1322 (2018) (discussing the use of the historical meaning of legal terms of art in interpreting the Constitution). In adopting this focus, I do not take a position on whether the inquiry's touchstone is the intent of the Framers or the public meaning of the text. *See* Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539, 540 (2013) (discussing these approaches). For convenience in this essay, as in prior scholarship, I use "English law" to refer to the law of England prior to the union with Scotland and to the law of the United Kingdom thereafter.

4. Lee, *supra* note 2, at 330–31, 362–63; Ramsey, *supra* note 2, at 210–13.

series of statutes to also include elements of the continental European principle of *jus sanguinis*, or subjectship derived from the subjectship of a person's parents."[5]

We principally disagree on how the Constitution, through the eligibility clause, adopted English law's incorporation of *jus sanguinis*.[6] In Professor Lee's view, the eligibility clause adopted English subjectship law's definition of "natural born" largely as it stood in 1787.[7] My view, as described in more detail in *The Original Meaning of "Natural Born*," is that the clause—combined with Congress's power over naturalization—gave Congress some power to adopt and define the parameters of *jus sanguinis* citizenship, similar to Parliament's power to adopt and define the parameters of *jus sanguinis* subjectship in seventeenth and eighteenth century England.[8]

A clarification is needed here. Professor Lee criticizes the view that would give Congress unlimited power to define natural born citizenship (including, for example, to convey it upon people with no connection to the United States at birth, and on the basis of actions taken long after birth).[9] Such unlimited congressional power, he argues, would be inconsistent with the clause's purpose, which was to prevent people without life–long connections to the United States from becoming President.[10] If Congress could declare anyone to be a natural born citizen, the eligibility clause would be effectively meaningless, or rather it would be an odd and awkward way of saying that Congress had plenary power to decide who should be eligible to be President.

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5. Lee, *supra* note 2, at 331–32, 362–82; Ramsey, *supra* note 2, at 210–24. As discussed below, we disagree on the specifics of the evolution of English law, with important consequences for our conclusions. *See infra* Part II. In contrast, other leading writers focus on the English common law of subjectship but discount statutory modifications. *See* Mary Brigid McManamon, *The Natural Born Citizen Clause as Originally Understood*, 64 CATH. U. L. REV. 317, 320–25 (2015); John Vlahoplus, *Toward Natural Born Derivative Citizenship*, 7 BRIT. J. AM. LEGAL STUD. 71, 104–10 (2018); see also *John Vlahoplus, "Natural Born Citizen": A Response to Thomas H. Lee*, 67 AM. U. L. REV. F. 15, 21–30 (2018) (criticizing Professor Lee's analysis).

6. Professor Lee and I agree that the eligibility clause fully incorporated the English law of *jus soli*. *See* Lee, *supra* note 2, at 335.

7. Lee, *supra* note 2, at 335–36. As discussed below, in Professor Lee's view, the eligibility clause does not incorporate the exact 1787–1788 rules of natural born subjectship law, but rather only those that he sees as core and longstanding ones.

8. *See* Ramsey, *supra* note 2, at 234–40.

9. Lee, *supra* note 2, at 334.

10. *See id.* at 354–57 (discussing the dual purposes of the eligibility clause in preventing European intrusion into domestic politics and involvement in European affairs by a leader whose loyalties lay outside the United States).

I agree with Professor Lee on this point, and it is important to emphasize that I do not read the clause to have given Congress such an unlimited power. As described in *The Original Meaning of "Natural Born*," my view is that the Constitution gave Congress power to define which connections to the United States at birth (beyond birth within its territory) would be sufficient to establish natural born citizen status.[11] I do not contend that the Constitution gave Congress power to declare persons lacking connections to the United States at birth to be natural born citizens.[12] Thus, in my reading the original meaning of the eligibility clause had substantial limiting force consistent with the clause's purpose to provide a constitutional restriction on eligibility.[13]

My view of Congress's power parallels Parliament's practice in the seventeenth and eighteenth centuries. During this time, Parliament passed a series of statutes declaring various groups of persons born outside sovereign territory to be natural born subjects. The requirements for such status shifted from statute to statute, but a common element was that the persons made natural born subjects by statute had a connection to England at birth because at least one of their parents was an English subject.[14] This practice was described at the time as part of Parliament's naturalization power, and my conclusion is that it carried over to Congress's naturalization power under the Constitution.[15]

As Professor Lee describes, Parliament also purported to declare certain groups of people to be natural born subjects based not on their connections to England at birth but upon their subsequent actions (such as serving in the English navy).[16] But he and I agree that these statutes did not actually confer full natural born subject status upon

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11. Ramsey, *supra* note 2, at 234–41.

12. *See id.* at 237–40.

13. *See id.* at 204–10; *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 164–65 (2005) (discussing purposes of the eligibility clause).

14. *Id.* at 218–21.

15. *See id.* at 213–24, 230–34. Professor Lee at times appears to attribute to me an unlimited (or at least much less limited) view of Congress's power to declare natural born citizenship. Because our Articles were written and published at about the same time, he may have obtained an incomplete view of my conclusions from an intermediate draft.

16. Lee, *supra* note 2, at 379–80 ("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 hardship duties.").

their beneficiaries, whatever the statutes appeared to say, because each of them contained a "disabling clause" restricting the ability of the beneficiaries to exercise the full rights of natural born subjects (in particular, the ability to hold office or to receive grants of land from the crown).[17] In my view, this practice supports a limit on Congress's ability to declare natural born citizenship status, if one concludes as I do that Congress's power in this regard derives from parliamentary practice.

Ironically, the strongest evidence for an unlimited congressional power to define "natural born" is a previously obscure Maryland statute re-discovered by Professor Lee.[18] As he recounts, in 1784 the Maryland legislature declared the Marquis de Lafayette and all his subsequent male heirs to be natural born citizens of Maryland, without limitation.[19] This statute suggests that the founding generation in America might have embraced an unlimited legislative power to define natural born status.

However, I agree with Professor Lee that the Maryland statute is insufficient to establish a broad congressional power. It was an outlier among Confederation-era state citizenship statutes, many of which conveyed citizenship on people based on their service to the Revolution but did not purport to convey natural born status for post-birth actions.[20] Maryland passed the citizenship act at a time when natural born citizenship had no particular distinction from mere citizenship and so it may well have been a rhetorical exercise. And, as Professor Lee argues, accepting its implications would undermine the purpose of the eligibility clause, which was to prevent people such as Lafayette's heirs (foreigners lacking attachment to the United States from birth) from aspiring to the presidency.[21]

In sum, the differences between Professor Lee's view and my view are narrow but important. He argues that the eligibility clause carried over the core English definitions of "natural born" (including its

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17. *See id.* at 373, 384; Ramsey, *supra* note 2, at 222–23; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 362 (1765) (discussing use of the "disabling clause" in naturalization statutes).

18. *See* Lee, *supra* note 2, at 395–97.

19. *Id.* at 395.

20. *See id.* at 394 (discussing other Confederation-era state statutes).

21. Lafayette himself would have been eligible to the presidency by the additional provision of Article II, Section 1, making "a Citizen of the United States, at the time of the Adoption of this Constitution" eligible. U.S. CONST. art. II, § 1.

incorporation of *jus sanguinis*) as they stood in 1787.[22] My view is that the eligibility clause carried over the English idea of "natural born" as meaning birth within sovereign territory plus such extensions to persons born abroad to English subjects as the legislature from time to time adopted. Although the difference may sound technical, it is of particular importance to people who would have been excluded from subjectship at birth under English law in 1787 but who are given citizenship at birth by modern U.S. law.[23] In the ensuing sections, I will focus on two points of disagreement that lead to our divergent conclusions.

II. STATUTORY DEFINITIONS OF "NATURAL BORN" UNDER ENGLISH LAW AND EARLY U.S. LAW

Within English law, Professor Lee finds a long-standing, well-established version of *jus sanguinis* subjectship rooted in the fourteenth-century statute *De Natis Ultra Mare* and co-existing with the traditional *jus soli* subjectship of common law.[24] This view allows him to describe a common law of *jus sanguinis* (confirmed and developed by statute) with ancient origins and considerable stability[25] that carried over into the U.S. Constitution. I think this view is mistaken in its

22. Lee, *supra* note 2, at 335–36.

23. Most notably, persons born abroad to a U.S. citizen mother and a noncitizen father, such as 2016 presidential candidate Ted Cruz, would be affected. *Compare* Akhil Reed Amar, *Why Ted Cruz Is Eligible to Be President*, CNN (Jan. 14, 2016, 11:59 PM), https://www.cnn.com/2016/01/13/opinions/amar-cruz-trump-natural-born-citizen (arguing that Ted Cruz qualifies as a natural born citizen based on statutes in place at the time of his birth) *with* Thomas Lee, *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 (arguing that under an originalist interpretation of the Constitution, Ted Cruz would be ineligible for the presidency based on his birth outside the United States to a U.S. citizen mother and non-citizen father).

24. Lee, *supra* note 2, at 367–70, 382. As Professor Lee repeatedly emphasizes, the *De Natis Ultra Mare* statute is central to this conception. *See id.* at 331 ("[S]tarting in 1350, Parliament passed statutes bestowing subject status upon the foreign-born children of English subjects . . . ."); *see also id.* at 381 (referring to 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").

25. *See id.* at 331 (noting that "'[c]ommon law' in this context means the evolving customary law of England as reflected not only in judicial decisions, but also in landmark statutes").

description of English law and fails to account for the first U.S. naturalization statute passed in 1790.

Most importantly, Professor Lee ascribes too much significance to *De Natis Ultra Mare*, and thus finds far too much ancient tradition behind the English embrace of *jus sanguinis* subjectship. *De Natis Ultra Mare* did not make anyone a subject (natural born or otherwise). Rather, it declared that some people who were not English subjects (because they were born abroad) could nonetheless inherit property in England (if both of their parents were English subjects).[26] That is, it removed a disability placed on other aliens by English alienage law, but it did not address English subjectship law.[27] The statute is important in indicating early discomfort with the strict rules of *jus soli* and the disabilities of aliens in English common law as applied to the children of English subjects born abroad. But it was not a departure from *jus soli*; it was a departure from some of the harsh disabilities placed on aliens.

Instead, the beginning of Parliament's extension of natural born subjectship came in two seventeenth-century statutes responding to the civil war in the mid-century and King William III's European wars at the end of the century (passed in 1677 and 1698 respectively).[28] Unlike *De Natis Ultra Mare*, these statutes expressly made certain categories of persons "natural born subjects."[29] These statutes were in a sense very narrow, applying only to persons born during particular periods associated with disruptive events.[30] They were broader in

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26. *See* Ramsey, *supra* note 2, at 214–15 (quoting the statute) ("[P]ersons '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 . . . .'").

27. This conclusion is apparent from the text of the statute, which does not refer to subjectship status, and I am not aware of any English authority giving the statute or common law a broader reading. *See id.*; *see also* BLACKSTONE, *supra* note 17, at 361 (describing *De Natis Ultra Mare* as a change in inheritance law, not a change in subjectship law).

28. *See* Ramsey, *supra* note 2, at 215–17; *see also* Lee, *supra* note 2, at 370–75 (discussing these statutes).

29. Ramsey, *supra* note 2, at 215–17.

30. *Id.* at 215–18. The 1677 statute covered only people born between 14 June 1641 and 24 March 1660; the 1698 statute covered only people born between 13 February 1688 and 25 March 1698, and covered only people whose fathers or mothers were "then actually in the Service" of the King or Queen of England. *Id.* at 216–17. The precision of these statutes shows that there was no general rule of *jus sanguinis* in seventeenth-century English law, whether as a result of the statute *De Natis Ultra Mare* or otherwise. Many of the people made subjects by the seventeenth century statutes

another sense, applying to persons with at least one English parent (mother or father), in contrast to the statute *De Natis Ultra Mare* (which applied only to persons with two English parents).[31] Subsequent statutes broadened and narrowed the statutory definition—extending it to all children born abroad with English parents without date restrictions (1708), "clarifying" that this extension applied only to persons with natural born English fathers (1731), then further extending it to persons with natural born English paternal grandfathers (1773).[32] I see no evidence that during this time English courts or legal practice applied a common law of *jus sanguinis* beyond the strict text of the statutes. Indeed, the 1763 case *Leslie v. Grant*[33] read the 1731 statute narrowly—arguably inconsistently with its text—to reject a claim of subject status by a person born abroad to an English father.[34]

In sum, a general idea of *jus sanguinis* subjectship was established in English law by statute over the course of the seventeenth and eighteenth centuries. But the contours of the principle were not fixed or settled; rather they shifted abruptly with the passage of new statutes, including two major shifts in the 60 years prior to the Constitution.[35] Thus, American observers in the 1780s—whether looking at the English statutes themselves or reading about them in Blackstone's account[36]—would not have seen a stable regime dating to the fourteenth century. Instead, they would have seen a shifting set of parliamentary definitions of "natural born" as applied to persons born abroad.[37]

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were allowed to inherit English property by the *De Natis Ultra Mare* statute but needed further legislation to make them full subjects.

31. *Id.* at 215–17 (including the statutory distinctions of "Fathers and Mothers" versus "Fathers or Mothers").

32. *Id.* at 218–20.

33. Leslie v. Grant (1763) 2 Paton 68.

34. Ramsey, *supra* note 2, at 220 n.71 (discussing *Leslie*). The claimant in *Leslie* was born abroad to a father who had gained natural born subject status under the 1731 Act (because his father was born abroad to a natural born English father). The court held that the 1731 Act only applied to persons whose fathers were natural born subjects under common law, not to those whose fathers were natural born subjects under statutory law, thus rejecting the claim of subjectship by the child. *Id.*

35. *Id.* at 231–32.

36. *See* BLACKSTONE, *supra* note 17, at 354–63 (describing English subjectship law pertaining to persons born abroad).

37. *See* Ramsey, *supra* note 2, at 213–24 (detailing the changing statutory subjectship scheme from the fourteenth through the eighteenth centuries).

Described this way, the history of English subjectship law substantially undercuts Professor Lee's reading of the eligibility clause. Notably, he does not argue that the eligibility clause adopted the exact definition of "natural born" in English law in 1787–1788; instead, he argues that the clause adopted the longstanding core meaning of "natural born" in English law (including as developed by landmark statutes).[38] But there was no longstanding core meaning of "natural born" in English law as applied to persons born abroad. There were only the various ways Parliament had applied it.

Moreover, there is evidence that the First Congress though it had flexibility in defining natural born citizenship. In addition to prescribing how adult aliens could become citizens, the 1790 Naturalization Act provided:

> 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 . . . .[39]

Two points stand out. First, Congress—well aware of the eligibility clause in the new Constitution—thought it had power to extend natural born citizenship to include some persons born abroad to U.S. citizen parents.[40] The congressional debates indicate that Congress understood this provision as not merely confirming something established by the Constitution or common law, but rather as granting a status that could not otherwise be claimed.[41] Second, Congress did not think it was bound by the then-existing contours of English subjectship law. The 1790 Act did not follow the then-existing English law, which gave natural born status to persons whose fathers or

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38. *See* Lee, *supra* note 2, at 335–36. For example, it appears that Professor Lee would not extend the constitutional definition of "natural born" to persons with citizen paternal grandfathers, although Parliament included as "natural born" subjects persons with natural born subject paternal grandfathers in 1773.

39. An Act to Establish an Uniform Rule of Naturalization, ch. 3, sec. 1, 1 Stat. 103, 104 (1790). *See* Ramsey, *supra* note 2, at 209, 237–40 (discussing the 1790 Act).

40. *See* Ramsey, *supra* note 2, at 209, 237–40.

41. The initial draft of the Act addressed only the naturalization of aliens after birth. One congressman suggested that the case of persons born abroad with U.S. citizen parents "ought to be provided for," referencing one of the early English statutes. *Id.* at 238. No one objected, and the next draft included the substance of the provision on natural born citizens as enacted. *See id.* at 238–39; Michael D. Ramsey, *Originalism, Natural Born Citizens, and the 1790 Naturalization Act: A Reply to Saul Cornell*, 2016 WIS. L. REV. FORWARD 146, 151–53 (2016).

paternal grandfathers were natural born English subjects.[42] Instead, the 1790 Act gave natural born status to persons who were "the children of citizens of the United States."[43] The statute may be ambiguous whether it required two U.S. parents or only one,[44] but in either event it was not the English rule. The Act also did not require that the parent(s) themselves be natural born, as English law did.[45] Further, the 1790 Act imposed a residency requirement for the father (adopted after some debate) that did not exist in English law.[46]

I do not see how Professor Lee's theory accounts for the 1790 Act. If, as Professor Lee contends, the constitutional meaning of "natural born" was fixed by core principles of English law as it stood in 1787, then Congress in 1790 was bound to the English definition and Congress's purported departures from it in the 1790 Act were unconstitutional. To be sure, the First Congress may have passed some unconstitutional legislation. But it seems notable that (so far as we know) no one raised any constitutional questions about this part of the 1790 Act, even though the natural born citizen provision was discussed with some attention. A better explanation seems to be that Congress thought it had some flexibility to define "natural born," as applied to persons with U.S. citizen parents, through its naturalization power—as Parliament had previously done in English law.[47]

Indeed, Professor Lee concedes that the Naturalization Act's residency requirement "is the one aspect of who counts as a 'natural born Citizen' eligible to be President under Article II that the Constitution leaves to Congress's discretion."[48] But why should we suppose that the clause left *only* this "one aspect" to Congress's discretion? The principle that natural born subjectship/citizenship could be obtained from one's parents had a host of definitional issues, including: whether it could be conveyed through multiple

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42. *See* Ramsey, *supra* note 41, at 155–56; 1 Stat. at 104.

43. 1 Stat. at 104; Ramsey, *supra* note 2, at 209.

44. *See* Lee, *supra* note 2, at 399; *see also infra* Part III.

45. That is, under the 1790 Act, the children of naturalized U.S. citizens, if born abroad, would be natural born citizens. The 1708 and 1731 English statutes expressly required that the child's father had to be a "natural-born subject[]" to convey natural born subject status on the child. *See* Ramsey, *supra* note 2, at 218–19 (quoting statutes).

46. *Id.* at 209.

47. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 89–90 (1997) (observing that in the 1790 Act, "Congress appears to have interpreted the authority to enact 'naturalization' laws to give it a general power to define or confer citizenship").

48. Lee, *supra* note 2, at 400–01.

generations; whether it could be conveyed only by parents who were themselves natural born; and whether it could be conveyed by the child's mother or father, only by the father, or only by both parents. The English law resolution of these questions was that Parliament made the extensions it thought appropriate by statute through its naturalization power.[49] I read the Constitution as having adopted the same solution.

III. SEXISM AND NATURAL BORN CITIZENSHIP

I now turn to a second related point of disagreement with Professor Lee. He emphasizes the sexism of English and continental *jus sanguinis* subjectship/citizenship law—specifically, that natural born English subjectship could be acquired from one's father but not through one's mother, and that a similar restriction existed in European legal thought as reflected in Emer de Vattel's widely read 1758 treatise.[50] Professor Lee further argues that this sexist distinction was constitutionalized by the eligibility clause.[51] This claim leads to the main practical difference between our views applied to modern circumstances. Modern U.S. law gives citizenship at birth to persons born abroad with a U.S. citizen mother and a noncitizen father (with some restrictions).[52] Under Professor Lee's view, such persons are not natural born citizens—and thus are not eligible to the presidency—under the Constitution's original meaning, whatever Congress may purport to provide.[53]

Although the existence and pervasiveness of eighteenth-century sexism is undeniable, I think Professor Lee overstates its relevance in interpreting the eligibility clause. Most importantly, the foundational English natural born subject statutes of the seventeenth century did

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49. Ramsey, *supra* note 2, at 213–24.

50. *See* Lee, *supra* note 2, at 376–78 (discussing English statutes); *id.* at 390–91 (emphasizing that in Vattel's description one obtained *jus sanguinis* citizenship only from one's father, not one's mother); *see also* EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 219 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1797).

51. *See* Lee, *supra* note 2, at 335–36.

52. *See* 8 U.S.C. § 1401 (2012) (granting U.S. citizenship to persons born outside the United States to at least one U.S. citizen parent provided certain residency requirements are met).

53. *See* Lee, *supra* note 23 (discussing the situation of 2016 presidential candidate Ted Cruz). To be clear, neither Professor Lee's view nor my view turns on any claim about the desirability of such a rule in modern circumstances.

allow natural born status to be acquired from a subject mother and a non-subject father.[54] The father-only rule arose in English law only in 1731.[55] It would not have been contrary to English traditions for Parliament to shift back to a mother-or-father requirement in a subsequent statute, as the seventeenth century statutes provided precedent for such an approach.[56] Rather than reflecting entrenched sexism regarding subjectship, the 1731 statute may have reflected the practicality that English women did not then commonly travel overseas and marry foreigners; the focus was likely on merchants (typically male) traveling overseas for commercial purposes. In any event, if one saw in English law a flexible tradition of Parliament defining the boundaries of natural born subjectship for persons born abroad, that tradition did not preclude extending such subjectship to children of English mothers, even though that was not the English rule in 1787.

Second, the 1790 Naturalization Act seems plausibly read to extend natural born citizenship to persons with U.S. citizen mothers and noncitizen fathers. On its face, its text appears ambiguous.[57] But the congressional debates suggest an intent to include as natural born citizens persons with only one U.S. citizen parent, either mother or father. As I previously described the debates:

> Representative Burke wanted to make a slight change to the bill's language to clarify that both parents need not be citizens to make the child a citizen: "it is unnecessary that the father and mother would both be citizens." He then referred to a "Statute [that] was made in W[illiam] the 3rd." Probably he was referring to the naturalization statute of 1698 (the only statute passed under King William relating to subjectship and foreign birth), which gave natural born subject status to persons with English fathers or mothers. Representative Livermore replied that Burke's change was unnecessary because the bill already had the effect Burke wanted: "This [that is, natural born citizenship] is extended to all people and the expression sets forth the children of every citizen."[58]

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54. *See* Ramsey, *supra* note 2, at 216–17 (quoting the seventeenth-century statutes that explicitly granted subjectship to persons born abroad to English "Fathers or Mothers" under certain circumstances).

55. *Id.* at 219.

56. Indeed, as Professor Lee notes, Parliament shifted to a mother-or-father rule in 1844. Lee, *supra* note 2, at 405.

57. The key language is "the children of citizens of the United States," which might mean "the children of [two] citizens of the United States" or "the children of [any of the] citizens of the United States."

58. *See* Ramsey, *supra* note 41, at 153 (quoting congressional debates).

Although one must be cautious in deriving meaning from such a brief exchange, no one was recorded as objecting to Livermore's reading; the bill was not modified, and Burke appeared satisfied with Livermore's explanation (at least, he did not press the matter further). If Livermore's reading was correct, then the Act required only a U.S. citizen father *or* a U.S. citizen mother.

Professor Lee argues that the Act's residency requirement undercuts this reading—indeed, that it renders it "utterly implausible."[59] The Act required—in addition to the U.S. citizen parent requirement—that the child's father (but not the mother) have been a resident of the United States. This requirement seems entirely consistent with a reading that the child's citizenship could be obtained from the child's U.S. citizen mother. Given the sexist attitudes of the time, Congress might have thought this an appropriate additional limit on gaining citizenship through one's mother.[60] That is, even if the father was a noncitizen, Congress might have wanted him to have some connection to the United States to convey natural born citizen status.[61] In any event, Congress surely supposed that typically citizenship would descend from the father, so focusing the residency requirement on the father would not seem odd even though obtaining citizenship from the mother remained a possibility.

But even if the 1790 Act has the meaning Professor Lee gives it, that would not preclude future Congresses from extending natural born

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59. *See* Lee, *supra* note 2, at 399–400; *see also* Saul Cornell, *The 1790 Naturalization Act and the Original Meaning of the Natural Born Citizen Clause: A Short Primer on Historical Method and the Limits of Originalism*, 2016 WIS. L. REV. FORWARD 92 (2016) (also focusing on the residency provision). Professor Cornell argues, on the basis of this provision and other historical context, that the 1790 Act did not allow citizenship to be obtained from a citizen mother and noncitizen father. *Id.* at 96–97. For a response specific to his arguments, see Ramsey, *supra* note 41.

60. *See* Ramsey, *supra* note 41, at 154. As the debates indicate, the main purpose of the residency requirement was to prevent U.S. citizenship being passed on to multiple generations of a family living abroad with no meaningful connections to the United States. *See id.* at 151, 154–55.

61. Professor Lee argues that "[t]he notion that the First Congress contemplated an American woman meeting a foreign man in the United States and follow[ing] him back to his country to have a child there, however ordinary it may seem today, is anachronistic." Lee, *supra* note 2, at 399–400. While surely not common at the time, this was the exact situation in *Shanks v. Dupont*, in which an American woman married an English officer during the Revolution, moved with him to England, and had children there; the issue in the case was whether the children could inherit land in the United States. Shanks v. Dupont, 28 U.S. 242, 244 (1830). It does not seem obvious that this situation would have been beyond Congress's contemplation.

citizen status to the children of U.S. citizen mothers and noncitizen fathers. The central message of the 1790 Act is that Congress believed it had power to define natural born citizenship for persons born abroad to U.S. citizen parents. Regardless of how the ambiguities of the Act should be resolved, Congress's 1790 definition of "natural born" did not follow exactly the definition of that phrase in English statutory law as it then existed. Thus, the 1790 Act is evidence that the First Congress understood the phrase "natural born" and its English law background as I do: that Congress had some flexibility in defining who was a citizen at birth.

CONCLUSION

In sum, my view is that "natural born" in the eligibility clause meant a person who was a citizen at birth under common law or by statute.[62] That view is supported by English practice, in which Parliament repeatedly changed the statutory definition of "natural born" over the course of the seventeenth and eighteenth centuries to encompass some (but not all) persons born abroad to English subject parents. It is also supported by the 1790 Act, in which the First Congress adopted a definition of "natural born," as applied to persons born abroad to U.S. citizen parents, that was both broader and narrower than the definition in then-existing English statutes.

Professor Lee's view, in contrast, is that the eligibility clause constitutionalized the longstanding contours of "natural born" as they existed in English law in 1787, including as they applied to persons born abroad to English subject parents. But that view seems inconsistent with the development of English subjectship law. Parliament's practice did not reflect a view that there was a fixed and longstanding category of "natural born" subjects among those born abroad. Parliament changed the definition repeatedly, most recently (from the Framers' perspective) in 1773.[63] And Professor Lee's view is inconsistent with the 1790 Act in which Congress saw itself as having power to create its own definition of natural born as applied to persons born to U.S. citizens abroad.

Professor Lee's strongest argument is that the eligibility clause cannot be read to give Congress an unlimited power to define who is a

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62. *See* Ramsey, *supra* note 2, at 242–44; *see also* AMAR, *supra* note 13, at 164 (reaching a similar conclusion and finding it consistent with the purposes of the eligibility clause).

63. Ramsey, *supra* note 2, at 219.

natural born citizen, as that would frustrate its purpose of limiting presidential eligibility. I agree. But I do not read the clause to give such an unlimited power to Congress. Rather, consistent with English practice and the 1790 Act, I think the clause (together with Congress's naturalization power) gave Congress a limited power to decide the extent to which the foreign-born children of U.S. citizen parents would be considered citizens at birth and thus natural born citizens.