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Natural Born in the U.S.A.: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It

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‘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

BY SARAH HELENE DUGGIN* AND MARY BETH COLLINS**

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INTRODUCTION

Article II of the United States Constitution mandates: "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."¹ The Twelfth Amendment establishes identical prerequisites for the Vice

¹ U.S. CONST. art. II, § 1, cl. 5. The remainder of the qualifications clause provides: "[N]either 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." *Id.*

Presidency,² and the current federal succession statute permits only individuals "eligible to the office of President under the Constitution"³ to act as President in the event that both the President and Vice President are unable to fulfill the obligations of office.⁴ While the language of this portion of Article II may appear clear on its face, few constitutional provisions are actually so opaque. Who is a "natural born Citizen"?⁵ Does the category encompass only persons born within the geographic boundaries of the fifty states, or does it include individuals born in Puerto Rico and other United States territories?⁶ What about Native Americans born on tribal lands,⁷ or children born to American parents living abroad?⁸ Does the Fourteenth Amendment's declaration that

² U.S. CONST. amend XII ("But no Person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.").

³ 3 U.S.C. § 19(e) (2000).

⁴ The line of succession begins with the Speaker of the House of Representatives, followed by the President Pro Tempore of the Senate, and then the members of the cabinet, provided they have been appointed with the advice and consent of the Senate – i.e., cabinet members who hold office as a result of unconfirmed recess appointments are not eligible to serve as Acting President. *Id.*; see *infra* text accompanying notes 184-192.

⁵ See U.S. CONST. art II, § 1, cl. 5.

⁶ See generally Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1 (1998) (discussing the limited citizenship rights of Puerto Ricans).

⁷ In *Elk v. Wilkins*, the Supreme Court held that a member of an Indian tribe recognized by the United States was not a citizen of the United States pursuant to the Fourteenth Amendment, because he was not born "subject to the jurisdiction" of the United States. 112 U.S. 94, 109 (1884). Although Congress conferred birthright citizenship on all Native Americans by statute in 1924, see *infra* note 259, the Supreme Court has never overruled *Elk*. As discussed in more detail in Part II, as a result of the *Elk* decision, the natural born citizenship status of many Native Americans is unclear.

⁸ The status of children born to United States citizens living abroad has been at the heart of much of the controversy surrounding the natural born citizenship proviso. As early as 1790, Congressman Burke stated: "The case of children of American parents born abroad ought to be provided for." 1 ANNALS OF CONG. 1160 (1790), quoted in Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1, 8 (1968). "[T]he Constitution arguably excludes from Presidential eligibility persons born to American citizens, and thus born as Americans [pursuant to federal statutes], but born abroad. . . . [T]hese two million Americans fall under a substantial legal cloud." James C. Ho, *President Schwarzenegger, or at Least Hughes?*, 7 GREEN BAG 2d 108, 108 (2004) [hereinafter *President Schwarzenegger*]. Compare *Weedin v. Chin Bow*, 275 U.S. 657, 670 (1927) ("[A]t common law the children of our citizens born abroad were always natural born citizens from the standpoint of this Government . . ."), with *United States v. Wong Kim Ark*, 169 U.S. 649, 702-03 (1898) ("A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens

“[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside[]”⁹ alter the original meaning of Article II? The answers to these questions have proven intractably elusive throughout our nation’s history.

The exclusivity of the natural born citizenship proviso has caused both politicians and scholars to describe it as anachronistic and “decidedly un-American” because it bars so many Americans, including thousands who have fought for their country, from serving as President.¹⁰ The clause almost certainly precludes popularly elected officials such as Michigan’s Canadian-born Democratic Governor Jennifer Granholm and California’s Austrian-born Republican Governor Arnold Schwarzenegger¹¹ from the Presidency and Vice

by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.”). The natural born citizenship status of children born to United States citizen parents living abroad is addressed in Part II.

⁹ U.S. CONST. amend. XIV, § 1.

¹⁰ 149 CONG. REC. S9251 (2003) (remarks of Sen. Orin Hatch) [hereinafter Remarks of Senator Hatch]. Senator Hatch pointed out that “[p]erhaps most disturbing is that the scores of foreign-born men and women who have risked their lives defending the freedoms and liberties of this great nation . . . remain ineligible for the Office of President. More than 700 recipients of the Congressional Medal of Honor – our Nation’s highest decoration for valor – have been immigrants.” *Id.* at S9252; see also *President Schwarzenegger*, *supra* note 8, at 108 (characterizing the ineligibility of naturalized citizens for the Presidency as a form of second-class citizenship); Randall Kennedy, *A Natural Aristocracy?*, 12 CONST. COMMENT. 175, 176 (1995) (criticizing “idolatry of place of birth” that bars even individuals who have risked their lives for their country from the nation’s highest office); Robert Post, *What Is the Constitution’s Worst Provision?*, 12 CONST. COMMENT. 191, 193 (1995) (attacking the validity of birthplace as a “proxy for allegiance”); Akhil Reed Amar, *Natural Born Killjoy: Why the Constitution Won’t Let Immigrants Run for President, and Why that Should Change*, LEGAL AFFAIRS, Apr. 2004, at 16, 16-17 [hereinafter *Natural Born Killjoy*] (offering reasons, including the ineligibility of two popular governors to the office of President, why the clause should be eliminated); *Maximizing Voter Choice: Opening the Presidency to Naturalized Americans: Hearing on S. 2319 before the Senate Judiciary Comm.*, 108th Cong. (Oct. 5, 2004) (remarks of Congressman Conyers), at <http://judiciary.senate.gov/hearing.cfm?id=1326> [hereinafter *Maximizing Voter Choice*] (last visited November 20, 2004).

¹¹ The Supreme Court has repeatedly said that the natural born citizenship proviso precludes naturalized citizens from serving as President. See, e.g., *Schneider v. Rusk*, 377 U.S. 163, 165 (1964); *Knauer v. United States*, 328 U.S. 654, 658 (1946); *Baumgartner v. United States*, 322 U.S. 665, 673 (1944); *Luria v. United States*, 231 U.S. 9, 22 (1913). Thus, as discussed in Part II, individuals born outside the United States who have no claim to United States citizenship other than *post-birth* naturalization by a judicial tribunal pursuant to federal naturalization statutes are barred from serving as President or Vice President. However, children born to United States citizen parents living abroad, as well as Americans born in Puerto Rico and some other United States territories, are *birthright* citizens. See discussion *infra* notes 209-229. Whether they and other birthright citizens born outside the fifty states are “natural born” within the meaning of Article II has never been resolved. See *infra* Part II.

Presidency, and it differentiates Illinois-born Senator Hillary Rodham Clinton from Mozambique native Teresa Heinz Kerry, although both are United States citizens.¹² The impact of the proviso on several current and past presidential contenders who are birthright, but not necessarily "natural born," citizens is uncertain.¹³ For example, Senator John McCain, whose name has frequently surfaced as a potential Presidential and Vice-Presidential candidate in recent years, was born in the Panama Canal Zone;¹⁴ former Michigan Governor George Romney, a candidate in the 1968 Presidential primaries, was the child of American missionaries living in Chihuahua, Mexico;¹⁵ Eleanor Roosevelt gave birth to Franklin Delano Roosevelt, Jr., a member of Congress once considered a possible successor to his father, at a family estate on Campobello Island in New Brunswick, Canada;¹⁶ and Senator Barry Goldwater, who ran against President Lyndon Johnson in 1968, came into the world in the territory of Arizona.¹⁷ If any of these men had won a national election, would he have

¹² Compare *Hillary Rodham Clinton, Biography*, at <http://www.whitehouse.gov/history/firstladies/hc42.html> (last modified Apr. 14, 2004), with *Teresa Heinz Kerry, Biography*, at http://www.johnkerry.com/about/teresa_heinz_kerry (last visited Nov. 7, 2004).

¹³ See *infra* Part II.

¹⁴ WHO'S WHO IN AMERICA 3447 (Danielle Netta et al. eds., 57th ed. 2003); JAMES W. JOHNSON, *ARIZONA POLITICIANS: THE NOBLE AND THE NOTORIOUS* 10-17 (2002); see also James C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 CONST. COMMENT. 575, 579 (2000) [hereinafter *Unnatural Born Citizens*] (suggesting that although McCain was born in the Canal Zone, he is a natural born citizen under the common law).

¹⁵ 18 AMERICAN NATIONAL BIOGRAPHY 803 (1999); *Unnatural Born Citizens*, *supra* note 14, at 579 & n.21; Anthony Ripley, *Romney Declares He is in '68 Race: Predicts Victory*, N.Y. TIMES, Nov. 19, 1967, at 1, cited in Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U. L. REV. 250, 252-53 (1989); M.B.W. Sinclair, *Postmodern Argumentation: Deconstructing the Presidential Age Limitation*, 43 N.Y.L. SCH. L. REV. 451, 457 & n.29 (1999). In a legal opinion published in the Congressional Record in 1967, the Honorable Pinckney McElwee concluded that "Mr. George Romney of Michigan is ineligible to become President of the United States because he was born in Mexico and is, therefore, not a *natural-born citizen* as required by the United States Constitution." 113 CONG. REC. 15,875, 15,880 (1967) (Brief of the Hon. Pinckney G. McElwee introduced by Mr. Dowdy) (emphasis in original) [hereinafter *McElwee Brief*].

¹⁶ 18 AMERICAN NATIONAL BIOGRAPHY 826 (1999). On May 16, 1949, The New York Times reported on a study concluding that Franklin Delano Roosevelt, Jr., "never can carry that great name back into the White House" because of his Canadian birth. Warren Freedman, *Presidential Timber: Foreign Born Citizens of American Parents*, 35 CORNELL L. Q. 357, 357 n.2 (1950) (quoting N.Y. TIMES, May 26, 1949, at 26). Herbert Hoover's son and namesake, born when his parents were living in London, was another foreign born citizen thought of as a potential Presidential candidate. *Herbert Hoover Chronology*, Herbert Hoover Presidential Library and Museum, at <http://www.hoover.archives.gov/education/chronology.html> (last visited July 28, 2004); see also *McElwee Brief*, *supra* note 15, at 15,879.

¹⁷ THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT*: 1964, 211-12 (1965)

been "eligible to the Office of President"¹⁸ pursuant to Article II, or would he have been disqualified because he was not a natural born citizen?¹⁹ Absent a definitive Supreme Court ruling, there is no way to know.

The tragic terrorist attacks of September 11, 2001 and the recent threat of a SARS pandemic²⁰ raise additional, even more critical, concerns about Presidential eligibility. If an uncontrolled disease pathogen or another terrorist attack left both President and Vice President dead or incapacitated, questions of eligibility pursuant to the natural born citizenship proviso could exacerbate a tense situation by complicating an already problematic Presidential succession mechanism.²¹ Federal law permits only persons constitutionally qualified to

(recounting Goldwater's birth in the Territory of Arizona in 1909, and the involvement of the Goldwater family in territorial affairs); see also Gordon, *supra* note 8, at 1 (mentioning the Republican Presidential candidate's birth in Arizona prior to statehood).

¹⁸ U.S. CONST. art. II, § 1, cl. 5.

¹⁹ A law suit was apparently filed in a state court – and later dismissed – challenging Senator Goldwater's qualifications for the Presidency, see Gordon, *supra* note 8, at 28 n.219 (referencing newspaper accounts of the lawsuit), and legal action against Governor Romney appeared imminent at the time he withdrew from the race. See D'Amato, *supra* note 15, at 252-53 (asserting that the Romney campaign's strategy "was to defuse the issue [of his natural born citizenship credentials] and get Romney nominated by the Republican party. The matter could then be left for scholars, lawyers and perhaps the Supreme Court justices to quibble about"); Gordon, *supra* note 8, at 29 n.229 (noting that the New York Times published an article on the possibility of a lawsuit challenging Romney's qualifications for the Presidency, but indicating Romney withdrew from the race before any such lawsuit was filed); *Romney's Foes, or Friends, Expected to File Court Test of His Citizenship*, N.Y. TIMES, Nov. 1, 1967, at 26; see also McElwee Brief, *supra* note 15, at 15,880 ("I find no proper legal or historical basis on which to conclude that a person born outside of the United States could ever be eligible to occupy the Office of President of the United States. . . . Mr. George Romney is ineligible . . . because he was born in Mexico and . . . not a *natural-born citizen*, as required by the United States Constitution." (emphasis in original)).

²⁰ See, e.g., Rosie Mestel, *SARS May Be Just the Start: Crowded Conditions, Food Production and World Travel Increase the Odds for Lethal Viruses*, L.A. TIMES, May 3, 2003, at A1 (reporting on experts' predictions of a widespread outbreak of SARS). For a gripping account of a past pandemic providing an idea of the potential for a new disease strain, see JOHN M. BARRY, *THE GREAT INFLUENZA: THE EPIC STORY OF THE DEADLIEST PLAGUE IN HISTORY* (2004) (describing the speed, lethality, and geographic reach of the 1918 influenza pandemic).

²¹ This article focuses on issues related to the exclusivity and ambiguity of the natural born citizen proviso, but there are a number of reasons why we should be concerned about practical problems with implementing various aspects of presidential succession procedures, as well as the issue whether the federal succession statute, 3 U.S.C. § 19 (2000), is constitutional. See Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215 (1994) (discussing problems with federal succession law) [hereinafter *Succession Gap*]; Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 114 (1995) [hereinafter *Is Succession Law Constitutional?*] (questioning the constitutionality of the presidential succession statute); William F. Brown & Americo R. Cinquegrana, *The*

serve as President to become Acting President.²² Consequently, the proviso

Realities of Presidential Succession: The Emperor Has No Clones, 75 GEO. L.J. 1389, 1392 (1987) (warning that presidential incapacity for even a few minutes is very dangerous); Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155 (1995) (discussing possible succession scenarios capable of engendering constitutional crises); Vasan Kesavan, *Is the Electoral Count Act Constitutional?*, 80 N.C. L. REV. 1653, 1810-12 (2002) (discussing potential complications if a President-elect is not constitutionally qualified for the Presidency); Paul Taylor, *Proposals to Prevent Discontinuity in Government and Preserve the Right to Elected Representation*, 54 SYRACUSE L. REV. 435 (2004) (identifying nine significant problems with current succession procedures and suggesting solutions); Howard M. Wasserman, *Structural Principles and Presidential Succession*, 90 KY. L.J. 345, 414 (2001) (suggesting revisions of federal succession statute); see also *infra* Part I.B.4.

In the fall of 2002, the American Enterprise Institute and the Brookings Institution jointly established the Continuity of Government Commission to review issues pertaining to possible terrorist attacks on the United States government. See CONTINUITY OF GOVERNMENT COMMISSION, PRESERVING OUR INSTITUTIONS: THE FIRST REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION i-ii, <http://www.continuityofgovernment.org/report/report.html> (June 4, 2003) (stating the mission of the Commission). Lloyd Cutler and Alan Simpson co-chair the Commission, and former Presidents Jimmy Carter and Gerald Ford serve as honorary co-chairs. Its members include a number of current and former government officials. *Id.* at v. The Commission's first report, issued in May 2003, begins with an apocalyptic description of a hypothetical inauguration day:

It is 11:30 A.M., inauguration day. Thousands await the noon hour Television networks have their cameras trained on the West Front of the Capitol, beaming live coverage of the event into millions of homes around the world. Suddenly the television screens go blank! Al Qaeda operatives have detonated a small nuclear device on Pennsylvania Avenue halfway between the White House and the Capitol. Everyone present at the Capitol, the White House, and in between is presumed dead, missing, or incapacitated. The death toll is horrific . . . the American people are asking who is in charge, and there is no clear answer.

Id. at 1. The report also observes that an even greater disaster could have occurred on September 11, 2001, if United Flight 93 had departed on time and succeeded in hitting the Capitol. *Id.* at 2. For additional discussion of the problem of catastrophic attack and appropriate governmental responses, see Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004). See also, James C. Ho, *Ensuring the Continuity of Government in Times of Crisis: An Analysis of the Ongoing Debate in Congress*, 53 CATH. U. L. REV. 1049 (2004).

²² 3 U.S.C. § 19(e) (2000). Commentator James Ho emphasizes that there is no constitutional bar excluding foreign born citizens from serving as Acting President. *Unnatural Born Citizens*, *supra* note 14, at 584-85. He urges Congress to amend the federal succession statute to eliminate the requirement that an Acting President meet the criteria for the Presidency set forth in Article II. He points out that the statute's requirement of prior Senate confirmation gives Congress a second chance to review candidates for Acting President, and urges Congress to "extend to millions of current and future mothers and fathers the distinctively American dream that their children might someday grow up to be

would exclude individuals otherwise squarely in the line of succession, such as former Secretaries of State Henry Kissinger, Madeleine Albright, and Christian Herter,²³ and Bush administration cabinet members Elaine Chao, Secretary of Labor,²⁴ Melquiades Martinez, Secretary of Housing and Urban Development and Carlos Gutierrez, Secretary of Commerce,²⁵ because all of these national leaders originally came to this country as immigrants. The clause also creates uncertainty about the eligibility of many other Americans to serve in the Oval Office.²⁶ Karen Hughes, a senior White House advisor to President George W. Bush, stated the conventional wisdom in a talk show interview: “[M]y mom always told me because I was the daughter of an Army officer born overseas in Paris, France, that under the Constitution . . . I could never run for president.”²⁷

We live in an increasingly mobile society in an era of rapidly escalating

(acting) President.” *Id.* at 585; *see infra* Part V.C.

²³ Secretary Kissinger was born in Fuerthe, Germany; Madeleine Albright was born in Prague, Czechoslovakia; and Christian Herter was born in Paris, France. Other foreign born cabinet members in the last thirty years include German-born W. Michael Blumenthal, Secretary of Transportation under President Jimmy Carter; Mexican-born Governor George Romney, who served as President Lyndon Johnson’s Secretary of Housing and Urban Development; Swiss-born C. Douglas Dillon, President Johnson’s Secretary of the Treasury; and Italian-born Anthony Celebrezze, Secretary of Health, Education and Welfare under President Johnson. *THE UNITED STATES EXECUTIVE BRANCH: A BIOGRAPHICAL DIRECTORY OF HEADS OF STATE AND CABINET OFFICIALS* 679 (Robert Sobel & David B. Sicilia eds., 2003).

²⁴ Chao was born in Taipei, Taiwan in 1953, and moved to the United States in 1961. *Id.* at 95.

²⁵ Martinez was born in Sagua La Grande, Cuba in 1946, and became a naturalized United States citizen in 1971. 2 *WHO’S WHO IN AMERICA* 3393 (57th ed. 2003). Gutierrez was also born in Cuba. *See* Elizabeth Llorente, *The Breakfast Champ*, at <http://www.hispaniconline.com/magazine/2004/jan-feb/coverstory/>. The proviso also bars many other well known Americans from the Presidency, including former Chairman of the Joint Chiefs of Staff General John Shalikashvili, Admiral Hyman Rickover who was known as the “Father of the Nuclear Navy”, and Supreme Court Justice Felix Frankfurter. General Shalikashvili was born in Warsaw, Poland, *id.* at 4781, and Admiral Rickover in Makov, Russia. 10 *THE NEW ENCYCLOPEDIA BRITANNICA* 58 (15th ed. 2002). Justice Frankfurter was born in Vienna, Austria, in 1882 and immigrated to the United States at age twelve. *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 314 (1992). It also precludes more than 700 winners of the Congressional Medal of Honor. Remarks of Senator Hatch, *supra* note 10, at S9252; *see* Frederick Schauer, *Constitutional Invocations*, 65 *FORDHAM L. REV.* 1295, 1302 (1997) (listing individuals in sensitive and high government positions who have arguably been ineligible for the Presidency).

²⁶ For example, President Lyndon B. Johnson’s Secretary of Housing and Urban Development, Robert Weaver, and President Bill Clinton’s Secretary of Commerce, Ron Brown, both were born in the District of Columbia. *See infra* Part II.

²⁷ Interview by Rush Limbaugh with Karen Hughes (April 15, 2004), at http://www.rushlimbaugh.com/home/estack/eib_interviews.guest.html (last visited Nov. 7, 2004). George Romney, however, apparently thought differently. *See supra* note 19.

globalization. The results of the 2000 Census indicate that nearly 12.5 million United States citizens are naturalized immigrants,²⁸ more than 2.5 million are Native Americans, and millions more come from United States territories.²⁹ Many others are the children of United States citizen parents living abroad at the time of their births.³⁰ Consequently, a dispute over the meaning of the natural born citizenship proviso is almost certain to emerge as a national issue in the near future. If the nation needed to resolve the meaning of the natural born citizenship proviso tomorrow, who would decide, and how would that decision impact the country?³¹

In the more than two hundred years since the drafting of the 1787 Constitution, a number of legal historians and constitutional scholars have explored the meaning of natural born citizenship, but no definitive understanding has emerged. As Alexis de Tocqueville long ago observed: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."³² If a dispute arises over the natural born citizenship qualifications of a President or prospective President, it will almost surely fall to the judiciary, and ultimately the United States Supreme

²⁸ The word "naturalized" connotes different qualities of citizenship depending on the context in which it appears. The term is often employed to describe a person who becomes a United States citizen pursuant to the multi-step procedure specified by statute for individual foreign nationals that culminates when the individual takes an oath of allegiance before a judicial tribunal. The term "naturalized" can also be employed to describe Americans who become citizens at birth pursuant to federal statutes – e.g., foreign born citizens of United States citizen parents – or those who are collectively made citizens pursuant to a treaty or other agreement. See *Elk v. Wilkins*, 112 U.S. 94, 100 (1884) (describing the process of conferring citizenship on certain Native Americans by treaties with individual tribes). These various routes to United States citizenship are discussed *infra* in Part II.

²⁹ See 2000 Census Chart QT-P14, Nativity, Citizenship Status, and Year of Entry, <http://factfinder.census.gov> (last visited Nov. 7, 2004). See generally Dianne Schmidley, U.S. Census Bureau, *The Foreign-Born Population in the United States: March 2002*, in CURRENT POPULATION REPORTS (2003), <http://www.census.gov/prod/2003pubs/p20-539.pdf> (last visited Nov. 7, 2004).

³⁰ The census data excludes from its "foreign-born" count all persons who were "born in the United States or a U.S. Island Area such as Puerto Rico or born abroad of at least one parent who was a U.S. citizen." Schmidley, *supra* note 29, at 1.

³¹ As Bruce Ackerman and David Fontana point out in another context, the controversy over the Presidential election of 2000 took place when "[t]he country was enjoying an unparalleled period of peace and prosperity." Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 629 (2004). A dispute over the meaning of natural born citizenship might well occur in the same kinds of circumstances Ackerman and Fontana worry about with respect to another vote-counting controversy – "when ideologically polarized parties may be struggling for the White House under conditions of grave economic or international distress." *Id.* at 630.

³² 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley, ed., Alfred A. Knopf, Inc. 1945) (1835).

Court, to determine the outcome. Yet, as the controversy surrounding the 2000 Bush-Gore contest amply demonstrated,³³ judicial resolution of disputes arising out of Presidential elections can be painful for all concerned and divisive for the nation. Whatever the merits of *Bush v. Gore*,³⁴ the Florida vote counting debacle eroded public confidence in the electoral process, and the Supreme Court's reputation as an impartial forum suffered.³⁵ Despite the relative ease of the 2004 election, a second case placing the Supreme Court in the position of determining who should hold the office of President could do far greater damage.³⁶ Even more importantly, a challenge to the natural born citizenship of an Acting President in the midst of a national crisis could prove extraordinarily costly, even paralyzing, for the nation. The country needs a clear, unassailable answer to the question of who is "eligible to the Office of President" *before* a dispute arises. That answer should rest on the fundamental principles of liberty and equality underlying the constitutional system of the most powerful nation on earth, not on an artifact of the fears of a struggling new nation.

This article explores the controversy surrounding the natural born citizenship proviso in order to demonstrate why a constitutional amendment is necessary to eliminate its inherent inequity and uncertain applicability, and to offer substantive recommendations for initiating such an amendment. Part I begins with a brief discussion of the historical and legal context of the natural born citizenship proviso. Part II explores the elusive nature of the term "natural born Citizen," and Part III focuses on the perils of passively awaiting judicial resolution of its meaning. The structural and policy reasons why limiting the Presidency to natural born citizens is inconsistent with the spirit of modern American democracy are discussed in Part IV, and Part V concludes with an examination of past efforts to modify the proviso and offers substantive recommendations for doing so today.

³³ See generally BUSH V. GORE: THE COURT CASES AND THE COMMENTARY (E.J. Dionne Jr. & William Kristol eds., 2001); THE NEW YORK TIMES, 36 DAYS: THE COMPLETE CHRONICLE OF THE 2000 PRESIDENTIAL ELECTION CRISIS (2001).

³⁴ 531 U.S. 98 (2000).

³⁵ See *infra* Part III, discussing reactions to the 2000 election dispute and the Supreme Court's decision in *Bush v. Gore*.

³⁶ See *supra* note 31. Although the battle never materialized, on the eve of the 2004 election, the nation braced for another legal battle "[a]s thousands of lawyers faced off against a backdrop of a divided nation." John McCormick, *Legal Fights Expected If Result Is Razor-thin: Lawyers Poised in More than 1 State*, CHI. TRIB., Nov. 1, 2004, at 1; see also, e.g., Henry Weinstein, *The Race for the White House: In Ohio Courts It's Almost Like Florida in 2000*, L.A. TIMES, Oct. 30, 2004, at A20. There is no reason to assume that we have seen the end of legal battles over the Presidency.

I. FENDING OFF PRINCES AND PROTECTING THE NATION: THE HISTORICAL AND LEGAL CONTEXT OF THE PROVISIO

Judges and constitutional scholars have come to very different conclusions about the meaning of natural born citizenship, particularly with respect to the status of individuals born to United States citizen parents living abroad and to Native Americans born on tribal lands. The following section offers a brief summary of the historical circumstances in which the natural born citizenship language became part of the Constitution³⁷ and discusses its interplay with the Twelfth, Fourteenth, Twentieth, and Twenty-fifth Amendments and the federal succession statute.

A. *The Origins of the Natural Born Citizenship Clause*

The phrase "natural born Citizen" appears only in Section 1, Clause 5 of Article II; there is no reference to "natural born" citizenship in any other part of the Constitution. The 1787 Constitution grants Congress power "to establish an uniform Rule of Naturalization,"³⁸ and several times specifically refers to "citizens."³⁹ It contains no definition of citizenship,⁴⁰ however,

³⁷ For many years, scholars have debated the validity of seeking to understand the original intentions of the Framers as a tool of constitutional interpretation. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980) (arguing for a flexible concept of original intent); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 227 (1998) (analyzing scholars' common objections to the "original intent" approach of constitutional interpretation); Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1214 (2003) (suggesting that these documents should be used, although as persuasive rather than dispositive sources); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 881 (1996) (concurring with the view that the intent of the Framers matters in interpreting the Constitution). Despite concern over the use of the secret drafting history documents to divine the Framers' intent, Kesavan & Paulsen, *supra*, at 1214, "[v]irtually everyone agrees that the specific intentions of the Framers count for something." Strauss, *supra*, at 881.

³⁸ U.S. CONST. art. I, § 8, cl. 4.

³⁹ See U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3; U.S. CONST. art. III, § 2, cl. 1; U.S. CONST. art. IV, § 2, cl. 2; see also *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 167 (1875) ("The Constitution does not, in words, say who shall be natural-born citizens.").

⁴⁰ "[A]lthough the Constitution created a new national legal polity and a shared political community, it failed to explicitly incorporate birthright citizenship or delineate that doctrine's geographical boundaries." Jonathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 683 (1995); see also Earl M. Maltz, *Citizenship and the Constitution: A History and Critique of the Supreme Court's Alienage Jurisprudence*, 28 ARIZ. ST. L.J. 1135, 1136-37, 1143 (1996) (contending that, contrary to the views of some well known constitutional scholars, the concept of citizenship was important to the Framers of the Constitution, as well as the Framers of the Fourteenth Amendment).

possibly because articulating the bases for United States citizenship would have required the Framers to confront directly issues pertaining to the status of slaves and Native Americans.⁴¹

The first known use of the term “natural born Citizen” in connection with presidential qualifications appears in a July 25, 1787 letter from John Jay to George Washington.⁴² In the midst of the Constitutional Convention in Philadelphia, Jay, who later became the nation’s first Chief Justice, wrote:

Permit me to hint, whether it would be wise and seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in Chief of the American army shall not be given to nor devolve on, any but a natural born Citizen.⁴³

⁴¹ The Constitution approved slavery in a *sotto voce* fashion, although the Framers took pains never to mention the word. See U.S. CONST. art. I, § 2, cl. 3 (the “Three-Fifths Compromise”); U.S. CONST. art. I, § 9, cl. 1 (barring Congressional prohibition of importation of persons prior to 1808); U.S. CONST. art. IV, § 2, cl. 3 (providing for return of persons “held to Service or Labor”). With respect to Native Americans, see *Elk v. Wilkins*, 112 U.S. 94, 112 (Harlan, J., dissenting) (“At the adoption of the Constitution there were, in many of the States, Indians, not members of any tribe, who constituted a part of the people for whose benefit the State governments were established.”). See also Drimmer, *supra* note 40, at 686-89 (discussing the impact of attitudes of racial superiority on the evolution of United States citizenship); Gordon, *supra* note 8, at 2 (surmising that the Framers avoided defining citizenship so as to avoid debates on slavery and state versus federal citizenship).

⁴² Jill A. Pryor, *The Natural-Born Citizenship Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881, 888-89 (1988) (identifying Jay’s letter as the likely source of the phrase “natural born citizen” in Article II). Pryor also notes that in June 1787, a month before Jay sent his letter to Washington, Alexander Hamilton drafted a “sketch of a plan of government” providing: “No person shall be eligible to the office of President of the United States unless he be now a Citizen of one of the States, or hereafter born a Citizen of the United States.” *Id.* at 889 (footnotes omitted). The parallels between Hamilton’s sketch and the final form of the Presidential qualifications clause are obvious. Compare *id.* at 889 (statement of Alexander Hamilton), with U.S. CONST. art. II, § 1, cl. 5. Hamilton apparently thought the President should be a citizen from birth, but not necessarily by virtue of the place of his or her birth. Pryor, *supra*, at 889. This is a reasonable assumption about the perspective of Hamilton, who was born on the Caribbean island of Nevis, but is far from definitive. The Framers may have attached significance to the addition of the word *natural*, or someone familiar with the phrase “natural born subject,” commonly used in English legal parlance, may have added the phrase. See *infra* text accompanying note 87. Without additional primary source material, it is impossible to determine why the Convention delegates added the word “natural,” or even to be sure precisely what Hamilton contemplated by the phrase “born a Citizen.” See Pryor, *supra*, at 889.

⁴³ Gordon, *supra* note 8, at 5 (emphasis in original) (quoting U.S. DEPT. OF STATE, 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 237 (1905)); see also Christina S. Lohman, *Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause*, 36 GONZ. L. REV. 349, 352 (2000); Pryor, *supra* note 42, at 888-89. Some have

speculated that Jay was concerned about Baron von Steuben of Prussia who fought with Washington in the Revolutionary War. See CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY 1775-1789*, at 137 (De Capo Press 1969) (1923) (expressing a strong belief that von Steuben was the foreigner worrying Jay when he wrote the letter); Pryor, *supra* note 42, at 888 n.39 (recounting Thach's contention). Others have suggested fear of an attempt to impose the second son of King George III, the Duke of York (also known as the Bishop of Osnaburgh), as the ruler of the new nation, see, e.g., Remarks of Senator Hatch, *supra* note 10, at S9251 ("While there was scant debate on this provision during the Constitutional Convention, it is apparent that the decision to include the natural born citizen requirement in our Constitution was driven largely by the concern that a European monarch . . . such as the Duke of York . . . might be imported to rule the United States."), or that "the fear of Austria (and Prussia and Russia, too) . . . motivated the Founders." *President Schwarzenegger*, *supra* note 8, at 108 ("Those powers had just rigged the election of their own candidate as the new monarch of Poland, in order to divide that nation's territory among themselves."); see also *Maximizing Voter Choice*, *supra* note 10 (statement of Forrest McDonald) (discussing the role of Austria, Prussia, and Russia in influencing Poland's political process in the late eighteenth century and suggesting that the possibility of foreign influence, as well as the possible lack of objectivity of naturalized citizens to their country of original affiliation, remains a risk justifying retention of the natural born citizenship proviso); *id.* (statement of John Yinger) (discussing the Framers' fears of foreign intervention and ambivalence toward barriers to the full participation of naturalized citizens in the new government); *Constitutional Amendment to Allow Foreign-Born Citizens to Be President: Hearing on H.J. Res. 88 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (July 24, 2000) (statement of Chairman Charles T. Canady), http://commdocs.house.gov/committees/judiciary/hju67306.000/hju67306_0.HTM (last visited Nov. 7, 2004) ("Some sources suggest that Jay was responding to a rumor that the Convention was secretly designing a monarchy to be ruled by a foreign monarch, but Jay's warning can also be seen simply as a reflection of the widely held fear of foreign influence in this new country's elections and of a general distrust of executive power at that time.").

Placing restrictions on eligibility to serve in the role of a nation's chief executive is not unique to the United States Constitution. A number of other countries have placed various conditions on equivalent offices. See 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, 255 n.9 (1987) (listing native-born citizen requirements for chief executive in many countries' constitutions that are similar to the United States Constitution's proviso); see also Alon Harel, *Economic Culturalism: A Comment on Dennis Mueller, Defining Citizenship*, 3 THEORETICAL INQUIRIES IN LAW 167, 174 (2002) (referring to the American natural born citizen proviso as "one of the most anachronistic yet revealing legal manifestations of suspicion of foreigners"). Harel also notes that "[s]ince Biblical times, it has been common practice to preclude foreigners from serving as political leaders." *Id.* at 173 (citing *Deuteronomy* 17:15).

Public concern over the possibility that the Convention would create a monarchy was so great that the delegates provided the press with an unofficial statement contradicting rumors of any intent to establish a "monarchical form of government[.] . . . [T]hough we cannot, affirmatively, tell you what we are doing, we can, negatively, tell you what we are not doing – we never once thought of a king." Cyril C. Means, Jr., *Is Presidency Barred to Americans Born Abroad?*, U.S. NEWS & WORLD REP., Dec. 23, 1955, at 28 (quoting PENNSYLVANIA JOURNAL, Aug. 22, 1787).

A few weeks later, on September 4, 1787, Washington wrote back to Jay thanking him for his "hints."⁴⁴ In the interim, a number of developments took place.

Among the many topics the delegates to the Constitutional Convention debated during the late summer of 1787 was the subject of qualifications for members of the new government.⁴⁵ Notes of the debates reflect that the delegates discussed and rejected excluding persons who were not "native born" from serving as Senators and Representatives,⁴⁶ but there is no record of any colloquy involving the term "natural born Citizen."⁴⁷ Commentators disagree as to whether the Framers used the terms "*native born*" and "*natural born*" interchangeably.⁴⁸ There are at least some Supreme Court dicta suggesting that the Court has interpreted the terms as equivalent. For example, in its 1875 decision in *Minor v. Happersett*, the Court opined: "[I]t was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were *natives*, or *natural born*

⁴⁴ Medina, *supra* note 43, at 259.

⁴⁵ *Id.* at 258-60; Gordon, *supra* note 8, at 3-4.

⁴⁶ Medina, *supra* note 43, at 259 n.19 (citing ARTHUR TAYLOR PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 218-27, 266-72 (1941)) ("The principal justification advanced was fear of foreign involvement and attachments. Madison successfully resisted the inclusion of more stringent native-born qualifications for Senators and Representatives. He argued that such limitations conveyed an air of illiberality, discouraged able and dedicated foreigners from coming to the United States and would, in any event, not be effective against bribery and corruption by foreign governments." (citations omitted); *Natural Born Killjoy*, *supra* note 10, at 16-17 (reporting rumors of contacts with Prince Henry of Prussia and speculation about George III's second son, as possible kings of America). The qualifications they ultimately agreed on are set forth in Article I, Section 2, Clause 2 and Section 3, Clause 3. Members of the House of Representatives must "have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States," and each must "be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I § 2, cl. 2. Senators must "have attained to the Age of thirty Years, and been nine Years a Citizen of the United States," and each Senator must also "be an Inhabitant of that State for which he shall be chosen." U.S. CONST. art. I, § 3, cl. 3.

⁴⁷ See Pryor, *supra* note 42, at 885 (remarking on the lack of evidence of any discussion of the meaning of the term "natural born citizen"); Gordon, *supra* note 8, at 3 (describing the lack of debate at the Convention on the issue of Presidential qualifications). Like the 1787 Constitution, the Articles of Confederation did not define citizenship. See Drimmer, *supra* note 40, at 683 (implying that the Framers were deliberately avoiding controversial issues).

⁴⁸ McElwee, for example, concludes that the terms were synonymous. McElwee Brief, *supra* note 15, at 15,876 (arguing that the terms had the same common law meaning when the Constitution was adopted). Randall Kennedy makes the same assumption in identifying the natural born citizenship proviso as the Constitution's worst clause. Kennedy, *supra* note 10, at 176 ("[I]t wholly *excludes* from eligibility for the Presidency all persons who are not native born." (emphasis in original)).

citizens, as distinguished from aliens or foreigners.”⁴⁹ A number of scholars contend, however, that the Framers were well aware of the difference between the two terms.⁵⁰

On August 22, 1787, the Convention’s Committee on Detail – a five-member panel assigned responsibility for composing a document incorporating the delegates’ ideas – proposed a first draft of the Constitution.⁵¹ This initial version included a Presidential qualifications clause with a threshold age of thirty-five years and a twenty-one year residency requirement.⁵² The Convention referred this provision and others to the Committee of Eleven – a task force comprised of representatives from each of the eleven participating states – for further review and incorporation of ideas generated in the delegates’ debates.⁵³ The Committee of Eleven presented its subsequent draft to the Convention on September 4, 1787.⁵⁴ In this draft the Presidential qualifications clause appeared as: (1) the natural born citizenship criterion; (2) a grandfather clause exempting those who were citizens at the time of the adoption of the Constitution; and (3) a residency requirement reduced from twenty-one to fourteen years.⁵⁵ The Convention adopted the clause as presented by the Committee of Eleven without debate on the natural born

⁴⁹ 88 U.S. (21 Wall.) 162 (1875) (emphasis added). The Supreme Court also distinguished Native Americans from other Americans in early judicial decisions. See, e.g., *Cherokee Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1, 16-17 (1831) (stating “the relation of the Indians to the United States is marked by peculiar and cardinal distinctions,” and characterizing Native American tribes as “domestic dependent nations”); *Elk v. Wilkins*, 112 U.S. 94, 111 (1884) (holding that Native Americans born into tribes recognized by the United States are not U.S. citizens); see *supra* text accompanying note 7.

⁵⁰ See, e.g., Gordon, *supra* note 8, at 9 (stating that “a person who was regarded in 1790 as a naturalized [rather than native born] citizen could also be deemed natural born if he acquired his United States citizenship at birth”); Medina, *supra* note 43, at 259 (explaining that in the course of debates on prerequisites for Congressional office the Framers considered, but ultimately rejected, Constitutional language requiring Senators to be “native-born”); Alexander Porter Morse, *Natural-Born Citizen of the United States: Eligibility for the Office of President*, 66 ALB. L.J. 99, 99 (1904-1905) (arguing that “the Framers generally used precise language,” knew the common meaning of “natural born,” and distinguished it from “native born”). But see McElwee Brief, *supra* note 15, at 15,876 (“At the time of the adoption of the U.S. Constitution, under the common law, the terms native born citizen and natural born citizen were synonymous.”).

⁵¹ Pryor, *supra* note 42, at 885; Gordon, *supra* note 8, at 3-4; Medina, *supra* note 43, at 259. As the result of an apparent typographical error, Medina refers to the year of the Jay letter as 1789. See *id.*

⁵² Gordon, *supra* note 8, at 4 n.21; Medina, *supra* note 43, at 259.

⁵³ Gordon, *supra* note 8, at 4.

⁵⁴ *Id.* at 4 n.21.

⁵⁵ 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 498 (rev. ed. 1937); Medina, *supra* note 43, at 259-60; Pryor, *supra* note 42, at 885. Together with the grandfather clause, the reduced residency term made all of the fifty-five convention delegates eligible for the Presidency. Medina, *supra* note 43, at 260 n.26.

citizenship requirement.⁵⁶ Neither Madison's notes on the Convention nor other contemporaneous records of the debates offer insight on the delegates' understanding of the meaning of natural born citizenship or the reasons why they agreed with the Committee that it should be included in Article II.⁵⁷ Records of the debates of the state ratifying conventions are similarly unenlightening.⁵⁸ It is important to note, however, that Jay's "hints" to Washington rested on a solid foundation. England had a history of importing foreign born heads of state, including such notable Kings as James I and William of Orange, a practice confirmed by the inclusion of foreign born royals in the line of succession set forth in the Act of Settlement of 1701.⁵⁹

⁵⁶ Pryor, *supra* note 42, at 886; *see also* 1 JONATHAN ELLIOTT, THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 306 (2d ed. 1859).

⁵⁷ It should be noted that there is some controversy over the legitimacy of reliance on the Constitution's secret drafting history as a tool of interpretation. *See generally* Kesavan & Paulsen, *supra* note 37. In this instance, however, neither the materials originally held in secrecy nor available public writings or records of state ratification debates offer insights into the meaning of natural born citizenship. *See supra* note 47 and accompanying text.

⁵⁸ *See* Gordon, *supra* note 8 at 3 (noting absence of any meaningful information in records of Constitutional Convention). McElwee, however, suggests that discussion of the residency requirement and grandfather clause is instructive. McElwee Brief, *supra* note 15, at 15,878-79. McElwee cites *Bancroft's History of the U.S. Constitution* to the effect that objections arose at the Convention to the residency requirement on grounds that "*no number of years could properly prepare a foreigner for that place*; but, as men of other lands had spilled their blood in the cause of the United States, and had assisted at every stage of the formation of their institutions[,]... it was unanimously settled that *foreign-born residents . . . at the time of the formation of the Constitution are eligible to the Office of the President.*" *Id.* at 15,878 (quoting 2 BANCROFT'S HISTORY OF THE U.S. CONSTITUTION 192 (1882)) (emphasis in original). McElwee therefore argues that the Framers did contemplate the situation of foreign born persons. McElwee Brief, *supra*, at 15,878-79. This begs the question, however, whether the Framers would have considered their own children foreigners if they happened to be born while their parents were living or traveling abroad, perhaps in the service of their country. Moreover, McElwee's contention that the Framers all shared the same heritage as British colonial subjects, *id.* at 15,879, misses the point that imposition of the Duke of York as ruler of the new nation was one of the possibilities feared by the Framers. *See* Remarks of Senator Hatch, *supra* note 10, at S9251. Gordon's argument that the Framers would not have dealt so ungenerously with their own children is far more persuasive. *See* Gordon, *supra* note 8, at 3.

⁵⁹ Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 (Eng.). *See* *Natural Born Killjoy*, *supra* note 10, at 17. As Professor Akhil Amar testified:

[The Framers'] anxieties had been fed by England's 1701 Act, which, though it banned foreigners from all other posts, imposed no native-birth requirement on the head of state himself. In fact, the 1701 Act explicitly contemplated foreign born monarchs – from the German House of Hanover, in particular. By 1787, this continental royal family had produced three English kings named George, only the third of whom had actually been born in England.

Maximizing Voter Choice, *supra* note 10 (testimony of Professor Akhil Amar). The phrase

1. The Proviso as a Response to Fears of Foreign Monarchs

An early scholarly explication of the rationale for the natural born citizenship requirement appeared in 1833 in Justice Joseph Story's *Commentaries on the Constitution of the United States*.⁶⁰ According to Justice Story, two competing tensions were at work in the drafting of the natural born citizenship proviso.⁶¹ First, as noted above, the Framers were concerned that foreign born individuals purportedly loyal to the new country might secretly maintain allegiance to the lands of their birth.⁶² There was at least some basis for their fears. Contemporary English law presumed that all British subjects maintained perpetual allegiance to the crown.⁶³ At the same time, however, there was widespread agreement that those who had fought with the colonists

"natural born citizen," or similar terminology, however, appears in several state constitutions as a criterion for eligibility to serve in high state office. *See* Medina, *supra* note 43, at 255 n.9 (listing state constitutions with natural born citizenship requirements for governor).

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

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See* United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898) (explaining the British common law doctrine of perpetual allegiance). To a large extent, the political and intellectual understanding of the period was shaped by the doctrine of perpetual allegiance. This concept held that a person born a subject of the English crown owed lifelong allegiance to the sovereign. *See infra* text accompanying notes 76-79; *see also* McElwee Brief, *supra* note 15, at 15,877. It also reflects the tension between the Framers' wish to encourage immigration and "[a] dim and murky fear of foreigners [that] has, on occasion, cast its dark, isolationist shadow over the entryway to the United States." Robert J. Shulman, *Children of a Lesser God: Should the Fourteenth Amendment Be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American Born Children of Illegal Aliens?*, 22 PEPP. L. REV. 669, 670 (1995). Even Benjamin Franklin fell prey to this kind of prejudice, as reflected in comments he once wrote about the changing demographics of Pennsylvania: "Why should Pennsylvania, founded by the English, become a colony of aliens who will shortly become so numerous as to Germanize us instead of Anglifying them, and will never adopt our Language or Customs any more than they can acquire our complexion." 3 THE WRITINGS OF BENJAMIN FRANKLIN 73 (Albert H. Smyth, ed., 1905), *quoted in* Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152, 152 (1999); *see also* Morse, *supra* note 50, at 100 ("[T]he Framers thought it wise, in view of the probable influx of European immigration to provide that the president should at least be the child of citizens owing allegiance to the United States at the time of his birth."). There is ample evidence that the Framers had a "vision of a white, English-speaking America." Román, *supra* note 6, at 19. Gabriela Evia, however, points out that non-citizen suffrage began in colonial times and continued following the Revolution. Gabriela Evia, *Consent by All the Governed: Reenfranchising Noncitizens as Partners in America's Democracy*, 77 S. CAL. L. REV. 151, 154 (2003). She cites periodic outbreaks of xenophobia as the cause of increasing restriction of non-citizen suffrage. *Id.* at 155-58.

against England merited recognition of their contributions.⁶⁴ In Justice Story's words:

This permission of a natural citizen to become President... was doubtless introduced... out of respect to those distinguished revolutionary patriots who were born in a foreign land, and yet had entitled themselves to high honors in their adopted country. A positive exclusion of them from the office would have been unjust to their merits and painful to their sensibilities. But the 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.⁶⁵

It is impossible to say whether Justice Story was correct, but his view makes a great deal of sense. The new nation was a lone democracy – a radical experiment with a government based on fidelity to ideals and principles in a world dominated by the politics of bloodlines, religious ties, and ethnic allegiances. It remained to be seen whether the nation would survive for even a generation. There is no question that the potential influence of foreign monarchs on members of the new government was one of the Framers' principal anxieties. Knowledge of that concern sheds light on their reasons for placing a restriction on eligibility for the Presidency, but it does not resolve the meaning of the clause.

2. Natural Born Citizenship and the Common Law

The early common law of the United States rested extensively, although not exclusively, on English common law.⁶⁶ The prerequisites for citizenship differed among the states, as did the degree to which each imported and adopted English common law concepts and began creating its own laws prior to 1776. There was no uniform rule of naturalization until the First Congress passed the Naturalization Act of 1790.⁶⁷ In an effort to understand the natural

⁶⁴ STORY, *supra* note 60, § 1479.

⁶⁵ STORY, *supra* note 60, § 1479 (citations omitted).

⁶⁶ Pryor, *supra* note 42, at 887 (explaining that the colonies adopted British common law to differing degrees) (citing JAMES KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608-1870*, at 78, 90-93 (1978)); ELIZABETH G. BROWN, *BRITISH STATUTES IN AMERICAN LAW 1776-1836*, at 14 (1964)); Gordon, *supra* note 8, at 5 (contending that the colonies' adoption of British common law varied widely).

⁶⁷ Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795); see Pryor, *supra* note 42, at 887-88 (stating that states' naturalization laws varied prior to the Naturalization Act of 1790).

born citizenship proviso, however, both courts and commentators have turned to the English common law extant in 1787,⁶⁸ although they disagree about the degree to which the Framers were familiar with or shared a common understanding of British precedents pertaining to citizenship.⁶⁹ The Supreme Court has often emphasized that "[t]he interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."⁷⁰

A venerable tenet of the English common law of nationality is that of *jus soli*.⁷¹ *Jus soli*⁷² links the mutual allegiance and protection of subject and

⁶⁸ See, e.g., *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898); *Moore v. United States*, 91 U.S. 270, 274 (1875); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 167 (1874); *Lynch v. Clarke*, 1 Sand. Ch. 583, 621 (N.Y. Ch. 1844) (discussing application of common law to distinction between natural born and native born under New York law); McElwee Brief, *supra* note 15, at 15,875; Gordon, *supra* note 8, at 7 ("The Framers certainly were aware of the long-settled British [common law.]").

⁶⁹ Compare McElwee Brief, *supra* note 15, at 15,877 (arguing that the British common law rule of *jus soli* was shared by all of the English colonies at the time of the Declaration of Independence and in the United States when the new nation was created), and Gordon, *supra* note 8, at 31 (stating that the natural born citizen proviso "must be considered in the light of the . . . English common law, particularly as it had been declared or modified by statute [in 1787]"), with Pryor, *supra* note 42, at 888 (concluding that in 1787 "there was no common understanding of what 'natural born citizen' meant").

⁷⁰ *Smith v. Alabama*, 124 U.S. 465, 478 (1888) (quoted in *Wong Kim Ark*, 169 U.S. at 655). While the original document neither defined citizenship nor indicated whether United States citizenship was to be based on the English common law understanding, "[t]he community gradually clarified the Constitution's ambiguities regarding birthright citizenship by applying common law principles" and defined the boundaries of the nation as including the territories of the "American empire." Drimmer, *supra* note 40, at 683-84 (citing *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820)). There are important twists in the process of American adoption of common law nationality principles, however. First, the government corrupted the principle of *jus soli* by denying citizenship to African American children born to enslaved parents and later, as a result of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), by denying the citizenship of even free African Americans. *Id.* at 404. In later years, the Supreme Court upheld deportations of Chinese laborers denied any possibility of becoming citizens under then-existing naturalization laws on grounds that "vast hordes . . . crowding in upon us . . . [who] will not assimilate" need not be accorded any rights. *Fong Yue Ting v. United States*, 149 U.S. 698, 706 (1893). Second, the Court ruled that members of Native-American tribes recognized by the United States government were not birthright citizens on grounds that they were not subject to the jurisdiction of the United States within the meaning of the Fourteenth Amendment. *Elk v. Wilkins*, 112 U.S. 94, 109 (1884); see *supra* text accompanying note 7. Third, the Court upheld the exclusion of United States citizens from "military areas" – part of a series of actions culminating in the internment of Japanese-American citizens during World War II – simply because of their ancestry. See *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944). See generally Drimmer, *supra* note 40, at 684-94.

⁷¹ Gordon, *supra* note 8, at 6-7 ("It is indisputable that the *jus soli*, under which

sovereign to birth within the sovereign's realm.⁷³ In contrast, pursuant to *jus sanguinis*⁷⁴ – more commonly associated with civil law during the last two centuries – nationality is transmitted to children by descent rather than on the basis of birthplace.⁷⁵ As the Supreme Court explained in its 1898 decision in *United States v. Wong Kim Ark*,⁷⁶ “[t]he fundamental principle of the common law with regard to English nationality was birth within the allegiance . . . of the King. The principle embraced all persons born within the King’s allegiance and subject to his protection.”⁷⁷ Encompassed within this relationship were the children of English parents and those of “aliens in amity.”⁷⁸ Children of foreign ambassadors and enemy aliens “were not natural-born subjects, because [they were] not born within the allegiance, the obedience, or . . . the jurisdiction of the king.”⁷⁹

Records from as far back as 1343, however, also reflect Parliament’s concern with foreign born children of English subjects, particularly their inheritance rights.⁸⁰ In 1350, Parliament enacted a statute declaring that these

nationality is determined by the place of birth, was always the basic tenet of the English common law.”) (citing *Weedin v. Chin Bow*, 274 U.S. at 660; *Wong Kim Ark*, 169 U.S. at 649). See generally Freedman, *supra* note 16, at 360; Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case*, 9 YALE J.L. & HUMAN. 73, 77-80 (1997).

⁷² Latin meaning “right of the soil.”

⁷³ Gordon, *supra* note 8, at 6-7. See generally Freedman, *supra* note 16, at 359-60 (distinguishing *jus soli* from *jus sanguinis*); Pryor, *supra* note 42, at 886 & n.24 (describing *jus soli* as the “guiding principle[s] of nationality law in England”).

⁷⁴ Latin meaning “right of blood.”

⁷⁵ Gordon, *supra* note 8, at 6 (defining *jus sanguinis* as citizenship derived from one’s parents at the moment of birth). See generally Freedman, *supra* note 16, at 360; Pryor, *supra* note 42, at 883 n.8. In the fourteenth century, Italian jurist Bartolus of Sassoferrato developed one of the earliest theories of naturalization and the equal civic entitlement of both birthright (*cives originarius*) and naturalized (*civis pacto*) citizens. Julius Kerstner, *Civitas Sibe Faciat Civem: Bartolus of Sassoferrato’s Doctrine on the Making of a Citizen*, 48 SPECULUM No. 4 at 694 (1973).

⁷⁶ 169 U.S. 649 (1898).

⁷⁷ *Id.* at 655. See generally Gordon, *supra* note 8; Drimmer, *supra* note 40; KETTNER, *supra* note 66.

⁷⁸ *Wong Kim Ark*, 169 U.S. at 655.

⁷⁹ *Id.* On the basis of this common law principle, the Court ultimately concluded that the American born child of alien parents of Chinese descent, who were neither diplomats nor official representatives of the government of China, was a United States citizen. *Id.* With few exceptions, subsequent commentators agree with the Court’s conclusions with respect to children of alien parents born within the United States. See *infra* Part II. But see PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 4 (1985) (questioning a grant of citizenship based on any involuntary factor and arguing for citizenship based on individual consent as the basis for a well-functioning polity).

⁸⁰ See Gordon, *supra* note 8, at 6-7 (noting that the issue was discussed by Parliament in 1343, but that the plague delayed legislative action).

children should “have and enjoy the same benefits and advantages” . . . in regard to the right of inheritance” as children born in England.⁸¹ In 1677, following the demise of the Puritan Commonwealth, Parliament passed a statute declaring that the children of persons who had fled England during Cromwell’s rule were to be considered “natural-born subjects.”⁸² A 1708 law provided that the children of natural born subjects were to be “deemed, adjudged and taken to be natural-born subjects . . . to all intents, constructions and purposes whatsoever . . . ;”⁸³ and a 1731 Act of Parliament declared that the foreign born grandchildren of natural born subjects were also natural born subjects.⁸⁴ During the eighteenth century, Parliament also enacted statutes governing the eligibility of British subjects born abroad to hold public office. The Act of Settlement of 1701 barred even naturalized foreign born subjects, except those “born of English Parents” from serving in Parliament or holding other high public office – although the royal line of succession confirmed in the Act included Princess Sophia Elestress, Dowager Duchess of Hannover, and other foreign born members of the royal family.⁸⁵ Several decades later, in 1740, Parliament allowed foreign born subjects to hold office in the colonies, but not in England or Ireland.⁸⁶

By 1787, English law thus included two bases for natural born citizenship: (1) birth in England; and (2) birth abroad as the child or grandchild of a natural born English subject.⁸⁷ English law, however, also encompassed precedent for

⁸¹ *Id.* at 6-7 (quoting 25 Edw. 3, c. 2, § 5 (1350) (Eng.)).

⁸² *Id.* at 7 (quoting 29 Car. 2, c. 6, § 1 (1677) (Eng.)).

⁸³ *Id.* at 7 (quoting 7 Ann., c. 5, § 3 (1708) (Eng.)). Gordon remarks that the 1708 statute “was substantially reenacted by 4 Geo. [2], c.21 (1731).” *Id.* at n.44.

⁸⁴ Pryor, *supra* note 42, at 886 & n.27 (citing KETTNER, *supra* note 66, at 15 n.10; quoting An Act . . . For naturalizing the children of natural-born subjects of the crown, 4 Geo. 2, c. 21 (1731)).

⁸⁵ Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 (Eng.); *see also* Pryor, *supra* note 42, at 886 & n.28 (doubting that the Framers imitated the Act of Settlement because colonists resented the Act) (citing KETTNER, *supra* note 66, at 124-26). Kettner and Pryor both reject the idea that the delegates to the Constitutional Convention intended to incorporate the principles of the 1701 British Act of Settlement into the American Constitution, because the colonists viewed the Act of Settlement with hostility and, in the Declaration of Independence, accused King George III of various transgressions related to migration to the colonies and naturalization of foreign settlers.

⁸⁶ Pryor, *supra* note 42, at 887 & n.29 (citing 13 Geo. 2, ch. 7 (1740), clarified by 13 Geo. 3, ch. 25 (1773)).

⁸⁷ *See* Gordon, *supra* note 8, at 5-7. According to Gordon, “the leading British authorities agree that under the early common law, status as a natural-born subject probably was acquired only by those born within the realm, but that the statutes . . . enabled natural-born subjects to transmit equivalent status at birth to the children born to them outside of the kingdom.” *Id.* at 7 (citing 1 COKE ON LITTLETON 8a, 129a (F. Hargrave & C. Butler eds., 1853); WILLIAM BLACKSTONE, COMMENTARIES 154-57 (Dean Gavit ed., 1941); SIR. ALEX COCKBURN, NATIONALITY: OR THE LAW RELATING TO SUBJECTS AND ALIENS, CONSIDERED

restricting the political role of foreign born subjects. Unfortunately, there is no way to ascertain whether, or to what extent, the Framers were relying on any particular British precedent when they included the phrase "natural born Citizen" in Article II. On the basis of the English common law as "declared or modified by statute,"⁸⁸ Charles Gordon contends:

'Natural-born citizen' doubtless was regarded as equivalent to 'natural-born subject,' adjusted for the transition from monarchy to republic. The Framers certainly were aware of the long-settled British practice, reaffirmed in recent legislation in England, which unquestionably 'applied to the colonies before the War of Independence,' to grant full status of natural-born subjects to the children born overseas to British subjects. There was no warrant for supposing that the Framers wished to deal less generously with their own children.⁸⁹

Although some commentators agree with Gordon's analysis,⁹⁰ others believe it is flawed. Jill Pryor, for example, points out that whether British nationality laws applied to the colonies is unclear.⁹¹ She observes that "[p]rominent jurists of the time disagreed over the proper legal analogy for the colonies, while the colonists wanted the protection of the British common law without being subject to control by Parliament."⁹² Commentator Christina Lohman emphasizes the complexity of the picture.⁹³ Reception statutes differed from colony to colony, and, while courts and legislators looked to the English common law heritage, they disagreed with many of the enactments of Parliament, as well as the King's positions on immigration matters.⁹⁴ Pinckney

WITH A VIEW TO FUTURE LEGISLATION 9 (1869); A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 173-78 (1896 ed. with Moore's Notes of American Cases)). Gordon notes that Dicey "is most explicit in stating that a natural-born subject 'means a British subject who became a British subject at the time of his birth' and that this designation includes a person born abroad whose father or paternal grandfather was born in British dominions." *Id.* at 7 (citing DICEY, *supra*, at 173-78).

⁸⁸ *Id.* at 31. Gordon's qualifying language pertaining to statutory modifications reflects fundamental differences in perception of what British common law precedents actually encompassed. Gordon would include statutory declarations and modifications in place prior to 1787. *Id.*

⁸⁹ *Id.* at 7-8 (citations omitted).

⁹⁰ Freedman, *supra* note 16, at 357 ("It is submitted that a foreign born child of American parents can rightly aspire to the position of President and hold such high office in accord with the eligibility requirements laid down both under common law principles and the entire body of statutory law."); Means, *supra* note 43, at 13171. ("American children born abroad are eligible to the offices of the President and the Vice President of the United States."); Morse, *supra* note 50, at 100 ("the child of citizens of the United States, wherever born, is 'a natural-born citizen of the United States,' within the constitution requirement").

⁹¹ Pryor, *supra* note 42, at 887.

⁹² *Id.*

⁹³ See generally Lohman, *supra* note 43.

⁹⁴ The Framers were concerned about encouraging immigration. See, e.g., THE

McElwee, author of a briefing paper on natural born citizenship submitted to Congress in 1967 when Mexican-born Governor George Romney was in the running for the Republican Presidential nomination, argues that only the English common law, stripped of the gloss of statutory precedent, was relevant.⁹⁵ He contends that under the British common law, "*natural born*" meant "*native born*,"⁹⁶ and that British subjects would have been aliens in the absence of statutory law.⁹⁷ By these lights, foreign born children of American-citizen parents were not "*natural born*" within the meaning of Article II. They were not even citizens until Congress passed the first national naturalization law in 1790.⁹⁸

DECLARATION OF INDEPENDENCE para. 2, 9 (U.S. 1776) ("[T]he present King of Great-Britain . . . has endeavoured to prevent the Population of these States; for that Purpose obstructing the Laws of Naturalization of Foreigners; refusing to pass others to encourage their Migrations hither, and raising the Conditions of new Appropriations of Lands.").

⁹⁵ McElwee Brief, *supra* note 15, at 15,876.

⁹⁶ *Id.* McElwee's position finds support in dicta in the Supreme Court's decisions in *Wong Kim Ark*, 169 U.S. 649, 658-59 (1898), and *Weedin v. Chin Bow*, 274 U.S. 657, 665 (1927), as well as lower court decisions. See e.g., *Wong Foong v. United States*, 69 F.2d 681, 682 (9th Cir. 1934) (holding that children of English fathers born abroad were not citizens under the common law); *Ludlam v. Ludlam*, 26 N.Y. 356, 369-70 (1863) (discussing the history of the debate as to whether children born to citizen parents abroad are citizens); *Lynch v. Clarke*, 1 Sand. Ch. 583 (N.Y. Ch. 1844) (differentiating between natural born and native born under New York law).

⁹⁷ McElwee Brief, *supra* note 15, at 15,876. ("It is very doubtful whether the common law covered the case of children born abroad to subjects of England.").

⁹⁸ *Id.* at 15,877. McElwee bases his conclusions on his analysis of British decisions to the effect that all children born abroad, except for a few categories such as children of ambassadors, were aliens who became British citizens through naturalization. *Id.* at 15,876 ("independently of statute, everyone born abroad is an alien") (citations omitted). McElwee, however, also relies on language from authorities that is ambiguous at best. See, e.g., *id.* at 15,876 ("'Natural-born subject' means a British subject who has become a British subject at the moment of his birth.") (quoting DICEY, *supra* note 87, at 173). One can become the subject of a sovereign *at birth* by the operation of either *jus soli* or *jus sanguinis*. See Freedman, *supra* note 16, at 363-64. Whether or not they have a constitutional claim to citizenship, United States law declares foreign born children of United States citizen parents and Native Americans born on tribal lands citizens as of the moment of birth. McElwee also cites *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 576 (1856), although it is hard to imagine a Supreme Court precedent weaker than *Dred Scott*. He draws on language in Justice Curtis' concurring opinion: "Undoubtedly, [the natural born Citizen] language of the Constitution . . . referred citizenship to the place of birth." McElwee Brief, *supra* note 15, at 15,877 (quoting *Dred Scott*, 60 U.S. at 576 (Curtis, J., concurring)). McElwee also cites to pronouncements in *Wong Kim Ark*, 169 U.S. at 649, that merit attention but are nevertheless dicta. See McElwee Brief, *supra* note 15, at 15,877.

B. *The Proviso's Interplay with Naturalization Laws and Key Constitutional Amendments*

1. Pre-Civil War Naturalization Statutes

In 1790, less than three years after the drafting of the Constitution, the First Congress passed *An Act to establish an uniform Rule of Naturalization*,⁹⁹ the United States' first federal naturalization law. The Act provided for naturalization of aliens in the United States, the derivative naturalization of their children, and the transmission of United States citizenship by descent to foreign born children of United States citizen fathers.¹⁰⁰ Unfortunately, like the Constitution's natural born citizenship proviso, the relevant language of the 1790 Act can be interpreted in different ways. In pertinent part, the statute 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 residents in the United States¹⁰¹

Once again, there is no record of any meaningful discussion of "natural born citizenship" during debate on the provision.¹⁰²

The 1790 Act could be read as simply declaratory – a means of providing a clear statement of rights that the Framers already deemed to exist.¹⁰³ There is ample precedent for such declarations beginning with the Bill of Rights itself.¹⁰⁴ As Charles Gordon points out, Congress later reaffirmed its

⁹⁹ Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795) (allowing "any alien, being a free white person" residing in the United States for at least two years to become a citizen upon satisfaction of certain requirements); see David P. Currie, *The Constitution in Congress, Substantive Issues in the First Congress 1789-1791*, 61 U. CHI. L. REV. 775, 822-25 (1997) [hereinafter *Substantive Issues in the First Congress*].

¹⁰⁰ Naturalization Act of 1790, ch. 3, §1, 1 Stat. at 104 (repealed 1795).

¹⁰¹ §1, 1 Stat. at 104.

¹⁰² See Gordon, *supra* note 8, at 9-10 (citing *Weedin v. Chin Bow*, 274 U.S. 657, 661 (1927)).

¹⁰³ See, e.g., *Wong Kim Ark*, 169 U.S. at 714 (Fuller, C.J., dissenting) (opining that the 1790 Act was "clearly declaratory" of existing rights); Freedman, *supra* note 16, at 361 (postulating that the Act of 1790 was declaratory of the common law doctrine of *Jus Sanguinis*); Morse, *supra* note 50, at 100 ("This provision as its terms express is declaratory; it is not the statute that constitutes children of American parentage citizens; it is the fact of American descent, the *jus sanguinus*, that makes them citizens at the moment of birth.").

¹⁰⁴ As the Ninth Amendment makes clear, the rights of the people were never deemed to be limited to those set forth in the Constitution – these amendments were intended to clarify existing rights. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 6.1, at 456 (2d ed. 2002); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-12, at 903-04 (3d ed. 2000).

adherence to *jus soli* as a basis for United States citizenship in the text of several subsequent naturalization statutes, even after the Fourteenth Amendment raised this principle to the level of a constitutional mandate.¹⁰⁵ Reading the 1790 Act as declaratory is logical, particularly because the last sentence appears to be a caveat limiting the corresponding English law principle extending natural born subject status to both children and grandchildren of natural born British subjects.¹⁰⁶

Alternatively, perhaps Congress believed it necessary to enact the statute because foreign born children would not otherwise inherit their parents' citizenship status.¹⁰⁷ If so, questions arise concerning the constitutionality of the Act.¹⁰⁸ To the extent that bestowing natural born citizenship on the foreign born children of United States citizen parents constituted a legislative attempt to expand the field of persons qualified for the Presidency pursuant to Article II, the statute was arguably unconstitutional.¹⁰⁹ As Gordon and Pryor suggest, however, the concepts of natural born citizenship and naturalization at birth are not mutually exclusive.¹¹⁰ Pryor specifically argues that "naturalization can create natural citizens,"¹¹¹ contending that the large number of Convention delegates who held seats in the First Congress supports the notion that Congress acted in accordance with the intent of the Framers.¹¹² While it is true

¹⁰⁵ Gordon, *supra* note 8, at 10.

¹⁰⁶ *Id.* at 9 & n.68.

¹⁰⁷ See, e.g., Pryor, *supra* note 42, at 894-95; McElwee Brief, *supra* note 15, at 15,879.

¹⁰⁸ See Gordon, *supra* note 8, at 9-10; Pryor, *supra* note 42, at 883 n. 9; McElwee Brief, *supra* note 15, at 15,877 (contending that "the Act of March 26, 1790 would be unconstitutional if it attempted to enlarge the rights of a naturalized citizen to be equal to those of natural-born citizens under the Constitution" and terming inclusion of "natural-born" in the Act as an error that was never repeated).

¹⁰⁹ Gordon, *supra* note 8, at 9-10. Gordon's position finds support in *Powell v. McCormack*, 395 U.S. 486 (1969), where the Supreme Court held that Congress may not constitutionally add to the qualifications established for members of the House of Representatives by Article I, Section 2, and in *United States Term Limits v. Thornton*, 514 U.S. 779 (1995), where the Court ruled that states are similarly barred from imposing limits on Congressional terms and held that the qualifications set forth in the Constitution are exclusive. See CHEMERINSKY, *supra* note 104, § 2.8.5, at 142. See generally SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 1020 (2d rev. ed. 2002).

¹¹⁰ Gordon, *supra* note 8, at 9; Pryor, *supra* note 42, at 894.

¹¹¹ Pryor, *supra* note 42, at 894 (emphasis in original).

¹¹² *Id.* at 894-95. Pryor also contends "[t]hat these statutes have never been challenged on the grounds that they are outside the authority delegated by the naturalization clause establishes de facto Congress' power to naturalize from birth. *Id.* at 891; see also *Natural Born Killjoy*, *supra* note 10, at 16 (explaining that "[s]even of the 39 signers of the Constitution in Philadelphia in 1787 were foreign born, as were thousands of the voters who helped ratify the Constitution. Immigrant Americans accounted for 8 of America's first 81 congressmen, 3 of our first Supreme Court justices, 4 of our first 6 secretaries of the treasury, and 1 of our first 3 secretaries of war").

that in some respects the First Congress continued the work of the constitutional convention,¹¹³ there are a number of examples of actions by those who attended the Constitutional Convention that the Supreme Court deemed unconstitutional. For example, in 1793, the justices declined to provide advice in response to a request from Secretary of State Jefferson, on behalf of President Washington, for assistance in resolving legal issues related to United States neutrality in the Napoleonic wars then raging in Europe on grounds that advising the President in the absence of an actual "case or controversy" would violate Article III.¹¹⁴ One commentator also raises the possibility that the term "natural born citizens" appeared in the 1790 Act because of an inadvertent copying error rather than as a result of a substantive decision by the delegates.¹¹⁵ The only real support for this conclusion, however, is the fact that the words "natural born" soon disappeared from American naturalization statutes.¹¹⁶

In 1795, Congress passed a second naturalization statute.¹¹⁷ This act provided that foreign born children of United States citizen parents were to be "considered as citizens of the United States," but it omitted the "natural-born" language of the 1790 statute.¹¹⁸ The term "natural born" never again appeared

¹¹³ Lohman, *supra* note 43, at 370.

¹¹⁴ See *TRIBE*, *supra* note 104, § 3-9, at 328. The justices also refused an earlier request to advise the Secretary of War and Congress on legal issues pertaining to pension applications. *Id.*

¹¹⁵ McElwee Brief, *supra* note 15, at 15,877.

¹¹⁶ McElwee, arguing that the foreign born progeny of U.S. citizens are not natural born, believed the drafters realized their error and its implications on Presidential eligibility, and thus hastily amended the statute. *Id.* James Madison, Samuel Dexter, and Thomas A. Carnes had all been members of the Constitutional Convention and were serving in the House of Representatives when Congress considered the second naturalization act in 1795. *Id.* McElwee states that "the false inference which [the 'natural-born' language of the statute] might suggest with regard to the President was noted, and the Committee sponsored a new naturalization bill which deleted the term 'natural-born' from the Act of 1795." McElwee Brief, *supra* note 15, at 15,877.

¹¹⁷ Act of Jan. 29, 1795, ch. 20, 1 Stat. 414 (repealed 1802).

¹¹⁸ *Id.* at 415. McElwee presents this change as a correction initiated by James Madison after he discovered the erroneous inclusion of the "natural born" modifier in the 1790 statute. McElwee Brief, *supra* note 15, at 15,877, 79. Freedman and Morse, however, view the subsequent statutory changes differently. See Freedman, *supra* note 16, at 361-62 (stating that the 1790 act reaffirmed the Framers' intent by declaring foreign born children of United States citizens "natural-born"); Morse, *supra* note 50, at 100 (arguing that the 1795 Act, like the 1790 Act, was merely declaratory of the principle of *jus sanguinis*). McElwee contends that the Freedman article "was apparently inspired by a desire to accomplish a desired result, namely, to urge eligibility for the Presidency on behalf of Mr. Franklin Delano Roosevelt, Jr. who was born at the family summer home at Campobello, New Brunswick, Canada." McElwee Brief, *supra* note 15, at 15,879. Interestingly, McElwee's own work is a briefing paper opposing the candidacy of Governor Romney. *Id.* at 15,875.

in the naturalization laws of the United States. "The accepted modern designations . . . refer only to citizenship at birth and by naturalization, with the former group divided into native-born citizens and citizens at birth abroad."¹¹⁹ The several comprehensive naturalization statutes enacted since 1795 reflect these modern designations.¹²⁰ All of these laws have provided for the citizenship of foreign born children of United States citizen parents, although the language of the Naturalization Act of 1802 left room to argue that children born abroad to American parents after 1802 were not included as citizens from birth.¹²¹ When this ambiguity came to light as a result of a controversial article published in 1854,¹²² Congress clarified the law in the Act of 1855.¹²³ That Act provided – both retrospectively and prospectively – that foreign born children of United States citizen fathers "shall be deemed and considered and are hereby declared to be citizens of the United States."¹²⁴

2. The Fourteenth Amendment

In 1866, Congress enacted the first of several federal Civil Rights Acts.¹²⁵ The Act declared "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed . . . citizens of the United States."¹²⁶ In 1868, the Fourteenth Amendment ensconced this principle in the Constitution: "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."¹²⁷ In so doing, the amendment unequivocally overturned the holding of the Supreme Court's infamous 1857 decision in *Dred Scott v. Sandford*¹²⁸ and constitutionalized the common law doctrine of *jus soli*

¹¹⁹ Gordon, *supra* note 8, at 11.

¹²⁰ See *id.* at 12; Act of April 14, 1802, ch. 28, § 4, 2 Stat. 153, 155, *repealed by* Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604.

¹²¹ See Gordon, *supra* note 8, at 12 (examining the possibility that the 1802 Act applied only retrospectively). The 1802 Act provided for naturalization of foreign born children of United States citizen parents. § 4, 2 Stat. at 155 (*repealed* 1855).

¹²² See Horace Binney, *The Alienigenae of the United States*, 2 AM. L. REG. 193 (1854).

¹²³ Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604; see Gordon, *supra* note 8, at 12 n.84 (noting that the Binney article was originally unsigned, but was later published under the author's name).

¹²⁴ § 1, 10 Stat. at 604.

¹²⁵ Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27 (codified as amended in scattered sections of 42 U.S.C.).

¹²⁶ *Id.* § 1, 14 Stat. at 27.

¹²⁷ U.S. CONST. amend. XIV, § 1.

¹²⁸ 60 U.S. (19 How.) 393 (1857). The *Dred Scott* Court held that African-Americans were not citizens and therefore could not bring suits in federal court under diversity of citizenship jurisdiction, and ruled that Congress did not have power to preclude slavery in the territories, thereby invalidating the Missouri Compromise. *Id.* at 469. The decision is most infamous for its sweeping denial of African-American citizenship and Chief Justice Taney's statements about the inferior status of African-Americans in the constitutional

citizenship.¹²⁹ The amendment, however, further complicated interpretation of the natural born citizenship proviso, because it left room to debate whether birth and naturalization were the *only* methods of acquiring United States citizenship.

The Supreme Court's position on the exclusivity of Fourteenth Amendment citizenship has evolved over the years. In its 1898 decision in *United States v. Wong Kim Ark*,¹³⁰ the Court addressed the plight of a man born in San Francisco to Chinese parents permanently residing in the United States but ineligible to become United States citizens because of the Chinese Exclusion Act.¹³¹ The Court ruled that Mr. Ark was a United States citizen by virtue of his birth in the United States.¹³² While concluding that the Fourteenth Amendment was not intended to impose any new restrictions on citizenship, the Court reasoned that its language "contemplate[d] two sources of citizenship, and two only — birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution."¹³³

Pursuant to the *Wong Kim Ark* definition, all United States citizenship rests on either (1) birth *in* the United States, or (2) naturalization.¹³⁴ Accepting this premise leads to the conclusion that birthright citizenship is limited to persons born within the physical limits of the United States — however defined — *and* subject to United States jurisdiction.¹³⁵ Naturalization broadly covers all other methods of acquiring citizenship, whether at birth or subsequent to birth, and the foreign born children of United States citizen parents are included among those who acquire citizenship by naturalization. Chief Justice Fuller, joined by Justice Harlan, dissented with respect to both the *Wong Kim Ark* holding and the majority's views on the exclusivity of the Fourteenth Amendment as a basis for natural born citizenship. The Chief Justice disagreed that Mr. Ark was a United States citizen solely by virtue of his place of birth.¹³⁶ He also disputed the majority's dicta concerning foreign born children of American

order. *Id.* For analysis of *Dred Scott* as "[t]he most important discussion of American citizenship prior to Reconstruction and the Fourteenth Amendment," see Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 61-62 (1997).

¹²⁹ See *supra* text accompanying notes 66-79.

¹³⁰ 169 U.S. 649 (1898).

¹³¹ *Id.* at 652-53.

¹³² *Id.* at 704.

¹³³ *Id.* at 702.

¹³⁴ *Id.*

¹³⁵ See *id.*

¹³⁶ *Id.* at 732 (Fuller, C.J., dissenting); see *infra* note 197 (discussing recent arguments over attempts to amend the Constitution to restrict birthright citizenship to children born to U.S. citizens or to permanent residents legally present in the United States at the time of the birth).

parents, opining, "[i]n my judgment, the children of our citizens born abroad were always natural-born citizens from the standpoint of this Government."¹³⁷

Although it subsequently reiterated the *Wong Kim Ark* majority's language with respect to the exclusivity of the two bases for citizenship articulated in the Fourteenth Amendment,¹³⁸ by the latter part of the twentieth century the Court parted with this aspect of the *Wong Kim Ark* analysis. The Court made this departure explicit in its 1971 decision in *Rogers v. Bellei*,¹³⁹ a case in which a man born in Italy to an Italian father and a native born American citizen mother challenged the constitutionality of the residency requirement of Section 1 of the Naturalization Act of 1934¹⁴⁰ pursuant to the Fifth, Eighth, and Ninth Amendments.¹⁴¹ The Act required children born abroad with one United States citizen parent and one alien parent to reside continuously in the United States for a five-year period between the ages of fourteen and twenty-eight in order to retain their United States citizenship.¹⁴²

The Court ruled against Mr. Bellei and upheld the constitutionality of the condition subsequent. In an opinion by Justice Blackmun, the majority reasoned that, although Bellei was a United States citizen pursuant to the 1934 Act, the Fourteenth Amendment's citizenship clause did not apply because he was not born or naturalized in the United States and had not been subject to United States jurisdiction.¹⁴³ The majority implicitly, disagreeing with birth in the United States subject to its jurisdiction and naturalization as the exclusive grounds for United States citizenship, held that Bellei "simply [was] not a Fourteenth-Amendment-first-sentence citizen."¹⁴⁴ The Court did not deny that children born abroad to one or two United States citizen parents were citizens, but characterized their status as purely statutory and not constitutionally protected.¹⁴⁵ According to the Court, Congress could – and did – allow the acquisition of United States citizenship by means other than those provided for

¹³⁷ *Wong Kim Ark*, 169 U.S. at 714.

¹³⁸ See, e.g., *Weedin v. Chin Bow*, 274 U.S. 657, 662-64 (1927); *Elk v. Wilkins*, 12 U.S. 94, 101 (1884).

¹³⁹ 401 U.S. 815 (1971).

¹⁴⁰ Act of May 24, 1934, ch. 344, 48 Stat. 797.

¹⁴¹ *Rogers*, 401 U.S. at 820.

¹⁴² § 102, 48 Stat. at 797.

¹⁴³ *Rogers*, 401 U.S. at 827.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 830. ("[T]he first sentence of the Fourteenth Amendment] has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization." *Id.* (second alteration in original) (quoting *United States v. Wong Kim Ark*, 169 U.S. 649, 688 (1898)); see also Pryor, *supra* note 42, at 893 (decrying "[t]he misconception that naturalization only refers to the acquisition of citizenship after birth [as] a potential stumbling block for the courts").

in the Fourteenth Amendment.¹⁴⁶

Wong Kim Ark and *Bellei* differ in their perspectives on the exclusivity of the citizenship grounds articulated in the Fourteenth Amendment. Neither case, however, conclusively resolves the dilemma posed by the natural born citizenship proviso. Is an infant who becomes a United States citizen at the moment of birth – whether she is “naturalized” or “simply not a Fourteenth-Amendment-first-sentence citizen” – a “natural born Citizen” within the meaning of Article II?

Charles Gordon wrote his thoughtful article on the natural born citizenship proviso three years before the Supreme Court decided *Bellei*.¹⁴⁷ Gordon concluded “that the Framers [of the 1787 Constitution] intended to exclude only persons who had not been born citizens and that those who acquired United States citizenship at birth abroad are eligible for the Presidency.”¹⁴⁸ Consequently, for Gordon, the Fourteenth Amendment has little relevance to the proper interpretation of the natural born citizenship proviso.¹⁴⁹ In contrast, Jill Pryor, writing several years after the *Bellei* decision, also concludes that birthright citizens are “natural born,” but does so on different grounds.¹⁵⁰ In accordance with *Wong Kim Ark*, but not *Bellei*, Pryor contends that the Fourteenth Amendment is the exclusive source of United States citizenship.¹⁵¹ She reasons, however, that citizens may be both naturalized and “natural born” in the United States.¹⁵²

Several scholars share Gordon and Pryor’s views with respect to the natural born status of foreign born children of United States citizen parents. Alexander Morse concludes “that the child of citizens of the United States, wherever born, is ‘a natural-born citizen of the United States.’”¹⁵³ Cyril Means

¹⁴⁶ *Rogers*, 401 U.S. at 830. The Court cites *Weedin’s* emphasis on residence in the United States as a more important basis for citizenship than descent, and states that Congress “indulged the foreign-born child with presumptive citizenship, subject to subsequent satisfaction of a reasonable residence requirement, rather than to deny him citizenship outright, as concededly it had the power to do, and relegate the child, if he desired American citizenship, to the more arduous requirements of the usual naturalization process.” *Id.* at 835.

¹⁴⁷ Gordon, *supra* note 8.

¹⁴⁸ *Id.* at 26.

¹⁴⁹ *Id.* at 15.

¹⁵⁰ Pryor, *supra* note 42, at 892.

¹⁵¹ *Id.* at 892.

¹⁵² *Id.* at 894. Pryor coins the term “naturalized-born” to define citizens who are citizens at birth by virtue of naturalization statutes or treaties. *Id.* Another commentator, concurring with the conclusions reached by both Gordon and Pryor, criticizes *Bellei* for “creat[ing] the potential for investiture in Congress of the power, through its plenary control of the non-fourteenth amendment citizenship process, to make a candidate, or incumbent President born abroad, constitutionally ineligible to be elected or to continue in office.” Medina, *supra* note 43, at 267.

¹⁵³ Morse, *supra* note 50, at 100; see also Freedman, *supra* note 16, at 364-65

similarly believes that if the courts were called upon to resolve the issue, they would conclude that "American children born abroad are [constitutionally] eligible to the offices of President and Vice President of the United States."¹⁵⁴ J. Michael Medina also asserts that "persons born as American citizens abroad probably, but not uncontrovertedly, are natural born."¹⁵⁵

A few commentators have interpreted the natural born citizenship proviso as either a partial or complete barrier to the presidential aspirations of Americans born outside the United States. Christina Lohman, for example, appears to accept that the proviso bars most foreign born citizens from serving as President.¹⁵⁶ She contends, however, that children born to United States citizens employed by the United States government and living abroad in the line of duty – e.g., those whose parents are diplomats and military personnel – should be considered "natural born" because they are "subject to the jurisdiction" of the United States from the moment of their birth.¹⁵⁷ In contrast, Pinckney McElwee takes the absolutist position that no person physically born outside the United States can ever qualify as a "natural born Citizen."¹⁵⁸

In the absence of a definitive ruling by the Supreme Court, and in light of the paucity of primary source material,¹⁵⁹ neither position is unreasonable, although we believe that Gordon and those espousing the view that persons who become citizens at birth are "natural born" have the better argument. Unfortunately, as discussed below,¹⁶⁰ neither the relevant constitutional amendments nor the federal succession statutes enacted over the years resolve the fundamental dilemma of the meaning of the natural born citizenship proviso with respect to the foreign born children of United States citizens and many other Americans.

3. Naturalization Statutes Enacted After Adoption of the Fourteenth Amendment

During the several decades following the adoption of the Fourteenth

(supporting Morse's analysis and arguing that the key to natural born citizenship is not whether a child acquires citizenship by virtue of common law principles or statutory provisions, "as long as it is clear that these children were, are, and will be subject to the jurisdiction of the United States as of birth.")

¹⁵⁴ Means, *supra* note 43, at 31.

¹⁵⁵ Medina, *supra* note 43, at 268.

¹⁵⁶ Lohman, *supra* note 43, at 368.

¹⁵⁷ *Id.* at 367-68.

¹⁵⁸ McElwee Brief, *supra* note 15, at 15,880.

¹⁵⁹ See Gordon, *supra* note 8, at 3 (describing the lack of discussion of the Presidential qualifications clause); Pryor, *supra* note 42, at 896 (stating that the "naturalized born approach enables courts to forego a misdirected search for specific intent regarding the facts of each case, for which there are little or no primary source materials").

¹⁶⁰ See *infra* Part II.

Amendment, Congress made a number of modifications to the system put in place by the Naturalization Act of 1855. For example, in 1907, Congress added a requirement that foreign born children of American parents living outside the United States must declare their intention to become residents and remain citizens before reaching the age of eighteen.¹⁶¹ In addition to imposing a condition subsequent on the citizenship of children born to mixed-citizenship parents living abroad, the 1934 statute at issue in *Bellei* provided for transfer of citizenship status to foreign born children by mothers as well as fathers.¹⁶² Congress enacted subsequent naturalization statutes in 1940,¹⁶³ and again in 1952¹⁶⁴ and 1986.¹⁶⁵ These laws modified the terms on which foreign born children of a single United States citizen parent were entitled to birthright citizenship,¹⁶⁶ but have little relevance to the interpretation of the natural born citizenship proviso.

4. Amendments and Statutes Related to Presidential Succession

Three constitutional amendments and a series of federal laws pertaining to executive succession complete the legal framework in which the natural born citizenship proviso operates: The Twelfth, Twentieth and Twenty-fifth Amendments, and the federal succession statute set forth in Title 3 of the United States Code.

a. *The Twelfth Amendment*

Early in the nation's history, it became evident that the executive selection

¹⁶¹ Act of March 2, 1907, ch. 2534, §6, 34 Stat. 1229; see Freedman, *supra* note 16, at 362.

¹⁶² Act of May 24, 1934, ch. 344, §1, 48 Stat. 797.

¹⁶³ Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137 (codified as amended in scattered sections of 8 U.S.C.); see also Freedman, *supra* note 16, at 363-64.

¹⁶⁴ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

¹⁶⁵ Immigration and Nationality Act Amendments of 1986, Pub. L. 99-653, 100 Stat. 3655 (codified as amended in scattered sections of 8 U.S.C.).

¹⁶⁶ The 1940 Act required that the United States citizen parent have resided in the United States or one of its outlying possessions for ten years, at least five of which were after age sixteen. Nationality Act of 1940 § 201(g). The 1952 Act lowered from age sixteen to fourteen the five-year portion of the residence requirement. Immigration and Nationality Act § 301(g). The 1986 Act, applicable to children born after November 14, 1986, reduced the ten-year residence requirement to five years, at least two of which must take place after age fourteen. *Id.* § 301(g), amended by Immigration and Nationality Act Amendments of 1986, §12, Pub. L. 99-653, 100 Stat. 3655, clarified by Immigration Technical Corrections Act of 1988, §23(d), Pub. L. 100-S25, 102 Stat. 2609, 2618; see CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 93.02(5)(c) (2004); see also T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 167-175 (4th ed. 1998); Robert A. Mautino, *Acquisition of United States Citizenship*, 6 BENDER'S IMMIGR. BULL. 3, 35-36 (Jan. 1, 2001).

mechanism set forth in Article II was problematic.¹⁶⁷ Although the Framers originally hoped to avoid a government immersed in partisanship, it was soon apparent that political parties were an inescapable reality.¹⁶⁸ Realization of the inevitability of party politics and their impact on the executive branch, along with concerns about the mechanics of the Electoral College system, led to the adoption of the Twelfth Amendment in 1804.¹⁶⁹

The principal innovations of the Twelfth Amendment were amending the Constitution's original system for electing the Vice President – the candidate with the second most electoral votes in the Presidential election – and, in the event no candidate received a majority of electoral votes, establishing procedures for selection of the President by the House of Representatives and the Vice President by the Senate.¹⁷⁰ The last line of the Twelfth Amendment, however, provides that “no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”¹⁷¹ This sentence effectively applies the qualifications set forth in Article II, Section 1, Clause 5 – including natural born citizenship – to the Vice President as well as the President.

b. *The Twentieth and Twenty-fifth Amendments*

The Twentieth Amendment, adopted in 1933, specifies dates and times for

¹⁶⁷ See Ackerman & Fontana, *supra* note 31, at 558-59 (theorizing that the Framers designed the Electoral College with the notion of a non-partisan republic in mind); Akhil Reed Amar, Essay, *President Quayle?*, 78 VA. L. REV. 913, 921-23 (1992) [hereinafter *President Quayle?*] (stating that “the framers of the Twelfth Amendment [recognized] that it would enable one party more easily to capture both the presidency and the vice-presidency,” but reasoning that “the inversion problem, and not the tendency of the election scheme under Article II towards a split executive, was the primary motivating force behind the adoption of the Twelfth Amendment.”); Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 675-78 (1996) (examining the concerns over unchecked discretion by the Electoral College). See generally TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804* (1994).

¹⁶⁸ The Framers “equated party with faction, and thought parties an unmitigated evil.” Ackerman & Fontana, *supra* note 31, at 558. The Madisonian republic tried to create a space for leaders to transcend the rule of faction all together. *Id.* at 559; see also George Washington, Farewell Address (Sept. 17, 1796), <http://usinfo.state.gov/usa/infousa/facts/democrac/49.htm> (last visited Nov. 7, 2004) (warning the citizens of the United States “in the most solemn manner against the baneful effects of the spirit of party generally”).

¹⁶⁹ See Ross & Josephson, *supra* note 167, at 677; Ackerman & Fontana, *supra* note 31 at 558-59; *President Quayle?*, *supra* note 167, at 921-23.

¹⁷⁰ See CHEMERINSKY, *supra* note 104, § 1.3, at 12-13; Brown & Cinquegrana, *supra* note 21, at 1412 n.81; Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505, 513 (1995).

¹⁷¹ U.S. CONST. amend. XII.

the beginning of Congressional terms of office, annual sessions of Congress,¹⁷² and the inauguration of the President and Vice President.¹⁷³ Most importantly for purposes of this discussion, the Twentieth Amendment authorizes Congress to enact procedures to be followed in the event of the death or failure to qualify of a President-elect, or both a President-elect and a Vice-President-elect.¹⁷⁴

The Twenty-fifth Amendment provides procedures for filling a vacancy in the Vice-Presidency, reaffirms Congress' authority to legislate a course of action to be followed in the event of the death, removal, or resignation of a President, and establishes procedures to be followed in the event that a President becomes temporarily or permanently disabled while in office.¹⁷⁵ The Twenty-fifth Amendment became part of the Constitution in 1967, during the turbulent era bracketed by the assassination of President John F. Kennedy in 1963¹⁷⁶ and the assassinations of Presidential candidate Senator Robert F. Kennedy¹⁷⁷ and Civil Rights leader Martin Luther King, Jr. in 1968.¹⁷⁸

Gerald R. Ford was the first Vice President appointed pursuant to the Twenty-fifth Amendment.¹⁷⁹ He became Vice President on December 6, 1973, following the abrupt resignation of Spiro Agnew in the midst of a criminal investigation,¹⁸⁰ and on August 9, 1974, he became President of the United States following the resignation of Richard Nixon as a result of the Watergate scandal.¹⁸¹ Shortly thereafter, Nelson Rockefeller became President Ford's Vice President and the second Vice President chosen pursuant to the Twenty-

¹⁷² U.S. CONST. amend. XX, § 2.

¹⁷³ U.S. CONST. amend. XX, § 1.

¹⁷⁴ U.S. CONST. amend. XX, § 3; see Kesavan, *supra* note 21, at 1796, 1808-11 (suggesting that the Twentieth Amendment provides a solution in the event that electors choose a constitutionally ineligible President or Vice President).

¹⁷⁵ U.S. CONST. amend. XXV, § 2; see Brown & Cinquegrana, *supra* note 21, at 1393 (recounting the Twenty-Fifth Amendment's procedures for filling a presidential vacancy); see also Goldstein, *supra* note 170, at 508 (suggesting that the Twenty-fifth Amendment reflects a change in perceptions of the role of the Vice President).

¹⁷⁶ President Kennedy's assassination, coupled with concern over President Johnson's heart problems, motivated Congress to initiate the amendment process. See Brown & Cinquegrana, *supra* note 21, at 1393-94 (stating that the effort that culminated in the Twenty-fifth Amendment began almost immediately after President Kennedy's assassination).

¹⁷⁷ See generally BRIAN DOOLEY, ROBERT KENNEDY: THE FINAL YEARS 137-47 (1996).

¹⁷⁸ See generally LENWOOD G. DAVIS, I HAVE A DREAM: THE LIFE AND TIMES OF MARTIN LUTHER KING, JR. 247-52 (Greenwood Press 1973) (1969).

¹⁷⁹ Gerald R. Ford, ENCYCLOPEDIA.COM, at <http://www.encyclopedia.com/html/F/Ford-G1er.asp> (last visited Nov. 7, 2004).

¹⁸⁰ Spiro T. Agnew, WIKIPEDIA, at http://en.wikipedia.org/wiki/Spiro_Agnew (last visited Nov. 7, 2004).

¹⁸¹ Richard M. Nixon, THE WHITE HOUSE, OFFICIAL WEB SITE, at <http://www.whitehouse.gov/history/presidents/rn37.html> (last visited Nov. 24, 2004).

fifth Amendment.¹⁸² The procedures established by the Twenty-fifth Amendment to deal with Presidential incapacity were first utilized on July 14, 1985, when President Ronald Reagan, about to undergo surgery, transferred his executive authority to then-Vice President George H.W. Bush for several hours.¹⁸³

Both the Twentieth and Twenty-fifth Amendments implicitly assume that all of those eligible to assume the offices of President and Vice President satisfy Article II's eligibility criteria, but neither explicitly addresses the issue.

c. *Federal Succession Laws*

Congress enacted the first Presidential succession statute in 1792.¹⁸⁴ The 1792 Act provided that, upon resignation or death of both the President and Vice President, the President Pro Tempore of the Senate, followed by the Speaker of the House, was to serve as Acting President pending the outcome of a special election.¹⁸⁵ This law remained in place until 1866, the year following President Lincoln's assassination. At that time, Congress eliminated the role of the President Pro Tempore of the Senate and the Speaker of the House, placed the members of the President's cabinet in the line of succession, and gave itself discretion to decide whether or not to hold a special election in the event of vacancies in both the Presidency and Vice Presidency.¹⁸⁶

In 1948, Congress again revised the succession law.¹⁸⁷ The 1948 Act, still in force today, eliminated the special election option and revised the order of those designated to follow the Vice President in the line of succession.¹⁸⁸ President Truman raised concerns about putting unelected cabinet members first in line for the Presidency in the event of a double vacancy, and expressed reluctance to name his own potential successor in choosing a Secretary of State. In response, Congress revised the statute to place elected officials –

¹⁸² *Nelson Rockefeller*, WIKIPEDIA, at http://en.wikipedia.org/wiki/Nelson_Rockefeller (last visited Nov. 7, 2004).

¹⁸³ Brown & Cinquegrana, *supra* note 21, at 1390. A number of other instances have arisen in which the Twenty-fifth Amendment could have been invoked to transfer Presidential authority, but was not. *See id.* at 1390-91 nn.2-3 (describing instances in which Presidents Nixon, Carter, and Reagan underwent, or contemplated undergoing, temporarily-disabling medical procedures).

¹⁸⁴ Act of March 1, 1792, ch. 8, §§ 9-10, 1 Stat. 239, 240-41 (repealed 1886) (mandating that, in case of removal, death, or resignation of the President and the Vice President, the President Pro Tempore of the Senate, followed by the Speaker of the House, will act as President, and further providing for appointment of electors by the states for a special Presidential election whenever the Offices of President and Vice President both become vacant). *See generally* Wasserman, *supra* note 21, at 353-54.

¹⁸⁵ Act of March 1, 1792, ch. 8, § 9.

¹⁸⁶ Act of Jan. 19, 1886, ch. 4, § 1, 24 Stat. 1 (repealed 1947).

¹⁸⁷ Act of June 25, 1948, Pub. L. No. 80-771, §1, 62 Stat. 672 (codified as amended in scattered sections of 3 U.S.C.).

¹⁸⁸ *Id.*

albeit officials elected by the voters of single states rather than the whole nation – first in line following the Vice President.¹⁸⁹ The current order of succession to the Presidency, following the Vice President, begins with the Speaker of the House of Representatives. The President Pro Tempore of the Senate is next in line, and the members of the cabinet follow beginning with the Secretary of State.¹⁹⁰ As noted earlier, however, only persons constitutionally qualified to serve as President may succeed to the office of Acting President.¹⁹¹

The interaction of the federal succession statute with the Twentieth and Twenty-fifth Amendments is potentially quite complex.¹⁹² For purposes of this discussion, however, the principal issue relates to the eligibility provision. So long as the law limits eligibility to the office of Acting President to those constitutionally qualified for the Presidency, uncertainty will continue to exist with respect to the eligibility of anyone in the line of succession born anywhere

¹⁸⁹ See Brown & Cinquegrana, *supra* note 21, at 1423-29; Wasserman, *supra* note 21, at 356-57.

¹⁹⁰ 3 U.S.C. § 19 (2000). The order of succession for cabinet members is as follows: Secretaries of State, Treasury, and Defense; Attorney General; Secretaries of Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, and Veterans Affairs. 3 U.S.C. § 19(d)(1) (2000). Congress has not yet included the most recently created cabinet position, the Secretary of Homeland Security, in the line of succession. Legislation to place the Secretary of Homeland Security in the line of succession following the Attorney General, and to clarify that acting members of the cabinet are not eligible to act as President, was introduced in 2003. See H.R. 2319, 108th Cong. (2003).

There is some question whether the current succession statute is constitutional. The Constitution provides that "Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what *Officer* shall then act as President, and such *Officer* shall act accordingly, until the Disability be removed, or a new President shall be elected." U.S. CONST. art. II, § 1, cl. 5 (emphasis added). Neither the Speaker of the House of Representatives nor the President Pro Tempore of the Senate is an officer of the United States in the sense of a member of the Executive Branch. Consequently, it is arguable that the current succession statute violates both the literal mandate of Article II and separation-of-powers principles. See generally *Is Succession Law Constitutional?*, *supra* note 21, at 113 (attacking the constitutionality of the current presidential succession statute); Calabresi, *supra* note 21, at 156 (agreeing with the Amars that the current federal succession statute is probably unconstitutional).

¹⁹¹ 3 U.S.C. § 19(d)(1) (2000). The office of Acting President differs from that of President. The Constitution provides that "Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then *act* as President, and such Officer shall *act* accordingly, until the Disability be removed, or a President shall be elected." U.S. CONST. art. II, § 1, cl. 5 (emphasis added). The Constitution does not afford Congress the power to declare a new President. See Brown & Cinquegrana, *supra* note 21; *Unnatural Born Citizens*, *supra* note 14.

¹⁹² See articles cited *supra* note 21.

other than within the geographic confines of one of the fifty states. In addition, persons naturalized after birth will remain unqualified for both the Presidency and Vice-presidency.

The following section of this article surveys some of the many ways of acquiring United States citizenship in order to identify the many different groups of Americans whose natural born citizenship status is uncertain. If an individual in this situation were to run for President or Vice President, or rise to the threshold of the Oval Office as a result of a national crisis, this uncertainty could impact the entire nation.

II. WHO IS A NATURAL-BORN CITIZEN?: PERMUTATIONS AND COMBINATIONS OF UNITED STATES CITIZENSHIP

There are many paths to United States citizenship, but "the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive. The only difference drawn by the Constitution is that only the 'natural born' citizen is eligible to be President."¹⁹³ To understand the need to eliminate, or at least clarify, this distinction, it is helpful to survey the principal categories of United States citizenship and to ask who among Americans is a natural born citizen. The discussion begins with an exploration of citizenship pursuant to the Fourteenth Amendment's incorporation of *jus soli*, then turns to the application of *jus sanguinis* principles.

A. Fourteenth Amendment Citizenship

In light of the language of section one of the Fourteenth Amendment, at a minimum, individuals "born . . . in the United States, and subject to the jurisdiction thereof"¹⁹⁴ are natural born citizens eligible to become President.¹⁹⁵ The difficulty, however, lies in defining what constitutes "in the United States," and "subject to the jurisdiction thereof," as well as in determining whether both conditions need to be satisfied simultaneously at the time of birth, or whether birth in the United States, combined with subsequent subjection to its jurisdiction, is sufficient.¹⁹⁶

1. Birth "in the United States"

a. *States and Territories that Have Become States*

United States citizens born to parents subject to United States jurisdiction in

¹⁹³ *Schneider v. Rusk*, 377 U.S. 163, 165 (1964).

¹⁹⁴ U.S. CONST. amend. XIV, § 1.

¹⁹⁵ *See Id.*; *see also* Pryor, *supra* note 42, at 881; Gordon, *supra* note 8, at 1; Means, *supra* note 43, at 13169.

¹⁹⁶ *See* discussion *infra* Part II.A.2.

one of the fifty states are unquestionably natural born citizens.¹⁹⁷ Even the narrowest reading of the Fourteenth Amendment dictates that all current states are *in* the United States. This is true regardless of parental citizenship, unless a child's parents are protected by the full immunity extended to foreign diplomats and their families, or they are enemy combatants.¹⁹⁸

United States citizens who, like Senator Goldwater, were born in jurisdictions that are now states but were territories at the time of their birth are arguably in a less certain position. Today, individuals born in Alaska before January 3, 1959, or in Hawaii prior to August 21, 1959, are most likely to fall into this category.¹⁹⁹ Before the Supreme Court's early twentieth century

¹⁹⁷ Perkins v. Elg, 307 U.S. 325, 328 (1939); Morrison v. California, 291 U.S. 82, 85 (1934); United States v. Wong Kim Ark, 169 U.S. 649, 702 (1898). Attempts have been made to amend the Constitution to exclude children born in the United States to illegally present aliens or non-permanent residents from acquiring birthright United States citizenship. E.g., H.R.J. Res. 42, 108th Cong., (2003); see also SCHUCK & SMITH, *supra* note 79, at 6-7 (arguing that some categories of people born in the United States should not be citizens), reviewed by David S. Schwartz, *The Amoralty of Consent*, 74 CAL. L. REV. 2143 (1986) (disagreeing with Schuck and Smith on political and moral theory grounds); Eisgruber, *supra* note 128, at 177 (acknowledging that everyone born in the United States receives citizenship automatically); Peter H. Schuck, *The Re-evaluation of American Citizenship*, 12 GEO. IMMIGR. L.J. 1, 4 (1997) (confirming that citizenship is extended to essentially all individuals born on United States soil); Robert J. Shulman, *Children of a Lesser God: Should the Fourteenth Amendment be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American Born Children of Illegal Aliens?*, 22 PEPP. L. REV. 669, 674 (1995) (stating that Fourteenth Amendment guarantees citizenship to all people born in the United States); Note, *The Birthright Citizenship Amendment: A Threat to Equality*, 107 HARV. L. REV. 1026, 1026 (1994) (stating that Fourteenth Amendment provides that all persons born in the United States and subject to its jurisdiction are citizens).

¹⁹⁸ See *In re Thenault*, 47 F. Supp. 952, 953 (D.D.C. 1942) (holding that children born to the Air Attachée of the French embassy did not acquire U.S. citizenship upon their births in the District of Columbia and Hyannis, Massachusetts). Children born in the United States to diplomats acquire United States permanent resident status at birth. GORDON ET AL., *supra* note 166, § 92.03(3)(b) (explaining that, although children born to foreign sovereigns or accredited diplomatic officials do not acquire United States citizenship at birth, they may be considered lawful permanent residents at birth).

¹⁹⁹ These dates are the official dates of statehood of Alaska and Hawaii. Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339 (codified as amended at 48 U.S.C. note preceding § 21 (2000)) (setting out the terms for Alaska's admission into the Union); Proclamation No. 3269, 24 Fed. Reg. 81 (1958) (admitting Alaska into the Union); Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 (codified as amended at 48 U.S.C. note preceding § 491 (2000)) (setting out the terms for Hawaii's admission into the Union); Proclamation No. 3309, 24 Fed. Reg. 6868 (1959) (admitting Hawaii into the Union). Prior to statehood, both Alaska and Hawaii were "incorporated" territories, and their residents U.S. citizens. Act of April 30, 1900, ch. 34, 31 Stat. 41 (declaring Hawaii an incorporated territory after this date, and considering all persons who were citizens of the Republic of Hawaii at the time of acquisition on August 12, 1898 to be U.S. citizens). Alaska was considered an incorporated territory from the time of its acquisition by purchase from Russia in 1867. *Rasmussen v.*

decisions in the *Insular Cases*,²⁰⁰ territories were viewed as “infant states” destined for future membership in the Union, and birth in a United States territory appeared equivalent to birth in a state.²⁰¹ Early American common law defined the “United States” as synonymous with what Chief Justice Marshall termed “the American empire”²⁰² – “our great republic, which is composed of States and territories.”²⁰³ Early jurists did not foresee, however, that the United States would one day acquire territories around the world, or that it would be either impractical or politically undesirable to bestow statehood on all of these territories.²⁰⁴ Eventually, however, both practical considerations and the ugly specter of racism led Congress to designate some of these areas as “unincorporated” territories, and still others as merely

United States, 197 U.S. 516, 525 (1905) (holding that Alaska was an unincorporated territory); see also GORDON ET AL., *supra* note 166, §§ 92.02(2)-(3) (indicating that determination of citizenship of inhabitants of new states requires determination of whether they were members of the political community of the state at the time of its admission, and discussing citizenship by birth in the United States in general).

A question also could be raised about the constitutional qualifications of John Nance Garner, Vice President from 1933 to 1941 during the first two terms of Franklin Delano Roosevelt. Vice President Garner was born in Texas in 1868, several months prior to Texas’ readmission to the union after the Civil War. However, there does not appear to be any record of a legal challenge to his qualifications for the office on natural born citizenship grounds. See *Biography of John Nance Garner*, The Handbook of Texas Online, at <http://www.tsha.utexas.edu/handbook/online/articles/view/GG/fga24.html> (last visited Nov. 7, 2004).

²⁰⁰ See *infra* notes 212-214 and accompanying text.

²⁰¹ *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 324 (1820) (describing territories as being in a “state of infancy advancing to manhood”). For example, one state appellate court opined that it did not believe the state Constitution should be construed so “that a person born in the republic of Texas prior to its admission into the Union is ineligible to the presidency of the United States” *Gibson v. Wood*, 49 S.W. 768, 769 (Ky. 1899); see also *Snow v. United States*, 85 U.S. 317, 320 (1873) (describing territorial status as a “term of . . . pupilage”).

²⁰² *Loughborough*, 18 U.S. at 319; see also Drimmer, *supra* note 40, at 684 (recognizing common law tradition of defining American sovereignty as coextensive with the American empire). But see David P. Currie, *The Constitution in Congress: Jefferson and the West, 1801-1809*, 39 WM. & MARY L. REV. 1441, 1444-45 (1998) [hereinafter *Jefferson and the West*] (distinguishing the sovereignty of states from territories’ dependence on the federal government).

²⁰³ *Loughborough*, 18 U.S. at 319.

²⁰⁴ The Northwest Ordinance of 1787, text available at <http://www.yale.edu/lawweb/avalon/nworder.htm> (last visited Jan. 26, 2005), envisioned the eventual creation of three to five new states in the territory. See ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 6 (1989); see also *Jefferson and the West*, *supra* note 202, at 1469-70 (“[I]t seems very difficult to deny that the Framers would have wanted any territory that might be acquired to come within the statehood provision.”).

"outlying possessions."²⁰⁵

Today, whether a territory is "in the United States" within the meaning of the Fourteenth Amendment may turn on Congressional intent with respect to future statehood.²⁰⁶ The Constitution applies in full force from the moment Congress designates a territory as incorporated, because incorporation presumably leads to future statehood.²⁰⁷ Individuals born within territories destined for statehood subsequent to this designation should be deemed constitutional birthright citizens within the meaning of the Fourteenth Amendment, as well as natural born citizens within the meaning of Article II. Consequently, Senator Goldwater was probably safe in seeking the Presidency, as are Alaskans and Hawaiians born before the forty-ninth and fiftieth states officially entered the union.²⁰⁸ Nevertheless, because the Supreme Court has never ruled on this question, the natural born citizenship of these Americans remains unsettled.

b. *Unincorporated Territories*

The eligibility of persons born in Puerto Rico, Guam, the Virgin Islands, or the Northern Mariana Islands to the Presidency is questionable. Pursuant to its power to "establish an uniform Rule of Naturalization,"²⁰⁹ Congress has defined "the United States" in various immigration and nationality statutes to include the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and

²⁰⁵ See *infra* text accompanying notes 212-229. Justice Gray, concurring in *Downes v. Bidwell*, distinguished between "[t]erritories, in the strict and technical sense, being those which lie within the United States, as bounded by the Atlantic and Pacific Oceans, the Dominion of Canada and the Republic of Mexico, and the territories of Alaska and Hawaii[.]" with "territory, in the broader sense, acquired by the United States by war with a foreign State." 182 U.S. 244, 345 (1901) (Gray, J., concurring). ISSACHAROFF ET AL., *supra* note 109, at 85 (citing Richard H. Pildes, *The Canon(s) of Constitutional Law: Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 305 (2000) (linking acquiescence in disenfranchisement of African-Americans in the south and residents of United States territories and possessions)).

²⁰⁶ Pursuant to Section 3 of Article IV of the Constitution, Congress has plenary power over territories. See *Simms v. Simms*, 175 U.S. 162, 168 (1899) (holding that considerations of sovereignty that would otherwise remove federal jurisdiction over divorce suits do not apply to territories).

²⁰⁷ See T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 25-26 (1994) (discussing the constitutional status of Puerto Rico).

²⁰⁸ See *Rasmussen v. United States*, 197 U.S. 516, 522-23 (1905) (stating that the treaty by which the United States acquired Alaska from Russia expressly provided for the incorporation of Alaska into the United States); *Hawaii v. Mankichi*, 190 U.S. 197, 210-11 (1903) (holding that the Hawaiian islands were annexed to the United States on July 7, 1898 but not incorporated as the territory of Hawaii until the Act of Congress of June 14, 1900, at which time the Constitution was formally extended).

²⁰⁹ U.S. CONST. art. I, § 8, cl. 4.

the United States Virgin Islands,²¹⁰ and, for purposes of these statutes, has broadened the term "state" to include these same territories as well as the District of Columbia.²¹¹ These statutes, however, do not resolve the question whether residents are natural born within the meaning of Article II.

The natural born citizenship claim of a person born in a United States territory lacking a Congressional designation regarding statehood is much more tenuous than that of an individual born in a territory already destined for future statehood. In the *Insular Cases*,²¹² a series of decisions handed down between 1901 and 1922, the Supreme Court held that the United States could possess permanent territories without intending to grant statehood or independence, and without applying the United States Constitution in full force to these territories.²¹³ This position was contrary to conventional wisdom because it allowed Congress to create "unincorporated" territories.²¹⁴

²¹⁰ Immigration and Nationality Act, 8 U.S.C. § 1101(a)(38) (2000) (defining "geographic United States" for purposes of immigration and nationality).

²¹¹ *Id.* § 1101 (a)(36) (defining "State" for purposes of immigration and nationality).

²¹² There is general agreement that one of the earliest cases, *Downes v. Bidwell*, 182 U.S. 244 (1901), is the most important for its development of the doctrine of incorporation, but the identity of the other cases that compose the canon of the *Insular Cases* is unsettled. Some scholars limit the series to the six original 1901 cases, while others include between twenty-three and twenty-eight Supreme Court decisions through 1922, ending with *Balzac v. Porto Rico*, 258 U.S. 298 (1922). See Juan R. Torruella, *One Hundred Years of Solitude: Puerto Rico's American Century*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 241, 248 n.14 (Christina Duffy Burnett & Burke Marshall eds., 2001) [hereinafter FOREIGN IN A DOMESTIC SENSE] (noting that, although strictly speaking the *Insular Cases* are the original six opinions issued in 1901, the series of cases involving status of territories that culminated in *Balzac* is often included in the same discussion); Christina Duffy Burnett, *A Note on the Insular Cases*, in FOREIGN IN A DOMESTIC SENSE, *supra*, 389, at 389-92 (indicating reasons for including in the *Insular Cases* rubric between twenty-three and twenty-eight cases in addition to the original six).

²¹³ *E.g.*, *Rassmussen v. United States*, 197 U.S. 516 (1905) (holding the territory of Alaska to be incorporated as of the time of its acquisition by treaty, and thus finding the Constitution to be fully applicable); *Dorr v. United States*, 195 U.S. 138, 149 (1904) (holding that the Constitution did not require the right to trial by jury in the Philippine Islands while it was a U.S. territory); *Hawaii v. Mankichi*, 190 U.S. 197, 210-11 (1903) (stating that the Constitution was not "formally extended" to the Hawaiian islands until June 14, 1900, when Congress incorporated them as a United States territory); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (holding that "Puerto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the constitution").

²¹⁴ *Downes*, 182 U.S. at 341-42 ("[While] in an international sense Porto Rico [sic] was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession."). The constitutionality of indefinitely maintaining unincorporated territories remains suspect. See Aleinikoff, *supra* note 207, at 25-26 (discussing the historical debate

Currently, the territories of Puerto Rico, Guam, the Virgin Islands, the Northern Mariana Islands, American Samoa, and Swains Island are unincorporated.²¹⁵ Congress has statutorily provided different citizenship arrangements for their people,²¹⁶ and the Court has ruled that, apart from basic fundamental rights, Congress may determine which provisions of the Constitution will apply in each territory.²¹⁷ For example, in one of the first of the *Insular Cases*, *Downes v. Bidwell*,²¹⁸ the Supreme Court held that the Uniformity Clause²¹⁹ does not apply to Puerto Rico and that United States citizens residing in Puerto Rico are not entitled to the Constitution's full

surrounding the United States' acquisition of Puerto Rico and whether, or to what extent, the Constitution must apply to United States territories); Drimmer, *supra* note 40, at 704 ("[T]he Supreme Court has subsequently limited the *Insular Cases* to their immediate holdings regarding the imposition of duties . . . [and] has recognized that the racially exclusive dicta in the *Insular Cases* contradicted America's premise of equality, and perverted the nation's constitutional principles.") (citing *Harris v. Rosario* 446 U.S. 651, 653 (1980) (Marshall, J. dissenting); *Torres v. Puerto Rico*, 442 U.S. 465, 475-76 (1979)); Nelson D. Hermilla, *Puerto Rico 1898-1998: The Institutionalization of Second Class Citizenship?*, 16 DICK. J. INT'L L. 275 (1998) (discussing Puerto Rico's current and historical political status); Sanford Levinson, *Installing the Insular Cases into the Canon*, in *FOREIGN IN A DOMESTIC SENSE*, *supra* note 212, at 121, 125 ("Can the United States blithely govern, indefinitely, any territory in a decidedly nonrepublican manner and cite the text of Article IV as licensing such governance?") (emphasis in original); José Trias Monge, *Injustice According to Law: The Insular Cases and Other Oddities*, in *FOREIGN IN A DOMESTIC SENSE*, *supra* note 212, at 226, 226-27 (arguing that the *Insular cases* were part of the "disease . . . of an empire" contracted by the United States in the late nineteenth century). See generally Mark Tushnet, *Partial Membership and Liberal Political Theory*, in *FOREIGN IN A DOMESTIC SENSE*, *supra* note 212, at 209 (discussing the "partial membership" status of Puerto Rico and the District of Columbia).

²¹⁵ GORDON ET AL., *supra* note 166, § 92.04(1)(c) (indicating that Puerto Rico, the Virgin Islands, and Guam are now designated as part of the United States for the purposes of nationality laws, and only American Samoa and Swains Island are outlying possessions).

²¹⁶ The Jones Act of 1917 granted U.S. citizenship to inhabitants of Puerto Rico. Act of Mar. 2, 1917, ch. 145, 39 Stat. 953 (1917) (codified as amended in scattered sections of 48 U.S.C.); see *infra* note 226 for statutes providing citizenship to inhabitants of other United States territories.

²¹⁷ See *Rasmussen v. United States*, 197 U.S. 516, 528 (1905) (holding Alaska to be an incorporated territory to which the Sixth Amendment applied); *Dorr v. United States*, 195 U.S. 138, 149 (1904) (holding the Sixth Amendment right to trial by jury was inapplicable to the Philippine Islands); *Hawaii v. Mankichi*, 190 U.S. 197, 215-18 (1903) (holding Fifth and Sixth Amendments inapplicable until formal incorporation of territory of Hawaii); *Downes v. Bidwell*, 182 U.S. 244, 342 (1901) (holding uniformity clause of the Constitution not applicable to Puerto Rico); see also *Jefferson and the West*, *supra* note 202, at 1480 (explaining that the terms of the 1803 treaty purchasing Louisiana from France made it clear that the Constitution did not apply to the territory until authorized by Congress).

²¹⁸ 182 U.S. 244 (1901).

²¹⁹ U.S. CONST. art. 1, § 8, cl. 1. The Uniformity Clause provides that "all Duties, Imposts and Excises shall be uniform throughout the United States." *Id.*

panoply of due process protections.²²⁰ Lower courts have since ruled that United States citizens resident in Puerto Rico do not have the right to vote for the President of the United States²²¹ or to have representation in Congress.²²² Consequently, Puerto Rican residents do not pay federal income tax; they are entitled to a lower level of social security benefits;²²³ and they may only vote in presidential primary elections.²²⁴ The treatment of Puerto Rican citizens by the courts and Congress sheds little light, however, on whether United States citizens born in Puerto Rico are natural born within the meaning of Article II.²²⁵ It is unlikely, though, that an individual who is not entitled to vote for the President of the United States is constitutionally eligible to become President.

²²⁰ *Downes*, 182 U.S. at 287; see also *Balzac v. Puerto Rico*, 258 U.S. 298, 313 (1922) (finding no Congressional intent to incorporate Puerto Rico into the Union "with the consequences which would follow"). The Court has, however, since held that "[t]he fundamental protections of the U.S. Constitution extend to the inhabitants of Puerto Rico." LEIBOWITZ, *supra* note 204, at 154.

²²¹ *Igartua de la Rosa v. United States*, 386 F.3d 313 (1st Cir. 2004) [hereinafter *Igartua III*] (holding United States citizen residents of Puerto Rico have no constitutional right to vote in national Presidential elections); *Igartua de la Rosa v. United States*, 229 F.3d 80, 83-84 (1st Cir. 2000) [hereinafter *Igartua II*] (holding that Puerto Rico is not a State within Article II of the Constitution, and therefore may not designate electors to the electoral college and vote for President and Vice President of the United States); *Igartua de la Rosa v. United States*, 32 F.3d 8, 9-10 (1st Cir. 1994) [hereinafter *Igartua I*] (holding also that Puerto Ricans may not vote in the national election); see also *Romeu v. Cohen*, 265 F.3d 118, 124 (2001) (holding that Congress may distinguish between those "former residents of States residing outside the United States" and "former residents of States residing in Puerto Rico").

²²² See *Alicia v. United States*, 180 F.2d 870, 872 (1st Cir. 1950) (holding the Selective Services Act applicable to Puerto Rico notwithstanding its lack of Congressional representation).

²²³ See *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (holding that the Territorial Clause authorizes Congress to treat Puerto Rico differently from States so long as there is a rational basis); accord *Califano v. Torres*, 435 U.S. 1, 5 (1978) (per curiam) (determining that exclusion of Puerto Rico residents from Supplemental Security Income is constitutionally permissible, so long as legislation is rational and not invidious).

²²⁴ Puerto Rican residents have been eligible to vote in presidential primary elections since 1980. See *Hermilla*, *supra* note 214, at 284 n.29 (citing sources discussing Puerto Rico's first participation in the Presidential primaries in 1980).

²²⁵ An even trickier question would arise over the status of a child born in Puerto Rico to parents from one of the fifty states who are either visiting or temporarily residing on the island. The child's United States citizenship could be derived from physical birth in Puerto Rico, or by descent from one or both United States citizen parents. Future complications are also possible if Puerto Rico or another current territory becomes a state, or declares itself an independent sovereign. See, e.g., Jose Julian Alvarez Gonzalez, *The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans*, 21 HARV. J. ON LEGIS. 309 (1990) (discussing the citizenship status of Puerto Ricans in the event the territory became an independent sovereign).

While the bulk of judicial decisions and legal scholarship has tended to focus on citizenship issues pertaining to Puerto Rico, the status of nationals of the territories of Guam, the Virgin Islands, and the Northern Mariana Islands raises similar questions. Separate treaties and statutes grant United States citizenship to persons born on these islands.²²⁶ As with Puerto Rico, Congress determines which constitutional rights apply to these citizens.²²⁷

Congress has designated American Samoa and Swains Island as “outlying possessions of the United States.”²²⁸ American Samoans are not born United States citizens, but are “nationals” who may subsequently become citizens through an expedited naturalization process.²²⁹ Given that they are not citizens at birth, it is unlikely that Americans born in these territories are natural born citizens within the meaning of Article II.

c. *The Special Case of the District of Columbia*

District of Columbia residents – in many ways the orphans of our republican democracy – have long lamented their political status.²³⁰ For most of the District’s history, it had neither Senators nor Congressional Representatives. This situation changed only in 1970 when Congress voted to permit the

²²⁶ Organic Act of Guam, ch. 512, sec. 4, § 206(a), 64 Stat. 384 (1950) (codified as amended at 8 U.S.C. § 1421 (2000)) (granting United States citizenship to persons born on Guam). In the Virgin Islands, all persons born on or after January 17, 1917, who were subject to United States jurisdiction as of February 25, 1927, are citizens through collective naturalization. Act of Feb. 25, 1927, ch. 192, § 3, 44 Stat. 1234 (codified as amended in scattered sections of 8 U.S.C.). Domiciliaries of the Northern Mariana Islands have been United States citizens since November 4, 1986. Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (codified as amended at 48 U.S.C. § 1801-05 (2000)) (providing ten year transition period for United States citizenship); see GORDON ET AL., *supra* note 166, § 92.04(5), (6), (9) (outlining the various treaties or statutes governing the Virgin Islands, Guam, and the Northern Mariana Islands).

²²⁷ See *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 8 n.12 (1955) (acknowledging that the Virgin Islands is an unincorporated territory); *Soto v. United States*, 273 F. 628, 633-34 (3d Cir. 1928) (categorizing the Virgin Islands as an unincorporated territory to which the *Insular Cases* applied).

²²⁸ 8 U.S.C. § 110(a)(29) (2000).

²²⁹ Residence as a national in American Samoa satisfies the permanent residency requirement for naturalization, and American Samoans can freely enter the United States and become naturalized after three months. See GORDON ET AL., *supra* note 166, § 92.04(7). The Immigration and Nationality Act (INA) defines a “United States national” as either a citizen of the United States, or “a person who, though not a citizen of the United States, owes permanent allegiance to the United States.” 8 U.S.C. § 1101(a)(22) (2000).

²³⁰ See, e.g., Spencer S. Hsu, *D.C. Democrats Win Voting Rights Forum: Norton to Address Party’s Convention*, WASH. POST, July 22, 2004, at B1 (recounting the District of Columbia’s “long quest” for representation in Congress). See generally, Jamin B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 HARV. C.R.-C.L. L. REV. 39 (1999); ISSACHAROFF ET AL., *supra* note 109, at 88-90.

District to have "shadow" representation in the House of Representatives.²³¹ Although it is improbable that anyone would seriously challenge the eligibility of an individual born in the District to serve as President or Vice President of the United States, given the continuing circumscription of their political rights in other respects, it is reasonable to ask whether individuals born in the District of Columbia are natural born citizens for purposes of Article II.

A would-be President born in the District, however, would have compelling arguments for eligibility to the office of President. It is almost unimaginable that the center of a nation's government would not be defined as "in the United States." In the words of Chief Justice John Marshall in 1820, "the district of Columbia . . . is not less within the United States, than Maryland or Pennsylvania."²³² The District has never been determined to be an unincorporated territory, and the Constitution applies in full force to the District.

In *District of Columbia v. Carter*,²³³ the Supreme Court stated that "[w]hether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular . . . constitutional provision depends upon the character and aim of the specific provision involved."²³⁴ Thus, the District of Columbia is not considered a state for purposes of the Fourteenth Amendment's Equal Protection Clause,²³⁵ Congressional representation,²³⁶ or diversity jurisdiction pursuant to Article III,²³⁷ but District residents are

²³¹ See Act of Sept. 22, 1970, Pub.L. No. 91-405, Title II, § 202, 84 Stat. 845 (codified as amended at 2 U.S.C. § 25(a) (2000)).

²³² *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 325 (1820) (holding "Congress possesses, under the constitution, the power to lay and collect direct taxes within the District of Columbia"); see also Drimmer, *supra* note 40, at 684 (stating that the United States adhered to the traditional common law when defining its borders for application of birthright citizenship).

²³³ 409 U.S. 418, 423 (1973) (holding that the District of Columbia was not a "State or Territory" within the meaning of 42 U.S.C. § 1983).

²³⁴ *Id.* at 420.

²³⁵ *Id.* at 424; see *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (companion case to *Brown v. Board of Education*, 347 U.S. 483 (1954), holding racial segregation in District of Columbia public schools unconstitutional on grounds of Fifth Amendment due process rather than the Fourteenth Amendment's guarantee of equal protection applied in *Brown*).

²³⁶ *Adams v. Clinton*, 90 F. Supp. 2d 35, 50 (D.D.C. 2000) (holding that the District of Columbia is not a state for purposes of congressional representation).

²³⁷ *Nat'l Mut. Ins. Co. v. Tidewater Title Co.*, 337 U.S. 582, 588 (1949) ("[The Founders] obviously did not contemplate unorganized and dependent spaces as states. The District of Columbia being nonexistent in any form, much less as a state, at the time of the compact, certainly was not taken into the Union of states by it, nor has it since been admitted as a new state is required to be admitted."). The Court in *Tidewater* upheld a statute extending diversity jurisdiction of federal district courts to District citizens as within Congress' power to legislate for the District under Article I, Section 8, Clause 17. *Id.* at 603-04.

protected by the Fifth Amendment's due process guarantee.²³⁸ District residents also must pay federal income tax, and are entitled to the same social security benefits as the residents of any of the fifty states. Even so, the District of Columbia is not a state, and Congress has never designated it for statehood.²³⁹ It was necessary to amend the Constitution to enfranchise District residents to vote in presidential elections,²⁴⁰ and, as noted above, the District still does not have Congressional representation on a par with that of the states. The Court has never decided whether a United States citizen born in the District is a natural born citizen. Consequently, a modicum of uncertainty remains.

2. "Subject to the Jurisdiction" of the United States

The second element of citizenship set forth in the Fourteenth Amendment is birth "subject to the jurisdiction" of the United States.²⁴¹ This additional requirement excludes the children of foreign diplomats and enemy combatants from United State citizenship.²⁴² Although present in the United States, these individuals are not subject to United States jurisdiction because they fall within "certain well known and universally recognized exceptions to the rule of territorial jurisdiction and supremacy"²⁴³ In 1884, the Supreme Court also denied Fourteenth Amendment citizenship to members of recognized Native American tribes on grounds that, as "alien nations," they are not subject to United States jurisdiction.²⁴⁴ The following discussion explores the implications of the Fourteenth Amendment's jurisdictional prerequisite with respect to interpretation of the natural born citizenship proviso.

²³⁸ *Bolling*, 347 U.S. at 499 (1954).

²³⁹ The Constitution grants Congress authority over the nation's capitol. U.S. CONST. art. I, § 8, cl. 17. Several attempts have been made to admit the District of Columbia into the Union as the State of New Columbia. *E.g.*, S. 898, 103d Cong. (1993); H.R. 51, 103d Cong. (1993); see JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS AND AMENDING ISSUES, 1789-2002*, 140-41 (2d ed. 2003).

²⁴⁰ U.S. CONST. amend. XXIII. This situation could well have resulted in a bizarre anomaly. Prior to the constitutional amendment granting District residents the right to vote in the presidential election, a District resident would have been eligible to become President, but unable to vote in the election.

²⁴¹ U.S. CONST. amend. XIV, § 1.

²⁴² See *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898) (stating that the Fourteenth Amendment excludes from citizenship the progeny of diplomats and enemy combatants); see also Drimmer, *supra* note 40, at 698 & n. 223 (discussing the *Wong Kim Ark* decision). See *infra* note 246.

²⁴³ Thomas P. Stoney, *Citizenship*, 34 AM. L. REG. 1, 4 (1886), *quoted in* Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868-1898 States' Rights, the Law of Nations, and Mutual Consent*, 15 GEO. IMMIGR. L.J. 519, 533-34 (2001)).

²⁴⁴ *Elk v. Wilkins*, 112 U.S. 94, 99 (1884). See *infra* notes 248-261 and accompanying text.

a. *Children of Diplomats, Other Representatives of Foreign Governments, and Enemy Combatants*

Courts have consistently held that ambassadors, other representatives of foreign governments who enjoy full diplomatic immunity, and enemy combatants are not subject to the jurisdiction of the United States.²⁴⁵ Consequently, United States citizenship does not extend to the progeny of foreign diplomats and enemy combatants,²⁴⁶ even when these children are born in one of the fifty states.²⁴⁷ In contrast, children of parents who are non-American-citizen representatives of a foreign government that the United States does not recognize, as well as children born to non-United States citizens who work with an international organization such as the United Nations, *are* subject to United States jurisdiction at birth. These children therefore acquire birthright and, presumably, natural born citizenship. The anomaly of this situation with respect to unrecognized foreign governments is inescapable. The United States generally declines to recognize certain governments for strategic reasons, often because they are considered

²⁴⁵ See *In re Thenault*, 47 F. Supp. 952, 953 (D.D.C. 1942) (holding that children born in the United States to foreign diplomats do not automatically receive United States citizenship); see also Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 31, 23 U.S.T. 3227, 500 U.N.T.S. 96 ("A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction . . ."). Each month, the United States Department of State publishes "Blue" and "White" lists of diplomats. The Blue List identifies all diplomatic officers and their family members entitled to full diplomatic immunity. The White List identifies diplomatic employees entitled to some protection but not to diplomatic immunity for their family members. See GORDON ET AL., *supra* note 166, § 92.03(3)(b).

²⁴⁶ The category 'enemy combatant' is especially complex because U.S. citizens may also be declared enemy combatants. *Hamdi v. United States*, 124 S. Ct. 2633, 2635 (2004) (holding that citizens detained as enemy combatants must be afforded core due process rights); *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942) (holding that United States citizenship does not preclude an individual from being designated an enemy combatant). Would a child born in the United States to one or two citizen enemy combatants be a natural born citizen?

²⁴⁷ See *supra* note 242. An individual in this position must base his United States citizenship on grounds other than *jus soli*. For example, if one parent is an American citizen, but the other is covered by the foreign representative exclusion, the child may receive statutory birthright citizenship on the same basis as a child born abroad to a couple composed of a non-United States citizen and an American citizen parent. See DANIEL LEVY, U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK § 4:6 (2003). If neither parent is a United States citizen, the child must go through the statutory naturalization procedure just as any foreign born immigrant. In either case, the child would be a naturalized citizen physically born in the United States. Would the natural born requirement in conjunction with the Fourteenth Amendment recognize such an individual as eligible for the office of President? Must the President be simultaneously born in the United States *and* subject to its jurisdiction, or would it suffice that the putative candidate was both physically born in this country and currently an American citizen? The more one reflects on the possible permutations and combinations, the more mind-numbing possibilities arise.

illegitimate or their objectives are deemed antithetical to American interests. Nevertheless, unlike children of representatives of recognized foreign governments, children born in this country to officials of unrecognized governments are born in the United States for purposes of the Fourteenth Amendment. However anomalous, there is no reason why these children would not be "natural born Citizens" for purposes of the presidential eligibility clause of Article II.

b. *The Plight of Native Americans*

Ironically, it is unclear whether Native Americans, particularly those who belong to tribes recognized by the United States government, are natural born citizens of the United States within the meaning of Article II. As noted above, in 1884, the Supreme Court held that members of Native American tribes are not subject to United States jurisdiction.²⁴⁸ In *Elk v. Wilkins*,²⁴⁹ the state of Nebraska denied a Native American permission to vote in a state election on grounds that he was not a citizen, even though he was no longer affiliated with his tribe or living on tribal lands. The Supreme Court upheld the state's action, ruling that Native Americans were not subject to the jurisdiction of the United States and therefore not citizens within the meaning of the Fourteenth Amendment.²⁵⁰ The Court disowned Native American children, stating: "Indians born within the territorial limits of the United States . . . although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' . . . [than] . . . children born within the United States, of ambassadors or other public ministers of foreign nations."²⁵¹ In reaching its decision, the Court cited the natural born citizen proviso to distinguish "citizenship by birth" from "citizenship by naturalization": "Persons not . . . subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired."²⁵² As a result of the Court's ruling in *Elk*, for several years Native

²⁴⁸ *Elk*, 112 U.S. at 109. Native Americans born on tribal lands are subject to the jurisdiction of tribal laws even though they are within the geographic borders of the United States. See Eisgruber, *supra* note 128, at 63 (noting that the Court has never overruled *Elk* and Native Americans derive their citizenship from statute); see also Drimmer, *supra* note 40, at 698-99 (describing the courts' view of Native American tribes as "distinct, racially defined entities . . . owing . . . allegiance to their ancestral tribes, and 'not part of the people of the United States'" (citing *Elk*, 112 U.S. at 99)).

²⁴⁹ 112 U.S. 94 (1884).

²⁵⁰ *Id.* at 109.

²⁵¹ *Id.* at 102.

²⁵² *Id.* at 100 (citing treaties declaring Cherokees, Choctaws, and other specific tribes to be either U.S. citizens or individually eligible to become citizens). Congress also granted citizenship to many Native Americans under the Allotment Act of 1887. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388; see GORDON ET AL., *supra* note 166, § 92.03(3)(e) (stating that

Americans were treated as foreign born aliens for citizenship purposes and required to complete an administrative naturalization procedure to obtain United States citizenship.²⁵³

Justice Harlan dissented in *Elk v. Wilkins* on grounds that the Civil Rights Act of 1866 conferred citizenship on Mr. Elk because he was residing in a state and subject to taxation.²⁵⁴ Justice Harlan also raised the possibility that one need not be simultaneously born in the United States *and* subject to its jurisdiction to be born a citizen within the meaning of the Fourteenth Amendment.²⁵⁵ He opined that persons born in the United States, including Native Americans, could later become subject to its jurisdiction. If so, they could be considered citizens within the meaning of the Fourteenth Amendment.²⁵⁶ Justice Harlan castigated the majority, stating:

[T]here is still in this country a despised and rejected class of persons, with no nationality whatever; who, born in our territory, owing no allegiance to any foreign power, and subject, as residents of the States, to all the burdens of government, are yet not members of any political community nor entitled to any of the rights, privileges, or immunities of citizens of United States.²⁵⁷

Although the Court has never overruled *Elk*,²⁵⁸ in 1924 Congress provided

the Allotment Act of 1887 conferred citizenship on many Native Americans who resided in the United States). As Pryor points out, only "free white inhabitants" were initially eligible to naturalize pursuant to the 1790 Act. Pryor, *supra* note 42, at 882 n.7. African Americans were not included in naturalization laws until 1870. *Id.* Racial restrictions were also placed on "Japanese, Chinese, Hindus, Afghans, Burmese, and Hawaiians[, and] the last of these restrictions was not removed until 1952." *Id.* (citing Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769, 791 n.95 (1971)).

²⁵³ Members of certain tribes were permitted to apply to a United States court for naturalization "upon satisfactory proof of fitness for civilized life." *Elk*, 112 U.S. at 100. It is unclear from the Court's opinion whether Elk belonged to one of the tribes granted authorization to become a United States citizen through administrative naturalization. *See id.*

²⁵⁴ *Elk*, 112 U.S. at 112-13 (Harlan, J., dissenting).

²⁵⁵ *Id.* at 116-17 ("There is nothing in the history of the adoption of the Fourteenth Amendment which, in our opinion, justifies the conclusion that only those Indians are included in its grant of citizenship who were, at the time of their birth, subject to the complete jurisdiction of the United States."); *see also* Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 CONST. COMMENT. 555, 570-71 (2000) (discussing Justice Harlan's dissent in *Elk*, and stating that "The decision in *Elk* clearly limited the significance of the Fourteenth Amendment to Native Americans seeking to become citizens of the United States.").

²⁵⁶ *Elk*, 112 U.S. at 121.

²⁵⁷ *Id.* at 122-23.

²⁵⁸ Eisgruber, *supra* note 128, at 63. At least one scholar suggests that the Court's ruling in *Wong Kim Ark* entitled the children of Native Americans to constitutional citizenship so long as they were born outside of tribal lands. Maltz, *supra* note 255, at 571-72.

statutory birthright citizenship to all Native American children born in the United States.²⁵⁹ The current citizenship statute pertaining to Native Americans states that persons "born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe" are United States citizens at birth.²⁶⁰

It is unlikely that a federal court would ever hold a putative President ineligible for office solely on grounds of membership in a Native American tribe. Nevertheless, the United States citizenship of many Native Americans purportedly arises from collective naturalization by statute rather than the Constitution.²⁶¹ Consequently, the natural born citizenship requirement casts a shadow over the eligibility of at least some Native Americans to serve as President of their country.

c. Children Born in Embassies, on Military Bases, and in Other Areas of Special United States Jurisdiction

Birth within United States territorial waters or airspace imparts United States citizenship based on the common law definition of land areas as including "the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographical miles."²⁶² Territorial waters are considered an extension of the land. Consequently, whether a birth occurs along the coast of Virginia or that of Puerto Rico could be significant in determining whether a citizen is natural born.²⁶³

In contrast, birth in places outside the United States but subject to United States jurisdiction does not automatically result in United States citizenship. Consequently, whether citizens born in such circumstances are natural born is

²⁵⁹ Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(a)(2) (2000)) (conferring United States citizenship upon all Native Americans who had not previously acquired citizenship).

²⁶⁰ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 301(b), 66 Stat. 267 (codified as amended at 8 U.S.C. § 1401(b) (2000)).

²⁶¹ See GORDON ET AL., *supra* note 166, § 92.03(3)(e).

²⁶² *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923); see GORDON ET AL., *supra* note 166, § 92.03(2)(b) (describing the territorial limits of the rule of *jus soli* as encompassing the fifty states and territorial waters and airspace). Territorial waters have since been extended to twelve nautical miles from the baselines of the United States. Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

²⁶³ Interestingly, a child born in the international zone of a United States port of entry to an alien mother who is not yet legally admitted into the United States may grow up to be President. Although immigration statutes create a legal fiction that an alien at an immigration checkpoint is not technically within the country until formal "admission," the principle of *jus soli* citizenship is based on actual physical presence, not legal presence. Therefore, children born to aliens in international zones are arguably natural born United States citizens. Their situation is identical to that of children born to an undocumented alien mother illegally present in the United States. GORDON ET AL., *supra* note 166, § 92.03(2)(d).

questionable. Although the law considers United States civilian and military vessels in international or foreign waters or airspace subject to United States jurisdiction for many purposes, birth aboard these vessels does not in itself result in citizenship.²⁶⁴ Likewise, contrary to popular belief, birth in United States embassies, consulates, or United States military facilities, does not result in United States citizenship in the absence of another basis for citizenship.²⁶⁵ As noted earlier, Christina Lohman argues that the natural born citizenship proviso should be interpreted to include children of United States government and military personnel living abroad on active duty assignment.²⁶⁶ The ambiguity of their status is evident, however, from both the periodic publicity about the citizenship quality of well-known political figures, and the number of resolutions introduced by members of Congress seeking to ensure that they are considered natural born citizens.²⁶⁷

3. Persons Whose Birthplace is Unknown

Could a United States citizen whose place of birth remains a mystery become President? Nationality law confers conditional United States citizenship on children less than five years old who are found in the United States.²⁶⁸ These "foundlings" are presumed to have been born in this country. They retain United States citizenship unless it is proven that they were born elsewhere before they reach the age of majority.²⁶⁹ It is unclear whether a person whose place of birth is never discovered would be eligible for the Presidency. Some risk would always remain that a foreign birthplace would be subsequently discovered.

B. Citizenship Based on *Jus Sanguinis* Principles

Despite the distinctions frequently drawn between common law and civil law countries – and the preference of the former for *jus soli* versus *jus sanguinis* – the nationality laws of most countries, including the United States, contain elements of both sources of citizenship. Although the Supreme Court has held that United States citizens have no constitutional right to transmit citizenship by descent,²⁷⁰ as early as 1790, Congress accorded birthright

²⁶⁴ See *Lam Mow v. Nagle*, 24 F.2d 316, 318 (9th Cir. 1928) (holding that a child born to alien parents while aboard an American ship outside of United States territorial waters did not acquire United States citizenship); GORDON ET AL., *supra* note 166, § 92.03(2)(c); see also Drimmer, *supra* note 40, at 705-06 (discussing *Lam Mow*).

²⁶⁵ GORDON ET AL., *supra* note 166, § 92.03(2)(d).

²⁶⁶ See *supra* notes 15-16 and text accompanying note 26.

²⁶⁷ See *infra* Part V.A.

²⁶⁸ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, §301(f), 66 Stat. 163 (codified as amended at 8 U.S.C. § 1401(f) (2000)).

²⁶⁹ *Id.*

²⁷⁰ *Rogers v. Bellei*, 401 U.S. 815, 830 (stating "the Court has specifically recognized the power of Congress not to grant a United States citizen the right to transmit citizenship by

citizenship to foreign born children of United States citizens.²⁷¹ Restrictions on acquiring citizenship through descent have varied from allowing fathers, but not mothers, to pass on United States citizenship, to imposing enhanced burdens of proving legitimacy on persons who claim to be the offspring of citizen fathers and other conditions subsequent on foreign born children of citizen parents.²⁷² These statutes have always required the physical presence of United States citizen parents in the United States for at least some period of time prior to the child's birth.²⁷³

Current nationality statutes provide that birth to two United States citizen parents, to an alien mother and United States citizen father who are married, or to a United States citizen mother, results in the automatic acquisition of citizenship at birth subject to parental residency requirements.²⁷⁴ Birth to an alien mother and United States citizen father who are not married imposes an additional requirement of legitimation by the father before his child can claim United States citizenship.²⁷⁵ In addition, at least one United States citizen parent must have resided in the United States prior to the child's birth, and, depending on date of birth, there may be certain conditions subsequent that the

descent" (footnote omitted)); *United States v. Wong Kim Ark*, 169 U.S. 649, 688 (1898) (stating in dicta that the citizenship status of children born abroad to United States citizens is subject to regulation by Congress). See generally STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1038 (2d ed. 1997).

²⁷¹ Naturalization Act of 1790, ch. 3, 1 Stat. 103, 104 (repealed 1795); see *supra* Part I.A.2.

²⁷² United States citizen mothers were unable to transmit citizenship to their children until a 1934 statute granted them equality of status. See Act of May 24, 1934, ch. 344, 48 Stat. 797 (providing that a child born abroad, whose mother or father was a United States citizen, is a citizen at birth if certain conditions of prior residence are satisfied); see also, GORDON ET AL., *supra* note 166, §93.02(6)(b) (describing conditions subsequent to citizenship applicable to children born abroad set forth in federal statutes enacted from 1907-1994). Children born out of wedlock to a United States citizen mother acquire United States citizenship at birth, while children born to an alien mother and United States citizen father must be legitimated by the father. The Supreme Court upheld these gender discriminations in *Montana v. Kennedy*, 366 U.S. 308, 311-12 (1961).

²⁷³ See GORDON ET AL., *supra* note 166, § 93.02(5)(a)-(c) (stating that residence of the parent(s) in the United States has always been "an indispensable prerequisite" to passing citizenship onto the child, then discussing the history of statutes specifying the exact type of residence required). A child's citizenship depends on the parent's citizenship status at the time of the child's birth; a foreign born child may not acquire United States citizenship from a former United States citizen. However, if a parent is denaturalized or expatriated subsequent to the child's birth, the child retains United States citizenship, regardless of the child's age at the time the citizenship of the parent was lost.

²⁷⁴ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, §301, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1401 (2000)); see GORDON ET AL., *supra* note 166, § 93.01(4).

²⁷⁵ Immigration and Nationality Act § 309 (codified as amended at 8 U.S.C. § 1409(a)).

foreign born child must satisfy in order to preserve United States citizenship.²⁷⁶

These statutory rules of *jus sanguinis* citizenship apply regardless of the reasons why a citizen parent is outside the United States at the time of the child's birth.²⁷⁷ Accordingly, children born abroad to parents who are United States government employees engaged in military or civil service receive United States citizenship on the same basis as any other child born abroad to American parents who are private citizens.²⁷⁸ Time spent abroad honorably and actively serving in the Armed Forces, however, may be counted as physical presence in the United States for purposes of computing the prior minimum residence required to transmit citizenship to a child.²⁷⁹

Likewise, American diplomats' children receive United States citizenship on the same statutory basis as other United States citizens' foreign born offspring.²⁸⁰ However, the children of American diplomats may also be United States citizens by application of the common law.²⁸¹ Children born in the United States to foreign diplomats are not subject to United States jurisdiction,

²⁷⁶ If both parents are United States citizens, at least one must have resided in the United States or its outlying possessions, but no minimum time period is prescribed. Immigration and Nationality Act § 301(c) (codified as amended at 8 U.S.C. § 1401(c)(2000)). If only one parent is a United States citizen, he or she must have been physically present in the United States or its outlying possessions for not less than five years, at least two of which were after age fourteen. 8 U.S.C. § 1401(g). If one parent is a citizen and the other is a United States noncitizen national, the citizen parent must have been physically present in the United States or one of its outlying possessions for a continuous period of at least one year prior to the child's birth. *Id.* § 1401(d). Generally, children born abroad to United States citizens prior to October 10, 1978 must reside in the United States either two or five years – again, depending on date of birth – between the ages of fourteen and twenty-eight. This condition subsequent withstood constitutional challenge in *Rogers v. Bellei*, 401 U.S. 815, 831 (1971). See *supra* text accompanying notes 139-146. However, Congress has since eliminated the requirement and it does not apply to citizens born after October 10, 1978. Act of Oct. 10, 1978, Pub. L. No. 95-432, § 1, 92 Stat. 1046; see GORDON ET AL., *supra* note 166, § 93.02(6) (describing how Congress repealed the requirement of U.S. residency to retain citizenship).

²⁷⁷ See 8 U.S.C. § 1401.

²⁷⁸ *Id.*

²⁷⁹ Immigration and Nationality Act § 301(a)(7) (codified as amended at 8 U.S.C. § 1401(a)(7)); see also Lohman, *supra* note 43, at 366-68 (arguing that children born abroad to military personnel and other United States government employees on active duty assignments should be considered natural born citizens, because the protection provided by the military, the role of the United States government in stationing their parents abroad, and the historical nature of troops stationed abroad indicates that such children are born "within the allegiance" of the United States).

²⁸⁰ See 8 U.S.C. § 1401.

²⁸¹ Lohman, *supra* note 43, at 365 (discussing Sir Edward Coke's view that children born abroad within the protection of the sovereign, such as children of ambassadors, were natural born, and explaining that under this rule the children born abroad of United States diplomats would be natural born).

and therefore are not United States citizens. By the same token, children born abroad to American diplomats are arguably natural born, at least in terms of a common law understanding of that term.

Analogous principles of citizenship apply to non-United States citizen minors adopted by United States citizens. With the recent passage of the Child Citizenship Act,²⁸² foreign born children adopted by United States citizens are treated identically to biological children for citizenship purposes once their adoptions are finalized, but it is far less likely that they could be considered "natural born citizens." Adoption laws generally do not permit prenatal adoptions.²⁸³ Consequently, if natural born citizenship arises as a result of the circumstances of one's birth – place of birth or parental citizenship status – then it is difficult to see how foreign born adoptees, even newborns, could be considered natural born for purposes of Article II.

C. *Multiple Nationalities*

Regardless of how United States citizenship is acquired, a United States citizen may simultaneously hold citizenship in one or more foreign countries. This has not always been the case. Prior to 1967, naturalizing in a foreign country was among several denationalizing actions triggering the loss of United States citizenship.²⁸⁴ In *Afroyim v. Rusk*,²⁸⁵ however, a naturalized United States citizen contested the loss of his United States citizenship as a consequence of voting in a foreign election. The Supreme Court ruled in his favor, holding that a specific intent to relinquish citizenship is required before United States citizenship can be lost.²⁸⁶ A foreign born individual who

²⁸² Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (codified as amended at 8 U.S.C. § 1431) (stating that the provisions for automatically acquiring citizenship and for acquiring a certificate of citizenship apply equally to validly adopted children). Foreign born children adopted by United States citizens may now automatically acquire citizenship once their adoptions are final. Prior to the Act, these children were required to go through the administrative naturalization process in order to obtain United States citizenship.

²⁸³ See *infra* note 486 and accompanying text.

²⁸⁴ See, e.g., Expatriation Act of 1907, ch. 2534, § 2, 34 Stat. 1228, *repealed by* Nationality Act of 1940, ch. 876, § 401(a), 54 Stat. 1168, *repealed by* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 349(a)(1), 66 Stat. 267 (codified as amended in scattered sections of 8 U.S.C.); see also GORDON ET AL., *supra* note 166, § 100.02(4)(c) (discussing the varying conditions under which a citizen could be expatriated as a result of naturalizing in a foreign state).

²⁸⁵ 387 U.S. 253 (1967).

²⁸⁶ *Id.* at 268. The Court further clarified its position that voluntary intent to relinquish United States citizenship was required in *Vance v. Terrazas*, 444 U.S. 252, 260-64 (1980) (affirming *Afroyim* and holding that "an expatriating act and an intent to relinquish citizenship must be proved by a preponderance of the evidence"). See GORDON ET AL., *supra* note 166, § 100.02(2)(b) (discussing the consequences and aftermath of the *Terrazas* decision and noting that Congress adopted the approach of the *Terrazas* case). At present, a

becomes a naturalized United States citizen may now preserve his or her foreign citizenship, so long as naturalization in another country does not result in loss of citizenship pursuant to the laws of the country of origin.²⁸⁷ Persons naturalized in the United States must take an oath of renunciation of foreign citizenship, but this provision is rarely substantively enforced.²⁸⁸

The intersection of rules of citizenship based on *jus soli* and *jus sanguinis* may also result in the acquisition of two or more nationalities at birth. Children born in the United States to parents who are citizens of a foreign country may be birthright citizens of both nations, if their parents' country follows *jus sanguinis* citizenship rules. Likewise, children born abroad to United States citizens may acquire the citizenship of the country where they are born if that country follows *jus soli* citizenship. They may maintain both citizenships because United States law does not require election in these circumstances. Birthright triple nationality is another possibility in cases where parents of two different countries (both of which adhere to *jus sanguinis* principles) have a child born in a third country with *jus soli* citizenship. It would even be possible, albeit quite rare, for a child to acquire four or more nationalities at birth if the parents are themselves dual or triple nationals.

Foreign born nationals subsequently naturalized in the United States come

United States citizen who naturalizes in a foreign country "is presumed to have intended to retain U.S. citizenship." *Id.* § 100.02(4)(c). An action such as swearing oaths of allegiance to foreign states "gives rise only to a highly persuasive inference that U.S. citizenship was abandoned, which inference may be rebutted with proof that the person did not intend . . . to relinquish citizenship." *Id.*

²⁸⁷ The trend is towards a greater acceptance of dual citizenship than in the past. See Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1456-57 (1997) (explaining that the United States now tolerates dual citizenship, and listing Italy, Turkey, Colombia, the Dominican Republic, Great Britain, Ireland, Switzerland, Greece, Israel, and El Salvador among the countries now permitting the retention of nationality after naturalizing in a foreign state); see also Eugene Goldstein & Victoria Piazza, *Naturalization, Dual Citizenship and Retention of Foreign Citizenship: A Survey*, 73 INTERPRETER RELEASES 517, 520, app. at 545-47 (1996) (describing the increased trend in favor of dual citizenship, and including the results of an eighty-five country survey on the legality of dual citizenship); GORDON ET AL., *supra* note 166, §§ 91.01(3)(d), 96.05(1) n.16 ("The [oath of allegiance] prohibition against dual allegiance does not preclude dual citizenship"); see also U.S. Department of State, Bureau of Consular Affairs, *Dual Nationality*, at <http://travel.state.gov/travel/dualnationality.html> (last visited Nov. 11, 2004).

²⁸⁸ Sanford Levinson, *Constituting Communities Through Words that Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440, 1464-65 (1986) (exploring the significance of loyalty oaths and comparing political to religious oaths of loyalty); Karin Scherner-Kim, Note, *The Role of the Oath of Renunciation in Current U.S. Nationality Policy: To Enforce, to Omit, or Maybe to Change?*, 88 GEO. L.J. 329, 330-33 (2000) (explaining that the oath is rarely enforced and arguing for greater enforcement on the grounds that "naturalization decisions [should] include affective considerations [such as] a desire to share in the United States' cultural and national identity, and particularly an adherence to a common set of core values"). *Id.* at 331.

to mind as possible dual nationals. As the foregoing discussion demonstrates, however, even an individual who is indisputably a natural born American can also be a dual national. The Constitution does not bar dual nationals from becoming President, and, in recent years, United States nationality law has become increasingly tolerant of multiple citizenship, thereby increasing the possibility that a dual national will become President. At least one commentator has suggested that a constitutional amendment eliminating the natural born citizenship requirement should also include a provision prohibiting the President from holding any foreign citizenship.²⁸⁹ This measure would eliminate the existence of alternative citizenship claims, even though the danger may be more apparent than real.

D. *Citizenship and Uncertainty*

There are currently many ways of acquiring United States citizenship, and the future offers even wider possibilities. Children born to surrogate mothers may already face unique dilemmas if the surrogate mother's citizenship differs from that of the parents who conceived and will raise the child.²⁹⁰ One day, children born in a space station or in artificial gestation environments may face even more complex issues. At present, as the foregoing discussion illustrates, the natural born citizenship status of millions of Americans is open to question. Natural born citizenship is absolutely certain only for United States citizens born post-statehood in one of the fifty states, provided that they are not members of Native American tribes recognized by the United States government. To varying degrees, the natural born status of all other United States citizens is suspect.

III. NATURAL BORN CITIZENSHIP, ELECTIONS, SUCCESSION AND THE COURTS

Without a constitutional amendment naturalized persons who are not birthright citizens would have no realistic claim to eligibility to the Presidency.

²⁸⁹ See Medina *supra* note 43, at 255-59 & n.9 (discussing provisions in state and foreign constitutions "requiring a specified quality of citizenship"); *Maximizing Voter Choice*, *supra* note 10 (statement of Matthew Spalding) (raising the issue of dual citizenship and arguing for enforcement of requirement that naturalized citizens take oath of renunciation of past allegiances). Several countries do prohibit dual nationals from holding either any public office or at least certain high elected positions. See Paula Gutierrez, *Mexico's Dual Nationality Amendments: They Do Not Undermine U.S. Citizens' Allegiance and Loyalty or U.S. Political Sovereignty*, 19 LOY. L.A. INT'L & COMP. L. REV. 999, 1010 (1997) (listing key political positions – including President, Senator, Congressperson, Supreme Court Justice – open only to Mexican born nationals who do not hold any other nationality).

²⁹⁰ See, e.g., Audrey McAvoy, *Japan Refuses Mother's Recognition Request*, SEATTLE POST-INTELLIGENCER, June 11, 2004, http://www.intendedparents.com/News/Japan_refuses_%20mothers_recognition_request.htm (last visited Oct. 25, 2004); Roderick Seeman, *Surrogate Births*, JAPANLAW.INFO, at http://www.japanlaw.info/lawletter/2003/2003_SURROGATE_BIRTHS.html (last visited Oct. 25, 2004).

Any of the many birthright citizens whose natural born status is unclear, however, could become entangled in a battle over the meaning of the natural born citizenship clause in a variety of ways. Early in the Presidential selection process, for example, media coverage of a prospective candidate's origins could trigger a national controversy over constitutional qualifications. A public credentials contest could, in turn, cause the candidate to withdraw from the race, or persuade supporters that backing the candidate would be too risky.²⁹¹ Alternatively, vigorous public debate might result in a popular consensus that birthright citizenship should suffice for the Presidency, regardless of the precise meaning of Article II. A popular consensus could persuade state election officials to include a Presidential hopeful's name on an election ballot, despite questionable natural born citizenship credentials, and it might dissuade potential challengers from initiating a legal action contesting the eligibility of the candidate to serve as President.²⁹² Given the nature of present-day political battles, however, it is hard to imagine that competitors would pull any punches in a Presidential contest.

Nor would winning the Democratic or Republican nomination necessarily insulate a Presidential candidate from legal action or convince a disappointed rival to abandon the quest for the Presidency. Moreover, as long as the constitutional standard remains ambiguous, the risk of contentious legal disputes will linger, even in the midst of a national emergency. Without absolutely clear standards, contention over who should succeed to the Presidency in the wake of a disaster would not be at all surprising.

Absent a constitutional amendment, it is likely that the judicial branch ultimately will be called upon to address any serious dispute over the natural born citizenship credentials of an actual or prospective President, Vice President, or Acting President.²⁹³ In the exercise of their duties, both the President and Congress necessarily interpret the Constitution and determine courses of action on the basis of their understanding of its mandates.²⁹⁴ When

²⁹¹ These kinds of considerations may have been a factor in George Romney's decision to withdraw from the 1968 Republican Presidential primary race. *See supra* note 19; *see also* D'Amato, *supra* note 15, at 252-53.

²⁹² Barry Goldwater's natural born citizenship credentials were at least susceptible to challenge, but apparently only one state court legal action contested his qualifications for the Presidency, and it was dismissed. *See supra* note 19.

²⁹³ Hereinafter the discussion focuses on the natural born citizenship of the President. It is important to remember, however, that the Twelfth Amendment provides that no person ineligible to the office of President may serve as Vice President. The same considerations applicable to Presidential citizenship qualifications would also apply to the Vice President, although the stakes at issue in a judicial dispute would be somewhat lower unless circumstances required the Vice President to step into the Presidency.

²⁹⁴ As Larry Alexander and Frederick Schauer point out, "[w]hen nonjudicial constitutional interpretation occurs against a background of judicial inaction, no conflict exists between the interpretive acts of nonjudicial officials and those of judges. In such cases, constitutional interpretation by nonjudicial officials is rarely controversial"

the actions of the executive or legislative branches are appropriately challenged in a court of law in the context of an actual case or controversy, however, "[i]t is emphatically the province and duty of the judicial department to say what the law is."²⁹⁵ Courts sometimes decline to entertain constitutional challenges on prudential grounds, but when they do reach a decision on the merits, "the federal judiciary is supreme in the exposition of the law of the Constitution."²⁹⁶

Resolution of a challenge to an individual's qualifications to serve as President would involve in-depth exploration of the kinds of constitutional questions discussed above in Part I.²⁹⁷ Before reaching the merits of the natural born citizenship proviso, however, the courts would need to deal with a number of jurisdictional obstacles involving justiciability. Courts are required to address justiciability questions *sua sponte* regardless of whether the parties do so, and the importance of these issues increases dramatically when major constitutional issues arise.²⁹⁸ As the Supreme Court explained in its 2004 decision in *Elk Grove Unified School District v. Newdow*,²⁹⁹ "[t]he command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake."³⁰⁰ Although many would argue that the Court's 2000 decision to rule on the merits of the election dispute in *Bush v. Gore*³⁰¹ raises questions about the Court's fidelity to this philosophy,³⁰² the Court consistently

Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1360 (1997). Alexander and Schauer also note that, from time to time, both the executive and legislative branches have made a case for non-deference to judicial interpretation of the Constitution, as did President Abraham Lincoln in denying that the *Dred Scott* decision was binding on the President. *Id.* at 1360-61. In their view, the argument for non-deference "is not only widely accepted today, but it has also enjoyed a remarkable persistence." *Id.* at 1360.

²⁹⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *accord* *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (citing *Marbury* and noting that this "principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system").

²⁹⁶ *Cooper*, 358 U.S. at 18.

²⁹⁷ See *supra* text accompanying notes 37-192.

²⁹⁸ See generally CHEMERINSKY, *supra* note 104, § 2.3. The constitutional aspects of justiciability arise out of the cases or controversies language of Article III. See U.S. CONST. art. III, § 2.

²⁹⁹ 124 S. Ct. 2301 (2004).

³⁰⁰ *Id.* at 2308.

³⁰¹ 531 U.S. 98 (2000).

³⁰² See Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 275 (2002) ("The Court did not pause even for a sentence in *Bush I* to explain why the Article II question . . . did not present a political question for resolution by Congress); see also discussion *infra* Part III.B & note 423.

has reiterated its “‘deeply rooted’ commitment ‘not to pass on questions of constitutionality’ unless adjudication of the constitutional issue is necessary.”³⁰³

A legal dispute over the meaning of the natural born citizenship proviso could involve both constitutional and prudential justiciability issues. Assuming – as is likely in at least some contexts – that the constitutional hurdles would not prove insurmountable, a significant question would remain: Should the Court decide what the natural born citizenship proviso means? The answer to this query has important consequences for the Court in that it poses significant questions of judicial self-restraint. The subject is at least equally important for Congress, because it directly ties into the question whether constitutional amendment of the natural born citizenship proviso is necessary or advisable. The following discussion explores potential issues of constitutional and prudential justiciability, as well as the more general question whether it is in the best interests of the Court and the nation to rely on the judiciary to resolve problems of Presidential eligibility pursuant to the natural born citizenship proviso if and when they arise. The discussion begins with a look at some of the ways in which such questions might come before the Court.

A. *The Justiciability of a Challenge Pursuant to the Natural Born Citizenship Proviso*

The justiciability of a legal dispute over natural born citizenship could turn on the context of the controversy. Several distinct scenarios are possible. The form of disputes arising out of a Presidential election would depend to a large extent on timing. Early in the electoral process – from the first state primary campaigns up until the eve of a national election – a number of potential actions are conceivable. Possible scenarios³⁰⁴ include challenges to actual or threatened actions such as (1) a state election official’s decision to include or exclude a candidate’s name from a primary ballot;³⁰⁵ (2) a determination by the officials of a political party to permit or deny a Presidential hopeful an opportunity to be considered as a candidate at a state nominating caucus; (3) an

³⁰³ *Newdow*, 124 S.Ct. at 2308 (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

³⁰⁴ See generally Gordon, *supra* note 8, at 28-31 (speculating on possible means by which the natural born citizen clause could be tested in court); Pryor, *supra* note 42, at 896 n.85 (similarly speculating on how such a challenge might validly come into court).

³⁰⁵ See, e.g., *Kneip v. Herseeth*, 214 N.W.2d 93, 100 (S.D. 1974) (issuing declaratory judgment in case involving state governor running for third term contrary to statutory limitation). For examples of other kinds of electoral challenges at the state and local levels see *Archer v. Bd. of Supervisors of Pima County*, 800 P.2d 972, 973 (Ariz. 1990) (holding that incumbent constable had standing to challenge sufficiency of signatures to put defendant challenger on the ballot in the other party’s primary); *In re Dixler*, 493 N.Y.S.2d 52, 52-53 (N.Y. App. Div. 1975) (determining eligibility of candidates for the Monroe Town Council).

election official's decision to include or exclude a candidate's name on a general election ballot; and (4) a ruling by the Federal Election Commission with respect to a candidate's eligibility for federal funds.³⁰⁶ Potential plaintiffs could include a Presidential hopeful, rival candidate, voter, political party, or other association.³⁰⁷

At the culmination of the electoral process, litigants conceivably could challenge the eligibility of a President-elect to take office,³⁰⁸ or even contest the qualifications of a sitting President.³⁰⁹ Outside of the electoral context, a challenge could arise to the constitutional eligibility of a person called upon to assume the duties of Acting President pursuant to the federal succession statute.³¹⁰ In the latter circumstances, the most likely plaintiffs would include persons with subsequent claims to the office of Acting President, other government officials, or members of the public.

The precise nature of a legal dispute over presidential citizenship credentials would, of course, depend on the particular circumstances giving rise to the controversy. A resulting lawsuit could originate in either state or federal court, although an action initiated in a state forum might well be removed to federal court.³¹¹ The parties would most likely seek injunctive and/or declaratory relief.³¹²

³⁰⁶ See 26 U.S.C. § 9004 (2000) (stating that "eligible candidates" are entitled to receive election funds). See generally THE FEDERAL ELECTION COMMISSION, THE PRESIDENTIAL PUBLIC FUNDING PROGRAM (1993), <http://www.fec.gov/info/pfund.htm> (last visited Nov. 7, 2004).

³⁰⁷ Associations generally have standing to bring suit when the association itself or its members have suffered injury. See *Sierra Club v. Martin*, 405 U.S. 727, 735 (1972) (rejecting a claim by the Sierra Club because it failed to allege that the association or its members would be affected by the challenged development).

³⁰⁸ See Pryor, *supra* note 42, at 898 n.92. Another conceivable legal attack might seek to prevent members of the Electoral College from casting votes for a candidate whose constitutional qualifications were arguably lacking.

³⁰⁹ See Gordon, *supra* note 8, at 30-31; Pryor, *supra* note 42, at 897 n.85.

³¹⁰ See 3 U.S.C. § 19 (2000).

³¹¹ In instances where an issue of federal constitutional or statutory law is an essential component of plaintiff's action, the case could be brought in or removed to federal court even though it arises from a state cause of action. See *Smith v. Kan. City Title & Trust Co.*, 255 U.S. 1801 (1921).

³¹² In most cases, the parties would probably seek injunctive relief. In addition, or as an alternative, either party could seek a declaratory judgment in federal court resolving the foreign born candidate's eligibility to serve as President. In appropriate circumstances, the threat of adverse action could be sufficient to permit an action pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a) (2000). The Supreme Court has articulated the standards for declaratory judgments as "a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, . . . although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1933) (citations omitted). See generally CHEMERINSKY, *supra* note 104, at § 2.4

Whatever the particular form of legal action, the justiciability questions inherent in these situations merit careful consideration. While comprehensive analysis of these issues is beyond the scope of this article, a few examples should suffice to demonstrate the tangled web of complex questions the courts could have to unravel before reaching the merits of a legal dispute over the meaning of the natural born citizenship proviso.

1. Standing

Questions of standing would likely arise in many of the scenarios outlined in the preceding paragraphs. Standing focuses on whether the person or entity initiating an action is the appropriate party to bring suit.³¹³ In its June 2004 decision in *Elk Grove Unified School District v. Newdow*,³¹⁴ the Supreme Court synthesized its holdings on this aspect of justiciability as follows:

[O]ur standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case or controversy requirement . . . and prudential standing, which embodies "judicially self-imposed limits on the exercise of federal jurisdiction" The Article III limitations are familiar: The plaintiff must show that the conduct of which he complains has caused him to suffer an "injury in fact" that a favorable judgment will redress. Although we have not exhaustively defined the prudential dimensions of the standing doctrine, we have explained that prudential standing encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that the plaintiff's complaint fall within the zone of interests protected by the law invoked." "Without such limitations – closely related to Art. III concerns but essentially matters of judicial self-governance – the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."³¹⁵

An otherwise qualified candidate whose name is excluded from a primary ballot by state election officials on grounds of ineligibility to serve as President

(distinguishing between declaratory judgments and advisory opinions). As in any other context, requests for declaratory relief pertaining to election campaigns "must be presented in the context of a specific live grievance." *Golden v. Zwickler*, 394 U.S. 103, 110 (1969); *see also, e.g., Wagner v. Milwaukee Co. Election Comm'n*, 666 N.W.2d 816, 823 (Wis. 2003) (granting declaratory judgment in contested election context); *cf. Fernandez v. Georgia*, 716 F. Supp. 1475, 1479 (M.D. Ga. 1989) (granting declaratory judgment that a state statute restricting eligibility for state trooper positions to natural born citizens was unconstitutional).

³¹³ CHEMERINSKY, *supra* note 104, § 2.5.1, at 60.

³¹⁴ 124 S. Ct. 2301 (2004).

³¹⁵ *Id.* at 2308-09 (citations omitted).

pursuant to the United States Constitution should have little difficulty establishing standing to challenge that exclusion. From an Article III perspective, the exclusion would constitute an injury in fact fairly traceable to the decision of election officials. The purpose of the lawsuit would be to redress that injury by means of a declaratory judgment establishing the candidate's eligibility for the Presidency and/or an injunction directing election officials to place the candidate's name on the ballot. From a prudential perspective, the candidate would be asserting her own rights rather than those of third parties,³¹⁶ and the associated grievance would be quite particular. The standing of other potential plaintiffs – e.g., a rival candidate, a voter, or political party – raises more complex questions. A rival candidate's standing would likely depend on a fact-specific analysis.³¹⁷ For example, a court might hold that a Republican candidate had standing to challenge the citizenship credentials of a rival Republican at the state primary stage but not those of a Democratic contender.³¹⁸ For a voter raising a federal constitutional challenge, however, standing seems unlikely. The critical question would be whether an allegation of injury arising out of the inclusion or exclusion of a Presidential candidate on an election ballot would constitute a sufficiently direct injury or merely a “generalized grievance.” The latter would not support standing.³¹⁹

³¹⁶ In *Bush v. Gore*, however, the Court allowed the candidates to litigate the rights of third parties in an equal protection context. 531 U.S. 98, 98-103 (2000).

³¹⁷ For analysis of analogous standing questions arising under state law, see, e.g., *Welch v. Gossens*, 25 So. 472, 475 (La. 1899) (allowing a challenge to defendant's election as mayor of Alexandria by plaintiff who was the opposing candidate in the election); *McLaughlin v. French*, 492 So. 2d 254, 255 (La. Ct. App. 1986) (allowing incumbent to contest challenger's eligibility in school board election, on the ground that the incumbent had standing as a registered voter).

³¹⁸ Some state courts have reached similar conclusions with respect to state elections. See, e.g., *In re Nominating Petition of Pasquay*, 525 A.2d 13 (Pa. Commw. Ct. 1987), *aff'd*, 529 A.2d 1076 (1987) (holding that a registered Democrat lacked standing to challenge a Republican primary candidate's nominating petitions). Some states, however, allow voters or rival contenders to challenge the qualifications of candidates from other parties pursuant to state statutes that afford broad rights designed to help safeguard the integrity of the electoral process. See, e.g., *Archer v. Bd. of Supervisors of Pima County*, 800 P.2d 972, 973 (Ariz. 1990) (allowing Republican incumbent to contest nomination of challenger despite incumbent's inability to vote in Democratic primary); *In re David Z. Dixler*, 493 N.Y.S.2d 52, 53 (N.Y. App. Div. 1985) (holding that any registered voter is entitled to challenge a candidate's designating petitions).

³¹⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (finding lack of standing in matter involving generalized complaints of environmental injury and suggesting that standing has a separation-of-powers component); *Warth v. Seldin*, 422 U.S. 490 (1975) (declining to rule on the merits of a matter involving “a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens”); *Frothingham v. Mellon*, 262 U.S. 447 (1923) (refusing to permit plaintiff taxpayer alleging only a “generalized grievance” to challenge federal expenditure). See generally CHEMERINSKY, *supra* note 104, § 2.5.5, at 90 (explaining that the “prudential principle,” bars hearing “generalized

Despite the bar on generalized grievances, the Court has made it clear that a real injury does not move beyond judicial reach simply because it is "widely shared."³²⁰ In the Court's words, "[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."³²¹ Nevertheless, in light of the overall tenor of the Court's standing jurisprudence, it is difficult to believe that a voter claiming an alleged injury shared by tens of millions of Americans could, without more, establish standing to challenge the natural born citizenship credentials of a Presidential candidate.

In 1937, the Supreme Court addressed an analogous situation when Albert Levitt, a member of the bar of the Court, alleged that Justice Black's appointment violated Article I, Section 6, Clause 2 of the Constitution.³²² Levitt filed a motion seeking an order directing Justice Black to show cause why his appointment was lawful. The Court summarily dismissed the motion on grounds that "the motion papers disclose[d] no interest upon the part of the petitioner other than that of a citizen and a member of the bar of th[e] Court."³²³ The Court admonished:

It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action, he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.³²⁴

Applying *Levitt*, as well as the lessons of nearly seventy subsequent years of standing jurisprudence, it is unlikely that a plaintiff whose claim of injury is simply that of a voter or concerned citizen would have standing to challenge the natural born citizenship qualifications of an incumbent President or Acting President. An individual in the line of succession, however, should have standing to challenge the natural born citizenship credentials of an Acting President. A cabinet member, for example, might argue that an Acting President held office unlawfully because he or she was not a natural born citizen within the meaning of Article II. The alleged injury of the plaintiff

grievances" brought by individual citizens or taxpayers).

³²⁰ Fed. Election Comm'n v. Atkins, 524 U.S. 11, 24-25 (1998) (holding that voters had standing to seek disclosure from lobbying group under federal law, and while the alleged injury was "widely shared" it was nevertheless "sufficiently concrete and specific" to be actionable).

³²¹ United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688 (1973).

³²² Ex Parte Levitt, 302 U.S. 633 (1937). Levitt also claimed that there was no vacancy to which Justice Black lawfully could be appointed.

³²³ *Id.*

³²⁴ *Id.*

would be direct, fairly traceable to the challenged conduct, and capable of redress by means of injunctive relief. Regardless of the standing element, though, the Court could well decline to entertain such a challenge on political question grounds.³²⁵ Before turning to the political question doctrine, however, the next section will consider threshold issues pertaining to the timing of a dispute over the natural born citizenship proviso.

2. Ripeness, Mootness and Other Timing Issues

One of the principal criticisms of the Supreme Court's decision in *Bush v. Gore* is that the case was not ripe for adjudication at the time the Supreme Court agreed to hear it.³²⁶ The Supreme Court has defined ripeness as the determination whether a matter is sufficiently developed to merit review by the federal courts.³²⁷ The purpose of the doctrine is to sift out cases that involve speculative injuries that may never cause concrete harm.³²⁸ Ripeness is also intertwined with standing to the extent that both doctrines focus on the plaintiff's claimed injury. Standing addresses the sufficiency of the injury and the plaintiff's personal connection to it, while ripeness focuses on whether the plaintiff's alleged injury either actually has occurred or is sufficiently likely to occur that the issues are concretely framed and judicial resolution is not deemed unnecessary.³²⁹ In some instances, the two aspects of justiciability are readily distinguishable, while in others they overlap – e.g., when it is unclear whether an alleged injury is sufficiently concrete and personal to the party alleging the harm to merit review as of the time suit is filed.³³⁰

³²⁵ The political question doctrine is discussed *infra* Part III.A.3.

³²⁶ Erwin Chemerinsky, for example, contends that the case could not have been ripe until all of the counting was completed in the state of Florida, principally because it was unclear whether then-Governor Bush would be ahead or behind until the state finished the recount. If Mr. Bush had ended up ahead, the controversy might have been avoided. In addition, as a result of its decision to take the case before the recount ended, the Court arguably ended up “improperly treat[ing] an ‘as applied’ Equal Protection challenge as if it were a facial challenge” and overlooked the impact of the appointment of a single judge to hear all of the vote challenges on the Equal Protection claims. Erwin Chemerinsky, *How Should We Think About Bush v. Gore*, 34 LOY. U. CHI. L.J. 1, 14 (2002). Although he does not use the term “ripeness,” this concept is inherent in Justice Stevens’ criticism of the majority’s reasoning. See *Bush v. Gore*, 531 U.S. 98, 126-28 (2000) (Stevens, J., dissenting) (arguing that majority’s decision to terminate recount before tabulation of all votes was premature, particularly in light of the appointment of an “impartial magistrate” to hear all challenges to the recount process).

³²⁷ *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967). The Court evaluates both whether the issues of the case are fit for review and the hardship to the parties of withholding review. *Id.*

³²⁸ CHEMERINSKY, *supra* note 104, § 2.6.1, at 102 (explaining that the ripeness inquiry is meant to bar consideration of injuries that are “speculative and never may occur”).

³²⁹ *Id.*

³³⁰ *Id.* § 2.6.1.

In the context of a Presidential campaign, ripeness considerations may preclude adjudication of the merits of a dispute at some stages but not at others.³³¹ Once serious candidates emerge, even early in a primary race, the ripeness doctrine is unlikely to bar resolution of a bona fide challenge to a candidate's constitutional eligibility to serve as President for several reasons. First, the issue would be concrete, and the case would not require development of the kind of record critical to most judicial decisions. The only essential facts would be the candidate's birthplace and the citizenship of her parents. The heart of the matter would not involve the interplay of legal principles with complex facts, but interpretation of extensive legal and historical research concerning Article II and the intentions of the Framers in light of relevant principles of constitutional interpretation.³³²

Second, and more importantly, the Supreme Court has ruled that in determining whether a case is ripe, federal courts must consider "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."³³³ In the context of a dispute over the natural born citizenship qualifications of a serious candidate for the Presidency, denying judicial review, even temporarily, could inflict great hardship. For example, excluding a would-be candidate from the ballot in an upcoming election would not only deprive that person of a place on a particular ballot, but would hinder his or her chances to raise funds and establish a viable presidential candidacy across the country. A contested decision to permit the name of a candidate with questionable natural born citizenship credentials to appear on a ballot, however, might cause a court to pause on grounds that the challenged candidate could well lose the election, thereby mooting the issue. Nevertheless, because of the obvious impact of a cloud on the qualifications of a candidate, there would be compelling reasons to resolve the issue prior to the election. If an excluded candidate were to prevail on the merits of the natural born citizenship issue after the election – for example, where a court held that the controversy was not moot on grounds that it was "capable of repetition yet evading review"³³⁴ – fashioning post-election relief would be difficult and

³³¹ See, e.g., *Boschetti v. MacKay*, 748 N.Y.S.2d 841, 842 (N.Y. Sup. Ct. 2002) (finding eligibility dispute in primary campaign ripe under state law because the County Board of Elections had already validated the candidates).

³³² See *supra* Part I.

³³³ *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967).

³³⁴ Once the election at issue takes place, regardless of the outcome, the matter may be moot. See, e.g., *Krajicek v. Gale*, 677 N.W.2d 488, 493 (Neb. 2004) (dismissing a challenge to a determination of ineligibility pursuant to Nebraska law because the primary election date had passed and plaintiff could no longer obtain the relief sought). In a number of cases, however, both federal and state courts have declined to hold disputes moot even after an election has taken place on grounds that the controversy is "capable of repetition yet evading review." See, e.g., *Morse v. Republican Party of Va.*, 517 U.S. 186, 235 n.48 (1996) (declining to hold election dispute involving delegate fees moot where matter was "capable of repetition yet evading review").

disruptive at best, and the legitimacy of the election itself would be in question.

It is also possible that equitable doctrines could come into play in connection with a dispute over the timing of a challenge to the constitutional eligibility of a Presidential candidate. For example, in 1968, the Peace and Freedom Party filed an original action for a writ of mandamus in the Supreme Court of Hawaii contesting the refusal of Hawaii's Lieutenant Governor to place its candidate on the state's 1968 Presidential ballot.³³⁵ The Party originally proposed Eldridge Cleaver for President, but the state declined to place Mr. Cleaver's name on the ballot on grounds that, at thirty-three years of age, he was ineligible for the Presidency pursuant to Article II, Section 1, Clause 5.³³⁶ Although the Lieutenant Governor informed the Party of the state's decision nearly eight weeks prior to the election, and offered the party an opportunity to replace Cleaver's name with that of an eligible candidate, the Party took no action until a few days prior to Election Day when its attorneys filed the mandamus action.³³⁷ Hawaii's highest court denied the writ.³³⁸ Deftly avoiding both substantive issues and complex justiciability questions, the court held that the Peace and Freedom Party's action was barred by laches.³³⁹

While laches and other equitable doctrines theoretically could be factors in the context of a dispute over natural born citizenship issues, it seems unlikely that these kinds of issues would arise with respect to litigation involving a serious Presidential candidate's right to seek the Presidency or a cabinet member's challenge to the constitutional qualifications of an individual with a prior claim to the office of Acting President. To the contrary, those concerned are likely to act expeditiously.³⁴⁰

3. The Political Question Doctrine

The political question doctrine dates back to *Marbury v. Madison*,³⁴¹ although it has evolved dramatically since Chief Justice Marshall penned his masterpiece in 1803.³⁴² During the intervening years, the Court has invoked

³³⁵ *Jones v. Gill*, 446 P.2d 558, 558 (Haw. 1968).

³³⁶ *Id.* at 558; see U.S. CONST. art II, § 1 (requiring that a person be thirty-five years old to be eligible for the Presidency).

³³⁷ *Jones*, 446 P.2d at 558.

³³⁸ *Id.* at 559.

³³⁹ *Id.* at 619.

³⁴⁰ See, e.g., Weaver, *supra* note 19 (discussing likelihood of legal action prior to the New Hampshire primary election to seek judicial resolution of objections to Governor Romney's citizenship qualifications for the Presidency).

³⁴¹ 5 U.S. (1 Cranch) 137, 170 (1803) (declaring that political questions "can never be made in this court").

³⁴² See Barkow, *supra* note 302, at 300 (discussing the "decline" of the political question doctrine); Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643, 644-45 (1989) (listing subject matter

the doctrine in cases involving subjects as varied as the Constitution's guarantee of a republican form of government,³⁴³ foreign policy prerogatives of the Executive,³⁴⁴ judicial impeachment,³⁴⁵ and the ratification process for constitutional amendments.³⁴⁶ While the Court's pronouncements have overtones of separation-of-powers theory, it remains uncertain whether the doctrine is essentially constitutional or prudential in nature.³⁴⁷

The Court's most comprehensive articulation of the factors relevant to a determination of whether a case presents a non-justiciable political question appears in Justice Brennan's opinion for the majority in the Court's 1962 decision of an equal protection challenge to a Tennessee reapportionment in *Baker v. Carr*.³⁴⁸ The opinion sets forth criteria applicable to the political question determination:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by

that the courts have deemed to be within the boundaries of the political question doctrine); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1031, 1034-35 (1984) (reviewing cases in which the Supreme Court has addressed the political question doctrine); Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 465-77 (2004) (categorizing the various applications of the political question doctrine); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1204-05 (2002) (suggesting that the political question doctrine has all but disappeared from Supreme Court jurisprudence). See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); CHEMERINSKY, *supra* note 104, § 2.8.

³⁴³ *Luther v. Borden*, 48 U.S. (7 How.) 1, 102-03 (1849) (holding that whether citizens have changed their form of government is a question to be settled by a political power).

³⁴⁴ *United States v. Belmont*, 301 U.S. 324, 330-32 (1937) (confirming power of Executive in foreign relations field and holding that foreign nationals who accuse their government of taking their property must look to their own nations' courts for relief).

³⁴⁵ *Nixon v. United States*, 506 U.S. 224, 251-52 (1993) (holding challenge to Senate impeachment procedure nonjusticiable).

³⁴⁶ *Coleman v. Miller*, 307 U.S. 433, 456 (1939) (holding that Congress holds the ultimate authority regarding the efficacy of ratifications of Constitutional amendments).

³⁴⁷ CHEMERINSKY, *supra* note 104, § 2.8.2, at 132 (reflecting on debate of "whether the political question doctrine is constitutional, prudential, or both").

³⁴⁸ 369 U.S. 186 (1962).

various departments on one question.

Unless one of these formulations is inextricable from the case at bar, the case should not be dismissed for nonjusticiability on the ground of a political question's presence.³⁴⁹

The United States House of Representatives argued that several of these factors were present in *Powell v. McCormack*,³⁵⁰ a case involving a challenge by Congressman Adam Clayton Powell to the refusal of the House to seat him during the second session of the 90th Congress in 1967, despite his reelection.³⁵¹ The Court, however, rejected the argument that Article I, Section 5 of the Constitution – providing that each House of Congress “shall be the Judge of the Elections, Returns and Qualifications of its own Members” and that each House may, “with the Concurrence of two thirds, expel a Member”³⁵² – rendered the matter a political question.³⁵³ The Court reasoned that these provisions invested the House of Representatives with judicially unreviewable discretion to determine its members' satisfaction of the constitutionally specified requirements of age, citizenship, and residence.³⁵⁴ The Court ruled, however, that it could review the question of Congress' authority to impose membership qualifications in addition to those set forth in the Constitution and proceeded to consider the merits of the House of Representatives' refusal to seat Mr. Powell. In so doing, the Court admonished:

Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.³⁵⁵

A few years later, in *Roudebush v. Hartke*,³⁵⁶ the Court upheld the right of state election officials to order a recount of votes in a senatorial contest, but cautioned: “[The Senate] is the judge of the elections, returns and qualifications of its members. It is fully empowered, and may determine such matters without the aid of the House of Representatives or the Executive or Judicial Department.”³⁵⁷

³⁴⁹ *Id.* at 217.

³⁵⁰ 395 U.S. 486, 495 (1969); *see also, e.g.*, *Nixon v. United States*, 506 U.S. 224, 237-38 (1993) (see discussion *infra* notes 358-367).

³⁵¹ *Powell*, 395 U.S. at 490.

³⁵² U.S. CONST. art. I, § 5.

³⁵³ *Powell*, 395 U.S. at 513.

³⁵⁴ *Id.* at 506 (citing U.S. CONST. art. I, § 5).

³⁵⁵ *Id.* at 549 n.86 (citing *McPherson v. Blacker*, 146 U.S. 1, 24 (1892) (remarking that it is “an impermissible suggestion” that a political branch might act in contravention of a judicial order)); *see infra* text accompanying note 421.

³⁵⁶ 405 U.S. 15 (1972).

³⁵⁷ *Id.* at 19 n.6 (quoting *Reed v. County Comm'rs*, 277 U.S. 376, 388 (1928) (citation

Several years after *Hartke*, in *Nixon v. United States*,³⁵⁸ the Court refused to review the merits of a former federal judge's claim that the Senate had violated the Constitution with respect to the conduct of his impeachment proceedings.³⁵⁹ Mr. Nixon objected to the conduct of a substantial portion of the proceedings by a Senate Committee, contending that the use of the word "try" in the Impeachment Clause³⁶⁰ required the full Senate to participate in all phases of the impeachment proceedings.³⁶¹

The Court rejected the former judge's arguments on grounds that the word "try" did not limit the authority constitutionally committed to the Senate with respect to impeachment proceedings. Consequently, the conduct of the Nixon impeachment was a nonjusticiable political question that the Court would not review.³⁶² In reaching its decision, the Court focused on the existence of a "textually demonstrable constitutional commitment to a coordinate political branch" – evidenced by the authority vested solely in the Senate to conduct impeachment proceedings and the inconsistency of judicial review with the Constitution's system of checks and balances³⁶³ – and the "not completely separate" issue "of a lack of judicially discoverable and manageable standards for resolving [the dispute]".³⁶⁴ The Court then turned to the issues of finality and relief, essentially concluding that judicial intervention in the impeachment process would be ill-advised and impractical. The Court noted the danger of "expos[ing] the political life of the country to months, or perhaps years of chaos" during judicial review of impeachment proceedings, particularly if the President were impeached,³⁶⁵ and the uncertainty of the Court's ability to grant relief if it were to overturn the impeachment conviction.³⁶⁶ The Court concluded: "[W]e are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability."³⁶⁷

Surprisingly, the Court did not address the relevance of its political question jurisprudence in *Bush v. Gore*,³⁶⁸ although ripples of the doctrine are evident just below the surface of the case. The per curiam opinion, for example, states:

None are more conscious of the vital limits on judicial authority than are

omitted)) (alteration in original).

³⁵⁸ 506 U.S. 224 (1993).

³⁵⁹ *Id.* at 228, 238.

³⁶⁰ U.S. CONST. art. I, § 3, cl. 6.

³⁶¹ *Nixon*, 506 U.S. at 230.

³⁶² *Id.* at 237-38.

³⁶³ *Id.* at 228-33.

³⁶⁴ *Id.* at 227.

³⁶⁵ *Id.* at 236 (quoting *United States v. Nixon*, 938 F.2d 239, 246 (D.C. Cir. 1991)).

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ 531 U.S. 98 (2000) (per curiam). For discussion of the conspicuous absence of reference to the political question doctrine in *Bush v. Gore*, see Barkow, *supra* note 302, at 275; Tushnet, *supra* note 342, at 1203-04.

the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.³⁶⁹

Reference to the doctrine is also implicit in Justice Breyer's dissent: "[T]he selection of the President is of fundamental national importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election."³⁷⁰

The potential applicability of the political question doctrine to questions of Presidential eligibility should depend on context. The force of arguments for nonjusticiability on political question grounds would be stronger following a national election than in the midst of a political campaign, and even greater in the face of a challenge to the natural born citizenship credentials of an incumbent President or Acting President. The lack of cohesiveness in the Court's political question jurisprudence, however, makes it difficult to predict whether, and in what circumstances, the Court would agree to adjudicate the substance of a dispute involving the natural born citizenship proviso. Nevertheless, this question merits consideration, if only to demonstrate the difficulty of navigating the currents and eddies of the doctrine in the context of the scenarios most likely to arise.

Despite their differences, in each of the scenarios discussed above, a political question analysis would begin with the question of the existence of a textual commitment to a coordinate political branch. As Steven Calabresi has aptly noted, "[t]extual' commitments must be discovered by structural analysis, since constitutional clauses do not come with footnotes attached saying which clauses are enforceable through judicial review and which are not."³⁷¹ There is no readily apparent answer to the question of a demonstrable textual commitment in connection with the natural born citizenship proviso. The Constitution's provisions for counting electoral votes³⁷² and the role of the

³⁶⁹ *Bush*, 531 U.S. at 111.

³⁷⁰ *Id.* at 153 (Breyer, J., dissenting). Justice Breyer also cautions that "Madison, at least, believed that allowing the judiciary to choose Presidential electors 'was out of the question[,]'" *id.* at 155 (quoting James Madison, remarks of July 25, 1787, *reprinted in* 5 ELLIOTT'S DEBATES ON THE FEDERAL CONSTITUTION 363 (2d ed. 1876)), and that "[t]he decision by both the Constitution's Framers and the 1886 Congress to minimize this Court's role in resolving close federal Presidential elections is as wise as it is clear . . . Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are all about." *Bush*, 531 U.S. at 155.

³⁷¹ Calabresi, *supra* note 21, at 157.

³⁷² Relevant provisions were originally set forth in Article II, Section I, Clause 2, and

legislative branch in choosing a President in specified circumstances – if a President-elect fails “to qualify”³⁷³ or in the event of simultaneous vacancies in the offices of President and Vice President³⁷⁴ – arguably constitute textual commitment of issues pertaining to executive qualifications to the legislative branch. This, however, is not a particularly satisfactory answer.

First, Congress has no constitutional role to play in the Presidential electoral process until the primaries are a distant memory, the national election is over, and the members of the Electoral College have cast their votes. Only then does the President of the Senate, in the presence of the members of the House and Senate, open and count the electors votes.³⁷⁵ Even if an overwhelming majority of the members of Congress believed the President-elect to be constitutionally unqualified on natural born citizenship grounds, at this point in the process action to preclude a popularly elected candidate from taking office could prove disastrous. Regardless of the circumstances, such a step would be antidemocratic and very probably fracture the legislative branch and the country along party or other factional lines. If, despite the Twentieth Amendment’s provision that “Congress may by law provide for the case wherein neither the President nor the Vice President elect shall have qualified,”³⁷⁶ the actual determination whether a candidate has qualified may be justiciable, as Vasan Kesavan suggests,³⁷⁷ the Court would enter treacherous seas by taking on this task.

Whatever its post-election effect, however, this arguable textual commitment should not preclude justiciability prior to a national election. Awaiting Congressional reaction to the natural born citizenship qualifications of a candidate would color all phases of a Presidential campaign. The candidate, rivals, party leaders, state election officials, Federal Election Commissioners, and voters would be forced to act on the basis of speculation over the candidate’s constitutional eligibility for the Presidency. In these circumstances, judicial restraint would not lead to orderly resolution of the issue; to the contrary, a refusal could infuse the entire electoral process with damaging uncertainty. A candidate with questionable natural born citizenship credentials – for example, an individual who had been born to military personnel serving abroad, or a Native American born on tribal lands – might never build the support necessary to reach the national ticket, creating anger and alienation among major segments of the population. Conversely, if the candidate did receive a major party nomination, judicial refusal to rule on a qualifications challenge would gravely undermine the finality of the election if the candidate were to win.

later modified by the Twelfth Amendment. U.S. CONST. amend. XII.

³⁷³ See U.S. CONST. amend. XX.

³⁷⁴ See U.S. CONST. art. II, § 1, cl. 6.

³⁷⁵ U.S. CONST. amend. XII.

³⁷⁶ U.S. CONST. amend. XX.

³⁷⁷ See Kesavan, *supra* note 21, at 1809-10.

Nor would the absence of "judicially discoverable and manageable" standards counsel judicial restraint prior to a national election. Early in the electoral process, the courts would be well suited to resolve questions of natural born citizenship on the basis of traditional constitutional analysis. The courts should also have little difficulty in fashioning relief at this stage. The available tools – declaratory judgments, stays and injunctions – would be those with which courts are intimately acquainted. In addition, prior to the national election it would be quite unlikely that one of the political branches would have taken a formal position on the matter. Hence, there would be little risk that judicial intervention would demonstrate a lack of respect for coordinate branches of government, undercut any existing political decision necessitating unquestioning adherence, or create a risk of embarrassing multifarious pronouncements by various departments.³⁷⁸

Once the national electoral process is concluded, however, key elements of the calculus would change dramatically. The most complicated scenario would entail a challenge to a popularly elected candidate³⁷⁹ just before or just after the vote of the Electoral College. Suppose, for example, Congress determined that the President-elect was not constitutionally qualified to serve as President. Although the political machinations involved in such a scenario are mind-boggling, this scenario is not inconceivable. If the President-elect challenged Congress' determination, judicial consideration of the merits of this claim would arguably intrude on responsibility constitutionally committed to Congress.³⁸⁰ Analysis of the intricacies of this hypothetical situation, while fascinating, is far beyond the scope of this discussion. However, even envisioning the possibilities and the extraordinary political fallout likely to result demonstrates why Congress should initiate steps to make sure the nation never needs to face a dispute over the meaning of natural born citizenship.

The question whether a challenge to the natural born citizenship credentials of a sitting President would be justiciable pursuant to the political question doctrine is analytically easier. The very pendency of a legal challenge to the constitutional legitimacy of the nation's Chief Executive could undermine the President's ability to lead the nation, particularly with respect to foreign affairs. Review on the merits in such circumstances would fly in the face of several of the *Baker* factors, especially the respect due to a coordinate branch of government; the existence of an unusual need for unquestioning adherence to a political decision already made; and the potentiality of embarrassment from multifarious pronouncements by various departments. A decision that an

³⁷⁸ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

³⁷⁹ As Akhil Amar points out, in constitutional terms, the victorious candidate may not be the "President-elect" until the electoral votes are cast and counted. *Succession Gap*, *supra* note 21, at 218.

³⁸⁰ *Id.* at 222-23, 231 n.22. Vasan Kesavan has suggested that the narrow question of a President-elect's constitutional qualifications may be justiciable. See Kesavan, *supra* note 21, at 1809-10.

incumbent President was not constitutionally qualified to serve would put the Court in the position of unseating a popularly elected official, one of only two federal officials for whom all Americans have the opportunity to vote³⁸¹ – a decision that would take the Court light-years beyond *Bush v. Gore*. It is difficult to imagine circumstances less appropriate for judicial involvement or more likely to strain our constitutional system.

Finally, a legal question about the natural born citizenship qualifications of an individual called upon, or about to be called upon, to serve as Acting President would raise somewhat different issues. In these circumstances, the question of the existence of a demonstrable textual commitment to a coordinate political branch of government should focus on the plenary authority Article II, Section 1, Clause 6 of the Constitution confers on Congress to provide for Presidential succession in the event of a double Executive vacancy,³⁸² as well as on the provision of Article II, Section 2, Clause 2 requiring the President to obtain the advice and consent of the Senate to appoint "Officers of the United States"³⁸³. The Constitution vests Congress with both the responsibility to approve persons nominated by the President to serve as officers of the United States and the authority to designate which officers of the United States are included in the line of succession and in what order. Consequently, as Steven Calabresi has argued persuasively in connection with a challenge to the constitutionality of the succession statute on grounds that it impermissibly includes legislative officials who are not officers of the United States in the line of succession,³⁸⁴ there are strong arguments that Presidential succession concerns are the sole province of Congress.³⁸⁵ In addition, as discussed above with respect to the possibility of a challenge to the natural born citizenship credentials of an incumbent President, other *Baker* factors, including respect for a coordinate branch, the need for unquestioning adherence to a political decision already made, and the potential for embarrassment – or worse – from multifarious pronouncements by different branches of government, should all counsel against judicial review in most circumstances.³⁸⁶ In sum, even a

³⁸¹ The same kinds of considerations would pertain to a challenge to the natural born citizenship of a Vice President or Vice President-elect, albeit somewhat less forcefully given the preeminent position of Presidential candidates in national elections and the very different roles fulfilled by the incumbents of the two offices in the absence of events leading to the invocation of the Twenty-fifth Amendment. See *supra* Part I.B.4.b.

³⁸² U.S. CONST. art. II, § 1, cl. 6.

³⁸³ U.S. CONST. art. II, § 2, cl. 2.

³⁸⁴ Steven Calabresi specifically addresses Congress' inclusion of the Speaker of the House and the President Pro Tempore of the Senate in the statutory line of succession. See Calabresi, *supra* note 21, at 156-57.

³⁸⁵ As Calabresi points out in his discussion of a possible successful legal challenge to the constitutional eligibility of the Speaker of the House or the President Pro Tempore of the Senate serving as Acting President, "What if the [Acting President] refused to obey the Court's order and the House of Representatives backed him[?]" *Id.* at 170.

³⁸⁶ Some scholars have suggested that, for a number of reasons, *Bush v. Gore* marks the

cursory review of a few of the scenarios in which a dispute is likely to arise over the meaning of the natural born citizenship proviso of Article II demonstrates that they would raise serious issues of justiciability.

The foregoing discussion is necessarily speculative because it is impossible to envision the particular circumstances in which these kinds of issues might arise. In any event, regardless of the outcome, placing these issues before the judicial branch could put the courts – particularly the Supreme Court – and the entire United States government in a profoundly difficult situation. Assuming that the issue is justiciable, the following discussion further explores the possible consequences of a judicial determination of the issue as a means of demonstrating why Congress needs to take action to eliminate the natural born citizenship proviso before these potential dangers become a reality.

culmination of a move away from application of the political question doctrine by the Supreme Court. Whatever the longterm issues pertaining to the political question doctrine, in the context of a dispute over natural born citizenship credentials, the circumstances and the degree of the alleged transgression should be significant. It may be, as Laurence Tribe suggests, that the political question doctrine involves flexible but not permeable boundaries. As he reflects:

[C]alling something a political question has served merely as shorthand for saying that the branch initially entrusted with making a decision – or, to put it another way, the institution to which the Constitution has granted the power to resolve such disputes – did so within the outer boundaries of its constitutional authority as policed by the Court. Perhaps, then, the real difficulty is that the political question doctrine really isn't about "political questions." Rather, the doctrine suffers from a "truth in advertising" problem – a problem . . . that is hardly unique to the Court's decision in *Bush v. Gore*. Simply put, the political question doctrine is misleadingly named; it really ought to be called the political process doctrine.

Laurence H. Tribe, *The Unbearable Wrongness of Bush v. Gore*, 19 CONST. COMMENT. 571, 595-96 (2002). Tribe goes on to conclude that "*Bush v. Gore* presented a political question that most likely never should have been decided – and, at a minimum, provided an answer that never should have been given – by a federal court." *Id.* at 573.

Other scholars, however, believe that the case was justiciable. Louise Weinberg, for example, states: "A presidential candidate with a certified state election in his favor surely is an individual with rights and standing to assert them." Louise Weinberg, *When Courts Decide Elections: The Constitutionality of Bush v. Gore*, 82 B.U. L. REV. 609, 623 (2002). Acknowledging that prudentialists – both past and present – would likely view the matter differently, Professor Weinberg asserts:

Courts cannot win legitimacy points by denying access to meritorious claims. Rather, in shying away from controversy courts are rightly perceived as shirking a duty. Moreover, since to decline jurisdiction persistently is to favor defendants persistently, courts faithfully exercising "the passive virtues" are rightly seen as actively unfair. No doubt jurisdiction in a contested election invites the opprobrium of the political faction on the losing side. But the possible wrath of the loser does not justify a court in refusing to perform a judicial duty.

Id. at 623-24 (footnotes omitted).

Regardless of how one views the justiciability of *Bush v. Gore*, Tribe's point is a compelling one that could well apply in the context of a dispute over the natural born citizenship proviso.

B. *The Risks of Forcing Judicial Resolution of the Meaning of Natural Born Citizenship*

In the best-case scenario, a legal challenge to the meaning of the natural born citizenship proviso would arise in the early stages of a Presidential election campaign. It is possible, however, that a reprise of the post-election trauma of 2000 could occur. It is also an unfortunate reality that neither a national disaster caused by a terrorist attack or pandemic, nor a legal dispute about Presidential succession following such an event, is inconceivable. A judicial determination in any of these situations could raise deep questions pertaining to the role of the Court, vis-à-vis those of the "political" branches of government at a time of far greater national vulnerability than in 2000. As Bruce Ackerman and David Fontana point out, the controversy over the 2000 election arose during a period when the country was in a particularly strong position.³⁸⁷ Since then, the events of September 11th, the United States' involvement in Iraq and Afghanistan and the economic slowdown have profoundly impacted the nation.³⁸⁸ While the fears expressed by some commentators of the potentially disastrous consequences of another *Bush v. Gore* situation for both the Court and the nation are undoubtedly exaggerated, there is reason for concern.³⁸⁹ The following discussion briefly explores the lessons *Bush v. Gore* offers with respect to a dispute over the natural born citizenship proviso and then turns to other landmark Supreme Court decisions relevant to this subject.

On December 12, 2000, the Supreme Court ensured that George W. Bush would become the forty-third President of the United States when it ordered a halt to Florida's vote recount in *Bush v. Gore*.³⁹⁰ Consequently, despite the majority's effort to limit its holding to the particular circumstances of the case,³⁹¹ there is widespread agreement that *Bush v. Gore* is – and will remain – one of the most significant decisions in the Court's history. Some

³⁸⁷ See *supra* note 28. Cf. Calabresi, *supra* note 298, at 155 (stating that "if 'double death' ever occurs, the country will feel shaken to its very roots in a way that only those who lived through the Civil War, Lincoln's assassination, and Andrew Johnson's impeachment and near removal could hope to understand").

³⁸⁸ See, e.g., Chemerinsky, *supra* note 326, at 2 ("The events of September 11, 2001, increased, not lessened, the importance of *Bush v. Gore*."). But see Howard M. Wasserman, *Structural Principles and Presidential Succession*, 90 KY. L.J. 345, 357 n.48 (2001) (asserting that an even greater risk of wholesale devastation of the government existed during the Cold War because of the potential impact of a nuclear attack on the entire nation).

³⁸⁹ See Gary C. Leedes, *The Presidential Election Case: Remembering Safe Harbor Day*, 35 U. RICH. L. REV. 237, 248 (2001) ("[T]he world watched to see how the United States would resolve an election dispute between two leading presidential candidates who both claimed victory.")

³⁹⁰ 531 U.S. 98 (per curiam).

³⁹¹ See *id.* at 109 ("Our consideration is limited to the present circumstances . . .").

constitutional experts defend the decision as "fair and balanced,"³⁹² "well reasoned,"³⁹³ an "act of courage,"³⁹⁴ and an essential step in avoiding a national crisis.³⁹⁵ Others, however, call it a "constitutional coup,"³⁹⁶ amounting to a judicial "act of usurpation."³⁹⁷ One scholar describes the result

³⁹² Leedes, *supra* note 389, at 245.

³⁹³ Charles Fried, *An Unreasonable Reaction to a Reasonable Decision in Bush v. Gore*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 3, 8 (Bruce Ackerman ed., 2002) [hereinafter *THE QUESTION OF LEGITIMACY*].

³⁹⁴ Nelson Lund, *An Act of Courage: Under Rehnquist's Leadership, the Court Did the Right Thing*, *THE WKLY. STANDARD*, Dec. 25, 2000, at 19.

³⁹⁵ Richard Posner and John Yoo argue that the Court acted appropriately to prevent a constitutional crisis. See RICHARD POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 188 (2001) (arguing that *Bush v. Gore* "enable[d] a national crisis to be averted by constitutional means," comparing the decision to other unconstitutional actions with "good effects"); John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 781 (2001) ("Indeed, the Court perhaps was best suited, as a rational decisionmaker, to settle questions involving rules of constitutional process that may stalemate the other branches of government."); see also Fried, *supra* note 393, at 8 ("[T]he Court's decision to take the case was in accord with past practice."); Leedes, *supra* note 389, at 237-38 (asserting that in the face of events "spinning out of control," the Supreme Court accepted the challenge "to serve as umpire" to prevent a crisis).

³⁹⁶ Bruce Ackerman, *Anatomy of a Constitutional Coup*, *LONDON REV. OF BOOKS*, Feb. 8, 2001, at 3.

³⁹⁷ Margaret Jane Radin, *Can the Rule of Law Survive Bush v. Gore*, in *THE QUESTION OF LEGITIMACY*, *supra* note 393, at 110, 114; see also, e.g., Chemerinsky, *supra* note 326, at 20 (concluding that "[t]he Supreme Court impermissibly usurped the Florida Supreme Court's authority to decide Florida law in this extraordinary case"); Peter Gabel, *What It Really Means to Say "Law Is Politics": Political History and Legal Argument in Bush v. Gore*, 67 BROOK. L. REV. 1141, 1144 (2002) (arguing that "the Court made transparent what is usually mystified – the political nature of all legal reasoning."); H. Jefferson Powell, *Overcoming Democracy: Richard Posner and Bush v. Gore*, 17 J.L. & POL. 333, 352 (2001) (arguing that "constitutional adjudication does not . . . license [judges] to act as a council of wise leaders, displacing political processes whenever they believe it is in society's interest to do so"); Linda Greenhouse, *High Court Appears Diminished in Process*, *SAN DIEGO UNION-TRIB.*, Dec. 14, 2000, at A1 (citing a source who referred to the majority opinion in *Bush v. Gore* as "analytically weak and untethered to precedent"); cf. Roy L. Brooks, *The Use of Policy in Judicial Reasoning: A Reconceptualization Before and After Bush v. Gore*, 13 STAN. L. & POL'Y REV. 33, 33-34 (2002) (analyzing case in terms of judicial policy-making); William P. Marshall, *The Supreme Court, Bush v. Gore, and Rough Justice*, 29 FLA. ST. U. L. REV. 787, 789 (2001) ("[A]lthough the Court's intervention was indeed appropriate, it ultimately reached the wrong result in its decision."); George L. Priest, *Reanalyzing Bush v. Gore: Democratic Accountability and Judicial Overreaching*, 72 U. COLO. L. REV. 953, 980-81 (arguing that the Court's decision cannot be understood without taking into account the lower courts' decisions leading up to the ruling, especially Florida Supreme Court Chief Justice Wells' dissent in *Gore v. Harris*, which first raised the idea of halting the recount). For an overview of reactions and approaches to "tak[ing] the sting out of the criticisms that the decision was infected by blatant partisanship," see Mark Tushnet,

as "an incomprehensible historic blunder . . . with the heart-stopping quality of a fix . . . of something sacred."³⁹⁸

For purposes of this inquiry, the substance of these views is less important than recognizing the controversy the decision generated. While the conflict has faded in the aftermath of September 11, 2001 and the 2004 election, the notion that the Court permitted political partisanship to trump legal principle remains a concern that could easily resurface. Although none of the justices retired prior to the 2004 election, an important initial concern was that the outcome of the case determined not only the winner of the 2000 Presidential race, but the dominant ideology of the federal courts for a generation. In the words of Ronald Krotoszynski, Jr., one of the decision's supporters:

A conventional understanding of the *Bush v. Gore* case goes something like this: The evil Supreme Court majority, bent on securing conservative appointees to the federal judiciary, engaged in blatant results-oriented reasoning to rule in favor of Governor Bush. Along the way, members of the evil majority abandoned all prior principles regarding respect for state courts and judicial restraint. The decision, accordingly, lacks legitimacy.³⁹⁹

"Renormalizing" *Bush v. Gore: An Anticipatory Intellectual History*, 90 GEO. L.J. 113, 114 (2001) (describing legal scholars' explanations, justifications, and rationalizations of the Supreme Court decision in *Bush v. Gore*).

³⁹⁸ Weinberg, *supra* note 386, at 615 (comparing the reaction to the Supreme Court's decision in *Bush v. Gore* with baseball fans' shock when, "[i]n 1919, the Chicago White Sox threw the World Series to the Cincinnati Reds"). Weinberg succinctly states the view shared by many legal scholars who believe that the Court overstepped its constitutional bounds: "Courts may regulate elections. But courts may not displace elections without violence to the Constitution." *Id.* at 639. She describes the Court's decision as an exercise of "inauthentic power." *Id.* at 618. For a review of two sharply contrasting analyses of *Bush v. Gore* – "a polemic" by Alan Dershowitz and "an apologia" by Richard Posner – see Robert J. Muldoon, Jr., *Bush v. Gore: Judging the Judges*, 87 MASS. L. REV. 131, 133-34 (2003) (book review).

³⁹⁹ Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law: Bush v. Gore and the Emerging Jurisprudence of Oprah!*, 90 GEO. L.J. 2087, 2089 n.3 (2002) (citations omitted). Louise Weinberg suggests that by directly deciding the outcome of the 2000 Presidential election, the conservative justices who formed the majority in *Bush v. Gore* improperly perpetuated their own ideologies far beyond both life tenure and *stare decisis* "by seizing an opportunity to name the President of the United States," thereby doing violence to both Article III and separation of powers principles. Weinberg, *supra* note 386, at 659. In her view, "The Supreme Court was the great prize in the election of 2000, no matter what the candidates said." *Id.* at 662 (emphasis in original). It was the means of "gaining and holding the ideological future ground." *Id.* at 663. A number of other legal scholars have joined the four dissenting justices in criticizing the Court's refusal to remand the case to the Florida Supreme Court. See, e.g., Jed Rubenfeld, *Not as Bad as Plessy. Worse.*, in THE QUESTION OF LEGITIMACY, *supra* note 393, at 20, 24-26 (attacking the majority's imposition of a false December 12 deadline); Mark Tushnet, *The Conservatism in Bush v. Gore*, in THE QUESTION OF LEGITIMACY, *supra* note 393, at 163,

Even more important is the impact of controversial Supreme Court decisions on public perceptions of the judiciary, government in general and, in this instance, the electoral process. As Justice Breyer stated in his dissent in *Bush v. Gore*, “[t]he political implications of this case for the country are momentous.”⁴⁰⁰ Nelson Lund, who defends the decision as “straightforward and legally correct,”⁴⁰¹ describes how the events of late 2000 might have appeared to the American public:

Partisans on both sides accused judges of manipulating the law in order to assist the candidate they favored, and aspersions were cast on the integrity of some judges even before they ruled. For the vast majority of observers who lacked the time or expertise to form an independent judgment, it must have seemed unlikely that all the judges involved behaved impartially. And many Americans may well have quietly concluded that they’re all just a bunch of political hacks in robes.⁴⁰²

Erwin Chemerinsky, Michael Klarman, and a number of other scholars believe that the decision is unlikely to have a serious adverse impact on the Court or undermine its legitimacy in the long run.⁴⁰³ Louis Siedman suggests that the decision reflects a “contagion of ideological malleability,”⁴⁰⁴ but he, too, concludes that “maybe it’s not so bad, after all,” because it offers new tools to combat sociopolitical problems and reaffirms “a set of commitments that allows people motivated by contradictory and irreconcilable substantive views to speak a common language.”⁴⁰⁵

Lani Guinier, however, argues that there is particular reason for concern over the message that those traditionally shunted aside in American politics –

165-68 (asserting that he had “not yet seen a decent legal defense of the majority’s decision to preclude Florida authorities from conducting a recount . . .”). Other commentators, including Charles Fried and Robert Pushaw, while conceding that the Supreme Court’s decision on the remedy question is “vulnerable,” contend that it was correct given applicable Florida law pertaining to completion of election recounts, as well as the impracticability of completing a recount in a timely fashion. Fried, *supra* note 393, at 17-18 (remarking on how long it would take for Florida to proceed with a constitutional recount).

⁴⁰⁰ 531 U.S. 98, 144 (per curiam) (Breyer, J., dissenting).

⁴⁰¹ Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219, 1219 (2002).

⁴⁰² *Id.* at 1221-22 (citations omitted).

⁴⁰³ See Chemerinsky, *supra* note 326, at 5 (describing the popular realization that the Court must “make political choices” and characterizing the Court’s legitimacy as robust rather than fragile); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1764 (2001) (suggesting that the decision “seems unlikely to harm the Court’s standing very much, especially if the Justices’ constitutional jurisprudence continues to manifest the uneven political valence that it has in recent years”).

⁴⁰⁴ Louis Michael Seidman, *What’s So Bad About Bush v. Gore? An Essay on Our Unsettled Election*, 47 WAYNE L. REV. 953, 956 (2001) (commenting that, after the Court’s decision, partisanship “infected” politicians, media, and academics).

⁴⁰⁵ *Id.* at 1025.

women, people of color, and individuals in lower economic classes generally – take away from the tumultuous aftermath of the 2000 election.⁴⁰⁶ Guinier points out that voters in these groups were disproportionately affected by the results because they tended to favor Gore, and levels particularly harsh criticism at the Court:

Animated by a passion for political stability, rather than political equality, the justices in the majority deployed the Equal Protection Clause as a formal tool to accomplish a goal that has little to do with noble ideas of political equality and much to do with an elite-centered political orientation. Indeed, the decision limited, rather than broadened, the concept of equality as the Court sought to avoid its greatest fear: the nightmare of too much democracy.⁴⁰⁷

The underlying problems Guinier highlights were exacerbated by the fact that Florida's vote counting machines rejected higher numbers of ballots in predominantly African-American and Latino precincts.⁴⁰⁸ Other commentators who do not go so far as Guinier still accuse the Court of failing to appreciate – or to concern itself with – the impact of its decision on voters outside the mainstream of American political power.⁴⁰⁹ Various sources describe the

⁴⁰⁶ Lani Guinier, *Supreme Democracy: Bush v. Gore Redux*, 34 LOY. U. CHI. L.J. 23, 44 (2002) ("In the 2000 election, most women and people of color voted for the losing candidate, as did a majority of all those who [cast] ballots in the presidential race").

⁴⁰⁷ *Id.* at 23. Guinier suggests that class distinctions – principally those differentiating women and people of color from the mainstream American society – frequently cause women and minorities to become alienated and withdraw from the political process. *Id.* at 25-26. Another author suggests that "[w]ithout a consideration of race . . . the conversation about *Bush v. Gore* remains woefully incomplete." Spencer Overton, *A Place at the Table: Bush v. Gore Through the Lens of Race*, 29 FLA. ST. U. L. REV. 469, 471 (2001) (concluding that the *Bush v. Gore* majority's "limited vision of democracy inadequately protects the political rights of racial minorities and other Americans as well . . ."). For a discussion of the impact of the electoral process on minority voters in "winner take all states," see Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 949-62 (1996) (describing the role of race in the Presidential election, particularly in the southern states).

⁴⁰⁸ See Overton, *supra* note 407, at 470 (observing that twice as many punch card ballots were rejected in African-American precincts as in Latino precincts and that four times as many were rejected in African-American precincts as in white precincts).

⁴⁰⁹ Michael Klarman suggests that "history's verdict on a Supreme Court ruling depends more on whether public opinion ultimately supports the outcome than on the quality of the legal reasoning or the craftsmanship of the Court's opinion." Klarman, *supra* note 403, at 1722. He notes that "[t]he legal reasoning of *Brown v. Board of Education* was widely ridiculed at the time . . . [y]et, over the course of ensuing decades, *Brown* became a cultural icon." *Id.* at 1722-23. Klarman states that "the Court's heroic decision in *Brown* seems, in the public mind, vastly to outweigh ignoble judicial deeds such as *Dred Scott*, *Plessy*, *Korematsu*, and the like." *Id.* at 1757. He also asserts that "the Court's standing and legitimacy are most at risk when it renders unpopular or controversial decisions in bunches,

reaction of minority voters to the Court's decision as particularly "angry, bitter and disenchanted[.]"⁴¹⁰ although voter turnout for the 2004 election may blunt these criticisms somewhat.⁴¹¹

Opinion is divided as to the degree to which *Bush v. Gore* is likely to impact the Court and the nation in the long run.⁴¹² Scholars have long debated the Supreme Court's legitimacy. Some have argued that the Court's legitimacy is fragile and that the Court must vigilantly exercise prudential wisdom to safeguard the independence of the judicial branch and its ability to carry out its constitutional function.⁴¹³ Others observe that the last two hundred years of history demonstrate that the Court as an institution is in robust health and that its institutional power rests on a solid foundation unlikely to be easily shaken and far from fragile.⁴¹⁴ Even so, Justice Stevens' words have the ring of truth:

Time will one day heal the wound . . . that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.⁴¹⁵

rather than individually." *Id.* at 1759. Klarman concludes that, unlike *Brown*, there is no reason for popular attitudes to change regarding *Bush v. Gore*, and that the case is unlikely to undermine the Court's legitimacy to any significant degree in the long run. *Id.* at 1764.

⁴¹⁰ Stephen G. Bragaw & Barbara A. Perry, *The "Brooding Omnipresence" in Bush v. Gore: Anthony Kennedy, The Equality Principle, and Judicial Supremacy*, 13 STAN. L. & POL'Y REV. 19, 19 (2002) (quoting remarks of Bronx Congressman Jose E. Serrano, who was recounting the reactions of his "mostly black and Hispanic constituents").

⁴¹¹ See, e.g., John M. Glionna & James Rainey, *Election 2004 The White House, The Voter: Long Lines and Intense Feelings*, L.A. TIMES, Nov. 3, 2004, at A1.

⁴¹² One legal scholar suggests: "We are raised on judicial review as we are on baseball. When the greatest judicial umpire of them all makes a call – however bad – we submit." Weinberg, *supra* note 386, at 612; see also Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32, 38 (2001) (demonstrating the changes in the public's knowledge and approval of the Court before and after the *Bush v. Gore* decision). Kritzer's statistics showed that the largest change was that more people learned the name of the Chief Justice. The author also observed that Democrats' approval of the Court decreased after *Bush v. Gore*, while Republicans' approval increased – likely a function of whether the candidate they voted for won. *Id.*

⁴¹³ The most famous exposition of this viewpoint is by Alexander Bickel. See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1967).

⁴¹⁴ See, e.g., Chemerinsky, *supra* note 326, at 5 (asserting that "no single decision is likely to make much difference in the public's appraisal of the Court").

⁴¹⁵ *Bush v. Gore*, 531 U.S. 98, 128-29 (per curiam) (Stevens, J., dissenting). Many other lessons could be extrapolated from *Bush v. Gore* and other high-profile judicial decisions to the context of a Supreme Court decision addressing natural born citizenship, particularly in the context of a Presidential election. For example, Mark Klock argues that "permitting a losing candidate to litigate . . . creates a moral hazard problem whereby the losing

In a similar vein, George Anastaplo observes:

The legitimacy of Congress is not properly called into question when it acts 'politically,' however much it may be faulted from time to time for its judgment. But courts are different, or at least they are supposed to be different, partly because they cannot be held accountable in the way that Congress (like the President) may be.⁴¹⁶

Evaluation, or even synthesis, of the scholarly commentary and popular reaction to *Bush v. Gore* is far beyond the scope of this article. The intensity of the tiny sampling of reactions discussed above, however, illustrates that the Supreme Court enters dangerous waters when it takes on questions of Presidential succession. It is difficult to imagine how any question that is likely to determine the nation's Chief Executive could be decided in an apolitical manner. Such decisions are inherently political.⁴¹⁷ Any doubt as to the perils of these seas should be laid to rest by history. While the Court has sometimes succeeded in reigning in overly aggressive actions by the nation's Chief Executive,⁴¹⁸ its members have encountered difficulty in dealing with electoral contests. In 1802, in the aftermath of the hotly contested election of 1800, the Republican Congress suspended the Supreme Court's term for fourteen months due, at least in part, to the Republicans' trepidation that the Federalist judiciary would continue to engage in the same kinds of political machinations that arguably underlay the courts' refusal to hold the Alien and Sedition Acts unconstitutional.⁴¹⁹

candidate's incentive is to maximize political and legal uncertainty, uncertainty that can adversely affect other important aspects of society." Mark Klock, *Is it "The Will of the People" or a Broken Arrow?: Collective Preferences, Out-of-the-Money Options, Bush v. Gore, and Arguments for Quashing Post-Balloting Litigation Absent Specific Allegations of Fraud*, 57 U. MIAMI L. REV. 1, 53-54 (2002).

⁴¹⁶ George Anastaplo, *Bush v. Gore and a Proper Separation of Powers*, 34 LOY. U. CHI. L.J. 131, 146 (2002); see Seidman, *supra* note 298, at 960 (opining with respect to *Bush v. Gore*: "There simply was no neutral, apolitical way in which the case could have been decided"); cf. Howard Gillman, *Judicial Independence Through the Lens of Bush v. Gore*, 64 OHIO ST. L.J. 249, 263 (2003) (suggesting that "[o]f all the judges who were involved in the 2000 election dispute, the ones whose behavior appeared the most partisan, and the least motivated by good faith understandings of the law, were the ones who enjoyed the most extreme insulation from conventional political pressure").

⁴¹⁷ Jeffrey Rosen, *Political Questions and the Hazards of Pragmatism*, in THE QUESTION OF LEGITIMACY, *supra* 393, at 145, 156 (declaring that "[c]learly, Congress is better equipped than the courts" to resolve elections, and that "these are political questions masquerading as legal questions, not fit for the wrangling of lawyers").

⁴¹⁸ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (holding that the President did not have the authority, under the Constitution, to authorize the Secretary of Commerce "to take possession of private property in order to keep labor disputes from stopping production").

⁴¹⁹ See Alien Enemies Act of 1798, ch. 66, 1 Stat. 577. See generally JAMES MORTON SMITH, *FREEDOM'S FETTER: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES*

Years later, as Justice Breyer points out in his *Bush v. Gore* dissent, Justice Bradley's chairmanship of the Electoral Commission appointed by Congress to resolve the Hayes-Tilden contest of 1876, and his role in casting the deciding vote for Hayes, immediately subjected Bradley to "vociferous attacks[,] . . . accus[at]ions of accepting bribes, of being captured by railroad interests, and of an eleventh-hour change in position after a night in which his house 'was surrounded by the carriages of Republican partisans and railroad officials.'"⁴²⁰

While neither accusations nor public perceptions should affect the Court's performance of its constitutional duties, they do give reason to ask whether it is in the nation's best interests to ignore a problem that could easily cast the federal judiciary into the middle of another political maelstrom with extraordinarily far-reaching consequences and no good solution.⁴²¹ Whatever the actual long-term effects of *Bush v. Gore*, the questions it has generated about the legitimacy of the Court and its alleged "antidemocratic" bent, the resulting public controversy, and the arguably disproportionate impact of the decision on people of color are difficulties that could be magnified greatly if the Court were forced to determine the meaning of the natural born citizenship proviso of Article II.

IV. THE PROVISIO AS AN INEQUITABLE AND DANGEROUS ANACHRONISM

A. *The Evanescence of Historical Justifications*

The natural born citizenship requirement no longer serves any purpose in the American constitutional system.⁴²² Any historically legitimate justification for the proviso faded away long ago. As previously discussed, the Framers almost certainly incorporated the requirement into Article II in an effort to prevent a British nobleman or foreign prince from infiltrating the vulnerable infant government.⁴²³ Fortunately, our independence from England is now secure,

35-62 (1956).

⁴²⁰ 531 U.S. 98, 156 (Breyer, J., dissenting) (quoting C. WOODWARD, REUNION AND REACTION 159-60 (1966)); see also Vasan Kesavan, *Is the Electoral Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1688 (2002) (discussing the Hayes-Tilden controversy). For an in-depth discussion of the election of 1876 and the Hayes-Tilde controversy, see William H. Rehnquist, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004).

⁴²¹ See Klock, *supra* note 415, at 54.

⁴²² See *Maximizing Voter Choice*, *supra* note 10 (testimony of Professor Akhil Amar) ("Modern Americans can best honor the Founders' generally egalitarian vision by repealing the specific natural-born rule that has outlived its original purpose."); Medina, *supra* note 43, at 255-256 (asserting that the natural born citizen proviso "creates significant potential crisis points, and it has no rational relationship to the needs of the Presidency"); Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871, 878-88 (2003) (questioning the distinction between naturalized citizens and the immigrant founders).

⁴²³ See *supra* Part I; Remarks of Senator Hatch, *supra* note 10, at S9251.

and the United States has grown from a fledgling former colony into the most powerful nation in the world. Despite the American public's occasional fascination with members of European royal families, there is no longer any reason to fear that foreign princes will seduce the nation's voters and undermine its democratic government. Moreover, the basic structures of the federal government are no longer new, and the extent of each branch's powers, while still uncertain at the margins, has been shaped by more than two centuries of history.⁴²⁴ The major political parties have accepted "certain basic constitutional principles and no longer contest the basic form or powers of the government."⁴²⁵

In any event, it is unclear whether the natural born citizenship requirement ever functioned effectively to safeguard the early republic from foreign influence. For example, James Madison was skeptical that similar requirements for Senators and Representatives would serve any purpose. He argued that a foreign nation could operate just as easily through a natural born citizen.⁴²⁶ Despite Madison's doubts, when the Constitution was drafted the natural born citizenship requirement arguably served a purpose. As noted earlier, in 1787 the prevailing understanding of citizenship undoubtedly was influenced by the English common law doctrine of perpetual allegiance.⁴²⁷ This doctrine held that the relationship between subject and sovereign endured forever; individuals were deemed incapable of transferring allegiance to any other sovereign.⁴²⁸ Birth within the physical dominion of the King created this allegiance as a matter of natural law.⁴²⁹ Man-made laws – such as naturalization statutes – could not destroy this tie, nor could an individual renounce this allegiance.⁴³⁰ English authorities considered those born in the mother country and its colonies – including those colonies in North America – to be British subjects legally incapable of renouncing their allegiance to the English crown. Most other nations followed a similar philosophy in the late eighteenth century.⁴³¹ Thus, limiting presidential eligibility to birthright citizens arguably served some purpose by disqualifying those most likely to be

⁴²⁴ Wasserman, *supra* note 388, at 381.

⁴²⁵ *Id.*

⁴²⁶ Medina, *supra* note 43, at 261 (discussing Madison's remarks "pointing out the ineffectiveness of [a native born requirement for members of Congress] in policing foreign influence" during the Convention debates) (citing A. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 268-69 (1941)).

⁴²⁷ See *supra* text accompanying notes 71-79.

⁴²⁸ Spiro, *supra* note 287, at 1420.

⁴²⁹ *Id.* at 1419 (stating that "individuals were identified . . . by personal allegiances tied to natural law").

⁴³⁰ David A. Wishart, *Allegiance and Citizenship as Concepts in Constitutional Law*, 15 MELB. U. L. REV. 688, 693 (1986) (stating that since naturalization was a man-made law, an alien did not gain natural law allegiance by becoming naturalized).

⁴³¹ Spiro, *supra* note 287, at 1420-1429.

impacted by the doctrine of perpetual allegiance from ascending to the Presidency. The doctrine of perpetual allegiance, however, faded into obscurity during the nineteenth century. Allegiance has become synonymous with individual loyalty based on personal beliefs rather than feudal notions of relationships.⁴³²

B. *The Irrationality and Inequity of Place of Birth as a Surrogate for Loyalty*

Place of birth often has been employed as a proxy for loyalty because there is no way to measure prospectively an individual's allegiance to the United States.⁴³³ The idea of distinguishing between natural born citizens and "non-natural born" citizens is based on the presumption that some citizens are more loyal than others as a result of the means by which they acquired their citizenship. James Madison disputed this proposition in 1787,⁴³⁴ and his conclusion that it is an unreliable measure of loyalty has been confirmed repeatedly. Of course, some naturalized citizens have been disloyal to the United States, but so have many of those who fall within the category of "natural born citizens." American Taliban fighter John Walker Lindh,⁴³⁵ the notorious spy Robert Hanssen,⁴³⁶ Oklahoma City bombers Terry Nichols and Timothy McVeigh,⁴³⁷ and many other native born citizens have worked for foreign powers for pecuniary gain or committed violent acts in the name of innumerable causes. In contrast, few would question the loyalty of Czechoslovakian-born former Secretary of State Madeleine Albright, Polish-born former Chairman of the Joint Chiefs of Staff John Shalikashvili, the hundreds of foreign born citizens who have received the Congressional Medal of Honor,⁴³⁸ or the thousands of naturalized citizens who have served honorably in the Armed Forces of the United States. In Randall Kennedy's words: "This idolatry of mere place of birth seems . . . an instance of rank

⁴³² Levinson, *supra* note 288, at 1445 (stating that American allegiance is based on consent, not descent); Romero, *supra* note 422, at 891 (equating loyalty and allegiance).

⁴³³ Romero, *supra* note 422, at 883-91.

⁴³⁴ See *supra* note 426.

⁴³⁵ See George P. Fletcher, *Ambivalence About Treason*, 82 N.C. L. REV. 1611, 1611-12 (2004) (describing the young American who "fought for the Taliban with full knowledge that it was engaged in hostilities against the United States"); Josh Tyrangiel, *The Taliban Next Door*, TIME, Dec. 17, 2001, at 36 (recounting the story of the capture of "American Taliban" John Walker Lindh).

⁴³⁶ See ELAINE SHANNON & ANN BLACKMAN, *THE SPY NEXT DOOR: THE EXTRAORDINARY SECRET LIFE OF ROBERT PHILIP HANSSSEN, THE MOST DAMAGING F.B.I. AGENT IN U.S. HISTORY 3* (2002) (describing Robert Hanssen as "the quintessential suburban dad" and commenting that "[n]obody would have guessed that . . . [he] had a very secret life").

⁴³⁷ See *United States v. Nichols*, 169 F.3d 1255 (10th Cir. 1999); *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998).

⁴³⁸ See Remarks of Senator Hatch, *supra* note 10, at S9251 (remarking that these foreign born citizens have received "our Nation's highest decoration for valor").

superstition. Place of birth indicates nothing about a person's willed attachment to a country, a polity, a way of life. It only describes an accident of fate over which an individual ha[d] no control."⁴³⁹ Our world is very different from that of the Framers of the Constitution, and the destabilizing forces we fear transcend nation-state borders; individuals whose interests are antithetical to those of the United States cannot be identified by their place of birth.

Depending on how the courts interpret it, the natural born citizenship proviso could lead to egregiously unfair outcomes. For example, under a strict interpretation equating "natural born" to "native born," a child born within the United States to alien representatives of a government the United States has refused to recognize would be eligible to become President, while a child born abroad on a United States military base to two United States citizen parents serving their country would not be eligible to become President.⁴⁴⁰ An infant born in one of the fifty states but raised in a foreign country by non-United States citizens could serve as President, while a foreign born child adopted by United States citizens at two months of age and raised in the United States would not be eligible to become President.

It is unrealistic to believe the Framers intended this result in light of the grandfather clause excepting all those who were citizens at the time of the adoption of the Constitution from the natural born citizenship requirement of Article II.⁴⁴¹ Justice Story asserts that they did this "out of respect to those distinguished revolutionary patriots who were born in a foreign land, and yet had entitled themselves to high honors in their adopted country."⁴⁴² Most of these patriots won these honors through fighting for their country in the Revolutionary War. Since that time, many others have sacrificed as much or more for the United States,⁴⁴³ yet, unlike their eighteenth century counterparts, they are not eligible to seek the Presidency.

Preserving the natural born citizenship proviso is inconsistent with the progressively more democratic nature of the United States government.⁴⁴⁴ As

⁴³⁹ Kennedy, *supra* note 10, at 176.

⁴⁴⁰ See *supra* note 27 and accompanying text; 150 CONG. REC. S1598 (2004) (statement of Sen. James Inhofe regarding Natural Born Citizen Act of 2004) ("[These children] should not be punished for their parents' willingness to serve their country abroad."); see also Lohman, *supra* note 43, at 366-369 (arguing that the foreign born children of parents serving in the United States military should be considered natural born because the government is largely responsible for where military dependents are born by posting the parents to a foreign military base).

⁴⁴¹ See U.S. CONST. art. II, § 1, cl. 5.

⁴⁴² STORY, *supra* note 60, § 1479 (citation omitted); see *supra* text accompanying notes 60-62.

⁴⁴³ See *supra* note 10.

⁴⁴⁴ See *Baker v. Carr*, 369 U.S. 186, 302-20 (1962) (reviewing the history of representation proportioned to population in England and the United States). See generally Wasserman, *supra* note 388 (discussing the operation of structural principles in presidential succession).

one commentator states: "The historical trend has been the shrinking of constitutional space, the encroachment of the People on selection processes, and the enhancement of direct (rather than indirect) democracy in selection."⁴⁴⁵ United States Senators are now directly elected,⁴⁴⁶ and states' Congressional districting plans are subject to constitutional challenges to ensure they proportionately represent the population.⁴⁴⁷ The Supreme Court has repeatedly recognized in dicta that the natural born citizenship requirement of Article II is the only area in which our law distinguishes among citizens based on the method of citizenship acquisition.⁴⁴⁸ This distinction endures only because it is embedded in the Constitution. As Michael Medina points out, this kind of disparate treatment would be unlikely to survive judicial scrutiny if it were embodied in a statute rather than the Constitution itself.⁴⁴⁹

Indeed, in 1989, a United States District Court struck down a Georgia statute permitting only natural born citizens to hold positions as officers or troopers in the state department of public safety.⁴⁵⁰ Retention of the natural born proviso also smacks of racial prejudice in light of the current demographics of United States immigration. The more than twelve million naturalized United States citizens are significantly more likely than native-born Americans to belong to racial or ethnic minority groups.⁴⁵¹ In recent years, nearly eighty percent of immigrants have come from Central and South America, the Caribbean basin, and Asia.⁴⁵² Moreover, given that the Supreme

⁴⁴⁵ Wasserman, *supra* note 388, at 391-92; *see also* Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 691 (2002) [hereinafter *Architexture*] ("[N]o fewer than ten of the seventeen post-1791 amendments have tried to push the system of presidential selection and succession toward increased democracy.").

⁴⁴⁶ U.S. CONST. amend. XVII.

⁴⁴⁷ *See* CHEMERINSKY, *supra* note 104, § 2.8.3 (reviewing Supreme Court decisions finding challenges to election districting to be justiciable).

⁴⁴⁸ *See, e.g.,* Schneider v. Rusk, 377 U.S. 163, 177 (1964); Knauer v. United States, 328 U.S. 654, 658 (1946); Baumgartner v. United States, 322 U.S. 665, 673 (1944); Osburn v. Bank of the United States, 22 U.S. 738, 827 (1944); Luria v. United States, 231 U.S. 9, 22 (1913).

⁴⁴⁹ Medina, *supra* note 43, at 274 n.100; *see also* Faruki v. Rogers, 349 F. Supp. 723, 730 n.15 (D.D.C. 1972) (stating that statutes distinguishing between native-born and naturalized citizens are subject to strict scrutiny).

⁴⁵⁰ The court held the statute unconstitutional because the state of Georgia did not meet its burden of showing a compelling state interest for the statute's distinction between natural born citizens and other citizens in this context. *Fernandez v. Georgia*, 716 F. Supp. 1475, 1479 (M.D. Ga. 1989); *see also* Natsu Taylor Saito, *For "Our" Security: Who Is an "American" and What Is Protected by Enhanced Law Enforcement and Intelligence Powers?*, 2 SEATTLE J. FOR SOC. JUST. 23, 25 n.13 (2003).

⁴⁵¹ *See* Romero, *supra* note 422, at 886 (arguing that because most naturalized citizens today are from Asia and Latin America, the natural born citizenship clause disproportionately excludes these minority groups from eligibility for the Presidency).

⁴⁵² *See* Schmidley, *supra* note 29, at 2 (stating that, of foreign born Americans, 52.2%

Court has never overruled *Elk v. Wilkins*, the proviso also arguably operates to exclude the more than two million United States citizens of solely Native American ancestry. Excluding naturalized citizens therefore disproportionately precludes racial and ethnic minorities from seeking the Presidency, regardless of their qualifications.⁴⁵³ Even for individuals who have no desire ever to serve as President, disqualification from the office of President perpetuates their marginalization in American society: "[E]ligibility for office alone promotes democratic values separate and apart from actual service in office. For one way to assess whether an individual is a full and equal member of a community is to ask whether the individual is eligible to serve in the highest office in that community."⁴⁵⁴

Finally, the natural born citizenship proviso deprives voters of the right to choose a President on the basis of credentials, demonstrated ability, and overall qualification for the position. As discussed below, the perception that American voters require protection from their own ignorance is an artifact from a time when travel conditions and primitive communication made it difficult for a much less literate public to learn about candidates for national office. Today, however, these barriers are nonexistent. As one commentator notes, "[e]xpanding the categories of natural-born citizens [would] make[] the eligible candidates more representative of the voting population, thereby increasing the rights of voters to select their representatives as well as the

were born in Latin America and 25.5% were born in Asia).

⁴⁵³ See Romero, *supra* note 422, at 886.

⁴⁵⁴ *Unnatural Born Citizens*, *supra* note 14, at 576. Similarly, Robert Post states:

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

Post, *supra* note 10, at 193. But see *Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary on H.R.J. Res. 88*, 106th Cong. 20 (2000) (statement of Balint Vazsonyi, Director, Center for the American Founding) (opposing the eligibility of naturalized citizens to the Presidency), available at http://commdocs.house.gov/committees/judiciary/hju67306.000/hju67306_0.htm (last visited Nov. 7, 2004). Mr. Vazsonyi testified:

[A]fter 41 years of making the most strenuous efforts of becoming an American, not just legally but in every sense of the word, and having spent 40 of those 41 years living with a native-born American, that I still have not been able to even approach the temperament, the natural tolerance, the unfailing goodwill toward the world that Americans are famous for.

Foreigners come here and have to learn it. It is a miracle that within one generation they can do so

. . . .

. . . [H]aving grown up in Hungary, I would find it very difficult to make decisions – not so much affecting Hungarians, but those toward whom Hungarians hold an animus.

Id.

rights of individuals to vie for the office of President.”⁴⁵⁵ In the words of Alexander Hamilton, “the people should choose whom they please to govern them.”⁴⁵⁶

C. *The Effectiveness of Contemporary Presidential Campaigns as a Screen for Loyalty*

The communications revolution, the consequent explosion of publicly available information, the increased regulation of election campaigns, and the expansion of the electorate combine to make the modern campaign serve as a reliable screen for presidential candidates’ loyalty. The intense public scrutiny of a national presidential campaign waged during today’s digital age should insure that presidential candidates will be called upon to answer for any hint of past instances of disloyalty or suspicious activities. Compared to American voters of the eighteenth and nineteenth centuries, today’s citizens have far greater access to comprehensive information about presidential candidates, allowing them to make more informed choices.⁴⁵⁷ As Christopher Eisgruber notes:

Voters . . . might reasonably predict that foreign-born politicians will sometimes be partial to the country or region where they were born. I do not think we would have any reason to condemn a voter who made predictions of that sort when deciding whether to support a foreign-born candidate.

But these predictions seem too doubtful to support an absolute, constitutionally inscribed prohibition upon the election of foreign-born Presidents.⁴⁵⁸

Modern systems of communication – rapid and efficient postal service, radio, television and the Internet – allow voters in even the most remote rural sections of the country to make educated and well-informed decisions about presidential candidates. The nature of the Internet, with its weblogs, chatrooms, and the ability to e-mail large numbers of people unconstrained by

⁴⁵⁵ Pryor, *supra* note 42, at 898.

⁴⁵⁶ 2 ELLIOTT, *supra* note 56, at 257, quoted in *Powell v. McCormack*, 395 U.S. 486, 541 (1969); see also *Constitutional Amendment to Allow Foreign-Born Citizens to be President: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 106th Cong. 10 (2000) (remarks of Barney Frank, Member, House Comm. on the Judiciary) (“I do not favor putting obstacles on the ability of the people to choose who they wish under those rules. I think the American public is perfectly capable of making those decisions, and for both those reasons I think [H.R.J. Res. 88] is a good idea.”).

⁴⁵⁷ *Architexture*, *supra* note 445, at 688 (“Some Philadelphia Framers objected to direct presidential election because they believed that ordinary Americans across a vast continent would lack sufficient information to choose intelligently among leading presidential candidates.”). As early as 1803, however, national presidential parties and national platforms began educating voters about candidates. *Id.*

⁴⁵⁸ Eisgruber, *supra* note 128, at 94.

printing and postage costs, allows "ordinary citizens" to publish and widely disseminate information and engage in dialogue with one another.⁴⁵⁹ Newspaper owners and the wealthy no longer hold a monopoly over the publication of information.⁴⁶⁰ Voters are now exposed to many more divergent viewpoints representing different sectors of society. In addition to possessing increased access to information, today's voters are more literate and have more formal education, which enables them to make better judgments about candidates. As the Supreme Court stated in its 1982 decision in *Anderson v. Celebrezze*,⁴⁶¹ – before the Internet and cable television revolutionized communications – in the Framers' view, "[e]lection by the people was . . . disfavored, in part because of concern over the ignorance of the populace as to who would be qualified for the job."⁴⁶² In the Framers' experience:

[I]t took days and often weeks for even the most rudimentary information about important events to be transmitted from one part of the country to another in 1787, [while] today even trivial details about national candidates are instantaneously communicated nationwide in both verbal and visual form. Second, although literacy was far from universal in 18th-century America, today the vast majority of the electorate not only is literate but also is informed on a day-to-day basis about events and issues that affect election choices and about the ever-changing popularity of individual candidates.⁴⁶³

The campaigning process is now highly regulated,⁴⁶⁴ and the unforeseen emergence of strong political parties, together with the interconnection of

⁴⁵⁹ See Richard Morris, *Direct Democracy and the Internet*, 34 LOY. L.A. L. REV. 1033, 1042 (2001).

⁴⁶⁰ See *id.* at 1044. Although newspapers and, more recently, radio and television stations have to a large extent ceased functioning as local operations and are instead controlled by corporate conglomerates, see, e.g., Ben Scott, *The Politics and Policy of Media Ownership*, 53 AM. U. L. REV. 645, 645 (2004) (discussing the Federal Communication Commission's 2003 revision of broadcast ownership rules to permit cross-media ownership in the same market, and increased media concentration in local and national television markets), the Internet affords access to an incredible variety of news sources around the world.

⁴⁶¹ 460 U.S. 780 (1983).

⁴⁶² *Id.* at 796 n.21 (quoting *Anderson v. Celebrezze*, 664 F.2d 554, 563-64 (6th Cir. 1981)).

⁴⁶³ *Id.* at 796-97 (footnotes omitted); see also GEORGE L. HASKINS & HERBERT A. JOHNSON, *THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES VOL. II* 16-28 (1981) (discussing the way of life in each region of the United States in the early 1800s).

⁴⁶⁴ See Federal Election Campaign Act of 1972, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. § 431-55 (2000)), amended by Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 26 U.S.C. § 9031-42 (2000)). Congress established the Federal Election Commission (FEC) in 1975 to oversee federal election campaigns.

national and local candidates' platforms, also assists in the broad dissemination of information.⁴⁶⁵ The resulting lack of privacy in the current digital age makes it extremely difficult for a presidential candidate to avoid disclosure of suspicious activities, whether or not explicitly required by election laws. Personal information, business transactions, and other activities are computerized and documented to a much greater extent than in the past, making it much less likely that an individual could clandestinely perform disloyal acts. Any evidence of a candidate's suspected disloyalty is much more likely to become widespread public knowledge than in the past.⁴⁶⁶ There is nothing unique about non-natural born candidates that would prevent this mechanism from functioning to scrutinize their loyalty. In fact, it is worth noting that federal law restricts alien ownership of communications media,⁴⁶⁷ as well as electoral campaign contributions by aliens.⁴⁶⁸

Finally, the expansion of the electorate allows more citizens a voice in choosing their elected officials, enhancing the legitimacy of the electoral process and maximizing the amount of scrutiny to which Presidential candidates are subjected. A greater percentage of the population is currently eligible to vote than at any time in the nation's history.⁴⁶⁹ Constitutional amendments have progressively expanded to include more and more previously excluded citizens – African-Americans and other minorities, women, citizens without property, and younger citizens.⁴⁷⁰ Consequently, the

⁴⁶⁵ Wasserman, *supra* note 388, at 349, 370-73 & n.16 (describing the early development of political parties and supporting the role of parties in providing the public with information); see also *Architexture*, *supra* note 445, at 688 (explaining that by the time of the Twelfth Amendment, the national parties linked presidential candidates to local candidates, and national platforms allowed voters to understand what candidates stood for).

⁴⁶⁶ As the Supreme Court noted in *Celebrezze*, its decisions reflect its "faith in the ability of individual voters to inform themselves about campaign issues," 460 U.S. at 797, particularly in the context of the intense publicity of a Presidential election. *Id.* at 798 (explaining that the above reasoning applies with greater force to a Presidential election because of its intense publicity).

⁴⁶⁷ 47 U.S.C. § 310(b)(1) (2000).

⁴⁶⁸ 2 U.S.C. § 441(e) (2000).

⁴⁶⁹ More than seventy-five percent of the population is eligible to register to vote. Wasserman, *supra* note 388, at 393 (citing Abner J. Mikva, *Doubling Our Claims to Democracy*, 39 ARIZ. L. REV. 793, 798 (1997)).

⁴⁷⁰ U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); U.S. CONST. amend. XIX, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."). States also voluntarily eliminated property ownership requirements. See Wasserman, *supra* note 388, at 393 (citing Mikva, *supra* note 469, at 797).

electorate more comprehensively represents the whole of the American population. Suffrage is now firmly connected to citizenship status, and resident aliens – often permitted to vote in colonial times and the early years of the new republic – are no longer eligible to vote in presidential elections.⁴⁷¹ The remote possibility that a high concentration of disloyal foreigners would succeed in electing a candidate sympathetic to their interests is virtually non-existent. In the aftermath of the events of September 11, 2001, a foreign born candidate would undoubtedly undergo penetrating public scrutiny.⁴⁷² As the publicity surrounding a recent remake of an old movie suggests, the real danger of a “Manchurian Candidate” is more likely to come from allegiance purchased by hard cash than political loyalty to a country left behind.⁴⁷³ There is therefore no need to use natural born citizenship as a proxy for loyalty.

D. *The Vulnerability Created by the Proviso's Ambiguity*

There is little question that the current uncertainty about the meaning of natural born citizenship in Article II of the Constitution places the United States in a vulnerable position for several reasons. First, in the electoral context, the ambiguity of the proviso invites a dispute over the qualifications of potential Presidential and Vice Presidential candidates. It is serendipitous that such a dispute has not occurred before now, and unrealistic to believe that it will never occur. When it does – assuming successful resolution of relevant questions of justiciability – the matter will almost surely come before the

⁴⁷¹ Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1393-94 (1993) (summarizing the history of resident aliens' voting rights in the United States).

⁴⁷² See Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race, Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 20 (2002) (linking foreignness to perceived disloyalty to the United States, in peacetime and even more in times of international conflict). See generally Romero, *supra* note 422, at 883-84 & n.41 (interpreting the differentiation between “natural born” and “naturalized” citizens in the Constitution as indicating that “natural born citizens were more presumptively loyal than naturalized ones”); Raskin, *supra* note 471, at 1397 (“Until . . . the xenophobic nationalism attending World War I, alien suffrage figured importantly in America’s nation-building process”). For example, recent presidential candidate John Kerry received criticism for seeming “too Continental,” and was advised to downplay his fluency in French and international connections. Joshua Kurlantzick, *The Campaign Trail Pardon?*, NEW YORKER, April 19 & 26, 2004, at 66 (describing Republican criticism of Kerry’s international connections, particularly his comfort with French language and culture, and Kerry’s subsequent efforts to change his image).

⁴⁷³ See generally Louis Menand, *Brainwashed: Where the “Manchurian Candidate” Came From*, NEW YORKER, Sept. 15, 2003, at 88, available at http://www.newyorker.com/critics/atlarge/?030915crat_atlarge (last visited Nov. 7, 2004) (discussing the anti-Communist paranoia surrounding the original movie); THE MANCHURIAN CANDIDATE (United Artists 1962) (based on Richard Condon’s 1959 novel by the same name).

Supreme Court. As in *Bush v. Gore*,⁴⁷⁴ however the Court rules – even if it does not reach the merits – the justices will face allegations of political partisanship. If a challenge arises only after the election of a candidate, the resulting dispute could be even more disruptive. If a majority of justices were to conclude that the proviso rendered a President-elect ineligible to assume office, the Court would be in an extraordinarily difficult position. A decision disqualifying the choice of the electorate surely would bring to the fore oft-raised questions about the antidemocratic nature of judicial decisions with more force and putative validity than in almost any instance to date, including the 2000 election.

A similar challenge to the qualifications of an incumbent President would raise different but equally problematic concerns. Although it is far less likely that such a dispute would arise, it is unclear how a challenge to a sitting President's eligibility would be resolved. A national crisis caused by a terrorist attack, disease pandemic, or natural disaster poses the gravest risks. As long as the federal succession statute requires a would be acting President to meet the constitutional eligibility requirements of Article II, ambiguity will continue to infect even the provisions Congress has made to deal with a double vacancy. A dispute over the natural born citizenship credentials of an official in the line of succession could wreak havoc at a time of extraordinary national vulnerability.

V. PROPOSALS FOR ACCOMPLISHING THE TASK AT HAND

During the more than two hundred years since the drafting of the Constitution, members of Congress have launched many efforts to clarify, modify, or eliminate the natural born citizen proviso. The Immigration Act of 1790 was arguably Congress' first attempt to clarify the term natural born citizen.⁴⁷⁵ A resolution introduced in 1868 was among the first of many efforts to amend the Constitution to eliminate the proviso.⁴⁷⁶ Over the years, many legislators have attempted to address the ambiguities and inequities inherent in the clause. The following discussion briefly reviews these proposals and offers suggestions for a constitutional amendment designed to address the problems posed by the natural born citizenship proviso.

A. *Congressional Initiatives to Date*

1. Proposed Clarifying Statutes

Congress' use of the term "natural born citizen" in the Naturalization Act of

⁴⁷⁴ 531 U.S. 98 (2000) (per curiam).

⁴⁷⁵ See *supra* Part I.B.1.

⁴⁷⁶ H.R.J. Res. 269, 40th Cong. (1868) (proposing a Constitutional Amendment making any citizen eligible for the presidency who satisfies the age and residency requirements).

1790⁴⁷⁷ to include foreign born children of United States citizen parents arguably supports at least one of two propositions: (1) the Framers intended Congress to have the authority to define natural born citizenship; or (2) the law merely declared rights its drafters already deemed to exist.⁴⁷⁸ In any event, as discussed above, the term "natural born citizen" inexplicably disappeared from the 1795 Act and subsequent naturalization statutes.⁴⁷⁹

Members of several later Congresses followed the lead of the First Congress in attempting to clarify natural born citizenship.⁴⁸⁰ Senators Nickles, Landrieu, and Inhofe introduced one of the most recent proposals for a clarifying statute early in 2004.⁴⁸¹ The goal of the proposed *Natural Born Citizens Act* is to make both biological children and foreign born children adopted by United States citizen parents eligible to the Presidency regardless of their place of birth.⁴⁸² The bill incorporates the Fourteenth Amendment's definition of citizenship and adds additional categories of citizens as "natural born." Section 2(a) of the bill provides:

Congress finds and declares that the term 'natural born Citizen' in Article II, Section 1, Clause 5 of the Constitution of the United States means –

- (1) any person born in the United States and subject to the jurisdiction thereof; and
- (2) any person born outside the United States –
 - (A) who derives citizenship at birth from a United States citizen parent or parents pursuant to an Act of Congress; or
 - (B) who is adopted by 18 years of age by a United States citizen

⁴⁷⁷ See Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795). The Act's definition of natural born citizens to include foreign born children of United States citizen parents was never challenged as an unconstitutional exercise of Congressional authority. Some commentators have suggested that the temporal proximity of this early Congress to the drafting of the constitution, as well as the presence of several convention delegates among its members, may indicate that the Framers were not opposed to legislating on the meaning of the term "natural born." See *Substantive Issues in the First Congress*, *supra* note 99, at 777 (describing the First Congress as a continuation of the Constitutional Convention and naming several of the most conspicuous overlapping members); Gordon, *supra* note 8, at 8 n.57 (noting that twenty members of the First Congress had been Constitutional Convention delegates, and that eight members had served on the committee that drafted the natural born proviso); Pryor, *supra* note 42, at 894-95 (suggesting that because the Congress that passed the Act was nearly contemporaneous with the Constitutional Convention, the Act reflects the Convention's original understanding that Congress had the power to define natural born citizen); see also discussion *supra* Part I.B.

⁴⁷⁸ See *supra* note 103-106 and accompanying text.

⁴⁷⁹ See *supra* Part I.B.

⁴⁸⁰ See *infra* Part V.A.2.

⁴⁸¹ See Natural Born Citizen Act, S. 2128, 108th Cong. § 2(a) (2004).

⁴⁸² See *id.* at § 2(a)(2)(A)-(B).

parent or parents who are otherwise eligible to transmit citizenship to a biological child pursuant to an Act of Congress.⁴⁸³

The proposed *Natural Born Citizens Act* also defines the "geographic sense" of the United States to mean "the several States of the United States and the District of Columbia."⁴⁸⁴

The *Natural Born Citizens Act* would make children born abroad to United States citizen parents, as well as children born in other countries who are subsequently adopted by a United States citizen, eligible for the Presidency. Despite its broad sweep and egalitarian goals, however, the legislation, as drafted, could create additional ambiguities and potentially irrational outcomes. For example, if a foreign born couple with a foreign born infant daughter were to become naturalized United States citizens, their infant would acquire United States citizenship through derivative naturalization. As a living biological child, however, she would not qualify as "natural born" pursuant to the Act. In contrast, if, following their naturalization, the same couple subsequently adopted a foreign born teenager who had never lived in the United States, this adopted child would be considered a "natural born" citizen. At the age of thirty-five, only the adopted child would be eligible for the Presidency, and no one naturalized after age eighteen could serve as President or Vice President. While a teenager adopted at age seventeen would be deemed "natural born," a nineteen year old immigrant would be perpetually barred from seeking the Presidency. Moreover, the status of both Native Americans⁴⁸⁵ and those born in United States territories would remain unclear.

Assuming these issues could be addressed, statutes such as that proposed by Senators Nickles, Landrieu, and Inhofe would still be subject to constitutional challenge. Any attempt to encompass persons naturalized *after* birth within the meaning of "natural born Citizen," is necessarily suspect. Even if the term "*natural born Citizen*" is not limited to *native* born citizens, the plain language of the proviso appears to require at least that prospective Presidents acquire citizenship *at* birth. Citizenship at birth is acquired through the circumstances of one's birth – i.e., by virtue of birthplace or parentage. It is difficult to see how foreign born adoptees, even newborns, could be considered natural born, because adoption laws generally do not permit prenatal adoptions, thereby precluding these children from being *born* United States citizens.⁴⁸⁶

⁴⁸³ *Id.* § (2)(a).

⁴⁸⁴ *Id.* § (2)(b).

⁴⁸⁵ The Supreme Court long ago held that Native Americans are not Fourteenth Amendment citizens because they are not "subject to the jurisdiction" of the United States. *Elk v. Wilkins*, 112 U.S. 94, 109 (1884); see *supra* Part I.B.2 & Part II.A.2.b. Nor are they born *outside* the United States. Consequently, Native Americans arguably do not fit within either of the classifications set forth in S. 2128.

⁴⁸⁶ Only two states – Alabama and Hawaii – permit a birth mother to consent to adoption prior to the child's birth. Even in these two states, the mother's consent is provisional. It may be withdrawn, and must be reaffirmed if the adoption is to proceed, following the

More importantly, the value of any statute purporting to clarify the meaning of "natural born Citizen" is questionable at best.⁴⁸⁷ First, it is unclear whether Congress has constitutional authority to define natural born citizenship for purposes of Article II.⁴⁸⁸ Second, even if Congress does possess the authority to legislate in this regard, a statute would not prevent a crisis from occurring. The constitutionality of any statute may be contested, and the very existence of a legal action would be disruptive, even if the courts ultimately held the case nonjusticiable. Consequently, even with enactment of legislation such as that envisioned by the proposed *Natural Born Citizens Act*, the Supreme Court could be placed in the position of deciding whether the statute would pass constitutional muster. Although the Court might be less likely to become embroiled in a controversy over the meaning of natural born citizenship if Congress had already spoken to the issue, significant risks would still remain.

Finally, any decision to define "natural born Citizen," rather than eliminate the distinction entirely, would necessarily discriminate against some United States citizens with respect to eligibility for the Presidency. Even if a statute could conceivably stretch to include adopted children, it is almost inconceivable that it could extend to other persons naturalized after birth without grave risk of constitutional infirmity. While there is wide room for legitimate debate over the meaning of the proviso, it is hard to believe that any judicial forum could in good faith interpret "natural born citizenship" to include any person retroactively declared "natural born" by Congress without regard to where she was born or the nationality of her parents.

A clarifying statute will not resolve the fundamental inequity inherent in perpetually excluding millions of citizens from eligibility to serve as President of the United States. Nor will it, in the absence of a definitive Supreme Court ruling upholding its constitutionality, eliminate the risk of dangerous ambiguity. To the contrary, a "clarifying" statute could add an additional layer of uncertainty that might exacerbate problems created by a disputed election or aggravate a crisis situation.⁴⁸⁹

child's birth. See ALA. CODE § 26-10A-13 (2004) (allowing consent to be withdrawn within five days of the child's birth, or if consistent with the child's best interests, up to fourteen days after birth); HAW. REV. STAT. § 571-61 (2003) (providing that, while an adoption petition may be entered at any time after the sixth month of pregnancy, no judgment may be entered until after the child's birth and a reaffirmation of consent has been filed).

⁴⁸⁷ Gordon, *supra* note 8, at 27 (arguing that the value of a clarifying statute passed by Congress seems "dubious" and "would [only] express the opinion of the present Congress . . . and would not be binding on the other two branches of our Government").

⁴⁸⁸ Pryor, *supra* note 42, at 883 n.9 (citing Freedman, *supra* note 16, at 364; Gordon, *supra* note 8, at 9; Means, *supra* note 43, at 29) (noting that several others have raised, but not answered, the issue of whether Congress can define the categories of persons who are "natural born" citizens); see *supra* notes 107-124 and accompanying text.

⁴⁸⁹ A court would first have to determine whether Congress had constitutional authority to legislate at all on the issue of Presidential qualifications, and, if so, interpret the substance of the statute. A statute could also be changed much more easily than a constitutional

2. Resolutions to Initiate a Constitutional Amendment

For well over a century, members of Congress have introduced bills proposing amendment of the natural born citizenship proviso. In contrast to clarifying statutes, a well-drafted amendment could resolve all the ambiguities and inequities inherent in the proviso. The resolutions proposed to date would do so in varying degrees. These initiatives generally fall into three categories: (1) Elimination of the natural born citizenship requirement entirely; (2) exemption of certain groups of citizens from the natural born citizenship requirement; and (3) elimination of the natural born citizenship criterion coupled with the addition of other criteria, such as minimum length of citizenship.

Congressman Robinson introduced an example of the first category as House Resolution 269 in 1868 for the purpose of “[p]roposing an amendment to the Constitution of the United States . . . so as to read: No person, except a citizen of the United States, 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.”⁴⁹⁰

Congressman Robinson’s proposal represents one of the broadest, most sweeping approaches possible to reform the natural born citizenship proviso. It would have made natural born and naturalized citizens equal in all respects, eliminating the last vestiges of distinction among citizens. It would have left intact the age and residency requirements of the Presidential qualifications clause, requirements that would then be applicable to all citizens seeking to meet the constitutional criteria for the offices of President or Vice President. These requirements would also apply to current eligibility requirements under the federal succession statute.⁴⁹¹

Later proposals for constitutional amendment of the natural born citizenship proviso have been less sweeping in scope and tend to fall into either the second or third categories. The most frequent initiatives to exempt particular groups from the reach of the proviso have been designed to ensure that children born abroad to members of the United States armed forces on active duty

amendment, and a later Congress could alter its statutory definition of “natural-born” to exclude or include potential candidates.

⁴⁹⁰ H.R.J. Res. 269, 40th Cong. (1868). Congressman Morgan also introduced a similar proposal a few years later to provide for the eligibility of naturalized citizens to the office of President. *See* H.R.J. Res. 52, 42d Cong. (1871) (“Naturalized citizens of the United States shall be eligible to the offices of President and Vice President. Any provision in the Constitution inconsistent herewith is hereby declared void and of no effect.”); *see also* S.J. Res. 161, 92d Cong. (1971) (“Notwithstanding the provision of clause 4 [sic] of section 1 of article II of the Constitution, a person who is a naturalized citizen of the United States shall be eligible to hold the office of President if he is otherwise eligible under such clause to hold such office.”).

⁴⁹¹ 3 U.S.C. § 19(e) (2000) (only persons constitutionally eligible to serve as President are eligible to act as President); *see supra* Part I.B.4.c.

assignment – e.g., Senior White House Adviser Karen Hughes⁴⁹² – are considered “natural born Citizens.” An example appears in House Joint Resolution 205 introduced by Congressman Fogarty on February 2, 1959:

SECTION 1. No person, except a person born in the United States and subject to the jurisdiction thereof, or a person born outside the United States of parents both of whom are citizens of the United States and one of whom is in the military service of the United States under orders to serve outside the United States, shall be eligible to the Office of President⁴⁹³

A few of these proposals have gone beyond military personnel to include other government employees. Later in 1959, on September 3, Congressman Fogarty introduced House Joint Resolution 517.⁴⁹⁴ The language of this resolution was substantially identical to House Joint Resolution 205, except for the deletion of the word “military.”⁴⁹⁵ The proponents of House Joint Resolution 517 presumably intended this change to broaden the application of the amendment to exempt the children of non-diplomats employed by the United States government who, like military personnel, are assigned to duty stations outside the United States.⁴⁹⁶

The third group of initiatives to amend the Constitution includes proposals to eliminate the distinction between “natural born” citizens and other Americans but add length-of-citizenship requirements. In August 1967, when it was clear that Governor Romney was in the running for the Republican Presidential nomination, then-Senator Gerald Ford offered House Joint Resolution 795, providing that “[n]o person except a natural born citizen of the United States, or a naturalized citizen of the United States for at least fifteen years, shall be eligible to the office of President.”⁴⁹⁷ In subsequent years, other members of Congress introduced similar provisions containing length-of-citizenship requirements ranging from eleven to thirty-five years.⁴⁹⁸

The most recent examples of initiatives for constitutional amendments of this type are House Joint Resolution 59 introduced by Congressman Snyder, on behalf of himself and co-sponsors Congressmen Issa and Frank, on June 11,

⁴⁹² See *supra* text accompanying note 27.

⁴⁹³ H.R.J. Res. 205, 86th Cong. (1959); see also, e.g., H.R.J. Res. 645, 84th Cong. (1956); H.R.J. Res. 80, 85th Cong. (1957); H.R.J. Res. 612, 85th Cong. (1958); H.R.J. Res. 214, 86th Cong. (1959).

⁴⁹⁴ H.R.J. Res. 517, 86th Cong. (1959).

⁴⁹⁵ *Id.*

⁴⁹⁶ See *id.*

⁴⁹⁷ H.R.J. Res. 795, 90th Cong. (1967).

⁴⁹⁸ See, e.g., S.J. Res. 72, 98th Cong. (1983) (eleven years); H.R.J. Res. 229, 100th Cong. (1987) (eleven years); H.R.J. Res. 450, 101st Cong. (1989) (eleven years); H.R.J. Res. 88, 106th Cong. (2000) (twenty years); H.R.J. Res. 47, 107th Cong. (2001) (twenty years); H.R.J. Res. 59, 108th Cong. (2003) (thirty-five years).

2003,⁴⁹⁹ and Senate Joint Resolution 15, introduced by Senator Hatch on July 10, 2003,⁵⁰⁰ along with its House counterpart, House Joint Resolution 104, introduced by Congressman Rohrabacher on September 15, 2004.⁵⁰¹ House Joint Resolution 59 provides: "A person who has been a citizen of the United States for at least 35 years and who has been a resident within the United States for at least 14 years shall be eligible to hold the office of President or Vice President."⁵⁰² Senate Joint Resolution 15, called the "Equal Opportunity to Govern" Amendment, and its House counterpart, House Joint Resolution 104 – with only incidental variation – reads: "A person who is a citizen of the United States, who has been for 20 years a citizen of the United States, and who is otherwise eligible to the Office of President, is not ineligible to that Office by reason of not being a native born citizen of the United States."⁵⁰³

These proposals have merit, but they are not necessarily sufficient to accomplish the task at hand. First, requiring an individual to be a citizen for a minimum of thirty-five, or even twenty, years is unnecessarily restrictive with respect to naturalized citizens. Additional years of citizenship no more effectively screen for loyalty than the natural born proviso itself.⁵⁰⁴ Any such requirement would discriminate against both persons who naturalized as adults and against some of those who naturalized before the age of majority.⁵⁰⁵ The Framers of the Constitution calculated fourteen years of residency as sufficient; a longer period would have excluded several of those who shaped the document itself.⁵⁰⁶ There is no reason why a fourteen-year residency period, coupled with an identical citizenship requirement, would be insufficient today.

Second, while each of these examples of the third category of resolutions

⁴⁹⁹ H.R.J. Res. 59, 108th Cong. (2003).

⁵⁰⁰ S.J. Res. 15, 108th Cong. (2003).

⁵⁰¹ H.R.J. Res. 104, 108th Cong. (2004).

⁵⁰² H.R.J. Res. 59, 108th Cong. (2003).

⁵⁰³ S.J. Res. 15, 108th Cong. (2003); H.R.J. Res. 104, 108th Cong. (2004). The Hatch Bill refers to native, not natural born, citizens. Otherwise, the text is identical to that of a proposed amendment introduced in 2001 by Congressmen Frank and Hoekstra. See H.R.J. Res. 47, 107th Cong. (2001).

⁵⁰⁴ For example, naturalization statutes recognize maximum periods of time of only five and ten years after naturalization for considering certain acts as reflecting adversely on original eligibility for naturalization: (1) Refusing within the ten years following naturalization to testify regarding subversive activities; or, (2) joining within five years following naturalization an organization in which membership would have barred naturalization. Immigration and Naturalization Act § 340, 8 U.S.C. § 1451 (2000); see GORDON ET AL., *supra* note 166, § 96.10(7).

⁵⁰⁵ A thirty-five year length-of-citizenship requirement arguably has a basis in the Constitution's Presidential age threshold, but would raise that age for anyone naturalized after birth. Even a twenty-year length-of-citizenship requirement would additionally burden those who naturalized after the age of fifteen.

⁵⁰⁶ See *supra* Part I and note 55.

eliminates the natural born citizen requirement, Senate Joint Resolution 15 gives rise to the possibility of generating further confusion by employing the term "*native born*" rather than "*natural born*." Consequently, given the construction of the proposed amendment, if "*natural born*" and "*native born*" are synonymous categories, then naturalized citizens would indeed be eligible. However, if "*natural born*" is a category of birthright citizenship broader than "*native born*," naturalized citizens might continue to be excluded.

One of the most far-reaching amendments proposed as a means of eliminating the distinction among citizens is House Joint Resolution 67, introduced on September 3, 2003 by Congressman Conyers: "A person who has been a citizen of the United States for at least 20 years shall be eligible to hold the Office of President."⁵⁰⁷ This proposed amendment makes no mention of the age and residency requirements. Although the introductory phrase explains that its laudable purpose is "to permit persons who are not natural-born citizens of the United States, but who have been citizens of the United States for at least 20 years, to be eligible to hold the Office of President,"⁵⁰⁸ the absence of any specific reference to the age and residency requirements could create confusion about the continued validity of these additional requirements set forth in Article II.

Despite many efforts to initiate the process of amending the Constitution, as well as attempts to clarify the meaning of "natural born Citizen" by statute, the language of the proviso remains exactly as it was in 1787. Today, however, the inherent inequities of the proviso, as well as the potential political turmoil and dangers its ambiguity may one day create, are only too apparent.

B. *Suggestions for a Constitutional Amendment*

Ideally, amendment of the natural born citizenship proviso should be included in the comprehensive succession planning currently on the agenda of many Congressional committees, as well as that of the Continuity of Government Commission.⁵⁰⁹ Amendment of the proviso, however, is a discrete task that can and should be undertaken separately if overall restructuring of succession plans turns into a long-term effort. The benefits of undertaking this task include abolition of the remnants of the "natural aristocracy" and its concomitant overtones of racial and ethnic discrimination, avoidance of the very real possibility of serious disputes involving future Presidential elections, and elimination of a source of confusion over eligibility to serve as Acting President that could impede the nation's ability to respond quickly and effectively to a devastating terrorist attack, or the ravages of a global pandemic or other natural disaster.⁵¹⁰

Assuming these outcomes are appropriate and realistic, it is possible to

⁵⁰⁷ H.R.J. Res. 67, 108th Cong. (2003).

⁵⁰⁸ *Id.*

⁵⁰⁹ See *supra* note 21.

⁵¹⁰ See *supra* Part IV.

identify several objectives for a proposed amendment to the natural born citizenship proviso. First, an amendment should eliminate any distinction or quality of citizenship based on circumstances of birth. Second, an appropriate change in the Presidential qualifications criteria need not disturb the criteria set by the Framers that have worked reasonably well since 1787 – i.e., the age and residency requirements set forth in Article II, Section 1, Clause 5.⁵¹¹

A third objective is less obvious, but a good idea nevertheless. In light of the realities of twenty-first century life, the Constitution should require a multinational President-elect to renounce any and all claims to foreign citizenship prior to taking the oath of office.⁵¹² While there is little reason to assume that a person who has amassed the credentials necessary to seek the Presidency is likely to feel allegiance to any other nation-state, providing for formal renunciation of potential bases for allegiance to another country would remove any appearance of disloyalty that could tarnish the office.

Accordingly, an appropriate amendment to the Presidential qualifications clause of Article II might read as follows:

Any citizen of the United States who has attained to the age of thirty five years and who has been fourteen years a resident within the United States shall be eligible to the Office of the President, provided that any person elected to the office of President who is also a citizen of any other country shall renounce any such citizenship under oath or by affirmation prior to taking the oath of the office of President.

This proposed language addresses three critical issues. First, it permits any and all United States citizens to serve as President of the United States, thereby eliminating any possibility for confusion with respect to a Presidential election or invocation of the procedures set forth in a federal succession statute. Second, it leaves intact the age and residency qualifications that have been relatively uncontroversial for more than two centuries. Finally, it takes into account the reality that many people now hold claims to dual citizenship or even multiple nationalities, but mandates that any specter of conflicting allegiance should be exorcised before a President, Vice President, or Acting President takes office.

C. *Interim Measures*

The process of amending the Constitution is often a lengthy one – the Twenty-seventh Amendment was adopted more than two hundred years after it

⁵¹¹ See U.S. CONST. art. II, § 1, cl. 5. To maximize clarity, however, Congress could make the residency requirement more specific. Although examination of the issues that could arise with respect to the residency criterion are beyond the scope of this discussion, if a Constitutional amendment is initiated, Congress should strive to eliminate any ambiguity pertaining to Presidential succession.

⁵¹² See *supra* Part II.C; see also *Maximizing Voter Choice*, *supra* note 10 (statement of Matthew Spalding).

was first proposed.⁵¹³ Recent Congresses have generally provided self-executing, seven-year sunset provisions in the resolutions proposing constitutional amendments,⁵¹⁴ but even an amendment on the fast track is likely to take several years to become part of the Constitution. Preparations for Presidential elections begin long before the actual events, and the threat of a national crisis is all too immediate. Congress should take interim measures to decrease the impact of the uncertainty created by the natural born citizenship proviso over the eligibility of Congressional leaders and cabinet members to assume the office of Acting President.

Congress can accomplish this objective by amending the current succession statute to eliminate the language that restricts the office of Acting President to persons constitutionally qualified to serve as President.⁵¹⁵ While Congress might choose to limit eligibility for the office of Acting President to citizens who are at least thirty-five years old and have been residents of the United States for a specified period of time, these conditions should be explicitly set forth in the succession statute. While it makes sense to incorporate the Constitution's age and residency criteria,⁵¹⁶ it is inappropriate to import

⁵¹³ See VILE, *supra* note 239, at 538. Congress proposed the Twenty-seventh amendment in 1787, but it was not ratified until 1992. *Id.*

⁵¹⁴ See, e.g., H.R.J. Res. 89, 108th Cong. (2004) (proposing a constitutional amendment to provide for the appointment of individuals to fulfill vacancies in the House of Representatives.); S.J. Res. 15, 108th Cong. (2003) (proposing a constitutional amendment to make those who have been citizens for twenty years eligible for the presidency); H.R.J. Res. 77, 108th Cong. (2003) (proposing a Constitutional amendment regarding the appointment of individuals to fill vacancies in the House of Representatives); H.R.J. Res. 42, 108th Cong. (2003) (proposing an amendment to deny United States citizenship to individuals born in the United States to parents who are neither United States citizens nor persons who owe permanent allegiance to the United States).

⁵¹⁵ 3 U.S.C. § 19(e) (2000). James Ho has eloquently stated reasons why the succession statute should be amended in this fashion. See *Unnatural Born Citizens*, *supra* note 14, at 584-85. Congress might do so in the context of addressing the concerns raised by Akhil and Vikram Amar, and others concerning the constitutionality of including the Speaker of the House and President Pro Tempore of the Senate in the line of presidential succession. See *Is Succession Law Constitutional?*, *supra* note 21, at 114.

⁵¹⁶ If Congress wishes to restrict eligibility to the office of Acting President on the basis of the quality of an individual's citizenship, it should do so with great care. Although the Constitution does not require cabinet members to be United States citizens, it is extremely unlikely that a President would choose, or the Senate confirm, anyone other than a United States citizen as a member of the Cabinet. Even so, out of an abundance of caution, Congress would be wise to mandate that an Acting President must be a United States citizen. Unless and until the meaning of the term "natural born Citizen" is definitively resolved by the Supreme Court or by a constitutional amendment, however, Congress should eliminate *natural born* citizenship as a prerequisite for service as Acting President. Otherwise, the federal succession statute simply multiplies the odds that the constitutional ambiguity will cause serious problems if the nation ever finds itself facing the nightmare of the loss of key leaders.

ambiguity into the law designed to provide for swift and sure transition of executive power in what – if it ever comes to pass – would surely be one of the nation's darkest hours.

CONCLUSION

If the natural born citizenship proviso ever served a legitimate purpose, it has long since outlived its usefulness. The most serious threats to our country are no longer conniving European monarchs capable of enthralling illiterate voters, but bitter political disputes, terrorist attacks, and diseases that quickly circumnavigate the globe. The uncertainty the proviso creates with respect to Presidential qualifications elevates the chances of another major electoral dispute in the near future and increases the vulnerability of the nation in the event of a crisis. Perhaps most importantly, in twenty-first century America, the natural born citizenship clause serves to divide us rather than to protect us. In a nation of immigrants, its inherent inequity flies in the face of the spirit of equality at the heart of our constitutional system. The distinctions it creates disserve Americans who work and live abroad while they do important jobs, it debases those who have freely chosen this land as their home, and it dishonors the sacrifices of thousands of members of the United States military and civil services. In short, the proviso ties the hope of a nation not to a mature decision that our Constitution and our beliefs are worthy of loyalty, but to an accident of birth. It is time to eliminate it.