The Natural Born Citizen Clause as Originally Understood

Mary Brigid McManamon
Widener University School of Law

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INTRODUCTION

In the summer of 2013, I put together a series of lectures for non-lawyer senior citizens on things every American should know about our Constitution.[1] The topics were drawn from the then-current headlines, such as the Fourteenth Amendment and marriage equality[2] and the Fifteenth Amendment and the Voting Rights Act.[3] The case law and scholarship on these subjects were familiar to me, as I teach them in my introductory course on the Constitution for law students. But, because I thought it would be interesting for my lay students, I added a topic I do not normally cover at the law school: the Natural Born Citizen Clause of Article II.[4] The class was old enough to remember Mexican-born George Romney's run for the presidency in 1968; Canal-Zone-born John McCain's run in 2008 was recent history; and at that time, Canadian-born Ted Cruz was hinting at a run in 2016.

[+]Professor of Law, Widener University School of Law, Delaware Campus. B.A., Yale (History); J.D., Cornell. I am eternally grateful for the research assistance of Widener University School of Law librarians Mary Alice Peeling, Janet Lindenmuth, and Enza Klotzbucher.

[1]In July 2013, I taught a four-week summer session at the University of Delaware's Osher Lifelong Learning Institute.

[2]U.S. v. Windsor, 133 S. Ct. 2675 (2013) (addressing marriage equality in context of federal Defense of Marriage Act), and Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (addressing marriage equality in context of California's Proposition 8), were less than a month old in July 2013.

[3]Shelby County v. Holder, 133 S. Ct. 2612 (2013) (addressing constitutionality of Voting Rights Act), was less than a month old in July 2013.

[4]"No Person except a natural born Citizen . . . shall be eligible to the Office of the President . . . ." U.S. CONST. art. II, § 1, cl. 5. The clause also provides that persons who were naturalized before the Constitution's adoption were eligible. Of course, everyone of that description is long gone.

To prepare for the lecture, I started my research with historical sources. When I began to study the modern scholarship on the clause, however, I was appalled. There was virtually no attempt to wrestle with the text of the Constitution, and the historical analyses were negligent at best. And *these* comments were from authors purporting to explain the meaning of the clause in the context of the time in which it was written. One author was refreshingly honest; he declared:

> The "natural born citizen" requirement manifests a distrust of the foreign-born that, in a nation of immigrants, can only be derided as repugnant. I both "reject" it and I "denounce" it! It's still part of the Constitution, however, and therefore we need to try to figure out what it means. My frankly normative move would be to limit the damage by limiting the scope of "foreign-born." There's no plausible way to read the provision to permit [Austrian-born former California governor Arnold] Schwarzenegger and other naturalized citizens to become President. There is a ready (if not 100% clearly the original) way to read it to permit Americans born abroad to U.S. parents to become citizens.[5]

That approach, unfortunately, is a bit too cavalier for me. Even though I believe our foundational document has evolved over time, I am of the opinion that in answering questions about its meaning, we should at least start with its text and history. In this Article, therefore, I explain how the clause would have been understood in the early days of the Republic. I shall leave to others the

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[5]Originalism Versus Straight Talk, Feb. 29, 2008, Dorf on Law blog, http://www.dorfonlaw.org/2008_02_01_archive.html. The author's idea was as follows: "The best reading–although not necessarily the original understanding–would be to say that anybody who was a citizen at birth (whether because born in the U.S. or because born to U.S. parents overseas), should qualify as 'natural born.'" Alexander Hamilton Was Eligible to be President, Feb. 28, 2008, Dorf on Law blog, http://www.dorfonlaw.org/2008_02_01_archive.html.

question whether this sense should be considered to have developed to meet the changed sensibilities of modern Americans.

There are several issues about the meaning of "natural born Citizen" that may be raised by a candidate. For example, does someone born in the United States of alien parents qualify? Or should children born in the incorporated territories of the United States–such as Kansas and Arizona formerly were[6]–be treated the same as those born in unincorporated territories of the United States–such as the Phillippines and the Canal Zone once were[7]? This Article, however, is not a comprehensive treatment of all the questions presented by the clause. It addresses only the issue that Governor Romney and Senator Cruz present: In the eyes of early Americans, would someone born in a foreign country of American parents be a "natural born Citizen" and therefore eligible to be President of the United States?

Because the phrase "natural born" was derived from the common law, this Article begins with an examination of pertinent English sources, which would have been known to the Framers of our Constitution. The Article then proceeds to show how the phrase was understood by early Americans, starting with the drafting of the Constitution,[8] including ratification of the Fourteenth Amendment,[9] and ending with a major pronouncement by the Supreme Court on the cusp of the

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[6]Incorporated territories were an integral part of the United States, although not yet states. None remain today, the last two being the Alaska Territory and the Hawaii Territory.

[7]Unincorporated territories are possessions overseas. The United States did not have any such territories until the mid-nineteenth century, with many being obtained as a result of the Spanish-American War. The United States retains five inhabited unincorporated territories: American Samoa, Guam, Northern Marianas, Puerto Rico, and United States Virgin Islands.

[8]The Constitution was drafted in 1787.

[9]The Fourteenth Amendment was ratified in 1868.

twentieth century.[10] This discussion includes the import of the earliest naturalization statutes. Finally, the Article reveals the weaknesses of modern commentary on the original meaning of the Natural Born Citizen Clause.

I. Meaning of the Phrase in England

The United States Constitution contains many phrases from the common law: e.g., ex post facto law, writ of habeas corpus, bill of attainder, natural born citizen. Unlike modern statutes, however, the Constitution does not contain a section entitled "Definitions." Faced with this silence, the Supreme Court has repeatedly declared that our paramount law "must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution."[11] So, it is to the common law that we must turn to determine the meaning of "natural born Citizen."

A. Significance of "Natural Born" at Common Law

On our question, the common law was absolute:

> The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England, that is, within the ligeance, or as it is generally called, the

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[10]United States v. Wong Kim Ark, 169 U.S. 649 (1898).

[11]*Id*. at 654; *accord, e.g.*, Smith v. Alabama, 124 U.S. 465, 478 (1888); Moore v. United States, 91 U.S. 270, 274 (1875); Minor v. Happersett, 88 U.S. 162, 167 (1874); Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 Md. L. Rev. 1, 5-6 (1968); *see, e.g.*, Carmel v. Texas, 529 U.S. 513, 521 (2000) (looking to English common law to define "ex post facto laws").

allegiance of the king; and aliens, such as are born out of it.[12]

There was a nuance to this rule, however. Although birth within English *territory* was generally a good indicator of whether a child was within the *ligeance* of the crown, the two concepts were not co-extensive. To be exact, an alien was not one born "*out of the realm*, but *out of the allegiance*; for he may be born out of the realms of England, yet within the allegiance."[13] There were two corollaries based on this distinction. First, "the children of the king's [a]mbassadors born abroad were always held to be natural subjects . . . ."[14] Second, children born to members of a hostile occupying force were considered born in the allegiance of the sovereign to whom the force belonged.[15] Likewise, children born in English territory while the monarch "was out of actual possession thereof" were not "subjects to the King of England."[16] This approach is referred to as *jus soli*, or the right of the soil.[17]

The common law notion of allegiance was derived from "the fe[u]dal system" of "our Gothic

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[12]1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 354 (1st ed. 1765); *accord, e.g.*, 1 JOHN COMYNS, DIGEST OF THE LAWS OF ENGLAND 421-22 (Stewart Kyd ed., 4th ed. 1793).

[13]EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND OR, A COMMENTARY UPON LITTLETON, NOT THE NAME OF A LAWYER ONLY, BUT OF THE LAW ITSELF 129a (1628) [hereinafter COKE ON LITTLETON] (spelling modernized); *accord, e.g.*, COMYNS, *supra* note 12.

[14]1 BLACKSTONE, *supra* note 12, at 361; *accord, e.g.*, Calvin's Case, 77 Eng. Rep. 377, 399 (C.P. 1608); ALEXANDER COCKBURN, NATIONALITY: OR THE LAW RELATING TO SUBJECTS AND ALIENS, CONSIDERED WITH A VIEW TO FUTURE LEGISLATION 7 (1869).

[15]Calvin's Case, 77 Eng. Rep. 377, 399 (C.P. 1608); COCKBURN, *supra* note 14.

[16]Calvin's Case, 77 Eng. Rep. 377, 399 (C.P. 1608); *accord, e.g.*, COMYNS, *supra* note 12, at 421.

[17]A different approach, called *jus sanguinis*, or right of the blood, determines a child's citizenship by the citizenship of his or her parents. Many European countries follow this approach. It was not until the eighteenth century, however, that England adopted a limited version of *jus sanguinis*. *See infra* text accompanying notes 55-64.

ancestors": "Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject."[18] Sir William Blackstone explained the importance of this governing principle thus: "For, immediately upon their birth, they are under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude; which cannot be forfeited . . . ."[19]

In the vast majority of cases, of course, someone born outside of English territory was an alien. Consequently, English sources routinely described aliens as those born "beyond the seas" or "in foreign parts."[20] This Article, therefore, follows that practice, unless one of the corollaries is applicable.

Aliens could become naturalized, but that required a private act of Parliament[21]: "The first Act conferring these rights on an individual is said to have been passed in 1437."[22] However,

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[18] 1 BLACKSTONE, *supra* note 12, at 354.

[19] *Id*. at 357 (footnote omitted).

[20] *E.g.*, HUGUENOT SOCIETY OF LONDON, LETTERS OF DENIZATION AND ACTS OF NATURALIZATION FOR ALIENS IN ENGLAND AND IRELAND, 1603-1700, at 54 (William A. Shaw ed., 1911) [hereinafter 17TH CENTURY NATURALIZATIONS].

[21] 1 BLACKSTONE, *supra* note 12, at 362; COCKBURN, *supra* note 14, at 28.

In addition, there was another category of people, called "denizens." They were aliens who had been given letters patent by the king, affording them certain rights of English citizenship. 1 BLACKSTONE, *supra* note 12, at 362; COKE ON LITTLETON, *supra* note 13. According to one source, "On the whole, foreigners opted for denization because it was cheaper[, even though it was] not retrospective and it did not allow one to hold public office." https://familysearch.org/learn/wiki/en/Aliens_and_Immigrants_in_England_and_Wales#Denization_and_Naturalization. For a more detailed explanation of the differences between naturalization and denization, including tax rates, see 17TH CENTURY NATURALIZATIONS, *supra* note 20, at iii-viii. The denizen did not survive the American Revolution and is not treated in the text of this Article.

[22] https://familysearch.org/learn/wiki/en/Aliens_and_Immigrants_in_England_and_Wales#Denization_and_Naturalization.

"naturalization under . . . a private bill could cost £50 or £60,"[23] "which limited naturalization to the wealthy."[24] To put this amount in perspective,

> [d]uring the eighteenth century wages could be as low as two or three pounds per year for a domestic servant, plus food, lodging and clothing. . . . Because [independent artisans] had to provide their own food, lodging and clothing, [they] needed to earn substantially more than this. . . . [A] figure closer to £40 [per year] was needed to keep a family.[25]

Despite the expense, "[c]hildren of Englishmen born abroad usually opted for naturalization."[26] For example, in 1553, Gersone and Barnabas Hylles, sons of Richard and Agnes, both English, were naturalized.[27] Likewise, in 1576, Joseph Caunte, son of Edward and Margaret, both English, was naturalized.[28] Again, in 1610, Margaret Clarke, daughter of John and Elizabeth Langton, both English, was naturalized.[29] Moreover, in 1660, Constant, Nathaniell, Joshua, and Giles

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[23]ROBIN D. GWINN, HUGUENOT HERITAGE: THE HISTORY AND CONTRIBUTION OF THE HUGUENOTS IN BRITAIN 153 (rev. 2d ed. 2001).

[24]https://familysearch.org/learn/wiki/en/United_Kingdom_Naturalization_and_Citizenship; *accord, e.g.*, GWINN, *supra* note 23.

[25]www.oldbaileyonline.org/static/Coinage.jsp.

[26]That is, as opposed to denization, *see supra* note 21. https://familysearch.org/learn/wiki/en/Aliens_and_Immigrants_in_England_and_Wales#Denization_and_Naturalization; *accord, e.g.*, HUGUENOT SOCIETY OF LONDON, LETTERS OF DENIZATION AND ACTS OF NATURALIZATION FOR ALIENS IN ENGLAND, 1509-1603, at i (William Page ed., 1893) [hereinafter 16TH CENTURY NATURALIZATIONS].

[27]16TH CENTURY NATURALIZATIONS, *supra* n. 26, at124; Appendix, Part I, *infra* p. 46.

[28]16TH CENTURY NATURALIZATIONS, *supra* n. 26, at 44; Appendix, Part I, *infra* p. 47.

[29]17TH CENTURY NATURALIZATIONS, *supra* n. 20, at 15; Appendix, Part II, *infra* p. 51.

Sylvester, children of Giles and Mary, both English, were naturalized.[30] Additionally, in 1701, Archibald Arthur, son of English parents, was naturalized.[31]

An important distinction between natural born subjects and aliens was that the latter were unable to inherit real estate.[32] This disability caused hardship to merchants who were natural born subjects: they traveled the world bringing goods and money back to England, but they could not pass their full estate to any of their children born beyond the seas. Therefore, to encourage foreign commerce, Parliament passed a statute in 1350

> that all children [which from henceforth shall be] born abroad, provided *both* their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England: and accordingly it hath been so adjudged in behalf of merchants.[33]

This statute was prospective only[34] and did not change the fundamental rule of the common

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[30] 17TH CENTURY NATURALIZATIONS, *supra* n. 20, at 79; Appendix, Part II, *infra* p. 52.

[31] HUGUENOT SOCIETY OF LONDON, LETTERS OF DENIZATION AND ACTS OF NATURALIZATION FOR ALIENS IN ENGLAND AND IRELAND, 1701-1800, at 1 (William A. Shaw ed., 1923); Appendix, Part III, *infra* p. 53. These are only a few of the children born abroad to English subjects who became naturalized. Many more are listed in the Appendix to this Article, *infra* at pp. 46-54.

[32] COCKBURN, *supra* note 14, at 143; COKE ON LITTLETON, *supra* note 13, at 8a; *see*, *e.g.*, Calvin's Case, 77 Eng. Rep. 377, 399 (C.P. 1608) ("an alien born is not capable of inheritance within England").

[33] 1 BLACKSTONE, *supra* note 12, at 361 (footnote omitted). The act referred to is A Statute for Those Who Are Born in Parts Beyond Sea, 25 Edw. 3, stat. 1 (1350). *See also* 42 Edw. 3, ch. 10 (1368) (confirming that children born in the king's lands and seignories "beyond the Sea" may inherit); *cf.* An Act To Enable His Majesty's Natural Born Subjects To Inherit the Estate of Their Ancestors Either Lineal or Collateral Notwithstanding Their Father or Mother Were Aliens, 11 Will. 3, ch. 6 (1699) (spelling modernized) (allowing natural born subjects to inherit from alien ancestors).

[34] It has been suggested that the 1350 statute was declaratory of the common law; that is, alien children of natural born subjects could inherit under the common law. *E.g.*, Bacon v. Bacon, 79 Eng.

law: children born overseas were aliens.[35] This principle always remained the default rule. Thus, when, a mere three decades after the 1350 statute, Parliament enacted a law requiring most people to obtain a special license from the king before being allowed to leave England,[36] the new statute was interpreted against the backdrop of the common law. If English subjects went "beyond sea without licence, or tarr[ied] there after the time limited by the licence, and ha[d] issue, . . . the issue [wa]s

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Rep. 1117, 1118 (K.B. 1640); *contra*, *e.g.*, *id*. (Berkley, J., insisting that inheritance was allowed because of the statute). "But all suggestions to that effect seem to have been derived, immediately or ultimately, from one or the other of . . . two sources . . . ." United States v. Wong Kim Ark, 169 U.S. 649, 669 (1898). The first source is dicta by Sir William Hussey, Chief Justice of the King's Bench, noting that children born abroad to English subjects inherited by the common law, but the 1350 statute makes it clear, "*mes le Statut fait cler*." Y.B. 1 Rich. 3, 4a, Mich. 7 (K.B. 1483) (Hussey, C.J.), *reprinted by Seldon Society in* 11 YEAR BOOKS 4 (photo. reprint 2007). But as Sir Alexander Cockburn, Chief Justice of the Queen's Bench and first Lord Chief Justice of England, declared, "this view is hardly consistent with its language, which . . . refers only to children which 'from henceforth shall be born;' and . . . if the statute had only been declaratory of the Common law, the subsequent legislation on this subject would have been wholly unnecessary." COCKBURN, *supra* note 14, at 9. The second source is "a note added to the edition of 1688 of Dyer's Reports, . . . which has been shown, by a search of the roll in the King's Bench so referred to, to be a mistake, . . . as the child there in question did not appear to have been born beyond sea." *Wong Kim Ark*, 169 U.S. at 669-70.

[35]"The common law . . . stood absolutely so; with only a very few exceptions: so that a particular act of parliament became necessary after the restoration, for the naturalization of children of his majesty's English subjects, born in foreign countries during the late troubles." 1 BLACKSTONE, *supra* note 12, at 361 (footnote omitted). The statute referred to was enacted in 1677 and is discussed *infra* at text accompanying notes 47-52. The only "exception[ ]" mentioned by Blackstone is the corollary concerning children of ambassadors, discussed in text accompanying note 14 *supra*.

[36]5 Rich. 2, stat. 1, ch. 2 (1381). The following were exempted from the requirement: "the Lords and other Great Men of the Realm, and true and notable Merchants, and the King's soldiers." *Id*. This statute was repealed after more than two centuries by An Act for the Utter Abolition of All Memory of Hostility and the Dependances Thereof Between England and Scotland, and for the Repressing of Occasions of Discord and Disorders in Time to Come, 4 Jac., ch. 1, § 4 (1606) (spelling modernized).

an alien, and not inheritable."[37]

The 1350 statute, moreover, referred only to "children *inheritors*"[38]; they were not thereby made subjects. Given the feudal roots of the "natural born subject" concept,[39] it would have made no sense to declare that a child born in the ligeance of another sovereign was also born within the ligeance of the English monarch. In the words of Blackstone, "every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once."[40]

Moreover, the inability to inherit English property was not the only handicap facing aliens. The 1350 statute left other disabilities intact. For example, aliens were not allowed to purchase real estate[41] or, if they managed to find someone to sell them property, enforce such a contract in court.[42] Moreover, customs and taxes were higher for aliens than for subjects: "[A]liens' customs were

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[37]Hyde v. Hill, 78 Eng. Rep. 270, 270 (K.B. 1582). The report notes that it is "contrary to the opinion of Hussey, 1 Rich. 3. pl. 4." For a discussion of "the opinion of Hussey" and its weaknesses, see *supra* note 34.

[38]COCKBURN, *supra* note 14, at 9. In Doe v. Jones, 100 Eng. Rep. 1031, 1035 (K.B. 1791) (Kenyon, C.J.), however, Lord Kenyon, Lord Chief Justice, noted in dicta, "I cannot conceive that the Legislature in passing that Act meant to stop short in conferring the right of inheritance merely on such children, but that they intended to confer on them all the rights of natural-born subjects." The position of Sir Alexander Cockburn, Chief Justice of the Queen's Bench and first Lord Chief Justice of England, is much more sensible than Lord Kenyon's, however. If the latter's opinion is correct, why would any of the subsequent naturalization acts, discussed in the text accompanying notes 47-61 *infra*, be necessary? *Accord, e.g.*, 1 BLACKSTONE, *supra* note 12, at 361 (pointing out need for subsequent naturalization statutes). And more importantly, why would foreign born children of natural born subjects ever become naturalized at great expense, *see supra* text accompanying notes 23-31; *infra* text accompanying note 45; Appendix, if they had already been naturalized by this act?

[39]*See supra* text accompanying notes 18-19.

[40]1 BLACKSTONE, *supra* note 12, at 361.

[41]*Id.* at 360; COCKBURN, *supra* note 14, at 139.

[42]COKE ON LITTLETON, *supra* note 13, at 129b (stating an alien "cannot maintain either real or mixt actions").

double the native customs."[43] In addition, aliens could not be members of Parliament or the Privy Council.[44] To cure these disabilities, therefore, in the centuries after 1350 well over two hundred children born abroad to English parents were naturalized, many of them the issue of an English mother *and* father.[45] It was more than three hundred fifty years before Parliament passed an act–in 1708–lifting the requirement of naturalization for children born abroad to parents who were natural born English subjects.[46]

*B. Relaxation of the "*Jus Soli*" Requirement*

Before turning to the game-changing acts of the eighteenth century, two seventeenth-century statutes need to be addressed. From 1641 to 1660–the years of the English Civil War and Interregnum–thousands of English subjects, unhappy with the political order, fled their homeland. "[T]o express a due sense of the merit of all such Loyal persons as out of their duty and fidelity to his Majesty and his Father of Blessed Memory did forgo or were driven from their Native Country," Parliament passed an act in 1677 "for the Naturalizing of Children of his Majesty's English Subjects

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[43] 17TH CENTURY NATURALIZATIONS, *supra* note 20, at v. One of the differences between being naturalized by Parliament and being made a denizen by the king, *see supra* note 21, was that the king could require that the denizen still pay alien taxes. 17TH CENTURY NATURALIZATIONS, *supra* note 20, at v-vi.

[44] 1 BLACKSTONE, *supra* note 12, at 362. In fact, in 1700, Parliament provided that the only naturalized subjects who were "capable to be of the Privy Council or a Member of either House of Parliament or to enjoy any Office or Place of Trust either Civil or Military or to have any Grant of Lands Tenements or Hereditaments from the Crown" were "such as [were] born of English Parents." An Act for the Further Limitation of the Crown and Hence Securing the Rights and Liberties of the Subject, 12 & 13 Will. 3, ch. 2 (1700) (spelling modernized) (footnote omitted).

[45] For a partial list of such naturalizations, see the Appendix *infra* at pp. 46-54.

[46] *See infra* text accompanying notes 55-64.

born in Foreign Countries during the late Troubles."[47]

The naturalization provided in the act was neither blanket nor automatic. First, it only applied to children of natural born subjects born abroad between June 14, 1641, and March 24, 1660.[48] Second, to gain the benefit of the statute, within seven years of its enactment, the child had to go through the usual naturalization process: "receive the [Protestant] Sacrament of the Lord's Supper and within one month next after such receiving the Sacrament take the Oaths of Allegiance and Supremacy in some of his Majesty's Courts at Westminster."[49] By the oath of allegiance, the alien promised fidelity to the king[50]; by the oath of supremacy, the alien renounced "the pope's pretended authority."[51] In other words, only Protestants could become naturalized under this statute.[52]

The eligible children thus still had to undergo the process of naturalization. The advantage

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[47]29 Car. 2, ch. 6 (1677) (spelling modernized).

[48]*Id*.

[49]*Id.* (spelling modernized); *cf*. An Act That All Such as Are To Be Naturalized or Restored in Blood Shall First Receive the Sacrament of the Lord's Supper and the Oath of Allegiance and the Oath of Supremacy, 7 Jac., ch. 2 (1609) (spelling modernized) (setting out requirements for naturalization).

[50]1 BLACKSTONE, *supra* note 12, at 356 (new subject promised "that he will be faithful and bear *true* allegiance to the king") (internal quotation marks omitted).

[51]*Id*.

[52]*Cf*. An Act That All Such as Are To Be Naturalized or Restored in Blood Shall First Receive the Sacrament of the Lord's Supper and the Oath of Allegiance and the Oath of Supremacy, 7 Jac., ch. 2 (1609) (providing that naturalization is "not fit to be bestowed upon any others than such as are of the Religion now established in this Realm") (spelling modernized). Therefore, another process called denization, *see supra* note 21, "was used by Catholics and Jews as they did not have to take the oaths of allegiance and supremacy required by naturalization." https://familysearch.org/learn/wiki/en/Aliens_and_Immigrants_in_England_and_Wales#Denization_and_Naturalization. Of course, they did not acquire as many rights as naturalized subjects. *See* 17TH CENTURY NATURALIZATIONS, *supra* note 20, at iii-viii (discussing possible limitation of rights for denizens).

provided by the statute, however, was that they were spared the expense of a private bill in Parliament.

A similar statute was passed at the end of the century. The act provided that children born abroad to natural born subjects who were in the service of the king during the Nine Years' War with France were "taken to all Intents & Purposes to be and to have been the King's natural born Subjects."[53] This statute applied only to those born abroad between February 13, 1688, and March 25, 1698. Additionally, to get the benefit of the statute, the child, within five years of attaining age fourteen, had to "receiv[e] the Sacrament and tak[e] the Oaths."[54] Again, the advantage gained by the statute was relief from the expense of a private bill in Parliament.

In the eighteenth century, Parliament, for the first time, relaxed the *jus soli* on behalf of foreign born children of natural born parents. In 1708, Parliament passed "An Act for naturalizing Foreign Protestants."[55] Pursuant to the new law, any foreign-born Protestant could avoid the expense of a private bill in Parliament by receiving the sacrament "in some Protestant or reformed Congregation" and taking "the Oaths."[56] In addition, however, the law declared that "the children of all natural-born subjects born out of the ligeance of her majesty, her heirs and successors, shall be deemed, adjudged and taken to be natural-born subjects of this kingdom, to all intents,

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[53]An Act To Naturalize the Children of Such Officers and Soldiers & Others[–]the Natural Born Subjects of this Realm[–]Who Have Been Born Abroad During the War[–]the Parents of Such Children Having Been in the Service of this Government, 9 Will. 3, ch. 20 (1698) (spelling modernized).

[54]*Id*.

[55]An Act for Naturalizing Foreign Protestants, 7 Anne, ch. 5 (1708).

[56]*Id*.

constructions and purposes whatsoever."[57]

The part of this act providing for easy naturalization for aliens not born of English parents was quickly repealed.[58] In 1731, Parliament clarified that the repeal had not changed the provision concerning children "born out of such ligeance, *whose fathers were or shall be natural-born subjects of the crown of England . . . at the time of the birth*."[59] Then, in 1773, Parliament confirmed the 1731 law as to foreign born children of natural born fathers and extended the opportunity for easy naturalization to foreign born children whose paternal grandfathers were natural born subjects.[60] In order for the grandchild to become an English subject, he or she had to move to England, take the required oaths, and "receive the sacrament of the Lord's supper, according to the usage of the Church of England, or in some Protestant or Reformed congregation."[61]

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[57]*Id*.

[58]An Act To Repeal the Act of the Seventh Year of Her Majesty's Reign, [E]ntit[ ]led, *An Act for Naturalizing Foreign Protestants* (Except What Relates to the Children of Her Majesty's Natural-born Subjects Born out of Her Majesty's Allegiance), 10 Anne, ch. 5 (1711).

[59]An Act To Explain an Act Made in the Seventh Year of the Reign of Her Late Majesty Queen Anne, *for Naturalizing Foreign Protestants*, Which Relates to Children of the Natural-born Subjects of the Crown of England, or of Great Britain, 4 Geo. 2, ch. 21 (1731). The key to naturalization was the child's father. Having a natural born mother but an alien father did not help the child. *E.g*., Doe v. Jones, 100 Eng. Rep. 1031, 1036 (K.B. 1791) (Kenyon, C.J.); 1 BLACKSTONE, *supra* note 12, at 361.

[60]An Act To Extend the Provisions of an Act, Made in the Fourth Year of the Reign of His Late Majesty King George the Second, Entitled, *An Act To Explain a Clause in an Act Made in the Seventh Year of the Reign of Her Late Majesty Queen Anne, for Naturalizing Foreign Protestants, Which Relates to the Children of the Natural-born Subjects of the Crown of England, or of Great Britain*, to the Children of Such Children, 13 Geo. 3, ch. 21 (1773) (spelling modernized).

[61]*Id*. The Acts of Union, passed in 1706 and 1707, united the Kingdoms of England and Scotland into the Kingdom of Great Britain. Both the 1731 and the 1773 naturalization statutes applied to children "born out of the ligeance of the crown of England, or of Great Britain." For simplicity's sake, however, I have chosen to continue referring only to the Kingdom of England.

These last three acts were "revolutionary" and "novel," "enunciat[ing] a new principle in English naturalization law."[62] The new statutes, by declaring persons born in the ligeance of another sovereign to be also English subjects, were "absolutely opposed to all mediæval conceptions of allegiance."[63] Moreover, they "brought into existence a new class of international status–persons of double nationality."[64]

II. UNDERSTANDING IN THE EARLY UNITED STATES

A. The "Natural Born" Concept Is Added to the Constitution

We know almost nothing about why the Natural Born Citizen Clause was added to the Constitution as there is no recorded debate on the subject. We do know that the first draft to include qualifications for the presidency was reported on August 22, 1787, and provided that "he shall be of the age of thirty five years, and a Citizen of the United States, and shall have been an Inhabitant thereof for Twenty one years."[65] Meanwhile, on July 25 of that year, John Jay sent the following note to George Washington,[66] who was serving as the president of the Constitutional Convention:

> Permit me to hint, whether it would not be wise & seasonable to provide a

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[62] 17TH CENTURY NATURALIZATIONS, *supra* note 20, at xi.

[63] *Id*. at xii; *see supra* text accompanying notes 18-19 (explaining feudal origins of the concept).

[64] 17TH CENTURY NATURALIZATIONS, *supra* note 20, at xii.

[65] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 367 (Max Farrand, ed. 1911) [hereinafter FARRAND].

[66] One historian suggested that Jay "may have written to others." CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY 137 (1969 republication by De Capo Press; this book was originally published as Series XL, No. 4 of the Johns Hopkins University Studies in Historical and Political Science, 1922 [or possibly 1923]). (I don't know how to cite this book. I used the 1969 reprint, but its title isn't exactly the same as the original. It's not like the ordinary photo reprint.)

> . . . strong check to the admission of Foreigners into the administration of our national Government; and to declare expres[s]ly that the Command in chief of the [A]merican army shall not be given to, nor devolve on, any but a natural *born* Citizen.[67]

Washington acknowledged receipt of Jay's missive on September 2, thanking him "for the hints contained in your letter."[68] Then, on September 4, a Committee of Eleven[69] reported the following provision to the Convention:

> No Person except a natural born Citizen, or a Citizen of the U.S. at the time of the adoption of this Constitution shall be eligible to the office of President: nor shall any Person be elected to that office, who shall be under the age of 35 years, and who has not been in the whole, at least 14 years a resident within the U.S.[70]

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[67]U.S. DEP'T OF STATE, 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 237 (1905) [hereinafter DOCUMENTARY HISTORY]. One scholar has noted that Jay

> was a well-known figure who had been President of the Continental Congress. Moreover, he would become an author, along with Alexander Hamilton and James Madison, of some of the famous *Federalist Papers* . . . and, after the Constitution had been ratified, he would be appointed as the first Chief Justice of the [United States by George Washington]. It seems reasonable to suppose, therefore, that his letter carried some weight.

John Yinger, *The Origins and Interpretation of the Presidential Eligibility Clause in the U.S. Constitution: Why Did the Founding Fathers Want the President To Be a "Natural Born Citizen" and What Does this Clause Mean for Foreign-Born Adoptees?*, http://faculty.maxwell.syr.edu/jyinger/citizenship/history.htm (footnote omitted).

[68]4 DOCUMENTARY HISTORY, *supra* note 67, at 269.

[69]This committee was "better known as the Committee on Postponed Matters." Michael Nelson, *Constitutional Qualifications for President*, 17 PRESIDENTIAL STUD. Q. 383, 391 (1987).

[70]2 FARRAND, *supra* note 65, at 494.

Without objection or debate, the Convention approved these requirements on September 7,[71] and the only changes thereafter were stylistic.[72]

One of the most important early American jurists, Joseph Story,[73] approved. In his treatise on the Constitution, he praised the Framers' decision to limit the presidency to "natural born citizen[s]."[74] He noted that the clause's provision that those who were naturalized before the Constitution's adoption could hold the office[75] represented "an exception from the great fundamental policy of all governments, to exclude foreign influence from their executive councils and duties."[76] Story continued, "[T]he general propriety of the exclusion of foreigners, in common cases, will scarcely be doubted by any sound statesman. It cuts off all chances for ambitious foreigners, who might otherwise be intriguing for the office . . . ."[77]

B. Early Interpretation of the Clause

The first question posed by the constitutional clause is whether there was any substantive distinction between the concept of "natural born subject" and "natural born citizen." The answer was, "no." In an early opinion, the North Carolina Supreme Court explained, "The term 'citizen' as

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[71]*Id*. at 536.

[72]For the text of the ratified clause, see *supra* note 4.

[73]Story was simultaneously a justice on the Supreme Court and the first Dane Professor of Law at Harvard. In addition, his treatises were, and still are, considered authoritative.

[74]3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 332 (1st ed. 1833).

[75]The clause provides that "a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of the President . . . ." U.S. CONST. art. II, § 1, cl. 5.

[76]3 STORY, *supra* note 74.

[77]*Id*. at 333.

understood in our law, is precisely analogous to the term *subject* in the common law, and the change of phrase has entirely resulted from the change of government."[78]

Now, how was the clause interpreted? Did the Framers believe they had constitutionalized the common law concept of "natural born"? Or did they consider the English statutes on the subject to have crossed the Atlantic, too? All of the early American sources that I have found show that it was the common law concept that was written into the Constitution.

Nicknamed "The Father of the Constitution" for his role in drafting our foundational document, James Madison is one of the most reliable sources on its meaning. In 1789, he indicated that the United States followed the common law notion of citizenship. On May 22 of that year, in a speech in the House of Representatives, Congressman Madison declared: "It is an established maxim that birth is a criterion of allegiance. Birth . . . derives its force sometimes from place and sometimes from parentage, but . . . place is the most certain criterion; it is what applies in the United States . . . ."[79]

William Rawle–a member of the Pennsylvania Constitutional Assembly and the first United

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[78]State v. Manuel, 4 Dev. & Bat. 20, 26 (N.C. 1838), *quoted with approval in* United States v. Wong Kim Ark, 169 U.S. 649, 664 (1898). The North Carolina court explained, "The sovereignty has been transferred from one man to the collective body of the people–and he who before was a 'subject of the king' is now 'a citizen of the State.'" *Id.*; *accord, e.g.*, Minor v. Happersett, 88 U.S. 162, 166 (1874); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *258 n.*d* [hereinafter KENT (star edition)] ("[Human beings], if born under the jurisdiction and allegiance of the United States, are natives, and not aliens. They are what the common law terms natural-born subjects. Subject and citizen are, in a degree, convertible terms as applied to natives; . . . though the term *citizen* seems to be appropriate to republican freemen . . . .") (language added in 3d ed. 1836; note designation varies from edition to edition); *see* U.S. CONST. art. III, § 2, cl. 1 (referring without distinction to "Citizens" of American states and "Citizens or Subjects" of foreign states).

[79]1 ANNALS OF CONG. 404 (Joseph Gales ed., 1834).

States Attorney for the District of Pennsylvania[80]–agreed. In 1825, he produced a scholarly treatise on the Constitution, with a second edition appearing in 1829. As to the meaning of the phrase "natural born citizen," he concluded, "Under our Constitution the question is settled by its express language, and when we are informed that . . . no person is eligible to the office of president unless he is a natural born citizen, the principle that the place of birth creates the relative quality is established as to us."[81]

Additionally, the well-regarded chancellor of New York, James Kent,[82] asserted that the United States distinguished between "natives" and "aliens" based on the "ancient English law" or the "common law."[83] In the second volume of his *Commentaries on American Law*, originally published in 1827, he averred: "Natives are all persons born within the jurisdiction of the United States."[84] In the third edition, published in 1836, he added, "They are what the common law terms natural-born subjects."[85] In contrast, he explained, "An alien is a person born out of the jurisdiction of the United States," except, of course, for "the children of public ministers abroad."[86]

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[80]He also founded the oldest law firm in America. For biographical information on William Rawle, see http://www.rawle.com/history.

[81]WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE STATES OF AMERICA 86 (2d ed. 1829) (photo. reprint 2003).

[82]He was also a lawyer at the time of the founding and the first professor of law at Columbia College.

[83]2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 43 (1st ed. 1827) [hereinafter KENT (1st ed.)].

[84]*Id*. at 33.

[85]2 KENT (star edition), *supra* note 78.

[86]2 KENT (1st ed.), *supra* note 83, at 43. Unfortunately, Kent then misstated the common law of inheritance, suggesting that "it is said the children born abroad, of English parents, were capable,

C. The Import of Early Naturalization Statutes

Article I of the Constitution gives Congress the power "[t]o establish an uniform Rule of Naturalization,"[87] and Congress initially used that power in 1790. Included in the first "Act to establish an uniform Rule of Naturalization" was the following language:

> [T]he children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States . . . .[88]

The very existence of this provision confirms that the early American notion of "natural born citizen" was that of the common law and did not include the eighteenth-century English naturalization statutes. Otherwise, why would the statutory clause have been necessary? One nineteenth-century senator stated the obvious: "[T]he founders of this Government made no

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at common law, of inheriting as natives . . . ." *Id.* For a discussion of the rule at common law, see *supra* note 34 and accompanying text. I suspect he knew he was on thin ice because, instead of writing in his usual declaratory style, he qualified his remarks with the passive, "it is said." Moreover, he cited a case that directly contradicted his position. Kent's mistake can be traced to dicta by Sir William Hussey in a 1483 case, Y.B. 1 Rich. 3, 4a, Mich. 7 (K.B. 1483) (Hussey, C.J.), *reprinted by Seldon Society in* 11 YEAR BOOKS 4 (photo. reprint 2007). *See supra* note 34. Surprisingly, Kent did not cite that case, instead citing Hyde v. Hill, 78 Eng. Rep. 270 (K.B. 1582). 2 KENT (1st ed.), *supra* note 83, at 43 n.*d.* The report of *Hyde v. Hill*, however, clearly stated that it was "contrary to the opinion of Hussey, 1 Rich. 3. pl. 4." 78 Eng. Rep. at 270. For a thorough analysis of Kent's error, see Horace Binney, *The Alienigenæ of the United States*, 2 AM. L. REG. 193, 193-97 (1854).

[87]U.S. CONST. art. I, § 8, cl. 4.

[88]Ch. 3, 1 Stat. 103, 104 (1790).

provision–of course they made none–for the naturalization of natural-born citizens."[89] Moreover, the legislative history makes clear that the first Congress believed it was effecting a change in the law, not merely declaring the status quo.[90]

Congress began consideration of a draft bill providing for naturalization on February 3, 1790.[91] The legislature recognized the common law principle that "[a]n alien has no right to hold lands in any country [but his own] . . . ."[92] There was no real opposition to "let[ting] foreigners, on easy terms, be admitted to hold lands" in America.[93] What concerned the Congress was the prospect of all those immigrants pushing their way into the government of the new nation. One congressman summed it up this way:

> A foreigner who comes here is not desirous of interfering immediately with our politics; nor is it proper that he should. His emigration is governed by a different principle; he is desirous of obtaining and holding property. I should have no objection to his doing this, from the first moment he sets his foot on shore in America; but it appears to me, that we ought to be cautious how we admit emigrants to the other privileges of citizenship . . . . [T]he admission of a great number of

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[89]CONG. GLOBE, 39th Cong., 1st Sess. 570 (1866) (statement of Sen. Morrill); *accord, e.g.*, CONG. GLOBE, 39th Cong., 1st sess. 598 (1866) (statement of Sen. Davis) ("[T]he naturalization laws apply to foreigners alone. . . . Congress has no power . . . to naturalize a citizen.").

[90]For the debate in the House of Representatives, see 1 ANNALS OF CONG., *supra* note 79, at 1109-25, 1240, 1408, 1412-13; for the Senate, see *id.* at 952-56.

[91]*Id*. at 1109.

[92]*Id*. at 1112 (statement of Rep. Hartley); for the common law rule that aliens cannot hold real estate, see *supra* text accompanying notes 42-32.

[93]1 ANNALS OF CONG., *supra* note 79, at 1118 (statement of Rep. Smith).

> foreigners to all the places of Government, may tincture the system with the dregs of their former habits, and corrupt what we believe the most pure of all human institutions.[94]

So, the focus of the debate was how to strike the balance between allowing an immigrant to purchase or inherit land quickly while being cautious about granting other aspects of citizenship.

In the midst of this discussion, one congressman suggested, "The case of the children of American parents born abroad ought to be provided for, as was done [by Parliament] in the case of English parents . . . ."[95] The statute to which he referred allowed English children to inherit from alien parents.[96] In other words, he was calling for a clause that would permit American parents to leave property to their alien children. Thus, he understood "the children of American parents born abroad" to be aliens and not inheritable.

At the end of the debate, the House decided to send the bill back to a subcommittee to

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[94]*Id*. at 1119 (statement of Rep. Stone).

[95]*Id*. at 1121 (statement of Rep. Burke). One author credits this suggestion with the addition of the phrase "natural born" to the 1790 statute: "[T]he reference to the English acts shows [that] the origin of the inadvertent error in using the term natural-born citizen instead of plain 'citizen' came from copying the English Naturalization Act." Pinckney G. McElwee, *The Meaning of the Term "Natural Born Citizen" as Used in Clause 4, Section 1 of Article II of the Constitution of the United States Relating to Eligibility for the Office of President*, 113 CONG. REC. 15,875, 15,877 (1967).

[96]An Act To Enable His Majesty's Natural Born Subjects To Inherit the Estate of Their Ancestors Either Lineal or Collateral Notwithstanding Their Father or Mother Were Aliens, 11 Will. 3, ch. 6 (1699) (spelling modernized). The congressman actually described the statute as enacted in "the 12th year of William III." 1 ANNALS OF CONG., *supra* note 79, at 1121 (statement of Rep. Burke). His mistake is understandable, as the statute was cited in *Chitty's Statutes* as "11 & 12 Will. 3, ch. 6." 1 CHITTY'S COLLECTION OF STATUTES, WITH NOTES THEREON, INTENDED AS A CIRCUIT AND COURT COMPANION 19 (W.N. Welsby & Edward Beavan eds., 2d ed. 1851). The Supreme Court made the same mistake, United States v. Wong Kim Ark, 169 U.S. 649, 661 (1898).

consider how best to address the issues raised.[97] As the discussion wound down, a member of the original subcommittee that presented the draft bill announced that "he had another clause ready to present, providing for the children of American citizens born out of the United States."[98] Again, this comment demonstrates that there was need to *provide* for these children because they were aliens.

Because the 1790 act stated that alien children of American parents "shall be considered as natural born citizens," the question remains as to how big a change Congress intended to effect. Did Congress mean to amend the requirements of Article II by statute? As demonstrated in the immediately preceding section,[99] the Framers constitutionalized the common law concept of natural born citizen. Under the common law, "[t]he first and most obvious division of the people is into aliens and natural-born [citizens]."[100] In other words, everyone is *either* an alien *or* a natural born citizen based on the place of birth; that essence does not change. In Article I, Congress is given the power to naturalize, that is, remove the disabilities of alienage. Congress is not, however, given the alchemical power to change an alien into a natural born citizen.[101] If this result were Congress's

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[97] 1 ANNALS OF CONG., *supra* note 79, at 1125.

[98] *Id*. (statement of Rep. Hartley); as to his appointment to the original subcommittee, see *id*. at 1058.

[99] *Supra* notes 78-86 and accompanying text.

[100] 1 BLACKSTONE, *supra* note 12; *see* text accompanying notes 12-26 *supra*.

[101] Justice Benjamin Curtis of the Supreme Court explained:

> Among the powers expressly granted to Congress is "the power to establish a uniform rule of naturalization." It is not doubted that this is a power to prescribe a rule for the removal of the disabilities consequent on foreign birth. To hold that it extends further than this, would do violence to the meaning of the term naturalization, fixed in the common law, . . . and in the minds of those who concurred in framing and adopting the Constitution. It was in this sense of conferring on an alien and his issue the rights and powers of a native-born citizen, that it was employed in the Declaration of Independence. It was in this sense it was expounded

intent, it would expand the requirements of Article II without a constitutional amendment.

That Parliament expanded the definition of natural born citizen in the eighteenth century is no precedent for the United States. Unlike our paramount law, the English Constitution is unwritten. By the late seventeenth century, their Constitution was essentially what Parliament said it was: "It hath sovereign and uncontrol[l]able authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws . . . ."[102] In sum, "[i]t can change and create afresh even the constitution of the kingdom and of parliaments themselves . . . ."[103] With power like that, Parliament was certainly capable of extending natural born status to those who would have been aliens otherwise.

The relationship between Congress and the American Constitution is quite different. As the Supreme Court explained in *Marbury v. Madison*, to allow Congress the same latitude as Parliament

> would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbid[d]en, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers

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> in the Federalist, (No. 42,) has been understood by Congress, by the Judiciary, . . . and by commentators on the Constitution. . . .
>
> It appears, then, that the only power expressly granted to Congress to legislate concerning citizenship, is confined to the removal of the disabilities of foreign birth.

Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 578 (1857) (Curtis, J., dissenting).

[102] 1 BLACKSTONE, *supra* note 12, at 156.

[103] *Id.*

within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.[104]

Therefore, Congress cannot alter who is constitutionally eligible to run for President by statute. To make that change requires a constitutional amendment.[105]

Not surprisingly, therefore, I have found no evidence of congressional intent to expand the class of persons who could run for President. Moreover, early commentators agreed that the use of "natural born" in the first naturalization act did not amend Article II. For example, in 1803, St. George Tucker–a Virginia delegate to the Annapolis Convention[106] and professor of law at the College of William and Mary[107]–published his edition of *Blackstone's Commentaries*.[108] Tucker added to the famous treatise his own notes concerning the differences between English and American

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[104]Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

[105]The Supreme Court recently reaffirmed this basic tenet of American constitutional law:

> Under our Constitution, the Federal Government is one of enumerated powers. . . . The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176 (1803).

City of Boerne v. Flores, 521 U.S. 507, 516 (1997). The Court continued, "Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause." *Id*. at 519. Likewise, Congress is given the power to naturalize; it is not given the power to "alter[ ] the meaning of the [Natural Born Citizen] Clause."

[106]Delegates from five states met in Annapolis in 1786. They agreed that a constitutional convention was necessary and sent a report to that effect to Congress and the states.

[107]He succeeded George Wythe, who is known as the first American law professor. Tucker was later appointed to the federal bench by President Madison and served on the Circuit Court with Chief Justice John Marshall.

[108]BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed., 1803).

law. On our question, he cited all American naturalization statutes that had been enacted to that date, including the 1790 act. He then concluded, "Persons naturalized according to these acts, are entitled to all the rights of natural born citizens, except . . . they are forever incapable of being chosen to the office of president of the United States."[109]

In any event, the 1790 statute was short-lived, being repealed in 1795. This time, debate in the House focused on several issues, the last two being whether aliens seeking naturalization should be made to renounce (1) foreign hereditary titles and (2) any claim to persons then held in slavery.[110] After the House voted "yea" on the first question and "nay" on the second,[111] the bill was recommitted to a select committee of three, including James Madison.[112] That was Friday, January 2, 1795. On the previous Monday, December 29, 1794, Madison had expressed the view that Congress had no naturalization authority over American citizens: "It was only granted to them to admit aliens."[113] The following Monday, January 5, 1795, "Mr. Madison . . . reported a new bill of Naturalization, containing the amendments recommitted, and also whatever was necessary from the Old Law, so that the latter should be entirely superceded."[114] Part of the "Old Law" that was salvaged was the provision for children of American citizens born abroad. Interestingly, however, the phrase

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[109]2 *Id*. at *374 n.12; *accord, e.g.*, Binney, *supra* note 86, at 204 (noting that 1790 statute "naturalize[d]" natives' children).

[110]For the House debate, see 4 ANNALS OF CONG. 1004-09, 1021-23, 1025-58, 1060-61, 1064-66, 1133 (1849); for the Senate debate, see *id*. at 809-12, 814-16.

[111]*Id*. at 1057.

[112]*Id*. at 1058.

[113]*Id*. at 1027.

[114]*Id*. at 1060.

"natural born" was deleted, although there is no recorded debate on the issue. The new statute provided in pertinent part:

> [T]he children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States: *Provided*, That the right of citizenship shall not descend to persons, whose fathers have never been resident in the United States . . . .[115]

It was now apparent that the alien child was only naturalized, not declared a natural born citizen.[116] The phrase "natural born" has never been used again in any naturalization statute.

D. The Fourteenth Amendment

Thus the definition of natural born citizen stood in the mid-nineteenth century. Horace Binney–a respected early American attorney and statesman, who studied law under a member of the Constitutional Convention[117]–published an article on this topic in 1854. The rules, he wrote, were clear:

> The notion that there is any common law principle to naturalize the children born in foreign countries, of native-born American father *and* mother, father *or* mother, must

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[115]An Act To Establish an Uniform Rule of Naturalization; and To Repeal the Act Heretofore Passed on That Subject, ch. 20, § 3, 1 Stat. 414, 415 (1795).

[116]Referring to "the inadvertent use of the term natural born in the Act of 1790," one author averred that "it was Mr. Madison who had participated in the drafting of the Constitution who had discovered the error and authorized the bill to correct it by deleting the term from the act of 1795 . . . ." McElwee, *supra* note 95, at 15,879. For the reason that Mr. McElwee considered the use of "natural born" in the 1790 act to be "inadvertent," see *supra* note 95.

[117]Binney studied law at the Philadelphia law office of Jared Ingersoll, who had signed the Constitution for Pennsylvania. An interesting, albeit irrelevant, fact is that the young Binney started the Hasty Pudding Club in 1795 while at Harvard.

be discarded. There is not and never was any such common law principle. . . . [T]he citizens of the United States are, [with the exception of those children covered by one of the corollaries[118]], such only as are either . . . born within the limits and under the jurisdiction of the United States, or naturalized by . . . virtue of an Act of the Congress of the United States.[119]

At this time, however, debate about another aspect of these rules came to a head: were children of African descent born in the United States "natural born citizens"? Chancellor Kent concluded, "Blacks, whether born free or in bondage, if born under the jurisdiction and allegiance of the United States, are natives, and not aliens. They are what the common law terms natural-born subjects."[120] Justice Benjamin Curtis of the Supreme Court concurred: "The . . . Constitution uses the language, 'a natural-born citizen.' . . . Undoubtedly, this language . . . was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth."[121] Unfortunately, Justice Curtis was one of only two dissenters in the infamous 1857 case of *Dred Scott v. Sandford*,[122] which held that African-Americans descended from slaves could not be citizens of the United States.

In response to *Dred Scott*, of course, the Congress drafted, and the states ratified, the Fourteenth Amendment. The first section provides in pertinent part, "All persons born or naturalized

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[118]For a discussion of the corollaries, see text accompanying notes 13-16 *supra*.

[119]Binney, *supra* note 86, at 203 (footnote added). For his discussion of the exceptions, see *id*. at 200-01.

[120]2 KENT (star edition), *supra* note 78.

[121]Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 576 (1857) (Curtis, J., dissenting).

[122]60 U.S. (19 How.) 393 (1857).

in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[123] This language reversed *Dred Scott*, but it did not otherwise change the law of citizenship. As one congressman described the opening sentence of the amendment, "It simply declares who shall be citizens of the United States. But the *fact* that certain persons are citizens, and the *number* of them, and the *definition* of citizenship or of its constituent elements, were just the same before the ratification of the fourteenth amendment that they are now."[124]

At the close of the nineteenth century, the Supreme Court decided a case concerning the citizenship of a man born in the United States to Chinese parents. In concluding that he was natural born and therefore a citizen, the Court explained the law as it then stood in the United States:

> The Fourteenth Amendment of the Constitution . . . contemplates two sources of citizenship, and two only: birth and naturalization. . . . Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized . . . 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 by proceedings in the judicial

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[123]U.S. CONST. amend. XIV, § 1.

[124]CONG. GLOBE, 42d Cong., 1st Sess. app. 47 (1871) (statement of Rep. Kerr); *accord, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 570 (1866) (statement of Sen. Morrill) ("[T]his amendment, although it is a grand enunciation, although it is a lofty and sublime declaration, has no force or efficiency as an enactment. I hail it and accept it simply as a declaration.").

tribunals, as in the ordinary provisions of the naturalization acts.[125]

Thus, the Fourteenth Amendment made explicit what had been the law all along: natural born citizens were those born within the United States; all others were aliens unless naturalized.[126]

III. THE WEAKNESSES OF MODERN HISTORIES

A. As to English Law

One modern source, written around the time of Governor Romney's candidacy, purports to describe English naturalization law before the ratification of our Constitution.[127] Unfortunately, the writer's description of the common law and the effect of the various English statutes on it is not accurate. More unfortunately, articles subsequent to his rely on his research as definitive.[128] The piece's author is Charles Gordon, who was at the time general counsel for the United States Immigration and Naturalization Service.[129] While he was presumably an expert on the then-current American law of naturalization,[130] his explanation of the subject's history is flawed.

First, Mr. Gordon misses the mark when he states the common law. He writes: "[T]he leading British authorities agree that under the early common law, status as a natural-born subject probably

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[125]United States v. Wong Kim Ark, 169 U.S. 649, 702-03 (1898).

[126]Excepting, of course, those to whom the corollaries apply, *see supra* notes 13-16 and accompanying text.

[127]Gordon, *supra* note 11, at 5-7.

[128]*See, e.g.*, Nelson, *supra* note 69, at 396 & n.45 (citing only the Gordon article for authority); Yinger, *supra* note 67, at n.38 (noting that Gordon article "is the source of the information in this paragraph").

[129]Gordon, *supra* note 11, at 1 n.*.

[130]He co-authored a treatise on immigration law, CHARLES GORDON & HARRY N. ROSENFIELD, IMMIGRATION LAW & PROCEDURE (1959).

was acquired only by those born within the realm . . . ."[131] This was the rule at common law, not "early" common law.[132] Technically, it was birth within the ligeance of the king that mattered, not within the realm.[133] And there was no "probably" about it; in the words of Blackstone, "The common law . . . stood absolutely so . . . ."[134]

Second, Mr. Gordon makes a more serious error when he attributes to those same British authorities the view that "the statutes described above[135] enabled natural-born subjects to transmit equivalent status at birth to the children born to them outside of the kingdom."[136] The statutes to

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[131]Gordon, *supra* note 11, at 7.

[132]Mr. Gordon makes two mistakes here. First, he believes, incorrectly, that English statutes prior to the eighteenth century Parliamentary acts changed the common law as to the definition of "natural born subject." Gordon, *supra* note 11, at 7; for a discussion of the impact of these statutes, see *supra* notes 8-13. Second, he appears to believe that the statutory scheme of the eighteenth century was part of the common law. Gordon, *supra* note 11, at 7; for a discussion of the change wrought by these statutes, see *supra* notes 13-15 and accompanying text.

[133]For the discussion of the difference between being out of the ligeance of the king and out of the realm, see text accompanying notes 12-20 *supra*.

[134] 1 BLACKSTONE, *supra* note 12, at 361 (footnote omitted); *accord, e.g.*, COCKBURN, *supra* note 14, at 7; *see* COKE ON LITTLETON, *supra* note 13, at 129a (defining aliens as those born out of the allegiance of the king).

[135]For his earlier description of the statutes, see Gordon, *supra* note 11, at 6-7; the statutes are also discussed in this Article, *supra* notes 41-61 and accompanying text.

[136]Gordon, *supra* note 11, at 7 (footnote added). Other modern authors follow Mr. Gordon to the same mistaken conclusion. *E.g.*, Nelson, *supra* note 69, at 396 (citing Gordon for proposition that "starting in 1350" Parliament expanded definition of "natural born" to include "babies born of British citizens abroad"); Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 Yale L.J. 881, 888 n.35 (1988) (citing Gordon and asserting that "British statutes have provided for [acquisition of citizenship at birth by children born abroad to] British subjects since the 14th century"); Yinger, *supra* note 67, at 5 & n. 38 (relying on Gordon for statement that "1677 law says that 'natural born' citizens include people born overseas to British citizens").

which he refers include the 1350 inheritance law[137] and the special provision of 1677 to allow easy naturalization following the restoration of the monarchy.[138] Neither of those statutes made such children subjects without being naturalized.[139] Only the eighteenth-century acts accomplished that goal. As demonstrated above, in the previous centuries, children born abroad to English subjects had to be naturalized to attain status equivalent to their parents.[140]

Mr. Gordon cites four authorities for his proposition. Not one of them, however, supports his point. The first source, Sir Edward Coke, said explicitly–in 1628–that if an Englishman "hath issue an alien that is born out of the king's allegiance: he cannot be heir."[141] The second, Sir William Blackstone, described–in 1765–the 1350 statute as allowing "children born abroad" to "inherit."[142] As to the 1677 statute, he noted that it "became necessary" because the common law was "absolute[ ]": the children born abroad to those English subjects who had fled during "the late troubles" were aliens.[143] The third jurist, Sir Alexander Cockburn, declared–in 1869–that the 1350 law referred only to "children *inheritors*."[144] Otherwise, he reasoned, "the subsequent legislation on this subject would

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[137]A Statute for Those Who Are Born in Parts Beyond Sea, 25 Edw. 3, stat. 1 (1350), discussed *supra* at notes 41-45 and accompanying text.

[138]An Act for the Naturalizing of Children of his Majesty's English Subjects born in Foreign Countries during the late Troubles, 29 Car. 2, ch. 6 (1677) (spelling modernized), discussed *supra* at text accompanying notes 47-52.

[139]For a discussion of the import of these statutes, see *supra* notes 38-52.

[140]Discussion of this time period is located *supra* notes 41-52 and accompanying text.

[141]COKE ON LITTLETON, *supra* note 13, at 8a.

[142]1 BLACKSTONE, *supra* note 12, at 361.

[143]*Id*.

[144]COCKBURN, *supra* note 14, at 9.

have been wholly unnecessary."[145] The final authority, Oxford professor Albert Venn Dicey, proclaimed the same in 1896: "The principle of the common law is that a person born beyond the limits of the British dominions does not at his birth owe allegiance to the Crown, and cannot therefore be a natural-born British subject."[146] He added that this principle had been "relaxed" by the eighteenth-century enactments.[147]

If Mr. Gordon's mischaracterization had occurred in some musty piece of scholarship about an obscure archaic principle, it might not have caused any mischief. The error, however, is problematic because this common law concept is the key to understanding the American constitutional provision. Unfortunately, he compounded his mistake by attributing his own incorrect conclusions to the understanding of our Framers:

> The Framers certainly were aware of the long-settled British practice, reaffirmed in recent legislation in England . . . 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.[148]

Of course, the "recent legislation in England" did not "reaffirm[ ]" the practice, but created it. This mistake clouds our understanding of the Natural Born Citizen Clause. It is, however, the leap from attempting to describe the law, albeit incorrectly, to mere "supposi[tion]" as to what the Framers did

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[145] *Id*.

[146] A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 178 (John Bassett Moore ed., 1896).

[147] *Id*. at 178 & n.1.

[148] Gordon, *supra* note 11, at 7-8 (footnotes omitted).

or did not "wish[ ]" that I find truly shocking. Why not look at what the early American jurists actually said on the matter? Their comments are, after all, available.[149]

Yet it is this kind of guesswork, filled with "maybe" and "perhaps," that dominates so-called scholarship in this field. For example, one author, citing no authority whatsoever, declares: "This history[, i.e., Mr. Gordon's mistaken summary,] *suggests* that the Founding Fathers used the term 'natural born' as an expansive definition of citizenship, that is, as a way to make certain that people born overseas to American citizens would have the full rights of other American citizens."[150] Another source, relying on Mr. Gordon's article alone, avers: "One can *presume only* that Jay and the delegates meant to apply the evolved, broader common law meaning of the term when they included it in the presidential qualifications clause."[151] Another source, again citing no authority, claims that the eighteenth-century British statutes "*undoubtedly* informed the Framers' understanding of the Natural Born Citizen Clause."[152] Each of these undocumented theories, however, is directly contradicted by the actual words of the Framers themselves.[153]

B. As to Early American Understandings

1. The Common Law

As demonstrated in this Article, the evidence points to only one conclusion: the Framers

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[149]*See supra* text accompanying notes 78-86.

[150]Yinger, *supra* note 67, at 6 (emphasis added).

[151]Nelson, *supra* note 69, at 396 (emphasis added).

[152]Laurence H. Tribe & Theodore B. Olson, Memorandum in Support of Sen. John McCain's Eligibility for President (Mar. 19, 2008), http://www.scribd.com/doc/25457698/The-Tribe-Olson-Natural-Born-Citizen-Memo (emphasis added).

[153]*See supra* text accompanying notes 78-86.

constitutionalized the common law notion of "natural born."[154] Nonetheless, most modern commentators addressing the question contend that the Framers took a broader view of the phrase. That is, these authors believe that children born abroad to American parents satisfy the constitutional requirement.[155] In addition to reliance on a mistaken view of the English statutes, discussed in the immediately preceding section, current American pundits suggest a few other creative arguments to support their view. None of them, however, can be substantiated.

Numerous scholars claiming that the Framers adopted an expansive view of "natural born" point to John Jay's children. Jay, of course, was the man who suggested to George Washington that the Commander in Chief should be a natural born citizen.[156] In the words of one modern jurist, "Certainly Jay did not mean to bar his own children, born in Spain and France while he was on diplomatic assignments, from legal eligibility to the presidency."[157] This reasoning, of course, does not stand up to scrutiny. Assuming arguendo that Jay had presidential aspirations for his children, the common law was no bar to them. Children born to those on diplomatic missions abroad were natural born citizens.[158]

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[154] *See supra* text accompanying notes 65-116.

[155] *See, e.g.*, Gordon, *supra* note 11, at 18; Christina S. Lohman, *Presidential Eligibility: The Meaning of the Natural Born Citizen Clause*, 36 GONZAGA L. REV. 349, 369 (2000); Jack Maskell, *Qualifications for President and the "Natural Born" Citizenship Eligibility Requirement* at 19, Congressional Research Service (2011), www.fas.org/sgp/crs/misc/R42097.pdf; Nelson, *supra* note 69, at 396.

[156] *See supra* text accompanying note 67.

[157] Nelson, *supra* note 69, at 396; *accord, e.g.*, Gordon, *supra* note 11, at 8 n.55; Maskell, *supra* note 155, at 19-20; Yinger, *supra* note 67, at 5.

[158] According to Chancellor Kent, "the children of [American] public ministers abroad" were natural born citizens of the United States. 2 KENT (1st ed.), *supra* note 83; *accord, e.g.*, authorities cited *supra* note 14.

In another attempt to reach the desired result, one author cites a different presidential requirement: the candidate must have been "fourteen Years a Resident within the United States."[159] The writer speculates, "If the Framers were speaking only of the native-born, this limitation would hardly have been necessary."[160] This conclusion ignores another logical explanation for the provision, however. Everyone born in the United States is a natural born citizen,[161] even those children whose parents are only here temporarily. The residency requirement ensures that such children, if taken to their parents' country and raised there, cannot suddenly emerge in adulthood as candidates for the American presidency.[162] Having not even considered this rationale, though, the commentator then opines, "[The residency requirement] *seems* consistent with a *supposition* that the 'natural-born' qualification was intended to include those who had acquired United States citizenship at birth abroad."[163] In short, the author rejects an explanation completely in accord with the understanding expressed by the Framers themselves in favor of a hypothetical explanation that "seem[ingly]" backs up his own "supposition," without offering a shred of evidence.

One author attempts sleight of hand to establish that the Constitution incorporates the broader

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[159]U.S. CONST. art. II, § 1, cl. 5.

[160]Gordon, *supra* note 11, at 3.

[161]Except, of course, for the children of ambassadors and hostile occupying forces. The corollaries to the basic definition of "natural born" are discussed in the text accompanying notes 13-16 *supra*.

[162]The requirement is not limited to such children, of course. American parents may move abroad with their children as well. Moreover, there was some question about whether Herbert Hoover met the 14-year residency. He was born and raised in the United States, but moved abroad as an adult, living in Australia and then China from 1897-1917. Thus, he had only been back in the United States for about 11 years when he was elected President in 1928. Of course, he had lived 23 years in the United States before his time overseas.

[163]Gordon, *supra* note 11, at 3 (emphasis added).

view of "natural born." The writer notes correctly that it was "common in the states after independence, upon the adoption of their constitutions and statutes, to incorporate both the common law of England, as well as the *statutory* laws adopted by Parliament and applicable in the colonies up until a particular date."[164] These state laws are referred to as reception statutes. The author then follows-up with a statement that incorrectly implies that the Federal Government also received a modified version of the common law:

> There is thus *some* argument and indication that it was common for a "modified" English common law–modified by long-standing provisions of English statutory law applicable in the colonies–to be among the traditions and bodies of law incorporated into the laws, applications, usages, and interpretations in the beginning of our nation.[165]

The writer, relying on the Gordon article,[166] predictably makes the same mistake. They both conclude that the broad view was long-standing in England.[167] More importantly, however, the essayist fails to note that the Congress did not enact a reception statute, and so what the states did is irrelevant.

Several authors claim confusion caused by the terminology of the Natural Born Citizen clause. They use this confusion to suggest that perhaps our Framers did not adopt the common law meaning of the phrase or that the original meaning is unknowable. For example, one says, "The notion of a 'natural born citizen' was likely a term of art derived from the idea of a 'natural born

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[164]Maskell, *supra* note 155, at 16.

[165]*Id*. (emphasis added).

[166]*Id.*

[167]*Id*. As to Mr. Gordon's mistake, see *supra* text accompanying notes 135-149.

subject' in English law . . . . But the Constitution speaks of 'citizens' and not 'subjects,' introducing uncertainties and ambiguities . . . ."[168] As discussed above, however, early Americans considered the two terms to be analogous.[169] Other pundits suggest that "natural born" is not synonymous with "native born." Natives are those who are born in the country; the use of the term "natural" instead, these writers posit, indicates that the Framers meant to use the so-called broader notion, which reaches children born abroad to American citizens.[170] Of course, there are myriad statements by early American jurists using the terms "natural born" and "native born" interchangeably.[171] In fact, Chancellor Kent explicitly defined "natives" as "what the common law terms natural-born subjects."[172]

2. The 1790 Statute

Because the first American naturalization statute provided that children born to United States

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[168]Lawrence B. Solum, Commentary, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22, 22 (2008), http://www.michiganlawreview.org/firstimpressions/vol107.solum.pdf.

[169]*See supra* note 78 and accompanying text.

[170]*E.g.*, Maskell, *supra* note 155, at 20; Yinger, *supra* note 67, at 6.

[171]*See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 575 (1871) (statement of Sen. Trumbull) (noting Constitution requires that President "must be a native-born citizen"); CONG. GLOBE, 40th Cong., 3d Sess. 1035 (1869) (statement of Sen. Sherman) ("The Constitution requires that the President must be a native-born citizen of the United States."); CONG. GLOBE, 40th Cong., 2d Sess. 1105 (1868) (statement of Rep. Clarke) (noting that "the President and Vice President must be native born"); CONG. GLOBE, 39th Cong., 1st Sess. 573 (1866) (statement of Sen. Williams) ("The Constitution of the United States provides that no person but a native-born citizen of the United States . . . shall be President of the United States . . . ."); CONG. GLOBE, 38th Cong., 2d Sess. 552 (1865) (statement of Sen. Johnson) ("No one who is not a native-born citizen of the United States . . . can be voted for [for President.]").

[172]2 KENT (star edition), *supra* note 78.

citizens abroad shall be "considered as natural born citizens,"[173] many modern commentators believe it is evidence of *something*, although they do not agree what. These authors note that, in the words of the Supreme Court, an act "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning."[174] We must remember, however, that this Congress was not infallible; it was the very same body that drafted the statute declared unconstitutional in *Marbury v. Madison*.[175]

Two modern authors, rather startlingly, believe that Congress has inherent power to alter the meaning of the Constitution by statute. They think that the 1790 act changed the definition of "natural born citizen": "[The constitutional phrase now] would appear to include those born abroad of U.S. citizens . . . as adopted by Congress by statute."[176] These writers contend, however, that the 1790 provision was not a naturalization law, "that is, a uniform rule whereby *aliens* may be admitted to citizenship."[177] Instead, they say, "the provision under discussion purports to recognize a certain

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[173]An Act To Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103, 104 (1790). The provision is quoted in the text accompanying note 88 *supra*.

[174]Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888) (referring to Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80); *see, e.g.*, Gordon, *supra* note 11, at 8; Lohman, *supra* note 155, at 370; Maskell, *supra* note 155, at 20-21; Pryor, *supra* note 136, at 894-95.

[175]5 U.S. (1 Cranch) 137 (1803) (holding portion of Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80, unconstitutional).

[176]Maskell, *supra* note 155, at 21 (referring to EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, at 39 (Randall W. Bland et al. eds., 5th rev. ed. 1984) as authority). [note: I copied Corwin's language from his 1957 edition. It matches Maskell's quotations, but I have not actually seen the 1984 edition.]

[177]CORWIN, *supra* note 176; Maskell, *supra* note 155, at 21 (quoting CORWIN, *supra* note 176, as authority).

category of persons as citizens from and because of *birth*."[178] Hence, in their view, Congress did not use its Article I power to enact "an uniform Rule of Naturalization." Nonetheless, these authors argue that the law was constitutional under "the proposition that, as the legislative body of a nation sovereign at international law, Congress is entitled to determine who shall and who shall not be admitted to the body politic."[179]

Not surprisingly, the authority for this theory is virtually nonexistent. The writer of the later piece cites only the earlier piece.[180] The writer of the earlier piece relies solely on a 1915 Supreme Court case that upheld an act providing that an American woman's marriage to a foreigner caused her to be expatriated.[181] The Court reasoned that the power to expatriate is "implied, necessary or incidental to the expressed power[ ]" to naturalize.[182] It is a far cry, however, from saying that

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[178]CORWIN, *supra* note 176; Maskell, *supra* note 155, at 21 (quoting CORWIN, *supra* note 176, as authority).

[179]CORWIN, *supra* note 176; Maskell, *supra* note 155, at 21 (quoting CORWIN, *supra* note 176, as authority).

[180]Maskell, *supra* note 155, at 21 (citing and quoting only CORWIN, *supra* note 176, at 38-39, as authority).

[181]CORWIN, *supra* note 176, at 39 & n.6 (citing Mackenzie v. Hare, 239 U.S. 299, 311-12 (1915) (upholding An Act in Reference to the Expatriation of Citizens and Their Protection Abroad, ch. 2534, § 3, 34 Stat. 1228, 1228-29 (1907)).

[182]Mackenzie v. Hare, 239 U.S. 299, 311 (1915). The Court added that "[a]s a government, the United States is invested with all the attributes of sovereignty." *Id*. The case, however, required no inquiry into just what those attributes are, and so it is a stretch to push this dicta into the very broad power Professor Corwin and Mr. Maskell claim for Congress.

Moreover, as the Court noted, *id*. at 308-09, the power to expatriate had been recognized long before 1915. In fact, one of the earliest Congresses had recognized the connection between naturalization and expatriation. On Tuesday, December 30, 1794, the House of Representatives debated a provision that would have expatriated any American who became a citizen or subject of another country. 4 ANNALS OF CONG., *supra* note 110, at 1028-30. After a discussion of the wisdom of the policy, but no concern about its constitutionality, the amendment was negatived. *Id*. at 1030.

expatriation is included in the concept of naturalization to saying that Congress may amend a different article of the Constitution by statute. It is a bedrock principle of our constitutional system that Congress cannot do that.[183] Moreover, this theory about the meaning and effect of the 1790 statute flies in the face of the original understanding: the act was seen as simply providing for naturalization of alien children born abroad to United States citizens.[184]

Two other commentators attempt to avoid suggesting that Congress can amend the Constitution. Instead, they urge that the language of the 1790 statute demonstrates that "the Founding Fathers, who dominated this Congress, believed that the right to define 'natural born' was conferred by the 'naturalization' clause."[185] The only evidence these writers present to support their theory, however, is the pedigree of the Congress and the fact that "natural" is the root word of "naturalization": "a Congress nearly contemporaneous with the adoption of the clause believed it had the power to define '*natural* born citizen' under its *natural*ization powers."[186] One of the authors does admit that "the link between 'natural born' and 'naturalization' was never made explicit by the Founding Fathers, and the term 'natural born' does not appear in any naturalization legislation passed since 1790."[187] Nonetheless, he sticks to his conclusion.

It is not surprising that the evidence these writers present is so slim. There was no need for

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[183]*See supra* notes 99-105 and accompanying text.

[184]*See supra* text accompanying notes 87-109.

[185]Yinger, *supra* note 67, at 6. In accord with this theory is Pryor, *supra* note 136, at 895.

[186]Pryor, *supra* note 136, at 895. Professor Yinger states it thus: "[A] literal interpretation of this action by the first Congress is that the Founding Fathers, who dominated this Congress, believed that the right to define 'natural born' was conferred by the 'naturalization' clause." Yinger, *supra* note 67, at 6.

[187]Yinger *supra* note 67, at 7.

Congress to define the term "natural born" as its meaning was well-known in 1790. Natural born citizens were natives[188]; naturalization was for aliens.[189] Unless what the authors actually mean is that Congress could, by "defining" the phrase, change the limitation of Article II through the use of Article I power. If that is what they are saying, that certainly cannot be the case. As discussed above, Congress cannot amend the Constitution by statute.[190]

Finally, one pair of lawyers recognizes that "[c]learly, the First Congress could not statutorily alter the Constitution."[191] These commentators instead suggest that the 1790 statute was declaratory of the law. In the words of one, "[The statute] was enacted to remove any doubt that status as a natural-born citizen was acquired by a child born abroad to American citizen parents."[192] The other posits that the act was merely "interpreting the Constitution."[193] As this conclusion flies in the face of the comments on the subject by early Americans,[194] it is not surprising that the authority cited by

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[188]*See supra* text accompanying notes 79-86.

[189]*See, e.g.*, *supra* text accompanying notes 89, 113; CONG. GLOBE, 39th Cong., 1st Sess. 598 (1866) (statement of Sen. Davis) ("[T]he naturalization laws apply to foreigners alone. . . . Congress has no power . . . to naturalize a citizen.").

[190]*See supra* text accompanying notes 99-105.

[191]Lohman, *supra* note 155, at 371; *see also* Gordon, *supra* note 11, at 9 (noting that a different interpretation "might still leave open the question of whether Congress can enlarge or modify the categories of eligible citizens encompassed within the presidential qualification clause").

[192]Gordon, *supra* note 11, at 9.

[193]Lohman, *supra* note 155, at 371.

[194]*See supra* text accompanying notes 88-109 (demonstrating that 1790 statute was not declaratory only).

these authors is very weak. The later author relies solely on the earlier author for support.[195] The earlier author relies on a dissenting opinion in the Supreme Court and two New York opinions.[196]

As to the Supreme Court dissent, the writer of the opinion disregarded centuries of common law jurisprudence and used a strained reading of the Fourteenth Amendment in order to conclude that a man born in the United States to Chinese parents could not be a natural born citizen.[197] He was joined by only one other justice[198]; the rest of the Court rejected his reasoning in a very scholarly, thoroughly researched opinion.[199] The majority, following the common law as it had been applied in the United States from the beginning, held that the nationality of the man's parents did not matter; he was born on American soil and was therefore a natural born citizen.[200] Thus, the dissent can be rejected out of hand; it is certainly not authoritative on the meaning of early American law.

The two New York opinions declared that, starting in 1350, children born abroad to English

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[195]Lohman, *supra* note 155, at 370-72 (relying solely on Gordon, *supra* note 11, at 4, 8-11). Ms. Lohman precedes the discussion of the 1790 statute by citing David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775 (1994), for the proposition that the first Congress continued the work of the Constitutional Convention, "consciously aware that their power was constitutionally limited." Lohman, *supra* note 155, at 370.

[196]Gordon, *supra* note 11, at 9 n.69 (relying on United States v. Wong Kim Ark, 169 U.S. 649, 714 (1898) (Fuller, C.J., dissenting); Ludlum v. Ludlum, 26 N.Y. 356 (1863); and Lynch v. Clarke, 1 Sand. Ch. 583, 660 (N.Y. Ch. 1844)).

[197]United States v. Wong Kim Ark, 169 U.S. 649, 705-26 (1898) (Fuller, C.J., dissenting).

[198]Justice Harlan concurred in the dissent. *Id*. at 705.

[199]*Id.* at 655-704 (setting out the law of citizenship at common law and in the United States from the founding to the Fourteenth Amendment).

[200]The Court's holding is found in *id*. at 705.

parents were natural born citizens.[201] To reach this conclusion, the cases relied heavily on two questionable English sources.[202] One is dicta that did not even support the state courts' assertion.[203] The other is a note, discussing a case decided hundreds of years before,[204] that was based on a mistake as to the facts.[205] Moreover, the view expressed by the New York courts is simply inconsistent with the hundreds of naturalizations of such children in the centuries after 1350.[206] These cases, therefore, are against the great weight of, and the better reasoned, authority on the subject.[207]

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[201]Ludlum v. Ludlum, 26 N.Y. 356, 362-65 (1863) [I have only seen WestLaw version of this case]; Lynch v. Clarke, 1 Sand. Ch. 583, 660 (N.Y. Ch. 1844)) [I have only seen the NY Legal Observer version of Lynch, so I'm not sure if the page in the official report is correct.].

[202]Ludlum v. Ludlum, 26 N.Y. 356, 362, 365 (1863); Lynch v. Clarke, 1 Sand. Ch. 583, 660 (N.Y. Ch. 1844)).

[203]Y.B. 1 Rich. 3, 4a, Mich. 7 (K.B. 1483) (Hussey, C.J.), *reprinted by Seldon Society in* 11 YEAR BOOKS 4 (photo. reprint 2007) (suggesting in dicta that children born abroad to English subjects inherited by the common law and 1350 statute was declaratory; not discussing whether alien children became subjects); *see also* 1 BLACKSTONE, *supra* note 12, at 361 (pointing out need for subsequent naturalization statutes). For a fuller discussion of the weaknesses of Hussey's opinion, see note 34 *supra*.

[204]The note was added to the 1688 edition of Dyer's Reports and discussed a case decided in the seventh year of Edward III's reign, 1333. United States v. Wong Kim Ark, 169 U.S. 649, 669-70 (1898).

[205]For a discussion of the weaknesses of the note, see note 34 *supra*.

[206]*See* Appendix to this Article, *infra* pp. 46-54.

[207]It is possible that the New York vice chancellor who wrote one of the opinions may not even have read the English sources. For example, he referred to comments supposedly made by "Ch. J. Tindal" and "Parke, Justice" in the case of "Doe dem. Thomas v. Ackland." Lynch v. Clarke, 1 Sand. Ch. 583, ___ (N.Y. Ch. 1844). [As mentioned above, I haven't seen the official report of this case.] When one actually reads the English case, however, one finds that the party was Acklam, not Ackland. Doe v. Acklam, 107 Eng. Rep. 572 (K.B. 1824). Moreover, Tindal and Parke were attorneys for plaintiff and defendant, respectively, *id*. at 574, 577; the case was decided by Abbott, C.J., *id*. at 578.

CONCLUSION

In the introduction to this Article, I posed a question: "In the eyes of early Americans, would someone born in a foreign country of American parents be a 'natural born Citizen' and therefore eligible to be President of the United States?"[208] After reviewing the pertinent historical materials, I can come to only one conclusion. The answer is, "no."[209]

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[208] *Supra* p. 3.

[209] Excepting of course the children covered by one of the corollaries. *Supra* notes 118-119 and accompanying text.

APPENDIX

A Partial List of Children–Born Abroad to English Parents–Who Were Naturalized

Part I: 1509-1603

Source: HUGUENOT SOCIETY OF LONDON, LETTERS OF DENIZATION AND ACTS OF NATURALIZATION FOR ALIENS IN ENGLAND, 1509-1603 (William Page ed., 1893). Page numbers in the following table refer to this book.

Year*	Children Naturalized by Parliament	Page
1542	Edward Castelyn, born in Greece, son of William Castelyn, mercer of London, and Angeleca, daughter of Michael Villacho of Greece	43
	John Dymock, born in Antwerp, son of John Dymock, late gentleman usher of the king's chamber, and Beatrice, his wife, daughter of John Van Cleve of Antwerp	86
	Children, born beyond the sea, of Thomas Poyntz, grocer of London	196
1544	Mathew and Gilbert Dethicke, sons of Robert Dethicke, born in Derbyshire, and Agatha, his wife, daughter of Mathis Leyendecker of Acon	77
	John Mary Fathe, born in Genoa, son of Robert Fathe, in the king's service, and Jeronyma, his wife, daughter of Frauncis Denoto	90
	Richard, Thomas, and William May, born in Portugal, sons of William May, skinner and merchant of London, and Isabell, his wife, daughter of John Balyro of Portugal	167
1553	Gersone and Barnabas Hylles, sons of Richard Hylles, citizen and merchant tailor of London, and Agnes, an Englishwoman	124
	John, Paul, Nicholas, Margaret, Katherine, and Anne Wheler, children of Nicholas Wheler, citizen and draper of London, and Margaret, his wife, daughter of Rutkyn Vourighe of Germany	252
1563	Peter Browne, son of Thomas Browne, citizen and ironmonger of London, and Gertrude, his wife, daughter of Cornelius Vanderdelf of Brabant	33
	Sebastian, James, Elizabeth, and Clare Harvye, children of James Harvye, citizen and ironmonger of London, and Anne, his wife, daughter of Sebastian Ghens of Antwerp	119-20

	Joyce and William Mason, children of William Mason, late citizen and mercer of London, and Josyn, his wife, daughter of John de Fisher of Brabant	165
	Gilbert, Susan, Richard, and Gabryel Saltonstall, children of Richard Saltonstall, citizen and skinner of London, and Susanne, his wife, daughter of Thomas Poyntz, gentleman	214
	Thomas Wheler, son of Nicholas Wheler, citizen and draper of London, and Margaret, his wife, daughter of Rutkyn Vourighe of Germany	252
1566	John Stafford, born in Geneva, son of the late Sir William Stafford and Lady Dorothy Stafford, daughter of Sir Henry Stafford, late Lord Stafford, William and Dorothy having fled to Geneva in the time of Queen Mary	224
1571	Peregrine Bertye, born in Duchy of Cleves, son of Richard Bertye and Lady Katherine, Duchess of Suffolk, his wife	22
1576	Susan and Sarah Alden, daughters of John Alden, grocer of London, and Barbara, his wife, daughter of Jaques du Prier	3
	Margery and Thomasyn Baker, daughters of John Baker, merchant of Ipswich, and Willemynkin, his wife, daughter of Jasper de Haes of Brabant	12
	William, John, and Elizabeth Barker, children of John Barker, merchant of Kingston upon Hull, and Barbara, his wife, daughter of John Johnson of Antwerp	14
	Joseph Caunte, born beyond the seas, son of Edward Caunte, fishmonger of London, and Margaret, his wife, both English	44
	Magdalin, Elizabeth, and Katerine Dodd, daughters of Philip Dodd, haberdasher of London, and Elizabeth, daughter of John Van Howte of Antwerp	80
	Samuel Graye, born in parts beyond the seas, son of John Graye, girdler of London, and Julyan, his wife, both English	110
	Anne Harvy, born in Brabant, daughter of James Harvy, alderman and ironmonger of London, and Anne, his wife, daughter of Sebastian Ghentz of Antwerp	119
	Peter, James, Thomas, Melchior, and Katherine Harvie, children of James Harvie, ironmonger of London, and Barbara, daughter of Peter Charles of Antwerp	119

	Kent and Dorothy, his wife, who in the time of Queen Mary fled England to enjoy freedom of conscience	
1581	John Barthelmewe, born in parts beyond the seas, son of John Barthelmewe, late mercer of London, and Joyce, his wife, both English	15
	Bartilmew, Katherine, and Michael Beeston, born in Antwerp, and Richard Beeston, born in Hamburg, children of Richard Beeston, merchant of Southampton, and Mary, his wife, daughter of Sampson Cacioppyne of the Hague	19
	Walter and Susan Coppinger, born in Antwerp, children of Walter Coppinger, mercer, and Elizabeth, daughter of Cornelius Van Bright, of Antwerp	53
	James, Richard, Fraunces, Mary, Margaret, Abigall, and Gertrude Holmes, born at Hamborough, children of James Holmes, merchant, and Gertrude, daughter of Bonyface Lowther of Antwerp	125
	Thomas, Harman, Giles, John, Richard, and Katherine Hughes, born in Hamburg, children of John Hughes of London and Elizabeth, daughter of John Bylf of Gulicke	127
	Adrian and Robert Moore, born in Antwerp, and Henry and Katherine Moore, born in Hamborough, children of Robert Moore, merchant of Southampton, and Katherine, his wife, daughter of Wincelowe Coberger of Antwerp	172
	William Watson, born at Dansk, son of Roger Watson, draper, and Margaret, daughter of Humfrey Carr of Newcastle upon Tyne	250
1592	Peregrine Wingfield, born in the Low Countries, son of Sir John Wingfield, and Dame Susan, Countess of Kent, his wife	255
1593	William Crumpe, born in Antwerp, son of William Crumpe, mercer of London, and Elizabeth, his wife, her Majesty's subjects	58
	Elizabeth Knolles, born in the Low Countries, daughter of Sir Thomas Knolles, a natural born Englishman, and Odilia, his wife	142
	William Lytleton, born in the Low Countries, son of Fraunces Lytleton, a true Englishman and Captain under Sir William Russell, and Mary, his wife	159
	Samuel Saltonstall, born beyond the seas, son of Richard Saltonstall, citizen and alderman of London, and Susan, his wife, daughter of Thomas Poyntz, her Majesty's faithful subject	214

	Danyel Scaliett, born at Antwerp, son of Mark Scaliett, born in London, and Joice Paschier, his wife	216
	Elizabeth and John Shepperd, children of Richard Shepperd, citizen and grocer of London, and Sara, his wife, daughter of Hanns Vander Hide of Hamborough	219
	William Sidney, born in Zealand, son of Sir Robert Sidney, born in Kent, and Dame Barbara, his wife, born in Wales	221
	Jane Sturtevant, born in Holland, daughter of Fraunces Sturtevant, grocer of London, and Phillipp [sic], daughter of Richard Rogers of Holland	227
1597	John and William Heather, born in Holland, sons of Richard Heather, merchant adventurer of London, and I., daughter of Harke Peterson of Amsterdam	121
	Ottowell Hill, born in Antwerp, son of Richard Hill, merchant of London, and Elizabeth, his wife, daughter of Sir William Locke, citizen of London	124
	William Lewkenor, born in Antwerp, son of Lewis Lewkenor, esquire to the Queen's body, and B., daughter of Joyce de Rottes of Antwerp	154
	George Sheppey, born in Antwerp, son of George Sheppey, a damasker of London, and Mary, his wife, daughter of Jobb Josse of Antwerp	219
	Helen Waters, born in parts beyond the seas in the time of Queen Mary, daughter of John Waters and Gertrude, his wife, late of Great Yarmouth	250
1601	Thomas Moxsen, born in Antwerp, son of William Moxsen, late merchant and adventurer of Yorkshire, and Maudlyn, his wife	176

Part II: 1603-1700

Source: HUGUENOT SOCIETY OF LONDON, LETTERS OF DENIZATION AND ACTS OF NATURALIZATION FOR ALIENS IN ENGLAND AND IRELAND, 1603-1700 (William A. Shaw ed., 1911). Page numbers in the following table refer to this book.

Year	Children Naturalized by Parliament	Page
1604	Margaret, Countess of Nottingham, born in Scotland, wife of Charles, Earl of Nottingham, and all her children, wherever she was or they shall be born	2

	John Gordon, born in Scotland, grandson of George Gordon, Earl of Huntley	4
	Thomas Glover, born in Livonia, son of Thomas Glover of Warwickshire and Theodora, his wife, stranger born; Francys Collymore, born in Antwerp, son of Robert Collymore, citizen and merchant of London, and Mary, his wife, stranger born; Alexander Danyell, born in Zealand, son of Richard Danyell, citizen and merchant of London, and Jaquelina, his wife, stranger born; Nicholas Gilpine, born in Emden, son of Richard Gilpine, citizen and draper of London, and Susan, his wife; Mary Copcott, born in Zealand, daughter of Reynold Copcott, citizen and ironmonger of London, and Jaquelina, his wife, stranger born	4-5
	Katheryne, Elizabeth, Susan, Hester, and Mary Vincent, born in Embden and Stoad, children of William Vincent, merchant of London, and Blanch, his wife	5
1607	Fabian Smith, born in Livonia, son of George Smith, an English merchant, and Anne, his wife, a Dutchwoman	10
	John Ramsden, born in Antwerp, son of Roger Ramsden, an English merchant	10
1610	Michael Boyle, born in Zealand, son of James Boyle, citizen and mercer of London	14
	Richard, John, and Robert Bladwell, born in Germany, children of John Bladwell, an Englishman; George and John Hasden, born in Germany, sons of John Hasden, an English merchant, and Marten, his wife, born in Germany; and Elizabeth and Ann Cradock, born in Germany, daughters of William Cradock, an Englishman	15
	Joane Greenesmith, born in East Frisland, daughter of Mathew Greenesmith, citizen and grocer of London, and Teake, his wife, born in East Frisland	15
	Margaret Clarke, born in Poland, daughter of John Langton, an English merchant, and Elizabeth, his wife, an Englishwoman	15
1624	Elizabeth and Mary Vere, born in The Hague, daughters of Sir Horace Vere, born in Essex, and Dame Mary, his wife, born in Gloucestershire	34
1628	Isaac (age 15), Henry (age 14), Thomas (age 12), and Barnard (age 11) Asteley, born in Holland, children of Sir Jacob Asteley, one of the younger sons of Isaac Asteley, late of Norfolk, and Dame Agneta, his wife, born in Holland	40

	Samuel Powell (age 4), born in Hamburg, son of John Powell, merchant of London, born in Shropshire, and Jane, his wife, daughter of Thomas Dockwra of Hertfordshire	40
	John (age 16) and Anne (age 12) Trumball, born in Brussels, children of William Trumball, one of the clerks of your Majesty's Privy Council, and Deborah, his wife, an Englishwoman; William (age 18), Edward (age 16), and Sidney (age 14) Bere, born in Zealand, children of John Bere, born in Kent, and Elizabeth, his wife, daughter of Peter Warburton of Chester; and Samuell Wentworth (age 8), born in Calais, son of William Wentworth, merchant of Kent, and his wife, an Englishwoman	40
	John, Marie, Anne, Elizabeth, and Margarett Aldersey, born in Germany, children of Samuell Aldersey of London and Marie, his late wife, daughter of Phillipp Vanoyrlle of Germany	41
	James Freese (age 25), born in Russia, son of John Freese, an Englishman	41
1641	Dorothy Spencer, daughter of Lord Spencer of Whormeleighton	60
1657	Sarah Crewes, born in Rotterdam, daughter of Mathew Crewes, late of Norfolk, and Elizabeth, his wife, to be added to this bill	73
1660	Frances and James Hyde, born in the Netherlands and Belgium respectively, children of the Right Hon. Edward Lord Hyde; Charles, Charlotte, and Isabella Gerrard, born in Paris, children of the Right Hon. Charles Lord Gerrard of Brandon; Symon Fanshaw, born in Brittany, son of Sir Thomas Fanshawe of Hertfordshire; Richard and John Hamilton, born in Normandy, children of Sir George Hamilton; Edward and Ann Bedell, born in Gilderland, children of William Bedell, late of Huntingdonshire; Thomas Crispe, born in the Netherlands, son of Thomas Crispe of Kent; and Symon Clerke, born in Flanders, son of Peter Clerke of Warwickshire	75-77
	Lawrence Blancart, born in Calais, son of Lawrence Blancart, late of Kent; William Hanmer, born in France, son of Sir Thomas Hanmer of Flintshire; Elias Brooke, born in Zealand, son of English parents; and Constant, Nathaniell, Joshua, and Giles Sylvester and Mary Cartwright, born in Amsterdam, children of Giles Sylvester and Mary, his wife, English parents	78-79
1661	Francis Brudenell and Anna Maria, Countess of Shrewsbury, born in France, children of the Right Hon. Robert Lord Brudenell	80

1662	John Scase, born in Amsterdam, son of Edward Scase of Suffolk and Miriam, his wife, born in Hampshire; Mathew Boucheret, born in France, son of Gedeon Boucheret of Sussex and Jane, his wife; Bartholomew Lane, born in France, son of Samuell Lane, born in London, and Susan, his wife; Charles Hales, born in Antwerp, third son of Sir Edward Hales of Kent; William Northey, an infant, born in Holland, son of William Northey of London; and John, Richard, and Thomas Hebdon, born in Russia, sons of John Hebdon, a natural Englishman	81-82
1664	Daniell van Peene, born in Zealand, son of Jacob van Peene, an Englishman; and Robert Hall, born in The Hague, son of Robert Hall of Kent and Elizabeth, his wife	94-95
1696	Dorothy Gee (age 7), born in Holland, son of William Gee of York and Elizabeth, his wife	239
1698	Dudley Vesey (under age 14), born in Rouen, son of Charles Vesey of Suffolk and Frances, his wife	251
	Charles May, born out of your Majesty's allegiance, of English parents	251
1699	Francis Best, born in Switzerland, son of Henry Best and Mary, his wife, English parents	263

Part III: 1701-1800

Source: HUGUENOT SOCIETY OF LONDON, LETTERS OF DENIZATION AND ACTS OF NATURALIZATION FOR ALIENS IN ENGLAND AND IRELAND, 1701-1800 (William A. Shaw ed., 1923). Page numbers in the following table refer to this book.

Year	Children Naturalized by Parliament	Page
1701	Archibald Arthur, born out of the king's allegiance, of English parents	1
	Charlotte Boscawen, born in Paris, daughter of Charles Godfrey, Esq., and Arabella, his wife	11
1705	William Burnet (under age 21), born in The Hague, son of Gilbert Lord Bishop of Salisbury and Mary Scott, his wife	45
1706	Mary Elizabeth Braithwait, born in Holland, daughter of Sir Roger Manley and Mary Catherine, his wife; and Jane Jeffreys, born in Sweden, daughter of Sir James Jeffreys, by Anna, his wife	47

	Paul, Frances, and Catherine Risley, born in Holland, children of Capt. Henry Risley, late of Buckinghamshire, and Elizabeth Duncombe, his wife	48
1708	Katherine Clerke, born in Paris, daughter of Sir William Clerke, late of Buckinghamshire, and Dame Katherine, his wife, born in Paris	61
	An Act for Naturalizing Foreign Protestants, 7 Anne, ch. 5, the first of the general naturalization statutes, went into effect in 1708. Not surprisingly, naturalizations of children born abroad to English subjects dropped off. There still seem to be some, however. This volume does not give as many details as the previous one, so I cannot be certain. Below are several examples of cases that may have involved English parents.	
1745	Dorothy Penton, born in Lisbon, daughter of Christian Symonds and Anne, his wife	148
1777	Francis Popham, born in France, son of Francis Popham and Martha Clarke	184
1792	Richard Walker, born in Bengal	196
	James Mainwaring (age 4), born in France before his parents' marriage, son of James Mainwaring of Cheshire and Anne Marie Mainwaring, born in Switzerland	197
1796	Robert (age 18), John (age 17), and Mary (age 15) Howard, born in India, requested by the Rev. Nicholas Isaac Hill of Middlesex, their guardian	204

*.When more than one date is indicated, only the latest is noted.