

ARTICLES

THE ORIGINAL MEANING OF “NATURAL BORN”

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ABSTRACT

Article II, Section 1 of the U.S. Constitution provides that no one but a “natural born Citizen” is eligible to be President of the United States. Modern conventional wisdom generally holds that the phrase “natural born Citizen” includes anyone made a U.S. citizen at birth by U.S. statutes or the Constitution. But that conventional wisdom is under attack in academic commentary and open to doubt on textual grounds. If anyone born a U.S. citizen is eligible, the word “natural” in the eligibility clause is superfluous. Further, in general in eighteenth-century legal language, natural meant the opposite of “provided by statute” (hence “natural law” and “natural rights”). And plausible arguments can be made for a narrow meaning of “natural born” on the basis of either traditional English common law or eighteenth-century continental public law. To this point, modern scholarship has provided no comprehensive response to these objections.

This Article defends the broad view of the original meaning of the eligibility clause. Although it finds that the usual sources of original meaning—the Constitution’s drafting and ratifying history, and contemporaneous commentary—are inconclusive on the meaning of “natural born,” it argues that meaning of the phrase in English law provides a useful guide. Under traditional English common law, a “natural born subject” meant, with minor exceptions, only a person born in English territory. But beginning in the seventeenth century, in a succession of Acts, Parliament extended the meaning of “natural born” to include some persons born abroad to English parents. In adopting the phrase “natural born” from English law, the American framers likely understood that they were using a phrase without a fixed definition and subject to at least some legislative alteration through the naturalization power. That conclusion in turn provides support for the modern view that Congress can create categories of “natural born” citizens by statute, although that power is likely subject to some limitation to preserve the original purpose of the eligibility clause.

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INTRODUCTION

Article II, Section 1 of the U.S. Constitution provides that only a "natural born Citizen" is eligible to be President.¹ Until recently, modern conventional wisdom generally held that this phrase includes anyone made a U.S. citizen at birth by U.S. statutes or the Constitution, including those born abroad with a U.S. citizen parent.²

That conventional wisdom increasingly has come under attack from an array of articles and commentary arguing that under the Constitution's original meaning, "natural born" status attached only to persons born in the

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¹ U.S. CONST. art. II, § 1.

² See, e.g., AKHIL AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 164 (2005) (equating "natural born Citizen" with "citizen at the time of his birth."); Paul Clement & Neal Katyal, *On the Meaning of "Natural Born Citizen"*, 128 HARV. L. REV. FORUM 161, 161 (2015) (arguing that the phrase "natural born Citizen" means "someone who was a U.S. citizen at birth with no need to go through a naturalization proceeding at some later time"). A U.S. statute makes most people born outside the United States to at least one U.S. citizen parent a citizen of the United States at birth. Immigration and Nationality Act of 1952, 8 U.S.C. § 1401 (2016). People in this category—along with those born within the United States and therefore citizens under the first sentence of the Fourteenth Amendment—are thought to be eligible for the presidency. See JACK MASKELL, CONG. RESEARCH SERV., R42097, *QUALIFICATIONS FOR PRESIDENT AND THE "NATURAL BORN" CITIZENSHIP ELIGIBILITY REQUIREMENT* 50 (2011) (concluding that "the majority of scholarship on the subject" indicates that birth abroad to at least one citizen parent is sufficient for natural born citizen status). George Romney (born in Mexico) and John McCain (born in the Panama Canal Zone) ran for President (in 1968 and 2008, respectively) without sustained objections to their eligibility.

United States,³ or only to a subset of those born abroad.⁴ In contrast, despite the confident ring of the conventional wisdom, there are essentially no sustained scholarly defenses of it. Its leading recent affirmation is only four pages long,⁵ and other scholarly examinations have found the clause mysterious and ambiguous.⁶ As a result, in the most recent election cycle, the clause provoked extraordinary attention and controversy.⁷

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- ³ See, e.g., Mary Brigid McManamon, *The Natural Born Citizen Clause as Originally Understood*, 64 CATH. U. L. REV. 317, 347 (2015) [hereinafter McManamon, *Natural Born Citizen Clause*]; John Vlahoplus, *Toward Natural Born Derivative Citizenship*, 7 BRIT. J. AM. LEGAL STUDS. (forthcoming 2018). For leading legal scholars taking this view in popular commentary, especially as applied to the presidential campaign of Senator Ted Cruz, see, for example, Einer Elhauge, *Ted Cruz Is Not Eligible to Run for President: A Harvard Law Professor Close-Reads the Constitution*, SALON (Jan. 20, 2016, 9:37 PM), http://www.salon.com/2016/01/20/ted_cruz_is_not_eligible_to_run_for_president_a_harvard_law_professor_close_reads_the_constitution/; Laurence H. Tribe, *Under Ted Cruz's Own Logic, He's Ineligible for the White House*, BOS. GLOBE (Jan. 11, 2016), <http://www.bostonglobe.com/opinion/2016/01/11/through-ted-cruz-constitutional-looking-glass/zvKE6qpF31q2RsvPO9nGoK/story.html>; Eric Posner, *Ted Cruz Is Not Eligible to Be President*, SLATE (Feb. 8, 2016, 12:26 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2016/02/trump_is_right_ted_cruz_is_not_eligible_to_be_president.html; Mary Brigid McManamon, *Ted Cruz Is Not Eligible to Be President*, WASH. POST (Jan. 12, 2016), https://www.washingtonpost.com/opinions/ted-cruz-is-not-eligible-to-be-president/2016/01/12/1484a7d0-b7af-11e5-99f3-184bc379b12d_story.html.
- ⁴ Thomas H. Lee, “Natural Born Citizen,” 67 AM. U. L. REV. 327 (2017) (arguing that, at the time of the adoption of the Constitution, natural born citizenship was conferred only upon children of male citizens born abroad); Thomas Lee, *Is Ted Cruz a ‘natural born Citizen’? Not if You’re a Constitutional Originalist*, L.A. TIMES (Jan. 10, 2016, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-lee-is-ted-cruz-eligible-to-be-president-20160110-story.html>.
- ⁵ See Clement & Katyal, *supra* note 2. Clement and Katyal principally rely on eighteenth-century British statutes, which, they say, “provided that children born abroad to subjects of the British Empire were ‘natural-born Subjects’” *Id.* at 162. But as explained below, see *infra* Part II.B., these statutes only applied to persons whose fathers (or paternal grandfathers) were British subjects. Modern U.S. law allows persons born abroad to claim birthright U.S. citizenship through their mothers as well.
- ⁶ See, e.g., Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22 (2008), <http://www.michiganlawreview.org/firstimpressions/vol107/solum.pdf>, updated version available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1263885 (revised 2010). Other leading scholarship on the clause emphasizes the difficulty of interpreting it. See, e.g., Sarah Helene Duggin & Mary Beth Collins, *‘Natural Born’ in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution’s Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. REV. 53, 55–56 (2005); Charles Gordon, *Who Can Be President of the United States: The Unsolved Enigma*, 28 MD. L. REV. 1, 1 (1968); Michael Nelson, *Constitutional Qualifications for President*, 17 PRES. STUD. Q. 383, 383 (1987); Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 BYU L. REV. 927, 932–33 (2005); 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, 881 (1988); William Jacobson, *Natural Born Citizens: Marco Rubio, Bobby Jindal, Ted Cruz*, LEGAL INSURRECTION (Sept. 3, 2013, 9:05 AM), <http://legalinsurrection.com/2013/09/natural-born-citizens-marco-rubio-bobby-jindal-ted-cruz/>.
- ⁷ See *supra* note 3. For commentary in support of the broader view of the clause, see, for example, Akhil Reed Amar, *Why Ted Cruz Is Eligible to Be President*, CNN (Jan. 14, 2016, 11:59 PM), <http://www.cnn.com/2016/01/13/opinions/amar-cruz-trump-natural-born-citizen/index.html>; Garrett Epps, *Ted Cruz Is a Natural Born Citizen*, ATLANTIC (Jan. 14, 2016), <https://www.theatlantic.com/politics/archive/2016/01/donald-trump-ted-cruz-birther-argument/424104/>.

Not only does the previous conventional wisdom rest on surprisingly thin scholarly foundations, it faces daunting textual and historical challenges. If anyone born a U.S. citizen is eligible to the presidency, the word “natural” in the Eligibility Clause seems superfluous. To give it meaning, there should be some “born” citizens who are not “natural born.” Further, in general in eighteenth-century legal language, “natural” meant the opposite of “provided by statute.” Natural law was the opposite of positive law; natural rights were rights that predated codification. The most obvious meaning of “natural born Citizen” thus is not a person who claims citizenship from a statute, but rather a person whose citizenship comes from the natural state of things.

Nonetheless, this Article concludes that the broad reading of the Presidential Eligibility Clause is correct. It provides the first comprehensive defense of the view that persons born outside the United States, if made U.S. citizens at birth by statute, are eligible to be President. Contrary to what has sometimes been assumed, that argument is complicated and not entirely free from doubt. As suggested above, the Constitution’s text seems to point in the opposite direction, toward an idea of “natural” citizenship arising from some connection to the nation apart from mere statutory status. The drafting and ratifying history is unhelpful, as the clause was rarely discussed, and only in general terms. Similarly, post-ratification discussions are inconclusive, or appear to point in different directions. On the basis of the text and the most frequently consulted founding-era sources, the phrase appears to refer to a “natural” relationship to the nation that was incompletely articulated, or perhaps incompletely understood.

One might be tempted to stop there and declare the clause fatally ambiguous.⁸ This Article argues, however, that meaning can be found in pre-constitutional sources, chiefly in the idea of “natural born subjects” in English law. In brief, traditional English common law reflected an idea of “natural” birth within the allegiance of the sovereign, based only on birth within the sovereign’s territory (with minor exceptions). These people were called

⁸ That is, it may be ambiguous in its application to certain categories of people. *See* Solum, *supra* note 6, at 5–6 (noting that most people are unambiguously covered or not covered by the clause, but finding that the clause might be ambiguous as to those with some, but not complete, connection to the United States at birth).

The Fourteenth Amendment is not immediately relevant to the meaning of the Eligibility Clause. It was ratified much later (in 1868) and did not purport to address the meaning of “natural born” citizen or the scope of presidential eligibility. Although it established a class of people whose birthright citizenship is protected by the Constitution, U.S. CONST. amend. XIV, § 1, and thus cannot be altered by statute, it did not preclude additional classes of people being given birthright citizenship by statute, and Congress has consistently recognized citizenship at birth beyond the constitutional minimum of the Amendment. On its own, the Fourteenth Amendment neither assured that everyone within its protection is “natural born” nor excluded those outside its protection from being “natural born.”

“natural born subjects.”⁹ Since the late seventeenth century, however, Parliament had extended “natural born subject” status to certain persons born abroad to English parents. Crucially, Parliament did not merely give these persons the rights of natural born subjects; it declared them to *be* natural born subjects. As a result, by the late eighteenth century, in English law the phrase “natural born”—contrary to its traditional meaning—had come to include those given subject status from birth by statute.¹⁰

This Article further argues that this understanding of “natural born” is the one most likely recognized by the Constitution’s Framers. The relevant features of English law were known in America through Blackstone’s widely read treatise.¹¹ Founding era and post-founding sources demonstrate that American citizenship law was strongly influenced by its English predecessor; although American commentators did not make clear their precise understanding of “natural born,” the most likely meaning seems to be the meaning it had in English law.

This understanding is strongly reinforced by the Constitution’s grant to Congress of the power to “establish an uniform Rule of Naturalization.”¹² The English statutes declaring certain categories of people to be natural born, even if not born in England, were called naturalization acts, and thus were understood as exercises of Parliament’s naturalization power. Absent indications to the contrary, the best guide to the scope of Congress’s naturalization power is the scope of Parliament’s naturalization power. Recovering this meaning highlights the underappreciated connection between the Article II’s Eligibility Clause and Article I’s Naturalization Clause. As English practice makes clear, the power granted by the latter includes (within limits) the power to define the meaning of the former.

The last point is crucial, because eighteenth-century English statutes did not recognize all persons born abroad with English parents to be natural born subjects; they recognized such a status for persons whose fathers (or, after 1773, paternal grandfathers) were English subjects.¹³ Modern U.S. law generally grants citizenship at birth to persons born abroad with either a U.S. citizen mother or a U.S. citizen father.¹⁴ If foreign-born citizens deriving citizenship only from their mother are eligible to the presidency, it cannot be because the American Framers adopted the English rule in effect at the time of the founding. Rather, it is because the Framers conveyed to Congress, through the Naturalization Clause, the power to define “natural” citizenship.

⁹ McManamon, *Natural Born Citizen Clause*, *supra* note 3, at 320; *infra* Part II.A.

¹⁰ *Infra* Part II.B.

¹¹ See AMAR, *supra* note 2, at 30 (noting the influence of WILLIAM BLACKSTONE, COMMENTARIES).

¹² U.S. CONST. art. I, § 8, cl. 4.

¹³ See *infra* Part II.B.

¹⁴ Immigration and Nationality Act of 1952, 8 U.S.C. § 1401(g) (2016).

The ensuing discussion proceeds as follows. Part I considers the Eligibility Clause's text and drafting history, concluding that nothing decisive can be found within it. Part II explores the legal background of the phrase "natural born," particularly its definition in English common law, English statutory law, and the law-of-nations theory of the eighteenth-century Swiss writer Emer de Vattel. Part III argues that the weight of available evidence shows the founding generation in America to have been most strongly influenced by English law rather than Vattel, and by the whole of English law rather than just its common law antecedents. Part IV concludes that the most likely meaning of the Eligibility Clause combined with the Naturalization Clause is that the Constitution adopted the English practice of a core common law definition subject to modification by statute—a reading that confirms the modern understanding of eligibility.

I. THE CONSTITUTION'S TEXT AND DRAFTING HISTORY

The Presidential Eligibility Clause provides:

No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen years a Resident within the United States.¹⁵

The clause thus creates two categories of eligible citizens (albeit only one relevant in modern times): (1) persons who are natural born citizens, and (2) persons who were citizens of the United States when the Constitution was adopted. Some interpreters have purported to be confused by the comma after "United States," which under modern grammatical conventions indicates that the phrase "at the time of the Adoption of this Constitution" modifies both "natural born Citizen" and "Citizen of the United States." This confusion seems misguided. As other sections of the Constitution indicate, the Framers had different and looser rules regarding comma placement than we do; moreover, attaching significance to the comma creates a manifestly absurd result—namely, that no person born after the adoption of the Constitution would be eligible to be President.

That leaves the question of the meaning of "natural born Citizen." According to a study by the Congressional Research Service, the phrase means any person who is a U.S. citizen by birth, including those whose citizenship is granted by statute.¹⁶ This broad view, however, is in substantial tension with the clause's text on two grounds.

¹⁵ U.S. CONST. art. II, § 1.

¹⁶ MASKELL, *supra* note 2, at 50.

First, reading the clause in this way violates the surplusage canon, which holds that in textual interpretation all words in a text should be given meaning.¹⁷ If all persons who are born citizens are eligible, the word “natural” has no effect. The Framers could as well have written “No person except a born Citizen” (or perhaps “No person except one born a Citizen”) shall be eligible. An interpretation of the clause should therefore strive to find some meaning of the word natural.¹⁸

Second, giving “natural” its ordinary legal meaning suggests the exact opposite of the conventional conclusion regarding citizenship derived from statutes. In eighteenth-century legal language “natural” meant arising from the nature of things¹⁹—a usage reflected, for example, in natural law (as opposed to statutory law) and natural rights (as opposed to statutory rights). Under this common meaning of natural, “natural” citizenship should be distinct from—not coextensive with—statutory citizenship.

Neither of these observations provides direct evidence of the phrase’s meaning, but they do suggest that the modern assumed meaning, at minimum, requires further explanation and support. On its face, the Eligibility Clause does not make all born citizens eligible to the presidency. The critical question is the eighteenth-century understanding of “natural” born.

The most common indicators of textual meaning—the drafting and ratifying history—are not helpful in finding a conclusive meaning. The initial draft of the Presidential Eligibility Clause came from the Committee of Detail’s August 22, 1787 report, and required only that the President 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.”²⁰ The “natural born” language first appeared in the Committee of Eleven report on September 4,

¹⁷ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012).

¹⁸ Alexander Hamilton’s written plan for the Constitution, which he gave to Madison near the close of the Convention, had a presidential eligibility clause similar to the one adopted in the Constitution but omitting the word “natural”: “No person shall be eligible to the office of President of the United States unless he be now a Citizen of one of the States, or hereafter be born a Citizen of the United States.” 3 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 629 (Max Farrand ed., 1911) [hereinafter *FARRAND, RECORDS*]. That appears to provide exactly what the modern consensus thinks the Eligibility Clause provides. However, the actual text does not say “born a citizen” but instead adopted (without explanation) the phrase “natural born.” Perhaps it was understood as a synonym, but that is far from obvious.

¹⁹ See JOHN ASH, *NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (1775); 2 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* 1349–50 (1755); NATHAN BAILEY, *AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY* (1721).

²⁰ 2 *FARRAND, RECORDS*, *supra* note 18, at 367. The Committee of Detail’s initial report, which had no presidential eligibility requirements, was delivered to the Convention on August 6, *id.* at 176, and several additional matters (although not presidential eligibility specifically) were referred back to the Committee on August 18 and 20, *id.* at 333, 342–43. The Committee then issued an additional report on August 22, recommending eligibility requirements.

in substantially its current form,²¹ without explanation, and apparently it was not debated by the Convention:

The Committee of Eleven did not explain why this new language had been added. The Convention approved this portion of the proposals without debate. The draft Constitution was then referred to a second Committee of Five, known as the Committee on Style and Arrangement or the Committee on Revision. That Committee retained the presidential qualification clause without comment, and without substantial change. It was adopted in this form, and without any debate, by the Convention. Indeed, no explanation of the origin or purpose of the presidential qualification clause appears anywhere in the recorded deliberations of the Convention.²²

There is some evidence, though, that the phrase had its origins with Secretary of Foreign Affairs and future *Federalist* co-author John Jay, who was not at the Convention. Jay wrote a letter to George Washington, the chair of the Convention, on July 25, 1787, making the following suggestion:

Permit me to hint, whether it would not be wise & seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in chief of the american army shall not be given to, nor devolve on, any but a natural born Citizen.²³

Jay did not elaborate what he meant by “natural born Citizen.” On September 2, shortly before the phrase appeared in the Committee draft, Washington replied, thanking Jay for “the hints contained in your letter.”²⁴ As one commentator concludes:

Because the second version of the presidential requirements came a mere two days following Jay’s letter to Washington and was adopted without discussion, and considering Washington’s considerable presence at the convention, it is entirely possible that Jay’s reasons for including the natural-born requirement were the primary motivations behind the provision: namely, fear of foreign dominance of government.²⁵

Some writers have gone further to speculate that Jay had a particular person in mind for exclusion: Baron von Steuben, the Prussian officer who had been a principal aide to General Washington during the Revolutionary War, but who was regarded as untrustworthy as a result of some subsequent activities.²⁶ (Jay was thinking only of the office of Commander-in-Chief;

21 *Id.* at 498. The Committee of Eleven, composed of one person from each of the eleven states then in attendance, was charged with resolving important matters that remained outstanding after the Convention considered the Committee of Detail report.

22 Gordon, *supra* note 6, at 4.

23 3 FARRAND, RECORDS, *supra* note 18, at 61; CHARLES THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY 137 (1923).

24 3 FARRAND, RECORDS, *supra* note 18, at 76.

25 Seymore, *supra* note 6, at 938–39.

26 THACH, *supra* note 23, at 137 (“The name of [Baron] von Steuben is not mentioned, but there can be little doubt that it was he . . . with his sympathies for the followers of Shay, and his evidently suspected dealings with Prince Henry of Prussia, whom Jay had in mind when he penned these

because the Philadelphia proceedings were secret, he did not know that the Convention had decided to create a President who was also Commander-in-Chief). Other historical studies suggest that the Framers’ motivation was more broadly a concern over the ambitions of foreign aristocrats and would-be monarchs.²⁷ Professor Akhil Amar, for example, emphasizes the Framers’ worries that foreign noblemen might seek to become the American monarch, and notes that England had twice invited a foreign aristocrat to become king (William III and George I).²⁸ Requiring natural born citizenship, rather than just citizenship, would avoid intrigues to naturalize favored foreigners (and potential monarchs):

The apparent purposes of this citizenship clause were thus to assure the requisite fealty and allegiance to the nation from the person to be the chief executive of the United States, and to prevent wealthy foreign citizens, and particularly wealthy foreign royalty and their relatives, from coming to the United States, becoming naturalized citizens, and then scheming and buying their way into the Presidency or creating an American monarchy.²⁹

Early commentary confirms the clause’s basic purpose. Convention delegate Charles Pinckney later commented that the purpose of the natural born citizen requirement was to “insure . . . attachment to the country.”³⁰ St. George Tucker, writing in 1803, described the clause as “a happy means of security against foreign influence” and as “guard[ing] against” the “admission of foreigners into our councils.”³¹ Although not speaking specifically of the Eligibility Clause, Alexander Hamilton’s *Federalist* 68—discussing selection of the President—warned against “the desire in foreign powers to gain an improper ascendant in our councils.”³² Writing somewhat later, in 1833, Joseph Story echoed these views:

It is indispensable, too, that the president should be a natural born citizen of the United States [T]he general propriety of the exclusion of foreigners, in common cases, will scarcely be doubted by any sound statesman. It cuts off all chances for ambitious foreigners, who might otherwise be intriguing for the office; and interposes a barrier against those corrupt interferences of

words. The silent insertion of the clause in a committee where matters could be managed quietly tends to confirm the conjecture.”).

²⁷ *E.g.*, AMAR, *supra* note 2, at 164–65.

²⁸ *Id.* at 165 (noting these fears and referring to the Eligibility Clause as “lay[ing] to rest public anxieties about foreign monarchs.”); *see also id.* (“Out of an abundance of caution—paranoia, perhaps—the framing generation barred not only European-style titles of nobility, but also European noblemen themselves (along with all other future immigrants) from America’s most powerful and dangerous office.”).

²⁹ MASKELL, *supra* note 2, at 8.

³⁰ 3 FARRAND, RECORDS, *supra* note 18, at 385, 387 (recording Charles Pinckney’s statement in the U.S. Senate).

³¹ 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. 323 (1803).

³² THE FEDERALIST NO. 68, at 410, 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

foreign governments in executive elections, which have inflicted the most serious evils upon the elective monarchies of Europe.³³

While plausible, these observations provide limited insight into the details of the clause's meaning. It seems clear that the phrase was intended to place a higher bar on presidential eligibility than the Convention had placed on eligibility for Congress, whose members merely had to be U.S. citizens for seven and nine years for the House and Senate respectively.³⁴ The events surrounding the drafting indicate a paradigm case of exclusion—persons lacking any plausible connections to the United States at birth—but standing alone they are not helpful in determining what connections at birth would be sufficient. In particular, they do not make clear whether statutory citizenship at birth would convey eligibility.

It also does not appear that there was any material discussion of the clause in the ratification debates. And the one near-contemporaneous comment by James Madison is ambiguous. In connection with the 1789 debate over the eligibility of William Smith to be a member of Congress, Madison emphasized that Smith had been born in the United States and observed: "It is an established maxim that birth is a criterion of allegiance. Birth, however, derives its force sometimes from place, and sometimes from parentage; but, in general, place is the most certain criterion; it is what applies in the United States"³⁵ While Madison emphasized birth within the United States,

³³ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (1833); *see also* JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 96 (1833) ("Were foreigners eligible to the office [of the presidency], it would be an object of ambition, or of policy, with foreign nations, to place a dependent in the situation; and scenes of corruption and bloodshed, which disgraced the annals of Poland, might have been acted over again in this country. The necessity of citizenship by birth, precludes this, by rendering it impossible for any foreigner ever to become a candidate."); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 255 (explaining that because of the Eligibility Clause "ambitious foreigners cannot intrigue for the office, and the qualification of birth cuts off all those inducements from abroad to corruption, negotiation, and war").

³⁴ U.S. CONST. art. I, §§ 2–3. In an earlier debate on August 13, Elbridge Gerry, speaking of the eligibility of members of Congress, had said that he "wished that in the future the eligibility might be confined to Natives. Foreign powers will intermeddle in our affairs, and spare no expence to influence them. Persons having foreign attachments will be sent among us & insinuated into our councils, in order to be made instruments for their purposes." 2 FARRAND, RECORDS, *supra* note 18, at 268. Madison and Hamilton objected on the other side and moved to eliminate the restrictions altogether. Gerry's suggestion did not come to a vote; the Hamilton/Madison motion was voted down, along with several others. *Id.* at 268–72. *See* 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?* (Apr. 6, 2000), <http://faculty.maxwell.syr.edu/jyinger/citizenship/history.htm> (discussing this debate).

³⁵ 1 ANNALS OF CONGRESS 404 (1789) (Joseph Gales ed., 1834) [hereinafter 1 ANNALS]; *see* MASKELL *supra* note 2, at 24 n.111. Smith was born in what became the United States but his parents were Loyalists who remained British subjects.

questions about extraterritorial birth were not raised and it seems that he deliberately avoided the issue.

A further consideration is that in 1790, Congress enacted a naturalization statute, pursuant to its Article I, Section 8 power to provide a uniform rule of naturalization. In addition to specifying the method by which aliens could be naturalized, the statute provided:

And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States . . .³⁶

One might take the 1790 Act as indicative of the Constitution’s original meaning, at least to the extent that the First Congress believed it had power to define natural born citizens in this way.³⁷ But no one in Congress explained the basis for such a belief or the extent of the power Congress understood itself to have.³⁸

Moreover, the 1790 Act was replaced five years later by a new naturalization act whose principal effect was to extend the residency period for aliens wishing to become citizens from two to five years. As to children of U.S. citizens, the new Act dropped the phrase “natural born citizen” and said only: “the 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 . . .”³⁹

The effect of the 1795 Act seems thoroughly ambiguous: was the key phrase “natural born” dropped inadvertently, dropped because Congress thought it was surplusage, or dropped because Congress had decided (for

³⁶ An Act to establish a uniform Rule of Naturalization, ch. 3, § 1, 1 Stat. 103, 104 (1790) [hereinafter 1790 Act] (repealed 1795). Some modern commentators have doubted Congress’s power to declare foreign-born children of U.S. parents to be U.S. citizens at birth. However, that objection seems insubstantial. As the English practice discussed in the next section shows, making a person a subject by statute, whether at birth or otherwise, was called “naturalization.” See *infra* Part II.B. Thus Congress’s naturalization power undoubtedly extended to making a category of persons citizens at birth, as the 1790 Act did. The difficult question is whether Congress had power to declare them *natural born* citizens.

³⁷ See Clement & Katyal, *supra* note 2, at 162 (relying on the 1790 Act); see also Saul Cornell, *The 1790 Naturalization Act and the Original Meaning of the Natural Born Citizen Clause: A Short Primer on Historical Method and the Limits of Originalism*, 2016 WIS. L. REV. FORWARD 92, 93–95 (criticizing Clement and Katyal’s reading of the 1790 Act); Michael D. Ramsey, *Originalism, Natural Born Citizens, and the 1790 Naturalization Act: A Reply to Saul Cornell*, 2016 WIS. L. REV. FORWARD 146 (2016) (defending Clement and Katyal’s reliance on the 1790 Act).

³⁸ Debate on the 1790 Act—which was minimal—is recorded in 1 ANNALS, *supra* note 35, at 1058, 1110, 1118–25, and in 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789–3 MARCH 1791: DEBATES IN THE HOUSE OF REPRESENTATIVES: SECOND SESSION: JANUARY–MARCH 1790, at 529–35 (Helen E. Veit et al. eds., 1994) [hereinafter DOCUMENTARY HISTORY]. For further discussion of the 1790 Act, see *infra* Part IV.B.

³⁹ An Act to establish a uniform rule of Naturalization; and to repeal the act heretofore passed on that subject, ch. 20, § 3, 1 Stat. 414, 415 (1795) [hereinafter 1795 Act] (repealed 1802). Naturalization acts thereafter did not use “natural born.”

constitutional reasons or otherwise) that foreign-born children of U.S. parents should not be declared natural born? Nothing in the congressional debates indicates a satisfactory answer. As with the 1790 Act, the clause relating to foreign-born children of U.S. citizens went unremarked, although unlike the 1790 Act, other provisions of the 1795 Act were extensively and sometimes rancorously debated in the House.⁴⁰

II. THREE FOREIGN SOURCES OF EIGHTEENTH-CENTURY MEANING

The Eligibility Clause received little contemporaneous explanation by the founding generation. As a result, its meaning is best assessed by examination of eighteenth-century legal traditions that might have influenced the Framers' understanding of it. Of these, there are three, which unfortunately point in somewhat different directions.

A. *English Common Law*

To begin, the phrase "natural born subject" had an established meaning in English⁴¹ law, and might reasonably be seen as a predecessor to the Constitution's phrase "natural born Citizen." Because the Constitution does not define most of its terms and uses phrases obviously drawn from contemporary legal language—*ex post facto*, *habeas corpus*, bill of attainder, and the like—the English legal background with which its drafters were familiar is a rich source of meaning, frequently more useful and relevant than dictionaries, which defined terms often without reference to their legal contexts.⁴² As Chief Justice Taft later wrote, when considering the meaning of the pardon power:

⁴⁰ See 4 ANNALS OF CONG. 1004–09, 1021–23, 1026–58, 1061, 1064–66 (1793–95) (Joseph Gales ed., 1849) [hereinafter 4 ANNALS] (recording the debate on the 1795 Act). The lengthy House debates contain no mention of foreign-born children of U.S. citizens. The recorded Senate proceedings debates were minimal and unrelated to the relevant clause as well. See *id.* at 809–12, 814–16. The Senate passed the House bill with unrelated amendments, *id.* at 816, and the House acceded to the Senate amendments to produce the final bill. *Id.* at 1133 (Jan. 26, 1795); see also *infra* note 140 (discussing further debate on the 1795 Act).

⁴¹ For convenience, this Article uses "English" to refer to the law both before and after the 1707 union of the crowns of England and Scotland to form Great Britain.

⁴² The phrase "natural born" is not defined as a phrase (or otherwise used) in the leading eighteenth-century dictionaries. See *supra* text accompanying note 19 (citing dictionaries). Yet the phrase appears to be used as a term of art in legal enactments (indeed, in some versions it is hyphenated), thus making its meaning difficult to reconstruct from the individual words. In any event, the definitions of the individual words are unhelpful. For example, Johnson defined "Natural" as, among other things, "[p]roduced or effected by nature"; "Native" in turn he defined as (among other things) "[r]elating to the birth; pertaining to the time or place of birth," "conferred by birth," and, without further explanation, "[o]riginal; natural." 2 JOHNSON, *supra* note 19, at 1349–50. Bailey's 1765 edition defined "Naturalization" as "when one who is an Alien, is made a Natural Subject by Act of Parliament." BAILEY, *supra* note 19, at 566. Similarly, Ash defined "Naturalize" as "[t]o make natural . . . to invest a foreigner with the privileges of a native subject," with "Native" defined

The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.⁴³

Under English common law, a natural born subject—consistent with the common legal meaning of “natural”—was one whose subjectship arose from the nature of things. As Blackstone explained:

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 allegiance of the king; and aliens, such as are born out of it. Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors.⁴⁴

(following Johnson) as both “[o]ne born in any place, an original inhabitant” and “conferred by birth.” 2 ASH, *supra* note 19 (definitions of “Natural,” “Naturalized” and “Native.”).

⁴³ *Ex parte Grossman*, 267 U.S. 87, 108–09 (1925); *see also* *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390–91 (1798) (Chase, J.) (“The prohibition, ‘that no state shall pass any *ex post facto* law,’ necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing. . . . The expressions ‘*ex post facto* laws,’ are *technical*, they had been in use long before the Revolution, and had acquired an appropriate meaning, by *Legislators, Lawyers, and Authors*.”); *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (Marshall, C.J.) (“As [the pardon] power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.”); *Smith v. Alabama*, 124 U.S. 465, 478 (1888) (“The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.”); *Carmell v. Texas*, 529 U.S. 513, 521 (2000) (relying on *Calder* and the English common law meaning of “*ex post facto*” to interpret the Ex Post Facto Clause); MASKELL, *supra* note 2, at 1 (noting relevance of eighteenth-century common law to the Eligibility Clause under these precedents and explaining, “Although the English common law is not ‘binding’ on federal courts in interpreting the meaning of words or phrases within the Constitution, nor is it necessarily to be considered the ‘law’ of the United States (as it is for the individual states specifically incorporating it), it can be employed to shed light on the concepts and precepts within the document that are not defined there, but which are reflected in the corpus of British law and jurisprudence of the time.”); Clement & Katyal, *supra* note 2, at 161 (noting English common law as an important source of constitutional meaning).

⁴⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES *354.

Blackstone then noted some minor exceptions:

When I say, that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood with some restrictions. The common law indeed 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. And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once.⁴⁵

The principal common law exception, Blackstone noted, was that "the children of the king's ambassadors born abroad were always held to be natural subjects: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of *postliminium*) to be born under the king of England's allegiance, represented by his father, the ambassador."⁴⁶ On the other hand, Blackstone added, "[t]he children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such."⁴⁷

Thus anyone reading Blackstone (as the Framers did) would understand English common law to tie "natural born" very closely to birth within English territory. As Blackstone explained, this was a "natural" relationship in that it arose not from an act of Parliament but from the nature of the relationship between the person and the monarch: the monarch granted protection in return for allegiance.⁴⁸

Although Blackstone was not always reliable in his accounts of English law, on this point his description conforms to later historical descriptions. One such account described the common law as follows:

By the common law all persons born within the power or protection of the Crown owe natural allegiance to the King, and are natural-born subjects of the realm, while all born out of the allegiance or protection of the King are aliens born, and remain aliens unless they are subsequently made denizens or naturalized. For the law of England has always adopted the feudal or territorial principle of determining nationality by the place of birth alone . . .⁴⁹

This account also confirmed Blackstone's recognition of narrow exceptions for children of ambassadors, whose nationality was determined by that

⁴⁵ *Id.* at *361.

⁴⁶ *Id.*

⁴⁷ *Id.* at *361–62.

⁴⁸ *Id.* at *354–55. This understanding comports with contemporaneous dictionary definitions of "natural" as that arising from nature. See *supra* text accompanying note 19.

⁴⁹ HENRY S.Q. HENRIQUES, *THE LAW OF ALIENS AND NATURALIZATION* 29 (1906); see also *id.* at 62 ("[T]he general effect [of the common law rule] is, that persons born within the dominions of the King, whether of English or foreign parents, are natural-born subjects, and that persons born without his dominions are aliens.").

of their father, not of their place of birth, and the children of others who did not owe even temporary allegiance to the territorial sovereign:

[A] person, though born within the realm may yet be an alien, if he is born in such circumstances that he cannot be held from the moment of his birth to owe allegiance to the King. Such, for instance, are the children of persons who, by the comity of nations, recognised by our courts as international law, are looked upon as being ex-territorial, *e.g.*, a foreign sovereign or his ambassador or accredited minister; such also are the children of alien enemies, who, as members of an invading army, may have succeeded in occupying part of the King's territory, for these cannot be considered to be even temporarily subjects of the King, for where no protection can be claimed, no allegiance can be due.⁵⁰

As numerous sources emphasize, these rules of English common law trace their traditional exposition to *Calvin's Case*,⁵¹ as reported by Sir Edward Coke in the early seventeenth century. The precise issue there was the status of a person born in Scotland after King James of Scotland also became King of England. The case, however, contains substantial discussion of the English common law of subjectship, setting forth the strong birth-within-sovereign territory approach repeated in Blackstone and later historical accounts.⁵²

In sum, the traditional English common law was that a “natural born” subject was only one born within the territory of the monarch, with narrow exceptions for the children of ambassadors and other ministers, and of invading armies. The touchstone was birth under the protection of the sovereign, which the common law understood to arise (except in unusual circumstances) from presence in the monarch's dominions.

If that were the end of the pre-Convention story, one might plausibly argue that only birth within the United States could convey presidential eligibility. It is, however, not the end of the story. As described in the next section, in addition to the common law background England had a complicated statutory tradition defining the phrase “natural born.”

B. *The English Statutory Background*

A bedrock principle of eighteenth-century English law was that Parliament could alter, extend and re-define the common law by statute. Despite

⁵⁰ *Id.* at 29–30; *see also id.* at 62–63 (listing as “[p]ersons born within the Realm or other dominions of the King who are aliens born” as the children of a foreign sovereign, ambassador, or other diplomat and children born in territory occupied by a hostile army); *id.* at 63–64 (listing as “[p]ersons born without the Dominions of the King who are Natural-born Subjects at Common Law” as children of the English monarch and his ambassadors and diplomatic agents and children born “within the territory of a prince who is subject to and is bound to do homage to the King of England”).

⁵¹ *Calvin's Case* (1608), 77 Eng. Rep. 377 (K.B.).

⁵² *See* Polly Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMAN. 73, 73, 139 (1997).

the common law background of the phrase “natural born,” Parliament had a long experience of statutory intervention. That is not surprising, for even in ancient times the common law rule created the practical oddity that the children of English subjects traveling or temporarily residing abroad were not English subjects even upon their (and their parents’) return to England. This condition had various difficulties attached, because under common law aliens could not own or inherit property and suffered other disqualifications.⁵³

Of course, aliens could be “naturalized.” By this, it was initially meant that a change in status could be effected individually by acts of Parliament declaring particular named persons to be English subjects.⁵⁴ Presumably Parliament commonly used this approach to resolve the problem of subjects’ children born abroad, as well as to make English subjects of aliens emigrating from their home countries. At least in the seventeenth century and earlier, persons naturalized in this way by statute apparently had all the rights of natural born subjects.⁵⁵

Parliament also altered the common law consequences of alienage on a general scale as early as the fourteenth century. As described above, the common law rule was that aliens could not inherit land, even from English-subject decedents (including their parents). In 1350, however, Parliament provided first that “the Law . . . is, and always hath been” that “Children of the Kings of England, in whatever Parts they be born, in England or elsewhere, be able and ought to bear the Inheritance after the death of their Ancestors.”⁵⁶ It further provided that the children of certain named persons “which were born beyond the Sea, out of the Ligeance of England, shall be from henceforth able to have and enjoy their Inheritance after the death of

⁵³ 1 BLACKSTONE, *supra* note 44, at *360–61; HENRIQUES, *supra* note 49, at 1–10.

⁵⁴ HENRIQUES, *supra* note 49, at 38–39 (noting an instance of naturalization as early as the reign of Henry VI but finding that “private Acts of Parliament of this kind did not come into vogue until the beginning of the reign of Queen Elizabeth.”). These private naturalization acts were common in the seventeenth century. *See, e.g.*, 7 STATUTES OF THE REALM 159–60 (Dawsons of Pall Mall 1963) (1820) (listing “Private Acts” of 1695–96 as including various acts for the naturalization of individual named persons); McManamon, *Natural Born Citizen Clause*, *supra* note 3, 348–49 (listing individual naturalizations); *see also supra* note 42 (listing dictionaries defining “naturalized” as having been given the rights of natural born subjects by statute).

⁵⁵ HENRIQUES, *supra* note 49, at 38. As noted below, this full equivalence was changed by the Act of Settlement, 12 & 13 Will. 3 c. 2 (1701) (Eng.), *reprinted in* 7 STATUTES OF THE REALM 636, 637 (Dawsons of Pall Mall 1963) (1820) [hereinafter Act of Settlement]. *See infra* text accompanying notes 62–64.

English law also traditionally recognized the power of the monarch to make an alien into a “denizen,” which was a sort of intermediate status, in terms of rights, between an alien and a subject. *See* HENRIQUES, *supra* note 49, at 38 (adding that “the King by his prerogative could not grant the full rights of a natural-born subject”).

⁵⁶ A Statute for those who are born in Parts beyond Sea, 25 Edw. 3 (1350) (Eng.), *reprinted in* 1 STATUTES OF THE REALM 310 (Dawsons of Pall Mall 1963) (1810).

their Ancestors, in all Parts within the Ligeance of England, as well as those that should be born within the same Ligeance."⁵⁷ Finally, it provided:

[A]ll Children Inheritors, which from henceforth shall be born without the Ligeance of the King, whose Fathers and Mothers at the Time of their Birth be and shall be at the Faith and Ligeance of the King of England, shall have and enjoy the same Benefits and Advantages, to have and bear the Inheritance within the same Ligeance, as the other Inheritors as aforesaid in Time to come.⁵⁸

By this provision, Parliament modified the effect of extraterritorial birth but did not use the phrase "natural born" nor purport to make subjects of aliens. So far, the statutory view accorded with the common law view (taking into account Parliament's ability to modify the common law): those born abroad, even with subject parents, remained aliens, but the consequences of their alienage were somewhat relaxed. The 1350 Act did, however, begin to introduce the idea that those born abroad of subject parents merited some special consideration.

Of greater significance was Parliament's gradual claim, starting in the seventeenth century, to be able to modify the meaning of "natural born." The seventeenth century posed rising challenges to the common law rule because, due to peculiar historical circumstances, unusually large numbers of children were born abroad to English parents. In particular, the turmoil of the mid-century Civil War drove many supporters of the Crown (and the heir to the Crown himself) abroad for a substantial amount of time, resulting in many more "English" children being born abroad. One may speculate that the system of private acts was too cumbersome to handle the post-Restoration demand for naturalization. In any event, after the Restoration, Parliament in 1677 passed a statute, "An Act for the Naturalizing of Children of his Majestyes English Subjects Borne in Forreigne Countryes durence the Late Troubles," noting that numerous English subjects "did either by reason of their attendance upon his Majestie or for feare of the then Usurped Powers reside in parts beyond the Seas out of his Majestyes Dominions."⁵⁹ The Act then declared that all persons:

[W]ho at any time betweene the fourteenth day of June in the said yeare of our Lord one thousand six hundred forty one and the foure and twentyeth day of March in the yeare of our Lord one thousand six hundred and sixty were borne out of his Majestyes Dominions and whose Fathers or Mothers were Naturall borne Subjects of the Realme are hereby declared and shall for ever be esteemed and taken to all Intents and Purposes to be and to have beene the Kings Naturall borne Subjects of the Kingdome and . . . shall be

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 29 Car. 2 c. 6 (1677) (Eng.), *reprinted in* 5 STATUTES OF THE REALM 847 (Dawsons of Pall Mall 1963) (1819) [hereinafter 1677 Act].

adjudged reputed and taken to be and to have been in every respect and degree Naturall borne Subjects and free to all intents purposes and constructions as if they and every of them had been born in England.⁶⁰

It is important to emphasize here that Parliament made a relatively narrow and precise change to the common law, applicable only to those born between 1641 and 1660 (that is, the interregnum period of the Civil War) and only to those who had fled England on account of the Civil War. Moreover, by linking the statutory “natural born subject” category to the time in which the rightful king himself was out of the country, Parliament might be said not so much to be redefining natural born subjectship in general but accommodating a uniquely disruptive episode in English history. At the same time, though, the 1677 Act was a departure from traditional practice in that Parliament did not merely naturalize a group of people; it specifically declared them “natural born.” That approach lacked practical significance, however, since under the law of the time there apparently was no difference in the rights of natural born and naturalized subjects.

The next step came in 1698, with “An Act to naturalize the Children of such Officers and Souldiers & others the natural borne Subjects of this Realme who have been borne abroad during the Warr the Parents of such Children haveing been in the Service of this Government.”⁶¹ The situation here was that King William III had spent extended time in his native Netherlands directing the war with France, together with a substantial army and body of attendants from England. As during the Civil War, that created a large group of people born abroad who were obviously English in every practical sense but who under the common law were not English subjects. Adopting the form of the 1677 Act, Parliament began by noting (consistent with common law) that:

Whereas during the late Warr with France divers of His Majesty's good and lawfull Subjects . . . did by reason of their Attendance on His Majesty in Flanders and bearing Armes under His said Majesty against the French King and other His Majesties Enemies reside in Parts beyond the Seas out of his Majesties Dominions[.] And whereas dureing such their Residence abroad divers Children have been borne unto such his Majesties Subjects which said Children notwithstanding they have been borne of English Parents yett by reason of their being borne in Parts beyond the Seas out of His Majesties Dominions may be interpreted to be incapable of taking receiving or enjoying any Mannors and Lands or any other Priveledges and Imunities belonging to the liege People and natural borne subjects of this Kingdome . . .⁶²

⁶⁰ *Id.* The Act further provided that to gain natural born status the children in question had to receive the sacrament from the Church of England and take the oath of allegiance to the king; these provisions were repeated in later statutes.

⁶¹ 9 Will. 3 c. 20 (1698) (Eng.), *reprinted in* 7 STATUTES OF THE REALM 380 (Dawsons of Pall Mall 1963) (1820) [hereinafter 1698 Act].

⁶² *Id.*

Parliament then declared, again in the model of the 1677 Act:

That . . . Persons who att any time since the Thirteenth Day of February One thousand six hundred eighty and eight or att any time since the beginning of the [said] late Warr with France & before the Twenty fifth Day of March One thousand six hundred ninety and eight which are or shall be borne out of His Majesties Dominions and whose Fathers or Mothers were natural borne Subjects of this Realme and were then actually in the Service of His Majesty or of His Majesty and the late Queen of Blessed Memory are hereby declared and shall forever be esteemed and taken to all Intents & Purposes to be and to have been the Kings natural born Subjects of this Kingdome and that the said Children and all other Persons borne as aforesaid and every one of them are and shall be adjudged reputed and taken to be in every respect and degree natural borne Subjects and free to all Intents Purposes & Constructions as if they & every one of them had been borne in England.⁶³

As in 1677, the adjustment of the common law operated in a narrow temporal window (1688 to 1698) and was keyed to a particular oddity of the King being substantially absent from the realm. Moreover, the 1698 Act specifically applied only to those actually in the King's service (that is, not to merchants or other persons abroad for other reasons, who presumably would still be governed by the common law as modified by the statute of 1350). But also of note, Parliament continued the 1677 Act's approach of declaring persons to be natural born, even where the common law would not have given them this status (and doing so retroactively).

At around the same time, the Act of Settlement in 1701, without mentioning natural birth, may have been the original English precedent for the Eligibility Clause. It provided:

That . . . no Person born out of the Kingdoms of England Scotland or Ireland or the Dominions thereunto belonging (although he be naturalized or made a Denizen (except such as [are] born of English Parents)[]) shall be capable to be of the Privy Councill or a Member of either House of Parliament or to enjoy any Office or Place of Trust either Civill or Military or to have any Grant of Lands Tenements or Hereditaments from the Crown to himself or to any other or others in Trust for him[.]⁶⁴

Presumably the immediate impetus for this provision was that the Act arranged for the Crown to pass (as in fact it did) to the German kings of

⁶³ *Id.* (second alteration in original).

⁶⁴ Act of Settlement, *supra* note 55, at 637. As a follow-up, to prevent evasion of this requirement, Parliament provided that no future naturalization bill could be passed unless it contained a similar statement of disqualification. An act to explain the act made in the twelfth year of the reign of King William the Third, intituled, An act for further limitation of the crown, and better securing the rights and liberties of the subject, 1 Geo. 1 c. 4 (1714) (Gr. Brit.), *reprinted in* 13 STATUTES AT LARGE 141, 142 (Danby Pickering ed., 1764). The propriety of that provision is dubious, given the ordinary rule that no Parliament could bind a future Parliament. It was, however, generally respected in the eighteenth century. *See infra* notes 74–83 and accompanying text.

Hanover upon the death of Queen Anne,⁶⁵ and Parliament wished to bar an influx of German courtiers into English government. Parliament may also have been influenced by the tendency of William III (a Dutchman) to rely on Dutch rather than English advisors, to the considerable annoyance of English politicians. In any event, the Act of Settlement indicated a preference for local birth, with a further recognition that birth overseas to English parents was the practical equivalent. It does not bear directly on the meaning of “natural born,” however, because (perhaps oddly) the Act did not use the phrase.⁶⁶

Thus at the beginning of the eighteenth century, the statutory law and common law meaning of “natural born” were, as a practical matter, substantially aligned, with narrow exceptions for people born in particular circumstances and particular time periods. But the 1677 and 1698 Acts were potentially important departures as a theoretical matter, because in them Parliament had undertaken its own definition of “natural born” (albeit with limited scope). Eighteenth-century parliaments seized on these precedents to make very sweeping changes to the common law definition.

In 1708, Parliament provided: “[T]he Children of all natural born Subjects born out of the Ligeance of Her Majesty Her Heires and Successors shall be deemed adjudged and taken to be natural born Subjects of this Kingdom to all Intents Constructions and Purposes whatsoever[.]”⁶⁷ The 1708 Act, although to some extent a logical successor to the seventeenth-century legislation, revolutionized the rules of subjectship in several respects. First, it was open-ended temporally, applying indefinitely into the future. Second, it no longer rested on unique historical circumstances, nor could it be justified by a legal fiction of direct service to the king when the king was abroad. The statute was thus a full-blown re-definition of the common law, not merely a one-time adjustment.

The 1708 Act also had a key ambiguity. The seventeenth-century statutes had specifically said that to be covered a child needed only one natural

⁶⁵ See Act of Settlement, *supra* note 55, at 637.

⁶⁶ Interestingly, the Act of Settlement apparently contemplated that some persons who were not natural born subjects would not be politically disqualified. Although the 1677 and 1698 Acts had made some persons born abroad of English parents natural born subjects, they conspicuously had not done so for all such persons.

⁶⁷ An Act for naturalizing Foreign Protestants, 7 Ann. c. 5 (1708) (Gr. Brit.), *reprinted in* 9 STATUTES OF THE REALM 63 (Dawsons of Pall Mall 1963) (1822) [hereinafter 1708 Act]. As the title indicates, the 1708 Act actually went much further, also declaring that all foreign born Protestants who took the oath of allegiance to the English monarch “shall be deemed adjudged and taken to be Her Majesties natural born Subjects of this Kingdom to all Intents Constitutions and Purposes as if they and every of them had been or were born within this Kingdom.” *Id.* That provision was repealed just three years later because of “divers Mischiefs and Inconveniences.” See An Act to repeal the Act of the Seventh Year of Her Majesties Reign intituled An Act for naturalizing Foreign Protestants (except what relates to the Children of Her Majesties natural born Subjects born out of Her Majesties Allegiance), 10 Ann. c. 9 (1711) (Gr. Brit.), *reprinted in* 9 STATUTES OF THE REALM 557 (Dawsons of Pall Mall 1963) (1822) [hereinafter 1711 Act].

born parent, father *or* mother. The 1708 Act, in contrast, could be read to require either one natural born parent or two, depending on how one read the phrase “Children of all natural born Subjects.” That led Parliament in 1731 to pass an act to “explain” the 1708 statute, which provided:

[A]ll children born out of the ligenace of the crown of *England*, or of *Great Britain*, or which shall hereafter be born out of such ligeance, whose fathers were or shall be natural-born subjects of the crown of *England*, or of *Great Britain*, at the time of the birth of such children respectively, shall and may, by virtue of the said recited clause in the said act of the seventh year of the reign of her said late Majesty [i.e., the 1708 Act] and of this present act be adjudged and taken to be, and all such children are hereby declared to be natural-born subjects of the crown of *Great Britain* to all intents, constructions and purposes whatsoever.⁶⁸

Note here that the “explanation” is that one’s *father* must be a natural born subject, a departure from the seventeenth-century statutes and really a change from (rather than a clarification of) the 1708 Act. For present purposes, though, the core point is that the 1731 Act continued the practice of declaring a class of foreign-born persons to be not merely subjects but *natural born* subjects, based on the circumstances of their birth.

Parliament used similar phrasing in a 1773 Act that extended natural-born subject status to those whose paternal grandfathers were natural-born subjects.⁶⁹ It expressly linked the extension of subjectship to policy considerations arising from expanding foreign commerce, reciting that:

WHEREAS divers natural-born subjects of *Great Britain*, who profess and exercise the protestant religion, though various lawful causes, especially for the better carrying on of commerce, have been, and are, obliged to reside in several trading cities, and other foreign places, where they have contracted marriages, and brought up families: and whereas it is equally just and expedient that the kingdom should not be deprived of such subjects, nor lose the benefit of the wealth that they have acquired; and therefore that not only the children of such natural-born subjects, but their children also, should continue under the allegiance of his Majesty, and be intituled to come into this kingdom, and to bring hither and realize, or otherwise employ, their capital . . .⁷⁰

⁶⁸ 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, 4 Geo. 2 c. 21 (1731) (Gr. Brit.), 16 STATUTES AT LARGE 243, 243–44 (Danby Pickering ed., 1765) [hereinafter 1731 Act]. The benefits of the statute were expressly denied to those whose parents had been attainted of treason or in the service of a foreign prince in enmity to the crown. *Id.*

⁶⁹ 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, intituled, 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 c. 21 (1773) (Gr. Brit.), reprinted in 30 STATUTES AT LARGE 28 (Danby Pickering ed., 1773) [hereinafter 1773 Act].

⁷⁰ *Id.*

The Act then provided, following the 1731 Act:

That all persons born, or who hereafter shall be born, out of the ligeance of the crown of *England*, or of *Great Britain*, whose fathers were or shall be, by virtue of [the 1731 Act] shall and may be adjudged and taken to be, and are hereby declared and enacted to be, natural-born subjects of the crown of *Great Britain*, to all intents, constructions, and purposes whatsoever, as if he and they had been and were born in this kingdom⁷¹

The founding generation in America was aware of these Acts, if not directly, via Blackstone, who explained:

To encourage also foreign commerce, it was enacted by statute 25 Edw. III. st. 2. that all children born abroad, provided *both* their parents were at the time of the birth in allegiance to the king . . . might inherit as if born in England But by several more modern statutes these restrictions are still farther taken off: so that all children, born out of the king's ligeance, whose *fathers* were natural-born subjects, are now natural-born subjects themselves, to all intents and purposes, without any exceptions; unless their said fathers were attained, or banished beyond sea, for high treason; or were then in the service of a prince at enmity with Great Britain.⁷²

Blackstone's description seems to resolve a possible ambiguity in the statutes, which might be read only to say that foreign born children have the rights of natural born subjects, not that they *are* natural born subjects. Blackstone, however, used the phrase "are now natural-born subjects," indicating a change in the definition, not merely an expansion of rights.⁷³

71 *Id.* One might suppose that children covered by the 1773 Act would already be natural born subjects by virtue of the 1731 Act: they were children born abroad whose fathers, though also born abroad, were natural born subjects under the 1731 Act (and thus whose children should also have been natural born subjects). However, a 1763 case, *Leslie v. Grant*, held otherwise. According to the court in *Leslie*, the 1731 Act only applied to persons whose fathers were natural born subjects under the common law, not those whose fathers were natural born subjects by statute. *Leslie v. Grant* (1763) 2 Paton 68, 77–78 (HL) (appeal taken from Scot.). Thus the 1773 Act was a partial overruling of *Leslie* (but only partial, as it extended only two generations, not indefinitely). See *infra* note 112 (further discussing *Leslie*).

72 1 BLACKSTONE, *supra* note 44, at *361. This was written before the 1773 Act extended natural born status to grandchildren. Another contemporary account, which may not have been available to the Framers, is Richard Wooddeson's 1777 series of lectures in English law (published in 1792). Consistent with Blackstone, Wooddeson observed, "An alien by the laws of England, is one born out of the ligeance of the king. . . . [I]f natural born subjects have children born abroad, such children also, by the [1708 Act], are to be adjudged natural born subjects, and not aliens." Richard Wooddeson, Vinerian Professor, University of Oxford, Lecture XIV: Of the State of Persons, and First of the State of Alienage, Course of Vinerian Lectures at Oxford University (1777), in 1 RICHARD WOODDESON, SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 370 (1792). He added: "The issue of an alien, born within the realm, are accounted natural subjects . . ." *Id.* at 386.

73 A later edition of the *Commentaries* altered the language slightly to say such persons "are deemed to be" natural born subjects. See Vlahoplus, *supra* note 3, at 49 n.218 (quoting 1 BLACKSTONE, *supra* note 44) (detailing the change made to the later edition of the *Commentaries* to "reflect the authority of the Act of Geo. III"). It does not appear, however, that this later edition was widely available in America prior to 1790. See Paul Finkelman & David Cobin, *Introduction* to 1 TUCKER, *supra* note 31, at i (indicating that the principal edition of the *Commentaries* in circulation in America prior to 1790 was the 1771 Robert Bell American reproduction of Blackstone's fourth edition; a new edition,

Again, Blackstone’s description is consistent with later historical works. For example, one leading account declared:

Persons Born Abroad who are by Statute Natural-born British Subjects.—Some persons born out of the dominions of the King, though aliens by the common law, have been made natural-born subjects by statute. These persons differ from those already mentioned, who, though born out of the King’s dominions, are natural-born subjects by the common law in that the latter, though born without the dominions, are yet born within the allegiance of the King. . . .

. . . .

The result of these statutes [the 1708, 1731, and 1773 Acts] is, that a person, though born abroad, whose father or grandfather on the father’s side was born within the British dominions, is a natural-born British subject⁷⁴

Although neither Parliament nor Blackstone provided a full explanation for why children born abroad to English subject parents were appropriately called “natural born subjects,” the statutory extension seems consistent with the principles of the common law. Under common law, “natural born” meant born within the protection of the monarch (and thus, as a natural matter, owing allegiance to the person who provided protection). In ancient times, when few people traveled, this understandably meant just those people born in the monarch’s territory, since that was typically the extent of the monarch’s protection. But by the seventeenth and eighteenth centuries, as foreign travel expanded, the protection of the monarch had to be understood more broadly, because English subjects traveling abroad also owed the monarch allegiance and claimed the monarch’s protection. Thus children of English subjects born abroad were born under the allegiance and protection of the monarch (what the common law required of a “natural born subject”) even though not born in the monarch’s lands. The statutory expansion of natural born subjects thus likely reflected a new recognition that the monarch’s protection and allegiance extended abroad in respect of English subjects and their children.

As a result of these developments, the traditional common law rule does not capture the English legal background in which the Framers operated. By the late eighteenth century, Parliament had claimed power to define natural born subjectship substantially beyond what the common law recognized, and to extend it—expressly for policy reasons—to broad classes of people born outside English territory.

the tenth, was not reprinted in America until 1790). In any event, the reason for the change is unclear, and of uncertain significance.

⁷⁴ HENRIQUES, *supra* note 49, at 66–68; *see also* A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 173 (1896) (“‘Natural-born British subject’ means a British subject who has become a British subject at the moment of his birth.”); *id.* at 178 (“*A* is born in England. *S*, his son, is born at Naples. *S* is a natural-born British subject.”). *But see* Vlahoplus, *supra* note 3, at 48–54 nn.216–39 (pointing to inconsistent nineteenth-century usage of the term “natural-born subjects”).

A second related group of English statutes further complicates the matter. By these, Parliament purported to extend natural born subject status to categories of persons based not on the circumstances of their birth but on post-birth actions. The first of these, in 1740, applied to persons who served two years on English ships during wartime, and stated that any such person

shall to all intents and purposes be deemed and taken to be a natural born subject of his Majesty's kingdom of *Great Britain*, and have and enjoy all the privileges, powers, rights, and capacities, which such foreign mariner or seaman could, should, or ought to have had, and enjoyed, in case he had been a natural born subject of his Majesty, and actually a native within the kingdom of *Great Britain*.⁷⁵

This wording departs from the 1731 Act addressing children born abroad and seems to betray some doubt whether Parliament could in fact make the beneficiaries actual natural born subjects (as opposed to merely giving the rights of natural born subjects). However, a subsequent statute in the same year used language closely tracking the 1731 Act, stating directly that persons who lived for seven years in the American colonies "shall be deemed, adjudged, and taken to be his Majesty's natural born subjects of this kingdom, to all intents, constructions, and purposes, as if they, and every of them, had been or were born within this kingdom . . ."⁷⁶ Similar statutes applied to persons who served three years on an English whaleboat⁷⁷ or served as a soldier in the American regiment.⁷⁸

From these statutes one might conclude that Parliament claimed a broader power to make anyone a natural born subject regardless of the circumstances of their birth. This group of statutes differed in one significant respect from the statutes granting natural born status by birth, however.

75 An act for the better supply of mariners and in his Majesty's ships of war, and on board and other trading ships, and privateers, 13 Geo. 2 c. 3 (1740) (Gr. Brit.), *reprinted in* 17 STATUTES AT LARGE 358, 359 (Danby Pickering ed., 1765) [hereinafter 1740 Supply of Seamen Act].

76 An act for naturalizing such foreign protestants, and others therein mentioned, as are settled, or shall settle, in any of his Majesty's colonies in America, 13 Geo. 2 c. 7 (1740) (Gr. Brit.), *reprinted in* 17 STATUTES AT LARGE 370, 371 (Danby Pickering ed., 1765) [hereinafter 1740 Naturalization Act].

77 An act for the further encouragement and enlargement of the whale fishery, and for continuing such laws as are therein mentioned relating thereto; and for the naturalization of such foreign protestants, as shall serve for the time therein mentioned, on board such ships as shall be fitted out for the said fishery, 22 Geo. 2 c. 45 (1749) (Gr. Brit.), *reprinted in* 19 STATUTES AT LARGE 365, 369 (Danby Pickering ed., 1765) [hereinafter 1749 Act].

78 An act for naturalizing such foreign protestants as have served, or shall serve for the time therein mentioned, as officers or soldiers in his Majesty's royal American regiment, or as engineers in America, 2 Geo. 3 c. 25 (1761) (Gr. Brit.), *reprinted in* 25 STATUTES AT LARGE 162–63 (Danby Pickering ed., 1763) [hereinafter 1761 Act]; *see also* An act to extend the provisions of an act made in the thirteenth year of his present Majesty's reign, intituled, An act for the naturalizing of such foreign protestants, and others therein mentioned, as are settled, or shall settle in any of his Majesty's colonies in America, to other foreign protestants who conscientiously scruple the taking of an oath, 20 Geo. 2 c. 44 (1747) (Gr. Brit.), *reprinted in* 19 STATUTES AT LARGE 143 (Danby Pickering ed., 1765) [hereinafter 1747 Act] (modifying the loyalty oath required to be sworn to become a subject under these acts).

Each of them contained what Blackstone called a “disabling clause,”⁷⁹ providing, with immaterial variations:

That no person who shall become a natural born subject of this kingdom by virtue of this act, shall be of the privy council, or a member of either house of parliament, or capable of taking, having, or enjoying any office or place of trust within the kingdoms of *Great Britain or Ireland*, either civil or military, or of having, accepting, or taking any grant from the crown to himself, or to any other in trust for him, of any lands, tenements, or hereditaments within the kingdoms of *Great Britain or Ireland*⁸⁰

This language paralleled the restriction in the Act of Settlement that barred persons born outside the dominions from holding office or accepting grants of land.⁸¹ As discussed, however, the Act of Settlement exempted from this bar persons “such as [are] born of English Parents,”⁸² so the statutes directed to children born abroad of English parents did not have this proviso.⁸³

Thus the statutes relating to post-birth activities did not make their beneficiaries full natural born subjects, regardless of what they appeared to say. Instead, Parliament appeared to recognize a key distinction, rooted in the Act of Settlement, between those born abroad to English parents (who could be given the full status of natural born subject) and those born abroad without familial connections to England (who could not). Significantly, in light of the adoption of the phrase “natural born” in the Eligibility Clause, a central part of this distinction is that those born abroad to English parents

⁷⁹ 1 BLACKSTONE, *supra* note 44, at *362.

⁸⁰ 1740 Naturalization Act, *supra* note 76, at 373; *see also* 1740 Supply of Seamen Act, *supra* note 75, at 359 (providing the same, with immaterial differences in language); 1747 Act, *supra* note 78, at 145 (providing the same, with immaterial differences in language); 1749 Act, *supra* note 77, at 370 (providing the same, with immaterial differences in language); 1761 Act, *supra* note 78, at 163 (providing the same, with immaterial differences in language).

⁸¹ Act of Settlement, *supra* note 55, at 637. As noted, a subsequent statute required this language to be contained in all naturalization bills. *See supra* note 64. The parallel was not exact, however, as the Act of Settlement appeared to apply to all offices and land grants throughout the dominions (or at least, it was stated in unlimited language), whereas the subsequent acts referred only to offices and land grants within Great Britain and Ireland. *See* An act to explain two acts of parliament, one of the thirteenth year of the reign of his late Majesty, for naturalizing such foreign protestants, and others, as are settled, or shall settle, in any of his Majesty’s colonies in America; and the other of the second year of the reign of his present Majesty, for naturalizing such foreign protestants as have served, or shall serve, as officers or soldiers in his Majesty’s royal American regiment, or as engineers, in America, 13 Geo 3 c. 25 (1773) (Gr. Brit.), *reprinted in* 30 STATUTES AT LARGE 30, 31 (Danby Pickering ed., 1773) (confirming this departure).

⁸² Act of Settlement, *supra* note 55, at 637 (alteration in original).

⁸³ *See* 1773 Act, *supra* note 69, at 28–29; 1731 Act, *supra* note 68, at 243–44; 1708 Act, *supra* note 67, at 63. As noted, the 1708 Act also gave natural born subject status to all foreign Protestants who moved to England and took a loyalty oath; it had no restriction on officeholding or receiving land grants, thus creating tension with the Act of Settlement. *See supra* note 68. The portion of the 1708 Act relating to foreign Protestants was repealed in 1711, and in 1714 Parliament enacted the statute calling for all future acts to have the restriction mandated by the Act of Settlement.

were eligible to high office while those born abroad without familial connections to England were not.

Notably, Blackstone described the two categories of statutes in different terms. As discussed, he said that those who gained subjectship from birth abroad to English fathers “are” natural born subjects.⁸⁴ He mentioned those who gained subjectship from post-birth events (living in the colonies, serving on whaleships or in the American regiment) in a separate paragraph two pages later in his discussion, and said only that they were “naturalized” as a result of their actions.⁸⁵ As a result, someone reading Blackstone might see an even sharper distinction between the two categories than might be justified from the statutes themselves.

But even if we assume that the American Framers had English statutory law in mind, it remains somewhat ambiguous what they would have concluded from it. Would they think that “natural born” meant what it meant in English law in 1787–88 (birth within sovereign territory or birth abroad to a citizen father or paternal grandfather)? Or would they have taken it more broadly to mean that “natural born” could, at least to a significant extent, be defined by statute? Part IV takes up that question, but before doing so it is necessary to consider another possible source of the Framers’ meaning.

C. *Vattel and the Civil Law Tradition*

English law is not the only possible source of the Framers’ understanding of “natural born” citizenship. Indeed, it is a slightly problematic one. English law spoke of natural born “subjects” rather than natural born “citizens,” and it is possible that the revolutionary-minded Americans perceived a difference between citizens and subjects for this purpose.⁸⁶ Moreover, the civil law tradition, and especially the influential work of the Swiss international law writer Emer de Vattel, supplies another possible definition of the phrase expressly linked to “citizens” rather than “subjects.”

⁸⁴ 1 BLACKSTONE, *supra* note 44, at *361.

⁸⁵ *Id.* at *363 (discussing naturalization by post-birth events). The later discussion reads, [E]very foreign seaman who in time of war serves two years on board an English ship is *ipso facto* naturalized; and all foreign protestants, and Jews, upon their residing seven years in any of the American colonies, without being absent above two months at a time, are upon taking the oaths naturalized to all intents and purposes, as if they had been born in this kingdom; and therefore are admissible to all such privileges, and no other, as protestants or Jews born in this kingdom are entitled to.

Id. at *363.

Blackstone may appear to err in saying that the persons described in this paragraph have “all” privileges of persons born in the kingdom, but in the previous paragraph he had described the “disabling clauses” as applied to such persons. *Id.* at *362.

⁸⁶ See Solum, *supra* note 6, at 28 (making this point and discussing distinctions between citizens and subjects made, *inter alia*, in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

As rendered in the 1760 translation of his work *Le Droit des Gens* (The Law of Nations), Vattel stated:

[§212] The citizens are the members of the civil society: bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. The *natives*, or *indigenes*, are those born in the country of parents who are citizens. Society not being able to subsist, and perpetuate itself, but by the children of citizens; those children naturally follow the condition of their fathers, and succeed to all their rights. . . . The country of the fathers is then that of the children; and these become true citizens, merely by their tacit consent. . . . I say, that in order to be of the country, it is necessary that a person be born of a father who is a citizen; for if he is born there of a stranger, it will be only the place of his birth, and not his country.⁸⁷

Vattel added that in England, however, “being born in the country naturalizes the children of a foreigner.”⁸⁸

As to those born abroad, Vattel wrote:

It is asked, whether the children born of citizens in a foreign country, are citizens? The laws have decided this question in several countries, and it is necessary to follow their regulations. By the law of nature alone, children follow the condition of their fathers, and enter into all their rights (§ 212); the place of birth produces no change in this particular, and cannot of itself furnish any reason for taking from a child what nature has given him⁸⁹

Thus Vattel’s view was apparently both broader and narrower than English common law—narrower in disqualifying people born within sovereign territory of non-citizen fathers from “natural” citizenship and broader in embracing natural citizenship for those born abroad to citizen fathers. (English statutory law paralleled Vattel on the latter point, but not the former).⁹⁰

Although the 1760 translation of Vattel did not link his view of citizenship directly with the phrase “natural born,” a 1797 translation did so expressly. It followed the 1760 translation on this subject in all material respects except that in Section 212 it translated the French word *indigenes* (which the 1760 translation had left untranslated) as “natural born citizens.” Thus the second sentence of Vattel’s Section 212 (the passage previously quoted) read in the 1797 translation: “The natives, or natural-born citizens, are those born in the country, of parents who are citizens.”⁹¹ Though this translation

⁸⁷ 1 EMER DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS bk. I, ch. XIX, § 212 (London, Newbery et al. 1760) (1758).

⁸⁸ *Id.* § 214.

⁸⁹ *Id.* § 215.

⁹⁰ It is possible to read Vattel to require both birth in sovereign territory and birth of a citizen father to establish “natural born” status. Read in isolation, that is what § 212 appears to say. However, § 215 adds that those born abroad to a citizen father have the same status “by the law of nature,” which appears to extend the category of those who have citizenship naturally.

⁹¹ EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, bk. I, ch. XIX, § 212 (Robinson

obviously could not have influenced the Framers, it suggests that the translator (and perhaps people in the wider society) associated Vattel's "indigenes" with the constitutional language of the Eligibility Clause.

Vattel was no doubt a principal channel for conveying this view of citizenship to America, but he was not an outlier; rather, he reflected the basic idea of citizenship by blood, or "jus sanguinis," in civil law traditions, which were likely accessible to at least some of the Framers from other sources. Blackstone acknowledged the difference: after declaring that all children of aliens born in England were English subjects, he observed that "the constitution of France differs from ours; for there, by their *jus albinatus*, if a child be born of foreign parents, it is an alien."⁹²

As a result, Vattel and the civil law tradition offer an alternative definition of "natural born" substantially at odds with the modern view. It would make a sizeable category of people not "natural born" even though born in the United States, and it would suggest that children born abroad of a citizen mother but not a citizen father are not natural born.⁹³ It remains to ask which of these meanings—common law, statutory law, or civil law—is most plausibly assigned to the Eligibility Clause. The next section takes up that question.

III. THE AMERICAN UNDERSTANDING OF NATURAL BORN CITIZENSHIP

This section asks which of the foregoing sources of meaning is best understood as the original public meaning of the Eligibility Clause. It is worth emphasizing here that the question is not the subjective intent of any particular Framers, or even the collective subjective intent of all the Framers (even assuming that could be identified). It is, rather, the public meaning of "natural born Citizen"—what a reasonable informed observer would understand by the phrase in the context in which it was used. In this sense, the legal meanings sketched in the preceding subsections are in the nature of

1797) (1758). In the original French (which was available to the Framers), the key sentence reads: "Les naturels ou indigenes font ceux qui font nés dans le pays, de Parens Citoyens." See MASKELL, *supra* note 2, at 22 n.100 (discussing the differences in the translations).

⁹² BLACKSTONE, *supra* note 44, at *362; see also HENRIQUES, *supra* note 49, at 29 ("[T]he law of England has always adopted the feudal or territorial principle of determining nationality by the place of birth alone, and has always, in theory, at any rate, rejected the contrary principle founded on the Roman law and incorporated in the Code Napoleon and the jurisprudence of many modern nations, whereby children, wherever born, are always deemed to possess the nationality of their parents, a legitimate child taking the nationality of the father and an illegitimate child that of the mother.").

⁹³ To be clear, this reading would not affect the *citizenship* of persons in these categories. Congress has power to naturalize (that is, to make an alien a citizen) and English practice shows that "naturalization" could be done either individually or categorically. Moreover, as to persons born in the United States, the Fourteenth Amendment appears categorically to declare them citizens at birth. The question, germane only to the Eligibility Clause, is whether persons in these categories are "natural born" citizens (as opposed to citizens by positive law), and the strong implication of a reading based on Vattel is that they are not.

dictionary definitions—they do not necessarily represent the views of everyone, or of any particular person, because people may use words colloquially or incorrectly. Rather they represent (or may represent) a meaning ascribed by the culture—in this case the legal culture—in general.

With this in mind, this section considers the possible candidates. Although each has surface plausibility, this section argues that the best source of meaning in this situation is English law generally, combining common law and statutory law. As explained below, the alternatives are speculative or implausible.

A. *The Preference for the English over the Civil Law Definition*

Relying on Vattel, and more generally the civil law tradition, to define the Constitution’s phrase “natural born” has some attractions. To begin, Vattel used the word “citizen” (citoyen) rather than “subject.” English law consistently used “subject.” As the Constitution also used “citizen,” and as the revolutionary generation in America surely saw at least in some contexts a difference between citizens and subjects,⁹⁴ Vattel might be thought to have a closer connection to the Eligibility Clause’s text and context. Further, Vattel’s work was well known in founding-era America, both in the original French and in several English translations. Vattel was a principal source of the founding generation’s understanding of the law of nations, which the United States, as a weak state threatened by powerful European empires, was anxious to uphold.⁹⁵ Thus there are reasons to think the Framers might have looked to Vattel in defining natural born citizens.

The weight of the evidence, however, points strongly in the other direction. First, any connection between Vattel and the Eligibility Clause is pure speculation. Apparently no one at the time made the connection, or at least there is no surviving record if they did. To be sure, some individuals might have done so. But it seems clear—as clear as we can be about these matters—that no widespread public connection was drawn.⁹⁶

⁹⁴ See, e.g., DAVID RAMSAY, A DISSERTATION ON THE MANNER OF ACQUIRING THE CHARACTER AND PRIVILEGES OF A CITIZEN OF THE UNITED STATES 3–4 (1789) (discussing the difference between citizens and subjects); Solum, *supra* note 6 (contrasting the term “natural-born subject” in English law with the term “natural-born Citizen” in the Constitution).

⁹⁵ See MICHAEL D. RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 344–45 (2007) (discussing the influence of international law writers, especially Vattel, in founding-era America).

⁹⁶ The closest to a founding-era adoption of Vattel’s approach is in David Ramsay’s brief 1789 “dissertation” on citizenship. Ramsay did not discuss “natural born” citizenship in those words, though at one point he wrote, “The citizenship of no man could be previous to the declaration of independence, and, as a natural right, belongs to none but those who have been born of citizens since the 4th of July, 1776.” RAMSAY, *supra* note 94, at 6. That appears to express a “jus sanguinis” approach to citizenship consistent with Vattel. Elsewhere, though, he wrote that citizenship can be acquired by “birth or inheritance.” *Id.* at 4 (emphasis added). This observation seems in tension with his claim that citizenship “as a natural right” could only come from one’s parents, because its

Second, there is evidence that the founding generation, at least in some instances, used “natural born citizen” and “natural born subject” interchangeably. For example, Massachusetts continued the English practice of legislative acts naturalizing particular named individuals. These acts recited that the naturalized individuals would have all the rights of (in some cases) “natural born subjects” of the state⁹⁷ and (in others) “natural born citizens.”⁹⁸ As far as the historical record reflects, no difference was intended; the phrases appear to be used interchangeably to convey the same meaning. In particular, the state Acts referred to “natural born subjects” during the Confederation period immediately before and during the drafting and ratifying process, suggesting that revolutionary Americans did not change their terminology from citizen to subject in the wake of the Revolution.

Similarly, Zephaniah Swift’s treatise on Connecticut law, published in 1795, repeatedly used the phrase “natural born subject” in connection with post-independence inhabitants of Connecticut. Swift began his discussion by saying that “[t]he people are considered as aliens, born in some foreign country, as inhabitants of some neighboring state of the union, or natural born subjects, born within the state.”⁹⁹ Later he added that the children of aliens, “born in this state, are considered as natural born subjects, and have the same rights with the rest of the citizens.”¹⁰⁰ As a result, there is little reason, on this ground, to think Vattel is a better source of the clause’s meaning than English law: Americans did not broadly reject the word “subject” and instead used it interchangeably with “citizen.”

Third, post-ratification evidence indicates that the Framers were using an English-law influenced definition of citizenship, not a Vattel-influenced definition. As described above, an early post-ratification discussion of citizenship was Madison’s comment in the Smith controversy (in which there

disjunctive suggests that one could acquire citizenship (though perhaps not citizenship “as a natural right”) by birth alone. In any event, to the extent Ramsay took a Vattelian view he appears to be an outlier, and he did not refer to Vattel by name.

97 *E.g.*, 1786 Mass. Acts 241–42; 1787 Mass. Acts 579–80, 630; 1788 Mass. Acts 25, 105–06; 1789 Mass. Acts 405–06, 509–10; 1790 Mass. Acts 85–86 (naming individual naturalized persons “intitled to all the liberties, privileges and immunities of natural born subjects”); *see also* 1782 Mass. Acts 9–10 (referring to privileges of “natural Subjects”).

98 *E.g.*, 1784 Mass. Acts 124–25; 1785 Mass. Acts 507–08; 1786 Mass. Acts 53–54; 1787 Mass. Acts 571–72; 1788 Mass. Acts 38–39 (naming individual naturalized persons entitled “to all the liberties, privileges & immunities of natural born Citizens”).

99 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 163 (1795).

100 *Id.* at 167; *see also id.* at 163 (referring to the “subject of the state”); *id.* at 165 (noting that a naturalized foreigner owes the same allegiance as a “natural born subject”); *id.* at 166 (noting that foreigners enjoy the same “justice and law” as “subjects of this state”); *id.* at 167 (noting that children of ambassadors born abroad are considered “natural born subjects”). Notably, Swift also sometimes used “citizen” to mean the same as “subject.” *See, e.g., id.* at 165 (noting that “[a]ll citizens of any of the individual states at the time of the adoption of the constitution, became citizens of the United States . . .”).

was some question whether Representative Smith was a citizen and thus eligible to Congress). Madison wrote, “It is an established maxim that birth is a criterion of allegiance. Birth, however, derives its force sometimes from place, and sometimes from parentage; but, in general, place is the most certain criterion; it is what applies in the United States”¹⁰¹

As discussed, this quote is ambiguous on the scope of citizenship rights (and does not use the phrase “natural born” at all). But it strongly indicates that Madison employed an English rather than a Vattelian definition. In referring to birth citizenship deriving “sometimes from place, and sometimes from parentage” he described the divide between English law “jus soli” and civil law “jus sanguinis.” He then said “place is the most certain criterion” and “what applies in the United States.”¹⁰² “Place” is the rule of English law; it is manifestly *not* Vattel’s rule, because Vattel excluded from birth citizenship the fairly large class of persons whose fathers were not citizens. Thus Madison apparently thought that the English rules were the U.S. baseline.

Swift’s treatise on Connecticut law, mentioned above, even more clearly adopts English law. Swift directly tied the status of “subject” to birth in sovereign territory, describing “natural born subjects” as those “born within the state” and later specifically saying that the children of aliens “born in this state” are natural born subjects.¹⁰³ Swift also included an explanation of the rule, based on the idea of allegiance to the territorial sovereign at birth in return for protection, that closely tracked Blackstone.¹⁰⁴ Like Madison’s assessment, Swift’s description accords with English law and is flatly inconsistent with Vattel.¹⁰⁵

St. George Tucker’s 1803 treatise also followed this pattern, observing:

Prior to the adoption of the constitution, the people inhabiting the different states might be divided into two classes: natural born citizens, or those born within the state, and aliens, or such as were born out of it. The first, by their birth-right, became entitled to all the privileges of citizens; the second, were entitled to none, but such as were held out and given by the laws of the respective states prior to their emigration.¹⁰⁶

Again, equating “natural born” and “born within the state” contradicts Vattel and adopts the English approach.¹⁰⁷

¹⁰¹ 1 ANNALS, *supra* 35, at 404; *see also supra* note 35 and accompanying text.

¹⁰² 1 ANNALS, *supra* 35, at 404.

¹⁰³ SWIFT, *supra* note 99, at 163, 167.

¹⁰⁴ *Id.* at 165.

¹⁰⁵ Swift went so far as to say that “It is an established maxim, received by all political writers, that every person owes a natural allegiance to the government of that country in which he is born.” *Id.* at 163. That, of course, was not true; Vattel and continental writers said the contrary. *See supra* Part II.C.

¹⁰⁶ 1 TUCKER, *supra* note 31, app. at 256 (quoting a letter from George Nicholas).

¹⁰⁷ Later constitutional treatises adopted a similar view. *See* 1 KENT, *supra* note 33, at 255 (describing the effect of the Eligibility Clause to be that “the president is required to be a native citizen”); 2 KENT, *supra* note 33, at 33 (defining “Natives” to mean “all persons born within the jurisdiction of

In sum, most American commentators and jurists who discussed citizenship in the late eighteenth and early nineteenth centuries followed the English approach in assuming that as a general rule birth in the United States was sufficient to convey citizenship.¹⁰⁸ That assumption shows that they did not think Vattel's view had been adopted in the United States, because Vattel directly declared that a person born in a country was not a citizen of that country unless his father was also a citizen of that country. Particularly in the context of a country with high immigration, as the United States was at the time, it would be impossible to follow Vattel's view without substantial difficulties: large numbers of people moved to the United States and then had children; the children were assumed to be U.S. citizens but (absent subsequent naturalization) would not be under Vattel's rule. Thus, following Vattel would have created a large (and self-sustaining) class of U.S. residents who were not U.S. citizens despite birth in the United States and with no material connections to any other country. There is no evidence that any substantial number of people in the eighteenth and nineteenth centuries thought U.S. law worked this way.

While it is true that this evidence is not comprehensive, it nonetheless indicates that in the post-ratification period Americans tended to adopt the English approach to subjectship/citizenship, not Vattel's approach. In any event, it outweighs evidence to the contrary, which apart from speculation is essentially non-existent.

B. Common Law or Statutory Law?

Once we conclude that founding-era Americans looked to English legal conceptions and definitions in thinking about citizenship, we face a more difficult question: did the Eligibility Clause adopt the common law meaning, or the common law meaning as modified by statute? As described above, this is a crucial question: English common law, with very minor exceptions, embraced an absolute territorial conception of subjectship at birth, such that (in

the United States."); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 80–81 (1825) ("Therefore every person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen in the sense of the constitution Under our constitution the question is settled by its express language, and when we are informed that, excepting those who were citizens, (however the capacity was acquired,) at the time the constitution was adopted, 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."). Joseph Story wrote to similar effect. See *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 122 (1830) (describing citizenship principally in terms of place of birth); *id.* at 155 (Story, J., concurring and dissenting) (taking a similar view).

¹⁰⁸ Some debate persisted as to the question of persons born to parents who were only visiting the United States temporarily. See, e.g., *Lynch v. Clarke*, 1 Sand. Ch. 583, 584–88 (N.Y. Ch. 1844) (reflecting debate over citizenship of persons born of parents only temporarily in the country).

general) children born abroad of subject parents were not natural born subjects;¹⁰⁹ in contrast, by statute the class of natural born subjects had been extended at various times to various persons, and after 1773 the rule was that children born abroad with English subject fathers or paternal grandfathers were “natural born” English subjects.¹¹⁰

Like the argument for looking to Vattel, the argument for looking only to the common law definition has some textual plausibility. In particular, the text’s use of the word “natural” implies a non-statutory definition, owing to the distinction between natural law and positive (statutory) law. Because English common law, at least with regard to subjectship, regarded itself as founded on natural law, the Constitution’s use of “natural” might be thought of as an express incorporation of common law. Further, unlike in the case of Vattel’s definition, post-ratification sources suggest that Americans were influenced by the natural law of subjectship/citizenship. All of the sources discussed above—Madison, Swift, Tucker, Rawle, Kent, and Story—emphasized the common law distinction between birth in sovereign territory and birth outside sovereign territory.¹¹¹ None of them expressly acknowledged that persons born abroad to U.S. citizens (other than diplomats) could be natural born U.S. citizens, and several of them spoke in categorical terms that seem to exclude the possibility.

Here, however, it is important to reemphasize that the question is the meaning of “natural born” in the Eligibility Clause. We look to English law because that phrase had an established meaning in English law, which is the best indication of its public meaning in the United States in 1787–88. Put this way, it seems odd to look at only a portion of English law (common law) rather than the whole body of English law.

The simple fact is that the pure common law definition of “natural born” was not the law in England in the 1780s, and had not been for over a century. A quick glance at Blackstone would suffice to show founding-era Americans that Parliament had altered the definition on numerous occasions. Importantly, it was not the case that Parliament had merely said certain persons born outside English territory were subjects despite the common law; Parliament had said that such persons would be called “natural born” subjects despite the common law. That is, the statutes expressly changed the definition (and again, this was apparent in Blackstone as well as in the statutes themselves).¹¹² In sum, the late-eighteenth-century definition of “natural born”

¹⁰⁹ See *supra* Part II.A.

¹¹⁰ See *supra* Part II.B.

¹¹¹ See *supra* notes 99–107 and accompanying text.

¹¹² See *supra* Part II.B. But see Vlahoplus, *supra* note 3, at 52 (arguing to the contrary that the English statutes did not change the definition but only gave the rights of natural born subjects to those who were not); see also *id.* at 48–54 nn.216–39. Vlahoplus’s argument principally rests on the language

was a combination of common law and statutory law—and anyone even mildly familiar with English law would have understood it this way. If we are using the meaning of terms in English law as a sort of dictionary definition of legal terms of art in the Constitution, it makes little sense to use anything but the then-existing legal meanings, rather than an artificial subset.

Moreover, as discussed, the Constitution's Framers were undoubtedly familiar with the English practice of defining "natural born" subjects by statute, especially through Blackstone's prominent description of it.¹¹³ If the Framers wanted to limit presidential eligibility only to persons born within the nation's territory, it is highly unlikely that they would have used a phrase—"natural born"—that they knew English law defined to include some people born *outside* the nation's territory. Had they intended it, they could easily have limited eligibility to those "born in the United States" instead of using a term with more flexible meaning.¹¹⁴ If there were evidence that the Framers used a different definition linked only to territory, or that they misunderstood English law, it would be another matter—but as recounted above there is no such evidence. And further, limiting the Eligibility Clause to the common law meaning would make the 1790 Act unconstitutional, as also explained above.¹¹⁵

of the statutes themselves, which he reads as stopping short of a full change to the definition, and the court decision in *Leslie v. Grant*, discussed *supra* note 71, along with post-ratification English cases and commentary. This argument seems unpersuasive, however. First, the statutory language appears on its face to declare status. As recounted above, the 1731 Act (the most significant one in force at the time of the founding) said that persons born abroad of English fathers "are hereby declared to be natural-born subjects." 1731 Act, *supra* note 68; see also 1773 Act, *supra* note 69 (persons born abroad whose fathers were naturalized by the 1731 Act "are hereby declared and enacted to be, natural-born subjects"). Further, as also discussed above, Blackstone appeared to read the relevant statutes as declaratory. See *supra* text accompanying notes 72–73 (persons born abroad and covered by the relevant statutes "are now natural born subjects"). Vlahoplus' strongest support comes from the *Leslie* case, which found the statutory grant of natural born subjectship did not extend to a second generation (that is, children born abroad whose fathers were natural born subjects under the 1731 Act were not themselves natural born subjects). However, the judges in *Leslie* did not make general conclusions about the effect of the naturalization statutes; their common conclusion was only that Parliament did not intend to extend natural-born subjectship to the second generation born abroad—a conclusion they reached substantially for instrumental reasons.

¹¹³ See *supra* Part II.B. In particular, John Jay, who is thought to have prompted the use of the phrase in the Eligibility Clause, was an Anglophile lawyer, diplomat and U.S. Foreign Secretary who had considerable dealings with England; he would seem likely to have had a full understanding of English law and practice.

¹¹⁴ One could argue that the Framers should have used "born in the United States or born abroad to U.S. parents" if that is what they intended. But that language would not have been satisfactory. In English practice, and in post-ratification U.S. practice, there have always been limits on the ability to gain natural born status from one's parents, including residency, fathers versus mothers, loyalty oaths, etc. Attempting to resolve and spell out all of these limitations would have been unduly burdensome; thus, a flexible term that left the details to Congress was a better choice.

¹¹⁵ See *supra* text accompanying notes 36–37.

The post-ratification commentary is not to the contrary. Most of it did not directly address the question. Even with the statutory modifications, eighteenth-century English law generally followed the traditional common law definition of “natural born” as meaning territorial birth. Thus, it is unsurprising that commentators, speaking generally, used what appears to be the common law definition. Most of them did not confront the question whether “natural born” could encompass statutorily defined birth abroad; several commentators could be read to suggest that it might, and one commentator who did address the question directly, James Bayard, expressly said that children born abroad of U.S. citizen parents were natural born citizens.¹¹⁶

Further, the Constitution’s Framers were familiar with the idea of statutorily defined birth-right citizenship from their own experiences. As early as 1779, Virginia passed a citizenship statute, “An act declaring who shall be deemed citizens of this commonwealth.”¹¹⁷ By that act,

all white persons born within the territory of this commonwealth, and all who have resided therein two years next before the passing of this act; and all who shall hereafter migrate into the same, other than alien enemies, and shall before any court of record, give satisfactory proof by their own oath or affirmation that they intend to reside therein; and moreover shall give assurance of fidelity to the commonwealth; and all infants wheresoever born, whose father if living, or otherwise whose mother was a citizen at the time of their birth . . . shall be deemed citizens of this commonwealth . . .¹¹⁸

This provision was modified somewhat in a new act in 1783 that declared among other things that “all free persons, born within the territory of this commonwealth . . . and also all children wheresoever born, whose fathers or

¹¹⁶ Bayard, in his 1833 treatise on the Constitution, observed in connection with his discussion of the Eligibility Clause:

It is not necessary that a man should be born in this country, to be ‘a natural born citizen.’ It is only requisite he should be a citizen by birth, and that is the case with all the children of citizens who have ever resided in this country, though born in a foreign country.

BAYARD, *supra* note 33, at 96. It is not clear, however, what basis Bayard had for this conclusion (and he pointed to no authority for it).

Of the other major commentators, Kent discussed the English statutes extending “natural born” status to children born abroad but did not say how those rules translated to U.S. law. 2 KENT, *supra* note 33, at 43–46. He then discussed U.S. statutes relating to naturalization without explaining the phrase “natural born.” *Id.* at 56–57. Rawle declared that all persons born in the United States are natural born citizens under the Eligibility Clause, but did not say anything about those born outside the United States. RAWLE, *supra* note 107, at 80–81. Tucker appeared to speak categorically of natural born citizens born within sovereign territory and others born outside it; however, he did not say anything specifically about children born abroad to U.S. citizen parents. 1 TUCKER, *supra* note 31, app. at 256.

¹¹⁷ An act declaring who shall be deemed citizens of this commonwealth, Act of May 3, 1779, ch. 55, reprinted in 10 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 129 (1822).

¹¹⁸ *Id.*

mothers are or were citizens at the time of the birth of such children, shall be deemed citizens of this commonwealth”¹¹⁹

The Virginia statutes did not use the phrase “natural born,” but they recognized citizenship at birth both in the sense of English common law (birth in the territory, without restriction as to the parents’ citizenship) and citizenship at birth by statutory extension to those born abroad to citizen parents. Although there is no direct evidence that Virginians regarded the latter category as “natural born,” the Virginia statutes paralleled the English citizenship statutes, and under the English statutes the foreign-born subjects-at-birth were called “natural born.” It would have been odd for Virginians to develop a different definition.

In sum, the best view is that “natural born” in the Eligibility Clause meant what it meant in contemporaneous English law, taken as a whole. That raises this project’s most difficult question: what did it mean? Did it mean precisely the contours of “natural born” as defined by common law and statute in 1787–88? Or did it mean more broadly the common law definition as modified from time to time by statute?¹²⁰ In considering this question, it becomes essential to consider the role of Congress’s naturalization power.

IV. THE NATURALIZATION CLAUSE AND CONGRESS’S “NATURAL BORN” POWER

A. Congress’s Power to Define “Natural Born”

To restate, this Article has concluded so far that (i) the phrase “natural born” in the Eligibility Clause can be defined by looking to that phrase’s meaning in contemporaneous English law, and (ii) English law, in this context, should be understood as English law generally, including both common law and statutory law.

One might suppose, then, that this assessment would yield a decisive result. English law in 1787–88 was clear. “Natural born” status included persons who were born subjects under common law—meaning essentially all persons born within sovereign territory (except children of foreign sovereigns, diplomats and invading soldiers) plus a small category of persons born abroad (children of English monarchs and diplomats). Full “natural born” status also

¹¹⁹ An act for the admission of emigrants and declaring their right to citizenship, Act of Oct. 8, 1783, ch. 16, *reprinted in* 11 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 322–323 (1823).

¹²⁰ As noted, the Clement & Katyal essay wholly elides this question by (incorrectly) describing eighteenth-century English statutory law as providing natural-born subject status to all “children born outside of the British Empire to subjects of the Crown.” Clement & Katyal, *supra* note 2, at 161–62.

included a category of persons who were declared to be born subjects by statute, namely those born abroad with English fathers or paternal grandfathers. It did not extend any further.¹²¹ Translated to U.S. terms in the Eligibility Clause, this would seem to mean that only persons meeting this description would be eligible to the presidency—most notably, in terms of modern law, excluding those born abroad with only citizen mothers.

This view, however, misunderstands the nature of Parliament's power over naturalization, and correspondingly misunderstands Congress's power under the Naturalization Clause. The lesson of developments in eighteenth-century English statutory law in this area was that "natural born" was not a fixed concept, but rather was amenable to parliamentary modification, at least at the margins. The history of Parliament's role in the definition showed that Parliament made frequent adjustments, in both directions. Parliament began with statutory adjustments for birth abroad that were very precise in time and category, but which allowed either a father or a mother who was a subject to be sufficient. The 1708 Act appeared to open the definition of "natural born" to anyone born abroad of an English parent, and indeed to any foreign protestant, but the latter provision was repealed after only three years, and the 1731 Act cut it back further to only those foreign-born persons with an English father; the 1773 Act then extended "natural born" to those with an English paternal grandfather.¹²² In short, there was no longstanding statutory definition. The definition was subject to continual parliamentary adjustment. Or, put another way, the definition was what Parliament said from time to time.

Moreover, it is clear that Parliament was not merely codifying a pre-existing common law, or even attempting to implement its own conclusions about natural law. Rather, the eighteenth-century extensions (and cutbacks) were instrumental, explained in terms of the nation's desire to promote overseas trade and travel, to expand its wealth, and to lure productive citizens to its territory. Well before 1787–88, therefore, the English understanding of "natural born" had lost its traditional connection with natural law and natural allegiance; it was a status Parliament could convey based on the circumstances of birth. It had, in other words, become something of a redundancy: "natural" no longer carried independent meaning within the phrase. A natural born subject was simply someone born a subject, by the operation of common law or statutory law. Or, put another way, the 1787–88 English law meaning of "natural born" was the common law definition as modified from time to time by statute.

¹²¹ As discussed, additional categories of people—persons living in the American colonies, and persons serving on English ships during wartime, on English whaleboats, or in the American regiment—had some but not all of the rights of natural born subjects.

¹²² See *supra* Part II.B.

As a result, it is important that the U.S. Constitution gave Congress “Power . . . [t]o establish an uniform Rule of Naturalization.”¹²³ The most obvious marker for the scope of this power is Parliament’s power of naturalization. In modern American discourse, “naturalization” is often understood as the power to extend U.S. citizenship to foreign citizens on an individualized basis. That, however, is not a full description of the power as understood in the eighteenth century. In addition to individualized grants of subjectship, “naturalization” in English law referred to statutes that declared categories of persons to be English subjects.¹²⁴ That is, “naturalization” meant a process that made someone a subject who was not a subject under common law. This is indeed the origin of the word: a person who was a subject under common law was a “natural” subject; a person made a subject by statute was made to be as if they were a natural subject—hence, naturalized.

Crucially, all of the eighteenth-century statutes that declared a class of persons to be “natural born” subjects were called acts of naturalization.¹²⁵ As a result, there is no doubt that Parliament’s power of naturalization included the power to declare categories of natural born subjects beyond the traditional common law. Somewhat confusingly, in terms of modern usage, these persons were *both* “natural born” and “naturalized.”

Applied to the U.S. Constitution, the implication of the English law terminology is clear. Congress’s power of “Naturalization,” like Parliament’s power, includes both the power to establish rules for naturalizing foreign citizens on an individualized basis and the power to declare categories of persons citizens by the circumstances of their birth. And the latter power includes the power to define certain categories as “natural born” (a phrase that in eighteenth-century English law had little practical effect, but which took on new significance in U.S. law as a result of the Eligibility Clause).

This perspective helps resolve a textual puzzle of the Eligibility Clause: why the drafters used the phrase “natural born.” Presumably they knew that it had a somewhat ambiguous definition—this would be apparent from a quick read of Blackstone and Vattel, who defined it differently. If they meant “persons born in the United States” it would have been much easier to simply say so. A plausible explanation is that they deliberately picked a phrase that they knew (from English practice) had some flexibility for statutory definition, but would still protect against the particular threats they were trying to avoid.¹²⁶ If they thought it important for the President to have some life-long

¹²³ U.S. CONST. art. I, § 8.

¹²⁴ See HENRIQUES, *supra* note 49, at 34–41 (discussing both powers of naturalization).

¹²⁵ See *supra* Part II.B.

¹²⁶ An alternative explanation might be that (assuming one credits the theory that the language originated with Jay) Jay did not want to limit eligibility to persons born in the United States as several of his children were born abroad. But, since they were born while he was serving as a diplomatic

connection to the United States but also thought this could be established in some circumstances for those born abroad, using a phrase somewhat open to legislative definition would serve them well.

B. *The 1790 Naturalization Act Revisited*

The foregoing observations also help explain the 1790 Naturalization Act, which declared that children born abroad of U.S. citizen parents were “natural born” citizens, provided the child’s father met a specific residency requirement.¹²⁷ The First Congress apparently believed it had power to declare this category of persons to be “natural born,” even though the category Congress chose did not precisely parallel existing English law and the Constitution did not expressly provide Congress with power to make such a declaration. Considering the English background, one can nonetheless see why Congress understood itself to have this power.

The first notable feature of the 1790 Act is that Congress created its own definition of natural born citizen. The 1790 Act’s definition did not exactly track any of the English or continental definitions of “natural born”: under English common law persons born abroad were not considered “natural born”;¹²⁸ under English statutory law as explained by Blackstone¹²⁹ and under Vattel’s law-of-nations theory¹³⁰ they were “natural born” if but only if their *fathers* were natural born citizens.¹³¹ Thus Congress did not seem to be adopting any existing definition, but rather reaching its own conclusions about the appropriate definition. In this sense, it was acting consistently with Blackstone’s suggestion of “natural born” as being open to statutory definition (even though Congress did not adopt the exact definition of English statutory law).¹³² The 1790 Act is hard to explain on any other theory (aside from the claim that Congress acted unconstitutionally).¹³³

agent of the United States, they would have been considered natural born citizens even under the traditional common law definition of “natural born.”

¹²⁷ 1790 Act, *supra* note 36.

¹²⁸ See *supra* Part II.A.

¹²⁹ See *supra* Part II.B; see also Ramsey, *supra* note 37.

¹³⁰ See *supra* Part II.C.

¹³¹ As noted, the 1790 Act is ambiguous as to whether it meant *both* parents or only one parent had to be a U.S. citizen, but in either event it was not precisely parallel with English law or law-of-nations theory. See Ramsey, *supra* note 37 (favoring the broader view of the statute but noting in any event that the 1790 Act did not parallel the English definition).

¹³² Congress’s definition resembled Virginia’s citizenship statute, which gave birth citizenship to anyone born abroad with at least one citizen parent, although Virginia did not use the phrase “natural born.” See *supra* notes 117–119 and accompanying text.

¹³³ To be sure, the First Congress did pass some unconstitutional provisions. But in this case, where the constitutional language is ambiguous on its face, the First Congress’s actions seem relevant evidence of the proper interpretation.

A second concern is that the “natural born” portion of the 1790 Act is not easily understood as the exercise of any constitutionally delegated power apart from the naturalization power. It is extremely likely that Congress saw the naturalization power as its source, as the Act was titled an act “to establish an uniform Rule of Naturalization” (exactly tracking the constitutional language), and the provisions on natural birth appear after a series of provisions describing how foreign citizens may become U.S. citizens (the more common understanding of “naturalization”).¹³⁴ Moreover, Congress declared foreign-born children of U.S. citizens not merely to be U.S. citizens, but to be *natural born* U.S. citizens.¹³⁵ Congress thus must have believed the naturalization power extended to declarations of “natural born” status.

Without a full understanding of English statutory practice, these conclusions might seem odd, but in light of Parliament’s naturalization acts they make perfect sense. The 1790 Congress evidently understood that Parliament’s naturalization power (and thus its own naturalization power) included the power to declare categories of persons to be natural born citizens.

The legislative history of the 1790 Act, though sparse, appears to confirm this interpretation. Initially the proposed bill did not address foreign-born children of U.S. citizens, providing only for the naturalization of adult aliens and their children. At one point Congressman Burke stated: “The case of the children of American parents born abroad ought to be provided for, as was done in the case of English parents, in the 12th year of William III.”¹³⁶ The statutory reference is apparently to the Act of Settlement, based on the citation, although Burke likely had the slightly earlier 1698 naturalization statute in mind.¹³⁷ Later Congressman Hartley said he “had another clause

¹³⁴ 1790 Act, *supra* note 36.

¹³⁵ *Id.* An objection might be that the statute’s language is arguably less emphatic than the English statutes, saying only that such persons should be “considered as” natural born citizens, not that they “are” natural born citizens. See John Vlahoplus, *On the Meaning of “Considered as Natural Born,”* WAKE FOREST L. REV. ONLINE (Apr. 5, 2017), <http://wakeforestlawreview.com/2017/04/on-the-meaning-of-considered-as-natural-born/>. However, the 1790 Act also said, using parallel language, that persons who go through the statutory naturalization process as adults shall be “considered as” citizens. Plainly this meant that they “are” citizens, not merely that they have the rights of citizens. Accordingly, it is hard to see why the clause relating to foreign-born children should be read differently. Moreover, it appears likely that Congress was specifically drafting with the Eligibility Clause in mind. There seems no other explanation for the decision to direct one group to be “considered as citizens” and the other to be “considered as natural born citizens”; the only difference in rights under the Constitution or applicable law was the Eligibility Clause.

¹³⁶ 1 ANNALS, *supra* note 35, at 1121.

¹³⁷ See *supra* Part II.B. It is likely Burke misspoke as to the date of the English statute. As discussed, *supra* Part II.B, the Act of Settlement was passed in the twelfth year of William III to (among other things) restrict office holding to English subjects born in the realm or born of English subjects abroad, but it did not provide any affirmative rights to children born abroad. Burke was more likely thinking of the statute of the ninth year of King William (1698), which recognized natural born subject status for children born to English subjects abroad. See 1698 Act, *supra* note 61. It is

ready” for this matter, which was presumably included in a subsequent re-draft as the basis of what became the finally enacted language.¹³⁸ David Currie, in his history of Congress’s discussion of the Constitution, mentions the 1790 Act briefly, observing that “[i]n accepting [Burke’s] suggestion, Congress appears to have interpreted the authority to enact ‘naturalization’ laws to give it a general power to define or confer citizenship.”¹³⁹

This history supports several conclusions. First, Congress saw foreign-born children of U.S. citizens as categorically different from other aliens wishing to become U.S. citizens. Second, the basis for this categorical distinction was the English statutory regime that gave natural born subject status to children of English subjects born abroad, as Burke’s comment indicated. That in turn confirms that Congress linked its power to declare natural born citizenship with the English Parliament’s actions regarding children born abroad and that it linked the phrase “natural born citizen” (which Congress surely knew was part of the Eligibility Clause) with the English idea of natural born subjects (including the idea that foreign-born children with English parents could be “natural born”). Third, Congress did not think it was limited to the exact English law definition of natural born, as it then existed; rather Congress thought its naturalization power included power to formulate its own version of natural born.¹⁴⁰

unclear why Burke focused on the earlier statute rather than the mid-eighteenth-century English statutes relating to natural born subjects that were then in force.

¹³⁸ 1 ANNALS, *supra* note 35, at 1125. The new proposal prompted some debate as to its extent, principally focused on two points. First, there was a question whether the new language encompassed children of U.S. citizen mothers and alien fathers. Compare Cornell, *supra* note 37 (reading the debate to suggest that it did not), with Ramsey, *supra* note 37 (reading the debate to suggest that it did); see also Clement & Katyal, *supra* note 2 (assuming without explanation that it did). Second, there was a question whether the citizenship right would extend too far into future generations lacking connection with the United States; this concern resulted in the addition of the residency requirement at the end of the clause.

¹³⁹ DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 89–90 (1997). For further discussion, see Ramsey, *supra* note 37.

¹⁴⁰ Two objections to this reading may be considered. First, Saul Cornell argues that St. George Tucker in his 1803 commentaries read the 1790 Act not to give presidential eligibility for children of U.S. citizens born abroad. See Cornell, *supra* note 37, at 99 (discussing 2 TUCKER, *supra* note 31, at 374–75 n.12). As discussed elsewhere, however, Tucker appeared here to be addressing persons naturalized under the first paragraph of the 1790 Act, not those declared natural born citizens. See Ramsey, *supra* note 37, at 157. Second, of greater weight, Congress replaced the 1790 Act with a new naturalization statute in 1795 that dropped the “natural born” language. See *supra* notes 39–40 and accompanying text. This action could be read as disclaiming a congressional power to declare natural born citizen status. However, as noted, nothing in the surrounding circumstances suggests this was Congress’s intent, and the significance of the shift in language remains uncertain. See CURRIE, *supra* note 139, at 194–95 (discussing debates over 1795 Act without mentioning the treatment of children of U.S. citizens born abroad).

Some scholars have found a comment by James Madison during the drafting of the 1795 Act to be suggestive. See McManahan, *Natural Born Citizen Clause*, *supra* note 3; Elhauge, *supra* note 3. At one point the House considered whether to bar former U.S. citizens who had renounced their

In sum, then, the key to the Eligibility Clause is not just its own language, but Congress's Article I, Section 8 power over naturalization. In English law the naturalization power included the power to define who was "natural born." Absent indications to the contrary, Congress's naturalization power should have the same scope—a point confirmed by the 1790 Naturalization Act.

C. Limits on Congress's Power to Define "Natural Born"

While the Constitution thus apparently granted Congress power to define natural birth, we should also consider possible limits on that power. The Constitution's Framers might have conveyed an unlimited power on Congress, but that seems unlikely. In particular, it is not clear that Congress's possession of an unlimited power would resolve the problems of foreign intrigue. If a person born and raised a foreigner could be made eligible for the presidency simply by having enough supporters in Congress to redefine his status, that would seem to heighten rather than ameliorate the problem of foreign intrigue.¹⁴¹

Ordinary language and English practice suggest at least two important limits on Congress's power, however. First, it is doubtful that Congress could convey natural born status on persons with no connections to the United States at birth. To begin, it simply does too much violence to the constitutional language to say that a person whose citizenship arises solely from events after birth is a "natural born" citizen. Whatever the interactions between "natural" and "born," there seems no way to plausibly say that a person

citizenship from regaining U.S. citizenship through naturalization. Madison observed that he "did not think Congress, by the Constitution, had any authority to readmit American citizens at all. It was granted to them to admit aliens." 4 ANNALS, *supra* note 40, at 1027. However, this comment provides little guidance. As both the context of the surrounding debate and Madison's language itself make clear, it came in the unrelated context of readmission of former citizens. See CURRIE, *supra* note 139, at 195 n.173 (discussing Madison's comment in these terms). It had nothing to do with Congress's power to extend "natural born" status to children born abroad, a topic which was not being discussed at the time. Plainly Madison thought, at minimum, that Congress could grant citizenship at birth to the children of U.S. citizens (the final bill did so, and Madison supported it). Further, Madison did not explain the basis of his belief, so there is no way to determine whether he might also have perceived other limits on Congress's naturalization power. And in any event his reading of the Constitution on this point seems wrong: a former U.S. citizen, having become an alien, would seem eligible for naturalization to the same extent as any other alien. But see *id.* (suggesting that Madison may have believed that U.S. citizens could not expatriate themselves). The final bill did not contain any limit on naturalization in this regard.

It is true, as some scholars point out, that Madison served on the House committee that drafted the bill; the failure to carry over the "natural born" language from the 1790 Act was presumably the work of that committee, as no other source is reflected in the Annals. See 4 ANNALS, *supra* note 40, at 1058 (reflecting that the drafting committee was charged with carrying over necessary language from the 1790 Act to complete the new bill). However, nothing indicates why the Committee made the change or why Madison went along with it.

¹⁴¹ That is especially true because English practice does *not* indicate a limit on retroactivity. As discussed, English statutes routinely conveyed natural born status on categories of persons already born. See *supra* Part II.B.

whose citizenship does not arise from birth is a “born” citizen. In contrast, one may plausibly say that “natural born” means “conveyed by birth”; while that reading makes the words somewhat superfluous, it is not an uncommon phrasing. A “natural born leader,” for example, means simply a person born with leadership qualities, with the word “natural” being largely superfluous.

Further, with one exception, Parliament never gave persons with no connections to England at birth the full status of natural born subjects. It is true, as discussed, that Parliament at various times purported to declare persons with no connection to England at birth to be “natural born subjects” based on subsequent activities (serving in the wartime navy, etc.). However, these statutes did not convey full natural born subject status; each of them contained the “disabling clause” mandated by the Act of Settlement, which limited their subjectship rights—in particular, their eligibility to office. The only persons granted full natural born subject status (including eligibility to office) by statute were those who had material connections to England at birth because their parents or grandparents were English subjects.¹⁴²

The one exception to this pattern tends to prove the rule. In the 1708 Act, Parliament declared all foreign Protestants, regardless of the circumstances of their birth, to be natural born English subjects, without limitation as to eligibility to office.¹⁴³ This gesture proved immediately unsatisfactory, was quickly repealed¹⁴⁴ and was not repeated.

Second, it is doubtful that Congress could convey natural born status on a particular individual without giving all similarly situated persons equivalent status. Again, Parliament did not exercise its naturalization power in this way. Some English naturalization acts did declare certain persons by name to be natural born subjects, but they went on to convey equivalent status categorically on all persons similarly situated.¹⁴⁵

Recognizing these limits on Congress’s naturalization power would help prevent the intrigues that concerned the Framers, while leaving Congress substantial definitional flexibility. To take the example of Baron von Steuben, whom Professor Thach thought John Jay had in mind in first suggesting the Eligibility Clause:¹⁴⁶ Steuben was born in Germany of non-U.S. parents and with no connection to the United States. He later came to the United States

¹⁴² See *supra* Part II.B.

¹⁴³ 1708 Act, *supra* note 67.

¹⁴⁴ 1711 Act, *supra* note 67; 1 BLACKSTONE, *supra* note 44, at *363.

¹⁴⁵ See *supra* Part II.B. This limit also may be suggested by the naturalization clause, which only gives Congress power to make a *uniform* rule of naturalization. See U.S. CONST. art. I, § 8, cl. 4. While the primary meaning of that phrase was no doubt to contrast with the non-uniform practices of the states, it may also suggest that a naturalization rule must be equally applicable to similarly situated persons.

¹⁴⁶ See THACH, *supra* note 23.

and gained fame as an aide to Washington in the Revolutionary War.¹⁴⁷ Under no plausible definition of “natural born” was he a “natural born citizen.” Once the Constitution took effect, Congress could have made him a naturalized citizen at any time, but could not have made him a “natural born” citizen.¹⁴⁸ Similarly, to the extent there was concern over rumored invitations to foreign nobles to assume the presidency, again the requirement of “natural born,” even if subject to some legislative definition, would preclude such intrigues in a way that a mere citizenship requirement would not.

As a result, though the Constitution gave Congress power to define who is natural born under its naturalization power, English practice and the purposes of the Eligibility Clause suggest that Congress’s power extended only to categories of persons with some material connection to the United States at birth.¹⁴⁹

CONCLUSION

Conventional wisdom holds that “natural born Citizen” in the Constitution’s Eligibility Clause means anyone who is made a U.S. citizen at birth under then-existing statutory language. However, that is not the most obvious reading of the clause. The Constitution’s reference to “natural” citizenship appears on its face to be a reference to citizenship conveyed by natural

¹⁴⁷ PAUL LOCKHART, *THE DRILLMASTER OF VALLEY FORGE: THE BARON DE STEUBEN AND THE MAKING OF THE AMERICAN ARMY* 106 (2008).

¹⁴⁸ In fact, however, von Steuben was a citizen of the United States at the time of the Constitution’s ratification, having been made a citizen of both Pennsylvania and New York. *Id.* at 295. Thus he was eligible to the presidency under the final version of the Constitution; it is not clear if Jay knew von Steuben was a citizen, and in any event the alternative eligibility rule was not in Jay’s proposal.

¹⁴⁹ A related puzzle is whether Congress could declare certain categories of persons *not* to be natural born citizens. As to persons not natural born under common law, the likely answer is yes. English statutory practice both expanded and contracted the definition of “natural born” over the course of the eighteenth century. See *supra* Part II.B. As to persons who had natural born status under common law, the question is more difficult, but there is no direct English precedent for doing so; in any event the question appears to have been mooted by the Fourteenth Amendment’s declaration that all persons born in the United States are citizens.

A further difficulty in modern law is that the current naturalization law declares most persons born outside the United States to a U.S. citizen parent to be U.S. citizens, but it does not declare that they are “natural born” citizens. As discussed, the 1790 Act used the phrase “natural born” in this context, but that language was dropped in the 1795 Act; subsequent enactments have followed the 1795 Act in this regard. Thus, while Congress has power to declare persons born outside the United States to a U.S. citizen parent to be “natural born” citizens, perhaps it has not done so. A full examination of this question is beyond the scope of this Article; it is worth noting, however, that Congress seems plainly to understand its Acts as making persons who are citizens at birth eligible to the presidency. See, e.g., S. Res. 511, 110th Cong. (2008) (enacted) (unanimously finding John McCain, who was born in the Panama Canal Zone and thus arguably outside U.S. territory, to be a natural born citizen by prior statute). This resolution generally refers to the children of Americans serving in the military (not just those in McCain’s situation) and specifically notes the 1790 Act. As a result, it seems clear that the resolution based its conclusions on McCain’s birth abroad to U.S. parents.

law (exactly the opposite of citizenship conveyed by statute). That has in turn led to considerable debate about the eighteenth-century “natural” law of citizenship, which is in turn uncertain depending on whether one looks at English common law, English statutory law, or law-of-nations principles espoused by writers such as Vattel. However, little direct evidence exists as to which view of natural law the Framers might have held. Under this line of inquiry, the better conclusion may be that the clause is inescapably ambiguous as to certain groups of citizens—a position suggested or embraced by several leading scholars.¹⁵⁰

As set forth above, careful review of the phrase’s history suggests that the conventional view is the best one, although the argument is more difficult and complex than the conventional view acknowledges. The decisive fact about the phrase “natural born” is that it had commonly appeared in English statutes throughout the late-seventeenth and eighteenth centuries. In traditional English common law, “natural born” (applied to “subjects”) meant (with minor exceptions) persons born within English territory. However, beginning in 1677, and continuing up to the Framers’ time, Parliament had expanded that definition by statute to include some persons born abroad to English parents. Crucially, Parliament had not merely extended the rights of natural born subjects to these new categories, but had declared that persons in the new categories *were* natural born subjects. As Blackstone put it, children so designated by statute “are now natural-born subjects themselves, to all intents and purposes, without any exception”¹⁵¹

This English practice was known to the Framers (at minimum, through Blackstone’s description). And absent any other conclusive definition of the phrase, it seems conclusive in itself. The Framers knew that in English law “natural born” had a core meaning of birth within sovereign territory, but was subject to statutory expansion to include those born overseas with what Parliament considered a sufficient connection to the nation. The best reading of the clause is that this is the constitutional meaning as well.¹⁵²

This reading is strongly reinforced by the Constitution’s grant to Congress of the power to “establish an uniform Rule of Naturalization.” The English statutes declaring certain categories of people to be natural born, even if not

¹⁵⁰ See Solum, *supra* note 6, at 30 (discussing the “[p]ossibility of [i]rreducible [a]mbiguity” in interpreting the Eligibility Clause); see also Jacobson, *supra* note 6 (concluding that, because of the ambiguity of the Framers’ intent, a “reasonable reading of the plain text” of the clause should be embraced, under which all citizens at birth would be “natural born”).

¹⁵¹ 1 BLACKSTONE, *supra* note 44, at *361.

¹⁵² This reading is consistent with the clause’s apparent purpose, which was to bar from the presidency people who lacked longstanding attachment to the United States. Like people born in the United States, people born of U.S. parents abroad have an attachment to the United States from birth. The Framers’ concern was with people who only became U.S. citizens later in life, who thus (they feared, perhaps unreasonably) might have more attachment to foreign interests, and in particular might scheme to establish foreign rule. See *supra* notes 19–40 and accompanying text.

born in England, were called naturalization acts. Thus eighteenth-century readers would understand the naturalization power to include the power (within certain limits) to define the scope of “natural” birth. As a result, somewhat counter-intuitively, “natural” born does at least to some extent depend on statutory law. Finally, this reading explains the 1790 Act, in which Congress created a statutory definition of “natural born” for children of U.S. citizens born abroad that largely (but not entirely) tracked English practice.

Notably, this reading (and only this reading) of the Eligibility Clause supports the modern view that all persons defined as citizens at birth by statute are “natural born.” In particular, the modern citizenship statute defines most persons born abroad with a U.S. citizen mother and a non-citizen father to be U.S. citizens at birth. That status is not consistent with the meaning of “natural born” in English common law or in law-of-nations theory; nor was it the case under late-eighteenth-century English statutory law (which gave those born abroad “natural born” status only if their fathers or paternal grandfathers were English subjects). But so long as we see that “natural born” was subject to statutory expansion under the naturalization power, the fact that modern birthright citizenship does not accord in all particulars with eighteenth-century birthright citizenship is not problematic.

In sum, as conventional wisdom holds, the best reading of the original meaning of the Eligibility Clause is that any person defined as a citizen at birth by the Constitution or a statute is eligible to the presidency. The proof, however, is much more difficult than conventional wisdom supposes.