

Presidential Eligibility: the Meaning of the Natural-Born Citizen Clause

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I. INTRODUCTION

The Natural-Born Citizen Clause of the United States Constitution¹ has been labeled by some as the “Constitution’s worst provision.”² The clause provides that “No person except a natural born Citizen, or Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.”³ Attacks on the provision stem primarily from disagreement with its inherent supposition that naturalized Americans are less loyal than natural-born, and therefore should be precluded from aspiring to the highest office in the land.⁴ Opponents of the provision have pointed out that notable public officials, such as Henry Kissinger,⁵ Madeleine Albright,⁶ and

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1. U.S. CONST. art. II, § 1, cl. 5.

2. See Randall Kennedy, *A Natural Aristocracy?*, 12 CONST. COMMENT. 175 (1995); Robert Post, *What is the Constitution’s Worst Provision?*, 12 CONST. COMMENT. 191 (1995).

3. U.S. CONST. art. II, § 1, cl. 5.

4. See Kennedy, *supra* note 2, at 176; Post, *supra* note 2, at 192-93.

5. Henry Kissinger was Secretary of State under President Richard Nixon. See William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: ‘The Emperor Has No Clones,’* 75 GEO. L.J. 1389, 1453 n.144 (1987).

6. Madeleine Albright served as the first female Secretary of State. See John Dwight Ingram, *The First ‘First Gentleman’: The Role of President Jane Doe’s Husband*, 7 AM. U.

many other high profile individuals,⁷ have been, or are presently, ineligible for the Office of the Presidency by reason of foreign-born status. While others have poked fun at the clause with tongue-in-cheek assertions that individuals born by cesarean section are not viable presidential candidates,⁸ the clause is no laughing matter to those who feel it is restrictive of basic American ideals.

Yet, the Constitution is restrictive. Just as it requires that United States Representatives be at least twenty-five years of age and citizens for seven years,⁹ and Senators be at least thirty years old and citizens for nine years,¹⁰ the Constitution demands that the President be a natural-born citizen.¹¹ Aside from the question of whether the term "natural-born citizen" encompasses foreign-born children of citizen parents,¹² its scope has evoked little commentary. Most likely this absence of debate stems from the fact that in the over 200 years since the founding of America, all serious presidential *candidates* have been born within the territory of the United States.¹³ The clause did emerge from the constitutional woodwork when, in 1968, Governor George Romney of Michigan, born in Mexico to American parents, was in pursuit of the Republican presidential nomination.¹⁴ Romney quickly dismissed concerns of potential presidential ineligibility by asserting natural-born status on the

J. GENDER SOC. POL'Y & L. 523; 530 (1999).

7. See Kiyoko Kamio Knapp, *The Rhetoric of Exclusion: The Art of Drawing a Line Between Aliens and Citizens*, 10 GEO. IMMIGR. L.J. 401, 440 n.25 (1996) (citing Lino A. Graglia, *Was the Constitution a Good Idea?* 36 NAT'L REV. 37 (1984) (noting that "Felix Frankfurter and Albert Einstein . . . were ineligible" for president)); Frederick Schauer, *Constitutional Invocations*, 65 FORDHAM L. REV. 1295, 1302 (1997) (discussing Secretary of State Christian Herter and Chairman of Joint Chiefs of Staff John Shalikashvili's ineligibility).

8. James M. Rose, "What's Round on the Ends, High in the Middle and Late in the Union?" *Will Become a Legal Question*, N.Y. ST. B.J., 71 Aug. N.Y. ST. B.J. 48, 49 n.16 (1999) (asserting that Warren G. Harding was an illegitimate president because he was born by caesarean section).

9. U.S. CONST. art. I, § 2, cl. 2.

10. U.S. CONST. art. I, § 3, cl. 3.

11. U.S. CONST. art. II, § 1, cl. 5.

12. Thomas E. Cronin, *President of the United States*, in 15 THE WORLD BOOK ENCYCLOPEDIA 762, 763 (1992) ("No law or court decision has yet defined the exact meaning of *natural-born*. Authorities assume the term applies to citizens born in the United States and its territories. But they are not sure if it also includes children born to U.S. citizens in other countries.").

13. THE WORLD ALMANAC AND BOOK OF FACTS 107-08 (2001) (listing all major party candidates); see generally 1 ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY (Leonard W. Levy & Louis Fisher eds., 1994) (providing biographical information for all major party candidates).

14. Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1, 1 (1968).

grounds that his parents were American citizens.¹⁵ While Romney's political pursuits produced temporary debate as to the exact meaning of "natural-born," upon his fading, the issue paled in the political arena as well. Indeed, its insignificance to most makes it one of unpalatable inquiry.

However, the import of the clause may be underestimated. The increasing mobility of American society, as well as the expanding ubiquity of the United States government throughout the world, progressively increases the chances that another George Romney will step up to the presidential plate. If a thorough analysis of this issue is not examined prior to such an occurrence, the potential for partisan politics to irreparably damage a possibly viable candidate is immense.¹⁶ Likewise, although it should be inconceivable that such politics could skew the judgment of the ultimate referees deciding the issue,¹⁷ history does not negate this possibility.¹⁸

This Article examines the Natural-Born Citizen Clause of the United States Constitution and addresses whether the clause was intended by the constitutional Framers to include foreign-born children of American citizen parents. This Article concludes that, even at its most restrictive interpretation,

15. See Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U. L. REV. 250, 252 (1989) (asserting that when Governor George Romney pursued the Republican nomination for President in 1968, Romney's "legal problem" of possibly not qualifying under the "natural-born" requirement was not viewed as disabling, just a negative).

16. Although it is recognized that partisan politics are capable of irreparably damaging a candidate on even more insignificant grounds.

17. Presumably this would be the United States Supreme Court, this being a matter of constitutional interpretation. One could argue however that this is in fact a political question as it involves presidential qualifications. See D'Amato, *supra* note 15, at 253.

18. GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 183-196 (David L. Shapiro et al. eds., 13th ed. 1997) (discussing President Franklin D. Roosevelt's "court-packing plan" which resulted from executive and legislative disfavor with Supreme Court Commerce Clause rulings, and the Supreme Court's consequent change of position, presumably in response to the plan). Natural-born status deserves examination for other reasons as well. It appears the last word from the Supreme Court on the status of Native Americans, admittedly very long ago, was that although they are subject to the laws of the United States, they serve a tribal sovereign. Thus, Native Americans are not under the "jurisdiction" of the United States per the Fourteenth Amendment, and therefore only obtain United States' citizenship via naturalization. See Jonathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 690-91 (1995) (citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1856)); See also 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, 899 n.7 (1988) (citing *Elk v. Wilkins*, 112 U.S. 94, 102 (1884)). While Congress has since provided statutory citizenship at birth for Native Americans, see 8 U.S.C. § 1401(b) (1994), this does not negate the fact that Native Americans are technically considered naturalized rather than natural born.

the Natural-Born Citizen Clause includes foreign-born children of American citizens when such children are born outside of the United States as a result of parental employment by the United States government. This determination is based on an analysis of the English common law as purportedly known and subscribed to by the constitutional Framers. This conclusion is discussed below as the “Jurisdictional Argument.” The Jurisdictional Argument analysis begins with an examination of the United States Supreme Court case, *United States v. Wong Kim Ark*,¹⁹ which strongly supports the proposition that foreign-born children of American citizens are not “natural-born.” This will be followed by a critique explaining how the *Wong Kim Ark* analysis still lends itself to the devolution of “natural-born” status to some foreign-born children of American citizens, namely those born to personnel in the employ of the United States Government.

This Article further asserts that the constitutional Framers had an even broader conception of “natural-born,” however, and deemed all foreign-born children of American citizen parents eligible for the Office of the Presidency. This judgment stems from examination of a statute passed by the First Congress that arguably serves to interpret “natural-born.” This assertion is discussed below as the “Interpretation Argument.”

II. HISTORY OF THE NATURAL-BORN CITIZEN CLAUSE

The history of the Natural-Born Citizen Clause can be traced back to early discussions among the country’s founders. On July 25, 1787, John Jay sent a letter to George Washington, and possibly to other delegates at the Constitutional Convention, which stated:

Permit me to hint, whether it would be wise and seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in Chief of the American army shall not be given to nor devolve on, any but a natural born Citizen.²⁰

His letter is thought to have stemmed from either suspicion of Baron Von Steuben or to have been in response to talk that the Convention was attempting to erect a monarchy to be headed by a foreign ruler.²¹ Whatever the reasons, the “natural-born citizen” language was introduced shortly thereafter by the

19. 169 U.S. 649 (1898).

20. Gordon, *supra* note 14, at 5 (alteration in original) (quoting 4 U.S. DEP’T OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 237 (1905)).

21. *Id.*

Committee of Eleven and was ultimately adopted, with no debate, in the form in which it was first introduced.²²

In addition to the Natural-Born Clause, the Framers created additional presidential requirements. The Presidential Qualifications Clause also required that the President be at least thirty-five years old and a U.S. resident for fourteen years.²³ These additional, very specific, qualifications may suggest that the natural-born requirement was meant by the Framers to be absolute— just as “thirty-five” and “fourteen” meant something very specific to the Framers. Therefore, it is through establishing what “natural-born” meant to the Framers that eligibility for the Office of President of the United States can be determined.

III. PRIOR ANALYSES OF THE CLAUSE

Although the Natural-Born Citizen Clause has failed to evoke extensive commentary, examining prior attempts to interpret the clause is necessary to insure that this present examination is not a mere duplication of another’s efforts. Further, it is important to explain why these prior attempts, some even reaching the same conclusion as this author, have not adequately or accurately addressed the issue.

A. *Naturalization Analysis*

One of the more recent attempts to address this issue was made by Jill A. Pryor in a 1988 note titled *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*.²⁴ In her note, Ms. Pryor asserts that the constitutional Framers intended the meaning of “natural-born” to be interpreted in light of naturalization statutes.²⁵ Her analysis concludes that any person deemed a citizen at birth pursuant to a naturalization statute is a natural-born citizen.²⁶ She asserts that the Framers considered the natural-born qualification to require “reference to the naturalization statutes in effect at the candidate’s birth.”²⁷ Ms. Pryor acknowledges the Framers were in search of “bright-line rules,” as evidenced by requiring the President to be at least thirty-five years old and fourteen years a resident, and insists that the Framers considered naturalization statutes to

22. *Id.* at 4 (citing 1 ELLIOT’S DEBATES 289; 5 ELLIOT’S DEBATES 507).

23. U.S. CONST. art. II, § 1, cl. 5.

24. 97 YALE L.J. 881 (1988).

25. *Id.* at 883.

26. *Id.* at 894.

27. *Id.* at 895.

provide such additional “bright-lines.”²⁸ As such, her examination of present naturalization statutes concludes that foreign-born children of citizen parents are “natural-born” United States citizens.²⁹

While Ms. Pryor’s explanation of the clause certainly makes its interpretation effortless and unambiguous, her approach allows Congress to change a constitutional provision without following the amendment procedures set forth in Article V of the Constitution.³⁰ Her position allows the Natural-Born Citizen Clause to mean one thing today, and something quite different tomorrow. This possibility does not reflect bright-line guidance, but rather suggests that the meaning of the Constitution is alterable at the whim of Congress. In light of Article V, this may not be a reliable method of interpreting the Natural-Born Citizen Clause.

B. *English Common Law Analysis*

The emergence of Governor George Romney in 1968 as a potential presidential candidate prompted an article by Charles Gordon titled *Who Can Be President of the United States: The Unresolved Enigma*.³¹ Gordon’s well written and historically thorough article examines the constitutional setting surrounding the drafting of the Natural-Born Citizen Clause, constitutional and legislative provisions enacted after adoption of the Constitution, and judicial and scholarly expressions deemed applicable to the clause.³² Like Ms. Pryor, his analysis also leads to the conclusion that foreign-born children of American citizens are natural-born citizens. His reasoning is essentially based on English common law “particularly as it had been declared or modified by statute.”³³ He asserts that although the English common law might not have allowed foreign-born children of British citizens to inherit natural-born status,³⁴ statutes enacted in England did provide such standing.³⁵ He reasons that the English common law, coupled with English statutes passed before the American Revolution, comprised a “total corpus” inherited by the United States and thus became the

28. *Id.*

29. Pryor, *supra* note 18, at 896-98; *see also* 8 U.S.C. § 1401 (1994) (“Nationals and citizens of United States at birth”).

30. U.S. CONST. art. V.

31. Gordon, *supra* note 14.

32. *Id.*

33. *Id.* at 31.

34. *Id.* at 7 (stating “the leading British authorities agree that under the early common law, status as a natural-born subject probably was acquired only by those born within the realm” but that statutes “enabled natural-born subjects to transmit equivalent status at birth to the children born to them outside of the kingdom”).

35. *Id.* at 12-13.

common law in America.³⁶ He specifically refers to a 1677 law that granted natural-born status to foreign-born children of British parents who fled England during the Cromwell era.³⁷ Also discussed is a 1708 law providing that “foreign-born children of natural-born British subjects shall ‘be deemed, adjudged and taken to be natural-born subjects of this kingdom, to all intents, constructions and purposes whatsoever.’”³⁸ Finally, he relies on a 1773 law granting natural-born status to the grandchildren of natural-born subjects to support his premise.³⁹

While it is unquestionable that many of the American colonies acknowledged some British statutes as having applicability in America via reception statutes,⁴⁰ it is doubtful the above statutes were so received. It appears the colonies adopting British statutes only received those that were either general in nature, directly applicable to, or previously applied in that particular colony.⁴¹ For example, the Delaware Constitution established that “[t]he common law of England as well as so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force.”⁴² Virginia’s reception statute stated that the “common law of England, all statutes or acts of Parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of a general nature, not local to that kingdom . . . shall be considered as in full force.”⁴³ Thus, it is unlikely that a statute as specific in substance as the 1677 statute, which directly addressed children born to citizens who had fled Cromwell’s rule, ever was recognized in the American colonies.

It is similarly unlikely that the 1773 law granting natural-born status to grandchildren of natural-born British subjects was ever accepted in America. Although the First Congress enacted a statute addressing the status of foreign-born children of United States citizens, derivative citizenship could not be obtained by such children if their father had never been a United States

36. Gordon, *supra* note 14, at 12-13.

37. *Id.* at 7 (citing 29 Car. II, c. 6, § 1 (1677)).

38. *Id.* at 7 (citing 7 Anne., c. 5, § 3 (1708)).

39. *Id.* (citing 13 Geo. III, c. 21 (1773)).

40. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 109-15 (2d ed. 1985) (referencing the first Continental Congress’ adoption of a Declaration of Rights that declared colonial entitlement “to the common law of England,” and those English statutes “which existed at the time of colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances”).

41. *Id.*

42. *Id.* at 110.

43. *Id.* (citing 9 WILLIAM WALTER HENNING, STATUTES AT LARGE . . . OF VIRGINIA 127 (1821)).

resident.⁴⁴ This appears to be an attempt to insure a parental nexus with the United States, thereby precluding the attainment of citizenship solely via a grandparent's citizenship. Because neither the First Congress nor any subsequent Congress has ever addressed or granted derivative citizenship to grandchildren of American citizens,⁴⁵ it is unlikely that the 1773 English law was received in America as a part of the common law.

The reception in America of the 1708 law granting natural-born status to foreign-born children of British subjects is also suspect. Although one could argue that America accepted the general statutory concept, adoption of the actual statute is unlikely because of its specific wording with regard to British citizenship. The statute, worded in such a way as to address "natural-born British subjects" and their citizenship in "this kingdom," would have likely been offensive to a people who had just broken ties with England. As written, the law made the children of any American colonist born in England a British subject, regardless of the colonist's residency or political loyalties.⁴⁶ (Similarly, the 1773 law, noted above, made British subjects of any American child whose grandparent had been born in England.⁴⁷)

Further, the colonists did not necessarily agree with the King's positions on citizenship, specifically as he exercised his positions in the colonies. In 1773 he advised his colonial Governors to refuse to authorize any bill for naturalizing aliens and to refuse legitimate title to their lands.⁴⁸ This was not well received in the colonies and the Second Continental Congress consequently berated the King's action.⁴⁹ This disapprobation was extended to the Declaration of Independence where the King was charged with endeavoring "to prevent the population of these States; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands."⁵⁰ Thus, the

44. Gordon, *supra* note 14, at 8 (citing Act of March 26, 1790, ch. 3, 1 Stat. 103, 104 (1790)).

45. See 8 U.S.C. § 1401 (1994) (For example, all present statutes that allow citizenship to devolve at birth to foreign-born children of American citizens include parental residency requirements in the United States. The parent of the child must have established some nexus with the United States in order for citizenship to be conferred, which precludes citizenship from passing via a grandparent.).

46. See *supra* note 38 and accompanying text.

47. See *supra* note 39 and accompanying text.

48. JOHN L. CABLE, DECISIVE DECISIONS OF UNITED STATES CITIZENSHIP 4 (1967).

49. *Id.* at 5.

50. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776); see also CABLE, *supra* note 48, at 6-14. Another reason the colonies might not have accepted such statutes is that during the revolutionary period colonists were in essence asked to prove local citizenship by loyalty. Cable discusses the revolutionary period and the inability of the colonies to force local loyalty. All adult individuals claiming to support the colonies were asked to take an oath of

1708 statute, composed in terms of British citizenship, invites skepticism concerning acceptance by the colonies.

Mr. Gordon also gleans support for his position from English inheritance statutes enacted by Parliament as far back as 1350.⁵¹ These statutes served to insure that foreign-born children of British parents were afforded rights of inheritance.⁵² There is no doubt that such English inheritance statutes were received and applied in some parts of the United States.⁵³ Yet, these statutes in no way relate to citizenship, and Mr. Gordon himself states that the first statutory reference in England to foreign-born children as “natural-born” subjects was in the 1677 law discussed above.⁵⁴ Thus, Mr. Gordon’s reliance on the alleged reception of English statutes in America to support his contention that foreign-born children are natural-born American citizens appears misguided.

Another area where Mr. Gordon may have potentially erred is his terse dismissal of the 1898 Supreme Court case, *United States v. Wong Kim Ark*.⁵⁵ Gordon asserts the statements made in the case “were dicta, pure and simple”⁵⁶ and that “these dicta are not addressed to the [P]residential [Q]ualification [C]lause and cannot control its construction.”⁵⁷ While this may be true, he ignores the fact that the Supreme Court in *Wong Kim Ark* purports to exhaustively examine the British common law, the source by which the constitutional Framers apparently derived the “natural-born” terminology. Of even more significance, the Court’s majority ultimately comes to a conclusion that, if carried to its logical end, the Natural-Born Citizen Clause precludes foreign-born children of American parents from “natural-born” status.⁵⁸ Thus, the *Wong Kim Ark* opinion should not be dismissed so readily and must be included in a thorough discussion of the Natural-Born Citizen Clause.

allegiance. Benjamin Franklin’s son, William, for example, elected to remain a British subject. Benjamin Franklin therefore limited his son’s inheritance, adding in his will that “. . . The part he acted against me in the late war, which is of public notoriety, will account for my leaving no more of an estate he endeavored to deprive me of.” *Id.* at 11. Thus, in light of the direct steps that were being taken to confirm local loyalty, it seems even more unlikely that statutes expressly conferring British citizenship would have been received in the colonies.

51. Gordon, *supra* note 14, at 6-7 (citing 25 Edw. III, c. 2 (1350)).

52. *Id.* at 7.

53. See *McCreery’s Lessee v. Somerville*, 22 U.S. (9 Wheat.) 354, 354-56 (1824) (“But the statute of 11 & 12 Wm. III., ch. 6., is admitted to be in force in Maryland; and that statute, beyond all controversy, removes the disability of claiming title by descent, through an alien ancestor.”).

54. Gordon, *supra* note 14, at 7.

55. 169 U.S. 649 (1898).

56. Gordon, *supra* note 14, at 19.

57. *Id.* at 32.

58. See *infra* Part IV.

C. *Other Interpretive Analyses*

In 1950 Warren Freedman wrote a Comment titled *Presidential Timber: Foreign Born Children of American Parents*.⁵⁹ Although he concludes that foreign-born children of citizen parents are “natural-born,” his Comment is more declaratory than explanatory. Freedman, unlike Gordon, gives some credence to the *Wong Kim Ark* decision, but only to the dissent.⁶⁰ He makes no reference to the majority opinion in the case but states that “[i]n able dissents by Chief Justice Fuller and Mr. Justice Harlan in *United States v. Wong Kim Ark* it was historically shown that foreign born children of American parents are not disqualified for the presidency.”⁶¹ He does not discuss the fact that the majority opinion appears to “historically show” just the opposite. This declaration is indicative of the entire article in that it makes ostensive statements of fact, yet provides little actual analysis.

While the above three authors conclude that foreign-born children of American parents are “natural-born citizens,” other authors have concluded the opposite. Westel Willoughby finds such children to have only a “qualified citizenship” due to a 1907 Act requiring the child’s presence in the United States prior to age 18.⁶² He concludes that a qualified citizenship is not consistent with natural-born status.⁶³ Mr. Willoughby’s opinion, however, was stated around the year 1929. Since that time, Congress has revised the 1907 statute and the requirement he refers to no longer applies to foreign-born children of two American parents.⁶⁴ The requirement of citizenship validation prior to age 18 now applies only to foreign-born children born out of wedlock to an American father.⁶⁵ (The same child born to an American mother acquires United States citizenship at birth without having to meet other requirements.)⁶⁶ If Mr. Willoughby’s hypothesis is accepted, then in 1907 no foreign-born children of American parents would have been “natural-born,” yet at present, all foreign-born children, except those born out of wedlock to an American father and alien mother, are natural-born. Mr. Willoughby’s hypothesis allows

59. 35 CORNELL L.Q. 357 (1950).

60. *Id.* at 358.

61. *Id.*

62. *Id.* at 366 (quoting WESTEL W. WILLOUGHBY, 1 THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 354 (2d ed. 1929)).

63. *Id.*

64. See 8 U.S.C. § 1409 (1994).

65. 8 U.S.C. § 1409 (1994).

66. 8 U.S.C. § 1409(c) (1994); see also Ranjana Natarajan, *Amerasians and Gender-Based Equal Protection Under U.S. Citizenship Law*, 30 COLUM. HUM. RTS. L. REV. 123 (1998) (discussing *Miller v. Albright*, 523 U.S. 420 (1998), where a plurality court ruled that gender-based distinctions in 8 U.S.C. § 1409(a) are not violative of equal protection).

Congress, per statute, to alter the meaning of “natural-born.” This runs counter to the only viable method of altering the Constitution—by amendment.⁶⁷

Thus, the above interpretations of the Natural-Born Citizen Clause fall short. In the following paragraphs an attempt will be made to examine the constitutional Framers’ conception of “natural-born,” since the Framers’ conception is dispositive as to the meaning of the clause. Because no evidence as to the meaning of the clause is provided in the deliberations of the Constitutional Convention,⁶⁸ it is presumed that “natural-born” was a term common to the Framers. Thus, it is necessary to look to the English common law, which would have provided the Framers’ point of reference with regard to the terminology. This examination begins with discussion of the case of *United States v. Wong Kim Ark*.⁶⁹

IV. THE ENGLISH COMMON LAW PER *WONG KIM ARK*

The Supreme Court in *Wong Kim Ark* set forth how the common law regarding citizenship evolved in America. Taken to its logical conclusion, the 1898 case held that an individual born abroad to American parents could not be deemed a “natural-born citizen.” Although the Court did not specifically address the presidential Natural-Born Citizen Clause, it nevertheless made reference to the Clause and proceeded to explicate the 14th Amendment in light of the English common law.⁷⁰ The Court stated:

The Constitution of the United States, as originally adopted, uses the words ‘citizen of the United States’ and ‘natural-born citizen of the United States’. . . . The Constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that ‘all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.’ In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. The language of the Constitution, as has been well said, could not be understood without reference to the common law.⁷¹

67. U.S. CONST. art. V.

68. See Gordon, *supra* note 14, at 4 (citing 1 ELLIOT’S DEBATES 289; 5 ELLIOT’S DEBATES 507).

69. 169 U.S. 649 (1898).

70. *Id.* at 654.

71. *Id.*

The purpose of the Supreme Court delving into the English common law in *Wong Kim Ark* was to determine the citizenship status of a man born in California to citizens of China.⁷² In 1894, Wong Kim Ark left the United States for a visit to China, returning in 1895 only to be refused entry on the basis that he was not a citizen of the United States.⁷³ Concluding that Wong Kim Ark was a United States citizen,⁷⁴ the Court explained “[t]he fundamental principle of the common law with regard to English nationality was birth within the allegiance,”⁷⁵ or *jus soli*.⁷⁶ This principle meant that anyone born within British dominions was deemed a natural-born British subject, regardless of parentage.⁷⁷

The Court recognized two exceptions that existed for this rule. First, any child born to an alien enemy father engaged in hostile occupation of British territory was not a natural-born British subject.⁷⁸ Second, any child born to an alien father who was an ambassador or diplomat of a foreign state was also excluded.⁷⁹ The Court held fast to this interpretation of the common law and quoted from numerous sources as well as American case law supporting the same. Quoting Justice Curtis in *Dred Scott v. Sanford*,⁸⁰ the Court stated:

The first section of the second article of the Constitution uses the language, ‘a natural-born citizen.’ It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth.⁸¹

Relying on *United States v. Rhodes*⁸² the Court reasoned:

All persons born in the allegiance of the King are natural-born subjects, and all persons born in the allegiance of the United States are natural-born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England. We find no warrant for the opinion that this great principle of the common law

72. *Id.* at 651.

73. *Id.*

74. *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898).

75. *Id.* at 655.

76. BLACK’S LAW DICTIONARY 868 (7th ed. 1999).

77. *Wong Kim Ark*, 169 U.S. at 657.

78. *Id.* at 657-58.

79. *Id.* at 658.

80. 60 U.S. (19 How.) 393 (1857).

81. *United States v. Wong Kim Ark*, 169 U.S. 649, 662 (1898) (quoting *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 576 (1857)).

82. 27 F. Cas. 785 (1866).

has ever been changed in the United States. It has always obtained here with the same vigor, and subject only to the same exceptions, since as before the Revolution.⁸³

The Court recognized that at the time of the framing of the United States Constitution and the adoption of the Fourteenth Amendment, other sovereigns held to a rule of *jus sanguinis*,⁸⁴ allowing citizenship to pass by parentage.⁸⁵ However, the Court was steadfast in its support of the British rule of *jus soli* whereby citizenship is acquired by country of birth.⁸⁶ The Court also stated:

[t]here is . . . little ground for the theory that, at the time of the adoption of the Fourteenth Amendment of the Constitution of the United States, there was any settled and definite rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.⁸⁷

The Court rejected arguments that English statutes enacted to grant inheritance rights to foreign born children of citizen parents were a pronouncement of the common law.⁸⁸ Instead, the Court viewed these laws strictly as statutory enactments that allowed such children, generally children of the King, to inherit in Britain, but that had no applicability to U.S. citizenship.⁸⁹

The *Wong Kim Ark* Court concluded that under English common law a child could be naturalized per statute, but “natural-born” status remained in the country of birth.⁹⁰ It further deemed the United States to have accepted this position and made reference to a cabinet opinion provided to President Grant in 1873.⁹¹ This opinion came in response to several questions the President had posed regarding allegiance, naturalization, and expatriation.⁹² The opinion stated:

The same principle on which such children are held by us to be citizens of the United States, and to be subject to duties to this country, applies to the

83. *Wong Kim Ark*, 169 U.S. at 662-63 (quoting *United States v. Rhodes*, 27 F. Cas. 785 (1866)).

84. BLACK'S LAW DICTIONARY 868 (7th ed. 1999).

85. *United States v. Wong Kim Ark*, 169 U.S. 649, 667 (1898).

86. *Id.*

87. *Id.*

88. *Id.* at 670 (quoting HORACE BINNEY, *THE ALIENIGENÆ OF THE UNITED STATES* 14, 20 (2d ed. 1853); 2 AM. L. REG. 193, 199, 203 (1854)).

89. *Id.* at 672.

90. See Natarajan, *supra* note 66, at 134 (citing *Wong Kim Ark*, 169 U.S. 659 (1898)).

91. *United States v. Wong Kim Ark*, 169 U.S. 649, 690 (1898).

92. *Id.*

children of American fathers born without the jurisdiction of the United States, and entitles the country within whose jurisdiction they are born to claim them as citizens and to subject them to duties to it. Such children are born to a double character: the citizenship of the father is that of the child, so far as the laws of the country of which the father is a citizen are concerned, and within the jurisdiction of that country; but the child, from the circumstances of his birth, may acquire rights and owes another fealty besides that which attaches to the father.⁹³

While the Court's finding in *Wong Kim Ark* decided only whether an individual born on American soil was deemed a citizen at birth per the Fourteenth Amendment, the issue of children born to American parents abroad was not overlooked. Chief Justice Fuller's dissent, with Justice Harlan concurring, expressed concern that:

[i]f the conclusion of the majority opinion is correct, then the children of citizens of the United States, who have been born abroad since July 28, 1868, when the amendment was declared ratified, were, and are, aliens, unless they have, or shall on attaining majority, become citizens by naturalization in the United States; and no statutory provision to the contrary is of any force or effect.⁹⁴

Chief Justice Fuller maintained that statutes passed by Congress regarding the status of such children, which ran contrary to the English birthplace rule, were meant as "declaratory, passed out of abundant caution, to obviate misunderstandings which might arise from the prevalence of the contrary rule elsewhere."⁹⁵ He stated that "[i]n my judgment, the children of our citizens born abroad were always natural-born citizens from the standpoint of this Government."⁹⁶ The majority rejected this view, however, accepting instead the British common law rule of *jus soli*.⁹⁷ The majority considered such children naturalized rather than natural-born.⁹⁸

One might contend that *Wong Kim Ark*'s naturalized rather than natural-born stance for foreign-born children gains historical support from naturalization statutes. Such statutes place various conditions upon the

93. *Id.* at 691 (citing U.S. DEP'T OF STATE, OPINIONS OF THE HEADS OF THE EXECUTIVE DEPARTMENTS, AND OTHER PAPERS, RELATING TO EXPATRIATION, NATURALIZATION, AND CHANGE OF ALLEGIANCE, 1191-92 (1873)).

94. *Id.* at 706.

95. *Id.* at 714.

96. *United States v. Wong Kim Ark*, 169 U.S. 649, 714 (1898).

97. *Id.* at 672-73.

98. *Id.*

acquisition of citizenship for such foreign-born children.⁹⁹ The U.S. Constitution grants Congress the sole authority to “establish an uniform Rule of Naturalization.”¹⁰⁰ It follows, then, that since Congress has always included foreign-born children of American citizens in such rules, such children are “naturalized,” rather than “natural-born.” Indeed, the majority in *Wong Kim Ark* indicated that the Fourteenth Amendment “has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization.”¹⁰¹

Thus, this begs the question whether *Wong Kim Ark* is determinative with regard to who may or may not be considered “natural-born” United States citizens for purposes of presidential eligibility. While clearly not dispositive, as the case primarily discusses the Fourteenth Amendment and does not specifically address the presidential eligibility requirement, *Wong Kim Ark* is influential in that it purports to exhaustively examine the sources by which the Constitutional Framers derived citizenship terminology—the English common law. Significantly, the explication of the common law within *Wong Kim Ark* has been relied upon consistently by subsequent courts, even as recently as 1982, making its substance more authoritative.¹⁰² Yet, while *Wong Kim Ark* suggests that the constitutional Framers did not consider foreign-born children of American parents to be “natural-born” per the English common law, the “natural-born citizen” clause, via the English common law, can be interpreted without disrupting *Wong Kim Ark* to include some foreign-born children of United States citizens.

V. THE JURISDICTION ARGUMENT

The first interpretation of English common law relies on a jurisdiction argument to support the contention that foreign-born children of United States citizens are eligible for the Office of President of the United States. If the Supreme Court’s explication of the English common law in *Wong Kim Ark* and its resulting conception of the constitutional Framer’s perception of citizenship is accurate, then the natural-born citizen clause can be interpreted to limit

99. See Natarajan, *supra* note 66, at 134 (discussing that one proposed reason for such conditions was to limit the incidence of dual nationality).

100. U.S. CONST. art. I, § 8, cl. 4.

101. *United States v. Wong Kim Ark*, 169 U.S. 649, 688 (1898).

102. *Drimmer*, *supra* note 18, at 705-6 (discussing *Lam Mow v. Nagle*, 24 F.2d 316 (9th Cir. 1928); *Weedin v. Chin Bow*, 274 U.S. 657 (1927); *Plyler v. Doe*, 457 U.S. 202 (1982)).

presidential eligibility to those born “within the allegiance” of the United States. The *Wong Kim Ark* Court answered only the rather simplistic question of whether “within the allegiance” of America included being born on American soil. Analysis of the common law and explicit wording of the Fourteenth Amendment led to an affirmative answer.¹⁰³ However, no attempt was made to define the breadth of “within the allegiance.” In the decision, the dissent expressed concerns about excluding foreign-born children of American citizens from natural-born status,¹⁰⁴ while the majority countered with the assertion that naturalization statutes governed such children.¹⁰⁵ Yet, nothing within the decision precludes a determination that some children may be born in a foreign land, but are still “within the allegiance” of the United States.

The *Wong Kim Ark* Court found the fundamental common law principle of English nationality to be “clearly” stated in *Calvin’s Case*,¹⁰⁶ and considered subsequent English authorities to have never wavered on the principles established.¹⁰⁷ *Calvin’s Case* was reported by Sir Edward Coke and was a decision reached by himself along with fourteen other judges.¹⁰⁸ Coke did in fact subscribe to the *jus soli* principle of birthright citizenship, but Coke’s elucidation of the concept did not preclude a conclusion that foreign-born children of English citizens could acquire this birthright. Schuck and Smith¹⁰⁹ adeptly explicate Coke’s position:

Coke’s entire analysis rested on the ascriptive view that one’s political identity is automatically assigned by the circumstances of one’s birth. Coke understood political identity as being at root a question of one’s allegiance as a subject to some sovereign. At birth, every person acquired such an allegiance. This relationship of allegiance was fundamental and inescapable. Coke stressed, moreover, that birth within a particular allegiance did not truly depend on the geographic location or physical circumstances of one’s nativity. One could be born within the king’s allegiance even if not born within his dominions. One could also be born within the king’s dominions “without obedience” and thus not be “a natural subject.”¹¹⁰

103. *Wong Kim Ark*, 169 U.S. at 693.

104. *Id.* at 706.

105. *Id.* at 688.

106. Also known as the *Case of Postnati*. *Id.* at 656.

107. *Id.*

108. PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT* 12 (1985).

109. *See supra* note 108.

110. SCHUCK & SMITH, *supra* note 108, at 13-14.

If not place of birth, what led to the ascription of an individual's subjectship to some sovereign? . . . The decisive element appears to have been birth under circumstances in which the sovereign possessed the power to provide protection to the subject and was actually exercising it to at least some minimal degree. This understanding also accounted for the established exceptions to the general rule of *jus soli*. If the English wives of the king's ambassadors had children in a foreign land, the latter were nevertheless "natural born subjects," for they were still under the power and protection of their monarch. But if alien enemies should occupy English soil and have children there, "that issue is no Subject to the King," for they were not born under his power or protection.¹¹¹

With regard to foreign-born children of English subjects, Coke maintained that:

'[T]here must of necessity be several kings, and several ligeances.' All individuals' obligations were determined by the extent of protection that they had received at birth, not by their parents' allegiance per se [A]lthough Coke treated the allegiance to the sovereign who had most direct power over the infant at birth as most natural and therefore primary, the child could also have obligations to the sovereign of his parents and could acquire obligations to additional sovereigns later in life. Each of these relationships imposed valid and binding allegiances, however much they might conflict with one another.¹¹²

Coke's position made the *Wong Kim Ark* decision effortless as reliance on his understanding of the common law led to the unmistakable result that anyone born within the dominions of the United States, unless falling under the exceptions to *jus soli*, were natural-born citizens.¹¹³ Thus, even the children of alien parents, such as Wong Kim Ark, if born within the United States, are natural-born citizens. Recognition of Coke's exceptions to the *jus soli* rule also leads to the unmistakable conclusion that foreign-born children of United States ambassadors, born in a foreign land as a result of parental ambassadorial duties, are natural-born U.S. citizens. Similarly, a child born in a foreign land to United States citizens in enemy military occupation of such foreign land would acquire natural-born American status as well. This was per the common

111. *Id.* at 14.

112. *Id.* at 14-15.

113. The wording of the Fourteenth Amendment appears to recognize the *jus soli* concept and exceptions to the rule. The wording states that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV § 1. The phrase "And subject to the jurisdiction thereof" indicates that citizenship is not acquired if one is not subject to United States jurisdiction even though one is born in America.

law as known, according to *Wong Kim Ark*, to the Framers at the drafting of the Constitution.¹¹⁴

Yet, Coke's explication of the common law suggested that these two exceptions to the *jus soli* rule were not exclusive, and that birth "within the allegiance" could encompass more. Coke clearly connoted that exceptions to the rule could extend as far as a sovereign's power or protection extended.¹¹⁵ This power or protection should always extend as far as the sovereign has undertaken to extend itself. Thus, under both the common law and *Wong Kim Ark*, it appears that, at the very least, all foreign-born children of United States citizens, foreign-born as a direct result of parental government employment, are "within the allegiance" of the United States at birth. For example, this should encompass all children of United States military personnel, whether or not in enemy occupation of a foreign land.

Evidence of how the United States government extends "protection" to such military dependents is abundant. Children are allowed birth on U.S. military installations with medical care heavily subsidized by United States tax revenue.¹¹⁶ The United States government issues certificates of birth from the United States Consulate of the foreign country, even though the country of birth may issue one as well.¹¹⁷ The United States birth certificate serves as ultimate recognition of United States citizenship and is used as authoritative evidence to acquire such things as a United States passport.¹¹⁸ Such dependents acquire privileges that non-United States military do not have. They are allowed access to the military installation itself, are allowed to make purchases from tax-free and subsidized U.S. government established shops, and are allowed employment in such establishments.¹¹⁹ All of these benefits are generally not afforded the non-military.

Further, the design of the military is such that military personnel do not remain at one military installation for more than a few years. Thus, if a child is born to U.S. citizen parents in a foreign land, the child can expect to be removed and transported to the United States long before the child ever reaches majority.

114. *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898).

115. SCHUCK & SMITH, *supra* note 108, at 14.

116. Office of the Assistant Sec'y of Def. (Health Affairs) & the Tricare Mgmt. Activity, *Military Health System*, at <http://www.tricare.osd.mil/> (last updated Jan. 23, 2001).

117. U.S. Dep't of State, *Documentation of United States Citizens Born Abroad Who Acquire Citizenship at Birth*, at <http://travel.state.gov/m300.html> (last updated Nov. 2000).

118. *See* Passports: Evidence of United States Citizenship or Nationality, 22 C.F.R. § 51.43 (2000).

119. *See, e.g., Identification Cards for Members of the Uniformed Services, Their Family Members, and Other Eligible Personnel*, Army Reg. 600-8-14 (1999); Air Force Instruction 36-3026 (I) (1999) (listing procedures regarding issuance of identification cards and corresponding privileges).

The child's birth in the foreign land is undoubtedly a direct result of U.S. governmental action, and removal from that country is generally at the hands of the U.S. government. "Tours" of military duty on bases in foreign countries are often for a set and limited duration, such as three years.¹²⁰ The military parent is governed by the Code of Military Justice, and, therefore, the parent's children are indirectly so governed.¹²¹ Ultimately, the child is subject to the whim of the United States government in the same manner as their parents. Hence, because of the instrumental role the United States government plays in bringing about military children's birth in a foreign land and the protections afforded the children after their birth, such children are "within the allegiance" of the United States government. The *Wong Kim Ark* Court probably could have made no protest to such an assertion.

In discussing the breadth of a nation's sovereignty, the Court cited the case of *The Exchange*¹²² in which Chief Justice Marshall discussed "the grounds upon which foreign ministers are, and other aliens are not, exempt from the jurisdiction of this country."¹²³ In *The Exchange*, Marshall explained situations under which a sovereign is considered to have ceded territorial jurisdiction temporarily to another power. One such instance is "where he allows the troops of a foreign prince to pass through his dominions."¹²⁴ Another circumstance is where:

a public armed ship, in the service of a foreign sovereign, with whom the Government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.¹²⁵

Thus, if the United States does not consider such foreign entities to be under the jurisdiction of the United States but rather under the jurisdiction of their own government, then a similarly situated United States entity must be under United States jurisdiction, at least in the eyes of the U.S. government. An

120. See, e.g., Army Reg. 614-30 (1997) (providing length of tour for country or geographic areas).

121. 10 U.S.C. § 802 (1994 & Supp. V 2000).

122. 11 U.S. (7 Cranch) 116 (1812).

123. *United States v. Wong Kim Ark*, 169 U.S. 649, 683 (1898) (citing *The Exchange*, 11 U.S. (7 Cranch) 116 (1812)).

124. *Id.* at 684 (quoting *The Exchange*, 11 U.S. (7 Cranch) 116, 188 (1812)).

125. *Id.* at 684-85 (quoting *The Exchange*, 11 U.S. (7 Cranch) 116, 140 (1812)).

American military base located in a foreign country is a situation where the foreign country has allowed “troops of a foreign prince to pass through his dominions.” The installation is similar to a foreign power allowing a friendly United States ship of war to enter port. As such, children born in a foreign country as a result of one or both of their U.S. citizen parents serving in the military should receive “natural-born” status, and thus, become eligible for the Office of President of the United States.

Some may object to the determination that foreign-born children of parents in the employ of the United States government are “natural-born” on the grounds that such children born to one American parent and one alien parent will thus be deemed natural-born, rather than naturalized. This runs contrary to Congress’ confirmed ability to limit or place restrictions on the acquisition of citizenship by such individuals.¹²⁶ This concern is partially alleviated by recognition that the common law, at least with regard to foreign-born children, appears to contemplate only children of two citizen parents,¹²⁷ thereby leaving all other children to be dealt with via naturalization statutes. Further, the “born within the allegiance” argument is weakened for a child born to one parent who is native to the land in which the child is born. Although one parent may have been placed in the foreign land by the U.S. government, the other parent was not and, therefore, the U.S. government arguably has less direct responsibility for the child’s birth in that particular country.

Some may also argue that at the time of the framing of the Constitution, United States military/governmental entities did not exist outside of the United States, and thus, the Framers could not have contemplated including such children as “natural-born.” The Constitution, however, has long been deemed unchanging in meaning, yet flexible enough to respond to societal transition. This transcendent ability of the Constitution was skillfully described by Justice Brewer in *South Carolina v. United States*.¹²⁸ He stated:

Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants

126. See *Fiallo v. Bell*, 430 U.S. 787, 797-801 (1977) (upholding immigration preferences for illegitimate children of citizen mothers, but not children of citizen fathers).

127. Although room for argument does exist, since in some historical settings the father’s citizenship status has been deemed more significant than the mother’s.

128. 199 U.S. 437 (1905).

were understood when made, are still within them, and those things not within them remain still excluded.¹²⁹

Thus, because English common law allowed for natural-born status to devolve on foreign-born children of citizens in certain circumstances, it must be contended that the Framers of the Constitution agreed with natural-born status in such circumstances, whether or not those circumstances were present in the United States at the time of the framing of the Constitution.¹³⁰

And so, it appears that even if the *Wong Kim Ark's* explication of the common law was deemed dispositive as to the interpretation of the Natural-Born Citizen Clause, children born in a foreign land as a result of parental government employment should nevertheless be deemed “natural-born” because of the jurisdiction the United States government exercises over the child.¹³¹ On the other hand, while *Wong Kim Ark* suggests that under the English common law *some* foreign-born children of American parents are “natural-born,” thereby extending presidential eligibility to such children, an alternative argument proffers that the Framers’ conception of “natural-born” included *all* foreign-born children of American parents.

VI. THE INTERPRETATION ARGUMENT

The constitutional Framers had a broad view of the term “natural-born” and considered all foreign-born children of American citizen parents eligible for the Office of the Presidency. This is illustrated by the passage of a statute in 1790 that interprets “natural-born” to include children of citizens of the United States born outside the boundaries of the United States.¹³² Prior to 1800, almost all constitutional law was made by the legislative or executive branches.¹³³

129. *Id.* at 448-49.

130. It should be noted that the United States has not always followed England’s lead as to how individuals who come within the jurisdiction of the sovereign are treated. England granted general citizenship to individuals residing in her colonies and in other British acquisitions. The United States has been less generous with citizenship. It was nearly two decades before Congress granted citizenship to the residents of Puerto Rico, a territory coming under the jurisdiction of the United States after the Spanish-American war. Guam and the Philippines are examples of acquired territories where initially no citizenship was granted. See JOSÉ A. CABRANES, *CITIZENSHIP AND THE AMERICAN EMPIRE* 94-5 (1979).

131. It is possible that this argument could be stretched further by examining the protection that United States embassies provide to children born in foreign lands, whose parents are merely visiting.

132. Gordon, *supra* note 14, at 8 (citing Act of March 26, 1790, ch. 3, 1 Stat. 103, 104 (1790)).

133. David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 776 (1994).

Indeed, prior to *Marbury v. Madison*¹³⁴ responsibility for constitutional interpretation had not been definitively decided.¹³⁵ The First Congress has been viewed as “a sort of continuing constitutional convention”¹³⁶ with the work of that Congress affording “important evidence of what thoughtful and responsible public servants close to the adoption of the Constitution thought it meant.”¹³⁷ Congressional delegates were sworn to uphold the Constitution, and they took their oath seriously.¹³⁸ The First Congress was consciously aware that their power was constitutionally limited.¹³⁹ George Washington advised James Madison, who in turn advised the House, that “careful investigation and full discussion” of constitutional issues should be made as “the decision that is at this time made, will become the permanent exposition of the Constitution.”¹⁴⁰ As an example of his resolve, Washington, although in favor of a national bank, was poised to veto it until he was convinced of its constitutionality by Hamilton.¹⁴¹

Of the members of the First Congress, twenty had been delegates to the Constitutional Convention.¹⁴² Thus, it would seem that the First Congress, comprised of twenty of the individuals whom had set forth the only method by which the Constitution could be changed, would have opposed any congressional action that served to alter the Constitution. If concerns arose, at the very least, they would have been debated. Yet, in 1790 the First Congress passed an act that stated:

And the children of citizens of the United States, that may be born beyond the 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

134. 5 U.S. (1 Cranch) 137 (1803).

135. It should be noted, however, that members of the First Congress did contemplate the potential for judicial review, see Currie, *supra* note 133, at 862. After *Marbury v. Madison* Congress has been encouraged at times to ignore potential Constitutional issues, such as when Franklin Roosevelt advised Congress to pursue New Deal legislation, regardless of the Supreme Court’s possible response, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1367 (1997).

136. Currie, *supra* note 133, at 777.

137. *Id.* at 865.

138. *Id.* at 857.

139. *Id.* (quoting 2 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 1903 (Joseph Gales ed., 1834)). Fisher Ames stated during the bank debate: “Let us examine the Constitution, and if that forbids our proceeding, we must reject the bill.” *Id.*

140. Currie, *supra* note 133, at 857 (citing 1 THE DEBATES AND PROCEEDINGS IN CONGRESS OF THE UNITED STATES 495 (Joseph Gales ed., 1834)).

141. *Id.* at 864.

142. Gordon, *supra* note 14, at 8 n.57.

descend to persons whose fathers have never been resident in the United States.¹⁴³ (emphasis added)

There is no indication that the use of “natural-born” within the act gave the delegates pause or caused them to question whether they might be adding to the Constitution in any way. If such fears existed, it seems likely they would have been raised. In addition, the Constitutional Convention Committee of Eleven was the source from which the Presidential Qualifications Clause originated.¹⁴⁴ Of these eleven, eight ultimately became members of the First Congress.¹⁴⁵ There is absolutely no evidence that the eight individuals who proposed the “natural-born citizen” clause, or any other member of the First Congress, were concerned that the above act, which referred to foreign-born children of American citizens as “natural-born,” conflicted with the meaning of “natural-born” within the Constitution.¹⁴⁶ Rather, conscious use of the terminology reflects that the First Congress was making evident that America’s conception of “natural-born” included foreign-born children of citizen parents. Clearly, the First Congress could not statutorily alter the Constitution. However, nothing prohibited the First Congress from interpreting the Constitution.

The 1790 act supports the proposition that the Framers did not strictly follow the English common law with regard to birthright citizenship, but rather followed the rule of *jus sanguinis*—or citizenship by descent. Likewise, it is possible the Framers were influenced by English statutory enactments.¹⁴⁷ In fact, it appears the 1790 act was enacted in reference to an English statute that similarly provided for foreign-born children of British subjects.¹⁴⁸ In a historical

143. *Id.* at 8 (citing Act of March 26, 1790, ch. 3, 1 Stat. 103,104 (1790)).

144. *Id.* at 4.

145. *Id.* at 8 n.57.

146. *Id.* at 9. In fact, there is no record of any debate at all with regard to the acquisition of natural-born status by foreign-born children.

147. It should be noted that the other sources that have examined the Natural-Born Citizen Clause also point to the 1790 act as significant, and thus, recognition of this statute is not new. However, the other sources do not make the argument that the statute served to interpret the Constitution. Jill Pryor, in her analysis, uses the statute to support her contention that “natural-born citizen” is to be interpreted via naturalization statutes, with the 1790 statute being such. See Pryor, *supra* note 18, at 894-95; Charles Gordon also mentions this act and sets forth several possibilities as to its meaning. After doing such he concludes that “it seems likely that the virtually contemporaneous coloration provided by the 1790 act lends support to the view that the constitutional reference to natural-born citizens was intended to include those who acquired United States citizenship by descent, at birth abroad.” See Gordon, *supra* note 14, at 8-11.

148. Gordon, *supra* note 14, at 8 (quoting 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 1121 (Joseph Gales ed., 1834), where a Mr. Burke stated that “the case of 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.”).

analysis of the common law, it is necessary to know if English statutes were received in America, thus becoming part of American common law. However, in examining a statute interpreting the Constitution, it is only necessary to know what the interpretation was, not why it was followed. Exactly how long belief in the “natural-born” status of foreign-born children had persisted in America is unclear, but it is known that the belief was widely held in 1790 in order for Congress to enact a statute stating as much. The 1790 act passed by the First Congress is about as close as one can get to knowing whether the Framers considered foreign-born children of citizen parents to be “natural-born.” There, twenty of the Framers were members of the First Congress,¹⁴⁹ eight of whom drafted the “natural-born citizen” clause,¹⁵⁰ and none apparently objected to foreign-born children of citizen parents being deemed “natural-born.”

Of course, this argument does have flaws. The 1790 act was titled “An Act to establish an uniform Rule of Naturalization,”¹⁵¹ possibly reflecting that the statute was purely one of naturalization. Therefore, Congress may have exceeded its powers in devolving “natural-born” status on foreign-born children. Yet, the act also provided for the naturalization of aliens and the naturalization of the children of naturalized citizens.¹⁵² The First Congress did not use the term “natural-born” when referring to either of these two groups.¹⁵³ Thus, it does not appear that the First Congress viewed naturalization as devolving natural-born status. Further, the title of the act should have no bearing on whether or not the act served to interpret the American meaning of natural-born.

Another limitation with this interpretation of the 1790 act is that in 1795 the act was repealed and replaced.¹⁵⁴ With regard to foreign-born children of American citizens, the new act was substantially equivalent to the old, except the term “natural-born” was omitted.¹⁵⁵ While reasons for this omission are unknown, one could certainly posit that the legislature recognized a possible constitutional conflict and sought to correct it. Further, the omission of “natural-born” makes the statute look more like one devolving citizenship by

149. Gordon, *supra* note 14, at 8 n.57.

150. *Id.*

151. *Id.* at 9.

152. *Id.* at 8.

153. *Id.*

154. Gordon, *supra* note 14, at 11 (citing Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415 (1795)).

155. *Id.* at 11.

naturalization. Yet, because it is unknown why “natural-born” was omitted, it is premature to conclude that Congress did not consider such children natural-born.¹⁵⁶

When examining the broad picture of citizenship, the issue of insuring compatibility with the Presidential Qualifications Clause would not likely have jumped out as demanding attention. It is possible that since the 1795 Congress was farther removed from the framing of the Constitution than the First Congress, it simply did not recognize the significance of leaving “natural-born” in the statute when it seemed to be surplusage.

In addition, the Presidential Qualifications Clause requires the President to be a United States resident for fourteen years.¹⁵⁷ It can be argued that this residency requirement contemplates foreign-born natural-born citizens and is designed to insure proper loyalties among these as well as other natural-born citizens. While the Presidential Qualifications Clause only requires natural-born status of those individuals not American citizens at the time of the adoption of the Constitution, the fourteen year residency requirement applies to both natural-born citizens and those who were citizens at the Constitution’s framing. Therefore, it is likely that Congress omitted “natural-born” because they viewed the words as surplusage. Admittedly, these are all unanswered questions that are difficult to resolve due to the lack of legislative and constitutional history on the topics. Nevertheless, a good argument can be made that the First Congress interpreted the constitutional meaning of natural-born via the 1790 act.

VII. CONCLUSION

Did the Framers intend to include foreign-born children of United States citizen parents within the ambit of “natural-born?” A negative conclusion would bring about paradoxical circumstances. A child born to United States military parents stationed abroad would not be eligible for the presidency, yet a child born in the United States to an alien parent would.¹⁵⁸ Such military personnel could expect their children to never have the ability to serve in the highest office in the land. Yet, a person born on American soil, fleeing America to avoid military service, would never have such an inhibition.¹⁵⁹ While seemingly

156. Even if Congress did not consider such children “natural-born,” it cannot change the constitutional Framers’ conception of “natural-born.”

157. U.S. CONST. art. II, § 1, cl. 5.

158. *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898).

159. *See Trop v. Dulles*, 356 U.S. 86 (1958) (holding unconstitutional a statute expatriating a citizen who was convicted by court martial of desertion from the United States Army during wartime and finding that the Eighth Amendment bars denationalization as a punishment).

unfair, if the Framers of the Constitution did not consider foreign-born children of citizen parents as “natural-born,” then these results are accurate.

The Framers, however, most likely did consider such children “natural-born.” Under the English common law, from which the constitutional Framers apparently derived the words “natural-born citizen,” at least some foreign born children of American citizen parents are “natural-born.” Included are children born within the allegiance or jurisdiction of the United States. Children born to citizen parents who are in a foreign land as a result of United States government employment undoubtedly fall within the allegiance of the United States, and, therefore, are eligible for the Office of the Presidency. The Framers, however, had an even broader understanding of “natural-born.” This understanding was reflected in a statute passed by the First Congress, of which twenty constitutional Framers were a part, that defined “natural-born” as including all foreign-born children of American citizen parents. Through this statute, the First Congress interpreted, at least in part, the constitutional meaning of “natural-born.” As a result, all foreign-born children of United States citizens parents are eligible for the Office of the Presidency.