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## The Natural Born Citizen Clause as Originally Understood

Mary Brigid McManamon

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# The Natural Born Citizen Clause as Originally Understood

## **Cover Page Footnote**

Professor of Law, Widener Law Delaware. B.A., Yale (History); J.D., Cornell. This Article is dedicated to the memory of my father, the Hon. Joseph F. McManamon. I am grateful for the research assistance of Widener Law Delaware librarians Mary Alice Peeling, Janet Lindenmuth, and Enza Klotzbucher.

# THE NATURAL BORN CITIZEN CLAUSE AS ORIGINALLY UNDERSTOOD

Mary Brigid McManamon<sup>+</sup>

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In July 2013, as part of a four-week summer session at the University of Delaware’s Osher Lifelong Learning Institute, I presented a series of lectures for non-lawyer senior citizens on things every American should know about the U.S. Constitution. Most of the topics were drawn from then-current headlines, such as the impact of the Fourteenth Amendment on marriage equality<sup>1</sup> and the relationship between the Fifteenth Amendment and the Voting Rights Act.<sup>2</sup> In addition to these traditional Constitutional Law subjects, I decided to include a topic not normally covered at the law school:

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1. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659–60 (2013) (addressing marriage equality in the context of California’s Proposition 8); *United States v. Windsor*, 133 S. Ct. 2675, 2683–84 (2013) (applying a Fifth Amendment equal protection analysis to marriage equality in the context of the federal Defense of Marriage Act). Both cases were less than a month old in July 2013.

2. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2618 (2013) (analyzing the constitutionality of the Voting Rights Act). This case was decided less than a month before July 2013.

the Natural Born Citizen Clause of Article II (“the Clause”).<sup>3</sup> The members of the class were old enough to remember Mexican-born George Romney’s 1968 presidential run;<sup>4</sup> Canal Zone-born John McCain’s run in 2008 was recent history;<sup>5</sup> and at the time, Canadian-born Ted Cruz was hinting at a run in 2016.<sup>6</sup>

As I researched the Clause, it quickly became clear to me that most modern scholars had made virtually no attempt to wrestle with the text of the Constitution<sup>7</sup> and their historical analyses were negligent at best. Ironically, most of these commentaries were created by authors purporting to explain the meaning of the Clause in the context of the time in which it was written.<sup>8</sup> One refreshingly honest author declared:

The “natural born citizen” requirement manifests a distrust of the foreign-born that, in a nation of immigrants, can only be derided as repugnant. I both “reject” it and I “denounce” it! It’s still part of the Constitution, however, and therefore we need to try to figure out what it means. My frankly normative move would be to limit the damage by limiting the scope of “foreign-born.” There’s no plausible way to read the provision to permit [Austrian-born former California Governor Arnold] Schwarzenegger and other naturalized citizens to become President. There is a ready (if not 100% clearly the original) way to read it to permit Americans born abroad to U.S. parents to become citizens.<sup>9</sup>

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3. “No Person except a natural born Citizen . . . shall be eligible to the Office of the President . . .” U.S. CONST. art. II, § 1, cl. 5. The Clause also provides that persons naturalized before the Constitution’s adoption were eligible. *Id.* Of course, no one fitting that description is alive today.

4. See Mark Memmot, *Why Could Romney’s Father Run for President if He Was Born in Mexico?*, NPR (Jan. 27, 2012, 1:55 PM), <http://www.npr.org/blogs/thetwo-way/2012/01/27/145987534/why-could-romneys-father-run-for-president-if-he-was-born-in-mexico> (discussing the legal concerns and justifications surrounding Governor Romney’s candidacy).

5. See Carl Hulse, *McCain’s Canal Zone Birth Prompts Queries About Whether that Rules Him Out*, N.Y. TIMES (Feb. 28, 2008), <http://www.nytimes.com/2008/02/28/us/politics/28mccain.html?fta=y> (presenting both sides of the legal debate concerning McCain’s candidacy).

6. Mark Hanrahan, *Ted Cruz 2016 Presidential Bid Looks Likely*, INT’L BUS. TIMES (Aug. 31, 2014, 12:38 AM), <http://www.ibtimes.com/ted-cruz-2016-presidential-bid-looks-likely-1674558>. That hint became a reality on March 23, 2015, when Senator Cruz announced his candidacy for the presidency. See Nick Corasaniti and Patrick Healy, *Ted Cruz Becomes First Major Candidate to Announce Presidential Bid for 2016*, N.Y. TIMES (Mar. 23, 2015), [http://www.nytimes.com/2015/03/24/us/politics/ted-cruz-2016-presidential-race.html?\\_r=0](http://www.nytimes.com/2015/03/24/us/politics/ted-cruz-2016-presidential-race.html?_r=0).

7. *E.g.*, Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. 22, 25–30 (2008) (relying largely on a secondary source instead of the Clause’s language).

8. See, *e.g.*, *id.* at 26–30 (examining the original understanding of “natural born” by introducing English law and commentaries).

9. Michael C. Dorf, *Originalism Versus Straight Talk*, DORF ON LAW (Feb. 29, 2008, 1:21 PM), <http://www.dorfonlaw.org/2008/02/originalism-versus-straight-talk.html>. The author’s idea was as follows: “The best reading—although not necessarily the original understanding—

Unfortunately, that approach is a bit too cavalier for me. Even though I believe the U.S. Constitution has evolved over time, I still think that, in order to answer questions about its meaning, one should begin with its text and history. Thus, this Article explains how the Clause would have been understood in the early days of the Republic. Whether this historical interpretation should be disregarded to meet the changing sensibilities of modern Americans is beyond the Article's scope.

A presidential hopeful may encounter several issues involving the meaning of "natural born citizen." For example, does someone born to alien parents in the United States qualify? Or should children born in the incorporated territories of the United States—such as Kansas and Arizona formerly were<sup>10</sup>—receive the same treatment as those born in unincorporated territories of the United States—such as the Philippines and the Canal Zone once were?<sup>11</sup> However, this Article is not a comprehensive treatment of all questions presented by the Clause. It only addresses the question raised by the candidacies of Governor Romney and Senator Cruz: in the eyes of early Americans, would someone born to American parents in a foreign country be a "natural born citizen" and therefore eligible to be a U.S. President?

Because the phrase "natural born" was derived from the common law, this Article begins with an examination of pertinent English sources, which would have been known to the Framers of the Constitution. This Article then reveals early Americans' understanding of the phrase, beginning with the drafting of the Constitution,<sup>12</sup> including ratification of the Fourteenth Amendment,<sup>13</sup> and ending with the Supreme Court's 1898 confirmation that birth in the United States is the key to being "natural born."<sup>14</sup> This discussion necessarily

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would be to say that anybody who was a citizen at birth (whether because born in the U.S. or because born to U.S. parents overseas), should qualify as "natural born." Michael C. Dorf, *Alexander Hamilton Was Eligible to be President*, DORF ON LAW (Feb. 28, 2008, 4:10 PM), <http://www.dorfonlaw.org/2008/02/alexander-hamilton-was-eligible-to-be.html>.

10. Richard E. Berg-Andersson, *Official Name and Status History of the Several States and U.S. Territories*, GREEN PAPERS (Aug. 22, 2001), <http://www.thegreenpapers.com/slgl/explanation-statehood.phtml>. Incorporated territories formed an integral part of the United States, although they were not yet states. *Id.*

11. Originally, all unincorporated territories were possessions overseas. *Id.* The United States did not have such territories until the mid-nineteenth century, and most were obtained as a result of the Spanish-American War. *Id.* The United States currently maintains five inhabited unincorporated territories: American Samoa, Guam, Northern Marianas, Puerto Rico, and the U.S. Virgin Islands. *Id.*

12. The Constitution was drafted in 1787. *Constitution of the United States*, CHARTERS FREEDOM, <http://www.archives.gov/exhibits/charters/constitution.html> (last visited Nov. 23, 2014).

13. The Fourteenth Amendment was ratified in 1868. *Primary Documents in American History: 14th Amendment to the U.S. Constitution*, LIBR. CONGRESS, <http://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html> (last updated Sept. 24, 2014).

14. See *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898) (recognizing citizenship of a child born in the United States to foreign born parents).

includes the import of the earliest naturalization statutes. Finally, the Article reveals the weaknesses of modern commentary on the original meaning of the Clause.

### I. THE MEANING OF THE PHRASE IN ENGLAND

The U.S. Constitution contains many phrases from the common law,<sup>15</sup> such as “ex post facto,” “writ of habeas corpus,” “bill of attainder,” and “natural born citizen.”<sup>16</sup> However, unlike modern statutes, the Constitution does not contain a section entitled “Definitions.” The Supreme Court has repeatedly faced challenges presented by this silence and declared that our paramount law “must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution.”<sup>17</sup> So, it is to the common law that one must first look to determine the meaning of “natural born citizen.”

#### A. Common Law Significance of “Natural Born”

English common law was absolute as to the definition of “natural born.”<sup>18</sup> Sir William Blackstone stated:

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.<sup>19</sup>

Although birth within English *territory* was generally a good indicator of whether a child was within the *ligeance* of the crown,<sup>20</sup> the two concepts were not co-extensive. To be exact, an alien was not one born “*out of the realm*,

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15. *Moore v. United States*, 91 U.S. 270, 274 (1875) (stating that the Constitution’s language derives from the common law).

16. *See, e.g.*, U.S. CONST. art. I, § 9, cls. 2, 3 (utilizing such terms in clauses relating to immigration and migration).

17. *Wong Kim Ark*, 169 U.S. at 654 (declaring U.S. common law indistinct from English common law); *accord, e.g.*, *Smith v. Alabama*, 124 U.S. 465, 478 (1888); *Moore*, 91 U.S. at 274; *Minor v. Happersett*, 88 U.S. 162, 167 (1874) (verifying that the framers were conscious of common law language); Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1, 5–6 (1968) (noting that the framers also retained English tradition and culture, in addition to legal wording). *See also Carmel v. Texas*, 529 U.S. 513, 521 (2000) (looking to English common law to define “ex post facto laws”).

18. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 354 (Oxford, The Clarendon Press 1765); *accord, e.g.*, 1 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 421–22 (London, A. Strahan 1822) (discussing the scope and rights afforded by allegiance).

19. BLACKSTONE, *supra* note 18, at 354.

20. ALEXANDER COCKBURN, NATIONALITY: OR THE LAW RELATING TO SUBJECTS AND ALIENS, CONSIDERED WITH A VIEW TO FUTURE LEGISLATION 7 (London, William Ridgway 1869) (declaring almost all persons, regardless of parentage, born within English borders to be subjects of the king).

but *out of the liegeance*; for he may be borne out of the realme of *England*, yet within the liegeance.”<sup>21</sup>

Two corollaries arose based on this distinction. First, “the children of the king’s ambassadors born abroad were always held to be natural subjects.”<sup>22</sup> Second, children born to members of a hostile occupying force were born in the allegiance of the sovereign to whom the force belonged.<sup>23</sup> Likewise, children born in English territory while the monarch “was out of actual possession thereof” were not the king’s subjects.<sup>24</sup> This approach is referred to as *jus soli* or the “right of the soil.”<sup>25</sup>

The common law notion of allegiance was derived from the “feodal system” of England’s “Gothic ancestors” and promoted the idea that “[a]llegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject.”<sup>26</sup> Blackstone explained the importance of this governing principle thus: “For, immediately upon their birth, they are under the king’s protection; at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude; which cannot be forfeited . . . .”<sup>27</sup>

In the vast majority of cases, someone born outside of English territory was an alien.<sup>28</sup> Consequently, English sources routinely described aliens as those born “beyond the seas” or “in foreign parts.”<sup>29</sup> Therefore, this Article uses that terminology unless one of the corollaries is applicable.

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21. 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND § 129a (Philadelphia, Robert H. Small 1853) [hereinafter COKE, INSTITUTES OF ENGLAND]; *accord, e.g.*, COMYNS, *supra* note 18, at 421 (explaining that allegiance to the king begins at birth, but can be acquired upon naturalization).

22. BLACKSTONE, *supra* note 18, at 361; *accord, e.g.*, Calvin’s Case, (1608) 77 Eng. Rep. 377 (K.B.) 399; 7 Co. Rep. 1 a, 18 b. *See also* COCKBURN, *supra* note 20, at 7.

23. Calvin’s Case, (1608) 77 Eng. Rep. 377 (K.B.) 399, 7 Co. Rep. 1 a, 18 b, COCKBURN, *supra* note 20, at 7.

24. Calvin’s Case, (1608) 77 Eng. Rep. 377 (K.B.) 399, 7 Co. Rep. 1 a, 18 b, *accord, e.g.*, COMYNS, *supra* note 18, at 421.

25. BLACK’S LAW DICTIONARY 994 (10th ed. 2014). A different approach, known as *jus sanguinis* (“right of blood”), *id.*, determines a child’s citizenship by the citizenship of his or her parents. Gordon, *supra* note 17, at 6. Many European countries followed this approach. *Id.* In the eighteenth century, however, England adopted a limited version of *jus sanguinis*. *See infra* notes 67–76 and accompanying text (detailing how the law restricted *jus sanguinis* to only one generation).

26. BLACKSTONE, *supra* note 18, at 354.

27. *Id.* at 357.

28. *Id.* at 354 (differentiating aliens from English subjects).

29. *E.g.*, 18 THE HUGUENOT SOC’Y OF LONDON, LETTERS OF DENIZATION AND ACTS OF NATURALIZATION FOR ALIENS IN ENGLAND AND IRELAND, 1603–1700, at 54 (William A. Shaw ed., 1911) [hereinafter SEVENTEENTH CENTURY NATURALIZATIONS] (listing all aliens naturalized in the seventeenth century and the reasons for the naturalizations).

Records indicate that as early as 1437, aliens began to become naturalized, but that process could only occur through a private act of Parliament.<sup>30</sup> However, “naturalization under . . . a private bill could cost £50 or £60,”<sup>31</sup> “which limited naturalization to the wealthy.”<sup>32</sup> To put this amount in perspective,

[d]uring the eighteenth century wages could be as low as two or three pounds per year for a domestic servant, plus food, lodging and clothing. . . . Because [independent artisans] had to provide their own food, lodging and clothing, [they] needed to earn substantially more than this. . . . [A] figure closer to £40 [per year] was needed to keep a family.<sup>33</sup>

Despite the expense, “[c]hildren of Englishmen born abroad usually opted for naturalization.”<sup>34</sup> For example, in 1553, Gersone and Barnabas Hylles, sons of British citizens Richard and Agnes, were naturalized.<sup>35</sup> Likewise, in 1576, Joseph Caunte, son of Edward and Margaret, both English, was naturalized.<sup>36</sup> Again, in 1610, Margaret Clarke, daughter of John and Elizabeth Langton, both English, was naturalized.<sup>37</sup> Moreover, in 1660,

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30. *Aliens and Immigrants in England and Wales*, FAMILYSEARCH, [https://familysearch.org/learn/wiki/en/Aliens\\_and\\_Immigrants\\_in\\_England\\_and\\_Wales](https://familysearch.org/learn/wiki/en/Aliens_and_Immigrants_in_England_and_Wales) (last updated Sept. 11, 2011) [hereinafter *Aliens and Immigrants*]. See also BLACKSTONE, *supra* note 18, at 362 (detailing the naturalization process); COCKBURN, *supra* note 20, at 28 (exploring the differences between naturalization and denization). Another category of people, called “denizens,” were aliens who received letters patent by the king that afforded them certain citizenship rights. BLACKSTONE, *supra* note 18, at 362; COKE, *INSTITUTES OF ENGLAND*, *supra* note 21, at § 129a. According to one source, “On the whole, foreigners opted for denization because it was cheaper[, even though it was] not retrospective and it did not allow one to hold public office.” *Aliens and Immigrants*, *supra*. For a more detailed explanation of the differences between naturalization and denization, including tax rates, see SEVENTEENTH CENTURY NATURALIZATIONS, *supra* note 29, at iii–viii. The denizen did not survive the American Revolution; thus, that discussion exceeds the scope of this Article.

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

32. *United Kingdom Naturalization and Citizenship*, FAMILYSEARCH, [https://familysearch.org/learn/wiki/en/United\\_Kingdom\\_Naturalization\\_and\\_Citizenship](https://familysearch.org/learn/wiki/en/United_Kingdom_Naturalization_and_Citizenship) (last updated Aug. 13, 2014) (exploring pre-1844 naturalization); accord, e.g., GWINN, *supra* note 31.

33. *Currency, Coinage and the Cost of Living*, OLD BAILEY ONLINE, [www.oldbaileyonline.org/static/Coinage.jsp](http://www.oldbaileyonline.org/static/Coinage.jsp) (last updated Apr. 2013).

34. That is, as opposed to denization. See *Aliens and Immigrants*, *supra* note 30; accord THE HUGUENOT SOCIETY OF LONDON, *LETTERS OF DENIZATION AND ACTS OF NATURALIZATION FOR ALIENS IN ENGLAND, 1509–1603*, at i (Lymington, Chas T. King 1893) [hereinafter *SIXTEENTH CENTURY NATURALIZATIONS*]. See also *supra* note 30 (providing a definition of “denizen”).

35. *SIXTEENTH CENTURY NATURALIZATIONS*, *supra* note 34, at 124; see *infra* App., at Part I.

36. *SIXTEENTH CENTURY NATURALIZATIONS*, *supra* note 34, at 44; see *infra* App., at Part I.

37. *SEVENTEENTH CENTURY NATURALIZATIONS*, *supra* note 29, at 15; see *infra* App., at Part II.



Constant, Nathaniell, Joshua, and Giles Sylvester, children of Giles and Mary, both English, were naturalized.<sup>38</sup> Additionally, in 1701, Archibald Arthur, son of English parents, was naturalized.<sup>39</sup>

One important distinction between natural born subjects and aliens was that the latter were barred from inheriting real estate.<sup>40</sup> This disability significantly hindered natural born merchants who traveled the world to bring goods and money back to England, but who could not pass their full estate to any of their children born beyond the seas.<sup>41</sup> Therefore, to encourage foreign commerce, Parliament passed a statute in 1350 providing that

all children [which from henceforth shall be] born abroad, provided both their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England: and accordingly it hath been so adjudged in behalf of merchants.<sup>42</sup>

This statute was prospective only<sup>43</sup> and did not change the fundamental common law rule that children born overseas were aliens.<sup>44</sup> This principle

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38. SEVENTEENTH CENTURY NATURALIZATIONS, *supra* note 29, at 79; *see infra* App., at Part II.

39. 27 THE HUGUENOT SOC'Y OF LONDON, LETTERS OF DENIZATION AND ACTS OF NATURALIZATION FOR ALIENS IN ENGLAND AND IRELAND, 1701–1800, at 1 (William A. Shaw ed., 1923); *see infra* App., at Part III. The preceding examples represent just a few of the children born abroad to English subjects who became naturalized. *See infra*, App.

40. COCKBURN, *supra* note 20, at 143 (exploring real estate rights of aliens in England); COKE, INSTITUTES OF ENGLAND, *supra* note 21, at § 8a (detailing the rights of heirs of Englishmen). *See, e.g.*, Calvin's Case, (1608) 77 Eng. Rep. 377 (K.B.) 399, 7 Co. Rep. 1 a, 18 b (stating that “an alien born is not capable of inheritance within England”).

41. *See, e.g.*, Bacon v. Bacon, (1791) 79 Eng. Rep. 1117 (K.B.) 1118, Cro. Car. 602, 602 (declaring a merchant's daughter an heir after her property was seized and she was arrested on grounds of trespassing, based on her mother's alien status).

42. BLACKSTONE, *supra* note 18, at 361 (footnote omitted). The act referred to is A Statute for Those Who Are Born in Parts Beyond Sea, 1350, 25 Edw. 3, stat. 1, *reprinted in* 1 STATUTES OF THE REALM 310 (1801). *See also* Statute Made at Westminster on the First Day of May in the Forty-Second Year of King Edward III, 1368, 42 Edw. 3, stat. 3 (confirming that children born in the king's lands and seignories “beyond the Sea” may inherit), *reprinted in* 1 STATUTES OF THE REALM 389 (1801); *cf.* An Act to Enable His Majesties Naturall Borne Subjects To Inherite the Estate of Their Ancestors Either Lineall or Collaterall Notwithstanding Their Father or Mother Were Aliens, 1699, 11 Will. 3, c. 6 (allowing natural born subjects to inherit from alien ancestors), *reprinted in* 7 STATUTES OF THE REALM 590 (1820).

43. COCKBURN, *supra* note 20, at 9 (recounting the comparisons between the statute and the common law). It has been suggested that the 1350 statute was declaratory of the common law; that is, alien children of natural born subjects could inherit under the common law. *E.g.*, Bacon v. Bacon, (1791) 79 Eng. Rep. 1117 (K.B.) 1118, Cro. Car. 602, 602 (awarding denizen status to the daughter of a merchant for purposes of inheritance but refusing to grant her citizenship); *but see, e.g., id.* (highlighting one judge's insistence that inheritance was allowed because of the statute). However, this assertion appears “to have been derived, immediately or ultimately, from one or the other of . . . two sources.” United States v. Wong Kim Ark, 169 U.S. 649, 669 (1898). The first source is dicta by Sir William Hussey, Chief Justice of the King's Bench, noting that children born abroad to English subjects inherited property under the common law, and the 1350 statute

always remained the default rule. Thus, when, a mere three decades after the 1350 statute's passage, Parliament enacted a law requiring most people to obtain a special license from the king before leaving England,<sup>45</sup> the new statute was interpreted against the backdrop of the common law.<sup>46</sup> If English subjects went "beyond sea without licence, or tarr[ied] there after the time limited by the licence, and ha[d] issue, . . . the issue [wa]s an alien, and not inheritable."<sup>47</sup>

Furthermore, the 1350 statute referred only to "children *inheritors*"; they were not thereby made subjects.<sup>48</sup> Given the feudal roots of the "natural born subject" concept,<sup>49</sup> it would have made no sense to declare that a child could

makes that clear, "*mes le Statut fait cler.*" Y.B. 1 Ric. 3, fol. 4a, Mich., pl. 7 (1483) (Eng.), reprinted in 11 SELDEN SOCIETY 4 (2007). But as Sir Alexander Cockburn, Chief Justice of the Queen's Bench and first Lord Chief Justice of England, declared, "this view is hardly consistent with its language, which . . . refers only to children which 'from henceforth shall be born;' and . . . if the statute had only been declaratory of the Common law, the subsequent legislation on this subject would have been wholly unnecessary." COCKBURN, *supra* note 20, at 9. The second source is

a note added to the edition of 1688 of Dyer's Reports, . . . which has been shown, by a search of the roll in the King's Bench so referred to, to be a mistake, . . . as the child there in question did not appear to have been born beyond sea.

*Wong Kim Ark*, 169 U.S. at 669–70.

44. "The common law . . . stood absolutely so; with only a very few exceptions: so that a particular act of parliament became necessary after the restoration, for the naturalization of children of his majesty's English subjects, born in foreign countries during the late troubles." BLACKSTONE, *supra* note 18, at 361. The statute that mandated "particular acts" from Parliament for naturalization was enacted in 1677 and is discussed at *infra* note 58. The only "exception[ ]" mentioned by Blackstone is the corollary concerning children of ambassadors, discussed in the text accompanying *supra* notes 21–22.

45. 5 Ric. 2, stat. 1, c. 2 (1381) (U.K.). The following were exempted from the requirement: "the Lords and other Great Men of the Realm, and true and notable Merchants, and the King's soldiers." *Id.* This statute was repealed after more than two centuries by An Act for the Utter Abolition of All Memory of Hostilitie and the Dependances Thereof Betweene England and Scotland and for the Repressing of Occasions of Discord and Disorders in Tyme to Come, 4 Jac. 1, c. 1, § 4 (1606).

46. *See, e.g.,* *Hyde v. Hill*, (1582), 78 Eng. Rep. 270 (K.B.) 270, 7 Co. Rep. 18, 18 (refusing to adopt Sir William Hussey's dicta opinion).

47. *Id.* The report notes that it is "contrary to the opinion of Hussey, 1 Ric. 3. pl. 4." *Id.* For a discussion of Hussey's opinion and its weaknesses, see *supra* note 43.

48. COCKBURN, *supra* note 20, at 9. In *Doe v. Jones*, (1791), 100 Eng. Rep. 1031 (K.B.) 1035, 4 T.R. 301, 308, however, Lord Kenyon, Lord Chief Justice, noted in dicta, "I cannot conceive that the Legislature in passing that Act meant to stop short in conferring the right of inheritance merely on such children, but that they intended to confer on them all the rights of natural-born subjects." Despite this suggestion, the interpretation of Sir Alexander Cockburn, Chief Justice of the Queen's Bench and first Lord Chief Justice of England, is better supported by subsequent legal history because no further naturalization acts would be needed if these children were granted full citizenship rights. *See infra* Part II.B; *accord, e.g.,* BLACKSTONE, *supra* note 18, at 361 (pointing out the need for subsequent naturalization statutes, thereby supporting Cockburn's position). More importantly, foreign born children of natural born subjects would have no need to go through the expensive naturalization process if they had already been naturalized by this act. *See supra* note 42 and accompanying text.

49. *See* text accompanying *supra* note 26.

simultaneously be born in both the ligeance of another sovereign and the ligeance of the English monarch. In Blackstone's words, "[E]very man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once."<sup>50</sup>

The inability to inherit English property was not the only handicap facing aliens; the 1350 statute left other disabilities intact. For example, aliens were not allowed to purchase real estate for their own use<sup>51</sup> or, if someone sold them property, they could not enforce such a contract in court.<sup>52</sup> Moreover, aliens faced higher customs and taxes than did subjects: "[A]liens' customs were double the native customs."<sup>53</sup> In addition, aliens could not be members of Parliament or the Privy Council.<sup>54</sup> To cure these disabilities, well over two hundred children born abroad to English parents were naturalized in the centuries after 1350, many of them the issue of an English mother *and* an English father.<sup>55</sup> Over three hundred fifty years later, Parliament passed an act that finally lifted the naturalization requirement for children born abroad to natural born English subjects.<sup>56</sup>

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

One must understand two seventeenth-century statutes in order to analyze the eighteenth-century acts that revolutionized the natural born citizen concept. From 1641 to 1660—the years of the English Civil War and Interregnum—thousands of English subjects, unhappy with the political order, fled their homeland.<sup>57</sup> In 1677, Parliament passed An Act for the Naturalizing of

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50. BLACKSTONE, *supra* note 18, at 361.

51. *Id.* at 360 (pointing out that owning property requires an allegiance to the king); COCKBURN, *supra* note 20, at 139 (remarking that aliens also could not lease property).

52. COKE, INSTITUTES OF ENGLAND, *supra* note 21, at § 129b (stating that an alien "cannot maintaine either reall or mixt actions" unless he becomes a religious leader whose order owns the property).

53. SEVENTEENTH CENTURY NATURALIZATIONS, *supra* note 29, at v. One difference between naturalization by Parliament and denization by the king was that the king could require the denizen to continue paying alien taxes. *Id.* at v–vi (highlighting that this dichotomy allowed England to continue generating revenue from foreign born merchants who sought denization rights in England to obtain permission to trade).

54. BLACKSTONE, *supra* note 18, at 362. In fact, in 1700, Parliament provided that the only naturalized subjects who were "capable to be of the Privy Council or a Member of either House of Parliament or to enjoy any Office or Place of Trust either Civill or Military or to have any Grant of Lands Tenements or Hereditaments from the Crown" were "such as [were] born of English Parents." An Act for the Further Limitation of the Crown and Better Securing the Rights and Liberties of the Subject, 1700, 12 & 13 Will. 3, c. 2, § 3 (Eng.) (footnote omitted).

55. For a partial list of such naturalizations, see *infra* App., at Part I.

56. See *infra* notes 67–68 and accompanying text (describing the new naturalization requirements).

57. See An Act for the Naturalizing of Children of His Majestyes English Subjects Borne in Forreigne Countryes Dureing the Late Troubles, 1677, 29 Car. 2, c. 6, § 1 (Eng.) (explaining that

Children of His Majesty's English Subjects Born in Foreign Countries During the Late Troubles "to expresse a due sence of the merit of all such Loyall persons as out of their duty and fidelity to his Majesty and his Father of Blessed Memory did forgoe or were driven from their Native Country."<sup>58</sup>

The naturalization that the Act provided was neither blanket nor automatic. First, it only applied to children of natural born subjects born abroad between June 14, 1641, and March 24, 1660.<sup>59</sup> Second, to benefit from the statute, the child had to go through the usual naturalization process within seven years of its enactment; that is, the child had to "receive the [Protestant] Sacrament of the Lords Supper and within one moneth next after such receiving the Sacrament take the Oathes of Allegiance and Supremacy in some of his Majestyes Courts at Westminster."<sup>60</sup> By the oath of allegiance, the alien promised fidelity to the king.<sup>61</sup> By the oath of supremacy, the alien renounced "the pope's pretended authority."<sup>62</sup> In other words, only Protestants could become naturalized under this statute.<sup>63</sup>

Although eligible children still had to undergo the naturalization process, the statute provided one advantage: children seeking naturalization were spared the expense of a private bill in Parliament. Obtaining naturalization, therefore, also became easier and faster for applicants.

A similar statute was passed at the end of the century. The act provided that children born abroad to natural born subjects who were in the service of the king during the Nine Years' War with France were "taken to all Intents [and] Purposes to be and to have been the King's natural borne Subjects."<sup>64</sup> This

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people were afraid of the king being overthrown), *reprinted in* 5 STATUTES OF THE REALM 847 (1819).

58. *Id.*

59. *Id.*

60. *Id.*; *cf.* An Act That All Such as Are To Be Naturalized or Restored in Blood Shall First Receive the Sacrament of the Lord's Supper and the Oath of Allegiance and the Oath of Supremacy, 1609, 7 Jac. 1, c. 2, § 1 (Eng.) (setting out the original requirements for naturalization repeated in the 1677 Act), *reprinted in* 4 STATUTES OF THE REALM 1157 (1819).

61. BLACKSTONE, *supra* note 18, at 356 (stating that a new subject promised "that he w[ould] be faithful and bear true allegiance to the king") (internal quotation marks omitted).

62. *Id.* (declaring the oath's main motivation was to ensure naturalized citizens renounced Catholicism).

63. *Cf.* An Act That All Such as Are To Be Naturalized or Restored in Blood Shall First Receive the Sacrament of the Lord's Supper and the Oath of Allegiance and the Oath of Supremacy, 1609, 7 Jac. 1, c. 2, § 1 (Eng.) (providing that naturalization was "not fit to be bestowed upon any others than such as are of the Religion nowe established in this Realme"). Therefore, members of other religions used denization to avoid taking the oath of supremacy. *See Aliens and Immigrants, supra* note 30. Of course, they did not acquire as many rights as naturalized subjects. *See SEVENTEENTH CENTURY NATURALIZATIONS, supra* note 29, at iii-viii (discussing possible limitations on rights for denizens as compared to naturalized citizens).

64. An Act To Naturalize the Children of Such Officers and Soldiers & Others The Natural Borne Subjects of This Realme Who Have Been Born Abroad During the War the Parents of Such Children Haveing Been In the Service of this Government, 1698, 9 Will. 3, c. 20, § 1 (Eng.), *reprinted in* 7 STATUTES OF THE REALM 380 (1820).

statute applied only to those born abroad between February 13, 1688, and March 25, 1698.<sup>65</sup> Additionally, to receive the statute's benefit of relief from the expense of a private bill in Parliament, the child had to "receiv[e] the Sacrament and tak[e] the Oaths" within five years of reaching age fourteen.<sup>66</sup>

In the eighteenth century, Parliament relaxed the *jus soli* on behalf of foreign born children of natural born parents for the first time. In 1708, Parliament passed an Act for Naturalizing Foreign Protestants.<sup>67</sup> Pursuant to the new law, any foreign born Protestant could avoid the expense of a private bill in Parliament by receiving the sacrament "in some Protestant or reformed Congregation" and taking "the Oaths."<sup>68</sup> However, the law went further and declared that "the Children of all natural born Subjects born out of the Ligeance of Her Majesty[,] Her Heirs and Successors[,] shall be deemed[,] adjudged and taken to be natural born Subjects of this Kingdom[,] to all Intents[,] Constructions and Purposes whatsoever."<sup>69</sup>

Three short years later, Parliament repealed the part of this Act that provided a simpler naturalization process to aliens not born of English parents.<sup>70</sup> Parliament clarified the repeal in 1731, claiming it had not changed the provision concerning children "born out of such Ligeance, *whose fathers were or shall be natural born Subjects of the Crown of England . . . at the time of the Birth.*"<sup>71</sup> Then, in 1773, Parliament reaffirmed the 1731 law regarding foreign born children of natural born fathers and extended the opportunity for easy naturalization to foreign born children whose paternal grandfathers were natural born subjects.<sup>72</sup> Thereafter, to become an English subject, the

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65. *Id.*

66. *Id.* at § 4.

67. An Act for Naturalizing Foreign Protestants, 1708, 7 Ann., c. 5 (Eng.), *reprinted in* 9 STATUTES OF THE REALM 63 (1822).

68. *Id.*

69. *Id.*

70. *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), 1711, 10 Ann., c. 5 (Eng.), *reprinted in* 9 STATUTES OF THE REALM 557 (1822).

71. 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 Children of the Natural Born Subjects of the Crown of England, or of Great Britain, 1731, 4 Geo. 2, c. 21 (declaring all such children natural born subjects based on the 1711 Act). The key to being "natural born" was the child's father; having a natural born mother but an alien father left the child an alien. *E.g.*, *Doe v. Jones*, (1791) 100 Eng. Rep. 1031 (K.B.) 1036, 4 T.R. 301, 309 (noting that the 1711 Act included both mothers and fathers, but later versions excluded mothers); BLACKSTONE, *supra* note 18, at 361 (highlighting the paternal requirement with the exception of children of men who had been exiled for treason).

72. *See* 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, 1773, 13 Geo. 3, c. 21

grandchild had to move to England, take the required oaths, and “receive the Sacrament of the Lord’s Supper, according to the Usage of the Church of England, or in some Protestant or Reformed Congregation.”<sup>73</sup>

These three acts, heralded as “revolutionary” and “novel,” “enunciated a new principle in English naturalization law.”<sup>74</sup> By declaring persons born in the allegiance of another sovereign to be also English subjects, the new statutes resolutely rejected “all mediæval conceptions of allegiance.”<sup>75</sup> Moreover, they “brought into existence a new class of international status—persons of double nationality.”<sup>76</sup>

## II. THE MEANING OF THE PHRASE IN THE EARLY UNITED STATES

### A. *The “Natural Born” Concept Is Added to the Constitution*

Almost nothing is known about why the Clause was added to the Constitution because no recorded debate on the subject exists. The first draft of the Constitution to include qualifications for the presidency was reported on August 22, 1787.<sup>77</sup> This draft provided that “he shall be of the age of thirty five years, and a Citizen of the United States, and shall have been an Inhabitant thereof for Twenty one years.”<sup>78</sup> Earlier, on July 25 of that year, John Jay sent the following letter to George Washington,<sup>79</sup> who was serving as the president of the Constitutional Convention at the time:

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

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(highlighting the policy to keep trade and wealth in England by making an easier naturalization process for merchants and their heirs), *reprinted in 9 STATUTES AT LARGE* 690 (London, Charles Eyre & William Strahan 1773).

73. *Id.* The 1731 and 1773 naturalization statutes required children to be born outside the “realm,” which at that time included both England and Scotland. *See An Act for an Union of the Two Kingdoms of England and Scotland, 1706, 6 Ann. c. 11 (Eng.)* (adding provisions and explanations to the laws that unified England and Scotland), *reprinted in 8 STATUTES OF THE REALM* 566 (1821).

74. SEVENTEENTH CENTURY NATURALIZATIONS, *supra* note 29, at xi–xii (discussing the impact of the acts).

75. *Id.* at xii; *see supra* text accompanying notes 26–27 (explaining feudal origins of the concept).

76. SEVENTEENTH CENTURY NATURALIZATIONS, *supra* note 29, at xii.

77. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 366 (Max Farrand, ed. 1911) [hereinafter FARRAND] (adding age and residency restrictions).

78. *Id.* at 367 (internal quotation marks omitted).

79. CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY 137 (The John Hopkins Press 1922). One historian suggested that Jay also “may have written to others.” *Id.*

expres[s]ly that the Command in chief of the [A]merican army shall not be given to, nor devolve on, any but a natural born Citizen.<sup>80</sup>

On September 2, Washington acknowledged receipt of Jay's missive and thanked him "for the hints contained in [his] letter."<sup>81</sup> Two days later, on September 4, a Committee of Eleven<sup>82</sup> reported the following provision to the Convention:

No Person except a natural born Citizen, or a Citizen of the U.S. at the time of the adoption of this Constitution shall be eligible to the office of President: nor shall any Person be elected to that office, who shall be under the age of 35 years, and who has not been in the whole, at least 14 years a resident within the U.S.<sup>83</sup>

On September 7, the Convention approved these requirements without objection,<sup>84</sup> and only stylistic changes were made thereafter.<sup>85</sup>

One of the most important early American jurists, Joseph Story,<sup>86</sup> approved of the provision. In his treatise on the Constitution, he praised the Framers' decision to limit the presidency to "natural born citizen[s]."<sup>87</sup> He noted that the Clause's provision that allowed individuals to be naturalized before the Constitution's adoption to become President<sup>88</sup> represented "an exception from

80. U.S. DEP'T OF STATE, 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870, at 237 (1905) [hereinafter DOCUMENTARY HISTORY]. One scholar noted that Jay

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

John Yinger, *The Origins and Interpretation of the Presidential Eligibility Clause in the U.S. Constitution: Why Did the Founding Fathers Want the President to be a "Natural-born Citizen" and What Does this Clause Mean for Foreign-Born Adoptees?*, MAXWELL SCH. (Apr. 6, 2000), <http://faculty.maxwell.syr.edu/jyinger/citizenship/history.htm> (footnote omitted).

81. DOCUMENTARY HISTORY, *supra* note 80, at 269.

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

83. FARRAND, *supra* note 77, at 494.

84. *Id.* at 536.

85. See U.S. CONST. art. II, § 1, cl. 5 (illustrating that the current text of the Natural Born Citizen Clause differs from the draft at the convention only by expanding or changing a term, and retains the draft's essential meaning).

86. Story was simultaneously a justice on the Supreme Court and the first Dane Professor of Law at Harvard. *Biographies of the Robes: Joseph Story*, PBS, [http://www.pbs.org/wnet/supremecourt/personality/robes\\_story.html](http://www.pbs.org/wnet/supremecourt/personality/robes_story.html) (last updated Dec. 2006). In addition, his treatises were, and remain, highly regarded in the legal community. *Id.*

87. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 332 (Boston, Hilliard, Gray & Co. 1833).

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

the great fundamental policy of all governments, to exclude foreign influence from their executive councils and duties.”<sup>89</sup> Story additionally claimed that “the general propriety of the exclusion of foreigners, in common cases, will scarcely be doubted by any sound statesman. It cuts off all chances for ambitious foreigners who might otherwise be intriguing for the office.”<sup>90</sup>

### B. Early Interpretation of the Clause

First, one might ask whether any substantive distinction existed between the concept of “natural born subject” and “natural born citizen.” Simply, the answer is “no.” As the North Carolina Supreme Court explained in 1838: “The term ‘citizen’ as understood in our law, is precisely analogous to the term *subject* in the common law, and the change of phrase has entirely resulted from the change of government.”<sup>91</sup>

Second, the drafters’ interpretation of the Clause is significant. Did the Framers believe they had constitutionalized the common law concept of “natural born”? Or did they consider the English statutes regarding the subject to have crossed the Atlantic, too? Early American sources indicate that the Framers intended to write the common law concept into the Constitution.<sup>92</sup>

Nicknamed “the Father of the Constitution” for his role in drafting that foundational document,<sup>93</sup> James Madison is one of the most reliable sources for its interpretation. In 1789, he indicated that the United States followed the common law notion of citizenship. On May 22 of that year, in a speech to the House of Representatives, Congressman Madison declared: “It is an established maxim that birth is a criterion of allegiance. Birth . . . derives its force sometimes from place, and sometimes from parentage; but . . . place is the most certain criterion; it is what applies in the United States . . . .”<sup>94</sup>

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89. STORY, *supra* note 87, at 332.

90. *Id.* at 333.

91. *State v. Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) 20, 26 (N.C. 1838). The North Carolina court explained, “The sovereignty has been transferred from one man to the collective body of the people—and he who before was a ‘subject of the king’ is now ‘a citizen of the State.’” *Id.*; accord, e.g., *Minor v. Happersett*, 88 U.S. 162, 166 (1874); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 258 n.d [hereinafter KENT (3d ed.)] (“[Both freemen and slaves], if born under the jurisdiction and allegiance of the United States, are natives, and not aliens. They are what the common law terms natural-born subjects. Subject and citizen are, in a degree, convertible terms as applied to natives . . . .”). See also U.S. CONST. art. III, § 2, cl. 1 (referring without distinction to “Citizens” of American states and “Citizens or Subjects” of foreign states).

92. See *infra* notes 93–110 and accompanying text (exploring the different suggestions and interpretations by early American theorists).

93. *James Madison*, WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/jamesmadison> (last visited Nov. 23, 2014).

94. 1 ANNALS OF THE CONGRESS OF THE UNITED STATES 404 (Joseph Gales ed., 1834) [hereinafter 1 ANNALS OF CONG.].



William Rawle—a member of the Pennsylvania Constitutional Assembly and the first United States Attorney for the District of Pennsylvania<sup>95</sup>—agreed. He produced a scholarly treatise on the Constitution and released a second edition in 1829.<sup>96</sup> He stated that location dictated the meaning of the phrase and concluded that “[u]nder our Constitution the question is settled by its express language, and when we are informed that . . . no person is eligible to the office of president unless he is a natural born citizen, the principle that the place of birth creates the relative quality is established as to us.”<sup>97</sup>

James Kent—the well-regarded chancellor of New York<sup>98</sup>—also asserted that the United States distinguished between “natives” and “aliens” by using the “ancient English law” or the “common law.”<sup>99</sup> In the first edition of his *Commentaries on American Law*, originally published in 1827, Kent averred: “Natives are all persons born within the jurisdiction of the United States.”<sup>100</sup> In the third edition, published in 1836, he added: “They are what the common law terms natural-born subjects.”<sup>101</sup> He further explained that “[a]n alien is a person born out of the jurisdiction of the United States,” with the exception of “the children of public ministers abroad.”<sup>102</sup>

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95. *History*, RAWLRE & HENDERSON LLP, <http://www.rawle.com/history> (last visited Nov. 23, 2014). He also founded the oldest law firm in America. *Id.*

96. See Preface to WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE STATES OF AMERICA (Philadelphia, Philip H. Nicklin, Law Bookseller 1829) (declaring that the second edition retains the principles explicated in the first edition).

97. *Id.* at 86.

98. *James Kent*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/314984/James-Kent> (last visited Nov. 24, 2014). He was also a lawyer at the time of the founding and the first professor of law at Columbia College. *Id.*

99. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 33, 43 (New York, O. Halsted 1827) [hereinafter KENT (1st ed.)].

100. *Id.* at 33.

101. KENT (3d ed.), *supra* note 91, at 258 n.d.

102. KENT (1st ed.), *supra* note 99, at 43. Unfortunately, Kent then misstated the common law of inheritance, suggesting that “children born abroad, of English parents, were capable, at common law, of inheriting as natives.” *Id.* For a discussion of the rule at common law, see *supra* note 44 and accompanying text (restating the common law as meaning that children born abroad are aliens). Notably, rather than writing in his usual declaratory style, he qualified his remarks with the passive, “it is said.” KENT (1st ed.), *supra* note 99, at 43. Kent’s mistake can be traced to dicta by Sir William Hussey in a 1483 case. See Y.B. 1 Rich. 3, fol. 4a, Mich., pl. 7 (1483) (Eng.), reprinted in 11 SELDEN SOCIETY 4 (2007). See also *supra* note 43. Surprisingly, Kent did not cite that case, instead citing *Hyde v. Hill*, (1582), 78 Eng. Rep. 270 (K.B.) 270, 7 Co. Rep. 18, 18. KENT (1st ed.), *supra* note 99, at 43 n.d. For a thorough analysis of Kent’s error, see HORACE BINNEY, THE ALIENIGENÆ OF THE UNITED STATES UNDER THE PRESENT NATURALIZATION LAWS 6–7 (Philadelphia, C. Sherman 1853) [hereinafter BINNEY, PRESENT NATURALIZATION LAWS] (pointing out Kent’s error by comparing his sources and highlighting the doubtful language he uses).

### C. *The Import of Early Naturalization Statutes*

Article I of the Constitution gives Congress the power “[t]o establish an uniform Rule of Naturalization,”<sup>103</sup> which Congress first exercised in 1790. Included in the first Act To Establish an Uniform Rule of Naturalization was the following language:

[T]he children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States . . . .<sup>104</sup>

The very existence of this provision demonstrates that the early American notion of “natural born citizen” adopted the English common law only and did not include the eighteenth-century statutes. If it had been otherwise, there would have been no need for the 1790 statute because the children covered would have been natural born under then-current English law. As one nineteenth-century senator stated: “[T]he founders of this Government made no provision—of course they made none—for the naturalization of natural-born citizens.”<sup>105</sup>

Moreover, the legislative history suggests that the first Congress intended to effectuate a change in the law, not merely to declare the status quo.<sup>106</sup> On February 3, 1790, Congress began debating a draft bill that provided for naturalization.<sup>107</sup> The legislature acknowledged the common law principle that “[a]n alien has no right to hold lands in any country [but his own].”<sup>108</sup> However, there was no real opposition to “let[ting] foreigners, on easy terms, be admitted to hold lands” in America.<sup>109</sup> One of Congress’ greatest concerns was the prospect of all those immigrants pushing their way into the budding nation’s new government. For example, one congressman, summing up the issue, stated:

A foreigner who comes here is not desirous of interfering immediately with our politics; nor is it proper that he should. His emigration is governed by a different principle; he is desirous of

103. U.S. CONST. art. I, § 8, cl. 4.

104. An Act to Establish an Uniform Rule of Naturalization, 1790, ch. 3, 1 Stat. 103, 103–04.

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

106. See 1 ANNALS OF CONG., *supra* note 94, at 1109–25 (documenting the debates in the House of Representatives and the Senate concerning how to construct the naturalization law of the United States).

107. *Id.* at 1109.

108. *Id.* at 1112 (statement of Rep. Hartley). For the common law rule against aliens holding real estate, see *supra* notes 40–51 and accompanying text (discussing the historical context of the parallel English concept).

109. 1 ANNALS OF CONG., *supra* note 94, at 1118 (statement of Rep. Smith).

obtaining and holding property. I should have no objection to his doing this, from the first moment he sets his foot on shore in America; but it appears to me, that we ought to be cautious how we admit emigrants to the other privileges of citizenship . . . . [T]he admission of a great number of foreigners to all the places of Government, may tincture the system with the dregs of their former habits, and corrupt what we believe the most pure of all human institutions.<sup>110</sup>

In sum, the debate focused on how to balance properly an immigrant's need to purchase or inherit land quickly and Congress' concerns about granting other aspects of citizenship.

Another congressman, referring to a statute that allowed English children to inherit from alien parents,<sup>111</sup> suggested that "the . . . children of American parents born abroad ought to be provided for, as was done [by Parliament] in the case of English parents."<sup>112</sup> In essence, he called for a clause that would permit American parents to bequeath property to their alien children. Thus, he understood "children of American parents born abroad" to be aliens and ineligible to inherit property.

At the close of the debate, the House sent the bill back to a subcommittee to consider how best to address the issues raised.<sup>113</sup> Just before the end of the discussion, a member of the subcommittee that originally presented the draft bill announced that "he had another clause ready to present, providing for the children of American citizens born out of the United States."<sup>114</sup> This comment further demonstrates the recognition of an ongoing need to *provide* for these children due to their alien status.

Because the 1790 Act stated that alien children of American parents would "be considered as natural born citizens," the question remains as to the scope of the change Congress intended to effect. Did Congress mean to amend the

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110. *Id.* at 1119 (statement of Rep. Stone).

111. *See* An Act to Enable His Majesties Naturall Borne Subjects To Inherit the Estate of Their Ancestors Either Lineall or Collaterall Notwithstanding Their Father or Mother Were Aliens, 1699, 11 Will. 3, c. 6, *reprinted in* 7 STATUTES OF THE REALM 590 (1822). The congressman actually described the statute as enacted in "the 12th year of William III." 1 ANNALS OF CONG., *supra* note 94, at 1121 (statement of Rep. Burke). His mistake is understandable, as the statute was cited in *Chitty's Statutes* as "11 & 12 Will. 3, c. 6." 1 JOSEPH CHITTY, CHITTY'S COLLECTION OF STATUTES, WITH NOTES THEREON, INTENDED AS A CIRCUIT AND COURT COMPANION 19 (London, Stevens & Norton, 2d ed. 1854). The Supreme Court made the same mistake in its *Wong Kim Ark* decision. 169 U.S. 649, 661 (1898).

112. 1 ANNALS OF CONG., *supra* note 94, at 1121 (statement of Rep. Burke). One author credits this suggestion with the addition of the phrase "natural born" to the 1790 statute: "[T]he reference to the English acts shows [that] the origin of the inadvertent error in using the term natural-born citizen instead of plain 'citizen' came from copying the English Naturalization Act." 113 CONG. REC. 15,877 (1967).

113. 1 ANNALS OF CONG., *supra* note 94, at 1125.

114. *Id.* (statement of Rep. Hartley).

requirements of the Clause statutorily? As aforementioned, the Framers constitutionalized the common law concept of natural born citizen. Under the common law, “[t]he first and most obvious division of the people is into aliens and natural-born [citizens].”<sup>115</sup> In other words, everyone is *either* an alien *or* a natural born citizen based on his or her place of birth; that status does not change. Article I grants Congress the power to naturalize, that is, “remove the disabilities of alienage.”<sup>116</sup> However, Congress does not possess the alchemical power to convert one’s status from alien to natural born citizen.<sup>117</sup> If truly Congress’ intent, such a result would expand the requirements of Article II without a constitutional amendment.

Moreover, Parliament’s expansion of the definition of “natural born subject” in the eighteenth century sets no precedent with respect to the American provision. In comparison to the American Constitution, the English Constitution is unwritten.<sup>118</sup> By the late seventeenth century, England’s Constitution consisted of whatever Parliament declared as law; Parliament had “sovereign and uncontrolable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws.”<sup>119</sup> As such, it could “change and create afresh even the constitution of the kingdom and of parliaments themselves.”<sup>120</sup> Parliament certainly had the power to extend natural born status to those who otherwise would have been aliens.

The relationship between Congress and the American Constitution is quite different. According to the Supreme Court in *Marbury v. Madison*,<sup>121</sup> to allow Congress the same latitude as Parliament

would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and

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115. BLACKSTONE, *supra* note 18, at 354.

116. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 597 (1857) (Curtis, J., dissenting), *superseded by constitutional amendment* U.S. CONST. amend. XIV.

117. Justice Benjamin Curtis of the Supreme Court explained:

Among the powers expressly granted to Congress is “the power to establish a uniform rule of naturalization.” It is not doubted that this is a power to prescribe a rule for the removal of the disabilities consequent on foreign birth. To hold that it extends further than this, would do violence to the meaning of the term naturalization, fixed in the common law, . . . and in the minds of those who concurred in framing and adopting the Constitution. It was in this sense of conferring on an alien and his issue the rights and powers of a native-born citizen, that it was employed in the Declaration of Independence. It was in this sense it was expounded in the *Federalist*, (No. 42,) has been understood by Congress, by the Judiciary, . . . and by commentators on the Constitution. . . . It appears, then, that the only power expressly granted to Congress to legislate concerning citizenship, is confined to the removal of the disabilities of foreign birth.

*Id.* at 578 (Curtis, J., dissenting) (quoting U.S. CONST. art. I, § 8, cl. 4).

118. STEVEN M. BARKAN ET AL., *FUNDAMENTALS OF LEGAL RESEARCH* 484 (9th ed. 2009).

119. BLACKSTONE, *supra* note 18, at 156.

120. *Id.*

121. 5 U.S. (1 Cranch) 137 (1803).

theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbid[d]en, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits.<sup>122</sup>

Therefore, Congress cannot alter who is eligible to run for President by statute. Such a dramatic change requires a constitutional amendment.<sup>123</sup>

Unsurprisingly, no evidence suggests Congress intended to expand the class of persons who could run for President. Moreover, early commentators agreed that the use of “natural born” in the first naturalization act did not amend Article II. For example, St. George Tucker—a professor of law at the College of William and Mary<sup>124</sup>—published his edition of *Blackstone’s Commentaries* in 1803, wherein he provided his own notes concerning the differences between English and American law.<sup>125</sup> With respect to naturalization and citizenship, he cited all of the American naturalization statutes enacted to that date, including the 1790 Act.<sup>126</sup> He then concluded that “[p]ersons [] naturalized according to these acts, are entitled to all the rights of natural-born citizens, except . . . they are forever incapable of being chosen to the office of president of the United States.”<sup>127</sup>

In any event, Congress swiftly repealed the 1790 statute in 1795.<sup>128</sup> This time, debate in the House focused on several issues, including whether aliens seeking naturalization should be made to renounce (1) foreign hereditary titles and (2) any claim to persons then held in slavery.<sup>129</sup> The House voted “yea”

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122. *Id.* at 178.

123. The Supreme Court recently reaffirmed this basic tenet of American constitutional law: Under our Constitution, the Federal Government is one of enumerated powers. . . . The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the “powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.” *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997).

124. Craig Evan Klafter, *St. George Tucker: The First Modern American Law Professor*, 6 J. HIST. SOC’Y 133, 139 (2006).

125. See 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* 366–75 (Philadelphia, William Young Birch & Abraham Small 1803).

126. *Id.* at 374 n.12.

127. *Id.*; accord, e.g., BINNEY, *PRESENT NATURALIZATION LAWS*, *supra* note 102, at 21–22 (noting the 1790 statute “naturalized” natives’ children born outside of the United States).

128. BINNEY, *PRESENT NATURALIZATION LAWS*, *supra* note 102, at 22.

129. For the House of Representatives debate on renouncing foreign hereditary titles, see 4 ANNALS OF CONGRESS 1004–09, 1021–23, 1025–58, 1060–61, 1064–66 (1849) [hereinafter 4 ANNALS OF CONG.]. On the subject of persons held in slavery, see *id.* at 1039–41. For the Senate debate on both topics, see *id.* at 809–12, 814–16.

on the first question and “nay” on the second.<sup>130</sup> On January 2, 1795, the bill was recommitted to a select committee of three individuals, one of whom was James Madison.<sup>131</sup> Earlier, on December 29, 1794, Madison had expressed the opinion that Congress had no naturalization authority over American citizens: “It was only granted to them to admit aliens.”<sup>132</sup> The following Monday, January 5, 1795, “Mr. Madison . . . reported a new bill of Naturalization, containing the amendments recommitted, and also whatever was necessary from the Old Law, so that the latter should be entirely superceded.”<sup>133</sup> Madison salvaged the “Old Law” provision that granted naturalization rights to children of American citizens born abroad.<sup>134</sup> Interestingly, the phrase “natural born” was deleted without any recorded debate on the issue.<sup>135</sup> The new statute provided in pertinent part that “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: *Provided*, That the right of citizenship shall not descend to persons, whose fathers have never been resident in the United States.”<sup>136</sup> The law established that the alien child was only naturalized, not declared a natural born citizen.<sup>137</sup>

#### D. The Fourteenth Amendment

Thus the definition of “natural born citizen” stood in the mid-nineteenth century. Horace Binney—a respected early American attorney and statesman<sup>138</sup>—published an article on the topic in 1854. He wrote that the rules were clear:

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130. *Id.* at 1057.

131. *Id.* at 1040, 1058.

132. *Id.* at 1027.

133. *Id.* at 1060.

134. *Id.* at 1041, 1053, 1061.

135. See Sarah Helene Duggin & Mary Beth Collins, ‘Natural Born’ in the USA: The Striking Unfairness and Dangerous Ambiguity in the Constitution’s Presidential Qualifications Clause and Why We Need to Fix It, 85 B.U. L. REV. 53, 78–79 (2005) (acknowledging the deletion and commenting that “[t]he term ‘natural-born’ never again appeared in the naturalization laws of the United States”).

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

137. Referring to “the inadvertent use of the term natural-born in the Act of 1790,” one author averred that “it was Mr. Madison who had participated in the drafting of the Constitution who had discovered the error and authorized the bill to correct it by deleting the term from the act of 1795.” 113 CONG. REC. 15,879 (1967) (quoting Hon. Pinkney G. McElwee). See Duggin & Collins, *supra* note 135, at 78–79.

138. Binney studied law at the Philadelphia law office of Jared Ingersoll, CHARLES C. BINNEY, THE LIFE OF HORACE BINNEY 29–30 (1903) [hereinafter BINNEY, THE LIFE OF HORACE], who signed the Constitution for Pennsylvania, *Jared Ingersoll (1749-1822)*, PENN U. ARCHIVES & RECS. CENTER, [http://www.archives.upenn.edu/people/1700s/ingersoll\\_jared.html](http://www.archives.upenn.edu/people/1700s/ingersoll_jared.html) (last visited Nov. 24, 2014). An interesting, albeit irrelevant, fact is that the young Binney started the Harvard Hasty Pudding Club in 1795. BINNEY, THE LIFE OF HORACE, *supra* note 138, at 27.

The notion that there is any common law principle to naturalize the children born in foreign countries, of native-born American father *and* mother, father *or* mother, must be discarded. There is not and never was any such common law principle. . . . [T]he citizens of the United States are, [with the exception of those children covered by one of the corollaries], such only as are either . . . born within the limits and under the jurisdiction of the United States, or naturalized by . . . virtue of an Act of the Congress of the United States.<sup>139</sup>

At this time, however, debate about another aspect of these rules came to a head: were children of African descent born in the United States natural born citizens? Chancellor Kent wrote that “[b]lacks, whether born free or in bondage, if born under the jurisdiction and allegiance of the United States, [were] natives, and not aliens. They [were] what the common law terms natural-born subjects.”<sup>140</sup> Supreme Court Justice Benjamin Curtis concurred: “[T]he Constitution uses the language, ‘a natural-born citizen.’ . . . Undoubtedly, this language . . . was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth.”<sup>141</sup> Unfortunately, Justice Curtis was one of only two dissenters in the infamous 1857 *Dred Scott v. Sandford*<sup>142</sup> decision.<sup>143</sup> The majority held that African Americans descended from slaves could not be U.S. citizens.<sup>144</sup>

Following the American Civil War, Congress drafted—and the states ratified—the Fourteenth Amendment.<sup>145</sup> The first section provides: “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.”<sup>146</sup> While this language reversed *Dred Scott*, it did not otherwise change the law with respect to citizenship. In describing the opening sentence of the amendment, one senator stated that “[i]t simply declares who shall be citizens of the United States. But the *fact* that certain persons are citizens, and the *number* of them, and the *definition* of citizenship or of its constituent elements, were just the same before the ratification of the [F]ourteenth [A]mendment that they are now.”<sup>147</sup>

139. BINNEY, PRESENT NATURALIZATION LAWS, *supra* note 102, at 20–21.

140. KENT (3d ed.), *supra* note 91, at 258 n.d.

141. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 576 (1857) (Curtis, J., dissenting), *superseded by constitutional amendment* U.S. CONST. amend. XIV.

142. 60 U.S. (19 How.) 393 (1857).

143. *Id.* at 529.

144. *Id.* at 419, 423.

145. See *Primary Documents in American History*, *supra* note 13.

146. U.S. CONST. amend. XIV, § 1.

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

At the close of the nineteenth century, the Supreme Court decided a case that centered on the citizenship of a man born to Chinese parents in the United States.<sup>148</sup> The Court held that he was natural born and, as such, he was a citizen.<sup>149</sup> The Court explicated the law as it then stood in the United States:

The Fourteenth Amendment of the Constitution . . . contemplates two sources of citizenship, and two only: birth and naturalization. . . . Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized . . . by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.<sup>150</sup>

According to the Court, the Fourteenth Amendment made explicit what had been the law all along: those individuals born within the United States were natural born citizens; all others were aliens unless naturalized.<sup>151</sup>

### III. THE WEAKNESSES OF MODERN HISTORIES

#### A. *Modern Scholarly Interpretations of English Law*

One modern source, written around the time of Governor Romney's presidential candidacy, purports to describe English naturalization law prior to the ratification of the U.S. Constitution.<sup>152</sup> Written by Charles Gordon while he served as General Counsel for the United States Immigration and Naturalization Service,<sup>153</sup> the article contains certain flaws in both fact and reasoning. Unfortunately, subsequent articles have relied on his inaccurate research as definitive.<sup>154</sup>

First, Gordon misstates the common law when he writes: "[T]he 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 . . . ."<sup>155</sup> This was the rule at common law, not "early" common law.<sup>156</sup> Further,

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148. See *United States v. Wong Kim Ark*, 169 U.S. 649, 652–53 (1898).

149. *Id.* at 704.

150. *Id.* at 702–03.

151. This rule applied to all children born in the United States, except those to whom the corollaries apply. See *supra* notes 22–24 and accompanying text.

152. Gordon, *supra* note 17, at 6–7.

153. *Id.* at 1 n.\* (stating Charles Gordon's qualifications).

154. See, e.g., Nelson, *supra* note 82, at 396 n.45 (citing only the Gordon article for authority on English history in connection with naturalization); Yinger, *supra* note 80, at n.38 (noting that the Gordon article "is the source of the information in this paragraph").

155. Gordon, *supra* note 17, at 7.



birth within the *ligeance of the king* was the determinative factor, not birth within the *realm*.<sup>157</sup> Also, there was no “probably” about it; in the words of Blackstone, “[t]he common law indeed stood absolutely so.”<sup>158</sup>

Further, Gordon errs more seriously by asserting that those same British authorities propounded the view that the statutes described above “enabled natural-born subjects to transmit equivalent status at birth to the children born to them outside of the kingdom.”<sup>159</sup> The statutes to which he refers include the 1350 inheritance law<sup>160</sup> and the special provision of 1677 that permitted easy naturalization following the restoration of the monarchy.<sup>161</sup> However, neither of those statutes made such children subjects without being naturalized.<sup>162</sup> Only the eighteenth-century acts accomplished that goal.<sup>163</sup> As previously demonstrated, before the eighteenth century, children born abroad to English subjects had to be naturalized in order to attain status equivalent to that of their parents.

Gordon cites four authorities for his proposition. However, none of them support his assertion. The first cited source,<sup>164</sup> Sir Edward Coke, explicitly stated in 1628 that any issue born to an Englishman “out[side] of the king’s

156. Gordon makes two mistakes here. First, he incorrectly believes that English statutes prior to the eighteenth century Parliamentary acts changed the common law definition of “natural born subject.” *Id.* For a discussion of the impact of these statutes, see *supra* notes 42–44, 58–60, 67–73 and accompanying text. Second, he apparently believes that the statutory scheme of the eighteenth century was part of the common law. Gordon, *supra* note 17, at 7. For a discussion of the change these statutes wrought, see *supra* notes 75–76 and accompanying text.

157. For a discussion of the difference between being out of the *ligeance* of the king and out of the *realm*, see text accompanying *supra* notes 18–23.

158. BLACKSTONE, *supra* note 18, at 361 (footnote omitted); *accord, e.g.*, COCKBURN, *supra* note 20, at 7 (declaring the English common law focused on the “dominions of the Crown”). See also COKE, *INSTITUTES OF ENGLAND*, *supra* note 21, at § 129a (defining aliens as those born out of the allegiance, not the realm, of the king).

159. Gordon, *supra* note 17, at 7. Other modern authors follow Gordon to the same mistaken conclusion. *E.g.*, Nelson, *supra* note 82, at 396 (citing Gordon for the proposition that “starting in 1350” Parliament expanded definition of “natural born” to include “babies born of British citizens abroad”); Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 *YALE L.J.* 881, 888 n.35 (1988) (citing Gordon and asserting that “British statutes have provided for [acquisition of citizenship at birth by children born abroad to] British subjects since the 14th century”); Yinger, *supra* note 80, at n.38 (relying on Gordon for statement that “1677 law says that ‘natural born’ citizens include people born overseas to British citizens”).

160. See *A Statute for Those Who Are Born in Parts Beyond Sea*, 1350, 25 *Edw.* 3, stat. 1, reprinted in 1 *STATUTES OF THE REALM* 310 (1801).

161. See *An Act for the Naturalizing of Children of His Majestyes English Subjects Borne in Forreigne Countryes Dureing the Late Troubles*, 1677, 29 *Car.* 2, c. 6, § 1 (Eng.).

162. See *supra* notes 42, 44, and 58–60 and accompanying text (discussing the impact these statutes had on naturalization and the continuing requirement for children to go through the process of making oaths).

163. See *supra* notes 67–73 and accompanying text.

164. Gordon, *supra* note 17, at 7 n.46.

liegeance” could not inherit from that Englishman.<sup>165</sup> The second cited source,<sup>166</sup> Sir William Blackstone, interpreted the 1350 statute as allowing “children born abroad” to “inherit.”<sup>167</sup> As to the 1677 statute, he noted that it “became necessary” because the common law was “absolute”: children born abroad to those English subjects who had fled “during the late troubles” were aliens.<sup>168</sup> The third jurist Gordon relies upon,<sup>169</sup> Sir Alexander Cockburn, declared in 1869 that the 1350 law referred only to “children *inheritors*.”<sup>170</sup> Otherwise, he reasoned, “the subsequent legislation on this subject would have been wholly unnecessary.”<sup>171</sup> The final authority Gordon cites,<sup>172</sup> Oxford professor Albert Venn Dicey, proclaimed the same in 1896: “The principle of the common law is that a person born beyond the limits of the British dominions does not at his birth owe allegiance to the Crown, and cannot therefore be a natural-born British subject.”<sup>173</sup> He added that this principle was not “relaxed” until the eighteenth century.<sup>174</sup>

Had Gordon’s mischaracterization occurred in a musty piece of scholarship dissecting an obscure archaic principle, it might not have been cause for concern. However, this error in interpretation is problematic because the common law concept is key to understanding the American constitutional provision. Unfortunately, he compounded this mistake by supporting his incorrect conclusions with the alleged intentions of the Constitution’s Framers:

The Framers certainly were aware of the long-settled British practice, reaffirmed in recent legislation in England . . . to grant full status of natural-born subjects to the children born overseas to British subjects. There was no warrant for supposing that the Framers wished to deal less generously with their own children.<sup>175</sup>

Contrary to Gordon’s assertions, the “recent legislation in England” created the practice; it did not “reaffirm[ ]” it.<sup>176</sup> This mistake jeopardizes any attempt to understand the Clause. Here, Gordon not only described the law incorrectly, but also “suppose[ed]” what the Framers did or did not “wish[.]”<sup>177</sup> Looking

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165. COKE, *INSTITUTES OF ENGLAND*, *supra* note 21, at § 8a.

166. Gordon, *supra* note 17, at 7 n.47.

167. BLACKSTONE, *supra* note 18, at 361.

168. *Id.*

169. Gordon, *supra* note 17, at 7 n.48.

170. COCKBURN, *supra* note 20, at 9.

171. *Id.*

172. Gordon, *supra* note 17, at 7 n.49.

173. A.V. DICEY, *A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS* 178 (London, Stevens & Sons, Ltd. 1896).

174. *Id.* at 178 & n.1.

175. Gordon, *supra* note 17, at 7–8 (footnotes omitted).

176. *Id.* at 7.

177. *Id.* at 8.

to the actual statements of early American jurists provides better guidance. After all, their comments are available.

Yet Gordon's kind of guesswork, filled with "maybe" and "perhaps," dominates purported "scholarship" in this field. For example, one author declares, without citing any authority whatsoever, that "the Founding Fathers used the term 'natural born' as an expansive definition of citizenship, that is, as a way to make certain that people born overseas to American citizens would have the full rights of other American citizens."<sup>178</sup> Another source, relying solely on Gordon's article, avers that "[o]ne can *presume only* that Jay and the delegates meant to apply the evolved, broader common law meaning of the term when they included it in the presidential qualifications clause."<sup>179</sup> Another source lacking any cited authority claims that the eighteenth-century British statutes "*undoubtedly* informed the Framers' understanding of the Natural Born Citizen Clause."<sup>180</sup> However, the Framers' own words directly contradict each of these undocumented theories.

### *B. Modern Scholarly Interpretations of Early American Understandings*

#### *1. The Common Law*

As this Article demonstrates, the evidence points to only one conclusion: the Framers constitutionalized the common law notion of "natural born"—not the notion expanded upon by the English naturalization statutes—into Article II. Nonetheless, most commentators currently addressing this question contend that the Framers adopted a broader view. These authors posit that children born abroad to American parents satisfy the constitutional requirement.<sup>181</sup> In addition to relying on a mistaken understanding of the English statutes, current American pundits suggest a few other creative arguments to support their view. However, none can be substantiated.

First, numerous scholars who claim that the Framers adopted an expansive view of "natural born" use the example of John Jay's children.<sup>182</sup> Jay, of course, was the man who suggested to George Washington that the Commander-in-Chief should be a natural born citizen.<sup>183</sup> In the words of one modern jurist, "[c]ertainly Jay did not mean to bar his own children, born in

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178. Yinger, *supra* note 80.

179. Nelson, *supra* note 82, at 396 (emphasis added).

180. Laurence H. Tribe & Theodore B. Olson, Opinion Letter, *Presidents and Citizenship*, 2 J. LAW 509, 510 (2008).

181. See, e.g., JACK MASKELL, CONG. RESEARCH SERV., R42097, QUALIFICATIONS FOR PRESIDENT AND THE "NATURAL-BORN" CITIZENSHIP ELIGIBILITY REQUIREMENT 18–20 (2011), available at [www.fas.org/sgp/crs/misc/R42097.pdf](http://www.fas.org/sgp/crs/misc/R42097.pdf); Gordon, *supra* note 17, at 18; Christina S. Lohman, *Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause*, 36 GONZ. L. REV. 349, 369 (2000); Nelson, *supra* note 82, at 396.

182. See, e.g., Nelson, *supra* note 82, at 396.

183. Gordon, *supra* note 17, at 5.

Spain and France while he was on diplomatic assignments, from legal eligibility to the presidency.”<sup>184</sup> However, this reasoning does not withstand scrutiny. Assuming *arguendo* that Jay had presidential aspirations for his children, the common law was no bar to them. Children born to those on diplomatic missions abroad were natural born citizens.<sup>185</sup>

Another attempt to establish the broader interpretation points to a different presidential requirement for support: the candidate must have lived in the United States for a minimum of fourteen years.<sup>186</sup> The writer, Gordon, speculates that “[i]f the Framers were speaking only of the native-born, this limitation would hardly have been necessary.”<sup>187</sup> This conclusion ignores the alternative explanation that everyone born in the United States is a natural born citizen, even those children whose parents are only here temporarily. The residency requirement ensures that such children could not become candidates for the American presidency as adults after being raised in a different country.<sup>188</sup> Without considering this rationale, the commentator opines, “[The residency requirement] *seems* consistent with a *supposition* that the ‘natural-born’ qualification was intended to include those who had acquired United States citizenship at birth abroad.”<sup>189</sup> In short, the author rejects an explanation completely in accord with the understanding expressly stated by the Framers in favor of a hypothetical explanation that “seem[ingly]” backs up his own “supposition,”<sup>190</sup> without offering a shred of evidence.

A third approach includes an author who attempts to establish that the Constitution incorporates the broader view of “natural born.” The writer correctly notes that it was “common in the states after independence, upon the adoption of their constitutions and statutes, to incorporate both the common law of England, as well as the *statutory* laws adopted by Parliament and

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184. Nelson, *supra* note 82, at 396; *accord, e.g.*, MASKELL, *supra* note 181, at 19–20; Gordon, *supra* note 17, at 8 n.55; Yinger, *supra* note 80.

185. According to Chancellor Kent, “the children of [American] public ministers abroad” were natural born citizens of the United States. KENT (1st ed.), *supra* note 99, at 43.

186. U.S. CONST. art. II, § 1, cl. 5.

187. Gordon, *supra* note 17, at 3.

188. The requirement is not limited to such children, of course. American parents may move abroad with their children as well. Moreover, there was some question about whether Herbert Hoover met the fourteen-year residency requirement. J. Michael Medina, *The Presidential Qualification Clause in this Bicentennial Year: The Need to Eliminate the Natural Born Citizen Requirement*, 12 OKLA. CITY U. L. REV. 253, 257 n.15 (1987). He was born and raised in the United States, but moved abroad as an adult, living in Australia, Belgium, and China. *Herbert Clark Hoover: A Biographical Sketch*, HERBERT HOOVER PRESIDENTIAL LIBR. & MUSEUM, <http://hoover.archives.gov/education/hooverbio.html> (last visited Nov. 24, 2014). Thus, he had only been back in the United States for about eleven years when he was elected President in 1928. *See id.* Of course, he had lived twenty-three years in the United States before his time overseas. *See id.*

189. Gordon, *supra* note 17, at 3 (emphasis added).

190. *Id.*

applicable in the colonies up until a particular date.”<sup>191</sup> These state laws are known as “reception statutes.”<sup>192</sup> Directly following this accurate assertion, the author incorrectly implies that the federal government also adopted a modified version of the common law:

There is thus *some* argument and indication that it was common for a “modified” English common law—modified by long-standing provisions of English statutory law applicable in the colonies—to be among the traditions and bodies of law incorporated into the laws, applications, usages, and interpretations in the beginning of our nation.<sup>193</sup>

The commentator, citing the Gordon article,<sup>194</sup> predictably makes the same mistake. Like Gordon, the writer concludes that the broad view of the term “natural born” was long-standing in England.<sup>195</sup> However, more importantly, the author fails to mention that Congress did not enact a reception statute. Therefore, that the states adopted some English statutes is irrelevant when discussing the meaning of the Constitution.

Several authors claim the language of the Clause is confusing. They suggest that perhaps the Framers did not adopt the common law meaning of the phrase or that the original meaning is unknowable. For example, one states that “[t]he notion of a ‘natural born citizen’ was likely a term of art derived from the idea of a ‘natural born subject’ in English law . . . . But the Constitution speaks of ‘citizens’ and not ‘subjects,’ introducing uncertainties and ambiguities . . . .”<sup>196</sup> As discussed above, however, early Americans considered the two terms to be analogous.

Other pundits speculate that “natural born” is not synonymous with “native born.”<sup>197</sup> Natives are those individuals born within the country’s borders, and therefore, use of the term “natural” instead indicates to these authors that the Framers must have meant something different. With no evidence, these writers assume the phrase includes children born abroad to American citizens.<sup>198</sup> Of course, myriad statements by early American jurists use the terms “natural born” and “native born” interchangeably.<sup>199</sup> In fact, Chancellor Kent defined “natives” as “what the common law terms natural-born subjects.”<sup>200</sup>

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191. MASKELL, *supra* note 181, at 16.

192. Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 5 (1966) (defining “reception” statute and providing a state law example).

193. MASKELL, *supra* note 181, at 16 (emphasis added).

194. *Id.* at 16 nn.72–74.

195. *Id.* at 16; *see supra* notes 153–57 and accompanying text.

196. Solum, *supra* note 7, at 30.

197. *E.g.*, MASKELL, *supra* note 181, at 20 (finding “natural born” to be more inclusive); Yinger, *supra* note 80 (looking to the dictionary definition of each term).

198. Yinger, *supra* note 80 (distinguishing between “natural born” and “naturalized”).

199. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 575 (1871) (statement of Sen. Trumbull) (noting the Constitution requires that the President “be a native-born citizen”); CONG. GLOBE,

## 2. The 1790 Statute

Because the first American naturalization statute provided that children born abroad to U.S. citizens shall be “considered as natural born citizens,”<sup>201</sup> many modern commentators believe it is evidence of *something*, although they disagree as to what.<sup>202</sup> These authors note that, as the Supreme Court stated, an act “passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.”<sup>203</sup> However, this Congress was not infallible; it was the very same body that drafted the statute declared unconstitutional in *Marbury v. Madison*.<sup>204</sup>

Startlingly, two modern authors argue that Congress possesses the inherent power to alter the meaning of the Constitution by statute. They posit that the 1790 Act changed the definition of “natural born citizen”: “[The constitutional phrase now] would appear to include those born abroad of U.S. citizens . . . as adopted by Congress by statute.”<sup>205</sup> However, these writers contend that the 1790 provision was not a naturalization law that offered citizenship rights to aliens.<sup>206</sup> Instead, they say, “the provision under discussion purports to recognize a certain category of persons as citizens from and because of *birth*.”<sup>207</sup> In their view, Congress did not use its Article I power to enact “an uniform rule of naturalization.” Nonetheless, these authors argue that the law was constitutional under “the proposition that, as the legislative body of a

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

200. KENT (3d ed.), *supra* note 91, at 258 n.d.

201. An Act to Establish an Uniform Rule of Naturalization, 1790, ch. 3, 1 Stat. 103, 103–04.

202. See, e.g., MASKELL, *supra* note 181, at 20–21 (suggesting the Framers’ intent to make a broad definition of “natural born”); Gordon, *supra* note 17, at 8 (declaring that the 1790 Act created three ways for individuals to become U.S. citizens: birthright, birthright to naturalized citizens, and naturalization); Lohman, *supra* note 181, at 370 (finding that the Act could not alter the Constitution and merely incorporated the children of foreign nations into “natural born” citizens); Pryor, *supra* note 159, at 894–95 (positing that this phrase was indicative of the Framers extending the power of naturalization to those born abroad).

203. *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888).

204. 5 U.S. (1 Cranch) 137, 138 (1803) (holding portion of Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80, unconstitutional).

205. E.g., MASKELL, *supra* note 181, at 21 (referring to EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1984*, at 38–39 (Randall W. Bland et al. eds., 5th rev. ed. 1984)).

206. E.g., *id.* at 21 (quoting CORWIN, *supra* note 205, at 39).

207. CORWIN, *supra* note 205, at 39.

nation sovereign at international law, Congress is entitled to determine who shall and who shall not be admitted to the body politic.”<sup>208</sup>

Not surprisingly, the support for this theory is virtually nonexistent. The author of the later piece only cites the earlier piece.<sup>209</sup> The author of the earlier piece relies heavily on a 1915 Supreme Court holding that an American woman’s marriage to an immigrant caused her expatriation.<sup>210</sup> The Court reasoned that the power to expatriate is “implied, necessary or incidental to the expressed power[ ]” to naturalize.<sup>211</sup> However, the idea that the concept of naturalization inherently encompasses expatriation differs greatly from the assertion that Congress may amend a different article of the Constitution by statute. A bedrock principle of our constitutional system holds that Congress cannot make such an alteration. Moreover, this theory about the meaning and effect of the 1790 statute disregards the original understanding that the Act simply provided for naturalization of alien children born abroad to U.S. citizens.

Alternatively, two commentators attempt to avoid suggesting that Congress can amend the Constitution. Rather, they urge that the language of the 1790 statute demonstrates that “the Founding Fathers, who dominated this Congress, believed that the right to define ‘natural born’ was conferred by the ‘naturalization’ clause.”<sup>212</sup> However, these authors only present the pedigree of the Congress and the fact that “natural” is the root word of “naturalization” to support their theory that “Congress nearly contemporaneous with the adoption of the clause believed it had the power to define ‘*natural* born citizen’ under its *naturalization* powers.”<sup>213</sup> One of the authors does admit that “the link between ‘natural born’ and ‘naturalization’ was never made explicit by the Founding Fathers, and the term ‘natural born’ does not appear in any

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208. *Id.*

209. MASKELL, *supra* note 181, at 21 n.97 (citing and quoting only CORWIN, *supra* note 205, at 38–39).

210. CORWIN, *supra* note 205, at 39 & n.6 (citing *Mackenzie v. Hare*, 239 U.S. 299, 307–12 (1915) (upholding An Act in Reference to the Expatriation of Citizens and Their Protection Abroad, c. 2534, § 3, 34 Stat. 1228, 1228–29 (1907) (declaring that a woman assumes the nationality of her husband upon marriage))).

211. *Mackenzie*, 239 U.S. at 311. The Court added that “[a]s a government, the United States is invested with all the attributes of sovereignty.” *Id.* The case, however, required no inquiry into just what those attributes are, *id.*, and so it is a stretch to push this dicta into the very broad power Corwin and Maskell both claim for Congress. Moreover, as the Court noted, the power to expatriate existed long before 1915. *Id.* at 308–09. In fact, one of the earliest Congresses had recognized the connection between naturalization and expatriation. On Tuesday, December 30, 1794, the House of Representatives debated a provision that would have expatriated any American who became a citizen or subject of another country. 4 ANNALS OF CONG., *supra* note 129, at 1028–30. After a discussion of the wisdom of the policy, but expressing no concern about its constitutionality, the amendment was negated. *Id.* at 1030.

212. Yinger, *supra* note 80; accord Pryor, *supra* note 159, at 895 (positing that the 1790 Act was Congress’ exercise of its “*naturalization* powers”).

213. Pryor, *supra* note 159, at 895.

naturalization legislation passed since 1790.”<sup>214</sup> Nonetheless, he maintains his conclusion.

Unsurprisingly, these authors present scant evidence to bolster their claims. Congress had no need to define the term “natural born” in 1790 because its meaning was already well established. Natural born citizens were natives; naturalization was for aliens.<sup>215</sup> The authors may actually mean that Congress could change the Article II limitation by exercising the Article I power and “defining” the phrase. If so, this proposition also fails because, as discussed above, Congress cannot amend the Constitution by statute.

Finally, one pair of lawyers recognizes that “[c]learly, the First Congress could not statutorily alter the Constitution.”<sup>216</sup> These commentators, Gordon and Christina Lohman, instead suggest that the 1790 statute was declaratory of the law. Gordon explains that the statute “was enacted to remove any doubt that status as a natural born citizen was acquired by a child born abroad to American citizen parents.”<sup>217</sup> Lohman posits that the Act merely “interpret[ed] the Constitution.”<sup>218</sup> This conclusion contradicts commentary by early American jurists, so the authority these authors cite provides weak support. Lohman relies solely on Gordon’s work for support.<sup>219</sup> Gordon relies on a dissenting Supreme Court opinion and two New York state decisions.<sup>220</sup>

In the Supreme Court dissent, Justice Fuller disregarded centuries of common law jurisprudence and used a strained reading of the Fourteenth Amendment to conclude that a man born to Chinese parents in the United States could not be a natural born citizen.<sup>221</sup> He was joined by only one other justice,<sup>222</sup> while the remainder of the Court rejected his reasoning.<sup>223</sup> Following the common law, the majority held that the nationality of the man’s

214. Yinger, *supra* note 80.

215. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 598 (1866) (statement of Sen. Davis) (“[T]he naturalization laws apply to foreigners alone. . . . Congress has no power . . . to naturalize a citizen.”).

216. Lohman, *supra* note 181, at 371. See also Gordon, *supra* note 17, at 9 (noting that a different interpretation “might still leave open the question of whether Congress can enlarge or modify the categories of eligible citizens encompassed within the presidential qualification clause”).

217. Gordon, *supra* note 17, at 9.

218. Lohman, *supra* note 181, at 371.

219. *Id.* at 370–72 (relying solely on Gordon, *supra* note 17, at 4, 8–11, and David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 776–865 (1994), for the proposition that the first Congress continued the work of the Constitutional Convention, “consciously aware that their power was constitutionally limited”).

220. *Ludlum v. Ludlum*, 26 N.Y. 356 (1863); *Lynch v. Clarke*, 1 Sand. C. 583, 660 (N.Y. 1844); Gordon, *supra* note 17, at 9 n.69 (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 714 (1898) (Fuller, C.J., dissenting)).

221. *Wong Kim Ark*, 169 U.S. at 732 (Fuller, C.J., dissenting).

222. See *id.* at 705 (Fuller, C.J., dissenting) (including Justice Harlan in his dissent).

223. *Id.* at 655–94 (setting out the law of citizenship at common law and in the United States from the time of the founding until the Fourteenth Amendment).



parents did not matter and that his birth on American soil made him a natural born citizen.<sup>224</sup> The dissent can be rejected out of hand; it is certainly not authoritative on the meaning of early American law.

The two New York opinions declared that, starting in 1350, children born abroad to English parents were natural born citizens.<sup>225</sup> To reach this conclusion, the cases relied heavily on two questionable English sources.<sup>226</sup> First, the state courts cited dicta that failed to support the courts' assertions.<sup>227</sup> Second, the courts used a note that discussed a case decided hundreds of years before.<sup>228</sup> Unfortunately, that note was based on mistaken facts.<sup>229</sup> Moreover, the view expressed by the New York courts is simply inconsistent with the hundreds of naturalizations of such children in the centuries after 1350.<sup>230</sup> Therefore, these cases fall short when compared to the great weight, and the better reasoning of, other authority on the subject.<sup>231</sup>

#### IV. CONCLUSION

The introduction to this Article posed a question: "in the eyes of early Americans, would someone born in a foreign country of American parents be a 'natural born citizen' and therefore eligible to be President of the United States?" The pertinent historical materials lead to only one conclusion: aside from children born to U.S. ambassadors or soldiers in hostile armies, the answer is "no."

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224. *Id.* at 705.

225. *Ludlum*, 26 N.Y. at 366; *Lynch*, 1 Sand. Ch. at 660.

226. *Ludlum*, 26 N.Y. at 362, 366; *Lynch*, 1 Sand. Ch. at 660.

227. Y.B. 1 Rich. 3, fol. 4a, Mich., pl. 7 (1483) (Eng.), reprinted in 11 SELDEN SOC'Y 4 (2007) (suggesting in dicta that the English common law and the 1350 statute were declaratory but not discussing whether alien children became subjects). See also BLACKSTONE, *supra* note 18, at 361–62 (pointing out the need for subsequent naturalization statutes in addition to the common law).

228. See *Wong Kim Ark*, 169 U.S. at 669–70.

229. *Id.*

230. See *infra* App.

231. The Vice Chancellor, who wrote one of the New York opinions, referred to comments supposedly made by "Ch. J. Tindal" and "Parke, Justice" in the case of "Doe dem. Thomas v. Ackland." *Lynch*, 1 Sand. Ch. at 660. However, he may never have read the English source because the party was Acklam, not Ackland. *Doe v. Acklam*, 1824, 107 Eng. Rep. 572 (K.B.) 572, 2 B&C 778. Moreover, Tindal and Parke were attorneys for the plaintiff and defendant, respectively. *Id.* at 574, 577.

## APPENDIX

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

## Part I: 1509–1603

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

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

1563	Peter Browne, son of Thomas Browne, citizen and ironmonger of London, and Gertrude, his wife, daughter of Cornelius Vanderdelf of Brabant	33
	Sebastian, James, Elizabeth, and Clare Harvyne, children of James Harvyne, citizen and ironmonger of London, and Anne, his wife, daughter of Sebastian Ghens of Antwerp	119–20
	Joyce and William Mason, children of William Mason, late citizen and mercer of London, and Josyn, his wife, daughter of John de Fisher of Brabant	165
	Gilbert, Susan, Richard, and Gabryel Saltonstall, children of Richard Saltonstall, citizen and skinner of London, and Susanne, his wife, daughter of Thomas Poyntz, gentleman	214
	Thomas Wheler, son of Nicholas Wheler, citizen and draper of London, and Margaret, his wife, daughter of Rutkyn Vourighe of Germany	252
1566	John Stafford, born in Geneva, son of the late Sir William Stafford and Lady Dorothy Stafford, daughter of Sir Henry Stafford, late Lord Stafford, William and Dorothy having fled to Geneva in the time of Queen Mary	224
1571	Peregrine Bertye, born in Duchy of Cleves, son of Richard Bertye and Lady Katherine, Duchess of Suffolk, his wife	22
1576	Susan and Sarah Alden, daughters of John Alden, grocer of London, and Barbara, his wife, daughter of Jaques du Prier	3
	Margery and Thomasyn Baker, daughters of John Baker, merchant of Ipswich, and Willemynkin, his wife, daughter of Jasper de Haes of Brabant	12
	William, John, and Elizabeth Barker, children of John Barker, merchant of Kingston upon Hull, and Barbara, his wife, daughter of John Johnson of Antwerp	14
	Joseph Caunte, born beyond the seas, son of Edward Caunte, fishmonger of London, and Margaret, his wife, both English	44
	Magdalin, Elizabeth, and Katerine Dodd, daughters of Philip Dodd, haberdasher of London, and Elizabeth, daughter of John Van Howte of Antwerp	80

	Samuel Graye, born in parts beyond the seas, son of John Graye, girdler of London, and Julyan, his wife, both English	110
	Anne Harvy, born in Brabant, daughter of James Harvy, alderman and ironmonger of London, and Anne, his wife, daughter of Sebastian Ghentz of Antwerp	119
	Peter, James, Thomas, Melchior, and Katherine Harvie, children of James Harvie, ironmonger of London, and Barbara, daughter of Peter Charles of Antwerp	119
	Nathaniel Kelke, born beyond the seas, son of John Kelke, merchant of London, and Elizabeth, his wife, both English	140
	Barbara, Symond, and Margaret, children of Robert Kingsland, merchant, and Barbara, his wife, daughter of Willeberte Vann Romer of Antwerp	142
	Jane and Susan Knightley, daughters of George Knightley, leather seller of London, and Agnes, his wife, daughter of John Pieterse and Joan, his wife, of Zealand	142
	William and Katherine Massam, children of William Massam, grocer of London, and Gartred, his wife, daughter of Christofher van Eyndhaven of Antwerp	165
	Anne Nedeham, daughter of George Nedeham, merchant of London, and Clara, his wife, daughter of Martin Croyte of Antwerp	178
	Adrian, Jasper, Daniel, Lucretia, Maria, Anna, and Susanna Poignes, children of Robert Poignes, grocer of London, and Agneta, his wife, daughter of Jasper Crate of Zealand	194
	Mary, Anne, and Susan Poignes, daughters of Fernando Poignes, grocer of London, and Elizabeth, his wife, daughter of Croyne Johnson of Zealand	194
	Randall, Henry, and Samuel Starkye, born in Zealand, sons of Randall Starkye, merchant tailor of London, and Cornelia Oliver, daughter of Bartholomey Oliver and Jane, his wife, of Zealand	225

	Fredinando, Thomas, Francis, Alexander, Arthur, Philip, Katherine, Elizabeth, and Margaret Staynton, children of Thomas Staynton, mercer of London, and Petronilla, his wife, daughter of Arthur van Scott of Antwerp	225
	John, Thomas, William, Magdalyn, and James Taylor, children of John Taylor, mercer of London, and Elizabeth, his wife, daughter of Martin de Hilt of Antwerp	230
	Walter Taylor, son of John Taylor, merchant of London, and Cornelia, his wife, daughter of Seger Vierlyn of Antwerp	230
	William Walker, son of Thomas Walker, officer of the Company of Merchant Adventurers of England, and Anne, daughter of Leonarde Talbon of Flanders	249
	Gerson Whetenhall, born in Germany, son of Thomas Whetenhall of Kent and Dorothy, his wife, who in the time of Queen Mary fled England to enjoy freedom of conscience	252
1581	John Barthelmewe, born in parts beyond the seas, son of John Barthelmewe, late mercer of London, and Joyce, his wife, both English	15
	Bartilmew, Katherine, and Michael Beeston, born in Antwerp, and Richard Beeston, born in Hamburg, children of Richard Beeston, merchant of Southampton, and Mary, his wife, daughter of Sampson Caciopyne of the Hague	19
	Walter and Susan Coppinger, born in Antwerp, children of Walter Coppinger, mercer, and Elizabeth, daughter of Cornelius Van Bright, of Antwerp	53
	James, Richard, Fraunces, Mary, Margaret, Abigall, and Gertrude Holmes, born at Hamborough, children of James Holmes, merchant, and Gertrude, daughter of Bonyface Lowther of Antwerp	125
	Thomas, Harman, Giles, John, Richard, and Katherine Hughes, born in Hamburg, children of John Hughes of London and Elizabeth, daughter of John Bylf of Gulicke	127

	Adrian and Robert Moore, born in Antwerp, and Henry and Katherine Moore, born in Hamborough, children of Robert Moore, merchant of Southampton, and Katherine, his wife, daughter of Wincelowe Coberger of Antwerp	172
	William Watson, born at Dansk, son of Roger Watson, draper, and Margaret, daughter of Humfrey Carr of Newcastle upon Tyne	250
1592	Peregrine Wingfield, born in the Low Countries, son of Sir John Wingfield, and Dame Susan, Countess of Kent, his wife	255
1593	William Crumpe, born in Antwerp, son of William Crumpe, mercer of London, and Elizabeth, his wife, her Majesty's subjects	58
	Elizabeth Knolles, born in the Low Countries, daughter of Sir Thomas Knolles, a natural born Englishman, and Odilia, his wife	142
	William Lytleton, born in the Low Countries, son of Fraunces Lytleton, a true Englishman and Captain under Sir William Russell, and Mary, his wife	159
	Samuel Saltonstall, born beyond the seas, son of Richard Saltonstall, citizen and alderman of London, and Susan, his wife, daughter of Thomas Poyntz, her Majesty's faithful subject	214
	Danyel Scaliatt, born at Antwerp, son of Mark Scaliatt, born in London, and Joice Paschier, his wife	216
	Elizabeth and John Shepperd, children of Richard Shepperd, citizen and grocer of London, and Sara, his wife, daughter of Hanns Vander Hide of Hamborough	219
	William Sidney, born in Zealand, son of Sir Robert Sidney, born in Kent, and Dame Barbara, his wife, born in Wales	221
	Jane Sturtevant, born in Holland, daughter of Fraunces Sturtevant, grocer of London, and Phillipp [sic], daughter of Richard Rogers of Holland	227
1597	John and William Heather, born in Holland, sons of Richard Heather, merchant adventurer of London, and I.,	121

	daughter of Harke Peterson of Amsterdam	
	Ottowell Hill, born in Antwerp, son of Richard Hill, merchant of London, and Elizabeth, his wife, daughter of Sir William Locke, citizen of London	124
	William Lewkenor, born in Antwerp, son of Lewis Lewkenor, esquire to the Queen's body, and B., daughter of Joyce de Rottes of Antwerp	154
	George Sheppey, born in Antwerp, son of George Sheppey, a damasker of London, and Mary, his wife, daughter of Jobb Josse of Antwerp	219
	Helen Waters, born in parts beyond the seas in the time of Queen Mary, daughter of John Waters and Gertrude, his wife, late of Great Yarmouth	250
1601	Thomas Moxsen, born in Antwerp, son of William Moxsen, late merchant and adventurer of Yorkshire, and Maudlyn, his wife	176

## Part II: 1603–1700

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

<u>Year</u>	<u>Children Naturalized by Parliament</u>	<u>Page</u>
1604	Margaret, Countess of Nottingham, born in Scotland, wife of Charles, Earl of Nottingham, and all her children, wherever she was or they shall be born	2
	John Gordon, born in Scotland, grandson of George Gordon, Earl of Huntley	4

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



1628	Isaac (age 15), Henry (age 14), Thomas (age 12), and Barnard (age 11) Asteley, born in Holland, children of Sir Jacob Asteley, one of the younger sons of Isaac Asteley, late of Norfolk, and Dame Agneta, his wife, born in Holland	40
	Samuel Powell (age 4), born in Hamburg, son of John Powell, merchant of London, born in Shropshire, and Jane, his wife, daughter of Thomas Dockwra of Hertfordshire	40
	John (age 16) and Anne (age 12) Trumball, born in Brussels, children of William Trumball, one of the clerks of your Majesty's Privy Council, and Deborah, his wife, an Englishwoman; William (age 18), Edward (age 16), and Sidney (age 14) Bere, born in Zealand, children of John Bere, born in Kent, and Elizabeth, his wife, daughter of Peter Warburton of Chester; and Samuella Wentworth (age 8), born in Calais, son of William Wentworth, merchant of Kent, and his wife, an Englishwoman	40
	John, Marie, Anne, Elizabeth, and Margaret Aldersey, born in Germany, children of Samuella Aldersey of London and Marie, his late wife, daughter of Phillip Vanoyrle of Germany	41
	James Freese (age 25), born in Russia, son of John Freese, an Englishman	41
1641	Dorothy Spencer, daughter of Lord Spencer of Whormeighton	60
1657	Sarah Crewes, born in Rotterdam, daughter of Mathew Crewes, late of Norfolk, and Elizabeth, his wife, to be added to this bill	73

1660	Frances and James Hyde, born in the Netherlands and Belgium respectively, children of the Right Hon. Edward Lord Hyde; Charles, Charlotte, and Isabella Gerrard, born in Paris, children of the Right Hon. Charles Lord Gerrard of Brandon; Symon Fanshaw, born in Brittany, son of Sir Thomas Fanshawe of Hertfordshire; Richard and John Hamilton, born in Normandy, children of Sir George Hamilton; Edward and Ann Bedell, born in Gilderland, children of William Bedell, late of Huntingdonshire; Thomas Crispe, born in the Netherlands, son of Thomas Crispe of Kent; and Symon Clerke, born in Flanders, son of Peter Clerke of Warwickshire	75–77
	Lawrence Blancart, born in Calais, son of Lawrence Blancart, late of Kent; William Hanmer, born in France, son of Sir Thomas Hanmer of Flintshire; Elias Brooke, born in Zealand, son of English parents; and Constant, Nathaniell, Joshua, and Giles Sylvester and Mary Cartwright, born in Amsterdam, children of Giles Sylvester and Mary, his wife, English parents	78–79
1661	Francis Brudenell and Anna Maria, Countess of Shrewsbury, born in France, children of the Right Hon. Robert Lord Brudenell	80
1662	John Scase, born in Amsterdam, son of Edward Scase of Suffolk and Miriam, his wife, born in Hampshire; Mathew Boucheret, born in France, son of Gedeon Boucheret of Sussex and Jane, his wife; Bartholomew Lane, born in France, son of Samuell Lane, born in London, and Susan, his wife; Charles Hales, born in Antwerp, third son of Sir Edward Hales of Kent; William Northey, an infant, born in Holland, son of William Northey of London; and John, Richard, and Thomas Hebdon, born in Russia, sons of John Hebdon, a natural Englishman	81–82
1664	Daniell van Peene, born in Zealand, son of Jacob van Peene, an Englishman; and Robert Hall, born in The Hague, son of Robert Hall of Kent and Elizabeth, his wife	94–95
1696	Dorothy Gee (age 7), born in Holland, son of William Gee of York and Elizabeth, his wife	239
1698	Dudley Vesey (under age 14), born in Rouen, son of Charles Vesey of Suffolk and Frances, his wife	251

	Charles May, born out of your Majesty's allegiance, of English parents	251
1699	Francis Best, born in Switzerland, son of Henry Best and Mary, his wife, English parents	263

## Part III: 1701–1800

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

<u>Year</u>	<u>Children Naturalized by Parliament</u>	<u>Page</u>
1701	Archibald Arthur, born out of the king's allegiance, of English parents	1
	Charlotte Boscawen, born in Paris, daughter of Charles Godfrey, Esq., and Arabella, his wife	11
1705	William Burnet (under age 21), born in The Hague, son of Gilbert Lord Bishop of Salisbury and Mary Scott, his wife	45
1706	Mary Elizabeth Braithwait, born in Holland, daughter of Sir Roger Manley and Mary Catherine, his wife; and Jane Jeffreys, born in Sweden, daughter of Sir James Jeffreys, by Anna, his wife	47
	Paul, Frances, and Catherine Risley, born in Holland, children of Capt. Henry Risley, late of Buckinghamshire, and Elizabeth Duncombe, his wife	48
1708	Katherine Clerke, born in Paris, daughter of Sir William Clerke, late of Buckinghamshire, and Dame Katherine, his wife, born in Paris	61

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

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