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THE “IRISH BORN” ONE AMERICAN CITIZENSHIP AMENDMENT

KEVIN C. WALSH*



“To be appointed to a place may be a matter of indifference. To be incapable of being appointed, is a circumstance grating, and mortifying.”¹

- Foreign-Born American Founder James Wilson

PROPOSED AMENDMENT

“That article two, section one, clause five, be amended so as to read:

‘No person except a Citizen of the United States shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a resident within the United States.’”

OR

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

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1. MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION 237 (1911).

INTRODUCTION

Our Constitution has a deferred maintenance problem because we have fallen out of the habit of tending to its upkeep ourselves. The silver lining is a double benefit from any constitutional maintenance projects that we undertake now. These projects are good not only for what they do to our Constitution, but also for making us exercise self-government muscles that have atrophied from civic sloth.

Fortunately, the time has never been better to repeal one of our Constitution's most pointlessly exclusionary provisions. The President of the United States is married to a naturalized citizen. And nobody can legitimately question the patriotism of the First Lady of the United States, Melania Trump. She flies on Air Force One with the President and represents our country both at home and abroad. As an American citizen, she is as much an American as the President himself. This fortuitous circumstance is just one reason it might be possible to eliminate what the Supreme Court has identified as the only legal difference between naturalized and natural born citizens—eligibility for the presidency.²

In a video address presented to newly naturalized citizens in West Virginia, President Trump told the brand-new American citizens present that, “No matter where you came from, what faith you practice, this is now your country. There is no higher honor, no greater responsibility. All Americans are now your brothers and sisters. You share one American heart, one American destiny.”³ President Trump was spot-on right, but for one point: “Unless,” he might have added, “you want to run for President of the United States.”

Article II, Section 1, Clause 5 of the Constitution limits eligibility for the office of President to “natural born Citizens.”⁴ This Natural Born Citizen Clause imposes an eligibility requirement for the presidency alone. The Twelfth Amendment extends the natural born citizen requirement to the vice presidency by piggybacking on the presidential eligibility requirements.⁵ But none of the other offices in

2. See *Luria v. United States*, 231 U.S. 9, 22 (1913) (“Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency.”).

3. Donald Trump, *Trump's Video Message to Newly Naturalized Citizens*, WHITE HOUSE, accessed via WASH. POST (Sept. 22, 2017), https://www.washingtonpost.com/video/politics/trumps-video-message-to-newly-sworn-in-us-citizens/2017/09/15/0d910122-9a1a-11e7-af6a-6555caeb8dc_video.html?utm_term=.66b339090650.

4. U.S. CONST. art. II, § 1, cl. 5.

5. U.S. CONST. amend. XII (“[N]o person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”).

the line of presidential succession has a natural born citizen requirement.

Naturalized citizens may serve as a Justice on the Supreme Court of the United States, in Congress, or in the President’s Cabinet, to name a few high federal positions.⁶ And many naturalized citizens have served in these capacities. This eligibility of naturalized citizens for federal offices other than President was a deliberate pro-immigrant break from English practice. The break was not complete, though, because the office of President presented a distinct worry in the early Republic. “[S]ome at the time feared that a scheming foreign earl or duke might cross the Atlantic with a huge retinue of loyalists and a boatload of European gold, and then try to bully or bribe his way into the presidency.”⁷ By virtue of his office, this foreigner would then hold the highest military command in the nation.

Even if that concern were well-founded then, it is not now. After all, despite fears of a foreign-born Commander in Chief in our fledgling nation, many naturalized citizens by now have held high military commands in the U.S. Armed Forces, and hundreds have earned the Congressional Medal of Honor.

The Natural Born Citizen Clause has long been anomalous in our constitutional order. There have been over thirty amendment proposals introduced in Congress to repeal Article II’s birth-based presidential eligibility requirement, including more than two dozen since 1960.⁸ The number and persistence of these proposals is unsurprising. It is un-American to discriminate against naturalized Americans the way the Natural Born Citizen Clause does.

The Clause also generates significant legal uncertainty, which imposes both economic and political costs on our presidential elections. Although the Natural Born Citizen Clause has a clear core that excludes naturalized citizens, the rest of its exclusionary reach is unclear because of longstanding unresolved questions about the legal

6. The only mention of “natural born Citizen” in the Constitution is in Article II’s presidential eligibility requirements. *See generally* U.S. CONST.

7. AKHIL AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 454 (2012).

8. *See, e.g.*, Thomas H. Lee, “*Natural Born Citizen*,” 67 *AM. U. L. REV.* 327, 328–29 (2017) (“[T]he U.S. Supreme Court has never decided what the words mean, and . . . intense prior scrutiny and scholarship has yielded no definitive answer to date.”); Lawrence Friedman, *An Idea Whose Time Has Come—The Curious History, Uncertain Effect, and Need for Amendment of the “Natural Born Citizen” Requirement for the Presidency*, 52 *ST. LOUIS U. L.J.* 137, 137–38, 137 n.7 (2007) (listing proposed amendments).

meaning of “natural born Citizen.”⁹ This uncertainty due to legal opacity is why disputes about the eligibility of various candidates regularly arise, and will continue to arise, in presidential election cycles.¹⁰ And because these disputes arise only in the context of specific candidates, the distorting forces of politics and ideology are at their maximum when election commissioners, courts, and voters find themselves confronted with the claim that a particular candidate is ineligible under this perplexing provision.

This essay proceeds in three parts. Part I reviews the primary reasons for the persistent appeal of an amendment to repeal the Natural Born Citizen Clause. This part does not go into much detail in examining the reasons for the failures of prior attempts. The simplest reasons are the most powerful: it is exceedingly difficult to amend the Constitution, and it is particularly hard to get enough people to care enough about something like the Natural Born Citizen Clause. Part II turns to why prospects for passage of a repeal amendment are more propitious now. Some of this has to do with the increasing salience of the Clause as more partisans become aware of its exclusion or potential exclusion of candidates from both major parties. But more has to do with the changing politics of immigration more generally. The political benefits for Republicans are relatively greater now than they have been in the past, while there would be no opposition at all from Democrats (as there has been in the past). Part III proposes a particular amendment to repeal the Natural Born Citizen Clause. This proposal is identical to the amendment first introduced in Congress in 1868 by Irish-born Representative William Erigena Robinson. The form and provenance of this proposal provide additional reasons for

9. See, e.g., Friedman, *supra* note 8, at 139 (“‘Natural born citizen’ is nowhere defined in the Constitution and does not appear to have been a term of art with a well-defined meaning under common law at the time the Constitution was adopted.”); Sarah Helene Duggin & Mary Beth Collins, ‘*Natural Born*’ in the USA: *The Striking Unfairness and Dangerous Ambiguity of the Constitution’s Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. REV. 53, 56 (2005) (listing questions about the legal meaning of “natural born Citizen” that “have proven intractably elusive throughout our nation’s history”); Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22, 22 (2008) (identifying paradigmatic cases of inclusion and exclusion while also contending that “[t]he enigmatic phrase ‘natural born citizen’ poses a series of problems for contemporary originalism”); Michael D. Ramsey, *The Original Meaning of ‘Natural Born’*, 20 U. PA. J. CONST. L. 199 (forthcoming 2018) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2712485 (asserting that the argument for the most likely original legal meaning of the Natural Born Citizen Clause “is complicated and not entirely free from doubt”).

10. See Derek T. Muller, “*Natural Born*” *Disputes in the 2016 Presidential Election*, 85 FORDHAM L. REV. 1097, 1112 (2016) (contending that the demonstrated lack of “an adequate procedural mechanism for reviewing the Natural Born Citizen Clause, particularly in instances where its understanding is a matter of dispute” counsels in favor of a repeal amendment).

the present generation of We the People to use a repeal of the Natural Born Citizen Clause to reclaim responsibility for our Constitution.

It takes strenuous effort and resolute political will to achieve amendment under Article V. The bad news is that the difficulty of the process prevents many beneficial changes from being made. But the good news is that any proposed amendment that can make it through the process must enjoy wide popular support. Especially in a time of deep partisan divisions, the pursuit of such an object is not only eligible in its own right but also because the process of undertaking the effort holds the promise of mending at least a small part of our civic fabric. And this is the right kind of constitutional change to make, one that brings our fundamental law into line with our fundamental commitments. In America, we do not have two classes of citizenship, just one. It is time to repeal the Natural Born Citizen Clause.

I. REASONS BEHIND PRIOR PROPOSALS

Three primary reasons have been at the foundation of the prior proposed amendments.¹¹ First, the Natural Born Citizen Clause is unjustifiably exclusionary. Second, its meaning is uncertain and this uncertainty imposes unnecessary economic and political costs. Third, amending the Constitution to include naturalized citizens among those eligible to be President is good politics. Let us consider each of these in a little more detail.

A. Unjustified Exclusion of Millions

The Natural Born Citizen Clause plainly excludes millions of naturalized American citizens who would otherwise be eligible for the presidency. This exclusion affects individuals across the political spectrum—Republicans such as Elaine Chao and Arnold Schwarzenegger, and Democrats such as Jennifer Granholm and Madeline Albright.

There is no good reason for this categorical exclusion. The Natural Born Citizen Clause was once thought to protect against foreign influence and guarantee personal allegiance. But natural born citizens

11. These reasons are in addition to the motivations of individual Congressmen and Senators specific to their time and place, such as the desire to help a particular potential candidate of their party who would otherwise be excluded' or to champion an unfairly treated immigrant group, for example.

can be influenced by foreign governments, and foreign-born citizens can have more allegiance than the natural born. Blanket birth-based exclusion is an extraordinarily weak way to account for allegiance. We should trust voters to discern what matters when it matters. The existing eligibility requirement makes everything hinge on circumstances at birth. But how someone has lived matters more for presidential fitness than where and to whom that person was born.

Consider, for example, the contrast between (a) someone who acquired citizenship through birth on U.S. soil to foreign parents and then lived the rest of his life abroad and (b) someone who acquired citizenship through naturalization after being brought to the United States as a baby and then lived the rest of her life here. The lifelong American (except for a few months around birth) would have more allegiance than the lifelong foreigner (except for a few months around birth). Yet the lifelong American would be ineligible for the presidency because she is not a “natural born Citizen.”

Obviously, some amount of time in the United States should be required of candidates for President. To serve in the House of Representatives, one must have been a citizen for seven years;¹² to serve in the Senate, one must have been a citizen for nine years.¹³ Both Representatives and Senators must also, when elected, be inhabitants of the state for which they are chosen.¹⁴ But a duration requirement for the Presidency can easily be addressed. As is, Article II already imposes a fourteen-year residency requirement for presidential eligibility.¹⁵ If the Natural Born Citizen Clause were eliminated, the residency requirement would still be in place, and it could be changed to a duration-of-citizenship requirement by substituting two words. In any event, there are many ways to structure a duration requirement to ensure some minimum level of expected allegiance. If the pledge of allegiance at the time of naturalization is not enough, a length-of-residency or length-of-citizenship requirement would be far more effective for ensuring allegiance than a birth-based exclusion. Yet the Natural Born Citizen Clause shuts off eligibility for millions completely and immediately at birth.

The Clause’s exclusion affects everyone it excludes even if it has practical bite only for a very small number. It is no great burden not to be the President of the United States. Most of us do not care to be

12. U.S. CONST. art. I, § 2, cl. 2.

13. U.S. CONST. art. I, § 3, cl. 3.

14. U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3.

15. U.S. CONST. art. II, § 1, cl. 5.

President. The point, rather, is that it is degrading and discouraging to render an entire class of American citizens ineligible for the office. James Wilson—one of our most eminent Framers and one of the original Associate Justices to serve on the Supreme Court of the United States—captured this sentiment well. Arguing at the constitutional convention against a proposal to limit eligibility for the Senate, the Scottish-born Wilson spoke about legal incapacities for holding state office that he had personally experienced. These incapacities, he said, “never ceased to produce chagrin, though he assuredly did not desire & would not have accepted the offices to which they related.”¹⁶ The problem was not that he wanted any particular office, but that he should not have been singled out as ineligible: “To be appointed to a place may be a matter of indifference. To be incapable of being appointed, is a circumstance grating, and mortifying.”¹⁷ Much has changed since Wilson spoke these words in 1787. But human nature has not.

B. Uncertainty and Costs for Our Political System

Although the Natural Born Citizen Clause unquestionably excludes millions, its most visible function in practical politics is to impose uncertainty and resulting costs respecting individuals whose “natural born” status is unclear. Because those who are plainly excluded do not bother to run, those who do run are either plainly not excluded or only arguably and uncertainly so.

Some eligibility challenges are based on disputed facts, such as the “Birther” claim that Barack Obama was not born in the United States.¹⁸ But more problematic than factual uncertainty—which can more easily be addressed—is legal uncertainty. The legal meaning of “natural born Citizen” in the Constitution has never been definitively settled, and it is likely to stay unsettled because of the scattered way challenges get raised and then not finally resolved on the merits. Jurists and scholars dispute whether “natural born” refers to a territorial concept (*jus soli*), a bloodline concept (*jus sanguinis*), or some combination, and how the law incorporated into the

16. 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION 237 (1911).

17. *Id.*

18. See, e.g., Lily Rothman, *This Is How the Whole Birther Thing Actually Started*, TIME (Sept. 16, 2016), <http://time.com/4496792/birther-rumor-started/>.

Constitution—whatever it may be—interacts with legislation enacted by Congress.¹⁹

Republican Senator Ted Cruz’s experiences in the 2016 presidential primary provide an illustration of the uncertain legal meaning of “natural born Citizen.” By statute, Cruz has been a citizen of the United States from the time of his birth in Canada to a Cuban father and an American mother.²⁰ But it is legally uncertain whether the federal statute supplying that status is a “naturalization at birth” statute or one that makes him “natural born.”²¹

This uncertainty imposed significant economic costs and incalculable (because unknown and unknowable) political costs. Cruz’s participation in the 2016 Republican primary, for example, led to state election commission proceedings in five states (Illinois, Indiana, New Hampshire, New Jersey, and New York); lawsuits in six state courts (Florida, Hawaii, Illinois, New York, Pennsylvania, and Vermont); and lawsuits in six federal courts (Northern District of Alabama, Eastern District of Arkansas, District of New Hampshire, Eastern District of New York, Southern District of Texas (with appeal to the Fifth Circuit), and District of Utah (with appeal to the Tenth Circuit and petition for certiorari to the Supreme Court)).²² These proceedings all required time and money. And these disputes did not yield a definitive resolution because they were resolved on non-merits grounds (such as lack of jurisdiction), or ended up moot or in a denial of certiorari at the Supreme Court when Cruz’s candidacy was no longer viable.²³ All of these proceedings—for just this one unsuccessful candidacy—were a waste of time and energy that amounted to nothing lasting for the law. And that is how such

19. See, e.g., JACK MASKELL, CONG. RESEARCH SERV., QUALIFICATIONS FOR PRESIDENT AND THE “NATURAL BORN” CITIZENSHIP ELIGIBILITY REQUIREMENT 1–3 (2011).

20. See Muller, *supra* note 10, at 1097.

21. Compare, e.g., Paul Clement & Neal Katyal, *On the Original Meaning of “Natural Born Citizen,”* 128 HARV. L. REV. 161, 161 (2015) (contending that a “natural born citizen” is “someone who was a U.S. citizen at birth with no need to go through a naturalization proceeding at some later time”) with, e.g., Einer Elhauge, *Why Ted Cruz Is Not a Natural Born Citizen Eligible to Be President and Why the Issue Is Not a Political Question* (Harvard Pub. Law Working Paper No. 16-11, 2016) (manuscript at 13), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748863 (describing Ted Cruz as someone who was a citizen at birth, but “only because a ‘naturalization’ statute so provides, rather than because he was otherwise ‘natural’ born”).

22. Derek T. Muller, *Status of Pending “Natural Born Citizen” Challenges and Litigation in 2016 Presidential Election*, EXCESS OF DEMOCRACY (Mar. 18, 2018, 10:50 PM), <http://excessofdemocracy.com/blog/2016/2/status-of-pending-natural-born-citizen-challenges-and-litigation-in-2016-presidential-election>.

23. *Id.*

proceedings have consistently cashed out over time. Nobody who has paid attention to this status quo can defend it.

C. Good Politics for Amendment Supporters

Whether a politician should propose or support a constitutional amendment is entirely discretionary. That so many politicians from across the political spectrum and over time have exercised their discretion to propose elimination of the Natural Born Citizen Clause is *prima facie* evidence that doing so is good politics for the proponents.

And that makes perfect sense. Proposed constitutional amendments can carry significant political benefits even if they fail to get enacted.²⁴ They are, for example, vehicles for building movements, promoting deliberation, and expressing dissent—and can have effects that radiate outward simply by being on the agenda.²⁵ More particularly, an amendment that would expand eligibility for office would be consistent in spirit with the Fifteenth, Nineteenth, and Twenty-Sixth amendments that expanded the right to vote based on race, sex, and age.²⁶ To have been successfully enacted, these amendments had to have garnered ratifying majorities in three-fourths of the states. Putting the Fifteenth Amendment aside because of the politics of Reconstruction, the success of the Nineteenth and Twenty-Sixth Amendments is strong evidence of the political support that citizenship-enhancing amendments like a repeal of the Natural Born Citizen Clause could gain.

From a political framing perspective, repeal of the Natural Born Citizen Clause is most easily analogized to the Twenty-Sixth Amendment. That Amendment extended the right to vote to those

24. See generally ROGER C. HARTLEY, *HOW FAILED ATTEMPTS TO AMEND THE CONSTITUTION MOBILIZE POLITICAL CHANGE* (2017).

25. *Id.* at 6.

26. U.S. CONST. amends. XV, XIX, XXVI. Cf. AMAR, *supra* note 7, at 454–55 (“[A] rule widening presidential eligibility would not only vindicate the Founders’ general principles of immigrant equality but also nicely fit the trajectory of post-Founding amendments. By treating naturalized citizens as the full equals of natural-born citizens, and by allowing a person of obvious merit to overcome a legal impediment created merely because he or she was born in the wrong place at the wrong time or to the wrong parents, the proposed amendment would widen and deepen the grand principle of birth equality at the heart of the Fourteenth Amendment. By making a new class of Americans eligible to be president, the proposed amendment would also echo and extend the spirit of the Fifteenth and Nineteenth Amendments, which entitled blacks and women not merely to vote on equal terms on Election Day but also to be voted for on equal terms and to vote and veto equally in matters of governance.”).

eighteen years and older, eliminating state rules that set a higher minimum voting age.²⁷ A potent argument for the Twenty-Sixth Amendment—enacted in the shadow of the Vietnam War—was that those old enough to die fighting for the country should not be excluded by their relative youth from being full voting members of the nation.²⁸ An argument of this sort in connection with proposed repeal of the Natural Born Citizen Clause emerged in the wake of our bloody Civil War in which tens of thousands of foreign-born American citizens (predominantly Irish and German) had been killed or wounded.²⁹ Those loyal enough to put their life on the line for the country are loyal enough to put themselves forward for consideration by their fellow citizens for the presidency.

II. HOW PROSPECTS FOR AMENDMENT HAVE IMPROVED

If repeal of the Natural Born Citizen Clause is good politics, then why has it not happened already? Obvious constitutional, cultural, and political challenges confront any proposal to repeal the Natural Born Citizen Clause. But due to the changing politics of immigration, it is now reasonable to believe that repeal of the Natural Born Citizen Clause is imminently achievable.

A. *Obstacles*

The Constitution of the United States is notoriously difficult to amend. Article V requires that amendments originate either from a two-thirds vote of both houses of Congress or from a convention of the States called upon application of two-thirds of them.³⁰ Any amendment proposals that emerge from Congress or a convention must then be ratified by three-quarters of the states to become law.³¹

27. U.S. CONST. amend. XXVI, § 1.

28. See Jenny Diamond Cheng, *Uncovering the Twenty-Sixth Amendment* (2008) (unpublished Ph.D. dissertation, University of Michigan) (manuscript at 31), https://deepblue.lib.umich.edu/bitstream/handle/2027.42/58431/jdiamond_1.pdf (“When the Senate debated the eighteen-year-old voting amendment in March 1970, Senator Warren Magnuson (D-WA) declared that military service was still ‘the most potent argument we can think of,’ that ‘if a man is old enough to fight for his country, to bleed and die and serve for his country, he or she is old enough to have a say in how this country is governed.’”).

29. Cf. CHRISTIAN G. SAMITO, *BECOMING AMERICAN UNDER FIRE: IRISH AMERICANS, AFRICAN AMERICANS, AND THE POLITICS OF CITIZENSHIP DURING THE CIVIL WAR ERA 186* (2009) (suggesting that the addition of “naturalized” to section 1 of the Fourteenth Amendment may have been “uncontroversial and thus unnoticed” because of the “military service of Irish American and German American soldiers, as well as the understanding that if ex-slaves could comprise citizens so also must naturalized Americans”).

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

31. *Id.*

Given the difficulty of this process, many proposed amendments that make for good politics cannot be enacted.³²

Perhaps even more powerful than the formal obstacle of Article V’s amendment process is our amendment culture—“the set of shared attitudes about the desirability of amendment, independent of the substantive issue under consideration and the degree of pressure for change.”³³ This set of attitudes provides a “baseline level of resistance to formal constitutional change,” such that the difficulty of amendment can be greater or lesser even under identical institutional arrangements.³⁴ Our current amendment culture in the United States makes amendment difficult by layering constitutional veneration over a general status quo bias. This culture can change, but the state of that culture for the last several decades should not be ignored when considering obstacles to amendment.

A final obstacle to repeal of the Natural Born Citizen Clause has been a lack of political will. Structural considerations like eligibility requirements for office do not excite people much in the abstract. But if individuals start paying attention to the Natural Born Citizen Clause because it blocks or could block a specific favored candidate, any proposed amendment effort would likely become colored with a partisan tint. That coloration would certainly diminish, and possibly destroy, the amendment’s prospect for super-majority support in Congress and across the States.

So why try again? What reason is there to think that things will turn out any better today or tomorrow than the thirty-plus tries in all

32. “During the approximately 225 years since the Constitution’s ratification, members of Congress have introduced roughly twelve thousand proposals to amend the Constitution. . . . Members of Congress introduce nearly two hundred constitutional amendment proposals annually.” HARTLEY, *supra* note 24, at 2.

Between 1789 and 1991, the U.S. Constitution was amended 26 times for a rate of 0.13 (26 amendments divided by 202 years equals 0.13 amendments per year). As of 1991, the fifty state constitutions had been in effect for an average of 95 years, and had been amended a total of 5,845 times, or an average of 117 amendments per state. This produces an average amendment rate of 1.23 for the states (117 amendments per state divided by the 95 years the average state constitution has been in effect). The state rate of amendment is (1.23) is thus about 9.5 times the national rate (.13).

DONALD S. LUTZ, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 247 (Sanford Levinson ed., 1995).

33. Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 *INT’L J. OF CONST. L.* 686, 699 (2015).

34. *Id.*

our yesterdays? The short answer is that the politics of immigration have changed. These changes have created circumstances in which astute political actors can advance their political careers through championing repeal of the Natural Born Citizen Clause.

B. The Politics of Division

The most important political development that has elevated the likelihood of enacting an amendment to repeal the Natural Born Citizen Clause has been the increased attention paid to “blood and soil” white nationalism. Although white nationalists occupy a fringe of American public life, the public profile of such individuals has increased in the past couple of years.³⁵ In such an environment, support for repeal of the Natural Born Citizen Clause can serve as a costless and highly visible symbol for a politician to show that he is not one of “them”—one of those “blood and soil” white nationalist bad guys.

One way that American politics works today is through identifying a new enemy to vanquish in the name of progress. The Natural Born Citizen Clause has been with us from the beginning. But the idea that birth determines allegiance will find few political mouthpieces these days because of the guilt by association enabled by the increased visibility of “blood and soil” white nationalists.

Politicians may not harbor strong sentiments one way or the other about the Natural Born Citizen Clause, but very few want to make themselves vulnerable to guilt by association. And supporting this simple improvement in the law provides an easy inoculation against the virulent accusation of being anti-immigrant.

None of the foregoing is intended to equate opposition to amendment of the Natural Born Citizen Clause with anti-immigrant opposition. That is a false and unfair equation because there are good and honorable reasons to maintain the constitutional status quo. One might, for example, wish to reserve constitutional amendments for substantial problems such as those that might arise from gross judicial misinterpretations of the Constitution. Or one might be suspicious that the real agenda behind an amendment proposal is not to get the amendment passed but to score political points or build a movement

35. After neo-Nazis and white nationalists descended on Charlottesville for protests that turned violent, for example, President Trump’s rhetoric in connection with those protests became a source of intense media interest. *See, e.g.*, Michael D. Shear & Maggie Haberman, *Trump Again Says Two Sides at Fault in Rally Violence*, N.Y. TIMES, Aug. 16, 2017, at A1.

for some other end through the process. Whatever reasons one might have for opposing repeal of the Natural Born Citizen Clause, though, they would still have to be very strongly held for anyone worried that opposition could make the “anti-immigrant” charge stick.

C. The Politics of Addition

There is a less wedge-driven way of thinking about how the changed politics of immigration have improved the prospects for a repeal of the Natural Born Citizen Clause, namely, via the politics of addition. Some politicians’ personal brands are built around identities as thoughtful problem solvers. These politicians should be attracted to any proposal that reasonably aspires to achieve ratification in three-fourths of the states. Aiming for that level of assent offers an opportunity in the politics of addition, giving voters who value compromise and bipartisanship a reason to accept one’s bona fides for this style of politics.

Once one acknowledges that we do not have a perfect Constitution, someone who practices the politics of addition sees in the constitutional amendment process a reason to identify and to correct constitutional imperfections that might not otherwise be salient. A proposed amendment cannot be too obvious, or else there would be little credit to be had for identifying and championing it. But it cannot be too obscure or trivial, either, or else there would be little expected gain from an investment of one’s political capital in advancing it. The amendment must be of a sort that does not have overwhelming support already, but that would and could merit such support if advanced effectively enough.

Repeal of the Natural Born Citizen Clause satisfies these conditions. There has not been any recent polling on an amendment of this sort, which is just as well for amendment supporters who would prefer to frame the narrative around an amendment before dialing people up for their opinions. Our constitutional amendment culture as it is now inclines people toward a default “no” on any proposed constitutional amendment. But there has likely been a major shift among Democrats and Democrat-leaning independents.

The most recent push for opening up the presidency to naturalized citizens came in 2004. Republican Senator Orrin Hatch of Utah proposed an “Equal Opportunity to Govern Amendment,” which

would have lifted the “natural born Citizen” requirement for naturalized citizens after twenty years of American citizenship.³⁶ Similar proposals were proposed in the House, one with a Democrat as sponsor.³⁷ These proposed amendments were not only supported but also opposed by members of both parties. Democrat Senator Dianne Feinstein of California, for example, opposed changing the Natural Born Citizen Clause.³⁸ “I don’t think it is unfair to say the president of the United States should be a native-born citizen,” Feinstein said.³⁹ “Your allegiance is driven by your birth.”⁴⁰

That was then. No Democrat in public office today (including Senator Feinstein herself) would make such a statement now. That is how much the politics have changed.

That Democrats as a cohesive bloc would likely support repeal of the Natural Born Citizen Clause is precisely why the initiative for repeal must come from Republican circles if it is to succeed. A repeal amendment championed by the entire Democratic party might not be taken seriously on its own terms but instead viewed as a play for “the immigrant vote.”

Any politicians who propose a repeal amendment of this sort would obviously be doing so based on calculations about popularity and votes. But even though Republicans could be attacked as opportunistic, the proposal would likely be viewed as clever and refreshing rather than soft or devious. The merits of eliminating the “natural born Citizen” eligibility requirement should be sufficiently attractive to Democrats on the merits (and the political downside for Democrats of opposing repeal so great) that Republican championship of the amendment should not prevent Democrats from supporting it.

Would enough Republicans champion an amendment of this sort? The answer will not be known until there is another try. But given the Republican support last time and the political imperative to separate oneself from “blood and soil” white nationalism, widespread Republican support is a reasonable prospect even without considering

36. S.J. Res. 15, 108th Cong. (2003).

37. See, e.g., Opinion, *A Foreign-Born President*, N.Y. TIMES, Oct. 26, 2004 (“A diverse Capitol Hill coalition—including Senator Orrin Hatch, a Republican, and Representative Barney Frank, a Democrat—is seeking to amend the Constitution to give naturalized citizens in the United States the right to take their political ambitions all the way to the Oval Office.”).

38. See Martin Kasindorf, *Should the Constitution be amended for Arnold?*, USA TODAY, Dec. 2, 2004.

39. *Id.* (quoting Sen. Feinstein).

40. *Id.* (quoting Sen. Feinstein).

the politics of addition. The case becomes even stronger when one considers that naturalized citizens make up approximately 8.8% of the voting-age population in the United States.⁴¹ In the 2014 congressional elections, over 19 million naturalized citizens were eligible to cast a vote.⁴² Naturalized citizens have historically registered and voted at a lower rate than U.S-born citizens.⁴³ But in the 2016 presidential election, the number of naturalized citizen voters increased from 9.3 million in 2012 to 10.8 million (a 16% increase), and the turnout rate of naturalized Hispanic and Asian voters was higher than for the U.S. born.⁴⁴ The impact of changes such as these will vary from state to state, but these changes cannot be ignored in a state like Virginia, where 39% of recently naturalized citizens are Asian American, Native Hawaiian, and Pacific Islanders, and 24% are Latino.⁴⁵

Support for an amendment that removes an important symbolic burden on naturalized citizens provides an easy way for Republican politicians to earn these voters' support. Such support also validates the positive stance toward naturalized immigrants that even Republicans with the strongest reputations for being a “hard liner” on illegal immigration have adopted at naturalization ceremonies. Representative Steven King, for example, expressed admiration for new American citizens when speaking at their naturalization ceremony and told them that “You are as much of an American as the president of the United States.”⁴⁶ Just about any other congressman

41. See MANUEL PASTOR, JUSTIN SCOGGINS & MAGALY N. LÓPEZ, CTR. FOR THE STUDY OF IMMIGRANT INTEGRATION (CSII), UNIV. OF S. CAL., ROCK THE (NATURALIZED) VOTE II, app. A tbl. 1 (Sept. 2016), http://dornsife.usc.edu/assets/sites/731/docs/rtnv2016_report_final_v4.pdf.

42. See THOM FILE, U.S. CENSUS BUREAU, ECON. & STATISTICS ADMIN., WHO VOTES? CONGRESSIONAL ELECTIONS AND THE AMERICAN ELECTORATE: 1974-2014 6 tbl. 2 (July 2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p20-577.pdf>.

43. Pastor, Scoggins & López, *supra* note 41, at 4–5.

44. Jens Manuel Krogstad & Mark Hugo Lopez, *Black Voter Turnout Fell in 2016, Even as a Record Number of Americans Cast Ballots*, PEW RES. CTR. (May 12, 2017), <http://www.pewresearch.org/fact-tank/2017/05/12/black-voter-turnout-fell-in-2016-even-as-a-record-number-of-americans-cast-ballots/>.

45. *Id.*

46. Kirby Kauffman, *King Shares Personal Story During Sioux City Naturalization Ceremony*, SIOUX CITY J. (Mar. 7, 2015), http://siouxcityjournal.com/news/king-shares-personal-story-during-sioux-city-naturalization-ceremony/article_4bd79240-0f2f-593c-831d-09f84c2ac8be.html; see also Robynn Tysver, *A Fierce Foe of Illegal Immigration, Steve King Praises Those Using Legal Route*, OMAHA WORLD HERALD (Mar. 7, 2015) (“King said attending naturalization ceremonies was one of his greatest legislative duties, along with awarding medals to soldiers and veterans. People who follow the law and come to this country are motivated to succeed, he said.”).

who has spoken at a naturalization ceremony, whether Republican or Democrat, has made similar statements. A natural place to begin organizing and shoring up Republican support, then, would be the systematic collection and organization of such statements. Even those most cynical about politicians meaning what they say might find that this issue is one on which it is not too difficult to bring politicians' actions in line with their words.

III. THE "IRISH-BORN" AMENDMENT PROPOSAL AND SOME ADDITIONAL MERITS

This part considers the form and substance of a particular proposal. Inspecting a particular proposal enables us to more fully consider benefits and drawbacks.

Of all the prior amendment proposals, the one that stands out for its provenance and form in addition to its substance is the amendment proposal introduced to Congress by Representative William Erigena Robinson in 1868. Representative Robinson was himself born abroad.⁴⁷ His middle name "Erigena" means "Irish born."⁴⁸ And indeed he was. Robinson represented Brooklyn, New York, which at the time contained many other Irish-born American citizens.

The immediate political context for Robinson's proposal was perceived second-class citizenship for naturalized American citizens of Irish descent who had fought for the Union.⁴⁹ Its introduction in 1868 shows that the problem of excluding naturalized citizens from presidential eligibility has been something people have been trying to fix for 150 years now.

On May 18, 1868, Representative Robinson introduced a resolution proposing as a constitutional amendment:

That article two, section one, subdivision four, be amended so as to read:

No person except a Citizen of the United States shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age

47. *ROBINSON, William Erigena*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000355> (last visited (Mar. 27 2018)).

48. *John Scottus Eriugena*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2008), <https://plato.stanford.edu/entries/scottus-eriugena/>.

49. See SAMITO, *supra* note 29, at 194–216 (describing the national political climate surrounding the status of Irish naturalized citizens in the late 1860s, including a detailed discussion of expatriation rights and the Act of July 27, 1868).

of thirty five Years, and been fourteen Years a resident within the United States.⁵⁰

Unlike every other constitutional amendment that has thus far been ratified, Robinson’s proposed amendment would not have added any language to the Constitution. It would simply have taken out the phrase “natural born” and obsolete language making non-natural-born citizens eligible for President if they were citizens at the time of constitutional ratification. In red-line form, the amendment would make the Constitution read: “No Person except a ~~natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution,~~ shall be eligible to the Office of President”

This proposal has an elegance which every other proposal that apes the form of prior amendments lacks. This “change the text itself” form is how our constitutional amendments should have been done from the beginning. It is the form that James Madison preferred and that he had good reason for preferring; when Madison proposed to the First Congress the amendments that eventually became known as the Bill of Rights, he proposed interpolating the amendments’ words directly into the Constitution in the place that they belonged.⁵¹ This approach has the merit of making clear how the amendment modifies the language that it is amending. The First Congress’s rejection of this approach in favor of a supplemental add-on approach was based on a misplaced concern about constitutional stability.⁵² But we are not fated to make the same mistakes that those before us made.

It is also particularly fitting to change the form of amendment for a circumstance in which the problem is the presence of certain language rather than its absence. If something is in the Constitution that should not be there, then we should take it out.

50. H.R.J. Res. 269, 40th Cong., 2d Sess. (1868), available at 39 CONG. GLOBE, 40th Cong., 2d Sess. 2526 (May 18, 1868).

51. *The Congressional Register, Aug. 13, 1789*, reprinted in, CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 11 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991).

52. The mode of amendment was first debated in Congress immediately when Congress took up proposed amendments on August 13, 1789. See XI DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: 1789–1791 1207–32 (1992). Representative Sherman’s proposal to change the form of amendment to supplement instead of incorporation was defeated that day. But Sherman tried again on August 19, and his motion carried. See Edward Hartnett, *A “Uniform and Entire” Constitution; Or, What If Madison Had Won?*, 15 CONST. COMMENT. 251, 252–58 (1998) (summarizing the debates and explaining the backdrop to Madison’s capitulation on the form of amendment).

One potential roadblock for the Robinson proposal is that it does not include a length-of-citizenship requirement. That contrasts with eligibility requirements for the House of Representatives (seven years of citizenship) and the Senate (nine years of citizenship). If the Robinson proposal were adopted, though, there would still be a length-of-residency requirement for the President (fourteen years). This length-of-residency requirement is probably enough to ensure that an individual is sufficiently immersed in an American way of life. But if people preferred a length-of-citizenship requirement instead, that could be easily accomplished through substituting the words “citizen of” for “resident within” the United States.

In contrast with the strikethrough of some words and the insertion of others, consider what the same proposal would look like as an added-on Twenty-Eighth Amendment: “A person who is a citizen of the United States, who has been for 14 years a citizen of the United States, and who is otherwise eligible to the Office of President, is not ineligible to the Office by reason of not being a natural born citizen of the United States.” Can there really be any question of the inferiority of that form to a simple change-the-words-that-need-changing amendment?

Technical merits of this form of amendment aside, another advantage of the strike-through form of amendment is cultural. The First Congress’s decision not to tinker with any of the language of the recently ratified Constitution, but instead to add language on at the end, was an early instantiation of the constitutional veneration that continues through this present day. That veneration continues to burden our constitutional amendment culture. The difficulty of formal amendment attributable to this culture serves to embolden and to legitimate informal amendments, typically via acquiescence to legislative, executive, and judicial departures from the original law of the Constitution.

Then as now, refusing to touch the language of the original ratified Constitution was a sign of insecurity. Congressmen then openly worried about the potential destabilizing effect that altering the language of the ratified Constitution could have. The decision to leave the ratified constitution’s language untouched was symbolic, to be sure. But symbolism matters in the life of a nation.

It is fitting that repeal of the Natural Born Citizen Clause be used to reject the idea of a ratified Constitution that cannot be admitted to be imperfect. For all but a very small number of naturalized citizens, the presence of the Natural Born Citizen Clause is of just symbolic

importance. Only a handful will seriously consider running for President of the United States. But it is an important symbol, standing as a constant reminder that naturalized citizenship is not quite the same as birth citizenship despite all the contrary assurances of judges, politicians, and other patriots who speak at naturalization ceremonies.

CONCLUSION

How, then, shall we conclude our consideration of this proposed amendment? Let us consider how to move from potential constitutional change to actual.

It is too early to consider a state-by-state strategy for obtaining assent from three-fourths of them. The motives that will push people over the edge depend on too many variables that cannot be foreseen. And which states to start with? Too early to say.

It is not too early, though, to conceive how to move the proposal to obtain consent from two-thirds or more of the House and Senate. The basic idea is to win a Republican majority and then make sure the Democrats are also on board. If the amendment begins as an instrument of Democrat policy, it will not garner enough Republican support.

Among Republicans, the best place to start in Congress is probably with those who have the most to gain by cleanly differentiating between legal and illegal immigrants as a way of distinguishing their actual policy views on illegal immigration from perceived personal anti-immigrant animus. At their core, they are already on board. To remind them of this, one need only remind them of the sorts of things they join other speakers in saying—in all sincerity, and with personal conviction, and often informed by lessons learned from immigrant parents or grandparents—at naturalization ceremonies for new citizens. If a substantial chunk of this group can come on board—and especially if President Trump decides to lend the power of his presidential rhetoric in support—we can quickly get this done. It has been 150 years since the Irish-born Robinson proposed his amendment in Congress. He was right then, and the time for us to make it real is now.