

# BEYOND PRESIDENTIAL ELIGIBILITY: THE NATURAL BORN CITIZEN CLAUSE AS A SOURCE OF BIRTHRIGHT CITIZENSHIP

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## I. INTRODUCTION

President Obama may be the first African-American elected to the presidency, but Senator John McCain would have been the first President born outside of the United States. Born in 1936 in the Panama Canal Zone to American parents, including a father in the United States Navy, Senator McCain was certainly not born in the United States proper, and probably not within its territory or jurisdiction in any legal sense.<sup>1</sup> Had he won in November of 2008, his election would have placed a significant “gloss”<sup>2</sup> on

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1. See Carl Hulse, *McCain Canal Zone Birth Prompts Queries About Whether That Rules Him Out*, N.Y. TIMES, Feb. 28, 2008, at A21.

2. The concept of “gloss” is a familiar one in constitutional law. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“It is an inadmissibly narrow conception of American constitutional law

one of the most enigmatic and occasionally controversial clauses in the Constitution. The Natural Born Citizen Clause states: “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.”<sup>3</sup> Nowhere does the Constitution explain the meaning of “natural born,” but from time to time in American history the Clause has attracted attention when the “natural” birth of one candidate or another was arguably in doubt. Senator McCain, born to American parents in the Panama Canal Zone, came closer than any other politician before him to putting the Clause to the test.<sup>4</sup> In all likelihood, his success in obtaining the Republican nomination was enough of a gloss on the Clause in and of itself, leading his colleagues in the Senate to pass a resolution recognizing his status as a natural born citizen.<sup>5</sup> As one scholar commented, McCain’s nomination alone seems to confirm at least “that ‘natural born’ citizens can include those extended citizenship at birth by statute in addition to those enjoying it under the Fourteenth Amendment.”<sup>6</sup> Had Senator McCain won, his election would have truly ended the controversy over whether children born to American citizens abroad were considered “natural born.” As Professor Corwin put it: “Should then, the American people ever choose for President a person born abroad of American parents, it is highly improbable that any other constitutional agency would venture to challenge their decision.”<sup>7</sup> Presumably, no Supreme Court Justice would have wished to invalidate the votes of tens of millions of Americans to the

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to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”).

3. U.S. CONST. art. II, § 1, cl. 5.

4. The last serious candidate for the presidency whose status under the Natural Born Citizen Clause was in doubt was George W. Romney, father of Senator McCain’s primary opponent Mitt Romney, who ran for President in 1968 as the governor of Michigan. Governor Romney was born in Mexico to Mormon missionary parents. See Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MICH. L. REV. 1, 1 (1968). Before Romney, Franklin D. Roosevelt, Jr., born in Canada to President Franklin D. Roosevelt, had raised the question. See Warren Freedman, *Presidential Timber: Foreign Born Children of American Parents*, 35 CORNELL L.Q. 357, 357 n.2 (1950).

5. See S. Res. 511, 110th Cong. (2008).

6. Peter J. Spiro, Commentary, *McCain’s Citizenship and Constitutional Method*, 107 MICH. L. REV. FIRST IMPRESSIONS 42, 43 (2008), available at <http://www.michiganlawreview.org/assets/fi/107/mccain.pdf>. As discussed below, however, Professor Gabriel Chin has also argued that the statute in force at the time of Senator McCain’s birth did not extend him United States citizenship.

7. Gordon, *supra* note 4, at 22 (quoting E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 32–34 (4th rev. ed. 1957)).

embarrassment of the entire political system.<sup>8</sup> Moreover, any potential plaintiff likely would have lacked standing to sue.<sup>9</sup>

Nevertheless, during the campaign legal scholars carried on an earnest debate over McCain's eligibility. In March of 2008, former Solicitor General Theodore Olson and Harvard Professor Laurence Tribe produced a joint memorandum outlining three arguments in favor of McCain's eligibility: (1) McCain was a "natural born" citizen by virtue of his parentage, as British statutes in force at the time of the Founding would have made children of British subjects born abroad "natural born subjects"; (2) the Panama Canal Zone was sovereign United States territory at the time of McCain's birth; and (3) the original intent of the Framers was not to "exclude a person from the office of the President simply because he or she was born to U.S. citizens serving in the U.S. military outside of the continental United States."<sup>10</sup>

Professor Gabriel J. Chin responded with two major opposing arguments: (1) The Panama Canal Zone was not the sovereign territory of the United States, and (2) citizenship by descent is only statutory, and in 1936, when McCain was born, naturalization statutes did not automatically confer citizenship upon children of American parents born in the Canal Zone.<sup>11</sup>

What the clamor of politics drowned out was that the Natural Born Citizen Clause has implications beyond presidential eligibility. As one of only a handful of places in the original Constitution where the word "citizen" is mentioned,<sup>12</sup> the Clause is one of the few clues we have for

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8. One can imagine the Court easily avoiding the issue by proclaiming it a political question. *See generally* *Baker v. Carr*, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found . . . an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.").

9. Some have already tried and failed. *See* *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1146 (N.D. Cal. 2008) (dismissing action for lack of standing and stating that Senator McCain likely is a natural born citizen); *Hollander v. McCain*, 566 F. Supp. 2d 63, 71 (D.N.H. 2008) (holding, without reaching the question of Senator McCain's eligibility, that the plaintiff's status as a citizen and primary-election voter did not confer standing).

10. Gabriel J. Chin, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, 107 MICH. L. REV. FIRST IMPRESSIONS 1, app. at 19–21 (2008).

11. *See id.* at 4–6.

12. As it was written at the Philadelphia Convention, the other clauses in the

divining the constitutional meaning of American citizenship. Indeed, it is impossible to decide who is eligible to be president without contending with the question of who enjoys American citizenship as a matter of birthright. Scholars, though often focusing on the former question, have not failed to recognize the latter. Professor Chin's article, for example, argues that if McCain is a natural born citizen, the legal maneuvers needed to reach that result make citizens out of many others.<sup>13</sup>

This Article argues that the Natural Born Citizen Clause implies the existence of birthright citizenship. It further argues that this citizenship extends to the first generation born abroad to parents who are United States citizens. In Part II, this Article surveys existing scholarship, including the traditional approach, the "naturalized born" approach, and the "interpretation" approach. Part III critiques these existing approaches, proposes a "constitutional minimum" framework combining aspects of the traditional and naturalized-born approaches, and attempts to resolve potential problems with the new understanding. Part IV argues that the Fourteenth Amendment does not displace the Clause's original meaning. Part V argues that the new approach would not disturb existing naturalization law as much as might be feared, at least when it comes to effects on the ground. While this Article does not focus on the question of presidential eligibility, under the proposed constitutional minimum approach, Senator McCain is indeed a natural born citizen.

## II. EXISTING SCHOLARSHIP

Governor George Romney's 1968 campaign for President prompted the seminal study that set forth what is now the traditional approach to deciphering the meaning of the Natural Born Citizen Clause. This Part of the Article examines that approach, as well as two subsequent challenges to it.

### A. *The Traditional Approach*

The forty-year-old essay by Charles Gordon, then the General Counsel of the United States Immigration and Naturalization Service,

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Constitution that mention citizenship relate to the eligibility of congressmen and senators, the jurisdiction of federal courts, and the Privileges and Immunities Clause. *See* U.S. CONST. art. I, § 2 (eligibility for House of Representatives); *id.* § 3 (eligibility for Senate); *id.* art. III, § 2 (jurisdiction of federal courts); *id.* art. IV, § 2 (Privileges and Immunities Clause).

13. *See* Chin, *supra* note 10, at 16.

remains the leading work in this area.<sup>14</sup> The Supreme Court expressed the basic notion of this approach many years prior to its publication: “The Constitution does not, in words, say who shall be natural born citizens. Resort must be had” to common law at the time of the Founding.<sup>15</sup> Ascertaining the constitutional meaning of the Natural Born Citizen Clause, therefore, is a matter of historical research. It is the same methodology—original intent—that the Court adopted in what is perhaps the most significant citizenship case it has ever decided, though that case directly related only to the Fourteenth Amendment.<sup>16</sup> The following paragraphs summarize Gordon’s argument and draw on other sources in support of it.

English nationality centered on the principle of *jus soli*, which made English subjects of all persons born within the realm—in contradistinction to the tradition of *jus sanguinis* in continental civil law countries,<sup>17</sup> where nationality followed descent.<sup>18</sup> Parliament made the basic tenet of *jus soli* explicit in 1368.<sup>19</sup> There is debate, however, over whether English “common law also encompassed the *jus sanguinis*”—it may be that any recognition of the principle was statutory only.<sup>20</sup> Historian James Kettner, for example, takes the position that the common law encompassed both principles, “for English jurists had no conscious attachment to the *jus soli*,”<sup>21</sup> and Sir Edward Coke described English nationality law as “haphazard.”<sup>22</sup> One former chief justice of Hong Kong, on the other hand, stated that the common law recognized only *jus soli*, though it made certain limited exceptions of *jus sanguinis*.<sup>23</sup> The children of the King, for

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14. See Gordon, *supra* note 4.

15. *Minor v. Happersett*, 88 U.S. 162, 167 (1874).

16. *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898) (stating that the Citizenship Clause of the Fourteenth Amendment “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”).

17. WILLIAM BLACKSTONE, *COMMENTARIES* 156–57 (Bernard Gavit ed., Wash. Law Book Co. 1941) (1892).

18. See 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, 886 n.24 (1988).

19. 42 Edw. 3, c. 10 (1368) (Eng.).

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

21. JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 13 (1978) (citing 42 Edw. 3, c. 10 (1368) (Eng.)).

22. *Id.* at 15–16 (quoting JOSEPH HENRY SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* 467 (1965)).

23. 1 SIR FRANCIS TAYLOR PIGGOT, *NATIONALITY* 41–42 (1907).

example, were British subjects even when born abroad.<sup>24</sup> Other accommodations of *jus sanguinis*, in this view, had to be found in statutes. In 1343, Parliament considered legislating more generally on children born abroad to British subjects, and it likely would have done so but for interruption by the plague.<sup>25</sup> In 1350, Parliament returned to the subject and enacted a statute, *De Natis Ultra Mare*, declaring that children born “beyond the Sea” to British subjects “shall have and enjoy the same Benefits and Advantages” as their parents in regard to the right of inheritance.<sup>26</sup>

Further statutory developments followed. In 1676, a statute clarified the status of foreign-born children of subjects exiled in the Cromwell era, and apparently declared such persons to be natural born subjects for the first time.<sup>27</sup> In 1698, another statute did the same for children born of parents engaged against the French.<sup>28</sup> During the reign of Queen Anne, new legislation provided that the “Children of all natural born Subjects born out of the Ligeance of Her Majesty . . . shall be deemed adjudged and taken to be natural born Subjects of this Kingdom to all Intents Constructions and Purposes whatsoever.”<sup>29</sup> A 1731 statute reaffirmed this rule, but in more precise language.<sup>30</sup> Finally, on the eve of the American Revolution, Parliament extended the same rule to the grandchildren of such subjects, allowing the transmission of British nationality by descent down to the second generation abroad.<sup>31</sup> A subsequent case confirmed this limitation.<sup>32</sup>

Americans did not necessarily inherit British laws wholesale, however, and the obvious first place to look for clues on what “natural born” meant to the Framers is in documents from the Constitutional Convention. Unfortunately, there is scant record of what the Framers thought. The phrase “natural born citizen” likely originated in a letter John Jay sent to George Washington, though there is no proof of this in the

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24. *Id.*

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

26. 25 Edw. 3, c. 2 (1350) (Eng.).

27. Gordon, *supra* note 4, at 6-7 (citing 29 Car. 2, c. 6, § 1 (1676) (Eng.)).

28. KETTNER, *supra* note 21, at 15 (citing 9 & 10 Will. 3, c. 20 (1698) (Eng.)).

The statutes required such persons to take the Sacrament and oaths of allegiance and supremacy. *See id.*

29. Foreign and Protestants Naturalization Act, 1708, 7 Ann., c. 5, § 3 (Eng.).

30. British Nationality Act, 1730, 4 Geo. 2, c. 21, § 1 (Eng.).

31. British Nationality Act, 1772, 13 Geo. 3, c. 21 (Eng.).

32. *DeGeer v. Stone*, 22 Ch.D. 243 (1882).

recorded deliberations of the Convention.<sup>33</sup> Hardly any discussion on the Clause took place at Philadelphia.<sup>34</sup> The Committee on Detail initially submitted without comment a recommendation that the President be a citizen and be a resident for twenty-one years.<sup>35</sup> The Committee of Eleven changed the wording to “natural born citizen” without explanation, and the Convention ultimately adopted the modified provision without debate.<sup>36</sup> After the Revolution and the Philadelphia Convention, the First Congress enacted the Naturalization Act of 1790 (1790 Act).<sup>37</sup> The statute stated:

And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States . . .<sup>38</sup>

Charles Gordon, having surveyed most of this history and beyond, concluded that English law gave natural born citizen status to foreign-born children, and that “it is hardly likely that the Framers intended to deal less generously with their own children.”<sup>39</sup> Presumably, then, Gordon would take the view that Senator McCain is eligible for the presidency.<sup>40</sup>

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33. Gordon, *supra* note 4, at 4–5. Jay’s letter read: “Permit me to hint, whether it would not be wise & seasonable to provide a a [sic] strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in chief of the american army shall not be given to, nor devolve on, any but a natural *born* Citizen.” *See* 4 U.S. DEPT. OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 237 (1905).

34. *See* Pryor, *supra* note 18, at 885 (“The records of the adoption of the clause by the delegates of the 1787 Constitutional Convention provide no evidence of the intended meaning of the phrase ‘natural-born citizen.’”).

35. 1 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 256–57 (2d ed. 1836).

36. *Id.* at 298, 302.

37. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795).

38. *Id.* at 104.

39. Gordon, *supra* note 4, at 31.

40. Curiously, in the heated debate over the McCain candidacy, neither Chin nor Olson and Tribe mention the common law rule that children born abroad to the King’s soldiers were an exception to *jus soli* and were considered British subjects, much like the children of the King himself and the children of ambassadors. *See* 1 PIGGOTT, *supra* note 23, at 41–43. Under the traditional approach, which Olson and Tribe implicitly adopted in their memorandum, this common law rule should form a part of the meaning of the Natural Born Citizen Clause, and Senator McCain would be eligible.

### B. *The “Naturalized Born” Approach*

Even Gordon admits, however, that the evidence for his conclusion is “not overwhelming,” and his research only “points in the direction” of his ultimate conclusion.<sup>41</sup> The inevitable uncertainty of the traditional approach, in particular the dearth of any meaningful clues from Philadelphia, inspired what is perhaps the most significant challenge so far against the traditional approach. The “naturalized born” approach, presented by Jill Pryor twenty years after Gordon’s essay, argues in favor of a broad congressional power to determine the meaning of the phrase “natural born.”<sup>42</sup>

Pryor begins by rejecting the idea that there are only two ways to be a citizen of the United States (either by birth or by naturalization)—an idea that leads to the conclusion that a United States citizen is necessarily either native-born or naturalized.<sup>43</sup> Without this dichotomy, one is free to recognize a third category of citizens, the “naturalized born”—“those made citizens at birth by naturalization statutes, or treaties”—who ought to be considered natural born,<sup>44</sup> given the general consensus that to be natural born, one must be a citizen at birth.<sup>45</sup>

Pryor then draws on the text of the Constitution, in particular the echo between presidential eligibility and Congress’s enumerated power to “establish an uniform Rule of Naturalization”:<sup>46</sup> “[t]he obvious connection between ‘natural’ in [A]rticle II and ‘naturalization’ in [A]rticle I supports the conclusion that the terms are not diametrically opposed; rather, *naturalization* can create *natural* citizens.”<sup>47</sup> Similarly, the 1790 Act, passed by a Congress that included many delegates to the Constitutional Convention,<sup>48</sup> can be seen as evidence supporting this view:

The first Congress not only exercised its naturalization power to make citizens of children born abroad of United States citizens, but it

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41. Gordon, *supra* note 4, at 31.

42. Pryor, *supra* note 18, at 883–85.

43. *Id.* at 893.

44. *Id.* at 894.

45. Both scholars and courts have generally taken this consensus view for granted. *See, e.g.*, *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1146 (N.D. Cal. 2008) (discussing 8 U.S.C. § 1403(a) retroactively rendering Senator McCain a natural born citizen).

46. U.S. CONST. art. I, § 8, cl. 4.

47. Pryor, *supra* note 18, at 894.

48. *Id.* n.75.

designated these citizens as “natural born.” Thus, a Congress nearly contemporaneous with the adoption of the clause believed it had the power to define “natural born citizen” under its *naturalization* powers.<sup>49</sup>

Besides this linguistic echo, Pryor points to the Clause’s placement amidst other bright-line rules, such as the age and residency requirements for presidential eligibility.<sup>50</sup> “This placement in the text suggests that the framers considered the natural born qualification to require not an investigation but simply reference to the naturalization statutes in effect at the candidate’s birth, which would yield an unambiguous answer.”<sup>51</sup> Or, as Professor Amar rephrases this approach in adopting it, “a child born abroad of American parentage would be eligible, so long as the citizenship rules in place at the time of his birth so provided.”<sup>52</sup>

The main advantage of the naturalized born approach is its certainty. As Pryor notes, a “bright-line test makes the most sense for eligibility requirements; there should not be any significant doubt as to who is eligible.”<sup>53</sup> In the specific case of Senator McCain, however, this approach ironically does not settle the matter conclusively. When Senator McCain was born in 1936, children born abroad to American parents were generally statutory citizens at birth, but Professor Chin has argued that the Panama Canal Zone was a kind of “no man’s land,” and thus that the naturalization statute “did not grant citizenship to those born in the Canal Zone.”<sup>54</sup>

More importantly, as this Article argues below, the naturalized born approach fails to acknowledge the existence of what this Article calls a “constitutional minimum”—a necessary residue of birthright citizenship that Congress has no power to diminish. This failure will provide the point of departure for this Article, which will illustrate the flaw and argue instead that the structure of even the original Constitution necessitated the existence of a constitutional minimum. The 1790 Act implied as much. The Fourteenth Amendment created no constitutional minimum; it merely maintained the status quo meaning of “natural born.”

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49. *Id.* at 895.

50. *Id.*

51. *Id.*

52. AKHIL REED AMAR, AMERICA’S CONSTITUTION 554 n.91 (2005).

53. Pryor, *supra* note 18, at 896.

54. See Chin, *supra* note 10, at 20.

### C. The “*Interpretation*” Approach

One other noteworthy proposed solution to the enigma of the Natural Born Citizen Clause focuses on the 1790 Act. The First Congress, under this view, held a privileged place as a primary expounder of the Constitution, providing “important evidence of what thoughtful and responsible public servants close to the adoption of the Constitution thought it meant.”<sup>55</sup> After all, twenty members of the First Congress had been delegates in Philadelphia, and eight of them had been on the Committee of Eleven that drafted the Natural Born Citizen Clause.<sup>56</sup> The legislative intent of the First Congress, then, supplements the original intent of the Constitutional Convention. As quoted above, the 1790 Act declared that children “born beyond [the] sea” to American parents “shall be considered as natural born citizens,” as long as their fathers have been resident in the United States.<sup>57</sup> The statute’s use of the identical phrase “natural born citizen” is, under this approach, an act of interpretation, and the First Congress was making clear that the constitutional meaning of “natural born” encompassed foreign born children of United States parents.<sup>58</sup> This approach suggests that “natural born citizen” has a fixed meaning for constitutional purposes and that the First Congress outlined that meaning (or at least one facet of it) in 1790, and as such, it would seem that this meaning is unalterable.

## III. THE “CONSTITUTIONAL MINIMUM” APPROACH

### A. The Inadequacies of Existing Approaches

Each of the approaches surveyed above has its weaknesses. To begin with, the emphasis that the “interpretation” approach places on the 1790 Act may be misguided. As the author of that approach admits, the title of the act was “An Act to establish an uniform Rule of Naturalization,” suggesting that Congress perhaps believed that it was merely exercising its naturalization power.<sup>59</sup> Lohman insists that “the title of the act should have no bearing on whether or not the act served to interpret the American

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55. Christina S. Lohman, *Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause*, 36 GONZ. L. REV. 349, 370 (2000) (quoting David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 865 (1994)).

56. Gordon, *supra* note 4, at 8 n.57.

57. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 104 (repealed 1795).

58. Lohman, *supra* note 55, at 371.

59. *Id.* at 372.

meaning of natural born.”<sup>60</sup> Perhaps, but perhaps not.

A second problem with the approach, which Lohman also acknowledges, is that just five years later Congress repealed this statute and enacted a new one. This time Congress declared foreign-born children of American citizens to be “citizens of the United States,” omitting the “natural born” language.<sup>61</sup> The reason, if any, for this omission remains unclear.<sup>62</sup> Lohman weakly comments that “because it is unknown why ‘natural-born’ was omitted, it is premature to conclude that Congress did not consider such children natural-born.”<sup>63</sup> Again, that may be so, but the enactment of the new statute undermines the 1790 Act’s claim to primacy. In 1802, Congress legislated on the matter yet again.<sup>64</sup> This time the language was ambiguous enough to lead one prominent lawyer, Horace Binney, to opine in 1854 that “children born abroad to American citizens after the enactment of that statute did not acquire American citizenship.”<sup>65</sup> Whatever interpretation the First Congress might have wished to render with respect to the Natural Born Citizen Clause, the interpretation is as nebulous as the Clause itself.

Nebulousness is also the main weakness of Gordon’s traditional analysis; and, as mentioned, it is Pryor’s primary objection to that approach. English common law and statutes did not necessarily supply the phrase “natural born” with a clear meaning at the time of the Founding. Whatever meaning it had under British law was not necessarily incorporated into the Constitution, and neither the Convention debates nor early congressional legislation illuminates the Clause’s intended meaning. If the meaning of the Natural Born Citizen Clause is immutable because it is fixed in the Constitution, then it may also be ultimately unknowable.

The naturalized born approach resolves the problem of indeterminacy by attaching the meaning of “natural born” to Congress’s power to legislate on naturalization, so that whoever is a citizen by statute at the time of his or her birth is a natural born citizen. This approach,

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60. *Id.*

61. Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415 (repealed 1802).

62. See Gordon, *supra* note 4, at 11 (noting that the legislative proceedings provide no reason for the change).

63. Lohman, *supra* note 55, at 373.

64. Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155.

65. Gordon, *supra* note 4, at 12 (citing Horace Binney, *The Alienigenae of the United States*, 2 AM. L. REG. 193 (1854)).

however, creates a structural problem within the Constitution.

To see the problem, consider the following hypothetical: could Congress, prior to the ratification of the Fourteenth Amendment, pass a citizenship statute stating that no one shall attain United States citizenship until his or her first birthday?<sup>66</sup> If Congress has plenary power to make naturalization laws and thereby define the meaning of “natural born,” it would seem that this hypothetical statute would be constitutional. However, in so doing, Congress would make it impossible for anyone born in the future to be a natural born citizen. Assuming the consensus view that, to be natural born, one must become a citizen upon birth, within a few generations no one would be eligible to be President, and Congress would have defined the Executive Branch out of existence through an act of naturalization. This cannot be the correct result.

Pryor, in proposing the naturalized born approach, argues that the original Constitution granted Congress “broad discretion to determine who shall be a citizen of the United States” under its naturalization power.<sup>67</sup> Subsequently, the Fourteenth Amendment “den[ied] Congress the power to determine who shall be native-born citizens, despite its naturalization powers.”<sup>68</sup> Because natural born citizens presumably had to fall within the ambit of the Fourteenth Amendment, “‘natural born’ must be either synonymous with ‘native born’ or also include a subset of ‘naturalized.’”<sup>69</sup> Pryor appears to suggest, therefore, that before the ratification of the Fourteenth Amendment, Congress had plenary power to define citizenship, including who would be considered natural born citizens. Under this approach there was no constitutional minimum prior to the Fourteenth Amendment, and one might say without too much exaggeration that the definition of a citizen of the United States was whatever Congress said it was. Pryor then suggests that a constitutional minimum has existed only since the Fourteenth Amendment’s ratification, and that a minimum, if it exists, must be a set that contains a subset of all native-born citizens.<sup>70</sup>

There are several problems with this picture. First, if plenary congressional power to define citizenship created a structural problem,

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66. The hypothetical illustrates the point as long as the date of attainment of citizenship is some time after one’s date of birth.

67. Pryor, *supra* note 18, at 891.

68. *Id.* at 892.

69. *Id.* at 893.

70. *See id.* at 892–93.

then there was a structural problem from 1788 to 1868. The Fourteenth Amendment, even if it did indeed create a constitutional minimum, could not retroactively rescue the Constitution in its first eighty years as the supreme law of the land. Second, the Fourteenth Amendment may well be insufficient to resolve the structural problem even after 1868. Pryor takes for granted that “natural born” can be translated into “native born” or “native born, *plus* those granted citizenship by statute at birth.” The Fourteenth Amendment, however, only requires that persons born in the United States be “citizens,” not “natural born citizens.”<sup>71</sup> One can argue that the Reconstruction Congress could have used the phrase “natural born citizen” but chose not to, and therefore while Congress cannot abridge citizenship rights under the Fourteenth Amendment, it can enact a statute declaring that while all persons born within the United States are citizens, only a subset of those are natural born citizens. Under this reading, the structural problem would persist. The only way to avoid these structural issues is for there to have been a constitutional minimum even under the Constitution as it was written in 1787.

In addition to the inadequacies of the picture that Pryor paints, the 1790 Act also suggests the existence of a constitutional minimum even under the original Constitution. Pryor relies on this statute in part for the proposition that Congress thought it had power to define the meaning of “natural born,”<sup>72</sup> but Congress did not address within this statute the citizenship of those born in the United States.<sup>73</sup> While the statute did not purport to provide comprehensively for all forms of United States citizenship, the omission of any discussion of those who would be natural born citizens under common law *jus soli* suggests that Congress assumed the existence of some residue that required no discussion.

Finally, Pryor may well be correct that the placement of the natural born requirement alongside bright-line rules such as the age and residency requirements implies that the concept of “natural born citizen” should also be clear-cut.<sup>74</sup> This may simply mean, however, that the concept was clear to all at the time of the Founding, though it has become nebulous over the years. That the First Congress chose to enact a non-comprehensive citizenship law against this background also suggests the existence of a residue that was generally recognized, if only implicitly.

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71. U.S. CONST. amend. XIV, § 1.

72. Pryor, *supra* note 18, at 891.

73. See Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 104 (repealed 1795).

74. Pryor, *supra* note 18, at 895.

### B. *The Constitutional Minimum Approach*

Whatever power of naturalization Congress has, the Constitution must contemplate a residue of birthright citizenship—a “constitutional minimum”—that Congress cannot cut into through its naturalization power. And it is the Natural Born Citizen Clause that creates this “constitutional minimum.” The 1790 Act seemed to assume as much.<sup>75</sup> The constitutional minimum approach agrees with the naturalized born approach in that above the constitutional minimum, Congress can grant natural born status by statute—that is, whoever is a citizen under statutory law in force at the time of one’s birth is a natural born citizen. Above the constitutional minimum, then, there is the benefit of certainty as to who is eligible to be President. The real object of investigation then becomes the constitutional minimum itself.

Put another way, the naturalized born approach is attractive by reason of the textual consonance between “[n]aturalized” in Article I, § 8, and “natural” in Article II, § 1, as well as the certainty this approach is likely to create in most cases. Nevertheless, the structure of the Constitution shows that congressional power in this regard is like a ratchet that can be moved up and down, but never below a certain threshold. In order to ascertain this threshold—this constitutional minimum—one must return to traditional investigations into pre-revolutionary British practices and the understanding at the time of the Founding. This may mean that the constitutional minimum cannot be fixed with perfect certainty. Nonetheless, there is less uncertainty under this approach than under traditional scholarship. Under the constitutional minimum approach, statutes are only suspect when they may cut into the minimum, whereas the traditional approach is also concerned with the possibility that one may be a citizen at birth for statutory purposes, but not as far as presidential eligibility is concerned.

### C. *Ascertaining the Constitutional Minimum*

As noted, under the proposed framework the real object of study becomes the constitutional minimum itself: Exactly what is the scope of that minimum? One can further sharpen the focus of this question by first establishing that *jus soli* must form a part of it. It is a matter of consensus that English common law encompassed *jus soli*.<sup>76</sup> The Supreme Court also

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75. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795) (omitting discussion of citizenship of those born in the United States).

76. See, e.g., ALEX COCKBURN, NATIONALITY 7 (London, William Ridgway

endorsed this view: “It thus clearly appears that by the law of England for the last three centuries . . . every child born in England of alien parents was a natural-born subject . . .”<sup>77</sup> The Court went on to say that *jus soli* “was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established.”<sup>78</sup> The Court has reaffirmed this analysis in later cases.<sup>79</sup>

It would be fair, then, to stipulate that *jus soli* forms a part of the constitutional minimum implicit in the Natural Born Citizen Clause. The Fourteenth Amendment also subsequently confirmed the principle of *jus soli*, though it did not use the “natural born” language.<sup>80</sup> The question then becomes whether the constitutional minimum also encompasses some degree of *jus sanguinis*. This Article argues that it does, though with limitation.

To see this point one should first consider two misconceptions and recognize their fallacy. The discussion above has already alluded to one of these: that *jus soli* and *jus sanguinis* are mutually exclusive principles so that the adoption of one necessarily implies the rejection of the other. In *United States v. Wong Kim Ark*, the dissent took this position: “If the conclusion of the majority opinion is correct, then the children of citizens of the United States, who have been born abroad since [the adoption of the Fourteenth Amendment], were and are aliens, unless they have or shall, on attaining majority, become citizens by naturalization . . .”<sup>81</sup> The mutual

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1869) (“By the Common law of England, every person born within the dominions of the Crown, no matter whether of English or of foreign parents . . . was an English subject; save only the children of foreign ambassadors . . . or a child born to a foreigner during the hostile occupation of any part of the territories of England.”); Gordon, *supra* note 4, at 6 (“It has always been true that a person born in the realm was a natural-born subject.”).

77. *United States v. Wong Kim Ark*, 169 U.S. 649, 658 (1898).

78. *Id.*

79. *See, e.g., Weedin v. Chin Bow*, 274 U.S. 657, 660 (1927) (“The very learned and useful opinion of Mr. Justice Gray, speaking for the court in *United States v. Wong Kim Ark* establishes that at common law in England and the United States the rule with respect to nationality was that of the *jus soli* . . .”) (citations omitted).

80. *See id.* at 670 (stating that the Fourteenth Amendment reaffirmed the principle that a person born in the United States, regardless of being denied naturalization under the law, was “a citizen of the United States by virtue of the *jus soli* embodied in the amendment.”).

81. *United States v. Wong Kim Ark*, 169 U.S. 649, 706 (1898) (Fuller, C.J., dissenting).

exclusion of *jus soli* and *jus sanguinis* is of course not logically necessary. Instead, the source of this notion is likely the divergent origins of the two principles, with *jus soli* arising in the island nation of England, and *jus sanguinis* dominating on the European continent.<sup>82</sup> Chief Justice Melville Fuller therefore pointed to the continental publicists of the law of nations, quoting one as saying that “in order to be of the country, it is necessary that a person be born of a father who is a citizen; for, if he is born there of a foreigner, it will be only the place of his birth, and not his country.”<sup>83</sup>

Besides being logically unnecessary, Fuller’s notion of mutual exclusion has not been borne out by English history, which, as already discussed, successfully combined *jus soli* with exceptions through the common law as well as statutory *jus sanguinis*. Neither has the American experience been one of applying *jus soli* to the exclusion of *jus sanguinis*. Even though, as discussed above, the 1802 statute arguably did not endow children born abroad to American parents between 1802 and 1855 with United States citizenship, one state supreme court nevertheless twice held that such persons were citizens through common law authority.<sup>84</sup> Surveying the history of *jus sanguinis* in the United States, Justice Stephen Breyer concluded that “history shows a virtually unbroken tradition of transmitting American citizenship from parent to child ‘at birth.’”<sup>85</sup> Therefore it is entirely unnecessary to think that inclusion of the principle of *jus sanguinis* in the Constitution’s definition of natural born citizen would create a contradiction.

The second misconception is that if citizenship can be transmitted by blood, then it can be transmitted *ad infinitum*—that the descendants of an American citizen, no matter how many generations removed and wherever born, would continue to enjoy United States citizenship. This misconception implies either that any statute limiting an American’s ability

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82. See BLACKSTONE, *supra* note 17; Pryor, *supra* note 18 (noting divergence in common law versus civil law nations).

83. *Wong Kim Ark*, 169 U.S. at 708 (Fuller, C.J., dissenting) (quoting 1 EMMERICH DE VATTEL, THE LAW OF NATIONS ch. 19, § 212 (Joseph Chitty trans. 1797)).

84. See *Ludlam v. Ludlam*, 26 N.Y. 356, 362–72 (1863). “Our government . . . extends its protection over its citizens when in foreign countries . . . . It can hardly be doubted that it would protect the infant child of such citizen, though born abroad, to the same extent that it would protect the father.” *Id.* at 370. See also *Lynch v. Clarke*, 1 Sand. Ch. 583, 659–62 (N.Y. Ch. 1844) (“With regard to the Act of 1802, I do not think that the children of our citizens born abroad are aliens.”).

85. *Miller v. Albright*, 523 U.S. 420, 479 (1998) (Breyer, J., dissenting) (citations omitted).

to transmit citizenship to his descendants is unconstitutional, or that any such statute demonstrates that no such ability to transmit citizenship existed in the first place. This view is implicit in the essay by Chin, in which he examines the citizenship statute in force at the time of Senator McCain's birth—Revised Statutes § 1933.<sup>86</sup> Under that statute, Americans could transmit citizenship to their children born abroad, provided that “citizenship shall not descend to any such child unless the citizen [parent] has resided in the United States previous to the birth of such child.”<sup>87</sup> Chin also argues that recognition of *jus sanguinis* under the Natural Born Citizen Clause would lead “thousands . . . including Panamanian children of U.S. citizens treated as aliens,” to discover all of a sudden that they were United States citizens after all.<sup>88</sup>

The idea of perpetual transmission of citizenship is misguided, however, even if it may feel intuitive. After all, English law prior to American independence had never allowed perpetual transmission of citizenship by blood. Though English law had gradually expanded the scope of *jus sanguinis*, as late as 1773 children born to British subjects abroad were only natural born subjects down to the second generation.<sup>89</sup> Chin explains that the residency requirement in § 1933 “prevented the creation of overseas enclaves of citizens with no connection to the United States.”<sup>90</sup> This may be a genuine concern, but there is no reason to think that it is incompatible with a constitutional doctrine of *jus sanguinis*, given that Parliament clearly did not contemplate *jus sanguinis* as all-or-nothing but instead believed it could be extended only to a limited number of generations. The First Congress presumably agreed, since the 1790 Act also declared that “the right of citizenship shall not descend to persons whose fathers have never been resident in the United States.”<sup>91</sup> In fact, the 1790 Act and § 1933 essentially are identical—the only substantial differences are that § 1933 is gender neutral and that it clarified the ambiguity in the 1790 Act’s language regarding whether the parent’s United States residency had to predate the child’s birth.<sup>92</sup>

Having gotten past these two misconceptions, one can readily see that the constitutional minimum likely includes, on top of *jus soli*, *jus sanguinis*

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86. Chin, *supra* note 10, at 24–28.

87. Act of May 24, 1934, ch. 344, § 1993, 48 Stat. 797.

88. Chin, *supra* note 10, at 48.

89. British Nationality Act, 1773, 13 Geo. 3, c. 21 (Eng.).

90. Chin, *supra* note 10, at 21.

91. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 104 (repealed 1795).

92. *See id.*; *see also* Act of May 24, 1934, ch. 344, sec. 1, § 1993, 48 Stat. 797.

for the first generation born abroad. As the above survey of English legal history shows, as early as 1350 England had provided that children born abroad would have the same rights as their parents.<sup>93</sup> In 1708 and again in 1731, Parliament affirmed that the first generation of children born to British subjects abroad were “natural born subjects.”<sup>94</sup> In 1790, Congress declared that the same rule applied to Americans.<sup>95</sup> While the 1790 Act did not also declare that the *jus soli* principle applied to those born within the United States, it referred to children born “beyond [the] sea,” echoing the language in the 1350 statute *De Natis Ultra Mare*, which had similarly assumed the existence of a *jus soli* rule without explicitly providing for it.<sup>96</sup> While Binney argued (and Chin agreed) that the 1802 statute cut back on this right,<sup>97</sup> it likely meant no such thing. As Gordon put it, “[t]here is not the slightest evidence of a Congressional wish to repudiate the consistent practice extending over several centuries, in England and the United States, to recognize citizenship status by descent.”<sup>98</sup> Long before Gordon, the New York Court of Appeals also rejected Binney’s argument.<sup>99</sup> Moreover, within a year after Binney published his thesis in 1854, Congress revised the statute in question to remove all doubt.<sup>100</sup> The case is strong, then, that the constitutional minimum includes *jus sanguinis* for the first generation born abroad.

It is important to note the distinctions between this argument and the interpretation and traditional approaches discussed above. The interpretation approach focuses on the 1790 Act as an act of congressional declaration, and thus suggests that what the 1790 Act provided was what Congress understood “natural born citizen” to mean. The vagaries of subsequent statutes, including the debate over the 1802 statute and Binney’s hypothesis, however, undercut the argument for treating the 1790 Act as interpretation. After all, if Congress simply stated the meaning of the Constitution in 1790, then why would it state anything different at a later time, or indeed at all? This Article, in contrast, does not give the 1790

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93. 25 Edw. 3, c. 2 (1350) (Eng.).

94. British Nationality Act, 1730, 4 Geo. 2, c. 21, § 1 (Eng.); Foreign and Protestants Naturalization Act, 1708, 7 Ann., c. 5, § 3 (Eng.).

95. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 104 (repealed 1795).

96. *Id. See also* 25 Edw. 3, c. 2 (1350) (Eng.).

97. *See* Gordon, *supra* note 4, at 12.

98. *Id.*

99. *See* Ludlam v. Ludlam, 26 N.Y. 356, 369–70 (1863).

100. *See id.* (stating Binney’s article “doubtless[ly] induced the passage of the Act of Congress of 1855”).

Act the pride of place, and thus subsequent revisions do not undermine this Article's argument. Instead, the argument here is that British practice, as absorbed into United States practice and statutes passed in the early years of the Republic, contemplates one generation's worth of *jus sanguinis*, notwithstanding Binney's hypothesis.

Neither is the argument here the same as the traditional approach. Traditional scholarship sought to ascertain the absolute meaning of the Natural Born Citizen Clause through an investigation of British law and early American understanding. As noted above, this approach inevitably involves a degree of indeterminacy. The constitutional minimum approach seeks only to ascertain through historical investigation what must be included within the Clause at a minimum, not the exact contours of what birthright citizenship the Clause may provide. While this approach is not completely immune to the problem of indeterminacy, it is much less plagued by it. The argument here is that at a minimum, the Natural Born Citizen Clause contemplates *jus sanguinis* for the first generation born abroad, not that members of the second generation born abroad necessarily are not natural born citizens; indeed, such persons would be natural born citizens if a statute so provided.

What of the second generation, then? Might the constitutional minimum also encompass grandchildren of American citizens abroad? The answer probably is *no*. While Parliament had extended *jus sanguinis* to grandchildren in 1773,<sup>101</sup> given the statute's recent vintage, it is not clear that American colonists had adopted the same rule by the time of Bunker Hill or Lexington. It must be remembered that Americans did not necessarily adopt every aspect of British law. Indissoluble allegiance to the Crown is one example of a British doctrine that Americans chose to repudiate, contrary as it seemed to the spirit of the Revolution itself.<sup>102</sup> In light of the 1790 Act, which provided that an American citizen needed to have been a resident of the country before he could transmit citizenship to his children abroad,<sup>103</sup> it seems clear that Americans did not absorb the 1773 English statute into the laws of this country. As Chief Justice William Howard Taft put it, "Congress had before it the Act of George III of 1773 which conferred British Nationality not only on the children but also on the grandchildren of British born citizens who were born aboard. Congress

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101. The British Nationality Act, 1772, 13 Geo. 3, c. 21 (Eng.).

102. Gordon, *supra* note 4, at 5–6.

103. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 104 (repealed 1795).

was not willing to make so liberal a provision.”<sup>104</sup> *Jus sanguinis* through the second generation, then, did not form part of the background legal understanding at the time of the Constitution’s adoption.

#### IV. THE IMPACT OF THE FOURTEENTH AMENDMENT

It remains to be answered whether the Constitution as amended, rather than as written, contemplates the same kind of birthright citizenship. The Fourteenth Amendment provides that “[a]ll 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>105</sup> The question is whether this language modifies any birthright citizenship that the Natural Born Citizen Clause may have recognized prior to the Fourteenth Amendment’s ratification. This Article argues that the Fourteenth Amendment did not alter the constitutional minimum implicit in the Natural Born Citizen Clause.

It is undoubtedly true that “*jus soli* [is] embodied in the amendment.”<sup>106</sup> It is probably also true that “ever since the Civil War, the transmission of American citizenship from parent to child, *jus sanguinis*, has played a role secondary to that of the transmission of citizenship by birthplace, *jus soli*.”<sup>107</sup> Nevertheless, the dominance of one does not necessarily imply the obsolescence of the other. Just as there is nothing in the concept of *jus soli* that logically requires the exclusion of *jus sanguinis*, so it is that there is nothing in the language of the Fourteenth Amendment that requires the abandonment of whatever *jus sanguinis* may be within the Natural Born Citizen Clause. One could insist that *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another—but there is nothing in the text, history, or structure of the Constitution that would require one to do so. In fact, the Supreme Court has stated in the seminal case on this question that “[the first] sentence of the [F]ourteenth [A]mendment is declaratory of existing rights, and affirmative of existing law.”<sup>108</sup> In the Court’s own estimation, neither the language of

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104. *Weedin v. Chin Bow*, 274 U.S. 657, 665 (1927).

105. U.S. CONST. amend. XIV, § 1.

106. *Weedin*, 274 U.S. at 670.

107. *Miller v. Albright*, 523 U.S. 420, 478 (1998) (Breyer, J., dissenting); *see also* *Rogers v. Bellei*, 401 U.S. 815, 828 (1971) (noting that “‘naturalization by descent’ was not a common-law concept”).

108. *United States v. Wong Kim Ark*, 169 U.S. 649, 688 (1898). Admittedly, the Court went on to say that the Fourteenth Amendment “has not touched the acquisition of citizenship by being born abroad of American parents; and has left that

the Fourteenth Amendment nor the holding in *Wong Kim Ark* could in any way displace citizenship rights implicit in the Natural Born Citizen Clause or anywhere else in the Constitution.<sup>109</sup>

Moreover, though *Wong Kim Ark* was a case of an individual of Chinese descent born in the United States, and though it is widely seen as the case that confirmed the *jus soli* rule of the Fourteenth Amendment, the Court did not lose sight of the Amendment's anti-slavery purpose. After all, the Amendment was the Reconstruction Congress's answer to Chief Justice Roger Taney's infamous *Dred Scott* opinion, which held that blacks could never be American citizens.<sup>110</sup> As the *Wong Kim Ark* Court noted, the same Congress that proposed the Fourteenth Amendment had also proposed the Civil Rights Act of 1866.<sup>111</sup> That Act had already provided that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."<sup>112</sup> Congress, "evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent congress," decided to insert substantially the same language into the Constitution itself.<sup>113</sup> The Amendment is therefore

declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Scott v. Sandford* . . . and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States.<sup>114</sup>

Nothing in this drafting history suggests that the adoption of the Fourteenth Amendment somehow abridged any *jus sanguinis* citizenship rights Americans also enjoyed under existing law. Nothing in the

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subject to be regulated, as it had always been, by congress." *Id.* This language would seem more consistent with either the naturalized born approach or the view that only those born within the United States can be natural born citizens. That passage is, however, mere dictum, and it was never the Court's aim in that case to explore the question of children born to Americans abroad.

109. *Id.*

110. *Scott v. Sandford*, 60 U.S. 393, 426–27 (1856).

111. *Wong Kim Ark*, 169 U.S. at 675.

112. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

113. *Wong Kim Ark*, 169 U.S. at 675.

114. *Id.* at 676.

Amendment's purpose suggests that such abridgement would be appropriate. Nothing in the structure of the Constitution as amended compels such abridgement. Finally, as already noted, nothing in the Amendment's text necessitates such abridgement. The Supreme Court has recognized as much.

#### V. RAMIFICATIONS OF THE CONSTITUTIONAL MINIMUM APPROACH

Professor Chin, having argued that Senator McCain is not eligible for the presidency, also argued that one way in which Senator McCain could be recognized as a natural born citizen is for the Court to adopt a doctrine of *jus sanguinis* birthright citizenship.<sup>115</sup> Chin has also argued, however, that such a move would require the Court to overturn *Rogers v. Bellei*<sup>116</sup> and perhaps make citizens out of Bellei and "thousands of others, including Panamanian children of U.S. citizens treated as aliens."<sup>117</sup>

As already noted, however, this would only be true if one assumed that *jus sanguinis* necessarily allowed one to transmit citizenship to an infinite number of generations of descendants. Under the constitutional minimum approach, the ramifications of recognizing such a doctrine would not be nearly as dramatic as Chin has suggested. This Article has argued that the Natural Born Citizen Clause only implies *jus sanguinis* citizenship for the first generation born abroad, and that generation has no power to pass American nationality onto its descendants without first residing within the United States. If this is so, then there should be very few inadvertent United States citizens. The vast majority of any descendants of Americans in Panama, if not already recognized as citizens by statute, most likely are not of the first generation born abroad, considering that at least since 1937, such children have already been granted citizenship by statute.<sup>118</sup> Children born elsewhere in the world to American parents have also long been

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115. Chin, *supra* note 10, at 46–48.

116. *Rogers v. Bellei*, 401 U.S. 815 (1971).

117. Chin, *supra* note 10, at 48.

118. Act of Aug. 4, 1937, ch. 563, § 1, 50 Stat. 558 (codified as amended at 8 U.S.C. § 1403(a) (2006)) ("[A]ny person born in the Canal Zone on or after February 26, 1904, and whether before or after the effective date of this chapter, whose father or mother or both at the time of the birth of such person was or is a citizen of the United States, is declared to be a citizen of the United States."). Because the statute is retroactive to 1904, it should be difficult to find more than a tiny number of Panamanians who would suddenly gain United States citizenship under a one-generation rule of *jus sanguinis*.

taken into account.<sup>119</sup> In short, the sky would not fall if the Court adopted the approach outlined in this Article.

Chin may be right, however, that the Court would have to overturn *Rogers*, in which the Court upheld a statute stripping the citizenship of those born abroad to American parents who fail to reside within the United States continuously for five years between the ages of fourteen and twenty-eight.<sup>120</sup> Under the constitutional minimum approach outlined in this Article, such a statute is indeed unconstitutional—Bellei's citizenship rights should not have been abridged on grounds of residency, save for his ability to transmit citizenship to his children. Thus, the Court erred in *Rogers*. That it was a five-to-four decision,<sup>121</sup> however, suggests that even in 1971, the Justices considered this a close question, and overturning it or distinguishing it should not be as traumatic as distinguishing, say, *Plessy v. Ferguson*, an eight-to-one decision.<sup>122</sup>

*Montana v. Kennedy*, which Chin also points to as problematic for *jus sanguinis* citizenship, ultimately dealt with the Equal Protection Clause rather than birthright citizenship.<sup>123</sup> The petitioner in that case was born abroad to an American mother and Italian father, and the statutes in force at the time of his birth did not allow American mothers to transmit citizenship by blood.<sup>124</sup> Properly rectified through modern Equal Protection Clause jurisprudence, any *jus sanguinis* citizenship contained in the Natural Born Citizen Clause would be applied without gender discrimination, and *Montana* would disappear.<sup>125</sup>

## VI. CONCLUSION

This Article has argued for a constitutional minimum approach to the

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119. See Pub. L. No. 73-350, § 1, 48 Stat. 797, 797 (1934) (“Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States . . .”).

120. *Rogers*, 401 U.S. at 836.

121. See *id.* at 836, 845 (presenting dissenting opinions by Justices Black, Douglas, Marshall, and Brennan).

122. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (presenting one dissent authored by Justice Harlan).

123. See generally *Montana v. Kennedy*, 366 U.S. 308 (1961).

124. *Id.* at 309–11.

125. Admittedly, however, there may still be some thorny dicta to be dealt with, such as the Court’s apparent endorsement of Binney’s hypothesis. See *id.* at 311–12.

Natural Born Citizen Clause. Under this approach, Congress has power to define who is natural born or “naturalized born” through its naturalization power, as long as it does not cut into a minimum residue of birthright citizenship as implied by the structure of the Constitution itself. While this approach does not completely exorcise the demons of indeterminacy that haunt traditional scholarship, it does greatly reduce that indeterminacy. It also corrects the structural flaw in the naturalized born approach.

Through investigation of English common law and statutes, early American statutes, and case law and scholarly commentary since the Founding, this Article concludes that the Natural Born Citizen Clause implies a constitutional minimum of not only *jus soli* but also *jus sanguinis* for the first generation born abroad, though not beyond. While this conclusion would require some overhaul of existing jurisprudence, and while it implies the unconstitutionality of certain past statutes, recognition of this kind of birthright citizenship would not disturb the fabric of the law nearly as much as Professor Chin fears.

Finally, under this approach, Senator McCain is a natural born citizen and eligible for the presidency. Though the 2008 presidential election is over, and questions of Senator McCain’s eligibility are moot for the time being, in a globalized world it is likely only a matter of time before another candidate born abroad steps forth to seek the presidency. At such time, similar questions will arise once again. This Article has sought to answer those questions.