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2016]

## CONSTITUTIONAL CITIZENSHIP UNDER ATTACK

JOSEPH W. DELLAPENNA\*

## I. INTRODUCTION

IN 1977, my article, *The Citizenship of Draft Evaders after the Pardon*,<sup>1</sup> analyzed the erroneous position taken by the U.S. government regarding the effect of President Carter's pardon of those who had gone abroad to evade military service in Vietnam.<sup>2</sup> Jody Powell, then White House Press Secretary, indicated that, although the President had waived the criminal penalties for draft evasion, he could not restore the citizenship that men had forfeited by evading the draft.<sup>3</sup> This misread the constitutional right of citizenship guaranteed by the Fourteenth Amendment.<sup>4</sup> That amendment denies Congress power to revoke citizenship derived from it.<sup>5</sup> While persons who became citizens other than by the Fourteenth Amendment are not so protected, the great majority of Americans are so protected.<sup>6</sup> Alteration of the citizenship of Fourteenth Amendment citizens can only be done by the citizens' consent or a constitutional amendment.

Few Americans (including most lawyers) study U.S. citizenship and the power, or lack of power, in Congress to affect it once acquired. Therefore, considerable confusion arises and persists in the public about citizenship questions. That a president of the United States, as with President Carter, gets it wrong both demonstrates and supports this confusion. The TEA Party (supposedly an acronym for Taxed Enough Already Party) and

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1. Joseph W. Dellapenna, *The Citizenship of Draft Evaders After the Pardon*, 22 VILL. L. REV. 531 (1977).

2. See Exec. Order No. 11,967, 42 Fed. Reg. 4393 (Jan. 24, 1977) (granting Attorney General discretion to allow persons in violation of Military Selective Service Act to reenter United States under same terms and conditions as aliens); see also Proclamation No. 4483, 42 Fed. Reg. 4391 (Jan. 24, 1977) (pardoning any person who violated or was convicted under Military Selective Service Act between Aug. 4, 1964, and Mar. 28, 1973).

3. See *Evaders Pardoned by Carter*, PHILA. INQUIRER, Jan. 22, 1977, at 5.

4. See U.S. CONST. amend. XIV, § 1.

5. See *Afroyim v. Rusk*, 387 U.S. 253, 261–62 (1967) (denying Congress plenary power to take away American citizen's citizenship without consent). For a discussion of the limits on Congress's power to revoke American citizenship under the Fourteenth Amendment, see *infra* Part IV.

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

several Republican candidates for President have seized upon this confusion to press three demands regarding constitutional citizenship.<sup>7</sup>

The demands did not originate with the TEA Party,<sup>8</sup> and meeting these demands would overturn precedents interpreting the Fourteenth Amendment stretching more than a century. Two of the demands directly challenge settled Fourteenth Amendment law, while the third addresses the citizenship requirement for election as President.<sup>9</sup> A correct resolution of the third demand, however, turns as much on the understanding of citizenship established under the Fourteenth Amendment as it does on the Presidential Qualifications Clause. The demands are:

That persons born in the United States be denied U.S. citizenship if one or both parents are not legal residents of the United States;<sup>10</sup>

That persons who commit or support terrorist acts against the United States be stripped of their citizenship;<sup>11</sup> and

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7. See, e.g., Anne Schroeder Mullins, *T.E.A. = Taxed Enough Already*, POLITICO (Apr. 8, 2009, 1:36 PM), [http://www.politico.com/blogs/anneschroeder/0409/TEA\\_Taxed\\_Enough\\_Already.html](http://www.politico.com/blogs/anneschroeder/0409/TEA_Taxed_Enough_Already.html) [<https://perma.cc/W9MP-AYMD>]; see also Daniel González & Dan Nowicki, *What If U.S. Ended Birthright Citizenship?*, ARIZ. REP., Sept. 14, 2015, at A1 (reporting several Republican candidates support of “repealing” birthright citizenship for children born in United States to undocumented alien parents), available at <http://www.azcentral.com/story/news/politics/immigration/2015/09/04/what-if-united-states-ended-birthright-citizenship/71672896/> [<https://perma.cc/P99U-5GND>]; Paul Mulshine, *After Tuesday, It’s Time for the Tea Party to Leave*, STAR-LEDGER (Newark, NH), Nov. 7, 2013, at 19, available at [http://blog.nj.com/njv\\_paul\\_mulshine/2013/11/after\\_tuesday\\_its\\_time\\_for\\_the.html](http://blog.nj.com/njv_paul_mulshine/2013/11/after_tuesday_its_time_for_the.html) [<https://perma.cc/T77T-NLC2>]; Christine Show, *Political Activists Gather to Pray*, ORLANDO SENTINEL, May 9, 2009, at J4; David Weigel, *Rand Paul Explains Why He Wants to Stop ‘Birthright Citizenship,’* WASH. POST, Aug. 20, 2015, available at 2015 WLNR 24686462; *WND Questions Rubio’s Eligibility—but Not Cruz’s*, CONWEBLOG, Apr. 14, 2015, available at 2015 WLNR 10901726 (concluding Ted Cruz is eligible to run for President even though he was born in Canada while Marco Rubio is not even though he was born in Florida).

8. The lineage of the various proposals will be discussed in the analysis of each proposal.

9. See U.S. CONST. art. II, § 1, cl. 4.

10. See Jennifer Rubin, *Right-Wingers Deny Constitutional Reality*, WASH. POST, Aug. 20, 2015, available at 2015 WLNR 24733811 (noting some politicians support repealing birthright citizenship); see also Christopher Parker, *The (Real) Reason the House Won’t Pass Comprehensive Immigration Reform*, L.A. PRENSA, Aug. 8, 2014, at 6 (reporting 66% of TEA Party conservatives oppose birthright citizenship), available at <http://laprensa-sandiego.org/editorial-and-commentary/commentary/the-real-reason-why-the-house-wont-pass-comprehensive-immigration-reform/> [<https://perma.cc/ARG6-399F>]. For a discussion of this claim, see *infra* Part III.

11. See Robert Costa & Ed O’Keefe, *GOP Senators Call for Special Forces in Iraq and Syria, as Obama Officials Plan Hill Briefings*, WASH. POST, Sept. 8, 2014, available at 2014 WLNR 24823328 (indicating Ted Cruz plans to introduce bill to strip citizenship from supporters of terrorists); see also Kellan Howell, *Conservatives Raise Call to Strip Jihadists of U.S. Citizenship, as Ted Cruz Pushes Exile*, WASH. TIMES, Sept. 1, 2014, available at 2014 WLNR 24080310 (noting some conservative politicians call to strip American citizenship from those who leave United States to join certain militant groups); Edward Schumacher Matos, *Citizens All, or Not?*, WASH. POST, Jan.

That persons are not “natural born citizens” if one or both of their parents were not citizens at the time of the person’s birth in the United States, but persons born abroad are “natural born citizens” if one or both parents were U.S. citizens at the time of their birth (trying to state this “principle” coherently is challenging).<sup>12</sup>

In this Article, I explore the three demands and consider their constitutionality if enacted by statute.<sup>13</sup> In doing so, I traverse many precedents that I analyzed in 1977, as well as consider the developments over the nearly forty years since. I will not provide extended argument over whether any or all of the demands should become amendments to the Constitution, in part because such amendments are unlikely to garner a two-thirds majority of both Houses of Congress and legislative majorities in three-fourths of the states.<sup>14</sup>

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15, 2011, available at 2011 WLNR 1532246; Wayne Slater, *Republican Scott Brown Says He Gave Ted Cruz the Idea to Strip the Citizenship of Americans Who Fight for ISIS*, DALL. MORNING NEWS, Sept. 16, 2014, available at 2014 WLNR 25669376. For further discussion of this claim, see *infra* Part IV.

12. See, e.g., *WND Questions Rubio’s Eligibility—but Not Cruz’s*, *supra* note 7. For further discussion of this claim, see *infra* Part V.

13. See Stephen Covell, Current Development, *Immigration Reduction Act of 1994*, 8 GEO. IMMIGR. L.J. 494, 494 (1994) (noting Title VII of proposed statute eliminated birthright citizenship); Daniel P. Derechin, Current Development, *Denying Birthright Citizenship to Those Born in the U.S. to Undocumented Aliens*, 11 GEO. IMMIGR. L.J. 911, 913–14 (1997) (stating congressional subcommittee considered denying birthright citizenship to those born in United States to undocumented parents); Laurel Tuell Parcher & Brad Winter, Current Development, *Bills in the 103d Congress*, 8 GEO. IMMIGR. L.J. 315, 317 (1994) (explaining proposed bill would eliminate automatic birthright citizenship); see also *Birthright Citizenship: Is It the Right Policy for America?: Hearing Before the Subcomm. on Immigration & Border Sec. of the Comm. on the Judiciary H.R., 114th Cong.* 5 (2015) (statement of Rep. Zoe Lofgren) (noting congressional Republicans called for legislation and constitutional amendment to restrict birthright citizenship in 2010); Sara Catherine Barnhart, Note, *Second Class Delivery: The Repeal of Birthright Citizenship as a Repeal of the “Pursuit of Happiness”*, 42 GA. L. REV. 525, 541–45 (2008) (discussing several bills to repeal birthright citizenship introduced in 2005 or 2007); Dana Gayeski, Comment, *Give Me Your Tired, Your Poor, Your Legal: Why Efforts to Repeal Birthright Citizenship Are Unconstitutional and Un-American*, 21 TEMP. POL. & CIV. RTS. L. REV. 215, 228–35 (2011) (discussing federal and state bills to restrict birthright citizenship); Beah Mejia, Legislative Updates, *H.R.140: “Birthright Citizenship Act of 2011,”* 7 MOD. AM. 81, 81–82 (2011) (describing bill introduced in 2011 to circumscribe birthright citizenship).

14. See U.S. CONST. art. V. I leave aside the possibility of proposing constitutional amendments through a national convention, a process that would still require ratification by three-fourths of the states. For consideration of some of the issues that would arise were the Citizenship Clause amended, see generally Emily Kendall, *Amending the Constitution to Save a Sinking Ship? The Issues Surrounding the Proposed Amendment of the Citizenship Clause and “Anchor Babies,”* 22 BERKELEY LA RAZA L.J. 349 (2012); Claudine Pease-Wingenter, *Empowering Our Children to Dream Without Limitations: A Call to Revisit the “Natural Born Citizen” Requirement in the Obama Era*, 29 CHICANA/O-LATINA/O L. REV. 43 (2010); Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 BYU L. REV. 927.

In Part II, I discuss the TEA Party approach to constitutional interpretation and delineate how the demands regarding constitutional citizenship fit into this approach. In Part III, I examine the claimed power to deny birthright citizenship to some persons born in the United States under U.S. jurisdiction. In Part IV, I consider the limited power of the Congress to revoke U.S. citizenship. In Part V, I explore the concept of a “natural born citizen” as a qualification for President of the United States. Finally, in Part VI, I offer a few general conclusions from this parsing of the arguments of TEA Party adherents (TEA Partiers).

## II. THE TEA PARTY’S APPROACH TO THE CONSTITUTION

The TEA Party is a diverse movement without centralized leadership and thus without an authoritatively prescribed platform.<sup>15</sup> Nonetheless, most TEA Partiers subscribe to certain characteristic patterns of legal and political claims.<sup>16</sup> The central characteristic of these claims is the view that TEA Party members (a fairly large number of whom are white, somewhat older men with significant property and wealth) are being oppressed by a “tyrannical” U.S. government, creating a need to “take back” the country.<sup>17</sup> Why such people, who normally exercise considerable power

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15. See Amy Gardner, *Gauging the Scope of the Tea Party Movement in America*, WASH. POST, Oct. 24, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/23/AR2010102304000.html> [<https://perma.cc/699G-JA82>]; Wash. Post Canvass, *An Up-Close Look at the Tea Party and Its Role in the Midterm Elections: Mapping the Tea Party*, WASH. POST, Oct. 24, 2010 [hereinafter *Up-Close Look*], <http://www.washingtonpost.com/wp-srv/special/politics/tea-party-canvass/> [<https://perma.cc/3WKC-UKK4>]; see also Jared A. Goldstein, *The Tea Party’s Constitution*, 88 DENV. U. L. REV. 559, 560–61 (2011) [hereinafter Goldstein, *Tea Party’s Constitution*]; Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L.Q. 193, 194 (2011) [hereinafter Schmidt, *Tea Party and the Constitution*].

16. See generally RONALD P. FORMISANO, *THE TEA PARTY: A BRIEF HISTORY* (2012); KATE ZERNIKE, *BOILING MAD: INSIDE TEA PARTY AMERICA* (1st St. Martin’s Griffin ed. 2011) (2010); *Up-Close Look*, *supra* note 15.

17. See Kate Zernike & Megan Thee–Brenan, *Poll Finds Tea Party Backers Wealthier and More Educated*, N.Y. TIMES, Apr. 14, 2010, at A1, available at [http://www.nytimes.com/2010/04/15/us/politics/15poll.html?\\_r=0](http://www.nytimes.com/2010/04/15/us/politics/15poll.html?_r=0) [<https://perma.cc/8V62-Y5SK>]; see also Jamal Greene, *The Alchemy of Dissent*, 45 TULSA L. REV. 703, 703 (2010); Matt Flegenheimer, *Cheers, Puns and Protest Welcome Donald Trump in Dallas*, N.Y. TIMES, Sept. 14, 2015, at A16, available at <http://www.nytimes.com/2015/09/15/us/politics/cheers-puns-and-protest-welcome-donald-trump-in-dallas.html> [<https://perma.cc/BY8F-7K9C>] (reporting Trump’s call to “take back our country”); Matt Flegenheimer, *Varied Pleas as Candidates Press Cases at Conservative Forum*, N.Y. TIMES, Sept. 18, 2015, at A12, available at <http://www.nytimes.com/2015/09/19/us/politics/varied-pleas-as-candidates-press-cases-at-conservative-forum.html> [<https://perma.cc/CG8S-9DEP>] (reporting Carly Fiorina’s call to “take our government back” (internal quotation marks omitted)). See generally JILL LEPORE, *THE WHITES OF THEIR EYES: THE TEA PARTY’S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY* (2010). This is a long-standing trope on the right in American political life. See Jared A. Goldstein, *The American Liberty League and the Rise of Constitutional Nationalism*, 86 TEMP. L. REV. 287 (2014).

in the United States, need to take America back and from whom are interesting questions that I will leave aside.<sup>18</sup>

While the TEA Party approach to politics has aptly, if oxymoronically, been called a “libertarian mob,” TEA Partiers have sought to buttress their political activism with a highly developed theory of the correct meaning of the U.S. Constitution.<sup>19</sup> I do not attempt a detailed analysis of the TEA Partiers’ constitutional theories in this Article.<sup>20</sup> Here, I briefly summarize the TEA Partiers’ most central theses and analyze their demands regarding constitutional citizenship and whether those demands can be squared with the Constitution that TEA Partiers profess to revere.

TEA Partiers generally espouse “originalism”—the concept that the correct meaning of constitutional or statutory provisions is found in the “original meaning” or the meaning originally “intended” by the drafters or enactors of the relevant language.<sup>21</sup> Ironically, all too often the “original meaning” put forth by TEA Partiers relies on a record that is at best ambiguous or actually contradicts their position.<sup>22</sup> Nowhere was this better illus-

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18. See STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 187–90* (2008); Greene, *supra* note 17, at 709; Matt Bai, *Obama the Other, Deployed as Election Tactic*, N.Y. TIMES, Sept. 16, 2010, at A23, available at <http://www.nytimes.com/2010/09/16/us/politics/16bai.html> [<https://perma.cc/H8MW-MR7K>]; Jonathan Martin, *Republicans Fear That Trump and Rivals Are Hardening Party’s Tone on Race*, N.Y. TIMES, Sept. 8, 2015, at A19, available at <http://www.nytimes.com/2015/09/08/us/politics/republicans-fear-donald-trump-is-hardening-party-tone-on-race.html> [<https://perma.cc/NXX7-KVBG>]; Arian Campo–Flores, *Are Tea Partiers Racist?*, NEWSWEEK (Apr. 25, 2010, 8:00 PM), <http://www.newsweek.com/are-tea-partiers-racist-70695> [<http://perma.cc/54GE-AK9U>].

19. See Mark Lilla, *The Tea Party Jacobins*, N.Y. REV. BOOKS May 27, 2010, at 53 (describing new wave of libertarianism and populism), available at <http://www.nybooks.com/articles/2010/05/27/tea-party-jacobins/> [<https://perma.cc/H88R-55ED>].

20. For extended analysis of the TEA Party theories of the Constitution, see, e.g., Goldstein, *Tea Party’s Constitution*, *supra* note 15; Greene, *supra* note 17; Schmidt, *Tea Party and the Constitution*, *supra* note 15.

21. See DICK ARMEY & MATT KIBBE, *GIVE US LIBERTY: A TEA PARTY MANIFESTO* 66 (2010); ANGELO M. CODEVILLA, *THE RULING CLASS: HOW THEY CORRUPTED AMERICA AND WHAT WE CAN DO ABOUT IT* 42–43 (2010); MARK R. LEVIN, *LIBERTY AND TYRANNY: A CONSERVATIVE MANIFESTO* 36 (2009); see also LEPORE, *supra* note 17, at 156; David Chang, *Beyond Formalist Sovereignty: Who Can Represent “We the People of the United States” Today?*, 45 U. RICH. L. REV. 549, 551 (2011) (noting Tea Party Patriots believe knowing original meaning of Constitution is possible); Goldstein, *Tea Party’s Constitution*, *supra* note 15, at 559–60 (stating Tea Party members do not believe Constitution needs to be interpreted); Schmidt, *Tea Party and the Constitution*, *supra* note 15, at 201–12, 249 (discussing Tea Party’s advocacy for originalism). See generally Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483 (2012).

22. See Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827, 850–56 (2011) [hereinafter Goldstein, *Perils of Popular Originalism*]; Greene, *supra* note 17, at 708–09; Sanford Levinson, *Who, If Anyone, Really Trusts “We the People”?*, 37 OHIO N.U. L. REV. 311, 317 (2011) (footnote in title omitted); Schmidt, *Tea Party and the Constitution*, *supra* note 15, at 194–95, 197, 211–12; Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. COLLOQUY 300 (2011).

trated than when TEA Party-supported members of Congress insisted on reading the Constitution aloud in the well of the House of Representatives but then omitted parts that they did not like from the reading.<sup>23</sup> This confusion derives in part from the reliance by many TEA Partiers, not on the Constitution itself nor on traditional legal or historical scholarship on the Constitution, but on the bizarre ideas of Cleon Skousen.<sup>24</sup>

At bottom, the TEA Party theory of the Constitution centers on the idea that, just as the Constitution was created by the people of the United States (or perhaps by the people of the several states), the people should be the body that properly interprets the Constitution and thus determines whether governmental action is constitutional.<sup>25</sup> Like many ideas espoused by TEA Partiers, this notion of “popular constitutionalism” did not originate with the TEA Party, but it has brought the theory into the forefront of contemporary political debate.<sup>26</sup> The theory overlooks that the Constitution was actually drafted by an aristocratic group that did not trust popular government and presumably would not have accepted the notion of a “popular constitutionalism”—that is, after all, why they gave us a written Constitution.<sup>27</sup> One does not, however, have to accept the Supreme Court as the exclusive organ for authoritative interpretation of the Constitution to recognize the central role of the Court in such interpretation,

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23. See Jennifer Steinhauer, *Constitution Has Its Day (More or Less) in House*, N.Y. TIMES, Jan. 7, 2011, at A15, available at [http://www.nytimes.com/2011/01/07/us/politics/07constitution.html?\\_r=0](http://www.nytimes.com/2011/01/07/us/politics/07constitution.html?_r=0) [<https://perma.cc/5QP4-HDQ6>] (noting most of what was omitted pertained to slavery).

24. See W. CLEON SKOUSEN, *THE MAKING OF AMERICA: THE SUBSTANCE AND MEANING OF THE CONSTITUTION* (1985) [hereinafter SKOUSEN II]; see also W. CLEON SKOUSEN, *THE FIVE THOUSAND YEAR LEAP: 28 GREAT IDEAS THAT CHANGED THE WORLD* (1981) [hereinafter SKOUSEN I]. For a discussion of Skousen’s importance to the TEA Party, as well as critiques of his thought, see Goldstein, *Tea Party’s Constitution*, *supra* note 15; Goldstein, *Perils of Popular Originalism*, *supra* note 22, at 839–50; Schmidt, *Tea Party and the Constitution*, *supra* note 15, at 202–03, 211, 215–16. Others have found the roots of TEA Party constitutionalism in the many books and articles of Richard Epstein, perhaps best summarized in RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014). That Epstein’s views are as “eccentric” as Skousen’s, see Cass R. Sunstein, *The Man Who Made Libertarians Wrong About the Constitution*, NEW REP. (May 19, 2014), <http://www.newrepublic.com/article/117619/classical-liberal-constitution-richard-epstein-reviewed> [<https://perma.cc/4XZ7-R5GY>].

25. See generally MARK R. LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* (2006); see also Chang, *supra* note 21; Jared A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 NW. U. L. REV. COLLOQUY 288, (2011); Levinson, *supra* note 22; Schmidt, *Tea Party and the Constitution*, *supra* note 15; Zietlow, *supra* note 21.

26. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425, 426–28 (2005); Christopher W. Schmidt, *Popular Constitutionalism on the Right: Lessons from the Tea Party*, 88 DENV. U. L. REV. 523, 527–30 (2011) [hereinafter Schmidt, *Popular Constitutionalism*].

27. See Schmidt, *Popular Constitutionalism*, *supra* note 26, at 547–49. Note how easily TEA Partiers forsake “originalism.”

particularly in protecting the rights of “discrete and insular minorities” from overreaching by the majority.<sup>28</sup>

TEA Partiers also generally assert that the federal government is merely delegated powers from the states and therefore should be strictly limited to the powers expressly spelled out in the Constitution to avoid treading on the powers of the states for which the federal government is an agent, as well as to protect individual liberty, and that the federal government exists primarily to protect private property and freedom of contract.<sup>29</sup> Some TEA Partiers go further, claiming that the original Constitution (including the Bill of Rights) is a divine covenant between the people and the Christian God and therefore any amendment that distorts the original shape of the Constitution contravenes the divine constitutional plan.<sup>30</sup> Each of these claims is highly contestable and also contradicts long-settled precedent set primarily, although not exclusively,

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28. See, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958). For a critique, see Sanford Levinson, *The Twenty-First Century Rediscovery of Nullification and Secession in American Political Rhetoric: Frivolousness Incarnate or Serious Arguments to Be Wrestled with?*, 67 ARK. L. REV. 17, 35–49 (2014) and *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Opponents of *Brown v. Board of Education* often employed the rhetoric of popular constitutionalism and the will of the majority to justify resistance to the decision. See *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); see also Schmidt, *Popular Constitutionalism*, *supra* note 26, at 551–52 (2011). See generally Michael Serota, *Popular Constitutional Interpretation*, 44 CONN. L. REV. 1637 (2012).

29. See Ben Hoffman, *Tea Party Manifesto*, DRUDGE RETORT (Apr. 27, 2010, 8:00 AM), <https://drudgeretort.wordpress.com/2010/04/27/tea-party-manifesto> [<https://perma.cc/JF8F-HBVY>]; see also Edward A. Fallon, *Charters, Compacts, and Tea Parties: The Decline and Resurrection of a Delegation View of the Constitution*, 45 WAKE FOREST L. REV. 1067 (2010); A. E. Dick Howard, *The Constitution and the Role of Government*, 6 CHARLESTON L. REV. 449, 495–502 (2012); Elizabeth Price Foley, *Sovereignty, Rebalanced: The Tea Party & Constitutional Amendments*, 78 TENN. L. REV. 751 (2011). So central is this claim that the TEA Party has succeeded in reviving the notion of state nullification notwithstanding the Supremacy Clause of the U.S. Constitution and the discrediting of nullification in the disputes of the early nineteenth century culminating in the Civil War. See THOMAS E. WOODS, JR., *NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY* (2010); see also Levinson, *supra* note 28; Austin Raynor, Student Article, *The New State Sovereignty Movement*, 90 IND. L.J. 613 (2015); James H. Read & Neal Allen, *Living, Dead, and Undead: Nullification Past and Present*, 1 AM. POL. THOUGHT 263 (2012); Schmidt, *Tea Party and the Constitution*, *supra* note 15, 218–21; Schmidt, *Popular Constitutionalism*, *supra* note 26, at 539–42. Randy Barnett has developed a more sophisticated argument for nullification in his proposed “repeal amendment” to the Constitution that would authorize collective action by the legislatures of two-thirds of the states to repeal federal legislation. See generally Randy E. Barnett, *The Case for the Repeal Amendment*, 78 TENN. L. REV. 813 (2011). Whether this would actually accomplish much is open to question. See SKOUSEN I, *supra* note 24, at 87–91, 124–26, 341; Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015); Goldstein, *supra* note 15, *Tea Party’s Constitution*, at 570–71, 575; Sanford Levinson, *Afterword: Full of Sound and Fury but Signifying Little?*, 78 TENN. L. REV. 867 (2011); Schmidt, *Tea Party and the Constitution*, *supra* note 15, at 224–26, 228–33, 237–48; Hoffman, *supra* note 29.

30. See, e.g., SKOUSEN I, *supra* note 24, at 38–40, 73–77, 103–04; SKOUSEN II, *supra* note 24, at 41–62, 225–31; see also Goldstein, *Tea Party’s Constitution*, *supra* note 15, at 562, 564–65, 572–73; Sanford Levinson, *How I Lost My Constitutional*



by the Supreme Court.<sup>31</sup> The turn towards “popular constitutionalism” allows TEA Partiers to contend that decisions of the Court do not determine the proper meaning of the Constitution.<sup>32</sup>

I do not trace the origins of, or problems with, these general claims here. A grasp of these underlying ideas helps elucidate how ideas about constitutional citizenship that fly in the face of established law can take hold among TEA Partiers. By appealing to “popular constitutionalism,” TEA Partiers feel entitled to disregard well-established Supreme Court precedents on these issues, appealing instead to a purported “plain meaning” or “original intent.”<sup>33</sup> On this basis, many TEA Partiers have concluded that the Fourteenth Amendment does not guarantee U.S. citizenship to children born to undocumented migrants even though they are born in the United States.<sup>34</sup> Many TEA Partiers would thus have Congress enact a statute denying some persons born in the United States “birthright citizenship” despite the plain language of the Amendment and clear holdings of precedents going back more than a century.<sup>35</sup> Many TEA Partiers would also strip citizenship from persons who support terrorist acts against the United States.<sup>36</sup> Established precedent has been to the contrary for nearly half-a-century.<sup>37</sup> Rejection of these precedents fits nicely with the idea of “taking back America,” both from a perceived flood of immigrants (a recurring nightmare for nativist thought in the United States for nearly 200 years) and disloyal people who support America’s enemies.<sup>38</sup>

The third TEA Party claim turns on the requirement that one must be a “natural born Citizen” to be elected President.<sup>39</sup> The meaning of “natu-

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*Faith*, 71 MD. L. REV. 956, 959–61 (2012); Schmidt, *Tea Party and the Constitution*, *supra* note 15, at 201–02, 204–06.

31. See Schmidt, *Tea Party and the Constitution*, *supra* note 15, at 194–95, 197.

32. See CODEVILLA, *supra* note 21, at xvii–xviii; Schmidt, *Tea Party and the Constitution*, *supra* note 15, at 199–201, 218.

33. See CODEVILLA, *supra* note 21, at 44; see also ZERNIKE, *supra* note 17, at 8; Schmidt, *supra* note 15, *Tea Party and the Constitution*, at 200–01, 206–09. This conflates the “textualist” and the “originalist” approach to constitutional interpretation, something that many TEA Partiers do. See Josh Blackman, *Back to the Future Originalism*, 16 CHAP. L. REV. 325 (2013); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011).

34. But see Bill Steiden, *Tackling ‘Birthright Citizenship,’* ATLANTA J.-CONST., Aug. 15, 2010, at A6 (reporting Lindsey Graham argues constitutional amendment is necessary to deal with birthright citizenship).

35. For a further discussion of these issues, see *infra* notes 45–94.

36. See Costa & O’Keefe, *supra* note 11 (indicating Ted Cruz plans to introduce bill to strip citizenship from supporters of terrorists); Monica Crowley, *How Ted Cruz Is Running the Republican Table*, WASH. TIMES, Sept. 10, 2015, available at 2015 WLNR 26802591; Matos, *supra* note 11; Slater, *supra* note 11.

37. For a further discussion of these issues, see *infra* Part IV.

38. See generally DAVID H. BENNETT, *THE PARTY OF FEAR: FROM NATIVIST MOVEMENTS TO THE NEW RIGHT IN AMERICAN HISTORY* (1988); Lepore, *supra* note 17.

39. See U.S. CONST. art. II, § 1, cl. 4.

ral born citizen” is also contested from a desire to “take back America.”<sup>40</sup> That language has not been authoritatively interpreted by the Supreme Court, but cases decided by the Court do provide points of reference for the interpretation of the phrase.<sup>41</sup> Some TEA Partiers, as well as others called “birthers,” have invoked the supposed plain meaning of the phrase to argue that President Obama is not eligible to be President.<sup>42</sup> Some but not all of these Obama critics, however, are not troubled by Ted Cruz’s candidacy for President although Cruz was born in Canada.<sup>43</sup> Stating a coherent legal principle to justify both of these conclusions is difficult. One can finesse these difficulties if one buys into certain highly unlikely factual claims made by many “birthers” who contend that Obama is not really President.<sup>44</sup>

### III. BIRTHRIGHT CITIZENSHIP

The U.S. Constitution did not define United States or state citizenship in 1787. It mentions citizenship regarding qualifications for public office and a provision conferring the “privileges and immunities” of citizens of each state on citizens of other states, but does not define either citizenship or privileges and immunities.<sup>45</sup> The failure to address fundamental questions of citizenship allowed the Supreme Court free reign in *Dred Scott v. Sandford*<sup>46</sup> to conclude that persons of African descent were not and could not be citizens of the United States or of any state. This decision fed into the heated debate that led to the Civil War just a few years later.

40. See generally LEPORE, *supra* note 17.

41. For a further discussion of these issues, see *infra* notes 136–74 and accompanying text.

42. See, e.g., Danielle Allen, *Birthers, ‘Trumpists,’ and a Crisis for the GOP*, WASH. POST (Sept. 4, 2015), [https://www.washingtonpost.com/opinions/birthers-trumpists-and-a-crisis-for-the-gop/2015/09/04/3b3e2074-5308-11e5-8c19-0b6825aa4a3a\\_story.html](https://www.washingtonpost.com/opinions/birthers-trumpists-and-a-crisis-for-the-gop/2015/09/04/3b3e2074-5308-11e5-8c19-0b6825aa4a3a_story.html) [<https://perma.cc/PS2W-4TM3>]. No one seems to have found much in the way of original intent or original meaning to parse this language.

43. See, e.g., William A. Jacobson, *Natural Born Citizens: Marco Rubio, Bobby Jindal, Ted Cruz*, LEGAL INSURRECTION (Sept. 3, 2013), <http://legalinsurrection.com/2013/09/natural-born-citizens-marco-rubio-bobby-jindal-ted-cruz/> [<https://perma.cc/5VHG-7FUK>]; Doug Mataconis, *Yes, Ted Cruz Is a “Natural Born Citizen,”* OUTSIDE THE BELTWAY (Mar. 23, 2015), <http://www.outsidethebeltway.com/yes-ted-cruz-is-a-natural-born-citizen/> [<https://perma.cc/UP54-2KY4>]. Some birthers have opposed Cruz as well as Obama. See, e.g., Steven Nelson, *Ted Cruz Inherits ‘Birthers’ with Presidential Bid*, U.S. NEWS & WORLD REP. (Mar. 24, 2015), <http://www.usnews.com/news/articles/2015/03/24/ted-cruz-inherits-birthers-with-presidential-bid> [<https://perma.cc/CXH5-VESR>].

44. We shall return to these “factual” claims in Part VI, *infra* notes 175–78.

45. See U.S. CONST. art. I, § 2, cl. 2 (House of Representatives); U.S. CONST. art. I, § 3, cl. 3 (Senate); U.S. CONST. art. II, § 1, cl. 4 (President); see also U.S. CONST. art. IV, § 2, cl. 1. The Constitution also authorized Congress to enact a uniform rule of naturalization. See U.S. CONST. art. I, § 8, cl. 4.

46. 60 U.S. 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

The Fourteenth Amendment was enacted in part to reverse *Dred Scott*, declaring in its first sentence that, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”<sup>47</sup> The Supreme Court had to determine the reach of this language several times during the first half-century after it was adopted. The exclusion of persons born in the United States who were not subject to the jurisdiction of the United States when they were born applied to the children of persons entitled to diplomatic immunity, to the children of visiting (or invading) military personnel who were also accorded immunity from the jurisdiction of the United States, or to children born on foreign-flagged vessels in U.S. waters.<sup>48</sup> Whether there were other implicit limitations to “birthright citizenship” was less clear, although the legislative history of the Clause would seem to reject that possibility.<sup>49</sup>

The Court might have construed the Fourteenth Amendment as only confirming the citizenship of ex-slaves so that it would not apply to anyone not of African descent. Or it might have read the Clause as excluding persons who, at birth, were not subject to the “complete and exclusive” jurisdiction of the United States.<sup>50</sup> The text of the Citizenship Clause does not state either proposition. Proponents of reading in a requirement that jurisdiction be “complete and exclusive” argue that the “subject to the jurisdiction” language would otherwise be meaningless because all persons born in the United States are necessarily subject to its jurisdiction—ignor-

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47. U.S. CONST. amend. XIV, § 1; see *The Slaughter-House Cases*, 83 U.S. 36, 72–73 (1872); see also Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165 (2011); James C. Ho, *Defining “American”: Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 367, 369 (2006); Stephen A. Siegel, *The Federal Government’s Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998).

48. See *United States v. Wong Kim Ark*, 169 U.S. 649, 682–85, 693 (1898); *In re Thenault*, 47 F. Supp. 952, 953 (D.D.C. 1942); see also 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, 99–100 (2005); James C. Ho, *Birthright Citizenship, the Fourteenth Amendment, and the Texas Legislature*, 12 TEX. REV. L. & POL. 161, 163 (2007).

49. See Ho, *supra* note 48; see also WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 87 (1988); Garet Epps, *The Citizenship Clause: A “Legislative History,”* 60 AM. U. L. REV. 331 (2010); Matthew Ing, *Birthright Citizenship, Illegal Aliens, and the Original Meaning of the Citizenship Clause*, 45 AKRON L. REV. 719 (2012); Kendall, *supra* note 14, at 352–56; Mark Shawhan, *“By Virtue of Being Born Here”: Birthright Citizenship and the Civil Rights Act of 1866*, 15 HARV. LATINO L. REV. 1 (2012). While the Supreme Court did not find the legislative history unequivocal, it did seem to conclude that it generally supported the lack of power in Congress to redefine citizenship. See *Afroyim v. Rusk*, 387 U.S. 253, 258–68 (1967).

50. See, e.g., John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 12 TEX. REV. L. & POL. 167, 170 (2007).

ing diplomatic and military immunities, as well as foreign-flagged vessels.<sup>51</sup> Such a reading proves too much because a great many children of lawful immigrants born before their parents' naturalization would be excluded from citizenship, as would their descendants down to the present day. Ironically, this probably includes some TEA Partiers who support such a reading of the Citizenship Clause.

In its first decision construing the Citizenship Clause, the Court decided that the Clause included white women born in the United States without settling the scope of the Clause.<sup>52</sup> In its next decision, *Elk v. Wilkins*,<sup>53</sup> the Court concluded that American Indians were not citizens even though they were born in the United States. The Court rested its decision on the grounds that American Indians were members of quasi-independent polities (shown both by the then-practice of the United States of entering into treaties with the tribes and the exemption of American Indians from taxation by the state and federal governments) and therefore were not, strictly speaking, subject to the jurisdiction of the United States despite birth in the United States.<sup>54</sup> The conclusion was reinforced by legislation enacted contemporaneously with the Fourteenth Amendment that treated American Indians as non-citizens.<sup>55</sup> Nearly forty years later, American Indians were granted U.S. Citizenship by statute.<sup>56</sup>

The Court emphatically rejected the application of this argument to the children of unnaturalized residents of the United States in *United States*

51. See *id.* at 171 (“[S]uch an interpretation would render the entire ‘subject to the jurisdiction’ clause almost entirely redundant . . . .”); see also Robert E. Mensel, *Jurisdiction in Nineteenth Century International Law and Its Meaning in the Citizenship Clause of the Fourteenth Amendment*, 32 ST. LOUIS U. PUB. L. REV. 331 (2013); Rogers M. Smith, *Birthright Citizenship and the Fourteenth Amendment in 1868 and 2008*, 11 U. PA. J. CONST. L. 1329 (2009); William M. Stevens, Comment, *Jurisdiction, Allegiance, and Consent: Revisiting the Forgotten Prong of the Fourteenth Amendment’s Birthright Citizenship Clause in Light of Terrorism, Unprecedented Modern Population Migrations, Globalization, and Conflicting Cultures*, 14 TEX. WESLEYAN L. REV. 337, 366–68 (2008).

52. See *Minor v. Happersett*, 88 U.S. 162 (1874). I will have more to say of this decision in Part V of this Article.

53. 112 U.S. 94 (1884).

54. See *id.* at 102–03. For analyses of *Elk*, see Duggin & Collins, *supra* note 48, at 100–02; Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 CONST. COMMENT. 555, 570–71 (2000); Anna Williams Shavers, *A Century of Developing Citizenship Law and the Nebraska Influence: A Centennial Essay*, 70 NEB. L. REV. 462, 480–86 (1991); Gerald Torres, *Social Movements and the Ethical Construction of Law*, 37 CAP. U. L. REV. 535, 562–69 (2009) (footnote in title omitted); Leti Volpp, *The Indigenous as Alien*, 5 U.C. IRVINE L. REV. 289 (2015).

55. See *Elk*, 112 U.S. at 103–06. Two Justices dissented, taking issue with the Court’s reading of the relevant national and legislative histories. See *id.* at 110–23 (Harlan & Woods, JJ., dissenting).

56. See Act of June 2, 1924, ch. 233, 68 Stat. 253 (current version at 8 U.S.C. § 1401(b) (2012)); see also *Goodluck v. Apache Cnty.*, 417 F. Supp. 13 (D. Ariz. 1975), *aff’d mem.*, 429 U.S. 876 (1976).

*v. Wong Kim Ark*.<sup>57</sup> Wong Kim Ark was born in San Francisco in 1873 to parents who were ineligible to become naturalized citizens.<sup>58</sup> His parents were merchants in San Francisco who had retired to China by the time of the litigation.<sup>59</sup> The Court ignored the fact that his parents at all times had been ineligible to naturalize and indicated expressly that the Chinese Exclusion Act, in force from 1882, was irrelevant to Mr. Wong's status.<sup>60</sup> In 1895, after Wong visited China for about a year, he sought to return to San Francisco.<sup>61</sup> At no time did Wong or his parents renounce any claim he might have had to U.S. citizenship.<sup>62</sup> When the authorities sought to exclude him on the grounds that he was ineligible for citizenship, he appealed to the Supreme Court. The Court held that, absent the special jurisdictional considerations (as in *Elk*), all persons of all races were included within the scope of the Fourteenth Amendment's Citizenship Clause.<sup>63</sup>

One last set of cases remained in the delineation of the Citizenship Clause's reach. When, after the Spanish–American War, the United States first acquired colonies (lands not intended to become states), the question

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57. 169 U.S. 649 (1898). For a modern claim that this argument should apply to the children of unnaturalized residents of the United States, see Eastman, *supra* note 50.

58. The earliest Naturalization Act (of 1790) and all subsequent Naturalization Acts limited naturalization to “free white persons.” See Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414, *repealed and superseded by* Act of June 18, 1798, ch. 54, 1 Stat. 566, *amended by* Act of Apr. 14, 1802, ch. 28, 2 Stat. 153, *repealed and superseded by* Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256 (codified at 30 REV. STAT. § 2169)); see also *In re Ah Yup*, 1 F. Cas. 223 (C.C.D. Cal. 1878). Apparently, some Chinese immigrants were naturalized despite the statutory bar. See RENQUI YU, TO SAVE CHINA, TO SAVE OURSELVES: THE CHINESE HAND LAUNDRY ALLIANCE OF NEW YORK 19 (Sucheng Chan ed., 1992) (reporting at least ten Chinese immigrants were naturalized in New York). See generally John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55, 64–66 (1996).

59. See *Wong Kim Ark*, 169 U.S. at 652.

60. See Act of May 6, 1882, ch. 126, 22 Stat. 58, *repealed by* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600 (making it illegal for Chinese to enter or settle in United States). For a history of the exclusion of, and discrimination against, Chinese immigrants, see *Wong Kim Ark*, 169 U.S. at 653; JOHN S. W. PARK, ELUSIVE CITIZENSHIP: IMMIGRATION, ASIAN AMERICANS, AND THE PARADOX OF CIVIL RIGHTS (2004); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995); Torok, *supra* note 58; Paul Yin, *The Narratives of Chinese-American Litigation During the Chinese Exclusion Era*, 19 ASIAN AM. L.J. 145 (2012).

61. See *Wong Kim Ark*, 169 U.S. at 652–53.

62. See *id.*

63. See *id.* at 682, 693, 704–05 (distinguishing *Elk*); see also Plyler v. Doe, 457 U.S. 202, 211 n.10 (1982) (dictum); Kendall, *supra* note 14, at 356–59; Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868–1898 States' Rights, the Law of Nations, and Mutual Consent*, 15 GEO. IMMIGR. L.J. 519 (2001); Leti Volpp, “Obnoxious to Their Very Nature”: Asian Americans and Constitutional Citizenship, 8 ASIAN L.J. 71 (2001) (footnote in title omitted). An earlier lower court opinion had reached the same conclusion. See *In re Look Tin Sing*, 21 F. 905 (C.C.D. Cal. 1884).

arose of whether the Constitution, including the Citizenship Clause, applied in these lands. The Court held, in a series of cases, that newly acquired lands were not subject to the full force of the Constitution unless Congress chose to “incorporate” those territories into the United States.<sup>64</sup> Therefore, the residents of certain “unincorporated territories,” (Guam, the Northern Marianas, Puerto Rico, and the Virgin Islands) did not become citizens under the Fourteenth Amendment, although the residents of all of these lands are citizens by statute.<sup>65</sup> Persons born in the American Samoa, the Canal Zone, Guantanamo, the Philippines, and the other Central Pacific Islands (under U.S. administration after World War II) were never made citizens by statute.<sup>66</sup>

The Court has had no occasion to revisit the basic conclusion from these cases that all persons born in “incorporated territories” of the United States are citizens of the United States unless they were, in some

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64. See *Dorr v. United States*, 195 U.S. 138, 143 (1904); *Downes v. Bidwell*, 182 U.S. 244, 282 (1901); see also *Haw. v. Mankichi*, 190 U.S. 197 (1903); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901). Collectively, these decisions are called *The Insular Cases* because the lands involved were all islands acquired by the United States in 1898 or 1899. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 756–57 (2008). The premise of *The Insular Cases* was reaffirmed as recently as 1979 in *Torres v. Puerto Rico*, 442 U.S. 465 (1979). See generally Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CALIF. L. REV. 1181 (2014). For an argument that Puerto Rico is now an “incorporated territory,” see Willie Santana, Student Showcase Article, *Incorporating the Lonely Star: How Puerto Rico Became Incorporated and Earned a Place in the Sisterhood of States*, 9 TENN. J.L. & POL’Y 433 (2014). Curiously, the District of Columbia would appear to be an unincorporated territory given that it was never intended to become a state, although that question has in fact never been litigated. See Duggin & Collins, *supra* note 48, at 96–98.

65. See 8 U.S.C. § 1402 (2012) (Puerto Rico; U.S. citizens as of 1941); *id.* § 1406 (Virgin Islands; U.S. citizens as of 1927); *id.* § 1407 (Guam; U.S. citizens as of 1950); 48 U.S.C. § 1801 (2012) (Northern Marianas, U.S. citizens as of 1986); see also *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Tuaua v. United States*, 788 F.3d 300 (D.C.C. 2015) (American Samoa), *petition for cert. docketed by* 84 U.S.L.W. 3434 (Feb. 1, 2016) (No. 15-981); Erman, *supra* note 64; Ediberto Román, *The Alien–Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1 (1998); Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437 (2002). This would no longer be true if Puerto Rico were held to be an “incorporated territory.” See Santana, *supra* note 64.

66. See 8 U.S.C. § 1403 (2012) (extending U.S. citizenship to persons born in Canal Zone only if at least one parent was U.S. citizen); see also DANIEL LEVY, U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK § 2.21 (Charles Roth ed., 2015) (Central Pacific Islands); *id.* § 2.22 (the Canal Zone); *id.* § 2.23 (Philippines). American Samoans have a special status as non-citizen “U.S. nationals.” See 8 U.S.C. § 1408 (2012); *Tuaua*, 788 F.3d at 300; Christina Duffy Burnett, “*They Say I Am Not an American . . .*”: *The Noncitizen National and the Law of American Empire*, 48 VA. J. INT’L L. 659 (2008); Adam Clanton, *Born to Run: Can an American Samoan Become President?*, 29 UCLA PAC. BASIN L.J. 135 (2012); Duggin & Collins, *supra* note 48, at 92–96; Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71 (2013).

sense, born outside the jurisdiction of the United States.<sup>67</sup> Nor was the question much debated among legal scholars, hardly a surprise given that the rule of *jus solis* (by right of the soil) has traditionally been the primary basis of citizenship under the common law.<sup>68</sup> The contrary rule of *jus sanguinis* (by right of blood) is traditionally followed in the civil law tradition, but is a secondary rule in the common law tradition.<sup>69</sup> The roots of this difference are lost in the Middle Ages.<sup>70</sup> The Court explored these patterns at great length in the nineteenth-century cases interpreting the Citizenship Clause.<sup>71</sup> To many, the idea of inheriting one's affiliation with a political community from one's parents might seem natural, but is it more natural than the concept that one's true affinities attach to the community in which one is raised, whose language and culture one imbibes from birth?<sup>72</sup> While neither conclusion is absolutely true in all cases, the American experience particularly lends itself to the latter view—the *jus solis* approach to citizenship.<sup>73</sup>

The economic slowdown of the 1970s and 1980s led to growing concern about the large and increasing numbers of undocumented migrants in the United States.<sup>74</sup> Therefore, some scholars searched for a rationale

67. See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); *Elk v. Wilkins*, 112 U.S. 94 (1884).

68. See *Wong Kim Ark*, 169 U.S. at 655–58 (citing English cases); see also DICEY'S *CONFLICT OF LAWS* 173–77 (J.H.C. Morris et al. eds., Stevens & Sons Ltd. 7th ed. 1958) (1896); Richard W. Flournoy, Jr., *Dual Nationality and Election*, 30 *YALE L.J.* 545, 546 (1921).

69. See DORA KOSTAKOPOULOU, *THE FUTURE GOVERNANCE OF CITIZENSHIP* 26–27 (2008); Flournoy, *supra* note 68, at 546; see also *Rogers v. Bellei*, 401 U.S. 815, 834–35 (1971) (holding citizenship of persons born abroad to American parent is not protected by Fourteenth Amendment); cf. Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 *VA. J. INT'L L.* 237, 249 (1994) (describing *jus sanguinis* as “hard to justify” in terms of American political theory). Some common law jurisdictions have recently abandoned *jus soli* in favor of *jus sanguinis*, at least in restricting citizenship to persons born in the country to persons one of whose parents was already a citizen or whose parents had resided in the country for some specified period of years. See, e.g., *Irish Nationality and Citizenship Act 2004* (Act No. 38/2004) (Ir.); *Citizenship Act 1997* (N.Z.); *British Nationality Act, 1981*, c. 61, § 1 (U.K.); see also Kendall, *supra* note 14, at 360–64.

70. The earliest extant expression of the *jus solis* rule in English law appears to be a statute from the reign of Edward III that was designed to extend citizenship rights to persons born outside of England. See 25 *Edw. 3*, c. 2 (1350) (Eng.); see also *Calvin's Case*, (1608) 77 *ENG. REP.* 377 (K.B.); Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 *YALE J.L. & HUMAN.* 73 (1997).

71. See, e.g., *Wong Kim Ark*, 169 U.S. at 655–75 (1898).

72. See T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 *MICH. L. REV.* 1471, 1494–97 (1986).

73. See, e.g., Neuman, *supra* note 69, at 249; Ronald D. Rotunda, *Birthright Citizenship Benefits the Country*, *CHI. TRIB.*, Sept. 16, 2010, at 21, available at [http://articles.chicagotribune.com/2010-09-16/opinion/ct-oped-0916-birthright-20100916\\_1-birthright-citizenship-illegal-aliens-alien-parents](http://articles.chicagotribune.com/2010-09-16/opinion/ct-oped-0916-birthright-20100916_1-birthright-citizenship-illegal-aliens-alien-parents) [<https://perma.cc/4Q6P-TVTC>].

74. See PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 72 (1998) (contending there was “tidal wave” of ille-

to deny birthright citizenship to the children of undocumented migrants.<sup>75</sup> Peter Schuck and Rogers Smith published the first major effort to justify a variant reading of the Citizenship Clause of the Fourteenth Amendment about twenty-five years before the advent of the TEA Party.<sup>76</sup> They argued that membership in a political community depended upon mutual consent, both of those who wanted to become members and of the existing members of the community.<sup>77</sup> They then reasoned that undocumented migrants, not having received consent to be present in the political community, could only claim citizenship for their children born in the United States if Congress were to confer citizenship on them by statute.<sup>78</sup> They argued that the requirement in the Fourteenth Amendment that the children be “subject to the jurisdiction” of the United States must exclude children born to undocumented migrants.<sup>79</sup> They dismissed *Wong Kim Ark* by asserting that the Court had only assumed that Wong was a citizen and had not found him to be a citizen, ignoring the clear holding of the case.<sup>80</sup> They would analogize the status of the children of undocumented migrants to the status of American Indians—who were members of semi-independent political communities within the confines of the nation.<sup>81</sup>

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gal immigrants eroding “community, self-definition, national autonomy, and social justice,” diminishing national legitimacy, and producing “a profound, perhaps irretrievable loss”); see also Peter H. Schuck, *The Meaning of American Citizenship in a Post-9/11 World*, 75 *FORDHAM L. REV.* 2531 (2007); Peter H. Schuck, *Whose Membership Is It, Anyway? Comments on Gerald Neuman*, 35 *V.A. J. INT’L L.* 321 (1994). Others have taken up the cry. See, e.g., Tyler Grant, Note, *Made in America: Medical Tourism and Birth Tourism Leading to a Larger Base of Transient Citizenship*, 22 *V.A. J. SOC. POL’Y & L.* 159 (2015). For doubts about such hyperbolic assertions, see Ediberto Román, *The Alien Invasion?*, 45 *HOUS. L. REV.* 841 (2008). Estimates of the number of such births vary widely but seem to have fallen sharply in recent years, if only because of the economic crisis. See Josh Barro, *Just What Do You Mean by ‘Anchor Baby?’*, *N.Y. TIMES*, Aug. 30, 2015, at SR3, available at [http://www.nytimes.com/2015/08/30/upshot/just-what-do-you-mean-by-anchor-baby.html?\\_r=0](http://www.nytimes.com/2015/08/30/upshot/just-what-do-you-mean-by-anchor-baby.html?_r=0) [https://perma.cc/H3R5-EL99]; Julia Preston, *Births to Undocumented Parents Decline*, *N.Y. TIMES*, Sept. 12, 2015, at A15, available at <http://www.nytimes.com/2015/09/12/us/births-to-undocumented-parents-decline.html> [https://perma.cc/8EV9-HY28].

75. Proposals to curtail birthright citizenship had begun as early as the late nineteenth century, but largely faded from view in the twentieth century. See generally Rachel E. Rosenbloom, *Policing the Borders of Birthright Citizenship: Some Thoughts on the New (and Old) Restrictionism*, 51 *WASHBURN L.J.* 311 (2012).

76. See PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985).

77. See *id.* at 3–4, 122.

78. See *id.* at 5–7, 116. Rogers Smith would later conclude that the consistent congressional rejection of bills to deprive children of undocumented migrants of birthright citizenship constitutes consent by society to such citizenship. See Smith, *supra* note 51, at 1332–33.

79. See SCHUCK & SMITH, *supra* note 76, at 76, 79–83, 119–20.

80. See *id.* at 102–03, 117; see also *United States v. Wong Kim Ark*, 169 U.S. 649, 693, 704–05 (1898).

81. See SCHUCK & SMITH, *supra* note 76, at 63–66, 83 (relying on *Elk v. Wilkins*, 112 U.S. 94 (1884)); see also Torres, *supra* note 54.



This was a status that presumably Schuck and Smith did not want to accord to undocumented migrants and their children.

Schuck and Smith's argument from a theory of mutual consent not only flatly contradicts settled case law interpreting the Fourteenth Amendment's Citizenship Clause, but also fails to provide a coherent explanation of a just theory of citizenship.<sup>82</sup> For example, it justifies the exclusion of any disfavored minority from birthright citizenship, including American Indians whose presence antedates European settlement.<sup>83</sup> It would even justify *Dred Scott* in excluding persons of African ancestry, some of whose ancestors have been in the country since 1619 (twelve years after the first permanent English settlement at Jamestown).<sup>84</sup> Yet the Fourteenth Amendment was intended to overrule *Dred Scott*, not "to create a new class

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82. See SCHUCK & SMITH, *supra* note 76, at 119. Schuck and Smith acknowledge this fact. See also Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1 (1989); Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 66–71 (1997); Allen R. Kamp, *The Birthright Citizenship Controversy: A Study of Conservative Substance and Rhetoric*, 18 TEX. HISP. J.L. & POL'Y 49 (2012); Gerard N. Magliocca, *Indians and Invaders: The Citizenship Clause and Illegal Aliens*, 10 U. PA. J. CONST. L. 499 (2008); D. Carolina Núñez, *Beyond Blood and Borders: Finding Meaning in Birthright Citizenship*, 78 BROOK. L. REV. 835 (2013); David S. Schwartz, *The Amoralism of Consent*, 74 CALIF. L. REV. 2143 (1986) (reviewing SCHUCK & SMITH, *supra* note 76).

83. See *Wilkins*, 112 U.S. at 94; see also Kristin Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014); Jonathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667 (1995); Eisgruber, *supra* note 82, at 59–61, 62–66, 72–85; Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-"Alien" Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905 (2011); Jennifer Gordon & R. A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493 (2007); Saby Ghoshray, *Rescuing the Citizenship Clause from Nativistic Distortion: A Reconstructionist Interpretation of the Fourteenth Amendment*, 51 WASHBURN L.J. 261 (2012); Priscilla Huang, *Anchor Babies, Over-Breeders, and the Population Bomb: The Reemergence of Nativism and Population Control in Anti-Immigration Policies*, 2 HARV. L. POL'Y REV. 385 (2008); Kendall, *supra* note 14, at 376–81; Neuman, *supra* note 69, at 248–49; Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521 (2007); Román & Simmons, *supra* note 67; Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871 (2003); Allison S. Hartry, Student Article, *Birthright Justice: The Attack on Birthright Citizenship and Immigrant Women of Color*, 36 N.Y.U. REV. L. & SOC. CHANGE 57 (2012); Note, *The Birthright Citizenship Amendment: A Threat to Equality*, 107 HARV. L. REV. 1026 (1994); Symposium, *Citizenship and Its Discontents: Centering the Immigrant in the Inter/National Imagination (Part I)*, 76 OR. L. REV. 207 (1997).

84. See *Dred Scott v. Sandford*, 60 U.S. 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; see also Eisgruber, *supra* note 82, at 61–62; Gerald L. Neuman, *Back to Dred Scott?*, 24 SAN DIEGO L. REV. 485 (1987) (reviewing SCHUCK & SMITH, *supra* note 76); see also John Thornton, *The African Experience of the "20. and Odd Negroes" Arriving in Virginia in 1619*, 55 WM. & MARY Q. 421 (1998).

of persons who had no rights a citizen is bound to respect[.]”<sup>85</sup> To conclude that Congress can exclude disfavored groups from citizenship even though they are born in the United States is to invite the creation of a permanent underclass of non-citizen residents, as are found in some foreign countries.<sup>86</sup>

Despite its analytical weakness, the Schuck and Smith thesis has considerable support from persons opposed to recognizing birthright citizenship for children of undocumented migrants.<sup>87</sup> Bills periodically introduced in Congress to enact this theory fail to pass.<sup>88</sup> Such arguments were revived during the intellectual ferment generated by the TEA Party. Lino Graglia additionally argued that the drafters of the Fourteenth Amendment could not have intended to confer citizenship on the children of undocumented migrants because there were no restrictions on immigration in 1868 when the amendment was ratified.<sup>89</sup> But there were illegal or undocumented migrants in the United States in 1868, although usually they were “illegal” under state law rather than federal law.<sup>90</sup>

The TEA Partiers’ efforts to restrict birthright citizenship seem unlikely to succeed<sup>91</sup>—although that could change after the 2016 election. Such a statute, if enacted, would seem clearly to be unconstitutional given both the rather clear text on point and the precedents construing that text. Proponents of restricting birthright citizenship have resorted instead to steps at the state level in order to frustrate the rights of infant citizens whom they don’t want to be citizens. The steps range from making it difficult or impossible for the infants to obtain birth certificates to prove they are citizens, to attempts to define state (as opposed to federal) citizenship more restrictively than it is defined in the Fourteenth Amendment, to attempts to enter into an interstate compact that would effectively redefine

85. Epps, *supra* note 49, at 372; *see also* Geoffrey A. Hoffman & Susham M. Modi, *The War on Terror as a Metaphor for Immigration Regulation: A Critical View of a Distorted Debate*, 15 J. GENDER RACE & JUST. 449, 466 (2012).

86. *See* Kendall, *supra* note 14, at 376–78.

87. *See, e.g.*, SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 104–06 (1988); Patrick J. Charles, *Decoding the Fourteenth Amendment’s Citizenship Clause: Unlawful Immigrants, Allegiance, Personal Subjection, and the Law*, 51 WASHBURN L.J. 211 (2012); Matthew Lister, *Citizenship, in the Immigration Context*, 70 MD. L. REV. 175 (2010); William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221 (2008); Stevens, *supra* note 51.

88. *See* the authorities collected *supra* at note 13. Did the failure to pass such bills mean that society consented to extending birthright citizenship to the children of undocumented migrants? *See* Smith, *supra* note 51, at 1332.

89. *See* Lino Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1, 5–6 (2009).

90. *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993); *see also* Epps, *supra* note 49, at 382–87. Under federal law, naturalization (but not immigration) in 1868 was limited to “free white persons.” *See* the authorities collected *supra* at note 54.

91. Consider the large number of proposed bills, collected *supra* note 13, all of which failed to enact. *See* Smith, *supra* note 51, at 1332–33.

citizenship notwithstanding the Fourteenth Amendment.<sup>92</sup> Just as other state initiatives attempting to exclude undocumented migrants have been preempted by the federal authority over immigration, so too should these mean-spirited efforts to punish children for the sins of their parents.<sup>93</sup> Fears that some parents have babies in the United States to ensure their ability to reenter the country as terrorists twenty or more years after their birth (terror babies) are too farfetched to merit serious discussion.<sup>94</sup>

#### IV. REVOKING CITIZENSHIP

Another proposal popular among TEA Partiers is to strip U.S. citizenship from those who provide material support for terrorism—although presumably they would not apply this rule against wholly domestic, right-wing terrorists.<sup>95</sup> This proposal suggests just how far the opinion of some Americans has changed from what was the traditional approach in the United States. From the beginning of the United States, and for more than a century afterwards, the American government was concerned about the right of aliens to abandon their foreign citizenship and take up a naturalized American citizenship. This concern became a prime cause of the

92. See, e.g., Kendall, *supra* note 14, at 368–70; Associated Press, *Texas: No Quick Ruling in Quest for Birth Certificates*, N.Y. TIMES, Oct. 17, 2015, at A16, available at <http://www.nytimes.com/2015/10/17/us/texas-no-quick-ruling-in-quest-for-birth-certificates.html> [https://perma.cc/YC4X-DAD4]; Manny Fernandez, *Immigrants Fight Texas' Birth Certificate Rules*, N.Y. TIMES, Sept. 18, 2015, at A1, available at <http://www.nytimes.com/2015/09/18/us/illegal-immigrant-birth-certificates.html> [https://perma.cc/3SC3-KGQ2]. One effect of denying a birth certificate would be to prevent these infants from voting when they obtain the legal age to vote. See Julie Bosman, *Vote ID Battle Shifts to Kansas*, N.Y. TIMES, Oct. 16, 2015, at A1, available at <http://www.nytimes.com/2015/10/16/us/politics/kansas-voter-id-law-sets-off-a-new-battle-over-registration.html?mtrref=www.google.com&gwh=42AD7744B4D2832ABD6E533BF65500C&gwt=pay> [https://perma.cc/76UG-RRCV]; see also Shankar Vedantam, *State Lawmakers Taking Aim at Amendment Granting Birthright Citizenship*, WASH. POST, Jan. 5, 2011, available at 2011 WLNR 255448.

93. See *Arizona v. United States*, 132 S. Ct. 2492 (2012); *Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1491 (2014); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013); see also *Plyler v. Doe*, 457 U.S. 202, 218–20 (1982); Epps, *supra* note 49, at 371; Hoffman & Modi, *supra* note 85, at 461; Robert F. Ley, *Are We Punishing "Illegal Citizen" Children to Deter Parents? Critiquing Birthright Citizenship Through the Citizens-Benefits Question and Citizenship Reductionism*, 33 BUFF. PUB. INT. L.J. 23 (2014).

94. See, e.g., Hoffman & Modi, *supra* note 85, at 461–63; Anderson Cooper Stuns GOP Rep. on 'Terror Babies': 'They Did Not Tell Me You Were Going to Grill Me' (VIDEO), HUFFINGTON POST (Aug. 11, 2010), [www.huffingtonpost.com/2010/08/11/anderson-cooper-stuns-gop\\_n\\_678650.html](http://www.huffingtonpost.com/2010/08/11/anderson-cooper-stuns-gop_n_678650.html) [https://perma.cc/JQE8-XAKC].

95. See the authorities collected *supra* at note 11. Of course, such arguments did not originate with the TEA Party, and in fact had figured prominently in public debate nearly a decade before the advent of the TEA Party. See J.M. Spectar, *To Ban or Not to Ban an American Taliban? Revocation of Citizenship & Statelessness in a Statecentric System*, 39 CAL. W. L. REV. 263 (2003); see also Charles Kurzman & David Schanzer, *The Growing Right-Wing Terror Threat*, N.Y. TIMES, June 16, 2015, at A27; Scott Shane, *Homegrown Extremists Tied to Deadlier Toll Than Jihadists in U.S. Since 9/11*, N.Y. TIMES, June 25, 2015, at A1.

War of 1812.<sup>96</sup> Congress eventually codified the right of voluntary expatriation in the Expatriation Act of 1868, which declared “the right of expatriation is a natural and inherent right of all people” and forbade any government agency from interfering in any way with this right.<sup>97</sup>

With World War II pending and the United States becoming a global actor, the American approach to expatriation changed. The Expatriation Act of 1868 was carried forward into the Nationality Act of 1940, but that statute also included elaborate provisions to strip persons of citizenship if they committed a prohibited or “denationalizing” act.<sup>98</sup> There were eight (later nine) acts that automatically caused loss of citizenship.<sup>99</sup> They included:

- Naturalization in another state;
- Taking an oath or affirming allegiance to another state;
- Serving in a foreign military;
- Serving in any office that requires foreign citizenship;
- Voting in a foreign political election;
- Formally renouncing US citizenship;
- Conviction by a court martial of desertion during time of war;
- Committing treason; and
- Departing from or remaining outside the country during time of war to avoid military service.<sup>100</sup>

This list is one that, with the addition of support for terrorist acts against the United States, many TEA Partiers could support. The idea that committing most of these acts exhibits such a level of disloyalty to the United States that the actor deserves to lose her citizenship has appeal. Yet ignored in such a policy is that for treason, at least, automatic revocation of citizenship might preclude a finding of guilt.<sup>101</sup> Treason can be

96. See ALAN TAYLOR, *THE CIVIL WAR OF 1812: AMERICAN CITIZENS, BRITISH SUBJECTS, IRISH REBELS, & INDIAN ALLIES* (2010).

97. See 15 Stat. 223 (codified at 25 REV. STAT. § 1999).

98. See 8 U.S.C. § 800 (2012). While not explicitly repealed, this provision was not carried forward into the Immigration and Nationality Act of 1952. See generally Alan G. James, *Expatriation in the United States: Precept and Practice Today and Yesterday*, 27 SAN DIEGO L. REV. 853, 861–67 (1990). The Expatriation Act of 1907, Pub. L. No. 59-193, 34 Stat. 1228, had provided for expatriation, but only for swearing allegiance to a foreign sovereign. See *Mackenzie v. Hare*, 239 U.S. 299 (1915) (upholding denationalization of woman who became foreign citizen upon marriage to foreign citizen).

99. See Nationality Act of 1940, Pub. L. 76-853, § 401, 54 Stat. 1137, 1168–69 (codified at 8 U.S.C. § 1481 (2012)); see also James, *supra* note 98, at 371–76.

100. Act of Sept. 27, 1944, ch. 418, 58 Stat. 746.

101. See *Respublica v. Chapman*, 1 U.S. (Dall.) 53, 58–59 (Pa. 1781) (holding defendant who left state before effective date of state’s treason act in order to support King against revolution was not chargeable with treason); see also *Kawakita v. United States*, 343 U.S. 717, 723–30 (1952) (rejecting factual claim that defendant renounced citizenship before committing treasonous acts). See generally Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 878–82 (2006); Ashwini Vasanthakumar, *Treason*,

committed by resident aliens, so perhaps revocation of citizenship would not affect guilt for some treasons.<sup>102</sup> Whether supporting terrorism against the United States would be treason is not entirely clear, but the crime of providing material support for terrorism does not turn on whether the culprit is an American citizen.<sup>103</sup>

The constitutionality of legislatively revoking citizenship for the doing of these or other acts has been fully litigated. The Supreme Court considered the matter directly on two separate occasions. In the first decision, *Perez v. Brownell*,<sup>104</sup> the Court held, in a 5–4 decision, that Congress, in regulating foreign affairs, had the power to impose denationalization for doing certain acts regardless of whether the actor intended to renounce her citizenship. Clemente Perez, a citizen by birth in Texas, was denationalized for voting in a Mexican election.<sup>105</sup> The Court limited congressional power by requiring that the act in question tend to embarrass the conduct of foreign relations.<sup>106</sup> In a decision announced along with *Perez*, the Court struck down a specific denationalization provision, holding that wartime desertion was unlikely to affect foreign relations.<sup>107</sup>

Finally, in *Afroyim v. Rusk*,<sup>108</sup> the Court overruled *Perez* in another 5–4 decision, only nine years after *Perez* was decided. Beys Afroyim, a naturalized citizen, faced denationalization for voting in an Israeli election.<sup>109</sup> The majority held that Congress had no authority to strip a citizen of her citizenship, and the only way such a person could lose her citizenship was by voluntary renunciation.<sup>110</sup> Justice Hugo Black wrote the following passage on behalf of the majority, which could explain why Congress lacks the

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*Expatriation and 'So-Called' Americans: Recovering the Role of Allegiance in Citizenship*, 12 GEO. J.L. & PUB. POL'Y 187, 201–12 (2014).

102. See *Carlisle v. United States*, 83 U.S. 147, 155–56 (1872); see also Larson, *supra* note 101, at 891–94.

103. See 18 U.S.C. § 2339A (2012). For an extended meditation on this point, see Jaykant M. Patidar, Note, *Citizenship and the Treatment of American Citizen Terrorists in the United States*, 42 BRANDEIS L.J. 805 (2004) and Larson, *supra* note 101, at 900–26.

104. 356 U.S. 44 (1958), *overruled in part by Afroyim v. Rusk*, 387 U.S. 253 (1967); see Dellapenna, *supra* note 1, at 533–35; Vasanthakumar, *supra* note 101, at 215–18.

105. See *Perez*, 356 U.S. at 60–61. He was also alleged to have remained outside the U.S. to evade military service during World War II, but the Court declined to consider this point. See *id.* at 62.

106. See *id.* at 60.

107. See *Trop v. Dulles*, 356 U.S. 86 (1958); see also *Schneider v. Rusk*, 377 U.S. 163 (1964) (striking down return of naturalized citizen to state of birth citizenship); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (striking down grounds of departing or remaining outside United States to evade military service). In another companion case, the Court found a failure to prove a voluntary expatriation. See *Nishikawa v. Dulles*, 356 U.S. 129 (1958).

108. 387 U.S. 253 (1967); see also Dellapenna, *supra* note 1, at 535–38.

109. See *Afroyim*, 387 U.S. at 254.

110. See *id.* at 257, 268.

power to pick and choose which infants born in the United States become citizens:

Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power . . . . [The Nation's] citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.<sup>111</sup>

With two contrary decisions from a nearly evenly divided court riven by intense disagreement, one might have expected the Court to revisit denationalization when the opportunity arose. It did not. Some argued that the holding in *Afroyim* should be limited strictly to the “voting in a foreign political election” clause, a position expressly rejected by the U.S. Attorney General.<sup>112</sup> When Congress amended the denationalization statute, supposedly to conform to the holding of *Afroyim*, it merely deleted

111. *Id.* at 267–68. Some other common law countries, not being constrained by a constitutional guarantee of citizenship, have enacted citizenship-stripping laws. *See, e.g.*, Immigration & Nationality Act, 2006, c. 13 (U.K.); Audrey Macklin, *Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien*, 40 QUEEN'S L.J. 1 (2014); *see also* Stewart Bell, *Ottawa Plans to Strip More Terrorists of Citizenship*, VANCOUVER SUN (Can.), Oct. 1, 2015, at B3, available at <http://www.pressreader.com/canada/the-vancouver-sun/20151001/281805692744195/TextView>; Simon Benson, *New Plan to Deport Terrorists*, HERALD SUN (Sydney, Austl.), Sept. 4, 2015, at 4; *Bill Boosting Powers to Deny Citizenship May Breach International Law*, GUARDIAN (U.K.), Feb. 11, 2015, available at 2015 WLNR 4226880; Joseph Breaun, *Citizenship—and Its Revocation—Emerges as a Major Theme in Election Campaign*, WINDSOR STAR (Can.), Oct. 3, 2015, at A12; Jim Bronskill, *Terrorist Cites Right to Vote in Move to Save Citizenship*, TORONTO STAR (Can.), Oct. 15, 2015, at A10; David Crowe, *Bipartisan Backing Adds Weight to Citizenship Laws*, AUSTRALIAN, Sept. 5, 2015, at 2, available at <http://www.theaustralian.com.au/in-depth/terror/bipartisan-backing-adds-weight-to-citizenship-laws/news-story/7aa82b56d9959e4cce639e9ccf99f86>; Kareem Fahim, *Kuwait, Fighting Dissent from Within, Revokes Citizenship*, N.Y. TIMES, Oct. 1, 2014, at A11, available at <http://www.nytimes.com/2014/10/01/world/middleeast/kuwait-fighting-dissent-from-within-uses-citizenship-as-a-weapon.html> [<https://perma.cc/SL8S-LPTK>]; Thomas Walkom, *Tories Get Creative with New Power to Strip Citizenship*, TORONTO STAR (Can.), Oct. 3, 2015, at A9; David Wroe, *Your Citizenship Stripped for Graffiti?*, AGE (Austl.), June 25, 2015, at 6.

112. *See, e.g.*, 42 OP. ATT'Y GEN. no. 34 (Jan. 18, 1969); WILLIAM W. BISHOP, JR., INTERNATIONAL LAW: CASES AND MATERIALS 527 n.88 (3d ed. 1971); *see also* United States v. Matheson, 532 F.2d 809, 813 (2d Cir. 1976); *Rocha v. INS*, 450 F.2d 946 (1st Cir. 1971); *Peter v. Sec'y of State*, 347 F. Supp. 1035 (D.D.C. 1972).

from the list of denationalizing acts the specific acts that had actually been declared unconstitutional by the Supreme Court.<sup>113</sup>

Despite the political resistance, in two decisions within fifteen years after *Afroyim*, the Court unanimously endorsed the premise that no one can be deprived of citizenship without that person's consent, on any grounds, and elucidated some important aspects of the principle.<sup>114</sup> In the first case, *Rogers v. Bellei*,<sup>115</sup> the Court clarified constitutional citizenship. Aldo Mario Bellei was born in Italy in 1939 to an Italian father and an American mother, therefore acquiring both Italian and American citizenship at birth.<sup>116</sup> United States law at the time in question, however, provided that a person such as Bellei lost his citizenship if he failed to live within the United States for five consecutive years between the ages of fourteen and twenty-eight—something Bellei did not do.<sup>117</sup> The majority, in another 5–4 decision, concluded that Bellei was neither born nor naturalized in the United States but had been naturalized at birth outside the United States; as such, his citizenship was not protected by the Fourteenth Amendment.<sup>118</sup> The four dissenters agreed that Bellei was a naturalized citizen but argued that the physical location of the naturalization did not determine whether Congress has the power to revoke his citizenship.<sup>119</sup> The majority analogized people like Bellei to Native Americans and residents of unincorporated territories—other persons whose citizenship is not based on the Fourteenth Amendment.<sup>120</sup>

A decade later, in *Vance v. Terrazas*,<sup>121</sup> the Court confronted burdens of proof regarding renunciation, without casting doubt on the proposition that Congress may not impose denationalization on a citizen born or naturalized “in the United States.”<sup>122</sup> Laurence Terrazas was born in Texas as a Mexican–U.S. dual national; but when he was a student in Mexico, at age

113. See 8 U.S.C. § 1481 (2012) (omitting wartime desertion, voting in foreign political elections, returning to birth land, and evading military service).

114. See *Vance v. Terrazas*, 444 U.S. 252, 259–62 (1980); *Rogers v. Bellei*, 401 U.S. 815, 827–28 (1971).

115. 401 U.S. 815 (1971).

116. See *id.* at 817–19.

117. See 8 U.S.C. § 1401(g) (2012).

118. See *Bellei*, 401 U.S. at 822–23, 827, 835; see also *id.* at 838–39 (Black, J., dissenting) (noting *Bellei* was neither born nor naturalized in United States); *United States v. Wong Kim Ark*, 169 U.S. 649, 688 (1898) (“But [the first sentence of Fourteenth Amendment] has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the [C]onstitution to establish a uniform rule of naturalization.”). At least one scholar has named citizenship through naturalization at birth as “acquired citizenship.” See Lee J. Terán, *Mexican Children of U.S. Citizens: “Viges Prin” and Other Tales of Challenges to Asserting Acquired U.S. Citizenship*, 14 SCHOLAR 583 (2012).

119. See *Bellei*, 401 U.S. at 842–43 (Black, Douglas & Marshall, JJ., dissenting); accord *id.* at 845 (Brennan & Douglas, JJ., dissenting).

120. See *supra* notes 53–56, 77–80 and accompanying text.

121. 444 U.S. 252 (1980).

122. See *id.* at 259.

twenty-two, he swore allegiance to Mexico and renounced his U.S. citizenship in order to obtain a certificate of Mexican nationality.<sup>123</sup> He admitted that he took the oath voluntarily, but he denied any actual intent to renounce his U.S. citizenship.<sup>124</sup> The Court held that the government had the burden of proving by a preponderance of the evidence that a citizen specifically intended to renounce her citizenship, even when doing a “denationalizing” act.<sup>125</sup> The Court upheld the statutory presumption that the act had been done voluntarily but rejected any presumption that the doing of the act was meant as a renunciation of citizenship.<sup>126</sup> The Court also rejected the notion, embraced by some in dissent, that the renunciation of citizenship must follow some prescribed formality.<sup>127</sup> If the requisite intent is found, even if it is not explicit, the renunciation is effective.<sup>128</sup>

The effect of these cases is clear. For a small percentage of American citizens—those whose citizenship was not acquired under the Fourteenth Amendment (Native Americans, persons born in unincorporated territories, and persons naturalized at birth outside the United States)—citizenship can be terminated by a simple act of Congress, even against their will.<sup>129</sup> For those citizens who obtained their citizenship under the Fourteenth Amendment either by birth in the United States or by naturalization in the United States (and in either case, subject to the jurisdiction of the United States), the only way they can lose their citizenship is to voluntarily renounce it.<sup>130</sup> For citizens naturalized in the United States, there is an “exception”—if they obtained their naturalization “illegally,” a court can void the naturalization.<sup>131</sup> This does not really contradict the general rule because such persons were never validly citizens.

In 1990, the State Department adopted a much more favorable approach to the preservation of citizenship, adopting the view that one gives it up only by formally renouncing it, or by doing a denationalizing act, or otherwise behaving in a way utterly inconsistent with an intent to remain a citizen.<sup>132</sup> After September 11, 2001, congressional support for a dena-

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123. *See id.* at 255–56.

124. *See id.* at 256.

125. *See id.* at 260–63.

126. *See id.* at 266–70 (upholding 8 U.S.C. § 1481(c) (2012)); *see also* James, *supra* note 98, at 886–95; Peter J. Spiro, *Expatriating Terrorists*, 82 *FORDHAM L. REV.* 2169, 2174–76 (2014); Vasanthakumar, *supra* note 101, at 218–22.

127. *See* *Vance v. Terrazas*, 444 U.S. 252, 274–76 (1980) (Brennan, J., dissenting). One Justice dissented on the burden of proof, wanting a clear and convincing evidence standard. *See id.* at 272–74 (Stevens, J., dissenting).

128. *See id.* at 261–63; *see also* Dellapenna, *supra* note 1, at 538–51.

129. *See* *Rogers v. Bellei*, 401 U.S. 815 (1971); *see also* Dellapenna, *supra* note 1, at 552.

130. *See* *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Terrazas*, 444 U.S. 252 (1980).

131. *See* *Fedorenko v. United States*, 449 U.S. 490 (1980); *see also* Bryan Denson, *Imam’s Citizenship Case Is Rare, Lawyers Say*, *OREGONIAN*, July 23, 2015, at A2.

132. *See* James, *supra* note 98, at 895–96.



tionalization statute was almost non-existent, whether because of its evident unconstitutionality or because it would make little practical difference.<sup>133</sup> Still, in at least one case, the government agreed to release a person from long-term imprisonment only on condition that he renounce his citizenship.<sup>134</sup> Whether such a coerced renunciation is valid is unclear. Of even more dubious legality is the effective banishment of U.S. citizens by placing them on a “no-fly” list while they are out of the country.<sup>135</sup>

#### V. NATURAL BORN CITIZENS

The third point where the TEA Partiers have put the Constitution’s rules about citizenship in play is regarding the qualifications to be President. The Constitution provides that “No Person except a natural born Citizen . . . shall be eligible to the Office of President.”<sup>136</sup> “Natural born Citizen” is not defined in the Constitution. Debate over the interpretation of this phrase has been complicated by a desire on the part of some simultaneously to delegitimize President Obama while legitimizing the right of Ted Cruz to run for President.<sup>137</sup> “Birthers” who espouse such views tie themselves in knots to justify their conclusions that the requirement that the President be a “natural born citizen” would preclude Obama (born in Hawaii) and not Cruz (born in Alberta, Canada).<sup>138</sup> Surprisingly, given the prominence of the “natural born citizen” requirement in the cam-

133. See Spiro, *supra* note 126.

134. See Saad Gul, *Return of the Native? An Assessment of the Citizenship Renunciation Clause in Hamdi’s Settlement Agreement in the Light of Citizenship Jurisprudence*, 27 N. ILL. U. L. REV. 131 (2007); see also Peter J. Spiro, *The Boundaries of Cosmopolitan Pluralism*, 51 WAYNE L. REV. 1261 (2005).

135. See Leti Volpp, *Citizenship Undone*, 75 FORDHAM L. REV. 2579 (2007).

136. U.S. CONST. art. II, § 1, cl. 4. The omitted language refers to persons who are citizens when “this Constitution” enters into effect. There are few, if any, persons to whom this clause could apply currently.

137. Compare Allen, *supra* note 42, with Jacobson, *supra* note 43, and Mataconis, *supra* note 43. Some do oppose Cruz as well as Obama. See, e.g., Nelson, *supra* note 43.

138. Compare Certificate of Live Birth: Barack Hussein Obama II, Haw. Dep’t Health, available at [https://web.archive.org/web/20110429013125/http://www.whitehouse.gov/sites/default/files/rss\\_viewer/birth-certificate-long-form.pdf](https://web.archive.org/web/20110429013125/http://www.whitehouse.gov/sites/default/files/rss_viewer/birth-certificate-long-form.pdf) [<https://perma.cc/M29X-SLYW>], and JACK MASKELL, CONG. RESEARCH SERV., R42097, QUALIFICATIONS FOR PRESIDENT AND THE “NATURAL BORN” CITIZENSHIP ELIGIBILITY REQUIREMENT 41–42 (Nov. 14, 2011), available at <https://fas.org/sgp/crs/misc/R42097.pdf> [<https://perma.cc/6XNV-J2JB>], with Certificate of Birth Rafael Edward Cruz, Alta. Dep’t Health, available at [http://www.dallasnews.com/incoming/20130818-cruz\\_0819nat\\_32638724.jpg.ece/BINARY/w940/CRUZ\\_0819NAT\\_32638724.JPG](http://www.dallasnews.com/incoming/20130818-cruz_0819nat_32638724.jpg.ece/BINARY/w940/CRUZ_0819NAT_32638724.JPG) [<https://perma.cc/NMP7-ZLVY>]. Some have argued that both parents had to have been citizens when a child was born to be a “natural born citizen.” See John Ira Jones IV, Note, *Natural Born Shenanigans: How the Birther Movement Exacerbated Confusion over the Constitution’s Natural Born Citizen Requirement*, 27 REGENT U. L. REV. 155, 177–81 (2014). This claim is so much without support in the authorities that I dismiss it without discussion, but note that it does not solve Cruz’s problem, for his father was not a U.S. citizen when he was born.

paign against Obama, thus far only a few people, including Donald Trump, have questioned whether Senator Cruz is a “natural born citizen.”<sup>139</sup>

To resolve their dilemma, some of the most extreme birthers resort to an elaborate conspiracy theory, the mere statement of which should be enough to discredit it. The theory proposes that Obama was not born in Hawaii to an American mother, but was born in Kenya to entirely Kenyan parents, and thereafter smuggled into the United States so that he could, forty-six years later, be elected President to complete a slow motion coup.<sup>140</sup> That anyone would consider selecting a black, African-born baby in 1961—when the Civil Rights Movement was just beginning and most African Americans were kept from voting—as a worthwhile investment of resources over forty-six years on the off chance that he could be elected President simply boggles the mind. After all, what parent not named Bush would ever pick up a baby and say this one definitely will be President one day?<sup>141</sup> Yet a hard core of 25% of Republicans apparently believe this story.<sup>142</sup> We shall abandon this theory and other factual claims about where President Obama was born and instead consider just who qualifies as a “natural born Citizen.”

Many people apparently assume that anyone who acquires U.S. citizenship at birth must be a “natural born Citizen.”<sup>143</sup> This was the conclusion that Jack Maskell, an attorney for the Congressional Research Service,

139. See Dan Riehl, *Trump Goes ‘Birther’ on Cruz*, BREITBART, Mar. 23, 2015, <http://www.breitbart.com/big-government/2015/03/23/trump-goes-birther-on-cruz/> [https://perma.cc/9KFC-965W]; see also Charles Kerchner, *The Birthers.org Website Issues a “Triple Dog Dare” to U.S. Senator Ted Cruz* (Oct. 28, 2014), <https://cdrkerchner.wordpress.com/2014/10/28/the-birthers-org-website-issues-a-triple-dog-dare-to-u-s-senator-ted-cruz/> [https://perma.cc/MPN8-MCP6].

140. See JEROME R. CORSI, WHERE’S THE BIRTH CERTIFICATE: THE CASE THAT BARACK OBAMA IS NOT ELIGIBLE TO BE PRESIDENT (2011); see also Jones, *supra* note 138, at 155–58; MASKELL, *supra* note 138, at 39.

141. See Kerchner v. Obama, 612 F.3d 204, 209 (3d Cir. 2010) (dismissing claim that President Obama is not U.S. citizen as frivolous); Berg v. Obama, 586 F.3d 234, 239 (3d Cir. 2009) (noting Berg’s claims had “obvious lack of any merit”); see also Rhodes v. MacDonald, 670 F. Supp. 2d 1363, 1378–80 (M.D. Ga. 2009), *aff’d*, 368 F. App’x 949 (11th Cir. 2010); Robinson v. Bowen, 567 F. Supp. 2d 1144 (N.D. Cal. 2008); Ankeny v. Governor, 916 N.E.2d 678 (Ind. Ct. App. 2009), *transfer denied*, 929 N.E.2d 789 (Ind. 2010); MASKELL, *supra* note 138, at 42–43.

142. See, e.g., Allen, *supra* note 42; see also Oliver Willis, *New Poll: More Than 50% of Iowa Republicans Are Still Birthers*, ADDICTING INFO (Sept. 8, 2015), <http://www.addictinginfo.org/2015/09/08/new-poll-more-than-50-of-iowa-republicans-are-still-birthers/> [https://perma.cc/AM9G-4MGC].

143. See, e.g., Neal Katyal & Paul Clement, *On the Meaning of “Natural Born Citizen,”* 128 HARV. L. REV. F. 161 (2015); Christina S. Lohman, *Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause*, 36 GONZAGA L. REV. 349, 369 (2000); Angie Drobnic Holan, *Is Ted Cruz, Born in Canada, Eligible to Run for President?*, POLITIFACT (Aug. 20, 2015), <http://www.politifact.com/truth-o-meter/article/2013/aug/20/ted-cruz-born-canada-eligible-run-president/> [https://perma.cc/7LGS-TV6S]; Jacobson, *supra* note 43; Dara Lind, *Can Canadian-Born Ted Cruz Run for President? (Yes.)*, VOX (Mar. 23, 2015), <http://www.vox.com/2015/3/23/8275573/ted-cruz-canada>. This conclusion, even if valid, would not help American

reached in 2011.<sup>144</sup> The question cannot, however, be resolved so easily. Some prominent commentators have interpreted the phrase as requiring that a President must be “native-born”—i.e., that the President must have been born in the United States.<sup>145</sup> The Supreme Court has also equated “natural born” with “native born” in at least two decisions.<sup>146</sup> Just because there is no definitive Supreme Court decision on the meaning of “natural born citizen” as a qualification for serving as President does not mean there are no sources to allow us to determine the legal meaning of this term.<sup>147</sup>

The requirement that a President be a “natural born Citizen” was added to the Constitution at the very end of the drafting process in 1787, with no recorded discussion or debate.<sup>148</sup> Nor is there any clear indication of what most people would have thought the phrase meant at the time, making recovery of the original meaning uncertain. Apparently, the requirement was added to ensure that only persons of unquestioned attachment to the United States could ever be commander-in-chief.<sup>149</sup> Some then feared that a foreign agent might become President and sub-

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Samoans who are born in an unincorporated territory and, as such, become American nationals at birth but not American citizens. See Clanton, *supra* note 66.

144. See MASKELL, *supra* note 138.

145. See ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES AND REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, App. at 323 (William Young Birch & Abraham Small 1803). The phrase “native born” does not appear in the Constitution or federal statutes, but its meaning is limited to persons born in the United States. See 7 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 91.02[4][a] (rev. ed. 2010).

146. See, e.g., *Schneider v. Rusk*, 377 U.S. 163, 165 (1963); *United States v. Macintosh*, 283 U.S. 605, 623–24 (1931).

147. See *Berg v. Obama*, 574 F. Supp. 2d 509 (E.D. Pa. 2008), *aff’d*, 586 F.3d 234 (3d Cir. 2009); *Robinson v. Bowen*, 567 F. Supp. 2d 1144 (N.D. Cal. 2008); *Hollander v. McCain*, 566 F. Supp. 2d 63 (D.N.H. 2008); see also Clanton, *supra* note 66, at 159–73; Duggin & Collins, *supra* note 48, at 108–34; Jones, *supra* note 138, at 167–77. The lack of a Supreme Court decision on the requirement that the President be a “natural born” citizen is hardly surprising. The question could not arise in court unless a person born outside the United States were to be on the ballot for President, a rare event, and then a complainant would have to find a procedural route to raise the question. Ordinary voters would probably lack standing. Conceivably, a state official in charge of conducting an election could sue to bar the appearance of such a candidate on the ballot or simply order the removal of the candidate’s name and leave it to the candidate to sue.

148. See 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 366–67, 376, 473, 493–94, 498, 574, 578 (1911); see also Duggin & Collins, *supra* note 48, at 63–68.

149. See Letter from John Jay to George Washington, *in*, 4 DOCUMENTARY HISTORY OF THE CONSTITUTION 237; see also Clement & Katyal, *supra* note 143, at 163; Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881, 888–89 (1988); Seymore, *supra* note 14, at 937–41.

vert the nation.<sup>150</sup> (This brings to mind the extreme conspiracy theories against President Obama.) Apparently, the drafters of the Constitution thought the meaning of “natural born citizen” was clear enough that it needed neither explanation nor definition. In such a case, the courts will refer to the English common law of the time to determine the meaning of the term.<sup>151</sup>

The meaning of a “natural born citizen” under English law in 1787 is not entirely clear. At the least, it meant that any person born on English soil (*jus soli*) was a “natural born subject of the crown” (and inferentially, a citizen of a pertinent North American colony).<sup>152</sup> An English statute from 1350 provided for citizenship at birth for the children of English subjects born abroad.<sup>153</sup> These statutes were applied in the colonies, although whether this could be considered part of the common law for the former colonies in 1787 is far from clear.<sup>154</sup> The Supreme Court in 1898 did not think this made them “natural born citizens.”<sup>155</sup> However, Blackstone (writing not about the Constitution, but about English law) did think so.<sup>156</sup> Madison, the reputed “Father of the Constitution,” explained in Congress in 1789 that “place is the most certain criterion; it is what applies in the United States . . . .”<sup>157</sup>

Congress, exercising its power to enact a uniform rule of naturalization, enacted a statute in 1790 to provide that “the children of citizens of the United States, that may be born beyond the sea, or out of the limits of the United States, shall be considered as natural born citizens,” at least if

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150. See 2 FARRAND, *supra* note 148, at 216, 235, 268 (discussing whether citizenship requirement should be imposed on all Senators and Representatives); see also AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 164–65 (2005); 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1473, 332–33 (1833); Duggin & Collins, *supra* note 48, at 69–70.

151. See, e.g., *Carmell v. Texas*, 529 U.S. 513, 521 (2000); *Ex parte Grossman*, 267 U.S. 87, 108–09 (1925); see also 1 STORY, *supra* note 150, § 157, at 149.

152. See *United States v. Wong Kim Ark*, 169 U.S. 649, 658, 661–62 (1898); *Calvin’s Case*, (1608) 7 Eng. Rep. 377, 4b-6a, 18a, 18b; 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 357–58 (1765).

153. See 1 BLACKSTONE, *supra* note 152, at 354–58, 361.

154. See SYDNEY GEORGE FISHER, *THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES* 189 (1897); see also Richard W. Flournoy, Jr., *Dual Nationality and Election*, 30 *YALE L.J.* 545, 548 (1921); Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 *MD. L. REV.* 1, 12, 18 (1968).

155. See *Wong Kim Ark*, 169 U.S. 649, 655–71, 693 (1898); see also *Minor v. Happersett*, 88 U.S. 162, 167–68 (1875) (indicating in dictum persons born in United States are natural-born citizens).

156. See 1 BLACKSTONE, *supra* note 152, at 361. Note that Blackstone’s conclusion about the meaning of “natural born subject” was “not completely clear or precise.” Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 *MICH. L. REV. FIRST IMPRESSIONS* 22, 27 (2008).

157. M. ST. CLAIR CLARKE & DAVID A. HALL, *CASES ON CONTESTED ELECTIONS IN CONGRESS FROM THE YEAR 1789 TO 1834, INCLUSIVE* 23, 32–35 (1834) (quoting James Madison, 1 Cong., 1st Sess. (1789)) (commenting on citizenship eligibility of Rep.-elect William Smith).

the father had been a resident of the United States.<sup>158</sup> Some consider this to be proof of the “original” meaning of “natural born citizen.”<sup>159</sup> The statute, however, does not indicate that such children are “natural born citizens,” but only that they are to be “considered” as “natural born citizens”—a peculiar wording if the statute was simply declaring that such children have always been considered “natural born citizens.” Instead, it seems to suggest that without the statute they would not be considered natural born citizens. Even if the more inclusive meaning is the correct reading of the statute, it cannot, of course, alter the constitutional qualifications for President, although it might be evidence of a contemporary understanding of the phrase. The statute, moreover, was named an “Act to Establish a Uniform Rule of Naturalization,” and therefore, arguably, whatever right it conferred was as a naturalized citizen.<sup>160</sup> In any event, it was replaced in 1795 with a statute that declared such children to be citizens but omitted the phrase “natural born.”<sup>161</sup> That earlier language never reappeared. St. George Tucker, writing in 1803, thought that this was the correction of an erroneous idea in the earlier statute rather than simply a drafting oversight, reaching the conclusion that the phrase “natural born citizen” meant “native born”—i.e., born within the United States.<sup>162</sup> Tucker was a judge in Virginia and professor of law at William and Mary College, as well as the American editor of *Blackstone’s Commentaries*, a standard reference work in the early nineteenth century.<sup>163</sup>

The evidence of original meaning is inconclusive at best, although the authority of James Madison and St. George Tucker provide weighty evidence supporting the view that “natural born” means born in the United States.<sup>164</sup> In interpreting the Fourteenth Amendment, which came into

158. See Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 104.

159. See Clement & Katyal, *supra* note 143, at 162; Duggin & Collins, *supra* note 48, at 76–78; Gordon, *supra* note 154, at 10–11; Lohman, *supra* note 143, at 370–73; MASKELL, *supra* note 138, at 20–21.

160. See 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, 144 (2007).

161. See Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415; see also Duggin & Collins, *supra* note 48, at 78–79.

162. See TUCKER, *supra* note 145, App. at 323.

163. See CHARLES T. CULLEN, ST. GEORGE TUCKER AND LAW IN VIRGINIA, 1772–1804, at 160–63 (1987); Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111, 1114 (2006).

164. See, e.g., Pryor, *supra* note 149, at 887–88 (“[A]t the time of the framing of the Constitution, there was no common understanding of what ‘natural born citizen’ meant.”); see also William T. Han, *Beyond Presidential Eligibility: The Natural Born Citizen Clause as a Source of Birthright Citizenship*, 58 DRAKE L. REV. 457 (2010); Friedman, *supra* note 160. This does not require us to resort to the writings of an eighteenth-century Swiss law professor. See ÉMMERICH DE Vattel, THE LAW OF NATIONS 101 (Joseph Chitty & Edward D. Ingraham trans., 1883) (declaring natural born citizen is one born in country to citizen parents). For support of reliance on Vattel, see Jones, *supra* note 138, at 161. For rejection of reliance on Vattel, see MASKELL, *supra* note 138, at 21–22.

effect in 1868, the Supreme Court, seeing that there were only two bases for U.S. citizenship—birth in the United States and naturalization—has consistently lumped persons born outside the United States to an American parent with “naturalized citizens,” rather than with “citizens born in the United States” in the terms of that Amendment.<sup>165</sup> The amendment did not say anything directly about the citizenship qualification for President, simply defining as citizens “all persons born or naturalized in the United States, and subject to the jurisdiction thereof.”<sup>166</sup> While the Fourteenth Amendment does not, in itself, change the qualifications for President,<sup>167</sup> the cases interpreting the Amendment, along with the evidence regarding the probable original meaning of the phrase “natural born citizen” in the qualifications clause, should be compelling reference points for interpreting the latter phrase: Persons born outside the United States to an American parent are not “natural born citizens” but are “naturalized by descent.”<sup>168</sup>

Jack Maskell of the Congressional Research Service mentions *Rogers v. Bellei* but argues that cases declaring that a child born abroad to an American parent and a child born in the United States are “equivalent” as citizens—that the foreign-born child must be a “natural born citizen” or otherwise they would not be equal.<sup>169</sup> Maskell falls into the trap that a good many commentators have fallen into: taking statements that there are two ways to acquire citizenship—birth or naturalization—to mean that persons who become citizens, although born abroad, must be in all respects the same as native-born citizens.<sup>170</sup> Yet it is clear that citizens by naturalization are equal in all respects to natural born citizens except as regards their eligibility to be become President.<sup>171</sup> It would be easier to assume that the Court, declaring foreign-born children of American citizens to be equal to U.S.-born children, simply was overlooking the one situation in which they are not equal.

165. See *Rogers v. Bellei*, 401 U.S. 815, 828 (1971); *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898); see also *Minor v. Happersett*, 88 U.S. 162, 167–68 (1874) (explaining birth and naturalization are two bases for citizenship without indicating into which group child born abroad to American parent would fall).

166. See U.S. CONST. amend. XIV, § 1.

167. For an argument to the contrary, see Elwood Earl Sanders, Jr., *Could Arnold Schwarzenegger Run for President Now?*, 6 FLA. COASTAL L. REV. 331 (2005). Of course, neither does a Senate resolution amend the U.S. Constitution, even if unanimous. See S. Res. 511, 110th Cong. (2008) (regarding citizenship of John McCain). For an apparent claim that the resolution does affect the meaning of the Qualifications Clause, see Clement & Katyal, *supra* note 143, at 164.

168. See *Bellei*, 401 U.S. at 828; see also Duggin & Collins, *supra* note 48, at 79–83; Pryor, *supra* note 149, at 893–99.

169. See *Nguyen v. INS*, 533 U.S. 53, 61 (2001); Maskell, *supra* note 138, at 36–37. At least one lower court has reached this conclusion. See *United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir. 2011).

170. See, e.g., *Miller v. Albright*, 523 U.S. 420, 423–24 (1998); see also MASKELL, *supra* note 138, at 30–31.

171. See *United States v. Schwimmer*, 279 U.S. 644, 649 (1929).

*Bellei* actually tells us the status of Senator Cruz: He was naturalized at birth; he is not a “natural born citizen.”<sup>172</sup> Without addressing this judicial holding, any conclusion that “natural born citizen” includes any person who becomes a citizen at birth is insupportable. If the foregoing analysis is correct, Senator Cruz is simply not eligible to be President. Indeed, it seems likely that a candidate was on the ballot in 2008 who was not eligible. John McCain was born in the Panama Canal Zone, a territory at the time leased from, but under the sovereignty of, Panama.<sup>173</sup> There is a certain irony, given the campaign against President Obama’s eligibility to be President, that the ineligible candidate in 2008 was not Barack Obama. Given the confusion about the term, *dicta* in a pair of District Court decisions to the contrary should not outweigh the original meaning of the presidential qualification clause and the clear holdings of the U.S. Supreme Court.<sup>174</sup>

## VI. CONCLUSIONS

This article has demonstrated that the three TEA Party claims regarding constitutional citizenship are fundamentally flawed. Congress has no power to ban birthright citizenship from the children of undocumented aliens if those children are born in the United States (or from any other children born in the United States if they were subject to the jurisdiction of the United States when born).<sup>175</sup> Congress has no power to revoke any citizen’s citizenship without that citizen’s consent, except if the citizenship has been obtained through fraud.<sup>176</sup> And no person not born within the United States is eligible to be President.<sup>177</sup> Perhaps all the foregoing analysis demonstrates that interpretation of the Constitution has as much or more to do with what the interpreter wants to find as it has to do with a careful reading and analysis of historical materials and case precedent. While the TEA Party’s general claims about constitutional interpretation

172. See, e.g., Duggin & Collins, *supra* note 48, at 92–96; John R. Hein, Comment, *Born in the U.S.A., but Not Natural Born: How Congressional Territorial Policy Bars Native-Born Puerto Ricans from the Presidency*, 11 U. PA. J. CONST. L. 423 (2009). Nor apparently would persons who became citizens through birth in an unincorporated territory who became citizens at birth by way of a statute.

173. See Duggin & Collins, *supra* note 48, at 102–06; Jones, *supra* note 138, at 174–77; 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 (2008); Peter J. Spiro, *McCain’s Citizenship and Constitutional Method*, 107 MICH. L. REV. FIRST IMPRESSIONS 42 (2008).

174. See *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1146 (N.D. Cal. 2008); *Hollander v. McCain*, 566 F. Supp. 2d 63, 66 (D.N.H. 2008). Note that these *dicta* assume that John McCain was a citizen at birth even if born outside the United States. For an argument that McCain did not receive U.S. citizenship until eleven months after his birth even though his parents were U.S. citizens when he was born, see Chin, *supra* note 173.

175. See the text and authorities *supra* at notes 45–94.

176. See *supra* notes 95–135 and accompanying text.

177. See *supra* notes 136–74 and accompanying text.

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are particularly suspect, perhaps ultimately the TEA Party is no less (or perhaps no more) guilty of this than many other would-be interpreters of the foundational document of our “civic religion.”<sup>178</sup>

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178. *See supra* notes 15–44 and accompanying text; *see also* LEVINSON, *supra* note 87 (comparing approaches to interpreting Constitution to approaches to interpreting sacred texts like Bible).