

Reflections on the “Natural Born Citizen” Clause as Illuminated by the Cruz Candidacy¹

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Among the many intriguing questions raised but never answered during the bizarre presidential primary season of 2015–16 was one that has arisen only rarely in American history—a question about presidential eligibility that is pertinent in itself as well as significant for the window it provides into how our centuries-old written Constitution should be understood in contemporary circumstances. The “Natural born Citizen” Clause, hidebound and ignored for decades at a time, confronts our sensibilities about constitutional interpretation anew. In the April 2016 American Philosophical Society talk on which I have based this paper, I began with a challenge intended to spark interest in light of the then-pressing question of whether Texas Senator Ted Cruz—still vying at the time for the Republican presidential nomination that later ended up going to Donald Trump—was eligible to be President of the United States. Using the Pulitzer Prize-winning Broadway sensation *Hamilton* as my backdrop, I surmised that the audience might be wondering:

How does a boy born in Canada to an American mother and a Cuban father, by providence impoverished, though not *quite* in squalor,

Grow up to be a hero and a scholar . . . and climb so high so fast that he can see himself walking into the White House parlor . . . ?

Well, our Canadian hero got a lot farther by working a lot harder,

By being a lot smarter, by being a self-starter . . .

I was, of course, paraphrasing what Lin-Manuel Miranda has Aaron Burr sing in the opening hip-hop number about our “ten-dollar

1 This essay is based on remarks made by the author at the Spring 2016 General Meeting of the American Philosophical Society on April 30 as part of a “Gentlemanly Debate” with Yale Law School Professor Akhil Reed Amar.

Founding Father.”² Despite Hamilton’s grandiose ambition, even if he had survived his famous duel with Burr the presidency would likely have remained out of his reach.³ Of note nonetheless is the fact that Alexander Hamilton was constitutionally eligible to hold that office, despite being born in the British West Indies, by virtue of an explicit “grandfather clause” exempting the Framers, being “Citizen[s] of the United States, at the time of the Adoption of this Constitution,” from the requirement of the Constitution’s “Natural born Citizen” Clause, which otherwise requires that anyone serving as President be “a natural born Citizen.”⁴

Like the play *Hamilton* and its founding namesake, our first Secretary of the Treasury, this obscure clause has recently enjoyed its own renaissance, most recently in the context of Senator Ted Cruz’s now-defunct bid for President.⁵ Cruz was born in 1970 in Calgary, Canada, to an American citizen-mother and a Cuban father, making him an American citizen at birth but only by virtue of a federal statute.⁶ However, unlike Alexander Hamilton, Senator Cruz could point to no “grandfather clause” exempting him from the requirement that Presidents be “Natural born Citizens,” which raised the question of whether Cruz is a “Natural born Citizen” and thus eligible to be President under Article II. The meaning of the “Natural born Citizen” Clause is far from clear, and the Supreme Court has never ruled on whether being a citizen at birth by grace of federal statutes in effect at the time is sufficient to establish “natural born” citizenship.⁷ Voters challenged Cruz’s eligibility

2 Various Artists, “Alexander Hamilton,” on *Hamilton (Original Broadway Cast Recording)* (Atlantic Recording Co., 2015), <http://atlanticrecords.com/HamiltonMusic/>.

3 Richard Zoglin, “Ron Chernow: What Would Have Happened If Alexander Hamilton Lived,” *Time*, December 30, 2015, <http://time.com/4149352/ron-chenow-alexander-hamilton-interview/> (“He was very ambitious, so I have no doubt that he wanted to be president . . . at the time of his death, Hamilton was already wandering in the political wilderness, his political career effectively over because the Jeffersonians were solidly in control”); see also Various Artists, “The Reynolds Pamphlet,” on *Hamilton (Original Broadway Cast Recording)* (Atlantic Recording Co., 2015), <http://atlanticrecords.com/HamiltonMusic/> (“You never gon’ be President now”).

4 U.S. Const. art. II, § 1, cl. 5.

5 See, e.g., Matt Flegenheimer, “Ted Cruz Suspends His Campaign for President,” *New York Times*, May 3, 2016, http://www.nytimes.com/2016/05/04/us/politics/ted-cruz.html?_r=0.

6 See, e.g., David Fitzpatrick and Drew Griffin, “What Were Ted Cruz’s Parents Doing in Canada When He Was Born?,” *CNN*, January 31, 2016, <http://www.cnn.com/2016/01/30/politics/ted-cruz-canada-rafael-eleanor-calgary/>.

7 See, e.g., Richard Primus, “The Ted Cruz Citizenship Fight Is Bogus—but Still Matters,” *Politico*, February 20, 2016, <http://www.politico.com/magazine/story/2016/02/ted-cruz-citizenship-fight-president-2016-213660>. On June 13, 2016, the Supreme Court denied certiorari in a case that would have forced it to confront constitutional definitions of citizenship (albeit under the Fourteenth Amendment), continuing the Court’s reticence in this

under the clause in several state courts,⁸ and the matter was widely debated by academic commentators.⁹ Although Cruz withdrew from the race for the Republican presidential nomination before the matter could be resolved in any authoritative way,¹⁰ the importance of the constitutional question his candidacy presented survives his campaign for several reasons.

First, and most concretely, the debate over the “Natural born Citizen” Clause will likely be resuscitated along with Cruz’s

area. See *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), *cert. denied*, 2016 WL 394793 (June 13, 2016). In *Tuaua*, American Samoan plaintiffs challenged the denial of birthright U.S. citizenship to individuals born on the island. *Id.* at 301. They argued that such a distinction between being born in American Samoa, a U.S. territory, and being born elsewhere in the United States violated the Fourteenth Amendment’s guarantee that “All persons born . . . in the United States and subject to the jurisdiction thereof are citizens of the United States.” *Id.* at 305 (quoting U.S. Const. amend. XIV, § 1). The denial of certiorari carries no value as precedent and signifies nothing more than a lack of four votes to take up this particular set of facts. See, e.g., *United States v. Carver*, 260 U.S. 482, 490 (1923) (“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case”).

8 Courts in Pennsylvania, New Jersey, and New York heard challenges to Ted Cruz’s presidential eligibility. In Pennsylvania, the court ruled that the “Natural born Citizen” Clause included all persons that are citizens “from birth with no need to go through naturalization proceedings.” *Elliott v. Cruz*, No. 77 M.D. 2016, slip op. at 17 (Pa. Commw. Ct. March 10, 2016) (quoting Neal Katyal and Paul Clement, “On the Meaning of ‘Natural Born Citizen,’” 128 *Harv. L. Rev. F.* 161, 161 [2015]), *aff’d*, 134 A.3d 51 (Pa. 2016). In New Jersey, the Administrative Law Judge ruled that the English common law included English naturalization statutes prior to the United States’ Framing. Initial Decision, *Williams v. Cruz*, OAL DKT. No. STE 5016-16, slip op. at 15 (April 12, 2016). The judge also looked at the 1790 Naturalization Act—which made citizens of children born outside of the country to United States citizens—to support the claim that the Framers intended to include those persons as natural born citizens. *Id.* at 20. The New Jersey Secretary of State affirmed the opinion “in its entirety.” Final Decision, *Williams v. Cruz*, OAL DKT. No. STE 5016-16, slip op. at 4 (April 13, 2016). In New York, a petition to the Board of Elections was dismissed for failing to timely file the petition. *Korman v. New York State Bd. of Elections*, 28 N.Y.S.3d 149, 151 (N.Y. App. Div.), *leave to appeal denied*, 27 N.Y.3d 903 (2016).

9 See, e.g., Einer Elhauge, “The Meaning of the Natural Born Citizenship Clause,” *Originalism Blog*, March 28, 2016, <http://originalismblog.typepad.com/the-originalism-blog/2016/03/the-meaning-of-the-natural-born-citizen-clause-einer-elhauge.html> (claiming that Ted Cruz was not a natural born citizen under any legitimate approach to constitutional interpretation, either one focused solely on original meaning or one that properly accounts for subsequent developments). But see Michael Ramsey, “The Original Meaning of ‘Natural Born,’” February 15, 2016 (unpublished manuscript), accessed May 20, 2016, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2712485 (concluding that any American made a citizen at birth by statute is “natural born”); Akhil Reed Amar, “Why Ted Cruz Is Eligible to Be President,” *CNN*, January 15, 2016, <http://edition.cnn.com/2016/01/13/opinions/amar-cruz-trump-natural-born-citizen/> (arguing that Congress has the power to define the phrase “natural born”); Jonathan H. Adler, “Debating Whether Ted Cruz Is a ‘Natural Born Citizen’ (Updated),” *Volokh Conspiracy*, January 12, 2016, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/12/debating-whether-ted-cruz-is-a-natural-born-citizen/> (summarizing the academic debate around the “Natural born Citizen” Clause).

10 See, e.g., Flegenheimer, *supra* note 5.

presidential ambitions, possibly as soon as the next presidential election cycle.¹¹ But even if Cruz himself does not run for President again in 2020, his 2016 campaign is unlikely to be the last time we will need to grapple with the meaning of natural born citizenship, just as it was not the first. In 2008, what two distinguished commentators described as a “few spurious” observers argued against Senator John McCain’s eligibility, despite overwhelming bipartisan and scholarly agreement that he was a “Natural born Citizen” because he was “born outside the United States on a U.S. military base in the Panama Canal Zone to a U.S. citizen parent”¹² who had been sent abroad on a mission for the U.S. government.¹³ Similar questions arose in 1964 over the eligibility of Senator Barry Goldwater, who was born to U.S. citizen-parents in Arizona but before it became a state, and in 1968 over the eligibility of Michigan governor George Romney, who was born in Mexico to U.S. citizen-parents.¹⁴ As New Jersey Administrative Law Judge Jeff S. Masin put it in rejecting a challenge to Cruz’s eligibility on the merits, “the meaning of the Constitutional term ‘natural born’ is a very legitimate subject of legal and historical debate, and whatever the outcome of the issue and its impact on the current presidential campaign, it is by no means a frivolous matter.”¹⁵ As a recurring issue plaguing quite a few presidential campaigns and decisively blocking other potential bids,¹⁶ the meaning of the “Natural born Citizen” Clause needs to be authoritatively resolved before the uncertainty surrounding that question triggers a constitutional crisis—regardless of what becomes of Cruz’s lingering presidential hopes.

Even beyond the practical import of the clause’s meaning, which

11 See, e.g., Sahil Kapur, “Republican Establishment Nightmare: Ted Cruz,” *Bloomberg Politics*, May 3, 2016, <http://www.bloomberg.com/politics/articles/2016-05-04/gop-establishment-nightmare-ted-cruz-2020>.

12 Katyal and Clement, *supra* note 8, at 163–4.

13 See Laurence H. Tribe and Theodore B. Olson, “Opinion Letter,” *Presidents and Citizenship*, 2 J.L. 509, 509 (2012) (describing the circumstances of John McCain’s birth in the Panama Canal Zone and arguing that such a situation does “satisfy the original meaning and intent of the Natural Born Citizen Clause, as confirmed by subsequent legal precedent and historical practice”). The full letter is available online at <http://journaloflaw.us/0%20JoL/2-3/JoL2-3.pdf>.

14 *Id.* at 164.

15 Initial Decision, *Williams v. Cruz*, OAL DKT. No. STE 5016–16, at 6 (April 12, 2016).

16 See, e.g., Dylan Matthews, “Ted Cruz Is a Canadian. That’s a Terrible Reason to Prevent Him From Being President,” *Washington Post*, August 19, 2013, <https://www.washingtonpost.com/news/wonk/wp/2013/08/19/ted-cruz-is-a-canadian-thats-a-terrible-reason-to-prevent-him-from-being-president/> (“Moreover, there are plenty of other cases where foreign-born politicians have been ruled out of the presidency for no reason other than their nation of origin. Former Michigan Gov. Jennifer Granholm (D) was born in Vancouver, and thus was ruled out of contention as a VP contender in both 2004 and 2008”).

will arise from time to time in the context of presidential campaigns, the interpretation of “natural born” retains a larger symbolic significance, marking an important sociocultural boundary in the construction of our American “imagined community.”¹⁷ The textual distinction between naturalized immigrant-citizens and “natural born” citizens smacks of arbitrary xenophobia to the modern ear and recalls the poorly disguised racial prejudice¹⁸ underlying the groundless claims by Donald Trump and others that President Obama, born in the State of Hawaii to an American mother, was not even a U.S. citizen—much less a “natural born” citizen.¹⁹ Limiting presidential eligibility to those who become citizens at birth (as the “Natural born Citizen” Clause certainly does regardless of how it is interpreted with respect to people like Cruz, who acquired their birth citizenship abroad) relegates tens of millions of naturalized citizens to second-class status, which matters not so much because of the political ceiling it creates for a miniscule handful of presidential hopefuls but rather because of what it symbolizes for an entire nation of immigrants.²⁰

Moreover, in addition to their expressive importance in the construction of the American identity, the disputes surrounding the meaning of the “Natural born Citizen” Clause open an important window into constitutional hypocrisy, coherence, and competing modalities of interpretation. These interpretive disputes—more than the meaning of “natural born” itself, even in its larger symbolic significance—first motivated my interest in this question.²¹ I continue to find it ironic that under Cruz’s own vaunted originalist methodology, he would (as I will explain below) be constitutionally ineligible for the presidency—and that only modes of interpretation repeatedly repudiated by Cruz, modes loosely

17 See generally Benedict Anderson, *Imagined Communities: Reflection on the Origin and Spread of Nationalism*, rev. ed. (2006).

18 See Dan Vergano, “Study: Racial Prejudice Plays Role in Obama Citizenship Views,” *USA Today*, May 1, 2015, <http://content.usatoday.com/communities/sciencefair/post/2011/04/social-scientists-look-at-racisms-role-in-birther-viewpoint/1#.Vz9RAJMrJn4>.

19 See *Elliott v. Cruz*, No. 77 M.D. 2016, slip op. at 12 (Pa. Commw. Ct. Mar. 10, 2016) (“Aside from the ‘birthers’ belief that he was not born in the United States, President Obama’s eligibility was challenged on the basis that even if he was born in Hawaii, he was not a ‘natural born citizen’ because his father was not a U.S. citizen”).

20 The stigma recalls John Adams insulting Alexander Hamilton as a “creole bastard,” quoted in the *Hamilton* song, “The Adams Administration” (Various Artists, “The Adams Administration,” on *Hamilton [Original Broadway Cast Recording]* [Atlantic Recording Co., 2015], <http://atlanticrecords.com/HamiltonMusic/>); see also Stephen F. Knott, “The Adams Family’s Revenge Against Alexander Hamilton,” *The Federalist*, October 8, 2015, <http://thefederalist.com/2015/10/08/the-adams-familys-revenge-against-alexander-hamilton>.

21 Laurence H. Tribe, “Under Ted Cruz’s Own Logic, He’s Ineligible for the White House,” *Boston Globe*, January 11, 2016, <https://www.bostonglobe.com/opinion/2016/01/11/through-ted-cruz-constitutional-looking-glass/zvKE6qpF31q2RsvPO9nGoK/story.html>.

described as forms of living constitutionalism, can possibly allow us to reconcile the text of Article II, Section 5, Clause 1 with egalitarian notions of citizenship in a way that would rescue Cruz from ineligibility, if not from his own interpretive incoherence.

NATURAL BORN ORIGINALISM

During his campaign, Cruz argued for a *jus sanguinis* (“law of blood”) theory of natural born citizenship, rather than a *jus soli* (“law of soil”) theory. Under Cruz’s preferred theory, an individual would be “a natural born citizen, regardless if born [*sic*] outside of the United States, where one of his parents is a United States citizen, thereby vesting him with citizenship at birth.”²² In attempting to rebut legal challenges to his eligibility, Cruz and his defenders rested almost entirely on the series of Naturalization Acts promulgated by Congress in the decades before his Canadian birth to an American mother. Their arguments were not absurd. Indeed, they built on preexisting scholarship on the “Natural born Citizen” Clause.²³ Perhaps most importantly for Cruz—whose mother was an American citizen at the time of his birth—under a 1934 federal naturalization statute, American *mothers* have the same ability as American *fathers* to pass their citizenship down to their offspring born on foreign soil.²⁴

There is therefore no doubt that Cruz was indeed a “naturalized” citizen at birth, sparing him the burden of going through a “naturalization” process later in life. But at least from the viewpoint of anyone who believes the Constitution’s terms must be interpreted in accord with their original meaning—a view to which Cruz himself famously claims

22 *Elliott v. Cruz*, No. 77 M.D. 2016, slip op. at 11 (Pa. Commw. Ct. Mar. 10, 2016).

23 See *id.* at 12–3 (discussing Charles Gordon, “Who Can Be President of the United States: The Unresolved Enigma,” 28 *Md. L. Rev.* 1 [1968]; Jack Maskell, Cong. Research Serv. R42097, *Qualifications for President and the “Natural Born” Citizenship Eligibility Requirement* [2011]; Katyal and Clement, *supra* note 8); Initial Decision, *Williams v. Cruz*, OAL DKT. No. STE 5016-16, at 10–3 (Apr. 12, 2016) (same).

24 Act of May 24, 1934, Pub. L. No. 73-250, 48 Stat. 797, *repealed* by Immigration and Nationality Act of 1952, tit. 3, ch. 1, § 301(a)(7), 66 Stat. 163, 236 (preserving the provision that children born abroad to one American parent become U.S. citizens at birth, subject to a residency requirement for the parent and the child); see also *Nguyen v. INS*, 533 U.S. 53 (2011) (upholding the constitutionality of a federal statute under which American mothers can transmit their U.S. citizenship to their offspring born abroad out of wedlock more easily than can their unwed American fathers). I disagree with the *Nguyen* decision and believe the dissent had the better of the argument under the equality component of the Fifth Amendment’s Due Process Clause. *Nguyen*, 533 U.S. at 74 (O’Connor, J., dissenting). More recently, the Second Circuit echoed Justice O’Connor’s reasoning when it declared another aspect of the differential treatment of men and women within the immigration laws to be unconstitutional. See *Morales-Santana v. Lynch*, 804 F.3d 520, 538 (2d Cir. 2015) (holding that physical presence requirements differentiating on the basis of gender violate the guarantee of equal protection implicit in the Fifth Amendment’s Due Process Clause).

allegiance²⁵—his status as a legally “naturalized” citizen would appear to mean that he was *not* a “Natural born Citizen,” as he would have been had he been born within the sovereign territory of the United States. Having to be “naturalized” in order to become a citizen itself implies, as a straightforward semantic matter, that one was not already a “natural” born citizen. The two words share the same root, but as my Harvard Law School colleague Einer Elhauge has persuasively put it, just as you cannot “legalize” something that’s already legal, or “sterilize” someone who is already sterile, you cannot “naturalize” what’s already natural.²⁶ Thus, Elhauge concludes that Senator Cruz is *not eligible* to be President, and as a matter of original understanding, I agree with him. Under the best reading of the Constitution, an originalist—who believes that constitutional language always means what it meant when first adopted—*must* conclude that Ted Cruz does not qualify as a “Natural born Citizen.” His naturalization occurred by an act of positive law when he was born, rather than as his automatic and inherent—that is, “natural”—birth-right, a distinction that made all the difference to the Framers. Therefore, Cruz cannot (now, or in a future campaign) continue to insist upon his eligibility while maintaining a consistent, principled commitment to originalism as an interpretive method. Unfortunately for Cruz (and similarly situated individuals), no one born abroad to American citizens—with the historically recognized exception of those born in what amount to American military or diplomatic enclaves to Americans sent overseas on U.S. government business—can claim eligibility to serve as President, at least if the original public understanding of the phrase “Natural born Citizen” remains controlling.

Interestingly, Cruz probably *would* have met the less stringent requirements for presidential eligibility that the Constitution would have enacted if Alexander Hamilton’s “sketch” of June 1787 had been adopted by the Philadelphia Convention. For Hamilton had not only proposed the inclusion of a grandfather clause for characters like himself—he had also urged the addition of a proviso that anyone “*hereafter* born a Citizen of the United States” should also be eligible.²⁷ Had Hamilton’s broader approach been adopted, an individual could be “born a citizen” under whatever naturalization law Congress had enacted as of the date

25 See, e.g., Maxwell Tani, “Ted Cruz: Obama Shouldn’t Appoint Justice Scalia’s Successor,” *Business Insider*, February 13, 2016, <http://www.businessinsider.com/ted-cruz-antonin-scalia-death-dead-2016-2> (“Justice Scalia fundamentally changed how courts interpret the Constitution and statutes, returning the focus to the original meaning of the text after decades of judicial activism”).

26 See Brief for Einer Elhauge as Amicus Curiae at 18–9, *Elliott v. Cruz*, No. 77 M.D. 2016 (Pa. Commw. Ct. Mar. 10, 2016); Elhauge, *supra* note 9.

27 Jill Pryor, Note, “The Natural-Born Citizenship Clause and Presidential Eligibility,” 97 *Yale L. J.* 881, 889 (1988).

of that individual's birth—even if *only* by virtue of that law.²⁸ But the month after Hamilton drafted that plan, John Jay, later the first Chief Justice of the United States, urged George Washington to minimize the dangers posed by giving too much power to what he called “Foreigners” by limiting the presidency to “*natural born* Citizen[s].” And James Madison chose John Jay’s language over Hamilton’s.

It was a choice that mattered. In *The Federalist* No. 78, Hamilton himself drew a clear distinction between rules “derived from any positive law,” such as the congressional naturalization laws relied upon by Cruz, and laws derived “from the nature and reason of the thing.”²⁹ With this Hamiltonian distinction in mind, the import of Madison’s adoption of John Jay’s suggested “Natural born Citizen” language becomes clear: the phrase operated to limit presidential eligibility to those who were automatically citizens *by virtue of their birth alone*—*not* by grace of Congress, as a purely contingent matter of positive civil law, but by what the Founding Generation regarded as the very *nature* of things (which some called “natural law,” as part of the English common law that informed their use of legal terms). England’s common law tradition had long been to treat *jus soli*, not Cruz’s preferred *jus sanguinis* theory, as the primary touchstone of the subject’s natural right to sovereign protection and the subject’s reciprocal duty of allegiance to the sovereign.³⁰ Consequently, by inserting the phrase “*natural born*” into the Constitution, Jay’s revision served essentially to limit future Presidents to those “born on American soil.”

A LIVING UNDERSTANDING OF THE NATURAL BORN CITIZEN CLAUSE

Even if one accepts that Cruz is ineligible as an originalist matter, no version of originalism that treats as decisive the specific meaning of a term as of the date of its inclusion in the Constitution commands

28 Presumably, even under Hamilton’s more encompassing version of birthright citizenship, the Constitution would have been taken to impose some implicit limits on the categories of individuals who could claim eligibility to serve as President by virtue of congressionally enacted naturalization statutes. For instance, if Congress were to enact a law making anyone born in Canada, the United Kingdom, Scotland, Ireland, Wales, or Australia an American citizen as of that individual’s birth and thus eligible to become President upon meeting the age and residency requirements, regardless of the non-U.S. status of both the newborn individual’s parents, the Court might well have held, even under Hamilton’s proposed text for Article II, that Congress had expanded presidential eligibility too broadly.

29 *The Federalist* No. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

30 Sarah Helene Duggin and Mary Beth Collins, “Natural Born in the U.S.A.: 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, 71 (2005) (“A venerable tenet of the English common law of nationality is that of *jus soli*”).

substantial support on the current eight-member Supreme Court, and the continued significance of originalist theories of constitutional interpretation is very much up in the air in the wake of the death of originalism’s most prominent proponent: Justice Antonin Scalia.³¹ Indeed, a unanimous Supreme Court ruled in *Caetano v. Massachusetts*,³² not long after Justice Scalia’s untimely death, that tasers and other “stun guns” constitute “arms” within the meaning of the Second Amendment and did so without even a nod to the nonexistence of such weapons either in 1791, when the Second Amendment was adopted, or in 1868, when the Liberty Clause made the right to bear arms binding against the States as well as the Federal Government.³³

But the possible eclipse of originalism does not end the matter. Even without purporting to identify, much less to be bound by, a singular “original meaning” of a constitutional provision, justices of varying stripes have adopted constitutional interpretations rooted in natural law when such a principle might be seen as undergirding a particular clause. Over the past 20 years, on issues as diverse as gun control and state sovereign immunity, a majority of the Court has set aside its long, deep skepticism of natural law³⁴ when finding that deference to natural

31 See, e.g., Ilya Somin, “The Future of Originalism after Scalia,” *Volokh Conspiracy*, February 22, 2016, www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/22/the-future-of-originalism/.

32 136 S. Ct. 1027 (2016).

33 See *McDonald v. Chicago*, 561 U.S. 742 (2010). *Caetano* could in theory be reconciled with a version of originalism that focuses on the meaning of language at a higher level of generality than that suggested by an enumeration of the particular examples of firearms to which the authors and ratifiers of the Second Amendment would have pointed at the time. For example, if one says that “Arms” in the phrase “the right of the people to keep and bear Arms” meant “guns in common use at any given time,” then the fact that tasers or guns created by 3-D Xeroxing were not in existence until the twentieth and twenty-first centuries would not matter to such an “originalist.” That originalist would say that what is in “common use” as a means of rapidly firing potentially lethal matter or energy across space at any point in time was a concept whose meaning was fixed as of 1791, but whose instantiation in particular forms of weapons was from the beginning understood to evolve as science and technology evolved. See Michael Dorf, “Second Thoughts about the Ninth Circuit’s Second Amendment First Order Originalism,” *Dorf on Law*, June 13, 2016, <http://www.dorfonlaw.org/2016/06/second-thoughts-about-ninth-circuits.html>; see also *infra* note 48.

34 Justice Oliver Wendell Holmes, Jr. denounced natural law as “a brooding omnipresence in the sky.” See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). For years he pushed the Court to abandon any reliance on what he viewed as an imagined “transcendental body of law,” calling such a conception mere “fallacy and illusion.” See *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). The core of his positivist view finally triumphed in *Erie Railroad Co. v. Tompkins*, a decision handed down six years after Holmes ended his time on the Supreme Court, in which the Court famously declared: “There is no federal general common law.” 304 U.S. 64, 78 (1938). Instead, federal judges considering state law questions, typically in civil suits between residents of different states (so-called “diversity cases”), were

law could be dressed in the garb of concrete historical analysis or fidelity to long-standing tradition.³⁵ With this in mind, one can readily imagine the arcane distinction between *jus soli* and *jus sanguinis* resurfacing to trouble the modern Court. And so the question remains: Must even someone who *rejects* originalism of any form as the sole legitimate guide to understanding the Constitution ultimately conclude that citizens like Cruz cannot be considered “natural born”? Professor Elhauge suggests that even a “living constitutionalist” must reject Cruz’s eligibility,³⁶ and with a few caveats, I am largely, albeit reluctantly, in accord.

Professor Elhauge offers ample linguistic, historical, and other evidence for the view that there is just no defensible way to ignore the difference between “natural” and “naturalized” without abandoning constitutional fidelity altogether.³⁷ Apart from our earlier observations about the Hamilton proposal ultimately rejected by the Constitutional Convention, and apart from the not-quite-defunct positive law/natural law distinction, Elhauge reasons plausibly that, if “Natural born Citizen” included anyone born a citizen, the word “natural” would become superfluous, violating the canon of construction that treats each word in the Constitution as having some reason for being.³⁸ Elhauge also analyzed how the word “natural” is used in other parts of the Constitution.³⁹ Under the Fourteenth Amendment, most importantly, the text expressly distinguishes citizenship by virtue of *birth* in the United States from citizenship by virtue of *naturalization* in the United States.⁴⁰ And Elhauge challenged other scholars’ interpretations

to apply the laws of the state in which those judges sat. *Id.* There was no divine or otherwise transcendent source of “general law” for the rule of decision in a given diversity case: “The authority and only authority is the State.” *Id.* at 79 (quoting *Black & White Taxicab & Transfer Co.*, 276 U.S. at 535 [Holmes, J., dissenting]).

35 See *District of Columbia v. Heller*, 554 U.S. 570, 593–5 (2008) (citing various treatises for the assertion that the Second Amendment’s right to bear arms reflected a constitutional incorporation of the “natural right” of self defense); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69 (1996) (defending an expansive view of natural sovereign immunity because “the principle of state sovereign immunity stands distinct from other principles of the common law in that only the former prompted a specific constitutional amendment”); cf. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–5 (2004) (relying on Founding-era common law and an indistinct “law of nations” to construe the scope of the Alien Tort Statute).

36 See Elhauge, *supra* note 9.

37 See *id.*; Brief for Einer Elhauge as Amicus Curiae at 18–9, *Elliott v. Cruz*, No. 77 M.D. 2016 (Pa. Commw. Ct. Mar. 10, 2016).

38 Brief for Einer Elhauge as Amicus Curiae at 13, *Elliott v. Cruz*, No. 77 M.D. 2016 (Pa. Commw. Ct. Mar. 10, 2016).

39 *Id.* at 18–9.

40 U.S. Const. amend. XIV, § 1 (“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”).

of the “Natural born Citizen” Clause in a way that casually conflated British *statutes* with British *common law*.⁴¹ The two main British statutes cited by Cruz and those defending his eligibility trace to 1708 and 1731.⁴² The statutes use the language “shall be deemed adjudged and taken to be natural born [s]ubjects,” which, as Elhauge argues, indicated that the subjects were not regarded as natural born until the passage of the statute; in other words, they were not natural born through the common law of England.⁴³ Moreover, evidence that parliamentary enactments and common law principles were not sharply distinguished in England at the time of our founding would hardly establish a similar conflation under our scheme of government, which clearly and deliberately rejected parliamentary supremacy in favor of a system in which the national legislature had only constitutionally delegated, and constitutionally circumscribed, powers. That the Parliament of England may have been recognized as having plenary authority to decree who could be equated with subjects born in England itself (and who could thus be crowned King or Queen just as could a commoner born in London or in the English countryside) cannot be taken to imply that the Congress of the United States was endowed with similarly open-ended authority. Unless the Naturalization Clause of Article I, Section 8 gave Congress power to decree categories of individuals “natural born,” in a sense making them eligible to serve as President, Congress had no such power even if Parliament might have enjoyed such a power in England.⁴⁴

Although these arguments do appear to shred the specific arguments proffered by the Cruz campaign, I am not entirely persuaded, as Elhauge evidently is, that nobody could *possibly* come up with a legitimate non-originalist theory under which the eighteenth-century meaning of “Natural born Citizen” (at a suitable level of generality)⁴⁵ no longer has to hold sway. That nonexistence theorem seems to me

41 Brief for Einer Elhauge as Amicus Curiae at 21, *Elliott v. Cruz*, No. 77 M.D. 2016 (Pa. Commw. Ct. Mar. 10, 2016).

42 See Katyal and Clement, *supra* note 8, at 161 (citing 7 Ann., c. 5, §3 [1708]; British Nationality Act, 1730, 4 Geo. 2, c. 21).

43 Brief for Einer Elhauge as Amicus Curiae at 26–8, *Elliott v. Cruz*, No. 77 M.D. 2016 (Pa. Commw. Ct. Mar. 10, 2016).

44 Little evidence supports the alternative conclusion that the Naturalization Clause confers such a definitional power. See Elhauge, *supra* note 9 (arguing against such an interpretation of the Naturalization Clause); see also Mary Brigid McManamon, “The Natural Born Citizen Clause as Originally Understood,” 64 *Cath. U. L. Rev.* 317, 345–6 (2015) (describing the paucity of evidence that the Framers so understood the Naturalization Clause); Duggin and Collins, *supra* note 30, at 76–9 (arguing that the Naturalization Clause does not empower Congress to define “natural born”).

45 See *supra* note 33.

something of a stretch. My skepticism—stemming from my own inability thus far to frame such a theory and a background view that puts a heavy burden of proof on those who assert that something cannot be done or does not exist—leaves me reluctant to slam the door on that possibility. That reluctance is reinforced by my recognition that the antiquated “natural born” limitation—resting on ideas of “natural law” that modern Americans have by and large rejected and that have gradually faded into the dustbin of history—is in tension with the broadly inclusive and democratizing trends in constitutional understanding, trends that point to a system making *all* citizens who meet the Constitution’s age and residency requirements, whether born here or naturalized anywhere in the world, eligible to lead our nation as President.⁴⁶ Thus I would welcome—even though I am not myself ready to propose—a way to construe Article II to permit such a system.

It seems worth underscoring that any such mode of construction would necessarily entail some version of living constitutionalism⁴⁷—the *only* kind of “ism” that could potentially render Cruz eligible to serve as President. That is rendered particularly noteworthy by the fact that the whole concept of living constitutionalism is one that Cruz himself has long condemned. But, of course, many scholars and judges, some more explicitly than others, embrace one or another version of living constitutionalism. Without embracing something of the sort, one simply cannot account for the kinds of understandings that many, including me, have long embraced and that even our conservative Supreme Court has largely adopted. Notions of living constitutionalism are obviously needed, for instance, to explain how the Court has come to treat broad, relatively abstract, morally freighted, and essentially aspirational terms like “liberty” and “equality” as having an evolving rather than static meaning, or at least an expanding sphere of generally accepted applications. Even if the broad *concepts* they express, couched at a very high level of generality, might be regarded as largely unchanging, the *content* of those concepts (in terms of the particular *conceptions* that might be thought to serve as examples or applications of the concepts themselves) has all but universally been understood to change over time.⁴⁸ It is just such an understanding that manifestly

46 See, e.g., Duggin and Collins, *supra* note 30, at 134 (“Any historically legitimate justification for the proviso faded away long ago”).

47 There are as many flavors of living constitutionalism—from Jack Balkin’s “living originalism” to David Strauss’s “constitutional common law” approach—as there are flavors of originalism. Compare Jack M. Balkin, *Living Originalism* (2011) and David A. Strauss, *The Living Constitution* (2010), with Daniel A. Farber, “The Originalism Debate: A Guide for the Perplexed,” 49 *Ohio St. L. J.* 1085 (1989) (describing the various forms originalism takes).

48 See, e.g., Ronald Dworkin, *A Matter of Principle* (1986), 48–50, 165 (distinguishing between understanding the Equal Protection Clause as enacting “the ‘concept’ of justice or

undergirds many of the Supreme Court’s landmark decisions, which necessarily rested on evolving understandings of freedom, dignity, and justice,⁴⁹ including those delegitimizing segregation and subordination based on race⁵⁰; undermining government discrimination on the basis of sex,⁵¹ gender identity,⁵² and sexual orientation⁵³; and defending reproductive liberty⁵⁴ and sexual privacy.⁵⁵

It would be novel, to be sure, to apply a similar living-constitutionalist approach to a deliberately precise, narrow, and concrete provision—especially one designed to limit those eligible to exercise awesome power over the entire nation. And of course, the “Natural born Citizen” Clause of Article II is just such a provision, no less than are the Article II provisions requiring that a President must “have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.” Not even the boldest “living constitutionalist” could defend replacing those specific conceptions with the general concepts they exemplify—concepts like maturity and long residential linkage to the nation. “Natural born Citizen,” as it appears in that clause, is likewise a legal term of art, one that reduces the general concerns animating its inclusion to something designed to be specific and minimize the need to exercise discretion in determining who fits the language and who fails to fit it. It would be exceedingly difficult to describe that phrase as pointing to a general concept rather than a highly particular conception.

Still, might even the meaning of a technical and concrete term like “Natural born Citizen” likewise evolve over time without a formal amendment to the Constitution’s text?

Perhaps it can, and below I will proceed to sketch a path along which such evolution might proceed. But readers are mistaken if they assume such an approach could somehow justify reading the term

equality” and enacting a lawmaker’s “particular ‘conception’ of those concepts,” *id.* at 49); see also Ronald Dworkin, *Taking Rights Seriously*, 2nd ed. (1978), 131–49 (arguing that “the due process and equal protection clauses [] must be understood as appealing to moral concepts rather than laying down particular conceptions,” *id.* at 147).

49 See, e.g., Laurence H. Tribe, “Equal Dignity: Speaking Its Name,” 129 *Harvard L. Rev. F.* 16 (2015); Laurence H. Tribe, Essay, “*Lawrence v. Texas*: The ‘Fundamental Right’ That Dare Not Speak Its Name,” 117 *Harv. L. Rev.* 1893, 1895 (2004).

50 See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

51 See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996).

52 See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding sex discrimination to encompass remarks made on the basis of nonconformity with gender stereotypes).

53 See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003).

54 See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992); *Roe v. Wade*, 410 U.S. 113 (1971).

55 See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

“Natural born Citizen” to mean “Citizen *naturalized at birth*”—or, simply, “*born [a] Citizen*”—as a way of bringing Article II into closer alignment with modern sensibilities (and perhaps also as a way of removing the political embarrassment of disqualifying someone who would have already received millions of votes in presidential primaries). Such an assumption is mistaken because *that* hybrid reading of the term “Natural born Citizen”—although it would *include* ambitious foreign-born politicians like Ted Cruz—would *exclude* tens of millions of citizens who came here as foreigners, whether legally or illegally, but were later naturalized. In drawing the line there, that hybrid reading would have neither the virtue of literal accuracy nor the virtue of adherence to a consistently egalitarian and democratic aspiration.

Such an interpretation would, for example, forever exclude the so-called “Dreamers,” innocent immigrants born abroad to foreign parents who brought them here as infants or toddlers in violation of our immigration laws. Even naturalizing such Dreamers by statute as part of a comprehensive immigration reform would thus leave them ineligible to reach the pinnacle of political power in America. Nobody could tell them, the way Ted Cruz’s parents might have told him, “You could grow up to be President someday.”

It follows that simply concluding that the category named in Article II as “*Natural born Citizens*” has somehow gradually morphed into the broader *but still dramatically circumscribed* category of all “*born citizens*,” lopping off the adjective “*natural*,” would be an internally inconsistent halfway measure, neither fish nor fowl. Even if we give way to a sense that we must find some way to reject an original, highly literal reading that is out of joint with modern egalitarian and inclusionary sensibilities,⁵⁶ the proposal under consideration here would fail to comport with those sensibilities, creating a compromise that should satisfy no one—like trying to leap across a chasm too wide to traverse in a single bound by opting to jump halfway, something the Talmud advises us not to try.

This is not to say that halfway measures are invariably worse than doing nothing at all. As with many clichés, wisdom underlies the admonition not to let the perfect become the enemy of the good. Many of the Constitution’s most dramatic advances, including those embodied in the Bill of Rights and the explicit amendments inching toward more inclusive representation of the people in the institutions of government—the Thirteenth, Fourteenth, Fifteenth, Seventeenth, Nineteenth,

56 Cf. Duggin and Collins, *supra* note 30, at 139 (“Even for individuals who have no desire ever to serve as President, disqualification from the office of President perpetuates their marginalization in American society”).

Twenty-fourth, and Twenty-sixth Amendments—have embodied gradual and notably incomplete advances. But there is a world of difference between (1) undertaking to revise the Constitution’s language through the super-majoritarian process of enacting a formal amendment, one whose text—as with the product of any expressly *lawmaking* process—is generally understood to represent political compromise; and (2) doing so through the anti-majoritarian, common-law-like process of adjudication. When we engineer changes in constitutional meaning through a judicial process whose hallmark is understood to be principled justification rather than political compromise or pluralistic log-rolling, stopping halfway deprives the reinterpretive move of the basic institutional legitimacy that is required of all constitutional change—even if that move claims part of its support from what judges imagine to be an inchoate popular consensus.

True, the Founders’ fears that foreign-born monarchs, princes, and potentates might endanger the fabric of our fledgling and fragile Republic seem greatly exaggerated if not altogether outmoded today.⁵⁷ But the language of Article II is inescapable. And even if the language left more wiggle room than it in fact does, there remains a kernel of truth, even in today’s world, in the idea that danger to our democracy lurks in the ambitions of individuals with theocratic or otherwise anti-American loyalties who might infiltrate our governing institutions, including the presidency.

But that danger would seem to be *greater* from individuals who were born as foreign citizens, grew up here with dual citizenship, and chose to abandon their foreign allegiance only decades later, after setting their sights on the White House, than it is from groups like the Dreamers. And not to put too fine a point on it, the former description would quite obviously include someone like Citizen and Presidential Aspirant Cruz, who was a citizen of both Canada and the United States until May 14, 2014. To weaken the wall the Founders erected to prevent such foreign infiltration by replacing “Natural born Citizens” with the newly minted hybrid of “those who acquired citizenship naturally *or* by statute *but did so at birth*” is not exactly unthinkable, but it can hardly commend itself to a living constitutionalist who seeks evolution through principled adjudication. Such a hybrid would result in a set of eligibility rules no less offensively discriminatory, nativist, and xenophobic than the rules that flow from insisting on preserving the classic, “original” meaning of the term. Living constitutionalism must be internally coherent in order to count as constitutionalism at all.

⁵⁷ See *id.* at 134–36.

THE OPTION OF FORMAL TEXTUAL AMENDMENT

One way to achieve that coherence, of course, would be to undertake the heavily uphill slog of formally amending Article II of the Constitution through the elaborate procedure of Article V to remove the words “natural born” altogether. In an ideal world, if that surgical excision could be accomplished with a snap of one’s fingers and without any of the ideological and political realignments that might be triggered by the actual process of invoking Article V from the agreement of two-thirds of both Houses to ratification by the legislatures of three-fourths of the States, that might well be the optimal solution to the problem posed by the existing language of Article II.

But ours is *not* that “ideal” world, and in any event, an important part of our Constitution’s design is that changes in its text cannot be achieved instantaneously and without full engagement of the political process. So, it is not entirely clear that the world envisioned in the preceding paragraph would be so ideal after all. As a realistic matter, apart from its deliberate difficulty—and in part as a consequence of the dynamics inherent in the Article V process—the formal amendment path could open an unwelcome can of worms, not least among them one stemming from the burgeoning nativist push to amend the Fourteenth Amendment’s definition of U.S. citizenship to exclude so-called “anchor babies,” the pejorative term applied by some to children born on American soil to mothers allegedly entering illegally to give birth to American citizens who would then give them as parents a moral and perhaps even legal claim to remain in the United States. So the amendment path is not one I would eagerly embrace.

Is there no other way—short of an implausibly muscular use of interpretive authority to airbrush key words of limitation out of Article II—to eliminate the current tension between presidential eligibility and the ideals of a welcoming nation of immigrants, whose French Statue of Liberty lifts its lamp beside the golden door?

CONGRESSIONAL ENFORCEMENT AND A COHERENT APPROACH TO “NATURAL BORN”

Conceivably there is. The law is a House of Many Mansions. Part of what makes the conclusion of ineligibility so troublesome is its tension with the anti-discriminatory and pro-democratic thrust of the Reconstruction Amendments (the Thirteenth, Fourteenth, and Fifteenth), on which later amendments have been built—namely, the Seventeenth, shifting power from State Legislatures to ordinary citizen voters in the selection of U.S. Senators; the Nineteenth, enfranchising women; the

Twenty-fourth, eliminating the poll tax; and the Twenty-sixth, enfranchising 18-year-olds.

The Enforcement Clauses of six of those amendments (all except the Seventeenth), empowering Congress “by appropriate legislation” to “enforce” their commands, might hold the key to the future in the area of presidential eligibility, which can remain as limited as it is today only at the high price of treating tens of millions of our countrymen and countrywomen as second-class citizens. These amendments echo backward and forward across time and the constitutional text, shedding modern and inclusive light even on the document’s oldest provisions and inviting us to rethink Congress’s power to alter by means of legislation the requirements of the “Natural born Citizen” Clause.⁵⁸

To understand the potential power of the Enforcement Clauses, one need only reflect on how broadly those provisions had been construed by the Supreme Court in landmark decisions of the 1960s, such as *Katzenbach v. Morgan*⁵⁹ and *Jones v. Mayer*.⁶⁰ In those key decisions, the Court upheld congressional power to extend rights of full participation in the American polity and economy well beyond merely implementing the

58 Professors Akhil Reed Amar and Jed Rubenfeld have both begun to explore this textual and temporal interplay, proposing normative theories of time’s simultaneously informative and subversive function in forming coherent constitutional understandings. Rubenfeld calls his approach commitmentarianism, and rejects “look[ing] to one moment to ground the Constitution’s bindingness.” Jed Rubenfeld, “Reading the Constitution as Spoken,” 104 *Yale L. J.* 1119, 1153 (1995). To Rubenfeld, the Constitution represents continual commitment to underlying ideals, rather than a commitment to an understanding of a given provision at a clear point in time. *Id.* at 1134–9 (distinguishing a model of interpretation that views the Constitution as an ongoing commitment from one that sees within the text a static understanding). Amar’s work likewise discusses this intertemporal project, arguing that the Constitution’s text must be interpreted with internal consistency, an approach that entails giving common meaning to words written centuries apart. See Akhil Reed Amar, “Intratextualism,” 112 *Harv. L. Rev.* 747, 789 & n.173 (1999). In a project I began some years ago and hope to publish relatively soon, I focus on the centrality of intertemporal analysis to understanding our Constitution’s design and its interaction with the political, social, and cultural contexts in which the Constitution operates to ground our legal system.

59 384 U.S. 641, 651 (1966) (upholding federal legislation banning English literacy requirements for voting—requirements not in themselves unconstitutional under then settled Supreme Court doctrine—by certain Puerto Ricans living in New York City as a means of giving those individuals the political clout needed to deter unconstitutional municipal discrimination against them on the basis of their ethnicity, and reasoning that the Enforcement Clause of the Fourteenth Amendment gives Congress “discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,” *both* as a prophylactic measure to enforce the Amendment as construed by the Court and as an exercise of authority to define the Amendment’s guarantees more generously than the Court has thought it appropriate for the Judicial Branch to do).

60 392 U.S. 409, 439 (1968) (holding that the Enforcement Clause of the Thirteenth Amendment’s abolition of slavery gives Congress “the power to eliminate all racial barriers to the acquisition of real and personal property” even if those barriers would not in themselves constitute instances of the slavery and involuntary servitude prohibited by the Amendment as construed by the Court).

Court's own relatively narrow understandings of how far those rights reached as a strictly constitutional matter in the absence of valid enforcement legislation. The Justices of half a century ago drew their inspiration, in those civil rights cases and others like them, from how expansively the great Chief Justice John Marshall read congressional authority, channeling none other than Alexander Hamilton in upholding the power of Congress, never specified in the Constitution, to charter the Second Bank of the United States in the seminal case of *McCulloch v. Maryland*.⁶¹

Regrettably, the Supreme Court, beginning roughly a quarter century ago, retreated across a wide front from that broad understanding of Congress's enforcement powers, as when it struck down key provisions of the Violence Against Women Act in *U.S. v. Morrison*,⁶² the application of the Religious Freedom Restoration Act to States in *City of Boerne v. Flores*,⁶³ and the pivotal pre-clearance provision of the Voting Rights Act in *Shelby County v. Holder*.⁶⁴ I have long been a critic of that disastrous retreat and a fervent advocate of a return to the classically broader view of congressional power.⁶⁵

With the Court's precedents on congressional enforcement powers in mind, the question remains: If and when the Court were to take a broader view of the Enforcement Clause of the Fourteenth Amendment, what would that mean for Congress's power to extend presidential eligibility by statute? In my view, the constitutional case for such congressional power would then be strong, although far from bulletproof.

In 2015, a bare majority of the Court in *Arizona State Legislature v.*

61 17 U.S. 316 (1819).

62 529 U.S. 598 (2000).

63 521 U.S. 507, 519 (1997) (holding that Congress lacks constitutional authority to extend the Religious Freedom Restoration Act [RFRA] to the States so as to require greater religious accommodation than the Court itself deems to be constitutionally required because the Fourteenth Amendment's Enforcement Clause does not give Congress "the power to decree the substance of the Fourteenth Amendment's restrictions," including those of the Free Exercise of Religion Clause of the First Amendment). None of the Justices advocated a more expansive interpretation of the Enforcement Clause under which Congress could impose stricter limits on the States than the Free Exercise Clause itself, as applied to the States judicially through the Fourteenth Amendment, imposes. The dissenters took issue not with the majority's juricentric reading of the Enforcement Clause but only with other aspects of the Court's holding. See *id.* at 544 (O'Connor, J., dissenting) (arguing the majority misconstrued the Free Exercise Clause); *id.* at 566 (Breyer, J., dissenting) (same, but reserving judgment on the Enforcement Clause issue); *id.* at 565–6 (Souter, J., dissenting) (arguing the Court should not have granted certiorari). Justice Stevens additionally wrote a concurrence suggesting that RFRA violated the First Amendment's Establishment Clause because it "provided the Church with a legal weapon that no atheist or agnostic can obtain." *Id.* at 537 (Stevens, J., concurring).

64 133 S. Ct. 2612 (2013).

65 See, e.g., Laurence H. Tribe, *American Constitutional Law* § 5-14 to 5-16, at 923–41 (3rd ed., 2000) (arguing against the Supreme Court's "cramped conception" of Congress's enforcement powers); Laurence H. Tribe, *American Constitutional Law* § 5-14, at 349–50 (2nd ed., 1988) (same).

*Arizona Independent Redistricting Commission*⁶⁶ produced a precedent on which a foundation for this congressional override power might be built. In that case, the Court upheld a state law seemingly overriding the explicit federal constitutional provision in Article I, Section 4 specifying that each State’s *Legislature* is to draw the lines defining congressional districts within that State. The five-Justice majority upheld Arizona’s effort, through the innovation of an independent redistricting commission, to combat what the State’s people deemed to be entrenched malapportionment in selecting the State’s delegation of Representatives in the House. Stretching the meaning of Article I’s reference to “the Legislature” of “each State” to encompass the State’s entire electorate when the State Constitution delegated lawmaking powers to them, acting by popular referendum, the Court in essence treated such statewide action as sufficient to trump what would otherwise have been the judicial reading of the term “Legislature.” Arguably, an Act of Congress signed by the President should carry at least as much weight in overriding the judicial reading of the phrase “Natural born Citizen,” particularly if that reading is driven in significant part by institutional limits thought by the Court to inhere in the process of adjudication—limits of no relevance when Congress acts legislatively.

What I have in mind at the national level would be a framework federal statute, put in place before the first presidential election to which it would apply, enforcing the Fourteenth Amendment’s norm of equality and its recognition of the “privileges of United States citizens,” in tandem with the Article I power of Congress to enact a uniform “Rule of Naturalization.”⁶⁷ Such a framework statute, while by no means easy to defend

66 135 S. Ct. 2652 (2015).

67 Michael Ramsey has argued that Congress’s Article I power to establish a uniform “Rule of Naturalization,” as a matter of original meaning on its own, gave Congress the power to declare categories of citizens “natural born.” Because Parliament passed several seventeenth- and eighteenth-century statutes extending natural born subject status to people who were not natural born under common law, Ramsey infers that “the 1787–88 English law meaning of ‘natural born’ was the common law definition as modified from time to time by statute.” See Ramsey, *supra* note 9, at 33. Congress still cannot make someone not born an American “natural born” because Parliament had never done so with people who were not born British. *Id.* at 36. Congress can, in effect, legislate out the word “natural” but not the word “born.”

This original meaning argument runs into at least three problems, apart from the textual issues discussed earlier. First, Ramsey assumes Congress inherited the full extent of Parliament’s naturalization powers. That assumption seems unwarranted, given that Congress enjoys only limited powers (see U.S. Const. art. I, sect. 1), whereas Parliament’s powers are not subject to constitutional limits (see 1 William Blackstone, *Commentaries on the Laws of England* 159 [“The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds”]).

Second, Congress has only once—in 1790, before repealing the relevant language in 1795—come close to making naturalized citizens “natural born,” and that 1790 statute

constitutionally, would at least be consistent with the Constitution's spirit, in the tradition of the other enforcement measures taken by Congress to make our laws more consistent with our core constitutional values. And it would not be as difficult to defend as would a judicial decision, taken in the absence of such a measure, purporting to erase altogether the words "natural born" before the word "Citizen" in Article II.

It might help if such a statute were to build in some safeguards against those who might seek to exploit the laws of our land to become naturalized U.S. citizens in order to tunnel their way into power over our country.⁶⁸ But, with or without such safeguards, the statute I have in mind would *not* render ineligible for the presidency (once they had become naturalized citizens and reached the age of 35 while residing in the United States for at least 14 years) those immigrants born abroad to foreign parents and brought to our shores as toddlers through no fault of their own in violation of American law (the so-called Dreamers).

Indeed, if the new law were to render those innocent children forever ineligible while at the same time rendering eligible all those who happened to be naturalized at birth, that arbitrary exclusion itself could well be deemed a violation of equality principles that the Supreme Court since the mid-twentieth century has transplanted from the Equal Protection Clause of the Fourteenth Amendment into the Due Process Clause of the Fifth Amendment⁶⁹—a fact that reinforces the idea of grounding the framework statute partly in the Fourteenth Amendment's Enforcement Clause.

EPILOGUE

When the issue of Cruz's eligibility to be President was first raised, he was barely a serious candidate. I must confess that I was satisfied at the time to take guilty pleasure in calling attention to the Senator's "fair-weather originalism." I emphasized that only a self-serving opportunist willing to

specified that individuals born abroad should "be *considered* as Natural born Citizens"; it did not declare them to *be* "Natural born Citizens." Compare Naturalization Act of 1790, ch. 3, 1 Stat. 103, with Naturalization Act of 1795, ch. 20, 1 Stat. 414.

Third, although Ramsey is right that Parliament had altered by statute the meaning of "natural born subject," it is not obvious the term's plasticity was particularly salient at the time. Perhaps the Founders understood the term as inherently malleable, but it is conceivable that they were just trying to freeze into place the 1787 definition. There is no real evidence either way.

68 Crafting such safeguards would obviously prove challenging. Anyone with ill motive would have every reason to conceal it. Beyond an oath of fidelity to the Constitution and office—which the President already must swear—it becomes difficult to even envision what form these safeguards might take.

69 Cf. *Plyler v. Doe*, 457 U.S. 202, 219 (1982) (holding that Texas violated the Equal Protection Clause by denying free public education to children there illegally through no fault of their own and thereby creating a permanent underclass for no persuasive reason).

manipulate constitutional interpretation to attain power could claim to be bound by the Constitution’s original meaning when doing so would serve—consistent with Cruz’s personal views—to restrict sex discrimination and discrimination based on gender identity,⁷⁰ or trample on the rights of LGBT individuals and rights of sexual privacy,⁷¹ while contemporaneously proclaiming that being naturalized at birth by laws enacted more than a century after the Founding made him a “Natural born Citizen” as those words were used in the late eighteenth century.⁷² In short, I savored the irony that as an ostensible originalist, Ted Cruz would have to embrace a view that was not just at odds with modern American values but that actually made him ineligible to serve as President.

But what I most savor *now*, given that the issue cannot be resolved in actual litigation during the current election cycle since the Cruz candidacy has been eclipsed by political forces on the Senator’s way to the White House, is something quite different—something that adds energy to the flame that drove me to open the debate underlying this essay with echoes of Lin-Manuel Miranda’s *Hamilton*.

It was, after all, Alexander Hamilton in *The Federalist* No. 85 who looked forward to the “completion” of our constitutional enterprise “with trembling anxiety,” and who warned, in that last of the great *Federalist Papers*, against the “despotism of a victorious demagogue.”⁷³ And it was Hamilton in *The Federalist* No. 82 who meditated on the “intricacy and nicety” of the questions that the “erection of our [new] government” could not “fail to originate.” In that 82nd *Federalist Paper*, Hamilton wisely observed: “’Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE.”⁷⁴

It is in that deep sense that Hamilton was the original non-originalist, the first authentic living constitutionalist. And it is in that spirit that I have sought—throughout my career as a constitutional scholar, teacher, and advocate—to “liquidate the meaning of all the parts,” the better to synthesize them into “a harmonious and consistent WHOLE.”

70 Emily Schulteis and Jake Miller, “Ted Cruz, Donald Trump Spar over North Carolina Transgender Bathroom Law,” *CBS News*, April 21, 2016, <http://www.cbsnews.com/news/ted-cruz-donald-trump-spar-over-transgender-bathroom-law/>.

71 Lawrence Hurley, “Republican Cruz Uses Senate Perch to Blast Supreme Court,” *Reuters*, July 22, 2015 (quoting Cruz: “Justice Kennedy’s pop psychology has no basis in the text and history of the Constitution”).

72 While, by the way, retaining his Canadian citizenship until getting close to his presidential run.

73 *The Federalist* No. 85 (Alexander Hamilton), *supra* note 29, at 527.

74 *The Federalist* No. 82 (Alexander Hamilton), *supra* note 29, at 491.