

NATURAL BORN SHENANIGANS: HOW THE BIRTHING MOVEMENT EXACERBATED CONFUSION OVER THE CONSTITUTION'S NATURAL BORN CITIZEN REQUIREMENT

INTRODUCTION

The campaign for the U.S. presidency in 2008 was marked by several high-profile media controversies,¹ but perhaps none so persistent² (nor high-profile)³ as the dispute over eventual President Barack Obama's place of birth. A vocal group known as "birthers" seized on Obama's father's Kenyan nationality to claim (or alternatively insinuate) that, contrary to his claim of birth in Hawaii, Obama was born in Kenya.⁴ According to birthers, Obama was ineligible to serve in the presidency by operation of the constitutional requirement that the President be a natural born citizen.⁵ Birthers battled a mainstream academy and press

¹ See, e.g., Jim Rutenberg et al., *For McCain, Self-Confidence on Ethics Poses Its Own Risk*, N.Y. TIMES, Feb. 21, 2008, at A1 (alleging a lobbyist's improper influence on candidate John McCain); Michael Dobbs, *Obama's "Weatherman" Connection*, WASH. POST (Feb. 19, 2008, 6:00 AM), http://blog.washingtonpost.com/fact-checker/2008/02/obamas_weatherman_connection.html (evaluating controversial claims about a personal connection between Obama and domestic terrorist William Ayers); Alex Mooney & Peter Hamby, *Clinton: Wright Would Not Have Been My Pastor*, CNN (Mar. 25, 2008, 5:35 PM), <http://www.cnn.com/2008/POLITICS/03/25/clinton.wright/> (case sensitive URL) (detailing candidate Hillary Clinton's reaction to a controversy surrounding statements made by Barack Obama's pastor, Jeremiah Wright).

² Some challenges to Obama's eligibility for the presidency based on his birthplace were still being litigated as this Note was being published. See, e.g., *Petition for Writ of Mandamus, Voeltz v. Obama*, No. 14-145 (U.S. Aug. 7, 2014), *mandamus denied, In re Voeltz*, No. 14-145, 2014 WL 3899255 (Oct. 14, 2014), see *Docket Search Page for In re Voeltz, No. 14-145*, SUPREME CT. U.S., <http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-145.htm> (last visited Nov. 11, 2014).

³ See, e.g., Michael D. Shear, *Want a Copy of Obama's Birth Certificate?*, N.Y. TIMES (May 18, 2011, 3:26 PM), <http://thecaucus.blogs.nytimes.com/2011/05/18/want-a-copy-of-obamas-birth-certificate-2/> (describing the Obama campaign's humorous response to birthers' demands for Obama's birth certificate in selling coffee mugs and other merchandise emblazoned with an image of Obama's birth certificate).

⁴ See, e.g., Jerome R. Corsi, *Did Obama's Grandmother Say He Was Born in Kenya?* WND (Aug. 24, 2009, 9:16 PM), <http://www.wnd.com/2009/08/107524/>. Corsi is a birther stalwart, and his work appears to have informed much of the litigation discussed in this Note. See generally JEROME R. CORSI, WHERE'S THE BIRTH CERTIFICATE? (2011) (discussing in detail the birther argument against Obama's eligibility for the presidency).

⁵ U.S. CONST. art. II, § 1, cl. 4; e.g., CORSI, *supra* note 4, at v.

unsympathetic to their views⁶ and potentially problematic productions by Obama,⁷ and theorists continue to champion their cause today.⁸

Whatever its merits, the birther movement's persistent advocacy against Obama's eligibility in the face of hard facts⁹ may have actually helped to downplay and discredit a distinct, more legally credible challenge to the candidate's status as a natural born citizen. Leo Donofrio,¹⁰ then an attorney in New Jersey, researched the historic understanding of "natural born citizen" as a term of art and found that it had a set, broadly-understood meaning at the drafting of the Constitution¹¹ which was very different from the meaning it has taken in modern times.¹² Employing an original-meaning textual framework, Donofrio contended that under Article II, Section 1 of the Constitution, both Obama and Republican candidate John McCain were ineligible to hold the presidency.¹³

A deluge of claims following variations on the "born in Kenya" formula hit state and federal courts throughout 2008,¹⁴ and Donofrio

⁶ See Kate Zernike, *Conspiracies Are Us*, N.Y. TIMES, May 1, 2011, at WK1; Dana Milbank, *The Tinfoil-Hat Brigade Fails in Challenge to Obama's Eligibility*, WASH. POST (Dec. 9, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/08/AR2008120803446.html> (case sensitive URL); see also *Rhodes v. MacDonald*, 670 F. Supp. 2d 1363, 1375 (M.D. Ga. 2009) (summarizing birther plaintiff's evidence as "an affidavit from someone who allegedly paid off a government official to rummage through the files at a Kenyan hospital to obtain what counsel contends is the President's 'authentic' birth certificate").

⁷ Michael D. Shear, *Citing "Silliness," Obama Shows Birth Certificate*, N.Y. TIMES, Apr. 28, 2011, at A1 (describing the Obama campaign's release of Obama's long-demanded long-form birth certificate in the buildup to the 2012 election).

⁸ See, e.g., Jerome R. Corsi, *Healthcare.gov Can't Verify Obama's Identity*, WND (Dec. 24, 2013, 6:44 PM), <http://www.wnd.com/2013/12/why-couldnt-healthcare-gov-validate-obamas-identity/> (repeating many birther claims alleging identity irregularities connected to Obama, while stopping short of actually repeating their usual conclusion that Obama is ineligible to serve as President).

⁹ See Shear, *supra* note 7 (reporting that Obama's birth certificate confirms that he was born in Hawaii).

¹⁰ Donofrio is admittedly a colorful figure who has since left the practice of law, and he has his detractors in the blogosphere. See Leo Donofrio, *I'm Not Who You Think I Am . . .*, NAT. BORN CITIZEN (May 24, 2011, 11:52 AM), <http://naturalborncitizen.wordpress.com/2011/05/24/im-not-who-you-think-i-am/>; *We're All Blood Brothers*, NAT. BORN CITIZEN (Mar. 13, 2012, 11:46 PM), <http://naturalborncitizen.wordpress.com/2012/03/13/were-all-blood-brothers/>. Donofrio's detractors err when they make *ad hominem* attacks on his positions; this Note seeks to analyze the arguments forwarded by Donofrio, not his personality. Such an analysis would be irrelevant to a proper understanding of the natural born citizen requirement.

¹¹ See *infra* Part I.

¹² See *infra* Part II.

¹³ See *infra* Part V.

¹⁴ See *infra* Part IV.

seemed unable to distinguish his lawsuit from coverage of the rolling tide of thoroughly discredited birther claims.¹⁵ Ultimately Donofrio's core arguments only received examination in dicta in a single state court opinion.¹⁶

Despite the President's successful election and reelection,¹⁷ confusion over the natural born citizen requirement (and attendant controversy) has not subsided so much as it has migrated to a new target. Recently, speculation that Republican Senator Ted Cruz might run for the presidency generated a whole new birther movement.¹⁸ The birthers speaking against Cruz's eligibility include old-guard birthers like Donald Trump, as well as relative newcomers such as Alan Grayson.¹⁹ Similar controversies have beset Presidents and candidates alike, including Chester Arthur and George Romney.²⁰ A neutral, detached observer might conclude that some ambiguity exists as to the proper application of the natural born citizen rule.²¹ And, claims to the contrary notwithstanding,²² such an observer would be correct. The perennial controversy spawned by this particular uncertainty in the law is unhealthy to our elections and government in ways too numerous and speculative for this Note to address.²³ Convincing resolution of the question would take at least one

¹⁵ See text accompanying notes 159–73173.

¹⁶ See *Ankeny v. Governor of Ind.*, 916 N.E.2d 678, 685–89 (Ind. Ct. App. 2009).

¹⁷ Adam Nagourney, *Obama*, N.Y. TIMES, Nov. 5, 2008, at A1; Jeff Zeleny & Jim Rutenberg, *Obama's Night*, N.Y. TIMES, Nov. 7, 2012, at A1.

¹⁸ Ben Jacobs, *Here Come the Democratic Birthers*, DAILY BEAST (Feb. 24, 2014), <http://www.thedailybeast.com/articles/2014/02/24/here-come-the-democratic-birthers.html>.

¹⁹ See *id.*; David Freedlander, *Donald Trump Is Still a Birther*, DAILY BEAST (May 30, 2014), <http://www.thedailybeast.com/articles/2014/05/30/donald-trump-is-still-a-birther.html>.

²⁰ THOMAS C. REEVES, *GENTLEMAN BOSS: THE LIFE OF CHESTER ALAN ARTHUR* 202–03 (1975); Mark Hosenball, *Romney's Birth Certificate Evokes His Father's Controversy*, REUTERS (May 29, 2012, 7:30 PM), <http://www.reuters.com/article/2012/05/29/us-usa-campaign-romney-birth-certificate-idUSBRE84S1GF20120529>.

²¹ See generally William T. Han, *Beyond Presidential Eligibility: The Natural Born Citizen Clause as a Source of Birthright Citizenship*, 58 DRAKE L. REV. 457 (2010) (identifying three existing approaches to understanding and applying the natural born citizen clause while proposing an additional approach).

²² See JACK MASKELL, CONG. RESEARCH SERV., R42097, *QUALIFICATIONS FOR PRESIDENT AND THE "NATURAL BORN" CITIZENSHIP ELIGIBILITY REQUIREMENT 3* (2011) (asserting that legal scholarship, historic opinion, and case law agree that the natural born citizen clause only requires that one become a citizen at or by birth).

²³ See, e.g., 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, 143–44 (2005) (noting the challenges that the Supreme Court would face both politically and practically if the Court was forced to determine that a sitting President were constitutionally ineligible for the office).

procedural hot potato off the table for future elections, allowing candidates to focus more on issues and less on birth certificates.

This Note does not seek to justify its reliance on original public-meaning textualism for constitutional analysis, nor does it rehearse the debates suggested by the very mention of the phrase. Rather, beginning with what may be a naïve conviction that the original public meanings attached by the Framers to the contents of our Constitution should control today,²⁴ this Note examines the natural born citizen requirement and related controversies. Part I examines the requirement's inclusion in Article II of the Constitution and establishes that the requirement's wording was actually a term of art as the Framers understood it. Part II discusses the requirement's interaction with Amendment XIV and the advent of birthright citizenship. Part III recounts the original birther conspiracy theory and focuses on a challenge to Chester Arthur's eligibility for the presidency in the election of 1880. Part IV summarizes some of the suits brought by prominent birthers. Part V discusses in greater detail the suits in which Donofrio was involved. Part VI examines possible solutions to the current state of the requirement. This Note argues throughout that an original public meaning textual approach is the proper way to interpret the constitutional requirement that the President be a natural born citizen.

I. THE FRAMERS ON NATURAL BORN CITIZENSHIP

Although we have fairly extensive records of many of the key debates and negotiations that took place at the Constitutional Convention in the summer of 1787,²⁵ relatively little exists to shed light on the natural born citizen requirement of Article II, Section 1.²⁶ An early draft of the Constitution submitted by the Committee on Detail contained a requirement that the President be a mere citizen,²⁷ but the Committee of Eleven changed the requirement to "natural born citizen" after George

²⁴ Under this approach, adaptations in the Constitution are best accomplished through the amendment process. See Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1633–34 (2013).

²⁵ See, e.g., THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., Subscribers' Ed. 1911).

²⁶ See Han, *supra* note 21, at 463 ("Hardly any discussion on the [natural born citizen] Clause took place at Philadelphia [during the Constitutional Convention].").

²⁷ 1 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 256–57 (1891); Han, *supra* note 21, at 463 ("The Committee on Detail initially submitted without comment a recommendation that the President be a citizen and be a resident for twenty-one years.").

Washington (and probably other delegates) received a suggestion to that effect from John Jay.²⁸ The letter read, in relevant part:

Permit me to hint, whether it would not be wise & seasonable to provide a a [sic] strong check to the admission of Foreigners into the administration of our national Government; and to declare expresly [sic] that the Command in chief of the american [sic] army shall not be given to, nor devolve on, any but a natural born Citizen.²⁹

The full Convention apparently accepted the change without controversy.³⁰ It comes as little surprise that a nation of rebels which had just fought a war to free itself from a foreign power would seek to protect itself from foreign entities using the election process to reestablish power over the nation.³¹ At any rate, the requirement, uncontroversial as it was, seems to have been an attempt to prevent foreign interests from usurping the highest executive office.³² Without addressing the natural born citizen requirement directly, Alexander Hamilton wrote about foreign influence in the presidency in Federalist 68:

Nothing was more to be desired, than that every practicable obstacle should be opposed to cabal, intrigue, and corruption.—These most deadly adversaries of republican government, might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign Powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the Chief Magistracy of the Union? But the Convention have guarded against all danger of this sort, with the most provident and judicious attention.³³

One early commentator, Judge St. George Tucker, wrote of the requirement that it was “a happy means of security against foreign influence, which, where-ever it is capable of being exerted, is to be dreaded more than the plague.”³⁴

But what exactly did “natural born citizen” mean? Some modern commentators seem to think that what the Framers meant by the phrase

²⁸ Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1, 5 (1968).

²⁹ Letter from John Jay to His Excellency General Washington (July 25, 1787), in 4 U.S. DEPT. OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 237 (1905) [hereinafter Letter from John Jay to General Washington].

³⁰ Han, *supra* note 21, at 463.

³¹ See Jack P. Greene, *The American Revolution*, 105 AM. HIST. REV. 93, 100 (2000); Letter from John Jay to General Washington, *supra* note 29.

³² See Letter from John Jay to General Washington, *supra* note 29.

³³ THE FEDERALIST NO. 68, at 374 (Alexander Hamilton) (E.H. Scott ed., 1898).

³⁴ 1 GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 323 (1803).

is not easily or clearly discernible.³⁵ These commentators often treat the absence of a definition for the term within the Constitution as a license to choose one's preferred definition from a smorgasbord of historical and plain-language indicators.³⁶ Such commentators are apparently in good company, as the Supreme Court said as much in *Minor v. Happersett*,³⁷ a case in which a female plaintiff sued for the right to vote under the Privileges and Immunities Clause of Amendment XIV.³⁸ In the Court's opinion, Chief Justice Morrison Waite wrote, "[t]he Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that."³⁹ Chief Justice Waite proceeded to consult British common law from the time of the founding to elucidate this question, and ultimately settled on a definition which largely comported with an originalist understanding.⁴⁰ However, while Chief Justice Waite's quote could be used as a license to ignore rather than consult valuable historical sources, such an approach distorts the holding in *Minor* as well as the requirement itself. Even Chief Justice Waite (and every commentator that has followed his initial approach in *Minor*) missed an important contemporary source which provides the needed insight to unwind and settle the question of the natural born citizen requirement's original public meaning: Emmerich de Vattel's 1758 treatise entitled *The Law of Nations*, which was apparently influential on the Framers' views of international and citizenship law.

It would be difficult to overstate the influence of Vattel's treatise on the Framers. Benjamin Franklin said of the treatise in 1775 that it "ha[d] been continually in the hands of the members of our Congress [then] sitting."⁴¹ A copy of the treatise was in George Washington's now-infamous

³⁵ See, e.g., 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, 881–82 (1988).

³⁶ See generally Han, *supra* note 21 (reviewing existing approaches to the natural born citizen analysis and suggesting a new approach based largely on policy considerations).

³⁷ 88 U.S. (21 Wall.) 162 (1874).

³⁸ *Id.* at 165.

³⁹ *Id.* at 167; Howard Jay Graham, *The Waite Court and the Fourteenth Amendment*, 17 VAND. L. REV. 525, 525 (1964).

⁴⁰ *Minor*, 88 U.S. at 167–68.

⁴¹ Letter from Benjamin Franklin to Charles William Frederick Dumas (Dec. 19, 1775), in 2 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 64 (Francis Wharton ed. 1889); see also *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 462 n.12 (1978) ("In 1775, Benjamin Franklin acknowledged receipt of three copies of a new edition, in French, of Vattel's *Law of Nations* and remarked that the book 'has been continually in the hands of the members of our Congress now sitting.'").

collection of overdue library books, discovered in 2010.⁴² Vattel was the most widely cited international jurist in the fifty years following the Revolutionary War,⁴³ and his treatise continues to be cited by Supreme Court opinions in the modern day, cropping up as recently as Justice Scalia's opinion in *District of Columbia v. Heller*.⁴⁴ It was written in French and later translated to English.⁴⁵

All this is purely academic unless Vattel speaks unequivocally to the meaning of natural born citizenship. Fortunately, Vattel's treatment of the topic is unequivocal, unambiguous and clear: "[t]he natives, or *natural-born citizens, are those born in the country, of parents who are citizens*."⁴⁶ Vattel's treatment of the term leaves little to be desired by way of a definition. Natural born citizens are those born in the country of parents who are citizens. Vattel provides a condensed discussion of why natural born citizenship works this way:

The society is supposed to desire this, in consequence of what it owes to its own preservation; and it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it. The country of the fathers is therefore that of the children; and these become true citizens merely by their tacit consent. We shall soon see whether, on their coming to the years of discretion, they may renounce their right, and what they owe to the society in which they were born. I say, that, in order to be of the country,

⁴² *George Washington's 221-Year Overdue Library Book: A Timeline*, WEEK (May 21, 2010), <http://theweek.com/article/index/203282/george-washingtons-221-year-overdue-library-book-a-timeline>. While humorous, this fact is also important to show Washington's personal familiarity with Vattel's work and his understanding of natural born citizenship, since Washington was the principal recipient of John Jay's letter suggesting the inclusion of the term as a presidential requirement, and thus the catalyst by which the term found its way into the Constitution. See *supra* notes 27–30 and accompanying text.

⁴³ *U.S. Steel Corp.*, 434 U.S. at 462 n.12.

⁴⁴ 554 U.S. 570, 587 n.10 (2008).

⁴⁵ Emmerich de Vattel, *The Law of Nations: or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (Joseph Chitty & Edward D. Ingraham eds., 1883). It has been reported that earlier anonymous translations contain the original French *indigenes* in place of "natural born citizen" and that the 1797 translation used by Chitty was the first to translate the word to English. See Dr. Conspiracy, *Citizenship Denialist Hoax Exposed!*, OBAMA CONSPIRACY THEORIES (May 6, 2009), <http://www.obamaconspiracy.org/2009/05/de-vattel-revisited/>. It went through a number of editions in its own right as a textbook. Franklin's copies were in the original French, but it is unclear what versions the Congressmen he referred to in his quote above were using. See *supra* note 41 and accompanying text. Although no English translation of Vattel existing in 1787 contains the exact phrase "natural born citizen," the parlance of the 1797 version shows that translating *indigenes* to English would yield that result during that time in history. See Mario Apuzzo, *The Framers Used Emer de Vattel, Not William Blackstone to Define a "Natural Born Citizen"*, NAT. BORN CITIZEN (Nov. 2, 2010, 2:08 AM), <http://puzo1.blogspot.com/2010/11/framers-used-emer-de-vattel-not-william.html>.

⁴⁶ VATTEL, *supra* note 45, at 101 (emphasis added).

it is necessary that a person be born of a father who is a citizen; for, if [h]e is born there of a foreigner, it will be only the place of his birth, and not his country.⁴⁷

Vattel points out here that a country's citizens must pass citizenship to their children as a matter of self-preservation. This fact sets up a presumption that parents pass citizenship on to their children, which is confirmed by the children's tacit acceptance and rebutted by renunciation upon reaching the age of their discretion. He explains that the father (and above mentions both parents) must be a citizen, because if this is not true, the country will only be the child's birthplace, and not his country. This rationale seems especially apposite to the question of presidential safeguards against foreign influence, since the little we have to go on suggests that the Framers desired to ensure any President would have undivided loyalty to the United States.⁴⁸

Contrary to the popular impulse toward a historically uninformed view of the term "natural born citizen," a cursory reading of Vattel coupled with an understanding of its significance to the Framers suggests that the requirement is not a novel term invented by the Framers, but rather a term of art with a fixed meaning which would have been known to scholars and statesmen of the day. Indeed, this understanding seems to comport with what one would expect of a group of learned men convening to lay out a framework for government—the Framers did not invent terms when invention was improper.⁴⁹ They used accepted, established terms to convey meanings in ways that would not be subject to later arbitrary revision.⁵⁰

Although parallel clauses in the Constitution dealing with federal representative and senator qualifications required mere citizenship for a set number of years,⁵¹ the Framers raised the bar for the presidency to require natural born citizenship.⁵² This requirement was engineered to prevent foreign influence from taking over the executive branch;⁵³ why would these careful drafters employ a term for a raised requirement that means little more than the distinct term they used for the requirement for

⁴⁷ *Id.*

⁴⁸ See Letter from John Jay to General Washington, *supra* note 29.

⁴⁹ See *United States v. Sprague*, 282 U.S. 716, 731 (1931) ("The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary . . . meaning . . .").

⁵⁰ See Letter from James Madison to Mr. Ingersoll, (June 25, 1831) in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 184 (1865); Daniel Webster, Convention at Andover, in 2 THE WORKS OF DANIEL WEBSTER 164 (1851).

⁵¹ U.S. CONST. art. I, §§ 2, cl. 2, 3, cl. 3.

⁵² U.S. CONST. art. II, § 1, cl. 4.

⁵³ See Letter from John Jay to General Washington, *supra* note 29.

congressional office? This interpretation of the work of the Constitutional Convention makes little sense. It is far more likely that if “natural born citizen” was a term of art, the Framers intended the meaning attached to that term of art. Vattel’s treatise supplies that meaning: to be a natural born citizen, one must be born (1) to two citizen parents (2) in the country.⁵⁴ And by all appearances, that meaning would have been familiar to the Framers who employed the term defined by it.⁵⁵

II. THE FOURTEENTH AMENDMENT’S IMPACT ON THE NATURAL BORN CITIZEN REQUIREMENT

Some have made the case that even if the Constitution relied on an understanding of natural born citizenship reminiscent of that delineated by Vattel, this understanding was abrogated by Amendment XIV’s grant of citizenship to “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof.”⁵⁶ This phrase and a body of case law following it have given rise to what is known as *jus soli*, or birthright citizenship, which is the practice of bestowing citizenship on persons born in the territory of the United States regardless of the citizenship of either parent.⁵⁷ Birthright citizenship poses a logical problem for Vattel’s definition of natural born citizenship. A natural born citizen is a person born to two citizen parents within American territory, whereas a person born to anyone within American territory is a citizen.⁵⁸ It is easy to conflate the terms, especially for an analyst proceeding without the benefit of Vattel’s definition. It would be easy to conclude that if a person is a citizen by virtue of birth on American soil, any rules about parental citizenship attached to arcane presidential qualifications are invalid.⁵⁹ This revolution in citizenship law complicates a proper understanding of natural born citizenship; without Vattel’s definition of “natural born citizen” as a term of art, it is unclear how a citizen by birth on American

⁵⁴ See VATTEL, *supra* note 45, at 101.

⁵⁵ See *supra* notes 41–43 and accompanying text.

⁵⁶ U.S. CONST. amend. XIV, § 1. Abdul Karim Hassan, a Guyana-born naturalized U.S. citizen, argued unsuccessfully as part of his 2012 presidential candidacy that the natural born citizen requirement was an unconstitutional national-origin-based form of discrimination that had been abrogated by Amendment XIV. *Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1194–95 (D. Colo. 2012).

⁵⁷ See Elizabeth Wydra, *Birthright Citizenship: A Constitutional Guarantee*, AM. CONST. SOC’Y FOR L. & POL’Y, 2 (May 2009) (“The Reconstruction Framers’ intent to grant citizenship to all those born on U.S. soil, regardless of race, origin, or status, was turned into the powerfully plain language of Section 1 of the Fourteenth Amendment.”).

⁵⁸ Compare VATTEL, *supra* note 45, at 101, with Wydra, *supra* note 57.

⁵⁹ See *Hassan*, 870 F. Supp. 2d at 1201 (discussing Hassan’s misplaced reliance on the Absurdity Doctrine and Amendment XIV to invalidate the natural born citizen requirement).

soil or territory differs from a natural born citizen. Indeed, without a definition of “natural born citizen” as a term of art, birthright citizenship obviates any real distinction between natural born citizens and children born to aliens on American soil. This merging of classifications ignores the self-evident risk for split national allegiances in the children of nonresident aliens. It was that very risk of dual allegiances that the Founders sought to guard against by the elevated “natural born citizen” requirement.⁶⁰ Indeed, the interplay between birthright citizenship and natural born citizenship is most significant in the confusion it may generate. Despite the pathos it may generate, there is no glaring logical or legal problem with allowing an individual to become a citizen but preventing her from becoming President based on the danger of split national loyalties.⁶¹ Without a full understanding of the term “natural born citizen,” though, the reasons for the distinction (and the will to maintain it) may be lost in the practice of birthright citizenship and its facial comportment with a lay understanding of the terms “natural born” and “citizen.”⁶² Therefore, Vattel’s definition and its vitality to the Framers are extremely important in a world in which one becomes a citizen by mere birthplace.

Even without Vattel’s insight into the natural born citizen requirement, there are problems with the view that the Fourteenth Amendment changed the meaning of “natural born citizen.” The most glaring is that the historical context of the Amendment’s ratification suggests that it was not intended to change natural born citizenship, but rather to clarify the citizenship status of millions of newly freed slaves who would have been denied citizenship based on the dreadful decision *Dred Scott v. Sandford*.⁶³ An additional wrinkle may arise depending on whether one views “natural born citizen” as a single term of art or two terms, “natural born” and “citizen.” Those contending for an original public meaning textual approach to the question may point to Vattel’s definition of a single term and attach that definition to the term’s use in

⁶⁰ See Letter from John Jay to General Washington, *supra* note 29.

⁶¹ See *Hassan*, 870 F. Supp. 2d at 1201.

⁶² See Pryor, *supra* note 35, at 889, 895 (asserting that a conclusive definition of the natural born citizen clause cannot be discerned from a study of the Framers’ intent and later proposing that the clause only requires that the President be a citizen at birth).

⁶³ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 393 (1857) (“A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a ‘citizen’ within the meaning of the Constitution of the United States.”), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

the Constitution.⁶⁴ Those arguing for a more progressive understanding of the requirement argue that “natural born” means born in the U.S. and that “citizen” was so affected by Amendment XIV that the presidential requirement was effectively rewritten.⁶⁵

The drafters of the Amendment may have provided an independent argument against an interpretation informed by birthright citizenship, if not against the very existence of birthright citizenship. Significant evidence from Congressional hearings on the Amendment before its presentation to the states for ratification indicates that the phrase “subject to the jurisdiction thereof” contains an implication of exclusivity, and that it may better be stated “subject *only* to the jurisdiction thereof.”⁶⁶ The drafters of the Amendment included the phrase to limit the Amendment’s application to freed slaves who had been born and lived all their lives in the United States, as opposed to creating a citizenship entitlement for any child with the good fortune to have his mother in the country at the time of his birth.⁶⁷ The latter interpretation seems a tortured and contrived application of the words of Amendment XIV when read in the historical context of their drafting.⁶⁸ At any rate, a hypothetical rejection of Amendment XIV-based birthright citizenship certainly resolves the difficulty its current understanding causes for natural born citizenship.⁶⁹

III. CHESTER ARTHUR’S CONTENTIOUS CAMPAIGN FOR VICE PRESIDENT

While preparing his lawsuits and amicus briefs in 2008 and 2009, Leo Donofrio performed significant research on the natural born citizen controversy surrounding Chester Arthur and discovered that Arthur was the subject of a controversy eerily reminiscent of that faced by Barack Obama.⁷⁰ Arthur was a Republican candidate for Vice President, running

⁶⁴ Cf. Petition for Writ of Certiorari at 23–26, *Hollister v. Soetoro*, 131 S. Ct. 1017 (2011) (No. 10–678) (discussing the influence of Vattel’s concepts in the framing of the Constitution).

⁶⁵ See Pryor, *supra* note 35, at 892–95.

⁶⁶ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2893–2895 (1866).

⁶⁷ *Id.* at 598, 1776.

⁶⁸ See *id.*

⁶⁹ See Duggin & Collins, *supra* note 23, at 89 (introducing the unresolved definitional difficulties that relying on Amendment XIV-based birthright citizenship poses for those seeking the office of President).

⁷⁰ See Leo C. Donofrio, *Historical Breakthrough—Proof: Chester Arthur Concealed He Was a British Subject at Birth*, NAT. BORN CITIZEN (Dec. 6, 2008, 9:08 PM), <http://naturalborncitizen.wordpress.com/2008/12/06/urgent-historical-breakthrough-proof-chester-arthur-concealed-he-was-a-british-subject-at-birth/>.

on a ticket with James A. Garfield in 1880.⁷¹ He later ascended the presidency when Garfield was shot by a deranged Arthur supporter.⁷² Arthur was a fascinating character in many respects, but perhaps the most intriguing was the controversy surrounding his candidacy.

Democrat opponents circulated a pamphlet alleging that Arthur had been born in either Ireland or Canada and was a British subject, not a natural born citizen of the United States.⁷³ Since the Constitution had by then been amended to require vice presidential candidates to meet its presidential qualifications, Garfield opponents apparently hoped to cast doubt on the ticket by arguing against Arthur's eligibility.⁷⁴

Arthur's detractors were not without reason to suspect his eligibility. Arthur's father was an Irish-Canadian who had immigrated to the United States after marrying Arthur's mother.⁷⁵ She had allegedly spent some time in Canada around Chester's birth.⁷⁶ Arthur's opponents picked up on what they viewed as low-hanging fruit. In fact, Arthur was born in Vermont, a fact which hurt his opponents' credibility.⁷⁷ It turned out that they were asking the wrong question.

There are two components to Vattel's definition of "natural born citizen"—the birthplace and the citizenship of each parent.⁷⁸ Arthur's detractors attacked his birthplace but ignored his parents' citizenship.⁷⁹ His mother was an American citizen at his birth, but according to Donofrio, his father was a subject of the British crown until young Chester was nearly fourteen years old.⁸⁰ Under the law according to Vattel, Arthur was a British subject through his father,⁸¹ and not a natural born citizen

⁷¹ ZACHARY KARABELL, CHESTER ALAN ARTHUR 40–42 (Arthur M. Schlesinger, Jr. ed., 2004).

⁷² BENSON J. LOSSING, A BIOGRAPHY OF JAMES A. GARFIELD: LATE PRESIDENT OF THE UNITED STATES 629, 638, 652–653 (1882).

⁷³ REEVES, *supra* note 20, at 202–03.

⁷⁴ Amendment XII provides, "But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States." U.S. CONST. amend. XII; see A. P. HINMAN, HOW A BRITISH SUBJECT BECAME PRESIDENT OF THE UNITED STATES 3 (1884).

⁷⁵ REEVES, *supra* note 20, at 4.

⁷⁶ *Id.* at 203.

⁷⁷ GEORGE FREDERICK HOWE, CHESTER A. ARTHUR: A QUARTER-CENTURY OF MACHINE POLITICS 5–6 (Frederick Ungar Publishing Co. 2d ed. 1957).

⁷⁸ See VATTEL, *supra* note 45, at 101.

⁷⁹ See REEVES, *supra* note 20, at 202–03.

⁸⁰ See Donofrio, *supra* note 70.

⁸¹ See VATTEL, *supra* note 45, at 101 ("I say, that, in order to be of the country, it is necessary that a person be born of a father who is a citizen; for, if [h]e is born there of a foreigner, it will be only the place of his birth, and not his country.").

in the parlance of the Framers.⁸² Arthur's opponents were correct about his status, but for the wrong reason. And because they never addressed the two-parent rule,⁸³ the opportunity was lost to address the original meaning of the natural born citizen requirement.

Arthur's acts as President included the appointment of Horace Gray to the Supreme Court.⁸⁴ It is ironic (or perhaps not) that Gray went on to write the Court's opinion in *United States v. Wong Kim Ark*,⁸⁵ the seminal case that established Amendment XIV birthright citizenship and was later relied upon by a state appellate court in rejecting Vattel's two-parent rule in a case challenging Barack Obama's eligibility.⁸⁶ Arthur lived and died an extremely secretive man and had most of his personal papers burned toward the end of his life.⁸⁷ Without venturing into conspiracy theories, it is clear that Arthur's detractors neglected thorough constitutional arguments and instead championed a sensational account of Arthur's birthplace;⁸⁸ while Vattel's definition might have had its vitality restored by a responsible conversation, it was instead largely lost to the sands of time as a result. At the same time, since the citizenship status of Arthur's father never materialized into an issue, Arthur's presidency does not provide precedent for the proposition that the two-parent rule is without merit. In fact, if the two-parent rule were to find new vitality in the present day, Arthur would be viewed as the first constitutionally unqualified usurper to the presidency.⁸⁹

IV. THE BIRTHER LAWSUITS

The birther movement spawned litigation challenging Barack Obama's eligibility for the presidency at a dizzying pace in the months immediately surrounding the 2008 election.⁹⁰ Most of it was filed by a

⁸² *See id.*

⁸³ *See generally* HINMAN, *supra* note 74.

⁸⁴ John Malcolm Smith, *Mr. Justice Horace Gray of the United States Supreme Court*, 6 S.D. L. REV. 221, 221 (1961).

⁸⁵ 169 U.S. 649 (1898).

⁸⁶ *See Ankeny v. Governor of Ind.*, 916 N.E.2d 678, 686 (Ind. Ct. App. 2009); Duggin & Collins, *supra* note 2323, at 80.

⁸⁷ REEVES, *supra* note 20, at 417–18.

⁸⁸ *See* HOWE, *supra* note 77.

⁸⁹ *See* Donofrio, *supra* note 70.

⁹⁰ The anti-birther website whatsyourevidence.com maintained a "Birther Scorecard," a spreadsheet of all birther litigation challenging Obama's eligibility on natural born citizen grounds through January 2014. *Birther Scorecard*, WHAT'S YOUR EVIDENCE, http://tesibria.typepad.com/whats_your_evidence/BIRTHER%20CASE%20LIST.pdf (last updated Jan. 10, 2014). The resource lists 226 cases filed, over 90 appeals to intermediate appellate tribunals, and over 25 appeals to the Supreme Court. *Id.* Although the spreadsheet

handful of litigants.⁹¹ A few lawsuits also sought to invalidate Obama's candidacy in the 2012 election.⁹² The most significant common thread connecting the suits was the argument that President Obama was born in Kenya and was therefore ineligible under the natural born citizen requirement.⁹³ Some of the attorneys handling the cases were strong figures, but some occasionally prosecuted their suits in ways that might give the average practitioner nightmares.⁹⁴ In the author's opinion, their suits probably generated much more public attention than legal thought.⁹⁵ Taken together with constant public derision of their claims,⁹⁶ they demonstrate how difficult association with the birther group could be. Below are summaries of just a handful of the more significant filings, organized by the attorneys that filed and litigated them.⁹⁷

*A. Phillip J. Berg*⁹⁸

On August 21, 2008, Attorney Phil Berg, appearing *pro se*, filed suit in the U.S. District Court for the Eastern District of Pennsylvania against

is an informal resource and is no longer maintained, it helps to map the cases and give an idea of the controversy's grand scope.

⁹¹ *See id.*

⁹² *E.g.*, *Sibley v. Obama*, 866 F. Supp. 2d 17, 19 (D.D.C. 2012).

⁹³ *See, e.g.*, *Barnett v. Obama*, No. SACV 09-0082 DOC (ANx), 2009 WL 3861788, at *1 (C.D. Cal. Oct. 29, 2009); *Berg v. Obama*, 574 F. Supp. 2d 509, 513 (E.D. Pa. 2008).

⁹⁴ One attorney's particularly bad submission to the New York Supreme Court received a scathing judicial response: "Plaintiff STRUNK's complaint is a rambling, forty-five page variation on 'birther' cases, containing 150 prolix paragraphs, in at times a stream of consciousness." *Strunk v. N.Y. State Bd. of Elections (Strunk I)*, No. 6500/11, slip op. at 1 (N.Y. Sup. Ct. Apr. 11, 2012).

⁹⁵ Below are summaries of some of the judicial reactions to the birther suits. *See infra* Part IV.A-C.

⁹⁶ Public derision is certainly no reason to discount the validity of a claim, but it may influence the success of an individual who unwillingly associates with a movement, as Donofrio probably did. *See, e.g.*, Glenn Kessler, *More "Birther" Nonsense from Donald Trump and Sarah Palin*, WASH. POST (Apr. 12, 2011, 6:00 AM), http://www.washingtonpost.com/blogs/fact-checker/post/the-donald-has-a-memory-lapse/2011/04/14/AFrme2MD_blog.html (case sensitive URL); Nick Wing, *Colin Powell: "Birther Nonsense" Is "Killing the Base" of the GOP*, HUFFINGTON POST (Jan. 21, 2013, 12:07 PM), http://www.huffingtonpost.com/2013/01/21/colin-powell-birther_n_2520578.html.

⁹⁷ This selection is intended to show some of the most high-profile claims and claimants, not to provide anything like a representative sample of the consistency or quality of birther claims as a whole.

⁹⁸ Phillip J. Berg is a well-known Pennsylvania attorney and self-described "lifelong Democrat." Phillip J. Berg, *Berg Asks Tea Party Individuals to Join with Him at the Obama Birth Certificate/Eligibility/ObamaCare Rally in Washington on Saturday, October 23, 2010*, OBAMACRIMES.COM (Sept. 14, 2010), www.obamacrimes.com. Berg gained some notoriety when he filed a RICO civil suit against President Bush and various government officials and agencies for allegedly engineering the attacks of September 11, 2001. *See Rodriguez v. Bush*, 367 F. Supp. 2d 765 (E.D. Pa. 2005).

Barack Obama (as well as a string of alleged aliases), the Democratic National Committee, the Federal Election Commission, and several additional defendants, seeking a declaratory judgment that Obama was constitutionally ineligible to sit for the presidency and an injunction against his inclusion on ballots.⁹⁹ Berg's complaint alleged that Obama was born in Kenya and was not a natural born citizen.¹⁰⁰ He included an alternative claim that regardless of Obama's citizenship at birth, Kenyan or U.S., it had been renounced during his time living in Indonesia with his mother¹⁰¹ and that having lost his citizenship under the Immigration and Nationality Act, Obama was barred by the natural born citizen requirement.¹⁰² Berg sought to establish standing by using his affiliation with the Democratic Party and the harm that would result to his interests as a "Democratic American[]" to show that he was the victim of a particularized (as opposed to generalized) injury and that he was thus not barred by the injury-in-fact criterion for standing.¹⁰³ In addition to declaratory judgment and injunctive relief,¹⁰⁴ Berg sought relief under 42 U.S.C. §§ 1983, 1985, and 1986 civil rights claims,¹⁰⁵ a Federal Election Campaign Act claim,¹⁰⁶ several Freedom of Information Act claims,¹⁰⁷ and promissory estoppel based on his donations to the Democratic National Committee in return for a number of promises contained in the party's national platform, and the harm that would result to his interest in those promises from an ineligible Democratic candidate being presented to voters.¹⁰⁸

The District Court dismissed all of Berg's claims on standing in a lengthy opinion which also addressed many of the merits (or lack thereof) in Berg's arguments.¹⁰⁹ Berg appealed to the Third Circuit, which affirmed the opinion below.¹¹⁰ That opinion contained a scathing analysis of the heart of Berg's claims:

⁹⁹ *Berg v. Obama*, 574 F. Supp. 2d 509, 512 (E.D. Pa. 2008).

¹⁰⁰ *Id.* at 513.

¹⁰¹ *Id.*

¹⁰² *Id.* at 529–30; *see* 8 U.S.C. § 1481 (2012).

¹⁰³ *Berg*, 574 F. Supp. 2d at 519.

¹⁰⁴ *Id.* at 512.

¹⁰⁵ *Id.* at 521. Section 1983 creates a cause of action for the violation of constitutional rights. 42 U.S.C. § 1983 (2012). Section 1985 is a conspiracy claim. § 1985. Section 1986 is a claim for neglecting to prevent a conspiracy. § 1986.

¹⁰⁶ *Berg*, 574 F. Supp. 2d at 524.

¹⁰⁷ *Id.* at 526.

¹⁰⁸ *Id.* at 528.

¹⁰⁹ *Id.* at 521–30.

¹¹⁰ *Berg v. Obama*, 586 F.3d 234, 242 (3d Cir. 2009).

Berg's wish that the Democratic primary voters had chosen a different presidential candidate, and his dissatisfaction that they apparently did not credit the evidence he tendered, do not state a legal harm. Similarly, Berg's angst that the presence on the ballot of an ineligible candidate might lessen the chances that an eligible candidate might win was a non-cognizable derivative harm.¹¹¹

The Supreme Court declined without comment to hear Berg's appeal from the Third Circuit's decision after multiple submissions and resubmissions from Berg.¹¹²

B. Orly Taitz¹¹³

Orly Taitz has tenaciously prosecuted the birther cause in a number of lawsuits,¹¹⁴ in which she alleges that Obama was born in Kenya.¹¹⁵ A few examples are related below.

In *Keyes v. Bowen*,¹¹⁶ Taitz represented 2008 third-party presidential candidate Alan Keyes and filed suit against California's Secretary of State for failure to verify Obama's eligibility before placing him on the ballot.¹¹⁷ Despite a stronger showing of individualized harm due to the fact that Keyes was a presidential candidate, the trial court dismissed the suit and the California Court of Appeal affirmed the dismissal.¹¹⁸ The Court of Appeal found that the plaintiffs failed to identify a statutory duty on the part of the secretary of state to verify a candidate's constitutional eligibility.¹¹⁹ Both the California Supreme Court and the U.S. Supreme Court declined without comment to hear the case.¹²⁰

¹¹¹ *Id.* at 240.

¹¹² See *Docket Search Page for Berg v. Obama, No. 08-570*, SUPREME CT. U.S., <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08-570.htm> (last visited Nov. 11, 2014).

¹¹³ Dr. Taitz is an California attorney who is perhaps an unlikely champion of the natural born citizen requirement due to her own status as a naturalized citizen, originally from Moldova in the former USSR. Martin Wisckol, *Crusader Against Obama Won't Bend*, ORANGE COUNTY REG., Oct. 25, 2009, at Special 3A. She is also a dentist and successful businesswoman. *Id.*

¹¹⁴ *Id.*

¹¹⁵ See *id.*

¹¹⁶ 117 Cal. Rptr. 3d 207 (Ct. App. 2010).

¹¹⁷ *Id.* at 209; see Spencer Kornhaber, *Meet Orly Taitz, Queen Bee of People Obsessed with Barack Obama's Birth Certificate*, ORANGE COUNTY WKLY. (June 18, 2009), <http://www.ocweekly.com/2009-06-18/news/orly-taitz/> (reporting that Orly Taitz was one of the attorneys that filed suit in *Keyes*).

¹¹⁸ *Keyes*, 117 Cal. Rptr. 3d at 209, 216.

¹¹⁹ *Id.* at 216.

¹²⁰ 117 Cal. Rptr. 3d 207 (Ct. App. 2010), *review denied*, No. S188724, 2011 Cal. LEXIS 1094 (2011), *cert. denied*, 132 S. Ct. 99 (2011).

In *Lightfoot v. Bowen*,¹²¹ Taitz represented another 2008 presidential candidate, this time Libertarian Gail Lightfoot.¹²² The suit began as an emergency petition filed with the California Supreme Court and sought to prevent certification of California's election results.¹²³ It was submitted to the U.S. Supreme Court and denied once before being resubmitted and subsequently denied again.¹²⁴

In *Barnett v. Obama*,¹²⁵ Taitz represented a group of forty-four plaintiffs that included several state legislators, military personnel, and candidates Alan Keyes and Wiley Drake.¹²⁶ It sought injunctive and declaratory relief against the recently sworn Obama, Secretary of State Clinton, Secretary of Defense Gates, Vice President Biden, and First Lady Michelle Obama¹²⁷ to prevent them from carrying out a number of governmental functions.¹²⁸ The suit also sought a number of FOIA disclosures¹²⁹ and a request that the court remove Obama from office and order a new election.¹³⁰ Judge Carter held that all the plaintiffs except the presidential candidates failed the particularized injury aspect of the standing inquiry,¹³¹ but assumed *arguendo* that the presidential candidates met that prong and proceeded to the redressability prong.¹³² Judge Carter then determined that each of the various forms of remedy sought was inappropriate and dismissed the suit.¹³³ He devoted a scathing section of the opinion to Taitz's conduct.¹³⁴ In it, he chided Taitz for favoring rhetoric over cogent legal argument, for encouraging her supporters to contact the court in an attempt to influence its decision, for moving to recuse a magistrate judge in response to his requiring Taitz to

¹²¹ *Lightfoot v. Bowen*, No. S168690, 2008 Cal. LEXIS 13985 (Dec. 5, 2008), *stay denied*, 555 U.S. 1151 (2009).

¹²² Dan Fletcher, *Orly Taitz*, TIME (Aug. 10, 2009), <http://content.time.com/time/nation/article/0,8599,1915285,00.html>.

¹²³ *Lightfoot*, 2008 Cal. LEXIS 13985; Fletcher, *supra* note 122.

¹²⁴ See *Docket Search Page for Lightfoot v. Bowen, No. 08A524*, SUPREME CT. U.S., <http://www.supremecourt.gov/search.aspx?filename=/docketfiles/08a524.htm> (last visited Nov. 11, 2014).

¹²⁵ No. SACV 09-0082 DOC (ANx), 2009 WL 3861788 (C.D. Cal. 2009).

¹²⁶ *Id.* at *1, *3.

¹²⁷ *Id.* at *1. In the order, Judge Carter included a footnote opining, “[t]he inclusion of the First Lady in this lawsuit, considering she holds no constitutional office, is baffling.” *Id.* at *12 n.2.

¹²⁸ *Id.* at *1.

¹²⁹ *Id.* at *2.

¹³⁰ *Id.* at *1.

¹³¹ *Id.* at *10.

¹³² *Id.*

¹³³ *Id.* at *16–20.

¹³⁴ See *id.* at *18–19.

comply with the local rules, and for failing to effect service on defendants for over seven months after filing.¹³⁵ Most gravely, Judge Carter expressed that “the Court . . . received several sworn affidavits that Taitz asked potential witnesses that she planned to call before th[e] Court to perjure themselves.”¹³⁶ Judge Carter expressed great concern that “Taitz may have suborned perjury through witnesses she intended to bring before [the] Court.”¹³⁷

In *Rhodes v. MacDonald*,¹³⁸ Taitz represented an officer in the U.S. Army challenging the validity of her deployment orders to Iraq because they were issued by President Obama, a constitutionally ineligible Commander-in-Chief because of his alleged birth outside the United States.¹³⁹ This was the second time Taitz’s client had filed this particular claim in a federal district court¹⁴⁰ and the second time Taitz had filed a claim challenging deployment orders to an overseas combat zone based on birther claims in the Middle District of Georgia.¹⁴¹ In an opinion thick with exasperation, Judge Land rejected the claim, labeling it “spurious” and “frivolous.”¹⁴² He was unimpressed with Taitz’s complaint:

[I]mplying that the President is either a wandering nomad or a prolific identity fraud crook, she alleges that the President “*might* have used as many as 149 addresses and 39 social security numbers prior to assuming the office of President.” Acknowledging the existence of a document that shows the President was born in Hawaii, Plaintiff alleges that the document “cannot be verified as genuine, and should be *presumed* fraudulent.” In further support of her claim, Plaintiff relies upon “the general opinion in the rest of the world” that “Barack Hussein Obama has, in essence, slipped through the guardrails to become President.” Moreover, as though the “general opinion in the rest of the world” were not enough, Plaintiff alleges in her Complaint that according to an “AOL poll 85% of Americans believe that Obama was not vetted, needs to be vetted and his vital records need to be produced.” Finally, in a remarkable shifting of the traditional legal burden of proof, Plaintiff unashamedly alleges that Defendant has the burden to prove his “natural born” status. Thus, Plaintiff’s counsel, who champions herself as a defender of liberty and freedom, seeks to use the power of

¹³⁵ *Id.*

¹³⁶ *Id.* at *19.

¹³⁷ *Id.*

¹³⁸ No. 4:09-CV-106 (CDL), 2009 WL 2997605 (M.D. Ga. 2009).

¹³⁹ *Id.* at *1.

¹⁴⁰ *Id.* (noting that “Plaintiff previously filed the present action in the United States District Court for the Western District of Texas”).

¹⁴¹ *Id.* at *1 n.2 (“This Court dismissed an earlier action filed by Plaintiff’s counsel on behalf of a military reservist based upon that plaintiff’s lack of standing.”).

¹⁴² *Id.* at *6.

the judiciary to compel a citizen, albeit the President of the United States, to “prove his innocence” to “charges” that are based upon conjecture and speculation. Any middle school civics student would readily recognize the irony of abandoning fundamental principles upon which our Country was founded in order to purportedly “protect and preserve” those very principles.¹⁴³

Judge Land dismissed the claim on abstention grounds and issued a warning that “the filing of any future actions in this Court, which are similarly frivolous, shall subject counsel to sanctions.”¹⁴⁴ Taitz responded by moving for reconsideration of the dismissal, “repeat[ing] her political diatribe against the President, complain[ing] that she did not have time to address dismissal of the action (although she sought expedited consideration), [and] accus[ing] [Judge Land] of treason.”¹⁴⁵ Judge Land responded by issuing an order to show cause why he should not impose sanctions on Taitz in the amount of \$10,000.¹⁴⁶ Taitz responded with a motion to recuse Judge Land based on naked allegations of misconduct and bias.¹⁴⁷ Judge Land’s opinion on this motion was thorough and incendiary. With respect to Taitz’s response to the show cause order, Judge Land wrote that it “[was] breathtaking in its arrogance and border[ed] on delusional. She expresse[d] no contrition or regret regarding her misconduct. To the contrary, she continue[d] her baseless attacks on the Court.”¹⁴⁸ Judge Land imposed sanctions on Taitz in the amount of \$20,000, double what he had threatened in the show cause order.¹⁴⁹

In *Taitz v. Obama*,¹⁵⁰ Taitz filed seeking a writ of *quo warranto* against President Obama to determine his eligibility for office,¹⁵¹ as well as additional claims, including one that the Affordable Care Act was unconstitutional because Obama’s signature on the bill was ineffective due to his ineligibility.¹⁵² The court dismissed the complaint on standing and other grounds, stating that “[t]his is one of several such suits filed by Ms. Taitz in her quixotic attempt to prove that President Obama is not a

¹⁴³ *Id.* at *3 (citations omitted).

¹⁴⁴ *Id.* at *1, *5.

¹⁴⁵ *Rhodes v. MacDonald*, No. 4:09-CV-106 (CDL), 2009 WL 3111834, at *1 (M.D. Ga. 2009).

¹⁴⁶ *Id.* at *3.

¹⁴⁷ *See* Motion to Recuse the Honorable Clay D. Land Pursuant to 28 U.S.C. §§ 144 and 455(a) at 1–2, *Rhodes v. MacDonald*, 670 F. Supp. 2d 1363 (M.D. Ga. 2009) (No. 4:09-CV-106 (CDL)).

¹⁴⁸ *Rhodes*, 670 F. Supp. 2d at 1379–80.

¹⁴⁹ *Id.* at 1384.

¹⁵⁰ 707 F. Supp. 2d 1 (D.D.C. 2010).

¹⁵¹ *Id.* at 3.

¹⁵² *Id.* at 6.

natural born citizen as required by [the] Constitution. This Court is not willing to go tilting at windmills with her.”¹⁵³

C. Christopher Earl Strunk

Strunk was another serial birther litigant who gained notoriety in 2013 for becoming liable for \$177,700 in fees and sanctions in a frivolous lawsuit criticizing Obama’s eligibility.¹⁵⁴ His claims were standard birther-movement fare, but his persistence impressed Judge Schack, particularly since a year earlier, the same judge had described Strunk’s conduct in terms reserved for only the most vexatious litigants: “If the complaint in this action was a movie script, it would be entitled *The Manchurian Candidate Meets [t]he Da Vinci Code*.”¹⁵⁵ He went on:

Plaintiff STRUNK’s complaint is a rambling, forty-five page variation on “birther” cases, containing 150 prolix paragraphs, in at times a stream of consciousness. Plaintiff’s central allegation is that defendants President OBAMA and Senator McCain, despite not being “natural born” citizens of the United States according to plaintiff’s interpretation of Article II, Section 1, Clause 5 of the U.S. Constitution, engaged with the assistance of other defendants in an extensive conspiracy, on behalf of the Roman Catholic Church to defraud the American people and usurp control of the Presidency in 2008. Most of plaintiff STRUNK’s complaint is a lengthy, vitriolic, baseless diatribe against defendants, but most especially against the Vatican, the Roman Catholic Church, and particularly the Society of Jesus (the Jesuit Order).¹⁵⁶

Strunk was enjoined from refiling future litigation following variations on his claims, and all were dismissed with prejudice.¹⁵⁷

V. VATTEL REDISCOVERED: DONOFRIO’S ARGUMENT

Meanwhile, following his original textualist arguments as related above, Leo Donofrio filed suit seeking to remove Obama and McCain from

¹⁵³ *Id.* at 3 (citation omitted).

¹⁵⁴ See *Strunk v. N.Y. State Bd. of Elections (Strunk II)*, No. 6500/11, 2013 WL 1285886, at *9–10 (N.Y. Sup. Ct. 2013); see also Oren Yaniv, *Brooklyn Judge Slams Birther Lawsuit as “Fanciful, Delusional and Irrational” and Orders Theorist to Pay \$177G*, N.Y. DAILY NEWS (Apr. 3, 2013, 12:54 AM), <http://www.nydailynews.com/news/national/brooklyn-judge-slams-birther-case-orders-theorist-pay-177g-article-1.1306268> (“Strunk was ordered to pay \$167,707 in attorney fees plus a \$10,000 sanction for the 2011 lawsuit that named Obama, New York’s Board of Elections and a list of others as defendants.”).

¹⁵⁵ *Strunk v. N.Y. State Bd. of Elections (Strunk I)*, No. 6500/11, 2012 WL 1205117, at *1 (N.Y. Sup. Ct. 2012).

¹⁵⁶ *Id.* at *1. Like some other birther litigators, Strunk also improperly cited the Constitution’s natural born citizen clause as Article II, Section 1, Clause 5; it is found in Clause 4. See *Ankeny v. Governor of Ind.*, 916 N.E.2d 678, 684 n.9 (Ind. Ct. App. 2009).

¹⁵⁷ *Strunk I*, 2012 WL 1205117, at *19.

New Jersey's ballot and participated in at least one other action challenging Obama's eligibility.¹⁵⁸

Donofrio's own case, *Donofrio v. Wells*,¹⁵⁹ was an unsuccessful suit against Nina Mitchell Wells in her capacity as New Jersey Secretary of State to remove McCain and Obama from the ballot.¹⁶⁰ Donofrio argued that McCain was ineligible because he was born in the Panama Canal Zone when persons similarly situated were not considered citizens under applicable U.S. law (but that their citizenship later attached retroactively by statute).¹⁶¹ He also asserted that Obama was ineligible for the presidency based on his father's Kenyan nationality and British citizenship at the time of Obama's birth.¹⁶² The suit was dismissed without reaching its merits, and the Supreme Court declined to hear an appeal.¹⁶³

Donofrio prepared an application for certiorari to the Supreme Court in pro se litigant Cort Wrotnowski's appeal¹⁶⁴ from the dismissal of his suit against Connecticut's Secretary of State, *Wrotnowski v. Bysiewicz*.¹⁶⁵

¹⁵⁸ Application for Emergency Stay at 2–3, *Donofrio v. Wells*, 555 U.S. 1067 (2008) (No. 08A407). As discussed below, Donofrio aided Cort Wrotnowski in his Connecticut lawsuit after the Connecticut Supreme Court dismissed Wrotnowski's complaint. See *Wrotnowski v. Bysiewicz*, 958 A.2d 709 (Conn. 2008); see *infra* notes 164–68 and accompanying text.

¹⁵⁹ 555 U.S. 1067 (2008).

¹⁶⁰ See *id.*; Application for Emergency Stay, *supra* note 158, at 2–3.

¹⁶¹ See Application for Emergency Stay, *supra* note 158, at 13–15.

¹⁶² See *id.* at 17–18 (asserting that Obama was born to a Kenyan father); Leo Donofrio, Kansas City Star—*Just Like MSNBC—Gets the Donofrio SCOTUS Story Wrong, Very Wrong*, NAT. BORN CITIZEN (Dec. 3, 2008, 2:11 PM), <http://naturalborncitizen.wordpress.com/2008/12/03/kansas-city-star-just-like-msnbc-gets-the-donofrio-scotus-story-wrong-very-wrong/> (asserting that, no matter where he was born, Obama was a British citizen at birth).

¹⁶³ *Donofrio*, 555 U.S. 1067; see Application for Emergency Stay, *supra* note 158, at 6–7 (noting that the New Jersey Appellate Division judge determined that Donofrio's claim was filed too late to be considered on the merits); see also Leo Donofrio, *SCOTUS Has No Original Jurisdiction to Issue a Writ of Quo Warranto re Obama; Legal Presumption in Favor of Natural Born Citizen Clause and Effect*, NAT. BORN CITIZEN (Mar. 16, 2009, 1:38 PM), <http://naturalborncitizen.wordpress.com/2009/03/16/scotus-has-no-original-jurisdiction-to-issue-writs-of-quo-warranto-legal-presumption-in-favor-of-natural-born-citizen-clause-and-effect/> (asserting that once President Obama was sworn in as President, the Supreme Court became powerless to enforce the natural born citizen clause, and as such, Donofrio's lawsuit became moot).

¹⁶⁴ Leo C. Donofrio & Cort Wrotnowski, *Wrotnowski Application Referred to Full Court by Justice Scalia—Distributed for Conference on Dec 12—Supplemental Brief to be Submitted Tomorrow*, NAT. BORN CITIZEN (Dec. 8, 2008, 7:20 PM), <http://naturalborncitizen.wordpress.com/2008/12/08/wrotnowski-application-referred-to-full-court-by-justice-scalia-distributed-for-conference-on-dec-12-supplemental-brief-to-be-submitted-tomorrow/>; *Docket Search Page for Wrotnowski v. Bysiewicz, No. 08A469*, SUPREME CT. U.S., <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08a469.htm> (last visited Nov. 11, 2014).

¹⁶⁵ 958 A.2d 709 (Conn. 2008).

Wrotnowski's initial suit was grounded in insinuations of Kenyan birth and demanded verification of Obama's eligibility by disclosure of health department or hospital records,¹⁶⁶ but Donofrio's application to the Supreme Court proceeded based on Obama's U.K. citizenship at birth and resulting failure to meet originalist understandings of the natural born citizen requirement.¹⁶⁷ The Supreme Court declined without comment to hear *Wrotnowski*.¹⁶⁸

Considering arguments similar to those forwarded by Donofrio in the *Wrotnowski* application, the Indiana Court of Appeals relied on its interpretation of Amendment XIV and Supreme Court precedent to offer a summary rejection of originalist arguments based around Vattel in dicta.¹⁶⁹ Donofrio criticized the *Ankeny* ruling in a lengthy article explaining how its reasoning was defective, principally in its interpretation of the interplay between important pieces of Supreme Court precedent.¹⁷⁰ Beyond *Ankeny's* dicta, Donofrio's originalist argument never received serious judicial consideration, and birther arguments characterized the body of natural born citizen clause challenges.

This disposition was probably appropriate. Despite the merits of his approach to the issue and the superiority of his research and arguments compared with those initiated and pursued by birthers, Donofrio's standing still suffered from the fact that his claimed injury was the generalized injury applicable to any voter.¹⁷¹ And even if he had somehow been able to get past standing, the political question doctrine would have been a significant hurdle.¹⁷² The proper forum for resolution of the natural

¹⁶⁶ See *id.* at 711.

¹⁶⁷ See Donofrio & Wrotnowski, *supra* note 164.

¹⁶⁸ *Wrotnowski v. Bysiewicz*, 555 U.S. 1083 (2008).

¹⁶⁹ Compare Application for Emergency Stay, *supra* note 158, at 18–19 (explaining Donofrio's originalist arguments regarding President Obama's Kenyan-born father), and Donofrio & Wrotnowski, *supra* note 164 (explaining that Donofrio helped Wrotnowski in filing and drafting the application to the Supreme Court, arguing the same issue he had argued in his own case), with *Ankeny v. Governor of Ind.*, 916 N.E.2d 678, 684–89 (Ind. Ct. App. 2009) (discussing Donofrio's arguments based on a historical treatise and congressional debates). Though the dicta is lengthy, it contains long block quotes and little serious analysis of the merits of the arguments of which it disposed. See *Ankeny*, 916 N.E.2d at 684–89.

¹⁷⁰ Leo C. Donofrio, *US Supreme Court Precedent States that Obama Is Not Eligible to Be President*, NAT. BORN CITIZEN (June 21, 2011, 4:36 PM), <http://naturalborncitizen.wordpress.com/2011/06/21/us-supreme-court-precedent-states-that-obama-is-not-eligible-to-be-president/>.

¹⁷¹ See Application for Emergency Stay, *supra* note 158, at 19–20.

¹⁷² See *Baker v. Carr*, 369 U.S. 186, 217–18 (1962) (defining the political question doctrine test); Daniel P. Tokaji, Comment, *The Justiciability of Eligibility: May Courts Decide Who Can Be President?*, 107 MICH. L. REV. FIRST IMPRESSIONS 31, 35–39 (2008),

born citizen requirement may well be the courts, but probably not through the vehicle of a direct challenge to a candidate.¹⁷³ However, including his claims in coverage with those of the oft-ridiculed birthers without explaining their important distinctions could reasonably be expected to denigrate Donofrio's arguments in the public eye, and if this was so, it may have prevented a serious, valuable public discussion of the natural born citizen requirement's original meaning and its application in the present day.

VI. A SOLUTION GROUNDED IN THE CONSTITUTION

Ultimately, both Chester Arthur and Barack Obama served as President, for better or worse, and nothing will change that. But the fact that they may have done so in violation of an explicit constitutional requirement¹⁷⁴ should not be ignored or dismissed. The Constitution is our bedrock statutory law.¹⁷⁵ It is both foundational and supreme in its force and application.¹⁷⁶ Its measures to prevent individuals with split national loyalties ascending the presidency are perhaps more appropriate now than ever before as globalization increases and globalist intrigue follows.¹⁷⁷ The regard paid the natural born citizen requirement does not reflect the gravity of the risks it was designed to counter.¹⁷⁸ Róger Calero, a Nicaraguan by birth and a lawful resident (but not naturalized citizen) of the United States,¹⁷⁹ was allowed on the ballot in five states during the 2008 presidential election.¹⁸⁰ This clear flouting of the requirement and

available at <http://www.michiganlawreview.org/articles/the-justiciability-of-eligibility-may-courts-decide-who-can-be-president>.

¹⁷³ As has been demonstrated, these are typically impossible for voters to bring because they lack standing, and this tactic is probably inadvisable for candidates desirous of avoiding bad publicity. A possible solution is discussed below. *See infra* Part VI.

¹⁷⁴ *See* U.S. CONST. art. II § 1, cl. 4.

¹⁷⁵ U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land . . .").

¹⁷⁶ *See id.*

¹⁷⁷ *See* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1121–23 (2000) (discussing the recent trend of U.S. Supreme Court Justices and other American judges holding summits with their international counterparts).

¹⁷⁸ *See* Pryor, *supra* note 35, at 890 (describing the tension between the Framers' desire to encourage immigration and their fear of foreigners taking power).

¹⁷⁹ Róger Calero, *SWP Candidate for President*, MILITANT, Jan. 14, 2008, *available at* <http://www.themilitant.com/2008/7202/720253.html> ("Born in Nicaragua, Calero has lived in the United States since 1985, when his family moved to Los Angeles. He joined the socialist movement there in 1993. . . . In December 2002 Calero was arrested by federal immigration cops The U.S. Immigration and Naturalization Service jailed Calero in Houston for 10 days and began deportation proceedings against him.")

¹⁸⁰ FED. ELECTION COMM'N, 2008 OFFICIAL PRESIDENTIAL GENERAL ELECTION RESULTS 1 (Jan. 22, 2009), *available at* <http://www.fec.gov/pubrec/fe2008/>

acquiescence by the states complicit in his candidacy demonstrate a near total lack of enforcement in some quarters.

A compelling case can be made that “natural born citizen” is a term of art which excludes Chester Arthur,¹⁸¹ Barack Obama,¹⁸² Arnold Schwarzenegger,¹⁸³ Ted Cruz,¹⁸⁴ and many other candidates who may be very well qualified in every other way. We should not ignore this conflict. We should not allow it to be defined away contrary to the letter and spirit of the Constitution.

The states, which are afforded reasonable latitude in regulating elections,¹⁸⁵ should enact safeguards to prevent constitutionally unqualified candidates from being placed on their respective ballots. States seeking guidance on the natural born citizen issue should consult Vattel’s treatise for a clear originalist lodestar.¹⁸⁶ His definition provides continuity with the Framers and shores up a vital safeguard that has eroded in recent decades.¹⁸⁷ Its bright line rule abandons ambiguity in favor of an easily discerned rule which is not onerous on citizens and honors the purpose of the requirement while working toward its fulfillment.

The Arizona legislature passed a bill based in birther sentiment that would have required the production of birth certificates to election

2008presgeresults.pdf. The results reflect that Calero received non-write-in votes in Delaware, Minnesota, New Jersey, New York, and Vermont. *Id.*

¹⁸¹ See *supra* Part III.

¹⁸² See *supra* Part V.

¹⁸³ See Chris Gentilviso, *Arnold Schwarzenegger 2016? Former Governor Mulls Rule Change Push to Run for President: REPORT*, HUFFINGTON POST (Oct. 19, 2013, 10:37 AM), http://www.huffingtonpost.com/2013/10/19/arnold-schwarzenegger-2016_n_4128022.html.

¹⁸⁴ See Saeed Ahmed, *It’s Official: Ted Cruz a Citizen of the U.S.—and the U.S. Only*, CNN (June 11, 2014, 7:54 AM), <http://www.cnn.com/2014/06/11/politics/ted-cruz-canada-citizenship/>.

¹⁸⁵ See *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (“[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends. Nevertheless, the State’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.” (citation omitted) (internal quotation marks omitted)).

¹⁸⁶ See VATTEL, *supra* note 45, at 101.

¹⁸⁷ See FEDERAL ELECTION COMM’N, *supra* note 180 (evidencing the disregard for the natural born citizen eligibility requirement that some states have displayed by including a clearly ineligible candidate on the presidential ballot).

authorities for ballot access, but Jan Brewer vetoed the bill.¹⁸⁸ The episode reiterates how states may address issues of candidate qualification and how poisonous reaction to the birther movement has made discussion of the natural born citizen requirement. It is not enough just to enact a kneejerk requirement; it must be grounded in good constitutional scholarship and accurately reflect the protections contained in the document.¹⁸⁹ The Arizona bill met neither prong.¹⁹⁰ States must do better to ensure their efforts are prudent and well-considered.

Even if only a few states wish to enforce the constitutional requirement, their efforts will be valuable. The status quo, with Schwarzenegger pushing to invalidate the requirement¹⁹¹ and Calero simply ignoring it,¹⁹² underscores the truism that some is better than none. Some enforcement is needed, and absent federal action (which seems unlikely),¹⁹³ the states are best suited to address that need.

And even if states were to pass solid originalist enforcement measures for the natural born citizen requirement only to have them struck down by the courts, at least the body of law would be settled. This silver lining seems more significant when one considers the length of time and volume of litigation which has been expended without resolving the meaning of this unique provision of the Constitution.

CONCLUSION

The tension at the heart of the historical public meaning of “natural born citizen,” while much lower profile than the sensationalism of the low points of the birther movement, is much more durable. Popular coverage of and reaction to the birther movement misrepresented the natural born citizen clause, and it became easy for observers to dismiss all such challenges out of hand.¹⁹⁴ But lurking between the sensational coverage of the more ineptly handled birther suits and the ambiguities in the text of

¹⁸⁸ H.B. 2177, 50th Leg., 1st Reg. Sess. (Ariz. 2011); Letter from Janice K. Brewer, Governor, State of Arizona, to Kirk Adams, Speaker of the House, Arizona House of Representatives (Apr. 18, 2011), *available at* http://azgovernor.gov/dms/upload/PR_041811_HB2177VetoLetter.doc.pdf (vetoing H.B. 2177).

¹⁸⁹ U.S. CONST. art. II, § 1, cl. 4.

¹⁹⁰ *See* Ariz. H.B. 2177.

¹⁹¹ *See* Gentilviso, *supra* note 183.

¹⁹² *See* Róger Calero, *supra* note 179.

¹⁹³ Any public support of the birther movement receives significant flak, to which federal legislators are likely unwilling to subject themselves. *See* Rachel Rose Hartman, *Obama Ridicules Trump at Correspondents' Dinner, Mocks "Birther" Crusade*, YAHOO NEWS (May 1, 2011, 12:38 A.M.), <http://news.yahoo.com/blogs/ticket/obama-ridicules-trump-correspondents-dinner-mocks-birther-crusade-043803862.html>.

¹⁹⁴ *See* Donofrio, *supra* note 162.

the provision is a real controversy.¹⁹⁵ It is unlikely to fade with time because it is based not on individual men and their voting preferences,¹⁹⁶ but on a historical understanding of a carefully contemplated and duly ratified provision of the Constitution.¹⁹⁷ It is not aimed at excluding any individual candidate or party, but on protecting the nation and its most powerful executive office from foreign influence by excluding a class of candidates who carry a higher risk of split national loyalties.¹⁹⁸ This cuts equally against Barack Obama and Ted Cruz—it is not a partisan issue, but a constitutional one. Whatever the final resolution of the controversy, we should settle it soon. It is not for the health of our Constitution that we continue to misconstrue or ignore its provisions. National politicians will not deal with the problem, as political fortunes counsel otherwise.¹⁹⁹ Besides, it is not candidates or the federal government, but the states, which are the primary arbiters of presidential ballot access.²⁰⁰ The courts show an understandable reluctance to declare candidates ineligible, especially considering that virtually no potential litigant against any given presidential candidate possesses standing to challenge him or her.²⁰¹ Additionally, for the courts to navigate a solution to any candidacy problem, they would have to navigate the political question doctrine—an unlikely feat, given the guidance considered above.²⁰²

This problem is ripe for state action, and with Vattel's guidance, it is one that states can address with confidence. The question would likely still land in the Supreme Court if states chose to enforce the historical constitutional requirement, but the question would be whether states have construed that requirement properly rather than whether Candidate Z can run for the office. This encourages settling a contentious issue which

¹⁹⁵ See generally Duggin & Collins, *supra* note 23.

¹⁹⁶ Though vociferous devotees to the rule seem to intensify in number and activity during election seasons, the rule itself cuts equally against any political ideology. This is demonstrated by a new birther movement rising in response to Republican Ted Cruz's possible candidacy for president. See Aaron Blake, *No, Ted Cruz "Birthers" Are Not the Same as Obama Birthers*, WASH. POST (Aug. 19, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/08/19/no-ted-cruz-birthers-are-not-the-same-as-obama-birthers/>.

¹⁹⁷ U.S. CONST. art. II, § 1, cl. 4.

¹⁹⁸ See Letter from John Jay to General Washington, *supra* note 29.

¹⁹⁹ See Hartman, *supra* note 193 (displaying the bad publicity that associating with the birther movement brings).

²⁰⁰ See *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

²⁰¹ See *Barnett v. Obama*, No. SACV 09-0082 DOC (ANx), 2009 WL 3861788, at *3–10 (C.D. Cal. 2009).

²⁰² See Tokaji, *supra* note 172.

may be in law (but has not been in practice) one of first impression in a legislative forum.²⁰³ The states are best suited to accomplish this.

Under the status quo, citizens are afforded a right under the Constitution without an available judicial remedy, because the harm from violation of the statute will almost always be generalized. This controversy has been lurking since Chester Arthur ascended to the presidency at the end of the nineteenth century, and it flared up again recently when President Obama was a candidate in 2008. It is time to settle the question and provide stability and clarity to this area of our election law.

*John Ira Jones IV**

²⁰³ See *supra* notes 188–90 and accompanying text. Because Governor Brewer vetoed Arizona H.B. 2177, the legislative action had no chance to be challenged in a court of law, and this issue remains one of first impression.

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