

THE 1790 NATURALIZATION ACT AND THE ORIGINAL MEANING OF THE NATURAL BORN CITIZEN CLAUSE: A SHORT PRIMER ON HISTORICAL METHOD AND THE LIMITS OF ORIGINALISM

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During the 2016 Presidential election a number of constitutional scholars debated Ted Cruz's eligibility to be President. This was not the first time in recent American history that the meaning of the Constitution's "natural born citizen" clause was a live issue in American law.¹ The answer to this legal question depends on the particular theory of constitutional interpretation one favors.² There has been a good deal of speculation on this issue by scholars of different methodological commitments. Much of the debate focuses on the meaning of the 1790 Naturalization Act, which raises deeper questions about the evolving

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1. See Collin Brinkley, *Can Cruz Legally Be President? Two Ivy League Scholars Debate*, BIG STORY (Feb. 5, 2016), <http://bigstory.ap.org/article/333f578bd3a14bda9904a8c4593340a1/can-cruz-legally-be-president-ivy-league-scholars-debate>; Robert Clinton, *Ted Cruz Isn't a 'Natural Born' Citizen*, U.S. NEWS & WORLD REPORT (Jan. 27, 2016), <http://www.usnews.com/opinion/articles/2016-01-27/ted-cruz-is-not-a-natural-born-citizen-according-to-the-constitution>.

2. See Akhil Reed Amar, *Why Ted Cruz is Eligible to Be President*, CNN (Jan. 14, 2016), <http://www.cnn.com/2016/01/13/opinions/amar-cruz-trump-natural-born-citizen/>; Michael Ramsey, *The Original Meaning of Natural Born Revised*, ORIGINALISM BLOG (Feb. 15, 2016), <http://originalismblog.typepad.com/the-originalism-blog/2016/02/the-original-meaning-of-natural-born-revisedmichael-ramsey.html>; Bryan Garner, *Memorandum: Is Ted Cruz Eligible for the Presidency?*, ATLANTIC (Jan. 14, 2016), <http://www.theatlantic.com/politics/archive/2016/01/ted-cruz-eligibility-memo/424206/>; Randy Barnett, *Why Ted Cruz is a "Natural Born Citizen"*, VOLOKH CONSPIRACY (Jan. 7, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/07/why-ted-cruz-is-a-natural-born-citizen/>. But see Einer Elhauge, *Ted Cruz is Not Eligible to Run for President: A Harvard Law Professor Close-reads the Constitution*, SALON (Jan. 20, 2016), http://www.salon.com/2016/01/20/ted_cruz_is_not_eligible_to_run_for_president_a_harvard_law_professor_close_reads_the_constitution/; Thomas Lee, *Is Ted Cruz a 'Natural Born Citizen'? Not If You're a Constitutional Originalist*, L.A. TIMES (Jan. 10, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-lee-is-ted-cruz-eligible-to-be-president-20160110-story.html>.

debate over the legitimacy of originalism as a constitutional theory.³ Rather than approach the meaning of eighteenth-century constitutional and legal texts in a genuinely historical fashion, originalists have adopted a method plagued by anachronism, which invariably leads to distortion.⁴

The problems with originalism are evident if one takes a close look at the way one of the key texts in the “natural born citizen debate,” the Naturalization Act of 1790, has been interpreted by originalists. In this Act, the First Congress declared “the children of citizens of the United States, that may be born beyond Sea, or out of the limits of the United States, shall be considered as natural born Citizens: *Provided*, that the right of citizenship shall not descend to persons whose fathers have never been resident in the United States.”⁵ Historians and originalists interested in discerning this text’s legal meaning in 1790 approach the problem from radically different methodologies.

For most historians, the first step in any such inquiry is to establish the range of possible beliefs this provision might have had in the founding era.⁶ The entire process of historical interpretation is guided by a holistic approach to meaning. As historian Jonathan Gienapp has recently argued, “The meaning of individual linguistic components—words, phrases, or utterances—can only be understood in terms of their relations within the conceptual vocabulary of which they are a part.”⁷ Finally, genuine historical inquiry embraces a form of thick contextualism. Context is never a simple given. Historical actors, and the historians who interpret their words, must actively construct the relevant

3. There has been relatively little scholarship on this topic. For some of the most important work, see Jack Maskell, *Qualifications for President and the “Natural Born” Citizenship Eligibility Requirement*, CONGR. RES. SERV. (Nov. 14, 2011), <http://www.fas.org/sgp/crs/misc/R42097.pdf>; Mary Brigid McManamon, *The Natural Born Citizen Clause as Originally Understood*, 64 CATH. U. L. REV. 317 (2015); 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 (2005); Malinda Seymore, *The Presidency and the Meaning of Citizenship*, 2005 BYU L. REV. 927 (2005); Jill A. Pryor, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving TwoHundred Years of Uncertainty*, 97 YALE L. J. 881 (1988).

4. See, e.g., Neal Katyal & Paul Clement, *On the Meaning of “Natural Born Citizen”*, 128 HARV. L. REV. F. 161, 161–62 (2015); Michael D. Ramsey, *The Original Meaning of “Natural Born”* (Jan. 7, 2016), <http://ssrn.com/abstract=2712485>.

5. An Act to Establish an Uniform Rule of Naturalization, 1 Stat. 103, 1 Cong. Ch. 3 (1790) [hereinafter the “1790 Act”].

6. See Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 722–23 (2013).

7. Jonathan Gienapp, *Historicism and Holism: Problems with Originalist Translation*, 84 FORDHAM L. REV. 935, 941 (2015).

linguistic and ideological contexts for interpreting texts from among the multiplicity of potential contexts available at any historical moment.⁸

By contrast, originalists approach meaning in an atomistic fashion, looking at the meaning of words as isolated linguistic facts. The originalist conception of context is also exceedingly thin.⁹ Originalist Lawrence Solum compares constitutional texts to messages in a bottle. In this metaphor context functions like a bucket filled with additional facts—pour the contents of the bottle into the bucket and out comes meaning.¹⁰

Neal Katyal and Paul Clement, two of the nation’s most distinguished lawyers, opt for an originalist approach to interpreting the natural born citizen requirement in an influential essay in the *Harvard Law Review Forum*.¹¹ Focusing on the 1790 Naturalization Act, they conjure up a reading that is almost impossible to imagine being accepted by most lawyers and judges in the founding era. “The Naturalization Act of 1790[.]” they assert, “expanded the class of citizens at birth to include children born abroad of citizen mothers as long as the father had at least been resident in the United States at some point.”¹² Their textualist approach is patently ahistorical. The two lawyers have unconsciously imported modern norms of gender equality into their analysis and produce an interpretation that is utterly implausible.¹³ According to Katyal and Clement, the 1790 Act rejected earlier English law, which limited the rights of natural born subjects to children of English fathers.¹⁴ Katyal and Clement’s anachronistic reading offers no evidence to substantiate such a view.

8. Lawrence B. Solum is among the most vocal critics of traditional intellectual history methodology. See Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1114–15 (2015). For a critique of Solum’s model, see Saul Cornell, *Originalism as Thin Description: An Interdisciplinary Critique*, 84 FORDHAM L. REV. RES GESTAE 1 (2015).

9. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 2, 21–22 (2015). *Contra* Gienapp, *supra* note 7, at 936. For Solum’s view on this issue, see Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22 (2015).

10. ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 14–15 (2011).

11. Katyal & Clement, *supra* note 4, at 161.

12. *Id.* at 162.

13. For a summary of modern norms, see ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 15–28 (2012). For critiques of Scalia and Garner, see William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531 (2013); Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685 (2014).

14. Katyal & Clement, *supra* note 4, at 162–63.

One of the few founding era texts they do cite, Sir William Blackstone's *Commentaries*, actually undercuts their argument, but Katyal and Clement's originalist approach blinds them to this realization.¹⁵ It is impossible to talk about citizenship without recognizing the importance of gender in legal definitions of who was a citizen in 1790. "By marriage," Blackstone wrote, "the husband and wife are one person in the law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover, she performs every thing;"¹⁶ Thus, for Katyal and Clement's reading of the 1790 Act to be correct, it would mean that the First Congress had overturned the doctrine of coverture. Not only is there no evidence to support such a bold claim, but if Katyal and Clement had looked at the relevant case law from the founding era on coverture, especially the case of *Martin v. Commonwealth*,¹⁷ they would have immediately grasped how radical their reading would have been in the founding era.

Among the issues central to *Martin* was the question of a married woman's capacity to assert her political independence and choose her own political allegiance.¹⁸ *Martin* demonstrates how far outside of mainstream founding era legal thought such a feminist reading of the 1790 Act would have been.¹⁹ The judges of Massachusetts' highest court dealt extensively with the implications of coverture for woman's legal identity as a citizen. In their view, a *feme covert*, the situation of a married woman whose legal identity was subsumed within her husband's during marriage, could have no separate political identity outside of her husband's national allegiance.²⁰ To accept Katyal and Clement's interpretation of the meaning of the text of the 1790 Act would mean that the First Congress overturned the pre-existing English doctrines on naturalization, allegiance, and citizenship, and also dismantled a key aspect of the legal doctrine of coverture. Moreover, it would entail accepting that the First Congress struck a major blow for women's rights that went unnoticed by any contemporary commentator, including some of the nation's leading jurists, who addressed the issue a little more than a decade later in *Martin*.²¹

15. 1 WILLIAM BLACKSTONE, COMMENTARIES, *442.

16. *Id.* (emphasis omitted).

17. *Martin v. Commonwealth*, 1 Mass. (1 Will.) 260, 293 (1805); Linda K. Kerber, *The Paradox of Women's Citizenship in the Early Republic: The Case of Martin vs. Massachusetts, 1805*, 97 AM. HIST. REV. 349, 351 (1992).

18. *Martin*, 1 Mass. (1 Will.) at 293; Kerber, *supra* note 17, at 351.

19. *Martin*, 1 Mass. (1 Will.) at 293; Kerber, *supra* note 17, at 351.

20. *Martin*, 1 Mass. (1 Will.) at 293; Kerber, *supra* note 17, at 351.

21. See JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 236 (1978); LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES:

Katyal and Clement are not the only originalists to have approached the 1790 Act in an anachronistic fashion. Michael Ramsey, another prominent originalist, makes the 1790 Act a cornerstone of his argument in several blog posts and in a forthcoming article.²² In his view, Congress inherited the virtually limitless power of the English Parliament to redefine the terms of citizenship, including the meaning of the term “natural born citizen.”²³ The most obvious problem with such a claim is that it equates Parliament’s power in this area, which was absolute under the English Constitution, with Congressional power under the American Constitution, which was far more limited in its scope.²⁴

A much more historically plausible reading of the 1790 Act would begin with the recognition that most members of the First Congress accepted the Blackstonian understanding of coverture and hence took it as unproblematic that the category of natural born citizen already articulated in English law was based on the status of one’s father alone.²⁵ A residence requirement for fathers would not have been seen as a repudiation of the pre-existing understanding of the paternal roots of citizenship, or a revolutionary step toward gender equality in citizenship, but rather a goal consistent with the widespread fears that aliens might exploit America’s generous terms of acquiring citizenship to foment counter-revolution. This interpretation better accords with the political and ideological context in which these early debates over naturalization occurred; the problem Congress grappled with was how to balance the need for a republican conception of naturalization against the danger of foreign threats to America’s new republican experiment, particularly the danger posed by subversion from radical immigrants.²⁶ Moreover, the doctrine of coverture and the gender norms in place at this time all contradict the feminist reading of the 1790 Act.²⁷ Finally, one must apply eighteenth century rules of statutory construction, not modern textualist

WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 36 (1998); HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* (2005).

22. Ramsey, *supra* note 4, at 9–10, 34–36.

23. Ramsey, *supra* note 4, at 4, 34.

24. Ramsey, *supra* note 4, at 34 (footnotes omitted). A similar argument informs left-leaning originalist Jack Balkin’s analysis. For a summary of Balkin’s views, see Harvard University Press Blog, *Meanwhile, In Cruz News* (Feb. 4, 2016), http://harvardpress.typepad.com/hup_publicity/2016/02/ted-cruz-presidential-eligibility.html.

25. Ramsey, *supra* note 4, at 4.

26. See KETTNER, *supra* note 21, at 238; *THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, VOL. 12. DEBATES IN THE HOUSE OF REPRESENTATIVES, SECOND SESSION, JANUARY-MARCH 1790*, at 528–30 (Helen E. Veit et al. eds., 1994) [hereafter *DHFFE*].

27. Samantha Ricci, *Rethinking Women and the Constitution: An Historical Argument for Recognizing Constitutional Flexibility with Regards to Women in the New Republic*, 16 WM. & MARY J. WOMEN & L. 205 (2009).

norms, if one seeks the historical meaning of this act.²⁸ According to those rules, the meaning of a statute was to be derived from an “understanding of the mischief to be remedied.” Congress was worried that citizens living abroad might pass citizenship on to children without ever residing in the United States. Representative Livermore expressed this concern clearly when he warned “that right might be transmitted from father to son and on to perpetuity.”²⁹ The law sought to accommodate the needs of Americans living overseas without creating a situation where one might be eligible to be President without having any real connection with America apart from a claim based on paternity. To conclude that the First Congress intended to equalize gender claims for citizenship without any clear historical reason for taking up this issue not only violates the rules of construction familiar to most lawyers at the time, it makes little historical sense. It is hard to fathom what logic would have impelled the First Congress to add an additional residency requirement for fathers living abroad, at the same time that they allowed mothers to avoid such a requirement.

Finally, originalism’s focus on how a hypothetical fully informed founding era lawyer would have read the texts is misguided.³⁰ Rather than speculate on what fictive constructed readers might have thought about the law, as many originalists suggest, historical inquiry must look at what actual readers thought. Only after establishing what actual readers thought can one hazard a guess at how to weigh any particular reading in terms of its influence or typicality in the founding era. Originalists talk in the language of empirical history, but upon closer inspection there is little genuinely empirical about their claims about how

28. John Adams summarized the rules of statutory construction, as follows:

“[F]or the sure and true Interpretation of all Statutes in general (be they penal or beneficial, restrictive or enlarging of the Com. Law,) four things are to be discerned and considered.

1. What was the Common Law before the making of the Act.
2. What was the Mischief and Defect for which the Common Law did not provide.
3. What Remedy the Parliament hath resolved and appointed to cure the Disease of the Commonwealth.

And 4. The true Reason and Remedy; and then the Office of all the Judges is always to make such Construction as shall suppress the Mischief, and advance the Remedy, and to suppress subtil Inventions and Evasions for Continuance of the Mischief”

John Adams, *Adams’ Notes of Statutes and Authorities: Court of Vice Admiralty, Boston, February 1773*, in 2 LEGAL PAPERS OF JOHN ADAMS 225–28, FOUNDERS ONLINE, NATIONAL ARCHIVES (L. Kinvin Wroth & Hiller B. Zobel eds., 1965), <http://founders.archives.gov/documents/Adams/05-02-02-0006-0009-0002> (last modified Mar. 28, 2016).

29. See DHFFE, *supra* note 26, at 529 in Lloyd’s Notes (Feb. 24, 1790).

30. On the methodological problems of using fictive readers, see Cornell, *supra* note 6, at 735–36.

readers behaved.³¹ This intellectual sleight of hand is neatly accomplished by assuming a level of consensus in the founding era that few serious historians would accept as an accurate description of founding constitutional culture.³² Using this method one can make any evidence from the founding the foundation for a revisionist argument about public meaning. In practice, moving from what specific readers of historical legal texts believed they meant to the larger question of how common such a reading may have been in the founding era is among the most difficult tasks undertaken by historians and must be approached cautiously.³³

One of the most interesting “actual readers” to comment on the meaning of this clause was the distinguished Virginia lawyer and jurist St. George Tucker. Originalists sometimes use Tucker and other early commentators on the Constitution as proxies for establishing the contours of an American legal mind, but Tucker was hardly a neutral voice in the contentious debates of the Constitution’s first decade; he was an ardent Jeffersonian Republican. Understanding Tucker’s ideological position in the debates of the 1790s is necessary to evaluating his interpretation of the natural born citizen clause. Tucker represented one pole of the spectrum of legal thought in this period. On this issue, Jeffersonians, including Tucker, were champions of a more open view of naturalization and immigration policy. Tucker thus offers a useful starting point for constructing the outer limits of what a permissive interpretation of naturalization would have looked like in the 1790s. His examination of this issue occurs in an extensive footnote in his annotated edition of *Blackstone’s Commentaries*.³⁴

In contrast to modern originalists, Tucker did not believe that the power to create uniform rules of naturalization meant that Congress

31. For a trenchant critique arguing that originalists invoke the authority of history while refusing to adhere to its methodological demands, see Martin S. Flaherty, *Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning*, 84 *FORDHAM L. REV.* 905 (2015).

32. On the problem of originalism’s reliance on an outdated and totally discredited notion of consensus history, see Saul Cornell, *Conflict, Consensus & Constitutional Meaning: The Enduring Legacy of Charles Beard*, 29 *CONST. COMMENT.* 383, 385–86 (2014).

33. *See id.*

34. ST. GEORGE TUCKER, 1 *BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENTS OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA* 374 n.12 (1803). Rather than treat Tucker as a proxy for a monolithic American legal mind, Tucker’s thought needs to be placed within the continuum of Founding era constitutional belief. On the problem of female citizenship in the Founding Era, see Rogers M. Smith, “*One United People*”: *Second-Class Female Citizenship and the American Quest for Community*, 1 *YALE J.L. & HUMAN.* 229 (1989).

could alter the scope of the natural born citizen clause.³⁵ After reviewing the 1790 Act, and the Naturalization Act of 1795 that dropped any reference to natural born, Tucker stated unambiguously that “[p]ersons naturalized according to these acts, are entitled to all the rights of natural born citizens” except for certain express limits on their ability to hold federal offices.³⁶ As far as the Presidency was concerned, Tucker was emphatic: “they are forever incapable of being chosen to the office of President of the United States.”³⁷ The dominant view among Jeffersonians, the group most sympathetic to the rights of aliens, thus cuts decisively against the notion that Congress had the power to retroactively redefine the meaning of the natural born citizen clause, at least regarding presidential eligibility.³⁸

Recent originalist accounts of the natural born citizen clause only underscore the theoretical and methodological flaws in this approach to constitutional interpretation. It seems hard to credit the notion that the dominant view in the founding era abandoned the longstanding gender hierarchies and patriarchal assumptions that governed thinking about citizenship in the Anglo-American legal world prior to the enactment of the Naturalization Act of 1790.³⁹

35. *Id.*

36. *Id.* at 375 n.12.

37. *Id.*

38. *Id.* at 374 n.12.

39. For additional evidence about the historical implausibility of the gender assumptions driving originalist defenses of Cruz and the meaning of the “natural born citizen clause” see Andrew Burstein & Nancy Isenberg, *Ted Cruz Has a Very Real Birther Problem: The Law Is Not Settled—But the History Is*, SALON (Jan. 22, 2016), http://www.salon.com/2016/01/22/ted_cruz_has_a_very_real_birther_problem_the_law_is_not_settled_but_the_history_is/.