

**ORIGINALISM, NATURAL BORN CITIZENS, AND THE
1790 NATURALIZATION ACT: A REPLY TO SAUL
CORNELL**

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In his essay, *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*,¹ Professor Saul Cornell uses the debate over the Constitution’s natural born citizen clause² to illustrate what he regards as the shortcomings of originalist methodology. He makes three main points: (1) that historians’ methodology is different from and superior to the approach of originalist legal scholars; (2) that originalist scholars have reached an erroneously broad reading of the 1790 Naturalization Act; and (3) that, as a result, originalist scholars have misread the natural born citizen clause. I believe each of these points is mistaken. This response addresses them in turn.

I. HISTORIANS AND ORIGINALISTS: A DIFFERENT METHODOLOGY?

Although there may be differences between the way legal scholars and historians approach the meaning of historical texts, Cornell has largely failed to identify them, and indeed his account does not show any departure from a standard originalist approach. He begins by saying that “[h]istorians and originalists interested in discerning [the 1790 Act’s] legal meaning in 1790 approach the problem from radically

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1. Saul Cornell, *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*, 2016 WIS. L. REV. FORWARD 92, <http://wisconsinlawreview.org/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/>.

2. U.S. CONST. art. II, § 1 (“No person except a natural born Citizen . . . shall be eligible to the Office of President”).

different methodologies.”³ He then appears to identify three core components of the historian’s approach.

First, Cornell says, “[f]or 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.”⁴ Assuming he means “range of possible meanings,” I agree this is the right approach and I doubt any originalists would disagree. Of course it is key to establish a range of possible meanings of a legal text under examination; it is not clear what the alternative would be.

Second, he says, there must be a “holistic approach to meaning”; quoting historian Jonathan Gienapp, he continues: “The meaning of individual linguistic components . . . can only be understood in terms of their relations with the conceptual vocabulary of which they are part.”⁵ Again, of course that is true. A text draws meaning from its context, including its linguistic context. This point is commonly emphasized by originalist scholars.⁶ Only a caricature of originalism would say otherwise.

Third, Cornell says, there must be “a form of thick contextualism. . . . Historical actors, and the historians who interpret their words, must actively construct the relevant linguistic and ideological context for interpreting texts”⁷ Although this point seems somewhat unclear without specific examples, it sounds similar to what originalists do in considering the backgrounds, influences, and goals of the framers. Again, context matters for originalists. It is curious that people persist in thinking it does not.

Cornell may think that originalists do not do these things well (and he might be right about some originalist scholarship), but I think he is wrong that originalists do not embrace these approaches. He says “[b]y contrast, originalists approach meaning in an atomistic fashion, looking at the meaning of words as isolated linguistic facts.”⁸ This seems a critique of a straw man. Rather, originalist scholars seek to find meaning from the way words were used in their historical context, very

3. Cornell, *supra* note 1, at 93.

4. *Id.*

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

6. See, e.g., MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 8 (2007) (“[T]he Constitution [does not have] a ‘plain meaning’ we can grasp simply by reading it in isolation. A text’s historical meaning arises from the context in which it was written. Although the starting point of the inquiry will always be the Constitution’s text, complete understanding of its meaning will entail examination of this context.”).

7. Cornell, *supra* note 1, at 93–94.

8. *Id.* at 94.

much not in isolation.⁹ They may not always do a good job, but Cornell is not describing a difference in methodological theory.¹⁰

To illustrate, consider what Cornell says is wrong with the originalist reading of the 1790 Act. A central interpretive question is whether the 1790 Act recognized “natural born citizen” status for persons born outside the United States whose mothers were United States citizens but whose fathers were not. The 1790 Act states:

And the children of citizens of the United States that may be born beyond Sea, or out of the limits of the United States, shall be considered as natural born Citizens: Provided, that the right of citizenship shall not descend to persons whose fathers have never been resident in the United States.¹¹

In a prominent essay, Neal Katyal and Paul Clement argued that this language includes as natural born citizens the children of United States mothers and alien fathers.¹² (That was important because Katyal and Clement were writing about the eligibility of Senator Ted Cruz, who fits this description.)

Cornell argues that Katyal and Clement are wrong because they ignore the eighteenth century law on the status of married women and the longstanding rule of English law that “natural born” status could only be acquired from one’s father. In particular, Cornell says, under the eighteenth century law of coverture, the citizenship of a married woman necessarily followed that of her husband.¹³ The Katyal/Clement

9. See RAMSEY, *supra* note 6, at 8.

10. I do think at least one methodological difference sometimes exists between historians and originalist legal scholars, but it is not one Cornell identifies. Legal scholars may be much more interested in, and tied to, the meaning of the actual text of the legal provision under examination, and may be less comfortable drawing abstract conclusions from social and ideological background without a concrete foundation in the text. See Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 MO. L. REV. 969, 970–77 (2008) (describing text-oriented originalist methodology); Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 111 (2015). That is very different, however, from saying that originalists are insensitive to context.

11. An Act to Establish a Uniform Rule of Naturalization, 1 Stat. 103, 1 Cong. Ch. 3 (1790) [hereinafter 1790 Act].

12. Neal Katyal & Paul Clement, *On the Meaning of “Natural Born Citizen,”* HARV. L. REV. F. 161 (2015). Katyal and Clement are not originalist scholars, and their short essay did not purport to explore all the possible aspects of the natural born citizen debate. However, they did expressly adopt an originalist methodology, so it is useful to consider what Cornell thinks they omitted. Cornell also briefly criticizes my draft article *The Original Meaning of “Natural Born,”* <http://ssrn.com/abstract=2712485> (forthcoming). See Cornell, *supra* note 1, at 93 n.4. I discuss his critique of my analysis in Part III *infra*.

13. Cornell, *supra* note 1, at 94.

view, he continues, would import an inappropriately modern view of gender equality and implausibly read the 1790 Act to overturn the common law of coverture.¹⁴

Leave aside for now whether Cornell is right on this point. Assuming he is right, would ordinary originalist scholarship consider this point relevant to interpreting the 1790 Act? I think the answer is: obviously yes. It is part of the legal background in which the 1790 Act was written; the Act's meaning necessarily arises in part from its historical and legal context. If Cornell's view of coverture is correct, and if Katyal and Clement did not take it into account, that is a substantial originalist criticism of the Katyal/Clement essay (bearing in mind, though, that it is a short essay by two distinguished lawyers, not an extensive academic article). I would be surprised if any originalist would say otherwise.

Moreover, in applying what he supposes to be a “radically different methodolog[y],” Cornell appears to rely principally on just four founding-era sources in opposition to Katyal and Clement: (1) a brief passage from Blackstone's Commentaries, together with some general statements about English legal practice; (2) an 1805 decision of the Massachusetts Supreme Court, *Martin v. Commonwealth*;¹⁵ (3) a portion of a comment by Representative Livermore in the congressional debates on the 1790 Act; and (4) a comment in St. George Tucker's 1803 commentaries on Blackstone.¹⁶ Leaving aside for the moment whether these sources prove his point, it is noteworthy that these are exactly the kind of sources originalists use to determine original meaning.¹⁷ There is simply no daylight between Cornell's approach and the standard originalist approach. True, Katyal and Clement do not discuss these sources, and they may be criticized on this ground if the sources are informative on the particular subject at hand—but that is not a critique of originalist methodology; it is a critique of Katyal and Clement for failing to follow originalist methodology.

My point here is that Cornell is actually using standard originalist methodology to critique arguably overstated originalist claims. He is

14. *Id.*

15. 1 Mass. (1 Will.) 260 (1805).

16. Cornell, *supra* note 1, at 95–98. He also cites several secondary accounts of the law of married women in the eighteenth century but does not appear to claim that these general histories establish anything specific about the 1790 Act. *See* Cornell, *supra* note 1, at 95 nn. 17 & 21.

17. *See* RAMSEY, *supra* note 6, at 8 (noting need for “frequent reliance upon writers of the time (including but not limited to the Constitution's actual drafters and ratifiers), to see what the text seemed to mean to those closest to it in time and context”); William Baude & Jud Campbell, *Early American Constitutional History: A Source Guide* (Feb. 29, 2016) available at <https://ssrn.com/abstract=2718777> (listing important historical sources compiled by constitutional originalist scholars).

not standing outside originalism but arguing within it. He only imagines that he is doing something qualitatively different because he has a caricatured view of originalism.

II. THE CORRECT READING OF THE 1790 ACT

A central part of Cornell's critique is that originalists have misread the 1790 Act. Again describing the Katyal/Clement essay, he argues:

Focusing on the 1790 Naturalization Act, [Katyal and Clement] 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.” 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.¹⁸

On closer examination, however, I think the Katyal/Clement reading is the correct one, or, at minimum, is a plausible one.

As quoted above, the 1790 Act provides that the “children of citizens of the United States” shall be considered as natural born citizens.¹⁹ Katyal and Clement say this includes children with citizen mothers and alien fathers. Cornell says this is “utterly implausible” and that the Act only applies to people with citizen fathers—and also that Katyal and Clement's error illustrates the deficiencies of originalist methodology.²⁰

As discussed in Part I, Cornell uses standard originalist sources to contest the Katyal/Clement reading. However, his sources do not appear necessarily to prove what he thinks they prove. Cornell's central claim is that under the common law of coverture as it stood in the late eighteenth century, a married woman took on the nationality of her husband and “could have no separate political identity outside her husband's national allegiance.”²¹ Thus the 1790 Act should not be read to include children of United States mothers and alien fathers,

18. Cornell, *supra* note 1, at 94 (quoting Katyal & Clement, *supra* note 12, at 162).

19. 1790 Act, *supra* note 11.

20. Cornell, *supra* note 1, at 94.

21. *Id.* at 95.

presumably because the (formerly) United States citizen mothers would not be considered United States citizens under the law of coverture.²²

The eighteenth century law of married women's rights and status seems somewhat confused, evolving and possibly contradictory.²³ But I am not persuaded by Cornell's sources, none of which addresses the question directly. First, his Blackstone quote describes the status of married women in general terms, without specifically addressing nationality.²⁴ Second, the *Martin* case addresses a somewhat different question: whether a Massachusetts statute penalizing failure to support the state during the revolution should be applied to a married woman whose husband did not support the state.²⁵ The court concluded that she was not within the meaning of the statute because at most she had only acted at the direction of her husband.²⁶ Although there is some language in some of the opinions supporting the general idea Cornell advances, it is not central to the case. Third, while St. George Tucker's comment is interesting and worth considering separately, it does not go to the question of married women's rights.²⁷

The quote from Representative Livermore is the most helpful to Cornell, though Livermore also was not addressing the question directly and the quote is more ambiguous when given in full. Livermore said:

That question [that is, the residency requirement in the 1790 Act] is introduced to prevent any abuse. If these citizens had children they might become citizens, but not to transmit their rights of citizenship. The child of a citizen if abroad may be

22. Cornell does not spell out his specific reading of the 1790 Act, but this reading seems to follow from his discussion.

23. See 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).

24. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (1765) ("By marriage, 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 everything."); Cornell, *supra* note 1, at 95 (quoting this passage).

25. *Martin v. Commonwealth*, 1 Mass. (1 Will.) 260, 293 (1805).

26. *Id.*

27. 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). See *infra* Part III for further discussion of Tucker's views.

useful. But that right might be transmitted from father to son and so on to perpetuity.²⁸

Cornell relies on the last sentence to say that Livermore thought the statute only applied to children of citizen fathers.²⁹ This may be a plausible reading, but earlier in the quote Livermore spoke generally of children of “citizens.” In the last sentence, Livermore may have been giving an example that he thought would be most common. And it is not clear if Livermore’s observation—even if it means what Cornell thinks it means—was representative. Originalists are cautious about relying on an isolated and somewhat ambiguous statement from a single congressman.

Moreover, there is substantial evidence that women who married aliens did not lose their prior allegiance. First, English statutes prior to 1731 had given “natural born subject” status to persons whose fathers or mothers were English subjects.³⁰ (A 1731 statute changed it to fathers only, where it remained through the founding era).³¹ Thus English law must not have supposed that the woman lost her English subject status upon marriage to an alien. Second, the United States Supreme Court considered this exact question in *Shanks v. Dupont*³² in 1830. Writing for the Court, Justice Story stated:

Neither did the marriage with Shanks [a British subject] produce that effect [of a loss of United States citizenship], because marriage with an alien, whether a friend or an enemy, produces no dissolution of the native allegiance of the wife. It may change her civil rights, but it does not effect her political rights or privileges. The general doctrine is that no persons can by any act of their own, without the consent of the government, put off their allegiance and become aliens. If it were otherwise, then a femme alien would by her marriage

28. 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 529 (Helen E. Veit et al. eds., 1994) [hereinafter DOCUMENTARY HISTORY].

29. Cornell, *supra* note 1, at 97.

30. See Ramsey, *supra* note 12, at 14–18 (describing statutes).

31. An Act to explain a Clause in an Act made in the seventh Year of the Reign of her late Majesty Queen Anne, for naturalizing foreign Protestants, which relates to the Children of the natural-born Subjects of the Crown of England, or of Great Britain, 4 Geo. 2, c. 21 (1731).

32. 28 U.S. 242 (1830).

become, ipso facto, a citizen, and would be dowable of the estate of her husband, which are clearly contrary to law.³³

While *Dupont* was decided well after the 1790 Act was passed, Story seemed to regard the common law rule as longstanding, and he cited a New York case from 1800, *Kelly v. Harrison*,³⁴ to the same effect.³⁵ *Kelly* involved an Irishman who emigrated to America and became a United States citizen, leaving a wife behind in Ireland; the question was whether she was an alien who could not make a claim on his estate.³⁶ As Story indicated, the court held that the wife did not become a United States citizen merely because her husband did.³⁷

Finally, a passage from the congressional debates immediately prior to the one Cornell cites suggests an intent to extend citizenship to children of United States mothers.³⁸ Representative Burke wanted to make a slight change to the bill's language to clarify that both parents need not be citizens to make the child a citizen: "it is unnecessary that the father and mother would both be citizens."³⁹ He then referred to a "Statute [that] was made in W[illiam] the 3rd."⁴⁰ Probably he was referring to the naturalization statute of 1698 (the only statute passed under King William relating to subjectship and foreign birth), which gave natural born subject status to persons with English fathers or mothers.⁴¹ Representative Livermore replied that Burke's change was unnecessary because the bill already had the effect Burke wanted: "This [that is, natural born citizenship] is extended to all people and the expression sets forth the children of every citizen."⁴²

This exchange, while not crystal clear, appears to support Katyal and Clement's view of the 1790 Act, and, in any event, is inconsistent

33. *Id.* at 246. Later in the opinion, Story specifically distinguished the case on which Cornell relies, *Martin v. Commonwealth*, saying that *Martin* "turned on very different considerations." *Id.* at 248. In this passage, Story also repeated the point that "[t]he incapacities of femes covert provided by the common law apply to their civil rights and are for their protection and interest. But they do not reach their political rights nor prevent their acquiring or losing a national character." *Id.*

34. 2 Johns. Cas. 29 (N.Y. Sup. Ct. 1800) (Radcliffe, J.).

35. *Dupont*, 28 U.S. at 246 (citing *Kelly*, 2 Johns. Cas. at 31).

36. *See Kelly*, 2 Johns.Cas. at 30.

37. *Id.* at 31 (Radcliff, J.); *id.* at 32 (Kent, J.); *id.* at 34 (judgment of the court).

38. DOCUMENTARY HISTORY, *supra* note 28, at 529.

39. *Id.*

40. *Id.*

41. An Act to Naturalize the Children of such Officers and Souldiers & others the natural borne Subjects of the Realm who have been borne abroad during the Warr the Parents of such Children having been in the Service of this Government, 9 Will. 3, c. 20 (1698); *see Ramsey, supra* note 12, at 14–18.

42. DOCUMENTARY HISTORY, *supra* note 28, at 529.

with Cornell's suggestion that under coverture the husband and wife could not have different allegiances.

Ironically, given his suspicions of pure textualism, the strongest evidence Cornell offers against the Katyal/Clement reading is textual: if the 1790 Act gave natural born citizenship to children with United States mothers and alien fathers, why did it then require the father—but not the mother—to have resided in the United States?

The Act's language is that "the right of citizenship shall not descend to persons whose fathers have never been resident in the United States."⁴³ This language may seem to suggest that the drafters were thinking only of citizen fathers. Otherwise it creates an asymmetry: a male United States citizen could go abroad, marry an alien and have children who became United States citizens at birth, but a female United States citizen could not do so unless the alien she married happened to have lived in the United States. But perhaps the drafters intended this asymmetry, which limits the ability of women to transmit citizenship. Perhaps they thought that, unlike male United States citizens, female United States citizens were not likely to marry aliens other than ones who had lived in the United States, so the difference was immaterial. Perhaps they thought that, due to the dominant role of the father in the household in that time, the father should have some connection to the United States even if citizenship came through the mother. In any event, the text, given its ordinary meaning, does not appear to lead to an absurd result, despite the asymmetry it creates.

In sum, despite claims to be engaged in a different methodological enterprise, Cornell's critique of Katyal and Clement follows conventional originalist/textualist methodology and invokes standard originalist sources. In the end, though, his sources do not greatly undermine the Katyal/Clement reading—at minimum, they surely do not render it "utterly implausible."⁴⁴

III. THE SIGNIFICANCE OF THE 1790 ACT

Cornell argues that because originalists have misread the 1790 Act, they have also come to erroneous conclusions about the Constitution's natural born citizen clause. As discussed in the previous section, I think his conclusions about the 1790 Act are mistaken, or at least overstated. However, in this section I will assume they are correct, and consider the implications for the natural born citizen clause.

As I have described in greater length elsewhere, the best view of the clause's original meaning is that it requires some connection to the

43. 1790 Act, *supra* note 11.

44. See *supra* note 18 and accompanying text.

United States at birth but conveys to Congress power to decide what sort of connection is sufficient.⁴⁵ This view of the natural born citizen clause does not depend on Katyal and Clement being right about the 1790 Act. Instead, it is principally based on English law and practice, in which parliament changed the definition of “natural born” status multiple times, in multiple directions, over the century prior to the Convention; the framers were presumably familiar with this practice because it is described in part by Blackstone. Further, the 1790 Act supports this reading because the First Congress, in enacting the Act, apparently thought it had power to come up with its own definition of “natural born.”⁴⁶

The latter point stands even if there is doubt about the Katyal/Clement reading of the Act. First, the 1790 Act defines “natural born” differently from English common law. The traditional common law definition recognized natural born status only for people born in sovereign territory (with minor irrelevant exceptions).⁴⁷ Some modern scholars contend that the Constitution adopted the common law definition of the phrase.⁴⁸ However, the 1790 Act clearly grants natural born status to a substantial class of people born outside United States sovereign territory, even if one does not accept Katyal and Clement’s reading: at minimum, it gives that status to people born abroad with two United States citizen parents. Thus, the First Congress plainly did not consider itself bound by the common law rule.

Second, the 1790 Act does not simply enact the English statutory definition of natural born that was in effect when the Constitution was adopted. The principal English naturalization act in place in 1787–89, the Act of 1731,⁴⁹ gave natural born status to anyone born abroad whose father was an English subject.⁵⁰ As discussed, the 1790 Act gave that status to “children of citizens”—which must mean either that both parents must be citizens (narrower than the 1731 Act) or that only one parent needs to be a citizen (broader than the 1731 Act). In either event, the First Congress evidently thought it could use its own definition of natural born and did not think it was constitutionally bound

45. See Ramsey, *supra* note 12.

46. See *id.* at 34. Cornell says the Act is “a cornerstone” of my view. See Cornell, *supra* note 1, at 96. It is not. I regard it only as confirming what is indicated by prior English practice.

47. See Ramsey, *supra* note 12, at 11–14.

48. E.g., Mary Brigid McManamon, *The Natural Born Citizen Clause as Originally Understood*, 64 CATH. U. L. REV. 317 (2015).

49. An Act to explain a Clause in an Act made in the seventh Year of the Reign of her late Majesty Queen Anne, for naturalizing foreign Protestants, which relates to the Children of the natural-born Subjects of the Crown of England, or of Great Britain, 4 Geo. 2, c. 21 (1731).

50. *Id.*

to the English statutory definition. The 1790 Act also added the proviso, discussed above, that in order to gain natural born citizenship in this way, a person's father must have at some point been a resident of the United States. There is no parallel requirement for natural born status in any of the English statutes; this is an invention of the First Congress—again showing that the First Congress thought it had power to set out its own definition.

Thus, whether or not one accepts the Katyal/Clement reading (that either a United States mother or a United States father is sufficient), the 1790 Act supports the view that Congress thought it had power to vary the definition of natural born. As a result, the main point of Cornell's essay, even if correct, does not refute my reading of the natural born citizen clause.

Cornell makes two other points that bear on my view. First, he says (without further elaboration): "The most obvious problem with [Ramsey's] 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."⁵¹

I agree that one must be cautious equating Congress' power with Parliament's power. However, I do not see any other satisfactory original meaning of "natural born." The framers used a legal phrase that they knew (from Blackstone) had no fixed definition in English law, but rather was subject to varying parliamentary definitions; and they did not further define it. To me, that indicates a decision to leave the matter in part to Congress. Moreover, the framers gave Congress a power—the power to provide rules of naturalization—that they knew described in English law the power to define "natural born" status.⁵² Cornell's claim that Congress' power "in this area" was "far more limited in scope"⁵³ just asserts a conclusion that is hard to fit with the text and its historical background.

Cornell also invokes St. George Tucker's 1803 treatise. Cornell says that Tucker did not think "Congress could alter the scope of the natural born citizen clause."⁵⁴ His assessment of Tucker's commentary is:

51. Cornell, *supra* note 1, at 96.

52. See Ramsey, *supra* note 12, at 30–31, 33–36.

53. Cornell, *supra* note 1, at 96.

54. See *id.* at 97–99, discussing TUCKER, *supra* note 27. Cornell criticizes originalists for not looking to "actual readers," such as Tucker, in establishing the Constitution's original public meaning, and for failing to take into account their biases. This is an odd criticism, for originalists routinely look at what founding-era commentators (including Tucker) said about constitutional provisions; indeed, this is a centerpiece of most originalist assessments. See Baude & Campbell, *supra* note 17. And if originalists do it right, they will take into account biases just as Cornell says.

Tucker stated unambiguously that “[p]ersons naturalized according to [the 1790 and 1795 Naturalization Acts], are entitled to all the rights of natural born citizens” except for certain express limits on their ability to hold federal offices. 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.”⁵⁵

However, despite what Cornell says, this passage is ambiguous. It is not clear whether Tucker was referring to all people granted citizenship under the Acts, including those declared citizens at birth, or whether he was referring only to people who became citizens as adults through the naturalization process prescribed in the Acts. If the former, he was really saying that the 1790 Act was unconstitutional, because the 1790 Act purported to give natural born citizen status to those it declared to be citizens at birth. But Tucker did not say that the 1790 Act was unconstitutional; he said that the Act did not convey presidential eligibility on the people he was discussing.⁵⁶ That makes sense only if one reads Tucker’s comments as directed only at people naturalized after birth.⁵⁷

Cornell’s essay therefore does not materially undermine the broad view of the natural born citizen clause, regardless of whether one thinks it is an effective criticism of Katyal and Clement. Even if the 1790 Act did not give natural born status to the foreign-born children of a United States mother and an alien father, the English historical background and the outlook of the First Congress indicate that Congress had power to do so if it chose.

55. Cornell, *supra* note 1, at 99 (quoting TUCKER, *supra* note 27, at 374–75 n.12).

56. See TUCKER, *supra* note 27, at 374–75 n.12.

57. This reading is confirmed by Tucker’s observation that the people he is discussing would not be eligible to serve as Representatives for seven years or as Senators for nine years after naturalization. TUCKER, *supra* note 27, at 374–75 n.12 (“Persons naturalized according to these acts, are entitled to all the rights of natural born citizens, except, first, that they cannot be elected as representatives in Congress until seven years, thereafter. Secondly, nor can they be elected senators of the United States until nine years thereafter. Thirdly, they are forever incapable of being chosen to the office of president of the United States.”). This comment makes sense if made in reference to people naturalized as adults, given the Constitution’s requirement of seven and nine years of United States citizenship for House and Senate eligibility, respectively. However, it makes no sense if applied to foreign-born persons made citizens at birth, because obviously they would not be eligible to the House after seven years nor to the Senate after nine years.

CONCLUSION

In sum, Professor Cornell has written a challenging and thought-provoking essay, but it fails to establish any of its three main points. It does not show that his preferred methodology is different from a standard originalist approach. It does not show that the broad view of the 1790 Act is erroneous. And it does not show the broad view of the natural born citizen clause is erroneous.

As to methodology, Cornell relies on sources that traditionally appear in originalist analyses: Blackstone's Commentaries, the background common law of the time (especially as reflected in contemporaneous court decisions), statements of framers, and early post-ratification commentary. His argument that originalists use a different approach because they look at language without considering context is a mistaken view of originalist methodology. To the extent he is criticizing particular originalist analyses (principally the Katyal/Clement essay) for ignoring these sources, Cornell's criticisms may be well taken, but they are criticisms that originalist scholars should and presumably would also raise.

As to the 1790 Act, Cornell is undoubtedly correct that we must avoid importing modern views of gender equality into an eighteenth century enactment. However, when the eighteenth century background is closely examined, it does not appear to establish the particular rule Cornell thinks existed. There is substantial evidence that a woman marrying an alien retained her native citizenship. Moreover, English law at various times had conveyed natural born status on the foreign-born children of English mothers and alien fathers. Thus, it is not implausible to believe that the 1790 Act could give natural born citizenship to the foreign-born children of United States citizen mothers and alien fathers.

Finally, even if he is right about the 1790 Act, Cornell does not substantially undermine the argument for a broad reading of the natural born citizen clause. Whether or not the 1790 Act extended citizenship to the children of United States mothers and alien fathers, the Act demonstrates Congress' belief that Congress had power to define natural born citizenship. The Act does not exactly reproduce either English common law or English statutory law; instead, it creates its own definition. Thus, Congress must have thought it had constitutional power to craft its own definition of natural born. That, in turn, is consistent with Parliament's practice of defining the "natural born" status of foreign-born children in the century preceding the Constitution.