



**Illinois Public Law and Legal Theory
Research Papers Series No. 08-17**

September 5, 2008

Originalism and the Natural Born Citizen Clause

Lawrence B. Solum*

*John E. Cribbet Professor of Law, University of Illinois College of Law

This paper can be downloaded without charge from the Social Science Research Network
Electronic Paper Collection:

<http://papers.ssrn.com/abstract=1263885>

D R A F T September 5, 2008

ORIGINALISM AND THE NATURAL BORN CITIZEN CLAUSE^{*}

LAWRENCE B. SOLUM^{**}

I. INTRODUCTION: THE ENIGMA OF THE NATURAL BORN CITIZEN CLAUSE

The United States Constitution provides:

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.¹

What is the legal significance of what we can call “the natural born citizen clause”? There is general agreement on the core of settled meaning.² Anyone born on American soil whose parents are citizens of the United States of American is a “natural born citizen.” Anyone whose citizenship is acquired after birth as a result of “naturalization” is not a “natural born citizen.” But agreement on these paradigm cases does not entail that the clause has a clear meaning. The clause becomes enigmatic once we focus on persons who are born outside the territory of the United States to parents who are American citizens. Are they “natural born citizens,” eligible for the presidency? Or do they fall into a constitutional twilight zone, neither “natural born” nor “naturalized,” but nonetheless citizens.

^{*} © 2008 by the Author. Permission is hereby granted to duplicate this paper for scholarly or teaching purposes, including permission to reproduce multiple copies or post on the Internet for classroom use and to quote extended passages in scholarly work, subject only to the requirement that this copyright notice, the title of the article, and the name of the author be prominently included in the copy or extended excerpt. Permission is hereby granted to use short excerpts (500 words or less each, so long as the total word count of the excerpts does not exceed 50% of the total word count of this work) with an appropriate citation and without inclusion of a copyright notice. In the event of the death or permanent incapacity of the author, all claims to copyright in the work are relinquished and the work is dedicated to the public domain in perpetuity. Even if the author is then living, all copyright claims are relinquished as of January 1, 2050. In the event that the relinquishment of copyright is not given legal effect, an unlimited license of all rights to all persons for all purposes is granted as of that date. This version of “Originalism and the Natural Born Citizen Clause” was created on September 5, 2008. The Author requests that citations to this version identify the work as a draft and note the date of creation in the citation or parenthetical explanation.

^{**} Associate Dean for Faculty and Research, John E. Cribbet Professor of Law, and Professor of Philosophy, University of Illinois College of Law. I owe thanks to Randy Barnett for discussion of an early draft of this paper.

¹ U.S. Const. Art. II, Sec. 1.

² The distinction between core and penumbra is associated with the work of H.L.A. Hart. *See* H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1997).

The meaning of the natural born citizen clause became politically salient when John McCain became the Republican nominee for President in September of 2008:³ McCain was born in the Panama Canal Zone to parents who were American citizens.⁴ Because McCain was born in 1937, there is a dispute as to whether the 1937 statute that purported to confer citizenship on children of American parents born in the Panama Canal Zone constitutes retroactive “naturalization” or whether that statute was merely a clarifying confirmation of preexisting law under which McCain was an American citizen at birth.⁵

This Essay explores the contribution of originalism as a theory of constitutional interpretation to the controversy over the meaning of the natural born citizenship clause. Part II of the Essay explains the relevance of originalist constitutional theory to the controversy with special reference to the New Originalism—the view of constitutional meaning that emphasizes public meaning of the constitutional text at the time each provision was framed and ratified. Part III argues that that the clause creates a problem for public meaning originalism—the phrase “natural born citizen” may not have had a widely shared public meaning in the late eighteenth century; the solution to this problem could be the notion of a “term of art,” in particular, the idea that the meaning of “natural born citizen” derives from the English concept of a “natural born subject.” Part IV considers the possibility that the original meaning of the natural born citizen clause is subject to an irreducible ambiguity. Part V concludes with reflections on the exemplary significance of the natural born citizen clause for constitutional theory.

II. THE PROBLEM FOR ORIGINAL PUBLIC MEANING ORIGINALISM

Interpretation of the phrase “natural born citizen” may pose a problem for originalist theory—and especially for what is sometimes called “the New Originalism” or “original public meaning originalism.” The question whether the phrase “natural born citizen” had a clearly understood “public meaning” depends both on linguistic facts and on the constitutional theory.

A. The Relevance of Constitutional Theory

Some constitutional theorists seem to believe that the constitutional text provides only loose constraints on the enterprise of constitutional interpretation. Consider, for example, the following analysis of the natural born citizen clause by constitutional scholar Michael Dorf:

[I]f one is not burdened by the label of "originalist," then [McCain's eligibility for the presidency] is a pretty easy question. The “natural born citizen” requirement manifests a distrust of the foreign-born that, in a nation of immigrants, can only be

³ [Add citation to report of McCain's nomination.]

⁴ Carl Hulse, McCain's Canal Zone Birth Prompts Queries About Whether That Rules Him Out, *New York Times*, February 28, 2008, <http://www.nytimes.com/2008/02/28/us/politics/28mccain.html>; Adam Liptak, A Hint of New Life to a McCain Birth Issue, *New York Times*, July 11, 2008, <http://www.nytimes.com/2008/07/11/us/politics/11mccain.html>.

⁵ Compare Gabriel J. Chin, Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship, July 9, 2008, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1157621, with Stephen E. Sachs, John McCain's Citizenship: A Tentative Defense, August 19, 2008, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1236882.

derided as repugnant. I both “reject” it and I “denounce” it! It's still part of the Constitution, however, and therefore we need to try to figure out what it means. My frankly normative move would be to limit the damage by limiting the scope of “foreign-born.” There's no plausible way to read the provision to permit Schwarzenegger and other naturalized citizens to become President. There is a ready (if not 100% clearly the original) way to read it to permit Americans born abroad to U.S. parents to become citizens.⁶

Dorf's comments raise an intriguing question: how would an originalist approach the question whether the original meaning of the natural born citizen clause would permit McCain (and others not born of American parents on American soil) to become President of the United States? To answer that question, we need first to understand “originalism” itself.

B. The New Originalism

“Originalism” is a really an evolving family of constitutional theories.⁷ Early originalist theory emphasized the intentions of the framers or ratifiers,⁸ provoking a variety of critical reactions.⁹ These criticisms set the stage for what is sometimes called “the New Originalism”¹⁰ and is also called “Original Public Meaning Originalism.”¹¹ In 1986, Antonin Scalia gave a speech suggesting to proponents of “originalism” that they “change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning.”¹² Scalia's speech was the precursor of the view that the “original meaning” of each provision of the constitution is the public meaning of the text at the time it was framed and ratified. A wide variety of theorists participated in the development of the New Originalism.¹³

⁶ Michael Dorf, *Originalism Versus Straight Talk*, Dorf on Law, February 29, 2008, <http://michaeldorf.org/2008/02/originalism-versus-straight-talk.html>.

⁷ See Thomas Colby & Peter Smith, *Living Originalism*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090282 (July 25, 2008).

⁸ See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976); RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (Harvard University Press 1977). See generally Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

⁹ See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 238 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 886, 903 (1985).

¹⁰ Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

¹¹ Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loy. L. Rev. 611, 611-29 (1999); RANDY BARNETT, *RESTORING THE LOST CONSTITUTION* (2004).

¹² Antonin Scalia, *Speech Before the Attorney General's Conference on Economic Liberties* (June 14, 1986), in Office of Legal Policy, *Original Meaning Jurisprudence: A Sourcebook* 106 (U.S. Dept. of Justice 1987); see also Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 555 (2003).

¹³ See Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992); Steven G. Calabresi, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 553 (1994); Randy E. Barnett, *Restoring the Lost Constitution*, *supra* note 11; KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* (1999); KEITH WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* (1999). For extended discussions of “original public meaning,” see Vasani Kesavan & Michael Paulson, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 Geo. L.J. 1113, 1127 (2003); Samuel T. Morison, *The Crooked Timber of Liberal*

In addition to the shift from original intentions to original public meaning, some of the New Originalists have embraced a distinction between “constitutional interpretation” understood as the enterprise of discerning the semantic content or linguistic meaning of the constitution and “constitutional construction,” which we might tentatively define as the activity of further specifying constitutional rules when the original public meaning of the text is vague (or underdeterminate for some other reason). When the linguistic meaning of the constitutional text “runs out,” constitutional interpretation must be supplemented by constitutional construction.

The New Originalism played a substantial role in the Supreme Court’s recent decision in *District of Columbia v. Heller*,¹⁴ which invalidated a District of Columbia statute that prohibits the possession of useable handguns in the home¹⁵ on the ground that it violated the Second Amendment to the United States Constitution.¹⁶ Given the paucity of precedent on the meaning of the “right to keep and bear arms,”¹⁷ *Heller* offered the Court an opportunity that is rare in contemporary constitutional jurisprudence—to address the meaning of the constitutional text unencumbered by constraining precedent. For this reason, *Heller* has exemplary significance for investigations of the relationship between constitutional theory and constitutional practice by squarely posing the question: how should courts determine the meaning of the constitution in the absence of controlling precedent?

Writing for the *Heller* majority, Justice Scalia addressed the issue of constitutional method as follows:

The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” In interpreting this text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” . . . Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.¹⁸

In this passage, the Court embraced “original public meaning originalism.”

C. Words, Phrases, and Terms of Art

Public meaning originalism focuses on the conventional semantic meaning of the text at the time each constitutional provision was adopted. In some cases, the inquiry into

Democracy, 2005 MICH. ST. L. REV. 461, 465 (2005). My views of originalist theory are stated most fully in Lawrence B. Solum, *Semantic Originalism*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 (August 20, 2008).

¹⁴ 128 S.Ct. 2783 (2008); see generally Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, NORTHWESTERN UNIVERSITY LAW REVIEW (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1241655 (August 20, 2008); Gary E. Barnett, *The Reasonable Regulation of the Right to Keep and Bear Arms*, 6 GEORGETOWN JOURNAL OF LAW & PUBLIC POLICY 607 (2008).

¹⁵ *Id.* at 2788, 2821-22.

¹⁶ U.S. CONST. amend. 2.

¹⁷ See Solum, *supra* note 14, at 1-2.

¹⁸ *Id.* at 2788.

original meaning can proceed clause-by-clause and word-by-word. We determine the conventional semantic meaning of each word and then combine the meanings of individual words into whole clauses by using the rules of grammar and syntax. Indeed, this is the method ordinarily used to understand utterances in any natural language.¹⁹

There is, however, a difficulty in applying this method to the natural born citizen clause. The phrase “natural born citizen” seems to have an idiomatic meaning that cannot be derived from the conventional semantic meanings of the three words “natural” “born” and “citizen.” If these words were used in another context, they might refer to citizens who were born naturally—distinguished from those who were born by Caesarian section or whose birth resulted from artificial insemination or other “nonnatural” reproductive technologies. Instead, the phrase “natural born citizen” seems to have a meaning that cannot be derived from individual word meanings—violating the principle of compositionality.²⁰ The relevant unit of meaning is the phrase as a whole.

The notion that phrases acquire meanings that are not reducible to the meanings of the constituent words is familiar to any competent speaker of a natural language such as English. Many such phrases are in common usage and have conventional semantic meanings that are accessible to most or all competent speakers of English. But some words and phrases are not familiar to all competent speakers of the language. Some of the words and phrases that comprise the constitutional text may be “terms of art,” the meaning of which is accessible only to a specialized readers. Blackstone put it this way: terms of art “must be taken according to the acceptation of the learned in each art, trade, and science.”²¹

For example, the phrase “letters of marque and reprisal”²² might not have been familiar to the ordinary citizen or common human at the time the Constitution was drafted, ratified, and put into effect. Such terms of art create a potential problem for Justice Scalia’s formulation of originalism in *Heller*: “Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.”²³ If the meaning of the Constitution excludes “technical meanings,” then any terms of art included in the constitution would fail to have any meaning at all and constitutional communication would misfire. For example, if the phrase “letters of marque and reprisal” was not “known to ordinary citizens in the founding generations,” then that provision of the constitution would simply be meaningless.

III. FINDING THE ORIGINAL MEANING OF “NATURAL BORN CITIZENS”

Part II articulated the bare bones of an originalism as a theory of the semantic content or linguistic meaning of the Constitution. This Part investigates the question: how can originalism be applied to the natural born citizen clause? The aim here is not to answer

¹⁹ Herman Cappelen, *Semantics and Pragmatics: Some Central Issues* in CONTEXT SENSITIVITY AND SEMANTIC MINIMALISM 3, 4 (Gerhard Preyer & Georg Peter eds., Oxford: Oxford University Press 2007).

²⁰ Zoltán Gendler Szabó, Compositionality, Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/compositionality/> (February 14, 2007).

²¹ BLACKSTONE’S COMMENTARIES, supra note **Error! Bookmark not defined.**, at 59.

²² U.S. Const. Art. I, Sec. 8.

²³ *Id.* at 2788.

the question, “Is John McCain a natural born citizen?” Rather, the aim is to provide a broad methodological framework for answering that question.

A. The Division of Linguistic Labor

How can originalists respond to the problem of constitutional terms of art—the use of “technical meanings”? The solution to this problem is to recognize a division of linguistic labor.²⁴ The intuitive idea is simple. When members of the general public encounter a constitutional term of art, their understanding of its meaning can be described as involving a process of deferral. Consider the following example. An ordinary citizen reads the phrase “letters of marquee and reprisal,” and thinks, “Hmm. I wonder what that means. It sounds like technical legal language to me. If I want to know what it means, I should probably ask a lawyer.” That is, ordinary citizens would recognize a division of linguistic labor and defer to the understanding of the term of art that would be the publicly available meaning to those who were members of the relevant group and those who shared the understandings of the members of the relevant group.

This solution requires either that each constitutional term of art refer us to a single group, or to a group of groups that share the same understanding of the term of art. For example, if both sailors and lawyers shared the same understanding of “letters of marquee and reprisal” then constitutional communication could succeed. If different groups had different understandings of the same phrase, constitutional communication could still succeed, assuming the publicly available context of constitutional utterance allowed resolution of the resulting ambiguity.

How does this notion of a division of linguistic labor contribute to our understanding of the natural born citizen clause? The phrase “natural born citizen” does not have a distinctive sense in contemporary usage by ordinary citizens, and we have already seen that readings guided by the principle of compositionality. Of course, it is possible that the phrase “natural born citizen” would have been familiar to most or even almost every ordinary speaker of American English in the late eighteenth century, but suppose this were not the case. The clause nonetheless could have had a conventional semantic meaning determined by the linguistic practice of those learned in the law in the late eighteenth century—so long as the division of linguistic labor made the “technical meaning” accessible to ordinary citizens.

B. “Natural Born Citizen” as a Paraphrase of “Natural Born Subject”

Existing scholarship does not reveal extensive usage of the phrase “natural born citizen” in the founding era, but it seems clear that it was derived from the related phrase “natural born subject, which had a technical meaning in English law and constitutional theory. Those learned in the law in the framing era would have been familiar with

²⁴ The idea of a division of linguistic labor is usually attributed to Hilary Putnam. See Hilary Putnam, *The Meaning of 'Meaning'* in PHILOSOPHICAL PAPERS, VOL. 2: MIND, LANGUAGE AND REALITY (Cambridge University Press, 1985); see also Robert Ware, *The Division of Linguistic Labor and Speaker Competence*, 34 PHILOSOPHICAL STUDIES 37 (1978); Mark Greenberg, "Incomplete Understanding, Deference, and the Content of Thought" . UCLA School of Law Research Paper No. 07-30 Available at SSRN: <http://ssrn.com/abstract=1030144>.

Blackstone's Commentaries, which James Madison described (in the Virginia ratifying convention) as "a book which is in every man's hand."²⁵ Blackstone writes as follows:

The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England, that is, within the ligeance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it. Allegiance is the tie, or ligamen, which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors.

* * *

Allegiance, both express and implied, is however distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themselves.

* * *

When I say, that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood with some restrictions. The common law indeed stood absolutely so; with only a very few exceptions: so that a particular act of parliament became necessary after the restoration, for the naturalization of children of his majesty's English subjects, born in foreign countries during the late troubles. And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. Yet the children of the king's ambassadors born abroad were always held to be natural subjects: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of postliminium) to be born under the king of England's allegiance, represented by his father, the ambassador.

To encourage also foreign commerce, it was enacted by statute 25 Edw. III. st. 2. that all children born abroad, provided both their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England: and accordingly it hath been so adjudged in behalf of merchants. But by several more modern statutes these restrictions are still farther taken off: so that all children, born out of the king's ligeance, whose fathers were natural-born subjects, are now natural-born subjects themselves, to all intents and purposes, without any exception; unless their said

²⁵ JONATHAN ELLIOT 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 501 (University of Michigan Library 2001).

fathers were attainted, or banished beyond sea, for high treason; or were then in the service of a prince at enmity with Great Britain.²⁶

Blackstone's understanding of the notion of a "natural born subject" is not completely clear or precise. On the one hand, he states "[n]atural-born subjects are such as are born within the dominions of the crown of England," but on the other hand, he suggests "all children, born out of the king's ligeance, whose fathers were natural-born subjects, are now natural-born subjects themselves, to all intents and purposes." The latter statement might be considered a modification of the first, but the use of the qualifying language "to all intents and purposes" could be read as suggesting that those born to British subject abroad are being granted the rights of natural born citizens, but are not actually "natural born" themselves. For most practical purposes, this fine distinction is irrelevant because the common-law rule could be overruled by statute, but when if applied to the natural born citizen clause, the fine distinction might become important, because statutes cannot overrule the Constitution.

Blackstone's understanding derived from the common law, and seems to have its origin in *Calvin's Case*, a decision of the Court of Common Pleas, reported by Lord Coke in 1608.²⁷ F.B. Edwards summarized the complex and difficult opinion as follows:

The question before the Court [in *Calvin's Case*] was whether Robert Calvin, the plaintiff, a Scottish Subject of King James I., who was born after James's accession to the English throne, was an alien; the unanimous finding of the judges was that he "was no alien . . ."

* * *

It is important to remember that at the time when that case was decided the feudal or territorial conception of nationality was practically universal throughout the world; or, at least, that that conception was operative in both England and Scotland as far as the acquisition of the local nationality at birth was concerned.²⁸

The fundamental premise of the judges was the concept of allegiance to the sovereign at birth (as noted by Blackstone).²⁹ The conception of natural born subjects under British law is tied to the conception of natural allegiance to a sovereign—based primarily on being born within the territory subject to the sovereign's rule, but with the addition of others (such as the children of Ambassadors or of the Sovereigns themselves) who have a "natural allegiance" to the sovereign.

What conception of territory underlies the English conception of a natural-born subject? Edwards's answer to this question suggests that such territories are limited to the "sovereign's dominions":

There is little difficulty in deciding whether any particular territory forms part of the King's Dominions. It is quite clear that British Protectorates, whether ordinary or colonial, and spheres of influence are not included within the King's Dominions,

²⁶ William Blackstone, Commentaries 1:354, 357--58, 361--62 (1765).

²⁷ *Calvin's Case* 7 Coke Report 1a, 77 ER 377 (1608).

²⁸ F.E. Edwards, *Natural Born British Subjects at Common Law*, 14 Journal of the Society of Comparative Legislation 314 (1914).

²⁹ *Id.* at 315.

and that a right to occupy and administer vested in the British Government does not make British the territory affected.

Nor do the Indian allied states come within the boundary of the British Empire.⁴ There seems, however, no reason, beyond a purely technical one, why territories held by the British Crown under what either is, or practically is, a lease in perpetuity, should be excluded from this limit. The proposition that British Protectorates, and consequently any less interest of the Crown, should be excluded from our definition of the King's protection, is supported by Sir William Anson, who declares that birth within such a region is not sufficient to found a claim for British natural-born status. The real test of whether a given territory is part of the British Dominions is that it must have passed openly, completely, and unequivocally into the possession of the Crown.³⁰

If the American conception of “natural born citizen” were equivalent to the English notion of a “natural born subject,” then it could be argued that only persons born on American soil to American parents would have qualified. This might lead to the conclusion that McCain would not be a constitutional natural-born citizen, because the Panama Canal Zone was not the sovereign territory of the United States, but was instead merely subject to its administrative control. On the other hand, the notion of a natural born subject might have been more flexible, encompassing all those who acquired citizenship at birth (as opposed to those whose citizenship was conferred after birth by “naturalization”).

C. Citizens versus Subjects

The discussion in the prior section³¹ operates on the assumption that the conventional meaning of the phrase of art “natural born citizen” for those learned in the law in the eighteenth century was equivalent to the meaning of the analogous phrase “natural born subject” in nineteenth century English law. But is this assumption correct? Does the substitution of the term “citizen” for “subject” alter the meaning of the phrase? And if they did recognize a difference, what implications does that have for the meaning of the natural born citizen clause?³²

The language of the Constitution recognizes a distinction between the terms “citizen” and “subject.” For example, in Article III Section 2, which confers “judicial power” on the federal courts, “citizens” of the several states are differentiated from “citizens” or “subjects” of foreign states—corresponding to the distinction between diversity and alienage jurisdiction. In the framing era, these two terms reflected two distinct theories of the relationship between individual members of a political community and the state. In feudal or monarchical constitutional theory, individuals were the subjects of a monarch or sovereign, but the republican constitutional theory of the revolutionary and post-revolutionary period conceived of the individual as a citizen and assigned sovereignty to the people.

³⁰ *Id.* at 321.

³¹ See *supra* Part III.B, “ “Natural Born Citizen” as a Paraphrase of “Natural Born Subject””, p. 8.

³² The discussion that follows is deeply indebted to thoughts offered by Randy Barnett.

The distinction between citizens and subjects is reflected in Chief Justice John Jay's opinion in *Chisholm v. Georgia*,³³ the first great constitutional case decided after the ratification of the Constitution of 1789:

[T]he sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State

[A]t the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may be so called) and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty. . . .

Sovereignty is the right to govern; a nation or State-sovereign is the person or persons in whom that resides. In Europe the sovereignty is generally ascribed to the Prince; here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents in Europe stand to their sovereigns.³⁴

Jay's articulation of the opposition between subjects and citizens is confirmed by Justice James Wilson's opinion in *Chisholm*. Wilson noted that with the exception of Article III, the Constitution refers to "citizens" and "persons,"³⁵ and not subjects: "[t]he term, subject, occurs, indeed, once in the instrument; but to mark the contrast strongly, the epithet 'foreign' is prefixed."³⁶

Both Jay and Wilson's opinions suggest that usage in the founding era reflected a significant conceptual distinction between the words "subject" and "citizen"—a distinction that was strongly associated with the ideas about the nature of sovereignty. The term "citizen" reflects the notion that individual citizens are sovereign in a republic, whereas the term "subject" reflects feudal and monarchical conceptual of the monarch as sovereign and the individual as the subject, owing a duty of allegiance and duty to the monarch. This conceptual distinction may be relevant to the original understanding of the phrase "natural born citizen" which was used instead of "natural born subject," the phrase that served as a term of art in English legal usage. The notion of a natural born subject may reflect a feudal understanding of political obligation: those born in the kingdom owed a natural duty of allegiance to their king and were his natural subjects. Given a republic theory of popular sovereignty, citizens are sovereign and the notion of a "natural born subject" would be anathema. This leaves a gap in the theory of citizenship—a gap that the Constitution fills with the concept of a natural born citizen.

One interpretation of the new term of art, "natural born citizen," is that its content is identical to the content of the old phrase, "natural born subject," with the purely nominal

³³ 2 U.S. (2 Dall.) 419 (1793).

³⁴ *Id.* at 471-72 (Jay, C.J.); see also Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment*, 60 *Stan. L. Rev.* 937, 956 (2008).

³⁵ 2 U.S. (2 Dall.) at 456 (Wilson, J.) ("In one sense, the term sovereign has for its correlative, subject, In [sic] this sense, the term can receive no application; for it has no object in the Constitution of the United States. Under that Constitution there are citizens, but no subjects. 'Citizen of the United States.' 'Citizens of another State.' 'Citizens of different States.' 'A State or citizen thereof.'" (footnotes omitted)).

³⁶ *Id.*; see also U.S. Const. art. III, § 2 (referring to "foreign States, Citizens or Subjects").

difference in the term (“citizen” versus “subject”) used to refer to members of the political community. This could result in the interpretation suggested above—which would limit “natural born citizens” to persons born of American parents on American soil.

There was, however, another aspect of the concept of “natural born subject” as that term was understood by those learned in English law. Children of the sovereign were “natural born subjects” wherever their birth might occur.³⁷ The issue of the king (like the children of ambassadors) owed a natural obligation to their father. But in republican theory, the people are sovereign and this suggests that the republican conception of natural born citizens would naturally treat the children of citizen-sovereigns as equivalent of the children of a monarchical sovereign or king. This understanding may have been reflected in the first naturalization act,³⁸ enacted in 1790, which provided “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.”³⁹ Arguably, this enactment by the First Congress reflected the original understanding of “natural born citizen” as encompassing those born of the citizen-sovereigns on foreign soil. On this interpretation, John McCain would be a “natural born citizen” of the United States (at least for the purposes of eligibility for the presidency) because the original meaning of that phrase includes all persons born to American citizens.

On the other hand, the language of the 1790 Act might be interpreted differently. The statute is not explicitly phrased as a declaratory: the phrase “shall be considered as natural born citizens” might have reflected the understanding that the children of American citizens on foreign soil were not “natural born” but could be treated as if they were by granting them a legal status that was otherwise identical to that held by those who were “natural born.” On this interpretation, McCain would not qualify as a natural born citizen even if a statute had conferred citizenship upon him at birth: at least this would be so on the conventional assumption that Congress lacks power to change alter the meaning of the Constitution through legislation.

From the point of view of originalist method, the question is how to resolve the conflict between these two interpretations of the clause. The New Originalism suggests that the object of our inquiry should be the linguistic practices of the relevant groups—either citizens at large or those learned in the law in the eighteenth century. The ambiguity could be resolved if evidence of usage confirms one of the readings suggested above—or, as may be the case, it establishes some other, slightly different meaning.

IV. THE POSSIBILITY OF IRREDUCIBLE AMBIGUITY

The analysis so far has suggested that the original meaning of the phrase “natural born citizen” may itself be ambiguous or that the evidence of that meaning may be insufficient to resolve an ambiguity introduced by the passage of more than two centuries. The assumption of most originalists is that most constitutional ambiguities can be resolved by reference to the original public meaning in context. But what can originalism say about

³⁷ See Edwards, *supra* note 28, at 318;

³⁸ Act of Mar 26, 1790, An Act to Establish a Uniform Rule of Naturalization, 1 Stat 103, repealed by Act of Jan 29, 1795, 1 Stat 414.

³⁹ *Id.*

ambiguities that cannot be resolved in this way. What if the original meaning is itself ambiguous or if there is insufficient evidence to resolve an ambiguity?

It is at this point that "new originalists," for example Keith Whittington and Randy Barnett might suggest that "interpretation runs out," and a different modality of constitutional practice must be engaged--this is what New Originalists call "constitutional construction." Although New Originalists agree on "original public meaning" as the correct account of constitutional interpretation, they disagree about the best approach to constitutional construction. Randy Barnett's distinctive theory of constitutional legitimacy sanctions as justice-enhancing account of constitutional construction.⁴⁰ Keith Whittington has emphasized deference to democratic political processes.⁴¹ Jack Balkin suggests that construction should be guided by reference to the purpose of the constitutional provision at hand.⁴² Different approaches to constitutional construction might give different answers to the question whether McCain is eligible for the presidency.

V. CONCLUSION: THE EXEMPLARY SIGNIFICANCE OF THE NATURAL BORN CITIZENSHIP
CLAUSE FOR CONSTITUTIONAL THEORY

The phrase "natural born citizenship" is semantically inaccessible to modern readers. Because this phrase violates the rule of compositionality, it must be understood as an idiom or term of art. For this reasoning, gleaning the meaning of the phrase requires us to investigate linguistic practice to recover the original meaning--the meaning of "natural born citizen" at the time of constitutional utterance. When we look for public meaning, we may discover that the division of linguistic labor in the late 19th century takes us to the shared understandings of those learned in the law. We may need to look to eighteenth century linguistic practice to make sense of a phrase that would otherwise be either mysterious or radically ambiguous. For this reason, the natural born citizen clause may illustrate what we might call the "inescapability of originalism." Some constitutional provisions only make sense after we turn our attention to the way language was used when they were framed and ratified—there is good reason to believe that the natural born citizen clause is one of these.

⁴⁰ See Barnett, *supra* note 11.

⁴¹ See Whittington, *supra* note 10.

⁴² See Jack M. Balkin, *Abortion and Original Meaning* 24 CONST. COMMENT. 291 (2007).