

# EMPOWERING OUR CHILDREN TO DREAM WITHOUT LIMITATIONS: A CALL TO REVISIT THE “NATURAL BORN CITIZEN” REQUIREMENT IN THE OBAMA ERA

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*“If there is anyone out there who still doubts that America is a place where all things are possible; who still wonders if the dream of our founders is alive in our time; who still questions the power of our democracy, tonight is your answer.”<sup>1</sup>*

*“The time has come to reaffirm our enduring spirit; to choose our better history; to carry forward that precious gift, that noble idea, passed on from generation to generation: the God-given promise that all are equal, all are free and all deserve a chance to pursue their full measure of happiness.”<sup>2</sup>*

*“The success of our economy has always depended . . . on the ability to extend opportunity to every willing heart — not out of charity, but because it is the surest route to our common good.”<sup>3</sup>*

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1. President-Elect Barack H. Obama, Election Night Victory Speech (Nov. 4, 2008) (transcript *available at* [http://www.barackobama.com/2008/11/04/remarks\\_of\\_presidentelect\\_barack.php](http://www.barackobama.com/2008/11/04/remarks_of_presidentelect_barack.php)).

2. President Barack H. Obama, Inaugural Address (Jan. 20, 2009) (transcript *available at* <http://www.whitehouse.gov/blog/inaugural-address/>).

3. *Id.*

## INTRODUCTION

Regardless of one's political affiliations, the recent election and inauguration of Barack Obama has been an occasion for reflection and inspiration by many in our country and even around the world. The once seemingly improbable ascent of an African-American person to our nation's highest elected office has inspired people of various backgrounds to dream big and throw off previously perceived limitations. Indeed, Obama's ascent to the White House seems to confirm our nation's promise that opportunity for greatness is open to all our children, regardless of their background and current circumstances. If a man whose father tended sheep in Kenya can become the leader of the free world, surely nothing is out of reach for our kids if they work hard in school and persevere.

Just before President Obama's inauguration, I was visiting with a colleague. We are both proud parents of young children, and we were sharing our plans to mark the historical event with our kids. My colleague is African-American, and he recalled that when he was growing up, his family would encourage him by telling him that nothing – *not even the presidency* – was out of reach if he worked hard in school. But he shared with me that in his heart of hearts, he had always doubted the truth of such statements. After all, the pictures of presidents in history books included only white men. He did believe that America had a lot of potential for him, but even as a youngster, my colleague sensed certain limitations. The White House was definitely among them. However, with the advent of the Obama administration, this same colleague reflected how things have changed so dramatically for his own young children. He and his wife could encourage their kids in the same way, but their kids would no longer be burdened by the perceived limitations my colleague had sensed in his youth. There was now clear proof that there were no limits to their potential: *President Barack Obama*.

Like other Americans, I am so deeply grateful for this important milestone. The metaphor of aiming for the White House is an important one. Clearly, not all children even want to be president, and very few will ultimately be elected to that office. But knowing that the highest elected office in our land is not out of reach has important implications to children's aspirations and goals. If the White House is a possibility, so too are dreams of becoming a doctor, an astronaut, a lawyer or an entrepreneur. My heart rejoices that children around our nation will look to President Obama as proof that their dreams should know no limits. Nonetheless, I am also cognizant that there are still many children in our own country, for whom the election of Barack

Obama is not sufficient proof of the high potential our country holds for them. Indeed, the White House continues to be a dream that is not even a legal possibility for some children to realize ever.

For over two hundred years, the United States Constitution has imposed only a few eligibility requirements for those who aspire to become president.<sup>4</sup> For those living in the United States, two of those requirements are fairly minimal to attain with time. According to Article II, section I of the Constitution, one must be thirty-five years of age, and one must have been a resident of the United States for fourteen years.<sup>5</sup> By contrast, a third requirement can be an impenetrable roadblock to many children in this country. Section I also requires that the president be a “natural born Citizen.”<sup>6</sup>

The mandate of U.S. citizenship is not itself surprising; U.S. citizenship is also constitutionally necessary for those who would serve in other elected offices at the federal level.<sup>7</sup> However, the Constitution imposes a unique citizenship requirement for the presidency – one must be a “natural born” citizen. That same requirement is mentioned nowhere else in the Constitution. Moreover, the requirement is strikingly anomalous as compared to other legal contexts; the law does not generally distinguish between citizens based on the route they took to attain citizenship. Once citizenship is attained, all citizens generally enjoy the same rights and duties under the law.<sup>8</sup> Because of this unusual constitutional requirement, even after the election of Barack Obama, two very broad categories of children are legally ineligible to become president ever despite the fact that they are U.S. citizens: (A) foreign-born children who immigrate with their parents and become naturalized citizens, and (B) children of U.S. citizens who are born abroad. By pure happenstance, the dreams of such American children must have very real limitations.

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4. U.S. CONST. art. II, § 1, cl. 5 (“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”). See also Kirath Raj, *The Presidents’ Mental Health*, 31 AM. J.L. & MED. 509, 514 (2005).

5. U.S. CONST. art. II, § 1, cl. 5.

6. *Id.*

7. Laura Hunter Dietz et. al., *Public office and employment generally not available*, 3B AM. JUR. 2D ALIENS AND CITIZENS § 1879 (2008).

8. Laura Hunter Dietz et. al., *Status of Naturalized Citizen*, 3C AM. JUR. 2D ALIENS AND CITIZENS § 2271 (2008). But see, e.g., Laura Hunter Dietz et. al., *Effect of Denaturalization or Expatriation*, 3C AM. JUR. 2D ALIENS AND CITIZENS § 15151 (2008) (Naturalized citizens may have their U.S. citizenship stripped in certain circumstances. By contrast, a person who achieved U.S. citizenship by birth is subject to removal from United States soil only if the person lost her U.S. citizenship through voluntary expatriation such that she has assumed the status of an alien).

As I sat in my colleague's office and listened to his excitement about the impact of Barack Obama's presidency on his own kids, it was a bittersweet moment for me personally. I certainly shared my colleague's excitement, but I was also struck with a heavy note of sadness because my own kids fall into one of the two categories noted above. Both of my daughters are U.S. citizens by virtue of my citizenship and that of my husband. However, they were each born abroad and spent the first months of their lives in under-resourced foreign orphanages. My husband and I adopted them and brought them to the United States when they were each less than a year old. Because of the circumstances of their birth, neither of my children satisfies the requirement of being a "natural born Citizen." Unless there is a constitutional amendment to remove that requirement,<sup>9</sup> they cannot ever realistically dream of becoming president.

Many other parents face the same impediment to their child's dreams. Further, this issue obviously has a much broader scope of impact than just the relatively small numbers of children who have been brought to the United States due to foreign adoption by American nationals.<sup>10</sup> Children born outside of the territory of the United States to American nationals are also precluded from dreaming realistically of ever attaining the presidency. Such children might have never been citizens of any other nation, but if their mothers were traveling or living abroad at the time of their birth, our nation's highest office is permanently out of their reach. Moreover, children who immigrate to this country with their families and are reared to pursue the American Dream have the same legal impediment blocking any dreams they might have to become president. Even if such children become naturalized citizens, it is not enough. The mere fact that they were not born in the U.S. will forever bar them from eligibility to serve as president.

This article explores the constitutional "natural born Citizen" requirement to understand why it was initially incorporated into our federal constitution, and to assess whether it is still necessary or desirable. Section I analyzes the text of the requirement, as well as our common understanding of its mandate. Section II concludes that the requirement should be abolished, and encourages a grass roots campaign led by the parents of impacted children to effect the requirement's removal from the

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9. James C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 CONST. COMMENT. 575, 578 (2000).

10. In 2008, there was a total of 17,438 intercountry adoptions by Americans. In 2004, the number of intercountry adoptions was the highest in a decade; in that year there were 22,884 intercountry adoptions. See [http://adoption.state.gov/news/total\\_chart.html](http://adoption.state.gov/news/total_chart.html) (last visited May 19, 2009).

Constitution. Section III summarizes the conclusion and recommendations of this article.

### I. UNDERSTANDING THE CONSTITUTIONAL PROHIBITION

To understand the “natural born” citizen requirement in the Constitution, it is first important to understand certain very basic principles of the law of citizenship. In very simple terms, there are three main routes to attaining U.S. citizenship. Persons born within the borders of the United States (or on certain United States territories abroad) are entitled to U.S. citizenship regardless of the citizenship of their parents<sup>11</sup>; this route rests on the principle of *jus soli*. Alternatively, persons born outside the United States to parents who are citizens of another nation, can eventually attain U.S. citizenship via naturalization.<sup>12</sup> Finally, when a child of U.S. citizens is born outside the United States, that child is entitled to U.S. citizenship by virtue of her parents’ citizenship<sup>13</sup>; this route rests on the principle of *jus sanguinis*. For simplicity and consistency, these three routes will be referenced hereafter as the “*jus soli* route,” the “naturalization route” and the “*jus sanguinis* route” to citizenship, respectively.<sup>14</sup>

Although many important rights and opportunities in the United States are premised on having U.S. citizenship, it is im-

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11. See, e.g., Nicole Newman, *Birthright Citizenship: The Fourteenth Amendment’s Continuing Protection Against an American Caste System*, 28 B.C. THIRD WORLD L.J. 437 (2008). (“The Citizenship Clause of the Fourteenth Amendment reads, ‘All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.’ The traditional interpretation of this Citizenship Clause follows a version of the *jus soli* rule of citizenship, or citizenship by right of the soil, which means that citizenship follows birth within a national territory”).

12. Michael G. McFarland, *Derivative Citizenship: Its History, Constitutional Foundation and Constitutional Limitations*, 63 N.Y.U. ANN. SURV. AM. L. 467, 488 (2008).

13. Ho, *supra* note 9, at 579.

14. Beyond the context of Article II, references are sometimes made to just two types of citizenship: “natural born” citizens and “naturalized” citizens. In such situation, the *jus sanguinis* route is ignored as a de minimis category, or is collapsed into the first route. Indeed, in some contexts, the *jus sanguinis* route to citizenship is sometimes considered to fall into the “natural born” category since such citizenship is based on one’s birth to U.S. citizens. Nonetheless, in the context of Article II, the *jus soli* and *jus sanguinis* routes are generally distinguished from one another. See, e.g., Mary Babb Morris, *Citizenship*, 31B TEX. JUR. 3D ELECTIONS § 100 (2008); *Citizenship*, DUNNELL MINNESOTA DIGEST § 1 (4th ed. 2008); Jane L. McClellan & Jon M. Sands, *Sentencing and Punishment: Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on “Fast-Track” Sentences*, 38 ARIZ. ST. L.J. 517 (2006); Michael Kent Herring, *A Soldier’s Road to U.S. Citizenship—Is a Conviction a Speed Bump or a Stop Sign?*, 2004 ARMY LAW. 20, 21 (2004) (“The U.S. Supreme Court defines naturalization as the “act of adopting a foreigner, and clothing him with the privileges of a native citizen.” While the naturalized citizen does enjoy her newly acquired citizenship to the same extent as a native born citizen, she will never become President. The Constitution contemplates that there will be two sources of citizenship and two only – birth and naturalization”).

portant to emphasize that in most cases the route taken to citizenship is legally irrelevant.<sup>15</sup> Under the Constitution and other laws, substantive distinctions are not generally made based on which of the three routes to citizenship was taken.<sup>16</sup> Indeed, it has often been said that once citizenship is achieved, there is no “second-class citizenship.”<sup>17</sup> Eligibility to the presidency is the key exception to this general approach.<sup>18</sup>

Equipped with a basic understanding of the law of citizenship, it is now appropriate to consider the text of the constitutional requirement of a “natural born” citizen. Since the Constitution was first enacted, Article II, Section 1 has always<sup>19</sup> provided:

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.<sup>20</sup>

The presidential requirement as to citizenship is technically disjunctive in nature. One could either be a “natural born” citizen, or a citizen of the United States at the time the Constitution was adopted. The Constitution was adopted in 1787 by the Constitutional Convention, and was subsequently ratified by each state.<sup>21</sup> Thus, all who were United States citizens at that time could be president, regardless of the circumstances of their birth.<sup>22</sup> As time passed, and there were no longer living human beings who had been alive at the end of the eighteenth century, the technically disjunctive nature of the citizenship requirement became irrelevant. Today, in reality, only “natural born” citizens are eligible to become president.

In the context of Article II, it is important to understand what the term “natural born” means. Unfortunately, its meaning is unclear because it has never been construed by the Supreme

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15. James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 195 (2007); Peter H. Schuck, *Citizenship in Federal Systems*, 48 AM. J. COMP. L. 195 n.2 (2000).

16. Dietz et. al., *supra* note 8.

17. *Id.*

18. *Id.*

19. Lawrence Friedman, *An Idea Whose Time Has Come—The Curious History, Uncertain Effect, and Need for Amendment of the “Natural Born Citizen” Requirement for the Presidency*, 52 ST. LOUIS U. L.J. 137 (2007) (The text of Article II, Section I, Clause V of the Constitution has remained unchanged since enacted in 1787).

20. U.S. CONST. art. II, § 1, cl. 5. (emphasis added).

21. Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK L. REV. 347, 387 (1995).

22. *Id.*

Court or any federal court.<sup>23</sup> Nonetheless, it is undisputed that it excludes those who take the naturalization route to citizenship.<sup>24</sup> However, there are ambiguities as to the application of the “natural born” requirement to those who took the *jus soli* or *jus sanguinis* route to citizenship.

Read very literally, the requirement might exclude those who are born on American soil via caesarean section; but of course the term has never been understood in that manner.<sup>25</sup> Beyond Article II, the term “natural born” has typically been interpreted in case law to refer to those persons who have been born within the national boundaries of the United States.<sup>26</sup> Although there is a dearth of interpretive authority of the term in the context of Article II, this interpretation seems uncontroversial in also understanding who is eligible to be our president.<sup>27</sup> Indeed, all American presidents heretofore have been born within the national boundaries of the United States.

Nonetheless, this uncontroversial understanding does not clarify the eligibility of *everyone* who took the *jus soli* route to citizenship, and it does not even begin to address those who took the *jus sanguinis* route. There is still significant ambiguity in applying the “natural born” requirement to persons who are not born within our nation’s borders.<sup>28</sup> For example, in 2008, John McCain secured his party’s nomination for the presidency although he was born outside the boundaries of the United States; he was born on United States territory in the Panama Canal Zone. Assuming that the 2008 GOP presidential nominee passed Article II muster,<sup>29</sup> one might assume that U.S. citizens would

23. Friedman, *supra* note 19.

24. McFarland, *supra* note 12, at 488; Andrew D. Miller, *Terminating the “Just Not American Enough” Idea: Saying “Hasta La Vista” to the Natural-Born Citizen Requirement of Presidential Eligibility*, 57 SYRACUSE L. REV. 97, 104 (2006).

25. Richard J. Dougherty, *A Response to Originalism and Precedent: Originalism and Precedent: Principles and Practices in the Application of Stare Decisis*, 6 AVE MARIA L. REV. 155, 187 (2007); Ho, *supra* note 9, at 579.

26. Newman, *supra* note 11 (citing case law declaring Native Americans and the children of Chinese immigrants born in the United States to be “natural born” citizens).

27. Nonetheless, some scholars have relied upon the Article II presidential eligibility requirements to make such bold assertions as George Washington was ineligible to serve as president, and Zachary Taylor was our nation’s last president to pass Article II muster. See Jordan Steiker, Sanford Levinson, & J.M. Balkin, *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237 (1995).

28. See, e.g., Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881 (1988).

29. But see Gabriel J. Chin, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, 107 MICH. L. REV. FIRST IMPRESSIONS 1 (2008) (concluding that McCain is not eligible for the presidency); Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L.

also satisfy Article II if they are born on other types of United States territory abroad. However, there is significant scholarly skepticism that citizens who took the *jus soli* route to citizenship would be eligible for the presidency if they were born on American military bases, embassies and consulates in foreign countries.<sup>30</sup> There is also great doubt that those receiving U.S. citizenship pursuant to the principle of *jus soli* would be eligible for the presidency if they were born on the soil of an American territory such as Puerto Rico, American Samoa or Guam.<sup>31</sup> Thus, it appears that at least some who take the *jus soli* route to citizenship fall short of the “natural born” citizen requirement.

McCain’s case raises other intriguing issues. His presumed eligibility for the presidency may have been a lucky fluke. He was born outside the United States because his father was serving in our nation’s armed forces. If during that period of service, his mother had happened to give birth in Panama, and not within the U.S. territory of the Panama Canal Zone, McCain might not have been eligible for the presidency. Indeed, the judicially untested, but common understanding of the “natural born” citizen requirement is that it excludes from eligibility those who take the *jus sanguinis* route to citizenship: the children of U.S. citizens who are born in a foreign country.<sup>32</sup> Thus, for example, it is widely understood that the children of U.S. citizens who serve in the military and are stationed abroad, are ineligible for the presidency.<sup>33</sup> Of course, this understanding can only be confirmed or corrected by a Supreme Court interpretation of the Article II term “natural born.”<sup>34</sup> However, for the sake of simplicity, this article will assume that the conventional wisdom is correct and

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REV. FIRST IMPRESSIONS 22 (2008) (concluding that there is continued ambiguity as to whether McCain is eligible for the presidency).

30. Sarah Helene Duggin & Mary Beth Collins, *Natural Born in the U.S.A.: The Striking Unfairness and Dangerous Ambiguity of the Constitution’s Presidential Qualifications Clause and Why We Need To Fix It*, 85 B.U. L. REV. 53, 102-03 (2005).

31. *Id.* at 92-96.

32. Friedman, *supra* note 19, at 144 (It is “at best questionable” that the foreign born children of U.S. citizens fall within the category of “natural born” citizens); Duggin & Collins, *supra* note 30, at 60 (Karen Hughes, a senior White House advisor to President George W. Bush, stated the conventional wisdom in a talk show interview: “My mom always told me because I was the daughter of an Army officer born overseas in Paris, France, that under the Constitution . . . I could never run for president.” Duggin and Collins summarize, however, that there are also potentially valid interpretations of the “natural born” requirement of Article II which could support an interpretation that only naturalized citizens are excluded from eligibility for the presidency).

33. Duggin & Collins, *supra* note 30, at 60.

34. *Id.* at 61-62; Christina S. Lohman, *Presidential Eligibility: the Meaning of the Natural-Born Citizen Clause*, 36 GONZ. L. REV. 349 (2000).

those who took the *jus sanguinis* route to citizenship are barred from the presidency by Article II.<sup>35</sup>

In summary, the “natural born” citizen requirement for the presidency appears to exclude from eligibility some who took the *jus soli* route to citizenship, as well as all who took the naturalization and *jus sanguinis* routes.

To determine whether the “natural born” requirement is a continuing necessity, it is important to understand why the Drafters of our Constitution originally included the requirement in establishing the rules for presidential eligibility. Unfortunately, the Drafters did not leave much documentary evidence of their consideration of this language.<sup>36</sup> Nonetheless, it is generally accepted by scholars that the language was largely added out of concern that the fledgling nation might be dominated by foreign governments.<sup>37</sup> Scholars also cite a generalized distrust of foreigners that may have also been a secondary concern of the Drafters.<sup>38</sup> However, similar restrictions on “natural born” citizenship were proposed for senators and representatives, but ultimately rejected after James Madison eloquently argued that such restrictions might prove a disincentive for talented foreigners to come to the new country.<sup>39</sup> As a result, it is widely believed that the dominant motivation for the “natural born” requirement on the presidency was the possibility of foreign domination of the government and a particularized fear that a monarchy might be imposed on the country.<sup>40</sup>

The Drafters’ concerns about domination by foreign governments and the imposition of a monarchy might have been understandable in the initial years of our republic while our

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35. See also McFarland, *supra* note 12, at 488; Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 BYU L. REV. 927, 948 (2005) (Previous attempts to abolish the “natural born” prerequisite to the presidency were inspired in part by the assumption that certain potential candidates were ineligible to serve as president because they were born to U.S. parents outside the United States, e.g., Christian A. Herter, Franklin D. Roosevelt, Jr., Herbert Hoover, Jr., Barry Goldwater, and George Romney).

36. Duggin & Collins, *supra* note 30, at 67. (“The Convention adopted the clause as presented by the Committee of Eleven without debate on the natural born citizenship requirement. Neither Madison’s notes on the Convention nor other contemporaneous records of the debates offer insight on the delegates’ understanding of the meaning of natural born citizenship or the reasons why they agreed with the Committee that it should be included in Article II. Records of the debates of the state ratifying conventions are similarly unenlightening”). See also Seymore, *supra* note 35, at 937.

37. Miller, *supra* note 24, at 104; Sarah P. Herlihy, *Amending the Natural Born Citizen Requirement: Globalization as the Impetus and the Obstacle*, 81 CHI.-KENT L. REV. 275, 277-28 (2006); Duggin & Collins, *supra* note 30, at 70; Seymore, *supra* note 35, at 939.

38. Seymore, *supra* note 35, at 937.

39. *Id.* at 937-38.

40. Herlihy, *supra* note 37, at 277-78; Seymore, *supra* note 35, at 939.

independence from England was still in its infancy. However, as our independence is now well-established, scholars believe the “natural born” requirement no longer serves any purpose.<sup>41</sup> Indeed, place of birth is now viewed by scholars as an outdated, irrelevant test of loyalty to our nation when native born sons including John Walker Lindh, Robert Hanssen and Timothy McVeigh have betrayed their fellow citizens with such contemptible acts, but foreign born citizens including Bob Hope and John Shalikashvili have served our country with honor and distinction.<sup>42</sup> As a result, the “natural born” requirement of Article II

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41. Duggin & Collins, *supra* note 30, at 134-35.

42. Herlihy, *supra* note 37, at 283; Duggin & Collins, *supra* note 30, at 136. Non-scholars have also panned the continued presence of the “natural born” citizenship requirement in the Constitution. See, e.g., Lindsey Forson, *Constitutional Ban on Foreign Presidents Must End*, THE BATTALION (Dec. 1, 2004) (“The entire basis of what defines an American is not one’s place of birth, but rather, one’s state of mind. For a self-declared melting pot founded by the very foreign-born citizens now being excluded from running for the office of president, America must amend this Clause to ensure not only that all citizens are given equal rights but also that the ablest candidate is elected its leader. In disallowing immigrants from running for president, America does itself a huge disservice. Should the best, brightest and ablest candidate to lead America — he who best represents the ideal of Americanism — not happen to have been born there, the American people are ultimately the ones who stand to lose the most”); Lindsay Morgan, *Foreign-Born Presidential Hopefuls Face Unlikely Future*, DAILY BRUIN (Oct. 11, 2004) (UCLA student, Marshall Miller, dubbed the requirement “a ridiculous restriction” and equated it with “granting women the right to vote or granting civil rights”); Kathy Matheson, *Both Houses Ponder Foreign-Born Presidents*, ASBURY PARK PRESS, A1 (Mar. 1, 2004) (Mayor David Chai noted that immigrants have contributed much to our nation’s prosperity and for some serving in government was “just another way of serving the country”).

Nonetheless, it should be noted that some individuals have defended the “natural born” citizenship requirement even in the twenty-first century. See, e.g., Ryan Taylor, *Friday Faceoff: Foreign Born President*, ROCHESTER DEMOCRAT AND CHRONICLE, 9A (Jul. 13, 2007); Samuel B. Hoff, *Retain Citizenship Rule for the Presidency*, THE NEWS JOURNAL, 9A (Feb. 21, 2005); Vanessa Maltin, *Bill Would Make Naturalized Citizens Eligible for Presidency*, COX NEWS SERVICE (Oct. 5, 2004). Typically, such defenders of the requirement offer one or more of several arguments to maintain the status quo. They decry taking the drastic step of altering the U.S. Constitution to satisfy the political aspirations of a few individual politicians, they cite polls indicating a lack of public support for dropping the requirement, and they raise post-9/11 suspicions of other countries. These arguments are weak. First, this article explains that the most important impetus to removing the “natural born” requirement is clearly not to satisfy the political aspirations of a few foreign-born politicians, but instead to confirm America’s promise to its children and to eliminate stubborn vestiges of second-class citizenship. Second, any current lack of public support for eliminating the “natural born” requirement is likely due to a lack of a thorough vetting of the issue. Until the recent grassroots movement to enable Arnold Schwarzenegger to run for president, the issue was long considered an academic debate of only theoretical implications. More recently, practical implications to the issue have been raised, but have been largely confined to the ability of foreign born political stars like Schwarzenegger to run for president. I believe a more thorough public discussion of the issue is likely to attract more interest in amending the Constitution. Finally, xenophobia is a perennial problem in any diverse society. Obviously, the United States is not immune to that problem, but it should not prevent

has been criticized as instilling a type of “second-class citizenship.”<sup>43</sup>

## II. THE CASE FOR CHANGE

Scholars have roundly criticized the continuing requirement of “natural born” citizenship as a prerequisite for the presidency.<sup>44</sup> The requirement has ceased to serve any important purpose at this stage of our nation’s history. Instead, it is considered a legal anomaly, and a contradiction of our image as a land of immigrants and opportunity. Indeed, the requirement has been called the “stupidest provision” in the Constitution, “undecidedly un-American” and “blatantly discriminatory.”<sup>45</sup> One constitutional scholar has even dubbed the “natural born” citizenship requirement the “Constitution’s worst provision.”<sup>46</sup>

The requirement is estimated to render over 10 million U.S. citizens ineligible for the presidency – including notable public servants such as Governors Arnold Schwarzenegger and Jennifer Granholm, Secretaries of State Madeleine Albright and Henry Kissinger, Secretary of Labor Elaine Chao, and over 700 Medal of Honor Winners.<sup>47</sup> It has also been observed that in the modern era the requirement “disproportionately precludes persons of color from the Presidency, since most naturalized citizens today are from Asia and Latin America.”<sup>48</sup>

Despite these many short-comings, and despite the increase of critical scholarly attention in recent years,<sup>49</sup> it would not be

our country from living up to its egalitarian ideals. Xenophobic arguments for retaining the “natural born” requirement are grounded on emotional fears, not facts.

43. Herlihy, *supra* note 37, at 280; Seymore, *supra* note 35, at 932.

44. Friedman, *supra* note 19; Herlihy, *supra* note 37; Duggin & Collins, *supra* note 30, at 136; Seymore, *supra* note 35, at 932; Ho, *supra* note 9, at 579.

45. Herlihy, *supra* note 37.

46. Robert Post, *What is the Constitution’s Worst Provision?*, 12 CONST. COMMENT. 191 (1995).

47. Herlihy, *supra* note 37. See also John Dwight Ingram, *The First “First Gentleman”: The Role of President Jane Doe’s Husband*, 7 AM. U.J. GENDER SOC. POL’Y & L. 523 (1998). (“...Albright is a naturalized United States citizen and the daughter of a Czech diplomat whose family fled the communist takeover of Czechoslovakia when she was eleven years old”).

48. Victor C. Romero, *Challenging the Boundaries of Nationality: Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871, 886 (2003). See also [http://www.dhs.gov/xlibrary/assets/statistics/publications/natz\\_fr\\_07.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/natz_fr_07.pdf) (last visited May 19, 2009) (North American and Asia were each the regions of origin of 36 percent of persons naturalizing in 2007. Mexico was the leading country of birth for naturalizing persons in 2007. It is significant to note that Asia was the leading region of origin of new citizens in every year from 1976-2006 except in 1996-2000, which is when IRCA legalization immigrants naturalized in large numbers. Approximately ninety percent of such IRCA immigrants in 1996-2000 were from North American countries).

49. Paul A. Clark, *Limiting the Presidency to Natural Born Citizens Violates Due Process*, 39 J. MARSHALL L. REV. 1343 (2006).

simple or easy to eliminate the “natural born” citizen requirement. The consensus of scholars is that a constitutional amendment would be necessary.<sup>50</sup> Effecting such an amendment would be an incredibly time-consuming, slow process. To date, only seventeen amendments have been ratified since the adoption of the Bill of Rights in 1791.<sup>51</sup> Indeed, numerous past proposals to remove the unpopular “natural born” citizen requirement have been offered, but they have always failed due to lack of a popular “groundswell of support.”<sup>52</sup> It has been argued that the “natural born” citizenship requirement does not affect enough people to garner sufficient attention and efforts to abolish it.<sup>53</sup>

Because of the arduous process required to effect any constitutional amendment, a successful effort to remove the “natural born” requirement would necessitate the mobilization of a sizeable and passionate constituency with a strong vested interest in its removal. Such a constituency would be necessary to do the hard work to get the job done. In the dawning of the Obama administration, when parents around our country have renewed hope in the possibilities this nation holds for their children, I suggest that those with the greatest vested interest would be the parents (and other relatives) of children whose dreams are stunted by the continued presence of the “natural born” requirement of Article II. I also suggest that the unique optimism occasioned by the Obama presidency renders our nation particularly receptive to such a change to our Constitution.

As mentioned previously, my own children are both adopted. They were each born in the People’s Republic of China (“PRC”), but abandoned shortly afterwards by their respective birth parents, who remained anonymous (presumably to avoid persecution for violation of the “one child” policy, which is intended to control the country’s enormous population). Both of our children are girls. In a culture that has a preference for male children, it continues to be very common for baby girls to be

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50. Some scholars have proposed creative theories to challenge the need for a constitutional amendment to eliminate the “natural born” requirement. Elwood Earl Sanders, Jr. has asserted the Fourteenth Amendment has actually already superseded the “natural born” requirement of Article II such that naturalized citizens are currently eligible for the presidency. See Elwood Earl Sanders, Jr., *Could Arnold Schwarzenegger Run for President Now?*, 6 FLA. COASTAL L. REV. 331 (2005). Paul A. Clark has argued that the courts have the authority to strike the “natural born” requirement because it violates the Due Process Clause. See Paul A. Clark, *Limiting the Presidency to Natural Born Citizens Violates Due Process*, 39 J. MARSHALL L. REV. 1343 (2006). However, these views have not yet garnered wide support, and a consensus of the academy believes a constitutional amendment is necessary.

51. Miller, *supra* note 24, at 107.

52. Seymore, *supra* note 35, at 952.

53. Herlihy, *supra* note 37, at 288.

abandoned in the PRC. For the first few months of their lives, each of our daughters lived in extremely humble orphanages before my husband and I traveled to the PRC to adopt them, and bring them to our home in the United States. They left their native land with a passport issued by the PRC and affixed with a US immigrant visa. They are no longer Chinese citizens; within a few months of arriving in the United States, they received their United States of America certificate of citizenship.

Our daughters are now 6 and 4 years old, so they have lived the vast majority of their young lives in the United States. Despite enrollment in Mandarin lessons and my attempts to teach them Spanish, English is the only language they have ever spoken. Our daughters love pizza and *Curious George*. They memorize Bible verses for Sunday School, and they delight in the Lion Dancers during the annual Chinese New Year celebrations. With loyalty to their parents' alma mater, they flash the "Hook 'em Horns" hand gesture when the "Eyes of Texas" is played. From the comfort of our living room, they enthusiastically cheered Michael Phelps to victory last summer during the Olympics. When they see an American flag, they salute it with respect as we have taught them to do. They are all-American girls, who are proud of their country.

Like any mother, I firmly believe that both our daughters are exceptionally intelligent and warm-hearted. Indeed, I am confident that as adults they will have important contributions to make to our country. My older daughter, Frannie, has long dreamed of being a firefighter part of the week and a teacher the rest. Nonetheless, the prospect of serving in the White House has already come up in our conversations.

Throughout 2008, my husband and I followed the history-making election very closely. In the spring, we participated in our local caucus where there were just two candidates: Hillary Clinton and Barack Obama. We took our daughters with us to the caucus, and tried to explain the process. I did fail to mention, however, that it was quite unusual to have a woman and a person of color as the leading contenders. I did not want to impose limitations on their thinking or skew the way they viewed others. In the days after the caucus, Frannie mentioned several times in passing that she would like to be president and live in the White House some day. Her interest never lasted long because frankly the firefighter gig was much more glamorous to her at this point in her young life. In some ways, I was relieved that this was only a passing interest. When Frannie did mention becoming president, I frankly did not have the heart to tell her the reality of the situation. I did not want to put limits on her dreams or make her

feel in any way inferior to her peers. That lack of honesty is probably forgivable when she is just six years old, but eventually I will have to tell her the truth.

But I may have some time before that becomes necessary. And in my heart, I hope that this situation resolves itself before that time comes. As suggested above, I believe the parents of children excluded by the “natural born” requirement have the greatest vested interest in seeking its removal from the Constitution. I propose an alliance of such parents to work together to this end. A sizeable and effective coalition could be brought together: the parents of foreign-born adoptees, the parents of immigrant children, parents serving our country in the military and Foreign Service, as well as other parents on expatriate status for non-governmental employers. A parent’s love is one of the strongest motivating forces in our society. With their children’s interests at stake, parent groups have been successful in past lobbying efforts to strengthen drunk-driving laws and guarantee rights to homeschool. Organizations as diverse as the League of United Latin American Citizens (LULAC), Families with Children from China (FCC), and United Services Automobile Association (USAA) might be called upon to help coordinate the effort to effect a constitutional amendment to remove the “natural born” citizenship requirement.

However, because the parents of young children are perennially short on time, I would also recommend enlisting the efforts of grandparents of impacted children. Retired and semi-retired Americans have long been recognized as one of the most powerful voting demographics. They participate in the electoral process in numbers disproportionate to their representation in the electorate. Indeed, AARP is considered one of the most important lobbying groups in our country. Grandparents of children impacted by the “natural born” requirement could be the foot soldiers in the battle to effect a constitutional amendment.

Because political will would be necessary, publicity would also be important to the battle. There are a number of high profile individuals who might be recruited to lend support and raise visibility for a constitutional amendment to remove the “natural born” requirement for the presidency. Because of the impact of the requirement on the children of soldiers stationed abroad, well-respected retired leaders of our military like Colin Powell, Norman Schwarzkopf and John Shalikashvili might be recruited to endorse the effort. Famous naturalized citizens including Patrick Ewing, Jim Carrey, Arianna Huffington, Wayne Gretzky, Salma Hayek, Yoko Ono and Sammy Sosa might also lend their

names.<sup>54</sup> Further, high profile adoptive parents of foreign born children such as Mia Farrow, Angelina Jolie, Brad Pitt, Meg Ryan, Madonna, Steven Curtis Chapman and Mary-Louise Parker could also lend their support to the cause. Who knows? Perhaps billionaire philanthropist and naturalized citizen George Soros might be inclined to subsidize the effort financially.<sup>55</sup>

Because effecting a constitutional amendment requires navigation of the political process, it would also be important to garner the support of powerful politicians. Diverse members of Congress, including Orrin Hatch and John Conyers, Jr. (who have both introduced legislation to remove the requirement in the past<sup>56</sup>), could serve as natural allies in the Senate and House of Representatives, respectively. Further, there is reason to believe that President Obama himself may be sympathetic to efforts to remove the “natural born” citizen requirement. During the presidential campaign, his own eligibility under the clause was challenged.<sup>57</sup> Moreover, his own half-sister, Maya Soetoro-Ng clearly falls within the “natural born” exclusion due to her birth in Indonesia.<sup>58</sup>

Despite the potential human resources that could be mustered to eliminate the “natural born” requirement in the Constitution, some may question the wisdom of using those resources at such a difficult time in our history when we are struggling to find solutions to unparalleled challenges. Our nation is fighting two wars, is confronted with the unpredictable menace of international terrorism and is faced with economic problems of a severity not known since the Great Depression. Clearly, overcoming those challenges will require unwavering resolve and ample creativity. By contrast, we know how to effect a constitutional amendment; the process is laid out clearly in our Constitution. It is a fairly mechanical process, which will not divert

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54. See [http://www.nclr.org/files/48390\\_file\\_naturalized\\_US\\_citizens\\_factsheet.pdf](http://www.nclr.org/files/48390_file_naturalized_US_citizens_factsheet.pdf) (last visited Jan. 30, 2009).

55. See <http://www.forbes.com/lists/2006/10/L9II.html> (last visited Jan. 30, 2009).

56. Duggin & Collins, *supra* note 30, at 150-151. See also *Presidency Should Be Open to All Citizens*, INDEPENDENT FLORIDA ALLIGATOR (Nov. 23, 2004), noting the “political savvy” of proposing such legislation when Hispanics are a voting demographic of growing importance; Earl O. Hutchinson, *President Arnold? Talk of Amending the Constitution Puts Immigration Issue Back into America's Public Policy Table, Where It Belongs*, DAILY NEWS OF LOS ANGELES, V1 (Nov. 21, 2004); Suzanne Nelson, *Many Fixes Floated for Presidential Citizenship*, ROLL CALL (Oct. 6, 2004).

57. Daniel P. Tokaji, *The Justiciability of Eligibility: May Courts Decide Who Can Be President?*, 107 MICH. L. REV. FIRST IMPRESSIONS 31 (2008). See also [http://urbanlegends.about.com/od/barackobama/a/obama\\_citizen.htm](http://urbanlegends.about.com/od/barackobama/a/obama_citizen.htm) (last visited Jan. 30, 2009); <http://www.stoptheaclu.com/archives/2008/07/05/is-obama-a-natural-born-citizen/> (last visited Jan. 30, 2009).

58. See <http://www.zimbio.com/Maya+Soetoro-Ng> (last visited Jan. 30, 2009); [http://en.wikipedia.org/wiki/Maya\\_Soetoro-Ng](http://en.wikipedia.org/wiki/Maya_Soetoro-Ng) (last visited Jan. 30, 2009).

ingenuity that is much needed elsewhere. In reality, effecting the constitutional amendment will require only our collective will and the persistence of a dedicated group to oversee the process. Moreover, because the “natural born” requirement is widely perceived as elitist and in violation of our egalitarian ethic, an effort to dismantle it could actually help bolster our nation’s spirits during this difficult time. It could serve a unifying role as we come together with common moral resolve in furtherance of our children’s dreams.

### III. CONCLUSION

The “natural born” citizen requirement of Article II is outdated and no longer necessary. It now chiefly serves to limit the dreams of millions of children in our country. Although the requirement technically only precludes such children from serving as president, the presidency is an important metaphor for lofty childhood aspirations. As a result, children’s dreams for their futures may be more broadly curtailed.

Seeking to effect a constitutional amendment to remove the “natural born” requirement is desirable, but it will not be a quick process. Nonetheless, effecting such an amendment is not a complicated process; no creative solutions are necessary. Further, there are important segments of the public who would have the dedication to coordinate such an effort, as well as key persons of influence who could help the process along. The families of children who are excluded by the “natural born” requirement would be particularly ideal candidates to lead the effort. Such an amendment would be an important step in confirming our nation’s promise to all of its children, and eliminating any stubborn vestiges of “second class citizenship” at a time when the dawn of the Obama administration has brought hope and raised the aspirations of so many.