

WHAT IS THE CONSTITUTION'S WORST PROVISION?

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I confess that when Sandy Levinson asked me to contribute to this Symposium I had a momentary flash of panic, the same searing sense of stammering inadequacy that always seems to well up whenever my ten-year-old daughter Amelia asks such pointed questions as "What is your favorite movie?" or "What color do you hate the most?" For someone like myself who perennially and professionally shifts among subdued shades of gray, celebrating nuance and complexity, such invitations to extreme and personal self-assertion are not only disruptive, they are downright painful. They flex muscles that have long atrophied.

Swallowing my anxiety, however, and accepting the assignment, I first faced a conundrum. What, after all, should count as the Constitution? I have in the past been critical enough of First Amendment doctrine that I have seen as deeply mistaken. But should such doctrine be treated as the Constitution for purposes of this Symposium? Probably not, because the question we have been asked to answer seems in its premises to point toward a specific and contained document, the one generally printed at the beginning or end of constitutional law casebooks. In this sense the question appears to embody an implicit distinction between amendment and interpretation.

Perhaps because this distinction has relatively little meaning in the areas in which I work, I should be clear that I rarely in fact read the document of the Constitution. Although the document creates a profound structure of governance, it has always seemed to me to contain an extraordinarily sparse and haphazard collection of rules for the management of that structure. Because this Symposium is not the proper occasion to assess large and deep questions of constitutional design (such as whether the Constitution erred in failing to establish a parliamentary system), I felt compelled to turn to this odd (and largely unfamiliar) collection

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of rules to find my candidate for the Constitution's worst mistake.

I was looking for a relatively clear rule that continues today in legal force and yet that somehow stands out as egregiously unacceptable. I thus ruled out the original constitutional provisions dealing with slavery, for these have long since been discredited and rendered inoperable. I also ruled out provisions like the direct tax clause (Art. I, § 9, cl. 4), whose meaning has never been very clear to me.

Given these constraints, my final choice was Article II, § 1, cl. 5:

No person except a natural born Citizen, or Citizen of the United States at the time of the Adoption of this Constitution, shall be eligible to the Office of President

The Clause is currently in force. It is remarkably innocent of both legislative history and judicial gloss.¹ Although it contains a number of important ambiguities, notably on the question of whether foreign-born children of American citizens qualify as "natural born,"² the Clause is highly objectionable because it unmistakably and clearly prohibits naturalized citizens from becoming President.

Without doubt Joseph Story correctly identified the purpose of this prohibition as cutting "off all chances for ambitious foreigners, who might otherwise be intriguing for the office."³ We might therefore understand the Clause as resting on three propositions: It distinguishes citizens from foreigners; it reserves the Office of the Presidency for the former; and it classifies naturalized citizens with the latter. It is the third and last proposition that I find so disturbing.

Our constitutional order does not ordinarily distribute the prerogatives of citizenship on the basis of where or how one is born.⁴ The Court has explained that this is because:

1. See generally, J. Michael Medina, *The Presidential Qualification Clause in This Bicentennial Year: The Need to Eliminate the Natural Born Citizen Requirement*, 12 Okla. City U. L. Rev. 253 (1987).

2. On this question, see Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 Md. L. Rev. 1 (1968); Eustace Seligman, *A Brief for Governor Romney's Eligibility for President*, 113 Cong. Rec. 35, 109 (1967).

3. Joseph Story, *Commentaries on the Constitution of the United States* 541 (Abridged Edition, 1833) (reprinted Carolina Academic Press 1987).

4. For a possible exception involving so-called "Non-Fourteenth Amendment" citizens, i.e., children of U.S. citizens who are born abroad, see *Rogers v. Bellei*, 401 U.S. 815 (1971).

Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other. Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency.⁵

Our constitutional order, in other words, divides citizens from non-citizens on the basis of membership in our polity. Allegiance is the sign of membership. Because allegiance is a matter of voluntary commitment rather than birth, it should not systematically differ as between naturalized and natural born citizens. That is why virtually everywhere in our constitutional order "the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive."⁶ The one exception is the clause of the Constitution we are now considering.

The exception arises because the Clause makes a person's status at birth a proxy for allegiance. Thus at the very heart of the constitutional order, in the Office of the President, the Constitution abandons its brave experiment of forging a new society based upon principles of voluntary commitment; it instead gropes for security among ties of blood and contingencies of birth. In a world of ethnic cleansing, where affirmations of allegiance are drowned in attributes of status, this constitutional provision is a chilling reminder of a path not taken, of a fate we have struggled to avoid. It is a vestigial excrescence on the face of our Constitution.

5. *Luria v. United States*, 231 U.S. 9, 22 (1913).

6. *Schneider v. Rusk*, 377 U.S. 163, 165 (1964).