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A NATURAL ARISTOCRACY?

*Randall Kennedy**

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

One concrete way of measuring the extent to which people affiliated with different social groups are full and equal members of this nation is to ask whether a person associated with that group could plausibly be elevated to the highest office in the land. The added difficulties, solely on the basis of race or gender, that an African-American or female presidential candidate faces, regardless of that person's talents, are a testament to the extent to which this society is still marked by racism and sexism. One might take some minimal comfort, though, in recognizing that their difficulties are the consequence of social biases rather than formal legal barriers, for the very point of the passage quoted above from Article II of the Constitution is to declare in effect that *any* native-born American over thirty five years of age who has resided in the United States for fourteen years is eligible to serve as President.² It thus exemplifies—by being inclusive—what is among the best aspects of the American political tradition.

Yet the clause also illustrates one of the least admirable parts of that tradition.³ The reason, therefore, that I choose this provision as my least favorite part of the Constitution is that, with one now-meaningless exception—persons who were citizens

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1. U.S. Constitution, Art. II, § 1, cl. 5.

2. There are, of course, two caveats to the statement in the text. Article I, § 3, cl. 7 allows Congress, upon impeaching a federal official, to disqualify them from "hold[ing] and enjoy[ing] any Office of honor, Trust or Profit under the United States," and the 22nd Amendment disqualifies anyone who has already served two terms as President. Neither presents the kinds of problems generated by the clause under discussion.

3. See the important article by Roger Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 *Am. Pol. Sci. Rev.* 549 (1993).

of the United States at the time the Constitution was adopted—it wholly *excludes* from eligibility for the Presidency all persons who are not native born.

Formally barred from the Presidency, then, are people who may have invested their all, even risked their lives, on behalf of the nation, some of them even before becoming citizens, many others afterward.⁴ This idolatry of mere place of birth seems to me an instance of rank superstition. Place of birth indicates nothing about a person's willed attachment to a country, a polity, a way of life. It only describes an accident of fate over which an individual had no control. It is a truly "immutable" aspect of one's biography, in today's world more so even than ethnicity or gender.

All citizens of the United States should have an equal legal right to vie for the nation's highest office; more precisely, any inequalities in that right should require full defense, as perhaps can be given in regard to post-impeachment and post-two-term-service disqualifications. But Article II imposes a totally *unjustified* inequality. There are many reasons why Henry Kissinger should not have become President, but his having been born in Germany is certainly not one of them. The natural-born citizen requirement embodies the presumption that some citizens of the United States are a bit more authentic, a bit more trustworthy, a bit more American than other citizens of the United States, namely those who are naturalized. It establishes the most literal kind of "natural aristocracy," wholly different from Jefferson's own invocation of that notion, in regard to eligibility to become Head of State.⁵

It may be that the clause is of more symbolic than "practical" importance. Yet Justice Holmes pointed out many years ago that we "live by symbols" and even clichés. It is important that a formal proposition of American life is that *every* native-born American child could conceivably grow up to become President, and we can legitimately criticize American politics to the extent that any such aspirations are frustrated by the unwillingness of people to judge candidates only on the basis of achievement

4. One would be curious, for example, how many Medal of Honor winners have been ineligible for the Presidency, to mention only the most obvious category of individuals who have proved their devotion to the United States quite literally above and beyond any normal call of duty.

5. Because the "rules" of this symposium included a Rawls-like "veil of ignorance" in regard to choices made by other participants, I did not learn until after submitting these remarks that Robert Post had also chosen this clause. I am delighted to incorporate by reference his eloquent denunciation of its implications.

rather than ascription. Such aspirations ought not be denied every naturalized citizen of the United States, regardless of the fortuity of place of birth.