

COMMENTS ON AN AMENDMENT TO REPEAL THE NATURAL BORN CITIZEN CLAUSE

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INTRODUCTION

I am delighted to have this opportunity to respond to Professor Walsh's proposal to repeal the Natural Born Citizen Clause.¹ To the extent Professor Walsh has committed himself to make real what easily could have remained an academic whimsy, I wish him Godspeed. I wish I had half of his optimism, for reasons I will explain.

Professor Walsh's motives are generous: he wants to allow more individuals into the American family, heal our broken politics, and use constitutional law as the great teacher, and for all these reasons, I commend him. But, perhaps out of Burkean caution (or elite cynicism, which often amounts to the same thing), I worry that his effort to excise the requirement of birth from Article II could have the unintended consequence of weakening our commitment to birthright citizenship in section 1 of the Fourteenth Amendment. I also wonder whether Professor Walsh's medicine treats the right ailment afflicting American political culture, at least at this particular moment. And in that sense, although I wish him well, I cannot help but feel a mix of apprehension and bemusement at Professor Walsh's bold plan.

I. A NARROWING (PERHAPS CLOSED) WINDOW OF OPPORTUNITY

Professor Walsh has decided to take us once more into the breach to repeal the Natural Born Citizen Clause, and it is a testament to his strong principles, intellect, and tenacity that he's done so. But the

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1. U.S. CONST. art. II, § 1.

prospects look dim. Every prior effort to repeal the Natural Born Citizen Clause, going all the way back to the nineteenth century, has ended in failure.

I laud Professor Walsh for trying to find some way to use the constitutional amendment process to mend our deeply divided political culture. His idea is that Republicans and Democrats could coalesce around abolishing the Natural Born Citizen Clause—this most “un-American”² of constitutional provisions—because it needlessly keeps skilled and capable individuals from ever ascending to the presidency. Individuals like former Michigan Governor Jennifer Granholm, a Democrat, or current Secretary of Transportation Elaine Chao, a Republican, are forever kept out of the Oval Office by an accident of birth, as are hundreds of other patriotic, service-minded citizens that we have never heard of.

In Professor Walsh’s calculus, Democrats would support such an amendment because they are generally inclined to have liberal attitudes towards citizenship and immigration anyway and are therefore a ready constituency. Republicans will join the effort because they are the most eager to shed their image as reflexive nativists. Republican backing—indeed, their spearheading—of a repeal measure will prove to all observers that the party is not so much anti-immigrant as anti-illegal immigrant. Sounds like an opportune constitutional moment. So, what’s the catch?

Well, I think it can be summed up in a tweet I saw recently about politics in the era of President Donald Trump: “[i]n 2018 anyone who takes a regular a[**] nap wakes up as Rip Van Winkle.”³

I fear that between the time Professor Walsh wrote this proposal and today, times have changed. The old conventional wisdom was that mainline Republicans were against illegal immigration but were fine with legal immigration. Theirs was an argument about law and order, not about immigrants per se.

It is now becoming apparent that the conventional wisdom has changed. The emerging GOP orthodoxy—or at least plurality—is that

2. Kevin C. Walsh, *The “Irish Born” One American Citizenship Amendment*, 13 DUKE J. CONST. L. & PUB. POL’Y 57, 59 (2018).

3. @upbeatprof, TWITTER (Jan. 25, 2018, 8:47 PM), <https://twitter.com/upbeatprof/status/956750392733216769>.

all immigration is bad.⁴ The Trump-backed RAISE Act,⁵ for instance, proposes to reduce *legal* immigration by over forty percent.⁶ One journalist reported that audience members at the Conservative Political Action Conference (CPAC) actually booed a speaker who mentioned the “beauty” of a naturalization ceremony.⁷ So, while some Democrats may still be willing to join an effort to repeal the Natural Born Citizen Clause, it seems like the window of opportunity has shrunk, if not entirely disappeared, when it comes to finding partners in the GOP on this issue.

II. CAN WE THROW OUT THE NATURAL BORN WITHOUT THE BIRTHRIGHT?

I am sympathetic to the notion that the accident of birth is a poor proxy for allegiance. Professor Walsh offers unassailable logic on that front. Yet, I cannot help but feel a deep sense that citizenship matters, and, more pointedly, that natural born citizenship matters.

Being a natural born citizen doesn’t matter for its exclusivity, nor does it matter because it’s a good heuristic for loyalty; it matters because of its apolitical register. It matters because the clause, “No Person except a natural born Citizen” has a textual echo in section 1 of the Fourteenth Amendment: “All persons born . . . in the United States . . . are citizens of the United States. . . .”⁸ The Fourteenth Amendment intentionally took the whole matter of citizenship out of the political realm and used one indisputable biological fact—birth—

4. See Peter Beinart, *It’s Not Illegal Immigration That Worries Republicans Anymore: The Trump-Era GOP Cares More About the National Origin and Race of Immigrants than the Methods They Used to Enter the United States*, THE ATLANTIC (Feb. 18, 2018), <https://www.theatlantic.com/politics/archive/2018/02/what-the-new-gop-crack-down-on-legal-immigration-reveals/553631/>; Steve Chapman, *Trump Leads GOP in Turn Against Legal Immigration: The President’s Plan Would Slash Legal Immigration by as Much as Half, the Most Drastic Cut in Nearly a Century*, REASON (Feb. 15, 2018), <https://reason.com/archives/2018/02/15/trump-leads-attack-on-legal-immigration>.

5. Reforming American Immigration for Strong Employment Act, S. 354, 115th Cong. (2017).

6. Berny Belvedere, *The RAISE Act: An Explainer*, NAT’L REV. (Aug. 8, 2017 8:00 AM), <https://www.nationalreview.com/2017/08/raise-act-immigration-bill-explainer-trump/>.

7. Philip Wegmann (@PhilipWegmann), TWITTER (Feb. 23 2018, 12:50 PM), <https://twitter.com/PhilipWegmann/status/967139518909427712>.

It is possible, however, that the audience reaction was to the idea that immigrants would be good Republican voters, or that Mexican immigrants share conservative values. See Sara Lee, *Update-Debunked?: Booing Naturalization of Immigrants is Anti-Conservative*, CPACers, REDSTATE (Feb. 24, 2018, 6:02 PM), <https://www.redstate.com/slee/2018/02/24/booing-naturalization-immigrants-anti-conservative-cpacers/>.

8. U.S. CONST. amend. XIV, § 1.

as the metric for belonging. Naturalization procedures can be fiddled with, immigration rules can be expanded or contracted, but being born in the United States is all that is required to be a citizen of the United States.

Changing the natural born requirement of Article II for inclusive reasons could be used by others, with less enlightened goals, to undermine the birthright citizenship clause of the Fourteenth Amendment⁹—either directly through a process of Article V repeal, or by softening commitments to the existing textual guarantee.¹⁰ Their argument would go something like this: If we don't think the accident of birth is important enough to determine who should lead the nation, why should we think it's important enough to determine who can be a member of the nation?

And so, as much as I see in Professor Walsh's proposal the opportunity for inclusion—I see in it the potential diminution of what the Union soldiers, the Freedmen, the marchers across Edmund Pettus Bridge, and the Freedom Riders bled and died for—a right to be treated as United States citizens according to their birthright. Until I can be certain that repeal of Article II, section 1 will not degrade our collective commitment to section 1 of Amendment XIV, I will feel uneasy.

III. A PROMISING TREATMENT: BUT IS IT THE RIGHT DIAGNOSIS?

Finally, I am conflicted about Professor Walsh's proposal because I'm not certain it is aimed at the right pathology in American politics. We have right now, today, an unapologetic birther sitting in the Oval Office.¹¹ Donald J. Trump rode what I believed to be the lunatic fringe of American political culture straight into the White House.

9. Philip Bump, *Donald Trump and Scott Walker Want to Repeal Birthright Citizenship. It's Nearly Impossible.*, WASH. POST: THE FIX (Aug. 18, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/08/18/donald-trump-and-scott-walker-want-to-repeal-birthright-citizenship-its-nearly-impossible/?utm_term=.dc2b5e76e1d0 (noting the opposition of at least seven 2016 Republican presidential candidates to “birthright citizenship”).

10. Although it remains an unorthodox position, some individuals, including apparently President Trump, insist that birth on American soil does not automatically confer American citizenship, despite the text and history of the Fourteenth Amendment and Supreme Court precedent on the topic. See Robert Farley, *Trump Challenges Birthright Citizenship*, FACTCHECK.ORG (Nov. 13, 2015), <https://www.factcheck.org/2015/11/trump-challenges-birthright-citizenship/> (remarks of then candidate Trump: “You don't need a new amendment. All we have to do is go back to Congress and have a rather routine—it's been fully vetted now, Bill. I was right on the anchor babies.”).

11. Birtherism is the conspiracy theory that President Barack Obama was not born in the United States or was born to Kenyan parents and smuggled into the country as a baby, and

If anybody doubts what the President thinks about certain immigrants, I will refer you to his own words about immigration from Haiti and Africa: “Why are we having all these people from sh**hole countries come here?”¹² He also asked, why we couldn’t admit more people from Norway.¹³ (For those who thought “sh**hole” a crass expression for unskilled, I think Senator Patrick Leahy had the best response: “Being from Norway is not a skill.”).¹⁴

Professor Walsh has suggested that taking out the Natural Born Citizen Clause of the Constitution could disrupt the ability of white nationalists to coordinate around that textual feature. Perhaps. But one thing the debate over President Obama’s birthplace revealed was that the conflict could only temporarily mask the real objections of the birthers. Once Obama produced his birth certificate, it did little to quell the most dedicated critics who had coalesced around the issue of his birthplace.¹⁵ But it did expose one thing—the birthers and their enablers didn’t oppose President Obama because he wasn’t a natural born citizen—they opposed him because he wasn’t a natural born *white* citizen.

Removing the Natural Born Citizen Clause from the Constitution may not remedy that noxious attitude as much as push it back into the shadows, or enable it to disguise itself in other garb. The Clause drew this racial bias out into the open. Producing a birth certificate

therefore cannot be a “natural born citizen.” There are a number of variants of the theory, of increasing offensiveness, all incredible. President Donald Trump has still not apologized to President Barack Obama for attacks on his citizenship. See Chris Cillizza, *Donald Trump’s Assault on Truth Circles Back to Birtherism*, CNN: THE POINT (Nov. 29, 2017, 8:23 AM), <https://www.cnn.com/2017/11/29/politics/trump-president-birth-certificate/index.html> (noting reports that President Trump is still questioning the authenticity of President Obama’s birth certificate). I am also troubled at the way Professor Walsh addresses the “birther” issue in his piece, as just an example of an “eligibility challenge[] based on disputed facts.” Walsh, *supra* note 2, at 63. Disputes about the fact of President Obama’s birthplace are as reasonable as disputes about the moon landing, the heliocentric theory of the solar system, and the existence of atoms.

12. Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.6dd5e503eeae.

13. *Id.*

14. Jennifer Bendery, *Trump’s Homeland Security Chief Not Sure If Norway Is Mostly White*, HUFFPOST (Jan. 16, 2018, 1:38 PM), https://www.huffingtonpost.com/entry/kirstjen-neilsen-norway-white-trump_us_5a5e2a44e4b0fcbc3a13d4bb4.

15. Even in 2016, a third of Republicans and one tenth of Democrats didn’t think Obama was born in the United States. See Kyle Dropp & Brendan Nyhan, *It Lives. Birtherism Is Diminished but Far from Dead.*, N.Y. TIMES: THE UPSHOT (Sept. 23, 2016), <https://www.nytimes.com/2016/09/24/upshot/it-lives-birtherism-is-diminished-but-far-from-dead.html>.

illuminated the ugly truth behind so much opposition to our first African American President, his legitimacy and his legacy.

CONCLUSION

I hope that my skepticism and fears concerning Professor Walsh's plan are unfounded. There is nothing I would like better than to be proven wrong. There is much power in using the amendment process as a moment of clarifying who we are and who we want to be, and Professor Walsh's eagerness to make his proposal a reality is an inspiration. Perhaps repeal would be worth it—perhaps for the Granholm's and Chao's of the future, perhaps for the Dreamer who aspires to be President, repeal is worth the attendant risks.

But if we were to follow Professor Walsh's call, I would want it understood, and clearly, that changing the Constitution to eliminate the Natural Born Citizen Clause would not damage our commitments to Fourteenth Amendment birthright citizenship; and that repeal would not be the last, but the first step in a far more sweeping and more difficult project of forever disentangling our notions of race from our notions of American citizenship.