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# LIMITING THE PRESIDENCY TO NATURAL BORN CITIZENS VIOLATES DUE PROCESS

PAUL A. CLARK\*

## INTRODUCTION

Article II of the United States Constitution declares that the President of the United States must be a “natural born citizen.”<sup>1</sup> In recent years, the number of legal scholars attacking this provision has been growing, and there have been numerous calls for a constitutional amendment to repeal this provision. Oddly, no one has argued that this provision can be thrown out by judges; however, it seems clear that this provision is in complete contradiction to the current understanding of the Fifth Amendment’s Due Process Clause. Numerous Supreme Court precedents have said that classifications based on national origin are subject to strict scrutiny and are presumptively unconstitutional for the federal government or the states. Moreover, there is ample precedent for the view that a constitutional amendment can overrule an earlier part of the constitution by implication, as well as by explicit repeal. Hence, there is nothing radically new in the idea that the Due Process Clause of the Fifth Amendment can be held to overrule the “Natural Born Citizen” Clause of Article II.

## I. STATUTORY CONSTRUCTION AND REPEAL OF EARLIER PROVISIONS

It is a basic rule of legal interpretation that statutes should not be read to render one provision of a code voided by another unless there is a clear contradiction between the two provisions:

[I]t is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect

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1. U.S. CONST. art. II, § 1, cl.5.

contemplated by the legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another.<sup>2</sup>

More recently, the Court has noted that “where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”<sup>3</sup> This rule of interpretation applies no less to constitutions than to ordinary statutes. Where two constitutional provisions can be read harmoniously, they ought to be, unless there is a clear contradiction or clear intent to abrogate an earlier provision.

Nevertheless, there are times when there is an unavoidable conflict between two provisions and one must take precedence over the other. Before discussing the Fifth Amendment and the Natural Born Citizen Clause, it will be helpful to lay out the four different ways two provisions can be in conflict when an earlier provision can be regarded as abrogated by a later one.

The first is by an *explicit repeal*, for example, “The eighteenth article of amendment to the Constitution of the United States is hereby repealed.”<sup>4</sup>

Second is by *explicit limitation*, for example, an amendment stating: “The Sixth Amendment right to trial by jury in criminal cases is hereby limited to felonies.” That would not repeal the sixth amendment but would limit it. This example is necessarily fictitious in the constitutional context because the United States Constitution has no such amendments, but this type of limitation is quite common in court decisions where a prior decision is not overruled but is “limited to the facts” of the prior case.<sup>5</sup> A var-

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2. *Peck v. Jenness*, 48 U.S. 612, 623 (1849).

3. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984); *see also* *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (holding that evidence of intention to repeal an earlier statute must be “clear and manifest”); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (“When there are two acts upon the same subject, the rule is to give effect to both if possible.”); *Cathedral Candle Co. v. U.S. Int’l Trade Comm’n*, 400 F.3d 1352, 1365 (Fed. Cir. 2005) (noting that “[t]he Supreme Court has frequently explained that repeals by implication are not favored”).

4. U.S. CONST. amend. XXI, § 1.

5. It should also be mentioned that courts often find implicit limitations in the language of provisions that are worded more broadly. For example, Article III’s provision that “trial of all crimes . . . shall be held in the state where the said crimes shall have been committed” looks absolute, but it has been interpreted as merely a right of the accused. U.S. CONST. art. III, § 2, cl. 3. This exception began as a requirement of due process under the theory that obtaining a fair trial might sometimes require change of venue. *See Rideau v. Louisiana*, 373 U.S. 723 (1963). If this were the theory, then it would be an excellent example of what this paper examines: the overruling of one constitutional provision by the requirements of “due process.” Yet Rule 21 of the Federal Rules of Criminal Procedure permits transfer “[u]pon the

iation on explicit limitation is a clarifying amendment. For example, the Eleventh Amendment says “[t]he judicial power of the United States shall not be construed to extend to any suit” against states by citizens of other states. The amendment does not alter Article III, but it requires that Article III be construed more narrowly than its wording might otherwise suggest.<sup>6</sup>

The third and most common way that a constitutional provision is overturned is by *necessary implication* because two provisions are logically contradictory. For example, the Seventeenth Amendment, providing for direct election of senators, necessarily contradicts the Article I provision providing for appointment of senators, even though the amendment makes no explicit reference to Article I. It is logically impossible for both provisions to exist at the same time.

The fourth way a constitutional provision can be overturned is by *practical incompatibility*. This occurs when, although the language of both provisions would permit each to exist without contradiction, one would limit the other so much that for all practical purposes they are regarded as incompatible. Another way to look at this is that the basic principles underlying two provisions are incompatible. This method of overruling an amendment by implication is somewhat controversial, but has been used by the Supreme Court on occasion. The example which will be fleshed out in more detail below is the Supreme Court’s decision in *Fitzpatrick v. Bitzer*,<sup>7</sup> which held that the principle of state sovereignty underlying the Eleventh Amendment was incompatible with the principle of national supremacy underlying the Fourteenth Amendment.

The first and second categories of overruling provisions are not particularly important for this paper; we will be focusing on the third and fourth categories, which are most often employed by courts to examine the continuing validity of constitutional provisions. The Natural Born Citizen Clause falls into the third

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defendant’s motion” for “convenience” as well as when justice requires. FED. R. CRIM. P. 21.

6. Article III authorizes federal jurisdiction in suits “between a State and the citizens of another State” — part of what we now call “diversity jurisdiction.” U.S. CONST. art. III, § 2, cl. 1. The Eleventh Amendment requires that diversity jurisdiction be construed so that states can sue individuals, but individuals cannot sue states. U.S. CONST. amend. XI. The amendment also forbids suits against states by non-citizens in “federal question” cases. *Id.* The Supreme Court has long held that Article III cannot reasonably be construed to forbid federal question suits by non-citizen while permitting them for citizens, so the Eleventh Amendment implicitly forbids suits by citizens against their own state. See *Hans v. Louisiana*, 134 U.S. 1 (1890).

7. 427 U.S. 445 (1976).

category, and so presents a strong basis for finding the provision incompatible with the Fifth Amendment.

Let me also make a rather obvious point, but one which is worthwhile to state explicitly. Every lawyer knows that the meaning of a statute or provision goes beyond the mere words of the provision. The meaning of the Fifth Amendment is not wholly contained in its words, but has been authoritatively explained by hundreds of Supreme Court opinions. Thus, mention of "the Fifth Amendment" necessarily means the Fifth Amendment as it is currently understood by the courts.<sup>8</sup>

## II. NATIONAL ORIGIN AS INVALID CLASSIFICATION

It is settled law that legal classifications based on national origin are subject to strict scrutiny and presumptively unconstitutional. It is worthwhile to briefly review some of this precedent.

*Korematsu v. United States*<sup>9</sup> is understood to establish the principle that race and national origin are subject to strict scrutiny. That case involved an American citizen of Japanese descent who challenged the exclusion of Japanese from the West Coast. The majority held, "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [C]ourts must subject them to the most rigid scrutiny."<sup>10</sup> The majority went on to declare that, "[n]othing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify [exclusion of Japanese citizens]."<sup>11</sup> The Court never said what specific provision of the Constitution was at issue. The majority merely declared that "[c]ompulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions."<sup>12</sup>

Although the majority did not explicitly say that the Fifth Amendment was the provision at issue, all three dissenting opinions cited the Fifth Amendment and seemed to assume it was the provision whose application was at issue. Justice Murphy stated the issue most explicitly: "Being an obvious racial

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8. I make this obvious point mainly to forestall an objection which might be raised by non-lawyers that the paper is not about the Fifth Amendment at all, but only about the Court's current interpretation (or perhaps even reinterpretation) of the amendment. To that objection I respond that there is, of course, no legal difference between the Fifth Amendment and courts' interpretations of the Fifth Amendment.

9. 323 U.S. 214 (1944).

10. *Id.* at 216.

11. *Id.* at 218.

12. *Id.* at 219-20.

discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment.”<sup>13</sup>

Justice Murphy was ahead of his time in declaring that the Fifth Amendment guaranteed “equal protection,” since it was not until 1954 that the full Supreme Court embraced this position. In *Bolling v. Sharpe*,<sup>14</sup> the Court held that racial discrimination in the District of Columbia was unconstitutional, declaring:

The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.<sup>15</sup>

Thus, the Court went on to “hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.”<sup>16</sup> The holding in *Bolling* has been almost universally applauded.<sup>17</sup>

Since *Bolling*, repeated precedents over the last fifty years have affirmed that the Fifth Amendment guarantee of due process requires equal protection. In 1976, the Supreme Court declared that “the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups.”<sup>18</sup> In 1990, the Court declared:

“The Constitution’s guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government’s use of race classifications.”<sup>19</sup> In

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13. *Id.* at 234-35, (Murphy, J., dissenting). See also *Korematsu*, 323 U.S. at 245-46, (Jackson, R., dissenting) (arguing that the Court’s approval of the internment program was a dangerous blow to liberty); *id.* at 232, (Roberts, O., dissenting) (calling the military order a violation of due process).

14. 347 U.S. 497 (1954).

15. *Id.* at 499.

16. *Id.* at 500.

17. There are some notable originalist exceptions. Distinguished jurist Michael McConnell has written that “the suggestion that the Due Process Clause of the Fifth Amendment prohibits segregation of public facilities is without foundation.” *Michael W. McConnell (concurring in the judgment)*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* at 158, 166 (Jack M. Balkin ed., 2001).

18. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

19. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 604 (1990).

*Bolling v. Sharpe*, the companion case to *Brown v. Board of Education*,<sup>20</sup> the Court held that equal protection principles embedded in the Fifth Amendment's Due Process Clause prohibited the federal government from maintaining racially segregated schools in the District of Columbia: "[I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."<sup>21</sup> Consistent with this view, the Court has repeatedly indicated that "the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth."<sup>22</sup>

A few years later, in *Adarand Constructors, Inc v. Pena*,<sup>23</sup> the Supreme Court reiterated that "the equal protection obligations imposed by the Fifth and the Fourteenth Amendments" are "indistinguishable."<sup>24</sup>

It is also worth noting that, in the context of the Fifth Amendment's requirement of equal protection, in *Frontiero v. Richardson* an eight to one majority declared that sex discrimination in compensation, as practiced by the United States military, constituted "unconstitutional discrimination . . . in violation of the Due Process Clause of the Fifth Amendment."<sup>25</sup> These cases leave no doubt that the Fifth Amendment requires the federal government, absent a compelling reason or subsequent modification by later amendments, to avoid discrimination based on race or national origin.

There is also an explicit statement by the Court that discrimination between citizens based on whether or not they are native born is unconstitutional. Ten years after *Bolling*, in *Schneider v. Rusk*,<sup>26</sup> the Court declared unconstitutional a statute that revoked the citizenship of naturalized citizens who lived abroad but did not revoke the citizenship of "natural born citizens" in the exact same circumstances. The Court held that:

This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make. Moreover, while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due

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20. 347 U.S. 483 (1954).

21. *Id.* at 500.

22. *Metro Broad.*, 497 U.S. at 604-05 (citing *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (plurality opinion)).

23. 515 U.S. 200 (1996).

24. *Id.* at 217.

25. *Frontiero v. Richardson*, 411 U.S. 677, 679 (1973). *See also* *Rostker v. Goldberg*, 453 U.S. 57 (1981) (holding that draft registration for men only was justified by a legitimate state interest, but affirming that Congress was required by "due process" and "equal protection" (terms the Court used interchangeably) to avoid sex discrimination without a good reason).

26. 377 U.S. 163 (1964).

process. A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship.<sup>27</sup>

This should be the end of the story. *Schneider* is clear that treating natural born citizens and naturalized citizens differently is contrary to the Fifth Amendment. Forbidding naturalized citizens from being president or vice president is a form of discrimination that limits their options and treats them as second-class citizens.

#### A. State Interest

Since national origin is a suspect class, it is not absolutely unconstitutional to treat natural born and naturalized citizens differently in every case, but the different treatment must be narrowly tailored to serve a compelling state interest. It is hard to imagine any legitimate governmental interest in the Natural Born Citizen Clause, much less a compelling one. I will not belabor this point here — the pointlessness of the provision has been amply and ably attacked from across the political spectrum.<sup>28</sup> It has been called the worst provision anywhere found in the Constitution.<sup>29</sup> As one recent article notes:

The natural born citizenship requirement no longer serves any purpose in the American constitutional system. Any historically legitimate justification for the proviso faded away long ago . . . . [T]he Framers almost certainly incorporated the requirement into Article II in an effort to prevent a British nobleman or foreign prince from infiltrating the vulnerable infant government.<sup>30</sup>

The idea of a foreign prince being elected president seemed silly enough even in the eighteenth century. It is hard to imagine any serious reason for keeping the provision.

It is worth considering whether the fact that the exception is

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27. *Id.* at 168-69 (internal citation and quotation marks omitted).

28. See Akhil Reed Amar, *Natural Born Killjoy: Why the Constitution Won't Let Immigrants Run for President, and Why that Should Change*, LEGAL AFF., Apr. 2004, at 16 (calling the provision "un-American"); see also *Maximizing Voter Choice: Opening the Presidency to Naturalized Americans: Hearing on S. 2319 Before the S. Comm. on the Judiciary*, 108th Cong. (2004). (remarks of Senator Orin Hatch, Chairman, S. Comm. on the Judiciary, calling the provision "artificial, outdated, unnecessary and [an] unfair barrier").

29. See Robert Post, *What Is the Constitution's Worst Provision?*, 12 CONST. COMMENT. 191 (1995).

30. Sarah Helene Duggin & Mary Beth Collins, 'Natural born' in the USA: *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, 134 (2005).



based upon a provision that was part of the original constitution might constitute a “compelling state interest.” That is to say, one could argue that because the original Constitution required such discrimination, continued discrimination is a compelling state interest, and narrowly tailored in the sense that what is required is no more and no less than would have been required without a Fifth Amendment. That type of reasoning however, has been repeatedly rejected by the Supreme Court in equal protection and due process cases. The fact that a provision is part of a state’s constitution and is of long duration has never been considered by the Court to entitle such a provision to any deference. In *Reynolds v. Sims*<sup>31</sup> the Supreme Court struck down a representation plan of two senators per county, which had been explicitly required by the state’s constitution for more than six decades, and similar provisions had been part of the state’s constitution since the day it entered the Union. Nor did the fact that a virtually identical provision was found in the U.S. Constitution entitle the provision to any deference.<sup>32</sup> Naturally, if the fact that a provision is found in the Constitution does not constitute a compelling reason on the state level, it should not constitute a compelling reason on the federal level either.

There is no doubt that a federal statute which limited employment to “natural born citizens” would be found unconstitutional today; or more specifically, it would be found to violate the Fifth Amendment. If a statute restricting employment to natural born citizens would be found unconstitutional, the only question left is to consider whether a provision of the Constitution should be treated differently than a statute. There is no reason to think so. In fact, it is almost too obvious to mention that if there is a conflict between an amendment to the Constitution and the earlier unamended version, that the amendment must take precedence. For example, the Establishment Clause of the First Amendment prohibits Congress from spending money in some ways which would have been permissible in the absence of a First Amendment.<sup>33</sup> If the Fifth Amendment prohibits discrimination based on national origin then it must supercede any conflicting provisions in Article II.

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31. 377 U.S. 533 (1963).

32. It is also worth noting *Romer v. Evans*, 517 U.S. 620 (1996), in which the Court struck down a Colorado Constitutional Amendment that discriminated against homosexuals. The fact that the provision was constitutional rather than statutory entitled it to no deference whatsoever; if anything, the Court seemed to suggest that the justification for judicial review is stronger when constitutional provisions are being evaluated since they are more difficult to revise by the democratic process. *Id.* at 651.

33. See *Flast v. Cohen*, 392 U.S. 83, 105 (1968) (holding that the establishment clause is a specific limitation upon the spending power conferred by Article I).

The Supreme Court has apparently never held a provision of the original constitution to be invalid because it conflicted with the Fifth Amendment, but in the famous case of *Battaglia v. General Motors*,<sup>34</sup> the second circuit suggested a similar doctrine. *Battaglia* involved a challenge to section 2(d) of the Portal-to-Portal Act which provided that “[n]o court of the United States . . . shall have jurisdiction of any action or proceeding . . . for or on account of the failure of the employer to pay minimum wages.”<sup>35</sup> This provision denying jurisdiction to federal courts seems well within the explicit provisions of Article III for Congress to create jurisdiction for lower federal courts, and the provision that the Supreme Court could exercise appellate jurisdiction subject to “such exceptions and under such regulations as the Congress shall make.”<sup>36</sup> The Second Circuit asserted that despite the apparent plenary power given to Congress by Article III to restrict the jurisdiction of federal courts, this power was subject to limits imposed by the Fifth Amendment:

A few of the district court decisions sustaining section 2 of the Portal-to-Portal Act have done so on the ground that since jurisdiction of federal courts other than the Supreme Court is conferred by Congress, it may at the will of congress be taken away in whole or in part . . . We think, however, that the exercise by Congress of the control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold and restrict the jurisdiction of courts other than the Supreme Court it must not so exercise that power as to deprive any person of life, liberty or property without due process of law or to take private property without just compensation.<sup>37</sup>

This statement was arguably dicta because the court held that the plaintiffs had not been deprived of liberty or property; hence, the court did not carry out its threat to exercise jurisdiction revoked by Congress. The principle that the Fifth Amendment limits

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34. 169 F.2d 254 (2d Cir. 1948).

35. *Id.* at 262.

36. See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 2.11 (2d ed. 1992) (“Since the beginning, Congress has never given the lower federal courts full Article III jurisdiction. And the Supreme Court has generally not rejected the Congressional position. Indeed, the Court has typically spoken broadly in dictum of Congress’ power to grant or take away jurisdiction of the lower federal courts.”).

37. *Battaglia*, 169 F.2d at 257. Note also that in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), the Supreme Court found an Oregon law restricting judicial review of damage awards in violation of the Due Process Clause of the Fourteenth Amendment. Presumably, an identical federal statute would violate due process under the Fifth Amendment.

Congressional power to limit jurisdiction of the courts has received widespread approval in the legal community.<sup>38</sup>

Another argument that might be advanced against courts refusing to nullify a constitutional provision, which they would not hesitate to nullify if it were a mere statute, would be the application of some sort of sliding scale. A sliding scale might mean that a court could strike down a statute as unconstitutional if the statute more likely than not contradicts a constitutional provision, but only strike down a constitutional provision if there is overwhelming evidence that the two are in conflict.<sup>39</sup> There is something to be said for such a system; after all, if statutes are found to be deficient, they are fairly easy to redraft and readopt. Constitutional amendments are very difficult to pass. This suggests that the Court should use great restraint in overruling prior constitutional provisions. This also distinguishes federal constitutional provisions from state ones, since it is generally much easier to pass constitutional amendments at the state level.

While the "sliding scale" may seem tempting, ultimately it is probably untenable. First, the distinction between a preponderance of the evidence and overwhelming evidence will often make little sense in terms of legal interpretation. Two propositions are either logically incompatible or they are not. More importantly, in theory we already seem to have an "overwhelming" standard. It was noted above that the Supreme Court has said that evidence of intention to repeal earlier statutes must be "clear and manifest."<sup>40</sup> What would the sliding scale look like: "absolutely clear and manifest?" Perhaps the sliding scale would require that only the first three methods for finding a contradiction outlined above would be permitted in the context of constitutional provisions rather than statutes. Again, there might be some appeal to such a system, but such a system has not been used by the Supreme Court. While the Supreme Court has not ruled on the precise issue of when the Fifth Amendment may

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38. 32 AM. JUR. 2D *Federal Courts* § 619 (2005). See also ALAN WRIGHT & ARTHUR R. MILLER, 20 FED. PRAC. & PROC. DESKBOOK § 11 (explaining that "[t]here is so much authority for the proposition that Congress is free to grant or withhold the judicial power that it might seem unnecessary to belabor the point," but going on to note that, "[i]f there is any limit on Congress, [the Fifth Amendment] is probably the maximum limit.")

39. It would be tempting to defend this sliding scale approach by arguing that when the Supreme Court declares an act of Congress to be null and void the Court is only placing itself above Congress, but in striking down a provision in the United States Constitution it is placing itself above the entire country. Yet, as Justice John Marshall noted in *Marbury v. Madison*, the power of judicial review does not mean that the Court is superior to Congress, it means that the Constitution is superior to both. 5 U.S. 137 (1803). Indeed, until they determine to change it through appropriate means, the Constitution is, in a way, superior to the entire American people.

40. *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

override earlier constitutional provisions, it has found a later amendment to have overruled an earlier provision by implication. The next section analyzes how the Supreme Court found the Eleventh Amendment to be overruled by implication.

### B. The Eleventh Amendment

The Eleventh Amendment presents a particularly interesting case to examine in the current context because it first changed, or clarified, the meaning of Article III, and then, in 1976, was itself found by the Supreme Court to have been limited or modified by the Fourteenth Amendment. The Eleventh Amendment states that “[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the united States by citizens of another State, or by citizens or subjects of any foreign state.”<sup>41</sup> This Amendment was adopted after the Supreme Court’s decision in *Chisholm v. Georgia*,<sup>42</sup> which permitted a citizen of one state to sue another state under the Article III provision that the judicial power of the United States extends to suits “between a state, or the citizens thereof, and foreign states, citizens or subjects.”<sup>43</sup> The Eleventh Amendment required that the Article III clause providing for suits between states and citizens of other states should not be construed to permit suits against unconsenting states.<sup>44</sup> This is important because no one has ever imagined that if there is a conflict between Article III and the Eleventh Amendment that Article III should be enforced. If there is a conflict between the two provisions, the later one must take precedence.

The story of the Eleventh Amendment becomes even more interesting when viewed in light of the Fourteenth Amendment.<sup>45</sup> In 1976, in *Fitzpatrick v. Bitzer*, the Supreme Court held that the Fourteenth Amendment superceded the Eleventh Amendment and permitted suits against states which violated civil rights.<sup>46</sup> It is

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41. U.S. CONST. amend. XI.

42. 2 U.S. 419 (1793).

43. U.S. CONST. art. III, § 2, cl. 1.

44. *Hans v. Louisiana*, 134 U.S. 1 (1890). The amendment says nothing about states *consenting* to suits, but it does say that “the judicial power of the United States shall not be construed to extend to any suit” of such a nature, and jurisdiction cannot be created by consent. U.S. CONST. amend. XI.

45. The provisions of the Fourteenth Amendment at issue are that “[n]o State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

46. 427 U.S. 445 (1976). The case involved a suit for damages against the state of Connecticut for employment discrimination. *Id.* at 450. The decision was unanimous, but two justices wrote concurring opinions questioning the majority’s Fourteenth Amendment reasoning and suggesting alternative bases

almost certainly the case that the framers of the Fourteenth Amendment did not understand themselves to be contradicting the Eleventh Amendment when the Fourteenth Amendment was written and ratified. To cite just one example, Representative Bingham, Chair of the Reconstruction Committee, told the House of Representatives, "Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it."<sup>47</sup> The *Fitzpatrick* decision certainly made no attempt to cite any statement from the reconstruction era debates, appealing instead to "general intent" by noting that the reconstruction amendments were "intended to be . . . limitations of the power of the States and enlargements of the power of Congress."<sup>48</sup>

While private suits against states are one way to enforce the provisions of the Fourteenth Amendment (although not a way that was ever mentioned in any of the debates on the ratification of the Fourteenth Amendment), there are other ways to enforce the Amendment. Other methods include: appeal of state cases refusing to enforce Fourteenth Amendment provisions to the U.S. Supreme Court; the United States filing civil suits against state governments that violated the Amendment; and, the United States filing criminal charges for violation of civil rights against individual state officials. All three of these methods have been used to enforce the Fourteenth Amendment and none of them would explicitly violate the terms of the Eleventh Amendment, which only bars suits by "citizens" against states.

It should also be noted that for more than a century, the Supreme Court regarded the Eleventh Amendment and the Fourteenth Amendment as fully compatible. In 1908, for example, the Supreme Court declared:

The Eleventh Amendment prohibits the commencement or prosecution of any suit against one of the United States by citizens of another State or citizens or subjects of any foreign State. The Fourteenth Amendment provides that no State shall deprive any person of life, liberty or property without due process of law, nor shall it deny to any person within its jurisdiction the equal protection of the laws. The case before the Circuit Court proceeded upon the theory that the orders and acts heretofore mentioned would, if enforced, violate rights of the complainants protected by the latter amendment. We think that whatever the rights of complainants may be, they are largely founded upon that Amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier Amendment. We may

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for permitting such suits against states. *Id.* at 458.

47. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

48. *Fitzpatrick*, 427 U.S. at 454 (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1880)).

assume that each exists in full force, and that we must give to the Eleventh Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant.<sup>49</sup>

As late as 1974, the Supreme Court refused to permit a suit against a state accused of violating the Equal Protection Clause of the Fourteenth Amendment based on the way the state processed claims for aid by disabled people. In *Edelman v. Jordan*<sup>50</sup> the Court acknowledged that “the equal protection claim cannot be said to be ‘wholly insubstantial,’”<sup>51</sup> but refused to reach the merits of the equal-protection claim, holding that suits for money damages against states were barred by the Eleventh Amendment.<sup>52</sup> *Edelman* was decided by a five to four vote, and despite there being four strong dissents, the apparently stark reversal just two years later — holding that the Fourteenth Amendment permitted suits against states — seems hard to reconcile with *Edelman*.<sup>53</sup>

Despite the facts that there was precedent to the contrary, there was no historical evidence that the framers intended to limit the Eleventh Amendment, and there was no logical contradiction between the two amendments, the Supreme Court in 1976 declared that the Fourteenth Amendment partially repealed the Eleventh Amendment. The Court began by noting previous decisions recognizing the reconstruction amendments for what they are, “limitations of the power of the States and enlargements of the power of Congress.”<sup>54</sup> From this observation the Court went on to declare:

It is true that none of these previous cases presented the question of the relationship between the Eleventh Amendment and the enforcement power granted to Congress under §5 of the Fourteenth Amendment. But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans v.*

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49. *Ex Parte Young*, 209 U.S. 123, 149-50 (1908).

50. 415 U.S. 651 (1974).

51. *Id.* at 653 n.1.

52. *Id.* The Court went on to hold that “a federal court’s remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury.” *Id.* at 677. Although the Court did not explicitly say that suits under the Fourteenth Amendment were always prohibited by the Eleventh Amendment, the Court’s refusal to even consider the merits of the equal protection claim is impossible to explain unless the Eleventh Amendment precluded such suits.

53. Ostensibly, *Edelman* was distinguished from *Fitzpatrick* because the statute in *Edelman* had not manifested congressional intent to abrogate Eleventh Amendment immunity. This is one reason *Fitzpatrick* held that abrogation of the Eleventh Amendment was not automatic but required Congressional authorization.

54. *Fitzpatrick*, 427 U.S. at 454.

*Louisiana*, 134 U.S. 1 (1890), are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce “by appropriate legislation” the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to §5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is “appropriate legislation” for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.<sup>55</sup>

This language does not leave any doubt as to what the Court was saying. Suits which are “constitutionally impermissible” are those forbidden by the Eleventh Amendment, but individuals may nevertheless bring suits against a state for civil rights violations if Congress provides for such suits. It is significant that Congress has the option of permitting such suits. The Court might have declared, as it did in *Bivens v. Six Unknown Federal Narcotics Agents*,<sup>56</sup> that the Constitution directly gives a right of action and no congressional authorization is needed. This limitation may simply have been necessitated by prior precedents, such as *Edelman*, which the Court preferred to distinguish rather than overrule directly.

Some of the language used in the *Fitzpatrick* opinion is admittedly confusing. For example, the Court in *Fitzpatrick* stated, “the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment.”<sup>57</sup> The assertion that the enforcement provisions “necessarily” limit state sovereignty seems odd in light of the fact that Congress is not required to take any action. Other decisions have also reaffirmed that the exercise of this power by Congress is optional. For example, in *Atascadero State Hospital v. Scanlon*,<sup>58</sup> the Court declared: “[W]e hold — consistent with *Quern*, *Edelman*, and *Pennhurst II* — that Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself. In light of this principle, we must determine whether Congress, in adopting the Rehabilitation Act, has chosen

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55. *Id.* at 456.

56. 403 U.S. 388, 396 (1971) (holding that the Fourth Amendment implicitly permitted suits against the federal government for violations of the Fourth Amendment rights even if Congress has not authorized such suits).

57. *Fitzpatrick*, 427 U.S. at 456 (emphasis added).

58. 473 U.S. 234 (1985).

to override the Eleventh Amendment.<sup>59</sup> Congress may choose to override Eleventh Amendment immunity to enforce the Fourteenth Amendment, but need not do so. Because the Fourteenth Amendment permits, but does not require, suits against states, there can be no inherent contradiction on a substantive level. That is to say, Eleventh Amendment immunity does not contradict the substantive provisions (the first four subsections) of the Fourteenth Amendment. It only comes into conflict with the enforcement clause, which permits Congress to enact appropriate legislation. Congress could decide to give full effect to Eleventh Amendment immunity in perfect harmony with the Fourteenth Amendment — which demonstrates that there is no direct or substantive contradiction between the two amendments.<sup>60</sup>

If one reads the *Fitzpatrick* opinion carefully, the Court never suggests there is any inherent contradiction. The incongruity only appears at a fairly abstract level. The Court declared that the Eleventh Amendment embodies “the principle of state sovereignty” while the “provisions of the Fourteenth Amendment . . . embody significant limitations on state authority.”<sup>61</sup> The explicit provisions of the two amendments do not contradict each other, but the principles they embody are contradictory. This is why the conflict between the Eleventh Amendment and the Fourteenth Amendment should be regarded as what has been described above as the fourth type of conflict.<sup>62</sup> A conflict where there is a practical incompatibility rather than a logical incompatibility.

The *Fitzpatrick* holding that Congress may abrogate Eleventh Amendment immunity in order to enforce the Fourteenth Amendment has had its share of critics.<sup>63</sup> This article aims neither

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59. *Id.* at 244.

60. Just to clarify what I mean by direct and substantive, as opposed to procedural, a different example will be helpful. Article IV, Section 2 openly permitted slavery in the United States by providing that escaped slaves would be returned to the owners. That was changed by the Thirteenth Amendment prohibiting slavery. The Thirteenth Amendment constituted a substantive change in the law of slavery. One can imagine a Thirteenth Amendment which was strictly procedural, providing that escaped slaves need not be returned to the owners. As to direct versus indirect, one can imagine a Thirteenth Amendment which instead of prohibiting slavery, simply said “Congress shall have power to outlaw slavery.” The latter would represent only an indirect conflict with the escaped slave clause because Congress could choose not to prohibit slavery and the escaped slave clause would remain valid. The two provisions would not be incompatible or contradictory in the ordinary senses of the words.

61. *Fitzpatrick*, 427 U.S. at 456.

62. *See supra* p. 5.

63. As David Currie has written: “This reasoning is less than overwhelming. One might have thought that § 5 [of the Fourteenth Amendment], like other ‘plenary’ grants of power, was subject to explicit and



to defend nor attack this reasoning, but merely to point out that it appears, at this point, to be settled law. In *Hibbs v. Nevada*,<sup>64</sup> the Supreme Court permitted suit against Nevada under the Family and Medical Leave Act holding again that Congress could “abrogate” states’ Eleventh Amendment immunity any time it passed legislation enforcing the Fourteenth Amendment. When we consider how the Supreme Court determined that the Eleventh Amendment had been annulled, we see that a similar annulment of the Natural Born Citizen Clause is easily defensible. This discussion of the Eleventh Amendment is merely meant to point out that repeal of one constitutional provision by a later one need not be explicit.

Finally, I want to briefly address the Supreme Court’s most recent foray into the Eleventh Amendment, *Central Virginia Community College v. Katz*,<sup>65</sup> to show that while it was a departure from past precedent in this area, the case does nothing to undermine any of the above analysis. At first glance, the *Katz* decision suggests that there is a conflict between the Eleventh Amendment and the Bankruptcy Clause,<sup>66</sup> but the Bankruptcy Clause took precedence. Actually, *Katz* simply held that there was no conflict at all between the Eleventh Amendment and the Bankruptcy Clause.<sup>67</sup>

*Katz* involved a suit by a bankruptcy trustee in Kentucky against three state universities to get the universities to refund money payed them by the bankrupt corporation. This looks like the sort of suit the Eleventh Amendment explicitly prohibits: it is a suit against the Commonwealth of Virginia by a citizen of Kentucky.<sup>68</sup> Several prior decisions had declared that the

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implicit constitutional limitations; one would hardly read it to empower Congress to authorize cruel and unusual punishment [for violators of the Fourteenth Amendment].” DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, 573-74 (Chicago: University of Chicago Press, 1990). Also, one might argue that one clause of the Constitution should be read to be repealed only when there is an explicit repeal. Since “Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language,” one might have thought that the Court should apply the same standard to constitutional interpretation and require that the framers of the amendment express their “intention to abrogate the Eleventh Amendment in unmistakable language.” *Scanlon*, 473 U.S. at 234.

64. 538 U.S. 721 (2003).

65. 126 S. Ct. 990 (2006).

66. U.S. CONST. art. I, § 8, cl. 1.

67. 126 S. Ct. at 1004.

68. There is no question that suits against a state university are suits against states. See, e.g., *Board of Trs. of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (holding that sovereign immunity precluded suit in federal court against the University of Alabama under the Americans with Disability Act).

Eleventh Amendment had precluded suits against states under all the provisions of Article I, but that the Fourteenth Amendment was different because it had been enacted after the Eleventh Amendment.<sup>69</sup> Nevertheless, the majority in *Katz* declared that those statements about the Eleventh Amendment overriding Article I were dicta<sup>70</sup> and offered an entirely new justification for overruling Eleventh Amendment immunity based on the Court's reading of the original intent of the Bankruptcy Clause:

The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena.<sup>71</sup>

The *Katz* opinion devotes page after page to discussing the original intent of the bankruptcy provision and finds that “[t]he ineluctable conclusion, then, is that States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to ‘Laws on the subject of Bankruptcies.’”<sup>72</sup> The opinion went on to declare that “the Bankruptcy Clause of Article I, the source of Congress’ authority to effect this intrusion upon state sovereignty, simply did not contravene the norms this Court has understood the Eleventh Amendment to exemplify.”<sup>73</sup> The Court pointed out that bankruptcy proceedings, like those in *Katz*, were similar to in rem proceedings. Virginia was just being asked to cough up the thing (money) which had been given to it by the bankrupt corporation, although technically suits for money are not in rem. The Court also noted that this type of proceeding was similar to a habeas corpus petition, and habeas suits are not considered suits against states.<sup>74</sup>

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69. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Alden v. Maine*, 527 U.S. 706, 748 (1999); *Hoffman v. Connecticut Dep’t of Income Maintenance*, 492 U.S. 96, 105 (1989) (O’Connor, J., concurring).

70. *Katz*, 126 S. Ct. at 1011 (Thomas, J., dissenting). The dissent points out, with some force, that a number of prior statements are difficult to dismiss as dicta. *Id.* at 1007. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 636 (1999), the Court declared: “*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause.” Thus the idea that the Eleventh Amendment limits all of the Article I powers of Congress appears to be essential to the holding in *Florida Prepaid*.

71. *Katz*, 126 S. Ct. at 996.

72. *Id.* at 1004.

73. *Id.* at 1003.

74. *Id.* at 1002.

The majority's analogies to in rem proceedings and habeas suits hardly seem ironclad enough to overcome what appears to be the clear language of the Eleventh Amendment: "The Judicial power of the United States shall not be construed to extend to *any suit* in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . ." <sup>75</sup> The four dissenting justices found the analogies unpersuasive, but *Katz* does nothing to suggest that when there is a real conflict between two provisions, the later amendment should not take priority.

Admittedly, the Court's conclusion that the Eleventh Amendment simply does not apply to bankruptcy proceedings is suspicious, and is reached without much analysis of the language or history of the Eleventh Amendment itself. Perhaps what the *Katz* opinion was trying to suggest was that, if the framers of the Constitution had abrogated state immunity in the context of bankruptcy just six or eight years earlier, it is unlikely that the Eleventh Amendment would have changed that so quickly; therefore, the two provisions should be read harmoniously. That would make sense, although there does not appear to be any hint of such an argument in the decision. The same argument might be used against the Fifth Amendment changing the Natural Born Citizen Clause. After all, the Fifth Amendment was adopted just a few years after the original Constitution, and many of the same people were involved in creating both. The argument that the Due Process Clause prohibits discrimination, however, is not based on the view that the framers of the Fifth Amendment believed it did, the conflict is based upon the settled law of the last fifty years.

If original intent is determinative, then the argument advanced in this paper is unquestionably wrong. There is no doubt that the framers of the Fifth Amendment saw no contradiction between the Due Process Clause and the Natural Born Citizen Clause, not to mention overt racial discrimination and slavery.

The *Katz* decision appears to be a comeback for originalism. *Katz* begins and ends with original intent analysis: in 1787, the framers of the Constitution intended to subject states to suit in bankruptcy, and that is all that matters. The Court's determination of what the framers of the Bankruptcy Clause understood it to mean in 1787 overcomes both the explicit language of the Eleventh Amendment and a clear line of cases stating that Article I powers are insufficient to overcome that Amendment.

Ultimately, however, the use of original intent to limit the reach of the Eleventh Amendment does nothing to undermine the Fifth Amendment analysis for a very simple reason: it is

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75. U.S. CONST. amend. XI (emphasis added).

unimaginable that the Supreme Court would reverse itself on due process and hold that the 1789 understanding of the Fifth Amendment governs federal discrimination cases. It is almost inconceivable that the Supreme Court would hold that the Natural Born Citizen Clause “simply did not contravene the norms this Court has understood the [Fifth] Amendment to exemplify.”<sup>76</sup> Regardless of what may be said for *Katz*’s reading of prior Eleventh Amendment cases, this paper shows that the Natural Born Citizen Clause undoubtedly contravenes settled Fifth Amendment jurisprudence.

Thus, while *Katz* is a unique case, it ultimately does nothing to undermine the analysis of the Natural Born Citizen Clause. The next section will examine how the *Fitzpatrick* line of cases suggests a model for how the Natural Born Citizen Clause may be overruled.

### III. PARALLELS BETWEEN THE FIFTH AND ELEVENTH AMENDMENTS

The line of cases discussing the Eleventh Amendment is illustrative of the issue at stake with due process and the Natural Born Citizen Clause because there are a number of similarities. First, there is no indication that the framers of the Fourteenth Amendment meant to contradict or limit the Eleventh Amendment, just as there is no indication that the framers of the Fifth Amendment meant to contradict Article II. Unless one adheres slavishly to “original intent” (and no one on the Court is willing to argue that the Fourteenth Amendment should not supercede the Eleventh), the fact that the interpretation of an amendment has gone well beyond what the framers envisioned is hardly a serious argument.

Second, just as the Court noted in *Fitzpatrick*, that the Fourteenth Amendment was intended to place “limitations o[n] the power of the States,”<sup>77</sup> it is equally true that the Fifth Amendment was intended to place limitations on the federal government, and on the executive in particular. One could argue that the Bill of Rights is superfluous and did not alter the original Constitution in any way (as Alexander Hamilton argued in *The Federalist* 84<sup>78</sup>), but no one has seriously accepted that position in

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76. *Katz*, 126 S. Ct. at 1003.

77. *Fitzpatrick*, 427 U.S. at 454.

78. Hamilton declared:

[B]ills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.

THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961). One could use Hamilton’s statement to argue that the Bill of Rights

about two hundred years.

Third, it may well be that there is no logical incompatibility between discrimination and the words “due process,” just as there is no logical incompatibility between the Eleventh and Fourteenth Amendments. Congress could decide not to permit suits against states, and thus show there is no logical incompatibility between the two provisions. The Due Process Clause could have been interpreted differently and have been logically consistent, and it once was probably thought by most people to be consistent with the Natural Born Citizen Clause. But, just as the understanding of the Fourteenth Amendment has evolved, and after more than a hundred years held to permit Congress to abrogate the Eleventh Amendment, so has the understanding of due process. The Natural Born Citizen Clause is absolutely incompatible with the current understanding of the Due Process Clause. Directly discriminating against one class of citizens based on national origin is substantive, and it directly and unquestionably contradicts the very essence of the current understanding of “due process.”<sup>79</sup>

Thus, the argument against the Natural Born Citizen Clause is considerably stronger than the argument put forth by the Court in *Fitzpatrick*. In addition, the natural born citizen question would be a matter of first impression.<sup>80</sup> As noted above, *Fitzpatrick* had to overrule prior precedent. Indeed, many of the recent cases finding new applications of due process and equal protection have overruled recent precedent.<sup>81</sup> That was also true of *Brown* and *Bolling*, both of which overturned numerous prior precedents.<sup>82</sup> In contrast, there is no Supreme Court precedent on the issue of whether the Natural Born Citizen Clause violates due process, so even the most slavish adherent to *stare decisis* could

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was not intended to modify the original Constitution in any way; however, the Court has unequivocally rejected the view that the Fifth Amendment should be interpreted in the way intended by their authors. Indeed, it may be conceded that the authors of the Fifth Amendment did not intend to modify Article II.

79. In other words, while Congress could refuse to allow suits against states, Congress could not refuse to allow due process. The Fourteenth and Eleventh amendments are indirectly and only potentially in conflict, while the Natural Born Citizen Clause and the Due Process Clause are directly and necessarily in conflict.

80. Robert Post has noted that the proviso has received remarkably little “judicial gloss.” Post, *supra* note 29, at 192.

81. To cite just a couple recent examples: *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)), and *Roper v. Simmons*, 543 U.S. 551 (2005) (overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989)).

82. *E.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Cumming v. Board of Ed. of Richmond County*, 175 U.S. 528 (1899); *Gong Lum v. Rice*, 275 U.S. 78 (1927); *Sweatt v. Painter*, 339 U.S. 629 (1950).

embrace the view that the Fifth Amendment negates the Natural Born Citizen Clause.<sup>83</sup>

The only precedent which might provide any support for the idea that discrimination against naturalized citizens might be constitutional is *Rogers v. Bellei*.<sup>84</sup> *Rogers* held that Congress could condition citizenship for children born to citizens living abroad upon residence in the United States. The "condition" however, is of a strange form. The Court noted that citizenship is only constitutionally guaranteed to those born in the United States or those accepted as naturalized citizens. Congress permitted children born to citizens living abroad to claim U.S. citizenship, but was under no constitutional requirement to do so. In other words, children born abroad whose parents are citizens have no constitutional right to citizenship. The statute at issue said that the child born abroad was a U.S. citizen, but that citizenship would be lost if he or she did not physically reside in the United States for five years before age twenty-eight. Using *Schneider*, the plaintiff argued that this constituted illegal discrimination among citizens.

The *Rogers* Court was careful to distinguish *Schneider*. The Court called the requirement of residency a "condition subsequent" of citizenship.<sup>85</sup> Because it was a condition of citizenship, the statute was not revoking citizenship. The statute permitted the children of citizens to exercise the rights of citizenship, but they were not actual citizens until they had fulfilled the condition of residing in the United States for five years prior to their twenty-eighth birthday. The Constitution *did require* equal treatment of citizens born and citizens naturalized. Once these people had lived in the United States for five years and fulfilled the condition to become citizens, they had exactly the same rights as all other citizens (other than, perhaps, being eligible to be president). In this sense, *Rogers* reaffirmed the need for citizens by birth and citizens by naturalization to be treated equally under the Fifth Amendment, just as *Schneider* had held. It was only those who were not yet full citizens (either by birth or naturalization) who could be treated differently.

Another case that might challenge the theory advocated here is *Matthews v. Diaz*.<sup>86</sup> A unanimous Supreme Court in *Matthews*

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83. The Supreme Court has mentioned in passing that the natural born citizenship proviso precludes naturalized citizens from being president, but it has never ruled on the issue in relation to the Due Process Clause, nor as far as I can tell has this clause ever been material to the holding of any Supreme Court decision. See, e.g., *Schneider v. Rusk*, 377 U.S. 163, 165 (1964); *Knauer v. United States*, 328 U.S. 654, 658 (1946); *Baumgartner v. United States*, 322 U.S. 665, 673 (1944); *Luria v. United States*, 231 U.S. 9, 22 (1913).

84. 401 U.S. 815 (1971).

85. *Id.* at 834.

86. 426 U.S. 67 (1976).

held that when the federal government discriminated against aliens in favor of citizens, that such discrimination would be reviewed only under the rational basis test, not under strict scrutiny. This is significant because the Court has held that state policies discriminating against aliens are subject to strict scrutiny.<sup>87</sup> The Court reasoned that Article I, Section 8 gave Congress plenary power to control aliens, and this meant that the federal government could regulate aliens in ways which would violate the Fourteenth Amendment if done by the states. If this is still good law, then it appears to be an exception to *Adarand's* pronouncement that "the equal protection obligations imposed by the Fifth and the Fourteenth Amendments" are "indistinguishable."<sup>88</sup> Yet, the Court decided *Matthews* twenty years before *Adarand*, and it seems likely that if this issue arose again today, *Adarand* would be read to overrule *Matthews*. Putting aside whether *Adarand* has in fact overruled *Matthews*, one could argue that the Court's holding in *Matthews* was incompatible with the theory of the Fifth Amendment espoused here. *Matthews* seemed to suggest that, had it not been for the grant of power to the federal government in Article I, Section 8 to set rules for naturalization, that the federal policy of denying welfare benefits to aliens would have been a denial of due process. It seems as though the Fifth Amendment and Article I, Section 8 were in conflict and Article I prevailed.

That reading of *Matthews*, however, is not correct. *Matthews* did not say that the federal government could ignore due process any time it dealt with aliens. *Matthews*, and *Hampton v. Mow Sun Wong*, the companion case handed down the same day and holding that the federal government could not refuse to employ aliens in the civil service, both held that the Fifth Amendment placed limits on laws Congress could make with respect to aliens. *Matthews* merely held that the due process limits on alienage legislation passed by Congress required rational basis rather than strict scrutiny. *Matthews* in no way contradicts the theory of the Fifth Amendment put forward here. All of the powers the federal government exercises under the original articles of the Constitution are limited by the requirements of the Due Process Clause of the Fifth Amendment. At most, *Matthews* would suggest that the Natural Born Citizen Clause should be scrutinized under rational basis — a test the natural born citizens clause would still probably fail. Moreover, given that *Matthews* involved classifications between citizens and non-citizens rather than

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87. See, e.g., *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

88. *Adarand* almost certainly overruled *Matthews* and *Mow Sun Wong*. *Mow Sun Wong* explicitly noted that "the two protections [afforded by the Fifth and Fourteenth Amendments] are not always coextensive." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

classifications among citizens, there is no reason to think that classifications among citizens would only be scrutinized under rational basis. This is especially true given precedent to the contrary discussed above.<sup>89</sup>

There does not appear to be any other Supreme Court precedent on this issue, which might call the application of equal protection into doubt. So *stare decisis* requires the rejection of discrimination based on naturalized status, for, as demonstrated above, the *Schneider* case and other Fifth Amendment precedent make the enforcement of the Natural Born Citizen Clause completely untenable.<sup>90</sup>

#### IV. STANDING AND COURT ENFORCEMENT

There is also a question as to who would have standing to bring a challenge to the Natural Born Citizen Clause. One could argue that no one would have standing unless actually elected, otherwise no harm has been shown. That extreme position is certainly not compatible with precedent. Since *Schneider* declared that treating naturalized citizens as possessing fewer political rights than natural born citizens stigmatizes them as second-class citizens and suggests that they may be disloyal, one would think that any naturalized citizen would have standing to challenge the provision. In *Mow Sun Wong*, for example, the plaintiffs did not need to establish that they definitely would have been hired by the federal government but for the requirement that all civil servants must be citizens. The Court granted standing to the five plaintiffs, merely noting that “each was qualified for an available job,”<sup>91</sup> but they would not even be considered for the job because of their alienage.<sup>92</sup>

Surely, a political figure such as Arnold Schwarzenegger, who is not only “qualified for an available job,” but also could have a legitimate chance to run for president or vice president, would have standing to bring a challenge since the harm to him is concrete and more than just speculative.

One argument to consider is whether the Court should get involved when there is a good chance that the political process will

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89. See *supra* Part II.

90. See *supra* Part II.

91. *Mow Sun Wong*, 426 U.S. at 91.

92. *Id.* The Court went on to note that the “disadvantage resulting from the enforcement of the rule ineligibility for employment in a major sector of the economy is of sufficient significance to be characterized as a deprivation of an interest in liberty.” *Id.* at 102. It is true that the two jobs placed off limits by the Natural Born Citizen Clause are not a “major sector of the economy” but I do not think this distinction affects the standing issue. *Id.* If there is an “available job” for which one is clearly qualified but one is prohibited from even applying, then whether there is one spot open or a million should not matter.



take care of the problem. Indeed, there appears to be a coalescing majority in favor of amending the Constitution on this point. One could argue that when political forces are willing to change the Constitution, the courts should not get involved, and the Supreme Court should deny certiorari in any case that might arise, or declare the issue to be a non-justiciable, political controversy. That argument seems untenable for a couple of reasons. First, if there is an ongoing violation of the Constitution and a suit is brought, then a court has a legal duty to rule on it. There is no precedent for a court refusing to decide if a current law is constitutional because the legislature seems likely to change it. The only established basis for such refusal to get involved (assuming it is a federal question and there are no standing, mootness or other issues), is the political question doctrine. A full analysis of the political question doctrine is well beyond the scope of this paper, but ordinarily a political question is one which either is constitutionally entrusted to a different branch of government,<sup>93</sup> or there is “a lack of judicially discoverable and manageable standards for resolving the question.”<sup>94</sup> The Natural Born Citizen Clause has nothing to do with the powers of the President, and causes no judicial management problems at all for judicial management. It is simply a garden variety equal protection issue.

Secondly, arguing that the Court should not get involved when there is an apparent political solution on the horizon would actually undermine the authority of the Supreme Court because it would amount to saying that the only time the Court declares something to be unconstitutional is when there is no hope of a constitutional amendment. What would such an implication do to the Court’s often cited assertion to be the arbiter of evolving standards of decency? If society really were evolving in a certain way (say evolving towards allowing naturalized citizens to become President, or that homosexual sodomy should not be a crime), then the Court would not have to get involved, it could just wait for the Constitution to be amended. If the Court can wait for an amendment to be passed changing the qualifications for President, why shouldn’t the Court wait every time it is asked to declare some newly evolved standard of decency?

#### V. OTHER APPLICATIONS OF THE DUE PROCESS TO THE ORIGINAL CONSTITUTION

If the above analysis is correct, and it is true that provisions of Article II can be set aside by federal judges as contradictory to the current understanding of the Fifth Amendment, it should be

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93. *Baker v. Carr*, 369 U.S. 186, 210-11 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers”).

94. *Vieth v. Jubelirer*, 541 U.S. 267, 268 (2004).

noted that there are other provisions of the original Constitution which may also be subject to challenge.

In *Adarand*, the majority held that minority set-asides were a violation of the equal protection component of the Fifth Amendment. The majority, however, did not consider the possibility “that Congress may [pass laws], in determining what is ‘appropriate legislation’ for the purpose of enforcing the provisions of the Fourteenth Amendment . . . which are constitutionally impermissible in other contexts.”<sup>95</sup> If this reasoning is followed, then Congress can enact affirmative action measures which violate the Fifth Amendment any time it acts under authority to enforce the Fourteenth Amendment, including measures to combat the lingering effects of state discrimination. This issue was not addressed in *Adarand*, and Congress, in passing the measure, does not appear to have appealed explicitly to its power under the Fourteenth Amendment. Thus, it appears that this too would be a matter of first impression before the courts.

There would, of course, be some peculiar limits to this doctrine. Under current jurisprudence, the equal protection provision of the Fourteenth Amendment would still prohibit states from enacting affirmative action programs, but the enforcement clause of the amendment would permit the federal government to do so, in the place of states. So while state universities could not be compelled by Congress to practice affirmative action, it might be true that Congress could require private universities such as Yale and Harvard to use affirmative action programs as a requirement of federal law.<sup>96</sup> It might seem odd that the Fourteenth Amendment permits, and arguably compels, the federal government to practice affirmative action while prohibiting the states from doing so, but there is nothing odd about that at all. The Commerce Clause,<sup>97</sup> for example, gives Congress power to regulate interstate commerce and at the same time denies that power to the states. Many other constitutional provisions also grant an exclusive power to the federal government. To use

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95. *Fitzpatrick*, 427 U.S. at 456.

96. The exact way this would work is obviously too complex to work out here, as well as the exact extent to which private conduct can be limited as affecting equal protection and said to fall under the aegis of the Fourteenth Amendment. See, e.g., *United States v. Guest*, 383 U.S. 745 (1966) (permitting criminal prosecution of private citizens for interfering with the civil rights of Blacks). Presumably Congress could appropriate money directly into a minority scholarship fund; they could also presumably require that private colleges charge less for minority students. Remember, of course, that the Just Compensation Clause of the Fifth Amendment may be ignored by Congress when it is acting under the Fourteenth Amendment, just as the Thirteenth Amendment explicitly exempted slave owners from being entitled to compensation which otherwise would be required.

97. U.S. CONST. art. I, § 8, cl. 3.

another example, the Constitution gives Congress power to coin money,<sup>98</sup> but it also explicitly forbids states from doing so.<sup>99</sup> Congress, therefore, could not order states to coin money, but can do so itself, or could authorize a private bank to do so. Setting aside recent Court precedent such as *Adarand*, it would be entirely logical to read the Fourteenth Amendment to forbid states from practicing affirmative action while allowing the federal government to do so.

There are a number of other constitutional provisions that might be modified through application of the principle of modification of earlier constitutional provisions by later ones, such as the provision of Article I, Section 3, Clause 1 stating, "The Senate of the United of States shall be composed of two Senators from each state."<sup>100</sup> In the landmark case *Reynolds v. Simms*, the Supreme Court declared:

We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.<sup>101</sup>

If, as precedents makes clear, the Equal Protection Clause of the Fourteenth Amendment and the Due Process clause of the Fifth are coextensive, then the Fifth Amendment prohibits non-proportional representation in the federal legislature as surely as the Fourteenth Amendment prohibits it in the states. Interestingly, however, the Seventeenth Amendment, adopted in 1913, mentions in passing that "[t]he Senate of the United States shall be composed of two senators from each State, elected by the people thereof."<sup>102</sup> One could make a strong case that the Seventeenth Amendment overrules the Fifth, insofar as the Fifth overruled Article I, Section 3, Clause 1. Nevertheless, there is no such later amendment applying to the House of Representatives, so presumably non-proportional representation in the House could violate due process.<sup>103</sup>

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98. U.S. CONST. art. I, § 8, cl. 5.

99. U.S. CONST. art. I, § 10.

100. U.S. CONST. art. I, § 3, cl. 1.

101. *Reynolds v. Simms*, 377 U.S. 533, 568 (1964).

102. U.S. CONST. amend. XVII, cl. 1.

103. Wyoming, with a population of 495,000 has one representative, while Nevada, with a population of nearly two million, has two representatives. A judge could use the Due Process Clause to order redistricting ignoring state boundaries in order to equalize congressional districts, finding that such a system "substantially dilutes" an individual's right to vote for representatives.

There may be dozens of other provisions of the first six articles of the constitution which could be nullified by federal judges using the Due Process Clause. The impeachment provisions of Article I, Congressional control of the District of Columbia (and denial of voting rights to residents of the District) found in Article I, the permission to suspend habeas corpus found in Article I, and the permission of Congress to restrict the jurisdiction of the federal courts in Article III all probably violate the current understanding of due process.

Application of the Fifth Amendment in some of these areas may be more limited than with respect to the Natural Born Citizen Clause either because of existing precedent or conflict with multiple provisions of the Constitution. For example, in the area of restricting the jurisdiction of the federal courts, we can create some difficult scenarios. Imagine that Congress had not only stripped the federal courts of all power to hear tort suits, but also refused to appropriate any money to pay damages. Recall that Article I, Section 9, of the Constitution declares that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>104</sup> The Supreme Court has consistently held that Congress must make appropriations for judgments before plaintiffs against the United States can collect.<sup>105</sup> In the current scenario, a plaintiff who has had his property taken away and destroyed in violation of the Fifth Amendment applies to a federal district court for relief, but the court has no statutory jurisdiction nor any money to pay damages. The easy answer to the question would be that the Fifth Amendment comes later than Article I, therefore, limitations on the courts’ power to order money judgments do not apply against violations of the Fifth Amendment.

While one could argue that limitations on appropriations are themselves limited by the Fifth Amendment, such an interpretation would be troubling because there are multiple constitutional provisions which are being modified, as well as a long line of precedent with respect to appropriations.<sup>106</sup> In itself, of

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104. U.S. CONST. art. I, § 9, cl. 7.

105. See *Reeside v. Walker*, 52 U.S. 272, 291 (1850) (holding that “no money can be taken or drawn from the Treasury except under an appropriation by Congress” and “without such an appropriation it cannot and should not be paid by the Treasury, whether the claim is by a verdict or judgment”); *Glidden Co. v. Zdanok*, 370 U.S. 530, 570 (1962) (holding that the Constitution “vests exclusive responsibility for appropriations in Congress, and the Court early held that no execution [for judgment] may issue directed to the Secretary of the Treasury until such an appropriation has been made”).

106. Of course, there were also a long line of precedents upholding the separate but equal doctrine when the Court reversed course in *Bolling* and *Brown*. *E.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Cumming v. Bd. of Ed. of Richmond County*, 175 U.S. 528 (1899); *Gong Lum v. Rice*, 275 U.S. 78

course, the fact that there are multiple constitutional provisions being abrogated or changed does not necessarily mean the interpretation is wrong. The Fourteenth Amendment, for example, has abrogated or changed literally dozens of clauses of the Constitution. The doctrine of selective incorporation has altered the meaning of many original constitutional provisions. For example, the First Amendment states that "Congress shall make no law with respect to the establishment of religion."<sup>107</sup> Prior to the adoption of the Fourteenth Amendment, a federal statute which declared "[n]o State shall establish any religion" would have violated the First Amendment. Since 1947, such a statute is perfectly acceptable under the Fourteenth Amendment.<sup>108</sup> While courts should certainly use caution in creating new interpretations of statutes which change or nullify multiple constitutional provisions, the Due Process Clause of the Fourteenth Amendment has been held to modify dozens of constitutional restrictions on the federal government, and there is no reason to think the Due Process Clause of the Fifth Amendment should be limited simply because it too would modify a wide range of provisions.

It may be objected that this doctrine will permit the federal courts to substantially rewrite the basic structure of the federal government. That is an exaggeration. It would be more accurate to say that the Fifth Amendment gives federal judges the same power to recreate and rewrite federal governmental structures as the Fourteenth Amendment gives them vis-a-vis the states. In *Bolling*, the Supreme Court declared: "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."<sup>109</sup> Simply substitute "equal representation" or "discrimination based on national origin" for "racially segregated schools," and one has the exact same argument. If a state attempted to restrict office-holders to natural born citizens, there is no doubt it would be found unconstitutional. It is "unthinkable" that the same Constitution would impose a lesser duty on the Federal Government.

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(1927); *Sweatt v. Painter*, 339 U.S. 629 (1950).

107. U.S. CONST. amend. I.

108. In *Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1 (1947), the Supreme Court held for the first time that the Establishment Clause was incorporated against the states by the Fourteenth Amendment.

109. *Bolling*, 347 U.S. at 500.