

FIVE

THE CONSTITUTION AS CREATOR OF SECOND-CLASS CITIZENS

Americans take justified pride in the assertion by the Declaration of Independence that "all men [and today we would surely add women] are created equal" and by the linked notion that "there are no second-class citizens in America." It is often asserted that "every youngster in America can dream of growing up to be president," though, as we shall presently see, this is patently false. At the very least, we would like to think that the Constitution itself places no barriers on participation in the polity. Alas, that is not the case. Although what I will call the "second-class citizenship clauses" of the Constitution almost certainly do not justify in themselves supporting the forthcoming referendum, they could either tip the balance for those readers who remain uncertain or reassure those who have already decided to vote yes.

Of the seventeen formal amendments added to the Constitution since the Bill of Rights in 1791, a full five—almost one-third—involve guaranteeing the right to vote. The Fifteenth and Nineteenth amendments forbid states from denying the suffrage on the basis of race or gender, respectively. Why only states? The answer is simple: Each and

every election in the United States is run by the states or their subdivisions. The national government is elected entirely through state-run processes, and each state, at least historically, had the right to determine who could vote on its own. Some states allowed African Americans to vote; most did not. Some states allowed women to vote; some did not. The two amendments foreclosed states from continuing to exercise their discretion with regard to race or gender. The Twenty-fourth Amendment banned the use of poll taxes, by which states, all of them southern, had made voting contingent on paying a fee. And the Twenty-sixth Amendment lowered the national voting age to eighteen. Finally, the Twenty-third Amendment gave the District of Columbia three electoral votes in the Electoral College, which meant that citizens in the District could now join other Americans in voting for the president.

Given that the drafters of the Constitution basically left it to the states to decide who could vote, the Constitution itself cannot accurately be described as having created the second-class citizenship by which only white males, or then men but not women, could vote. This is not true, however, of the discriminations that are the subject of this chapter. They are, as with the allocation of voting power in the Senate or the presidential veto power, hard-wired into the Constitution. But, as we shall see, they are no more defensible than are these other attributes, whose defects we have already explored.

QUALIFICATIONS FOR THE HOUSE AND SENATE: A BLOT ON DEMOCRATIC VALUES

One rarely thinks of the requirements for service in the House of Representatives or the Senate, though they present some interesting problems for anyone called on to judge the Constitution's conformity with enlightened political values. "No Person shall be a Representative who shall not have attained to the age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." The clause relating to the Senate substitutes "thirty" for "twenty-five" and "nine" for "seven." We see, therefore, that membership in the Congress is limited by *age*, *duration of citizenship*, and *place of habitation*.

Duration of Citizenship

Similarly, what is the defense of the seven- and nine-year citizenship requirements in a political system that professes to have no second-class citizens? (I shall have more to say below about the fact that presidents must be "natural born" citizens, which thus disqualifies from our highest office anyone born abroad as a noncitizen.) The Constitution in effect stigmatizes naturalized citizens by telling them that they are deemed unfit, in a Constitution ostensibly committed to the equal dignity of all citizens, to take part in governance for several years, and perhaps forever. At a less symbolic level, it is also true that a country that currently has almost 19 million resident aliens⁷ might surely benefit from having in the House or Senate someone who very recently shared their status. If one disagrees with the desirability of such persons in official positions, then it would seem adequate to vote against them rather than to make such service unconstitutional. Recently naturalized citizens are in the same position as our eighteen- to twenty-four-year-old citizens: They can vote even if they are not eligible to occupy national office. As with the youngsters, recently naturalized citizens have no reason to endorse a Constitution that views them as only second-class citizens.

There is a special irony (or, for some, an outrage) linked to the years-of-citizenship requirement inasmuch as every naturalized citizen must demonstrate, prior to citizenship, "attachment" to the "principles of the Constitution."⁸ One should certainly hope they are committed to the beautiful words and inspiring ideals of the Preamble. But do we really expect them to be attached to their own disability to represent their neighbors in Congress for many years? The easiest way to resolve this is simply, once more, to remember that we should never confuse the principles of the Constitution with the particular means set out below the Preamble. It is almost self-evident, for example, that no decent person should have felt truly attached to the provision of the original Constitution that barred any congressional prohibition of the international slave trade until 1808.⁹ It is almost as clear that no woman naturalized before 1920, the date of the Nineteenth Amendment guaranteeing woman suffrage, should have felt the slightest attachment to the particular aspect of the Constitution that gave states carte blanche to restrict the electorate. One expresses the greatest fidelity to the deepest principles of the Constitution by relentlessly—at times, even unforgivingly—examining the extent to which the main body of the Constitution is indeed conducive to realizing the ends set forth and by being willing to change the Constitution whenever it is found wanting.

the ability to produce sound national policies in the face of holdout states, which prefer to continue polluting or which refuse to apply certain welfare benefits to the poor (and therefore keep taxes low in an effort to lure industry from more generous and therefore higher-taxing states). All of them feature the same basic tension between the interest of a presumptively selfish individual—or congressional district or state—and the collective interests of the community. And even individuals in holdout states may very well be harmed if, for example, they are the poor who need the medical care or the adequate education denied them by budget-cutting state legislators.

To some extent, every American is the victim—one might even say the prisoner, in an iron cage—of the centripetal tendencies generated by the Constitution, even if we take comfort in knowing that our particular representative or senator is bringing home the bacon for some local interest while being indifferent as to who exactly is paying for the pork or what alternative uses there might be for the money involved. Should the forthcoming referendum demonstrate that a majority of Americans feel at least sufficient discontent with the present Constitution to authorize a new convention, the subsequent convention might well consider adding to the House of Representatives and Senate, assuming the retention of bicameralism, a number of new members elected on a nationwide basis. This would provide not only a more national focus but also, perhaps paradoxically, greater representation for individuals who belong to groups that, because they are distributed nationwide rather than concentrated in given localities, are unable to influence the political outcomes in strictly territorially based electoral districts.¹¹

CAN ALL AMERICAN CITIZENS ASPIRE TO LIVE IN THE WHITE HOUSE?

*Should America Really Say That No Immigrants
Need Apply to Be President?*

Article II, section 1, clause 5, states: "No person except a natural born Citizen . . . shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall have not attained to the

Age of thirty-five Years, and been fourteen Years as Resident within the United States." Each of these three qualifications presents problems. One of them, age, I have already discussed, and nothing further need be said. But consider the requirement that the president be a "natural born Citizen." Some professors like to play word games by asking if the clause would disqualify someone born in a cesarean operation or, in our modern world, through a process of in vitro fertilization. But these *are* mere games. It is close to self-evident that what this provision means, in our own time, is that no one who is not at birth a citizen of the United States is ever eligible thereafter to occupy our highest office. No such disability attends those who wish to serve in the Congress or the judiciary; the presidential disability stands alone.

Harvard law professor Randall Kennedy has discussed—and condemned—the clause in an essay suitably titled "A Natural Aristocracy."¹² Even if one takes into account age and citizenship qualifications, one can still say that each and every citizen of the United States can aspire to serve at the highest levels of government, although it might take a while to become eligible. Only with regard to naturalized citizens is the bar complete and permanent. It is irrelevant, as Kennedy notes, that they may have "invested their all, even risked their lives, on behalf of the nation." It is hard to disagree with him that "[t]his idolatry of mere place of birth seems to me an instance of rank superstition." It offers no evidence whatsoever "about a person's willed attachment to a country, a polity, a way of life." I share Kennedy's view that Henry Kissinger should not have become president of the United States, but that is most certainly *not* because he was born in Germany. Nor, incidentally, do I doubt for a moment that Kissinger has devoted his life to serving the interests of the United States as he sees them. My distaste for him is based entirely on policy disagreements. He is not one whit "less American" than I am because I was born in North Carolina.

"The natural-born citizen requirement," writes Kennedy, "embodies the presumption that some citizens of the United States are a bit more authentic, a bit more trustworthy, a bit more American than other citizens of the United States, namely, those who are naturalized. It establishes the most literal kind of 'natural aristocracy,' altogether different, as he notes, 'from Jefferson's own invocation of that notion'

to describe those who by talent and merit are best fit to govern. Kennedy concedes that "the clause is of more symbolic than 'practical' importance." Yet symbolism counts, especially in a document meant to be venerated as well as obeyed. The symbolism of the Natural-Born Citizenship Clause is indefensible in a liberal democracy. It may be too late for gifted immigrants like Kissinger, Madeleine Albright (born in Czechoslovakia), or Ted Koppel (England) to consider running for our highest office. But consider Republican California governor Arnold Schwarzenegger (born in Austria) or the Democratic governor of Michigan, Jennifer Granholm (Canada). Whether either makes it to the White House should be the result of our collective choice at the ballot box instead of their being ruled out by a xenophobic text rooted in a fear of British or French domination of a vulnerable new nation.

Fortunately, millions of naturalized Americans are entitled to an equal vote in our national referendum, just as they can vote for, even if they cannot hope to become, president of the United States. This indefensible prohibition is a sound reason for them to resolve any doubts they might have about redrafting the Constitution.

Where Exactly Is the United States and How Does This Affect Who May Become President?

Surely the most esoteric qualification is the requirement that a president have "been fourteen Years as Resident within the United States." Perhaps I should confess that two colleagues and I once wrote an article that questioned whether George Washington was eligible to become president in 1789 inasmuch as the United States was not even "born" before 1776, the date of the Declaration of Independence, or even 1783, the date of the Treaty of Paris by which the existence of the brand-new country was formally recognized by the former colonial power, Great Britain.¹³ This article was meant as a joke. But one can imagine modern circumstances where the language would have real bite and be no laughing matter.

Consider, for example, persons born in the United States but taken thereafter by their parents to a foreign country where, altogether plausibly in today's world, one or both of the parents had a job with a glo-

bal corporation. Or, perhaps, the parent was an old-fashioned religious missionary or an active participant in Doctors Without Borders. You get the idea. The children return to the United States, say, at twenty-three, and twelve years later one of them decides to make a run for the White House. Would he or she be barred by the "fourteen Years as Resident" clause? I think the answer is clearly yes. One might well believe that such a candidate is exhibiting monumental *chutzpah*. But, as with the other qualifications, why should we constitutionalize such a bar instead of simply voting against the candidate? Are we not to be trusted to make such decisions for ourselves?

There are probably few persons who fit the suggested biography in the paragraph above. Unlike the young, or the immigrants, or other groups I have tried to mobilize as part of my pro-referendum coalition, this does not appear to be a promising group. There is, however, one group for whom the residency clause might actually make a difference, and that is Puerto Ricans.

It would take this book too far afield to consider fully the fascinating constitutional dimensions of Puerto Rico's transfer to the United States in the aftermath of the Spanish-American War of 1898 and its history as an American territory—or, as some would say, "colony"—thereafter.¹⁴ Suffice it to say that, since 1917, persons born in Puerto Rico have enjoyed American citizenship, so they presumably suffer no bar under the Natural-Born Citizen Clause. Imagine, though, someone born and raised in Puerto Rico who comes to the mainland of the United States at the age of twenty-five and wishes to run for the presidency thirteen years later. Is *she* eligible? This requires us to address the seemingly odd question, "Where exactly is Puerto Rico?" The flip-pant answer, "in the Caribbean Sea," won't do, because, after all, Hawaii is in the mid-Pacific, far more distant from the mainland than is Puerto Rico. And there is no doubt that anyone born in Hawaii is eligible, however unlikely that might be, to become president of the United States even if he has never spent a day outside Oahu.

Note that the Qualifications Clause does not require that one be a citizen of a state as well as of the nation. All that is seemingly required is national citizenship, which Puerto Ricans have. And what would lead us to say that Puerto Rico is less "within the United States" than, say,

the District of Columbia, which is also not a state even though it does have three electoral votes courtesy of the Twenty-third Amendment? Surely, someone who has never left the confines of the District of Columbia is eligible to become president.

There is one further twist that is even more directly relevant to the central conceit of this book, which is the forthcoming referendum on whether to retain the Constitution. Will Puerto Ricans be allowed to vote in the referendum? Is it not *their* Constitution as well as the Constitution of those of us who live in one of the fifty states plus the District of Columbia? Would it not be rank bigotry to deny our fellow citizens in San Juan a right to vote on the Constitution that has important consequences for their own lives, for good and for ill? But if they have the right to vote, it can only be because we do recognize them as inhabiting the "United States" in the same way that the District of Columbia is treated as part of the "United States." Statehood is not a prerequisite for being part of the United States. So, perhaps, Puerto Ricans do not have an incentive to disapprove of the Constitution, at least on this ground.