

# The Natural-Born Citizen Clause, Popular Constitutionalism, and Ted Cruz's Eligibility Question

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## ABSTRACT

*This Essay argues that recent debates over the eligibility of Barack Obama and Ted Cruz to serve as President offer unique insights into the phenomenon of constitutional contestation outside the courts. Rather than anything approaching serious constitutional engagement, the public debate over presidential eligibility has been characterized by dramatic shifts in public opinion, crass opportunism, and excessive deference to elite views. Cruz is a fervent advocate of the American people standing up against courts and elites when it comes to defining basic constitutional values, but he abandons his commitment to popular constitutionalism when it comes to questions of presidential eligibility. Instead, he favors a reading of the “natural born Citizen” clause that was crafted by constitutional lawyers under which he is eligible for the Presidency. Contestation over the meaning of the “natural born Citizen” requirement shows the power of popular constitutionalism to reframe the terms of a debate, but it also shows the fluid, ephemeral, and opportunistic qualities of popular constitutional claims.*

## INTRODUCTION

If ever there was a constitutional provision that offers an ideal opportunity to consider how the American people directly assert and act upon their own reading of the nation's founding text—what scholars call “popular constitutionalism”—it would be the requirement that the President be a “natural born Citizen.”<sup>1</sup> Here is a provision with obvious and direct importance to the American people that the courts have basically ignored, leaving it to others to determine its meaning.<sup>2</sup> The American people have expressed their views on its meaning using the tools available—advocating,

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<sup>1</sup> See U.S. CONST. art. II, § 1, cl. 5.

<sup>2</sup> See Lawrence Friedman, *An Idea Whose Time Has Come—The Curious History, Uncertain Effect, and Need for Amendment of the “Natural Born Citizen” Requirement for the Presidency*, 52 ST. LOUIS U. L.J. 137, 139–40 (2007). But see *Robinson v. Bowen*, 567 F. Supp. 2d 1144 (N.D. Cal. 2008) (finding it “highly probable, for the purposes of this motion for provisional relief, that Senator McCain is a natural born citizen”).

organizing, and voting.<sup>3</sup> In a modern American society in which the Supreme Court dominates so many constitutional disputes, and in which even the most dedicated advocates of popular constitutionalism have trouble explaining exactly how it is supposed to operate, public debate over the natural-born citizen clause would seem to provide a rare opportunity to see the people, freed from the long shadow of judicial review, directly engaging with their Constitution.<sup>4</sup>

But if this is popular constitutionalism, it is hardly a flattering portrait. How can one view much of anything related to our recurring “birther” wars, particularly the efforts to question President Obama’s eligibility, as demonstrating the benefits of constitutional contestation outside the courts?<sup>5</sup> Rather than anything approaching serious constitutional engagement, the public debate over presidential eligibility has been characterized by dramatic shifts in public opinion, crass opportunism, and excessive deference to elite views.

Republican candidate Ted Cruz’s eligibility not only demonstrates these problematic tendencies; it also brings an ironic turn to the issue. As much as any serious presidential candidate in recent times, Cruz has espoused a commitment to popular constitutionalism.<sup>6</sup> Yet when it comes to giving meaning to the natural-born citizen clause, Cruz made no effort to rally the people around his reading of the Constitution; instead, he abandoned popular constitutionalism and told everyone to listen to the elite lawyers and academics who read the clause as making him eligible to be President.<sup>7</sup>

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<sup>3</sup> See, e.g., Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L.Q. 193, 250–51 (2011).

<sup>4</sup> The seminal study of popular constitutionalism is Larry Kramer’s *The People Themselves: Popular Constitutionalism and Judicial Review*. One of Kramer’s central contentions is that, in the twentieth century, a national commitment to judicial supremacy displaced a robust historical tradition of constitutional contestation outside the court. See, e.g., LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 228 (2004) (lamenting “the all-but-complete disappearance of public challenges to the Justices’ supremacy over constitutional law,” and chiding the current generation for being “so passive about their role as republican citizens”).

<sup>5</sup> See, e.g., Michael D. Shear, *With Document, Obama Seeks to End “Birther” Issue*, N.Y. TIMES (Apr. 27, 2011), <http://www.nytimes.com/2011/04/28/us/politics/28obama.html>.

<sup>6</sup> See *Transcript: Cruz Announces Presidential Campaign*, FOXNEWS.COM (Mar. 23, 2015), <http://www.foxnews.com/politics/2015/03/23/transcript-cruz-announces-presidential-campaign/> (demonstrating Senator Cruz’s use of the Constitution to mobilize popular support).

<sup>7</sup> Compare Kathy Frankovic, *Who Is a Natural Born Citizen?*, YOUNGOV.COM (May 22, 2014, 7:25 AM), <https://today.yougov.com/news/2014/05/22/who-natural-born-citizen/> (showing that fifty-two percent of both parties, and fifty-three percent of Republicans, think

Contestation over the meaning of the “natural born Citizen” requirement shows the power of popular constitutionalism to reframe the terms of a debate, but it also shows the fluid, ephemeral, and opportunistic qualities of popular constitutional claims. If the primary goal of constitutionalism is to elevate the terms of debate above day-to-day political disputes to a level of fundamental principles, then the recent wave of birther debates is a case study in popular constitutional failure.

### I. TED CRUZ’S POPULAR CONSTITUTIONALISM PROBLEM

“It is a time for truth. It is a time for liberty. It is time to reclaim the Constitution of the United States.”<sup>8</sup> With these words Senator Ted Cruz declared his intent to be the next President of the United States.<sup>9</sup> More than anyone in the crowded field of Republican presidential candidates, Cruz has placed the nation’s founding legal document at the center of his campaign.<sup>10</sup> The freshman Senator has gained national notoriety for his attacks on anyone, including his own Republican colleagues, who fails to adhere to his principles of “constitutional conservatism.”<sup>11</sup> Taking a page from the playbook of the Tea Party movement,<sup>12</sup> Cruz has found considerable political success combining a populist, insurgent ethos with an insistence that the answer to the nation’s problems is a return to the principles of the Constitution.<sup>13</sup> “This is our fight,” he told his audience at Liberty University when he announced his candidacy for President, “The answer will not come from Washington. It will come only from the men

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that those born abroad to an American-citizen mother and noncitizen father are not “natural born citizens”), with *Exclusive: Ted Cruz on Announcing Candidacy for President*, FOXNEWS.COM (Mar. 23, 2015), <http://www.foxnews.com/transcript/2015/03/24/exclusive-ted-cruz-announcing-candidacy-president/> (Cruz responding to questions about his eligibility by explaining “as a legal matter, the issue is quite straightforward, that if you or I travel abroad [sic] and we have a child that’s born abroad, and we’re American citizens, that child is a natural born citizen”), and *infra* note 24.

<sup>8</sup> *Transcript: Cruz Announces Presidential Campaign*, *supra* note 6.

<sup>9</sup> *See id.*

<sup>10</sup> *See, e.g.,* Ted Cruz, *Constitutional Remedies to a Lawless Supreme Court*, NATIONAL REVIEW (June 26, 2015, 5:59 PM), <http://www.nationalreview.com/article/420409/ted-cruz-supreme-court-constitutional-amendment>; *Transcript: Cruz Announces Presidential Campaign*, *supra* note 6.

<sup>11</sup> *See* Cruz, *Constitutional Remedies*, *supra* note 10 (Senator Cruz defining himself as a “constitutional conservative”); Andrew Prokop, *Ted Cruz’s Meteoric Rise, Explained*, VOX.COM (Feb. 2, 2016, 1:24 AM), <http://www.vox.com/2016/2/2/10892870/ted-cruz-bio-iowa-caucus> (noting that Cruz “seemed to have a particular genius for inventing ways to position himself as more conservative than anyone else in his party”).

<sup>12</sup> *See* Schmidt, *supra* note 3, at 250–51.

<sup>13</sup> *See Transcript: Cruz Announces Presidential Campaign*, *supra* note 6; Prokop, *Ted Cruz’s Meteoric Rise, Explained*, *supra* note 11.

and women across this country, from men and women, from people of faith, from lovers of liberty, from people who respect the Constitution.”<sup>14</sup> Cruz’s constitutional vision revolves around his belief that the true meaning of the Constitution comes not from the Supreme Court—“an arrogant judicial elite” he has accused of a “sustained attack” on “our Constitution”<sup>15</sup>—or from professors of constitutional law, but from the “grassroots army” “of courageous conservatives all across America.”<sup>16</sup> Cruz, in short, has become the nation’s most prominent proponent of popular constitutionalism.<sup>17</sup>

Herein lies a remarkable irony at the heart of Cruz’s candidacy for President: *Cruz’s own vision of constitutionalism would make his candidacy unconstitutional.* To be eligible for the Presidency, the Constitution requires one be a “natural born Citizen.”<sup>18</sup> Cruz was born in Canada to a mother who was a U.S. citizen and a father who was not.<sup>19</sup> Does this make him eligible to be President? If we follow Cruz’s populist approach to determining the meaning of the Constitution, we look not to the Supreme Court (which has never ruled on this issue), not to academic “elites,” but to the people themselves. And on this question, a large portion of the American people—a majority in many polls—believe that a person born outside the country to an American citizen and a noncitizen is not a “natural born” citizen.<sup>20</sup>

And it is not as if the American people have not had an opportunity to

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<sup>14</sup> *Transcript: Cruz Announces Presidential Campaign*, *supra* note 6.

<sup>15</sup> Cruz, *Constitutional Remedies*, *supra* note 11; *see also Transcript: Cruz Announces Presidential Campaign*, *supra* note 6 (calling recent Supreme Court decisions “lawless,” “unacceptable,” and examples of “judicial tyranny”).

<sup>16</sup> *Transcript: Cruz Announces Presidential Campaign*, *supra* note 6.

<sup>17</sup> Cruz’s constitutional vision bears remarkable similarities to the call to arms with which Kramer concludes his *THE PEOPLE THEMSELVES*:

The question Americans must ask themselves is whether they are comfortable handing their Constitution over to the forces of aristocracy: whether they share this lack of faith in themselves and their fellow citizens, or whether they are prepared to assume once again the full responsibilities of self-government . . . The point, finally, is this: to control the Supreme Court, we must first lay claim to the Constitution ourselves.

KRAMER, *supra* note 4, at 247.

<sup>18</sup> U.S. CONST. art. II, § 1.

<sup>19</sup> Cruz’s father was Cuban. *See Transcript: Cruz Announces Presidential Campaign*, *supra* note 6.

<sup>20</sup> *See, e.g., Frankovic, supra* note 7. Cf. Benjamin Siegel, *Ted Cruz Could Be First Canadian-Born US President: Here’s Why*, ABCNEWS.COM (Mar. 23, 2015, 3:21 PM), <http://abcnews.go.com/Politics/ted-cruz-canadian-born-us-president-heres/story?id=29846887> (“Most Americans learn early on that you can’t be [P]resident of the United States unless you’re born in America.”).

consider the issue. This is, after all, just the latest in a series of public controversies over a presidential candidate's eligibility to serve. Cruz's actual birth history—born outside of the United States to an American mother and noncitizen father—is remarkably similar to the alleged birth history that has dogged President Barack Obama throughout his presidency. So-called “birthers” have claimed that Obama was not, in fact, born in the United States, that his Hawaiian birth certificate was a fake, and that therefore he was not eligible for the Presidency.<sup>21</sup> The controversy reached such a fever pitch that the President himself even felt compelled to release his birth certificate.<sup>22</sup>

The primary line of defense for President Obama against the birther accusations was a factual one: the claims of Obama's foreign birth were baseless. Yet, the birther accusation was premised on a legal claim about the meaning of the Constitution—that the fact of a foreign birth would have made Obama ineligible to be President.<sup>23</sup> Obama supporters, in their effort to refute the accusations that fueled the birthers, implicitly conceded the accuracy of the constitutional claim that drove the birther movement. It would seem, then, that the birther movement had the effect of strengthening a popular reading of the natural-born citizen clause that would require birth on U.S. soil to be eligible for the Presidency. If Ted Cruz were to follow the logic of his own constitutional vision, he would conclude that the very document to which he so aggressively asserts his allegiance prohibits him from becoming President.

Of course, we have seen nothing of the sort. Rather, when confronted with questions about his eligibility to be President, Cruz has a ready answer: he turns to the opinions of the same elites whom he denounces in most other contexts.<sup>24</sup> Cruz's best source of support for his claim that he is

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<sup>21</sup> Shear, *supra* note 5; Ben Smith & Byron Tau, *Birtherism: Where It All Began*, POLITICO (April 24, 2011, 5:33 PM), <http://www.politico.com/story/2011/04/birtherism-where-it-all-began-053563>.

<sup>22</sup> See Shear, *supra* note 5.

<sup>23</sup> There is a technical legal argument that Cruz is eligible while Obama would not have been eligible had he been born outside of the United States, based on the changes to statutory conferral of citizenship at birth. Obama's mother was eighteen at the time of his birth, and the citizenship statute at the time of his birth required the American parent to have resided in the United States for at least five years after the age of fourteen. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, tit. III, § 301(a)(7), 66 Stat. 163, 236 (1952) (codified at 8 U.S.C. § 1401 (2012)). Cruz's mother allegedly met the five-year requirement. Jim Newell, *Does Ted Cruz Have a “Birther” Problem? Why Donald Trump's New Attack on the Texas Senator Is Pitch Perfect*, SLATE.COM (Jan 7, 2016, 6:26 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2016/01/donald\\_trump\\_is\\_questioning\\_if\\_ted\\_cruz\\_s\\_canadian\\_birth\\_makes\\_him\\_eligible.html](http://www.slate.com/articles/news_and_politics/politics/2016/01/donald_trump_is_questioning_if_ted_cruz_s_canadian_birth_makes_him_eligible.html).

<sup>24</sup> See *Exclusive: Ted Cruz on Announcing Candidacy for President*, FOXNEWS.COM

eligible to be President are the opinions of a group of lawyers and academics who argue that a person born in a foreign country who has at least one parent with American citizenship receives citizenship at birth through statute and is, therefore, a natural born citizen under the Constitution.<sup>25</sup> The ironies of this situation only multiply because Cruz is not only an advocate of popular constitutionalism, he is also an originalist, and, as Harvard Law Professor Laurence Tribe and other legal scholars have argued, an originalist constitutional interpretation of Article II serves him no better on this issue.<sup>26</sup>

## II. ACADEMIC OPINION AND THE MEANING OF THE “NATURAL BORN CITIZEN” CLAUSE

The meaning of “natural born Citizen” in Article II, § 1 of the U.S. Constitution, historian Lawrence Friedman wrote a few years ago, has “mystified and sometimes enraged commentators for more than 200 years.”<sup>27</sup> The mystifying muddle lies in the middle of an interpretation

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(Mar. 23, 2015), <http://www.foxnews.com/transcript/2015/03/24/exclusive-ted-cruz-announcing-candidacy-president/> (arguing that “as a legal matter, the issue is quite straightforward”); Steven Nelson, *Ted Cruz Inherits ‘Birthers’ with Presidential Bid*, U.S. NEWS & WORLD REP. (Mar. 24, 2015, 3:59 PM), <http://www.usnews.com/news/articles/2015/03/24/ted-cruz-inherits-birthers-with-presidential-bid> (Cruz spokesman saying that the *Harvard Law Review* article “puts this issue to rest”); Hunter Walker, *Ted Cruz’s Team Says This Is the Proof That He Can Run for US President Despite his Canadian Roots*, BUSINESSINSIDER (Mar. 30, 2015, 1:30 PM), <http://www.businessinsider.com/ted-cruz-legal-argument-against-birthers-2015-3> (“According to his campaign team, two top lawyers definitively settled the question of whether Sen. Ted Cruz (R-Texas) is eligible to run for US president with an article published in the *Harvard Law Review* earlier this month.”).

<sup>25</sup> See *infra* notes 28–43 and accompanying text.

<sup>26</sup> Laurence H. Tribe, *Under Ted Cruz’s Own Logic, He’s Ineligible for the White House*, BOS. GLOBE (Jan. 11, 2016), <https://www.bostonglobe.com/opinion/2016/01/11/through-ted-cruz-constitutional-looking-glass/zvKE6qpF31q2RsvPO9nGoK/story.html> (arguing that Cruz is ineligible under an originalist interpretation of natural born citizen); see also Einer Elhauge, *Ted Cruz Is Not Eligible to Run for President: A Harvard Law Professor Close-Reads the Constitution*, SALON (Jan. 20, 2016, 5:37 PM), [http://www.salon.com/2016/01/20/ted\\_cruz\\_is\\_not\\_eligible\\_to\\_run\\_for\\_president\\_a\\_harvard\\_law\\_professor\\_close\\_reads\\_the\\_constitution/](http://www.salon.com/2016/01/20/ted_cruz_is_not_eligible_to_run_for_president_a_harvard_law_professor_close_reads_the_constitution/) (“[B]oth textualism and originalism cut strongly against Cruz being a natural-born citizen.”); Mary Brigid McManamon, *Opinion, Ted Cruz Is Not Eligible to Be President*, WASH. POST (Jan. 12, 2016), [https://www.washingtonpost.com/opinions/ted-cruz-is-not-eligible-to-be-president/2016/01/12/1484a7d0-b7af-11e5-99f3-184bc379b12d\\_story.html](https://www.washingtonpost.com/opinions/ted-cruz-is-not-eligible-to-be-president/2016/01/12/1484a7d0-b7af-11e5-99f3-184bc379b12d_story.html); Eric Posner, *Ted Cruz Is Not Eligible to Be President*, SLATE (Feb. 8, 2016, 12:26 PM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2016/02/trump\\_is\\_right\\_ted\\_cruz\\_is\\_not\\_eligible\\_to\\_be\\_president.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2016/02/trump_is_right_ted_cruz_is_not_eligible_to_be_president.html) (“Cruz . . . believes that the Supreme Court has gone astray by refusing to enforce the original understanding of the Constitution. If he’s right, then he’s not eligible for the presidency.”).

<sup>27</sup> Friedman, *supra* note 2, at 137.

spectrum whose two ends are largely settled.<sup>28</sup> Someone who was born on United States soil unquestionably qualifies as a natural born citizen.<sup>29</sup> Someone who was born abroad to alien parents and who only later becomes a citizen by the process of naturalization does not.<sup>30</sup> This much is clear. But once we move to the grey area between these unproblematic interpretive claims—the case of someone “born abroad of American parents, or of one American and one alien parent”—clarity dissolves and the debates emerge.<sup>31</sup> Neither the text of the provision nor the history surrounding its drafting and ratification shed much light. Indeed, the provision is a touchstone of sorts as a subject of constitutional interpretation because it is on a fairly specific and limited subject, yet the text itself provides no definition and there is only fragmentary evidence from the historical record about why the phrase was included at all.<sup>32</sup>

In response to the controversy surrounding John McCain’s eligibility during the 2008 presidential campaign, what appeared to be a stable academic consensus took shape around the idea that those who are foreign born to U.S. citizen parents meet the requirements of the clause. McCain, who was born of two U.S. citizens on a U.S. naval base in the Panama Canal Zone, a territory controlled by the United States, would not have met the definition of natural born citizen if the term were limited to those born in the actual United States.<sup>33</sup> The McCain campaign confronted the issue by requesting Laurence Tribe and former Solicitor General Theodore Olson to offer a legal opinion on McCain’s eligibility.<sup>34</sup> They advanced two bases in support of McCain’s eligibility: first, that the Canal Zone was the “United States” for purposes of being “natural born”; and, second, that foreign born children of U.S. citizens are citizens at birth by statute and, therefore, “natural born” citizens.<sup>35</sup> The Tribe-Olson opinion was publicly

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<sup>28</sup> Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881, 881–82 (1988).

<sup>29</sup> See *id.* at 881.

<sup>30</sup> *Id.*

<sup>31</sup> See *id.* at 881–82.

<sup>32</sup> See, e.g., Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22, 25–26 (2008), [http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1088&context=mlr\\_fi](http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1088&context=mlr_fi) (arguing that the meaning of the term “natural born citizen” poses particular problems for originalists).

<sup>33</sup> See Gabriel J. Chin, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, 107 MICH. L. REV. FIRST IMPRESSIONS 1, 1–2 (2008), [http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1089&context=mlr\\_fi](http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1089&context=mlr_fi).

<sup>34</sup> 154 CONG. REC. S3645–46 (daily ed. Apr. 30, 2008).

<sup>35</sup> *Id.*

released and made a part of the *Congressional Record*.<sup>36</sup> Subsequently, the Senate unanimously passed a resolution confirming that McCain was a natural born citizen and eligible for the Presidency.<sup>37</sup> Although McCain's eligibility was challenged in court, the cases were all dismissed.<sup>38</sup>

By the time Cruz announced his candidacy, scholars who drew on a variety of interpretive approaches coalesced around a broad reading of the natural-born citizen requirement based on the statutory definition of citizens at birth.<sup>39</sup> Any American citizen who was legally recognized as a citizen at birth would fall within the natural-born citizen category; anyone who received American citizenship through a subsequent naturalization process would not.

Ted Cruz's eligibility for office became an issue shortly after his surprise senate victory in 2012.<sup>40</sup> Cruz has never contested his Canadian birth but has consistently argued that he became a citizen at birth because his mother was a U.S. citizen.<sup>41</sup> In March 2015, a few weeks prior to the announcement of Cruz's presidential campaign, Neil Katyal and Paul Clement argued in the *Harvard Law Review Forum* that Cruz was eligible

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<sup>36</sup> *Id.*

<sup>37</sup> S. RES. 511, 110th Cong. (2008).

<sup>38</sup> See Daniel P. Tokaji, *The Justiciability of Eligibility: May Courts Decide Who Can Be President?*, 107 MICH. L. REV. FIRST IMPRESSIONS 31, 32 (2015) [http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1087&context=mlr\\_fi](http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1087&context=mlr_fi), (citing *Inland Empire Voters v. United States*, No. 5:08-CV-00304, 2008 WL 2096719 (C.D. Cal. Apr. 21, 2008); *Hollander v. McCain*, 566 F. Supp. 2d 63 (D.N.H. 2008); *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1146 (N.D. Cal. 2008)).

<sup>39</sup> JACK MASKELL, CONG. RESEARCH SERV., R42097, QUALIFICATIONS FOR PRESIDENT AND THE "NATURAL BORN" CITIZENSHIP ELIGIBILITY REQUIREMENT, at Summary (2011), <http://www.fas.org/sgp/crs/misc/R42097.pdf> ("The weight of legal and historical authority indicates that the term 'natural born' citizen would mean a person who is entitled to U.S. citizenship 'by birth' or 'at birth,' either by being born 'in' the United States and under its jurisdiction, even those born to alien parents; *by being born abroad to U.S. citizen-parents*; or by being born in other situations meeting legal requirements for U.S. citizenship 'at birth.'") (emphasis added)); Dara Lind, *Why Donald Trump Is Casting Birther Aspersions on Canadian-Born Ted Cruz*, VOX.COM (Jan. 7, 2016, 11:41 AM), <http://www.vox.com/2015/3/23/8275573/ted-cruz-canada> ("It's pretty clear Cruz can run for president—smart legal minds have looked at the relevant laws and generally agree that an American born in Canada is still eligible to run the country."); see David Cantanese, *Will Buzz About Cruz End at Birth?*, POLITICO (Jan. 7, 2013, 11:30 PM), <http://www.politico.com/story/2013/01/cruz-draws-presidential-buzz-but-is-he-eligible-85873.html> (finding that "most constitutional scholars surveyed by POLITICO believe" Cruz qualifies to be President).

<sup>40</sup> See Cantanese, *supra* note 39.

<sup>41</sup> Domenico Montanaro, *Is Ted Cruz Allowed to Run Since He Was Born in Canada?*, NPR (Mar. 23, 2015, 11:03 AM), <http://www.npr.org/sections/itsallpolitics/2015/03/23/394713013/is-ted-cruz-allowed-to-run-since-he-was-born-in-canada>.



under the natural-born citizen clause.<sup>42</sup> Speaking in definitive terms, Katyal and Clement argued that “[d]espite the happenstance of a birth across the border, there is no question that Senator Cruz has been a citizen from birth and is thus a ‘natural born Citizen’ within the meaning of the Constitution.”<sup>43</sup> Calling the Constitution “refreshingly clear on these eligibility issues,” they labeled any arguments requiring birth on United States soil to be “spurious,” “specious,” and not a “serious issue[]” worth debating.<sup>44</sup>

After Cruz’s announcement of his candidacy, numerous media articles referenced the Katyal-Clement piece as support for Cruz’s eligibility to become President.<sup>45</sup> There were rumblings, however, from a set of conservative Obama “birthers” who insisted that the same born-on-U.S.-soil standard applied to Cruz.<sup>46</sup> Among his Republican primary competitors, only Donald Trump, a leader of the anti-Obama birther movement, raised any concerns about Cruz’s eligibility: “[Cruz] was born in Canada. If you know and when we all studied our history lessons, you are supposed to be born in this country, so I just don’t know how the courts will rule on this.”<sup>47</sup> After meeting with Cruz, Trump dropped the subject<sup>48</sup> and Cruz’s eligibility appeared to have become a nonissue in the Republican primary campaign.

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<sup>42</sup> Neal Katyal & Paul Clement, *On the Meaning of “Natural Born Citizen”*, 128 HARV. L. REV. F. 161, 163 (2015).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 164.

<sup>45</sup> See Robert Barnes, *Legal Experts: Cruz’s Canadian Birth Won’t Keep Him Out of the Oval Office*, WASH. POST (Mar. 12, 2015), <http://www.washingtonpost.com/news/post-politics/wp/2015/03/12/legal-experts-cruzs-canadian-past-shouldnt-keep-him-out-of-the-oval-office/>; Steve Contorno, *Is Ted Cruz, Born in Canada, Eligible to Run for President? (Updated)*, POLITIFACT (Mar. 26, 2015), <http://www.politifact.com/truth-o-meter/article/2015/mar/26/ted-cruz-born-canada-eligible-run-president-update/>; Montanaro, *supra* note 41; Nelson, *supra* note 24; Walker, *supra* note 24.

<sup>46</sup> See Howard Koplowitz, *Birther 2.0: Can Ted Cruz Run for President? ‘He’s Even Worse Than Obama,’ Citizenship Skeptic Says*, INT’L BUS. TIMES (Mar. 26, 2015, 3:20 PM), <http://www.ibtimes.com/birther-20-can-ted-cruz-run-president-hes-even-worse-obama-citizenship-skeptic-says-1860804> (quoting Mario Apuzzo, who filed briefs against Obama’s eligibility with the Supreme Court, as saying that Cruz is similarly ineligible and that Cruz’s presidential run reflects “hypocrisy to the max”); Nelson, *supra* note 24 (quoting noted birthers Orly Taitz and Larry Klayman as also opposing Cruz’s eligibility).

<sup>47</sup> Nelson, *supra* note 24.

<sup>48</sup> Ben Schreckinger, *Trump Changes Tune on Cruz*, POLITICO (July 15, 2015, 7:25 PM), <http://www.politico.com/story/2015/07/donald-trump-changes-tune-on-cruz-120182>; Katie Zezima, *How Ted Cruz Wooed and Won Donald Trump*, WASH. POST (Sept. 2, 2015), [http://www.washingtonpost.com/politics/how-ted-cruz-wooded-and-won-donald-trump/2015/09/01/04f9f65e-4cec-11e5-84df-923b3ef1a64b\\_story.html](http://www.washingtonpost.com/politics/how-ted-cruz-wooded-and-won-donald-trump/2015/09/01/04f9f65e-4cec-11e5-84df-923b3ef1a64b_story.html).

As it turns out, Trump was not done with his challenges to Cruz's eligibility. In January 2016, in response to Cruz's rise in the polls, Trump lashed out by raising the issue once again, calling Cruz's status "very precarious" and fearing that the matter could be tied up in litigation for years.<sup>49</sup> Cruz initially tried to brush off Trump,<sup>50</sup> insisting that his eligibility was "settled law"<sup>51</sup> and that "as a legal matter" there was no question he could be President.<sup>52</sup> But Trump would not back off, and Cruz's eligibility became a significant campaign issue. Cruz's constitutional law professor Laurence Tribe wrote a widely discussed op-ed in which he said that under an originalist interpretation of the Constitution, Cruz was not a natural born citizen.<sup>53</sup> Other scholars joined in Tribe's assessment,<sup>54</sup> and several new voices joined the debate to try to shore up what had been an academic consensus on the issue.<sup>55</sup> The press now had to report that legal experts were divided on the issue and that many scholars felt the issue was a legitimately difficult constitutional question—a sharp change from the prior conventional wisdom. Commentators and candidates questioned Cruz's eligibility.<sup>56</sup> Even John McCain jumped into the fray,

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<sup>49</sup> Robert Coster & Philip Rucker, *Trump Says Cruz's Canadian Birth Could Be 'Very Precarious' for GOP*, WASH. POST (Jan. 5, 2016), [https://www.washingtonpost.com/politics/trump-says-cruzs-canadian-birth-could-be-very-precarious-for-gop/2016/01/05/5ce69764-b3f8-11e5-9388-466021d971de\\_story.html](https://www.washingtonpost.com/politics/trump-says-cruzs-canadian-birth-could-be-very-precarious-for-gop/2016/01/05/5ce69764-b3f8-11e5-9388-466021d971de_story.html); see also Adam Edelman, *Trump Raises Questions over Cruz's U.S. Citizenship*, N.Y. DAILY NEWS (Jan. 7, 2016, 6:23 AM), <http://n.ydailynews.com/news/politics/trump-raises-questions-cruz-u-s-citizenship-article-1.2487139>.

<sup>50</sup> See Edelman, *supra* note 49 (referencing Cruz's tweet that Trump had "jump[ed] the shark" on the issue).

<sup>51</sup> David Weigel, *Ted Cruz: My Presidential Eligibility Is 'Settled Law'*, WASH. POST (Jan. 6, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/01/06/ted-cruz-my-presidential-eligibility-is-settled-law/>.

<sup>52</sup> Allegra Kirkland, *Fiorina: It's 'Odd' Cruz Didn't Renounce Canadian Citizenship Until 2014*, TPM (Jan. 8, 2016, 10:24 AM), <http://talkingpointsmemo.com/livewire/fiorina-ted-cruz-canada-birth-odd>.

<sup>53</sup> Tribe, *supra* note 26.

<sup>54</sup> See Elhauge, *supra* note 26; McManamon, *supra* note 26; Posner, *supra* note 26.

<sup>55</sup> See, e.g., Akhil Reed Amar, *Why Ted Cruz Is Eligible to Be President*, CNN (Jan. 14, 2016, 11:59 PM), <http://www.cnn.com/2016/01/13/opinions/amar-cruz-trump-natural-born-citizen/index.html> (concluding that Cruz is eligible but emphasizing the difficulty of the constitutional question); Michael Ramsey, *The Original Meaning of 'Natural Born'* 1–4, 38 (Jan. 7, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2712485](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2712485) (same); Cass R. Sunstein, *Is Cruz 'Natural Born'? Well . . . Maybe*, BLOOMBERG VIEW (Jan. 12, 2016, 8:00 AM), <http://www.bloombergvew.com/articles/2016-01-12/is-cruz-natural-born-well-maybe> (same).

<sup>56</sup> See, e.g., Sara Jerde, *Rand Paul: Cruz Is Definitely Qualified To Be Canada's Prime Minister*, TPM (Jan. 6, 2016, 6:29 PM), <http://talkingpointsmemo.com/livewire/rand-paul-ted-cruz-prime-minister-qualifications>; Allegra Kirkland, *Ann Coulter Now Suggests*

saying that Cruz's natural-born citizenship status "is worth looking into."<sup>57</sup> Trump exhorted Cruz to settle the issue by seeking a declaratory judgment from a federal court.<sup>58</sup>

### III. POPULAR CONSTITUTIONALISM, CONSTITUTIONAL MEANING, AND THE BIRTHER DISPUTE

These recent flare-ups over the natural-born citizen clause demonstrate the centrality of popular constitutionalism as a component of constitutional development. If the courts continue to treat this issue as a "nonjusticiable political question," then debate will be resolved, to the extent that it is resolved, outside the courts.<sup>59</sup> And this, some have argued, is as it should be. "[O]rdinary courts should butt out, now and forever," writes Yale Law Professor Akhil Amar, "[t]hey have no proper role here . . . ."<sup>60</sup>

So how well have the mechanisms of popular constitutionalism performed in this particular constitutional dispute? Poorly. The debate over the proper interpretation of the natural-born citizen clause has been marked by several troubling characteristics. We have seen abrupt lurches in public opinion and media coverage, tied more to partisan opportunism than any substantive development of the issues.<sup>61</sup> And for a debate that is supposed to offer the opportunity for popular engagement with the Constitution, we have seen a remarkable level of deference to elite views, manifested in expressed desire for judicial resolution of the issue and in declarations that legal experts have resolved the issue.<sup>62</sup>

The relative instability of extrajudicial interpretations of the natural-born citizen clause demonstrates a potentially problematic characteristic of

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*Ted Cruz Isn't a 'Natural Born Citizen'*, TPM (Jan. 6, 2016, 12:41 PM), <http://talkingpointsmemo.com/livewire/ann-coulter-ted-cruz-birtherism>.

<sup>57</sup> Andrew Kaczynski, *John McCain: "I Don't Know" If Cruz Is Eligible for Presidency with Canadian Birth*, BUZZFEED NEWS (Jan. 6 2016, 7:28 PM), [http://www.buzzfeed.com/andrewkaczynski/john-mccain-i-dont-know-if-cruz-is-eligible-for-presidency-w?utm\\_term=.hu7gZIJg4#.krWPEx2P7](http://www.buzzfeed.com/andrewkaczynski/john-mccain-i-dont-know-if-cruz-is-eligible-for-presidency-w?utm_term=.hu7gZIJg4#.krWPEx2P7). Laurence Tribe, who supported McCain's eligibility for President, has said that the legal issues of Cruz's natural-born citizenship status are "completely unsettled." Tribe, *supra* note 26.

<sup>58</sup> Gabby Morrongiello, *Trump: Cruz Should Obtain a 'Declaratory Judgment' on Birth Status*, WASH. EXAM'R (Jan. 6, 2016, 6:19 PM), <http://www.washingtonexaminer.com/trump-cruz-should-obtain-a-declaratory-judgment-on-birth-status/article/2579776>; Martin Pengelly, *Ted Cruz Insists He Is a Natural-Born Citizen After New Donald Trump Attack*, GUARDIAN (Jan. 10, 2016, 9:59 AM), <http://www.theguardian.com/us-news/2016/jan/10/ted-cruz-natural-born-citizen-donald-trump-attack>.

<sup>59</sup> See Amar, *supra* note 55.

<sup>60</sup> *Id.*

<sup>61</sup> Compare Schreckinger, *supra* note 48, with Morrongiello, *supra* note 58.

<sup>62</sup> See Barnes, *supra* note 45.

popular constitutionalism. At least when applied to certain constitutional principles, interpretations that develop outside the courts risk having a distinctively provisional quality.<sup>63</sup> Lacking the kinds of institutional memory characteristic of constitutional claims that emerge from courts or established government practices, popular constitutional claims do not exhibit the same kind of entrenchment characteristics that are generally presumed to be an essential attribute of constitutionalism.<sup>64</sup> They can have a remarkably short shelf life.

One reason for this troubling transience of constitutional interpretation is the tendency for popular constitutional debate to intertwine facts and law—and, in some cases, to place facts above the law—in a way that sharply differs from appellate constitutional litigation.<sup>65</sup> This can be seen most clearly in the Obama “birther” controversy. Challenges to Obama’s eligibility revolved around two claims.<sup>66</sup> One was deeply controversial: Barack Obama was not born in the United States.<sup>67</sup> The other was far less controversial (at least in the public discourse that surrounded the birther movement): his (alleged) foreign birth meant he was ineligible for the Presidency.<sup>68</sup> The first claim was factual; the second, a claim of about the meaning of the Constitution. The birther movement thus took an easy issue, the factual claim about Obama’s birthplace, and turned it into a controversial one. And it took a harder issue, the meaning of the natural-born citizen clause, and turned it into noncontroversial one. By insisting there was a problem where, in fact, there was none, the birther movement had the effect of reducing and simplifying a difficult question relating to the meaning of the Constitution. The controversial nature of the interpretive claim was largely missed because everyone’s attention was on the factual claim about Obama’s birth certificate. Thus, largely overlooked in all the raging about the birth certificate was the fact that the public debate over the birther challenge seemed to take for granted that a person needed to be born on U.S. soil to be eligible to be President under the Constitution. This was the dog that didn’t bark—the constitutional debate that never happened. Because the debate over the factual premise of the

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<sup>63</sup> See generally Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (offering a critique of extrajudicial constitutional interpretation).

<sup>64</sup> See *id.* at 1373–77.

<sup>65</sup> This contrasts with the “law qua law” analyses of judicial constitutionalism. See *id.* at 1374.

<sup>66</sup> See Shear, *supra* note 5.

<sup>67</sup> See *id.*

<sup>68</sup> See *id.* (failing to consider whether birth outside the United States would have disqualified the President from holding office).

birther claim consumed the entirety of the issue, the public debate never really engaged the constitutional claim. Obama's supporters could not challenge the interpretive claim, for to do so would be to implicitly accept the possibility that the factual claim was true. It was this same reasoning that prevented the mainstream press from considering the correctness of the constitutional claim driving the birthers.

By landing upon such a volatile (and offensive) factual claim, which rested upon an interpretive assumption, the birthers legitimated a reading of the Constitution that was in direct tension with the then-prevailing opinion of legal experts, who argued that one could be born in a foreign country and still be legally recognized as a natural born citizen.<sup>69</sup> The birther movement reinforced and amplified a reading of the Constitution that made being born on American soil a requirement for eligibility to be President.<sup>70</sup>

Yet this reading of the Constitution, resting on a rather technical interpretative question (what is a natural born citizen?) and solidified through a unique process in which a meritless factual claim displaced any debate over the constitutional merits of the claim, proved anything but durable. When Ted Cruz came along and said he wanted to be President, the constitutional claim that drove the birther movement failed to derail his candidacy,<sup>71</sup> even though we can assume that many of his supporters believed Obama's eligibility turned on whether he had been born on United States soil. When it came time to evaluate Cruz's eligibility, it was almost as if the entire Obama birther debate had never happened. Then, once the eligibility issue seemed to have gone away, it reappeared in January 2016.<sup>72</sup> Why? Because Donald Trump thought the issue offered a way to

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<sup>69</sup> This does not mean that the birthers' claim that if Obama was born in Kenya he would not be eligible for the Presidency is necessarily wrong, even from an elite perspective. See *supra* note 23 (discussing statutory citizenship requirements at the time of Obama's birth).

<sup>70</sup> See, e.g., Lily Rothman, *What the Supreme Court Could Say About Ted Cruz's Canadian Past*, TIME (Mar. 23, 2015), <http://time.com/3754408/ted-cruz-history-natural-born/> (describing the "common misconception" that one must be born in the United States to be eligible to be President). Interestingly, in a 2014 poll, a majority of respondents stated that they believed an individual born of two U.S. parents on foreign soil did meet the requirements, while an individual born of one U.S. parent was not. Frankovic, *supra* note 7 (reporting that sixty-one percent of respondents believed that a foreign born child with two U.S. parents was a natural born citizen, while only thirty-one percent believed a foreign born child with a U.S. mother and twenty-nine percent believed a foreign born child with a U.S. father were natural born citizens).

<sup>71</sup> See Jonathan Martin, *Ted Cruz Wins Republican Caucuses in Iowa*, N.Y. TIMES (Feb. 1, 2016), <http://www.nytimes.com/2016/02/02/us/ted-cruz-wins-republican-caucus.html>.

<sup>72</sup> See Elise Jordan, *Ted Cruz Deserves Donald Trump's Birther Scrutiny*, TIME (Jan. 8, 2016), <http://time.com/4172788/ted-cruz-donald-trump-birther/>.

undermine the candidacy of a rival who was gaining on him in the polls.<sup>73</sup> This blatant act of opportunism sparked a public reassessment of the constitutional question and, all of a sudden, it was an open issue once again.

Candidates and commentators exacerbated the fluid, even finicky nature of extrajudicial assessments of the natural-born citizen clause by continually insisting that the issue either had been resolved by legal experts or should be resolved by the courts.<sup>74</sup> If ever there was a candidate who was in a position to insist the American people assume the mantle of responsibility in assessing the meaning of this clause, it was Senator Cruz, the man who has made a political career of railing against legal elites and insisting that the Constitution belongs to the American people.<sup>75</sup> However, neither Cruz nor his opponents have challenged the voters to decide this issue.<sup>76</sup> Everyone, it seems, is calling for elite resolution of the issue. Donald Trump has referenced the authority of the courts,<sup>77</sup> while Cruz has insisted that a group of smart lawyers have settled the issue.<sup>78</sup> Neither sees a role for the popular constitutionalism for which Cruz himself has advocated on other issues of vital constitutional import.

#### CONCLUSION

Advocates of popular constitutionalism, a group that runs the ideological gamut from liberal law professors to Tea Party activists, believe that we are better off when the American people refuse to accept a particular interpretation of the Constitution simply because it is the preferred reading of judges or law professors.<sup>79</sup> Popular engagement with the Constitution and its history, according to this perspective, should be encouraged, even when the constitutional claims that emerge from this engagement run counter to the constitutional doctrine produced by the courts.

Ted Cruz has aggressively embraced a Tea Party-inspired variant of popular constitutionalism while selectively rejecting that same approach

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<sup>73</sup> See *id.*

<sup>74</sup> See *supra* notes 24, 39–48 and accompanying text.

<sup>75</sup> See *supra* note 10 and accompanying text.

<sup>76</sup> For a rare embrace of popular constitutionalism as the proper mode of resolving this dispute, see Amar, *supra* note 55 (“Who decides whether Cruz is eligible? My answer: At first, you do. We, the people, do. We do this on Election Day when we cast our ballots with the Constitution in our hearts and minds if not in our hands. If you think Cruz is ineligible . . . you can vote against him.”).

<sup>77</sup> See *supra* note 58 and accompanying text.

<sup>78</sup> See *supra* note 24 and accompanying text.

<sup>79</sup> See *supra* notes 4, 55 and accompanying text.

when it comes to interpreting the presidential eligibility requirements outlined in the Constitution. The reading of the Constitution that fueled the birther movement has proven remarkably thin, even ephemeral. The debate over Obama's eligibility when placed alongside the debate over Cruz's eligibility illuminates a problematic contradiction that lies at the heart of popular constitutionalism: non-elite claims on the Constitution can at once be so powerful so as to create a national controversy and then they can dissolve when political alignments shift. Popular constitutionalism around the issue of presidential eligibility has shown how extrajudicial claims on the Constitution can amplify and distort political contestation, all the while avoiding any sort of entrenchment of fundamental principles, which is generally understood as an essential characteristic of constitutionalism. The transience of certain popular constitutional commitments undermines the very values that constitutionalism is supposed to represent: constraining and guiding everyday political decisions with enduring, fundamental principles.